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Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals

Martin S. Lederman
Georgetown University Law Center, msl46@law.georgetown.edu

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MARTIN S. LEDERMAN*

Congress has recently authorized military commissions to try enemies not only for violations of the international law of war, but also for domestic-law offenses, such as providing material support to terrorism and conspiring to commit law-of-war offenses. Moreover, President Trump has indicated support for further military trials, including trials against U.S. citizens. Such military tribunals lack the civilian jury and independent judge that Article III of the Constitution prescribes. The constitutionality of such an abrogation of Article III's criminal trial guarantees has been debated during many of the nation's wars without clear resolution, and the constitutional question is now at the heart of a potentially landmark case, al Bahlul v. United States*, currently before the Supreme Court.*

In the rare cases where the Supreme Court has recognized exceptions to Article III's criminal trial protections, it has typically invoked functional and normative justifications. When it comes to adjudication of war-related domestic-law offenses, however, neither the government nor the appellate judges who have defended commission trials have offered any such functional or normative considerations sufficient to justify denial of the independent judge and jury that Article III guarantees. Defenders of the military tribunals have instead relied almost exclusively upon historical claims of two kinds to defend the constitutionality of using military commissions in this context. This Article addresses one of those historical claims—namely, that the Constitution should be understood to have preserved, rather than to have modified, the federal government's power to prosecute a war as it did during the Revolutionary War. According to this argument, the Constitution was ratified against, and should be presumed not to have called into question, a practice of military adjudication of offenses that were not violations of the international law of war: court-martial proceedings, authorized by the Second Continental Congress and approved by General George Washington, against certain spies and against disloyal civilians who aided the British. The earliest Congresses purportedly confirmed this constitu-

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tional understanding by enacting statutes permitting military trials for spying and for aiding the enemy—statutes that have remained in the federal code ever since.

This Article offers the first comprehensive account of the Revolutionary War precedents. It discusses how they were understood in the ensuing decades and the ways in which they, and the post-1789 statutes, have been invoked and mischaracterized as authority in later wars. This history demonstrates that the received wisdom about these precedents is almost entirely mistaken, and that they provide little, if any, support for a new Article III exception for military adjudication of war-related domestic-law offenses. The Article thus offers an object lesson in how a complex history can be misunderstood and distorted in the course of constitutional interpretation, particularly on questions of war powers.

The pre-constitutional history does, however, include one conspicuous aberration: a 1778 congressional resolution authorizing trial by court-martial of civilians who provided a particular kind of aid to the British army. General Washington relied upon this resolution in 1780 as authority to convene a court-martial to try Joshua Hett Smith for assisting Benedict Arnold in the plot to surrender West Point to the British. This Article shows why it would be a mistake to accord much interpretive weight to the Smith case—a striking deviation from Washington's otherwise consistent conduct—in crafting exceptions to Article III's criminal trial guarantees.

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INTRODUCTION

Although the United States has been engaged in an armed conflict with al-Qaeda for more than fifteen years, it has not abandoned prosecution of criminal conduct as a principal means of combatting terrorism. To the contrary, criminal prosecution was the Obama Administration's preferred method of dealing with terrorist suspects, even when they belonged to an organized armed group, such as al-Qaeda, against which the United States also employs tradi-

tional military force.[1] In still other cases, the federal government has prosecuted individuals in Article III courts for providing material support to al-Qaeda and other groups at war with the United States.

Congress, however, has been considerably less hospitable to the prospect of Article III prosecutions of terrorists. The legislature has not only authorized al-Qaeda members to be tried by military commissions,[2] but has also enacted legislation precluding the Executive Branch from transferring detainees at the Guantánamo Bay Naval Base to the United States for Article III trials.[3] Thus, for those Guantánamo detainees alleged to have committed crimes, all of whom were apprehended before President Obama took office, the only prosecutorial option in recent years has been a military proceeding. Moreover, we may see even more such military trials now that President Obama has left office. During the 2016 election campaign, President Trump expressed disdain for Article III trials of terrorist suspects and signaled that he intends to continue trying detainees, including even U.S. citizens, before military commissions.[4]

These military trials raise an age-old, still unresolved, constitutional question: When, if ever, can the federal government use military tribunals—in which military officers, rather than tenure-protected judges and civilian juries, preside and render judgments—to try individuals for war-related criminal offenses?

The text of Article III—particularly its reference to "all Crimes"—appears to offer an unequivocal answer: Such trials are unconstitutional.[5] And yet the government *has* used military tribunals to adjudicate federal offenses in several of the nation's major wars, including the current conflict with al-Qaeda.

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1. *See* John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening our Security by Adhering to our Values and Laws, Address at Harvard Law School (Sept. 16, 2011) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an [https://perma.cc/LB6K-7ZSW]) (expressing the Administration's "strong preference" to incapacitate threats "through prosecution, either in an Article III court or a reformed military commission"); Barack Obama, NATIONAL STRATEGY FOR COUNTERTERRORISM 6 (2011), https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism_strategy.pdf [https://perma.cc/3H35-9HMZ] (criminal prosecution should "continue to play a critical role in U.S. [counterterrorism] efforts"). Thus, almost without exception, whenever the Obama Administration captured, and retained long-term custody of, a member of al-Qaeda or an associated force against which the nation was engaged in armed conflict, it treated that individual within the traditional Article III criminal justice system, and took pains to develop the evidentiary case for prosecuting him in a civilian tribunal for violations of the U.S. criminal code.

2. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 10 U.S.C. §§ 948a(7)(C), 948c (2012).

3. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1031, 129 Stat. 726, 968 (2015).

4. *See* Donald Trump, Speech in Youngstown, Ohio (Aug. 15, 2016) (transcript available at https://www.wilsoncenter.org/article/us-presidential-candidates-isis-extremism [https://perma.cc/B8X2-RWLH]) ("Foreign combatants will be tried in military commissions."); Patricia Mazzei, *Trump: Americans Could Be Tried in Guantánamo*, MIAMI HERALD (Aug. 11, 2016), http://www.miamiherald.com/news/politics-government/election/donald-trump/article95144337.html [https://perma.cc/6W5A-2M9X] ("I know that they want to try them in our regular court systems, and I don't like that at all. . . . I would say they could be tried [in military commissions], that would be fine.").

5. U.S. CONST. art. III, § 2, cl. 3; *see also infra* notes 66–69 and accompanying text.

This practice is explained in part by the 1942 decision in *Ex parte Quirin*, in which the Supreme Court held that Congress can prescribe military trials for members of enemy forces, or individuals who are otherwise subject to the enemy's direction and control, for violations of the international law of war, even if the defendants are U.S. citizens.[6] As I will explain, that holding's logic and rationale are problematic because the Court relied upon misunderstandings of international law.[7] Whether or not the Court's reasoning was well-grounded, however, *Quirin* is now the well-established basis for military adjudication of law-of-war offenses—such as the current proceedings against five Guantánamo detainees, including Khalid Shaikh Mohammed, for the deliberate attacks on civilians on September 11, 2001.

But what about cases in which there are no allegations of international law offenses? Can Congress likewise authorize military tribunals to try charges of domestic-law offenses committed by persons who are part of, or who have aided, enemy forces in an armed conflict? The Supreme Court has offered one important guidepost relevant to that question. In *Ex parte Milligan*, the Court famously opined—technically in dicta—that Congress cannot subject individuals who are *not* part of enemy forces, or subject to the direction and control of the enemy, to military trial for domestic-law offenses where Article III courts are not "actually closed" and are thus available to try them for their misdeeds.[8]

Milligan and *Quirin*, however, hardly suffice to establish the constitutional parameters. Most importantly, the Supreme Court has never decided whether the federal government may use military courts to try persons who are part of enemy forces for violations of domestic law, a question that is now of exceptional importance because of two interrelated contemporary developments.

First, in the United States' current armed conflicts against non-state armed terrorist organizations such as al-Qaeda, individuals frequently engage in conduct that is not directly governed by *Milligan* and *Quirin* as a result of several considerations:

1. The individuals are members of enemy forces in an armed conflict with the United States, or engage in conduct at the direction of such enemy forces, and therefore are not covered by *Milligan*'s "holding" on congressional power;[9]
2. The conduct of the individuals—such as conspiring to engage in war crimes, or attacking U.S. armed forces—did *not* violate the international

6. *See* 317 U.S. 1, 45–46 (1942).

7. *See infra* Section III.A.

8. 71 U.S. 2, 127 (1866) ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then* . . . there is a necessity to furnish a substitute for the civil authority . . . ."). This "holding" of *Milligan* was not, by its terms, limited to domestic-law offenses. The Court in *Quirin*, however, later distinguished *Milligan* as having not addressed violations of the international law of war committed by persons acting at the enemy's direction. *See* 317 U.S. at 45; *see also infra* note 304 and accompanying text.

9. *See Milligan*, 71 U.S. at 127.

law of war, and therefore is not governed by *Quirin*;[10]

3. The law of war nevertheless does not *privilege* the conduct—that is, international law permits the United States to subject the individuals who engage in such conduct to criminal sanctions;[11] and such conduct violates ordinary U.S. criminal laws, and thus could be prosecuted in an Article III court, with a civilian jury and tenure-protected judge.

Second, in the Military Commissions Act of 2009 (MCA),[12] Congress authorized military commissions to try "alien unprivileged enemy belligerent[s]" for many domestic-law offenses, including knowingly and intentionally aiding an enemy in breach of an allegiance or duty to the United States (which usually constitutes treason, as well);[13] soliciting or advising another to commit a substantive offense triable by military commission;[14] conspiring to do the same;[15] providing material support or resources intending that they be used in preparation for, or in carrying out, an act of terrorism;[16] and providing material support or resources to an international terrorist organization engaged in hostilities against the United States or one of its co-belligerents[17] (a potentially capacious offense the government has used to try numerous persons in Article III courts). Therefore, as far as federal statutory law is concerned, a substantial number of terrorism-related activities constitute offenses that can now be tried either by a military tribunal or in an Article III court.

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10. *See Quirin*, 317 U.S. at 45–46; *infra* note 294 and accompanying text.

11. In most international conflicts (wars between states), the law does not deem the actions of the vast majority of combatants to be criminal or blameworthy. To the contrary, international law affords combatants within state armed forces a privilege to engage in conduct—such as killing enemy soldiers or destroying property—that would violate the host state's domestic laws in almost any other context. *See* Jens David Ohlin, *The Combatant's Privilege in Asymmetric and Covert Conflicts*, 40 YALE J. INT'L L. 337, 342–43 (2015); *see also* Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 art. 57 (promulgated Apr. 24, 1863) (Washington, Government Printing Office 1898) [hereinafter "Lieber Code"].

The general view of affected states, however, is that international law does not privilege most of the conduct undertaken by al-Qaeda or similar terrorist groups, not only because much of that conduct violates the law of war (for example, targeting civilians), but also because the actors are not members of a legitimate armed force to which the privilege attaches. Therefore, even when those actors engage in conduct—such as the targeting of state armed forces—that would be privileged if committed by members of a state military in a traditional international armed conflict, the injured state generally can prosecute them for violation of its domestic laws (for example, a law prohibiting the murder of U.S. personnel abroad). *See* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 514–15 (2012); *see also* Ohlin, *supra*, at 368, 370–71 (such terrorist groups are not entitled to the privilege because they "typically make no effort to distinguish themselves from the civilian population, nor do they limit their targeting to military objectives"). Moreover, individuals who are not part of al-Qaeda forces can be prosecuted under U.S. "material support" laws if they provide assistance to al-Qaeda or endeavor to do so. *See* 18 U.S.C. § 2339B(a)(1) (2012).

12. *See* 10 U.S.C. §§ 948a–950t (2012).

13. *See id.* § 950t(26).

14. *See id.* § 950t(30).

15. *See id.* § 950t(29).

16. *See id.* § 950t(25).

17. *See id.*

That number might expand still further if Congress were to add other domestic-law offenses to the MCA. Congress might also expand the category of individuals subject to military justice. For example, although the MCA does not presently authorize the trial of U.S. citizens,[18] President Trump has expressed interest in trying U.S. citizens in military commissions,[19] and it is conceivable that the current Republican-controlled Congress might amend the MCA to permit such trials. Even without such an amendment, the Trump Administration could dust off a long-overlooked and almost never-used provision of the Uniform Code of Military Justice (UCMJ) that authorizes the trial in military tribunals—with a potential penalty of death—of U.S. persons who attempt to aid or correspond with the enemy.[20]

Not only is the Article III question suddenly of great importance; it is also being litigated, for the first time in many decades, in a case currently pending before the Supreme Court.[21] A military commission at Guantánamo Bay convicted Ali Hamza Ahmad Suliman al Bahlul, a member of al-Qaeda, of several war-related offenses that are not violations of the international law of war—such as providing material support to terrorism. The United States Court of Appeals for the District of Columbia Circuit overturned all but one of those convictions on other constitutional grounds, leaving only a single remaining conviction for an inchoate conspiracy to violate the law of war.[22] The United States conceded that such an agreement is not itself a violation of the international law of war.[23] The government has nevertheless argued that it was

18. The MCA limits the personal jurisdiction of military commissions to offenses committed by "alien unprivileged enemy belligerent[s]." 10 U.S.C. § 948c (2012). Although the definition of "unprivileged enemy belligerent" is broad, including anyone who is not entitled to the combatant's privilege and has "engaged in hostilities against the United States or its coalition partners" or "has purposefully and materially supported hostilities against the United States or its coalition partners," *id.* § 948a(7)(A)–(B), the MCA does not authorize commission trials of U.S. citizens. *See id.* § 948a(1).

19. *See* Mazzei, *supra* note 4.

20. *See* 10 U.S.C. § 904 (2012). Section 904 contemplates trial by a court-martial or a military commission—but expressly excludes a military commission "established under" the MCA. *Id.* This provision, which has been part of the federal code in one form or another since the Founding, is one of the principal subjects of this Article. As I will explain, for most of the nation's history the better reading of the provision was that it applied only to persons in or affiliated with the armed forces—and therefore did not raise any significant constitutional question. When Congress re-enacted it in 1920, however, the legislature might have assumed it was authorizing military trials of civilians unconnected to the military for treason-like conduct, at least to the (uncertain) extent the Constitution allowed—even if that is not what Congress had intended in earlier iterations of the regulation. *See infra* notes 694–97 and accompanying text. And by 1950, when Congress enacted the most recent version of the aiding-the-enemy article as part of the UCMJ, legislators almost surely thought that it applied to civilians unconnected to the military. *See infra* note 786 and accompanying text.

21. al Bahlul v. United States, No. 16-1307 (petition docketed May 1, 2017). The Court will likely decide whether to hear the case early in the October 2017 Term.

22. *See* al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc) [hereinafter "*al Bahlul I*"], *aff'd on remand*, 792 F.3d 1 (D.C. Cir. 2015) [hereinafter "*al Bahlul II*"], *rev'd in part per curiam on reh'g en banc*, 840 F.3d 757 (D.C. Cir. 2016) [hereinafter "*al Bahlul III*"].

23. *See* Brief for United States at 2, *al Bahlul III*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (No. 11-1324) [hereinafter "U.S. *al Bahlul III* Brief"]. For an extended discussion of why such a conspiracy

constitutional for Congress to authorize a military tribunal to try al Bahlul for such a domestic-law offense.

In a recent en banc decision, the Court of Appeals divided sharply on that constitutional question: Four judges concluded that the military trial of al Bahlul for conspiracy did not violate Article III;[24] four others concluded that it did;[25] and three judges either did not participate or did not opine on the merits question.[26]

In trying to justify such a military exception to Article III, the government and the judges who voted in its favor have not placed much reliance on constitutional text.[27] Nor, for the most part, have they relied upon any compelling functional, pragmatic, or normative justifications for abandoning civilian judges and juries in such a case.[28] Indeed, the most striking thing about the *al Bahlul* litigation is that the government has offered only a single functional or normative argument for why it is important, let alone essential, to use military commissions to try domestic-law offenses. Further, that single rationale, relating to different evidentiary rules in the two tribunals, is ill-suited to the task, because it does not purport to explain why such trials should be held without the juries and independent judges that Article III guarantees.[29]

The government's case for military tribunals, as well as Judge Kavanaugh's opinion in *al Bahlul III* defending the constitutionality of such an Article I trial, is therefore predicated almost exclusively on historical antecedents, and upon the Supreme Court's insistence, in several recent cases, that "long-standing practice of the government . . . can inform our determination of what the law is."[30]

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does not violate international law, see *al Bahlul III*, 840 F.3d at 813–16 (joint opinion of Rogers, Tatel and Pillard, JJ., dissenting).

24. *See al Bahlul III*, 840 F.3d at 759–74 (Kavanaugh J., joined by Brown and Griffith, JJ., concurring); *id.* at 759 (Henderson, J., concurring, and incorporating by reference her dissenting opinion in *al Bahlul II*, 792 F.3d at 27–72).

25. *See id.* at 809–26, 835–37 (joint opinion of Rogers, Tatel and Pillard, JJ., dissenting); *id.* at 800 (Wilkins, J., concurring) (stating that if he were to reach the merits, "I would be inclined to agree with the dissent").

26. Judge Millett concluded that the conviction could be affirmed because it was not "plain error." *Id.* at 788–95. Chief Judge Garland and Judge Srinivasan did not participate in the decision.

27. *See al Bahlul III*, 840 F.3d at 768 (Kavanaugh, J., concurring) ("Based solely on the text of Article III, Bahlul might have a point.").

28. *See id.* at 828 (joint opinion of Rogers, Tatel, and Pillard, JJ., dissenting) ("[R]emarkably, throughout this protracted litigation, the government has offered no reason to believe that expanding the traditionally understood scope of Article III's exception for law-of-war military commissions is necessary to meet a military exigency. . . . Perhaps the government has eschewed a claim of military necessity because of the many other tools at its disposal. Congress remains free to enact, and the President to employ, domestic laws to bring terrorists to justice before Article III courts, as they have on hundreds of occasions already with remarkable success."); *see also infra* Section II.B.1.

29. *See infra* notes 212–19 and accompanying text.

30. U.S. *al Bahlul III* Brief, *supra* note 23, at 30 (quoting NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014)); *see also al Bahlul III*, 840 F.3d at 764–65 (Kavanaugh, J., concurring); *al Bahlul II*, 792 F.3d 1, 62 (D.C. Cir. 2015) (Henderson, J., dissenting).

The government and the judges who have rejected the application of Article III make two different sorts of historical arguments.

The first is, in effect, a type of originalist argument—not so much about the alleged original "meaning" of the words of Article III, but about early understandings or expectations concerning whether and to what extent the new Constitution would alter wartime practices familiar at the Founding. In particular, the government points to resolutions the Second Continental Congress enacted, authorizing courts-martial proceedings for spies and for persons alleged to have aided the British during the Revolutionary War. It also relies upon actual court-martial cases convened pursuant to those resolves, and approved by General George Washington, in the years 1778–1780.[31] Judge Kavanaugh has further stressed that even after the Constitution was ratified, the very first Congresses codified the pre-constitutional articles of war that included certain of those wartime offenses;[32] and in 1806, the Ninth Congress expressly established two new articles of war authorizing military trials for certain forms of assistance to the enemy, as well as for spying in specified circumstances, as part of its comprehensive codification of the military's Articles of War.[33] According to the government, and to several of the judges in *al Bahlul III*, we should understand the Constitution as having preserved, rather than repudiated, these early pre- and post-ratification practices.

This argument evokes an intuitively appealing presumption the Supreme Court articulated in a post-Civil-War case—namely, that, with rare exceptions (such as the Third Amendment), the Constitution was designed to afford the government "the power of carrying on war as it had been carried on during the Revolution."[34] Indeed, during the Second World War the Court actually used precisely this form of argument-from-origins to establish the Article III exception for military adjudication of international law-of-war offenses.[35] In *Quirin*, Chief Justice Stone wrote that the Court had "often recognized" that

> it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but *not to bring within the sweep of the guaranty those*

31. U.S. *al Bahlul III* Brief, *supra* note 23, at 32–36.

32. *See al Bahlul III*, 840 F.3d at 765 (Kavanaugh, J., concurring).

33. I discuss these post-constitutional enactments in Part V, *infra*.

34. Miller v. United States, 78 U.S. 268, 312 (1871); *see also* Reid v. Covert, 354 U.S. 1, 33 n.60 (1957) (plurality opinion) (looking to Revolutionary War cases to inform whether and when the Constitution permits military trials of dependents of the armed forces who accompany the forces: "We have examined all the cases of military trial of civilians by the British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research.").

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

> *cases in which it was then well understood that a jury trial could not be demanded as of right*.[36]

Quirin thus relied on what Stephen Sachs has called a "constitutional backdrop"—a pre-constitutional common-law norm or practice that the Framers are presumed to have preserved, even if the plain text of the Constitution might suggest otherwise.[37]

By the same logic of constitutional preservation, if the Second Continental Congress and General Washington did indeed use military tribunals to try offenses that were not violations of the international law of war during the Revolutionary War, then arguably Article III should be understood not to apply to at least some such cases.

The government's second type of historical argument extends well beyond the Framing. It rests upon a scattered handful of political branch precedents long after 1789 that might be said to have effectively settled, or, in Madison's terms, "liquidated," what had originally been an open question about the scope of Article III's application in wartime.[38]

Part of this alleged liquidation consists of Congress's longstanding treatment of spies and disloyal residents. From the Framing to the present day, the federal code has included variations on the Second Continental Congress's resolutions, permitting military trials for aiding the enemy, and for spying in at least some circumstances, even though those offenses are not violations of the international law of war.[39] As I explain later in this Article, those enactments have mostly lain dormant: The Executive has rarely used them, apart from a flurry of trials during the Civil War and a single prosecution in World War II. Nevertheless, according to Judge Kavanaugh, the "consistent congressional practice requires our respect."[40]

The government's post-Framing historical account is not limited to the spying and aiding-the-enemy statutes, however. As Judge Kavanaugh stressed in *al Bahlul III*, during the Civil War and the Second World War the Executive Branch used military tribunals to try individuals for other offenses (conspiracy, in particular) that were not violations of the international law of war.[41] In

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36. *Id.* at 39 (citing District of Columbia v. Colts, 282 U.S. 63 (1930)) (emphasis added).

37. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1817–18 (2012).

38. *See* THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); *see also* Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 447, 450 (G. Hunt ed., 1908) ("[It] was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.").

39. Today, the two offenses are codified as 10 U.S.C. §§ 904, 906 (2012).

40. *al Bahlul III*, 840 F.3d 757, 765 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

41. *Id.* at 766.

particular, Kavanaugh pointed to what he called "[t]he two most important military commission precedents in U.S. history": the trial of the individuals accused of conspiring to assassinate Abraham Lincoln, and the trial of the Nazi saboteurs in *Quirin*.[42] This historical practice, he wrote, "cannot be airbrushed out of the picture. Prosecuting conspiracy and other non-international-law-of-war offenses is not at the periphery of U.S. military commission history and practice," but instead "lies at [its] core."[43] Invoking the Supreme Court's recent admonition in *NLRB v. Noel Canning*, Kavanaugh concluded that "we must be 'reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.'"[44]

* * * *

In this and a forthcoming article,[45] I closely examine these two different sorts of arguments from history. The present Article focuses on the Founding-era use of courts-martial to try spies and individuals accused of aiding the enemy, and the ways in which later generations have grappled with—and often misrepresented or misunderstood—that Revolutionary War practice and the statutes enacted by the first few Congresses.

The tension between the apparent commands of Article III and the early practice of prescribing military trials for spying and aiding the enemy has been a longstanding source of debate among scholars, military lawyers, and courts, across many of the nation's wars. As I will explain, there is good reason to question whether Article III was, in fact, designed to preserve the Revolutionary War status quo rather than to establish new guarantees.[46] But even if one accepts the premise of constitutional continuity, the historical debate has been beset by a misunderstanding of the Eighteenth Century history, based upon a mischaracterization that took hold during the Civil War and later became the standard-issue account of how Washington and the early Congresses understood the place of military courts in the constitutional scheme. One of the principal functions of this Article is to recover a more faithful understanding of that early history—a history that, if anything, undermines the notion that the Constitution preserves a discrete, implicit exception for wartime military tribunals.

To be sure, during the nation's first war, certain types of spies found behind enemy lines were subject to court-martial, even though—contrary to Chief Justice Stone's assumption in *Quirin*[47]—such spying did *not* violate the international law of war.[48] This treatment of spies in military proceedings, however,

42. *Id.*
43. *Id.* at 768.
44. *Id.* (quoting 134 S. Ct. 2550, 2573 (2014)).
45. Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. (forthcoming 2018).
46. *See infra* Section III.B.
47. *See* 317 U.S. 1, 45–46 (1942).
48. *See infra* notes 346–57 and accompanying text.

was a function of idiosyncratic characteristics unique to spying—in particular, that the conduct was not typically viewed as wrongful. That practice, then, did not reflect an understanding that the jury right was inapposite to particular sorts of war-related criminal offenses. Spying truly was, and remains, a *sui generis* case, and thus it is hazardous, at best, to draw any broader principle from that example.[49]

At first glance, the Revolutionary War congressional resolutions prohibiting the provision of aid to the enemy would appear to be a more difficult precedent to reconcile with the text of Article III. Not surprisingly, then, military officers and commentators in subsequent wars often pointed to such "quasi-treason" enactments as the basis for a broader theory of permissible military jurisdiction, and did so even after the Court's later decision in *Milligan*, which appeared to impose severe constitutional constraints on the use of military tribunals to try U.S. citizens for providing aid to the enemy.[50] The Revolutionary War enactments, however, were generally much more limited in scope than has commonly been assumed. The Second Continental Congress designed them to apply only to persons in or associated with the Continental Army and, rarely, in places where the civilian courts were truly unavailable to try persons accused of treason. And, for the most part, General Washington rigorously adhered to this limited understanding of the resolutions' scope—in fact, Washington was something of a stickler for ensuring due deference to the civil courts to deal with the problem of British loyalists aiding the enemy.[51]

Thus, as this Article demonstrates, the constitutional "backdrop" of wartime justice against which Article III and the Sixth Amendment were written and ratified is not nearly as clear-cut as many have long assumed—indeed, if anything, it points in the other direction. Moreover, there is no reason to think that when the first few Congresses "ratified" the authorization of military courts to try the offense of aiding the enemy, the legislature intended to allow military trials of that offense against ordinary civilians unassociated with the armed forces—a practice that would appear to conflict not only with Article III, Section One and the Sixth Amendment, but also with the Treason Clause.[52]

There is, however, a conspicuous breach in this narrative. In 1780, General Washington authorized the trial by court-martial of Joshua Hett Smith, a citizen of New York, for having allegedly abetted Benedict Arnold in his scheme to help the British capture the Army encampment at West Point, even though the

49. *See infra* Section IV.B.

50. *See* 71 U.S. 2, 127 (1866).

51. *See infra* Section IV.C. Therefore, those resolves were less inconsistent with the Court's later *Milligan* decision than has often been understood.

52. *See* U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

New York Constitution guaranteed Smith the right to trial by jury.[53] Indeed, the Continental Congress was arguably complicit in Smith's court-martial: that proceeding was conducted pursuant to a 1778 resolution that did not appear to be limited to cases of true exigency, as were other congressional resolutions involving disloyal residents during the War.[54]

Not surprisingly, then, when the military was pressed to justify the constitutionality of the military commission proceedings against those alleged to have conspired to kill President Lincoln in 1865, prosecutor John Bingham invoked General Washington—"the peerless, the stainless, and the just, with whom God walked through the night of that great trial"[55]—as having sanctioned a precedent that established the legitimacy of the assassins' trial.[56] The government also invoked the Smith trial as a significant precedent in the landmark *Milligan* case.[57]

This is a familiar sort of move in constitutional debate—what Jack Balkin has referred to as the "argument[] from honored authority."[58] It is tempting to dismiss such arguments as a form of mere hero-worship. Yet to the extent one believes the Constitution's true nature might, at least in part, be established by "the way the framework has consistently operated"—by the proverbial "gloss which life has written upon" the words of the document[59]—then it is only natural to look to the nation's wars, and the ways in which Congress and successful wartime Presidents have prosecuted those wars, for guidance.[60]

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53. *See infra* Section IV.C.5.

54. *See infra* Section IV.C.3, IV.C.4.

55. THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 362 (compiled and arranged by Benn Pitman) (1989 ed.) [hereinafter PITMAN].

56. *See infra* notes 631–33 and accompanying text.

57. *See* 71 U.S. 2, 100–01 (1866) (argument of Benjamin Butler for the government); *see also infra* notes 638–43 and accompanying text.

58. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 672 (2013). For understandable reasons, Lincoln himself is the President most frequently invoked as authority for arguable wartime deviations from constitutional norms. *See, e.g.*, Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691 (2004); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004); John Yoo, *Lincoln at War*, 38 VT. L. REV. 3 (2013). This type of argument predates the Civil War, however. Indeed, during that war itself, in the infamous case involving the military detention and trial of Clement Vallandigham, a government lawyer remarked that the defendant's challenge to the Lincoln Administration's use of military tribunals was necessarily an indictment of a much longer, storied history: "[T]he practice, now complained of as strange and unprecedented, was commenced under the administration of Washington. Jefferson and Jackson are also implicated. When Vallandigham shoots his poisoned arrows at President Lincoln, if there should prove to be strength enough in the bow, the same aim will pierce a succession of illustrious defenders of liberty." *Ex parte* Vallandigham, 28 F. Cas. 874, 908 (C.C.S.D. Ohio 1863) (No. 16,816) (argument of Aaron Perry for the government).

59. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1951) (Frankfurter, J., concurring).

60. In a pair of previous articles, for instance, David Barron and I showed how great wartime Presidents such as Washington, Lincoln and Roosevelt regularly declined to assert, or acknowledged that it would be *improper* to assert, a purported war-powers prerogative that is now the subject of contestation—a purported authority of the Commander in Chief to disregard statutory constraints on the conduct of war. Such a longstanding historical consensus, we argued, reflected in virtually (but not quite) uniform practice of executives who were nonetheless able to successfully prosecute the nation's

Washington's example, in particular, has frequently been a touchstone for constitutional understandings. "In the American constitutional tradition," writes Akhil Amar, "what Washington did . . . has often mattered much more than what the written Constitution says, at least in situations where the text is arguably ambiguous and Washington's actions fall within the range of plausible textual meaning."[61] To be sure, Washington's constitutional authority is most pronounced with respect to his actions as President, when he was implementing the new Constitution itself. Yet there is also a storied tradition of looking to Washington's actions as Commander in Chief during the war as a model the Framers presumably did not intend to jettison when it came time to craft the Constitution shortly after that successful military campaign.[62]

To assess how much weight to assign such "honored authority," however, it is necessary to pay careful heed to what that alleged authority consists of, and how it was justified, defended, and treated in its own era—and whether such examples have withstood the test of time.

The first three parts of this Article set the stage for the history that follows by providing the broader constitutional context. Part I examines the rationales for the judge and jury guarantees in Article III (and the Sixth Amendment's jury right) and the reasons why military trials in particular raise acute constitutional concerns. Part II canvasses the various Article III exceptions the Supreme Court has recognized in the context of criminal trials—alleviating the requirement of a civilian jury, an independent Article III judge, or both—and demonstrates that, apart from one prominent counterexample (*Quirin*'s exception for violations of the law of war), each of those exceptions ultimately rests upon pragmatic or functional justifications, rather than on text or history. Part II then proceeds to explain why the government barely relies upon any such pragmatic or functional (or normative) considerations to justify the use of military tribunals to try domestic-law offenses against persons unconnected with the U.S. armed forces, and why it is no longer plausible (if it ever was) simply to say that wartime enemies (even enemy aliens, such as al Bahlul) are unprotected by Article III's

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armed conflicts, ought to bear heavily on modern understandings of whether the Constitution is best understood to establish, or countenance the exercise of, that contested prerogative. *See generally* 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 (2008) [hereinafter "Barron & Lederman I"]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008). The Article III issue discussed in the present Article raises what might be seen as the converse question—namely, whether and how the occasional *exercise* of a particular wartime authority by some of those same, esteemed executives, such as Washington, Lincoln and Roosevelt, often pursuant to statutory authorization, might affect constitutional understandings.

61. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 309–10 (2012); *see also id.* at 309 ("Much as modern Christians ask themselves, 'What would Jesus do?,' presidents over the centuries have quite properly asked themselves, 'What would President Washington do?' and, even more pointedly, 'What did President Washington do?'").

62. *See, e.g.*, Barron & Lederman I, *supra* note 60, at 773–80.

guarantees: For this particular proposed exception to Article III, it's history or bust.

Part III offers reasons to be skeptical about the assumption that Article III was not designed to alter the prevailing norms during the Revolutionary War and shortly thereafter. Part III also explains how the Supreme Court nevertheless embraced this "preservationist" account of Article III in its opinion in *Quirin*. Rightly or wrongly, Chief Justice Stone insisted that Article III's criminal trial protections extended only to those categories of cases where the right to trial by jury had previously been recognized by the pre-constitutional common law "and in all cases of a like nature as they might arise in the future."[63] And *Quirin*'s rationale thus tees up the substantive question at the heart of this Article: Was it "well understood" at the Framing that "a jury trial could not be demanded as of right"[64] for, and that an Article III judge need not preside over, the trial of certain war-related domestic-law offenses?

Part IV recounts the story of the spying and aiding-the-enemy offenses during the Revolutionary War, and how General Washington implemented the relevant congressional resolves. Part V examines the period immediately after ratification of the Constitution, including Congress's 1806 enactment of new Articles of War concerning spying and treasonous conduct, and the treatment of civilians accused of aiding the British enemy in the War of 1812. Part VI then examines how the Revolutionary War history, and the spying and aiding-the-enemy prohibitions more broadly, have been understood—or, more often, *mis*understood—in subsequent wars. Finally, Part VII offers some concluding thoughts on what, if anything, this historical account demonstrates with respect to the Article III question.[65]

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63. *Ex parte* Quirin, 317 U.S. 1, 39 (1942) (citing District of Columbia v. Colts, 282 U.S. 63 (1930)).

64. *Id.*

65. In a forthcoming article, I examine the second sort of historical argument on which the government and Judge Kavanaugh rely—the idea that post-Framing-era practice "liquidated" an Article III exception for war-related domestic-law offenses. Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45. That article focuses on the ways in which the Article III question was negotiated during and shortly after the Civil War, with particular attention to the Lincoln assassination trial. It also traces the ways in which the Lincoln assassination trial was—or, more often, was not—treated as constitutional authority over the course of the past 150 years, and demonstrates that the nascent respect for the Lincoln trial as a constitutional precedent in the past few years is an historical anomaly. That proceeding might, indeed, "lie[] at the core of U.S. military commission history and practice." *al Bahlul III*, 840 F.3d 757, 768 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring). Even so, until recently it was folly for anyone to rely upon that proceeding as a valid precedent that might support the argument that domestic-law offenses in wartime can be tried in military commissions rather than in Article III courts. As the nation's then-leading expert on military law, Frederick Bernays Wiener, wrote to Justice Frankfurter shortly after the *Quirin* decision in 1942, the Lincoln conspirators' trial was a precedent that "no self-respecting military lawyer will look straight in the eye." Letter from Frederick Bernays Wiener to Justice Felix Frankfurter, at 9 (Nov. 5, 1942), Felix Frankfurter Papers, Harvard Law School Library, Part III, Reel 43.

I. ARTICLE III, CRIMINAL TRIALS, AND MILITARY TRIBUNALS

With respect to criminal trials, Article III generates two important guarantees—one related to the jury, the other to the judge—that are not honored in trials under the Military Commissions Act (MCA).

A. A CIVILIAN JURY

Article III provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"[66]—a constitutional guarantee so important that it reappears in similar form in the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[67] That is just about as unconditional as constitutional language gets: As the Court stated in *Milligan*, "all crimes" and "all criminal prosecutions" are "provisions . . . too plain and direct, to leave room for misconstruction or doubt of their true meaning."[68] These provisions are "expressed in such plain English words, that it would seem the ingenuity of man could not evade them."[69]

Yet evade them the Court has. As I explain below, the Court has identified certain limited exceptions to the jury guarantee, including one exception the *Milligan* Court itself identified only a few paragraphs after insisting that there was no room for textual misconstruction—namely, the trial by court-martial of active-duty service members "for offences committed while the party is in the military or naval service."[70]

Even so, such exceptions are strongly disfavored because the right to be tried by jury—what Justice Scalia called "the spinal column of American democracy"[71]—is one of the most fundamental of constitutional guarantees, "reflect[ing] a profound judgment about the way in which law should be enforced and justice administered."[72] Not only was that "profound judgment"

66. U.S. CONST. art. III, § 2, cl. 3.

67. U.S. CONST. amend. VI. *See also* Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., joined by Souter & Ginsburg, JJ., concurring in part and dissenting in part) (remarking that "this guarantee [is] the only one to appear in both the body of the Constitution and the Bill of Rights"). The Supreme Court has held that, notwithstanding the difference in terms between the two formulations (compare "the trial of all crimes" with "all criminal prosecutions"), the Sixth Amendment "did not enlarge" the scope of the jury trial right that Article III established. *Ex parte* Quirin, 317 U.S. 1, 39 (1942). As Professor Amar notes, the distinct function of the Sixth Amendment was to guarantee that the jurors would come from the local community affected by the crime. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 105–06 (1998).

68. 71 U.S. 2, 119 (1866).

69. *Id.* at 120. To be sure, the phrase "[t]he trial of all crimes" in Article III presumably refers only to trial for violations of *federal* law. The Supreme Court has held, however, that the Sixth Amendment right to a jury trial is incorporated against the states. *See* Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968).

70. *Milligan*, 71 U.S. at 123.

71. *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part).

72. *Duncan*, 391 U.S. at 155.

reflected in the Declaration of Independence;[73] in addition, "the right to trial by jury in criminal cases was the only guarantee common to the twelve state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter."[74] Alexander Hamilton, in *The Federalist*, went so far as to remark that

> [t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[75]

This extraordinary and deep consensus explains why the right to a jury trial in criminal cases was "provided for, in the most ample manner, in the plan of the convention."[76]

The MCA does not provide the right to trial by jury that Article III and the Sixth Amendment guarantee. Whereas "the essential feature" of that jury right "obviously lies in the interposition between the accused and his accuser of the commonsense judgment *of a group of laymen*, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence,"[77] a military commission panel consists of commissioned officers of the armed forces on active duty.[78] Moreover, the Constitution guarantees a jury of at least six members,[79] yet the MCA authorizes five-member panels for non-capital cases.[80] And although the Constitution requires that the jury verdict be unanimous in a federal trial,[81] the MCA permits a conviction upon the vote of two-thirds of the members.[82]

B. AN INDEPENDENT PRESIDING JUDGE

Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may

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73. One of the charges against King George III was that he had "subject[ed] us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws," by approving legislation "depriving us, in many Cases, of the Benefits of Trial by Jury." THE DECLARATION OF INDEPENDENCE paras. 15, 20 (1776).

74. *Neder*, 527 U.S. at 31 (Scalia, J., concurring in part and dissenting in part).

75. THE FEDERALIST No. 83, at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

76. *Id.*

77. Williams v. Florida, 399 U.S. 78, 100 (1970) (emphasis added).

78. *See* 10 U.S.C. § 948i(a) (2012).

79. *See* Ballew v. Georgia, 435 U.S. 223, 239 (1978).

80. *See* 10 U.S.C. § 948m(a) (2012).

81. *See* Richardson v. United States, 526 U.S. 813, 817 (1999); Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring); *id.* at 382 (Douglas, J., dissenting); *id.* at 395 (Brennan, J., dissenting); *id.* at 399 (Stewart, J., dissenting); *id.* at 400 (Marshall, J., dissenting); Andres v. United States, 333 U.S. 740, 748 (1948).

82. *See* 10 U.S.C. § 949m(a) (2012).

from time to time ordain and establish," and further specifies that the judges of such courts "shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[83] However, the text of Article III does not guarantee that all trials of federal crimes be held in Article III courts with Article III judges; rather, it merely *empowers* Congress to create federal courts with the jurisdiction to adjudicate such cases. And so, as the Supreme Court once assumed,[84] perhaps Congress could opt to have federal offenses tried outside the federal government, in state courts.[85]

Whether or not that is a constitutionally available option, however, there is no such historical practice of state courts hosting prosecutions under federal criminal law[86] and Congress has long prohibited such trials.[87] Accordingly, it is and always has been the responsibility of the federal government to try federal criminal offenses. This triggers the Supreme Court's strong presumption that such trials must be in an Article III court, with a presiding judge who enjoys the protections of lifetime tenure and emoluments, thereby to ensure "maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."[88] Because Executive Branch judges and other officials do not have such protections, there is a presumption that they may not exercise adjudicative authority, criminal or otherwise, that is "brought within the bounds of federal jurisdiction"[89]—that is to say, authority that is part of the "judicial Power" of Article III.[90]

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83. U.S. CONST. art. III, § 1.

84. *See* Palmore v. United States, 411 U.S. 389, 402 (1973).

85. The Court's assumption in *Palmore* that state courts could entertain federal criminal trials is in tension with understandings both before and after that case. In *Martin v. Hunter's Lessee*, for example, Justice Story opined in dicta that the jurisdiction to try federal crimes is exclusive to Article III courts, and that "[n]o part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals." 14 U.S. 304, 337 (1816); *see also* Houston v. Moore, 18 U.S. 1, 69 (1820) ("It has been expressly held by this Court, that no part of the criminal jurisdiction of the United States can consistently with the constitution be delegated by Congress to State tribunals; and there is not the slightest inclination to retract that opinion." (citation omitted)). Scholars have recently explained that Justice Story's presumption in *Hunter's Lessee* was widely shared throughout much of the Nineteenth Century, including in several other Supreme Court cases. *See generally* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243 (2011); *see also* Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 992–1000 (2006). To similar effect, Chief Justice Roberts recently stated that a defendant "may not agree to stand trial on federal charges before a state court." Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1955–56 (2015) (Roberts, C.J., dissenting, joined by Scalia, J.).

86. *See, e.g.*, Collins & Nash, *supra* note 85, at 266–78 (discussing the practice in the early Republic).

87. *See* 18 U.S.C. § 3231 (2012) ("The district courts of the United States shall have original jurisdiction, *exclusive of the courts of the States*, of all offenses against the laws of the United States." (emphasis added)).

88. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955); *see also Ex parte* Milligan, 71 U.S. 2, 122 (1866) ("One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court . . . not composed of judges appointed during good behavior.").

89. Stern v. Marshall, 564 U.S. 462, 484 (2011).

90. U.S. CONST. art. III, § 1.

The protections of tenure and salary, the Court has explained, guarantee the federal judiciary's independence from the political branches, in order

> to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.[91]

As Hamilton famously put the point in Federalist No. 78, quoting Montesquieu, "there is no liberty if the power of judging be not separated from the legislative and executive powers."[92] "The standard of good behavior for the continuance in office of the judicial magistracy," explained Hamilton, "is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[93] Chief Justice Roberts recently elaborated upon how such separation of adjudicative function within the federal government protects liberty:

> The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges."[94]

An Article III judge does not preside over a military commission proceeding. Instead, such a trial is overseen by a "military judge"—a commissioned officer of the armed forces[95] who does not enjoy the protections of lifetime tenure and emoluments and who is subject to political-branch influence.

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91. Evans v. Gore, 253 U.S. 245, 253 (1920).

92. THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting MONTESQUIEU, SPIRIT OF LAWS 181 (1748)).

93. *Id.*

94. *Stern*, 564 U.S. at 483–84 (first quoting The Declaration of Independence ¶ 11, then quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., 1896)); *accord* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (Article III "safeguard[s] litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

95. *See* 10 U.S.C. § 948j(b) (2012).

C. THE SPECIAL CONCERNS ASSOCIATED WITH MILITARY TRIALS, ESPECIALLY IN WARTIME

As I discuss in Part II, when it comes to criminal prosecutions for federal offenses, the only contexts in which the Supreme Court has sanctioned exceptions to *both* of the Article III guarantees—the requirements of tenure- and salary-protected judges and civilian juries—involve tribunals administered by the military.[96] And yet it is in military tribunals that the absence of Article III's protections can raise the most acute concerns.

"Traditionally military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties . . . ."[97] To be sure, in recent decades Congress has taken steps "to make the system of military justice more like the American system of civilian justice"[98] in a manner sufficient to satisfy the requirements of the Fifth Amendment's Due Process Clause by prohibiting direct command influence over the conduct of military judges,[99] and by authorizing eventual civilian court review of the judgments and legal determinations of military courts.[100] Even so, the structural differences between Article III courts and military tribunals remain substantial:

> [C]onceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.[101]

Start with the difference in the presiding judges. Article III courts are supervised by judges with tenure and salary protections "during good Behaviour,"[102] who have "maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."[103] That is not the case in a military court. Indeed, for most of the nation's history there was no such thing as a military judge at all; courts-martial and military commissions were composed of panels of military officers chosen by, and beholden to, a military commander.[104] The panels themselves decided all questions of fact and law. It

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96. Except where noted, in this Article I do not draw distinctions between the two principal types of military tribunals that Congress has traditionally authorized—courts-martial and military commissions. Both types of tribunals can try civilians and members of enemy forces under certain circumstances, *see, e.g.*, *id.* §§ 802(a)(7)–(13), 904–906 (courts-martial); *id.* §§ 948c, 948a(7) (military commissions), and neither has an Article III judge or a civilian jury.

97. United States v. Denedo, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in relevant part) (quoting Reid v. Covert, 354 U.S. 1, 35–36 (1957) (plurality opinion)).

98. Weiss v. United States, 510 U.S. 163, 179 (1994).

99. *See* 10 U.S.C. § 837(a) (2012) (courts-martial); *id.* § 949b (military commissions).

100. *See id.* § 867a(a) (courts-martial); *id.* § 950g (military commissions).

101. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

102. U.S. CONST. art. III, § 1.

103. *Toth*, 350 U.S. at 16.

104. *See* United States v. Norfleet, 53 M.J. 262, 266 (C.A.A.F. 2000).

was not until the 1950 enactment of the UCMJ that Congress established the position of a "law officer" who performed some of the traditional roles of a trial judge.[105] In the Military Justice Act of 1968, Congress overhauled the military justice system in an effort to "civilianize" court-martial procedures (that is, to adopt many, but hardly all, Article III structures and protections).[106] The 1968 enactment designated the law officer of a court-martial as a "military judge,"[107] required such judges to be commissioned officers of the armed forces and members of a bar,[108] authorized such judges to rule on legal questions and instruct the court-martial panel on the relevant law,[109] and afforded such judges increased protection from influence by convening authorities and other officers.[110]

Nevertheless, the prospect of subtle forms of command influence, and the incentives for military judges to act in ways that find favor with their superior officers, remains a structural reality, especially when compared with the independence and impartiality of Article III judges.[111] Military judges not only lack lifetime salary and tenure protections; they are also assigned to judicial duty by another executive officer (their service branch's Judge Advocate General), and they enjoy no statutory tenure protection against at-will removal, in the form of reassignment.[112] Moreover, their future prospects for promotion and reassignment remain in the hands of superior officers in the command structure; and the judges also have reason to stay in Congress's good graces because promotion to a higher rank is an appointment to a new office that requires Senate consent.[113]

The deviation from Article III courts is even starker when we move from the judge to the adjudicative panel—the finders of fact who determine whether the prosecution has met its burden. "Members" of court-marital and military commission panels are officers of the armed forces, "detailed" by the convening authority.[114] These members have more expertise than lay jurors with respect to both matters of military discipline and culture, and the rules and practices of armed conflict (in trials involving alleged law-of-war offenses). "[I]nherent in

105. *See id.* at 266–67.

106. Pub. L. No. 90–632, 82 Stat. 1335 (1968).

107. *See* 10 U.S.C. § 826(a) (2012).

108. *See id.* § 826(b).

109. *See id.* § 851(b).

110. *See id.* § 837. On the statutory protections that are designed to ensure judicial independence, see Weiss v. United States, 510 U.S. 163, 180–81 (1994). For more detail about this historical evolution, see, e.g., Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 633–41 (1994); CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW IN A NUTSHELL 1–29 (4th ed. 2013).

111. *See* Lederer & Hundley, *supra* note 110, at 648–69; *see generally* Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970).

112. *See* EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 69–71 (2016).

113. *See* 10 U.S.C. § 624 (2012).

114. *See id.* § 825 (courts-martial); *id.* § 948i (military commissions).

the institution of trial by jury," however, is the idea that "laymen are better than specialists"[115] in determining guilt or innocence:

> Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field. On many occasions, fully known to the Founders of this country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices.[116]

Military panels raise particular questions of independence not only because they are hand-picked by the convening authority, but also because the members, no matter how conscientious they might be, remain acutely aware that their professional prospects are in the hands of their commanding officers (and of senators), some of whom may not be indifferent to the results of the trial. As Luther West wrote in 1970, "the military future of every member of the court-martial is still within the absolute discretion of the military commander who convenes the court-martial."[117] Such officers are only human, and thus could hardly be faulted if they were to be concerned about how their verdict might affect those prospects. For all these reasons, although a military panel may endeavor to be quite faithful to its oath, it cannot possibly exercise the same independence that an Article III jury enjoys. Furthermore, the military panel does not bring to bear the diverse sentiments and perspectives of a distinct civilian community that the local jury is designed to reflect.[118]

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115. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955).

116. *Id.* at 18–19 (citations omitted). The *Toth* Court added that in those cases where jurors "betrayed the cause of justice by verdicts based on prejudice or pressures," Article III tribunals—unlike their Article I military counterparts—have "independent trial judges" with the "power to set aside convictions." *Id.* at 19.

117. West, *supra* note 111, at 151.

118. In addition to the differences respecting judges and juries, military tribunals also deviate from Article III courts in a third fundamental way: they do not comply with the Grand Jury requirement of the Fifth Amendment. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."). Charges in military tribunals have traditionally been brought by military commanders, and today are proffered by the Secretary of Defense or his designee within the armed forces. *See* U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, Rule 401, at II-19 (2010 ed.). For the most part, this Article does not focus on the right to a grand jury as much as on the Article III protections of a tenure-protected judge and a civilian jury—not only because the grand jury right is often of less practical significance, but also because it does not derive from Article III. Because its genesis is "only" in the Bill of Rights, the right to grand jury presentment therefore might present a distinct doctrinal puzzle of its own in cases not involving U.S. persons—that is to say, virtually all of the cases that are likely to be at issue under the MCA and possible similar statutes. It is an open question whether the Grand Jury Clause of the Fifth Amendment would protect an alien defendant tried by the federal government overseas. *Cf.* Johnson v. Eisentrager, 339 U.S. 763, 782–85 (1950) (leaving open the question of whether alien defendants could invoke the Grand Jury Clause of the Fifth Amendment). The

As pronounced as these problems are in the context of the most common form of military adjudication—the trial of fellow members of the armed services—they are exponentially greater in the "war tribunal" cases that are the subject of this Article, namely, the trial of enemy belligerents, or of civilians who have come to the aid of enemy forces, during an armed conflict. The principal aim of the military arm of the government, after all, is to win the war; and members of the armed services, including those serving as judges or members of military tribunals, are generally devoted to using all of their resources and skills to that end. Can such military officers—even very principled officers, endeavoring to be true to their oath that they will assess the facts and the law without prejudice or preconceptions—realistically be expected to dispense justice without fear or favor in such situations? To put out of mind the fact that the defendants before them may be committed to using lethal force relentlessly against the U.S. armed forces themselves?

Not only is it unrealistic to expect that most military tribunal judges and members can and will discard their biases; it is also not something expected of them—indeed, it has often been invoked as a *justification* for the use of military tribunals. For example, William Winthrop, the "Blackstone of Military Law,"[119] asserted that the military commission is "an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander in chief in war."[120] More recently, the Court in *Hamdan* invoked Winthrop in explaining that the military commission "derives its original sanction" from "those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution."[121] Accordingly, proponents of military wartime tribunals have often been quite forthright in acknowledging that they prefer such courts precisely because they are not subject to the constraints of an Article III court, and by the vagaries of a civilian jury, and thus are more likely to dispense swift and severe sentences. As Judge Advocate General Joseph Holt—perhaps the most zealous Civil War advocate of such courts—explained in 1865, military commissions are "un[e]ncumbered by the technicalities and inevitable

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Court's decisions in *In re Yamashita* and *Quirin*, however, suggest that aliens would not be treated any differently from citizens with respect to the Grand Jury Clause in a trial occurring in the United States or on U.S. territory. *See* 327 U.S. 1, 23 (1946); 317 U.S. 1, 35 (1942). Assuming that is so, it is quite likely that the Grand Jury Clause would apply to an Article III trial of an enemy alien in the United States or at Guantánamo. It is also fairly certain that if the protections of Article III do not apply to a particular military trial, then neither would the protection of the Grand Jury Clause. *See Quirin*, 317 U.S. at 40–41 (suggesting that the jury and grand jury rights rise or fall together). All of which is to say that if a particular defendant is not entitled to a jury, then he almost surely would not be entitled to grand jury presentment, either.

119. Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006) (plurality opinion) (quoting Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)).

120. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920) [hereinafter "WINTHROP 2d ed."].

121. 548 U.S. at 592 n.21 (emphasis omitted) (quoting WINTHROP 2d ed., *supra* note 120, at 831).

embarrassments attending the administration of justice before civil tribunals."[122]

There is nothing illegitimate or unusual about this perspective, or about designing military courts to help prosecute a military campaign. After all, any army would wish to swiftly and decisively punish and incapacitate enemies (and their abettors) who violate the law in the conduct of an armed conflict. For present purposes, however, the important point is simply that military officers on a wartime panel are differently situated from their counterparts on an Article III jury, in perspective and in motivation: By virtue of their roles in the military, and in the armed conflict, they have an acute stake in the outcome. Inevitably, then, at least some such officers will be inclined to perform their functions not only with an eye to adjudicating guilt and innocence—to see that justice is done—but also to incapacitate the enemy, and to deter future violations of the law of war, so as to more effectively and successfully prosecute the conflict itself. That might be a very valuable thing when it comes to winning the war, but it is in deep tension with the purposes of Article III's guarantees.

II. THE CRIMINAL TRIAL EXCEPTIONS TO ARTICLE III AND THEIR JUSTIFICATIONS

Notwithstanding the plain language of Article III, adjudication within the Executive Branch is ubiquitous in the modern administrative state. The Supreme Court has therefore often opined on the circumstances in which Congress can assign adjudicatory *civil* authority to Article I officers.[123] That topic is a staple of Federal Courts courses, and has a prominent pride of place in the canonical casebook.[124]

Scholars have paid far less attention, however, to deviations from Article III in the context of criminal trials.[125] That is not because the question is less important in that setting: Indeed, the liberty-based concerns that Chief Justice Roberts invoked in *Stern*[126] are far more pronounced in the context of criminal prosecution. Moreover, the threats to judicial independence and objective fact-finding are all the greater in the criminal setting because the Executive Branch

122. Report of Judge Advocate General Joseph Holt to Edwin Stanton, Secretary of War, Nov. 13, 1865, *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series III, vol. 5, at 493 (United States Department of War 1900) [hereinafter OFFICIAL RECORDS].

123. *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985); Crowell v. Benson, 285 U.S. 22 (1932).

124. RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 345–90 (7th ed. 2015) [hereinafter "HART & WECHSLER"].

125. HART & WECHSLER, *supra* note 124, barely mentions the topic, except for a relatively recent, short section on law-of-war military commissions. *Id.* at 402–09. Fortunately, Stephen Vladeck has recently begun to fill this gap, with the first comprehensive analytic treatment of the variety of "military" exceptions to Article III. *See generally* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015).

126. *See* 564 U.S. at 483.

serves not only as a "party,"[127] but as an adversarial prosecutor, endeavoring to abridge the defendant of his liberty. This explains why the "public rights doctrine"—the most familiar and important exception to Article III in the civil context—"does not extend to any criminal matters, although the Government is a proper party."[128]

A. THE FUNCTIONAL AND PRAGMATIC JUSTIFICATIONS FOR ALL BUT ONE OF THE RECOGNIZED ARTICLE III CRIMINAL EXCEPTIONS

Even absent the public rights doctrine, however, the Supreme Court has sanctioned five circumstances in which the judge and jury protections of Article III do not apply, in full or in part, to criminal prosecutions. The first two, which do not involve military courts, are partial exceptions: One, the trial of "petty" offenses, involves the denial of a jury within a tribunal with a presiding Article III judge; whereas the other, criminal trials in territorial courts, preserves the jury trial, but permits non-Article III judges to preside. The other three "full" exceptions—in which neither the Article III judge nor jury is present—all involve military tribunals.

In all but one of the contexts in which it has recognized exceptions to Article III's judge and/or jury protections in criminal cases, the Supreme Court has relied principally on functional or pragmatic considerations, rather than on constitutional text, history, or Founding-era understandings, to justify the departure from Article III. This section describes the Court's functional justifications for those four exceptions. In section II.B, I examine whether any such functional reasons, or other nonhistorical rationales, might justify a further Article III exception for the trial of domestic-law offenses in the nation's current armed conflicts. Then, in Part III, I turn to the fifth of the Court's recognized exceptions, the only one that the Court has clearly premised on Founding-era history: the exception, recognized in *Quirin*, for trial of violations of the international law of war.

1. The Partial Exceptions

a. Petty Offenses. In an 1888 opinion, the Supreme Court assumed in dicta that the right to a jury does not attach to the trial of certain minor, or "petty," offenses.[129] It first issued a holding to that effect in 1904, in *Schick v. United States*.[130] By 1930, in a case holding that a reckless driving charge triggered the jury right, the Court deemed it "settled" that "there may be many offenses called 'petty offenses' which do not rise to the degree of *crimes* within the

127. *See* U.S. CONST. art. III, § 2, cl. 1 (extending judicial power of the United States "to Controversies to which the United States shall be a Party").

128. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.24 (1982) (plurality opinion).

129. *See* Callan v. Wilson, 127 U.S. 540, 552, 557 (1888).

130. 195 U.S. 65 (1904).

meaning of Article III, and in respect of which Congress may dispense with a jury trial."[131] Notably, however, this was a "partial" Article III exception: the Court did not suggest that "petty" crimes could be tried in a tribunal lacking an Article III judge.

The Court has never settled upon a single, let alone satisfactory, explanation for why Article III's prescription of a jury trial for "all crimes" permits such a "minor offense" exception. In *Schick*, the Court tendered a textual argument. It noted that the Framers at the Philadelphia Convention voted to change the phrase "the trial of all criminal offenses" to "the trial of all crimes," at a time when the "popular understanding" of the word "crimes" in the common law arguably denoted "'such offenses as are of a deeper and more atrocious dye'" than most misdemeanors.[132] This reading, based solely on the use of the word "crimes," is hardly convincing.[133] Among other things, it would have absurd implications for the use of the same term elsewhere in the Constitution, such as in Article IV's Extradition Clause,[134] which certainly applies to petty crimes, and also in the "all Crimes" clause of Article III itself, which provides not only that the trial of "all Crimes shall be by Jury," but also that they "shall be held in the State where the said Crimes shall have been committed."[135]

Sixteen years before *Schick*, in *Callan v. Wilson*, the Court acknowledged that the term "all Crimes" in Article III *could* encompass "every violation of public law."[136] The *Callan* Court also suggested, however, that the term might alternatively have a more "limited" scope, embracing only "offen[s]es of a serious or atrocious character."[137] The basis for this suggestion was the Court's understanding of Article III's relationship to the pre-constitutional common law. The Court opined that the phrase "all Crimes" should "be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury."[138] In other words, the *Callan* Court assumed that Article III was designed not to make a sharp break with the pre-1789 common-law practice when it came to the jury right, but instead to reflect, if not the specific holdings of the common law, at least the "principles" that animated common-law decisions about which offenses did and did not

131. District of Columbia v. Colts, 282 U.S. 63, 72–73 (1930).

132. *Schick*, 195 U.S. at 69–70 (quoting 4 WILLIAM BLACKSTONE, Commentaries *5).

133. *See* Stephen A. Siegel, *Textualism On Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 107–42 (2013).

134. U.S. CONST. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

135. U.S. CONST. art. III, § 2, cl. 3. Professor Siegel has further demonstrated the flaws in the *Schick* Court's reliance upon the change of phrasing in Philadelphia, and on Blackstone. *See* Siegel, *supra* note 133, at 120–42.

136. 127 U.S. 540, 549 (1888).

137. *Id.*

138. *Id.*

trigger a right to trial by jury. By those lights, the jury right would attach to the trial of not only "felonies, or offenses punishable by confinement in the penitentiary," but also "some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen."[139] In 1926, Professor Felix Frankfurter, writing with his protégé Tommy Corcoran, published an elaborate defense of the "petty offense" exception, in which they enthusiastically endorsed the *Callan* Court's presumption that Article III should be interpreted to sustain, rather than to have overturned, distinctions that the Framing-era common law drew between those offenses that did, and those that did not, require a trial by jury.[140] Shortly after Frankfurter and Corcoran published their article, the Supreme Court appeared to embrace their "preservation of the common law" argument.[141]

More recently, however, the Court has largely abandoned the Founding-era common law as a touchstone for determining when the "petty offense" exception applies. The modern Court looks instead primarily to "objective indications of the seriousness with which society regards the offense," especially to the maximum authorized penalty.[142] This evolution, to a more self-consciously normative balancing test for determining which charges are not sufficiently serious to warrant a jury guarantee,[143] is partly a function of the fact that "many contemporary statutory offenses lack common-law antecedents."[144] It is also, however, the Court's concession to reality—a recognition that the doctrine itself

139. *Id.*

140. *See generally* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

141. *See* District of Columbia v. Colts, 282 U.S. 63, 72 (1930) (reasoning that Article III's jury clause should be "interpreted in the light of the common law").

142. Lewis v. United States, 518 U.S. 322, 326 (1996) (quoting Frank v. United States, 395 U.S. 147, 148 (1969)). Under current doctrine, a jury trial is required as to all offenses for which the statute authorizes a term of imprisonment of more than six months. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974). If the maximum prison term is less than six months, the Court presumes that the jury right does not attach, *see id.*, but as cases such as *Callan* (conspiracy) and *Colts* (reckless driving) demonstrate, that presumption can be overcome, even for maximum terms of less than six months, if there are other indicia that the offense is "of a grave character, affecting the public at large." *Callan*, 127 U.S. at 556; *see also Colts*, 282 U.S. at 70.

143. The modern Court's doctrine is concededly dependent upon normative judgments, more so than on text or on analogies to the framing-era common law. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 542–43 (1989) (explaining that although a defendant will usually consider a term of less than six months anything but "petty," the Court has "found that the disadvantages of such a sentence, 'onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications'") (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970) (plurality opinion)). For example, when the Court abandoned its traditional view that criminal contempt trials were categorically exempt from the jury requirement, it offered a survey of the pre-constitutional history that was not "simple or unambiguous"—and then admonished that "[i]n any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution." Bloom v. Illinois, 391 U.S. 194, 200 n.2 (1968). The Court now treats criminal contempts no differently from other potentially "petty" offenses, with the same six-month-sentence presumption. *See* United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826–27 (1994); *Bloom*, 391 U.S. at 197–98, 210.

144. *Lewis*, 518 U.S. at 325 (quoting *Blanton*, 489 U.S. at 538, 541 n.5).

has strayed far from the Founding-era common law, requiring jury trials in cases where the old common law almost surely would not have insisted upon them. As Stephen Siegel notes: "Summary proceedings were used in England, the colonies, and the newly independent states to try offenses that were far more serious, both in terms of the gravity of the crime and the severity of the punishment, than the Supreme Court's conception of the petty offense exception has ever permitted."[145]

As things now stand, "the ultimate question" the Court asks about whether any particular offense is so "minor" as to fall outside of Article III's jury guarantee "is not whether the traditional doctrine is historically correct but whether . . . [denial of] a jury trial is a necessary or an acceptable construction of the Constitution."[146] That is to say, the modern Court predicates the "petty offense" exception to the jury right upon normative considerations and is no longer tethered to the pre-constitutional common law.

b. Territorial Courts, and Courts of the District of Columbia. The second partial deviation from Article III is a converse of the first. Whereas the "petty crimes" exception justifies denial of a jury but not of an Article III judge, in U.S. territories the right to a criminal jury usually applies,[147] but there is no requirement that an independent Article III judge preside over the trial.

The genesis of this territorial exception—"[t]he authority upon which all the later cases rest"[148]—is Chief Justice Marshall's 1828 opinion in the *Canter* case.[149] In dicta, Marshall opined that a court Congress established in Florida, with judges serving fixed four-year terms, could have entertained an admiralty

145. Siegel, *supra* note 133, at 137.

146. *Bloom*, 391 U.S. at 200 n.2; *see also* David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 449 n.26 (1971) (noting the Court's "rejection of history as affording a controlling test" with respect to the guarantee of jury trial in criminal cases) (citing *Bloom*, 391 U.S. at 200 n.2).

147. Although the right to a jury usually applies in Article I territorial courts such as the current courts for the District of Columbia, *see, e.g.*, District of Columbia v. Colts, 282 U.S. 63, 71–74 (1930), the Court held in the *Insular Cases* that it does not apply to tribunals within certain "unincorporated territories," in part because it was not a "fundamental" right. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922) (Puerto Rico); Dorr v. United States, 195 U.S. 138 (1904) (Philippines). Those holdings are no longer valid with respect to the trial of U.S. citizens. *See* Reid v. Covert, 354 U.S. 1, 7 (1957) (plurality opinion). Even as to noncitizens, it is at best uncertain whether the Court would reaffirm the holding of the *Insular Cases* respecting the jury right in such unincorporated territories if it were to revisit the question today, especially in light of the Court's intervening holding in *Duncan* that trial by jury in serious criminal cases is "fundamental to the American scheme of justice." 391 U.S. 145, 149 (1968); *see also* United States v. Tiede, 86 F.R.D. 227, 249, 252–53 (D. Berlin 1979) (holding that "the *Insular Cases* do not apply when the United States is acting as prosecutor *in its own court*" and that "the holdings in the *Insular Cases* that trial by jury in criminal cases was not 'fundamental' in American law" was "authoritatively voided" in *Duncan*); *see also, e.g.*, Boumediene v. Bush, 553 U.S. 723, 757–59 (2008); *Reid*, 354 U.S. at 14 (plurality opinion). Such a judicial reconsideration is unlikely, however, because there is a statutory right to trial by jury in the territories. *See, e.g.*, 48 U.S.C. § 1616 (2012) (Virgin Islands).

148. O'Donoghue v. United States, 289 U.S. 516, 535 (1933).

149. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828).

suit that would otherwise have come within the jurisdiction of an Article III court.[150] Marshall did not offer much reason for this conclusion, except to note that, in legislating for federal territories, "Congress exercises the combined powers of the general, and of a state government."[151] As Stephen Vladeck notes, the consensus modern view is that Marshall's rationale is a non sequitur that "fails to persuade."[152] "[F]rom [Marshall's] irreproachable statement that in legislating for a territory Congress has both general and local powers," David Currie rightly explained, "it does not follow that the Framers were unconcerned about the independence of territorial judges."[153]

Much later, the second Justice Harlan, in an admirable effort to defend Marshall's *ipse dixit*, suggested that there might be a functional justification for the territorial exception, namely, that "the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by [Article III]."[154] Indeed, Harlan invoked *Canter* and other cases to make a more general point that whether Article III admits of exceptions in particular circumstances is, and should be, resolved based upon concededly *functional* considerations:

> Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling.[155]

Whatever the best rationale for *Canter* might be, the Court has long since come to accept that Congress may create territorial courts for the territories, if only because of the longstanding historical practice.[156] It was not until its 1973 decision in *Palmore v. United States*,[157] however, that the Court considered whether territorial courts could exercise *criminal* jurisdiction over offenses arising under federal law. Palmore was convicted of a felony under the law of the District of Columbia, in a local D.C. court that Congress established in

150. *See id.* at 546.

151. *Id.*

152. Vladeck, *supra* note 125, at 971.

153. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 122 (1985).

154. Glidden Co. v. Zdanok, 370 U.S. 530, 546 (1962) (plurality opinion). Of course, such a justification is dependent upon the particular nature of territorial judges and their relationships to the territorial and national governments. The same presumably could not be said if, for instance, Congress were to authorize military officers, within the chain of command, to act as territorial judges.

155. *Id.* at 547–48.

156. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) (noting that "Article III judges are not required in the context of territorial courts" because of the "firmly established historical practice to the contrary"); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–65 (1982) (plurality opinion).

157. 411 U.S. 389 (1973).

1970, with judges who served fifteen-year terms.[158] Writing for the Court, Justice White appeared to acknowledge that Congress's Article I "police power" to govern the District of Columbia[159] was not sufficient, in and of itself, to establish an exception to Article III's requirement of judicial salary and tenure protection for D.C. criminal trials—an implicit rebuke to Chief Justice Marshall's rationale in *Canter*.[160]

Justice White instead offered three related reasons why such Article III guarantees were not constitutionally required. Two of them were obvious makeweights—or, in any event, no more persuasive than Marshall's Article I powers argument that White rejected.[161] Justice White's third rationale, however, was more interesting and important—namely, that the Court has recognized Article III exceptions based upon a "confluence of practical considerations."[162]

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158. The D.C. criminal laws, unlike offenses under Title 18 of the U.S. Code, apply only to conduct within the District. Nevertheless, that body of local law—which is prosecuted by a United States Attorney in the name of the United States—"aris[es] under . . . the laws of the United States" for purposes of Article III. U.S. CONST. art. III, § 2, cl. 1; *see, e.g.*, Whalen v. United States, 445 U.S. 684, 687 (1980) (explaining that the D.C. Code "certainly come[s] within this Court's Art. III jurisdiction"); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 650 (1949) (Frankfurter, J., dissenting) (explaining that whenever Congress "create[s] some right for the inhabitants of the District, it could choose to provide for the enforcement of that right in any court of the United States, because the case would be one arising under 'the Laws of the United States'"); *but see generally* Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292 (1982) (arguing that the criminal law governing the District should not be understood as "arising under" federal law).

159. U.S. CONST. art. I, § 8, cl. 17.

160. *See Palmore*, 411 U.S. at 399 ("[Palmore's] conviction was clearly within the authority granted Congress by Art. I, § 8, cl. 17, unless, as Palmore contends, Art. III of the Constitution requires that prosecution for District of Columbia felonies must be presided over by a judge having the tenure and salary protections provided by Art. III.").

161. First, pointing to the assumed power of state courts to entertain prosecutions under federal law, Justice White rejected the categorical view "that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Art. III." *Id.* at 400–02. As noted previously, it is open to question whether state courts can, in fact, entertain prosecutions for violations of federal criminal law, something they have never done. *See supra* note 85. Moreover, state court adjudication would not raise the same constitutional concerns as adjudication in an Article I court, as the Court has explained in rejecting Justice White's similar argument in the context of civil cases. *See N. Pipeline*, 458 U.S. at 64 n.15 (plurality opinion) ("Justice White's dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state-court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges.") (citing Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 304–05 (1981)).

Second, Justice White invoked the "constitutional history and practice" supporting other Article III exceptions—principally *Canter* itself, and the subsequent tradition of criminal proceedings in territorial courts, but also the long-established practice of trying members of the armed forces in court-martial proceedings "in the military mode, not by courts ordained and established under Art. III." *Palmore*, 411 U.S. at 402–03, 404. That history, however, only serves to show that Article III is not airtight in the criminal context—it does not offer a reason for an additional exception.

162. *Palmore*, 411 U.S. at 404 (citing both Justice Harlan's functionalist account of the territorial exception in *Glidden Co.*, *see* 370 U.S. 530, 546 (1962), and the Court's explanation that the

But what, then, were the "practical considerations" that permitted Palmore to be tried before an Article I judge? After all, his crime (and trial) took place not in a remote territory with attenuated historical ties to the United States, but in the District of Columbia[163]—and the Court had already held that the District was *not* similarly situated to the overseas territories for purposes of Article III and, in particular, that the pre-1970 courts in the District *did* have to be staffed by judges with the tenure and salary protections of Article III.[164] The fact that the protections of Article III are arguably inapplicable to the overseas territories because of "peculiar reasons," explained the Court in *O'Donoghue v. United States*, does not mean "that they are likewise inapplicable to the District where these peculiar reasons do not obtain."[165] The *Canter* line of cases itself, therefore, could not be invoked to identify the "practical" considerations that justified the denial of a presiding Article III judge in the District.

To the contrary, explained the *O'Donoghue* Court in 1933, far from being "an 'ephemeral' subdivision of the 'outlying dominion of the United States,'" the District of Columbia is "the capital—the very heart—of the Union itself."[166] Therefore, the protections of Article III are, if anything, even more important within the District than elsewhere in the nation, because the judges "are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments."[167]

For present purposes, it is not important how Justice White, in *Palmore*, attempted to distinguish *O'Donoghue* and thereby justify the use of Article I judges for some criminal trials in the District, whether that distinction was persuasive, or what it means for the current state of the territorial exception.[168]

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court-martial exception is justified by the "exigencies of military discipline requir[ing] the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply" (quoting O'Callahan v. Parker, 395 U.S. 258, 261 (1969))).

163. *See Palmore*, 411 U.S. at 399.

164. *See* O'Donoghue v. United States, 289 U.S. 516, 541–42 (1933).

165. *Id.* There is good reason to question whether there are even "peculiar," practical reasons to permit criminal trials outside of Article III in the overseas territories. *See* Vladeck, *supra* note 125, at 973 n.248. But even if there were, those reasons would be inapposite to the District of Columbia. To be sure, just as Congress has a plenary power over the territories, so, too, does it have a similar authority with respect to the District. *See* U.S. CONST. art. I, § 8, cl. 17. But that power of District governance, held the Court, does not afford Congress the authority "to destroy the operative effect of [Article III] within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable." *O'Donoghue*, 289 U.S. at 546.

166. 289 U.S. at 539 (internal citations omitted).

167. *Id.* at 535.

168. The District of Columbia courts before 1970, Justice White explained—including of course, the trial court in *O'Donoghue* itself—were (as the Article III courts in the District are today) principally devoted to adjudication of questions of federal, i.e., national, law. *See Palmore*, 411 U.S. at 396. Those pre-1970 D.C. courts also were obliged to hear claims under the law specially governing the District, but their "consideration of 'purely local affairs [was] obviously subordinate and incidental.'" *Id.* at 407 (quoting *O'Donoghue*, 289 U.S. at 539). In 1970, however, Congress largely split these local and

The important point is simply that the Court in *Palmore* ultimately relied, persuasively or not, on functional considerations to justify a limited rule that an Article I court in the District of Columbia that focuses "primarily" on matters "strictly of local concern" may try local crimes "under statutes that are applicable to the [locality] alone,"[169] despite the absence of an Article III judge, albeit *with* a civilian jury.

2. The Full Exceptions for Military Trials

The other exceptions the Court has recognized in the criminal context all lack both of the Article III protections. Each of these exceptions involves trials by military officers.

a. Courts-martial of Service Members. The most common, and well-established, military exception to Article III is for the courts-martial trial of members of the U.S. armed forces (and certain persons closely associated with the armed forces). Since the beginning of the Republic, Congress has authorized such military trials in a series of "Articles of War."[170] From the start, and continuing to the present day, the Articles of War (now codified within the UCMJ) have been designed not only as a means of punishing wrongdoing by service members, but also as a system of military discipline and good order,

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national functions, and assigned primary coverage of the former to new "local" courts in the District, including the one in which Palmore was tried, "the focus of whose work is primarily upon cases arising under the District of Columbia Code and to other matters of strictly local concern. They handle criminal cases only under statutes that are applicable to the District of Columbia alone." *Id.* "*O'Donoghue* did not concern itself with courts like these, and it is not controlling here," according to Justice White. *Id.*

It is far from obvious why this factual distinction makes a functional difference sufficient to establish an exception to Article III. Be that as it may, this much is clear: After *Palmore*, if the focus of a particular Article I court is "primarily" on matters "strictly of local concern," Congress can confer upon that court the authority to try local crimes, that is, criminal cases "under statutes that are applicable to the [locality] alone." *Id.* It remains an open question, however, whether Congress can authorize territorial Article I courts to try crimes of *general* federal jurisdiction (that is, offenses under Title 18 of the United States Code). That is not an issue in the District of Columbia, where Congress has precluded the local D.C. courts from hosting such cases, or in Puerto Rico, where Congress has established Article III courts. In three other current territories, however—Guam, the Northern Mariana Islands, and the Virgin Islands—there are no Article III courts, and therefore local courts regularly entertain criminal trials alleging Title 18 offenses. *See* Vladeck, *supra* note 125, at 934 n.3 (citing statutes). The constitutionality of that practice has rarely been challenged, but one court of appeals rejected the Article III argument in 1983. *See* United States v. Canel, 708 F.2d 894 (3d Cir. 1983). That court relied primarily on longstanding practice, *see id.* at 896–97 ("Congress assumed that it had the plenary sovereignty recognized in *American Insurance Co. v. Canter*. . . . Outside the geographical limits of the states which are members of the federal union, however, the tenure and compensation guarantees of article III, section 1 have been recognized for too long to be matters of legislative grace rather than constitutional right for this court to hold otherwise."), and on the immediate practical impact of a contrary holding, *see id.* at 896 ("Were we to hold that Title 18 could not be enforced in the District Court of the Virgin Islands, the entire title would be for all intents and purposes a dead letter in the territory.").

169. *Palmore*, 411 U.S. at 407.

170. The first formal codification of those articles after ratification of the Constitution occurred in 1806. *See* Act of Apr. 10, 1806, ch. 20, 2 Stat. 359 (1806).

"with a view to maintaining obedience and fighting fitness in the ranks."[171] The current UCMJ sets out approximately fifty offenses,[172] an article that authorizes courts-martial jurisdiction over violations of the law of war,[173] and a "General Article" that authorizes courts-martial of service members who commit "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty."[174]

The Supreme Court first addressed the constitutionality of such courts-martial in *Dynes v. Hoover*, in 1858.[175] In his opinion for the Court, Justice Wayne invoked a hodge-podge of constitutional text to explain why such trials are permissible: the provision of Article I, Section 8 authorizing Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces";[176] the Article II designation of the President as Commander in Chief of those same forces;[177] and the Fifth Amendment, which specifically excepts "cases arising in the land or naval forces" from its mandate that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[178] These three clauses, together, wrote Justice Wayne,

> show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States.[179]

This catch-all textual enumeration in *Dynes* was hardly a satisfactory explanation of why service members are not entitled to the protections of Article III when being tried for criminal offenses. That Congress has an Article I power, for example, does not mean it can exercise that power in contravention of other specific constitutional limits, such as those found in Article III and the Sixth Amendment. After all, Congress has Article I authority to enact the corpus of

171. Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion).

172. *See* 10 U.S.C. §§ 877–933 (2012).

173. *Id.* § 818.

174. *Id.* § 934.

175. 61 U.S. 65 (1858). By the time it considered *Dynes*, the Court already had decided several cases involving such military courts-martial, without considering the constitutional question. *See, e.g.*, Martin v. Mott, 25 U.S. 19 (1827); Houston v. Moore, 18 U.S. 1 (1820); Wise v. Withers, 7 U.S. 331 (1806).

176. U.S. CONST. art. I, § 8, cl. 14.

177. *Id.* art. II, § 2, cl. 1.

178. *Id.* amend. V; *see Dynes*, 61 U.S. at 78–79.

179. *Dynes*, 61 U.S. at 79; *see also Ex parte* Milligan, 71 U.S. 2, 123 (1866) ("[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.").

criminal offenses in Title 18, too—but surely it does not follow that Congress can jettison the judge and jury protections of Article III for the trial of all those offenses. Likewise, although it is true, as Justice Wayne noted, that the Fifth Amendment includes an express military exemption to the *grand jury* requirement for "cases arising in the land or naval forces,"[180] neither the Fifth Amendment nor any other provision of the Constitution includes a parallel exemption to the petit jury right prescribed in Article III and the Sixth Amendment.[181] Moreover, the notion that the Fifth Amendment created an exception to a protection earlier established by Article III is implausible. Accordingly, almost a century after *Dynes*, the Court finally acknowledged that the Grand Jury Clause "does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces."[182] Finally, the Commander-in-Chief Clause[183] is simply inapposite. It affords the President the authority to "command" members of the armed forces, but says nothing about the power of Congress to strip them of Article III's guarantees when they are not being "commanded" but are instead subjected to trial to determine their guilt and possible punishment (including penalties that might extend long beyond their term of military service).

Not surprisingly, then, the Court in more recent cases has emphasized functional justifications for the service-member exception. In particular, it has invoked the "exigencies of military discipline requir[ing] the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art[icle] III trials need apply."[184] These function-

180. U.S. CONST. amend. V.

181. *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI. Interestingly, Madison's original proposal in 1789 was to replace the criminal trial clause of Article III with a provision similar to the eventual Fifth and Sixth Amendment jury guarantees—except that that proposal would have expressly exempted "cases arising in the land or naval forces" from the petit jury guarantee. 1 ANNALS OF CONG. 452 (1789). The House eventually decided not to amend the original articles, but instead only to approve supplementary amendments. *See id.* at 795; *see also id.* at 809 (forwarding the approved amendments to the Senate for concurrence). The Tenth Article of the House-approved amendments, like Madison's proposal, would have exempted "cases arising in the land or naval forces" from the petit jury guarantee. *See* S. JOURNAL, 1st. Cong., 1st Sess., at 64 (1789). On September 4, however, the Senate struck most of that amendment, including the petit jury guarantee. *See id.* at 71. Five days later it rejected a motion to reconsider the petit jury guarantee by an equally divided vote, but it voted to approve a *grand jury* guarantee, with an "arising in" exception, that eventually became the Fifth Amendment's Grand Jury Clause. *See id.* at 77. The Conference Committee reinserted the petit jury guarantee of the Sixth Amendment, but it did not include the "arising in the land and naval forces" exception that appeared in the final Constitution. *See* 1 ANNALS OF CONG. 948 (1789). The recorded proceedings offer no explanation for this migration of the "arising in" exception from the petit jury guarantee to the eventual Grand Jury Clause.

182. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 n.5 (1955).

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

184. O'Callahan v. Parker, 395 U.S. 258, 261 (1969); *see also, e.g.*, Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion) ("Because of its very nature and purpose the military must place great emphasis on discipline and efficiency."); *Toth*, 350 U.S. at 17 ("Unlike courts, it is the primary business

alist explanations do not necessarily withstand careful scrutiny, either.[185] Nevertheless, as Stephen Vladeck explains, no matter how "light on analysis" *Dynes* and subsequent cases may be, "their understanding [has] only bec[o]me more ingrained in the Court's jurisprudence over time."[186]

Even so, there remain significant constitutional limits to the jurisdiction of courts-martial—limits that are, at least in part, tied to the functional justification for the exception itself: "[M]ilitary tribunals must be restricted 'to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.'"[187]

Most importantly, the Court has held that Congress can only authorize military trials of persons while they are on active duty in the armed services, and only for offenses they committed while on such duty.[188] The Court has also held, in a series of rulings, that it is unconstitutional to use courts-martial to try persons who are not service members but who are alleged to have committed offenses while accompanying the military overseas.[189] These cases collectively resolved that "courts-martial have no jurisdiction to try those who are not

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of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.").

185. *See* Vladeck, *supra* note 125, at 948–51.

186. *See id.* at 953.

187. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240 (1960) (quoting *Toth*, 350 U.S. at 22).

188. *See Toth*, 350 U.S. at 22 ("It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."). At one point, the Court also held that service members could not be court-martialed for non-service-connected crimes committed during their active duty. *See O'Callahan*, 395 U.S. at 272. The Court later reversed that ruling, however. *See* Solorio v. United States, 483 U.S. 435, 436 (1987).

One other, more obscure Article III exception bears mention here. In *Kahn v. Anderson*, the Court held that an offense committed by an individual *while in military custody* can be tried by court-martial, even if the defendant was not a service member at the time of the offense. 255 U.S. 1, 8–9 (1921). This explains the current provision of the UCMJ subjecting persons serving a sentence imposed by a court-martial to further court-martial proceedings for offenses committed while in custody. *See* 10 U.S.C. § 802(a)(7) (2012); *see also id.* § 802(a)(9) (same as to prisoners of war in custody of the armed forces). The Court in Kahn did not address Article III specifically, and its reasoning was sparse—Chief Justice White merely noted that the power to authorize such courts-martial was "long established and recognized," which Congress had "exerted from the beginning." 255 U.S. at 8. Moreover, the certitude of *Kahn*'s authority was "rudely unsettled" by the line of modern cases beginning with *Toth. See* Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 372 (1964); *see also Simcox v. Madigan*, 298 F.2d 742, 747–48 (9th Cir. 1962) (Duniway, J., concurring). The Supreme Court has not revisited the question, however, and the lower courts therefore have continued to apply *Kahn. See, e.g.*, *id.* at 744–47 (majority opinion); *see also* Bishop, *supra*, at 375–76 (offering functional reasons why the situation in *Kahn* should not be subject to the *Toth* rationale for affording civilians the protections of Article III, at least with respect to many custody-related offenses committed by former service members).

189. *See, e.g.*, *Kinsella*, 361 U.S. at 240–46; McElroy v. United States *ex rel*. Guagliardo, 361 U.S. 281, 283–84 (1960); Grisham v. Hagan, 361 U.S. 278, 280 (1960); *Reid*, 354 U.S. at 21 (plurality opinion).

members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline."[190]

b. Occupation Courts and Martial-Law Courts. In rare situations where the military has effectively and lawfully displaced civilian government, and in which no Article III or other civilian courts are available, military courts may try cases involving active-duty members of the armed forces and civilians for all manner of crimes.

The most well-accepted example of this exception is "occupational" criminal jurisdiction: the "recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function."[191] In these cases, the military court is effectively a surrogate for the civil courts of the occupied jurisdiction, and thus it typically applies the law of the occupied territory itself rather than that of the United States.[192] The Supreme Court has rarely, if ever, entertained an Article III challenge to these occupational courts in the context of criminal proceedings,[193] but it has confronted such criminal cases without raising constitutional doubts.[194] As a plurality of the Court recently confirmed in *Hamdan*, in both the civil and criminal contexts, such a military occupational tribunal is a court of exigency,

190. *O'Callahan*, 395 U.S. at 267. There remains one discrete, lingering question in this respect: the constitutionality of Article 2(a)(10) of the UCMJ, which authorizes court-martial jurisdiction "[i]n time of declared war or a contingency operation [over] persons serving with or accompanying an armed force in the field." 10 U.S.C. § 802(a)(10) (2012). The United States Court of Appeals for the Armed Forces recently upheld that law as applied to a non-citizen civilian contractor working with the armed forces in Iraq. *See* United States v. Ali, 71 M.J. 256, 265–71 (C.A.A.F. 2012). That decision is vulnerable to serious criticism. *See* Vladeck, *supra* note 125, at 955–56. The best defense of the judgment in *Ali* is found in Judge Baker's concurrence. Relying principally upon functional considerations, Judge Baker would have limited the Court's holding to cases "where it is not feasible or practicable to suspend military operations to pursue the transfer of persons back to the United States for trial." *Ali*, 71 M.J. at 274 (Baker, J., concurring in part and in the result). He stressed that in *Ali* the defendant "was enmeshed within a military unit both during duty time, when he was a required and integral part of accomplishing the military mission, and during off-duty time, when he lived in close proximity with and relied on the military unit to control the society within which he lived." *Id.* at 275. Judge Baker also pointed to a finding that the absence of Ali's victim, a combat translator, "rendered his squad 'mission incapable' for five days." *Id.* "If Congress could not extend court-martial jurisdiction to Appellant in this context," reasoned Judge Baker, "the United States could not at one time hold Appellant responsible for his criminal offenses and provide for the military discipline and readiness of a combat unit in the field." *Id.* at 275–76. Whether Judge Baker's empirical presumptions were correct, his reasoning was quite narrow and might only be sufficient to sustain the law in a small handful of accompanying-contractor cases.

191. Duncan v. Kahanamoku, 327 U.S. 304, 314 n.8 (1946) (citing cases).

192. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341, 356 (1952) (explaining that a U.S. occupational court applied the German Criminal Code in occupied Germany following the end of World War II).

193. The Court rejected Article III challenges to *civil* cases heard by a Civil War occupational court in New Orleans in *The Grapeshot*, 76 U.S. 129, 131–33 (1870), and in *Mechs. & Traders' Bank v. Union Bank*, 89 U.S. 276, 294–97 (1875).

194. *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950); *Madsen*, 343 U.S. at 356–61.

"born of military necessity."[195]

Similarly, Congress might authorize military courts to adjudicate criminal cases within the United States in the even rarer situation in which martial law has properly been declared over a specified area and the civilian courts in that area are, literally or in effect, closed. Once again, however, this would be an exception defined by necessity—a situation in which the choice is between military justice and no justice at all. As the Court explained in *Milligan*:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[196]

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The Court has recognized one further Article III criminal exception, too—the "*Quirin*" exception for trials of offenses against the international law of war. The basis for this final exception, however—unlike all the others—was the Court's account of a pre-constitutional practice that the Court assumed the Framers intended to preserve. I address the *Quirin* exception separately in Part III. Before doing so, however, it is important to understand why the government, and its judicial defenders, rely on a *Quirin*-like historical argument, rather than on functional, pragmatic, or other non-historical justifications, as the basis

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195. 548 U.S. 557, 590 (2006) (plurality opinion); *see also id.* at 595 n.26 ("The limitations on these occupied territory or military government commissions are tailored to the tribunals' purpose and the exigencies that necessitate their use. They may be employed 'pending the establishment of civil government . . . .'") (quoting *Madsen*, 343 U.S. at 354–55).

196. 71 U.S. at 127. Chief Justice Chase's concurrence for four Justices famously disagreed with the majority's categorical statement respecting martial-law courts. Chase would have offered a narrow opening for Congress to authorize the use of military tribunals in circumstances where the majority might not. *Id.* at 140–41 (Chase, C.J., concurring). He reasoned that in times of war, when all parts of the nation are "exposed to invasion," Congress (but not the President) could authorize the use of military courts even where civil courts were nominally open, in cases where those civil courts were, in Congress's view, "wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty." *Id.* at 141. This could occur where the civil judges and marshals are "in active sympathy with the rebels," such that the courts have become the rebels' "most efficient allies." *Id.*

In the aftermath of the Civil War, Congress *did* authorize the use of military commissions to adjudicate ordinary criminal cases during Reconstruction in the South, on the theory that the civilian courts in the South were incapable of performing their functions properly. *See* Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45. The constitutionality of those Reconstruction military tribunals—whether they were consistent with the majority view in *Milligan*—remains an unresolved question.

for establishing yet another Article III exception for war-related *domestic-law* offenses.

B. THE SURPRISING DEARTH OF FUNCTIONAL AND OTHER NON-HISTORICAL JUSTIFICATIONS FOR THE MILITARY TRIAL OF WAR-RELATED OFFENSES

As discussed above, in all but one of the contexts in which it has recognized exceptions to Article III's protections in criminal cases, the Supreme Court has ultimately relied upon functional considerations, rather than on constitutional text, history, or even Founding-era understandings.[197] For example, the Court has countenanced courts-martial because of the "exigencies of military discipline requir[ing] the existence of a special system of military courts,"[198] "with a view to maintaining obedience and fighting fitness in the ranks."[199] It has permitted jury trials without Article III judges in the territories—at least for local crimes—in large measure because there is little risk of the territorial judges being subject to influence from the political branches. And the Court has approved of occupational courts, and in theory of some martial-law courts, as well, because resort to domestic Article III courts would be impracticable in those discrete contexts.

Are there similar functional justifications that might justify the use of military tribunals for prosecution of war-related offenses?

1. The Absence of Compelling Functional Justifications

It is difficult to see how there are any "exigencies of war" in the nation's current armed conflicts that might "g[i]ve rise" to a current need to use military tribunals to try domestic-law offenses[200]—or, at a minimum, no apparent need that is sufficiently compelling to justify the denial of juries and independent judges.[201] The military commissions Congress has created are not, after all, tribunals "called upon to function under conditions precluding resort" to civilian juries and Article III judges.[202] They are not makeshift courts in, say, Afghanistan, established to meet a "need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield."[203] The defendants currently charged in military commissions are detained at Guantánamo Bay, half a world away from the battle and more than a decade since their capture. Furthermore, nothing other than possible statutory restrictions limits the pros-

197. *See supra* Section II.A.

198. O'Callahan v. Parker, 395 U.S. 258, 261 (1969).

199. Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion).

200. *Hamdan*, 548 U.S. at 590; *see also* Madsen v. Kinsella, 343 U.S. 341, 346–48 (1952) ("Since our nation's earliest days, [military commissions and occupational courts] have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war" and were "adapted in each instance to the need that called it forth.").

201. *See Hamdan*, 548 U.S. at 591 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution.").

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

203. *Hamdan*, 548 U.S. at 607.

pect of Article III trials for future defendants. For many years now, the military has regularly transferred al-Qaeda fighters whom it has captured overseas, in the midst of war, to the civilian court system, where the government has had overwhelming prosecutorial success.[204] Indeed, as former President Obama noted, whereas "our Article III federal courts have proven to have an outstanding record of convicting some of the most hardened terrorists," military commissions, by contrast, have been "very costly [and] have resulted in years of litigation without a resolution."[205]

In *al Bahlul II*, Judge Karen LeCraft Henderson identified several national security considerations that legislators mentioned during the 2006 congressional deliberations preceding enactment of the original MCA—concerns that might, in her view, justify the use of military commissions even where Article III courts are available.[206] Those national security justifications, however, do not withstand even cursory scrutiny and certainly do not explain why it might be necessary or important to dispense with Article III judges and juries.[207] Accord-

204. *See, e.g.*, Mary B. McCord, *Federal Prosecution is a Viable Option for Enemy Combatants*, LAWFARE (July 24, 2017, 2:19 p.m.), https://lawfareblog.com/federal-prosecution-viable-option-enemy-combatants [perma.cc/JYN2-DV5H]; CTR. ON LAW & SEC., NEW YORK UNIVERSITY SCHOOL OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010 (2010), http://www.lawandsecurity.org/wp-content/uploads/2011/09/01_TTRC2010Final1.pdf [https://perma.cc/YNW4-ETVN].

205. Barack Obama, President of the United States, Remarks on Plan to Close Prison at Guantanamo Bay (Feb. 23, 2016) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay [https://perma.cc/AYM2-7GRQ]); *see also* Brennan, *supra* note 1 ("Our federal courts are time-tested, have unquestioned legitimacy, and, at least for the foreseeable future, are capable of producing a more predictable and sustainable result than military commissions. . . . In short, our Article III courts are not only our single most effective tool for prosecuting, convicting, and sentencing suspected terrorists—they are a proven tool for gathering intelligence and preventing attacks.").

206. *See al Bahlul II*, 792 F.3d 1, 67–68 (D.C. Cir. 2015) (Henderson, J., dissenting).

207. Judge Henderson identified five concerns cited during the 2006 congressional deliberations: "[1] the potential disclosure of highly classified information; [2] the efficiency of military-commission proceedings; [3] the military's expertise in matters of national security; [4] the inability to prosecute enemy combatants due to speedy-trial violations; and [5] the inadmissibility of certain forms of evidence." *Id.* At least three of these five things (Nos. [1], [4] and [5]) have nothing to do with the denial of judge and jury—that is, with whether the trial is convened in a commission or an Article III court. Two of them (Nos. [1] and [5]) are based upon statutory rules that, if constitutionally permissible, Congress could prescribe for both types of tribunals, or for neither. Congress has, for instance, enacted rules to protect classified information in each tribunal that are equivalent to one another in virtually every material respect. *Compare* 10 U.S.C. § 949p-1 (2012) (procedures for treatment of classified information in military commissions proceedings), *with* 18 U.S.C. § 3 (2012) (Classified Information Procedures Act provisions applicable in Article III trials). Likewise, although the speedy trial guarantee (No. [4]) is constitutional in origin, its application, too, does not depend on whether the tribunal has a civilian judge and jury—and, in any event, it has not proved to be a serious barrier to Article III trials of al-Qaeda defendants many years after their criminal conduct, *see, e.g.*, United States v. Ghailani, 733 F.3d 29, 41–55 (2d Cir. 2013) (per curiam). As for "efficiency" (No. [2]), there is no reason to think that commissions proceedings will be more efficient than Article III trials, in light of the fact that the MCA prescribes processes for commissions designed to emulate those in Article III courts in almost every respect. And in fact, commission proceedings have proved to be far *less* efficient than Article III trials, by a fair margin. *See* McCord, *supra* note 204; Obama, *supra* note 205.

ingly, even the government itself in its *al Bahlul* briefings has not invoked the "national security" justifications that some legislators mentioned in 2006, nor did Judge Kavanaugh rely upon them in his opinion in *al Bahlul III*.[208]

To be sure, shortly before Congress enacted the amended version of the MCA in 2009, some senators mentioned yet another reason to avoid civilian trials: "the risk of terrorist attacks on domestic courts."[209] Such a risk is, if anything, a function of the location of the trial, not the presence of judge and jury—which explains why the legislators in question invoked that concern not in the context of amending the MCA but instead in support of legislation to prevent the transfer of detainees from Guantánamo Bay to the United States. Of course, it is true that if detainees do remain at Guantánamo they likely cannot be tried by an Article III court there: Article III, Section 2 provides that a trial of federal crimes "shall be held in the State where the said Crimes shall have been committed."[210] And even if Congress could establish an Article III court at Guantánamo, it would be virtually impossible to convene a jury pool there.

Therefore, if there were some basis—contrary to experience—for members of Congress to think that safe trials of al-Qaeda defendants could not occur within the United States, they might well have concluded that military tribunals were necessary, due to the obstacles of convening Article III trials outside the United States.[211] Such a justification, however, would appear to prove far too

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That leaves only one of the 2006 concerns: "the military's expertise in matters of national security." *al Bahlul II*, 792 F.3d at 67. *Perhaps* it would be reasonable for Congress to assume that military officers have greater expertise than lay juries with respect to understanding the traditional, international law of armed conflict: such officers are, after all, extensively trained in the law of war. Thus, as explained below, *see infra* notes 288–89 and accompanying text, that could have been (but was not) a pragmatic justification for the Court's decision in *Quirin* that military tribunals may try offenses against the law of war. *See Quirin*, 317 U.S. at 39. There is no similar basis, however, to conclude that lay juries and Article III judges are not up to the task of understanding domestic-law offenses related to national security. Surely, the extensive experience of trying terrorism cases in domestic courts refutes any such notion. Moreover, the whole premise of Article III's protection of the jury right is the constitutional presumption that "laymen are better than specialists," including military specialists, in assessing guilt or innocence. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955).

208. Judge Henderson, writing only for herself in *al Bahlul III*, did, however, incorporate by reference her earlier opinion, which discussed those rationales. *See* 840 F.3d 757, 759 (D.C. Cir. 2016) (Henderson. J., concurring).

209. *al Bahlul II*, 792 F.3d at 68 (Henderson, J., dissenting). For example, Senator McConnell stated that "[w]e know what happened when you had a terrorist trial in Alexandria, VA. . . . The Moussaoui trial . . . made the[] community a target for attacks. When they moved Moussaoui to and from the courtroom, they had to shut down large sections of the community." 155 CONG. REC. S5589 (daily ed. May 19, 2009) (statement of Sen. McConnell); *see also, e.g.*, *id.* at S6434 (daily ed. June 10, 2009) (statement of Sen. Kyl) ("You start with the proposition that there are huge security concerns."); *accord* Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT'L L. 289, 294 (2009) ("Since the [military commissions] trial would take place within a military facility, the active duty armed forces could provide an extremely high level of security in a manner which would be virtually impossible in a civilian community.").

210. U.S. CONST. art. III, § 2, cl. 3.

211. As it happens, experience belies the plausibility of this safety-related justification for prohibiting trial of such persons in the United States. As Attorney General Eric Holder explained, although "hundreds of individuals have been convicted of terrorism or terrorism-related offenses in civilian

much: After all, there are many other contexts—cases involving gang violence and organized crime, for example—in which federal trials raise some risk of harm to jurors, judges, and the community. Surely such risks would not justify Congress moving such trials outside the United States to military installations, where Article III courts cannot sit. Understandably, then, the government has opted not to invoke any security-based justification in its arguments for military commissions, either.

If all of these reasons cited by Judge Henderson are unavailing, then what exactly *is* the justification for military trials of inchoate conspiracies, and other domestic-law offenses, apart from historical pedigree? The government's briefs have not (thus far, anyway) offered any such reasons—nor did Judge Kavanaugh, in his opinion in *al Bahlul III*, so much as advert to any such justifications.

At oral argument before the en banc court in *al Bahlul III*, the Deputy Solicitor General was asked this very question about the functional need for commissions in such a case.[212] He responded by invoking a single practical consideration—namely, that military commissions are not bound by the constitutional rules of *Miranda v. Arizona*[213] and *Crawford v. Washington*,[214] both of which preclude the prosecution from introducing certain forms of evidence in its case-in-chief (voluntary-but-unwarned statements of the accused, and certain hearsay, respectively).[215] In the MCA, Congress included both a *Miranda* exception, allowing the prosecution to introduce certain voluntary-but-unwarned statements made by accused alien enemy belligerents, and a circumscribed hearsay exception that would not be *Crawford*-compliant.[216] Congress has not prescribed parallel excep-

courts" since 2001, "[n]ot one of these individuals has escaped custody" and "[n]ot one of the judicial districts involved has suffered retaliatory attacks." Eric Holder, Attorney General, Speech at the American Constitution Society Annual Convention, Washington, D.C. (June 16, 2011) (transcript available at https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-theamerican-constitution-society-convention [https://perma.cc/MRS4-XDZV]); *see also* Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 121–27 (Human Rights First 2008).

212. *See* Transcript of Oral Argument at 50, *al Bahlul III*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam) (No. 11-1324) [hereinafter "*al Bahlul III* Oral Argument"].

213. 384 U.S. 346 (1966).

214. 541 U.S. 36 (2004).

215. *See al Bahlul III* Oral Argument, *supra* note 212, at 50.

216. *See* 10 U.S.C. § 948r(c)(1)–(2) (2012) (providing that an unwarned statement of the accused may be admitted in evidence if the military judge finds "that the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and that the statement was either "voluntarily given" or "was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence"); *id.* § 949a(b)(3)(D)(ii) (providing that hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if, *inter alia*, the judge, "after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne determines that . . . direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circum-

tions for trials of alien enemy belligerents in Article III courts.

The requirements of *Miranda* and *Crawford* should not be much of a problem for prosecution of *future* detainees in Article III courts, at least as long as the Trump Administration follows the lead of the Obama Administration and makes it a priority to anticipate and prepare for such trials whenever al-Qaeda forces are captured.[217] Nevertheless, the prosecution's case in the trials of some of the detainees captured during the Bush Administration may depend upon custodial admissions that were not preceded by *Miranda* warnings, or upon the hearsay statements of other detainees who are not available to testify. And where that is the case, perhaps such prosecutions would be stymied in Article III courts, where such statements would be inadmissible. For that reason, the government's desire to use commissions so as to be able to introduce statements that would not comply with *Miranda* and/or *Crawford* is understandable.

That is hardly a justification, however, for trying cases in a military commission, and thereby denying the constitutional guarantees of a civilian jury and a tenure-protected Article III judge. If Congress perceives a need for such exceptions to *Miranda* and/or *Crawford* in certain cases involving collection of evidence in the heat of an armed conflict (assuming the Constitution would permit such exceptions),[218] it can simply codify such exceptions within the Article III system. Eliminating the protections of a civilian jury and a tenure-protected judge is an unmeasured, inapposite response to this perceived problem.[219] Indeed, if there *were* such statutory exceptions, it presumably would be preferable for an Article III, tenure-protected judge, rather than a military officer, to decide questions such as whether an accused's custodial statement was made voluntarily, or whether and to what extent the Fifth Amendment allows admission of voluntary-but-unwarned statements by alien enemy belligerents or admission of hearsay against such defendants—which is all the more reason to address this prosecutorial concern in the context of Article III trials.

Thus there do not appear to be any compelling functional or practical reasons, at least as things currently stand, that would be constitutionally sufficient to justify eliminating Article III's judge and jury protections for trials of domestic-law offenses in the circumstances of our current armed conflicts.[220]

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stances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness").

217. *See supra* note 1.

218. The constitutionality of such exceptions under the Fifth Amendment presumably would not turn on which sort of tribunal is hearing the case—either they would be constitutional in both tribunals or in neither.

219. *See* THE FEDERALIST NO. 78, at 470–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.").

220. In an article devoted to an ostensible functionalist defense of military commissions, Peter Margulies contends that use of the current commissions is appropriate "where more formal Article III proceedings would be 'impracticable and anomalous.'" Peter Margulies, *Justice at War: Military*

2. Two Fairness Arguments

Before proceeding to address other types of potential arguments in support of the constitutionality of military trials, however, two normative justifications are worth flagging, even though the government has not yet relied upon them in the recent Article III challenges to military commissions.

a. Fairness to Defendants. The first such argument is that military trials might actually be fairer to the *defendants* than trials in Article III courts—a notion that actually finds some support in modern international law. In a traditional state-to-state, international armed conflict, Article 84 of the Third Geneva Convention not only approves of the use of military courts to try prisoners of war, but actually reflects a preference for such courts.[221] It provides that a prisoner of war "shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war."[222] Article 84 appears to be premised on the assumption that, in wartime, civilian juries would be more biased against enemy soldiers than would military officers, who might have greater incentives to treat their adversaries fairly due to reciprocity considerations.[223]

Tribunals and Article III, 49 U.C.D. L. REV. 305, 349 (2015). Margulies offers almost no specific reasons why the Article III trial of domestic-law offenses in current conflicts would be impracticable *or* anomalous, however. At one point, he echoes Judge Henderson's concern that such trials would "risk . . . disclosure of sensitive national security information." *Id.* at 379 (citing *al Bahlul II*, 792 F.3d at 67–68 (Henderson, J., dissenting)). As I have explained, however, there is no reason to believe such risks would be higher in Article III courts, in light of the parallel protections Congress has prescribed for protection of classified information in both sorts of tribunals. *See supra* note 207. Furthermore, the denial of an independent judge and a jury is hardly a tailored remedy for such concerns. Margulies also refers in passing to Justice Jackson's concern in *Eisentrager* that giving enemies held overseas the right to petition the courts for habeas relief might "hamper our war effort and bring aid and comfort to the enemy." Marguiles, *supra*, at 361 (quoting 339 U.S. 763, 779 (1950)). Margulies surmises that "resort to more formal [Article III] tribunals" for the trial of such alien enemies "could impair the war effort." *Id.* This is a fairly audacious suggestion to offer during a conflict in which such detainees have *both* regularly petitioned the courts for habeas relief *and* regularly been tried, and convicted, in Article III courts, without any noticeable harmful effect on the nation's efforts to defeat al-Qaeda. In any event, even if Margulies were correct that military tribunals are more likely to convict defendants and thereby more effectively advance the nation's effort to defeat the enemy, that would hardly be an admissible reason to deny Article III's judge and jury guarantees. This explains why neither the government nor Judge Kavanaugh has alluded to such a justification.

221. Geneva Convention Relative to Penal and Disciplinary Sanctions art. 84, Aug. 12, 1949, 6 U.S.T 3316, 3382, T.I.A.S 3364 [hereinafter "Article 84"].

222. *Id.*

223. *See also* 155 CONG. REC. S5652 (daily ed. May 20, 2009) (statement of Sen. Graham) (surmising that when an enemy prisoner is tried in civilian court, it is possible "that civilian justice, jurors and judges, will have revenge on their mind"). This sort of argument has been raised in earlier wars, too. In the Vallandigham case in the Civil War, for example, counsel for the government argued that military justice should be invoked for cases involving disloyal citizens "in the interests of mercy," as an "amelioration" rather than an "aggravation of dangers," because lay juries were apt to convict and execute "without sufficient evidence." *Ex parte* Vallandigham, 28 F. Cas. 874, 894 (C.C.S.D. Ohio)

Such a presumption hardly seems realistic in our present conflicts, however—which is no doubt why defendants ordinarily do not prefer to be tried by military commissions. The drafters of the Third Geneva Convention presumably anticipated that trials of POWs from another state army would be for alleged violations of the international law of war. As I explain below, there are potentially strong reasons to think that military personnel are better-suited than lay juries to try such offenses.[224] In particular, because the customary law of war governs the conduct of all belligerents in armed conflicts, military officers are likely to be more sensitive to the manner in which that custom develops in trials for violations of those norms, and will be more understanding than lay juries of the circumstances in which enemy forces use force that pushes up against the legal limits. Moreover, such military actors adjudicating a case against a traditional enemy might take into consideration the impact of verdicts upon trials of U.S. forces by the opposing belligerent power (that is to say, a reciprocity concern).

These considerations, however, surely have "lesser force in the asymmetrical context of conflict between a state and a non-state actor."[225] The offenses at issue are not part of the universal international law norms that govern the everyday conduct of military actors. And there is no prospect of the enemy conducting reciprocal trials, let alone fair trials, of U.S. forces. Moreover, even in the unlikely event Congress did prescribe military trials based upon a paternalistic concern to avoid the vagaries and vengeance of a lay jury when confronted with enemy fighters, that would not be sufficient reason to ignore the dictates of Article III, any more than Congress could more broadly remove trial of certain especially gruesome or disfavored offenses from the aegis of the jury based upon such fairness concerns. The judge and jury guarantees of Article III are designed not only to protect defendants, but also as "an inseparable element of the constitutional system of checks and balances."[226] Thus, "to the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty"; the Article III judge and jury provisions "serve institutional interests that the parties cannot be expected to protect."[227] To be sure, there may be cases in which lay juries "betray[] the cause of

(1863) (argument of Aaron Perry). "When society is imperiled by intestine war," counsel continued, "the passions rage which occasioned the war, the entrails of the volcano, covered for a while, have at length broken forth. Smoke and ashes obscure the sky. Fiery floods pour along the earth. No good man could be impartial . . . . Believing his government to be in the right, interest, feeling, lawful duty, compelled him to uphold it with all his power . . . . Its enemies are, and in the nature of the case must be, his enemies; its friends his friends." *Id*.

224. *See infra* notes 288–89 and accompanying text.

225. Gerald L. Neuman, Comment, *Counter-terrorist Operations and the Rule of Law*, 15 EUR. J. INT'L L. 1019, 1023 (2004).

226. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

227. *Id.* at 850–51. *But cf.* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944–45 (2015) (holding that Article I bankruptcy courts can adjudicate certain claims only by consent of the parties,

justice by verdicts based on prejudice or pressures."[228] In such cases, however, it is precisely the "independent trial judges" guaranteed by Article III who "have a most important place under our constitutional plan since they have power to set aside convictions."[229]

b. Fairness to Service Members. The second possible fairness argument for military tribunals is premised on an inequity that cuts in a different direction. There is something disconcerting about the notion that enemy forces would be entitled to the Article III protections for trials of domestic-law offenses when Congress denies those same protections to members of the U.S. armed forces. One therefore might contend that it is simply unfair, at best, to afford enemy forces greater procedural protections than those to which our own armed forces are entitled.[230]

There is good reason that the government has not raised this argument, either: The functional justification that the Court has long identified for courts-martial of service members—the need to preserve a self-contained system of military discipline and good order, "with a view to maintaining obedience and fighting fitness in the ranks"[231]—is simply inapposite with respect to alien enemy belligerents.[232]

3. Arguments that the Constitution Does Not Apply

During the Bush Administration, the Department of Justice briefly rehearsed a more categorical argument in support of military adjudication, in response to a Guantánamo detainee's contention that the President had overstepped his consti-

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due to a set of particular circumstances that ensure the practice will not have a significant impact on the judiciary's constitutionally assigned role).

228. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 19 (1955).

229. *Id.*

230. The Supreme Court has articulated a similar-sounding rationale in the course of holding that enemy soldiers can be tried in military tribunals for violations of the international law of war. *See* Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) ("If [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. . . . It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies."); *Ex parte* Quirin, 317 U.S. 1, 44 (1942) (doubting that the drafters of the Bill of Rights would have "intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death").

231. Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion); *see also supra* notes 184–86 and accompanying text.

232. Moreover, under the current MCA, enemy aliens are *not* afforded trial rights equivalent to those that members of the armed forces receive under the UCMJ. In particular, *Crawford*'s exclusion of certain hearsay statements applies in courts-martial proceedings against military personnel, *see, e.g.*, United States v. Gardinier, 65 M.J. 60, 64–65 (C.A.A.F. 2007), and the UCMJ itself includes a statutory exclusionary rule for unwarned statements of the accused, 10 U.S.C. § 831(b), (d) (2012), that is, in some respects, more forgiving than the rule under *Miranda*. *See, e.g.*, United States v. Rogers, 47 M.J. 135, 136–38 (C.A.A.F. 1997). The government often opts for military commission trials precisely to avoid the constraints of *Crawford* and *Miranda*. *See supra* notes 212–19 and accompanying text.

tutional authority by unilaterally establishing military commissions, allegedly without statutory authorization. "As an alien enemy combatant detained outside the United States," the Solicitor General wrote, "petitioner does not enjoy the protections of our Constitution."[233]

Although some judges continue to invoke this argument, even as to the judge and jury guarantees of Article III,[234] the government has not revived it in the *al Bahlul* litigation contesting the constitutionality of the use of commissions for domestic-law offenses.[235] As we will see, there is good reason for the government's reluctance. The broad notion that the "Constitution does not apply" in such cases has roots in three other, often-overlapping arguments of more ancient vintage, relating to (a) geography, (b) alienage, and (c) the exercise of belligerent authorities. None of those three arguments, however, has much, if any, purchase today.

a. Extraterritorial Limitations. The first such older argument was simply that, as the Supreme Court announced in *In re Ross* in 1891, "[t]he Constitution can have no operation in another country,"[236] even with respect to U.S. nationals. For example, in *Ross* itself the Court held that a U.S. seaman could be denied the jury right in a criminal trial aboard a U.S. vessel in Japan, even though he would be entitled to a jury if he were "brought [to the United States] for trial for alleged offenses committed elsewhere."[237] As Gerald Neuman has elaborated, this strict geographical understanding of the Constitution—that its coverage extended only to places where the nation's power of legislation was plenary, "to

233. *See* Brief for Respondents at 43, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184). The Supreme Court did not address this argument in *Hamdan* because it held that although Congress had authorized the use of military commissions, the tribunals President Bush established did not comply with statutory requirements. *See Hamdan*, 548 U.S. at 635.

234. *See al Bahlul II*, 792 F.3d 1, 71 (D.C. Cir. 2015) (Henderson, J., dissenting) ("Even if the Criminal Jury Clause [of Article III] did limit military-commission jurisdiction, it has no application here because Bahlul is neither a U.S. citizen nor present on U.S. soil."); *see also* United States v. Ali, 71 M.J. 256, 266–69 (C.A.A.F. 2012) (holding that the Sixth Amendment jury right does not protect an alien who is being tried abroad for a crime committed outside the United States).

235. Most notably, when the defendant in *Ali* petitioned to the Supreme Court, the government did not rely upon the majority's rationale that the Constitution does not protect the defendant. *See* Brief for the United States in Opposition, *Ali v. United States*, No. 12-805 (U.S. Apr. 5, 2013), *cert. denied*, 133 S. Ct. 2338 (2013); *see also* Vladeck, *supra* note 125, at 955 (criticizing *Ali*'s reasoning).

236. 140 U.S. 453, 464 (1891).

237. *Id.* As Kal Raustiala explains, the Court denied the extraterritorial effect of the right to a jury trial in *Ross* "largely on the grounds of expediency and practicality." KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 65 (1st ed. 2009); *see also Ross*, 140 U.S. at 464 (explaining that enforcement of the grand jury and petit jury rights "abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury" and thus "would, in a majority of cases, cause an abandonment or all prosecution"). Indeed, the Court went so far as to suggest that such trials in Japan might be inconsistent with treaty arrangements with the host nation. *See id.* ("When . . . the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.").

cases where it could govern by right, not by consent or comity"—was a dominant view until well into the Twentieth Century.[238]

As the nation's extraterritorial regulation and law enforcement expanded, however, this argument became increasingly difficult to defend, and the Court abandoned the strict geographical understanding of constitutional coverage in 1957, in *Reid v. Covert*.[239] Justice Black's plurality opinion in *Reid* explained that "[t]he *Ross* approach that the Constitution has no applicability abroad" is "obviously erroneous," and that "[a]t best, the *Ross* case should be left as a relic from a different era."[240] Justice Frankfurter likewise wrote in his separate opinion that "[i]nsofar as the [*Ross*] opinion expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated," and that "[g]overnmental action abroad," including "proceedings before American military tribunals," is "performed under both the authority and the restrictions of the Constitution."[241] More recently, in *Boumediene*, the Court conclusively rejected a "formal sovereignty-based test" for assessing when aliens are entitled to constitutional protections.[242] Justice Kennedy's opinion for the Court identified a "common thread" in the Court's case law that unites not only *Reid* and other modern cases, but also the *Insular Cases* (including *Ross*) and *Eisentrager*—namely, that questions of constitutional extraterritoriality "turn on objective factors and practical concerns, not formalism."[243]

This does not mean that extraterritorial considerations play no role at all in determining the circumstances under which various constitutional guarantees attach. It does, however, preclude the argument that Article III and the Sixth Amendment can be abandoned simply because the operative conduct occurred, or because the trial will take place, outside the United States.

b. The "Protection/Allegiance" Argument. The second of the older arguments, like the first, is not limited to wartime; unlike the first argument, however, it is not strictly geographical, either. It is instead predicated on an alleged absence of constitutional protection for aliens who have not developed

238. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 82–83, 89–94 (1996); *see also* RAUSTIALA, *supra* note 237, at 59–93. This older principle, even if credited, would not affect the Article III question if a trial were convened in the United States. Hamdan's trial, however, like al Bahlul's, took place at Guantánamo Bay, over which Cuba has formal sovereignty.

239. 354 U.S. 1 (1957).

240. *Id.* at 12 (plurality opinion).

241. *Id.* at 56 (Frankfurter, J., concurring in the result); *accord id*. at 67 (Harlan, J., concurring in the result) ("I also think that we were mistaken in interpreting *Ross* and the *Insular Cases* as standing for the sweeping proposition that the safeguards of Article III and the Fifth and Sixth Amendments automatically have no application to the trial of American citizens outside the United States, no matter what the circumstances.").

242. 553 U.S. 723, 764 (2008).

243. *Id.*; *see also* Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring in the judgment) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities.").

sufficient ties to the nation. The gist of the argument is that the protections of the Constitution are available only for persons who have an "allegiance" to the nation, in the sense of being obligated to comply with the laws of the United States, by virtue of citizenship, residence or otherwise.[244] On this view, allegiance and protection are said to be "reciprocal," or a two-way street: "[A]llegiance was given on the condition of protection, and similarly . . . protection was given on the condition of allegiance."[245] Persons who "submitted to the laws" of the state, "whether they were citizens or foreigners, deserved both the punishment and the protection of the laws."[246] But those who do not "submit" to such laws—including, arguably, most aliens overseas, and especially enemy aliens, wherever they are found—would not be entitled to invoke the protection of the Constitution.[247] A vestige of this argument can be found in more recent Court holdings that the national government is not required to comply with certain constitutional constraints when dealing with aliens outside the United States.[248]

Whatever the general merits of such an argument might be, there is no basis for concluding that it applies with respect to the question whether the Constitution applies when the government subjects aliens to criminal trial. Indeed, the existence of such trials calls into question the underlying premises of the basic argument. The protection/allegiance theory depends upon the assumption that U.S. law simply does not apply to constrain the conduct of aliens overseas (and hostile aliens who make war within the United States): "Enemy aliens . . . were not accountable at law; . . . This meant that, whether in civil or criminal proceedings, they could be neither defendants nor plaintiffs."[249] It has long been accepted, however, that U.S. law can and does bind aliens found overseas, even for conduct outside the United States, and even in cases where the individuals have not in any meaningful sense "submitted" themselves to such U.S. legal obligations. The United States has extended its criminal laws to conduct of non-nationals overseas pursuant to several established international-law principles, including the "protective principle," which provides jurisdiction over

244. *See generally* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

245. *Id.* at 1823, 1834; *see also id.* at 1876 (explaining that an enemy alien who came within the country during the war "could . . . be dealt with as a prisoner of war under the laws of war" but "had no obligation under the [U.S.] law and could not be prosecuted as a criminal").

246. *Id.* at 1860; *see also* Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in* Ex parte Quirin, *the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 176–211 (2013).

247. This argument would not have been relevant to several of the historical cases I discuss in this Article, in which the defendants were, or included, U.S. persons. The current MCA, however, applies only to "enemy alien belligerents." *See* 10 U.S.C. § 950t(26) (2012).

248. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to search and seizure by U.S. agents of property owned by a nonresident alien in Mexico).

249. Hamburger, *supra* note 244, at 1861.

acts committed outside a state that harm the security of the state;[250] the "passive personality principle," which confers jurisdiction over acts that harm a state's citizens abroad;[251] and, on occasion, the "universality principle," which provides for jurisdiction over certain especially egregious extraterritorial acts condemned by all civilized nations.[252] And, more to the point, the current cases involving Article III challenges to military courts are precisely those in which the United States *is* asserting the authority to hold foreigners criminally responsible for transgressing U.S. law, thereby undermining the fundamental premise of the "protection/allegiance" argument.

Thus, even in a case holding that the Fourth Amendment was inapplicable to a search of an alien overseas, the Supreme Court was careful to explain that such an alien would be entitled to the Fifth Amendment privilege against self-incrimination if and when the federal government brought him before a criminal court.[253] And the doctrinal case against the "protection/allegiance" argument is, if anything, even plainer when it comes to the guarantees of Article III. In cases such as *Quirin*[254] and *Yamashita*,[255] the Court failed even to mention the possibility that Article III does not apply in all criminal trials of

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250. *See* United States v. Yousef, 327 F.3d 56, 110–11 (2d Cir. 2003); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 201 cmt. i (AM. LAW. INST., Tentative Draft No. 2, 2016) [hereinafter RESTATEMENT Draft No. 2].

251. *See Yousef*, 327 F.3d at 91 n.24; *see also* RESTATEMENT Draft No. 2, *supra* note 250, § 201 cmt. h.

252. *See Yousef*, 327 F.3d at 91 n.24; *see also* RESTATEMENT Draft No. 2 *supra* note 250, § 201 cmt. j. To be sure, Congress did not commonly authorize these forms of prescriptive jurisdiction until recent decades. *See, e.g.*, Monika B. Krizek, Note, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 B.U. INT'L L.J. 337 (1988) (describing history of protective principle in U.S. law). The Supreme Court recognized the power of the federal government to do so, however, as early as 1804. *See* Church v. Hubbart, 6 U.S. 187, 234–35 (1804). There have long been

> provisions in the law of the United States . . . which it is difficult to reconcile with an exclusively territorial or personal theory of penal competence and which appear to be based in some measure upon the principle that the United States is competent to prosecute offences which interfere with the functioning of its public agencies and instrumentalities, irrespective of the place of the offence or the nationality of the offender.

Am. Soc'y of Int'l L., *Codification of International Law: Part II—Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 544 (Supp. Research in Int'l L. 1935) (citing as an example an 1856 federal statute that made it unlawful to engage in perjury before an American diplomatic or consular officer, including overseas).

253. *See Verdugo-Urquidez*, 494 U.S. at 264; *see also id.* at 278 (Kennedy, J., concurring) ("The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant."). To be sure, the majority in *Verdugo-Urquidez* implied that the distinction in the applicability of constitutional rights turned in part on the fact that the search, unlike a trial, "occurred solely in Mexico." *Id.* at 264. It is hard to imagine, however, that the Court would permit the federal government to circumvent all of the constitutional trial-right protections against an alien defendant lacking allegiance to the United States if only it established and used a court overseas. *See supra* Section II.B.3.a.

254. 317 U.S. 1 (1942).

255. 327 U.S. 1 (1946).

aliens who have not demonstrated allegiance to the United States.[256] That is understandable, for the jury and judge protections of Article III, and the jury right in the Sixth Amendment, "are not limited to citizens; they apply to citizens and aliens alike."[257] Indeed, because Article III, like the Suspension Clause, is a structural provision that preserves a particular role for the federal judicial branch, its application is not limited to trials of U.S. persons, even in contexts in which some "mere" rights-protective constitutional provisions arguably might not apply to foreign nationals who have not developed ties to the nation.[258]

c. The Distinction Between Belligerent and Municipal Authorities. The story is a bit more complicated with respect to the final historical source of the "Constitution does not apply" argument. This third argument, which was prominent during at least the first century of the Constitution, turned not on geography alone, nor on the alienage or allegiance of the defendant, but instead on whether the federal government was exercising a "belligerent" rather than a "municipal" authority. If the government is acting in its municipal capacity, according to this argument, it must comply with the Constitution. If, on the other hand, it is exercising belligerent authorities, the constraints of the Constitution and other domestic laws are simply inapposite—they are displaced by the international law of war, which acts as a kind of *lex specialis* so that exercise of the belligerent powers is not entirely unconstrained.

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256. Instead, as explained below, *infra* Section III.A, in both cases the Court held that Article III does not prohibit the use of military courts to try offenses against the law of war, even when citizens are the defendants. The Court in those cases also permitted enemy aliens without ties to the United States the right to petition for habeas relief, even though the President had decreed that they be denied access to the courts. *See Yamashita*, 327 U.S. at 9; *Quirin*, 317 U.S. at 24–25. Accordingly, even scholars who are generally dubious about the extension of constitutional rights to enemy aliens acknowledge that *Quirin* and its progeny undermined that proposition. *See, e.g.*, Kent, *supra* note 246, at 245 ("*Quirin* exploded the protection-allegiance framework and therefore disrupted the policy justifications for excluding certain people from court access and entitlement to constitutional rights. . . . *Quirin*'s destruction of the allegiance-protection framework of justification therefore greatly helped to undermine the centuries-old principle that constitutional protections were unavailable to noncitizens outside the United States.")

257. *See* Trial of Spies by Military Tribunals, 31 OP. ATT'Y GEN. 356, 361 (1918) (concluding that the trial rights of Article III and the Sixth Amendment protected a German spy, bent on sabotage, who was arrested as soon as he entered the United States).

258. *See* Boumediene v. Bush, 553 U.S. 723, 743 (2008). In *Patton v. United States*, the Court held that the jury guarantees in Article III and the Sixth Amendment are individual rights that can be waived, rather than structural imperatives. 281 U.S. 276, 293–98 (1930). The *Patton* Court's analysis of Article III has been sharply questioned. *See, e.g.*, AMAR, *supra* note 67, at 104–08; *see generally* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373 (2012). In any event, the requirement of an Article III judge, like the conditions for suspension of the habeas writ at issue in *Boumediene*, is surely structural in nature, designed not only to protect individual rights directly, but also to "safeguard[] the role of the Judicial Branch in our tripartite system by barring congressional attempts to 'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts.'" Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (quoting Nat'l Ins. Co. v. Tidewater Co. 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting) (second alteration in original)); *accord* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015).

Importantly, this theory of constitutional displacement was not limited to actions taken against aliens, or outside the United States: It applied to the exercise of belligerent powers even against disloyal citizens and their property—those who "unit[ed] themselves to the cause"' of the enemy, or who "aid or abet and give comfort to enemies"[259]—and even against loyal citizens residing in (or such citizens' property found in) enemy territory.[260] Not surprisingly, then, arguments of this sort were often invoked to defend the military detention and trial of citizens during the Civil War; in *Milligan*, for example, the government defended the military commission prosecutions at issue, in part, on the ground that "no limitations were put upon the war-making and war-conducting powers of Congress and the President," other than the Third Amendment's limitation on the compelled quartering of soldiers absent statutory authorization.[261]

This argument might sound deeply discordant to modern ears,[262] but it was very prominent during and after the Civil War,[263] and the Supreme Court endorsed it in at least two landmark decisions: *The Prize Cases*[264] and *Miller v. United States*,[265] both of which held that the property-protective provisions of the Constitution did not limit the exercise of such belligerent powers (such as a blockade or confiscation).[266] Indeed, the distinction was so well-established that even the dissenting Justices in *Miller* acknowledged it. Justice Field summed up the argument this way:

> [I]t is evident that legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those applicable to legislation

259. Miller v. United States, 78 U.S. 268, 311–12 (1871).

260. *See id.* at 310–11.

261. *See* 71 U.S. 2, 20–21 (1866) (argument of the United States).

262. *But see* H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 65–79 (2016) (invoking this doctrine in support of an argument that the Due Process Clause does not apply to the President's decision to kill a U.S. citizen who is thought to be part of enemy forces in an armed conflict). A notorious Bush-era opinion of the Department of Justice also expressed this view: "The strictures that bind the Executive in its role as a magistrate enforcing the civil laws have no place in constraining the President in waging war." Memorandum from John C. Yoo, Deputy Assistant Attorney General, to William Haynes, II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* at 7 (Mar. 14, 2003), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutsideunitedstates.pdf [https://perma.cc/H8LT-CPM9].

263. *See generally* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010). The argument is, for instance, reflected in Articles 40 and 41 of the Lieber Code. *See* Lieber Code, *supra* note 11, art. 40 ("There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land."); *id.* art. 41 ("All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field."); *see also, e.g.*, WILLIAM WHITING, THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY 47–59 (1st ed., 1863).

264. 67 U.S. 635 (1863).

265. 78 U.S. 268 (1871).

266. *Id.* at 304–13; *Prize Cases*, 67 U.S. at 671–74.

> founded upon the municipal power of the government and directed against criminals. Legislation in the former case is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. Legislation in the latter case is subject to all the limitations prescribed by the Constitution for the protection of the citizen against hasty and indiscriminate accusation, and which insure to him, when accused, a speedy and public trial by a jury of his peers.[267]

Although this argument has a much more compelling pedigree than the argument predicated on allegiance, it, too, fails to justify the current use of military commissions to try war-related offenses, for at least two reasons.

First, there was an internal, perhaps insoluble, tension lying at the root of the doctrine, especially with respect to criminal trials. The difficult question in any given case was to determine on which side of the divide the government was acting: as a sovereign or as a belligerent. As a general matter, the Supreme Court looked to whether the particular state action was predicated on punishing the individual based upon his personal guilt (in which case it was said to be an exercise of the sovereign, municipal power), or was instead being used as "an instrument of coercion," to impair the enemy's ability to prosecute the war and thereby bring the struggle to a successful resolution (in which case it was said to be a "belligerent" action, at least if it was an incident of war traditionally employed by belligerent states).[268] So, for example, in *Miller*, the Court opined that whereas the first four sections of the Second Confiscation Act[269]—providing for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto—were "undoubtedly" municipal in nature ("aimed at individual offenders") and thus subject to the constraints of the Constitution, other sections of the Act providing for particular forms of property confiscation were exercises of the "belligerent" power in support of the Union Army, enacted (in the words of Section 5 of the Act) "to insure the speedy termination of the present rebellion," and thus were not subject to the Constitution's protections of property rights.[270]

When it comes to war-specific criminal trials, however, a prosecution might well partake of both objectives—that is, the military might convene the trial both to punish individual wrongdoing and also to weaken the enemy to enhance the prospect of victory. This is most clearly so in the case of a trial for violation of the law of war; but such dual objectives can also characterize, for example, a statute punishing the provision of assistance to a national enemy, or to the offenses in the current Military Commissions Act, all of which are designed to

267. *Miller*, 78 U.S. at 315 (Field, J., dissenting).
268. *See id.* at 304–07 (majority opinion).
269. Second Confiscation Act, ch. 195, 12 Stat. 589 (1862).
270. 78 U.S. at 308–10 (quoting Second Confiscation Act § 5, 12 Stat. at 590).

apply exclusively in the context of armed conflict.[271] The traditional dichotomy between sovereign and belligerent powers did not offer a clear answer on how such cases should be treated. Dicta of the Court in *Miller*, however, suggested that such prosecutions would "undoubtedly" be "an exercise of the sovereign, not the belligerent rights of the government."[272] If that was correct, then the "belligerent power" justification for the inapplicability of the Constitution would certainly not excuse noncompliance with Article III for the trials in question (although perhaps that conclusion was not so clear during the Civil War itself).

Second, and more significantly, whatever the strength of this argument might have been in and just after the Civil War, modern Supreme Court developments have effectively foreclosed it. In neither *Quirin* nor *Yamashita*, for example, did the Court hint at any argument that Article III and the Sixth Amendment were inapposite because the trials there were an exercise of the government's belligerent power—a proposition that would have rendered much of the Court's opinions in those cases superfluous and would have been a barrier to the Court's holdings that the enemies at issue had the right to petition for habeas.[273] More recently, and more definitively, in *Hamdi v. Rumsfeld*, Justice O'Connor's controlling opinion held that the Fifth Amendment's Due Process Clause provided an alleged member of enemy forces the right to challenge the legality of his military detention[274]—a holding that would be difficult, if not impossible, to square with the notion that the Constitution does not constrain the exercise of belligerent powers, a view that no member of the *Hamdi* Court endorsed.[275]

III. THE ANOMALOUS *QUIRIN* EXCEPTION FOR TRIAL OF OFFENSES AGAINST THE INTERNATIONAL LAW OF WAR, AND THE "PRESERVATIONIST" ACCOUNT OF ARTICLE III

As Part II demonstrated, there are virtually no compelling textual, functional, pragmatic, normative, or equitable arguments that would support trying war-related domestic-law offenses in military tribunals. This explains why the government's singular focus in the *al Bahlul* litigation (and Judge Kavanaugh's, too) has been on purported historical justifications—in particular, on the notion that Article III should not be read to prohibit wartime practices that were well-established at the Founding.

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271. *See* 10 U.S.C. § 950p(c) (2012) ("An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities."); *see also id.* § 948a(9) (defining "hostilities" to mean "any conflict subject to the laws of war").

272. 78 U.S. at 308.

273. *See Quirin*, 317 U.S. 1 (1942); *Yamashita*, 327 U.S. 1 (1945).

274. 542 U.S. 507, 528–35 (2004) (plurality opinion); *see also id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

275. Even Justice Thomas, in dissent, did not suggest that the Due Process Clause was inapplicable; instead, he argued that Hamdi had received the process that was due under the circumstances. *Id.* at 589–98 (Thomas, J., dissenting).

In offering such a "preservationist" argument, the government is not working on a blank slate, for such a rationale was at the core of the Supreme Court's decision in *Quirin*, which established the fifth existing Article III exception for criminal trials: for military trials of offenses against the international law of war.

A. *QUIRIN*'S HOLDING AND CHIEF JUSTICE STONE'S ERRORS ON INTERNATIONAL LAW

Quirin involved a constitutional challenge to the military trial of eight individuals—including at least one U.S. citizen—paid and directed by the German army to secretly come ashore in the United States, disguise themselves as civilians (by burying their uniforms on the beach), and then go off into the interior of the nation to destroy war industries and facilities.[276] The saboteurs were arrested by civil authorities,[277] and in the ordinary course they would have been tried in a federal court in the District of Columbia, presumably for conspiring to sabotage federal facilities. President Roosevelt, however, ordered them to be tried by a military commission in the Department of Justice building,[278] even though, as the Supreme Court would later note, "no circumstances justified transferring them from civil to military jurisdiction."[279] The military tribunal convicted the individuals of the charges, and President Roosevelt approved the judgment.[280] Before the verdict, the accused petitioned the Supreme Court for relief, arguing that it was unconstitutional for the government to try them in a military court. On July 31, 1942, after expedited briefing and two days of oral argument, the Court issued a short, unanimous per curiam opinion, concluding that the accused were alleged to have committed "an offense or offenses which the President is authorized to order tried before a military commission," and promising to later issue "a full opinion which necessarily will require a considerable period of time for its preparation."[281] Just eight days later, the government executed six of the convicted individuals; the other two received prison sentences.[282]

Three months later, the Court issued an opinion, written by Chief Justice Stone, in which it held that it was constitutional for the federal government to resort to a military commission, even where civilian courts were "open and functioning normally,"[283] to try persons who were part of, or directed by, the German army, for at least one offense against the law of war, a "branch of

276. *See* 317 U.S. at 20–21.

277. *See id.* at 21.

278. *See* Exec. Order No. 9,185, 7 Fed. Reg. 5103 (July 7, 1942).

279. Johnson v. Eisentrager, 339 U.S. 763, 780 (1950).

280. STATEMENT FROM THE WHITE HOUSE ON THE SENTENCES OF EIGHT NAZI SABOTEURS LANDED BY SUBMARINE ON THE LONG ISLAND AND FLORIDA SHORES ON JUNE 13 AND 17, 1942 (Aug. 8, 1942), http://www.ibiblio.org/pha/policy/1942/1942-08-08a.html [https://perma.cc/SLE7-7ZPR].

281. *See Ex parte* Quirin, 317 U.S. 1, 18–19 (1942) (unnumbered footnote).

282. STATEMENT FROM THE WHITE HOUSE, *supra* note 280.

283. *Quirin*, 317 U.S. at 24.

international law."[284]

Before examining the reasoning of the Court's opinion, it is important to identify two arguments Chief Justice Stone did *not* rely upon in support of the holding. First, the government proffered a textual argument: It reasoned that because the charged offenses occurred within the "lines" of the U.S. armed forces (which, according to the government, included the entire continental United States), those offenses "ar[o]se in the land or naval forces,"[285] and therefore not only fell within the Fifth Amendment's *grand jury* exception for such cases, but were implicitly excluded from the Sixth Amendment's right to a trial before a petit jury, as well.[286] As we will see, this was an argument that the government had been invoking for some time—going back at least to the Civil War—in justification of military trials. Stone rejected the argument. He explained that the "objective" of the Fifth Amendment's grand jury exception "was quite different"—namely, to allow for the court-martial trial of members of the armed forces, regardless of whether they were charged with offenses against the law of war.[287] The Court thus did not accept the location-dependent argument that Article III and the Sixth Amendment jury right were inapplicable merely because the conduct (arguably) occurred within U.S. military lines.

Second, a fairly powerful functional argument was available to the *Quirin* Court, but Stone did not rely upon it. During the Second World War, there was no provision in the United States Code specifically authorizing the trial in Article III courts for violations of the law of war. Civilian courts, in other words, were effectively "unavailable" for such cases, unless the conduct in question also constituted a domestic-law criminal offense. There was good reason that the United States, like most other nations, had traditionally reserved such cases for military tribunals. The precedents set in such proceedings—

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284. *Id.* at 29; *see also id.* at 40 ("[W]e must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts."). The Court indicated that this law-of-war-offense exception is not absolute: some violations of the law of war, wrote Stone, might be in a "class of offenses constitutionally triable only by a jury." *Id.* at 29. Stone included this caveat at the insistence of Justice Black, who wrote Stone an internal note declaring his reluctance to issue a categorical judgment: "I seriously question whether Congress could constitutionally confer jurisdiction to try *all* such violations before military tribunals. . . . [T]o subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves, might go far to destroy the protections declared by the *Milligan* case." Memorandum of Justice Black to Chief Justice Stone, Oct. 2, 1942, HUGO L. BLACK PAPERS, Box 269 (Library of Congress). The Court's opinion did not offer any guidance about which law-of-war offenses must be tried in an Article III court.

285. U.S. CONST. amend. V.

286. *See* Brief for the Respondent at 14–15, *In re Burger, et al.*, *Ex parte* Quirin, 317 U.S. 1 (1942) (Nos. 1-7), *reprinted in* 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 3, 393–94 (Philip B. Kurland & Gerhard Casper, eds. 1975).

287. *Quirin*, 317 U.S. at 43; *see also infra* notes 603–08 and accompanying text (explaining that in Reid v. Covert, 354 U.S. 1 (1957), and related cases, the Court decisively rejected the application of the "arising in" exception apart from cases involving the trial of military personnel).

regarding what wartime conduct violates the law of war and what does not—exerts an important influence on the common-law development of the law of war, which governs the future conduct of militaries. The armed forces, accordingly, have a substantial interest in the outcome of such trials because they help to establish the rules for the military's own future behavior in war, and that of opposing forces. Further, military officers have familiarity with, and training in, the law of war—which a lay judge and jury ordinarily would not; and the armed forces are more familiar than civilians with the contexts in which these legal questions arise and with the complexities that can attend the "fog of war." Members of the armed forces, therefore, might have a nuanced understanding of precisely which forms of wartime conduct the law of war should proscribe—constraints that will later limit their own actions in war. Thus, just as the court-martial system establishes a code of conduct for the armed forces—one of the principal justifications for that Article III exception[288]—so, too, trials of the enemy for violations of the law of war effectively help to establish the rules of the road for the U.S. military and for other armies around the globe. Arguably, that might be a compelling enough reason to permit Congress to assign such adjudications to the professional military.[289]

Regardless of whether this functional justification might have been sufficient to establish a "law-of-war offenses" exception to Article III, Stone did not mention it. Instead, he relied almost exclusively on an historical argument, based upon purported understandings at the Framing concerning the trial of enemy spies. Stone's reasoning was as follows:

1. Relying principally on the Court's then-existing jurisprudence regarding "petty offenses,"[290] Stone asserted that whereas the object of Article III's

288. *See supra* notes 184–86 and accompanying text.

289. Hamilton suggested such an argument in *The Federalist*. *See* THE FEDERALIST NO. 83, at 504 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (trial by jury should not be afforded in civil cases "where the question turns wholly on the laws of nations," because juries "cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries," with the attendant "danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war"). This functional justification might have somewhat less salience today than it did in 1942, not only because Congress has now provided for the trial of many law-of-war offenses in Article III courts, *see, e.g.*, 18 U.S.C. § 2441 (2012) (making it unlawful for U.S. nationals to commit violations of certain laws of war codified in treaties); *id.* § 2332f (making it unlawful to bomb places of public use, including public transportation systems, in certain circumstances), but also because international acceptance of military justice has receded sharply since 1949. *See, e.g.*, Charles H. B. Garraway, *Interoperability and the Atlantic Divide: A Bridge over Troubled Waters*, 80 INT'L L. STUD. 337, 347–49 (2006) (explaining that an "inbuilt suspicion of military justice" has developed, "brought about by years of misuse by some," and that "the assumption that military officers will conduct their duties 'without partiality, favour or affection' has been replaced almost by an assumption the other way"). Even so, although international human rights law has increasingly cut back on the permissibility of using military trials for other offenses, it continues to recognize the legitimacy of using military courts to try offenses of a strictly military nature committed by military personnel. *See* Vladeck, *supra* note 125, at 997–99.

290. *See supra* Section II.A.1.a.

jury trial right "was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future," the Framers did *not* intend "to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right."[291]

2. During the Revolutionary War, the Continental Army tried many individuals for spying behind enemy lines, without the protections of a civilian jury;[292] and in 1806, Congress codified a Revolutionary War resolution of the Continental Congress that authorized courts-martial to try such spies.[293]
3. Spying behind enemy lines was (according to Stone) an offense against the international law of war,[294] and the reason spies had been tried by military tribunals at the Founding was "not because they were aliens but only because they had violated the law of war."[295]

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291. *Quirin*, 317 U.S. at 39 (citations omitted).

292. *See id.* at 42–44; *see also id.* at 31 n.9 (describing proceeding against Major John André for spying behind enemy lines before a board of officers appointed by General Washington).

293. *See id.* at 41.

294. *See id.* at 31 ("The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be *offenders against the law of war* subject to trial and punishment by military tribunals." (emphasis added)); *id.* at 44 (describing spying trials as cases of "offenders against the law of war"). In a recent brief in *al Bahlul*, the government argued that the Court in *Quirin* was not necessarily referring to international law. *See* U.S. *al Bahlul III* Brief, *supra* note 23, at 44–45. In his opinion in the en banc proceeding, Judge Kavanaugh suggested likewise: "There is no indication in the opinion or historical record," he wrote, "that the *Quirin* Court actually believed that spying was an international law of war offense." *al Bahlul III*, 840 F.3d 757, 764 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

There is no question, however, that Chief Justice Stone's references to the "law of war" were to the *international* law of nations. *See Quirin*, 317 U.S. at 28 ("Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against *the law of nations* by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts *of the law of nations, and more particularly the law of war*, are cognizable by such tribunals." (emphasis added)); *id.* at 29 ("[T]hese petitioners were charged with an offense against the law of war . . . . It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify *that branch of international law* . . . ." (emphasis added)); *see also al Bahlul III*, 840 F.3d at 817 (joint dissent of Rogers, Tatel, and Pillard, JJ.) (demonstrating how "the Supreme Court's analysis makes clear that it viewed 'spying and the kindred offense of sabotage' as offenses against the international laws of war"). In its brief and argument in *Quirin*, the federal government likewise explained that the law of war is a subset of the law of nations. *See* Brief for Respondent at 29, *Ex parte* Quirin, 317 U.S. 1 (1942) (Nos. 1-7), *reprinted in* 39 LANDMARK BRIEFS, *supra* note 286, at 430 (explaining the "common law of war" is "a centuries-old body of largely unwritten rules and principles of international law"); Transcript of Oral Argument, at 96, *Ex parte* Quirin, 317 U.S. 1 (Nos. 1-7), *reprinted in* 39 LANDMARK BRIEFS, *supra* note 286, at 591 (argument of Attorney General Biddle) ("The Law of War is the well established law of nations existing for many hundreds of years . . . ."). When later writing of the case, Attorney General Biddle explained that he relied upon the international law of war, a body of law about which both he and the Justices had but a "dim idea" as oral argument approached. FRANCIS BIDDLE, IN BRIEF AUTHORITY 338 (1962).

295. *Quirin*, 317 U.S. at 44.

4. *Ergo*, reasoned Stone, the Founding-era practice (and the 1806 Congress's ratification of that practice) "must be regarded as a contemporary construction" of Article III and the Fifth and Sixth Amendments "as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces."[296]

Stone then applied that holding about the Article III exception for trial of law-of-war offenses to one of the charges on which the saboteurs had been convicted: Specification 1 of the first charge, which stated that the accused,

> being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States.[297]

Stone reasoned (mistakenly) that such conduct, undertaken out of uniform and behind enemy lines, "plainly alleges violation of the law of war."[298] And if such conduct violates the law of war, it then follows, according to the Court's understanding of the Founding era, that the Constitution does not forbid trial of such an offense in a military tribunal.[299]

Quirin's holding and rationale are clear. What complicates matters, however, is that the rationale only supports the holding by virtue of two errors about the law of war in Stone's argument.

First, Stone's assumption that "unprivileged" belligerency automatically violates the law of war reflected a "fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection."[300] Second, Stone was therefore wrong to assume that either spying behind enemy lines (the offense tried by courts-martial, on Washington's

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296. *Id.* at 41.

297. *Id.* at 36.

298. *Id.*

299. *Id.* Stone based this conclusion upon the fact that such conduct disqualifies individuals from being entitled to the "privileges" that are afforded to "lawful belligerents." He reasoned, mistakenly, that such "unlawful belligerency" also *violates* the law of war. *Id.* at 33–38.

300. Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 340 (1951); *see also* Marty Lederman, *Unprivileged Does Not Mean Prohibited*, JUST SECURITY (Sept. 26, 2013, 2:05 PM), https://www.justsecurity.org/1153/unprivilegedunlawful [perma.cc/VB9C-RMVN]. For critiques of this aspect of *Quirin*, see, e.g., Baxter, *supra*, at 339–40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 520 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 510 n.31 (2003); *see also* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offence*, 7 J. INT'L CRIM. JUST. 63, 74–79 (2009) (explaining that the authorities Stone relied upon do not provide clear support for his conclusion).

orders, during the Revolutionary War), or the conduct alleged against the saboteurs in Specification 1, violated the law of war. Such conduct might not be privileged—that is, international law may permit states to punish it under their domestic law—but international law itself does not prohibit the conduct.[301]

This leaves us with something of a puzzle in terms of how to understand *Quirin*'s impact on the question of whether and when Article III admits of exceptions for wartime military tribunals.

On the one hand, there is no question that the Court's holding in *Quirin* was limited to upholding the constitutionality of military trials for violations of the international law of war.[302] Indeed, Stone was careful to indicate strong doubts that military tribunals could try individuals for war-related offenses that are *not* violations of the law of war.[303] That is, in effect, how Stone distinguished *Quirin* from *Milligan*: Lambdin Milligan, he explained, was a "non-belligerent"—"not being a part of or associated with the armed forces of the enemy"—and therefore the law of war was "inapplicab[le]" to him (or so Stone thought) and, for that reason, the military court lacked the constitutional authority to try him.[304] Stone also emphasized that the Court was *not* opining on whether it was constitutional for the saboteurs' military commission to adjudicate Charge II, which alleged that they violated then-Article 81 of the Articles of War,[305] a provision still in effect today that proscribes "aiding the enemy."[306] The Court also declined to opine on the fourth charge against the saboteurs, which alleged

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301. *See infra* notes 347–58 and accompanying text. The government in *Quirin* did not argue that spying behind enemy lines in war was a violation of the law of war. *See, e.g.*, Brief for Respondent at 38, *Ex parte* Quirin, 317 U.S. 1 (1942) (Nos. 1–7), *reprinted in* 39 LANDMARK BRIEFS, *supra* note 286, at 439 (distinguishing the charge of spying in violation of Article 82 of the Articles of War from the separate charge alleging that the saboteurs "violat[ed] the law of war"). To the contrary, the War Department's 1940 Law of War Manual specifically clarified that the spying condemned in Article 82 "involves no offense against international law" and that spies are "not . . . violators of the laws of war." U.S. WAR DEP'T, BASIC FIELD MANUAL 27-10, RULES OF LAND WARFARE 58 (1940).

302. *See supra* note 294. The Court reaffirmed this holding in other World War II cases. *See In re* Yamashita, 327 U.S. 1, 7–8, 11, 14 (1946); Duncan v. Kahanamoku, 327 U.S. 304, 313–14 (1946); *see also* Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) (citing *Quirin* and *Yamahshita* for proposition that military has jurisdiction to try "enemy belligerents, prisoners of war, or others charged with violating the laws of war").

303. *See Quirin*, 317 U.S. at 29.

304. *Id.* at 45.

305. Act of June 4, 1920, art. 81, 41 Stat. 759, 804 [hereinafter "Article 81"].

306. *See Quirin*, 317 U.S. at 46 ("Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional."). Article 81 provided that

> [w]hosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

a conspiracy[307]—another offense that does not violate the international law of war. Thus, although the *Quirin* Court did not issue any conclusive holding on whether it would be constitutional to use military tribunals to try domestic-law offenses related to war, its rationale strongly implied that such trials, in contrast to trials for violations of the international law of war, would raise serious constitutional concerns.

On the other hand, Stone was correct that courts-martial did try many individuals for spying behind enemy lines during the Revolutionary War and that Congress codified such military-court jurisdiction over spying in 1806—a statute that has remained on the books to this day. Contrary to Stone's assumption, however, such spying behind enemy lines is *not* a violation of the international law of war.[308] Therefore, if Stone's chief assumption was correct—namely, that Article III was not designed to cover cases "in which it was [at the Framing] well understood that a jury trial could not be demanded as of right"[309]—then what, exactly, does the Founding-era treatment of spying cases in military tribunals demonstrate?

B. QUESTIONING *QUIRIN*'S PREMISE THAT ARTICLE III WAS DESIGNED TO PRESERVE THE PRE-CONSTITUTIONAL STATUS QUO

Before examining what the relevant Revolutionary War precedents might show, it is appropriate to ask a more fundamental question: Does it matter? In other words, was Stone's "preservationist" premise about Article III valid? There is at least one important reason to think it might not be.

To be sure, in some contexts the Supreme Court has reasoned that a particular constitutional provision, or feature, was not designed to have avulsive effects on a well-established, pre-constitutional "backdrop," or status quo—including with respect to some questions about the meaning and application of Article III.[310]

The current version of the law, which is materially the same, is entitled "Aiding the Enemy." *See* 10 U.S.C. § 904 (2012). It is noteworthy that the government did not use this statute to prosecute a number of U.S. citizens who assisted one of the saboteurs in the United States. *See* United States v. Haupt, 136 F.2d 661 (7th Cir. 1943). Those defendants were, instead, tried and convicted of treason in an Article III court, *see id.* at 663, perhaps reflecting some trepidation by the government about the constitutionality of using military tribunals for the stand-alone domestic offense of "aiding the enemy." *See infra* notes 787–89 and accompanying text.

307. *See Quirin*, 317 U.S. at 23.

308. *See infra* notes 347–58.

309. *See Quirin*, 317 U.S. at 39.

310. *See, e.g.*, Vermont Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 776–77 (2000) (reasoning that the history of British and pre-constitution *qui tam* actions, and their equivalent, are "well nigh conclusive with respect to . . . whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process'") (quoting Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 102 (1998)); *cf.* Stern v. Marshall, 564 U.S. 462, 484 (2011) ("When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment))).

Nevertheless, the Constitution was in many respects designed to fundamentally alter the system of governance the colonies had experienced under British rule and, to some extent, what they had originally experimented with during the first dozen or so, pre-constitutional years of practice in the new nation.

Of most relevance here, the judicial tenure and emoluments protections of Article III were designed to guarantee a degree of judicial independence from the political branches—a sharp break from the control the crown had exerted over the courts in the colonies.[311] Likewise, a principal reason the Constitution affords special solicitude to the right to a jury trial was to preclude recurrence of

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One well-known, age-old debate within the Court—concerning whether the Constitution preserved the states' sovereign immunity—nicely illustrates the tension between viewing Article III as preservative of the pre-constitutional order and understanding Article III as having established novel structural protections that diverged from then-common practices. In *Chisholm v. Georgia*, decided just after the Constitution was ratified, several of the Justices in the majority relied upon the plain language of Article III—which extends the federal judicial power to "controversies . . . between a state and citizens of another state"—to conclude that the new Constitution had abandoned the form of sovereign immunity that had prevailed in Britain, thereby permitting the citizens of one state to sue another in federal court. 2 U.S. 419, 466 (1793) (Cushing, J.) ("The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the second section of the third article of the Constitution."); *see also id.* at 454–58 (Wilson, J.); *id.* at 470–77 (Jay, C.J.). Justice Iredell, by contrast, reasoned that

> it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable . . . .

Id. at 437 (Iredell, J., dissenting). A century later, the Court in *Hans v. Louisiana* sided with Iredell, accusing the *Chisholm* majority of being unjustifiably "swayed by a close observance of the letter of the Constitution, without regard to former experience and usage." 134 U.S. 1, 12 (1890); *see also* Alden v. Maine, 527 U.S. 706, 727 (1999) (recognizing a presumption that Article III does not authorize proceedings or suits that were "'anomalous and unheard of when the constitution was adopted'" (quoting *Hans*, 134 U.S. at 18)). *But cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 138 (1996) (Souter, J., dissenting) (arguing that the Constitution did not "draw the common law in its train").

311. Recall the grievance in the Declaration of Independence that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." DECLARATION OF INDEPENDENCE para. 11 (1776). To be sure, Article III's guarantee of judicial independence was not entirely unprecedented. In 1760, Parliament enacted a statute providing that the judges of the British superior courts could continue in their offices "during their good behaviour," with previously ascertained salaries secured during the continuance of their commissions. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *267–68 (discussing 1 Geo. III, c. 23 (1761)). The Crown did not, however, apply the same rules to the judges in the colonies, who served at the pleasure of the King, thus prompting the grievance in the Declaration. *See generally* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976). Some of the early state constitutions established judicial tenure during "good behavior" (although most gave state legislatures considerable authority to remove judges). *See id.* at 1133–35. Salary protection, however, was less common. *See id.*; Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138–47 (1969).

the resort to military justice that plagued the colonists under British rule.[312] Accordingly, and in contrast to *Quirin*, the Supreme Court has often resisted the view that Article III and the Sixth Amendment codified the pre-existing common-law right to a jury trial.

For example, the Court in *Williams v. Florida* reasoned that although the Framers' intent "is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."[313] "[T]here is absolutely no indication in 'the intent of the Framers,'" wrote Justice White,

> of an explicit decision to equate the constitutional and common-law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial.[314]

Accordingly, although the pre-constitutional common law appeared to guarantee a twelve-member jury, the Court in *Williams* held that "the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment."[315]

Conversely, the Court has sometimes held that the Sixth Amendment provides *greater* protections than did the pre-constitutional common-law jury right. For example, in its decision last Term in *Pena-Rodriguez v. Colorado*, the Court acknowledged that at the pre-1789 common law, "jurors were forbidden to impeach their verdict,"[316] but the Court refused to limit the jury-trial right to that pre-constitutional backdrop. Justice Kennedy's majority opinion sketched out a post-ratification "common-law development of the no-impeachment rule,"[317] which pointed the way to the Court's holding that "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."[318] The Court based this holding not on the pre-constitutional practice, but instead on "a central premise of the Sixth Amendment trial right"—namely, the need to "prevent[] a systemic loss of confidence

312. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 24–30 (1957) (plurality opinion) (recounting the colonial history inspiring the right to a jury trial).

313. 399 U.S. 78, 92–93 (1970).

314. *Id.* at 99–100.

315. *Id.* at 100.

316. 137 S. Ct. 855, 863 (2017).

317. *Id.* at 864.

318. *Id.* at 869.

in jury verdicts."[319]

Thus, to the extent the Continental Congress and General Washington adopted certain common-law trial practices during their struggle against the British, there might be good reason to doubt that the subsequent Constitution was necessarily designed to lock those practices into place.[320]

Even so, that "preservationist" theory was the basis of the Court's holding in *Quirin*. Therefore, it is certainly understandable that the government invokes pre-constitutional precedents as support for an additional Article III exception involving military trials of war-related offenses that are not violations of the international law of war. The question remains, however: What exactly do those early precedents illustrate?

IV. UNDERSTANDING THE SPYING AND AIDING-THE-ENEMY RESOLUTIONS AND TRIALS DURING THE REVOLUTIONARY WAR

Assuming for the sake of argument that the Constitution is designed to preserve, rather than to modify, the federal government's power to "carry[] on war as it had been carried on during the Revolution,"[321] what would that entail with respect to military trials? If, as explained above, the Revolutionary War trials of spies do not support the Court's holding in *Quirin* that military tribunals can try offenses against the international law of war, then what *does* that practice—together with the court-martial proceeding against some individuals for providing aid to the British—demonstrate about the background norms against which the Constitution was designed?

A. HISTORICAL CONTEXT CONCERNING THE AUTHORITY OF THE PRE-1781 CONTINENTAL CONGRESS

Before examining the Revolutionary War practices in question, it is important to describe the legal backdrop against which the Continental Congress was acting during the relevant pre-constitutional period (roughly speaking, from 1776 to 1780).

During that period, there was no federal law right to a jury trial, and no federal judiciary, let alone a right to criminal trial of national offenses before judges with the protections of tenure and emoluments. The state judicial sys-

319. *Id.* The Court thus rejected Justice Thomas's view in dissent that the jury trial right "is limited to the protections that existed at common law when the Amendment was ratified." *Id.* at 872 (Thomas, J., dissenting). *See also* Apprendi v. New Jersey, 530 U.S. 466, 527–28 (2000) (O'Connor, J., dissenting) (noting that the Court has never embraced Justice Thomas's claim that the Fifth and Sixth Amendments codified the pre-constitutional common law); *supra* notes 142–46 and accompanying text (explaining that the modern Court insists on jury trials for minor offenses that would not have been tried by jury before 1789).

320. Indeed, the text of the Seventh Amendment, which expressly "preserve[s]" the right to a jury for *civil* "Suits at common law," demonstrates that when the Framers wanted to have the jury right track pre-constitutional antecedents, they knew how to say so directly. *See* U.S. CONST. amend VII. Notably, there is no such language of "preserv[ation]" in Article III or the Sixth Amendment.

321. Miller v. United States, 78 U.S. 268, 312 (1871).

tems, however—in which virtually all criminal trials occurred—were beginning to secure such protections. Although the judges in state courts typically lacked the robust forms of independence from executive and legislative pressures that Article III would establish for the federal judiciary, the nascent state constitutions were gradually establishing tenure for "good behavior" and other indicia of judicial independence.[322] Those new constitutions, beginning with that in Virginia less than a week before the Declaration of Independence, also began to guarantee the right to trial by an impartial jury of one's peers.[323]

The wartime military trials at issue, however, did not occur in state courts, and the offenses were not established by state law. As we will see, those trials were, instead, conducted by authority of resolutions of the Second Continental Congress, for offenses defined by that national legislature. At first blush, this might seem odd, as there was no general, national criminal code at the Founding. How is it, then, that the Second Continental Congress had the power to establish courts-martial and other military tribunals, let alone to define substantive criminal law offenses, violations of which could be tried in those tribunals? After all, as Alexander Hamilton remarked in 1780, one might well have assumed that because the pre-1781 Continental Congress "had never any definitive powers granted them," it "of course could exercise none—could do nothing more than recommend."[324] Indeed, for the most part, especially with respect to the establishment of criminal law, that was precisely what happened: the Second Continental Congress merely recommended to the states that they should enact certain laws.[325]

From its inception, however, the Second Continental Congress also passed resolutions that were treated as binding law. The source of the congressional authority to do so has never been definitely resolved; indeed, it was somewhat obscure even at the time. The best, and most common, understanding was that

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322. *See supra* note 311.

323. *See, e.g.*, VA. CONST. of 1776, § 8 ("[I]n all capital or criminal prosecutions a man hath a right . . . to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty."); *see also* GA. CONST. of 1777, art. XL; MD. CONST. of 1776, art. XIX (similar to the Virginia Constitution); MASS. CONST. of 1780, art. XII ("[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate; but by the judgment of his peers, or the law of the land. . . . And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."); N.J. CONST. of 1776, art. XXII ("[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); N.Y. CONST. of 1777, art. XLI (similar to the Virginia Constitution); N.C. CONST. of 1776, art IX (same); PA. CONST. of 1776, art. IX (same).

324. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON 400, 401 (Harold C. Syrett ed., 1961).

325. For example, in 1781, after a congressional committee found that "the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations," the Congress "*Resolved*, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment for offences against the law of nations." 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 1136–37 (Nov. 23, 1781) (J. Fitzpatrick ed., 1933) [hereinafter "JOURNALS"].

when the United States became an independent nation in 1776, it automatically became "possessed of all the . . . powers . . . by the law of nations incident to such" independence.[326] In the pre-constitutional era, the states collectively exercised most of those powers. But as to some issues, and on some occasions, state law was inadequate to deal with the exigencies of the new nation. In those cases, there was little option but for the Continental Congress to step in.[327] Thus, as Justice Chase wrote in 1796, "[t]he powers of Congress originated from necessity," and "[t]heir extent depended on the exigencies and necessities of public affairs."[328]

Most prominently, as Justice Iredell explained in *Penhallow v. Doane*, the Second Continental Congress exercised the "high powers" of "external sovereignty," including declaring and prosecuting war against other nations, and making treaties of commerce and alliance.[329] The Congress exercised other national authorities, as well. For example, it issued currency[330] and established a postal system.[331] The Second Continental Congress also authorized, and arranged for the sustenance of, the Continental Army, appointed its officers, including its Commander in Chief,[332] and, of most relevance here, beginning one year before independence it established a set of rules to govern the Army, and authorized courts-martial to prosecute violations of those rules.[333]

When the Second Continental Congress enacted these resolutions, it was with the express or implied consent of the states, each of which had a single vote in the Congress.[334] Indeed, the Second Continental Congress rarely acted in any major respect without the virtually unanimous approbation of the state delega-

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326. JAMES WILSON, *Considerations on the Bank of North America* (1785), *in* 1 COLLECTED WORKS OF JAMES WILSON 66 (Kermit L. Hall & Mark David Hall eds., 2007).

327. *See id.* ("Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled.").

328. Ware v. Hylton, 3 U.S. 199, 232 (1796) (Chase, J.); *see also* Penhallow v. Doane, 3 U.S. 54, 91 (1795) (Iredell, J.) ("The powers of Congress at first were indeed little more than advisory; but, in proportion as the danger increased, their powers were gradually enlarged, either by express grant, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise.").

329. 3 U.S. at 91; *accord Ware*, 3 U.S. at 232 (Chase, J.) ("I entertain this general idea, that the several States retained all *internal sovereignty*; and that Congress properly possessed the great *rights of external sovereignty*: Among others, the right to make treaties of commerce and alliance; as with *France* on the 6th of *February* 1778.").

330. *See, e.g.*, 2 JOURNALS, *supra* note 325, at 105–06 (June 25, 1775); 7 JOURNALS, *supra* note 325, at 373 (May 20, 1777).

331. *See* 2 JOURNALS, *supra* note 325, at 208–09 (July 26, 1775).

332. *See id.* at 91 (June 15, 1775) (appointing George Washington).

333. *See id.* at 111–12 (June 30, 1775).

334. *See, e.g.*, *Ware*, 3 U.S. at 232 (Chase, J.) ("I see but one safe rule, namely, that all the powers ACTUALLY exercised by Congress, before [1781] were *rightfully* exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an *express*, or *implied grant* . . . ."); *Penhallow*, 3 U.S. at 92 (Iredell, J.) ("If Congress, previous to the articles of confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each Province in the first instance.").

tions, which "cheerfully submitted" to the resolutions of the national body.[335] Accordingly, the question of whether congressional resolutions were inconsistent with state laws—and with state constitutional guarantees, in particular—rarely arose.[336]

The vast majority of the Articles of War that the Second Continental Congress enacted were regulations of the Continental armed forces. There does not appear to have been any controversy about consigning such persons to military tribunals for adjudications of alleged offenses in the Articles of War. In two discrete respects, however, the Second Continental Congress established prohibitions governing persons outside the armed forces—for spying and for aiding the enemy—and authorized military tribunals (usually courts-martial) to try such offenses.[337] As to spying, the permissibility of military proceedings was virtually never challenged, for reasons I will explain shortly. By contrast, the justification for military trials of persons who aided the enemy—a form of treason, in a sense—was far more uncertain, especially in light of the fact that the citizens subject to those rules were otherwise protected by the jury-trial rights found in the new state constitutions.[338]

B. THE IDIOSYNCRATIC "OFFENSE" OF SPYING WITHIN ARMY ENCAMPMENTS

The Articles of War that the Second Continental Congress enacted in 1775 did not contain a prohibition on spying.[339] Just seven weeks after independence, however, on August 21, 1776, the Congress passed the following resolution:

> Resolved, That all persons, not members of, nor owing allegiance to, any of the United States of America, . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct.[340]

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335. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 324, at 401.

336. *See* Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 390 (2016) ("Most state declarations of independence and instructions on independence referred to the powers of the Continental Congress, but those references suggest ambivalence, disagreement, and a sense that under practical pressures, political actors did not fully think through, or think at all, about the relevant issues of sovereignty [as between the Congress and the states]."); *see also id.* at 408 (explaining that the "free and independent states remained subject in some undefined way to national edicts, 'the directions of the honourable American Congress'" (quoting PA. CONST. of 1776, Preamble)).

337. *See* 2 JOURNALS, *supra* note 325, at 116 (July 2, 1775).

338. *See supra* note 323 (citing some such constitutional provisions).

339. *See* 2 JOURNALS, *supra* note 325, at 111 (June 30, 1775). Perhaps this was because the pre-independence Congress had no obvious source of authority to regulate and punish British agents.

340. 5 JOURNALS, *supra* note 325, at 693 (Aug. 21, 1776). Congress further ordered that this resolution "be printed at the end of the rules and articles of war." *Id.*

Two aspects of this early enactment are noteworthy, for reasons that will become clear presently. First, the 1776 spying resolve did not regulate the conduct of citizens of the states of the new nation, or any others who owed allegiance to those states—even though the British army surely could (and did) employ such persons as spies.[341] Second, by requiring that the person be "found lurking" as a spy "in or about" army fortifications or encampments, the resolution reflected a peculiar limitation of international law, namely, that a belligerent party may not try or punish an enemy spy who successfully returns to his own nation, or army lines, after obtaining intelligence, even if it later captures him.[342] Thus, if a British spy left the vicinity of the U.S. Army lines after successfully obtaining intelligence by deceit, returned to his own encampment, and was later captured by the Continental Army, the spying resolve would *not* authorize a court-martial for spying.

As the Supreme Court in *Quirin* later explained, the Continental Army used military tribunals to try a number of enemy agents captured as spies behind Army lines, pursuant to the 1776 spying resolve, between 1778 and 1781.[343] The lesson Chief Justice Stone drew from this practice was that there must have been an understanding, during the Revolutionary War (and thus, in Stone's view, when the Constitution was ratified), that the jury right did not attach to trials *for violations of the law of war*.[344] That conclusion was, in turn, based on Stone's (mistaken) assumption that spying behind enemy lines was conduct that violated the law of war.[345]

Stone's assumption that the law of war prohibited spying behind enemy lines might have been reasonable. After all, the 1776 spying resolve itself stated that courts-martial could sentence spies to death "according to the law and usage of nations."[346] What that clause of the 1776 spying resolution meant, however, was not that spying itself violated the law of war, but simply that the law of nations did not foreclose a state from punishing spies acting on behalf of the opposing army—that is, that international law did not *privilege* such conduct against criminal sanctions, in the way that the international law of war privi-

341. For example, when a court-martial convicted Robert Land of spying in 1779, General Washington rejected the verdict because Land, an inhabitant of Pennsylvania, was "not subject to Military jurisdiction," as he would have been if he had been a British subject. Letter from General George Washington to Colonel Oliver Spencer (Apr. 9, 1779), *in* 14 THE WRITINGS OF GEORGE WASHINGTON, 1745–1799 at 357 (J. Fitzpatrick ed., 1936) [hereinafter WASHINGTON, WRITINGS] (letter drafted by Alexander Hamilton, *see id.* at 357 n.25). Washington directed Colonel Oliver Spencer to deliver Land "to the civil authority of [Pennsylvania] furnishing such documents of his crimes as may be in your possession, to enable the law to operate upon." *Id.* at 357–58. Land was subsequently indicted for high treason before the Supreme Court of Pennsylvania, but was released on bail in September 1779. *See* John M. Coleman, *The Treason of Ralph Morden and Robert Land*, 79 PA. MAG. OF HIST. & BIOGRAPHY 439, 444–45 (1955).

342. *See infra* notes 368–69 and accompanying text.

343. *See* 317 U.S. 1, 42–43 n.14 (1942) (citing cases).

344. *See id.*

345. *See supra* notes 294–95, 300 and accompanying text.

346. *See* 5 JOURNALS, *supra* note 325, at 693 (Aug. 21, 1776).

leges, or immunizes, other belligerent activities (for example, targeting enemy forces, or confiscating enemy property).

State practice over many centuries belies the notion that international law prohibits spying, even in the circumstances described in the 1776 resolve. Spying is, and has always been, an openly acknowledged, common practice of virtually all states, often vital to military success.[347] This was the understanding of the most esteemed law-of-war jurists at the time of the Founding, such as Grotius and Vattel,[348] and it has remained the consensus view to this day.[349]

Indeed, just three weeks after the Second Continental Congress passed the 1776 spying resolve, General Washington commissioned Nathan Hale to cross into British lines on Long Island in disguise to obtain information about an impending British attack on Long Island.[350] Hale successfully obtained vital intelligence, but the British captured him in Flushing Bay on September 21, 1776, while he was trying to return to the Confederate Army, and hanged him the next day.[351] Surely Washington did not think he was violating the law of war

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347. *See* J. M. SPAIGHT, WAR RIGHTS ON LAND 205 (1911) ("[E]very nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheath its sword for ever."). Spaight cited a "Soldier's Pocket Book" of the time, in which Colonel Worseley instructed army officials that they should not hesitate to use spies: "As a nation we are bred up to feel it a disgrace even to succeed by falsehood; the word spy conveys something as repulsive as slave; we will keep hammering along with the conviction that 'honesty is the best policy,' and that truth always wins in the long run. These pretty little sentences do well for a child's copy-book, but the man who acts upon them in war had better sheathe his sword forever." GARNET J. WOLSELEY, THE SOLDIER'S POCKET-BOOK FOR FIELD SERVICE 81 (2d ed. 1871).

348. *See* 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, ch. IV, para. xvii, cl. 3 1295 (Liberty Fund, Inc., 2005) ("[S]o are Spies used, yet it is held lawful, by the general Consent of Nations, to send such, as *Moses* did, and such was *Joshua* himself . . . ."); 3 EMER DE VATTEL, THE LAW OF NATIONS ch. X, § 179, 582 (Liberty Fund, Inc., 2012) ("The employment of spies is a kind of clandestine practice or deceit in war," and a belligerent party "may unquestionably take advantage of their exertions, without any violation of justice or honour," if they volunteer for the function.); *see also* H. W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 406 (H.H. Bancroft & Co., 1861) ("The employment of spies is considered a kind of clandestine practise, a deceit in war, allowable by its rules."); *id.* at 407 (citing additional publicists); Henry Wager Halleck, *Military Espionage*, 5 AM. J. INT'L L. 590, 593 (1911) (written sometime during the Civil War) ("The employment of spies is no offense against the laws of war, and it gives to the enemy no cause of complaint."); SPAIGHT, *supra* note 347, at 204 ("Spying is not criminal . . . .").

349. *See, e.g.*, Baxter, *supra* note 300, at 342 ("[T]he law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished."); *id.* at 329 (noting "a virtual unanimity of opinion that . . . spies do not violate international law"); *id.* at 333 ("[E]spionage is regarded as a conventional weapon of war, being neither treacherous nor productive of unnecessary suffering . . . ."); Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 330–38 (1996); *see also* U.K. MINISTRY OF DEF., JOINT SERVICE PUBLICATION 383, MANUAL OF THE LAW OF ARMED CONFLICT § 4.9.3 (2004) [hereinafter "UK MANUAL"] ("The obtaining of intelligence about the enemy is an important military activity. . . . [I]t is lawful to employ spies and secret agents . . . ."); U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 4.17, at 148 (Dec. 2016 ed.) [hereinafter 2016 DOD LOW MANUAL] ("Belligerents may employ spies and saboteurs consistent with the law of war."); *id.* § 4.17.4, at 152–53 (same).

350. *See* HALLECK, INTERNATIONAL LAW, *supra* note 348, at 407.

351. *See id.*

by sending Hale on his perilous mission—indeed, it is hard to imagine that anyone at the time thought Washington (or Hale) had violated the law of war, even though everyone understood the inevitable, common fate of the disguised spy caught behind enemy lines.

What apparently confused Chief Justice Stone, when he was writing the Court's opinion in *Quirin*, is the oddity that belligerent armies have regularly punished this familiar form of military conduct—indeed, often punished it very harshly, with death—despite that it was sanctioned by esteemed officers the world over, including Washington. That practice, however, does not mean (and did not mean during the Revolutionary War) that such spying violated the law of war. Spies such as Hale, and Major John André of the British army, who suffered the same fate at the hand of Washington's army,[352] are not condemned by history as war criminals—they are, instead, lauded as brave, patriotic heroes. As Oppenheim summarized the well-established rule of international law: "War cannot be waged without all kinds of information about the forces and the intentions of the enemy . . . . To obtain the necessary information, it has always been considered lawful to employ spies . . . ."[353]

War espionage is thus something of an anomalous, almost inexplicable, case under international law. As a general matter, the law of armed conflict either condemns, and outlaws, a particular form of state belligerent conduct (for example, targeting civilians, or torturing prisoners), or affirmatively privileges it, in the sense that the affected state may not prosecute another state's soldiers for engaging in the conduct (for example, targeting enemy forces or confiscating certain enemy property).[354] Spying, however, falls in a rare legal gap: In certain circumstances, international law neither prohibits nor privileges espionage, so that although the conduct does not violate international law, the injured state *may* prosecute the spy under its own domestic law.[355]

For instance, if the spy is a civilian—not a part of state enemy forces to begin with—then he is not entitled to the combatant's privilege, and thus may be prosecuted under domestic law. Moreover, even when the individual is part of

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352. *See infra* notes 480–81 and accompanying text.

353. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 422 (H. Lauerpacht, ed., 8th ed. 1952).

354. *See* Lieber Code, *supra* note 11, art. 57 ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."); Ohlin, *supra* note 11, at 342–43; *see also* Letter from Daniel Webster, Department of State, to John G. Crittenden, Attorney General (Mar. 15, 1841), *reprinted in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 134–35 (1848) ("An individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations.").

355. *See* OPPENHEIM, *supra* note 353, at 422 ("Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes them, likewise acts lawfully."). Spying is not the only tool of warfare that falls in this gap. For example, international law also permits a state to use civilian personnel to engage in belligerent activities, but those persons, unlike their counterparts in the armed forces, are potentially subject to being tried under the domestic law of the opposing state if they are caught. *See* Ohlin, *supra* note 11, at 373.

enemy armed forces, and thus is ordinarily immune from prosecution for his belligerent activities against enemy forces, he loses his immunity by engaging in espionage under discrete circumstances. In particular, international law does not prohibit a state from punishing a person for wartime spying if: (i) acting clandestinely, or in disguise, and (ii) "in the zone of operations of a belligerent," (iii) he obtains or endeavors to obtain information with the intention of communicating it to the hostile party, and (iv) is captured before he has rejoined the armed forces to which he belongs.[356]

The 1776 resolve of the Continental Congress reflected this international law category of non-privileged espionage—espionage that is not unlawful under the international law of war, but that was (and is) regularly punished by belligerent states pursuant to their domestic law when undertaken in the service of the enemy, as it was by both the British and Confederate armies. Although such spying did not (and to this day does not) violate international law, the opposing army's execution of spies captured under the circumstances described above was—in the words of the board of inquiry that advised General Washington in the famous case of Major John André—"*agreeable to* the law and usage of nations."[357]

Chief Justice Stone, writing in *Quirin*, thus was beset by the common and "fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection."[358] If the *Quirin* Court was wrong about the characteristic that distinguished the spying prosecutions in the Revolutionary War, however, it begs the question that Stone set out to answer: What (if anything) *does* the 1776 spying resolution, and Washington's subsequent practice of trying spies in military tribunals, tell us about the Founding era's understanding of the circumstances in which the right to jury was inapposite?

The likely answer is that such a practice respecting spies tells us virtually nothing, other than perhaps that such spying was not considered blameworthy at all, and that such "trials" therefore were not designed to adjudicate moral culpability for a "crime."

It probably did not occur to anyone during the Revolutionary War that enemy spies were entitled to a jury trial—in any event, I have not come across any such claim. It is uncertain, however, exactly why that was the case. Several characteristics of the spying "offense" and its common treatment in war, in some combination, likely foreclosed any objection.

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356. *See* Hague Convention Respecting the Laws and Customs of War on Land Annex arts. 29, 31, Oct. 18, 1907, 36 Stat. 2277, 6 U.S.T. 3516 [hereinafter "Hague Annex"]; *see also* Protocols Additional to the Geneva Conventions of 12 August 1949 art. 46(1), (4), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter "Geneva API"]; UK MANUAL, *supra* note 349, §§ 4.9, 4.9.1; 2016 DOD LOW MANUAL, *supra* note 349, §§ 4.17, 4.17.2.1, 4.17.5.1, at 149, 150, 154–55.

357. PROCEEDINGS OF A BOARD OF GENERAL OFFICERS HELD BY ORDER OF HIS EXCELLENCY GEN. WASHINGTON, COMMANDER IN CHIEF OF THE ARMY OF THE UNITED STATES OF AMERICA, RESPECTING MAJOR JOHN ANDRÉ, ADJUTANT GENERAL OF THE BRITISH ARMY 13 (Francis Baily, 1780).

358. Baxter, *supra* note 300, at 340.

For starters, the state court systems in which the jury right was guaranteed were not available to try such offenses committed by British nationals. If a captured spy was a citizen of one of the new states, that state's judiciary could prosecute that individual for treasonous conduct.[359] But state laws did not address the conduct of British forces or agents. Nor was any federal trial court available, either: The Second Continental Congress likely did not have the authority to establish such a tribunal, let alone to prescribe a system of jury trials within it.[360] Therefore, as a practical matter, trial of British spies had to be convened in a military court or not at all.

Second, and relatedly, there was a widespread assumption at the time that such enemy aliens, without any allegiance to the states, were not entitled to the protections of the laws of those states at all.[361] If that was so, then of course it would not have occurred to many people that enemy aliens might be entitled to a civilian jury trial.[362]

Third, another common view at the time was that municipal laws, including constitutional protections, generally did not apply to the commander of an army when exercising certain belligerent rights against enemy forces during war.[363]

Fourth, and most importantly, notwithstanding that the 1776 spying resolve referred to "sentences" for and "punishments" of captured spies, it is probably more accurate to view the courts-martial proceedings against spies during this era not so much as criminal proceedings designed to punish individuals for

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359. *See supra* note 341 (discussing case of Robert Land); *infra* notes 388–89 (discussing state treason statutes).

360. Concededly, although this helps to explain why the Second Continental Congress decided to prescribe courts-martials for spies, it does not necessarily offer a sufficient explanation for why the Congress did not think a *jury* trial was required. The Congress could, for example, have recommended that the states establish laws against spying, just as it encouraged the states to enact treason laws. *See infra* note 387 and accompanying text. That it did not do so is likely attributable to the further considerations discussed below.

361. As I explain *supra* Section II.B.3.b, such a categorical view is no longer widely accepted.

362. Even if this was the common view, it would not be a complete answer to the spying riddle, because on at least one occasion the Second Continental Congress authorized a court-martial to try *citizens of the States* as spies. In 1781, two inhabitants of the states, Lawrence Marr, Jr. and John Moody conspired to steal the secret journals of the Continental Congress and convey such valuable information to the British. Their ostensible co-conspirator was a man named Thomas Addison, a clerk formerly employed by the Congress's Secretary, Charles Thompson. It appears that Addison, however, had arranged to entrap Marr and Moody in Philadelphia, where they were arrested. *See* JAMES MOODY, NARRATIVE OF THE EXERTIONS AND SUFFERINGS OF LIEUT. JAMES MOODY, IN CAUSE OF GOVERNMENT SINCE THE YEAR 1776, at 46–55 (1865). The Congress's Board of War reported to Congress that there did not appear to be any military authority to try the two citizen spies. *See* 21 JOURNALS, *supra* note 325, at 1109 (Nov. 7, 1781). The Congress thus proceeded to resolve that General Courts Martial could try and, with Washington's approval, sentence such spies who were "apprehended in the place where Congress shall sit," without regard to their citizenship. *Id*. A board of officers, with the Marquis de Lafayette presiding, concluded that Marr and Moody were guilty, and the Board of War approved the judgment. Moody was hanged on November 13. Marr was "respited" and became a military prisoner. *See* CONTINENTAL J. & WKLY. ADVERTISER, Nov. 29, 1781, at 3 (report from Fish-Kill, N.Y., of Nov. 22, 1781). Marr and Moody might have been the only citizens of the United States tried as spies during the war.

363. *See supra* Section II.B.3.c (discussing this common, pre-Twentieth Century view, and why it does not resolve the Article III question).

wrongdoing, but instead as preventive measures, established to ensure that the enemy did not obtain the military intelligence that the spy was endeavoring to steal. Such an understanding would explain why the general historical practice, before 1776, allowed for the execution of spies without any trial at all, as reflected in the contemporaneous case of Nathan Hale.[364] Neither domestic nor international law condemned that practice of summary justice.[365]

Viewing the execution of spies as preventive rather than punitive is also the best explanation for the otherwise unexplained condition, well-established in international law, that if a spy from another belligerent's forces successfully returns to his own camp, the state from which he obtained intelligence can no longer subject him to trial or penalty, despite that the state has suffered actual harm because the enemy has obtained the intelligence. If the affected state later captures the spy, he must be "treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."[366] The spy can only be prosecuted, in other words, if he is captured *in flagrante delicto*.[367] This would be almost inexplicable if the prosecution of spies were understood as a punitive measure in response to blameworthy conduct—as if the spy's culpability disappeared to the extent he was successful in harming the targeted state.

This odd limitation, which is not found elsewhere in the law of war, suggests that the principal justification for allowing states to summarily execute spies is

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364. *See supra* notes 350–51 and accompanying text.

365. Thus, by prescribing the trial of spies by court-martial, the 1776 spying resolution actually represented a striking advance in the humanitarian protections afforded spies caught behind enemy lines, giving them certain procedural rights where they previously had none. International law no longer allows summary execution: Article 30 of the Hague Annex established that "[a] spy taken in the act cannot be punished without previous trial." Hague Annex, *supra* note 356, art. 30; *accord* Geneva API, *supra* note 356, art. 75 (establishing fundamental trial guarantees); UK MANUAL, *supra* note 349, § 4.9; 2016 DOD LOW MANUAL, *supra* note 349, § 4.19.4, at 162.

366. Hague Annex, *supra* note 356, art. 31; *accord* Geneva API, *supra* note 356, art. 46(4) ("A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy *unless he is captured before he has rejoined the armed forces to which he belongs*." (emphasis added)); *see also* Lieber Code, *supra* note 11, art. 104 (explaining that "[a] successful spy or war-traitor, safely returned to his own army, and afterward captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor"); *In re* Martin, 45 Barb. 142, 148 (N.Y. 1865) (directing release of alleged spy who had "returned within the lines of the confederate forces, or had otherwise escaped," because "no case in modern history or in reports of cases decided in the courts, where any person has been held or tried as a spy who was not taken before he had returned from the territory held by his enemy"); Halleck, *Military Espionage*, *supra* note 348, at 593–94 (recounting the case of Spencer Kellogg, a member of the Union Navy who had spied within rebel lines by pretending to be a Union deserter, and who the Confederate Army later captured after he had returned to Union lines: "Our government demanded that he should receive the treatment of prisoner of war, as he could not be punished as a spy."); W.D. Porter, Letter to the Editor, *The Execution of Spencer Kellogg*, N.Y. TIMES, Oct. 4, 1863 ("The execution is an outrage on the usages of war" because Kellogg "was not captured in the capacity of a spy . . . .").

367. *See, e.g.*, *In re* Rieger, Cour de cassation [Cass.] [supreme court for judicial matters] crim., May 5, 1948, Bull. Crim., No. 158 (Fr.) (holding German officer who had traveled in France in civilian disguise to obtain intelligence during Second World War, and who was transferred to the German army in Denmark in 1944, could not be tried after his capture in 1946).

not that they are blameworthy and thus deserving of punishment, or because international law condemns such surreptitious conduct (it doesn't), but instead simply to empower states to prevent such persons from conveying secret, valuable information to their principals: In the event of a prosecution and sentence, "all possibility of the spy's information reaching the enemy is destroyed."[368] Accordingly, spying behind enemy lines is the rare situation in which international law permits an army to kill a captured enemy to incapacitate him, without formal legal proceedings, just as enemy forces can be targeted in the field.[369] It is, in other words, a discrete exception to the general rule (which only became clearly established later in the development of the law of war) that persons *hors de combat*, including prisoners, may not be harmed because they are already incapacitated and therefore do not present a threat to the opposing state.[370]

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368. Trial of Spies by Military Tribunals, 31 OP. ATT'Y GEN. 356, 363 (1918).

369. *See* Edmund M. Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 113 (1920) (quoting from an unpublished memorandum of Colonel Eugene Wambaugh, Chief of the Judge Advocate General's Division of Constitutional and International Law during the First World War: "[T]hough through a military tribunal a spy can be sentenced to death, the sentence is really not punitive but is simply part of a system meant to protect the troops against danger. Just as a sharpshooter outside the lines is to be shot, though certainly he is no criminal, so the spy within the lines is to be shot as merely a matter of protection . . . . Neither the sharpshooter nor the spy is a criminal. Each of them is killed."). As I explain below, although Wambaugh's insight that the trial of spies is not "punitive" was likely correct, his analogy of the spy to the sharpshooter, although superficially attractive, does not hold up. Unlike the spy, if the sharpshooter is captured he cannot be executed or otherwise punished, but can only be detained, which is also an effective means of "protect[ing] the troops against danger." *See infra* note 370.

370. *See, e.g.*, Lieber Code, *supra* note 11, art. 56 ("A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity."); *id.* art. 71 ("Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted . . . ."). This understanding of the rationale for executing spies does, however, raise yet another unresolved puzzle about the logic of the law of war's treatment of spying: If the purpose of the domestic law against spying is to prevent information from being shared with the enemy, why does international law permit a state to sanction or "punish" the spy—even to execute him—rather than simply permitting the state to detain him, given that international law recognizes the legitimacy of the spying activity? Vattel thought that spies must be condemned to die "since we have scarcely any other means of guarding against the mischief they may do us." VATTEL, *supra* note 348, § 179, at 582. That is obviously mistaken, however: There *is* another means of preventing the information from getting through to the enemy, namely, by detaining the spy as one detains other prisoners of war. Indeed, that is exactly how the law treated—and continues to treat—an enemy agent captured in uniform while trying to obtain intelligence behind military lines, if that agent, although concealed, did not employ any false pretenses in order to obtain the intelligence. In such a case, international law would prohibit a trial or execution—which likely explains why the 1776 spying resolve did not authorize a court-martial in that situation. Such uniformed personnel could be detained, but not executed, even though they were attempting to secure the same intelligence. *See, e.g.*, Hague Annex, *supra* note 356, art. 29 ("[S]oldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies."); Geneva API, *supra* note 356, art. 46(2) ("A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as

If this is, indeed, a more accurate characterization of the "offense" of spying behind enemy lines, and the courts-martial proceedings against spies thus were not fundamentally punitive at all—and thus not akin to a typical criminal trial for ordinary domestic-law offenses—that, too, could explain why the issue of the right to trial by jury escaped attention during the Revolutionary War. Spying in war, in other words—unlike, say, torture or targeting civilians—was not blameworthy and thus was not treated as a crime, even though the spy might be executed in some cases.

This understanding of the function of executing spies also suggests two other reasons why the Founding generation might never have entertained the notion of civilian jury trials of enemy war spies. First, in most of the wars familiar to those in the mid-Eighteenth Century, if an army captured a spy within its encampment, it would likely be impractical and onerous for that army to transport the individual to be tried by civilian authorities, back home in a land far from the army lines.[371] Noteworthy, in this respect, is the Supreme Court's recognition that "[f]rom a time prior to the adoption of the Constitution *the extraordinary circumstances present in an area of actual fighting* have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules."[372]

Second, such a wartime trial of a spy before a civilian jury could result in the public revelation of the very intelligence that the defendant received or was attempting to obtain, thereby undermining the law's preventive rationale. That

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engaging in espionage if, while so acting, he is in the uniform of his armed forces."); OPPENHEIM, *supra* note 353, § 160, at 423; Halleck, *Military Espionage*, *supra* note 348, at 591 ("[A]n enemy who comes within our lines, without disguise or false pretenses, and seeks information, no matter how secretly, is no spy. If captured he must be treated as a prisoner of war; he may be confined with rigor, as a dangerous person, and his exchange refused; but he cannot be hung as a spy."). Yet if the same agent is captured out of uniform, international law would permit his punishment (and, at one time, his execution).

There is no well-accepted explanation for this paradox in the law of spying. One possibility is that although international law recognizes the legitimacy of spying, it also wishes to discourage states from engaging in such conduct in a manner that will result in extensive losses of valuable intelligence. If so, perhaps it is fair to see the curious distinctions in the law of spying—in particular, the prospect of execution or other criminal penalty under domestic law, rather than simply detention—as designed to encourage the use of *uniformed* agents, who are easier to detect and capture before they share intelligence with the opposing party. Another possibility is that belligerent parties felt it was too risky to detain captured spies, because those spies might share the intelligence they obtained with fellow captives, who might then convey that information to the enemy army when they were released (such as in a prisoner exchange).

371. *See* Johnson v. Eisentrager, 339 U.S. 763, 778–79 (1950) ("To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. . . . It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."); *Ex parte* Quirin, 317 U.S. 1, 39 (1942) (noting that military tribunals have "usually [been] called upon to function under conditions precluding resort to . . . procedures" such as trial by a jury of the vicinage where the crime was committed).

372. Reid v. Covert, 354 U.S. 1, 33 (1957) (plurality opinion) (emphasis added).

presumably would not be as acute a concern in a military proceeding, in which there are no civilian jurors and less of a risk of revelation.

In sum, it is likely that the Second Continental Congress prescribed courts-martials for the trials of wartime spies not because spying violated the international law of war (as the Court wrongly assumed in *Quirin*),[373] or, more broadly, because spying was a war-related domestic-law offense (as Judge Kavanaugh suggested in *al Bahlul*).[374] Rather, the 1776 resolution authorized the trial of spies by courts-marital, rather than in jury trials, due to a combination of disparate factors, the most important of which is that spies did not act wrongfully—and therefore their trial and sentence were not a form of punishment. Understood as such, the court-martialing of such spies during the Revolutionary War does not, or should not, serve as a precedent for the military trial of other domestic-law offenses.

C. AIDING THE ENEMY—THE "QUASI-TREASON" RESOLVES

A second set of resolutions that the Second Continental Congress enacted, also authorizing courts-martial for the adjudication of domestic-law offenses, raises a very different set of questions. On at least two occasions between 1776 and 1778, the Congress authorized the Army to use courts-martial to try ordinary civilian citizens—persons who were not part of the armed forces on either side of the conflict—for providing certain types of assistance to the British enemy.[375] These were, in effect, what we might call "quasi-treason" laws. General Washington and the Continental Army invoked these resolutions much less frequently than they used the 1776 spying resolve; on rare occasions, however, they used the quasi-treason resolves as the basis for court-martial trials of civilians, including one case in which a civilian, entitled to the jury-right protections of the New York Constitution, was tried by court-martial even though an ordinary state court was available to try him.[376]

At the nation's birth, it was not common to find such general, treason-like offenses enumerated within "articles of war," which were dedicated exclusively to the regulation of the conduct of the armed forces—the typical and uncontroversial subjects of court-martial proceedings.[377] The Massachusetts Articles of War, for example—which the Provisional Congress of Massachusetts Bay adopted in April 1775—included three provisions authorizing general courts-martial to punish persons "belonging to the Massachusetts Army" for providing certain forms of aid to the enemy,[378] yet those Articles did not include any analogous

373. *See supra* notes 294–95, 300 and accompanying text.

374. *See al Bahlul III*, 840 F.3d 757, 768 (D.C. Cir. 2016) (opinion of Kavanaugh, J., concurring).

375. *See infra* Sections IV.C.3, IV.C.4.

376. *See infra* Section IV.C.5.

377. *See supra* Section II.A.2.a (discussing the long-established Article III exception for trials of service members).

378. MASSACHUSETTS ARTICLES OF WAR (1775), arts. 25–27, *reprinted in* WINTHROP 2d ed., *supra* note 120, at 950.

provisions regulating persons who were not part of the state army. Similarly, Article XXVIII of the first Articles of War promulgated by the Continental Congress, on June 30, 1775, provided that *"[w]hosoever belonging to the continental army*, shall be convicted of holding correspondence with, or of giving intelligence to, the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered."[379]

These provisions effectively dealt with the most troubling cases of betrayal: those involving members of the Continental Army itself. They hardly resolved the entire problem, however, because there were many Tory sympathizers among the colonial population at large, and many such civilian persons endeavored to aid the British cause—providing what we might today call "material support" to the enemy. Of particular notoriety was the Mayor of New York,

379. 2 JOURNALS, *supra* note 325, at 116 (June 30, 1775). In November of 1775, the Continental Congress enacted an amendment to those Articles, providing that such persons could be sentenced to death: "All persons convicted of holding a treacherous correspondence with, or giving intelligence to the enemy, shall suffer death, or such other punishment as a general court-martial shall think proper." 3 JOURNALS, *supra* note 325, at 331 (Nov. 7, 1775). Some later observers suggested that the use of the term "all persons" reflected a congressional intent to extend the war-treason prohibition in the 1775 Articles to persons outside the Army. *See, e.g.*, WINTHROP 2d ed., *supra* note 120, at 102. There is no evidence, however, that the November 1775 amendment was ever applied to persons outside the military; and, as I explain in the text, just a few months later the Congress plainly acted upon the understanding that it had not yet dealt with the problem of assistance to the British from nonmilitary personnel. It would also be surprising if the pre-independence Congress believed it had the authority to impose criminal regulations on the conduct of private residents of the colonies.

The better view of the November 1775 amendment is simply that it authorized the penalty of death for those members of the Continental Army in cases where they violated the existing Article XXVIII. Without such an amendment, Article LI prohibited a court-martial from imposing the death sentence upon traitorous Army officers. This legal gap had created some consternation in the case of Dr. Benjamin Church, the director general of the Army hospital at Cambridge, who had been discovered in correspondence with the enemy. At a October 1775 conference between a Committee of Congress, General Washington, and Representatives of the New England Colonies—a meeting that was convened to discuss, *inter alia*, needed changes in the Articles of War—the conferees noted that the existing "Articles for the Government of the Army point[ed] out a very inadequate Punishment" for Church. Minutes of Oct. 22, 1775, THE CONFERENCE BETWEEN A COMMITTEE OF CONGRESS, WASHINGTON, AND REPRESENTATIVES OF THE NEW ENGLAND COLONIES, 18–24 OCTOBER 1775, National Archives, FOUNDERS ONLINE, http://founders.archives.gov/documents/Franklin/01-22-02-0142 [https://perma.cc/5YX7-CMTX]; *see also* Minutes of Oct. 4, 1775, Council of War, National Archives, FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/03-02-02-0083 [https://perma.cc/W8HU-YDD3] ("After examining the Regulations of the Continental Army & particularly the Articles 28 & 51 . . . [i]t was determined" that a "very inadequate Punishment" was available for "the Enormity of [Church's] Crime."). Washington had himself reached the same conclusion earlier that month, and had recommended that Congress amend Article XVIII to permit a more serious sentence. Letter from General George Washington to John Hancock, the President of Congress (Oct. 5, 1775), *in* 4 WASHINGTON, WRITINGS, *supra* note 341, at 9, 11 ("suggesting to [Congress's] Consideration, whether an Alteration of the 28th Article of War may not be necessary" in light of the Church case). The October 1775 conferees accordingly proposed the amendment to the Articles authorizing a court-martial to impose the penalty of death in such a case. Minutes of Oct. 22, 1775, THE CONFERENCE BETWEEN A COMMITTEE OF CONGRESS, WASHINGTON, AND REPRESENTATIVES OF THE NEW ENGLAND COLONIES, *supra*. Just over two weeks later, in November 1775, the Congress enacted that *de facto* amendment, designed not to create a new offense or to extend that offense to a new set of potential offenders, but merely to increase the possible sentences available for violations of Article XVIII.

David Matthews, who was alleged to have been a key player in a seditious mutiny plot. The New York civil authorities did not then have the power to deal with such cases.[380] At this time, however, it was far from clear that the Continental Congress could do anything about this problem, either, because such civilians were, after all, British subjects, and the question of whether they owed fealty to the revolutionary cause, and thus could be punished for betraying the new authority, was very much still open.

Accordingly, on June 5, 1776, the Continental Congress appointed an esteemed five-person committee—consisting of John Adams, Thomas Jefferson, Edward Rutledge, James Wilson, and Robert Livingston—"to consider what is proper to be done with persons giving intelligence to the enemy, or supplying them with provisions."[381]

1. The June 1776 Loyalty Resolve and Recommendation

On Monday, June 17, 1776, the five-man committee submitted its initial report to the Congress.[382] One week later, the Congress, having considered the committee's report, declared that "all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto."[383] The Congress also declared that if and when any such persons "owing allegiance to any of the United Colonies" were to "levy war against any of the said colonies . . . or be adherent to the king of Great Britain," or give "aid and comfort" to the King, such persons would be "guilty of treason against such colony."[384] John Adams noted the significance of this resolve: It was perhaps the first "clear attribution of all the rights of absolute sovereignty which had belonged only to George the Third, to the new and self-constituted authority of the American people."[385] It effectively eliminated the notion of neutrality for those residing in the colonies and "subjected their action to rigid supervision" by the new authority.[386] It was, in other words, an effective declaration of independence, promulgated two-and-a-half weeks before July 4, 1776.

Notably, however, the Continental Congress did not itself establish an offense of treason, nor a means of prosecuting it—let alone prescribe military adjudica-

380. *See* Curtis P. Nettels, *A Link in the Chain of Events Leading to American Independence*, 3 WM. & MARY Q. 36, 40–43 (1946).

381. 5 JOURNALS, *supra* note 325, at 417 (June 5, 1776).

382. *Id.* at 458 (June 17, 1776). Unfortunately, it appears that no copy of this report of the "Committee on Spies" has been preserved.

383. *Id.* at 475 (June 24, 1776).

384. *Id.*

385. 1 JOHN ADAMS, WORKS OF JOHN ADAMS 225 (Charles F. Adams ed., 1856).

386. *Id.*

tion without juries. Instead, the most it could do was "recommend[] to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described."[387] Over the course of the next few months the vast majority of the new states did just that: They enacted treason statutes, as the Congress had recommended.[388]

2. The September 1776 Articles of War

On June 14, 1776, Congress resolved that the five-person committee consisting of Adams, Jefferson, Livingston, Rutledge, and Wilson—which it now denominated the "Committee on Spies"—"be directed to revise the rules and articles of war, and to make such additions and alterations as they may judge proper, and lay the same before Congress for their consideration."[389] On August 7, 1776, the Committee submitted its report,[390] in the form of a draft of the new articles.[391] Eleven weeks after the Declaration of Independence, on September 20, 1776, Congress approved the new nation's first Articles of War, largely tracking the Committee's draft.[392]

As with the 1775 Articles, the new Articles were designed, at least primarily, to govern the military establishment. Two of the articles, however, both prohibiting aid to the enemy, were susceptible to a broader reading. Section XIII, Article 18 provided that "[w]hosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbour or protect an enemy, shall suffer death, or such other punishment as by a court-martial shall be inflicted."[393] Article 19, in turn, provided that "[w]hosoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such punishment as by a general court-martial shall be inflicted."[394]

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387. 5 JOURNALS, *supra* note 325, at 475. *See* BRADLEY CHAPIN, THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS 36 (1964) ("Though these resolves could not establish a basis for the trial of [Loyalist New York City Mayor David Mathews], they did put the moral force of the Union behind whatever action New York chose to take against him. The state officials first had hoped that Washington would try the mayor, but since the resolves did not authorize the military trial of civilians, he took no action.").

388. *See* Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 248–49 n.35 (1944) (collecting state treason enactments).

389. 5 JOURNALS, *supra* note 325, at 442 (June 14, 1776).

390. *Id.* at 636 (Aug. 7, 1776).

391. *See id.* at 807 n.2 (Sept. 20, 1776); PAPERS OF THE CONTINENTAL CONGRESS, No. 27, folio 5, *et seq.*, https://www.fold3.com/image/246/357686 [https://perma.cc/DT39-THGF].

392. 5 JOURNALS, *supra* note 325, at 788.

393. *Id.* at 799.

394. *Id.* These two articles were copied verbatim from the draft that the Committee on Spies had submitted. *See* Report of the Committee on Spies at 20–21, PAPERS OF THE CONTINENTAL CONGRESS, No. 27, folios 28–29, https://www.fold3.com/image/246/357706 [https://perma.cc/NG5V-28RA], https://www.fold3.com/image/246/357707 [https://perma.cc/QW37-K7L3].

Because each of these two articles used the unqualified term "whosoever"—in contrast to narrower terms used in other articles, such as "whatsoever *officer or soldier*,"[395] or "whosoever, *belonging to the forces of the United States*,"[396] and in contrast with Article XXVIII of the 1775 Articles, which had prohibited correspondence with the enemy by "[w]hosoever *belonging to the continental army*"[397]—some writers and military prosecutors would later argue that these two articles in Section XIII applied to *all* persons, or at least to all citizens of the United States and others owing allegiance to the nation. This more capacious reading of the September 1776 Articles appeared, for instance, in William Winthrop's influential treatise on military law, first published late in the Nineteenth Century.[398] Winthrop wrote that "[i]t is a reasonable argument that, in abandoning the words of limitation first employed [i.e., in the 1775 Articles], it was intended by Congress that these statutes should not be restricted in their application to members of the army."[399]

Although that might have been a "reasonable" reading, it was not the only one available. Alternatively, the Continental Congress might have employed the unqualified term "whosoever" to indicate that Articles 18 and 19 encompassed not only officers and soldiers in the Army, but also nonmilitary personnel accompanying the Army, such as commissaries, "suttlers," and "retainers"—that is, contractors who were also regulated by earlier-listed Articles.[400] Those latter categories of individuals were not encompassed by the language of the 1775 Articles ("whosoever *belonging to* the continental army"),[401] and therefore the decision to disdain the qualifying language might have been a deliberate effort to close that gap—without any intent to reach the civilian population at large. At least three factors support this latter, narrower reading.

First, the 1776 Articles were adopted directly from the 1774 *British* Articles of War that were in place during the Revolutionary War;[402] and the language of

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395. *See, e.g.*, Sec. XIII, art. 12, 5 JOURNALS, *supra* note 325, at 798 (emphasis added).

396. *See* Sec. XIII, art. 17, *id.* at 799 (emphasis added).

397. *See supra* note 379 and accompanying text.

398. 1 WILLIAM WINTHROP, MILITARY LAW 123–26 (1886); *see also* WINTHROP 2d ed., *supra* note 120, at 102–04.

399. 1 WINTHROP, *supra* note 398, at 124; *see also, e.g.*, Morgan, *supra* note 369, at 99 ("The inference is irresistible that Congress used this unrestricted language, 'whosoever,' advisedly, and therefore made manifest its intent to have it apply to civilians."); *infra* note 590 and accompanying text (discussing 1863 argument of Judge Advocate General Joseph Holt).

400. *See, e.g.*, Sec. IV, art. 6, 5 JOURNALS, *supra* note 325, at 792 (commissaries); Sec. VIII, art. 1, *id.* at 794 (suttlers); Sec. XII, art. 1, *id.* at 796 (commissaries and store-keepers).

401. *See supra* note 379.

402. John Adams, chairman of the congressional committee tasked to develop the new articles, wrote:

> There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in undoubted facts, that the prosperity of nations had been in proportion to the discipline of their forces by sea and land; I was therefore, for reporting the British articles of war, *totidem verbis*. Jefferson, in those days, never failed to agree with me, in

Articles 18 and 19, in particular, was adopted verbatim (but for changes in punctuation and capitalization) from Articles 18 and 19 of Section XIV of the British Articles.[403] It is noteworthy that, according to the canonical authority on the British articles, the word "whosoever" in these two articles "includes all who are amenable to the Arts. of War and to mil. orders and regs"—*not* anyone and everyone.[404]

Second, there is no record evidence, apart from the absence of qualifying words in the text (for example, "belonging to the continental army"), that the Congress actually intended to take the extraordinary, anomalous step of applying the Articles of War to cover treasonous activities of civilians unconnected to the armed forces. Nor does it appear that General Washington ever used Articles 18 and 19 to subject ordinary civilians to court-martial proceedings.[405] To the contrary, there is some evidence that it did not occur to Washington that those articles applied to cases of aid from Tory sympathizers: In July 1777, Washington wrote to a congressional committee that had been established "to make a diligent enquiry into the state of the army."[406] In that letter, Washington noted that "[a] doubt has arisen" whether the August 1776 spying resolution[407] could be used to authorize the court-martial of an individual owing allegiance to the United States who provided cattle to the enemy, recruited for the British, and

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> everything of a political nature, and he very cordially concurred in this. The British articles of war were, accordingly reported, and defended in Congress by me assisted by some others, and finally carried.

3 JOHN ADAMS, WORKS OF JOHN ADAMS 68–69 (Charles F. Adams ed., 1856).

403. *See* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES: TOGETHER WITH THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL AND OTHER MILITARY TRIBUNALS 581, 593 (1st ed. 1898). The language in the 1774 Articles was the same as in the 1765 British Articles, *see* WINTHROP 2d ed., *supra* note 120, at 931, 940, which, in turn, derived from Article VIII of the 1688 Articles of War of James II, *see id.* at 920, 921; *see also* CODE OF ARTICLES OF KING GUSTAVUS ADOLPHUS OF SWEDEN: ARTICLES AND MILITARY LAWS TO BE OBSERVED IN THE WARRES arts. 70, 71, 76, 77 (1621), *reprinted as translated in* WINTHROP 2d ed., *supra* note 120, at 903, 911 (prescribing the penalty of death for "[w]hoever" or "[w]hosoever" provided certain forms of aid to the enemy, without specifying the adjudicating court).

404. WILLIAM HOUGH, THE PRACTICE OF COURTS-MARTIAL, ALSO THE LEGAL EXPOSITION AND MILITARY EXPLANATION OF THE MUNITY ACT, AND ARTICLES OF WAR 326 (2d ed. 1825).

405. Winthrop would later assert that Washington's army convened one such court-martial proceeding. In May 1777, General Philip Schuyler reported to Congress that a court-martial had convicted one John Brown, alias John Lee, of violating Article 19 by, *inter alia*, "holding a traiterous correspondence with the enemy, in offering himself as a pilot to General Howe, to conduct the British army from Brunswick to Philadelphia; and also in promising to discover to the enemy to what place the continental stores, from Philadelphia, were removed." 7 JOURNALS, *supra* note 325, at 374 (May 21, 1777). Winthrop viewed this as a "contemporaneous construction" of Article 19 to apply to civilians. WINTHROP 2d ed., *supra* note 120, at 102; *accord* Morgan, *supra* note 369, at 101. Perhaps. Winthrop offered no evidence, however, that Brown was a civilian. The description of the court-martial in the *Journals of the Continental Congress* does not indicate that Brown was a civilian, nor is there any indication that Brown objected to the denial of a jury trial, something a civilian presumably would have done. The Brown case, therefore, is an equivocal precedent, at best, as we do not know whether Brown was in or affiliated with the military.

406. 8 JOURNALS, *supra* note 325, at 546 (July 11, 1777).

407. *See supra* Section IV.B.

was appointed as an officer in the enemy army.[408] If there had been even an inkling in Washington's mind that Articles 18 and 19 of the September 1776 Articles of War might reach such civilian-provided, disloyal aid, surely he would not have bothered to stretch to imagine how the *spying* provision might be awkwardly construed to apply to such a case.

Finally, and perhaps most revealingly, as explained below, the actions of the Continental Congress itself over the next eighteen months belied the notion that Articles 18 and 19 already regulated efforts by Tory sympathizers outside the military to provide aid to the British.

3. The October and December 1777 Resolutions for the Vicinity of Philadelphia

Following the British victory at the Battle of Brandywine on September 11, 1777, the American Army was forced to retreat toward the capital, Philadelphia, which thus became vulnerable to British attack. The British captured the city on September 26 and occupied it for the next nine months, until France's entry into the war required the British to repair to defend Manhattan in June 1778.[409] Naturally, in this state of affairs beginning in late September 1777, the Pennsylvania authorities were no longer operative and, in particular, were effectively powerless to prevent the many Tory sympathizers in the area from aiding the British occupying army. It thus fell to the Continental Congress to consider whether anything at the national level could be done to prevent civilians in and around Philadelphia from providing critical assistance to the British.

The papers of the Second Continental Congress include an undated proposed resolve, drafted by James Wilson, that would have acknowledged the "very familiar Situation of Pennsylvania, where the common enemy employ against us Spies and Traitors," and in which many such men "should be arrested and punished, [but] for which no Provision probably has been made."[410] Wilson's resolve would not have provided for any substantive treatment of those spies and traitors at the hands of the national government or the military; instead, it would merely have

> recommended to the Inhabitants of the City of Philadelphia & each County in Pennsylvania to choose, as speedily as possible, Commissioners of Inspection for watching over their Liberties from and for procuring to them every Design

408. Letter from General George Washington to Philip Livingston, Elbridge Gerry, and George Clymer (July 19, 1777), *in* 8 WASHINGTON, WRITINGS, *supra* note 341, at 439, 444–45.

409. *See* STEPHEN R. TAAFFE, THE PHILADELPHIA CAMPAIGN, 1777-1778 (2003).

410. The index to the Journals includes the following entry: "Wilson, James. Motion re spies in Philadelphia. Undated. 2 p. M247, r43, i38, vA, p. 135." Wilson's "motion" can be found at https://www.fold3.com/image/452394 [https://perma.cc/P7QC-KYM7]. I am grateful to Thanh Nguyen for tracking down the Wilson resolve, and to Erin Kidwell for deciphering most of Wilson's handwriting.

> of Security that can be procured in this Time of internal and intense Danger in Co-operation with the other Powers of the State.[411]

The Wilson resolve would also have recommended such measures "to the Inhabitants in other Parts of Pennsylvania who may find themselves in such a Situation as to render it proper and necessary."[412]

On October 8, 1777, the Second Continental Congress passed a version of Wilson's draft recommendation. Referring to Pennsylvania, New Jersey, and Delaware, the resolve read:

> [W]hereas, it has been represented to Congress, that many evil disposed persons, enemies to these United States, make a practice of passing to and from the enemy's quarters, propagating false intelligence, thereby to dispirit the people and aid the cause of our enemies,
>
> *Resolved*, That it be recommended to all magistrates and officers, civil and military, and to all the good people of these states, to be vigilant in apprehending, securing and bringing to condign punishment all such offenders, in order that a speedy and effectual stop may be put to such a pernicious practice.[413]

Notably, however, the congressional resolve then proceeded to go further than Wilson's draft. "[I]t is of essential consequence to the general welfare," stated the resolve, "that the most effectual measures should be forthwith pursued for cutting off all communication of supplies, or intelligence to the enemy's army now in, and near the city of Philadelphia."[414] Congress further found "by the experience of all states, that, in times of invasion, *the process of the municipal law is too feeble and dilatory* to bring to a condign and exemplary punishment persons guilty of such traitorous practices."[415] Accordingly, the Congress decided that, in this discrete situation, where the local powers were inadequate to address the problem, there was a need for action by the U.S. Army:

> *Resolved*, That any person, being an inhabitant of any of these states, who shall act as a guide or pilot by land or water for the enemy, or shall give or send intelligence to them, or in any manner furnish them with supplies of provisions, money, cloathing, arms, forage, fuel, or any kind of stores, be considered and treated as an enemy and traitor to these United States; and that General Washington be empowered to order such person taken within thirty miles of any city, town or place in the states of Pensylvania, Jersey and Delaware, which is, or may be in the possession of any of the enemy's forces,

411. *Id.*
412. *Id.*
413. 9 JOURNALS, *supra* note 325, at 784–85 (Oct. 8, 1777).
414. *Id.* at 784.
415. *Id.* (emphasis added).

> to be tried by a court martial, and such courts martial are hereby authorized to sentence any such persons convicted before them of any of the offences aforesaid, to suffer death or such other punishment as to them shall seem meet.[416]

At least three things are noteworthy about this resolve, which was, in effect, the new nation's first treason law. For one thing, unlike the earlier resolves, it clearly applied to ordinary civilians: "any person, being an inhabitant of any of these states." It also, however, included two significant *limitations.* First, it was *geographically* limited to those areas in which the ordinary municipal processes—the treason laws of Pennsylvania and surrounding states—were presumed to be inadequate to the task (where the "law is too feeble and dilatory"). Courts-martial were authorized to try disloyal individuals only if such persons were "taken within thirty miles of any city, town or place in the states of Pensylvania, Jersey and Delaware, which is, or may be in the possession of any of the enemy's forces."[417] Second, the Congress also imposed a *temporal* constraint: "This resolve to remain in force until the first day of January next, unless sooner revoked by Congress."[418] At the end of 1777, the Congress extended this court-martial authority for just over three more months, to April 10, 1778.[419]

In other words, the Second Continental Congress endeavored to tailor this extraordinary power of court-martialing civilians to the scope of the particular exigency that justified such a deviation from the norm—and no further. It is evident, then, that the Congress was not of the view that Articles 18 and 19 of Section XIII of the 1776 Articles of War had already established a broader authority for the court-martialing of disloyal civilians. The much more carefully circumscribed October 1777 resolve would have been unnecessary if, as some would later assume,[420] the Articles of War had already made treason broadly triable by military tribunal.

In early 1778, courts-martial tried several civilians for attempting to bring provisions to the British in Philadelphia, in violation of the 1777 congressional resolve. Some of the accused were acquitted.[421] Others were convicted and suffered a range of sentences, including execution. General Washington approved, rejected, or modified each sentence.[422]

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416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at 1068 (Dec. 30, 1777).

420. *See* WINTHROP 2d ed., *supra* note 120, at 102–04; *see also infra* notes 398–99 and accompanying text.

421. *See, e.g.*, General Orders (Mar. 1, 1778), *in* 11 WASHINGTON, WRITINGS, *supra* note 341, at 11 (noting Washington's approval of the acquittals of Philip Bocker, Joseph De Haven, and Michael Milanberger).

422. *See, e.g.*, *id.* at 11–12 (reflecting Washington's approval of a sentence against Jacob Cross of "two hundred lashes on his bare back well laid on" for having stolen calves and brought them into Philadelphia; and Washington's approval of the execution of Joseph Worrell for having acted as a guide to the enemy); General Orders (Mar. 25, 1778), *in id.* at 142–43 (reflecting Washington's approval of a

It is clear, however, that Washington well understood just how deviant, and disfavored, this practice was. In a letter to Brigadier General John Lacey, Jr., dated March 2, 1778, Washington addressed the question of the "great numbers of people taken going into Philadelphia."[423] While acknowledging that he had punished many such disloyal persons, including some severely, he also explained that "[i]f the State would take them in hand and deal properly with them it would be more agreeable to me than to inflict Military punishment upon them."[424] Therefore, he instructed Lacey, "[i]f you think that the State will receive those persons you have taken [going into Philadelphia], I am willing that they should be given up to them, either to be punished as Criminals or kept to exchange for those inhabitants lately taken away from their families."[425]

Even more important and remarkable was Washington's reaction to the court-martial of Samuel Carter, a New Jersey inhabitant, just a few days before the Philadelphia-focused congressional resolve expired. Washington had received the proceedings of that court-martial from Colonel Israel Shreve: Carter, along with William Seeds, had been charged with having deserted to the British army. On April 6, 1778, Washington wrote Colonel Shreve, disapproving the verdict because the court-martial had been improperly appointed, and instructing Shreve to re-try Seeds in a properly constituted court-martial. When it came to Carter, however, Washington directed Shreve to deliver him "to the Civil Authority," because "[b]y the Resolve of Congress we are not empowered to try

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sentence of one hundred lashes and detention at hard labor for the remainder of the war against Abel Jeans, convicted of, *inter alia*, supplying the enemy with money; and Washington's order of a sentence of one month's work "on fatigue" for five Pennsylvania inhabitants convicted of supplying the enemy with provisions); General Orders (Apr. 3, 1778), *in id.* at 202 (noting the court-martial conviction of William Morgan, and sentence of hard labor during the war, for attempting to carry a horse into Philadelphia); General Orders (Apr. 13, 1778), *in id.* at 253–54 (reflecting Washington's approval of court-martial sentences against Philip Culp and John Bloom of employment "in some publick work for the use of the Continent while the British Army continues in this State," for having attempted to carry flour into Philadelphia; and Washington's approval of a similar sentence against John Evans for "attempting to send Provisions into Philadelphia").

423. Letter from General George Washington to Brigadier General John Lacey, Jr. (Mar. 2, 1778), *in id.* at 14.

424. *Id.*

425. *Id.* at 14–15. A few weeks later, in a letter dated April 11, 1778, General Washington discussed with Lacey the court-martial proceedings Lacey had reported against "sundry inhabitants for supplying the Enemy with provision . . . ." Letter from George Washington to Brigadier General John Lacey, Jr. (Apr. 11, 1778), *in id.*, at 243–44. Washington explained to Lacey that those would be the last such trials, because the congressional resolve had expired the day before, on April 10; from that point forward, Washington instructed, Lacey could not apprehend, let alone court-martial, such British abettors: "If they are found going into Philadelphia with provision, you may take that and their Horses from them." *Id.* at 244.

One odd and unexplained later event should be noted. The General Orders of the Army of August 8, 1778, include a report of a general court-martial on August 4, 1778, several months after the Philadelphia "quasi-treason" resolve had expired: Anthony Matica, a New York inhabitant, was tried for "supplying the Enemy with Fuel," and was acquitted. 12 WASHINGTON, WRITINGS, *supra* note 341, at 299 (Aug. 8, 1778). The General Orders do not specify the authority for the Matica court-martial, or whether the acquittal was based on the absence of authority or on the merits. *See id.* at 299–301. Nor do they suggest that Washington was asked to approve the proceedings. *See id.*

persons, inhabitants of the States, if taken more than thirty Miles from the Head Quarters of the Army."[426]

Three days later, Shreve responded by explaining that "Virtuas Inhabitants and Militia officers Seemed very much Dissatisfied, on account of Carter[']s being Delivered up to the Civil Law," especially because Carter's brothers were in the British service and other of his relatives were also notoriously hostile to the revolution.[427] Besides, Shreve added, Carter "was taken in arms within Less than Twenty-five miles of your Excy[']s Head Quarters," which would have qualified him for a court-martial under the terms of the congressional resolve.[428] "[U]pon the whole," wrote Shreve, obviously hoping that he could persuade Washington to leave well enough alone, "I thought Best to have him tried [by a new court-martial] and Send the pr[o]ceedings for your Excy Consideration."[429]

Washington stood his ground, even on the assumption that Carter was captured within thirty miles of Washington's headquarters: "I cannot confirm the Sentence against Carter," he explained to Shreve, "until I have consulted [New Jersey] Govr. Livingston upon the matter. Introducing martial law into

426. Letter from General George Washington to Colonel Israel Shreve (Apr. 6, 1778), *in* 11 WASHINGTON, WRITINGS, *supra* note 341, at 222. A similar correspondence took place the next month. Brigadier General William Smallwood sent Washington the proceedings and sentence of a court-martial against a Delaware mariner named Joseph Judson, also known as "Jetson." According to Smallwood, Jetson "for some time past has been not less dreaded, than fam'd for his Infamous Practices of Piloting the Enemy in the Night and Aiding them in . . . Support of the Common Cause." Letter from Brigadier General William Smallwood to General George Washington (May 17, 1778), National Archives, FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/03-15-02-0146 [https://perma.cc/TQU3-FM25]. Washington regretfully responded, in a letter penned on the Commander in Chief's behalf by Alexander Hamilton, that he could not approve the sentence because of various irregularities. *See* Letter from General George Washington to Brigadier General William Smallwood (May 19, 1778), *in* 11 WASHINGTON, WRITINGS, *supra* note 341, at 420 ("The character you give of Jetson makes him so atrocious, that I regret his trial and sentence are not more clear and regular. There could be no more proper object for an example, if it could be made with propriety, than the circumstances you mention designate this man to be."). Among other problems, Washington noted, where the evidence in the proceedings did describe a crime, the Army had "no law, subjecting him to the jurisdiction of a court Martial; but he must be referred to the civil power, to be tried for treason." *Id.* Washington referenced the 1777 congressional resolution, but explained that "the operation of this law is limited to persons taken within thirty Miles of Head Quarters; which prevents its application to the present case." *Id.* at 421. (Washington might also have mentioned, but did not, that the resolve had expired in April.) Washington did, however, enclose for Smallwood's consideration a copy of a February 1778 resolution "for the trial and punishment of Kidnappers," discussed in greater detail below. *Id.* "[I]f proper evidence can be adduced in support of [a kidnapping charge against Judson]," Washington suggested, and if the offense occurred after the February resolution was approved, "you may have him tried on that charge, which will effectually procure him his deserts; otherwise he must of necessity be turned over to the civil power of the State, to which he belongs, which it is to be hoped will at least take proper precaution to prevent his doing further mischief." *Id.*

427. Letter from Colonel Israel Shreve to General George Washington (Apr. 9, 1778), *in* 14 THE PAPERS OF GEORGE WASHINGTON, at 443 (D. Hoth ed., 2004); *see also* Letter from Colonel Israel Shreve to General George Washington (Apr. 10, 1778), *in id.* at 471 (repeating these pleas, and explaining that he had court-martialed Carter "to Satisfy" those who were "so much Dissatisfied at his being Delivered over to the Cevel Law").

428. Letter from Colonel Israel Shreve to General George Washington (Apr. 9, 1778), *in id.* at 443.

429. *Id.*

this State [Pennsylvania], was intended to remedy the weakness of the Civil; but in the State of New Jersey where there is a law framed expressly for the purpose of trying inhabitants taking Arms on the side of the Enemy, I think such persons should be delivered to the Civil power. When I have the Governor's determination upon this matter, you shall hear from me."[430]

Recall that the Congress had *expressly* referenced New Jersey in the plain terms of the 1777 congressional resolve, along with Pennsylvania and Delaware. Yet even armed with this apparent statutory authority, Washington nevertheless refused to approve the Carter court-martial unless and until he was certain that the civil authorities in New Jersey, like those in Pennsylvania, were incapable of dealing with traitors in the ordinary course of criminal proceedings. Washington promptly wrote to New Jersey governor William Livingston, explaining that he "knew [New Jersey] had Laws fully competent to the punishment of offenders of such a nature."[431] Washington acknowledged that the congressional resolve from 1777, by its terms, gave him the power to try *all* persons assisting the enemy and taken within thirty miles of the Army Headquarters; nevertheless, he explained, he "imagine[d] this Resolve was passed with an intent to operate principally in Pennsylvania, where . . . the Civil Authority is extremely weak."[432] Washington confessed to Livingston that he was "not fully satisfied of the legality of trying an inhabitant of any State by Military Law, when the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy."[433]

After the 1777 resolution finally expired in April 1778, and the British abandoned Philadelphia for New York in June 1778, the Pennsylvania authorities once again began trying disloyal residents for treason under state law, where scores of defendants received jury trials and were protected by robust legal requirements.[434]

4. The February 1778 Kidnapping Resolve

In February of 1778, the Continental Congress took up the matter of a new, distinct form of treasonous activity by "inhabitants" of the new states: the practice of kidnapping loyal residents and conveying them to the British. Based upon a report of the Board of War, Congress found that:

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430. Letter from General George Washington to Colonel Israel Shreve (Apr. 14, 1778), *in* 11 WASHINGTON, WRITINGS, *supra* note 341, at 258.

431. Letter from General George Washington to Governor William Livingston (Apr. 15, 1778), *in id.* at 262.

432. *Id.* at 263.

433. *Id.* at 262. Washington asked Livingston for his view on the question. Livingston replied to Washington on April 27. *See* Letter from William Livingston to General George Washington, *in* 14 THE PAPERS OF GEORGE WASHINGTON, *supra* note 427, at 665. Unfortunately, any passage referencing Carter is not included in the surviving extract. Therefore it is not certain what became of Carter, except that there does not appear to be any record of Washington approving his execution.

434. *See* CHAPIN, *supra* note 387, at 56–59, 67–70, 77.

> a few deluded inhabitants of these states, prompted thereto by arts of the enemy, have associated together, for the purpose of seizing and secretly conveying to places in possession of the British forces, such of the loyal citizens, officers, and soldiers of these states, as may fall into their power; and being assisted by parties furnished by the enemy, have, in several instances, carried their nefarious designs into execution; and such practices being contrary to their allegiance as subjects, and repugnant to the rules of war.[435]

Congress therefore resolved as follows:

> That whatever inhabitants of these states shall kill or seize, or take any loyal citizen or citizens thereof, and convey him, her, or them, to any place within the power of the enemy, or shall enter into any combination for such purpose, or attempt to carry the same into execution, or hath assisted or shall assist therein; or shall, by giving intelligence, acting as a guide, or in any other manner whatever, aid the enemy in the perpetration thereof, he shall suffer death by the judgment of a court martial, as a traitor, assassin, and spy, if the offence be committed within seventy miles of the head quarters of the grand or other armies of these states, where a general officer commands.[436]

This resolution, passed while the 1777 resolve was still in effect, was obviously much narrower in scope *substantively* than its predecessor, as it only reached a discrete form of aid to the enemy. In other respects, however, it did not—at least not on its face—include the sorts of limitations found in the 1777 Philadelphia resolution. For example, it did not have an expiration date. Nor did it contain express geographical limits.[437] Most importantly, perhaps, Congress

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435. 10 JOURNALS, *supra* note 325, at 204 (Feb. 27, 1778).

436. *Id.* at 204–05. This was the rare resolution in the Second Continental Congress on which a vote was called. All of the state delegations voted in favor except those from Connecticut, which opposed the resolution 2–1, and New Jersey, which was split 1–1. *Id.* at 205.

437. Unfortunately, neither the Board of War Report, 1 REPORTS OF THE BOARD OF WAR AND ORDNANCE 533–34 (Feb. 26, 1778), PAPERS OF THE CONTINENTAL CONGRESS, https://www.fold3.com/image/1/382834 [http://perma.cc/SCXP-9Z67], nor the congressional resolution itself (which tracked the Report almost verbatim), specified which states were included in the resolution's vague reference to "these states." (The Board Report capitalized "States," which might have been a reference to all of them.) Perhaps the Congress's intent was to refer to states in New England: Reportedly, Representative William Ellery of Rhode Island, aware that the kidnapping practice "render[ed] a residence on the sea-board terrifying to the most resolute" in his state, "urged the subject with all his powers on the attention of congress, and aided by several of the most distinguished members of that body," successfully argued for the resolution. JOHN SANDERSON, ROBERT WALN, & HENRY DILWORTH GILPIN, 9 BIOGRAPHY OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 261–62 (1824). Two days after the February 27 resolution, Ellery wrote to Rhode Island Governor Nicholas Cooke that "[s]ome of the citizens of this state having been lately kidnapped and carried into Philadelphia, Congress have resolved that all offenders taken within 70 miles of the main army, or any detachment or post, under the Command of a General, shall be tried by a court martial, and suffer the pains of Death." Letter from William Ellery to the Governor of Rhode Island (Mar. 1, 1778), *in* 3 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 103 (Edmund C. Burnett, reprint ed., 1963). Although Ellery's description in this letter includes a geographical condition not found in the congressional resolve, it appears to confirm that the resolve was prompted by the British kidnapping of Rhode Island residents.

did not offer any justification for *why* it authorized court-martial proceedings for kidnapping civilians. In stark contrast to the 1777 resolve, this resolution did not suggest that the laws of the states—for example, prohibitions on kidnapping and treason—were inadequate to deal with the problem.

Not surprisingly, the Army used the more circumscribed February 1778 resolution far less frequently than it invoked the 1777 resolve. Indeed, I have been unable to find any record of any court-martial convictions pursuant to the 1778 resolution.

Notably, however, in one case where the 1778 resolution was at issue, General Washington appeared to adopt the view that the new resolve, like its 1777 predecessor, could be applied only where state legal authorities were not (in the words of his April 1778 letter to Governor Livingston) "fully competent to the punishment of offenders of such a nature."[438] In May 1780, Washington wrote to Brigadier General William Maxwell,[439] in response to Maxwell's inquiry about what to do with a group of prisoners that Colonel Elias Dayton had apprehended.[440] It appears that at least some of those prisoners must have conveyed Continental Army soldiers to the enemy, for Washington wrote the following:

> I would have you inquire minutely whether any laws of the State, at present in force, provide for the punishment of persons taken for seducing soldiers to desert or conveying them to the *enemy. If there are none such*, I think you may safely bring the person you have in Custody, to trial as a spy found near your Camp.[441]

From all that appears, then, Washington treated both the 1777 and 1778 resolutions as authorizing courts-martial for treasonous activity where the civil courts were not open and capable of handling such cases—in effect, an exception of necessity. But where the civilian courts *were* available, he was—at the very least—deeply uneasy about the legitimacy of using military courts, even in cases that might have been covered by the plain language (even if not the underlying rationale) of the congressional resolutions.

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438. Letter from General George Washington to Governor William Livingston (Apr. 15, 1778), *in* 11 WASHINGTON, WRITINGS, *supra* note 341, at 262.

439. Letter from General George Washington to Brigadier General William Maxwell (May 19, 1780), *in* 18 WASHINGTON, WRITINGS, *supra* note 341, at 388.

440. Letter from Brigadier General William Maxwell to General George Washington (May 17, 1780), i*n* National Archives, FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/99-01-02-01773 [https://perma.cc/M89B-HFZA].

441. 18 WASHINGTON, WRITINGS, *supra* note 341, at 389 (emphasis added). Washington's reference to a possible trial for *spying* strikes a false note, because it is hard to see how the conduct in question described the offense of spying. Presumably Washington used that term because the February 1778 resolve itself provided, rather imprecisely, that the kidnappers in question "shall suffer death by the judgment of a court martial, as a traitor, assassin, and spy." 10 JOURNALS, *supra* note 325, at 204 (Feb. 27, 1778).

This otherwise consistent narrative is, however, complicated by one conspicuous counterexample that occurred after all of the events recounted above—namely, Washington's order of a court-martial trial of Joshua Hett Smith, an alleged accomplice to the treasonous plot of Benedict Arnold.

5. The Court-Martial of Joshua Hett Smith

On August 3, 1780, Washington appointed Major General Benedict Arnold to command of the important Army garrison near West Point, New York, along the western bank of the Hudson River.[442] Arnold had distinguished himself with valor and bravery in several important battles, including the Battle of Saratoga in 1777, in which he suffered a serious leg injury. Washington implored Arnold to use his post at West Point to obtain as much intelligence about British movements as he could.[443] Little did Washington know, however, Arnold had grown disillusioned with the Army after its defeat at Charleston, and dubious that the revolution would succeed. Moreover, Arnold was deeply resentful of what he viewed as false and malicious allegations that he had acted corruptly as military governor of Philadelphia after the British left that city. Arnold was also deeply in debt. For a combination of these reasons (and others), he resolved to betray the new nation by initiating a traitorous arrangement with Henry Clinton, the British Commander in Chief.[444] As Alexander Hamilton would write later that year, "the ingratitude [Arnold] had experienced from his country, concurring, with other causes, had intirely changed his principles, that he now only sought to restore himself to the favour of his king, by some signal proof of his repentance."[445]

Clinton, who had already captured New York City, set his designs upon West Point: If he could secure the post and garrison there, and set up a series of posts between West Point and New York City, he might effectively cut off the major route by which the Continental Army was supplied with goods—and thereby bring General Washington's army to its knees, and end the rebellion for good. Arnold had already begun a correspondence with Clinton, and with his chief of intelligence, Major John André, in the course of which he had betrayed Washington's plan to establish command on the Hudson River.[446] This rendered West Point an even more attractive target for Clinton's machinations. And when Washington fortuitously appointed Arnold to take command there, all the pieces for Clinton's plot appeared to be falling into place. Clinton agreed to give Arnold a hefty reward if Arnold would surrender West Point and guarantee the presence of at least three thousand American troops who might be killed or

442. *See* NATHANIEL PHILBRICK, VALIANT AMBITION 275 (2016).

443. *See id.* at 278.

444. *See generally id.* at 230–41.

445. Letter from Alexander Hamilton to Lieutenant Colonel John Laurens (Oct. 11, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON 460 (Harold C. Syrett ed., 1961).

446. PHILBRICK, *supra* note 442, at 243–45.

captured there.[447]

As the plan approached its final stages, it became increasingly difficult for Arnold and Major André to reliably communicate with one another about the details of their plot. Accordingly, late in September of 1780, André, recently appointed as Clinton's Adjutant General, determined to meet with Arnold personally.[448] He therefore secreted himself on a British sloop of war, the HMS *Vulture*, anchored on the Hudson near Haverstraw, New York.[449] Meanwhile, Arnold importuned a 31-year-old New York attorney by the name of Joshua Hett Smith, who lived near Haverstraw, to help him with what he described as a critical and sensitive intelligence matter in the service of the American cause: Arnold directed Smith to guide an individual from the *Vulture* to meet with Arnold in the dead of night on September 21, 1780.[450] Whether Smith knew of Arnold's treachery, or that the individual he was asked to transport was a British officer in cahoots with Arnold to sacrifice West Point to the British, remains unknown. Smith would later insist that he presumed Arnold was a loyal officer and hero, endeavoring to obtain secret intelligence from sources who were themselves betraying the British cause.[451]

On the evening of September 21, on the *Vulture*, André introduced himself to Smith under a pseudonym, John Anderson; he did not tell Smith the nature of his business with Major General Arnold.[452] Smith rowed "Anderson" ashore, where the British officer met with Arnold in a grove of fir trees on the western shore of the Hudson for about three hours, discussing the details of their plan. By this point, it was too late for Smith to row André back to the ship undetected, for dawn was approaching. Arnold and André therefore decided that they would continue their conversation at Smith's house—which happened to be within the U.S. Army lines—and that Smith would return André to the *Vulture* the next night. The American Army at King's Ferry, however, had begun firing on the *Vulture*, and so the British ship set off down the Hudson, out toward sea. This meant that André would have to find another way back to the British lines in Manhattan—by land.[453]

In the light of day the next morning, Friday, September 22, Smith noticed that "Anderson" was sporting a British uniform. (André probably had worn it so that if he were captured, he could simply claim to have been openly doing business as a British officer, rather than being a spy in disguise, something that would

447. *See id.* at 279–80.

448. Clinton and André reportedly desired the face-to-face meeting to ensure that Arnold was not a double-agent and that he had genuinely decided to betray the revolutionary cause. *See* Herbert Haines, *The Execution of Major André*, 5 ENGLISH HISTORICAL REV. 31, 31–33 (1890).

449. *See* PHILBRICK, *supra* note 442, at 285–89.

450. *See id.* at 285–86; *see also* RICHARD J. KOKE, ACCOMPLICE IN TREASON: JOSHUA HETT SMITH AND THE ARNOLD CONSPIRACY 71, 78–80 (1973).

451. *See* JOSHUA HETT SMITH, AN AUTHENTIC NARRATIVE OF THE CAUSES WHICH LED TO THE DEATH OF MAJOR ANDRÉ, ADJUTANT-GENERAL OF HIS MAJESTY'S FORCES IN NORTH AMERICA 13–17 (Duykinck, 1809).

452. *See* KOKE, *supra* note 450, at 83–84.

453. *See id.* at 87–92; SMITH, *supra* note 451, at 21–23; PHILBRICK, *supra* note 442, at 288–94.

almost certainly result in his execution.[454]) Benedict Arnold explained to Smith that Anderson was a New York citizen who had borrowed the uniform from a British friend—and Smith apparently believed that unlikely story (or so he would later insist).[455] Before heading out that evening, Arnold asked Smith to provide "Anderson" with a coat and hat, so that he might pass undetected on the journey back to New York. Smith did as he was instructed.[456] Arnold then sent the travelers off with papers in which he instructed any guards to allow "Mr. John Anderson" to pass, as he was on "public business" at the direction of Major General Arnold.[457] Smith accompanied André much of the night, until they parted ways near the bridge across the Croton River on Saturday, September 23.[458]

Later that day, three New York militiamen interdicted André and they discovered, in his boots, documents revealing his plot with the traitor Arnold, including a plan of the fortifications of West Point and a copy of the minutes of a council of war held by General Washington a few weeks earlier.[459] Two days later, on Monday, September 25, Arnold got wind of André's arrest, and he fled his post at West Point less than half an hour before he was to have breakfast with General Washington.[460] Washington and his companions received notice of the attempted treason several hours later. Lieutenant Colonel Alexander Hamilton gave chase on horseback, but was unable to catch Arnold, who made it to British lines and thereby secured his freedom, a subsequent appointment as a British brigadier—and eternal ignominy.[461]

During his flight, Arnold wrote a letter to Washington, his commander and mentor, in which he tried to defend his actions and asked Washington to show mercy to Arnold's wife. At the end of the letter, in a further effort to protect those who had unwittingly aided him, Arnold added that his assistants, as well as Joshua Hett Smith, were "totally Ignorant of any transactions of mine."[462] Far from absolving Smith of any wrongdoing, this reference in Arnold's letter prompted Washington and his allies to suspect Smith, for they had dined with the young attorney just the night before, at which time Smith had offhandedly mentioned that Arnold had been at his house two days earlier.[463] Putting the pieces together, Washington ordered Smith arrested that evening, Monday,

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454. *See* HALLECK, *supra* note 348, at 591 (discussing how the offense of spying could not be applied to a scout who was not in disguise).

455. *See* KOKE, *supra* note 450, at 87.

456. *See* SMITH, *supra* note 451, at 23.

457. *See* KOKE, *supra* note 450, at 89; PHILBRICK, *supra* note 442, at 294–95.

458. *See* SMITH, *supra* note 451, at 24–30; KOKE, *supra* note 450, at 93–99; PHILBRICK, *supra* note 442, at 296–300.

459. *See* PHILBRICK, *supra* note 442, at 300–02.

460. *See id.* at 308–10.

461. *See id.* at 310–14.

462. Letter from Benedict Arnold to George Washington (Sept. 25, 1780), *Founders Online*, National Archives, http://founders.archives.gov/documents/Washington/99-01-02-03372 [https://perma.cc/PNM7-ZNNP].

463. *See* KOKE, *supra* note 450, at 103–04.

September 25.[464] Washington was understandably desperate to obtain further information about the nefarious plot, and Smith was not only a suspect, but a possible source for such crucial intelligence.

Smith was roused from his bed and arrested that evening. The next morning, September 26, Smith found himself confronted by a five-man interrogation team: General Washington, Lieutenant Colonels Alexander Hamilton and Robert Harrison, Brigadier General Henry Knox, and the Marquis de Lafayette.[465] Smith, professing ignorance of any wrongdoing, demanded to know why he was detained. According to Smith's later description of the confrontation, Washington responded that Smith was charged with "the blackest treason," that the General had the authority to hang him immediately as a traitor, and that nothing could prevent this sordid fate other than a "candid confession" of his accomplices in the "horrid and nefarious designs" he had mediated in the preceding days.[466] Smith insisted that he was not guilty of anything—that he had merely acted in accordance with Benedict Arnold's orders, thinking them to be part of a loyal, and thus benign, design.[467]

Washington and his retinue continued to pressure Smith to confess, threatening him with summary execution "on yonder tree" if he failed to do so.[468] Smith responded "that as a citizen I did not conceive myself amenable to military jurisdiction."[469] He also insisted (or so he claimed when he wrote of the incident many decades later) that the 1778 congressional "aiding the enemy" resolution, pursuant to which Washington was purporting to act, was merely a "recommendatory resolve," and that it could not be used to contravene the right to a jury trial to which Smith was entitled under the New York Constitution[470]—a constitution Smith himself had helped draft three years earlier.[471]

Smith would later write that Washington was "irritated" by Smith's retort, and returned him to confinement.[472] (If Washington offered any response on the merits, no evidence of it survives.) A bit later, Hamilton—apparently playing the role of "good cop"—personally intervened with Smith, "compassionately" urging him to confess "for the sake of [his] family," and to spare his own life.[473] Smith did not budge on his story, however; he would not confess to knowing of Arnold's treasonous design.[474] Washington then re-entered the room, and report-

464. *See id.* at 104–06.
465. *See* SMITH, *supra* note 451, at 30–31.
466. *Id.* at 32.
467. *See id.*
468. *Id.*
469. *Id.* at 33.
470. *Id.*
471. *See* KOKE, *supra* note 450, at 32.
472. SMITH, *supra* note 451, at 33.
473. *Id.*
474. Smith would later write that he had persuaded Hamilton of his sincerity, in part because Hamilton was familiar with Smith's longstanding support for the revolution. *Id.* at 34. Hamilton

edly said to Hamilton: "I am not yet satisfied; take him into the back room; we must know something more about this business."[475] At that point, Smith was left to wait for a couple of hours, before being remanded to the custody of other officers.[476] Smith speculated that the "main object" of Washington's decision to detain and try him "was to obtain the knowledge of General Arnold's confederates in the army, as well as in Congress."[477] This interrogation and threat of military trial was, in other words, a shakedown, if Smith's own account is accurate.

Washington wrote to New York Governor George Clinton that day, as well as to the Continental Congress, informing them of the plot between Arnold and André. Washington told Congress that he found Smith "to have had a considerable share in this business"[478]; and he likewise informed Governor Clinton that Smith—a New York citizen—was in custody and "has confessed facts sufficient to establish his guilt."[479]

Washington directed that both André and Smith be detained and tried at Army headquarters in Tappan, New York. In Major André's case, Washington convened a "Board of General Officers." On September 29, after considering the evidence, the Board unanimously recommended to Washington that André "ought to be considered as a Spy from the enemy and that agreeable to the law and usage of nations, . . . he ought to suffer death."[480] Washington agreed. André was hanged as a spy on October 2, 1780, just nine days after his arrest.[481]

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testified at the court-martial proceedings, however, that he was wary of Smith's true inclinations because, early in the war, Smith had exhibited "appearances of an intemperate zeal for the cause of America"—an "excessive warmth." HENRY B. DAWSON, RECORD OF THE TRIAL OF JOSHUA HETT SMITH, ESQ., FOR ALLEGED COMPLICITY IN THE TREASON OF BENEDICT ARNOLD 30 (Bradstreet Press, 1866).

475. SMITH, *supra* note 451, at 34.

476. *See id.* at 37–38.

477. *Id.* at 38–39.

478. Letter from General George Washington to the President of Congress, (Sept. 26, 1780), *in* 20 WASHINGTON, WRITINGS, *supra* note 341, at 91–93.

479. Letter from General George Washington to Governor George Clinton, (Sept, 26, 1780), *in id.* at 93–94.

480. PROCEEDINGS OF A BOARD OF GENERAL OFFICERS HELD BY ORDER OF HIS EXCELLENCY GEN. WASHINGTON, COMMANDER IN CHIEF OF THE ARMY OF THE UNITED STATES OF AMERICA, RESPECTING MAJOR JOHN ANDRÉ, ADJUTANT GENERAL OF THE BRITISH ARMY 13 (Francis Baily, 1780); KOKE, *supra* note 450, at 136.

481. *See* KOKE, *supra* note 450, at 148–52. It is uncertain whether André's proceedings were authorized by the 1776 congressional spying resolution, *see supra* note 340 and accompanying text, for at least two reasons. For one thing, Washington did not use a court-martial, as the resolve prescribed. Nor is it is clear that André's case came within the terms of the resolution: he was apprehended on a road outside Tarrytown, New York, rather than (as the resolution required) "found lurking . . . in or about the fortifications or encampments of the armies of the United States." *See* 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, 777 n.288 (2008). Moreover, although it was probably permissible for the Army to execute André for having tried to bribe an officer to betray his loyalty, André almost certainly did not engage in a form of prohibited spying that justified the ignominious penalty of death by hanging. *See* HALLECK, INTERNATIONAL LAW, *supra* note 348, at 408–99. André did not cross enemy lines in disguise to steal information, *see supra* note 356 and accompanying

Meanwhile, on September 30, Lieutenant Colonel Harrison directed the Army's Judge Advocate General, John Lawrence, to prosecute Joshua Hett Smith before a court-martial on four charges.[482] The first two charges alleged, in effect, that Smith had abetted André's spying, and the third charge alleged that Smith himself had spied by "procuring intelligence for the enemy."[483] The fourth charge—the one of primary importance here—was evidently predicated on the February 1778 kidnapping resolve: it alleged that Smith had aided and abetted Benedict Arnold in a plot to permit the enemy to "take, kill, and seize" the loyal soldiers and citizens in the garrison at West Point.[484]

The sitting court-martial, consisting of thirteen officers, was ordinarily in the business of trying run-of-the-mill cases involving wrongdoing (e.g., embezzlement, desertion, ungentlemanly behavior) by Army personnel.[485] The Smith proceeding was a very different sort of trial, however, for it was the rare case in which a civilian was in the dock.

The proceedings commenced on September 30. Lawrence first asked the members to consider whether they had jurisdiction to consider the four charges.[486] With respect to the three spying charges, Lawrence cited the congressional spying resolve of August 21, 1776.[487] The panel decided that it lacked jurisdiction over those three charges, presumably because the congressional resolution, by its terms, did not apply to persons, such as Smith, who were "members of," or owed allegiance to, "any of the United States of America."[488] As to the fourth charge, however, the panel decided that it had jurisdiction pursuant to the congressional resolution of February 27, 1778, which authorized court-martial proceedings against inhabitants of "these states" who assisted the enemy—"by giving intelligence, acting as a guide, or in any other manner"—in an effort to "kill or seize, or take any loyal citizen or citizens."[489] The loyal citizens in question, according to the charge, were the soldiers at West Point who Clinton was plotting to kill or capture, with Arnold's (and, allegedly, Smith's) assistance.[490]

Smith, who was representing himself because Washington had denied his request for the privilege of counsel, argued that the panel lacked the power even to consider this fourth charge, because he was not a proper subject for trial by a

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text (describing this condition of the offense of spying); rather, he came ashore to meet with Arnold, with Arnold's permission, while wearing his British uniform.

482. *See* DAWSON, *supra* note 474, at 1–2.

483. *Id.*

484. *Id.* at 2.

485. *See* KOKE, *supra* note 450, at 136.

486. *See* DAWSON, *supra* note 474, at 3–4.

487. *See supra* note 340 and accompanying text.

488. *See* DAWSON, *supra* note 474, at 4; *see also supra* note 340 and accompanying text. The panel might have also dismissed the third charge for lack of proffered evidence that Smith himself had engaged in any spying activity.

489. DAWSON, *supra* note 474, at 4.

490. *See id.* at 2–5.

military tribunal. Smith contended—as Washington himself had done[491]—that Congress presumably passed the 1778 aiding-the-enemy resolution to account for cases in states in which there were no courts adequate to try such civilians early in the war.[492] Smith noted, however, that New York now had a constitution, which not only established a court system, but also guaranteed a trial by jury[493]—which was the norm the state itself honored in its many treason trials in civilian court.[494] Smith told the military panel that if the congressional resolution were construed to cover a case in such a state, he "could not conceive how a mere resolve of Congress could abrogate a fundamental article in any of the civil constitutions of the United States."[495] To do so, he insisted, would make the military "paramount to the civil authority," and would be inconsistent with "one of the principal reasons assigned by Congress for their separation from Great-Britain, in the declaration of independence," namely, the denial of trial by jury.[496] The panel overruled Smith's constitutional objection, and the case proceeded to trial on the single charge of aiding Arnold in "combination" with the enemy to kill or seize the loyal soldiers at West Point.[497]

At the end of the trial, Smith once again interjected a jurisdictional objection as part of his closing on October 24, arguing that the military trial had denied him the jury right, "the great bulwark of individual freedom."[498] "It must appear strange to the world," he inveighed, "that Congress should violate those rights

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491. *See supra* notes 438–41 and accompanying text.

492. *See* SMITH, *supra* note 451, at 73.

493. *See* NEW YORK CONST. art. XLI (1777):

> And this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever.

That state constitution also established a modest form of judicial independence, providing that the judges of the state supreme court, and the first judge of the county court in every county, would hold their offices "during good behavior or until they shall have respectively attained the age of sixty years," *id.* art. XXIV, and further providing that such judges could not simultaneously hold any other executive office, *id.* art. XXV.

494. In 1777, the Provincial Congress of New York itself had authorized courts-martial to try traitors while the legislature was drafting the state constitution. Those court-martial resolves were time-limited, however, in effect to last only until the state had established a working government with civil courts. *See* CHAPIN, *supra* note 387, at 50–51, 64. Some state officers continued a drumbeat of pressure to convene such trials in civil courts as soon as possible, lest "whilst we are strugling for the Sacred Name of Liberty we are establishing the fatal Tendency to Despotism." *Id.* at 64. Thus, when the mechanisms of the state constitution were finally in place and the special resolves expired, the state convention "put an emphatic period to the court-martial trial of traitors." *Id.* at 65. That practice lasted only a few months. *Id.* at 51–53. By the time Smith was accused of his treasonous activities three years later, New York had instituted a robust practice of civil treason trials; the state secured over 800 convictions between February 1780 and December 1783. *Id.* at 76–77.

495. SMITH, *supra* note 451, at 73.

496. *Id.* at 73–74.

497. *Id.* at 72.

498. *Id.* at 114.

of citizenship, for which their country was drenched in blood."[499] Smith chalked up the irregularity of his case to General Washington's intense anger when he learned of Arnold's betrayal: "This flagrant injustice will mark the savage ferocity with which their general sought my life, (not sufficiently glutted with that of the accomplished André,) *and ought to be a warning to posterity how they invest tyrants with any sort of power, that they can with impunity abuse.*"[500]

Following deliberations, the panel announced its verdict: It did not accept Smith's jurisdictional argument, but it ruled in his favor nonetheless. Although the panel concluded that Smith had, in fact, abetted Arnold's scheme with Major André, it also found that the evidence was insufficient to prove that Smith was privy to, or had knowledge of, Arnold's "criminal, traitorous or base designs." Accordingly, the court-martial found Smith not guilty of the charge under the February 1778 resolution.[501]

Remarkably, Smith was not present for the verdict, nor was he informed of it for many months afterward, as he languished in detention.[502] The prospect of Smith going unpunished for his involvement in Arnold's scheme did not sit well with General Washington. After the court-martial verdict, Washington informed New York Governor George Clinton that Smith would be released shortly "unless the Civil authority should interpose to demand him."[503] Governor Clinton, after reviewing the trial record, concluded that it would be "dangerous to the safety of this State that [Smith] should be permitted to go at large," and therefore ordered that Smith be transferred to state custody, to await possible trial under New York law.[504] Smith's detention in New York lasted for months, as state authorities endeavored (at first unsuccessfully) to persuade a grand jury to indict Smith for treason.[505] Finally, on May 21, 1781, Smith escaped from the jail and became a fugitive, eventually ending up in exile in England.[506]

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In sum, the common practice of many inhabitants of the new nation to offer intelligence, provisions, and other assistance to the British cause confronted the

499. *Id.* at 115–16. Apparently Smith also argued that the 1778 resolution should be interpreted only to apply to the State of Pennsylvania while the British occupied Philadelphia, much like the 1777 resolution was geographically limited to areas where civil courts could not act. *Id.* at 115. This "constitutional avoidance" argument, however, was less compelling than Smith's straightforward constitutional argument: As explained above, *supra* note 437 and accompanying text, the language of the 1778 resolution did not contain the words of geographical distinction that characterized the Congress's 1777 resolve involving Philadelphia and its environs.

500. SMITH, *supra* note 451, at 116 (emphasis in original).

501. *See* DAWSON, *supra* note 474, at 106.

502. *See* KOKE, *supra* note 450, at 179–80.

503. Letter from General George Washington to Governor George Clinton, or in His Absence Lieutenant Governor Van Cortlandt (Oct. 29, 1780), *in* 20 WASHINGTON, WRITINGS, *supra* note 341, at 262.

504. KOKE, *supra* note 450, at 185.

505. *See id.* at 188–91.

506. *See id.* chs. 16–20.

Second Continental Congress and General Washington with an acute and continuing problem. In cases where members of the armed forces were the culprits, Congress authorized court-martial proceedings, and the Army regularly tried its own members for their betrayal in such military tribunals, just as it did for many other offenses (and just as it does to this day). With respect to prosecution of *civilians* for such treasonous conduct, however, the Congress and the Commander in Chief generally chose to rely upon application of state law, and municipal criminal trials by jury, to deal with the problem—and such state-law prosecutions before civilian juries were the norm.[507] The Congress made a minor exception, however, for cases in the vicinity of Philadelphia during the few months in which the British army occupied that city, because in that discrete time and place the municipal law was "too feeble and dilatory to bring to a condign and exemplary punishment persons guilty of such traitorous practices."[508] It was, in other words, an exception defined by necessity. And even in that case, General Washington did not approve courts-martial within the literal terms of the resolve in cases where civil authorities were sufficient to the task. Indeed, Washington's deference to the civil justice system was so pronounced that when he resigned his commission as Commander in Chief in December 1783, Congress commended him for "conduct[ing] the great military contest with wisdom and fortitude *invariably regarding the rights of the civil power through all disasters and changes*."[509]

The February 1778 kidnapping resolve, however—and Washington's decision to try Joshua Hett Smith by court-martial pursuant to that resolution in 1780—stands as an aberrant deviation from this basic narrative, even if no one was ever convicted pursuant to that resolve. Congress did not explain why it approved the resolution, and there is no record of any justification Washington might have entertained or offered for committing Smith to a court-martial, even after Smith reminded Washington of his right to a jury trial under New York law. Washington must have known that Smith's constitutional argument was formidable—after all, it tracked Washington's own views about military trials of civilians in cases where municipal courts were open and effective. Although it is impossible to say for certain, it appears likely that Washington invoked the 1778 resolve, and the prospect of Smith's summary execution after a military proceeding, as a way of coercing Smith to disclose further information about the plot.[510] Revelation of Arnold's treachery had blindsided Washington, and the General was not only furious about his comrade's betrayal, but also desperate to quickly uncover the scope and details of what he must have assumed was an ongoing

507. *See, e.g., supra* note 494 (describing the practice in New York).

508. 9 JOURNALS, *supra* note 325, at 784.

509. ANSWER OF THE UNITED STATES IN CONGRESS, ASSEMBLED TO HIS EXCELLENCY GEORGE WASHINGTON, COMMANDER IN CHIEF, UPON HIS RESIGNING HIS COMMISSION, Dec. 23, 1783 (emphasis added), National Archives, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/99-01-02-12224 [https://perma.cc/XW2X-QHC9].

510. *See supra* notes 465–77 and accompanying text.

plan to cripple the Continental Army and bring the revolution to an end. Whatever the undisclosed reason, Washington's failure even to proffer any justification for the court-martial, in the face of a serious constitutional objection, is telling.

V. THE EARLY CONGRESSES, THE 1806 ARTICLES OF WAR, AND THE WAR OF 1812

In the recent en banc *al Bahlul* decision, Judge Kavanaugh's opinion on behalf of himself and Judges Brown and Griffith emphasized not only the resolutions and Articles of War the Continental Congress enacted during the Revolutionary War, but also the fact that, after the Constitution was ratified, the First Congress adopted the very same Articles of War, and that in 1806, Congress updated the Articles "and, in doing so, was careful to preserve the offenses of spying and aiding the enemy as crimes triable by military tribunal."[511] This post-ratification continuity, according to Judge Kavanaugh, demonstrates an understanding of the early Congresses that the Article III exception for war-related offenses is not limited to violations of the international law of war.[512] A careful assessment of the early post-1789 history, however, does not support this reading.

The 1789 ratification of Section 2 of Article III of the Constitution guaranteed the right to a jury, and to an independent judge, for the "[t]he Trial of all [federal] Crimes, except in Cases of Impeachment."[513] Shortly thereafter, the Sixth Amendment reconfirmed the right to a jury trial.[514] What is more, Section 3 of Article III established even more robust protections for allegations of treason—defined as "levying War against [the United States], or in adhering to [its] Enemies, giving them Aid and Comfort."[515] It provides that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[516] The First Congress enacted a federal treason statute conforming to these constitutional requirements in 1790.[517]

Just after the Constitution was ratified, Secretary of War Knox wrote to President George Washington "[t]hat the change in the Government of the United States will require that the articles of war be revised and adapted to the

511. *al Bahlul III*, 840 F.3d 757, 765 (D.C. Cir. 2016) (en banc) (Kavanaugh J., concurring).

512. *Id.*

513. U.S. CONST. art. III, § 2, cl. 3.

514. *See supra* note 67.

515. U.S. CONST. art. III, § 3, cl. 1.

516. *Id.* Section 3 also provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." *Id.* cl. 2.

517. Act of Apr. 30, 1790, ch. 9, § 1, 1 Stat. 112, 112 (current version at 18 U.S.C. § 2381 (1994)); *see also id.* § 24, 1 Stat. at 117 (not codified) (providing that a treason conviction shall not work corruption of blood, or any forfeiture of estate). Indeed, the federal law went further: it also gave the accused a right to the names and addresses of prospective jurors and witnesses at least three days prior to trial, and the right to challenge up to 35 jurors peremptorily. *Id.* §§ 29, 30, 1 Stat. at 118–19 (not codified).

constitution."[518] It would be another seventeen years, however, before Congress got around to promulgating a new set of Articles to replace those that governed the Army during the Revolutionary War.[519]

In the meantime, as a stopgap, the First Congress passed a law simply providing that the "troops [in the service of the United States] shall be governed by the rules and articles of war which have been established by the United States in Congress assembled [that is, the pre-constitutional Articles from the Revolutionary War], or by such rules and articles of war, as may hereafter by law be established."[520] A few months later, Congress specified a bit more precisely that "the commissioned officers, non-commissioned officers, privates and [military] musicians . . . shall be governed by the rules and articles of war, which have been established by the United States in Congress assembled, *as far as the same may be applicable to the constitution of the United States*, or by such rules and articles [of war], as may hereafter by law be established."[521] Congress passed a similar law after ratification of the Bill of Rights,[522] and thereafter applied the longstanding rules and articles to newly enlisted officers and privates.[523]

In effect, then, the Articles of War of 1776, and the appended rules, remained in effect for the first seventeen years of the Constitution, at least insofar as they were "applicable to the constitution of the United States."[524] The post-1789 law, therefore, included the spying resolution of August 1776,[525] as well as Articles 18 and 19 of the September 1776 Articles of War, which authorized trial by court-martial for certain forms of aid to the enemy: relieving the enemy with money, victuals, or ammunition; knowingly harbouring or protecting an enemy; and holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly.[526] As explained in Part IV, the spying-behind-the-lines offense applied only to persons who were not members of, nor owed allegiance to, any of the states, and who were captured before returning to camp "in or about the fortifications or encampments of the armies of the United States";[527] and the better reading of Articles 18 and 19 was that they regulated only persons within, or serving with, the U.S. military, but did not apply to ordinary civil-

518. Secretary Henry Knox, *A Statement of the Troops in the Service of the United States*, *in* 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 5, 6 (Lowrie & Clarke eds. 1832).

519. *See infra* notes 530–38 and accompanying text.

520. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96.

521. Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 119, 121 (emphasis added); *see also* Act of July 1, 1797, ch. 7, § 8, 1 Stat. 523, 525 (providing that "the [commissioned] officers, non-commissioned officers, seamen, and marines, belonging to the navy" shall be governed by the 1775 naval rules insofar as they "may be applicable to the constitution and laws of the United States").

522. Act of Mar. 3, 1795, ch. 44, § 14, 1 Stat. 430, 432.

523. *E.g.*, Act of Mar. 2, 1799, ch. 31, § 3, 1 Stat. 725, 725.

524. Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 121.

525. *See supra* Section IV.B.

526. *See supra* Section IV.C.2.

527. *See supra* Section IV.B.

ians.[528] Congress's early post-constitutional laws, if anything, only confirmed these circumscribed readings of the venerable rules and articles.[529]

Finally, in 1805, Representative Joseph Bradley Varnum, like Secretary Knox before him, urged Congress to adapt the articles of war "to the provisions under the present Government," because "our circumstances had materially changed" since 1776.[530] After sparse debate, Congress enacted a new set of Articles of War, which President Jefferson signed on April 10, 1806.[531] The new articles did not significantly differ from the 1776 articles that had remained in effect from 1789 to 1806.[532] In particular, Congress continued in force the three provisions with which we are most concerned, without material change:

1. The new Article 56 (previously Article 18) provided that "[w]hosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court martial."[533]
2. Article 57 (previously Article 19) provided that "[w]hosoever shall be convicted of holding correspondence with or giving intelligence to the enemy either directly or indirectly, shall suffer death or such other punishment as shall be ordered by the sentence of a court martial."[534]
3. The spying provision, denominated "Section 2" of the 1806 Act, provided "[t]hat in time of war, all persons not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial."[535]

Congress did not in any way signal that Articles 56 and 57 would permit courts-martial of persons unconnected to the armed forces. To the contrary, the section of the statute containing those quasi-treason provisions specified that "the following shall be the rules and articles *by which the armies of the United States shall be governed*."[536] And that specification made perfect sense, not only because the 1776 Articles on which these articles were directly based did not apply to ordinary civilians,[537] but also because all, or almost all, of the conduct

528. *See supra* Section IV.C.2.

529. For example, Congress specified that the articles and rules were to govern "commissioned officers, non-commissioned officers, privates and [military] musicians." Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 119, 121.

530. 15 ANNALS OF CONG. 264 (1805) (statement of Rep. Varnum).

531. Act of Apr. 10, 1806, ch. 20, § 1, 2 Stat. 359.

532. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 22 & n.160 (1958).

533. Act of Apr. 10, 1806, ch. 20, § 1, 2 Stat. 359, 366.

534. *Id.*

535. *Id.* § 2, 2 Stat. at 371.

536. *Id.* § 1, 2 Stat. at 360 (emphasis added).

537. *See supra* notes 400–08 and accompanying text.

they described would amount to treason, and the notion that treason could be adjudicated by a military tribunal would surely trigger serious constitutional questions in light of the Treason Clause of Article III.[538]

This reading was confirmed by the first major contemporary treatise on U.S. military law. In 1813, General Isaac Maltby, who would serve as Brigadier General throughout most of the War of 1812, published *A Treatise on Courts Martial and Military Law*. Maltby devoted a long section of this volume to the question at hand. He insisted that, with the principal exception of foreign spies caught behind army lines, "[o]f course, no private citizen, or person in civil life, is amenable" to courts-martial.[539] Maltby noted with surprise, however, that General Zebulon Pike, commanding officer of the Army at West Lake Champlain, had recently published a military order, dated January 5, 1813, staking out the contrary view.[540] Pike's order insisted that members of the community who held correspondence with, or gave intelligence to, the enemy, could be court-martialed pursuant to Article 56 of the Articles of 1806.[541] Such an order, wrote Maltby, had previously "never been known in a free country."[542] To be sure, such citizens, "so lost to a sense of their duty," could be tried for their crimes—but by a civil, not a military, tribunal.[543] Pike had misconstrued the 1806 Articles, wrote Maltby, which were not styled "for the government of the citizens of the United States," but rather "for the government of the *armies* of the United States."[544] The narrower statutory interpretation, Maltby insisted, was sufficient to settle the matter, without even adverting to the constitutional right to a trial by jury, which loomed in the background.[545] If Pike's contrary view were to take hold, Maltby warned, a "complete military despotism" would prevail.[546] Maltby was consoled, however, by the thought that Pike's doctrine "[could not] be supported, nor the practice of it carried into effect, so long as due diligence [was] exercised by a free people."[547]

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538. A century later, one prominent commentator expressed amazement that "it does not appear that the constitutionality of . . . unrestricted application [of the enemy aid articles] to civilians was ever discussed or even considered by Congress." Morgan, *supra* note 369, at 105. The absence of any constitutional discussion, or concern, is entirely understandable, however, once one realizes that Congress probably did not intend the Articles in question to reach ordinary aid to the enemy *by civilians*. Professor Morgan's all-too-common mistake was to assume it was "clear beyond dispute that the [Articles in question] and all [their] predecessors, beginning with November, 1775, were intended to be operative against civilians." *Id.* at 100. As we have seen, that was not the case.

539. ISAAC MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW 37 (Boston, Thomas B. Wait & Co. 1813).

540. *Id.* Pike was killed in the battle of York (Toronto) in 1813; he had earlier been an explorer, and Pikes Peak in Colorado bears his name. *See* JARED ORSI, CITIZEN EXPLORER: THE LIFE OF ZEBULON PIKE 168, 271 (2013).

541. MALTBY, *supra* note 539, at 37–39.

542. *Id.* at 37.

543. *Id.* at 38.

544. *Id.* at 39.

545. *Id.* at 39–40.

546. *Id.* at 40.

547. *Id.*

Practice during the War of 1812 confirmed that Maltby, not Pike, had the better of the argument. Whereas there is plenty of evidence of civilians being tried in Article III courts for treason by virtue of alleged provisions of aid and comfort to the enemy,[548] there is no record of any civilians being tried by courts-martial during the war under Articles 56 and 57. And, in at least two cases, New York courts held that civilians providing aid to the enemy were *not* subject to military adjudication.[549] Four decades later, in *Milligan*, the Supreme Court cited one of these cases with obvious approval, as demonstrating that the military trials of citizens "not in the military service" were "uniformly condemned as illegal."[550]

The leading such case involved a claim for assault and battery and false imprisonment against an Army officer (Smith), for detaining and failing to release a U.S. citizen (Shaw) who had been arrested by other Army officers.[551] Smith's principal defense was that the detention was lawful because he had reason to believe that Shaw might have been subject to a court-martial, given that the other officers had charged him with a variety of offenses, including that he had furnished the enemy with necessaries, and that he was a British spy.[552] The state appellate court, however, held that a court-martial would not have jurisdiction over any of the charges against Shaw. "He might be amenable to the civil authority," the court held, but the military had "a want of jurisdiction."[553]

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548. *See, e.g.*, United States v. Pryor, 27 Fed. Cas. 628 (C.C.D. Pa. 1814); United States v. Hodges, 26 Fed. Cas. 332 (C.C.D. Md. 1815); United States v. Lee, 26 Fed. Cas. 907 (C.C.D.C. 1814); NATHANIEL WEYL, TREASON: THE STORY OF DISLOYALTY AND BETRAYAL IN AMERICAN HISTORY ch. 9 (1950).

549. Those cases are discussed in greater detail in Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1580–85 (2004).

550. *Ex parte* Milligan, 71 U.S. 2, 128–29 (1866).

551. Smith v. Shaw, 12 Johns. 257 (N.Y. Sup. Ct. 1815).

552. *Id.* at 258–60.

553. *Id.* at 265. Indeed, it does not appear from the reported case that Smith even argued that a court-martial could try Shaw for providing aid to the enemy: Smith's counsel did not invoke Article 56 of the Articles of War, even though that article would have been directly on point if it had been understood to apply to civilians. *See id.* at 259–61 (reporting arguments on behalf of Smith).

The other significant New York case involved Samuel Stacy, who was arrested by the military on July 1, 1813, on suspicion of having provided intelligence to the British that facilitated the May 29 attack on the vulnerable base at Sackets Harbor, near Ontario. *See In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813). Stacy filed for a writ of habeas corpus, seeking relief from military detention. When served with the writ, one officer stated that "Stacy had been guilty of treasonable practices, in carrying provisions and giving information to the enemy, and that he believed a court-martial was the proper tribunal to try the said Stacy, though he was a citizen, or words of like import." *Id.* at 330. Chancellor Kent, on the appellate court, opined not only that the charge of treason was pretextual, and not sufficiently "founded upon oath" with "specification of the matters of which it might consist," but also that the treason charge was "without any colour of authority in any military tribunal to try a citizen for that crime." *Id.* at 333. Stacy was released from military custody shortly thereafter because, as a citizen, he was not subject to trial by court-martial. *See* Letter from John Armstrong, Secretary of War, to Senator Joseph Anderson, Chairman of the Military Committee of the U.S. Senate (July 26, 1813), *in* 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES—MILITARY AFFAIRS 384 (Lowrie & Clarke eds., 1832). Once again, the failure of the military officers to rely upon, or even to invoke, Article 57, is telling.

In another case that is also revealing of the Executive's understanding of the quasi-treason articles, Elijah Clark, a U.S. citizen, spied on U.S. Army camps and conveyed information to the British about Army conditions.[554] A court-martial convicted Clark of spying.[555] President Madison overturned the verdict because the spying provision of the law, by its terms, did not apply to U.S. citizens.[556] Notably, Madison did not suggest to the commanding officer that the court-martial should charge Clark with a violation of Article 57, for providing intelligence to the British; instead, he was "pleased to direct, that unless [Clark] should be arraigned by the *civil* court for treason, or a minor crime, under the laws of the state of New York, he must be discharged."[557]

This wartime practice, and the pre-1812 history that informed it, support Isaac Maltby's understanding of the narrow scope of the "whosoever" Articles that have been part of the federal code since 1776. It is also consistent with the general presumption during this period, reflected in formal opinions of the Attorney General, that the right to a jury trial is "the great palladium of our most sacred rights," and that therefore statutes should not be construed to have authorized military trials, and thus to have abrogated that "high constitutional privilege by implication."[558] There is almost nothing in this period to suggest the Congresses or Presidents of the era believed that those early Articles of War, including the 1806 codification, permitted military trials against persons unaffiliated with the armed forces, with the exception of enemy spies who were not U.S. citizens and who were captured under very specific circumstances. Nor is there evidence of any political branch understanding, in those first decades after

554. *See* HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES 409–10 (1814).

555. *Id.*

556. *See* "Opinion of the President," in Letter from Secretary of War William Eustis to General A. Hall (Oct. 20, 1812), *in id.* at 410–11.

557. *Id.* (emphasis added). A leading post-war constitutional law treatise, going beyond Madison's statutory understanding, took the view that such a military trial of a U.S. civilian spy for the enemy would be unconstitutional. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 209–10 (1825).

One other notorious military trial in the War of 1812 should also be noted, although it is a precedent of little or no value to the question at hand. After victory in the Battle of New Orleans in 1814, General Andrew Jackson continued to impose martial law in New Orleans, fearing that the British might return. This prompted a letter of complaint in the *Louisiana Courier*, written by state Senator Louis Louaillier, politely arguing that Jackson had gone too far and that civil order should be restored in the city. *See* H.R. DOC. NO. 69, 27th Cong., 3d Sess. at 5–7 (1843). Jackson arrested Louaillier and brought him up before a court-martial, where one of the charges (the only one the panel agreed to hear) was that Louaillier's publication of the letter violated the 56th and 57th articles of the Rules and Articles of War. *Id.* at 8 (concerning Charge No. 5). Louaillier objected that those articles did not govern civilians such as himself. *Id.* at 4. Although the court-martial overruled that objection, *id.* at 5, 10, the merits of the allegation were facially preposterous, and on the second day of the proceedings the court-martial found Louaillier not guilty, *id.* at 12.

558. Cadets at West Point, 1 OP. ATT'Y GEN. 276, 276–77 (1819) (William Wirt); *see also id.* at 279 ("[T]he sacred respect in which Congress have ever regarded the right of trial by jury . . . will justify us in assuming it *as their sense*, that this right is never to be taken away by implication . . . ."); Offences on Vessels with Letters-of-Marque, 1 OP. ATT'Y GEN. 177, 177 (1814) ("The jurisdiction of the military tribunals is not to be stretched by implication.").

the Constitution's ratification, that Article III would permit military trials over all or most domestic-law offenses related to war.

VI. SPYING, TREASONOUS CONDUCT, AND MILITARY TRIALS IN LATER AMERICAN WARS

As we have seen, during the Revolutionary War, and up through and beyond the War of 1812, there was a general understanding that, apart from the idiosyncratic exception of alien spies apprehended within Army encampments, and a rare situation in 1777–1778 where civilian courts were unavailable around Philadelphia, courts-martial were not available to try persons other than those within or employed by the armed forces.[559] The "quasi-treason" Articles of War were generally understood not to confer such authority, and Article III and the Sixth Amendment would have presented significant barriers had Congress deigned to authorize such military trials.

Even so, the 1778 kidnapping resolve and the 1780 Joshua Hett Smith trial complicated this otherwise unbroken narrative. Moreover, as I will show in this Part, those anomalies, along with the spying law itself, became the source of one of the principal arguments invoked in some of the nation's major wars—the Civil War and the two World Wars—for the proposition that military tribunals can try certain war-related domestic law offenses.

As far as I have been able to determine, the first inkling of such an argument—other than in General Pike's unimplemented military order of 1813[560]—appeared in an 1846 treatise on American military laws, written by Army Lieutenant John O'Brien. O'Brien acknowledged that the 56th and 57th Articles of War "relate to offences closely allied to treason,"[561] and thus that they were "cognizable either by the civil or by the military courts."[562] Yet he further assumed that Congress's use of the term "whosoever" in both articles rendered those provisions applicable to those "in civil life," as well as to those within the military—a "deviation from the general rule" that courts-martial are reserved for trial of persons within the armed forces.[563] O'Brien surmised, unpersuasively, that the justifications for such a deviation included "the necessity of a prompt and immediate example" and "the difficulty, if not impossibil-

559. *See also* Steiner's Case—Civil Responsibility of the Army, 6 OP. ATT'Y GEN. 413, 425 (1854) ("A court martial is a lawful tribunal, existing by the same authority that any other court exists by, and the law military is a branch of law as valid as any other, and it differs from the general law of the land in authority only in this, that it applies to officers and soldiers of the army, *but not to other members of the body politic*, and that it is limited to *breaches of military duty*." (emphasis added)).

560. *See supra* notes 540–42 and accompanying text.

561. JOHN O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL 146 (1846).

562. *Id.* at 148.

563. *Id.* at 147.

ity, of bringing the offenders before a civil tribunal."[564] O'Brien did not contend with Isaac Maltby's persuasive counterargument that the Articles were more limited in scope; he did not attempt to explain why the Continental Congress and General Washington failed to rely on such provisions during the War of Independence to deal with civilians providing aid to the British, nor why those articles similarly went unused for such purposes during the War of 1812; and O'Brien did not engage with the serious constitutional questions that his reading presented.

A. THE CIVIL WAR

At the outset of the Civil War, the Confederacy enacted its own Articles of War, adopted virtually verbatim from the 1806 Articles—including, importantly, the two quasi-treason provisions (Articles 56 and 57),[565] and the spying provision (Section 2).[566] In September 1862, the Confederate Army's Judge Advocate, James O. Fuqua, was asked whether Articles 56 and 57 applied to civilians unconnected to the Confederate military forces.[567] Fuqua adopted Maltby's reading—the traditional understanding—rather than O'Brien's: He opined that the quasi-treason Articles applied only to persons "belonging to the armies of the Confederate States," notwithstanding use of the word "whosoever," and that military courts in general (with one minor exception not relevant here) had no jurisdiction to try civilians.[568] Fuqua acknowledged his initial assumption that such a reading of the Articles would be "untenable." Upon study of the question, however, he concluded that the government had clearly "left the punishment of this class of traitors exclusively to the slow and uncertain process of the civil tribunals," even though that might be "inconvenien[t] and even danger[ous]."[569] Thereafter, the Confederate Congress rarely, if ever, authorized the military trial of civilians. As Professor Currie wrote, even "in the waning days of the war," when that legislature made it unlawful to assert false claims against the government, to conspire to overthrow the Confederacy, or to give military information to the enemy, it "provided for courts-martial only of members of the armed forces; civilian defendants were to be tried in the

564. *Id.* at 147–48. For example, common civilian court practice pursuant to treason laws in the states before the Constitution, and under the federal treason statute thereafter, belied O'Brien's assumption that civil trials would be "difficult[], if not impossib[le]." *Id.*

565. *See* ARTICLES OF WAR, FOR THE GOVERNMENT OF THE ARMY OF THE CONFEDERATE STATES 14 (Charleston, 1861).

566. *Id.* at 24.

567. *See* Letter from James O. Fuqua, Judge-Advocate and Provost-Marshal-General, to Brig. Gen. Daniel Ruggles (Sept. 22, 1862), in OFFICIAL RECORDS, *supra* note 122, Ser. 2, vol. 4, at 894, 894–95.

568. *Id.* at 895–96.

569. *Id.* at 896–97. The following year, the Confederate Acting Attorney General concluded likewise. *See* Jurisdiction of Courts Martial (Nov. 18, 1863), *in* THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL 1861–1865, at 352 (Rembert W. Patrick ed., 1950) ("Does the 57 Article of War apply to any but persons belonging to the Army of the Confederate States? . . . I may answer at once in the negative.").

ordinary civil courts."[570]

Things were very different, however, on the Union side of the conflict.

1. Joseph Holt's Reading of the Quasi-Treason Articles in the Smithson Court-Martial

In a treatise published at the outset of the Civil War, Captain Stephen Vincent Benét (grandfather of the poet and novelist) followed O'Brien's lead, construing Articles 56 and 57 of the 1806 Articles to apply to persons unconnected to the military.[571] More importantly, the Union Army itself adopted this revisionist reading of the quasi-treason Articles, and began to prosecute persons unconnected to the Union armed forces in courts-martial for treasonous activity, pursuant to Articles 56 and 57.[572]

In at least one such case, the Army Judge Advocate General, Joseph Holt—the principal architect of the system of military commissions in the Civil War and the man who would later prosecute the Lincoln assassination conspirators—was compelled to explain why Article 57 applied, and why a court-martial proceeding against a civilian for treasonous activities would be constitutional.[573]

In December 1861, the Navy came upon a quantity of contraband correspondence on the schooner *Lucretia*, near Alexandria, Virginia. The haul included two encoded letters written by one "Charles R. Cables" to an unidentified rebel colonel. The letters warned of an alleged plot by Lincoln and his cabinet to fund two Union loyalists from Tennessee—Senator Andrew Johnson and Clerk of the House Emerson Etheridge—to burn bridges and mills in Tennessee. The military soon determined that the letters were written by William T. Smithson, a banker in Washington, D.C. Secretary of State Seward ordered Smithson's arrest on January 8, 1862, and civil authorities held Smithson until the War Department ordered him to be transferred to military custody on February 15. In May 1862, Smithson was discharged after taking an oath of allegiance.

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570. David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1339 (2004).

571. STEPHEN V. BENÉT, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 30–31 (1862). Benét's sole basis for this reading was the statutory term "whosoever."

572. *See* WINTHROP 2d ed., *supra* note 120, at 103 & nn.27–28. In one case early in the war, for instance, a court-martial convicted Ulysses C. Vannosdoff of ostensible violations of Articles 56 and 57 for enlisting in the rebel army and inducing others to do the same. The court-martial sentenced Vannosdoff to confinement at hard labor during the war and confiscation of his property. *See* Records of the Office of the Judge Advocate General (Army), 1792–2010 (National Archives Record Group 153); Court Martial Case Files, 12/1800–10/1894; Case of Ulyssses C. Vannosdoff—Citizen (Headquarters, W. Dep't, Sept. 20, 1861) [National Archives Identifier 1805311; Local Identifier II-473]. Notably, that same court-martial, on the same day, convicted another Missouri civilian, Isaac Wilcox, for "[t]reason against the Government of the United States," based upon similar facts, and without express reference to Articles 56 and 57. *See* Records of the Office of the Judge Advocate General (Army), 1792–2010 (National Archives Record Group 153); Court Martial Case Files, 12/1800–10/1894; Case of Isaac Wilcox—Citizen, Missouri (Headquarters, W. Dep't, Sept. 20, 1861) [National Archives Identifier 1813076; Local Identifier KK-817].

573. *See generally Case of William T. Smithson*, OFFICIAL RECORDS, *supra* note 122, Ser. II, vol. 2, at 1354–57.

One year later, the military discovered that Smithson was heavily engaged in the purchase and sale of Southern securities and currency, and was acting as a business agent for Confederate authorities. In May 1863, the military arrested Smithson once again.[574] Joseph Holt wrote to Secretary of War Stanton, urging that because Smithson's conduct amounted to treason, he should be held without access to the writ of habeas corpus (which Lincoln had suspended, with recent congressional ratification), and his property confiscated.[575] In July, Smithson's brother-in-law importuned President Lincoln to have Smithson turned over to the civil court, as appeared to be contemplated by Sections 2 and 3 of the 1863 Habeas Act;[576] and on August 1, Lincoln agreed that Secretary Stanton should "[p]lease consider the case & dispose of it according to law."[577] Lincoln's notation was given to one of Stanton's clerks, but apparently Stanton never responded, and Smithson remained in military detention in the Capitol Prison.

In September, a number of District residents, vouching for Smithson's character, wrote to the President, once more seeking Smithson's transfer to civilian court.[578] They explained that a civilian grand jury had indicted Smithson for treason based upon his conduct related to his trading in Confederate securities, presumably pursuant to an updated treason statute that Congress enacted the previous year.[579] A motion had been made to the criminal court judge to issue an order directing Smithson's transfer, but after learning from Stanton that the military refused to surrender Smithson to civil authorities, the judge decided that "he would not bring his Court in conflict with the military authorities."[580] The supplicants pleaded with Lincoln to have Smithson released or transferred to civil court for trial.[581]

The War Department never did transfer Smithson to the civilian justice system, however; instead, Stanton and Holt decided to try him by court-martial, based upon the two letters he allegedly wrote to a Confederate officer back in 1861. In November 1863, two charges were brought against Smithson before a

574. *See* Letter from Edwin M. Stanton to Charles A. May (May 20, 1863), *in* OFFICIAL RECORDS, *supra* note 122, Ser. II, vol. 5, at 664, 664.

575. Letter from Joseph Holt to Edwin M. Stanton (May 25, 1863), *in* OFFICIAL RECORDS, *supra* note 122, Ser. II, vol. 5, at 699, 700.

576. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, §§ 2, 3, 13 Stat. 755, 755–56 (1863); *see also* Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45 (discussing the 1863 Habeas Act).

577. Endorsement Concerning William T. Smithson (Aug. 1, 1863), *in* 6 COLLECTED WORKS OF ABRAHAM LINCOLN 361 (Basler ed., 1953).

578. Petition of Charles Wilson and Others to Abraham Lincoln (Sept. 1863), *in* PAPERS OF ABRAHAM LINCOLN, http://lincolnpapers2.dataformat.com/images/1863/09/221776.pdf [https://perma.cc/M3KX-A3XN] [hereinafter Wilson Petition].

579. Act of July 17, 1862, ch. 195, § 1, 12 Stat. 589, 589–90. The indictment can be found as an exhibit to the court-martial record in *Trial of William T. Smithson*, National Archives, RECORDS OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL (ARMY), 1792–2010, Court Martial Case Files, Record Group 153, Box 976, MM1125 [hereafter Smithson Trial Case File].

580. Wilson Petition, *supra* note 578, at 2–3.

581. *Id.* at 3–4.

court-martial under Article of War 57, alleging that he had held correspondence with, and had given intelligence to, the enemy, by virtue of sending those two letters.[582]

In defense, Smithson's counsel argued both that the evidence was insufficient to show that he wrote the pseudonymous letters, and that the evidence was, in any event, inadequate to show a correspondence with the enemy, or a sharing of intelligence, because the letters had never reached their audience (having been interdicted by the Navy).[583] Smithson's principal defense, however, was a detailed, lawyerly argument that the court-martial lacked jurisdiction over his case, and that he should instead be tried in the nearby civil court in the District, "where the municipal law is daily administered" and where both civilians and military personnel were regularly being "tried and punished." Smithson's counsel argued both that Article 57 did not apply to persons unaffiliated with the military,[584] and that if it did apply it would violate the constitutional right to a jury trial found in Article III and the Sixth Amendment—the "great palladium of our most sacred rights."[585]

Judge Advocate General Holt successfully defended the court-martial's statutory and constitutional jurisdiction: The court-martial turned aside Smithson's jurisdictional plea, proceeded to find him guilty of all charges, and sentenced him to a term of five years in the penitentiary in Albany, New York.[586] During his argument to the court-martial, however, Holt acknowledged that the jurisdictional question was ultimately for President Lincoln to resolve in his review of the judgment: "[I]t cannot be doubted anything of weight that may have been urged on the question of jurisdiction under the Constitution will receive the most conscientious and careful consideration."[587] Accordingly, in his report to the President and to Secretary Stanton, Holt offered an elaborate, formal defense of the court-martial's jurisdiction over nonmilitary personnel for traitorous assistance to the enemy, allegedly in violation of Article 57.[588]

Part of Holt's argument was based upon a straightforward and unabashed disdain of civilian proceedings precisely because of their more robust, and less summary, procedural protections: "Without the authority to visit upon this class

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582. General Orders No. 371, War Dep't, Adjutant General's Office (Nov. 18, 1863), *in* 2 GENERAL ORDERS OF THE WAR DEPARTMENT 634, 634–37 (N.Y. 1864).

583. The account in this paragraph is derived from the handwritten "Statement of Defense," in the Smithson Trial Case File, *supra* note 579.

584. He specifically argued that the Continental Congress's original change in the Article from "whosoever, belonging to the forces of the United States" to a simpler "whosoever," in September 1776, *see supra* notes 395–398 and accompanying text, was best read to ensure that the Article covered suttlers and retainers to the armed forces. *See supra* notes 400–01 and accompanying text.

585. Smithson's counsel borrowed that formulation from Attorney General Wirt's 1819 opinion, *see supra* note 558.

586. General Orders No. 371, *in* 2 GENERAL ORDERS OF THE WAR DEPARTMENT, *supra* note 582, at 637.

587. Holt made this statement in his closing argument, which can be found in the Smithson Trial Case File, *supra* note 579.

588. Report of the Judge Advocate General, *Case of William T. Smithson*, 5 OPS. J.A.G. RECORDS 287 (Nov. 13, 1863).

of offenses *summary and severe* punishments," Holt wrote:

> the War making power would be greatly enfeebled if not absolutely paralyzed. Proceedings in the ordinary criminal courts, by indictment and jury trial, *would have no terror* for such traitors, through whose machinations indeed, the military power of the Country might be overthrown, before the machinery of such courts could be even set in motion. . . . If [enemy abettors among the demoralized and disloyal classes outside of the Army] cannot be promptly and unsparingly punished, there can be no successful prosecution of hostilities.[589]

Holt's primary argument, however, was decidedly historical, and dependent upon a particular narrative about what had occurred before and shortly after the Revolutionary War. His argument is worth setting out at length, as it resonates so closely with the "preservationist" account on which the government is presently relying in support of military commission trials of domestic-law offenses:

> The history of the 57th article of War, will go far to show the conviction which has obtained from the foundation of the government, of the necessity of summarily and severely punishing by military courts, this class of offenders, and the acquiescence in such proceedings as in harmony with the constitution. At the outset of the revolution,—as is learned from the correspondence of that period—so strong a popular prejudice existed against the military, that the establishment of a military code,—now known as the articles of War—was an extremely difficult and almost odious task. . . . The article of War, now known as the 57th but which was the 28th of the code adopted by Congress on the 30th of June 1775, was restricted to persons "belonging to the Continental army." This restriction was probably the fruit of the prejudice referred to. It was soon discovered however that thus restricted, the article would be in effect a *brutum fulmen*, since the offenders against whom its penalties were directed, were not within, but without the military service. Accordingly in November following, the same Congress threw off this restriction and enacted that "all persons convicted of holding a treacherous correspondence with or giving intelligence to the enemy shall suffer death, or such other punishment as a general Court Martial shall think proper—" This article of War, thus enlarged, was in force on the ratification of the Federal Constitution, and on the adoption of the amendment, which is claimed in the defense to be invaded by this trial. It continued to be the law of the service until 1806, when it was substantially reaffirmed by Congress, and adopted as it now exists, the word "whosoever" having been substituted for "all persons." *The feature of the article now assailed thus appears to be older than the constitution, to have been in force when that instrument came into existence, and to have been re-adopted, a few years thereafter by a Congress, in which were in all probability, many who must be ranked among the founders of the republic, and who were doubtless intimately acquainted with the spirit and import of*

589. *Id.* at 292 (emphasis added).

> *this and other provisions of the constitution*. This action may well be accepted as virtually a contemporaneous exposition of this clause of the fundamental law, which, added to the usage in the service that has constantly prevailed, must be regarded as precluding the government from opening a question thus long closed. The power now contested, has been exercised without doubt as to its constitutionality, through all the wars in which the republic has been engaged, and involved as we are, in civil commotions, and grappling with a gigantic rebellion, whose emissaries are found every where in our midst, and hanging about our military camps, such a power could not be surrendered without a culpable disregard of the highest considerations connected with the public safety.[590]

Importantly, Holt was using this historical account to argue two things: not only that the quasi-treason provisions of the Articles of War were applicable to civilians unconnected to the Union armed forces, but also that there was no constitutional problem with that reading, because Congress endorsed it without hesitation shortly after the Constitution was ratified, and because it "has been *exercised without doubt as to its constitutionality*, through all the wars in which the republic has been engaged." Yet Holt's account was deeply problematic on both statutory and constitutional grounds.

To begin with, Holt's historical account of the Articles of War was shot through with historical errors:

1. As explained earlier, the Continental Congress did not enact the November 1775 amendment in order to expand the substantive coverage of the restriction in the 28th article of the June 1775 Articles.[591]
2. The term "whosoever" was first added not (as Holt argued) in 1806, but in Section XIII, Articles 18 and 19 of the September 1776 Articles of War—and it, too, was not designed to broaden the scope of those prohibitions to persons unconnected to (that is, not enrolled in or employed by) the military.[592]
3. The 1806 Congress did not "substantially reaffirm[]" or "readopt[]" Holt's reading of the Articles to cover civilians—because that was not the general understanding of the provisions *before* 1806.[593]
4. Nor was Holt's reading of Article 57 "exercised without doubt as to its constitutionality through all the wars in which the republic has been engaged"—to the contrary, that reading was repudiated in the War of 1812, and it was only in the Civil War itself that the military, at Holt's own command, began to act in reliance upon the broader reading.[594]

590. *Id.* at 294–95 (emphasis added).
591. *See supra* note 379.
592. *See supra* notes 396–11 and accompanying text.
593. *See supra* notes 530–38 and accompanying text.
594. *See supra* notes 548–57 and accompanying text.

Even if there had been merit to Holt's statutory history, however, Holt realized that his reading of Article 57 would raise serious constitutional questions, because it would appear to suggest that Congress could ignore the protections of Article III and the Sixth Amendment not only as to cases of treason, which Article III specifically addresses, but also, perhaps, as to any and all domestic-law offenses that had an effect on the Army's war efforts. As the passage above demonstrates, Holt's principal defense of his reading was that the constitutional question was settled by an implicit "contemporaneous exposition" of the Constitution—an "exposition" that took the form of the early enactment and (allegedly) common use against civilians of the quasi-treason Articles themselves. Even so, Holt's historical account, even if it had been accurate, did not contend with the plain constitutional text, nor did it offer any limiting principles.

Accordingly, Holt went further: Citing O'Brien and Benét (neither of whom had considered the constitutional question), Holt offered the following structural argument, predicated on the Grand Jury Clause of the *Fifth* Amendment ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . . .")[595]:

> In a period of hostilities, relieving the enemy, with money, victuals or ammunition, or knowingly harboring and protecting him, or holding a correspondence with or giving intelligence to such enemy, is a crime which may be said within the meaning of the constitution, to "arise in the land or naval forces," since it directly connects itself with the operation and safety of these forces, whose overthrow and destruction it seeks. This is especially true when, as in case of the prisoner, the correspondence is held or intelligence given from the midst of our military camps, whose shelter he was enjoying, and with whose plans and preparations for movements, he had every opportunity of acquainting himself. This view of the constitutionality of these articles of War (56 + 57) has uniformly prevailed. Benet (31) and O'Brien treat as clear the right to try by military courts certain classes of persons not belonging to the army. The latter author, at page 147, remarks with much force on the necessity of such a power as resulting from the nature of the offenses and the urgency with which the public safety demands their prompt and immediate punishment.[596]

It is not surprising that Holt placed such reliance on the Grand Jury Clause, in light of a then-recent Supreme Court precedent. Just five years earlier, in *Dynes*, the Court had held, in effect, that because the Grand Jury Clause exempted members of the armed forces from the right to a grand jury, they were also exempt from the jury trial right of Article III and the Sixth Amendment (and,

595. U.S. CONST. amend. V (emphasis added).
596. 5 OPS. J.A.G. RECORDS at 293.

implicitly, the Article III guarantee of an independent judge), and thus could be subject to courts-martial.[597] The *Dynes* Court's reasoning was vulnerable from the start—after all, Article III *preceded* ratification of the Fifth Amendment, and there is no evidence that the latter provision of the Bill of Rights was designed to expunge judge and jury rights established by the earlier guarantee—and it did not stand the test of time.[598] Even so, it made sense for Holt, in 1863, to rely upon *Dynes* and the Grand Jury Clause as support for his argument concerning abrogation of the right to a trial by jury for a civilian such as Smithson, too.[599]

But even if Holt had been correct that cases "arising in the land or naval forces" were exempt from the judge and jury guarantees of Article III, there remained the question of whether and how the military commission cases in question, involving civilians' aid to the Confederacy, *did* "arise in" the military forces, even when not committed by military personnel or by persons accompanying the forces. Holt made two distinct arguments on this score. The narrower, and easier, case, he suggested ("[t]his is especially true") is when the individual acts from within the military encampment itself, such as when a spy is caught red-handed in the Army camp, or (Holt's example) when a prisoner attempts to send forth, to his comrades, intelligence to which he has been privy. In such cases, perhaps it makes some sense to say that the offense literally "arises in"—that is, among—the military forces, although the Supreme Court would later effectively reject that reasoning as a basis for military tribunals.[600] Such cases, however—in which the accused's actions occurred within actual Army encampments—were few and far between, and thus did not cover the vast majority of the cases Holt and his colleagues were prosecuting in military tribunals.

Holt therefore constructed a much broader theory of "arises in." He argued that conduct "arises in" the land forces if it "directly connects itself with the operation and safety of th[e] forces, whose overthrow and destruction it seeks." On this view, any aid to the enemy that is likely to undermine the Union Army's war effort would "arise in" the armed forces and would, for that reason, permit military adjudication, even when (as in Smithson's case) the conduct could also be tried in an Article III court.

This "effects-on-the-military test" could not possibly be right, even apart from the point, later established, that the Grand Jury Clause is not a source of congressional power to establish military tribunals.[601] It would mean, for

597. *See supra* notes 175–86 and accompanying text.

598. *See supra* note 67.

599. Holt himself, on behalf of the government, relied almost exclusively on *Dynes* in his brief to the Supreme Court in the famous *Vallandigham* case later in 1863. *See* Brief for the Petitioner on Application for Writ of Certiorari at 5, *Ex parte* Vallandigham, December Term 1863. In its decision in that case, the Court concluded that it lacked jurisdiction to review the military commission proceedings, and therefore did not reach the merits of the constitutional question. *Ex parte* Vallandigham, 68 U.S. 243, 251 (1864).

600. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 n.5 (1955).

601. *See id.*

example, that virtually any act of treason could be tried in military court. Just one month before Holt wrote, a New York court rejected this reasoning.[602] And many years later, the Supreme Court effectively undermined Holt's "arising in" argument, holding in *Reid v. Covert* that Congress does not have the authority to subject children and other dependents of servicemen to courts-marital, even when they commit an offense while accompanying service members abroad at government expense and receiving other benefits from the government.[603] The government argued in *Reid*—shades of Holt's argument in the Civil War—that it was "implicit in the Federal Constitution," and "consistent with the guarantee of a jury trial for cases not arising in the land or naval forces," to assume that Congress "is given certain authority to determine what persons not actually in the army or navy were to be subject to court-martial *because of their connection with the military*."[604] Justice Black's plurality opinion, however, explained that the Fifth Amendment exception for "cases arising in the land or naval forces," together with the correlative power of Congress to provide for the "Government and Regulation" of the armed services,[605] "does not encompass persons who cannot fairly be said to be 'in' the military service."[606] Justice Black insisted that the "latitudinarian interpretation" pressed by the government would "be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority"[607]:

> The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.' There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.[608]

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602. *See* Jones v. Seward, 40 Barb. 563, 571–72 (N.Y. Sup. Ct. 1863) (explaining that if someone beyond military lines gives vital intelligence to the enemy, "[t]his man is, indeed, emphatically a traitor; he is guilty of high treason against the United States of America; but he is to be tried by a civil tribunal, according to the course and practice of the established law, on a presentment or indictment of a grand jury. His case has not arisen in the land or naval forces, or in the militia when in actual service in time of war or public danger. . . . *Although it indeed affects the operations of a certain portion of the land forces*, it is not a military but a civil offense." (emphasis added)).

603. *See* 354 U.S. 1, 22–23 (1957) (plurality opinion).

604. Supplemental Brief for Appellant and Petitioner on Rehearing at 79, Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (1957) (Nos. 701, 713) (emphasis added).

605. U.S. CONST. art. I, § 8, cl. 14.

606. *Reid*, 354 U.S. at 22 (plurality opinion).

607. *Id.* at 30.

608. *Id.*; *see also, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 267 (1969) ("[C]ourts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline."); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 284 (1960) (holding that Congress cannot prescribe military jurisdiction over civilian employees of the military for peacetime offenses).

Accordingly, Holt's strongest argument was not his reading of the Fifth Amendment's "arising in" clause, but instead his contention, discussed above, that there was a distinct *wartime* exception to the jury right—an argument predicated not on constitutional text, but upon Holt's (misguided) understanding of the early history of the quasi-treason Articles. It is hardly surprising that Holt tendered that argument in Smithson's case, because that court-martial proceeding itself involved one of those very Articles—Article 57.[609]

Holt's preservationist reasoning also served an objective far beyond Smithson's case, however—namely, to justify the Department of War's extensive Civil War practice of trying non-service members in *military commissions* (rather than courts-martial), tribunals that were (at least at first) not authorized by the Articles or any other statute.

2. The "Necessity" Argument for Military Commissions

By the time Holt wrote in the Smithson case in late 1863, he and other officers within the War Department had established an extraordinary, vast system of military commissions, which the Army used to prosecute a wide range of charges against persons who were unconnected to the Union forces, in addition to cases of spying and providing aid to the enemy, which were prescribed by the Articles of War and thus generally prosecuted in courts-martial.[610] The commissions proceedings began in the border states of Missouri and Kentucky, primarily against organized "guerrilla" groups and other marauders who were engaged in efforts to undermine the Union cause by sabotage, including the destruction of railroads, bridges, and telegraph lines.[611] The cases quickly expanded, however, to other jurisdictions, including the District of Columbia and some northern states, and to a "stunningly wide array of conduct."[612] Some cases involved ordinary crimes such as horse-stealing, robbery, murder, and rape—often with only a very attenuated or nonexistent connection

609. As for Smithson himself, Secretary Stanton and then President Lincoln approved his conviction and five-year sentence, without mentioning the jurisdictional dispute. General Orders No. 371, *in* 2 GENERAL ORDERS OF THE WAR DEPARTMENT, *supra* note 582, at 637. A few months later, Lincoln wrote to Stanton that the Smithson case was "troublesome" because "[h]is wife and children are quartered mostly on our friends, and exciting a great deal of sympathy, which will soon tell against us." *See* Letter from Abraham Lincoln to Edwin M. Stanton (Mar. 18, 1864), *in* 7 COLLECTED WORKS OF ABRAHAM LINCOLN 254, 257 (Basler ed., 1953). The President asked what Stanton thought of sending Smithson to the South, "holding the sentence over him to be re-inforced if he returns during the war." It was not until November 1864, however, that Lincoln had Smithson conditionally released, subject to renewed imprisonment if he misbehaved. *See* Letter from Abraham Lincoln to Edwin M. Stanton (Nov. 21, 1864), *in* 8 COLLECTED WORKS OF ABRAHAM LINCOLN 119, 119 (Basler ed. 1953); *see also* Letter from Edwin M. Stanton, Secretary of War, to Abraham Lincoln (Nov. 21, 1864) (reporting that the Adjutant General was instructed to issue orders conforming to Lincoln's wishes).

610. *See generally* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES chs. 2, 8 (1991); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 263–73 (2012).

611. *See* NEELY, *supra* note 610, at 41–44, 168–72.

612. *See* WITT, *supra* note 610, at 268.

to the war—while others involved a wide array of activities that the military viewed as harmful to the Union war effort, such as obstructing the recruitment of forces and discouraging enlistment, trading with the enemy, traveling into the South without a pass, permitting rebels to lurk in a neighborhood without reporting them, corrupt business dealings with the military, corresponding with a child in the Confederate Army, public condemnation of the draft, and simply expressing sympathy for the Confederacy or criticizing the Union war effort.

The Union lawyers who defended these tribunals did not settle upon a single justification for their constitutionality. They invoked several different theories over time, in various combinations, including, for example, the Grand Jury Clause argument that Holt had raised in the Smithson case;[613] the assertion that the conduct in question (or much of it, anyway) violated the law of war;[614] and a variant on the argument, described earlier, that the Constitution does not govern the exercise of belligerent activities in wartime, but is instead displaced by the law of war.[615] Each of those arguments was problematic, and none withstood the test of time, at least not with respect to the mine run of military commissions cases that the Union Army prosecuted.[616]

For purposes of this Article, two of the arguments are especially pertinent by virtue of their relationship to the Founding-era practice involving spies and individuals who aided the British.

First, the most common and prominent explanation the War Department offered to justify its military commissions was one of exigency—namely, that military tribunals were necessary because the defendants could not be tried in ordinary civilian courts. Holt, for example, writing at the close of the war, insisted that the commissions "originat[ed] in the necessities of the rebellion," and were employed "in regions where other courts had ceased to exist, and in cases of which the local criminal courts could not legally take cognizance, or which, by reason of intrinsic defects of machinery, they were incompetent to pass upon."[617]

This argument thus resembled, in form, the argument the Continental Congress and General Washington offered to justify the use of military courts in the Philadelphia area in 1777–1778: military tribunals were necessary because they were the only game in town.[618] The difficulty with the analogy to 1777 Philadelphia, however, is that the civilian courts had not actually "ceased to exist," literally or in effect, in most of the areas where President Lincoln and his generals declared martial law and began to regularly use military commissions

613. *See supra* notes 595–99 and accompanying text.

614. *See* WITT, *supra* note 610, at 267–73.

615. *See supra* Section II.B.3.c.

616. I discuss these rationales at greater length in Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45.

617. Letter from Joseph Holt to Edwin Stanton, Secretary of War (Nov. 13, 1865), *in* 5 OFFICIAL RECORDS, *supra* note 122, Series III, vol. 5, at 490, 493.

618. *See supra* Section IV.C.3.

in the Civil War; nor were the civil courts unable to "take cognizance" over most of the dangerous conduct that was adjudicated in military commissions. As I discuss elsewhere,[619] the real reason the War Department turned to military commissions was not so much necessity, but rather that it was eager to impose penalties that were much swifter, harsher, and less constrained than in the ordinary course of trials in Article III (and state) courts. Lincoln's generals endeavored to avoid civilian courts, in other words, for the very reasons that the Constitution guarantees access to such courts and disfavors military justice.

In the *Milligan* case, the Supreme Court effectively rejected the War Department's relatively unbounded notion of exigency, the logic of which would permit resort to military courts whenever the political branches determine that the dispensation of justice in civilian courts is insufficiently "severe." Congress can only authorize military tribunals, reasoned the Court majority, in cases where the civil courts are "effectually closed" and the civil administration of the laws "depose[d]."[620] The historical example of Philadelphia in 1777–1778 thus could not have sufficed to support most or all of the Union's practice of military commissions in the Civil War, even under the assumption that the Constitution preserves the federal government's power to emulate that pre-constitutional example.

3. Resurrecting the 1778 Resolve, and the Joshua Hett Smith Trial, in the Lincoln Assassination Trial and the *Milligan* Case

The War Department raised yet another argument in defense of military commissions, however, that was *expressly* predicated upon the pre-constitutional practice. Although this argument is rarely recalled in Civil War histories, the government relied upon it in the two most famous Civil War commissions cases—the trial of the Lincoln assassination conspirators, and the *Milligan* case.

On May 1, 1865, President Johnson signed an order authorizing a military commission trial, in the District of Columbia, of eight of John Wilkes Booth's alleged accomplices in the assassination of Abraham Lincoln.[621] The commis-

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619. *See* Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45.

620. *Ex parte* Milligan, 71 U.S. 2, 127 (1866). Chief Justice Chase, concurring, agreed that the political branches' power to authorize military trials against such civilians was limited by necessity, although he would have allowed Congress more leeway to decide when the civil courts were *effectively* closed. *Id.* at 139–42 (concurring opinion); *see also supra* note 196 and accompanying text. More recently, the Court has indicated that the test is a demanding one:

> There must be some overpowering factor that makes a recognition of [the jury right and other constitutional trial rights] incompatible with the public safety before we should consent to their temporary suspension. If those rights may safely be respected in the face of a threatened invasion, no valid reason exists for disregarding them. In other words, the civil courts *must be utterly incapable of trying criminals or of dispensing justice in their usual manner* before the Bill of Rights may be temporarily suspended.

Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (emphasis added).

621. *See* PITMAN, *supra note* 55, at 17.

sion consisted of nine military officers.[622] The prosecutor was Judge Advocate General Holt, aided by two Assistant Judge Advocates, John Bingham and Henry Burnett.[623] At several points during the proceedings, counsel for the defense challenged the jurisdiction of the tribunal, arguing that Article III required that the case be tried in the federal civilian court that was open and operating in the District.[624]

In support of the tribunal's constitutional jurisdiction, Bingham made a series of arguments, most of which the Supreme Court effectively rejected in *Milligan* two years later.[625] In the midst of his long soliloquy, however, Bingham made an aggressive appeal to practices and alleged constitutional understandings at the Founding: "The struggle for our national independence was aided and prosecuted by military tribunals," Bingham noted, even in cases where "the courts of justice were open."[626] Bingham began this historical part of his speech by invoking the same mistaken account of the quasi-treason articles that Holt had described two years earlier in the Smithson case.[627] He also cited the spying resolve of June 1776.[628] Although, for reasons already explained, these examples did much less work than Bingham (and Holt) assumed they did, Bingham then also specifically raised the example of the February 27, 1778 resolution involving kidnapping. "How comes it," Bingham asked, if the defendants' arguments about the Constitution were correct, "that this enactment was passed by the Congress of 1778, when the constitutions of the several states, at that day, as fully guaranteed trial by jury to every person held to answer for a crime, as does the Constitution of the United States at this hour?"[629] And why didn't any "loyal man ever challenge[]" its constitutionality?[630]

At that point Bingham ratcheted up the stakes, invoking the authority of none other than George Washington, "the peerless, the stainless, and the just, with whom God walked through the night of that great trial."[631] Washington, declared Bingham, enforced the February 1778 resolve—"this just and wise enactment"—"upon all occasions."[632] As we have seen, this was an exaggera-

622. *See id.* at 18.

623. *See id.* at 17–18. Burnett had been the chief prosecutor of the military commission trial of "copperheads" Lambdin Milligan and others in Indiana—a case I discuss below. Bingham went on to become a member of the House of Representatives, in which capacity he was the principal author of Section 1 of the Fourteenth Amendment.

624. *See* Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45.

625. *See* PITMAN, *supra* note 55, at 351–72.

626. *Id.* at 361–62.

627. *See supra* notes 590–94 and accompanying text.

628. PITMAN, *supra* note 55, at 361.

629. *Id.* at 362.

630. *Id.* Later in 1865, a military prosecutor made virtually the same argument about the lack of any challenge to the 1778 resolution, in defending the jurisdiction of a military commission convened to try two civilians in North Carolina charged with the brutal murder of a Union scout. *See* Senate Exec. Doc. 11, 39th Cong., 1st Sess. 211–12 (1866) (argument of Brevet Major C.D. Roberts in court-martial of Neill McGill and J.L. McMillan (Oct. 1865)).

631. PITMAN, *supra* note 55, at 362.

632. *Id.*

tion: Washington tried to enforce the 1778 resolution only once. Yet Bingham naturally made the most of that singular example. He pointedly described the court-martial of Joshua Hett Smith, held at a time when the Constitution of New York guaranteed the right to jury trial, and when the states retained their sovereignty. If a military court had jurisdiction in *that* case, argued Bingham, why not in the Lincoln assassination trial, too?[633]

There is no way to know whether and to what extent the Washington example in the Smith case helped Bingham's cause. It was virtually a foregone conclusion that the hand-picked commission he was addressing would not deny its own power to hear the case; its rejection of the jurisdictional challenge was overdetermined.

The next year, after the war had ended, and the question of the legality of military commissions was finally before the Supreme Court in *Milligan*, the government once again invoked General Washington, and the Joshua Hett Smith trial, in defense of the system of military courts it had been using during the preceding four years. Lambdin Milligan and his codefendants were U.S. citizens living in Indiana who were convicted by a military commission for offenses that included conspiring to overthrow the government, seizing munitions, and aiding the rebel army.[634] They petitioned for writs of habeas corpus, claiming that they should have been transferred out of military custody and tried, if at all, by the civilian courts that were open and available in Indiana.[635] In the course of his oral argument on behalf of the defendants, future President James Garfield offered an extensive exegesis of British and American history, placing special emphasis on the practice of Washington, as both Commander in Chief in the Revolutionary War and as the first President, to show that the "practice of our Revolutionary fathers" was "equally marked by respect for civil law, and jealousy of martial law."[636] Garfield's co-counsel, Jeremiah Black, likewise invoked the example of the first great General: "Washington," Black said, "deserved the lofty praise bestowed upon him by the president of Congress when he resigned his commission,—that he had always regarded the rights of the civil authority through all changes and through all disasters."[637]

Benjamin Butler, arguing for the United States on rebuttal, saw the Washington gambit as an opening, and decided that two could play at that game: "Reference has been made by opposing counsel to what they consider the views of General Washington; and an argument has been attempted to be drawn from

633. *Id.*

634. *Ex parte* Milligan, 71 U.S. 2, 6–7 (1866).

635. *Id.* at 7–8.

636. *Id*. at 50.

637. *Id.* at 80. Black was referring to the congressional "answer" to Washington's resignation of his commission as Commander in Chief in Annapolis in December 1783; Congress lauded Washington for having "conducted the great military contest with wisdom and fortitude, invariably regarding the rights of the civil power through all disasters and changes." 25 JOURNALS, *supra* note 325, at 838 (Dec. 23, 1783).

this," said Butler.[638] He pointed out, however, that "the first military commission upon this continent of which there is any record sat by command of Washington himself"—namely, the trial of Major André.[639] Butler conceded that "[t]his may be said to have been the exceptional case of a spy," but "we do not stop there."[640] Butler then played his trump card: "To give . . . another illustration of what Washington thought of the rights of military commanders in the field," said Butler, "attention may be directed to the trial of Joshua Hett Smith," who was "tried by a military court for treasonable practices" even though the civil courts "were open at Tarrytown, at that time."[641] Butler went so far as to relate, in detail, Washington's intimidating effort to shake loose intelligence from Smith by threatening him with swift military justice.[642] From Butler's perspective, the Smith trial was the *coup de grâce* that demonstrated that the Milligan commission was in accord with constitutional traditions:

> What now, may I ask, is to be thought of the argument of my opposing brethren, who assert that in civil courts the Constitution does not allow any pressure to be brought upon a man to make him confess, at the same time that they eulogize the military conduct of Washington?[643]

The Court overturned the petitioners' convictions on statutory grounds, ruling unanimously that the Habeas Corpus Act of 1863 had prohibited the trial of Milligan and his codefendants in a military tribunal.[644] Before it reached that holding, however, the Court majority famously proceeded to further opine, as a matter of constitutional limitation, that Congress *could not* subject such persons to military justice unless the civil courts were literally or "effectually" closed.[645] Neither the majority opinion nor Chief Justice Chase's concurrence discussed the Joshua Hett Smith case, or any of the other Revolutionary War examples on which counsel for both sides had relied. Although the Justices may have disagreed somewhat among themselves on the power of Congress to identify

638. *Milligan*, 71 U.S. at 99.
639. *Id.*
640. *Id.* at 100.
641. *Id.*
642. *Id.*
643. *Id.* at 100–01.
644. *Milligan*, 71 U.S. at 131; *see also id.* at 133–36 (Chase, C.J., concurring). The 1863 Act directed the Secretary of State and the Secretary of War to furnish to the local federal court a list of all persons within its jurisdiction who were "citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts" and who were being held by the military "otherwise than as prisoners of war." Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755, 755. If the grand jury in the federal court then terminated its session without indicting a person on one of those prisoner lists, the Act required a judge of that court to discharge the person, so long as he first took an oath of allegiance to the Union. *Id.* at 755–56. The Act further provided that if the Secretaries, for whatever reason, failed to supply the court with such a list, a detainee could petition the court for the same relief, on the same grounds. *Id.* § 3, 12 Stat. at 756. I discuss the 1863 Act further in Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45.
645. *Milligan*, 71 U.S. at 118–30.

dysfunctions in the civilian courts that could establish the requisite necessity for military tribunals, none of them signaled any sympathy for the government's argument that the Revolutionary War precedents justified commissions even absent any precondition of necessity.[646]

Indeed, it might be thought that the Court's decision in *Milligan* not only dismissed the significance of precedents such as the Joshua Hett Smith court-martial and the Revolutionary War trials of spies, but actually *resolved* that the Constitution prohibits such prosecutions. By concluding that Milligan's prosecution for aiding the enemy could not have been convened in a military court even if Congress had authorized it, didn't the *Milligan* Court, in effect, reject the government's current argument that domestic-law offenses can be tried in military tribunals? And, if so, why has the question continued to be the subject of frequently renewed debate for a century and a half after *Milligan*?

There are at least two reasons why *Milligan* has not been viewed as having settled the question. First, the discussion of congressional power in the majority and concurring opinions, no matter how renowned it might be, was not necessary to the resolution of the case. The Court unanimously held that Holt and the military had violated a federal statute that *precluded* the military trial—not that Congress had actually overstepped its constitutional authority by authorizing a military proceeding. The Justices' debate about the scope of Article III and the Sixth Amendment therefore is probably best viewed as *obiter dicta*, no matter how well-considered it evidently was.[647] Second, it is probably fair to view the Court's discussion of congressional power to be limited to the case of defendants who were *not* "part of or associated with the armed forces of the

646. In a remarkable, bitter pamphlet published soon after the *Milligan* decision—likely ghost-written by Joseph Holt—an anonymous congressional committee roundly condemned virtually every aspect of the Court's opinions, in an effort to justify the long and extensive practice of using commissions to help win the war. The pamphlet, quoting at length from John Bingham's oration in the Lincoln trial two years earlier, criticized the Court for having not adequately dealt with the Revolutionary War precedents. *See* THE UNION CONGRESSIONAL EXECUTIVE COMMITTEE, REVIEW OF THE DECISION OF THE U.S. SUPREME COURT, IN THE CASES OF LAMBDIN P. MILLIGAN AND OTHERS, THE INDIANA CONSPIRATORS 13–15 (Chronicle Print 1867).

647. Although the nonbinding nature of Justice Davis's Article III discussion is often overlooked in modern treatments of *Milligan*, it was widely understood in the contemporaneous assessments of the decision, and for many decades thereafter. *See generally* CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1868, PART ONE 207–37 (1971); *see also* FRANCIS BIDDLE, IN BRIEF AUTHORITY 338 (rev. ed. 1976) ("I argued [to the Court in *Quirin*] that *Ex parte Milligan*, having but enunciated a dictum, quite unnecessary to the decision of the case, was no binding precedent, and that the Court should now take the opportunity to sweep away any lingering authority that the case still carried."); Charles Warren, *Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal*, 53 AM. L. REV. 195, 209 (1919) (*Milligan* "was not a decision upon the power of Congress to legislate under Article I, Section 8, of the Constitution."); Curtis A. Bradley, *The Story of* Ex parte Milligan: *Military Trials, Enemy Combatants, and Congressional Authorization*, *in* PRESIDENTIAL POWER STORIES 93, 115 (Christopher H. Schroder & Curtis A. Bradley ed., 2009) ("[T]he majority's unnecessary resolution of a constitutional issue . . . seems questionable by contemporary standards.").

enemy."[648] If so distinguished, the majority's statements in *Milligan* about the limits on Congress's power would call into question the military prosecution of someone who independently provides "material support" to the enemy; but it would leave open the question of whether Article III limits Congress's power to prescribe military trials against members of enemy forces for violations of domestic law.[649]

4. Congress's Amendments to the Spying Statute

Before we move forward from the Civil War, one other development should be noted. Recall that the Continental Congress's 1776 resolution on spies, codified after ratification of the Constitution as Section 2 of the 1806 act establishing the Articles of War, authorized court-martial proceedings in certain cases of spying, but only against persons who were "not members of, nor owing allegiance to, any of the United States of America."[650] In the Civil War, this statutory limitation made little sense, because the spies of the Confederate Army were U.S. citizens who owed allegiance to the nation.[651] Accordingly, in February 1862, Congress struck that condition from the spying offense.[652]

More significantly for present purposes, the following year the House passed a slightly amended version of the spying statute, which was appended to a conscription bill.[653] The purpose of the 1863 amendment was to make two technical changes. First, it authorized the trial of spies in military commissions, in addition to courts-martial. The second change was to eliminate the geographic limitation that Congress had, for some reason, included in the 1862 statute—which required the prosecution to prove that the spy was found in a part of the United States "in a state of insurrection"[654]—so that the law would apply to spies found in Army encampments in the northern as well as the border states.

In so doing, however, the new amendment added a two-word phrase that might have been read to expand the conditions under which the spying prohibition would apply far beyond the terms of the pre-1862 law. The new, House-

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648. Ex parte *Quirin*, 317 U.S. 1, 39, 45 (1942) (distinguishing *Milligan* on the ground that Milligan and his cohorts were not subject to, and thus could not have violated, the international law of war, which was the touchstone of Stone's *ratio decidendi* in *Quirin*, *see supra* Section III.A).

649. *But see supra* Section II.B.3.b (explaining why it would be difficult under modern doctrine to argue that enemy aliens are subject to less favorable treatment for purposes of Article III and the Sixth Amendment's jury-trial guarantee).

650. *See* 5 JOURNALS, *supra* note 325, at 693.

651. *See* CONG. GLOBE, 37th Cong., 2d Sess. 387 (Jan. 20, 1862) (remarks of Sen. Wilson) ("We recognize these persons as citizens of the United States, and hence we have no power to punish a South Carolinian for lurking around our camps as a spy, while we have a right to punish an Englishman. This bill applies to all persons hostile to the Government; and if we are going to carry on the war, we need the change.").

652. Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 339, 339–40.

653. *See* CONG. GLOBE, 37th Cong., 3d Sess. 1291 (Feb. 25, 1863) (remarks of Rep. Olin); *see also id.* at 1293 (House approving the underlying bill).

654. Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. at 340.

passed version provided that:

> all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies in or about any fortification, post, or encampment of any of the Armies of the United States *or elsewhere*, shall be triable by military commission, and, upon conviction, shall suffer death.[655]

The words "or elsewhere" suggested that spies could be tried in military tribunals even if they were *not* apprehended "in or about any fortification, post, or encampment" of the Army. As explained above, international law—which circumscribes the traditional, *sui generis* Article III exception for the trial of spies—allows states to prosecute spies from enemy armed forces only in cases where they deceive the armed forces through dissimulation, and if they are caught before returning to their own camp.[656] For those reasons, the age-old spying statute had, since 1776, required that the person be apprehended "in or about" Army facilities. The House-passed amendment in 1863, by contrast, could have been read to permit the trial of spies who had successfully left Army lines and returned to their own camp, thereby extending the law beyond the international law norm.

When the amendment came before the Senate three days later, Senator Bayard made a motion to strike the new words "or elsewhere."[657] That term, he explained, would introduce a "dangerous obscurity" that might lead to prosecution, by "men uninstructed in the great leading principles of law," of persons who were not "spies" as defined by those principles.[658] The Senate rejected Bayard's proposed amendment—according to Bayard, because it was eager to pass the underlying legislation that the House had already approved.[659] Senator Davis then declared that he would vote for the bill because the new spying provision "declare[d] what is already the law of war," and thus applied only to the class of persons traditionally known as spies, "and to no other persons."[660] Therefore, although Davis agreed that the insertion of the term "or elsewhere" was potentially "mischievous," he concluded that it had "no legal effect whatever in the law," and for that reason he was comfortable voting for it.[661] Congress enacted the newly amended spying provision as the final section of the conscription act on March 3, 1863.[662]

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655. CONG. GLOBE, 37th Cong., 3d Sess. 1291 (Feb. 25, 1863) (remarks of Rep. Olin) (emphasis added).

656. *See supra* Section IV.B.

657. CONG. GLOBE, 37th Cong., 3d Sess. 1390 (Feb. 28, 1863) (remarks of Sen. Baynard).

658. *Id.*

659. *Id.*

660. *Id.*

661. *Id.*

662. Act of Mar. 3, 1863, ch. 75, § 38, 12 Stat. 731, 737. The amended spying law as enacted was slightly different from the version that passed the House, but not in any respect relevant here. It

Thereafter during the Civil War, a number of persons found within Union lines in disguise—primarily Confederate officers and soldiers—were tried and convicted by military commissions for being spies.[663] On one occasion, military authorities arrested an individual, Robert Martin, and charged him with being a spy after he had made his way back to Confederate lines—a prosecution that presumably depended upon an aggressive reading of the words "or elsewhere" in the 1863 amendment.[664] A New York judge granted Martin's application for a writ of habeas corpus. As to the charge of spying, the court did not even address the 1863 spying statute, but the judge reached the same basic conclusion as Senator Davis: Because the prisoner "was not taken in the act of committing the offense charged," and because he had, in fact, "returned within the lines of the confederate forces, or had otherwise escaped" after his spying—and, in addition, because the judge believed the war had since ended—Martin could no longer be tried as a spy.[665] "I know of no case in modern history or in reports of cases decided in the courts," wrote the judge, "where any person has been held or tried as a spy who was not taken before he had returned from the territory held by his enemy, or who was not [] brought to trial and punishment during the existence of the war."[666] The traditional spying exception to the right to jury trial, reflected in the Revolutionary War proceedings against Hale and André, thus continued apace during the Civil War, without regard to the new statutory phrase "or elsewhere." The potential mischief introduced by that phrase would not become an issue again until the First World War.[667]

B. THE EARLY TWENTIETH CENTURY

Shortly after the Civil War and the Court's decision in *Milligan*, the constitutional limits on military trials of civilians for domestic-law offenses appeared to have become more firmly established. Attorney General James Speed, for example, who had written a long opinion attempting to justify the military commission trial of the Lincoln assassination conspirators,[668] opined that Jefferson Davis could not be tried by military commission for his aggression against the Union, even assuming that a state of war still existed, but instead had to be remanded to civil authorities for a possible treason trial.[669] The next year,

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provided: "That all persons who in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission and shall, upon conviction, suffer death."

663. *See* WINTHROP 2d ed., *supra* note 120, at 767 & n.100.

664. *In re* Martin, 45 Barb. 142, 148 (N.Y. Sup. Ct. 1865).

665. *Id.*

666. *Id.*

667. *See infra* Section VI.B.2.

668. Military Commissions, 11 OP. ATT'Y GEN. 297 (1865). I discuss this opinion in greater detail in Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45.

669. Case of Jefferson Davis, 11 OP. ATT'Y GEN. 411, 411–12 (1866). Similarly, that same year, a federal circuit court concluded that if an 1862 enactment were construed to subject military contractors

Speed's successor, Henry Stanberry, likewise opined that a military commission sitting in Washington, D.C. during the Civil War did not have jurisdiction to try an individual for forging enlistment papers and selling them to draft evaders in New York, where the civil courts "were in the full possession and exercise of all their powers."[670]

This apparent resolution of the question was not without complications, however. In 1871, General William Tecumseh Sherman asked Attorney General Amos Akerman how he should treat certain persons who had been caught trading with members of the Comanche Indian tribe. Akerman identified offenses for which the detainees could be tried in civil courts, but then added that if there were an ongoing *war* between the United States and the Coamanches, the military could try them in a court-martial for violations of Article of War 56 ("[w]hosoever shall relieve the enemy with . . . ammunition . . . shall suffer death, or such other punishment as shall be ordered by the sentence of a court martial"), if they had provided ammunition to the enemy Indians.[671] Akerman simply assumed, without analysis, Joseph Holt's contested view of Article 56—that it "applies to persons who are not, as well as to persons who are, in the military service"—and he did not address the constitutional question at all.[672]

Then, in 1886, Colonel William Winthrop, who had been one of Judge Advocate General Joseph Holt's assistants during the Civil War, published the first edition of his magisterial treatise on military law. In that tome, Winthrop—who the Supreme Court has characterized as the "Blackstone of Military Law"[673]—adopted Holt's (mistaken) reading of the quasi-treason articles and their early history, citing as authority not only Holt himself, but Attorney General Akerman's 1871 opinion, as well.[674] Winthrop's reading took hold; thereafter, many (but not all) commentators simply took for granted that the Continental Congress, as well as the 1806 Congress, intended those articles to apply to civilians unconnected to the armed forces.[675]

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to court-martial jurisdiction for fraud related to their contracts, it would be "clearly unconstitutional" under Article III. *Ex parte* Henderson, 11 F. Cas. 1067, 1075 (C.C.D. Ky. 1878).

670. Devlin's Claim, 12 OP. ATT'Y GEN. 128, 128 (1867). Stanberry also concluded that a congressional act of 1867, authorizing the use of military courts in Reconstruction in the South, could not constitutionally be applied to try civilians "short of an absolute or controlling necessity." The Reconstruction Acts, 12 OP. ATT'Y GEN. 182, 199 (1867). The subsequent use of such military courts in Reconstruction thereafter famously occasioned an unprecedented constitutional showdown between the political branches and the Court. *See Ex parte* McCardle, 73 U.S. 318 (1869).

671. Unlawful Traffic with Indians, 13 OP. ATT'Y GEN. 470, 472 (1871).

672. *Id.*

673. Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2005) (plurality opinion) (quoting Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)).

674. 1 WINTHROP, *supra* note 398, at 123–26. By the time Winthrop wrote, Congress had renumbered the quasi-treason Articles of War as Articles 45 and 46, in a recodification of the federal code. *See* REVISED STATUTES OF THE UNITED STATES, PASSED AT THE FIRST SESSION OF THE FORTY-THIRD CONGRESS, 1873–1874, tit. XIV, ch. 5, § 1342, arts. 45–46, at 233 (1875).

675. *See, e.g.*, Morgan, *supra* note 369, at 97–107; ROLIN A. IVES, A TREATISE ON MILITARY LAW AND THE JURISDICTION, CONSTITUTION, AND PROCEDURE OF MILITARY COURTS 63 (4th ed. 1886); WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT & MARTIAL LAW 118–19 (1st ed. 1892). *But see* GEORGE B. DAVIS, A

Most such observers, however—including Winthrop—recognized that this capacious reading of the Articles raised a serious constitutional issue, not least because the acts they proscribed were "mostly acts of treason"[676] (at a minimum, "treasonable in their nature"[677]), and yet, as Winthrop acknowledged, "treason *as such* is not an offense properly cognizable by a court-martial."[678] Winthrop and others thus endeavored to describe a cabined category of cases in which the Articles could be applied constitutionally, typically by relying upon the "arising in" clause of the Grand Jury Clause of the Fifth Amendment. Like Holt,[679] these writers mistakenly assumed both that "arising in" described a geographical condition, and that the exemption from the Fifth Amendment's grand jury guarantee would, where it applied, carry over to Article III and to the jury-trial guarantee of the Sixth Amendment.[680] The trick, then, was to identify the circumstances in which the treasonous conduct "arose in" the military forces. For Winthrop, the permissible category of applications included those in which civilians acted "on the theater of war or within the scope of martial law."[681] Colonel Morgan, writing just after the First World War, argued, somewhat more broadly, that the Articles could constitutionally be applied to "civilians whose offenses occur in the theatre of war, in the theatre of operations *or in any place over which the military forces have actual control and jurisdiction*."[682]

1. Brigadier General Crowder and the 1916 Revision of the Articles of War

Shortly before the First World War, Holt's esteemed successor as Judge Advocate General, Brigadier General Enoch Crowder, addressed the quasi-treason articles in his official Digest of Opinions of the Judge Advocates General of the Army.[683] Crowder took note of Holt's broad reading from the Civil War; echoing Winthrop, he wrote that this construction might be "warranted so far as relates to acts committed on the theater of war or within a district under martial law," but he also recognized that "the effect of the leading adjudged cases," including *Milligan*, "preclude[d] the exercise of the military jurisdiction over this class of offenses, when committed by civilians in places

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TREATISE ON THE MILITARY LAW OF THE UNITED STATES: TOGETHER WITH THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL AND OTHER MILITARY TRIBUNALS 417 (1st ed., New York, 1898) (limiting the articles to cover those in or connected with the military would seem to be the "sounder construction").

676. 1 WINTHROP, *supra* note 398, at 126.

677. *Id.* at 898.

678. *Id.*

679. *See supra* notes 595–601 and accompanying text.

680. I have previously explained why both of these assumptions were dubious and eventually rejected by the Court. *See supra* notes 603–08 and accompanying text.

681. 1 WINTHROP, *supra* note 398, at 126.

682. Morgan, *supra* note 369, at 107 (emphasis added). Birkhimer reasoned, more narrowly, that "being penal in their nature and derogatory of the constitutional right of trial by jury," the Articles could only be applied constitutionally in cases where the offenders *must* be tried by the military or else go unpunished: "Wherever the civil courts without prejudice to the interests of the service can take jurisdiction this should be done." BIRKHIMER, *supra* note 675, at 119.

683. A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 128 (1912).

not under military government or martial law."[684] Crowder then reasoned that the "sounder construction" of the Articles was that they were "a code enacted for the government of the military establishment," and that they should therefore be understood to "relate only to persons belonging to that establishment, unless a different intent should be expressed or otherwise made manifest"—and, notably, "[n]o such intent is so expressed or made manifest."[685] In other words, Crowder appeared, in effect, to have adopted Isaac Maltby's (proper) construction of the Articles, and to have rejected Holt's alternative reading. Indeed, Crowder further surmised that if the 1776 legislation did, as Holt thought, extend application of the quasi-treason articles to civilians, that extension "seems to have become modified on the adoption of the Constitution."[686]

That same year, however, Crowder himself appeared to reintroduce the broader reading, in the context of a proposed revision of the Articles of War. Crowder was principally responsible for drafting the first extensive amendment to the Articles since 1806. In so doing, he combined the two quasi-treason articles into one, a new 81st Article, entitled "Relieving, Corresponding with, or Aiding the Enemy." His draft article provided:

> Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct.[687]

The proposed new 82nd Article, in turn, was a revision on the longstanding prohibition on spying:

> Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States or elsewhere shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.[688]

In presenting these amendments to the House of Representatives, Crowder testified that if Congress retained the "whosoever relieves the enemy" formulation in the 81st Article, it would at least "suggest" that the military jurisdiction

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684. *Id.* at 128 n.7.

685. *Id.* at 128–29 n.7.

686. *Id.* at 129 n.7. Crowder further suggested that "[p]ersons not belonging to the military establishment may be proceeded against for the acts mentioned in the article"; if so, however, it was "by virtue of the power of another jurisdiction, namely, martial law; and martial law does not owe its existence to legislation but to necessity." *Id.*

687. DEPARTMENT OF WAR, COMPARISON OF PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 43 (1912) (quoting H.R. 23628, 62d Cong., 2d Sess. 33 (1912)).

688. *Id.*

in question would run to the "civilian as well as the person in military service."[689]

Congress delayed consideration of the revision. Four years later, however, in support of substantially the same revision, Crowder testified even more definitively that the offenses in the 81st Article "may, and usually will be, committed by persons outside of the Army."[690]

Congress enacted the new Articles in August 1916. They included the 81st and 82nd Articles as Crowder had drafted them.[691] There was some reason to think that Article 81 would not apply to civilians. Article 2 of the new Articles of War specified, in great detail, the "persons [who] are subject to these articles"—and, notably, that enumeration did *not* include civilians unconnected to the military forces.[692] Likewise, when the Judge Advocate General published a new *Manual for Courts-Martial* in 1917, the section discussing persons subject to the new Articles did not mention such civilians.[693]

Nevertheless, Crowder's testimony did suggest a broader reading of Article 81. Moreover, notwithstanding its constrained reading of who was "subject to" the new Articles generally, Crowder's *Manual for Courts-Martial* also stated that Article 81, in particular, "subjects to the jurisdiction of courts-martial and military commissions *all persons, either military or civil*, who, in the theater of operations and during the continuance of war traffic with the enemy in any of the ways herein denounced," even though the *Manual* also acknowledged that "[t]his article describes, in nearly every phrase, an overt act of treason."[694]

By virtue of this rather ambiguous legislative and administrative history, it would be fair to infer that by the time Congress re-enacted the 81st Article in 1920,[695] it might have assumed that it was authorizing military trials of civilians

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689. *Revision of the Articles of War: Hearing before the House Comm. on Military Affairs on H.R. 23628*, 62d Cong., 2d Sess. 69 (1912).

690. *Revision of the Articles of War: Hearing before the Senate Subcomm. on Military Affairs*, 64th Cong., 1st Sess. 79 (1916).

691. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 663. Congress did not repeal the 1863 version of the spying provision, which continued to appear in the federal code as section 1343 of the United States Revised Statutes. From 1916 to 1950, therefore, the code included two complementary wartime spying provisions. For present purposes, there were no material differences between them.

692. *Id.* at 651.

693. JUDGE ADVOCATE GENERAL'S OFFICE, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW 2–4 (1917).

694. *Id.* at 234 (emphasis added). The *Manual*'s geographic qualifier, "in the theater of operations," was not found in the 81st Article itself. Presumably, that was Crowder's effort, following Winthrop, to salvage the constitutionality of the broad reading—by limiting it to circumscribed locations. Another passage from the *Manual*'s analysis indicated just how unconstrained that condition was, however, according to Crowder's telling: "Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war which threaten punishment for communication with the enemy. The offense of communicating with the enemy when committed by a resident of occupied territory constitutes war treason and is properly charged under this article." *Id.* at 235.

695. Act of June 4, 1920, ch. 227, ch. II, 41 Stat. 759, 804 (1920). The 1920 enactment amended Article 81 to also include *attempts* to relieve the enemy with arms, ammunition, supplies, money, or other things. *Id.*

unconnected to the military for treason-like conduct, at least to the (uncertain) extent the Constitution allowed—even if that is *not* what Congress had intended in earlier iterations of the regulation in 1776 and in 1806.

As for the new 82nd Article on wartime spying, the 1917 *JAG Manual* confirmed that concealment was not enough for culpability—there had to be deception or "dissimulation" as well.[696] Thus, an accused person could only be convicted if "found at a certain place within our lines, acting clandestinely, or under false pretenses"; an act of espionage "completed by the escape of the accused to his own lines can not be the subject of trial if the *quondam* spy is later captured."[697]

2. Assistant Attorney General Charles Warren's Remarkable, Unauthorized Campaign for Expansion of Military Jurisdiction Over Domestic-Law Offenses

In the heat of the First World War, Congress enacted several notoriously harsh laws designed to punish conduct inimical to the war effort, including the Espionage Act of 1917,[698] the nation's first comprehensive statute criminalizing espionage and the sharing or disclosure of defense-related information. That and related laws also criminalized various forms of aid to enemy nations and obstruction of the war effort, especially respecting enlistment.[699] Once these laws were in place—supplementing the existing treason statute—virtually all of the conduct covered by the 81st and 82nd Articles of War (the quasi-treason and spying Articles) was also proscribed by civil laws, enforceable by trial in Article III courts.[700]

For some members of the Senate, however, this was not enough. They were intent on also proscribing anti-war speech, and other modes of expression thought to be supportive of the enemy or harmful to the U.S. military cause. On April 5, 1918, the Senate debated an amendment to the Espionage Act that would have made it a crime, "when the United States is at war," to

> utter, print, write, or publish any disloyal, profane, scurrilous, contemptuous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States.[701]

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696. JAG MANUAL FOR COURTS-MARTIAL, *supra* note 693, at 236–37.

697. *Id.*

698. Espionage Act of 1917, ch. 30, 40 Stat. 217.

699. *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 146–85 (2004).

700. Therefore, to the extent the constitutional basis for allowing spies to be tried by court-martial had been that no other tribunal was available to deal with such conduct, *see supra* notes 359–60 and accompanying text, that rationale was rendered obsolete.

701. 56 CONG. REC. 4629 (1918); *see also* STONE, *supra* note 699, at 185–91 (discussing Sedition Act of 1918).

Some proponents of the bill wished to go further still. Henry Cabot Lodge of Massachusetts, in particular, proposed an amendment prohibiting the use of the mails for any newspapers, magazines, or pamphlets that included any German language.[702] More importantly, Lodge thought that all the criminal laws in the world would not be enough to stop those who would undermine the war effort. He was deeply skeptical that the ordinary criminal justice system was up to the task of dealing with the fifth columns that he thought were present throughout the land—"agents of the German Government" engaged not only in traditional spying, but also in sabotage, arson, destruction of railroads, even "mixing glass with bread."[703] Such criminals, he insisted, "have been treated altogether too delicately" by the civilian justice system: "They come to trial and they get some short term in the State prison or the prison of the United States, a punishment for which they care nothing."[704] Lodge insisted that the only way to stop such persons from doing harm was to "try them by a court-martial and shoot them."[705] Lodge's speech caught the attention of Oregon Senator George Chamberlain, Chairman of the Committee on Military Affairs, who had been contemplating legislation that would, indeed, dramatically expand military tribunal jurisdiction. "[I]f our military code is not broad enough to cover that class of cases," said Chamberlain, "it seems to me it ought to be amended so as to place within the jurisdiction of military tribunals the classes of men—and women, too, if you please—mentioned by the Senator."[706] Lodge seconded the idea, and Senator Lee Overman of North Carolina concurred: "There ought to be some law providing for a court-martial to hang these people," said Senator Overman, because the existing legal tools were "utterly inefficient."[707] Other senators interjected to remind their colleagues of the constitutional right to a jury trial, and of the *Milligan* decision,[708] but that did not deter Overman, Lodge, and Chamberlain.

Over at the Department of Justice, Assistant Attorney General Charles Warren took close heed of this Senate debate. Warren would later become known for his three-volume *History of the United States Supreme Court*, for which he won the 1923 Pulitzer Prize in history; but at the time, his primary claim to fame was that he was one of the principal architects of the Espionage Act, the Trading with the Enemy Act, and other internal security legislation promoted by the Wilson Administration.[709] Earlier in the War, Warren had been at the heart of the government's efforts to counter what it perceived as pro-German and

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702. 56 CONG. REC. at 4628.
703. *Id.* at 4645.
704. *Id.*
705. *Id.*
706. *Id.*
707. *Id.* at 4646.
708. *See, e.g.*, *id.* (remarks of Sen. Nelson); *id.* at 4652 (remarks of Sen. Thomas).
709. *See* Letter from Charles Warren to Sen. George Chamberlain at 1 (Apr. 12, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6).

anti-American activities in the United States, through both prosecutions and detentions of alien enemies under the Alien Enemy Act of 1798. In October 1917, however, Attorney General Thomas Watt Gregory established a new War Emergency Division to handle such matters, and appointed John Lord O'Brian to run the division.[710] Warren's portfolio at the Department thus no longer covered the treatment of internal critics and war saboteurs.[711]

Warren, like the senators, had become increasingly frustrated by what he saw as the inefficiencies of the prosecutorial arm of the Department of Justice, and the overall inadequacy of the criminal justice system to deal with persons in the United States whose speech and conduct were undermining the war effort. As early as August 1917, Warren met with Wisconsin Senator Paul Husting and with Wheeler Bloodgood, a member of the executive council of the Wisconsin Loyalty League, to discuss the growing threat.[712] At the time, Wisconsin and Minnesota had significant numbers of residents of German heritage, and there was a robust anti-war movement in Milwaukee, including within elements of the Socialist Party. A well-known centrist within that party, Victor Berger, who had earlier been the first Socialist elected to the House of Representatives, was the editor of influential newspapers, including the *Milwaukee Leader.* Another Socialist, Daniel Hoan, was the mayor of Milwaukee. Senator Husting and the Loyalty League were committed to stopping the anti-war movement in the upper Midwest, and they quietly enlisted Charles Warren to help them do so.[713] Warren—insisting that he was speaking only in his individual capacity, and not on behalf of the Department of Justice—told Bloodgood that he was "firmly of the opinion that a war can not be run in the criminal courts of the country or by the Department of Justice," and that therefore Congress should grant the Army all necessary authority to deal with enemy activities.[714] Husting and Warren reportedly agreed that what was needed was an amendment to the 82nd Article of War to "change the definition of a spy so it would be brought up to date and would meet the conditions that it appeared at that time were rampant in this country."[715]

Senator Husting died in October 1917—killed by his brother in a duck-hunting accident[716]—but his idea gathered new force with the colloquy of

710. *See The Reminiscences of John Lord O'Brian* 229–35 (1952), Oral History Collection, Columbia University, New York, N.Y.

711. *See* Letter from Charles Warren to Sen. George Chamberlain (Apr. 12, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6); Letter from Attorney General Thomas W. Gregory to Rep. William Gordon (Apr. 29, 1918) (on file with the Department of Justice, National Archives and Records Admin., Case File 190470, Section 5, Record Group 60, Box 2818), *reprinted in* 56 CONG. REC. APP. 307, 308 (1918) (noting that Warren had had "practically no connection with any of the activities" at issue "[f]or more than six months").

712. *See Extending Jurisdiction of Military Tribunals: Hearings on S. 4364 Before the S. Comm. on Military Affairs*, 65th Cong., 2d Sess. 5 (1918) (testimony of W.P. Bloodgood).

713. *See id.*

714. *Id.* at 9.

715. *Id.* at 5.

716. "Husting is Killed by Brother in Hunt," N.Y. TIMES, Oct. 22, 1917.

Senators Lodge, Chamberlain, and Overman in April 1918, just a few days after Victor Berger, the Socialist newspaperman, was defeated in the election to replace Husting (an election that occurred while Berger was under an Espionage Act indictment for his speeches advocating an end to the war).[717] Warren was ready and he seized the opening. On the next business day after the Senate debate, Monday, April 8, he sent a letter to Senator Overton, explaining that he had been "giving considerable attention" to the question and had "prepared material" for a law review article on it.[718] "Speaking personally, and not officially, and not speaking in any way for the Department of Justice," Warren offered the Senator his view that military adjudication was critical because "I do not believe that war can be effectively carried on by the criminal courts."[719] Warren attached a memorandum defending the constitutionality of legislation authorizing such trials; it was entitled "Who Are Spies?: A memorandum of law on the power of Congress to subject civilians to trial by court-martial under the Constitution," attributed to "Charles Warren, Assistant Attorney General of the United States."[720] Warren also sent copies of his memorandum to Senators Lodge, Chamberlain, and others, and continued to send the Senators revised versions as he made corrections over the course of the next week.[721]

The day after he received Warren's memo, Senator Chamberlain asked Warren to help him draft legislation. Warren had been reluctant to do so, "inasmuch as I felt that I would be trespassing on the prerogatives of the War Department in so doing."[722] When Senator Chamberlain informed Warren that Judge Advocate General Crowder was "entirely agreeable" to the idea, however,

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717. *See* THE WISCONSIN BLUEBOOK 1919, at 46 (P. Hunter ed., 1919). Berger was elected to the House of Representatives that November, after he had been convicted of the Espionage Act offenses. The House voted 309-1 to deny Berger his seat, however—and did the same after he prevailed again in a special election shortly thereafter. In 1921, the Supreme Court overturned Berger's conviction on the ground that Berger and his codefendants had sufficiently alleged anti-German animus on the part of the trial judge, Kennesaw Mountain Landis. *See* Berger v. United States, 255 U.S. 22 (1921). Berger once again ran for the House in November 1922, and was finally permitted to serve when he won for a third time. *See* Powell v. McCormack, 395 U.S. 486, 545 n.83 (1969).

718. *See* Letter from Charles Warren to Sen. L.S. Overman (Apr. 8, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6).

719. *Id.* at 1–2.

720. *See* Letter from Attorney General Thomas W. Gregory to Rep. William Gordon, *supra* note 711, at 1, *in* 56 CONG. REC. APP. at 308. Overton promptly asked the Senate Committee on Printing to publish the memorandum as a public document, 56 CONG. REC. at 4757 (1918); but the Committee never printed it, even after Warren pushed for such publication after he had left office. *See* Letter from Sen. George Chamberlain to Charles Warren (May 21, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6) (stating that the Committee on Printing would consider the publication request when it had a quorum).

721. *See*, *e.g.*, Letter from Charles Warren to Senator L.S. Overman (Apr. 10, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6); Letters from Charles Warren to Senators Henry Cabot Lodge and Frank B. Kellogg (Apr. 16, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6).

722. Letter from Charles Warren to Senator George Chamberlain at 2 (April 12, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6).

Warren sent Chamberlain a draft of legislation the next day, April 12.[723] Warren candidly acknowledged, at least by implication, that such a law might be on thin constitutional ice, but that did not dissuade him: "If an Act of this nature is required for the protection of the Government," he explained, "it would appear to be wise to enact it, even if after the war the courts might hold it unconstitutional."[724] "I have long believed," Warren wrote, "that the moral effect of one man arrested and tried by court-martial was worth a hundred men tried by the Department of Justice in the criminal courts."[725] Warren again added the disclaimer that these were only his personal views, and not those of the Department of Justice.[726]

Four days later, Chamberlain introduced the legislation.[727] Its scope was breathtaking.[728] It would apply to everyone: "any person, whether citizen or subject of the enemy country or otherwise." It would apply "anywhere in the United States" (apparently premised on the idea that the entire nation was "part of the zone of operations" of the armed forces, even without any fighting). And it would cover virtually any and all conduct, and speech, that would "endanger

723. *Id.* at 2–3.
724. *Id.* at 3.
725. *Id.* at 1.
726. *Id.* at 4–5.
727. *See* 56 CONG. REC. at 5120 (Apr. 16, 1918) (noting Chamberlain's introduction of S. 4364).
728. The full text of Section 1 was:

> [O]wing to changes in the conditions of modern warfare, whereby the enemy now attempts to attack and injure the successful prosecution of the war by the United States, by means of civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, thus constituting the United States a part of the zone of operations conducted by the enemy, any person, whether citizen or subject of the enemy country or otherwise, who shall, anywhere in the United States, in time of war, endanger or interfere with, or attempt to endanger or interfere with, the good discipline order, movements, health, safety, or successful operations of the land or naval forces of the United States, (a) by causing or attempting to cause insubordination or refusal of duty by any member of such land or naval forces, or (b) by delivering or transmitting, or causing to be delivered or transmitted, to any member of such land or naval forces any written or printed matter which shall support or favor the cause of the enemy country or of its allies in the war, or which shall oppose the cause of the United States therein, or which shall contain any false reports or false statements intended to interfere with the successful operation of such land or naval forces or (c) by printing or publishing any such printed matter, or (d) by performing or attempting to perform any act made by an offense against the United States by section one (a), section one (b), section one (c), section one (d), or section two of Title I of the [Espionage Act of 1917], or (e) by performing, or attempting to perform, any act made an offense against the United States by the [Sabotage Act that the President would sign later that month], or (f) by performing, or attempting to perform, any act made an offense against the United States by section twelve or section thirteen of the act entitled "An act to authorize the President to increase temporarily the military establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, shall be deemed to be a spy and be subject to trial by a general court-material, or by a military commission of the Army, or by a court-material of the Navy, and on conviction thereof shall suffer death or such other punishment as said general court-material, or military commission, or court-material shall direct.

Extending Jurisdiction of Military Tribunals, *supra* note 712, at 3–4.

or interfere with the good discipline, order, movements, health, safety, or successful operations of the land or naval forces of the United States," including any publication opposing the U.S. war cause, and violations of various provisions of the recently enacted Espionage Act and soon-to-be-enacted sabotage statute. The audacity was not only in that the bill would have made such conduct unlawful—for much of it already was—but, more importantly, that the legislation would have provided that anyone engaging in such conduct would be "deemed to be a spy," and be subject to trial and sentence, including the possibility of death, by a court-martial or military commission.

In hearings that week, several military officers testified in support of the legislation, without the support of their commanding officers. Colonel Ralph Van Deman, the chief of the Army's Military Intelligence Division, insisted that "summary justice" was necessary but impossible to achieve in civilian courts because they are "tied up with form and red tape and law which they can not get around."[729] The Assistant Director of Naval Intelligence, Captain McCauley, similarly testified that "naval and military men are apt to consider things as legal evidence . . . that perhaps civilians would not consider sufficient to condemn a man in court."[730] The prospect of a military trial, then, would "put the fear of God in these people."[731]

That same week, Warren himself went so far as to testify in favor of the bill, in executive (that is, nonpublic) session.[732] When the hearing resumed in open session, Chairman Chamberlain publicly related Warren's views "that the Department of Justice can not deal with the subject," that a military tribunal was necessary "to stop this propaganda," and that the draft legislation was constitutional.[733] Bloodgood further testified of Warren's boast that "the moral effect of one man arrested and tried by court martial was worth a hundred men tried by the Department of Justice in the criminal courts,"[734] and reported that Warren, in his statement to the committee, had further stated (as he had in his letter to Senator Chamberlain) that by the time the courts passed on the law's constitutionality, "all the work necessary to have been done will have been done."[735]

It bears emphasizing that Warren took all these steps in support of the legislation while free-lancing: Not only did he not speak for the Department of Justice; he did not even inform the Attorney General of his assistance and testimony in support of the legislation. He simply couldn't help himself; as he wrote to a friend the following week: "In accordance with the unfortunate way I

729. *Id.* at 40.
730. *Id.* at 46.
731. *Id.* at 47.
732. *See id.* As far as I have been able to determine, no transcript of that closed hearing is available.
733. *Id.* at 20.
734. *Id.* at 9.
735. *Id.* at 15.

have, when I believe a thing, I say it."[736] Attorney General Gregory learned of Warren's apostasy on April 17, 1918. He immediately wrote a scathing letter to Warren.[737] Gregory reminded Warren that the subject matter was now in John Lord O'Brian's portfolio, not Warren's. "I am sure," Gregory continued, "that you are also fully aware of the fact [that] your views . . . were in conflict with those of [O'Brian], of the Attorney General himself, and with the policies of the Department."[738] Gregory pointedly added that it was both his opinion and the Administration's that the bill Warren had drafted "is subversive of fundamental principles of justice."[739] "[T]he least that can be said of your action," concluded Gregory,

> is that it was taken in reckless disregard of the views of your superiors and of the assistant in charge of the problem with which you were dealing, and that it evidences an indifference to their opinions or an unwillingness to co-operate with them which is entirely incompatible with the orderly administration of the affairs of the Department.[740]

Gregory asked for Warren's resignation, which Warren "tendered instantly."[741]

What is more, the Attorney General wrote to Congress emphasizing that he "entirely disapprove[d]" of Warren's actions, and that the policies reflected in the bill Warren had drafted were "exactly contrary to those approved" by the Attorney General and by the Assistant Attorney General "in charge of the problems involved."[742] In the meantime, Senator Overman had written to President Wilson, asking what he thought of the Chamberlain bill. The President's response, like Gregory's, was unequivocal—indeed, he stressed that the legislation was not only un-American but unconstitutional:

> I am wholly and unalterably opposed to such legislation . . . . I think it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America, and, in view of the recent legislation, the Espionage bill, the Sabotage bill, and the Woman Spy bill, I think it is unnecessary and uncalled for.[743]

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736. *See* Letter from Charles Warren to "Gard" (Apr. 22, 1918) (on file with the Library of Congress, PAPERS OF CHARLES WARREN, Box 1, folder 6).

737. Letter from Attorney General Gregory to Charles Warren (Apr. 18, 1918) (on file with the Department of Justice, National Archives and Records Admin., Case File 190470, Section 17, Record Group 60, Box 2821).

738. *Id.* at 2.

739. *Id.*

740. *Id.* at 2–3.

741. Letter from Charles Warren to "Gard," *supra* note 736, at 1.

742. Letter from Attorney General Thomas F. Gregory to Rep. William Gordon, *supra* note 711, at 2, 56 CONG. REC. APP. at 308.

743. Letter from President Wilson to Senator Overman (Apr. 20, 1918), *in* 47 THE PAPERS OF WOODROW WILSON (Arthur S. Link ed., 1984).

That was effectively the end of Senator Chamberlain's proposal (which he withdrew), and of Charles Warren's gambit. Two months later, Attorney General Gregory reaffirmed the Administration's view that the existing criminal statutes were wholly adequate to the task, adding that it was "perfectly plain" that in the absence of a valid, nationwide declaration of martial law, "Congress could not constitutionally provide for the trial by courts-martial of civilians charged with offenses committed outside of military camps or other military territory."[744]

So why did Assistant Attorney General Warren conclude otherwise? How could he possibly have thought it was within Congress's power to "deem" as a "spy" anyone engaged in such a wide range of conduct—and then, having effected such "deeming," to subject such persons to the same form of military justice, and same draconian penalties, as had long been the fate of *actual* wartime spies?

The explanation appears in the "Who is a Spy?" memorandum Warren provided to the Senate, a version of which he later published in the *American Law Review*.[745] Warren basically relied upon the same argument from history and practice that has become commonplace with respect to military commissions today, a version of which Judge Kavanaugh embraced in *al Bahlul*: If it has always been understood that military tribunals may constitutionally try spies, narrowly defined—and if the February 1778 resolution of the Continental Congress established that other persons who aid the enemy, such as Joshua Hett Smith (whose trial Warren invoked[746]), may also be subject to military justice—why can't such tribunals also host the trial of *other* domestic-law offenses that likewise undermine the war effort?[747]

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744. Letter from Attorney General Gregory to Rep. John E. Baker (June 27, 1918), *reprinted in* 56 CONG. REC. 528 (1918); *see also Reminiscences of John Lord O'Brian*, *supra* note 710, at 283–85 (recounting Gregory's resolute opposition to the "quite grotesque" legislation).

745. Charles Warren, *Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal*, 53 AM. L. REV. 195 (1919). Senator Chamberlain also borrowed heavily from the Warren memorandum in an extended interview he gave to the *New York Times*, justifying his proposal after it had been roundly criticized and withdrawn. "Spies and Plotters: Chamberlain Defends Drastic Bill Which He Withdrew—The Trials of Enemies in England, France, and Italy," N.Y. TIMES, Apr. 28, 1918, at 1. Chamberlain went out of his way to state that the interview "follow[ed] closely . . . one of" the memoranda submitted to his committee—presumably that written by Warren. *Id.* at 8.

746. Warren, *supra* note 745, at 211 n.19.

747. Warren adverted to other arguments, as well, of less direct importance to the question at hand. For instance, like the Chamberlain bill itself, Warren asserted that the entire United States was within the military's "zone of operations"—hoping, perhaps, that such a finding might trigger the Fifth Amendment's "arising in" clause. *See id.* at 210; *see also supra* notes 600–09 and accompanying text (discussing the inadequacy of the common "arising in" theory of military jurisdiction). And as to individuals who were enemy *aliens*, Warren argued that Congress had "plenary power" to subject them to military trial, without regard to constitutional limitations. Warren, *supra* note 745, at 220–23. That argument was mistaken, *see supra* Section II.B.3.b, and Attorney General Gregory specifically rejected it. *See* Warren Letter to "Gard," *supra* note 736, at 2; Trial of Spies by Military Tribunals, 31 OP. ATT'Y GEN. 356, 361 (1918) (explaining that the trial protections of Article III and the Sixth Amendment "are not limited to citizens; they apply to citizens and aliens alike"). In any event, Warren did not place

The predicate for this argument was Warren's misunderstanding of *why* it is constitutional to try spies in military fora. He wrote that "[t]he basis for the subjection by Congress of civilian spies to Military Law . . . seems to be the danger to the safety and discipline of the troops and the risk of disaster to them, arising from acts so inherently affecting the success of military operations."[748] Having started from this mistaken premise, it was only a small step for Warren to extrapolate the theory far beyond spying, to any *other* conduct that negatively "affects the success of military operations."[749] Is the need for "protection and safety . . . not fully as great," he rhetorically asked, "against the acts of the destructive enemy agent, as against the acts of the disguised 'spy'"? And, if so, and if a military trial is necessary and constitutional for a spy, isn't it "equally necessary for the other form of enemy agent"?[750] This is how Senator Chamberlain put the argument in the *New York Times*:

> We admit the necessity of the trial of spies by court-martial, *in order to afford protection to the army and navy and therewith to guard the safety of the country*. But in our present situation it is asserted, and I think with a good deal of truth, that the greatest injury done to us in this country is not done by enemy agents who would come under the technical description of spies, but by those enemy agents who cause injury to aircraft, munitions of war, &c., or by those who spread the poison of German propaganda. We control the lines of communication between this country and Europe, so that the spy, in the literal legal sense, is at least much hampered in sending any information from this country to Germany. *If it is our safety that is primarily concerned, and I contend that it is*, why may not offenders certainly working as much injury to us as the technical spy be made subject to trial by court-martial?[751]

Two things about this rationale are noteworthy. First, Warren and Chamberlain were simply incorrect about the traditional rationale (such as it was) for trying spies in military tribunals. The basis for permitting such trials was *not*

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principal reliance on the "enemy alien" argument, because the vast majority of persons that he and Chamberlain intended to reach were U.S. nationals.

748. Warren, *supra* note 745, at 204–05.

749. *Id.* at 205.

750. *Id.* at 219. Warren did not contend with the fact that the legislation in question would not have been limited to persons who, like spies, are "agents" of enemy forces: It authorized military trials for many people whose independent conduct (like Lambdin Milligan's) might undermine the war effort, including critics who merely spoke out against the war.

751. "Spies and Plotters," *supra* note 745, at 8 (emphasis added). Warren and Chamberlain were hardly the first to make such an argument. In his influential constitutional law treatise, John Norton Pomeroy likewise reasoned from the example of spies. Because a spy (ostensibly) can be tried and punished for "interfer[ing] directly with the process of waging war," Pomeroy reasoned, it must follow that "[w]henever a civilian citizen or alien is engaged in practices which directly interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result," the President "may treat this person as an enemy, and cause him to be arrested, tried, and punished in a military manner, although the civil courts are open, and although his offence may be sedition or treason." JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 714, at 597–98 (10th ed., rev. 1888).

simply that spying threatens the protection of the armed forces or "the safety of the country."[752] Such a rationale would prove far too much (which explains why the Chamberlain bill was drafted so broadly), and would be impossible to reconcile with historical practice and judicial precedent, including *Milligan*.[753]

Second, the political branches effectively, and decisively, *rejected* Warren's theory, recognizing how radically inconsistent it would be with the Constitution, notwithstanding Warren's reliance on the ancient spying law and the 1778 resolution. The Attorney General and President Wilson concluded that such legislation would be unconstitutional, and Congress immediately abandoned the initiative.

The Warren incident does, however, nicely demonstrate the sort of mischief that can follow from a mistaken understanding of the history and rationale of the spying and quasi-treason Articles of War.

3. The Witzke and Wessels Spying Cases

The Executive branch's repudiation of the Warren view was confirmed later in 1918, when the Army captured a German agent, Lieutenant Lothar Witzke, in Nogales, Arizona, just as he crossed the Mexican border in disguise, under the pseudonym Pablo Waberski, with plans to conduct acts of sabotage in the United States.[754] Attorney General Gregory issued a formal opinion to President Wilson, explaining why Witzke could not be tried as a spy under Article 82 and section 1343, the two parallel wartime spying provisions.[755]

Witzke had not even had an opportunity to enter—and thus was not "found lurking" in—any military camp, fortification, or other premises. Recall, however, that in 1863 Congress had added the words "or elsewhere" to the spying Article,[756] a phrase that thus appeared in both spying provisions in 1918. Gregory explained that "whatever may have been the meaning of those words intended by the framers thereof," they had to be construed in light of the Constitution.[757] And so Gregory turned to the Article III/Sixth Amendment question. *Milligan*, he reasoned, appeared to settle the issue against military adjudication, given that the civil courts were open and Congress had more broadly authorized prosecution of *any* espionage, without regard to location, under the Espionage Act. Importantly, Gregory concluded that it did not matter that Witzke, unlike Milligan, was not a U.S. citizen but was instead an enemy alien: "[T]he provisions of the Constitution upon which the decision was based

752. *See supra* Section IV.B.

753. *Cf.* Reid v. Covert, 354 U.S. 1, 30 (1957) (plurality opinion) ("The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.'").

754. For a detailed and colorful account of the Witzke plot and capture, see Charles H. Harris III & Louis R. Sadler, *The Witzke Affair: German Intrigue on the Mexican Border, 1917–1918*, 59 MIL. REV. 36 (1979).

755. Trial of Spies by Military Tribunals, 31 OP. ATT'Y GEN. 356 (1918).

756. *See supra* notes 653–62 and accompanying text.

757. Trial of Spies by Military Tribunals, *supra* note 755, at 358.

are not limited to citizens; they apply to citizens and aliens alike."[758] Gregory further reasoned that even "if there were no *Milligan* case to furnish us with an authoritative precedent," the relevant constitutional provisions themselves (including Section I of Article III, establishing the right to an independent judge, which Gregory specifically flagged)[759] would

> plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other *peculiarly military territory*, except members of the military or naval forces or those immediately attached to the forces such as camp followers.[760]

This reasoning, however, confronted Gregory with the obvious question, which Charles Warren had flagged just a few months earlier—namely, how to explain the fact that military tribunals had, since the Founding, tried "spies" as defined by the law of war. Gregory insisted that this historical practice was *consistent* with his reading of *Milligan* and Article III, for two related reasons. First, Gregory correctly explained that the international law of war has long permitted spies to be tried, and executed or otherwise disabled, for *preventive*, not punitive, reasons—so that "all possibility of the spy's information reaching the enemy is destroyed."[761] Second, the law of war permits such preventive treatment only in a very circumscribed set of cases—namely, only when the spy has already entered the "lines or zone of military operations."[762] "That this is the basis of the jurisdiction of the military authorities over the enemy spy," Gregory reasoned, "is indicated by the fact, that if he escapes and returns to his own lines and is later captured, he may not be tried or punished as a spy, but must be treated as a prisoner of war."[763] "This shows," wrote Gregory, "how inapplicable the principle of the trial and execution of spies is" to a case such as Witzke's; "for, if the man who escape from our military lines may not be tried by court-martial as a spy when recaptured, surely then the man who has never gone into our military lines may not be so tried."[764]

Gregory closed his opinion by insisting that the spying "exception" *had* to be so circumscribed, or otherwise its example would, logically, undermine the constitutional protections altogether. In a passage manifestly designed as a rebuke of the Warren/Chamberlain theory that had garnered so much attention

758. *Id.* at 361.
759. *Id.* at 362.
760. *Id.* at 361 (emphasis added).
761. *Id.* at 363; *see supra* notes 364–74 and accompanying text.
762. *Id.*
763. *Id.* at 363–64.
764. *Id.* at 364.

several months earlier, Gregory wrote:

> If [Waberski] could constitutionally be tried by court-martial, then it would logically follow that Congress could provide for the trial by military courts of any person, citizen or alien, accused of espionage or any other type of war crime, no matter where committed and no matter where such person be found and apprehended. It was because I realized that this is where the claim of military jurisdiction over Waberski would logically lead, that I felt it necessary to call your attention to the case even before it came to you in the regular course.[765]

The Attorney General thus concluded that the spying Articles "can not constitutionally be applied to the Waberski case," which "render[ed] it unnecessary to further discuss the meaning of the words 'or elsewhere' in those statutes."[766]

Gregory's opinion apparently did not sit well within the Department of Justice. "Numerous" DOJ employees "desired to have it expressly recalled and overruled."[767] Accordingly, a year later, Gregory's successor as Attorney General, the far more belligerent Mitchell Palmer, was asked to reassess the Witzke case based upon a changed understanding of the facts. Palmer was informed that Witzke had "crossed into our territory at least three times within twenty-four hours" and, most importantly, that he was captured "about a mile distant from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side."[768] Attorney General Palmer concluded that because Witzke had been so close to Army encampments, he could be tried by court-martial.[769] Whether or not Palmer was correct that such a one-mile proximity to the Army camp brought Witzke within the "zone of operations" that was decisive for law-of-war and constitutional purposes,[770] his reconsideration of the case did not call into question Gregory's limiting rationale.[771]

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765. *Id.* at 365.

766. *Id.*

767. Memorandum from Attorney General Francis Biddle to Alexander Holtzoff, Assistant to the Attorney General, Re: *Opinion in the Waberski Case, 31 Op. A.G. 356 (1918)*, at 1 (July 2, 1942) (on file with the Franklin D. Roosevelt Presidential Library & Museum, OSCAR S. COX PAPERS, Box 61).

768. Trial of Spy by Court Martial, 40 OP. ATT'Y GEN. 561, 561 (1919).

769. *Id.*

770. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex art. 29 (1917). Palmer's reasoning threatened to render the condition virtually meaningless. In April 1918, for example, a memorandum written to Judge Advocate General Crowder argued that "it must be recognized that today, by reason of railways, telegraphs, telephones, aircraft, and other inventions destroying space, every square foot in the United States is in the neighborhood of some center of military operations" and thus "every square foot of the United States is covered by the eighty-second article of war." Memorandum for Gen. Crowder (Apr. 6, 1918), *in* 2 OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 252, 253 (1918).

771. *See* 40 OP. ATT'Y GEN. at 561 ("This expression of my views should not be treated as overruling the opinion of my predecessor on the facts which were before him, but merely as holding that under the entirely different statement of facts you now submit, the principles announced in that opinion have no

Another spying case, decided after the war ended, further tested the scope of the spying exception. Herman Wessels was an officer in the German Imperial Navy who used a forged Swiss passport to enter the United States.[772] He operated as an enemy agent while living in Yonkers, New York.[773] After the Navy arrested Wessels, the Department of Justice indicted him for conspiracy to commit espionage and treason, and Wessels's compatriots were, indeed, tried (and acquitted) in federal court.[774] Wessels himself, however, was never brought to an Article III trial, because the Navy also charged him with spying under Article 82, and continued to hold him for a court-martial proceeding in the military justice system. Wessels petitioned for a writ of habeas corpus, contending that he had a constitutional right to be tried in the civilian tribunal.

The district court judge held that the spying exception was exempt from the constitutional jury rights because "spying," as defined by international law, is "not [a] crime," and "is not to be considered only as visiting punishment upon the individual, but as a means of prevention."[775] The key question, however, was whether Wessels fell within this exception, given that he was apprehended in a civilian setting in New York, while there were no hostilities ongoing in the United States. Was Wessels endeavoring to obtain information within the "zone of operations of the belligerent," as international law required in order for his conduct to be rendered unprivileged and thus subject to punishment?[776] Judge Manton concluded that he was. Judge Manton's opinion offered two distinct rationales. First, even if the legal standard was that the spy "enter[] forts or armed encampments in the purposes of his mission," Manton reasoned that the port of New York, where Wessels had entered the nation, had such establishments.[777] If that had been the sum of Judge Manton's opinion, then the Wessels case would not have been very noteworthy—it would have been an ordinary application of the traditional spying exception. The problem, however, was that there did not appear to be evidence that Wessels had tried to obtain information within those forts or encampments. Manton therefore offered a broader rationale: It wouldn't matter whether Wessels had entered forts or armed encampments at all, in Manton's view, because the "port of New York" came within the

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application."); *see also* Memorandum from Attorney General Francis Biddle to Alexander Holtzoff, Assistant to the Attorney General, Re: *Opinion in the Waberski Case, 31 Op. A.G. 356 (1918)*, at 1 (July 2, 1942) (on file with the Franklin D. Roosevelt Presidential Library & Museum, OSCAR S. COX PAPERS, Box 61) (Palmer "was unwilling to make an open repudiation of his predecessor's opinion"). The court-martial sentenced Witzke to death, but President Wilson commuted the sentence to life imprisonment at hard labor, and in 1923 Witzke was allowed to return to Germany, where he was welcomed as a hero and awarded the Iron Cross. *See* Harris & Sadler, *supra* note 754, at 46–47.

772. United States *ex rel.* Wessels v. McDonald, 265 F. 754, 762–63 (E.D.N.Y. 1920).

773. *Id.*

774. *See* United States v. Fricke, 259 F. 673 (S.D.N.Y. 1919); United States v. Robinson, 259 F. 685 (S.D.N.Y. 1919).

775. *Wessels*, 265 F. at 762–63.

776. *See supra* note 356 and accompanying text (citing Hague Annex).

777. *Wessels*, 265 F. at 764. Manton did not suggest, however, that Wessels had engaged in any spying within those encampments, or that he had been captured within them.

"field of active operations."[778] Indeed, the judge went further still, explaining that in the circumstances of modern warfare the entire United States counted as a covered zone (or "field") of operations, even if (as in the First World War) no actual hostilities occurred there:

> In this great World War through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations. The implements of warfare and the plan of carrying it on in the last gigantic struggle placed the United States fully within the field of active operations. The term "theater of war," as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. Great numbers of troops were being sent abroad, and, in larger numbers, sailing from the port of New York. Vessels loaded with ammunition and supplies for the army were daily, and frequently in a day, leaving this port. German submarines were landing unheralded and unaware in our ports, before the United States entered the war. Ships were being destroyed within easy distance of the Atlantic coast; there was the constant threat of and fear for airships above the harbor and the city of New York on missions of destruction. A spy of the enemy might well have aided these hostile operations.[779]

This latter, broader rationale, in which an entire nation might be deemed the relevant "zone of operations of a belligerent," was, to say the least, questionable, at least as a matter of hewing to the international law test for denying combatant immunity to enemy spies. Judge Advocate General Frederick Bernays Wiener would later write that there is "reason to believe that this precedent may be a doubtful one."[780]

Wessels appealed to the Supreme Court, arguing that the Court had already decided, in *Milligan*, that the *threat* of enemy conduct in a particular jurisdiction where the courts were open did not transform that area into a "theater of operations" in which the constitutional trial protections do not apply to spies.[781] Before the Court had an opportunity to resolve the question, however, the Secretary of the Navy dismissed the court-martial proceedings "at the instance of the Department of Justice,"[782] and the appeal to the Supreme Court case was

778. *Id.* at 763–64.

779. *Id.*

780. FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 138 (1940).

781. Brief for Appellant at 7–11, Wessels v. McDonald (No. 287) (Oct. Term 1920).

782. *See* WIENER, *supra* note 780, at 138 n.31. Judge Advocate General Wiener surmised that the Department of Justice might have insisted on pretermitting the court-marital proceedings because the war had officially ended by April 1921, and there was some doubt about whether a spy could be prosecuted by court-martial after the close of a war. *Id.* at 138–39 n.31.

therefore dismissed pursuant to stipulation.[783]

C. THE MODERN ERA

There has been far less treatment of the spying and quasi-treason Articles in the past century or so. When Congress enacted the Uniform Code of Military Justice in 1950, both articles were incorporated without significant change.[784] The quasi-treason Article is now found at 10 U.S.C. § 904, with the historical (and ambiguous) term "whosoever" replaced by "any person":

> Any person who—
>
> (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
> (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;
>
> shall suffer death or such other punishment as a court-martial or military commission may direct.

The war-spying Article is now 10 U.S.C. § 906. It, too, uses the term "any person," and it now includes a somewhat more specific list of covered places in which the spy must be "found lurking," although retaining the catch-all term "or elsewhere" that the 1863 Congress had added:

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.[785]

Whatever might be said about earlier congressional intent, by the time it enacted the UCMJ in 1950 Congress might well have assumed that Articles 104 and 106 would, by virtue of the "any person" language, cover persons who are neither in, nor associated with, the armed forces. Indeed, one witness in the Senate hearings in 1949, a Colonel in the Judge Advocate General Reserve, specifically inveighed against the broad scope of those articles, warning that they might be unconstitutional as applied to civilians: Because Article 104, for example, refers to "any person" who "communicates or corresponds with or

783. *See* Wessels v. McDonald, 256 U.S. 705 (1921).
784. Pub. L. No. 81-506, ch. 169, 64 Stat. 107, 138 (1950).
785. 10 U.S.C. § 906 (2012).

holds any intercourse with the enemy, either directly or indirectly," he surmised that a military commission could be convened to try a "mother [who] writes to her son who is in a foreign army," in which case "*Ex parte Milligan* goes out the window."[786]

As the preceding discussion concerning World War I demonstrates, the military and the Department of Justice have long been aware of such constitutional problems in cases where the articles would be invoked to try civilians unconnected to the military, or to try enemy agents for domestic law offenses other than the traditional war-spying offense. Accordingly, over the past ninety-seven years the government has rarely tried to use those articles to try such persons in military courts, even though there have been plenty of opportunities to do so. The modern history is not, however, entirely consistent, principally by virtue of a single, notorious counterexample—the 1942 trial of the Nazi saboteurs, in which charges were brought under both articles, even though the defendants were not part of the U.S. military, and even though one or two of them were U.S. citizens.

1. Aiding the Enemy

During the past century the military has occasionally used the quasi-treason Article for the court-martial of U.S. service members—for example, those who have assisted the enemies who captured them.[787] Yet the military has almost never used that Article to prosecute civilians who aid the enemy; instead, the Department of Justice has typically prosecuted such individuals for treason in Article III courts.[788] The constitutional question therefore has rarely been addressed in the context of an actual prosecution.[789]

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786. *Uniform Code of Military Justice: Hearings Before a Subcomm. of the S. Comm. on Armed Servs. on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 127 (1949) (statement of Col. P.G. McElwee).

787. *See, e.g.*, United States v. Batchelor, 22 C.M.R. 144, 149 (C.M.A. 1956) (prisoner of Korea violated Article 104 by "communication with the enemy without proper authority"); *see also* Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 745–50 (1956), and cases cited therein.

788. *See, e.g.*, Cramer v. United States, 325 U.S. 1 (1945); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).

789. *See* United States v. Dickenson, 20 C.M.R. 154, 163–64 (C.M.A. 1955) (because the accused was a member of the military, the court declined to reach the question of whether "civilians not otherwise validly subject to the Uniform Code cannot be tried by a military tribunal if the offense charged is not a violation of the laws of war, or if martial law has not been constitutionally established"); Dickenson v. Davis, 245 F.2d 317, 319–20 (10th Cir. 1957) (similarly not reaching that question). In its 1940 *Field Manual*, the War Department assumed that Article 81 would authorize the trial of civilians by military tribunals, and that in wartime it could apply "to persons of all classes, without regard to citizenship or military or civil status," but candidly warned that "it is believed that this statute, when subject to judicial interpretation, will be held [to apply] only when the offense has been committed within territory under martial law or military government, or within the zone of military operations, or within a military reservation, post, or camp, or in a place otherwise especially subject to military jurisdiction." WAR DEPARTMENT, BASIC FIELD MANUAL 27–10, RULES OF LAND WARFARE

The one fleeting exception was in the *Quirin* case itself, where the government charged the saboteurs with a violation of the 81st Article—even though most of the defendants did not owe any allegiance to the United States. The petitioners argued that Article 81 could only be constitutionally applied to them, if at all, if their alleged conduct occurred in a "zone of military operations," which they insisted was not properly alleged in the case.[790] The government did not really engage with the constitutional question in its brief, nor did the Solicitor General explain how, exactly, the defendants had "relieved" Germany with any "thing" or given intelligence to Germany—or how the 81st Article could possibly be read to prohibit *German* nationals from providing aid to the German cause.[791] The Court and the advocates addressed the 81st Article only briefly at oral argument, when Chief Justice Stone and Justice Reed queried how the saboteurs' conduct might possibly fit within the Article.[792] Most importantly, the Court chose not to issue any ruling with respect to the statutory or constitutional questions raised by the Article 81 charge.[793]

2. Spying

Likewise, since 1920 the government has typically tried spies for espionage in Article III courts; therefore there has been little occasion for courts to consider the proper scope or constitutional limitations of Article 82 (and its successor, UCMJ Article 106).[794]

Once again, however, the 1942 saboteurs case stands as a rare, and indeterminate, exception. The third charge before the commission alleged that the saboteurs had engaged in spying in violation of Article 82. In the Supreme Court, the petitioners, invoking the War Department's own 1940 *Field Manual*—which in turn cited Attorney Gregory's 1918 opinion—insisted that Article 82 could not properly be applied to them because the government had accused them of

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59 (1940); *accord* DEPARTMENT OF THE ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE 33 (1956) (same as to revised version of article as Article 104 of the UCMJ).

790. Brief in Support of Petitions for Writ of Habeas Corpus at 27–28, *Ex parte* Quirin, 317 U.S. 1 (1942) (Nos. 1–7), *in* 39 LANDMARK BRIEFS, *supra* note 286, at 332–33.

791. *See* Brief for the Respondent at 80–81, *Quirin*, 317 U.S. 1 (Nos. 1–7), *in* 39 LANDMARK BRIEFS, *supra* note 286, at 481–82.

792. Transcript of Oral Argument, July 30, 1942, at 56, *Quirin*, 317 U.S. 1 (Nos. 1–7), *in* 39 LANDMARK BRIEFS, *supra* note 286, at 657.

793. *See* 317 U.S. at 46 ("Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion . . . to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional.").

794. In 1940, the War Department's Law of War Manual appeared to adopt the narrow reading of the phrase "or elsewhere," citing Attorney General Gregory's 1918 opinion for the proposition that it does not justify trial by military tribunals of "persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces, such as camp followers." 1940 BASIC FIELD MANUAL 27–10, *supra* note 789, at 58–59 (quoting 31 OP. ATT'Y GEN. at 361). In 1956, the Field Manual stated that it "has not been decided whether" that is the proper reading. 1956 FIELD MANUAL 27–10, *supra* note 789, at 32.

engaging in espionage "outside of the field of military operations or territory under martial law or other peculiarly military territory."[795] At oral argument, the Justices repeatedly engaged with petitioner's counsel on the permissible scope of Article 82.[796] When it came time to write the Court's opinion, however, Chief Justice Stone recognized that there were "difficulties . . . both constitutional and in the construction of the [81st and 82nd Articles]," as applied "to a citizen who does his dirty work at points remote from military establishments."[797] He decided to "avoid[] all this by sustaining the jurisdiction of the Commission to try charge one."[798] Accordingly, in his opinion for the Court, Stone specifically noted that the Court was not resolving the question of whether the commission had lawful jurisdiction over the spying charge—or of any of the other charges, either, apart from one of the specifications of Charge I, alleging that the defendants had crossed U.S. Army lines in disguise for purposes of sabotage.[799]

In 1945, the government likewise included an Article 82 spying charge in another military commission case very similar to *Quirin*, involving two German agents, William Colepaugh and Eric Gimpel, who alit secretly from a submarine in Frenchman's Bay, Maine, in civilian garb.[800] In the subsequent habeas proceedings, the court of appeals concluded that the case was basically on all fours with *Quirin*, and did not separately address the spying charge.[801] The difficulty with this holding, Colepaugh explained in his certiorari petition to the Supreme Court, was that the government had only demonstrated that Colepaugh engaged in surveillance, or espionage, in the United States, rather than the sort of sabotage that the 1942 saboteurs had planned.[802] Nor did the government try to show that Colepaugh had been spying within any actual military facilities or encampments—it merely argued that he had avoided detection by the military patrol when he arrived on shore in Maine (the government showed that naval units regularly patrolled the area, and that the Army occasionally patrolled the surrounding highways), and that he had planned to gather scientific data regarding shipbuilding, airplanes, and rockets, to be transmitted back to Germany.[803] Colepaugh's case thus, at least in theory, teed up the question of whether the

795. Brief of Petitioners, *Quirin*, at 22–23, in 39 LANDMARK BRIEFS, *supra* note 286, at 327–28.

796. *See, e.g.*, Transcript of Oral Argument, July 29, 1942, at 26–27, 36, 43, *Quirin*, 317 U.S. 1 (Nos. 1–7), *in* 39 LANDMARK BRIEFS, *supra* note 286, at 521–22, 531, 538.

797. Letter from Harlan Fiske Stone to [Law Clerk] Bennett Boskey (Aug. 20, 1942) at 1 (on file with the Library of Congress, Manuscript Div., HARLAN FISKE STONE PAPERS, Box 69, folder marked "July Special Term 1942 *Ex parte* Quirin et al.").

798. *Id.*

799. 317 U.S. at 46 ("Since the first specification of Charge I set forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional.").

800. Colepaugh v. Looney, 235 F.2d 429, 431–32 (10th Cir. 1956).

801. *Id.* at 432–33.

802. *See* Petition for Writ of Certiorari, *Colepaugh v. Looney*, No. 381 Misc., Oct. Term 1956.

803. *See* Brief for the Respondent in Opposition at 3, *Colepaugh v. Looney*, 352 U.S. 1014 (1957), No. 381 Misc., Oct. Term 1956.

circumstances of his espionage fell within the limited ambit of Article 82.

In its opposition to certiorari, the government invited the Supreme Court to do what it had done in *Quirin*—namely, to avoid a decision on Article 82—because it was allegedly sufficient that Colepaugh's espionage violated *the international law of war*, separate and apart from the domestic law Article of War.[804] The Solicitor General explained—correctly—that Article 82 did not codify the law of war. Nevertheless, he insisted that the law of war itself established a distinct spying offense that was less constrained than Article 82, applying whenever a spy "passes the military lines" of the enemy.[805] The only authority the government offered for this (mistaken) proposition about the international law of war was Chief Justice Stone's own, confused dictum in *Quirin*:

> The spy who secretly and without uniform *passes the military lines of a belligerent* in time of war, seeking to gather military information and communicate it to the enemy, *or* an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but *to be offenders against the law of war* subject to trial and punishment by military tribunals.[806]

The Court denied certiorari in *Colepaugh*.[807] The issue, therefore, remained unresolved, and has not been raised again in the past sixty years.

VII. WHAT TO MAKE OF THE HISTORY

In the absence of any compelling textual, functional, or equitable reasons for using military commissions to try domestic-law offenses in our current armed conflicts, the government has, quite reasonably, invoked history. Likewise, historical precedents are virtually the be-all and end-all of the rationale of the court of appeals judges who concluded in *al Bahlul III* that the domestic-law offense of conspiracy could be tried by a military commission. A significant component of this historical argument—not surprisingly—consists of an appeal to the practices of the Revolutionary War, and to an assumption that the Constitution was designed to preserve the government's "power of carrying on war as it had been carried on during the Revolution."[808] Such an argument is hardly unprecedented. As the preceding historical survey has demonstrated, military lawyers and scholars—and, significantly, the Supreme Court in *Quirin*—have often looked to the practices of the Revolutionary War for insight into the

804. *Id.* at 6–7.

805. *Id.* at 6 (The commission had convicted Colepaugh of violating the law of war in addition to the separate charge under Article 82.).

806. *Id.* at 7 (quoting *Quirin*, 317 U.S. at 31) (emphasis added).

807. 352 U.S. 1014 (1957).

808. Miller v. United States, 78 U.S. 268, 312 (1871).

constitutional limits on military jurisdiction to try war-related offenses. At the outset of the Civil War, military officers, especially Judge Advocate General Joseph Holt, began to articulate an account of the nation's first war in which both the Continental Congress and General George Washington—"the peerless, the stainless, and the just, with whom God walked through the night of that great trial"[809]—approved the use of courts-martial to try all manner of civilians who aided the British cause. Once that story took hold, both within the military justice system run by Holt, and in the leading military law treatise penned by his acolyte, William Winthrop, it rapidly became the standard narrative, one that many other commentators and officers accepted uncritically. At the same time, Washington's practice of trying spies found near Army encampments began to be cited for the proposition that the Constitution permits military trials against any and all conduct that might undermine the military's prosecution of war—an argument that fully flowered during the (unsuccessful) effort in World War I to transfer a huge swath of domestic-law cases to military jurisdiction.

Neither of these narratives, however, offered an accurate account of the pre-constitutional practice. As this Article has demonstrated, both the Continental Congress and General Washington were (with one noteworthy exception) acutely sensitive to the right of those accused of aiding the enemy, and similar treasonous conduct, to be tried in the available state civil justice systems by juries of their peers. Indeed, Washington abjured use of a court-martial even when a congressional resolution, by its terms, would have authorized it, in a case where the rationale for that authorization (the disability of the local civilian courts) was inapposite. There were two principal exceptions to this general practice: Congress plainly authorized courts-martial to try *members of the armed forces* for numerous offenses, including providing aid to the enemy—a practice that is now well-established as compatible with the Constitution. And in late 1777, Congress authorized courts-martial to convene trials around Philadelphia for a limited period, because the British occupation of that city had rendered the civil courts there incapable of dealing with the problem—an instance of genuine necessity, which is also consistent with modern constitutional doctrine, but which does not provide a justification for military trials of offenders in our current armed conflicts, all of whom could easily, indeed, more efficiently, be tried in Article III courts.

There was, however, one conspicuous deviation from this norm during the Revolutionary War. The Continental Congress did not offer any excuse of exigency (or any other explanation, either) in February 1778 when it authorized courts-martial to try civilians accused of kidnapping on behalf of the British cause. And although George Washington and his generals virtually never invoked that unusual authority, Washington did personally insist on using it in one very high-profile case: the 1780 trial of Joshua Hett Smith. Given that Washing-

809. *See supra* note 55 and accompanying text (quoting John Bingham's jurisdictional argument in the Lincoln assassination trial).

ton is often viewed "as a sort of constitutional paragon and a model for constitutional virtue,"[810] it is not surprising that this singular precedent has been invoked to justify expansive military court jurisdiction.

The Smith case, however, is a thin reed on which to establish an authoritative constitutional understanding—especially one that cuts against the (later-ratified) constitutional text. It is telling, and important, that Washington never offered any justification for his actions in the Smith case, even when Smith confronted him with the jury-right argument.[811] It is not unreasonable to think that, in this one case, Washington was swayed by circumstances that he felt were more compelling than constitutional fidelity.[812] Washington was panicked by the prospect of a British attack that might have spelled defeat for the colonists, and thus was desperate to obtain as much intelligence as he could from Smith so he would be able to prepare for whatever stratagem General Clinton had in mind. Once he had threatened Smith with the prospect of severe military justice—and a swift execution—as a means of inducing the detainee to talk, perhaps Washington felt as if he had to follow through on the threat.[813]

For these reasons, it would surely be rash to look to the singular example of the Smith court-martial—an example difficult to square with Washington's otherwise punctilious sensitivity to the primacy of civilian justice—as compelling evidence of an implied exception to the constitutional guarantee that the Framers would secure almost a decade later. "Even the good Homer nods," but "in so long a work it is allowable if drowsiness comes on."[814] Indeed, as Washington himself famously remarked in his Farewell Address, "I am . . . too sensible of my defects not to think it probable that I may have committed many errors."[815] Or one, anyway.

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810. Balkin, *supra* note 58, at 684.

811. *See supra* notes 470–71 and accompanying text.

812. Similarly, on one occasion during the Civil War, President Lincoln confessed to acting "without any authority of law," to ensure that "the Government was saved from overthrow." CONG. GLOBE, 37th Cong., 2d Sess. 2383 (1862) (message from the President to the Senate and House of Representatives). For discussion of this uncharacteristic episode, see Barron & Lederman, *A Constitutional History*, *supra* note 60, at 1001–03.

813. There are other ways in which Washington probably cut legal corners in the Arnold/André affair, too, such as by hanging André as a spy, *see supra* note 481, and by offering to release André if Sir Henry Clinton, the British Commander, would surrender Benedict Arnold back to the Continental Army for punishment, an "inadmissible proposal" that "no man of honour could have entertained." Haines, *supra* note 448, at 34–36. *See also* Letter from "A.B." [possibly Alexander Hamilton, writing at Washington's behest] to Sir Henry Clinton (Sept. 30, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON 445 (Harold C. Syrett ed., 1961) (notifying Clinton that Major André had been captured "in such a way as will according to the laws of war justly affect his life"). One historian later surmised that although Washington was generally an "upright man" who suppressed his strong and angry passions "by a resolute exertion of his will," Arnold's treachery, which might have destroyed the republic, "hit Washington hard," and was a singular occasion that "seems to have roused all that was worst in Washington." Haines, *supra* note 448, at 34.

814. HORACE, DE ARS POETICA 359–60.

815. General George Washington, Address to the People of The United States on his Declining of the Presidency of the United States (Sept. 19, 1796).

Proponents of military jurisdiction have not limited their arguments to the pre-constitutional era, however; they have also invoked the actions taken by Congress shortly after 1787. In particular, Judge Kavanaugh has assumed that the first Congresses, even in the shadow of the Treason Clause, ratified pre-constitutional Articles of War that authorized courts-martial to try civilians who aid the enemy in war, and that the 1806 Congress specifically re-enacted those authorizations.[816]

This sort of historical argument is a familiar one; it rests upon the notion, often accepted by the Supreme Court, that early congressional enactments can "provid[e] contemporaneous and weighty evidence of the Constitution's meaning."[817] Founding-era practice has, in particular, been thought to settle, or at least strongly inform, certain questions concerning the operation of Article III, such as whether Congress can require Supreme Court Justices to "ride circuit,"[818] and whether "qui tam" actions are "cases" or "controversies" justiciable in Article III courts.[819]

On the other hand, it is important not to overstate the significance of early enactments. As cases no less canonical than *Marbury v. Madison* and *New York Times v. Sullivan* demonstrate, early congressional understandings surely are not conclusive of close constitutional questions.[820]

In any event, the factual premise of this argument, too, is simply wrong: there is no evidence that the early Congresses believed they were ratifying, or authorizing, courts-martial proceedings against civilians engaged in treasonous conduct. The first Congresses merely rubber-stamped the existing Articles of War as a stopgap until such time as they got around to a comprehensive revision—and even then, they added the conspicuous caveat that the Articles

816. *al Bahlul III*, 840 F.3d 757, 765 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

817. Printz v. United States, 521 U.S. 898, 905 (1997) (internal citations omitted).

818. *See* Stuart v. Laird, 5 U.S. 299, 309 (1803) ("[P]ractice and acquiescence [by the Justices] under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.").

819. *See* Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 776–77 (2000) (recounting the history of British and pre-constitution *qui tam* actions, and their equivalent, and concluding that this history is "well nigh conclusive with respect to . . . whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process'" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998))).

820. The Court decided *Marbury* just six days after its decision in *Stuart v. Laird*, in which the Justices afforded extraordinary deference to an early congressional understanding of Article III. That deference to the first Congresses' understanding of the Constitution disappeared in *Marbury*: The Court held that section 13 of the Judiciary Act of 1789, 1 Stat. 80, which the Court construed to give the Court original jurisdiction to issue writs of mandamus to public officers, was inconsistent with Article III. Marbury v. Madison, 5 U.S. 137, 176 (1803). The Court did not so much as suggest that the First Congress's (purported) understanding was relevant. Likewise, in *Sullivan*, the Court effectively affirmed what it referred to as a "broad consensus" that the Sedition Act of 1798 was unconstitutional. New York Times v. Sullivan, 376 U.S. 254, 276 (1964); *see also* Lee v. Weisman, 505 U.S 577, 626 (1992) (Souter, J., concurring) ("If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.").

were to apply only "as far as [they] may be applicable to the Constitution of the United States"—a concession that, in certain unspecified circumstances, the Constitution might impose limits on the court-martial system that had been in place during the Revolutionary War.[821] It is true that the Ninth Congress, acting seventeen years after the Constitution was ratified, enacted two articles (Articles 56 and 57) prescribing the court-martial of "whosoever" provided certain forms of aid to the enemy in war. At the time, however, it is unlikely that members of Congress considered those articles to apply to ordinary civilians unaffiliated with the armed forces—and the general understanding during the War of 1812, and for the next few decades, was that they did not. The alternative narrative—that the 1806 Articles and their antecedents applied to authorize military trials of what was, in effect, treasonous activity by ordinary civilians—only began to take hold during the Civil War, when Holt and other military officers found it useful to construe the language in question to have a much broader scope, a reading that even the Confederacy rejected with respect to its own, identically worded, articles of war.

I do not mean to suggest that the controversy at hand was definitively settled in 1777, or in 1787, or in 1806. There was no particular occasion to engage the intricacies of the question between 1780 and the War of 1812, and thus it is unlikely that most Framers, and members of the first nine Congresses, even paid the question any mind. Moreover, as Professor Flaherty has written, any "story of continuity and consensus" with respect to difficult constitutional questions during this era of "rebellion, revolution, and innovation" should be viewed with a healthy dose of caution, for that past "is notoriously messy" and typically "replete with conflicting voices."[822]

Even so, the denial of the right to trial by jury was certainly among the most important grievances that prompted independence; virtually nothing else in the Constitution engendered quite so strong and broad a consensus as the (double) guarantee of that right. As Hamilton put it, the only disagreement was whether the jury guarantee was *merely* "a valuable safeguard to liberty," or whether it

821. *See supra* notes 521, 524 and accompanying text. Indeed, just before World War I, an esteemed Judge Advocate General surmised that, assuming the 1776 legislation extended application of the quasi-treason articles to civilians, that extension "seems to have become modified on the adoption of the Constitution." *See supra* note 686 and accompanying text.

822. Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 171 (2004); *see also, e.g.*, Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1741 (2015) ("[O]ne should never forget that certain aspects of the Constitution—including Article III and the structural framework within which it is situated—represented major innovations in their time. . . . [T]he separation of powers framework was, at the least, a transformation of the British model, if not a dramatic departure from it. Against this backdrop, it would be curious indeed if the details of the Article III power were fully settled from the outset."); *cf.* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1758 (2015) ("[D]espite the controlling significance of norms of practice, no simple, algorithmic formula dictates how pertinent kinds of history fit together to yield determinate conclusions in many cases that provoke constitutional controversy.").

was, in fact, "the very palladium of free government"[823]—in Justice Scalia's words, "the spinal column of American democracy."[824] Viewed from that perspective, there is no historical evidence, either before or shortly after constitutional ratification, compelling enough to establish an implied preservation of a wartime exception for the trial of treasonous conduct or other domestic-law offenses.[825]

It is equally undeniable, however, that during the Civil War the military (and, to a certain extent, President Lincoln himself) did act on the presumption that the political branches have extensive, albeit not unlimited, authority to subject domestic-law offenders to military justice in a wide range of circumstances—culminating in "the highest-profile and most important U.S. military commission precedent in American history,"[826] the 1865 trial of the Lincoln assassination conspirators. Not surprisingly, the government cites that dramatic example, together with a handful of less well-known trials in the Civil War and World War II, as having established a "longstanding practice of the government," long *after* the Founding, that ought to "inform our determination of what the law is."[827] Likewise, the judges who have voted with the government in the *al Bahlul* case cited the Lincoln assassination proceeding—along with the Nazi saboteurs' trial in 1942—as canonical authority that might liquidate a constitutional settlement.[828] Accordingly, in a forthcoming article I examine whether such a fleeting but high-profile historical practice in two of the nation's most important wars, and arguably endorsed by two of the nation's greatest wartime presidents, offers persuasive justification for a broader military-tribunal exception to Article III.[829] As this Article has demonstrated, however, whether or not those later landmark cases are to be afforded precedential respect, that question should be considered without any illusion that those adjudications were faithful adaptations of a well-entrenched practice derived from the Founding. To the contrary, they were, if anything, a sharp break from the original foundations—including the experience of the Revolutionary War—and a deviation from the guarantees enshrined in Article III.

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823. THE FEDERALIST No. 83 (Alexander Hamilton), at 499 (Clinton Rossiter ed., 1961).

824. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

825. To be sure, it might be fair to assume that by the time of World War I, some members of Congress believed the ancient spying and quasi-treason statutes reflected the permissibility of authorizing military proceedings to try civilians who aid the enemy in at least *some* circumstances. As we have seen, however, the Executive decisively rejected the effort of several senators and Assistant Attorney General Warren to read that purported legislative authority for all it was worth—and other officials and commentators, who accepted *some* such congressional authority, were nonetheless at pains to try to craft an implied constitutional limit, beyond which the quasi-treason article could not apply. *See supra* Sections VI.B.2, VI.B.3.

826. *al Bahlul I*, 767 F.3d 1, 68 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

827. U.S. *al Bahlul III* Brief, *supra* note 23, at 32 (quoting NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014)); *see also id.* at 36–44 (canvassing Civil War and World War II cases).

828. *al Bahlul III*, 840 F.3d 757, 768 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

829. Lederman, *The Law(?) of the Lincoln Assassination*, *supra* note 45.