

**RATIONALIZING THE CONSTITUTION: THE MILITARY  
COMMISSIONS ACT AND THE DUBIOUS LEGACY OF  
*EX PARTE QUIRIN***

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Introduction .....	14
I. The Judiciary and the Separation of Powers .....	22
II. The Separation of Powers Applies to Military Commissions Convened at Guantanamo Bay .....	23
III. Guantanamo Detainees Are in Privity with the Federal Constitution .....	31
A. The United States Exercises Sufficient De Facto Sovereignty Over Guantanamo to Invoke “Fundamental” Rights Applicable in Unincorporated Territories .....	35
B. The Constitutional Protections of Article III and the Fifth and Sixth Amendments Apply to Citizens and Non-Citizens Alike .....	39
IV. The Military Commissions Act .....	43
V. The Genesis of Military-Commission Jurisdiction.....	45
VI. Constitutional Limitations on Military Jurisdiction .....	51
A. <i>Ex parte Milligan</i> and the “Open Court” Rule .....	51
B. <i>Ex parte Quirin</i> .....	57
C. Post- <i>Quirin</i> Military Commissions Decisions.....	64

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\* LL.M, Harvard University 2008; J.D., University of Notre Dame 2001; B.A., Bowling Green State University 1997. I extend my deepest thanks to my faculty advisor at Harvard, Dr. Gerald Neuman. Dr. Neuman is the true master of extraterritorial-constitutional law. His wisdom proved an invaluable resource writing this Article. I also thank Dr. Jane Bestor, the director of the graduate writing program at Harvard Law. Dr. Bestor cheerfully invested countless hours helping me cut through the tedium of the *Insular Cases* resulting in a far more readable paper. More importantly, she never let me settle for less than its full potential. Finally, I thank the editors and staff of the *Akron Law Review* for their hard work preparing this Article for publication. Any mistakes are my responsibility alone.

VII. Reconciling <i>Milligan</i> with <i>Quirin</i> .....	67
A. Common Features of <i>Milligan</i> and <i>Quirin</i> .....	68
B. Jurisdictional Elements that Rendered the <i>Quirin</i> Offenses Subject to Military Jurisdiction, While <i>Milligan</i> 's Alleged Crimes Remained Within the Exclusive Purview of the Judiciary .....	71
Conclusion .....	100

*“[T]he greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.”*<sup>1</sup>

## INTRODUCTION

Alexander Hamilton famously characterized the Judiciary as the “least dangerous” branch.<sup>2</sup> It “has no influence over either the sword or the purse” and thus “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>3</sup> But this perceived safeguard has sometimes proven to be the institution’s undoing. Faced with the prospect of appearing impotent, the Supreme Court has, on occasion, played the role of doctrinal apologist. The Court has bent seemingly immutable constitutional prerogatives to sanction Executive action when a contrary ruling would likely go unheeded.

The Justices learned the limits of their power early in the Court’s history. In 1832, State authorities ignored the Court’s ruling in *Worcester v. Georgia*,<sup>4</sup> and proceeded with the forced migration of the Cherokee Nation to Oklahoma.<sup>5</sup> Declining to enforce the Court’s judgment, President Jackson was widely, although probably erroneously, quoted as saying, “John Marshall has made his decision, now let him

1. JOHN MARSHALL, PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 616, 619 (1830), *quoted in* O’Donoghue v. United States, 289 U.S. 516, 532 (1933).

2. THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

3. *Id.* at 523.

4. 31 U.S. (6 Pet.) 515 (1832).

5. Donald E. Laverdure, *A Historical Braid of Inequality: An Indigenous Perspective of Brown v. Board of Education*, 43 WASHBURN L.J. 285, 298-99 (2004). Georgia’s invasion of the Cherokee’s land ignored *Worcester*’s holding that:

The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

*Worcester*, 31 U.S. at 561.

enforce it.”<sup>6</sup> True or not, this phrase accurately sums up the Judiciary’s precarious position in the constitutional order.

Viewed contemporaneously as a great embarrassment, history validated *Worcester*. The Cherokee’s relocation, infamously known as the “Trail of Tears,” came to be regarded as one of the nation’s most shameful chapters.<sup>7</sup> And the Judiciary emerged without any blood, proverbially or *literally*, on its own hands. More importantly, the governing precedent — the life blood of our common-law tradition — correctly assesses the incident for what it was: a lawless act that violated the Constitution and treaties of the United States.

Unfortunately, the Court has not always adhered to these principles when its inability to command the “sword” threatened to reveal perceived chinks in its armor. The Judiciary sports a particularly checkered history when called upon to judge the constitutionality of Executive conduct during wartime. Faced with another forced relocation in *Korematsu v. United States*,<sup>8</sup> the Court acquiesced, finding that naked exigency justified deviation from ordinarily inviolate constitutional principles.<sup>9</sup> As Justice Jackson’s dissent prophetically recognized, giving judicial blessings to such machinations poses ramifications far greater than the constitutional breach itself.

A military order, however unconstitutional, is not apt to last longer than the military emergency . . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather *rationalizes the Constitution* to show that the Constitution sanctions such an order, the Court for all time has validated the principle . . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>10</sup>

*Worcester* and *Korematsu* stand as constitutional bookends exemplifying the Hobson’s choice between principled, though futile, resolve and judicial abdication by result-oriented doctrinal manipulation. As Justice Jackson’s dissent forcefully reminds us, “rationaliz[ing] the Constitution” can have grave consequences. Sometimes the specters of

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6. Laverdure, *supra* note 5, at 298-99.

7. *Id.* at 302-03.

8. 323 U.S. 214 (1944).

9. *Id.* at 223-24 (“Regardless of the true nature of the assembly and relocation centers — and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order.”).

10. *Id.* at 246 (Jackson, J., dissenting) (emphasis added).

past judicial mistakes return to haunt future generations. Today, the Court must confront just such a revenant.

The al Qaeda attacks of September 11, 2001, prompted domestic angst not experienced since Pearl Harbor. In the so-called “war on terror”<sup>11</sup> that followed, the military and other federal agents apprehended thousands of suspected “unlawful enemy combatants” in the United States and in nations around the world — both inside and outside theatres of military operations.<sup>12</sup> The Government transported hundreds of these men to the Guantanamo Bay Naval Base for indefinite detention.<sup>13</sup> Some have been held there for more than seven years.

Relying on questionable historical precedent,<sup>14</sup> the Executive claims that the existence of an “extraordinary emergency . . . for national

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11. Unlike the specific campaigns in Afghanistan and Iraq, the “global war on terror” is not a “war” in the legal sense of the term. As Professor Jordan Paust explained,

[T]he United States cannot be at “war” with bin Laden and al Qaeda as such. Bin Laden was never the leader or member of a state, nation, belligerent, or insurgent group (as those entities are understood in international law) that was at war with the United States. Armed attacks by nonstate, nonnation, nonbelligerent, noninsurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the U.N. Charter against those directly involved in processes of armed attack, but even the use of military force by the United States merely against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda . . . .

Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340-41 (2004).

12. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006). The military has also detained alleged enemy combatants in South Carolina. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). Thousands more are detained at foreign installations, most notably Bagram Air Force Base in Afghanistan. David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125, 134 n.49 (2005) (citing Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1) (noting that as of 2005 the U.S. military reportedly detained 9,000 prisoners worldwide).

13. *Hamdan*, 548 U.S. at 568; *Hamdi*, 542 U.S. at 510. See also *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005) (noting that in addition to those detained in the Afghani war zone, Guantanamo detainees include men captured in, among other places, Bosnia, Gambia, Thailand, and Zambia).

14. The Government frequently cites the military-commission trials of Henry Wirz (the Confederate commandant of the Andersonville prisoner-of-war camp) and the Lincoln conspirators as “precedent” for the propriety of military tribunals. See *Hamdan*, 548 U.S. at 699 n.12, (Thomas, J., dissenting). Neither of these historical examples were reviewed by an Article III court. While the Wirz trial may have passed constitutional muster (see *In re Yamashita*, 327 U.S. 1 (1946)), the trial of the Lincoln conspirators has been called into question by subsequent authority. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

defense purposes”<sup>15</sup> requires that some of these men must be tried not by Article III courts, but rather by specially created military commissions charged with determining their guilt.<sup>16</sup> Such commissions, which may most accurately be categorized as “Article II courts,”<sup>17</sup> deviate widely from civilian courts. Ordinarily inviolate procedural protections are disregarded. Juries are denied. The right of appellate review is circumscribed. The universal common-law prohibition against the admission of hearsay, even multiple hearsay, and un-sworn evidence is not honored.<sup>18</sup> Most critically, the structural independence enjoyed by Article III courts and even state jurists is wholly absent.<sup>19</sup> Military commissions are inquisitorial in nature. Military judges and even the commission members themselves fall within the direct chain of command of the President and his proxies and ultimately depend on favorable reviews from these superiors for promotion and career advancement.<sup>20</sup>

The President premised his authority to convene these tribunals on the Supreme Court’s controversial World War II era decision in *Ex parte Quirin*.<sup>21</sup> *Quirin* sustained military jurisdiction to try eight German servicemen captured on United States soil on a mission to sabotage defense industries.<sup>22</sup> *Quirin* stands in plain tension with *Ex parte Milligan*,<sup>23</sup> the seminal case on the use of military commissions. *Milligan* famously established the “open court” rule, which holds that military courts lack jurisdiction to try war-time offenders in places

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15. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833-34 (Nov. 13, 2001).

16. *Id.* at 57,833. That is, the individuals that the Government has chosen to actually file charges against.

17. See David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993).

18. Military Commissions Act, Pub. L. No. 109-366, § 949a(b)(2)(E)(i)-(ii), 120 Stat. 2600, 2608-09 (2006); *Hamdan*, 548 U.S. at 614.

19. While most state judgeships are elected offices and thus are answerable to the electorate, state jurists, unlike military jurists, enjoy institutional independence from the coordinate branches of government.

20. Military Commissions Act, Pub. L. No. 109-366, § 948i-j, 120 Stat. 2600, 2603-04 (2006). Military defense lawyers representing Salim Ahmed Hamdan filed motions accusing Brigadier General Thomas Hartmann, the White House’s chief advisor on the Guantanamo Bay military commissions, of exercising “unlawful command influence” over subordinate officers defending accused terrorists. Carol J. Williams, *Defender Says Advisor Exerts Illegal Sway: A Navy Lawyer for Bin Laden’s Ex-Driver Says His Superior Is Pursuing Election-Year Guilty Verdicts When His Job Is To Be Impartial*, L.A. TIMES, Mar. 28, 2008, at A15.

21. 317 U.S. 1 (1942).

22. *Id.* at 28-29.

23. 71 U.S. (4 Wall.) 2, 80 (1866).

where the civil courts are open and functioning.<sup>24</sup> In contrast, *Quirin* radically extended military-commission jurisdiction to include certain offenses that violate the “law of war” — even in locales where Article III courts are open and available to try the alleged offenders.<sup>25</sup>

President Bush unilaterally authorized the trial of Guantanamo detainees by military commissions in a 2001 executive order.<sup>26</sup> The order dictated that any non-citizen whom the President had “reason to believe . . . is or was” a member of al Qaeda or had participated in terrorist activities harmful to the United States “shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death.”<sup>27</sup>

The Supreme Court struck down the President’s order in *Hamdan v. Rumsfeld*.<sup>28</sup> Five Justices concluded that the order was invalid because, unlike in *Quirin*, Congress impliedly prohibited the President’s actions. A majority of the Court concluded that the President’s unilateral act violated the separation of powers. “Located within a single branch,” military tribunals “carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.”<sup>29</sup>

Justices Thomas, Scalia, and Alito argued in dissent that Congress had, in fact, impliedly authorized such tribunals.<sup>30</sup> Even the majority Justices suggested that the order’s separation of powers problems could be cured by congressional approval. Justice Breyer, writing for four of the majority Justices, specifically asserted that “[n]othing prevents the president from returning to Congress to seek the authority he believes necessary.”<sup>31</sup> He did. Less than four months later, Congress hurriedly enacted the Military Commissions Act of 2006 (“MCA”).<sup>32</sup> The MCA specifically provided that “[t]he President is authorized to establish

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24. *Id.* at 80.

25. *Quirin*, 317 U.S. at 29-30.

26. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

27. *Id.* at 57,834.

28. 548 U.S. 557 (2006).

29. *Id.* at 638 (Kennedy, J., concurring).

30. *See id.* at 680 (Thomas, J., dissenting). Chief Justice Roberts recused himself from the proceedings.

31. *Id.* at 636 (Breyer, J., concurring).

32. Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

military commissions . . . [to] try unlawful enemy combatants . . . .”<sup>33</sup> Despite the Act’s swift enactment, President Bush did not initiate the first MCA prosecutions until the spring of 2008. On August 5, 2008, the commission issued its first verdict. The tribunal convicted *Hamdan* petitioner Salim Hamdan of material support of terrorism for his employment as Osama bin Laden’s driver, sentencing him to five and a half years in military prison.<sup>34</sup>

In this Article, I challenge *Hamdan*’s apparent inference that congressional approval can save the MCA from the “open court” rule. I argue that the separation of powers remains at the heart of the Guantanamo military commission’s debate irrespective of the MCA. It is well settled that Congress cannot divest another branch of the power it is constitutionally vested.<sup>35</sup> The power at stake in the MCA is purely *Judicial*. The authority to try criminals and administer punishment lies at the core of the Judicial Article’s paramount constitutional prerogative “to say what the law is.”<sup>36</sup> The Constitution entrusts that power exclusively to the Judiciary. Congress cannot divest it.

In Part I, I explore the Judiciary’s proper constitutional role in the separation-of-powers scheme. I assert that the Judiciary’s paramount constitutional obligation to declare “what the law is” necessarily includes the responsibility to conduct federal criminal trials.

In Part II, I examine the role of the Judiciary in adjudications conducted in so-called insular areas: territories that have not been admitted as States. The Court has frequently stated that the Judiciary plays a diminished role in such trials. The *Insular Cases*<sup>37</sup> found that the Constitution permits Congress to empanel jury-less legislative courts in federal possessions not destined for statehood.<sup>38</sup> But the Constitution

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33. *Id.* § 948b(a)-(b).

34. Jerry Markon, *Hamdan Guilty of Terror Support; Former Bin Laden Driver Acquitted of Aiding Attacks*, WASH. POST, Aug. 7, 2008, at A01. Hamdan was acquitted of the more serious charge of conspiring to commit terrorist acts. *Id.* Because he had already served sixty-one months awaiting trial, Hamdan should be released in January, 2009.

35. *See, e.g.*, *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 945 (1983) (holding that congressional enactment affording the House of Representatives a “legislative veto” power was unconstitutional because such a power conflicted with “[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process”).

36. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

37. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

38. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601

limits the use of such tribunals to distant locales where it would be impossible or at least extremely difficult to empanel juries or create permanent Article III courts. I argue that necessity alone justifies these extraordinary tribunals. Accordingly, they may only be constitutionally convened where the location of the alleged offense bears a reasonable geographical nexus to the territory where the trial takes place. If no geographical nexus were required to justify the use of such extraordinary tribunals, then Congress could easily identify Guantanamo Bay or other locations where no Article III courts exist as the appropriate venue for any extraterritorial violations of American law, thereby evading the separation of powers and attendant constitutional protections.<sup>39</sup> The alleged offenses for which the Guantanamo detainees face trial bear no geographical connection with the Base whatsoever. And from the standpoint of producing evidence and witnesses, the Government faces no greater burden transporting the defendants to an Article III court on the mainland than to the Base. Therefore, I assert that only an Article III court may constitutionally exercise jurisdiction in these cases.

In Part III, I address *Johnson v. Eisentrager*,<sup>40</sup> which strongly implied that aliens detained, tried, and imprisoned outside the United States lack judicially enforceable rights under the Fifth Amendment. The President has contended that this decision obviates the application of the “open court” rule in the case of suspects apprehended outside the United States and detained and tried at Guantanamo Bay. In its recent decision in *Boumediene v. Bush*,<sup>41</sup> the Supreme Court found that absent invocation of the Suspension Clause,<sup>42</sup> Congress could not divest Guantanamo Bay detainees of *habeas corpus* review. The Court distinguished *Eisentrager* on the ground that the United States’ control over the post-World War II German prison at issue in that case “was neither absolute nor indefinite,” but rather “was under the jurisdiction of the combined Allied Forces.”<sup>43</sup> Conversely, the United States “maintains *de facto* sovereignty over” Guantanamo “by virtue of its

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n.30 (1976).

39. Under this logic, foreign drug traffickers captured in Mexico could be transported to Guantanamo Bay for trial to avoid the strictures of Article III.

40. 339 U.S. 763 (1950).

41. 128 S. Ct. 2229 (2008).

42. The Constitution’s Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when, in Case of Rebellion or Invasion, the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

43. *Boumediene*, 128 S. Ct. at 2260.



complete jurisdiction and control over the base.”<sup>44</sup> But the Court did not specify what other constitutional rights, if any, apply to aliens tried at Guantanamo. It stated that the Government’s constitutional obligations vary from one insular area to another based on a particular territory’s “conditions and requirements.”<sup>45</sup> I argue that all “fundamental” constitutional protections apply on the Base because, as the Court noted, “[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”<sup>46</sup>

In Part IV, I examine the particular contours of the Military Commissions Act. In Part V, I analyze the historical evolution of the military commission, from its origins on the battlefields of the Mexican War to the present “war on terror.” In Part VI, I examine *Milligan*’s “open court” rule and the subsequent in-roads cut by *Quirin* upon that once bright-line rule.

Finally, in Part VII, I attempt to reconcile the doctrinal divide separating *Milligan* and *Quirin*. While I strongly question *Quirin*’s propriety, I argue that the Court need not overrule the decision to avert the potential constitutional crisis posed by the Military Commissions Act. The tensions between *Milligan* and *Quirin* invest the Court with substantial latitude to cabin military jurisdiction within traditionally recognized constitutional bounds. In short, the Court should limit *Quirin* to its facts. Applying these principles, I argue that military jurisdiction should be limited to the prosecution of:

- (1) admitted combatants, or persons whose combatancy has been established by an Article III tribunal;
- (2) who are members of *state-affiliated* military corps;
- (3) who are prosecuted for crimes committed during the pendency of a *congressionally declared* war.

The case for circumscription of *Quirin* in favor of *Milligan*’s constitutional values could hardly be stronger. *Milligan* is celebrated as “one of the bulwarks of American liberty,”<sup>47</sup> while *Quirin* strongly bears the indicia of undue Executive influence over the Judiciary.<sup>48</sup>

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44. *Id.* at 2253.

45. *Id.* at 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

46. *Id.* at 2261.

47. 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 149 (1926), quoted in Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 461 (2002).

48. With this premise in mind, I refer to *Korematsu* throughout this Article. I do not mean to suggest that *Quirin* and *Korematsu* are doctrinally linked. Rather, given the Court’s sometimes loose adherence to *stare decisis* in constitutional cases, I believe that the decisions that command

## I. THE JUDICIARY AND THE SEPARATION OF POWERS

The Constitution's principal thesis is the separation of powers. As James Madison warned, the American concept of government under the rule of law is inherently premised on the division of authority between separate departments. Just as government is necessary to govern men, preservation of the rule of law dictates that government power must be divided among separate departments to "oblige it to control itself."<sup>49</sup> To that end, each branch must "resist encroachments of the others."<sup>50</sup> Lacking the "sword" and the "purse," the Judiciary is the most vulnerable.<sup>51</sup>

As *Marbury v. Madison*<sup>52</sup> established, the quintessential constitutional function invested in the Judicial Department is the "province and duty . . . to say what the law is"<sup>53</sup> in "*particular cases and controversies*."<sup>54</sup> This now-familiar axiom is frequently associated with its "public rights" aspect — defining the law for future applications.<sup>55</sup> But *Marbury* equally entails a quintessential "private rights" function — settling disputes and ascertaining the *individual* liabilities of *particular* parties.<sup>56</sup> "The province" of the Judiciary is "to decide on the rights of *individuals*."<sup>57</sup> This function necessarily includes the responsibility for

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the strongest respect are those where the Court established a legally principled position in the face of threatened non-compliance — *Milligan*, *Worcester*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Conversely, I believe the decisions that historically appeared compelled by threats of non-compliance — like *Quirin* and *Korematsu* — command the weakest pull.

49. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

50. *Id.*

51. THE FEDERALIST NO. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

52. 5 U.S. (1 Cranch) 137 (1803).

53. *Id.* at 177.

54. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995) (emphasis added) (citing *Marbury*, 5 U.S. at 177).

55. *Marbury*, 5 U.S. at 177 ("[A]n act of the legislature, repugnant to the constitution, is void"); see also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1416 (1988) (arguing that "*Marbury* was . . . a manifestation of the public rights model").

56. See Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1919-20 (1986) ("Chief Justice Marshall emphasized the necessity for judicial protection of vested or legal rights. His arguments for judicial review were premised on the Court's duty to decide the rights of individuals. *Marbury* thus presaged the adoption of a private rights model of judicial authority . . .").

57. *Marbury*, 5 U.S. at 170 (emphasis added).

conducting criminal adjudications.<sup>58</sup> As the Court explained in *Toth v. Quarles*,<sup>59</sup>

Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. *It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases.*<sup>60</sup>

Exigency cannot empower Congress or the President to reallocate this constitutional prerogative. “Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency.”<sup>61</sup> Nor, as the *Boumediene* Court recently recognized, may Congress and the President “contract[] away” the Judicial role through the simple expediency of “surrendering formal sovereignty” over territory “while at the same time entering into a lease that grants total control over the territory back to the United States . . .”<sup>62</sup> Indulging in such fictions violates the separation of powers “leading to a regime in which Congress and the President, not th[e] Court, say ‘what the law is.’”<sup>63</sup>

## II. THE SEPARATION OF POWERS APPLIES TO MILITARY COMMISSIONS CONVENED AT GUANTANAMO BAY

Despite Article III’s seemingly plain import, the Court has sanctioned extra-Judicial criminal adjudicatory bodies. For example, in *Ross v. McIntyre*,<sup>64</sup> the Court long ago blessed the congressional establishment of consular courts to try American nationals for crimes committed abroad.<sup>65</sup> Such tribunals, composed of commissions staffed by consulate personnel, tried both civil and criminal disputes. While the

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58. *Cf. Plaut*, 514 U.S. at 218-19 (“[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy — with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a judicial Power is one to render dispositive judgments.’”) (citation and emphasis omitted).

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

60. *Id.* at 15 (emphasis added).

61. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934).

62. *Boumediene v. Bush*, 128 S. Ct. 2229, 2258-59 (2008).

63. *Id.* at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

64. 140 U.S. 453 (1891).

65. *Id.* at 465.

Court initially justified these tribunals on the dubious notion that “[t]he Constitution can have no operation in another country,”<sup>66</sup> subsequent decisions premised their legitimacy on necessity.<sup>67</sup> Congress established consular courts in locales where literal compliance with the Constitution was impossible.<sup>68</sup> Their jurisdiction was limited to locations lacking a sufficient population of American citizens to constitute a jury pool, in lands too distant to enable transport to the United States for trial.<sup>69</sup> The Constitution countenanced such tribunals to avert potential anarchy and vigilantism.<sup>70</sup> Nonetheless, as Justice Black later recognized, because

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66. *Id.* at 464.

67. *See, e.g., Reid v. Covert*, 354 U.S. 1, 56 (1957) (Frankfurter, J., concurring) (“Insofar as [Ross] expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution . . . *Ross* is not rooted in any abstract principle or comprehensive theory touching constitutional power or its restrictions. It was decided with reference to a very particular, practical problem with a long history.”).

68. In his concurring opinion in *Reid*, Justice Harlan suggested a more forgiving standard than objective impossibility:

[T]he basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.

*Reid*, 354 U.S. at 74 (Harlan, J., concurring). Justice Kennedy has endorsed this standard. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring). While the precise definition of “impracticable and anomalous” remains unclear, it plainly is something short of impossible. In my view, the standard should be governed by “impossibility.” “Impracticability” is only relevant to the degree to which the Government owes a constitutional duty to transport defendants, witnesses, and evidence to districts where civilian courts are open for trial. *See Reid*, 354 U.S. at 47 (Frankfurter, J., concurring) (noting the government’s argument that “it would often be equally impracticable to transport all the witnesses back to the United States for trial”).

69. *Reid*, 354 U.S. at 56-57 (plurality opinion).

70. *Id.*; *see also* David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 304 (2005) (“Both legislative and consular courts served as exceptional tribunals, hearing cases where access to U.S. courts was impossible or impractical. They were created out of necessity, administering justice to a small number of Americans.”). It should be noted that the historical premise underlying the conclusion that such tribunals were necessary to prevent lawlessness is somewhat dubious. This assumption was inevitably based on the conclusion that the nations where they were established lacked sufficiently mature legal systems to adjudicate criminal prosecutions involving Americans. “These courts, typically founded on coercive treaties, adjudicated claims among western citizens abroad as well as between western citizens and locals, on the theory that the local law was barbaric, unpredictable, and strange. In other words, westerners in places like Shanghai lived under their home state’s laws (or an amalgam of western laws) rather than Chinese law . . . .” Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2511 (2005). The potential racism lurking behind this rationale was overtly expressed by *Ross*: “Treaties conferring . . . jurisdiction upon [consular courts] were essential to the peaceful residence of Christians within [non-Christian] countries and the successful prosecution of commerce with their people.” *Ross*, 140 U.S. at 463.

consular courts, in effect, blended the trinity of federal authority in a single department, they raised grave separation-of-powers concerns:

[C]onsuls could and did make the criminal laws, initiate charges, arrest alleged offenders, try them, and after conviction take away their liberty or their life — sometimes at the American consulate. *Such a blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism.*<sup>71</sup>

The Judiciary has similarly played a diminished role in territories that have not been admitted as States. Beginning in *American Insurance Co. v. Canter*,<sup>72</sup> the Court, per Chief Justice Marshall, recognized that Article IV<sup>73</sup> empowers Congress to establish “legislative courts” in territories that have not yet become States.<sup>74</sup> Such courts exercise jurisdiction outside the operation of “that judicial power which is defined in the 3d article of the Constitution.”<sup>75</sup> The judges presiding over these tribunals lack the tenure and salary protections afforded to Article III judges. *Canter* affirmed their constitutionality, reasoning that Article IV invests Congress with plenary power over federal territories equivalent to that enjoyed by States. “In legislating” for territorial courts, “Congress exercises the combined powers of the general, and of a state government.”<sup>76</sup> Thus, just as the States possess the plenary authority to establish their own court systems, Congress likewise may empower territorial governments to empanel their own tribunals to fill the role served by the state courts.<sup>77</sup> This authority to convene

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71. *Reid*, 354 U.S. at 11 (plurality opinion) (emphasis added).

72. 26 U.S. (1 Pet.) 511 (1828).

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

74. *Canter*, 26 U.S. at 546. *Canter* addressed the constitutionality of a judgment issued by a Florida territorial court. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* As the Court explained of Congress’s parallel plenary power over the District of Columbia:

Congress may . . . exercise all the police and regulatory powers which a state legislature . . . would have in legislating for state or local purposes. Congress “may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.

legislative courts immediately divests when the territory becomes a State.<sup>78</sup> While these courts are generally obligated to observe the strictures of the Fifth and Sixth Amendments,<sup>79</sup> they lack the institutional independence afforded Article III courts.

The Supreme Court has also emphasized that Congress is not required to establish *lifetime* Article III commissions in places where the tenure of federal jurisdiction is uncertain. As the Court has explained, the “transitory character” of territorial governments justifies the establishment of non-Article III courts:<sup>80</sup> “[t]he absence from the Constitution of [Article III’s tenure and salary] guarantees for territorial judges was no doubt due to the fact that the organization of governments for the territories was but temporary, and would be suspended when the territories became states of the Union.”<sup>81</sup> Given the uncertain nature of diplomatic endeavors, the same is plainly true of the establishment of American consuls and consular courts.

In the *Insular Cases*,<sup>82</sup> the Court found that the Judiciary’s role is still further weakened in so-called “unincorporated” territories. Distinguishing “incorporated” and “unincorporated” territories, the Court has explained, “[t]he former category encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force. The latter category included those Territories not possessing that anticipation of statehood. As to them, only ‘fundamental’ constitutional rights were guaranteed to the inhabitants.”<sup>83</sup> “Fundamental” constitutional rights applicable in

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Palmore v. United States, 411 U.S. 389, 397 (1973) (emphasis added) (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)).

78. *Benner v. Porter*, 50 U.S. (9 How.) 235, 243 (1850). As the *Benner* Court explained: The admission of [a] State into the Union br[ings] the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. By art. 3, § 1, “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour.”

*Id.*

79. *Canter*, 26 U.S. at 543.

80. *O’Donoghue v. United States*, 289 U.S. 516, 536 (1933).

81. *Id.* at 536-37 (quoting *McAllister v. United States*, 141 U.S. 174, 187-88 (1891)).

82. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

83. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 n.30 (1976).

unincorporated territories are generally synonymous with those rights applicable against the States through the selective-incorporation doctrine.<sup>84</sup> But the right to trial by jury is an important exception. For purposes of the selective-incorporation doctrine, the right to “trial by jury in criminal cases is *fundamental* to the American scheme of justice” and thus is applicable to States via the Due Process Clause of the Fourteenth Amendment.<sup>85</sup> But the Court found that it was not “fundamental” in the context of unincorporated territories.<sup>86</sup>

The Court’s endorsement of more relaxed constitutional restraints upon Government action in unincorporated territories stemmed principally from the presumed inability of the local populations to accommodate the right to trial by jury. The *Insular Cases* repeatedly emphasized the perceived impossibility of convening juries in territories deemed to be lacking “citizens trained to the exercise of the responsibilities of jurors.”<sup>87</sup> *Boumediene* recently offered a more sensitive explanation for this rhetoric.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a

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84. See *Montalvo v. Colon*, 377 F. Supp. 1332, 1340 (D.P.R. 1974). As the *Montalvo* court explained:

Curiously, despite the difference in outward appearance between the Fourteenth Amendment provision that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” and the doctrine announced in *Downes v. Bidwell* that only “fundamental” provisions of the Constitution apply in “unincorporated territories” like Puerto Rico, the practical and theoretical application of these two standards has been remarkably similar.

*Id.*; see also Kermit Roosevelt, III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2055 n.187 (2005) (“Application of the Bill of Rights to the states eventually came to be governed . . . by an analysis that asked whether the asserted right was ‘fundamental’ . . . . Likewise, the *Insular Cases* now tend to be understood as adopting an approach that turned on the fundamentality of the right at issue.”).

85. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (emphasis added).

86. *Balzac v. Porto Rico*, 258 U.S. 298, 309-13 (1922).

87. *Id.* The supposition of *Balzac* and other *Insular Cases* was premised largely upon dubious assumptions concerning the intellectual capacities of the populations of the insular territories and ultimately smacks of racism. *Balzac*’s conclusion that Puerto Rico lacked a sufficient pool of qualified jurors is particularly questionable in light of the Court’s recognition that at the time of the decision Puerto Rico utilized jury trials in felony cases. *Id.* at 300. The Court also found that the Constitution’s uniform-taxation requirement is inapplicable to Puerto Rico. *Downes*, 182 U.S. at 287.

complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory.<sup>88</sup>

*Ross* and the *Insular Cases* raise the question whether the Judiciary plays *any* role in the Guantanamo Bay military trials of aliens accused of extra-territorial offenses. As I will explain in greater detail in the following sections, the authority to convene military tribunals and consular courts are of a similar constitutional vintage. When military authorities assume the role of providing temporary governance for territories where civil authority has been displaced, they necessarily assume the power and responsibility to provide a functioning legal system. But military courts — like consular courts, legislative courts, and jury-less “unincorporated” territorial courts — cannot serve as constitutional substitutes for Article III tribunals in territories where such constitutionally contemplated courts are open and available to try offenders. Rather than constituting alternative tribunals that may be empanelled at the whim of Congress or the President, or both, these extraordinary tribunals are permissible only in places where Article III courts cannot operate.<sup>89</sup>

*Ross* concluded that Congress may constitutionally convene consular courts in Japan to adjudicate crimes committed by American nationals there. But this does not imply that such tribunals can be constitutionally empanelled inside the United States. Nor does *Ross* stand for the proposition that Congress can convene such tribunals on an island or ship just outside the territorial waters of the United States to evade the strictures of Article III or the Bill of Rights.<sup>90</sup>

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88. *Boumediene v. Bush*, 128 S. Ct. 2229, 2254 (2008).

89. Legislative courts established in “incorporated” territories differ from unincorporated-territorial courts, military courts, and consular courts. As previously noted, the power to establish territorial courts does not arise from any special circumstances. Rather, as *Canter* explained, the power to establish these tribunals arises from the plenary power Congress exercises over federal territories — the same type of power States exercise over their own territory. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). As such, they are analogous to state courts. It is well settled that the Constitution accords state courts dignity equal to that of Article III courts. *See Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat) 304, 346 (1816) (“[S]tate judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity”).

90. While access to an Article III forum and compliance with the provisions of the Bill of Rights are separate issues, the Supreme Court has suggested that the two rights may be coextensive. Addressing the Seventh Amendment right to a jury trial in the civil context, the Court noted, [O]ur decisions point to the conclusion that . . . the question whether the Seventh Amendment permits Congress to assign . . . adjudication to a tribunal that does not



In my view, the military-commission precedents, the consular tribunals sanctioned by *Ross*, and the jury-less courts recognized by the *Insular Cases* should be read collectively as a constitutional backstop — a last resort to prevent anarchy in transitory venues.<sup>91</sup> The principle underlying all these tribunals is the need to convene *local* courts to try *local* offenses. The Constitution does not compel authorities in remote locales to transport defendants, witnesses, and evidence across distant seas to the United States for trial whenever a crime has been committed. This principle is particularly compelling in the case of military commissions, at least as traditionally organized. Historically, military officers empanelled commissions to conduct trials in the theatre of war itself where the very witnesses, usually soldiers, might be called upon at any moment to restore the peace or repel invaders.<sup>92</sup>

But where, as in the case of Guantanamo, the Government has voluntarily chosen to transport accused offenders thousands of miles from the war zone, the strictures of the separation of powers should apply in full force. The Government could constitutionally try Ross before a consular court *in Japan* for a crime committed *in Japan*. But if it transported him across the Pacific, it could not try him before a similarly constituted court on the Farallon Islands (a federal enclave located twenty-seven miles off the coast of San Francisco).<sup>93</sup> Having assumed the burden of transporting him, and presumably the witnesses

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employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.

*Granfinanciera v. Nordberg*, 492 U.S. 33, 53 (1989). While *Granfinanciera* involved the Seventh Amendment right to a jury in the trial of common-law causes of action in the *civil* context, these justifications would resonate even more strongly in the context of Fifth and Sixth Amendment rights in *criminal* cases.

91. *Boumediene's* explanation of the *Insular Cases* emphasized the importance of the transitory character of unincorporated territories:

[A] complete transformation of the prevailing legal culture [in transitory federal enclaves] would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory . . . . The Court was thus reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories.

*Boumediene*, 128 S. Ct. at 2254.

92. Military commissions are convened “typically *on the battlefield itself*.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 596-97 (2006) (plurality opinion) (emphasis added).

93. For purposes of this hypothetical, I treat the Farallones as an “unincorporated” territory. Technically the Farallones are part of the State of California, although the federal government exercises exclusive jurisdiction. The islands have been designated as a marine wildlife sanctuary. Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 725-26 (2003).

and evidence, such a great distance, the Government would, in effect, waive any claim of geographical inconvenience. The fact that the hypothetical Farallones “court” would be twenty-seven miles closer to Japan than the federal courthouse in San Francisco would not provide the necessary geographical nexus. The only purpose for convening such a tribunal would be to take advantage of the perceived diminished constitutional constraints. The constitutional limitations implicit in the separation of powers cannot be so easily evaded. The Guantanamo Bay commissions are no different.

As Justice Stevens noted, the *Hamdan* commission “was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities.”<sup>94</sup> The MCA did nothing to change this *status quo*. No exigency or need to adjudicate locally war-time offenses requires that accused offenders apprehended in the Middle East be tried in the Caribbean. As Justice Stevens further noted, the President’s dilatory prosecution firmly demonstrates that the offenses at issue, being far removed from the battlefield, are not the sort “which military efficiency demands be tried expeditiously . . . .”<sup>95</sup> Indeed, many of these men “were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term,”<sup>96</sup> including such distant locations as Bosnia, Gambia, Thailand, and Zambia.<sup>97</sup> The Government plainly demonstrated its will to transport these men many thousands of miles. It could easily have transported them another 125 miles to a venue where Article III courts are open and available to try them.<sup>98</sup> The authority to convene consular tribunals in distant lands does not empower Congress or the President to employ the same procedure for offenders that have actually been transported nearly within sight of American shores. And so it is with military commissions.<sup>99</sup>

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94. *Hamdan*, 548 U.S. at 612.

95. *Id.*

96. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005) (“In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay . . . numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term. For example, detainees at Guantanamo Bay who are presently seeking habeas relief in the United States District Court for the District of Columbia include men who were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia, and Thailand.”).

97. *Id.*

98. *Baher Azmy, Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 372 (2007) (noting that the Guantanamo Bay Naval Base is 125 miles from Miami, Florida “as the crow flies”).

99. Whatever exigency the Government may normally claim regarding war-time

Once removed from the exigency of the war zone, the legitimacy of military tribunals rapidly dissipates. The inability to comport with the separation of powers in the chaos of combat does not warrant the use of circumscribed military-commission procedures in the trial of an alleged war-zone offender years after the Government has transported him far away from the fighting.

### III. GUANTANAMO DETAINEES ARE IN PRIVACY WITH THE FEDERAL CONSTITUTION

The President has repeatedly asserted that alien Guantanamo detainees taken into custody outside the United States possess no enforceable constitutional rights. This argument finds its genesis in the *Ross* Court's assertion that "[t]he Constitution can have no operation in another country."<sup>100</sup> While later cases rejected this ill-considered principle,<sup>101</sup> vexing questions still linger about the scope of constitutional protections enjoyed by foreign detainees captured outside the United States. It remains clear that the Constitution possesses limited extraterritorial application.

In *Johnson v. Eisentrager*,<sup>102</sup> the Supreme Court held that the writ of *habeas corpus* was unavailable to foreign troops captured, tried by military commissions, and imprisoned outside the territorial boundaries of the United States.<sup>103</sup> The petitioners were German soldiers convicted of war crimes by American military commissions convened in China during World War II.<sup>104</sup> Following their convictions, Allied Forces imprisoned them in West Germany.<sup>105</sup> Finding that the writ lacked

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jurisprudence, it has plainly waived any such assertions here. As the *Hamdan* plurality noted: [T]he circumstances of [the petitioner's] trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly four years, [he] has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.

*Hamdan*, 548 U.S. at 646.

100. *Ross v. McIntyre*, 140 U.S. 453, 464 (1891).

101. *See, e.g., Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

102. 339 U.S. 763 (1950).

103. *Id.* at 777-78.

104. *Id.* at 765-66.

105. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260 (2008) ("Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor

extraterritorial effect, the *Eisentrager* Court held that it could not consider the merits of their *habeas* petition:

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting *their presence in the country implied protection*. No such basis can be invoked here, for these prisoners *at no relevant time were within any territory over which the United States is sovereign*, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.<sup>106</sup>

Citing this principle, the Government has repeatedly argued that *habeas corpus* and other express constitutional rights are inapplicable to Guantanamo detainees captured outside the United States.<sup>107</sup> The Supreme Court initially rejected this argument on statutory grounds in *Rasul v. Bush*.<sup>108</sup> *Rasul* addressed *habeas* petitions filed by Kuwaiti and Australian detainees accused by the Government of offering material support to the Taliban.<sup>109</sup> The Government asserted that the prisoners could not challenge their detentions by *habeas* petition because, as in *Eisentrager*, they were non-citizens captured and detained outside the United States. The district court accepted this argument, finding that “aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of *habeas corpus*.”<sup>110</sup> The Supreme Court rejected this conclusion on statutory grounds, finding that Congress, in the *habeas* statute,<sup>111</sup> conferred jurisdiction to all persons, regardless of citizenship, “detained within ‘the territorial jurisdiction’ of the United States.”<sup>112</sup> The Court found that Guantanamo fell within American “territorial jurisdiction” as used in the statute because “[b]y the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over [the Base], and may continue to exercise such control permanently if it so chooses.”<sup>113</sup>

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indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces.”).

106. *Eisentrager*, 339 U.S. at 777-78 (emphasis added).

107. *Hamdan v. Rumsfeld*, 548 U.S. 557, 626 (2006).

108. 542 U.S. 466 (2004).

109. *Id.* at 472.

110. *Id.* at 472-73.

111. 28 U.S.C.A. § 2241 (West 2004).

112. *Rasul*, 542 U.S. at 480 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

113. *Id.*

The MCA unmistakably revoked the statutory *habeas* jurisdiction over alien Guantanamo detainees recognized by *Rasul*.<sup>114</sup> *Boumediene* struck down this provision of the MCA as violative of the *habeas corpus* Suspension Clause. The Court concluded that while it was bound to accept the political branches' assertion that Cuba retains "*de jure* sovereignty" over the Base, the Constitution required acknowledgment of "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over th[e] territory."<sup>115</sup> *Boumediene* interpreted *Eisentrager* to establish not a "formalistic, sovereignty-based test,"<sup>116</sup> but rather a "functional approach to questions of extraterritoriality."<sup>117</sup> The majority did not specify the contours. Citing the *Insular Cases*, it simply noted that constitutional restrictions upon Government actions vary in territories that are not States based on a particular territory's "conditions and requirements."<sup>118</sup> Applying this ambiguous standard, the Court found that because the United States exercised "complete jurisdiction and control over the base"<sup>119</sup> and a right of perpetual occupation, the applicable "conditions and requirements" warranted application of the Suspension Clause. The Court contrasted Guantanamo with the Allied-occupied German prison at issue in *Eisentrager*:

The Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation. The Court's holding in *Eisentrager* was thus consistent with the *Insular Cases*, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. *In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.*<sup>120</sup>

*Boumediene* did not decide what other constitutional rights might be applicable at Guantanamo. But the Court implied, in dicta, that because the United States acquired the Base at the same time as Puerto Rico and other insular areas and had governed it continuously since that

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114. Military Commissions Act, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600 (2006).

115. *Boumediene v. Bush*, 128 S. Ct. 2229, 2253 (2008).

116. *Id.* at 2257.

117. *Id.* at 2258.

118. *Id.* at 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

119. *Id.* at 2253.

120. *Id.* at 2260-61 (emphasis added) (citations omitted).

time, it constituted an unincorporated territory. Rejecting the Government's assertion that Cuba's claimed *de jure* sovereignty precludes jurisdiction, the Court noted:

The necessary implication of the [Government's] argument is that by surrendering *formal sovereignty over any unincorporated territory* to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this.<sup>121</sup>

Indulging such a fiction would contravene the separation of powers by giving Congress and the President “the power to switch the Constitution on or off at will,” enabling them “to govern without legal constraint.”<sup>122</sup> Such divestment of the Judiciary “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”<sup>123</sup>

The fact that Guantanamo detainees have been held in territory “within the constant jurisdiction of the United States”<sup>124</sup> alone brings to bear, at minimum, the “fundamental” constitutional rights recognized by the *Insular Cases*. Further, the constitutional provisions most pertinent to the exercise of military jurisdiction — Article III's separation of powers and the Sixth Amendment's right to a jury trial — do not differentiate between citizens and aliens. Rather, they “*are universal in their application to all persons within the territorial jurisdiction of the United States.*”<sup>125</sup> The *Insular Cases* held that these provisions are inapplicable to trials conducted in unincorporated territories. This rule, however, arises as a function of necessity, not legislative discretion. Crimes are ordinarily tried in the district in which they are committed. Hence, when crimes are committed in insular areas, the Government is not expected to transport offenders, witnesses, and evidence across distant oceans to Article III courts. But when the Government seeks to try extra-territorial offenders in an insular area lacking any geographical nexus to the location of their alleged crimes, I posit that the otherwise universally applicable rights afforded by Article III and the Sixth

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121. *Id.* at 2258-59 (emphasis added).

122. *Id.* at 2259.

123. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

124. *Id.* at 2261.

125. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (emphasis added).

Amendment nonetheless must apply; at least, where, as in the case of Guantanamo Bay, the Government would have faced no greater burden transporting the defendants, witnesses, and evidence to an Article III court than to the insular area. My thesis rests on two indispensable propositions:

(1) The United States exercises sufficient “*de facto* sovereignty” over Guantanamo Bay to dictate that accused alien offenders detained or tried there achieve constitutional privity acquiring at minimum the “fundamental” constitutional rights applicable in “unincorporated territories”; and

(2) No geographical nexus exists between the Base and the alleged offenses at issue and the Government would have faced no significant additional burden in transporting the accused offenders to districts where Article III courts are open and functioning.

I will address each of these issues in turn.

*A. The United States Exercises Sufficient De Facto Sovereignty Over Guantanamo to Invoke “Fundamental” Rights Applicable in Unincorporated Territories*

The Guantanamo Bay Naval Base comprises forty-five square miles of land and water along the southeast coast of Cuba.<sup>126</sup> The United States occupies the site pursuant to a purported “lease” agreement with Cuba.<sup>127</sup> While the agreement asserts that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” it dictates that the United States shall “exercise complete jurisdiction and control over” the site and that it shall continue to do so into perpetuity if it wishes, “[s]o long as the United States . . . shall not abandon” it.<sup>128</sup> The *Boumediene* Court found that despite Cuba’s “*de jure* sovereignty” over the base, the United States exercised sufficient “*de facto* sovereignty” to invoke the *habeas* Suspension Clause there. While the Court applied the *Insular Cases*’ “conditions and requirements”<sup>129</sup> analysis, it did not find that the constitutional rights applicable at Guantanamo are necessarily coextensive with those applicable in Puerto Rico and other

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126. *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

127. *Id.*

128. *Id.*

129. *Boumediene*, 128 S. Ct. at 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

unincorporated territories. “The formal legal status of a given territory affects, at least to some extent, the political branches’ control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.”<sup>130</sup> Thus, *Boumediene* held open the possibility that Guantanamo’s unique “conditions and requirements” might render some constitutional rights applicable in insular areas where the United States exercises both “*de jure*” and “*de facto*” jurisdiction inapplicable at the Base. Dissenting in *Rasul*, Justice Scalia argued that the United States’ jurisdiction over Guantanamo is more akin to the military occupation of a foreign battlefield than to Puerto Rico: “Since ‘jurisdiction and control’ obtained through a lease is no different in effect from ‘jurisdiction and control’ acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws.”<sup>131</sup>

This argument fails because it ultimately places undue emphasis on the fictional use of the term “lease.” A familiar axiom of property law holds that the use of a term of art to describe a given ownership interest will not convert that interest into something it is not.<sup>132</sup> For example, a conveyance that endows a recipient with a mere “right of access” to a particular property is an “easement,” even if the instrument labels the interest conveyed “fee simple.”<sup>133</sup> The bald use of the term “fee simple” manifestly contradicts the interest expressly conveyed by the instrument. The legal definition of *lease* is “[a] temporary conveyance of the right to

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130. *Id.* at 2258.

131. *Rasul*, 542 U.S. at 501 (Scalia, J., dissenting). Writing for the D.C. Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), Judge Randolph accepted Justice Scalia’s rationale, denying *habeas* review to Guantanamo detainees: “The text of the [Guantanamo Bay] lease and decisions of circuit courts and the Supreme Court all make clear that Cuba — not the United States — has sovereignty over Guantanamo Bay.” *Id.* at 992. Justice Thomas also asserted this position in his dissent in *Hamdan*, arguing without substantial elaboration that “[n]otwithstanding the ill-considered dicta in . . . *Rasul* . . . , it is clear that Guantanamo Bay, Cuba, is outside the sovereign ‘territorial jurisdiction’ of the United States.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 670 (2006) (Thomas, J., dissenting). The Supreme Court’s decision in *Boumediene* rejected this view.

132. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1536 (Fed. Cir. 1996) (noting that the conveyance’s use of standard “fee simple” deed form was not determinative because the actual interest described by the instrument had the “legal effect” of “convey[ing] only an easement”); *Chevy Chase Land Co. v. United States*, 37 Fed. Cl. 545, 572 (Fed. Cl. 1997) (noting that use of the term “fee simple” was not determinative because the language of the conveyance actually described a “right of way”); *Ray v. King County*, 86 P.3d 183, 189-90 (Wash. Ct. App. 2004) (noting that use of the term of art “right of way” in conveyance not determinative because the language of the conveyance was “most consistent with the grant of fee title, not an easement”).

133. *See supra* note 132.



use and occupy real property . . . ; the lease term can be for [natural] life, for a fixed period, for a period terminable at will — *but always for less time than the lessor has a right to.*<sup>134</sup> Conversely, *fee simple* is “[a]n estate of indefinite or *potentially infinite* duration . . . .”<sup>135</sup> Here, irrespective of the talismanic use of the term “lease” in the instrument, the interest conveyed is perpetual, “of potentially infinite duration.” Thus, the conveyance at issue is plainly not “for less time than [Cuba] has a right to.” As such, the use of the term “lease” is purely fictional. In truth, the interest conveyed, being expressly of “indefinite” and “potentially infinite duration” is, in the vernacular of property law, *fee simple*.<sup>136</sup> Thus, applying *Boumediene’s* “functional approach,” the United States in every sense exercises the same degree of sovereignty over the Base that it wields over Puerto Rico and other unincorporated territories.<sup>137</sup> This is particularly evident in light of the facts that the United States’ annual \$4,000 rental payment has not been accepted in more than forty years<sup>138</sup> and Cuba, the *de jure* sovereign, has repeatedly demanded that the United States vacate the Base to no avail.<sup>139</sup>

The indefinite nature of the Government’s property interest in Guantanamo also distinguishes it from military occupation of territory in Afghanistan and Iraq. Occupation of the latter sort is, by definition, *temporary* and gives rise to no vested property rights.<sup>140</sup> Moreover, in the cases of Afghanistan and Iraq, the United States’ presence is at least theoretically premised on the consent of the actual sovereigns. Similarly, the United States acted as a *licensee* or an *invitee* of the Chinese authorities when it convened the military tribunals at issue in

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134. BLACK’S LAW DICTIONARY 366 (2d pocket ed. 1996) (emphasis added).

135. BLACK’S LAW DICTIONARY 649 (8th ed. 2004) (emphasis added).

136. The fact that abandonment would reinstitute Cuban sovereignty simply creates a right of reversion. The possibility of “reversion” in the event of abandonment does not undermine or diminish the possessor’s “dominion” over property. *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1384 (Pa. 1983).

137. *See, e.g., Creppel v. Shell Oil Co.*, 738 F.2d 699, 701 (5th Cir. 1984) (noting that a “fee simple” title constitutes “dominion”).

138. Owen Fiss, *The State as an Instrument of Justice: In the Shadow of War*, 58 U. MIAMI L. REV. 449, 456 (2003).

139. Christopher J. Schatz & Noah A. F. Horst, *Will Justice Delayed Be Justice Denied? Crisis Jurisprudence, the Guantanamo Detainees, and the Imperiled role of Habeas Corpus in Curbing Abusive Government Detention*, 11 LEWIS & CLARK L. REV. 539, 562 (2007).

140. While a court may defer to claims of temporary military occupation made by Congress or the President, if at some point it became clear that the occupation was not in fact temporary, then in my view the occupied territory like Guantanamo would become United States territory for constitutional purposes.

*Eisentrager*.<sup>141</sup> Conversely, Cuba has repeatedly demanded the United States vacate Guantanamo to no effect.<sup>142</sup>

Because *Boumediene* seemingly reaffirmed the *Insular Cases* and extended their application to Guantanamo, litigants properly within the jurisdiction of the Base are entitled to neither an Article III tribunal, nor a jury trial. Thus, if a hypothetical local population resided at Guantanamo, such a polity would be entitled only to the jury-less legislative courts contemplated by the *Insular Cases*.<sup>143</sup> But, as I argued in the previous Part, the serious constitutional issues raised by such tribunals, require that their jurisdiction be subject to strict geographical limitations.

The Executive arrested Guantanamo detainees in numerous distant locations, including among other places, Afghanistan, Bosnia, Gambia, Thailand, and Zambia.<sup>144</sup> No geographical nexus whatsoever exists between crimes committed in Zambia (or Afghanistan) and a court at Guantanamo Bay. While Congress can establish military tribunals *in these locations* to try crimes *committed there*, it cannot establish such a tribunal at Guantanamo.<sup>145</sup> Having transported accused offenders within 125 miles of open and operating Article III courts, the Government has waived any claim that geographical necessity excused application of the separation of powers and the Bill of Rights. As *Ross* demonstrated, the Government is not obligated to transport accused offenders along with witnesses and evidence halfway around the world for trial before an Article III tribunal. But, having gratuitously transported the Guantanamo detainees many thousands of miles, the Government cannot pretextually stop just shy of the American coastline for the express purpose of evading the Constitution. This was the President's aim. In 2001, then-Attorney General Ashcroft candidly admitted that the evasion of constitutional rights constituted one of the Government's principal

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141. Similarly, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), United States authorities did not exercise sovereign authority in conducting a search of a Mexican national's Mexican property; rather they acted as invitees of Mexican authorities. *Id.* at 262.

142. Schatz & Horst, *supra* note 139, at 562.

143. "[O]ther than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers." *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008).

144. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005).

145. I do not assert that the Government necessarily need establish a separate tribunal in each such country. But in my view, to act constitutionally the Government must establish at least regional tribunals bearing some reasonable geographical nexus to the location of the accused's arrest, alleged offense, witnesses, and evidence.

motives for utilizing military commissions rather than Article III courts. “Foreign terrorists who commit war crimes against the United States . . . are not entitled to and do not deserve the protections of the American Constitution.”<sup>146</sup>

*B. The Constitutional Protections of Article III and the Fifth and Sixth Amendments Apply to Citizens and Non-Citizens Alike*

The *Eisentrager* Court concluded that the “Fifth Amendment’s protections do not extend to aliens outside the [United States’] territorial boundaries.”<sup>147</sup> *Boumediene* qualified this pronouncement finding that aliens detained at Guantanamo acquired sufficient constitutional privity to implicate the Suspension Clause. But the question remains whether an alien arrested outside the United States enjoys the protections of Article III and the Fifth and Sixth Amendments when brought forcibly to the United States to face justice. The plain constitutional text answers this question.

Article III prescribes a generally applicable institutional structure. Similarly, the Fifth and Sixth Amendments speak globally of “persons” and “accused[s]”; they contain no qualifiers limiting their protections to citizens.<sup>148</sup> As the Supreme Court said of the Fourteenth Amendment in *Wong Wing v. United States*,<sup>149</sup>

The . . . Amendment . . . is not confined to the protection of citizens. It says: “Nor shall any State deprive any *person* of life, liberty or property without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the law.” *These provisions are universal in their application to all persons within the territorial*

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146. Robin Washington, *War on Terrorism; Lawyers Raise Red Flags Over Military Tribunals*, BOSTON HERALD, Nov. 15, 2001, at 006, *quoted in* Belknap, *supra* note 47, at 434. This proffered rationale stands at odds with constitutional precepts. Even at the high-water mark of its deference to the Executive, the Supreme Court recognized that “[c]onstitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty.” *Ex parte Quirin*, 317 U.S. 1, 25 (1942). The fallacy of the Attorney General’s rationale is self-evident: the Government asserts the defendants’ presumed guilt *itself* demands that they must be deprived of the Constitution’s procedural safeguards governing the determination of *guilt*.

147. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)).

148. U.S. CONST. art. III; U.S. CONST. amend. V; U.S. CONST. amend. VI.

149. 163 U.S. 228 (1896).

*jurisdiction, without regard to any differences of race, of color, or nationality . . .*<sup>150</sup>

This same rule of interpretation applies with equal force to the Fifth and Sixth Amendments:

Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.<sup>151</sup>

Thus, “[a]ll persons within the [incorporated] territory of the United States,’ including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government . . .”<sup>152</sup>

Despite the broad import of these decisions, not all constitutional protections — even some regarded as “fundamental” — are bestowed upon aliens. In *United States v. Verdugo-Urquidez*,<sup>153</sup> the Court, per Chief-Justice Rehnquist, held that the Fourth Amendment’s prohibitions did not protect an alien in custody in the United States from a warrantless search of his Mexican home.<sup>154</sup> The Court concluded that while “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country,” the Fourth Amendment does not protect an alien from extraterritorial searches and seizures if she “has had no previous significant voluntary connection with the United States . . .”<sup>155</sup> The Court concluded that the defendant’s involuntary extradition to the United States did not constitute the requisite “voluntary connection” to subject the search of his Mexican home to the strictures of the Fourth Amendment: “[T]his sort of presence — lawful but involuntary,” the

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150. *Id.* at 238 (emphasis added).

151. *Id.* (emphasis added).

152. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). The *Plyler* Court did not refer to the *Insular Cases*’ distinction between “incorporated” and “unincorporated” territories, but given *Boumediene*’s apparent reaffirmation of the doctrine, the above-quoted statement must be taken as applying only to “incorporated” territories. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990) (citing the *Insular Cases* approvingly).

153. 494 U.S. 259 (1990).

154. *Id.* at 278.

155. *Id.* at 271.

Court concluded, “is not of the sort to indicate any substantial connection with our country.”<sup>156</sup>

A broad reading of *Verdugo-Urquidez* suggests that an alien defendant forcibly brought into the United States to face charges is vested with no constitutional rights whatsoever. But a closer analysis reveals that the privity requirement contemplated by the Court is inapplicable to the institutional framework and procedural protections of Article III and the Fifth and Sixth Amendments for two reasons.<sup>157</sup>

First, the Court limited the articulated rule to constitutional violations committed by American authorities *outside* of the territorial jurisdiction of the United States. The Court found that because the defendant was brought into the United States involuntarily, he lacked the requisite connection with the U.S. to challenge the propriety of the search of his property *in Mexico*.<sup>158</sup> The Court did not suggest that he lacked sufficient constitutional privity to be afforded the procedural rights guaranteed by Article III and the Fifth and Sixth Amendments at his trial *in the United States*.<sup>159</sup> Rather, the Court emphasized the constitutional significance of the location of the alleged breach by contrasting it with the Constitution’s criminal-procedure protections: “The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.”<sup>160</sup> As such, “a constitutional violation” of that right “occurs only at trial” *in the United States*.<sup>161</sup> The Fourth Amendment “prohibits ‘unreasonable searches and seizures’” and as such “a violation of the Amendment is ‘fully accomplished’ at the time of an unreasonable governmental intrusion,” which occurred in Mexico.<sup>162</sup> Thus, “if there were a constitutional violation” of the defendant’s rights “it occurred solely *in Mexico*.”<sup>163</sup> Only because the constitutionally questionable conduct took place outside the United States did it become necessary to examine the nature of the defendant’s contacts with the U.S. in order to ascertain whether his *extraterritorial* property interests were protected by the Fourth Amendment. Conversely, a Fifth Amendment violation “occurs

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156. *Id.*

157. The Court expressly noted that the applicability of the Fifth and Sixth Amendments were not at issue in the case. *Id.* at 264. Thus, any suggested broader application is purely dicta.

158. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

159. *Id.* at 264.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* (emphasis added).

only at trial” *in the United States* and thus presumptively protects the defendant, regardless of his nationality and “connections” with the U.S.<sup>164</sup>

Second, the Chief Justice’s decision expressly distinguished the Fourth Amendment’s prohibitions from the Fifth and Sixth Amendments. In Rehnquist’s view, by using the term “the people” to describe the intended beneficiaries of the Fourth Amendment, the Framers directed its protections to a particular constituency.<sup>165</sup> “[T]he people’ seems to have been a term of art employed in select parts of the Constitution.”<sup>166</sup> The term, the Court explained, “refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>167</sup> Because the Fourth Amendment’s use of the term “people” indicates that its protections are limited to this special polity, the Court engaged in its protracted “contacts” analysis to determine whether the defendant constituted one of *the* “people.”<sup>168</sup> Illustrating the significance of the use of the Amendment’s reference to “the people,” the Chief Justice emphasized that this term “contrasts with the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments regulating procedure in criminal cases.”<sup>169</sup>

*Verdugo-Urquidez* implies that an alien must demonstrate some special nexus with the United States to apply constitutional provisions textually applicable to “the people” (the First, Second, and Fourth Amendments) to government conduct *outside the United States*. Conversely, provisions applicable to “persons” or “the accused” or that contain no limiting language at all apply to “*all persons within the territory of the United States*.”<sup>170</sup> The protections of Article III and the Fifth and Sixth Amendments plainly fall within this latter category.

164. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

165. The Fourth Amendment provides:

The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (emphasis added).

166. *Verdugo-Urquidez*, 494 U.S. at 265.

167. *Id.* The Chief Justice buttressed this interpretation by noting that “[t]he Preamble declares that the Constitution is ordained and established by ‘*the People* of the United States.’” *Id.* (emphasis added).

168. *Id.* at 265-66.

169. *Id.*

170. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (emphasis added).

The *Insular Cases* dictate that neither citizens nor aliens enjoy Article III's separation of powers or the Sixth Amendment's jury-trial right within the proper jurisdiction of an unincorporated territory. But this is only the case where the unincorporated territory is the geographically appropriate venue for trial. When the Government brings an alien to *de facto* United States territory such as Guantanamo Bay for trial or detention, at minimum the so-called "fundamental" constitutional protections recognized by the *Insular Cases* attach. If that forum is a State, then the full panoply of constitutional protections<sup>171</sup> are applicable to the trial of the accused unless he falls within the very narrow category of military jurisdiction addressed in Part VII-B, *infra*. If the forum is an "unincorporated" territory, then a second question comes into play: Does the offense charged bear a proper geographical nexus to this unincorporated territory? If the answer is "yes," as explained in the preceding Part, then the accused may be tried there by a non-Article III court subject only to the "fundamental" constitutional protections applicable to unincorporated territories. But if the offense charged bears no geographical nexus to the forum and if the Government could just as easily have transported the accused offender to a district where an Article III court is open and available, the protections of the separation of powers and the Sixth Amendment must apply. The truncated constitutional protections applicable in unincorporated territories and consular courts are permissible only in exceptional circumstances. The Government cannot deliberately transport offenders to such locales when Article III courts are equally accessible, even if they are captured outside the United States, to evade *inconvenient* constitutional protections. This is exactly what the MCA does.

#### IV. THE MILITARY COMMISSIONS ACT

Accepting *Hamdan's* invitation to "return[] to Congress to seek the authority he believe[d] necessary,"<sup>172</sup> the President lobbied Congress in the summer of 2006 for explicit authorization to convene military commissions. In response, Congress hastily enacted the MCA. As requested, the statute places the power to militarily try individuals apprehended in the "war on terror" squarely in the Executive's hands.

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171. With the probable exception of alleged violations premised upon constitutional provisions textually directed toward "the people," where the violation alleged occurred outside the United States.

172. *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

The Act authorizes the President “to establish military commissions”<sup>173</sup> to “try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions.”<sup>174</sup> Such tribunals purportedly possess exclusive jurisdiction to try “any offense made punishable by [the statute], or the law of war, when committed by an alien unlawful enemy combatant before, on or after September 11, 2001.”<sup>175</sup> The Act expressly provides that such tribunals “shall not have jurisdiction over *lawful* enemy combatants.”<sup>176</sup>

The MCA broadly defines “unlawful enemy combatants” to include, among other things, any “person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant . . . including a person who is part of the Taliban, al Qaeda, or associated forces . . . .”<sup>177</sup> Conversely, “lawful enemy combatant” status is narrowly limited to state-affiliated actors. The definition includes only,

(A) a member of the regular forces of a *State party* engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement *belonging to a State party* engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a *government* engaged in hostilities, but not recognized by the United States.<sup>178</sup>

Thus, unlike traditional military-commission jurisdiction, which historically focused upon crimes committed by members of *state-affiliated* foreign military units, the MCA limits military jurisdiction exclusively to sub-state actors.<sup>179</sup>

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173. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(b), 120 Stat. 2600, 2602 (2006).

174. *Id.* § 948b(a).

175. *Id.* § 948d(a).

176. *Id.* § 948d(b) (emphasis added).

177. *Id.* § 948a(1).

178. *Id.* § 948a(2) (emphasis added).

179. *See infra* Part V.B.2.



The statute specifically invests the Secretary of Defense with significant authority over the conduct of military commissions. The Act empowers the Secretary to “convene[] commissions”<sup>180</sup>; to select commission members that he deems “are best qualified for the duty”<sup>181</sup>; and to “prescribe regulations providing for the manner in which military judges are . . . detailed to military commissions.”<sup>182</sup> Perhaps most critically, the statute entrusts the Secretary, “in consultation with the Attorney General,” to prescribe “[p]retrial, trial, and post-trial procedures, including elements and modes of proof . . . .”<sup>183</sup> This power includes an express authorization to promulgate rules of evidence permitting the admission of hearsay evidence so long as “the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence” unless the adverse party “demonstrates that the evidence is unreliable or lacking in probative value.”<sup>184</sup>

Finally, the statute authorizes commissions to impose the full panoply of criminal punishments, including life imprisonment and the death penalty.<sup>185</sup>

#### V. THE GENESIS OF MILITARY-COMMISSION JURISDICTION

As *Hamdan* explained, the Constitution makes no mention of military commissions; nor were they initially created by statute. Rather, the institution “was born of military necessity.”<sup>186</sup> It was “inaugurated” by General Winfield Scott during the Mexican War in 1847.<sup>187</sup> “As commander of occupied Mexican territory, and *having available to him no other tribunal*,” General Scott established military courts to try both “ordinary crimes committed in the occupied territory” and “offenses against the law of war.”<sup>188</sup>

In dicta, the Supreme Court denounced General Scott’s invocation of military courts as a violation of the separation of powers in 1851:

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180. Military Commissions Act, Pub. L. No. 109-366, § 948(h), 120 Stat. 2600, 2603 (2006).

181. *Id.* § 948i(b).

182. *Id.* § 948j(a).

183. *Id.* § 949a(a).

184. *Id.* § 949a(b)(2)(E)(i) & (ii).

185. *Id.* § 950i.

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

187. *Id.*

188. *Id.* (emphasis added).

[U]nder the Constitution . . . the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or laws of the United States. And *neither the President nor any military officer can establish a court in a conquered country, and authorize it to . . . administer the laws of nations.*<sup>189</sup>

Despite this condemnation, President Lincoln renewed the practice when the Union Army was called upon to govern occupied Confederate territory during the Civil War. This time the Court gave its blessing. Writing for the majority in *The Grapeshot*,<sup>190</sup> Chief Justice Chase opined that

it became the duty of the National government, whenever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.<sup>191</sup>

Citing Colonel William Winthrop's 1920 treatise *Military Law and Precedents*,<sup>192</sup> the so-called "Blackstone of Military Law,"<sup>193</sup> the *Hamdan* plurality stated that the Constitution sanctions the use of military commissions in three situations.<sup>194</sup> "First, [military commissions] have substituted for civilian courts at times and in places where martial law has been declared" and the civilian courts have been legitimately closed.<sup>195</sup> "Second, commissions have been established to try civilians as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function."<sup>196</sup> I will refer to these two types of tribunals collectively as territory-based commissions. Third, the Government may constitutionally convene commissions "as an incident

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189. *Jecker v. Montgomery*, 54 U.S. (13 How.) 498, 515 (1852) (emphasis added). It should be noted that *Jecker* did not address the question whether military courts may be empanelled with congressional authorization. *See id.*

190. 76 U.S. (9 Wall.) 129 (1869).

191. *Id.* at 132.

192. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920).

193. *Hamdan*, 548 U.S. at 597 (quoting *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957)).

194. *Id.* at 595-96. The dissenters accepted this characterization. *Id.* at 683 (Thomas, J., dissenting).

195. *Id.* at 595; *see also id.* at 683 (Thomas, J., dissenting).

196. *Id.* at 595-96 (internal quotation omitted); *see also id.* at 683 (Thomas, J., dissenting).

to the conduct of war when there is a need to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”<sup>197</sup> The Court coined this species of tribunal as the “law of war” commission.<sup>198</sup>

A “law of war” commission is “utterly different” from territory-based commissions and its jurisdiction is more limited.<sup>199</sup> “Not only is its jurisdiction limited to offenses cognizable during wartime, but its role is primarily a factfinding one — to determine, typically *on the battlefield itself*, whether the defendant has violated the law of war.”<sup>200</sup> With the exception of the *Quirin* and *Yamashita*<sup>201</sup> decisions addressed below, every military commission sanctioned by the Supreme Court fell into the territory-based categories identified in *Hamdan*. The Executive convened each such tribunal in the theatre of war — on the battlefield itself, in occupied territory, or in locations where martial law was legitimately declared and the civilian courts could not operate. In these environments, the realities of war sometimes require the adoption of truncated procedures. Empanelling commissions constitutes an expense of limited military resources. The judges and commission members are officers whose principal duty is to ensure the national defense.<sup>202</sup> The investigators are usually soldiers whose primary function is not police work.<sup>203</sup> Consequently, they are not usually trained in the proper

197. *Id.* at 596 (internal quotations omitted); *see also id.* at 683 (Thomas, J., dissenting). Citing Colonel Winthrop, *Hamdan* noted at least four additional jurisdictional limitations traditionally placed upon military commissions:

First, “[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander.” The “field of command” in these circumstances means the “theatre of war.” Second, the offense charged “must have been committed within the period of the war.” No jurisdiction exists to try offenses “committed either before or after the war.” Third, a military commission not established pursuant to martial law or an occupation may try only “[i]ndividuals of the enemy’s army who have been guilty of illegitimate warfare or other offences in violation of the laws of war . . . .” Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: “Violations of the laws and usages of war cognizable by military tribunals only,” and “[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.”

*Id.* at 597 (quoting WINTHROP, *supra* note 192, at 836-39) (citations omitted); *see also id.* at 683 (Thomas, J., dissenting).

198. *Id.* at 597; *see also id.* at 683 (Thomas, J., dissenting).

199. *Id.* at 596-97 (2006) (plurality opinion); *see also id.* at 683-84 (Thomas, J., dissenting).

200. *Id.* at 596-97 (emphasis added).

201. *In re Yamashita*, 327 U.S. 1 (1946). *Yamashita* is discussed in detail in *infra* Part VI.C.1.

202. WINTHROP, *supra* note 192, at 836.

203. Gen. Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What if There*

collection and handling of evidence.<sup>204</sup> Even the witnesses are frequently military personnel who might be called to fight at any time.<sup>205</sup> Thus, tradeoffs of normally inviolate civil liberties are tolerated.

The prophylactic procedural protections applied in civil courts are time consuming and often impossible to accommodate:

It . . . take[s] time to secure a grand jury indictment, to allow the accused to procure and confer with counsel, to permit the preparation of a defense, to form a petit jury, to respect the elementary rules of procedure and evidence and to judge guilt or innocence according to accepted rules of law.<sup>206</sup>

Thus, juries are denied. The rules of evidence are substantially relaxed.<sup>207</sup> Military tribunals routinely permit the “admission in evidence of depositions, affidavits and hearsay and opinion evidence . . . .”<sup>208</sup> Appeals are often denied or their scrutiny is substantially diminished. Indeed, the Supreme Court has held that Article III review of the verdicts of military commissions (usually *habeas* review<sup>209</sup>) is limited to “the lawful power of the commission to try the [accused] for the offense charged.”<sup>210</sup> Where military tribunals possess proper subject-matter jurisdiction over the parties, “correction of

*Were a War and No One Could Be Detained Without an Attorney?*, 34 DENV. J. INT’L L. & POL’Y 63, 85 (2006) (opining that “America’s war-fighting ability will be markedly and adversely affected if the duties of our soldiers as warriors are forced to compete with the obligation to act as investigators”).

204. See *id.* at 84 (“Capturing an enemy on the battlefield and disarming him is a routine combat activity. Once an enemy is detained and removed from the area of active hostilities, the soldier who captured the enemy remains on the front lines — fighting.”).

205. See Tim Bakken, *The Prosecution of War Crimes: Military Commissions and the Procedural and Substantive Protections Beyond International Law*, 30 FORDHAM INT’L L.J. 553, 559 (2007) (arguing that trying enemy combatants in U.S. courts would inhibit military capacity by requiring “field commanders” to return to the U.S. to testify thereby “divert[ing] [their] efforts and attention from the military offensive abroad to the legal defensive at home”).

206. *Duncan v. Kahanamoku*, 327 U.S. 304, 331 (1946).

207. It has sometimes been suggested that deviations from the standard rules of evidence are justified because, as is in bench trials, the fact-finders in military tribunals are not lay jurors. In my view, this justification is dubious in light of the fact that military-commission members historically consisted of officers and enlisted men with no legal training whatsoever. See Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 19 (1990). As such, they would presumably be subject to the same influences as lay jurors.

208. *In re Yamashita*, 327 U.S. 1, 6 (1946); Military Commissions Act, Pub. L. No. 109-366, § 949a(b)(2)(E)(i)-(ii), 120 Stat. 2600, 2608-09 (2006); *Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006).

209. See *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1864) (holding that judgments of military commissions are not appealable to the Supreme Court on direct review).

210. *Yamashita*, 327 U.S. at 8.

[such tribunals'] errors of decision is not for the [Article III] courts but for the military authorities which are alone authorized to review their decisions."<sup>211</sup>

Most importantly, while commissions employ the usual platitudes concerning the presumption of innocence, the basic machinery of justice is tilted in a manner to secure more convictions than in civilian courts.<sup>212</sup> Blackstone's axiom that it is "better that ten guilty persons escape, than that one innocent suffer,"<sup>213</sup> is not honored in theatres of war. It cannot be. "Civil liberties and military expediency are often irreconcilable."<sup>214</sup> War zones are violent places where people die. Minimizing casualties — both among civilians and servicemen — requires more exacting discipline than is tolerated in civil society.<sup>215</sup>

Relaxations of normally inviolate civil protections have been constitutionally tolerated so long as they are limited to war zones. The very attempt to convene *quasi*-judicial institutions in such environments constitutes a laudable attempt to honor the basic concepts of justice. In earlier times, occupying military governments simply ignored crimes against civilians, and those suspected of crimes against the military were summarily executed.<sup>216</sup> Faced with the choice of permitting complete

211. *Id.*

212. Military-commission trials conducted in the aftermath of the Great Sioux Uprising illustrate the disturbing conviction rate of military tribunals. As Professor Carol Chomsky succinctly chronicled:

Between September 28 and November 3, 1862, in southwestern Minnesota, nearly four hundred Dakota men were tried for murder, rape, and robbery. All but seventy were convicted, and 303 of these were condemned to die. After an official review of the trials [by the President], the sentences of thirty-eight were confirmed and, on December 26, 1862, these thirty-eight were hanged in Mankato, Minnesota, in the largest mass execution in American history.

Chomsky, *supra* note 207, at 13. Similarly, the *Quirin* Court noted nineteen military trials of alleged British spies conducted during the Revolutionary War and the War of 1812. *Ex parte Quirin*, 317 U.S. 1, 42 n.14 (1942). These tribunals are not considered to be of the same pedigree as military commissions. *Hamdan*, 548 U.S. at 590 (tracing the first incidents of true military commissions to the Mexican War in 1847). But these trials further demonstrate the brutal certainty of military justice. Of the nineteen men tried, the military tribunals convicted eighteen. *Quirin*, 317 U.S. at 42 n.14. The military hanged sixteen of these men, one escaped before he could be executed, and one death sentence was commuted by President Madison. *Id.* The conviction rate evidenced in these historical examples (18-1) is one that any career prosecutor would surely envy.

213. 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

214. *Duncan v. Kahanamoku*, 327 U.S. 304, 331 (1946).

215. "[The] exigencies of military discipline require 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." *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969).

216. See Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 993-94 (2003). *Cf.*, *Military Commissions*, 11 Op. Att'y Gen. 297, 301 (1865)

lawlessness and bringing perpetrators to justice through the use of an expedited process, the use of military commissions constitutes a necessary lesser evil, both to protect civilians and soldiers.<sup>217</sup> In war, death of innocents, both while under arms and at the hand of military discipline, is a very real possibility. This risk strongly counsels against the expansion of such rudimentary tribunals beyond the theatre of combat. Once military jurisdiction over criminal proceedings is unmoored from the confines of the war zone, it threatens the precarious balance of power between the Executive and Judiciary.<sup>218</sup>

The separation of powers is exceedingly limited in a war zone. The Executive, as commander in chief, is the primary authority.<sup>219</sup> In the immediate zone of combat, the Executive assumes nearly plenary control over the day-to-day conduct of military forces. Thus, when the military is called upon to assume the temporary guise of *quasi*-civilian authority, that power is ultimately exercised by the President, even when Congress consents to the use of such power. As Professor David Bederman has observed, “[i]t was recognized at an early juncture in American practice that a provisional military government should be vested with executive, legislative, and judicial powers; although, owing to military necessity, these powers usually could not be separated into different institutions exercising checks and balances on each other.”<sup>220</sup> Thus, as with consular courts, the trinity of government powers is commingled.

“[W]hatever may be the limits of the military power” when acting as an interim government, “it certainly must include the authority to establish courts of justice, which are so essential a part of any government.”<sup>221</sup> While such tribunals pose the risk of injustice in their limited sphere of application,<sup>222</sup> they do not pose a greater risk to the

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(“Anciently, when two nations were at war, the conqueror had or asserted the right to take from his enemy his life, liberty, and property; if either was spared, it was as a favor or act of mercy.”).

217. See *Military Commissions*, *supra* note 216, at 308 (“War in its mildest form is horrible; but take away from the contending armies the ability and right to organize [military tribunals], they would soon become monster savages, unrestrained by any and all ideas of law and justice.”).

218. James Madison argued that the proliferation of military jurisdiction will “gradually poison” the “very fountain” of civil liberty. *THE FEDERALIST* NO. 45, at 308-09 (James Madison) (Jacob E. Cooke ed., 1961).

219. The chief war power possessed by Congress (in addition to the obvious power over funding) is the exclusive authority to declare war. While this power is often regarded as anachronistic, in my view it is a necessary but not sufficient condition for triggering the full panoply of “War Powers” contemplated by the Constitution. See *infra* Part VII.B.3.

220. Bederman, *supra* note 17, at 852.

221. *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909).

222. In his opinion endorsing the trial of the Lincoln conspirators by military commission,

separation of powers because they do not divest the Judiciary of any role. By definition, such tribunals only possess jurisdiction over territories “*having available . . . no other tribunal.*”<sup>223</sup> As with the consular courts sanctioned in *Ross*, such commingling of powers, while justifiable in distant locales where constitutionally contemplated Article III courts are wholly unavailable, is “the very acme of absolutism” when brought to our own shores or in close proximity thereto.<sup>224</sup>

## VI. CONSTITUTIONAL LIMITATIONS ON MILITARY JURISDICTION

### A. *Ex parte Milligan and the “Open Court” Rule*

In *Ex parte Milligan*,<sup>225</sup> the Supreme Court confronted for the first time the constitutionality of a military-commission trial conducted outside the confines of a theatre of war or insurrection.<sup>226</sup> Lambdin Milligan allegedly belonged to a pro-Confederate “secret society” known as the “Sons of Liberty” — an insurgent organization President Johnson had concluded was bent on “overthrowing the Government and duly constituted authorities of the United States.”<sup>227</sup> In 1864, Army officers arrested Milligan at his Indiana home and brought him before a military commission in Indianapolis.<sup>228</sup> The Government charged him with “violat[ing] . . . the laws of war” by “communicat[ing]” and “conspir[ing]” with “the enemy” and “the Sons of Liberty” to “seize munitions of war stored in [Union] arsenals” and “to liberate [Confederate] prisoners of war.”<sup>229</sup> The commission convicted Milligan and promptly sentenced him and two co-defendants to hang.<sup>230</sup>

Milligan’s case reached the Supreme Court as a petition for *habeas corpus* in the spring of 1866. As in *Korematsu*, the Court confronted grave doubt whether military authorities would honor a judgment in

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Attorney General Speed acknowledged that “[i]t would be a miracle if the records and history of this war do not show occasional cases in which those tribunals have erred.” Military Commissions, 11 Op. Att’y Gen. 297, 308-309 (1865).

223. *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006) (emphasis added).

224. *Reid v. Covert*, 354 U.S. 1, 11 (1956) (plurality opinion).

225. 71 U.S. (4 Wall.) 2 (1866).

226. While the military-commission trials of Henry Wirtz and the Lincoln conspirators are frequently cited as historical examples of military commissions convened outside the theatres of war, the judiciary reviewed neither of these cases.

227. *Milligan*, 71 U.S. at 4.

228. *Id.* at 68.

229. *Id.* at 4.

230. *Id.* at 68.

Milligan's favor. The Court decided the case just nine months after the executions of four Confederate sympathizers convicted by military commission of conspiring with John Wilkes Booth to assassinate President Lincoln.<sup>231</sup> At the time of the Lincoln conspirators' trial, "the civil courts were open and held their regular sessions."<sup>232</sup> The Government had premised military jurisdiction over the conspirators on the same legal theory invoked by Milligan's commission.<sup>233</sup> When the Court heard the *Milligan* case it could not confirm whether Milligan was even still alive.<sup>234</sup> Tacitly acknowledging these pressures, Justice Davis observed,

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.<sup>235</sup>

Observing that "[n]o graver question was ever considered by this court,"<sup>236</sup> *Milligan* began by reaffirming that where a military commission possesses proper jurisdiction over a defendant, "it is not our province to interfere."<sup>237</sup> But if the commission's jurisdiction is constitutionally defective, it is the Court's "duty to declare the nullity of the whole proceedings."<sup>238</sup>

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231. Thomas D. Morris, *Military Justice in the South, 1865-1868: South Carolina as a Test Case*, 54 CLEV. ST. L. REV. 511, 526 (noting that the Lincoln conspirators were executed on July 7, 1865).

232. Military Commissions, *supra* note 216, at 297.

233. *See id.* at 314-15 ("A bushwacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war . . . . The judge of a civil court is not more strongly bound under the Constitution and the law to try a criminal than is the military to try an offender against the laws of war.").

234. *Milligan*, 71 U.S. at 75 (noting the government's argument that "this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President").

235. *Id.* at 69 (emphasis omitted). Justice Jackson's dissent in *Korematsu* persuasively illustrates the hazards of deciding such fundamental matters when the temper to the times did not allow sufficient calmness in deliberation. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

236. *Milligan*, 71 U.S. at 75.

237. *Id.*

238. *Id.*



Applying a straightforward textual analysis, the Court concluded that “[t]he provisions of” the Constitution “on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning.”<sup>239</sup> First, the Court found that the commission necessarily exercised distinctively *Judicial* power because “[e]very trial involves the exercise of judicial power” within the meaning of Article III.<sup>240</sup> Hence, the commission lacked the authority to try Milligan because “no part of [the] judicial power . . . was conferred” on it, as it was not an Article III court.<sup>241</sup>

Second, in addition to the separation of powers problems, the Court concluded that the commission trial violated several of Milligan’s fundamental constitutional rights. Specifically, by exercising jurisdiction over Milligan, the commission trespassed upon:

- (1) Article III’s guarantee that “the trial of all crimes, except in case of impeachment, shall be by jury”<sup>242</sup>;
- (2) the Fifth Amendment’s guarantee “that no person shall be held to answer for a capital . . . crime unless on presentment by a grand jury”; and prohibition against the “depriv[ation] of life, liberty or property without due process of law”<sup>243</sup>; and
- (3) the Sixth Amendment’s guarantees of “the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished”; as well as “the right to a speedy and public trial . . . .”<sup>244</sup>

The Court noted that the Fifth Amendment excuses the jury trial and presentment requirements in “cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger.”<sup>245</sup> But Milligan was not a member of the armed forces. Nor

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239. *Id.*

240. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 76 (1866).

241. *Id.*

242. *Id.* at 75.

243. *Id.*

244. *Id.*

245. *Id.* at 77. The Court explained, “[t]he discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts,” as such pursuant to the courts martial clause, servicemen “while thus serving, surrender[] [their]

did his affiliation with the “Sons of Liberty” or his alleged conspiracy with Confederate forces bring him within the ambit of military jurisdiction.<sup>246</sup>

The Court buttressed its conclusions on the Anglo-American judiciary’s historic struggle to protect its jurisdiction from military encroachment.

[P]recedent[] inform[s] us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined.<sup>247</sup>

In recognition of this long-standing wariness of military jurisdiction, *Milligan* established what has become known as the “open court” rule.<sup>248</sup> As the Court explained, “the laws and usages of war . . . can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”<sup>249</sup> Because “in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances,” the constitutional prerequisites of military jurisdiction did not exist.<sup>250</sup>

Despite the constitutional commitment to the separation of powers, and the express prohibitions of the Fifth and Sixth Amendments, *Milligan* did not find that military commissions *per se* are unconstitutional. Rather, consistent with the territory-based military commission models later identified by the *Hamdan* Court, *Milligan* noted that military jurisdiction could constitutionally substitute for civilian authority when actual hostilities precluded operation of the courts:

[i]f, in foreign invasion or civil war, the courts are actually closed, and it is *impossible* to administer criminal justice according to law, then *on*

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right to be tried by the civil courts.” *Id.* at 78.

246. *Id.* at 77.

247. *Id.* at 75.

248. *Duncan v. Kahanamoku*, 327 U.S. 304, 328 (1946).

249. *Milligan*, 71 U.S. at 76.

250. *Id.* The Court noted: “[S]oon after this military tribunal was ended the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments.” *Id.* at 77.

*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.<sup>251</sup>

But the Court cautioned that this exception is subject to the strictest spatial and temporal limitations:

[a]s necessity creates the rule, so it limits its duration; for, if this [military] 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.<sup>252</sup>

This is an exceedingly strict standard. As the Court explained eighty years later in *Duncan v. Kahanamoku*,<sup>253</sup> the mere threat of invasion cannot justify resort to military jurisdiction. In *Duncan*, the petitioner challenged a criminal conviction issued by a military court in Hawaii after authorities closed the islands' civilian courts in the aftermath of the Pearl Harbor attack. The military premised the closure on fears that a full blown Japanese invasion of the islands was imminent. The Supreme Court struck down the conviction for want of jurisdiction. Relying on *Milligan*, the Court explained that "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."<sup>254</sup>

These prohibitions ultimately find their footing in Madisonian separation of powers principles. Foretelling Justice Black's observation that the commingling of Judicial and Executive power constitutes "the very acme of absolutism,"<sup>255</sup> *Milligan* observed that "[the Framers] knew — the history of the world told them — the nation they were

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251. *Id.* at 80 (emphasis added).

252. *Id.* at 80 (emphasis added). In this respect, military tribunals resemble legislative courts. Once a territory is admitted as a State, the jurisdiction of the legislative courts immediately divests. *Brenner v. Porter*, 50 U.S. (9 How.) 235 (1850).

253. 327 U.S. 304 (1946). At the time *Duncan* was decided, the Supreme Court had proclaimed Hawaii to be an "incorporated" territory. Act of April 30, 1900, 56 Cong. ch. 339, 31 Stat. 141. While I do not contend that Guantanamo Bay is an "incorporated" territory, this fact is in my view not determinative because I do not view Guantanamo as having proper geographic jurisdiction over trials conducted under the MCA for the reasons explained in Part II and Part III.A.

254. *Duncan*, 327 U.S. at 330 (emphasis added).

255. *Reid v. Covert*, 354 U.S. 1, 11 (1957) (plurality opinion).

founding . . . would be involved in war; . . . and that unlimited power wherever lodged at such a time was especially hazardous to freeman.”<sup>256</sup> For this reason, they infused the Constitution with internally limiting features to prevent the accumulation of too much power in a single hand and imposed fundamental procedural safeguards.<sup>257</sup> “Not one of these safeguards can the *President or Congress, or the Judiciary* disturb, except the one concerning the writ of *habeas corpus*.”<sup>258</sup> It is only “[b]y the protection of the law [that] human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people.”<sup>259</sup>

*Milligan* made clear the Judiciary’s manifest province to declare “*what the law is*,”<sup>260</sup> entails the concomitant obligation to act as guardian of constitutional rights when the rule of law is threatened:

[w]hen peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion — if the passions of men are aroused and the restraints of law weakened, if not disregarded — these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws.<sup>261</sup>

Until the advent of World War II, courts and commentators treated *Milligan*’s bright-line limitations as an article of faith: The constitutional restraints on military jurisdiction dictated that a “[military commission] trial must be had within the theatre of war . . .; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence w[ould] be *coram non judice*.”<sup>262</sup>

256. *Milligan*, 71 U.S. at 79.

257. On this point, Justice Davis noted,

This nation . . . cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

*Id.*

258. *Id.* at 79 (emphasis added).

259. *Id.* at 75.

260. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

261. *Milligan*, 71 U.S. at 78.

262. WINTHROP, *supra* note 192, at 836, *quoted in Hamdan v. Rumsfeld*, 548 U.S. 557, 598 n.29 (2006).

### B. Ex parte Quirin

For seventy-six years *Milligan's* “open court” rule went unchallenged. At the height of World War II the rule came before the Court again when it confronted *Ex parte Quirin* in 1942. *Quirin* called upon the Justices to decide the fate of eight German servicemen captured on the American mainland on a mission to commit acts of sabotage. President Roosevelt ordered that the alleged saboteurs be tried by a military commission even though Article III courts were open and available to try them.

The *Quirin* Court, like *Milligan* before and *Korematsu* after, confronted the prospect of judicial futility. Historians now claim that President Roosevelt directed his Attorney General, Francis Biddle, to privately instruct the Court that the Executive would not comply with an order in the petitioners’ favor.<sup>263</sup> The President reportedly intoned: “I won’t hand them over to any United States marshal armed with a writ of *habeas corpus*.”<sup>264</sup> Biddle told Justice Roberts of the President’s intentions, and Roberts in turn relayed the information to his brothers.<sup>265</sup> Roberts informed his colleagues that he believed that the President would execute the petitioners, irrespective of the Court’s ruling.<sup>266</sup> Chief Justice Stone was reportedly distressed by this prospect.<sup>267</sup> Noting some of the questionable circumstances surrounding the case, Justice Scalia candidly acknowledged in *Hamdi v. Rumsfeld*<sup>268</sup> that *Quirin* “was not this Court’s finest hour.”<sup>269</sup>

#### 1. *Quirin's* Factual Background

In the summer of 1942, eight German servicemen landed on American shores under cover of darkness. Delivered by submarine, they acted on orders “to destroy war industries and war facilities in the United

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263. Belknap, *supra* note 47, at 476 (citing David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 68 (1996)). Biddle later said of President Roosevelt’s war-time decisions that “[t]he Constitution has not bothered any wartime President.” FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962), quoted in David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2591 (2003).

264. Belknap, *supra* note 47, at 476 (citing Danelski, *supra* note 263, at 68).

265. *Id.* (citing Danelski, *supra* note 263, at 69).

266. *Id.* (citing Danelski, *supra* note 263, at 69).

267. *Id.* (citing Danelski, *supra* note 263, at 72).

268. 542 U.S. 507 (2004).

269. *Id.* at 569 (Scalia, J., dissenting).

States.”<sup>270</sup> Four landed on Long Island on June 13; the remaining four at Ponte Vedra Beach, Florida on June 17.<sup>271</sup>

Though German nationals, each of the men had previously lived in the United States.<sup>272</sup> One, Herbert Haupt, was an American citizen.<sup>273</sup> Wearing German Marine Infantry uniforms, they arrived carrying explosives, fuses, and incendiary and timing devices.<sup>274</sup> “Immediately after landing they buried their uniforms and the other articles,” including the explosives.<sup>275</sup> Proceeding in civilian dress, the Long Island party initially traveled to New York City; the Florida party to Jacksonville.<sup>276</sup> Later, they departed “to various points in the United States.”<sup>277</sup> On June 22, 1942, two of these men, George Dasch and Earnest Burger, confessed their plans to the authorities in Washington, D.C.<sup>278</sup> F.B.I. agents then arrested their comrades separately in New York and Chicago.<sup>279</sup>

On July 2, 1942, President Roosevelt appointed a military commission to try the saboteurs.<sup>280</sup> The President’s order prescribed regulations for the trial’s procedure and for review of the record and of any judgment or sentence.<sup>281</sup> The following day, July 3, the Government formally charged the defendants with:

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270. *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

271. *Id.*

272. *Id.* at 20.

273. *Id.*

274. *Id.* at 21.

275. *Id.*

276. *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

277. *Id.*

278. Belknap, *supra* note 47, at 478; Joseph R. Thysell, Jr., *Ex parte Quirin: The Case for Military Commissions*, 31 S.U. L. REV. 129, 142 (2004). The F.B.I.’s handling of the case was less than ideal. After agreeing with Burger to confess their plans, Dasch initially called the local F.B.I. field office in New York, where an agent recorded his confession but took no action on it. Belknap, *supra* note 47, at 477-78. Dasch later traveled to the Bureau’s Washington, D.C. office to turn himself in, where his story was met with great skepticism. *Id.* at 478. Despite these lapses, Director J. Edgar Hoover furthered the myth that the saboteurs’ plans were thwarted by the F.B.I.’s covert operations. *Id.* Fear that the F.B.I.’s mishandling of the case would become public may have influenced the decision to try the saboteurs by military commission where the evidence introduced would remain secret. An F.B.I. agent testified at the commission trial that the Bureau sought a presidential pardon for Dasch in exchange for his agreement not to testify about his role as an informant in the case. *Id.*

279. Belknap, *supra* note 47, at 477-78.

280. *Quirin*, 317 U.S. at 22.

281. *Id.* The President also ordered that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . and are charged with

1. Violation of the law of war;
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy;
3. Violation of Article 82, defining the offense of spying;
4. Conspiracy to commit offenses alleged in charges 1, 2 and 3.<sup>282</sup>

The trial began five days later, on July 8.<sup>283</sup> The defendants promptly moved to dismiss the charges for want of jurisdiction, and the commission rejected the motion.<sup>284</sup> On July 27, evidence closed awaiting counsels' closing arguments.<sup>285</sup> On July 28, the defendants sought *habeas* relief in district court, asserting that *Milligan* precluded the commission's jurisdiction.<sup>286</sup> Their application admitted that they had "landed on the coast of the United States in June, 1942, from a German submarine, with explosives," under German orders "to use for the purpose of committing sabotage on certain American industries."<sup>287</sup> The district court promptly denied relief.<sup>288</sup> The next day, July 29, the Supreme Court held a special session to consider the *habeas* application.<sup>289</sup> Two days later, on July 31, the Court issued a *per curiam* order denying the petitioners' application without elaboration.<sup>290</sup>

On August 1 the commission heard closing arguments.<sup>291</sup> After two days of deliberation, the panel found the defendants guilty and sentenced them to death.<sup>292</sup> On August 4, President Roosevelt approved the commission's findings, but commuted the sentences of the informants, Dasch and Burger, to prison terms of thirty years and life,

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committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and the jurisdiction of military tribunals.

*Id.* at 22-23.

282. *Id.* at 23.

283. *Id.*

284. Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 492-93 (2007).

285. *Quirin*, 317 U.S. at 23.

286. Renzo, *supra* note 284, at 493.

287. *Ex parte Quirin*, 47 F. Supp. 431, 431 (D.D.C. 1942).

288. *Id.*

289. Renzo, *supra* note 284, at 493.

290. *Id.*; Belknap, *supra* note 47, at 474.

291. Renzo, *supra* note 284, at 494; Belknap, *supra* note 47, at 474.

292. Renzo, *supra* note 284, at 494.

respectively.<sup>293</sup> On August 8, 1942 — *just fifty-seven days after their capture* — federal authorities executed the remaining six defendants by electrocution in Washington, D.C.<sup>294</sup> On October 29, 1942 (eighty-two days after the executions), the Supreme Court finally issued its written opinion.<sup>295</sup> The decision conspicuously omitted any mention of the petitioners' fates.

## 2. The *Quirin* Decision

The *Quirin* petitioners argued that the President lacked both statutory and constitutional authority to subject them to military jurisdiction. Addressing the statutory issue, the Court concluded that Congress provided the requisite authority in the Articles of War.<sup>296</sup>

With regard to the constitutional question, the Court noted that “Congress and the President, like the courts, possess no power not derived from the Constitution.”<sup>297</sup> The Court addressed the constitutional issue by examining the respective war-making powers of Congress and the President. The Court noted Congress' powers,

- (1) To provide for the common Defence;
- (2) To raise and support Armies;
- (3) To provide and maintain a Navy;
- (4) To make Rules for the Government and Regulation of the land and naval Forces;
- (5) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- (6) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- (7) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by

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293. *Id.* President Truman pardoned Dasch and Burger in 1948 and the two were deported to Germany. Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 739 n.579 (2002).

294. Renzo, *supra* note 284, at 494.

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

296. *Id.* at 26-27 (citing 10 U.S.C. §§ 1471-1593).

297. *Id.* at 25.



this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>298</sup>

The Court then noted the President's war-making powers.

The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.<sup>299</sup>

*Quirin* found that when synergized, these powers combined to yield the power to convene military commissions.

The Constitution . . . invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.<sup>300</sup>

*Quirin* left open the question "to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."<sup>301</sup> The Court concluded that Congress, in enacting the Articles of War,<sup>302</sup> "sanction[ed], within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to . . . the law[s] of war, are cognizable by such tribunals."<sup>303</sup> In short, the Articles of War "incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war."<sup>304</sup> And the President "by his Proclamation in time of war . . . invoked that law."<sup>305</sup>

*Quirin* found that the "common law of war" recognized a fundamental distinction between "lawful" and "unlawful" combatants:<sup>306</sup>

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298. *Id.* at 26.

299. *Id.*

300. *Id.*

301. *Id.* at 29.

302. 10 U.S.C.A §§ 1471-1593 (1946).

303. *Quirin*, 317 U.S. at 28.

304. *Id.* at 30.

305. *Id.* at 28.

306. *Id.* at 35.

By universal agreement and practice, the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>307</sup>

The Petitioners' status as combatants was conclusively established because they conceded in their *habeas* petition that they "landed on the coast of the United States in June, 1942, from a German submarine, with explosives," under orders "to use for the purpose of committing sabotage on certain American industries."<sup>308</sup> Thus, the commission possessed jurisdiction to try them for alleged acts of *unlawful combatancy*:

[A]n 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.<sup>309</sup>

The Court's apparent constitutionalization of "law of war" jurisdiction appears to raise tensions with *Milligan*. There too, the Government expressly charged the defendant with "*violat[ing] . . . the laws of war.*"<sup>310</sup> Tacitly acknowledging this tension, *Quirin* distinguished *Milligan* by cryptically noting that some "offenses against the law of war," nonetheless, fall into a "class of offenses constitutionally triable only by a jury."<sup>311</sup> The offense at issue in

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307. *Id.* at 30-31.

308. *Ex parte Quirin*, 47 F. Supp. 431, 431 (D.D.C. 1942).

309. *Quirin*, 317 U.S. at 31.

310. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866) (emphasis added).

311. *Quirin*, 317 U.S. at 29. *Quirin* offered two criteria to distinguish *Milligan*. See *id.* *Quirin* found that under *Milligan's* open-court rule, a defendant is not amenable to military jurisdiction where he is accused of a crime that is either (1) "not recognized by our courts as violat[ive] of the law of war," or (2) "of that class of offenses constitutionally triable only by a jury." *Id.* The first factor could not have applied to *Milligan* because he was plainly charged with "communicat[ing]" and "conspir[ing]" with "the enemy" and "the Sons of Liberty" to "seize munitions of war stored in [federal] arsenals" and "to liberate [Confederate] prisoners of war." *Milligan*, 71 U.S. at 4. These are well-recognized examples of crimes punishable under the laws of war. WINTHROP, *supra* note 192, at 840. Thus, according to *Quirin*, *Milligan's* right to an Article III tribunal necessarily arose from the conclusion that his alleged crimes were "of that class of offenses constitutionally triable only by a jury." See *infra* Part VII.A.

*Milligan* — while seemingly constituting a violation of the law of war — still fell outside the ambit of military jurisdiction. Conversely, the *Quirin* defendants “were charged with an offense against the law of war which the Constitution does not require to be tried by jury.”<sup>312</sup> In other words, *Quirin* did not find that military-commission jurisdiction constitutionally extended to the entire body of offenses recognized by the common law of war. After *Quirin*, law-of-war offenses remain that must be tried by Article III courts.

The opinion provided little elaboration as to what exactly distinguished the *Milligan* and *Quirin* defendants. The Court simply stated that it “construed the [*Milligan*] Court’s statement as to the inapplicability of the law of war . . . as having particular reference to the facts before it.”<sup>313</sup> On the basis of those facts, the *Milligan* Court “concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as — in circumstances found not there to be present and not involved here — martial law might be constitutionally established.”<sup>314</sup>

*Quirin*’s attempt to distinguish *Milligan* in this respect is disingenuous. The *Milligan* Court did not make a *factual* finding as to the defendant’s combatancy status. The Government expressly charged Milligan with, among other things, “violat[ing] . . . the laws of war” by “conspir[ing]” with “the enemy” and “the Sons of Liberty” to “seize munitions of war stored in [federal] arsenals; [and] to liberate [Confederate] prisoners of war . . . .”<sup>315</sup> As Justice Thomas recently observed in his *Hamdan* dissent, under the common law of war, “unlawful combatants” include “[i]rregular armed bodies or persons *not forming part of the organized forces of a belligerent* who would not be

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312. *Quirin*, 317 U.S. at 29. In reaching the conclusion that the Framers did not intend to subject military-commission trials to the requirements of Article III or the Fifth and Sixth Amendments, the Court analogized to other constitutionally recognized criminal proceedings where these provisions are inapplicable.

No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

*Id.* at 41.

313. *Quirin*, 317 U.S. at 45.

314. *Id.*

315. *Milligan*, 71 U.S. at 4.

likely to respect the laws of war.”<sup>316</sup> Milligan and his alleged companions in the “Sons of Liberty” would seem to meet this definition. Indeed, their alleged plan to wreak havoc behind the Union lines resembles both the *Quirin* plot to sabotage war industries and the *modus operandi* of the plain-clothes operatives employed by modern terrorist organizations. Yet, *Milligan* concluded that they did not meet the constitutional prerequisites for military jurisdiction.

Ultimately, *Quirin* replaced the formerly crystalline “open court” rule with a very muddy jurisdictional boundary lying somewhere between its own facts and those of *Milligan*. Exactly where this metaphysical radius lies remains a mystery. *Quirin* expressly declined to provide further elaboration. “We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”<sup>317</sup> Only by unraveling this ambiguity can the MCA’s constitutionality be judged.

### C. Post-*Quirin* Military Commissions Decisions

#### 1. *In re Yamashita*

Relying on the authority established by *Quirin*, the Supreme Court further expanded the jurisdiction of law-of-war commissions in *In re Yamashita*.<sup>318</sup> There, the Court sanctioned the military trial of a Japanese general charged with failing to prevent atrocities committed by his subordinates in the Philippines.<sup>319</sup> General Yamashita was tried before a military commission in the Philippines after the cessation of hostilities but before a formal declaration of peace.<sup>320</sup> He argued that the end of the fighting precluded military jurisdiction. The Court rejected this argument, finding that military commissions retain jurisdiction “to

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316. *Hamdan v. Rumsfeld*, 548 U.S. 557, 668 (2006) (Thomas, J., dissenting) (emphasis added) (quoting *WINTHROP*, *supra* note 192, at 783-84).

317. *Quirin*, 317 U.S. at 45-46.

318. 327 U.S. 1 (1946).

319. *Id.* at 13-14. General Yamashita’s charge read:

[W]hile commander of armed forces of Japan at war with the United States of America and its allies, [Yamashita] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.

*Id.*

320. *Id.* at 13.

try violations of the law of war committed before [the] cessation [of hostilities], at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.”<sup>321</sup> Because neither Congress nor the President had formally “proclaimed” peace, the military retained jurisdiction to try General Yamashita.<sup>322</sup> The Army hanged him in the Philippines just three weeks after the Court delivered its decision.<sup>323</sup>

## 2. *Hamdan v. Rumsfeld*

*Quirin*-type military jurisdiction lay dormant for more than fifty years following World War II. Military commissions were not utilized in the Korean or Vietnam Wars.<sup>324</sup> As previously discussed, President Bush disinterred the doctrine as a tool to try suspected terrorists following the invasion of Afghanistan. In *Hamdan*, the Supreme Court struck down the President’s unilateral action as a violation of implied congressional prohibitions.<sup>325</sup> The majority, plurality, and dissenting opinions quarreled over, among other things:

(1) whether the Court possessed statutory *habeas* jurisdiction to hear the case;<sup>326</sup>

(2) the scope of congressional authorization to convene military commissions;<sup>327</sup> and

(3) the types of offenses triable under the laws of war.<sup>328</sup>

Despite their lack of consensus on these issues, all the opinions ignored the Article III premises at the heart of *Milligan*, treating the matter as a purely statutory question. Each of the opinions accepted as a matter of faith that the power to try Hamdan by military commission resides somewhere on the spectrum of authority conferred by Articles I

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321. *Id.* at 12. This finding stands in tension with *Milligan*’s proscription that the continued exercise of military jurisdiction “after the courts are reinstated . . . is a gross usurpation of power.” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 80 (1866).

322. *Yamashita*, 327 U.S. at 12.

323. Edward J. Klaris, *The Press and the Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 790 (2005).

324. *Hamdan v. Rumsfeld*, 548 U.S. 557, 617 (2006).

325. *Id.* at 581, 635.

326. *See id.* at 557-80. *See also id.* at 655-59 (Scalia, J., dissenting). While the MCA plainly revoked *habeas* jurisdiction over Guantanamo detainees, the plurality concluded that the MCA’s revocation did not apply retroactively to cases pending before the MCA’s enactment. *See id.* at 557-80.

327. *See id.* at 592-94. *See also id.* at 678-83 (Thomas, J., dissenting).

328. *See id.* at 601-05. *See also id.* at 688-98 (Thomas, J., dissenting).

and II.<sup>329</sup> At the outset of his majority opinion, Justice Stevens casually accepted Hamdan's concession that "a court-martial constituted in

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329. I read the *Hamdan* opinions to resolve the case on the basis of the schema offered by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In fact, Justice Kennedy's concurring opinion did so explicitly. *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring). *Youngstown* addressed President Truman's unilateral seizure of the American steel industry when a labor dispute threatened production during the height of the Korean War. *Youngstown*, 343 U.S. at 582-83. The Court struck down the President's action. *Id.* at 589. In his oft-quoted concurring opinion, Jackson asserted that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635 (Jackson, J., concurring). He offered a template to evaluate the scope of presidential power in such cases. This methodology was later applied by a majority of the Court in *Dames & Moore v. Regan*, 453 U.S. 654, 661, 674 (1981). Under Justice Jackson's schema:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring) (footnotes omitted). Jackson ultimately concluded that the seizure fell within the third category because prior statutes impliedly prohibited the President's action. "Congress has not left seizure of private property an open field," Jackson wrote, "but has covered it by . . . statutory policies inconsistent with th[e] seizure." *Id.* at 639. Because the seizure power did not fall within preclusive executive authority, the Court invalidated the President's order. *Id.* at 660. Similarly, *Hamdan* struck down President Bush's executive order because Congress, in enacting the UCMJ, had impliedly prohibited the President's invocation of military commission jurisdiction over Hamdan. *Hamdan*, 548 U.S. at 579-80; *see also id.* at 636 (Breyer, J., concurring). As Justice Kennedy noted, "Congress, in the proper exercise of its powers . . . has considered the subject of military tribunals and set limits on the President's authority." *Id.* at 636-37 (Kennedy, J., concurring). Kennedy concluded that "Hamdan's military commission exceed[ed] the bounds Congress ha[d] placed on the President's authority in . . . the UCMJ." *Id.* at 653. But he added that "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes . . . it has the power and prerogative to do so." *Id.* at 637. I posit that this assertion is fundamentally erroneous. For an invocation of power to be evaluated on Justice Jackson's doctrinal spectrum, it must be one that resides either among Congress' Article I authority or the President's Article II domain. Powers specifically invested in the Judiciary do not belong to either of these actors and cannot be divested — with or without congressional consent. Justice Jackson's very premise acknowledges that a "zone of twilight" exists "in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). The power to conduct criminal trials is far removed from this "zone of twilight." This power falls squarely within the province of the Judiciary. "It is the primary, indeed the sole business of [Article III] courts to try cases and controversies between individuals and between individuals and the Government. *This includes*

accordance with the Uniform Code of Military Justice . . . would have authority to try him.”<sup>330</sup> But the Article III premises underlying *Milligan* dictate otherwise.<sup>331</sup>

The *Hamdan* Court first rejected the Government’s argument that Congress’ enactment of the Authorization for Use of Military Force<sup>332</sup> and Detainee Treatment Act<sup>333</sup> impliedly authorized the President’s use of military commissions to try suspected terrorists.<sup>334</sup> The dissenters disagreed with this conclusion.<sup>335</sup> The Court then surveyed the authority to empanel military commissions conferred upon the President by the Uniform Code of Military Justice<sup>336</sup> (“UCMJ”). The majority concluded that the UCMJ “acknowledge[s] a general Presidential authority to convene military commissions in circumstances . . . justified under . . . the law of war.”<sup>337</sup> The majority further noted that the statute specifically required that military commissions must provide the same procedural protections afforded to American servicemen tried by general courts-martial unless such provisions were “impracticable.”<sup>338</sup> The dissenting Justices accepted these propositions.<sup>339</sup> Ultimately, the Justices simply divided over whether *Hamdan*’s charges fell within the purview of the common law of war, and whether full compliance with court-martial safeguards would be sufficiently “impracticable” within the meaning of the UCMJ to warrant the truncated procedures dictated by the President’s order.<sup>340</sup> Concluding that Congress had impliedly denied the President the power to convene military commissions of the sort contemplated, the Court struck down his order.<sup>341</sup>

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*criminal trials.*” United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955) (emphasis added).

330. *Hamdan*, 548 U.S. at 567.

331. See *infra* Part VII.B.3.a.(2).

332. Pub. L. No. 107-40, 115 Stat. 224 (2001).

333. Pub. L. No. 109-148, 119 Stat. 2739 (2005).

334. *Hamdan*, 548 U.S. at 593-94.

335. *Id.* at 681-82 (Thomas, J., dissenting).

336. 10 U.S.C.S. §§ 801-839 (Lexis 2006).

337. *Hamdan*, 548 U.S. at 594-95.

338. *Id.* at 622.

339. *Id.* at 683 (Thomas, J., dissenting).

340. *Id.* at 583-85. Justice Stevens’ plurality opinion also concluded that by incorporating the common law of war, the UCMJ impliedly adopted the prohibitions of Common Article III of the Geneva Convention, requiring enemy combatants be tried before “regularly constituted” courts. Justice Stevens concluded that this provision required that enemy combatants receive the same process afforded to U.S. servicemen facing courts-martial. *Id.* at 613-15.

341. *Id.* at 583-84.

## VII. RECONCILING *MILLIGAN* WITH *QUIRIN*

For all its sound and fury, *Hamdan* addressed few of the constitutional questions underlying the exercise of military jurisdiction. In relying solely upon whether the offenses at issue fell within the ambit of the statutorily authorized “law of war” jurisdiction, *Hamdan* wholly ignored *Quirin*’s recognition that pursuant to *Milligan* some “law of war” offenses constitutionally must be tried by Article III courts. The constitutional question posed by the inherent tension between *Milligan* and *Quirin* remains an open one.

*Milligan* and *Quirin* stand at competing poles, each exerting its own gravity upon future cases. The tension between the policies underlying the two decisions invests the Court with considerable leeway, depending on the policy it might choose to emphasize. The facts surrounding the rendition of judgment in *Quirin* are open to great suspicion. Nonetheless, the decision does not need to be overruled to conclude that the MCA runs afoul of the Constitution. Although it seemingly deprived *Milligan* of much of its vigor, *Quirin* did not claim to overrule the decision or to otherwise change the law. Rather, as already discussed, *Quirin* purported to distinguish its own facts from those of *Milligan*. Several important but unelaborated legal and factual distinctions separating the two decisions could cabin the expansive jurisdiction potentially conveyed by *Quirin*.

Madison’s foundational premise that the proliferation of military jurisdiction will “gradually poison” the “very fountain” of civil liberty,<sup>342</sup> demonstrates that the text, history, and policy of the Constitution favor *Milligan* over *Quirin*. Adherence to *Milligan* seems particularly appropriate because the alternative position rests upon a case decided under circumstances strongly suggesting undue presidential influence.

### A. Common Features of *Milligan* and *Quirin*

Recall that *Quirin* distinguished *Milligan* by noting,

there are acts regarded . . . by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such

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342. THE FEDERALIST NO. 45, at 308-09 (James Madison) (Jacob E. Cooke ed., 1961).



grounds that the Court denied the right to proceed by military tribunal in . . . *Milligan* . . . . But . . . these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.<sup>343</sup>

While its explanation is far from clear, it is evident that, in the *Quirin* Court's view, Milligan's tribunal lacked jurisdiction because the offenses of which he was accused "*either*" (1) are "not recognized by our courts as violations of the law of war," *or* (2) are "of that class of offenses constitutionally triable only by a jury."<sup>344</sup>

Writing for a plurality in *Hamdi v. Rumsfeld*,<sup>345</sup> Justice O'Connor suggested that the distinction rested on the fact that Milligan was not charged with acts of combatancy as that term is now understood.<sup>346</sup> "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different."<sup>347</sup> But this argument ignores the nature of the charges in *Milligan*. The Government plainly charged Milligan with offenses "recognized by our courts as violations of the law of war . . . ."<sup>348</sup> Recall that Milligan faced charges of "conspiring to overthrow the Government, seize munitions, and liberate [Confederate] prisoners of war."<sup>349</sup> As Colonel Winthrop recognized, it is well settled that "furnishing [the enemy] with . . . arms" and "aiding the escape of [enemy] soldiers held as prisoners of war" are paradigmatic violations of the laws and usages of war.<sup>350</sup> It is equally accepted that "[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent" may be held liable for breaches of the laws of war.<sup>351</sup> Attorney General Speed's endorsement of the military trial of the Lincoln conspirators stressed this point: "That the laws of war authorized commanders to create and establish military commissions . . . for the trial of offenders against the laws of war,

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343. *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

344. *Id.* (emphasis added).

345. 542 U.S. 507 (2004).

346. *Id.* at 521-22.

347. *Id.* at 522.

348. *Quirin*, 317 U.S. at 29.

349. *Hamdi v. Rumsfeld*, 542 U.S. 507, 567 (2004) (Scalia, J., dissenting).

350. WINTHROP, *supra* note 192, at 840.

351. *Id.* at 783, 784, *quoted in* *Hamdan v. Rumsfeld*, 548 U.S. 557, 688 (2006) (Thomas, J., dissenting).

whether they be active or *secret participants* in the hostilities, cannot be denied.”<sup>352</sup>

Because Milligan was charged with offenses “recognized . . . as violations of the laws of war,”<sup>353</sup> *Quirin*’s enigmatic language must be read to assert that he was exempt from military jurisdiction because, for some reason, the “law of war” offenses for which he was charged nonetheless fall within a “class of offenses constitutionally triable only by a jury.”<sup>354</sup> Assuming that *Quirin* offered a principled interpretation, something about the nature of *Milligan*’s circumstances required a trial before an Article III tribunal.

From a logistical standpoint, it is perhaps easier to identify *Milligan* and *Quirin*’s distinguishing features by first examining the important jurisdictional facts common to both cases.

### 1. Location

*Milligan* and *Quirin* cannot be distinguished on the basis of the locus of the alleged crimes or the arrests. In neither case were the defendants apprehended in a war zone. In *Milligan*, both the alleged misconduct and the defendant’s arrest took place in Indiana. As the Court took great pains to emphasize, at all times Indiana remained loyal to the United States and never fell subject to Confederate control or martial law.<sup>355</sup> Similarly, the F.B.I. arrested the *Quirin* defendants in Washington, D.C., New York, and Chicago for crimes they planned to carry out in the United States.<sup>356</sup> Thus, in both cases the defendants were arrested and tried in locales where, at all times, the courts remained open and the machinery of civilian jurisdiction was unimpeded.<sup>357</sup>

### 2. Citizenship

Milligan was a citizen and resident of Indiana.<sup>358</sup> Likewise, one of the condemned *Quirin* petitioners, Herbert Haupt, was also a United

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352. Military Commissions, *supra* note 216, at 308 (emphasis added).

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

354. *Ex parte* Quirin, 317 U.S. 1, 29 (1942).

355. *Milligan*, 71 U.S. at 76.

356. *Quirin*, 317 U.S. at 21.

357. Of course, the Guantanamo detainees (unlike South Carolina detainees) subjected to military trial by the MCA are not facing trial in so-called “incorporated” areas of the United States. I find this fact indistinguishable for the reasons set forth in Part III.A.

358. *Milligan*, 71 U.S. at 68.

States citizen.<sup>359</sup> Yet, the *Quirin* Court made clear that Haupt's citizenship provided him no comfort:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of . . . the law of war.<sup>360</sup>

Thus, in the eyes of the *Quirin* Court, Milligan's citizenship plainly was not the critical feature that saved him from the gallows.

### 3. Offenses

The nature of the alleged offenses at issue in *Milligan* and *Quirin* both constitute violations of the laws of war. The *Quirin* defendants were accused of conspiring "to destroy war industries and war facilities in the United States."<sup>361</sup> Similarly, Milligan was charged with "conspiring to overthrow the Government, seize munitions, and liberate [Confederate] prisoners of war."<sup>362</sup> Such offenses, whether committed by soldiers or civilians, constitute hornbook violations of the laws of war.<sup>363</sup>

### 4. Statutory Authorization

The decisions cannot be reconciled on the basis of *Quirin*'s congressional authorization of military jurisdiction. In light of the fact that "[t]he provisions of" the Constitution "on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning,"<sup>364</sup> *Milligan* expressly concluded that "Congress could grant no such power" to the President.<sup>365</sup>

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359. *Quirin*, 317 U.S. at 20.

360. *Id.* at 37-38.

361. *Id.* at 21.

362. *Hamdi v. Rumsfeld*, 542 U.S. 507, 567 (2004) (Scalia, J., dissenting).

363. WINTHROP, *supra* note 192, at 840.

364. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 75 (1866).

365. *Id.* at 76.

*B. Jurisdictional Elements that Rendered the Quirin Offenses Subject to Military Jurisdiction, While Milligan's Alleged Crimes Remained Within the Exclusive Purview of the Judiciary*

While the offences charged in *Milligan* and *Quirin* closely resembled one another, careful examination of the decisions yields three jurisdictionally significant, distinguishing elements that counsel against the constitutionality of the MCA.

The defendants tried in *Quirin* (and *Yamashita*) were:

- (1) admitted enemy combatants;
- (2) members of a state-affiliated military corps; and
- (3) accused of war-crime offenses committed after a formal congressional declaration of war.

Conversely, in *Milligan*, the defendant:

- (1) disputed his alleged enemy-combatant status;
- (2) was accused of membership in a sub-state insurgent group; and
- (3) was tried for offenses committed in the absence of a formal declaration of war.

I posit that the convergence of these three jurisdictional elements in *Quirin* — the defendants' admitted combatancy, their membership in a state-affiliated military unit, and that their alleged violations of the laws of war occurred during the pendency of a congressionally declared war — rendered the charges against them “offense[s] against the law of war which the Constitution does not require to be tried by jury.”<sup>366</sup> Conversely, the absence of these requisite elements in *Milligan* dictated that the charges there, while “regarded by . . . writers on international law as offenses against the law of war,” fell within a “class of offenses constitutionally triable only by a jury.”<sup>367</sup> This conclusion does not inherently arise from *Quirin*. The Court was deliberately obtuse as to the precise elements that distinguished the case from *Milligan*. To be blunt, the limiting principles I propose no more follow from *Quirin* than *Quirin* follows from *Milligan*. But taken together, these elements provide principled bases to reconcile *Quirin* with *Milligan*. Given that *Quirin* and *Milligan* may not be distinguished on the basis of citizenship, the locality of offenses, the nature of the alleged crimes, or congressional authorization, if the above-proffered elements do not distinguish the decisions, *Quirin* effectively emasculates *Milligan*.

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366. *Quirin*, 317 U.S. at 29.

367. *Id.*

I suggest that the Court adopt *each* of these three jurisdictional elements as necessary conditions precedent to the exercise of military jurisdiction. Judicial recognition of these elements significantly diminishes the threat of military jurisdiction to the separation of powers. When established, the legitimacy of military commissions ultimately rests on constitutional parity: members of the United States armed forces are constitutionally subjected to military jurisdiction. Members of foreign military corps at war with the United States would receive no greater protections than our own troops.<sup>368</sup> But allowing the exercise of such jurisdiction without first satisfying these conditions poses undue risk of subjecting civilians to military jurisdiction.

These limiting principles are consistent with the historical application of military jurisdiction. Recall that the Court has traditionally recognized three species of military commissions.<sup>369</sup> *Milligan* made clear that the constitutional limitations on military jurisdiction do not apply to tribunals established either in occupied territory or in territory where authorities legitimately declare martial law.<sup>370</sup> It is only the so-called “law of war” commission that is subject to *Milligan’s* separation-of-powers limitations. Thus, if *Milligan* were accused of the same offenses in an occupied Confederate State or in a district where martial law had been legitimately declared because the civil courts could not function, he would have been subject to military jurisdiction by virtue of the fact that no other court would have been available to try him.<sup>371</sup>

Similarly, if the “war on terror” necessitated the temporary occupation of foreign territory, the Government could establish military commissions *in that territory* to try offenses *committed in that territory*. If, for example, the Government were to establish a territory-based military commission in Afghanistan to try offenses against the law of war committed within the occupied territory, these limitations would

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368. I propose, without venturing to debate the issue here, that the Due Process Clause may dictate that when these conditions are met and trial by military commission is proper, the Government must offer foreign combatants the same procedural protections guaranteed to American servicemen facing courts-martial (as the Geneva Convention requires). The MCA fails to satisfy this condition. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 948(b)(f), 120 Stat. 2600, 2602 (2006). I reserve this issue for a future paper.

369. See *supra* Part V.

370. By definition, such courts pose no threat to the separation of powers because their jurisdiction is limited to locales “having available . . . no other tribunal.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

371. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 80 (1866).

have no application. The limiting principles I suggest are applicable only in extraordinary cases where the Government voluntarily transports alleged offenders from a war zone to territory, like Guantanamo, that is far removed from hostilities and “is within the constant jurisdiction of the United States.”<sup>372</sup>

1. For a Defendant to Be Subject to the Jurisdiction of a Law-of-War Military Commission, His Combatancy Status Must Be Affirmatively Established Either By Judicial Admission or By De Novo Adjudication Before an Article III Tribunal

Unlike the less controversial territory-based commissions, law-of-war commissions have historically been utilized only in cases where the defendant’s status as an “enemy combatant” was not in doubt. The historical purpose of law-of-war tribunals has been not to determine whether the accused is a “combatant” rather than a civilian, but whether *as a combatant* he has engaged in *lawful* or *unlawful* acts of belligerency.

“Combatant” status is a constitutionally necessary element to the exercise of law-of-war jurisdiction.<sup>373</sup> Such commissions cannot exercise jurisdiction over civilians. Distinguishing *Milligan*, the *Yamashita* Court went to great pains to point out that “[w]e are not here concerned with the power of” a law-of-war commission “to try civilians.”<sup>374</sup> Rather, the *Yamashita* commission possessed “authority . . . *only* to try the purported charge of violation of the law of war committed by petitioner, *an enemy belligerent* . . . during time of war.”<sup>375</sup> As a participant in war, a combatant (whether lawful or unlawful) assumes peculiar hazards unknown in civilian life. Among these is the harsh hand of military justice — even at the hands of the enemy.<sup>376</sup>

Non-combatants, both foreign and domestic, assume no such risk. As *Yamashita*’s qualifying language implies, application of military jurisdiction should be limited to situations where the defendant’s combatancy status is established. Such was the case in both *Yamashita*

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372. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260 (2008).

373. WINTHROP, *supra* note 192, at 838.

374. *In re Yamashita*, 327 U.S. 1, 9 (1946).

375. *Id.* (emphasis added).

376. *See Military Commissions*, *supra* note 216, at 308 (1865) (noting that the judgments of military commissions against combatants “have been sometimes harsh, and sometimes even tyrannical”).

and *Quirin* — the only Supreme Court decisions to date affirming the application of law-of-war commission jurisdiction.

As noted, General Yamashita conceded that he was a Japanese officer who was “in command of a hostile army occupying United States territory.”<sup>377</sup> Similarly, the *Quirin* defendants candidly admitted in their *habeas* application that they had “landed on the coast of the United States in June, 1942, from a German submarine, with explosives,” under German orders “to use for the purpose of committing sabotage on certain American industries.”<sup>378</sup> Thus, as the Supreme Court expressly acknowledged, the *Quirin* defendants were “admitted enemy invaders.”<sup>379</sup>

I do not mean to imply that an obvious enemy combatant can avoid military jurisdiction through the simple expediency of denying combatancy. Only that in the extraordinary circumstance where the Government seeks to try combatants deliberately removed from the war zone to actual or *de facto* American territory in close proximity to the U.S. mainland, Article III courts *presumptively* possess exclusive jurisdiction. If the defendant does not stipulate his combatancy, the Government must bear the burden of proving his combatancy to an Article III court. This requirement might be fulfilled either by a preliminary or post-conviction *de novo* combatancy trial before an Article III tribunal.<sup>380</sup> While the MCA permits limited review of commission proceedings before the D.C. Circuit, the Act expressly restricts such review to “matters of law.”<sup>381</sup> Thus, the MCA professes to place responsibility for determining the prerequisite constitutionally necessary, jurisdictional facts *exclusively* in the hands of the commission. Long ago, the Supreme Court recognized that when Congress seeks to invest non-Article III bodies with adjudicative power, Article III courts must make *de novo* judicial determinations of the prerequisite constitutionally necessary “jurisdictional” facts before a judgment may be enforced.<sup>382</sup> While the Court has since abandoned the *de novo* review requirement in private civil disputes,<sup>383</sup> this requirement

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377. *Yamashita*, 327 U.S. at 9.

378. *Ex parte Quirin*, 47 F. Supp. 431, 431 (D.D.C. 1942).

379. *Ex parte Quirin*, 317 U.S. 1, 47 (1942) (emphasis added).

380. Because “combatancy” is an element of the offense, the Government must prove it beyond a reasonable doubt.

381. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950g(b), 120 Stat. 2600, 2622 (2006).

382. *Crowell v. Benson*, 285 U.S. 22, 54-56 (1932).

383. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 54 (1936). The *de novo* review

remains an absolutely inviolate component of criminal law.<sup>384</sup> In criminal cases, courts may not defer to an extra-Judicial body's findings of constitutionally necessary facts.<sup>385</sup> The MCA violates this principle by purporting to strip Article III courts of the ability to make these requisite factual determinations.<sup>386</sup> Mere Article III *appellate review* is insufficient. As the Court has explained,

[o]ur precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level.<sup>387</sup>

Justice Scalia's dissent in *Hamdi* lends support to this argument. *Hamdi* involved a *habeas* petition brought by a United States citizen captured in Afghanistan and held indefinitely without charge by the Executive as an enemy combatant.<sup>388</sup> The divided Court issued a judgment requiring that in order to proceed with the indefinite detention of a citizen alleged to be an "unlawful combatant," the Government must notify the detainee of "the factual basis of his classification" and provide him an opportunity "to rebut the Government's factual assertions before

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requirement in civil cases fell casualty to the modern administrative state.

384. See, e.g., *Sash v. Zenk*, 439 F.3d 61, 64 (2d Cir. 2006) (noting that courts owe agencies no deference in matters of criminal law). Territorial "legislative courts" fall outside this prohibition because they are derived from Congress' plenary authority over federal territories and thus are analogous to state courts. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

385. *Sash*, 439 F.3d at 64.

386. Historically such combatancy could be proven by direct or circumstantial evidence. For example, even in the absence of their judicial admission, the combatancy of the *Quirin* defendants could have been established by evidence demonstrating that they buried German uniforms and munitions upon landing in the United States. See *Ex parte Quirin*, 317 U.S. 1, 21 (1942). The Government's task would be admittedly more difficult in the present conflict. "In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay . . . numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term . . . [D]etainees at Guantanamo Bay . . . include men who were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia, and Thailand." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005). But this is precisely why the Government should be put to its proof. While military membership (including membership in an enemy's military) subjects belligerents to military jurisdiction, the Constitution dictates that civilians not be put to the hardships attendant to military justice. *In re Yamashita*, 327 U.S. 1, 9 (1946).

387. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982) (plurality opinion).

388. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11 (2004).



a neutral decisionmaker.”<sup>389</sup> The Government’s factual assertions create a “presumption” in favor of its classification such that once it provides “credible evidence that the *habeas* petitioner meets the enemy-combatant criteria,” the burden shifts to the petitioner “to rebut that evidence with more persuasive evidence that he falls outside the criteria.”<sup>390</sup>

In dissent, Justice Scalia asserted that for American citizens, *Quirin* dictates that the conclusive *Judicial* determination of combatancy is an absolute prerequisite to the exercise of military jurisdiction.

In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were “*admitted* enemy invaders,” and it was “undisputed” that they had landed in the United States in service of German forces. The specific holding of the Court was only that, “upon the *conceded facts*,” the petitioners were “plainly within [the] boundaries” of military jurisdiction. But where those jurisdictional facts are *not* conceded — where the petitioner insists that he is *not* a belligerent — *Quirin* left the pre-existing law [articulated by *Milligan*] in place . . . .<sup>391</sup>

Justice Scalia qualified his proffered “conceded facts” rule, stating that it does not apply to the detention of aliens. He based this limitation on his view that non-citizens detained at Guantanamo Bay lack access to *habeas* jurisdiction because they have not set foot on United States sovereign soil, and thus have not achieved constitutional privity under *Eisentrager*.<sup>392</sup> Dissenting in *Boumediene*, he reiterated this argument. “There is simply no support for the Court’s assertion that constitutional rights extend to aliens held outside U.S. sovereign territory . . . , and *Eisentrager* could not be clearer that the privilege of *habeas corpus* does not extend to aliens abroad.”<sup>393</sup> I agree with Justice Scalia’s limiting construction of *Quirin*, but the *Boumediene* majority opinion demonstrates why his “conceded facts” rule cannot be limited to citizens. The trial and/or detention of accused aliens in United States territory provides the necessary constitutional nexus to bring into play constitutional rights that “are universal in their application to all persons

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389. *Id.* at 533.

390. *Id.* at 534.

391. *Id.* at 571-72 (Scalia, J., dissenting) (citations omitted) (emphasis added).

392. *Id.* at 577 (“Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court.”).

393. *Boumediene v. Bush*, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting).

within the territorial jurisdiction . . . .”<sup>394</sup> As explained above, the Government’s perpetual control over Guantanamo Bay fully renders the site the “*de facto*” territory of the United States.<sup>395</sup>

The MCA does not limit military-commission jurisdiction to *confirmed* combatants. The Act empowers the President to empanel military commissions to try “alien unlawful enemy combatants . . . for violations of the law of war . . . .”<sup>396</sup> The Act broadly defines an “unlawful enemy combatant” to include,

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>397</sup>

Neither of these requirements limits military jurisdiction to *confirmed* combatants.

First, the statute’s reference to “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States” simply describes the nature of the offense for which someone who satisfies the necessary jurisdictional requisites may be tried. It provides no mechanism to determine a defendant’s combatant status.

Second, the MCA’s reliance upon the determinations of Combatant Status Review Tribunals (“CSRTs”) is similarly deficient. Responding to *Hamdi* and *Rasul*, the Defense Department promulgated regulations creating CSRTs, limited-purpose military tribunals assigned to ascertain whether the Government possesses reasonable cause to indefinitely detain suspected enemy combatants.<sup>398</sup> The Department modeled these procedures upon Justice O’Connor’s plurality decision in *Hamdi*.

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394. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

395. *See supra* Part III.A.

396. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(a)-(b), 120 Stat. 2600, 2602 (2006).

397. *Id.* § 948a.

398. Muneer I. Ahmad, *Guantanamo Is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. LEGAL F. 1, 11-12 (2007).

Congress subsequently codified the use of CSRTs in the Detainee Treatment Act.<sup>399</sup>

CSRTs employ a rebuttable presumption of combatancy.<sup>400</sup> Given the accused's generally limited access to evidence, this presumption is a heavy one to overcome.<sup>401</sup> Despite the *Hamdi* plurality's apparent endorsement of the process, the *Boumediene* majority seemed to reverse course, labeling CSRTs "closed and accusatorial," noting that "even when all the parties involved in [the CSRT] process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact."<sup>402</sup> As Judge Rogers noted in his dissent to the D.C. Circuit's decision in *Boumediene*,<sup>403</sup> in addition to shifting the burden of proof, the CSRTs impose other significant obstacles.

The detainee need not be informed of the basis of his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel. Moreover, these proceedings occur before a board of military judges subject to command influence . . . . Additionally, . . . continued detention may be justified by a CSRT on the basis of evidence resulting from torture.<sup>404</sup>

Given the "considerable risk of error in [its] findings of fact,"<sup>405</sup> the truncated preliminary procedure provided by CSRT review is a patently insufficient, constitutional substitute for determination of constitutionally necessary, jurisdictional facts by an Article III court.

Justice Thomas' dissent in *Hamdan* took the opposite position. A CSRT had previously branded Hamdan an "enemy combatant."<sup>406</sup>

399. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 199 Stat. 2680, 2742 (2005).

400. *Id.* § 1005(e)(2)(C)(i).

401. See Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 1020-21 (2005) ("Under the combatant status review tribunal rules, a civil standard of proof is required as opposed to proof beyond a reasonable doubt. This creates a danger that, in cases of uncertainty about whether the detainee is an enemy combatant, the doubts will be settled in the government's favor. This is particularly true when the civil standard of proof is coupled with a presumption in favor of the Government's evidence. This effectively places the accused in a position of having to establish that he is not an enemy combatant.").

402. *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (citations omitted).

403. 476 F.3d 981 (D.C. Cir. 2007) (Rogers, J., dissenting). A majority of the D.C. Circuit panel had denied the petitioner's *habeas* petition finding that he lacked constitutional rights under *Eisenrager* because he had no "presence or property" in the United States. *Id.* at 990-94.

404. *Id.* at 1005-06 (Rogers, J., dissenting).

405. *Boumediene*, 128 S. Ct. at 2270.

406. *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).

Joined by Justices Alito and Scalia, Justice Thomas argued that Hamdan's allegedly established "enemy combatant" status subjected him to military jurisdiction. This methodology rested on the apparent presumption of Hamdan's guilt to justify subjecting him to the extraordinary jurisdiction of a military commission. "Hamdan is an *unlawful combatant* charged with joining and conspiring with a terrorist network . . . ." <sup>407</sup> This assertion puts the cart before the horse. The dissenters explicitly accepted the CSRT's preliminary administrative determination that Hamdan was *guilty of being an unlawful combatant* as sufficient to subject him to trial before a military commission *on the charge of being an unlawful combatant*. As *Quirin* acknowledged, "[c]onstitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."<sup>408</sup> In the *Quirin* and *Yamashita* law-of-war commissions, every defendant's combatancy status was undisputed.<sup>409</sup> As Justice Scalia's own dissenting opinion in *Hamdi* persuasively demonstrates, the *Quirin* defendants' concession of combatancy was necessary to satisfy the jurisdictional prerequisites to subject them to military, rather than civilian jurisdiction. The issue at trial was simply whether they engaged in unlawful acts of belligerency. Conversely, Hamdan had not conceded membership in al Qaeda, or any other foreign corps hostile to the United States.

The MCA's classification of all "combatants" within its jurisdiction as "unlawful" also runs afoul of *Milligan's* jurisdictional boundaries.<sup>410</sup> The Act limits the definition of "lawful" combatants, over which the

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407. *Id.* at 689 (Thomas, J., dissenting) (emphasis added).

408. *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

409. General Yamashita (unlike the *Quirin* petitioners) was not accused of being an unlawful combatant. Rather, he was accused of being a *lawful* combatant who engaged in *unlawful belligerency*. As Professor Paust has explained:

The phrase "unlawful combatant" . . . confuses two separate issues concerning (1) the status of a person (*e.g.*, as a combatant or noncombatant who is not privileged to engage in combat), and (2) a lack of immunity for personal acts committed in violation of the laws of war. If one is a combatant, one is not an unlawful combatant (although some of their acts may be unlawful), and a person having any status can violate the laws of war and lack immunity from prosecution.

Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 768 n.43 (2007). The MCA, however, eviscerates this distinction. Under the Act, "lawful" combatants are textually limited to those who "abide by the law of war." Military Commissions Act of 2006, Pub. L. No. 109-366, § 948a(2), 120 Stat. 2600, 2601 (2006). Because General Yamashita was convicted of violating the laws of war, he would have been an "unlawful combatant" under the MCA. *See id.*

410. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948d(b), 120 Stat. 2600, 2603 (2006).

commissions lack jurisdiction, to “state affiliated” soldiers, excluding Taliban fighters.<sup>411</sup> This limitation demonstrates a fundamental incompatibility with traditional models of law-of-war commission jurisdiction. A central premise underlying law-of-war jurisdiction assumes that the defendant may raise the immunities of war as a defense — that the defendant’s conceded belligerency may be found to be “lawful.” In all previously sanctioned law-of-war commissions, the tribunals were charged with determining whether the combatant had engaged in “lawful” or “unlawful” combatancy. A combatant could not be punished for merely raising arms against the United States, only for committing war crimes. For example, General Yamashita could not have been convicted for simply engaging in acts of hostility against American forces; only for engaging in acts of belligerency that violated the laws of war.<sup>412</sup> The ability to raise these immunities mitigates the harshness of military justice.

*Milligan* demonstrates that a law-of-war commission may not exercise jurisdiction in cases where *any* act of combatancy *alone* would be “unlawful.” Such commissions are only appropriate where the accused can raise the defense that he acted as a “lawful” combatant. *Milligan*’s inability to raise any defense that he was a lawful combatant removed his case from the realm of military jurisdiction.

If in Indiana [Milligan] conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war [as a lawful combatant]; for he was not engaged in legal acts of hostility against the government, and only such persons [combatants], when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a [lawful combatant] prisoner of war, how can he be subject to their pains and penalties?<sup>413</sup>

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411. *Id.* § 948a(2). The Taliban are presumably denied “lawful” combatant status because of their failure to wear uniforms. See *id.* § 948a(2)(B) (limiting lawful combatant status to corps “wear[ing] a fixed distinctive sign recognizable at a distance”).

412. General Yamashita’s charge read:

[W]hile commander of armed forces of Japan at war with the United States of America and its allies, [Yamashita] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.

*In re Yamashita*, 327 U.S. 1, 13-14 (1946).

413. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 82 (1866).

Here, the MCA provides no such safe harbor. The overwhelming majority of Guantanamo Bay inmates are not members of state-affiliated military corps. As with Milligan's alleged membership in the "Sons of Liberty," the immunities of war are wholly unavailable.

To be clear, I am not arguing that the Government cannot render individuals who raise arms against the United States on behalf of al Qaeda or other foreign (or domestic) terrorist organizations as outlaws. As with RICO,<sup>414</sup> Congress can provide that individuals who knowingly offer assistance to terrorist enterprises bear criminal responsibility for crimes committed by such enterprises.<sup>415</sup> Terrorist organizations are not due the dignity — and corresponding immunities — afforded to state actors. But as far as law-of-war-commission jurisdiction has been traditionally understood, combatancy is inherently a two-sided coin. As *Milligan* demonstrates, if a defendant "cannot enjoy the immunities attaching to the character" of lawful combatancy, "how can he be subject to the pains and penalties" of military jurisdiction?

## 2. For a Defendant to Be Subject to the Jurisdiction of a Law-of-War Military Commission, He Must Be a Member of a State-Affiliated Military Corps

The MCA limits military-commission jurisdiction entirely to *sub-state actors*. This classification ignores a fundamental limitation upon military jurisdiction implicit in *Milligan* and *Quirin*. In both cases, the defendants were accused of acting on behalf of organizations hostile to the United States. In *Quirin*, the defendants were acknowledged members of the German military dispatched to commit acts of sabotage in the United States. The Government accused Milligan of conspiring with the insurgent Sons of Liberty to commit similarly disruptive acts behind Union lines during the Civil War. In both cases, the defendants were tried in locations where the civilian courts were open and available. The Court found the state-affiliated *Quirin* defendants amenable to law-of-war jurisdiction while Milligan, a sub-state actor, retained the right to be tried by an Article III court subject to the Bill of Rights. I suggest

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414. 18 U.S.C.A §§ 1961-1968 (West 2006).

415. Criminal liability should be limited to material support that the organization can use to further its terrorist goals. Mere advocacy, expressions of agreement, or symbolic membership in an organization should not give rise to criminal liability. See *United States v. Marzook*, 383 F. Supp. 2d 1056, 1062 (N.D. Ill. 2005) (noting that the Government cannot criminalize mere advocacy of a terrorist organization's goals or symbolic membership therein).

that read together, *Quirin* and *Milligan* should be interpreted to limit law-of-war commission jurisdiction to members of *state*-affiliated military corps.

State affiliation is a principled bright-line distinction between war crimes punishable by military tribunals and those subject to Article III jurisdiction. As *Quirin* explained, Milligan's alleged offenses, while criminally proscribed as violations of the "law of war," nonetheless, fell into a "class of offenses constitutionally triable only by a jury."<sup>416</sup> In this vein, *Quirin* expressly distinguished *Milligan*, concluding that the petitioner in *Milligan* was not triable by a law-of-war commission because he was merely a member of a sub-state insurgent group and "not . . . a part of or associated with the armed forces of the enemy . . ."<sup>417</sup> The Court further emphasized state affiliation in its discussion of Petitioner Haupt's American citizenship. "Citizens who associate themselves with *the military arm of the enemy government* . . . are enemy belligerents within the meaning of . . . the law of war."<sup>418</sup>

The state-actor dichotomy is a critical limiting principle. If mere affiliation with sub-state actors dedicated to committing violence against military interests or even civilians gave rise to military jurisdiction, the role of the Judiciary would be greatly circumscribed.<sup>419</sup> Consider some historical examples.

In 1995, members of an insurgent militia group killed 168 people in the bombing of the Murrah federal building in Oklahoma City.<sup>420</sup> Two perpetrators, Timothy McVeigh and Terry Nichols, were ultimately tried and convicted by civilian courts for their crimes.<sup>421</sup> Yet, it was never suggested that their militia affiliation gave rise to military jurisdiction. The Ku Klux Klan — "[t]he world's oldest, most persistent terrorist organization" — has engaged in a systematic campaign of violence and

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416. *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

417. *Id.* at 45 (emphasis added).

418. *Id.* at 37-38 (emphasis added).

419. I do not mean to imply that Congress cannot impose special procedures for trials of suspected terrorists. In light of the national-security implications and peculiar threats at issue in these cases, I believe that Congress could appropriately establish a special court, such as the FISA court. But whatever procedures might be applied, the separation of powers dictates that an Article III setting is necessary.

420. Tatsha Robertson, *Militia Groups Say McVeigh Case Is Proof of U.S. Plot*, BOSTON GLOBE, May 14, 2001, at A1.

421. See *United States v. McVeigh*, 9 F. App'x 980 (10th Cir. 2001); *United States v. Nichols*, No. 99-1438, 2000 WL 1846225 (10th Cir. 2000).

intimidation against civilians for more than 130 years.<sup>422</sup> As Justice Thomas observed,

Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.<sup>423</sup>

The Klan has “scourged, mangled, banished and murdered” untold thousands of victims.<sup>424</sup> Nonetheless, it has never been subjected to military jurisdiction.<sup>425</sup>

I do not mean to minimize the extraordinary threat posed by al Qaeda and similar organizations. As Justice Thomas aptly noted, “[w]e are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001 . . . .”<sup>426</sup> Nonetheless, once divorced from the implicit limiting principle of state affiliation, the boundaries of military jurisdiction rest upon a very slippery slope. So unmoored, the jurisdictional trap door opens to virtually any large organized and potentially dangerous band that can euphemistically be described as being “at war” with the Government. As the Supreme Court noted, “the national security underpinnings of the ‘war on terror’ . . . are broad and malleable . . . .”<sup>427</sup> So it is with many other “wars” waged in recent years. What about the on-going “war on drugs?” The Government has engaged in military operations in Colombia.<sup>428</sup> Are Colombian drug lords “enemy combatants?” What about the Mexican drug lord tried in *Verdugo-Urquidez*?<sup>429</sup>

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422. *Virginia v. Black*, 538 U.S. 343, 388-89 (2003) (Thomas, J., dissenting).

423. *Id.*

424. Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children?*, 54 OKLA. L. REV. 333, 342 n.53 (2001) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 518 (1871)).

425. In 1871, Congress suspended the writ of *habeas corpus* in nine South Carolina counties to fight the Klan. Michael W. Fitzgerald, *Lou Faulkner Williams, The Great South Carolina Ku Klux Klan Trials, 1871-1872*, 17 LAW & HIST. REV. 193, 193 (1999).

426. *Hamdan v. Rumsfeld*, 548 U.S. 557, 705 (2006) (Thomas, J., dissenting).

427. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

428. Miriam Schneider, Note, *Military Spying in the United States: When It Is Not Your Neighbor Knocking at Your Door, Where Do You Turn?*, 7 CARDOZO J. CONFLICT RESOL. 199, 208 n.52 (2005).

429. 494 U.S. 259 (1990). See *supra* notes 153-169 and accompanying text.



Dissenting in *Hamdan*, Justice Thomas argued that state affiliation is not a requisite element of military jurisdiction. As he quite correctly observed, quoting Colonel Winthrop, precedent supports the argument that military tribunals “have jurisdiction over ‘[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent’ ‘who would not be likely to respect the laws of war.’”<sup>430</sup> But Justice Thomas’ opinion confuses territory-based commissions, chartered in locales where ongoing fighting prevents the civil courts from functioning, with the “law of war” commissions contemplated by the MCA. As Winthrop recognized, law-of-war commissions enjoy much more circumscribed jurisdiction. The jurisdiction of such commissions is limited to “[i]ndividuals *of the enemy’s army* who have been guilty of . . . offences in violation of the laws of war . . . .”<sup>431</sup>

Territory-based military commissions operate *in lieu of* civilian courts in locations where civil authorities cannot function. As such, they possess jurisdiction over the panoply of defendants, including civilians.<sup>432</sup> Conversely, as *Quirin* recognized, the jurisdiction of law-of-war commissions is limited to defendants “associate[d] . . . with the military arm of the *enemy government* . . . .”<sup>433</sup> If the expansive jurisdiction to which Justice Thomas refers (*i.e.*, “[i]rregular armed bodies or persons”) extended to law-of-war commissions, Milligan necessarily would have been subject to military jurisdiction. Recall that the Government plainly charged Milligan with offenses “recognized by our courts as violat[ive] of the law of war . . . .”<sup>434</sup> If sub-state militants fall within the jurisdiction of such commissions, Milligan’s association with the “Sons of Liberty” seemingly would have brought him too within that jurisdiction. It might be tempting to argue that the present threat posed by al Qaeda is more serious than that presented by the pro-Confederate insurgents in *Milligan*. But viewed in proper historical context, this contention plainly fails. During the Civil War the Midwest was plagued by several militant secret societies plotting to sabotage the

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430. *Hamdan*, 548 U.S. at 688 (Thomas, J., dissenting) (quoting WINTHROP, *supra* note 192, at 783, 784).

431. WINTHROP, *supra* note 192, at 838 (emphasis added).

432. *Id.* at 836.

433. *Ex parte Quirin*, 317 U.S. 1, 37 (1942) (emphasis added).

434. Milligan faced charges of “conspiring” with the insurgent Sons of Liberty “to overthrow the Government, seize munitions, and liberate [Confederate] prisoners of war.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 567 (2004) (Scalia, J., dissenting). It is well settled that “furnishing [the enemy] with . . . arms” and “aiding the escape of [enemy] soldiers held as prisoners of war” are paradigmatic violations of the laws and usages of war. WINTHROP, *supra* note 192, at 840.

Union war effort. Chief among these were the Sons of Liberty.<sup>435</sup> Moreover, the Court decided *Milligan* in the immediate aftermath of a war fought on American soil that cost some 600,000 lives,<sup>436</sup> and just months after other insurgents successfully conspired to assassinate President Lincoln. Yet, the Court found that even these dire circumstances did not militate against the dictates of the separation of powers.

Were law-of-war commission jurisdiction as malleable as Justice Thomas suggests, innumerable “enemies” could be subjected to military trials by the simple Executive dispatch of armed forces coupled with the talismanic cry of “war.” As *Milligan* illustrates, the separation of powers cannot be evaded so easily — at least not when the defendants are tried in territory within the “*de facto*” and “practical sovereignty” of the United States.<sup>437</sup>

### 3. By *Quirin*'s Own Terms, a Formal Declaration of War Is a Necessary Condition Precedent to the Congressional Establishment of Law-of-War Military Commissions

No constitutional provision confers upon Congress or the President the power to empanel extra-Judicial military commissions. Rather, *Quirin* deduced that this power emanates from the combined force of the enumerated war-related powers, which read together, “invest[] the President, as Commander in Chief, with the power to wage war *which Congress has declared . . .*”<sup>438</sup> Because, by *Quirin*'s own terms, a formal declaration of war is a necessary condition precedent to the commission power, that power cannot be exercised in the absence of such a declaration.

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435. Capt. Robert G. Bracknell, *All the Laws But One: Civil Liberties in Wartime*, 47 NAVAL L. REV. 208, 216 (2000) (book review) (citing WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 83-84 (1998)).

436. Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective*, 40 AM. CRIM. L. REV. 11, 13 (2003). The exact number of Civil War casualties is subject to dispute. Sources estimate the number of dead as low as 500,000 and as high as 700,000. Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia about the History of the Privileges or Immunities Clause*, 93 KENTUCKY L.J. 659, 682 n.121 (2005).

437. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2252-53 (2008).

438. *Quirin*, 317 U.S. at 26 (emphasis added).

a. No Constitutional Provision Confers the Power to Convene Law-of-War Military Commissions

“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”<sup>439</sup> As such, the power to empanel military commissions must itself derive from the Constitution. Pressed to identify the constitutional locus of this power, *Quirin* referred to the so-called “war power.” Of course, there is no express “war power” provision in the Constitution, much less a “military commissions” clause. Rather, as *Quirin* noted, the Constitution confers Congress with several enumerated war-related powers:

- (1) To provide for the common Defence;
- (2) To raise and support Armies;
- (3) To provide and maintain a Navy;
- (4) To make Rules for the Government and Regulation of the land and naval Forces;
- (5) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- (6) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- (7) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>440</sup>

In light of the canon that “provisions of the Constitution,” that are “specific” in “grant or restriction” supersede “general clauses, which afford a broad outline,”<sup>441</sup> none of these powers taken alone authorizes the establishment of military commissions. As *Milligan* noted, “[t]he provisions of” the Constitution “on the administration of criminal justice

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439. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

440. *Quirin*, 317 U.S. at 26.

441. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934). *See also* *New York Times Co. v. United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring) (“[T]he Solicitor General argues . . . that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history.”).

are . . . plain and direct.”<sup>442</sup> Thus, the specificity canon dictates that constitutional authorization to deviate from these procedures — to conduct criminal adjudications outside the auspices of the Judicial Branch — must be equally “plain and direct.”

None of the enumerated war-related powers referenced above conveys the authority to convene law-of-war commissions. *Quirin* did not find otherwise. In a feat of jurisprudential legerdemain, the Court concluded that these powers combine to yield a sum greater than its parts. Putting aside the logical deficiencies of this line of reasoning, *Quirin* concluded that the extra-textual commission power is a necessary implication of the fact that “[t]he Constitution . . . invests the President, as Commander in Chief, with the power to wage war *which Congress has declared* . . . .”<sup>443</sup> I save for another day the debate over *Quirin*’s ontological argument.<sup>444</sup> For present purposes it is sufficient to note that by the terms of the Court’s own reasoning, a congressional declaration of war is a necessary condition precedent to *Quirin*’s commission power.

- (1) The Powers “To provide for the common Defence”; “To raise and support Armies”; and “To provide and maintain a Navy”

The first three of the clauses addressed by *Quirin* — empowering Congress to “provide for the common Defence,” “raise and support Armies,” and “provide and maintain a Navy” — merely convey generic authority to establish and subsidize a federal military. They invest Congress with the “indefinite power of raising troops, as well as providing fleets; and of maintaining both in peace, as well as in war . . . .”<sup>445</sup> But these clauses offer no textual authority to empanel extra-Judicial criminal adjudicatory forums.

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442. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 75 (1866).

443. *Quirin*, 317 U.S. at 26 (emphasis added).

444. The Ontological argument posits that if one can conceive of God, God must exist. Steven D. Smith, *Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AM. J. JURIS. 299, 313 n.55 (1997).

445. FEDERALIST NO. 41, at 270 (James Madison) (Jacob E. Cooke ed., 1961).

(2) The Power “To make Rules for the Government and Regulation of the land and naval Forces”

The Supreme Court has long construed Congress’ power to “make Rules for the Government and Regulation of the land and naval Forces” as authority for the exercise of courts-martial jurisdiction over American servicemen.<sup>446</sup> Some suggest that the provision likewise authorizes the exercise of military jurisdiction over enemy combatants.<sup>447</sup> But this construction finds no support in either the text or the history of the clause. Its plain language suggests that the clause’s contemplation of “*the land and naval forces*” directly refers to the very *American* armies and navies which the preceding provisions empower Congress to “establish,” “raise and support.” The clause’s history confirms this. The Framers simply “added [it] from the existing Articles of Confederation.”<sup>448</sup> The provision from which the clause was borrowed made clear that it contemplated only regulation of Armed Forces “*in the service of the United States*.”<sup>449</sup>

The United States in Congress assembled shall . . . have the sole and exclusive right and power of . . . appointing all officers of the Land Forces, *in the service of the United States* . . . — Appointing all the officers of the Naval Forces, and commissioning all officers whatever *in the service of the United States* — Making Rules for the Government and Regulation of the *Said* Land and Naval Forces, and directing their operations.<sup>450</sup>

While the clause, as incorporated into Article I, section 8, omitted the words “*in the service of the United States*,” the complete absence of

446. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79 (1857). Other decisions suggest that courts-martial jurisdiction arises from the conjunction of this provision and the Fifth Amendment’s exemption to the Grand Jury indictment requirement for “cases arising in the land or naval forces.” *Milligan*, 71 U.S. at 77.

447. Cf. Josiah Ramsey Fricton, Note, *The Balance of Power: The Supreme Court’s Decision on Military Commissions and the Competing Interests in the War on Terror*, 33 WM. MITCHELL L. REV. 1693, 1701 (2007) (“Article I, section 8 of the Constitution grants Congress the power to regulate military commissions by giving Congress the power ‘to make rules for the government and regulation of the land and naval forces,’ which means that the President must have authorization from Congress to enact military commissions.”).

448. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 482 (Adrienne Koch ed., Ohio Univ. Press 1966) (“‘To make rules for the Government and regulation of the land & naval forces,’ added from the existing Articles of Confederation.”).

449. ARTICLES OF CONFEDERATION art. IX, § 4 (1777) (emphasis added).

450. *Id.* (emphasis added).

debate demonstrates that the change was purely stylistic and did not evidence any intent to change its meaning from that in the Articles of Confederation.

Moreover, even if this omission could be construed to extend regulatory power over the troops of a foreign state, it could not authorize the trial of private parties not associated with *any nation's* "land [or] naval Forces." *Milligan's* finding that the defendant's alleged affiliation with an insurgent militia group did not bring him within the ambit of military jurisdiction illustrates this principle.<sup>451</sup>

(3) The Powers to "grant Letters of Marque and Reprisal," and to "make Rules concerning Captures on Land and Water"

The exercise of military jurisdiction similarly cannot be attributed to the power to "grant Letters of Marque and Reprisal," or to "make Rules concerning Captures on Land and Water." Letters of Marque and Reprisal constitute "an authorization . . . granted in time of war by a government to the owner of a private vessel to capture enemy vessels and goods on the high seas."<sup>452</sup> This provision merely empowers Congress to authorize "the seizure or destruction of *property* of another nation to atone for an international wrong committed by that nation."<sup>453</sup> As Blackstone explained, "the words" Marque and Reprisal "in themselves . . . signify[] a *taking* in return . . . ."<sup>454</sup> The power to "make Rules concerning Captures on land and Water" likewise "authorize[s] the seizure and condemnation of the *property* of the enemy within or

451. See *Milligan*, 71 U.S. at 78. Even with respect to individuals associated with American military forces, the Supreme Court has narrowly construed the ambit of courts-martial jurisdiction. The Court has struck down extensions of courts-martial jurisdiction to the trial of civilian dependents accompanying American servicemen abroad, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960), civilian employees attached to U.S. military installations overseas, *Grisham v. Hagan*, 361 U.S. 278, 279-80 (1960), and even former servicemen accused of crimes committed during their term of service, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14-15 (1955).

452. BLACK'S LAW DICTIONARY 814 (5th ed. 1979).

453. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1559 (2002) (emphasis added) (citing EMMERICH DE Vattel, THE LAW OF NATIONS 283-86 (Joseph Chitty ed., 1863) (1758)); see also *Brown v. United States*, 12 U.S. 110, 126 (1814); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 94 (5th ed., Melville M. Bigelow ed., 1994).

454. 4 WILLIAM BLACKSTONE, COMMENTARIES \*258 (emphasis added), quoted in Ramsey, *supra* note 453, at 1599.

without the United States.”<sup>455</sup> The clause’s predecessor in the Articles of Confederation specifies that it empowers Congress to “establish[] rules for deciding . . . in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.”<sup>456</sup> No historical account suggests the Framers construed these provisions to apply to the prosecution — much less the *extra-Judicial* prosecution — of enemy troops.

(4) The Power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”

Proponents of military jurisdiction sometimes cite the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations” as authority to empanel military commissions.<sup>457</sup> But this provision too is a nonstarter. The Framers contemplated a limited realm of exclusive federal criminal jurisdiction.<sup>458</sup> Believing that in these limited areas “[t]he law should be uniform,” the Framers collectively empowered Congress to “punish piracies and felonies committed on the high seas; counterfeiting the securities and current coin of the U[nited] States, and offences a[gainst] the laws of nations.”<sup>459</sup>

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455. STORY, *supra* note 453, at 95 (emphasis added).

456. ARTICLES OF CONFEDERATION art. IX, § 1 (1777).

457. See Capt. Brian C. Baldrate, *The Supreme Court’s Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, and Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 11 (2005) (“By giving Congress the power to ‘declare War’ and ‘to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,’ the Constitution . . . empowers Congress to create military commissions to prosecute war crimes and to establish martial law and military government courts.”).

458. See, e.g., Julie R. O’Sullivan, *The Changing Face of White-Collar Crime: The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 651 (2006) (“the Constitution contemplates a limited role for federal criminal law”); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 51 (1998) (“The Framers of the Constitution contemplated a relatively minor role for the federal government in responding to criminal activities.”); Alan L. Adlestein, *A Corporation’s Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 392 n.79 (1994) (“the federal government’s criminal jurisdiction was clearly not contemplated to replace the basic police power of the states”).

459. MADISON, *supra* note 448, at 474. This provision was later divided into separate clauses. U.S. CONST. art. I, § 8, cl. 6; U.S. CONST. art. I, § 8, cl. 10.

A subsequent revision empowered Congress to “*define* and to punish . . . Offences against the Law of Nations.”<sup>460</sup> The Framers added the term “define” at the behest of Gouverneur Morris to underscore the need for enabling legislation, because “the law of nations,” in his view, was “too vague and deficient to be a rule.”<sup>461</sup> Thus, the clause merely authorizes Congress to enact federal criminal statutes defining and prescribing punishment for “Piracy” and “Offences against the law of nations,” and divests the States of criminal jurisdiction over these matters. But as with other sources of exclusive federal criminal authority, it merely empowers Congress to define offenses that may be prosecuted by the Executive and *tried by the Judiciary*.<sup>462</sup> As Justice Wilson<sup>463</sup> noted in *Henfield’s Case*<sup>464</sup> in 1793, as “congress has power to ‘define and punish offences against the law of nations,’ the jurisdiction of the states is thereby divested of the particular subject matter; and that consequently as the jurisdiction exists somewhere, it exists in the *federal courts* . . . .”<sup>465</sup> The clause no more empowers Congress to create an extra-Judicial forum to adjudicate violations of the laws it enacts under it than does Congress’ power to “[p]unish[] . . . counterfeiting.”<sup>466</sup>

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460. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 614-15 (Max Farrand ed., 1911) (emphasis added).

461. *Id.* at 615.

462. As the Court has explained,

The Constitution divides the National Government into three branches — Legislative, Executive and Judicial. This “separation of powers” was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

*United States v. Brown*, 381 U.S. 437, 442-43 (1965).

463. Justice Wilson was an influential delegate at the Constitutional Convention. William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 505 n.210 (1986).

464. 11 F. Cas. 1099 (C.C. Pa. 1793) (No. 6360).

465. *Id.* at 1120 n.6 (emphasis added). This is also evidenced by the fact that prosecution of piracy, criminalized under this clause, has been conducted in Article III courts. *E.g.*, *United States v. Pirates*, 18 U.S. 184 (1820); *United States v. Smith*, 18 U.S. 153 (1820).

466. U.S. CONST. art. I, § 8, cl. 6.



(5) The Power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”

In light of the “plain and direct” provisions concerning adjudication of criminal charges,<sup>467</sup> the Supreme Court has found that “the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14 — ‘the land and naval Forces.’”<sup>468</sup> Because Clause 14 — the power “[t]o make Rules for the Government and Regulation of the land and naval Forces” — is limited in reach to Forces “*in the service of the United States*,”<sup>469</sup> Congress likewise could not enact the MCA on the basis of the “Necessary and Proper” Clause.

b. Because the Power to Convene Law-of-War Commissions Principally Emanates from Congress’ Power to Declare War, a Declaration of War Is a Necessary Condition Precedent to the Establishment of Such Commissions

In apparent recognition of the fact that none of the above-referenced powers authorize extra-Judicial criminal adjudicatory forums, *Quirin* held that when synergized and read in concert with the President’s authority as Commander in Chief, these powers collectively yield the authority to convene military commissions:

The Constitution . . . invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.<sup>470</sup>

This rationale is strangely reminiscent of Justice Douglas’ controversial thesis in *Griswold v. Connecticut*<sup>471</sup> that the “specific guarantees in the Bill of Rights have penumbras, formed by emanations

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467. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 75 (1866).

468. *Reid v. Covert*, 354 U.S. 1, 20-21 (1957) (plurality opinion).

469. ARTICLES OF CONFEDERATION art. IX, § 4 (1777) (emphasis added); *see also Milligan*, 71 U.S. at 123. *See supra* Part VII.B.3.a.2.

470. *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

471. 381 U.S. 479 (1965).

from those guarantees . . . .”<sup>472</sup> Among these “penumbras,” Douglas opined, is a constitutionally mandated “right of privacy.”<sup>473</sup> *Quirin* reasoned, in effect, that the enumerated war powers set out in Article I and the President’s Article II commander-in-chief power too have “penumbras.” Just as *Griswold* found that the Bill of Rights collectively imparts a right of privacy despite the fact that no single Amendment creates such a right, *Quirin* found that the enumerated war-related powers and the commander-in-chief power collectively impart the extra-textual power to empanel law-of-war commissions despite the fact that none of these provisions create such a power.

*Quirin*’s analysis presupposes a declaration of war. The Court did not hold that the commission power is triggered by the simple congressional authorization of force. Rather, the Court found that it arises as a natural consequence of the fact that “[t]he Constitution . . . invests the President, as Commander in Chief, with *the power to wage war which Congress has declared* . . . .”<sup>474</sup> While the other war-related powers also play a role, *Quirin*’s emphasis on the simultaneous exercise of the declare-war and commander-in-chief powers demonstrates that these authorities form the wellspring from which the commission power originates. Justice Douglas’ “privacy” syllogism, while relying on multiple Bill of Rights provisions, similarly emphasized the Fourth and Fifth Amendments as principle sources, describing them “as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”<sup>475</sup> Just as *Griswold*’s “privacy” narrative could not stand on the force of the remaining Bill-of-Rights Amendments alone, *Quirin*’s commission power presupposes a congressional declaration of war.

Given that none of the enumerated war powers even remotely contemplate the establishment of military commissions, I question *Quirin*’s deduction that the combination of these provisions implies congressional power to establish tribunals so plainly prohibited by Article III and the Fifth and Sixth Amendments. In light of these deficiencies, the commission power should not be further expanded beyond the already textually questionable limits recognized by *Quirin*.

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472. *Id.* at 484.

473. *Id.* at 485.

474. *Quirin*, 317 U.S. at 26 (emphasis added).

475. *Griswold*, 381 U.S. at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

The distinction between “declared” and “undeclared” wars has no significance under international law.<sup>476</sup> Nonetheless, the notion that a formal declaration of war triggers domestic-law powers unavailable during undeclared wars has long been recognized by both the Court and Congress. In 1800, the Supreme Court distinguished declared “general” wars and undeclared “limited” wars. As Justice Chase recognized in *Bas v. Tingy*,<sup>477</sup>

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time. If a general war is declared, its extent and operations are only restricted and regulated by the [laws of war] . . . ; but if a partial war is waged, its extent and operation depend on our municipal laws. . . . [T]here are, undoubtedly, many rights attached to a [declared] general war, which do not attach to [an undeclared limited war’s] modification of the powers of defence and aggression.<sup>478</sup>

*Bas* did not expressly address the constitutional limitations upon Congress’ war power. The Court found that congressional authorization of a “limited” war, without more, does not invoke the full panoply of sovereign war powers recognized under the law of war.<sup>479</sup> Unlike the authorization in *Bas*, the MCA did not merely sanction the use of military force; it expressly authorized law-of-war commissions. Nonetheless, *Bas* recognized that a declaration of war is not merely a symbolic exercise, but rather triggers normative separation-of-powers consequences not implicated by a mere authorization to use military force.<sup>480</sup> Congress has likewise recognized this distinction. To date, Presidents have committed American troops to at least 125 military engagements.<sup>481</sup> Congress sanctioned many of these campaigns through

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476. “A declaration of war serves no purpose under international law; it can have no bearing on the underlying legal situation. No longer a performative utterance, it is only a meaningless utterance — not even descriptive — from the perspective of international law.” Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 16-17 (2000) (citing Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for A New International Law of Hostility*, 28 CORNELL INT’L L.J. 1, 14-15 (1995)).

477. 4 U.S. (4 Dall.) 37 (1800).

478. *Id.* at 43-44 (Chase, J.) (emphasis added).

479. *Id.*

480. Because *Bas* focused on congressional authorization, presumably the President could not have ordered Naval officers or privateers to act in a manner inconsistent with Congress’ directive, even if such authority would be available under the law of nations had Congress declared war.

481. *Campbell v. Clinton*, 203 F.3d 19, 30 n.6 (D.C. Cir. 2000) (Randolph, J., concurring).

simple legislation.<sup>482</sup> But it has formally declared war only five times.<sup>483</sup> At the same time, Congress has continuously recognized that a declaration of war is an act of great constitutional significance. As Judge Randolph noted in *Campbell v. Clinton*:<sup>484</sup>

A congressional declaration of war carries with it profound consequences. The United States Code is thick with laws expanding executive power “in time of war” . . . . Under these laws, the President’s authority over industries, the use of land, and the terms and conditions of military employment is greatly enhanced. A declaration of war may also have the effect of decreasing commercial choices and *curtailing civil liberties*.<sup>485</sup>

These powers are not available during an undeclared war — whether the hostilities are congressionally authorized or not.<sup>486</sup>

At the height of the Vietnam War, the Court of Military Appeals held in *United States v. Averette*<sup>487</sup> that a provision of the Uniform Code of Military Justice authorizing courts-martial of Defense Department civilian employees “in time of war” applied only during the pendency of a congressionally declared war.<sup>488</sup> While the court premised its ruling on statutory construction, it made clear that its reading was strongly influenced by constitutional considerations: “[G]uidance . . . from the Supreme Court” concerning “the constitutionally delicate question of military jurisdiction over civilians” dictates “that a strict and literal construction of the phrase ‘in time of war’ should be applied.”<sup>489</sup> “A broader construction . . . would open the possibility of civilian prosecutions by military courts whenever military action on a varying

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482. REHNQUIST, *supra* note 435, at 218. A spirited debate rages whether Congress possesses the textual authority to authorize the use of military force absent a declaration of war. This issue need not be debated here. If Congress lacks the lesser power to authorize undeclared wars, which is uncontradicted by any express congressional prohibitions, it necessarily lacks the greater power to empanel law-of-war commissions — a power which is at odds with the express prohibitions of Article III and the Fifth and Sixth Amendments.

483. *Campbell*, 203 F.3d at 30 n.6 (Randolph, J., concurring).

484. 203 F.3d 19 (D.C. Cir. 2000).

485. *Id.* at 29-30 (Randolph, J., concurring) (emphasis added) (citing OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, DIGEST OF WAR AND EMERGENCY LEGISLATION AFFECTING THE DEP’T OF DEFENSE 171-84, 185-91, 192-98 (1996) (contrasting statutes “effective in time of war,” “effective in time of national emergency declared by the President,” and “effective in time of national emergency declared by Congress”)).

486. *Id.*

487. 19 C.M.A. 363 (1970).

488. *Id.* at 365.

489. *Id.*

scale of intensity occurs.”<sup>490</sup> In reaching this conclusion, the court emphasized that Vietnam constituted a “war” in both the colloquial and the international-law sense, but not in the constitutional sense.

We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison — the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation — the Vietnamese armed conflict is a major military action. *But such a recognition should not serve as a shortcut for a formal declaration of war*, at least in the sensitive area of subjecting civilians to military jurisdiction.<sup>491</sup>

While *Campbell* and *Averette* involved questions of statutory construction, both these judgments invoked the canon of constitutional avoidance.<sup>492</sup> The canon “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”<sup>493</sup> The courts implicitly recognized that the invocation of certain powers during the pendency of an undeclared war raised more “*serious constitutional doubts*” than would be posed by the invocation of those same powers during the prosecution of a declared war. Chief Justice Rehnquist echoed these sentiments, arguing that a declaration of war does in fact trigger otherwise unavailable constitutional powers. Contrasting the twentieth century’s undeclared wars with the two World Wars and the Civil War (which he regarded as the “equivalent of a declared war”),<sup>494</sup> the Chief Justice concluded that

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490. *Id.*

491. *Id.* at 365-66 (emphasis added).

492. *Campbell v. Clinton*, 203 F.3d 19, 29-30 (D.C. Cir. 2000) (Randolph, J., concurring) (holding that a Congress member lacked standing to challenge President Clinton’s violation of the War-Powers Act because plaintiff could not show that the President’s action “had the effect of completely nullifying their votes” not to declare war because a “congressional declaration of war carries with it profound consequences” not implicated by the mere authorization of force); *Averette*, 19 C.M.A. at 365 (adopting a “a strict and literal construction of the phrase ‘in time of war’” because of “recent guidance . . . from the Supreme court” concerning “the constitutionally delicate question of military jurisdiction over civilians”).

493. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

494. REHNQUIST, *supra* note 435, at 218, *cited in* Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1406 (1999) (“Rehnquist is quite clear about his reasons for limiting his analysis to the Civil War, World War I, and World War II: those were the nation’s declared wars (or their equivalent, in the case of the Civil War).”). The Chief Justice implied that infringement of civil liberties was constitutionally limited to wars where the nation’s very survival was at stake. *See* REHNQUIST, *supra* note 435, at 223. Formal declarations of war apparently provide a necessary

“[w]ithout question the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war — the *Schenck* and *Hirabayashi* opinions make this clear.”<sup>495</sup>

The textual basis for the Chief Justice’s argument is wanting. But it is no more tenuous than the Court’s penumbra-like reading of the war-related powers. And it is consistent with a straightforward reading of *Quirin*: the power to convene law-of-war commissions is incident to the “power to wage war which Congress has declared . . . .”<sup>496</sup> This reading can also be reconciled with *Milligan*. Because of its dubious textual basis, however, I would oppose the extension of *Quirin*’s penumbra-like rationale to justify the invocation of other extra-textual powers in the event a war is declared in the future. I argue that *Quirin* should be limited to its facts. As *Milligan* emphasized, the Judiciary’s recurrent struggle “to preserve liberty and to relieve those in civil life from military trials”<sup>497</sup> informs the Constitution’s separation-of-powers design. Given this presumption against military jurisdiction, in the absence of a formal declaration of war — “the highest sovereign prerogative”<sup>498</sup> — neither Congress, nor the President may convene *Quirin*-type law-of-war commissions within *de facto* American territory so long as the civil courts are functioning.<sup>499</sup> Congress has made no such declaration — in Afghanistan or elsewhere.

One might argue that the Authorization for Use of Military Force<sup>500</sup> (“AUMF”), enacted by Congress in the aftermath of the September 11, 2001 attacks constitutes a viable substitute for a formal declaration of war.<sup>501</sup> The AUMF authorized the President to “use all necessary and appropriate force” against “nations, organizations, or persons” which he determined “planned, authorized, committed, or aided in the September

litmus test for such a state of affairs. *See id.* (pondering whether a President should “risk[] losing the Union that gave life to the Constitution because that charter denied him the necessary authority to preserve the Union”).

495. REHNQUIST, *supra* note 435, at 218 (emphasis added). Chief Justice Rehnquist cited two decisions in support of this proposition: *Schenck v. United States*, 249 U.S. 47 (1919) (affirming the conviction of a World War I draft protester under a statute criminalizing interference with conscription) and *Hirabayashi v. United States*, 320 U.S. 81 (1943) (affirming conviction of knowingly disregarding a curfew order imposed on persons of Japanese ancestry).

496. *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (emphasis added).

497. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 75 (1866).

498. STORY, *supra* note 453, at 92.

499. The *Hamdan* plurality acknowledged that law-of-war commissions were not utilized in either Korea or Vietnam. *Hamdan v. Rumsfeld*, 548 U.S. 557, 617 (2006).

500. Pub. L. No. 107-40, 115 Stat. 224 (2001).

501. One could make the same argument about the Gulf of Tonkin Resolution or Congress’ authorization to use force preceding the first Gulf War.

11, 2001, al Qaeda terrorist attacks.”<sup>502</sup> This generalized consent broadly authorizes the President to use military force. But this very breadth shows why it is inadequate. Constitutionally contemplated declarations of war are directed toward specific States. They are not generically directed to “enemies” to be identified later by the President.<sup>503</sup> The power to declare war does not constitute a blank check. “[T]he power of declaring war is . . . in its own nature and effects, so critical and calamitous that it requires the utmost deliberation, and the successive review of all the councils of the nations.”<sup>504</sup> It is precisely the task of declaring war against a *particularly identified enemy at a particular time* that separates formal declarations of war from the more rhetorical declarations (such as the “war on drugs”) discussed in the preceding section. The AUMF is, at most, a “limited” authorization of “the powers of defence and aggression,”<sup>505</sup> not a constitutional declaration of war triggering the synergized war powers contemplated by *Quirin*.

Some say that this is simply empty formalism,<sup>506</sup> that Congress could easily nullify the argument by replacing the AUMF with a

502. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

503. See John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 904 (1990) (noting that “declarations of war don’t typically specify allies; they specify enemies”). In a similar vein, Professor Ely argued that a congressional authorization of force that “failed to specify an enemy . . . seems a textbook violation of the nondelegation doctrine. . . .” *Id.* at 895-96.

504. STORY, *supra* note 453, at 92.

505. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43-44 (1800) (Chase, J.).

506. See, e.g., Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT’L & COMP. L. 865, 867 (2004) (“Today, formal declarations of war are as much an anachronism as ‘Letters of Marque and Reprisal’ — another power given to Congress in the same clause that has been outlawed by international law.”). This position is inconsistent with the Framers’ design. Experienced as they were with the ruthless efficiency of the British “regulars,” the founding generation was deeply fearful of standing armies in general and the President’s seemingly unilateral control of them in particular. See Earl F. Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 180 (2006) (discussing the founding generations’ fear of standing armies). Addressing these fears, Alexander Hamilton argued that the Constitution’s division of war-making responsibilities precluded the Executive’s unilateral invocation of the panoply of law-of-war powers so frequently abused by English monarchs. Hamilton placed particular emphasis on Congress’ exclusive power to declare war.

[T]he President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great-Britain, but in substance much inferior to it. *It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies — all which, by the Constitution*

declaration of war. But the simple fact is that it has not declared war since 1941 — despite the fact that the United States has engaged in at least five undeclared wars during that period. A declaration of war carries greater political consequences than a generic authorization of force. The Framers sought to hold Congress’ feet to this political fire before empowering it to restrict otherwise inviolate civil liberties such as through the invocation of the extra-textual commission power identified in *Quirin*.<sup>507</sup> As the Supreme Court noted in *New York v. United States*,<sup>508</sup>

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.<sup>509</sup>

Given the Court’s inflexible adherence to the Framers’ “finely wrought and exhaustively considered procedure[s],”<sup>510</sup> in past

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under consideration, would appertain to the legislature.

FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). Hamilton’s essay demonstrates that the Framers did not consider the declaration of war to be merely symbolic.

507. This “bright-line test” forces “Congress to take a clear stand, up front, on questions of war and peace.” Ely, *supra* note 503, at 924. As Professor Gregory Sidak observed,

[A]dherence to formalism in matters that affect the separation of powers, including the initiation of war, is more likely than constitutional informality and political improvisation to produce predictability and clarity in the specification of the responsibilities of political officials in Congress and the executive branch; to facilitate the effective monitoring of these political officials as they discharge their responsibilities; and to permit the electoral process to function as an effective means to reward fidelity, good judgment, and the resourcefulness, and likewise to punish infidelity, folly, and indolence.

J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 68 (1992).

508. 505 U.S. 144 (1992).

509. *Id.* at 187. Strict adherence to formalism is evident in *Boumediene*. There, Congress could have replaced the MCA’s revocation of *habeas* jurisdiction with a formal suspension of the writ for Guantanamo detainees. U.S. CONST. art. I, § 9, cl. 2. This did not prevent the Court from requiring Congress to observe this formality. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260-61 (2008).

510. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) (holding that one house veto violated the Constitution’s bicameralism and presentment requirements). *See also Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that line-item veto violated the



separation-of-powers decisions, strict adherence to form seems particularly compelling before enabling Congress and the President to invoke the amorphous “war power” to trump the “plain and direct” prohibitions of Article III and the Bill of Rights.<sup>511</sup>

### CONCLUSION

*Milligan* advocated a bright-line rule that admitted no exceptions. Prior to the advent of World War II, even the most fervent advocates of military jurisdiction acknowledged that the Constitution required that a “[military commission] trial must be had within the theatre of war . . . ; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*.”<sup>512</sup> Nonetheless, confronted with apparent threats of Executive non-compliance, the *Quirin* Court seemingly emasculated this rule. Whether the Justices did so out of a sense of felt need, or in response to Executive extortion, the new rule they announced is discordant with the text, history, and policy of the Constitution. They may well have believed or hoped that the decision would simply become lost amongst the dust of the United States Reports. It did not. As Justice Jackson warned, “rationaliz[ing] the Constitution” to judicially bless the usurpation of a constitutional power has lasting consequences: once judicially recognized, “[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>513</sup> I leave for another day the question of whether *Quirin* should be overruled. But it should not be expanded.

During times of war or insurrection, the military may be called upon to exercise the powers of government temporarily in places where fighting prevents the operation of civil authority. The President, as commander in chief, is necessarily called upon to assume the mantle of government for the affected territory, usually through his military

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Constitution’s bicameralism and presentment requirements); *Sidak*, *supra* note 507, at 71 (“Consider the alternative: If no particular formalism need be obeyed by Congress when the United States decides to initiate war against another nation . . . then it is doubtful that any constitutional event could command obedience to form. In such a case, the Supreme Court’s rejection of the legislative veto in *Chadha* on the grounds that it violated bicameralism and presentment would be simply pedantic.”).

511. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 66, 73 (1866).

512. *Hamdan v. Rumsfeld*, 548 U.S. 557, 598 n.29 (2006) (quoting WINTHROP, *supra* note 192, at 836).

513. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

proxies. In these limited circumstances, the Constitution permits the President to exercise the panoply of government functions — executive, legislative, and judicial. But this power must be regarded as the ultimate necessary evil that should be strictly limited to the time and place of the violence. Entrusting the trinity of powers in a single hand, even with the blessing of Congress, is the very anathema of the constitutional design. By empowering the military, and thus ultimately the President, to try sub-state actors before inquisitorial criminal tribunals that are wholly removed from the physical boundaries of the war zone and the temporal constraints of a formal declaration of war, the MCA commits this cardinal sin. There can be no more fundamental constitutional truth: the power to conduct criminal trials is quintessentially *Judicial*.<sup>514</sup> Congress cannot divest this responsibility, nor may the courts abdicate it.<sup>515</sup>

As with *Milligan* and *Korematsu*, the Supreme Court may well be called upon once again to determine the legitimacy of the MCA.<sup>516</sup> Read together, *Milligan* and *Quirin* provide the tools necessary to impose limiting principles cabinining military jurisdiction within traditionally recognized constitutional bounds.

Once unmoored from these limiting principles, the Constitution's promise of an independent Judiciary rings hollow. This is particularly true when applied to the present, ill-defined conflict. "[T]he national security underpinnings of the 'war on terror' . . . are broad and malleable."<sup>517</sup> If such a generalized declaration of hostilities against unspecified enemies can oust the Judiciary of its primary constitutional function, then the most fundamental liberty-preserving device of the Constitution will be emasculated. For only "if governmental power is fractionalized, if a given policy can be implemented only by a *combination* of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its

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514. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955); *Milligan*, 71 U.S. at 121.

515. *Milligan*, 71 U.S. at 79 ("[The Framers] secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.").

516. Even if the next President elects to discontinue the use of military commissions, the MCA's constitutionality still may come before the Court. The propriety of any MCA conviction or sentence issued before the discontinuation of military-commission prosecutions will rest upon the MCA's constitutionality. Moreover, barring congressional action, the MCA will remain on the books to be utilized by future presidents.

517. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

unchecked will.”<sup>518</sup> The Court should not allow the President to open this Pandora’s Box, even with Congress’ consent. “[T]he political branches [do not] have the power to switch the Constitution on or off at will . . . .”<sup>519</sup>

As the events of September 11, 2001 demonstrate, the Government’s interest in prosecuting suspected terrorists detained at Guantanamo is undoubtedly compelling. A great many of these men — perhaps even most — are guilty of unspeakable crimes. But just as certainly, we must face the inconvenient reality that some of them are innocent. How we identify the guilty is a judgment that, like *Korematsu*, may define the legacy of the Court and the American legal community for generations to come.

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518. *United States v. Brown*, 381 U.S. 437, 443 (1965) (emphasis added).

519. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008).

