MILITARY COURTS AND ARTICLE III

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Few areas of the Supreme Court’s federal courts jurisprudence raise as many questions—and provide as few coherent answers—as the permissible scope of Congress’s power to invest the “judicial power of the United States” in federal tribunals unencumbered by Article III’s jurisdictional constraints,2 staffed by judges who don’t enjoy Article III’s tenure and salary protections,3 and, in the case of criminal trials, unbound by Article III’s jury-trial rights.4 Historically, the Court has identified three categories in which such “non-Article III” federal adjudication is permissible: (1) all adjudication by federal “territorial” courts;5 (2) certain criminal prosecutions before

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Although the views expressed herein are mine alone, readers should know that I was co-counsel to the Petitioner in Hamdan v. Rumsfeld (“Hamdan I”), 548 U.S. 557 (2006), and have co-authored amicus briefs in support of the appellant in al Bahlul v. United States, No. 11-1324 (D.C. Cir. to be argued Oct. 22, 2014), the litigation in both of which figure prominently herein.

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


3. See id. § 1.

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

5. See, e.g., Palmore v. United States, 411 U.S. 389 (1973). At present, there are four federal territorial trial courts and one federal territorial appellate court: The District Court of Guam, see 48 U.S.C. § 1424(a)(1); the District Court for the Northern Mariana Islands, see id. § 1821(a); the District Court of the Virgin Islands, see id. § 1611(a); and the District of Columbia Superior Court and Court of Appeals, see D.C. CODE §§ 11-701(a), 11-901(a). The U.S. District Court for the District of Puerto Rico is an Article III court, see 28 U.S.C. § 119, and there is no “federal” court
military judges; and (3) resolution of “public rights” disputes by non-Article III federal courts or federal administrative agencies.\(^6\)

But whereas the Court has frequently opined on the permissible scope of the “public rights” exception to Article III (and may revisit the question again during its current Term),\(^7\) it has been decades since it has reconsidered either the territorial or military species of non-Article III adjudication. The same period has seen a concomitant decline in academic attention to these tribunals,\(^8\) perhaps reflecting acquiescence in the sentiment expressed by then-Justice Rehnquist in 1982—that, whatever their merits, these are “tidy” exceptions to Article III whose bounds are both well-understood and well-settled, and therefore not warranting judicial or academic reexamination.\(^9\)

Even if the territorial exception could properly be described as “tidy,”\(^10\) however, the military exception is anything but. For starters, there has never been a truly unitary carve-out from Article III for “military” courts. Instead, in different cases, the Supreme Court has articulated different normative, historical, and textual rationales to justify three different forms of military

\(^6\) In addition to the Article I U.S. Court of Federal Claims, U.S. Tax Court, and U.S. Court of Appeals for Veterans Claims—the jurisdiction of which is exclusively public rights disputes—such cases may also be resolved by U.S. bankruptcy courts and administrative adjudicators. See generally Crowell v. Benson, 285 U.S. 22 (1932).


\(^10\) Under Palmore v. United States, 411 U.S. 389 (1973), the territorial exception is simply a matter of congressional discretion: Congress is free to create non-Article III federal courts in any of the six federal territories. And other than minor alterations to the structure of Article III appellate review of territorial courts, the last substantial changes to the jurisdiction of these courts themselves were the 1982 abolition of the District Court for the Canal Zone pursuant to Article XI of the 1979 Panama Canal Treaty, see Egle v. Egle, 715 F.2d 999, 1009–11 (5th Cir. 1983), and statutory revisions to the jurisdiction of the Guam and CNMI district courts in 1984. See Act of Oct. 5, 1984, Pub. L. No. 98-454, §§ 801–904, 98 Stat. 1732, 1741–45 (codified as amended in scattered sections of 48 U.S.C.).
adjudication: courts-martial, military commissions, and courts incident to military rule (e.g., martial law or belligerent occupation).11

The Supreme Court’s textual rationales for military justice, in particular, can’t possibly bear the weight that has been placed upon them. Thus, even if one accepts the Court’s conclusion that the express exception in the Grand Jury Indictment Clause for “cases arising in the land or naval forces”12 was meant to exempt military cases from certain constitutional protections, the Justices have never explained why language in that provision of the Fifth Amendment also obviates (1) the petit jury protections of Article III and the Sixth Amendment; or (2) Article III’s more basic requirement of a tenure- (and salary-)protected judge.13 More fundamentally, if the Founders all agreed that the Constitution contemplated some form of military justice, it simply cannot be the case that the primary textual hook for that enterprise was provided by the Grand Jury Indictment Clause—which, along with the rest of the Bill of Rights, was ratified more than three years after the Constitution entered into force. The Court has assumed these points to be settled since 1858,14 but has never actually settled—or defended—them.

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

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

12. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .” (emphasis added)); see also infra note 126.

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

power.\textsuperscript{15} Thus, even at the time of then-Justice Rehnquist's “tidy” comment in 1982, the military exception to Article III was, in fact, an incoherent mess.

But what is perhaps most remarkable about the military exception is that it has only become more untidy in recent years, thanks to a trio of subtle but potentially dramatic expansions in the scope of military jurisdiction: (1) the Supreme Court's 1987 holding that Congress’s power to subject servicemembers to court-martial for any offense, and not just those that are “service-connected”;\textsuperscript{16} (2) Congress’s 2006 expansion of court-martial jurisdiction to encompass civilian contractors “serving with or accompanying an armed force in the field” during a “contingency operation”;\textsuperscript{17} and (3) the Military Commissions Act of 2006, which authorizes military commissions to try war crimes not recognized by international law—at least so long as they are established violations of the “U.S. common law of war.”\textsuperscript{18} Given these expansions, the litigation that they have provoked, and the tension they have placed upon the already untidy military exception, it is long-past time for a reassessment of where and how military courts fit into our understanding of Article III—and the exceptions thereto.

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


\textsuperscript{17} \textit{See} 10 U.S.C. § 802(a)(10); \textit{see also} United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012) (upholding that expansion as applied to a non-citizen tried outside the United States), \textit{cert. denied}, 133 S. Ct. 2338 (2013).

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

The question then becomes whether any satisfying theory exists that at once supports and coherently cabins the military justice system as a whole. Of course, the answer may well be no. But Part IV offers one possibility—a theory grounded not in the elusive, multifactor balancing test the Court has deployed in its public rights cases,19 but in clearly established norms of foreign and international practice. As Part IV explains, one coherent way to explain the military exception to Article III—and the way it has been understood at times in the Court’s military jurisdiction cases—is by loose analogy to the Supreme Court’s venerable decision in Missouri v. Holland20 and situations in which the United States shares some of its judicial authority with multinational or international tribunals. Under this view, departures from Article III are constitutionally permissible when specifically grounded in supranational bodies of law, e.g., the law of nations or common foreign practices that have become norms of customary international law. Thus, Part IV concludes, a potentially more coherent approach to the military exception would view it as encompassing those cases in which clear foreign and international practice support subjecting the offender and offense to trial before a military tribunal.

As much as this suggestion may seem counterintuitive, it is already reflected in at least some elements of the Supreme Court’s jurisprudence concerning the military exception. For example, Ex parte Quirin upheld military commissions on the view that Article III and the jury-trial protections of the Fifth and Sixth Amendments did not apply to “offenses

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19. As Part IV explains, this was the approach proposed by a 1990 Harvard Law Review note—to date, the only comprehensive attempt at reconceptualizing the military exception, as such. See Note, supra note 8.

20. See Missouri v. Holland, 252 U.S. 416 (1920) (holding that Congress, in enforcing a treaty, may exercise regulatory powers not otherwise enumerated in Article I); cf. Bond v. United States, 134 S. Ct. 2077 (2014) (interpreting a federal statute to avoid having to revisit Holland).
committed by enemy belligerents against the law of war.”21 In other words, military commissions did not have to comply with Article III when they were tasked with enforcing norms established by international, rather than domestic, law. To be sure, the current proceedings before the D.C. Circuit in the Guantánamo military commission cases are testing Quirin’s limits in this regard,22 but for the time being, international law continues to operate as the principal jurisdictional constraint on the Guantánamo commissions.

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

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

American military justice pre-dates the Constitution. In 1775, the Second Continental Congress codified the first American Articles of War, which, among other things, provided for courts-martial for certain prescribed offenses.24 The 1775 Articles were reaffirmed (as amended) in 1776 and 1786.25 And there was little question at the Constitutional Convention that such authority would be preserved under the new Constitution—i.e., that


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

there would be federal military justice separate and apart from Article III.26
What is far more opaque from Founding-era sources was the shape that
system would take—or whether such a departure from what Article III would
soon prescribe only encompassed the exceedingly narrow parameters of
eighteenth-century military discipline.27
Part of the reason for such opacity can be directly tied to the fundamental
difference in Founding-era understandings of military justice. Eighteenth-
(and nineteenth-)century American military justice looked very little like the
courts-martial of today: courts-martial were far more administrative than
judicial (indeed, the title of military "judge" wasn’t created by Congress until
1968);28 there was no appellate review (and judicial review through a
collateral challenge was only available to attack the military’s assertion of
jurisdiction);29 and the inconsistent (and, at times, Spartan) procedures were
subsequently decried by Justice Black as providing little more than a “rough
form of justice.”30 Thus, as Professor Frederick Bernays Wiener wrote, “we

26. Such consensus stands in marked contrast to the disagreement over whether lower federal
civilian courts would be needed, which helped to precipitate the Madisonian Compromise. See, e.g.,
Collins, supra note 1.

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

(summarizing the significance of the 1968 Act).

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

30. See, e.g., Reid v. Covert, 354 U.S. 1, 35–36 (1957) (plurality opinion) (“Traditionally,
military justice has been a rough form of justice emphasizing summary procedures, speedy
convictions and stern penalties with a view to maintaining obedience and fighting fitness in the
ranks. . . . [T]here has always been less emphasis in the military on protecting the rights of the
individual than in civilian society and in civilian courts.”).
must be circumspect in examining the Continental articles of war when seeking to ascertain the constitutional rights of the officers and soldiers subject thereto.”

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

A. A Brief Introduction to U.S. Military Courts

1. Courts-Martial

Notwithstanding its checkered procedural past, the U.S. military justice system over the past six decades has increasingly come to resemble ordinary civilian courts in recent years, at least in criminal cases (the military courts generally lack the power to entertain non-criminal proceedings). Enacted in 1950, the Uniform Code of Military Justice (UCMJ) today recognizes three types of court-martial proceedings: First, a “summary” court-martial

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


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


35. See 10 U.S.C. § 816 (delineating the different classes of courts-martial).
provides a straightforward (and essentially non-judicial) procedure for resolution of relatively minor misconduct charges against enlisted members of the military (who must consent to such summary proceedings). Second, a “special” court-martial, which is presided over by a military judge and can include three or more members serving in place of the more conventional “jury,” exercises jurisdiction over cases in which the maximum punishment is 12 months’ imprisonment, along with a bad-conduct discharge. Third, “general” courts-martial are for all more serious charges, featuring a military judge and not fewer than five members (in non-capital cases), or 12 members in all non-exigent cases in which the possible sentence includes the death penalty.

Under Article 17 of the UCMJ, courts-martial may exercise jurisdiction over any offense proscribed by the UCMJ—which defines approximately 50 distinct crimes, along with a “General Article” (Article 134) that subjects to trial by court-martial “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty.” The third clause of Article 134, in turn, has been held to encompass both civilian federal criminal offenses and those violations of state law that fall within the scope of the federal Assimilative Crimes Act—the statute that applies the criminal laws of states in which federal installations are located to offenses committed on such federal property.

36. See id. § 820.
37. See id. § 819.
38. See id. § 818.
39. See id. § 825a; see also id. (“[U]nless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified.”).
40. Id. § 817.
41. See id. §§ 877–933.
42. Id. § 934.
44. See, e.g., United States v. Robbins, 52 M.J. 159 (C.A.A.F. 1999). See generally 18 U.S.C. § 13 (assimilating into federal law all state law offenses “which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which [the relevant federal installation at which the
As elaborated upon below, although the Supreme Court had long required that offenses be “service-connected” in order to fall within the constitutional scope of court-martial jurisdiction,\(^{45}\) the Justices retreated from that requirement in 1987, categorically holding that servicemembers may be tried for any offense recognized by Congress, regardless of its connection (or lack thereof) to their military service.\(^{46}\)

With regard to who may be tried by courts-martial, Article 2(a) identifies 13 categories of individuals subject to military jurisdiction, most of which focus on current servicemembers, those in a reserve component, or those former servicemembers who are still receiving pay or other benefits from the military (or still serving sentences arising out of prior court-martial convictions).\(^{47}\) Controversially, Article 2(a)(10), as amended in 2006, also extends court-martial jurisdiction “[i]n time of declared war or a contingency operation,\(^{48}\) [to] persons serving with or accompanying an armed force in the field,”\(^{49}\) and was recently upheld by lower courts as applied to non-citizen civilian contractors in Iraq\(^{50}\)—despite earlier Supreme Court decisions appearing to disclaim the constitutionality of military jurisdiction over

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\(^{46}\) See Solorio v. United States, 483 U.S. 435, 450–51 (1987). Since Solorio, four Justices have suggested that the Constitution may still require a service connection in capital cases. See Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., concurring in the judgment). This issue has not been squarely presented, however, as there has not yet been a post-Solorio military capital case without a clear service connection. See, e.g., United States v. Gray, 51 M.J. 1, 11 (C.A.A.F. 1999).

\(^{47}\) See 10 U.S.C. § 802(a).

\(^{48}\) A “contingency operation” is any military operation that, inter alia, “is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force.” 10 U.S.C. § 101(a)(13)(A).


\(^{50}\) See United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012), cert. denied, 133 S. Ct. 2338 (2013); see also infra text accompanying notes 143–148 (discussing the Ali decision).
Prior to the 1950 enactment of the UCMJ, the only means of obtaining judicial review of a court-martial conviction was through a collateral proceeding (usually habeas) in the civilian courts—and even then, the only issue that could be challenged was whether the military court properly exercised jurisdiction.\(^52\) One of the UCMJ’s central innovations was the formalization of an appellate structure within the military justice system, which today features “Courts of Criminal Appeals” (CCAs) established by the Judge Advocate General of each service branch to hear appeals from general (and some special) courts-martial,\(^53\) and a civilian Court of Appeals for the Armed Forces (CAAF) with largely discretionary jurisdiction over the four service-branch CCAs.\(^54\)

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

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52. See supra note 29.


54. See id. § 867.

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

56. See id. § 867a; 28 id. § 1259.

57. See 10 id. § 867a(a) (“The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.”); see also 28 id. § 1259 (identifying four specific circumstances in which CAAF
As for military judges, the Military Justice Act of 1968 formalized the position, providing that such judges preside over special or general courts-martial, rule on all legal questions, and instruct the court-martial members regarding the law and procedures to be followed. By statute, military judges must be commissioned officers of the Armed Forces—which necessarily means that they are already appointed by the President and confirmed by the Senate—and they must be members of the bar of a federal court or a state’s highest court. As active-duty servicemembers, the salaries of military judges are based on their military rank and station, rather than their judicial service. And in important distinction to their civilian counterparts, the roughly 80 active-duty and 50 reserve trial-level military judges do not serve for fixed terms—and only perform judicial duties when assigned to do so by their service branch’s Judge Advocate General. The primary difference between the trial-level military judges and those appointed to the CCAs is that the latter category may—in at least some cases—include civilians. Otherwise, however, the CCA judges are also assigned by their service branch’s Judge Advocate General to perform specific decisions may be reviewed via certiorari). See generally Eugene R. Fidell, Review of Decisions of the United States Courts of Appeals for the Armed Forces By the Supreme Court of the United States, in EVOLVING MILITARY JUSTICE 149 (Eugene R. Fidell & Dwight H. Sullivan, eds. 2002).

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

58. See sources cited supra note 28.
59. 10 U.S.C. § 826.
60. Id. § 851.
61. Id.
62. Id. § 826(a).
63. Id. § 531; see also Weiss v. United States, 510 U.S. 163, 168 & n.2 (1994).
64. 10 U.S.C. § 826(b).
65. See Weiss, 510 U.S. at 168. Weiss itself held that the Due Process Clause did not require military judges to hold fixed terms of office. See id. at 181.
66. See 10 U.S.C. § 866(a). But see Edmond v. United States, 520 U.S. 651 (1997) (holding that civilian judges on the Coast Guard CCA must be appointed by the Secretary of Transportation, not the Coast Guard JAG, in order to avoid a serious Appointments Clause question that is not implicated by servicemember judges).
judicial duties during a (usually) unspecified term of service.

By design, CAAF is a different story. Pursuant to statute (Article 142 of the UCMJ), the highest court in the military justice system is to be staffed by five judges “appointed from civilian life by the President” and confirmed by the Senate,67 who serve roughly 15-year terms,68 subject to removal only for “neglect of duty,”69 “misconduct,”70 or “mental or physical disability”71 (and not “any other cause”),72 and whose salaries are pegged by statute to those of Article III circuit judges.73 Article 142 also authorizes the Chief Justice of the United States to appoint Article III judges (at the request of the Chief Judge of CAAF) to temporarily fill vacancies on CAAF when no senior judges are available,74 even though such mixed panels might raise constitutional concerns.75

2. Military Commissions

“The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”76 Unlike courts-martial, military commissions have historically been irregular courts

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68. Id. § 942(b)(2). To ensure that the terms all expire on the same date (September 30), the statute technically allows for terms from between 14 and one-half to 15 and one-half years. See id.
69. Id. § 942(c)(1).
70. Id. § 942(c)(2).
71. Id. § 942(c)(3).
72. Id. § 942(c).
73. See id. § 942(d). Curiously, the UCMJ also provides that “Not more than three of the judges of the court may be appointed from the same political party.” Id. § 942(b)(3).
75. Cf. Nguyen v. United States, 539 U.S. 69 (2003) (interpreting statute to bar non-Article III federal judge from sitting on Ninth Circuit panel otherwise comprised of Article III judges in order to avoid question of whether such an assignment was constitutional). Insofar as the constitutional concern arises from potential oversight of Article III lower courts by non-Article III appellate judges (which would presumably violate the ban on extrajudicial revision of Article III judgments, see Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)), it’s possible that this practice wouldn’t raise similar concerns in the military context, since CAAF never reviews Article III judgments. But whether mixed panels are by themselves unconstitutional is the precise constitutional question the Nguyen Court ducked.
with carefully circumscribed jurisdiction. One species of commissions has served as martial-law or occupation courts exercising general criminal jurisdiction in exceptional situations.\(^\text{77}\) The other has entertained prosecutions of enemy belligerents for violations of the international laws of war—such as the body that convicted the Nazi saboteurs in \textit{Ex parte Quirin}\(^\text{78}\) and the numerous war crimes tribunals convened by the United States after World War II.\(^\text{79}\) Whether or not these courts operated with express congressional authorization,\(^\text{80}\) their procedures, rules, and judges were entirely controlled by the Executive Branch (and basically unregulated by statute).\(^\text{81}\) Judicial review was only available collaterally via habeas corpus\(^\text{82}\)—and even then, only for challenges to the commissions’ “jurisdiction.”\(^\text{83}\)

In its 2006 decision in \textit{Hamdan v. Rumsfeld} (“\textit{Hamdan I}”), the Supreme


\(^{78}\) 317 U.S. 1 (1942); see also Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956).


\(^{80}\) To distinguish the Supreme Court’s earlier decision in \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2 (1866), the Court in \textit{Ex parte Quirin}, 317 U.S. 1 (1942), held that Congress had authorized military commissions through then-Article 15 of the Articles of War, even though that provision only specified that “the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions.” 317 U.S. at 27 (emphasis added); see also id. at 30 (“Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction.” (citation omitted)). The Court would later describe such a characterization of Article 15 as “controversial,” albeit without revisiting it. See Hamdan v. Rumsfeld (“\textit{Hamdan I}”), 548 U.S. 557, 593 (2006).

\(^{81}\) Other than the limiting the jurisdiction of commissions to “offenders or offenses that by statute or by the law of war may be tried by military commissions,” the only other statutory requirement that arguably applied to commissions prior to 2006 was the mandate in Article 36 of the UCMJ that “All rules and regulations made under this article shall be uniform insofar as practicable.” 10 U.S.C. § 836(b); see also \textit{Hamdan I}, 548 U.S. at 617–20.

\(^{82}\) See \textit{Ex parte Vallandigham}, 68 U.S. (1 Wall.) 243 (1864) (holding that the Supreme Court could not review a military commission directly via certiorari).

\(^{83}\) See, e.g., \textit{Yamashita}, 327 U.S. at 8 (“If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.”).
Court struck down military commissions established by President Bush after September 11 to try non-citizens detained at Guantánamo, holding that the Bush Administration’s tribunals departed too substantially from that which Congress (according to the Court’s reading of its prior jurisprudence) had authorized. The decision in Hamdan I precipitated the Military Commissions Act of 2006 (MCA), in which Congress for the first time created a general statutory foundation for (and arguably sought to “regularize”) military commissions. Although the MCA (as amended in 2009) did not abolish the pre-2006 authority for commissions (which might be called “Chapter 47” commissions, after the relevant subsection of Title 10 of the U.S. Code), it created a new set of courts (“Chapter 47A” commissions) with a detailed framework of statutory rules.

As relevant here, the MCA vests jurisdiction in military commissions to try “alien unprivileged enemy belligerents” for any violation of the international laws of war, violations of Articles 104 or 106 of the UCMJ, or any of 32 distinct substantive offenses prescribed by the MCA. The MCA requires that a military judge already certified to preside over general courts-

84. Hamdan I, 548 U.S. at 593.
87. Indeed, one provision of the MCA expressly clarifies that Article 21 of the UCMJ (the authorization for the commission in Quirin “does not apply to a military commission established under [the MCA].” MCA of 2006, § 4(a)(2), 120 Stat. at 2631 (codified at 10 U.S.C. § 821).
88. See 10 U.S.C. §§ 948q–s (pre-trial procedures); id. §§ 949a to 949p-7 (trial procedures); id. §§ 949s–950j (sentencing and post-trial procedures).
89. An “unprivileged enemy belligerent” is defined as individuals who aren’t privileged belligerents, see 10 U.S.C. § 948a(6), who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter,” id. § 948a(7). The MCA only authorizes trial by military commission of alien unprivileged enemy belligerents. See id. § 948c. Privileged enemy belligerents who violate the laws of war are subject to trial by court-martial. See 10 U.S.C. § 802(a)(13). There is no provision under the MCA for military trials—by court-martial or military commission—of unprivileged belligerents who are U.S. citizens; if anything, such individuals are only subject to military trial in a Chapter 47 commission, as in Quirin.
90. See id. § 948d.
91. See id.; see also id. § 904 (aiding the enemy); id. § 906 (spying).
92. See id. § 950t.
martial under Article 26 of the UCMJ preside over commission proceedings, and the statute invests the Secretary of Defense with the authority to prescribe rules governing the detailing of military judges to the commissions. 

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

Thanks to a series of amendments pushed by the Obama Administration in 2009, the CMCR today exercises both final and interlocutory jurisdiction that is largely equivalent to that exercised by the CCAs in the court-martial context. In contrast, the D.C. Circuit only has appellate jurisdiction with respect to final decisions of the CMCR; there is no provision for interlocutory appeal from the CMCR to the D.C. Circuit. Finally, although the 2006 MCA appeared to foreclose collateral review of military commissions in the Article III courts, that provision was eliminated by the 2009 MCA—which, together with the Supreme Court’s invalidation of the 2006 MCA’s habeas-

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93. See id. § 948j(b).
94. See id. § 948j(a).
95. See id. § 950f(a).
96. See id. § 950g.
97. See id. § 950g(e); see also 28 id. § 1254(1).
98. See, e.g., 10 id. § 950f(d); see also id. § 950d (providing for interlocutory appeals by the United States). For a detailed explanation of how the 2009 MCA improved the deeply problematic scope of appellate review in the military commissions under the 2006 MCA, see Vladeck, supra note 15.
99. See 10 U.S.C. § 950j(g(a); see also Khadr v. United States, 529 F.3d 1112, 1115–17 (D.C. Cir. 2008) (holding that the D.C. Circuit may not entertain a defendant’s statutory appeal from an interlocutory decision by the CMCR).
100. See 10 U.S.C. § 950j(b) (2006) (“Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.”).
101. See id. § 950j (2010).
stripping provision in *Boumediene v. Bush*, otherwise restores collateral review of commissions at least to the same extent as such collateral review is available for courts-martial.

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

**B. The Normative Justifications for Military Justice**

In explaining why the Constitution permits all of the non-Article III military adjudication described in Section A, the Supreme Court has relied upon textual justifications that will be more fully discussed in Sections C and D, below. Before getting to those, however, it is worth taking a moment to focus on the Justices’ explanations for why there should be a military justice system separate from the Article III federal civilian courts. Unfortunately, the Court has focused almost exclusively on normative defenses of courts-martial, and not of commissions. Thus, as Chief Justice Burger wrote for the Court thirty years ago, “[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.” Building off of that basic sentiment, arguments have typically rested on some combination of four distinct—but related—normative justifications: what might be


104. *Id.* § 950f(b)(2).

105. *Id.* § 950f(b)(3).

described as “physical” separation, “philosophical” separation, “legal” separation, and “remedial” separation.

Physical separation, as Professor Ed Sherman explained, was one of the earliest justifications for separate military courts: “Military justice developed as a separate legal system under command control because military units were often isolated from both civilians and each other. Commanders needed the power to convene a court-martial staffed with their own officers so that a quick determination of guilt could be made.” Of course, “modern transportation and communication have ended the isolation of military units, and civilian trials of offenses traditionally subject to military jurisdiction is now feasible in far more situations,” as exemplified in specific statutes such as the War Crimes Act of 1996 and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), and the more general movement to apply certain criminal statutes extraterritorially.

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

108. Id.
111. Although the Supreme Court has taken increasingly narrow views of the extraterritorial application of federal statutes, see, e.g., Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1359 (2013), those cases involve statutes that do not expressly apply overseas. At the same time, Congress has amended a number of criminal statutes (especially in the terrorism and national security spheres) to make them expressly extraterritorial in their scope. See Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (amending 18 U.S.C. § 2339B(d)); USA PATRIOT Act of 2001 § 805(a)(1)(F), 115 Stat. at 377 (amending 18 U.S.C. § 2339A(a)). See generally Jennifer Daskal & Stephen I. Vladeck, After the AUMF, 5 HARV. NAT’L SEC. J. 115 (2014) (discussing the implications of these expansions).
112. Sherman, supra note 107, at 1401.
instructed on elements of criminal statutes with which they are not already familiar.

Related to physical separation are arguments based upon legal separation, i.e., “that the military is a society apart from civilian life which requires different legal standards the civilian courts cannot appreciate or adequately enforce.”113 To be sure, recent years have witnessed a dramatic “civilianization” of military justice—a convergence, on multiple levels, of the relevant legal standards applicable to civilian and military criminal prosecutions alike.114 But it is still very much the case today that there are at least some procedural rules (such as the very different pre-trial process required by Article 32 of the UCMJ),115 substantive offenses (e.g., conduct unbecoming an officer),116 and constitutional protections (grand jury indictment being the most obvious)117 that differ materially as between these two systems.118

Finally, and perhaps most significantly, remedial separation is the idea that the underlying goals of the civilian and military justice system differ. Unlike the punitive and rehabilitative goals undergirding civilian criminal justice, “military justice has traditionally been viewed as partly judicial and partly disciplinary,”119 i.e., as existing as much to preserve “good order and discipline” within military units as to punish and rehabilitate individual offenders. Thus, even if civilian courts applied the same legal principles in the exact same manner as their military counterparts, the mere fact that

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113. Id. (emphasis added).


115. 10 U.S.C. § 832 (requiring a far more rigorous pre-trial hearing to assess the sufficiency of the charges before a case can be referred to a general court-martial).

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

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

118. See, e.g., United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004) (“[T]his Court has consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite.” (emphasis added)). For a side-by-side comparison of the applicability of specific constitutional safeguards in the civilian courts as compared to courts-martial, see R. Chuck Mason, Cong. Res. Serv., Military Justice: Courts-Martial, an Overview 9–15 tbl.1 (2013), http://www.fas.org/sgp/crs/natsec/R41739.pdf.

119. Sherman, supra note 107, at 1402.
such adjudication is undertaken by civilians outside the military command structure would arguably dilute the utility and efficacy of the prosecution with respect to preserving such “good order and discipline.”

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

C. The Supreme Court’s Constitutional Defense of Courts-Martial

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

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


122. Although the discussion in this section has focused on philosophical justifications for courts-martial, the same conclusion—that the Court has never relied on these justifications as the basis for departing from Article III—applies to military commissions. Even in Ex parte Quirin, 317 U.S. 1 (1942), Chief Justice Stone’s normative defense of trying war crimes by military commission was tied to text—that the drafters of the Bill of Rights could not have “intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death.” Id. at 44.

123. U.S. CONST. art. I, § 8, cl. 14; see also id. cl. 16 (empowering Congress “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . .”).
As Justice Wayne noted in *Dynes v. Hoover*, the first case in which the Justices had reason to reflect on the relationship between the Constitution and military justice, military jurisdiction did not depend solely upon Congress’s Article I powers. (After all, Congress enumerated criminal offenses pursuant to a number of its regulatory authorities under Article I; that fact alone has never been viewed as sufficient to justify trial of such offenses outside Article III courts.) Instead, the President’s Article II authority as Commander-in-Chief and the text of the Fifth Amendment—which expressly exempts from the Grand Jury Indictment Clause “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”—were also key ingredients to the constitutionality of adjudication by non-Article III federal military courts: “These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations.” Moreover, “the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.”

To be sure, *Dynes* stressed that such non-Article III adjudication was only

124. 61 U.S. (20 How.) 65 (1858).

125. *Dynes* was not the first military justice case to reach the Supreme Court. See, e.g., Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806). But none of the other cases appeared to raise any specific question about the constitutional validity of federal military justice, as such.

126. U.S. CONST. amend. V.

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

127. 61 U.S. (20 How.) at 79.

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

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

Although Dynes and Milligan were light on analysis, their understanding only became more ingrained in the Court’s jurisprudence over time, whether as a matter of stare decisis, agreement with their undefended conclusions, or both. Such reliance became especially pronounced after World War II, when

129. See id. at 81–82. That convictions by military courts could be attacked collaterally in the civilian courts for lack of jurisdiction was already well settled. See, e.g., sources cited supra note 125.

130. A contemporaneous opinion by Attorney General Cushing also reflected this view. See Civil Responsibility of the Army, 6 Op. Att’y Gen. 413, 425 (1856) (suggesting that the Grand Jury Indictment Clause “expressly excepts [sic] the trial of cases arising in the land or naval service from the ordinary provisions of law”).

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

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

the Justices were confronted with a host of new challenges to the constitutional limits of military jurisdiction. In United States ex rel. Toth v. Quarles, for example, the Justices held that former servicemembers could not constitutionally be subjected to court-martial for offenses committed while in the military.

Writing for a 6-3 majority, Justice Black explained that the exception in the Grand Jury Trial Clause “does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces.” That power, in turn, could not extend to former servicemembers because “the power granted Congress ‘To make Rules’ to regulate ‘the land and naval Forces’ would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.” Moreover, Black explained, “any expansion of court-martial jurisdiction like that in the 1950 Act [to former servicemembers] necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.”

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

Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.140

In Covert itself, the Court only invalidated the military’s power to court-martial a civilian dependent in a capital case during “peacetime”—and no single rationale commanded more than a plurality of the Justices.141 But just three years later, a majority of the Court extended Covert’s rationale to preclude the trial by court-martial of all civilians during peacetime—even for non-capital offenses.142 To justify the departure from Article III, courts-martial had to involve “cases arising in the land or naval forces.” Put another way, the validity of non-Article III federal adjudication did not just turn on Congress’s power to proscribe the relevant conduct (typically through its police power over the military); it also turned on the applicability, or lack


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

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

thereof, of the jury-trial provisions of Article III and the Fifth and Sixth Amendments.

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

CAAF’s analysis of the applicability of the jury-trial provisions was problematic, at best. Among other things, (1) it summarily dismissed Ali’s substantial voluntary connections to the United States, including his pre-deployment training in Georgia, which should have been sufficient to trigger constitutional protections; (2) even if such connections were insufficient, it failed to analyze Ali’s entitlement to extraterritorial constitutional rights under the new framework articulated in Boumediene v. Bush; (3) it never considered whether, even if the Fifth and Sixth Amendments do not apply to Ali, Article III’s jury trial protections might; and (4) it did not explain how,
even if all three of the jury-trial provisions did not apply, the Make Rules Clause (or some other Article I authority) affirmatively empowered Congress to subject civilians to military jurisdiction.\footnote{149} But whatever the merits of CAAF’s analysis of Ali’s jury-trial rights, Judge Erdmann’s view that the propriety of non-Article III military jurisdiction turns on the existence of an exception to those provisions—whether a specific one for “cases arising in the land and naval forces” or the more general one relied upon in Ali—seems at least methodologically consistent with the Supreme Court’s jurisprudence discussed above.

Finally, although the discussion thus far has focused on how the Constitution constrains who may be tried by courts-martial, the Court had also long hewed to this understanding of the permissible scope of non-Article III court-martial jurisdiction in its analysis of the range of triable offenses, as well. For instance, when the majority in \textit{O’Callahan v. Parker} held that the Constitution only authorizes non-Article III courts-martial of servicemembers for offenses connected to their service,\footnote{150} the crux of Justice Douglas’s analysis was the role of the jury-trial provisions. In his words, offenses tried by courts-martial “must be service connected, lest [the Grand Jury Indictment Clause exception] be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.”\footnote{151}

The Court unceremoniously overruled \textit{O’Callahan} 18 years later, all-but categorically holding in \textit{Solorio v. United States} that “the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged.”\footnote{152} But even though \textit{Solorio} paid less overt attention to the role of the jury-trial provisions,\footnote{153} Chief Justice Rehnquist’s analysis still


\footnote{150. \textit{See} 395 U.S. 258 (1969).}

\footnote{151. \textit{Id.} at 272–73 (footnote omitted).}

\footnote{152. 483 U.S. 435, 450–51 (1987); \textit{see also supra} note 46 (noting the open question about whether \textit{Solorio} overrules the service-connection requirement in capital cases).}

\footnote{153. Justice Marshall’s dissent was primarily focused on the claim that it was the jury-trial provisions, and not Article I, that compelled \textit{O’Callahan}’s “service connection” test—that the
turned on the related conclusions that (1) the Constitution invested Congress with police power over the military—the authority to make rules for the “Government” of such persons; and (2) as a result, the textual exception in the Grand Jury Indictment Clause necessarily encompassed the full range of offenses Congress could constitutionally proscribe pursuant to the Make Rules Clause. In short, “the proper exercise of court-martial jurisdiction” turns on “the military status of the accused,” a conclusion that at once expands the scope of court-martial jurisdiction over servicemembers and arguably contracts it decisively as applied to those without such status.154

Thus, the Supreme Court’s validation of non-Article III federal adjudication in the court-martial context has historically turned on both Congress’s police power over the military and its construction the jury-trial exception in the Fifth Amendment’s Grand Jury Indictment Clause—as implicitly read into the petit jury trial provisions of Article III and the Sixth Amendment. As Justice Black explained in Covert, “the exception in [the Fifth] Amendment for ‘cases arising in the land or naval forces’ was undoubtedly designed to correlate with the power granted Congress to provide for the ‘Government and Regulation’ of the armed services.”155

D. The Supreme Court’s Constitutional Defense of Military Commissions

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

For example, whereas the rhetoric of the Court’s 1866 decision in Ex parte Milligan—which invalidated military tribunals unilaterally established under the authority of President Lincoln to try suspected Confederate sympathizers during the Civil War—focused on the relationship between civilian and military rule,156 the actual constitutional analysis in the majority opinion focused on the right to jury trial guaranteed by Article III and the
Fifth and Sixth Amendments. \(^{157}\) As Justice Davis explained, “if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.” \(^{158}\) Whether or not Congress could constitutionally authorize trial by military commissions when the civilian courts were open and functioning (a question on which the otherwise unanimous Milligan Court divided 5-4), \(^{159}\) the jury-trial provisions still militated against military jurisdiction absent congressional intervention.

Perhaps because the jury-trial provisions formed the crux of the Milligan Court’s analysis, they were also one of the focal points when the Supreme Court in Ex parte Quirin purported to distinguish Milligan in upholding military tribunals established by President Roosevelt to try eight Nazi saboteurs during World War II. \(^{160}\) After holding that, unlike in Milligan, Congress had provided statutory authorization for the proceedings pursuant to its power to define and punish offenses against the law of nations, \(^{161}\) Chief Justice Stone proceeded to explain why the Petitioners’ commission did not raise the same jury-trial concerns that the Milligan majority had invoked:

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one “arising in the land . . . forces,” when the accused is not a member of or associated with those forces. But even so, the exception [in the Grand Jury Indictment Clause] cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals

\(^{157}\) See id. at 123.

\(^{158}\) Id.

\(^{159}\) See, e.g., id. at 136–42 (Chase, C.J.).

\(^{160}\) See 317 U.S. 1 (1942).

\(^{161}\) See supra note 80.
without a jury, offenses committed by enemy belligerents against the law of war.  

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

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

And even after September 11, when the Court in *Hamdan v. Rumsfeld* ("*Hamdan I*") invalidated military commissions established by President

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162. *Id.* at 41.


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


166. 343 U.S. 341.

167. *Id.* at 354–55.
Bush to try non-citizen “enemy combatants” detained at Guantánamo Bay,\textsuperscript{168} the gravamen of Justice Stevens’s analysis was that the commissions were inconsistent with the constitutional structure envisaged by \textit{Quirin}.\textsuperscript{169} Indeed, because the authority that \textit{Quirin} read into Article 21 (Article 15’s successor)\textsuperscript{170} only encompassed offenders or offenses triable by military commissions under the international laws of war, the question never arose whether the jury-trial exception identified in \textit{Quirin} swept any broader; a commission consistent with Article 21 would necessarily be one trying “offenses committed by enemy belligerents against the law of war.”

After \textit{Hamdan I}, however, that dynamic changed. In the 2006 MCA, Congress specifically authorized the trial by military commission of at least some substantive offenses that the government concedes are not recognized under the international laws of war,\textsuperscript{171} including conspiracy\textsuperscript{172} and “providing material support to terrorism.”\textsuperscript{173} The MCA thereby raised—for the first time—the permissible scope of military commissions’ departure from Article III beyond that which was sanctioned in \textit{Quirin}.

At first, the military commission trial courts and CMCR nevertheless concluded that such offenses were international war crimes,\textsuperscript{174} and so necessarily (if implicitly) satisfied the jury-trial exception recognized in \textit{Quirin}.\textsuperscript{175} On appeal to the D.C. Circuit, however, the government

\begin{itemize}
\item \textsuperscript{168} 548 U.S. 557 (2006).
\item \textsuperscript{169} See id. at 592–92 & n.23.
\item \textsuperscript{170} See 10 U.S.C. § 821 (2006) (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”).
\item \textsuperscript{171} See supra notes 85–86 and accompanying text (discussing and citing the Military Commissions Acts of 2006 and 2009).
\item \textsuperscript{172} See 10 U.S.C. § 950t(29). But see \textit{Hamdan I}, 548 U.S. at 595–613 (plurality opinion) (concluding that conspiracy is not recognized as a war crime under international law).
\item \textsuperscript{173} See 10 U.S.C. § 950t(25).
\item \textsuperscript{175} Although this understanding necessarily settled the applicability of the jury-trial exception recognized in \textit{Quirin}, it raised the (as-yet unresolved) question of whether Congress’s Article I power to “To define and punish . . . Offences against the Law of Nations” (or its other Article I war powers) allows it to prospectively define offenses specifically not recognized as violations of international law. See al Bahlul, 2014 WL 3437485, at *58–60 (Kavanaugh, J.,
fundamentally shifted the focus of its argument, contending instead that the commissions may constitutionally exercise jurisdiction because Congress has defined offenses against the “U.S. common law of war,” as distinct from the international laws of war. And unlike international law, the government argued, such a “U.S. common law of war” recognizes conspiracy and material support as war crimes subject to trial by military commission.176

As a result, the question arises whether the jury-trial exception articulated in Quirin applies only to international war crimes. If so, the logic of both the courts-martial and military commission cases surveyed above suggests that the adjudication of such “U.S. common law of war” offenses by non-Article III military commissions (as opposed to by Article III civilian courts) would be unconstitutional—at least where the substantive offenses do not overlap with international law and the defendants are not U.S. servicemembers.177

Thus far, at least, the D.C. Circuit has skirted this question, focusing only on whether the MCA impermissibly authorized retroactive application of its “new” offenses.178 Thus, in al Bahlul v. United States, the en banc Court of Appeals only resolved a defendant’s ex post facto challenge to his convictions (based upon pre-MCA conduct) for conspiracy, material support, and solicitation.179 Applying deferential “plain error” review, the Court of Appeals unanimously held that the convictions on the latter two charges violated the

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


177. It is also possible that, like CAAF in Ali, see supra notes 143–148 and accompanying text, courts might eventually conclude that the defendants, as non-citizens held outside the United States for offenses committed overseas, are categorically unprotected by the jury-trial provisions of the Fifth and Sixth Amendments. Cf. Kiyemba v. Obama, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) (holding that the Guantánamo detainees do not have rights under the Fifth Amendment’s Due Process Clause), vacated, 559 U.S. 131 (2010) (per curiam), reinstated on remand, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), cert. denied, 131 S. Ct. 1631 (2011). For a host of reasons, this approach seems unlikely.

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

Ex Post Facto Clause, whereas a 6-1 majority held that the conspiracy conviction did not. In the process, the Court of Appeals expressly teed up the Article III issue for the original three-judge panel on remand—which will hear oral argument on October 22, 2014.180

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

There is no textual reason to think that the exception to the jury trial protections for military commissions is somehow confined to international law of war offenses. That exception, as the Supreme Court has explained, stems from the various war powers clauses in Article I and Article II. And those war powers clauses are not defined or constrained by international law.

Moreover, Bahlul’s novel theory contravenes precedent: It is inconsistent with the Lincoln conspirators and Nazi saboteurs conspiracy convictions, and it cannot be squared with Quirin.181

Although Judge Kavanaugh’s analysis of precedent is debatable at best,182 his methodological approach is consistent with that which the Supreme Court has deployed in outlining the contours of the military exception to Article III. For courts-martial, the exception is generally defined by a combination of Congress’s plenary regulatory power under the Make Rules Clause of Article I and the text of the Grand Jury Indictment Clause (as incorporated into Article III and the Sixth Amendment), which exempts “cases arising in the land or naval forces.” And for military commissions, the exception is generally defined by a combination of Congress’s regulatory power under the Define and Punish Clause and the atextual jury-trial exception enunciated by the Supreme Court in Ex parte Quirin for “offenses committed by enemy belligerents against the law of war.”

But the Court has never paused to actually explain (1) why the language of the Grand Jury Indictment Clause, standing alone, also exempts courts-

180. See id. at *21.
181. Id. at *63 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).
martial from Article III judges or Article III and the Sixth Amendment’s petit jury protections; (2) why violations of the laws of war are similarly exempted from Article III and the jury provisions despite the absence of any constitutional language to that effect; or (3) why there’s no stronger connection between these two disparate sets of cases. Simply put, it is relatively easy to describe the current doctrinal state of the military exception; it is exceedingly difficult to explain why it is so. And even if the Supreme Court’s constitutional defenses of courts-martial and military commissions bear at least some structural resemblance to each other, what should be clear from the above analysis is that the Court has in fact embraced very different constitutional explanations for these two most common forms of military courts—and, in the process, has implicitly suggested that the military exception isn’t tidy, after all.

II. RECENT EXPANSIONS TO MILITARY JURISDICTION

As Part I demonstrated, the Supreme Court by the end of the 1950s had appeared to coalesce around two guiding principles for the scope of the military exception: courts-martial could only try servicemembers for “cases arising in the land or naval forces,” and commissions could only exercise jurisdiction over law-of-war offenses triable by military courts under international law. After introducing three recent departures from these principles, this Part demonstrates that these developments cannot be reconciled with, and have therefore destabilized, whatever justifications might have supported the military exception to Article III circa 1960.

A. Solorio and the Service-Connection Test

By far, the most significant U.S. military justice development of the past half-century came in 1987, when the Supreme Court in Solorio v. United States held that servicemembers may be court-martialed for any offense, whether or not the crime had any relationship to their military service.183 In so holding, the Court overruled O’Callahan v. Parker, the 1969 decision in which Justice Douglas had relied on the text of the Grand Jury Indictment Clause to articulate what was subsequently described as the “service-connection test.”184 As Douglas had explained, the service-connection requirement filled the gap between the Make Rules Clause—which empowers Congress to “make Rules for the Government and Regulation of the land and

Thus, Douglas concluded, cases that do not “arise in” the land or naval forces cannot be tried by military courts whether or not they fall within the regulatory ambit of the Make Rules Clause.186

In reaching the contrary conclusion for the Solorio Court, Chief Justice Rehnquist focused his analysis on flaws in Justice Douglas’s historical analysis and on the plain language of the Make Rules Clause.187 In the process, Solorio all-but ignored O’Callahan’s textual argument—grounded in the narrower scope of the Grand Jury Indictment Clause’s exception vis-à-vis the broader Make Rules Clause. Thus, Chief Justice Rehnquist asserted that, “In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.”188 The problem with Rehnquist’s analysis is that he used cases concerning the scope of the Make Rules Clause to reach an implicit conclusion about the scope of the Grand Jury Indictment Clause—when there was plenty of countervailing evidence for the proposition that the scope of the two provisions was not identical. As Justice Marshall observed,

the exception contained in the Fifth Amendment is expressed—and applies by its terms—only to cases arising in the Armed Forces. O’Callahan addressed not whether [the Make Rules Clause] empowered Congress to create court-martial jurisdiction over all crimes committed by service members, but rather whether Congress, in exercising that power, had encroached upon the rights of members of Armed Forces whose cases did not “arise in” the Armed Forces.189

Solorio thereby used the language of the Make Rules Clause to countenance a broadening of the Article III exception as compared to that which could have been tied directly to the text of the Grand Jury Indictment Clause—and with dramatic consequences, holding that “determinations

185. Id. at 272–73.
186. See id.
188. Id. at 439.
189. See id. at 454 (Marshall, J., dissenting); see also id. at 461 (“Instead of acknowledging the Fifth Amendment limits on the crimes triable in a court-martial, the Court simply ignores them.”).
concerning the scope of court-martial jurisdiction over offenses committed by servicemen [is] a matter reserved for Congress.” And because of the scope of the UCMJ, especially Article 134, servicemembers therefore became subject to trial by court-martial by dint of Solorio for virtually any offense, anytime, anywhere.

At the same time, although Solorio thereby put serious pressure on the scope of the military exception, that pressure may have come with a silver lining. After all, “the logic of Solorio,” by shifting focus from the Grand Jury Indictment Clause to the Make Rules Clause, “cuts very much against congressional power to subject individuals outside the scope of the Make Rules Clause to military jurisdiction, unless another source of such legislative authority can be identified.” In other words, Solorio may have undermined the existing textual basis for the military exception to Article III, but it at least replaced it with an alternative bright line—those cases falling within the scope of the Make Rules Clause.

B. Ali and Chief Judge Baker’s Blurring of Solorio’s Bright Line

This understanding of Solorio helps to explain the significance of CAAF’s 2012 decision in United States v. Ali, upholding the constitutionality of the court-martial of a non-citizen civilian contractor in Iraq. As noted above, in the first case to test the constitutionality of a 2006 amendment to the UCMJ, the majority concluded that Ali, as a non-citizen lacking substantial voluntary connections to the United States, lacked the constitutional entitlement to jury-trial protections that otherwise constrained military jurisdiction. Leaving aside the flaws in the majority’s analysis of Ali’s constitutional rights, the CAAF majority also completely ignored the Article I question, i.e., why Ali’s case fit within the Make Rules Clause—and thereby satisfied Solorio.

In his opinion concurring in the judgment, Chief Judge Baker paid far more attention to the Article I question—and the source of Congress’s power that allowed it to provide for the court-martial of a civilian contractor. As he

190. Id. at 440 (majority opinion).
191. Vladeck, supra note 134, at 311–12.
193. See supra text accompanying notes 143–148.
194. See supra notes 148–149 and accompanying text.
195. See Ali, 71 M.J. at 271 (Baker, C.J., concurring in part and in the result) (“Congress must have an enumerated and positive authority to act, even if its actions would not otherwise run afoul of the Bill of Rights.”).
explained, “In the current legal context, I do not find sufficient positive authority to reach this result on the authority implied from [the Make Rules Clause] alone.” 196 Instead, he traced Congress’s power to its “enumerated and implied war powers,” 197 and then proceeded to articulate a series of five principles that would illuminate the permissible scope of such legislative authority—explaining why they supported Congress’s power to subject Ali to a military trial. 198 And because Ali’s offense occurred while he was accompanying the troops in the field, it also fell within the Fifth Amendment’s exception for “cases arising in the land or naval forces,” even if he was not himself a member thereof. 199

The merits of Chief Judge Baker’s analysis aside, 200 the larger point to take away from his opinion is the extent to which it rested the constitutionality of Ali’s court-martial conviction not on the defendant’s citizenship-based lack of jury-trial rights, but on the extent to which his was a “case[] arising in the land or naval forces,” even though Congress, in Baker’s view, did not have the power to proscribe his conduct pursuant to the Make Rules Clause. In other words, whereas Solorio justified a departure from the textual constraints of the Grand Jury Indictment Clause by focusing on the Make Rules Clause, Ali justified a departure from Solorio’s reading of the Make Rules Clause by focusing on the plain text of the Grand Jury Indictment Clause—completing the vitiation of the hitherto-essential relationship between those provisions.

If, as seems likely, Chief Judge Baker’s analysis comes to be seen as the more defensible explanation for the result in Ali, 201 then it could yield

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196. Id. at 273.
197. Id.
198. See id. at 274–76.
199. See id. at 276–77.
200. At its core, the central analytical objection to Chief Judge Baker’s approach is his effectively undefended assumption that the “war powers” beyond the Make Rules Clause provided Congress with the authority to regulate the conduct of a private military contractor serving as a translator in Iraq in 2008. For starters, one would at least have expected some analysis of the assumption that the United States was still “at war” in Iraq by that late date. And in any event, the statute authorizing Ali’s court-martial does not turn in any way on whether or not the underlying conduct occurred during “war,” however defined. See supra note 48 (quoting 10 U.S.C. § 101(a)(13)); see also Vladeck, supra note 18, at 293–94. Even on Chief Judge Baker’s view, then, Article 2(a)(10) would raise serious constitutional concerns in at least some of the cases to which it applies.
201. In its brief in opposition to certiorari in Ali, the United States gravitated toward Chief Judge Baker’s constitutional analysis—all-but abandoning the analysis of the majority. See Brief for the United States in Opposition at 13–17 & n.1, Ali v. United States, 133 S. Ct. 2338 (2013)
dramatic (if subtle) consequences for the scope of the military exception to Article III. After all, by his logic, cases could properly be tried in military courts whenever they “arise in the land or naval forces,” regardless of the status of the offender, the substantive nature of his conduct, or the specific enumerated power of Congress pursuant to which that conduct has been proscribed. So long as Congress is acting pursuant to its “war powers,” Chief Judge Baker’s analysis would conceivably allow it to subject to trial by court-martial any offense committed by any individual accompanying U.S. armed forces for any purpose anywhere in the world. And while reasonable minds may dispute the wisdom of such expansive military jurisdiction, what cannot be gainsaid is the fairly dramatic expansion of the military exception to Article III that such a result would portend.

C. The MCA and the “U.S. Common Law of War”

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

As previously noted, Congress responded in the MCA by enumerating


specific substantive offenses triable by military commissions, including conspiracy and “providing material support to terrorism,” which the government concedes are not violations of the international laws of war. Because of that concession, the power of military commissions to try these offenses necessarily turns on whether the military exception to Article III could be broadened to encompass military commission trials of at least some domestic offenses (the government’s position is that the exception should extend to offenses against the “U.S. common law of war,” i.e., offenses for which there is U.S. historical precedent for military commission trials).

Although that issue is soon to be resolved by the original three-judge panel in al Bahlul, Judge Kavanaugh has already suggested—however unconvincingly—that such offenses do not fall outside Quirin’s framework, because the jury-trial exception identified in Quirin—i.e., for offenses committed by enemy belligerents against the laws of war—also encompasses offenses against the domestic law of war.

Although Judge Kavanaugh’s reading of Quirin is deeply problematic, the

204. See supra text accompanying note 92.
205. 10 U.S.C. § 950t(29).
206. Id. § 950t(25).
207. Another possibility is that Congress is entitled to broad deference under the Define and Punish Clause in codifying what it believes to be international war crimes, and so Quirin is satisfied so long as Congress provides that a specific offense is, in its view, a violation of the laws of war, whether or not there is any support for that conclusion in international law. See, e.g., Paulsen, supra note 175, at 1820 (“Congress must define the ‘Offences’; the regime of international law may not dictate to Congress what those offenses may or must be.”); see also id. at 1821 (“It is worth pausing for a moment to absorb just how sweeping this legislative power may be. Congress may define what it understands to be a violation of ‘the Law of Nations’ and use this judgment as the basis for legislative enactments.”). See generally al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *44–52 (D.C. Cir. July 14, 2014) (en banc) (Brown, J., concurring in the judgment in part and dissenting in part).

It should certainly follow that, where Congress is legislating validly pursuant to the Define and Punish Clause, offenses committed by enemy belligerents against the laws of war as Congress has defined them are triable by a military commission under Quirin. Unlike Judge Brown and Professor Paulsen, though, I believe Congress is entitled to very little interpretive deference under the Define and Punish Clause, especially when it is using that power to subject individuals to military, rather than civilian, trial. See Vladeck, supra note 134. After all, it cannot be the case that Congress could respond to decisions such as United States v. Lopez, 514 U.S. 549 (1995), simply by asserting that possession of a gun near a school zone is a war crime—and thus triable not just in a federal civilian court, but in a military commission, as well.

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

D. Article III and the Civilianization of Military Jurisdiction

Between them, Solorio, Chief Judge Baker’s concurrence in Ali, and
Judge Kavanaugh’s concurrence in al Bahlul thereby produce (or at least
envision) three specific expansions in the military exception as compared to
the pre-Solorio status quo: (1) the expansion of court-martial jurisdiction to
encompass non-service-connected offenses by servicemembers; (2) the
expansion of court-martial jurisdiction to encompass offenses by at least some
civilian contractors serving with or accompanying the armed forces in the
field; and (3) the expansion of military commission jurisdiction to encompass
offenses against the U.S.—but not international—common law of war, an
amorphous category that could be far broader than its international
analogue. And although these developments might each be questioned in
their own right, the far more significant point is the extent to which they
cannot be reconciled with either the legal or philosophical justifications for
the military exception.

Taking the constitutional justifications first, whether or not one accepts
Chief Justice Rehnquist’s interpretation of the Make Rules Clause in Solorio
as encompassing non-service-connected offenses,209 the more significant issue
arises from his—largely implicit—sidestepping of the text of the Fifth
Amendment’s Grand Jury Indictment Clause,210 which only exempts cases
“arising in the land or naval forces.”211 It is possible, of course, that the
Solorio Court was of the view that any case involving a member of the land or
naval forces necessarily “arises” therein, but that is not only a strained
Parsing of the constitutional text; it is also wholly inconsistent with prior

209. This question, in turn, largely reduces to the historical debate between Chief Justice
Rehnquist in Solorio and Justice Douglas in O’Callahan about the scope of Parliament’s power to
regulate non-military offenses at the time of the Founding. See generally FREDERICK BERNAYS
WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689,
ESPECIALLY IN NORTH AMERICA (1967).
210. See supra text accompanying note 189.
211. U.S. CONST. amend. V (emphasis added).
precedent. As Justice Harlan explained in 1960, “[t]he Fifth Amendment excepts from its protection ‘cases arising,’ not persons, ‘in the land or naval forces.’”\footnote{212} And insofar as \textit{Solorio} held that a servicemember could be tried by a court-martial even for a case that did \textit{not} arise in the land or naval forces, that, too, would have been foreclosed by case law.\footnote{213}

Whereas \textit{Solorio} thereby ignored the constraints the Court had previously read into the Grand Jury Indictment Clause, \textit{Ali} ignored the constraints that had been read into the Make Rules Clause. The majority upheld the court-martial of a civilian contractor based upon the (debatable) proposition that he categorically fell outside the scope of the Fifth and Sixth Amendments;\footnote{214} and Chief Judge Baker’s far-more-persuasive concurrence nevertheless assumed—contra prior precedent—that Congress could subject offenses to trial by court-martial pursuant to “war” powers \textit{other than} the Make Rules Clause, at least in some circumstances.\footnote{215}

And although it arose in a different context, Judge Kavanaugh’s solo concurrence in \textit{al Bahlul} reflected versions of \textit{both} of those analytical shortcomings. It not only asserted that Congress could use authorities other than the Define and Punish Clause to codify “domestic” war crimes triable by military commission, it also asserted (without much in the way of analysis) that the jury-trial exception identified in \textit{Quirin} actually encompasses such non-international law offenses, as well.\footnote{216}

Taken together, all three of these jurisprudential developments represent a fundamental departure from the principles that had previously constrained the military exception—that there are specific links between Congress’s enumerated powers and jury-trial exceptions justifying each assertion of non-

Article III adjudicatory authority. In the process, these developments also open the door to an expanding “civilianization” of military jurisdiction, where a far broader scope of offenses and offenders become subject to military, rather than civilian trials.\footnote{217} And as the above analysis underscores, such developments come at the cost of doctrinal stability—opening the door to the revisiting of questions concerning expansions in military jurisdiction that had long been viewed as settled.

\footnote{212. Kinsella v. United States \textit{ex rel.} Singleton, 361 U.S. 234, 253 n.9 (1960) (opinion of Harlan, J.).}

\footnote{213. \textit{See} United States \textit{ex rel.} Toth v. Quarles, 350 U.S. 11 (1955).}

\footnote{214. \textit{See supra} note 148.}

\footnote{215. \textit{See supra} text accompanying notes 196–201.}

\footnote{216. \textit{See supra} text accompanying note 181.}

\footnote{217. \textit{See generally} Vladeck, \textit{supra} note 18 (summarizing the “civilianization” trend).}
E. Reconciling the Military Exception with Civilianization

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

As a matter of logic and practice, civilian offenses or offenders necessarily raise far fewer concerns about the need for separation between the military and civilian justice systems. Typically, such offenders and offenses are within the purview of civilian courts, at least absent compelling evidence that civilian—as opposed to military—prosecutions have negatively impacted the military’s ability to preserve “good order and discipline” within the ranks.

Relatedly, although arguments could have been made in the past that the inability of civilian courts formally to handle these cases was itself a justification for military jurisdiction, such claims have been overtaken by subsequent events. With regard to courts-martial, for example, the Military Extraterritorial Jurisdiction Act of 2000 has closed most of the “jurisdictional gap” that the Second Circuit famously decried with respect to

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

nonmilitary offenses committed by civilians or former servicemembers outside the territorial United States. And MEJA’s implementing regulations have gone a long way toward ameliorating the logistical and procedural difficulties that might otherwise arise in such cases.

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

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

\textbf{III. MILITARY JUSTICE AND THE NON-ARTICLE III CANON}

Another possibility, of course, is that the expansions in military jurisdiction documented above might be justified by reference to other permissible examples of non-Article III federal adjudication. But as this Part demonstrates, the doctrinal and academic justifications that have emerged over time for these other exceptions to Article III would prove either far too little or far too much as applied to military adjudication. As significantly, the Supreme Court’s more recent forays into these other areas of non-Article III federal adjudication have only reiterated the significance of construing these

\begin{itemize}
\item \textit{United States v. Gatlin}, 216 F.3d 207 (2d Cir. 2000) (holding that the federal courts lacked jurisdiction to try civilians for criminal conduct undertaken on overseas U.S. military installations absent criminal statute that specifically applied outside territorial United States).
\item The War Crimes Act creates criminal liability for war crimes if “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.” 18 U.S.C. § 2441(b).
\item \textit{See supra} note 111 and accompanying text.
\end{itemize}
exceptions narrowly. Thus, Sections A through C explain why the Supreme Court’s other non-Article III jurisprudence is of little help in explaining either the military exception or these recent expansions, and Sections D and E reach similar conclusions about how academic efforts to reconcile these cases can’t reasonably be mapped onto the military exception.

A. Territorial Courts and Congress’s Police Powers

The fountainhead Supreme Court precedent upholding Congress’s power to invest non-Article III federal territorial courts with the “judicial power of the United States” is Chief Justice Marshall’s enigmatic 1828 opinion in American Insurance Co. v. 356 Bales of Cotton (known to history as “Canter”).227 Canter, which dealt formalism “a blow from which it has never recovered,”228 addressed whether an admiralty dispute could be heard by a salvage court in Key West established by Florida’s territorial legislature—or whether it had to be brought before the federal territorial court that Congress had established in Florida.229 Although no party contested the constitutional authority of the federal territorial court to entertain such a dispute, Chief Justice Marshall nevertheless went out of his way to uphold its validity (and, arguably, the validity of the entire Louisiana Purchase).

As Marshall explained,230 because of Congress’s police power over the

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228. Lawson, supra note 227, at 887.


230. As Chief Justice Marshall explained,

The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of the judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the
territories, and because, at least according to Marshall, Congress could not create Article III courts in the territories, Congress was free to create tribunals in the territories wholly unencumbered with Article III's jurisdictional constraints, and staffed by judges wholly unprotected by Article III's tenure and salary guarantees. At the same time, however, Marshall concluded that, because such courts were not Article III tribunals, they did not exercise the same exclusive jurisdiction over admiralty suits that Congress had vested in Article III courts. Thus, the actual holding of Canter was that the Key West salvage court had the power to resolve the relevant dispute entirely because Florida did not have an Article III court with exclusive jurisdiction over such disputes.

Whether or not Professor Gary Lawson is correct that Marshall's discussion of Congress's power to create territorial courts was unnecessary to the result, it is hard to disagree with him (and virtually every other sustained discussion of the decision) that it fails to persuade. After all, and contra Chief Justice Marshall, Congress does clearly have (and has exercised) the power to create Article III courts in the territories; the concerns over judicial independence motivating Article III's tenure and salary protections have at least some salience in the territories, as well; and even laws Congress enacts for the territories are still federal law for purposes of Article

\[\text{Canter, 26 U.S. (1 Pet.) at 546.}\]

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


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

234. See Currie, supra note 229, at 122 ("[F]rom his irreproachable statement that in legislating for a territory Congress has both general and local powers it does not follow that the Framers were unconcerned about the independence of territorial judges.” (footnote omitted)).
III’s grant of “arising under” jurisdiction.\textsuperscript{235} To similar effect, it cannot be the case that the Constitution draws a bright line between those suits that may be heard by Article III courts and those suits that may be heard by non-Article III courts; the Madisonian Compromise necessarily assumes the possibility of at least \textit{some} concurrent jurisdiction between such tribunals.\textsuperscript{236}

Even the most ringing defense of \textit{Canter}—the second Justice Harlan’s plurality opinion in \textit{Glidden Co. v. Zdanok}\textsuperscript{237}—asserts that Chief Justice Marshall couldn’t have “meant” to imply that territorial courts may not receive Article III jurisdiction.\textsuperscript{238} Nevertheless, as both the spirit and letter of Justice Harlan’s controlling opinion in \textit{Zdanok} suggests, \textit{Canter} has become the unassailable bedrock of the Supreme Court’s jurisprudence concerning territorial courts notwithstanding its analytical shortcomings. By 1872, the Justices would explain that the general validity of non-Article III territorial courts “was decided long ago in [\textit{Canter}].”\textsuperscript{239}

More recently, when the Supreme Court in \textit{Palmore v. United States} upheld the power of the D.C. local courts to entertain federal prosecutions after the 1970 bifurcation of the D.C. judicial system,\textsuperscript{240} \textit{Canter} was at the heart of the Court’s explanation for why such prosecutions need not be brought before Article III judges. As Justice White summarized, territorial courts “have not been deemed subject to the strictures of Art. III, even though they characteristically enforced not only the civil and criminal laws of Congress applicable throughout the United States, but also the laws applicable only within the boundaries of the particular territory.”\textsuperscript{241}

To similar effect, as Justice Brennan put it a decade later, the Court’s

\begin{footnotesize}
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\item \textsuperscript{235} See U.S. Const. art. III, § 2, cl. 1 (“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .”).
\item \textsuperscript{236} Although the Supreme Court appeared at one time to embrace such a rigid dichotomy, see Williams v. United States, 289 U.S. 553 (1933), it has since come to its senses, see, \textit{e.g.}, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63 n.14 (1982) (plurality opinion). See generally James S. Liebman & William F. Ryan, “\textit{Some Effectual Power}”: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 705–73 (1998).
\item \textsuperscript{237} 370 U.S. 530 (1962).
\item \textsuperscript{238} See \textit{id}. at 544–45 (plurality opinion); \textit{see also id}. at 545 n.13 (‘Far from being ‘incapable of receiving’ federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so.’).
\item \textsuperscript{239} Clinton v. Engelebrecht, 80 U.S. (13 Wall.) 434, 447 (1872).
\item \textsuperscript{240} 411 U.S. 389 (1973).
\item \textsuperscript{241} \textit{Id}. at 402–03 (citation and footnotes omitted).
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jurisprudence upholding non-Article III courts “dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government.”242 The principal analytical defense of Congress’s power to create non-Article III federal territorial courts was thus—and remains—the fact that Congress acts as a general government over the territories.243 Whatever its merits as a matter of first impression, the Justices have acquiesced in deferring to the weight of history, and to the view that Congress’s “police” power is the sum total of the


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

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

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

To be sure, the Supreme Court has never explained why such pragmatic concerns could not be resolved as they have been in Puerto Rico—with a local court controlled by the territorial legislature acting pursuant to a delegation of power from Congress, and a federal Article III court created and controlled directly by Congress. If the Puerto Rico example is any guide, it simply cannot follow that non-Article III federal territorial courts are necessary to allow for quasi-local tribunals exercising general jurisdiction in the territories. Harlan’s defense is also anachronistic; if it wasn’t already clear in 1828, it certainly was apparent by the time Harlan wrote in 1962 that not all territories were destined for statehood—and thereby raised the “no place to put them” concern. See id. at 548 n.19.
constitutional defense of non-Article III federal territorial courts. Congress is allowed to create non-Article III federal courts in the territories entirely because the territories are subject to plenary and exclusive federal regulatory power under Article I (for the District of Columbia), or Article IV (for the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands). And whatever the merits of the police-power-only explanation as applied to civilian territorial courts, it should be clear, in light of the cases surveyed in Part I, that Congress’s police power over the military is neither necessary (see military commissions and the Define and Punish Clause) nor sufficient (see courts-martial and civilian contractors) to explain the current law justifying non-Article III military adjudication. If it were, then Congress’s police power over federal territories should also support non-Article III military adjudication there, as well.

B. Public Rights Adjudication and “Balancing”

Although the Supreme Court has never acknowledged as much, the above discussion illuminates how there has been at least some overlap between the justifications the Court has seized upon in upholding adjudication by non-Article III territorial courts and by non-Article III military courts. But in the context of why non-Article III courts may resolve “public rights” disputes, the Court has historically looked to wholly different—and increasingly contested—rationales. A proper unpacking of the evolution of these rationales helps to explain why, contra a 1990 student note, the Court’s “public rights” jurisprudence is not a better lens through which to understand the relationship between military courts and Article III.

The forerunner of the Court’s “public rights” jurisprudence is its 1856 decision in Murray’s Lessee v. Hoboken Land & Improvement Co., which upheld the power of an Executive Branch official to audit the accounts of a federal employee and, where a deficit was found, summarily attach

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

245. See U.S. Const. art. I, § 8, cl. 17 (empowering Congress “To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States . . . .”).

246. See id. art. IV, § 3, cl. 2 (“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . .”).

247. See Note, supra note 8.
funds.248 As Justice Curtis explained, there is a category of “public rights” disputes “which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”249

Although Murray’s Lessee first suggested the idea that “public rights” disputes might be resolved by non-Article III adjudicators, it was only in later cases that the Court sought to explain in detail why permitting such non-Article III adjudication would not raise constitutional concerns. Thus, in Ex parte Bakelite Corp.,250 Justice Van Devanter tied the constitutionality of non-Article III adjudication of such disputes to the federal government’s sovereign immunity:

claims against the United States . . . . may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.251

In other words, because Congress could simply deny litigants any forum for the resolution of claims against the United States by declining to waive the government’s sovereign immunity, it should follow that Congress may dictate the forum in (and conditions under) which such disputes—when allowed—should be resolved.252 This precise logic appeared at the heart of Crowell v. Benson—the Court’s landmark decision three years after

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250. 279 U.S. 438 (1929).
251. Id. at 452.
252. Of course, the idea that the greater power includes the lesser ignores the extent to which the Constitution might nevertheless constrain how Congress chooses to waive the federal government’s sovereign immunity, e.g., if it imposed unconstitutional conditions on the waiver. See Martin H. Redish, Legislative Courts, Administrative Agencies and the Northern Pipeline Decision, 1983 DUKE L.J. 197, 212 (offering reasons why “[i]n the present context the ‘greater-includes-the-lesser’ argument simply does not work”).
Bakelite—which involved a dispute over whether a federal agency could resolve workers compensation claims brought by a longshoreman. In upholding the authority of federal administrative adjudicators to engage in preclusive factfinding, 253 Crowell emphasized both the limited nature of the role the agency was performing and the substantial efficiency such administrative decisionmaking would provide. In the process, Crowell provided the constitutional foundation for modern federal administrative adjudication.

Related but distinct from sovereign immunity, the Justices have also traced the authority of non-Article III federal adjudication of public rights disputes to more amorphous separation-of-powers considerations, i.e., “a historical understanding that certain prerogatives were reserved to the political Branches of Government.” 254 But whether it comes from sovereign immunity specifically or the separation of powers generally, “[t]he understanding of these cases,” as Justice Brennan would later recount, “is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress’ employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.” 255

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

For a long time, the Justices understood the answer to the first question on narrow terms—as only encompassing matters arising “between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” 256 That is to say, “public rights” did not include all claims by citizens against the government, but rather only those claims against the government other than one “which, from its nature, is the subject of a suit at

255. Id. at 68.
256. Crowell, 285 U.S. at 50.
That understanding began to shift in *Northern Pipeline*, even as the Court invalidated the authority given to bankruptcy courts under the Bankruptcy Reform Act of 1978. Although Justice Brennan’s plurality opinion suggested that no issues in bankruptcy cases implicate public rights, Justice Rehnquist, concurring in the judgment (and joined by Justice O’Connor), was more circumspect. In his view, it was clear that state law claims that were only “related to” bankruptcy cases were not public rights, but it wasn’t clear that the same could be said of claims based on federal bankruptcy law—even though the federal government was not (necessarily) a party to such proceedings, and so such claims in no way turned upon a waiver of sovereign immunity. Congress’s response to *Northern Pipeline* reflected this precise dichotomy, with bankruptcy judges empowered to decide as a matter of finality “core” bankruptcy matters (some of which were not “public rights” under the traditional understanding), but only to act as adjuncts for “non-core” matters.

The Court took a decisive step away from a formalistic view of public rights in *Thomas v. Union Carbide*, in the course of holding that Congress could subject adjudication of a particular administrative dispute between private parties under federal law to binding arbitration. As Justice O’Connor wrote for the Court, “Insofar as appellees interpret [*Northern Pipeline*] and *Crowell* as establishing that the right to an Article III forum is

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258. 458 U.S. 50.

259. See id. at 71.

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

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

262. See id. at 91.

263. Under 28 U.S.C. § 1334, the district courts are vested with “original and exclusive jurisdiction of all cases under title 11,” and with “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” In turn, the district courts are empowered to delegate that authority to bankruptcy courts in each district, who are authorized by statute (if not by Article III) to resolve to final judgment all “core” proceedings along with “non-core” proceedings in which the parties consent to such authority; and to make recommendations to the district court in other “non-core” proceedings. See id. § 157(a)–(c); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2603–04 (2011).

absolute unless the Federal Government is a party of record, we cannot agree." 265

Instead, Thomas concluded that courts should embrace a more functional approach when assessing whether particular claims are “public rights” appropriate for non-Article III adjudication. Echoing Justice White’s Northern Pipeline dissent, Thomas suggested that, because “the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.” 266

To that end, Justice O’Connor noted that (1) the claim in Thomas rested on federal law, as opposed to the state law claims in Northern Pipeline; 267 (2) the federal claim did not displace a pre-existing state law right to compensation; 268 (3) the claim implicated a complex federal administrative scheme that itself represented “a pragmatic solution” to a difficult public policy question; 269 (4) the non-Article III adjudication relies on its own internal sanctions and does not generally require Article III courts for enforcement; 270 and (5) limited Article III review was available in extreme cases, including review for constitutional error. 271 Concurring in the judgment, Justice Brennan—who gave such a narrow compass to public rights in Northern Pipeline—appeared to agree with the majority’s bottom-line, reasoning that non-Article III adjudication was permissible because the dispute in Thomas “involves not only the congressional prescription of a federal rule of decision to govern a private dispute but also the active participation of a federal regulatory agency in resolving the dispute.” 272

Whatever else may be said about the evolution of the distinction between private and public rights, it is clear at a minimum that the Court’s functional approach in Thomas necessarily decoupled non-Article III federal adjudication of public rights disputes from sovereign immunity; there is no sovereign immunity for the federal government to waive in disputes between private parties. Instead, the theory animating the public rights doctrine

265. Id. at 586.
266. Id. at 589.
267. See id. at 589–90.
268. See id.
269. Id. at 590.
270. See id. at 591.
271. See id. at 592–93.
272. Id. at 600 (Brennan, J., concurring in the judgment).
today is more generally grounded in the separation of powers—and the idea that, where a federal right to a civil remedy exists only by virtue of legislative grace, non-Article III adjudication raises far fewer constitutional concerns.

To that end, the bulk of litigation over the permissible scope of non-Article III public rights adjudication since Thomas has focused on the power of Congress to allow for indisputably private rights to be resolved as part of otherwise permissible non-Article III public rights adjudication—the constitutional flaw in the 1978 Bankruptcy Act that had commanded a majority in Northern Pipeline. Thus, in CFTC v. Schor, the Court upheld the power of the Commodity Futures Trading Commission to entertain a state-law counterclaim in reparations proceedings.273

Two distinct considerations drove Justice O'Connor’s analysis for the majority: First, in the Court’s view, Schor had effectively waived his right to have the state-law counterclaim against him adjudicated in an Article III federal (or state) court by choosing the CFTC’s administrative procedure with knowledge of the agency’s power to resolve counterclaims in lieu of filing for relief in the district court—and thereby consenting to such a non-Article III procedure.274 Second, allowing the CFTC to adjudicate counterclaims like the one at issue in Schor did not implicate Article III concerns because

The CFTC, like the agency in Crowell, deals only with a “particularized area of law,” whereas the jurisdiction of the bankruptcy courts found unconstitutional in Northern Pipeline extended to broadly “all civil proceedings arising under title 11 or arising in or related to cases under title 11.” CFTC orders, like those of the agency in Crowell, but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the district court.275

Non-Article III adjudication was permissible, in other words, because “the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC’s primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.”276 Echoing Justice White’s dissent from Northern Pipeline, Schor suggested that courts should balance three factors in assessing the validity of non-Article III public rights adjudication: “the extent

274. See id. at 848–50.
275. Id. at 852–53 (citations omitted).
276. Id. at 854.
to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts,” “the origins and importance of the right to be adjudicated,” and “the concerns that drove Congress to depart from the requirements of Article III.”

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

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

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

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

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277. *Id.* at 851.
278. 131 S. Cr. 2594 (2011).
279. *See id.* at 2601–02 (recounting the relevant facts).
Vickie’s claim in the bankruptcy court proceedings. . . .280

As Chief Justice Roberts succinctly put it, “The ‘experts’ in the federal system at resolving common law counterclaims such as [Smith’s] are the Article III courts, and it is with those courts that her claim must stay.”281

What is remarkable about this reasoning is how closely it resembles the categorical and formalistic approach embraced by Justice Brennan’s plurality opinion in Northern Pipeline, rather than the far-more functionalist multifactor balancing approach subsequently adopted by Justice O’Connor for the Court in Thomas and Schor. There are ways to rationalize either pair of decisions with each other, but no remotely satisfying explanation that unites all four. Moreover, Chief Justice Roberts’ analysis appeared to call into question the power of bankruptcy courts to resolve any state-law counterclaims no matter their relationship to the bankrupt estate—analysis that “is causing enormous confusion and litigation concerning its scope,”282 as Dean Chemerinsky has explained, if not the scope of permissible non-Article III federal adjudication in general.283

The uncertainty surrounding the Court’s inconsistent approach to the public rights exception also undermines arguments such as those made in a 1990 Harvard Law Review note—that public rights balancing could be utilized as a basis for either understanding or reframing the scope of the military exception to Article III.284 Leaving aside the more general objections that have been leveled against the public rights balancing approach,285 its application is especially difficult to fathom in the military context because the factors identified by Justice O’Connor in Schor would virtually always

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

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


283. In one particularly vexing decision, for example, the Fifth Circuit saw it as an exceedingly close question whether Chief Justice Roberts’ opinion in Stern called into question the consent jurisdiction of federal magistrate judges—and only resolved that question in the negative because of the “rule of orderliness.” See Tech. Automaton Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 404–07 (5th Cir. 2012).

284. See Note, supra note 8.

285. See, e.g., Stern, 131 S. Ct. at 2621 (Scalia, J., concurring).
support assertions of military jurisdiction.

Unlike in the public rights context, where the concern is allowing non-Ar
Article III resolution of legal questions typically litigated in Article III courts,
the concern in the military context arises instead from allowing non-Ar
Article III trials of individuals who are otherwise entitled to the protections of an
Article III court. Thus, as with territorial courts, the law that has emerged to
justify the public rights exception to Article III does little to illuminate the
current or proper scope of the military exception thereto. If anything, the only
aspect of Stern that is truly relevant to a discussion of the scope of the
military exception to Article III is the Chief Justice’s repeated focus on the
constitutional significance of the question presented in that case—and the
reasons why departures from Article III ought to be construed narrowly.286

C. The Jury Trial Thesis

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

At first blush, such an approach seems at least superficially promising. At
least at the Founding, the Constitution’s jury-trial protections didn’t apply to
the most common source of non-Ar territorial adjudication—state courts.287 And
for better or worse,288 the so-called Insular Cases continue to stand for the

286. Id. at 2620 (majority opinion) (“We cannot compromise the integrity of the system of
separated powers and the role of the Judiciary in that system, even with respect to challenges that
may seem innocuous at first blush.”). Perhaps tellingly, this quotation followed shortly on the
heels of a quotation from Reid v. Covert. See id. (quoting Reid v. Covert, 357 U.S. 1, 39 (1957)
(plurality opinion)).

287. Although the Supreme Court has incorporated the Sixth Amendment right to jury trial
against the states, see Duncan v. Louisiana, 391 U.S. 145 (1968), it has yet to incorporate either the
Grand Jury Indictment Clause of the Fifth Amendment or the jury-trial right of the Seventh
Amendment. But see Gonzalez-Oyarbun v. Caribbean City Builders, No. 14-1101, 2014 WL
2885027 (D.P.R. June 25, 2014) (holding that the Seventh Amendment does apply “within the
states, commonwealths, and territories of the United States”).

288. It is worth emphasizing that there are two strong arguments against the continuing force
of the Insular Cases today, at least with respect to the jury-trial provisions. First, the decisions in
the Insular Cases all predated the Supreme Court’s recognition in Duncan, 391 U.S. 145, that the
Sixth Amendment right to trial by jury is fundamental, and should therefore be incorporated
against the states. Indeed, one might well analogize the Court’s modern Fourteenth Amendment
proposition that the grand- and petit-jury trial rights do not apply on their own in the “unincorporated territories”—including Guam, the CNMI, and the U.S. Virgin Islands. Instead, the jury-trial protections that apply in the federal territorial courts are a matter of legislative grace; there are provisions in the Organic Acts for each of the territories that have incorporated these constitutional rights by statute.

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

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

That said, there is one obvious example of a non-Article III federal territorial court that doesn’t comport with this understanding: The D.C. Superior Court. Although that tribunal has clearly been an Article I court since its creation in 1970, defendants before the D.C. courts are


Second, and in any event, discussions of the Insular Cases tend to neglect the Jury Trial Clause of Article III itself, which presumably binds Article III courts wherever they operate, cf. Vladeck, supra note 79, at 1541–42, including the territories. In other words, Congress’s choice to create an Article III or Article IV court in unincorporated territories itself controls the applicability of at least a constitutional right to trial by petit jury in criminal cases.


unquestionably protected by the Fifth Amendment’s right to grand jury indictment and the petit-jury rights conferred by the Sixth Amendment, since D.C. is not an “unincorporated territory,” in the archaic vernacular of the *Insular Cases*.

It is possible, of course, that D.C. is the exception that proves the rule; it wouldn’t be the first time. As was the case in the *Tidewater Transfer* decision, perhaps the constitutional uniqueness of the national capital justifies an accommodation that would not be permissible elsewhere or otherwise.

Of course, it is also possible that the current structure of the D.C. court system raises serious constitutional concerns; *Palmore*, the 1973 Supreme Court decision upholding the current incarnation of the D.C. courts, has been widely criticized on a host of grounds, and might charitably be described as failing to persuade. Moreover, prior to the 1970 bifurcation, virtually all of the major civil and criminal adjudication in the District was handled by the *Article III* unitary D.C. court system, which undermines at

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


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

300. *See, e.g.*, O’Donoghue v. United States, 289 U.S. 516 (1933); *cf.* United States *ex rel.* Stokes v. Kendall, 26 F. Cas. 702, 713 (C.C.D.D.C. 1837) (holding that, as an Article III court with hybrid local-federal jurisdiction, the D.C. courts had the unique authority to issue common-law relief against federal officers), aff’d, 37 U.S. (12 Pet.) 524 (1838).
least to some degree any argument that *some* non-Article III tribunal in the nation’s capital is either formally or functionally necessary. But whatever one makes of these arguments, they suggest that, unless the current D.C. court system is unconstitutional, the jury-trial provisions can’t provide the unifying theory for non-Article III federal adjudication.

That conclusion is only reinforced by reference to the public rights context, notwithstanding the Supreme Court’s suggestion of some overlap between the applicability of the Seventh Amendment’s jury-trial right and the permissible scope of non-Article III federal adjudication. There, at least, a jury-trial-based exception would prove far too much, for it would suggest that there is no constitutional problem with non-Article III federal adjudication of all civil cases falling outside the scope of the Seventh Amendment (including cases arising in equity or admiralty), regardless of whether they raise a “public right.”

Finally, as a more philosophical matter, if the animating concern in non-Article III federal adjudication is the power of Congress to dilute the role of Article III courts by subjecting particular disputes to resolution before judges who lack Article III’s salary and tenure protections—and who as a result are presumably more subject to pressure from the political branches and the public—then it is difficult to see how those concerns are mitigated by not requiring either grand-jury indictment or petit-jury trial, either. If anything, the converse is more convincing, *i.e.*, that constitutionally mandated jury protections might alleviate the concerns that prosecution before a non-Article


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

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

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

D. The Appellate Review Model

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

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

304. Id.
305. Id.
307. See id. at 917. Fallon was neither the first nor the most recent scholar to focus on Article III appellate review as a more coherent theoretical defense of non-Article III adjudication; as Professor Pfander has pointed out, “[s]imilar suggestions appear in the work of Professors Bator, Redish, Saphire, and Solimine.” James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 666 (2004); see also id. at 647 n.10. But Fallon’s 1988 article is perhaps the most thoroughgoing—and convincing—explication of this view. See id. at 667 n.123 (explaining the differences between Fallon’s view and that of the other
At the heart of the appellate review theory is the idea that, at least at this stage in the development of the federal courts, “adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III,”³⁰⁸ and that, so long as it exists, “the decision whether to use non-article III bodies to make initial determinations even of constitutional law should be largely discretionary with Congress.”³⁰⁹ In other words, nothing specifically unites the three categories of cases in which non-Article III federal adjudication has been sustained other than what comes after such adjudication: appellate review by Article III courts, including ultimate supervision by the Supreme Court itself.

But the elegant simplicity of the appellate review model also provides one of the central charges against it, for it would thereby endorse all non-Article III federal adjudication so long as provision is made for searching Article III appellate review at some point. As Professor Resnik has argued, such an approach could end up insulating most initial non-Article III federal adjudications—whether by agencies or legislative courts—from meaningful appellate review, especially to the extent that the proliferation of intermediate non-Article III appellate courts might further distort the role of Article III appellate courts and/or Crowell would allow Congress to insulate the non-Article III adjudicator’s factual findings from meaningful appellate review.³¹⁰ So construed, “the idea that ‘Article III values’ are served by providing litigants access through appellate review to life-tenured judges has more theoretical power than practical application.”³¹¹

In addition, the appellate review theory runs into both textual and practical difficulties, as well. Textually, the theory provides little solace to formalists who still struggle to understand how the Constitution contemplates the investiture of federal judicial power in any non-Article III courts—but especially those operating under federal, rather than state, authority.³¹² And practically, the appellate review theory appears difficult to

³⁰⁸. Fallon, supra note 306, at 918.
³⁰⁹. Id.
³¹¹. Id. at 640.
³¹². See, e.g., Pfander, supra note 307, at 668 & n.130.
reconcile with existing (and in many cases, Founding-era) statutory limits on Article III appellate jurisdiction over a host of non-Article III bodies, including the historical constraints on the Supreme Court’s appellate jurisdiction vis-à-vis state courts, which has never encompassed anywhere near the nine sets of cases over which the Constitution recognizes federal judicial power.313

Indeed, military courts prove some of the toughest cases for the appellate review model, given the historical bar on direct supervision of courts-martial and military commissions by the Supreme Court; the continuing gaps in the Court’s post-1983 authority over CAAF and the military justice system;314 and the lack of any mechanism for appellate review (or for de novo collateral review) of the decisions of military commissions prior to the Detainee Treatment Act of 2005.315 One might also quibble with a theory the salience of which rests on equating the Supreme Court’s current certiorari jurisdiction with meaningful appellate review when, as is currently true for D.C. local courts and courts-martial, the increasingly discretionary review by the Justices is the only generally available mechanism for Article III oversight.316 Thus, as with the explanations offered by the Supreme Court for the three existing categories of permissible non-Article III adjudication, the appellate review model provides an unsatisfying justification for the military departure from Article III.

E. Military Courts as “Inferior Tribunals”

Responding specifically to these shortcomings in the appellate review

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

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

315. See supra notes 82–83 and accompanying text (discussing the limits on appellate and collateral review of military commissions).

model, a more recent attempt at a cross-cutting explanation for non-Article III federal adjudication was undertaken by Professor Pfander in a 2004 article in the Harvard Law Review,317 which he expanded upon in a subsequent book.318 Pfander’s account starts with the Constitution’s text, including Article III’s declaration that “[t]he judicial Power of the United States . . . shall be vested in one supreme Court,”319 and Article I’s grant of power to Congress “To constitute Tribunals inferior to the supreme Court.”320 As Pfander points, notes, although the Constitution is replete with references to “courts,” especially in Article III, this latter provision is its sole reference to “tribunals,”321 a distinction that should not be dismissed as semantic.322 Tying these two textual threads together, Pfander posits that

the Inferior Tribunals Clause may empower congress to create inferior ‘tribunals’ with judges who lack Article III protections. While these tribunals must remain inferior to the Supreme Court and the judicial department, Article I does not require that they employ life-tenured judges and Article III does not formally invest these tribunals with the judicial power of the United States.323

At once, then, Pfander’s “inferior tribunals” account provides textual support for the appellate review theory, but also supplies the missing top-down substantive principle to cabin the permissible scope of non-Article III federal adjudication: the underlying justification for non-Article III federal adjudication is to resolve disputes “thought to lie beyond the judicial power of

317. See Pfander, supra note 307.
319. U.S. CONST. art. III, § 1 (emphasis added). Indeed, Pfander finds significance in the fact that Article III uses a lowercase “s” to refer to the Court—suggesting that “supreme” was not the name of the body, but rather an adjective. See Pfander, Jurisdiction-Stripping, supra note 318, at 1455 n.88; see also DAVID A. ENGDHALL, WHAT’S IN A NAME? THE CONSTITUTIONALITY OF MULTIPLE “SUPREME” COURTS, 66 IND. L.J. 457, 463 (2000).
321. See Pfander, supra note 307, at 650.
322. See id. at 677–89.
323. Id. at 651.
the United States.” On this theory, the two questions courts must ask in assessing the permissible scope of non-Article III federal adjudication are whether “the work of the Article I tribunal does not, as structured by Congress, lie at the traditional core of the judicial power of the United States,” and, if not, whether “Congress has provided some form of review sufficient to preserve the tribunal’s inferiority in relation to the judicial department.”

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

Although Pfander’s account thereby alleviates at least some of the shortcomings in the appellate review model, it raises some of its own, as well. For starters, it turns on a relatively subjective understanding of the “traditional core” of federal judicial power as compared to those claims that fall sufficiently outside that core to justify non-Article III adjudication. After all, even if one were inclined to believe that questions of federal military law do not implicate the “traditional core” of federal judicial power, recall that courts-martial have increasingly come to apply generally applicable federal statutory and constitutional law in their proceedings, and so should require the same supervision as their civilian counterparts.

324. See id. at 652.
325. Id. at 747.
326. Id. at 748.
327. See, e.g., Burns v. Wilson, 346 U.S. 137, 140 (1946) (plurality opinion) (“Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”). Since 1983, the Supreme Court has possessed the very supervisory power over military courts the absence of which undergirded the Burns plurality’s approach. Compare id. (“This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it . . . .”), with 28 U.S.C. § 1259.
328. In particular, Pfander’s central claim is that “local” federal law doesn’t implicate the same separation of powers concerns as federal laws of general applicability. Even if that were true (which is not immediately obvious given their constitutional equivalency), it doesn’t explain courts-martial, which don’t just enforce federal criminal laws generally applicable to the military, but also, via Article 134 of the UCMJ, federal criminal laws generally applicable to everyone (and some state laws, too). See supra notes 43–44 and accompanying text.
329. For more on this argument, see Brief of Amicus Curiae Nat’l Ass’n of Crim. Def. Lawyers in Support of Petitioner, Behenna v. United States, 133 S. Ct. 2765 (2013) (mem.) (No. 12-802),
Second, and perhaps more controversially, Pfander’s approach compels the counterintuitive result that Congress is necessarily conscripting state courts as inferior “federal” tribunals whenever it “allows” them to entertain federal question suits. And even then, there is still the previous question concerning claims implicating the “traditional core of the judicial power,” which, per the Madisonian Compromise, state courts were clearly intended to have at least some authority to resolve ab initio.

*                          *                          *

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

IV. RETHINKING MILITARY JUSTICE AND ARTICLE III

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

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

Any such effort to reconceive the military exception should begin with Justice Black, who, in concluding his opinion for the Court in Toth, wrote that “Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.”331 The quotation—to Justice Johnson’s 1821 opinion in Anderson v. Dunn—was more than just an accident; the “least possible power” mentality has been deployed in any number of contexts (including in Anderson itself332) to stand for the proposition that, “As necessity creates the rule, so it limits its duration.”333 To similar effect, the Court’s most recent foray into non-Article III federal adjudication underscored the importance of carefully circumscribing such departures—since “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s “judicial Power” on entities outside Article III.”334

With those principles in mind, the most modest reaction to the analysis provided above is that there is not one exception to Article III for military courts, but rather two narrow exceptions—one for courts-martial based upon the relationship between the Make Rules Clause and the Grand Jury Indictment Clause, and one for commissions based upon the distinct relationship between the Define and Punish Clause and the atextual exception to the jury clauses articulated in Quirin. Even that conclusion, though, requires a reassessment of at least some of the Court’s jurisprudence,


332. The issue in Anderson was whether Congress had the implicit power, in the absence of an express statute, to hold an individual in contempt. Although the Court answered that question in the affirmative, it stressed the significance of narrowly construing the scope of such atextual power.


since the Court has upheld instances of both forms of military adjudication in cases at least appearing to fall outside the proffered justifications.

A. Reconceiving the Military Exception: From Madsen to Dynes

For example, recall that the Supreme Court in Madsen shoehorned occupation courts into the Fifth Amendment Grand Jury Indictment Clause’s exception. And yet, in upholding the jurisdiction of a U.S. military tribunal in occupied Germany to try a civilian dependent for the murder of her husband under German law, Justice Burton found statutory authority in the very same provision upon which the Court had relied in Ex parte Quirin—even though the earlier case involved a law-of-war commission. In his words, the “law of war” the violations of which could be tried in a military commission pursuant to Article 15 of the Articles of War “includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government.” Indeed, Burton continued, “The jurisdiction exercised by our military commissions in the examples previously mentioned extended to nonmilitary crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress.”

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

335. See supra text accompanying notes 166–167.
337. Id. at 354–55.
338. Id. at 355.
340. See id. at 41 & n.13.
violated the law of war by committing offenses constitutionally triable by military tribunal.”

Thus, at least in the context of occupation courts and law-of-war commissions, the unifying theme appears to be the amenability of such offenses to military trial under international law. To that end, recall that Quirin cast the jury-trial exception that justified trial by military commission as encompassing “offenses committed by enemy belligerents against the law of war.” Nevertheless, Madsen was not an enemy belligerent and did not commit a war crime. Perhaps what Quirin meant—and should have said—is that the Constitution exempts from the jury-trial provisions “offenses triable by military tribunal under international law.” In Quirin, that would have been a distinction without a difference; in Madsen, it was anything but.

Among other things, such a reconceptualization of the Quirin exception also resolves one of Quirin’s most troubling analytical puzzles: its recognition of the historical use of military commissions to try spying and aiding the enemy, even though neither is recognized today as a war crime under international law—and arguably weren’t so recognized at the time Quirin was decided. As Judge Kavanaugh pointed out in al Bahlul, theories of Article III that view the Quirin exception as exhaustive therefore struggle to explain how such non-war crimes can also be tried by military tribunal.

But while many (including this author in prior writings) have simply dismissed the jurisdiction of military courts to try spying and aiding the enemy as an “enigmatic statutory precedent,” there are two additional (and potentially compelling) explanations that Judge Kavanaugh neglected: Either these offenses were recognized as international war crimes at the Founding and just aren’t anymore; or, even if they were never recognized as international war crimes, they are rare examples of non-international war crimes that have nevertheless been subject to military jurisdiction under international law since the Founding—and therefore fit quite comfortably

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341. Id. at 44.
342. Id. at 41; see supra text accompanying notes 162–164.
within such a reconceived military exception to Article III.\textsuperscript{347}

If either of these approaches is correct, a view of the military exception grounded in international law would, if nothing else, introduce a degree of coherence and analytical stability to the permissible scope of military commission jurisdiction. In the process, such an approach would drive home the stakes of the pending panel decision in \textit{al Bahlul}—which may finally have to resolve whether the jury-trial exception recognized in \textit{Quirin} truly does encompass non-international war crimes.

So understood, an international law-based theory would tidily reconcile \textit{Quirin}, \textit{Madsen}, and spying, and thereby bring at least a modicum of coherence to the constitutional defense of non-Article III military commissions. The far harder question is whether it would also make sense to apply such a theory to the other major strand of the military exception, \textit{i.e.}, courts-martial. After all, courts-martial and military commissions have historically been understood as entirely distinct—if not hermetically sealed—entities, with different legal and philosophical justifications. And unlike commissions, courts-martial have seldom been understood by reference to international law—if for no other reason than because there is no such thing as an international law of military jurisdiction.

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

\begin{quote}
Congress has the power to provide for the trial and punishment of military and naval offences \textit{in the manner then and now practiced by civilized nations}; and \ldots the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States \ldots .\textsuperscript{348}
\end{quote}

Justice Wayne did not elaborate, and his allusion to the law of nations has been all-but lost to subsequent jurisprudence, but the argument could easily be analogized to the revised understanding of \textit{Quirin} outlined above: The exemption from Article III for military courts does not \textit{derive} from the Constitution’s text; it derives from international law, as \textit{reflected} in several scattershot textual clues. And insofar as international law has historically

\begin{footnotesize}
347. By contrast, offenses against the “U.S. common law of war” are only those that have historically been subject to trial by military courts \textit{within the United States}.

\end{footnotesize}
recognized the power of sovereigns to subject their own soldiers to military jurisdiction at least for military offenses, and the Supreme Court had never endorsed courts-martial of civilians, there would never have been any reason to ask, at least prior to Solorio, what role international law played in justifying (and/or constraining) courts-martial. Analogous authorities were already provided by the text of the Make Rules and Grand Jury Indictment Clauses, at least as interpreted by successive generations of Justices.

If so, then perhaps Quirin—“not a happy precedent”\textsuperscript{349} by any means—had the right idea, but the wrong formulation: One coherent, cross-cutting explanation for the scope of the military exception, which would tie together the seemingly disparate threads of non-Article III military adjudication and resolve most of its puzzles, would be an exception from Article III for all cases in which there is clear precedent in foreign and international practice for subjecting the offender and offense to military jurisdiction. That is to say, such precedents provide the constitutional justification for the departure from the Article III default rule—and, in their absence, fail to displace Article III’s mandate.

B. An International Law Exception to Article III?

Looking to international law to interpret the Constitution is often a fraught proposition.\textsuperscript{350} But in one sense, an Article III carve-out grounded in international law is not as novel an idea as it may seem. As Professor Monaghan documented in an influential 2007 Columbia Law Review article,\textsuperscript{351} there are already any number of respects in which international tribunals may themselves be said to exercise “the judicial power of the United States,” and yet not offend the strictures of Article III, especially insofar as the conduct of U.S. government actors is still subject to Article III oversight.\textsuperscript{352} Although Professor Monaghan rested much of his argument on an analogy to the public rights doctrine,\textsuperscript{353} it is in many ways a different

\textsuperscript{349}. See Carlos M. Vázquez, “Not a Happy Precedent”: The Story of Ex Parte Quirin, in FEDERAL COURTS STORIES 219 (Vicki C. Jackson & Judith Resnik eds., 2010).


\textsuperscript{353}. See Monaghan, supra note 351, at 866–75.
variation on the same theme—that supranational legal arrangements can justify departures from the Constitution’s national norms.\textsuperscript{354}

An obvious analogy in that regard is Congress’s power to implement duly enacted treaties under the Necessary and Proper Clause of Article I.\textsuperscript{355} Per Justice Holmes’ opinion in \textit{Missouri v. Holland},\textsuperscript{356} Congress may enact statutes to implement the United States’ treaty obligations even if no enumerated power would have authorized the same legislation in the absence of the treaty.\textsuperscript{357} In other words, international law—in \textit{Missouri}, as reflected in bilateral treaties, but perhaps as also reflected in customary international law—provides an independent source of federal regulatory power that would otherwise exceed the limits imposed by the Constitution—including the Tenth Amendment.\textsuperscript{358} Of course, exactly how far Congress may go in implementing a treaty remains unresolved (after the Supreme Court ducked the issue in the \textit{Bond} case).\textsuperscript{359} But the underlying principle—that international law may in some cases support exercises of federal authority lacking a more specific hook in the text of the Constitution—is almost certain to survive. In the context of military courts, an exception grounded in international law would play a comparable role by authorizing military-specific departures from Article III (and by circumscribing such departures absent clear precedent in foreign and international practice).

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

\begin{footnotesize}
\textsuperscript{354}. Additional examples of this principle abound. For another variation especially relevant to the military, see Ingrid Brunk Wuerth, \textit{International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered}, 106 Mich. L. Rev. 61 (2007).

\textsuperscript{355}. \textit{See} U.S. Const. art. I, § 8, cl. 18.

\textsuperscript{356}. 252 U.S. 416 (1920).

\textsuperscript{357}. \textit{See id.} at 431–34.

\textsuperscript{358}. \textit{See id.} at 432.

\textsuperscript{359}. \textit{See} Bond v. United States, 134 S. Ct. 2077 (2014) (construing an Act of Congress implementing a treaty to not apply to Petitioner’s conduct in order to avoid resolving the constitutional question that would arise if it did). \textit{But see id.} at 2098–102 (Scalia, J., concurring in the judgment) (disagreeing with the majority’s statutory interpretation, and concluding that \textit{Holland} should be narrowed); \textit{id.} at 2103–11 (Thomas, J., concurring in the judgment) (same); \textit{id.} at 2111 (Alito, J., concurring in the judgment) (same).
\end{footnotesize}
be overcome in circumstances in which foreign and international practice clearly supports the assertion of military, rather than—or, at least, in addition to—civilian jurisdiction of any form.

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

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


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


363. See supra text accompanying notes 171–176.
In *Hamdan II*, at least, the D.C. Circuit not only looked to international law, but suggested the appropriate standard of review. As Judge Kavanaugh wrote for the unanimous three-judge panel,

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

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

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In a curious footnote in his solo concurrence in *al Bahlul*, Judge Kavanaugh sought to dismiss at least some of his analysis from *Hamdan II* as unnecessary dicta. See *al Bahlul v. United States*, No. 11-1324, 2014 WL 3437485, at *58 n.5 (D.C. Cir. July 14, 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part). As I've explained elsewhere, however, this part of *Hamdan II* not only wasn't dicta, but it also necessarily survived the en banc court's decision in *al Bahlul*—part of which overruled one of *Hamdan II*'s other holdings. See Steve Vladeck, *What's Left of Hamdan II? Quite a Lot, Actually...*, JUST SECURITY, July 17, 2014, 9:50 a.m., http://justsecurity.org/12989/left-hamdan-ii-lot-actually/. Moreover, and in any event, even the en banc majority in *al Bahlul* concluded that Bahlul's convictions for solicitation and material support were “plainly” a violation of the Ex Post Facto Clause—by reference to the absence of examples of military trials for such offenses under domestic or international law. See *al Bahlul*, 2014 WL 3437485, at *18–21.

366. To that end, courts applying the Ex Post Facto Clause have held that it can be violated simply by subjecting offenders to trial in a military, rather than civilian, court—even if the same conduct was triable by a civilian court at the time of the offender’s conduct. At least with regard to material support and solicitation, *al Bahlul* is a case squarely on point.
C. The International Law of Military Jurisdiction

It remains, then, to assess whether international law actually provides useful illumination of the permissible scope of military jurisdiction through clear examples of authorizations or constraints upon military trials. Obviously, even if it was possible, a full accounting of the international law of military jurisdiction is beyond the ambit of this article. It must also be said that many will fail to be persuaded that such a body of international law could ever provide sufficiently coherent principles to circumscribe Article III.

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

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

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

368. See Christina M. Cerna, International Decision, 107 AM. J. INT’L L. 199 (2013). As Cerna notes, in addition to the Mexican Supreme Court decision prompting her note, “Argentina, Colombia, and Peru, to cite the most dramatic examples, have all seen the jurisdiction of their military courts radically reduced as a result of decisions of the inter-American system.” Id. at 204.

369. Id.
The same pattern has played out under the fair trial provision (Article 6) of the European Convention on Human Rights, which the European Court of Human Rights has interpreted to foreclose military jurisdiction over civilians except “when the proceedings are objectively fair, when there are compelling reasons for the assertion of such jurisdiction, and when there is a clear and foreseeable legal basis.”370 Based on that test, the European Court has, among other things, invalidated the United Kingdom’s assertion of military jurisdiction over a civilian because the military court wasn’t sufficiently independent, and may in any event have lacked any kind of compelling justification.371

These more specific anecdotes are emblematic of a far larger trend—one in which even those countries with long-established and generally fair military justice systems have had to scale back some of their more marginal exercises of military authority in order to square domestic practice with international human rights law.372 There continue to be examples to the contrary, of course, but it would hardly behoove the U.S. government to argue that an international norm of military jurisdiction is clearly established by domestic practice in countries such as Brunei, North Korea, or Somalia.

Supplementing these specific decisions are the more general assessments undertaken by the United Nations in recent years. For example, the U.N. Commission on Human Rights in 2006 promulgated “Draft Principles Governing the Administration of Justice Through Military Tribunals,”373 known as the “Decaux Principles” after Emmanuel Decaux, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights. And in August 2013, the U.N. Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, produced her own report summarizing the administration of justice through military tribunals in a wide range of jurisdictions,374 and offering a series of conclusions largely

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in line with the Decaux Principles.

In introducing the Decaux Principles, the Commission described them as “a minimum system of universally applicable rules, leaving scope for stricter standards to be defined under domestic law.”\(^{375}\) To that end, Principle No. 5 discourages military jurisdiction over civilians, except in cases of occupation or martial law in which no other forum is available.\(^{376}\) Principle No. 8 provides that “The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.”\(^{377}\) Principle No. 9 articulates a preference for civilian, rather than military, trials in all cases alleging serious human rights violations.\(^{378}\) Principle No. 17 underscores the importance of having plenary appellate review of military convictions in civilian courts.\(^{379}\) And Principle No. 19 reflects the “international trend towards the gradual abolition of the death penalty” by discouraging its use—and prohibiting it for offenses committed by (1) individuals under the age of 18; (2) pregnant women or mothers of young children; or (3) persons suffering from any mental or intellectual disabilities.\(^{380}\)

Of course, one could certainly object that the Decaux Principles are an aspirational set of forward-looking ideals, rather than a comprehensive summary of existing international law norms—or that, much as a drunk might use a lamppost, they provide support, rather than illumination.\(^{381}\) But even a modest perusal of more concrete foreign practice provides at least some support for these conclusions. As noted above, an ever-increasing number of domestic and international courts are relying upon fair-trial protections in human rights treaties to create comparable constraints upon military jurisdiction—to limit servicemember liability to military offenses, and civilian liability to cases of overriding necessity. Even if the United States is not a party to these human rights treaties, such emerging jurisprudence certainly appears to bespeak a growing international consensus against the exercise of military jurisdiction in such contexts.

\(^{375}\) Decaux Principles, supra note 373, ¶ 10.

\(^{376}\) See id. ¶¶ 20–21.

\(^{377}\) Id. ¶ 29.

\(^{378}\) See id. ¶¶ 32–35.

\(^{379}\) Id. ¶¶ 55–57.

\(^{380}\) Id. ¶ 61.

But even if the Decaux Principles are, at best, a species of soft law, they would at least provide specific data points, which the government would presumably have to rebut in order to justify assertions of military jurisdiction inconsistent therewith. And so long as the justification for departing from Article III is the existence of a clearly established foreign or international practice of subjecting such offenders and offenses to military jurisdiction, then the assertion of military jurisdiction in such cases would not violate Article III. 382

Thus, the point is not that the Decaux Principles would instantly transmogrify into constitutional constraints; far more modestly, they would merely underscore the difficulty the government might encounter in identifying countervailing examples that would support assertions of military jurisdiction. 383 Per the Knaul Report, the burden of justifying the assertion of military jurisdiction “rests with the State.” 384 And if Judge Kavanaugh’s reasoning from Hamdan II is followed, “imposing liability on the basis of a violation of ‘international law’ or the ‘law of nations’ or the ‘law of war’ generally must be based on norms firmly grounded in international law.” 385

If the government could not provide such evidence, then this thesis would yield four visible effects for U.S. military jurisdiction: First, it would compel the conclusion that Solorio is wrongly decided—and that, when the civilian courts are otherwise available, the Constitution only permits a departure

382. Other constitutional constraints will still be relevant, inasmuch as they apply. Thus, the fact that international law authorizes courts-martial for military offenses does not absolve the government of the need to vindicate whatever rights a military defendant may still possess under First, Fourth, Fifth, Sixth, and Eighth Amendments.

383. In that regard, the Knaul Report, which is based upon a more specific study of individual national judicial systems, largely supports the conclusions reflected in the Decaux Principles. For example, it stressed that “military tribunals should have jurisdiction only over military personnel who commit military offences or breaches of military discipline,” and that “Exceptions are to be made only in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel.” Knaul Report, supra note 374, ¶ 89; see also id. ¶ 102 (“The trial of civilians in military courts should be limited strictly to exceptional cases concerning civilians assimilated to military personnel by virtue of their function and/or geographical presence who have allegedly perpetrated an offence outside the territory of the State and where regular courts, whether local or those of the State of origin, are unable to undertake the trial.”). Even then, the Knaul Report offered a series of recommendations for better ensuring the impartiality and fairness of military justice proceedings. See id. ¶¶ 93–97.

384. Id. ¶ 103.

385. Hamdan v. United States (“Hamdan II”), 696 F.3d 1238, 1250 n.10 (D.C. Cir. 2012); see also supra note 365 (explaining why this aspect of Hamdan II survived the en banc decision in al Bahlul).
from Article III for military offenses. Second, it would also likely require the invalidation (or, at least, dramatic narrowing) of Article 2(a)(10) insofar as it authorizes the military trial of civilian contractors who are serving with or accompanying the armed forces in the field. Third, it would likely prevent the government from asserting military jurisdiction over offenses framed as purely “domestic” war crimes. Fourth, it would also require the broadening of the Supreme Court’s appellate jurisdiction vis-à-vis CAAF to encompass all cases over which CAAF may exercise jurisdiction, whether or not it chose to do so.386

In other words, other than the necessary (and long-sought) filling out of the Supreme Court’s appellate jurisdiction over courts-martial, a reconstruction of the military exception to Article III grounded in international law would at first blush largely return U.S. law in the field to the pre-Solorio status quo, albeit with a far more satisfying theoretical and analytical explanation for how we got there—and why it will be exceedingly difficult for Congress to expand military jurisdiction any further absent dramatic shifts in foreign and international practice.387 Difficult questions would undoubtedly continue to arise at the margins,388 but at least the margins would be drawn.

**CONCLUSION**

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

At the same time, CAAF’s July 2012 decision in *Ali* and the D.C. Circuit’s pending panel decision in *al Bahlul* provide a ripe opportunity for reassessing

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

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

the scope of the military exception—not just because these cases sit right on the margins of that exception, but because the difficulties courts have confronted in these cases at once underscore and derive from the incoherence pervading non-Article III doctrine more generally. Indeed, whether consciously or not, the existing incoherence of the military exception may well have helped to precipitate these expansions—or, at the very least, the judicial decisions upholding them. And as Chief Justice Roberts eloquently explained in *Stern,*

> Although “[i]t may be that it is the obnoxious thing in its mildest and least repulsive form,” we cannot overlook the intrusion: “illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.” We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.389

From both a doctrinal and theoretical perspective, then, the *Ali* and *al Bahlul* cases provide an especially propitious opportunity for revisiting the underpinnings of the military exception to Article III—and for considering whether American military courts can—and should—be placed on firmer constitutional footing.

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