

DETAINED SUSPECTED TERRORISTS: TRIAL IN MILITARY COURTS OR CIVILIAN COURTS?

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To assess the constitutionality of military commissions, let us start with a question near and dear to the Federalist Society: What did the Framers think? Consulting the Framers leads to two conclusions. First, military commissions are an important and constitutionally valid tool in the conflict with al Qaeda. Second, military commissions must be conducted in the right way. The Framers, as is often the case, provide good guidance on how to conduct them.

Consider the advice on international law provided by Alexander Hamilton, perhaps the single greatest inspiration for the Federalist Society. Arguing a pre-Constitution New York case called *Rutgers v. Waddington*,¹ Hamilton asserted that compliance with international law was nothing less than a test of our national character.² Our willingness to comply with international law signaled to the rest of the world how we would conduct ourselves as a new republic.

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1. *Rutgers v. Waddington*, reprinted in 1 THE LAW PRACTICE OF HAMILTON: DOCUMENTS AND COMMENTARY 393 (Julius Goebel, Jr. ed., 1964).

2. *Id.* at 362.

Madison echoed these sentiments in *Vices of the Political System of the United States*, written during the Articles of Confederation era.³ Third on Madison's list of vices was a failure to comply with international law.⁴ Madison and the other Framers were very concerned about a famous episode from the pre-constitutional era called the Marbois Incident, which involved an attack on a French consul, a gross and egregious violation of diplomatic immunity, that the Framers thought could have landed us in a war with European powers.⁵

Because of their worry about the risk of war and damage to the United States' reputation, the Framers put a particular clause in the Constitution: the Define and Punish Clause.⁶ This clause says that Congress has the power to define and punish offenses against the law of nations. Particularly when Congress legislates prospectively, we should also consider the Make Rules Clause, which authorizes Congress to "make Rules for the Government and Regulation of the land and naval forces."⁷ Finally, we should consider whether commission jurisdiction is consistent with Article III of the Constitution, which established an independent federal judiciary protected by life tenure.⁸ These provisions should be our touchstones in considering the jurisdiction of military commissions.

Military commissions, historically, have been upheld by courts and generally have received the favor of onlookers, both in this country and abroad, when they followed international law, or when they focused on trying charges involving clear war crimes.⁹ Violation of the international law of war includes, for

3. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2021 (1999).

4. See *id.*

5. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 859–61 (2006).

6. U.S. CONST. art. I, § 8, cl. 10. See also Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 163 (2009) ("The 'define' power was necessary to fix the version of the offense, and in Madison's view, to clarify that international law did not create individual criminal liability of its own force.").

7. U.S. CONST. art. I, § 8, cl. 14.

8. *Id.* art. III, § 1.

9. See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 261–66 (2002).

example, killing civilians.¹⁰ Targeting civilians is clearly a war crime.¹¹ Sabotage, and particularly sabotage under false pretenses, which involves feigning civilian garb to engage in an act of sabotage, has also historically been considered a war crime.¹² What we call war treason, which is feigning civilian garb, even if you do not get to the point where you actually destroy property, is also a war crime.¹³

Historically, we have seen a trend in the way that America has looked at military commissions. One interesting hiccup occurred in 1818 in Tallahassee, Florida.¹⁴ Andrew Jackson decided to convene a military commission as part of the first Seminole War to deal with a case of a somewhat pitiable figure, an elderly Scottish trader named Alexander Arbuthnot.¹⁵ Arbuthnot's primary crime was that he wrote to the British ambassador and others that our treatment of Native Americans was unjust.¹⁶

What Arbuthnot failed to consider when he wrote those letters was that, although Andrew Jackson had many strengths, a forgiving nature was not among them. So Jackson decided to hold Arbuthnot responsible for the insurgence of the Seminoles on the state of Georgia from what was then Spanish territory in Florida.¹⁷ Accordingly, Jackson authorized the military com-

10. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 5–6 (2002).

11. See Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 478 (2008) (“An international consensus now exists that violent acts targeting civilians are per se unlawful . . .”).

12. See Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL'Y REV. 309, 320–21 (2013).

13. See generally Mark David Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?*, 84 MIL. REV. 17 (2004), available at <http://www.au.af.mil/au/awc/awcgate/milreview/maxwell.pdf> [http://perma.cc/MNU2-HKWK].

14. See Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT'L L.J. 1, 32–33 (2013).

15. *Id.* at 5.

16. *Id.* at 34–35.

17. See Deborah A. Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 J. EARLY REPUBLIC 559, 559–60 (2008).

mission.¹⁸ The commission convicted Arbuthnot¹⁹ and he was summarily executed.²⁰

Arbuthnot did not commit a war crime. Stating your opinions about justice or the lack thereof is not a war crime. Nonetheless, that is really the only clear incidence in the U.S. history of military commissions where we departed from international law. During the Civil War, in contrast, we tried people for things like destroying bridges—clear acts of sabotage.²¹ In World War II, in the *Quirin* case, we tried German saboteurs.²² So historically, that has been the trend—adjudications of conduct with a substantial nexus to clear war crimes.

Today, we have problems because we have deviated from this trend and tried people for offenses that are not as clearly defined under the law of war. For example, we have tried people in military commissions for what is called material support.²³ Material support, broadly defined, includes things like giving money to a terrorist group.²⁴ That is a violation of U.S. criminal law, but it is not a war crime.²⁵ We have also tried people for conspiracy, defined as mere agreement without a completed act.²⁶ We can try people in our federal courts for mere agreement.²⁷ Prosecutions

18. See *id.*; Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT'L L. 121, 122 (2011).

19. See Rosen, *supra* note 17, at 560.

20. See *id.* at 559.

21. See Ilana Tabacinic, *The Enemy-Property Doctrine: A Double Whammy?*, 62 U. MIAMI L. REV., 601, 612 (2008).

22. *Ex parte Quirin*, 317 U.S. 1, 20–23 (1942).

23. See *Al Bahlul v. United States*, 767 F.3d 1, 7 (D.C. Cir. 2014) (en banc) (stating one of the charges against al Bahlul was “material support for terrorism”).

24. See 18 U.S.C. § 2339A(b)(1) (2012) (“[M]aterial support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities . . .”).

25. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 611–12 (2006) (plurality opinion) (concluding that conspiracy to violate the law of war is not itself a war crime).

26. See *id.* at 612 (stating the defendant was charged for conspiracy for an agreement and not an act).

27. See 18 U.S.C. § 371 (2012) (criminalizing conspiring to commit offenses); see also *United States v. Tutino*, 269 F.2d 488, 491 (2d Cir. 1959) (“Final success of the illegal agreement is, of course, not necessary in order to complete the crime of conspiracy, so long as the agreement is shown, and some overt act toward its accomplishment is proved.”).

often rest on that.²⁸ But mere agreement, in itself, without a completed act, is not an international war crime.²⁹

How have we dealt with these legacy cases? One of these cases is the case of Salim Hamdan, a driver for Osama bin Laden.³⁰ Another is the case of Ali Hamza al Bahlul, a bin Laden aide who acted as a press relations agent for bin Laden.³¹ The United States has justified these cases in court with the theory it calls the U.S. common law of war.³² It has said that you do not have to worry about international law.³³ That is not really relevant. We will just talk about the U.S. common law of war.

The trouble is that this theory, the U.S. common law of war, bears absolutely no relationship to what the Framers held dear. They would have analyzed a U.S. common law of war the way they would have assessed something like a U.S. law of gravity. There is no U.S. law of gravity. It is the same law of gravity for the United States as for every single other nation of the globe. You need to look at international sources.³⁴

28. See *Hamdan*, 548 U.S. at 612 (stating that the defendant's conspiracy charge was based on agreement).

29. *But see Al Bahlul v. United States*, 767 F.3d 1, 22–27 (D.C. Cir. 2014) (en banc) (concluding that it was not plain error to convict the defendant for conspiracy to commit war crimes, because the historical practice of military commissions, especially in the United States, provides sufficient evidence of inchoate conspiracy's viability to survive deferential plain error review).

30. See *Hamdan v. United States*, 696 F.3d 1238, 1242 (D.C. Cir. 2012) (“Hamdan became Osama bin Laden’s personal driver and bodyguard.”).

31. See *Al Bahlul*, 767 F.3d at 24 (stating al Bahlul was a personal assistant to Osama bin Laden).

32. See *Hamdan*, 548 U.S. at 595–99 (discussing the common law of war).

33. See Brief for the United States at 44–46, *Hamdan*, 696 F.3d 1238 (No. 11-1257) (arguing that crimes Congress has criminalized that are not international crimes show Congress can criminalize acts that do not violate international law).

34. *But see Al Bahlul*, 767 F.3d at 24 (deciding it was unnecessary to decide definitively whether Section 821 is limited to the international law of war). In *Al Bahlul*, the D.C. Circuit declined to take this view. *Id.* Because it held that al Bahlul had waived his objections to commission jurisdiction, it analyzed the issue of jurisdiction under a “plain error” standard. *Id.* at 8–10. Applying this relaxed standard, it determined that it was not “obvious” that a U.S. military commission trying law of war violations is limited to violations of international law. *Id.* at 27. Based on this finding, the *en banc* court rejected al Bahlul’s Ex Post Facto Clause challenge to his conspiracy conviction, vacated his material support conviction, and remanded other challenges based on the First Amendment and Articles I and III of the Constitution to a panel of the court. *Id.* at 31.

Generally the Ex Post Facto Clause is deemed to be forum-specific. To determine whether a defendant in a given forum has received the fair warning that the Clause requires, a court would consider only the law applicable in that forum, not law appli-

That was the D.C. Circuit's position had in the *Hamdan* case, where the court said that merely driving Osama bin Laden to various meetings is not a war crime, and, therefore, one does not have adequate notice under the Ex Post Facto Clause³⁵ to justify imposing punishment on that individual³⁶—an individual who, by the way, the United States released five years ago, so we cannot possibly believe he was that much of a threat.³⁷

The second case, in which I filed an amicus brief, is Ali Hamza al Bahlul. He is, to me, a different story. He was an aide to bin Laden.³⁸ He administered the so-called bayat, the oath of allegiance, to two people who were critical figures in the September 11th plot—Mohamed Atta, the ringleader of the plot in the United States, and Ziad Jarrah, the pilot of United Airlines Flight 93, which crashed in Pennsylvania, probably en route to either the White House or the Capitol.³⁹ Al Bahlul knew that those two individuals, whom he named in a letter that was evidence in this case, were part of a special mission designed to

cable in other forums. In other words, to determine whether a prosecution in a military commission for a violation of the law of war complies with the Ex Post Facto Clause, a court would consider only statutes designating charges before commissions. The court would *not* consider provisions of Title 18 of the U.S. Code on conduct that can be prosecuted in ordinary civilian courts. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 (2006) (plurality opinion) (“Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war.” (quoting *In re Yamashita*, 327 U.S. 1, 13 (1946))). Violations of U.S. criminal law can be tried and punished in ordinary Article III tribunals, but they cannot be punished in military commissions established to try violations of the law of war. *Id.* But see *Al Bahlul*, 767 F.3d at 18–22 (suggesting as alternative ground for holding that provision in federal criminal law, 18 U.S.C. § 2332, punishing conspiracy to kill nationals of the United States overseas, gave defendant in military commission sufficient notice under Ex Post Facto Clause, even though law of war military commission cannot try individuals for violations of federal criminal law).

35. U.S. CONST. art. I, § 9, cl. 3.

36. See 696 F.3d at 1241 (reversing *Hamdan*'s conviction because his conduct was not an international war crime at the time it occurred); cf. *Al Bahlul*, 767 F.3d at 8–10 (because of defendant's forfeiture, applying plain error standard to uphold inchoate conspiracy conviction while acknowledging that inchoate conspiracy was not internationally recognized war crime).

37. See *Hamdan*, 696 F.3d at 1244 (stating that *Hamdan* was released around January 8, 2009 even though the United States could have detained him as an enemy combatant).

38. See *Al Bahlul*, 767 F.3d at 5 (stating that al Bahlul was a personal assistant to bin Laden).

39. See *id.* at 6 (“Bahlul arranged the loyalty oaths of two of the September 11th hijackers, Mohamed Atta and Ziad al Jarrah, and prepared their ‘martyr wills’ . . .”).

kill civilians⁴⁰—such killing being an acknowledged war crime.⁴¹ In fact, al Bahlul said that there are no U.S. civilians, including women and children.⁴² Everyone in the United States, he said, supports the U.S. government, and, therefore, they are not civilians.⁴³ They can be killed.⁴⁴ That was his view, and he was proud of it.⁴⁵ In his letter, he acknowledged that he played what he called a small role in the September 11th attacks, but the tenor of his letter indicated that he had hoped to play a larger role.⁴⁶ There is ample authority under international law for the prosecution of Ali Hamza al Bahlul. If you look at theories that prevailed in international tribunals, like the theory of joint criminal enterprise (JCE), all that is required is that you be a small cog in the wheel, and Ali Hamza al Bahlul obviously fits that rubric in regards to the September 11th attacks.⁴⁷

As I have noted elsewhere,⁴⁸ JCE as a form of liability is narrower than the Racketeering Influenced and Corrupt Organizations Act (RICO) enterprise theory that the government raised and subsequently dropped in several military commissions cases, including al Bahlul's. RICO enterprise liability, which hinged on mere *membership* in a terrorist organization,⁴⁹ went beyond

40. See *id.* at 21–22 (stating that al Bahlul did not dispute at trial that the conspiracy's purpose was to kill United States nationals).

41. See 10 U.S.C. 950t(2) (2012) (listing the crime of “attacking civilians”).

42. See *Al Bahlul*, 767 F.3d at 21 (discussing witness testimony from the trial stating that al Bahlul considered all Americans to be targets).

43. See *id.* (quoting testimony stating that al Bahlul considers no Americans to be protected civilians).

44. See *id.* (quoting testimony of al Bahlul stating that what he did was kill Americans).

45. See Brief for the United States at 7, *Al Bahlul*, 767 F.3d 1.

46. See Brief of Former Government Officials et al., *supra* note *, at 16–17.

47. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶232 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999); see also Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 108 (2005) (“If the prosecution successfully demonstrates that the defendant intended to participate in a [Joint Criminal Enterprise], that defendant will be liable for crimes committed by others . . . as long as those crimes were foreseeable.”).

48. See Peter Margulies, *Sur-Reply to Heller on al Bahlul*, LAWFARE (July 20, 2013, 7:42 AM), <http://www.lawfareblog.com/2013/07/sur-reply-to-heller-on-al-bahlul/> [<http://perma.cc/KP6R-5PPB>].

49. See *United States v. Omar Khadr*, Record of Trial, Appellate Exhibit 81—Defense Motion to Strike Surplus Language from Charge III (Jan. 11, 2008), at 4 (contending that the RICO enterprise charge “is not an accurate statement of the ele-

the aid to a common plan requirement of JCE⁵⁰ or even the agreement required by inchoate conspiracy. Ruling that the RICO enterprise charge exceeded the ambit of inchoate conspiracy, a military judge found that Congress in enacting the MCA had not altered conspiracy's "traditional construction" under U.S. law, which requires an express or implied agreement, and is not satisfied by mere membership.⁵¹ Because JCE liability requires actual aid to a common plan, dropping a RICO enterprise theory premised on mere membership was irrelevant to a JCE theory.⁵²

There is a small issue here, which is that al Bahlul was not charged with a completed act—he was charged merely with agreement. However, the charging documents, the evidence at trial, and the findings of members of the military commission all address al Bahlul's role in the September 11th attacks. For example, they cited his giving the oath of allegiance to Atta and Jarrah.⁵³ Those extensive references to al Bahlul's role in the September 11th attacks clearly provided him with actual notice, consistent with a fair trial.⁵⁴ He had a full opportunity to contest that characterization of his role⁵⁵ and he chose not to do

ments of the offense of [inchoate] conspiracy" because "[w]hatever else *joining* an 'enterprise of persons who shared a common criminal purpose' may be, it is not the offense of conspiracy" as it is known in U.S. criminal law) (emphasis added).

50. *Tadić*, Case No. IT-94-1-A, at ¶ 199 (explaining that a defendant takes part in a JCE if he intentionally aids a common plan that results in a completed war crime).

51. *See* *United States v. Hamdan*, Record of Trial, Appellate Exhibit 211—Ruling on Motion to Dismiss Conspiracy (Jun. 1, 2008).

52. At least one judge on the en banc D.C. Circuit may have conflated the RICO enterprise charge that was dropped with a JCE charge, even though the two charges are quite different. The majority noted that the dropped RICO charge focused on the mere joining of an organization. *See* *Al Bahlul v. United States*, 767 F.3d 1, 21 n.12 (D.C. Cir. 2014) (en banc) (noting that the "Government amended charge by striking allegation that al Bahlul *joined* 'an enterprise of persons who share the common criminal purpose that involved . . . the commission . . . of one or more substantive offenses'" (emphasis added)). Judge Rogers' dissent wrongly asserted that the dropped charge concerned JCE, not a RICO enterprise premised on mere membership. *See id.* at 38–39 (Rogers, J., dissenting in part) ("The government also did not pursue the theory that Bahlul had joined a joint criminal enterprise."). As noted in the text, JCE differs from a RICO enterprise theory because it requires *action*, not merely membership.

53. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1192 (Ct. Mil. Comm'n Rev. 2011).

54. *See* 10 U.S.C. § 950(t)(2), (29)–(30) (2012).

55. *See* *Al Bahlul*, 820 F. Supp. at 1163 (noting that the services of defense counsel were "ostensibly rejected" by Al Bahlul).

so.⁵⁶ In fact, he acknowledged his role in the course of representing himself at his military commission hearing.⁵⁷

So what will we do in the future? Here, the Make Rules Clause⁵⁸ should entitle Congress to a measure of deference. The Make Rules Clause empowers Congress to make rules that govern the armed forces, including incidents of the use of force such as commissions. Consider the *al Iraqi* case, which deals in part with an alleged conspiracy that occurred after enactment of the Military Commissions Act.⁵⁹ That conspiracy concerns an individual making false statements to seek to enter Iraq to coordinate perfidious attacks on U.S. forces that would violate the law of war. That charge does not have the *ex post facto* problem because it deals with conduct that occurred after the enactment of the Military Commissions Act.⁶⁰ The question there is: Can Congress criminalize, under the law of war, conduct that was not criminal before the Military Commissions Act? I would argue that Congress has some leeway to do that, because it has provided adequate notice, the same as you would in an ordinary criminal proceeding.

The next question concerns the *al-Nashiri* case,⁶¹ involving the U.S.S. Cole bombing. Some have argued that at that time we were not engaged in hostilities with al Qaeda, and therefore al-Nashiri's actions may be a fit subject for an ordinary criminal prosecution, but not a fit subject for a military commission.⁶² Those arguments, to me, are wrong.

56. *Al Bahlul*, 767 F.3d at 7 (“Bahlul waived all pretrial motions, asked no questions during voir dire, made no objections to prosecution evidence, presented no defense and declined to make opening and closing arguments.”).

57. See Brief of Former Government Officials et al., *supra* note *, at 3.

58. U.S. CONST. art. III, § 8, cl. 14.

59. Steve Vladeck, *The al Iraqi Case and the Future of Military Commissions*, JUST SECURITY (Feb. 15, 2014, 9:20 AM), <http://www.justsecurity.org/7184/al-iraqi-case-future-military-commissions/> [<http://perma.cc/ZS8N-QBGL>].

60. See *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (“[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.” (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925))).

61. *Al-Nashiri v. MacDonald*, 741 F.3d 1002 (9th Cir. 2013).

62. Larkin Kittel, Note, *Trying Terrorists: The Case for Expanding the Jurisdiction of Military Commissions to U.S. Citizens*, 44 GEO. J. INT'L L. 783, 795 (2013) (“Military

Before the Cole bombing, the embassy bombings in East Africa occurred and killed hundreds of people.⁶³ The United States replied with cruise missile strikes.⁶⁴ That certainly sounds like an armed conflict to me. There must also be an organized armed group to trigger an armed conflict.⁶⁵ Al Qaeda was very much an organized group. They were behind the Cole and behind the September 11th terrorist attacks. They have plots going around the entire world. So, to me, the al-Nashiri case is consistent with international law, as well.

A brief note is appropriate regarding the status of today's military commissions under Article III of the Constitution. Article III requires that the "judicial power of the United States" be exercised in tribunals whose judges enjoy lifetime tenure and salary protection.⁶⁶ The right to jury trial also attaches to proceedings in Article III courts. As Hamilton indicated in *The Federalist No. 78*, lifetime tenure and salary protection for Article III judges serve a structural purpose, preserving federal judges' "necessary independence."⁶⁷ The right to jury trial in cases where a jury trial was recognized at the time of the Constitution's enactment also promoted individual rights and accountability, ensuring that a party's peers could adjudicate that

commissions are designed to address military necessity arising from the exigencies of war.").

63. James C. McKinley, Jr., *Bombings in East Africa: In Nairobi; As 155 Kenyan Lives Ended, Many More Changed Forever*, N.Y. TIMES, Aug. 10, 1998, <http://www.nytimes.com/1998/08/10/world/bombings-east-africa-nairobi-155-kenyan-lives-ended-many-more-changed-forever.html?scp=12&sq=embassy+bombing+nairobi+kenya&st=nyt> [http://perma.cc/PZ79-V6MC].

64. Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, WASH. POST, Aug. 21, 1998, <http://www.washingtonpost.com/wp-srv/inatl/longterm/eafricabombing/stories/strikes082198.htm> [http://perma.cc/FR4D-H4W3].

65. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1 § 1-2, 8 June 1977, 1125 U.N.T.S. 609 (defining armed conflicts as those which take place in a state's territory between its armed forces and other organized armed groups; isolated and sporadic acts of violence do not qualify as armed conflicts).

66. U.S. CONST. art III, § 1.

67. See THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961); cf. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion) (noting Hamilton's view in holding that Article III barred bankruptcy court jurisdiction over tort and contract action brought by bankruptcy petitioner against another entity that was not claimant in the bankruptcy proceeding).

party's claim or defense.⁶⁸ If Article III's requirements applied to military commissions, the cases discussed here would be fatally flawed, since none feature Article III judges or provide a civilian jury. For some commentators whose focus is protecting both the structural and individual rights aspects of Article III, military commissions that adjudicate charges not expressly authorized by international law are constitutionally infirm.⁶⁹

To counter the argument that Article III imposes strict limits on military commissions, one can interpose a functional view. This approach hinges on a number of factors prominent in the case law. First, a functional approach would ask whether the tribunal at issue was established pursuant to Congress's Article I powers.⁷⁰ Second, a court would inquire whether the circumstances of adjudication would render an Article III tribunal impracticable.⁷¹ Third, a functional approach would ask whether any manageable "limiting principle" would prevent Congress's provision for non-Article III tribunals from substantially undermining both individual rights and the separation of powers.⁷² Finally, the functional approach would ask whether historical practice dating to the Framers' day had assigned the issues to be adjudicated to Article III tribunals or to other tri-

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

69. See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. (forthcoming 2015), available at <http://ssrn.com/abstract=2419342> [<http://perma.cc/H9L6-DPYP>].

70. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (citing "concerns that drove Congress to depart from the requirements of Article III" in upholding agency's adjudication of both customer's complaint against commodities broker and broker's state law counterclaim to recover shortfall in customer's account balance); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (citing Congress's Article I power to "authorize an agency administering a complex regulatory scheme to allocate costs and benefits," when exercise of that power entailed requiring binding arbitration to resolve disputes between companies that had submitted data to support initial pesticide registration and other companies that used this data to support their own subsequent registration efforts for related products).

71. See *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (explaining that exigent wartime circumstances requiring adjudication in a theater of war by a military commission would block use of juries and other "familiar parts of the machinery for criminal trials").

72. *Northern Pipeline*, 458 U.S. at 73. In an influential article, Professor Fallon suggested that the availability of judicial review of questions of law by an Article III court would cure virtually any Article III violation. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 949-50, 973 (1988) (outlining theory while conceding that model would require changes to existing law regarding courts-martial).

bunals, such as state courts, beyond Congress's reach.⁷³ Such historical practice would strongly suggest that incursions by a non-Article III tribunal were beyond Congress's power. The functional view would favor Congress's provision of military commission jurisdiction to adjudicate conduct by belligerents reasonably related to violations of international law or to violations of domestic law, such as laws prohibiting espionage, that international law has traditionally allowed states to punish in military commissions.

The Supreme Court has held that commissions are an "important incident" of the power to declare and wage war, since they function as a check on the conduct of enemy belligerents.⁷⁴ The Court has frequently noted the importance of deferring to the political branches on matters concerning foreign affairs and armed conflict.⁷⁵ In such matters, the democratic accountability of the political branches makes deference appropriate, along with the political branches' superior information-gathering capabilities.⁷⁶

Moreover, requiring Article III tribunals in place of military commissions would often be "impracticable and anomalous."⁷⁷ Military commissions may often be held in close proximity to a theater of war or on foreign territory.⁷⁸ In the case of the Guan-

73. See *Stern v. Marshall*, 131 S. Ct. 2594, 2612 (2011) (citing long pedigree of Article III or state court adjudication of private law claims in holding that Article III prohibited bankruptcy court's consideration of tort counterclaim by bankruptcy petitioner against individual who had not filed claim in bankruptcy); cf. *Northern Pipeline*, 458 U.S. at 64 (plurality opinion) (citing historic examples of adjudication by non-Article III tribunals, including courts-martial and territorial courts).

74. See *Quirin*, 317 U.S. at 28.

75. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (warning, in rejecting First Amendment challenge to federal statute barring material support to terrorist groups, that "it is vital in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch'" (citation omitted)).

76. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1392-94 (2009).

77. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (citing practical difficulties in seeking warrant for searches abroad as basis for refusal to construe Fourth Amendment as barring search of Mexican residence of suspected drug trafficker with no ties to U.S.).

78. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (declining to grant writ of habeas corpus sought by defendants challenging convictions in U.S. military commissions convened on Chinese territory shortly after World War II); *Al Bahlul v. United States*, 767 F.3d 1, 5 (D.C. Cir. 2014) (en banc) (rejecting *Ex Post Facto*

tanamo commissions, for example, Congress also determined that any transfer of Guantanamo detainees to U.S. territory would impose security risks.⁷⁹ The political branches, acting together, have sufficient power to make such decisions.⁸⁰ Indeed, because commissions have often been conducted under exigent circumstances, the Supreme Court in *Quirin* indicated that such circumstances “preclud[ed] resort” to juries and other appurtenances of civilian trials,⁸¹ and further opined that military commissions were not “courts in the sense of the Judiciary Article” of the Constitution.⁸²

That still leaves the question of a limiting principle. If the President or Congress could merely swap out Article III courts for military commissions on their say-so, little would remain of the separation of powers that judicial independence was supposed to protect, or of individual rights such as a jury trial and presentment to a grand jury. Fortunately, such a principle exists. A commission should be consistent with Article III if it adjudicates conduct by a belligerent in armed conflict that is reasonably related to violations of international law or violations of domestic law (such as laws against wartime espionage) that international law permits states to try in military commissions.⁸³

The Supreme Court’s groundbreaking decision in *Ex parte Milligan*⁸⁴ is consistent with this analysis. In *Milligan*, the Court vacated a military commission conviction for conduct during the Civil War because it determined that the defendant, a U.S. citizen and longtime Indiana resident, had not been a belligerent in

Clause challenge to conviction in commission convened at U.S. naval base at Guantanamo Bay, Cuba).

79. Cf. Supplemental Appropriations Act, Pub. L. No. 11-32, § 14103, 123 Stat. 1859, 1920–21 (2009) (imposing restrictions on release of Guantanamo detainees); David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179 (2012) (discussing congressional restrictions).

80. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

81. *Ex parte Quirin*, 317 U.S. 1, 39 (1942).

82. *Id.*

83. The test here is narrower than the one suggested in Amicus Brief on Remand, *supra* note *, at 8 n.5, which turned on mere belligerent status. A narrower test can better protect the values of judicial independence and fairness promoted by Article III.

84. 71 U.S. 2 (1866).

the conflict. The Supreme Court in *Ex parte Quirin* ruled that *Milligan* did not preclude commission proceedings for belligerents, even when two of the defendants were U.S. citizens.⁸⁵ If, as al Bahlul acknowledged, he was a belligerent in an armed conflict with the United States,⁸⁶ *Milligan* would not bar military commission jurisdiction in his case.

Consistency with Article III requires both a threshold showing by the government of the defendant's belligerent status and charges reasonably related to international law. First, consider the threshold showing of status. To proceed to trial in a military commission, the government need only show that the defendant was a belligerent. Requiring a more extensive factual showing prior to trial would distort the trial process.⁸⁷

To be consistent with Article III, the charges against the defendant should be reasonably related to violations of international law. This requirement deters state overreaching that would undermine Article III. Suppose that an internal rebellion such as the Civil War could end with the wholesale trial of all members of rebel forces in military commissions for seditious conspiracy or other violations of domestic law. That risk could seriously disrupt the separation of powers and individual rights such as the right to a jury trial. However, by the same token, requiring that under Article III a commission restrict itself to adjudi-

85. *Quirin*, 317 U.S. at 37.

86. *Al Bahlul v. United States*, 767 F.3d 1, 21–22 (D.C. Cir. 2014) (en banc) (noting that conduct that al Bahlul admitted in correspondence and FBI interviews, including administering Al Qaeda *bayat* to key 9/11 figures Mohamed Atta and Ziad Jarrah, “directly relate[d]” to the September 11 attacks).

87. See *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005); see also *United States v. Alfonso*, 143 F.3d 772, 777 (2d Cir. 1998) (citing *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987)) (“[W]hen a question of federal subject matter jurisdiction is intermeshed with questions going to the merits, the issue should be determined at trial. . . . This is clearly the case when the jurisdictional requirement is also a substantive element of the offense charged.”); cf. *Solorio v. United States*, 483 U.S. 439, 451–51 (1987) (discussing courts-martial of members of U.S. armed forces under the Uniform Code of Military Justice that entailed litigation of threshold issues); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1221, 1235–37 (Ct. Mil. Comm’n Rev. 2007) (holding that military commission judge can determine prior to trial whether a defendant is an “unlawful belligerent” not entitled to the immunity that protects lawful combatants who fight within a command structure, wear insignia distinguishing them from civilians, carry arms openly, and refrain from targeting civilians or other violations of the law of war).

cating clear violations of international law, such as the murder of civilians, would unduly hamstring Congress.

To accommodate these competing concerns, courts should limit commission jurisdiction to belligerents' conduct that is reasonably related to violations of international law or violations of domestic law that international law has long permitted states to try in military commissions. Examples of the latter include wartime espionage.⁸⁸ The former would include conspiracy as mere agreement, if the conspiracy concerned clear war crimes such as the murder of civilians. Congress should be able to prospectively provide, pursuant to the Necessary and Proper Clause,⁸⁹ that waiting for a completed act is imprudent and unsafe. To effectuate its power to deter the murder of civilians and other acknowledged international war crimes, Congress should be able to empower a military commission to adjudicate allegations of agreements that have not yet ripened into completed acts.⁹⁰ *Ex parte Quirin's* discussion of "unlawful combatants[']"⁹¹ amenability to trial by commission supplies authority for a flexible view of Congress's war powers. Authority also stems from *Quirin's* reference to "the adoption of measures by the military command not only to repel and defeat the enemy, but to . . . subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."⁹²

Finally, historical practice is in line with this reading of Article III. Military commissions in the U.S. have never been viewed as requiring a jury trial.⁹³ They are thus fundamentally different

88. *Quirin*, 317 U.S. at 31 (citing jurisdiction of commission to try a "spy who secretly and without uniform passes the military lines of a belligerent in time of war").

89. U.S. CONST. art. I, § 8, cl. 18.

90. The Ex Post Facto Clause would still bar retrospective prosecutions for mere agreement.

91. *Quirin*, 317 U.S. at 30–31.

92. *Id.* at 28–29. The Court's reference to "enemies . . . [who] attempt to thwart or impede our military effort" would be unnecessary if the Court wished to define the phrase "law of war" narrowly for all purposes, including consistency with Articles I and III of the Constitution. The Court's framing of the issue suggests that the need to deter such hostile attempts can inform Congress's definition of the law of war. Moreover, one can read the Court's language as recognizing that Congress can prospectively provide commissions with jurisdiction to try certain inchoate offenses, including attempts and conspiracy.

93. *Id.* at 39.

from the “wholly private” state law tort, contract, and property claims⁹⁴ that the Supreme Court has held were triable in the “courts at Westminster” at the time of the Constitution’s enactment,⁹⁵ and therefore must be adjudicated either by Article III tribunals or state courts. Holding otherwise, and letting bankruptcy courts adjudicate such claims even when a party had not asserted a claim against the bankruptcy estate, would allow Congress to supplant a wide swath of Article III and state court jurisdiction with tribunals of Congress’s own devising. This danger to both constitutional structure and individual rights would violate Article III. In contrast, the limited commission jurisdiction set out here, which would cover al Bahlul’s conviction, is entirely consistent with Article III’s text and purpose.

In conclusion, the U.S. common law of war theory does not satisfy the requirements of the Ex Post Facto Clause. However, the Ex Post Facto Clause is satisfied by a showing that the conduct at issue violates international law. With respect to military commissions that are pending now, the United States is on the right side of international law and Article III. For that, the Framers would be happy.

94. *Stern v. Marshall*, 131 S. Ct. 2594, 2612 (2011).

95. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).