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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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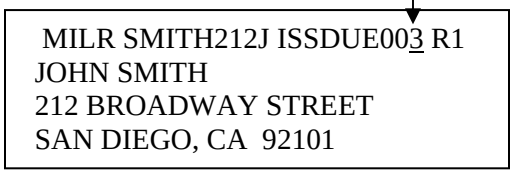

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MILITARY LAW REVIEW

Volume 186 **Winter 2005**

THE SUPREME COURT'S ROLE IN DEFINING THE JURISDICTION OF MILITARY TRIBUNALS: A STUDY, CRITIQUE, & PROPOSAL FOR *HAMDAN V. RUMSFELD*

CAPTAIN BRIAN C. BALDRATE*

Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[1]

I. Introduction

Imagine the following scenarios.[2] In the spring of 2006, the wife of an Air Force colonel stationed with her husband in England detonates a bomb in a military aircraft hanger destroying a B-52 bomber and killing dozens of Airmen. In Iraq, a civilian employee of the Marine Corps working as an interrogator tortures and kills an Iraqi prisoner. Back in North Carolina, two former Soldiers sneak onto Fort Bragg and steal machine guns, grenades, and claymore mines for use in their efforts to overthrow the federal government. Finally, in Omaha, Nebraska, a retired World War II Navy fighter pilot files a false tax return by failing

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[1] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[2] The following fictitious scenarios are not intended to represent any actual events. Rather, they are designed to demonstrate the consequences of applying current Supreme Court doctrine to potential contemporary problems.

to declare his winnings from his weekly church bingo game. Surprisingly, under current law the only person subject to a military tribunal is the retired Navy pilot charged with tax evasion. Even more concerning is that according to the Supreme Court, the United States Constitution mandates this anomalous outcome. Given this inconsistency in the Supreme Court's current military jurisprudence, it is no wonder there is such confusion about the constitutionality of the military tribunals at Guantanamo Bay, Cuba.

Following the 11 September 2001 attacks, President George W. Bush published an Executive Order establishing military commissions.[3] Pursuant to this order on 24 August 2004, the U.S. Defense Department convened the first U.S. military commission in more than fifty years, charging Salim Ahmed Hamdan with conspiracy to commit war crimes.[4] Less than three months later a federal district court halted the proceedings, declaring that the military commission could not prosecute Hamdan.[5] In July 2005, the Court of Appeals reversed the district court's decision allowing Hamdan's trial by military commission to proceed.[6] Four months later the Supreme Court granted *certiorari* and agreed to determine the constitutionality of Hamdan's military trial.[7] On 13 January 2006, after Congress passed the Detainee Treatment Act of 2005, the Bush Administration filed a motion to dismiss Hamdan's case arguing that Congress' recent legislation stripped the Supreme Court of jurisdiction over the case.[8] While the *Hamdan* decision works its way through the appellate process military commissions remain in legal

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[3] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 C.F.R. § 57833 (2005). Following the President's Order, the Department of Defense subsequently issued rules and procedures for these military commissions. *See* 32 C.F.R. §§ 9.1-18.6 (2005); *see also* Department of Defense, Military Commissions, http://www.defenselink.mil/news/commissions.html (last visited Dec. 29, 2005) (providing extensive links to background materials on the Military Commissions).

[4] *See* Press Release, U.S. Department of Defense Office of the Assistant Secretary of Defense, No. 820-04, First Military Commission Convened at Guantanamo Bay, Cuba (Aug. 24, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040824-1164.html.

[5] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173-74 (D.D.C. 2004) *rev'd* 415 F.3d 33 (D. D.C. Cir. 2005).

[6] Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D. D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) (No. 05-184).

[7] *Id.*

[8] Respondents' Motion To Dismiss for Lack of Jurisdiction, Hamdan v. Rumsfeld, No. 05-184 (D.C. Cir. July 15, 2005).

limbo,[9] and federal courts continue to struggle with the military's authority over detainees at Guantanamo Bay.[10]

Many prominent scholars wrote substantive articles about the constitutionality of military tribunals immediately following President Bush's creation of military commissions.[11] However, most of the

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[9] Prior to the district court's decision, the military began a second military commission on an Australian citizen, David Hicks. *See* Press Release, U.S. Department of Defense Office of the Assistant Secretary of Defense, No. 820-04, Australian Citizen is the Second Commissions Case (Aug. 25, 2004), http://www.defenselink.mil/ releases/2004/ nr20040825-1169.html. Following the federal district court decision in *Hamdan*, the military suspended all military commissions pending final resolution of the appeal in *Hamdan*. *See* United States Department of Defense, Military Commissions Update (Nov. 4, 2004), *available at* http://www.defenselink.mil/news/Nov2004/d20041104update.pdf; *see also* Hicks v. Bush, 02-CV-0299 (D.D.C. 2004) (holding Hick's habeas corpus claim in abeyance pending final resolution of all appeals in *Hamdan*). Following the opinion of the U.S. Court of Appeals for the District of Columbia, the military resumed work on military commissions. *See* United States Department of Defense, *Military Commissions to Resume* (July 18, 2005), http://www.defenselink.mil/releases/2005/nr20050718-4063.html. While Hamdan's and Hick's and one other commission remain on hold while awaiting a decision from the Supreme Court, two other military commissions have been referred to trial and are set to begin in January 2006. Interview with Major (MAJ) Jane Boomer, Spokesperson, Office of Military Commissions, in Arlington, VA (Dec. 6, 2005).

[10] *See, e.g.*, Dan Eggen & Josh White, *U.S. Seeks to Avoid Detainee Ruling*, WASH. POST, Jan. 16, 2005, at A7 (recounting U.S. District Judge Reggie B. Walton's recent decision to indefinitely stay all fifteen pending detainee cases before him while the appellate courts resolve the issue); *compare Hamdan*, 344 F. Supp. at 153 (declaring military commissions unlawful), *and In re Guantanamo* Detainee Cases, 2005 U.S. Dist. LEXIS 1236 (D.D.C. 2005) (allowing Guantanamo detainees to challenge their detention in federal court), *with* Khalid v. Bush, No. 04 –CV-2035 (D.D.C. 2005) (holding Guantanamo detainees have no right to seek habeas corpus relief). Another excellent example of the conflicted rulings regarding detainees is the continuing legal battle of Jose Padilla, a U.S. citizen, and alleged enemy combatant. The Padilla case has involved numerous legal proceedings before various federal district courts, appellate courts, and the U.S. Supreme Court. Padilla was recently indicted in civilian court as his claim challenging his status as an enemy combatant case was pending at the Supreme Court. *See* David Stout, *Supreme Court Allows Transfer of Padilla to Civilian Court,* N.Y. TIMES., Jan. 4, 2006, at A1.

[11] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002) (supporting the constitutionality of military commissions); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing against the constitutionality of military tribunals); Ruth Wedgewood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 329 (2002); Jack L. Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002); Michael R. Belknap, *A Putrid Pedigree*, 38 CAL. W. L. REV. 433, 480 (2002).

constitutional dialogue focused on whether the procedures of military commissions comport with Due Process and other Fifth and Sixth Amendment protections contained in the Bill of Rights.[12] Yet, the Supreme Court has never found any military tribunal procedure unconstitutional despite tremendous variations and irregularities with military tribunal procedures.[13] While the Court has occasionally asserted that some Bill of Rights' protections apply to military tribunals,[14] it has never explicitly held that the proceedings of any military tribunal violate Due Process or any other constitutional safeguard.[15] Rather, the only

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[12] *See* David Glazier, *Kangaroo Court or Competent Tribunal?: Judging The 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003) ("As government preparations for conducting these trials progress, however, there has been a discernable shift in the debate from a historical analysis toward a more narrowly focused discussion about procedural concerns regarding the proposed trial rules."); *see, e.g.*, Eugene R. Fidell, Dwight H. Sullivan & Dentlev F. Vagts, *Military Commission Law*, ARMY LAW., Dec. 2005, at 47; Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50 FED. LAW. 24 (2003); Frederick Borch, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have Full and Fair Trials: A Rebuttal to Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003; AM. BAR ASS'N, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS: REPORT TO THE HOUSE OF DELEGATES (Feb. 10, 2003), *available at* http://news.findlaw.com/hdocs/docs/aba/abarpt21003cmbtnts.pdf. The federal district court cases concerning the Guantanamo detainees have focused on Due Process of the military commissions [hereinafter AM. BAR ASS'N]. *See, e.g.*, *Hamdan*, 344 F. Supp. at 152, 185 ("It is obvious beyond the need for citation that such a dramatic deviation . . . could not be countenanced in any American court . . . but it is not necessary to consider whether Hamdan can rely on any American constitutional notions of fairness."); *In re Guantanamo* Detainee Cases, 2005 U.S. Dist. LEXIS 1236, *6-7 (D.D.C. 2005).

[13] The two most recent examples of military tribunals with irregular procedures are *Ex parte* Quirin, 317 U.S. 1 (1942) and *In re* Yamashita, 327 U.S. 1 (1946). However, the Court has consistently upheld military tribunals even with very irregular proceedings. *See, e.g.*, Swaim v. United States, 165 U.S. 553 (1897).

[14] *See, e.g.*, Weiss v. United States, 510 U.S. 163, 195 (1994) (Ginsberg, J., concurring) (stating "A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution.").

[15] *See, e.g.*, Fredric Lederer & Frederick Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 WM. & MARY BILL OF RTS. J. 219, 220 (1994) ("Although the Supreme Court has assumed that most of the Bill of Rights does apply, it has yet to squarely hold it applicable."); *Weiss*, 510 U.S. at 177-78 (holding that military due process test is whether the factors supporting a soldier's position "are so extraordinarily weighty as to overcome the balance struck by Congress."); Reid v. Covert, 354 U.S. 1, 37 (1957) (stating "as yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials"); Whelchel v. MacDonald, 340 U.S. 122, 127 (1950) (holding that in a courts-martial there is no right to trial by jury). In 1960, the Court of Military Appeals held that the Bill of Rights are applicable at courts-martial. *See* United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960) (holding that the Bill of Rights apply to soldiers unless explicitly or implicitly limited).

military tribunals that the Court has ever found unconstitutional were those tribunals in which the Court held the military lacked jurisdiction over either the person or the offense charged. Given that the Court's only constitutional restraints on military tribunals involve jurisdictional declarations, it is surprising that there is such scant research on the limits that the Constitution places on the jurisdiction of military courts.

This article analyzes the Supreme Court's judicial review over military courts in order to identify the constitutional limits on military tribunals. The central thesis is that the Supreme Court's review over military tribunals has failed to define a coherent boundary between federal courts and military tribunals. Rather than creating a consistent precedent, the Court's decisions have led to arbitrary results and increased uncertainty about the constitutionality of the military commissions at Guantanamo Bay, Cuba. This article seeks to remedy the problem by proposing a method of constitutional interpretation that will create a principled distinction between the cases belonging in federal court and those matters properly situated before military tribunals.

Part II of this article defines the different types of military tribunals, explains their bases under the Constitution, and illustrates how they relate to other federal courts. Part III examines the relationship between the Supreme Court and military tribunals, identifying the Supreme Court's use of collateral and direct review to define the jurisdiction of military tribunals. Part IV examines the historic use of military tribunals, reviewing their statutory support, their use by military commanders, and, most importantly, each instance of Supreme Court review over these military courts. After discussing these military jurisdiction cases, Part V critiques the Supreme Court's predominant methodology of originalism in limiting the jurisdiction of military courts. This part argues that the Court's reliance on originalism has led to a categorical rule-based approach to military jurisdiction. This bright-line approach creates arbitrary and illogical results that provide no guidance on whether current military commissions are constitutional.

Part VI advocates an alternative methodology known as translation theory—a more pragmatic, standards-based approach—which seeks to understand the Constitution's original meaning in a modern context. Part VI returns to the scenarios in this Introduction and demonstrates how

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However, this ruling is not binding on other military tribunals and has never been explicitly held by the Supreme Court.

translation theory can reconcile previous Supreme Court precedent while providing a superior method of defining the constitutional boundaries of military courts. Part VII applies translation theory to Hamdan's military commission, demonstrating how the Court should analyze the current military commission cases. The article concludes by arguing that *Hamdan's* military commission is likely unconstitutional because Hamdan is not charged with any offense recognized under the law of war. However, it suggests that other military commissions at Guantanamo Bay may be constitutional if the members of al Qaeda are charged with actual war crimes.

II. Military Tribunals

A. The Relation Between Article III Courts & Military Tribunals

Article III of the United States Constitution establishes an independent and impartial judiciary to decide all cases and controversies of the United States. Article III, Section 1 proclaims:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in office.[16]

In drafting Article III, the Founding Fathers provided federal judges with lifetime tenure and fixed salaries in order to ensure an impartial judicial branch independent from Legislative and Executive control.[17] The Framers viewed an independent federal judiciary as essential to maintaining the separation of powers inherent in the Constitutional structure.[18] Moreover, the Framers wanted to ensure that these independent courts (known as constitutional courts) were given the entire

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[16] U.S. CONST. art. III, § 1.

[17] *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (citing the fact that King George III "made Judges dependant on his Will alone, for the Tenure of their offices, and the Amount and Payment of their Salaries" among the list of grievances).

[18] *See, e.g.*, THE FEDERALIST 78, at 433-34; No. 79 at 440 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

judicial power of the United States government. As such, Article III, Section 2 directed that constitutional courts preside over "all cases . . . arising under this Constitution [and] laws of the United States."[19]

While the literal language of Article III mandates that constitutional courts hear all cases involving federal law, non-Article III courts have adjudicated certain federal issues throughout America's history.[20] The Supreme Court has upheld the existence of non-Article III courts in some instances,[21] while declaring their use impermissible and unconstitutional in other circumstances.[22] While Article III certainly places some limitations on the use of non-Article III federal courts, there remains considerable controversy as to what those precise limitations are.[23] It is generally agreed, however, that military tribunals are separate from Article III constitutional courts.[24] Yet, if a military tribunal is not part of the federal judiciary, what exactly is it, what is its constitutional authority, and what are its constitutional limits?

B. What is a Military Tribunal?

Colonel William Winthrop—dubbed by the Supreme Court as the Blackstone of military law[25]—provided the classic definition of military law:

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[19] U.S. CONST. art. III, § 2. Article III, Section Two enumerates the jurisdiction of federal courts.

[20] *See, e.g.*, Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919 (1988) (noting that the first Congress tasked executive officials with resolving issues like veterans benefits that might have been vested in Article III courts).

[21] *See, e.g.*, American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (upholding the constitutionality of territorial courts); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (upholding the constitutionality of public rights courts); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858) (upholding the constitutionality of military courts-martial).

[22] *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932) (declaring that private rights cases must be heard in constitutional courts); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding that the bankruptcy court established by Congress was unconstitutional).

[23] HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 43 (Richard H. Fallon, Jr. et al. eds., 4th ed. 1996).

[24] *See, e.g.*, sources cited *supra* notes 11-12.

[25] *See* Reid v. Covert, 354 U.S. 1, 19 n.38 (1957).

> Military law in its ordinary and more restricted sense is the specific law governing the Army as a separate community. In a wider sense, it includes also that law, which, operative only in time of war or like emergency, regulates the relations of enemies and authorizes military government and martial law.[26]

Winthrop broadly defined a military tribunal as both a commander's tool for maintaining order and discipline[27] and a wartime court used to punish war crimes and maintain order during armed conflict and military occupation.[28] This definition posits four main types of military tribunals:

> (1) Military Justice Court—A court established to punish members of the Armed forces for violations of a code that governs them;
>
> (2) Law of War Court—A court established to prosecute individuals accused of violating the law of war (commonly called "war crimes");
>
> (3) Martial Law Court—A court established to enforce law and order when martial law is imposed during times of emergency within the nation's borders and the military temporarily replaces the civil government;
>
> (4) Military Government Court—A court established when military forces occupy territory outside the United States and the occupied nation's courts are unable or unwilling to ensure law and order. [29]

Within the United States, the first type of court, designed to discipline members of the armed forces, is known as a court-martial.[30] The

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[26] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 15 (2d ed. 1920).

[27] *Id.* at 54; *see also* Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1 (1958); Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19.

[28] WINTHROP, *supra* note 26, at 831-33.

[29] *See* Lieutenant Colonel (LTC) Thomas Marmon, Major Joseph Cooper & Captain (CPT) William Goodman, Military Commissions 14 (1953) (unpublished L.L.M. thesis, The Judge Advocate General's School) (on file at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia) [hereinafter Marmon Thesis].

[30] WINTHROP, *supra* note 26, at 48-49.

remaining three courts are commonly referred to as military commissions.[31]

Virtually all scholarly writing about military courts follows this broad categorization, separating courts-martial analysis from a discussion of military commissions.[32] Scholars have also further distinguished the types of military commissions. For example, Lieutenant Colonel (LTC) John Bickers contends that the current military commissions prosecuting "law of war" offenses are "so utterly different" from all other types of military commissions that the history of other military commissions is irrelevant in assessing the constitutionality of President Bush's current military order.[33] While categorizing military tribunals may help explain their different purposes,[34] this categorization is much less helpful in identifying their constitutional boundaries. Military tribunals have taken on many different forms and names throughout history. In fact, "Court-Martial, War Court, Military Court under Martial Law, Military Court, Courts of Inquiry, Special Court Martial, and Common Law War Courts are just a few of the terms that the tribunals have been called throughout their history."[35] Confusion often results because military tribunals not only have various names and bases of authority, but also overlapping

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[31] *Id.* at 832-33 (listing the three types of military commissions); *see also* Bradley & Goldsmith, *supra* note 11, at 250 (citing various authors who identify these three main purposes of military commissions). At least one author has properly noted that during the Mexican American War General Winfield Scott used military commissions for a fourth reason—to extend criminal jurisdiction to his own soldiers serving in Mexico who were beyond the jurisdiction of American courts. Because the Articles of War included no authority to punish soldiers for civilian offenses, General Scott convened "military commissions," a phrase he coined, "to try U.S. soldiers for civil offense not covered by the Articles of War, such as murder, rape, and robbery." Glazier, *supra* note 12, at 2028. This rationale is seldom mentioned by contemporary scholars because subsequent modifications to the Articles of War addressed this jurisdictional gap. *See id.* at note 73.

[32] *See, e.g.*, WINTHROP, *supra* note 26, at 45, 831 (separately defining courts-martial and military commissions); The Oxford Companion to the Supreme Court separates the topics of courts-martial and military commissions, defining courts-martial as "judicial proceedings conducted under the control of the military, rather than civilian authority," and military commissions as "simply the will of the commanding general." THE OXFORD COMPANION TO THE SUPREME COURT, MILITARY TRIALS AND MARTIAL LAW 546 (Kermit L. Hall ed., 1992).

[33] John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 902 (2003).

[34] *See id.* (claiming that this confusion has led to a "lasting befuddlement of numerous lawyers, military and civilian alike").

[35] Michael O. Lacey, *Military Commissions, A Historical Perspective*, ARMY LAW., Mar. 2002, at 42.

purposes.[36] Accordingly, "the distinction between the several kinds of military tribunals is at best a wavering line which tends at times to disappear."[37] While there is no doubt that there are significant differences among the many types of military tribunals, they are similar in that they are all federal criminal trials which operate outside of the Article III federal judiciary. Because the Constitution requires that all cases be heard in constitutional courts, defining the proper boundary between military courts and constitutional courts requires a proper analysis of *all* military tribunals, whatever their given name.

C. Constitutional Authority of Military Tribunals

American military courts are as old as the nation itself and were consistently used prior to the adoption of the Constitution.[38] However, because "Congress, and the President, like the courts possess no power not derived from the Constitution,"[39] the use of any military tribunal since the Constitution's adoption in 1789 is limited by the government's constitutional authority to convene them. The Constitution provides several different bases for creating military tribunals. Article I, section eight, clause fourteen of the U.S. Constitution gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces."[40] This express authority, along with Congress' authority under the Necessary and Proper clause,[41] empowered Congress to establish

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[36] For example, military commissions were used by General Scott to try American soldiers in Mexican War. *See* Glazier, *supra* note 12. Similarly, courts-martial have been used to try civilians who were not part of the armed forces. *See* Reid v. Covert, 354 U.S. 1, 3 (1957) (holding that a court-martial lacks jurisdiction over a military dependent family member).

[37] Marmon Thesis, *supra* note 29, at 13-14. Although many scholars attempt to separate the different military tribunals, LTC Marmon does an excellent job of demonstrating why this is not really possible. For example, he states that law of war courts and military government courts "are not so distinct as they appear." *Id.* at 18. He continues by stating that different types of military commissions "are so interlocked that nearly every attempt to deal with them discusses both in a single breath" and cites numerous authority to prove his point. *Id.* at n.3.

[38] *See, e.g.*, WINTHROP *supra* note 26, at 17 (noting the Articles of War and courts-martial "predate the Constitution being derived from those adopted by the Constitutional Congress in 1775 and 1776."). For a discussion of the earlier practice see *infra* Section 4.A.1.

[39] *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

[40] U.S. CONST. art. I, § 8, cl. 14.

[41] *Id.* cl. 18 (granting Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

military courts-martial separate and distinct from constitutional courts.[42] Indeed, in 1789, following the Constitution's ratification, Congress explicitly adopted the then-existing Articles of War based on this Article I authority.[43] Using Article I, Congress has repeatedly modified the nature and procedures of courts-martial by amending the Articles of War, and subsequently the Uniform Code of Military Justice (UCMJ).[44] By giving Congress the power to "declare War"[45] and "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"[46] the Constitution also empowers Congress to create military commissions to prosecute war crimes and to establish martial law and military government courts.[47]

The clear language of Article I of the Constitution makes it understandable that early military law scholars argued that Congress had the sole authority to grant military courts jurisdiction over individuals or offenses. Major Alexander Macomb, author of the first American treatise on military law, stated that military jurisdiction extended only over those persons Congress explicitly included in the Articles of War.[48] However, while Congress repeatedly defined the jurisdiction of courts-martial governing the armed forces, it has rarely defined the scope of military commissions.[49] Instead, Congressional legislation on military

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[42] Dynes v. Hoover, 64 US (20 How.) 65, 79 (1858) (holding that Congress' plenary power to establish courts martial is "entirely independent" of Article III); *see also* WINTHROP, *supra* note 26, at 17 (stating the Articles of War are enacted by Congress in exercise of their constitutional authority to "make rules for the government and regulation of the land forces."); Walter T. Cox III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 4 (1987).

[43] WINTHROP, *supra* note 26, at 23.

[44] Uniform Code of Military Justice, 10 U.S.C.S. §§ 801-946 (LEXIS 2005).

[45] U.S. CONST. art. I, § 8, cl. 11.

[46] *Id.* cl. 10; *cf. id.*, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States."). *See also* David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 835, 827 (1994) (discussing the authority to convene military tribunals based on these two different clauses). While there have occasionally been military courts used to resolve civil law issues, the focus of this article is on criminal trials.

[47] *See, e.g.*, MacDonnell, *supra* note 27, at 20 (stating there is little question that "Congress could . . . establish a military commission.").

[48] *See* ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW, AND COURTS-MARTIAL 19-20 (1809); *see also* WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 36 (1846) (stating that only positive action by Congress can subject someone to military jurisdiction); Glazier, *supra* note 12, at 2027 (citing various early authorities for this same proposition).

[49] During the American Revolution, the Continental Congress made it a crime to spy for the British by explicitly granting court-martial jurisdiction over enemy spies. *See* Resolution of the Continental Congress, Aug. 21, 1776, in 1 JOURNALS OF THE AMERICAN

commissions has generally just recognized the President's authority to implement these commissions during times of war.[50] Rather than proceeding from specific Congressional grants, military commissions have evolved as common law courts of necessity, used "as a pragmatic gap filler, allowing justice to be served on persons not directly subject to [courts-martial] such as citizens in territory under military government and enemy belligerents accused of improper conduct through a 'common law' application of the laws of war."[51]

In addition to Congress, it is often asserted that the President has an independent authority to convene all types of military tribunals. Article II of the Constitution makes the "President [the] Commander in Chief of the Army and Navy of the United States."[52] Winthrop maintained that a court-martial was merely a tool that Congress gave the President in order to "assist" him in his constitutional duty of maintaining good order and discipline.[53] Similarly, many scholars, including Winthrop, contend that military commissions are merely another tool at the Commander in Chief's disposal, under his constitutional authority to successfully wage war.[54] In fact, the President and his subordinate military commanders have frequently used military commissions with congressional approval and occasionally used them without congressional approval.[55] Congress' broad support and acquiescence to the President's use of military commissions during times of war makes it unclear whether the President

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CONGRESS: FROM 1774 TO 1778, at 450 (1823). This statute was used to try Major John Andre and his accomplice Joshua Hett Smith. Major Andre's trial was called a court of inquiry while Joshua Smith's trial was a special court-martial. Courts of inquiry are technically information-gathering bodies, while courts-martial draw legal conclusions. The fact that they were both used for the same offense illustrates how frequently the names for military trials are interchanged. *See* Marmon Thesis, *supra* note 29, at 4. Congress also specifically authorized military commissions with the Reconstruction Acts following the Civil War. *See* Act on March 2, 1867, § 3 and 4, *reprinted in* WINTHROP, *supra* note 26, at 848; *see also id.* at 853 (discussing the authority of these military commissions).

[50] *See infra* Part IV (discussing Article 15 of the 1916 Articles of War and subsequently Article 21 of the Uniform Code of Military Justice).

[51] Glazier, *supra* note 12, at 2010.

[52] U.S. CONST. art. II, § 2, cl. 1.

[53] *See* WINTHROP, *supra* note 26, at 48-49.

[54] *See id.* at 831 (stating Congress "has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of offenses against the law of war and other offences not cognizable by court-martial."); *see also* Marmon Thesis, *supra* note 29, at 10-11 (citing Attorney General Speed's view and Army Judge Advocate General Crowder's view that war courts were borne out of necessity and usage).

[55] *See infra* Part IV.

has constitutional authority to convene military tribunals on his own accord.[56]

One scholar, Professor David Bederman, argues that while Congress has the power to convene courts-martial and law of war courts, martial law and military occupation courts emanate solely from the President's authority as Commander in Chief.[57] History and experience, however, demonstrate the difficulty in precisely restricting the authority to convene military courts to either Congress or the President. The prevailing view is that that the power to create a military tribunal . . . "lie[s] at the constitutional crossroads [because] both Congress and the President have authority in this area."[58] By whatever name, all military tribunals derive their constitutional authority from one of three places: Congress's power under Article I; the President's power pursuant to Article II; or Congress and the President's joint authority from both Articles I and II of the United States Constitution.

D. Jurisdiction of Military Tribunals

Jurisdiction is "the power and authority of a court to decide a matter in controversy."[59] Defining the jurisdiction of military tribunals involves a decision of when a military court has the "power to try and determine a case."[60] In order for a military tribunal to have jurisdiction, like any court, it must have "jurisdiction over the person being tried and the subject matter in issue."[61] Determining when a military tribunal, rather

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[56] Because the Supreme Court has rarely addressed this issue it remains an open question. Some object to looking solely to the Supreme Court in determining the President's authority under the Constitution in wartime. For example, when examining the constitutionality of Lincoln's use of military commissions, Clinton Rossiter wrote "[T]he law of the Constitution is what Lincoln did in the crisis, not what the Court said later." CLINTON ROSSITER & RICHARD P. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 39 (2d ed. 1976). Yet, even Rossiter acknowledges that Lincoln's use of military commissions was "the most dubious and judicially assailable" of all of Lincoln's executive practices, and states that the use of military commissions in Indiana was "it must be agreed, plainly unconstitutional." *Id.* at 26, 36. His point merely underscores the Supreme Court's difficulty in acting to actually constrain Executive action.

[57] Bederman, *supra* note 46, at 838.

[58] MacDonnell, *supra* note 27, at 19, 20. *See also* JONATHON LURIE, ARMING MILITARY JUSTICE 9 (1993).

[59] BLACKS LAW DICTIONARY 852 (6th ed. 1990).

[60] RICHARD C. DAHL & JOHN F. WHELAN, THE MILITARY LAW DICTIONARY 89 (1960).

[61] MacDonnell, *supra* note 27, at 25.

than a constitutional court, has jurisdiction to try a case is an exceedingly difficult task. While the Constitution does not explicitly sanction the use of military tribunals (or any non-Article III court), military courts have been used throughout history and are at least implicitly recognized in the Constitution.[62]

In practice, both congressional statutes and unwritten common law have limited the jurisdiction of military tribunals. By publishing the Articles of War, and subsequently, the Uniform Code of Military Justice, Congress codified who can be tried for what offense at military court-martial.[63] However, Congress has not codified the jurisdiction of military commissions and instead has authorized their jurisdiction "against offenders or offenses that by the law of war may be triable by military commissions."[64] As Commander in Chief, the President often relies on his Article I authority and this congressional legislation to use military commissions to prosecute people and offenses consistent with historical practice and international law.[65] While these factors help define the jurisdiction of military courts, neither congressional statute, historical practice, nor international law can extend the jurisdiction of a military court beyond the limits set forth in the Constitution. Therefore, the Constitution's requirement that Article III hear all cases and controversies provides the ultimate limitation on the jurisdiction of military tribunals.[66] However, universal agreement that Article III of the

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[62] *See supra* notes 20-23 and accompanying text. The Constitution implicitly recognizes military tribunals in the Fifth Amendment, where it states, "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." U.S. CONST. amend V.

[63] MacDonnell, *supra* note 27, at 26. The current UCMJ includes Articles 2, 5, 17, and 18, which establish personal jurisdiction, and Articles 18-20 which define the subject matter jurisdiction. *See* LURIE, ARMING MILITARY JUSTICE, *supra* note 58 at 4-8; WINTHROP, *supra* note 26, at 17 (noting that both the Articles of War and courts-martial "predate the Constitution being derived from those adopted by the Constitutional Congress in 1775 and 1776.").

[64] *See, e.g.*, Act of June 4, 1920, ch. 227, art. 15, 41 Stat. 790 (1921). For a full discussion see *infra* Part IV.B-D.

[65] *See* WINTHROP, *supra* note 26, at 831-33 (supporting the commander's inherent authority without Congressional approval); *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding the president's authority based on Congressional legislation).

[66] Recognizing this obvious principle, Secretary of War Henry Knox noted "the change in the Government of the United States will require the articles of war be revised and adopted to the Constitution." Wiener, *supra* note 27, at 4. Similarly, in ratifying the Article of War Congress simply adapted the Articles of War as they existed prior to the Constitution "as far as the same may be applicable to the constitution of the United States." Act of April 30, 1790, ch 10, Sec 13, I Stat. 121.

Constitution limits the jurisdiction of military tribunals does not equal agreement on who determines the boundaries of military tribunals or what those boundaries are. Specifically unresolved is the Supreme Court's role in determining the jurisdiction of military courts.

III. Judicial Review of Military Tribunals

A. Collateral Review of Military Tribunals

Under America's system of judicial review, the United States Supreme Court is the final arbiter of the Constitution.[67] Because military tribunals are federal tribunals that are not part of the judiciary under Article III, initially there was great uncertainty about whether civilian courts had any legal purview over military courts.[68] Historically, military courts were not subject to direct review from any constitutional court.[69] Having no direct appellate review over military tribunals, civilian courts (both state and federal) would only review a military tribunal decision when a petitioner sought relief from a military court action by some form of collateral attack.[70] Before the Civil War there were very few collateral challenges of military court actions brought to the federal judiciary.[71] The only collateral challenges to reach the Supreme Court during that time were lawsuits seeking to recover fines and other damages from an action at a military court-martial.[72] When these cases arose, a constitutional court would determine whether the military court exceeded its authority.[73]

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[67] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1802) ("it is emphatically the province and duty of the judicial department to say whet the law is."). For historical background information on *Marbury* and its progeny, see ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 36-44 (1960).

[68] LURIE, ARMING MILITARY JUSTICE, *supra* note 58, at 29.

[69] *See* WINTHROP, *supra* note 26, at 50.

[70] *See id.* at 51. Much of the collateral review of military courts actually occurred in state court until 1871 when the U.S. Supreme Court limited that venue. *See, e.g.*, *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871); Ableman v. Booth, 62 U.S. 506 (1859). Moreover, virtually all of the remaining cases were originally heard in federal district courts or the federal court of claims.

[71] Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5 (1985).

[72] *Id.* at 20.

[73] *See* WINTHROP, *supra* note 26, at 53; Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

Collateral claims take many forms, such as suits for back pay, injunctive relief, and writs for mandamus, but the most prevalent collateral claim is an appeal for the writ of habeas corpus.[74] Although habeas claims ultimately became commonplace, the Civil War was the first time a habeas petition from a military court reached the Supreme Court.[75] The writ of habeas corpus protects individuals from unlawful restraint and detention by the Executive.[76] The right to habeas corpus exists in both British and American common law and receives explicit protection in the Constitution, which forbid suspension of "the Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may Require it."[77] The first Congress extended the right of habeas corpus to federal courts in the Judiciary Act of 1789.[78] Section 14 of that act authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same."[79] The current statutory authority implementing this constitutional right authorizes federal courts to hear a habeas petition from any person who claims to be held "in violation of the Constitution or laws or treaties of the United States."[80]

B. Direct Review of Military Tribunals

Thanks to the writ of habeas corpus and other forms of collateral relief, the Supreme Court has always exercised some form of review over military tribunals after military cases went through the appropriate district and appellate courts. Over the last half century, civilian review of military courts has gradually expanded. In 1950, Congress passed the Uniform Code of Military Justice (UCMJ).[81] Article 67 of the UCMJ

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[74] *See* Rosen, *supra* note 71 at 19-20; *see* Cox, *supra* note 42, at 20 (1987).

[75] *See Ex parte* Vallandigham 68 U.S. (1 Wall.) 243 (1864); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). The first court-martial to reach the Supreme Court on habeas was *Ex parte* Reed, 100 U.S. 13 (1879).

[76] *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention."); *see also* Roberto Iraola, *Enemy Combatants, the Courts, and the Constitution*, 56 OKLA. L. REV. 565, 580 (2003) (detailing both the history and purpose of habeas corpus).

[77] U.S. CONST. art. I, § 9, cl. 2.

[78] Act of Sept. 24, 1789, ch 20. § 14, 1 Stat. 82. (1789).

[79] *Id.*

[80] 28 U.S.C.S. §§ 2241(c)(3) (LEXIS 2005).

[81] *See* Act of May 5, 1950, ch. 169, 39 Stat. 619 (1950). For a detailed history and background of the UCMJ see F. Edward Barker, *Military Law—A Separate System of*

created the Court of Military Appeals to review the decisions of military courts-martial. This appellate court has changed names throughout its history and is currently referred to as the Court of Appeals for the Armed Forces (CAAF). While CAAF provides civilian review over courts-martial, Congress chose to make CAAF an Article I court, denying these judges the protections of lifetime tenure and fixed salaries of Article III judges.[82] Although CAAF provides significant civilian oversight over courts-martial and is instrumental in the development of military law,[83] it is not a constitutional court and does not provide independent Article III review over military tribunals. In 1983, Congress amended the UCMJ to include some Article III review by granting the Supreme Court the power to issue a writ of certiorari over CAAF decisions.[84] Even with this expansion of direct review, the effect on military courts has been limited because the Supreme Court has used the writ of certiorari sparingly throughout its twenty plus year history.[85] Finally, Congress' statutory grant of power to the Supreme Court for direct review applies only to

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Jurisprudence, 36 UNIV. OF CIN. L. REV. 223 (1967)*;* Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

[82] *See* Cox, *supra* note 42, at 14-17. While there was initially some question about whether or not the CAAF was a "court" or an "executive agency," in 1968 Congress eliminated any doubt by stating explicitly that CAAF would be known as a court created under Article I of the Constitution. *See* Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 179. It is interesting to note that in 1983, as part of the Military Justice Act Congress established a commission to make improvements to military justice. One of the committee's recommendations was to make CAAF an Article III court. *See* THE MILITARY-JUSTICE ACT OF 1983 ADVISORY COMMISSION REPORT 9 (1984). This recommendation was never implemented.

[83] For a thorough, detailed, and heavily annotated analysis of the history of the Court of Military Appeals see Johnathon Lurie's superb two-volume work: LURIE, ARMING MILITARY JUSTICE, *supra* note 58; and JONATHON LURIE, PURSUING MILITARY JUSTICE (1998). Professor Lurie has also written a more accessible one volume work, JONATHON LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980 (2001).

[84] Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405-06 (codified at 28 U.S.C. § 1259 (LEXIS 2005)).

[85] *See* Eugene R. Fidell, *Review of Decisions of the United States Court 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) (noting that the Court only granted the writ of certiorari to courts-martial ten times in its twenty-year history, and has rarely, if ever, granted relief for a defendant); *see also* SUPREME COURT PRACTICE 84 (Robert L. Stern, et. al. eds., 7th ed. 1993) (stating "since the Supreme Court acquired certiorari jurisdiction over military cases in 1984, the Court has received more than 200 certiorari petitions . . . through the end of its 1993 Term, the Court had granted only five.").

military courts-martial and does not apply to other military tribunals.[86] Thus, except for courts-martial, habeas corpus petitions and other forms of collateral attack remain the primary method for obtaining constitutional court review over military tribunals.

C. Jurisdiction: The U.S. Supreme Court's Test for Military Tribunals

Even though federal courts have always been vested with some power to review military tribunals, "the relationship between [military courts] and the regular federal courts is extremely tenuous."[87] In practice, the federal courts, and in particular the U.S. Supreme Court, have been extremely reluctant to review the proceedings of military courts because military courts comprise an entirely separate system of justice.[88] In fact, throughout most of American history, the Supreme Court consistently held that constitutional courts could not review the merits of any military tribunal decision.[89] In *Dynes v. Hoover*, the Supreme Court specifically limited civilian court review to the technical jurisdiction of a military court.[90] Indeed, for the first 150 years of American history, federal court review of military courts was predicated on "the single inquiry, the test [for] jurisdiction."[91]

In determining the constitutionality of military tribunals, federal courts examine both subject matter jurisdiction and personal jurisdiction of the military tribunal.[92] Subject matter jurisdiction requires a military

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[86] It appears that under the Military Justice Act neither the CAAF nor the Supreme Court have judicial review over military tribunals. *See* The Military Justice Act of 1983, § 10 (codified at 28 U.S.C. § 1259 (2000). *But see* Glazier, *supra* note 12, at 2075 (arguing that the broad language in that Act could be construed as applying to military commissions as well).

[87] ROSSITER & LONGAKER, *supra* note 56, at 103.

[88] *Id.*

[89] *See* Rosen, *supra* note 71, at n.9 (listing the long line of cases and numerous law review articles supporting this proposition).

[90] 61 U.S. (20 How) 65, 81-82 (1858). *Dynes* is regarded as the seminal case limiting civilian court review of military tribunals. It held: "When the sentences of courts-martial which have been convened regularly and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them." *Id.* at 82. *See also* Rosen, *supra* note 71, at 21-22.

[91] United States v. Grimley, 137 U.S. 147, 150 (1890).

[92] *See* Rosen, *supra* note 71, at 31-33. As Colonel (COL) Rosen correctly points out, the Court also defines technical jurisdiction to include two other factors it will review: whether a military tribunal was lawfully convened and constituted, and whether the

tribunal to have the legal authority to try the offense charged,[93] and over the years, federal courts have looked at many different scenarios in so determining. For example, federal courts examined whether an offense was a war crime,[94] took place in a geographic area where military courts had authority,[95] or was committed during time of war or occupation.[96] Similarly, federal courts heard challenges to the personal jurisdiction of military courts from individuals claiming that they were not properly subject to military tribunals. These challenges came from "civilians, discharged military prisoners, reservists, deserters, and service members held beyond the term of their enlistments and other unlawful enlistment claims such as being a minority, overage, a non citizen, or a deserter from previous services."[97]

Despite this longstanding view that constitutional courts could review only the *jurisdiction* of military courts, the Supreme Court modestly expanded the scope of federal court review in 1953. In *Burns v. Wilson*,[98] the petitioner did not assert jurisdictional error. Instead, he claimed that "gross irregularities and unlawful practices rendered the trial and conviction invalid."[99] Breaking with earlier case law, the Supreme Court asserted that in addition to determining the jurisdiction of military courts-martial, federal courts could also review constitutional questions if the military court failed to deal "fully and fairly" with the constitutional claim.[100] In *Burns*, the Supreme Court held "it is the limited function of the civil courts to determine whether the military has given fair consideration to each of these claims," but determined that the military court had done so in this particular case.[101]

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sentence was duly approved and authorized by law. *See id* at 34-35. These two areas deal mainly with statutory issues such as whether court-martial or other military court complied with the Article of War. Generally, these questions are not relevant in defining the constitutional relationship between military courts and Article III courts. As such, these two areas are given minimal attention in this article.

93 *See* Rosen, *supra* note 71, at 31.

94 *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1 (1942).

95 *See e.g.*, Aderhold v. Menefee, 67 F.2d 345 (5th Cir. 1933).

96 *See, e.g.*, Kahn v. Anderson, 255 U.S. 1 (1921).

97 Rosen, *supra* note 71, at 32-33. *See, e.g.*, Johnson v. Sayre, 158 U.S. 109 (1895), Kahn v. Anderson, 255 U.S. 1 (1921); United States *ex rel.* Pasela v. Fenno, 167 F.2d 593 (2d Cir.); *Ex parte* Smith, 47 F.2d 257 (D. Me. 1931); Barrett v. Hopkins, 7 F. 312 (C.C.D. Kan. 1881); United States v. Grimley, 137 U.S. 147 (1890); *Ex Parte* Kerekes, 274 F. 870 (E.D. Mich. 1921); *In re* McVey, 23 F. 878 (D. Cal. 1885).

98 346 U.S. 137 (1953).

99 Burns v. Lovett, 104 F. Supp. 312, 313 (D.D.C. 1952).

100 Burns v. Wilson, 346 U.S. 137, 144 (1953).

101 *Id.* at 144.

Since *Burns*, the Supreme Court has given very little guidance on how to apply the "full and fair" consideration test.[102] Thus, the federal courts' right to review constitutional issues associated with military tribunals has been a largely empty gesture. In fact, the Supreme Court has never declared any procedure, practice, or rule of a military tribunal unconstitutional. While the Court continues to follow *Burns* and assert that constitutional protections apply to military courts,[103] the Court has never found any such constitutional violation in a military trial.[104] The only constitutional limitation the Supreme Court has ever placed on a military tribunal is an assertion that the military court lacked either personal or subject matter jurisdiction. Based on this history, it is unlikely the Supreme Court will strike down the procedures of the current military commission against Hamdan. If the Supreme Court is going to place any constitutional limitation on military tribunals, it will likely do so, as it has throughout history, by identifying a limit on the jurisdiction of military tribunals.

The nature of collateral review requires subordinate courts to review military tribunals before reaching the United States Supreme Court.[105] Although there is a wealth of history and persuasive analysis provided in various lower court opinions, this article focuses only on U.S. Supreme Court decisions both because it is the final interpreter of the Constitution, and because Hamdan is now pending before the Court.[106] Part IV examines the history of military tribunals and describes how the United States Supreme Court has defined the jurisdiction of these military tribunals.

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[102] *See* Rosen, *supra* note 71, at 7.

[103] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."); Weiss v. United States, 510 U.S. 163, 195 (1994). In actuality, the Court has never directly asserted that constitutional protections apply to military commissions and has even upheld the use of military commissions in some instances with very irregular procedures. *See, e.g.*, *In re* Yamashita, 327 U.S. 1 (1946).

[104] *See supra* note 15 and accompanying text.

[105] Prior to the Civil War state courts collaterally reviewed federal courts-martial decisions. In 1871, the Supreme Court held that state courts lacked the power to review federal habeas actions and eliminated state court review of federal military tribunals. *See, e.g.*, *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).

[106] For a good primer on state and federal court decisions, see generally Rosen, *supra* note 71.

IV. Military Tribunals and U.S. Supreme Court Review Throughout American History

A. Military Tribunals from the Revolution to the Civil War

1. Authority and Use of Military Tribunals 1775-1861

Although early colonists fighting under the British flag were subject to the British courts-martial system, the Continental Congress provided for the first purely national American military tribunals by publishing the 1775 Articles of War.[107] The 1775 Articles of War set forth sixty-nine articles to regulate the procedure and punishment of federal Soldiers, based heavily on the existing code of the British Army.[108] In 1776, the Continental Congress passed a statute explicitly subjecting spies to capital punishment under the Articles of War.[109] Because General (GEN) George Washington found the 1775 Articles of War insufficient,[110] Congress established a committee comprised of Thomas Jefferson, John Rutledge, James Wilson, and R.R. Livingston to expand the existing Articles of War.[111] The Continental Congress adopted these revised Articles of War on 20 September 1776, [112] expanding the power of military tribunals, especially the punishments that courts-martial could impose.[113] Following victory in the Revolutionary War and ratification

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[107] *See* Articles of War of 1775, *reprinted in* WINTHROP, *supra* note 26, at 953. For a thorough history of the evolution of the Articles of War, *see id.* at 21-24. Prior to passage of the UCMJ, the Army was governed by the Articles of War, and the Navy was governed by a separate code known as Articles for Government of the Navy. When discussing military law statutes prior to the UCMJ, this Article refers to the Articles of War because it was the law that effected the largest military population. Additionally, while the Rules for the Navy are still subject to the Constitution, the "law of the high seas has always been steeped in ancient traditions." John F. O'Connor, *Don't Know Much about History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts Martial*, 52 U. MIAMI L. REV. 177, 193 (1997). For a history of the naval justice system, see *id.* at 191-96.

[108] WINTHROP, *supra* note 26, at 22.

[109] *Id.* at 22. Congress ordered that the Act of August 21 1776, which criminalized spying be "printed at the end of the rules and articles of war." *Id.*

[110] *See* LURIE, ARMING MILITARY JUSTICE, *supra* note 58, at 4.

[111] WINTHROP, *supra* note 26, at 22.

[112] *See* Articles of War of 1776, *reprinted in* WINTHROP, *supra* note 26, at 961.

[113] *See id.* at 961. While the 1775 Articles only allowed the death penalty for three offenses, the 1776 Articles allowed it for sixteen different offenses. Under the 1776 Articles the offenses punishable by death were mutiny and sedition (2, art. 3); failure to suppress mutiny and sedition (2, art. 4); striking a superior officer in the execution of his duties (2, art. 5); desertion (6, art. 1); sleeping on post (13, art. 6); causing a false alarm in camp (13, art. 9); causing violence to persons bringing provisions into camp (13, art. 11);

of the Constitution, Congress adopted the 1776 Articles of War "as far as the same may be applicable to the constitution of the United States."[114] Congress passed a complete revision of the Articles of War in 1806, recognizing the need to draft a new code to comply with the Constitution and the Bill of Rights.[115] This Code remained intact without significant modification throughout the War of 1812, the Mexican War, and the Civil War, until 1874.[116]

By passing the Articles of War in 1775, America's Founding Fathers empowered Congress to define who and what could be subject to a military tribunal, rather than relying on the discretion of military commanders.[117] In accordance with the Articles of War, GEN Washington court-martialed numerous Soldiers for desertion and other congressionally specified offenses.[118] Consistent with congressional legislation, and in addition to convening courts-martial, GEN Washington convened military tribunals against people accused of spying for the British. The most notable of those trials was Major (MAJ) John Andre's in 1780.[119] Major Andre was captured in civilian clothes carrying the plans of the West Point defense fortifications he allegedly received from General Benedict Arnold.[120] Washington ordered MAJ Andre charged as a spy before a military tribunal called a Court of Inquiry.[121] Despite his protests,[122] the Court judged Andre guilty and recommended he be put to death by hanging.[123]

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misbehavior before the enemy (13, art. 13); casting away arms or ammunition (13, art. 14); disclosing the watch-word (13, art. 15); forcing a safeguard (13, art. 17); aiding the enemy (13, art. 18); correspondence with the enemy (13, art. 19); abandoning post in search of plunder (13, art. 21); and subordinate compelling surrender (13, art. 22). *Id.*; *see also* O'Connor, *supra* note 107 (discussing the history of capital punishment in the military).

[114] Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121. In 1789, Congress adopted the 1776 Articles of War. *See* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. The next year Congress added the phrase "as far as the same may be applicable to the constitution of the United States."

[115] WINTHROP, *supra* note 26, at 23; *see also* Louis Fisher, *Military Tribunals: Historical Patterns and Lessons*, CONG. RES. SERVICE 4 (2004). Fisher cites Representative Barnum who reminded the House that the rules and regulations for the army needed to be revised to meet the changes of a Constitutional government).

[116] *See* Cox, *supra* note 42, at 6; WINTHROP, *supra* note 26, at 22.

[117] Fisher, *Military Tribunals*, *supra* note 115, at 4.

[118] For a superb history of courts-martial in this era, *see* JAMES C. NEAGLES, SUMMER SOLDIERS, A SURVEY AND INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL (1986).

[119] Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 832 (1948).

[120] *See* WILLIAM S. RANDALL, BENEDICT ARNOLD: PATRIOT AND TRAITOR 867-69 (1990).

[121] Both Major (MAJ) Andre and his assistant Joshua Hett Smith were tried for spying, presumably under the statute passed by Congress. While MAJ Andre's trial was called a

While Congress made few substantive changes to the Articles of War following the Revolutionary War, military leaders occasionally convened military tribunals that were outside the authority of the Articles of War. During the War of 1812, then-General Andrew Jackson placed the city of New Orleans under martial law.[124] After GEN Jackson's heroic victory over the British in January 1815, GEN Jackson refused to terminate martial law, sparking a confrontation with New Orleans leaders.[125] During this period of tension, a state legislator, Louis Loullier, published an article in the local newspaper critical of Jackson's conduct.[126] General Jackson promptly arrested Loullier for inciting a mutiny and for spying.[127] After Loullier's arrest, a federal judge, Dominick Hall, issued a writ of habeas corpus ordering Loullier's release because martial law was unjustified since the British were now in retreat. In response, Jackson arrested Judge Hall for "aiding, abetting and exciting mutiny."[128] General Jackson convened a court-martial to try Loullier for mutiny and spying. The court-martial dismissed the charges believing that under the Articles of War, the court-martial lacked jurisdiction over Loullier, a civilian.[129] Dissatisfied with the result and unlikely to secure a conviction in a court-martial against Judge Hall, Jackson kept Loullier in jail and banished Judge Hall from the city. The following day, confirmation of the peace treaty arrived, and Jackson revoked martial law and released Loullier.[130] After restoration of civil law, Judge Hall returned to New Orleans and accused GEN Jackson of contempt of court for refusing to obey the court's writ of habeas corpus and for imprisoning

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court of inquiry, Joshua Smith's trial was called a special court-martial. *See* Green, *supra* note 119, at 833. The fact that these two men were "tried" for the same offense under military tribunals of different names demonstrates how interchangeable the names of military tribunals can be.

[122] Andre contended that he was a British soldier and thus should be sentenced to death by firing squad instead of by hanging which was generally reserved for spies. General Washington denied his request because he was captured in civilian clothes, and initially gave a false name to his captors. *See* RANDALL, *supra* note 120, at 868-69.

[123] *See id.*

[124] *See* Robert Remini, *Andrew Jackson and the Course of American Empire, 1767-1821* 310 (1977); *see also* Jonathan Lurie, *Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam"*, 126 MIL L. REV. 133 (1989).

[125] Remini, *supra* note 124, at 310.

[126] *Id.* at 310.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 312.

[130] *Id.*

the judge. Over Jackson's protestations, the Judge held him in contempt, and fined him a thousand dollars.[131]

Notwithstanding his earlier experience, during the Seminole War in 1818, GEN Jackson again turned to military courts-martial to prosecute two British subjects for assisting the Creek Indians in waging war against the United States.[132] Alexander Arbuthnot was charged with spying, inciting, and aiding the Creek Indians, while Robert Ambrister was charged only with aiding and abetting the Creeks in their war against the United States.[133] While Arbuthnot was found not guilty of spying, the "special" court-martial found both Arbuthnot and Ambrister guilty of several charges of assisting the Indians.[134] The court-martial originally sentenced both men to death, but ultimately reconsidered Ambrister's punishment and sentenced him to fifty lashes and one year confinement. General Jackson ignored the court's revised decision and executed both men.[135] General Jackson's courts-martial and execution of Arbuthnot and Ambrister provoked great criticism[136] and resulted in condemnation by the House Committee on Military Affairs, which stated that the courts-martial had "no cognizance or jurisdiction over the offenses charged."[137] Similarly, a Senate Committee established to investigate the conduct of the Seminole War concluded that Jackson's actions were an "unnecessary act of severity on the part of the commanding general, and a departure from . . . the dictates of sound policy."[138] While the House ultimately passed a resolution supporting the trial and execution of Arbuthnot and Ambrister, the Senate never took action on the committee report or the legality of GEN Jackson's actions.[139]

Despite GEN Jackson's isolated use of military tribunals in the early nineteenth century, it was not until America's occupation of Mexico in 1847 that U.S. forces used military tribunals on a widespread basis to try

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131 *Id.*
132 WINTHROP, *supra* note 26, at 832.
133 *See* Fisher, *supra* note 115, at 9.
134 *Id.*
135 Indeed Winthrop argued that Jackson's action of overriding the sentence was "wholly arbitrary and illegal [and] for such an order and its execution a military commander would now be indictable for murder." WINTHROP, *supra* note 26, at 464.
136 *Id.*
137 Fisher, *supra* note 115, at 10.
138 *Id.* at 11.
139 *Id.*

both people and offenses not specified by the Articles of War.[140] As a result, it is generally agreed that the true origin of the American military commission is the Mexican War of 1846.[141] During the United States occupation of Mexico, both U.S. Soldiers and Mexican citizens committed many common law crimes.[142] However, the Articles of War did not provide military commanders with the authority to punish Soldiers for crimes against civilians. Nor did the Articles of War extend military jurisdiction over Mexican citizens under occupation.[143] While commanding in Mexico, GEN Scott noted that military commanders lacked the authority to impose "legal punishment for any of those offences, for by the strange omission of Congress, American troops take with them beyond the limits of their own country, no law but the Constitution of the United States, and the rules and articles of war."[144] He stated that the Constitution and Articles of War "do not provide any court for the trial and punishment of murder, rape, theft, [etc.] . . . no matter by whom, or on whom committed."[145] Understandably, GEN Scott did not want to use local Mexican courts to prosecute U.S. Soldiers charged with crimes against Mexican citizens. Nor did he trust Mexican courts to prosecute Mexican citizens accused of crimes against U.S. forces. General Scott therefore asked Congress to pass legislation amending the Articles of War to cover these crimes.[146] When Congress failed to take action, GEN Scott took matters into his own hands, and published an order invoking martial law and establishing military commissions "until Congress could be stimulated to legislate on the subject."[147] After issuing this "addition to the written military code prescribed by Congress in the rules and articles of war,"[148] Scott

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[140] *See* WINTHROP, *supra* note 26, at 832 ("It was not till 1847, upon the occupation by our forces of the territory of Mexico in the war with that nation, that the military commission was, as such, initiated.").

[141] *See* Glazier, *supra* note 12, at 2027.

[142] Scott knew from the study of Napoleon's men and military history that lawlessness of soldiers would incite guerilla uprisings. As such, he wanted to impose martial law to protect Mexican property rights and prevent guerilla war. *See* TIMOTHY D. JOHNSON, WINFIELD SCOTT, THE QUEST FOR MILITARY GLORY 166-68 (1998).

[143] 2 MEMOIRS OF LIEUT. GENERAL SCOTT 392 (1864).

[144] *Id*. at 392.

[145] *Id.* at 393.

[146] *Id.* at 392. Actually, GEN Scott did not approach Congress directly, but used his chain of command by drafting an order to establish military commissions and presenting the order to the Secretary of War and the Attorney General. The Secretary of War forwarded this request to Congress recommending they pass legislation authorizing military commissions. Fisher, *supra* note 115, at 12.

[147] SCOTT, *supra* note 143, at 393.

[148] JOHNSON, *supra* note 142, at 165.

proceeded to prosecute both Mexicans citizens and U.S. Soldiers by military commissions for common law crimes. In addition to convening courts-martial and military commissions, GEN Scott appointed a third military tribunal called a "Council of War," tasked with prosecuting violations of the law of war.[149] This War Council heard cases alleging violations of the law of war against both Mexican and U.S. civilians.[150]

2. U.S. Supreme Court Review of Military Tribunals 1775-1861

Although military commanders like Generals Jackson and Scott occasionally used military tribunals, because these tribunals were not authorized by Congress and were never reviewed by the Supreme Court, it is difficult to assess their precedential value. While GEN Jackson's use of military courts was heavily criticized,[151] GEN Scott's use of military courts was more widely accepted. While acknowledging congressional authority to legislate, many scholars favorably view their use as an interim common law measure in the absence of specific legislation.[152] Prior to the Civil War, Supreme Court review of military tribunals was limited to collateral review of military courts-martial. In

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[149] WINTHROP, *supra* note 26, at 832.

[150] Glazier, *supra* note 12, at 2033. Commander Glazier argues that Councils of War were "short-lived experiments that should have no precedential value." He bases this assertion in part on the fact that "council of war" courts were combined with military occupation "military commission" courts during the Civil War. *Id.* However, others scholars, like Lieutenant Colonel (LTC) Bickers, argue that GEN Scott used the term "council of war" to highlight the jurisdictional distinction between the two courts. A distinction, Bickers argues, that remains important to analyzing the current military commissions being used in the Global War on Terrorism. *See* Bickers, *supra* note 33, at 909-12.

[151] WINTHROP, *supra* note 26, at 464 (noting the negative reaction to Jackson's action and the debate it fostered in Congress for years to come). Professor Lurie noted that in the case of Jackson, "it is not clear what was settled [because] the real issue—was Jackson justified in detaining Judge Hall and disobeying the writ—was never resolved. . . Whether or not a definitive answer could have served as a guide for future decisions can never be known. The actual record shows pragmatic rather than doctrinal responses that on the whole are not encouraging." Lurie, *supra* note 124, at 144. *But see* WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 354 (1904) (supporting the inherent authority of Jackson and other military commanders to take whatever action they deemed appropriate).

[152] *See, e.g.*, STEPHEN V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 15 (2d ed. 1862) (supporting the use of military commissions to try "offenses not punishable by courts-martial" or within the "jurisdiction of any existing civil courts."); BIRKHIMER, *supra* note 151, at 354.

Wise v. Withers[153]—the first case to reach the U.S. Supreme Court on collateral attack—the plaintiff sued to recover a fine he had been charged at court-martial for refusing to report for military duty.[154] The plaintiff claimed that because he was a justice of the peace and a congressional statute exempted "officers of the United States" from military service, he could not be ordered to military duty.[155] When the plaintiff failed to appear for duty, a court-martial imposed a fine in his absence and sent an officer to his house to take property to pay the debt.[156] The plaintiff's suit was for trespass against the officer. The Supreme Court agreed with the plaintiff's position, holding, that because he was statutorily exempt from military duty, the court-martial "clearly lacked its jurisdiction."[157] The Court relied on the fact that Congress had specifically excluded federal officers from military service as a justification for limiting the court-martial jurisdiction.

Twenty-one years later, in *Martin v. Mott*,[158] the Supreme Court again addressed the issue of military jurisdiction. Like *Wise*, *Martin* involved a suit to recover property that was taken as a fine at court-martial when the accused failed to appear for military duty during the War of 1812.[159] The plaintiff alleged many different jurisdictional errors, including that because he refused to enter military service, he was not "employed in the service of the United States" as required under the Articles of War and therefore must be tried by civil court instead of by court-martial.[160] Writing for the Court, in a somewhat strained opinion, Justice Story held that the plaintiff was subject to court-martial because he was ordered to military duty even though he was "not employed in military service of the United States" under Congress' Act of 1795, and thus not subject to *all* of the Articles of War.[161] Ironically, the Court held

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153 7 U.S. (3 Cranch.) 331 (1806).
154 *Id.*
155 *Id*. at 335-36.
156 *Id* at 331-32.
157 *Id.* at 337.
158 Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).
159 *Id.* at 33-34.
160 *Id.* at 34.
161 *Id.* Justice Story relied on Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). *Houston* held that a militia man refusing the call to active service could be tried in either a state or federal court-martial. *Id.* at 29. This was based on Congressional Act of April 18, 1814, which authorized a court-martial for "the trial of militia, drafted, detached and called forth for the service of the United States . . . shall be conducted in the manner prescribed by the rules and articles of war." *Id.* at 14. Because that case involved a state court-martial, the judge's pronouncement about the authority of federal courts-martial was

that someone *ordered* to military service might in fact be entitled to less procedural protections at courts-martial then someone who was actually *employed* in military service of the United States and subject to all of its protections.[162] In *Martin*, the Court bypassed the remaining procedural problems with the court-martial and held that once court-martial jurisdiction is determined, the court-martial judgment is conclusive.[163]

In 1857, the Supreme Court decided *Dynes v. Hoover*,[164] the seminal case concerning military jurisdiction. The plaintiff, Dynes, was a sailor who brought a damages action for false imprisonment against the United States after he was convicted for attempted desertion and sentenced to hard labor without pay.[165] Dynes argued that while he was charged with the offense of desertion at court-martial, he was found guilty only of *attempted* desertion, which was not listed as an offense under the Articles for Government of the Navy.[166] As such, the court-martial "had no jurisdiction or authority" to convict him of an offense not listed by congressional statute and not charged at his court-martial.[167] The Court reiterated that a court-martial acting without jurisdiction over an offense becomes a trespasser entitling plaintiff to a remedy.[168] Nonetheless, it found subject matter jurisdiction in this case.[169] Even though Congress failed to define attempted desertion as a crime, because Congress provided in the Navy Rules for the punishment of "unnamed offenses" which were "in accordance with the laws and nations of the sea," the Court found the court-martial had jurisdiction over Dynes' offense.[170] In addition to looking to congressional statutes to determine the jurisdiction of courts-martial, the Court went on to declare the limits of civil review over military tribunals. The Court held:

> With the sentences of courts-martial which have been convened regularly and have proceeded legally, and by

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merely dicta. It was not until *Martin* that the Court actually held that federal courts-martial over inductees were constitutional. *See Martin*, 25 U.S. at 34.

[162] *Martin*, 25 U.S. at 35.

[163] *Id.* at 38.

[164] Dynes v. Hoover 64 U.S. (20 How.) 65 (1858).

[165] *Id*. at 77.

[166] Act of 23, April, 1800, 2 Stat. 45 (1800). These rules were the Navy's equivalent of the Articles of War until the two were merged in 1950 under the Uniform Code of Military Justice. *See* Part IV.C1, *infra.*

[167] *Dynes*, 64 U.S. at 80.

[168] *Id*. at 82-83.

[169] *Id.* at 83.

[170] *Id.* at 82.

> which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, not are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrates or the civil courts.[171]

Following the War with Mexico, the Supreme Court decided two other cases that dealt more broadly with military jurisdiction, though not specifically with the jurisdiction of military courts. In *Fleming v. Page*,[172] the plaintiffs argued that during America's occupation of Mexico, under international law, Mexico was part of the sovereign territory of the United States. Because Mexico was not an independent sovereign, the plaintiffs alleged that it was illegal to charge an import tariff while bringing goods over the border.[173] The Court agreed that under international law then in existence, Mexico should be considered part of the United States.[174] Nevertheless, the Court stated that the Constitution mandates that a congressional declaration of war "can never be presumed for the purpose of conquest."[175] Rather, the President can expand the land of the United States only by specific congressional legislation giving the President treaty-making authority.[176] Similarly, in *Jecker v. Montgomery*,[177] the Navy identified a U.S. trade ship, *The Admittance*, that was illegally trading with Mexico and captured it as a prize of war.[178] Because military exigencies prevented the naval commander from sending *The Admittance* to a United States port, he left it in Mexico, where a presidential proclamation had created civil courts to adjudicate claims of captured property.[179] The Supreme Court held that "under the Constitution of the United States . . . neither the President nor any military officer can establish a court in a conquered country, and

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171 *Id*.
172 50 U.S. (9 How.) 603 (1850).
173 *Id.* at 614.
174 *Id*. at 615.
175 *Id*.
176 *Id*.
177 Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1852).
178 *Id.* at 513.
179 *Id.* at 513-14.

authorize it to decide upon the rights of the United States or of individuals in prize cases."[180]

In sum, prior to the Civil War, although the Supreme Court occasionally limited military authority, it never invoked the Constitution to limit the jurisdiction of military courts. Instead, the Court deferred broadly to congressional action in determining the authority of military tribunals. If Congress spoke clearly on the matter and exempted someone from military court by statute—as in *Wise*—the Court determined that the court-martial exceeded its personal jurisdiction. In general, the Court took a very expansive interpretation of Congress' grant of jurisdiction to military courts: Thus, the Court upheld the personal jurisdiction of a court-martial over draftees even though they were "not employed in the service of the United States."[181] In addition, the Court broadly construed Congress' statutory grant of subject matter jurisdiction, upholding a conviction of charges that were not specifically enumerated in the Articles of War (or even charged at trial), as long as they were "in accordance with the laws and nations of the sea."[182] During this era, the Court did not use the Constitution to limit the jurisdiction of military courts.

One reason for the Court's general deference to military courts in this era may have been that the military attempted to exercise jurisdiction only over a limited class of people and limited number of offenses. As one scholar noted, "military law . . . applied to a mere handful of individuals, all of whom were [S]oldiers by choice, and for the most part it denounced only offenses that were not punishable in courts of common law."[183] For example, throughout the nineteenth century, the Army narrowly interpreted the Articles of War provision, extending jurisdiction to "all persons serving with the armed forces" as strictly a wartime

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[180] *Id.* at 515. While the Court invalidated the use of Courts to determine prize cases and to decide upon rights of United States citizens, the Court did legitimize the establishment of military government in Mexico. *See* Leitensdorfer v. Webb, 61 U.S. (20 How.) 176, 178 ("[A]s occupying conqueror . . . these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power incompatible with them."); *accord* Cross v. Harrison, 57 U.S.(16 How.) 164, 189-90 (1853).

[181] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 34 (1827).

[182] Dynes v. Hoover, 64 U.S. (20 How.) 65, 80 (1858).

[183] Wiener, *supra* note 27, at 8. For an example of the actual laws in effect for the Army and Navy during this era, see Articles of War of 1806, ch. 20, 2 Stat. 359 (1800); Articles for the Government of the Navy, ch. 33, 2 Stat. 45 (1800).

measure and not applicable outside of armed conflict.[184] Because military courts were used infrequently, the Court rarely reviewed their decisions in this era. Of course, the Court did recognize some constitutional limits on the ability of the President and his military commanders during war.[185] In later years, the Court eventually invoked this notion—that the Constitution places some restraint on military power, even in war—in limiting the jurisdiction of military tribunals.

B. Military Tribunals from the Civil War to World War I

1. Authority and Use of Military Tribunals 1861-1914

The Civil War brought about increased use of military tribunals[186] even though Congress did very little to expand the jurisdiction of military courts.[187] Prior to the Civil War, Congress had only sanctioned the use of military courts-martial,[188] but in 1862, Congress passed a law that statutorily recognized the existence of military commissions.[189] However, this congressional act gave little specific guidance on the proper jurisdiction of such military commissions. Rather, this early statute merely endorsed the use of military commissions against people who were already subject to the Articles of War.[190] The first significant

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[184] *See* WINTHROP, *supra* note 26, at 131-32.

[185] *See supra* notes 172-180 and accompanying text.

[186] WINTHROP, *supra* note 26, at 834 (noting that during the Civil War and Reconstruction period military commissions "must have tried and given judgment in upwards of two thousand cases.").

[187] In fact, between 1806 and 1862 there were only twelve amendments to the Articles of War. *See* Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 n.305 (1990) (citing FREDERICK C. BRIGHTLY, ANALYTICAL DIGEST OF THE LAWS OF THE UNITED STATES, 1789-1757, at 83 (1858) and FREDERICK C. BRIGHTLY, ANALYTICAL DIGEST OF THE LAWS OF THE UNITED STATES, 1757-1763, at 1101-03 (1863)).

[188] Congressional acts also recognized military courts of inquiry and boards of general officers. *See, e.g.*, 2 Stat. 359, 370 (1862). While these were information-gathering bodies and not criminal courts, at times commanders used them in determining whether to punish enemy spies. *See supra* note 49.

[189] *See* 12 Stat. 598, sec. 5 (1862) (requiring the judge advocate general to keep records "of all courts-martial and military commissions.").

[190] *See, e.g.*, Glazier, *supra* note 12, at n.154 (stating "legislation enacted during the Civil War . . . only authorized [military commissions] to try persons already subject to court-martial jurisdiction."). While accurate for this first statute, subsequent statutes expanded military jurisdiction to people not identified in the Articles of War. *See, e.g.*, Act of July 2, 1864, ch. 215 § 6, 13 Stat. 394, 397 (1864) (authorizing trial by military commission of guerillas for war crimes not provided in the Articles of War). *See* discussion *infra* note

change to the Articles of War took place in 1863,[191] when Congress modified the Articles to extend the jurisdiction of both courts-martial and military commissions over several common law crimes that took place "in times of war or rebellion."[192] These crimes were neither purely military in nature nor directly related to the good order and discipline of the armed forces, as had been previously required by the Articles of War.[193] Subject matter jurisdiction expanded to include common-law crimes like murder, rape, and arson,[194] committed by members of the armed forces who were already subject to the Articles of War.[195] Congress "did not give [military] tribunals jurisdiction over citizens who were not in the military,"[196] but by expanding the subject matter jurisdiction of military tribunals for [S]oldiers' common law crimes, Congress gave military commanders the means to discipline Soldiers that General Scott sought during the Mexican War. As noted, this extension of military jurisdiction over Soldiers' common-law crimes was authorized only "in times of war or rebellion."[197] The Act of 1863 made several additional modifications to the Articles of War, such as subjecting spies to courts-martial or military commission,[198] and criminalizing resisting the draft.[199] Congress rejected President Lincoln's previous proclamation that citizens resisting the draft would be tried by military tribunal,[200] and instead required that individuals charged with resisting the draft would be prosecuted in civilian court.[201] The next year, in 1864, Congress enacted the first statute authorizing a trial by military commission for offenses that were not punishable by court-martial. Specifically, it allowed commanders to use "military

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202 and accompanying text. Moreover, the mere fact that Congress referenced military commissions at the time they were being used against citizens could be seen as implicit authorization for their continued use during the Civil War to prosecute civilians.

191 *See* Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736 (1863) (codified at 18 Rev. Stat. 1342, art. 58 (1875)).

192 *Id*. The Act held that "murder, manslaughter, robbery, larceny, and certain other specified crimes, when committed by military persons in time of war or rebellion, should be punishable by sentence of court-martial or *military commission*." *See also* WINTHROP *supra* note 26, at 833 (detailing several statutes passed in 1863 and 1864 that recognized the propriety of using military commissions or courts-martial).

193 *See* WINTHROP, *supra* note 26, at 667.

194 *See id.* at 689.

195 12 Stat. 736, sec. 30 (1863).

196 Fisher, *supra* note 115, at 20.

197 12 Stat. 736, sec. 30 (1863).

198 *Id.* at 737, sec. 38.

199 *Id.* at 735, sec. 25.

200 *See* Lincoln's Order, *infra* note 206.

201 12 Stat. 735, sec. 25 (1863).

commissions upon guerrillas for violation of the laws and customs of war."[202]

Following the end of the Civil War, Congress significantly modified military tribunal jurisdiction by passing the 1867 Reconstruction Acts.[203] This legislation gave military commanders the authority to try criminals by military commission instead of in civil court if the commander deemed it appropriate.[204] The Reconstruction Acts explicitly authorized military commanders to try civilians for common law crimes despite the fact that the civilians were not otherwise subject to the Articles of War.[205] Following Reconstruction, Congress took very little action with respect to military tribunals for almost forty years. It would take the turn of the century and World War I before any other significant revision of the Articles of War.

While Congress did very little to expand military jurisdiction during the Civil War, the President was not so constrained. Congress was in recess in April of 1861 when President Lincoln declared martial law and suspended the writ of habeas corpus between Washington and Philadelphia.[206] This action allowed military commanders to arrest anyone they deemed dangerous.[207] Lincoln defended the constitutionality of his actions and sought Congress' ratification of his decisions when Congress convened in an emergency session in July of 1861.[208] Congress ultimately authorized the President to suspend the writ of habeas corpus in 1863,[209] but did not explicitly authorize the use

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[202] Act of July 2, 1864, ch. 215 § 6, 13 Stat. 394, 397 (1864). During the Mexican War, GEN Scott used "military commissions" to punish common law crimes and "councils of war" to prosecute law of war violations. During the Civil War the two courts merged and the term military commission was retained to cover both types of courts. *See* WINTHROP *supra* note 26, at 833.

[203] An Act to provide for the more efficient Government of the Rebel States, ch. 153, § 3-4, 14 Stat. 428 (1867). This Act was passed over President Johnson's veto on March 2, 1867.

[204] *See id.*; *see also* WINTHROP, *supra* note 26, at 853.

[205] Other than the statute of 1864 authorizing commanders to execute military commission sentences for law of war violations, the Reconstruction Acts were the first and only congressional acts to explicitly authorize the use of military commissions.

[206] Letter from President Abraham Lincoln, to General Winfield Scott, *in* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 25 (1998) [hereinafter Lincoln's Order].

[207] *Id.* at 25.

[208] 6 LIFE AND WORKS OF ABRAHAM LINCOLN 3, 14 (Marion Mills Miller ed., 1907) [hereinafter LIFE AND WORKS OF ABRAHAM LINCOLN].

[209] Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (1863). On 6 August 1861, Congress passed legislation approving President Lincoln's acts, proclamations, and orders

of military tribunals. Instead, Congress required that the President inform the federal courts of every military prisoner and allowed the federal courts to release the prisoners if they were not properly indicted following their arrests.[210]

Following the examples of previous American generals like Jackson and Scott, field commanders initially convened military commissions in areas of declared martial law.[211] For example, in Missouri in August 1861, Major General (MG) Fremont published an order proclaiming that anyone found with a weapon would be court-martialed, and, if found guilty, shot.[212] Lincoln rebuked MG Fremont's unnecessarily harsh and broad order,[213] but military commanders continued to use military commissions in occupied territory and places under martial law.[214] In January 1862, MG Haddock sought and received permission from Washington to impose martial law and convene military commissions by arguing that the civilian courts were unable to maintain law and order.[215] On 24 September 1862, President Lincoln directly sanctioned the use of military commissions when he issued the following proclamation:

> During the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all person discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels

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respecting the Army and Navy "as if they had been issued and done under the previous express authority and direction of the Congress of the United States." Act of Aug. 6, 1861, ch 63, § 3, 12 Stat. 326. However, this Act did not address or support the President's suspension of habeas corpus.

[210] 12 Stat. 755, sec. 2 (1863).

[211] WINTHROP, *supra* note 26, at 830 (noting that martial law gives military tribunals jurisdiction over both law of war offenses and civil offenses that the commander feels are in the public interest).

[212] MARK E. NEELY JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 34-35 (1991).

[213] Fisher, *supra* note 115, at 18 (noting that Lincoln feared that shooting Confederate soldiers would lead to the shooting of Union soldiers, among other concerns Lincoln had with Fremont's order).

[214] WINTHROP, *supra* note 26, at 823-30.

[215] *See* NEELY, *supra* note 212, at 34; *see also* Fisher, *supra* note 115, at 18 (quoting General Halleck as saying "civil courts can give us no assistance as they are very generally unreliable."), *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES II 247 (1894) [hereinafter WAR OF THE REBELLION].

> against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions.[216]

Throughout the Civil War, commanders repeatedly used military tribunals to try civilians in areas under martial law or military occupation.[217] They were also used to prosecute Confederate Soldiers accused of violating the laws of war,[218] people accused of disloyal practices, and people fighting as guerrillas.[219]

In addition to their use during the Civil War, military tribunals were also used during this era to deal with other serious conflicts short of war. When fighting broke out between the Dakota (Sioux) Indians and American settlers in Minnesota, a military commission prosecuted nearly 400 Dakotas of murder, rape and robbery.[220] The military originally convicted 303 Dakotas and sentenced them to death, but ultimately executed only thirty-eight after President Lincoln commuted or pardoned the remaining sentences.[221] A military commission was also used in 1873 to prosecute Indians for killing an army general during a truce in the Moduc War.[222]

In May of 1865, President Andrew Johnson convened perhaps the most controversial military tribunal in American history: a military commission prosecuted the eight people accused of participating in the assassination of President Lincoln.[223] Four of the conspirators were

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[216] Proclamation Suspending the Writ of Habeas Corpus Because of Resistance to Draft (Sept. 24, 1862), *in* LIFE AND WORKS OF ABRAHAM LINCOLN, *supra* note 208, at 203. It is worth noting that Congress subsequently criminalized resisting the draft but stated that accused must be tried in civil court, not by a military tribunal. *See supra* note 201 and accompanying text.

[217] *See* NEELY, *supra* note 212, at 34.

[218] Examples of law of war violations prosecuted by military commission include robbing civilians and passing Union lines in civilian dress. WAR OF THE REBELLION, *supra* note 215, at 674-81 (1894). While the Union never recognized the Confederacy as an independent sovereign, Confederate soldiers were treated as legitimate belligerents and not tried for treason. *See* Chomsky, *supra* note 187, at n.328.

[219] *See* J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 175-76 (1951).

[220] *See* Chomsky, *supra* note 187 (providing a comprehensive and authoritative account on the Dakota Trials).

[221] Fisher, *supra* note 115, at 21.

[222] *See* KEITH A. MURRAY, THE MODUCS AND THEIR WAR 293-97 (1959).

[223] ROSSITER & LONGAKER, *supra* note 56, at 110 (calling the trial of Lincoln's assassins "easily the most spectacular of all military commissions."). Dr. Samuel Mudd, one of the convicted but not sentenced to death, challenged his conviction via habeas corpus. The

sentenced to death and ordered to hang, while the other four were sentenced to life in prison.[224] On 7 July 1865, Mary Surratt, the lone woman sentenced to death, convinced a federal judge to grant her petition for habeas corpus.[225] However, the judge relented upon receiving a written letter from President Johnson proclaiming the continued suspension of habeas corpus in this particular case, and the military executed Mary Surratt the next day.[226] The very next month, another military commission prosecuted and convicted Henry Wirz of abusing Union Soldiers in Andersonville, a prisoner of war camp in Georgia.[227] Notwithstanding evidence that indicated Wirz made several efforts to improve conditions at Andersonville,[228] he was found guilty of most of the charges and sentenced to death by hanging.[229]

Military commissions were also used in the South between 1867 and 1870 during the period of Reconstruction. In accordance with congressional statutes, military commissions were used whenever a

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district court rejected his claim and held that President Lincoln's murder was triable by military tribunal. *See* 17 F. Cas. 954 (S.D. Fla 1868). In 1950, Clinton Rossiter wrote "the pardoning of the three surviving accomplices in 1869, put an end to any possibility that the legality of the military commission would ever be tested in the courts." *Id.* at 112. While that statement seemed obvious at the time, amazingly, the battle over the validity of this military commission remains alive today. In 1992, Dr. Mudd's grandson got the Army Board for the Correction of Military Records to agree that the military commission lacked jurisdiction over the original case. The Secretary of the Army rejected the Army Board's recommendation that that Dr. Mudd's conviction be set aside and the case was heard in federal court in 1998. That court ruled that the Secretary of the Army's rejection of the Army Board's recommendation was not supported by substantial evidence in the record and remanded the case back for further hearings. Mudd v. Caldera, 26 F. Supp. 2d 113 (D.D.C. 1998). In 2001 the court held that the military tribunal did have jurisdiction to try Dr. Mudd for violations of the law of war. *See* Mudd v. Army, 134 F. Supp. 2d 138 (D.D.C. 2001). After Dr. Mudd's grandson (who was over 100 years old) died in 2002, the Court of Appeals ruled that the remaining family lacked standing to continue the challenge. Mudd v. White, 309 F.3d 819, 822 (D.C. Cir. 2002). As such, the controversy lives on.

[224] WILLIAM HANCHETT, THE LINCOLN MURDER CONSPIRACIES 65-70 (1986).

[225] ROSSITER & LONGAKER, *supra* note 56, at 111.

[226] *Id.* at 111. Mary Surratt's execution ended up being a major source of embarrassment for President Johnson when the Army Judge Advocate General later stated that he had presented President Johnson with a petition signed by five members of the military tribunal recommending clemency for Ms. Suratt. *See* HANCHETT, *supra* note 224, at 87. Johnson denied he had ever seen the petition until several days after Surratt was hanged. *Id.*.

[227] Trial of Henry Wirz, *reprinted in* H.R. EXEC. DOC. NO. 23, 40th Cong., 2d Sess. 1 (1868).

[228] *Id.* at 26, 40.

[229] *Id.* at 815.

commander believed a "resort to military jurisdiction was essential to the due administration of justice."[230] In addition, military tribunals were used in the Philippines and Puerto Rico following the Spanish-American War.[231]

2. Supreme Court Review of Military Tribunals 1861-1914

The extensive use of military tribunals during the Civil War era resulted in a sharp increase in the number of federal court cases challenging the validity of these military proceedings,[232] but suspension of the writ of habeas corpus meant that civilian court review remained extremely limited.[233] While several lower courts continued to issue writs of habeas corpus, the military disobeyed these writs, and the courts were powerless to enforce their judgments.[234] The most famous of these cases occurred in May 1861, when John Merryman was arrested as a suspected leader of a secessionist group intent on blowing up railroads and bridges in Maryland.[235] After his arrest, Merryman's attorney sought a writ of habeas corpus from Justice Taney, the Chief Justice of the Supreme Court, who was sitting in his capacity as a circuit judge. When the Chief Justice issued the writ directing the military to produce Merryman, the military commander refused, citing President Lincoln's suspension of the writ of habeas corpus.[236] Justice Taney issued a citation to hold the commander in contempt; however, the clerk of the court was unable to enter the military base to serve the writ.[237] Thereafter, Justice Taney issued his opinion that the military lacked authority to arrest anyone "not subject to the Articles of War, for an offense against the laws of the United States, except in the aid of the judicial authority, and subject to its

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[230] WINTHROP, *supra* note 26, at 853. Winthrop notes that during this time period military commissions were used relatively infrequently and did not try any law of war violations. *Id.* Moreover, because commanders generally let the state courts handle regular "crimes and disorders" there were only around two hundred military commissions convened throughout Reconstruction. *Id.*

[231] *See* BRIAN MCALLISTER LINN, THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899-1902, at 55-56 (1989); CHARLES MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 19-34 (1902).

[232] *See* Rosen, *supra* note 71, at 28.

[233] *See supra* notes 206-209 and accompanying text.

[234] RANDALL, *supra* note 219, at 157-63.

[235] *Ex parte* Merryman, 17 Fed. Cas. 144 (D.C. Md. 1861).

[236] REHNQUIST, *supra* note 206, at 32-33.

[237] *Merryman*, 17 Fed. Cas. at 147.

control."[238] Recognizing the court's inability to implement this order, Justice Taney directed his clerk to transmit a copy to President Lincoln to assist him "in fulfillment of his constitutional obligation to take care that the laws be faithfully executed."[239] President Lincoln ignored Taney's order and continued to confine Merryman, eventually indicting him for treason.[240] However, Merryman was never brought to trial either by military commission or before a civilian court.[241]

Following Chief Justice Taney's conflict with President Lincoln, the Supreme Court took a very deferential approach to the President's authority to detain people and to use military tribunals. In *Ex parte Vallandigham*,[242]—the lone case concerning military trials to reach the Supreme Court during the war—the Court sidestepped the issue of the military court's jurisdiction by holding that the Court lacked direct appellate authority over military tribunals.[243] The Supreme Court did not hear another case involving the authority of military tribunals until 1866, well after the war was over, and a year after President Lincoln had been assassinated.[244] The Court's decision that year is among the most significant Supreme Court holdings defining the jurisdiction of military tribunals.

Lambdin Milligan was an Indiana attorney active in Democratic politics.[245] He was arrested in the summer of 1864, charged with conspiring against the Union, and tried by military commission.[246] On 21 October 1864, the military commission found Milligan guilty and

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[238] *Id*. at 153.
[239] *Id.*
[240] *Id.*
[241] Lincoln's Order, *supra* note 206, at 38-39.
[242] 68 U.S. 243, 1 Wall. 243 (1864).
[243] *Id.* at 251. The Court was able to evade this issue because Vallandigham's request to the Supreme Court came as a writ of certiorari instead of a writ of habeas corpus. The Court held that it lacked direct appellate review to entertain the certiorari writ, and as the Supreme Court, it lacked original jurisdiction to issue a habeas corpus order. *Id*. at 253-54. Some scholars argue that this decision was a case of the Court trying to avoid the issue during time of war because if the Court wanted to decide Vallandigham's case it could have converted the petition for certiorari to one for a writ of habeas corpus. *See* ROSSITER & LONGAKER, *supra* note 56, at 37.
[244] *See* ROSSITER & LONGAKER, *supra* note 56, at 30 ("nothing more concerning the legality of military commissions was heard in the courts of the United States until the end of the war."); *see also* Rosen, *supra* note 71, at 29 (noting that the first court-martial to reach the Supreme Court on habeas corpus did not occur until 1879).
[245] Lincoln's Order, *supra* note 206, at 89.
[246] *Id.* at 83.

sentenced him to hang.[247] Milligan petitioned for habeas corpus arguing that the military tribunal lacked jurisdiction over him and that he was entitled to a trial by jury in civilian court. The Supreme Court held that the military commission lacked jurisdiction over Milligan because the law of war "can never be applied to citizens in states . . . where the courts are open and their process unobstructed."[248] The Court held that a military commission lacked the jurisdiction to try Milligan, or any civilian citizen, for "any offense whatever" if the civil courts where open.

The Court reached its decision by resorting to the literal language of the Constitution and the historical importance the founding fathers placed on the Fourth, Fifth, and Sixth Amendments of the Bill of Rights.[249] The Court stated that the answer to whether a military court has jurisdiction is not found in previous court decisions or in the laws of war. Rather, it is "found in that clause of the original Constitution which says 'That the trial of all crimes, except in case of impeachment, shall be by jury;' and in the fourth, fifth, and sixth articles of the amendments."[250] The Court noted that the President alone convened Milligan's military commission and the military court was clearly not an Article III court established by Congress. Moreover, the Court held that every citizen is guaranteed the right to a grand jury indictment, a trial by jury, and the other guaranteed protections of the Fourth, Fifth, and Sixth Amendments.[251] The only exception provided in the Constitution was the Fifth Amendment's express exception for the military, in cases "arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."[252] The Court held that even during times of war, not even "the President, or Congress or the Judiciary [can] disturb" these essential safeguards.[253] The Court rejected the claim that during times of martial law the President and his military commanders alone had the authority to decide whether to use military

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[247] *Ex parte* Milligan, 71 U.S. 2, 107 (1886).
[248] *Id.* at 121. While the Court was unanimous that the military commission that tried Milligan was unconstitutional, four justices disagreed with the majority that both Congress and the President lacked the authority to convene a military tribunal. *Id.* at 137. *See infra* note 256 and accompanying text.
[249] *Milligan*, 71 U.S. at 121.
[250] *Id.* at 119.
[251] *Id.* at 119-20, 123.
[252] *Id.* at 119-20 (citing U.S. CONST. amend. V).
[253] *Milligan*, 71 U.S. at 125.

commissions instead of constitutional courts. The Court stated that such a result:

> would destroy[] every guarantee of the Constitution, and effectually render[] the 'military independent of and superior to the civil power.'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence.[254]

While holding that military commissions lacked jurisdiction over civilians for "any offense whatsoever" when the courts were open, the Court also acknowledged that there were times when martial law is necessary, and the use of military courts may be appropriate:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.[255]

So, while the Constitution might allow for the use of military courts under a true necessity, generally speaking, the Constitution prohibited the use of military courts against civilians, regardless of the nature of the offense. The Court was unanimous in its opinion that Milligan's trial by military commission was unconstitutional, but four justices argued that Congress, not the President, could have authorized his trial by military commission. Relying on Congress' power under Article I of the Constitution to declare war and to govern the land and naval forces, these

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[254] *Id*. at 124.
[255] *Id*. at 127.

justices held that "Congress, had power, though not exercised, to authorize the military commission which was held in Indiana."[256]

The decision of the majority in *Milligan*—holding that neither the President nor Congress could authorize a military tribunal—provoked enormous public controversy.[257] Many viewed it as a direct assault upon the plans of radical republicans beginning Reconstruction.[258] In apparent disregard of *Milligan's* majority holding, Congress authorized the use of military commissions during Reconstruction and commanders continued to employ them throughout the South.[259] A number of challenges to these military commissions reached the Supreme Court, but the defendants were released before the Court ever issued a ruling as to their constitutionality.[260]

It was not until 1879 that the first court-martial, *Ex parte Reed*,[261] reached the Supreme Court by a petition for *habeas corpus*. Reed, who was a paymaster for the Navy, was found guilty of malfeasance by a general court-martial.[262] Before the Supreme Court he argued that as a civilian paymaster in the Navy, he was a civilian, like Milligan, and a court-martial lacked personal jurisdiction over him. The Court disagreed, citing both the historical importance of the paymaster position and Congress' intention via the navy regulations to subject paymasters to military jurisdiction. The Court held:

> The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the

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[256] *Id.* at 137, 139-42 (Chase, Wayne, Swayne, and Miller. JJ., concurring).

[257] *See, e.g.*, ROSSITER & LONGAKER, *supra* note 56, at 31 (stating that the Milligan decision resulted in "the most violent and partisan agitation over a Supreme Court decision since the days of Dred Scott.").

[258] *See* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 423-49 (1962) (providing an excellent account of the debate that occurred during this time period).

[259] *See supra* notes 200-205 and accompanying text; *see also* NEELY, *supra* note 212, at 176-77 (stating that between April 1865 and January 1869 over 1400 military tribunals were held).

[260] *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); *Ex parte* Yerger, 75 U.S. (8 Wall.) 8 (1868); *see also* Glazier, *supra* note 12, at 2042 n.154.

[261] 100 U.S. 13 (1879).

[262] *Id.* at 21.

> navy must be in writing, and filed in the department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the payroll, and are paid accordingly. They may also become entitled to a pension and to bounty land.[263]

By holding that a congressionally established court-martial had jurisdiction over a civilian paymaster, the Court continued its general practice of deferring broadly to congressional interpretations of who should be subject to the Articles of War.[264] The Court brushed aside any notion that Congress' extension of personal jurisdiction might be unconstitutional by stating that "the constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court."[265]

In 1890, the Supreme Court decided two cases about whether courts-martial had personal jurisdiction over Soldiers who were either too young or too old for lawful service in the United States Army. In both cases, the Court again upheld jurisdiction based on Congress intent

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[263] *Id.* at 22-23.

[264] The *Reed* decision also confirmed the Court would follow the standard of review set forth in *Dynes v. Hoover* for habeas petitions. As a result, the Court would continue to limit its review of courts-martial merely to matters of technical jurisdiction and would not consider the merits of petitioner's claims. *Id.* at 32. The focus of this article is on two of those constitutional areas of technical jurisdiction, personal and subject matter jurisdiction. However, the Court also considered technical jurisdiction to include a statutory review that the court-martial was lawfully convened, and that the sentences were authorized by law. *See, e.g.*, McClaughry v. Deming, 186 U.S. 49, (1902) (holding that the Articles of War prohibited regular army officers from sitting on a court martial of volunteer army officers); Runkle v. United States, 122 U.S. 543 (1887) (holding that the dismissal of an officer at court-martial was improper because the Articles of War required the President's approval for the dismissal of a commissioned officer in time of peace). The following Supreme Court cases also support this standard of judicial review: Mullan v. United States, 212 U.S. 516, 520 (1909); Bishop v. United States, 197 U.S. 334, 342 (1905); Carter v. McClaughry, 183 U.S. 365, 380 (1902); Carter v. Roberts 177 U.S. 496, 498 (1900); Swaim v. United States, 165 U.S. 553, 555 (1897); United States v. Fletcher, 148 U.S. 84 (1893); United States v. Page, 137 U.S. 673 (1891). For an excellent article discussing civil court review of court-martial see Rosen, *supra* note 71.

[265] *Reed*, 100 U.S. at 21.

ignoring any constitutional limitations. In *Morrissey v. Perry*,[266] the petitioner enlisted in the Army when he was seventeen years old and living with his mother, who did not consent to his enlistment. Federal law at that time held that no person under the age of twenty-one could enlist in the military service of the United States without the written consent of his parents or guardians.[267] After serving a short time in the Army, Morrissey deserted, did not return until five years later, and demanded a discharge because he was a minor at the time he enlisted.[268] The Court disagreed and held that because his mother did not actively control her son's behavior, Morrissey's enlistment contract was valid. The Court stated that Morrissey "was not only de facto, but de jure, a soldier—amenable to military jurisdiction. . . . His desertion and concealment for five years did not relieve him from his obligations as a [S]oldier, or his liability to military control."[269]

Similarly, in *U.S. v. Grimley*,[270] the petitioner enlisted in the Army at the age of forty by lying to his recruiter and alleging that he was only twenty-eight years old. He subsequently deserted from the Army and was convicted for that offense at court-martial.[271] On a petition for habeas to the U.S. district court, the court ordered Grimley's release. The court held Grimley's enlistment void because the Articles of War limited the age of enlistment to people under age thirty-five.[272] The district court held that Grimley never became a Soldier, and was not subject to the jurisdiction of the court-martial.[273] The Supreme Court reversed this decision and held that "Grimley was sober, and of his own volition went to the recruiting office and enlisted. There was no compulsion, no solicitation, no misrepresentation. A man of mature years, he entered freely into the contract."[274] Because he freely entered into this enlistment contract, the Court held that, notwithstanding the Articles of War, Grimley became a Soldier and was subject to the jurisdiction of court-martial.[275]

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[266] 137 U.S. 157 (1890).
[267] *Id.* at 159.
[268] *Id.* at 158.
[269] *Id.* at 159-60.
[270] 137 U.S. 147 (1890).
[271] *Id.* at 149-50.
[272] *See id.* at 147.
[273] *Id.* at 150. The circuit court upheld the district court's order to release Grimley.
[274] *Id.* at 151.
[275] *Id.* at 152.

A few years later, in *Johnson v. Sayne*,[276] another Navy paymaster challenged the jurisdiction of courts-martial, this time by arguing that the Constitution prohibited a court-martial from prosecuting him unless it was during time of war or national emergency. He based his argument on the Fifth Amendment, which prohibits a trial without a grand jury indictment "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."[277] A circuit court granted Johnson habeas relief, concluding that although a paymaster was a "member of the naval forces" under the *Reed* decision, he was not in "actual service during time of war or public danger" as required by the Fifth Amendment.[278] While acknowledging that the lower court's ruling was a linguistically plausible interpretation of the Fifth Amendment, the Supreme Court rejected that interpretation and instead held that members of the military were subject to the Articles of War at all times. Relying on the long historical practice of courts-martial, the Court held "the necessary construction is that the words, in this amendment, 'when in actual service in time of war or public danger' . . . apply to the militia only" and that active duty members are subject to the Articles of War at all times.[279] Therefore, because a paymaster was deemed a member of the active forces, he was still subject to court-martial in time of peace.[280]

In addition to broadly interpreting the personal jurisdiction of courts-martial, the Supreme Court gave military tribunals wide latitude in exercising subject matter jurisdiction over offenses arguably not authorized by the Articles of War. One example is the case of *Ex parte Mason*.[281] Mason was an army sergeant tasked with guarding the assassin of President Garfield. While on guard duty, Mason took matters into his own hands and avenged his Commander in Chief by shooting and killing the civilian prisoner.[282] The Articles of War prohibited the use of a court-martial to try the offense of murder (except in times of war).[283] Therefore, instead of being court-martialed for murder, Mason was court-martialed for disobeying his orders to guard the prisoner.

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[276] 158 U.S. 109 (1895).
[277] *Id.* at 113-14.
[278] *Id.* at 114.
[279] *Id*. at 115.
[280] *Id.*
[281] 105 U.S. 696 (1882).
[282] *Id.* at 697.
[283] *Id.* at 698-89 (citing to Article of War 58 & 59).

Despite this creative charging decision, the Court upheld Mason's conviction, explaining its opinion as follows:

> The gravamen of the military offence is that, while standing guard as a soldier over a jail in which a prisoner was confined, the accused willfully and maliciously attempted to kill the prisoner. Shooting with intent to kill is a civil crime, but shooting by a [S]oldier of the army standing guard over a prison, with intent to kill a prisoner confined therein, is not only a crime against society, but an atrocious breach of military discipline. While the prisoner who was shot at was not himself connected with the military service, the [S]oldier who fired the shot was on military duty at the time, and the shooting was in direct violation of the orders under which he was acting. It follows that the crime charged, and for which the trial was had, was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard.[284]

The Court's interpretation of the Articles of War expanded the subject matter jurisdiction of court-martial to include common-law offenses specifically withheld to civilian courts under the Articles of War, as long as the crime was styled as an offense prejudicial to good order and discipline.[285] Again, the Court based its opinion on statutory grounds and never addressed the issue of constitutional restraints.

In *Smith v. Whitney*,[286] yet another Navy paymaster ran into trouble and challenged the personal and subject matter jurisdiction of his court-martial. Smith alleged that a court-martial had no jurisdiction to try him because his position of Paymaster General was a purely separate job that answered only to the civilian Secretary of the Navy.[287] Moreover, he argued that even if he were personally subject to court-martial

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[284] *Id.* at 698.

[285] *See* Coleman v. Tennessee, 97 U.S. 509, 512-14 (1878) (holding that a Soldier accused of murder during occupation of the South is subject to trial by court-martial and not the local state courts); Kurtz v. Moffitt, 115 U.S. 487 (1885) (holding that a peace officer had no authority, without the order of a military officer, to arrest or detain a deserter from the U.S. Army).

[286] 116 U.S. 167 (1886).

[287] *Id.* at 181.

jurisdiction, because his charged offenses took place off-duty in his personal capacity, they were outside the subject matter of the court-martial.[288] The Court reiterated its position in *Dynes* that "the jurisdiction of courts-martial, under the articles for the government of the navy established by Congress, was not limited to the crimes defined or specified in those articles, but extended to any offence which, by a fair deduction from the definition, Congress meant to subject to punishment."[289] This meant that a court-martial had subject-matter jurisdiction both over specified crimes and over other offenses that were recognized crimes throughout naval history. The Court went on to cite to British history supporting the proposition that a crime is still subject to trial by court-martial even when it has no other effect on the armed forces except for disgracing the military's reputation.[290] With this, the

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[288] *Id*. The accusations against Smith involved several business transactions. He was charged with several counts of "scandalous conduct tending to the destruction of good morals," and "culpable inefficiency in the performance of duty." *Id.*

[289] *Id.* at 183.

[290] The Court cited a long section of English history to support this proposition. It stated:

> Two cases, often cited in books on military law, show that acts having no relation to the public service, military or civil, except so far as they tend to bring disgrace and reproach upon the former—such as making an unfounded claim for the price of a horse, or attempting to seduce a brother officer's wife during his illness—may properly be prosecuted before a court martial under an article of war punishing "scandalous and infamous conduct unbecoming an officer and a gentleman;" for the sole ground on which the sentence was disapproved by the King in the one case, and by the Governor General of India in the other, was that the court martial, while finding the facts proved, expressly negatived scandalous and infamous conduct, and thereby in effect acquitted the defendant of the charge,. . In a third case, a lieutenant in the army was tried in England by a general court martial for conduct on board ship while coming home from India as a private passenger on leave of absence from his regiment for two years. The charge was that, being a passenger on board the ship Caesar on her voyage from Calcutta to England, he was accused of stealing property of one Ross, his servant; and that the officers and passengers of the ship, after inquiring into the accusation, expelled him from their table and society during the rest of the voyage; yet that he, "under circumstances so degrading and disgraceful to him, neither then, nor at any time afterwards, took any measures as became an officer and a gentleman to vindicate his honor and reputation; all such conduct as aforesaid being to the prejudice of good order and military discipline." Before and at the trial, he objected that the charge against him did not, expressly or constructively, impute any military offence, or infraction of any of the Articles of War, or any positive act of misconduct or neglect, to

Court went well beyond *Mason*, which granted jurisdiction over a Soldier who murdered a civilian while performing his duty, and held that a court-martial would have subject matter jurisdiction of private, off-duty business transactions if the conduct compromised one's position as a member of the Navy.[291] Again, the Court failed to address what limitation, if any, the Bill of Rights, or the Constitution, had on court-martial jurisdiction over these unspecified offenses.

Several conclusions can be drawn from the Supreme Court's decisions throughout the nineteenth century concerning the jurisdiction of military tribunals. The Supreme Court took a very deferential approach to the use of military jurisdiction and, in particular, of military courts-martial. With the striking exception of the *Milligan* decision, the Court found no constitutional limitations on the jurisdiction of military tribunals. In *Milligan*, the Court held that the Constitution prohibited a military tribunal from prosecuting a "civilian" for any offense as long as constitutional courts were open. But in other cases during this era the Court upheld the personal jurisdiction of other "civilians" like paymasters who were arguably not "members of the land and naval forces" under a strict construction of the Constitution and the Articles of War. Similarly, the Court found no constitutional violations when military courts-martial prosecuted Soldiers for civilian common law offenses like murder and fraud. In fact, although these offenses were not specifically identified in the Articles of War, the Court found statutory authority for them when the crime was styled as a military offense. In deciding these courts-martial cases, the Court rarely considered whether the Constitution placed any limits on these uses of military jurisdiction. As long as military courts did not prosecute civilians patently unrelated to the armed forces the Court seemed content to let Congress, and the military commanders themselves, determine which people and what offenses were subject to military tribunal. One scholar, Clinton Rossiter, described the Supreme Court's military jurisprudence during this era

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> the prejudice of good order and military discipline; or state any fact which, if true, subjected him to be arraigned and tried as a military officer. But the court martial proceeded with the trial, found him 'guilty of the whole of the charge produced against him, in breach of the Articles of War,' and sentenced him to be dismissed from the service, and added, 'that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the army.'

Id. at 184-85 (citations omitted).

[291] *Id.* at 185-86.

more colorfully when he wrote "[T]he Court, feeling somewhat shamefaced for allowing itself to be dragged by the heels into heathen territory, has excused its presence by unnecessarily low bows."[292]

C. Military Tribunals from World War I through World War II

1. Authority and Use of Military Tribunals 1914-1950

Following Reconstruction, Congress did not significantly revise military jurisdiction until World War I. In 1916, Congress passed an appropriations bill that significantly modified the Articles of War. The 1916 Articles extended courts-martial jurisdiction over common-law crimes committed by Soldiers during peacetime.[293] This marked a significant change from previous legislation, which as discussed above, authorized military trials only for military offenses, or for common-law crimes committed by Soldiers "in times of war or rebellion"[294] when the threat to civilians was greatest and civilian courts failed to operate effectively and efficiently.[295] Despite this vast extension of courts-martial power, the 1916 Articles still maintained two significant restrictions on courts-martial jurisdiction. First, the 1916 Article required commanding officers to turn over military personnel accused of common-law crimes to civilian courts upon request of the victim.[296] This preserved the subordination of military courts-martial to civilian

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[292] ROSSITER & LONGAKER, *supra* note 56, at 104-05.
[293] Act of Aug 29, 1916, ch. 418, arts. 87-96, 39 Stat. 664-665 (1916).
[294] Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736 (1863).
[295] *See* Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 450 (1960). Explaining the expansion of court-martial jurisdiction, they wrote:

> It appears the statute was intended not merely to ensure order and discipline among the men composing those forces, but to protect the citizens not in the military service from the violence of soldiers. It is a matter well known that the march even of an army not hostile is often accompanied with acts of violence and pillage by straggling parties of soldiers, which the most rigid discipline is hardly able to prevent. The offenses mentioned are those of the most common occurrence, and the swift and summary justice of a military court was deemed necessary to restrain their commission.

Id. (citations omitted).
[296] 39 Stat. 664 (1916) (art. 74).

authority.[297] Second, jurisdiction extended only to those capital offenses committed outside the United States and beyond the reach of civilian courts.[298] Congress continued to reserve jurisdiction over capital crimes committed by service members in the United States to the appropriate state and federal courts.

In addition to this expansion of subject matter jurisdiction, Congress statutorily authorized the use of military commissions. The 1916 Articles of War gave court-martial jurisdiction not only over Soldiers subject to the Articles of War, but also over "any other person who by statute or the law of war is subject to trial by military commission."[299] As a result, a question arose as to whether Congress' expansion of court-martial jurisdiction eliminated the need for military commissions. In order to prevent that interpretation, the Army Judge Advocate General, Enoch Crowder, sought and gained statutory language ensuring the concurrent jurisdiction of courts-martial and military commissions.[300] The result was Article 15 of the 1916 Articles of War:

> Art. 15. NOT EXCLUSIVE—the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent

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[297] WINTHROP, *supra* note 26, at 691.

[298] 39 Stat. 664 (1916) (art. 92). Thus, even following the 1916 Articles civilian courts, not courts-martial maintained jurisdiction over capital crimes committed by service members in the United States. *Id.* art. 59. The one exception is that courts-martial were granted jurisdiction over capital crimes not committed on U.S. soil, presumably due to the need to have an available forum for those crimes committed abroad.

[299] *Id.* at 652 (art. 12).

[300] In 1912, when the House was considering revising the Articles of War, Brigadier General (BG) Crowder lobbied for a new article to "make it perfectly clear that in such cases the jurisdiction of the war court is concurrent" with that of a court-martial. *Revision of the Articles of War*, hearing before the House Committee on Military Affairs, 62d Cong., 2d Sess., at 29 (1912) (testimony of BG Enoch H. Crowder). When the Revised Articles went before the Senate in 1916, BG Crowder supported the inclusion of Article 15 as follows: "a military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. . . . [Article 15] just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure. S. REP. No. 64, 130, 64th Cong., 1st Sess., at 40 (1916) (testimony of BG Enoch H. Crowder). While General Crowder maintained that both courts-martial and military commissions have the same procedure that has not been the case throughout recent history. For an article discussing the historical differences in procedure between courts-martial and military commissions, *see generally* Glazier, *supra* note 12.

> jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such commissions, provost courts, or other military tribunals.[301]

Instead of expressly defining the jurisdiction of military commissions under their constitutional authority to "define and punish . . . Offenses against the Law of Nations",[302] Congress chose to recognize the law of war as providing a separate source of authority for military tribunals.

Following World War I, Congress debated the Articles of War and the practice and procedures of military tribunals.[303] As a result, Congress enacted the National Defense Act creating the 1920 Articles of War.[304] The 1920 Articles of War added several procedural protections to courts-martial, such as a right to counsel,[305] a formalized legal procedure,[306] and establishment of a legal board of review.[307] The 1920 Articles also made some modifications to the use of military commissions. Article 15 was expanded to include not just offenders or offenses punishable "under the law of war," but also to include "offenders or offenses that *by statute* or by the law of war may be triable by military commission."[308]

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[301] 39 Stat. 653 (1916) (art. 15).

[302] U.S. CONST. art. I, § 8, cl. 10.

[303] This debate about military reform resulted in a heated dispute between the Army Judge Advocate General, BG Crowder, and his assistant, BG Ansell. The best account of this very public debate is found in LURIE, ARMING MILITARY JUSTICE, *supra* note 58, at 46-126.

[304] Act of June 4, 1920, ch. 227, 41 Stat. 759-812 (1921).

[305] *Id.* at 789 (art. 11). Congress' decision to grant court-martial defendants the right to counsel was done well in advance of federal law. The Supreme Court did not recognize the right to counsel in other federal trials until 1938 and did not apply this right to state courts until 1960. *See* Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372, U.S. 335 (1963).

[306] 41 Stat. 793 (1921) (art. 31).

[307] *Id.* at 797 (art. 50 ½).

[308] *Id*. at 790 (art. 15) (emphasis added). The complete article reads as follows:

> Art. 15. JURISDICTION NOT EXCLUSIVE—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be lawfully triable by such commissions, provost courts, or other military tribunals.

Id.

Additionally, the 1920 Articles directed how the President could promulgate rules for both courts-martial and military commissions.[309]

While instances of abuse during World War I highlighted the need for reforming the Articles of War,[310] the use of military tribunals during the first half of the twentieth century was rather limited.[311] Courts-martial were used primarily against members of the Armed Forces. One famous court-martial that precipitated many of the calls for reform in 1920[312] resulted from the Fort Sam Houston "Mutiny." In this case, several black Soldiers, angered by racial injustice in Houston, took to the streets, rioting and eventually killing fifteen white citizens from the local community.[313] The Army rounded up the suspected Soldiers, placed them in the military stockade, and tried them by general court-martial.[314] Following the court-martial, thirteen of the black Soldiers were hanged the next day without any appellate review and before any higher headquarters were even informed of the verdict.[315]

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[309] *Id.* at 794 (art. 38). Article 38 authorized the President to prescribe regulations for all military tribunals but directing that these regulations "in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States" and that "nothing contrary or inconsistent with these articles shall so be prescribed." *Id.* While General Crowder and others had previously suggested that the rules for courts-martial and military commission were the same (and while that had often been the case throughout history) the 1920 Articles of War were the first statutory pronouncement that military commission procedures should be governed by the same rules as court martial. Military commentators support this view. *See* FREDERICK BERNAYS WIENER, A PRACTICE MANUEL OF MARTIAL LAW 124-25 (1940). In practice, following World War II this has not been the case and rules for military commissions have varied widely from the congressionally established rules. *See infra* Part IV.D.

[310] *See* Herbert F. Margulies, *The Articles of War, 1920: The History of a Forgotten Reform*, 43 MIL. AFF. 85 (1979).

[311] *See* WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 13 (1973) ("Following the 1919 burst of activity . . . the Army . . . settled back into a comfortable peacetime routine [and] court-martial systems were largely forgotten by the American population as a whole."); Fisher, *supra* note 115, at 33 ("After the Civil War, the United States made little use of military tribunals until World War II); Cox, *supra* note 42, at 10 ("The modern history of military justice can be traced to World War II.").

[312] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 126 (1975) (arguing that "no other event . . . portended such a vast change in the review of court-martial proceedings as the trial of black troopers . . . in late 1917.").

[313] *Id.* at 126.

[314] *Id.* at 127.

[315] *Id.* at 126.

Another significant military tribunal during World War I was the trial of Lothar Witzke. Witzke, a German national, was caught in America during World War I carrying a Russian passport. Witzke had traveled through Mexico before the military captured him in Arizona while he was preparing to sabotage American targets.[316] The military brought him to Fort Sam Houston to be tried before a secret military court-martial. The court-martial convicted Witzke of spying and sentenced him to hang.[317] Despite the court-martial conviction, Attorney General Thomas Watt Gregory concluded—in a secret opinion—that Witzke's court-martial was unconstitutional. He wrote:

> [M]ilitary tribunals, whether courts-martial or military commissions, cannot constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military [forces] or those immediately attached to the forces such as camp followers.[318]

In 1920, President Wilson commuted Witzke's sentence of death to life imprisonment based on the Attorney General's opinion.[319] Three years later, after Witzke rescued several inmates from a prison fire at the Fort Leavenworth prison, he was set free and returned to Germany. Germany greeted Witzke with a hero's welcome and awarded him two citations of the Iron Cross.[320]

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316 HENRY LANDAU, THE ENEMY WITHIN: THE INSIDE STORY OF GERMAN SABOTAGE IN AMERICA 112-27 (1937).

317 *Id.*

318 31 Op. Att'y Gen. 356 (1918).

319 *See* Charles H. Harris III & Louis R. Sadler, *The Witzke Affair: German Intrigue on the Mexican Border, 1917-18*, MIL. REV., 36, 46 (Feb. 1979). In still another remarkable twist in this strange case, during the Nazi saboteur trials of World War II defense counsel relied on the opinion of the attorney general in Witzke to argue that President Roosevelt's military commission was unconstitutional. *See* Fisher, *Military Tribunals*, *supra* note 115, at 36. In order to refute that claim, during the 1942 trial, the Justice Department released a previously unpublished opinion that appeared to overrule the attorney general and concluded that because Witzke was "found lurking as a spy" the military tribunal was constitutional. *Id.*

320 *See* Harris & Sadler, *supra* note 319, at 46.

World War II brought about a drastic expansion of the military ranks[321] and an equally unprecedented expansion of the use of military tribunals. By the end of World War II, America had convened almost two million courts-martial, executed more than one hundred Soldiers, and placed over 45,000 more Soldiers in federal prison.[322] All told, there were more than sixty court-martial convictions for each and every day the war was fought.[323] These massive number of courts-martial proceedings brought during this era increased public awareness of, and concerns about, their deficiencies.[324] The court-martial of Lieutenant Sidney Shapiro is a commonly-cited example of court-martial abuse during World War II.[325] The Army assigned Shapiro to defend a Soldier charged with assault with intent to commit rape. Believing that his client could not be identified properly, Shapiro substituted another person for his client at counsel's table during the court-martial.[326] After the accused identified the man sitting at the table as the perpetrator, Shapiro revealed his scheme. Still, the court-martial convicted Shapiro's real client, and the Army court-martialed Shapiro himself for delaying the orderly progress of the previous court-martial.[327]

World War II also brought about the return of military commissions. During World War II, military commissions were used for all three commonly-articulated purposes: martial-law courts, military government courts, and law of war courts. Military commissions were first used shortly after the attack on Pearl Harbor on 7 December 1941, in order to prosecute civilians for both state and federal common-law crimes while Hawaii was under martial law.[328] The use of martial law was originally intended to last for only a short time, but in fact lasted for nearly three

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[321] *See* LURIE, ARMING MILITARY JUSTICE, *supra* note 58, at 128 (noting that the military grew from just over one million personnel to more than eight million).

[322] *See id*.

[323] GENEROUS, *supra* note 311, at 14.

[324] *See, e.g.*, LURIE, ARMING MILITARY JUSTICE, *supra* note 58, at 123; GENEROUS, *supra* note 311, at 15.

[325] GENEROUS, *supra* note 311, at 169-70; Cox, *supra* note 42, at 11-12.

[326] Cox, *supra* note 42, at 12.

[327] *Id.*. The Court of Claims ultimately threw out the conviction on a suit to recover back pay. Brown v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[328] J. GARNER ANTHONY, HAWAII UNDER ARMY RULE 1-33 (1975) (publishing General Order Number 4 the same day that Pearl Harbor was attacked). Anthony reproduces a copy of General Order Number 4. *Id.* at 137.

years.[329] Indeed, military courts continued to operate in Hawaii even after Hawaii's civil government had been restored and the danger of a Japanese land invasion no longer existed.[330] Only when the civil courts finally intervened in 1944, did martial law in Hawaii come to an end.[331]

Military commissions were also used extensively throughout World War II as military government courts. During and after the war, military government courts were used in Germany and Japan as well as throughout Europe and Asia by American and Allied forces.[332] These courts were of a scope and duration never previously witnessed in history.[333] American military government courts heard hundreds of thousands of cases in Germany alone.[334] Following World War II, military government courts became a significant presence throughout much of the world.

Military government courts were the most widely used type of military commission, but the most famous and controversial use of military commissions was the use of law of war commissions used during and after World War II. While there is no comprehensive list of the various different military commissions, the most famous included The International Military Tribunal at Nuremberg (IMT), The International Military Tribunal for the Far East (IMTFE), and The United States Military Tribunal at Nuremberg (NMT).[335] Following World War II, the United States alone tried over 3,000 defendants in Germany for

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[329] REHNQUIST, *supra* note 206, at 214 ("Military rule in Hawaii was not a short-run thing. It lasted nearly three years, until it was revoked in October 1944, by a proclamation from Roosevelt.").

[330] ANTHONY, *supra* note 328, at 58-59.

[331] *Id.* at 61. During this timeframe battles between military commanders and federal judges were reminiscent of the conflict between Andrew Jackson and Judge Hall. The most famous dispute involving General Richardson and Judge Metzger is recounted in Anthony' work. *Id.* at 65-76. For a discussion of Duncan v. Kahanamoku, the Supreme Court case invalidating the continued exercise of martial law in Hawaii, see *infra* Part IV.C.2.

[332] *See* Pitman B. Potter, *Legal Bases and Character of Military Occupation in Germany and Japan*, 43 AM. J. INT'L L. 323 (1949). For a general discussion of military government courts see Charles Fairman, *Some Observations on Military Occupation*, 32 MINN. L. REV. 319 (1948).

[333] *See* Potter, *supra* note 332.

[334] Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A.B.A. J. 777, 777-80 (1947).

[335] *See* WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 5 (Norman E. Tutorow ed., 1981) [hereinafter WAR CRIMES] (listing these and various other courts used following WWII to prosecute war crimes).

war crimes and nearly 1000 more defendants in Japan and the rest of the Pacific.[336] All told, well over 25,000 people were tried for war crimes related to World War II[337]

In addition to their use in Hawaii during martial law, military commissions were also used on two different occasions on the U.S. mainland to try war criminals. The first incident occurred in the summer of 1942 when Germans landed on Long Island Sound with plans to sabotage factories in Chicago and New York.[338] Within two weeks, the alleged saboteurs were rounded up and captured by the Federal Bureau of Investigation (FBI). On 2 July 1942, President Theodore Roosevelt issued Proclamation 2561, establishing a military commission to try the Nazis in accordance with the law of war.[339] He also issued a military order appointing members of the tribunals and giving guidance to the court.[340] The military commission met from 8 July to 1 August, 1942—and after a brief interlude in which the Supreme Court ruled that the military commission had proper jurisdiction[341]—the commission found all eight men guilty and sentenced them to death.[342] In 1944, two more Nazi saboteurs landed on the eastern American coast and were again captured by the FBI.[343] They were also tried by military commission and sentenced to death. However, in ordering this military commission President Roosevelt significantly modified the order from the earlier

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[336] *Id.* at 5-6.

[337] *Id.*

[338] Several excellent books and articles have been written on this single famous case. *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL 19 (2003) [hereinafter FISHER, NAZI SABOTEURS]; G.E. White, *Felix Frankfurter's 'Soliloquy'* in Ex Parte Quirin: *Nazi Sabotage & Constitutional Conundrum*, 5 GREEN BAG 2d 423 (2002); Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 9 (1980); EUGENE RACHLIS, THEY CAME TO KILL: THE STORY OF EIGHT NAZI SABOTEURS IN AMERICA (1962); R.E. Cushman, *The Case of the Nazi Saboteurs*, 36 AM. POL. SCI. REV. 1082 (1942); General Myron C. Cramer, *Military Commissions: Trial of the Eight Saboteurs*, 17 WASH. L. REV. & STATE B.J. 247 (1942).

[339] 7 Fed. Reg. 5,103 (1942).

[340] *Id.*

[341] *Ex parte* Quirin, 317 U.S. 1, 18-19 (1942). This decision was a *per curiam* opinion handed down orally by the Court on 31 July 1942. The Court published a full written opinion three months later explaining their decision. This case is discussed in further detail *infra* Part IV.C.2.

[342] FISHER, NAZI SABOTEURS, *supra* note 338, at 109-21.

[343] *Id.* at 138-44. Interestingly one of those two Germans spies wrote a book on this experience that was recently published in America. *See* AGENT 146: THE TRUE STORY OF NAZI SPY IN AMERICA (2003).

Nazi trial, making the procedures in the second case much more consistent with the procedures of the Articles of War.[344]

2. Supreme Court Review of Military Tribunals 1914-1950

As noted above, during World War I, congressional legislation converted civilians into "member[s] of the armed forces" as soon as they received their draft notice and before they were even inducted into the military.[345] The Supreme Court heard many cases challenging military conscription,[346] but the Court never ruled on the constitutionality of prosecuting draft dodgers by military tribunals instead of in civil court. During World War I, the Court heard very few cases concerning the jurisdiction of military courts. In the post World War I era, the first military tribunal case to reach the Supreme Court was a habeas corpus petition brought by several military prisoners. Appellants in *Kahn v. Anderson*[347] were several dishonorably-discharged prisoners who were court-martialed for murder while they were serving prison time in the military disciplinary barracks. The prisoners argued that the court-martial lacked personal jurisdiction over them because they were already discharged from the military and were no longer members of the armed forces.[348] Thus, trial by court-martial denied the accused their right to a trial by jury and their other Fifth and Sixth Amendment protections.[349] They also argued that the court-martial lacked subject matter jurisdiction because the Articles of War prohibited trial for the offense of murder during time of peace.[350]

The Court relied on congressional statute declaring the prisoners subject to military jurisdiction. In upholding the convictions, the Court stated "as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment."[351] Interestingly, the Court again rejected plaintiffs' assertion that Constitution limited Congress' ability to subject

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[344] 10 Fed. Reg. 548 (1945).
[345] Selective Service Act of 1917, 40 Stat 76.
[346] *See* Selective Draft Law Cases, 245 U.S. 366 (1918) (holding that Congress has the power to compel people into involuntarily military service).
[347] 255 U.S. 1 (1921).
[348] *Id.* at 7-8
[349] *Id.*
[350] *Id.*
[351] *Id.* at 8.

prisoners who were no longer members of the armed forces to military trial. The Court stated the opposite and implied that Congress might be empowered to subject anyone they wish to military tribunals:

> [W]e observe that a further contention, that, conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury, respectively secured by Art. I, § 8, [Art. III, § 2,] of the Constitution, and Art. V, [and Art. VI,] of the Amendments—is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained.[352]

Moreover, the Court rejected the petitioners' subject matter jurisdiction complaint, declaring "complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities."[353]

While the Supreme Court rarely addressed the issue of military jurisdiction following World War I, the beginning of World War II once again brought the issue to the forefront. The Supreme Court's decision in *Ex parte Quirin*[354] ranks with *Milligan* as among the Court's most significant pronouncement on the constitutionality of military jurisdiction. The *Quirin* case involved the trial of eight German saboteurs who covertly entered the United States under the direction of the German army to blow up factories and bridges.[355] While all eight were born in Germany and were German citizens, one of the accused alleged that he was also a U.S. citizen by virtue of his parents' naturalization.[356] They were tried by military commission for violating

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[352] *Id.*

[353] *Id.* at 10. For other World War I jurisdiction cases, *see also* Givens v. Zerbst, 255 U.S. 11 (1921) (upholding courts-martial jurisdiction even though the record did not demonstrate that the accused was a member of the armed forces); Collins v. Macdonald, 258 U.S. 416 (1922) (broadly construing the subject matter jurisdiction of courts-martial to include offenses not defined by federal statute).

[354] 317 U.S. 1 (1942).

[355] *Id.* at 36.

[356] *Id* at 20-21. The government rejected that he was a U.S. citizen because after becoming an adult he elected to maintain German citizenship and in any case renounced or abandoned his United States citizenship. *Id.* at 21.

the law of war, conspiracy, violating the Articles of War by aiding the enemy, and spying.[357] Before conclusion of the commission, the Supreme Court granted a petition for certiorari and issued a *per curiam* opinion from the bench. The Court's short oral opinion denied a request to file a habeas petition and held that the saboteurs were clearly subject to the personal jurisdiction of the military commission.[358] The military trial resumed, convicted all eight men, and sentenced them to death.[359] President Roosevelt executed six of the accused before the Court published its written opinion.[360]

The Court's published opinion made several important findings concerning the jurisdiction of military courts. First and foremost, it recognized that the Constitution does indeed provide some limits on the use of military tribunals, and asserted that "Congress and the President, like the courts, possess no power not derived from the Constitution."[361] The Court then reviewed congressional legislation and determined that by passing Article 15 of the Articles of War, Congress had given the President authorization to convene military tribunals in accordance with the law of war. The Court recognized:

> [By] reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commissions,' 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.[362]

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[357] *Id.* at 23. For greater background on these cases see *supra* notes 338 and 342 and accompanying text.
[358] *Id.* at 18-19.
[359] *Id.*
[360] For one of several thoughtful arguments suggesting that the President's decision to hastily execute the prisoners influenced the Court's opinion, see FISHER, NAZI SABOTEURS, *supra* note 338, at 109-21. *See also* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION (1947). For a more recent, and perhaps more significant, indictment of *Quirin*, see Justice Scalia's recent dissenting opinion in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2669 (2004) (declaring *Quirin* "was not this Court's finest hour" and seeking to limit its influence) (Scalia, J., dissenting).
[361] *Quirin*, 317 U.S. at 25.
[362] *Id.* at 30.

The Court continued:

> By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.[363]

The Court made clear that it was not determining whether the President could constitutionally convene military commissions without congressional support, because under the facts in *Quirin* (unlike *Milligan*), Congress had given the President the power to use military commissions in accordance with the law of war "so far as it may constitutionally do so."[364] Therefore, the question before the Court was whether the Constitution permitted these petitioners to be tried before a military commission for the offenses with which they were charged.

The Court then turned to the subject matter and personal jurisdiction of military tribunals. The Court first looked to whether the charged crimes were violations of the law of war that were within the subject matter jurisdiction of military tribunals. The Court concluded quite easily that at least some of the charged offenses were war crimes:

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[363] *Id.* at 28.
[364] *Id.*

> The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[365]

After addressing subject matter jurisdiction, the Court next turned to the issue of the personal jurisdiction of the military tribunal and whether

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[365] *Id*. at 30-31. While the Court held that the first charge alleging law of war violations was within the subject matter jurisdiction of military tribunals, the Court declined to specify whether the remaining charges were proper. The Court stated:

> Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation. Specification 1 states that petitioners, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States." This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions.

Id. at 37. The remaining three charges that the Court did not address were: Violation of Article 81 of the Articles of War (relieving or attempting to relieve, or corresponding with or giving intelligence to the enemy); Violation of Article 82 (spying); and Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

these individuals should be entitled to an Article III constitutional court, which would provide a trial by jury and other Fifth and Sixth Amendment protections. The Court again looked to history and determined that because the Continental Congress had authorized military trials for enemy spies contemporaneously with the Constitution, the Constitution did not preclude military trials of all offenses against the law of war.[366] The Court held that "because they had violated the law of war by committing offenses," they were "constitutionally triable by military commission."[367]

The Court did not ignore *Milligan*, which held that the military commissions 'can never be applied to citizens . . . where the courts are open and their process unobstructed."[368] *Milligan* was especially significant because the *Quirin* Court chose not to resolve the question of whether one of the accused saboteurs was a U.S. citizen[369] Instead of overruling *Milligan*, or following it, the Court distinguished it. The Court reasoned that the accused in *Milligan* was a twenty-year resident of Indiana, was not part of enemy armed forces, and was therefore "a non-belligerent, not subject to the law of war."[370] The Court stressed the limitations of its opinion:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries. . . .We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.[371]

The *Quirin* case was easily the most significant case to come out of the World War II era, but it was far from the only one. In *Billings v.*

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[366] *Id.* at 41-44.
[367] *Id.* at 44.
[368] *Id*. at 45.
[369] *Id.* at 21 ("We do not find it necessary to resolve these contentions.").
[370] *Id.* at 45. The Court declined to explain why Milligan was a "non-belligerent" instead of an "unlawful belligerent" giving aid to the Confederate army in its war against the United States. That reading would place Milligan in exactly the same status as the accused in *Quirin*.
[371] *Id.* at 45-46.

Truesdell,[372] the Court answered the question raised during World War I of whether courts-martial had personal jurisdiction over draftees. Billings was a conscientious objector who refused to participate in military in-processing.[373] He was charged and convicted by court-martial for failing to follow orders.[374] On petition for habeas corpus, he argued that the court-martial lacked personal jurisdiction over him as a draftee. The Supreme Court agreed, holding that because the plaintiff had not been inducted into the Army he could not be subject to court-martial, and must be prosecuted in civil court.[375] However, the Court did not base the lack of personal jurisdiction on the Constitution, but instead on congressional legislation. Following the challenges to induction laws during World War I,[376] Congress changed the Selective Service Act to grant a court-martial jurisdiction over only those individuals who were already inducted into the armed services.[377] The Act provided that draftees, who had not yet been inducted into the military, were to be prosecuted in civil court.[378] While the Court asserted that there "was no doubt of the power of Congress to . . . subject to military jurisdiction those who are unwilling . . . to come to the defense of their nation,"[379] because "Congress has drawn the line between civil and military jurisdiction it is our duty to respect it."[380] While the Court's dicta in *Billings* indicated that Congress could constitutionally subject draftees to a military court, *Billing's* holding limited court-martial jurisdiction over draftees on statutory grounds.

Two years later, the Court again relied on a congressional statute to limit the jurisdiction of military courts, but in this instance with more significant constitutional implications. *Duncan v. Kahanamoku*[381] involved two civilians who were prosecuted by military tribunal while the Hawaiian Islands were under martial law following the attack at Pearl Harbor.[382] Congress had previously authorized the use of martial law in Hawaii with the *Hawaiian Organic Act*, which authorized the governor

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372 321 U.S. 542 (1944).
373 *Id.* at 544-45.
374 *Id.*
375 *Id.* at 552.
376 *See supra* note 346 and accompanying text.
377 *See* Section 11 of The Selective Service Act of 1940, 54 Stat. 894 (codified at 50 U.S.C. § 311 (2000)).
378 *Id.*
379 *Billings*, 321 U.S..at 556.
380 *Id.* at 559.
381 327 U.S. 304 (1946).
382 *Id.* at 307-08. *See also supra* notes 328-331 and accompanying text.

of Hawaii to declare martial law during times of rebellion, invasion, or imminent danger.[383] Pursuant to this congressional authorization, the governor established martial law and the military established military tribunals to replace the civilian court system.[384] Military tribunals prosecuted two civilians, Mr. Duncan and Mr. White, for civilian crimes several months after imposition of martial law.[385] Both men challenged the jurisdiction of the military tribunals to prosecute them by arguing that as civilians charged with civilian offenses they had a right to be prosecuted in a constitutional court with all of the protections of the Bill of Rights.[386] The Court agreed and held that when Congress authorized "martial law" it did not "declare that the governor in conjunction with the military could for days, months, or years close all the courts and supplant them with military tribunals."[387] In reaching the decision, the Court determined that the *Organic Act* and its legislative history failed to state that "martial law" in Hawaii included the replacement of civil courts with military tribunals.[388] The Court relied on the Founding Fathers' desire to subordinate the military to society in determining that "courts and their procedural safeguards are indispensable to our system of government."[389] In accordance with those founding principles, the Court concluded that absent specific language stating otherwise, Congress must not have intended the *Organic Act* to supplant the civil courts with military tribunals.[390] While technically the Court's decision was only a statutory interpretation, it had constitutional implications. It asserted that the President and the military could not establish military commissions—even during times of congressionally-declared martial law—in the absence of more specific congressional authorization.[391]

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[383] *Duncan*, 327 U.S. at 307-08; *see also* Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153 n.1.

[384] *Duncan*, 327 U.S. at 308.

[385] Mr. Duncan was prosecuted for assault and Mr. White was prosecuted for stock embezzling. *Id.* at 309-10.

[386] *Id.* at 310.

[387] *Id.* at 315.

[388] *Id.* at 317. The Court reached this decision despite the fact that the Hawaii Supreme Court had previously addressed this issue and had, in fact, held that martial law did allow for replacement of civil courts with military tribunals. *Id*.

[389] *Id.* at 322.

[390] *Id.* at 324. Justice Murphy addressed the constitutional issue in his concurring opinion stating: "Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States." *Id*. at 325 (Murphy, J, concurring).

[391] Charles Fairman articulated it best when he wrote:

> While the decision is technically only a construction of statutory

In 1946, the Supreme Court also decided *In re Yamashita*,[392] another case defining the jurisdiction of military tribunals. Yamashita was a commanding general of the Japanese army in the Philippine Islands during World War II.[393] After his surrender, he was held as a prisoner of war until General MacArthur directed Yamashita's prosecution by military tribunal for the war crime of failing to prevent his troops from committing atrocities.[394] The commission convicted Yamashita and sentenced him to death by hanging.[395] On petition for habeas corpus,[396] the defense raised many challenges to the subject matter jurisdiction of the military tribunal, arguing in part that military commissions could not try law of war violations after hostilities had ended, and the actual charge against General Yamashita failed to allege any violation of the law of war.[397] The petition also raised several due process claims.[398]

> language, we may take it that it would be the view of the Justices who joined in it that a commander who has to act without any specific statute on which to rely will be constitutionally restrained by those principles which the Court finds applicable to the interpretation of this statute. Indeed, as construed, the statute authorized nothing more than could have been sustained without it.

Charles Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the* Yamashita *Case*, 59 HARV. L. REV. 833, 855 (1946).

[392] 327 U.S. 1 (1946).

[393] *Id.* at 5. For a detailed description of the case see J. Gordon Feldhaus, *The Trial of Yamashita*, 15 S. DAK. B. J. 181 (1946). For an overview of the thousands of allied trials in the far east see PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST 1945-1951 (1979); THE YAMASHITA PRESIDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 71 (1982).

[394] *Yamashita*, 327 U.S. at 5.

[395] *Id.* Interestingly, twelve international war correspondents covering the trial took a vote and voted twelve to zero that Yamashita should have been acquitted. *See* PICCIGALLO, *supra* note 393, at 57.

[396] The habeas petition originally went before the Philippine Supreme Court but after they ruled they lacked authority over the U.S. Army who convened the tribunal, the U.S. Supreme Court elected to hear the case. *Yamashita*, 327 U.S. at 6.

[397] *Id.* at 8-22.

[398] The actual issues raised by the defense were as follows:

> (a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan;
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> (b) That the charge preferred against petitioner fails to charge him with a violation of the law of war;

The Supreme Court first cited to *Quirin* and Article 15 as Congress' authorization for the President to use military commissions to punish war crimes pursuant to its constitutional power to "define and punish . . . Offences against the Law of Nations."[399] The Supreme Court had no difficulty finding that international law allowed the use of military commissions following the end of hostilities.[400] The defense's next contention was that because the charges against Yamashita did not claim that he either "committed or directed" anyone to perform atrocities, he could not be charged with committing a war crime.[401] While the Court recognized that the charges against Yamashita must allege a violation of the law of war in order to be consistent within Congress' mandate, the Court held that the charges met that burden.[402] Under various international law agreements, commanders are "to some extent responsible for their subordinates," and thus the charge that Yamashita unlawfully disregarded and failed to control the members of his command "tested by any reasonable standard, adequately alleges a violation of the law of war."[403]

> (c) That the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War and the Geneva Convention, and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;
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> (d) That the commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention.

Id. at 6-7.

[399] *Id.* at 7.

[400] In supporting this conclusion, the Court noted that "[n]o writer on international law appears to have regarded the power of military tribunals . . . as terminating before the formal state of war has ended." *Id*. at 7. The Court further identified that "in our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war." *Id.* Of course following the Civil War the Court had rejected the trial of Milligan by military commission.

[401] *Id*. at 13.

[402] *Id.* at 14.

[403] *Id*. at 15, 17. Justice Murphy vehemently disagreed with this assessment in his dissent and argued that international law made no attempt to "define the duties of a commander." *Id*. at 35-36. In addition, Justice Murphy and Justice Rutledge both issued lengthy impassioned dissents arguing that the procedures of the military trial against

Following *Yamashita*, the Supreme Court distanced itself from the role of reviewing the jurisdiction of overseas military tribunals. In two cases, *Hiroto v. MacArthur*,[404] and *Johnson v. Eisentrager*,[405] the Court held that it lacked the authority to affect the judgments of these overseas military courts. *Hiroto* involved GEN Macarthur's prosecution of Japanese war criminals by the International Military Tribunal for the Far East (IMTFA). While MacArthur was the U.S. commanding general in the Far East, he had also been appointed the Supreme Commander for the Allied Powers, which had established the IMTFA.[406] In a 6-1 decision, the Supreme Court held that the IMTFA military tribunal was "not a tribunal of the United States" and therefore "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners."[407]

Similarly, *Eisentrager* presented the Court with a habeas petition from twenty-one German nationals who were convicted by an American military tribunal in China. The Germans were convicted of violating the laws of war by providing intelligence about U.S. forces to the Japanese after the surrender of Germany, but before surrender of Japan.[408] While the petitioners relied on *Quirin* and *Yamashita* to support their petition for habeas corpus, the Court distinguished these two cases. In *Quirin* and *Yamashita*, the accused were both in the physical territory (either actual or occupied) of the United States.[409] In *Eisentrager*, the petitioners were enemy aliens who had never been in the United States, who were captured and held as prisoners of war outside U.S. territory, and were tried, convicted, and imprisoned for war crimes by a military commission

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Yamashita grossly violated the Articles of War and due process clause of the Constitution. *See id.* at 26-41 (Murphy, J, dissenting); *id.* at 41-83 (Rutledge, J., dissenting). In fact, subsequent studies and experiences during the Vietnam War have generally rejected the principle that a commander's negligence can subject him to prosecution of war crimes. Instead, it has generally been concluded that a commander must have actual knowledge of his subordinates' action to be guilty of a law of war violation. *See, e.g.*, Franklin A. Hart, *Yamashita, Nuremberg and Vietnam*: *Command Responsibility Reappraised*, 25 NAVAL WAR COLL. REV. 19, 30 (1972); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

[404] 338 U.S. 197 (1948).

[405] 339 U.S. 763 (1950).

[406] *Hirota*, 338 U.S. at 198.

[407] *Id.*; *see also* Homma v. Patterson, 327 U.S. 759 (1946); Milch v. U.S., 332 U.S. 789 (1947) (denying requests for *habeas* despite dissents from Justices Murphy and Rutledge and requests by four justices to hear oral arguments on the issue of jurisdiction).

[408] *Eisentrager*, 339 U.S. at 775-76.

[409] *Id.* at 779-80.

sitting outside the United States.[410] As such, the Court held that these "nonresident enemy alien[s], especially one who has remained in the service of the enemy," do not have the right to file habeas petitions in United States courts.[411]

During the post-war period, the Court addressed other cases affecting the jurisdiction of military commissions. For example, in *Hirshberg v. Cooke*,[412] the Court held that a court-martial lacked personal jurisdiction over a Sailor who was accused of abusing Japanese prisoners of war during a previous enlistment, from which he was honorably discharged.[413] The Court cited congressional language and longstanding practice of the military in holding that the military lacked authority to court-martial a Soldier for an offense committed in a prior enlistment ended by honorable discharge, despite the fact that he subsequently reenlisted.[414]

In sum, during the era between World War I and World War II, the Court directly addressed the constitutional limitations on military jurisdiction for the first time since *Milligan*. In two instances, the Court explicitly upheld the constitutionality of prosecuting conceded enemy combatants for war crimes by military tribunals in accordance with congressional legislation. However, the Court refused to uphold the use of military jurisdiction in Hawaii, despite the congressional acknowledgement of martial law. Unlike *Milligan*, the Court's decisions in this era made no attempt to assert a bright-line rule, or develop a methodology for determining the constitutional boundaries of military tribunals. The Court left previous military jurisdiction precedents intact, and constrained their holdings as much as possible to the specific facts before them in each case. Thus, while the Court decided several cases concerning the constitutional limits on military jurisdiction, the lessons from these cases are exceedingly difficult to apply.

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410 *Id.* at 776.
411 *Id.*
412 336 U.S. 210 (1949).
413 *Id.* at 211.
414 *Id.* at 218-19. For other relevant Supreme Court cases on the military during this timeframe see Wade v. Hunter, 336 U.S. 684 (1949) (limiting the application of double jeopardy in the military); Whelchel v. MacDonald, 340 U.S. 122, 127 (1950) (holding that the military tribunal did not lose jurisdiction by its failure to address the soldier's possible insanity at the time of the offense); Hiatt v. Brown, 339 U.S. 103 (1950) (limiting a civil court's ability to review a military court's compliance with the Due Process Clause).

D. Military Tribunals from Enactment of the UCMJ to Present

1. Authority and Use of Military Tribunals 1950-2004

Following World War II, America embarked on the most thorough and comprehensive review of military law in U.S. history. Outrage over the abuses of the military justice system[415] coupled with extensive publicity resulted in repeated calls for reform.[416] Multiple blue-ribbon panels and public interest groups like the American Bar Association and the American Legion lobbied for reform of the Articles of War and military justice.[417] As a result of these calls for reform, Congress passed the Uniform Code of Military Justice (UCMJ),[418] which radically altered the use of military tribunals and the entire system of military justice.[419] In addition to establishing uniform law for all of the services, and establishing a civilian court of review,[420] the UCMJ substantially expanded the jurisdiction of military courts-martial. The UCMJ extended the personal jurisdiction of courts-martial to include many people previously not subject to military justice, including discharged Soldiers, contractors, and retirees.[421] The new code also expanded the subject matter jurisdiction of courts-martial to cover all peacetime common law crimes, including capital crimes like murder and rape, even if the crime had no military nexus.[422] In addition, Congress eliminated

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[415] *See infra* Part IV.C.1.

[416] *See, e.g.*, LURIE, MILITARY JUSTICE IN AMERICA, *supra* note 83, at 76-88.

[417] *See* Cox, *supra* note 42, at 3.

[418] *See* Act of May 5, 1950, Uniform Code of Military Justice, Pub. L. No. 810506, 64 Stat. 107 (1950). Actually, the first congressional action was passage the 1948 Elston Act, see Selective Service Act of 1948, Pub. L. No. 80-759, 201-49, 62 Stat. 604 (1949). However, this Act was a short-term measure that was superseded two years later by Congress' passage of the Uniform Code of Military Justice. As a result, this article focuses on the UCMJ.

[419] For a detailed history and background of the UCMJ see LURIE, PURSUING MILITARY JUSTICE, *supra* note 83, and other sources cited *supra* note 80.

[420] UCMJ art. 67 (2005).

[421] *Id.* arts. 2-3. This vast expansion of personal jurisdiction was well documented at the time. *See, e.g.*, JOSEPH W. BISHOP JR., JUSTICE UNDER FIRE 60 (1974) ("The Uniform Code of 1950 marked the zenith of military jurisdiction over civilians."); GENEROUS, *supra* note 311, at 176 ("The new UCMJ provided for court-martial jurisdiction over a varieties of people who in the past had been in such small numbers as to be insignificant."). Some of the provisions of the UCMJ extending jurisdiction were limited by the court. *See infra* Part IV.D.2.

[422] UCMJ arts. 118, 120. The expansion of subject matter jurisdiction received similar contemporaneous criticism, *see, e.g.*, BISHOP, *supra* note 421, at 60 ("By 1950 . . . all soldiers and millions of civilians were triable by court-martial for just about any

the turnover provision, which had required commanding officers to honor requests to deliver Soldiers accused of common law crimes to civil authorities.[423] For the first time, military courts-martial were given subject-matter jurisdiction over all common law felonies without being required to relinquish authority to civilian courts. While Congress continues to modify rules and procedures from time to time, the UCMJ of 1950 remains the primary authority for military courts-martial.[424]

While the UCMJ significantly modified the Articles of War concerning who and what could be tried before military court-martial, Congress did not make any changes to the authority of military commissions. Rather, in Article 21 of the UCMJ, Congress merely adopted verbatim the language from Article 15 of the 1920 Articles of War, which provided for concurrent jurisdiction of military commissions in cases where statute or the law of war authorized their use.[425] Additionally, while Congress has recently passed laws granting federal courts jurisdiction over war crimes and other military employees, in each case it preserved the concurrent jurisdiction of military commissions under the law of war.[426] Throughout the last half-century, Congress has

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offense"). Subject matter jurisdiction was also restricted temporarily by the Supreme Court. *See infra* Part IV.D.2.

[423] *See* Wiener, *supra* note 27, at 12.

[424] *See, e.g.*, Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1336 (1968) (creating military trial judges); The Military Justice Act of 1983, Pub. L. No. 98-209, 1259, 97 Stat. 1393, 1405-06 (1983) (granting the Supreme Court certiorari over decisions of the Court of Appeals of the Armed Forces).

[425] The specific language reads as follows:

> Art. 21. Jurisdiction of courts-martial not exclusive. The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such commissions, provost courts, or other military tribunals.

See Katyal & Tribe, *supra* note 11, at 1287-90 (suggesting that Article 21 of the UCMJ should not be construed identically to its predecessor, Article 15, and instead limited to times of declared war).

[426] *See, e.g.*, Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C.S. § 3261(c) (LEXIS 2005).

> Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military

continued to provide statutory authority for the use of military commissions in accordance with "statute or the law of war," but has made no effort to define their jurisdiction expressly.

The United States also modified the jurisdiction of military tribunals by entering into an international agreement supporting the four Geneva Conventions of 1949. Because the Constitution mandates that "all Treaties made . . . under Authority of the United States, shall be the Supreme Law of the Land,"[427] the Geneva Conventions became binding domestic law, and part of the law of war, after receiving President Truman's signature in 1949 and upon final Senate ratification on 8 February 1955.[428] The two Geneva treaties with the most significant restrictive impact on military tribunals were Geneva Convention III, Relative to the Treatment of Prisoners of War, [429] and Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War.[430] While neither of these treaties flatly prohibited military tribunals, each treaty placed limitations on how and when such military courts could be used.

Building upon previous international agreements,[431] Geneva Convention III set forth specific requirements for the trial of enemy

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commission, provost court, or other military tribunal.

See also War Crimes Act, 18 U.S.C. § 2441 (granting federal district courts jurisdiction over war crimes where either the accused or the victim is a national of the United States). "The enactment of [The War Crimes Act] is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under the law of war or the law of nations." H.R. REP. No. 104-698 at 12 (1996), *reprinted in* U.S.C.C.A.N. 2166, 2177. *Id.* Both of these federal laws filled jurisdictional gaps that existed because Congress had previously not extended many federal criminal laws or federal court jurisdiction to cover crimes committed overseas.

[427] U.S. CONST. art. VI, § 2.

[428] *See* International Committee of the Red Cross, Treaty Database, *at* http://www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/d6b53f5b5d14f35c1256402003f9920; *see also* Senate Comm. of Foreign Relations, Geneva Conventions for the Protection of War Victims, S. EXEC. REP. No. 84-89 (1955), *reprinted in* 84 CONG. REC. 9958, 9972 (1955).

[429] Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

[430] Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention IV].

[431] *See, e.g.*, JEAN DE PREUX ET AL., COMMENTARY, IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3-4 (Jean S. Pictet ed., 1958).

prisoners of war (POWs). Specifically, Geneva Convention III limited the use of military tribunals against POWs to "the same courts according the same procedure as in the case of members of the armed forces of the Detaining Power."[432] Because the United States does not use military commissions to try its own military personnel, Geneva Convention III mandates that the United States can no longer use them to prosecute enemy POWs. This marked a significant change in U.S. policy from the trials of General Yamashita and other World War II prisoners of war by military commission. During military occupation, Geneva Convention IV requires the use of local national courts as much as possible to punish all civilian crimes[433] and requires that any military tribunal punishing violations of military order sit in the occupied territory itself, and not in some other location.[434] Moreover, Geneva Convention IV limits military courts' abilities to prosecute offenses committed before actual occupation. Instead, it requires that military courts only punish civilians for crimes committed before the military occupation if those offenses were "breaches of the laws and customs of war."[435] Taken together, Geneva Conventions III and IV place significant limitations on the use of military tribunals, limiting both the personal and subject matter jurisdiction of tribunals and requiring that the United States afford enemy prisoners the same due process that it gives its own Soldiers.

For many years, these changes had little or no practical effect on the United States, because following the end of World War II, military commissions were not used for the remainder of the twentieth century. Instead, the only military tribunals convened by the United States were courts-martial under the UCMJ. However, because the UCMJ expanded both personal and subject matter jurisdiction of courts-martial, the use of military courts continued to be a live issue through the twentieth century. Without a doubt, the UCMJ substantially improved the fairness of military courts, but the military justice system continued to receive substantial criticism from both inside and outside the military.[436] This was especially true during the Vietnam War.[437] The most famous case of

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[432] Geneva Convention III, *supra* note 429, art. 102.
[433] Geneva Convention IV, *supra* note 430, art. 64.
[434] *Id.* art. 66.
[435] *Id.* art. 70.
[436] *See, e.g.*, Kenneth J. Hodson, *The Manual for Courts-Martial*—1984, 57 MIL. L. REV. 1, 1-5 (1972) (chronicling much of the criticism of military justice, in general, and the UCMJ in particular).
[437] *See, e.g.*, ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969).

this era, and one that drew the most intensive criticism,[438] concerned the court-martial of Lieutenant William Calley for the massacre of 500 women, children and unarmed civilians at Mai Lai on 16 March 1968.[439] The court-martial convicted Lieutenant Calley of murder and sentenced him to life in prison. In the face of immense public dissatisfaction with the verdict, however, President Nixon released Calley from prison in 1974.[440]

Beginning in August 2004, President Bush began using military commissions against Hamdan and other Guantanamo Bay detainees.[441] The President maintains authority to convene these military commissions as Commander in Chief under the Constitution's Article II, and from the congressional authority granted him under Article 21 of the UCMJ.[442] The Government asserts that Hamdan, the first person tried by military commission, is guilty of conspiracy of war crimes by serving as Osama bin Laden's personal driver and bodyguard, and delivering weapons and ammunition to al Qaeda members from February 1996 through November 2001.[443] While the military captured Hamdan during combat operations in Afghanistan, many of these other detainees at Guantanamo Bay were not captured on the battlefield but instead taken from "friendly" nations outside a theatre of traditional international armed conflict.[444] In justifying the use of military commissions, the United States maintains that the accused are neither civilians, entitled to a trial in

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[438] Major General Hodson, Judge Advocate General of the Army, stated that the Calley trial "developed a number of critical scholars of the military justice system," and noted that he had received more that 12,000 letters about Lieutenant Calley's conviction. *See* Cox, *supra* note 42, at 16.

[439] For details on the incident, see generally SEYMOUR HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1970). *See also* United States v. Calley, 22 M.J. 534 (C.M.A.); Calley v. Callaway, 519 F.2d 184 (1975), *cert denied*, 425 U.S. 911 (1976).

[440] Kevin Byrne, *One Day in a War: My Lai and the Horrors We Need to Remember*, THE CHI TRIB., Nov. 13, 1989, at 15. The Secretary of the Army reduced Calley's life sentence to 10 years, and in 1975 he was released on parole.

[441] *See supra* notes 3-5 and accompanying text.

[442] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 918 (2005).

[443] *See* Dep't of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, *available at* http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf (last visited Jan. 13, 2006).

[444] The military captured other Guantanamo Bay detainees in nations where the United States has not been involved in traditional international armed conflict such as Gambia, Zambia, Bosnia, and Thailand. *See In re Guantanamo* Detainee Cases, 2005 U.S. Dist. LEXIS 1236, 6-7 (D.D.C. 2005).

constitutional court, nor prisoners of war, entitled to the protections of a court-martial under Geneva Convention III.[445] Instead, the government asserts that Hamdan, and the other detainees at Guantanamo Bay, are military-civilian hybrids known as "unlawful combatants," properly tried before a military commission without the protections of Geneva Convention III.[446]

2. Supreme Court Review of Military Tribunals 1951-2004

Although the UCMJ made military court-martial more sophisticated and protective of individual rights, in the years following its enactment, the Supreme Court became more willing than ever before to limit the jurisdiction of military tribunals. The first case the Supreme Court heard during this era, *Madsen v. Kinsella*,[447] concerned the use of a military commission prior to enactment of the UCMJ. Yvette Madsen was a U.S. citizen who lived in Germany because her husband was assigned there as an officer in the United States Air Force.[448] In October 1949, Madsen was charged by a United States Military Government Court with murdering her husband in violation of the German Criminal Code. She was found guilty by military commission and sentenced to 15 years in federal prison.[449] On a petition for habeas corpus, Madsen did not challenge the authority of the military to prosecute her by arguing that she must be prosecuted in either German or American court. Instead, she asserted that a military court-martial was the only military tribunal with jurisdiction to prosecute her, not the military commission used in her case. The Supreme Court disagreed, citing to both historical use of military commissions and Congress' approval under Article of War 15 (now Article 21 of the UCMJ) to allow their use for crimes that "by statute or by the law of war may be triable by such military commissions."[450] The Court concluded that because U.S. military occupation courts in Germany were consistent with the law of war, the President could establish military commissions in territory occupied by

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[445] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160 (D.D.C. 2004) ("The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention.").
[446] *Id.*
[447] 343 U.S. 341 (1952).
[448] *Id.* at 343.
[449] *Id.* at 344-45.
[450] *Id*. at 354.

military forces "in the absence of attempts by Congress to limit the President's power."[451] Justice Black wrote the sole dissent in the *Madsen* case. He argued that "if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority," rather than in any military court[452]

Following *Madsen*, Justice Black's dissenting position began to gain support, and the Supreme Court issued a serious of decisions significantly restricting the jurisdiction of military tribunals. For the first time, the Supreme Court struck down several congressionally created jurisdictional provisions of courts-martial by holding that they exceeded constitutional limits. First, in *Toth v. Quarles*,[453] the Court struck down Article 3a[454] of the recently-enacted UCMJ extending courts-martial personal jurisdiction over discharged service members who committed felonies during their time on active duty.[455] Toth was a former airman in the United States Air Force who completed his service and received an honorable discharge from the military. After his discharge, the military discovered that he committed a murder while stationed in Korea and still on active duty. The Air Force arrested Toth and pursuant to the UCMJ, returned him to Korea, where a court-martial convicted him of murder. On petition for certiorari, Toth argued that after his discharge, he was a civilian and the Constitution prohibited his trial by court-martial.[456] The Supreme Court agreed. Now, writing for the Court, Justice Black pointed to Article III of the Constitution and held that Congress' power to make rules for the government of the military "does not empower Congress to deprive people of trials under Bill of Rights safeguards." Because the use of military jurisdiction calls for "the least possible power adequate to the end proposed,"[457] civilians like Toth are entitled to the benefits and safeguards of Article III courts provided in the Constitution.[458]

When the Supreme Court revisited the issue of military jurisdiction the next year, it indicated a lack of interest in further restricting the

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[451] *Id*. at 348, 356.
[452] *Id*. at 372 (Black, J., dissenting).
[453] 350 U.S. 11, 23 (1955).
[454] UCMJ art. 3(a) (2005).
[455] 350 U.S. 11 (1955).
[456] *Id*. at 13.
[457] *Id*. at 23.
[458] *Id*.

jurisdiction of military courts. At the end of Supreme Court's term, the Court heard two cases, *Kinsella v. Krueger*,[459] and *Reid v. Covert*,[460] which involved two military spouses convicted at court-martial for killing their husbands while stationed overseas. Both women challenged the constitutionality of their trials by courts-martial rather than constitutional courts.[461] The Court initially rejected their claims by pointing to the historical power of Congress to establish legislative courts. Historically, Congress possessed the constitutional authority to establish territorial courts outside the United States that do not necessarily meet Article III constitutional restrictions. By this analogy, the Court upheld Congress' authority to subject military dependants serving in foreign countries to courts-martial under the UCMJ.[462] Three justices dissented from this opinion, stating:

> [The issue is] complex, the remedy drastic, and the consequences far-reaching upon the lives of civilians. The military is given new powers not hitherto thought consistent with our scheme of government. For these reasons, we need more time than is available in these closing days of the Term in which to write our dissenting views. We will file our dissents during the next Term of Court.[463]

By the time the 1957 Court Term arrived, two Supreme Court justices had retired, and the Court took the unusual step of granting a petition for a rehearing on these two cases. Upon rehearing, the Court reversed course and dismissed the murder convictions of both military wives. In *Reid v. Covert*,[464] Justice Black wrote the lead opinion. He held that the text of the Constitution clearly prohibited the trial of military spouses by military tribunal, and that every extension of military jurisdiction necessarily encroached on the power of civil courts and the

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[459] 351 U.S. 470 (1956).
[460] 351 U.S. 487 (1956).
[461] Dorothy Krueger Smith was court-martialed in Tokyo, Japan and sentenced to life imprisonment for killing her husband, a colonel in the U.S. Army. *Krueger*, 351 U.S. at 471-72. Clarice Covert was court-martialed in England and sentenced to life in prison for killing her husband, an Air Force sergeant. *Reid*, 351 U.S. at 491.
[462] *Krueger*, 351 U.S. at 475-76; *Reid*, 351 U.S. at 488.
[463] *Krueger*, 351 U.S. at 485-86 (Warren, Black, and Douglas, JJ., dissenting). The dissent also applied to *Reid*. *Id.* Justice Frankfurter filed a reservation to the case noting that the pressure of the end of the term precluded the Court from properly analyzing the issues. *Id.* at 481-83.
[464] 354 U.S. 1 (1957).

protections of the Bill of Rights such as trial by jury. He asserted that it was "clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces.'"[465] He went on: "The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.'"[466] Thus, the text and history of the Constitution make clear that the Constitution does not subject civilians who have a relationship with the armed forces to trial by military tribunal.[467]

The military initially sought to limit the impact of the Court's decisions to capital crimes because both Covert and Krueger were court-martialed for the capital offense of murder. In 1960, however, the Supreme Court clarified that the Constitution prohibited military courts from prosecuting family members for non-capital offenses as well. Thus, in *Kinsella v. United States* ex. rel. *Singleton*,[468] the Court held the military could not court-martial Joanna Dial for involuntary manslaughter even though she was stationed overseas with her Soldier-husband. Following the rationale articulated in *Toth* and *Covert*, the Court held that "trial by court-martial is constitutionally permissible *only* for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces.'"[469] The Court established a bright-line rule of personal jurisdiction, stating that "the test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"[470] In reaching this decision, the Court rejected the government's suggestion that the Court adopt a balancing test that examined the significance of the military offense and the nature of the

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[465] *Id*. at 30.
[466] *Id*.
[467] Justice Black wrote "if the language . . . is given its natural meaning, the power granted does not extend to civilians—even though they may be dependents living with servicemen on a military base. The term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents." *Id.* at 19-20.
[468] 361 U.S. 234 (1959).
[469] *Id.* at 240.
[470] *Id*. at 241.

person's connection to the service.[471] In rebuking that view, the Court held that whoever is part of "the land and naval forces" is subject to court-martial for any offense; those who are not part of the land and naval forces cannot be tried by military court-martial whatsoever.[472] The Supreme Court published two companion cases the same day as *Singleton*, striking down courts-martial jurisdiction over civilian employees of the military for both capital or non-capital offenses, even while serving with the Army overseas.[473]

The Court next addressed the issue of military jurisdiction in *Lee v. Madigan*.[474] John Lee was a prisoner, dishonorably discharged from the Army for assault and robbery. The military court-martialed Lee for conspiring to commit murder while serving time in jail after his military

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[471] *Id.* at 246.

[472] The Court held:

> The power to "make Rules for the Government and Regulation of the land and naval Forces" bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment thereof. If civilian dependents are included in the term "land and naval Forces" at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments.

Id. at 246.

[473] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 286 (1960) (holding courts-martial jurisdiction over a civilian employee of the armed forces serving outside the United States in time of peace for non-capital case is unconstitutional); Grisham v. Hagen, 361 U.S. 278, 280 (1960) (courts-martial over civilian employee of the Army serving outside the United States during peacetime employee for a capital offense is unconstitutional). The issue of whether or not a civilian could be court-martialed while serving overseas during armed conflict has never been addressed by the Supreme Court and is still an open issue. During the Vietnam War, the Court of Appeals for the Armed Forces avoided the issue by declaring that in order for a civilian employee to be court-martialed there must be a declaration of war by Congress. *See* United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). Congress addressed this issue recently in the Military Extraterritorial Justice Act of 2000 to expand federal jurisdiction over civilians accompanying the armed forces. However, it kept open the option of concurrent military jurisdiction. *See* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261(c) ("Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.").

[474] 358 U.S. 228 (1959).

discharge. Lee argued that the Court's decisions in *Toth* and its progeny effectively overruled *Kahn* by holding that the Constitution prohibits court-martial jurisdiction over discharged Soldiers, including discharged military prisoners.[475] The Court chose not to reach the constitutional question whether court-martial jurisdiction extends to discharged military prisoners. The Court instead held that because the 1920 Articles of War in effect at the time of Lee's offense prohibited court-martial for murder in time of peace, Lee's court-martial lacked subject matter jurisdiction over the offense.[476] The Court reached its decision by referencing America's historic desire to limit the reach of military tribunals. Even if Congress wanted to continue the use of military courts "long after hostilities ceased, we cannot readily assume that the earlier Congress used 'in time of peace' in Article 92 to deny Soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased."[477] As such, the Court concluded that while the U.S was still technically at war with Germany and Japan in 1949, it was a "time of peace" for purposes of the court-martial, and military courts lacked subject matter jurisdiction.[478]

Dicta in *Singleton* indicated that if a court-martial had jurisdiction over a particular person, then there was no constitutional limitation on its subject matter jurisdiction.[479] But, the Court quickly abandoned that view, at least temporarily. In 1969, the Supreme Court again curtailed Congress' broad grant of courts-martial jurisdiction under the UCMJ, this time holding that Congress lacked the constitutional power to grant courts-martial subject-matter jurisdiction over crimes that had no military "service connection."[480] In *O'Callahan v. Parker*,[481] the Supreme Court held that despite Congress' authority under Article I, Clause 14 of the Constitution to "make Rules for the Government and Regulation of the

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[475] Lee v. Madigan, 248 F.2d 783, 784 (9th Cir. 1957).
[476] *Lee*, 358 U.S. at 235-36.
[477] *Id*. at 236.
[478] This is a significant departure from previous precedent. In *Kahn*, the previous Supreme Court case dealing with a military prisoner, the Court unanimously held that the term "in time of peace" in Article 92 "signifies peace in the complete sense, officially declared." *Id*. at 237 (Harlan, J, dissenting). *See also supra* note 353 and accompanying text. Accordingly, this case is difficult, if not impossible, to reconcile with *Kahn*.
[479] *See, e.g.*, *Singleton*, 361 U.S. at 234 ("the power to make Rules for the Government of the land and naval Forces' bears no limitation as to offenses"); *see also supra* notes 468-472 and accompanying text.
[480] O'Callahan v. Parker, 395 U.S. 258, 272 (1969).
[481] 395 U.S. 258 (1969).

land and naval forces,"[482] Congress could not confer courts-martial jurisdiction without violating Article III of the Constitution and the Fifth and Sixth Amendments unless the crime itself was service-related.[483] The *O'Callahan* Court did not look merely at the status of the accused as a member of the armed forces to decide the question, stating that "[status] is the beginning of the inquiry, not its end."[484] It canvassed historical practice and noted that "both in England prior to the American Revolution and in our own national history military trial of Soldiers committing civilian offenses had been viewed with suspicion."[485] Indeed, throughout much of American history, courts-martial have lacked the authority to try Soldiers for civilian offenses.[486] Basing its holding on this historical analysis, the Court held: for a "crime to be under military jurisdiction [it] must be service connected, lest 'cases arising in the land or naval forces' . . . 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."[487]

Following the *O'Callahan* decision, the Supreme Court attempted to clarify and define which offenses were "service-connected" and amenable to prosecution by military courts-martial. In *Relford v. Commandant*,[488] the Court enumerated twelve factors to use in deciding whether a particular Soldier's crime was service-connected.[489] *O'Callahan's* limitation on subject matter jurisdiction did not last long. In 1987, the Supreme Court explicitly overruled *O'Callahan* in *Solorio v. United States*,[490] stating that "on re-examination of *O'Callahan*, we have decided that the service connection test announced in that decision should be abandoned."[491]

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[482] U.S. CONST. art. I, § 8, cl. 14.
[483] *O'Callahan*, 395 U.S. at 272-74.
[484] *Id*. at 267.
[485] *Id*. at 268.
[486] *See id*.
[487] *Id*. at 273.
[488] 401 U.S. 355 (1971).
[489] *Id*. at 365. *See also* Gosa v. Mayden, 413 U.S. 665, 674 (1973) (noting that *O'Callahan* "restrict[ed] the exercise of jurisdiction by military tribunals to those crimes with a service connection as an appropriate and beneficial limitation 'to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.'").
[490] 483 U.S. 435 (1987).
[491] *Id*. at 440-41.

In overruling the *O'Callahan* decision, the *Solorio* majority also based its decision on historical practice, asserting that "the *O'Callahan* Court's representation of . . . history . . . is less than accurate."[492] In refuting *O'Callahan's* reading of history, the *Solorio* majority quoted from sections of both the British Articles of War of 1774, and the American Articles of War, which the Court viewed as punishing Soldiers for civilian offenses.[493] The Court went on to overrule the *O'Callahan*

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[492] *Id*. at 442.

[493] One example of the Court's questioning *O'Callahan's* reading of history is Justice Rehnquist's majority opinion, citing to Section XIV of Article XVI of the British Articles of War of 1774. Solorio v. United States, 483 U.S. 435, 443 (1987). It stated that any Soldier who

> shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by order of the then Commander in Chief of Our forces, to annoy any Rebels or other Enemies in Arms against Us, he or they shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or general Court Martial.

Id. (quoting British Articles of War of 1774 art. XVI, sec. XIV), *reprinted in* G. DAVIS, MILITARY LAW OF THE UNITED STATES 581, 593 (3d rev. ed. 1915). This position was disputed by the dissenting justices. For example Justice Marshall pointed out the Court's omission of the beginning of the quotation, which read "All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March." British Articles of War of 1774, art. XVI, sec. XIV, *reprinted in* DAVIS, *id.* at 582, 594. Justice Marshall argued that this omission shows that this section of the British Articles of War was designed to prevent dereliction of military duty, as opposed to a purely civilian offense. *Solorio*, 483 U.S. at 459-60 (Marshall, J. dissenting). The entire quote from the British Articles actually reads as follows:

> All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whoever shall commit any Waste or Spoil either in Walks or Trees, Parks, Warrens, Fish Ponds, Houses or Gardens, Corn Fields, Enclosures or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by order of the then Commander in Chief of Our forces, to annoy any Rebels or other Enemies in Arms against Us, he or they shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or general Court Martial.

Id. Based on this language it seems the dissent may have a stronger reading of history in this particular instance. *See* Michael P. Connors, *The Demise of the Service-Connection Test:* Solorio v. United States, 37 CATH. U. L. REV. 1145, 1166-67 (1988). In a vehement dissent, Justice Marshall argued that the *Solorio* majority had incorrectly

service-connection requirement by relying on a literal reading of Congress' power under Article I, Clause 14 of the Constitution: "The history of court-martial jurisdiction in England and in this country during the seventeenth and eighteenth centuries is far too ambiguous to justify the restriction on the plain language of Clause 14 *O'Callahan* imported into it."[494] Thus, *Solorio* held that Congress' plenary power under Article I to "make Rules for the Government and Regulation of the land and naval forces"[495] allows courts-martial jurisdiction as long as the accused "was a member of the Armed Services at the time of the offense charged."[496] The *Solorio* opinion is significant because it was the first, and thus far only, explicit overruling of a previous military jurisdiction decision. It appeared to resolve the issue of military jurisdiction by making the sole constitutional test that for court-martial the status of the accused as a member of "the land and naval Forces."

While *Solorio's* purportedly authoritative interpretation of history might have ended debate on whether the Constitution limits the subject-matter jurisdiction of courts-martial, the issue resurfaced less than ten years later in *U.S. v. Loving*.[497] In *Loving*, four justices wrote a concurring opinion stating:

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decided the case "by assuming that the limitation on court-martial jurisdiction enunciated in *O'Callahan* was based on the power of Congress, contained in Art I, § 8, cl. 14." *Id.* at 451. He criticized the majority because rather than "acknowledging the [constitutional] limits on the crimes triable in a court-martial, the [*Solorio*] court simply ignores them." *Id.* Justice Marshall maintained that the *O'Callahan* decision was firmly based not on Clause 14, but on the Bill of Rights. *Id* at 451-52. To support this assertion he cited *O'Callahan*'s holding: "[for a] crime to be under military jurisdiction [it] must be service connected, lest 'cases arising in the land or naval forces' . . . 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." *Id.* at 452. While *O'Callahan*'s rationale may have been ambiguous, the *O'Callahan* Court did hold that Congress could not allow a court-martial to violate a soldier's Fifth and Sixth Amendment protections unless the case itself—not just the person accused—arose in the armed forces. *Id.* Thus, Justice Marshall argued that *O'Callahan* stood for the principle that Congress' "express grant of general power [under Article I must] be exercised in harmony with the express guarantees of the Bill of Rights." *Id.* He went on to harshly criticize the *Solorio* majority and argued that the Court's overruling of *O'Callahan* "reflects contempt, both for the members of our Armed Forces and for the constitutional safeguards intended to protect us all." *Id.* at 467 (Marshall, J, dissenting).

[494] *Solorio*, 483 U.S. at 446.

[495] U.S. CONST. art. I, § 8, cl. 14.

[496] *Solorio*, 483 U.S. at 451.

[497] 517 U.S. 748 (1996).

> The question whether a "service connection" requirement should obtain in capital cases is an open one both because *Solorio* was not a capital case, and because *Solorio's* review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try non-capital ones.[498]

The Supreme Court has not again addressed the issue, but this concurring opinion re-ignited the debate about whether the Constitution prohibits courts-martial jurisdiction over capital cases without a military nexus.[499]

In 2004, in *Rasul v. Bush*,[500] the Supreme Court significantly altered the ability of constitutional courts to review the jurisdiction of military tribunals other than courts-martial. *Rasul* involved a petition from two Australian and twelve Kuwaiti citizens who were captured by American forces in Afghanistan during hostilities between the United States and the Taliban. The individuals were being held (along with over 600 other foreign nationals) by the U. S. military at a Naval Base in Guantanamo

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[498] *Id.* at 774 (Stevens, J., concurring). In *Loving*, the issue before the Court was limited to whether the President had authority to promulgate aggravating factors for capital offenses to support the death penalty. While the Court was unanimous in holding that the President had such power, Justice Stevens wrote a concurring opinion, joined by Justices Breyer, Ginsburg, and Souter supporting the decision only because the case clearly involved a military offense.

[499] This opinion generated a good deal of legal scholarship and directly impacted the strategy of subsequent military defendants in lower courts, *see, e.g.*, O'Connor, *supra* note 107; Nicole, E. Jaeger, *Supreme Court Review: Maybe Soldiers Have Rights After All*: Loving v. Virginia, 87 J. CRIM. L. & CRIMINOLOGY 895 (1997); Christine Daniels, *Capital Punishment and the Courts-Martial: Questions Surface Following* Loving v. United States, 55 WASH & LEE L. REV. 577 (1998); Mark R. Owens, Loving v. United States: *Private Dwight Loving Fights a Battle for His Life Using Separation of Powers as His Defense*, 7 WIDENER J. PUB. L. 287 (1998); Meredith L. Robinson, *Volunteers for the Death Penalty? The Application of* Solorio v. United States *to Military Capital Litigation*, 6 Geo. MASON L. REV. 1049 (1998). *See also* United States v. Gray, 51 M.J. 1, 11 (1999) (describing the accused's argument that the court-martial lacked jurisdiction because the prosecution failed to prove that his murder was service-connected); Martin Sitler, *The Court-Martial Cornerstone: Recent Developments in Jurisdiction*, ARMY LAW., Sept. 2000, at 4 ("There is undoubtedly a trend to recognize a service connection requirement in military capital cases. Practitioners should heed this message.").

[500] 124 S. Ct. 2686 (2004). The Supreme Court released two other cases that same day dealing with the military's detention of "unlawful combatants." *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (holding that a "citizen-detainee is entitled to challenge his classification as an enemy combatant."); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (limiting habeas corpus jurisdiction to "the district in which the detainee is confined.").

Bay, Cuba.[501] The district court and the court of appeals rejected petitioners' claims for habeas corpus because the courts believed that under *Eisentrager*, aliens detained outside the United States could not seek a writ of habeas corpus. The Supreme Court granted certiorari and reversed, holding that federal courts could entertain petitions for habeas corpus from prisoners detained in Guantanamo Bay.[502] Instead of relying on *Eisentrager*, the Court distinguished it from *Rasul*:

> Petitioners in these cases differ from the Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[503]

The Court relied on *Milligan*, *Quirin*, and *Yamashita* to support its holding that detainees are entitled to habeas review if they are being held in territory exclusively controlled by the United States.[504] The Court's

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[501] *Rasul*, 124 S. Ct. at 2690.

[502] *Id.* at 2691-92. Technically, the Court did not rule on purely constitutional grounds. Rather, (as in *Duncan*) the Court imputed a broad statutory intent to Congress to prevent the Court from the need to confront directly the constitutional question. The Court held that in enacting 10 U.S.C. § 2441, Congress intended to extend habeas to foreign nationals. *Id.* at 2691-92.

[503] *Id*. at 2693.

[504] *Id*. at 2693, 2700. In his dissent, Justice Scalia argued that *Eisentrager* clearly controlled this case:

> The Court today holds that the habeas statute extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson v. Eisentrager*. . . . This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change and dissent from the Court's unprecedented holding.

Id. at 27-31 (Scalia, J., dissenting) (citations omitted).

decision in *Rasul* provided the basis for Hamdan to challenge his trial by military commission in U.S. district court.[505]

In sum, during the modern era, the Court directly confronted the constitutional limits of military jurisdiction in several instances. The Court held that the Constitution limited the jurisdiction of military tribunals in a number of cases even when Congress had explicitly authorized an extension of military jurisdiction. As such, the Court plainly renounced earlier case law indicating Congress had unlimited authority to regulate the "land and naval forces." Moreover, during this era, the Court began using a consistent methodology to determine the constitutional boundaries of military courts-martial. In case after case, the Supreme Court relied on the text of the Constitution and historical precedent in answering these questions. This methodology ultimately resulted in the conclusion that the sole constitutional restraint on court-martial jurisdiction is status: whether a person is "in the land and naval forces." If the person is part of the armed forces, per *Solorio*, he is constitutionally subject to court-martial for any offense. However, the Court's focus during this era has been solely on courts-martial under Congress' power to regulate the land and naval forces. Thus, these decisions provide little guidance for analyzing other military jurisdiction cases, such as Hamdan's trial by military commission.

V. The Supreme Court's Method of Analyzing Military Jurisdiction

A. Originalism- The Court's Inquiry

One striking aspect of the Supreme Court's decisions limiting the constitutionality of military jurisdiction is the Court's reliance on originalism.[506] John Hart Ely maintained that the basic premise

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[505] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 156 (D.D.C. 2004).

[506] Originalism has gone by many different names throughout history including formalism, self-restraint, interpretivism, and strict constructionism. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980) (describing the different names and terms); This article employs the modern term, originalism. Some of the many works studying this method of constitutional interpretation include: Lino A. Graglia, "*Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1019-22 (1992) ("Originalism is a virtual axiom of our legal-political system, necessary to distinguish the judicial from the legislative function."); Donald E. Lively, *Competing for the Consent of the Governed*, 42 HASTING L.J. 1527, 1531-45 (1991) (describing literalism and original intent as well as other theories of judicial review); Maurice H. Merrill, *Constitutional Interpretation: The Obligation to Respect the Text*, 25 OKLA. L.

underlying originalism is the "insistence that the work of the political branches is to be invalidated only in accordance with an inference whose underlying premise, is fairly discoverable in the Constitution."[507] Originalism demands that the Court interpret the Constitution in an identical manner as the Founders would have. As Judge Bork stated, "What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment."[508] Accordingly, originalists rely on the Constitution's text as well as historical analysis to identify the original intention of the Founders.[509]

The Court has consistently relied on constitutional text and history in analyzing the constitutional limits of military jurisdiction.[510] Despite the obvious need to reference history and text in constitutional interpretation, these sources alone have not always been effective in helping the Court determine the proper constitutional limits on military jurisdiction. In fact, neither history nor constitutional text provides clear guidance on contemporary issues of military jurisdiction that were never confronted by the Founders. This problem is vividly demonstrated by the Supreme Court's decision in *Solorio*, where the Court ruled that a person's military status as a member of the land and naval forces is the only relevant factor to determine whether a person can be subject to military jurisdiction. In reaching that decision, the Supreme Court overruled *O'Callahan*, a previous military jurisdiction decided just eighteen years earlier. By overruling *O'Callahan* and being forced to argue that the *O'Callahan* Court seriously misread history, *Solorio* demonstrated the limits of history in resolving contemporary disputes of military jurisdiction.[511]

It is hard to overstate the difficulty of relying only on history when interpreting contemporary issues of military jurisdiction. First, the

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REV. 530 (1972) (advocating a literal interpretation of the Constitution's text). Perhaps the best and most articulate defense of originalism is by Judge Robert Bork, a former Supreme Court nominee. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 81-3 (1990); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971). Justice Scalia is currently the Supreme Court's most outspoken advocate of originalism. *See, e.g.*, ANTONIN SCALIA. A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[507] ELY, *supra* note 506, at 2.

[508] BORK, *supra* note 506, at 144.

[509] *See* Lively, *supra* note 506, at 1531.

[510] For a thorough discussion of these cases, see *supra* Parts IV.B.2, IV.C.2 and IV.D.2.

[511] Solorio v. United States, 483 U.S. 435, 442 (1987).

Founders held differing opinions concerning the role of the military in society. As noted by Frederick Weiner: "to speak mildly, there existed in the late 1780s a considerable diversity of opinion regarding military policy."[512] The Founders also severely limited both who and what could be subject to military jurisdiction, generally excluding any offense that could be tried in civil court.[513] Historical practice provides little help with modern military jurisdiction cases because few, if any, military tribunals of the seventeenth, eighteenth, and nineteenth centuries prosecuted peacetime common-law crimes.[514] Today's military jurisdiction subjects many more people and offenses to military courts than the Founders could have ever envisioned.[515]

Recognizing the ambiguity of historical analysis, the *Solorio* Court grounded its decision in the text of Article I. The Court declared that the unqualified language of Article I gives Congress plenary power to regulate members of the armed forces:

> Such disapproval [of courts-martial jurisdiction] in England at the time of William and Mary hardly proves that the Framers of the Constitution, contrary to the plenary language on which they conferred the power to Congress, meant to freeze court-martial usage at a particular time in such a way that Congress might not

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[512] Wiener, *supra* note 27, at 5.

[513] *Id*. *See* O'Connor, *supra* note 107, at 213-14 (the Constitutional Convention "offers little evidence as to the substantive meaning of Clause 14 . . . The Federalist papers . . . give us . . . nearly the only [ ] evidence of the extent of the power the Framers intended to give Congress."); *see also* THE FEDERALIST No. 23, 145 (Alexander Hamilton) (powers for the common defense "ought to exist without limitation, because it is nearly impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.").

[514] Most historical references to courts-martial jurisdiction argued against allowing military jurisdiction during peacetime. For example, Blackstone stated: "the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not be permitted in time of peace." 1 WILLIAM BLACKSTONE, COMMENTARIES (1769). The *Solorio* Court addressed this issue and concluded that although they did "not doubt that Blackstone's views on military law were known to the Framers, we are not persuaded that their relevance is sufficiently compelling to overcome the unqualified language of Art 1 [to regulate the land and naval Forces]." *Solorio*, 483 U.S. at 446.

[515] Wiener, *supra* note 27, at 11 (noting that the significant differences between the Founders' vision of a small limited military and the modern military "must be emphasized lest we be led to import into a consideration of the common understanding of 1787-1791 the vastly different situation of today.").

> change it. The unqualified language of Clause 14 suggests that whatever these concerns, they were met by vesting Congress . . . authority to make rules for the government of the military.[516]

Given the lack of historical clarity, the Court's reliance on textualism is understandable. Yet, as demonstrated below, by applying a literal interpretation of the text of Article I to today's vastly different circumstances, the Court expanded military jurisdiction beyond the intentions of the Founders and created an unworkable framework for further defining military jurisdiction.

B. Originalism Creates a Categorical Rule-Based Approach to Constitutional Law that Fails to Properly Define Military Jurisdiction

While originalism is often thought of as a method of legal reasoning used by judges to interpret the Constitution, it has a substantive component as well. Originalism also describes a rule-based substantive interpretation of the Constitution that draws clear, categorical, bright-lines in announcing constitutional decisions.[517] As articulated by Justice Scalia, "adherence to a more or less originalist theory of construction . . . facilitates the formulation of general rules" in constitutional decisions.[518] This rule-based approach draws bright-line boundaries and then classifies fact situations as falling on one side or the other of that line.[519] By establishing definite rules for even vague provisions of the Constitution, the rule-based approach seeks to provide clear guidance in order improve predictability, ensure consistency and uniformity, and encourage judicial restraint.[520]

Without doubt, the Court's rule-based approach in the majority of military jurisdiction decisions stems from the fact that Justice Black—

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[516] *Solorio*, 483 U.S. at 447.

[517] *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE BASED DECISION-MAKING IN LAW AND IN LIFE 167-76 (1991) (describing the relationship between originalist theories and rules); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (arguing that originalism and textualism lead to the formulation of general rules in constitutional law).

[518] Scalia, *supra* note 517 at 1184.

[519] *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 59-60 (1992).

[520] *See* Scalia, *supra* note 517, at 1178-80; *see also* Sullivan, *supra* note 5192, at 59-60 (detailing the advantages and disadvantages of a rule-based approach).

who led the effort to limit military jurisdiction—was among the Court's fiercest advocates of originalism.[521] For example, writing for the Court in *Toth*, Justice Black held that "given its natural meaning, 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."[522] Following this same textual interpretation, in *Reid*,[523] the Court stated:

> The Constitution does not say that Congress can regulate "the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces." There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces.[524]

This originalist approach paved the way for the Court to adopt a strict status test in *Solorio* limiting Congress' Article I power to govern the "land and naval forces" to limit courts-martial jurisdiction exclusively to members of the armed forces.

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[521] Justice Black wrote many of the decisions limiting the jurisdiction of military tribunals including *Duncan*, *Toth*, and *Reid.* *See supra* Part IV.C.2, IV.D.2. His advocacy of originalism is legendary. *See, e.g.*, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV 865 (1960); ELY, *supra* note 506, at 2 ("Black is recognized, correctly, as the quintessential [originalist]."); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1962); Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221 (2002). In fact, in numerous cases Black argued that originalism was the only proper method of interpreting the Constitution. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1169 (1993). Lessig cites several cases in which Justice Black criticizes other methods of constitutional interpretation: Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting) ("I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or to 'bring it into harmony with the times.'"); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting) ("[T]here is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems."); Griswold v. Connecticut, 381 U.S. 479, 522 (1964) (Black, J., dissenting) (rejecting the philosophy that the Court has a duty to "keep the Constitution in tune with the times.").

[522] Toth v. Quarles, 350 U.S. 11, 15 (1955).

[523] 354 U.S. 1, 30 (1957).

[524] *Id*. at 30.

Despite the Court's originalist rule-based approach to military jurisdiction decisions, the application of these categorical rules has been problematic. Bright-line rule-based decisions often suppress relevant similarities and differences in cases leading to arbitrary and illogical results. Additionally, strict rule-based tests become obsolete or even contrary to original intent over time because they are unable to adapt to changing circumstances.[525] For example, the *Solorio* Court's goal in creating a status test was to eliminate confusion resulting from *O'Callahan* and clarify once and for all the subject-matter jurisdiction of military courts-martial. Yet, the issue resurfaced less than ten years later in *Loving*.[526] Even worse, *Solorio*'s rule-based approach appears to sanction the use of military tribunals in an exactly opposite manner than the Founders intended. The Founders originally extended military jurisdiction over primarily military offenses that civil courts could not hear, leaving civil courts to prosecute Soldiers accused of common law crimes. Current doctrine under *Solorio*—making a person's military status the sole constitutional requirement for jurisdiction—allows military trials over Soldiers for purely civilian offenses, and at the same time prohibits military trials over purely military offenses in cases where the accused is no longer a member of the armed forces.[527]

Additionally, the Court's reliance on bright-line categorical rules has led to arbitrary and illogical results—subjecting some people to military jurisdiction even though their crimes have no effect on the military, while shielding others from trial by military tribunal even for crimes that directly harm the military mission. The fictional scenarios at the beginning of this article highlight the weaknesses of the Court's current originalist approach. The Court's rule-based focus on whether someone is a member of "the land and naval forces" ignores the distinct impact different people and different crimes have on the armed forces. A rule-based interpretation of Article I leads to the result that "whoever gets too close to the armed forces, whoever steps over the line separating those 'in' from those 'out' is subject to the totality of military jurisdiction; whoever remains on the other side of that line is wholly immune."[528]

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[525] *See, e.g.*, Sullivan, *supra* note 519, at 66-67 (identifying some of the advantages of standards over rules).

[526] *See supra* notes 497-499 and accompanying text.

[527] *See* Duke & Vogel, *supra* note 295, at 441 (1960) (pointing out these types of problems with modern military jurisdiction).

[528] Joseph Bishop Jr., *Court Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 331 (1964).

This approach led the Court to hold that certain military-civilian hybrids like military family members, civilian employees, and former Soldiers are constitutionally immune from military jurisdiction, even for offenses that are purely military in nature. Thus, the wife who destroys the Air Force bomber, murdering several Airmen, the Marine employee who tortures and kills an Iraqi prisoner on duty, and the ex-Soldiers who break onto a military post to steal weapons and overthrow the government are all constitutionally protected from a trial in military court. Yet, the military can court-martial the retired fighter pilot for any offense, including tax evasion, because retirees are part of the land and naval forces and subject to military jurisdiction.[529]

The Court's over-reliance on originalsim, including its determination to draw bright-line rules prevents the Court from creating a workable methodology for analyzing all military jurisdiction cases. Because the Court's approach has failed to create a workable framework to identify the proper boundary between military and constitutional courts, those seeking to determine the constitutionality of Hamdan's military commission are left with little guidance.

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[529] To date, the Supreme Court has never directly ruled on the constitutionality of court-martialing a retiree. In the only case to reach the Supreme Court on that matter, *Runkle v. United States*, 122 U.S. 543 (1887), the Court did not address the issue and invalidated the court-martial solely on the ground that the President had not approved the sentence. However, the Court of Appeals for the Armed Forces has upheld the court-martial of a retiree for sodomy. *See* Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989); United States v. Hooper, 9 C.M.R. 417 (C.M.A. 1958). Moreover, the *U.S. Code* and Department of Defense regulations continue to authorize a retiree to be recalled to active duty at any time for court-martial. U.S. DEP'T OF DEFENSE, DIR. 1352.1, MANAGEMENT AND MOBILIZATION OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS para. 6.3.3 (3 Mar. 1990) (citing 10 U.S.C.S. § 302(a) (LEXIS 2005) and other provisions to recall a retiree for court-martial). Navy Regulations require the Secretary of the Navy's approval before a retiree's case is referred to trial but not before it is preferred. *See* U.S. DEP'T OF NAVY, JAGINST 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. 1 sec. 0123(a)(1) (3 Oct. 1990). For a thorough discussion of whether retirees are subject to military jurisdiction, see Bishop, *supra* note 528, at 331-57. For a more recent analysis, see J. Mackey Ives, & Michael J. Davidson, *Court-Martial Jurisdiction Over Retirees Under Articles 2(4) And 2(6): Time To Lighten Up And Tighten Up?*, 175 MIL. L. REV. 1 (2003). Similarly, while the Supreme Court has only held that it is unconstitutional to court-martial civilian employees during peace-time, see *Grisham v. Hagen*, 361 U.S. 278, 280 (1960), following the Court's reasoning, CAAF held that in order for a civilian employee to be court-martialed there must be a declaration of war by Congress, see United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). For more information see *supra* note 473 and accompanying text.

The uncertainty about the constitutionality of the current military commissions is understandable. The Supreme Court's originalist courts-martial decisions, and their conclusion that Congress has plenary power to courts-martial Soldiers for any offense based on Article I authority to regulate the armed forces, provide no guidance on Congress' power to create military commissions based on other Article I powers such as their power to "declare War,"[530] and "to define and punish . . . [o]ffences against the Law of Nations."[531] Nor do these cases provide any guidance about the President's power under Article II as the "Commander in Chief of the Army and Navy"[532] to establish military trials. The Court's approach in court-martial jurisdiction provides no assistance in limiting martial law, military government, or law of war military courts. The Supreme Court's categorical conclusion that military status is the sole constitutional requirement for court-martial jurisdiction inhibits development of a framework for determining the constitutional limits of other military courts.

Apart from these court-martial cases, only a handful of Supreme Court precedents identify constitutional boundaries for military tribunals. Lower courts are left with the unenviable task of reconciling *Milligan*, *Duncan*, *Madsen*, *Yamashita*, and *Quirin* to entirely new facts never confronted by previous courts.[533] While all of these cases remain "good" case law, none of these cases provide systematic guidance on how to determine the constitutionality of military courts.[534] While *Milligan* created a bright-line rule by looking to the text of Article III and declaring military tribunals unconstitutional where civil courts were open,[535] *Quirin*, limited that holding by relying on the text of Article I giving Congress the power to create military trials for violations of the

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[530] U.S. CONST. art. I, § 8, cl. 11.
[531] *Id.* cl. 10.
[532] *Id.* art. II, § 2, cl. 1.
[533] *Milligan* and *Quirin* are the two key cases. For a recent example of a lower court finding *Milligan* and *Quirin* the controlling two cases when confronted with a similar dilemma, *see* Padilla v. Hanft, 2005 U.S. Dist. LEXIS 2921 (D.S.C. 2005) (comparing *Milligan* and *Quirin* in determining whether the United States military can detain Padilla without charging him with a crime).
[534] *See supra* Part IV.
[535] *Ex parte* Milligan, 71 U.S. 2, 119 (1886) (the answer is "found in that clause of the original Constitution which says 'That the trial of all crimes, except in case of impeachment, shall be by jury;' and in the fourth, fifth, and sixth articles of the amendments."). *See supra* notes 247-256 and accompanying text.

law of war.[536] *Duncan*, decided on statutory grounds, generally supports *Milligan* in prohibiting military jurisdiction over civilians when civil courts are open.[537] *Madsen* and *Yamashita* generally follow *Quirin*, the first upholding the constitutionality of military jurisdiction during declared war, the second upholding military trials during military occupation in foreign countries where constitutional courts lack jurisdiction. None of these cases address contemporary issues such as whether military tribunals can prosecute aliens for international terrorism outside the context of declared war. In fact, in *Quirin*, the Court specifically refused to identify a framework, stating that the Court "had no occasion to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. . . . [I]t is enough that petitioners here, upon conceded facts, were plainly within those boundaries."[538]

Despite over 225 years of reviewing military jurisdiction, the Supreme Court's jurisprudence leaves current military commissions in unchartered territory. Following past precedent, the Court is left with essentially two options in determining the constitutionality of military commissions: follow *Milligan* and prohibit military trials based on Article III, or follow *Quirin* and allow them to go forward under either Article I or Article II.[539] Either of these paths are problematic, given the questionable precedential value of both of these holdings.[540]

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[536] *Ex parte* Quirin, 317 U.S. 1, 41-44 (1942). *See supra* notes 354-71 and accompanying text.

[537] Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946). *See supra* notes 381-91 and accompanying text.

[538] *Quirin*, 317 U.S. at 45-46.

[539] Seeking to avoid this constitutional dilemma, the district court in *Hamdan* took a middle ground approach holding that Hamdan can be constitutionally tried by military tribunal only if he is prosecuted by a court-martial consistent with the requirements of Geneva Convention III. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 178 (D.D.C. 2004). There is a compelling argument supporting the position that Geneva Convention III requires military commissions convened by the United States to use the same procedures as courts-martial. *See, e.g.*, Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama*, ARMY LAW., Nov. 2003, at 18; Katyal & Tribe, *supra* note 11; MacDonnell, *supra* note 27; Barry, *supra* note 12. While this approach may be consistent with international law, and even with past U.S military practice, it is not consistent with the Supreme Court's *constitutional* analysis; *see* Glazier, *supra* note 12,. The Court has never held that the Constitution mandates any specific procedural requirements for military trials. *See supra* note 15 and accompanying text. In *Yamashita*, and *Madsen*, the Court specifically held that military commissions need *not* follow the same procedures as courts-martial. *See In re* Yamashita, 327 U.S. 1, 19 (1946); Madsen v. Kinsella, 343 U.S. 341, 346-48 (1952). Most importantly, this approach avoids the threshold question raised

In *Milligan*, the Court held that the Constitution flatly prohibits the President's use of a military tribunal even for alleged violations of the law of war. Because Milligan was a civilian-citizen, the Court held that the military commission lacked personal jurisdiction, and Milligan must be tried in civilian court, even though he was accused of unlawfully waging war. In *Hamdan*, the government similarly claims military jurisdiction over the accused because the President determined that Hamdan was assisting an enemy force and violating the law of war.[541] While Hamdan is not a U.S. citizen,[542] following *Milligan*, the Court could extend the protections of civil courts to alleged enemy aliens and conclude that the Constitution prohibits Hamdan's trial by military tribunal because he is not part of an admitted enemy force during time of declared war.

Alternatively, the Court could follow *Quirin* and make a bright-line determination that the Constitution permits the President to use military commissions to prosecute Hamdan and any non-citizens accused of assisting al Qaeda in the current armed conflict between the United States and al Qaeda. In *Quirin*, the Court upheld military trials by concluding that Congress sanctioned the use of military courts against "offenders and offenses that by . . . the law of war may be tried by military commissions."[543] It recognized the President's inherent authority as Commander in Chief, but did not determine "to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of congressional

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by this article, that of when the Constitution allows trial by *any* military tribunal instead of a trial in constitutional court.

[540] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 238 (2d ed. 1988) ("Both [*Milligan* and *Duncan*] limiting the power of the President to declare and enforce martial law were handed down after hostilities had subsided; one may doubt that the Court would have been so courageous had war still been underway."); ROSSITER & LONGAKER, *supra* note 56, at 39 (*Milligan*'s "general observations on the limits of the war powers are no more valid today than they were in 1866."); CORWIN, *supra* note 360, at 118 (*Quirin* was "little more than a ceremonious detour to a predetermined goal intended chiefly for edification."); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2669 (2004) (*Quirin* "was not this Court's finest hour.") (Scalia, J., dissenting).

[541] Hamdan was captured during armed conflict in Afghanistan. The United States denied him status as an enemy prisoner of war. *See* Press Release, Dep't of Defense, President Determines Enemy Combatants Subject to his Military Order (July 3, 2003), *available at* http://www.defenselink.mil/ releases/2003/nr20030703-0173.html.

[542] *Id.* Several of the other detainees being held at Guantanamo Bay were not captured in places where the United States is involved in active international armed conflict, but taken from the territory of friendly nations. *See supra* note 444.

[543] UCMJ art. 21 (2005).

legislation."[544] In *Quirin*, the Court held Congress had authorized military tribunals over the defendants because, consistent with the law of war, the accused were all admitted Soldiers of an enemy government accused of committing unlawful war crimes during a declared war. This differs from the current situation where President Bush is asserting military jurisdiction outside of the historical, traditional boundaries of a declared war.[545] While Congress did not declare war against al Qaeda or any nation, it passed a joint resolution authorizing the use of force against the perpetrators of the September 11th attacks. [546] Following *Quirin* by analogy, the Court could determine that the President's inherent authority, along with the congressional authorization to use force against al Qaeda, provides sufficient justification to permit trial by military commission.

The above analysis demonstrates that the Supreme Court lacks an effective methodology to define the constitutional limits of military jurisdiction. The Court's reliance on originalism has led to bright-line rules for courts-martial that offer no assistance in defining the jurisdiction of military commissions. Similarly, the few military commissions cases decided by the Court are fact-specific, result-oriented decisions that provide little precedential value and no controlling framework for analyzing military jurisdiction. Neither *Milligan*, nor *Quirin*, nor any of the other military jurisdiction cases, address whether the current use of military commissions is constitutional. As important, the Court's holdings fail to provide any framework to identify meaningful distinctions between military tribunals and constitutional courts. The Supreme Court can resolve this problem by expressly adopting a consistent methodology for analyzing the constitutional limits of military jurisdiction.

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[544] *Quirin*, 317 U.S. at 11.

[545] *See* 32 C.F.R. § 9.2 (2005) (defining broadly the personal jurisdiction of military commissions to include anyone associated with al Qaeda and the subject matter jurisdiction to include crimes of terrorism).

[546] *See* Joint Resolution of Congress Authorizing the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2129-31 (2005) (arguing that Congress has authorized the current use of military commissions).

VI. An Alternative Methodology for Analyzing Military Jurisdiction

A. Translation Theory and Fidelity to the Constitution

Constitutional scholar and Stanford law professor Larry Lessig advocates an alternative method of constitutional interpretation to formal originalism.[547] Lessig argues that in addition to originalism, the Supreme Court also uses a method of interpretation known as constitutional translation.[548] Translation "aims at finding a current reading of the original Constitution that preserves its original meaning in the present context."[549] Lessig explains that translation is a two-part test: "[T]he first [step] is to locate a meaning in an original context, the second is to ask how that meaning is to be carried to a current context."[550] Lessig, and other proponents of translation, contend that it is superior to originalism's textualist approach, which forces courts to "appl[y] the original text now the same as it would have been applied then,"[551] and focuses on language to the exclusion of the original meaning of the text.[552] These scholars argue that translation should be used when

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[547] Lessig, *Fidelity in Translation*, *supra* note 521.

[548] For some of Lessig's numerous writings concerning translation, see for example, Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L. J. 869 (1996); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

[549] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 114 (1997).

[550] Lessig, *Fidelity and Constraint*, *supra* note 548, at 1372.

[551] Lessig, *Fidelity in Translation*, *supra* note 521, at 1183.

[552] There are other scholars who have argued that translation is superior to originalism. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1811 (1996) (stating "the most appropriate way to maintain fidelity to the Founding is not through literal 'originalism,' such as that advanced by Justice Scalia and Judge Bork, but through models that serve the Founders' more general purposes in light of changed circumstances."); Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 822 (1996) ("A Constitution is merely words—subject to changes in meaning and context over time. As Lawrence Lessig has argued convincingly, fidelity to the true meaning of the Constitution often requires an exercise in translation, the purpose of which is to bring the document's provisions forward to the changed context of today."); Willard C. Shih, *Assisted Suicide, the Due Process Clause and "Fidelity in Translation,"* 63 FORDHAM L. REV. 1245, 1271 (arguing translation is "preferable to 'originalism' because it 'incorporates the ratifiers' intent into the method of interpretation.").

circumstances have significantly changed since adoption of the Constitution, such as cases like military jurisdiction. This interpretive method translates the original constitutional protections created by the Founders to the changed circumstances reflected in modern society by "deciding the present in terms of the past. Its aim is to choose in a way that is faithful to the choices of the past, to translate the commitments of the past into a fundamentally different context."[553]

While Lessig is credited with renewing academic interest in translation, it has been a consistent method of constitutional interpretation throughout Supreme Court history. In 1928, in *Olmstead v. United States*,[554] Justice Brandies provided one of the Court's earliest articulations of translation theory. Since that time, it has remained a constant, though prior to Lessig often unarticulated, methodology in the Supreme Court's constitutional jurisprudence.[555] Translation is not a radical principle or a seldom-used practice, but "common in our constitutional history, and central to the best in our constitutional traditions."[556] In recent years, several prominent scholars have supported Lessig's translation model as an effective method of interpreting the Constitution.[557] The Supreme Court also recently relied on translation in

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[553] LESSIG, *supra* note 549, at 109.
[554] 277 U.S. 438, 464-65 (1928).
[555] *See generally* Lessig, *Fidelity in Translation*, *supra* note 521.
[556] LESSIG, *supra* note 549, at 116.
[557] Translation has gained the attention of numerous scholars and law review articles. For a review of this literature, see *Symposium, Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247, 1365-1517 (1997) (containing articles on the translation model by Lawrence Lessig, Steven G. Calabresi, Sanford Levinson, Jed Rubenfeld, Abner S. Greene). Other articles that have explicitly advocated translation include: Frances H. Foster, *Translating Freedom From Post-1997 Hong Kong*, 76 WASH. U. L.Q. 113 (1998) (applying translation principles to Hong Kong's basic law guarantees); William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 758 (1997) (applying translation model to War Powers Clause); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2668 (1996) (using translation to support treating today's sworn statements like the unsworn statements of the past to meet the Framers' understanding); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1173 n.9 (1995) (applying translation to jury reforms); Willard C. Shih, *Assisted Suicide, the Due Process Clause and "Fidelity in Translation,"* 63 FORDHAM L. REV. 1245 (1995) (applying translation to context of assisted suicide); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 784 (1995) (applying translation model to the Takings Clause); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 816 n.223 (1994) (arguing citizen review panels are an example of "fidelity" in "translation" to the participatory democracy underlying the American jury system).

several landmark decisions restricting Congress' Article I power to regulate Commerce.[558] Analyzing the Court's use of translation in limiting Congress' Article I, Commerce Clause power may be useful in determining how the Court could limit the Legislative and Executive powers over military jurisdiction.

Article I of the Constitution gives Congress plenary authority to regulate interstate commerce: "The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[559] Historically, based on the plain language of Article I, the Supreme Court has been exceedingly deferential to congressional efforts to regulate interstate commerce.[560] Despite the plenary nature of Congress' commerce power, the Supreme Court began limiting Congress' exceedingly broad power under the Commerce Clause[561] in two relatively recent cases: *United States v. Lopez*,[562] and *United States v. Morrison*.[563] The Court justified these holdings as necessary to ensure that Congress did not "effectually obliterate the distinction between what is national and what is local."[564] The Court held that Congress can only "regulate those activities having a *substantial relation to interstate commerce*, . . . i.e., those activities that substantially affect interstate commerce."[565] Otherwise, "were the

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Despite its recent popularity, translation is not without critics. For some critiques of the translation model, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

[558] For a discussion of the Court's use of translation in limiting the Commerce Clause s*ee* Lessig, *Translating Federalism*, *supra* note 548, at 125.

[559] U.S. CONST. art. I, § 8, cl. 1.

[560] For an example of the Court's historic approach to Congress' power to regulate commerce, *see* United States v. Morrison, 529 U.S 598, 605 (2000) ("We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.").

[561] In *Lopez*, the Court struck down The Gun-Free School Zones Act of 1990, 18 U.S.C.S. § 922(q) (LEXIS 2005), which criminalized the use of handguns near public schools. *See Lopez*, 514 U.S. at 561. In *Morrison*, the Court denied Congress the authority to criminalize gender-motivated violence. The congressional statute in question was The Violence Against Women Act of 1994, 42 U.S.C. § 13981**,** 108 Stat. 1941-42. Section 13981(c) of the Act established criminal liability against anyone who committed gender-motivated violence. *See Morrison*, 529 U.S. at 603.

[562] 514 U.S. 549 (1995).

[563] 529 U.S. 598 (2000).

[564] *Lopez*, 514 U.S. at 556-57.

[565] *Id.* at 558-59 (citing *Jones & Laughlin Steel*, 301 U.S. at 37) (emphasis added).

Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."[566] Despite the express grant of authority given to Congress under the Commerce Clause, in *Lopez* and *Morrison*, the Court held that gun-free school zones and gender-based violence did not have enough of a substantial relation to interstate commerce to justify congressional regulation.[567]

The Supreme Court faced a common dilemma of constitutional interpretation in these decisions. The Court believed there was "little doubt that the scope of the [Commerce] powers now exercised by Congress far exceed[ed] that imagined by the framers. . . . But there was a second obviousness: That in the current interpretive context, the language of the Constitution's power clauses, read according to the formula given by the federal founding powers opinions, plainly supports this expanse of federal power."[568] In other words, prior to *Lopez* the Court applied originalism and relied on a textualist rule-based approach to Congress' commerce power and "allowed Congress a power, which reaches to the extreme of what the words of the [Commerce Clause] allow."[569]

In *Lopez* and *Morrison*, however, the Supreme Court refused to look solely to the text of the Commerce Clause in deciding the limits on congressional authority. Nor could the Court look to history and ask whether the Founders would have allowed Congress to regulate gun-free schools or gender-based violence. Instead, the Court rejected the "textualist reading of the [Commerce Clause] in the name of fidelity to a founding understanding about how far these powers of Congress were to reach."[570] It recognized that the "Constitution requires a distinction between what is truly national and what is truly local,"[571] and placed constitutional boundaries on Congress' ability under the Commerce Clause in order to preserve the Founders' original balance of power between the states and the federal government. By requiring that congressional legislation show a substantial relation to interstate commerce, the Court redefined the boundaries between interstate

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[566] *Id.* at 580.
[567] *See Morrison*, 529 U.S. at 615-16.
[568] Lessig, *Translating Federalism*, *supra* note 548, at 129.
[569] *Id.*
[570] *Id.* at 130.
[571] *Morrison*, 529 U.S. at 616.

commerce and the power of the states to regulate criminal conduct. In this way, the Court sought to remain faithful to the Founders' intention of maintaining separation of powers between the federal government and the states, while still recognizing Congress' broad authority under Article I to regulate commerce.

B. Applying Translation to Military Jurisdiction Cases

Just as the Court's pre-*Lopez* use of categorical rules failed to create meaningful boundaries between Congress' regulation of commerce and state police powers, the Court's use of originalism in the military jurisdiction cases has distorted the proper jurisdictional boundaries between military tribunals and constitutional courts under Article III. As a result, the Court has failed to fulfill the Founders' original intention of balancing Congress' and the President's war powers with the requirement that all cases be resolved in constitutional courts. The Court can begin reconciling these competing values just as it has done recently in defining the boundaries of the Commerce Clause. The Court should use translation principles to balance the political branches' war powers obligations with constitutional courts' requirement to hear all cases and controversies, limiting military jurisdiction solely to cases that have a substantial influence on the military mission.

There are important differences between Congress' power to regulate commerce and the power of both the President and Congress to convene military tribunals. Congress' power to regulate commerce and military tribunals both derive from the Constitution's Article I, Clause 8. However, the power to convene military tribunals derives not only from Congress' Article I war-making powers, but also from the President's authority under Article II as the Commander in Chief. The Commerce Clause deals with the relation between the federal government and the states; military tribunals deal with the relation between Legislative and Executive authority and that of the federal judiciary. Certainly, the Court should not employ the substantial relation test for military tribunals in the exact same manner it applied the test to interstate commerce cases. Rather, the Court should apply this test to military tribunals consistent with its analysis of the President and Congress' war fighting powers.

In *Youngstown Sheet & Tube v. Sawyer*,[572] the Supreme Court set forth the test used in determining the constitutionality of the President's war powers.[573] The case arose during the Korean War, when President Harry Truman issued an executive order seizing privately-owned steel mills in order to avoid an industry-wide strike that he believed would

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[572] 343 U.S. 579 (1953).

[573] Throughout its history, the Court has set forth two competing visions of how the Constitution limits the war powers of the President and Congress. These two competing paradigms have come to be known as the *Curtiss-Wright—Youngstown* debate. The *Curtiss-Wright—Youngstown* debate involves two distinct camps: the Presidentialists and the Congressionalists. The Presidentialists assert the preeminence of the president in national security, and advocate the Supreme Court's approach in *Curtiss-Wright*. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 234, 256 (1984); William Treanor, *Fame, Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696 (2000) (listing several other scholars who argue for strong executive authority); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-66 (1972); Henry P. Monaghan, *Presidential War-making*, 50 B.U. L. REV. 19 (1970). On the other hand the Congressionalists advocate a primary role for Congress in national security and look to the *Youngstown*, and in particular Justice Jackson's concurring opinion. *See* LOUIS FISHER, PRESIDENTIAL WAR POWER (1995); JOHN HART ELY, WAR AND RESPONSIBILITY CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3-10 (1993); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 74-77 (1990); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1-26 (1973); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971).

This article makes no attempt to provide an ultimate answer to the *Curtiss-Wright—Youngstown* debate. But it advocates Justice Jackson's *Youngstown* model for several reasons. First, military tribunals directly effect individual rights, and have been the subject of significant Congressional legislation. *See supra* note 48 for various sources supporting the proposition of Congress' importance in creating military jurisdiction. Second, *Youngstown* is most often applied in cases where individual rights are implicated, and in areas where Congress has actively legislated. *See, e.g.*, U.S. v N.Y. Times, 403 U.S. 713, 788-91 (1971). For a detailed review (and critique) of this individual rights model see Roy E. Brownell II, *The Coexistence of* United States v. Curtis-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J. L. & POLS. 1, 88-91 (2000). For an article generally supportive of the individual rights model see Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 1009 (2004) ("In certain contexts, such as where individual rights are implicated, or where Congress has legislated in the relevant foreign policy area, judicial intervention is appropriate, albeit with significant deference to the political branches."). As such, the *Youngstown* model provides a natural fit for the analysis of military tribunals, which are the creation of both Congress and the President and implicate Article III concerns. As *Youngstown* is the more rigorous methodology, the substantial relation test can easily be adopted to the *Curtiss-Wright* methodology.

cripple national security.[574] The issue before the Supreme Court in *Youngstown* was whether President Truman's executive action was lawful. Writing for the Court, Justice Black held President Truman's action unconstitutional, because "no express constitutional language grants this power to the President."[575] True to his originalist form, Justice Black established a categorical rule that the President's power must stem either from "an act of Congress" or from "the text of the Constitution itself."[576] While Justice Black authored the opinion of the Court, Justice Jackson's now-famous concurrence has become the controlling opinion.[577] Justice Jackson's concurring opinion took a more flexible approach, establishing a tripartite model to determine the constitutionality of presidential action. He linked the constitutionality of the President's action to its harmony with the actions of Congress. Explaining his model, Justice Jackson wrote:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive

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574 *Youngstown*, 343 U.S. at 584.
575 *Id.* at 587.
576 *Id*. at 585.
577 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (acknowledging that the Supreme Court unanimously endorsed Justice Jackson's concurring opinion in *Youngstown* in deciding *U.S. v. Nixon*, 418 U.S. 683, 707 (1974)).

> presidential control in such a case only by disabling the Congress from acting upon the subject.[578]

Justice Jackson concluded that because Congress refused to authorize President Truman to seize the steel mills, President Truman's action were within the third category of judicial scrutiny, where presidential power was at its lowest ebb. Using this higher level of judicial scrutiny, the Court held that President Truman's executive order was unconstitutional.[579]

As stated at the onset, the power to convene military tribunals originates from one of three places: Congress's power under Article I; the President's power pursuant to Article II; or Congress and the President's joint authority derived from both Articles I and II of the United States Constitution.[580] Like translation theory's substantial relation test, Justice Jackson's three-tiered model provides a standards-based balancing approach to determine the constitutionality of Presidential action. Applying this model to determine the constitutionality of military tribunals might produce the following test: if the President attempts to use military courts with the express or implied authorization of Congress, his authority is at its maximum, and military jurisdiction should be upheld as long as there is a substantial relation to the President's military purpose. As long as Congress has authorized the use of military tribunals under Article I, the Court should apply the substantial relation test as it did in the Commerce Clause cases and determine whether the proposed use of military jurisdiction substantially relates to a legitimate military interest.[581] However, if the President establishes military courts without congressional approval, the President's use of military courts is more suspect, and the extension of military jurisdiction must survive closer scrutiny to determine whether the President's action stems from independent presidential responsibility, concurrently shared by Congress. Finally, if the President extends

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578 *Youngstown*, 343 U.S. at 635-38.

579 *Id.* at 638.

580 *See supra* notes 48-58 and accompanying text.

581 The fact that the Court applies the same test as in commerce does not mean the Court needs to employ the same level of deference. For example, in *Morrison* the Supreme Court struck down the Violence Against Women Act despite "numerous [Congressional] findings regarding the serious impact that gender-motivated violence" has on society. United States v. Morrison, 529 U.S 598, 612 (2000). In contrast, the Court may decide to grant far greater deference to Congress or the President in determining the jurisdiction of military tribunals.

military jurisdiction contrary to the will of Congress, the President's power is at its lowest ebb, and the Court should strike down the President's use of military tribunals unless the President can demonstrate he has constitutional authority to create military tribunals contrary to Congressional demands.

C. Translation Effectively Reconciles Previous Supreme Court Decisions

Part V.B highlights the drawbacks of using originalism, explaining how the rule-based courts-martial cases offered little guidance, and how the handful of military commissions cases are in tension with one other. Translation theory is better able to explain these decisions and reconcile them into a workable constitutional methodology. For example, President Lincoln's decision to prosecute Milligan in Indiana following the Civil War was without congressional authorization. Therefore, his action should have been (and as a practical matter was) subject to heightened judicial scrutiny. Additionally, the rebellion ended a full year before the trial, and the civil courts remained open in Indiana throughout this period. This explains the Court's skepticism about the necessity of President's actions and whether Milligan's trial was really a compelling military objective. Nonetheless, four Justices in *Milligan* argued that if Congress had authorized the use of military commissions, Lincoln's use of military tribunals would have withstood constitutional scrutiny. Viewed from this perspective, *Milligan* is much more easily reconciled with the Court's decision in *Quirin* and its other military jurisdiction cases.

In *Quirin*, because Congress authorized military commissions to try offenses against the law of war, President Roosevelt's actions fell within the first tier of judicial review and were subject to the greatest judicial deference. Accordingly, his use of military commissions was constitutional as long as it served a substantial military purpose. Because the *Quirin* trial took place in the summer of 1942, when America's victory in World War II was very much in doubt, it is easier to understand the Court's willingness to uphold the President's decision that a speedy trial of German saboteurs by military tribunal served a substantial government interest. Translation theory also helps explain why the Court prohibited the use of military tribunals in *Duncan* following World War II, but upheld their use in *Yamashita* and *Madsen*. In *Duncan*, though Congress had authorized imposition of martial law in

Hawaii, the petitioners were two civilians with no connection to the military charged with minor common-law crimes of assault and embezzlement. Moreover, the threat of an invasion of Hawaii greatly diminished and the civil courts were open and could have prosecuted these cases. The Court's resulting decision rightly concluded that the use of military tribunals to prosecute the two petitioners served no substantial military purpose under the circumstances.

Yet, *Duncan* differs greatly from *Yamashita* and *Madsen*. Yamashita was a general in the Japanese military prosecuted in the Philippines for war crimes. Not only were his crimes not subject to trial in federal court, but his trial by military commission was pursuant to congressional authorization under Article of War 15. Therefore, the Court reasonably concluded that punishing enemy combatants for violating the law of war during military occupation serves a substantial military purpose. Similarly, following World War II, Yvette Madsen lived in occupied Germany pursuant to her husband's military orders. When she killed her husband there was no civil court in either the United States or in Germany with jurisdiction to prosecute her criminal behavior. As a result, it is logical that the Court upheld the President's decision to prosecute Madsen by military tribunal. Indeed, at the time, military tribunals were needed to protect the government's compelling interest in punishing those who murdered Soldiers serving in occupied territory that had no functioning judicial system. In *Madsen*, however, the Court was careful to note that if Congress passed legislation limiting the President's use of military tribunals, his action might not have survived constitutional challenge.

In analyzing the World War II cases, Professor Charles Fairman sought to harmonize the Supreme Court's decision in *Duncan* with its other World War II decisions that upheld much more draconian war powers such as the internment of Japanese citizens. Fairman wrote:

> A rational and wholly adequate explanation lies in this, that such measures as were sustained, though drastic, had a clear relation to a permissible end; the justification for trying Duncan and White by [military] court really came to nothing more that "*ipse dixit* of the commander." We need a new doctrine for the future. We need not evolve new doctrine, for nothing that the Court had decided is inconsistent with what has always been sound in principle. . . . Since the Constitution

> commits to the Executive and to Congress the exercise of the war power . . . it is necessarily given them a wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. But those who exercise it must be prepared to satisfy the courts that there was a "direct relation," a "substantial basis for the conclusion" that this was indeed "a protective measure necessary to meet the threat."[582]

Fairman's observations accurately reflect a consistent (although often unarticulated) theme found in the Supreme Court's military jurisdiction cases and identifies the methodology that should be applied in analyzing the Constitutional limits of military commissions.

Similarly, the Supreme Court's recent cases limiting courts-martial jurisdiction are better understood and reconcilable using the translation model. *Toth* and the other personal jurisdiction cases were all decided following Congress' passage of the UCMJ. Because Congress specifically authorized this extension of military jurisdiction, the Supreme Court's review of courts-martial jurisdiction deserved the Supreme Court's greatest deference under *Youngstown's* model. Yet, the Court repeatedly held Congress' extension of military jurisdiction unconstitutional in several of these instances. The lead opinions in these cases relied on originalist rule-based arguments of whether someone was a "member of the armed forces." Many of the concurring opinions, however, relied on the view that Congress' extension of military jurisdiction was not substantially related to a legitimate military interest.[583] In several such concurring opinions, Justices Harlan and Frankfurter rejected the use of originalism[584] and advocated a balancing

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[582] Fairman, *supra* note 391, at 857-58 (citations omitted).

[583] Even Justice Black—the leading Supreme Court advocate of originalism—deviated from a literal interpretation of the Constitution in *Toth*, when he wrote that the constitutionality of military jurisdiction was limited to "the least possible power adequate to the end proposed." Toth v. Quarles, 350 U.S. 11, 23 (1955). Similarly, in *Reid v. Covert*, he wrote that "there might be circumstances where a person could be 'in' the armed services for purposes of [military jurisdiction] even though he had not formally been inducted into the military or did not wear a uniform." Reid v. Covert, 354 U.S. 1, 22-23 (1957).

[584] In *Reid*, Justice Frankfurter wrote, in a concurring opinion: "The cases cannot be decided simply by saying that, since these women were not in uniform, they were not 'in the land and naval Forces.' The Court's function in constitutional adjudications is not

test similar to the substantial relation test proposed here. For example, in *Reid*, Justice Harlan wrote:

> I think it no answer to say, as my brother BLACK does, that "having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of [Art. I] Clause 14." For that simply begs the question as to whether there is such a collision, an issue to which I address myself below. For analytical purposes, I think it useful to break down the issue before us into two questions: First, is there a rational connection between the trial of these army wives by court-martial and the power of Congress to make rules for the governance of the land and naval forces; in other words, is there any initial power here at all? Second, if there is such a rational connection, to what extent does this statute, though reasonably calculated to subserve an enumerated power, collide with other express limitations on congressional power; in other words, can this statute, however appropriate to the Article I power looked at in isolation, survive against the requirements of Article III and the Fifth and Sixth Amendments.[585]

Similarly, Justice Frankfurter wrote:

> [W]e must weigh all the factors involved in these cases in order to decide whether these women dependents are so closely related to what Congress may allowably deem essential for the effective "Government and Regulation of the land and naval Forces," that they may be subjected to court-martial jurisdiction in these capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments.[586]

These justices voted to prohibit this extension of military jurisdiction to military spouses because they felt the evidence did not indicate that

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exhausted by a literal reading of words." *Reid*, 354 U.S. at 70. Similarly in *Singelton*, Justice Harlan wrote "the true issue on this aspect of all such cases concerns the closeness or remoteness of the relationship between the person affected and the military establishment." *Ex rel.* Singleton, 361 U.S. 234, 257 (1960).

[585] *Reid*, 354 U.S. at 70 (Harlan, J., concurring).

[586] *Id.* at 45 (Frankfurter, J., concurring).

prosecuting family members was "clearly demanded" for the effective regulation of the armed forces such as to justify the use of military courts.[587] This article advocates the application of this rationale to all military jurisdiction cases, consistent with the *Youngstown* model.

In critically examining the Court's personal jurisdiction cases, Joseph Bishop wrote a persuasive law review article demonstrating why the Court's reliance on originalism was misguided, and advocating that the cases are better understood, and better decided, by the substantial relation test advanced by Justices Harlan and Frankfurter. He wrote:

> [T]he Court can no doubt attempt to solve the problem by attempting more or less arbitrarily to decide at what point on the military-civilian spectrum a particular class shades into one community or the other. A more flexible, though probably more difficult approach, perhaps better calculated to reconcile fairness to the man with the legitimate needs of the military establishment, might be to give more weight to the 'necessary and proper' clause and to consider in each case not merely the military 'status' of the individual, but also the nature, military or civilian, of the offense involved and the punishment to be inflicted.[588]

Bishop's critique remains as true today as it did when he wrote it in 1964. Expanding the substantial relation test to apply not just to courts-martial created under Congress power to regulate the armed forces, but also to every case involving the use of military tribunals, will provide a consistent and effective methodology for ensuring the proper balance between military and constitutional courts.

D. Translation Theory Resolves Modern Military Jurisdiction Questions

Historically, whenever the Supreme Court faced a military-civilian hybrid case, such as a Navy paymaster, a discharged Soldier, a military prisoner, or a military family member, the Court relied on originalism, drawing a bright-line that either subjected the entire group of people completely to military jurisdiction, or excluded them altogether. Rather

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[587] *Id.* at 47.
[588] Bishop, *supra* note 528, at 377.

than relying on this inflexible methodology, the Court should employ the substantial relation test to determine which offenders and offenses are substantially related to the military mission. In each instance, the Court should examine the military's nexus to both the accused, and his conduct. It then should determine whether that nexus creates enough of a substantial relation with the military mission to constitutionally justify the use of a military tribunal instead of a constitutional court. This balancing test would not prevent the Court from drawing bright-line rules. For example, the Court might conclude that the military interest is so great on the battlefield to constitutionally permit military jurisdiction of all offenses committed on the battlefield regardless of whether the accused is a civilian, a Soldier, or a military contractor. Interestingly, while courts and commentators have generally ignored the possibility of revising military jurisdiction in this way, business and government leaders are taking notice.[589]

Returning to our fictional scenarios at the beginning of this article helps demonstrate the effectiveness of using this approach. Should a military tribunal have jurisdiction over an Air Force spouse in England; a Marine Corps employee in Iraq; anarchists in North Carolina; or a retired fighter pilot in Nebraska? Following translation analysis, there can be no doubt that the military has a substantial interest in prosecuting military employees accused of torturing detainees while performing their official duties on the battlefield. The military also has a strong interest in prosecuting a family member who destroys an Air Force war plane and murders Airmen serving overseas. While the military has some interest in prosecuting ex-Soldiers that commit crimes on their former military installation, this is closer call and reasonable minds may differ. Conversely, one would be hard pressed to assert that the military has a legitimate interest in prosecuting retirees who commit common-law crimes like tax evasion, which are completely unrelated to the military mission.

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[589] *See, e.g.*, Christopher C. Burns, *U.S. Contractors Beware: 'United States v. Hamdan' Might Extend Courts-Martial Jurisdiction to Civilians*, 20 CORP. COUNS. WKLY. (Bur. of Natl. Aff., No. 45), Nov. 23, 2005, *available at* http://www.kslaw.com/library/pdf/chrisburrisbna.pdf ("One possible, and apparently unanticipated, outcome of the grant of certiorari may be to extend the jurisdiction of U.S. court-martial to civilians serving with . . . U.S. armed forces in Iraq, Afghanistan, and elsewhere.").

VII. Translation's Application to Current Use of Current Military Commissions

A. Hamdan's Military Commission is Unconstitutional Because Hamdan is Not Charged With a War Crime

The first step in applying the translational model to Hamdan's case is determining the proper standard of judicial review. This requires a determination of whether Congress authorized the military commission prosecuting Hamdan or whether it is based solely on the President's Article II authority as Commander in Chief. If the President is acting with congressional support, his authority is at its maximum and the government need only show that the military commission substantially related to a legitimate military interest.[590] However, if the President is acting without Congressional support his power is subject to heightened scrutiny, and the military tribunal is likely unconstitutional absent both a true national emergency and a showing of actual Presidential authority.[591]

Hamdan's current trial by military commission is a law of war court. As Lieutenant Colonel Bickers wrote:

> A law of war military commission is the only kind of military commission at issue in the War Against Terrorism. There is obviously no need for martial law anywhere within the United States. The United States has not asserted the role of an occupier in Afghanistan or anywhere else in connection with the war. This . . . means that any commission convened under the Military Order must be subject to the inherent subject matter limitations of the law of war commission.[592]

In addition, by passing Article 21 of the UCMJ, Congress limited the President's use of military commissions (or purported to) to offenders and offenses under the law of war.[593] This means that President Bush has

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[592] Bickers, *supra* note 33, at 912.

[593] Article 21, UCMJ (2005). Article 21 allows for the use of military tribunals for offenses that are punishable both "by statute or the law of war." UCMJ Article 104 (aiding the enemy) and Article 106 (Spying) list two statutory offenses that might provide another basis for trial by military jurisdiction. *Id.* arts 104, 106. However, Hamdan is not charged with a violation of either of these two offenses.

Congressional authorization to prosecute Hamdan by military commission if Hamdan and his charged offenses are violations of the law of war.

There is legitimate question about whether a Congressional declaration of war is required before subjecting any non-Solider to military jurisdiction.[594] While *Quirin*, and the other World War II cases occurred following a Congressional declaration of war, the United States has engaged in several other wars including the Korean War, the Vietnam War, and the Gulf War, without a formal war declaration.[595] Additionally, while there is sincere debate about whether the law of war can ever apply to non-state actors such as al Qaeda,[596] the prevailing view is that the law of war does apply to non-state actors.[597] In this case, several factors favor subjecting Hamdan to the law of war. Hamdan is an alleged member of al Qaeda who was captured in Afghanistan during international armed conflict.[598] Moreover, while the United States never formally declared war on Afghanistan (or al Qaeda), Congress did pass a joint resolution authorizing the President to use force against "all persons he determined planned, authorized, committed, or aided in the 11 September 2000 attacks."[599] Cutting against this argument is the fact that Hamdan is accused of committing some crimes, such as conspiracy to commit terrorism, before the 11 September attacks took place and before passage of the Congressional authorization to use force against al Qaeda.[600] The President appears to have less of a basis to allege Congressional support for military commissions for crimes that occurred

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[594] *Compare* United States v. Averette, 41 C.M.R. 364) (C.M.A. 1970) (holding civilians accompanying the military in Vietnam cannot be subject to military jurisdiction because there was not a Congressionally declared war); *and* Katyal & Tribe, *supra* note 11, at 1287-90 (suggesting that Article 21 of the UCMJ should be limited to times of declared war), *with* Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D. D.C. Cir. 2005) (holding Congress's authorization to use for is tantamount to a declaration of war) *and* Bradley & Goldsmith, *supra* note 546, at 2129-31 (arguing the same point).

[595] *Hamdan*, 415 F.3d at 11-12.

[596] *See* George H. Aldrich, *The Law of War on Land*, 94 AM. J. INT'L L. 42 (2000). *See also* AM. BAR ASS'N, *supra* note 12, at 7 ("Since World War II, there has been considerable debate about the application of the law of war to conflicts involving non-state actors.").

[597] *See, e.g.*, DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 230-31 (2001).

[598] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 154 (D.D.C. 2004).

[599] *See* Joint Resolution of Congress Authorizing the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[600] *See* Dep't of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, *available at* http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf (last visited Jan. 13, 2005).

before 11 September and the subsequent Congressional authorization to use force. While the above-mentioned factors might ultimately be dispositive in determining someone's amenability to military trial, they are not necessary in determining the constitutionality of Hamdan's military commission. In Hamdan's case, even if we *assume* that no declaration of war is needed and that non-state actors like al Qaeda can be prosecuted for violating the law of war, the current charge of conspiracy against Hamdan is not an offense that is recognized under the law of war. Because Article 21 requires that "the act charged is an offense against the law of war,"[601] Hamdan's military commission appears unconstitutional.

International law does not recognize conspiracy as an offense under the law of war. Neither the Geneva Conventions nor the Hague Convention defines conspiracy as a war crime. While Congress exhaustively defined war crimes by passage and amendment of the War Crimes Act,[602] none of the treaties Congress references or the definitions it uses to define war crimes includes the crime of conspiracy. Conspiracy to commit war crimes has never been formally recognized as a violation of the law of war before any military tribunal.[603] Following World War II, neither the Nuremberg Charter nor the Charter for the Tokyo tribunals considered conspiracy to commit war crimes an offense under the law of war.[604] Similarly, neither the International Criminal Tribunal for the Former Yugoslavia (ICTY), nor the International Criminal Court (ICC), recognize conspiracy as a criminal offense despite embracing other inchoate theories of criminal responsibility such as "command responsibility" and "joint criminal enterprise."[605] In fact, while the military commission in *Quirin* charged and convicted the saboteurs of multiple offenses including conspiracy, the Supreme Court refused to recognize the validity of the conspiracy charge. Rather, the Court held:

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

602 War Crimes Act, 18 U.S.C.S. § 2441 (LEXIS 2005).

603 *See* ANTONIO CASSESSE, INTERNATIONAL CRIMINAL LAW 197 (2003) (noting that "conspiracy has never been used to prosecute an inchoate offense against the law of war.").

604 *See* Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275, 281 (1995).

605 *See* Richard P. Barrett, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV 30, 60-61 (2003).

> It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war. *We hold only that those particular acts constitute an offense against the law of war, which the Constitution authorizes to be tried by military commission.*[606]

Because the government's sole charge of conspiracy against Hamdan is not an offense under the law of war, the President's military commission lacks congressional authorization. Therefore, the constitutionality of Hamdan's military commission rests solely on the President's inherent authority as Commander in Chief.

Because the President charged Hamdan with an offense not authorized by Congress, the Court should only uphold the constitutionality of Hamdan's military commission if it finds that the President has a compelling interest in prosecuting Hamdan that is within his Article II authority as Commander in Chief. The President cannot demonstrate that Hamdan's trial by military commission meets this stringent test. There is no doubt that the President has constitutional authority to protect America's national security.[607] However, there is little evidence that prosecuting Hamdan by military commissions is necessary to protect America from further attack. If Hamdan is guilty of a crime, he could be criminally prosecuted in federal court. In the alternative if the government can demonstrate Hamdan is an enemy combatant, he could be held until the end of hostilities between the United States and al Qaeda. As Clinton Rossiter wrote in critiquing Milligan's trial by military commission:

> It is no answer to point out that the regular courts . . . were more of a hindrance than help to the cause of the

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[606] *Quirin*, 317 U.S. at 46 (emphasis added).

[607] Protecting America's national security is an obviously compelling interest. Congress' Resolution authorizing the President to use force against the perpetrators of the September 11th attack "in order to prevent any future acts of international terrorism against the United States" furthers demonstrates the compelling interest. *See* Joint Resolution of Congress Authorizing the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

> Union; for if the military authorities did not trust the civil courts, they had only to keep their suspects locked up until the danger had passed. This, indeed, was the usual method of handling these cases. In other words, it was arguable that, under the conditions then obtaining, Milligan should be denied the privilege of the writ, but it was not necessary to go further and place him on trial before a military court.[608]

This past year, Justice Thomas echoed this sentiment in *Hamdi v. Rumsfeld*.[609] Justice Thomas dissented in *Hamdi* arguing that by allowing detainees at Guantanamo Bay to file petitions for habeas corpus, the Court failed to respect the President's constitutional authority to detain alleged enemy combatants.[610] He maintained that the President's decision to detain suspected enemies "should not be subjected to judicial second-guessing."[611] However, even Justice Thomas concluded that once the President moves beyond detaining enemy combatants and seeks to punish them by military tribunal, the Court rightfully reviews whether the President is within his war-making authority.[612] While the President might be able to demonstrate the need to detain Hamdan during the duration of the conflict with al Qaeda, the President cannot demonstrate that Hamdan's prosecution by military tribunal is so necessary to protect national security it must be done in the absence of Congressional support. Accordingly, the President's unilateral decision to prosecute Hamdan by military commission should be found unconstitutional.

B. Other Military Commissions Now in Use Might be Constitutional

While the above analysis demonstrates why the military commission prosecuting Hamdan is unconstitutional, this does not mean that every military commission used in the current war on terrorism is per se unconstitutional. The President's order authorizes the use of military commissions in a variety of circumstances and against various

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608 ROSSITER & LONGAKER, *supra* note 56, at 36.
609 124 S. Ct. 2633 (2004).
610 *Id.* at 2682 (Thomas, J., dissenting)
611 *Id.*
612 *Id.* ("More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against *Milligan* . . . the punishment-non-punishment distinction harmonizes all of the precedent.").

individuals including: armed combatants captured on the battlefield, lawful U.S. resident-aliens living in the United States, illegal immigrants living in the U.S., and citizens of friendly nations captured in their home countries.[613] Similarly, military commissions assert jurisdiction over a broad range of offenses including: unlawful belligerency during armed conflict, terrorism, conspiracy, and perjury.[614] Obviously, each individual the President prosecutes by military commission will have a unique relationship to the military based on who the accused and what offense he is charged with. There are numerous detainees currently at Guantanamo Bay with cases currently pending either before a military commission or a federal court.[615] It is conceivable that some of the detainees charged by military commission will face war crime charges resulting from their direct participation in international armed conflict. As such, their trial by military commission would have Congressional authority and need only bear a substantial relation to the military mission. While the President's decision to prosecute Hamdan for conspiracy by military tribunal is unconstitutional, that does not mean the Constitution necessarily prohibits the use of a military tribunal in other situations, such as against a senior al Qaeda leader charged in connection with the September 11th attacks. Using translation methodology, the Court can determine whether each accused and his charged offenses are so substantially related to the military mission to constitutionally permit his trial by military tribunal.

VIII. Conclusion

While the Constitution gives Congress and the President the joint authority to wage war and protect America's national security, it also requires that all federal trials be heard in constitutional courts. When

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613 32 C.F.R. § 9.3 (2005) (defining the Jurisdiction of military commissions). *See also supra* note 444 and accompanying text (listing several other detainees being held at Guantanamo Bay who were captured in their own nation outside of a traditional battlefield).

614 32 C.F.R. § 11.6 (2005) (listing all of the offenses punishable by military commission).

615 *See* Brief for Appellee at iv-v, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173-74 (D.D.C. 2004), *available at* http://www.law.georgetown.edu /faculty /nkk/documents/ hamdanBrief12-29-04.pdf (listing eighteen different cases brought by detainees at Guantanamo Bay currently pending in federal district court); *See* Department of Defense Links to Information about Particular Military Commissions (Dec. 8, 2005), *available at* http://www.defenselink.mil/news/commissions.html (identifying 9 different individuals pending trial by military commission).

these two constitutional mandates conflict, the Supreme Court bears the responsibility to interpret the Constitution and resolve that dispute. The Court's historic use of originalism has led to bright-line categorical rules that fail to properly define the boundary between constitutional and military courts. Translation theory allows the Court to uniformly analyze all assertions of military jurisdiction whether they involve courts-martial, martial law, military government, or law of war courts. By using the translation framework, the Court can properly balance the political branches' need to accomplish a military mission with the Constitution's mandate that federal criminal trials be heard in constitutional courts. Most importantly, consistent application of translation theory over time will help the Court develop a coherent, rational, and principled distinction between federal courts and military tribunals. The Court can begin that process in Hamdan by adopting translation theory in determining the constitutionality of his military commission.

THE EVOLUTION OF THE JUST WAR TRADITION: DEFINING JUS POST BELLUM

MAJOR RICHARD P. DIMEGLIO*

We do not seek peace in order to be at war, but we go to war that we may have peace.[1]

I. Introduction and Analytical Framework for the Article

The field of international law is replete with theories and paradigms regarding the systemic causes of war.[2] Regulations and manuals provide

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[1] JAMES TURNER JOHNSON, MORALITY AND CONTEMPORARY WARFARE 33 (1999) (quoting Letter from Saint Augustine to Count Boniface (A.D. 416), *in* SUMMA THEOLOGICA (Benziger Bros. Ed. 1947)).

[2] *See* JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE (2004) (offering a contemporary paradigm on the cause of war, entitled Incentive Theory). Professor Moore, Professor of International Law at the University of Virginia

guidance on how a military must operate once thrust into a conflict.[3] Soldiers train repetitively on battle drills so they can understand and perform their wartime roles and responsibilities. In contrast to the voluminous material regarding causes of war and actions in war, there is a vacuum regarding proceedings after war termination. While the military forces of nations like the United States have clearly mastered how to fight and win wars, some people question what leaders know about achieving the peace.[4]

This article uses the framework of an influential and historical perspective on force and morality, known as the just war tradition, to analyze what a just peace, or a jus post bellum, should look like. The just war tradition has traditionally focused solely in two realms: the circumstances under which a nation is morally justified to go to war (jus ad bellum) and the moral restraints imposed once a nation engages in war (jus in bello).[5] There is, however, a third, largely historically neglected prong of the just war tradition, known as jus post bellum, which focuses on the issues regulating the end of war and the return from war to peace.[6]

School of Law, posits that major wars arise as a result of the synergy between an absence of democracy and an absence of effective deterrence at the national and international levels against aggressive nondemocratic nations, along with a failure to provide a proper set of incentives to the individual decision makers leading those nondemocratic nations. *See id*. at xx. Professor Moore defines "major war" as a conflict incurring over 1000 total casualties. *Id.* at xviii.

[3] For an overview of U.S. doctrine on operations and legal support to operations, see U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY (14 June 2001); U.S. DEP'T OF ARMY, FIELD MANUAL 3.0, OPERATIONS (June 2001); U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000). For more specific guidance on peace operations, see U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (Feb. 2003); JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, JOINT TACTICS, TECHNIQUES AND PROCEDURES FOR PEACE OPERATIONS (12 Feb. 1999).

[4] Rear Admiral Louis V. Iasiello, the Twenty-Third Chief of Navy Chaplains, points to current problems in Iraq and Afghanistan. Despite the impressive and overwhelming military victories by the United States and Coalition partners, he wonders: "Why has the *post bellum* phase of these conflicts proved such a challenge to the victors of battle?" Rear Admiral Louis V. Iasiello, *Jus Post Bellum: The Moral Responsibilities of Victors in War*, 57 NAVAL WAR C. REV. 33, 33-34 (2004). Ekaterina Stepanova, a senior associate at the Center for International Security, Institute of World Economy and International Relations, in Moscow, adds: "The crisis in Iraq has . . . demonstrated the failure of unprecedented military might unconstrained by international legal norms and backed by technological and economic superiority to achieve a just and durable peace after the war – a challenge no less complex or ambitious than effectively waging war." Ekaterina Stepanova, *War and Peace Building*, 27 WASH. Q. 127, 127-28 (2004).

[5] *See* JOHNSON, *supra* note 1, at 27.

[6] *See* Iasiello, *supra* note 4, at 34.

Unlike the first two prongs, which have defined criteria permitting moral discourse, the concept of jus post bellum is underdeveloped and does not yet contain established criteria for analyzing issues.

Section II of this article provides a general historical background on the development and framework of the just war tradition. This section places the just war tradition in context with realist and pacifist perspectives and analyzes its contemporary use and misuse. It then defines the existing jus ad bellum and jus in bello principles to provide a larger context by which to later understand jus post bellum.

After this introduction to the just war tradition, Section III offers a brief overview of the existing state of the law concerning post-conflict resolution. It highlights the paucity of guidance and the need for additional insight into post-war justice. Section III also examines the roots of jus post bellum in the just war tradition, noting the lack of defined criteria.

Section IV presents proposals for jus post bellum criteria proffered by three leading just war scholars and theorists. The first is by theologian Michael Schuck, who was the first to present jus post bellum criteria in the aftermath of the 1991 Persian Gulf War.[7] The second belongs to Professor Michael Walzer, widely viewed as the preeminent contemporary authority on just war.[8] Third, Section IV provides the principles offered by Professor Brian Orend, the author of the most comprehensive proposed jus post bellum criteria.[9]

Section V incorporates the overview of the just war tradition, the thoughts and proposals by the three scholars, international law, and recent lessons learned from military operations in Iraq and Afghanistan. The result is a proposal for three jus post bellum criteria. The first criterion recognizes a need to ensure that a post-war peace is, to the best extent possible, a lasting peace. It is of little moral value, and disproportionate to the costs of lives and resources expended, to permit a nation to justly engage in war and successfully terminate a conflict, and yet allow conditions to remain in place that would permit violence and aggression to erupt once again. The second standard seeks to deter future aggression by other leaders and provide closure for victims by

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[7] *See infra* Part IV.A (providing Professor Schuck's criteria).
[8] *See infra* Part IV.B (providing Professor Walzer's criteria).
[9] *See infra* Part IV.C (providing Professor Orend's criteria).

demonstrating, through war crimes tribunals, that there are individual consequences for morally abhorrent behavior. The final principle also seeks to deter aggression and provide closure by requiring appropriate post-war reparations.

This article seeks to help fill the current vacuum by using the general framework of the just war tradition to develop jus post bellum criteria to affect a just peace. As Rear Admiral Louis V. Iasiello, the Twenty-Third Chief of Navy Chaplains, notes:

> In an era when military victories on the battlefield are virtually assured for the United States and its allies, we must recognize the critical nature of *post bellum* operations and devote more attention to the development of a theory that will drive operational concerns in the post-conflict stages of occupation, stabilization, restoration, and other aspects of nation building. Thorough planning for this sometimes neglected aspect of war may ultimately save thousands of combatant and noncombatant lives, and quite possibly billions of dollars. The lessons of recent U.S. operations and today's geopolitical realities demand nothing less.[10]

II. Overview of the Just War Tradition

> *Perhaps there never has been a totally just war. But then perhaps there never has been a totally virtuous person. Neither fact reduces the usefulness of clarifying the standards involved or having them in the first place.*[11]

A. Background on the Just War Tradition

The just war tradition has been in perpetual evolution for nearly two thousand years; indeed, the very essence of the tradition requires constant scrutiny, appraisal, and refinement. Its origins were in early Christianity as a means to refute Christian pacifists and provide for certain, defined grounds under which a resort to warfare was both

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[10] Iasiello, *supra* note 4, at 34.

[11] W. L. LACROIX, WAR AND INTERNATIONAL ETHICS: TRADITION AND TODAY 141 (1988).

morally and religiously permissible.[12] In the fifth century A.D, Augustine of Hippo (Saint Augustine) searched for a means to reconcile traditional Christian pacifism with the need to defend the Holy Roman Empire from the approaching vandals by military means.[13] From Saint Augustine's initial writings providing for a limited justification for war, philosophers, theologians, theorists, and scholars including Saint Thomas Aquinas, Francisco de Victoria, Francisco Suarez, Hugo Grotious, and Immanuel Kant, have developed and advanced the theory, principles, and criteria over the course of nearly two millennia.[14] The expansion continues today as just war scholars continue to apply moral reasoning within historical and contemporary perspectives to the issues of war and peace.[15] This progression of ideas and debates, manifested today throughout religious writings, international laws, treaties and conventions, is collectively known as the just war tradition.[16]

Brian Orend, a professor of philosophy at the University of Waterloo in Ontario, Canada, and a prominent contemporary just war theorist, describes the just war tradition in the following manner:

> Just war theory . . . offers rules to guide decision-makers on the appropriateness of their conduct during the resort to war, conduct during war and the termination phase of the conflict. Its over-all aim is to try and ensure that wars are begun only for a very narrow set of truly defensible reasons, that when wars break out they are

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[12] *See* MICHAEL WALZER, ARGUING ABOUT WAR 3 (2004).

[13] *See* JAMES TURNER JOHNSON, CAN MODERN WAR BE JUST? 1 (1984).

[14] *See* JOHNSON, *supra* note 1, at 14-15, 24; Brian Orend, *War*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2002), *available at* http://plato.stanford.edu/entries/war/. *See generally* PETER S. TEMES, THE JUST WAR: AN AMERICAN REFLECTION ON THE MORALITY OF WAR IN OUR TIME 41-75 (2003) (providing additional insight concerning the founders of the just war tradition). The just war tradition reached its peak of influence alongside the rise of the Roman Catholic Church in the Middle Ages. After the Peace of Westphalia in 1648, ending the Thirty Years War, the power of the Church to influence decisions on warfare began to wane, and with the emergence of the state as an independent sovereign and international actor, nations began to arbitrate independently about the justness of war, with predictable results. *See* JOHNSON, *supra* note 1, at 52-54.

[15] *See* JOHNSON, *supra* note 13, at 12. Professor James Turner Johnson argues that the just war tradition should not be viewed as "doctrine" requiring a positivist approach, but rather, it "requires active moral judgment within a historical context that includes not only the contemporary world but the significantly remembered past." *Id*.

[16] *See* Iasiello, *supra* note 4, at 36-37; *see also* JOHNSON, *supra* note 1, at 30 (linking just war principles to positivist international law).

> fought in a responsibly controlled and targeted manner, and that parties to the dispute bring their war to an end in a speedy and responsible fashion that respects the requirements of justice.[17]

Michael Walzer, a Professor at the Institute of Advanced Studies at Princeton University, and author of the 1977 seminal work on just war theory, *Just and Unjust Wars*,[18] remarks on the enduring nature of the just war tradition: "Just war theory is not an apology for any particular war, and it is not a renunciation of war itself. It is designed to sustain a constant scrutiny and an immanent critique."[19]

As an international paradigm, just war theory finds its niche squarely between the alternate extreme perspectives of realism and pacifism.[20] A realist believes that war "is an intractable part of an anarchical world system; that it ought to be resorted to only if it makes sense in terms of national self-interest; and that, once war has begun, a state ought to do whatever it can to win."[21] From a realist's vantage point, "if adhering to a set of just war constraints hinders a state in this regard, it ought to disregard them and stick soberly to attending to its fundamental interests in power and security."[22] In short, for a realist, "[t]alk of the morality of warfare is pure bunk."[23]

By contrast, pacifists find themselves on the opposite end of the use of force spectrum. A pacifist is of the persuasion "that no war is or could be just. . . . In short, pacifists categorically oppose war as such, though their reasons tend to vary."[24] Professor Orend notes that a pacifist does not share a realist's "moral skepticism"[25] concerning warfare and may agree with the just war tradition of applying ethical standards to conflict management. However, "pacifists differ from just war theorists by

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[17] Orend, *supra* note 14.
[18] MICHAEL WALZER, JUST AND UNJUST WARS (1977).
[19] WALZER, *supra* note 12, at 22.
[20] *See* BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 44 (2000) ("There seem, at bottom, to be three basic perspectives on the ethics and legality of war and peace, with realism and pacifism at the extremes and just war theory in the middle.").
[21] *Id*.
[22] *Id*.
[23] Orend, *supra* note 14 (listing a number of prominent realists, to include Thucydides, Machiavelli, Hobbes, Hans Morgenthau, Henry Kissinger, and Kenneth Waltz).
[24] OREND, *supra* note 20, at 47.
[25] Orend, *supra* note 14.

contending that the substance of such moral judgments is always that we should never resort to war."[26] Although pacifism is a morally judicious theory of conflict management, it, like realism, provides little practical value to the contemporary international law practitioner.

Some have claimed that the just war tradition embodies an inherently pacifistic presumption against war.[27] This is untrue and is an inversion of the moral analysis; maintaining justice under the just war tradition may actually necessitate a call to arms.[28] George Weigel, Senior Fellow of the Ethics and Public Policy Center in Washington, D.C., posits:

> If the just war tradition is a theory of statecraft, to reduce it to a casuistry of means-tests that begins with a "presumption against violence" is to begin at the wrong place. The just war tradition begins by defining the moral responsibilities of governments, continues with the definition of morally appropriate political ends, and only then takes up the question of means. By reversing the analysis of means and ends, the "presumption against violence" starting point collapses *bellum* into *duellum*

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[26] OREND, *supra* note 20, at 47.

[27] *See* JOHNSON, *supra* note 1, at 34-36 (mentioning and then refuting these claims).

[28] *See* Michael Novak, *The Rule of Law in Conflict and Post-Conflict Situations: Just Peace and the Asymmetric Threat: National Self Defense in Uncharted Waters*, 27 HARV. J.L. & PUB. POL'Y 817, 827-28 (2004). Novak, a theologian, author, and former U.S. Ambassador, notes:

> According to St. Augustine, fallen human nature being what it is, there will always be a presumption that generation after generation some evil men will choose disorder, violence, and unjust aggression. At times, the only way to restore order will be to use war as a just instrument of statecraft.

Id. at 828. He adds that the just war tradition may even embrace a preemptive attack underpinning:

> The just war tradition does not begin "with a presumption against war or violence," but with the presumption that the protection of international order in every generation is likely to require either going to war for the sake of restoring justice, or (better) at least the intimidating and well-honed *capacity* to fight just wars successfully, in order to prevent them in advance.

Id. at 832-33.

> and ends up conflating the ideas of "violence" and "war."[29]

Professor James Turner Johnson, a prominent just war scholar, agrees that the presumption against war is misplaced and notes, instead, that the just war tradition has a "presumption against *injustice* focused on the need for responsible use of force in response to wrongdoing."[30]

When one rejects the extremes of realism and pacifism, the just war tradition remains the appropriate paradigm for analysis of conflicts. That is not to say that the just war tradition is devoid of critics. Some claim that the just war tradition is no longer applicable in today's strategic and legal environment.[31] Others argue that there is no place for a religious-philosophical theory since contemporary wars are no longer dominated by opposing nation-states, but instead, are often intrastate wars or conflicts against itinerant terrorist organizations who do not adhere to the norms of customary international law or to traditional notions of warfare.[32] Professor Orend refutes these claims and asserts that the just

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[29] George Weigel, *Moral Clarity in a Time of War*, 2003 FIRST THINGS 128, 20-27, *available at* http://www.firstthings.com/ftissues/ft0301/articles/weigel.html.

[30] JOHNSON, *supra* note 1, at 35.

[31] *See* OREND, *supra* note 20, at 8. Professor Orend discusses some of the skepticism facing just war theorists today:

> There is, so to speak, a certain smell about just war theory that any defender of it must deal with, even prior to enunciating anything substantive. Three of the most commonly held beliefs of these skeptics, in this regard, are: 1) that just war theory is irredeemably tainted by its origins in Catholic doctrine; 2) that just war theory is dated and irrelevant; and 3) that just war theory is so liable to abuse as to be nothing more than a cloak with which to hide, or even justify, the commission of great evils, and by no less dubious an institution than the modern nation-state.

Id; *see also* JOHNSON, *supra* note 1, at 223-27 (refuting the criticism that the just war tradition's emphasis on placing limits on warfare is irrelevant in an age of nuclear weapons and total warfare); Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 879-80 (2004) (arguing that the just war tradition is irrelevant today because only the Security Council, acting under the authority of the Charter of the United Nations, may authorize the use of force). *But see* YEHUDA MELZER, CONCEPTS OF JUST WAR 39 (1975) (providing for a role for the just war tradition alongside the Charter by observing that "the aim of the United Nations is to secure peace. . . . It is not to achieve and maintain justice").

[32] *See* OREND, *supra* note 20, at 8.

war theory is still quite applicable today, even in a world threatened by non-traditional actors:

> With regard to the terrorist objection [by critics of just war theory], it should be noted that interstate armed conflict has hardly gone the way of the dinosaur. Consider the Persian Gulf War of 1991 and the multistate war raging in the heart of Africa—Zaire/Congo—in 1998/99. Second, terrorists are not literally nomads: they enjoy the protection (either tacit or explicit) of many of the states they inhabit. . . . As well, intrastate civil wars are still fought in what we might call a state-laden context: they are fought either over which group gets to control the existing state or over which group gets to have a new state. Thus, there are always state-to-state issues involved in contemporary armed conflict, even civil wars and terrorism. Finally, the norms of just war theory . . . are sufficiently flexible to apply in a meaningful way whenever political violence is employed.[33]

Moreover, the consistent insertion of just war concepts into political discourse underscores the contemporary vitality and relevance of the just war tradition. Unfortunately, this often leads to misunderstandings since politicians and military commanders often manipulate the tradition out of form through the persistent misuse of the terms in an effort to justify their political or military actions on moral grounds.[34] One need not look any further for an example than the three 2004 U.S. presidential debates between Rrepublican President George W. Bush and Democratic presidential nominee Senator John Kerry. During the televised debates, both candidates repeatedly discussed the justification for going to war in

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[33] *Id*. at 9.

[34] *See id*. at 8. For example, it is common for leaders to use the jus ad bellum principles when referring to having a "just cause" for military actions or debating whether there was a situation of "last resort" requiring military intervention. *See infra* note 35; *see generally* Jimmy Carter, Editorial, *Just War—or a Just War?*, N.Y. TIMES, Mar. 9, 2003, § 4, at 13 (employing the jus ad bellum criteria to argue that the then impending war against Iraq would be unjust on every prong); William Jefferson Clinton, *A Just and Necessary War*, N.Y. TIMES, May 23, 1999, at W17 (utilizing just war terminology to portray the situation in Kosovo).

Iraq and directly referenced, generally incorrectly, the jus ad bellum term "last resort" no less than ten times.[35]

The use and misuse of the just war terms in political discourse are neither a weakness nor a failure of the just war tradition, but rather, recognition of the lasting power of the theory.[36] The tenets of just war

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[35] President George W. Bush and Senator John Kerry, Presidential Debate at St. Louis, Missouri (Oct. 8, 2004) (transcript available at http://wid.ap.org/transcripts/debates/prez2.html.) President Bush said: "I remember going down to the basement of the White House on the day we committed our troops as last resort . . . ." *Id.* Senator Kerry stated:

> I believe the President made a huge mistake . . . not to live up to his own standard . . . and go to war as a last resort. I ask each of you just to look into your hearts, look into your guts. Gut-check time. Was this really going to war as a last resort?

Id.; *see also* President George W. Bush and Senator John Kerry, Presidential Debate at Coral Gables, Florida (Sept. 30, 2004) (transcript available at http://wid.ap.org/transcripts/debates/prez1.html. President Bush said: "But a President must always be willing to use troops. It must – as a last resort." *Id.* Senator Kerry replied:

> [President Bush] promised America that he would go to war as a last resort. Those words mean something to me, as somebody who has been in combat. Last resort. You've got to be able to look in the eyes of families and say to those parents, I tried to do everything in my power to prevent the loss of your son and daughter. . . . [President Bush] misled the American people when he said we'd go to war as a last resort. We did not go as a last resort. And most Americans know the difference.

Id. Unfortunately, most politicians do not themselves understand the difference and the actual requirements of "last resort" under the just war tradition. Professor Johnson provides a clarification of this jus ad bellum criterion:

> It is important to note that the criterion of last resort does not mean that all possible non-military options that may be conceived of must first be tried; rather, a prudential judgment must be made as to whether *only* a rightly authorized use of force can, in the given circumstances, achieve the goods defined by the ideas of just cause, right intervention, and the goal of peace, at a proportionate cost, and with reasonable hope of success. Other methods *may* be tried first, if time permits and if they also satisfy these moral criteria; yet this is not mandated by the criterion of last resort - and 'last resort' certainly does not mean that other methods must be tried indefinitely.

JAMES TURNER JOHNSON & GEORGE WEIGEL, JUST WAR AND THE GULF WAR 29 (1991).

[36] *See generally* WALZER, *supra* note 12, at 3-15. Professor Walzer observes how the success of the just war theory can unintentionally undermine its integrity. *See id.* Professor Walzer remarks that when politicians and military generals start defining their

theory are undeniably "slippery"[37] and subject to manipulation. However, while the semantics and theoretical bases for the theory continue to be debated and refined by politicians and scholars, the true strength of the just war tradition rests in providing at least some "minimally adequate theory"[38] with which to analyze conflict management.

B. The First Two Prongs of the Just War Tradition

Just war discussions have traditionally focused upon only the two thematic branches of jus ad bellum and jus in bello, and have failed to discuss jus post bellum considerations. Before embarking on an analysis of jus post bellum, however, it is necessary to briefly mention the first two prongs in order to understand jus post bellum in the context of the larger just war construct.

The first category, jus ad bellum, encompasses the concept of whether nation-states should resort to warfare.[39] The second prong, jus in bello, focuses on the actions of the nation-states once warfare has commenced.[40] Professor Walzer summarizes the two concepts: "*Jus ad bellum* requires us to make judgments about aggression and self defense;

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actions in terms of just war principles, it can result in "a certain softening of the critical mind, a truce between theorists and soldiers" that can weaken the scrutiny that must be applied to the principals. *Id*. at 15. *But see* Weigel, *supra* note 29 (arguing that politicians must provide input into the just war tradition). Weigel states:

> If the just war tradition is indeed a tradition of statecraft, then the proper role of religious leaders and public intellectuals is to do everything possible to clarify the moral issues at stake in a time of war, while recognizing that what we might call the "charism of responsibility" lies elsewhere – with duly constituted public authorities, who are more fully informed about the relevant facts and who must bear the weight of responsible decision-making and governance. It is simply clericalism to suggest that religious leaders and public intellectuals "own" the just war tradition in a singular way.

Id.

[37] OREND, *supra* note 20, at 10.

[38] *Id*. at 10. Professor Orend attributes this phrase to Professor Bonnie Kent of Columbia University's Philosophy Department. *See id*. at 11 n.6.

[39] *See* BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 4 (2000).

[40] *See id*.

jus in bello about the observance or violation of the customary and positive rules of engagement."[41]

Although scholars often mention and analyze jus ad bellum and jus in bello in conjunction, the just war tradition views these two prongs as separate and distinct. Professor Orend reminds a student of just war "that a war can begin for just reasons, yet be prosecuted in an unjust fashion. Similarly, though perhaps much less commonly, a war begun for unjust reasons might be fought with strict adherence to *jus in bello*."[42]

1. Jus ad Bellum

Jus ad bellum contains the principles used to articulate the just resort to war. According to the just war tradition, the jus ad bellum criteria "must be met by any state considering the resort to armed force"[43] before that state can declare its resort to force justified. The six factors traditionally used to analyze jus ad bellum, which the just war tradition addresses to the political leaders of states, are: (1) just cause; (2) right intention; (3) proper authority and public declaration; (4) last resort; (5) probability of success; and (6) macro proportionality (proportionality of good versus evil).[44]

Discussing each of the jus ad bellum criteria in depth would form a separate endeavor; therefore, Professor Orend's summary of these

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[41] WALZER, *supra* note 18 at 21.

[42] OREND, *supra* note 20, at 50. Professor Orend adds that "the *jus ad bellum* criteria are thought to be the preserve and responsibility of political leaders whereas the *jus in bello* criteria are thought to be the province and responsibility of military commanders, officers and soldiers." *Id*.

[43] *Id.* at 48-49.

[44] *See* OREND, *supra* note 39, at 87. There is no one authoritative list of the jus ad bellum criteria. The number and titles of the criteria vary slightly among scholars; however, these six are the most commonly used. Some just war theorists add a seventh criterion. Professor Orend lists these six criteria but adds a seventh factor of comparative justice. *See* OREND, *supra* note 20, at 49. "The idea here is that every state must acknowledge that each side to the war may well have some justice in its cause. Thus, all states are to acknowledge that there are limits to the justice of their own cause, thus forcing them to fight only limited wars." *Id*; *see also* JOHNSON, *supra* note 1, at 27-29 (including a seventh criterion requiring that a nation wage war for the "aim of peace"); Iasiello, *supra* note 4, at 37 (adding a seventh criterion of "a formal declaration of war"); Thomas A. Shannon, *What is 'Just War' Today?*, CATH. UPDATE (May 2004), *available at* http://www.americancatholic.org/Newsletters/CU/ac0504.asp (listing comparative justice as a seventh criterion).

criteria follows. A failure of any one leads to an entire jus ad bellum failure.[45]

> *JWT 1. Just cause*. A state must have a just cause in launching a war. The causes most frequently mentioned by the just war tradition include: self-defence by a state from external attack; the protection of innocents within its borders; and, in general, vindication for any violation of its two core state rights: political sovereignty and territorial integrity.
>
> *JWT 2. Right intention.* A state must intend to fight the war only for the sake of those just causes listed in JWT 1. It cannot legitimately employ the cloak of a just cause to advance other intentions it might have, such as ethnic hatred or the pursuit of national glory.
>
> *JWT 3. Proper authority and public declaration.* A state may go to war only if the decision has been made by the appropriate authorities, according to the proper process, and made public, notably to its own citizens and to the enemy state(s).
>
> *JWT 4. Last resort*. A state may resort to war only if it has exhausted all plausible, peaceful alternatives to resolving the conflict in question, in particular through diplomatic negotiation.
>
> *JWT 5. Probability of success*. A state may not resort to war if it can reasonably foresee that doing so will have no measurable impact on the situation. The aim here is to block violence which is going to be futile.
>
> *JWT 6. (Macro-) proportionality*. A state must, prior to initiating a war, weigh the expected universal good to accrue from its prosecuting the war against the expected universal evils that will result. Only if the benefits seem reasonably proportional to the costs may the war action proceed.[46]

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[45] *See* Orend, *supra* note 14.
[46] OREND, *supra* note 20, at 49.

As noted earlier, the modern political and military lexicon is replete with several of these jus ad bellum terms.[47] Additionally, many of the jus ad bellum principles have taken root during the past century in international law and through the United Nations Charter.[48]

2. Jus in Bello

In contrast to jus ad bellum, which focuses upon the moral justification to go to war, jus in bello analyzes the actions of a state already engaged in combat operations to determine if that state is fighting justly.[49] The two traditional jus in bello criteria, which fall primarily to the responsibility of the military leadership for adherence, are micro proportionality and discrimination.[50] Similar to the jus ad

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[47] *See supra* notes 34-36 and accompanying text (discussing the use of the jus ad bellum principles by politicians and military leaders).

[48] *See* JOHNSON, *supra* note 1, at 24. For example, the criterion of just cause permits a nation to respond in self-defense when confronted with an external armed attack. *See supra* note 46 and accompanying text (discussing just cause). This parallels the general concepts embodied in Articles 2 and 51 of the U.N. Charter. Article 2(3) of the U.N. Charter states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. Charter art. 2, para. 3. Article 2(4) notes: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.* art. 2, para. 4. The first sentence of Article 51 of the U.N. Charter, however, adds: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." *Id.* art. 51.

The concept of proper authority is interesting and debatable. Can the United States, acting unilaterally, be a proper authority? Must the United Nations Security Council sanction every action? *See* JOHNSON, *supra* note 1, at 58-63 (observing that the United Nations lacks the cohesion, sovereignty, and chain of command necessary to be a competent proper authority under the just war tradition); Weigel, *supra* note 29 (arguing that prior U.N. authority to use force is not required before a state acts); *see also* TEMES, *supra* note 14, at 15-16 (arguing that although the term proper authority may have once accounted "for the idea that a Just War might also be undertaken by, as examples, revolutionary movements, breakaway provinces, clans, tribal groups, or religious sects" the form of war today in some way always involves nations and nations have become the proper authorities). *But see* Dinstein, *supra* note 31, at 879 (arguing that the Security Council is the only proper authority absent self-defense).

[49] *See* OREND, *supra* note 20, at 50.

[50] *See id.*

bellum analysis, a violation of either of these two criteria leads to an entire failure in jus in bello.[51] A definition of these criteria is helpful.

> *(Micro-) proportionality*. Similar to JWT 6 [the Jus ad Bellum criterion of Macro Proportionality], states are to weigh the expected universal goods/benefits against the expected universal evils/costs, not only in terms of the war as a whole but also in terms of each significant military tactic and manoeuvre employed within the war. Only if the goods/benefits of the proposed action seem reasonably proportional to the evils/costs, may a state's armed forces employ it. . . .
>
> *Discrimination*. . . . The key distinction to be made here is between combatants and non-combatants. Non-combatant civilians, unlike combatant soldiers, may not be directly targeted by any military tactics or manoeuvres; non-combatants, thought to be innocent of the war, must have their human rights respected.[52]

Like the jus ad bellum criteria, these jus in bello concepts have found a home in positivist international law to include the Hague regulations, the Geneva Conventions, arms limitation treaties, military doctrine, and rules of engagement formulation.[53]

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[51] *See id*.

[52] *Id.*

[53] *See* JOHNSON, *supra* note 1, at 24 (listing the connections between the just war tradition and positivist international law); *see, e.g.*, Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, para. 5b, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (stating that "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" would be considered an indiscriminate attack and violate the principle of proportionality); Hague Convention IV Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations] ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 41 (18 July 1956) [hereinafter FM 27-10] ("[L]oss of life and damage to property must not be out of pro-portion to the military advantage to be gained."). The United States signed Additional Protocol I on December 12, 1977, subject to declarations, but never formally ratified Additional Protocol I. The United States, however, considers many of the provisions of Additional Protocol I, including Art. 51, para. 5b, customary international law. *See* Michael Matheson, *Session One: The United States Position on*

III. Post-Conflict Resolution and Jus Post Bellum

A. The Current State of Post-Conflict Resolution

International law regarding proper actions after conflict is woefully inadequate. Rules abound regulating decisions to go to war and prescribing conduct once engaged in war; however, international law provides very little discussion concerning actions after the cessation of hostilities, and even less that ties in concepts of ethics and morality.[54] The antiquated Articles 32 through 41 of the Hague Convention (IV), drafted in 1907, contain the majority of available guidance on post-conflict resolution.[55] These Articles are, unfortunately, largely inapplicable for the demands of modern day conflict.[56] In the absence of law or guidance, a sense of "winner's justice" can prevail.

Today, as the United States and her coalition partners are engaged in continuing operations in Iraq and Afghanistan, the need for direction in post-conflict resolution has never been greater. As Professor Orend notes, "the lack of rules regulating postwar conduct on the part of states creates serious problems of legal vacuum, political insecurity and profound injustice. The situation requires rectification, ideally through the establishment of international laws of war termination which are codified and effectively observed."[57]

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the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT'L L. POL'Y 419, 420 (1987).

[54] *See generally* CONFLICT TERMINATION AND MILITARY STRATEGY: COERCION, PERSUASION, AND WAR (Stephen J. Cimbala & Keith A. Dunn eds., 1987) (providing a general introduction to concepts of war termination); WAR AND MORALITY (Patrick Mileham, ed., 2004) (containing an excellent collection of contemporary articles discussing warfare and morality, focusing upon operations in Iraq and Afghanistan, compiled by the United Kingdom's Royal United Services Institute for Defence and Security Studies).

[55] *See* OREND, *supra* note 20, at 218; Hague Regulations, *supra* note 53, arts. 32-41.

[56] Professor Orend remarks: "Those articles were ratified in 1907, and sound like it. Their quaint references to white flags and buglers, their vague commitments to military honour, their pedantic distinctions between general and local armistices, and the overwhelming emptiness of their nature renders these articles all but irrelevant in the current context." OREND, *supra* note 20, at 218.

[57] *Id.* at 222. Professor Orend lists the benefits of having codified international laws regarding war termination:

> 1. At their most narrow, these laws would specify the content of minimally acceptable behaviour during war termination.

The lack of guidance in this area can cause nations to lengthen their strategic engagements, thereby escalating casualties and destruction. "Since [warring parties] have few assurances regarding the nature of the settlement, belligerents will be sorely tempted to keep using force to jockey for position."[58] Additionally, the absence of standards may lead to inconsistent or disproportionate results, which can increase the chance of future aggression.

B. Jus Post Bellum in the Just War Tradition

The issue of a proper post-conflict resolution has also been elusive in the just war tradition. Just war theorists have traditionally been satisfied solely with analyzing and commenting on both the decision to go to war and the conduct within the war. They have historically neglected the discussion and scrutiny of a proper resolution to the war and the transfer from warfare back to peace.[59]

There is, however, historical precedent for jus post bellum considerations in the just war tradition. One can trace the roots of jus

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> 2. At their most broad, these laws would serve as shared standards of commitment and aspiration with regard to healing the wounds of war.
> 3. These laws would establish guidelines, or a kind of procedure, whereby belligerents could communicate to their opponents their intentions for action during postwar negotiations.
>
> 4. These laws would thereby help to stabilize and ground expectations of state behaviour during a very uncertain and delicate period, leading to shared modes of interpreting and evaluating peace treaties and mitigating reliance on prolonged fighting to strengthen position at the bargaining table.
> 5. In many instances, the laws will, if properly framed, express morally worthy aims, such as the protection of human rights, the minimization of postwar deprivation and suffering, the directing of punitive measures away from innocent non-combatants and the gradual transformation of the international system itself into one in which war is resorted to less frequently, with diminished rates of death and destruction.

Id. at 222-23.

[58] Brian Orend, *Justice after War*, 16 ETHICS & INT'L AFF. 43, 43 (2002).

[59] Perhaps this is because the majority of the intellectual debate among leaders, theologians and politicians usually occurs prior to initiation of hostilities and again during conflict. By the time the war concludes, the world focuses its attention on the next potential conflict arena.

post bellum back to the works of the German philosopher and just war theorist Immanuel Kant at the end of the eighteenth century.[60] Kant believed that any dialogue on war and morality must also logically encompass a discussion on post-conflict justice.[61] Kant recognized the existence of this third branch of the just war tradition and premised his jus post bellum analysis on the assumptions that the victor first engaged in and then fought a just war, or that jus ad bellum and jus in bello criteria were already satisfied.[62] Although he recognized the need to identify and discuss jus post bellum, Kant did not specify criteria for the category.

The discourse on jus post bellum seemingly disappeared after Kant's death only to resurface nearly two hundred years later. Although some just war scholars may point to prior vague references to war termination in their works or the works of others, the first unequivocal reference to jus post bellum, and accompanying distinguishable criteria, belonged to theologian Michael Schuck in 1994. Professor Schuck reintroduced the topic in a reflection upon the 1991 Persian Gulf War.[63]

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[60] *See* OREND, *supra* note 20, at 2, 217.

[61] *See id.* at 217.

[62] *See id.* at 223-24. The jus post bellum considerations are particularly linked to the jus ad bellum factors leading a nation to decide to embark upon war. Indeed, the very goal of going to war under jus ad bellum considerations is to obtain a better peace. *See* JOHNSON, *supra* note 13, at 3. While Kant believed that analysis of a proper war termination hinged on the victor first satisfying the jus ad bellum and jus in bello criteria, there is considerable value in analyzing jus post bellum considerations regardless of the successful satisfaction of the two prior prongs. This is especially true given the paucity of international guidance on postwar management.

Professor Brian Orend follows the Kantian approach, believing that one must premise a jus post bellum analysis upon the assumption that the victor already has satisfied the jus ad bellum and jus in bello prongs. He writes: "In my judgment, it is only when the victorious regime has fought a just and lawful war, as defined by international law and just war theory, that we can speak meaningfully of rights and duties, of both victor and vanquished, at the conclusion of armed conflict." Orend, *supra* note 58, at 44. However, even Professor Orend conducts his own application of his jus post bellum criteria to the 1991 Persian Gulf War after noting that he is not going to first concern himself about satisfying the prior Jus ad Bellum or Jus in Bello issues. *See* OREND, *supra* note 20, at 235. Thus, although he does not openly admit it, he too must see a value in analyzing jus post bellum regardless of satisfaction of the prior two prongs.

[63] *See* Michael J. Schuck, *When the Shooting Stops: Missing Elements in Just War Theory*, 3 CHRISTIAN CENTURY, Oct. 26, 1994, at 982. Professor Schuck became inspired to comment on jus post bellum after seeing a picture of U.S. General Norman Schwarzkopf, Commander of Central Command (CENTCOM) and of coalition forces during the 1991 Persian Gulf War, leading a postwar victory parade at Disneyworld alongside Mickey Mouse and Donald Duck. *See id*. Professor Schuck labeled the picture "a scandalous trivialization of war." *Id.*

After being largely absent during the preceding two thousand years of the just war tradition, the topic has received considerable attention and review as post-war operations continue in Iraq and Afghanistan. Because of the significant issues arising in connection with operations in those countries, many just war theorists are now discovering jus post bellum and offering their insights to illuminate and define this critically underdeveloped prong of the culture of war.

IV. Proposed Jus Post Bellum Criteria

This section presents and reviews ideas and criteria for analyzing jus post bellum proposed by three just war scholars.[64] The first set belongs to theologian Michael Schuck, who offered his criteria in the aftermath of the 1991 Persian Gulf War. The second is from Professor Michael Walzer, a prominent contemporary just war scholar. Although Professor Walzer has not yet succinctly itemized his criteria, his recent speeches and writings on the topic, predominantly reflecting on U.S. operations in Iraq and Afghanistan, sufficiently reveal his theories of jus post bellum. The third model is from Professor Brian Orend, who offers a detailed and comprehensive listing of jus post bellum criteria.

A. Professor Michael Schuck's Criteria

Michael Schuck, an associate professor of theology at Loyola University in Chicago, wrote a short article in *The Christian Century* in 1994, after the 1991 Persian Gulf War.[65] In the article, Professor Schuck asks: "If Christians are called upon to probe the moral propriety of entering and conducting war . . . should they not also be called upon to monitor the moral propriety of concluding a war through some set of *jus post bellum* principles?"[66] In response to his own query, Professor Schuck proposes the following jus post bellum principles: (1) repentance by the victor; (2) honorable surrender; and (3) restoration.[67] Professor

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[64] The author selected these three scholars for analysis based on the following reasons: Professor Michael Schuck was the first to propose distinguishable jus post bellum criteria; Professor Michael Walzer is widely regarded as the leading voice in just war theory; and Professor Brian Orend offers the most comprehensive proposal for jus post bellum criteria.

[65] *See* Schuck, *supra* note 63, at 982.

[66] *Id.*

[67] *See id.*

Schuck views his criteria "as a litmus test for the sincerity of the just war claims made before and during the conflict."[68] Failure to comply with the jus post bellum requirements, according to Professor Schuck, undermines the prior jus ad bellum motives and rationale used by the victors.[69]

1. Repentance

The principle of repentance is the "centerpiece"[70] of Professor Schuck's jus post bellum considerations. "Victors would be expected to conduct themselves humbly after a war. Where public display is called for, victors should show remorse for the price of war paid not only by their comrades but also by the vanquished."[71] Professor Schuck permits celebrations honoring the return of victorious soldiers, but proscribes "ethnocentric celebrations of victory"[72] meant only to celebrate the defeat of the vanquished nation. Professor Schuck notes that although this type of distinction "may seem marginal . . . in morality, margins often make all the difference."[73] Theologian Kenneth R. Himes adds: "[Schuck's] principle of repentance requires a sense of humility and remorse by the victors for the suffering and death that was brought about even in a just struggle. An appropriate sense of mourning is needed when Christians kill even if the killing is judged legitimate."[74]

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[68] *Id.* at 983.
[69] *See id.*
[70] *Id.* at 982.
[71] *Id.* Over two thousand years ago, the Greek philosopher Plato cast his thoughts towards repentance when he "urged Greeks not to construct monuments to honor the victors of war . . . fearing that such public observances might fuel hard feelings and thus impede the healing progress." Iasiello, *supra* note 4, at 41.
[72] Schuck, *supra* note 63, at 982.
[73] *Id.*
[74] Kenneth R. Himes, *The Case of Iraq and the Just War Tradition*, (Dec. 3, 2002), *available at* http://www/wtu.edu.news/TheologiansCorner/12-3-02-Himes-JustWar-Iraq.htm. Professor Schuck elaborates: "[Saint] Augustine thought that anyone, Christian or not, could participate in a just war and escape legal culpability. But to escape divine culpability a soldier must conduct himself in a manner free of cruelty, enmity and lust." Schuck, *supra* note 63, at 984. Rear Admiral Iasiello places a moral responsibility on belligerents to help heal the warriors' mental and emotional wounds from war, and to assist the warriors and their families back into the normalcy of humanity and society. *See* Iasiello, *supra* note 4, at 48-51.

2. Honorable Surrender

The second criterion, honorable surrender, is reflective of Professor Schuck's requirement that the victorious nation "construct the terms and method of surrender in a manner that protects the fundamental human rights of the vanquished. Proscribed by such a principle would be punitive terms (such as those of the 1919 Versailles Treaty) as well as methods that degrade the defeated."[75]

Professor Schuck perceives a need to end a war in a manner that allows former adversaries to overcome prior sources of strife and build upon a more harmonious future. Professor Schuck uses Union Major General (MG) Joshua L. Chamberlain's legendary dignified salute and acceptance of the surrender of Confederate MG John B. Gordon and the Confederate troops at the conclusion of the U.S. Civil War at Appomattox on 12 April 1865, as an illustration of honorable surrender.[76]

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[75] Schuck, *supra* note 63, at 982. The Treaty of Versailles was signed on June 28, 1919, in the aftermath of World War I between Germany and the victorious Allied armies of the United States, Great Britain, and France. The Treaty required Germany to surrender its overseas empire and one-seventh of its territory in Europe, including the valuable Alsace-Lorraine region; dismantled Germany's armed forces and forbade Germany to station troops or erect fortifications; denied Germany entry into the newly formed League of Nations; and required Germany to pay a sizable reparations bill. *See* LARRY H. ADDINGTON, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY 158-59 (1984).

Failure to permit honorable surrender may only hasten a subsequent conflict. The "stigma" of signing such an onerous treaty along with the severe reparations undermined the newly established German Weimar Republic, plunged Germany into depression, and paved the way for the rise of Adolf Hitler, Nazism, and World War II twenty years later. JAMES L. STOKESBURY, A SHORT HISTORY OF WORLD WAR II 37-38 (1980). Rear Admiral Iasiello adds, "The absence of postwar vision [at Versailles] negated, for all practical purposes, any hope of a just and lasting peace." Iasiello *supra* note 4, at 38.

[76] *See* Schuck, *supra* note 63, at 982-83. MG Chamberlain ordered his Union troops to salute the defeated Confederate force as it approached the Union line. Upon seeing this, MG Gordon then turned to his men and ordered his Confederates to return the salute as they marched past the Union soldiers. Major General Chamberlain later described the scene as "honor answering honor." *Id*; *see also* Iasiello, *supra* note 4, at 40-41 (describing the poise and honor of the surrender at Appomattox). The formal signing of the articles of capitulation, which paroled the Confederate Army, had occurred at the Appomattox Courthouse three days earlier, on 9 April 1865, between Union Lieutenant General Ulysses S. Grant and Confederate General Robert E. Lee. *See* JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 482 (1982).

3. Restoration

Professor Schuck intertwines his requirement for an honorable surrender with his final principle of restoration. He supports his criterion of restoration on the notion that "for many innocent victims, the war continues after surrender."[77] Most often it is those who are least able to fend for themselves who are affected the greatest in the aftermath of war— the children, the sick and the elderly.[78] Professor Schuck demands that the victors "return to the fields of battle and help remove the instruments of war,"[79] such as landmines, to prevent death and destruction from continuing long after the military forces have obtained their tactical and strategic objectives.[80] In some situations, Professor Schuck would also require that the victors assist in rebuilding the social infrastructure of the vanquished nation.[81]

B. Professor Michael Walzer's Criteria

Although jus post bellum considerations are a recurring topic of his recent writings and speeches, Professor Walzer has not yet succinctly proposed criteria for the matter. An analysis of his contemporary works, however, yields helpful insights into his beliefs on a just peace.[82]

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[77] Schuck, *supra* note 63, at 983*; see also* Iasiello, *supra* note 4, at 44-45 (noting that children and other noncombatants not only suffer directly as a result of losing families, homes, life support means, and a sense of normalcy, but, also, indirectly through the lingering effects of uranium munitions and defoliating agents).

[78] *See* Iasiello, *supra* note 4, at 44-45. Rear Admiral Iasiello comments that in post-war situations when basic resources and life sustaining objects are scarce, children, the sick, and the elderly suffer and die in "disproportionate numbers" in comparison to the "more influential or powerful segments of society." *Id*. at 45.

[79] Schuck, *supra* note 63, at 983.

[80] *See* Iasiello, *supra* note 4, at 45-47 (arguing that belligerent nations share a duty, and the international community should hold these countries accountable, to restore the environment to a condition that existed ante bellum).

[81] *See* Schuck, *supra* note 63, at 983; s*ee also* Himes, *supra* note 74 (analyzing Professor Schuck's criteria and suggesting a fourth principle of "establishing a civil society" to accompany Professor Schuck's principle of restoration). "The principle of establishing a civil society complements the principle of restoration by extending 'basic infrastructure' to include not just the material infrastructure of roads, electricity, and communication but the human infrastructure for peaceful communal life" such as police and judicial functions. Himes, *supra* note 74.

[82] The majority of the analysis of Professor Walzer's beliefs evolves from the text of a speech Professor Walzer presented to the Heinrich Böll Foundation in Berlin, Germany, on July 2, 2002. *See* Michael Walzer, Address Given at the Heinrich Böll Foundation, Berlin, Germany: Judging War (July 2, 2002), *available at* http://www.boell.de/downloads/aussen/walzer_judging_war.pdf [hereinafter Walzer Address]. The analysis also relies heavily upon Professor Walzer's book, *Arguing About War*, published in 2004,

For Professor Walzer, a sensible baseline for defining the existence of a just peace is when "the unjust aggression [is] defeated and the status quo ante restored."[83] Professor Walzer, however, is not satisfied with simply restoring conditions to their pre-conflict status, observing that, "[t]he object in war is a *better* state of peace."[84] Professor Walzer remarks that the term "better, within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations."[85] Not only is returning to a status quo prior to the beginning of the conflict likely impossible as a result of the physical devastation of war, a return to prior conditions would be of little practical use since the prior setting was such that war was deemed justified and initiated.

After moving beyond the conclusion that the status quo ante bellum is insufficient, Professor Walzer's writings focus on the necessity of reconstruction.[86] One may capture Professor Walzer's framework on reconstruction and, in essence, his thoughts on jus post bellum, by using his concepts of local legitimacy and closure.[87]

1. Local Legitimacy

For Professor Walzer, one important aspect of reconstruction and jus post bellum is ensuring the government in the vanquished, former aggressor nation, is legitimate.[88] In discussing legitimacy, Professor Walzer notes:

> The goal of reconstruction is local legitimacy. The new regime has to be non-aggressive and non-murderous,

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which contains several of his recent essays on Iraq and Afghanistan. *See generally* WALZER, *supra* note 12. Professor Walzer is a vocal opponent of the U.S. decision to go to war with Iraq in 2003, and is critical of the U.S. postwar plans for Iraq. *See id.* at 165. Professor Walzer exhorts warring nations to engage in jus post bellum considerations at the beginning of hostilities and notes, "occupying powers are morally bound to think seriously about what they are going do in someone else's country." *Id.*

[83] Walzer Address, *supra* note 82.

[84] WALZER, *supra* note 18, at 121 (quoting B.H. LIDDELL HART, STRATEGY 338 (1974)) (emphasis added).

[85] *Id.* at 121-22.

[86] *See* Walzer Address, *supra* note 82.

[87] *See id.*

[88] *See id.*

> obviously, but it also has to command sufficient support among its own people so that it isn't dependent on the coercive power of the occupying army.[89]

Professor Walzer emphasizes that a victor nation may not use the requirement for local legitimacy as subterfuge to impose democracy upon non-democratic vanquished nations: "Democracy is the strongest form of local legitimacy, but not the only one."[90]

Professor Walzer attaches great importance to freedom of choice and existing national sovereignty and believes that jus post bellum permits installing a new regime in a vanquished nation only under extreme circumstances.[91] It is more important to Professor Walzer that the government that exists after the war in the vanquished nation be one that its citizens recognize and accept as legitimate. Professor Walzer adds: "We want wars to end with governments in power in the defeated states that are chosen by the people they rule—or at least recognized by them as legitimate—and that are visibly committed to the welfare of those same people (all of them)."[92]

2. Closure

The second important jus post bellum tenant for Professor Walzer is closure. On one level, closure implies simply "impos[ing] some constraints on the future war-making capacity of the aggressor state."[93] Denying the defeated aggressor the ability to wage future war may appear as an effective means to create a lasting peace.[94]

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[89] *Id.*

[90] *Id.*

[91] *See id.* Professor Walzer believes that the government of a vanquished nation can forfeit its right to rule when that government has embarked on repeated acts of aggression or is a murderous regime. *See id.* Professor Orend believes that Professor Walzer does not advocate an "expansive view on forcible rehabilitation . . . because of the great value he attaches to political sovereignty, to shared ways of life, and to free collective choice—even if these end up failing to express the degree of domestic human rights fulfillment that we in Western liberal democracies might prefer." Orend, *supra* note 58, at 51.

[92] WALZER, *supra* note 12, at 164.

[93] Walzer Address, *supra* note 82.

[94] As shown by the Treaty of Versailles, however, subjecting a defeated Germany to overly oppressive and unrealistic military limitations had the opposite effect. *See supra* note 75 and accompanying text (discussing the terms of the Treaty of Versailles).

On another level, closure also requires personal accountability for actions and decisions. Professor Walzer believes that closure and personal accountability may occur through the conduct of war tribunals. "There can be no justice in war if there are not, ultimately, responsible men and women."[95] Professor Walzer, however, does not view war tribunals as a necessity for a just peace, and instead, offers a proportionality test. He favors the trial and punishment of aggressive political leaders, but only so long as those proceedings do not extend the war in terms of either time or costs.[96] He believes that in some circumstances, lengthening the war may create disproportionate costs and effects upon the civilian populations that outweigh the value of conducting war tribunals.[97]

C. Professor Brian Orend's Criteria

Professor Brian Orend, in his book, *War and International Justice: A Kantian Perspective*, provides a comprehensive contemporary proposal for jus post bellum criteria.[98] Professor Orend begins his analysis with the general proposition that a just ending to a conflict must encompass the following objectives: "1) rolling back aggression and reestablishing the integrity of the victim of aggression as a rights-bearing political community; 2) punishing the aggressor; and 3) in some sense deterring future aggression, notably with regard to the actual aggressor but perhaps also, to some extent, other, would-be aggressors."[99]

Professor Orend links his concept of jus post bellum closely to the existing rubric of the just war tradition. The titles of his five jus post bellum criteria are similar to the traditional jus ad bellum and jus in bello criteria, although the substances vary.[100] Professor Orend's jus post bellum criteria include: just cause for termination; right intention; public declaration, legitimate authority and domestic rights-protection;

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[95] WALZER, *supra* note 41, at 288.
[96] *See* Walzer Address, *supra* note 82.
[97] *See id.*
[98] *See* OREND, *supra* note 20, at 217-63.
[99] *Id.* at 226.
[100] The six traditional jus ad bellum criteria are just cause, right intention, proper authority and public declaration, last resort, probability of success, and macro proportionality (proportionality of good versus evil). *See supra* note 46 and accompanying text (providing a definition of the jus ad bellum criteria). The two traditional jus in bello criteria are micro proportionality and discrimination. *See supra* note 52 and accompanying text (defining the jus in bello criteria).

discrimination; and proportionality.[101] Professor Orend also ties into the existing just war tradition by asserting that a serious violation of any one of his five jus post bellum criteria can undermine the entire jus ad bellum rationale for going to war.[102] In extreme cases, he argues, the violation can provide a just cause for the aggrieved party to resume hostilities.[103]

1. Just Cause for Termination

Professor Orend's first criterion is a just cause for termination. It is his most substantive principle, and his other criteria are principally devolved from it. This criterion encompasses Professor Schuck's notion of restoration, along with many of Professor Walzer's ideas on local legitimacy and closure.[104] Professor Orend believes that a warring nation must cease fighting once there is vindication of the prior underlying causes leading to the just resort to war.[105] "To go beyond that limit would itself become aggression: men and women would die for no just cause."[106] Professor Orend adds:

> A state has just cause to seek termination of the just war in question if there has been a reasonable vindication of those rights whose violation grounded the resort to war in the first place. Not only have most, if not all, unjust gains from aggression been eliminated and the objects of

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[101] *See* OREND, *supra* note 20, at 232-33.
[102] *See id.* at 233.
[103] *See* Orend, *supra* note 58, at 56. Professor Orend posits:

> Any serious defection, by any participant, from these principles of just war settlement should be seen as a violation of the rules of just war termination, and so should be punished. At the least, violation of such principles mandates a new round of diplomatic negotiations – even binding international arbitration – between the relevant parties to the dispute. At the very most, such violation may give the aggrieved party a just cause – *but no more than a just cause* – for resuming hostilities. Full recourse to the resumption of hostilities may be made only if all the other traditional criteria of *jus ad bellum* are satisfied in addition to just cause.

Id.
[104] *See supra* Parts IV.A.3 and IV.B.1-2 (discussing Professor Schuck's notion of restoration and Professor Walzer's theories on local legitimacy and closure).
[105] *See* Orend, *supra* note 58, at 46.
[106] *Id.*

> Victim's rights been reasonably restored, but Aggressor is now willing to accept terms of surrender which include not only the cessation of hostilities and its renouncing the gains of its aggression but also its submission to reasonable principles of punishment, including compensation, *jus ad bellum* and *jus in bello* war crimes trials, and perhaps rehabilitation.[107]

Professor Orend incorporates the idea of rehabilitation into his criterion of a just cause for termination. Rehabilitation, according to Professor Orend, can "require some demilitarization and political rehabilitation [of the aggressor], depending on the nature and severity of the aggression it committed and the threat it would continue to pose in the absence of such measures."[108] Rehabilitation can encompass total political restructuring for the aggressor, although Professor Orend believes that complete restructuring is only necessary in the most severe cases.[109] In those instances, the victim and vindicator nation must contribute in paying the costs of the rehabilitation of the aggressor.[110] Professor Orend, however, is less cautious than Professor Walzer in the area of rehabilitation and allows for the piercing of national sovereignty for minor political restructuring, while noting that any rehabilitation still "need[s] to be proportional to the degree of depravity inherent in the [aggressor's existing] political structure."[111]

Additionally, Professor Orend links his concept of punishment to his criterion of a just cause for termination. For Professor Orend, proper punishment includes requiring that an aggressor nation provide

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[107] OREND, *supra* note 20, at 232.

[108] Orend, *supra* note 58, at 47.

[109] *See id.* at 50. Professor Orend points to World War II and Nazi Germany as an aggressor nation and regime warranting complete political rehabilitation. *See id.* He also states that the rehabilitation efforts of the Allies after World War II in both Japan and West Germany are illustrative of the scope and commitment required by the victorious side. *See id.* at 50-51; *see also infra* notes 143-144 and accompanying text (discussing several examples of rehabilitation).

[110] *See* Orend, *supra* note 58, at 50.

[111] *Id.* at 51. In some instances, Professor Orend believes that minor rehabilitation may suffice such as instituting basic human rights programs, reforming the military, police and judiciary, and verifying election proceedings. *See id.* Professor Walzer is more concerned with violating national sovereignty and focuses more on the local legitimacy of the government in the aggressor nation rather than the degree of depravity, reserving political restructuring for only the most heinous regimes. *See supra* Part IV.B.1 (discussing Professor Walzer's concepts of national sovereignty and local legitimacy).

restitution to the victim nation for "at least some of the costs incurred during the fight for its rights."[112] Professor Orend cautions, however, against overreaching and attempting to exact too much from the aggressor nation.[113] He reminds his reader that "to beggar thy neighbor is to pick future fights,"[114] as demonstrated by the punitive terms placed on Germany after World War I.[115] Professor Orend also cautions that one must balance the desire to make a victim whole with the need to preserve the basic human rights of the citizens of the aggressor nation.[116] Professor Orend's concept of punishment also encompasses war crimes tribunals; however, he discusses this mechanism under his second criterion of right intention.[117]

2. Right Intention

Continuing his desire to place his jus post bellum criteria under the existing just war framework, Professor Orend titles his second criterion right intention. He notes: "A state must intend to carry out the process of war termination only in terms of those principles contained in the other *jus post bellum* rules. Revenge is strictly ruled out as an animating force."[118]

Professor Orend's second principle, however, has little to do with the jus ad bellum criterion of the same name[119] and instead, focuses primarily on war crimes tribunals. Professor Orend draws a distinction between jus ad bellum and jus in bello violations when discussing tribunals. He agrees with Professor Walzer that one must weigh the benefit of conducting a war crimes tribunal for a jus ad bellum violation against the potential for additional destruction and suffering.[120] For jus in bello violations, Professor Orend is less cautious, emphasizing only that the vindicator nation must look inward, as well as outward, to

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[112] Orend, *supra* note 58, at 47.
[113] *See id.* at 48.
[114] *Id.*
[115] *See supra* note 75 (discussing the terms of the Treaty of Versailles).
[116] *See* Orend, *supra* note 58, at 47.
[117] *See* OREND, *supra* note 20, at 232.
[118] *Id.*
[119] The jus ad bellum criterion of right intention states that a nation must fight a war only for a just cause. *See supra* note 46 and accompanying text (defining the jus ad bellum criterion of right intention).
[120] *See* Orend, *supra* note 58, at 53; *see also supra* Part IV.B.2 (discussing Professor Walzer's thoughts on war tribunals).

investigate war crimes. "[T]he just state in question must commit itself to symmetry and equal application with regard to the investigation and prosecution of any jus in bello war crimes."[121]

3. Public Declaration, Legitimate Authority, Domestic Rights-Protection

Professor Orend's third criterion is very straightforward. "The terms of the peace must be publicly proclaimed by a legitimate authority . . . and domestic rights must be fulfilled just as readily as external rights."[122] There must be a public presentation stating the parameters of the peace to the people who have suffered through the destruction and turmoil of warfare.[123] Professor Orend does not require the populace to endorse the peace settlement, nor does he dictate a proscribed form or treaty for presentation, only that the proclamation by the legitimate authority is public.[124]

4. Discrimination

Traditional just war lexicon uses the jus in bello term "discrimination" to differentiate between combatants and non-combatants.[125] Professor Orend uses this same term in his jus post bellum discussion to differentiate between the moral culpability of the aggressor elites and the innocence of the civilian population. He writes:

> In setting the terms of the peace, the just and victorious state is to differentiate between the political and military leaders, the soldiers and the civilian population within

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[121] OREND, *supra* note 20, at 232. Professor Orend recommends that "an impartially constructed international tribunal" try all violations of jus in bello, regardless of whether they occur on the side of the aggressor or vindicator. Orend, *supra* note 58, at 54.

[122] OREND, *supra* note 20, at 232.

[123] *See* Orend, *supra* note 58, at 55. Professor Orend concedes that occasionally there is a need for secrecy in diplomatic negotiations (such as the Cuban missile crisis); however, this need for secrecy does not exist after a full-scale war. *See id*. at 54-55.

[124] *See id.* at 54-55. The jus ad bellum criterion of proper authority and public declaration likewise requires that the appropriate authority make the decision to go to war public. *See supra* note 46 and accompanying text (defining the jus ad bellum criterion of proper authority and public declaration).

[125] *See supra* note 52 and accompanying text (defining the jus in bello criterion of discrimination).

> Aggressor. Undue and unfair hardship is not to be brought upon the civilian population in particular: punitive measures are to be focused upon those elites most responsible for the aggression.[126]

This principle correlates with Professor Orend's concept of compensation mentioned in his first criterion of a just cause for termination.[127] "Respect for discrimination entails taking a reasonable amount of compensation only from those sources that can afford it *and* that were materially linked to the aggression in a morally culpable way."[128] The monetary compensation that the aggressor is required to provide to the victim "ought to come, first and foremost, from the personal wealth of those political and military elites in Aggressor who were most responsible for the crime of aggression."[129]

5. Proportionality

Professor Orend again uses a familiar just war term for his final criterion.[130] He advocates for an element of proportionality in a just peace while linking rights vindication to his first principle of a just cause for termination. "Any terms of peace must be proportional to the end of reasonable rights vindication. Absolutist crusades against, and/or draconian punishments for, aggression are especially to be avoided. The people of the defeated Aggressor never forfeit their human rights."[131]

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[126] OREND, *supra* note 20, at 232.

[127] In his first jus post bellum criterion, Professor Orend states that one factor to use in determining if a just cause for termination exists, is whether the aggressor nation is willing to provide compensation to victims. *See id.*

[128] Orend, *supra* note 58, at 48.

[129] *Id.* Professor Orend feels that this is feasible since the regime elites in aggressor nations historically tend to be wealthy, often as a direct result of abusing their leadership positions. *See id.*

[130] The just war tradition employs the term proportionality in both jus ad bellum and jus in bello. In jus ad bellum, it is the requirement for a state to weigh the potential good that can occur from using force to stop an evil from occurring or continuing to occur, against the potential for harm and destruction that can occur from the use of force. *See supra* note 46 and accompanying text (defining the jus ad bellum use of the term proportionality); *see also* JOHNSON, *supra* note 1, at 28, 34-35 (providing additional insight into the application of this criterion in jus ad bellum). In jus in bello, proportionality refers to weighing the potential military benefit of an action against the potential for harm done to non-combatants and property. *See supra* note 52 and accompanying text (defining the jus in bello use of the term proportionality).

[131] OREND, *supra* note 20, at 232-33

Proportionality in a just peace, according to Professor Orend, rarely permits a vindicator nation to seek unconditional surrender.[132] "Such a discriminating policy on surrender may be defensible in extreme cases, involving truly abhorrent regimes, but is generally impermissible."[133] Professor Orend is concerned that such an inflexible standard can cause fighting to continue beyond what is necessary to achieve the original rights vindication, leading to unjustified deaths and destruction.[134]

V. The Author's Criteria

The jus post bellum criteria proposed in this section incorporate many of the ideas of Professor Schuck, Professor Walzer, and Professor Orend; include concepts from international law; and draw from lessons learned from recent military operations. The intent is to provide criteria for a general application within the just war framework, rather than make specific recommendations pertinent to the contemporary situation in Iraq or Afghanistan. The criteria are entitled: (1) seek a lasting peace; (2) hold morally culpable individuals accountable; and (3) extract reparations. These jus post bellum criteria are a political responsibility, similar to the jus ad bellum criteria. Therefore, although military leadership may assist, accomplishment of these criteria falls within the power and prerogative of political leadership.[135]

A. Seek a Lasting Peace (Political Restructuring)

Succinctly stated, a just peace must also aim to be a lasting peace. It is of little practical value and disproportionate to the cost of lives and resources expended to permit a nation to justly engage in war and successfully terminate a conflict, yet allow conditions to remain that permit violence and aggression to again erupt. Just war theory is ultimately about the "responsible use of force in response to

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[132] *See* Orend, *supra* note 58, at 46.
[133] *Id.*
[134] *See id.*
[135] For the United States, responsibility for conducting peace operations and coordinating the activities for U.S. executive branch employees statutorily falls under the purview of the U.S. Department of State through the Chief of Mission. *See* 22 U.S.C. § 3927 (2000). The statute, however, specifically excludes individuals under the command of the area U.S. military commander from the direct control of the Chief of Mission. *See id*.

wrongdoing."[136] It is, therefore, irresponsible to fail to finish properly what a vindicator nation justly began as a means of last resort.

Gary J. Bass, Assistant Professor of Politics and International Affairs at Princeton University, advocates for an even more aggressive stance in circumstances in which a vindicator nation embarks on a just war in response to genocide.[137] In those situations, Professor Bass argues that the failure to accomplish jus post bellum successfully might act retrospectively to negate the previous jus ad bellum rationale.[138] "If a state wages war to remove a genocidal regime, but then leaves the conquered country awash with weapons and grievances, and without a security apparatus, then it may relinquish by its postwar actions the justice it might otherwise have claimed in waging the war."[139]

How does the vindicator nation satisfy this criterion and seek a lasting peace? Conditions in the aggressor state that existed ante bellum leading to the unjustified actions must be altered, but states do not create wars; people, and in particular, regime elites, initiate them.[140] Thus, a

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[136] JOHNSON, *supra* note 1, at 35.

[137] *See* Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 386 (2004).

[138] *See id.*

[139] *Id.* Professor Bass, however, limits his arguments to a situation involving genocide and remarks that in general "there should be a presumption against any right of the victors to reconstruct a defeated country." *Id*. at 396.

[140] Professor Moore notes a logical, yet significant, distinction between regime elites in democracies and nondemocracies. A democratic leader will more easily conclude that a failed or imprudent war or aggressive act is, in simplest terms, not worth it because of the prospect that the democratic electorate will vote him out of office. "Democracy internalizes these costs in a variety of ways including displeasure of the electorate at having war imposed upon it by its own government. And deterrence either prevents achievement of the objective altogether or imposes punishing costs making the gamble not worth the risk." MOORE, *supra* note 2, at 43.

In contrast, the leader of a nondemocratic regime does not share that self-preservation concern. "Decision elites in nondemocratic nations, then, may be far more disposed to high risk aggressive actions risking major war and other disasters for their people." *Id*. at 11. Professor Moore often uses a classroom analogy of a "heads-I-win, tails-I-lose" situation for a democratically elected leader who engages in international conflict. If the war effort succeeds, the democratic leader's popularity soars (as did U.S. President George H.W. Bush's immediately after the 1991 Persian Gulf War). If the war effort suffers, the democratic leader will suffer detrimental effects (as did U.S. President Lyndon Johnson with regard to Vietnam). By contrast, the leader of a nondemocratic nation faces a "heads-I-win, tails-*you*-lose" scenario and only the citizens in his country who may potentially die or lose their well-being experience the loss. *See* Steven Geoffrey Gieseler, *Debate on the 'Democratic Peace,'* AM. DIPL. (Mar. 3, 2004),*available at* http://www.unc.edu/depts/diplomat/archives_roll/2004_01-03/gieseler_de-bate/gieseler_debate.html.

realization of a more lasting peace may require replacing regime elites and politically restructuring the aggressor nation. Calling for political restructuring, however, creates three pressing issues.

The first issue asks when is it permissible to change the political structure of the aggressor state. To answer this, consider the historical causes of war. Data shows that nations that respect the rule of law, have a representative form of government, and foster fundamental human rights[141] are less likely to engage in major international warfare.[142] Thus, to the extent that the prior government in the aggressor nation did not respect the rule of law, was unrepresentative of its people, and did not foster fundamental human rights, the criterion of seeking a lasting peace allows for some form of political restructuring.[143]

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[141] Although there is no definitive list of what is encompassed in the term "fundamental human rights," the most informative is the Restatement (Third) of Foreign Relations Law of the United States (2003). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (2003). The Restatement provides the U.S. position that certain fundamental rights have risen to the level of customary international law. *See id*. A state violates international law if, as a matter of policy, it "practices, encourages, or condones" any of the following: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; violence to life or limb; hostage taking; punishment without fair trial; prolonged arbitrary detention; failure to care for and collect the wounded and sick; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights. *Id*.

[142] *See* MOORE, *supra* note 2, at 1-25. In support of the democratic peace theory, which posits that major war occurs rarely if at all between liberal democracies, Professor Moore cites to a study by Professors Rudy Rummel and Bruce Russett showing that between 1816 and 1991 there were 353 pairings of nations fighting in international wars, yet none of these wars was between democracies. *See id.* at 2. One may view Kant's writings as the beginnings of the democratic peace paradigm. Kant, who introduced jus post bellum into the just war tradition, envisioned a republic where free people would naturally desire avoidance of war and as voting members could control the actions of the state. *See* Gieseler, *supra* note 140.

A separate study of democracies and dictatorships that were in existence from 1955 through 2002 "found that economic, ethnic, and regional effects have only a modest impact on a country's risk of political instability. Rather, stability is overwhelmingly determined by a country's patterns of political competition and political authority." Jack A. Goldstone & Jay Ulfelder, *How to Construct Stable Democracies*, 28 WASH. Q. 9, 9 (2004). The study concluded that "the key to maintaining stability appears to lie in the development of democratic institutions that promote fair and open competition, avoid political polarization and factionalism, and impose substantial constraints on executive authority." *Id*. at 10.

[143] One can point to several successful recent examples of political restructuring following conflict: Panama after the U.S. invasion, in 1989 (codenamed Operation Just Cause utilizing the jus ad bellum criterion), Bosnia-Herzegovina after the 1996 Dayton peace accords and Kosovo in 1999. *See* Daniel L. Byman & Kenneth M. Pollack,

The second issue concerns the scope of permissible restructuring. Professor Orend's theory of scaling the restructuring to "be proportional to the degree of depravity inherent in the [aggressor's existing] political structure"[144] is an appropriate solution for this issue. Professor Walzer is

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Democracy in Iraq?, 26 WASH. Q. 119, 126 (2003). The study of nations between 1955 through 2002, referenced by Goldstone and Ulfelder, suggested that all nations, regardless of wealth and internal tensions, have the potential for democratic institutions and stability. *See* Goldstone & Ulfelder, *supra* at 10. *But see* Janusz Bugajski, *Balkan in Dependence?*, 23 WASH. Q. 177, 177 (2000) (arguing that both Bosnia and Kosovo have become too reliant upon international institutions and risk a permanent dependence on the international community that will impede national self-determination).

[144] Orend, *supra* note 58, at 51. A recent example of a situation permitting major restructuring was Afghanistan after the fall of the Taliban regime in November 2001. The Taliban regime, a collection of former mujahedin and fundamental Islamic militia, took advantage of a power vacuum within Afghanistan that existed after the withdrawal of Soviet troops in 1989 and began seizing control over the country in 1994. *See* Zalmay Khalilzad & Daniel Byman, *Afghanistan: The Consolidation of a Rogue State*, 23 WASH. Q. 65, 66-67 (2000). The Taliban, Arabic for "religious students," imposed their version of strict Islamic rule upon Afghanistan by banning outside influences to include television, cameras and music. *See* Christopher L. Gadoury, Comment, *Should the United States Officially Recognize the Taliban? The International and Political Considerations*, 23 HOUS. J. INT'L L. 385, 386, 392 (2001). The Taliban condoned public tortures and executions, required men to wear beards, and stripped woman of nearly all rights, to include education. *See id*. at 392-93. In the months leading up to the September 11, 2001, attacks on the United States, only three nations, Pakistan, Saudi Arabia, and the United Arab Emirates officially recognized the Taliban as the government of Afghanistan. *See id*. at 386. The rest of the world refused to recognize the Taliban, citing to human rights abuses, involvement in drug production and trading, and harboring of terrorists. *See id*. at 386-87. On December 7, 2004, following the ouster of the Taliban and a three-year occupation by a coalition of international nations led by the United States, Hamid Karzai was inaugurated as President of Afghanistan, the nation's first democratically elected leader. *See* Eric Schmitt & Carlotta Gall, *Karzai is Sworn In, Citing a "New Chapter" for Afghanistan*, N.Y. TIMES, Dec. 8, 2004, at A8.

After World War II, complete political restructuring also occurred in Allied controlled Germany and in Japan. In Germany, an April 1945 Directive issued by the U.S. Department of State to the Supreme Allied Commander, General Dwight D. Eisenhower, outlined the basic objectives of the post-war military occupation in Germany:

> The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany's capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.

right to caution against overreach, and there is a legitimate concern that accomplishing restructuring risks prolongs fighting and increased human and economic costs.[145] Professor Walzer is reluctant to pierce the veil of national sovereignty, except for the most heinous regimes.[146] This approach, however, is overly cautious. There is an essence of injustice, and a greater evil, to fight a just war risking lives, only to undermine the opportunity to obtain a long-term peace. When a failure to change will only revert to a status quo preceding the war, it brings the very jus ad bellum justification for the war into question.

The third pressing issue poses the question who is responsible for enacting restructuring, if it is indeed necessary. The answer is that there may be, and likely should be, several responsible parties. Clearly, there is a role for the victor's military if it becomes an occupying force.[147] The

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Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, April 1945, http://usa.usembassy.de/etexts/ga3-450426.pdf.

In Japan, U.S. General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan, directed a six-year military occupation that oversaw a revision of the country's laws, a new constitution focusing upon human rights and social justice and the creation of a new Japanese legislature, the Diet. *See* David B. Rivkin Jr. & Darin R. Bartram, *Military Occupation: Legally Ensuring a Lasting Peace*, 26 WASH. Q. 87, 94-95 (2003).

[145] Concerning Operation Iraqi Freedom, critics outside of the just war tradition usually focused on other objections to political restructuring and planned democratization. Among the claims asserted were: Iraq was not ready for democracy; the Iraqi society was too fragmented; the ideological makeup of the country would taint the results; and the internal community would not provide the long-term commitment of support to Iraq. *See* Byman & Pollack, *supra* note 143, at 119-34 (refuting these objections and providing historical counter-points).

[146] *See supra* note 91 and accompanying text (discussing Professor Walzer's reluctance to intrude on national sovereignty). The struggle between enforcing principles such as fundamental human rights and self-determination while restraining from interfering in the internal affairs of a sovereign state is complex and even exists in the Charter of the United Nations. Article 1 of the Charter lists "self-determination," "human rights," and "fundamental freedoms" as purposes and goals of the United Nations. U.N. Charter art. 2, paras. 2-3. Article 2, paragraph 7, of the Charter, however, prohibits nations from "interven[ing] in matters which are essentially within the domestic jurisdiction of any state." U.N. Charter art. 2, para. 7; *see also* Pascal Boniface, *What Justifies Regime Change?*, 26 WASH. Q. 61, 63 (2003) (discussing the historical basis in the Charter of the United Nations for this balance between self-determination and sovereignty).

[147] If there is an occupation, the occupying force is obligated to take certain measures within the occupied territory. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Hague Regulations, *supra* note 53, art. 42; FM 27-10, *supra* note 53, para. 351. A military occupation "does

leaders of the local populace, private agencies, non-governmental organizations (NGOs), and perhaps a coalition assembled under the banner of the United Nations will also have substantial roles and functions in this process.[148] The ability of these various entities to work together, understanding their conflicting missions, visions and requirements, will determine success or failure.[149]

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not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty." FM 27-10, *supra* note 53, para. 358.

The occupying force has several obligations to administer as the government in the occupied country as noted in the 1907 Hague Regulations and the 1949 Geneva Convention Relative to the Protection of Civilian Personnel in Time of War. *See* Hague Regulations, *supra* note 53, arts. 42-56; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, arts. 47-48, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]. "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Hague Regulations, *supra* note 53, art. 43. Subsequent Articles 44-56 in the Hague Regulation impose additional requirements upon the occupying force. *See id*. arts. 44-56.

Additionally, Section III of Geneva Convention (IV) adds provisions requiring the occupying state to take measures including: devoting special care for children, see Geneva Convention (IV), *supra*, art. 50; providing food and medical supplies to the local population, see *id*. art. 55; maintaining proper medical and hospital services, see *id*. art. 56; and ensuring the proper administration of justice, see *id*. arts. 64-78.

The law of occupation provided in the Hague Regulations and Geneva Conventions is severely dated and its applicability and validity in the modern landscape is questionable. *See generally* Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985) (stating that occupation law must become more contemporary and should borrow concepts from modern human rights law); David Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003) (noting that the scope of modern day occupations exceed what existing occupation law envisioned); Robert D. Tadlock, *Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227 (2004) (arguing that existing occupation law prevents the occupier from changing foreign investment law to the benefit of the occupied nation).

[148] Not only will the magnitude of restructuring necessitate the involvement of many agencies and actors, allowing others to participate in the restructuring can reduce "the fear of imperial hegemony" that some critics currently possess regarding the "altruistic motives" of the United States in Iraq. Boniface, *supra* note 146, at 71; *see also* William J. Durch, *Picking Up the Peaces: The UN's Evolving Postconflict Roles*, 26 WASH. Q. 195 (2003) (extolling the benefits of involving the United Nations in post-conflict situations).

[149] In particular, the desires of NGOs and the military are often at odds in post-conflict areas. The NGOs often request that the military provide general security such that there

As a model for post-war restoration, Rear Admiral Iasiello proposes a three-step process. The first step is that of a "protectorship,"[150] in which the victor provides security and basic life support to the populace of the occupied country, to prevent suffering or death. The second step is "partnership,"[151] in which the victor works with the forming local government to rebuild the economy and the society. The third step is "ownership,"[152] which represents the restoration of the vanquished nation's "sovereignty and reentry into the community of nations. . . . [A]ll aspects of political, economic, and social life are returned to the control of the indigenous population. Interim political authorities are eventually replaced by elected officials, and these political figures assume full responsibility for security, critical infrastructure, and nation building."[153]

Regardless of the process or the parties involved in the restructuring, the resulting government must be legitimate in the eyes of the world and

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is freedom to circulate amongst the population to reach out and accomplish their humanitarian missions. The NGOs wish to balance this assistance, however, with a need for the local populace to view them as politically neutral and impartial. They do not desire to associate with a certain military or political agenda. Militaries, by contrast, want to be able to control and monitor movement throughout their area of operations and may be reluctant to provide classified security and route information to those outside of direct military channels. The military may often look to utilize NGOs as a force multiplier in accomplishing its post-conflict stabilization objectives. The ability of the NGOs and the military to cooperate without compromising either's objectives is often a difficult hurdle to clear. *See* WAR AND MORALITY, *supra* note 54, at 151-53 (discussing the relationship between NGOs and the military). For additional reading on the interactions between NGOs and the military in post-conflict situations, from the perspective of NGOs, see Jean-Michel Piedagnel, *Humanitarian Space*, *in* WAR AND MORALITY, *supra* note 54, at 143-45 (discussing the interaction of Médecins Sans Frontières (Doctors Without Borders) with the military in humanitarian operations); Roger Yates, *Relief—A Human Right*, *in* WAR AND MORALITY, *supra* note 54, at 139-41 (contrasting the NGOs role in stabilization operations with that of the military); Tim Yates, *Stabilization—For Real People*, *in* WAR AND MORALITY, *supra* note 54, at 147-50 (discussing the complexity of stabilization operations).

[150] Iasiello, *supra* note 4, at 42-43.

[151] *Id*. at 43-44.

[152] *Id*. at 44.

[153] *Id*. The difficult part may be for the victor and international community to provide a proper level of security and supervision during the "protectorship" and "partnership" stages without impeding the advancement of the national security apparatus and local government framework, thereby creating a situation of long-term dependency that will preclude "ownership." *See* Bugajski, *supra* note 143, at 192 (arguing that "institutional dependence on foreign actors" is undermining long-term stability and self-determination in the Balkans).

its populace.[154] This requires establishing a government that abides by both international norms and the rule of law, while still embodying national standards and practices. To accomplish legitimacy, all parties must work together under a common vision to rebuild and repair the aggressor country as necessary.[155]

B. Hold Morally Culpable Individuals Accountable (War Crimes Tribunals)

Citizens of the aggressor nation, and indeed of the entire world, must see that there are direct, individual consequences for morally abhorrent behavior. Failure to pursue justice against morally culpable individuals after war may result in a peace that lacks a sense of closure. This failure is also counter to the first criterion of seeking a lasting peace. As Professor Walzer noted: "There can be no justice in war if there are not, ultimately, responsible men and women."[156] Further, the failure to act may invalidate the government in an aggressor nation if aggressive leaders remain in power. If indeed, as Professor Walzer remarks, the

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[154] Professor Walzer's requirement for local legitimacy in reconstruction is critical for stability. *See supra* Part IV.B.1 (discussing Professor Walzer's requirement for local legitimacy). Professor Bass notes that creating a post-war government in a vanquished nation that the defeated populace both recognize and accept is not only "an obligation of justice," but also an act of "political prudence." Bass, *supra* note 137, at 392. Professor Bass points to the post World War I government in Germany, and quotes Winston Churchill: "The Weimar Republic, with all its liberal trappings and blessings, was regarded as an imposition of the enemy. It could not hold the loyalties or the imagination of the German people." *Id.* at 393 (quoting WINSTON S. CHURCHILL, THE SECOND WORLD WAR: THE GATHERING STORM 11 (1948)).

[155] This process will often require support for many years from the international community. In countries such as Iraq, where Saddam Hussein's Ba'th regime facilitated the rule by the privileged Sunni minority over the Shi'a majority, even greater obstacles to embracing democratic principles abound. *See* Byman & Pollack, *supra* note 143, at 127, 129-32 (declaring that political stability in Iraq rests with the international community supporting a new Iraqi government, encouraging ideologically opposed representatives to work towards compromise, protecting Iraq from meddling neighbors, minimizing internal civil strife and ensuring domestic security).

Economic revitalization is often a necessary connected corollary to political restructuring. *See* Bathsheba Crocker, *Reconstructing Iraq's Economy*, 27 WASH. Q. 73 (2004) (discussing the challenges of rebuilding Iraq's economy in the aftermath of Operation Iraqi Freedom).

[156] WALZER, *supra* note 18, at 288.

general "object in war is a better state of peace,"[157] then one should view war crime proceedings as furthering this same goal.[158]

Holding morally culpable individuals responsible for their actions through tribunals is necessary for two primary reasons. First, conducting war crime proceedings provides a remedy for jus ad bellum and jus in bello violations. If the just war tradition offers certain criteria that a nation must meet before going to war, and other criteria that nations must abide by in warfare, it must also articulate a mechanism to hold those nations accountable that do not abide by the jus ad bellum and jus in bello criteria. Dr. Davida Kellogg, Adjunct Professor of Military Science at the University of Maine at Orono, uses a chess analogy to illustrate this point.

> If Just War is undertaken to right wrongs done by a group or groups of people to another – if in fact the only acceptable reason for going to war is, as Michael Walzer and other Just War theorists contend, to do justice – then stopping short of trying and punishing those most responsible for war crimes and crimes against humanity which either led to war or were committed in its prosecution may be likened to declaring "checkmate" and then declining to take your opponent's king. It makes no strategic sense, since the purpose for which war was undertaken is never achieved.[159]

To be complete and relevant, the just war tradition must integrate standards and principles of going to war and engaging in war with appropriate remedies for violations.

Secondly, war crimes tribunals may possess a deterrent effect, both for those who may seek unjustified war as well as for those who might otherwise seek retribution. As Professor Bass notes: "War crimes trials represent a powerful instantiation of the principles of just war theory, formally calling leaders to account for their violations of those tenets at

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[157] *Id.* at 121 (quoting B.H. LIDDELL HART, STRATEGY 338 (1974)).

[158] Professor Johnson adds that the establishment of war crime proceedings helps to institute the "rule of law" and to aid the "reconstruction of a civil society torn by conflict." JOHNSON, *supra* note 1, at 206.

[159] Davida E. Kellogg, *Jus Post Bellum: The Importance of War Crimes Trials*, PARAMETERS, Autumn 2002, at 88.

the heart of *jus ad bellum* and *jus in bello*."[160] The proceedings place other regime elites on notice of the potential ramifications of their actions. Tribunals can also generate public confidence in governmental institutions and in the orderly process of justice, while deterring victimized groups from seeking retribution on their own.[161] To that end, tribunals can aid in the healing and reconciliation process and validate the experiences of the victims.[162]

What should the scope and conduct of these trials be? The international policy on war crimes, the distinctions between grave and simple breaches, and the jurisdictional issues are complex and exceed the scope of this article.[163] There is, however, significant established

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[160] Bass, *supra* note 137, at 406. Moreover, meritorious prosecutions ensure that these leaders to do not return to power.

[161] The process also aids civilians in the aggressor nation, who were the targets of national propaganda and misinformation, to understand the evils committed by the aggressor's regime elites that prompted a resort to just war. *See* Major Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96, 154 (2001) (noting that tribunals can provide a powerful and positive introduction to civilians in formerly aggressive regimes on the role of justice and the rule of law).

Whether recent war crimes tribunals have been effective in generating public confidence in the legitimate process of justice is debatable. Unfortunately, negative views by the ruling government in a nation that is undergoing tribunals can undermine public confidence in the process. This has occurred in both Rwanda and Serbia as those national governments have taken actions to criticize and undermine the legitimacy of the international tribunal process. *See* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 83-100 (Steven R. Ratner & James L. Bischoff eds., 2004) [hereinafter MAKING A DIFFERENCE?]; Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminals: Two Case Studies—the Former Yugoslavia and Rwanda*, 12 N.Y. L. SCH. J. HUM. RTS. 631, 643 (1995) (noting that in November 1994, when the U.N. Security Council adopted Resolution 955 establishing the Rwanda Tribunal, Rwanda, which was coincidentally an at-large member of the Security Council at the time, was the only one of the fifteen nations on the Security Council to vote against the resolution). As a result of negative actions by their own governments, citizens may not view the process as a means towards reconciliation, but rather "as an unavoidable and enforced precondition for . . . full return to the world community." MAKING A DIFFERENCE?, *supra*, at 93.

[162] *See generally* MAKING A DIFFERENCE?, *supra* note 161, at 76-106 (discussing international tribunals and their impact on national reconciliation).

[163] The definition of a war crime is complex and hinges upon the multiple definitions for both war and crime. The term "war crime" is often generally defined as "a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." FM 27-10, *supra* note 53, para. 499. War crimes are further broken down into grave breaches and simple breaches. Grave breaches differ from simple breaches in that grave breaches are those violations of the law of war that occur

precedent for pursuing war crimes tribunals. Several mechanisms exist to prosecute war crimes, to include the establishment of independent tribunals created by special arrangement for unique circumstances such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda,[164] and the International Criminal Court (ICC).[165] One can use these existing apparatuses as a template to construct a specific forum and procedure tailored to the precise post-war issues presented.[166]

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during international armed conflict and are committed against a protected person under one of the Geneva Conventions. The four Geneva Conventions list the categories of grave breaches which include offenses such as willful killing, torture, hostage taking and compelling a prisoner of war to serve in the armed forces of his enemy. The contracting parties to the Geneva Conventions are required to try individuals suspected of committing grave breaches. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-50, 6 U.S.T. 3114, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 129-30, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV), *supra* note 147, arts. 146-47.

[164] *See generally* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS (2000) (discussing the establishment and politics of five separate war crimes tribunals including: St. Helena in 1815 for the Bonapartists; tribunals in Leipzig and in Constantinople following World War I; Nuremberg following World War II; and the International Criminal Tribunal for the Former Yugoslavia); TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS (2001) (focusing on the tribunals for Japanese soldiers and officers, to include General Tomoyuki Yamashita, after World War II); MAKING A DIFFERENCE?, *supra* note 161 (focusing upon the tribunals for the Former Yugoslavia and Rwanda).

[165] *See generally* David L. Herman, *A Dish Best Served Not at All: How Foreign Military War Crimes Suspects Lack Protection Under the United States and International Law*, 172 MIL. L. REV. 40 (2002) (examining the sources of law for defining and prosecuting war crimes and providing a critique of the ICC); Lieutenant Colonel (LTC) Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001) (providing a critique of the principle of complementarity in the ICC that allows the ICC to impinge upon state sovereignty and complement any domestic trials for war crimes with an international tribunal); Major Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence*, 167 MIL. L. REV. 156 (2001) (noting concerns about the ICC and arguing that a move towards the ICC is a threat to U.S. national interests and may weaken the potential ability to use more effective military power).

[166] Major Spears advocates tailoring a system to try war criminals that is unique to each conflict: "[A] post-conflict system of justice must be tailored to meet the needs of the unique populations and consistencies that present themselves. Failure to do so will miss an opportunity to reconcile competing interests, while possibly setting the stage for future international armed conflict or civil war." *See* Spears, *supra* note 161, at 153.

Regardless of the precise method used, the prosecution of war crimes tribunals should occur through a mechanism open to public scrutiny[167] and protective of the defendant's rights. Involvement by local judicial institutions is preferable, especially in high-level cases, since it strengthens the domestic legitimacy and acceptance of the process and results, and can help rebuild and reunite a divided nation.[168] As a practical matter, international involvement may be necessary since the local judicial system can be dysfunctional or seen as an unjust instrument of the former regime elites.[169] The international process, however, must actively incorporate local institutions and individuals to build a suitable judicial foundation and ensure continuity and sustainability.[170]

Professors Walzer and Orend advocate in favor of conducting a proportionality analysis before conducting war crimes trials.[171] They recommend balancing the benefit from the justice served by the trial, versus the potential for lengthening the conflict and additional bloodshed.[172] But that tradeoff fails to acknowledge that "justice is

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[167] One criticism of the rules for the International Criminal Tribunal for the Former Yugoslavia is that disclosure of the terms of a plea agreement is conducted in a closed judicial session outside of the view of the public and any victims. *See* MAKING A DIFFERENCE?, *supra* note 161, at 25-26.

[168] *See* Major Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 70-76 (2002) (advocating for domestic enforcement measures in lieu of international criminal tribunals out of a concern that international tribunals politicize prosecutions, "de-legitimize already chaotic states," and lessen the domestic credibility of the final judgment); Rivkin & Bartram, *supra* note 144, at 98 (arguing that allowing Iraqi courts to prosecute former Iraqi regime elites for jus ad bellum and jus in bello violations would strengthen the legitimacy of the decisions in the Arab world); *see generally* Spears, *supra* note 161, at 154-55 (arguing that national commissions, courts-martial or domestic courts are appropriate and speedier forums for lower-level cases or cases that more appropriately, because of subject matter, fall under the jurisdiction of those forums).

[169] In Iraq, for example, the law enforcement and judicial institutions are often viewed by Iraqis merely as repressive instruments of the former Saddam Hussein regime. *See* Frederick D. Barton & Bathsheba Crocker, *Winning the Peace in Iraq*, 26 WASH. Q. 7, 9, 16-17 (2003).

[170] *See* Michele Flournoy & Michael Pan, *Dealing with Demons: Justice and Reconciliation*, 25 WASH. Q. 111, 112 (2002).

[171] *See supra* notes 96, 120 and accompanying text (discussing Professor Walzer and Professor Orend's views on war crimes tribunals).

[172] *See id*. Professor Bass also views the decision on war crimes tribunals as a proportionality analysis. "The duty of peace must outweigh the duty of justice . . . legal justice is one political good among many – like peace, stability, democracy, and distributive justice." Bass, *supra* note 137, at 384, 405. Professor Bass further notes that this compromise occurred in U.S. foreign policy as recently as Operation Iraqi Freedom. "Before the Iraq war, Donald Rumsfeld, the U.S. secretary of defense, floated the idea of

rarely served by ignoring injustice."[173] The requirement to enforce jus ad bellum and jus in bello violations, the potential deterrent effects on other regime elites and victimized groups, and the ability to aid in the restoration of a war-torn society are all strong points advocating for the tribunals.

C. Extract Reparations

In warfare, all sides to the conflict inevitably destroy property. After the war, society must rebuild, often at tremendous cost and effort. Where should the money necessary for reconstruction come from?

One should seek to have the costs imposed upon those who caused the war. Similar to the rationale behind conducting war crimes tribunals, requiring appropriate post-war reparations would deter those who would otherwise engage in aggressive warfare and deter victims' individual acts of retribution. Additionally, requiring just reparations for victims can assist in providing closure. And, as Professor Bass logically concludes: "[t]he costs of economic restoration must be paid by someone, after all; it might as well be the aggressors."[174]

Who exactly should pay the bill, and how can one create such a system? As to the first question, ideally a system of reparation would directly target those most responsible for the aggression. Professor Bass posits:

> Ideally, the bill would be footed directly from the bank accounts of the aggressor leaders, but that will be difficult practically, and anyway would not be anywhere

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exiling Saddam and other top Ba'thists with *de facto* impunity from war crimes prosecutions as a 'fair trade to avoid a war.'" *Id.* at 405; *see also* Steve R. Weisman, *Exile for Hussein May Be an Option, U.S. Officials Hint*, N.Y. TIMES, Jan. 20, 2003, at A1.

Professor Johnson argues that war crime proceedings should only occur in cases where there is "a pattern of atrocious conduct" since ongoing proceedings may prolong the road to peace. JOHNSON, *supra* note 1, at 204. Professor Johnson notes that "[w]ithin the framework of just war reasoning, the test of last resort needs to be passed before resort to force is finally warranted in moral terms, and it may also be well to think of the institution of war crimes proceedings in this way." *Id.*

[173] Iasiello, *supra* note 4, at 48.

[174] Bass, *supra* note 137, at 408.

> near enough. So some kind of broader taxation will be required. Since the defeated aggressor state retains its sovereignty, this could be seen as a partial national price for that sovereignty. The burden should fall as much as possible on war supporters and profiteers . . . . If a dictatorship has fallen, then the bank accounts of the thugs, probably lined by the exploitation of state power, could also properly be turned over to the freed public. Economic restoration must be kept within limits: there would be little point in taxing Afghans to pay for the reconstruction of lower Manhattan . . . .[175]

Professor Orend, in his criterion of a just cause for termination, recommends that a victor utilize a proportionality analysis to determine the ability of the aggressor to pay war reparations.[176] This is a sensible compromise that would ensure retributions are neither merely vindictive nor adverse to the establishment of a legitimate government.

Regarding the enactment of such a system, one can look to the United Nations under its Chapter VII authority[177] for historical experience and assistance. United Nations Security Council Resolution 687, adopted on 3 April 1991, established a reparations system after the

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[175] *Id.* at 408-09. The 1907 Hague Regulations permit an occupying force to "take possession of cash, funds, and realizable securities which are strictly the property of the [occupied] State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for military operations." Hague Regulations, *supra* note 53, art. 53.

[176] *See supra* notes 113-114, 116 and accompanying text (discussing Professor Orend's views on extracting restitution from aggressor nations); *see also* FM 27-10, *supra* note 53, art. 364 ("The economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.").

[177] Chapter VII of the Charter of the United Nations, entitled, "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," encompasses Articles 39 through 51 of the Charter and grants the Security Council the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. Charter art. 39. The Security Council may authorize measures short of force, to include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." U.N. Charter art. 41. The Security Council may also authorize member States to employ military force should the lesser means provided for in Article 41 be inadequate. *See* U.N. Charter art. 42.

1991 Persian Gulf War through a claims adjudication process.[178] The reparations system affirmed Iraq's liability under international law for its unlawful invasion and occupation of Kuwait and established a system to compensate victims by creating a fund financed from Iraqi oil exports.[179]

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[178] *See* S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

[179] The relevant paragraphs of Resolution 687 state:

> 16. Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait;
>
> 17. Decides that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;
>
> 18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;
>
> 19. Directs the Secretary-General to develop and present to the Security Council for decision, no later than thirty days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a programme to implement the decisions in paragraphs 16, 17 and 18 above, including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 above; and the composition of the Commission designated above.

S.C. Res. 687, *supra* note 178. Security Council Resolution 687 is a lengthy and comprehensive resolution. "It is known amongst diplomats and lawyers as the 'mother of

As of May 2004, the fund, administered by the United Nations Compensation Commission, had resolved over 2.6 million claims from over eighty nations and awarded compensation of over $48 billion.[180]

A more recent example from Iraq and Afghanistan is the Commander's Emergency Response Program (CERP). The CERP, originally funded from seized Iraqi Ba'athist funds and Iraqi oil sales proceeds, and later financed with U.S. Treasury Department appropriated funds, is used to provide money for humanitarian assistance and reconstruction efforts in Iraq and Afghanistan.[181] While the prior corruption of Iraq's regime elites, along with proceeds from oil sales,[182]

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all resolutions,' the longest resolution at the time." Christopher Greenwood, *Legal Justification for the Resort to Force*, *in* WAR AND MORALITY, *supra* note 54, at 44.

In August 1991, the Security Council passed Security Council Resolution 705, which allocated a cap of thirty percent of the annual value of Iraq's exports of petroleum and petroleum products to the reparations fund. *See* S.C. Res. 705, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/705 (1991).

[180] *See* David D. Caron, *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. DAVIS J. INT'L L. & POL'Y 123, 134-35 (2004). The status of the United Nations Compensation Commission (UNCC) claims processing as of May 7, 2004, was:

No. of claims left to be resolved	44,270
Compensation sought by claims left to be resolved (US$ approx.)	82,620,139000
No. of claims resolved	2,604,482
Compensation sought by claims resolved (US$)	265.992.097,839
No. of resolved claims awarded compensation	1,507,374
Compensation awarded (US$)	48,170,438,256

See id. at 135. As shown above, of the 2,604,482 claims resolved, the UNCC provided compensation on only 1,507,374 claims. This is a result of the UNCC both denying unsubstantiated claims as well as excluding claims that did not meet the definitional and jurisdictional requirements of paragraph 16 of Resolution 687. *See id.*

[181] *See* Major Kevin Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review*, ARMY LAW., Jan. 2004, at 195, 204; Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1. The initial funding for the CERP came from more than $750 million (U.S.) hidden in caches by Ba'athist leaders and seized by U.S. soldiers in the days after the fall of Baghdad. *See* Martins, *supra*, at 3. Through coordination with the U.S. Treasury Department, the U.S. Department of Defense, the U.S. Office of Management and Budget, and the Coalition Provisional Authority, military commanders use these funds for vital reconstruction assistance projects in Iraq and Afghanistan. These funds not only assist in rebuilding those countries, but also, provide a means to employ numerous local national personnel and companies and infuse capital into their economies. *See id.* at 3-9.

[182] *See* Rivkin & Bartram, *supra* note 144, at 99 (arguing that the occupying powers may use Iraqi oil assets to recoup all costs for reconstruction following Operation Iraqi

offered a uniquely viable avenue with which to provide compensation, other novel avenues for reparations can be pursued in the future with aggressor nations.

VI. Conclusion

For nearly two thousand years, the just war tradition has provided critical moral guidance on the initiation of war and on conduct during warfare. Today, the tradition must evolve to analyze and develop criteria to apply to jus post bellum. The author proposes three jus post bellum criteria: (1) seek a lasting peace (political restructuring); (2) hold morally culpable individuals accountable (war crimes tribunals); and (3) extract reparations. These criteria are an attempt to define the parameters of a just peace under the general framework of the just war tradition. The just war tradition should not be viewed as a mathematical formula by which to calculate the legality or permissibility of actions, but rather, as a tool to stimulate thought and debate about the morality of a given conflict. One must analyze and apply these jus post bellum criteria in a similar manner.

Arguably, the principles underlying jus ad bellum and jus in bello in the just war tradition fit most neatly when applied to a conventional armed conflict between states. There is, however, applicability of the criteria to all conflicts. Likewise, although the jus post bellum criteria are analyzed in terms of conventional armed conflict, they are also broad enough in scope to be applicable to the seemingly indefinite global war on terrorism. Indeed, it is precisely in this type of conflict that the need for post-conflict resolution criteria is most manifest. The alternative is to maintain the status quo of "winner's justice." That is much less desirable, especially if a nation finds itself on the "losing" side.

It is imprudent to debate the justness and morality of warfare without concerning oneself with the status of post-war justice. The post-war results must be morally consistent with the initial reasons for going to war. Technological might and superiority in battle may lead to military

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Freedom). The Hague Regulations support the ability of the occupying power to utilize the natural resources of the occupied nation: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Hague Regulations, *supra* note 53, art. 55.

victory, but the final judgment on winning the war will result from the attainment of a just and sustainable peace.

SALVAGING THE REMAINS: THE KHMER ROUGE TRIBUNAL ON TRIAL

MICHAEL LIEBERMAN*

I. Introduction

Over a generation after the Khmer Rouge regime's fall from power, Cambodia finally will have the opportunity to hold its remaining principals accountable for their crimes. This long-awaited prospect results from a recent agreement between the United Nations and Cambodia to prosecute the "senior leaders of Democratic Kampuchea and those who were most responsible"[1] for the regime's rampage of bloodshed.[2] In the hopes of the Cambodian people who have for so long awaited this day, justice delayed need not be justice denied.

Cambodia's 2003 Law on the Establishment of the Extraordinary Chambers, recently ratified by Cambodia's parliament, implements the

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1 Royal Government of Cambodia, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea of 2004, art. 1, *available at* http://www.cambodia.gov.kh/krt/pdfs/Combination%20of%20KR%20Law%20and%20the%20Amended%205%20Oct%202004%20-%20Eng.pdf [hereinafter The Law of 2004] (last visited Jan. 24, 2006).

2 Royal Government of Cambodia, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, http://www.cambodia.gov.kh/krt/english/draft%20agreement.htm (last visited Jan. 23, 2005) [hereinafter Agreement]. The draft form of the agreement was initialed on 17 March 2003, after over five years of contentious, on-again, off-again negotiations. It was approved by the Cambodian parliament on 4 October 2004 and finally ratified on 19 October 2004. Royal Government of Cambodia, Instrument of Ratification of Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, http://www.cambodiagov.kh/krt/pdfs/Instrument%20of%20Ratification%20of%20Agreement.pdf (last visited Jan. 23, 2005)*; see also* Amy Kazmin, *Cambodia in Agreement on UN Genocide Tribunal*, FIN. TIMES, Oct. 5, 2004, at 10.

Agreement.[3] This law establishes a special tribunal within Cambodia's existing court system that features Cambodian judges, prosecutors, and defense counsel working alongside international counterparts. It thus differs from a purely international tribunal such as the International Criminal Tribunals for Rwanda or Yugoslavia.[4] It is instead one of a number of "hybrid" tribunals that have also been established in Kosovo and Sierra Leone.[5]

Hybrid courts differ in specifics, but all feature both international and domestic judges, prosecutors and defense counsel, and sit in the country where the crimes they are adjudicating occurred.[6] These courts purport to offer dual benefits, combining the expertise and integrity of international personnel with the ownership, accessibility, and perceived legitimacy of a trial staffed by nationals in the place of the atrocities.[7] Ancillary benefits may accrue as well, such as reduced expenses, easier access to witnesses and evidence, and the potential for local capacity building.[8]

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[3] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20(Eng%20trans%206%20Sept%202001).pdf [hereinafter the Law of 2001]. This law did not meet with U.N. approval and was subsequently amended to its current form. While the current law largely reflects the original law of 2001, in some ways it alters the latter's structure and procedure. For example, it eliminates the mid-level appellate body and explicitly granting the accused rights under the International Covenant on Civil and Political Rights. *Compare* The Law of 2004, *supra* note 1, art. 9, *with* The Law of 2001, *supra* note 3, art. 9. *Compare also* The Law of 2004, *supra* note 1, art. 35, *with* The Law of 2001, *supra* note 3, art. 35. It further refers the question of the consequences of previously granted amnesties to the Extraordinary Chambers. *Compare also* The Law of 2004, *supra* note 1, art. 40, *with* The Law of 2001, *supra* note 3, art. 40.

[4] *See* International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/glance/index.htm (last visited Nov. 16, 2005); International Criminal Tribunal for Rwanda, http://www.ictr.org/default.htm (last visited Nov. 16, 2005).

[5] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 2, U.N. Doc. S/2002/246 (Jan. 16, 2002), *available at* http://www.sc-sl.org/scsl-agreement.html; Statute of the Special Court for Sierra Leone, art. 12, U.N. Doc. S/2000/915 (2000), *available at* http://www.sc-sl.org/scsl-statute.html. *See, e.g.*, David Marshall & Shelley Inglis, *Human Rights in Transition: The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95 (2003).

[6] Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, *in* POST-CONFLICT JUSTICE 74-75 (M. Cherif Bassiouni ed. 2001).

[7] Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306 (2003).

[8] *See id.* at 307. This is the hope of many foreign and domestic observers, including the Cambodian Defenders Project, a local legal aid organization. Karen J. Coates, *Cambodia*

For these reasons, many human rights groups and scholars welcome this innovation as another potential mechanism to address serious international crimes.[9] Cambodia's Extraordinary Chambers law, however, has elicited intense criticism. The most prominent of the Agreement's detractors is UN Secretary-General Kofi Annan, whose lead negotiator at one point found the Cambodian position so unacceptable that he walked away from the negotiating table.[10] Adamant, however, that some reckoning take place, the UN General Assembly, quickly ordered him back and directed him to reach an agreement,[11] greatly circumscribing his flexibility. The current agreement is the result.

In a relatively blunt report on the agreement to the General Assembly, Annan cited as a serious concern the "precarious" state of the judiciary in Cambodia and recalled that both the UN Special Representative to Cambodia and the General Assembly had found serious "problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary."[12] Human rights groups and some commentators share the Secretary-General's skepticism and have been strident in their condemnation. [13] At least one has gone so far as to call

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Tribunal May Pave Way for Judicial Reform, CHRISTIAN SCI. MONITOR, Oct. 14, 2004, at 5.

[9] *See, e.g.*, Dickinson, *supra* note 7; Kritz, *supra* note 6, at 74-75.

[10] Tom Fawthrop, *Why UN Washes Its Hands of Khmer Trial*, KOREA HERALD, Feb. 22, 2002.

[11] G.A. Res. 228, U.N. GAOR, 57th Sess., U.N. Doc. A/57/228 (2002). General Assembly Resolution A/RES/57/228 was recalled on 18 December 2002. Consequently, resolution 57/228, in section V of the Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 49 and corrigendum (A/57/49 and A/57/49 (Vol. I (Corr. 1), vol. I, becomes resolutions 57/228A).

[12] *Report of the Secretary-General on Khmer Rouge Trials*, at 11, U.N. DOC. A/57/769 (2003) [hereinafter *Report of the Secretary-General*].

[13] *See, e.g.*, Human Rights Watch, *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, Apr. 2003, http://hrw.org/backgrounder/asia/cambodia040303-bck.htm [hereinafter *Serious Flaws*]; Amnesty International, *Position and Concerns Regarding the Proposed Khmer Rouge Tribunal*, Apr. 25, 2003, http://web.amnesty.org/library/index/engasa230052003 [hereinafter *Amnesty International's Position*]; LAWYERS COMMITTEE FOR HUMAN RIGHTS, CAMBODIA: THE JUSTICE SYSTEM AND VIOLATIONS OF HUMAN RIGHTS 54 (1992) [hereinafter THE JUSTICE SYSTEM]; U.S. Department of State, Country Reports on Human Rights Practices: Cambodia (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18238.htm [hereinafter State Department Country Report].

for UN withdrawal if the Agreement is not renegotiated to provide for further assurances against governmental interference.[14]

In addition to the state of Cambodia's judiciary, critics cite vagaries in the law and confused, potentially intractable decision-making processes as potentially fatal flaws.[15] These shortcomings of the Chambers' legal structure might be less of an issue if those concerned had more faith in Cambodian Prime Minister Hun Sen's willingness to bring former Khmer Rouge leaders to justice. Of course, the Chambers' weaknesses exist for this very reason, and there is a well-placed fear that Hun Sen will work behind the scenes to delay the trials, mete out lenient sentences or engineer outright acquittals.[16]

Though the Cambodian government originally requested international assistance for a tribunal,[17] and the Prime Minister now expresses his support for one,[18] many see this position at odds with his interests and actions. Hun Sen has demonstrated some resolve to bring some Khmer Rouge to justice by arresting two former Khmer leaders, Ta Mok, known as "the Butcher," and Kang Kek Ieu, known as "Dutch," who now await trial for crimes against humanity.[19] It is questionable, however, whether their arrests indicate Hun Sen's determination to bring former Khmer Rouge leaders to justice or his desire to placate the international community by singling out perpetrators who happen to have fallen from grace. Numerous other Khmer Rouge leaders remain free. One, Ieng Sary, former Democratic Kampuchean head of state, received a royal pardon in 1996.[20] Two others, former head of state Khieu Samphan and "ideological guru" Nuon Chea, both live openly in Phnom

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[14] Scott Luftglass, Note, *Crossroads in Cambodia: The United Nations' Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute Former Members of the Khmer Rouge*, 90 VA. L. REV. 893, 895 (2004).

[15] *See Serious Flaws*, *supra* note 13; *Amnesty International's Position*, *supra* note 13.

[16] *See* Luftglass, *supra* note 14, at 909.

[17] *Report of the Secretary-General*, *supra* note 12, para. 74.

[18] Seth Mydans, *Cambodian Denies He Opposed Trial for Khmer Rouge*, N.Y. TIMES, Jan. 2, 1999, at A1.

[19] Thomas Crampton, *Cambodia to Restore Khmer Rouge Sites*, INT'L HERALD TRIBUNE, Aug. 21, 2003, at 2.

[20] *Cambodian Political Stalemate Could Delay Khmer Rouge Tribunal: Hun Sen*, AGENCE FRANCE PRESSE, Oct. 14, 2003. The Agreement defers deciding on his status, leaving it up to the Extraordinary Chambers. *See* The Law of 2004, *supra* note 2, art. 11.

Penh, the capital city of Cambodia.[21] As recent defectors to the government, they could well enjoy its continued protection.[22]

Indeed, detractors of the Agreement point out, several former Khmer Rouge leaders hold powerful positions within the government.[23] These leaders include Hun Sen himself, who defected to Vietnam two years prior to that country's invasion of Cambodia in 1979.[24] At the time of his defection, the Khmer Rouge already had been in power for two years, by which time it had already proven itself to be a relentless perpetrator of atrocity.[25] Yet upon its invasion, Vietnam installed Hun Sen as a high-ranking official in a new Cambodian government.[26] Considering Cambodia's longstanding distrust of Vietnam,[27] and Hun Sen's role in the Khmer Rouge regime, Hun Sen has good reason to keep skeletons in their closets.[28] In addition to these motives, it may be that Hun Sen is not eager to establish accountability as a standard of Cambodian governance.[29]

The stark implications of these facts are heightened by Hun Sen's insuperable demands for a hybrid court with an equal or predominant role for Cambodian personnel, many of whom, as noted above, are subservient to his diktat.[30] Though as noted above, hybrid courts hold out the promise,[31] few, if any, believe that fostering a sense of local ownership or promoting judicial professionalism accounted for Hun Sen's negotiating position. Hun Sen's motives and the Chambers' weaknesses notwithstanding, the Extraordinary Chambers are

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[21] Patrick Walter, *Hun Sen Vows to Try Khmer Rouge Pair*, AUSTL., Feb. 12, 2002, at 7.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See* Brian D. Tittemore, *Khmer Rouge Crimes: The Elusive Search for Justice*, 7 HUM. RTS. BRIEF 3 (Fall 1999).
[26] Walter, *supra* note 21, at 7.
[27] Terrence Duffy, *Toward a Culture of Human Rights in Cambodia*, *in* CAMBODIA 277 (Sorpong Peou ed. 2001).
[28] In the midst of negotiations for the tribunal, Hun Sen was quoted as saying, "If a wound does not hurt why should we poke it with a stick to make it bleed?" Mydans, *supra* note 18, at A1.
[29] Steven Ratner, *Current Development: The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948, 949 (1999) (citing Thomas Hammarberg, former U.N. Special Representative for Human Rights in Cambodia).
[30] *See, e.g.*, THE JUSTICE SYSTEM, *supra* note 13, at 54; *Amnesty International's Position*, *supra* note 13; *Serious Flaws*, *supra* note 13; State Department Country Report, *supra* note 13.
[31] *See, e.g.*, Dickinson, *supra* note 7.

Cambodia's last opportunity to bring its past tormentors to justice. At this point, the interests of justice must merge with those of practicality. The longer the trials are delayed, the less the chance that crucial evidence, witnesses, or even the defendants will be available. The perfect, in this case, must not be made the enemy of the good.

Beyond accountability for the perpetrators and justice for the victims, moving forward is a good way for the international community to lend real assistance to Cambodia's stultified judiciary and to have a chance at helping bring the Khmer Rouge leaders to justice. The rule of law in Cambodia, as noted, is in a poor state. The tribunal, staffed by international experts and watched closely by the global community, may provide an opportunity to bolster ongoing efforts at enhancing the integrity and capability of Cambodia's justice system. With sufficient effort, the tribunal could serve as a workshop for Cambodian judges, and give the Cambodian people a chance to witness legal procedures according to international standards of law. Despite the current regime's wishes, it might even do the same for Cambodian elites. Through outside political pressure on the Cambodian government not to interfere with the tribunal and a vigorous insistence upon developed criminal justice principles in trial and appellate chambers, Cambodia may benefit from seeing justice done alongside a judicial shot in the arm. In order for this to occur, not to mention real accountability, the international community must be prepared to make the most out of the Extraordinary Chambers.

This article seeks to provide initial guidance towards that end. It begins by describing the makeup of the Extraordinary Chambers and the outlines of its substantive and procedural laws. It then critically examines the arguments of human rights groups such as Amnesty International, Human Rights Watch, and others, which condemn the tribunal as insufficient and rife with opportunities for malfeasance. The paper confirms the validity of many of these critiques, while questioning the strength of others in light of the Cambodian and international law under which the Chambers will formally operate. In this way it seeks to provide a first step at rectifying some of the tribunal law's shortcomings. After suggesting methods to do so via a purely legal strategy, it goes on to suggest ways the international community can influence the Chambers to live up to its promise of closing a chapter of Cambodia's long-running nightmare.

II. Overview of the Agreement

The current law establishing the tribunal establishes "Extraordinary Chambers" within Cambodia's extant judicial system to try the primary perpetrators of the Khmer Rouge's crimes.[32] Its subject matter jurisdiction covers crimes under the 1956 Penal Code of Cambodia, namely homicide, torture and religious persecution.[33] It further includes crimes under numerous international treaties, such as the Genocide Convention of 1948,[34] "grave breaches" of the Geneva Conventions of 1949,[35] the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, and the Vienna Convention of 1961 on Diplomatic Relations.[36] The current law also takes its definition of crimes against humanity from the Rome Statute establishing the International Criminal Court.[37]

The procedures "shall be in accordance with Cambodian law,"[38] but where such law does not address an issue, "guidance may also be sought in procedural rules established at the international level,"[39] such as Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (ICCPR),[40] to which Cambodia is a party.[41]

Structurally, the Agreement establishes two chambers, a Trial Chamber, composed of three Cambodian and two international judges, and the Supreme Court Chamber, made up of four Cambodian and three

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[32] The Law of 2004, *supra* note 1, art. 2.
[33] *Id.* art. 3.
[34] *Id.* art. 6.
[35] *Id* art. 7
[36] *Id.* art. 8.
[37] *Id.* art. 5; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF. 183/9 (July 17, 1998).
[38] *Id.* arts. 20, 23, 33.
[39] *Id.*
[40] These include the right to a fair and public hearing, the presumption of innocence, the engagement of an accused's choice of counsel, adequate time and facilities to prepare a defense, the provision of counsel if the accused cannot afford one and the right to confront one's accusers and adverse witnesses. *Id.* art. 33; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 14,15,21, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).
[41] Cambodia ratified the ICCPR on 26 August 1992. *See* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), http://www.unhchr.ch/pdf/report.pdf.

international judges.[42] The UN Secretary-General nominates the international judges, who are then selected by Cambodia's Supreme Council of the Magistracy.[43] Under Cambodia's constitution, the Council is responsible for, *inter alia*, making proposals on the appointment of judges.[44] For the judges to render a decision, an "affirmative vote" is required of at least four judges in the Trial Chamber and five judges in the Supreme Court Chamber.[45] This supermajority formula thus requires the support of at least one international judge for a chamber to render a decision.

For the conduct of investigations, the Agreement creates two equal investigating judges, one Cambodian and one international.[46] The same formula is established for the two co-prosecutors.[47] Both the international investigating judges and the international prosecutors, like the international judges, are appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General.[48] The investigators and prosecutors "shall be independent . . . and shall not accept or seek instructions from any Government or any other source."[49] In case of disagreement between the two co-investigating judges or the two co-prosecutors the investigation or prosecution "shall proceed"[50] unless one or both of either duo requests settlement of the dispute by a pre-trial chamber of three Cambodian and two foreign judges, selected in the same way as are the other adjudicative judges.[51] In the event of a dispute, members of both teams are to submit the reasons for their disagreement to the pre-trial chamber.[52] A supermajority formula applies in this chamber as well, but in the event that no resolution of the dispute can be reached, the investigation or prosecution also "shall proceed."[53]

To help ensure the smooth functioning of these processes, the Agreement requires that Cambodia agree to "comply without undue

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[42] The Law of 2004, *supra* note 1, art. 9.
[43] *Id.* art. 11.
[44] CONST. OF THE KINGDOM OF CAMBODIA art. 134, *available at* http://www.embassy.org/cambodia/government/constitution.htm.
[45] The Law of 2004, *supra* note 1, art. 14.
[46] *Id.* art. 23.
[47] *Id.* art. 18.
[48] *Id.* arts. 18, 26.
[49] *Id.* art. 19.
[50] *Id.* arts. 23, 20.
[51] *Id.*
[52] *Id.*
[53] *Id.*

delay" with any request for assistance by the investigating judges, prosecutors or Chambers for the identification, location and detention of persons, transfer and the service of documents.[54] Finally, as a hedge against Cambodian non-cooperation, the UN reserves the right to withdraw from the Agreement if the government of Cambodia should "cause [the Chambers] to function in a manner that does not conform with the terms of the present Agreement."[55] The Secretary-General's negotiators did not submit this clause as boilerplate, indicating the skepticism with which they and the human rights community view the Cambodian government's commitment. Their distrust, and the way the Agreement falls short of fully addressing it, forms the basis for much of the criticism of the Agreement.

The remainder of this Article examines and evaluates the leading critiques of the Agreement. It then takes the lessons gleaned and suggests a strategy to bolster the credibility and efficacy of the Extraordinary Chambers.

III. Criticisms of the Agreement Examined

Denouncing what they see as a flawed compromise that undermines the prospect of seeing true justice done, observers charge that the proposed tribunal fails in at least three key respects. These shortfalls are: (1) a failure to guarantee prosecutorial, investigative and judicial independence; (2) the lack of a clear, controlling body of law; and (3) "unworkable and confused" investigative and decision-making processes.[56] The following section examines these reservations from an instrumental perspective, with an eye toward discovering how Cambodian and international law may help ameliorate some of the above concerns.

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[54] Agreement, *supra* note 2, art. 25.

[55] *Id.* art. 28.

[56] Other criticisms decry the absence of an adequate system for protecting witnesses and victims, as well as the deferral of a decision regarding the pardon of former Khmer Rouge foreign minister Ieng Sary. Because this article assumes the agreement will be the basis for a tribunal, and is concerned with functional and legal issues related to the trials themselves, it does not explore these other critiques in detail.

A. Failure to Guarantee Judicial, Prosecutorial and Investigative Independence and Impartiality

1. No Majority of International Judges

The most pointed and overarching critique of the proposed tribunal rests on the susceptibility of the Cambodian judiciary to manipulation from the government. The Secretary-General voiced his concern with this problem in his March 2003 report on the Agreement, recalling that both the UN Special Representative to Cambodia and the General Assembly found serious "problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary."[57] One human rights group even calls the Cambodian judiciary an "arm of the ruling Cambodian People's Party."[58] The Agreement's establishment of a majority status for Cambodian judges from such a system thus introduces a potentially corruptive and obstructive element, as they lack "the physical [and] professional security to simply decide to behave differently."[59]

Beyond its lack of independence, systematic corruption also plagues the Cambodian courts.[60] Other problems include incompetence due to a lack of education and training, low salaries, resource constraints and poor infrastructure.[61] As a result, though there may be good reasons for having nationals of a state adjudicate war crimes or crimes against humanity that occur within that country,[62] the Cambodian judiciary may be incapable of executing its solemn task. This weakness, critics charge, will prevent the Extraordinary Chambers from enjoying the same

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[57] *Report of the Secretary-General*, *supra* note 12, at 11; *see also* THE JUSTICE SYSTEM, *supra* note 13, at 54.

[58] THE JUSTICE SYSTEM, *supra* note 13, at 54..

[59] *Serious Flaws*, *supra* note 13, at 4.

[60] *Id.* at 3; Amnesty International USA, *Cambodia: Urgent Need for Judicial Reform*, http://www.amnestyusa.org/stoptorture/document.do?id=F74A8DDB9A24CBBE80256BEB0039AF24 (last visited Nov. 29, 2005) [hereinafter Amnesty International Website].

[61] Amnesty International Website, *supra* note 60.

[62] *See* text accompanying notes 5-9; Dickinson, *supra* note 7, at 305-07 (arguing that "hybrid" courts comprised of both foreign and international judges can help promote legitimacy, local capacity building and the penetration of international norms into domestic regimes); *see also* Kritz, *supra* note 6, at 75 (commending such courts as being more accessible to local populations, allowing for greater local ownership and contributing to the reform of national judiciaries).

credibility, such as the purely international tribunals established for Rwanda and the former Yugoslavia,[63] thus denying Cambodians the prospect of seeing their tormentors answer for their crimes.

2. Co-Investigating Judges

Another feature that many decry is the Agreement's provision for investigating judges.[64] Cambodia insisted on their inclusion, arguing that they are essential if the Extraordinary Chambers are to exist within Cambodia's legal system, which as a civil law country uses them extensively.[65] These investigating judges, whom the Agreement describes as being "responsible for the conduct of investigations,"[66] appear subject to the same interference, incompetence, pressures and obstacles as the Cambodian judges and prosecutors.[67] Of particular concern is their unclear role in relation to the co-prosecutors. In one of Cambodia's governing criminal codes,[68] the State of Cambodia Law, investigating judges are charged with "finding the truth," a task that grants them wide powers to arrest the accused, to summon him or others for questioning, to search his property and to otherwise fulfill his investigatory function.[69] Prosecutors usually assign these responsibilities to investigating judges, but also posses the power to conduct investigations themselves.[70]

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[63] *See, e.g.*, *Report of the Secretary-General*, *supra* note 12, para. 29; *Serious Flaws*, *supra* note 13, at 3. The twenty-four judges on the International Criminal Tribunal for the Former Yugoslavia, including *ad litem* judges, each come from a different country, none of which are parts of the former Yugoslavia. *See* International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/glance/index.htm (last visited Nov. 16, 2005). The eighteen judges on the ICTR, each also representing a different nationality, come from countries other than Rwanda. *See* International Criminal Tribunal for Rwanda, http://www.ictr.org/default.htm (last visited Nov. 14, 2005).

[64] *See, e.g.*, *Amnesty International's Position*, *supra* note 13, at 8; *Serious Flaws*, *supra* note 13, at 6.

[65] *Serious Flaws*, *supra* note 13, at 6.

[66] Agreement, *supra* note 2, art. 5(1).

[67] *Serious Flaws*, *supra* note 13, at 6.

[68] *See* Section C, *infra*, for a discussion of the confusion regarding "Cambodian law."

[69] International Human Rights Law Group, RESOURCE GUIDE TO THE CRIMINAL LAW OF CAMBODIA § 2.37 (2000), *available at* http://www.globalrights.org/site/DocServer/Cambodia_covcontent.pdf?docID=186 [hereinafter RESOURCE GUIDE].

[70] *Id.* § 2.36.

In practice, the functions of the two offices seem confused.[71] Some investigating judges, for instance, have taken responsibility for prosecutors' inquiries, but then refused to continue.[72] Indeed, valid questions exist about the value of the investigating judge, as the position may be just another opportunity for obstruction.[73]

Still, though the problem of delay is insurmountable under the current Agreement's terms, it is one that potentially answers itself, because the prosecutor has the same investigative powers under Cambodian law.[74] Because the Agreement does not explicitly recognize this authority, the international co-prosecutor ought to take full advantage of these prerogatives. Even if in practice prosecutors do not exercise this power themselves in Cambodia, the international prosecutor will be justified in being aggressive in his investigations if the investigating judges are gridlocked. Conversely, the investigating judges may serve as a backup in case the prosecutors' investigations are hindered.

3. No Single, International Prosecutor

A strong prosecutorial arm is integral to any tribunal, particularly in Cambodia where the legal framework and political realities contain many obstacles and difficulties. The law, as discussed, calls for two co-prosecutors, one Cambodian and one international.[75] The Agreement does not clearly list their duties, providing only that they "shall work together to prepare indictments against the Suspects [sic] in the Extraordinary Chambers."[76] Human rights groups criticize this bifurcation for reasons similar to the criticism of the placement of Cambodian judges in the trial and appellate chambers. They note that the Cambodian prosecutorial service suffers from the same weaknesses as the Cambodian judiciary: governmental fealty, a lack of professionalism, and corruption.[77] As the Agreement lacks a clear division of duties between the co-prosecutors and provides no procedural

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[71] *Serious Flaws*, *supra* note 13, at 6.
[72] *Id.*
[73] *Id.*
[74] RESOURCE GUIDE, *supra* note 69, § 2.36.
[75] The Law of 2004, *supra* note 1, art. 16.
[76] Agreement, *supra* note 2, art. 6(1).
[77] *Serious Flaws*, *supra* note 13, at 4; *Amnesty International's Position*, *supra* note 13, at 9.

mechanism for them to carry out their functions, delay, obfuscation, and impotence are stark possibilities.

These threats are mitigated somewhat by the dispute resolution mechanism outlined in Article 7 of the Agreement, which establishes the pre-trial chamber to decide disputes between the co-prosecutors.[78] Because in the absence of a decision, for which the vote of at least one international judge is required, the prosecution "*shall* proceed,"[79] a Cambodian prosecutor under orders to undermine a case can only delay, not derail, a prosecution.

For "the prosecution to proceed", of course, there must first be a prosecution. A close reading of the Agreement in conjunction with the Cambodian Constitution reveals the danger that, in the event of a dispute, even if the pre-trial chamber sided with an international prosecutor seeking to file an indictment, or could not reach a decision and thus allowed the prosecution to "proceed," a prosecution could only be filed with the consent of the Cambodian co-prosecutor.

Under Article 131 of the Constitution, "[o]nly the Department of Public Prosecution shall have the right to *file criminal suits*."[80] Because neither the Agreement nor the Law on the Extraordinary Chambers explicitly grants the international prosecutor the right to bring suit, the Cambodian prosecutor could arrogate to himself the sole right to do so. This could effectively leave the fate of the tribunal in the hands of the Cambodian government, despite efforts made by the international personnel. Even if an international prosecutor could participate in the prosecution, his inability to file suit would relegate him to the role of deputy prosecutor, not co-prosecutor. A reading that leaves the exclusive right of "fil[ing] criminal suits" to the Cambodian prosecutor is bolstered by the Agreement's language establishing the Extraordinary Chambers "within the existing court structure of Cambodia,"[81] which necessarily brings it within the ambit of the country's constitution, and thus within Article 131.

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[78] Agreement, *supra* note 2, art. 7.
[79] *Id.* (emphasis added).
[80] CONST. OF THE KINGDOM OF CAMBODIA art. 131, *available at* http://www.embassy.org/cambodia/government/constitution.htm (emphasis added).
[81] Agreement, *supra* note 2, pmbl. para. 4.

One possible way out of this predicament is to insist on the Agreement's description of the prosecutors as "co-prosecutors," thus eliminating any conception of disparity between them. Another solution may be the Agreement's language incorporating the Vienna Convention on the Law of Treaties.[82] The Vienna Convention requires parties to perform their treaty obligations in good faith[83] and forbids a party from invoking provisions of internal law to justify failing to honor its obligations.[84] Thus, if the UN can provide evidence that the parties contemplated granting the international prosecutor the right to file a suit, perhaps through an examination of the *traveaux prepartoire*[85] or through subsequent practice, as provided by Vienna's rules of interpretation,[86] the international prosecutor may avail himself of the right to bring suits, hopefully, but not necessarily, with the backing of his co-prosecutor.

B. Unworkable and Confused Investigative and Decision Making Process

A glaring and serious weakness that will be difficult to overcome is an investigative and decision-making process that simmers with potential friction. As described, if the co-prosecutors or co-investigating judges cannot agree among themselves, they may appeal to the pre-trial chamber. Once there, a majority plus one is needed to decide the dispute.[87] Such a supermajority, it is argued, could be necessary "dozens or even hundreds" of times in the course of a case.[88] "Even decisions about who to investigate can become the subject of this cumbersome process," one group claims.[89] While the process may be halting and fraught with the danger of dilatory tactics, it is not insurmountable.

What critics of the Agreement and the tribunal law overlook is that in the case of the prosecutorial and investigative disputes, if the pre-trial chamber cannot render a decision due to the obstinacy of compromised

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[82] *Id.* art. 2(2).
[83] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339.
[84] *Id.* art. 27.
[85] Materials used in preparing the ultimate form of an agreement or statute, and especially of an international treaty. BLACK'S LAW DICTIONARY 1505 (7th ed. 1999)
[86] *Id.*; *see id*. art. 31.
[87] The Law of 2004, *supra* note 1, art. 20.
[88] *Serious Flaws*, *supra* note 13.
[89] *Id*. at 6.

members, the investigation or prosecution "*shall proceed.*"[90] Moving forward with an investigation or prosecution would thus not require a supermajority, only the lack of one *against* the proceeding. This circumstance, then, would be unlikely considering the breakdown of the pre-trial chamber, which features enough international members to prevent such an outcome, assuming they themselves saw merit in pursuing a particular case.[91]

C. No Clear, Controlling Body of Law

1. Procedural Law

Another serious critique of the Agreement is its ambiguous reference to the choice of procedure. Article 12 states that "[t]he procedure shall be in accordance with Cambodian law."[92] As described above, where the law does not address an issue, is uncertain, or may not comply with international standards, Article 12(2) states that "guidance may also be sought in procedural rules established at the international level."[93] This default recognizes that Cambodia's present "system" of criminal procedure is a morass of different legal regimes, established under various recent governments.[94] The criminal codes established under the United Nations Transitional Authority in Cambodia (UNTAC), and the State of Cambodia Law (SOC law), passed by Hun Sen's Cambodian People's Party before the present Constitution came into effect and thus of questionable legitimacy, are the most widely used.[95] Still, inconsistency and unpredictability plague the application of the law,[96] a problem that both results from and lends itself to political pressures. Further, some of the laws still in use, such as the Vietnamese-backed People's Republic of Kampuchea 1984 Decree Law 27, utterly fail to

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[90] The Law of 2004, *supra* note 1, arts. 20, 23 (emphasis added).

[91] Unfortunately, the negotiators did not include a similar provision for interlocutory appeals from the trial to the appellate chamber. Because Cambodian law allows for such appeals, the international judges may be forced to rely on techniques of persuasion rather than on analysis of law to overcome this problem if it arises. RESOURCE GUIDE, *supra* note 69, § 4.38.

[92] Agreement, *supra* note 2, art. 12.

[93] *Id.*; The Law of 2004, *supra* note 1 arts. 20, 23, 33.

[94] Others include the Vietnamese-backed People's Republic of Kampuchea (PRK) laws and the Criminal Code of 1969. *See* RESOURCE GUIDE, *supra* note 69, §§ 2.23 – 34.

[95] RESOURCE GUIDE, *supra* note 69, § 2.23.

[96] *Serious Flaws*, *supra* note 13, at 7.

meet standards of international due process[97] and tend to be used in cases of politically motivated arrests.[98] According to some critics, this state of affairs "may make it impossible to offer due process to defendants."[99]

While the question of the applicable law is certainly one the Chambers must address, it need not hinder the tribunal. The UNTAC criminal code, the SOC law, and the ICCPR, to which Cambodia is a party, provide sufficient legal standards to protect the accused and assure a fair trial. Their application, of course, is far from guaranteed, but unless Cambodia proves extraordinarily obstinate or the international judges are pliant and unassertive, there is a strong foundation for adhering to universally accepted benchmarks. One can even infer this view from the very critique that condemns the smorgasbord nature of the applicable law, at least in reference to Article 12(2) of the Agreement. "It is unclear," reads one assessment, "which 'procedural rules established at the international level' should be used to clarify weaknesses in the Cambodian law. The Rome statute of the ICC . . .? The statute of the International Criminal Tribunal for the Former Yugoslavia? [100] The statute of the International Criminal Tribunal for Rwanda?"[101] Yet all of these codes of procedure are substantially similar and uphold minimum due process standards. Cambodia's membership to the Rome Statute and the ICCPR provides yet another source of applicable procedural law.

Another fault in the Agreement is the absence of ICCPR Article 9, which contains important pre-trial rights of the accused, alongside ICCPR Articles 14 and 15 in Article 12 of the Agreement. [102] Cambodia is a party to the ICCPR. Such a criticism, along with a view suspicious of the tribunal's susceptibility to interference, undermines the consistency of critics' impression of the Hun Sen regime. Either the Prime Minister is insufficiently committed to bringing former Khmer Rouge senior leaders to justice, or he is overly zealous and thus liable to

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[97] *Id.*

[98] RESOURCE GUIDE, *supra* note 69, § 3.14.

[99] *Id.*

[100] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159 (1993), amended by S.C. Res. 1166, U.N. SCOR, 53d Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998).

[101] Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

[102] *Serious Flaws*, *supra* note 13, at 11.

ignore fundamental due process rights. This concern would be more urgent if the Cambodian government sought to accuse scapegoats instead of the real culprit. The chances of letting this occur, however, are small considering the presence and powers of the international personnel and the substantial evidentiary basis implicating suspects who are by now quite notorious.[103]

Surely the most stringent and specific standards should permeate every aspect of the Agreement. Yet falling slightly short of that threshold should not cause undue alarm. The problem is less with the law than with the vigor with which the tribunal analyzes, interprets, and applies the law. For this reason, international pressure from both within and without the tribunal is essential.

2. Substantive Law

In a vein similar to that of the noted critiques, Human Rights Watch charges that the "lack of clarity of the substantive law" renders due process guarantees insecure.[104] This argument conflates procedural and substantive law. The International Covenant on Civil and Political Rights Articles 14 and 15, previously discussed, clearly address procedural matters, the absence of ICCPR Article 9 notwithstanding. Moreover, the group's proposed remedy, incorporating the text of the ICC in the Agreement, already has been accomplished regarding an area in which the ICC goes significantly further than other incorporated texts, namely crimes against humanity.[105] The other international instruments referenced in the Agreement, such as the Geneva Conventions, resemble the ICC substantive law.[106] The concerns, then, that "[c]ompetent defense counsel will be able to raise constant objections based on the lack of clarity of the substantive law" and that "[j]udges may then find themselves with no choice but to dismiss indictments or require them to be re-filed"[107] does not appear well-founded. And with sufficiently zealous foreign personnel, these fears should be unrealized.

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[103] *See, e.g.*, Walter, *supra* note 21, at 7.
[104] *Serious Flaws*, *supra* note 13, at 7.
[105] *See* Agreement, *supra* note 2, art. 9 ("the subject-matter jurisdiction . . . shall be [*inter alia*], crimes against humanity as defined in the 1998 Rome Statute of the [ICC].").
[106] *Id.*
[107] *Serious Flaws*, *supra* note 13, at 7.

3. Defenses

a. Pardons

Article 11 of the Agreement prohibits Cambodia from requesting amnesty or a pardon for anyone under investigation for or convicted of crimes under the Tribunal Law.[108] In 1996, however, Ieng Sary, the foreign minister under Democratic Kampuchea, received a royal pardon from King Sihanouk for his 1979 genocide conviction under the Vietnam-backed People's Revolutionary Tribunal.[109] Instead of rescinding this pardon, the Agreement leaves the scope of it to the Extraordinary Chambers, thus leaving open the possibility that Sary will escape justice.

In arguing that Sary's amnesty should not stand, those judges who wish to prosecute him should employ the precedent of the Special Court of Sierra Leone. Despite a grant of amnesty under the Lome Agreement that ended that country's civil war,[110] the statute that later established the Special Court prevented such amnesties as bars to prosecution.[111] Just as it did in its negotiations over amnesties with Cambodia, the UN objected to the analogous provision in the Lome accord, lodging a reservation to it stating that "amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other [such] serious violations."[112] Seeking to resolve the difference between the contradictory agreements, then-UN High Commissioner for Human Rights Mary Robinson argued that the Lome amnesty provisions may be applicable with respect to national law, but not international law,[113] thereby justifying the supremacy of the statute establishing the Special

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[108] Agreement, *supra* note 2, art. 11.

[109] GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 3 (Howard J. De Nike, John Quigley, Kenneth J. Robinson, eds. (2000)).

[110] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, U.N. Doc. S/1999/777 (providing protection of human rights and humanitarian law for the people of Sierra Leone), available at http://www.sierra-leone.org/lomeaccord.html (last visited Jan. 29, 2006).

[111] Statute of the Special Court for Sierra Leone, art. 12(1)(a), S.C. Res. 1315, U.N. SCOR, 55th sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000), *available at* http://www.sierra-leone.org/specialcourtstatute.html [hereinafter SCSL Statute] (last visited Jan. 29, 2006).

[112] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, U.N. Doc. S/2000/915 (Oct. 4, 2000).

[113] *U.N. Human Rights Commissioner Wants International Probe into Sierra Leone*, AGENCE FRANCE PRESSE, July 9, 1999.

Court. Since Cambodia's Extraordinary Tribunal Law incorporates international conventions as the basis for many of its substantive crimes, those seeking to overcome the previously granted amnesty can make a similar case.

b. Superior Orders

One group denounces the Agreement for not explicitly barring superior orders as a defense, though it recognizes such a bar under Article 29 of the Cambodian Tribunal Law, in which the Agreement is couched.[114] That Article reads, "The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility."[115] As a defendant would thus have trouble invoking this defense under the law, it is curious, if not unduly punctilious, to attack the Agreement's omission of the superior orders defense prohibition. Such hypercritical behavior does nothing to mitigate the tribunal's very real shortcomings and erodes the force of the human rights community's stronger objections.

Their shortcomings notwithstanding, the criticisms of the Agreement identify serious weaknesses that must be addressed. Because the Agreement appears to be the final word on any Khmer Rouge tribunal, however, it is critical that in addition to the legal strategies outlined above, the international legal community develops other means to optimize the tribunal's capacity to mete out justice. The following section sketches some considerations towards that end.

IV. A Strategy To Mitigate Malfeasance, Promote Justice, and Contribute to the Development of the Rule of Law in Cambodia

The failure of the Agreement to establish protocols geared towards the maximum efficiency, credibility, and accountability of the tribunal is unfortunate. Yet the Agreement is likely the last chance for Cambodians to bring leaders of Democratic Kampuchea to justice. Considering the weaknesses of the Agreement, it is unwise to hope that it will provide the degree of catharsis and closure sought for and deserved by victims of the

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[114] *Amnesty International's Position*, *supra* note 13, at 9.
[115] The Law of 2004, *supra* note 1, art. 39.

Khmer Rouge. Some justice, however, is better than none. Youk Cheng, head of the Documentation Centre of Cambodia**,** an organization that collects and records evidence of the horrors of the Khmer Rouge regime, believes in "symbolic justice."[116] The tribunal, he says, can serve "as our own individual revenge. For the interests of the country, for stability, for resources, I think the top 10 [Khmer Rouge leaders] are sufficient for all of us."[117]

For the top tier of leaders to face justice in the face of any potential obstinacy and interference by the Cambodian government and tribunal personnel, the international community must prepare itself to make the most of the Agreement. It must also ensure that international judges do not come merely to oversee the trials and then depart. As contributors of the international community, the international judges should add value to local capacity building and judicial training. Some specific steps the international community can take are as follows (1) the Secretary-General must nominate strong, assertive international personnel; (2) pressure Cambodia to respect the integrity of the Tribunal; (3) Identify pertinent sources of Cambodian law; (4) use the avenues available in the Agreement; (5) use the opportunity to help train Cambodian judges and lawyers, and (6) as a last resort, threaten to walk away:

A. The Secretary-General Must Nominate Strong, Assertive International Personnel

Under Article 3 of the Agreement, the UN Secretary-General nominates the international judges, co-prosecutors, and co-investigating judges.[118] The Cambodian Council of the Magistracy, however, can only select international personnel from the list provided. The Secretary-General, then, should ensure that his nominees not only meet the standards enunciated in Article 3(3) of the Agreement ("high moral character, impartiality and integrity . . ."),[119] but also informal qualifications such as assertiveness, experience dealing with Cambodians and, perhaps, diplomatic experience. The international personnel must be prepared to aggressively pursue investigations and prosecutions (and,

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[116] John Aglionby, *Pol Pot's Soldiers Escape Justice for Genocide: Only Senior Khmer Rouge Officers Will Stand Trial for 1.7m Deaths*, GUARDIAN (U.K.), Aug. 5, 2003, at 12.
[117] *Id.*
[118] Agreement, *supra* note 2, art. 3(5).
[119] *Id.* art. 3(3).

where warranted, convictions) in the face of any Cambodian truculence. The international appointees may also help advance trials by using their colleagues' inexperience with international criminal law to influence the proceedings more than their minority status may suggest is possible. Judges with experience in the mixed tribunals in Kosovo may be particularly well suited to this task.[120]

B. Pressure Cambodia to Respect the Integrity of the Tribunal

Articles 3, 5 and 6 of the Agreement require, respectively, that judges, prosecutors, and investigating judges "be independent . . . and shall not accept or seek instructions from any Government or any other source."[121] Article 2 of the Agreement also requires Cambodia to abide by the Vienna Convention. The international community should pressure Cambodia to abide by these articles. Since, as we have seen, many do not trust Cambodia to respect these provisions, the General Assembly may wish to provide a channel for whistleblowers to expose their violations, and perhaps even threaten sanctions or countermeasures if the Cambodian government is seen to interfere. This could provide a way for other nations and the UN to gauge Cambodia's commitment to respecting the Agreement, and to work to make sure that it does so.

C. Identify Pertinent Sources of Cambodian Law

The Tribunal's substantive law is sufficiently clear. Yet because Cambodian criminal procedure is a mixture of different rules and practices, the international personnel should do their homework, and identify the relevant sources of Cambodian law that could bear on criminal procedure.[122] This Article has attempted to sketch some preliminary lines of inquiry for this effort. The international personnel should also insist on Cambodia's adherence to the default "rules established at the international level,"[123] such as the ICCPR, to which Cambodia belongs.

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[120] As of November 2005, the Secretary General was still interviewing candidates. *See* American University War Crimes Research Office, Extraordinary Chambers for Cambodia Status Updates, *at* http://www.wcl.american.edu/warcrimes/krt_updates.cfm (last visited Jan. 17, 2006).

[121] *Id.* arts. 3(3), 5(3), 6(3).

[122] *See* Section IV(C)(1), *supra*.

[123] Agreement, *supra* note 2, art. 12(1).

In addition, the Extraordinary Chambers must, upon first convening, promulgate detailed rules for implementing the procedures envisioned in the Agreement. Such rules would be neutral and, of course, comply with the Agreement and Cambodian law. In addition to clarifying the procedure and avoiding delay, their creation could give the international judges a chance to assertively inject international standards into the tribunal, and provide a stronger basis for them to do so.

D. Use the Avenues Available in the Agreement

The Agreement contains provisions that give significant influence to the international personnel. The supermajority system, which requires at least one international judge to issue a decision, provides a safeguard against undue acquittals and convictions. The requirement that investigations or prosecutions "shall proceed" in the case of a deadlock between the co-prosecutors or co-investigating judges guarantees, at least in law, that the international personnel are able to move forward, notwithstanding opposition from their counterparts. A thorough examination not just of the Agreement, but also of its relationship to Cambodian law, is crucial to surmounting the obstacles in the Agreement.

E. Use the Opportunity to Help Train Cambodian Judges and Lawyers

The international personnel should also not shy away from their didactic duties of educating their Cambodian colleagues in techniques of proper criminal investigations and trial management. United Nations Special Representative for Human Rights in Cambodia Thomas Hammarberg originally suggested that such an educational process occur in The Hague over several years prior to the start of the trials.[124] Though ideally the Cambodian judges would have had this learning opportunity before the trials started, the international judges must nonetheless be sure to take advantage of the avenue presented. In doing so, the international personnel can draw upon the experience of mentoring programs in places such as Kosovo and East Timor.[125] These efforts could also involve

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[124] *Serious Flaws*, *supra* note13, at 4 n.3.

[125] *See, e.g.*, *IFES Project Report, East Timor: Mentoring Public Defenders, at*

other rule of law development organizations, such as the Cambodian Bar Association. The international personnel must leave behind more than their efforts to see the Khmer Rouge face justice; they must also take what steps it can to ensure that a robust adherence to the rule of law allows Cambodia to be free from such tyrants forever.

F. Threaten to Walk Away

Under the Agreement, the UN reserves the right to withdraw support from Extraordinary Chambers in the case of Cambodian refusal to cooperate.[126] The UN may see fit to strategically invoke this right. Though forced to return to the negotiating table by the General Assembly, the Secretary-General's refusal to continue negotiations with Cambodia in 2002 could well be credited for securing several subsequent concessions. These include the reduction of the Chambers from three to two,[127] the default role of international procedural standards when Cambodian law is unclear,[128] and the specific mention of ICCPR Articles 14 and 15.[129] If all else fails and the tribunal begins to appear to be a sham, the UN must be prepared to threaten abandoning the effort, though there should be a high bar to actually doing so.

V. Conclusion

The Agreement and the law establishing the tribunal are flawed, but not fatally so. Instead of abandoning the effort as hopeless, the pursuit of justice now demands sublimating idealistic advocacy to practical preparation. In Cambodia, the window of opportunity is closing rapidly. Even if the tribunal were to convene tomorrow, it would be longer than any other time in history between the commission of internationally condemned crimes and their perpetrators' appearance before courts of justice. No more Khmer Rouge leaders should die without facing their victims. As the international community assists in this process, it must be sure to leave behind not only accountability, but also the tools to

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http://www.ifes.org/rol-project.html?projectid=easttimormentor (last visited Jan. 17, 2006); United Nations Development Programme, Judicial Inspection Unit Support Project, *at* http://www.kosovo.undp.org/Projects/JIU/JIU.htm.

[126] Agreement, *supra* note 2, art. 28.

[127] *Report of the Secretary-General*, *supra* note 12, at 10, para. 26.

[128] *Id.* at 14, para. 49.

[129] Agreement, *supra* note 2, art. 12.

ensure that justice is done after the Extraordinary Chambers complete their task. Despite the obstacles ahead, we may still salvage what remains of the hope for justice in Cambodia.

LOST TRIUMPH
LEE'S REAL PLAN AT GETTYSBURG – AND WHY IT FAILED[1]

REVIEWED BY MAJOR TIMOTHY P. HAYES, JR.[2]

Success has a thousand fathers, but failure is an orphan.[3]

Lost Triumph is a new take on an old story. In a highly readable book, Tom Carhart establishes the very bold premise that Pickett's Charge on day three at Gettysburg was not a foolhardy last gasp by a commander with his back to the wall. Instead, it was part of a complex and brilliant plan that, if executed to perfection, would have resulted in a stunning and monumental victory for the Confederate Army under General Robert E. Lee. Perhaps even more controversial is Professor Carhart's theory that Brigadier General George Armstrong Custer of Little Bighorn fame thwarted the plan.[4] Professor Carhart relies on primary sources wherever possible, but also depends on many secondary sources that he admits are pure conjecture in some instances.[5] While perhaps not lending credence to his theory, these supplements are plausible and make the book a fascinating read for a student of military history.

Professor Carhart's theory in *Lost Triumph* is easily summarized. Pickett's Charge, the fabled "High Water Mark of the Confederacy,"[6] was merely a "massive distraction."[7] Coupled with that distraction was to be a renewed offensive by General Richard Ewell's 2nd Confederate Corps on the Union right. This offensive was in fact initiated by contact with the enemy ahead of schedule. But the presently forgotten or

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[1] TOM CARHART, LOST TRIUMPH, LEE'S REAL PLAN AT GETTYSBURG – AND WHY IT FAILED (2005).

[2] U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] James M. McPherson, *Foreword* to TOM CARHART, *supra* note 1, at xiii.

[4] General Custer is most well-known for his leadership in the massacre at Little Bighorn, Montana, in 1876. He died there along with several hundred of his men, in what was later dubbed, "Custer's Last Stand." For more information on this battle, *see* National Park Service, http://www.nps.gov/libi/ (last visited Nov. 28, 2005).

[5] CARHART, *supra* note 1, at 176.

[6] This phrase has been in common usage since shortly after the end of the Civil War. There is a monument bearing this moniker on the battlefield at the point where some of Pickett's men momentarily breached the Union line.

[7] CARHART, *supra* note 1, at 4.

unknown stroke of genius was a planned cavalry charge led by General J.E.B. (Jeb) Stuart into the heart of the Union rear, meeting Pickett at the center of the Union line and effectively cutting the Union Army in half, then destroying it gradually. Professor Carhart boldly asserts that this plan was thwarted only by George Armstrong Custer's "raw personal courage".[8]

Professor Carhart's book has a clearly defined purpose—to advance his theory—and his story is tightly woven to support that goal. He anticipates and attempts to answer the reader's most obvious questions: where is the evidence of Lee's plan, and why is it only now coming to light? Professor Carhart readily admits that he does not rely on any newly discovered evidence, but bases his theory on his own interpretation of existing sources,[9] most notably eyewitness sources collected in the *Bachelder* papers.[10] While noting that there were only two Confederate reports of the cavalry battle between Stuart and Custer in the official reports,[11] Professor Carhart asserts that General Lee suppressed confederate reports of that aspect of the fight[12] because they revealed that Jeb Stuart's invincible cavalry had been held off by a much smaller force. Such a revelation would have been devastating for confederate morale and a much needed boost to Union spirits. Professor Carhart surmises that, rather than allow the proliferation of this news, Lee preferred to shoulder the blame himself.[13] But, of course, he could not control the Union reports. So why were they ignored? Professor Carhart cites ample anecdotal evidence of the cavalry prong of the attack provided by Union cavalrymen in various journals and articles, but he maintains that these reports were regarded by historians as mere puffery, and ignored.[14] He does, however, acknowledge two previous historians who espoused his theory in works of larger scope.[15] Critics, however,

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[8] *Id.* at 6.
[9] *Id.* at 5.
[10] *Id.* (referencing 1-3 THE BACHELDER PAPERS: GETTYSBURG IN THEIR OWN WORDS (1994-1995)).
[11] There were seventeen federal reports of the battle. *See* CARHART, *supra* note 1, at 241 (citing THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (1889)).
[12] CARHART, *supra* note 1, at 242.
[13] *Id.* at 245.
[14] *Id.* at 252.
[15] *Id.* (citing JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM (1989) and STEPHEN Z. STARR, THE UNION CAVALRY IN THE CIVIL WAR (1979)).

tend to agree that Professor Carhart is the first to offer a comprehensive interpretation of this theory.[16]

Professor Carhart offers other support for his theory as well. First, he proposes that this grandiose plan was in keeping with General Lee's overall boldness in battle,[17] although it could be argued that an unsupported Pickett's charge would have been even bolder. But tactically, Professor Carhart argues, Lee would not have attacked with only Pickett's Division, as it amounted to only twenty percent of his available forces.[18] Professor Carhart also points to Lee's unfailing loyalty to his subordinates, and notes that Lee would have been particularly loathe to disparage Stuart's name following his combat-related death ten months after Gettysburg.[19] To explain why there is no evidence in the form of written orders predating the battle, Professor Carhart insists that General Lee was far too secretive to publish his orders in writing.[20] And, as historian James McPherson notes in the foreword to *Lost Triumph*, a success will attract scores of supporters eager to be associated with the victory, but survivors will quickly distance themselves from a defeat.[21] In the end, Professor Carhart frankly admits that his assessment is "unfortunately meaningless" because the plan ultimately failed.[22] While this may be true from a historical perspective, it does not negate the fact that Professor Carhart has made a valuable contribution to Gettysburg literature, and no doubt sparked renewed debate about the strategies and tactics that were employed.

In *Lost Triumph*, Tom Carhart occasionally exceeds the scope of his thesis. For example, the first chapter discusses General Lee's actions in the Mexican War. While underscoring the well-known effectiveness of a younger Lee in battle, this chapter does little to advance his theory of the Gettysburg battle and is filled with conjectural narrative.[23] The next chapter is even less useful, as it attempts an unnecessary history lesson

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[16] *See, e.g.*, Tom Carhart, Author, Additional Praise for Lost Triumph (Bruce Lee ("*Lost Triumph* presents the first comprehensive view of Lee's previously unknown plan to win the battle.") and James McPherson ("No historian before Carhart has pieced together the whole story . . . .")), http://www.tomcarhart.net/books.htm (last visited Nov. 28, 2005).
[17] CARHART, *supra* note 1, at 268.
[18] *Id.* at 148, 150.
[19] *Id.* at 268.
[20] *Id.* at 246.
[21] *Id.* at xiii.
[22] *Id.* at 267.
[23] *See, e.g.*,, *id.* at 7.

about the period between the Mexican and Civil Wars. The reader is left to wonder what effect the Wilmot Proviso or the oratory of Stephen Douglas had on the battle at Gettysburg, or more specifically, Lee's strategy there. Carhart assumes little knowledge of the Civil War or the antebellum period in these early chapters, which unfortunately causes the book to lose focus at that point.

Professor Carhart begins to tie the narrative into his theory when he discusses Lee's tenure as superintendent of West Point. He notes that Lee studied the tactical brilliance of Napoleon as both a student and superintendent of the Academy.[24] He also states that Lee read Jomini's works on attacking an enemy that was fixed in place,[25] as the Union army was at Gettysburg. Professor Carhart bases the latter assertion on the fact that Lee owned a copy of Jomini's book, although it was in French and mere ownership does not necessarily indicate study. But here the reader should consider the author's background. As a former West Point cadet himself, Professor Carhart is intimately familiar with the curriculum at the Academy and undoubtedly studied Jomini himself. He is clearly well versed in military history, as chapter four illustrates.[26] Professor Carhart examines the battles of Cannae, Leuthen, and Austerlitz—battles he asserts that Lee also studied—and finds strategies in each battle that he argues Lee incorporated into his secret Gettsyburg plan. Professor Carhart goes on to describe the tactics and equipment of the three combat arms involved in the battle at Gettysburg- infantry, cavalry, and artillery. His description does little to advance his theory but reinforces to the reader Carhart's firm grasp of the military art and science.

It is not until chapter six that Professor Carhart begins to examine the Civil War period, and here he focuses on early displays of bravery and prowess by Custer[27] and Stuart.[28] Earlier in the book, Carhart makes interesting references to the prior encounters between Lee and Stuart, as respective superintendent and student at West Point[29] and at Harper's

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[24] *Id.* at 34.
[25] *Id.* at 35.
[26] In addition to his West Point education, Professor Carhart is a twice-wounded Vietnam veteran, has a Ph.D. in history, a law degree, has authored four books, and is a university professor. *See* Penguin Group, http://www.penguinputnam.com/nf/Author/ /AuthorPage/0,,0_1000037675,00.html (last visited Nov. 28, 2005).
[27] *See* CARHART, *supra* note 1, at 176.
[28] *See id.* at 90.
[29] *Id*. at 31 (noting that Lee treated Stuart like a son).

Ferry.[30] Before he discusses the events at Gettysburg, Professor Carhart examines in some detail the battle at Chancellorsville in an attempt to bolster his theory. He makes two analogies between the two battles. First, he argues that because General Stonewall Jackson's movements and success at Chancellorsville were due to Lee's orders,[31] Stuart's movement to the Union rear at Gettysburg resulted from Lee's order as well. This is a plausible assumption, though no written orders exist, as Lee was the senior tactical commander on the field in both instances. Professor Carhart's second analogy requires a greater logical leap. He compares Lee's actions at Chancellorsville with Napoleon's actions at Arcola versus Alvintzy.[32] Professor Carhart asserts that because Lee borrowed from Napoleon's strategy at Chancellorsville, he likely implemented a Napoleonic plan at Gettysburg as well. While Napoleonic tactics probably influenced Lee, given that Lee had devoted his adult life to the art of warfare, Professor Carhart perhaps assumes too much. While one can compare the similarities between the two generals, one can never know if Lee made a conscious decision to duplicate any specific strategy or tactic because no evidence of such a decision exists. It is safer to say that these battles likely shaped Lee's thinking and experience.

When Professor Carhart finally moves into the battle at Gettysburg, he initially focuses on the relationship between Lee and one of his corps commanders, General James Longstreet. Lee allegedly promised Longstreet that Lee would only fight in the tactical defensive in a campaign into the North despite being on the offensive strategically, but reneged on this vow at Gettysburg.[33] This cuts against Professor Carhart's theory that Lee's plan was brilliantly conceived, but poorly executed. Professor Carhart posits that Pickett's Charge, a frontal assault by Pickett's Division in the center of the Union line, unfolded only because Longstreet had disobeyed an order by Lee to attack earlier that morning on the Union left flank.[34] If this is so, the Pickett's Charge prong of the attack occurred more by happenstance than by preconceived

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[30] *Id.* at 37.
[31] *Id.* at 96.
[32] *See id.* at 97-105.
[33] *Id.* at 125. *See also* JEFFREY D. WERT, GENERAL JAMES LONGSTREET, THE CONFEDERACY'S MOST CONTROVERSIAL SOLDIER 257 (1993) (Wert stating that Longstreet did not *expect* a tactical offensive and *believed* that Lee was committed to the defense) (emphasis added).
[34] CARHART, *supra* note 1, at 168-171.

design,[35] although the evidence is clear that part of Longstreet's Corps would attack somewhere on the Union line that day. But Professor Carhart appears to assert in this chapter that if Longstreet had not disobeyed Lee's order, Pickett never would have met Stuart in the center of the Union line. This assertion seems to undercut his thesis, unless Professor Carhart is to have the reader believe that Lee concocted an intricately detailed plan that afternoon, as soon as Lee learned of Longstreet's failure to attack.

Professor Carhart notes that Longstreet once again objected to his commander's plan, and surmises that his objection was because Longstreet was unaware that Stuart's cavalry would be conducting a simultaneous attack against the Union rear.[36] A cynic would argue that was because no such plan existed. Perhaps Lee did not feel the need to explain himself or his strategy, but it seems that Lee would have disclosed that information to Longstreet if it were true.[37]

In fairness to Professor Carhart, there is ample evidence to support his thesis as well, including the aforementioned Official Reports[38] of the battle, the memoirs of Major Henry McClellan of Stuart's staff,[39] and, perhaps most compelling, Stuart's own after action report of the battle.[40] Professor Carhart's theory is plausible, despite the gaps in reasoning. He is extremely well-versed in military history as is evidenced in his recitations of previous momentous battles,[41] his knowledge of period weaponry,[42] and his assessment of tactical decision-making.[43]

Lost Triumph is well organized, both logically and chronologically. Professor Carhart writes in clear and passionate prose, which makes the

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[35] There is also evidence opposing this view. *See, e.g.*, THOMAS B. BUELL, THE WARRIOR GENERALS, COMBAT LEADERSHIP IN THE CIVIL WAR 232 (1997).

[36] CARHART, *supra* note 1, at 171.

[37] Perhaps even more disturbingly, this lack of disclosure, if the plan was carried out successfully, would have resulted in friendly troops unexpectedly converging on the objective, which could have had disastrous consequences. Carhart does not acknowledge this potential effect when defending his theory.

[38] THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (1889).

[39] CARHART, *supra* note 1, at 174 (citing H.B. MCCLELLAN, I RODE WITH JEB STUART (1958) (wherein McClellan refers to the plan to attack the Union rear)).

[40] CARHART, *supra* note 1, at 197, 198.

[41] *See, e.g.*, *id.* at 156.

[42] *See, e.g.*, *id.* at 206.

[43] *See, e.g.*, *id.* at 153.

book an enjoyable read. Other than the previously noted deficiencies, the author works to examine and rationalize the counterpoints to his arguments in a balanced approach. *Lost Triumph*, although devoid of photographs or illustrations, provides adequate and relevant maps of the various battles to demonstrate the author's points. Professor Carhart frequently refers to both period and present terrain and vegetation surrounding the Gettysburg battlefield, and photographs to illustrate these points would have been useful.

Taken as a whole, Professor Carhart's book is well researched, tightly focused, and an exciting read. *Lost Triumph*, while a welcome addition to any historian's civil war library, is of particular interest to military officers. Perhaps unintentionally, Professor Carhart underscores the point that even a flawlessly conceived and executed plan, supported with appropriate resources, can be defeated by an enemy combatant commander who possesses the timeless Army value of personal courage.[44] Custer's stand against Stuart's cavalry is a perfect example. It is an apt reminder to military officers in a time of war that personal courage when leading subordinates can make the difference in a battle or campaign and can even change the course of history. *Lost Triumph* is a must-read for military officers and Civil War aficionados, and neither faction will be disappointed.

[44] U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP 2-34 (31 Aug. 1999).

GETTSYBURG JULY 1[1]

REVIEWED BY MAJOR JERRETT W. DUNLAP, JR.[2]

Hundreds of the Confederates fell at the first volley, plainly marking their line with a ghastly row of dead and wounded men, whose blood trailed the course of their line with a crimson stain clearly discernable for several days after the battle, until the rain washed the gory record away.[3]

Dr. David G. Martin's epic account of the first day of the Civil War's most decisive battle[4] ensures that neither rain nor time itself will wash away the heroic acts of 1 July 1863. Dr. Martin undertakes to write "the most detailed account of the first day's battle yet written."[5] He also attempts to investigate the numerous controversies surrounding day one of the battle.[6] Dr. Martin proposes that "the decisive battle between Lee and Meade could have occurred anywhere between York, [Pennsylvania], and Frederick, [Maryland]."[7] He concludes that the battle occurred at Gettysburg on 1 July 1863 due to "specific decisions" of the commanding generals in the days immediately prior to, as well as the morning of, the battle.[8] Dr. Martin's narrative is an exhaustive work that marches through each aspect of the battle with painstaking detail. The result is a resource that belongs in all devoted Civil War students' reference collection. *Gettysburg July 1* also serves as a useful text for a judge advocate officer leadership development program (LDP), because of its descriptions of the leadership styles, examples, and decisions of the battle's prominent leaders. Ultimately, a thorough reading of *Gettysburg July 1* leaves the reader with an intimate familiarity of day one of the battle, its leaders, and the heroic struggle of the tens of thousands of brave American Soldiers who fought that day, which time cannot wash away.

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[1] DAVID G. MARTIN, GETTYSBURG JULY 1 (First Da Capo Press ed., 2003) (1995).

[2] U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] MARTIN, *supra* note 1, at 236 (quoting JOHN D. VAUTIER, HISTORY OF THE 88TH PENNSYLVANIA VOLUNTEERS IN THE WAR FOR THE UNION, 1861-1865 135 (1894)).

[4] *See id.* at 9.

[5] *Id.* at 10.

[6] *See id.*

[7] *Id.*

[8] *Id.*

Foundations

Dr. Martin dedicated *Gettysburg July 1* to his mother and father, "who fostered and nourished [his] passion for history from the beginning."[9] It is clear that passion forms the foundation of such a well-researched and thorough narrative. Dr. Martin states that he has been "longing" to write this book since adulthood.[10] This work is not his first foray into historical authorship, however. He received a Ph.D. from Princeton University and has authored over twenty books on the Civil War and the Revolutionary War.[11] His stellar credentials and detailed research and analysis, combined with a passion for history, all result in a professional reference book about the first day of battle at Gettysburg that a student of the Civil War can turn to again and again.

Gettysburg July 1 is not for the uninitiated Civil War historian or those lacking an understanding of the battle. It contains 736 pages, 2,652 endnotes, and an eighteen-page bibliography detailing the hundreds of sources relied upon.[12] Dr. Martin puts the battle at Gettysburg under the microscope again and again. He describes all aspects of the battle, to include an analysis of the terrain, the number and disposition of troops, orders and guidance from leaders, quotations and personal accounts of the battle, and causalities.[13] Although this level of detail may not be appropriate for readers desiring an overview of the battle,[14] it is fitting for more serious students of the battle. He also analyzes numerous major and minor controversies throughout the book,[15] many of them well

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[9] *Id.* at 5.

[10] *Id.* at 6.

[11] *See* Longstreet House, http://www.longstreethouse.com/author.html#dm (last visited Dec. 2, 2005) (describing Dr. Martin's biography).

[12] *See* MARTIN, *supra* note 1, at back cover (indicating that the sources are "primary, first-hand sources, many of which are unpublished and some of which have never been cited before.").

[13] *See, e.g.*, *id.* at 102-40 (using thirty-eight pages and 225 endnotes to address the twenty-five minute fight between Brigadier General (BG) Lysander Cutler's brigade and BG Joseph R. Davis' brigade).

[14] *See, e.g.*, *id.* at 11-12 (providing an overview of General (GEN) Robert E. Lee's summer offensive into Pennsylvania in only two paragraphs). Given the small amount of background information provided, Dr. Martin clearly assumes that the reader has at least a moderate level of familiarity with the Civil War.

[15] *See, e.g.*, *id.* at 97 (meeting between Major General (MG) John F. Reynolds and BG John Buford at the Seminary); *id.* at 105-06 (separation of 147th New York from the 76th New York and the 56th Pennsylvania); *id*. at 138 (number of Confederate prisoners taken during BG Davis' attack at the Railroad Cut); *id.* at 145-49 (direction of the shot that

known to students of the battle. He first describes the nature of each controversy, then examines multiple accounts describing the facts surrounding the controversy, and finally compares and discusses which version is most reliable.[16] Dr. Martin's analysis is always well documented, balanced, and reaches a logical result. Given his impeccable qualifications and research, it is certainly difficult to argue with his conclusions, which always appear to be reasonable. The examination of these controversies, when combined with the detailed treatment of the battle, provides interesting information that should appeal to serious students of the battle. Nevertheless, this may prove to be more than a Gettysburg neophyte bargained for.

Dr. Martin lays the foundation for the battle by providing specific information regarding to the location and movement of GEN Robert E. Lee's Army of Northern Virginia beginning on 26 June 1863.[17] He then discusses in detail GEN Lee's strategic objective, namely to locate and defeat the Army of the Potomac.[18] The discussion includes numerous sources to establish GEN Lee's intent, which was to concentrate the bulk of his forces against portions of Major General (MG) George G. Meade's forces,[19] while avoiding a "pitched battle as the aggressor."[20] Dr. Martin also provides a similar description of the location and movements of MG Meade's Army of the Potomac and his objectives.[21] Major General

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killed MG Reynolds); *id.* at 160 (disposition of BG James J. Archer's sword); *id.* at 291-96 (meeting between BG Francis C. Barlow and BG J. B. Gordon (*see infra* note 31)).

[16] *See, e.g.*, *id.* at 59-67. Not only is Chapter III entitled *Opening Shots*, but it describes the numerous accounts surrounding who fired the first shot of the battle.

[17] *See id.* at 12.

[18] *See id.* at 16.

[19] Major General Meade took command of the Army of the Potomac upon the relief of MG Joseph Hooker on 28 June 1863. *See id.* at 33-36.

[20] *Id.* at 17; *see also id.* at 17 and 596 n.25 (quoting Letter from MG Isaac R. Trimble to John B. Bachelder (Feb. 8, 1883) (on file with the N.H. Hist. Soc'y) (indicating GEN Lee told MG Trimble of his intention to "throw an overwhelming force against the enemy's advance," in a conversation with on the afternoon of 25 June 1863); MARTIN, *supra* note 1, at 17 (quoting GEN Robert E. Lee, The Gettysburg Campaign Report (Jan. 20, 1864), *in* 27 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, pt. 2 at 313, 318 (Gov't Print. Off., 1889), *available at* http://cdl.library.cornell.edu/moa/browse.monographs/waro.html (last visited Jan. 9, 2006) [hereinafter WAR OF THE REBELLION] ("It had not been intended to deliver a pitched battle so far from our base unless attacked."); *id.* at 17-18 (quoting Letter from Lieutenant General (LTG) James Longstreet to MG Lafayette McLaws (July 25, 1873) (Lafayette McLaws Papers on file with S. Hist. Collection, Univ. of N.C., Chapel Hill), *available at* http://www.lib.unc.edu/mss/inv/m/McLaws,Lafayette.html (stating the intended campaign would be "one of offensive strategy, but defensive tactics.")).

[21] MARTIN, *supra* note 1, at 33-43.

Meade indicated his intention was to move north after crossing the Potomac in the direction of the Susquehanna, "keeping Washington and Baltimore well covered, and if the enemy is checked in his attempt to cross the Susquehanna, or if he turns to Baltimore, to give him battle."[22] While Dr. Martin's description of the road to the battle and the commanders' intentions clearly provides the reader with a solid foundation about the position of the two armies and the objectives of their commanders, and presents a persuasive case in support of Dr. Martin's thesis regarding where the battle could have occurred, it is in no way a primer for readers who are not familiar with the history of the war leading up to the dramatic battle at Gettysburg.[23]

The Union Carries the Morning

After setting the stage for the battle, Dr. Martin describes the opening encounter between Brigadier General (BG) John Buford's Union Cavalry troopers and the Confederate Soldiers of MG Henry Heth's Division, a part of Lieutenant General (LTG) A. P. Hill's Third Army Corps.[24] After describing the position and movement of MG Heth's brigades, he provides a similar explanation of the deployment of BG Buford's two Cavalry brigades along McPherson's Ridge and the strategy and weaponry he employed.[25] Dr. Martin then gives a compelling and detailed description of the brawl between BG Buford's cavalrymen and MG Heth's infantrymen.[26] Throughout *Gettysburg July 1*, Dr. Martin effectively uses maps to illustrate unit positions, movements, and region topography.[27] Dr. Martin positions the maps within the chapters at regular intervals.[28] When combined with the detailed minute-by-minute description of unit location and movement, the maps allow the reader to clearly visualize the development of the battle. The narrative describes the arrival of MG Reynolds, Commander of the Union Army's left wing, followed by BG Lysander Cutler's brigade and BG Solomon Meredith's Iron Brigade, as well as the ensuing

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[22] *Id.* at 37 (quoting Telegram from MG George Meade to MG Henry Halleck (June 28, 1863), *in* WAR OF THE REBELLION, *supra* note 20, pt. 1, at 61.
[23] *See supra* notes 7-8 and accompanying text.
[24] *See* MARTIN, *supra* note 1, at 59-88.
[25] *See id.* at 69-82.
[26] *See id.* at 82-88.
[27] *See id.* at 8 for an index of maps.
[28] *See, e.g.*, *id.* maps 10, 11, and 12 (depicting Early's attack at 1515 hours and 1530 hours, and Coster's Last Stand at 1545).

fight during the morning between these Union brigades and the Confederate brigades of BG James J. Archer and BG Joseph R. Davis.[29] He fills the account of this struggle with compelling examples of personal bravery to reinforce the tremendous sacrifices made by the brave Soldiers in both factions.[30]

His organization addresses the battle chronologically, by unit composition, position and action, and then by subject matter.[31] This method provides an orderly, thorough narrative. However, occasionally this method results in Dr. Martin covering the same material more than once.[32] It also requires Dr. Martin to refer to an earlier time period as he shifts from one unit to another, if the action and subject matter throw off his chronology.[33] Although Dr. Martin's organizational style provides some distraction, it does not significantly detract from the work as a whole. In fact, it only reinforces the conclusion that *Gettysburg July 1* is most useful as a reference work.[34] The reader can refer to a specific

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[29] *See id.* at 89-102.

[30] *See, e.g.*, *id.* at 115 (depicting a 76th New York Soldier's dedication to duty); *see also id.* at 117 (describing the "true Irish grit" of Sergeant (SGT) William A. Wybourn, 147th New York, as he saved the Regimental Colors (quoting N.Y. MONUMENTS COMMISSION FOR THE BATTLEFIELDS OF GETTYSBURG AND CHATTANOOGA, FINAL REPORT ON THE BATTLEFIELD OF GETTYSBURG 993 (1902) (citing Cooey, *Cutler's Brigade*, NAT'L TRIB. (July 17, 1915))).

[31] For example, Chapter VII, *Collapse of the XI Corps*, begins by describing XI Corps' arrival on the battlefield and deployment north of Gettysburg beginning around 1200 hours. Dr. Martin describes the deployment of each division and brigade, regiment by regiment. He then describes the move of BG Barlow's First Division, XI Corps, to Blocher's Knoll. Next, he outlines the assault of MG Jubal A. Early's division against Barlow's division, and the collapse of BG Barlow's division. Finally, he describes and analyzes the controversy surrounding the encounter of BG J. B. Gordon with the then wounded BG Barlow, and the history related to that controversy. After concluding this analysis, Dr. Martin moves on to the collapse of another unit in XI Corps, i.e., Colonel Wladimir Krzyzanowski's brigade. *See* MARTIN, *supra* note 1, at 257-96.

[32] *See, e.g.*, *id.* at 109-10, 459 (describing in two separate sections the same account of SGT Henry Cliff, Company F, 76th New York, and his suffering after being wounded.) Incidentally, this account fits nicely into a discussion of obligations regarding the treatment of wounded on the battlefield as a part of a judge advocate officer LDP. *See infra* note 44 and accompanying text.

[33] *See, e.g.*, *id.* at 140-49 (shifting from the fight between BG Cutler's brigade and BG Davis' brigade from 1020 to 1115 hours, to MG Reynolds' death at approximately 1030 hours, then again to the fighting between the Iron Brigade and BG Archer's brigade, which took place at approximately the same time as the Cutler-Davis fight).

[34] Further reference tools contained in *Gettysburg July 1* are found in the appendices, which are excellent sources of information. They include an order of battle of all Union and Confederate commanders, down to the regimental level, who were involved on 1 July 1863. *See id.* at 570-80. Appendix II contains strength and casualty data. *See id.* at 581.

section or topic and receive a complete, detailed analysis of that section, without having to refer to other sections.

The Tide Turns

Dr. Martin describes the arrival of MG Oliver O. Howard's XI Corps and its deployment and ultimate collapse in his usual detail, including the many controversies surrounding its implosion.[35] Although not as well known as some other assaults on 2 or 3 July 1863, this was some of the fiercest fighting of the battle. Dr. Martin documents this with compelling empirical data.[36] However, the personal accounts of the battle that he recites again and again provide the most compelling account of the ferocity of the combat.[37] *Gettysburg July 1* also details the retreat of MG Abner Doubleday's I Corps after its determined stand on McPherson's ridge, and again on Seminary ridge.[38]

Prelude to Days Two and Three

The final chapter in *Gettysburg July 1* describes the decisions surrounding the regrouping of Union forces on and around Cemetery Hill after the chaotic retreats of I and XI Corps and the Confederate forces' failure to attack.[39] This chapter contains Dr. Martin's analysis of the decisions made by both Union and Confederate leaders that set the stage for the battle on days two and three. Dr. Martin begins by describing the decisions MG Howard made after he succeeded the late MG Reynolds as

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There is also a detailed topographical appendix, as well as a chronological and meteorological index. *See id.* at 582-91. Finally, there are tables of Medal of Honor winners and battery armaments from day one. *See id.* at 592-93.

[35] *See id.* at 167-335.

[36] *See, e.g., id.* at 315 (calculating total casualties in BG Coster's brigade to be 83.5 percent, the highest percentage casualty rate of any Union unit in the battle); *see also id.* at 236 (recounting casualties of BG Alfred Iverson's brigade at sixty-five percent, including the 23d North Carolina, which suffered casualties of eighty-nine percent). Brigadier General Iverson's brigade's casualties were as bad as those of MG George E. Pickett's division on 3 July 1863. *See id.* at 236.

[37] *See, e.g., id.* at 322 (describing the heroics of CPT Francis Irsch, 45th New York, who was awarded the Medal of Honor). The eight Medals of Honor awarded for action on 1 July 1863 are in Appendix V. *See id.* at 592.

[38] *See id.* at 342-466.

[39] *See id.* at 467-569.

Union Commander.[40] He then analyzes MG Winfield S. Hancock's impact on the Union forces as they regrouped on Cemetery Hill, [41] and examines some of GEN Lee's decisions and mistakes in battle.[42] Finally, Dr. Martin considers MG Henry W. Slocum's decisions in leading the nearly 10,000 man XII Corps.[43] The final chapter is a significant departure in style from the preceding chapters of *Gettysburg July 1*. Whereas the majority of the narrative focuses on the heated action of the battle, the final section takes place as the fighting of day one draws to a close and the leaders' decisions take center stage for determining the remainder of the battle. This section may be the most interesting as Dr. Martin describes the various leadership styles at play and shows how those leadership styles have made a direct impact on history.

Leadership Lessons

The detailed examination of the four generals' leadership styles is ideal for use in the LDP. A staff judge advocate could assign subordinate officers to read the different accounts and draw lessons learned from the leadership styles. For example, the program could take place over four separate sessions, with all officers reading the materials, and one officer leading the discussion about a different general each week. Another option would be to assign four judge advocates to role-play the four named generals. The actors would then describe their leadership styles and participate in a debate between the four generals on the decisions they made. As *Gettysburg July 1* is so full of individual accounts directly relevant to judge advocates, it is fertile ground for harvesting many valuable examples and lessons related to the practice of military law.[44]

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[40] *See id.* at 467-73.
[41] *See id.* at 478-95.
[42] *See id.* at 498-514.
[43] *See id.* at 523-41.
[44] *See, e.g.*, MARTIN, *supra* note 1, at 53 (Union commanders given authority to order instant death for Soldiers derelict in their duties); *see also id.* at 163 (treatment of BG Archer as a prisoner of war); *id.* at 316 (treatment of prisoners of war); *id*. at 233, 290, 314-15, 350-53 (valor in protecting the colors); *id*. at 112-13, 220, 288, 468 (friction of war).

Conclusion

Gettysburg July 1 is certain to remain a classic study of this important battle in American history for years to come. Its true value lies in its in-depth research and keen analysis of the battle as well as the many controversies surrounding 1 July 1863.[45] Dr. Martin shows how the commanders' decisions, together with their leadership styles, had a direct impact on when and where the two armies fought the battle.[46] This narrative belongs on the shelf of all Civil War students. As such, it will ensure that the record of the brave Union and Confederate Soldiers will not wash away with time.[47]

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[45] *See id.* at 10.
[46] *See id.*
[47] *See supra* note 3 and accompanying text.