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Defining, Punishing, and Membership in the Community of Nations- Material Support and Conspiracy Charges in Military Commissions

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ARTICLES

DEFINING, PUNISHING, AND MEMBERSHIP IN THE COMMUNITY OF NATIONS: MATERIAL SUPPORT AND CONSPIRACY CHARGES IN MILITARY COMMISSIONS

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INTRODUCTION

Impulse has clashed with reflection throughout the American history of military commissions. The Framers had a clear favorite in this fight. Deploring the frequency of treaty violations and assaults on foreign ambassadors in the Articles of Confederation period,[1] they gave Congress authority to "define and punish . . . Offenses against the Law of Nations"[2] to inspire deliberation that the Articles of Confederation period had lacked. However, impulse has frequently threatened to supplant reflection in this exigent realm.

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1. Madison cautioned that the Articles encouraged "any indiscreet member to embroil the Confederacy with foreign nations." *See* THE FEDERALIST NO. 42, 262 (James Madison) (Clinton Rossiter ed., 1961).

2. U.S. CONST. art. I, § 8, cl. 10.

In the aftermath of September 11, President Bush established commissions unilaterally, only to be rebuffed by the Supreme Court.[3] While the Obama administration helped remedy the procedural infirmities that drove the Supreme Court's decision, the government has returned to impulse's well in two cases, one pending before the District of Columbia Circuit and the other just decided, arguing that international law does not limit military commission jurisdiction over charges of "material support" to terrorism.[4] According to the government, Congress's war powers[5] underwrote the development of a United States "common law of war" which renders the Define and Punish Clause superfluous.[6] Critics of the government's view argue, in contrast, that the Define and Punish Clause *precludes* the use of military commissions to try any charges of material support. This Article argues that both the government and its critics have misread the Framers' intent, American practice, and the limits of international law.

The problem in the two D.C. Circuit cases, *United States v. Hamdan* and *United States v. al Bahlul*, arises because of the exceptional breadth of the domestic material support statute, which bars material support of both terrorist activity and terrorist groups.[7] For reasons that make sense in the domestic context, the statute bars providing money, services, training, and expert advice or assistance.[8] Providing any amount of money, no matter how small, to a group such as Hamas designated by the Secretary of State as a "foreign terrorist organization" violates the domestic statute. Congress largely imported this broad prohibition in the Military Commission Acts (MCAs) of 2006 and 2009. While the MCA prohibition is limited to Al Qaeda and

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3. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 559 (2006).

4. *See* Hamdan v. United States (*Hamdan II*), 696 F.3d 1238 (D.C. Cir. 2012), (reversing United States v. Hamdan (*Hamdan I*), 801 F. Supp. 2d 1247 (Ct. Mil. Comm'n Rev. 2011)); United States v. al Bahlul, 820 F. Supp. 2d 1141 (Ct. Mil. Comm'n Rev. 2011).

5. U.S. CONST. art. I, § 8, cl. 11–14 (governing initiation of hostilities and the regulation of the armed forces).

6. *See* Brief for Respondent at 25, *Hamdan II*, 696 F.3d 1238 (No. 11-1257) (D.C. Cir. Jan. 17, 2012) [hereinafter Hamdan Brief for the United States], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/01/Hamdan-Brief-for-US-As-Filed.pdf.

7. *See* 18 U.S.C. § 2339A (2012).

8. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2713 (2010).

associated forces, it clearly reaches acts such as low-level financial support that have never been considered violations of international law.[9] Applying the statute to acts committed before its enactment would trigger a clash with the principle of legality, inscribed in the Constitution's Ex Post Facto Clause, which requires that a prospective defendant receive fair notice that his contemplated conduct is criminal.[10] That clash with the principle of legality dominates appeals of the material support convictions of Salim Hamdan (Osama bin Laden's former driver) and Al Qaeda propagandist Ali Hamza al Bahlul.

The scope of military commission jurisdiction over charges such as material support entails questions far broader than the two cases now on appeal. These questions involve the role of international law in the structure of the Constitution and the United States' options in meeting the continuing threat of terrorism. Unfortunately, the principal schools of thought on military commission jurisdiction have not made arguments that do justice to the stakes involved.

The government's argument that a US common law of war allows it to bypass the Define and Punish Clause would have troubled the Framers. The Framers had carefully studied the early scholars (publicists) of international law such as Vattel, Grotius, and Pufendorf. They admired the development of international law, which had helped set the stage for the constraints favored by the Framers on arbitrary government authority. Vattel asserted that international law is important precisely because individual nations display defects in judgment when left to their own devices.[11] Hamilton, arguing in a New York court that a state law violated the law of nations, had viewed compliance with that law as a matter of "national character."[12] Edmund Randolph, the first Attorney General, advised that "every change [in the law of nations] is at the peril

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9. 10 U.S.C. §§ 948a(7), 950t(25) (2009).

10. *See* DAVID LUBAN, JULIE R. O'SULLIVAN, & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 14–15 (2010).

11. EMMERICH DE VATTEL, THE LAW OF NATIONS 137 (London 1797).

12. *See* Rutgers v. Waddington, Opinion of the New York Mayor's Court, Aug. 27, 1784. There is no official report of the case. Documents from the case are collected in 1 THE LAW PRACTICE OF HAMILTON: DOCUMENTS AND COMMENTARY 284–543 (Julius Goebel ed., 1964). The opinion of the court is reprinted in *id.* at 393–419 [hereinafter LAW PRACTICE].

of the nation which makes it."[13] From the Framers' perspective, a "US common law of war" would have made as much sense as a "US law of physics."

Moreover, the overwhelming weight of US practice has tracked the Framers' concerns. US practice *informs* the development of international law without creating a distinctive body of law that supplants the law of nations. In the Civil War and World War II, the US tailored prosecutions to conduct such as sabotage, espionage, and the killing of civilians which has traditionally been tried in military commissions. To conform to our allies' reading of international law, American prosecutors at Nuremberg narrowed the amorphous category of "membership offenses" to participation in units that specialized in killing civilians and the knowing provision of substantial financial support to such groups. The exception to this trend is Andrew Jackson's First Seminole War military commission trial for an elderly Scottish trader, Alexander Arbuthnot, a vocal but almost certainly nonviolent defender of Native American rights.[14] Historians have cast Jackson's resort to a military commission as an outlier, not an example to be followed.[15]

If the US common law of war approach fails to persuade, so does the opposing argument, which I call the categorical approach. Backers of this theory, including the D.C. Circuit panel in *Hamdan v. United States*, have asserted that unless international bodies have endorsed prosecution of the precise offense charged in military commissions, the law of nations provides inadequate authorization under the Define and Punish Clause.[16] The categorical approach fails to ask whether the test of jurisdiction should be functional, relying on the conduct at

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13. Who Privileged From Arrest, 1 Op. Att'y Gen. 26, 27 (1792).

14. *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 27–31 (2005) (discussing the legal impact of Jackson's decisions); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 532–33 (2007) [hereinafter Kent, *Global Constitution*] (analyzing the incident); *see generally* Deborah A. Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 J. EARLY REPUBLIC 559 (2008) (interpreting debate in Congress and in popular press).

15. *See* Rosen, *supra* note 14, at 590–95.

16. *See Hamdan II*, 696 F.3d 1238, 1249–52 (D.C. Cir. 2012); Kevin Jon Heller, *Why Hamdan's Material Support Convictions Violate the Ex Post Facto Clause*, OPINIO JURIS (Aug. 7, 2008, 8:19 AM), http://opiniojuris.org/2008/08/07/why-hamdans-material-support-convictions-violate-the-ex-post-facto-clause.

issue rather than the label that the charge represents. Just as the US common law of war view narrows US practice to fit its argument, the categorical approach narrows international practice. Aiding and abetting liability, for example, is analogous to a subset of material support charges that entails concrete assistance to unlawful violence or knowing performance of a substantial role in violent organizations.

The Framers did not share the categorical approach's embrace of arbitrary labels. Madison in Federalist No. 37 distinguished law's "course of practice" from science's "perfectly accurate . . . delineations."[17] The difficulty of codification also argued for a measure of deference to Congress. In an important early case on the Define and Punish Clause, Justice Story observed that international law's resistance to facile formulas led the Framers to entrust Congress with the "power to define" the law of nations.[18] The certainty of the categorical approach would have earned a skeptical rejoinder from the pragmatic Framers.

The categorical approach also ignores the profound concern that the publicists and Framers had with violent nonstate actors who defied state authority. Vattel warned against the dangers of individuals and groups that embroiled states in war, while Jay attributed wars with Native American nations to the excesses of border state officials and residents.[19] Courts have typically upheld legislation under the Define and Punish Clause that targets individuals such as pirates and counterfeiters who threaten America's standing in the world.[20] Terrorists constructing a haven in one nation as they launch attacks on another surely fit into the same category of individuals who threaten international cooperation.

To understand why both sides fall short, I advance a membership theory of the Define and Punish Clause that relies on Enlightenment ideas about the psychology of law. I argue that the Framers drafted the Define and Punish Clause to enhance the deliberation achieved by membership in the

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17. THE FEDERALIST NO. 37, *supra* note 1, at 224 (James Madison).

18. United States v. Smith, 18 U.S. 153, 159 (1820).

19. THE FEDERALIST NO. 3, *supra* note 1, at 44 (John Jay) (attributing the existence of several such conflicts to improper behavior of border states and their residents).

20. *See generally* United States v. Arjona, 120 U.S. 479 (1887).

community of nations. Publicists like Vattel claimed that accepting international norms would temper the short-term impulses toward vanity and revenge that had convulsed Europe. Membership would discipline those impulses, allowing a longer-term perspective to emerge. The Framers sought to promote this turn toward reflection through enactment of the Define and Punish Clause.

The Clause also contained in miniature the separation of powers framework that the Framers had constructed to promote deliberation. Checks and balances would neutralize the "momentary inclinations" that had cast the Articles of Confederation period into near anarchy.[21] Under the Clause, *Congress*, not the President, defined the law of nations. Congressional involvement paved the way for public debate between the political branches. The necessity for such debate freed decisions from the monolithic turn of mind that can afflict the executive branch.[22] Hamilton, who had argued in *Rutgers v. Waddington* that a New York court had to interpret state law in light of international law, also saw a role for courts in curbing the sometimes capricious "humors" of the political branches and squaring legislation under the Clause with the contours of the law of nations.[23]

However, the Framers and subsequent courts recognized that to define the law of nations, Congress required a zone of deference. International law, like other "institutions of man," did not submit readily to the "efforts of human sagacity."[24] Madison, recalling his experience in drafting the Constitution, also noted with some ruefulness that the codification of any body of law involved the "unavoidable inaccuracy" of words.[25] Defining international law therefore required the exercise of judgment, not merely the diligence of a scribe. Without a measure of deference, legislative fear of second-guessing would

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21. *See* THE FEDERALIST NO. 78, *supra* note 1, at 468 (Alexander Hamilton).

22. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1415–16 (2009) (discussing psychological influences promoting groupthink); *cf.* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 132 (2012) (praising checks on decision making provided by military lawyers consulting on targeting decisions).

23. *See* THE FEDERALIST NO. 78, *supra* note 1, at 468 (Alexander Hamilton).

24. *See* THE FEDERALIST NO. 37, *supra* note 1, at 224 (James Madison).

25. *Id.* at 225.

hobble Congress's power under the Define and Punish Clause,[26] leaving it to the fate Madison depicted for most previous democratic experiments: "short in their lives . . . [and] violent in their deaths."[27]

The case for deference was even stronger because the community of nations that the new Republic sought to join was hardly a utopia: the Framers knew that European states had often honored international law mainly in the breach.[28] In their more selfish moments, European powers might view America not as a member of a community entitled to respect but as "prey" ripe for the taking.[29] Indeed, the Framers included a number of provisions of the Constitution, such as the Foreign Gifts Clause and the requirements for election of members of the House of Representatives, precisely to minimize the dangers of foreign influence. A decision such as *Arjona* exhibited this measure of deference, viewing the counterfeiting of foreign currencies within the United States as undermining global trade and therefore a violation of the law of nations, despite the lack of an express prohibition of counterfeiting in treaties or customary international law.[30] Counterfeiters, like pirates, were governed by short-term impulses like greed that threatened to disrupt global cooperation. The Define and Punish Clause aimed to control the harm arising from such impulses, in order to preserve space for long-term perspectives.

The deference the Framers expected is hardly foreign to international law today, which would also accord a measure of deference to individual states' assessments of their obligations. The principle of complementarity in international law requires that international tribunals accord deference to state

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26. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 734 (2008) (observing that "Congress's power to 'define and punish . . . Offences against the Law of Nations' gives the legislature substantial authority to decide what conduct violates international law").

27. *See* THE FEDERALIST NO. 10, *supra* note 1, at 76 (James Madison).

28. *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 397–98 (2012).

29. *See* THE FEDERALIST NO. 62, *supra* note 1, at 379 (James Madison).

30. *See* United States v. Arjona, 120 U.S. 479, 484–85 (1887).

investigations of crimes against humanity.[31] This approach builds state capacities for enforcing legal norms. Post-September 11 Security Council resolutions that stress international cooperation in counterterrorist efforts fortify the argument for granting states a quantum of discretion.[32]

Based on this domestic and international authority, US courts should extend a measure of deference to current attempts by Congress to address the threat posed by terrorist groups such as Al Qaeda. However, as the plurality opinion by Justice Stevens hinted when the Supreme Court struck down President Bush's unilateral establishment of military commissions, that deference cannot be absolute.[33] Some judicial scrutiny is necessary to preserve the deliberative benefits of the law of nations that the Framers contemplated in the Define and Punish Clause.

To realize the membership conception in military commission trials, courts should defer to Congress's establishment of either a formal or a functional nexus between the charges it wishes military commissions to adjudicate and conduct charged in past military commission proceedings. As the champions of the categorical approach would acknowledge, a charge such as aiding and abetting the killing of civilians may be tried in a commission, because international tribunals have tried such charges in the past. Going beyond such formal links, a functional nexus entails an analogy between the underlying *conduct at issue* in past proceedings and the *conduct alleged* in current trials. Courts can narrowly interpret broad charges of material support, permitting military commission jurisdiction only over acts that parallel aiding and abetting liability. Typically, charges should entail a significant link to violence or knowing performance of a substantial role in Al Qaeda. In the cases before the D.C. Circuit, Hamdan's role as bin Laden's driver would not meet this jurisdictional predicate, although al Bahlul's conduct as bin Laden's personal propagandist would.

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31. *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 67–68 (2008).

32. *See* S.C. Res. 1373, ¶ 1(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

33. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 558–662 (2006).

This Article breaks new ground both normatively and descriptively. It relies on the Enlightenment's psychology of law as an interpretive lens for both the enactment of the Define and Punish Clause *and* subsequent US practice. Other scholars have noted the Framers' distrust of short-term impulse and their quest for a structure that would encourage longer-term perspectives. Previous work, however, has not fully analyzed the Define and Punish Clause's incorporation of the Framers' structural innovations such as separation of powers.[34] In addition, other scholars have not situated a zone of deference for Congress's exercise of power under the Clause within the Framers' fear of foreign factions.

The approach taken in the Article also presents advantages over both the US common law of war and categorical approaches. Unlike the US common law of war approach, the membership approach is consistent with the Framers' commitment to the law of nations. Because the Article rejects the categorical approach's rigid preclusion of material support charges in military commissions and instead recommends a functional test for tailoring such charges, it dovetails with the pragmatic strand found both in the Framers' thought and international law doctrines such as complementarity.

The Article is in five parts. Part I explores the Enlightenment psychology of law, arguing that it comprises a membership view of a global community. Part II explores the influence of this approach on the Framers. It demonstrates that the publicists' distrust of short-term impulses played a major role in the Constitution's treatment of the law of nations. Part III offers an account of the membership approach that encompasses American practice from the Founding Era to the present, including the Civil War, World War II, and the Nuremberg tribunals. With the exception of Andrew Jackson's commission for Arbuthnot, American practice has consistently followed the membership conception. With that backdrop in place, Part IV discusses the special problems caused by the MCAs' inclusion of material support charges as offenses triable

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34. *See* Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 939–40 (2010); *see also id.* at 1000 (describing the Define and Punish Clause as a "minor provision").

by military commission. Part IV also describes the US common law of war and categorical approaches to this problem, and the drawbacks of each. It devotes particular attention to the D.C. Circuit's application of the categorical test in *Hamdan II.* Part V applies the membership approach to the problem of material support. It argues that a tailored approach to conduct constituting material support fits US precedent and practice and harmonizes with international law. Part V also addresses charging conspiracy in military commissions, concluding that charging conspiracy as a mode of liability, like aiding and abetting, is appropriate for war crimes such as killing civilians. However, the law of nations does not support charging conspiracy as a separate offense that rests on mere agreement to commit a crime.

I. *THE MEMBERSHIP CONCEPTION AND THE ENLIGHTENMENT'S PSYCHOLOGY OF LAW*

The Enlightenment thinkers who influenced the Framers saw membership in a community of nations as an aid for salutary deliberation that would constrain government. They argued that domestic and international law corrected for pervasive flaws in individual psychology. As Pufendorf noted, "not all of the faculties of man act continually or in a uniform manner; [s]ome . . . are excited, and then controlled and directed, by an impulse from within."[35] European thinkers claimed that monarchs thirsting for glory and revenge had turned the continent into a landscape of permanent war and gold-encrusted palaces that yielded grim lives for ordinary people.[36]

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35. 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO 3 (James B. Scott ed., Frank G. Moore trans., 1927) (1682) (describing insight that dovetails with recent work in cognitive psychology that suggests that people make decisions based on inadequate information). *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 245–48 (2011); *see also* Daniel Read, *Intertemporal Choice, in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 424, 428–29 (Derek J. Koehler & Nigel Harvey eds., 2004) (noting that individuals prefer "smaller-sooner reward"). See Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law,* 96 IOWA L. REV. 195, 205–11 (2010) and Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?,* 112 YALE L.J. 1011 (2003), for a discussion of the role of cognitive biases in national security policymaking and judicial review.

36. *See* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 9–12 (1977); *cf.* PIERRE FORCE, SELF-

To counter these impulses, the philosophers championed the development of institutions and authorities with three elusive attributes. Sound institutions and authorities had to bind officials and private individuals, adapt to changing times, and maintain continuity with abiding values.[37]

Without such institutions and authorities, Pufendorf cautioned that ruinous impulses often overwhelm both state officials and private individuals.[38] Governed by impulse, private individuals and nations fail to act consistently, undermining cooperation and making long-term investments of time and effort impossible.[39] By providing standards for members of the international community, thinkers like Pufendorf and Vattel set a longer time horizon.[40]

For the Enlightenment thinkers, the ascendancy of international law sprang from the interdependence of nations in growing global commerce. Rulers who wished to finance wars and palaces with public debt would be chastened by the negative reactions of international markets.[41] Fear of a prompt market response would temper the "sudden arbitrary actions of the sovereign" which Montesquieu and others feared.[42] An

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INTEREST BEFORE ADAM SMITH: A GENEALOGY OF ECONOMIC SCIENCE 165–67 (2003) (analyzing Adam Smith's view of envy as a disabling impulse); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 55 (1995) (discussing Smith's listing of passions that overwhelmed judgment, including "envy, malice, the longing for revenge, parochial loyalty . . . [and] zealotry").

37. *See* HIRSCHMAN, *supra* note 36, at 10–13.

38. *See* PUFENDORF, *supra* note 35, at 92; *see also* HIRSCHMAN, *supra* note 36, at 53–54 (citing David Hume).

39. PUFENDORF, *supra* note 35, at 92 (noting that each person, without the benefit of law, would tend to be an "inconstant friend"); *cf.* HIRSCHMAN, *supra* note 36, at 53–54 (discussing Pufendorf's influence on Locke).

40. *See* PUFENDORF, *supra* note 35, at 91–92 (observing that law curbs impulses because it provides the wisdom of a "common judge" as a shared metric for the resolution of disputes).

41. *See* CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 389 ¶ 20 (Anne M. Cohler et al. eds. & trans., 1989) (1748) ("[I]n this way commerce was able to avoid violence and maintain itself everywhere."); HIRSCHMAN, *supra* note 36, at 73–74 (citing Montesquieu); FORCE, *supra* note 36, at 151 (noting that Montesquieu credited Jewish merchants as inventing bills of exchange that tempered monarchical power because their intangibility permitted ready trade across borders); *cf.* Francesca Trivellato, *Credit, Honor, and the Early Modern French Legend of the Jewish Invention of Bills of Exchange*, 84 J. MOD. HIST. 289, 323 (2012) (arguing that ascription of the development of bill of exchange to Jews is largely apocryphal, while noting Montesquieu's use of story as example of commerce's check on arbitrary governance).

42. HIRSCHMAN, *supra* note 36, at 74.

appreciation of the "network of mutual obligations" that international commerce created would defuse the impulses that prompted armed conflict.[43]

When war nonetheless broke out, nations' reliance on global commerce also raised their stake in rules that assuaged the inevitable resentments engendered by conflict. As Vattel argued, the uncertainty and chaos endemic to war make it "difficult always to form a precise judgment of what the present case requires."[44] Giving way to short-term impulses in the conduct of war could unleash unnecessary force that would spur further violence and complicate the restoration of peace and commerce.[45] To curb the impulse to wield gratuitous force, Vattel urged, it was "absolutely necessary that nations should reciprocally conform to general rules."[46]

In refining these rules, Vattel described a trend in state practice toward heeding "the voice of humanity" regarding the treatment of captives.[47] The impulse toward expediency, Vattel admitted, could mute this voice, particularly when fighting an enemy that was "savage, perfidious, and formidable."[48] As David Hume also acknowledged, the desire for revenge could obscure humanity's urgings.[49] However, international law increasingly recognized that "[o]n an enemy's submitting and laying down of arms, we cannot with justice take away his life."[50] The state could benefit from being seen as deliberate and just. Membership in the community of nations required emulation of the "generous" leader whose actions were guided by a longer-term perspective.[51]

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43. *See id.* at 75; *see also id.* at 80 (citing Montesquieu, who observed that "the natural effect of commerce is . . . peace . . . [t]wo nations that trade together become mutually dependent").

44. *See* VATTEL, *supra* note 11, ¶ 137.

45. *Id.*

46. *Id.*

47. *Id.* ¶ 151; *cf.* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795 (2010) (discussing history of balancing two values).

48. VATTEL, *supra* note 11, ¶ 151.

49. *See* HIRSCHMAN, *supra* note 36, at 54 (citing DAVID HUME, A TREATISE ON HUMAN NATURE (T.H. Green & T.H. Grose eds., 1878)).

50. VATTEL, *supra* note 11, ¶ 140.

51. *See id.* ¶ 151.

For Vattel, a state's membership also implied responsibility for harm that impulsive citizens could inflict on the international order. Because individuals driven by short-term impulses could ignite unnecessary conflicts, Vattel declared that the power to make war "solely belongs to the sovereign power," who is best situated to judge "circumstances of the utmost importance to the . . . state."[52] Allowing individuals acting on their own to engage in armed conflict against foreign states would be "dangerous," since any individual under the sway of ideology or avarice could "involve [the state] in war."[53] War could occur because a state victimized by the incursions of individuals from another state has rights by virtue of its own membership in the international community.[54] The victim state need not be a hostage to the short-term impulses of another state's nationals; instead, it may "enter [the defaulting] country in pursuit" of its enemies.[55] A victim state that captures

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52. *Id.* ¶ 223; *cf.* Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESOLUTION, HARVARD UNIV. OCCASIONAL PAPER SERIES, Winter 2005, *available at* http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf (discussing traditional elements of law of war, including requirement that individuals engaged in hostilities had to have "right authority" which is defined as state sanction).

53. VATTEL, *supra* note 11, ¶ 4.

54. *See id.*

55. *Id.* ¶ 133. Following Vattel, US policymakers have located this prerogative in a victim state's right of self-defense. *See* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (stating US policy when another state is unable or unwilling to control nonstate actors who threaten the US or US personnel). The law of neutrality has also recently furnished a useful analogy for a state's prerogatives in non-international armed conflicts with groups such as Al Qaeda. *See* Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499–503 (2012); *see also* Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 25–36 (2011) (looking to neutrality law to define "enemy" who can be targeted or detained); *cf.* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=2049532 (suggesting additional guidelines for use of force). *But see* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al Qaeda*, 47 TEX. INT'L L.J. 75 (2011) (arguing that neutrality law has little to say about detention of suspected terrorists based in another state).

individuals who have violated the laws of war may impose appropriate punishment.[56]

Policing the short-term impulses that drive violations of the law of war required not merely legal norms, but also institutions to enforce them. Institutional architecture had to ensure against the resurgence of the absolute monarchs who had wasted Europe's blood and treasure. To avoid replicating the risks of individuals' short-term thinking, institutions needed a careful blend of independence and overlap. In the 17th century, Pufendorf sought to promote this longer-term perspective with a larger role for courts. To further this project, he developed a series of maxims, such as interpreting norms to maximize "common advantage" or "peace" between persons and states and tailoring them to avoid absurd results.[57] Montesquieu expanded on this insight, developing a theory of checks and balances in which the agenda of each branch curbed the others.[58] One can read Vattel as less committed to institutions; indeed, American officials who resisted the membership conception's reliance on institutions like judicial review cited Vattel's assertion that a state may summarily execute "banditti" who kill and plunder indiscriminately.[59] However, this is an unduly superficial reading. Vattel conditioned application of the death penalty on a finding that the captive was "guilty" of exceptionally serious violations of the laws of war.[60] Such a determination requires a fair and accurate process.[61] Hasty or

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56. *See* VATTEL, *supra* note 11, ¶ 141 (stating punishment is appropriate for a "breach of the law of nations, and particularly when [the offending individual] has violated the laws of war").

57. *See* PUFENDORF, *supra* note 35, at 85.

58. *See* HIRSCHMAN, *supra* note 36, at 7778 (quoting MONTESQUIEU, COMPLETE WORKS 112 (1949)) ("So that there may be no abuse of power, it is necessary that, through [institutional design] . . . power be stopped by power.").

59. VATTEL, *supra* note 11, ¶ 226 (asserting that if individuals act on their own after nation declares war, the "enemy shows them no mercy, but hangs them up as he would so many robbers or banditti"); *see also* Letter from J.Q. Adams, Sec'y of State, to George W. Erving, Minister Plenipotentiary to Spain (Nov. 18, 1818), reprinted in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 539–41(1834) [hereinafter Adams Letter] (citing Vattel in endorsing Jackson's use of military commissions in 1818 during the Second Seminole War).

60. VATTEL, *supra* note 11, ¶ 141.

61. *See generally id.* ¶¶ 136–59 (discussing standards and recommendations for putting prisoners to death).

biased decisions would merely replicate the short-term impulses that the philosophers sought to curb.

In curbing harm triggered by the short-term impulses of officials, citizens, and foreign nationals, the publicists believed that states under the membership conception needed some discretion. As Pufendorf recognized, a legal system that sought to preclude all flexibility would soon become mechanical in application, since the future's "infinite variety" demands exceptions to general rules.[62] A member of a community should not be set up to fail. By virtue of its membership, a state had some leeway to "judge what her own particular situation authorizes."[63] This leeway was not unlimited; certain principles, such as diplomatic immunity, were absolute.[64] Nevertheless, for international law to form a workable system, states needed a zone of deference.[65] Exercising judgment within this zone, states could refine approaches that were broadly consistent with established norms and also fostered global compliance.

II. *THE FRAMERS ON MEMBERSHIP*

The Framers refined and deepened the psychological perspective pioneered by the European philosophers. Like the publicists, they believed that short-term impulses such as vengeance threatened to commandeer official and individual decisions.[66] The deleterious influence of short-term impulses in the individual states was central to the case for a strong federal government.[67] In holding recently that much of Arizona's immigration law was preempted by federal legislation, the

62. PUFENDORF, *supra* note 35, at 85.

63. VATTEL, *supra* note 11, ¶ 137.

64. *Id.* ¶ 138.

65. *See id.* ¶¶ 136–59.

66. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 15–16 (2009) (noting the Framers' debt to Vattel); *see also* THE FEDERALIST NO. 16, *supra* note 1, at 109 (Alexander Hamilton) (arguing that confederacy under a weak federal government would prompt disputes among members and soon lead to armed conflict, in which the "passions . . . observe no bounds of moderation," and aggrieved parties would go to "any extremes necessary to avenge the affront").

67. *See* Letter of Edmund Randolph (Oct. 10, 1787), *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 482, 483 (Jonathan Elliot ed., 2d ed. 1836) (noting that "law of nations is unprovided with sanctions in many cases," resulting in "wretched impotency" in deterring violations).

Supreme Court cited Jay's observation that individual states acting "under the impulse of sudden irritation" could defy international law and disrupt foreign relations.[68] Haunted by worries that a failure to comply would doom the new Republic to foreign domination, the Framers devised institutions such as the separation of powers that would promote compliance and allow for progress in the humanity of international norms. The Define and Punish Clause contributed to that goal, cementing America's place in the global system and deterring individuals at home and abroad whose short-sighted actions could undermine America's global standing. However, the Framers were not naïve. They also recognized that harmful foreign influence could distort both domestic and foreign policy.[69] The Define and Punish Clause encouraged Congress to refine the disparate strands of the law of nations into a guide with greater "certainty and uniformity."[70] Secure in the knowledge that the separation of powers would guide the Clause's implementation, the Framers' views implied that a measure of deference to Congress's handiwork was appropriate.

A. *Impulses, Institutions, and the Constitution's Treatment of the Law of Nations*

Hamilton, a lawyer by trade well-acquainted with the European philosophers, was most acute in elaborating on the psychological argument that the philosophers had pioneered. In Federalist No. 78, Hamilton famously warned of short-term impulses' pernicious effects, decrying the "ill humors" that overtook the political branches.[71] Hamilton's concern was the product of years practicing international law in New York, where he saw first-hand the ill effects of impulses that discounted the law of nations during the Articles of Confederation period.[72]

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68. *See* Arizona v. United States, 132 S. Ct. 2492, 2498–99 (2012) (citing THE FEDERALIST NO. 3, *supra* note 1, at 39 (John Jay)).

69. *See* THE FEDERALIST NO. 16, *supra* note 1, at 109 (Alexander Hamilton) (warning that foreign powers would seek to take advantage of confederation's weakness and dissension).

70. *See* THE FEDERALIST NO. 42, *supra* note 1, at 262 (James Madison) (noting that such uniformity was "necessary and proper").

71. *See* THE FEDERALIST NO. 78, *supra* note 1, at 469 (Alexander Hamilton).

72. *See* LAW PRACTICE, *supra* note 12, at 419.

Hamilton's experience is revealed most vividly in the case of *Rutgers v. Waddington.*[73]

In *Rutgers*, Hamilton argued that the law of nations should govern interpretation of New York's Trespass Act, which allowed citizens to seek damages against British nationals who had seized their property during the war.[74] Hamilton asserted that the law of nations shielded the defendant, who had seized the property in compliance with military orders.[75] He argued that the case was nothing less than a contest over "national character."[76] Nations in an earlier era may have given in to the impulse for revenge. However, Hamilton urged, this impulse clashed with the need for a stable peace treaty with Britain. According to Hamilton, widespread concern over the decades of war that had engulfed Europe and the New World had "refined" international norms and lent priority to a "principle of . . . amnesty."[77] Others argued, in short-sighted fashion, that New York was under no obligation to obey the law of nations.[78] Hamilton derided this parochial turn, contending that New York could no more shed the law of nations than it could detach itself from the "relations of Universal society."[79] Agreeing with Hamilton's psychological account, the court read the law of nations into the New York law, rejecting the impulse toward "revenge" and the "hatred and animosity" revenge generates.[80] Instead, the court embraced "benevolence even towards our enemies."[81] Viewing this more benign stance as an underlying principle of the law of nations, the court sought to avoid the "confusion" that would result "if each separate state should arrogate to itself a right of changing at pleasure [the] laws . .

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73. *See id.* at 393. For a discussion of *Rutgers*, see Golove & Hulsebosch, *supra* note 34, at 963–66 (discussing *Rutgers* as guide to Hamilton's view that law of nations was part of American law and would exert salutary influence on US sensibilities), and John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895, 899–905 (2011) (discussing *Rutgers*'s importance).

74. *See* Golove & Hulsebosch, *supra* note 34, at 964–65.

75. *Id.* at 963–64.

76. *See* LAW PRACTICE, *supra* note 12, at 362.

77. *Id.* at 361.

78. *Id.* at 367.

79. *Id.*

80. *Id.* at 400 n.*.

81. *Id.*

. of the civilized world."[82] Even if revenge had been an acceptable impulse at some earlier time, New York now faced "a new situation," as part of "one of the nations of the earth" bound to comply with the law that bound those nations together.[83]

Because the *Rutgers* court's acknowledgment of the United States' "new situation" was a rarity during the Articles of Confederation period, the Framers feared that the temptations of impulse could sever the ties that sustained membership in the community of nations. The Framers' choices gave government the capacity to limit damage caused by individuals' short-sightedness. Violations of diplomatic immunity had roiled the Articles of Confederation period, as an assault in Philadelphia on the French Consul General Marbois and another such attack in New York ignited confrontations with European powers.[84] Edmund Randolph, in his remarks opening the Constitutional Convention in Philadelphia, had cited these incidents and the states' perceived failure to control them as a central justification for a stronger federal government.[85] Writing in Federalist No. 3, John Jay noted the challenge to peace posed by a "disunited America" in which disparate actors offended foreign powers.[86] Stressing the psychological dimension, Jay warned that both individuals and American states were susceptible to "passions"

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82. *Id.* at 405–06.

83. *Id.* at 400.

84. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004) (noting that concern over "inadequate vindication of the law of nations persisted through the time of the Constitutional Convention"); *see also* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1692–93 (2012) [hereinafter Kontorovich, *Discretion and Delegation*] (discussing impact of episode on deliberations of the Framers). *But see* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 640–41 (2002) (questioning the incident's importance); J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 874–88 (2007) [hereinafter Kent, *Define and Punish*].

85. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 24–25 (Max Farrand ed., rev. ed. 1966) (warning that, under the Articles of Confederation, "[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the federal government] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war."); *cf.* Kent, *Define and Punish*, *supra* note 84, at 897–99 (discussing Randolph's views).

86. *See* THE FEDERALIST NO. 3, *supra* note 1, at 36–37 (John Jay).

that precipitated clashes with Native American and foreign nations.[87]

The Define and Punish Clause was part of the Framers' program for addressing these perils. Madison in Federalist No. 42 explained that the Define and Punish Clause would deter violations of the law of nations such as assaults on ambassadors and defiance of treaties, which had allowed "any indiscreet member to embroil the Confederacy with foreign nations."[88] By authorizing Congress to enact laws governing piracy and felonies on the high seas, the Clause further extended the legislature's ability to deter non-state actors whose conduct could endanger international cooperation.

Like the universe in a grain of sand, the Framers' overarching ideas about separation of powers figured in the Define and Punish Clause's text and design. Granting the President sole power to define violations of the law of nations would have expanded the Executive's institutional advantage over the other branches. Granting this power to Congress dispersed power and substituted dialog for executive fiat. In this sense, the Clause's text followed the recommendation of Madison, echoing Montesquieu, that "[a]mbition must be made to counteract ambition."[89] In a post-September 11 case, Justice Stevens reinforced this view of the Clause, suggesting that a unilateral executive attempt to define violations of the law of nations punishable by military commissions expanded the reign of short-term impulses that the Framers had hoped to defuse.[90] One can also read colloquy at the Constitutional Convention as suggesting that allowing the President alone to determine what

87. *Id.* at 38–39.

88. THE FEDERALIST NO. 42, *supra* note 1, at 262 (James Madison).

89. THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison). Madison actually presumed that the Congress would be the dominant branch of government. *See id.* (claiming that "[i]n republican government, the legislative authority necessarily predominates"). However, the overall trajectory of Article I's grants of legislative authority still bears out Madison's intent.

90. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 601 (2006) (plurality opinion) (finding that the Constitution did not authorize President's unilateral classification of conspiracy as a war crime, citing Madison's observation in Federalist No. 47 that "[a]ccumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny").

conduct violated international law would yield prohibitions "too vague" to provide adequate notice.[91]

Another key element of the Clause's design hinges on the role of courts, which would promote fidelity to international law principles if Congress defaulted. Hamilton's discussion of judicial review in Federalist No. 78 echoed his arguments in *Rutgers v. Waddington*, noting that a court interpreting two legal doctrines or provisions that appear to clash should seek "any fair construction [which allows them to be] . . . reconciled to each other."[92] A court applying this rule of construction would seek to harmonize a federal statute with international law, as Chief Justice Marshall did some years later in *Murray v. The Schooner Charming Betsy*.[93] James Wilson of Pennsylvania, a prosecutor in the Marbois case,[94] delegate to the Constitutional Convention, and later Justice of the Supreme Court, also envisioned a robust role for the courts, prophesying that "[t]o every citizen of the United States, this law [of nations] is not only a rule of conduct, but may be a rule of decision."[95]

Wilson, Randolph, and other supporters of the Constitution anticipated that the courts would constrain the scope of

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91. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., rev. ed. 1966) (remarks of Gouverneur Morris of New York). However, this interpretation is subject to debate, because "elite opinion" at the time of the Convention held that violations of the law of nations were common law crimes whose prosecution did not require legislative codification. *See* Kent, *Define and Punish*, *supra* note 84, at 899. Morris's exchange with James Wilson of Pennsylvania may instead have been intended to provide Congress with a measure of discretion in codifying portions of international law. *See infra* notes 127–37 and accompanying text.

92. THE FEDERALIST NO. 78, *supra* note 1, at 467 (Alexander Hamilton).

93. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (holding that the navy commander lacked statutory authority for seizure of vessel owned by a national of a neutral power, and the vessel was therefore protected under international law). *See* Curtis A. Bradley, Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) [hereinafter Bradley, Charming Betsy *Canon*] (offering qualified praise of *Charming Betsy* canon); *see also* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004) (arguing that courts should interpret statutes authorizing force as being consistent with international humanitarian law); *see generally* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293 (2005) (offering a broader view of the canon's application).

94. *See* Kent, *Define and Punish*, *supra* note 84, at 878 n.169.

95. James Wilson, Of Man, as a Member of the Great Commonwealth of Nations, *in* 1 COLLECTED WORKS OF JAMES WILSON 673, 688 (Kermit L. Hall & Mark David Hall eds., 2007).

Congress's power and ensure that any prosecutions comported with procedural safeguards. While Antifederalists who opposed the Constitution warned that the federal government could invoke the Define and Punish Clause to suppress speech that was critical of American foreign policy, supporters of the Constitution pointedly rejected such a sweeping reading.[96] Wilson asserted that the Define and Punish Clause barred Congress from punishing noncitizens in a manner conflicting with the "predominant authority of the law of nations."[97] Foreshadowing the result in *United States v. Furlong*,[98] the only decision to strike down a statute passed pursuant to the Clause, Wilson asserted that Congress lacked the power to classify a murder at sea committed in the course of piracy as an act of piracy.[99] While this position may seem peculiar to a modern audience, it illustrates the Framers' belief that the statutes enacted under the Clause should receive meaningful review.[100]

For an even more vivid example of the Framers' view that the trial of alleged violations of the law of nations requires safeguards, consider a debate at the Virginia ratifying convention between Patrick Henry and Edmund Randolph. On the surface, the debate concerned the need for the Constitution's Bill of Attainder Clause. However, it also sheds light on contemporary understandings of the law of nations. In the debate, Randolph criticized on fairness grounds the supposed summary execution of Josiah Phillips, a murderous Loyalist who had terrorized the Virginia countryside during the

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96. *See* Kent, *Define and Punish*, *supra* note 84, at 909–10 (discussing the writings of Federalist and Anti-federalist pamphleteers).

97. James Wilson, A Charge Delivered to the Grand Jury in the Circuit Court of the United States, for the District of Virginia (May 1791), *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 95, at 334 [hereinafter Grand Jury Charge]. *See* Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 344–45 (2011) (discussing Wilson's view).

98. United States v. Furlong, 18 U.S. 184, 202 (1820).

99. Grand Jury Charge, *supra* note 97, at 332 (contending that piracy only encompassed "*robbery* and *depredation*" on the high seas, and that a murder committed in the course of piracy was punishable as a murder under international maritime law, with those who played a supporting role guilty only as accessories) (emphasis in original).

100. *Cf.* Tara Helfman, *Marauders in the Courts: Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong*, 62 SYRACUSE L. REV. 53, 65 n.75 (2012) (referring to *Furlong* holding and rationale as "strange").

Revolutionary War.[101] Randolph asserted that a bill of attainder, forbidden under the proposed Constitution, had been issued with no concrete information, but upon "mere reliance on general reports."[102] Despite being deprived of the opportunity to confront his accusers or provide evidence on his own behalf, Randolph recalled, Phillips was convicted and executed.[103] Randolph suggested that the proposed Constitution's prohibition of bills of attainder would have ensured a fair trial for Phillips.[104] While Phillips was a citizen, his alleged crimes occurred during participation in the Revolutionary War. Randolp's position therefore also has relevance for the Framers' views on the international law of armed conflict. Randolph's insistence on procedural safeguards cast him as a worthy successor to Vattel's praise of the "voice of humanity."

Henry, an opponent of the Constitution who had sought a bill of attainder for Phillips as governor of Virginia, disputed Randolph's contention in terms borrowed expressly from Vattel and the law of nations. Rejecting the need for the procedural protections that the proposed Constitution would yield in such a case, Henry cited Vattel for the proposition that Phillips was "a pirate, an outlaw . . . a common enemy to all mankind, [who] may be put to death at any time."[105] Henry, like others who would contest the membership view in the future, cited Vattel's language but ignored the European scholar's concern with the fairness and accuracy of adjudication.

In a stroke of irony, both Henry and Randolph had faulty recollections of this episode: after the Virginia legislature had passed the bill of attainder for Phillips, Randolph himself had drafted an ordinary civil indictment of Phillips for highway robbery, and had supervised a trial for Phillips upon his capture.[106] Phillips was convicted and executed, but only after he

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101. *See* William Romaine Tyree, *The Case of Josiah Phillips: How Virginia Came to Pass a Bill of Attainder*, 16 VA. L. REG. 648, 648–49 (1911) (explaining Phillips's crimes and the connection of Randolph and Henry to his case).

102. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 66 (Jonathan Elliot, ed., 2d ed. 1836).

103. *See id.* at 67.

104. *See id.* (arguing for the adoption of the Constitution).

105. *Id.* at 140.

106. *See* Tyree, *supra* note 101, at 654–55 (explaining Randolph's connection to the case).

received the protections of the legal process whose supposed absence Randolph, perhaps spoiling for a fight with Henry, bemoaned a decade later.[107] Randolph's actions, even more than his words, dovetailed with the membership conception's rejection of short-sighted impulses.

B. *Foreign Factions, Codification's Challenges, and Deference to Congress's Judgments on the Law of Nations*

In part due to the safeguards on the power to define and punish, the Framers suggested that they intended to carve out a reasonable zone of deference for Congress's exercise of its authority. Factors justifying this zone of deference included the range and fluidity of international law, the distinctive needs of each state and dangers of foreign factions, and the separation of powers' promotion of fidelity to core international principles.

Because the Framers understood that customary international law is vast and always changing,[108] they recognized that even the "most enlightened legislators" would fail in precisely demarcating its boundaries.[109] The elusive character of customary international law, with its reliance on a myriad of sources establishing a consensus of state opinion and practice, compounded this challenge. As Justice Story suggested in *United States v. Smith*, the Framers lodged in Congress the power to define offenses against the law of nations in large part because they recognized the law of nations could not be "completely ascertained and defined" in any preexisting code, or one that would be drafted in the foreseeable future.[110]

A state's distinctive needs also counseled a measure of deference insulated from foreign influence. Just as short-sighted impulses were the enemy of the deliberation that membership required, so was foreign manipulation. The Framers believed

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107. *See id.* at 654–56 (suggesting that Randolph may have been anxious to debate Henry about the execution of Phillips).

108. *See* LAW PRACTICE, *supra* note 12, at 361 (predicting gradual extension of "*principle of . . . amnesty*" resolving property disputes after peace treaty in favor of bona fide purchasers) (emphasis in original).

109. *See* THE FEDERALIST No. 37, *supra* note 1, at 229 (James Madison) (describing difficulty of "delineating the several objects and limits of different codes of laws . . . [including] common law . . . [and] maritime law").

110. United States v. Smith, 18 U.S. 153, 159 (1820).

that influence exerted by the contending European powers had much in common with the short-term impulses that the Constitution's architecture was designed to withstand: foreign influence pushed particular agendas to the forefront without the circumspection that the Framers admired. Hamilton argued against a confederation in part on the grounds that dissension among the members would encourage weaker states to seek "recourse [from] . . . foreign powers."[111] Randolph warned that extravagant gifts from the King of France to Benjamin Franklin and others had "disturbed confidence" in the relationship between France and the United States.[112] The bar on such gratuities in the Foreign Gifts Clause connoted the Framers' efforts to shield the deliberations of American officials from these blandishments.[113] Hamilton relied on similar reasoning in defending the Treaty Clause's requirement that a super-majority of the Senate vote to ratify an agreement. Expressing the fear that a cabal of senators might otherwise have "prostituted their influence . . . as the mercenary instruments of foreign corruption" and championed a treaty that injured American interests, Hamilton was reassured that two-thirds of that august body would not bow to such a devious strategy.[114] The residency requirements for election to the House of Representatives and the shifting composition of the Electoral College were also parts of the Framers' blueprint for excluding foreign influence.[115]

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111. THE FEDERALIST NO. 16, *supra* note 1, at 109 (Alexander Hamilton).

112. DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330–31 (2d ed., 1805); *see also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 948 n.51 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing origins of the foreign gifts provision); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n.245 (2009) (same); *cf.* Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 471–75 (2012) [hereinafter Margulies, *Advising Terrorism*] (discussing the origins of the constitutional provisions in light of current concerns about foreign terrorist organizations); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 5 (2012) (acknowledging that the Framers were concerned about foreign influence, but arguing that this concern was only one of a number of factors that the Framers had to balance). Ironically, Randolph's indiscreet disclosures to a French diplomat eventually forced his resignation from Washington's cabinet. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 425–29 (1993).

113. *See* U.S. CONST. art I, § 9.

114. *See* THE FEDERALIST NO. 66, *supra* note 1, at 404 (Alexander Hamilton).

115. Concerning the residency requirements of the House of Representatives, George Mason of Virginia warned that a "rich foreign Nation, for example Great

Furthermore, there are hints that the Framers understood that the formation of customary international law could also be plagued by the ills of faction that they sought to manage throughout the constitutional scheme. The Framers, as students of the world stage, were well aware that European powers during this period frequently acted expediently, instead of standing on principle.[116] Madison did not view faction's evils at stopping at the water's edge; rather, he saw such evils "*everywhere* . . . divid[ing] mankind into parties."[117] For Madison, the proliferation of factions "inflamed . . . with mutual animosity" and . . . "ambitiously contending for pre-eminence and power" was a "propensity of mankind," as was the "zeal for different opinions . . . concerning government."[118] The role of factions on the global stage suggested the need for prudence in determining when an innovation has ripened into a rule of customary international law.[119] Before settling on a consensus, short-term impulses within the international community might ebb and flow with the ascendancy of various factions.[120] Some of those factions might intentionally or inadvertently propound rules with adverse consequences for the United States.[121]

The Framers' intent to neutralize this risk also figured in the drafting and construction of the Define and Punish Clause.

Britain, might send over her tools who might bribe their way into the Legislature for insidious purposes." 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 91, at 216. After Mason's warning, the Framers required that, at the time of election, a member of the House of Representatives be a United States citizen for seven years and an "inhabitant" of the state that included the member's district. *See* U.S. CONST. art. I, § 2, cl. 2. Regarding the Electoral College, Hamilton argued that the Electoral College's temporary operation and fluid membership would frustrate "the desire in foreign powers to gain an improper ascendant in our councils." THE FEDERALIST NO. 68, *supra* note 1, at 411 (Alexander Hamilton). Permitting longer membership in a sitting body, Hamilton claimed, would facilitate foreign efforts at corruption. *Id.*

116. *See* Reinstein, *supra* note 28, at 397–98.

117. THE FEDERALIST NO. 10, *supra* note 1, at 73–74 (James Madison) (emphasis added).

118. *Id.*

119. *See generally* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1804 (2009) (noting that "problem of uncertainty is most severe with respect to customary international law, which lacks any clear rule of recognition").

120. *See* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L & POL. 363, 372–73 (applying Madison's theory of factionalism to an international stage).

121. *See id.*

In a debate at the Constitutional Convention, Governor Morris of New York successfully argued that the language of the clause should expressly empower Congress to "define," as well as punish, offenses against the law of nations.[122] While Pennsylvania's James Wilson argued that it would have the "look of arrogance" for Congress to purport to "*define* the law of nations which depended on the authority of all the Civilized Nations of the World," Morris took a more practical view.[123] Morris argued that granting Congress power to define offenses would both provide greater notice to defendants who might otherwise be unaware of the domestic obligations that the law of nations engendered and allow Congress some room to tailor international norms to United States interests.[124] Often, Morris worried, the writings of philosophers, multifarious state pronouncements, and accounts of state practice that made up the law of nations would prove "too vague and deficient to be a rule."[125] Morris's concern suggested that Congress would play a valuable role by not merely defining the law of nations in a mechanical fashion, but refining that occasionally turgid and murky stream of disparate sources.[126] When the operation of a rule lacked predictability and manageability, Congress could supply those qualities.[127] Moreover, if parties with parochial agendas, including foreign states or other entities, precipitously claimed that the law of nations had changed, relying on Congress to set a rule would prevent an unduly hasty shift in abiding principles.[128]

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122. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 91, at 615; *cf.* Kent, *Define and Punish*, *supra* note 84, at 899 (discussing the exchange between Morris and James Wilson); Kontorovich, *Discretion and Delegation*, *supra* note 84, at 1700–02.

123. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 91, at 615 (emphasis in original).

124. *See* Note, *The Offenses Clause After* Sosa v. Alvarez-Machain, 118 HARV. L. REV. 2378, 2386 (2005).

125. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 91, at 615.

126. *See id.* at 614–15.

127. *See id.*; *cf.* Kent, *Define and Punish*, *supra* note 84, at 899 ("Morris's desire for prior notice and clear definition sounds in the due process and legality principle concerns . . . about vague criminal statutes.").

128. *Cf. id.* (arguing that Morris might have believed that "Congress should not be bound by anyone else's view but its own as to whether an offense [against the law of nations] had been committed by another state . . . .").

Madison, while not opining directly on this language, suggested similar views in his discussion of the portion of the Define and Punish Clause relating to felonies on the high seas. In Federalist No. 42, Madison noted that wide variations in the definition of felonies would otherwise impair the implementation of the authority that the Framers conveyed: "[f]or the sake of certainty and uniformity," Madison urged, "the power of defining . . . was in every respect necessary and proper."[129] Any other result might have left the republic hostage to casual shifts with unintended consequences that injured American interests. Membership required greater stability.

Finally, one predicate for deference was the reliability conferred on United States formulations of international law by the separation of powers. Like any other power in the Constitution, the Framers saw the authority granted by the Define and Punish Clause through the prism of checks and balances.[130] A measure passing through this prism would shed the influence of short-term impulse.[131] In Jay's words regarding the federal government's superiority over individual states in managing foreign affairs, it would be "temperate and cool."[132]

III. *THE DEFINE AND PUNISH CLAUSE FROM THE FOUNDING ERA TO THE PRESENT*

A. *The Founding Era: Contention and Consensus*

After the Constitution's enactment, the Founding Era saw challenges to the balancing act that membership in the community of nations necessarily entails. Washington's Neutrality Proclamation and continued concern about foreign intrigue highlighted the importance of the state as a filter for short-term impulses.[133] Institutions such as judicial review followed the direction set in *Rutgers v. Waddington*, promoting

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129. THE FEDERALIST NO. 42, *supra* note 1, at 266 (James Madison).

130. *See supra* notes 95–110 and accompanying text (discussing views of Hamilton, Wilson, and Randolph on the role of the courts).

131. *See* THE FEDERALIST NO. 3, *supra* note 1, at 39 (John Jay).

132. *See id.*

133. *See generally* ELKINS & MCKITRICK, *supra* note 112, at 336–41 (discussing the arguments Hamilton and Jefferson offered Washington before the issuance of the Neutrality Proclamation).

greater deliberation among the political branches on measures that might conflict with the law of nations.

Serving as the nation's first Attorney General, Edmund Randolph reaffirmed the Framers' insight that "a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land."[134] After an arrest at a diplomat's residence by a New York constable, the tender feelings left by the Marbois incident impelled Randolph to restate the importance of the core doctrine of diplomatic immunity.[135] Randolph opined that the Define and Punish Clause did not authorize any material changes in this fundamental rule.[136]

The relatively light lifting of the diplomatic immunity question was followed by a more demanding challenge in the Neutrality Crisis.[137] The crisis arose from persistent intrigue by France that sought to involve both United States citizens and the new Republic's government in France's conflict with Britain.[138] Washington recognized that neutrality in the European conflict was a safer course for a new nation unequipped for war.[139] The French diplomat Edmond Genet ignored Washington and approached citizens directly, outfitting at least one privateer that sailed from American shores to prey on British shipping.[140] In response, Randolph issued an opinion that justified the seizure of a British vessel that had been taken as prize by a French privateer and led into the port of Philadelphia by an American citizen, Gideon Henfield.[141] Randolph, who had relied on

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134. Military Commissions, 11 Op. Att'y Gen. 297, 299 (1865).

135. *See* Who Privileged from Arrest, *supra* note 13, at 27–28.

136. *Id.* at *2 (advising that Clause only permitted "modifications on some points of indifference").

137. *See* ELKINS & MCKITRICK, *supra* note 112, at 336 (discussing events surrounding Neutrality Proclamation).

138. *See generally id.* at 341–54 (discussing Genet's failed attempt to garner support for France in the United States during France's war with Britain).

139. Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts, in* PRESIDENTIAL POWER STORIES 21, 44 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) [hereinafter Flaherty, *Neutrality Controversy*].

140. *See* ELKINS & MCKITRICK, *supra* note 112, at 332–53; Flaherty, *Neutrality Controversy*, *supra* note 139, at 44; MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 78–80 (2007).

141. *See* Seizure in Neutral Waters, 1 Op. Att'y Gen. 32 (1793).

Vattel's views in crafting the administration's position, stated that "to attack an enemy in a neutral territory is absolutely unlawful."[142] Jefferson was even more pointed in his condemnation of Genet's machinations. Echoing Vattel's view that individuals relying on short-term impulses posed a danger for a nation committed to deliberation on foreign policy, Jefferson declared that for "United States citizens to commit murders and depredations on the members of nations at peace with us . . . [was] as much against the law of the land as to murder or rob [other US citizens]."[143] Washington, in a Proclamation announcing the neutrality policy largely drafted by Randolph (who again relied heavily on Vattel), barred American citizens from aiding either side to the European conflict.[144]

Founding Era anxiety about foreign influence co-existed with mistrust of overzealous government and reliance on the separation of powers as a remedy.[145] Popular constitutional sentiment opposed the prosecution of Henfield, who may have violated neutrality law but had not violated any US statutes.[146] Jay and Wilson, riding circuit as part of their Supreme Court duties, instructed the jury on the dangers of individuals substituting their impulse for "revenge" for the government's judgment on

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142. *Id.* at 33. *See* Reinstein, *supra* note 28, at 398–99 (discussing Randolph's reliance on Vattel).

143. *See* Letter of Thomas Jefferson to Edmond C. Genet (June 17, 1793), *in* 9 WRITINGS OF THOMAS JEFFERSON 131, 136 (Andrew A. Lipscomb ed., 1903).

144. See Reinstein, *supra* note 28, at 429–33 (noting Randolph's reliance on Vattel).

145. Another instance of French intrigue undermined Randolph. Randolph was forced to resign after revelations that he had informed a French diplomat of cabinet squabbling over the Whiskey Rebellion in western Pennsylvania and the controversial treaty on British property in America that Jay had negotiated. *See* ELKINS & MCKITRICK, *supra* note 112, at 425–29. John Marshall was the next target of French officials' passions for clandestine influence. Marshall was part of the US delegation to France undone by the notorious XYZ Affair, in which French officials tried to extort money from Marshall and his colleagues. *See* II ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 306–12 (1916); *see also* ELKINS & MCKITRICK, *supra* note 112, at 568; *cf.* H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511–27 (1999) (analyzing Marshall's perspective on presidential power and foreign policy).

146. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 3 (2004).

foreign policy.[147] Nonetheless, the people appeared to side with James Monroe's position that a prosecution should not rest on mere defiance of an executive proclamation.[148] This reaction surely contributed to Henfield's acquittal.[149] Washington, displaying the disposition toward dialogue that marked his presidency, put his neutrality policy on a firmer footing by securing congressional authorization.[150]

Courts also protected against the short-term impulses of the political branches by ensuring that Congress deliberated about clashes between statutes and international law. Writing for the Court in *Murray v. The Schooner Charming Betsy*, Marshall echoed the New York court's decision in *Rutgers v. Waddington*, construing a federal statute to avoid conflict with the law of nations.[151] In accordance with this maxim, Marshall read a statute that limited citizens' trade with France as not barring commerce by subjects of neutral states such as Denmark.[152] By upholding the principle that "an act of Congress ought never to

147. *See* Henfield's Case, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (No. 6360) (John Jay); *cf. id.* at 1119–21 (James Wilson) (arguing that common law prosecution was permissible and describing individuals who violated neutrality policy as short-sighted; by risking war, such individuals would be "destroying not only those with whom we have no hostility, but destroying each other").

148. *See* Reinstein, *supra* note 28, at 434; *cf.* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 664–87 (2004) (arguing that while Washington's actions during the Neutrality Crisis may well have been within his constitutional authority, they do not bear out claims that the Vesting Clause, U.S. CONST. art. II, § 1, cl. 1, grants the President broad residual authority over foreign affairs); Flaherty, *Neutrality Controversey*, *supra* note 139, at 26–39 (discussing the law of nations and presidential power aspects of the Neutrality Proclamation).

149. *See* KRAMER, *supra* note 146, at 3; Reinstein, *supra* note 28, at 439; *cf.* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1599–1615 (2005) (assessing arguments against constitutional interpretation by people and elected officials); Jared Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 856–66 (2011) (cautioning that popular constitutionalism is a double-edged sword which can protect liberty, but is also susceptible to manipulation).

150. *See* Reinstein, *supra* note 28, at 440. While controversy attended efforts to prosecute violations of the Neutrality Proclamation as common law crimes, no one doubted that Congress had the power to prohibit such conduct. *See also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 850–51 (1997).

151. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 81 (1804). *Compare* Bradley, Charming Betsy *Canon*, *supra* note 93 (praising the narrow view of the canon as promoting deliberation), *with* Wuerth, *supra* note 93 (favoring a broader view of the canon).

152. *Charming Betsy*, 6 U.S. (2 Cranch) at 80–85.

be construed to violate the law of nations if any other possible construction remains,"[153] Marshall provided an institutional hedge against the "momentary inclinations" that Hamilton feared[154] and modeled the more considered view that membership in the community of nations requires deliberation to preemptively resolve such conflicts.

B. *Military Commissions and the Define and Punish Clause Since the Founding Era*

The membership conception has dominated the jurisprudence of the Define and Punish Clause since the Founding Era, including practice during the Civil War and during and immediately after World War II. Control of state actors and individuals arrayed against United States interests has been a common theme, including situations such as piracy and counterfeiting in which US interests largely harmonized with international interests. The separation of powers has often figured in precedent and practice, with checks and balances prominent in the jurisdiction and operation of military commissions. Our account of post-Founding Era developments must begin, however, with General Andrew Jackson's use of military commissions during the First Seminole War – an episode where separation of powers was lacking when it was needed most.

1. Jackson's Florida Campaign and Military Commissions

The military commission convictions of British nationals Robert Ambrister and Alexander Arbuthnot occurred in the wake of Jackson's 1818 intervention in Florida—then a Spanish colony. Jackson had moved to stop cross-border raids by Seminoles and other Native Americans who claimed land in Georgia under the Treaty of Ghent.[155] Secretary of State John Quincy Adams supported the convictions and executions of Ambrister and Arbuthnot, asserting that each had violated Spanish neutrality through their alleged instigation of the

153. *Id.* at 118.

154. THE FEDERALIST NO. 78, *supra* note 1, at 468 (Alexander Hamilton).

155. *See* Kent, *Global Constitution*, *supra* note 14, at 531, 532; *see also* 10 ANNALS OF CONG. 641 (1801).

raids.[156] Jackson touted the proceedings as an "example to the world" of the fate that awaited "unprincipled villains."[157] Despite Jackson's confidence in the results, the procedural flaws and compromised evidence supporting Arbuthnot's conviction ignited a bitter debate in Congress about both constitutional authority and the law of nations, driven by Jackson's most persistent adversary, then Speaker of the House Henry Clay.[158] Historians have joined Clay in discerning conflict between Arbuthnot's conviction and the premises underlying the membership conception.[159]

Secretary of State Adams invoked Vattel's conception of neutrality in defending Jackson, asserting that the defendants were nationals of Britain, which Adams described as preserving its neutrality by disavowing their actions.[160] According to Adams, the defendants had violated the law of nations by engaging in violence despite their country's neutrality.[161] Spain had violated neutrality law by actively supporting their efforts.[162] By conducting war while their country sought to preserve the peace, Adams argued, the acts of the two defendants were analogous to the behavior of the lawless *banditti* that Vattel had identified as violating the law of nations.[163] In a move that recalled Henry's minimalist approach to the law of nations in his debate with Randolph on Josiah Philips, Adams insisted that

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156. *See* Kent, *Global Constitution*, *supra* note 14, at 532.

157. *See* Message Transmitting Documents Relating to the War with the Seminole Indians, and to the Trial and Execution of Arbuthnot and Ambrister (November 18, 1818), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 681, 702 (1818).

158. *See* Lobel, *supra* note 97, at 347–48. The problems with Ambrister's execution did not involve his guilt, since most contemporaneous and current sources agree that he had led Native Americans in violent attacks against settlements in Georgia, and had tolerated abuses against captives and civilians. *See* ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE 1767–1821 358 (1977). Questions arose, however, because the commission imposed a sentence involving corporal punishment and a year of hard labor, which Jackson on his own initiative vacated and replaced with the death penalty. *Id.*; *see also* Kent, *Global Constitution*, *supra* note 14, at 532 (discussing the episode).

159. *See* REMINI, *supra* note 158, at 352 (describing Arbuthnot's conviction as an episode that would "haunt Jackson's reputation").

160. *See* Adams Letter, *supra* note 59, at 540.

161. *See id.* at 539; *see also* Lobel, *supra* note 97, at 346–47.

162. Adams Letter, *supra* note 59, at 540–41. Each had been disavowed by Britain. *Id.* at 540.

163. *Id.* at 544.

Vattel would have permitted summary execution of Ambrister and Arbuthnot.[164]

Henry Clay pushed back, scoffing at the notion that the military commissions had jurisdiction over the defendants.[165] Invoking the separation of powers, Clay noted that Congress had not authorized military commissions for the Florida campaign.[166] Moreover, according to Clay, the neutrality-based allegations against Ambrister and Arbuthnot did not amount to a violation of the law of nations.[167]

On this legal point, Adams had the better argument. Although the United States has since Washington's Neutrality Proclamation defined the obligations of neutrality more robustly than many other countries, Vattel's analysis of neutrality supported that definition. Distinguished commentators and unbroken executive branch practice buttressed Adams' conclusion, situating it well within the zone of deference that the Framers constructed.[168]

However, Clay's critique acquires fresh cogency on the fairness of Arbuthnot's trial.[169] The truncated proceeding had at least four critical procedural defects. First, the commission denied Arbuthnot's motion to call Ambrister.[170] Since Ambrister had by contemporary and historical accounts been more directly involved in the conduct of the raids that prompted Jackson's campaign, his testimony could have been vital for Arbuthnot's claim that the latter had not played a role.

Second, the commission admitted crucial evidence against Arbuthnot without a proper foundation. The government relied

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164. *Id.*

165. *See* ANNALS OF CONG., *supra* note 155, at 517, 641; *see also* Rosen, *supra* note 14 (describing the debate).

166. *See* ANNALS OF CONG., *supra* note 155, at 644–47.

167. *See generally* ANNALS OF CONG., *supra* note 155, at 632 (asserting the disapprobation of the proceedings in the trial and execution of Arbuthnot and Ambrister).

168. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 113–14 (New York, O. Halsted 1826) [hereinafter KENT, COMMENTARIES] (approving of United States' stance on neutrality law); *see also* ANNALS OF CONG., *supra* note 155, at 666. Clay, in contrast, failed to acknowledge or address Vattel's ideas, which were so central to the Framers' understanding of the law of nations. *See id.* at 663–64.

169. *See* ANNALS OF CONG., *supra* note 155, at 660. Clay conceded that the case against Ambrister, who had led cross-border raids, was strong on the facts. *Id.* at 641.

170. Rosen, *supra* note 14, at 568.

on a memorandum on the back of one of Arbuthnot's letters to the British ambassador to the United States. Arbuthnot's letter merely complained of "wanton aggression" of the United States against Native Americans.[171] The memorandum on the back of the letter was something else again. The government claimed that the memorandum was a request written or dictated by Native American chiefs and intended for Arbuthnot, seeking large quantities of guns and ammunition. However, the government never proved that the chiefs had written or dictated the document, or offered *any* evidence regarding its origins.[172]

Third, command influence on the commission rendered the conviction fundamentally unfair. Jackson's lieutenant, General Edmund Gaines, was one of the judges. Gaines had received correspondence before the campaign from Georgia's governor asserting that a British agent had been instigating the transborder incursions.[173] As Gaines had surely come to know before the commission was convened, Jackson believed that Ambrister and Arbuthnot were the agents described in these reports.[174] Gaines's role in the campaign would have made it difficult for him to acquit the person that American authorities believed had incited his foes. Even if he had wished to, Gaines could not have voted to acquit Arbuthnot without risking Jackson's anger, which Gaines knew to be formidable.

Fourth, Arbuthnot's death sentence was carried out almost immediately, precluding administrative or judicial review.[175] The nature and scope of judicial review of military commissions was unsettled at this time. However, administrative review would have permitted some opportunity to raise the issue of the other

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171. AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 723.

172. Frank L. Owsley, Jr., *Ambrister and Arbuthnot: Adventurers or Martyrs for British Honor?*, 5 J. EARLY REPUBLIC 289, 295 (1985); *cf.* ANNALS OF CONG., *supra* note 155, at 517–18 (Committee Report unfavorable to Jackson).

173. *See* Letter from Gov. William Rabun to Gen. Edmund Gaines (Feb. 5, 1817), *in* AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 681 (warning of influence of British agents among Seminoles and escaped slaves).

174. *Id.* at 701 (reporting the letter from Jackson to Secretary of War John Calhoun, Apr. 20, 1818, and reporting on finding documents among papers of Ambrister, Arbuthnot, and an alleged confederate "pointing out instigators of this savage war . . . in some measure, involving the British Government"); *id.* at 702 (reporting the letter from Jackson to Calhoun, May 5, 1818, and referring to the trial and execution of Ambrister and Arbuthnot as British agents).

175. *See* REMINI, *supra* note 158, at 358–59.

procedural defects in the case. The thin evidence against Arbuthnot highlighted the harshness of foreclosing this option.

Given these procedural defects, the evidence regarding Arbuthnot's role was suspect, as Clay observed.[176] Arbuthnot, Clay maintained, may have merely traded with Native Americans and agreed with Clay's own view that the Treaty of Ghent entitled Native American nations to territories lost during the War of 1812. Indeed, the evidence against Arbuthnot was most consistent with Clay's account. Historians have been unanimous that Arbuthnot's diligent and futile correspondence with British officials on behalf of the Native Americans, whom both he and Clay regarded as victims, rendered violence "out of character."[177] At one point, for example, Arbuthnot informed a former British agent for Native Americans that the British ambassador had requested that Arbuthnot pay for the postage on any subsequent letters describing the Native Americans' predicament.[178] Arbuthnot meekly asked how he could apprise British officials of the injustices done to Native Americans if the ambassador would not even pay for letters on the subject.[179] The plaintive tenor of Arbuthnot's letter hardly befits the violent mastermind portrayed in Jackson's accusations. The evidence suggests that, rather than being a criminal, Arbuthnot simply cared too much about the Native Americans' plight, believed unwisely that the British government shared his concern, and failed to grasp that Andrew Jackson "was not a merciful man."[180]

In convicting Arbuthnot without proof of his knowing connection to violence, Jackson embraced the "revenge" cautioned against by the *Rutgers v. Waddington* court. Adams' defense did not dispel this impression, particularly with its broad reading of Vattel's approval of summary execution. Adams failed

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176. ANNALS OF CONG., *supra* note 155, at 641.

177. Owsley, *supra* note 172, at 304; *cf.* DAVID S. HEIDLER & JEANNE T. HEIDLER, OLD HICKORY'S WAR: ANDREW JACKSON AND THE QUEST FOR EMPIRE 155 (2003) (observing that Arbuthnot's letters show "a man determined to preserve peace between the Seminoles and the United States"); ANNALS OF CONG., *supra* note 155, at 633–35 (noting Henry Clay's agreement with Arbuthnot's views regarding Native American rights under the Treaty of Ghent).

178. Letter from Alexander Arbuthnot to Col. Edward Nicholl (Aug. 27, 1817), *in* AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 725.

179. *Id.*

180. *See* REMINI, *supra* note 158, at 359.

to acknowledge that Vattel endorsed summary disposition only when state forces were *certain* that a captive had methodically and egregiously violated the law of nations. That certainty was absent in Arbuthnot's case.

Despite Adams' insistence that *any* legal proceedings were more than the law required, subsequent authorities on the law of war have not viewed the Arbuthnot episode as precedent. Britain cited Jackson's Seminole War commissions as precedent for the 1837 attack in American territory on *The Caroline*, a vessel allegedly used by Canadian rebels. However, a US official countered this claim, describing Jackson's measures "has not yet become authoritative in the code of nations."[181] William Winthrop, who served in the Civil War and wrote a much-cited nineteenth century treatise on the law of armed conflict, had particularly harsh words on Jackson's ordering of Robert Ambrister's execution. Noting that Jackson had disregarded the less severe sentence handed down by the commission, Winthrop asserted that Jackson's decision was "wholly arbitrary and illegal."[182] Indeed, Winthrop suggested, Jackson would as of the writing of Winthrop's study have been "indictable for murder."[183] Until the Court of Military Commission Review (CMCR) sustained Salim Hamdan's conviction for material support in 2011, no court had cited Jackson's decision. In sustaining Hamdan's conviction, the CMCR cited another commentator, William Birkhimer, who had deemed Jackson's approach lawful.[184] However, Birkhimer failed to address the procedural and evidentiary flaws with Arbuthnot's trial, instead assuming that both Arbuthnot and Ambrister were caught "red-handed."[185] Moreover, Birkhimer based his analysis on the proposition advanced by Adams and Patrick Henry that

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181. *See* People v. McLeod, 25 Wend. 483, 557 (N.Y. Sup. Ct. 1841) (citing remarks of US Attorney Joshua Spencer); *cf.* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 116–17 (2012) (noting that Secretary of State Daniel Webster advised Spencer on his arguments).

182. 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 711 (1896) (2d ed. 1896).

183. *Id.*

184. *See* WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 352–54 (3d ed. 1914); *see also* United States v. Hamdan, 801 F. Supp. 2d. 1247, 1300 (Ct. Mil. Comm'n Rev. 2011), *rev'd*, 696 F.3d 1238 (D.C. Cir. 2012) (citing to another edition of Birkhimer's treatise).

185. BIRKHIMER, *supra* note 184, at 354.

summary execution was appropriate, so that any kind of proceeding was more than the law required.[186] Birkhimer's analysis endorsed indicia of membership that are far narrower than the membership conception's vision. Rejecting the voice of humanity heeded by Vattel and the great American scholar James Kent,[187] Berkhimer urged that summary execution was particularly appropriate for "savages."[188] No current tribunal should view such an account as definitive. Indeed, the citation to Birkhimer highlights the outlier status earned by Arbuthnot's conviction.

2. The Civil War and Military Commissions

While military commissions were used far more widely during the Civil War than in Jackson's Florida campaign, their use tracked the outlines of the membership conception. Attorney General James Speed, in an opinion justifying the use of military commissions to try individuals accused of conspiring with John Wilkes Booth to assassinate President Lincoln, acknowledged the Framers' view that the law of nations is "part of the law of the land."[189] This respect for the law of nations influenced contemporary assessments of both the discretion accorded Congress under the Define and Punish Clause and the role of military commissions. In addition, administrative review provided a check on commission verdicts, supplying the

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186. *Id.*

187. *See* VATTEL, *supra* note 11, ch. 15, ¶ 151 (suggesting the importance of humane treatment even for an enemy that is "savage" and "perfidious"); KENT, COMMENTARIES, *supra* note 168, at 10–11 (arguing that laws of war also governed treatment of non-Christian enemies).

188. *See* BIRKHIMER, *supra* note 184, at 354.

189. Military Commissions, 11 Op. Att'y Gen. 297 (1865) (citing Who Privileged From Arrest, 1 Op. Att'y Gen. 27 (1792)). Military commissions were also used in the Mexican-American War. *See* WITT, *supra* note 181, at 124–26. However, the lack of documentation of commission proceedings in that conflict precludes definitive analysis of their scope. *Id.* at 126. Mexican guerillas tried in the commissions may have been accused of unlawful acts of violence, such as abuse of captives, which occurred throughout the conflict. *Id.* at 120–21; Glazier, *supra* note 14, at 36. Trial for such offenses would have raised none of the problems posed by Jackson's use of military commissions. Moreover, surviving documentation indicates that only a handful of Mexican nationals were tried by such tribunals; the overwhelming percentage of commission defendants were American troops accused of a broad range of war crimes and disciplinary offenses. *Id.* at 37.

opportunity for reflection that the Framers' sought through inter-branch separation of powers.

Attorney General Speed's opinion suggested that the Define and Punish Clause gave Congress a limited zone of discretion within the landscape of international law. Citing Randolph's opinion, Speed's analysis centered on the distinction between "defining" a norm and "making" one.[190] "To *define*" Speed observed, "is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations"[191] In contrast, Speed pointed out, "Congress has the power to *make* rules for the government of the army and navy."[192] This textual distinction had two important consequences. First, Speed opined, while Congress can "define" the laws of nations, it "cannot abrogate them."[193] Quoting Randolph, Speed asserted that Congress had the power to "'modify [the law of nations] on some points of indifference.'"[194] In other words, Congress could distill or refine norms from the law of nations, but could not ignore those norms. This formulation accorded Congress a measure of deference. Speed authorized the use of military commissions to try the Lincoln conspirators, who had abetted Booth's plan to use civilian disguise for the assassination.[195] In authorizing a commission, Speed cited the perfidious element of the plot, describing its participants as "secret active public enemies."[196] Although Booth apparently did not consult with Confederate commanders, Speed readily classified Booth and his cohort as perpetrators of a war crime, not an ordinary offense reserved for trial in civilian courts.[197] This aspect of his opinion indicated

190. *See* Military Commissions, 11 Op. Att'y Gen 297 (1865).

191. *Id.* (emphasis in original).

192. *Id.* (emphasis added).

193. *Id. at* 297–99.

194. *Id.*

195. *Id.*

196. *Id.* at 316–17.

197. Speed's opinion might appear to clash with the Supreme Court's decision in Ex parte *Milligan*, 71 U.S. 2 (1866), in which the Court ruled that the Suspension Clause barred a military commission trial for the petitioner when civilian courts were available. However, a federal district court distinguished *Milligan* in denying the habeas petition of Dr. Samuel Mudd, one of the Lincoln conspirators. *See Ex parte* Mudd, 17 F. Cas. 954 (S.D. Fla. 1868). The court in *Mudd* held that *Milligan* had not addressed a

that Speed did not read the Define and Punish Clause as unduly restricting the definition of offenses against the law of nations.[198] However, Speed's citation to Randolph's opinion and his focus on perfidy in the Lincoln assassination suggested that Congress lacked power to retroactively authorize commissions for conduct that the law of war had previously permitted.

Speed's reliance on the distinction between defining under the Define and Punish Clause and the power granted elsewhere in Article I, section 8 to "make rules" for the armed forces had another important consequence. Speed conceded that Congress could invoke its war powers to establish military tribunals for the armed forces of the United States. However, Speed continued, Congress's war powers did *not* extend to creation of military tribunals "for the adjudication of offences committed by persons *not* engaged in, or belonging to, such forces."[199] To authorize these tribunals, Congress would have to rely on the Define and Punish Clause.[200] Extending Congress's power beyond the boundaries of the law of nations would trigger the very problems that the Framers had drafted the Constitution to prevent.[201] Unmoored from the law of nations and hence from

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case in which an individual in Milligan's home state of Indiana had made his way behind the lines of a Union army camp and "not from any private animosity, but from public reasons" had assassinated the commanding officer. According to the *Mudd* court, such an act committed in the course of an armed conflict would remain a war crime triable in a military commission. *Cf.* WITT, *supra* note 181, at 291–92 (describing evidence in the Lincoln conspirators' case, which was circumstantial but provided basis for inferring participation in common plan); Curtis A. Bradley, *The Story of* Ex parte *Milligan: Military Trials, Enemy Combatants, and Congressional Authorization, reprinted in* PRESIDENTIAL POWER STORIES 93, 119–21 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) [hereinafter Bradley, *Story of* Ex Parte *Milligan*] (discussing litigation involving Lincoln conspirators).

198. For another example of deference to Congress, see Miller v. United States, 78 U.S. 268, 304–05 (1870), holding that congressional war power authorized confiscating property of individuals who provided aid and comfort to the Confederacy, and that such confiscation was also the right of belligerent under law of war. *But see id.* at 316–23 (Field, J., dissenting) (arguing that Congress's war powers are limited by law of nations, and that the statute at issue violated international law because it provided for forfeiture of property without appropriate procedural safeguards); *cf.* David Golove, *The Supreme Court, the War on Terror, and the American Just War Constitutional Tradition, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 561, 565 (David L. Sloss et al. eds., 2011) (discussing *Miller*).

199. Military Commissions, 11 Op. Att'y Gen. 298 (1865) (emphasis added).

200. *See id.*

201. *See id.* at 299.

membership in the international community, Americans would devolve into an "uncivilized and barbarous people."[202]

The use of military commissions in the Civil War was consistent with Speed's formulation. Commissions adjudicating acts of violence were wary of amorphous charges. Conviction of a defendant charged with a war crime, such as killing of civilians, plunder of civilian property, or perfidious attacks on individuals or strategic targets, required clear proof.[203] The Lincoln conspirators' trials, which hinged on the conspirators' assistance to Booth's perfidious plot, met this standard. The commissions also tried civilian defendants for regulatory offenses such as trading with the enemy. However, these prosecutions were predicated on defendants' breach of their duty of allegiance to the United States and international rules governing military occupation.[204]

Contemporary officials who established military commissions used the tribunals for both of these purposes.[205] Because of horrific violence in Missouri relatively early in the war, General Henry Halleck, himself an expert in international law, sought and eventually obtained authority to establish commissions for "bushwhackers."[206] These small groups, who

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202. *See id.* at 300.

203. *See* U.S. War Dep't, General Orders No. 19, April 24, 1862, *in* 1 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. II, at 484–88 (Washington, D.C., Gov't Printing Office, 1894) [hereinafter 1 OR ser. II] (adjudicating the case of Ambrose R. Tompkins); *cf.* MARK NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 170–71 (1991) (discussing the case of Francis M. Armstrong, in which President Lincoln commuted Armstrong's sentence to detention for duration of war for entering Union lines to recruit for the Confederate Army).

204. *See* General Court Martial Order No, 55, Feb. 3, 1865, *in* GENERAL COURT MARTIAL ORDERS JANUARY–MARCH 1865 (Washington, D.C., Gov't Printing Office, 1865), *available at* http://ia701203.us.archive.org/25/items/generalcourtmart00unit/generalcourtmart00unit.pdf (describing defendants, District of Columbia residents convicted of trading with the enemy, as US citizens "owing allegiance" to nation); *cf.* Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT'L L. 121, 133–35 (2011) (discussing evolution of doctrine under law of war).

205. *See generally* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010) (discussing law of war theories that influenced Civil War practice).

206. *See* General Order No. 13, Dec. 4, 1861, *in* 1 OR ser. II, *supra* note 203, at 233–36; *see also* FRANCIS LIEBER, GUERILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAW AND USAGES OF WAR 16–17 (1862) (noting nature and scope of prohibition); *cf.* NEELY, *supra* note 203, at 36–39 (noting Halleck's repeated requests for this

took their cue from the banditti deplored by Vattel, robbed and pillaged in the west. Halleck's order also included bridge burners, who in sympathy with or on orders from the Confederate command, destroyed strategic targets. Spies and individuals trading with the enemy rounded out Halleck's list.[207]

Bushwhackers and bridge burners both displayed a concrete link to violence that Andrew Jackson's target, Alexander Arbuthnot, had lacked. Bushwhackers' victims were often ordinary civilians. Attacks on civilians were war crimes, whether such acts were committed by regular or irregular forces. Defendants in the bridge-burning cases provided concrete aid to a specific unlawful operation, frequently assisting in the operations through their "presence and advice."[208] Indeed, in several of the cases cited by the government, the defendants not only provided "aid and comfort" to groups that burned bridges, but both plotted and participated in these acts.[209]

Although Attorney General Speed's opinion authorizing military commissions for the Lincoln conspirators trotted out Vattel's assertion that banditti could be summarily executed, both experience and the weight of authority demonstrated a commitment to more probing inquiry. Speed recommended commission trials rather than summary execution for the Lincoln conspirators. Other commentators also restricted the use of summary dispositions. William Winthrop, in a widely cited treatise written after the war that examined wartime proceedings in detail, opined that summary dispositions were appropriate, but only when the defendants' guilt was "clear."[210] Invoking the

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authority, which first met with inertia from the ever-cautious General George McClellan, but were ultimately approved by Lincoln).

207. *See* General Order No. 13, Dec. 4, 1861, *in* 1 OR ser. II, *supra* note 203, at 233–36.

208. *See, e.g.*, General Order No. 20, Jan. 14, 1862, *in* 1 OR ser. II, *supra* note 203, at 403–04 (noting charges against one James R.J. Jones).

209. *See id.* at 404 (noting charges against one Thomas M. Smith); *General Order No. 19, in* 1 OR ser. II, *supra* note 203, at 478 (recording that defendant Matthew Thompson: joined band "then and there" engaged in bridge-burning and stole horse for purpose of aiding bushwhackers); *id.* at 479 (recording that defendant Owen C. Hickman engaged in assault with intent to kill).

210. WINTHROP, *supra* note 182, at 10–11; *cf.* GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 82 (1863) (noting, in groundbreaking code by Francis Lieber, that those who fight, plunder, etc., "without commission, without being part . . . of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting

legality of summary execution was more a rhetorical trope than a reflection of reality. In the vast run of cases, defendants received a trial with meaningful procedural safeguards. The proof is in the pudding: Missouri was the scene of extraordinary violence during the war, and was also the site of almost half of the over 4,000 military commissions during the conflict.[211] In a representative sample of the Missouri proceedings, acquittals occurred in nearly fifteen percent of the contested cases and administrative review of the sentence produced commutations in another forty percent of such matters.[212]

Commissions also generally avoided the vague charges that marred Jackson's military commission trial of Alexander Arbuthnot. In practice, as noted above, commissions issued serious punishments such as death or substantial imprisonment only on findings of concrete involvement in violence. When commissions dispensed such punishments for more amorphous conduct, such as violation of an oath of allegiance to the Union and recruitment for the Confederacy behind Union lines, administrative review typically commuted the sentence.[213] Commissions did sometimes target individuals because of anti-government opinions.[214] In retrospect, these prosecutions are problematic, particularly given the robust view of political speech embodied in modern First Amendment jurisprudence.[215] However, vigorous criticism of the administration continued

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returns to their homes and avocations . . . are not public enemies . . . and are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates").

211. *See* NEELY, *supra* note 203, at 168.

212. *See id.* at 43.

213. *See id.* at 170–71 (noting that in this case, the Judge Advocate General argued for upholding death penalty, but Lincoln commuted sentence).

214. The most famous case involved Ohio politician Clement Vallandigham, whose sentence Lincoln commuted to banishment to the Confederacy. *See id.* at 65–68; Bradley, *Story of* Ex parte *Milligan*, *supra* note 197, at 104–05; *cf.* Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1360–61 (1993) (book review) (offering more critical perspective); *see also* Ex parte Vallandigham, 68 U.S. 243, 251–52 (1864) (dismissing Vallandigham's challenge to his conviction on procedural grounds, contending that it lacked jurisdiction to issue a writ of certiorari to a military commission, but failing to address whether a challenge could have been construed by Court as writ of habeas corpus seeking original jurisdiction).

215. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

throughout the conflict, and the prosecutions were a small portion of the commissions' total output.[216]

The noted law of war authority Winthrop contradicted Attorney General Speed on another key point. Speed had argued that the offense of bushwhacking was complete upon the defendant's joining of a group.[217] Speed's view would have permitted far more cursory review of the defendant's conduct. However, Winthrop's perusal of Civil War precedent convinced him that more was necessary. Winthrop opined that "overt acts," not mere intentions, were required.[218] The cases cited above again bear out Winthrop's view.

Review by generals like Halleck or by President Lincoln himself helped temper military commission dispositions, substituting for the more formal review that an Article III court might have provided. Layers of review unearthed procedural irregularities and introduced mercy into decisions that might otherwise have been unduly harsh.[219] This mechanism did some of the work of the separation of powers that Montesquieu and the Framers had contemplated, bringing to bear a long-term perspective and curbing the tendency for revenge. Lincoln's concern with underlying facts echoed Randolph's temperate position in the debate with Patrick Henry about Josiah Phillips' treatment[220] and contrasted with Jackson's rush to judgment in the Florida campaign.[221]

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216. *See* NEELY, *supra* note 203, at 44 (asserting that "[t]rials by military commission did not often serve the purpose of repression for political opinion").

217. Military Commissions, 11 Op. Att'y Gen. 297, 312 (1865).

218. *See* WINTHROP, *supra* note 182, at 73–74.

219. *See* Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 88–90 (1990) (analyzing Lincoln's review of military commission verdicts regarding members of the Dakota nation who had allegedly killed captives and targeted civilians for killing and sexual violence). The Lincoln administration was careful to comply with international law in other respects, including the treatment of blockade-runners. *See* David M. Golove, *Leaving Customary International Law Where it Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333, 364–70 (2006).

220. *See supra* notes 101–07 and accompanying text.

221. *See supra* notes 155–88.

3. Defining and Punishing Piracy and Counterfeiting under Federal Criminal Law

While Andrew Jackson and Civil War officials acted independently of Congress, court cases starting in the nineteenth century directly considered Congress's powers. Courts served the membership conception by deferring to Congress when individuals' short-term impulses jeopardized global commercial interests. While the Court ceded a zone of discretion to Congress regarding the definition of individual conduct that undermined membership, it also imposed limits.

Justice Story, in his opinion for the Court in *United States v. Smith*,[222] agreed that Congress acted within its authority under the Define and Punish Clause when it enacted a statute criminalizing piracy. The Framers had expressly granted Congress power to define and punish the offense of piracy, which Madison acknowledged in Federalist No. 42 was also an offense under international law.[223] Piracy was a danger because it attacked commerce between nations, which European philosophers had designated as a crucial force for tempering short-term impulses.[224] States increasingly had mechanisms for accountability that promoted a long-term perspective, including governing institutions, a "civil society" of associations between citizens, and the reciprocity between nations that helped to enforce international law. Pirates, in contrast, were "unconnected individuals."[225] Pirates' own deliberations, such as they were, partook of short-term impulses for gain and notoriety. In permitting those short-term impulses full sway, pirates became the "enemies of mankind."[226] Enhancing the community of nations' ability to address this danger was an important element of the Framers' conception of membership.

In responding to this need, Story wrote, Congress was entitled to some deference. In the statute at issue in *Smith*, Congress had not specified particular acts as triggering criminal penalties, but had incorporated by reference the international jurisprudence outlawing piracy. Story endorsed Congress's

222. *See* United States v. Smith, 18 U.S. 153 (1820).
223. *See* Federalist No. 42, *supra* note 1, at 266.
224. *See* HIRSCHMAN, *supra* note 36 at 60 (citing Montesquieu).
225. *Smith*, 18 U.S. at 163 n.8.
226. *Id.*

reliance on international law to fill in the gaps, observing that customary international law was too vast and various to be "completely ascertained and defined in any public code recognized by the common consent of nations."[227] Because a comprehensive international code was not practicable, granting Congress the flexibility to fill in interstices fit the Framers' design.[228] As a representative institution with the ability to investigate facts and arrive at solutions tailored to the tenor of the times, Congress was well situated to discharge this task.[229]

In the piracy cases, the Court set limits only when the United States had no demonstrable interest in regulation. For example, in *United States v. Palmer*,[230] the Court indicated that Congress would have to state clearly that it wished to prohibit thefts on the high seas that did not involve citizens or United States flag vessels.[231] One case from the period, *United States v. Furlong*,[232] imposed a limit on Congress's power by holding that Congress could not criminalize the murder of one member of a pirate ship's crew by another.[233] However, as we shall see, this case relied on idiosyncratic reasoning that cut against the grain of more recent international law,[234] and in any case imposed only a modest limit on Congress's authority.[235]

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227. *Id.* at 159; *cf.* United States v. bin Laden, 92 F. Supp. 2d189, 220 (S.D.N.Y. 2000) (citing *Smith* for proposition that Congress has complied with the Define and Punish Clause if "at least some members of the international community" regard particular conduct as violation of international law).

228. *See Smith*, 18 U.S. at 159 (asserting that the wisdom of deferring to Congress surely carried "great weight" with the Framers).

229. *Id.* (noting a "peculiar fitness in giving the power to define as well as to punish" to Congress).

230. United States v. Palmer, 16 U.S. 610, 630–35 (1818).

231. *Cf.* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 226 (2004) (explaining rationale in the cases).

232. *See* United States v. Furlong, 18 U.S. (5 Wheat..)184 (1820).

233. *Id.* at 195.

234. *See* Helfman, *supra* note 100, at 65 n.75; Kontorovich, *supra* note 231, at 204–05 (acknowledging this point, while critiquing normative basis for subsequent expansion of universal jurisdiction under international law).

235. In *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825), Chief Justice Marshall observed that state bans of the slave trade had not yet ripened into a rule of international law. Marshall's analysis hinted strongly that Congress's power was not limitless. *See id.* at 122 (asserting that, "[a]s no nation can prescribe a rule for others, none can make a law of nations, and . . . [the slave trade] remains lawful to those whose

Later in the nineteenth century, the Court applied comparable deference to Congress's efforts to deal with international counterfeiting in *United States v. Arjona.*[236] In *Arjona,* the Court held that Congress had acted within its power under the Define and Punish Clause when it passed a law criminalizing the manufacturing of counterfeit foreign currencies within the United States for use in a foreign state. Just as pirates undermined trade by preying on international shipping, counterfeiters' greed undermined the long-term global good of "wise and equitable commercial laws."[237] The membership conception required that each state take action to ward off this risk. Echoing the expansive view of neutrality law that had been so important in the debates about Washington's Proclamation and Jackson's military commissions during the Florida campaign, the Court cited Vattel for the proposition that, "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace."[238] While the Court observed that Congress's determination that a given act violated the law of nations was subject to judicial review,[239] its analysis reinforced the validity of reasonable efforts by Congress to fulfill the United States' international obligations.[240]

4. World War II: Espionage, Sabotage, and the *Quirin* Case

In the twentieth century, the foremost precedent on the Define and Punish Clause, *Ex parte Quirin,* continued this

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governments have not forbidden it"). However, this portion of the analysis was dicta, as the case did not address Congress's power under the Define and Punish Clause.

236. United States v. Arjona, 120 U.S. 479, 487 (1887).

237. *Id.* at 484.

238. *Id.* at 484; *cf.* Kontorovich, *Discretion and Delegation, supra* note 84, at 1727–30 (acknowledging this rationale, while finding it to be "strained" interpretation that confers excessive power on Congress).

239. *Arjona,* 120 U.S. at 488 ("Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress.").

240. *Cf.* Thomas H. Lee & David L. Sloss, *International Law an Interpretive Tool in the Supreme Court, 1861–1900, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 198, at 124, 147–48 (noting that the *Arjona* Court relied mainly on Vattel and policy, without citing treaties, state practice, or other publicists).

pattern of deference.[241] *Quirin* addressed Congress's power to define and punish espionage and sabotage in a case involving individuals who disembarked from submarines on the eastern coast of the United States. The Court suggested that Congress could authorize military commissions to try individuals charged with espionage or sabotage, even though the former has an ambiguous status under international law and the defendants had not consummated the acts normally required for the latter.[242]

Because both sabotage and espionage have long pedigrees,[243] the Court took a less formal view of the requirements of the separation of powers. According to the Court, express congressional authorization of each charge was unnecessary, because Congress had implicitly included[244] offenses historically triable by military commissions. The

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241. *See generally Ex Parte* Quirin, 317 U.S. 1 (1942). The United States also applied military law in territories acquired after the Spanish-American War. *See* Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 143 (2011). While the Supreme Court on occasion expressed deference to military tribunals, cases generally involved either violations of the law of war or conduct that undermined the military administration's ability to fulfill its international law duties as an occupying authority. *See* Neely v. Henkel, 180 U.S. 109, 121–23 (1901) (upholding military court's jurisdiction over US official who had allegedly embezzled funds from US-run postal service in Cuba). When military administrators issued orders that appeared to treat civilians unfairly, the Court intervened to temper those effects. *See* Ochoa v. Hernandez, 230 U.S. 139, 162–64 (1913) (construing military order governing disposition of property to provide opportunity for hearing). *See id.* at 165 (asserting that military orders applicable to civilians should follow "general rules of international law and . . . fundamental principles known wherever the American flag flies").

242. All members of the group were convicted. Two defendants, who after their entry into the United States informed the Federal Bureau of Investigation of the group's plans, ultimately had their sentences commuted. *See* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 175 (2003). The rest were executed. Adding to the controversy around the decision, the executions occurred *before* issuance of the Court's full decision upholding the convictions. *See* Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 739 (2002) (noting that the Court released a preliminary decision "with the promise of an opinion at a later date"). For different views of the case, compare A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 310 (contending that *Quirin*, along with changes in law of habeas corpus, provides significant protection for defendants in military tribunals), with Turley, *supra* note 242, at 734–40 (criticizing *Quirin*).

243. *Quirin*, 317 U.S. at 12–14 (asserting that Congress had "incorporated by reference" all such offenses).

244. *Id.* at 12 (citing United States v. Smith, 18 U.S. 153 (1820)).

extensive pedigree of each charge presumably also influenced the Court's view that Congress had authorized military commissions in such cases. The provision of the Espionage Act that the Court relied on to demonstrate congressional authorization, 50 U.S.C. § 38, actually read more like a savings clause.[245] A savings clause does not grant jurisdiction or other authority, but merely declares that Congress has not intended to limit jurisdiction or other authority that already exists. In retrospect, Congress appears to have acquiesced in a long pattern of executive branch usage regarding the trial of sabotage and espionage charges.[246]

Spying has long been an offense triable by military commission. In the Revolutionary War, General Washington convened a military commission to try Major John Andre.. Andre had been captured behind American lines in civilian garb after a meeting with General Benedict Arnold, whom Andre was persuading to defect to the British.[247] Henry Clay, who so vigorously condemned Jackson for the military commissions that convicted Ambrister and Arbuthnot in the Florida campaign, agreed that spying was a violation of the laws of war.[248] General Halleck, author of one of the best-known international law treatises of the day, noted that spying involving "*disguise*, or *false pretence* . . . constitutes . . . perfidy" punishable by death.[249] However, ambiguity about the precise status of espionage is not far from the surface.

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245. *Id.* at 10; *see generally* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Commission Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295 (2010) (discussing ambiguities in statute).

246. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also id.* at 610 (Frankfurter, J., concurring) (discussing legislative acquiescence as triggering judicial deference); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, HARV. L. REV. (forthcoming Dec. 2012) (analyzing patterns of acquiescence); *see generally* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding presidential negotiation of claims settlement with Iran); *cf.* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 121–29 (Oxford University Press 1994) (discussing what authors call "customary national security law").

247. *Quirin*, 317 U.S. at 31 n.9; I HENRY WAGNER HALLECK, HALLECK'S INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (Sherston Baker ed., 3rd ed. 1893).

248. ANNALS OF CONG., *supra* note 155, at 644–46.

249. HALLECK, *supra* note 247, at 572 (emphasis in original).

Twentieth century authority suggests at the very least that espionage is not a war crime like killing civilians, and may merely be a violation of municipal law that international law *permits* nations to prosecute. Nuremberg prosecutor Telford Taylor recognized in his Final Report that espionage was an offense against the law of nations, although he did not view it as a war crime in the same sense as the targeting of civilians.[250] International agreements like the Hague Convention defined espionage as acting "clandestinely or on false pretences" in order to procure information.[251] However, neither the Hague Convention nor subsequent agreements prohibit espionage, although they clearly indicate that states have the legal right to punish it.[252]

Under the deference that the membership conception grants Congress, the exact status of espionage under international law is less important than the near-universal tradition of trying espionage in military commissions or dealing with accused spies by summary execution. Modern international law bars the latter practice, requiring that an accused spy receive a trial.[253] However, modern doctrine does not preclude the use of military commissions.

Ultimately, espionage fits best under the rubric of offenses that a military authority can try and punish to maintain order in territory it occupies or controls.[254] The deception practiced by

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250. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 1–2 (1949) [hereinafter WAR CRIME TRIALS] *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf (distinguishing "'noncriminal' offenses against the laws of war (such as espionage) from 'criminal' offenses such as atrocities against civilians").

251. *See* Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

252. *Id.* art. 30 (mandating that accused spy "shall not be punished without . . . trial"). *See* Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 328–29 (1951) (expressing doubt that espionage is violation of law of nations); *cf.* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offence: The Common Law Origins of 'Murder in Violation of the Law of War'*, 7 J. INT'L CRIM. JUST. 63, 73–79 (2009) (elaborating on Baxter's view).

253. *See* Hague Regulations, *supra* note 251, art. 30.

254. Madsen v. Kinsella, 343 U.S. 341, 362 (1952) (upholding use of military commission in occupied Germany to try civilian wife for murder of service member spouse); *cf.* United States v. Ali, 2012 CAAF Lexis 815, at *17–24 (C.A.A.F. July 18, 2012) (upholding military commission jurisdiction over foreign national translator

spies ripples to civilians. As the Supreme Court pointed out in *Quirin*, spies often turn to sabotage.[255] Spies may also recruit supporters from a state's population, weakening the ties that bind the state and its citizens. The spy's cultivation of secrecy makes these effects even harder to detect. Moreover, a spy's transmittal of strategic and tactical information aids the enemy, perhaps even more effectively than measures such as trading food or ammunition. The desire to control these untoward effects is entirely consistent with the authority provided to Congress under the Define and Punish Clause. *Quirin*'s flexible view of Congress's authority under the Clause is not an outlier, but a point on the continuum first noted by the Justice Story' opinion over a century earlier in *Smith*. Indeed, the *Quirin* Court's approach echoed 'the Court in Smith, as it rejected any effort to hamstring Congress with an unduly "meticulous" demarcation of the law of nations' "ultimate boundaries."[256]

The Court's holding on sabotage is an even clearer indication of deference. While few if any scholars have expressed doubt that the defendants intended to commit acts of sabotage, the accused saboteurs made little progress toward realizing that goal. Nevertheless, the Court rejected the defendants' argument that they had not executed or even attempted any acts of sabotage.[257] Instead, the Court in effect extended the temporal scope of the prohibition on sabotage, holding that the defendants' entry into US territory with the intent to commit sabotage rendered their offense "complete."[258] The Court obviously viewed such a modification as within Congress's power under the Define and Punish Clause.

"serving with or accompanying an armed force in the field"); *id.* at *59–60 (Baker, J., concurring) (observing that providing for jurisdiction was necessary and appropriate exercise of congressional war powers, since inability to discipline foreign national performing mission-critical function could undermine war effort).

255. *Ex Parte* Quirin, 317 U.S. 1, 31 n.10.

256. *Id.* at 45–46.

257. *Quirin*, 317 U.S. at 38; *cf.* Kontorovich, *Discretion and Delegation*, *supra* note 84, at 1735 (noting that the Court "recognized that the parameters of international law could be vague," and that Congress therefore deserved some deference in fixing those parameters).

258. *Id.*; *cf.* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Stevens, J., plurality opinion) (citing this holding with approval).

5. Nuremberg and Membership Offenses

The Nuremberg tribunals after World War II reflected a strong victory for the membership conception. Fittingly enough, the relevant precedents from Nuremberg entailed the trial of "membership offenses."[259] Although this category could have been sweepingly broad, American officials worked with their European colleagues to tailor the definition.

Because the Nuremberg prosecutors recognized early on (with some prodding from the Nuremberg judges[260]) that membership in a criminal organization like the Nazi SS was an unduly amorphous basis for guilt, prosecutors defined membership offenses to include two relatively narrow categories of conduct.[261] The first comprised individuals who played substantial roles in murderous organizations such as the SS. The second involved individuals who, much like members of the bushwhackers during the Civil War, participated in relatively small groups that committed acts of violence against civilians. The narrow categories promoted notice for potential defendants and precluded use of the tribunals as a blunt instrument of revenge.

The first category included defendants Flick and Steinbrinck, charter members of the quaint group, "Friends of Himmler." The defendants knowingly provided a "blank check" for the gruesome operation of the psychopathic SS chief.[262] The second category, entailing direct complicity in war crimes, largely concerned members of German military units known as *einsatzgruppen* that killed hundreds of thousands of noncombatants.[263] Here, however, as in the Civil War bridge

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259. *See* TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 272–85 (1992); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094 (2009).

260. *See* TAYLOR, *supra* note 259, at 280–83.

261. *See* Bush, *supra* note 259, at 1161 (noting that prosecutors recognized that for legal, political, and practical reasons they could not use membership offense charges to try "average complicitous Germans").

262. 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1221 (Sept. 16 2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf.

263. *See generally* CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 18–25 (1998) (describing history of one typical *Einsatzgruppen* unit).

burning cases, the Nuremberg tribunals were lenient with defendants who did not play a concrete role in furthering unlawful violence.[264] The tailoring done by the American prosecutors thus combined accountability with respect for procedural safeguards.

6. After September 11: Salim Hamdan and Conspiracy

The membership conception's fear of short-term impulse also drove the Court's 2006 decision in *Hamdan v. Rumsfeld*[265], restricting the President's power to unilaterally create military commissions.[266] Justice Stevens, writing for the Court, suggested that President Bush's post-9/11 order creating military commissions lacked the sober second thoughts that characterized the Nuremberg prosecutors' efforts to limit the scope of membership offenses.[267] Drafted without congressional buy-in or the procedural safeguards required by the Geneva Convention's Common Article 3, the executive order threatened to sacrifice adjudication on the altar of revenge. However, *Hamdan* also suggests that a more tailored measure passed by Congress pursuant to the Define and Punish Clause would pass muster.

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264. *See generally* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 584–87 (Sept. 16 2012) (hereinafter TRIALS OF WAR CRIMINALS), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf (showing a case of a noncommissioned officer Mathias Graf, who sought repeatedly to leave his unit and was sentenced to time served).

265. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

266. *Compare* Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 613–20 (2002) (arguing that military tribunals are appropriate under international law), *and* Jack L. Goldsmith & Curtis A. Bradley, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 249 (2002) (arguing for validity of Administration's Military Order establishing military tribunals), *with* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that congressional authorization was required), *and* Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 656–57 (2002) (expressing concerns about command influence).

267. *Hamdan*, 548 U.S. at 601–02 (suggesting that unilateral presidential action in this context could lead to despotic rule); Deborah Pearlstein, *Justice Stevens and the Expert Executive*, 99 GEO. L.J. 1301, 1310–11 (2011) (discussing factors that contributed to Justice Stevens' plurality opinion in *Hamdan*).

One portion of Justice Stevens' opinion asserted that the military commission established by the President could not try Hamdan, who had served as Osama bin Laden's driver, on charges that he conspired to join Al Qaeda in killing civilians and committing other war crimes.[268] The section of Stevens' opinion addressing conspiracy cites the same concern with separation of powers that led the Court to decisively reject President Bush's unilateral attempt to establish commissions.[269] Stevens quoted the argument in Federalist No. 47 for separate but overlapping powers, in which Madison warned that, "Accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."[270] While the "evolutionary" common law tradition of the law of war[271] would permit some executive branch designation of conduct as triable by military commission, precedent under the law of nations for such designation would have to be "plain and unambiguous."[272] Stevens expressly declined to consider

268. *Hamdan*, 548 U.S. at 601–02. The tally was 4–3 on this issue, with Justice Kennedy declining to join the opinion; Chief Justice Roberts recused himself because he had been part of the panel that heard the case in the D.C. Circuit. The make-up of the plurality alone provides some basis for uncertainty about the vitality of the opinion, at least insofar as it suggests absolute limits on military commission jurisdiction. Justice Kennedy, explaining his refusal to join this part of Stevens' opinion, found it unnecessary to address the validity of conspiracy charges. *Id.* at 655. Kennedy noted further that, on the general question of determining whether a given charge can be tried in a commission, "Congress, not the Court, is the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with the national interest or international justice.'" *Id.* at 655 (citation omitted).

269. These concerns have also driven case law and scholarly debate on detention. *See generally* Boumediene v. Bush, 553 U.S. 723, 742 (2008) (citing separation of powers in striking down limits on detainees' access to habeas corpus); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009) (arguing that the Supreme Court has used procedural rulings in terrorism cases to police interaction between the branches), Martin S. Flaherty, *Constitutional Resolve in a World Changed Utterly*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 198 at 575, 578–80 (analyzing judicial review in war on terror cases); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2125–35 (2009) (discussing historical background).

270. *Hamdan*, 548 U.S. at 602.

271. *Id.* at 602 n.34.

272. *Id.* at 602–03. For Stevens, the crimes of sabotage and espionage at issue in *Quirin* met this standard. *See id.* at 603 (citing *Ex parte* Quirin, 317 U.S. 1, 30, 35–36).

whether legislation enacted pursuant to the Define and Punish Clause was subject to the same restriction.[273]

Stevens also viewed separation of powers as a signal of long-term perspective in his discussion of the Nuremberg membership offense prosecutions. Stevens' opinion noted that the prosecutions stemmed from provisions in the London Charter through which the Allied Powers established the tribunals.[274] Charges based on membership in a criminal organization like the SS were not a mere whim of the prosecutors, and were therefore entitled to greater respect.[275]

Furthermore, Stevens' opinion tracked the membership conception in seeking a link between a defendant and concrete actions that violated the law of war. Stevens recognized that the Civil War precedents generally entailed specific crimes, rather than mere membership in a particular unit.[276] In addition, he noted that the Nuremberg prosecutors had tailored membership offenses to avoid "mass . . . trials" and instead had focused on "high-level Nazi officials."[277]

Two aspects of Stevens' plurality opinion on conspiracy suggest that he would have extended greater deference to congressional authorization of material support charges. First, much of Stevens' discussion stressed the dangers of executive unilateralism.[278] That persistent theme and Stevens' careful reservation of issues regarding Congress's exercise of its enumerated power under the Define and Punish Clause hinted that agreement between the political branches should trigger greater deference. Stevens also praised the *Quirin* Court's approach, including its handling of the espionage and sabotage charges.[279] As we have noted, the *Quirin* Court's analysis of these issues discounted problems with the international law status of espionage and the temporal scope of sabotage.[280] Finding each of these charges to be within Congress's power under the Define

273. *Id.* at 601.
274. *Id.* at 600 n.32.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.* at 601–02.
279. *Id.* at 603–07.
280. *See supra* notes 241–58 and accompanying text, discussing *Quirin*, 317 U.S. at 31–38.

and Punish Clause requires the measure of deference to Congress that the membership conception contemplates.

7. Summary

The membership conception dominates the period from Jackson's Florida campaign to the present. The piracy cases and *Arjona* illustrated the zone of deference that courts accorded Congress in policing individual misconduct that threatened cooperation among nations. From the military commissions in Missouri during the Civil War to the Nuremberg prosecutors' tailoring of membership offenses, officials resisted or rethought the short-term impulse for revenge.

This narrative is not monolithic. Military commission jurisdiction was pushed beyond the breaking point by Jackson in his use of a military commission to try Alexander Arbuthnot. During the Civil War, Clement Vallandigham's military commission conviction for speech critical of government policy was another challenge to the membership conception. However, these excesses always encountered robust pushback. Henry Clay denounced Arbuthnot's trial and execution, triggering a sustained and serious debate on the law of nations. Responding to a comparable level of controversy, Lincoln commuted Vallandigham's sentence. Vallandigham's conviction was in any case an outlier among military commission convictions, which typically centered on participation in unlawful acts of violence.

Ex parte Quirin and the post-9/11 jurisprudence tell the same tale. As Justice Stevens noted decades later in *Hamdan*, the law of war presented sufficient precedent for military commission jurisdiction over the charges of espionage and sabotage in the *Quirin* case. The commutation of sentences of the two defendants who had tipped off the FBI showed the sober second thoughts that have always typified the membership conception. *Hamdan* itself, with its rejection of executive unilateralism and embrace of the procedural safeguards in the Geneva Convention's Common Article 3, displayed the membership conception's fortitude in the crucible of post 9/11 fears. However, Hamdan's case and that of another Guantanamo detainee, Ali Hamza al Bahlul, posed a fresh challenge, to which we now turn.

IV. *INVITATION TO A PROBLEM: MATERIAL SUPPORT LAWS AND MILITARY COMMISSIONS*

After the Supreme Court struck down President Bush's efforts to unilaterally establish military commissions, Congress joined the fray with the Military Commission Act of 2006. The 2006 MCA included material support of terrorism as a charge triable before military commissions. A broad definition of material support would reach a great deal of conduct that the law of war does not prohibit, exceeding the measure of deference that the membership approach requires. This section first provides some background on the application of material support charges pursuant to federal criminal law, and then discusses the arguments made by the government and its critics in the two military commission cases currently before the D.C. Circuit Court of Appeals.

A. Material Support and Federal Criminal Law

Congress first enacted laws barring material support of terrorism as provisions of the Federal Criminal Code. The first provision, 18 U.S.C. § 2339A, passed in 1994, bars material support of terrorist activity.[281] After the Oklahoma City bombing, Congress passed section 2339B, which bars material support of terrorist groups, such as Hamas.[282] Section 2339A requires proof that a defendant *specifically intended* to promote attacks on persons or property. In contrast, section 2339B bars *any* contribution of material support to groups that the Secretary of State has designated as foreign terrorist organizations (DFTOs). Under section 2339B, a defendant need not intend to further violence, as long as he knows that he is providing support to a DFTO. Courts construing section 2339B have uniformly upheld Congress's view that DFTOs, like state sponsors of terrorism, "are so tainted by their criminal conduct

281. Material support covers a broad range of activities, including tangible items, such as explosives and weapons, and intangible items, such as financial and other services, personnel, training, and expert advice or assistance. 18 U.S.C. § 2339A (1994). *See also* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 12–18 (2005) (discussing the history of the statute); Margulies, *Advising Terrorism*, *supra* note 112.

282. *See* 18 U.S.C. § 2339B.

that any contribution to such an organization facilitates that conduct."[283]

After September 11, the government used the material support laws in efforts to deter terrorist conspiracies and disrupt terrorist attacks before they reached a critical stage.[284] Relying heavily on the government's special competence in the realm of foreign affairs, the Supreme Court upheld § 2339B in 2010, rejecting vagueness and First Amendment challenges.[285] Chief Justice Roberts, writing for a 6-3 majority that included Justice Stevens, explained that § 2339B survived heightened scrutiny because support had to be "coordinated with" the DFTO.[286] Even training in nonviolence provided in coordination with a DFTO would violate the statute, Roberts observed, because a terrorist group could use that training to present a kinder, gentler face to the world and raise more money to support violence.[287]

To tailor the statute to core First Amendment interests, the Court observed that the statute did not prohibit individuals from expressing an independent opinion that happened to coincide with views expressed by a DFTO.[288] A sensible reading of the statute would also exempt scholarship, journalism, human rights monitoring, legal advocacy, and mediation a la the Carter Center.[289] Moreover, the statute does not cover domestic organizations.[290] Nevertheless, both the statute and the Supreme Court's decision upholding it have drawn a significant amount of criticism.[291] Even more importantly for the purposes of this

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283. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 301(a)(7), 110 Stat. 1214, 1246 (codified as amended at 18 U.S.C. § 1 (2006)) Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–25 (2010) (upholding the statute).

284. *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS—2009 UPDATE AND RECENT DEVELOPMENTS 13–16 (2009) (discussing prosecutions and noting that prosecutors have been successful in obtaining convictions).

285. *See Holder*, 130 S. Ct. at 2719–21.

286. *Id.* at 2721–22.

287. *Id.* at 2729–30.

288. *Id.* at 2722–23.

289. *See* Margulies, *Advising Terrorism*, *supra* note 112, at 506–12 (arguing that this reading of the statute is consistent with constitutional precedent).

290. *See Holder*, 130 S. Ct. at 2730.

291. *See* David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147

Article, the provision reaches acts such as low-level financial support and nonviolent training that have never been considered violations of the law of war.[292]

B. *Material Support Moves to Military Commissions*

Congress also believed that material support charges were triable before military commissions. When Congress codified crimes triable before commissions in the Military Commissions Act of 2006 (MCA), it included material support to terrorism as one of the charges authorized.[293] Although the Obama administration expressed doubt that Congress had the power to authorize military commission trials of material support charges,[294] Congress also included material support in the MCA of 2009.[295]

Since the 2006 MCA became law five years after September 11, it may seem odd to attribute its enactment to the short-term impulses that the Framers feared. However, the law was passed hastily, as a response to the Supreme Court's 2006 *Hamdan*

(2012); Wadie E. Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 2011 BYU L. REV. 1455 (2011); Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT'L L. REV. 519 (2011); Timothy Zick, *The First Amendment in Trans-border Perspective: Toward a More Cosmopolitan Perspective*, 52 B.C. L. REV. 941, 966–69 (2011); *cf.* Steven R. Morrison, *Terrorism Online: Is Speech the Same As It Ever Was?*, 44 CREIGHTON L. REV. 963 (2011) (warning of threat to First Amendment in prosecution under material support law of online terrorist recruitment).

292. *See* Geoffrey S. Corn, *Understanding the Limitations on Invoking the Courts-Martial Option for Trying Captured Terrorists*, 17 WILLAMETTE J. INT'L L. & DISPUTE RES. 1, 18 (2009). Corn has taken a more textured position, suggesting that Congress could prospectively provide for trial of material support charges in military commissions. Corn. *Id.* at 18. *Cf.* Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 179–80 (2008) (analyzing problems with trying material support cases in military commissions).

293. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v(b)(28), 120 Stat. 2600 (codified as amended at 10 U.S.C.§§948a-950w (2006)), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf, replaced by Military Commissions Act of 2009, 10 U.S.C. § 950t(25) (2012).

294. *See, e.g.*, Hearing of the Constitution, Civil Rights, and Civil Liberties Subcommittee of the House Judiciary Committee, *Proposals for Reform of the Military Commissions System*, Fed. News Service, July 30, 2009 (hereinafter Proposals for Reform Hearing) (testimony of Assistant Attorney General David Kris).

295. *See* Military Commissions Act of 2009, 10 U.S.C. § 950t(25) (2012).

decision striking down presidentially established commissions.[296] Moreover, other provisions of the law, especially its curbing of habeas corpus for detainees, displayed the lack of deliberation that had disturbed Hamilton in Federalist No. 78. As Justice Kennedy wrote in his opinion for the Court in *Boumediene v. Bush*,[297] the curbs on habeas demonstrated the volatility that occurs when the political branches expect no challenge from the courts. Kennedy warned of the "pendular swings" that occur in the absence of separation of powers.[298] Kennedy's concern about reflection's absence in the MCA could just as easily apply to the law's provisions on material support.

Two active cases currently before the United States Court of Appeals for the District of Columbia Circuit involve challenges to the military commissions' jurisdiction over charges of material support. In one case, a military commission convicted Salim Hamdan, best known as Osama bin Laden's driver in the period surrounding the September 11 attacks. [299] In the other case, a commission convicted Ali Hamza al Bahlul, who served as media secretary for bin Laden, and in that capacity prepared a video celebrating the bombing of the U.S.S. Cole and

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296. *Cf.* Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 760, 765–70 (2006) (analyzing *Hamdan* as indicating Court's commitment to procedural safeguards).

297. *See* Boumediene v. Bush, 553 U.S. 723 (2008); *see also* Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (arguing that habeas provides vital check on political branches); *cf.* Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301 (2009) (arguing that judicially imposed rules are necessary to compensate for short-sighted executive policies); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2009 SUP. CT. REV. 1 (2008) (praising the decision); David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, CATO SUP. CT. REV. 47 (2007); *But see* Charles A. Shanor, *Terrorism, Historical Analogies, and Modern Choices*, 24 EMORY INT'L L. REV. 589, 607–12 (2010) (discussing post-*Boumediene* D.C. Circuit cases that limited impact of Supreme Court's holding by shifting burden to detainee upon government's showing of "credible evidence" to warrant detention); Eric A. Posner, *International Law and the War on Terror:* Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, CATO SUP. CT. REV. 23, 39–46 (2007) (criticizing decision as unmanageable and illegitimate extension of protection of American law to noncitizens not on American soil).

298. *Boumediene*, 553 U.S. at 742.

299. Hamdan was also found guilty of providing weapons to the Taliban and fellow Al Qaeda operatives, although not in connection with any specific attack. United States v. Hamdan (*Hamdan I*), 801 F. Supp. 2d. 1247, 1247(Ct. Mil. Comm'n Rev. 2011).

distributed the "martyr's wills" of two of the September 11 hijackers.[300] Each of these convictions has been upheld by the Court of Military Commission Review ("CMCR");[301] the D.C. Court of Appeals recently reversed the CMCR in *Hamdan* and argument is pending in that court in *al Bahlul.* It seems quite possible, given the importance of the questions presented, that at least one of the cases will eventually reach the United States Supreme Court.

1. The Court of Military Commission Review Decisions

The CMCR decisions in *Hamdan* and *al Bahlul* took a broad view of prosecutions under the law of armed conflict, which clashes with the membership conception and to some degree has been overtaken by certain events. Although, as we have seen, the Civil War and Nuremberg precedents are best read narrowly, the CMCR construed them as applying in a sweeping fashion to almost any assistance provided to Al Qaeda.[302] Moreover, the CMCR viewed Jackson's military commission for Arbuthnot as a precedent, not a cautionary tale. As a result, even the government has opted to change the terrain in defending the convictions.

The CMCR's analysis does not bring Hamdan's conviction within the fabric of the law of war. Consider the CMCR's treatment of the Civil War precedents. The bushwhackers and bridge burners prosecuted by commissions participated directly in violence. None of the cases involved a defendant like Hamdan, who performed ministerial tasks several steps removed from the operational planning or execution of a terrorist plot. The aiding the enemy cases involved US citizens with a duty of loyalty to the US which Hamdan does not share. The Nuremberg membership offense cases[303] similarly support liability only for a defendant who played a substantial role in a

300. United States v. Al Bahlul, 820 F. Supp. 2d1141 (Ct. Mil. Comm'n Rev.. Sept. 9, 2011).

301. *Hamdan I,* 801 F. Supp. 2d.at 1247 (Ct. Mil. Comm'n Rev. 2011); *rev'd,* Hamdan v. United States (*Hamdan II*), 696 F.3d 1238 (D.C. Cir. 2012); United States v. Al Bahlul, 820 F. Supp. 2d1141, 1141–42 (Ct. Mil. Comm'n Rev. 2011).

302. *Hamdan I,* 801 F. Supp. 2d. at 1294–1301; *cf.* Peter Margulies, *The Fog of War Reform: Structure and Change in the Law of Armed Conflict After Sept. 11,* 95 MARQUETTE L. REV. 1417, 1477–84 (2012) (critiquing decision).

303. *Hamdan I,* 801 F. Supp. 2d. at 1306.

murderous organization like the SS or served in a small unit like the *einsatzgruppen* dedicated to the killing of civilians. *Hamdan* meets neither of these criteria. Finally, the Joint Criminal Enterprise (JCE) theory used by the International Criminal Tribunal for the former Yugoslavia (ICTY)[304] also does not fit Hamdan's conduct. In *Prosecutor v. Tadic*,[305] the ICTY tied JCE, which is still controversial,[306] to direct participation in forced removal of village residents that resulted in the murder of civilians.[307] Here, too, Hamdan's conduct did not rise to the level that the standard requires. That leaves Jackson's commission for Arbuthnot. Arbuthnot's repeated efforts to advocate for Native Americans foreshadowed the acts which the Supreme Court in *Holder v. Humanitarian Law Project* held could be prosecuted criminally if done in coordination with a DFTO. However, Jackson's commission has attracted only modest support in case law and scholarship.[308]

Because the CMCR's broad reading of precedents is difficult to sustain, the government has taken a different approach in the D.C. Circuit Court of Appeals. The government's current position does not abandon arguments under the Define and Punish Clause. However, the government has shifted its emphasis to a new theory that posits a distinctive US common law of war. At first blush, this approach resolves some of the issues that plagued the CMCR's analysis. However, appearances deceive.

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304. *Id.* at 1284–86.

305. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

306. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 82–85 (2005) (discussing due process problems with the Joint Criminal Enterprise doctrine, which in some tribunals has been read to require little in the way of knowledge or intent by defendant).

307. See Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

308. Al Bahlul's case is closer, for reasons discussed *infra* notes 392–94 and accompanying text.

2. The Constitution, the Law of Nations, and the US Common Law of War

Before the D.C. Circuit, the government has shifted the Define and Punish Clause to the back burner, and relied principally on the new argument that, regardless of the international law of war, the "US common law of war" authorizes trial of material support in military commissions.[309] The "U.S. common law of war" argument does not rely on the Define and Punish Clause, with its reference to the law of nations, but instead relies on Congress's power under Article I, section 8 to "make rules" for the army and navy, as well as other textual anchors of Congress's authority over making war. Unfortunately, the US common law of war argument does not fit the Framers' constitutional design or most American practice, which largely reflect the membership view.

The Framers, with their deep understanding of publicists like Vattel, would have deplored assertions of a "U.S. common law of war."[310] Hamilton had argued in *Rutgers v. Waddington* that the law of nations had to inform state law.[311] He and Madison, with their memories of attacks on ambassadors and states' failure to observe treaties during the Articles of Confederation period, had pressed for a Constitution to signal the United States' allegiance to international law.[312] They and their fellow Framers would have found the notion of a "U.S. common law of war" distressingly familiar; that same notion, when articulated by the states during the Articles of Confederation period, had crystallized the case for a new Constitution.

As evidence from the Founding Era and beyond suggests, both the text and purpose of the Define and Punish Clause show that it was supposed to be the *exclusive* source for Congress'

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309. *See* Hamdan Brief for the United States, *supra* note 6, at 24–46. The Court of Military Commission review ("CMCR") had rejected this broader argument. United States v. al Bahlul, 820 F. Supp. 2d 1141, 1171 (asserting that the government lacked power to determine military commission jurisdiction "without . . . reference to international norms").

310. *Cf.* Janet Cooper Alexander, *Military Commissions: A Place Outside the Law's Reach*, 46 ST. LOUIS L.J. 1115,1143 (2012) (noting that the Framers "viewed the 'Law of Nations' as a real body of law that was international in character").

311. *See supra* notes 73–83 and accompanying text.

312. *See supra* notes 84–88 and accompanying text.

power to authorize military commission trials of individuals without a duty of loyalty to the United States. The government's argument in *Hamdan* and *Bahlul* that Congress can invoke its war powers to do an end run around the Define and Punish Clause undermines that framework. Randolph, in his capacity as Attorney General, noted that when dealing with foreign nationals, "every change [in the law of nations] is at the peril of the nation which makes it."[313] Randolph did not merely add this observation in the spirit of prudence; the tone of his opinion indicated that he was analyzing the legal boundaries of the government's power.

Invoking Congress's war powers to achieve a result that was materially different from the one permitted under the Define and Punish Clause would clearly have been viewed by Randolph as a substantial "modification"[314] which the Constitution barred. Attorney General Speed's opinion in 1865 grounds similar sentiments in the text of the Clause. Speed, as we have seen, made much of the distinction between the term, "define" which gives the Clause its name, and the Framers' use of the term "make" in establishing Congress' power to regulate the armed forces.[315] While Randolph and Speed conceded that Congress had some latitude in its work when it invoked the Define and Punish Clause, they both viewed such latitude as circumscribed compared with Congress' expansive war powers. Permitting war powers to expand Congress' discretion under the Define and Punish Clause would make these linguistic differences superfluous, and risk the confrontations with foreign powers that the Framers wished to avoid.[316]

Modern precedent reinforces this view. In *Ex parte Quirin*, the Supreme Court first catalogued the various sources of Congress's and the President's power over armed conflict, but then pivoted to a closer focus on the Define and Punish Clause.[317]. Congress, according to the Court, has always viewed

313. Who Privileged from Arrest, *supra* note 13.

314. *See id.*

315. Military Commission, 11 Op. Att'y Gen. 297, at *2 (1865)

316. *Cf.* Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 471–72 (2009) (arguing that military commissions that are perceived as illegitimate impair global counterterrorism efforts).

317. *Ex Parte* Quirin, 317 U.S. 1, 10–12, 26–29 (1942).

the law of war as "part of the law of nations."[318] The empowerment of military commissions to try "offenders . . . against the law of war" thus stemmed directly from Congress' power under the Define and Punish Clause.[319] In *In re Yamashita*,[320] the Court reinforced this understanding, noting that in the Articles of War Congress pursuant to the Define and Punish Clause "incorporated . . . by reference"[321] the law of war.[322] This body of law, the Court noted, included the "system of military common law . . . deemed applicable by courts."[323] Stressing the jurisprudence's international pedigree, the Court observed that the law of war also included international agreements such as the Hague Convention.[324] Since the Hague Convention imposed new restraints on states in conducting warfare,[325] this passage recognized that United States practice regarding the law of war was authoritative not in its own right, but only as it informed interpretation of the "law of nations." *Hamdan*'s rejection of military commissions unilaterally established by the executive branch and its finding that Congress had incorporated the Geneva Convention's Common Article 3 supports this ongoing consensus, as does the conspiracy section of Justice Stevens' opinion.[326]

Despite the government's claims, executive branch practice largely adheres to the Framers' design. The Civil War military commission convictions typically rested on individuals' participation in specific acts of violence or breach of a duty of allegiance to the United States.[327] The Nuremberg prosecutors' careful tailoring of membership offenses also dovetails with the Framers' scheme, not with the government's wholesale reinterpretation.

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318. *Id.* at 11.

319. *Id.*

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

321. *Id.* at 7–8.

322. *But see* Comment, Haridimos v. Thravalos, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737, 739 (2006) (taking broader view of presidential authority to establish military commissions and suggesting that *Yamashita* signaled movement away from sole reliance on the Define and Punish Clause).

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

324. *Id.*

325. *See* Schmitt, *supra* note 47, at 800; Watkin, *supra* note 52, at 21.

326. Hamdan v. Rumsfeld, 548 U.S. 557, 594–95, 629–32 (2006).

327. *Id.* at 609.

Skepticism is also warranted by the government's reliance on Jackson's commission for Arbuthnot.[328] As we have observed, that episode attracted virulent criticism at the time, and seems unmoored to any remotely credible proof of concrete involvement with acts of violence. Arbuthnot's conviction and execution may have fit Jackson's desire to place an exclamation point at the close of his warning to the British to give up any lingering ambitions on the Southeastern United States. However, Congress's rejection of efforts to censure Jackson[329] does not establish a precedent that would authorize similar moves. Moreover, Secretary of State John Quincy Adams' correspondence supporting Jackson's decision relied on international law, not on a distinctive United States body of authority. If Adams was highly selective in his account of the evidence in the case, those flaws should diminish respect for his analysis, not discredit the role of international law.

3. The Categorical View of Military Commission Jurisdiction

While the government's US common law of war theory is an end-run around international law, champions of the categorical approach suffer from the opposite flaw: a rigid and arbitrary account of the law of nations. States either accept this parched account of international law or act lawlessly.[330] That stark position ignores the flexibility built into both international law and the jurisprudence of the Define and Punish Clause.

For categorical theorists, determining the scope of Congress's power under the Define and Punish Clause is just a matching game. If international bodies have endorsed prosecution of an offense with the same name as the offence that Congress wishes to punish, Congress has acted within its authority. However, if the offence carries a different name, Congress has exceeded its power, even if Congress intends to punish the same *conduct* that international bodies have

328. *See* Rosen, *supra* note 14, at 590.

329. *Id.* at 291.

330. *See* Kevin Jon Heller, *Heller Responds to Margulies on the CMCR Decision in Al-Bahlul*, LAWFARE (Sept. 15, 2011), http://www.lawfareblog.com/2011/09/heller-responds-to-margulies-on-the-cmcr-decision-in-al-bahlul (arguing that viability of charges under customary international law is categorical question, not fact-specific).

addressed.[331] In the first test of the government's theory, the D.C. Circuit pushed back by adopting the categorical approach.

Judge Kavanaugh's opinion for the court in *Hamdan II* rejected the US common law of war theory, noting correctly that the US could inform, but not displace, the law of nations, at least if it wished to permit the MCA 2006 to apply retroactively. In assessing whether material support was a crime under the law of nations, Judge Kavanaugh looked to treaties, case law, and commentary. He observed that no treaty listed material support as a crime punishable by a transnational tribunal.[332] Furthermore, no tribunal had convicted anyone of the offence, or even entertained charges. Commentators, the judge continued, also typically declared that material support was not a recognized war crime prior to the MCA's passage. Material support might overlap in some cases with aiding and abetting charges, Judge Kavanaugh acknowledged.[333] However, he noted, the elements of material support differed from the better-established offence of aiding and abetting. If the government believed that Hamdan was guilty of aiding and abetting, it should have charged him accordingly, the panel concluded.[334]

While the *Hamdan II* panel reached the right result in vacating Hamdan's conviction, its rationale was unduly rigid. Appreciating that point requires a wider perspective on the flaws of the categorical approach. It also requires analysis of the flaws in the *Hamdan II* panel's opinion.

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331. *See, e.g.*, David Glazier, *Playing By the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1033 (2009) (asserting that there is "no known precedent . . . for considering the provision of material support to terrorism to constitute a law of war violation"); Alexander, *supra* note 310, at 1143–44 (same); Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT'L & COMP. L. REV. 1 (2013) (same).

332. *See Hamdan II*, 696 F.3d 1238, 1251 (D.C. Cir. 2012). Responding to the *Hamdan II* decision, Brig. Gen. Mark Martins, chief prosecutor of the military commissions system, recently dropped stand-alone conspiracy charges pending against Khalid Shaikh Mohammed and four others accused of complicity in the 9/11 attacks. See Charlie Savage, *U.S. to Press Fight of Detainee's Appeal*, N.Y. Times, Jan. 10, 2013, at A14. This was a sound tactical decision, given Gen. Martins' assessment of the strength of the remaining charges. *Id.*

333. *Id.* at 37.

334. *Id.* at 37–38.

Consider first the question of notice. As Madison noted in Federalist No. 37[335] and as Justice Story echoed in *United States v. Smith*,[336] international law has long resisted codification. However, most tribunals have regarded this inhospitality to codification as consistent with a more flexible definition of notice. Tribunals from Nuremberg to the ICTY have tried and punished defendants based on doctrines, including membership offenses, JCE, and treating aggression as a war crime, which were not codified at the time of the alleged offenses.[337] The long pedigree of offences such as abuse of captives or perfidy provides adequate notice to any reasonable individual that certain conduct will be regarded as a violation of the law of war. Spies typically understand, for example, that their conduct carries with it exposure to harsh sanctions.[338] Similarly, history provides little doubt of the consequences that ensue from assisting in the killing of civilians or acting as a principal in an organization engaged in such killing.[339]

Champions of the categorical view are correct that notice is inadequate for trial in military commissions of the full range of material support charges that can be prosecuted in ordinary courts.[340] An individual who actually read the Nuremberg

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335. *See* THE FEDERALIST No. 37, *supra* note 1, at 229 (James Madison).

336. United States v. Smith, 18 U.S. 153, 159 (1820).

337. *See* David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 16–22 (Georgetown Pub. Law Research Paper No. 1154117, 2008), *available at* http://ssrn.com/abstract=1154177 (analyzing issue and defending adequacy of notice in prosecutions of crimes against humanity).

338. *Cf.* TAYLOR, *supra* note 259, at 8 (noting ubiquity of "capital punishment for spies").

339. *See* Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 125–33 (2008) (discussing Nuremberg precedents); *id.* at 133–41 (discussing more recent tribunals, including the International Criminal Tribunal for the Former Yugoslavia). *But see* Kevin Jon Heller, *A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal*, 39 CASE W. RES. J. INT'L L. 261, 264–68 (2006) (asserting that tribunal trying Saddam Hussein for conduct in the early 1990's had violated principles of notice); *cf.* MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 181–83 (2008) (defending Iraqi tribunal).

340. For a general discussion of the role of material support, see Jens David Ohlin, *Targeting Co-Belligerents*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 60, 69 (Claire Finkelstein et al., eds., 2012) [hereinafter Ohlin, *Targeting Co-Belligerents*] (considering whether financial assistance that would constitute material support under federal criminal law is "direct participation in hostilities" that would justify targeting individual with lethal force); *cf.* George P. Fletcher, *Hamdan*

decisions on membership offenses could not reasonably predict that modest cash or in-kind contributions to Al Qaeda would give rise to a trial before a military commission. However, notice is adequate for prosecution of material support charges better tailored to the history and traditions of the law of war. Material support charges tailored to aiding and abetting, for example, would not present notice problems, since aiding and abetting has long been an offence under the law of war. As we shall see in the final sections of this Article, courts and other tribunals have long tailored both criminal charges and civil causes of action to international and constitutional norms. Tailoring material support fits well with this tradition.

The categorical view also overstates the restrictive effect of precedent on Congress's power. The Supreme Court has struck down legislation enacted pursuant to the Define and Punish Clause in only one case: *United States v. Furlong*. *Furlong* dealt with an extreme set of facts – a murder of a foreign national by another foreign national on the high seas aboard a non-United States vessel. That extreme set of facts should not govern cases involving conduct, such as the murder of civilians in armed conflict, that international law clearly prohibits.

Second, *Furlong* has long been called a "strange" case because of its secondary rationale.[341] In explaining why murder was not punishable under the law of nations while piracy was, the Court asserted that murder was more heinous, and therefore demanded application of a state's municipal law.[342] However,

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Confronts the Military Commissions Act of 2006, 45 COLUM. J. TRANSNAT'L L. 427, 441–47 (2007) (discussing whether material support and conspiracy are war crimes). The *Hamdan II* panel addressed this issue by interpreting the Military Commissions Act of 2006 to bar retroactive application of the provision authorizing trial of material support charges. *See Hamdan II*, 696 F.3d at 1247–48. Judge Kavanaugh justified this approach by invoking the canon that courts should strive to interpret statutes to avoid serious constitutional issues. *Id.* However, Judge Kavanaugh failed to explain why this interpretation was preferable to tailoring material support charges in military commissions to those that could also be framed as aiding and abetting. *Cf. infra* notes 374–92 and accompanying text (discussing tailoring). Since international agreements, case law, and commentators have recognized this more limited set of offenses as triable in international tribunals, tailoring would also satisfy the avoidance canon, while doing less violence to Congress's comprehensive framework.

341. *See* Helfman, *supra* note 100.

342. *See* United States v. Furlong, 18 U.S. 184, 196–97 (1820) (asserting that murder is an "offence too abhorrent to the feelings of man, to [be] ... brought within ... universal jurisdiction").

this rationale does not square with the evolving understanding of war crimes and crimes against humanity. Such crimes are punishable by international tribunals precisely because they are viewed as especially heinous.[343] *Furlong*'s logic swims against the current of modern international law.

The *Hamdan II* decision also fails to adequately account for the Supreme Court's decision in *Quirin*. Judge Kavanaugh's opinion reads *Quirin* both too narrowly and too broadly. Judge Kavanaugh failed to acknowledge *Quirin*'s deference to the political branches on the contours of offences triable in military commissions. As noted, the *Quirin* Court treated espionage as a violation of the law of nations, even though espionage is more accurately described as an offense under a state's own law for which the law of nations has traditionally authorized punishment. The expansive view of espionage, along with the *Quirin* Court's view that the crime of sabotage did not require a completed act or even an attempt, could have passed muster only if the Court accorded Congress a measure of deference.[344] The *Hamdan II* panel declined to accord comparable deference to the definitions in the MCA, but failed to explain how its refusal squared with *Quirin*.

Curiously, the *Hamdan II* panel also read *Quirin* too broadly. Judge Kavanaugh's opinion described *Quirin* as holding that Congress could provide for the military commission trial of "unlawful enemy combatants,"[345] and *Quirin* contains language to support this characterization.[346] However, as I explain later in this Article, defining mere unlawful combatancy as a war crime was problematic at the time *Quirin* was decided, and is even more problematic today.[347] Unlawful combatancy, without more, refers to a fighter's failure to wear a uniform or other identifying insignia. However, this failure, without an additional concrete act such as killing civilians, did not constitute a war crime in 1942 and does not amount to a war crime now. Congress lacked the power under the Define and Punish Clause to make

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343. *Cf.* Kontorovich, *The Piracy Analogy*, *supra* note 231 (explaining and critiquing development of international law).

344. *See supra* notes 254–62 and accompanying text.

345. *Hamdan II*, 696 F.3d 1238, 1243 n. 2 (D.C. Cir. 2012).

346. *See Ex Parte* Quirin, 317 U.S. 1, 31 (1942).

347. *See infra* notes 392–99 and accompanying text.

unlawful combatancy a war crime, since this classification would have entailed substantially rewriting the law of nations. Only a standard far more deferential than the one articulated by the *Hamdan II* panel could support this result. However, here, too, the panel failed to explain the inconsistency between its approach and its handling of *Quirin*.

The categorical approach has another, fundamental flaw, which also seems curious given the generally conservative tenor of previous opinions by the members of the *Hamdan II* panel.[348] In pondering the perils of the short-term impulses that the Define and Punish Clause seeks to tame, categorical theorists are notably one-sided. Champions of the categorical view excel at spotting the perils presented by states' overzealous enforcement. However, they are often less perceptive about the risks posed by non-state actors such as terrorist groups. Vattel recognized centuries ago that non-state actors operating without the state's mediating institutions could be exceedingly "dangerous."[349] The Framers shared this insight.[350] They realized, as the categorical theorists sometimes fail to, that the community of nations rests on control of both government and non-state actor overreaching. Judge Kavanaugh's previous opinions evinced a thorough understanding of the dangers of violent non-state actors. Indeed, some argued that an opinion cited in *Hamdan II* went too far in this direction, asserting that detention of suspected terrorists was not governed by international law.[351] While Judge Kavanaugh rightly recognized in *Hamdan II* that the language of the Define and Punish Clause required attention to international law, that turn should also have encompassed appreciation for the dangers of violent non-state actors, which the Framers shared with publicists like Vattel. A tailored definition of material support could reconcile these

348. *See, e.g.*, al-Bihani v. Obama, 619 F.3d 1, 9–23 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (asserting, despite government's argument to the contrary, that international law of armed conflict did *not* circumscribe executive's authority to detain persons who were part of Al Qaeda or associated forces).

349. VATTEL, *supra* note 11, *available at* http://www.matrixfiles.com/LoN.pdf.

350. *See, e.g.*, THE FEDERALIST NO. 3, *supra* note 1, at 44 (John Jay) (warning about hostilities that caused "the slaughter of many innocent inhabitants" when individual states were "unable or unwilling to restrain or punish offenses" against Native American nations).

351. *See al-Bihani*, 619 F.3d at 9–23.

values. However, that reconciliation would have entailed an analysis more nuanced than the *Hamdan II* panel's categorical approach.

V. *THE MEMBERSHIP CONCEPTION AND MATERIAL SUPPORT*

If the US common law of war argument and the categorical approach fall short, the membership conception may do better at addressing the challenges of trying suspected terrorists after September 11. Since only some of the wide range of acts that could be charged as material support in an ordinary civilian court are consistent with military commission jurisdiction, courts applying the membership approach must tailor the material support provision as the Nuremberg prosecutors did with membership offenses, taking care to avoid amorphous charges that are not analogous to traditional crimes under the law of war. The result of that tailoring represents a modest extension of the aiding and abetting liability that international law currently accepts. That result should receive a measure of deference, as the Framers, case law, and international law contemplate.

A. *Deference and Complementarity*

We have already seen that the publicists, Framers, and subsequent courts carved out a zone of deference for the state's definition of its duties under international law. Factors contributing to this measure of deference included the breadth and dynamic nature of international law,[352] the particular needs of each state and hazards of foreign factions, and the utility of the separation of powers as a guarantor of core international principles. The international law principle of complementarity similarly provides a measure of deference, particularly where a state's internal institutions have some indicia of independence.

The case for deference that was persuasive to the Framers has if anything grown more compelling with time. Consider the

352. *See* THE FEDERALIST NO. 37, *supra* note 1, at 228–29 (James Madison); *supra* notes 111–12 and accompanying text.

Framers' fear of foreign faction. In recent decades, the cardinal example from the law of war is the passion of non-aligned nations and those under the sway of the former Soviet Union for proposed changes codified in Additional Protocol I of the Geneva Convention.[353] These changes made it easier for violent non-state actors to forsake uniforms and other insignia of combatancy.[354] Released from those rules, non-state actors such as terrorist groups would have more readily mounted perfidious attacks on civilians and government targets.[355] While the United States has declared that it recognizes other, less controversial portions of Additional Protocol I as customary international law,[356] it has declined to ratify the entire agreement, and other countries have only done so with express reservations.[357] Suppose that the United States sought to use military

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353. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

354. *See id.* § 44; *cf.* Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 344–47 (2009) (discussing political crosscurrents that contributed to enactment of Protocol I). *But see* Kim L. Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L SECURITY L. & POL'Y 437, 451 (2010) (arguing that global counterterrorism measures permit many states to camouflage their substandard governance as counterterrorism); Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 153 (2010) (suggesting that policies in the United States, United Kingdom, and India invite concerns about the effect of counterterrorism efforts on human rights). *See generally* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 59 (2007) (critiquing incentive structure of nongovernmental groups that critique foreign policy of Western powers); Kenneth Anderson, *"Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT'L L. 841 (2011).

355. *See* Newton, *supra* note 354, at 344–47.

356. This is true, for example, of the principle of proportionality, which requires that attackers avoid excessive collateral damage in achieving a military advantage. *See* Additional Protocol I, *supra* note 353, at arts. 52, 57; Koh, *supra* note 55 (noting that US views proportionality as binding international law when making targeting decisions); *see also* Michael J. Matheson, *The United States Position on 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 (1987) (discussing the American view of Additional Protocol I); *cf.* (discussing legal compliance encouraged by US military lawyers); Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1391–97 (2012) (outlining an integrated approach to targeting and detention based on factors including whether a less drastic alternative exists); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a "They," Not an "It"*, 96 MINN. L. REV. 194, 238–43 (2011).

357. *See* Newton, *supra* note 354, at 347–53.

commissions to try terrorists who had targeted its personnel for perfidious attacks. The text, purpose, and history of the Define and Punish Clause would counsel deference to that decision, not obeisance to the faction-driven changes in Additional Protocol I.

International law has also traditionally provided some measure of deference to state determinations. Consider the principle of complementarity,[358] which requires that international tribunals such as the International Criminal Court (ICC) intervene to prosecute alleged perpetrators of crimes against humanity only when national institutions have defaulted on this duty.[359] In considering a state's choices, some quantum of deference is required. State officials will often understand the political culture and needs of their polity in a way that exceeds the ability of international actors parachuting in from abroad.[360] In addition, encouraging national efforts gives states a stake in the international order. Armed with this stake, states can build robust internal capacities for vindicating the rule of law.[361] Without such a stake, states will abandon the long-term perspective that international law demands and revert to the reign of short-term impulse.[362]

The case for deference is even stronger in the context of a state's use of military commissions to try violent non-state actors. In considering the deference due a state's efforts to investigate crimes against humanity by its own officials, international law balances the prerogatives of the state against the need to disrupt the culture of impunity that often lingers around such crimes.[363]

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358. I am indebted to Ashley Deeks for this example.

359. *See* Rome Statute of the International Criminal Court pmbl. ¶ 10, art. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (noting that ICC was established as "complementary to national criminal jurisdictions").

360. *See* Tara Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 439 (2009) (noting that "local needs are best appreciated by local actors").

361. *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 148 (2007) (praising internal restorative justice mechanisms that promote a "forgiveness process characterized by truth telling, redefinition of the identity of the former belligerents, partial justice, and a call for a new relationship"); Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 436–37 (2011) (noting importance of enhancing internal capacities).

362. *See* Burke-White, *supra* note 31, at 67–68.

363. *See* Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, Case No. ICC-01/09-02/11 OA, Judgment on Defence Appeal

However, a state's use of military commissions to try individuals for alleged violations of international law does not bolster the culture of impunity. If anything, it combats this syndrome, giving the state more remedies against violence. This deference should not be absolute, since a state's profligate use of military commissions can be just as oppressive as its failure to hold officials accountable for past human rights violations. However, a measure of deference in these instances serves the same beneficial ends as the principle of complementarity, giving the state a stake in engagement with international law.[364]

A post-September 11 innovation in the United Nations's cooperation on terrorism strengthens the case for deference. Shortly after September 11, the United Nations Security Council put out a resolution requiring states to cooperate in worldwide counterterrorism efforts.[365] As both Congress and the

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Challenging Admissibility of Case, ¶¶ 39–43 (Aug. 30, 2011), available at http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf (holding that ICC proceeding would not violate principle of complementarity under Article 17(1)(a) of Rome Statute when the state had failed to investigate an individual already charged by tribunal); *see also* Michael A. Newton, *The Quest for Constructive Complementarity* 9 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 10-16, 2010), *available at* http://ssrn.com/abstract=1585402 (arguing that Rome Statute "requires . . . an appropriate balance of authority between the supranational court and domestic states"); *cf.* Diane F. Orentlicher, *"Settling Accounts" Revisited:* Reconciling Global Norms with Local Agency, 1 INT'L J. TRANSITIONAL JUST. 10 (2007) (discussing the balance between deference to states and commitment to universal principles).

364. For other instances of deference in transnational tribunals, see Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 47 (1976) (granting a "margin of appreciation" to state decision banning a book on sexuality marketed to teenagers); *see also* Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90 B.U. L. REV. 975, 983 (2010) (allowing that the "margin of appreciation" confers flexibility on sovereign states so that they may "implement or interpret human rights in ways that may be sensitive or responsive to prevailing social, cultural, and other norms within their polities"); Council of Europe Comm. of Ministers, Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights, (19–20 April, 2012), *available at* http://hub.coe.int/20120419-brighton-declaration (noting that margin of appreciation is vital because "national authorities are in principle better placed than an international court to evaluate local needs and conditions"); *cf.* Mónica Pinto, *National and International Courts—Deference or Disdain?*, 30 LOY. L.A. INT'L & COMP. L. REV. 247, 257–63 (2008) (noting that Inter-American Court of Human Rights does not rely on a "margin of appreciation", but uses analogous "fourth instance" doctrine to limit intrusion in domestic law).

365. *See* S.C. Res. 1373, ¶1(d) U.N. Doc. S/RES/1373 (Sept. 28, 2001) (holding that "states are required to prohibit anyone within their personal or territorial jurisdiction from making any "funds, financial assets or economic resources . . .

Humanitarian Law Project Court indicated, the complex task of reducing the flow of resources to DFTOs entails global cooperation.[366] While the Security Council did not expressly authorize military commissions, its resolutions contemplate a more robust role for domestic law enforcement. Appropriately cabined military commissions can supplement domestic law enforcement, providing an additional option when ordinary civilian courts are inadequate or unavailable.[367] A categorical approach to military commission jurisdiction that precluded resort to this option would clash with the spirit, if not the letter, of Security Council measures. In contrast, granting states a measure of discretion in shaping military commission jurisdiction facilitates the state cooperation that is crucial to the membership project against terrorism.[368]

Congress should receive a measure of deference on the nexus it designates between charges in military commissions and conduct previously tried in such tribunals pursuant to international law. While champions of the categorical approach

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available . . . for the benefit of persons who . . . commit . . . or participate in the commission of terrorist acts"); *cf.* Scheppele, *supra* note 354, at 440 (arguing that S.C. Res. 1373 has provided pretext for antidemocratic crackdowns).

366. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010) (noting importance of "cooperative efforts" and "international cooperation" for a successful response to terrorism).

367. *Cf.* Aziz Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1454–68 (2012) (arguing that availability of military commissions as additional option in appropriate cases promotes more efficient process); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SEC. L. & POL'Y 1, 17–23 (2009) (discussing different criteria for administrative detention). Others have argued that establishing a national security court is a useful alternative to both ordinary federal courts and military tribunals; Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (discussing relative advantages and overlapping principles in Article III courts, detention, and military commissions);. *See generally* Kevin E. Lunday & Harvey Rishikof, *Due Process is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87 (2008).

368. Courts should accord even greater deference to a statute that operates prospectively, raising none of the retroactivity problems that the *Hamdan II* panel perceived in the Military Commission Act's inclusion of material support. *See Hamdan II*, 696 F.3d at 1246 n. 6 (observing, in portion of opinion concurred in only by Judge Kavanagh, that Congress has authority under war powers to prospectively allow material support charges); *but see* United States v. Bellaizac-Hurtado, 7 (11th Cir. Nov. 6, 2012), at *21–35 (holding that Congress lacked power under Define and Punish Clause to prospectively criminalize drug trafficking on vessels located in territorial waters of other nations).

argue that Congress should only be permitted to authorize trial of charges that have been tried in military tribunals previously, Congress may also elect to pursue the trial based on a functional nexus. Under a functional approach, the specific conduct charged should dovetail with conduct that earlier material commissions have tried and punished.[369] As long as the conduct in each context overlaps, defendants have the notice that the law of nations requires. As we shall see, a functional test will permit material support charges that allege certain conduct linked to unlawful violence, although it will bar charges alleging conduct without such links.

B. *Tailoring Material Support*

While categorical theorists assert that a decision-maker should look merely at the name of the offense to determine whether it fits within Congress's power, neither international nor domestic tribunals have taken this approach. Both transnational and domestic tribunals have instead tailored charges to the boundaries of conduct that may be punished under the Constitution and international law.

In domestic courts, the interpretation of statutes in light of the law of nations pre-dates the Constitution's enactment. The Rutgers v. Waddington court followed international law and interpreted New York's Trespass Act as protecting a British merchant who had followed military orders, even though the statute expressly precluded a military orders defense.[370] After the Constitution's enactment, Chief Justice Marshall's formulation of the Charming Betsy canon tailored legislation that clashed with international law.[371] The Nuremberg prosecutors' narrowing of membership offenses was also a species of tailoring. Each parallels federal courts' avoidance, exhibited in

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369. *Cf.* Ohlin, *supra* note 340, at 86–87 (providing a functional definition of membership in Al Qaeda that would justify targeting and detention).

370. *See* LAW PRACTICE, *supra* note 12, at 417; Golove & Hulsebosch, *supra* note 34 at 969–70. The blowback in the political realm from the court's decision was considerable. *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1663–1830, at 199–201 (2005) (discussing claims of the decision's critics that reliance on international law was illegitimate).

371. *See* Wuerth, *supra* note 93.

the recent healthcare decision, of statutory interpretations that clash with constitutional requirements.[372] The clear line of hermeneutic method from Hamilton to Marshall to health care suggests that tailoring is a prudent hedge against the "momentary inclination" to fray the fabric of constitutional and international norms.[373]

C. *Tailored Material Support and Aiding and Abetting Liability*

A tailored version of material support charges would look much like aiding and abetting. The accepted definition needs to be more limber to accommodate some charges of material support. However, the tailored definition would still preclude the broadest uses of the federal criminal prohibition. Our touchstone on aiding and abetting liability is the codification effort by the International Law Commission (ILC). The ILC noted that collective attributions of guilt were generally inappropriate, and that conviction of crimes against humanity such as the murder of civilians rested on "individual responsibility."[374] The ILC recognized that individual responsibility could include the actions of one who "[k]nowingly aids, abets or otherwise assists, directly and

372. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2594 (2012) (holding that the avoidance canon counseled construing the penalty imposed by Patient Protection and Affordable Care Act of 2010 for individuals who fail to purchase health insurance as a tax); *see also* Yates v. United States, 354 U.S. 298, 318 (1957) (avoiding "constitutional danger zone" of suppression of ideas through narrow reading of statute that prohibited membership in organizations such as the Communist Party, which advocated for forcible overthrow of the United States government). For more on the avoidance doctrine, see Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring); *cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–51 (2012) (praising doctrine); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1550 (2000) (discussing rationale for avoidance). *But see* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (1996) (expressing skepticism about legitimacy and utility of doctrine).

373. THE FEDERALIST NO. 78, *supra* note 1, at 468 (Alexander Hamilton) (noting that the "independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . the influence of particular conjunctures, sometimes disseminate among the people themselves").

374. *See Report Of The International Law Commission on the Work of its Forty-eighth Session*, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, art. 2, U.N. Doc. A/51/10 (May 6–July 26, 1996) [hereinafter ILC Draft Code].

substantially, in the commission of . . . a crime."[375] The commentary to this section noted that the accomplice must "knowingly provide . . . assistance which facilitates the commission of a crime in some significant way."[376]

Aiding and abetting liability includes assistance after the crime's commission, as long as the perpetrator and accomplice agreed on this assistance before the fact.[377] Assistance that a perpetrator knows will be forthcoming upon commission of a crime facilitates commission of the crime just as surely as direct assistance before the fact.[378] Aiding after the fact is an in-kind insurance policy, guaranteeing that the perpetrator will not face obstacles that may well have dampened the perpetrator's ardor for the entire operation.

Aiding and abetting liability covers many of the offenses supposedly included in the "U.S. common law of war."[379] The bridge-burning cases clearly fall under this rubric, with most defendants convicted of conduct that entailed concrete assistance to acts of violence against government targets.[380] The bushwhacker cases often involved similar proof of violence against civilian persons and/or property, in the context of units so small that an individual who slacked off in engaging in such conduct would receive substantial and immediate peer pressure from his colleagues in crime.[381]

The Nuremberg prosecutors' refinement of the London Charter's "membership offenses" is also analogous to aiding and abetting liability, albeit with somewhat greater play at the joints. The bushwhacker scenario explains the conviction of the noncommissioned officer Graf, who was part of the murderous *einsatzgruppen* that engaged in face-to-face killing of hundreds of

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375. *Id.* art. 2 ¶ 3(d).

376. *Id.* art. 2 Commentary, ¶ 11.

377. *Id.* art. 2 Commentary, ¶ 12.

378. *See* Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 Harv. Hum Rts. J. 241, 271 (2008) (noting importance of perpetrator's knowledge prior to crime's commission that he would receive help afterward).

379. *See supra* notes 309–29 and accompanying text.

380. *See supra* notes 208–09 and accompanying text (describing how bridge-burners were often complicit in acts against the government).

381. *See supra* note 210 and accompanying text (outlining the establishment of commissions to prosecute bushwackers).

thousands of civilians in Central and Eastern Europe.[382] Although Graf was reluctant to continue in the unit – a fact that reduced his sentence—it would be difficult for a noncommissioned officer in such a unit to avoid conduct such as assisting in transportation or logistics that facilitated the *einsatzgruppen*'s activities.

A later case arising out of the activities of the *einsatzgruppen* is *Public Prosecutor v. Menten*,[383] in which a Dutch court convicted a translator of crimes against humanity in connection with the killing of Jews, Polish nationalists, and suspected communists. Although the trial occurred decades after the events in question and evidence of the defendant's participation in actual killing was slim,[384] the court found that Menten had assisted forces engaged in killing through his services as a translator[385] and his "accurate knowledge of persons and places" in the area.[386] Aiding and abetting also covers the conduct of the German financiers and industrialists like Flick and Steinbrinck who banded together as "Friends of Himmler" to assist the SS's murderous mission.[387] An efficient war crimes machine requires care and feeding, and Flick and Steinbrinck provided the resources that made that possible. The tribunal also found that they contributed eagerly with full knowledge of the SS's lethal activities.[388]

More recent cases have often involved leaders in armed conflicts that resulted in the murder of civilians and rampant

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382. *See* TRIALS OF WAR CRIMINALS, supra note 264, at 587 (finding Graf guilty of membership in the SD).

383. Public Prosecutor v. Menten, 75 I.L.R. 331 (Neth. Sup. Ct. 1981).

384. *Id.* at 345 (noting that defendant's joint responsibility was proven, although his "exact part [in the killings] could not be precisely established after such a long time").

385. *Id.* at 347.

386. *See id.* at 351, 360, 365 (discussing defendant's use of his skills to aid the police and render "incidental services" to unit).

387. *See See* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1221 (1952) (finding that the donation of money to Himmler, which in turn went to fund illegal activities, was sufficient for conviction).

388. *Id.* at 1216, 1222–23 (noting that Flick and Steinbrinck were convicted of having "knowledge of the criminal activities of the SS [and still] contribut[ing] funds and influence to its support."

sexual abuse of women. In *Prosecutor v. Krstic*,[389] the ICTY convicted a Serbian commander of aiding and abetting genocide in connection with the killing of thousands of Bosnian Muslim men. More recently, the Special Court for Sierra Leone convicted the Liberian leader Charles Taylor of aiding and abetting murder, mutilation, and sexual abuse in Sierra Leone by providing arms and logistical support to groups that engaged in such activity.[390] The court defined aiding and abetting broadly as lending "practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offence."[391]

Although two of the recent cases involved leaders, nothing in aiding and abetting liability restricts the class of defendants to this small group. Small fish can also play a significant role, depending on the nature of their conduct. Material support charges that entail analogous types of assistance and knowledge therefore build on a solid international law foundation.

Bringing material support within the aiding and abetting fold would prompt a split decision in *Hamdan II* and *al Bahlul*. Consider Hamdan's conviction first. As discussed above, the law of nations spurs doubts about Hamdan's conviction, which hinged neither on specific unlawful acts of violence nor on performance of a substantial role in an organization dedicated to such violence.[392] The difficulty of shoehorning Hamdan's conviction into one of these rubrics suggests that the outcome may be difficult to uphold, even if courts ultimately reject the categorical approach adopted by the D.C. Circuit in *Hamdan II*.

On the surface, it might be persuasive for the US to take a different tack, arguing that Hamdan violated international law as an "unprivileged belligerent" in Afghanistan. Hamdan had not received the approval of Yemen, his country of origin, for his activities. He arguably broke the neutrality norms enforced by the US against its own nationals since Washington's Neutrality Proclamation. One could analogize Hamdan, who did

389. Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, ¶¶ 135–39, 144 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber, Apr. 19, 2004).

390. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 6910–12 (Special Court for Sierra Leone, May 18, 2012).

391. *Id.* ¶482 (defining "aiding and abetting").

392. *See supra* notes 302–08 and accompanying text (discussing facts in Hamdan's case).

not wear a standard uniform, to the banditti whom Henry, Adams, and Speed asserted could have been hung from the nearest tree. However, this view would conflate the two levels of generality that the Framers built into the Define and Punish Clause.

At the time it was enacted, the Define and Punish Clause embodied not merely the specific principles of the law of nations in place during that period, but the future contours of this body of law.[393] The Framers recognized that these principles were always evolving.[394] Even more than the open-textured constitutional guarantees of liberty and equality, the reference to the law of nations in the Define and Punish Clause indicates that the Framers drafted the Clause to reflect that evolution. The Framers understood that while international law's fluidity often defies codification, a definitive expression of international sentiment can create new norms and modify old ones. As Edmund Randolph hinted in his early discussion of the Define and Punish Clause, the US can adhere to international law principles that have encountered pushback from some parties, but cannot exhume principles that the weight of international opinion has buried.[395] Today, a definitive expression of international opinion bars casting mere unprivileged belligerency as a war crime. Additional Protocol I of the Geneva Convention allows hostile parties to a conflict to decline to wear uniforms until the moment they are "engaged in a military deployment preceding the launching of an attack."[396] While the US, which has not ratified Additional Protocol I, is entitled to *target*[397] and *detain*[398] such fighters, a majority of nations reject

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393. *See* THE FEDERALIST NO. 37, *supra* note 1, at 228 (James Madison).

394. *Id.*

395. Who Privileged from Arrest, *supra* note 13, at 28–29.

396. Additional Protocol I, *supra* note 353, art. 43, ¶3; *see also* Alexander, *supra* note 310, at 1144 (criticizing unprivileged belligerency charges); Baxter, *supra* note 252; David J.R. Frakt, *Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War*, 46 VAL. U. L. REV. 729, 732–34 (2012), *available at* http://ssrn.com/abstract=2103906; *cf.* Newton, *supra* note 354 (critiquing provision); Proposals for Reform Hearing, *supra* note 294 (testimony of David J.R. Frakt, Lead Defense Counsel, Office of Military Commissions) (noting that three military commissions in Guantanamo cases had rejected prosecution theories based on mere unprivileged belligerency).

397. *See* BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR (2011); Robert M. Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the*

trial of these fighters for war crimes absent direct involvement in unlawful violence or the performance of a substantial role within such an organization. US practice, exemplified in *Quirin*, has treated mere unprivileged belligerency as a war crime, but only in conjunction with other concrete acts, such as espionage and sabotage,[399] which the government did not allege that Hamdan had committed. Hamdan's arms sales might qualify as trading with the enemy, but only if he had owed a duty of loyalty to the US or had traded weapons during the US occupation. Since these factors do not fit Hamdan, a Yemeni national who was captured during the initial fighting in Afghanistan after September 11, the law of nations as presently constituted deprives military commissions of jurisdiction.

Al Bahlul's conduct is a closer call. Since al Bahlul engaged in after-the-fact distribution of martyr's wills for two of the September 11 hijackers,[400] his acts provide a closer nexus with a specific Al Qaeda operation that targeted civilians. Moreover, the attackers and al Bahlul's superior, Osama bin Laden, viewed the propaganda advantage reaped by September 11 as a central rationale for the attacks themselves. This supplies the before-the-

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International Legal Regulation of Lethal Force, 13 Y.B. INT'L HUMANITARIAN L. 3 (2011) (analyzing issues around the US targeting and use of lethal force against al-Awlaki); Hakimi, *supra* note 356.

398. *See* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 53–55 (2009) (describing the types of persons who may be detained).

399. *See Ex Parte* Quirin, 317 U.S. 1, 35–36 (1942).

400. Al Bahlul acknowledged that he "'typed' or 'transcribed'" martyr's wills after the attacks. *See* Brief of Petitioner at 7, al Bahlul v. United States, No. 11-1324 (D.C. Cir. Mar. 9, 2012). Al Bahlul has claimed that he was at home in Yemen, not with bin Laden, when the wills were first drafted and read on tape by the hijackers, thus precluding any before-the-fact role. *See id.* at 7–8; *see also* Transcript of Military Commission Hearing at 193–94, United States v. al Bahlul, 820 F. Supp. 2d 1141 (Ct. Mil. Comm'n Rev. 2011) (No. CMCR 09–001), *available at* http://www.mc.mil/cases/militarycommissions.aspx (hereinafter al Bahlul Transcript) (recounting testimony of defendant that he "did not have the honor" of initially drafting or filming martyr's wills). The Court of Military Commission Review took a somewhat broader view of al Bahlul's role, describing him as having "prepared . . . 'martyr wills' to motivate [hijackers] . . . to commit the 9/11 attacks." *See* United States v. al Bahlul, 820 F. Supp. 2d 1141, 1162 (Ct. Mil. Comm'n Rev. 2011).

fact agreement that the ILC demands.[401] In addition, al Bahlul's role as a media adviser to bin Laden placed him near the center of Al Qaeda policy.[402] This moves al Bahlul's case closer to those of the "Friends of Himmler," Steinbrinck and Flick, who knowingly provided substantial financial support and encouragement to the SS chief and fit the tailored version of membership offenses advanced by American prosecutors at Nuremberg. A similarly tailored version of material support would sustain al Bahlul's conviction.

D. *Conspiracy After Hamdan II*

Even if one agrees with the *Hamdan II* panel that material support isn't a violation of the law of nations, the future of conspiracy charges in military commissions may be brighter. True, there are significant problems with conspiracy, either as a mode of liability requiring a completed crime (the view in France and other civil law countries) or as a separate offense requiring only an agreement and some overt act furthering the agreement (the view under ordinary US criminal law). That said, conspiracy is a plausible mode of liability in military commission cases, including *al Bahlul*. However, international law and practice dim the prospects for charging conspiracy as a separate and independent offense.

Applying the *Hamdan II* analysis, conspiracy's main edge over material support is its pedigree in international treaties, case law, and commentary. The lack of this pedigree was fatal to

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401. *Cf.* Max Abrahms, *What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy*, 32 INT'L SECURITY 78, 85–86 (2008) (discussing terrorists' incentives).

402. For precedents holding propagandists liable, *see* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 548 (1948) [hereinafter IMT Trials] (convicting Nazi propagandist Julius Streicher, who had "injected [poison] . . . into the minds of thousands of Germans . . . [and] caused them to follow the National Socialist policy of Jewish persecution and extermination"); *see also* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Summary of Judgement (Nov. 28, 2007) (affirming convictions of a number of defendants who owned or operated media outlets for incitement and instigation of genocide in Rwanda, while vacating other convictions). *But see* IMT Trials, *supra*, at 584–85 (acquitting a more junior propagandist, Hans Fritzsche, due to findings that his acts were ministerial in nature and speeches he wrote "did not urge persecution or extermination of Jews"); TAYLOR, *supra* note 259, at 461 (noting that Fritzsche's "influence on policy was only interstitial").

material support in Judge Kavanaugh's *Hamdan II* opinion.[403] Conspiracy's lineage is more substantial.

First consider the pedigree of conspiracy as a mode of liability. Analysis begins with the 1996 ILC Draft Code of Crimes Against Peace and Security of Mankind.[404] Article 2(e) of the Draft Code prohibits "planning or conspiring" to engage in war crimes, such as targeting civilians, that "in fact occur." The ILC Draft Code's standing provides some evidence of conspiracy's acceptance, of the kind that the *Hamdan II* panel found lacking in the case of material support. Conspiracy as mode of liability, however, encounters problems elsewhere in the indicia of legitimacy that Judge Kavanaugh outlined in his opinion for the court. The London Charter governing the Nuremberg tribunals expressly provided for conspiracy, and the Nuremberg tribunals permitted such charges, albeit in a limited manner.[405] The statutes of more recent tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), are more restrictive. They do not include conspiracy as a mode of liability, although they do allow charging conspiracy to commit genocide (and genocide only) as a separate offense.[406] Whether this is an insurmountable obstacle depends on how one reads Judge Kavanaugh's opinion.

If one reads the indicia of authority in the opinion as conjunctive, conspiracy as mode of liability is problematic. On this view, the failure to include conspiracy as a mode of liability in the statutes of the ICTY and other recent tribunals would be fatal. However, one can also read Judge Kavanaugh's discussion as a more flexible guide to the range of authority that could support military commission jurisdiction. On this more flexible view, the ILC's endorsement of conspiracy would still be

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403. *See Hamdan II*, 696 F.3d 1238, (D.C. Cir. 2012).

404. *See* ILC Draft Code, supra note 374.

405. *See* London Agreement of 8 August 1945, Charter of the International Military Tribunal, and the Nuremberg Tribunal's Rules of Procedure, *reprinted in* 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 675–91 (1995); Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 702 (2011) [hereinafter Ohlin, *Joint Intentions*].

406. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 4(3)(b), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

meaningful, along with conspiracy's inclusion in the London Charter of the Nuremberg tribunals.

This pedigree also creates room for the analogical reasoning that Judge Kavanaugh rejected in the case of material support. As Cornell's Jens David Ohlin mentions in an important recent article,[407] conspiracy as a mode of liability shares many attributes with another mode of liability involving concerted activity, Joint Criminal Enterprise (JCE), which *is* included in the statutes of recent tribunals and figures heavily in the case law. For example, Article 25(3)(d) of the Rome Statute of the International Criminal Court permits the conviction of an person who "contributes to the commission... of... a crime by a group of persons acting with a common purpose."[408] This pairing of joint intention with action is very close to conspiracy – close enough that no individual charged with the latter as a mode of liability can claim lack of notice.

Consider how this plays out in the case of bin Laden's propagandist, al Bahlul. Al Bahlul was convicted of both material support and conspiracy under the Military Commissions Act of 2006, which authorizes conspiracy as *both* a mode of liability and a separate offence. Al Bahlul, as an aide to bin Laden, was obviously below bin Laden's pay grade, and it's unclear whether he had advance, specific knowledge of the 9/11 attacks. However, he clearly contributed to the attacks before and after the fact. Evidence includes al Bahlul's closeness to the Al Qaeda leader, knowledge of earlier attacks on civilians such as the East Africa embassy bombings, admitted administration of the *bayat* or loyalty oath to two of the 9/11 hijackers including ringleader Muhammed Atta,[409] and acknowledgment that after the attacks he distributed his two protégés' martyr's wills justifying their role. Al Bahlul's contributions to the attacks through administration of the *bayat* and distribution of the martyr's wills meet the requirements for JCE, and should

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407. *See* Ohlin, *Joint Intentions*, supra note 405.

408. *See* Rome Statute, *supra* note 359, art. 25(3)(d).

409. *See* Brief for Respondent at 9–10, Al Bahlul v. United States, No. 11-1324 (D.C. Cir. May 16, 2012) (hereinafter al Bahlul, Brief for Respondent) (summarizing evidence at trial).

therefore also fit under the rubric of conspiracy as a mode of liability.[410]

The viability of conspiracy to commit war crimes as a *separate offence* is a tougher question. Here, too, conspiracy crosses Judge Kavanaugh's first threshold, since a range of treaties mention it. For example, Article 6 of the London Charter that governed the International Military Tribunal (IMT) at Nuremberg permitted charges of "conspiracy for the accomplishment of" crimes against peace. These crimes included aggressive war and war in violation of treaties. However, the specific definitions of war crimes and crimes against humanity, which followed the definition of crimes against peace in the Charter, did *not* include conspiracy language. When Justice Robert Jackson, the head Nuremberg prosecutor, submitted indictments that also charged conspiracy to commit war crimes, the IMT swatted away Jackson's attempt, ruling that it lacked jurisdiction.[411]

Current treaties, statutes, and tribunals track this pattern. The Genocide Convention makes conspiracy a stand-alone offence. Because of the Convention's inclusion of conspiracy, the statutes of tribunals such as the ICTY and the International Criminal Tribunal for Rwanda (ICTR) also permit charging conspiracy to commit genocide as a stand-alone crime.[412] However, as Cornell's Ohlin notes, these tribunals have repeatedly expressed skepticism about conspiracy, perhaps because of long-standing worries in civil law systems about the

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410. Al Bahlul's trial gave rise to another problem related to the distinction between conspiracy as mode of liability and separate offense. The military jury in the case made findings regarding conspiracy as a separate offense, but did *not* make findings regarding conspiracy as a mode of liability. In other words, it found an agreement, but not a completed underlying act such as the murder of civilians. However, al Bahlul's own testimony conceded that the 9/11 attacks had occurred. *See* al Bahlul Transcript, *supra* note 400, at 193–94 (asserting that his stay in Yemen precluded his having "honor" of videotaping martyr's wills of hijackers). Al Bahlul litigated his case as if he was being charged with conspiracy as a mode of liability based on the 9/11 attacks. The military jury found that he had committed acts relating to the 9/11 attacks, including administering the oath of allegiance to two of the 9/11 hijackers and "preparing" their martyr's wills. *See* al Bahlul Respondent Brief for Respondent, *supra* note 409, at 13, 16. Therefore, treating the occurrence of the 9/11 attacks as an undisputed fact would not result in prejudice.

411. *See* Bush, *supra* note 259, at 1162.

412. *See* Statute for the International Criminal Tribunal for Rwanda art. 2(3)(b), Nov. 8, 1994, 33 I.L.M. 1498.

vagueness such charges might yield. Moreover, no treaty permits charging conspiracy to commit *war crimes*, such as targeting civilians, as an independent offence. The Military Commissions Act of 2006 is thus an outlier in this regard.

One can argue that the inclusion of conspiracy for genocide but not war crimes is a function of pragmatism, not principle. Genocide may be a crime of unique dimensions, but that does not justify rejecting the added deterrence that stand-alone conspiracy charges might yield for other serious crimes, such as mass killing of civilians that falls just short of genocide. However, the argument that international law *should* treat war crimes and genocide equally echoes the natural law concepts that dominated international law until the nineteenth century. This period saw the gradual eclipse of "naturalist" principles in international law and the ascendancy of positivism – what the law *is*, not what it should be.[413] Moreover, the failure to include conspiracy to commit war crimes as a separate offence in treaties and case law raises the concerns about retroactive application and the Ex Post Facto Clause that Judge Kavanaugh stressed in *Hamdan II*. If a trained lawyer assessing the relevant authorities would not anticipate this charge, a lay defendant would not either. That makes lack of notice a problem of constitutional scale.

Evidence from US history is does not trump the positivist trend or provide the notice otherwise lacking. First, as Judge Kavanaugh rightly noted, under the Constitution's Define and Punish Clause, there is no distinct "U.S. common law of war" that trumps international law. Second, the United States Supreme Court endorsed the positivist trend in *The Antelope*, in which Chief Justice Marshall explained that slavery was not yet a violation of customary international law, although he readily acknowledged that it might become one.[414] Third, it is true that the United States has a history of filing conspiracy charges in military commissions, as plotters of Lincoln's assassination discovered. However, as Justice Stevens noted in *Hamdan I*, most conspiracy charges entailed completed crimes. This history

413. *See* Duncan B. Hollis, *Treaties in the Supreme Court, 1861–1900, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 198, at 55, 62–65.

414. The Antelope, 23 U.S. 66, 121–22 (1825).

suggests the United States, like Europe, did not develop what Madison in Federalist No. 37 called a "course of practice" in charging conspiracy to commit war crimes as an independent offence.

Viewed in this light, conspiracy after *Hamdan II* requires careful tailoring. Military commissions do not have jurisdiction over conspiracy as a separate offence. They should, however, have jurisdiction over conspiracy as a mode of liability.

CONCLUSION

Tailoring of both conspiracy and material support charges is consistent with the membership conception that the publicists and Framers embraced. Publicists like Vattel and Pufendorf viewed membership in the community of nations as valuable precisely because it remedied the effects of short-term impulses. The publicists also envisioned institutional arrangements, like separation of powers, which would resist impulse's rule and facilitate reflection. The Framers refined these sentiments, seconding Hamilton's claim that embracing the guidance of international law was a test of "national character."[415]

The enactment of the Define and Punish Clause was a crucial manifestation of the membership conception. In drafting the clause, the Framers had two goals. They sought to signal to the community of nations that the new Republic would live by the same rules as other states. These rules, as the Framers defined them, included the procedural safeguards that Randolph extolled in his debate with Patrick Henry on the propriety of summary execution. At the same time, the Framers were worried about factions from abroad exerting undue influence and prompting volatility in the sometimes amorphous elements of the law of nations that Madison warned about in Federalist No. 37. The Define and Punish Clause's delegation to Congress sought to comply with international law while preserving a zone of deference to combat individuals and entities who threatened global cooperation.

American practice from the Founding Era to the present largely tracks the membership conception. As the first Attorney

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415. LAW PRACTICE, *supra* note 12, at 393.

General, Randolph affirmed the Define and Punish Clause's limits on congressional power. However, the perils of foreign influence during this period, manifested in controversies over neutrality and the Jay Treaty, suggested the need for a space where the new nation could accommodate international law to its own needs. Judicial tailoring could supply the reflection that the political branches sometimes lacked, as Chief Justice Marshall's opinion in the *Charming Betsy* case showed. The piracy and counterfeiting contexts also displayed deference to congressional determinations of danger to the United States, although *United States v. Furlong* indicated that cases of wrongdoing without clear links to the United States would encounter special scrutiny. Tailoring also played an important role in the Civil War military commissions, where executive review – sometimes by Lincoln himself – helped assure that most verdicts involved direct participation in violence or breaches of citizens' duty of loyalty. The outlier in this narrative was Jackson's military commission for Arbuthnot, which relied on questionable evidence presented without procedural safeguards.

Jackson's legendary vindictiveness aside, American practice has continued to echo the membership conception. During World War II, *Quirin* upheld prosecution on espionage and sabotage charges, whose long pedigree in military commissions provided the notice that fairness required. Addressing due process concerns, American prosecutors at Nuremberg dramatically scaled down membership offenses, focusing on acts of violence or substantial roles in organizations that promoted such acts. The plurality opinion on conspiracy by Justice Stevens in the Supreme Court's 2006 *Hamdan* decision stressed the separation of powers, noting that President Bush's unilateral attempt to create military commissions embodied an impulse toward tyranny that did not plague Congress's exercise of power under the Define and Punish Clause. Yet Stevens' analysis of conspiracy liability suggested that the Court would not be a rubber stamp, even for Congress.

The consensus in American practice favoring the membership conception encounters fresh challenges in Congress's authorization of material support prosecutions in military commissions. The breadth of the federal criminal law statutes barring material support would permit military

commissions trials based on alleged conduct, such as providing nominal financial support or training in nonviolence to Al Qaeda, even though such charges have not previously been triable in this forum. To salvage the material support convictions of both Salim Hamdan and Ali Hamza al Bahlul, the government has turned to a novel theory which posits a "U.S. common law of war." However, the government's answer compounds the challenges posed by material support charges in military commissions.

Positing a US common law of war turns the Framers' careful design on its head. As we have seen, the Define and Punish Clause was drafted to show that the new nation would curb the violations of international law, such as attacks on ambassadors and flouting of treaties, which plagued the Articles of Confederation period. The Framers would have been baffled by a theory that allowed Congress to by-pass this constraint.

The Framers would also have rejected the categorical account of military commission jurisdiction that opposes the government's position. That account seeks to reduce the vast realms of international law to handy recipe cards noted by Madison in Federalist No. 37. Under this rote approach, the labels attached to charges mean everything, while the actual conduct charged in military commissions means nothing. The rigidity of the categorical approach does not fit the Framers' pragmatic proclivities. Nor does it harmonize with the deference accorded to states under the international law principle of complementarity.

A membership conception would navigate between the license sanctioned by the US common law of war position and the categorical approach's rigidity. It would allow courts to tailor the material support provisions in military commission legislation. Tailoring would permit only charges that alleged conduct functionally analogous to acts previously charged in military commissions, such as direct participation in violence against civilians or perfidious attacks, or performance of a substantial role in an organization that coordinated such efforts. Tailoring would permit charging conspiracy as a mode of liability for completed acts of violence, but not as a separate offense involving mere agreement. In this fashion, tailoring

would grant Congress a measure of deference without giving it a blank check.

Neither the government nor its categorical opponents will get everything they want from the functional approach to material support charges. Hamdan's conviction for generic service as a foot soldier will fall. However, the functional approach would uphold al Bahlul's conviction for his after-the-fact distribution of the 9/11 attackers' martyr's wills and his role as bin Laden's personal propagandist. A split decision empowers Congress to regulate unlawful violence while blunting the short-term impulses that the Framers feared. This careful balance keeps faith with the contending values that the Framers built into the Define and Punish Clause.