

ARTICLE

History, *Hamdan*, and Happenstance: “Conspiracy by Two or More To Violate the Laws of War by Destroying Life or Property in Aid of the Enemy”

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Abstract

The U.S. Court of Appeals for the District of Columbia Circuit will soon confront the question of whether, under the Military Commissions Act of 2009, conspiracy to violate the law of war is an offense triable by law-of-war military commission. In June 2006, a plurality of the Supreme Court in *Hamdan v. Rumsfeld* determined that the Government failed to make a colorable case for the inclusion of conspiracy among those offenses cognizable by law-of-war military commission. The plurality’s reasoning was largely based on its survey of domestic law sources and precedents. That survey, however, was inaccurate and incomplete.

This Article examines and expounds upon the domestic law sources and precedents, spanning from the Civil War to beyond World War II, that inform the issues surrounding the charge of conspiracy to violate the law of war. These sources and precedents are supplemented by the scholarship of highly respected military law historians who continually recognized conspiracy as an offense triable by law-of-war military commission. Crucially, the *Hamdan* plurality relied on one such scholar for a principle

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that he did not assert, and this author's discovery of a critical record-keeping error illuminates the defects in the *Hamdan* plurality's rationale.

The Article concludes that a thorough analysis of historical evidence leads to a substantial showing that conspiracy to violate the law of war is, itself, a violation of the law of war that has traditionally and lawfully been tried by law-of-war military commission.

I. Introduction

“[J]ustice demands a body of law which is fixed, ascertainable and independent of human caprice, a demand which is not met by customary rules recorded only in unpublished decisions and the fickle memories of men. That concept of justice requires also that the decisions of judicial bodies be subjected to the cold light of public scrutiny, in order that their weaknesses may be discovered”¹

In June 2006, the Supreme Court of the United States in *Hamdan v. Rumsfeld* struck down President George W. Bush's use of military commissions to try suspected members of al-Qaeda.² A plurality of the Court also concluded that conspiracy was “not a stand-alone offense against the law of war” triable by “law-of-war military commission.”³ The issue whether conspiracy is triable by military commission arises again in *Ali Hamza Suliman Al Bahlul v. United States*,⁴ which is pending before the U.S. Court of Appeals for the District of Columbia Circuit and may be heading back to the Supreme Court. In *Al Bahlul*, the D.C. Circuit must decide whether Congress has the constitutional power in the Military Commissions

¹ William F. Fratcher, *Colonel William Winthrop*, 1 JUDGE ADVOC. J. 12, 14 (Dec. 1944).

² 548 U.S. 557 (2006) (plurality opinion). The Court invalidated President George W. Bush's military order creating military commissions. See President George W. Bush, Military Order (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 13, 2001), 3 C.F.R. 918 (2002).

³ See *Hamdan*, 548 U.S. at 608 (plurality opinion). The four members of the Court who comprised the plurality were Justices Stevens, Souter, Ginsburg, and Breyer. Justice Kennedy concurred in the result, which invalidated President Bush's military commissions. Three justices (Justices Scalia, Thomas, and Alito) dissented. The Chief Justice of the United States, John G. Roberts, Jr., did not participate because he had heard the case below when he was a judge on the U.S. Court of Appeals for the District of Columbia Circuit. See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

⁴ *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir.) (pending).

Act of 2009⁵ to authorize the trial of the offense of conspiracy by military commission. Petitioner Al Bahlul contends that “[t]here is an extensive and unanimous history of rejecting conspiracy to commit war crimes.”⁶ He bases his conclusion, with respect to domestic precedents, solely upon the reasoning adopted by the *Hamdan* plurality.⁷ Therefore, the *Hamdan* plurality’s reasoning, which was informed by its reading of relevant legal history, has immediate consequences for the vitality of military commissions now and in the future.

This Article examines the Supreme Court’s ruling in *Hamdan v. Rumsfeld*, both legally and historically, to determine whether the plurality correctly concluded that conspiracy was “not a stand-alone offense against the law of war” triable by “law-of-war military commission.”⁸ Part II of this Article traces the confusion that envelops the precise constitutional authority for military commissions. Part III briefly describes the *Hamdan* plurality’s factual and legal rationale for its contention that “[t]he crime of ‘conspiracy’ has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction.”⁹ Part IV analyzes the foundation of the *Hamdan* plurality’s rationale, which in light of a crucial labeling error, was based on an incomplete and incorrect reading of American history. Part V concludes that numerous precedents and highly respected scholarship unequivocally demonstrate that “conspiracy to violate the laws of war” is, and has been since the Civil War, a violation of the law of war that has traditionally been triable by law-of-war military commission.

II. The Constitutional Authority for Military Commissions

Under historic U.S. Army practice, a military commission was a “common law war court set up during periods of hostilities, martial rule or

⁵ 10 U.S.C. §§ 948a-950t (2006 & Supp. IV 2010).

⁶ Brief of Petitioner at 19, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Mar. 9, 2012); *but see* *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1191 (U.S. Ct. Mil. Comm’n. Rev. 2011) (holding that conspiracy was “punishable by military commission”).

⁷ *See* Brief of Petitioner at 19–21, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Mar. 9, 2012).

⁸ *Hamdan*, 548 U.S. at 608 (plurality opinion).

⁹ *See id.* at 603–04 (plurality opinion).

military government.”¹⁰ Although these common-law war-courts have existed since the Revolutionary War, they have always been shrouded in confusion.¹¹ Confusion obscures the law of military commissions for three reasons.¹² First, no modern work definitively treats the present-day law of military commissions, requiring the student to consult a variety of disparate, and often conflicting, sources.¹³ Second, the overwhelming majority of

¹⁰ Thomas C. Marmon, Joseph E. Cooper & William P. Goodman, *Military Commissions* 3 (Apr. 1953) (unpublished L.L.M. thesis, The Judge Advocate General’s School) (on file with The Judge Advocate General’s Legal Center and School Library, The Judge Advocate General’s School) [hereinafter Marmon Thesis]. Although the U.S. Army was the first service to employ the military commission, it has not been the only service to do so. The U.S. Navy employed military commissions during World War II. See, e.g., George E. Erickson, Jr., Note, *United States Navy War Crimes Trials (1945-1949)*, 5 WASHBURN L.J. 89 (1965).

¹¹ See, e.g., 2 WINFIELD SCOTT, MEMOIRS OF LIEUT.-GENERAL SCOTT, LL.D. 393–94 (New York, Sheldon & Co. 1864) (“To suppress these disgraceful acts abroad, the autobiographer drew up an elaborate paper, in the form of an order—called, his *martial law order*—to be issued and enforced in Mexico, until Congress could be stimulated to legislate on the subject. On handing this paper to the Secretary of War (Mr. Marcy) for his approval, a *startle* at the title was the only comment he then, or ever made on the subject. It was soon silently returned, as too explosive for safe handling. A little later the Attorney-General called (at whose instance can only be guessed) and asked for a copy, and the law officer of the Government whose business it is to speak on all such matters, was stricken with legal dumbness.”) (emphasis in original).

¹² While the law of military commissions is shrouded in confusion, often the facts are equally obscured. Compare Trial of Spies by Military Tribunals, 31 Op. Att’y Gen. 356 (1918) (T. W. Gregory, Att’y Gen.) (holding that military tribunal lacked jurisdiction to try alleged spy Lather Witcke, alias “Pablo Waberski”), with Trial of Spy by Court Martial, 40 Op. Att’y Gen. 561 (1919) (A. Mitchell Palmer, Att’y Gen.) (reversing former Attorney General Gregory’s Nov. 25, 1918 opinion and holding, based upon newly discovered facts, that military commission did have jurisdiction to try alleged spy Lather Witcke, alias “Pablo Waberski”). The latter opinion was rendered December 24, 1919 but was, at Attorney General’s Palmer’s request, “treated as strictly confidential, and not made public.” *Id.* at 562. This opinion ultimately was released for publication on July 29, 1942, in connection with the *Ex parte* Quirin litigation. See *id.* at 561. In response to Attorney General Palmer’s opinion, President Woodrow Wilson personally approved the conviction of Lather Witcke, alias “Pablo Waberski” on May 27, 1920. See Sec’y of War Newton D. Baker, General Orders, No. 32, War Department, Washington, June 4, 1920 (approving conviction, but commuting sentence, of Lather Witcke, alias “Pablo Waberski” (German citizen charged with violating Art. 82 of 1916 Articles of War in Nogales, Ariz. during Jan. 1918 before military commission convened Aug. 16, 1918 at Fort Sam Houston, Tex.) to imprisonment at hard labor for life by May 27, 1920 order of President Woodrow Wilson).

¹³ John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 902 (2003) (“Great confusion often results from distinct phenomena sharing a single name That three types of tribunals are labeled

military commission precedents exist solely in manuscript form in governmental archives and are therefore largely inaccessible to the public, further making them not well understood.¹⁴ Third, the law of military commissions is a complex field of law and history in which precise terms of art are used imprecisely¹⁵ and simple facts (such as who was tried, where they were tried, and why they were tried) are not readily known.¹⁶ These three factors have led to a dearth of actual knowledge about the law of military commissions.

Any serious assessment of the legality of military commissions must begin by examining the Constitution of the United States, which, in contrast to oft-reviled orders establishing military commissions, has been described as “the most wonderful work ever struck off at a given time by the brain and

‘military commissions’ has caused similar confusion. Two of these, those arising from the imposition of martial law and those created within a military government, are greatly alike. The third, the law of war court, is so utterly different that it had a different name at its birth. Much of the present confusion stems from the fact that occurrences of this third variety came to be called ‘military commissions’ like the others, to the lasting befuddlement of numerous lawyers, military and civilian alike.”).

¹⁴ See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 161 (1991) (“Though extensive treatments of a few individual trials exist, most notably those of Lincoln’s assassins and of Milligan and Vallandigham, no overall study of military commissions exists that might provide an institutional and a historical context for these more sensational trials.”).

¹⁵ See, e.g., *Martial Law*, 8 Op. Att’y Gen. 365, 365 (1857) (Caleb Cushing, Att’y Gen.) (lamenting imprecise use of terms “military law” and “martial law”) (“Permit me to say, before leaving the case, that the extreme indeterminateness and vagueness of exciting conceptions, on this particular subject, are a matter of regret, and the removal thereof a desideratum in our constitutional jurisprudence.”) (emphasis in original); see also Charles Fairman, *The Law of Martial Rule*, 22 AM. POL. SCI. REV. 591, 591 (1928) (“At the very outset of a study of martial law one is bewildered by the haze of uncertainty which envelops the subject. The literature relating to it is replete with dicta and aphorisms often quoted glibly as universal truths, whereas they are properly limited to a particular significance of the term ‘martial law.’”).

¹⁶ See, e.g., HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 135, 179 (1993) (stating that then-available World War II war crimes statistics were “either non-existent or unreliable”). The same problem persists with respect to the Civil War. See, e.g., THOMAS P. LOWRY, *CONFEDERATE HEROINES: 120 SOUTHERN WOMEN CONVICTED BY UNION MILITARY JUSTICE* 187 (2006) (“In the Union army, during the Civil War, there were 5,456 military commissions, 70,310 courts-martial, and 193 courts of inquiry.”); NEELY, *supra* note 14, at 168, 176 (“During the Civil War, the army conducted at least 4,271 trials by military commission From the end of April 1865 to January 1, 1869, another 1,435 such trials occurred—and still more in 1869 and 1870.”). Thus, even the number of defendants tried by military commission during the Civil War remains elusive.

purpose of man.”¹⁷ Although military commissions existed before there was, in fact, a Constitution, the precise constitutional source of military commission jurisdiction is an issue of contention today.¹⁸ The Constitution contains no express language creating military commissions, but numerous provisions can be interpreted as implicitly authorizing their use.¹⁹ For example, Article I, Section 8 of the Constitution sets forth seventeen specific paragraphs of enumerated congressional power, eight of which are related, in whole or in part, to warfare.²⁰ Specifically, Congress has the power “To . . . provide for the common Defence and general Welfare of the United States”;²¹ “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”;²² “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures

¹⁷ W. E. Gladstone, *Kim Beyond Sea*, 127 N. AM. REV. 179, 185 (Sept.–Oct. 1878). The Supreme Court has noted that in the context of analyzing the power of military courts the Constitution is the source of all government power. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141 (1866) (Chase, C.J., concurring in the result) (observing that “there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution”); *see also* Charles E. Hughes, War Powers Under the Constitution, S. DOC. NO. 65-105, at 3 (1917) (“We are making war as a nation organized under the constitution, from which the established national authorities derive all their powers either in war or in peace.”). When Charles Evans Hughes gave this address to the American Bar Association on September 5, 1917, he was a former Associate Justice of the U.S. Supreme Court. Between February 1930 and June 1941, he served the nation as the eleventh Chief Justice of the United States.

¹⁸ *See* PROCEEDINGS OF A BOARD OF GENERAL OFFICERS, HELD BY ORDER OF HIS EXCELLENCY GEN. WASHINGTON, COMMANDER IN CHIEF OF THE ARMY OF THE UNITED STATES OF AMERICA, RESPECTING MAJOR JOHN ANDRE, ADJUTANT GENERAL OF THE BRITISH ARMY, SEPTEMBER 29, 1780 (Phila., Francis Bailey 1780).

¹⁹ *See* A. Wigfall Green, *The Military Commission*, 42 AM. J. INT’L L. 832, 834–36 (1948) (noting that the Constitution provides abundant authority for military commissions); Marmon Thesis, *supra* note 10, at 12 (“Although military commissions are not constitutional courts in the sense that they were expressly provided for in that document, they exist under the Constitution.”).

²⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (“Indeed, out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare. The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. Art. II, § 2, Const. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.”).

²¹ U.S. CONST. art. I, § 8, cl. 1.

²² *Id.* cl. 10.

on Land and Water”;²³ “To raise and support Armies”;²⁴ “To provide and maintain a Navy”;²⁵ “To make Rules for the Government and Regulation of the land and naval Forces”;²⁶ “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”;²⁷ “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”²⁸

In addition to these specific grants of power, Article I, Section 8, Clause 18 of the Constitution gives Congress the general power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁹ Separately, the Constitution confers less well-defined powers upon the President of the United States. For instance, under Article II of the Constitution, the “executive Power” is “vested in a President of the United States of America,”³⁰ who by solemn oath pledges to “faithfully execute the Office of President of the United States”;³¹ the President is made the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”;³² and the President is mandated to “take Care that the Laws be faithfully executed.”³³

²³ *Id.* cl. 11.

²⁴ *Id.* cl. 12.

²⁵ *Id.* cl. 13.

²⁶ *Id.* cl. 14.

²⁷ *Id.* cl. 15.

²⁸ *Id.* cl. 16.

²⁹ *Id.* cl. 18. The Necessary and Proper Clause appears to have special importance during a time of war. *See, e.g.*, Hughes, *supra* note 17, at 8 (“The power of the National Government to carry on war is explicit and supreme, and the authority thus resides in Congress to make all laws which are needed for that purpose; that is, to Congress in the event of war is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success, and this power is to be exercised without impairment of the authority committed to the President as Commander-in-Chief to direct military operations.”).

³⁰ U.S. CONST. art. II, § 1, cl. 1.

³¹ *Id.* cl. 7.

³² *Id.* art. II, § 2, cl. 1.

³³ *Id.* art. II, § 3.

Three competing schools of thought have emerged over where the constitutional power to convene military commissions is lodged. Proponents of the first school of thought view the power to convene military commissions as coming solely from Congress's Article I, Section 8, Clause 10 power to "define and punish . . . Offences against the Law of Nations."³⁴ Proponents of the second school of thought, in contrast, view the power to convene military commissions as coming solely from Congress's Article I, Section 8, Clause 11 power to "declare War."³⁵ Proponents of the third school of thought view the power to convene military commissions as coming from the President's Article II power as constitutional Commander-in-Chief of the Army and Navy.³⁶ The proponents of each of these schools of thought generally believe that only their model is appropriate. The better view, however, is that all three schools of thought are correct, and the power to convene military commissions comes from an amalgam of Congress's Article I, Section 8 powers, combined with the President's Article II, Section

³⁴ See, e.g., Bickers, *supra* note 13, at 914 (noting power to convene military commissions comes from the Offenses Clause).

³⁵ See, e.g., Memorandum Opinion from Maj. Gen. Myron C. Cramer, U.S. Army, The J. Advoc. Gen., to Brig. Gen. John M. Weir, U.S. Army, Assistant J. Advoc. Gen. & Director, War Crimes Office, *Applicability of Articles of War to Trials of War Criminals by Military Commissions* (Serial No. SPJGI) (n.d.), in Record Group 331 (Records of Allied Operational and Occupation Headquarters, World War II), Entry 1336 (Records of the SCAP Legal Division), Stack 290, Row 12, Compartment 31, Shelf 4, Box 1853, National Archives at College Park, College Park, Maryland (holding that the power "to punish war criminals is derived from the war power," and specifically the Declare War Clause). While this memorandum is not dated, internal references indicate that it was prepared after April 23, 1945. See *id.* at 6.

³⁶ See, e.g., CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 147 (1921) ("Military commissions, deriving their authority and jurisdiction from military usage and the common law of war, and their creation, composition, procedure, and decisions being subject to the complete control of the Executive, are therefore, even more than courts-martial, merely agencies of the Executive in his capacity as Commander-in-Chief."); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957 258 (4th rev. ed. 1957) ("Punishment of the saboteurs was therefore within the President's power as Commander-in-Chief in the most elementary, the purely martial, sense of that power."); Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex Parte Quirin*, 9 GREEN BAG 2d 223, 237 (2006) (publishing Assoc. Justice Robert H. Jackson's Oct. 23, 1942 unpublished opinion in *Ex parte Quirin*) ("The history and the language of the Articles are to me plain demonstration that they are completely inapplicable to the case, and it is abundantly clear to me that it was well within the war powers of the President as Commander in Chief to create a non-statutory Presidential military tribunal of the sort here in question.").

2, Clause 1 authority as Commander-in-Chief. The fusion of these constitutional powers is supported by past and present authority.³⁷

³⁷ See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d rev. ed. 1920) (reprint of 1896 edition) [hereinafter *WINTHROP MILITARY LAW AND PRECEDENTS*] (enumerating constitutional provisions sanctioning military commissions under the common law of war):

The Constitution confers upon Congress the power “to define and punish offences against the law of nations,” and in the instances of the legislation of Congress during the late war by which it was enacted that spies and guerillas should be punishable by sentence of military commission, such commission may be regarded as deriving its authority from this constitutional power. But, in general, it is those provisions of the Constitution which empower Congress to “declare war” and “raise armies,” and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.

Id. (emphasis in original); see also Marmon Thesis, *supra* note 10, at 3 (“The term ‘Military Commission’ means a common law war court set up during periods of hostilities, martial rule or military government as an instrumentality for the more efficient execution of the war powers vested in Congress and the President.”); Eugene A. Steffen, *The Exercising of Military and Extraterritorial Jurisdiction over Civilians and War Crimes* 18–19 (Mar. 1976) (unpublished L.L.M. thesis, The Judge Advocate General’s School) (on file with The Judge Advocate General’s Legal Center and School Library, The Judge Advocate General’s School), available at http://www.loc.gov/rr/frd/Military_Law/pdf/steffen-thesis.pdf (“Authority for the establishment of the military commission derives from the war powers vested in Congress by Article I, § 8, clause 1 and clauses 11 through 16, and by Article I, § 8, clause 10, which confers upon Congress the power to ‘define and punish—Offenses against the Law of Nations.’ This authority also is considered to derive from the power of the President as Commander-in-Chief of the Nation’s armed forces as provided by Article II, § 2, clause 1.”); see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, *COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT* 8 (2010) (“The Constitution empowers Congress to declare war and ‘make rules concerning captures on land and water,’ to define and punish violations of the ‘Law of Nations,’ and to make regulations to govern the armed forces. The power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws of the nation. Under the Articles of War and subsequent statute, the President has at least implicit authority to convene military commissions to try offenses against the law of war. The authority and objectives underlying military courts-martial and military commissions are not coextensive.

Historically, confusion plagued all three branches of government—legislative, executive, and judicial—as to the precise constitutional source of military commission jurisdiction. For example, in 1996 the Committee on the Judiciary of the House of Representatives found that military commission jurisdiction comes from the Offenses Clause.³⁸ In 2006, the same House committee found that military commission jurisdiction comes from a combination of the Offenses Clause, the Declare War Clause, the Make Rules Clause, and the Necessary and Proper Clause.³⁹ The Executive Branch, for its part, informed the United Nations in 1966 that the power to convene military commissions comes from the Offenses Clause, the Declare War Clause, the Make Rules Clause, and the Necessary and Proper

Rather than serving the internally directed purpose of maintaining discipline and order of the troops, the military commission is externally directed at the enemy as a means of waging successful war by punishing and deterring offenses against the law of war.”).

³⁸ See H. COMM. ON THE JUDICIARY, WAR CRIMES ACT OF 1996, H.R. REP. NO. 104-698, at 7 (1996) (noting that the “constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions”). The committee then cited to a passage from *In re Yamashita*, which implies that military commissions are convened by virtue of the Offenses Clause. See *id.*; see generally War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2441 (2006 & Supp. IV 2010)). The House Judiciary Committee reiterated this opinion when the War Crimes Act of 1996 was amended in 1997. See H. COMM. ON THE JUDICIARY, EXPANDED WAR CRIMES ACT OF 1997, H.R. REP. NO. 105-204, at 9 (1997) (“[T]he Committee finds the authority for this legislation in Article I, section 8, clause 10 of the Constitution The constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes.”); see generally Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 583, 111 Stat. 2386, 2436 (1997) (amending War Crimes Act of 1996).

³⁹ See H. COMM. ON THE JUDICIARY, MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 2, at 15 (2006) (Report to accompany H.R. 6054) (“[T]he Committee finds the authority for this legislation in article 1, section 8 of the Constitution, including clauses 10, 11, 14 and 18.”). The House Judiciary Committee issued this report on H.R. 6054. See Military Commissions Act of 2006, H.R. 6054, 109th Cong. (2006) (as reported by H. Comm. on the Judiciary, Sept. 25, 2006). The House Armed Services Committee also issued a report on H.R. 6054. See H. COMM. ON ARMED SERVICES, MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 1, at 24 (2006) (Report to accompany H.R. 6054) (“The offenses defined here are not new crimes, but rather reflect the codification of the law of war into the United States Code pursuant to Congress’s constitutional authority to ‘Define and Punish * * * Offences against the Law of Nations.’”). H.R. 6054 was similar in all material respects to the bill (S. 3930, 109th Cong. (2006)), which ultimately enacted as the Military Commissions Act of 2006.

Clause.⁴⁰ In 2001, however, the Executive Branch held that the power to convene military commissions resides in the President of the United States by virtue of his Article II power as Commander-in-Chief.⁴¹ The Judicial Branch is no more consistent: In 1866, four members of the Supreme Court in *Ex parte Milligan* held that military commissions come from the Declare War Clause, the Raise Armies Clause, and the Make Rules Clause;⁴² in 1942, the *Ex parte Quirin* Court held that military commission jurisdiction comes from the Offenses Clause;⁴³ in 1946, the *In re Yamashita* Court implied military commission jurisdiction springs from the Offenses Clause but almost immediately thereafter observed that “the commission derives its

⁴⁰ See United States of America Reply dated 23 February 1966 to the Secretary-General’s Note of 15 May 1965 (Feb. 23, 1966), U.N. Doc. E/CN.4/927/Add.1, at 28–29 (Jan. 30, 1967) (stating that Congress had power to enact legislation creating military tribunals to try law-of-war offenses pursuant to Article I, Section 8, Clauses 10, 11, 14, and 18 of U.S. Constitution):

The Constitution of the United States empowers the Congress “To make Rules for the Government and Regulation of the land and naval Forces”; “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”; “To define and punish. . . Offenses against the Law of Nations”; and “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .” Under these provisions, Congress has from time to time enacted legislation providing for the creation of military tribunals for the trial of offences against the laws of war.

Id.

⁴¹ See Legality of the Use of Military Commissions To Try Terrorists, 25 Op. O.L.C. at 6 (2001), available at <http://www.usdoj.gov/olc/2001/pub-millcommfinal.pdf> (“It is important, nevertheless, to note that the President has inherent authority as Commander in Chief to convene such tribunals even without authorization from Congress.”).

⁴² See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 142 (1866) (Chase, C.J., concurring in the result) (“We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.”).

⁴³ See *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) (“Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.”).

existence” from the “war power”;⁴⁴ and in 1952, in *Madsen v. Kinsella*, the Court noted that military commissions are “common-law war courts” that are “constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.”⁴⁵ Thus, it is apparent that all

⁴⁴ Compare *In re Yamashita*, 327 U.S. 1, 7 (1946) (“In *Ex parte Quirin*, 317 U. S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to ‘define and punish . . . Offences against the Law of Nations . . . ,’ of which the law of war is a part, had, by the Articles of War (10 U. S. C. §§ 1471-1593) recognized the ‘military commission’ appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.”), with *id.* at 11–12 (“An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin*, *supra*, 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. See *United States v. Anderson*, 9 Wall. 56, 70; *The Protector*, 12 Wall. 700, 702; *McElrath v. United States*, 102 U. S. 426, 438; *Kahn v. Anderson*, 255 U. S. 1, 9-10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.”). As to the *Yamashita* Court’s subtle shift away from the Offenses Clause, see Howard S. Fredman, Comment, *The Offenses Clause: Congress’ International Penal Power*, 8 COLUM. J. TRANSNAT’L L. 279, 301–03 (1969) (“What is puzzling is why the Court resorted to the Offenses Clause to justify this exercise of power. It seems to be clear that Congress, under its war powers, may punish agents of foreign states acting behind its lines contrary to the laws of war. . . . In all probability the Offenses Clause was originally intended for offensive use against non-nationals and non-residents only in the case of piracy ‘and similar topics of limited compass,’ while the more ample war powers were designed to vindicate ordinary violations of the laws of war. . . . It is difficult to understand what conceivably is gained—either in terms of additional authority or analytic clarity—by classing military prosecutions of war crimes as an exercise of the Offenses Power. . . . That the Supreme Court was not entirely satisfied with this classification became apparent in its *Yamashita* opinion. In that case, the Court not only repeated *Quirin*’s argument that authority was derived from the Offenses Clause, but also put the military prosecution of war criminals squarely within the war powers of Congress.”).

⁴⁵ *Madsen v. Kinsella*, 343 U.S. 341, 346 (1952); see *id.* at 346 n.9 (quoting Col. William Winthrop for the proposition that the military commission “derives its original sanction” from the “war powers vested in Congress and the power vested in the President as

three branches of government believe that the Constitution provides for the existence of military commissions, but that the precise textual origin of this power has been a source of persistent disagreement.

What cannot be disagreed upon, however, is that military commissions are quintessentially war-courts.⁴⁶ They arise only in time of war. They are “an instrumentality” to wage war successfully.⁴⁷ Military commissions are therefore convened by virtue of the war power,⁴⁸ which is

Commander-in-chief in war” but omitting Col. Winthrop’s reference to the Offenses Clause, which he viewed as augmenting the “war powers vested in Congress”).

⁴⁶ See Letter Opinion from George B. Davis, U.S. Army, J. Advoc. Gen., to Sen. John T. Morgan (Feb. 11, 1905), *reprinted in* S. DOC. NO. 58-157, at 1, 6 (3d Sess. 1905) (“More serious offenses against the laws of war are tried by war courts, having a more extensive criminal jurisdiction, called ‘military commissions.’”); *Revision of the Articles of War: Hearing on H.R. 23628 Before the H. Comm. on Military Affairs*, 62d Cong. 29 (1912) (May 14, 1912 statement of Brig. Gen. Enoch H. Crowder, U.S. Army, J. Advoc. Gen.) (“While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved.”); *Revision of the Articles of War: Hearing on S. 3191 Before the Subcomm. of the S. Comm. on Military Affairs*, 64th Cong. (1916), *reprinted in* S. REP. NO. 64-130, at 40 (1916) (Feb. 7, 1916 statement of Brig. Gen. Enoch H. Crowder, U.S. Army, J. Advoc. Gen.) (“A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law.”); WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 275 (rev. 3d ed. 1914) (“Although not known in the United States service by the name military commission prior to the promulgation of General Scott’s orders in Mexico, before referred to, the war court, originally based on the common law of war, has always been recognized in the service.”); GEORGE B. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 308 (rev. 3d ed. 1915) (defining “military commissions” as “criminal war-courts” that are “resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law, and cannot be extended to include certain classes of offenses, which in war would go unpunished in the absence of a provisional forum for the trial of the offenders”); Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 19 (1996) (noting that “[w]ar-making authority provides the linchpin to understanding the consistent case law regarding the jurisdiction of military commissions”); see also Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT’L L. 958, 966 (1911) (“[C]ourts-martial exist in peace and war, but military commissions are war courts and can exist only in time of war.”).

⁴⁷ See WINTHROP MILITARY LAW AND PRECEDENTS, *supra* note 37, at 831 (reprint of 1896 edition).

⁴⁸ President Lincoln famously described his conception of the “war power” in his message to a special session of Congress on July 4, 1861. See President Abraham Lincoln, Special Session Message to the Senate and House of Representatives (July 4, 1861), *reprinted in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 23, 31

expressed most clearly by the Declare War Clause. Under the war power, Congress may prosecute in military commissions offenses that the United States has historically tried by military commission.⁴⁹ Congress's war power to prosecute offenses historically triable by military commission is augmented by Congress's power to "define and punish . . . Offences against the Law of Nations."⁵⁰ Exercising its war power and its power to define and punish offenses against the law of nations in October 2006 and October 2009, two successive Congresses and Presidents acting in concert enacted the Military Commissions Act of 2006⁵¹ and the Military Commissions Act of 2009,⁵² each of which recognized that military commissions are a lawful forum to try alien unprivileged enemy belligerents "for violations of the law of war and other offenses triable by military commission."⁵³

III. The *Hamdan* Plurality's Conspiracy Rationale

In *Hamdan*, the Supreme Court analyzed whether conspiracy was triable by military commission, resulting in a plurality of four justices who concluded that conspiracy was not so triable, and three justices who

(James D. Richardson ed., Washington, Gov't Printing Office 1897) ("So viewing the issue, no choice was left but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation. . . . It was with the deepest regret that the Executive found the duty of employing the war power in defense of the Government forced upon him."). The "war power" has been defined to encompass Art. I, Sec. 8, Cl. 11–16 of the Constitution. *See, e.g.*, U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY (William Winthrop ed., Washington, Gov't Printing Office 1895) ("The war power of the United States is vested in Congress by Art. I, Sec. 8, pars. 11, 12, 13, 14, 15 and 16, of the Constitution. The President, as Executive and Commander-in-chief of the Army and Navy, becomes authorized, in time of war, to execute this power under the public Acts of Congress initiating and defining the same."). With regard to the general power to wage war, see Hughes, *supra* note 17, at 7 ("The power to wage war is the power to wage war successfully.").

⁴⁹ *See* THE JUDGE ADVOCATE GEN. SCH., U.S. ARMY, WAR POWERS AND MILITARY JURISDICTION 38 (Dec. 1, 1943) ("From this line of cases, culminating in the *Quirin* case, we derive the doctrine that a military commission has jurisdiction to try any belligerent, whether a citizen of the United States or not, for an *offense* which was considered historically to be a violation of the laws of war.") (emphasis in original).

⁵⁰ *See supra* note 22.

⁵¹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w (2006 & Supp. II 2008)).

⁵² Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a-950t (2006 & Supp. IV 2010)).

⁵³ *Id.* at § 948b.

concluded that it was.⁵⁴ While a plurality opinion is not technically binding as precedent on the courts below, it does represent the considered judgment of four justices of the Court, and is therefore entitled to a high degree of respect.⁵⁵

In analyzing the issue of conspiracy, the *Hamdan* plurality bifurcated its analysis between domestic and international law precedents.⁵⁶ The

⁵⁴ Justice Kennedy declined to join the plurality with respect to the issue of conspiracy, and Chief Justice Roberts did not participate in the case.

⁵⁵ See *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁵⁶ This Article is limited to an analysis of the domestic law precedents that demonstrate historic U.S. practice. It is frequently argued, however, that the rulings of the International Military Tribunal at Nuremberg (IMT), the subsequent proceedings at Nuremberg conducted under the authority of Control Council Law No. 10 (NMT), and the International Military Tribunal for the Far East at Tokyo (IMTFE) stand for the proposition that conspiracy to violate the law of war is not a cognizable international offense. The four major victorious allies of World War II—the United States, the United Kingdom, France, and the U.S.S.R.—created the IMT by international agreement (commonly known as the London Agreement), which set forth the London Charter. The IMT’s conspiracy ruling was based on “treaty” construction, akin to statutory construction, of the London Charter rather than abstract principles of international law. See, e.g., U.S. DEPT OF STATE, PUB. NO. 3080, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL MILITARY CONFERENCE ON MILITARY TRIALS vii (1949) (“Another point on which there was a significant difference of viewpoint concerned the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists. Continental law recognizes the criminality of aiding and abetting but not all the aspects of the crime of conspiracy as we know it. But the French and Soviet Delegations agreed to its inclusion as appropriate to the kind of offenses the charter was designed to deal with. However, the language which expressed this agreement seems not to have conveyed to the minds of the judges the intention clearly expressed by the framers of the charter in conference, for, while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment.”); Telford Taylor, *The Nuremberg War Crimes Trials*, 27 INT’L CONCILIATION 243, 264, 345 (1949) (“In the second section, devoted to the conspiracy charge, the Tribunal decided (for technical reasons based on the particular language of the London Charter) that the charge of conspiracy to commit war crimes and crimes against humanity should be disregarded, and that ‘only the common plan to prepare, initiate, and wage aggressive war’ needed to be considered. The court adopted a rather narrow view of the concept of conspiracy, not so evident in its general language as in its decision as to the guilt or innocence of particular defendants. . . . We have seen earlier that the indictment before the IMT was drawn on the theory that conspiracy was the broadest of all the charges, but that the IMT treated it as the narrowest. Not only did they convict four defendants of the substantive charge of planning and waging aggressive war who had been acquitted on the conspiracy count, but also they dismissed entirely the charge of conspiracy to commit war crimes and crimes against humanity as beyond their jurisdiction under the

plurality found that conspiracy was not a violation of the law of war under domestic precedents for three reasons.⁵⁷ First, the plurality noted that the

language of the London Charter. It became apparent during the IMT trial, not only from the arguments of defense counsel but from the reactions of the Continental members of the Tribunal, that many European jurists view the Anglo-Saxon concept of criminal conspiracy with deep suspicion.”). The NMT followed the IMT. *See* 15 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 90 (1949) (“The existence as a separate offence of conspiracy to commit the crime of waging aggressive war does not seem to have been doubted by the United States Military Tribunals; in this they accepted the view of the Nuremberg International Military Tribunal. On the other hand, again following the decision of the International Military Tribunal, they have not recognised as a separate offence conspiracy to commit war crimes or crimes against humanity.”). The IMTFE also followed the IMT. *See* International Military Tribunal for the Far East, Judgment of the International Military Tribunal for the Far East (Nov. 4-12, 1948), *in* 101 THE TOKYO MAJOR WAR CRIMES TRIAL 48,414, 48,449–50 (R. John Pritchard ed., 2000) (“Counts 37 and 38 charge conspiracy to murder. Article 5, subparagraphs (b) and (c) of the Charter, deal with Conventional War Crimes and Crimes against Humanity. In sub-paragraph (c) of Article 5 occurs this passage: ‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.’ A similar provision appeared in the Nuremberg Charter although there it was an independent paragraph and was not, as in our Charter incorporated in sub-paragraph (c). The context of this provision clearly relates it exclusively to sub-paragraph (a), Crimes against Peace, as that is the only category in which a ‘common plan or conspiracy’ is stated to be a crime. It has not application to Conventional War Crimes and Crimes against Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal. The Prosecution did not challenge this view but submitted that the counts were sustainable under Article 5(a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by this Tribunal are those set out in the Charter. Article 5(a) states that a conspiracy to commit the crimes therein specified is itself a crime. The crimes, other than conspiracy, specified in Article 5(a) are ‘planning, preparation, initiating or waging’ of a war of aggression. There is no specification of the crime of conspiracy to commit murder by the waging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in counts 37 and 38 and decline to entertain these charges.”); *see also* Hirota v. MacArthur, 338 U.S. 197, 215 (1948) (Douglas, J., concurring) (“The conclusion is therefore plain that the Tokyo Tribunal acted as an instrument of military power of the Executive Branch of government. It responded to the will of the Supreme Commander as expressed in the military order by which he constituted it. It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power.”). Much like international law precedents, potential Ex Post Facto Clause issues are outside the scope of this Article.

⁵⁷ *See* Hamdan v. Rumsfeld, 548 U.S. 557, 600 (2006) (plurality opinion).

Court in *Ex parte Quirin*⁵⁸ did not affirmatively decide whether conspiracy to violate the law of war was itself a violation of the law of war triable by law-of-war military commission, thus negating the case's precedential value.⁵⁹ Second, the plurality found that Captain Charles Roscoe Howland's 1912 treatise—which listed conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” as a violation of the law of war tried by law-of-war military commissions during the Civil War—was based upon faulty scholarship.⁶⁰ Third, the plurality observed that Colonel William Winthrop,⁶¹ in his famous treatise, *Military Law and Precedents*, recognized the

⁵⁸ 317 U.S. 1 (1942).

⁵⁹ See *Hamdan*, 548 U.S. at 605 (plurality opinion).

⁶⁰ See *id.* at 607–08 (plurality opinion).

⁶¹ William Woolsey Winthrop was born in New Haven, Connecticut on August 3, 1831. He received his B.A. from Yale College (1851) and his LL.B. from Yale Law School (1853). Thereafter, he spent a year in graduate study at Harvard Law School (1853–1854). He practiced law in Boston, Massachusetts and St. Anthony's, Minnesota between 1855 and 1860, when he settled in New York City. On April 14, 1861, Fort Sumter—in Charleston Harbor, South Carolina—fell, thus beginning the Civil War. On April 15, 1861, President Lincoln issued a proclamation calling for 75,000 volunteers. See President Abraham Lincoln, Proclamation (Apr. 15, 1861), *reprinted in* 12 Stat. 1258 (1861) (calling out “the militia of the several States of the Union, to the aggregate number of seventy-five thousand,” and convening extraordinary session of Congress on July 4, 1861). Winthrop answered the President's call by swiftly enrolling as a private in the New York State Militia on April 17, 1861. On October 1, 1861, he accepted a commission as first lieutenant of Company H, 1st U.S. Sharpshooters and was promoted to captain on September 22, 1862 for gallantry in the field. On April 14, 1863, Captain Winthrop was assigned to duty in the Office of the Judge Advocate General in Washington, D.C. He was promoted to the rank of major and judge advocate of U.S. Volunteers on September 19, 1864. On March 13, 1865, he was brevetted twice: first, as lieutenant colonel of U.S. Volunteers for faithful and meritorious services in the field, and, second, as colonel of U.S. Volunteers for faithful and meritorious services in the field and in the Office of the Judge Advocate General/Bureau of Military Justice. On February 25, 1867, he was given the status of a permanent member of the regular U.S. Army with the rank of major and judge advocate. After serving briefly as Acting Judge Advocate General during February 1881, he became a lieutenant colonel of the U.S. Army and deputy judge advocate general on July 5, 1884. Between August 1886 and August 1890, Lieut. Col. Winthrop served as professor of law at the United States Military Academy at West Point, N.Y. He became a colonel of the U.S. Army and assistant judge advocate general on January 3, 1895. Colonel Winthrop was retired for age on August 3, 1895. See generally Fratcher, *supra* note 1, at 12–14; William F. Fratcher, *Notes on the History of the Judge Advocate General's Department, 1775–1941*, 1 JUDGE ADVOC. J. 5 (June 1944); George S. Prugh, Jr., *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A. J. 126 (1956); William F. Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 MIL. L. REV. 89 (1959); William Winthrop, 28 MIL. L. REV. iii (1965); George S. Prugh, *Introduction to William Winthrop's "Military Law and Precedents"*, 27 MIL. L. & L. WAR

error in Captain Howland's earlier scholarship, and excluded "conspiracy of any kind from his own list of offenses against the law of war."⁶² From these "facts," the plurality concluded that "these sources at best lend little support" to the proposition that conspiracy to violate the law of war was a violation of the law of war triable by law-of-war military commission and "at worst undermine it."⁶³

IV. Analysis of the *Hamdan* Plurality's Conspiracy Rationale

The *Hamdan* plurality's contentions will be considered in turn, as each has a complicated history behind it—a history that does not ultimately favor the plurality's conclusion. First, with respect to *Quirin*,⁶⁴ the *Hamdan* plurality indicated the fact that "the defendants in *Quirin* were charged with conspiracy" was "not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission."⁶⁵ While the Judicial Branch may not have passed on this issue affirmatively, the issue did receive the sanction of the Executive Branch when the President of the United States—Franklin Delano Roosevelt—personally approved the convictions of the eight *Quirin* defendants, six of whom were sentenced to death and all of whom were convicted of conspiracy.⁶⁶ Executive Branch interpretation may not seem especially compelling to some, but one must recall that military commissions, at the time, were war-time military courts convened under the

REV. 435 (1988); JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP* (2009) (chronicling life and times of Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen.).

⁶² See *Hamdan*, 548 U.S. at 604–08 (plurality opinion).

⁶³ *Id.* at 605 (plurality opinion).

⁶⁴ *Ex parte Quirin*, 317 U.S. 1 (1942) (8-0 decision) (holding that law-of-war military commission convened July 8, 1942 at Washington, D.C. had jurisdiction to try Richard Quirin and seven others).

⁶⁵ *Hamdan*, 548 U.S. at 605 (plurality opinion).

⁶⁶ See Lewis Wood, *Clemency for Two*, N.Y. TIMES, Aug. 9, 1942, at 1 ("Six of the eight Nazi saboteurs were executed in the electric chair at the District of Columbia Jail today, while the two others were sentenced to serve at hard labor for life and for thirty years, respectively. The executions started at noon. . . . President Roosevelt personally approved a finding of the seven-general military commission that all the men were guilty and should die in the electric chair, but on recommendation of the commission he commuted the sentences of Burger and Dasch in consideration of assistance they gave the government against their confederates."); see also *Quirin*, 317 U.S. at 48 (questioning whether "the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures").

common law of war by the Executive Branch. Accordingly, most legal interpretation regarding their scope and propriety over the past two centuries has come from within the Executive Branch—usually expressed in the form of legal opinions rendered by the Judge Advocates General of the Army and Navy and the Attorneys General of the United States.⁶⁷

The *Hamdan* plurality failed to note several other plain and unambiguous World War II-era precedents that demonstrate conspiracy is an offense triable by military commission. First, another set of saboteurs, the so-called “1944 Nazi Saboteurs,” were charged with offenses nearly identical to those preferred against the *Quirin* defendants. In this commission convened at Governors Island, New York during February 1945, William Curtis Colepaugh (an American) and Erich Gimpel (a German) were charged with offenses against the law of war and “Conspiracy to Commit All of the Above Acts.” Their convictions were found to be lawful (1) by a special Board of Review in the Office of The Judge Advocate General of the Army,⁶⁸ (2) by the Judge Advocate General of the Army, Major General

⁶⁷ See, e.g., CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 109 (Richard P. Longaker ed., expanded ed. 1976) (1951) (“[T]he military commission is wholly the creature of the commander in chief or of one of his ranking officers in the field. Congress, too, may occasionally authorize the establishment of military commissions, as the southern states learned in the period of Reconstruction. In general, however, they are executive creations. Their jurisdiction, composition, procedure, and powers are for the President alone to determine and supervise.”); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 68 (1990) (noting that Federal courts heard few challenges to military commission jurisdiction during Civil War).

⁶⁸ See Opinion of Special Board of Review, Office of The Judge Advocate General, Army Service Forces, U.S. War Dep’t, to The Judge Advocate General (Mar. 27, 1945), in Harry S. Truman Papers, White House Central Files, Confidential Subject Files: War Department, 1945, Harry S. Truman Library, Independence, Missouri (opining that military commission trial (convened Feb. 6, 1945 at Governors Island, N.Y.) of William Curtis Colepaugh and Erich Gimpel (U.S. citizen and German citizen charged with (1) violating “the Law of War” (by secretly passing through, in civilian dress, “the military and naval lines and defenses of the United States” for “the purpose of committing espionage, sabotage and other hostile acts” and remaining, in civilian dress, behind “the military and naval defenses and lines of the United States” for “the purpose of committing and attempting to commit espionage, sabotage and other hostile acts”) in United States during Nov.–Dec. 1944, (2) violating Art. 82 of 1920 Articles of War in United States during Nov.–Dec. 1944 and (3) “Conspiracy to Commit All of the Above Acts” (by plotting, planning, and conspiring “with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the acts enumerated in the foregoing charges and specifications”) in Germany and United States during 1944) was lawful, and recommending that the sentences be approved).

Myron C. Cramer,⁶⁹ and (3) by the President of the United States, Harry S. Truman, who personally approved the convictions of these two men.⁷⁰ Ultimately, the men were sentenced to death by the military commission and their sentences were approved, but commuted to confinement at hard labor for life, by President Truman. In addition to Executive Branch review of their trial, Colepaugh and Gimpel had their convictions upheld by the U.S. Court of Appeals for the Tenth Circuit, a ruling the Supreme Court declined to review.⁷¹

Notably, Colepaugh and Gimpel were tried for conspiracy in a pure law-of-war military commission.⁷² This commission was not a hybrid military commission because martial law did not prevail in New York during the February 1945 trial, nor was New York enemy-occupied territory subject to military government. Colepaugh and Gimpel were tried for the “stand-alone offense against the law of war” of conspiracy, and not a “compound offense,” because the conspiracy charge related to the same underlying transactions alleged to be in violation of the law of war. The Colepaugh/Gimpel military commission, therefore, is a World War II-era precedent for the principle that conspiracy to violate the law of war is, itself, a violation of the law of war triable by law-of-war military commission.

The U.S. Army continued to follow the Colepaugh/Gimpel precedent when law-of-war military commissions were granted jurisdiction to try conspiracy in overseas theaters of war during the concluding months of World War II.⁷³ The Army maintained its long-held and long-published

⁶⁹ See Endorsement from Maj. Gen. Myron C. Cramer, U.S. Army, The J. Advoc. Gen., to the Secretary of War (Apr. 23, 1945), in *id.* (approving opinion of Special Board of Review).

⁷⁰ See Sec’y of War Henry L. Stimson, General Orders No. 52, War Department, Washington, D.C., July 7, 1945, in Record Group 407 (Records of the Adjutant General’s Office), Reference Collection of DRB Series Lists, Project Files, and Miscellaneous DoD Issuances (War Department General Orders, 1945), Stack 270, Row 48, Compartment 30, Shelf 1, Box 61, National Archives at College Park, College Park, Maryland (approving conviction, but commuting sentence, of William Curtis Colepaugh to life imprisonment by May 15, 1945 order of President Harry S. Truman, and approving conviction, but commuting sentence, of Erich Gimpel to life imprisonment by May 15, 1945 order and June 13, 1945 order of President Harry S. Truman).

⁷¹ See *Colepaugh v. Looney*, 235 F.2d 429, 433 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

⁷² *Hamdan*, 548 U.S. at 608 (plurality opinion).

⁷³ See, e.g., Gen. Douglas MacArthur, Letter Order, General Headquarters, United States Army Forces, Pacific, *Regulations Governing the Trial of War Criminals*, Sept. 24, 1945 (File No.

policy that conspiracy was triable by law-of-war military commission throughout the 1950s—even after the rulings of the International Military Tribunal at Nuremberg, the subsequent proceedings at Nuremberg conducted under the authority of Control Council Law No. 10, and the International Military Tribunal for the Far East at Tokyo suggested that law-of-war military tribunals could not try conspiracy.⁷⁴ Specifically, U.S. Army General Douglas MacArthur, acting as Commander-in-Chief of the United Nations Command, promulgated rules and regulations governing the trials by United Nations law-of-war military commissions during the Korean War, which were explicitly granted jurisdiction to try conspiracy.⁷⁵ Moreover, the U.S. Army adhered to its historic practice of punishing conspiracy by law-of-war military commission in its 1956 Field Manual governing *The Law of Land Warfare*, which explicitly stated that conspiracy to commit “war crimes” was “punishable.”⁷⁶

AG 000.5 (24 Sep 45)JA (making “participation in a common plan or conspiracy” punishable by military commission in Pacific Theater of Operations during World War II); Lieut. Gen. Albert C. Wedemeyer, Letter Order, Headquarters, United States Forces, China Theater, *Regulations Governing the Trial of War Criminals*, Jan. 21, 1946 (File No. AG 000.5 (21 Jan 46)JA) (making “participation in a common plan or conspiracy” punishable by military commission in China Theater of Operations during World War II). This order with respect to China is particularly noteworthy. Unlike Austria, Germany, Italy, and Japan during World War II, China was not occupied militarily by U.S. Armed Forces (or allied armed forces). Rather, U.S. Armed Forces operated in China with the consent of the Chinese government and as a co-belligerent waging war against a common foe. This is significant because China was therefore not subject to American military government. Moreover, martial law applies only to domestic territory. Hence, the only jurisdiction available to military commissions convened in China during and after World War II was what the *Hamdan* plurality would describe as “law-of-war” jurisdiction. Thus, the military commissions convened in China during and after World War II were pure law-of-war military commissions and were explicitly granted jurisdiction to try conspiracy.

⁷⁴ See *supra* note 56.

⁷⁵ See, e.g., Gen. Douglas MacArthur, Letter Order, General Headquarters, United Nations Command, Tokyo, Japan, *Trial of Accused War Criminals*, Oct. 28, 1950 (File No. AG 000.5 (28 Oct 50)JA) (promulgating U.N. Command, Rules of Criminal Procedure for Military Commissions of the United Nations Command (Oct. 22, 1950)); U.N. COMMAND, RULES OF CRIMINAL PROCEDURE FOR MILITARY COMMISSIONS OF THE UNITED NATIONS COMMAND at Rule 4 (Oct. 22, 1950) (making “all attempts to commit, or conspiracies and agreements to commit, as well as inciting, encouraging, aiding, abetting, or permitting violations of the laws and customs of war” committed during Korean War punishable by U.N. military commission).

⁷⁶ U.S. DEPT OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE ¶ 500 (July 18, 1956) (as amended by Change No. 1 of July 15, 1976) (“Conspiracy, direct

The *Hamdan* plurality's second and third contentions—with respect to the treatises of Captain Howland and Colonel Winthrop—are inextricably linked, and therefore will be treated together. Here, the plurality began by noting that “military historian” Captain Howland listed “conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as a violation of the law of war “passed upon and punished by military commissions” during the Civil War.⁷⁷ The plurality acknowledged that Captain Howland's work was “superficially” helpful to the United States, because he listed conspiracy to violate the law of war as an offense tried by military commissions during the Civil War.⁷⁸ But, the plurality concluded, the “records of cases” that Captain Howland cited to support conspiracy, upon critical examination, actually provided “no support for the inclusion of conspiracy as a violation of the law of war.”⁷⁹ The “records of cases” to which the plurality referred are the “Record Books” of the Office of The Judge Advocate General of the Army, which are currently housed at the National Archives in Washington, D.C. and are open to public inspection.⁸⁰ These “JAG Record Books” contain more than 30,000 manuscript legal opinions rendered by successive Judge Advocates General during and after the Civil War.⁸¹

It seems clear that the plurality examined these JAG Record Books and, based on its review, concluded that Captain Howland's citation to them with respect to conspiracy was erroneous, thus making Captain Howland's opinion vis-à-vis conspiracy unworthy of credence.⁸² The

incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable.”).

⁷⁷ See *Hamdan*, 548 U.S. at 605, 607 (plurality opinion) (quoting U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY: 1912, at 1070–71 (Charles Roscoe Howland ed., 1912)).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry 1 (Letters Sent, 1842–1889), Stack 7E3, Row 13, Compartment 3, Shelf 1, National Archives Building, Washington, D.C. [hereinafter JAG RECORD BOOKS].

⁸¹ See W. M. DUNN, A SKETCH OF THE HISTORY AND DUTIES OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, UNITED STATES ARMY, WASHINGTON, D. C. 7 (Washington, Thomas McGill & Co. 1878) (reporting that Office of Judge Advocate General/Bureau of Military Justice (1) received 224,313 “records of military trials and investigations” and (2) rendered 34,923 reports and opinions between Sept. 1, 1862 and Mar. 1, 1878).

⁸² See *Hamdan*, 548 U.S. at 607–08 (plurality opinion).

plurality further concluded that the esteemed scholar, Colonel William Winthrop—whom the Supreme Court itself has described as “the ‘Blackstone of Military Law’”⁸³—“apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war.”⁸⁴ In fact, there is an apparent, but no real conflict between Captain Howland and Colonel Winthrop. First, it is a physical impossibility that Colonel Winthrop “recogniz[ed]” the alleged error in Captain Howland’s 1912 treatise and attempted to correct it; Colonel Winthrop died in April 1899, nearly thirteen years before the publication of Captain Howland’s

⁸³ Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion) (“Colonel Winthrop, who has been called the ‘Blackstone of Military Law,’ made the following statement in his treatise . . .”). It appears that the genesis of this high praise for Colonel Winthrop is traceable to Brig. Gen. Enoch H. Crowder, U.S. Army, J. Advoc. Gen. during June 1916—nearly 41 years before the Supreme Court so described him. See *Revision of the Articles of War: Hearing on An Act To Amend Section 1342 and Chapter 6, Title XIV, of the Revised Statutes of the United States, and for Other Purposes Before the H. Subcomm. on Military Affairs*, 64th Cong. 35 (1916) (June 30, 1916 statement of Brig. Gen. Enoch H. Crowder, U.S. Army, J. Advoc. Gen.) (describing Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen. as “our standard military law writer, and, really, our Blackstone”). Then-Maj. Gen. Crowder reiterated this statement, in the manner we know it today, during October 1919—as have others before and since. See, e.g., *Establishment of Military Justice: Hearings on S. 64 Before the Subcomm. of the S. Comm. on Military Affairs* (pt. 2), 66th Cong. 128 (1919) (Aug. 26, 1919 statement of former Brig. Gen. Samuel T. Ansell, U.S. Army) (describing Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen. as “the Blackstone of the Army”); *Establishment of Military Justice: Hearings on S. 64 Before the Subcomm. of the S. Comm. on Military Affairs* (pt. 8), 66th Cong. 1171 (1919) (Oct. 24, 1919 statement of Maj. Gen. Enoch H. Crowder, U.S. Army, J. Advoc. Gen.) (describing Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen. as “the Blackstone of military law”); Harold L. Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. PA. L. REV. 272, 272 (1944) (noting Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen. had “frequently been referred to as the Blackstone of Military Law”); Archibald King, *The Army Court Martial System*, 1941 WIS. L. REV. 311, 313 (describing Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen. as “the Blackstone of military law”); Harold L. Kaplan, *Constitutional Limitations on Trials by Military Commissions* (pt. 2), 92 U. PA. L. REV. 272, 272 (1944) (describing Col. William Winthrop, U.S. Army, J. Advoc. & Assistant J. Advoc. Gen. as “the Blackstone of Military Law”). Praise for Colonel Winthrop’s most famous work, *Military Law and Precedents*, has been equally as flattering. See, e.g., George S. Prugh, Jr., *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A.J. 126, 126 (1956) (describing Col. Winthrop’s *Military Law and Precedents* as “the greatest single contribution to military legal thought ever to appear on the American scene”).

⁸⁴ *Hamdan*, 548 U.S. at 608 (plurality opinion).

1912 treatise.⁸⁵ Colonel Winthrop's 1920 masterpiece—*Military Law and Precedents*—was simply a posthumously published, repaginated reprint of his 1896 work of the same name.⁸⁶ It can only be supposed that the plurality, after correctly noting that *Military Law and Precedents* was published in 1920, assumed that Colonel Winthrop was alive at the time of its republication.⁸⁷

⁸⁵ See *Establishment of Military Justice: Hearings on S. 64 Before the Subcomm. of the S. Comm. on Military Affairs* (pt. 8), 66th Cong. 1186 (1919) (Oct. 25, 1919 statement of Maj. Gen. Enoch H. Crowder, U.S. Army, J. Advoc. Gen. submitting "a statement of the military service of William Winthrop, late of the United States Army, compiled from the records of The Adjutant General's office," which noted that Colonel Winthrop died Apr. 8, 1899). Colonel Winthrop was but sixty-eight years old at the time of his death.

⁸⁶ See WINTHROP MILITARY LAW AND PRECEDENTS, *supra* note 37, at 8 (reprint of 1896 edition) (printing editor's note indicating that "the 1896 edition" of *Military Law and Precedents* was being reprinted and repaginated). As to the lasting impact of Colonel Winthrop's work, see Fratcher, *supra* note 1, at 14 ("*Military Law and Precedents* was a masterpiece of painstaking scholarship, brilliant erudition and lucid prose. It collected for the first time in one work the precedents which constitute the framework of military law, gleaned from a bewildering and unusable mass of statutes, regulations, orders, and unpublished opinions and from the amorphous body of customs of the service reposing in scattered fragments in the works of military writers and the minds of military men. What Lord Chief Justice Sir Edward Coke did through his *Reports* and *Institutes* for the common law Colonel William Winthrop did through his *Digest*, and *Military Law and Precedents* for military law."). Colonel Winthrop completed the second edition of *Military Law and Precedents* on November 1, 1895 but his work was not published until 1896. See 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS viii (Boston, Little, Brown & Co. rev. 2d ed. 1896). Almost a decade earlier, then-Lieutenant Colonel Winthrop wrote a candid letter to the Secretary of War describing the scope of his original work, *Military Law*. See Letter from Lieut. Col. William Winthrop, U.S. Army, J. Advoc. & Deputy J. Advoc. Gen., to William C. Endicott, Sec'y of War (Nov. 10, 1885), *reprinted in* Fratcher, *supra* note 1, at 14 (discussing manuscript of what would become Lieut. Col. Winthrop's MILITARY LAW (Washington, W. H. Morrison 1886)) ("[M]y literary work is now the only means by which I can add to my reputation or record as an officer or perform satisfactory public service of a valuable and permanent character. There is no existing treatise on the science of military law in our language—no collection even of the many precedents on the subject, many of which are of great value both legally and historically. My object in the extended work prepared by me is to supply to the body of the public law of the United States a contribution never yet made. My book is a *law book*, written by me in my capacity of a lawyer even more than in that of a military officer; and the reception which my previous work has met with from the bar and the judges, encourages me to believe that my present complete treatise will be still more favorably appreciated.") (emphasis in original). It would appear that then-Lieut. Col. Winthrop exceeded his own expectations.

⁸⁷ The reply brief submitted by Petitioner Hamdan on March 15, 2006 may have been the genesis of this contention. See Reply Brief for the Petitioner at 11 n.18, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) ("Winthrop corrected some loose language in C. Howland, Digest of Opinions of the Judge Advocates General of the Army 1071

Second, Captain Howland's work—*A Digest of Opinions of the Judge Advocates General of the Army: 1912*, which may be conveniently described as the “1912 JAG Digest”—is a compendium of the legal opinions rendered by the Judge Advocates General of the Army from September 1862 to January 1912, gleaned from the JAG Record Books and other office precedents. Captain Howland's 1912 JAG Digest, however, was not the first JAG Digest to be compiled.⁸⁸ In fact, the first-ever JAG Digest was compiled in 1865—two score and seven years earlier—by none other than then-Major William Winthrop.⁸⁹

In addition to his 1865 JAG Digest, Major (and later Colonel) Winthrop compiled four subsequent JAG Digests, which were published by the authority of the War Department in 1866,⁹⁰ 1868,⁹¹ 1880,⁹² and 1895.⁹³ Upon Colonel Winthrop's retirement from the U.S. Army in August 1895,

(1912).”); *cf. In re Yamashita*, 327 U.S. 1, 67 n.33 (1946) (Rutledge, J., dissenting) (noting that Colonel Winthrop was “speaking of military commissions at the time he was writing, 1896”).

⁸⁸ The 1912 JAG Digest was not the last JAG Digest to be prepared, as the tradition of digesting opinions of the Judge Advocate General of the Army for the convenience of the service continued during World War I though to the eve of World War II. *See, e.g.,* U.S. WAR DEP'T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY: 1912-1930 (1932) (digesting opinions of Judge Advocate General of Army from Feb. 1, 1912 to Dec. 31, 1930); U.S. WAR DEP'T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY: 1912-1940 (1942) (digesting opinions of Judge Advocate General of Army from Feb. 1, 1912 to Dec. 31, 1940).

⁸⁹ U.S. WAR DEP'T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Washington, Gov't Printing Office 1865) (digesting opinions of Judge Advocate General of Army from Sept. 1862 to Jan. 1865).

⁹⁰ U.S. WAR DEP'T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Washington, Gov't Printing Office 1866) (digesting opinions of Judge Advocate General of Army from Sept. 1862 to Mar. 1866).

⁹¹ U.S. WAR DEP'T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (William Winthrop ed., Washington, Gov't Printing Office 3d ed. 1868) [hereinafter 1868 JAG DIGEST] (digesting opinions of Judge Advocate General of Army from Sept. 1862 to July 1868).

⁹² U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (William Winthrop ed., Washington, Gov't Printing Office 1880) [hereinafter 1880 JAG DIGEST] (digesting opinions of Judge Advocate General of Army from Sept. 1862 to Sept. 1880).

⁹³ U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY (William Winthrop ed., Washington, Gov't Printing Office 1895) [hereinafter 1895 JAG DIGEST] (digesting opinions of Judge Advocate General of Army from Sept. 1862 to Jan. 1, 1895).

the task of updating the 1895 JAG Digest was entrusted to Major Charles McClure.⁹⁴ Major McClure's edition of the JAG Digest was published in 1901,⁹⁵ and this edition was itself updated by Captain Howland in 1912.⁹⁶ Thus, Captain Howland's 1912 JAG Digest—the treatise that the *Hamdan* plurality summarily dismissed—is, in fact, the “direct lineal descendant[]” of Colonel Winthrop's 1880 JAG Digest.⁹⁷

Colonel Winthrop's 1880 JAG Digest was also the first JAG Digest to set forth an illustrative list of “*offences against the laws and usages of war*” tried by military commissions during the Civil War.⁹⁸ One of the offenses on Colonel Winthrop's list was “[c]onspiracy by two or more to violate the laws

⁹⁴ See Report from G. N. Lieber, J. Advoc. Gen., to Russell A. Alger, Sec'y of War (Oct. 3, 1898), *reprinted in* H.R. DOC. NO. 55-2, pt. 1, at 376 (3d Sess. 1898) (“A revision of the Digest of Opinions of the Judge-Advocate General has also been begun, the work having been intrusted to Capt. Charles McClure, Eighteenth Infantry, but this officer having, at his own request, been relieved, in order to enable him to join his regiment during the present war, it has been temporarily discontinued. The work is important, and I hope that it may soon be resumed.”).

⁹⁵ U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE-ADVOCATES GENERAL OF THE ARMY (Charles McClure ed., rev. ed. 1901) (digesting opinions of Judge Advocate General of Army from Sept. 1862 to Jan. 1, 1901) [hereinafter 1901 JAG DIGEST].

⁹⁶ U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY: 1912 (Charles Roscoe Howland ed., 1912) [hereinafter 1912 JAG DIGEST] (digesting opinions of Judge Advocate General of Army from Sept. 1862 to Jan. 31, 1912). The 1912 JAG Digest was itself reprinted in 1917. See Report from S. T. Ansell, Acting J. Advoc. Gen., to the Secretary of War (Oct. 1, 1917), *reprinted in* H.R. DOC. NO. 65-856, pt. 1, at 216 (1918) (“A reprint, with certain minor corrections and additions, of the Digest of Opinions of the Judge Advocate General, 1912, including a supplement containing the digest of the opinions of the office from July 1, 1912, to April 1, 1917, was made and distributed to the Army.”). The provisions of the 1912 JAG Digest discussed herein are identical to those in the revised 1912 JAG Digest reprinted in 1917. Compare 1912 JAG DIGEST, *supra*, at 1070–71, with U.S. WAR DEP'T, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY: 1912, at 1070–71 (Charles Roscoe Howland ed., 1917).

⁹⁷ See Fratcher, *supra* note 1, at 14 (stating that (1) Colonel Winthrop was author of 1865, 1866, 1868, 1880, and 1895 JAG Digests, (2) Colonel Winthrop's 1895 JAG Digest was updated by Major McClure and published as 1901 JAG Digest and (3) 1912 JAG Digest, edited by Captain Howland, was the “direct lineal descendant[] of Colonel Winthrop's work”).

⁹⁸ See 1880 JAG DIGEST, *supra* note 92, at 328; see also 1868 JAG DIGEST, *supra* note 91, at 224 (lauding ability of military commissions to try Lincoln conspirators and Capt. Henry Wirz by military commission where “the element of *conspiracy*, which gave to these cases so startling a significance, was enabled to be traced and exposed”) (emphasis in original).

of war by destroying life or property in aid of the enemy.”⁹⁹ This offense of conspiracy was repeated verbatim by Colonel Winthrop in the 1895 JAG Digest,¹⁰⁰ by Major McClure in the 1901 JAG Digest,¹⁰¹ and by Captain Howland in the 1912 JAG Digest.¹⁰² Thus, contrary to the *Hamdan* plurality’s assertion, Captain Howland’s “list of offenses against the law of war”—which included conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” as a violation of the law of war triable by law-of-war military commission—is, in fact, Colonel Winthrop’s “own list,” which the learned colonel first set forth in 1880.¹⁰³ Significantly, in addition to the 1880 and 1895 JAG Digests, Colonel Winthrop also personally held in both his 1886 and 1896 treatises (and the 1920 reprint of the latter) on military law and precedents that conspiracy was a violation of the law of war triable by law-of-war military commission.¹⁰⁴

⁹⁹ See *id.* at 328–29 (recognizing “[c]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as violation of law of war “passed upon and punished by military commissions” during the Civil War).

¹⁰⁰ See 1895 JAG DIGEST, *supra* note 93, at 502–03 (recognizing “[c]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as violation of law of war “passed upon and punished by military commissions” during the Civil War).

¹⁰¹ See 1901 JAG DIGEST, *supra* note 95, at 464–65 (recognizing “conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as violation of law of war “passed upon and punished by military commissions” during the Civil War).

¹⁰² See 1912 JAG DIGEST, *supra* note 96, at 1070–71 (recognizing “conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as violation of law of war “passed upon and punished by military commissions” during the Civil War).

¹⁰³ See *id.*

¹⁰⁴ See 2 WILLIAM WINTHROP, MILITARY LAW 70 & n.5, 75–76 (Washington, W. H. Morrison 1886) (listing “criminal conspiracies” as both (1) “[c]rimes and statutory offences cognizable by State or U. S. courts” and (2) “[v]iolations of the laws and usages of war cognizable by military tribunals” that were tried and punished by military commissions during the Civil War) (“Where the offence is both a crime against society and a violation of the laws of war, the charge, in its form, has not unfrequently represented both elements, as ‘Murder, in violation of the laws of war,’ ‘Conspiracy, in violation,’ &c.”); 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1309 & n.1, 1314 (Boston, Little, Brown & Co. rev. 2d ed. 1896) (listing “criminal conspiracies” as both (1) “[c]rimes and statutory offences cognizable by State or U. S. courts” and (2) “[v]iolations of the laws and usages of war cognizable by military tribunals” that were tried and punished by military commissions during the Civil War) (“Where the offence is both a crime against society and a violation of the laws of war, the charge, in its form, has not unfrequently represented both elements, as ‘Murder, in violation of the laws of war,’ ‘Conspiracy, in violation,’ &c.”); WINTHROP MILITARY LAW AND PRECEDENTS, *supra* note 37, at 842 (reprint of 1896 edition) (listing “criminal conspiracies” as both (1) “[c]rimes and statutory offences cognizable by State or

What, however, of the *Hamdan* plurality's observation that the citation to which Colonel Winthrop and Captain Howland referred did not support their conclusion that conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" was a violation of the law of war triable by law-of-war military commission?¹⁰⁵ The answer turns out to be nothing more than a labeling error.¹⁰⁶ Colonel Winthrop's original citation in the 1880 JAG Digest was "XXI, 280."¹⁰⁷ This corresponds to Volume 21, Page 280 of the JAG Record Books.¹⁰⁸ In the 1901 JAG Digest, Major McClure supplemented Colonel Winthrop's citation by adding the month and year in which the opinion was rendered; namely, "March, 1866."¹⁰⁹ Captain Howland's corresponding citation in the 1912 JAG Digest, building on that of his predecessors', was "21, 280, Mar., 1866."¹¹⁰ Therefore, an opinion rendered by the Judge Advocate General of the Army in March 1866 and recorded in 21 JAG Record Books 280 should support the proposition that conspiracy is a law-of-war violation triable by law-of-war military commission. As the *Hamdan* plurality correctly noted, however, an examination of this citation in the JAG Record Books does not reveal the desired opinion.¹¹¹ What the plurality could not have reasonably

U. S. courts" and (2) "[v]iolations of the laws and usages of war cognizable by military tribunals" that were tried and punished by military commissions during the Civil War) ("Where the offence is both a crime against society and a violation of the laws of war, the charge, in its form, has not unfrequently represented both elements, as 'Murder, in violation of the laws of war,' 'Conspiracy, in violation,' &c."); see also 1895 JAG DIGEST, *supra* note 93, at 3 (noting that 1895 JAG Digest was keyed to forthcoming 1896 edition of *Military Law and Precedents*, and that these two publications should be read in unison).

¹⁰⁵ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 607–08 (2006) (plurality opinion).

¹⁰⁶ The reply brief submitted by Petitioner Hamdan on March 15, 2006 also may have been the genesis of this contention. See Reply Brief for the Petitioner at 11 n.18, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) ("Howland's mention of conspiracy cited a number of commission cases, but those cases (which are kept in the National Archives) do not reveal a single conspiracy charge (and certainly not the approval of one) in them").

¹⁰⁷ See 1880 JAG DIGEST, *supra* note 92, at 320.

¹⁰⁸ Colonel Winthrop's 1895 JAG Digest bore the same citation as did the 1880 JAG Digest: "XXI, 280." See 1895 JAG DIGEST, *supra* note 93, at 503.

¹⁰⁹ See 1901 JAG DIGEST, *supra* note 95, at 465.

¹¹⁰ See 1912 JAG DIGEST, *supra* note 96, at 1071.

¹¹¹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 607 (2006) (plurality opinion) (stating that "while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war"). See Letter from Arthur B. House Jr., Archives 1—Textual Reference Section, Textual Archives Services Div., Nat'l Archives

known, however, was that by happenstance—a quirk of history—the JAG Record Book in question was inadvertently mislabeled. At some unknown point in time subsequent to the publication of the 1912 JAG Digest, Volume 21 and Volume 16 were switched, the former being mislabeled as the latter.¹¹² Thus, the desired opinion—21 JAG Record Books 280—exists, but is physically located in what today is 16 JAG Record Books 280.

Under the record-keeping practices that prevailed during the Civil War, each opinion of the Judge Advocate General of the Army was made in duplicate. The original opinion, which was prepared in longhand, was signed by the Judge Advocate General and dispatched to its intended recipient (usually the Secretary of War or the President of the United States). Before dispatching the original opinion, however, office clerks would transcribe the original opinion into the JAG Record Books, thus creating a “record copy” that would later serve as an office precedent. These JAG Record Books were also separately indexed, so as to ensure the orderly location of these office precedents. In this instance, Volume 2 of the Index Books to the JAG Records Books (which covers Volume 21 of the JAG Record Books, and spans the opinions rendered between November 1865 and November 1866) notes that the opinion recorded in 21 JAG Record Books 280 pertains to the case of one William Murphy, “Boat-burner.”¹¹³

& Records Admin., to H. V. Thravalos (Apr. 3, 2008) (File No. NWCT1-28-03038-ABH) (on file with Harvard National Security Journal) (enclosing copy of opinion of Judge Advocate General from “Volume 21, page 280 which does not refer to March, 1866”). Interestingly, this opinion—located at 21 JAG RECORD BOOKS 280 (actually 16 JAG RECORD BOOKS 280)—was rendered June 17, 1865 by Maj. W. W. Winthrop, J. Advoc. “in absence of Judge Advocate General” Joseph Holt respecting the case of one Priv. Michael Dignan. It appears that Judge Advocate General Holt was absent from the Bureau of Military Justice during this time because he was co-prosecuting the Lincoln conspirators by military commission. *See Fratcher, History of the Judge Advocate General's Corps, United States Army*, *supra* note 61, at 97 (1959) (noting that John A. Bingham was “co-prosecutor with General Holt” during military commission trial of Lincoln conspirators).

¹¹² The author was initially perplexed as to why the citations to Volumes 16 and 21 of the JAG RECORD BOOKS did not correspond to the principles set forth in the JAG Digests. In fact, an examination of the citations in the 1880, 1895, 1901, and 1912 JAG Digests that refer to Volumes 16 and 21 reveals that all of the citations are erroneous. However, if Volumes 16 and 21 are transposed, the citations correspond precisely to the principles set forth in the JAG Digests.

¹¹³ 2 INDEX BOOKS TO THE JAG RECORD BOOKS, in Record Group 153 (RECORDS OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE ARMY), ENTRY 2 (INDEXES TO LETTERS SENT, 1842–1876), Stack 7E3, National Archives Building, Washington, D.C. (indicating that opinion in case of William Murphy was recorded in 21 JAG RECORD

The JAG case-file of William Murphy,¹¹⁴ in turn, contains the original opinion of the Judge Advocate General, bearing the date March 21, 1866, with the notation that it was recorded in the JAG Record Books at “21, 280.”¹¹⁵ This opinion is identical to the opinion recorded in 16 JAG Record Books 280 (which at the time of issuance was actually Volume 21).¹¹⁶

Thus, the citation originally noted by Colonel Winthrop in 1880 (21 JAG Record Books 280), and verified by both Major McClure in 1901 and Captain Howland in 1912, is correct. A simple labeling error, which occurred at some unknown point in time during the ensuing century, obscured this fact and led the *Hamdan* plurality to conclude erroneously that Captain Howland’s citation was incorrect. Put simply, contrary to the plurality’s assertion, Captain Howland’s allegedly “incorrect” citation is actually Colonel Winthrop’s correct citation, and the case referred to in 21 JAG Record Books 280 is that of William Murphy.

William Murphy was tried by a military commission convened at Saint Louis, Missouri during September 1865—five months after

BOOKS 280). Perhaps not unsurprisingly, this index book is itself mislabeled. On its spine is embossed Volume “No. 1” but the National Archives catalogues this index book as Volume “No. 2.” *See id.*

¹¹⁴ *See* Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry 15 (Court-Martial Case Files), Stack 7E3, Row 14, Compartment 3, Shelf 4, Box 1420, File M.M. 3562, National Archives Building, Washington, D.C. [hereinafter General Courts-Martial Records No. M.M. 3562].

¹¹⁵ *See* Review from Joseph Holt, J. Advoc. Gen., to the Secretary of War (Mar. 21, 1866), *in id.* (opining that military commission trial (convened Sept. 19, 1865 at Saint Louis, Mo.) of William Murphy (U.S. citizen charged with (1) “Conspiracy to burn and destroy steamboats and other property belonging to or in the service of the United States of America, or available for such service, with intent to aid the rebellion against the United States” in Mobile, Ala. and “divers other places within the United States” during July 1863–Jan. 1865 and (2) violating “the laws and customs of war” (by burning/attempting to burn steamboats plying on Mississippi River) in Memphis, Tenn. during Sept. 1863 and Memphis, Tenn. and Cairo, Ill. during Sept. 1864) was lawful, and recommending that sentence be approved). This original review bears the citation “21, 280,” which stands for 21 JAG RECORD BOOKS 280.

¹¹⁶ *See* Review from Joseph Holt, J. Advoc. Gen., to the Secretary of War (Mar. 21, 1866), *in* Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry 1 (Letters Sent, 1842–1889), Stack 7E3, Row 13, Compartment 3, Shelf 1, National Archives Building, Washington, D.C. (same). This JAG Record Book version is located in 16 JAG RECORD BOOKS 280 (which at the time of issuance was actually Volume 21).

Confederate General Robert E. Lee surrendered at Appomattox¹¹⁷—for (1) “Conspiracy to burn and destroy steamboats and other property belonging to or in the service of the United States of America, or available for such service, with intent to aid the rebellion against the United States”¹¹⁸ and (2) “Violation of the laws and customs of war.” The Judge Advocate General of the Army, Joseph Holt,¹¹⁹ held, on March 21, 1866, that Murphy’s trial was

¹¹⁷ See Letter from Lieut. Gen. U. S. Grant to Gen. R. E. Lee, C.S. Army (Apr. 9, 1865), *reprinted in* 34 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 1, pt. 1) 56 (Washington, Gov’t Printing Office 1891) (proposing terms of surrender of Army of Northern Virginia); Letter from Gen. R. E. Lee, C.S. Army, to Lieut. Gen. U. S. Grant (Apr. 9, 1865), *reprinted in id.* (accepting terms of surrender of Army of Northern Virginia); Agreement Entered into This Day in Regard to the Surrender of the Army of Northern Virginia to the United States Authorities, U.S.-C.S.A., Apr. 10, 1865, *reprinted in* 46 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 1, pt. 3) 685–86 (Washington, Gov’t Printing Office 1894) (“The surrender of the Army of Northern Virginia shall be construed to include all the forces operating with that army on the 8th instant, the date of commencement of negotiation for surrender, except such bodies of cavalry as actually made their escape previous to the surrender, and except also such pieces of artillery as were more than twenty miles from Appomattox Court-House at the time of surrender on the 9th instant.”).

¹¹⁸ Murphy’s unindicted co-conspirators were Confederate President Jefferson Davis, Confederate Secretary of War James A. Seddon, Confederate Secretary of State Judah P. Benjamin, Joseph W. Tucker, alias “Deacon Tucker” (general agent in the Confederate states), Minor Majors (general agent in the Union states), Thomas L. Clark (general agent in the Union states), Robert Kirk (general agent in the Confederate states), Henry Dillingham (civilian-saboteur on land), and Isaac Elshire (civilian-saboteur on water). See President Andrew Johnson, General Court Martial Orders, No. 107, War Department, Adjutant General’s Office, Washington, Apr. 18, 1866 [hereinafter General Court Martial Orders No. 107]; see generally G. E. Rule, *The Sons of Liberty and the Louisville Warehouse Fire of July 1864*, 107 LINCOLN HERALD 68 (Summer 2005) (describing sabotage operations conducted by civilian-saboteurs during the Civil War on both land and water).

¹¹⁹ Joseph Holt served as the Judge Advocate General of the Army from September 1862 to December 1875. He had a good working relationship with President Lincoln. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 675 (2005) (discussing President Abraham Lincoln’s opinion of Judge Advocate General Joseph Holt) (“Lincoln liked and respected Judge Holt, having worked closely with him on court-martial cases.”). President Lincoln respected Judge Holt so much that he asked Holt to become his Attorney General upon the resignation of Edward Bates. See generally Letter from Edward Bates, Att’y Gen., to the President (Nov. 24, 1864) (on file with Harvard National Security Journal) (resigning office of Attorney General of the United States effective Nov. 30, 1864); Letter from Joseph Holt, J. Advoc. Gen., to the President (Nov. 30, 1864), *in id.* (declining appointment to become Attorney General of the United States) (“In view of all the circumstances, I am satisfied that I can serve you better in the position which I now hold at your hands, than in the more elevated one to which I have been invited.”); Letter from Joseph Holt, J. Advoc. Gen., to the President (Dec. 1, 1864), *in id.*

lawful. President Andrew Johnson personally passed upon and approved Murphy's conviction on March 30, 1866,¹²⁰ a mere three days before the President proclaimed that the Civil War was at an end.¹²¹ Murphy was sentenced to confinement at hard labor for ten years.¹²²

(recommending that James Speed be appointed Attorney General of the United States); Telegram from President Abraham Lincoln to James Speed (Dec. 1, 1864), in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 126 (Roy P. Basler ed., 1953) (appointing James Speed to be Attorney General of the United States) ("I appoint you to be Attorney General. Please come on at once."); Telegram from James Speed to the President of the United States (Dec. 1, 1864) (on file with Harvard National Security Journal) (accepting appointment to become Attorney General of the United States).

¹²⁰ See President Andrew Johnson, Exec. Order (Mar. 30, 1866), in General Courts-Martial Records No. M.M. 3562, *supra* note 114 (approving conviction of William Murphy). The President's handwritten order was promulgated, by his direction, in printed orders on April 18, 1866. See General Court Martial Orders No. 107, *supra* note 118 (publishing President's Mar. 30, 1866 approval of conviction of William Murphy).

¹²¹ See President Andrew Johnson, Proclamation (Apr. 2, 1866), *reprinted in* 14 Stat. 811 (1866) (declaring the Civil War to be at end in all states of the Union except Texas). The President declared the Civil War to be at an end in Texas on August 20, 1866. See President Andrew Johnson, Proclamation (Aug. 20, 1866), *reprinted in* 14 Stat. 814 (1866) (declaring the insurrection in Texas to be at an end, that the insurrection generally was at end, and that peace, order, tranquility, and civil authority existed throughout all of the United States). The termination of a state of war is significant, as the return of peace would serve to oust law-of-war military commission jurisdiction under the common law of war. See, e.g., Report from Joseph Holt, J. Advoc. Gen., to E. M. Stanton, Sec'y of War (Mar. 20, 1866), *reprinted in* 8 U.S. WAR DEP'T, THE WAR OF THE REBELLION (ser. 2) 890, 891-92 (Washington, Gov't Printing Office 1899) (recommending that former Confederate President Jefferson Davis and former Sen. Clement C. Clay, Jr., be tried by law-of-war military commission) ("[I]t only remains for me respectfully, but most earnestly, to renew my former recommendation that Davis and Clay be arraigned and tried before a military commission. As this tribunal, the only one believed to be competent to ascertain and pass upon the guilt of these men, may presently be ousted of its jurisdiction by the anticipated operation of the proclamation which is to declare the termination of the state of war, there is danger that unless such commission be speedily convened their crime, certainly one of the most atrocious and appalling of the nineteenth century, will pass unpunished.").

¹²² See General Court Martial Orders No. 107, *supra* note 118, at 3 (sentencing William Murphy to confinement "at hard labor for the period of ten (10) years" to be served in "the Penitentiary at Jefferson City, Missouri"). Murphy ultimately was released after serving over eighteen months in confinement. See *In re* Murphy, 17 F. Cas. 1030, 1031 (C.C.D. Mo. 1867) (No. 9947) (discharging William Murphy because military commission took place in state in which "the courts of the United States were open, and perfectly competent to the trial of any offences within their jurisdiction"); but see *Ex parte* Quirin, 317 U.S. 1, 31 n.10 (1942) (citing approvingly the law-of-war military commission trial of William Murphy, as an example of how military commissions during the Civil War were "extensively used for the trial of offenses against the law of war"). As to the subsequent history in Murphy's case,

Like the Colepaugh/Gimpel military commission during World War II, the Murphy military commission was a pure law-of-war military commission because martial law did not prevail in Missouri during the September 1865–January 1866 trial, nor was Missouri enemy-occupied territory subject to military government. Moreover, the Murphy law-of-war military commission tried the “stand-alone offense against the law of war” of conspiracy, and not a “compound offense,” because the conspiracy charge related to the same underlying transactions alleged to be in violation of the law of war.¹²³ Therefore, the Murphy military commission is a Civil War-era precedent for the principle that conspiracy to violate the law of war is, itself, a violation of the law of war triable by law-of-war military commission.

The William Murphy precedent, however, is but one example that conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” has historically been a violation of the law of war triable by law-of-war military commission.¹²⁴ In fact, the William Murphy precedent was

see Letter Opinion from Joseph Holt, J. Advoc. Gen., to S. L. Warren, U.S. Att’y for the District of West Tennessee (Oct. 19, 1867), in 26 JAG RECORD BOOKS 112 (reporting that William Murphy had been released “by Habeas Corpus” and “that he would be remanded for trial by the civil authorities at Memphis”) (“I am in receipt of a telegram from J. W. Noble, Esq., U. S. Attorney, at St. Louis, advising me of the release by Habeas Corpus of the notorious boat-burner Murphy, and stating that he would be remanded for trial by the civil authorities at Memphis.”); Letter Opinion from Joseph Holt, J. Advoc. Gen., to S. L. Warren, U.S. Att’y for the District of West Tennessee (Nov. 11, 1867), in *id.* at 169 (transmitting copy of Mar. 21, 1866 review in case of William Murphy) (“In the meanwhile I send you a certified copy of the Report made on the record by this Bureau to the Secretary of War, in the hope that it may be of use to you in preventing a release of the prisoner until you are in a condition to make a proper presentation of the testimony against him.”); Letter Opinion from Joseph Holt, J. Advoc. Gen., to S. L. Warren, U.S. Att’y for the District of West Tennessee (Dec. 11, 1867), in *id.* at 271 (acknowledging report that William Murphy was released from custody) (“I am in receipt of your note announcing the release of Murphy under circumstances which are certainly to be deplored.”).

¹²³ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 608 (2006) (plurality opinion). In fact, Murphy sought to evade criminal liability by asserting that he was simply following the military orders of his superiors.

¹²⁴ In addition to military commission precedents, the Lieber Code punished certain types of conspiracies. See Sec’y of War Edwin M. Stanton, General Orders, No. 100, War Department, Adjutant General’s Office, Washington, Apr. 24, 1863, *reprinted* in 3 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 3) 148, 156–57 (Washington, Gov’t Printing Office 1899) (publishing Dr. Francis Lieber’s “Instructions for the Government of Armies of the United States in the Field” by order of President Abraham Lincoln) (“A prisoner of

not the first law-of-war military commission trial involving conspiracy during the Civil War, and Colonel Winthrop could have selected any number of precedents to demonstrate this principle. For instance, two years before the Murphy trial, during December 1863, Robert Loudon—a Mississippi River “boat-burner” like Murphy—was tried by a law-of-war military commission convened at Saint Louis, Missouri.¹²⁵ Loudon was charged with (1) transgressing the law of war (by coming “within the lines of the military forces of the United States” with rebel messages), (2) spying, and (3) “Conspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river.”¹²⁶ Loudon was convicted on all three charges by the military commission and sentenced to death. The Judge Advocate General of the Army reviewed his case on February 9, 1864

war who escapes may be shot, or otherwise killed, in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape. . . . If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons. . . . War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence.”).

¹²⁵ *United States v. Loudon* (Dec. 14-18, 1863) (General Courts-Martial Records No. N.N. 1074), in Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry Stack 7E3, Row 14, Compartment 7, Shelf 3, Box 1627, File N.N. 1074, National Archives Building, Washington, D.C. (trial transcript in case of Robert Loudon (Missouri citizen charged with (1) transgressing law of war (by coming “within the lines of the military forces of the United States” with rebel messages) in Saint Louis, Mo. during July 1862 and Jan.-Feb. 1863, (2) being spy in Saint Louis, Mo. during July-Sept. 1863 and (3) “Conspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river” in Saint Louis, Mo. during Sept. 1863) tried by military commission convened Dec. 14, 1863 at Saint Louis, Mo., and convicted Dec. 18, 1863).

¹²⁶ See Sec’y of War Edwin M. Stanton, General Orders, No. 102, War Department, Adjutant General’s Office, Washington, Mar. 15, 1864 (approving conviction of Robert Loudon by Feb. 15, 1864 order of President Abraham Lincoln) [hereinafter General Orders No. 102].

and recommended that the sentence of death be approved by the President of the United States.¹²⁷ President Abraham Lincoln, in turn, promptly reviewed the Loudon case on February 15, 1864 and approved the death sentence.¹²⁸

In October 1864, John D. Cambron was tried by a law-of-war military commission convened at Saint Louis, Missouri.¹²⁹ Cambron was charged with (1) violating the law of war by consorting with, and belonging

¹²⁷ See Review from Joseph Holt, J. Advoc. Gen., to the President (Feb. 9, 1864), in 7 JAG RECORD BOOKS 154–55 (opining that military commission trial of Robert Loudon was lawful, and recommending that his sentence be approved) (“No reason is perceived for hesitating in this case to direct the prompt enforcement of the extreme penalty of the law, as imposed by the sentence of the Court.”).

¹²⁸ See General Orders No. 102, *supra* note 126. President Lincoln’s kind-hearted clemency is well documented. See, e.g., Darrell Baughn, *Major General Joseph Holt*, ON POINT: THE J. OF ARMY HIST., at 18, 19 (Winter 2009) (“On a weekly basis, Holt would report to Lincoln directly with these cases, and they would spend hours perusing them together. The famous ‘leg cases’ arose from these visits. Lincoln examined a stack of deserter cases one day, and after going over them for hours, he rolled them up and stuck them in a cubby hole in his desk. Since this desertion was their first offense, and since he himself had once felt his knees shake in battle, he favored leniency ‘because God gave man legs to run.’”). Thus, the President’s decision to enforce Loudon’s death sentence is especially notable. Judge Advocate General Holt again reviewed Loudon’s case and held that the conviction was valid and that he should be executed for his crimes. See Report from Joseph Holt, J. Advoc. Gen., to the President (May 7, 1864), in 8 JAG RECORD BOOKS 388 (recommending against pardon of Robert Loudon, who was convicted of “conspiring to burn steamboats on the Mississippi River. . . . [N]o valid reason is discovered warranting the interposition of the pardoning power. . . . The recommendation, that the sentence be executed without delay, is renewed.”). Ultimately Loudon was not executed because he escaped from military custody in Missouri. See Report from Col. J. H. Baker, Provost Marshal Gen., Dep’t of the Missouri, to C. A. Dana, Assistant Sec’y of War (Apr. 25, 1865), *reprinted in* 48 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 1, pt. 2) 194, 195 (Washington, Gov’t Printing Office 1896) (listing names of 19 alleged “boat-burners,” including Robert Loudon and William Murphy, and noting that Loudon, under “sentence of death” rendered by military commission, had escaped from military custody “while being transferred from Gratiot to Alton Military Prison” in Missouri).

¹²⁹ United States v. Cambron (Oct. 29, 1864), in Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry 15 (Court-Martial Case Files), File L.L. 2697, National Archives Building, Washington, D.C. (trial transcript in case of John D. Cambron (Illinois citizen charged with (1) violating law of war in Missouri during Mar. 1864 and (2) conspiracy to “unlawfully combine, confederate, and conspire” to “release one Zack” Baxter from Monticello Prison in Missouri) in McDonald County, Ill. during Mar. 1864) tried by military commission convened Oct. 29, 1864 at Saint Louis, Mo., and convicted Oct. 29, 1864).

to, a “band of marauders, outlaws, insurgents, guerrillas or rebel enemies of the United States” and (2) conspiracy to release a fellow “bushwhacker” from confinement in Monticello, Missouri.¹³⁰ The commission acquitted him of violating the law of war but convicted him on the conspiracy charge.¹³¹ Because the sentence adjudged was confinement for two years, his case was not required to be passed upon by the President of the United States.¹³² The commanding officer, however, approved Cambron’s conviction, and the Judge Advocate General concurred.¹³³

In addition to these 1863 and 1864 trials, and the trial of William Murphy, there were three additional prominent 1865 trials involving conspiracy; namely, the trials of George St. Leger Grenfel et al.,¹³⁴ the Lincoln conspirators,¹³⁵ and Captain Henry Wirz, C.S. Army.¹³⁶ In *Hamdan*,

¹³⁰ A “bushwhacker” was a term used during the Civil War to describe unprivileged enemy belligerents. *See, e.g.*, Military Commissions, 11 Op. Att’y Gen. 297, 302 (1865) (James Speed, Att’y Gen.) (“Secret, but active participants, as spies, brigands, bushwhackers, jayhawkers, war rebels, and assassins. In all wars, and especially in civil wars, such secret, active enemies rise up to annoy and attack an army, and they must be met and put down by the army.”).

¹³¹ *See* Maj. Gen. W. S. Rosecrans, General Orders, No. 205, Head Quarters, Department of the Missouri, Saint Louis, Missouri, Nov. 10, 1864 (approving conviction of John D. Cambron) [hereinafter General Orders No. 205].

¹³² *See* Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 (“[N]o sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President.”).

¹³³ *See* General Orders No. 205, *supra* note 131, at 5 (approving conviction of John D. Cambron); Review from Joseph Holt, J. Advoc. Gen., to the Secretary of War for the President (Sept. 30, 1865), in 15 JAG RECORD BOOKS 676–77 (opining that military commission trial of John D. Cambron was lawful, and recommending against pardon) (“[I]t is believed that the sentence should be fully executed.”).

¹³⁴ *See generally* United States v. St. Leger Grenfel (Jan. 11–Apr. 18, 1865), *reprinted in* H.R. EXEC. DOC. NO. 39-50, at 2 (2d Sess. 1867) (reprinting trial transcript in case of Col. George St. Leger Grenfel et al. (British subject charged with (1) “Conspiring, in violation of the laws of war, to release the rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Illinois” and (2) “Conspiring, in violation of the laws of war, to lay waste and destroy the city of Chicago, Illinois” in Chicago, Ill. during Nov. 1864) tried by military commission convened Jan. 11, 1865 at Cincinnati, Ohio, and convicted Apr. 18, 1865).

¹³⁵ *See generally* United States v. Herold (May 9–June 29, 1865), *reprinted in* THE CONSPIRACY TRIAL FOR THE MURDER OF THE PRESIDENT, AND THE ATTEMPT TO OVERTHROW THE GOVERNMENT BY THE ASSASSINATION OF ITS PRINCIPAL OFFICERS (Benjamin Perley Poore ed., Boston, J. E. Tilton & Co. 1865–66) (reprinting trial transcript in case of David E. Herold, George A. Atzerodt, Lewis Payne, Michael O’Laughlin, Edward Spangler, Samuel Arnold, Mrs. Mary E. Surratt, and Dr. Samuel A. Mudd (U.S. citizens and Lincoln

both the plurality and the dissenters examined these well-known military commission trials to determine whether conspiracy was a violation of the law of war triable by law-of-war military commission.¹³⁷ In analyzing these trials, the facts and legal rationale of the trial participants themselves is critical to determining the jurisdiction of their respective commissions.¹³⁸ In all three cases, the prosecuting judge advocates argued they were trying violations of the law of war by law-of-war military commissions, which derived their constitutional authority from the war power of the political branches, not the Offenses Clause.¹³⁹ These three military commission

conspirators charged with “combining, confederating, and conspiring” to “kill and murder” President Abraham Lincoln in Washington, D.C. during Mar.-Apr. 1865) tried by military commission convened May 9, 1865 at Washington, D.C., and convicted June 29, 1865).

¹³⁶ See generally *United States v. Wirz* (Aug. 23-Oct. 24, 1865), reprinted in H.R. EXEC. DOC. NO. 40-23, at 2 (2d Sess. 1867) (reprinting trial transcript in case of Capt. Henry Wirz, C.S. Army (U.S. citizen and Confederate soldier charged with (1) “combining, confederating, and conspiring” to “injure the health and destroy the lives of soldiers in the military service of the United States” in violation of “the laws and customs of war” in the South during Mar. 1864–Apr. 1865 and (2) murder “in violation of the laws and customs of war” in Andersonville, Ga. during May–Sept. 1864 and Feb. 1865) tried by special military commission convened Aug. 23, 1865 at Washington, D.C., and convicted on Oct. 24, 1865).

¹³⁷ Compare *Hamdan v. Rumsfeld*, 548 U.S. 557, 609 & n.37 (2006) (plurality opinion), with *id.* at 699–702 (Thomas, J., dissenting).

¹³⁸ See Bickers, *supra* note 13, at 909 & n.61 (“For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission. This made for convenience and efficiency for the military commanders, but has spawned confusion among some contemporary analysts who have not realized that the single term now describes separate and distinct types of tribunals. . . . In other words, researchers must examine the facts of a particular case to determine whether the commission had jurisdiction only because of martial law, or whether the alleged violation of the law of war granted jurisdiction independently to the military commission.”).

¹³⁹ See H.L. Burnett, Reply of Judge Advocate Burnett Before the Military Commission in the Case of the United States vs. Charles Walsh, Buckner S. Morris, and George St. Leger Grenfel (Apr. 18, 1865), reprinted in H.R. EXEC. DOC. NO. 39-50, at 575, 576, 579 (2d Sess. 1867) (arguing for convictions of Charles Walsh, Buckner S. Morris, and Col. George St. Leger Grenfel) (“Military commissions come into existence only in times of war It was well said by Mr. Hervey that the jurisdiction of this court depends upon the existence of war where the offences were alleged to have been committed.”); John A. Bingham, Argument of John A. Bingham, Special Judge Advocate, in Reply to the Several Arguments in Defence of Mary E. Surratt and Others, Charged with Conspiracy and the Murder of Abraham Lincoln, Late President of the United States (June 27, 1865), reprinted in H.R. EXEC. DOC. NO. 39-1, pt. 3, at 1007 (1st Sess. 1866) (arguing for conviction of David E. Herold, George A. Atzerodt, Lewis Payne, Mrs. Mary E. Surratt, Michael O’Laughlin, Edward Spangler, Samuel Arnold, and Dr. Samuel A. Mudd):

trials, contrary to the *Hamdan* plurality's assertions, can therefore fairly be described as pure law-of-war military commissions that tried law-of-war violations.

During January-April 1865, Colonel George St. Leger Grenfel, a British subject, and four others were tried by a law-of-war military commission convened at Cincinnati, Ohio. St. Leger Grenfel was charged with (1) "Conspiring, in violation of the laws of war, to release the rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Illinois" and (2) "Conspiring, in violation of the laws

From these grants the Supreme Court infer the power to establish courts-martial, and from the grants in the same 8th section, as I shall notice hereafter, that "Congress shall have power to declare war," and "to pass all laws necessary and proper to carry this and all other powers into effect," it is necessarily implied that in time of war Congress may authorize military commissions, to try all crimes committed in aid of the public enemy, as such tribunals are *necessary* to give effect to the power to make war and suppress insurrection.

Id. at 1011; N. P. Chipman, Argument of the Judge Advocate (Oct. 20, 1865), *reprinted in* H.R. EXEC. DOC. NO. 40-23, at 722 (2d Sess. 1867) (arguing for conviction of Capt. Henry Wirz, C.S. Army):

As we recede from a state of actual war and approach a condition of profound peace, we doubtless travel away from the cornerstone upon which the military commission as a judicial tribunal rests; but that your right to try the case before you is disturbed by a mere suspension of hostilities on the part of rebels in the field, while the spirit of rebellion is still rampant, I do not for a moment suppose, and in a very brief resumé of the argument on the subject I hope to make it so appear. As I view this question of jurisdiction, it is one of both law and fact, to determine which each case must rest upon its own merits. . . .

Your jurisdiction is a special one, resting upon no written law, but derived wholly from the war powers of the President and Congress, which are themselves of course derivable from the Constitution. If it can be shown to safely rest upon these, you become invested, not only with a right, but a high duty to sustain it in obedience to the proper order of your commander-in-chief.

Id. at 723-24.

of war, to lay waste and destroy the city of Chicago, Illinois.”¹⁴⁰ St. Leger Grenfel was convicted on both charges by the military commission and was sentenced to death. The Judge Advocate General of the Army reviewed his case on June 29, 1865 and recommended that the sentence of death be approved by the President of the United States (or commuted to confinement).¹⁴¹ On July 22, 1865, President Andrew Johnson approved the death sentence but commuted it to imprisonment at hard labor for life.

During May–June 1865, David E. Herold and seven others were tried by a law-of-war military commission convened at Washington, D.C. Herold and his co-defendants were charged with “combining, confederating, and conspiring” to “kill and murder” President Abraham Lincoln in Washington, D.C.¹⁴² Four of the defendants were sentenced to death, three defendants received life imprisonment, and one defendant received a six-year sentence. The Judge Advocate General of the Army reviewed their case on July 5, 1865 and recommended that their sentences

¹⁴⁰ See Sec’y of War Edwin M. Stanton, General Court-Martial Orders, No. 452, War Department, Adjutant-General’s Office, Washington, Aug. 22, 1865, *reprinted in* 8 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 2) 724 (Washington, Gov’t Printing Office 1899) (approving conviction, but commuting sentence, of Col. George St. Leger Grenfel by July 22, 1865 order of President Andrew Johnson); *see also* Maj. Gen. Joseph Hooker, General Orders, No. 30, Headquarters Northern Department, Cincinnati, Ohio, Apr. 21, 1865, *reprinted in id.* at 502 (approving convictions of Charles Walsh and Richard T. Semmes, and approving acquittals of Buckner S. Morris and Vincent Marmaduke).

¹⁴¹ See Review from Joseph Holt, J. Advoc. Gen., to the President (June 29, 1865), *reprinted in* H.R. EXEC. DOC. NO. 39-50, at 645–49 (2d Sess. 1867) (opining that military commission trial of Col. George St. Leger Grenfel was lawful, and recommending that the death sentence of Col. George St. Leger Grenfel be approved (or approved but commuted)).

¹⁴² President Andrew Johnson, General Court-Martial Orders, No. 356, War Department, Adjutant-General’s Office, Washington, July 5, 1865, *reprinted in* 8 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 2) 696, 699–700 (Washington, Gov’t Printing Office 1899) (approving convictions of David E. Herold, George A. Atzerodt, Lewis Payne, Mrs. Mary E. Surratt, Michael O’Laughlin, Edward Spangler, Samuel Arnold, and Dr. Samuel A. Mudd (U.S. citizens and Lincoln conspirators charged with “combining, confederating, and conspiring” to “kill and murder” President Abraham Lincoln in Washington, D.C. during Mar.–Apr. 1865 before military commission convened May 9, 1865 at Washington, D.C.)).

be approved by the President of the United States.¹⁴³ On July 5, 1865, President Andrew Johnson approved the adjudged sentences.¹⁴⁴

¹⁴³ Review from Joseph Holt, J. Advoc. Gen., to the President (July 5, 1865), *reprinted in* H.R. EXEC. DOC. NO. 39-1, at 1006–07 (1st Sess. 1866) (opining that military commission trial of David E. Herold, George A. Atzerodt, Lewis Payne, Michael O’Laughlin, Edward Spangler, Samuel Arnold, Mrs. Mary E. Surratt, and Dr. Samuel A. Mudd was lawful, and recommending that sentences be approved).

¹⁴⁴ The *Hamdan* plurality viewed this case as “at best an equivocal exception.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 604 n.35 (2006) (plurality opinion). In contrast, the Judge Advocate General viewed the Lincoln assassination as a violation of the law of war. *See* Report from Joseph Holt, J. Advoc. Gen., to the President (Dec. 16, 1865), in 16 JAG RECORD BOOKS 100–01 (actually 21 JAG RECORD BOOKS 100–01) (discussing case of one Mr. Porterfield—“a banker in Canada, who, it is alleged, was engaged in financial transactions with the rebel agents in that province during the progress of the rebellion”—who was part of the conspiracy, “which at length culminated in the monstrous crime in which they were adjudged by the late Military Commission to have been implicated”). This “monstrous crime” was, of course, the assassination of President Lincoln. The conspiracy to assassinate, and the actual assassination of, President Lincoln were deemed to be a violation of the law of war that was triable by law-of-war military commission by the U.S. District Court for the Southern District of Florida in 1868 and by the U.S. Army administratively in 2001, which decisions were upheld by the U.S. Court of Appeals for the District of Columbia Circuit in 2002. *See Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (“It was not Mr. Lincoln who was assassinated, but the Commander in Chief of the army for military reasons. I find no difficulty therefore, in classing the offence as a military one, and with this opinion, arrive at the necessary conclusion that the proper tribunal for the trial of those engaged in it was a military one. . . . [T]he military commission not only had jurisdiction, but was the proper tribunal for the purpose, and that the President’s proclamation does not embrace the situation occupied by these petitioners.”); *Mudd v. Caldera*, 134 F. Supp. 2d 138, 147 (D.D.C. 2001), *aff’d sub nom. Mudd v. White*, 309 F.3d 819 (D.C. Cir. 2002) (“The Secretary reasoned that John Wilkes Booth was an unlawful belligerent who had committed the Lincoln assassination as an act of war. Therefore, according to the Secretary, the military tribunal’s power to try Dr. Mudd was appropriate because the laws of war applied to all parts of the underlying conspiracy.”). *Id.* at 822. *See also* Bickers, *supra* note 13, at 909–10 (describing military commission trial of Lincoln conspirators as “the most prominent” trial held during the Civil War) (“Thus, the Hunter Commission was not prohibited by the *Milligan* decision, precisely because it was a law of war commission and not one functioning under martial law. In other words, the controlling legal feature of the trial was the subject matter of the offense, not the location of the tribunal.”). It should be noted that, prior to leaving office, President Andrew Johnson pardoned the three incarcerated Lincoln conspirators. *See* President Andrew Johnson, Pardon of Dr. Samuel A. Mudd (Feb. 8, 1869), in 9 DEPARTMENT OF STATE PARDON BOOKS 395 (granting “a full and unconditional pardon” to Dr. Samuel A. Mudd); President Andrew Johnson, Pardon of Samuel B. Arnold (Mar. 1, 1869), in *id.* at 469 (granting “a full and unconditional pardon” to Samuel Arnold); President Andrew Johnson, Pardon of Edward Spangler (Mar. 1, 1869), in *id.* at 474 (granting “a full and unconditional pardon” to Edward Spangler). These pardons, however, appear to have been granted as a matter of grace and not of justice.

During August–October 1865, Captain Henry Wirz, C.S. Army, was tried by a law-of-war military commission convened at Washington, D.C. Captain Wirz was charged with (1) “combining, confederating, and conspiring” to “injure the health and destroy the lives of soldiers in the military service of the United States” in violation of “the laws and customs of war” and (2) murder “in violation of the laws and customs of war.”¹⁴⁵ The commission sentenced him to death. The Judge Advocate General of the Army reviewed his case on October 31, 1865 and recommended that Wirz’s sentence be approved by the President of the United States.¹⁴⁶ President Andrew Johnson approved the adjudged death sentence on November 3, 1865.¹⁴⁷

¹⁴⁵ President Andrew Johnson, General Court-Martial Orders, No. 607, War Department, Adjutant-General’s Office, Washington, Nov. 6, 1865, *reprinted in* 8 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 2) 784, 791 (Washington, Gov’t Printing Office 1899) (publishing Nov. 3, 1865 approval of the conviction of Capt. Henry Wirz, C.S. Army).

¹⁴⁶ Review from Joseph Holt, J. Advoc. Gen., to the President (Oct. 31, 1865), *reprinted in* H.R. EXEC. DOC. NO. 40-23, at 808–14 (2d Sess. 1867) (opining that special military commission trial of Capt. Henry Wirz, C.S. Army was lawful, and recommending that sentence be approved).

¹⁴⁷ Unlike the *Hamdan* plurality, the American Commission To Negotiate Peace that traveled to Versailles to negotiate the end of World War I saw the *Wirz* precedent as a clear one authorizing the trial of war criminals for conspiracy to violate the law of war. *See* Memorandum from David Hunter Miller, Technical Adviser, American Commission To Negotiate Peace & James Brown Scott, Technical Adviser, American Commission To Negotiate Peace, to the President of the United States & the American Commission To Negotiate Peace, *Memorandum Regarding the Responsibility of the Authors of the War and for the Crimes Committed in the War* (c. Feb. 1919), *reprinted in* 3 DAVID HUNTER MILLER, MY DIARY AT THE CONFERENCE OF PARIS 458 (1924) (“The question of the criminal responsibility for crimes committed against prisoners of war was raised, discussed and decided at the trial of Henry Wirz, Commandant of the Confederate prison at Andersonville Georgia, by a United States military court at the close of the Civil War. In addition to crimes of murder personally committed by the accused, he was charged with the same crime for the deaths of prisoners resulting from cruel and inhuman punishments which the accused claimed were inflicted as punishment for infractions of the regulations and to preserve discipline among the prisoners. . . . Wirz was further accused of conspiracy to injure the health and destroy the lives of soldiers of the United States held as prisoners of war, in violation of the laws and customs of war, by subjecting them to torture and great suffering, confining them in unhealthy and unwholesome quarters, exposing them to the inclemency of the weather, compelling them to use impure water, furnishing them with insufficient and unwholesome food, and failing to provide them with proper medical attention. Among his co-conspirators, were included the President of the Confederacy, the Commander of the Army Post at Andersonville, various officers at the prison and certain confederate soldiers stationed there. The military court found the accused guilty of this charge also, but it does

Subsequent to the Civil War, the U.S. Army followed these precedents during the Philippine Insurrection, which began February 4, 1899 and ended July 4, 1902.¹⁴⁸ Military commissions in the Philippines acted as both military-government military commissions and law-of-war military commissions.¹⁴⁹ As a result, a searching factual inquiry is required to determine which commissions were acting as substitutes for the local criminal courts and which commissions were exercising law-of-war jurisdiction. In the Philippines, law-of-war military commissions tried

not appear that any of the co-conspirators were brought to trial. Should the evidence in the cases of the crimes during the present war warrant it, no reason is seen why high enemy officials may not similarly be charged with conspiracy to violate the Laws of War.”).

¹⁴⁸ Report from Maj. Gen. E. S. Otis, Commanding Department of the Pacific and Eighth Army Corps, to the Adjutant-General, U.S. Army (Apr. 6, 1899), *reprinted in* H.R. DOC. NO. 56-2, pt. 4, at 365 (1st Sess. 1899) (noting that “the outbreak of active hostilities between the insurgents and our forces” began Feb. 4, 1899); Maj. Gen. Arthur MacArthur, U.S. Military Governor in the Philippines, Notice of Amnesty (June 21, 1900), *reprinted in* H.R. DOC. NO. 57-2, pt. 7, at 120–21 (1st Sess. 1901) (announcing—by direction of President William McKinley—“amnesty with complete immunity for the past and absolute liberty of action for the future to all persons who are now, or any time since February 4, 1899, have been, in insurrection against the United States in either a military or civil capacity” and who “formally renounce all connection with such insurrection and subscribe to a declaration acknowledging and accepting the sovereignty and authority of the United States in and over the Philippine Islands” but excepting “persons who have violated the laws of war during the period of active hostilities”); President Theodore Roosevelt, Proclamation (July 4, 1902), *reprinted in* 32 Stat. 2014, 2014 (1902) (proclaiming Philippine Insurrection to be “at an end” and peace established in “all parts” of the Philippine Islands “except in the country inhabited by the Moro tribes, to which this proclamation does not apply”).

¹⁴⁹ Report from Lieut. Col. E. H. Crowder, U.S. Army, J. Advoc. & Sec’y to the U.S. Military Governor in the Philippines, to the U.S. Military Governor in the Philippines (June 21, 1901), *reprinted in* H.R. DOC. NO. 57-2, pt. 4, at 228, 245 (1st Sess. 1901) (reporting on military government of the Philippines from June 30, 1900 to June 21, 1901) (“Military commissions and provost courts in the exercise of their appropriate war jurisdiction and of the civil jurisdiction conferred upon them for time to time have played an important part during the whole period of United States rule in the maintenance of law and order. They have carried almost the entire burden of judicial administration in criminal cases. Reference is here made to these tribunals for the purpose of noting only the jurisdiction which they have exercised in civil and criminal cases ordinarily pertaining to civil courts and explaining the necessity which gave rise thereto, it being understood that a report of trials by them of offenses against the laws of war will be included in the annual report of the chief of staff and adjutant-general of the division.”).

persons for conspiring with guerrillas in violation of the law of war.¹⁵⁰ In addition, a conspiracy was sometimes included as a specification to the charge of violating the law of war¹⁵¹ and, in other instances, a conspiracy was found to exist in cases in which the defendants were charged with murder in violation of the law of war¹⁵² and with murder itself.¹⁵³

¹⁵⁰ See, e.g., Report from G. N. Lieber, J. Advoc. Gen., to Elihu Root, Sec'y of War (Sept. 25, 1900), *reprinted in* H.R. DOC. NO. 56-2, pt. 2, at 251, 257 (2d Sess. 1900) (recognizing "[c]onspiring and combining with guerillas" as violation of law of war punished by military commissions during the Philippine Insurrection); Maj. Gen. E. S. Otis, General Orders, No. 11, Headquarters Division of the Philippines, Manila, P. I., May 2, 1900, *reprinted in* S. DOC. NO. 57-205, pt. 2, at 3 (1st Sess. 1902) (approving conviction of Gabriel Cayaban (Filipino charged with (1) "[c]ombining and conspiring with guerrillas, contrary to the laws and usages of war" (by "swearing fealty to a band of Guerillas, organized for the purpose of carrying on illegal warfare against the said United States") in Alcalá Pueblo, Pangasinan Province, Luzon, P. I. during Jan.-Feb. 1900 and (2) misconduct in office as president of pueblo under civil government established by U.S. military authorities in Alcalá Pueblo, Pangasinan Province, Luzon, P. I. during Feb. 1900 before military commission convened Apr. 2, 1900 at Bautista, Pangasinan Province, Luzon, P. I.)).

¹⁵¹ See, e.g., Maj. Gen. Arthur MacArthur, General Orders, No. 69, Headquarters Division of the Philippines, Manila, P. I., Aug. 11, 1900, *reprinted in id.* at 20 (disapproving conviction of Capt. Juan Buenafe, Philippine Insurgent Army (Filipino insurgent charged with (1) lurking as spy in Sampaga Barrio, Batangas Pueblo, Batangas Province, Luzon, P. I. during Mar. 1900 and (2) violating law of war (by "conspir[ing] to carry on an unlawful method of warfare against the supreme authority of the United States") in Batangas Province, Luzon, P. I. during Feb. 1900 before military commission convened June 11, 1900 at Batangas, Batangas Province, Luzon, P. I.)). The commanding general disapproved the defendant's conviction of the second charge because "[t]he evidence of record" did "not show the commission of the offenses charged with that certainty which the law requires." See *id.* at 21.

¹⁵² See, e.g., Maj. Gen. Adna R. Chaffee, General Orders, No. 334, Headquarters Division of the Philippines, Manila, P. I., Oct. 29, 1901, *reprinted in id.* at 366 (approving convictions, but commuting sentences, of Juan de Jesus (Filipino charged with murder in violation of law of war (of 2 U.S. soldiers) in San Pedro Barrio, Cordon Pueblo, Isabela Province, Luzon, P. I. during Feb. 1901 before military commission convened June 4, 1901 at Echague, Isabela, Luzon, P. I.), Roque Escarios (Filipino charged with murder in violation of law of war (of two U.S. soldiers) in San Pedro Barrio, Cordon Pueblo, Isabela Province, Luzon, P. I. during Feb. 1901 before military commission convened June 4, 1901 at Echague, Isabela, Luzon, P. I.), and Juan Ramires (Filipino charged with misconduct and neglect of duty as presidente in Cordon Pueblo, Isabela Province, Luzon, P. I. during Jan.-Feb. 1901 before military commission convened June 4, 1901 at Echague, Isabela, Luzon, P. I.)) ("In the foregoing case of Juan de Jesus and Roque Escarios, natives, these accused upon their trial admitted that they were present and witnessed the killing of two American soldiers, but sought to avoid any responsibility for the murder by their unsupported statements that they were compelled to be present by five men whom they did not know and who were the real perpetrators of the crime. . . . From the evidence it appears that the presidente of the pueblo of Cordon had knowledge of this murder at the time it was

Trying conspiracy by law-of-war military commission was not limited to the United States during the turn of the twentieth century. The British also tried the offense of conspiracy by military courts (their version of the military commission) during the Second Boer War, which began during October 1899 and ended during May 1902. For instance, during October 1900, two Orange River Colony residents were tried and convicted of

committed, directed the bodies to be buried, and gave warning that death would be meted out to anyone disclosing the crime to the American authorities. The facts established show that they there was a conspiracy to commit this murder, and that beyond a reasonable doubt these accused were active participants therein.”).

¹⁵³ See, e.g., Maj. Gen. Adna R. Chaffee, General Orders, No. 339, Headquarters Division of the Philippines, Manila, P. I., Nov. 6, 1901, *reprinted in id.* at 290 (approving convictions, but commuting sentences, of Florentio Antonio, alias “Prudencio,” Pastor Santos and Francisco Felizardo, alias “Quicoy” (Filipinos charged with murder (of 6 Filipinos) in Taytay Pueblo, Morong Province, Luzon, P. I. during May 1900, July 1900, Aug. 1900 and Dec. 1900 before military commission convened Mar. 25, 1901 at San Felipe Neri, Manila, Luzon, P. I.), approving convictions of Caledonio Javier, Pablo Anorma, and Santiago Gadapia, alias “Baldado” (Filipinos charged with murder (of 6 Filipinos) in Taytay Pueblo, Morong Province, Luzon, P. I. during May 1900, July 1900, Aug. 1900, and Dec. 1900 before military commission convened Mar. 5, 1901 at San Felipe Neri, Manila, Luzon, P. I.), and approving conviction of Leonardo de Posoy (Filipino priest charged with murder (of 6 Filipinos) in Taytay Pueblo, Morong Province, Luzon, P. I. during May 1900, July 1900, Aug. 1900 and Dec. 1900 before military commission convened May 2, 1901 at Manila, Luzon, P. I.)) (setting forth “a few of the well-established principles of law and procedure in cases of conspiracy” for “the future guidance of military commissions”):

In the foregoing case of Caledonio Javier, Pablo Anorma, Florentio Antonio, alias “Prudencio,” Santiago Gadapia, alias “Baldado,” Pastor Santos, and Francisco Felizardo, alias “Quicoy,” natives, who were jointly tried, the record covers more than 1,200 pages of typewritten matter, much of which is due to an unending contention between counsel for the accused and the judge-advocate, arising chiefly upon the theory of the prosecution that a conspiracy had been entered upon by these accused to accomplish the crimes charged. After sufficient evidence had been adduced to lay the foundation for the conspiracy, and the commission had repeatedly ruled upon the admissibility of the evidence upon its inception, progress, and accomplishment, counsel, in disregard of the rules of evidence and the repeated rulings of the commission, iterated and reiterated his objections in arguments of such wearisome length as to raise the presumption that his intent was more to vex the commission into some fatal irregularity than to aid in the elucidation of the truth.

Id. at 291.

“Conspiring to communicate with the enemy.”¹⁵⁴ Moreover, a few months earlier during August 1900, a Transvaal soldier and paroled prisoner of war was tried and convicted of “Treacherously conspiring against British authority” in a failed attempt to kidnap the British commanding general in the Transvaal.¹⁵⁵ In addition to these trial precedents, the treaty of peace that ended the Second Boer War also provided for the trial of persons who had violated the law of war.¹⁵⁶ The fact that our British forebears tried conspiracy by their law-of-war military commissions demonstrates that conspiracy has historically been deemed to be a law-of-war offense, which Congress has the power to punish.¹⁵⁷

¹⁵⁴ See *Great Britain v. Wantenaar* (Oct. 24, 1900) (case of C. J. Wantenaar and R. W. Fockens (Orange River Colony residents charged with (1) “Conspiring to communicate with the enemy” and (2) “Being in possession of signalling apparatus”) in Springfontein, Orange River Colony during Oct. 1900 tried by British military court convened Oct. 24, 1900 at Springfontein, Orange River Colony, and convicted Oct. 24, 1900), *summarized in* Papers Relating to the Administration of Martial Law in South Africa, 1902, [Cd.] 981, at 160.

¹⁵⁵ See *Great Britain v. Cordua* (Aug. 16–21, 1900) (trial transcript in case of Lieut. Hans Cordua, Transvaal Forces (German citizen and Transvaal soldier/paroled prisoner of war charged with (1) “Violating his parole” (by taking part in movement against British government and being found disguised in British uniform) and (2) “Treacherously conspiring against British authority” (by conspiring to set fire to certain portions of Pretoria, Transvaal in order to facilitate simultaneous kidnapping of Field-Marshal Frederick Sleigh (Baron Roberts of Kandahar and Waterford, Commanding in Chief Her Majesty’s Troops in South Africa) in Pretoria, Transvaal during Aug. 1900), tried by British court-martial convened Aug. 16, 1900 at Pretoria, Transvaal, and convicted Aug. 21, 1900), *summarized in id.* at 122. See also GRAHAM JOOSTE & ROGER WEBSTER, *INNOCENT BLOOD* 179–81 (2002).

¹⁵⁶ See Draft Agreement as to Terms of Surrender of the Boer Forces in the Field Approved by His Majesty’s Government, May 31, 1902, 95 B.S.P. 160, 161 (terminating Second Boer War, between Orange Free State (Orange River Colony) and South African Republic (Transvaal) and Great Britain):

No proceedings, civil or criminal, will be taken against any of the burghers surrendering or so returning for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts, contrary to usages of war, which have been notified by the Commander-in-chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities.

Id. at 161.

¹⁵⁷ As *Hamdan* made clear, the historic practice of law-of-war military commissions is relevant to analyzing military commission jurisdiction. See generally *Hamdan v. Rumsfeld*,

As noted in Part II, confusion often obscures the law of military commissions because precise terms of art are used imprecisely and simple facts are not known.¹⁵⁸ The habeas corpus case of William Murphy—*In re Murphy*, which was decided by Supreme Court Justice Samuel Freeman Miller “riding circuit” in Missouri during 1867—is no exception.¹⁵⁹ Justice Miller served as an Associate Justice of the U.S. Supreme Court from July 1862 to October 1890. In this capacity, he participated in the landmark case of *Ex parte Milligan*.¹⁶⁰ Justice Miller joined the four-member minority opinion, led by Chief Justice Salmon Portland Chase, which concurred in the result but disagreed with the reasoning employed by the five-member *Milligan* majority. In *Milligan*, the Court held that the martial law military commission¹⁶¹ that tried Lambdin P. Milligan and others in Indianapolis,

548 U.S. 557, 595–613 (2006) (plurality opinion) (surveying the historic practice of law-of-war military commissions).

¹⁵⁸ Bickers, *supra* note 13, at 909 & n.61 (“For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission. This made for convenience and efficiency for the military commanders, but has spawned confusion among some contemporary analysts who have not realized that the single term now describes separate and distinct types of tribunals.”) (“In other words, researchers must examine the facts of a particular case to determine whether the commission had jurisdiction only because of martial law, or whether the alleged violation of the law of war granted jurisdiction independently to the military commission.”).

¹⁵⁹ JEFFREY BRANDON MORRIS, *ESTABLISHING JUSTICE IN MIDDLE AMERICA: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT* 21–23 (2007) (describing life and times of Assoc. Justice Samuel Freeman Miller as circuit justice).

¹⁶⁰ 71 U.S. (4 Wall.) 2 (1866) (5-4 decision); see generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 137 (1998) (“The *Milligan* decision is justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime. It would have been a sounder decision, and much more widely approved at the time, had it not gone out of its way to declare that Congress had no authority to do that which it never tried to do.”).

¹⁶¹ The *Milligan* military commission was a martial law, not a law-of-war, military commission. See Charles Warren, *Spies, and the Power of Congress To Subject Certain Classes of Civilians to Trial by Military Tribunal*, 53 AM. L. REV. 195, 209 (1919) (“The *Milligan* case was, in fact, a decision upon the right of the President to establish martial law or military tribunals in localities where the courts were open; it was not a decision upon the power of Congress to legislate under Article I, Section 8, of the Constitution.”) (emphasis in original); Harvey A. Goldman, Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947, 955 (1970) (“Thus, *Milligan* does not speak directly to the propriety of trial of civilians by military commission for violations of the law of war.”); see also THE JUDGE ADVOCATE GEN. SCH., U.S. ARMY, *WAR POWERS AND MILITARY JURISDICTION* 37 (Dec. 1, 1943) (“The Quirin case deals with belligerency and the *Milligan* case with nonbelligerency.”).

Indiana during October–December 1864 was “illegal” because the military commission, which was not “ordained and established by Congress,” specifically contravened the Habeas Corpus Act of 1863.¹⁶²

In *Milligan*, the Court began by carefully detailing the facts and circumstances relevant to its holding.¹⁶³ First, the Court found that *Milligan* was a citizen of the loyal state of Indiana.¹⁶⁴ Second, the Court found that Milligan was arrested by U.S. armed forces in the loyal state of Indiana.¹⁶⁵ Third, the Court found that the Federal courts in Indiana were “open and their process unobstructed” and thus were capable of adjudicating criminal cases.¹⁶⁶ Fourth, the Court found that Milligan was “not a resident of one of

¹⁶² See *Milligan*, 71 U.S. at 121; Habeas Corpus Act of Mar. 3, 1863, ch. 81, 12 Stat. 755. The Habeas Corpus Act of 1863 essentially placed the *Milligan* commission in what today would be described as “category three” of Justice Robert H. Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which set forth the seminal three-part test for separation of powers analysis. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Under *Youngstown*’s “category three,” when the President takes measures incompatible with Congress’s express or implied will, the President’s power is at its “lowest ebb” because the President can rely solely on his own constitutional powers, and not on any power Congress may possess. In this situation, a court can sustain the President’s power only by disabling Congress from acting on the subject. See *id.* at 637–38 (Jackson, J., concurring) (noting that when President takes action inconsistent with will of Congress, his power is at its nadir). In *Milligan*, the President’s commission conflicted with Congress’s express will (the Habeas Corpus Act of 1863), which “had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them.” *Milligan*, 71 U.S. at 122. As to the act’s implementation, see Letter from Edwin M. Stanton, Sec’y of War, to Joseph Holt, J. Advoc. Gen. (Mar. 23, 1863), reprinted in S. EXEC. DOC. NO. 38-23, at 1 (2d Sess. 1865) (ordering implementation of Habeas Corpus Act of 1863); Report from Joseph Holt, J. Advoc. Gen., to E. M. Stanton, Sec’y of War (June 9, 1863), reprinted in 5 U.S. WAR DEP’T, THE WAR OF THE REBELLION (ser. 2) 765 (Washington, Gov’t Printing Office 1899) (reporting on implementation of Habeas Corpus Act of 1863 with respect to prisoners detained at “Saint Louis, Alton, Louisville, Sandusky, Wheeling, Camp Chase (Ohio), Fort Lafayette, Fort McHenry, Fort Delaware and the Old Capitol Prison at Washington”); Letter from Edwin M. Stanton, Sec’y of War, to the President of the Senate (Feb. 18, 1865), reprinted in S. EXEC. DOC. NO. 38-23, at 1 (2d Sess. 1865) (reporting on implementation of Habeas Corpus Act of 1863).

¹⁶³ See *Milligan*, 71 U.S. at 118, 121–22, 131.

¹⁶⁴ See *id.* at 118 (stating that Milligan was “a citizen of Indiana for twenty years past”); see also *id.* at 131 (stating that Milligan had “lived in Indiana for the past twenty years”).

¹⁶⁵ See *id.* at 118 (noting that Milligan was “arrested by the military power of the United States”); see also *id.* at 131 (noting that Milligan “was arrested” in Indiana).

¹⁶⁶ *Id.* at 121 (observing that “in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances”).

the rebellious states.”¹⁶⁷ Fifth, the Court found that Milligan was “a citizen in civil life, in nowise connected with the military service” of the United States.¹⁶⁸ Sixth, the Court found that Milligan was not a “prisoner of war.”¹⁶⁹ Seventh, the Court found that Milligan had not engaged in “acts of hostility against the government” of the United States.¹⁷⁰

Based on this searching factual inquiry, the Court concluded that Milligan was not a belligerent. As a result, Milligan was neither entitled to the status of “prisoner of war” accorded to privileged belligerents upon capture, nor was he subject to the “pains and penalties” imposed upon unprivileged enemy belligerents who had violated the law of war. The Court concluded further that the law of war could “never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”¹⁷¹ Moreover, because Federal authority in Indiana “was always unopposed, and its courts always open to hear criminal accusations and redress grievances,” no “usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service.”¹⁷² The *Milligan* military commission conflicted with Congress’s express will (the Habeas Corpus Act of 1863), which “had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them.”¹⁷³ In brief, the Habeas Corpus Act of 1863 applied to Milligan’s case; this act was not complied with; and the *Milligan* military commission, therefore, lacked jurisdiction in the premises.

The *Milligan* Court filed its opinion with the Clerk of the Court on December 17, 1866. Subsequently, at the October 1867 term of the Circuit Court for the District of Missouri, William Murphy petitioned the circuit court for a writ of habeas corpus, praying that he be released from a ten-year sentence, which had been imposed upon him during January 1866 by a law-of-war military commission convened September 1865 at Saint Louis,

¹⁶⁷ *Id.* at 118; *see also id.* at 131 (stating that Milligan “had not been, during the late troubles, a resident of any of the states in rebellion”).

¹⁶⁸ *Id.* at 121–22; *see also id.* at 118 (noting that Milligan was “never in the military or naval service”).

¹⁶⁹ *Id.* at 118; *see also id.* at 131 (same).

¹⁷⁰ *Id.* at 131.

¹⁷¹ *Id.* at 121.

¹⁷² *Id.* at 121–22.

¹⁷³ *Id.* at 122.

Missouri.¹⁷⁴ When the Civil War began, William Murphy was an American citizen (born in Cincinnati, Ohio during April 1829), residing in the secessionist state of Louisiana at New Orleans.¹⁷⁵ Thus, in contemplation of law, Murphy was both a citizen, and an “enemy,” of the United States.¹⁷⁶ In addition to being an “enemy” in law, Murphy was also an “enemy” in fact. As Murphy’s record of trial makes clear, he was part of a network of so-called Confederate “boat-burners,” who sought to thwart and impede the Union war effort by clandestinely destroying Union steamboats plying on the Mississippi River, which were ferrying Union soldiers and materiel to the war-front. Murphy was paid handsomely for his services. Under the terms of the financial arrangement that he negotiated with the Confederate military authorities (who were acting under the direction of the Confederate Secretary of War), Murphy was paid 40% of the value of everything that he destroyed—30% in Confederate currency and 10% in gold, the value to be estimated by the reports made in Northern newspapers. In effect, Murphy was a civilian-saboteur who had associated himself with the military arm of the enemy government (the Confederacy), and with its aid and direction entered Union territory bent on committing hostile and warlike acts for pecuniary gain. Murphy was, therefore, unquestionably an unprivileged enemy belligerent.

¹⁷⁴ See *In re Murphy*, 17 F. Cas. 1030, 1031 (C.C.D. Mo. 1867) (No. 9947) (discharging William Murphy because military commission took place in state in which “the courts of the United States were open, and perfectly competent to the trial of any offences within their jurisdiction”).

¹⁷⁵ See Statement of William Murphy 1 (Feb. 22, 1865), in Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry 6 (Letters Received, 1854-1894), Stack 7E3, Row 13, Compartment 5, Shelf 1, Box 12, National Archives Building, Washington, D.C. (noting that he was resident of New Orleans, Louisiana “at the time the war broke out” and “at the time Louisiana seceded”).

¹⁷⁶ See, e.g., *Ford v. Surget*, 97 U.S. 594, 604 (1878) (“The district of country declared by the constituted authorities, during the late civil war, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions.”); see generally President Abraham Lincoln, Proclamation (Aug. 16, 1861), reprinted in 12 Stat. 1262 (1861) (declaring inhabitants of Georgia, South Carolina, Virginia (except part lying west of Alleghany mountains), North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida to be in insurrection).

Union authorities apprehended Murphy in New Orleans, Louisiana in May 1865. Thereafter, they transported him to Saint Louis, Missouri to stand trial on charges of (1) “Conspiracy to burn and destroy steamboats and other property belonging to or in the service of the United States of America, or available for such service, with intent to aid the rebellion against the United States” and (2) “Violation of the laws and customs of war”—the latter charge alleging, in part, that Murphy set fire to, and caused to be burned and destroyed, the Union steamboat *Champion*, which had been plying on the Mississippi River near Memphis, Tennessee during September 1863.¹⁷⁷ At that time, Murphy was not a member of either the Union or Confederate armed forces, but was a paid emissary in the employ of the Confederacy, reportedly receiving from its military arm the then-princely sum of \$3000 to destroy the *Champion*.

In beginning his *In re Murphy* analysis, Justice Miller noted that while he personally disagreed with the *Milligan* majority’s reasoning, he would nonetheless apply the rule of law enunciated by the *Milligan* Court.¹⁷⁸ Justice Miller ultimately discharged Murphy from military custody because he was “tried by and held under the sentence of a court which had no jurisdiction of his person or of his offence.”¹⁷⁹ Although Justice Miller declared that Murphy’s military commission had neither personal nor subject-matter jurisdiction over him, Justice Miller did not disclose the reasoning he used to support his conclusion; in fact, contrary to *Milligan*, Murphy’s belligerent status was never discussed.¹⁸⁰ Justice Miller simply noted that, “at the time of his trial, the federal courts had resumed their functions, and in any of them the petitioner could have been tried for any of the offences of which

¹⁷⁷ See General Court Martial Orders No. 107, *supra* note 118 at 3; W. CRAIG GAINES, *ENCYCLOPEDIA OF CIVIL WAR SHIPWRECKS* 92 (2008) (describing Union steamboat *Champion*) (“Union. Side-wheel steamer, 676 tons. Built in 1858 at Cincinnati.”).

¹⁷⁸ See *Murphy*, 17 F. Cas. at 1030, 1031 (“This class of questions has lately been thoroughly discussed by the supreme court, to the decision of which, this court, whatever be the individual opinions of its members, will ever pay the greatest respect. . . . The opinion of the majority of the court goes still further, and must be binding upon every member of that court, whatever be his individual opinion.”).

¹⁷⁹ *Id.* at 1032.

¹⁸⁰ This is all the more important as Justice Miller struck down an act of Congress legalizing the proceedings of military commissions that occurred during the Civil War. See Act of Mar. 2, 1867, ch. 155, 14 Stat. 432 (legalizing “all acts, proclamations, and orders of the President of the United States”—after Mar. 4, 1861 and before July 1, 1866—respecting “military trials by courts-martial or military commissions,” and providing indemnity).

those courts had jurisdiction.”¹⁸¹ Thus, Justice Miller based his decision to release Murphy from military custody squarely on *Milligan’s* “open court” rule, rather than on any searching factual inquiry into the belligerent status of the accused or the related legal issues concerning personal and subject-matter jurisdiction applicable to law-of-war military commissions.¹⁸²

Justice Miller’s failure to undertake a searching factual inquiry into the belligerent status of the defendant demanded by *Milligan* was a critical error. Moreover, if Justice Miller’s reasoning—that the “open court” rule alone was dispositive—was truly the correct rule of reason governing the legality of military commission jurisdiction, then every Civil War-era law-of-war military commission that tried an unprivileged enemy belligerent outside of southern territory would have been unlawful because the Federal courts were “open and their process unobstructed.” In addition, the same reasoning also would have invalidated the pure law-of-war military commissions that tried the Modoc Indians during 1873, Pablo Waberski during 1918, the *Ex parte Quirin* saboteurs during 1942, and Colepaugh and Gimpel during 1945—all of which took place in locations in which the Federal courts were “open and their process unobstructed.” In fact, in all of these cases, the legal reviews (be they executive, judicial, or both) carefully considered *Milligan* and distinguished it on the facts because the defendants in those cases were all enemy belligerents who were subject to the law of war.¹⁸³

¹⁸¹ *Murphy*, 17 F. Cas. at 1031; *see also id.* (“This petitioner was arrested at New Orleans in 1865, charged with offences committed at Memphis in 1864. In both of these places the courts of the United States were open, and perfectly competent to the trial of any offences within their jurisdiction. He was tried at St. Louis, in a state where the process of the courts had never been interrupted.”).

¹⁸² *See generally* Military Commissions, *supra* note 130, at 315 (anticipating and disagreeing with the “open court” rule) (“The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, a bandit, or other offender against the law of war may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.”).

¹⁸³ *See, e.g.,* The Modoc Indian Prisoners, 14 Op. Att’y Gen. 249, 252 (1873) (George H. Williams, Att’y Gen.) (concluding that certain Modoc Indians were triable by military commission for violating law of war in Tule Lake, California during April 1873 despite *Milligan* because they were enemy belligerents) (“*Milligan’s Case* (4 Wallace, 2) holds, under the circumstances therein stated, a military commission to be illegal. But the facts there are entirely different from those under consideration. *Milligan* was the resident of a State not in

A comparison of the diametrically opposed facts in *Milligan* and *In re Murphy* is critical to understanding the role that belligerency plays in analyzing law-of-war military commission jurisdiction. As recounted above, the *Milligan* Court found that: (1) Milligan was a citizen of a loyal state; (2) he was arrested by the U.S. military in a loyal state; (3) the Federal courts were open in the loyal state in which he was arrested; (4) he was not a resident of a rebellious state; (5) he was unquestionably a citizen in “civil life” and not a member of the military or naval service of the United States; (6) he was not a “prisoner of war”; and (7) he had not engaged in “acts of hostility against the government” of the United States and was therefore not an enemy belligerent. In contrast to Milligan, the Murphy record of trial shows that: (1) Murphy was a citizen of a disloyal state; (2) he was arrested by the U.S. military in a disloyal state; (3) the Federal courts were open in the disloyal state in which he was arrested only by the force of Union arms; (4) he was a resident of a rebellious state and was consequently an “enemy” in law; (5) he was unquestionably not a citizen in “civil life” or a member of the military or naval service of the United States but was, rather, a civilian-saboteur employed by the enemy government; (6) he was not a “prisoner of war” but an unprivileged enemy belligerent; and (7) he had engaged in “acts of hostility against the government” of the United States and was therefore an unprivileged enemy belligerent who had committed acts in violation of the law of war. These facts demonstrate conclusively that Murphy was an unprivileged enemy belligerent subject to the law of war, while Milligan, “not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war.”¹⁸⁴

rebellion. The courts were open and unobstructed for his prosecution. He was neither a prisoner of war nor attached in any way to the military or naval service of the United States.”); *see generally* Proceedings of a Military Commission Convened at Fort Klamath, Oregon, for the Trial of Modoc Prisoners (July 5–9, 1873), *reprinted in* H.R. EXEC. DOC. NO. 43-122, at 131 (1st Sess. 1874) (reprinting trial transcript in case of Captain Jack, Schonchis, Black Jim, Boston Charley, Barncho, alias “One-Eyed Jim,” and Sloluck, alias “Cok” (Modoc Indians “engaged in open and flagrant war with the United States” charged with (1) murder in violation of law of war (of Brig. Gen. E. R. S. Canby, U.S. Army and Rev. Dr. Eleazur Thomas “in wanton violation” of “a flag of truce”) and (2) assault with intent to kill in violation of law of war (of A. B. Meacham and L. S. Dyer “in wanton violation” of “a flag of truce”) in Tule Lake, Cal. during Apr. 1873) tried by military commission convened July 5, 1873 at Klamath, Ore., and convicted July 9, 1873)).

¹⁸⁴ *Ex parte Quirin*, 317 U.S. 1, 45 (1942) (distinguishing Milligan from *Quirin* saboteurs).

Colonel William Winthrop, the “Blackstone of Military Law,” relied on the underlying Murphy military commission trial as an example of a pure law-of-war military commission notwithstanding *In re Murphy*, of which he was aware.¹⁸⁵ Over a period of nearly sixteen years, Colonel Winthrop cited the William Murphy military commission trial approvingly in his 1880 and 1895 JAG Digests and both of his editions of *Military Law and Precedents*. Moreover, Colonel Winthrop relied on Murphy’s underlying military commission trial for a principle of law that *In re Murphy* did not challenge—that conspiracy is triable by pure law-of-war military commission. It is perhaps not unsurprising that Justice Miller did not address in *In re Murphy* whether conspiracy itself was triable by military commission because he had already intimated as much but a few months earlier, when he joined Chief Justice Chase’s minority opinion in *Milligan*, which twice had stated that Congress could make conspiracy triable by military commission.¹⁸⁶

Significantly, a unanimous Supreme Court, in *Ex parte Quirin*, also recognized what Justice Miller did not: that the belligerent status of the defendant—not whether the Federal courts are “open and their process unobstructed”—is the pivot upon which law-of-war jurisdiction turns.¹⁸⁷ The 1942 law-of-war military commission trial of eight so-called “Nazi Saboteurs” is an oft-told tale. In reviewing the saboteurs’ trial, a unanimous Supreme Court upheld their convictions.¹⁸⁸ The *Quirin* Court began its analysis of the saboteurs’ case by noting that, during the Civil War, “the military commission was extensively used for the trial of offenses against the law of war.”¹⁸⁹ In surveying the Civil War-era “practice of our own military

¹⁸⁵ Compare WINTHROP MILITARY LAW AND PRECEDENTS, *supra* note 37, at 836 n.90, with *id.* at 839 n.5 (reprint of 1896 edition).

¹⁸⁶ See, e.g., *Milligan*, 71 U.S. at 139 (Chase, C.J., concurring in the result) (“And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power?”); *id.* at 140 (Chase, C.J., concurring in the result) (“We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy.”).

¹⁸⁷ See *Quirin*, 317 U.S. at 35 (“By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.”).

¹⁸⁸ See *id.* at 48.

¹⁸⁹ *Id.* at 31 n.10.

authorities,” the Court cited some of “the more significant cases for present purposes.”¹⁹⁰ These “significant cases” were the military commission trials of Thomas E. Hogg et al.,¹⁹¹ John Y. Beall,¹⁹² Robert C. Kennedy,¹⁹³ and William Murphy. All four of these trials were held in Western and Northern states (California, New York (twice), and Missouri) in which martial law did not prevail and where military government did not exist. Thus, all four trials were had by pure law-of-war military commissions in localities in which the Federal courts were “open and their process unobstructed.” To the Court, these cases were relevant “for present purposes” because the *Quirin* military commission, like the four cited historical examples, was a pure law-of-war military commission trying law-of-war violations. Law-of-war jurisdiction attached in *Quirin*, despite the fact that the Federal courts were “open and their process unobstructed,” because the *Quirin* saboteurs were enemy

¹⁹⁰ *Id.* at 31 & n.10.

¹⁹¹ See Maj. Gen. Irvin McDowell, General Orders, No. 52, Headquarters Department of the Pacific, San Francisco, California, June 27, 1865, *reprinted in* 8 U.S. WAR DEPT., THE WAR OF THE REBELLION (ser. 2) 674, 681 (Washington, Gov’t Printing Office 1899) (approving convictions, but commuting sentences, of Acting Master Thomas E. Hogg, C.S. Navy, Midshipman Edward A. Swain, C.S. Navy, Acting Chief Engineer John S. Hiddle, C.S. Navy, Acting Assistant Paymaster William L. Black, C.S. Navy, Acting First Assistant Engineer Timothy J. Grady, C.S. Navy, Sailing Master Robert B. Lyon, C.S. Navy, and Paymaster’s Clerk Joseph Higgin, C.S. Navy (U.S. citizens and Confederate sailors charged with violating “the laws and usages of civilized war” (by coming “on board the U. S. merchant steamer Salvador” in “the guise of peaceful passengers, without any visible mark or insignia indicating their true character as enemies” with “the intent, purpose, and object of treacherously rising on the master, crew, and unsuspecting passengers of said steamer”) in Panama, New Granada during Nov. 1864 before military commission convened May 22, 1865 at San Francisco, Cal.)).

¹⁹² See Maj. Gen. John A. Dix, General Orders, No. 17, Headquarters Department of the East, New York City, Feb. 21, 1865, *reprinted in id.* at 279 (approving conviction of Acting Master John Y. Beall, C.S. Navy (Virginia citizen and Confederate sailor charged with (1) violating law of war in Kelley’s Island, Ohio and Middle Bass Island, Ohio during Sept. 1864 and Suspension Bridge, N.Y. and Buffalo, N.Y. during Dec. 1864 and (2) being spy in Kelley’s Island, Ohio and Middle Bass Island, Ohio during Sept. 1864 and Suspension Bridge, N.Y. during Dec. 1864 before military commission convened Jan. 20, 1865 at New York, N.Y.)).

¹⁹³ See Maj. Gen. John A. Dix, General Orders, No. 24, Headquarters Department of the East, New York City, Mar. 20, 1865, *reprinted in id.* at 414 (approving conviction of Capt. Robert C. Kennedy, C.S. Army (Louisiana citizen and Confederate soldier charged with (1) being spy in New York, N.Y. during Nov. 1864 and Detroit, Mich. during Dec. 1864 and (2) violating law of war (by undertaking “to carry on irregular and unlawful warfare” by attempting “to burn and destroy” New York City “by setting fire thereto”) in New York, N.Y. during Nov. 1864 before military commission convened Jan. 31, 1865 at New York, N.Y.)).

belligerents charged with violating the law of war. Thus, when viewed through the prism of *Quirin*, it is further established that the underlying trial of William Murphy was had by a lawful law-of-war military commission.

The significance of *Quirin* cannot be overstated because, for the first time in civil litigation, the Court explicitly recognized the existence of law-of-war jurisdiction enforceable through criminal proceedings conducted by pure law-of-war military commissions, a source of jurisdiction that had long been recognized by the “practice of our own military authorities.”¹⁹⁴ *Quirin*, in turn, had built upon Chief Justice Chase’s minority opinion in *Milligan*, which for the first time clearly set forth the tripartite distinction between military law, military government, and martial law—a distinction that had, prior to that time, remained unclear.¹⁹⁵ Moreover, *Quirin* greatly affected

¹⁹⁴ See, e.g., Letter from Frederick Bernays Wiener to Assoc. Justice Felix Frankfurter, Further Observations on Ex Parte Quirin (Aug. 1, 1943), in Felix Frankfurter Papers, Library of Congress, Washington, D.C. (analyzing significance of *Ex parte Quirin*):

Now for the significance of the case as a whole: I think that the importance of *Ex parte Quirin* in the largest sense is that it outlines a head of military jurisdiction, which, although long recognized, has never heretofore been isolated in civil litigation. . . . But where can *Ex parte Quirin* be placed in that arrangement?

It did not involve military law, because *Quirin et al.* were not members of our armed forces. It was not an instance of military government, because the Eastern United States was not occupied territory. And it was not a matter of martial law, or martial rule, because no government was being carried on by military agencies and no civil agencies were superseded. The fact of the matter was that the case dealt with something entirely outside the scope of civil government, a violation of the laws of war. This was a matter which, as the Court recognized, has always been beyond the competence of civil courts. The result is that, in my opinion, we now have—or rather, we can now clearly recognize and distinguish—a fourth division of military jurisdiction, namely, offenses against the laws of war. That, to me, is the real significance of *Ex parte Quirin*, and the reason why it will be regarded in the future as a landmark in the field.

Id.

¹⁹⁵ See *Milligan*, 71 U.S. at 141–42 (Chase, C.J., concurring in the result) (explicating differences between military law, military government, and martial law) (“There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within

official U.S. Army policy—as the Army, after *Quirin*, amended its *Manual for Courts-Martial* to reflect the recognition of “law-of-war jurisdiction” as a fourth kind of military jurisdiction that was triable by military commission.¹⁹⁶

Where, then, does William Murphy’s conduct fit along the *Milligan/Quirin* spectrum? Murphy’s conduct is similar in all material respects to the acts committed by the *Quirin* saboteurs. First, like the *Quirin* saboteurs and unlike Milligan, Murphy was an “emissary in the employ of and collegued with” the enemies of the United States, acting as “a part of or associated with the armed forces of the enemy” as an unprivileged enemy belligerent. Second, like the *Quirin* saboteurs and unlike Milligan, Murphy conspired to commit and actually committed “hostile and warlike” acts in civilian dress in violation of the law of war during an armed conflict.¹⁹⁷ Third, like the *Quirin* saboteurs and unlike Milligan, Murphy was an “enemy” both in fact and in law. In short, like the *Quirin* saboteurs and unlike Milligan, Murphy was unquestionably an unprivileged enemy

the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.”); *see generally* WINTHROP MILITARY LAW AND PRECEDENTS, *supra* note 37, at 818 (reprint of 1896 edition) (describing Chief Justice Chase’s explication as “the first complete judicial definition of the subject”).

¹⁹⁶ Compare U.S. DEP’T OF THE ARMY, MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1949, at ¶ 2 (1948) (recognizing four kinds of military jurisdiction: (1) military law, (2) martial law, (3) military government, and (4) law-of-war), with U.S. WAR DEP’T, A MANUAL FOR COURTS-MARTIAL, U. S. ARMY ¶ 2 (1936) (recognizing three kinds of military jurisdiction: (1) military law, (2) martial law, and (3) military government).

¹⁹⁷ See *Ex parte Quirin*, 317 U.S. at 36–37 (“As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents.”).

belligerent who was subject to trial by law-of-war military commission, even though the Federal courts were “open and their process unobstructed.”

In sum, Justice Miller faithfully applied *Milligan’s* “open court” rule but failed to inquire into the belligerent status of the defendant, which the *Milligan* Court itself (and, later, the *Quirin* Court) deemed critical.¹⁹⁸ Had Justice Miller undertaken this searching factual inquiry, he would have recognized the clear factual differences between Lambdin P. Milligan and William Murphy; specifically, that Milligan, “not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war,” while Murphy was unquestionably an unprivileged enemy belligerent who was subject to the law of war. Further, if Murphy’s law-of-war military commission trial is examined in light of *Quirin’s* holding, it is even more evident that the Murphy trial was lawful because it is factually similar in all material respects to *Quirin*. In brief, Colonel Winthrop described in 1880 what “our own military authorities” had known since at least the beginning of the Civil War and what *Quirin* made plain in 1942: law-of-war military jurisdiction exists to try violations of the law of war in locations where martial law does not prevail and where military government does not exist, irrespective of whether the Federal courts are “open and their process unobstructed.”¹⁹⁹

¹⁹⁸ Bickers, *supra* note 13, at 911–12 (“In *Quirin*, where the military commissions were held in Washington, D.C. by a functioning federal government, the Court found this fact irrelevant. The only way to explain this odd dichotomy is to recognize that the *Milligan* military commission was fundamentally different from the *Quirin* military commission. The former was an outgrowth of an unjustified, and hence unlawful, imposition of martial law. The latter was a law of war commission: it was designed, like the Hunter Commission, to determine whether an accused individual was guilty of violating the law of war.”).

¹⁹⁹ See, e.g., U.S. DEP’T OF DEFENSE, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 2 (1951) (“The first subparagraph restates the classic instances of the exercise of military jurisdiction enumerated by Chief Justice Chase in his dissenting opinion in *Ex parte Milligan*, 4 Wall 2; 18 L Ed 281, 287. To the three examples enumerated in that case; namely, military government, martial law, and military law, there has been added in the text a fourth category—the exercise of military jurisdiction by a government with respect to offenses against the law of war. This does not fall under any of the categories enumerated by Chief Justice Chase although it has existed as an exercise of military jurisdiction for years. For instance, Captain Wirtz, the Confederate Commandant of Andersonville Prison was tried and hanged for war crimes committed against Union prisoners of war. See also the modern cases, *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1, and the various war crimes cases which were not incidents of military government, martial law, or military law proper.”) (emphasis in original).

Colonel Winthrop repeatedly cited the principle of law derived from the law-of-war military commission trial of William Murphy; namely, that conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” is, itself, a violation of the law of war triable by law-of-war military commission. Colonel Winthrop duly noted, but simply disagreed with, Justice Miller’s application of *Milligan’s* “open court” rule, which, contrary to *Milligan* itself, did not take into account the defendant’s belligerent status. Therefore, the principle of law that conspiracy is triable by pure law-of-war military commission—a principle that *In re Murphy* did not address and which Colonel Winthrop and other law-of-war commentators have uniformly supported—is a “plain and unambiguous” precedent.

V. Conclusion

The Civil War-era and World War II-era precedents of trials for conspiracy to violate the law of war before law-of-war military commissions documented above are “plain and unambiguous.”²⁰⁰ For example, both the William Murphy and William Curtis Colepaugh/Erich Gimpel records of trial by law-of-war military commission that tried the offense of conspiracy were reviewed and held to be lawful by the U.S. Army’s highest legal adviser on the law of war—the Judge Advocate General—and were personally passed upon and approved by the President of the United States, acting in his capacity as constitutional Commander-in-Chief of the Army. Moreover, Colonel William Winthrop also personally held in his 1880 and 1895 JAG Digests, and his 1886 and 1896 treatises on military law and precedents, that conspiracy was a violation of the law of war triable by law-of-war military commission. Colonel Winthrop’s opinion was subsequently and consistently adhered to by the U.S. Army in the 1901 and 1912 JAG Digests, and in actual U.S. Army practice during the Philippine Insurrection, World War II, and the Korean War. Significantly, the U.S. Army maintained this opinion through July 1956—after the International Military Tribunal at Nuremberg, the Nuremberg Military Tribunals, and the International Military Tribunal for the Far East at Tokyo issued their rulings—in its Field Manual governing *The Law of Land Warfare*, which, prior

²⁰⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (plurality opinion).

to *Hamdan*, had never been challenged by any of the three coordinated branches of government.²⁰¹

Put simply, based on the historical evidence detailed herein, “conspiracy to violate the laws of war” is, and has been since the Civil War, a violation of the law of war that has traditionally been triable by law-of-war military commission under the American common law of war. It would appear, then, that based on these domestic precedents, there is “a substantial showing” that “conspiracy to violate the laws of war” is a violation of the law of war that has historically been tried by military commission, thus satisfying the *Hamdan* plurality’s test for lawfulness.²⁰² Therefore, it would seem that Petitioner Al Bahlul’s contention that “[t]here is an extensive and unanimous history of rejecting conspiracy to commit war crimes”—which is based squarely on the reasoning of the *Hamdan* plurality—is, itself, historically incorrect.

²⁰¹ See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (noting that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on ‘executive Power’ vested in the President”).

²⁰² See *Hamdan*, 548 U.S. at 611 (plurality opinion).

