Accepting Sosa's Invitation: Did Congress Expand the Subject Matter Jurisdiction of the ATS in the Military Commissions Act?

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ACCEPTING SOSA’S INVITATION: DID CONGRESS EXPAND THE SUBJECT MATTER JURISDICTION OF THE ATS IN THE MILITARY COMMISSIONS ACT?

Samuel T. Morison*

The Alien Tort Statute (ATS) provides a federal forum for aliens to seek tort damages for certain violations of customary international law, including war crimes. In Sosa, the Supreme Court admonished the lower courts to exercise caution when creating new causes of action under the ATS, but this is entirely a matter of respecting the separation of powers. If Congress enacts a statute that “occupies the field,” the Court observed, then a judge’s task is to faithfully enforce the norms delineated in the statute. To date, the Military Commissions Act (MCA) has been almost completely ignored in human rights litigation under the ATS, perhaps because it does not, in terms, provide for civil remedies. But this overlooks the fact that the MCA is not an ordinary domestic criminal statute with a long-arm provision. Instead, the statute purports to “occupy the field” of war crimes, at least for U.S. domestic purposes. Perhaps most importantly, the MCA penalizes terrorism, broadly construed, providing material support for terrorism and conspiracy as war crimes, when committed by private, non-state actors in the context of and associated with an armed conflict. If this is a valid exercise of Congress’s prescriptive authority to define and punish violations against the law of nations, it follows that such norms should be actionable in ATS litigation. Accordingly, if the constitutionality of the MCA is ultimately affirmed by the Supreme Court, the decision will come with a previously unacknowledged systemic cost, namely a sharp increase in the scope of ATS liability.

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INTRODUCTION

The law of unintended consequences has been usefully defined as “what happens when a simple system tries to regulate a complex system.”¹ This occurs, not infrequently, when legislators, who operate “with limited information, … short time horizons, low feedback, and poor and misaligned incentives,” attempt to regulate a complex, evolving social system.²

Sociologist Robert Merton is apparently credited with coining the phrase, though certainly not the concept which it describes. In addition to simple ignorance and error, Merton attributed the phenomenon largely to the “imperious immediacy of interest,” by which he meant those “instances where the actor’s paramount concern with the foreseen immediate consequences excludes the consideration of further or other consequences of the same act.”³

The subject of this article is a rather dramatic example of the presumably unintended consequences of Congress’s zeal to institutionalize the practice of subjecting foreign nationals accused of terrorism-related offenses to trial by military commission for alleged “war crimes,” rather than the prosaic but time-tested method of referring them for prosecution in an Article III court or a court-martial.⁴ In 2006, in order to ease the transition to this new permanent wartime framework, Congress enacted the Military Commissions Act (MCA),⁵ which for the first time in American history purported to codify the entire corpus of criminal violations against the laws and customs of war.

While most of the offenses codified in the MCA are not controversial, several appear to lack any grounding in the customary law of war, including terrorism, broadly defined, and providing material support for terrorism.⁶ Importantly, the MCA also criminalizes the inchoate offenses of conspiring with or soliciting another person to commit any of the substantive offenses delineated therein.⁷ In this way, the MCA substantially lowers the obstacles for penalizing non-state actors as war criminals, which previously had been confined within relatively narrow but well-established boundaries.

While it is perhaps emotionally satisfying to brand a terrorism suspect an “alien enemy,” rather than merely a “criminal defendant,” if the Supreme Court ultimately upholds the constitutionality of the MCA as it stands, the decision will come with a considerable systemic cost. This result follows for a remarkably simple reason, which seems to have largely escaped notice in the complex debate concerning the domestic status of customary international law.

² Id.
⁴ See Peter Finn & Anne E. Kornblut, Obama Criticizes Curbs on Trying Guantanamo Detainees in U.S., WASH. POST (Jan. 8, 2011) (“There are 173 detainees remaining at the prison at Guantanamo Bay, Cuba. The administration’s efforts to close the military facility have been repeatedly stymied by bipartisan opposition to its plans to move some detainees to the United States for trial and house others in indefinite detention at a new facility.”).
⁷ Id. at §§ 950t(29), (30).
Under the Alien Tort Statute (ATS), the federal district courts “have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” In its landmark decision in *Sosa v. Alvarez-Machain*, the Supreme Court authorized the district courts to entertain a limited category of federal common law causes of action under the ATS, provided the norm in question satisfies a demanding test of specificity and widespread acceptance in the amorphous body of rules that emerges from the common norms of state practice and *opinio juris*.

Scholars and litigants have assumed, reasonably enough, that the lower courts will be constrained to hew closely to *Sosa*’s guidance when asked to recognize novel claims in human rights litigation under the ATS. But this overlooks the fact that these constraints only apply to the judicial creation of federal common law tort remedies in the absence of legislative guidance. Unless a rule of decision is grounded in a constitutional imperative, however, it is axiomatic that Congress retains the authority to change virtually any rule of federal common law. When Congress codifies a tort remedy for violations of an international norm, as it did in the Torture Victim Protection Act, the court’s interpretive task devolves into a straightforward exercise in the construction of the statutory terms. Similarly, when Congress expressly incorporates the substantive content of international crimes into the federal code, as it did with respect to grave breaches of the Geneva Conventions and genocide, then it has arguably “defined” those particular norms for ATS purposes, even though those statutes do not in terms provide for a civil cause of action.

The article proceeds as follows. Part I sets the stage by establishing that *Sosa*’s rationale is premised entirely on the assumption that the ATS evinces a settled congressional intention to empower the district courts to create common law tort remedies for violations of certain international norms, which are incorporated by reference into domestic law. This suggests that the concerns about judicial overreaching are misplaced when Congress defines the relevant norms by statute. In either case, *Sosa* presumes that Congress has the last word, provided it acts within the scope of its constitutional authority. In addition, *Sosa* presumes that customary international law is a unified body of normative principles. As such, the proper standard for determining the substantive content of customary international law is the same, regardless of the remedy being sought in a particular legal proceeding. If this is correct, it suggests that the *Sosa* standard controls the construction of criminal statutes that likewise incorporate by reference customary international norms into domestic law.

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10 *Id.* at 731 (“Congress … may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”).
11 *Id.* at 728, 731. Although it is beyond the scope of this essay, while Congress has defined the applicable international norms relating to torture and extrajudicial killing in the TVPA, it does not follow that the TVPA has implicitly repealed the ATS with respect to such claims. On the contrary, *Sosa* suggests that Congress intended the TVPA to supplement rather than preempt the ATS. See Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U.PA.L.REV. 1383 (2008).
Part II turns to the legal status of piracy, which formed a significant part of the Court’s docket in the early decades of the nineteenth century. At first blush, the relevance of these cases might seem to be little more than a matter of antiquarian interest, but the Court’s piracy jurisprudence is actually central to our inquiry for at least two reasons. First, *Sosa* treats piracy as the paradigmatic example of a customary international norm that possesses the requisite clarity and acceptance in state practice to ground the assertion of subject matter jurisdiction under the ATS. As such, any contemporary international offense that rises to this level will necessarily satisfy *Sosa*’s demanding test.

In addition to serving as an exemplar for an actionable violation of international law, the piracy cases are relevant because, unlike *Sosa*, they directly address the vexing question of the constitutional limits on Congress’s prescriptive authority to “define and punish ... Offences against the Law of Nations.”13 As we’ll see, when Congress seeks to codify international norms and then regulate the conduct of persons having no nexus to the United States, the existing body of customary international law serves as an objective constraint on Congress’s prescriptive authority. Although this case law has been examined elsewhere, previous accounts have failed to address the import of the law of war, which is lurking in the background of the Court’s analysis. The upshot is that Congress is no more permitted to unilaterally alter the law of war than any other branch of customary international law pursuant to its define and punish authority.

Finally, Parts III and IV turn directly to the codification of the *jus in bello*, the branch of customary international law that governs the conduct of participants in an armed conflict. Taken together, these sections establish that for most of American history, Congress wisely made no effort to prescribe in fine detail the content of the law of war. Instead, it allowed the law to develop in a common law fashion under the supervision of the military justice establishment that was primarily responsible for enforcing it. Indeed, the methodological template for the adjudication of war crimes under domestic military law had been the ATS and the federal piracy statute.

As noted above, this traditional practice came to an abrupt end in 2006, when Congress passed the MCA in response to the Supreme Court’s decision in *Hamdan*, which invalidated the first post-9/11 iteration of military commissions designed to try aliens accused of terrorism-related offenses. In contrast, the MCA occupies the field by codifying the entire corpus of war crimes for purposes of American military practice. Accordingly, if the MCA is uncritically accepted as a valid exercise of Congress’s prescriptive authority under the Define and Punish Clause, the logic of *Sosa* teaches that non-state actors, including corporations, may be held directly liable under the ATS for violating the norms delineated in the MCA, including providing, or conspiring to provide, material support for terrorism.14

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13 U.S. CONST., art. I, § 8, cl. 10.
14 There is, of course, a circuit split on the question of corporate liability under the ATS, and the issue is currently pending before the Supreme Court. See *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 2011 WL 4905479 (U.S. Oct. 17, 2011) (No. 10-1491).
I. THE SOSA STANDARD

A. Judicial Discretion in the Shadow of Congressional Oversight

The status of customary international law as a species of federal common law remains a hotly contested issue in the legal academy. In the wake of Sosa, commentators have been equally divided on the import of the decision, with each camp arguing that the Court definitively resolved the debate in its favor. Yet, it seems to me that neither position is quite right. Sosa arguably elides the issue altogether, because the relevant question, as the Court saw it, was not whether customary international law is self-executing federal common law. Rather, it was the proper construction of a statute conferring subject matter jurisdiction on district courts for the express purpose of establishing a forum in which non-citizens may assert violations of extant international-law-based norms “with a potential for personal liability.”

To be sure, the task of identifying the substantive norms that underwrite such claims is a separate and potentially difficult exercise. But in no event does a court adjudicating an ATS claim act without legislative sanction, since Congress made a deliberate policy choice to incorporate by reference customary international law, with all its attendant complexities, as the source of the applicable rules of decision. In the absence of the ATS, the law of nations presumably would not of its own force authorize the federal courts to fashion common law tort remedies for violations of any such norms. Given the passage of the ATS, however, the entire corpus of norms opaquely identified in the statute, whatever they happen to be at a particular time, are grist for the judicial mill. Finally, the fact that relatively few norms rise to this level


17 Sosa, 542 U.S. at 724.

18 See Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011) (“The determination of what offenses violate customary international law … is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas … [that are] widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that [it] … is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source.”).

19 See Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir.1995) (“The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations”); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (“[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.”).

20 See United States v. Hasan, 747 F.Supp.2d 599, 632 (E.D. Va. 2010) (“[W]hen Congress enacts a statute that expressly incorporates customary international law into the domestic law of the United States, the federal courts are required, as with any other constitutional congressional mandate, to follow the statutory language adopted by Congress and apply customary international law.”).
is not the product of a preference for judicial restraint for its own sake, but rather an acknowledgment that international law has generated only a modest set of universally binding norms the violation of which create private rights or impose private duties, as opposed to rules governing relations between nation-states.21

This reading of Sosa is consistent with the political context that prompted the passage of the ATS. During the Confederation period, the Continental Congress was confronted with an intractable problem regarding the fledgling nation’s obligations under international law, namely an inability to effectively control the decisions of state governments on matters with the potential to embroil the United States in international disputes.22 The Articles of Confederation had authorized Congress to establish courts “for the trial of piracies and felonies committed on the high seas” and “for receiving and determining finally appeals in all cases of captures.”23 These provisions gave the central government the ability to exercise a measure of control over cases arising under admiralty and maritime jurisdiction.24 As a creature of delegated powers, however, it had no inherent authority to provide for private damage remedies to redress violations of the law of nations, despite the fact that “a mixed approach to international law violations, encompassing both criminal prosecution … and compensation to those injured through a civil suit, would have been familiar to the founding generation.”25 In an effort to address the problem, the Continental Congress could do little more than pass a resolution that “implored the States to vindicate rights under the law of nations” by asking that they “provide expeditious, exemplary

21 Sosa, 542 U.S. at 720.
22 A principal argument in favor of the new Constitution was the need to provide for uniformity in the conduct of foreign affairs. See Federalist No. 42, at 212 (James Madison) (Gary Wills ed., 1982) (“The power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs with equal propriety to the general government, and is a still greater improvement on the articles of Confederation. … These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations.”).
23 Articles of Confederation, art. 9, § 1, 1 Stat. 6 (1778). The Continental Congress delegated the trial of maritime cases to the state courts, while retaining the appellate function. See William R. Casto, The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates, 37 AM. J. LEGAL HIST. 117, 128 n.59 (1993).
24 In 1780, Congress ended the practice of hearing prize appeals by special committee and established the Court of Appeals in Cases of Capture, which was the institutional predecessor to the U.S. Supreme Court. Staffed by congressionally appointed judges rather than legislators, the court eventually decided more than 60 appeals from state admiralty courts, thereby exercising federal supervision over this branch of international law. See Henry J. Bourguignon, Incorporation of the Law of Nations During the American Revolution – The Case of the San Antonio, 71 AM. J. INT’L L. 270, 275 (1977). In 1792, the Second Congress stipulated that “all the records and proceedings” of the court “shall have like faith and credit” with those of the Supreme Court. Act of May 8, 1792, ch. 36, § 12, 1 Stat. 279; see also United States v. Peters, 9 U.S. 115, 116 (1809) (enforcing a judgment of the “court of appeals in prize causes, erected by the continental congress”). Interestingly, the court held that where the law of nations supplied the rule of decision, Congress lacked the authority to unilaterally alter the law and then impose it on foreign nationals having no nexus to the United States. See Miller v. The Ship Resolution, 2 U.S. 1, 3 (Fed. App.), rev’d in part on other grounds, 2 U.S. 19 (Fed. App. 1781) (interpreting an ordinance of the Continental Congress altering settled prize law to apply only to citizens and residents of the United States, because “[t]he municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation; and by the law of nations a neutral subject, whose property has been illegally captured, may pursue and recover that property in whatever country it is found, unless a competent jurisdiction has adjudged it prize. The municipal laws of a country can only bind its own subjects.”). Congress’s decision to reaffirm the court’s jurisprudence shortly after the passage of the Constitution arguably informs the original meaning of the Define and Punish Clause.
25 Sosa, 542 U.S. at 724.
and adequate punishment” for such infractions and “authorize suits … for damages by the party injured.”

Connecticut appears to have been the only state to respond favorably to Congress’s entreaties, and the Framers were forced to resolve the impasse by granting in the Constitution the authority that Congress had been denied under Articles of Confederation. The First Congress wasted no time exercising its new constitutional powers. As William Casto observes, “[t]he resulting Judiciary Act coupled with the first federal criminal code virtually duplicated the measures originally recommended in the earlier Continental Congress resolve.” While the original federal criminal code did include specific statutory prohibitions of piracy, various affronts to ambassadors and other public ministers, and violations of safe conduct, Congress felt it was unnecessary (and perhaps unwise) to attempt a complete enumeration of violations against the law of nations.

Instead, the First Congress adopted a legislative strategy of incorporation by reference. The Judiciary Act of 1789 vested the federal courts with plenary jurisdiction over any civil action in which an alien was a party, including, among others, torts committed in violation of the law of nations. Similarly, the Act vested the federal trial courts with plenary jurisdiction over “all crimes and offenses cognizable under the authority of the United States.” At the time, these jurisdictional grants were widely construed to mean that the law of nations was available to supply the substantive rule of decision in an appropriate case, even if the offense had not previously been defined by statute, provided there was an otherwise valid constitutional basis for the court’s assertion of jurisdiction.

Given this historical background, the Sosa Court was justified in concluding that, although the ATS “is in terms only jurisdictional,” the First Congress did not intend it to be a toothless “convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to

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26 Id. at 716.
29 See Robert C. Palmer, The Federal Common Law of Crime, 4 L. & Hist. Rev. 267, 275-76 (1986) (arguing that given the legislative burden on the First Congress, “[d]efining all offenses against the law of nations would have been imprudent. … While the definition of piracy was not onerous, a definition of all offenses against the law of nations would have been very time-consuming.”).
31 Id. at §§ 9, 11.
32 Palmer, supra note 29, at 276, 278 (“Allowing the judiciary to punish offenses against the law of nations without prior congressional definition was congruent with constitutional original intent. … Federal jurisdiction over piracy and the law of nations was the least contentious jurisdiction of the inferior federal courts.”); Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L. J. 229, 242 (1990) (“In American law, the view persisted until surprisingly late, that acts against the law of nations and common crimes on the high seas could be punished even without specific Congressional enactment.”).
have a practical effect.” Rather, the Court construed the statute “as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”

In terms of the substantive reach of the statute, the Court assumed that its authors did not have “any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” More importantly, however, the majority found no persuasive reason to believe that Congress expected the scope of the statute to be impervious to future developments in customary international law, even if the creation of a private damages remedy is now conceptualized as an exercise in post-<em>Erie</em> judicial lawmaking. Indeed, the most controversial use of the ATS as a vehicle for rectifying human rights abuses by non-state actors has yet to provoke a negative reaction by Congress, which “has not in any relevant way amended § 1350 or limited civil common law power by another statute.” It is true that the “modern ... congressional understanding of the judicial role” does not give federal courts a license to “seek out and define new and debatable violations of the law of nations” in the absence of “legislative guidance.” And this concern is heightened where “the possible collateral consequences of making international rules privately actionable” poses a risk “of adverse foreign policy consequences,” which is the quintessential domain of the political branches.

Nevertheless, the Court concluded that the federal courts retain the discretion to fashion civil tort remedies for violations of “the present-day law of nations” which may have been unknown to the First Congress, provided the norm in question is “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” contemporary with enactment of the statute. This remains a constitutionally proper exercise of judicial power precisely because it occurs in the shadow of congressional oversight. If Congress

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33 Sosa, 542 U.S. at 712, 719; id. at 714 (rejecting the assertion that “the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action.”); id. at 719 (“There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.”); id. at 724 (“Congress did not intend the ATS to sit on the self until some future time when it might enact further legislation.”).

34 Id. at 724; id. at 720 (“Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”); id. at 721 (“[T]he ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations”); id. at 730 (“The First Congress ... assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction.”); id. at 731 n.19 (“Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining common law claims derived from the law of nations.”).

35 Id. at 724. In fact, the Court added a little noticed fourth category, “individual actions arising out of prize captures,” which were likewise governed by the law of nations. Id. at 720.

36 Id. at 730 (“We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international law norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”); id. at 732 (ATS claims “must be gauged against the current state of international law.”).

37 Id. at 725; id. at 731 (“Nothing Congress has done is a reason for us to shut the door to the law of nations entirely.”).

38 Id. at 728, 726.

39 Id. at 727-28.

40 Id. at 725, 731; id. at 732 (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory”).
does not approve of the results, the Court reasoned, it “may ... at any time (explicitly, or implicitly by treaties or statutes that occupy the field) ... modify or cancel any judicial decision [to create a cause of action] so far as it rests on recognizing an international norm as such.”

This approach is consistent with the original purpose of Congress’s authority to define violations of the law of nations, which was conceived as “the power to adjust, a power properly exercised only occasionally and not always in advance of judicial action. ... Congress could define in its own way ... if it felt the courts going awry.”

Accordingly, while the Court presumes the need for judicial restraint in importing international norms into domestic law, this admonition only applies in the absence of explicit statutory authorization or guidance. When Congress acts within its legislative competence to define the relevant norms, Sosa takes for granted that the courts are bound by that determination. In the absence of such legislation, the ATS authorizes the courts to derive the relevant norm by reference to the standard menu of sources comprising customary international law. In that event, Sosa instructs the courts to proceed cautiously, consistent with the modern understanding of the limited discretion of the federal judiciary to fashion common law tort remedies, coupled with the potential collateral consequences of regulating the behavior of foreign nationals occurring outside the United States. But the judicial resort to secondary sources to determine the content of customary international law is neither necessary nor appropriate if Congress has defined the relevant norm in a municipal statute, as it did in the War Crimes Act.

B. War Crimes Litigation Under the ATS

The second salient principle endorsed by Sosa’s analysis is the unity of customary international law as a body of substantive norms, regardless of the remedy being sought in a particular legal proceeding. In particular, the Court was careful to note that each of the Blackstonian trinity of offenses within section 1350’s original jurisdictional grant was also the subject of a parallel criminal statute expressly incorporating those norms into the Crimes Act. Although the latter statutory provisions were designed to punish the offender rather than compensate his victim, their substantive content was derived from the same body of customary norms as those made civilly actionable under the ATS. And when the Court needed an exemplar of the proper methodology for determining the content of the law of nations, it freely relied on a

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41 Id. at 731.
42 Palmer, supra note 29, at 277.
43 Sosa, 542 U.S. at 734.
44 See Sarei v. Rio Tinto, PLC, 2011 WL 5041927, at *23 (9th Cir. 2011) (en banc) (“By ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes. Moreover, through enactment of [the War Crimes Act], Congress has incorporated this precise definition into the federal criminal law.”); Al-Quraishi v. Nakhla, 728 F.Supp.2d 702, 745 (D. Md. 2010), rev’d on other grounds, 657 F.3d 201 (4th Cir. 2011) (holding that although the War Crimes Act “does not in and of itself create a private civil cause of action,” the substance of the law is “appropriately viewed as reflecting the law of nations,” since “Congress enacted the law in order to comply with certain obligations of the Geneva Conventions.”); In re Xe Servs. Alien Tort Litigation, 665 F.Supp.2d 569, 583 (E.D. Va. 2009) (holding that for purposes of the ATS, “Congress has directly and explicitly stated [in the War Crimes Act] that the Geneva Conventions contain the binding international norms that govern the definition of war crimes in federal courts.”).
45 Sosa, 542 U.S. at 719.
prosecution for the international crime of piracy.\textsuperscript{46} Indeed, as recently as 2011, the federal government cited \textit{Sosa} as controlling the proper construction of the federal piracy statute. “Although \textit{Sosa} did not involve a criminal statute,” the government maintained, “the Supreme Court has followed the same methodology in the context of violations of the law of war, which is part of the law of nations.”\textsuperscript{47}

The rationale of \textit{Sosa} thus supports the proposition that the essential purpose of the ATS is to provide a federal forum in which non-citizens may seek compensatory damages for serious violations of international criminal law.\textsuperscript{48} Not surprisingly, then, it is settled that traditional war crimes, which (like piracy) “have fairly precise definitions and ... have achieved universal condemnation,”\textsuperscript{49} enjoy the sort of clarity and acceptance in state practice necessary to create ATS jurisdiction under the standard articulated in \textit{Sosa} and its antecedents. As the Ninth Circuit recently observed, liability for war crimes “form[s] the least controversial core of modern day [ATS] jurisdiction.”\textsuperscript{50}

In this regard, the seminal case on the international status of terrorism remains \textit{Tel-Oren}, in which the D.C. Circuit rejected claims that members of the Palestinian Liberation Organization could be held liable under the ATS for violating “customary principles of international law” for engaging in violent terrorist acts, because this is “an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East.”\textsuperscript{51} Although “[s]ome aspects of terrorism have been the subject of several international conventions,” the court found that “no consensus has developed on how properly to define ‘terrorism’ generally.”\textsuperscript{52} As a result, “[i]nternational law and the rules of warfare as they now

\textsuperscript{46} \textit{Id.} at 732, \textit{citing} United States v. Smith, 18 U.S. 153, 163-80 (1820); \textit{see also} In re South African Apartheid Litigation, 617 F.Supp.2d 228, 263 (S.D.N.Y. 2009) (“[T]he Supreme Court recently stated ... that the law of war provides liability only for conspiracy to commit genocide and common plan to wage aggressive war. .... \textit{Sosa} requires that this Court recognize only forms of liability that have been universally accepted by the community of developed nations. Conspiracy does not meet this standard.”).


\textsuperscript{48} \textit{See} Sosa, 542 U.S. at 762-63 (Breyer, J., concurring) (“[T]he criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself.”); Doe v. Exxon Mobile Corp., 654 F.3d 11, 32 n.17 (D.C. Cir. 2011) (“Crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts: the crime of theft is the tort of conversion; the crime of assault is the tort of battery ... [I]n a much earlier era of Anglo-American law, ... criminal and tort proceedings were not clearly distinguished.”); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 270 n.5 (2d Cir. 2007) (holding that in ATS litigation, “reliance on criminal law norms seems entirely appropriate given that ... international law does not maintain [a] kind of hermetic seal between criminal and civil law.”).

\textsuperscript{49} United States v. Yousef, 327 F.3d 56, 106 (2d Cir. 2003).

\textsuperscript{50} Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007), \textit{rev’d in part en banc on other grounds}, 550 F.3d 822 (9th Cir. 2008); \textit{see also} Sosa, 542 U.S. at 762 (Breyer, J., concurring) (observing that the ATS confers jurisdiction over claims of “torture, genocide, crimes against humanity, and war crimes.”); Sarei, 2011 WL 5041927, at *23 (holding that war crimes are “sufficiently specific, obligatory, and universal to give rise to a cause of action under the ATS.”); Kiobel, 621 F.3d at 120 (holding that “because customary international law imposes individual liability for ... war crimes ... we have held that the ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes.”); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (holding that private actors, including corporations, may be liable under the ATS for war crimes).

\textsuperscript{51} \textit{Tel-Oren}, 726 F.2d at 806 (Bork, J., concurring).

\textsuperscript{52} \textit{Id.} at 806-07.
exist are inadequate to cope with this new mode of conflict.”

While the court’s reasoning was famously fractured, on this point it was unanimous. In June 2011, the D.C. Circuit reaffirmed the central holding of Tel-Oren under the standard articulated in Sosa, because “it remains the case that appellants have shown us no such consensus” in customary international law.

Not surprisingly, given the continuing disagreement over the status of terrorism, claims for providing material assistance to terrorists likewise have been repeatedly rejected in ATS litigation, at least in the absence of evidence that a defendant acted with a mens rea of purposefully, not merely knowingly, facilitating a specific violation of the law of nations. In particular, “[w]hen a business engages in a commercial quid pro quo – for example, by making a loan to a third party – it is insufficient to show merely that the business person knows that the transaction will somehow facilitate the third party’s wrongful acts. … Rather, the business person must participate more fully in the wrongful acts,” either by “personally participat[ing]” in carrying them to fruition, or by gratuitously “acting in a non-commercial, non-mutually-beneficial manner.” In this context, “providing material support” is construed as a mode of

53 Id. at 807.

54 See id. at 795-96 (Edwards, J., concurring) (arguing that terrorism is not a violation of international law “no matter how repugnant it might be to our own legal system,” because “the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus”); id. at 823-24 (Robb, J., concurring) (arguing that the matter is nonjusticiable due to the indeterminacy of “the international status of terrorist acts.”).

55 Ali Shafi v. Palestinian Authority, 642 F.3d 1088, 1096 (D.C. Cir. 2011); see also Yousef, 327 F.3d at 106-08 (“We regretfully are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase ‘state-sponsored terrorism’ proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. … We thus conclude … that terrorism – unlike piracy, war crimes, and crimes against humanity – does not provide a basis for universal jurisdiction.”); Kiobel, 621 F.3d at 178 n.34 (“[T]he act of placing a bomb on an airplane operated by a foreign carrier [does] not support the exercise of universal criminal jurisdiction, because the nations of the world disagree over which forms of conduct constitute ‘terrorism.’”); In re Chiquita Brands Int’l, Inc., 2011 WL 2163973, at *15 (S.D. Fla. June 3, 2011) (“A claim for terrorism in general, or material support thereof, is not based on a sufficiently accepted, established, or defined norm of customary international law to constitute a violation of the law of nations.”); Mwani v. Bin Laden, 2006 WL 3422208, at *3 n.2 (D.D.C. Sept. 28, 2006) (“The law is seemingly unsettled with respect to defining terrorism as a violation of the law of nations.”).

56 See Aziza v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011) (“[F]or liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation”); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (“[T]he mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.”); see also Sarei, 2011 WL 5041927, at *25 (“[P]urposive action in furtherance of a war crime constitutes aiding and abetting that crime,” while reserving judgment “as to whether … allegations of knowledge but not purpose in aiding or abetting the commission of war crimes would also be cognizable under Sosa.”).

57 Doe v. Nestle, S.A., 748 F.Supp.2d 1057, 1094-95 (C.D. Cal. 2010); see also In re Terrorists Attacks on September 11, 2001, 740 F.Supp.2d 494, 518 (S.D.N.Y. 2010) (“[T]o state a claim for violation of international law under the ATS, [the complaint must allege] that the defendant purposefully aided and abetted, conspired with, or materially supported al Qaeda in … the hijacking of a commercial airplane. … A bank cannot be held liable for the injuries sustained by an act of terrorism simply because the monies that funded the violent act passed through the bank itself.”); In re Terrorist Attacks on September 11, 2001, 718 F.Supp.2d 456, 494 (S.D.N.Y. 2010) (although bank “knew that the material support it provided to al Qaeda, in the form of banking and financial services, would aid … in the commission of a terrorist attack … the pleadings fail[ed] to demonstrate that [the bank] purposefully aided and abetted, or conspired with others to hijack an aircraft.”); Barboza v. Drummond Co., No. 06-61527, Slip op., DE 39, at *22 (S.D. Fla. July 17, 2007) (“Allegations of [financial] support for terrorism not based on specific conduct which violates international law” is insufficient to state a claim under the ATS); Saperstein v. Palestinian Authority, 2006 WL 3804718, at *7 (S.D. Fla. Dec. 22, 2006) (same); Stutts v. De Dietrich Group, 2006 WL
participation in underlying conduct that otherwise violates a universally recognized international norm, rather than a stand-alone substantive offense.\textsuperscript{58}

II. THE LAW OF PIRACY AND THE LIMITS OF CONGRESS’S PRESCRIPTIVE AUTHORITY

The Sosa Court had no occasion to consider the contours of Congress’s authority under the Define and Punish Clause, because its statutory analysis assumes that the ATS does nothing more than incorporate by reference widely recognized international norms into domestic law. In principle, the judicial enforcement of such rules merely sanctions conduct that is already considered to be an internationally cognizable offense, and thus does not risk imposing idiosyncratic domestic standards on foreign nationals having no nexus to the United States.\textsuperscript{59}

Yet, in view of the “anxieties” that prompted its inclusion in the Constitution, the Define and Punish Clause cannot have been understood to confer on Congress plenary power to unilaterally impose globally binding rules of conduct where the United States “has no links of territoriality or nationality with the offender or victim.”\textsuperscript{60} As the Attorney General observed in

\textsuperscript{58}To be sure, the D.C. Circuit recently held that the standard for aiding and abetting liability under the ATS is knowledge, rather than purpose. Exxon Mobile, 654 F.3d at 32–39. Even so, the defendant must act with knowledge that he was providing “practical assistance” that “substantially contributes” to a specific violation of customary international law, as distinguished from engaging in ordinary commercial transactions with an illegal enterprise, such as “routine banking” services or the “sale of commodities.” Id. at 34, 39 n.26; see also Nestle, 748 F.Supp.2d at 1083 (“[T]o the extent that a ‘knowledge’ mens rea standard applies … [the defendant must know] that the acts performed assist the commission of the specific crime of the principal perpetrator. … This approach requires that the aider and abettor must know or have reason to know of the relationship between his conduct and the wrongful acts.”).

\textsuperscript{59}This is commonly expressed by saying that violations of customary international law must be matters of mutual, rather than merely several, concern. Hence, the mere fact that auto theft and murder are crimes in every domestic legal system does not mean that they are violations of customary international law. See Cisneros v. Aragon, 485 F.3d 1226, 1231 (10th Cir. 2007); Flores v. S. Peru Copper Corp., 414 F.3d 233, 249 (2d Cir.2003). Conversely, genocide, crimes against humanity, and serious war crimes are in principle wrongful wherever they occur because they implicate the interests of all nations. See Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, Sosa v. Alvarez-Machain, reprinted in 28 HASTINGS INT’L & COMP. L. REV. 99, 116–17 (2004) (“the ATS did not provide for the extraterritorial application of United States law. Instead, it provided jurisdiction to adjudicate disputes under a law that was already binding everywhere in the world – the law of nations.”).

\textsuperscript{60}Restatement (Third) of Foreign Relations Law § 404, cmt. a (1987); see also The Nereide, 13 U.S. 388, 434 (1815) (“Surely the practice of one nation ... ought not to be permitted to control the law of the world.”); The Scotia, 81 U.S. 170, 187 (1872) (“Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of
1865, whereas Congress has largely unfettered discretion "to make" rules for the management of the armed forces, “[t]o define is to give the limits or precise meaning of a word or thing [already] in being ... Congress has the power to define, not to make, the laws of nations.”\footnote{Military Commissions, 11 Op. Att’y Gen. 297, 299 (1865) (original emphasis).} If we attend to the distinction between “making” and “defining,” Congress may well retain a degree of flexibility to “modify on some points of indifference” when it acts to incorporate existing international norms into domestic law,\footnote{Id.; see also Smith, 18 U.S. at 159 (holding that to “define” the offense of piracy means “the express enumeration of all the particulars included in that term.”).} but this sort of discretion hardly amounts to a license to create new offenses out of whole cloth under the guise of providing definitional certainty. In this sense, the existing body of customary international law serves as an objective constraint on Congress’s prescriptive authority when it legislates pursuant to the Define and Punish Clause.

Although the Supreme Court has not definitely resolved the level of deference, if any, owed to Congress’s judgment when it purports to codify customary international law, it is not true that we are working on a blank slate. The text of Article I provides that Congress has the authority to “define” three types of misconduct: “piracies on the high seas,” “felonies on the high seas,” and “offenses against the law of nations.” But since the law of nations constitutes a unified body of substantive norms, and piracy is a discrete subset of the law of nations, then the power to “define” presumably means the same thing in each case. As a matter of both text and logic, if Congress was free to define the substantive content of offenses against the law of nations in its discretion, without regard to the existing state of the law, then, \textit{a fortiori}, it would possess the same discretion with respect to the subset of piracy.\footnote{See Eugene Kontorovich, \textit{Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause}, 106 Nw. U. L. Rev. (forthcoming 2012), at *29, available at \url{http://ssrn.com/abstract=1876038}.} Conversely, if the Define and Punish Clause limits the scope of Congress’s lawmaking authority to existing international norms with respect to piracy, then the same constraint presumably applies when it asserts jurisdiction over violations against the law of nations generally.

\textbf{A. The Ambiguous Legal Status of Piracy}

In the early decades of the Republic, the threat to maritime commerce posed by organized bands of pirates bore more than a passing resemblance to present-day concerns about the transnational reach of non-state terrorist organizations. Although “salt water thieves” were typically motivated by financial gain rather than political or religious ideology, they were no less lethal, “prey[ing] mainly upon unarmed, innocent people. They murdered ruthlessly, indiscriminately and often senselessly and in so doing provoked fear and insecurity throughout their theatres of operation.”\footnote{Donald J. Puchala, \textit{Of Pirates and Terrorists: What Experience and History Teach}, 26 CONTEMP. SEC. POL’y 1, 3 (2005); see also Wedgwood, supra note 32, at 239-40 (“The most feared act at sea was piracy, troubling because of its indiscriminate violence, and its commission far beyond any nation’s effective reach. ... [P]irates ... used violence for private purpose without rules or restriction.”).} Indeed, due to its close association with the lawful practice of privateering,\footnote{A privateer was a privately owned and crewed vessel, acting under a commission (called a letter of marque) issued by a recognized belligerent for the purpose of seizing merchant ships and cargo on the high seas to prevent} piracy occupied an uncertain space in the legal imagination between a species of illegitimate maritime belligerency and an ordinary domestic crime.
This dichotomy was reflected in the Articles of Confederation, which conferred on Congress the exclusive power of “determining on peace and war,” short of an actual or imminent invasion. As such, the states were generally prohibited from actively maintaining vessels of war or issuing letters of marque in the absence of a formal declaration of war by Congress. An exception was made, however, if a particular state should find itself “infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue.” The scourge of piracy was thus considered a sufficiently serious security threat to justify a military response.

On the other hand, Congress’s authority to establish courts “for the trial of piracies and felonies” was limited to those offenses “committed on the high seas,” presumably because the oceans were considered a kind of a tenancy-in-common, beyond the exclusive jurisdictional reach of any nation-state. Since the prospect of a state court in Massachusetts or South Carolina arbitrarily condemning European merchant vessels was fraught with implications for the country’s international obligations, the Articles provided that the United States would speak with one voice in this arena. Yet, as Alfred Rubin points out in his seminal study of the subject, this grant of congressional authority was not “intended to affect the residual powers of the states to denominate as ‘piracy’ whatever they chose within their territorial jurisdiction, and establish courts to try alleged offenders under state law.”

The duel-headed nature of piracy – at once a form of asymmetric warfare governed by the unwritten law of nations and an ordinary crime subject to municipal regulation – made it difficult to neatly categorize in an international legal order built on Westphalian foundations. Both conceptions of piracy uneasily coexisted in this period, with “naval suppression existing side by side with municipal tribunals. The distinctions were presumably worked out in practice depending on where any particular accused ‘pirate’ was taken and by whom, and under what license the taker operated.”

The inherent uncertainty about the proper classification of piracy was reflected in Congress’s initial effort to draft a comprehensive federal penal code. In Section 8 of the Crimes Act of 1790, Congress exercised its define and punish power to impose the death penalty on “any person” who committed robbery “upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state,” which was consistent with the widely accepted definition of the international crime of “general piracy.” However, Section 8 also purported to assert

them from reaching its enemy. The existence of a valid commission, or a good faith reliance on a defective commission, was an affirmative defense to a charge of piracy. Given their status as naval mercenaries, however, privateers were expected to abide by the laws of war. In particular, privateers “could use force only for capture; hostages could not be taken, nor noncombatants slain. A privateer had to discriminate between contraband and permissible cargo, and neutral and belligerent ships, and had to submit captures to the ‘neutral and detached magistracy’ of the prize courts before property could be sold.” Wedgwood, supra note 32, at 239; see also Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation, 45 HARV. INT’L L. J. 183, 210-17 (2004).

66 ARTICLES OF CONFEDERATION, art. 9, § 1, 1 Stat. 6 (1778).
67 Id., art. 6, § 5.
68 Id., art. 9, § 1.
70 Id.
71 Crimes Act, § 8, 1 Stat. 113.
jurisdiction over “any person” who committed a variety of other crimes styled “piracy” but lacking the same internationalist credentials, such as murder on the high seas, “running away” with a ship or merchandise with a value of fifty dollars, shipboard revolt by “any seaman,” and “any other offense” subject to the death penalty “if committed within the body of a county.”72 Moreover, Section 10 of the Act provided that “every person” who undertook to “aid and assist, procure, command, counsel or advise any person” to commit one of the foregoing piratical acts was deemed to be an accessory to the substantive crime and thus subject to the same penalty, without regard to their physical location or citizenship status.73

B. The Jonathan Robbins Affair

Although doubts were soon raised about the breathtaking scope of the federal piracy statute by Justice James Wilson in his charge to a federal grand jury in Virginia,74 the issue became a subject of intense public interest a decade later. The occasion was the celebrated debate in the House of Representatives over the so-called Jonathan Robbins affair, which was a prelude to the bitterly partisan presidential election of 1800.75 In September 1797, the British frigate Hermione was cruising the waters of the West Indies in search of enemy warships under the command of Hugh Pigot, a “[s]adistic, erratic and highly irritable” captain, who had a reputation for flogging his crew “frequently and without mercy.”76 Pushed beyond the breaking point, a number of sailors revolted and brutally murdered Pigot and nine other officers in a frenzy of revenge. The mutineers then sold the ship to the local Spanish governor in Caracas and, “with only the slightest of traces, disappeared into the gaping crevices of the war-torn Atlantic world.”77 The British Admiralty was naturally determined to make an example of the traitorous crew members, and thus “conducted an unparalleled transatlantic manhunt that in the course of nearly a decade resulted in eighteen court martial cases trying a total of thirty-eight men.”78

Several of the fugitives made their way to the United States. In February 1799, one of the ringleaders of the insurrection, a petty officer named Thomas Nash, was discovered in Charleston, South Carolina, serving on the crew of an American merchant ship and, at the request of British authorities, he was placed under arrest. In a habeas action in the local federal district court, Nash spectacularly claimed that he was an American citizen by the name of Jonathan Robbins, who had been pressed into service in the British Navy. However, he was positively identified by a former shipmate who had served with him on the Hermione shortly before the mutiny.79

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72 Id. at 113-14.
73 Id. at 114.
77 Id. at 159.
78 Id. at 160.
79 Id. at 175; see also Wedgwood, supra note 32, at 286-87. As Nash would later concede, the ship’s record book reflected that he was born in Waterford, Ireland, had voluntarily enlisted in the British Navy in 1792 for a
Coupled with testimony that he had drunkenly boasted about his role in the affair, the British government reiterated its demand for Nash’s extradition under the terms of the Jay Treaty. The treaty provided that either country was obliged to “deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek asylum within any of the countries of the other.” The only condition on the right to demand rendition for the enumerated offenses was a requirement that there be sufficient “evidence of criminality ... according to the laws of the place where the fugitive” sought refuge to “justify his apprehension and commitment for trial, if the offense had there been committed.” The district court judge, Thomas Bee, was persuaded that the British government had satisfied this evidentiary threshold.

In the absence of implementing legislation, however, Judge Bee was reluctant to deliver Nash to the tender mercies of the British Admiralty without prior approval from the executive branch. At the urging of the British minister, Secretary of State Pickering advised President Adams that, even if the mutiny had been an act of piracy over which the United States could assert concurrent jurisdiction, “the only legal question was whether an offense committed on board a public ship of war, on the high seas, was committed within the jurisdiction of the party demanding the offender.” Since there was no serious dispute that Great Britain had jurisdiction over the murders, Pickering advised the President to “direct” Judge Bee “to deliver up the offender in question, on the demand of the British government by its minister.”

Although Adams doubted that he could dictate the court’s actions, he agreed with Pickering’s reading of the treaty and therefore had “no objection” if Pickering conveyed to the court his “advice and request” that the application be approved. Judge Bee did not expressly rely on the president’s letter in rendering his decision, but it was “shown to counsel on both sides” and made part of the record, as was the judge’s reply to Pickering that he had dutifully “compl[ied] with the request of the president.” The court thus remanded the prisoner to the custody of a waiting British naval officer, who immediately transferred him to the British military outpost at Port Royal Harbour, Jamaica, where he was hastily convicted by a court-martial, executed, and hung in chains as a warning to other would-be mutineers.

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bounty of three pounds, and had been assigned to the *Hermione* in 1793. United States v. Robins, 27 F. Cas. 825, 840-42 (D.C. S.C. 1799).


81 *Id.*

82 Robins, 27 F. Cas. at 833.

83 *Id.* at 833, 841.

84 *Id.* at 842. A ship on the high seas was considered to be within the jurisdiction of the nation to which it was registered. *See* United States v. Cooper, 25 F. Cas. 631, 641 (C.C.D. Pa. 1800) (“All vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong. This is according to the law of nations.”); *see also* United States v. Rodgers, 150 U.S. 249, 264 (1893); United States v. Flores, 289 U.S. 137, 155-56 (1933).

85 Robins, 27 F. Cas. at 842.

86 *Id.* at 843.

87 *Id.* at 825, 842.

88 *Id.* at 833, 840, 842; *see also* Wedgwood, *supra* note 32, at 303-04; Frykman, *supra* note 76, at 175.
Fueled by the opposition press, Nash’s execution quickly became a national cause célèbre, in which the Republicans relentlessly assailed the president’s decision to deliver an ostensibly innocent American citizen “into the murderous talons of the British government.” In February 1800, Edward Livingston of New York introduced a resolution calling for Adams’s censure by the House of Representatives, thereby setting off an acrimonious debate that lasted for several weeks. The principal argument of the resolution’s sponsors was that the proper construction of the extradition provision in the Jay Treaty, the jurisdictional reach of American criminal law, and the investigation of the underlying facts were “all matters exclusively of judicial inquiry.” In this view, Adams’s “decision of those questions ... against the jurisdiction of the courts of the United States” constituted “a dangerous interference of the Executive with Judicial decisions,” and Judge Bee’s obeisance to the executive branch was “a sacrifice of the Constitutional independence of the Judicial power.” On the merits, they argued that the reach of the extradition provision should be limited to offenses within the exclusive jurisdiction of the requesting State, whereas Nash had been subject to federal prosecution for the statutory offense of murder on the high seas, which was defined as “piracy” under the Crimes Act.

Although John Marshall’s widely influential floor speech defending President Adams is best remembered for his articulation of the distinction between justiciable and political questions of law, he also addressed the merits of his opponents’ jurisdictional claims. In this regard, the premise of his argument was that, through the mechanism of the Define and Punish Clause, the law of nations functions as a constitutional constraint on the authority of Congress to assert jurisdiction over criminal offenses committed by persons having no nexus to the United States. The Republicans did not dispute that the murder of a British naval officer by a British sailor on board a British warship was “committed within the jurisdiction of the British nation.” The only relevant question was thus whether the United States had some legitimate basis for asserting concurrent jurisdiction over the crimes for which Nash had been extradited.

Marshall began by rejecting the simplistic notion that the United States could assert “jurisdiction over all offenses at sea” merely because the oceans are a commons outside the exclusive control of any single nation. If this were true, he argued, then it would lead to the absurd result that the United States could adjudicate literally any legal dispute arising between aliens on a foreign-flagged vessel, including “a suit instituted for the recovery of money” on a contract executed at sea, “a private theft by one mariner from another,” and “desertion from one

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90 10 ANNALS OF CONG. 533 (Feb. 20, 1800).
91 Id.
92 Id. ("[I]t is directed by law that the offense of murder committed on the high seas shall be deemed piracy and murder, and that 'all crimes committed on the high seas, or in any place out of the jurisdiction of any particular States, shall be tried in the district where the offender is apprehended, or into which he may first be brought.").
94 For analyses of Marshall’s argument on the jurisdictional issues, see Wedgwood, supra note 32, at 346-47, and Kontorovich, supra note 74, at 182-84.
95 10 ANNALS OF CONG. 598 (Mar. 7, 1800).
96 Id.
belligerent Power to another.\textsuperscript{97} Since his interlocutors were not prepared to argue that the United States could take cognizance of these sorts of matters, Marshall’s opponents conceded that “no such common jurisdiction exists.”\textsuperscript{98}

It was true that, in addition to offenses involving “its own citizens or vessels, or offenses against itself,” the United States also could assert jurisdiction over “general piracy,” which was uncontroversially defined in the law of nations as robbery on the high seas. Here, Marshall reminded his colleagues of the crucial distinction between general piracy and “piracy by statute.” For domestic purposes, he allowed that a State was free to “make any offense piracy, committed within the jurisdiction of the nation passing the statute, and such offense will be punishable by that nation.”\textsuperscript{99} But in order to justify the assertion of universal jurisdiction, Marshall insisted that the offense must “consist in an act which is an offense against all” nations, since “[n]o particular nation can increase or diminish the list of offenses thus punishable” by statutory fiat.\textsuperscript{100}

Next, Marshall expressed skepticism at Albert Gallatin’s contention that the mutiny on the \textit{Hermione} constituted an act of general piracy, because the gravamen of the offense is “an intention to rob generally.”\textsuperscript{101} As it happened, the crew’s “sole object” seems to have been “to free themselves from the tyranny experienced” at the hands of Captain Pigot, rather than to reap illicit profits by stealing the ship.\textsuperscript{102} Indeed, the seizure and disposal of the ship was apparently little more than the means of their escape. It was thus not clear that Nash had acted with the requisite \textit{mens rea} to be guilty of general piracy.

In any event, Marshall acutely observed that Gallatin’s argument was quite beside the point, because even if “running away with a vessel to deliver her to an enemy was an act of general piracy, punishable by all nations,” the object of the extradition provision was the “distinct offense” of murder.\textsuperscript{103} It follows that if Nash had been tried and acquitted of general piracy in South Carolina, he still would have been subject to extradition on the murder charge. Accordingly, President Adams was surely entitled, acting in his capacity as chief executive, to forego an ultimately pointless criminal prosecution in favor of extradition, particularly given the potential foreign policy consequences of refusing to accommodate Britain’s insistence that the United States comply with its treaty obligations.

The resolution’s sponsors were thus forced to rely on the argument that Section 8 of the Crimes Act was a valid exercise of Congress’s prescriptive authority to expand the elements of general piracy to include any murder on the high seas and to vest jurisdiction over the offense in the federal courts. All else equal, this is the only way that President Adams plausibly could be said to have acted imprudently by refusing to exercise jurisdiction over Nash’s alleged crimes.

In response, Marshall forcefully argued that such an assertion of authority would exceed the “legislative jurisdiction” of Congress. Read literally, the terms of the statute did indeed

\textsuperscript{97} \textit{Id.} at 599.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 600.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at 602.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
“embrace the subjects of all nations,” but this language could not be taken at face value, because “the legislative jurisdiction of a nation extends only to its own territory, and to its own citizens, wherever they may be. Any general expression in a legislative act must, necessarily, be restrained to the objects within the jurisdiction of the Legislature passing the act.” The Define and Punish Clause does not support a contrary result, Marshall reasoned, because

that clause can never be construed to make to the Government a grant of power, which the people making it do not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offenses committed on board of foreign ship against a foreign nation. Of consequence, in framing a Government for themselves, they cannot have passed this jurisdiction to that Government. The law, therefore, cannot act upon the case. ... There are cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation; the people of America possessed no other power over the subject, and could consequently transfer no other to their courts.

Although it is doubtful that these issues were actually contemplated when the Crimes Act was passed, Marshall’s point is that if Congress had intended to “define” murder on the high seas as falling within the universally cognizable offense of general piracy, this would have exceeded its constitutional authority under the Define and Punish Clause, because murder was not recognized as such in the existing law of nations. In this sense, the argument is more stringent than a nascent version of the Charming Betsy canon, which is merely a default rule of statutory construction that Congress may always override if it acts with sufficient clarity to abrogate the law of nations for domestic purposes. Instead, Marshall’s reading of the statute implicitly invoked a quite different principle of interpretation, namely the doctrine of constitutional avoidance.

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104 Id. at 603. Marshall pointed out that several other provisions of the Act used the same expansive jurisdictional language, but could not reasonably be construed to impose obligations on persons owing no duty of allegiance to the United States. For example, Section 2 provided that “any person” was guilty of misprision of treason if they failed to disclose their knowledge of a treasonous plot against the United States. But a person cannot be guilty of misprision of treason if he is under no obligation to refrain from the predicate offense. “Can it be supposed,” Marshall rhetorically asked, “that the act designed to punish an Englishman or a Frenchman, who, residing in his own country, should have knowledge of treasons against the United States, and should not cross the Atlantic to reveal them?” Id. Similarly, Section 6 provided that “any person” was guilty of misprision of a felony if they failed to disclose the commission of any “murder or other felony” occurring within the “jurisdiction of the United States.” As Marshall observed, it was “impossible to apply this [provision] to a foreigner, in a foreign land, or to any person not owing allegiance to the United States.” Id.

105 Id. at 607.

106 Compare Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”), with Marbury v. Madison, 5 U.S. 137, 178 (1803) (“[T]he constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply”). See also Serra v. Lappin, 600 F.3d 1191, 1198 (9th Cir. 2010) (“[W]e do not review federal law for adherence to the law of nations with the same rigor that we apply when we must review statutes for adherence to the Constitution”).

107 Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (Marshall, Cir. J.) (“No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.”).
After speaking for about three hours, Marshall demurely refrained from imposing any further on “the indulgence of the House ... by recapitulating ... the arguments which had already been urged,” but a summation was hardly necessary.108 By that point, the effort to censure the president was essentially a dead letter. Albert Gallatin, the chief spokesman for the Republicans in the debate, had been tapped to give a rebuttal, but the strength of Marshall’s presentation persuaded him to throw in the towel. “Gentlemen,” he reportedly told his bemused colleagues, “answer it yourself. For my part, I think it is unanswerable.”109 The next day, the resolution was soundly defeated by a vote of 61 to 35,110 and the following week, the Federalists introduced a resolution approving the president’s actions, which passed by a similar margin.111

C. The Supreme Court’s Piracy Jurisprudence

The immediate impact of Marshall’s speech was the political vindication of President Adams, but when the Supreme Court had occasion to take up the meaning of the federal piracy statute more than a decade later, the jurisdictional theory he had articulated on the House floor was for all intents and purposes enshrined as constitutional doctrine.112 In the first quarter of the nineteenth century, the Atlantic world was swept by a wave of revolutionary enthusiasm inspired by the American and French Revolutions.113 As a result, the crumbling Spanish and Portuguese colonial empires were wrecked with political turmoil, as numerous self-styled republics declared their independence and eagerly issued privateering commissions in order to disrupt colonial Spanish and Portuguese maritime commerce.114 Although these ships were often financed and

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108 10 ANNALS OF CONG. 618 (Mar. 8, 1800).
109 SMITH, supra note 89, at 262.
110 10 ANNALS OF CONG. 619 (Mar. 8, 1800).
111 Id. at 621 (Mar. 10, 1800).
112 It bears noting that, given Marshall’s juridical stature, the speech itself has achieved precedential status. In addition to being published as an appendix to the official report of Judge Bee’s decision, Robins, 27 F. Cas. at 860-69, the Supreme Court has repeatedly relied on Marshall’s reasoning regarding executive authority in matters of foreign affairs. See Powell, supra note 93, at 1513-14 (citing cases). Most recently, the speech was cited by the federal government in a criminal appeal as persuasive authority for the principle that general piracy includes “[n]ot only an actual robbery ... but cruising on the high seas without commission, and with intent to rob.” See Brief of the United States, United States v. Dire, 2011 WL 2941447, at *51 (4th Cir. July 22, 2011), quoting Robins, 27 F. Cas. at 862; see also The Chapman, 5 F. Cas. 471, 474 (N.D. Cal. 1864) (relying on the same passage); Dole v. New England Mut. Marine Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (same).
113 See Caitlin Fitz, “A Stalwart Motor of Revolutions”: An American Merchant in Pernambuco, 1817-1825, 65 THE AMERICAS 35 (2008) (“A new order for the New World was unfolding in the early nineteenth century, or so many Americans believed. Between 1808 and 1825, all of Portuguese America and nearly all of Spanish America broke away from Europe, casting off Old World monarchs and inaugurating home grown governments instead. People throughout the United States looked on with excitement, as the new order seemed at once to vindicate their own revolution as well as offer new possibilities for future progress.”).
114 See Fred Hopkins, For Freedom and Profit: Baltimore Privateers in the Wars of South American Independence, 28 THE NORTHERN MARINER 93, 94 (2008) (“By 1816, however, Spain’s colonies from Mexico to the Rio de la Plata were in full revolt. None of these colonies had a naval tradition so the issuance of privateering commissions became the means to offset Spain’s maritime advantage by harassing that country’s commerce.”); G. Edward White, The Marshall Court and International Law: The Piracy Cases, 83 AM. J. INT’L L. 727, 729-30 (1989) (“The numerous independent ‘republics’ that surfaced in Spanish and Portuguese colonies in Latin America provided bases for ships that were often crewed by citizens of belligerent nations but whose ‘home ports’ freed them from wartime restrictions.”).
crewed by American citizens, the United States soon began to feel a backlash. “As rebel privateers swarmed the Caribbean and South American waters,” one scholar observes, “seeking loot under the pretense of freedom, ... many privateers extended the scope of their efforts, attacking neutral – and even U.S. – vessels.”

This was the historical context in which the first major piracy case reached the Court in 1818. In United States v. Palmer, the defendants were three American seamen serving on a privateer that had been commissioned by an unnamed revolutionary government engaged in a civil war with Spain and, in that capacity, participated in the plunder of various goods from a Spanish merchant vessel. They were subsequently arrested and charged under Section 8 of the Crimes Act with the offense of “piracy on the high seas.” Although Marshall’s opinion has been criticized for a strained reading of the statute, in fairness, his task was complicated both by poor legislative draftsmanship and the unusual procedural posture of the case.

The judges of the circuit court had been sharply divided over a series of legal questions, which they certified to the Court. Yet, the defendants were not represented by counsel and the appellate record contained “nothing but the indictment and the impaneling of the jury. No motion; no evidence; no demurrer ore tenus, or case stated appears upon the transcript.”

Given the uncertain state of the record, it seems likely that the Court was reluctant to see the defendants hanged under these circumstances. Moreover, the defendants made a plausible claim that the vessel on which they were serving had been commissioned by a lawful belligerent, which if proven was a defense to the charge of general piracy. The reported opinion does not disclose the identity of the rebel government involved, but the Court’s analysis assumes that the United States had recognized its belligerent status, which is consistent with the government’s general policy of maintaining neutrality in the myriad conflicts between Spain and her soon-to-be former colonies.

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115 See Piero Gleijeses, The Limits of Sympathy: The United States and the Independence of Spanish America, 24 J. LATIN AM. STUDIES 481, 483 (1992) (“It was American capital and American seamen that carried on much of this business. In some cases, no one aboard the privateers spoke Spanish and of a list of thirty-two captains who carried letters of marque for the government of Buenos Aries, it is likely that all but three were U.S. citizens.”); see also Hopkins, supra note 114, at 95 (estimating that “between fifteen and twenty thousand seamen from the United States were engaged in revolutionary privateering activities ... At least eighteen captains who served as privateers maintained their homes and families in Baltimore.”).

116 Gleijeses, supra note 115, at 482-83.

117 16 U.S. 610, 611-12 (1818).

118 Id. at 640-41 (Johnson, J., concurring in part and dissenting in part).

119 Id. at 643-44 (“[W]hen a civil war rages in a foreign nation, one part of which separates itself from the old established government and erects itself into a distinct government, the courts ... must view such newly constituted government as it is viewed by the legislative and executive departments ... If the [United States] remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy”). The U.S. district attorney had argued, incorrectly, that a rebel government could not issue a valid commission unless Congress or the President had formally recognized it as a sovereign nation. Id. at 621-25 (argument of counsel). However, a rebel government need only be recognized as a belligerent power to lawfully engage in an armed conflict, including the issuance of letters of marque, which falls short of a recognition of sovereignty. See Ford v. Surget, 97 U.S. 594, 608-23 (1878).

120 See The Neustra Senora De La Caridad, 17 U.S. 497, (1819) (holding that where the United States had recognized the existence of a civil war between Spain the Province of Carthagena, a privateer acting under a commission issued by the rebel government could not be considered a pirate); The Josefa Segunda, 18 U.S. 338, 358 (1820) (holding that where “open war exists between [Spain and Venezuela], in which the United States maintain
The question that divided the Court was whether Congress intended to make literally any act of robbery on the high seas subject to the death penalty, or only the subset of robberies that would be capital if they had been committed within the territorial United States. The question arose because the text of Section 8 ambiguously prohibited “any person ... upon the high seas” from committing “murder or robbery, or any other offense, which, if committed within the body of a county, would by the laws of the United States be punishable with death.” Applying a rule of lenity, Justice Johnson thought the purpose of the statute was “to produce uniformity in the punishment ... [of] crimes which may be committed either on sea or land.” Since robbery on land was not generally a capital offense under federal law, Johnson would have applied the same rationale to robbery at sea. He objected to a broader interpretation because it would mean that “a whole ship’s crew may be consigned to the gallows for robbing a vessel of a single chicken.”

The problem with this approach, Marshall pointed out for the Court, is that it would have left “the crime [of robbery on the high seas] entirely unpunished.” But while this resolved the particular grammatical conundrum posed by the statute, the jurisdictional reach of the Crimes Act was a separate question. On this issue, Marshall’s analysis echoed the speech he had given nearly twenty years earlier, albeit in a highly abbreviated form. While there was no dispute that the Define and Punish Clause conferred on Congress the power to “enact laws punishing pirates, although they may be foreigners, and may have committed no particular offense against the United States,” the question presented was whether it had done so in this particular statute.

Marshall began by observing that the title of the Act, though not controlling, suggested that Congress had meant to punish “offenses against the United States, not offenses against the human race.” More convincingly, he argued that a comparative analysis of the different sections of the Act showed that the expansive term “any person” could not be taken literally. Rather, the statute purported to punish as piracy a variety shipboard offenses, such as mutiny, that were not universally cognizable in the federal courts because they could only be committed by “persons owing permanent or temporary allegiance to the United States.” Similarly, the Act provided that “every person” who aided or advised anyone to commit one of these statutory

strict neutrality ... this Court cannot but respect the belligerent rights of both parties; and does not treat as pirates, the cruisers of either, so long as they act under, and within the scope of their respective commissions.”); The Santissima Trinidad, 20 U.S. 283, 337 (1822) (holding that where “the United States has recognized the existence of a civil war between Spain and [Buenos Ayres], and has avowed a determination to remain neutral between the parties,” each party was deemed to be a lawful belligerent and thus entitled to exercise “the rights of war.”).

121 Crimes Act, § 8, 1 Stat. 113.
122 16 U.S. at 637.
123 Id. at 639.
124 Id. at 629. In fact, Marshall was not entirely correct, since robbery of the mail with a dangerous weapon was a capital offense. See Act of Apr. 30, 1810, ch. 37, § 19, 2 Stat. 598. Hence, an armed robbery of the mail “upon the high seas” or other navigable waterways “out of the jurisdiction of any particular state” would have been a capital offense even under Johnson’s reading of the statute.
125 16 U.S. at 630-31.
126 Id. at 631; cf. 10 ANNALS OF CONG. 603 (Mar. 7, 1800) (Rep. Marshall) (“The title is: ‘An act for the punishment of certain crimes against the United States.’ Not against Britain, France, or the world, but singly ‘against the United States.’”).
127 16 U.S. at 631-32.
offenses was guilty as an accessory to the substantive crime. But Congress certainly could not impose accessorial liability on a non-resident alien merely for advising someone to commit an offense on a foreign vessel that lacked any nexus with the interests of the United States. “Can it be believed,” Marshall asked incredulously, “that the legislature intended to punish with death the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery?”

The Court thus read a limiting principle into the Act in order to avoid a violation of the Define and Punish Clause, holding that it could not be applied to the conduct of “a person on the high seas, on board of any [foreign] ship or vessel” directed against “persons within a [foreign] vessel.” Instead, such actions must be adjudicated by “the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are.” The Court was unanimous on this point, since Johnson agreed that “Congress can inflict punishment on offenses committed on board the vessels of the United States, or by citizens of the United States anywhere; but Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses.”

Many commentators have been puzzled by this holding because it seems to overlook the obvious fact that the defendants were American citizens. This criticism misses the mark, however, because it fails to account for the crucial function of the law of war in the Court’s analysis. The vessel on which the defendants had served was acting under the authority of a valid commission issued by a recognized belligerent power. As Justice Johnson pointed out, “whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries.” It is true that an American citizen could not rely on a commission “from any foreign prince or state” as a defense to a charge under the statute, but the waiver of immunity applied only if the defendant’s actions were directed “against the United States, or any citizen thereof.” In other words, the Crimes Act did not prohibit American citizens from employment as mercenaries in the service of a foreign belligerent, which was a lucrative and widespread practice, but only from aggressing against the maritime commerce of their own country in the process. Hence, the

128 Crimes Act, § 10, 1 Stat. 114.
129 16 U.S. at 633.
130 Id. at 633-34.
131 Id. at 632.
132 Id. at 641-42.
133 See, e.g., Kontorovich, supra note 74, at 185-88.
134 See The Ambrose Light, 25 F. 408, 428-29 (S.D.N.Y. 1885) (observing that the Court’s opinion in Palmer “turned wholly” on the assumption that the “alleged acts of piracy [were] committed under a commission from revolutionists carrying on a struggle for independence against Spain, who had already been acknowledged by our government as belligerents.”).
135 16 U.S. at 642.
136 Crimes Act, § 9, 1 Stat. 114.
137 See United States v. Furlong, 18 U.S. 184, 201-02 (1820) (holding that Section 9 of the Crimes Act “declare[s] those acts piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others.”); see also Piracy upon the High Seas, 3 Op. Att’y Gen. 120, 121-22 (1836) (capture of an American merchant vessel carrying munitions to Mexico by citizens of the Republic of Texas “can in no view be deemed an act of piracy,” where the president had recognized the “existence of a civil war between the people of Texas and the authorities ... of the other Mexican States,” unless “the principal actors in the capture were citizens of the United States.”).
Palmer defendants do not appear to have violated either international or domestic law, because they participated in the seizure of a Spanish merchant vessel in international waters while serving under a valid commission from a belligerent power at war with Spain.\textsuperscript{138}

The decision was not well received in Congress, because many legislators understood it to hold that Section 8 of the Crimes Act was a strictly municipal statute that could not be used to prosecute general piracy. In hindsight, this was an overreaction. It would be more accurate to say that the Court did not believe the defendants were guilty of general piracy because they stood in the shoes of their foreign sponsors. They could be convicted, if at all, of a municipal offense that violated some duty toward the United States, whereas the underlying events were governed by the law of war, which could not be dictated by legislative fiat. Strictly speaking, the status of general piracy under Section 8 remained an open question. This reading of Palmer is reinforced by the next major piracy case to reach the Court, in which it agreed with the government’s assertion that general piracy could indeed be prosecuted under Section 8, where the defendant was serving on a stateless vessel that did not enjoy the protection of a valid commission.

In United States v. Klintock, the defendant was an American citizen convicted of piracy on the high seas under the federal piracy statute for serving on the crew of a privateer, which had seized a Danish merchant ship in the Caribbean and brought it to Savannah under false pretenses.\textsuperscript{139} The offending vessel was owned and operated by Luis Aury, a self-styled “Brigadier of the Mexican Republic and Generalissimo of the Floridas,” who had purported to issue a “commission” authorizing the ship to engage in privateering activities.\textsuperscript{140} In fact, Aury was a French national with a notorious reputation as a privateer and slave trader who operated under the auspices of several newly-minted Latin American republics, from which he reaped sufficient profits to acquire his own private fleet of ships.\textsuperscript{141} In 1816, he allied his organization with the ill-fated Republic of Mexico and “established a base at Galveston Bay on the coast of Texas where he continued his raids on Spanish vessels in the Gulf.”\textsuperscript{142} However, by the time his ships actually began making seizures under the authority of his Mexican commission, “the so-called government which had issued it had been dispersed and dissolved by Spanish forces. Thus, Aury could not truly claim that his actions ... were sanctioned by any existing government.”\textsuperscript{143}

On appeal, the Court rejected the defendant’s contention that the case was governed by Palmer. Most importantly, unlike the Palmer defendants, Klintock had been the first lieutenant

\textsuperscript{138} The existing Neutrality Act made it a misdemeanor for American citizens to “accept and exercise a commission to serve a foreign prince or state in war by land or sea,” but was limited to acts occurring within the territorial United States. Act of June 5, 1794, ch. 9, § 1, 1 Stat. 381-82. As Rubin explains, “this statute ... did not apply to American nationals abroad, and was aimed at preserving the neutrality of the United States by forbidding American territory to be used for foreign enlistments or fitting out foreign warships.” RUBIN, supra note 69, at 160 (original emphasis). It is not clear where the defendants’ enlistment occurred and, in any event, they were not charged under this statute.

\textsuperscript{139} 18 U.S. 144, 144-45 (1820).

\textsuperscript{140} Id.

\textsuperscript{141} See Richard G. Lowe, The American Seizure of Amelia Island, 45 FLA. HIST. Q. 18, 21 (1966); Stanley Faye, Commodore Aury, 24 LA. HIST. Q. 622 (1941).

\textsuperscript{142} Lowe, supra note 141, at 21; see also Rufus Kay Wyllis, The Filibusters of Amelia Island, 12 GA. HIST. Q. 297, 323-24 (1928).

\textsuperscript{143} Lowe, supra note 141, at 21 n.14.
on a ship that lacked a valid commission from a recognized belligerent power. Aury was simply a non-state actor with a private mercenary force. As such, he had no quasi-sovereign prerogative to license anyone to engage in legitimate acts of maritime warfare, such as seizing neutral merchant vessels trading with his purported “enemy.” Nor did he acquire a derivative authority to engage in privateering from his erstwhile Mexican patrons, whose attempt to establish their independence from Spain had been fully suppressed. As Marshall put it, “Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea.”144 It follows that his “commission” could not justify the seizure of the Danish merchant ship under customary international law, which was thus “not captured jure belli, but seized ... animo furandi. It was not a belligerent capture, but a robbery on the high seas.”145

Absent a valid privateering commission, the jurisdictional concerns that had animated the Court’s narrow reading of the Crimes Act dissolved. Marshall thus distinguished Palmer on the grounds that “the reasoning which [had] conducted the Court” was the necessity of limiting the reach of “the general words” of the Crimes Act to offenses that were “within the ordinary jurisdiction of the United States.”146 The Court reaffirmed that when a robbery or murder is “committed by a person on board of any ship or vessel belonging exclusively to the subjects of a foreign State,” the offense is properly subject to the jurisdiction of the State to which the vessel belongs.147

On the other hand, when a robbery on the high seas is committed “by a person on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever,” then the offense “is punishable in the Courts of the United States,” because general piracy “is committed against all nations, including the United States.”148 As Justice Breyer remarked in his Sosa concurrence, the assertion of jurisdiction over the crew of a stateless vessel preying against maritime commerce on the ocean does not “significantly threaten the practical harmony that comity principles seek to protect,”149 because there was a widespread procedural consensus that pirates were “proper objects for the penal code of all nations.”150

Taken together, Palmer and Klintock set the parameters for piracy prosecutions arising under Section 8 of the Crimes Act, as well as prize proceedings that turned on the piratical nature of the captured vessel. Thus, where a privateer was acting under a valid commission in the context of a recognized armed conflict, the vessel derived its authority to act from the laws of war. As lawful belligerents, the crew could not be considered pirates for engaging in such hostilities, with the caveat that American citizens were prohibited under domestic law from

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144 18 U.S. at 149.
145 Id. at 150; see also The Nueva Anna, 19 U.S. 193, 193-94 (1821) (rejecting the legality of any act done under the flag or commission of the Mexican Republic, the existence of which had not been acknowledged by the United States).
146 18 U.S. at 151-52.
147 Id. at 151.
148 Id. at 152.
149 542 U.S. at 762.
150 18 U.S. at 152.
engaging in hostilities against the interests of the United States. Moreover, any crew members who acted beyond the privileges afforded to combatants could, of course, “legally be treated as war criminals under the laws of war as administered in the courts of the capturing power.”

Yet, the mere fact that privateering was a legitimate form of maritime warfare does not imply that robbery at sea without a commission was a violation of the laws of war. As Rubin points out, piracy has never been considered “a ‘war crime’ historically or by any known definition applied in diplomatic practice or court case.” Instead, the term was used to “distinguish those who fought as privateers under the laws of war and those who had no valid commission ... and thus were subject not at all to the laws of war but to the normal criminal law of some state with the necessary legal interest to try them.” In modern terms, a pirate was thus treated as an unprivileged belligerent, in the sense that he did not enjoy the protection of combatant immunity and when captured was subject to domestic criminal prosecution for his hostile actions. A striking feature of *Palmer* and its progeny is that it arguably elevates this principle to the status of constitutional doctrine.

If the character of the vessel exposed the crew to criminal charges, the courts of the United States could assert jurisdiction depending on the facts and circumstances of the offense, with “each case [tested] by a reference to the punishing powers” of Congress. Like all nations, the United States could assert universal jurisdiction over robbery on the high seas, at least where the vessel was not affiliated with a recognized belligerent power. On the other hand, in the absence of any nexus with the legal interests of the United States, Congress was powerless to expand the definition of general piracy in order to make those cases universally cognizable by the federal courts. Thus, where a murder was committed on board an American vessel, by a crew member serving on an American vessel, or by or against an American citizen, there was no question that the United States could prosecute the defendant for the statutory offense of piracy, defined to include murder on the high seas. But where a murder was committed on board a foreign-flagged vessel, and both the offender and the victim were foreign nationals, “not even the omnipotence of legislative power can confound or identify” murder with general piracy, since otherwise there would literally be no limit to Congress’s prescriptive authority.

To be sure, some members of the Court were ambivalent about whether a murder committed by the crew of a stateless vessel fell within the definition of general piracy. For example, in *United States v. Holmes*, the captain of a prize crew placed upon a captured vessel was murdered by several of his crew members. In a perfunctory opinion, Justice Washington

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151 Rubin, *supra* note 69, at 294.
152 *Id.*
153 *Id.*
155 Furlong, 18 U.S. at 196.
156 *Id.* at 193, 197 (“[W]hen embarked on a piratical cruise, every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked. ... Robbery at sea is considered as an offense within the criminal jurisdiction of all nations.”).
157 *Id.* at 194, 197-99.
158 18 U.S. 412 (1820).
suggested that the disposition of the case was controlled by *Klintock*, because there was no proof that the ships on which the crew served held a valid commission.\(^{159}\) Yet, there were ample American contacts to justify the Court’s jurisdiction. The victim appears to have been either an American citizen or a resident alien domiciled in Baltimore, and at least one of the defendants was an American citizen.\(^{160}\) Moreover, the ships at issue had been built in Baltimore; while their registration papers were suspiciously missing, the Court held that, under the circumstances, the burden of proof on this issue fell on the defendants.\(^{161}\) The ships were thus presumed to be both American owned and commanded, and for that reason alone the Court had jurisdiction over the defendants.\(^{162}\)

The most likely explanation for this anomalous result is that it reflects “a deep jurisprudential split” among the justices over the theoretical foundation of customary international law.\(^{163}\) As Rubin notes, Story and Washington comprised the “naturalist” wing of the Court. As such, they clung to a conception of customary international law as an autonomous body of normative principles grounded in natural law and reason, which were thought to be broadly enforceable by the courts of any nation. In contrast, the Chief Justice favored the emerging “positivist” view that customary international law was comprised primarily (albeit not entirely) of legal obligations grounded in actual state practice. Thus, whereas Story was willing to sanction the slave trade as a violation of customary international law merely because it was morally reprehensible,\(^{164}\) this was not sufficient for Marshall. Although the practice had been prohibited in the domestic penal law of the United States and Great Britain, Marshall was not convinced that the international movement to abolish the slave trade had yet ripened into a universally binding rule of state practice. As a doctrinal matter, the positivist view espoused by Marshall prevailed.\(^{165}\)

\(^{159}\) *Id.* at 416-17.

\(^{160}\) *Id.* at 412-14.

\(^{161}\) *Id.* at 414, 418-19.

\(^{162}\) See, e.g., The Bello Corrunes, 19 U.S. 152, 170-71 (1821) (“This Court ... proceeds upon the assumption that the [vessel] is still, in reality, American owned, and ... that she must be held to be American commanded; since [the captain’s] family has never been removed from Baltimore, and his home has been always either there, or upon the ocean.”). *Holmes* is also flatly inconsistent with *Smith*, decided just a few weeks earlier, which authoritatively held that general piracy was defined as robbery at sea.

\(^{163}\) RUBIN, supra note 69, at 163; see also White, supra note 114, at 729.

\(^{164}\) See United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (Story, Cir. J.) (holding that the slave trade “is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible that it can be consistent with any system of law that purports to rest on the authority of reason or revelation.”).

\(^{165}\) See The Antelope, 23 U.S. 66, 121-22 (1825) (Marshall, Ch. J.) (“Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of [nation-states] ... If we resort to this standard as the test of international law, the question ... is decided in favour of the legality of the [slave] trade. ... [F]or nearly two centuries, it was carried on without opposition and without censure. A jurist could not say, that a practice thus supported was illegal and that those engaged in it might be punished, either personally, or by deprivation of property.”).
III. STATUTORY INCORPORATION AND THE COMMON LAW OF WAR

The Court’s piracy jurisprudence is significant, because it establishes that, as a matter of constitutional doctrine, Congress does not have unfettered authority under the Define and Punish Clause to “unilaterally proscribe an act as general piracy sufficient to invoke universal jurisdiction with a mere stroke of its legislative pen when the law of nations does not so define the act as such.”166 Given the context in which the cases arose, moreover, the law of war was necessarily lurking in the background. The Court’s analysis presumes that the judiciary of a neutral country cannot enforce domestic criminal statutes that trench upon the exercise of belligerent rights by parties engaged in an armed conflict. Hence, Congress may no more unilaterally stigmatize “as criminal those acts of hostility which war authorizes,”167 than it may alter the law of general piracy by statutory fiat. It follows that extant customary international law functions as an objective constraint on Congress’s prescriptive authority whenever it legislates under the Define and Punish Clause, particularly when it seeks to regulate the conduct of foreign nationals lacking any traditional nexus to the legal interests of the United States.

A. Incorporating Piracy by Express Reference to International Law

In 1819, Congress reacted to Palmer by enacting a new statute that attempted to circumvent the jurisdictional difficulties the Court had identified in Section 8 of the Crimes Act by conforming the definition of piracy to the existing contours of customary international law. In this way, Congress ensured that it legislated to the full extent of its prescriptive authority. Reverting to the practice that had informed the passage of the ATS, Congress thus made it a capital offense for “any person or persons whatsoever ... on the high seas, [to] commit the crime of piracy, as defined by the law of nations.”168

The statute was soon put to the test and survived a due process challenge. In United States v. Smith, the defendant was a crew member on a privateer that had been duly commissioned by the government of Buenos Ayres, which was engaged in a civil war with Spain. While the ship was anchored in port, the crew mutinied, confined the officer on the ship, and forcibly seized another privateer docked nearby. The crew then “proceeded to sea on a cruise, without any documents or commission,” at which point they attacked and plundered a Spanish merchant vessel.169 The defendant was later arrested and charged under the 1819 Act. On appeal, the question before the Court was the amenability of the defendant to the jurisdiction of an American court. The defendant was represented by Daniel Webster, who argued that the statute was unconstitutional, because “Congress is bound to define [the crime of piracy] in terms, and is not at liberty to leave it to be ascertained by judicial interpretation,” which he suggested would violate the injunction against the creation of common law crimes.170

166 Hasan, 747 F.Supp.2d at 624.
167 Palmer, 16 U.S. at 644.
170 Id. at 156-57. See United States v. Hudson & Goodwin, 11 U.S. 32, 33-34 (1812) (holding that the federal courts have no criminal jurisdiction, except what is given by statute).
Justice Story, writing for the Court, found that in proscribing piracy by express reference to the law of nations, Congress had defined the offense with sufficient clarity to put the defendant on notice that his actions were subject to the criminal jurisdiction of an American court. The analysis begins by rejecting the linguistic theory inherent in Webster’s argument, which if accepted without qualification would equally invalidate the municipal crimes delineated in Section 8 of the Crimes Act. When Congress enacts a penal statute of any sort, Story observed, “there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offense,” as opposed to referring to “a term of a known and determinate meaning” adapted from an external source.171 For example, in Section 8, Congress proscribed piracy to include “robbery” and “murder” without further elaboration, but these are terms of art defined by the amorphous collection of statutes and judicial decisions that comprise the common law, and “by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act.”172

Indeed, if this sort of definitional backstop was impermissible, Story reasoned, legislation would essentially become impossible, because we would find ourselves stuck in an infinite semantic regress, with each new term requiring yet further clarification. For purposes of the Define and Punish Clause, then, Congress may codify offenses against the law of nations “either by reference to crimes having a technical name, or by enumerating the acts in detail.”173

With that interpretive principle in place, Story turned to the merits of whether the law of nations, in fact, defined the offense of piracy “with reasonable certainty” for purposes of a federal criminal prosecution.174 To ascertain the definition of piracy in customary international law, he consulted what has since become the standard menu of sources, namely “the works of jurists,” “the general usage and practice of nations,” and “judicial decisions recognizing and enforcing that law.”175 After reviewing numerous such sources, including a seventeen-page footnote comprised primarily of citations to scholarly opinions, Story concluded that “[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature ... [R]obbery or forcible depredations upon the sea, animo furandi, is piracy.”176

171 Id. at 159.
172 Id. at 160. See also United States v. New Bedford Bridge, 27 F. Cas. 91, 104 (C.C.D. Mass. 1847) (“[W]e must look entirely to the constitution, treaties, and acts of congress, to see what constitutes an offense in this court. The United States has no unwritten code to give it jurisdiction, though the common law ... may be resorted to for ... definitions, where jurisdiction is conferred.”); United States v. Coolidge, 25 F. Cas. 619, 620 (C.C.D. Mass. 1813), rev’d on other grounds, 14 U.S. 415 (1816) (“[C]ongress has provided [by statute] for the punishment of murder, manslaughter and perjury, under certain circumstances; but it has no where defined these crimes. Yet no doubt is ever entertained on trials, that the explanation of them must be sought and exclusively governed by the common law.”); Ex parte Bollman, 8 U.S. 75, 93-94 (1807) (“[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction ... [but] for the meaning of the term habeas corpus, resort may unquestionably be had to the common law.”); cf. Whitfield v. United States, 543 U.S. 209, 213 (2005) (“[A]bsent contrary indications, Congress intends to adopt the common law definition of statutory terms.”).
173 18 U.S. at 160.
174 Id.
175 Id. at 160-61.
176 Id. at 161.
On this view, when a court enforces the statute, it is not, as Webster had suggested, exercising its discretion to invoke a common law jurisdiction over the offense of piracy. Instead, the statute confers jurisdiction over the offense and then directs the court to a determinate body of law to establish the meaning of its terms. This was understood to be an objective inquiry, in which the court endeavored to “find” rather than “create” the substantive law, in precisely the same way that a district court discovers the substantive norms enforceable in ATS litigation. Accordingly, the Court concluded that Congress had “sufficiently and constitutionally” codified general piracy in the 1819 Act, because the customary law of nations defined the offense with sufficient clarity to satisfy due process concerns. Finally, as applied, the conduct of the defendant and his associates “completely fit the [foregoing] definition,” because they had plundered the victim merchant vessel without “protection from the flag or commission of any government” and therefore could not claim to be lawful belligerents.

B. The Legal Status of the Military Commission

Aside from its significance for ATS litigation, the relevance of Smith’s construction of the 1819 piracy statute is that, prior to the passage of the Military Commissions Act in 2006, it might fairly be characterized as a methodological template for the adjudication of war crimes. A history of the military commission as an institution is beyond the scope of this essay, but it suffices to note that, in American military practice, these tribunals have traditionally been regarded as “common law war courts.” Although the term was invented by Major General Winfield Scott during the Mexican War in 1847, the legal parameters of the military commission as we know it today were established during the Civil War period. The first major codification of the law of land warfare, commonly known as the Lieber Code, distinguished between courts-martial, which have jurisdiction over statutory military offenses under the Articles of War, and “military offenses which do not come within the statute,” which therefore “must be tried and punished under the common law of war ... by military commissions.”

On this point, the Lieber Code expressly built upon the practice already introduced by General-in-Chief of the Union Army, Henry Halleck, who supervised the formation of the code

177 Id. at 162.
178 Id. at 163.
180 See Revision to the Articles of War: Hearings on S. 3191 Before the Committee on Military Affairs, 64th Cong., 1st Sess. 40 (1916) (statement of Enoch H. Crowder, Judge Advocate General of the Army) (“A military commission is our common law war court. It has no statutory existence, though it is recognized by statute law.”); CHARLES ROSCIE HOWLAND, A DIGEST OF THE OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 1066-67 (1912) (“[M]ilitary commissions ... are simply criminal war courts ... [T]heir competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General.”).
181 Glazier, supra note 179, at 36-40.
and should be credited as the intellectual godfather of the modern military commission. In his previous command, Halleck had sought and received President Lincoln’s authorization to declare martial law in the Department of the Missouri, which was being wrecked with internecine violence rooted in deep-seated regional conflicts that predated the war. Shortly thereafter, he instituted a system of hybrid military commissions, which had jurisdiction over two categories of offense: (1) ordinary domestic crimes that could not be tried in the local courts due to the exigency caused by the war, and (2) offenses against “the general code of war” committed by the civilian population, which were neither “triable ... by courts-martial” nor “within the jurisdiction of any existing civil court.”

An accomplished international law scholar, Halleck was sensitive to the distinction. As he subsequently wrote in the second edition of his treatise, which was intended to be a textbook for the military academies at West Point and Annapolis, insofar as such tribunals prosecuted violations of the common law of war, they “must be governed and guided by the principles of universal public jurisprudence.” Moreover, Halleck was careful not to conflate the mere status of being an unprivileged belligerent with the commission of war crimes. “Private citizens who commit acts of violence,” he wrote, “without the authority or sanction of their own government” are not considered “enemies, legitimately in arms,” and thus are not entitled “to plead the laws of war in ... justification” of their actions. In the absence of combatant immunity, it follows that “when captured, they are not treated as prisoners of war, but as criminals subject to the punishment due their crimes.” Hence, the “taking of property by such forces ... is not a

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184 Sec. of State Seward to Maj.-Gen. Halleck (Dec. 2, 1861), O.R.A., Ser. 2, Vol. 1, at 233 (conveying the President’s instructions that Halleck was “authorized and empowered to suspend the writ of habeas corpus within the limits of the military division under [his] command and to exercise martial law ... to secure the public safety”); Hqtrs. Dep’t. of the Missouri, General Orders, No. 13, (Dec. 4, 1861), O.R.A., Ser. 2, vol. 1, at 233 (Halleck’s order announcing the imposition of martial law).


186 Hqtrs. Dep’t. of the Missouri, General Orders, No. 1, (Jan. 1, 1862), O.R.A., Ser. 2, vol. 1, at 247-49 (Halleck’s order establishing a system of military commissions). Roughly half of all military commission trials during the Civil War occurred in Missouri. See Neely, supra note 185, at 168; Hart, supra note 183, at 4 n.18. In September 1862, President Lincoln extended martial law to the entire nation with respect to persons “guilty of any disloyal practice,” which Congress retroactively affirmed in the Suspension Act of 1863. See Proclamation No. 1, 13 Stat. 730 (Sept. 24, 1862); Act of Mar. 3, 1863, 12 Stat. 755. After the war, the Reconstruction Congress placed the entire South under military rule, which authorized district commanders to utilize military commissions in lieu of “local civil tribunals” to enforce state criminal laws. Act of Mar. 2, 1867, ch. 153, § 3, 14 Stat. 428. As a result, there were relatively few law-of-war commissions convened during this period.

187 Henry W. Halleck, Elements of International Law and Laws of War 333 (2d ed. 1866). There is no theoretical obstacle to combining the prosecution of domestic offenses and war crimes in a single martial law tribunal. In practice, however, these proceedings typically did not clearly delineate the nature of the offense, which is hardly surprising given the chaotic circumstances. Civilians were often prosecuted on the general charge of “violation of the laws of war,” but whether they were convicted of an actual war crime depends entirely on the specific facts alleged. It is a painstaking exercise to discern from the sparse surviving records the precise nature of a particular charge. As the Supreme Court has correctly admonished, any given precedent from this period “must therefore be considered with caution.” Hamdan v. Rumsfeld, 548 U.S. 557, 596 n.27 (2006) (plurality).

188 Henry W. Halleck, International Law 386 (1861).

189 Id. at 386-87.
belligerent act authorized by the law of nations, but a *robbery,*” and “the killing of an enemy by such forces ... is not an act of war, but a *murder,*” unless the defendant acted in self-defense.\(^{190}\)

An unprivileged belligerent might also be guilty of a war crime, to be sure, but each case had to be judged on its own merits. In this regard, the Lieber Code contains an intriguing reference comparing unprivileged belligerents to pirates.\(^{191}\) As an expert on the law of the sea, the analogy surely would not have escaped Halleck’s meticulous attention.\(^{192}\) In context, this provision was understood to mean that unprivileged belligerency in land warfare, like privateering without a commission on the high seas, merely removed the cloak of combatant immunity, thereby maintaining the distinction between domestic crimes and violations of the law of war.\(^{193}\)

When the Lieber Code was revised in 1914, the drafters retained the reference to piracy without change, but added a separate paragraph stating that unprivileged belligerents are “liable to punishment for [their] hostile acts as war criminals.”\(^{194}\) Some commentators have uncritically read this to mean that any hostile act committed by an unprivileged belligerent in the context of an armed conflict *ipso facto* constitutes a “war crime,” but this is by no means an obvious inference. To say that a person is “liable” for a particular act may mean that he is “legally responsible,” but can also mean that he is simply “exposed or subject to a given contingency.”\(^{195}\) The only way to reconcile these two provisions is to interpret the term “liable” in the latter sense of being “exposed” or “subject” to war crimes charges, not that every hostile act by an unprivileged belligerent invariably constitutes a war crime. Indeed, if a defendant commits an actual war crime, his belligerent status is quite beside the point.\(^{196}\)

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\(^{190}\) *Id.* at 386 (emphasis in original).

\(^{191}\) Lieber Code, \(\S\) 82, O.R.A., Ser. 3, vol. 3, at 157 (“Men or squads of men who commit hostilities ... without commission, without being part ... of the organized hostile army ... are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”).

\(^{192}\) In fact, Halleck carefully reviewed a draft of the code and made extensive corrections and editorial comments. See Brainerd Dyer, *Francis Lieber and the American Civil War*, 2 HUNTINGTON LIBRARY Q. 449, 455-56 (1939); Hart, *supra* note 183, at 37-38.

\(^{193}\) See HALLECK, *supra* note 188, at 396 (“The authority which grants the commission determines what limits shall be imposed upon the exercise by the privateer of belligerent rights; and if such vessel exceed the limits of its commission, and commit acts of hostility not warranted by the letter it carries, if such acts be not in violation of the laws of war, it is responsible to and punishable by the state alone from which the commission was issued.”).

\(^{194}\) WAR DEP’T, RULES OF LAND Warfare \(\S\) 369, at 130 (1914).

\(^{195}\) BLACK’S LAW DICTIONARY 719 (2d ed. 1910); see also BLACK’S LAW DICTIONARY 925 (7th ed. 1999) (defining “liable” to mean either the “quality or state of being legally obligated or accountable” or “the opposite of immunity”).

\(^{196}\) For example, in 1865, John Beall was convicted and sentenced to death by a military commission at Fort Lafayette for, *inter alia*, “carrying on irregular and unlawful warfare as a guerrilla.” THE TRIAL OF JOHN Y. BEALL 7 (1865). Beall and his compatriots had secretly crossed the Union military lines into New York, disguised in civilian clothing, and under cover of darkness attempted to derail a passenger train loaded with civilians “by placing obstructions across the track.” *Id.* At trial, his lawyer argued that Beall, a commissioned officer in the Confederate Navy, was a lawful belligerent and thus could not be convicted of being a guerrilla. *Id.* at 66. In reply, the prosecutor correctly pointed out that Beall’s status as a guerrilla was “quite immaterial” and “mere surplusage,” because “the facts alleged in these specifications constitute violations of the laws of civilized warfare,” namely perfidy and attacking protected persons and property. *Id.* at 82. Thus, it was the circumstances under which Beall committed the offense, not his belligerent status, which made his conduct a violation of the law of war and conferred subject matter jurisdiction on the commission.
Accordingly, while closely analogous to a court martial in both structure and procedure, the law-of-war commission was distinguished from a court martial, on the one hand, and a martial law or occupation tribunal, on the other hand, by the scope of its subject matter jurisdiction. The jurisdiction of courts-martial was limited to statutory offenses set forth in the Articles of War, which governed the conduct of U.S. service members and certain classes of persons associated with the armed forces, whereas martial law or occupation tribunals were authorized to try ordinary civil and criminal cases in the absence of functioning local judicial institutions. In contrast, a law-of-war commission was established by a commanding officer, typically in an active theater of military operations, for the purpose of trying persons accused of committing acts of illegitimate warfare in violation of customary international law, which supplied the substantive rules of decision.

It is important to emphasize that this type of tribunal is not, strictly speaking, a “court” in the familiar Article III meaning of the term. Instead, the essential purpose of this type of tribunal is to assist the convening authority to maintain military discipline on the battlefield by making factual findings and recommending a disposition concerning alleged violations of the law of war. The convening authority is authorized, in his discretion, to approve, disapprove or modify the findings and decision of the panel members, with the sole proviso that he cannot increase the sentence beyond the panel’s recommendation. In this sense, the commission functions as “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.”

Yet, like any exercise of the war powers, Congress’s constitutional authority was understood to be constrained by the law of nations. “Congress can declare war,” the Attorney General opined in 1865, but

[w]hen war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Under the power to define those laws, Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an

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197 O.R.A., Ser. 2, vol. 1, at 248 (Halleck’s order directing that military commissions “should be ... constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 842 (2d ed. 1920) (military commissions “will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.”).


199 Hamdan, 548 U.S. at 595-98; WINTHROP, supra note 197, at 838.

200 See In re Vidal, 179 U.S. 126, 127 (1900) (military tribunals are not “courts with jurisdiction in law or equity within the meaning of those terms as used in [Article III] of the Constitution.”).

201 This procedure is modeled on courts-martial practice. Compare 10 U.S.C. § 950b(c), with 10 U.S.C. § 860. See also Jecker v. Montgomery, 54 U.S. (13 How.) 498, 515 (1851) (holding that military commissions “established or sanctioned in Mexico during the war by commanders of the American forces, were nothing more than agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied.”); In re Yamashita, 327 U.S. 1, 11 (1946) (“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.”).
Within the constraints of the Define and Punish Clause, then, Congress was presumed to have the authority to “prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure,” but in any event, a law-of-war commission could only “take cognizance of such offenses as the laws of war permit.” As a matter of longstanding practice, Congress was content to legislate at the margins, without attempting to prescribe the substantive content of such offenses. Instead, it delegated to military justice authorities the responsibility of supervising the application of the law in a common law fashion, consistent with their unique professional imperatives.

C. Ex Parte Quirin

This was the state of the law in June of 1942, when eight German soldiers were surreptitiously landed by submarine on the beaches near Amagansett, Long Island and Jacksonville, Florida, in possession of a large amount of U.S. currency and a cache of high-powered explosives, fuses and timing devices. Once on the beach, the saboteurs shed their military uniforms and donned civilian clothing, buried their weapons in the sand, and scattered into the community with plans to reconnoiter potential targets. Having attended a special training camp near Berlin, their mission was to sabotage the American war effort by destroying key transportation infrastructure and manufacturing facilities. In addition, the saboteurs were

204 Id. at 298.
205 See, e.g., Act of July 17, 1862, ch. 201, § 5, 12 Stat. 598 (creating the position of judge advocate general, “to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all [such] proceedings.”); Act of March 3, 1863, ch. 75, § 38, 12 Stat. 737 (providing that “all persons” found acting as spies shall be “triable by a general court-martial or military commission.”); Act of June 20, 1864, ch. 145, §§ 5, 6, 13 Stat. 145 (creating the Bureau of Military Justice to “receive, revise, and have recorded the proceedings of courts-martial, courts of inquiry, and military commissions.”); Act of July 2, 1864, ch. 215, § 1, 13 Stat. 356 (providing statutory authorization for “the commanding general in the field, or the commander of the department” to utilize military commissions to try and punish “guerilla marauders” for domestic crimes, such as robbery, arson, burglary, rape and murder, as well as “for violation of the laws and customs of war.”); Act of June 22, 1874, Tit. XIV, ch. 5, § 1343, 18 Stat. 241 (amending the Articles of War to provide that spies may be tried by military commission); Act of Aug. 29, 1916, ch. 418, ¶ 15, 39 Stat. 653 (providing that the “articles [of war] conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions ... of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions.”).
206 With creation of the Office of the Judge Advocate General in 1862 and the Bureau of Military Justice in 1864, the military justice establishment exercised appellate supervision over military commission proceedings, and repeatedly disapproved findings where a commission was found to have exceeded its jurisdiction. See Howland, supra 180, at 1069-70; Hart, supra note 183, at 57-65; see also Dynes v. Hoover, 61 U.S. 65, 82 (1857) (holding that the punishment of offenses against “the laws and customs of the sea” pursuant to Article 32 of the Rules for the Government of the Navy was not impermissibly vague, because “what those crimes are, and how they are to be punished, is well known by practical men in the navy ... who have studied the law of courts martial, and the offenses of which [they] have cognizance.”).
207 The background facts summarized here have been recounted in numerous publications, including Louis Fisher, Military Tribunals: The Quirin Precedent, CRS REPORT RL31340 (Mar. 26, 2002); Michal R. Belknap, The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case, 89 MIL. L. REV. 59 (1980); Eugene Rachlis, They Came to Kill: The Story of Eight Nazi Saboteurs in America (1961).
instructed to attack civilian persons and property for propaganda purposes, including “scattered nuisance bombings” of railroad stations and Jewish-owned department stores, “time to create the greatest possible panic.”

Finally, they were given “a concise, but thorough, indoctrination in [the use of] secret inks,” in order to relay to their German handlers “observations ... which would help in planning future sabotage groups” and “the location of new war plants.”

Within a matter of days after the landing, two of the saboteurs, George Dasch and Ernest Burger, concluded that the mission was doomed to failure and decided to save themselves by revealing the plot to the American authorities. Convinced that he would be greeted as a hero, Dasch traveled to Washington, D.C. and turned himself in to the FBI, who subjected him to an extensive debriefing. Armed with this information, FBI agents were able to apprehend the remaining saboteurs before their plans could be executed.

The government had initially intended to try the saboteurs in federal court, but President Roosevelt rejected this option, because he was determined to see them executed and there were serious doubts about the government’s ability to secure a conviction on a capital charge. On July 2, Roosevelt thus issued a proclamation, based on his authority as Commander-in-Chief and “the statutes of the United States,” directing that “all enemies” who entered United States territory “during a time of war” for the purpose of committing “sabotage, espionage or other hostile or warlike acts ... shall be subject to the law of war and to the jurisdiction of military tribunals.” More controversially, he attempted to insulate the proceedings from judicial review altogether, declaring that “such persons shall not be privileged to seek any remedy or maintain any proceeding ... in the courts of the United States.”

On the same day, Roosevelt issued a military order establishing a commission, comprised of seven Army generals, to try the eight saboteurs “for offenses against the law of war and the Articles of War.” Although the order purported to direct the commission to conduct the trial in a manner “consistent with the powers of military commissions under the Articles of War,” it departed sharply from the procedural requirements of the Articles and the Manual for Courts-

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208 Rachlis, supra note 207, at 21.
209 Id. at 64, 73.
210 Id. at 156-65.
211 The federal sabotage statute carried a maximum penalty of 30 years’ imprisonment and the Justice Department ostensibly concluded that seven of the defendants were not amenable to treason because they were German citizens. Belknap, supra note 207, at 63. This makes little sense, however, because the existing treason statute made it a capital offense for any person “owing allegiance to the United States” to “levy war” against it, or to give “aid and comfort within the United States” to its enemies. Act of Mar. 4, 1909, ch. 321, §§ 1, 2, 35 Stat. 1088. The obligation of allegiance attaches to anyone who by reason of his citizenship or presence within U.S. territory enjoys the reciprocal protection of the government, which makes him “amenable to the laws of the United States,” including those “prescribing punishment for treason.” Carlisle v. United States, 83 U.S. 147, 155 (1872); see also United States v. Greathouse, 26 F. Cas. 18, 24 (C.C.N.D. Cal. 1863) (“The local and temporary allegiance, which every one – citizen or alien – owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason.”). It thus seems more likely that the government was unsure whether it could meet the stringent evidentiary burden of proving treason. A less principled reason to prefer a military commission was secrecy, since the Administration was anxious to protect the reputation of the FBI by preventing public disclosure that the saboteurs had been captured only because Dasch betrayed them. Fisher, supra note 207, at 3-5.
213 Id.
Martial. \(^{215}\) In particular, the order authorized the panel, in its discretion, to admit any evidence it deemed to “have probative value to a reasonable man,” and to impose a death sentence by a non-unanimous verdict. \(^{216}\) Moreover, the record of trial would not be reviewed in the ordinary course by the Judge Advocate General’s office, which had been assigned to assist the Attorney General prosecute the case, but instead would be forwarded directly to Roosevelt for final action. \(^{217}\)

The next day, a military attorney signed a charging document alleging that the defendants had committed four crimes, each of which was supported by the same factual allegations: (1) a catch-all count charging a violation of the common law of war, (2) aiding the enemy in violation of Article 81, (3) spying in violation of Article 82, and (4) conspiring to commit the foregoing offenses. \(^{218}\) The trial commenced the following week under strict security in a former lecture hall on the fifth floor of the Justice Department building in Washington, D.C., with heavy black curtains draped over the windows. \(^{219}\)

Meanwhile, the defendants’ appointed counsel lodged a petition for habeas corpus in the Supreme Court, supported by a 72-page brief that challenged virtually every aspect of the proceedings, including the personal and subject matter jurisdiction of the commission and the procedural irregularities licensed by the President’s order. \(^{220}\) In particular, they argued that the President was without constitutional or statutory authority to establish a military tribunal to prosecute violations of customary international law, insisting that this amounted to penalizing common law crimes. With distinct echoes of Daniel Webster’s argument in Smith, they wrote that “the alleged Law of War which is asserted by the prosecution is a species of international law analogous to common law. No principle is better settled than the principle that there is no common law crime against the United States. ... Each crime must be covered by a specific criminal statute.” \(^{221}\)

On July 31, after hearing some nine hours of oral argument over the course of two days, the Court issued a terse per curiam opinion announcing that the commission had been lawfully constituted, that it had jurisdiction over the charged offenses, and that the defendants had failed to show that their detention was unlawful. \(^{222}\) A full opinion explaining the basis of its decision

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\(^{215}\) Id.

\(^{216}\) Id. Article 43 provided that no person could be sentenced to death by a court martial except by a unanimous vote of the panel members. Act of June 4, 1920, ch. 227, § 43, 41 Stat. 795-96. The rules of evidence governing courts-martial proceedings were set forth in the Manual for Courts-Martial 107-37 (1943). Unless specifically provided otherwise, “the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States” were applicable in courts-martial. Id. at 109.

\(^{217}\) 7 Fed. Reg. 5103. Under Articles 46 and 50½, the Judge Advocate General exercised appellate review over the judgments of courts-martial and military commissions. In particular, no death sentence could be executed “unless and until” a board of review appointed by the Judge Advocate General held “the record of trial upon which such sentence is based legally sufficient to support the sentence.” Act of June 4, 1920, ch. 227, § 50½, 41 Stat. 797-98.

\(^{218}\) Ex Parte Quirin, 317 U.S. 1, 23 (1942).

\(^{219}\) Fisher, supra note 207, at 7.


\(^{221}\) Id. at 28-29.

\(^{222}\) 317 U.S. at 18-19.
would follow some three months later, albeit not until after six of the saboteurs had already been executed.\textsuperscript{223} This uncomfortable fact prompted the Court to base its decision on the narrowest possible grounds, since it seemed imperative from an institutional perspective to issue a unanimous opinion that avoided casting doubt on the validity of its previous judgment.\textsuperscript{224}

While the Court agreed with the defendants’ initial contention that their status as enemy aliens did not preclude them from seeking judicial review of the legality of their detention, it flatly rejected the claim that the commission lacked “jurisdiction to try the charge preferred against [them]” for violating the law of war, merely because the elements of the offense weren’t specifically delineated in a statute.\textsuperscript{225} But in order to answer the defendants’ argument that they were being illegally prosecuted for an impermissibly vague common law offense, the Court felt compelled to find a statutory basis for the commission’s assertion of subject matter jurisdiction over this charge.

The most obvious solution would have been to rely instead on Charges II and III, which alleged domestic military offenses that were expressly subject to trial by military commission. The stipulated record certainly seemed to support those charges. After all, the defendants had confessed to being agents of the armed forces of Nazi Germany, against whom the United States was engaged in a congressionally declared war. In that capacity, they had secretly crossed into the sovereign territory of the United States, disguised in civilian clothing, with the specific intent to destroy strategic military assets, convey intelligence to the enemy, and attack protected persons and property as a form of psychological warfare. Although they failed to bring their plans to fruition, this was by any reasonable measure an adequate factual foundation to allege a culpable attempt to violate Article 82.\textsuperscript{226} Similarly, by entering onto American soil, the defendants had incurred a temporary duty of allegiance to the United States and were therefore amenable to trial for aiding the enemy, as codified in Article 81.\textsuperscript{227}

This straightforward analysis was not a practical option, however, because of the unusual posture of the case. Despite having already announced its decision, several justices harbored serious doubts about the legality of the President’s order, insofar as it departed from the procedural safeguards of the Articles of War. The commission’s jurisdiction thus could not be

\begin{footnotesize}
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\item \textsuperscript{223} The trial concluded on August 1, when the commission found each defendant guilty and sentenced them to death, although it recommended that Dasch and Burger be spared due to their cooperation. After reviewing the 3,000-page record of trial for several days, Roosevelt approved the commission’s findings and recommendations. On the morning August 8, the six condemned men were executed in the electric chair at the D.C. jail; Dasch and Burger were sentenced to 30 years and life imprisonment, respectively. RACHLIS, supra note 207, at 281-90.
\item \textsuperscript{224} On the Court’s struggle to craft an opinion that commanded a consensus, see Fisher, supra note 207, at 27-32; Belknap, supra note 207; at 78-81; Jack Goldsmith, Justice Jackson’s Unpublished Opinion in Ex Parte Quirin, 9 GREEN BAG 2d 223 (2006).
\item \textsuperscript{225} 317 U.S. at 25.
\item \textsuperscript{226} See WINTHROP, supra note 197, at 766-68.
\item \textsuperscript{227} See GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 302 n.1 (3d rev. ed. 1915) (where several British citizens traveled to South Carolina to assist in the manufacture of “treasury notes for the Confederate authorities, and at the end of their employment came secretly and without authority into our lines with the design of returning to their home ... [they] were properly amenable to trial [by military commission] for the offense of penetrating our military lines in violation of the laws of war.”). On aiding the enemy under the law of war, see Samuel T. Morison, History and Tradition in American Military Justice, 33 U. PENN. J. INT’L L. 121, 130-37 (2011).
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\end{footnotesize}
said to rest on a violation of the punitive Articles as such, because that would arguably place the Court in the untenable position of having permitted the execution of six men in derogation of their statutory due process rights. As Chief Justice Stone wrote to Frankfurter, it would “seem almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated.” Moreover, Dasch and Burger were still very much alive, and Stone worried that they might raise the issue in a collateral proceeding, which “would not place the present Court in a very happy light.” To avoid this “unhappy” result, Stone’s opinion for the Court focused entirely on the defendants’ amenability to trial under the customary law of war as alleged in Charge I.

Although Stone’s reasoning has been subjected to withering criticism, the interpretive key to understanding the opinion is its direct analogy between the Articles of War and the 1819 piracy statute upheld in *Smith*. When placed in historical context, this part of the analysis is actually more robust than many critics have acknowledged. As Stone correctly observes, the existing Articles made no less than half a dozen references to “the military commission” as an institution, which as a matter of established practice was “appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial.” And when Congress undertook the first systematic overhaul of the Articles in 1916, it was careful to preserve, on the recommendation of the Judge Advocate General, the “concurrent jurisdiction [of military commissions] in respect of offenders or offenses that ... by the law of war may be triable by such ... tribunals.”

To be sure, the substantive content of the law of war is a separate question. But taken together, these statutory references may plausibly be read as evincing a congressional intention to vest the military commission, “within constitutional limitations” prescribed by the Define and Punish Clause, with subject matter jurisdiction “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.” Indeed, to find otherwise would have been a wholesale repudiation of nearly a century of experience that had accrued within the military justice establishment, which Congress deliberately allowed to develop over “a long course of practical administrative construction” under the supervision of the Judge Advocate General.

This conclusion is reinforced when the decision is viewed through the prism of the Court’s piracy jurisprudence. The mere fact that Congress had not seen fit to “mark [the] precise

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229 Id.

230 317 U.S. at 46 (“Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of [the remaining charges].”).

231 Id. at 27.

232 Id. On the legislative history of Article 15, see Glazier, *supra* note 179, at 57-60.

233 317 U.S. at 28; see also id. (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders and offenses against the law of war in appropriate cases.”); id. at 30 (“[I]n the 15th Article of War ... Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction.”).

234 Id. at 35.
boundaries ... which [the law of war] condemns” was not a compelling objection, Stone reasoned, because Congress had sanctioned such tribunals for the purpose of applying a body of customary international norms that was sufficiently determinate to satisfy due process, just as it had done in the 1819 piracy statute.235 In both cases, the norms being enforced were derived entirely from extant customary international law. It is instructive, moreover, that the Court drew no principled distinction between the law of war and any other branch of customary international law, because it also relied on the existing codification of the ATS, which similarly “conferr[ed] on the federal courts jurisdiction over suits brought by an alien for a tort ‘in violation of the law of nations.’”236

In each instance, Congress had necessarily acted within the constitutional limits of its prescriptive authority, because the device of incorporation by reference, by definition, does not transcend the boundaries of the existing law of nations. “Congress had the choice,” Stone concluded, “of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.”237

Although Quirin articulated the correct standard for determining the subject matter jurisdiction of a military commission, the Court’s application of that standard was arguably distorted by its compromised position.238 Anxious to avoid grounding its decision on the assertion of jurisdiction over a municipal offense, the Court assumed that espionage could be prosecuted as a freestanding “war crime.” However, this elides the fact that the use of such tactics is an entirely lawful means of warfare, and a spy is therefore not a war criminal in the international sense of the term. Instead, according to the Army’s own official doctrinal statement, which the Court conspicuously failed to mention, a spy is subject to punishment under the domestic military law of the capturing power, “not as [a] violator of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible for the enemy.”239 Similarly, for the reasons adduced above, there is simply no such thing as the “offense of unlawful belligerency” in the law of war, which conflates the status of being an unprivileged belligerent with the commission of a war crime.240 The fundamental flaw in this

235 Id. at 29, citing Smith, 18 U.S. at 153 (“An Act of Congress punishing ‘the crime of piracy, as defined by the law of nations’ is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, ‘to define and punish’ the offense, since it has adopted by reference the sufficiently precise definition of international law.”).
237 Id. at 30; see also Yamashita, 327 U.S. at 7-8.
238 Id. at 31-36.
240 See supra text accompanying notes 152-54, 188-96. In 1955, this was also the considered position of the Justice Department. During the debate over the ratification of the Geneva Conventions, the Senate asked the Department “whether the articles dealing with grave breaches could result in imposing criminal liability upon persons without official status.” Letter from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, to Senator Walter F. George, Chairman, Senate Foreign Relations Committee (June 7, 1955), in Geneva Conventions for the Protection of War Victims, Hearing Before the Committee on Foreign Relations, 84th Cong., 1st Sess. at 58 (June 3, 1955). In response, the Department opined:

We are reluctant to state that the mistreatment of a [protected] person ... by a private person (e.g., the killing of a wounded airman) could never constitute a grave breach no matter what the intent
aspect of the Court’s opinion is that it severs the analysis from the actual content of the law of nations, in which case it cannot function as a constraint on the subject matter jurisdiction of this type of military tribunal.

IV. CONGRESS OCCUPIES THE FIELD

A. Hamdan v. Rumsfeld

In the wake of the 9/11 attacks, President Bush issued a military order in his capacity as Commander-in-Chief, expressly modeled on the Roosevelt Order upheld in Quirin, with the important exception that it was far broader in scope. The Bush Order provided that any foreign national who was believed to be a current or former member of al Qaeda, or any other non-citizen who engaged in or conspired to commit a terrorist act having, inter alia, an “adverse effect” on the interests of the United States, as well as anyone who “knowingly harbored” such a person, could be subjected to trial for “violations of the laws of war and other applicable laws by military tribunals.” Although the details were left to be worked out by the Secretary of Defense, like the Roosevelt Order, the Bush Order dispensed with the procedural and evidentiary rules ordinarily applicable in courts-martial proceedings. However, whereas the Roosevelt Order established an ad hoc tribunal to prosecute a specific set of defendants for a discrete offense, the Bush Order seemed to contemplate something more permanent. The President thus reserved the right, in his discretion, to “determine from time to time” who would be subject to military jurisdiction with no apparent temporal or geographic limitation.

and circumstances. However, it is entirely clear that these provisions ... were not intended to convert into grave breaches every common crime in which the victim happens to be a [protected] person.

Id. at 58–59; see also Geneva Conventions for the Protection of War Victims, S. Rep. No. 9, 84th Cong., 1st Sess. at 58–59 (June 27, 1955) (“The committee was also concerned as to whether these provisions as to ‘grave breaches’ would impose criminal liability upon persons without official status. However, it is clear that these provisions of the conventions do not convert into a ‘grave breach’ every corresponding crime in which a protected person is the victim.”).


Military Order, §§ 1(e), 2(a).

Id. at § 1(f). In particular, the Bush Order permitted the admission of any evidence deemed to “have probative value to a reasonable person,” non-unanimous capital verdicts, and review of the record of trial by the President. Id. at §§ 4(c)(3), (8). In addition, despite Quirin’s holding that the German saboteurs could seek habeas review, the order purported to forbid defendants from “seek[ing] any remedy or maintain[ing] any proceeding” in the courts of the United States, as well as “any court of any foreign nation” or “any international tribunal.” Id. at § 7(b)(2).

Id. at § 2(a). In March 2002, the Secretary of Defense issued procedural guidelines implementing the President’s directive to establish a permanent system of military commissions. See DEP’T OF DEF., MILITARY COMMISSION ORDER NO. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002). A year later, the Secretary of Defense delineated the offenses subject to trial by military commission. See DEP’T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, Crimes and Elements for Trials by Military Commission (Apr. 30, 2003).
In July 2003, President Bush designated Salim Hamdan, a Yemeni citizen who was alleged to have been a driver and bodyguard for Usama bin Ladin in Afghanistan, for trial by military commission. In July 2004, after Hamdan had commenced a habeas action challenging the legality of the President’s designation, he was formally charged with participating in a wide-ranging conspiracy culminating in the 9/11 attacks. When the case reached the Supreme Court, the majority struck down the Bush Order, finding that the procedures and evidentiary rules it established to govern commission proceedings exceeded the President’s authority under both the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Convictions.

Importantly, the majority also reaffirmed the standard articulated by Quirin for determining the subject matter jurisdiction of a law-of-war commission, which in principal requires a searching analysis of the actual content of customary international law. For the sake of argument, the Court assumed that the congressional authorization to use military force against those responsible for the 9/11 attacks had “activated the President’s war powers,” including “the authority to convene military commissions” in appropriate circumstances. However, the Court rejected the government’s sweeping assertion that, once activated, the President’s inherent power as Commander-in-Chief entitled him to “invoke military commissions when he deems them necessary,” without regard to the constraints imposed by the law of war.

Indeed, this conclusion had been strengthened by events subsequent to Quirin. In 1950, Congress undertook a comprehensive overhaul of the Articles of War with the passage of the UCMJ. In the new statute, Congress deliberately retained Article 15, now codified as Article 21, 10 U.S.C. § 821. As Justice Stephens explained,

the Quirin Court recognized that [in this provision] Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions – with the express condition that the President and those under his command comply with the law of war. That much is evidenced by the Court’s inquiry, following its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case.

245 Hamdan, 548 U.S. at 569.
246 Id. at 569-70.
247 Id. at 613-26 (holding that the President’s bare assertion of impracticability was not sufficient to justify deviating from the rules governing courts-martial, as codified in Article 36, UCMJ); id. at 626-35 (holding that the military commission established to try Hamdan did not constitute a “regularly constituted court” under Common Article 3, where no practical need justified departing from courts-martial procedures); see also id. at 639-53 (Kennedy, J., concurring).
249 Id., quoting Brief for Respondents at 17.
250 Id. at 593 (original emphasis); see also id. at 597 n.27 (“[A]s we recognized in Quirin ... commissions convened during time of war but under neither martial law nor military government may only try offenses against the law of war.”); id. at 599 n.31 (“If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions.”); id. at 641 (Kennedy, J., concurring) (“[T]he President’s authority [under Article 21] to convene military commissions is limited. ... If the military commission at issue is illegal under the law of war, then an offender cannot be tried ‘by the law of war’ before that commission.”).
The choice to assimilate Article 15 into the UCMJ was a considered decision. The legislative history of the statute reveals that Congress accepted *Quirin*’s interpretation of this provision, namely that by incorporating the common law of war by reference into the domestic military code, it had acted at the apex of its prescriptive authority under the Define and Punish Clause.\(^{251}\) As it had in response to *Palmer*, Congress accepted that it could go no further in this field than conforming domestic law to the contours of the existing law of nations and it chose incorporation by reference as the most efficient means of achieving that result. This explains Justice Stephens’s observation that *Quirin*’s construction of the language contained in Article 15 “represents the high-water mark of military power to try enemy combatants for war crimes.”\(^{252}\) The reason “no more robust model of executive power exists” is that Congress cannot confer any greater authority on the President for this purpose, even if it wanted to.\(^{253}\)

While the Court’s task was therefore “to decide whether Hamdan’s military commission is ... justified” under the common law of war in the absence of “more specific congressional authorization,” this hardly entails that any statute would suffice.\(^{254}\) It is true, as *Quirin* had acknowledged, that Congress retains the prerogative to clarify the myriad issues implicated by the use of military commissions through the exercise of “its constitutional authority to ‘define and punish ... offenses against the Law of Nations.’”\(^{255}\) This might include, for example, “positively identify[ing]” the “elements of the offense[s]” and the “range of permissible punishments” for violations against the law of war.\(^{256}\) But this does not suggest that Congress can validly proscribe “war crimes” lacking a concrete basis in existing customary international law, any more than it can arbitrarily define murder to be a species of general piracy, because its authority to codify such offenses is constrained by the command of the Define and Punish Clause.\(^{257}\)

This rationale was accepted by a majority of the Court. “Congress has the power and responsibility to determine the necessity for military courts,” Justice Kennedy carefully explained, “and to provide the jurisdiction and procedures applicable to them,” but the exercise of that power is always “[s]ubject to constitutional limitations.”\(^{258}\) Accordingly, *Hamdan* cannot

\(^{251}\) *See* Establishing a Uniform Code of Military Justice: Hearings on S. 875 and H.R. 4080 Before the Committee on Armed Services, 81st Cong., 1st Sess. at 106 (May 4, 1949) (Statement of Senator McCarran, Chairman of the Committee on the Judiciary) (“This provision stems from [Article] 15. The Supreme Court has held that by this provision Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases (*Ex Parte Quirin* (1942), 317 U.S. 1, 28.)”) (emphasis added); *see also* Establishing a Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Committee on Armed Services, 81st Cong., 1st Sess. at 975 (Mar. 23, 1949).

\(^{252}\) *Id.*; *see also* Quirin, 317 U.S. at 29 (to determine “whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission ... [w]e must ... first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal”); United States v. Arjona, 120 U.S. 479, 488 (1887) (“Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress.”).

\(^{253}\) *548* U.S. at 595.

\(^{254}\) *Id.* at 601.

\(^{255}\) *Id.* at 602.

\(^{256}\) *See supra* text accompanying notes 166-67.

\(^{257}\) *548* U.S. at 645; *see also id.* at 637 (“If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do
plausibly be read as licensing a departure from the law-of-nations jurisprudence consistently articulated in the line of cases from *Palmer* to *Quirin*.

Applying this standard, a plurality of the Court concluded that none of the discrete overt acts Hamdan was alleged to have committed constituted a violation of the law of war. The plurality further held that the charge of conspiracy was not a cognizable offense in any event, since it had “rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in ... the major treaties on the law of war.” As a result, the offense of conspiracy lacked sufficient historical pedigree in the norms of state practice to qualify as an offense triable by a law-of-war commission. “At a minimum,” Justice Stevens cautioned, “the government must make a substantial showing that the crime for which it seeks to try a defendant by [this type of] military commission is acknowledged to be an offense against the law of war.” Whatever precise formulation one prefers, the “high standard of clarity” contemplated by the Court is satisfied only where the alleged violation is “by universal agreement and practice, both in this country and internationally, recognized as an offense against the law of war.”

### B. Promulgation of the Military Commissions Act

Shortly after the *Hamdan* decision was announced, the Bush Administration took up the Court’s admonition to seek additional statutory guidance, and therefore drafted legislation proposing the enactment of a “code of military commissions” as an adjunct to the UCMJ. The purpose of the legislation, the White House press release announced, was to create a permanent “system of military commissions” for the trial of “unlawful enemy combatants, including members of al Qaeda, the Taliban, and other international terrorists.” In the official message transmitting the bill to Congress, the President reiterated that it was intended to establish “for the first time in our Nation’s history a comprehensive statutory structure that would allow for the fair
and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants.”

In October 2006, Congress gave the President most of the authority he had sought, passing the MCA with few substantive changes. The ostensible “purpose” of the Act was to establish “procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war.”

This assertion is disingenuous, however, because the jurisdictional reach of the Act sweeps far more broadly than those engaged in direct hostilities against the United States. The term “unlawful enemy combatant” is defined to include any non-citizen (other than a lawful enemy combatant) who is either (1) “engaged in hostilities ... against the United States or its co-belligerents,” or (2) “purposefully and materially supported hostilities against the United States or its co-belligerents,” including anyone who is “part of” the Taliban, al Qaeda, or an “associated” armed group.

When this definition is unpacked, the implications are quite breathtaking. In the first place, as we’ve seen, the mere fact that an unprivileged belligerent commits a hostile act in the context of an armed conflict has never been understood to constitute a per se violation of the law of war. If that were true, it would have the entirely counterintuitive implication that civilians who violently resisted the Nazi occupation of Europe were actually committing war crimes against the German army, a theory that was firmly rejected in the jurisprudence of the post-war military tribunals. Nor is this a jurisdictional principle that the United States is likely to embrace with any semblance of consistency, since as David Glazier acutely observes, it would expose its own special forces, CIA paramilitary personnel, and allied guerrilla forces, each of which have routinely operated behind enemy lines without wearing distinctive insignia or uniforms, to potential war crimes charges.

266 10 U.S.C. § 948b(a) (2006). An “alien” is defined as a non-citizen of the United States, whereas the definition of a “lawful enemy combatant” is based loosely on the conditions set forth in the Geneva Conventions. Id. at §§ 948a(2), (3) (2006); see also 10 U.S.C. § 948a(6) (2009) (defining “privileged belligerent” by reference to the “Article 4 of the Geneva Conventions.”).
267 Id. at 948a(1)(i) (2006). The 2009 version of the MCA substitutes the terms “unprivileged enemy belligerent” and “coalition partner” for “unlawful enemy combatant” and “co-belligerent,” respectively, but these terms appear to be functional equivalents. See 10 U.S.C. §§ 948a(3), (7) (2009).
268 See supra text accompanying notes 152-54, 188-96, 240.
269 See 9 J.H.W. VERZIL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 88-93 (1978). As Baxter points out, it was not until the Nuremberg Tribunals that serious “judicial consideration was given to the status of persons falling outside the class of so-called ‘lawful belligerents.’” Baxter, supra note 154, at 334, 336. In the Hostages Trial, which involved the brutal suppression of partisan forces during the German occupation of Yugoslavia and Greece, “guerrillas were actually said, in legal intendment, to resemble spies in that the enemy punished such activities not because of their illegality in an international sense but because of the danger they presented to him.” Id. at 336.
Moreover, the personal jurisdiction of the MCA is not limited to offenses committed in the context of an armed conflict in which the United States is a direct participant. Taken at face value, any armed conflict subject to the laws of war would apparently suffice, provided only that a coalition partner of the United States is a party to the conflict. The 2009 version of the MCA clarifies this point, by defining the term “hostilities” to include “any conflict subject to the laws of war.”\(^{271}\) In addition, any non-citizen who “was a part of al Qaeda at the time of the alleged offense” is subject to the jurisdiction of the Act without qualification.\(^{272}\) As a result, the United States unambiguously asserts the right to exercise universal jurisdiction over current and former members of al Qaeda or an associated armed group, for any alleged violation of the MCA, occurring in the context of any armed conflict, without regard to the identity of the parties to the conflict.\(^{273}\)

The jurisdiction of the Act also extends to persons who have never actually committed a belligerent act, but who merely provide “material support” to an entity engaged in hostilities against the United States or a coalition partner. Assuming the application of the identical phrase in the federal code is a reliable guide, this would be true even if the support was not given with a hostile intent. An alien would thus be considered an “unprivileged belligerent” for, inter alia, making a charitable contribution animated by humanitarian concerns, providing routine goods or services for profit, or the coordinated expression of political or legal advocacy on behalf of an adverse belligerent.\(^{274}\)

Unlike the parallel federal statute, however, the MCA does not limit this principle to giving such support to a non-state terrorist organization. This leaves open the possibility that in a conventional armed conflict, the entire civil service, and perhaps even every loyal taxpaying citizen, of the enemy will be subject to the jurisdiction of the MCA. Needless to say, it is unprecedented to expose large portions of a civilian population to potential war crimes.

\(^{272}\) Id. at § 948a(7)(C). Although the term “part of” is not statutorily defined, it has been given an expansive interpretation for detention purposes. See Salahi v. Obama, 625 F.3d 745, 751-52 (D.C. Cir. 2010).
\(^{273}\) This is not a hypothetical argument. In September 2011, the United States referred war crimes charges under the MCA against a Guantanamo detainee for his alleged involvement in a terrorist attack in the Gulf of Yemen against a French-flagged tanker that had been chartered by a Malaysian oil company, which resulted in the death of a Bulgarian crew member. See Charge Sheet, Abd Al Rahim Hussayn Muhammad Al Nashiri, at 4-5, 9, 12 (Sept. 28, 2011), available at http://www.mc.mil/CASES/MilitaryCommissions.aspx. Although France was a coalition partner with the United States in the war in Afghanistan, the United States was not a party to any armed conflict in Yemen when this incident occurred in 2002.
\(^{274}\) See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2722 (2010) (the provision of legal services or human rights advocacy in coordination with, or at the direction of, a foreign terrorist organization constitutes “material support”); Haile v. Holder, 658 F.3d 1122, 1129 (9th Cir. 2011) (“[S]upplying [a terrorist organization] with provisions such as sugar, shoes, and cigarettes … amount in the aggregate to ‘material support.’”); Hussain v. Mukasey, 518 F.3d 534, 538 (7th Cir. 2008) (“If you give money … for the teaching of arithmetic to children in an elementary school run by Hamas, you are providing material support to a terrorist organization even though you are not providing direct support to any terrorist acts.”); Weiss v. National Westminster Bank PLC, 453 F.Supp.2d 609, 625 (E.D.N.Y. 2006) (under federal law, a bank that knowingly furnishes “routine banking services” to groups associated with a terrorist organization is providing “material support”); In re Guantanamo Detainee Cases, 355 F.Supp.2d 443, 475 (D.D.C. 2005) (noting that, in the government’s view, “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source” qualify as “enemy combatants”).
prosecution for these sorts of activities, at least in the absence of a duty of allegiance to the complaining party. Indeed, if this is a correct reading of the statute, it would undermine the bedrock principle of distinction and hence threaten the entire structure of the law of war. The argument is not that the MCA necessarily “confers jurisdiction in violation of the laws of war” in every conceivable application, as Stephen Vladeck has pointed out, but rather that the statute is so broadly written that it “could easily support personal jurisdiction . . . where the defendant would not be subject to military jurisdiction under the laws of war.”

The MCA also abandons the longstanding practice of specifying subject matter jurisdiction through a generic reference to the common law of war. Instead, the Act “occupies the field” by enumerating in detail the essential elements of 28 separate law-of-war offenses and provides related definitions and explanations of liability. As already mentioned, most of these offenses do, in fact, fall comfortably within Congress’s authority to “crystallize in permanent form” traditional war crimes and have thus generated little controversy. There are several conspicuous exceptions, however. Perhaps most importantly, the MCA proscribes terrorism as a substantive war crime, despite the fact that there is neither an academic nor an international legal consensus regarding the proper definition of the term, much less that it constitutes a universally cognizable law-of-war offense.

With that predicate in place, the MCA expansively criminalizes providing material support for terrorism as well, thereby collapsing the standard for personal and subject matter jurisdiction into a single inquiry. Rather than drawing on established international sources, however, the offense combines the substance of two federal statutes that did not exist until the mid-1990s. In particular, the MCA prohibits the provision of “material support or resources” either (1) “knowing or intending that they are to be used” to prepare for or carry out a discrete act of terrorism, or (2) where they are given to “an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged . . . in terrorism.”

279 See supra text accompanying notes 51-58. This is not to suggest that acts conventionally described as “terrorist” may never qualify as war crimes. Rather, the law of war already prohibits direct attacks against civilian persons and objects in the context of an armed conflict, without resort to the politically contested label of terrorism. This has the important consequence of maintaining the distinction between acts of violence that are permissible in an armed conflict, namely those directed against military objectives, and acts of terrorism, which are governed by municipal criminal law. See International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 89 INT’L REV. OF THE RED CROSS 719, 722-29 (2007).
280 In 1994, Congress made it a federal crime to provide material support for terrorism. In 1996, Congress extended criminal liability to those providing material support to designated foreign terrorist organizations. See Boim v. Quranic Literacy Inst. & Holy Land Found., 291 F.3d 1000, 1013 (7th Cir. 2002).
Congress obliquely acknowledged the constitutional limits on its prescriptive authority in this context by pointedly disclaiming any attempt at legislative innovation in the MCA. Indeed, Congress insists that the statute does not “establish new crimes that did not exist before its enactment,” but merely “codif[i]es offenses that have traditionally been triable by military commissions,” which had been grounded almost entirely in the common law of war. For this reason, the MCA purports to be “declarative of existing law,” and therefore does “not preclude trial for crimes that occurred before the date of the enactment of this chapter.” By its own terms, then, Congress has arguably conceded that the constitutional validity of the substantive offenses delineated in the MCA is subject to an intrinsic historical test. Accordingly, whether the codification of these offenses constitutes a legitimate exercise of Congress’s prescriptive authority under the Define and Punish Clause must be measured against the accuracy of the assertion that they do, in fact, have genuine provenance in customary international law.

C. Through the Looking Glass

In 2011, the convictions of the first two Guantanamo detainees tried under the MCA were affirmed by the U.S. Court of Military Commission Review (CMCR), an intermediate appellate court modeled on the service courts of criminal appeals. Although a complete analysis of these lengthy opinions is beyond the scope of this essay, it is sufficient to note that the CMCR’s assessment of the constitutionality of the statute is less than convincing. In fairness, the court began by accurately construing the MCA as “a comprehensive code to define and punish the conduct of widely disparate individuals in a global battle space,” which affirms that the common law of war has been displaced in American military practice.

Importantly, the court also found that Congress’s authority to “establish a statutory framework … for trying and punishing violations of the law of war” is grounded in the Define and Punish Clause, and therefore flatly rejected the government’s contention that Congress was free “to make conduct punishable by military commission without any reference to international norms.” As a result, the determination of whether Congress acted within “its constitutional authority by defining the subject conduct as punishable by military commission,” depends upon a “substantial showing” that the crimes in question constituted “existing offenses against the law of nations” prior to the enactment of the MCA. And that question, the court held, is ultimately a matter of law to be decided by the judiciary.

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286 Al Bahlul, at *11; id. at *13-14 (characterizing the MCA as a “comprehensive statutory structure for military commissions” that “by its plain language casts a wide, potentially global net of individual criminal liability.”).
287 Id. at *14.
288 Id. at *14-15; Hamdan II, at *12 (stating that the MCA “seek[s] to protect our Nation’s interests in ensuring compliance with the law of war and adherence to the law of nations, including customary international law, through adjudication and punishment of particular crimes against the law of war.”).
289 Al Bahlul, at *14; Hamdan II, at *19.
But while the CMCR correctly articulated the constitutional question at issue, its resolution of the matter was so deferential to Congress’s legislative judgment that it effectively abandoned any requirement of adherence to existing international law. Instead, the analytical backbone of the court’s reasoning was a blunt reliance on Quirin’s flawed maxim that a person who fails to qualify as a privileged belligerent is guilty of a war crime if he “commit[s] hostile acts of any kind” in the context of an armed conflict.\textsuperscript{290} From this dubious premise, the court’s analysis of the constitutional validity of the MCA turned on a studied equivocation of the distinction between domestic crimes and violations of customary international law. The topsy-turvy logic of the court’s account of terrorism as a “war crime” thus has a disconcerting, through-the-looking-glass quality.

The court conceded, for example, that no “universally accepted definition of terrorism existed at the time of [the appellants’] charged conduct, or … currently exists in international law.”\textsuperscript{291} Under Tel-Oren and its progeny, this would seem to be the end of the matter.\textsuperscript{292} Undeterred, the court relied upon a series of treaties and suppression conventions that address the subject of terrorism, despite the fact that none of them purports to codify or create a customary international norm proscribing terrorism or material support for terrorism as a violation of the law of war. Indeed, the court freely admitted that these instruments merely “oblige the parties to criminalize various facets of terrorism in their domestic criminal codes and to cooperate in the prevention and punishment of acts of terrorism.”\textsuperscript{293} Yet, the court pronounced itself “satisfied that [these] international conventions and treaties provide an additional basis” for concluding that material support for terrorism and conspiracy were “internationally condemned and criminal” when the underlying events occurred.\textsuperscript{294} But this conclusion is a non-sequitur, because it elides the distinction between municipal crimes and violations of the law of war, which has been entrenched in constitutional doctrine at least since Palmer.

The superficiality of the court’s analysis is further illustrated by its reliance on the Financing of Terrorism Convention.\textsuperscript{295} The court opined that the convention bears “particular significance” to the resolution of the constitutionality of the MCA, because it “seeks to

\textsuperscript{290} Al Bahlul, at *23; id. at *18, *23-27, *40, *45, *53, *58; Hamdan II, at *18 n.48, *28-30, *40-41. This theme is consistent with the government’s insistence that any murder committed “while the accused did not meet the requirements of privileged belligerency” constitutes an offense triable by military commission, “even if such conduct does not violate the international law of war.” Manual for Military Commissions, Part IV-13, at 268 (2010). This theory of liability finds no support in ATS jurisprudence, however. See Xe Servs., 665 F.Supp.2d at 585 (a murder committed “for reasons unrelated to the conflict” by one who “merely takes advantage of the civil disorder that invariably accompanies an armed conflict” cannot be a war crime); In re Sinaltrainal Litigation, 474 F.Supp.2d 1273, 1288 (S.D. Fla. 2006), aff’d in relevant part, Sinaltrainal, 578 F.3d at 1267 (claim that paramilitary organization was “able to use violence to [further the defendant’s business interests] with impunity because there is a raging civil war that creates a lawless environment” failed to allege a war crime, because the offense was not associated with the conflict).

\textsuperscript{291} Al Bahlul, at *33; Hamdan II, at *25 & n.84.

\textsuperscript{292} Although Tel-Oren was decided by the CMCR’s supervising court, and was expressly relied on by al Bahlul, the CMCR does not mention the decision, much less engage its reasoning. Worse yet, the CMCR selectively quotes from Yousef, but fails to note that the Second Circuit reaffirmed Tel-Oren’s holding on the indeterminate status of terrorism under international law. Compare Hamdan II, at *12, with Yousef, 327 F.3d at 106-08.

\textsuperscript{293} Al Bahlul, at *33; Hamdan II, at *20.

\textsuperscript{294} Hamdan II, at *22.

criminalize conduct falling within the definition of providing material support for terrorism articulated in the [statute].”

Aside from the fact that the convention obligates States Party to enact domestic legislation on the subject, its aspirational stance underscores that the proscription of financial support for terrorism was not widely accepted as a violation of international law, much less the law of war, at least at the time the convention was ratified. And while the majority of States have now become signatories to the convention, it hardly follows that its norms are well-established and obligatory, because “the signatories … dispute many of the rules therein,” as demonstrated “by the many declarations and reservations … appended to the convention.”

The CMCR also failed to notice the significance of the Financing Convention’s definition of terrorism, which is limited to acts “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict.”

As Marco Sassòli observes, this means that, in the context of an armed conflict, acts of violence directed against combatants are excluded from the definition of terrorism, which is instead regulated by the law of war. The law of war, in turn, does not proscribe civilian participation in hostilities, although civilians may be targeted while so engaged and are not entitled to claim combatant immunity upon capture, which leaves them exposed to ordinary criminal prosecution for their hostile actions. Accordingly, the Financing Convention maintains the distinction between acts of terrorism and war crimes, which are governed by different bodies of law. If the purpose of the convention was to establish terrorism per se as a war crime, as the CMCR assumed, this definition would be inexplicable.

The court was thus forced to invoke the doctrine of crimes by analogy, albeit without any evident appreciation for its disreputable intellectual history. Under the discomforting banner

296 Hamdan II, at *21 (emphasis added); Al Bahlul, at *32-33.
297 To compound matters, the court ignores the fact that ratification did not occur until after the appellants were taken into custody. The convention entered into force in April 2002, and was ratified by the United States in June 2002. Hamdan II, at *20 n.59. Hamdan was captured in Afghanistan in November 2001. Id. at *4. Al Bahlul was captured in Pakistan in December 2001. Al Bahlul, at *1, *56. By the court’s own rationale, the appellants’ material support convictions were ex post facto and should have been reversed.
298 Chiquita Brands, 2011 WL 2139737, at *13 (rejecting the Financing Convention as a basis for the assertion of ATS jurisdiction over material support claims); see also Khulumani, 504 F.3d at 325 n.11 (a treaty “constitute[s] evidence of a norm of customary international law only if an overwhelming majority of States have ratified [it] and those States uniformly and consistently act in accordance with its principles.”).
299 Financing Convention, Art. 2(1)(b).
301 Id. at 969-70. The same distinction is maintained, either expressly or implicitly, in the nine suppression conventions incorporated by reference into the Financing Convention. For example, the Terrorist Bombings Convention excludes “[t]he activities of armed forces during an armed conflict, as those terms are understood under [the law of war], which are governed by that law.” International Convention for the Suppression of Terrorist Bombings, 15 Dec. 1997, 2149 U.N.T.S. 284, Art. 19(2). Similarly, the Hostages Convention provides that it “shall not apply to an act of hostage-taking committed in the course of an armed conflict as defined in the Geneva Conventions of 1949 and the Protocols thereto.” International Convention against the Taking of Hostages, 17 Dec. 1979, 1316 U.N.T.S. 205, Art. 12.
302 The constitutional prohibition on “crimes by analogy” is grounded in due process, which precludes the application of a criminal statute to conduct that falls “within the reason or mischief of a statute” merely because it is “of equal atrocity, or of kindred character” with conduct “enumerated in the statute.” United States v. Wiltberger, 18 U.S. 76, 96 (1820); see also Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972); United States v. Hubbard, 856 F.Supp. 1416, 1418 (E.D. Cal. 1994), citing Zschernig v. Miller, 389 U.S. 429, 435 n.6 (1968). This
of “Criminalization of Analogous Global Conduct,” the court dutifully recited that it was obligated “to ascertain whether … providing material support to terrorism constituted an offense against the law of nations.”303 Yet, in the very next breath, without betraying a hint of contradiction, the court stated that it would undertake this inquiry by “consider[ing] the degree to which appellant’s underlying conduct violated international standards defining crimes as shown by various national laws prohibiting terrorism.”304 Thereupon, the court embarked on a wide-ranging survey of various national criminal statutes related to terrorism.305 But since the content of these municipal statutes does not establish an “international standard defining” violations of customary international law applicable in an armed conflict, the court’s entire discussion is simply beside the point.306

Nevertheless, the court’s “[r]eview of the general principles of [domestic] law recognized by civilized nations” leads it inexorably to the conclusion that the MCA is a constitutionally sound exercise of the Define and Punish Clause. The court thus stipulated that “Congress acted within the scope of its constitutional authority by defining” terrorism, material support for terrorism, conspiracy and solicitation as war crimes, and “in making such conduct punishable by military commission, when committed by an [alien unprivileged belligerent] in the context of an armed conflict.”307 Remarkably, the court managed to pull off this feat without citing to a single source which suggests that these offenses have ever been recognized in international law as violations of the law of war.

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303 Hamdan II, at *19, *25.
304 Id.; see also Al Bahlul, at *53.
305 Hamdan II, at *25-27 (surveying for illustrative purposes the domestic terrorism laws of Canada, India, and Pakistan); see also Al Bahlul, at *35-38 (canvassing the domestic criminal laws of 13 nations “prohibit[ing] conduct that is similar to providing material support for terrorism”); id. at *60-64 (canvassing the domestic criminal laws of 12 nations “address[ing] conspiracy and conspiracy-like conduct”); id. at *69-74 (canvassing the domestic criminal laws of 15 nations “recogniz[ing] inchoate liability for conduct akin to solicitation, inducement, or advice to another to commit terrorism.”). Curiously, the court also notes that, “[u]nder U.S. domestic law, members of al Qaeda have violated federal statutes relating to terrorism,” although neither defendant was charged with a civilian offense. Hamdan II, at *16; Al Bahlul, at *73.
306 See Sosa, 542 U.S. at 732 & n.20 (“[W]hether a norm is sufficiently definite to support a cause of action” for a violation of the law of nations depends upon “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.”); Khulumani, 504 F.3d at 269 (“We have repeatedly emphasized that the scope of the [ATS’s] jurisdictional grant should be determined by reference to international law.”); Abecassis v. Wyatt, 704 F.Supp.2d 623, 654 (S.D. Tex. 2010) (“Sosa establishes international law as the touchstone of the ATS analysis.”); Chiquita Brands, 2011 WL 2163973, at *14 (“Reliance on domestic laws, even those of the United States, cannot support recognition of an international norm under the ATS.”); Barboza, No. 06–61527, Slip op., at *18 (rejecting plaintiff’s reliance on federal criminal law as evidence of an international law norm against financing terrorism.).
307 Al Bahlul, at *74, *58; see also Hamdan II, at *18, *24-27, *43.
Regardless of its ultimate reception by the international community, this diluted conception of a “war crime” has a sting in the tail for domestic purposes. To date, the MCA has been virtually ignored in ATS litigation, but this overlooks the jurisprudential theory embedded in the statute. The MCA is not an ordinary federal criminal statute with a long-arm provision. Read literally, the statute’s sprawling jurisdictional reach purports to codify the entire subset of the law of nations dealing with violations of the *jus in bello*. The substantive offenses delineated in the punitive provisions of the MCA must therefore be regarded by the federal courts as an authoritative compilation of “[a]ctionable violations of international law … norm[s]” that, per hypothesis, are “specific, universal, and obligatory” requirements of the customary law of war.\(^{308}\)

As a result, a properly stated claim for the violation of such a norm uncontroversially gives rise to a cause of action under the ATS. As William Casto has observed, “[i]n the United States, our received tradition is to provide victims who have suffered an identifiable injury caused by criminal misconduct with a civil tort remedy. … [T]he general overlap in the United States between tort norms and criminal norms is an empirical fact. Therefore, judges should routinely exercise their discretion to provide a civil damage remedy for norms taken from international criminal law.”\(^{309}\)

Nor would the prospect of opening the proverbial floodgates to litigation constitute a valid reason for rejecting tort claims premised directly on violations of the norms specified in the MCA. Indeed, *Sosa* teaches that it would be inappropriate for a court to reject a well-pleaded complaint on this basis. The prudential concerns that informed *Sosa*’s cautionary approach to the expansion of ATS jurisdiction are grounded entirely in separation-of-powers principles related to the proper role of the judiciary vis-a-vis the Legislative Branch.\(^{310}\) As the Court recognized, these concerns simply do not arise when Congress has defined the relevant norms in a statute that “occupies the field.”\(^{311}\)

If the CMCR’s analysis is the last word on the subject, it follows that the *Tel-Oren* line of cases are no longer good law. In *Tel-Oren*, for example, the plaintiffs were the survivors and representatives of the decedents of the so-called Coastal Road Massacre, an infamous suicide attack on civilians by a terrorist cell from the Fatah wing of the PLO, which occurred in the context of and was associated with ongoing hostilities between the PLO and the State of Israel.\(^{312}\)

\(^{308}\) *Sosa*, 542 U.S. at 732.


\(^{310}\) *Sosa*, 542 U.S. at 725-30.

\(^{311}\) *Id.* at 731 (“While we … would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”); *see also Xe Servs.*, 665 F.Supp.2d at 582 (holding that “federal courts must examine whether Congress has itself defined the relevant norm by legislative enactment; if so, federal courts are bound by that determination.”).

\(^{312}\) As the court summarized the facts, in March 1978, “thirteen heavily armed members of the [PLO] … landed by boat in Israel and set out on a barbaric rampage along the main highway between Haifa and Tel Aviv. They seized a civilian bus, a taxi, a passing car, and later a second civilian bus. They took the passengers hostage. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded.” *Tel-Oren*, 726 F.2d at 776. Israel responded to the attack by invading Southern Lebanon where the PLO had taken refuge. The fighting
The plaintiffs filed an ATS action against the PLO for the acts of its agents, alleging that they had committed numerous tortuous acts in violation of the law of nations, including terrorism, torture and murder amounting to summary execution. 313 In addition, they filed suit against an Arab advocacy organization and the PLO’s U.S. foreign mission, alleging that they were complicit in a conspiracy with the PLO, because they had “helped plan, finance, outfit, and direct the terrorist operation.”314

As noted above, the D.C. Circuit unanimously rejected the contention that terrorism itself was a violation of the law of nations, because no consensus had “developed on how to define ‘terrorism’ generally,” particularly where a non-state entity, like the PLO, was engaged in what some States characterized a legitimate “war of national liberation.”315 Moreover, Judge Edwards opined that while he was in full agreement with “the legal principles set forth in Filartiga,” which famously held that state-sponsored torture was actionable under the ATS, he was unwilling “to stretch Filartiga’s reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of law.”316 For the same reason, he assumed that while “state-sponsored summary executions” would be a violation of the law of nations, this proscription was limited to “murder conducted in uniform, as opposed to lawful, state-imposed violence.”317 By negative inference, a murder committed by a person not acting under color of law thus did not amount to a violation of international law. Finally, the court summarily affirmed the dismissal of the material support allegations against the non-PLO defendants, because it seemed obvious that such conduct was “too insubstantial to satisfy the § 1350 requirement that a violation of the law of nations be stated.”318

Yet, assuming this incident was part of an “armed conflict” for purposes of the law of war, there is little doubt that a violent assault by an organized insurgent group of the sort alleged in Tel-Oren would be sufficient under the CMCR’s reasoning to state a claim for the “war crime” of terrorism. And, of course, Judge Edwards’ assumption that summary execution by a non-state actor cannot be a violation of international law is directly contradicted by the MCA, which proscribes “murder in violation of the law of war,” without regard to the official status of the putative defendant.319 Similarly, the provision of financial and other resources to an organized armed group with knowledge that it intended to carry out an attack on protected persons would be sufficient to state a claim for the “war crime” of providing material support for terrorism. Indeed, if a court refused to recognize an ATS cause of action grounded on these sorts of allegations merely because it might result in increased civil litigation, it would be endorsing the anomalous position that some, but not all, war crimes are actionable under the ATS, with no apparent criteria to distinguish between the two sets of offenses.

313 Tel-Oren, 726 F.2d at 775, 791 n.20.
314 Id. at 800.
315 Id. at 807; see also id. at 795-96, 823.
316 Id. at 791-92.
317 Id. at 791 n.20.
318 Id. at 775 n.1.

lasted for seven days, at which point Israel acceded to a United Nations’ resolution to declare a cease fire, withdrew its forces, and permitted U.N. peacekeeping troops to occupy the region. See EDGAR O’BALLANCE, CIVIL WAR IN LEBANON, 1975-92 74-77 (1998).

313 Tel-Oren, 726 F.2d at 775, 791 n.20.
More recently, in *Ali Shafi*, the plaintiff was an Israeli citizen of Palestinian descent, who was detained for six months by the security services of the Palestinian Authority (PA) after the outbreak of the Second Intifada, which the defendant conceded was an armed conflict under international law.\(^{320}\) In this context, the complaint alleged that the PA had instituted a policy of systematically detaining, torturing and, in some cases, executing persons who were suspected of collaborating with Israel as part of its strategy to disrupt Israel’s efforts to suppress the Intifada.\(^{321}\) After being taken into custody, the plaintiff was repeatedly tortured and “eventually convicted and sentenced to death in a 30 minute ‘trial’ by one of the PA’s kangaroo security courts.”\(^{322}\) After he managed to escape, the plaintiff filed an ATS action alleging that the PA’s policy toward suspected collaborators constituted a violation of “the preemptory rules of armed conflict recognized by international customary law and reflected in Common Article 3 of the Geneva Conventions.”\(^{323}\) As such, he argued that *Tel-Oren* was distinguishable, because that decision did not address “the question of whether war crimes committed by a private (i.e., non-state) defendant are actionable under the ATS.”\(^{324}\)

Relying squarely on *Tel-Oren*, the D.C. Circuit rejected the plaintiff’s argument that torture by a private actor constitutes a violation of customary international law sufficient to invoke the ATS, merely because it occurred in the context of the Intifada. The court endorsed the blanket “proposition that torture claims against nonstate actors [are] not within the jurisdictional grant of the ATS,” because there is “an insufficient consensus … that torture by private actors violates international law.”\(^{325}\) The court further opined that “it is not obvious that Common Article 3 applies under the circumstances … alleged” in the complaint, because while Israel is a party to the convention, “the PLO is not, and the status of the PLO and the nature of Israeli relations with the territory wherein the alleged torture took place, are subjects of continuing dispute.”\(^{326}\) Finally, even assuming Common Article 3 did apply to the conflict at issue, the court observed that the scope of the article “is exceedingly broad and at times vague; to afford ATS jurisdiction for each and every violation of its wide-ranging provisions would violate the command of *Sosa* that federal courts exercise vigilant door-keeping” when creating new causes of action.\(^{327}\)

But whatever doubts a court might legitimately entertain about the applicability or scope of the broadly-worded norms contained in Common Article 3, the same ambiguity cannot be attributed to the MCA. According to the CMCR, the statute is a valid exercise of Congress’s

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\(^{320}\) The PA has repeatedly taken the position that the conflict between Israel and the Palestinians is an armed conflict under international law. *See* Estate of Klieman v. Palestinian Authority, 424 F.Supp.2d 153, 162-63 (D.D.C. 2006); Biton v. Palestinian Interim Self-Government Authority, 412 F.Supp.2d 1, 7 (D.D.C. 2005). In addition, the Supreme Court of Israel has held that the outbreak of the Second Intifada in September 2000 initiated a state of armed conflict between Israel and Palestinians. *Mara’abe v. The Prime Minister of Israel*, Supreme Court of Israel, HCJ 7957/04, 15 September 2005, para. 1.


\(^{322}\) *Id.* at *9.

\(^{323}\) *Id.* at *12.

\(^{324}\) *Id.* at *13.

\(^{325}\) *Ali Shafi*, 642 F.3d at 1092, 1096.

\(^{326}\) *Id.* at 1095.

\(^{327}\) *Id.* at 1094, *quoting* Estate of Amergi ex rel. Amergi v. Palestinian Authority, 611 F.3d 1350, 1363 (11th Cir. 2010).
authority for the specific purpose of codifying established violations of customary international law, including delineating the essential elements of torture and cruel or inhuman treatment.\footnote{10 U.S.C. §§ 950t(11), (12) (2009).} Under the statute, these offenses may be committed by an alien unprivileged enemy belligerent in the context of and associated with any conflict subject to the laws of war. And the definition of an unprivileged belligerent includes the members of transnational terrorist groups, such as al Qaeda, who are by definition private, non-state actors. Indeed, the D.C. Circuit seems to have acknowledged that if a consensus develops that such conduct constitutes a war crime, then it may form the basis of an ATS action against a private party.\footnote{See Saleh v. Titan Corp, 580 F.3d 1, 15 n.13 (D.C. Cir. 2009) (noting that “[e]ven if torture suits cannot be brought against private parties – at least not yet – it may be that ‘war crimes’ have a broader reach.”). The federal government also persists in distinguishing torture from war crimes on the grounds that the latter “do not require state involvement,” albeit without mentioning the MCA. Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum, No. 10-1491, at *17-18 (Dec. 21, 2011). This uncertainty is perhaps understandable, since the MCA’s designation of torture as a war crime when committed by a non-state actor conflicts with the official position of the United States as expressed in its accession to the Torture Convention. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 4 (1988), 1465 U.N.T.S. 85, 113-114 (defining “torture” as certain conduct done “by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.”).} On the assumption that the CMCR’s constitutional analysis is sound, that day has now arrived.

CONCLUSION

I have argued that a fair reading of the Supreme Court’s law-of-nations jurisprudence yields the conclusion that Congress does not have the unilateral authority to declare that any particular action constitutes a violation of international law. Simply put, no plausible reading of the Constitution gives Congress a roving license to act as the world’s policeman. Instead, as a matter of both text and logic, the Define and Punish Clause imposes an objective constraint on Congress’s prescriptive authority when it purports to codify a rule of customary international law for the purpose of regulating the conduct of non-citizens abroad, particularly in the absence of any nexus to the United States. At a minimum, this means that there must be a good faith basis for believing that the rule so codified actually qualified as a rule of customary international law, namely, clearly defined and widely-accepted as a matter of mutual obligation in the norms of state practice. The argument is not that the sovereignty of the United States is in some sense limited by customary international law ex proprio vigore, but rather that Congress’s legislative powers are constrained by the Constitution, as interpreted and applied by the Supreme Court.

It is also true that ascertaining the content of customary international law can be a difficult exercise, and there will surely be cases at the margin about which reasonable minds might differ concerning the status of a particular norm. But this dilemma is not unique to the practice of international law; it is simply a feature intrinsic to “the enterprise of subjecting human conduct to the governance of rules.”\footnote{LON FULLER, THE MORALITY OF LAW 106 (rev. ed. 1969).} Like poverty, marginal cases will always be with us, but in practice this should not be an insurmountable problem, since the garden-variety case necessarily does not fall within the margin. As the piracy case law demonstrates, a court exercising de novo review must be satisfied that Congress has acted within the scope of its constitutional authority, consistent with its essential institutional responsibility to safeguard the
rule of law. The separation of powers concerns are further exacerbated where Congress vests criminal jurisdiction over the conduct of civilians in a military tribunal, in derogation of the requirements of Article III and the Bill of Rights. \(^{331}\) This arguably explains Congress’s usual practice of incorporating international norms by statutory reference, which in principle ensures that it legislates to the limit of its authority without exceeding the boundaries of the existing law of nations.

In a sharp departure from past practice, Congress responded to the Supreme Court’s decision in *Hamdan* by enacting a comprehensive statutory scheme, which confers personal jurisdiction over a broadly-defined class of aliens on a permanent military commissions bureaucracy and codifies the entire range of war crimes, thereby replacing the common law of war for domestic purposes. Yet, it does not follow that the subject matter jurisdiction of the new “code of military commissions” is entitled to any special measure of judicial deference. This much is apparent from the plain language of the statute itself, in which Congress insists that it has not attempted to push the development of customary international law by defining any novel offenses. To the contrary, in an implicit nod to the constitutional limits on its prescriptive powers, Congress maintains that the MCA is intended to be entirely retrospective in orientation, and thus “crystallizes in permanent form” offenses that already violated the law of war.

Admittedly, most of the offenses codified in the MCA are consistent with widely-accepted views of the customary law of war and thus fit comfortably within this description. As applied to the terrorism-related charges at issue in *Hamdan II* and *Al Bahlul*, however, the CMCR’s facile acceptance of Congress’s self-serving denial of legislative innovation sets up a pretense of legality. In fact, there is no real dispute that the MCA exposes a larger population of actors (including those who customarily had been classified as non-combatants) to the jurisdiction of U.S. military authorities, for the commission of offenses that are based on a more attenuated conception of substantive liability than previously had been imagined. This conclusion is underscored by the fact that, prior to September 2001, terrorist acts by private non-state groups were not widely regarded as giving rise to an armed conflict subject to the laws of war. \(^{332}\) Consequently, the MCA represents an abrupt, punctuated expansion of the scope of war crimes liability, at least according to the United States.

If the CMCR’s reading of the statute is correct, the consequences are striking. The MCA provides that terrorism broadly defined is a violation of the law of war. But if so, this is an unambiguous jurisdictional basis for asserting such claims against private, non-combatants who are not otherwise lawful combatants, provided the conduct occurs in the context of and is associated with an armed conflict. This has the effect of reversing *Tel-Oren* and its progeny. In addition, the MCA may help clarify some of the second-order questions over which the circuit courts have splintered. For example, war crime liability for conspiracy and material support for terrorism would seem to be relevant to the existence of corporate liability under the ATS, since the CMCR assumed that organized groups are capable of committing such offenses.


\(^{332}\) See Marco Sassoli, *Use and Abuse of the Laws of War In the “War on Terrorism”*, 22 Law & Ineq. 195 (2004).
In the last analysis, reasonable minds might disagree about whether a permanent system of military commissions is worth the candle, but that policy judgment should be based upon an accurate assessment of its costs. As we’ve seen, the legal externalities begat by the MCA cannot be easily confined to its immediate political objective, which was to ensure that a handful of suspected terrorists detained at Guantanamo Bay were treated as unprivileged enemy combatants, rather than criminal defendants. Instead, it certainly appears that Sosa’s cautionary standard no longer sets forth the relevant test for determining subject matter jurisdiction in ATS litigation, at least with respect to claims alleging violations of the law of war.