

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued December 1, 2015

Decided October 20, 2016

No. 11-1324

ALI HAMZA AHMAD SULIMAN AL BAHLUL,  
PETITIONER

v.

UNITED STATES OF AMERICA,  
RESPONDENT

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On Petition for Rehearing En Banc

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*Michel Paradis*, Counsel, Office of the Chief Defense Counsel, argued the cause for petitioner. With him on the briefs were *Mary R. McCormick* and *Todd E. Pierce*, Counsel.

*David Weissbrodt* and *William J. Aceves* were on the brief for *amici curiae* International Law Scholars in support of petitioner.

*J. Douglas Richards* was on the brief for *amicus curiae* National Institute of Military Justice in support of petitioner.

*Robert Barton* was on the brief for *amicus curiae* Professor David Glazier in support of petitioner.

*Ian Heath Gershengorn*, Principal Deputy Solicitor General, U.S. Department of Justice, argued the cause for

respondent. On the brief were *Steven M. Dunne*, Chief, Appellate Unit, and *John F. De Pue* and *Joseph Palmer*, Attorneys.

*James A. Schoettler Jr.* was on the brief for *amici curiae* Former Government Officials, Former Military Lawyers, and Scholars of National Security Law in support of respondent.

*Richard A. Samp* was on the brief for *amici curiae* John D. Altenburg, Maj. Gen., U.S. Army (Ret.), *et al.* in support of respondent.

Before: GARLAND,\* *Chief Judge*, and HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, SRINIVASAN,\*\* MILLETT, PILLARD, and WILKINS, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* KAVANAUGH, with whom *Circuit Judges* BROWN and GRIFFITH join.

Concurring opinion filed by *Circuit Judge* MILLETT.

Concurring opinion filed by *Circuit Judge* WILKINS.

Joint Dissenting opinion filed by *Circuit Judges* ROGERS, TATEL, and PILLARD.

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\* Chief Judge Garland was a member of the *en banc* court at the time the case was argued but did not participate in this opinion.

\*\* Circuit Judge Srinivasan did not participate in this matter.

PER CURIAM: Bahlul is a member of al Qaeda who assisted Osama bin Laden in planning the September 11, 2001, attacks on the United States. Bahlul was convicted by a U.S. military commission of the offense of conspiracy to commit war crimes, among other offenses. The U.S. Court of Military Commission Review affirmed Bahlul's conviction.

In a prior en banc decision, we recounted the facts and considered Bahlul's Ex Post Facto Clause objection to the conspiracy conviction. Applying plain error review, we concluded that the Ex Post Facto Clause did not preclude the conspiracy charge against Bahlul. *See Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

In this en banc case, Bahlul argues that Articles I and III of the Constitution bar Congress from making conspiracy an offense triable by military commission, because conspiracy is not an offense under the international law of war.

We affirm the judgment of the U.S. Court of Military Commission Review upholding Bahlul's conspiracy conviction. Six judges – Judges Henderson, Brown, Griffith, Kavanaugh, Millett, and Wilkins – have voted to affirm. Three judges – Judges Rogers, Tatel, and Pillard – dissent.

Of the six-judge majority, four judges (Judges Henderson, Brown, Griffith, and Kavanaugh) would affirm because they conclude that, consistent with Articles I and III of the Constitution, Congress may make conspiracy to commit war crimes an offense triable by military commission. They would uphold Bahlul's conspiracy conviction on that basis.

Judge Millett would apply plain error review and affirm Bahlul's conviction under that standard of review. She would not reach the question of whether Congress may make inchoate conspiracy an offense triable by military commission.

Judge Wilkins would affirm because he concludes that the particular features of Bahlul's conviction demonstrate that Bahlul was not convicted of an inchoate conspiracy offense. He further concludes that Bahlul's conviction complies with the Constitution because the particular features of Bahlul's conviction have sufficient roots in international law. He therefore would not reach the question of whether Congress may make inchoate conspiracy an offense triable by military commission.

Judges Rogers, Tatel, and Pillard have filed a Joint Dissent. They conclude that Article III of the Constitution bars Congress from making inchoate conspiracy an offense triable by a law-of-war military commission.

Bahlul has also raised First Amendment and Equal Protection challenges to his conviction. The Court rejects those challenges. *See* Kavanaugh Concurring Op. at 24 n.12; Millett Concurring Op. at 2, 44-45; Wilkins Concurring Op. at 14. The Joint Dissent neither reaches those claims nor adopts the above characterization of the facts.

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We affirm the judgment of the U.S. Court of Military Commission Review upholding Bahlul's conspiracy conviction.

*So ordered.*

**[Judge Henderson's opinion is omitted.]**

KAVANAUGH, *Circuit Judge*, with whom *Circuit Judges* BROWN and GRIFFITH join, concurring: Pursuant to congressional authorization, Presidents throughout U.S. history have employed military commissions to try enemy war criminals for conspiracy to commit war crimes. That history includes the two most significant U.S. military commission trials: the 1865 military commission trial of the Confederate conspirators who plotted to kill President Lincoln and the 1942 military commission trial of the Nazi conspirators who secretly entered the United States during World War II and planned to attack U.S. infrastructure and military facilities.

In the wake of al Qaeda's attacks on the United States on September 11, 2001, Congress has twice passed laws (signed by President Bush in 2006 and President Obama in 2009) expressly reaffirming that military commissions may try unlawful enemy combatants for conspiracy to commit war crimes. Pursuant to those express congressional authorizations, President Bush and later President Obama have employed military commissions to try alleged al Qaeda war criminals for the offense of conspiracy to commit war crimes. Indeed, Khalid Sheikh Mohammed, one of the alleged masterminds of the September 11th attacks, faces a conspiracy charge in his pending military commission trial. Several other al Qaeda members likewise have been charged with conspiracy before U.S. military commissions.

Bahlul is an al Qaeda member who worked closely with Osama bin Laden in plotting al Qaeda's September 11th attacks on the United States. In December 2001, Bahlul was captured in Pakistan. In 2008, he was tried and convicted before a U.S. military commission of conspiracy to commit war crimes.

Citing Article I and Article III of the Constitution, Bahlul argues that Congress may establish military commissions only

for offenses under the *international* law of war. Bahlul further argues (and the Government concedes) that conspiracy is not an offense under the international law of war. Therefore, Bahlul contends that he may not be tried for conspiracy before a U.S. military commission.

On its face, Bahlul's argument is extraordinary. It would incorporate international law into the U.S. Constitution as a judicially enforceable constraint on Congress and the President. As a matter of U.S. constitutional law, the wartime decisions of Congress and the President to try unlawful enemy combatants before military commissions would be subject to the dictates of foreign nations and the international community, as embodied in international law.

The Government responds that, under the Constitution, Congress may establish military commissions to try, at a minimum, (i) international law of war offenses *and* (ii) offenses that are not international law of war offenses but have historically been tried by U.S. military commissions. As the Government points out, conspiracy has historically been tried by U.S. military commissions.

This case therefore raises one central legal question: Under the U.S. Constitution, may Congress establish military commissions to try unlawful enemy combatants for the offense of conspiracy to commit war crimes, even if conspiracy is not an offense under the international law of war? The answer is yes. We know that from the text and original understanding of the Constitution; the structure of the Constitution; landmark Supreme Court precedent; longstanding congressional practice, as reflected in venerable

and contemporary federal statutes; and deeply rooted Executive Branch practice, from the 1800s to the present.<sup>1</sup>

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<sup>1</sup> The Government argues that Bahlul forfeited this claim. Even if that were true, the Court should review the claim de novo, not simply for plain error. In rare and extraordinarily important cases, the Court has discretion to hear even a forfeited claim de novo. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995). The question of whether conspiracy may constitutionally be tried by military commission is extraordinarily important and deserves a “definitive answer.” *Al Bahlul v. United States*, 767 F.3d 1, 62 (D.C. Cir. 2014) (en banc) (separate opinion of Brown, J.). The question implicates an important part of the U.S. Government’s war strategy. And other cases in the pipeline require a clear answer to the question. This case unfortunately has been pending in this Court *for more than five years*. It is long past time for us to resolve the issue squarely and definitively.

Judge Kavanaugh adds that he would apply de novo review for that reason, as well as for any of five other independent reasons. *First*, before the military judge, Bahlul objected to the military commission’s authority to try him for the charged offenses. Bahlul did not forfeit this claim. *Second*, even if Bahlul had not objected, the question of whether the Constitution requires Article III courts to try conspiracy offenses is a structural question of subject matter jurisdiction, and cannot be forfeited or waived. See *Ex Parte Quirin*, 317 U.S. 1, 25 (1942) (describing the question as one of “jurisdiction”). *Third*, in any event, Rules 905 and 907 of the Rules for Military Commissions require de novo judicial review of the question whether a charged offense may be tried by military commission. *Fourth*, even if all of those points are incorrect, the Government has repeatedly forfeited any forfeiture argument during the course of this litigation. For example, before the U.S. Court of Military Commission Review, the Government expressly acknowledged that Bahlul’s argument was *not* forfeited or waived. See Bahlul Appendix at 161 n.5 (quoting Government’s submission: “The Government does not argue” that Bahlul’s argument “questioning jurisdiction” is “waived.”). Only at the 11th hour has the Government belatedly claimed that Bahlul forfeited his

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I

We first address the Article I issue. Bahlul acknowledges that Congress possesses authority under Article I to establish military commissions to try war crimes. But he contends that military commissions may try only *international* law of war offenses. Bahlul further argues (and the Government concedes) that conspiracy is not an international law of war offense. Therefore, Bahlul says he may not be tried by military commission for conspiracy.

Contrary to Bahlul's argument, Article I of the Constitution does not impose international law as a limit on Congress's authority to make offenses triable by military commission.<sup>2</sup> That is apparent from five sources of law: the text and original understanding of Article I, the overall structure of the Constitution, landmark Supreme Court precedent, longstanding federal statutes, and deeply rooted U.S. military commission practice.

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constitutional argument. *Fifth*, even if Bahlul forfeited his argument and plain error review applied here, the Court when applying plain error often holds that there was no error, rather than merely holding that any possible error was not plain. We should do the same here.

<sup>2</sup> To be clear, Congress may and sometimes does incorporate international law principles into statutes. In doing so, Congress may on occasion enact statutes that simply refer to "international law" in general terms. *See, e.g.*, 22 U.S.C. §§ 5604-5605 (empowering the President to impose sanctions on foreign countries that use chemical or biological weapons "in violation of international law"). Likewise, the President and Senate may enter into self-executing treaties with foreign nations. *See Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008). Those statutes and self-executing treaties are U.S. law, not international law.



*First*, the text and original understanding of Article I demonstrate that international law does not impose a limit on Congress's authority to make offenses triable by military commission.

The premise of Bahlul's Article I argument is that Congress's *sole* source of constitutional authority to make offenses triable by military commission is the Define and Punish Clause of Article I. That Clause grants Congress authority to "define and punish . . . Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. Bahlul argues that the "law of nations" is a synonym for international law, and further contends that conspiracy is not an offense under the international law of war. Therefore, according to Bahlul, Congress lacks power under Article I, Section 8 to make conspiracy an offense triable by military commission.

We need not decide the scope of the Define and Punish Clause in this case.<sup>3</sup> That is because the premise of Bahlul's Article I argument is flawed. Regardless of the scope of the Define and Punish Clause, an issue we do not decide, Congress's Article I authority to establish military commissions – including its authority to determine which crimes may be tried by military commission – does not derive exclusively from that Clause.

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<sup>3</sup> Judge Henderson and Judge Brown have previously concluded that the Define and Punish Clause grants Congress authority to make conspiracy an offense triable by military commission. *See Al Bahlul v. United States*, 792 F.3d 1, 44-55 (D.C. Cir. 2015) (Henderson, J., dissenting); *Al Bahlul v. United States*, 767 F.3d 1, 53-62 (D.C. Cir. 2014) (en banc) (separate opinion of Brown, J.).

Rather, the war powers clauses in Article I, Section 8 – including the Declare War Clause and the Captures Clause, together with the Necessary and Proper Clause – supply Congress with ample authority to establish military commissions and make offenses triable by military commission. And the Declare War Clause and the other war powers clauses in Article I do not refer to international law or otherwise impose international law as a constraint on Congress’s authority to make offenses triable by military commission. *Cf. Al Bahlul v. United States*, 792 F.3d 1, 55-56 (D.C. Cir. 2015) (Henderson, J., dissenting).

As the Supreme Court has long recognized, a congressional authorization of war pursuant to the Declare War Clause is understood “by universal agreement and practice” to encompass all of the traditional incidents of war – including the power to kill, capture, and detain enemy combatants, and most relevant here, the power to try unlawful enemy combatants by military commission for war crimes. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (binding opinion of O’Connor, J.); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593-94 (2006); *In re Yamashita*, 327 U.S. 1, 11-12 (1946).<sup>4</sup> As Colonel William Winthrop, described by the Supreme Court as the “Blackstone of Military Law,” *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality opinion), summarized it: “[I]n general, it is those provisions of the Constitution which empower Congress to ‘declare war’ and ‘raise armies,’ and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. . . . The commission is simply an

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<sup>4</sup> On September 18, 2001, Congress authorized the use of force against al Qaeda and related terrorist groups. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

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.” WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (rev. 2d ed. 1920); *see also Hamdan*, 548 U.S. at 592 n.21 (quoting Winthrop’s statement that the Declare War Clause, among others, supplies Congress with authority to establish military commissions to try war crimes). So too, Justice Story explained that Congress’s power to make substantive and procedural rules for military commissions is a “natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy.” 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1192 (1833).<sup>5</sup>

In short, it would be textually and historically inaccurate to deem the Define and Punish Clause, whatever its scope, as the *sole* source of Congress’s authority here. The Declare War Clause and the other war powers clauses in Article I authorize Congress to establish military commissions and make offenses triable by military commission. And those clauses do not refer to international law or otherwise impose international law as a constraint on Congress’s authority to make offenses triable by military commission. By their terms, therefore, those clauses do not confine U.S. military commissions to trying only international law of war offenses.

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<sup>5</sup> Contrary to the suggestion advanced by Bahlul and the joint dissent, it would be absurd to say that the war powers clauses grant Congress authority to establish military commissions but not to specify which offenses may be tried by military commission. There is no support in Supreme Court precedent for slicing and cabining Congress’s war powers authority in that way. Moreover, the longstanding historical practice in the Legislative and Executive Branches flatly contravenes that suggestion.

*Second*, the overall structure of the Constitution strongly reinforces the conclusion that international law does not impose a limit on Congress's authority to make offenses triable by military commission.

The Framers of the Constitution paid careful attention to the allocation of war powers between the national government and the states, and within the national government. The Framers assigned the national government – in particular, Congress and the President – the authority to make wartime decisions on behalf of the United States. The Framers assigned that power to the national government in part because the inability to wage war effectively had been one of the key weaknesses of the Articles of Confederation, and the Framers sought to fix that flaw.

What matters most for present purposes is that the Framers certainly did not purport to afford foreign nations (acting through the international law of war or otherwise) any constitutional authority over the wartime decisions of the United States, such as the determination of which war crimes may be prosecuted by U.S. military commissions. It would be a historical anomaly to conclude that “We the People of the United States” gave foreign or international bodies the power to constrain U.S. war-making authority in that way. Yet that would be the necessary consequence of the argument put forward by Bahlul and the joint dissent. They would incorporate international law into the U.S. Constitution as a *judicially enforceable constraint* on the wartime decisions of the Congress and the President. *As a matter of U.S. constitutional law*, Congress and the President would be subject to the dictates of the international community, a community that at any given time may be unsupportive of or even hostile to U.S. national security interests.

Put simply, the argument advanced by Bahlul and the joint dissent does not comport with the Constitution's structure. The Constitution does not give foreign nations (acting through the international law of war or otherwise) a de facto veto over Congress's determination of which war crimes may be tried by U.S. military commissions.

*Third*, consistent with the Constitution's text and structure, landmark Supreme Court precedent likewise supports the conclusion that Congress's authority to establish offenses triable by military commission is not confined by international law.

The Supreme Court's leading constitutional decision regarding military commissions is *Ex Parte Quirin*. There, the Supreme Court ruled that use of military commissions to try war crimes was constitutionally permissible. In doing so, the Court emphasized that U.S. military commissions have long been authorized by Congress, and the Court noted in particular that military commissions have long tried the offense of spying. *See Ex Parte Quirin*, 317 U.S. 1, 41-42 & n.14 (1942). But spying was not and has never been an offense under the international law of war. *See* Government Br. 45 (spying not an international law of war offense); *see also* National Institute of Military Justice Amicus Br. 14-15 n.6 (same); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2132 (2005) (same). The Court nonetheless relied on and approved of trying spying offenses by military commission.<sup>6</sup> *Quirin* is admittedly a difficult

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<sup>6</sup> The *Quirin* Court's discussion of spying was not dicta. One primary basis for the Court's finding a military commission exception to Article III was the longstanding statute that made spying an offense triable by military commission. *See Quirin*, 317 U.S. at 41-42. But even if the Supreme Court's reference to spying

decision to decipher. But the Supreme Court's reliance on spying, a non-international-law-of-war offense, as an offense triable by military commission at least suggests – even if it does not conclusively show – that Congress has authority under Article I to make offenses triable by military commission even if those offenses are not war crimes under the international law of war.<sup>7</sup>

The Court in *Quirin* did not say that military commissions are constitutionally permitted only for international law of war offenses. Nor did any later Supreme Court case hold that military commissions are constitutionally permitted only for international law of war offenses. One would have expected the Court at some point to say as much if the Court actually thought as much.

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were dicta, we as a lower court generally treat Supreme Court dicta as authoritative. See *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”) (internal quotation marks and citations omitted); *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) (“It may be *dicta*, but Supreme Court *dicta* tends to have somewhat greater force – particularly when expressed so unequivocally.”). The *Quirin* Court's discussion of spying was hardly the kind of stray comment that a lower court can or should cast aside.

<sup>7</sup> To be sure, the *Quirin* Court did not expressly *state* that Congress may make non-international-law-of-war offenses triable by military commission. Had it explicitly done so, the question would be indisputably resolved and we would not be facing the current litigation, after all. But in considering an objection to trial by military commission, the Court did *rely on* a longstanding statute that made spying, a non-international-law-of-war offense, triable by military commission.

An amicus brief nonetheless argues that the *Quirin* Court thought that international law was a constitutional constraint on Congress but that the *Quirin* Court believed, albeit mistakenly, that spying was an international law of war offense. See National Institute of Military Justice Amicus Br. at 14 n.6. The joint dissent agrees. See Dissenting Op. at 25-26. That argument lacks foundation. To begin with, the Supreme Court never said anything to the effect that Congress's *constitutional* authority to make offenses triable by military commission is constrained by the international law of war. Moreover, the idea that the Court actually thought spying was an international law offense necessarily assumes that the *Quirin* Court – with Justices such as Harlan Fiske Stone, Felix Frankfurter, Robert Jackson, and Hugo Black – was ignorant of the content of international law. We cannot plausibly make such an assumption. There is no indication in the opinion or historical record that the *Quirin* Court actually believed that spying was an international law of war offense. Nor do any later Supreme Court cases suggest as much. On the contrary, the *Quirin* Court cited authorities that indicated that spying was *not* an international law of war offense. See *Quirin*, 317 U.S. at 30 n.7, 31 n.8, 32, 34, 37 (citing, among other authorities, (i) the Hague Convention No. IV, art. 1 (annex), 36 Stat. 2295 and (ii) the 1940 U.S. War Department's Rules of Land Warfare, which states in Paragraph 203 that spying “involves no offense against international law”).

To be sure, the *Quirin* Court discussed international law authorities. Those international law authorities were relevant for, among other things, determining whether the charged offenses could be tried by military commission under Article 15 of the Articles of War, which is present-day Article 21 of the Uniform Code of Military Justice, or 10 U.S.C. § 821. That statute has long used the broad term “law of war” to

define the scope of offenses triable by military commission. The Court discussed those authorities in part because an offense's status as an international law of war offense is *sufficient* but not *necessary* to make an offense triable by U.S. military commission under the "law of war" prong of 10 U.S.C. § 821. See *Quirin*, 317 U.S. at 46; *Al Bahlul v. United States*, 767 F.3d 1, 65-72 (D.C. Cir. 2014) (en banc) (separate opinion of Kavanaugh, J.); see also *Hamdan*, 548 U.S. at 594-95. But the *Quirin* Court never stated that the international law of war constituted a *constitutional* limit on Congress's authority to make offenses triable by military commission.

*Fourth*, when we interpret the Constitution, especially the provisions related to the separation of powers, the historical practice of the Legislative and Executive Branches matters. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091, slip op. at 20 (2015) ("In separation-of-powers cases this Court has often put significant weight upon historical practice.") (internal quotation marks omitted); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560, slip op. at 7 (2014) ("[L]ongstanding practice of the government can inform our determination of what the law is.") (internal quotation marks and citations omitted); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . . ."); *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (when considering a separation of powers question, court should "receive a considerable impression" from longstanding practice).

In this case, turning first to the Legislative Branch, Congress's longstanding practice strongly supports the conclusion that international law is not a constitutional constraint on Congress's authority to make particular crimes triable by military commission. From the earliest days of the



Republic, Congress has gone beyond international law in specifying the offenses that may be tried by military commission. Beginning in 1776, the Continental Congress codified the offense of spying – a non-international-law offense – as a crime triable by military tribunal. *See* Resolution of the Continental Congress (Aug. 21, 1776), in 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774 – 1789, at 693 (Worthington Chauncey Ford ed. 1906) [hereinafter “JOURNALS”] (authorizing trial by military court of “all persons, not members of, nor owing allegiance to, any of the United States of America . . . who shall be found lurking as spies”); *see also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 765-66 & n.88 (rev. 2d ed. 1920). Likewise, in September 1776, Congress authorized trial by military tribunal for another non-international-law offense: aiding the enemy. *See* Articles of War (Sept. 20, 1776), in 5 JOURNALS, at 799. In 1789, after the Constitution was ratified, the First Congress adopted the same Articles of War that had been promulgated by the Continental Congress, including the offenses of spying and aiding the enemy. *See* Act of Sept. 29, 1789, ch. 25, §4, 1 Stat. 95, 96 (1789). Again in 1806, Congress updated those provisions and, in doing so, was careful to preserve the offenses of spying and aiding the enemy as crimes triable by military tribunal. *See* Articles of War of 1806, ch. 20, arts. 56, 57, § 2, 2 Stat. 359, 366, 371 (1806). Both of those prohibitions remain on the books today. *See* 10 U.S.C. §§ 950t(26), 950t(27). Congress has made those two crimes triable by military commission even though they are *not* international law of war offenses.

Congress’s practice of going beyond international law has continued to the present. As recently as 2006 and 2009, Congress enacted new laws making several non-international-law offenses, such as solicitation and material support for terrorism, triable by military commission. *See* Military

Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2630; Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574, 2611.

That consistent congressional practice requires our respect. As the Supreme Court has stated, the “uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936).

The joint dissent responds that Congress, over the course of more than two centuries, actually thought itself bound by international law but believed (mistakenly) that those offenses – spying and aiding the enemy, for example – were in fact international law offenses. *See* Dissenting Op. at 34-36. That assertion seems to materialize out of thin air. We are aware of no credible support for the notion that Congress has believed itself bound by international law in this context or has thought that those offenses were in fact international law offenses. Moreover, the joint dissent does not deal with the persistence of congressional practice – from the Founding to the recent 2006 and 2009 Acts. In short, the deeply rooted congressional practice directly contradicts the joint dissent’s position.

*Fifth*, in addition to the historical practice in Congress, the historical practice in the Executive Branch demonstrates that international law is not a constraint on which offenses may be tried by military commissions. Indeed, perhaps the most telling factor when considering this constitutional question is the deeply rooted history of U.S. military commission trials of the offense of conspiracy, which is not

and has never been an offense under the international law of war. *Cf. Zivotofsky*, 135 S. Ct. at 2091, slip op. at 20 (“In separation-of-powers cases this Court has often put significant weight upon historical practice.”) (internal quotation marks omitted); *Noel Canning*, 134 S. Ct. at 2560, slip op. at 7 (“[L]ongstanding practice of the government can inform our determination of what the law is”) (internal quotation marks and citations omitted).

The two most important military commission precedents in U.S. history – the trials of the Lincoln conspirators and the Nazi saboteurs – were trials for the offense of conspiracy.

Consider the trial of the Lincoln conspirators. After seeking the advice of the Attorney General, President Andrew Johnson decided to try the Lincoln conspirators by military commission rather than by criminal trial in civilian court. *See Military Commissions*, 11 Op. Attorney Gen. 297, 298 (1865). The Lincoln conspirators were expressly charged with and convicted of *conspiracy* – in that case, conspiracy to violate the law of war by killing the President and Commander in Chief of the Union Army, Abraham Lincoln. Indeed, conspiracy was the *only* offense charged against them. After an extensive multi-week trial that gripped the Nation and after vigorous argument about the facts and the commission’s jurisdiction, numerous conspirators were convicted of conspiracy.

The joint dissent tries to cast doubt on whether the Lincoln conspirators were actually tried for conspiracy. There is no doubt. Consider what a contemporary court said in response to a habeas petition filed by three of the Lincoln conspirators: “[T]he prisoners are guilty of the charge on which they were convicted – of a conspiracy to commit the military crime which one of their number did commit, and

some of them of more or less participation.” *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868).<sup>8</sup> Indeed, in the prior en banc decision in this case, our Court (joined by one of the judges who joins the joint dissent today) described the Lincoln case as a trial for conspiracy and stated that “the sole offense alleged was conspiracy.” *Al Bahlul v. United States*, 767 F.3d 1, 25 (D.C. Cir. 2014) (en banc). Our en banc Court explained that the Lincoln case was a “particularly significant precedent” and a “high-profile example of a conspiracy charge tried by a military commission.” *Id.*; see also *Al Bahlul v. United States*, 792 F.3d 1, 59-61 (D.C. Cir. 2015) (Henderson, J., dissenting).

Consider also the military commission trial of the eight Nazi saboteurs who had been selected to execute Operation Pastorius – Adolf Hitler’s plan to destroy America’s war industries and facilities – and secretly entered the United States during World War II. The defendants were expressly charged with and convicted of *conspiracy*, as well as of other offenses. Attorney General of the United States Francis Biddle, who would later represent the United States as a judge at Nuremberg, personally prosecuted the case before the military commission. President Franklin Roosevelt reviewed and approved all of the convictions. The defendants filed habeas corpus petitions to block the proceedings as unconstitutional. The Supreme Court affirmed the legality of

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<sup>8</sup> Although the original records for the Southern District of Florida from that time period were initially lost, a copy of Judge Boynton’s opinion for the court is on file with the Library of Congress. Moreover, the opinion was published in full in the *New York Times* on October 1, 1868 – precisely one month after the decision was handed down by the court. *The Application in Behalf of Dr. Mudd, Arnold and Spangler – Opinion of Judge Boynton*, N.Y. TIMES at 2 (Oct. 1, 1868).

the trial, and in doing so, did not disturb the conspiracy charge. *See Quirin*, 317 U.S. at 46.

Later in World War II, moreover, the Government prosecuted another set of Nazi saboteurs for conspiracy and tried them before a military commission. In that case, Assistant Attorney General Tom Clark, who would later serve on the Supreme Court, produced a formal memorandum – based in large part on the precedents involving the Lincoln conspirators and the earlier Nazi saboteurs – concluding that conspiracy was an offense triable by military commission. *See* Memorandum from Tom C. Clark, Assistant Attorney General, to Myron C. Kramer, Judge Advocate General (Mar. 12, 1945), *reprinted in* Government Supplemental Appendix 104-10. In Assistant Attorney General Clark’s words, it was “well established that a conspiracy to commit an offense against the laws of war is itself an offense cognizable by a commission administering military justice.” *Id.* at 110. The military commission subsequently convicted the defendants of conspiracy. President Truman reviewed and affirmed the convictions. After one of those Nazi saboteurs later challenged his conviction in court, the Tenth Circuit affirmed the denial of his habeas petition, and the Supreme Court denied certiorari. The Tenth Circuit stated the charges against him were clearly “within the jurisdiction of the duly constituted Military Commission with power to try, decide and condemn.” *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

Put simply, the most well-known and important U.S. military commissions in American history tried and convicted the defendants of *conspiracy*. That history matters. *See Zivotofsky*, 135 S. Ct. at 2091, slip op. at 20; *Noel Canning*, 134 S. Ct. at 2559-60, slip op. at 6-7. And that history is directly on point here because conspiracy is not an

international law of war offense and because conspiracy is the precise offense that Bahlul was charged with committing.

In response to all of this, the joint dissent says that there is no “robust history.” Dissenting Op. at 37. But to reiterate, the two most important military commission trials in U.S. history were trials for conspiracy, which is not an international law of war offense. From the beginning of the Nation, Congress and the President have gone well beyond international law when enacting legislation making offenses triable by military commission. To be sure, military commissions were not employed by the United States during the Korean War, the Vietnam War, or the Persian Gulf War. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (plurality opinion) (“The last time the U.S. Armed Forces used the law-of-war military commission was during World War II.”)<sup>9</sup> So those wars do not supply us with any additional examples of military commission trials, and thus do not tell us anything one way or the other about trying conspiracy or other non-international-law offenses before military commissions.

But in the two most significant U.S. wars of the last 200 years – the Civil War and World War II – as well as in the current war against al Qaeda and its associated forces, the

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<sup>9</sup> In the Korean War, General Douglas MacArthur – who was serving as the head of the U.S. and United Nations forces in Korea – issued regulations specifying conspiracy to commit war crimes as an offense triable by military commission. *See* U.N. COMMAND, RULES OF CRIMINAL PROCEDURE FOR MILITARY COMMISSIONS OF THE UNITED NATIONS COMMAND at Rule 4 (Oct. 22, 1950) (establishing that “all attempts to commit, or conspiracies and agreements to commit . . . violations of the laws and customs of war” committed during the Korean War were to be punishable by U.N. military commission). But no U.S. military commissions ultimately were convened during that war.

U.S. has employed military commissions. And the *most important* military commission trials during those wars were trials for conspiracy, which is not an international law of war offense. That historical and contemporary practice cannot be airbrushed out of the picture. Prosecuting conspiracy and other non-international-law-of-war offenses is not at the periphery of U.S. military commission history and practice. Prosecuting conspiracy and other non-international-law-of-war offenses lies at the core of U.S. military commission history and practice.

As the Supreme Court cautioned in *Noel Canning*, we must be “reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.” *Noel Canning*, 134 S. Ct. at 2573. Moreover, the Supreme Court has explained that historical practice constitutes “an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.” *Id.* at 2560.

In short, the text and original understanding of the Constitution; the structure of the Constitution; landmark Supreme Court precedent; the deeply rooted historical practice of the Legislative Branch, as seen in federal statutes; and the longstanding practice of the Executive Branch, as seen in U.S. military commission practice stretching back over two centuries, all point decisively to the same conclusion: The war powers clauses of Article I of the Constitution do not impose international law as a constraint on Congress’s authority to establish offenses triable by military commission.

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## II

Bahlul also contends that Article III of the U.S. Constitution confines U.S. military commissions to international law of war offenses.

This iteration of Bahlul's argument begins with the premise that Article III vests the judicial power in Article III courts and requires crimes to be tried by jury, not before military commissions.<sup>10</sup> Based solely on the text of Article III, Bahlul might have a point. But the Supreme Court has long recognized an exception to Article III for military commissions to try enemy war crimes. *See Ex Parte Quirin*, 317 U.S. 1, 38-45 (1942); *see also Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Exceptions to Article III, including the exception for military commissions, are established and interpreted in light of historical practice. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) (“[T]he literal command of Art. III . . . must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.”); *Quirin* 317 U.S. at 39 (“[I]t was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial.”); *see also Stern v. Marshall*, 564 U.S. 462, 504-05 (2011) (Scalia, J., concurring) (“[A]n Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary.”); *see generally*

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<sup>10</sup> *See* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested . . . .”); *id.* § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”).



*Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091, slip op. at 20 (2015) (“In separation-of-powers cases this Court has often put significant weight upon historical practice.”) (internal quotation marks omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”); *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (“[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.”).

In this context, if historical practice demonstrates that an offense is triable by U.S. military commission, that history resolves the Article III issue. As explained in Part I of this opinion, the history of U.S. military commissions trying non-international-law-of-war offenses is extensive and dates from the beginning of the Republic. That historical practice therefore amply demonstrates that Article III is not a barrier to U.S. military commission trials of non-international-law-of-war offenses, including the offense of conspiracy to commit war crimes.

Notwithstanding that history, Bahlul says that *Quirin* already considered the military commission exception to

Article III and limited the exception to international law of war offenses.

Bahlul's reading of *Quirin* is incorrect. In *Quirin*, the Nazi saboteur defendants claimed that they had a right under Article III to be tried by jury in an Article III federal court and therefore could not be tried by military commission. At some length, the *Quirin* Court specifically considered and rejected the defendants' Article III objection. See *Quirin*, 317 U.S. at 38-45.<sup>11</sup> The Court explained that Article III did not "enlarge the then existing right to a jury trial" beyond the right as it existed at common law. *Id.* at 39. Because the common law did not preclude trial by military commission for war crimes, Article III "cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts." *Id.* at 40.

As explained above, in reaching its conclusion on the Article III issue, the *Quirin* Court emphasized that Congress – exercising its Article I powers – had made spying an offense triable by military commission since the earliest days of the Republic. The Court stated that the early Congress's enactment of the spying statute "must be regarded as a contemporary construction" of Article III "as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces." *Id.* at 41. "Such a construction," the Court said, "is entitled to the greatest respect." *Id.* at 41-42.

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<sup>11</sup> The Court also referred to the Fifth and Sixth Amendments when talking about Article III, but the Court analyzed them together. For ease of reference, we will refer only to Article III.

The Supreme Court's analysis in *Quirin* is instructive for present purposes because, as noted above, the offense of spying on which the *Quirin* Court relied to answer the Article III objection was not (and is not) an offense under the international law of war. It thus makes little sense to read *Quirin* as barring military commission trials of non-international-law-of-war offenses when *Quirin*, in rejecting a jury trial objection to military commissions, expressly relied on a longstanding statute making spying – a non-international-law-of-war offense – triable by military commission.

In addition, as previously discussed, nothing about the Court's reasoning in *Quirin* rested on whether the offense tried by a military commission was an international law of war offense. The Court never suggested that military commissions are constitutionally permitted only for international law of war offenses. Nor has the Court ever said anything like that in its several later military commission cases. One would have expected the Court to say as much if the Court actually thought as much.

To be sure, the *Quirin* Court referred to international law authorities. But as noted above, the Court discussed those authorities in part because an offense's status as an international law offense is sufficient but not necessary to make an offense triable by military commission under 10 U.S.C. § 821, the statute that used the broad term "law of war" to define offenses triable by military commission.

In short, Article III does not limit U.S. military commissions to international law of war offenses or otherwise

foreclose trial of the offense of conspiracy to commit war crimes before U.S. military commissions.<sup>12</sup>

All of that said, the Constitution does not grant Congress unlimited authority to designate crimes as triable by military commission. At oral argument, the Government stated that the charges must at least involve an enemy combatant who committed a proscribed act during or in relation to hostilities against the United States. *See* Tr. of Oral Arg. at 37. In general, if an offense is an international law of war offense *or* has historically been tried by U.S. military commission, that is *sufficient* to uphold Congress's constitutional authority to make the offense triable by military commission. *See generally Quirin*, 317 U.S. at 24-48. As Winthrop explained, the war crimes triable by U.S. military commission are “derived from International Law, supplemented by acts and orders of the military power and a few legislative provisions.” WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 773 (rev. 2d ed. 1920).

But is one of those conditions *necessary*? In other words, what if an offense is neither an international law of war offense nor historically rooted in U.S. military commission practice? Consider a hypothetical new statute that makes cyber-attacks by enemy forces a war crime triable by military commission. *Quirin* stated that Article III does “not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission,” and does not bar “the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents

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<sup>12</sup> Bahlul also has raised equal protection and First Amendment challenges to his conviction. Those arguments are frivolous, for reasons explained in *Al Bahlul v. United States*, 767 F.3d 1, 75-76 (D.C. Cir. 2014) (en banc) (separate opinion of Kavanaugh, J.).

against the law of war.” *Quirin*, 317 U.S. at 45, 41. Perhaps that language suggests that Article III permits what Article I authorizes with respect to which enemy war crimes may be tried by U.S. military commission. But we need not answer that hypothetical in this case and need not define with precision the outer limits of the Constitution in this context, other than to say that international law is not such a limit. Wherever one might ultimately draw the outer boundaries of Congress’s authority to establish offenses triable by military commission, the historically rooted offense of conspiracy to commit war crimes is well within those limits. An enemy of the United States who engages in a conspiracy to commit war crimes – in Bahlul’s case, by plotting with Osama bin Laden to murder thousands of American civilians – may be tried by a U.S. military commission for conspiracy to commit war crimes.

### III

In light of the importance of this case, and the serious and passionate arguments advanced by the joint dissent, we close with a few additional responses to points made by the joint dissent.

*First*, in reaching its conclusion, the joint dissent relies in part on *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). That reliance is misplaced. As relevant here, *Hamdan* was a statutory case interpreting the phrase “law of war” in 10 U.S.C. § 821. Nowhere did the Supreme Court ever say (or even hint) that the *United States Constitution* imposed international law as a limit on what offenses may be tried by U.S. military commissions. The joint dissent’s citations to *Hamdan* therefore do not support its *constitutional* position.

In fact, the *Hamdan* decision and its aftermath only highlight the extraordinary nature of the joint dissent's position. In *Hamdan*, the Court confronted but ultimately did not resolve the question of whether the relevant statute in effect at the time, 10 U.S.C. § 821, barred military commission trials of alleged war criminals *for conspiracy*. But four of the Justices in the majority expressly invited Congress to clarify the scope of military commission power. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring, joined by Kennedy, Souter, and Ginsburg, JJ.); *id.* at 653 (Kennedy, J., concurring in part, joined in relevant part by Souter, Ginsburg, and Breyer, JJ.). In response to the Justices' invitation, Congress and the President promptly enacted new legislation to make crystal clear that conspiracy is an offense triable by military commission. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2625, 2630 (expressly authorizing trials before military commissions for conspiracy offenses).

A decade after *Hamdan*, Bahlul and the joint dissent have now come back with a novel and extraordinary constitutional interpretation that would thwart the considered wartime decisions of two Congresses and two Presidents – decisions invited by the Supreme Court in *Hamdan* – to authorize military commission trials of conspiracy offenses. Under the joint dissent's theory, the congressional action invited by the Supreme Court was all a waste of time because U.S. military commissions are *constitutionally* barred from trying the offense of conspiracy, regardless of statutory authorization. But in *Hamdan*, not a single Justice hinted at a lurking constitutional problem with trying conspiracy offenses before military commissions (nor did Hamdan himself in his arguments to the Supreme Court, either directly or through a constitutional avoidance argument). To be sure, the *Hamdan* decision does not formally preclude the Supreme Court from

now returning to the scene and finding a previously missed constitutional problem with trying conspiracy offenses by military commission. But in this wartime context, one should not lightly assume that the Supreme Court expressly encouraged the political branches to launch into an utterly meaningless, decade-long exercise.

*Second*, the joint dissent says: “It is not international law, however, that constrains Congress’s authority here – it is Article III.” Dissenting Op. at 46. That sentence glides over the key question. The question is whether Article III (or Article I) incorporates international law as a constraint on U.S. military commissions. The joint dissent says yes. But the constitutional text and structure, Supreme Court precedents, and deeply rooted U.S. history tell us that the answer is no.

Of course, the consistent U.S. history is the consistent U.S. history for a reason. As explained above, the consequences for the United States of *judicially* incorporating international law into the U.S. Constitution would be deeply problematic and run afoul of our most fundamental constitutional principles and traditions. International law often embodies a majority or consensus view of nations. Does the United States Constitution really allow foreign nations, through the guise of international law, to set *constitutional* limits *enforceable in U.S. courts* against the U.S. war effort? Under Bahlul’s argument, and under the theory advanced by the joint dissent, the answer would be yes. We think not. We see no basis in U.S. law, precedent, or history – not to mention, common sense – for that position. To paraphrase Justice Jackson, the Constitution is not “a suicide pact.” *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

To be sure, the Judiciary plays a critical role in enforcing constitutional and statutory limits in justiciable wartime cases, and this Court must not hesitate (and has not hesitated) in doing so, even when the consequences are significant. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc) (Ex Post Facto Clause bars Congress and the President from making material support for terrorism a war crime that can be retroactively prosecuted before a military commission); *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (same, via constitutional avoidance doctrine). But in this case, neither Article I nor Article III confines Congress to international law of war offenses when Congress establishes war crimes triable by military commission.

To be clear, we take no position on the *policy* question of whether the U.S. Government should use military commissions to try the offense of conspiracy or other non-international-law-of-war offenses, or indeed whether the Government should use military commissions at all. That policy decision belongs first to Congress and the President in the legislative process, and then to the President in the exercise of his or her Commander-in-Chief power. Likewise, we take no position on the general question of when and how Congress and the President should weigh international law principles in making those decisions. International law is important, and the political branches have good reason to adhere to international law when determining what offenses will be tried before U.S. military commissions. But international law has its own enforcement mechanisms. The federal courts are not roving enforcers of international law. And the federal courts are not empowered to smuggle international law into the U.S. Constitution and then wield it as a club against Congress and the President in wartime.



*Third*, the joint dissent seeks to explain away the history and practice of U.S. military commissions. But that effort is entirely unpersuasive.

In the face of the deeply rooted U.S. history and practice of trying conspiracy offenses by military commission, the joint dissent had two options. It could discount the importance of history to the constitutional analysis, and try to explain that the constitutional text and structure matter most here. The joint dissent did not choose that approach, no doubt because the constitutional text and structure also show what the history shows: that international law is not a constraint on Congress when Congress determines which offenses may be tried by military commission.

Alternatively, the joint dissent could attack the history head-on on the theory that the history does not actually show what it seems to show. That is the route that the joint dissent chose. But it does not work. Consider all of the contortions the joint dissent has to make in attempting to wriggle out of the history. First, faced with the historical fact that Congress since the Founding has consistently made non-international-law offenses triable by military commission, the joint dissent unconvincingly posits that those Congresses all mistakenly believed that those offenses actually were international law offenses (even though they were not and even though there is no persuasive evidence that Congress thought they were). *See* Dissenting Op. at 34-35. Second, faced with the historical fact that the Executive Branch's two most important military commissions in the history of the country were trials of conspiracy offenses, which are not international law offenses, the joint dissent implausibly suggests that the Lincoln case was not really a conspiracy case (even though it plainly was), and it notes that the conspiracy charges against the eight Nazis at issue in *Quirin* were never directly reviewed by a

court (even though the relevant point is that the military commission trial of the Nazis for conspiracy remains a central part of Executive Branch historical practice). *See id.* at 37-39, 42-44. Third, faced with the fact that the Supreme Court relied on a non-international-law offense, spying, in its landmark *Quirin* decision upholding military commissions, the joint dissent seeks to sweep that inconvenient snippet under the rug by suggesting that the Court mistakenly believed that spying was an international law offense (even though there is no persuasive evidence that the Court actually thought as much). *See id.* at 25-26.

The bottom line here is that the history matters, the history is overwhelming, and the history devastates the joint dissent's position.

*Fourth*, in justifying its position, the joint dissent posits a hypothetical of non-U.S.-citizens living together in an apartment in Virginia with pipe bombs, al Qaeda propaganda, and a map of the Washington Metro. The joint dissent says it would be "dangerous" to apprehend such a group and then try them for conspiracy before a military commission. Dissenting Op. at 63-64. We are mystified by the joint dissent's apparent belief that this is a helpful hypothetical for its position. We take it that the point of the hypothetical is to suggest that military commissions should not be used to try non-citizen enemy terrorists who are (i) captured in the United States (ii) before they commit their planned attacks. Of course, the current war has no such neat geographical boundaries. And neither did World War II, for that matter. After all, the Nazi saboteurs were captured in the United States before their planned attacks on U.S. facilities. They were then prosecuted before U.S. military commissions. And if Mohamad Atta and his fellow attackers had been captured on the night of September 10, 2001, in Portland, Maine, and

elsewhere, and then tried before congressionally authorized U.S. military commissions for conspiracy, we certainly would not have characterized that scenario as “dangerous.”

*Fifth*, the joint dissent insists that the mission of the military is to defeat enemies on the battlefield, not to punish enemy wrongdoers. *See* Dissenting Op. at 49-50. The dissent’s effort to define U.S. military strategy in that way is both legally and factually flawed. As the Supreme Court has long recognized, including in landmark cases such as *Hamdi*, war is waged not only by killing enemy combatants, but also by surveilling, capturing, and detaining enemy forces, and by trying unlawful enemy combatants for war crimes. And in the current war, the modus operandi of the enemy is to target citizens; to frighten, unsettle, disrupt, and demoralize; to make normal peaceful life impossible and carnage routine. In response to the enemy’s tactics, two Congresses and two Presidents – like their predecessors throughout U.S. history – have determined that employing military commissions to try unlawful enemy combatants for their war crimes is an important part of the overall war effort. The Constitution assigns that question of military strategy to Congress and the President, not to the joint dissenters.

*Sixth*, and relatedly, in seeking to minimize the consequences of its theory, the joint dissent suggests that military commissions are not essential to the U.S. war effort because the U.S. Government can simply try al Qaeda war criminals in federal courts, including for conspiracy to commit war crimes. *See, e.g.*, Dissenting Op. at 1, 47-48. With all respect, the joint dissent has no business making such a statement. It has no basis to express such confidence and no relevant expertise on that question of wartime strategy. Unlike the joint dissenters, Presidents Bush and Obama, as well as the two Congresses in 2006 and 2009, determined that

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the ordinary federal court process is not suitable for trying certain enemy war criminals. The only question for us as judges is one of law: whether the U.S. Constitution permits that policy choice by Congress and the President. If the answer were no, then we would enforce the Constitution. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (2004) (Scalia, J., dissenting). But here, the answer is yes.

\* \* \*

We vote to affirm Bahlul's conviction for conspiracy to commit war crimes.

**[The concurring opinions of Judge Millett and Judge Wilkinson are omitted.]**

ROGERS, TATEL, and PILLARD *Circuit Judges*, dissenting: When confronted with the facts of this case, one is tempted to search for a way to sustain Ali Hamza Ahmad Suliman al Bahlul's conviction for the crime of inchoate conspiracy to violate the laws of war. After all, he has admitted that he swore an oath of loyalty to Osama bin Laden, served as bin Laden's personal secretary, and made al Qaeda recruitment videos. But tempting as it may be, too much is at stake to affirm. The prosecution of al Bahlul in a law-of-war military commission for inchoate conspiracy infringes the judiciary's power to preside over the trial of all crimes, as set forth in Article III of the Constitution. History and precedent have established a narrow, atextual exception to Article III under which the military may try enemy belligerents for offenses against the international "laws of war," but inchoate conspiracy is not such an offense.

The challenges of the war on terror do not necessitate truncating the judicial power to make room for a new constitutional order. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). The exceptional authority the government seeks here falls outside the bounds established by more than a century of constitutional practice. Equally important, the government here has never contended that such authority is even necessary. The prosecution could have charged al Bahlul with recognized war crimes using conspiracy as a theory of liability or it could have charged him before an Article III court with inchoate conspiracy and any number of other crimes triable there but it chose neither course. The circumstances of this case thus present no occasion for the judicial branch to abandon its responsibility to enforce the constitutional plan of separated powers.

Accordingly, for the reasons set forth below, we respectfully dissent from the judgment affirming al Bahlul's conviction. We begin in Part I with the standard of review, concluding—along with the majority of this court—that al Bahlul's separation-of-powers claim is properly reviewed de novo. In Part II we set forth the relevant precedent governing that claim, explaining that it fails to provide support for the government's prosecution of al Bahlul in a military commission for the crime of inchoate conspiracy. We also respond to the government's key arguments for upholding al Bahlul's conspiracy conviction, finding none persuasive. Part III then responds to several of our colleagues' arguments, and Part IV addresses the potential consequences of the government's asserted authority. We conclude by emphasizing that, in keeping with our Constitution's commitment to judicial independence, a majority of this court declines to cede the requested judicial authority to the military.

**[The dissent's discussion of the standard of review is omitted.]**

## II.

By its text, Article III commits the entire “judicial Power of the United States” to the Supreme Court and “such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. It further provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,” *id.* § 2, cl. 1; that the judges who sit on Article III courts shall enjoy life tenure and salary protections, *id.* § 1; and that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,” *id.* § 2, cl. 3.

Over time, the Supreme Court has recognized certain limited exceptions, based on principles “rooted in history and the Constitution,” *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982) (plurality opinion), to Article III’s commitment of the judicial power to constitutional courts and the judge and jury protections that go along with it. Thus, Congress may create non-Article III courts to try cases in the District of Columbia and U.S. territories. *Palmore v. United States*, 411 U.S. 389, 390–91 (1973); *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828); *see* U.S. CONST. art. I, § 8, cl. 17. It may assign to administrative agencies the adjudication of private disputes involving “public rights” stemming from federal regulatory programs. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272,

284 (1855); *see* U.S. CONST. art. I, § 8, cl. 1. It may also assign certain criminal prosecutions of individuals connected to military service to courts martial. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857); *see* U.S. CONST. art I, § 8, cl. 14. Finally, at issue here, the Supreme Court has upheld a narrow Article III carve-out for military commissions. *See Quirin*, 317 U.S. at 39–41.

Historically, the government has established military commissions in three situations in which wartime necessity has required them: First, it has established commissions to operate as general courts in areas under martial law. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (recognizing that “there are occasions when martial rule can be properly applied”). Second, the government has employed military commissions as general courts in areas that the military temporarily occupies. *See Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding a military commission’s jurisdiction to try a civilian for murder in occupied Germany). Third, the government has created commissions to punish enemy belligerents who commit offenses against the laws of war during an armed conflict. *See Quirin*, 317 U.S. 1; *see also Hamdan*, 548 U.S. at 595–97 (plurality opinion); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 836–40 (rev. 2d ed. 1920) [hereinafter WINTHROP, MILITARY LAW].

The parties agree that al Bahlul was tried before the third type of tribunal—that is, a law-of-war military commission. They part ways, however, in defining the permissible scope of those commissions’ jurisdiction. Al Bahlul contends that law-of-war military commissions may try only offenses against the *international* laws of war, and that the sole remaining charge here, the standalone crime of conspiracy, is not such an offense. The government responds to al Bahlul’s constitutional challenge in two ways. First, it contends that



Congress may authorize military commissions to try enemy belligerents for violations of the international laws of war *as well as* any other offenses Congress defines as violations of the “laws of war.” Following from this point, the government asserts that although conspiracy to commit war crimes is not recognized as an international law-of-war offense, Congress in the Military Commissions Act of 2006 lawfully vested military commissions with authority to try individuals like al Bahlul for the crime of conspiracy. In doing so, the government takes the position that international law imposes no constraints on the kinds of offenses Congress can make triable by military commission. Alternatively, the government takes the slightly narrower position that the military can try enemy belligerents for international war crimes, as well as any offenses punishable under a “U.S. common law of war,” by which the government means any offenses traditionally tried by military commission in the United States. On this point, the government contends that there is sufficient historical precedent for trying conspiracy before law-of-war military commissions, and that the charge against al Bahlul was, therefore, lawful. Based on the Supreme Court precedent most directly on point—which we, as a lower court, must follow—al Bahlul has the better of these arguments.

**A.**

The principal decision that governs here is *Ex parte Quirin*, a case in which seven Nazi saboteurs challenged the government’s authority to try them in a military, as opposed to civilian, tribunal. Prior to their arrests, the saboteurs had received military training at a sabotage school in Germany, traveled to the United States by submarine, discarded their military uniforms once ashore, and then traveled to various locales in civilian dress with the apparent intent to destroy U.S. war industries and facilities. 317 U.S. at 21. After they

were apprehended and detained, President Roosevelt issued an executive order establishing a military commission to try them for offenses against the laws of war and the Articles of War. *Id.* at 22. Pursuant to that order, the Army Judge Advocate General prepared four charges against the saboteurs, which read as follows:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

*Id.* at 23.

Focusing on the first charge alone, the Supreme Court upheld the commission's jurisdiction to try the defendants. It observed that "[a]n important incident to the conduct of war is the adoption of measures by the military command 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." *Id.* at 28–29. It further found that Congress had authorized the use of law-of-war military commissions in Article 15 of the Articles of War. Article 15 directed that "the provisions of the[] articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of *offenders or offenses that by statute or by the law of war may be triable by such military commissions.*" *Id.* at 27–28

(emphasis added). By enacting that provision, the Court explained, Congress had

exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

*Id.* at 28.

Stating that the term “law of war” refers to a “branch of *international law*,” *id.* at 29 (emphasis added); *see also id.* at 27–28, the Court proceeded to consider whether the defendants had been charged with a violation of the international rules governing armed conflicts, *id.* at 30–31, 35–36. It ultimately concluded that they had been, expressing its belief that passing behind enemy lines in civilian dress with the purpose of committing hostile acts was then an offense under international law. *Id.* at 31. According to the Court, the “precept” that “those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, [are] . . . punishable . . . by military commission” was “so recognized in practice both here and abroad” and “so generally . . . accepted as valid by authorities on international law” that it had to be “regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.” *Id.* at 35–36.

After concluding that Congress had lawfully authorized the military-commission trial of the offense specified in the

first charge, the Court turned to consider whether, despite Congress's authorization, the jury trial protections in Article III, § 2 and the Fifth and Sixth Amendments nonetheless barred the saboteurs' prosecution in a military commission. Concluding that they did not, the Court emphasized that military tribunals "are not courts in the sense of the Judiciary Article," *id.* at 39, and that the adoptions of Article III, § 2 and the Fifth and Sixth Amendments were in no way intended to deprive the military of its traditional ability to try enemy belligerents for offenses against the laws of war, *id.* at 39–41. Violations of the laws of war, the Court observed, have, "since the founding of our government," been cognizable by military tribunals. *Id.* at 41. For support, the Court pointed to an 1806 statute subjecting alien spies to death, "according to the law and usage of nations, by sentence of a general court martial." *Id.* at 41. That statute, the Court explained, provided a "contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces." *Id.* at 41. Thus, in *Quirin* the Supreme Court recognized an exception to Article III and its judge and jury protections for military trials of violations of the "laws of war"—a body of law that, as noted above, the Court described as international. *Id.* at 29.

For over seventy years, the Court has treated the phrase "law of war" as referring to a body of international law, thus reinforcing the idea that *Quirin* recognized an Article III exception for international law-of-war offenses. For instance, only four years after *Quirin*, in *In re Yamashita*, 327 U.S. 1 (1946), the Court, reaffirming *Quirin's* "governing principles," *id.* at 9, considered whether a military commission could try a Japanese Commanding General for the "plain violations of the law of war" committed by his

troops, based on a command theory of responsibility, *id.* at 16. Continuing to rely on the Articles of War as having provided congressional authorization for military commissions to try enemy combatants for offenses against the “law of war,” *id.* at 7, the Court concluded that the commission had jurisdiction over the specified offense, *id.* at 17–18. Importantly for our purposes here, the Court looked to *international* sources to determine whether the charges specified offenses against the “laws of war.” *Id.* at 15–16.

Four years later, the Court again addressed the scope of law-of-war military commissions’ jurisdiction in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Court reiterated the principles laid out in *Quirin* and *Yamashita*, observing that “[t]he jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the *laws of war* is long-established.” *Id.* at 786 (emphasis added). It again looked only to international sources to conclude that the conduct with which the petitioners were charged—“[b]reach of the terms of an act of surrender”—violated the international laws governing armed conflicts. *Id.* at 787–88.

*Quirin*, as reinforced by *Yamashita* and *Eisentrager*, thus upheld the authority of military commissions to try enemy belligerents for violations of the international laws of war without running afoul of Article III. But those cases went no further. And while it is true that those cases did not address the question presented here—i.e., whether military commissions can exercise jurisdiction over crimes unrecognized under international law without offending Article III’s structural principles—we, as a lower court, should be hesitant to stretch the exception recognized in those cases in the ways the government suggests. For one thing, a Supreme Court plurality has already described *Quirin* as “the high-water mark of military power to try enemy combatants

for war crimes.” *Id.* at 597. For another, law-of-war military commissions present an atextual exception to Article III’s vesting of the judicial power in civilian courts, requiring that we construe the exception narrowly. Finally, expanding the scope of military commissions’ jurisdiction would erode their historical and theoretical underpinnings as an important mechanism for punishing enemy combatants who fail to abide by the internationally agreed upon rules governing the conduct of war.

## B.

Given the foregoing principles, the Article III inquiry in this case turns on whether conspiracy to commit war crimes is an offense under the international laws of war. As the government candidly and rightly concedes, it is not. *See* Brief for the United States 34, *Al Bahlul I*, 767 F.3d 1 (No. 11-1324), 2013 WL 3479237, at \*34 (“[T]he government has acknowledged that conspiracy has not attained recognition at this time as an offense under customary international law. This is true even when the objects of the conspiracy are offenses prohibited by customary international law, as some of them are in this case.” (internal citation omitted)); *see also* Government Response to Defense Motion to Dismiss for Lack of Lack of [*sic*] Jurisdiction Over the Charge of Conspiracy, AE048A, at 21–22, *United States v. Al-Nashiri* (M.C. Mar. 26, 2012) (“[H]istory reflects a lack of international consensus for treating the standalone offense of conspiracy as a war crime as a matter of customary international law . . . .” (emphasis omitted)).

To begin, neither the Hague nor the Geneva Conventions—“the major treaties on the law of war,” *Hamdan*, 548 U.S. at 604 (plurality opinion)—mention conspiracy, *see* Convention with Respect to the Laws and

Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803; Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

International tribunals established for the prosecution of war crimes, crimes against humanity, and crimes against peace have also declined to recognize conspiracy as a war crime. For instance, the London Charter, which established the International Military Tribunal at Nuremberg for the prosecution of major Nazi war criminals after World War II, did not list conspiracy among the punishable war crimes. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 (London Charter). Indeed, the tribunal dismissed a charge for conspiracy to commit war crimes and crimes against humanity because “the Charter d[id] not define as a separate crime any conspiracy except the one to commit acts of aggressive war.” 22 TRIAL OF THE MAJOR WAR

CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL  
469 (1948).

The same is true of the charter for the International Military Tribunal for the Far East, *see* Supreme Commander for the Allied Powers at Tokyo, General Order No. 20, Special Proclamation for the Establishment of an International Military Tribunal for the Far East, Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevens 20; International Military Tribunal for the Far East, Judgment of 4 November 1948, *in* 22 THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 48,448–51 (R. John Pritchard and Sonia M. Zaide eds. 1981), and the law conferring authority on the forces occupying post-war Germany to punish lower-level Nazi officials for war crimes, *see, e.g.*, 2 TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 122, 174 (1949). As a tribunal established under the latter explained, “[N]either the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.” *Id.*

More recently, the statutes for the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone did not identify conspiracy as a violation of the laws of war. *See* Statute of the International Tribunal for the Former Yugoslavia, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704 (May 3, 1993), adopted by S.C. Res. 827 (May 25, 1993), *reprinted in* 32 I.L.M. 1159



[hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138. And, quite tellingly, the Rome Statute, which established the International Criminal Court and which “catalogues an extensive list of international war crimes,” *Hamdan v. United States*, 696 F.3d 1238, 1251 (D.C. Cir. 2012), *overruled on other grounds*, *Al Bahlul I*, 767 F.3d at 11, does not list conspiracy to commit war crimes as itself a war crime. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

Other sources on the laws of war likewise recognize that international law has declined to adopt conspiracy to commit war crimes as a standalone offense. *See, e.g.*, ANDREA BIANCHI & YASMIN NAQVI, INTERNATIONAL HUMANITARIAN LAW AND TERRORISM 244 (2011); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 191, 197 (2003). Domestic jurists confirm that international law has long rejected conspiracy as a law-of-war offense. Professor George Fletcher observes that, “Since 1948 and the residue of the Genocide Convention in the statutes of the ad hoc tribunals, every relevant international treaty on international humanitarian law or international criminal law had deliberately avoided the concept and language of conspiracy.” George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT’L L. 427, 448 (2007). William Winthrop, the “Blackstone of military law,” *Reid v. Covert*, 354 U.S. 1, 19 (1957) (plurality opinion), noted that conspiracy was not a law-of-war offense. WINTHROP, MILITARY LAW, *supra*, at 842, *cited in Hamdan*, 548 U.S. at 597. Where Winthrop listed the law-of-war violations that had

principally been charged in U.S. military commissions, conspiracy was not among them. *See id.* at 839–40.

Significantly for the issue before us, international law has adopted conspiracy as a standalone offense in only two circumstances. First, it has recognized conspiracy to commit genocide as a crime against humanity. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. 3(b), Dec. 9, 1948, 78 U.N.T.S. 277; ICTY Statute, *supra*, art. 4; ICTR Statute, *supra*, art. 2. Second, it has acknowledged conspiracy to wage aggressive war as a crime against peace. *See* London Charter, art. 6(a). Outside of these two contexts, however, the crime of conspiracy has gained no traction in international law. *Hamdan*, 548 U.S. at 610 (plurality opinion). Those exceptions are plainly not at issue here, for al Bahlul was charged with neither.

The limited international acceptance of conspiracy is not due to a lack of consideration. For instance, during negotiations over the London Charter in 1945, the concept of conspiracy as a separate offense generated considerable debate. *See* BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 51 (1977); ROBERT H. JACKSON, REPORT OF UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, at vii (1947) (“Another point on which there was a significant difference of viewpoint concerned the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists.”). Although the prosecution, led by Justice Robert Jackson, charged the defendants with conspiracy to commit war crimes and crimes against humanity, the tribunal rebuffed the effort, *see* 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 412, 469 (1948); SMITH, *supra*, at 135–37, likely due to the controversy surrounding those charges,

*see* CASSESE, *supra*, at 197; SMITH, *supra*, at 121 (reporting that the lead French judge raised several objections to the conspiracy charges, “[b]eginning with the obvious objection that the crime of conspiracy was unknown to both continental and international law”); *see also* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 70 n.188, 227 (1949) (speculating that the tribunals established in post-war Germany under Control Council Law No. 10 rejected charges for conspiracy to commit war crimes and crimes against humanity because of “the hostility of the French (and probably Soviet) judges to the concept of conspiracy” and recounting that during the proceedings under the London Charter “many European jurists view[ed] the Anglo-Saxon concept of criminal conspiracy with deep suspicion”). Indeed, after returning from Nuremberg, even Justice Jackson wrote approvingly of the “more discriminating principles upon which to prosecute criminal gangs, secret associations and subversive syndicates” that he had learned of from British, French, Soviet, and German lawyers. *Krulewitch v. United States*, 336 U.S. 440, 450 (1949) (Jackson, J., concurring).

To take a more recent example, during negotiations over the Rome Statute for the International Criminal Court, the concept of conspiracy again presented a “very divisive issue.” Per Saland, *International Criminal Law Principles in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 189, 199 (Roy S. Lee ed., 1999). At least one proposal would have made conspiracy to commit any of the other substantive crimes a punishable offense. *See* 2 Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N.GAOR, 51st Sess., Supp. No. 22A, at 94–95, U.N. Doc. A/51/22 (1996), *reprinted in* M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL*

CRIMINAL COURT: A DOCUMENTARY HISTORY 489–90 (1998). But the final statute did not incorporate the idea. *See Rome Statute*. It appears that conspiracy was ultimately excluded as a substantive offense because of “conceptual differences concerning conspiracy among the different legal systems” and because of a belief among some that inchoate conspiracy should be punishable only when its object is an “exceptionally serious crime.” 2 Report of the Preparatory Committee, *supra*, at 95; *see also, e.g.*, Rapporteur for the Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996, at 75–77, A/AC.249/1 (May 7, 1996) (reporting a Japanese proposal to exclude punishment for conspiracy except where it relates to “exceptionally serious offences,” for which “it may be necessary to punish a conduct of plot or preparation before the commencement of the execution of a crime”).

The emphasis that international tribunals have placed on distinguishing concepts like joint criminal enterprise as a liability theory from the standalone crime of conspiracy further demonstrates conspiracy’s lack of acceptance within international law. For example, in rejecting a challenge to the prosecution’s ability to charge a defendant with substantive offenses like murder on a joint criminal enterprise theory of liability—a concept discussed in greater detail below—the Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia stressed: “Criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.” *Prosecutor v. Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 26 (Int’l Crim.

Trib. for the Former Yugoslavia, Appeals Chamber, May 21, 2003).

In sum, conspiracy to violate the laws of war is not a punishable offense under international law. *Cf. Hamdan*, 696 F.3d at 1249–51 (looking to similar sources to conclude that material support for terrorism is not a violation of the international laws of war). Indeed, not only has the government conceded as much, but a plurality of the Supreme Court has already so found. *See Hamdan*, 548 U.S. at 610 (plurality opinion). Accordingly, Congress cannot vest military commissions with jurisdiction to try enemy combatants for that offense without running afoul of Article III.

### C.

With inchoate conspiracy lying beyond the reach of any accepted understanding of the international laws of war, the government offers a different interpretation of *Quirin* and other relevant precedents. Its arguments are unpersuasive.

First, the government insists that *Quirin* itself demonstrates that the atextual Article III exception for military trials of “law of war” offenses extends to purely domestic war crimes. In support, it claims that “spying and the kindred offense of sabotage”—the offenses the Court examined in *Quirin*—were not, and have never been, offenses against the international laws of war. Resp’t’s Br. 44–45; *see* Kavanaugh Op. at 9–12 & nn.6–7. In its view, this shows that the “law of war” to which the Court referred in carving out an Article III exception includes purely domestic offenses.

The greatest flaw in the government’s argument is that the Court expressly identified the “law of war” as a branch of

international law. *See Quirin*, 317 U.S. at 29. That definition was consistent with the widely recognized understanding of that term. *See, e.g.*, WINTHROP, *MILITARY LAW*, *supra*, at 773 (defining the law of war as a “branch of International Law”); *Laws of War*, BLACK’S LAW DICTIONARY (3d ed. 1933) (“This term denotes a branch of public international law, and comprises the body of rules and principles observed by civilized nations for the regulation of matters inherent in, or incidental to, the conduct of a public war . . .”). It was also consistent with the *Quirin* parties’ understanding of the term. *See* Brief for the United States 29, *Quirin*, 317 U.S. 1 (describing the “law of war” as a “centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers and civilians during time of war” (citing, *inter alia*, WINTHROP, *MILITARY LAW*, *supra*, at 773)); Brief for Petitioners 28, *Quirin*, 317 U.S. 1 (“[T]he alleged Law of War which is asserted by the prosecution is a species of international law analogous to common law.”). Had the Court thought that the term actually encompassed a domestic “common law of war,” it likely would have said as much. Thus, we should apply *Quirin*’s Article III exception for military trials of “law of war” offenses as the *Quirin* Court defined it—that is, as an exception for military trials of those who violate the internationally agreed upon rules governing armed conflict.

But the government’s argument suffers from yet another major flaw—the Supreme Court’s analysis makes clear that it viewed “spying and the kindred offense of sabotage” as offenses against the international laws of war. The Court began its analysis from the premise that Congress had authorized the use of military commissions for “offenders or offenses against the law of war,” *Quirin*, 317 U.S. at 28, which, as noted above, the Court identified as a “branch of international law,” *id.* at 29; *see* Part II.A, *supra*. Thus, when

it concluded that Congress had vested military commissions with jurisdiction over the offense of having passed behind enemy lines with the intent to commit espionage or sabotage, *see Quirin*, 317 U.S. at 35–36, it implicitly concluded that those offenses violated the international laws of war.

Further to the point, in analyzing the charge, the Court looked to “[a]uthorities on International Law” who “regarded as war criminals” saboteurs who passed behind enemy lines without uniform, *id.* at 35 n.12, and it relied on international sources to establish that the offense was, “[b]y universal agreement and practice,” recognized as an international law violation, *id.* at 30 & n.7, 31 n.8, 35 n.12. It also quoted early statutes and military proceedings that appeared to identify spying as punishable by military tribunal according to the “law and usage of nations”—that is, according to international practice. *Id.* at 31 n.9, 41. Accordingly, although the government points to scholarly criticism of the Court’s treatment of spying, *see* Resp’t’s Br. 33–35, we are bound by the Court’s own analysis, which was premised on the understanding that spying and sabotage were international law-of-war offenses. *See Quirin*, 317 U.S. at 35–36.

The government pushes back, pointing out that *Quirin* surveyed American historical practice in determining whether the conduct described in the first charge constituted a violation of the “law of war.” In its view, this shows that the Court believed that the “law of war” encompassed domestic offenses. But, once again, the Court in *Quirin* expressly defined the law of war as a body of international law. *Quirin*, 317 U.S. at 28–29. It would have been strange for the Court to have defined it as such if it understood that it also encompassed a domestic body of law. Considered in its proper context, then, *Quirin*’s analysis of domestic precedents for trying spying and sabotage reflect an effort to confirm that

our law did not *preclude* a military trial for the specified offense. That is, the Court referred to U.S. cases to discern potential domestic limits on the prosecution of law-of-war offenses. The Court explained that there might be offenses that

would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury.

*Id.* at 29; *see id.* (citing, as an example of the latter, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2). The government's position gains no support from *Hamdan*'s consideration of domestic precedents in determining whether inchoate conspiracy qualified as a violation of the "law of war," as that term is used in 10 U.S.C. § 821. The plurality looked to domestic precedent in just the same way the *Quirin* Court had: as a potential limitation on military-commission jurisdiction. *See Hamdan*, 548 U.S. at 603, 610 (plurality opinion); *Al Bahlul II*, 792 F.3d at 8–9; *id.* at 25–26 (Tatel, J., concurring).

The government next argues that Article III must be construed in light of Congress's Article I powers and that those powers enable Congress to go beyond international law in determining the offenses triable by military commission. In support, the government notes that *Quirin* and its progeny indicate that Congress's power to create military commissions derives from its war powers. Resp't's Br. 29–30 (citing, *inter alia*, *Yamashita*, 327 U.S. at 11). It then argues that Congress's power to codify offenses triable by such tribunals must stem from those powers as well. Those powers include the power to "declare War," U.S. CONST. art. I, § 8, cl. 11, "raise and support Armies," *id.* § 8, cl. 12, "provide and maintain a Navy," *id.* § 8, cl. 13, "make Rules for the



Government and Regulation of the land and naval Forces,” *id.* § 8, cl. 14, and “provide for calling forth the Militia,” *id.* § 8, cl. 15. Pointing out that these powers, unlike the define and punish power, contain no textual limitation based on international law, the government concludes that Congress’s power to define offenses triable by military commissions must be similarly unconstrained. *See* Resp’t’s Br. 30–32; *see also* Kavanaugh Op. at 4–19.

As an initial matter, although it is true that *Quirin*, *Yamashita*, and *Hamdan* looked to the war powers in discussing congressional authority to *establish* military commissions, *see Hamdan*, 548 U.S. at 591 (plurality opinion); *Yamashita*, 327 U.S. at 12; *Quirin*, 317 U.S. at 26; *see also* WINTHROP, *supra*, at 831 (stating that Congress’s power “to ‘declare war’ and ‘raise armies’” provided the “original sanction” for military commissions), they consistently looked to the Define and Punish Clause alone in addressing Congress’s authority to confer *jurisdiction over particular offenses*. *See Hamdan*, 548 U.S. at 601–02 (plurality opinion); *Yamashita*, 327 U.S. at 7; *id.* at 26 (Murphy, J., dissenting); *Quirin*, 317 U.S. at 28. For instance, in *Yamashita*, the Court explained that “the [military] commission derives its *existence*” from the war powers, 327 U.S. at 12 (emphasis added), but that its jurisdiction over specific offenses comes from Congress’s “exercise of the power conferred upon it by Article I, § 8, cl. 10 of the Constitution to ‘define and punish \* \* \* Offenses against the Law of Nations \* \* \*,’ of which the law of war is a part.” *Id.* at 7 (alteration in original). Winthrop endorsed this distinction, stating that Civil War-era legislation subjecting “spies and guerillas” to military jurisdiction “may be regarded as deriving its authority from” the Define and Punish Clause. WINTHROP, *supra*, at 831.

The government argues that it would be “anomalous”—and three of our colleagues call it “absurd”—to conclude that the war powers authorize Congress to establish military commissions but not vest them with jurisdiction over specific offenses. *See* Resp’t’s Br. 31; Kavanaugh Op. at 7 n.5. But as noted above, the Supreme Court has repeatedly drawn this precise distinction. Thus, even were we to determine the scope of the Article III exception by reference to Congress’s Article I powers, it would still be constrained by international law.

Despite *Quirin*’s discussion of Congress’s Article I powers in determining whether the President and Congress had the authority to establish military commissions, *Quirin* did not look to Congress’s Article I powers in determining the scope of the Article III exception. *See Quirin*, 317 U.S. at 39–41. Rather, it looked to historical practice regarding military commissions at the time that the Constitution was adopted to conclude that Article III posed no bar to military trials of enemy combatants who violate the laws of war. *Id.*

The government next argues that Congress may define conspiracy to commit war crimes as a law-of-war offense by virtue of its power to define and punish offenses against the “Law of Nations.” *See* Resp’t’s Br. 55; *see also* Millett Op. at 38–39. In support, it claims that international law includes sufficiently analogous notions of criminal liability. Resp’t’s Br. 3.

But, as the government admits, “[w]hen conspiracy is used as a mode of liability under international law, there is generally a requirement that the object offense be completed or attempted.” Resp’t’s Br. 56. The military commission in al Bahlul’s case was instructed that it could convict him of conspiracy without “[p]roof that the offense[s]” that were the

objects of the conspiracy—murder, attacking civilians or objects, murder and destruction of property in violation of the law of war, terrorism, and providing material support for terrorism—“actually occurred.” Trial Tr. 848. Neither, under these instructions, did al Bahlul’s overt act in furtherance of the conspiracy have to be a criminal act; as an element of proof of a standalone conspiracy charge, the overt act serves merely as “a clear indication that the conspiracy is being carried out.” *Id.* at 849.

The government also points to prosecutions for conspiracy brought under the domestic laws of individual allied governments following World War II, *see* Resp’t’s Br. 55, but those prosecutions are irrelevant to whether conspiracy was a punishable offense against international law. Many offenses that are punished by many, if not all, countries are not of concern to international law because “international law addresses only those ‘wrong[s]’ that are ‘of *mutual*, and not merely *several*, concern’ to States.” *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)); *see also* *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1252 (11th Cir. 2012).

To be sure, when Congress legislates for the punishment of war crimes outside of Article III courts, it may have authority to clarify somewhat murky areas of international law. *See* U.S. CONST. art. I, § 8, cl. 10. But Congress certainly has no power to make up that law entirely. *See, e.g., Military Commissions*, 11 Op. Att’y Gen. 297, 299 (1865) (“To *define* is to give the limits or precise meaning of a word or thing *in being*; to make is to call into being. Congress has power to *define*, not to make, the laws of nations . . . .”) (second emphasis added); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., rev. ed. 1937)

(Statement of Gouverneur Morris); *Bellaizac-Hurtado*, 700 F.3d at 1250 (“The insertion of the power to “define” enabled Congress to provide notice to the people through codification; it did not enable Congress to create offenses that were not recognized by the law of nations.”); *cf. United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 198 (1820) (when exercising its power to define and punish piracy, Congress cannot redefine that offense). Indeed, in clear contrast to Congress’s authority to “*make* Rules for the Government and Regulation of the land and naval Forces,” U.S. CONST. art. I, § 8, cl. 14 (emphasis added), Congress has the authority only to “define” offenses against the law of nations. *See also* NOAH WEBSTER, 1 A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 79 (1806) (“define” means “to explain, limit, mark out, fix, decide”); SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE, at dlvii (6th ed. 1785) (“define” means “to give definition, to explain a thing by its qualities and circumstances”; or “to circumscribe, to mark the limit, to bound”).

Here, as the government asserts, Congress in the Military Commissions Act of 2006 has done much more than codify an accepted but not fully defined concept of international law; it has *made* a new war crime, one that the international community has repeatedly declined to adopt. *See* Part II.B, *supra*. Whether Congress might be entitled to the type of leeway the government suggests when it exercises its define and punish powers to legislate for the punishment of crimes in *Article III courts*, it did no such thing in the Military Commissions Act. That Act legislated for the punishment of crimes in *military commissions*. In doing so, it ran up against a clear constitutional limit: Article III’s commitment of the “judicial Power” to the Supreme Court and “such inferior Courts as Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

The government also invokes the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, which authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” The government argues that Congress may enact legislation necessary to comply with the nation’s “international responsibilities,” and that Congress was reasonably seeking to fulfill its obligation to prevent acts of terrorism and war crimes when it made conspiracy punishable by military commission. Resp’t’s Br. 58. It points to the nation’s responsibilities under the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra*, 6 U.S.T. 3516, 75 U.N.T.S. 287, which prohibits “[c]ollective penalties and likewise all measures of intimidation or of terrorism.” *Id.* art. 33. The Convention requires signatories to “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention,” *id.* art. 146, which include the “willful killing . . . of a protected person,” *id.* art. 147, defined as “those who . . . find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals,” *id.* art. 4.

But the Necessary and Proper Clause does not allow Congress to do what it is otherwise expressly barred from doing. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21–22 (1955). And however it may affect Congress’s define and punish power when it legislates for the punishment of international offenses in Article III courts, the Necessary and Proper Clause cannot be read to allow Congress to do an end run around the constitutional limit imposed by Article III. *See id.* at 22; *Reid*, 354 U.S. at 22 (plurality opinion); *see also Northern Pipeline*, 458 U.S. at 73 (plurality opinion)

("[W]here Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it.").

Article III's limitations on congressional power apply even where Congress exercises its powers to enact "legislation necessary to carry out its international obligation to prevent terrorism as a mode of warfare." Resp't's Br. 57. The political branches' efforts to comply with international obligations must also comply with the Constitution. *See Medellin v. Texas*, 552 U.S. 491, 520 (2008); *Reid*, 354 U.S. at 16 (plurality opinion). Even assuming that Congress could only meet its international obligations by criminalizing conduct not recognized as an offense against international law, the government never explains why its asserted authority to do so under Article I would imply the power to establish military jurisdiction over that conduct. *See United States v. Arjona*, 120 U.S. 479, 484 (1887).

Ultimately, whether Congress's authority to codify the offenses triable by military commissions is grounded in its define and punish powers or its war powers is beside the point. So too is the Necessary and Proper Clause's impact on Congress's Article I authority to comply with its international obligations by going somewhat beyond the current scope of international law. Whichever clause in Article I, § 8 grants Congress the authority to establish and determine the offenses triable by military commissions, and whatever the impact of the Necessary and Proper Clause on Congress's Article I powers, Congress may not transgress the bounds of Article III. Article III does include an exception for law-of-war military commissions. But that has been narrowly defined by reference to the international laws and customs governing war. *Quirin*, 317 U.S. at 38–41.

**D.**

The government last falls back on the idea that Article III's scope must be determined by reference to historical practice. This argument comes in two forms. First, the government maintains that spying and aiding the enemy are not violations of the international laws of war but that Congress has made those offenses triable by military commission since the early days of the Republic. This, its argument continues, shows that early congresses believed Article III poses no bar to making domestic crimes punishable by military commission. Second, the government maintains that "the experience of our wars and the acts and orders of our wartime tribunals reflect a long history of trying conspiracy to violate the laws of war in a military commission," Resp't's Br. 2–3; *see* Kavanaugh Op. at 14–19, 21, and that Article III must be considered in light of that practice. Neither argument advances the government's cause.

With respect to the first, it is true that Congress has long made spying and aiding the enemy punishable by military commission. *See, e.g.*, An Act for Establishing Rules and Articles for the Government of the Armies of the United States, § 2, 2 Stat. 359, 371 (1806) (Articles of War). But the government's reliance on early congressional statutes making spying and aiding the enemy punishable by military commission suffers from two flaws. First, the government cites nothing indicating early congresses actually *knew* that those two offenses did not violate the international laws of war, and some sources suggest they might well have believed that those offenses did. For instance, an 1806 statute "imposed the death penalty on alien spies 'according to the law and usage of nations, by sentence of a general court martial.'" *Quirin*, 317 U.S. at 41 (quoting Act of Congress of Apr. 10, 1806, 2 Stat. 359, 371). A 1776 Resolution adopted

by the Continental Congress contained a nearly identical provision. *See* Resolution of Aug. 21, 1776, 5 JOURNALS OF THE CONTINENTAL CONGRESS 693 (Ford ed. 1906). In 1865, the Attorney General of the United States, James Speed, also concluded in a formal opinion that “every lawyer knows that a spy was a well-known offender under the laws of war, and that under and according to those laws he could have been tried and punished without an act of Congress.” 11 Op. Att’y Gen. at 312, 313. Thus, we cannot infer from those early statutes that early congresses understood Article III to pose no bar to the punishment of domestic war crimes in military tribunals.

But even were there evidence that early congresses understood that spying and aiding the enemy were not international law-of-war offenses, it would shed little light on whether early congresses felt free to punish purely domestic offenses as they saw fit. Both spying and aiding the enemy have been subject to military jurisdiction since the ratification of the Constitution. *See Quirin*, 317 U.S. at 41; Resolution of Aug. 21, 1776, 5 JOURNALS OF THE CONTINENTAL CONGRESS 693 (Ford ed. 1906) (“[A]ll persons, not members of, nor owing allegiance to, any of the United States of America . . . who shall be found lurking as spies . . . shall suffer death, according to the law and usage of nations, by sentence of a court martial . . .”); Resolution of Sept. 20, 1776, 5 JOURNALS OF THE CONTINENTAL CONGRESS 799 (Ford ed. 1906) (“Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbour or protect an enemy, shall suffer death, or such other punishment as by a court-martial shall be inflicted.”); Act of Apr. 10, 1806, 2 Stat. 371. As a result, those two offenses may well fit within an established historical exception.



Indeed, although the government and four of our colleagues contend that Congress's longstanding practice of making spying and aiding the enemy triable by military tribunal "strongly supports the conclusion that international law is not a constitutional constraint on Congress's authority to make particular crimes triable by military commission," Kavanaugh Op. at 12; *see* Resp't's Br. 32–33; Henderson Op. at 1, *incorporating by reference Al Bahlul II*, 792 F.3d at 69 (Henderson, J., dissenting), it seems that, if anything, Congress's consistent decision to codify those two offenses—and those two offenses alone—undermines that conclusion. Had Congress, over the last two hundred years, actually believed itself free to punish by military tribunal whatever wartime conduct it deemed necessary, it would be rather surprising that it codified only two offenses, both of which were subject to military trial at the time the Constitution was adopted. Thus, while these two offenses may fall within an Article III exception based on longstanding historical practice, we find them uninformative regarding Congress's general authority to make purely domestic crimes punishable by military commission.

This brings us to the government's final contention that conspiracy has long been tried by military commission in the United States and that it must therefore fall within a historical exception to Article III. Here, too, it falters.

Importantly, when the Supreme Court has relied on historical practice to determine where one branch's powers end and another's begin, it has required robust evidence of a historical practice. For instance, in *Myers v. United States*, 272 U.S. 52, 175 (1926), in examining the President's removal power, the Court found more than seven decades in which Presidents had a continuous practice of removing executive branch officers without congressional involvement,

and on that basis held Congress lacked authority to restrict the President's removal power. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936), the Court pointed to an "unbroken legislative practice which has prevailed almost from the inception of the national government to the present day" to reject a constitutional nondelegation challenge to a joint resolution of Congress authorizing the President to determine whether to embargo the sale of arms and munitions to belligerents in a foreign war. Recently, in *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014), the Court invoked a lengthy and dense historical practice defining the scope of the President's authority under the Recess Appointments Clause, U.S. CONST. art. II, § 2, cl. 3. Upon identifying "thousands of intra-session recess appointments" and noting that "Presidents since Madison have made many recess appointments filling vacancies that initially occurred prior to a recess," *id.* at 2562, 2571, the Court concluded that the Clause authorized such appointments. By contrast, where the Court found only a handful of instances in which a President had made a recess appointment during an inter-session recess lasting less than ten days, the Court held that those recesses were "presumptively too short to fall within the Clause." *Id.* at 2567.

There is no such robust history of trying inchoate conspiracy before law-of-war military commissions. *See Hamdan*, 548 U.S. at 604 (plurality opinion). The government has identified only a handful of at best ambiguous examples, *see Resp't's Br.* 40–43, and none in which a conviction was for inchoate conspiracy by a law-of-war commission that was affirmed by the Judicial Branch. The examples are unpersuasive in themselves and insufficient to establish a longstanding historical practice that would justify a more expansive understanding of the law-of-war military commission exception to Article III.

First, the government places substantial reliance on Civil War era historical practice, but that practice does not support its case. For instance, although the charges against the Lincoln assassins referred to conspiracy, the specifications listed the elements of the completed offense—“traitorously” murdering President Lincoln. *See* J. Holt & T. Ewing, CHARGE AND SPECIFICATION AGAINST DAVID E. HEROLD, ET AL. 3 (1865); *see also Hamdan*, 548 U.S. at 604 n.35 (plurality opinion); *id.* at 609; General Court-Martial Orders No. 356, War Dep’t (July 5, 1865), *reprinted in* H.R. Doc. No. 55-314, at 696 (1899). The Attorney General’s formal opinion in 1865 also described the charge as “the offence of having assassinated the President.” 11 Op. Att’y Gen. at 297; *see id.* at 316–17. As such, it appears that conspiracy was at most a theory of liability on which to hold each of the partners to account for the assassination completed by Booth alone.

Construing the Lincoln assassins’ case as a conspiracy conviction is anachronistic and conflates conspiracy as a theory of liability with inchoate conspiracy as a standalone offense. *See* Kavanaugh Op. at 15–16. Prosecution of conspiracy as a standalone offense, chargeable apart from and in addition to the crimes that are the conspiracy’s object and carrying their same penalties, is a modern innovation. *See Iannelli v. United States*, 420 U.S. 770, 781 & n.13 (1975) (citing Hampton L. Carson, *The Law of Criminal Conspiracies and Agreements as Found in the American Cases*, in R. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 191 (1887)). At the time of the Lincoln assassination, it was unclear that conspiracy could even be charged separately from its object offense, once completed. *See id.* And when Congress first codified conspiracy as a crime in 1867, it carried only a two-year penalty. *See* Act of

Mar. 2, 1867, 14 Stat. 471, 484. Conspiracy as then understood would hardly have been an appropriate principal charge against the President's assassins. The government mistakenly reads our modern understanding of conspiracy into events, including the Lincoln assassins' conviction, from an era in which that understanding had not yet taken hold, a move that fundamentally miscasts that earlier precedent.

Further, Winthrop noted that the Lincoln assassins' tribunal was a mixed martial-law and law-of-war military commission. See WINTHROP, MILITARY LAW, *supra*, at 839 & n.5; *cf. id.* at 842. The unreported district court opinion in *Ex parte Mudd*, 17 F. Cas. 954 (1868), see Kavanaugh Op. at 15–16, does not undermine that conclusion; the district court described the offense as “assassination” of the Commander in Chief and only used “conspiracy” in the same terms as the charging document, while distinguishing *Ex parte Milligan* based on the state of war in the Capital, not based on the nature of the offense. *Ex parte Mudd*, 17 F. Cas. at 954. Thus, “even if [it could be] properly classified as a trial by law-of-war commission, [the Lincoln assassins' trial] is at best an equivocal exception.” *Hamdan*, 548 U.S. at 604 n.35 (plurality opinion) (internal citation omitted); see also *Al Bahlul II*, 792 F.3d at 12.

Second, the government asserts that other Civil War precedents show that defendants were charged with conspiracies as un consummated offenses. Resp't's Br. 42–43. The examples on which it relies do not support its position. Col. George St. Leger Grenfel was convicted by a military tribunal of conspiracy to free prisoners of war in Chicago and to destroy that city. See GENERAL COURT MARTIAL ORDERS No. 452, War Dep't (Aug. 22, 1865), reprinted in H.R. Doc. No. 55-314, at 724–35. As *al Bahlul* points out, Grenfel's commission, like that of the Lincoln assassins, was a

“hybrid” commission exercising jurisdiction based in part on the President’s declaration of martial law. *See* Reply Br. 20 (citing *Hamdan*, 548 U.S. at 609 n.37 (plurality opinion); WINTHROP, *MILITARY LAW*, *supra*, at 839 n.5); S. STARR, *COLONEL GRENDEL’S WARS: THE LIFE OF A SOLDIER OF FORTUNE*, 5, 219 (1971) (cited in Resp’t’s Br. 41). Such hybrid commissions “regularly tried war crimes and ordinary crimes together,” *Hamdan*, 548 U.S. at 608, and the crimes charged were, “[n]ot unfrequently[,] . . . a combination of the two species of offenses”—that is, hybrid versions of law-of-war offenses and domestic crimes, *id.* (quoting C. HOWLAND, *A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 1071* (1912)). These cases thus provide little insight into the traditional jurisdiction of pure law-of-war military commissions. Indeed, in defending the jurisdiction of the Grenfel commission, the prosecution relied on the fact that “martial law obtained throughout the United States and the Territories during the continuance of the [Civil] [W]ar.” Judge Advocate’s Reply, Courtroom, Cincinnati, Ohio, Jan. 17, 1865, *United States v. Walsh, et al.*, *reprinted in* H. EXEC. DOC. NO. 50, 39th Cong., 2d Sess., at 20. The Grenfel commission, like the Lincoln assassins’ commission, “is at best an equivocal” example. *Hamdan*, 548 U.S. at 604 n.35 (plurality opinion).

The government’s reliance on the case of Confederate Army Captain Henry Wirz is similarly misplaced; in his case conspiracy served only as a mode of liability for the completed law-of-war offenses of abusing, torturing, and murdering war prisoners. GENERAL COURT MARTIAL ORDERS, No. 607, War Dep’t (Nov. 6, 1865), *reprinted in* H.R. Doc. No. 55-314, at 785, 789.

Also unavailing are the government’s citations to William Winthrop’s 1880 *Digest of Opinions of the Judge*

*Advocate General of the Army* and to Charles Roscoe Howland's 1912 *Digest of Opinions of the Judge Advocate General of the Army*. Both stated that, during the Civil War, one of the principal offenses charged in military commissions as an offense against the laws of war was "[c]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy." W. WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 329 (1880); HOWLAND, *supra*, at 1071. But a Supreme Court plurality has already examined the cases cited and concluded that they provide "no support for the inclusion of conspiracy as a violation of the law of war." *Hamdan*, 548 U.S. at 607 (plurality opinion). And, as that plurality further noted, Winthrop's subsequent treatise, *Military Law and Precedents*, does not list conspiracy as an offense against the laws of war. *Id.* at 608 (citing WINTHROP, MILITARY LAW, *supra*, at 839–40).

Indeed, in his later treatise, Winthrop clarified the issue. In describing the mixed jurisdiction of military commissions during the Civil War, he noted that the tribunals presided over two classes of offenses—"(1) Crimes and statutory offenses cognizable by State or U.S. courts, and which would properly be tried by such courts if open and acting; [and] (2) Violations of the laws and usages of war cognizable by military tribunals only." WINTHROP, MILITARY LAW, *supra*, at 839. He identified criminal conspiracy as a crime of the first class, but made no mention of conspiracy in the second. In a footnote, he also identified many of the conspiracy cases to which the government now points, including those of Wirz, Grenfel, and the Lincoln assassins, as having been of the first class (i.e., cases charging crimes normally triable only in civil court) or "of the first and second classes combined," *id.* at 839 n.5, that is, cases charging "species of compound offense[s] of the type tried by the hybrid military commissions of the Civil War,"

*Hamdan*, 548 U.S. at 608 (plurality opinion). Those cases thus fail to support the government's contention that there is a robust history of trying conspiracy in pure law-of-war military commissions.

Third, the government draws on World War II-era practice. Although the charges against the Nazi saboteurs in *Quirin* included conspiracy, the Supreme Court upheld the jurisdiction of the law-of-war military commission only as to the charge of passing behind enemy lines with hostile purpose and did not mention conspiracy in its analysis. *See Quirin*, 317 U.S. at 46. Similarly, although William Colepaugh was convicted of sabotage and spying, in addition to conspiracy to commit those offenses, the U.S. Court of Appeals for the Tenth Circuit affirmed the jurisdiction of the military tribunal in view of the law-of-war offense of unlawful belligerency only, without addressing the conspiracy charge. *See Colepaugh v. Looney*, 235 F.2d 429, 431–32 (10th Cir. 1956).

The government insists that these cases are nonetheless important because “despite such judicial review, ‘no U.S. court has ever cast any doubt on the landmark military commission convictions embracing conspiracy charges, or the validity of trying conspiracy by military commission.’” Resp’t’s Br. 37–38 (quoting *Al Bahlul I*, 767 F.3d at 70 (Kavanaugh, J., concurring in the judgment in part and dissenting in part)) (alterations omitted). To this, it adds that executive branch officials, including the President, approved the charges in both cases, thereby giving their “imprimatur” to the convictions. *Id.* at 38.

But at most those cases underscore the uncertain position that the crime of conspiracy has occupied in the history of military commissions. The defendants in both *Quirin* and

*Colepaugh* challenged the conspiracy charges on the ground that the military commissions lacked jurisdiction over that offense, *see* Brief for Petitioner at 29, *Quirin*, 317 U.S. 1; Opinion of Special Board of Review, *United States v. Colepaugh*, CM 276026, at 28 (Mar. 27, 1945), suggesting that it was in no sense well established that military tribunals had jurisdiction to preside over conspiracy charges. Additionally, the court in each case focused on completed violations of the international laws of war and declined to address the legitimacy of the conspiracy charges, indicating that those charges may have presented difficult questions. In *Hamdan*, four Justices recognized as much, stating:

If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of the law of war—at least not one triable by military commission—without the actual commission of or attempt to commit a hostile and warlike act.

548 U.S. at 606–07 (plurality opinion) (internal quotation marks omitted)). Thus, these cases appear neutral at best and, more likely, undermine the government's position.

The government also relies on evidence that the executive branch has viewed conspiracy as triable by military commission, suggesting that this is entitled to some weight. Resp't's Br. at 34–46; *see* Kavanaugh Op. at 14–18. But the executive branch opinions on which it relies rest on shaky foundations. For example, although Assistant Attorney General Tom Clark concluded in a memorandum that



William C. Colepaugh could be tried for conspiracy in a law-of-war military commission, the sources on which he relied drew almost exclusively from martial-law commissions that exercised plenary jurisdiction, not law-of-war military commissions of the kind at issue here. *See* Memorandum from Tom C. Clark, Assistant Attorney General, to Myron C. Kramer, Judge Advocate General (Mar. 12, 1945), reprinted in Government Supplemental Appendix 104–10 (citing, *inter alia*, the Lincoln Assassins and Captain Wirz).

The orders of General MacArthur from the Korean Conflict, *see* Resp't's Br. 39; Millet Op. at 41, also offer little, if any, support for the government because the *en banc* court has viewed such military orders as unpersuasive for lack of high-level Executive Branch consultation. *See Al Bahlul I*, 767 F.3d at 25 n.16. And during the Korean Conflict there apparently were no prosecutions conducted by United Nations Military Commissions. *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 724 (1996).

In sum, the Supreme Court has recognized a limited Article III exception for the prosecution of internationally recognized war crimes in military tribunals. The government has offered no reason—rooted in history, the Constitution, case law, or anything else—for extending that exception further.

### III.

We turn now to the additional arguments of our colleagues.

45

A.

Four of our colleagues believe that *Hamdan* supports the notion that Congress can vest law-of-war military commissions with jurisdiction over inchoate conspiracy without transgressing the bounds of Article III because several Justices in *Hamdan* “expressly invited Congress to clarify the scope of military commission power” without “even hint[ing] at a lurking constitutional problem with trying conspiracy offenses before military commissions.” Kavanaugh Op. at 26; *see also* Henderson Op. at 1, *incorporating by reference Al Bahlul II*, 792 F.3d at 50-52 (Henderson, J., dissenting); Resp’t’s Br. 53.

The Justices’ invitation to Congress in *Hamdan* is, however, a thin reed on which to rest. For one thing, it is far from clear that the invitation was in any way related to Congress’s ability to make inchoate conspiracy punishable by military commission. *Hamdan*’s principal holding was that the commissions convened under Military Commission Order No. 1, such as Salim Hamdan’s, were invalid because their procedures failed to comport with statutory requirements. 548 U.S. at 613. The Justices’ may have thus intended their “invitation” to underscore nothing more than Congress’s power to authorize the invalidated procedures. *See id.* at 636 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

Perhaps equally important, the issues presented in *Hamdan* did not include the question we consider here, i.e., whether Article III limits Congress’s authority to vest military commissions with jurisdiction over conspiracy charges. The

two questions on which the Supreme Court granted certiorari asked: (1) whether the President required congressional authorization to establish law-of-war military commissions and, if so, whether the President had received such authorization; and (2) whether Guantanamo detainees could enforce the provisions of the 1949 Geneva Conventions in habeas corpus proceedings. Although the parties' briefs in *Hamdan* touched on related issues, neither side squarely addressed Article III's limits on military-commission jurisdiction. This court should, accordingly, not read too much into the Justices' invitation.

Next, Judge Kavanaugh, like the government, believes that Congress derives its authority to determine the offenses triable by military commission from its war powers and that those powers are unconstrained by international law. In his view, the Constitution cannot possibly give the international community—through the development of international law—the ability to limit Congress's exercise of its war powers. Kavanaugh Op. at 8–9. It is not international law, however, that constrains Congress's authority here—it is Article III. The Framers of the Constitution expected Article III courts to have jurisdiction over the trial of all crimes, *Toth*, 350 U.S. at 15; *Reid*, 354 U.S. at 21 (plurality opinion), save for a few narrow exceptions, such as battlefield prosecutions of enemy combatants who “in their attempt to thwart or impede our military effort have violated the law of war,” *Quirin*, 317 U.S. at 28–29; *id.* at 41–42. The international-law constraint that *Quirin* recognized and that we would apply here functions not as an independent constraint on the political branches' powers to wage war, but rather as an essential demarcation between military and civilian jurisdiction. Without it, “the line between civilian and military jurisdiction could become elusive—if not altogether illusory.” National Institute of Military Justice Amicus Br. 29. We find apt here the Supreme Court's

warning in *Northern Pipeline*, 458 U.S. at 73–74 (plurality opinion), against constitutional interpretations that would “replace the principles delineated in [Supreme Court] precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.”

The idea that international law has a role to play in our constitutional framework is also not as surprising as one might think. The Framers of the Constitution well understood that our country’s newly forged sovereignty brought with it both rights and obligations. John Jay, the first Chief Justice of the United States, explained in 1793 that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (opinion of Jay, C.J.). Embracing the law of nations and adhering to its principles, he further explained, was the new nation’s “duty” and in its own “interest.” *Id.*; see also *Who Privileged from Arrest*, 1 Op. Att’y Gen. 26, 27 (1792) (The law of nations’ “obligation commences and runs with the existence of a nation.”).

There is nothing anomalous or contrary to national security in vesting Article III courts with exclusive power to try all crimes except for internationally recognized war crimes that have been traditionally tried by military commission. Our military has long abided by the international laws of war. For instance, in its 1940 Rules of Land War, it noted that the “well-established rules known as the rules or laws of war” that govern the conduct of war among civilized nations “are binding upon all civilized nations,” and are to “be strictly observed by our forces.” War Department, *Rules of Land Warfare* 1–2 (1940). Both the Framers’ and our military’s

desire to adhere to the law of nations and, more specifically, the laws of war appears sound: “If the United States now decides that it can hold foreign personnel accountable for violating ‘national’ law-of-war rules, other states will be entitled to assert the same authority.” Glazier Amicus Br. 27; *see Arjona*, 120 U.S. at 487 (“[W]hat is law for one is, under the same circumstances, law for the other.”).

Standing firm on the constitutionally prescribed boundaries between civilian and military jurisdiction is compelled by Supreme Court precedent and doubly compelled where, as here, the government has made no claim of military necessity. Military exigency, although insufficient to justify military jurisdiction, is nevertheless a necessary condition. *Hamdan*, 548 U.S. at 590. But remarkably, throughout this protracted litigation, the government has offered no reason to believe that expanding the traditionally understood scope of Article III’s exception for law-of-war military commissions is necessary to meet a military exigency. We claim no authority to determine military necessity; we simply note that the government has asserted no such exigency here. Perhaps the government has eschewed a claim of military necessity because of the many other tools at its disposal. Congress remains free to enact, and the President to employ, domestic laws to bring terrorists to justice before Article III courts, as they have on hundreds of occasions already with remarkable success. *See Al Bahlul II*, 792 F.3d at 27 (Tatel, J., concurring); Center on Law and Security, New York University School of Law, Terrorist Trial Report Card: September 11, 2001–September 11, 2011, at 2, 7, tbl.1, available at <http://goo.gl/Ks3Okc> (reporting that in the ten years after September 11, 2001, federal prosecutors had obtained convictions in almost 200 “jihadist-related” terrorism and national security cases); Press Release, Department of Justice, Fact Sheet: Prosecuting and Detaining

Terror Suspects in the U.S. Criminal Justice System (June 9, 2009) (citing Richard B. Zabel & James L. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* 23 (May 2008), available at <http://www.humanrightsfirst.org/resource/pursuit-justice>); see also, e.g., *Nizar Trabelsi*, No. 15-3075 (D.C. Cir., argued May 17, 2016); *United States v. Ghailani*, 733 F.3d 29 (2d Cir. 2013).

For detainees ill-suited for prosecution in Article III courts, the government has other options. It may detain them as enemy belligerents. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–24 (2004) (plurality opinion). It may continue to try violations of the laws of war in military commissions. See, e.g., Government Response to Defense Motion to Dismiss for Lack of Jurisdiction, AE107A, at 1, *United States v. Mohammad* (M.C. Jan. 16, 2013) (acquiescing to Khalid Shaikh Mohammad’s and his codefendants’ motion to dismiss charges for inchoate conspiracy, but continuing to pursue charges of recognized law-of-war offenses, including attacking civilians on September 11, 2001). It might also help craft new international conventions to address the demands of new kinds of war and implement appropriate procedures for prisoners of war. See generally *Hamdan*, 548 U.S. at 619.

On this note, it is worth remembering that, historically, the military has not been in the business of prosecuting individuals for crimes and locking them up for life. Its primary mission has always been to defeat our enemies on the battlefield. Cf. *Reid*, 354 U.S. at 35 (plurality opinion) (“[T]he business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes.”); *Toth*, 350 U.S. at 17 (“Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. . . . [T]rial of soldiers to maintain discipline is merely

incidental to an army's primary fighting function.”). To be sure, punishing enemy belligerents who violate the international rules governing armed conflicts is an “important incident” to waging war. *Quirin*, 317 U.S. at 28. Such punishment helps encourage adherence to the laws of war. But restricting the military's ability to intrude on the judiciary's domain hardly raises the types of concerns that enforcing the limits on the President's other war powers could.

**[The dissent's discussion of Judge Millett and Judge Wilkins's opinions is omitted.]**

#### IV.

One may wonder, “why the fuss?” *Stern v. Marshall*, 564 U.S. 462, 502 (2011). After all, the government is not seeking to prosecute cyber or drug crimes before military commissions; it is seeking only to prosecute conspiracies to commit recognized war crimes. Can such a modest expansion of military-commission jurisdiction really threaten the Constitution’s separation of powers? As in *Stern v. Marshall*, “[t]he short but emphatic answer is yes.” *Id.* “[O]ur Constitution . . . commands that the independence of the Judiciary be jealously guarded . . .” *Northern Pipeline*, 458 U.S. at 60 (plurality opinion). The political branches “may no more lawfully chip away at the authority of the Judicial Branch than [they] may eliminate it entirely.” *Stern*, 564 U.S. at 503. And “[a]lthough it may be that it is the obnoxious thing in its mildest and least repulsive form, we cannot overlook the intrusion: illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.” *Id.* (internal quotation marks omitted).



Here, it is easy to see how allowing the political branches to stretch Article III's exception for law-of-war military commissions to encompass inchoate conspiracy charges could represent just the first step toward a much greater usurpation of the judiciary's domain. Against the backdrop of the war on terror, in which many of the traditional constraints on the use of law-of-war military commissions are disappearing, the government articulates a breathtakingly expansive view of the political branches' authority to subject non-servicemembers to military trial and punishment. Indeed, it admits only two constitutional constraints on its power to try individuals in law-of-war military commissions: the charges must allege (1) that the individuals are "enemy belligerents" who (2) engaged in proscribed conduct "in the context of and associated with hostilities." Oral Arg. Tr. 37–38 (Dec. 1, 2015).

Critically, the government's suggestion that the defendant's status as an enemy belligerent in the context of hostilities suffices to subject him to trial by military commission ignores the Supreme Court's focus on the *offenses* triable to law-of-war military commissions, in addition to the status of the offenders. Thus the Court has focused on "the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the *offenses* with which they are charged." *Quirin*, 317 U.S. at 29 (emphasis added). In *Quirin*, the Court "assume[d] that there are *acts*" that could not be tried by military commission "because they are of that class of *offenses* constitutionally triable only by a jury." *Id.* (emphases added). So, too, in *Yamashita*. 327 U.S. at 8. And in *Hamdan*, the Court explained that the status of the offender (being a member of a foreign armed force) and the nature of the offense were *both* necessary conditions for the exercise of jurisdiction by a law-

of-war military commission. *See Hamdan*, 548 U.S. at 597–98 (plurality opinion) (citing WINTHROP, MILITARY LAW, *supra*, at 836–39); *accord id.* at 683 (Thomas, J., dissenting).

But putting that aside, the extent to which the government’s proposed limits have any force is far from clear. What does it mean, for instance, for an individual to have committed an offense in the context of hostilities? The answer is uncertain, both as a temporal and geographic matter. We would be willing to wager that if you asked Americans when the United States’ “war” with al Qaeda began, most would say September 11, 2001. Even executive branch officials often cite that date as the beginning of hostilities against al Qaeda and its affiliates. For example, for certain naturalization purposes, the President “designate[d] as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001.” E.O. 13,269, 67 Fed. Reg. 45,287 (July 3, 2002); *see* Memorandum for the Attorney General, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Determination of Enemy Belligerency and Military Detention* (June 8, 2002), *available at* 2002 WL 34482990, at \*7 (“[T]he September 11, 2001 attacks on the World Trade Center and the Pentagon began an international armed conflict between the United States and the al Qaeda terrorist organization.”). But in a pending military-commission case, the government seeks to hold an alleged member of al Qaeda responsible for a failed attack on a U.S. vessel that occurred in January 2000. It takes the position in that case that the United States’ war with al Qaeda goes back “to at least 1998,” and it appears to believe that the conflict may date as far back as 1992. *See* Brief for the United States 5, 41, *United States v. Al-Nashiri*, Nos. 15-5020 & 15-1023 (D.C. Cir. Dec. 28, 2015). *But see United States v. Al-Nashiri*, --- F.3d --- (D.C. Cir. 2016) (recognizing

as unsettled for purposes of mandamus when hostilities began against Al Qaeda).

If the government's view in this case that military commission jurisdiction is limited only by Congress' war powers were to prevail, Congress and the President could authorize military prosecutions in many situations that we traditionally think of as within the exclusive province of domestic law enforcement agencies and civilian courts. Suppose, for instance, that the FBI launches an investigation into three lawful permanent residents who have lived in the United States since early childhood. Searching an apartment in Virginia that the three share, it discovers pipe bombs, al Qaeda propaganda, and a map of the Washington, D.C. metro system. The government arrests the three and wishes to prosecute them for conspiracy to kill innocent civilians. Under the government's view of things, the Constitution would pose no bar to transferring the individuals into military custody and prosecuting them before a military commission. In fact, when presented with this hypothetical at oral argument, government counsel conceded that these facts "might well be enough" to try the individuals in a military tribunal. Oral Arg. Tr. 51–53 (Dec. 1, 2015); *see also* Kavanaugh Op. at 30–31. This is a dangerous suggestion to say the least. *Cf. Reid*, 354 U.S. at 23–24 (plurality opinion) ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.").

But the government's position gets more dangerous still. Now suppose that the three are U.S. citizens. Could the government do an end run around Article III solely because they had *some* connection to the "war" on terrorism? It would seem so. *See Quirin*, 317 U.S. at 37–38 (holding that a saboteur's U.S. citizenship was irrelevant to a commission's

authority to try him for law-of-war offenses). What if the FBI instead discovered that the three U.S. citizens sent \$200 to the humanitarian wing of an organization that the United States designated a foreign terrorist organization, earmarked for training in human-rights advocacy that the donors hope will turn the organization away from terrorist activities? Could the three be shipped off to a military base and tried for material support for terrorism—an offense unrecognized under international law but made punishable under the Military Commissions Act? 10 U.S.C. § 950t(25); *cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 7–11 (2010). The government seems to think so.

According to Judge Kavanaugh’s opinion, the court need not concern itself with the limits (or lack thereof) on the political branches’ authority to make conduct punishable by military commission because whatever those limits might be, the punishment of conspiracies to commit war crimes certainly falls within them. *See* Kavanaugh Op. at 25. But if international law does not mark the boundaries between civilian and military jurisdiction, what does? On this, our colleagues are silent. Based on the principles articulated by the government and embraced in Judge Kavanaugh’s opinion, however, it would seem that Congress and the President could vest military commissions with authority to try enemy belligerents for almost any crime so long as it related in some way to “hostilities.” *Id.* at 24–25. Especially in this new era of “war” against difficult-to-identify enemies on difficult-to-identify “battlefields,” such positions would appear to leave few, if any, enforceable limits on the political branches’ authority to avoid Article III courts and prosecute individuals in military commissions. Thus, although allowing military commissions to take cognizance of inchoate conspiracy charges might seem to some a small and harmless encroachment on the judiciary’s domain, it could very well

open the door to much broader intrusions. Any such intrusion would be all the more pernicious here and corrosive of Article III given that, in this case, the government has made no effort to demonstrate the “military necessity” that has traditionally been a prerequisite to resort to military commissions. *Hamdan*, 548 U.S. at 590; *see also id.* at 598–99 (plurality opinion); *id.* at 646 (Kennedy, J., concurring). To accept the government’s position would embed the use of military commissions “more deeply in our law and thinking,” ready to be “expand[ed] . . . to new purposes.” *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting). A majority of this court declines today to deal any such “blow to liberty.” *Id.*

\* \* \*

Before concluding, we think it worth underscoring the result of today’s decision. Eight of the nine judges deciding this appeal believe that the question lying at the heart of it, i.e., whether Congress can lawfully vest military commissions with jurisdiction over the crime of inchoate conspiracy, is deserving of *de novo* review. Only four of those considering the question *de novo* answer it in the affirmative. Accordingly, the majority of judges declines to endorse the government’s view of the Constitution. Today’s decision thus provides no precedential value for the government’s efforts to divert the trial of conspiracy or any other purely domestic crime to law-of-war military commissions.

We, for the reasons discussed, see no lawful basis for the government’s claimed power. Whatever deference the judiciary may owe to the political branches in matters of national security and defense, it is not absolute. Far from it, it is the duty of the courts “in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of

civil liberty.” *Quirin*, 317 U.S. at 19. And although the government might well be entitled to detain al Bahlul as an enemy belligerent, *see Hamdi*, 542 U.S. at 518–24 (plurality opinion), it does not have the “power to switch the Constitution on and off at will,” *Boumediene*, 553 U.S. at 766. Its prosecution of al Bahlul in a military commission for conspiracy to violate the laws of war exceeded the scope of Article III’s exception for law-of-war military commissions and, as a result, violated Article III. Accordingly, we would vacate his conspiracy conviction.