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Article II Courts

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by David J. Bederman*

It is understandable that a reader may be puzzled by the title of this study. American lawyers are undoubtedly familiar with the notion of "constitutional" courts established under Article III of the Constitution.[1] They also are likely to recall another class of federal tribunals, created by virtue of the legislative authority vested in Congress by Article I of the Constitution.[2] However, few lawyers and scholars are aware that there exists a third class of courts created by the Constitution. These are executive courts that, from time to time in the Republic's history, have been formed to administer justice, in times of war or civil unrest, over territories occupied by American armed forces.

There is no question that these tribunals have been considered anomalous, as aberrations of established constitutional order. Indeed, little intellectual effort has been expended in examining the constitutional place of presidential courts. In the midst of war or its aftermath, few were brave enough to criticize the President's establishment of courts of law. Fewer still were prepared to argue that his power should be limited by other provisions of the Constitution. Instead, a pattern of judicial deference begun with the establishment of the first such court in the Mexican War of 1846 has persisted to this day. Exceptions to this trend have been noted, and it may even be apparent that a new constitutional practice of Article II courts has evolved. Nonetheless, the President's power in this field has gone virtually unchallenged.

This Article carefully examines the creation, operation, and jurisprudence of executive courts. As a first step, however, it is essential to accurately define what is meant when one refers to an Article II court. This

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1. U.S. CONST. art. III.
2. *Id.* art. I.

inquiry places in sharp focus the traditional constitutional dichotomy between Article III "constitutional" courts and Article I legislative tribunals. Adding presidential courts to this matrix does not upset the analysis used heretofore; it merely places a greater premium on identifying the constitutional source of power for creating the court in question.

Once this Article clarifies what is and what is not an executive court, it will introduce the historical examples of this institution. I have identified twelve tribunals that satisfy the definition propounded here. Although most date from the Civil War and before, four of them operated in this century, and one of them rendered a judgment no more than twelve years ago. Undoubtedly others exist that my research has not revealed. Each of these courts shared one thing in common: they were established by federal authorities occupying territory as a result of armed conflict. The constitutional problems raised by belligerent occupation, including the maintenance of law and order and the establishment of justice, will be considered since this provided the practical imperative for the exercise of the President's power to constitute judicial tribunals. How the President exercised and delegated this power is also significant. More important, however, is to understand how the power was limited, whether by the President's own restraint, judicial review, or the passage of time and the termination of hostilities.

What remains is the question of what law was applied by Article II courts. Addressing this inquiry brings one face-to-face with one of the most complex and vexing issues in current constitutional discourse: the applicability of the Constitution to persons outside of the United States. Because executive courts were invariably created beyond the nation's borders, or at least beyond that area in which the United States exercised effective control, parties raised the issue when seeking a protection granted by the federal Constitution. In addition, Article II judges also had to decide whether they were obliged to apply local law to their proceedings, no matter how alien, primitive, or doctrinally unacceptable that law may be.

Executive courts were the product of military occupation. As a consequence, their decisions often implicated very delicate issues of national security and separation of powers. The story of Article II courts is thus a narrative of judicial improvisation transformed over time into regular and predictable constitutional order. In contemplation of the likelihood that no new executive courts will be created, it seems a propitious moment to look back, take stock, and learn the lessons taught by this curious species of government institution.

I. WHAT IS AN ARTICLE II COURT?

In the beginning, there was the clear and clarion command of the Constitution. It provided simply that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[3]

There is no doubt that the intent of the Framers was to establish a judiciary independent and impartial, by ensuring life tenure and protection against diminution of salary.[4] Just as important, the intent of the clause was to vest the entire judicial power of the United States, as was defined in the following provision,[5] in judicial tribunals possessing just that independence and integrity. And, at first, all courts established by Congress could easily be qualified as "constitutional," or Article III, tribunals.

The trouble began with the 1828 Supreme Court decision in *American Insurance Co. v. Canter*.[6] In *American Insurance*, the Court had to decide the legal status of a territorial court established by Congress. In reply to an argument made that such a court lacked authority under the Constitution, Chief Justice Marshall, writing for the Court, said that those territorial tribunals

> [were] not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue

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3. *Id.* art. III, § 1.

4. *See* THE FEDERALIST No. 78, at 494-96; No. 79, at 497 (Alexander Hamilton) (J. Cooke ed. 1961). *See also* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (listing among the grievances against King George III the fact that "He has made Judges dependent on his Will alone, for the Tenure of their offices, and the Amount and Payment of their Salaries.").

5. U.S. CONST. art. III, § 2, cl. 1 (setting forth heads of jurisdiction).

6. 26 U.S. (1 Pet.) 511 (1828). This dispute came from the territory of Florida. An earlier act of Congress, March 30, 1822, ch. 13, §§ 6, 8, 3 Stat. 656 (1822), had created two Superior Courts for that territory, with judges to serve four-year terms, and had authorized the territorial legislature to create other, inferior tribunals. One of these was established later at Key West and given jurisdiction over salvage matters, and the members were paid a fee based on the value of the salvage. 26 U.S. (1 Pet.) at 512-14. *See also* Act of May 23, 1828, ch. 77, 4 Stat. 292 (1828).

A ship was wrecked on the coast of Florida, part of the cargo was saved, and a judicial sale of the cargo was ordered by the court at Key West at which David Canter bought a consigment of cotton. Later, American Insurance Company, which was subrogated to the rights of the cargo owners, brought suit in Charleston for Canter's cotton, claiming that the sale was invalid because the court at Key West had exceeded its jurisdiction. *Id.* at 512-20.

> of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.[7]

And even though the territorial tribunal in question exercised a judicial power reserved for Article III courts, that of admiralty jurisdiction, the Supreme Court nonetheless held that "the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general [that is, federal], and . . . state government."[8]

Accordingly, territorial courts were distinguished from tribunals established under Article III of the Constitution. Territorial judges were subject to removal and salary reductions.[9] Chief Justice Marshall's distinction between "constitutional" and legislative courts has endured, although extraordinary doctrinal confusion has arisen when the status of other courts has been considered. Chief among these other judicial organs were the Court of Claims,[10] the Court of Customs and Patent Appeals,[11]

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7. 26 U.S. (1 Pet.) at 546 (Marshall, C.J.).

8. *Id.* For more on this case see, Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 887-93 (1990).

9. *See* McAllister v. United States, 141 U.S. 174 (1891); United States v. Fisher, 109 U.S. 143 (1883).

10. *See* Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864) (in which Supreme Court refused to hear appeals from the Court of Claims because the authority of the Secretary of the Treasury to revise its decisions denied the Supreme Court judicial power); Williams v. United States, 289 U.S. 553 (1933) (holding the Court of Claims to be a legislative court); Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (after a clarifying statute was passed, the Supreme Court held that the Court of Claims was a constitutional court for the purpose of assignment of judges).

Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-146, 96 Stat. 25 (codified in 28 U.S.C. §§ 171-77, 1295-96, 1491, 1631, 2503, 2510, 2522 (1988)), Congress bifurcated the jurisdiction of the Court of Claims. The trial duties were vested in a Claims Court, an Article I court, and the appellate function was given over to the Court of Appeals for the Federal Circuit, an Article III tribunal.

11. *See Ex parte* Bakelite Corp., 279 U.S. 438 (1929) (holding that the Court of Customs Appeals was a legislative court and could thus properly render the equivalent of an advisory opinion, an activity from which Article III courts are excluded); Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (after Congress adopted a clarifying statute, the Court held that the Court of Customs and Patent Appeals was an Article III court).

Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-146, 96 Stat. 25 (codified in 28 U.S.C. §§ 171-77, 1295-96, 1491, 1631, 2503, 2510, 2522 (1988)), the jurisdiction of the Court of Customs and Patent Appeals was given over to the United States Court of Appeals for the Federal Circuit, established as an Article III court. *Id.*

and the courts of the District of Columbia.[12] These cases raised the question of when the judicial functions of the United States could be entrusted to judicial officers who were not guaranteed life tenure and salary protection.

In some instances the distinction was made based on the supposed powers of the court. If the tribunal exercised Article III jurisdiction, then its judges must have Article III tenure. If the tribunal did not exercise Article III jurisdiction then Article III protections were unnecessary. In other circumstances, judges deemed Congress' intent dispositive. If Congress determined that Article III established a court, then, presumably, those judges received life tenure. Yet Congress sometimes explicitly granted tenure and salary protection to judges sitting on what Congress acknowledged to be Article I courts.[13]

In short, the distinction between constitutional and legislative courts has always been a bit of a fiction.[14] Indeed, Article I and Article III courts share one obvious and very significant thing in common: they are all, with the single exception of the Supreme Court, established by Congress. Taken literally, of course, the term "constitutional court" could only refer to the Supreme Court since it is the only judicial organ mandated by the Constitution itself. Nonetheless, the distinction persists. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[15] the Court examined the constitutionality of the 1978 Bankruptcy Reform Act's[16] crea-

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12. *See Ex parte* Bakelite Corp., 279 U.S. 438, 450-55 (1929) (Van Devanter, J.) (contending in dicta that the courts of the District of Columbia were legislative courts); O'Donoghue v. United States, 289 U.S. 516, 546-50 (1933) (reversing the suggestion made in Bakelite and holding that courts in the District of Columbia possessed a hybrid character and qualified as constitutional courts).

Under the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473-668 (1970), the United States District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit lost jurisdiction over matters of local concern and those matters were vested in a local court system, with the District of Columbia Court of Appeals as the highest court of the jurisdiction. *Id. See also* Palmore v. United States, 411 U.S. 389 (1973) (declaring that local courts of the District were Article I tribunals and no longer had a hybrid status).

13. *See, e.g.*, Act of September 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966) (granting life tenure to judges on the United States District Court for the District of Puerto Rico); *see also* United States v. Montanez, 371 F.2d 79 (2d Cir.), *cert. denied*, 389 U.S. 884 (1967).

14. *See generally* Wilbur Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930); George Watson, *Concept of the Legislative Court: A Constitutional Fiction*, 10 GEO. WASH. L. REV. 799 (1942); Note, *The Distinction between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133 (1962); Comment, *Legislative and Constitutional Courts: What Lurks ahead for Bifurcation*, 71 YALE L.J. 979 (1962).

15. 458 U.S. 50 (1982).

16. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

tion of bankruptcy courts in each judicial district,[17] and a majority of the justices agreed that the jurisdiction of bankruptcy courts could not extend to matters properly within the cognizance of the federal district courts.[18]

Justice Brennan, writing for the plurality, attempted to bring order to the chaos of precedent on legislative courts. Noting the language in the Supreme Court's 1856 decision in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[19] which recognized that Congress may assign some judicial authority to non-Article III courts,[20] the *Northern Pipeline* plurality wrote that:

> [W]hen properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.[21]

The three classes of legislative courts recognized by the plurality were territorial courts, courts-martial, and those tribunals and agencies "created by Congress to adjudicate cases involving 'public rights.' "[22] One

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17. *See* Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Bankruptcy court judges were appointed to fourteen-year terms, subject to removal by the judicial council in which they serve on grounds of incompetence, misconduct, neglect of duty, or disability. Their salaries were set by statute and could be reduced. 458 U.S. at 53.

Northern Pipeline filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. Subsequently, Northern Pipeline filed a suit in the same court against Marathon for alleged breach of contract and other common law claims. *Id.* at 56. Marathon moved for dismissal "on the ground that the Act unconstitutionally conferred Art. III judicial power on judges who lacked life tenure and salary protection." *Id.* at 56-57. The Bankruptcy Court denied the motion, but on appeal the District Court granted the motion. The Supreme Court affirmed. *Id.* at 57-89.

18. 458 U.S. at 89-92 (Rehnquist, J., concurring). For an intense criticism of the methodology employed by the Court in this case, see Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

19. 59 U.S. (18 How.) 272 (1856).

20. 458 U.S. at 63 (construing 59 U.S. (18 How.) at 284) (certain matters "congress may or may not bring within the cognizance of [Art. III courts], as it may deem proper.").

21. *Id.* at 63-64 (Brennan, J.) (footnote omitted).

22. *Id.* at 64-67 (Brennan, J.). For more on the notion of courts adjudicating public rights, see Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977); Crowell v. Benson, 285 U.S. 22, 50 (1932); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

must suppose from the plurality's judgment that all other courts would consist of Article III judges.[23]

As suggested above, however, no ground exists for distinguishing between constitutional and legislative courts. A distinction based on whether the tribunal exercises any jurisdiction under Article III of the Constitution seems to be the most satisfactory approach. Nevertheless, problems arise when the same court possesses authority over both Article III subject-matters and over state law issues and questions reserved under federal legislation. Nor can congressional intent always be dispositive in making a determination as to the source of power for a federal court. After all, Congress could later revoke an enactment providing judges with life tenure and salary guarantees with a finding that Article III of the Constitution did not establish the court in question.

What, then, is distinctive about a court established under Article II of the Constitution? First, executive tribunals are established *without* an act of Congress or any other form of legislative concurrence. Congressional intent concerning the status of a presidential court is irrelevant because no congressional approval is needed. The fact that the President alone can create an executive court places it outside the scope of Article III of the Constitution, which demands that Congress shall establish courts inferior to the Supreme Court. Second, executive courts are created pursuant *only* to the power and authority granted to the President in Article II of the Constitution. In practice, the only presidential power that would call for the creation of a court is that arising from his responsibility as Commander in Chief of the armed services and his consequent war-making authority.[24]

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23. *But see* 458 U.S. at 103-116 (White, J., dissenting) (providing a careful refutation of the plurality's analysis of the distinction between Article I and Article III courts). *See also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986) (in a case concerning federal agency adjudication of a state law counterclaim, the Court established a four-part test for determining the validity of a given exercise of judicial power by a non-Article III tribunal: first, "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts" through appellate review; second, "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; third, "the origins and importance of the right to be adjudicated"; and fourth, "the concerns that drove Congress to depart from the requirements of Article III.") (citations omitted).

24. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."). An argument might be made that the President's power to "take Care that the Laws be faithfully executed," might implicate the creation of courts, but this is most unlikely. *Id.* § 3. In the same vein, the general grant of executive power in Article II, section 1 ("The executive Power shall be vested in a President of the United States of America . . . ."), is no longer considered an independent ground supporting the creation of executive tribunals. *See generally*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 42-44, 54-56 (1975). *But cf.* Griffin v. Wilcox, 21 Ind. 370 (1863)

Under the working definition employed in this study, an Article II court is a tribunal established: (1) pursuant only to the President's war-making power under Article II of the Constitution; (2) which exercises either civil jurisdiction or criminal jurisdiction over civilians in peacetime; and (3) was constituted without an Act of Congress or any other legislative concurrence. This typology excludes a number of different sorts of federal courts that have been established in the past. It is important and useful to indicate the character of these other tribunals and to distinguish them from presidential courts.

To begin with, it is manifest that territorial courts are Article I, and not Article II, tribunals. They are established by Congress in view of its power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[25] Congress created the territorial courts and they have no life independent and apart from it.

Consular courts present a more difficult question. Congress established these tribunals in those countries in which treaties granted the United States extraterritorial privileges. These agreements did not, however, directly establish consular courts. This required an act of Congress,[26] which was an exercise of its power to regulate foreign commerce.[27] Congress endowed the consuls with judicial authority,[28] a practice later approved by the Supreme Court,[29] and typically limited consular jurisdiction to criminal prosecutions and a small class of civil actions in which both parties were usually Americans.[30] With the exception of the United States Court

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(Perkins, J.) ("The right . . . of the President to temporarily govern localities . . . derives solely from the fact that he is the commander-in-chief of the army, and is to see that the laws are executed . . . ."). *Id.* at 382-83.

25. U.S. CONST. art. IV, § 3, cl. 2.

26. *See* Act of Aug. 11, 1848, ch. 150, 9 Stat. 276; Act of June 22, 1860, ch. 179, 12 Stat. 72; Act of July 28, 1866, § 11, 14 Stat. 322; Act of July 1, 1870, ch. 194, § 1, 16 Stat. 183. The statutes applied to China, Japan, Siam, Turkey, Persia, Tripoli, Tunis, Morocco, Muscat, the Samoan Islands, and to any other country with which an appropriate treaty was made. Act of June 14, 1878, ch. 193, 20 Stat. 131. *See also* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 613 (1906); RAVNDAL, THE ORIGIN OF THE CAPITULATIONS AND THE CONSULAR INSTITUTION, S. Doc. No. 34, 67th Cong., 1st Sess. (1921).

27. *See Ex Parte* Bakelite Corp., 279 U.S. 438, 451 (1929).

28. *See* 2 MOORE, *supra* note 26, at 613-17 (for a full discussion of the limits of a consul's jurisdiction).

29. *See In re* Ross, 140 U.S. 453, 468-71 (1891) (upholding conviction by consul of a seaman for murder on board an American vessel at Yokohama, Japan); Dainese v. Hale, 91 U.S. 13 (1875) (interpreting treaties with Turkey so that consuls exercise judicial authority over Americans there).

30. *See* E. SURRENCY, HISTORY OF THE FEDERAL COURTS 325 (1987).

for China, which operated from 1906 to 1943,[31] an appeal of a consular court decision to an Article III court was not possible,[32] and the "judges" of these tribunals had no tenure.[33] Congress never established the applicable law in these courts,[34] although the Supreme Court did rule in 1890 that the Constitution did not extend overseas to their proceedings.[35] The United States abandoned its last extraterritorial privileges in 1956, thus closing the door on consular jurisdiction.[36] But because Congress' foreign commerce power expressly established courts of consular jurisdiction, they plainly do not qualify as Article II courts.

Likewise, Article I of the Constitution sanctioned courts-martial.[37] These tribunals, established to govern discipline in the American armed forces, predate the Constitution itself,[38] and comprise a distinct and sepa-

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31. *See* Act of June 30, 1906, ch. 3934, 34 Stat. 814. For more on this most peculiar court, see David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 460-63 (1988); Charles S. Lobingier, *A Quarter Century of Our Extraterritorial Court*, 20 GEO. L.J. 427 (1932); Charles Loring, *American Extraterritoriality in China*, 10 MINN. L. REV. 407 (1926). The Court for China was vested with exclusive jurisdiction for all civil cases against American citizens residing in China in which the amount exceeded $500, and for crimes committed by American citizens residing there when the punishment could exceed a $100 fine or sixty days imprisonment. Act of June 30, 1906, §§ 2 & 4.

32. A consul's decision could be reviewed by his minister or commissioner. *See* Act of Aug. 11, 1848, ch. 150, § 9, 9 Stat. 276, 277. An exception was made for appeals from the decision of consuls in Japan and China. Act of July 1, 1870, ch. 194, §§ 3-8, 16 Stat. 183, 184 (amending Act of June 22, 1860, ch. 179, 12 Stat. 72). *See also* THE PING-ON v. Blethen, 11 F. 607 (C.C.D. Cal. 1882) (Hoffman, J.); THE SPARK v. Lee Choi Chum, 22 F. Cas. 871 (C.C.D. Cal. 1872) (No. 13,206) (Sawyer, J.).

33. The judges of the U.S. Court for China served terms of ten years. Act of June 30, 1906, ch. 3934, § 7, 34 Stat. 814, 816. Another criticism of the consular court system was that, typically, consuls had no training in the law. *See* Lobingier, *supra* note 31, at 431-33 n.27 (quoting one tribute to a former Consul General in China: " 'He didn't know anything about law, but he was hell on equity.' ")

34. *See* Bederman, *supra* note 31, at 470-74.

35. *See In re* Ross, 140 U.S. 453 (1891). *See also* Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1, 58-60 (1986) (placing this case in the context of later constitutional developments).

36. Joint Resolution of Aug. 1, 1956, Pub. L. No. 84-856, 70 Stat. 773 (relinquishing consular privileges in Morocco).

37. U.S. CONST. art. I, § 8, cl. 14 ("The Congress shall have Power . . . To makes Rules for the Government and Regulation of the land and naval Forces.").

38. The Articles of War, enacted by the Continental Congress in 1775 to govern the American Revolutionary Army, expressly provided for trial by court-martial of soldiers and civilians serving with the army. *See* American Articles of War, art. XXXII, *reprinted in* Madsen v. Kinsella, 343 U.S. 341, 349 n.15 (1952) ("All settlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.").

rate system of justice.[39] Since 1858 the Supreme Court has consistently ruled that courts-martial are not subject to Article III strictures.[40] While Congress has steadily increased the criminal subject-matter jurisdiction of these tribunals to encompass all felonies in wartime or peacetime,[41] the Court has ruled that soldiers and sailors active in the service must be charged only with service-connected crimes,[42] that soldiers and sailors dismissed from the service are immune from military process,[43] and, most importantly, that the trial of civilians is forbidden.[44] In the long history of courts-martial, neither Congress nor the Supreme Court have considered them as anything other than Article I tribunals.

Military commissions, as distinct from courts-martial, present some features that closely parallel the definition of Article II courts noted above. While courts-martial ensure discipline within the ranks, the nation's armed forces have designed military commissions, composed exclusively of officers, to impose authority upon enemy combatants and civilians actively engaged in hindering the war effort.[45] Although federal statute recognizes military commissions, it is clear that Congress considers them established not by virtue of the grant of power under Article I, but under the laws of war.[46]

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39. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 265 (1969) ("A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.") (footnote omitted).

40. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). In this case, a navy seaman, convicted of attempting to desert, challenged the constitutionality of his court-martial. *Id.* at 65. The Court noted that Congress' plenary authority to establish a system of courts-martial was "entirely independent" of Article III judicial powers. *Id.* at 79.

41. *See* 10 U.S.C. §§ 918, 920 (1988).

42. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

43. *See* O'Callahan v. Parker, 395 U.S. 258 (1969); Relford v. Commandant, 401 U.S. 355 (1971). The service-connection test has, however, eroded over the past few years. *See* Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1915-18 (1990).

44. *See* McElroy v. United States *ex rel* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

45. *See generally* Madsen v. Kinsella, 343 U.S. 341, 347-53 (1952); *Ex parte* Quirin, 317 U.S. 1, 21-28, 45-48; (1942); W. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 351-60 (2d rev. ed. 1904); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 61-71 (1990); Major Willard B. Cowles, *The Trial of War Criminals by Military Tribunals*, 30 A.B.A. J. 330 (1944); A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948).

46. *See* 10 U.S.C. § 821 (1988) (article 21 of the Uniform Code of Military Justice) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.").

The first military commission constituted in American history convicted Major André as a spy in the American Revolution.[47] Andrew Jackson ordered the formation of a tribunal to punish two British provocateurs in his suppression of West Florida in 1818.[48] Until this time, Congress often denominated these tribunals as "special courts" or "boards." General Winfield Scott, during the Mexican War, first called them by their currently known name.[49] These military commissions figured prominently in the Civil War; in fact, a military commission tried those accused of assassinating President Lincoln.[50] Local Union commanders, garrisoning areas well-behind the front lines, used military commissions extensively to punish any dissent and disorder.[51] After some jurisdictional missteps,[52] the Supreme Court ruled that a military commission could not be used to try a noncombatant civilian in areas where the civil courts were still in operation.[53]

Most military commissions were established to enforce military discipline among civilian populations and to punish spies, saboteurs, provocateurs, and those that seriously disturbed the public order.[54] To the extent

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47. *See* BIRKHIMER, *supra* note 45, at 351 (mentioning also the trial, by military commission, of Joshua Kett Smith).

48. *Id.* at 351-54.

49. *See id.* at 351, 354-55; Cowles, *supra* note 45, at 331. For the text of General Scott's General Order No. 20, as amended by General Order No. 287, Sept. 17, 1847, authorizing the appointment of military commissions in Mexico, see BIRKHIMER, *supra* note 45, at 581-82. *See also* Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 40-44, 167-75 (1991) (for more on the history of military commissions through the Civil War).

50. *See Ex Parte* Mudd, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9,899) (a summary of the otherwise lost decision in Dr. Mudd's habeas appeal of a conviction by a military tribunal for giving aid and comfort to John Wilkes Booth; court held that the commission was properly constituted); 11 Op. Att'y Gen. 297 (1865) (authorization for the military commission to try Lincoln's assassins); Cowles, *supra* note 45, at 330.

51. *See* Act of July 2, 1864, ch. 215, § 1, 13 Stat. 356 (giving equal recognition to "sentences of military commissions as [well as] to those of courts-martial" and extending jurisdiction of both to "spies, mutineers, deserters, and murderers"); *see also* Madsen v. Kinsella, 343 U.S. 341, 346 (1952); Cowles, *supra* note 45, at 330 (providing more details on this period).

52. *See Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863). Petitioner had been convicted by a military tribunal of uttering seditious statements at a public meeting in Ohio. *Id.* at 244-47. The Court held that it had no jurisdiction to entertain a writ of certiorari to directly review the proceeding. *Id.* at 249-54.

53. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127-32 (1866); *In re* Murphy, 17 F. Cas. 1030 (C.C.D. Mo. 1867) (No. 9,947); United States v. Commandant of Fort Delaware, 25 F. Cas. 590, 591 (D. Del. 1866) (No. 14,842).

54. For a recent case, see *Ex parte* Quirin, 317 U.S. 1 (1942), in which a military commission tried eight German soldiers who had been landed by submarine in the United States to carry out various acts of sabotage. The President appointed a military commission of five officers, and the Attorney General prosecuted the case. Defendants were not afforded a jury trial, nor were they indicted by a grand jury. *Id.* at 18-24. The Supreme Court turned away

that a military commission prosecuted an alien belligerent or combatant, Congress clearly excluded them from the definition of an Article II court proposed here. These were offenses against the laws of war, and, as such, were not carried out, strictly speaking, pursuant to the war powers of the President. Even more importantly, the military did not actually direct these proceedings against civilians.[55]

Finally, one needs to refer to some sui generis institutions that, although appearing to have the characteristics of an Article II court, in fact, do not. Among these are the international war crimes trials conducted by the victorious Allied powers after the Second World War. After conviction in their respective Nurenburg and Tokyo courts, and placement under United States custody, German and Japanese defendants later sought habeas corpus relief. Courts consistently ruled that these international military tribunals were not part of the courts of the United States and, as a result, no American court had the power to review their decisions.[56] These international war crimes trials were convened by international agreement,[57] and so were not an exercise of either the President's Article II powers or any power under the Constitution.

In one recorded instance, a treaty actually established an American court. In 1862, the United States and Great Britain agreed on further

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all challenges of the constitutionality of the military commission. In wartime, the Court ruled, the President could constitutionally assign espionage and sabotage cases (at least those involving foreign nationals) to a military court. *Id.* at 46.

See also In re Yamashita, 327 U.S. 1 (1946), in which following the Japanese surrender in the Phillippines, the commanding Japanese officer was tried before a military commission for war crimes. *Id.* at 5. The Supreme Court, after reviewing the long history of military commissions and citing to the Congress' explicit grant for their use, 10 U.S.C. § 821 (article 21 of the Uniform Code of Military Justice), held that the commission was properly constituted, even though hostilities had ended. 327 U.S. at 9-13.

55. Some tribunals, specifically denominated as "military commissions," did exercise either civil jurisdiction or criminal jurisdiction over civilians in peacetime. For the purposes of the study, these courts will be considered as Article II tribunals. The Supreme Court recognized this phenomenon when it referred in Madsen v. Kinsella, 343 U.S. 341 (1952) to "United States occupation courts in the nature of [military] commissions." *Id.* at 346.

56. *See* Hirota v. MacArthur, 338 U.S. 197, 198 (1948); Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949); Brandt v. United States, 333 U.S. 836 (1948); Milch v. United States, 332 U.S. 789 (1947); Everett v. Truman, 334 U.S. 824 (1948) (per curiam); *see also* Robert B. Ely, III, *The Treaty Making Power: The Constitutionality of International Courts*, 36 A.B.A. J. 738 (1950).

57. *See* Moscow Declaration, Oct. 30, 1943, *reprinted in* 9 DEP'T STATE BULL. 307 (1943); London Agreement & Charter of the International Military Tribunal, Aug. 8, 1945, *reprinted in* 13 DEP'T STATE BULL. 222 (1947); *see also* Hirota v. MacArthur, 338 U.S. 197, 205-07 (1949) (Douglas, J., concurring) (discussing the constitution of the International Military Tribunal for the Far East).

measures to suppress the slave trade.[58] Included was provision for rights of visit on the high seas of vessels suspected of engaging in the trade.[59] If a British naval vessel found an American slaver, or vice versa, the treaty, and subsequent enabling legislation,[60] required civil forfeiture proceedings before mixed claims courts established at New York, Sierra Leone, and the Cape of Good Hope.[61] The decisions of these courts could not be appealed.[62] Although this tribunal exercised civil jurisdiction, unlike most military tribunals (either international or domestic), the fact that legislative concurrence created this one invalidates its claim as an Article II court. Nevertheless, while it seems the United States did appoint a judge to sit on this court, no other evidence of its proceedings exists.[63]

Thus, one can characterize Article II courts in both an affirmative and negative manner. A definition that focuses on the source of the constitutional authority of these tribunals (the President's war-making powers), as well as their functions (civil jurisdiction and/or criminal jurisdiction over civilians in peacetime), seems to provide a cogent and careful way to discriminate between these institutions and similar ones. Although doubt exists about classifying some of these other tribunals—particularly, certain military commissions—what remains is a special category of American court. The next section offers a profile of all of these Article II courts.

II. A Survey of Executive Courts

This author has identified the establishment of twelve Article II courts in the history of the United States for which some record—no matter how sparse—has remained. Aside from comporting with the definition provided above, they all share one thing in common: they were each constituted by the armed forces of the United States occupying territory cap-

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58. Treaty for the Suppression of the African Slave Trade (Treaty of Washington), Apr. 7, 1862, U.S.-Gr. Brit., 12 Stat. 1225; *see also* Additional Article, Feb. 17, 1863, 13 Stat. 645, T.S. No. 127.

59. Treaty for the Suppression of the African Slave Trade, *supra* note 58, art. 1.

60. Act of July 11, 1862, ch. 140, 12 Stat. 531.

61. Treaty for the Suppression of the African Slave Trade, *supra* note 58, art. 4.

62. *Id.* art. 4, para. 3.

63. *See* Surrency, *supra* note 30, at 327-28. *See also* 2 Moore, *supra* note 26, at 946-48. The treaty was later superceded with an agreement that provided for actions before the courts of the contracting parties, instead of the mixed claims tribunals. Additional Convention, June 3, 1870, 16 Stat. 777, T.S. No. 131.

Other mixed claims tribunals have been established pursuant to international agreement, including the recent Iran-U.S. Claims Tribunal at The Hague, created by the Claims Settlement Declaration, Jan. 19, 1981, Iran-U.S.-Algeria, *reprinted in* Dep't State Bull., Feb. 1981, at 1, 3 and 1 Iran-U.S. Claims Tribunal Reports 3 (1983). These international tribunals cannot be considered courts of the United States. *See supra* notes 56 & 57 and accompanying text.

tured from an enemy. For that reason, they have sometimes been referred to as "occupation courts,"[64] a term that will be used synonymously with "Article II," "presidential," or "executive" tribunals. We know about these courts today because many of them left behind a startling trail of litigation. As Clinton Rossiter observed:

> Those were the days when American traders, and other nationals as well, could get loose in Vera Cruz or New Orleans or San Juan about one day after (if not before) the fighting had ceased, and could get involved in the most complicated squabbles with the military authorities.
>
> An unlimited number of pages might easily be devoted to the dozens of cases on this subject, especially since many of them provided the judicial climax to some rather colorful clashes between civilians at their most clever and soldiers at their most stupid.[65]

While I have no intention of spending an unlimited number of pages on the subject, it might be useful to briefly summarize the history of each of these courts.

A. The Mexican War

We begin in 1846 with the Mexican War. General Kearney had occupied and established a provisional government in what would later become the territory of New Mexico. As part of this provisional government, General Kearney ordered the creation of a two-tiered court system, including a single appellate court, consisting of three judges, and a number of circuit courts.[66] The circuit courts were cognizant over all criminal cases and all civil matters that were not actionable before the prefects or alcades of the Mexican regime.[67] This court system was largely continued when New Mexico was organized by Congress as a territory four years later in 1850.[68] Afterwards, the territorial legislature implicitly adopted the acts, orders, and laws of the earlier provisional government, including

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64. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341, 346, 357 (1952); Fullerton, *supra* note 35, at 24.

65. CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 121 (1951).

66. *See* Leitensdorfer v. Webb, 61 U.S. (20 How.) 176, 177-78 (1857), *aff'g* 1 N.M. (Gild.) 34, 43 (1853).

67. *See Leitensdorfer*, 61 U.S. (20 How.) at 178.

68. *See* Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 449-50. Congress stipulated, however, that the lower territorial court in New Mexico was to be called the "district court," as opposed to the "circuit courts" of the provisional government. *See* Leitensdorfer v. Webb, 61 U.S. (20 How.) 176, 180-81 (1857). *See also* A. POLDERVAART, BLACK-ROBED JUSTICE: A HISTORY OF THE ADMINISTRATION OF JUSTICE IN NEW MEXICO FROM THE AMERICAN OCCUPATION IN 1846 UNTIL STATEHOOD IN 1912 at 21-31 (1948).

the decisions of its courts,[69] but not without raising substantial disputes of right. Nonetheless, for nearly four years, New Mexican tribunals dispensed justice without any constitutional basis, save for the war-making powers of the President. This was the first Article II court.

The second court was established just a few months later, in 1847. By then, the victorious American forces had swept the Mexicans out of California, and vigorous naval operations were proceeding in the Pacific. At Monterey, the naval commander on station, Commodore Biddle, had an elegant solution to a vexing problem. His captains were capturing lucrative prize vessels. Under the laws of war, these ships had to be brought into an American port for condemnation proceedings in prize. Regrettably, he could not spare the crews necessary to sail the captured ships around Cape Horn to a port on the Atlantic seaboard. So, Commodore Biddle decided to establish his own prize court at Monterey. The military governor of the territory agreed, and the President later authorized the order, although with the proviso that the prize money could not be distributed until the Secretary of the Navy concurred with the individual decisions.[70] A navy chaplain, whose name has been lost to history, was named as prize judge.[71] We have a record of only a single case decided by the prize court; however, that one case is known quite well since in its tortuous career it twice made its way before the Supreme Court.[72]

B. The Civil War

The Civil War was the heyday of occupation courts. As Union forces made incursions against the Confederacy, larger tracts of territory came under Union control. These areas were placed under military government and, almost immediately, a need arose for the provision of justice. Many of these tribunals were so informal as to leave virtually no record at all. As one contemporary writer noted:

> [I]nstitutions in the nature of courts were established by the General commanding, and an officer was detailed to hear and decide controversies of a particular character. Soldiers were detailed to execute his commands, to bring the accused before him for trial, and to see that the judgments pronounced were executed.

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69. *See* New Mexico Act of July 14, 1851, No. 176, *quoted in* Leitensdorfer v. Webb, 1 N.M. (Gild.) 34, 42 (1853).

70. *See* Jecker v. Montgomery, 54 U.S. (13 How.) 498, 512-13 (1851).

71. *Id.* at 512.

72. The reported decisions of this litigation include Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1851); Fay v. Montgomery, 8 F. Cas. 1112 (C.C.D. Mass. 1852) (No. 4,709); Jecker v. Montgomery, 59 U.S. (18 How.) 110 (1855).

> Such a court had in fact no legal name, but was known by the name of the officer who held it. It had no full formal records, although some one of the men detailed kept a list of the persons in favor of and against whom judgments were rendered and some brief memorandum of the judgments themselves, the amount of recovery if any, or the amount of the fine, or the extent of the imprisonment imposed, and this person shortly came to be called the clerk, if indeed he was not originally so christened.[73]

These tribunals often were known as provost courts. Their jurisdiction was often assimilated to that of justice of the peace or police courts.[74] These provost courts were extraordinarily ad hoc institutions, often moving with the front lines of the armies. All occupation courts were, of course, to some degree impermanent, but the provost courts were especially so. Records are sparse for these tribunals, but their use was known to be widespread.[75]

Some of these informal courts were charged with civil jurisdiction. Typical of these tribunals was a provisional court established toward the end of the war by General Saxton in the vicinity of Port Royal, South Carolina.[76] A civil commission court was also established in Memphis, Tennessee in 1863 and operated through 1865,[77] although, like General Saxton's tribunal, the War Department seated in Washington never officially recognized it.[78] Some of these civil courts were very specialized in their jurisdiction. The Mississippi Special Court of Equity for Cotton, established by the military governor of that state in June 1865, was limited in its competence to " 'contracts for cotton or other personal property in this

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73. Anonymous, *Provisional Judiciary of Louisiana*, 4 AM. L. REG. (n.s.) 257, 259 (March 1865).

74. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 803 (2d ed. 1920). *See also* C. MCCLURE, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY ¶ 1577, at 428 (rev. ed. 1901).

75. WINTHROP, *supra* note 74, at 803-04 (detailing the establishment of provost courts for the "Department of the Gulf," Virginia, Texas, Arkansas, South Carolina, and the posts at Vicksburg and Natchez).

76. *See* 11 Op. Att'y Gen. 149 (1865); 11 Op. Att'y Gen. 86 (1864).

77. *See* BIRKHIMER, *supra* note 45, at 143-45. *See also* Hefferman v. Porter, 46 Tenn. (6 Cold.) 391, 392-93 (1869) (for more on the civil commission court at Memphis); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 231 (1964).

78. *See* Hefferman v. Porter, 46 Tenn. (6 Cold.) 391 (quoting 1863 decision of Judge Advocate General, ruling that the civil commission was " 'an anomolous and irregular tribunal, entirely unauthorized by military law.' "); State v. Stillman, 47 Tenn. (7 Cold.) 341, 352 (1870) (noting that a civil commission was not approved by the President). *See also* RANDALL, *supra* note 77, at 233-34 (noting that U.S. Attorney General Edward Bates opposed certain judicial acts of General Butler in Virginia).

State, with power to proceed in a summary way on petition, to enforce specific performance, or rescind contracts, on notice to parties.' "[79]

The progressive evolution of occupation courts during the Civil War is well-illustrated by developments in New Orleans and surrounding areas in Louisiana. Union forces captured the city in May 1862, and the captors suspended exisiting civil government.[80] The captors immediately created a provost marshal's court. At first, this tribunal had jurisdiction only over questions concerning the army, officers, soldiers, and the laws of war.[81] Within a few months, however, the provost court acquired jurisdiction over all criminal matters and most civil causes.[82] Concurrent with the operation of the provost court in New Orleans, the military commanders revived the former parish courts of the vicinity. Most of the old judges for these courts were disloyal and had fled the city upon its capture, so the Union occupiers had to erect new institutions and staff them with loyal jurists.[83] Three civil state courts resumed operation in November 1862,[84] but their jurisdiction was strictly limited to defendants resident in the parish of Orleans.[85] The provost court continued to exercise exclusive criminal jurisdiction for all areas in Louisiana under the control of Union forces.[86]

Until this time, no federal court had been operating in Louisiana. At the outbreak of the Civil War, the seceding states disbanded all federal courts in their territories.[87] Once Union forces recovered a large swath of territory in Louisiana, it was time to revive the federal courts there. Additional problems arose, however, concerning the provost court's extended jurisdiction over criminal matters outside of New Orleans parish and over the fact that no civil court was available to areas under Union control,

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79. Scott v. Billgerry, 40 Miss. 119, 131 (1866) (quoting a commission by the Governor dated July 12, 1865). *See also* Fulton v. Woodman, 40 Miss. 593 (1866).

80. WILLIAM ROBINSON, JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA 108 (1941).

81. *See* Anonymous, *supra* note 73, at 259.

82. *See id.* at 259-60 (indicating that civil jurisdiction extended to injunctions, divorce decrees, administration of estates, and the appointment of guardians and trustees); ROBINSON, *supra* note 80, at 108. *See also* Mechanics' & Traders' Bank v. Union Bank, 89 U.S. (22 Wall.) 276, 277 (1874) (for more details on the creation of this court).

83. *See* Anonymous, *supra* note 73, at 260-62; ROBINSON, *supra* note 80, at 108-09.

84. *See* Anonymous, *supra* note 73, at 262.

85. *Id.*; *see also* Pennywit v. Eaton, 82 U.S. (15 Wall.) 383, 384 (1872) (appointment of a judge to the Fourth District Court in New Orleans); Handlin v. Wickliffe, 79 U.S. (12 Wall.) 173, 174-75 (1870) (appointment of a judge to the Third District Court in New Orleans); Lanfear v. Mestier, 18 La. Ann. 497, 498 (1866) (noting that Fifth District Court for the Parish of Orleans was left vacant).

86. *See* Anonymous, *supra* note 73, at 262; ROBINSON, *supra* note 80, at 109.

87. *See* Erwin Surrency, *Documents: The Provisional Court in Louisiana*, 2 AM. J. LEG. HIST. 86 (1958).

except inside the Crescent City.[88] The solution was the creation of an entirely sui generis tribunal, the United States Provisional Court for the State of Louisiana.

President Lincoln signed an Executive Order to establish the Provisional Court on October 20, 1862.[89] The Order provided in pertinent part:

> The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensibly necessary that there shall be some judicial tribunal existing there capable of administering justice, . . . I do hereby constitute a Provisional Court, which shall be a court of record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a provisional judge to hold said court, with authority to hear, try, and determine, all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana; His judgment to be final and conclusive . . . . [This appointment is] to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana.[90]

This grant of authority has been called remarkable, encompassing the broadest possible powers,[91] and indeed it was. Lincoln intended the Provisional Court to have jurisdiction over both state and federal matters, as indicated by the Order's reference to "all causes" and its incorporation of the principles of Louisiana practice.[92] Not so apparent from the terms of

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88. *See* ROBINSON, *supra* note 80, at 109; Anonymous, *supra* note 73, at 264-65.

89. Burke v. Miltenberger, 86 U.S. (19 Wall.) 519 (1873).

90. *Id.* at 519-20; *see also* United States v. Reiter, 27 F. Cas. 768, 770 (Prov. Ct. La. 1865) (No. 16,146); WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 285 (1871); Surrency, *supra* note 87, at 88; Anonymous, *United States Provisional Court for the State of Louisiana*, 4 AM. L. REG. (n.s.) 65, 68 (Dec. 1864) [hereinafter *Provisional Court*].

91. *See* ROBINSON, *supra* note 80, at 109; Surrency, *supra* note 87, at 87.

92. A contemporary writer noted that the Provisional Court was a:

> central court . . . with powers to bring litigants to itself wherever held, and whose operations practically would expand and contract with the flow and ebb of our army . . . . The wants of the state, not only as to matters formerly within the cognisance of state courts, but also as to those within the cognisance of the Federal courts throughout the state, embracing the Eastern and Western Judicial Districts of Louisiana, the Provisional Court was well calculated to supply.

Anonymous, *supra* note 73, at 264-65. *See also Provisional Court*, *supra* note 90, at 73.

the Executive Order, the President intended the Provisional Court to act as a court of appeal for civil matters heard outside of the parish. In addition, the court acquired competence over cases that had been pending before the old federal district and circuit courts before the outbreak of the rebellion.[93]

For a time, these three executive courts operated concurrently in New Orleans, building a bewildering web of jurisdictions.[94] To make matters even more complicated, the United States District Court was re-established at New Orleans in May 1863 to hear prize cases,[95] the one type of action that the Provisional Court excluded from its remit.[96] That left a gap in the authority of the occupation courts at New Orleans. Technically, appeals from the three civil parish courts were to be directed to the Louisiana Supreme Court, then being held behind the Confederate lines at Baton Rouge, which resulted in judgments being delayed from final execution.[97] To remedy this, Judge Peabody of the Provisional Court ordered, in January 1863, the transfer of all cases before the Louisiana Supreme Court to his own tribunal.[98] A few months later, the military governor for the Union-occupied areas of Louisiana simply constituted a new Supreme Court to sit in New Orleans. Judge Peabody was appointed as chief justice, and two associate justices were named.[99] Fortunately, at the end of hostilities and the forming of a new reconstruction government, this patchwork system of justice was dismantled in Louisiana—as elsewhere in the occupied areas of the South—and the former system of federal and state courts resumed operation. Congress formally concluded the

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93. *See Provisional Court*, *supra* note 90, at 69. The transfer of cases from the Circuit Court to the Provisional Court provided the procedural predicate for The Grapeshot, 74 U.S. (7 Wall.) 563 (1868), later proceeding, 76 U.S. (9 Wall.) 129 (1869), in which the Supreme Court passed squarely—for the first time—on the constitutional legitimacy of occupation courts. For a contemporary criticism of the creation of the Provisional Court and its assumption of the powers of the former District and Circuit courts, see Anonymous, *The Authority of the "Provisional Court" of Louisiana*, 4 AM. L. REG. (n.s.) 385, 388 (May 1865) (an article by the pseudonymous "B" of New Haven, Connecticut).

94. Because of the creation of the Provisional Court, much of the work of the provost court was limited—once again—to military personnel and infractions. Anonymous, *supra* note 73, at 267. Indeed, for a short time Judge Peabody of the Provisional Court also acted as provost judge. *Id.*

95. *See* 1 F. Cas. at xxi (table of judges, indicating the appointment of Edward H. Durell).

96. *See* ROBINSON, *supra* note 80, at 109-110; Surrency, *supra* note 87, at 87. For more on this particular limitation, a legacy of the Supreme Court's decision in Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1851), see *infra* notes 215-19 and accompanying text.

97. Anonymous, *supra* note 73, at 266.

98. ROBINSON, *supra* note 80, at 110 (also noting that at least one case was appealed secretly to the Supreme Court holding session in Confederate territory).

99. *See id.* at 110-11; Anonymous, *supra* note 73, at 266.

affairs of the Provisional Court in Louisiana in July 1866, and transferred its cases back to the appropriate federal district and circuit benches, while extending official recognition to the Provisional Court's judgments.[100]

C. *The Spanish-American War*

Nearly forty years elapsed before the United States created the next Article II court. When the United States conquered Puerto Rico during the Spanish-American War, little time was lost in creating a new judicial system for the island.[101] General Davis, the military governor, established a Provisional Court on June 27, 1899, just two months after the United States concluded a treaty of peace with the Spanish government ceding the island to the United States.[102]

General Order Number 88, which General Davis issued to constitute the court after he had received presidential authorization,[103] was more carefully crafted than the executive order creating the Louisiana Provisional Court during the Civil War.[104] The jurisdiction of the Puerto Rican court was limited to those cases "which would be properly cognizable by the circuit or district courts of the United States,"[105] as well as an enumerated list of criminal infractions or offenses.[106] The order limited the civil jurisdiction of the Provisional Court to matters in which the amount

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100. *See* Act of July 28, 1866, ch. 310, 14 Stat. 344. *See also* Edwards v. Tanneret, 79 U.S. (12 Wall.) 446, 449-50 (1870) (construing the Act as not granting any additional jurisdiction to the district or circuit courts when cases were transferred from the Provisional Court).

101. *See* CARMELO DELGADO CINTRÓN, DERECHO Y COLONIALISMO: LA TRAYECTORIA HISTÓRICA DEL DERECHO PUERTORRIQUEÑO 171-73 (1988); CHARLES MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 19-34 (1902) (providing a contemporary account).

102. *See* Santiago v. Nogueras, 214 U.S. 260, 263-64 (1909).

103. *See* Santiago v. Nogueras, 2 P.R. Fed. R. 467, 474 (D.P.R. 1907).

104. The full text of the Order is reprinted in *Santiago*, 2 P.R. Fed. R., at 489-91. Excerpts appear in Santiago v. Nogueras, 214 U.S. 260, 264-65 (1909).

105. General Order No. 88 (June 27, 1899), § 2, *reprinted in* Santiago v. Nogueras, 2 P.R. Fed. R. 467, 489-91 (D.P.R. 1907).

106. General Order No. 88 (June 27, 1899), § 2. The enumerated criminal acts included:

> (1) All offenses punishable under the statutory laws of the United States . . . .; (2) offenses committed by or against persons, foreigners or Americans, not residents of this department, but who may be travelling or temporarily sojourning therein, or against the property of nonresidents; (3) offenses against the person or property of persons belonging to the Army or Navy, or those committed by persons belonging to the Army or Navy, not properly triable by military or naval courts; but not including minor police offenses; (4) offenses committed by or against foreigners or by or against citizens of another state, district, or territory of the United States, residing in this department.

Id. § 8.

in controversy exceeded fifty dollars, or in which non-Puerto Ricans were involved, or which were submitted by stipulation of the parties.[107] Notably, appeal of the Provisional Court's decisions to the United States Supreme Court was allowed by writ of certiorari.[108]

The Puerto Rico provisional court was plainly constituted as a federal tribunal. Unlike the Louisiana court, the President did not intend it to supplant the authority of local institutions. The pre-existing tribunals on Puerto Rico were reformed a few months after the Provisional Court was established, but they operated thereafter as a distinct judicial system.[109] The Provisional Court continued its operations until the Foraker Act of April 1900 established a Federal District Court on the island.[110] Judge Rodney, of the District Court, later noted that he was "not informed as to how much litigation was tried before th[e] provisional court during its eight or nine months of existence, but it is said to have been quite considerable."[111] When created by Act of Congress, the Federal District Court in Puerto Rico became an Article I court for the territory so organized. The new District Court was recognized as the legal successor to the Provisional Court.[112]

D. The Second World War

The remaining three executive courts were created in the aftermath of the Second World War to provide justice to German and Japanese territories occupied by the United States. Of these three, by far the largest in terms of volume of cases heard was that established in the American-occupied sector of Germany. Immediately after the surrender, United States armed forces established a system of Military Government Courts.[113] These courts had jurisdiction "over all persons in the occupied territory," except for Allied armed forces, their dependents, and civilian officials, for "[a]ll offenses against the laws and usages of war[,] . . . [a]ll

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107. *Id.* § 10. General Order 88 also provided that cases "arising under article 11 of the treaty of peace between the United States and Spain" would be judged under procedures provided therein. *Id.* § 9. This was a reference to cases pending in Puerto Rican courts, or on appeal to the Supreme Court of Spain. *See* Treaty of Peace, Dec. 10, 1898, U.S.-Spain, art. XI, 30 Stat. 1754.

108. General Order No. 88 (June 27, 1899), § 11 *reprinted in* Santiago v. Nogueras, 2 P.R. Fed. R. 467, 489-91 (D.P.R. 1907). *See* infra notes 220-22 and accompanying text.

109. *See* Santiago v. Nogueras, 2 P.R. Fed. R. 467, 479 (D.P.R. 1907) (referring to General Order No. 118, issued on August 16, 1899, creating new local judicial system).

110. Act of Apr. 12, 1900, ch. 191, § 34, 31 Stat. 77, 84. *See also* CINTRÓN, *supra* note 101, at 172-73.

111. Santiago v. Nogueras, 2 P.R. Fed. R. 467, 486 (D.P.R. 1907).

112. Act of Apr. 12, 1900, ch. 191, § 34, 31 Stat. 85.

113. *See generally* Eli E. Nobleman, *American Military Government Courts in Germany*, 40 AM. J. INT'L L. 803 (1946).

offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces, [and] [a]ll offenses under the laws of the occupied territory or of any part thereof."[114] These courts, with exclusively criminal jurisdiction, carried out their functions until 1949.[115] In that year, they were shifted from a military to a civilian footing. The new tribunals were called the United States Courts of the Allied High Commmission, under the aegis of the State Department and manned exclusively with civilian jurists, prosecutors, and officials.[116] The criminal jurisdiction of the new courts was quite broad, including cases arising under both occupation and German law if the offense was committed in the American sector.[117] Civil jurisdiction was confirmed as extending to all cases in which a member of the United States armed forces, a dependent, or a civilian official, was a party.[118] When the Federal Republic of Germany assumed its sovereignty, the Allied High Commission Courts were disbanded.[119]

Even after the occupation of West Germany ended, Allied forces remained in control of Berlin.[120] The American sector of Berlin thus continued under an occupation regime, to deter Soviet aggression.[121] Law Number 7, promulgated by the Allied Kommandatura on March 17, 1950,

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114. United States Military Government, Ordinance No. 2, Military Government Courts, 12 Fed. Reg. 2189, 2190-91 (1947).

115. In August 1948, pursuant to Military Government Ordinance No. 31, 14 Fed. Reg. 124 (1949), this system was reorganized around eleven judicial districts, *id.* art. 3, and a court of appeals. *Id.* art. 4.

116. *See* William Clark & Thomas Goodman, *American Justice in Occupied Germany: United States Military Government Courts*, 36 A.B.A. J. 443, 444 (1950).

117. Allied High Commission, Law No. 1, 15 Fed. Reg. 2086 (1950).

118. *Id. See also* Clark & Goodman, *supra* note 116, at 446 (describing civil jurisdiction exercised by former Military Government Courts).

119. The occupation regime officially ended on May 5, 1955, with the entry into force of the Bonn Conventions between the Federal Republic of Germany and the three western occupying powers (France, Britain, and the United States). Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251, 331 U.N.T.S. 327; Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219; Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, 331 U.N.T.S. 253. *See also* United States v. Tiede, 86 F.R.D. 227, 229-35 (U.S. Ct. Berlin 1979) (for a narrative history of the American occupation courts in Germany). *See also In re* Kraussman, 130 F. Supp. 926 (D. Conn. 1955) (regarding subsequent attempt to extradite an individual to the custody of the High Commission Courts; request denied).

120. *See* Tripartite Agreement on the Exercise of Retained Rights in Germany, Oct. 23, 1954, U.S.-U.K.-Fr., 6 U.S.T. 5703, T.I.A.S. No. 3427 (including among these retained rights the appointment of an Allied Kommandatura to occupy the four sectors of Berlin).

121. President Eisenhower assigned in 1955 responsibility for the occupation of Berlin to the United States ambassador in Bonn. *See* Exec. Order No. 10608, 20 Fed. Reg. 3093 (1955). For more on the operations of the Allied occupation of Berlin, see generally I. HENDRY & M. WOOD, THE LEGAL STATUS OF BERLIN (1987).

established the legal immunities of the occupation forces in the western Berlin sectors.[122] Law Number 7 declared that German courts in Berlin had no jurisdiction over Allied forces,[123] nor over any acts arising from the occupation, except when specifically authorized by the Allied Kommandatura or a respective sector commander.[124] Thus, the Kommandatura had the power to decide what was, and was not, within the competence of the local German courts, and, in extraordinary circumstances, to withdraw the matter from their jurisdiction.[125] This last provision was coupled with the ability of the occupiers to establish their own courts to handle these reserved matters.

The U.S. High Commissioner for Germany, in Law Number 46 of April 28, 1955, created the United States Court for Berlin.[126] Although the Kommandatura Law Number 7 contained no bar to civil jurisdiction,[127] the mandate of the United States Court for Berlin was strictly limited by its own statute to criminal cases within the American sector of the city.[128] The judge for the United States Court in Berlin, and all other court officers, served at the pleasure of the Ambassador in Bonn,[129] and only the Ambassador, himself, could review the court's decisions.[130] Unlike the American courts in West Germany, which decided (by one reckoning) over 600,000 cases before they disbanded in 1955,[131] the United States

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122. Allied Kommandatura, Law No. 7, Judicial Powers in the Reserved Fields, Mar. 17, 1950, ALLIED KOMMANDATURA GAZETTE [hereinafter "AK GAZETTE"] 11 (1950-53), as amended by Law No. 17, Aug. 21, 1951, AK GAZETTE 382, discussed in HENDRY & WOOD, *supra* note 121, at 65-67.

123. Allied Kommandatura Law No. 2, Feb. 9, 1950, AK GAZETTE 4, cited in HENDRY & WOOD, *supra* note 121, at 65 n.35 (defining the term "Allied forces" as the Occupation Authorities, Occupation Forces and their members; members of the families and non-German persons in the service of persons in the foregoing catgeories; and non-German persons whose presence in Berlin was deemed necessary for the purposes of the occupation.). HENDRY & WOOD, *supra* note 121, at 65 n.35.

124. *See* Law No. 7, *supra* note 122, arts. 1, 2 (discussed in HENDRY & WOOD, *supra* note 121, at 65-66).

125. *Id.* arts. 3, 7, 10.

126. High Commissioner Law No. 46, Apr. 28, 1955, AK GAZETTE 1056, *reprinted in* United States v. Tiede, 86 F.R.D. 227, 261-65 (U.S. Ct. Berlin 1979).

127. *See* Law No. 7, *supra* note 122, arts. 1, 2 (discussed in HENDRY & WOOD, *supra* note 121, at 65-66).

128. *See* Law No. 46, *supra* note 126, art. 3, para. 1 (reprinted in United States v. Tiede, 86 F.R.D. at 263) ("[T]he Court shall have original jurisdiction to hear and decide any criminal case arising under any legislation in effect in the United States Sector of Berlin if the offense was committed within the area of Greater Berlin").

129. *Id.* art. 2, para. 5 (reprinted in United States v. Tiede, 86 F.R.D. at 262).

130. *Id.* art. 5 (reprinted in United States v. Tiede, 86 F.R.D. at 264).

131. Worth B. McCauley, *American Courts in Germany: 600,000 Cases Later*, 40 A.B.A. J. 1041, 1041-42 (1954).

Court for Berlin sat for only one matter, *United States v. Tiede*,[132] just over twelve years ago in 1979. With the recent reunification of Germany, the United States, along with the rest of the Allied powers, abandoned their occupation of Berlin, thus also ending the limited life of the United States Court for that city.[133]

In the Pacific, the United States took Okinawa in the last battle of the war with Japan. In the ensuing Peace Treaty, Japan gave the United States the right "to exercise all and any powers of administration, legislation and jurisdiction over the territory" encompassing the Ryukyu Islands and Okinawa.[134] The Executive Order that provided for the administration of the Ryukyu Islands[135] established a two-tiered judicial system in a fashion that closely paralleled the occupation regime in Puerto Rico.[136] The lower tier was a local court system with general civil jurisdiction and criminal jurisdiction limited to Ryukyuan natives.[137] The upper tier was a Civil Administration Court system, with both trial and appellate levels[138] that granted civil jurisdiction over "case[s] or controvers[ies] of particular importance affecting the security, property, or interests of the United States,"[139] and cases in which American nationals were parties.[140] The Civil Administration Courts also had criminal jurisdiction over United States nationals employed by the occupiers,[141] and over offenses affecting the security, property, or interests of the United States.[142] These courts

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132. 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

133. *See* Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, art. 7, para. 1, *reprinted in* 29 I.L.M. 1186; Agreement on the Settlement of Certain Matters Relating to Berlin, Sept. 25, 1990, arts. 3 & 4, *reprinted in* 30 I.L.M. 445. *See also* Michael Young, *The Legal Aspects of German Unification*, 1 FOREIGN POLICY BULL. OF U.S. DEP'T OF STATE (No. 2) 83 (Sept./Oct. 1990).

134. Treaty of Peace with Japan, Apr. 28, 1952, art. 3, 3 U.S.T. 3169, 3173, 136 U.N.T.S. 45, 50.

135. Exec. Order No. 10713, 22 Fed. Reg. 4007 (1957).

136. *See supra* notes 101-12 and accompanying text. *See also* B.J. George, Jr., *The United States in the Ryukyus: The Insular Cases Revived*, 39 N.Y.U. L. REV. 785, 785-94 (1964) (for more on the system of government for the Ryukyus under U.S. occupation).

137. Exec. Order No. 10713, § 10(a), 22 Fed. Reg. 4007.

138. *Id.* § 10(d).

139. *Id.* § 10(b)(1).

140. *Id.* § 10(b)(2).

141. *Id.* § 10(b)(3). This provision was later amended by Exec. Order No. 11010, 27 Fed. Reg. 2621 (1962), which extended the criminal jurisdiction of the Civil Administration Courts to "(a) the civilian component, (b) employees of the United States Government who are United States nationals, and (c) dependents, excluding Ryukyuans, (i) of the foregoing and (ii) of members of the United States forces." *Id.* § 2(2).

142. Exec. Order No. 10713, § 10(b)(4), 22 Fed. Reg. 4007.

operated until the United States returned Okinawa and the Ryukyu Islands to Japan in 1971.[143]

As conceded above, other Article II courts may have existed, but have escaped the notice of this writer. In some instances, other authorities have referred to them,[144] but I have found no other evidence of their operations. Since the focus of this Article is on the placement of executive courts in the constitutional order, complete historical coverage is neither necessary nor desirable. Indeed, the remaining sections of this Article focus chiefly on those occupation tribunals that left a legacy of constitutional interpretation. In short, the object here is not to recite the historical provenance of these anomalous courts, but rather to chart their jurisprudence.

III. LIMITS ON THE OPERATION OF ARTICLE II COURTS

A. Constitutional Problems Raised by Occupations

Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops. Because military occupation invariably entailed the replacement of one sovereign with another, American jurists were particularly sensitive to the constitutional implications of this presidential war-making power. Our first experiences of occu-

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143. *See* Agreement Concerning the Ryukyu and the Daito Islands, June 17, 1971, Japan-U.S., 23 U.S.T. 446. *See also* United States *ex rel.* Jacobs v. Froehlke, 334 F. Supp. 1107, 1109 (D.D.C. 1971).

144. *See, e.g.*, Clark & Goodman, *supra* note 116, at 443 (who refer to "military tribunals" established in Cuba and the Philippines after the Spanish-American War, at Tampico in the 1916 campaign against Pancho Villa, and in the Rhineland after World War I, but do not indicate if these were truly occupation courts, as that term is used here). *See* Robert Ireton, *The Rhineland Commission at Work*, 17 AM. J. INT'L L. 460, 466-68 (1923) (providing more on the international commission occupying the Rhineland and its judicial activities); MELGUIADES J. GAMBOA, AN INTRODUCTION TO PHILIPPINE LAW 72 (7th ed. 1969) (indicating that the American occupiers of the Philippines in 1898 continued the operation of pre-existing tribunals); W. THOMPSON, THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO, 1898-1905 14-19 (1989) (noting that a provost court was established in the Philippines to try criminal offenses, but this was before the Treaty of Peace of December 10, 1898; civil jurisdiction was vested in a revived audiencia territorial, as the Supreme Court of the Philippines). It is also interesting to note that the courts of the Commonwealth of the Philippines recognized the rights of the Japanese occupiers in World War Two to establish criminal courts. *See* Peralta v. Director of Prisons, 75 Phil. 285, 296-98 (1945).

During the second occupation of Cuba, a military commission was created to try two soldiers charged with murdering some native people. *See* S. REP. No. 229, 63d Cong., 2d Sess. 53, 98-99 (1912) (testimony of General Crowder), *reprinted in* Madsen v. Kinsella, 343 U.S. 341, 354 n.20 (1952). *See also* Neely v. Henkel, 180 U.S. 109, 118 (1901) (indicating the establishment of a Supreme Court in Cuba, with both civil and criminal jurisdiction, coopting the previous colonial institution).

pation, arising from the American Revolution and the War of 1812, were, of course, quite negative.[145] In the aftermath of that later conflict, the Supreme Court had to concede that land occupied by British forces, most notably large swaths of territory in Maine, had been temporarily lost by the United States and the government could not, even when sovereignty had been restored, impose customs regulations retroactively during the time of the occupation.[146] The Court concluded that:

> [t]he sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose.[147]

The phenomenon of military occupation was soon observed in the events following the acquisition of Florida from Spain. Although Spain ceded that territory to the United States and thus the territory was no longer subject to conquest,[148] Chief Justice Marshall, writing in the case of *American Insurance Co. v. Canter*,[149] assimilated the two conditions for constitutional purposes:

> The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.
>
> The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed . . . .[150]

Chief Justice Marshall was careful to distinguish the war-making from the treaty power, but the clear import of this passage is that the President, as commander in chief, could govern areas under belligerent occupation subject to the dictates of a later treaty of peace and an act of Congress organizing the territory.

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145. *See, e.g.*, FREDERICK B. WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA (1971).

146. *See* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

147. *Id.* at 254 (Story, J.).

148. *See* Treaty of Cession, Feb. 22, 1819, U.S.-Spain, 8 Stat. 252.

149. 26 U.S. (1 Pet.) 511 (1828). *See supra* notes 6-8 and accompanying text.

150. 26 U.S. (1 Pet.) at 541.

The real importance of this holding would only be realized in the Mexican War, which, not uncoincidentally, saw the first appearance of an Article II court to provide justice in occupied regions.[151] In its consideration of whether the President, through military commanders on the scene in newly-conquered California, could impose import and tonnage duties on goods,[152] the Supreme Court held that:

> the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered territory, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession . . . . No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of the peace treaty.[153]

This passage contains the essential jurisprudence of military occupation that the Supreme Court would apply to the present day. First, the President, by virtue of his war-making powers under Article II, may govern regions subject to belligerent occupation. Second, it is implicit that the President substantially delegates to his army and navy commanders the responsibility for the actual conduct of the military government. Third, no apparent restrictions force the President, or his commanders, to conduct the belligerent occupation in a particular fashion. Fourth, at some point the occupation must come to an end—presumably, but not necessarily, by the conclusion of hostilities—and, at that time, the President's exclusive and unfettered powers of military occupation should lapse.

Obviously, the creation of courts with civil jurisdiction, or of criminal jurisdiction over civilians, is just one relatively minor aspect of a belligerent occupation. An occupier under today's laws of war has the duty to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[154] Although the question

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151. *See supra* notes 66-72 and accompanying text.

152. These facts presented precisely the opposite pattern as those in United States v. Rice, 17 U.S. (4 What.) 246 (1819), the case that arose from the War of 1812. *See also* Ho Tung & Co. v. United States, 42 Ct. Cl. 213 (1907) (examining the same issue regarding occupation of Philippines in 1898).

153. Cross v. Harrison, 57 U.S. (16 How.) 164, 189 (1853) (Wayne, J.).

154. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, ch. 5, sec. III, art. 43, 36 Stat. 2277. "Territory is considered occupied when it is actually placed under the authority of the hostile army." *Id.* art. 42. *See also* Convention Respecting the

whether the military occupier is obliged to observe the laws already in force in the territory has been hotly disputed by the authorities,[155] no doubt exists that law and order must be provided for and, as a corollary, that courts of justice be made available to the population. It was recognized at an early juncture in American practice that a provisional military government should be vested with executive, legislative, and judicial powers;[156] although, owing to military necessity, these powers usually could not be separated into different institutions exercising checks and balances on each other.

The issue of the creation of occupation courts, particularly those endowed with civil jurisdiction, was seemingly settled in the aftermath of the Civil War when the judgments issued by these tribunals were vigorously attacked. The facts of *Mechanics' & Traders' Bank v. Union Bank*[157] were illustrative of the patterns presented by these cases. The Provost Court in New Orleans issued a judgment, apparently upon the orders of the commanding Union officer there, in which a loan between the two banks was repayable in the lawful money of the United States, and not the Confederate notes that were originally tendered. The aggrieved bank argued, after the War and initially before the Louisiana Supreme Court, that the Provost Court could not properly exercise civil jurisdiction under the Constitution.[158] The Louisiana Supreme Court held that because "[a]s an incident of war powers the President ha[s] the right to establish civil government, [and] to create courts to protect the lives and the property of the people," it followed that courts with civil jurisdiction could be established.[159]

The United States Supreme Court affirmed, and made a valiant attempt to offer some guidance in this area of jurisprudence.[160] For the first

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Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; D. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION (1949); Elbridge Colby, *Occupation under the Laws of War (pt. 1)*, 25 COLUM. L. REV. 904 (1925); Elbridge Colby, *Occupation Under the Laws of War (pt. 2)*, 26 COLUM. L. REV. 146 (1926).

155. As noted above, early Supreme Court decisions, *see, e.g.*, American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 541-42 (1828); United States v. Rice, 17 U.S. (4 What.) 246, 254 (1819), tended to permit the occupier to adopt whatever laws it chose for occupied areas. The requirement of administering occupied territory according to the laws of the defeated state is sometimes impossible to meet, owing not only to the breakdown of all authority, but also to the desire sometimes to eliminate all vestiges of the enemy's laws, as was the case in the defeat of Nazi Germany. *See* Edmund H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 YALE L.J. 393 (1945); Comment, *The Law of Belligerent Occupation in the American Courts*, 50 MICH. L. REV. 1066 (1952).

156. *See* Leitensdorfer v. Webb, 1 N.M. (Gild.) 34, 43 (1853).

157. 89 U.S. (22 Wall.) 276 (1874), *aff'g* 25 La. Ann. 387 (1873).

158. 89 U.S. (22 Wall.) at 277-78.

159. 25 La. Ann. at 388-89 (Wyly, J.).

160. 89 U.S. (22 Wall.) at 295.

time, the Court articulated, albeit imperfectly, the distinction between executive tribunals and Article III tribunals. Justice Strong simply noted that Article III "has no application to the abnormal condition of conquered territory in the occupancy of the conquering army."[161] He also correctly identified one factor distinguishing an Article II court: they were created without Congressional action.[162] The Court then located the source of constitutional authority for occupation courts in the President's war powers and the "exercise of the ordinary rights of conquest."[163] This, too, was an essential part of the definition for a presidential court.

But Justice Strong misstepped in a remark he made, almost as an aside, in holding against the application of Article III strictures to these tribunals. Article III, he wrote, "refers only to the courts of the United States, which military courts are not."[164] As discussed above,[165] courts-martial and military tribunals are, indeed, courts of the United States, and are sanctioned either under Article I of the Constitution or under the laws of war. Only those tribunals constituted under strictly international authority have been denied status as courts of the United States.[166] Justice Strong was thus mistaken in denying recognition to Article I and Article II courts.

Most Civil War era jurists, when faced with an argument of an occupation court's unconstitutionality, tended to place faith in an expansive construct of presidential power only partially restrained by the laws of war and virtually unfettered by judicial review or Congressional action. Particularly revealing in this regard are the opinions of the judges actually sitting on these tribunals. One such decision is extant. Judge Peabody, as judge of the Provisional Court of Louisiana, was faced with a head-on challenge to his authority in *United States v. Reiter*,[167] a criminal prosecution of two defendants charged with serious crimes that had no adverse impact on the military occupation in New Orleans.[168]

Judge Peabody instantly conceded that the court over which he presided "was quite out of the usual course and novel. It has not its origin or foundation in any constitutional or legislative enactment—[it] is not the

161. *Id.*

162. *Id.* at 296.

163. *Id.*

164. *Id.* at 295.

165. *See supra* notes 37-55 and accompanying text.

166. *See supra* note 56 and accompanying text.

167. 27 F. Cas. 768 (Prov. Ct. La. 1865) (No. 16,146). The other regularly-reported decision of this court is of little interest to constitutional scholars. Union Bank v. New Orleans, 24 F. Cas. 550 (Prov. Ct. La. 1866) (No. 14,351).

168. 27 F. Cas. at 769 (noting that the crimes were, under the laws of Louisiana, punishable by death).

creature of any regularly-organized constitutional or legislative body."[169] In short, neither Article I nor Article III of the Constitution sanctioned the Provisional Court. Instead, it was observed that the tribunal "depends for its existence on the law of nations, and on that part of the law of nations relating to war . . . ."[170]

This being stipulated, all that remained was to link the rights granted to belligerent occupiers with the exercise of presidential power. Judge Peabody elegantly made this connection:

> So the government of the United States, having conquered and expelled from the territory or country, theretofore known as the state of Louisiana, the power by which the government of it had been theretofore administered, and having established there its own power, was bound by the laws of war, as well as the dictates of humanity, to give to the territory thus bereft a government in the place and stead of the one deposed or overthrown, such a[] one as should reasonably secure the safety and welfare of the people thus reduced to subjection; in some manner, not inconsistent, to be sure, with the proper interests of the governing power, and the maintenance of it in its supremacy there. The power established there was the military power of the United States, and the president of the United States, . . . the commander-in-chief of the forces, military and naval, of the United States, was at the head of that power, and had the right and duty to exercise and direct it. It was incumbent on him, representing for this purpose the sovereignty of the United States, to see that the duty devolving on his government should be properly performed. He acted in obedience to this duty, and in accordance with this right, when he attempted to establish there a judicial tribunal capable of deciding controversies and administering justice.[171]

This passage is quoted at length because it explicates the essential jurisprudential basis for occupation courts. Once the connection was made between the dictates of the laws of war and the powers bestowed upon the President by Article II of the Constitution, the justification for executive tribunals necessarily followed. Moreover, this rationale remained applicable no matter the actual political conditions of the occupation. It made no difference, for example, that the Confederate states were not foreign territory newly occupied by American forces. The right of belligerent occupation extended to the suppression of rebellion, and thus the power to establish civil tribunals also attached.[172]

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169. *Id.*

170. *Id.*

171. *Id.* at 771-72.

172. *Id.* at 774-76. *See also* New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 393-94 (1874); State v. Hall, 65 Tenn. (6 Bax.) 3, 9-11 (1873) (Sneed, J.) ("[I]t makes no difference what these tribunals are called—whether circuit courts or civil commissions—so that they

Opposition to the establishment of the occupation courts existed, and not just among disgruntled rebels. One authority, writing under the pseudonym of "B" in the *American Law Register* of May 1865, argued that the constitution provided no basis to establish a provisional court in Louisiana when the former federal courts had already been created and were staffed with loyal jurists.[173] "B" also suggested that absolutely no constitutional authority existed authorizing the President to create courts and vest them with civil jurisdiction over matters properly within the cognizance of state tribunals.[174] As time elapsed, however, few judges were willing to overturn the judgments rendered by the Union occupation courts during the Civil War.[175] As one Tennessee judge succinctly noted, "[t]hese tribunals have in diverse ways been recognized by the court, and treated as lawfully constituted tribunals. And if for no other reason, this ought to be so upon consideration of public policy, and for the sake of public repose."[176]

The principles of jurisprudence developed during the Civil War plainly guided later rulings on the status of Article II courts. In the aftermath of the Spanish-American War, the Supreme Court had occasion to pass judgment on the establishment of the Provisional Court in Puerto Rico. This tribunal was created soon after the cession of the island by Spain. It remained in operation for ten months until Congress acted to politically organize the island.[177] The question was presented to the Supreme Court whether the President's occupation powers lapsed with the conclusion of the Treaty of Peace. Justice Moody, writing for the Court in the case of *Santiago v. Nogueras*,[178] replied in the negative:

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be constituted by competent military authority."); Hefferman v. Porter, 46 Tenn. (6 Cold.) 391, 396-97 (1869); Isbell v. Farris, 45 Tenn. (5 Cold.) 426, 428-29 (1868); Rutledge v. Fogg, 43 Tenn. (3 Cold.) 554, 561 (1866) (discussing the legal status of civil commission courts established in Nashville and Memphis).

173. *Provisional Court, supra* note 90, at 388. *See supra* notes 80-97 and accompanying text (tracing the history of the occupation courts in Louisiana).

174. *Provisional Court, supra* note 90, at 388.

175. *But see* Walt v. Thomasson, 57 Tenn. (10 Heisk.) 151 (1872); State v. Stillman, 47 Tenn. (7 Cold.) 341 (1870); *see also infra* notes 202-04 and accompanying text (discussing these two cases).

176. State v. Hall, 65 Tenn. (6 Bax.) 3, 11 (1873) (Sneed, J.).

177. *See supra* notes 101-12 and accompanying text. General Davis, whose General Order number 88 established the Provisional Court, believed that it could only be legitimized as an exercise of the "constitutional power of the President, as Commander in Chief of the Army, . . . to administer the affairs of territory captured or acquired through . . . war until such time as Congress may assume the responsibility for legislating for conquered territories." *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1900, Report of the Military Governor of Puerto Rico on Civil Affairs*, H.R. Doc. 2, 56th Cong., 2d Sess. 52 (1900).

178. 214 U.S. 260 (1909).

> [P]ending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief.[179]

This passage touches on two essential points. First, the presidential power to conduct a belligerent occupation is not necessarily terminated by the conclusion of hostilities or by the exercise of Congress's treaty-making power in reaching such a peace. The authority to create and maintain executive courts remains within the war-making power, even after the end of the war.[180] Second, the power of the President to establish occupation courts is limited in one vital respect. Congress may act to establish a system of justice for these areas, thus ending the life of the occupation tribunals.[181]

After World War Two the Supreme Court addressed this last issue in *Madsen v. Kinsella*,[182] in which the applicant, after having been convicted of murdering her husband by a United States Court of the Allied High Commission,[183] sought release on the ground that the Article II tribunal was unconstitutional.[184] Writing for the Court, Justice Burton turned away this challenge after carefully explicating the respective jurisdictions of courts-martial and occupation tribunals.[185] Yet, in what was plainly dicta, the Court hinted at an as-yet undefined limit on presidential power in this field:

> In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions . . . . The policy of Congress to refrain from

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179. *Id.* at 265.

180. *But see* the curious passage in a later case, Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okl. 1970) (Daugherty, J.) saying that the President's power in creating the civil administration courts for the Ryukyu Islands was "conferred on him, not by the United States Constitution, nor by Congress, but by Japan through Art. 3 of the Treaty of Peace." *Id.* at 843. *See supra* note 134.

181. 214 U.S. at 265.

182. 343 U.S. 341 (1952).

183. *See supra* notes 115-19 and accompanying text.

184. 343 U.S. at 342-43.

185. *Id.* at 345-49.

> legislating in this uncharted area does not imply its lack of power to legislate.[186]

So, this last word on the constitutional power of the President to create occupation courts is an ambivalent one.[187] As this Article has made clear, the historical trend, arising chiefly from the legacy of the Civil War, was to give the President virtually unlimited power in this realm. Before the decision in *Madsen*, it seems that virtually no checks and balances on presidential authority existed, save for the affirmative act of Congress in politically organizing, or reorganizing, a territory under occupation. The remaining sections of this part deal, however, with some jurisprudential limits placed by courts on the establishment, powers, and duration of executive tribunals. These operational restraints were quite weak, particularly when compared with the already generous grant of executive power in this area.

B. Problems of Delegation, Jurisdiction, and Duration

The question of who could exercise executive power to create an occupation court was never an issue when the President's action was clear and express. With some occupation tribunals, most notably the Louisiana Provisional Court[188] and the Ryukyu Islands Civil Administration courts,[189] the order came directly from the White House. In other instances, presidential appproval came in advance of the commanding officer's order establishing such courts as the prize court at Monterey,[190] the Puerto Rico Provisional Court,[191] and the United States Court for Berlin.[192]

But a number of cases exist in which a local military commander created an occupation tribunal and no presidential authorization was later forthcoming. Earlier precedents tended to raise a grave presumption against civil courts erected by military commanders.[193] To overcome this presumption, and to accommodate unreliable communications during

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186. *Id.* at 348-49.

187. The future importance of the *Madsen* dicta is, however, discussed *infra* note 340 and accompanying text.

188. *See supra* note 90 and accompanying text.

189. *See supra* notes 134-43 and accompanying text.

190. *See* Jecker v. Montgomery, 54 U.S. (13 How.) 498, 512 (1851).

191. *See* Santiago v. Nogueras, 2 P.R. Fed. R. 467, 474 (D.P.R. 1907).

192. *See supra* notes 126-33 and accompanying text.

193. *See, e.g.*, Snell v. Faussatt, 22 F. Cas. 714, 716 (C.C.D. Pa. 1805) (No. 13,138) (questioning the legality of a prize when the prize tribunal was irregularly constituted by a local military commander).

wartime, some authorities preferred a rule that granted senior military commanders the discretion to establish presidential tribunals.[194]

This issue rarely proved embarassing because American military authorities, particularly the Judge Advocate General corps, quickly disavowed the proceedings of courts irregularly constituted by inferior military officers. The Attorney General, in two opinions issued in 1864 and 1865,[195] repudiated the decisions of General Saxton's Provisional Court in South Carolina.[196] Attorney General James Speed went to great lengths to delimit the powers of local military commanders operating within the Confederacy, and sought to refute the analogy of powers granted to General Kearney in New Mexico and Colonel Mason in California during the Mexican War.[197] He concluded, rather pungently, that "[c]learly, then, if any officer in the department was authorized to establish courts of justice to decide civil controversies between citizens of the United States temporarily in the limits of the department, that officer was not General Saxton."[198]

The issue of the proper delegation of presidential authority was particularly acute concerning the civil commission courts established in Tennessee during the Civil War.[199] When the Supreme Court of Tennessee later scrutinized their judgments, it reached various conclusions on whether those tribunals had been properly constituted. In its first consideration of the question, in *Hefferman v. Porter*,[200] the Tennessee Supreme Court focused exclusively on whether the President, as a general matter, had the authority to create an occupation tribunal, and not whether that authority had been properly delegated.[201] But when the question arose again, three years later in *Walt v. Thomasson*,[202] the court, citing two decisions of Judge Advocate General Joseph Holt in 1863,[203] held that although the commander of an occupation district had the

194. *See* WINTHROP, *supra* note 74, at 804-05.

195. 11 Op. Att'y Gen. 86 (1864); 11 Op. Att'y Gen. 149 (1865).

196. *See supra* note 76 and accompanying text.

197. *See* 11 Op. Att'y Gen. 149, 155.

198. *Id.* at 154.

199. *See supra* note 77 and accompanying text.

200. 46 Tenn. (6 Cold.) 391 (1869) (Ellett, Special Judge).

201. *Id.* at 393-400.

202. 57 Tenn. (10 Heisk.) 151 (1872) (Nicholson, C.J.).

203. *See id.* at 157-58 (quoting the cases of Able and Orgill, in which the Judge Advocate referred to the civil commission court at Memphis as " 'an anomalous and irregular tribunal, entirely unauthorized by military law' " and that its exercise of civil jurisdiction was " 'unwarranted by law or usage, and [its] action has become highly deterimental to the service and to the public welfare.' ").

power to create a military commission, he did not have the authority, save with explicit presidential approval, to grant it civil jurisdiction.[204]

Precisely the same issue arose in regard to the Provost Court at New Orleans, the first occupation tribunal established in that city with the arrival of Union troops.[205] In *Mechanics' & Traders' Bank v. Union Bank*,[206] one of the issues raised by the financial institution compelled by the Provost Court to repay a debt, concerned whether General Butler had insufficient authority, acting alone, to endow that tribunal with competence over strictly civil matters.[207] The United States Supreme Court simply ruled that General Butler had the power to constitute the Provost Court, and whether it could take cognizance of civil matters was a question of state law,[208] which the Louisiana Supreme Court had already decided in the affirmative.[209]

Justice Strong's denial that the federal constitution established occupation courts has already been critiqued above,[210] but his application of state law in the determination of an executive court's jurisdiction appeared to be a far more grieveous error. Indeed, an unspoken asumption of the Court in this case seemed to be that the occupation tribunals in the South were state (and not federal) courts, a conclusion that was entirely unsupportable.[211] Perhaps the Court desired not to disturb the contrary rulings in Tennessee;[212] however, the Court did not mention the earlier

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204. *Id.* at 159-61.

205. *See supra* notes 80-82 and accompanying text.

206. 89 U.S. (22 Wall.) 276 (1874). *See supra* notes 157-63 and accompanying text.

207. 89 U.S. (22 Wall.) at 296-97.

208. *Id.* at 297.

209. *See* 25 La. Ann. 387, 388-89 (1873).

210. *See supra* notes 164-66 and accompanying text.

211. *See, e.g.*, Scott v. Billgerry, 40 Miss. 119, 135 (1866) (Ellett, J.) (the cotton equity court "was not a State, but a Federal court, deriving its existence, and all its powers, from the Federal Government."). Although some of the Civil War occupation courts combined state and federal jurisdiction, none pretended—save for the reconstituted parish courts in New Orleans, *supra* notes 83-85 and accompanying text—that the basis for their authority was state law. *See also* Jecker v. Montgomery, 54 U.S. (13 How.) 498, 515 (1951) (Taney, C.J.) (referring to the prize court at Monterey, noting that "[e]very court of the United States . . . must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States.").

It should also be pointed out that Judge Ellett, sometime justice of the Mississippi Supreme Court, also sat as a special judge in Tennessee, ruling in Hefferman v. Porter, 46 Tenn. (6 Cold.) 391 (1869), the case that first affirmed the establishment of the Memphis civil commission courts, but which was later overruled.

212. *See supra* notes 199-204 and accompanying text. *Cf.* Scott v. Billgerry, 40 Miss. 119, 132-35 (1866) (in which the Mississippi Supreme Court ruled that the Mississippi Cotton Equity Court, see *supra* note 79 and accompanying text, was properly established by order of the provisional governor in the absence of any indication that the President disapproved of the measure).

decision of *Walt v. Thomasson* in the briefs or in the opinion. Nonetheless, Justice Field, in dissenting from the decision in *Mechanics' Bank*, plainly had been influenced by the Tennessee Supreme Court's approach when he argued vigorously for a strict showing of presidential authorization for the establishment of occupation courts having civil jurisdiction.[213] He insisted "that where [occupation] courts [are] established the authority from the President must be shown, and that it cannot be presumed from the mere existence of the courts, and the exercise of jurisdiction by them."[214]

While today, with the advent of modern communications and the centralization of executive authority, the question of presidential delegation is no longer significant,[215] these earlier cases do intimate that the jurisdiction of an Article II court is limited in one particular way. The Supreme Court declared in 1851, upon review of the proceedings of the special prize court established at Monterey during the Mexican War,[216] that "neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations."[217] This holding was consistent with earlier precedent,[218] and later courts appeared to confirm this one jurisdictional bar for presidential tribunals.[219]

Questions surrounding the jurisdiction of Article II courts were so bitterly debated because direct review of their judgments was a near impossibility. The Supreme Court was consistent in holding that Article III courts were powerless to hear appeals of occupation tribunal decisions, just as they were barred from considering appeals from military commissions or courts-martial except by legislative leave.[220] Even when the directive establishing the executive court allowed for appeals, as was the case in General Order Number 88 creating the Puerto Rico Provisional

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213. 89 U.S. (22 Wall.) 276, 301-07 (1874) (Field, J., dissenting).

214. *Id.* at 306-07 (Field, J., dissenting).

215. *See, e.g.*, Madsen v. Kinsella, 93 F. Supp. 319, 324 (S.D. W.Va. 1950) (Moore, J.) ("It makes no difference through what agency he may act; the President is still commander-in-chief . . . .").

216. *See supra* notes 70-72 and accompanying text.

217. Jecker v. Montgomery, 54 U.S. (13 How.) 498, 515 (1851) (Taney, C.J.).

218. *See, e.g.*, Snell v. Faussatt, 22 F. Cas. 714, 716 (C.C.D. Pa. 1805) (No. 13,138).

219. *See* Surrency, *supra* note 87, at 87; *Provisional Court*, *supra* note 90, at 73 (indicating that contemporary opinion was that the Louisiana Provisional Court was barred from prize proceedings, thus necessitating revival of U.S. district court in New Orleans). *See also* Dooley v. United States, 182 U.S. 222, 234-35 (1901).

220. *See, e.g.*, *Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863). *See also* Scott v. Billgerry, 40 Miss. 119, 136 (1866) (a later ordinance of the provisional Mississippi legislature allowed for an appeal of decisions from the Cotton Equity Court to the Mississippi Supreme Court). *See also* Neely, *supra* note 49, at 65-68 (for more on *Vallandingham*).

Court,[221] the Supreme Court held that the Court itself was not empowered to review its proceedings by certiorari.[222] More recent occupation courts have allowed a second level of review. The United States High Commission Courts and the Ryukyu Civil Administration courts provided an appellate panel,[223] while the United States Court for Berlin permitted appeals to the United States Ambassador in Bonn.[224] Collateral attacks on judgments and convictions were used to question the legitimacy of presidential tribunals, but few courts, as noted above, sought to overturn the jurisdiction of these institutions.

Courts likewise deferred on the issue of how long occupation courts could remain in operation after the termination of actual hostilities. Judges seemed to agree that the conclusion of a peace treaty did not end the president's authority to maintain an executive tribunal.[225] The Provisional Court for Louisiana, for example, carried on with its work long after the state had been militarily subdued and the vestiges of civil authority had reasserted themselves.[226] Charles Peabody, judge of that court, concluded that until state sovereignty was restored, the Provisional Court would continue to operate,[227] as stipulated in President Lincoln's order creating it.[228] In *Burke v. Miltenberger*,[229] the Supreme Court, Justice Davis writing, held that the restoration of civil authority in Louisiana occurred in April 1866 (as with all the Southern states, save Texas),[230] but that the jurisdiction of the Provisional Court only lapsed with the act of Congress that terminated its existence and transferred its cases to the federal district and circuit courts.[231]

Military occupations can subsist for a time after hostilities have ended with the ratification of a treaty of peace, a fact that the Supreme Court

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221. *See supra* notes 101-08 and accompanying text. *See also* WHITING, *supra* note 90, at 287-88.

222. *See In re* Vidal, 179 U.S. 126, 127 (1900).

223. *See* Allied High Commission, Law No. 1, art. 2, 15 Fed. Reg. 2086 (1950) and Exec. Order No. 10713, § 10(d), 22 Fed. Reg. 4007 (1957). The Court of Appeals of the U.S. Military Government Courts in Germany handed down 1,083 opinions, reported in bound volumes, printed from 1949-55.

224. *See supra* note 130.

225. *See* Leitensdorfer v. Webb, 1 N.M. (Gild.) 34, 43-44 (1853).

226. *See* United States v. Reiter, 27 F. Cas. 768, 777-78 (Prov. Ct. La. 1865) (No. 16,146).

227. *Id.* at 778 ("At the time this motion was made . . . there was not a court in the part of Louisiana within the federal lines having any reasonable pretence of authority from any other source than the federal government.").

228. *See supra* note 90 and accompanying text.

229. 86 U.S. (19 Wall.) 519 (1873).

230. *Id.* at 525. *See also* Daniel v. Hutcheson, 22 S.W. 933, 937-38 (Tex. 1893).

231. 86 U.S. (19 Wall.) at 525; *see also* Act of July 28, 1866, ch. 310, 14 Stat. 344.

recognized later in *Madsen v. Kinsella*.[232] This period can be as short as ten months, as was the case with the Puerto Rico Provisional Court,[233] or as long as ten, twenty-five, or even forty-five years, as happened with the occupations of Germany proper, the Ryukyu islands, and West Berlin.[234] The longevity of the Ryukyu and Berlin occupations was rationalized and accepted as a protective measure pending the return of the territories to their original owners.[235] The Court has never held an executive tribunal constitutionally infirm because the Court deemed that the President's authority to govern occupied territory had lapsed. Nonetheless, the length of an occupation has affected jurists' consideration of the law applied by those tribunals, and particularly the question whether any constitutional guarantees extend to parties before such courts. This subject will be examined in the next section.

IV. The Law Applied by Presidential Tribunals

A. *The Constitution*

Whether Article II courts are obliged to observe the Constitution is part and parcel of a larger question whether the Constitution applies at all beyond the frontiers of the United States. Since the United States has established executive tribunals abroad, or at least beyond the territory in which it exercised effective control, it is important to understand the historical contours of this larger doctrinal debate. The Supreme Court's first pronouncement on the subject was in *In re Ross*,[236] in which the Court considered a challenge to a seaman's murder conviction by a consular court in Japan.[237] The Court virtually declared that the loss of constitutional rights was a small price to pay for an American not to be delivered up to heathen authorities for prosecution.[238]

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232. 343 U.S. 341, 348 n.12 (1952). *See also* Neely v. Henkel, 180 U.S. 109, 124 (1901) (noting that duration of an occupation is to be determined solely by executive branch).

233. *See* Act of Apr. 12, 1900, ch. 191, § 34, 31 Stat. 77, 84; Santiago v. Nogueras, 2 P.R. Fed. R. 467, 478-83 (D.P.R. 1907).

234. *See supra* notes 113-43 and accompanying text.

235. For the course of the occupation of Okinawa and the Ryukyus, see United States *ex rel.* Jacobs v. Froehlke, 334 F. Supp. 1107, 1109 (D.D.C. 1971); Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okl. 1970). For more on the Berlin court, see United States v. Tiede, 86 F.R.D. 227, 232-35 (U.S. Ct. Berlin 1979); Fullerton, *supra* note 35, at 29-47.

236. 140 U.S. 453 (1891).

237. *Id.* at 453. For more on the consular court system, see *supra* notes 26-36 and accompanying text.

238. 140 U.S. at 465.

> While, therefore, in one aspect the American accused of crime committed in [Oriental] countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is a gainer, in being with-

At the turn of the century, the Supreme Court decided a series of controversies that elaborated on the holding in *Ross*. Known collectively as the *Insular Cases*,[239] the Court was primarily concerned with the issue of levying import duties on goods entering this country from the recently-conquered colonies of Spain, including Cuba, Puerto Rico, and the Philippines.[240] The Court did pass, however, on the issue of rights afforded to criminal defendants. In *Hawaii v. Mankichi*,[241] it held that a conviction without the benefit of an indictment or a unanimous jury verdict was acceptable in a territory of the United States because those rights were not considered "fundamental."[242] When read with *Ross*, the rule developed

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drawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture.

Id.

239. Those opinions that constitute the *Insular Cases* are: Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. New York & P.R. S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); Neely v. Henkel, 180 U.S. 109 (1901). *See also* Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169 (1901) (finding the views expressed in these cases to be inconsistent).

240. *See, e.g., Downes*, 182 U.S. at 287 (holding that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution"). *But see De Lima*, 182 U.S. at 283, 285-86 (for opposite holding).

241. 190 U.S. 197 (1903). The issue in this case was whether, during the period between Hawaii's annexation by treaty and formal incorporation into the United States, the Fifth and Sixth Amendments were deemed to supplant the islands' existing legislation on civil and criminal procedure. *Id.* at 209-11, 214-15. For more on this issue, *See also Ex Parte* Edwards, 13 Haw. 32 (1900) and W.C. Peacock & Co. v. Republic of Haw., 12 Haw. 27 (1899).

It is important to note, however, that the United States did not erect any new courts in Hawaii after annexation, and instead left the existing judicial system intact until the territory was organized by Congress. Thus no Article II courts were established in Hawaii at that time.

It might be suggested, however, that the provost courts established in Hawaii after the Japanese attack on Pearl Harbor were Article II courts. These tribunals are not considered in this survey because the ostensible jurisprudential basis for their creation was Congress' grant to the territorial governor, in the Hawaii Organic Act, 31 Stat. 141, 153 (1900), of the power to declare martial law. *See id.* § 67. In any event, this ground for their creation was rejected by the U.S. Supreme Court in Duncan v. Kahanamoku, 327 U.S. 304 (1946). For more on these war-time courts in Hawaii, see Scheiber & Scheiber, *Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946*, 3 W. LEGAL HIST. 341 (1990).

242. 190 U.S. at 217-18. *Cf. id.* at 236-41 (Harlan, J., dissenting) (arguing that any territory over which the United States is sovereign is entitled to be protected by the full ambit of the Constitution). It should be noted that although a grand jury indictment remains, as yet, a non-fundamental right in constitutional jurisprudence, Hurtado v. California, 110 U.S. 516, 538 (1884), the right to a jury trial is now considered fundamental. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

that Americans in unincorporated territories were entitled only to fundamental rights; those residing elsewhere outside of the United States received no protections at all.[243]

Only after the Second World War did the Court shift away from the restrictive *Ross* and *Insular Cases* holdings and towards a permissive application of the Constitution abroad. The issue arose again in the 1957 landmark decision of *Reid v. Covert*,[244] a case that presented similar facts as in *Madsen v. Kinsella*.[245] In *Covert* the Court addressed the preliminary question of whether the Constitution applied abroad. In holding that it did, the Court distinguished both the *Ross* and *Insular Cases* holdings. The Court summarily rejected *Ross* as misconceived,[246] and further held that the *Insular Cases* had themselves repudiated *Ross*.[247] As to the notion in the *Insular Cases* that only "fundamental" rights could be applied in unincorporated territories, the Court eschewed the idea that rights could be distinguished by their fundamental or nonfundamental character.[248]

In the decision in *Covert* the Court found another ground for distinguishing the *Insular Cases* insofar as "they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship."[249] This passage raised a number of distinct doctrinal possibilities for the extraterritorial application of the Constitution. First, there might be a new test for the application of constitutional rights. Instead of the Constitution being linked with

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243. *See also* Balzac v. Porto Rico, 258 U.S. 298, 304-09 (1922); Dorr v. United States, 195 U.S. 138, 146-49 (1904) (holding that right to jury trial in criminal actions was not required in Puerto Rico or the Philippines, respectively).

244. 354 U.S. 1 (1957).

245. 343 U.S. 341 (1952). *See supra* notes 182-87 and accompanying text. In *Madsen* the Supreme Court was faced with the habeas petition of a woman convicted of murdering her husband, an air force officer stationed in occupied Germany in 1949, by the Courts of the Allied High Commission. 343 U.S. at 360. *See supra* notes 113-19 and text. She claimed, curiously, that she was entitled to a general court-martial, which would have been without benefit of a jury. Arguably, *Madsen* has no bearing on the issue of jury trials in occupation courts, since the defendant never asked for one. 343 U.S. at 360 n.26.

246. This was accomplished by simply declaring that the case:

> rested, at least in substantial part, on a fundamental misconception and the most that can be said in support of the result reached there is that the consular court jurisdiction had a long history antedating the adoption of the Constitution. The Congress has recently buried the consular system of trying Americans. We are not willing to jeopardize the lives and liberties of Americans by disinterring it. At best, the *Ross* case should be left as a relic from a different era.

Reid v. Covert, 354 U.S. 1, 12 (1957) (footnote omitted).

247. *Id.* at 12 n.19.

248. *Id.* at 9.

249. *Id.* at 14.

sovereignty and territory, it would be an inherent aspect of citizenship.[250] This possibility reflected a realized vision of the United States as a superpower, no longer pressed by other nations into limitations on the Constitution's scope and authority.

Second, application of the Constitution abroad might depend on sovereignty, specifically on territorial control. This reading required a distinction between "uncivilized" territories in the process of being incorporated into the United States, when the Constitution would not apply, and territories where the United States already exercised authority, when the Constitution could apply.[251] It was not clear, therefore, whether the extraterritorial application of the Constitution was an attribute of citizenship or of territory.

The history of occupation courts suggests that it might, instead, have been a matter of power and expediency. Yet, while one might expect that few Article II courts recognized constitutional guarantees in their proceedings, just the opposite is true. And although scholars and authorities have suggested that the President has complete discretion to prescribe the law applied by executive tribunals,[252] and thus may order that constitutional protections have no force in their proceedings,[253] this discretion has apparently not been exercised in that fashion.

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250. The Supreme Court described this as almost a first principle of constitutional interpretation:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Id. at 5-6 (Justice Black continued by quoting the Bible, *Acts* 22:24-29 (Paul's claim on Roman citizenship at trial in Judea), and citing older British authority). For contrary view, see *id.* at 74-75 (Harlan, J., concurring).

251. *See id.* at 64 (Frankfurter, J., concurring) (saying that *Ross* could not apply automatically "to the present situation, involving hundreds of thousands of American citizens in countries with civilized systems of justice"). Strangely, Justice Frankfurter endorsed the "fundamental" rights distinction of the *Insular Cases*. *Id.* at 53. However, he also declared that they were inapplicable where the court was not sitting in a U.S. "territory." *Id.*

252. *See* Williamson v. Alldridge, 320 F. Supp. 840, 843 (W.D. Okl. 1970) (Daugherty, J.) ("The rights to grand jury indictment and jury trial in the Civil Administration courts are not constitutional rights but only rights existing at the pleasure of the President."); ROSSITER, *supra* note 65, at 122-23.

253. *See* WHITING, *supra* note 90, at 289.

> [H]owever organized or established, [Article II] courts exercise no part of the judicial power of the government under the Constitution. Hence it is obvious that [the Bill of Rights] ha[s] no application to military courts, or to the proceedings thereof; but relate only to the exercise of civil and judicial power conferred by judicial courts.

Courts have made clear that one constitutional right is definitionally denied to parties before executive tribunals: the right to have a judicial official, with life tenure and protection from salary diminution under Article III of the Constitution, adjudicate one's cause. Once the Supreme Court ruled in 1828 that courts of the United States could be established other than pursuant to Article III,[254] this argument became untenable. Recently, parties to a case challenging the authority of the Civil Administration courts of the Ryukyu Islands resurrected that argument;[255] however, the court ruled that since the President lawfully constituted that tribunal under his war-making powers, the defendant was not entitled to be judged by an Article III official.[256]

One might justly sense some circularity in this holding. The above argument was an attack on the constitutionality of the executive tribunal. As previously demonstrated, only in the most extreme circumstances of improper delegation,[257] or of a technically-deficient grant of jurisdiction,[258] has a reviewing judge or official found an Article II court to be improperly established.

Had *Rose* been decided some fifteen years later, the defendant's lawyers might have argued that under the standard enunciated by the plurality in *Northern Pipeline*[259] and by the Court in *Commodity Futures Trading Commission v. Schor*,[260] no Article II court should be allowed to operate. However, a court likely would find this line of authority to be inapposite, for the simple reason that Article I of the Constitution established the tribunals at issue in those cases. The real issue presented was whether Congress had exceeded the constitutional limits of its authority in granting jurisdictional competence to territorial and specialized courts, as well as to courts-martial. The standard enunciated in those cases, particularly *Schor*'s four-prong test,[261] is simply irrelevant to presidential tribunals. So, aside from a policy argument that parties deserve greater protection from government (read "military") abuses in Article II pro-

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Id. See supra notes 164-66 (for more on the debate whether Article II tribunals are courts established under the Constitution).

254. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). *See also supra* notes 3-23 and accompanying text for more on the doctrine distinguishing Article I from Article III courts.

255. *See* Rose v. McNamara, 375 F.2d 924 (D.C. Cir. 1967) (in which defendant, a naturalized American citizen, was convicted of evading a local tax).

256. *Id.* at 927-28.

257. *See supra* notes 193-214 and accompanying text.

258. *See supra* notes 215-19 and accompanying text.

259. 458 U.S. 50, 63-64 (1982) (Brennan, J.). *See supra* notes 15-23 and accompanying text.

260. 478 U.S. 833, 850-51 (1986). *See supra* note 23.

261. 458 U.S. at 850-51.

ceedings,[262] no legal basis exists for an entitlement to Article III adjudicators.

In contrast to this jurisprudential position, occupation courts have been liberal in granting many other constitutional rights. In the only prosecution before the United States Court for Berlin,[263] *United States v. Tiede*,[264] the Court freed one of the codefendants, charged with air piracy and kidnapping, when it ruled to suppress her incriminating statements taken in violation of the Fifth Amendment.[265]

Presidential courts periodically used grand juries, established under the Fifth Amendment to the Constitution, to bring indictments or presentments in criminal prosecutions. During the Civil War, the Provisional Court for Louisiana apparently required the return of indictments,[266] although no record remains concerning the composition of the grand jury or whether it ever returned a "no bill," thus declining to prosecute. Apparently, the Puerto Rico Provisional Court did not provide for grand jury indictments,[267] but charges did proceeed on information.[268] And while the Allied High Commission Courts in Germany did not allow for grand juries,[269] the Civil Administration Courts of the Ryukyu Islands, after initially barring that right, later granted it.[270]

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262. *See, e.g.*, Fullerton, *supra* note 35, at 17-19.

263. *See supra* notes 120-33 and accompanying text.

264. 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

265. *See* HERBERT STERN, JUDGMENT IN BERLIN 212 (1984) (for Judge Stern's account of the proceedings). United States v. Tiede was considered an extraordinarily sensitive case by the State Department. Defendants, two East Germans, had hijacked a plane from Poland and forced it to land in West Berlin. The United States was waging a war against air piracy and was encouraging other nations to participate. *See* Andreas Lowenfeld, *Hijacking, Freedom, and the "American Way,"* 83 MICH. L. REV. 1000, 1000, 1011-14 (1985) (review of H. STERN, JUDGMENT IN BERLIN (1984)). Having an East German hijack a plane to West Berlin was a political embarassment. So much so, that the German authorities were relieved to have the American sector authorities remove the prosecution from the local Berlin courts, as per Law Number 7. *Supra* note 122, art. 7.

Herbert Stern, United States District Judge for the District of New Jersey, was appointed by the Amabassador in Bonn as judge of the Berlin Court. The propriety of an Article III judge sitting in such a capacity has been disputed. *See* Mistretta v. United States, 488 U.S. 361 (1989); *In re* Application of the President's Comm'n on Organized Crime, 763 F.2d 1191, 1197-98 (11th Cir. 1985) (holding the practice unconstitutional); *In re* President's Comm'n on Organized Crime, 783 F.2d 370 (3d Cir. 1986) (holding the practice constitutional).

266. *See* United States v. Reiter, 27 F. Cas. 768, 769 (Prov. Ct. La. 1865) (No. 16,146); ROBINSON, *supra* note 80, at 109; BIRKHIMER, *supra* note 45, at 165; *Provisional Court*, *supra* note 90, at 73. The courts established in New Mexico in 1847 by General Kearney also, apparently, used grand juries. *See* POLDERVAART, *supra* note 68, at 25.

267. *See Ex Parte* Baez, 177 U.S. 378, 385 (1900).

268. *See* Basso v. United States, 239 U.S. 602, 605 (1916).

269. *See* Madsen v. Kinsella, 343 U.S. 341, 360 (1952).

270. *See* Rose v. McNamara, 252 F. Supp. 111, 112 (D.D.C. 1966); Ryukyu Islands Civil Administration Ordinance, No. 144 (Mar. 16, 1955), Change No. 19 (Mar. 8, 1963), ch. 5, §

It goes without saying, however, that the most prized privilege under the Bill of Rights is trial by jury in both civil and criminal cases.[271] The defense of this right was the most hotly contested issue in this area of Article II courts' constitutional jurisprudence. Because the Louisiana Provisional Court granted not only grand jury indictments, but also petit jury trials, this issue did not arise in that forum.[272] Instead, the question of the right to a jury before an occupation tribunal was first presented before the Mississippi Supreme Court, sitting in review of a decision of the Special Court of Equity for Cotton[273] in the case of *Scott v. Billgerry*.[274] As discussed above,[275] the Cotton Court was given equity jurisdiction over contracts involving cotton and other personal property, and given the power to order either rescission of the contract or specific performance. The purpose of the Court was to settle many long-standing disputes that arose from cotton supply contracts that soured because of confiscations or for other reasons.[276]

In this case, defendant, Scott, had agreed to deliver seventy-five bales of cotton to plaintiff, Billgerry, in exchange for an amount paid in advance. Scott tendered the cotton, but the seventy-five bales were the subject of an order of destruction by Union forces. Although Billgerry had contractually accepted the risk of destruction, he brought suit for specific performance and the matter was presented before the Special Cotton Equity Court, Judge Swann presiding.[277] That court ruled that defendant was liable, at Billgerry's option, to tender thirty-six bales of cotton or the sum of $4,464.[278] Scott appealed to the Mississippi Supreme Court.[279]

The Mississippi Supreme Court reversed and based its judgment on the jurisdictional competence of the Cotton Court.[280] Appellant's argument was quite straightforward, and the Mississippi Supreme Court adopted it

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1.5.1 ("Any person charged with an offense before a Civil Administration Court shall have the right to indictment by a grand jury as to any offense which may be punished by death or imprisonment for a term exceeding one year . . . .").

271. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed"); *Id.* amend. VII. ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved").

272. *See Provisional Court*, *supra* note 90, at 73.

273. *See supra* notes 79, 211-12.

274. 40 Miss. 119 (1866).

275. *See supra* note 79 and accompanying text.

276. *See* 40 Miss. at 138-39.

277. *Id.* at 120-23.

278. *Id.* at 131. The dispositive factual issue was whether Mrs. Scott had, in some fashion, colluded with the Union troops ordered to burn Billgerry's cotton. It appears that her cotton was not burned. *Id.* at 123-31.

279. *See supra* note 220.

280. 40 Miss. at 143-47.

in its entirety. The Cotton Court, it ruled, was a creation of the Constitution, under the President's Article II powers.[281] The Cotton Court was, by the very terms of the military Governor's order creating it, a tribunal with only equity jurisdiction.[282] Therefore, it did not provide for trial by jury, and none was granted in this case. Nonetheless, in issuing a money judgment as an alternative form of remedy, the Cotton Court had invaded the province of a court of law, and adjudged a matter that would normally be reserved for the jury. Therefore, the Cotton Court, by entertaining a petition seeking money damages, had exceeded its jurisdiction and its award was null and void.[283]

The Mississippi Supreme Court, Justice Ellett writing, held that:

> [w]ithout disputing the power of the Executive of the nation, while holding a State under absolute military rule, to create provisional governments, to ordain laws, and to establish judicial tribunals for their administration, still, all these powers must be exercised in subordination to the Constitution of the United States. That instrument recognizes the distinction between legal and equitable rights, and when the President, or his subordinates, undertake to create civil tribunals to administer the laws of any State or Territory, held for the time being under military dominion, he is bound to respect these fundamental regulations, and to refrain from exercising power which the legislative department of the government would not, in the same case, possess. He may abstain from instituting civil tribunals, if he will; but if he exercises the power, he cannot disregard the restrictions of the organic law.[284]

In short, the President may not subvert a citizen's right to a jury trial in a civil matter by creating a tribunal and granting it only equity jurisdiction. This holding was rejoined in a vigorous dissent by Chief Justice Handy, who argued for a wide interpretation of presidential powers, used in this instance to create a tribunal charged with resolving all extant property disputes.[285] More importantly, the dissent argued that constitutional guarantees could not be applied in occupation courts. "[T]his special court of equity," Chief Justice Handy wrote, "was an emanation of military power, in the abnormal political condition in which the State was then placed; and it would appear, that the rules for the ordinary action of the Federal Government were not applicable to such a state of things."[286] It was important to note, however, that the Mississippi Supreme Court did not hold the Special Cotton Court to be unconstitutionally organized;

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281. *Id.* at 132-36.
282. *Id.* at 136-39.
283. *Id.* at 143-47.
284. *Id.* at 143.
285. *Id.* at 147-55 (Handy, C.J., dissenting).
286. *Id.* at 155 (Handy, C.J., dissenting).

rather, it ruled that the Cotton Court had exceeded its narrow jurisdiction and that its competence could not be extended without violating the Constitution of the United States.[287]

The decision in *Scott* explicitly required that Article II courts observe the Constitution in their proceedings. Later decisions were less categorical in their approach. General Order Number 88, which established the Puerto Rico Provisional Court, allowed that a "jury system may be introduced or dispensed with in any particular case in the discretion of the court."[288] Apparently, jury trials were never granted by this court,[289] nor were they available before the Military Government Courts, the precursor to the Allied High Commission Courts in occupied Germany. The Supreme Court noticed this in *Madsen v. Kinsella*, although the fact that the Military Government Courts were assimilated to courts-martial explained the absence of jury trials in their proceedings.[290] Therefore, the Supreme Court has never been required to squarely confront the issue of jury trials before executive tribunals.

The issue arose with a vengeance in criminal prosecutions before the Ryukyu Islands Civil Administration courts. Under the Code of Penal Law and Procedure, originally promulgated for these courts in 1955, defendants were not afforded the rights to an indictment, a jury trial, or benefit of counsel.[291] In two cases decided by the United States District Court for the District of Columbia in 1962 and 1963, defendants challenged their convictions by a Civil Administration Court sitting without a jury.[292] In these habeas corpus actions, the government contended that the institution of a jury system was entirely impracticable and would undermine the American administration on the islands.[293] This argument

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287. *See also* Fulton v. Woodman, 40 Miss. 593, 597-98 (1866) (holding, in another case, that the Cotton Equity Court had acted within its jurisdiction).

288. General Order No. 88 (June 27, 1899), § 5 (reprinted in Santiago v. Nogueras, 2 P.R. Fed. R. 467, 490 (D.P.R. 1907)).

289. *See, e.g., Ex parte* Baez, 177 U.S. 378, 385 (1900).

290. *Id.* at 359-60 n.26. *See also* United States Military Gov't v. Ybarbo, *in* 1 UNITED STATES MILITARY GOVERNMENT COURTS FOR THE UNITED STATES AREA OF CONTROL IN GERMANY: COURT OF APPEALS REPORTS OPINIONS Nos. 1-20 207, 212 (1949) ("[I]n order to have the U.S. Constitution . . . extend to any territory not included within the continental United States, Congress must pass a law expressly incorporating such territory into the United States.").

291. *See* United States Civil Administration of the Ryukyu Islands, Code of Penal Law and Procedure, ch. 5 (Mar. 16, 1955); *see also* Rose v. McNamara, 252 F. Supp. 111, 113 (D.D.C. 1966).

292. *See* Ikeda v. McNamara, Habeas Corpus No. 416-62 (Findings of Fact and Conclusions of Law) (D.D.C. Oct. 19, 1962), *cert. denied*, 389 U.S. 856 (1967); Nicholson v. McNamara, Habeas Corpus No. 141-61 (Memorandum) (D.D.C. Nov. 15, 1963).

293. *See* Affidavit of Powell Pierpoint, ¶ 4, Nicholson v. McNamara, Habeas Corpus No. 141-61 (D.D.C. filed June 21, 1963).

relied on the earlier *Ross* and *Insular Cases* decisions of the Supreme Court,[294] and was employed whenever opposition developed to the use of juries in American territories.[295] On both occasions, the D.C. Court ruled that petitioner's constitutional rights had been violated.[296] Immediately thereafter a jury system was instituted for the Civil Administration Courts.[297]

Unfortunately, the D.C. District Court did not provide any reasons in its unpublished holdings, and the matters were never reviewed on appeal. One can assume that Judges McLaughlin and McGarraghy were troubled that the occupation of the Ryukyu Islands, which when initiated in 1952 was intended to be temporary, had subsisted for ten years and that no end was in sight.[298] Indeed, the Civil Administration Court system lasted until 1971.[299] The length of the occupation apparently lessened the President's discretion to deny jury trials before executive tribunals.

This was the explicit holding in the last reported decision of an Article II tribunal, the 1979 order of the United States Court for Berlin in *United States v. Tiede*.[300] Judge Stern's opinion can rightly be consid-

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294. *See supra* notes 236-43 and accompanying text.

295. See also a number of cases concerning American possessions in the Pacific. In King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975), plaintiff sued the Secretary of the Interior for injunctive relief since the territorial court of Samoa had convicted him of tax evasion without a jury. *Id.* at 1142-43. Plaintiff correctly noted that since a jury trial was now considered a "fundamental" right, under the Insular Cases, the court of a territory was required to give him one. The Circuit Court, in dicta, made a weak attempt to question whether the jury system was suitable for Samoa. *Id.* at 1147 (citing Justice Harlan's concurrence in Reid v. Covert, 354 U.S. 1, 75 (1957) ("[T]he particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas.")). The Circuit Court remanded this question for consideration, and it was later decided that the jury system was, indeed, appropriate for Samoa. *See* King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977). *See also* Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977), in which the Due Process Clause of the Fifth Amendment was applied to a property valuation proceeding in Micronesia. *Id.* at 618-19. *But see* Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984) (in which Circuit Court held that fundamental right of jury trial may not extend to all felonies in the local courts of the Northern Mariana Islands). *Id.* at 689-90.

296. *See supra* note 292.

297. *See* Ryukyu Islands Civil Administration Ordinance, No. 144 (Mar. 16, 1955), Change No. 19 (Mar. 8, 1963), ch. 5, § 1.5.3. Qualifications for serving as a juror were also specified, but among these, being an American citizen was not one of them. *Id.* § 1.5.5 (instead requiring only three months residence on the islands). *See* Rose v. McNamara, 375 F.2d 924, 926-27 n.4 (D.C. Cir. 1967) (holding that defendant was not entitled to a jury composed solely of American citizens). *See also* George, *supra* note 136, at 803-05.

298. *See supra* notes 134-43 and accompanying text. *See also* United States *ex rel.* Jacobs v. Froehlke, 334 F. Supp. 1107, 1109 (D.D.C. 1971).

299. *See supra* note 143.

300. 86 F.R.D. 227 (U.S. Ct. Berlin 1979). *See also supra* note 264.

ered the culmination of the constitutional jurisprudence of presidential courts, and provides the major reason why another Article II court will probably never again be established. The State Department, whose attorneys conducted the prosecution of the East German hijacker, sorely underestimated Judge Stern's independence. He angrily rejected both their argument that he had no discretion to interpret the Constitution to allow for a jury trial in the case, and the corollary notion that the political question doctrine precluded an exercise of his authority.[301] Judge Stern noted that:

> [t]he Prosecution's position, if accepted by the Court, would have dramatic consequences not only for the two defendants whom the United States had chosen to arraign before the Court, but for every person within the territorial limits of the United States Sector of Berlin. If the occupation authorities are not governed by the Constitution in this Court, they are not governed by the Constitution at all. And, if the occupation authorities may act free of all constitutional restraints, no one in the American Sector of Berlin has any protection from their untrammeled discretion.[302]

On this point, the court concluded that "there has never been a time when United States authorities exercised governmental powers in any geographical area—whether at war or in times of peace—without regard for their own Constitution."[303]

Judge Stern was careful to limit his holding granting a trial by jury to "friendly aliens, charged with civil offenses."[304] He did not extend it to govern a military commission trying a case in wartime, during a belligerent occupation before the termination of war, or when the offense involved espionage, sabotage, or an infraction of the laws of war.[305] After first charting the history of judicial review of occupation court procedures[306] and then emphasizing the length of the Berlin occupation with its unique role in the Cold War,[307] the court held that a jury trial could be granted under the Constitution.[308] The State Department was displeased

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301. 86 F.R.D. at 238-44.

302. *Id.* at 242-43.

303. *Id.* at 242.

304. *Id.* at 244.

305. *Id.* at 244-45. For more on military commissions, see *supra* notes 45-55 and accompanying text.

306. 86 F.R.D. at 253-59. Judge Stern took special care to distinguish the *Madsen* footnote, mentioned *supra* at note 290 and accompanying text, by noting that the Supreme Court was concerned with jury trials before courts-martial, and not occupation tribunals. 86 F.R.D. at 255.

307. 86 F.R.D. at 245-47.

308. *Id.* at 260.

with Judge Stern's decision. After the defendant was convicted on a lesser charge and later released for time served, Stern was dismissed as judge of the United States Court for Berlin.[309]

Although Judge Stern's holding has been criticized on a number of grounds,[310] it remains a landmark contribution to the law of executive courts. He was careful to limit his holding to the procedures used in Article II courts, as defined in this study, and did not stray into the jurisprudential minefield of military commissions and their authority. There can be no doubt that presidential tribunals must at least afford the most basic constitutional protections to parties—and among these must be included the right to a jury trial. The decision in *Tiede* caps a series of decisions, beginning with *Reid v. Covert*[311] and continuing through the Ryukyu Island holdings, which virtually repudiate any notion that the Constitution can be withheld from those involved in proceedings before American courts, even those held abroad.

As suggested above, however, the longevity of a particular Article II tribunal is often a key factor in determining whether any of these constitutional guarantees will be granted. When the occupation is fresh and Congress intends to quickly exercise its power to politically organize a territory, there has been a tendency to allow procedural restrictions on these freedoms. But once hostilities have ended and the belligerent occupation is reduced to a civilian administration, the government's rationale for denying these privileges is gradually eroded until it fails altogether.

B. Respect for Local Laws

The foregoing has been concerned with the role of the Constitution in the practice of Article II courts, specifically procedural rights to an indictment, legal representation, and to a jury trial. The question that remains is what substantive law has been applied by these tribunals. A few observations will suffice on this point.

During the Civil War, occupation courts not only applied state law, but also commonly acted as state courts. Though these tribunals exercised jurisdiction normally reserved for state courts, it was always with the un-

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309. STERN, *supra* note 265, at 374. Just before he was dismissed, a group of Berlin residents sought to file a civil case before the Court, see Dostal v. Haig, Civ. A. No. 79-1964 (D.D.C. 1979) (excerpted in MARION NASH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW: 1979 787 (1983)), *aff'd*, 652 F.2d 173 (D.C. Cir. 1981), even though its jurisdiction was limited to criminal matters. *See supra* note 128 and accompanying text.

310. *See, e.g.*, Dostal v. Haig, 652 F.2d 173, 176 (D.C. Cir. 1981) (noting that Stern "ordered that 500 unsuspecting Berliners be rounded up to make a venire for the trial"); Fullerton, *supra* note 35, at 11 n.29 (suggesting that empaneling venire of non-U.S. citizens violated 28 U.S.C. § 1869(f) (1988)).

311. 354 U.S. 1 (1957).

derstanding that the source of their authority was the force of arms of the federal authorities.[312] As the Louisiana Supreme Court noted in *Mechanics' & Traders' Bank v. Union Bank*,[313] "as a sovereign the United States is bound by the limitations of the constitution, and, of course, it cannot appoint a judge to a State court, much less create a State court and appoint the judge to administer it."[314] So, for example, the parish courts established in New Orleans,[315] as well as the alternative Louisiana Supreme Court,[316] were not properly state courts at all, but were federal tribunals that had arrogated state jurisdiction.

Most American occupation tribunals were careful to observe the local laws in force when the territory came under the control of the American armed forces. These tribunals changed local law only as needed to effectuate the occupation, and then only by ordinance passed by the provisional government. Article II courts did not rule by decree, nor by creating an applicable law as they progressed. Today, this is a custom of the laws of war, but it had not always been the case.[317] It is, arguably, one of the more important contributions that American practice has made in this field of international humanitarian law.

This approach first manifested itself in the occupation of New Mexico in 1846. Drawing from the precedent of the earlier cession of Florida by the United States,[318] the highest territorial court of New Mexico, and later the United States Supreme Court, affirmed the notion that the original laws of an area remain in force until superseded by the conqueror's legislative act.[319] This first occupation was also significant because the United States, through its military commander on the scene, General Kearney, quickly enacted a substantive code of law that only partially modified the earlier civil law of Mexico.[320]

Similarly, the Union occupation courts in the South respected the state law in force in those districts. For example, the Provisional Court for Louisiana consistently applied that state's law, which had been suggested

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312. *See, e.g.*, Scott v. Billgerry, 40 Miss. 119, 135-36 (Ellett, J.), 156-57 (Handy, C.J., dissenting) (1866); Lanfear v. Mestier, 18 La. Ann. 497, 506 (1866).

313. 25 La. Ann. 387 (1873).

314. *Id.* at 388.

315. *See supra* notes 83-85 and accompanying text.

316. *See supra* notes 97-99 and accompanying text.

317. *See supra* notes 154-56 and accompanying text.

318. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 540-41 (1828). *See also supra* notes 148-50 and accompanying text.

319. Leitensdorfer v. Webb, 1 N.M. (Gild.) 34, 44-45 (1853); 61 U.S. (20 How.) 176 (1857).

320. 1 N.M. (Gild.) at 55.

by President Lincoln in his order establishing that tribunal.[321] The court was still left with substantial discretion to refuse to apply local law in certain cases, and Judge Peabody occasionally exercised that power.[322] He also made clear, in handing down his ruling in *United States v. Reiter*,[323] that:

> [t]his court is commissioned to administer justice, and no code of laws is prescribed for it. It may adopt such rules as may seem wise and expedient, whether corresponding to the system in use here at the time of the conquest, or differing from it. It has always administered justice according to the Code of Louisiana, and so have all other courts here, not because it was bound by that Code, as law of the state, but because it seemed expedient and wise to continue along under the system found in use here, rather than to introduce a new one.[324]

It seems that Judge Peabody was acting, as did many other judges of the presidential courts of the period, only on pragmatic considerations, and he did not feel compelled to apply local law by virtue of the Constitution or the dictates of the laws of war.

In his order establishing a Provisional Court in Puerto Rico, General Davis crafted a specific clause to govern suits between island natives and suits involving contracts concluded before the occupation.[325] In such instances the "court shall, as far as practicable, conform to the precedents and decisions of the United States courts in similar cases which have been tried and determined in territory formerly acquired by the United States from Spain or Mexico."[326] This appears to be a veiled reference to the practice, noted above, of applying the civil law in force in the territory unless altered by decree. This approach was problematic, particularly when a *lacunae* opened between the earlier Spanish law and the decrees of the occupier, as occurred in *United States v. Caparros*.[327] In *Caparros* defendant was charged with illegally cutting timber; however, his act had occurred before the establishment of the provisional military government and the creation of the Provisional Court.[328] The court held

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321. *Reprinted in* Burke v. Miltenberger, 86 U.S. (19 Wall.) 519, 519-20 (1873) (requiring that Judge Peabody conform "his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana").

322. *See Provisional Court*, *supra* note 90, at 72; Anonymous, *supra* note 73, at 268-69; BIRKHIMER, *supra* note 45, at 134; ROBINSON, *supra* note 80, at 109.

323. 27 F. Cas. 768 (Prov. Ct. La. 1865) (No. 16,146).

324. *Id.* at 778.

325. General Order No. 88 (June 27, 1899), § 10 (reprinted in Santiago v. Nogueras, 2 P.R. Fed. R. 467, 491 (D.P.R. 1907)).

326. *Id.*

327. 1 P.R. Fed. R. 59 (D.P.R. 1900).

328. *Id.* at 60-61.

that because his act was not illegal under the earlier Spanish law, he could not be prosecuted under the new occupier's regime.[329]

Likewise, in 1913, the Supreme Court of the United States ruled in *Ochoa v. Hernandez y Morales*[330] that a retroactive change in the law of adverse possession, which had been effected by the United States military commander in Puerto Rico soon after the occupation, was unlawful. The Court decided that General Henry's order altering the existing civil law of land tenure in Puerto Rico was an attempt to exercise legislative power, and since General Henry made the order without express presidential authority, it would be invalidated as a deprivation of property without due process of law.[331] In short, because General Henry's order lacked any military purpose, and exceeded his authority granted by the President, the Court could not recognize it.[332]

Ochoa marks the confluence of a number of doctrinal rivers. Although it deals with the attempted exercise of a military occupier's legislative power, the Court acknowledged that the case actually concerned the issue of adjudicated rights and interests of individuals. Although the Court's basis for decision was the lack of presidential authority and inadequate delegation,[333] the issue of constitutional due process under the Fifth Amendment weighed heavily. The issue obviously would have been more starkly presented had the President expressly approved a retroactive change in the Puerto Rican law. Nonetheless, one may validly cite *Ochoa* for the principle that courts must afford due process in judicial proceedings—however characterized—under an American occupation regime.

To conclude, the executive tribunals formed in the aftermath of the Second World War all explicitly provided for the application of the local law then in force.[334] For example, criminal prosecutions before the Ryu-

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329. *Id.* at 61. It has been suggested that General Butler, commander of the U.S. forces occupying Cuba in 1899, accepted the continuing validity of Cuban laws, even though no record has been left of an occupying court in Cuba. *See* United States Military Gov't v. Ybarbo, 1 U.S. Military Gov't in Ger. Ct. App. Reports 207, 224 (1949). Likewise, the American occupiers of the Philippines in 1898 left in force (at least provisionally) most of the pre-existing Spanish private law of the islands. *See* Gamba, *supra* note 144, at 72-73. *See also* THOMPSON, *supra* note 144, at 7-98.

330. 230 U.S. 139 (1913).

331. *Id.* at 148-51, 160. Appellants had apparently benefitted from that military order, and the consequent change in title.

332. *Id.* at 160-61.

333. *See supra* notes 188-214 and accompanying text.

334. For the German occupation, see Proclamation No. 2, United States Commanding General—Europe, Sept. 19, 1945, art. 2, *reprinted in* 12 Fed. Reg. 6997 (1947) ("Except as heretofore abrogated, suspended or modified by Military Government or by the Control Council for Germany, the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation, until repealed by, or superseded by a new law . . . ."); *see also* Madsen v. Kinsella, 188 F.2d 272, 274 (4th Cir. 1951); Clark

kyu Islands Civil Administration Courts typically charged violations of Japan's Criminal Code[335] as well as local regulations.[336] Whether the United States could impose its own law on Okinawa without Japanese consent later became a contentious issue for American courts.[337] Nonetheless, the Article II tribunals operating on the islands were consistent in their observance of local law. By the end of the occupation in 1971, local law had substantially diverged from that in force in Japan, so much so that one might conclude that the Japanese had to engage in substantial law reform once the area returned to its control.[338]

V. THE LEGACY AND FUTURE OF ARTICLE II COURTS

What do executive tribunals tell us of our modern constitutional order? First and foremost, they are a testament to the elasticity of a constitutional text that can stretch to accommodate circumstances of national emergency without snapping in defense of basic freedoms.[339] One would expect that the President's prerogative in establishing courts of justice in occupied lands to be completely unfettered. And although reviewing courts have turned aside constitutional challenges to the establishment of Article II courts on such theories as excessive jurisdiction and improper delegation, extraordinary limitations remain in place to check the power of these tribunals.

First, there exists a separation of powers concern incumbent in Congress' authority to politically organize territories and establish courts of

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& Goodman, *supra* note 116, at 444-45. For the Berlin occupation, see STERN, *supra* note 265, at 59 (confirming that defendant in *Tiede* was charged with violations of the German Penal Code).

335. *See* Ikeda v. McNamara, Habeas Corpus No. 416-62 (Findings of Fact and Conclusions of Law) (D.D.C. Oct. 19, 1962) (charging violation of art. 246 (fraud) of Japanese Penal Code); Nicholson v. McNamara, Habeas Corpus No. 141-61 (Memorandum) (D.D.C. Nov. 15, 1963) (Information filed May 6, 1961) (violation of arts. 199 and 205 (murder)).

336. *See* Ikeda v. McNamara, Habeas Corpus No. 416-62 (Findings of Fact and Conclusions of Law) (D.D.C. Oct. 19, 1962) (charging violation of article 2.3.4.1 of United States Civil Administration Ryukyu Penal Code (operating business without a license)).

337. *See, e.g.*, Cobb v. United States, 191 F.2d 604 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952). The issue in *Cobb* was whether Okinawa was a "foreign country" for the purposes of excluding the jurisdiction of the Federal Torts Claim Act. *See* 28 U.S.C. § 2680(k) (1988). The Ninth Circuit decided that because the United States was barred, under the laws of war, see *supra* note 154 and accompanying text, from changing the local law in force on Okinawa, it would remain a "foreign country" and thus plaintiff's suit had to be dismissed. *Cobb*, 191 F.2d at 609-11. For a criticism of this holding, see David J. Bederman, *Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica*, 21 VAND. J. TRANSNAT'L L. 731, 744-45 (1988).

338. *See supra* note 143 and accompanying text.

339. *See generally* William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMP. L. 389 (Supp. 1990).

law in those areas. As one may observe from above, neither the end of hostilities nor the conclusion of a treaty of peace marks the end of presidential power to continue to administer justice through occupation courts. Instead, Congress must establish courts, thereby supplanting presidential authority in this realm. Since an essential attribute of an Article II court is that it does not require legislative concurrence for its creation, it follows that Congress can "trump" presidential power by converting an Article II court into an Article I tribunal. Of course, Congress can only exercise this power when it intends to create a new territory of the United States, signalling the incorporation of that region into the American domain and holding out at least the possibility of future statehood.

Nonetheless, no future American military occupation will likely be made with the intent of territorial annexation. Therefore, this check on the President's power to create and maintain Article II courts has been vastly diminished. Congress cannot curtail the President's occupation power with its countervailing authority to administer territories. The Supreme Court clearly recognized this fact in deciding the 1952 case of *Madsen v. Kinsella*.[340] Realizing that Congress' power to terminate the jurisdiction of an Article II court by politically organizing the territory of its operation would soon be irrelevant, the Supreme Court noted that Congress could *prospectively* legislate the jurisdiction and procedures of presidential tribunals.[341]

Conceivably, Congress could go so far as to prohibit the President from creating new Article II courts or to sharply limit their jurisdiction. The Supreme Court acknowledged that congressional reluctance to legislate in this area has given the President a free hand, but that this deferrence could end at any time.[342] Congress is unlikely to exercise any power to prospectively legislate for Article II courts because it is highly unlikely that the United States will engage in a military occupation of sufficient length to warrant the creation of a tribunal with civil competence or criminal jurisdiction over civilians in peacetime. Although the United States has, since the Second World War, belligerently occupied a number of areas, no executive tribunals have been erected.

Congress also may be reluctant to intrude into this preserve of presidential power, notwithstanding Justice Jackson's encouraging comment in *Youngstown Sheet & Tube Co. v. Sawyer*,[343] that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress

340. 343 U.S. 341 (1952).
341. *Id.* at 348-49.
342. *Id.* at 372.
343. 343 U.S. 579 (1952).

over the matter."[344] In this uncharted area of separation of powers, Congress may have difficulty in prospectively converting Article II courts to an Article I footing without running afoul of the recent concerns raised by the Supreme Court in *Commodity Futures Trading Commission v. Schor*.[345]

Therefore, even if the President creates a new occupation court, Congress would probably abstain from prescribing the competence and procedures of that tribunal. In the absence of such legislation, the parties involved in proceedings before Article II courts would have to rely on the terms of the executive order establishing the tribunal and on the extensive jurisprudence dealing with the application of the Constitution and local laws before such courts. As always, the most contentious issue is likely to be the availability of basic procedural safeguards, including grand jury indictments, jury trials, and the right to counsel. If this future presidential court is given sufficient judicial independence, it might be persuaded to follow the modern precedents of the Ryukyu Islands Civil Administration Courts and the United States Court for Berlin—not to mention the practices of the Louisiana Provisional Court and Mississippi Cotton Equity Court—in granting these rights. Just as likely, however, the President might seek to limit the availability of these freedoms by explicitly barring the application of the Constitution in the constituent document of the tribunal or in the selection of pliant jurists. Under such circumstances, the holdings of this court may be subject to scrutiny on constitutional grounds. As long as judicial review of the decisions of Article II courts is available either through habeas corpus proceedings in criminal matters or through collateral attack in civil causes, these issues will remain open.

The constitutional legacy of Article II courts is thus extraordinarily hopeful. Far from manifesting the worst abuses of military justice, their jurisprudence has reinforced doctrinal limits on the President's powers in relation to the other branches of government, as well as recognizing individual rights and freedoms in what were usually circumstances in which they were tragically ignored. An enduring constitutional order must accommodate times of war and civil unrest. Article II courts are one aspect of that accommodation.

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344. *Id.* at 637 (Jackson, J., concurring).

345. 478 U.S. 833, 850-51 (1986). *See also supra* note 23.