Speaking with a Different Voice: Why the Military Trial of Civilians and the Enemy is Constitutional

Saikrishna Bangalore Prakash*

I. The Revolutionary War and the Far-reaching Power to Use Military Courts ........................................................................................ 1024

II. A Tale of Continuity: The Sweeping War Power under the Constitution ............................................................................... 1030

A. Congress’s Power to Prevail in Wars .................................. 1030

B. Congress’s Power to Authorize Military Trials ................. 1033

III. Early Exercises of the Sweeping War Power ..................... 1038

Conclusion ............................................................................................ 1040

The Constitution declares that the “Privilege of the Writ of Habeas Corpus” can be suspended by the federal government only “in Cases of Rebellion or Invasion [when] the public Safety may require it.” 1 Because some regard this Habeas Clause as the Constitution’s only “emergency” provision, the Clause looms large in treatments of the Constitution’s operation in crisis. 2

DOI: https://doi.org/10.15779/Z38PK0724J

Copyright © 2019 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* James Monroe Distinguished Professor of Law, Paul G. Mahoney Research Professor of Law, and Miller Center Senior Fellow, University of Virginia. Thanks to the California Law Review for hosting a wonderful symposium and to Christian Talley & TJ Whittle for first-rate comments and research assistance.


Professor Amanda Tyler’s magnificent book, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay, is a breath of fresh air. She expertly reveals that the American government has sometimes dishonored the privilege of the writ, even as to citizens. Professor Tyler’s tome further proves the age-old adage that in wartime, the laws frequently fall silent. Officials often willfully pervert the existing legal framework or carelessly misread it.

This Essay addresses a question that makes but a few appearances in her tome, namely, whether the Constitution permits the use of military courts (either courts-martial or military commissions) to try civilians. At various points, Professor Tyler argues that the military trial of civilians is unconstitutional.

I respectfully disagree. In the course of explaining why, this Essay will discuss the broader question of when military courts may be used to try individuals—soldiers, civilians, and the enemy. I have written about this before, in The Sweeping Domestic War Powers of Congress. The basic intuitions, amply reflected in many early American statutes, are that desperate times require (and help to justify the legality of) desperate measures, and that the nation is most vulnerable when in the throes of a war fought on its own soil. Put another way, to use the language of the Constitution, in the face of armed conflict within the United States, more extreme legislative measures become “necessary and proper for carrying into Execution” the powers of the federal government. The Habeas Clause itself signals that more is possible in domestic wars—invasions and rebellions—for it declares that suspensions of the privilege are permissible only in that narrow context.

To ensure that the United States prevails in domestic wars, Congress can adopt measures that would be unconstitutional in peacetime. Among other things, Congress can grant extensive authority to the executive, making the President something of a constitutional dictator. In particular, Congress can convey authority to detain Americans without trial, the power to spend at his pleasure, and other legislative powers. In Sweeping Domestic War Powers, I also explained that the Constitution empowers Congress to authorize the use of military trials for civilians and the enemy. The overarching point is that when a domestic war rages, the Constitution’s system of separated powers and individual rights do not apply in the same way. To borrow from the inimitable

---

4. Id. at 3, 172–74, 189, 220–21.
7. Prakash, Imperial from the Beginning, supra note 5, at 215.
Chief Justice William Rehnquist, in times of domestic war, the Constitution is not silent. By design, it is meant to “speak with a somewhat different voice.”

Since my article appeared in 2015, I have benefitted from Professor Marty Lederman’s 2017 article on the constitutionality of employing military courts to try “spies, saboteurs, and enemy accomplices.” Compared to my treatment of the issue, Professor Lederman’s analysis is both broader (he considers a longer time frame) and narrower (he says less about the breadth of Congress’s authority to prevail in wars and little about the source of Congress’s crisis powers). As members of Congress sometimes say, I will treat this as an opportunity to “revise and extend” my remarks on the breadth of congressional authority, with a focus on military courts.

The constitutionality of military courts, it seems to me, turns on a host of factors. Is America at war? Is there an invasion or rebellion, or is the nation involved in an overseas war? Is there a credible threat of domestic attack? Is the accused a member of some armed force? Are the civilian courts open? Are ordinary court personnel, both judges and the community jury pool, faithful to the United States? How closely tethered to the military are those tried in the military courts? How needful is swift conviction and punishment of the accused? And the ultimate question: how “necessary and proper” is a military (as opposed to a civilian) trial? That last question is a judgment call for Congress to make based on its consideration of the factors listed above and any others it deems relevant.

The easiest case is the use of military courts to try members of the US armed forces, both in war and in peace. This has long been America’s practice, even though the Constitution never specifically authorizes such trials, and the tradition may seem to be in tension with Article III and the Sixth Amendment, both of which declare that trials for crimes shall be by jury.

As noted earlier, I think it is also clear that in cases of invasion or rebellion, Congress may authorize the use of military courts to try civilians, spies, and the enemy. Congress may do so when it supposes that such trials would be necessary and proper for executing its undoubted power to thwart invasions and rebellions.

---

10. See id.
12. To be clear, I believe that the Constitution vests significant crisis powers with Congress and not the President. I have argued elsewhere that the Constitution renders the executive almost wholly dependent upon Congress for emergency authority. See Saikrishna Bangalore Prakash, The Imbecilic Executive, 99 Va. L. Rev. 1361 (2013). This is in keeping with the practices in Great Britain, the states, and the Articles of Confederation, where executives did not have emergency powers in crises but instead had to rely upon legislative grants. See id. at 1375–89.
14. U.S. Const. amend. VI.
Military trials help prosecute the war because such trials can be more rapid and are more apt to convict.

During an overseas war, where there is no invasion or rebellion within the United States and where the civilian courts are open and trustworthy, the case for military courts is weaker. But even in a foreign war, the use of military courts to try Americans and foreigners can be constitutional.\textsuperscript{15}

Finally, some congressional laws authorizing military trials have applied not only in times of war, foreign and domestic, but also in times of peace. That is to say, Congress has long subjected certain individuals to military justice even when there is no war afoot. In particular, the Continental Congress and then our Congress subjected members of the state militias, alleged spies, and some civilians to military trials. In so doing, both Congresses conspicuously bypassed civilian courts and their juries.

Part I discusses pre-constitutional statutes and practices, evidence that bespeaks a broad power to try soldiers, citizens, and the enemy in military courts. Part II considers whether the Constitution altered that established regime of far-reaching legislative authority. Part III recounts early congressional statutes—laws signaling that Congress believed its extensive authority to order military trials continued under the Constitution.

I.

\textsc{The Revolutionary War and the Far-reaching Power to Use Military Courts}

No treatment of the scope of federal power under the Constitution, particularly in the realm of war powers, can hope to be complete unless it considers the war that helped birth the nation, the Revolutionary War. After all, the Constitution was not written in a vacuum but was drafted in Philadelphia less than a decade after the defeat of the British.

When we look to that War, we find, among other things, a number of assemblies enacting measures meant to safeguard their governments and to help America prevail in its contest with Great Britain, including statutes authorizing the military trial of civilians. At the state level, New York and Virginia specifically authorized military courts to try their civilians.\textsuperscript{16} But they were hardly alone. A number of states granted plenary—dictatorial—powers to their executives, thereby sanctioning the executive’s martial law and its military trial

\textsuperscript{15} Though the case for military courts is weaker in the context of a foreign war, we must bear in mind the kind of enemy we face. Many modern enemies have the ability, in an instant, to wreak havoc and debilitate America’s capacity to prevail in war. Given the advent of military technologies capable of quickly devastating the United States, the dichotomy between domestic and foreign wars is less relevant today. In particular, Congress likely has broader emergency authority in the course of foreign wars because our oceans no longer protect us in the way they did for many decades.

\textsuperscript{16} Prakash, \textit{Sweeping Domestic War Powers}, supra note 5, at 1356–57.
of civilians. Astonishingly, the South Carolina Governor, for a brief spell, apparently could execute citizens with no trial at all. As a general matter, these emergency measures were thought to be consistent with the early state constitutions. The constitutional logic was straightforward and was repeatedly expressed: state governments had the power to preserve themselves, and state legislatures in particular had broad legal authority to enact emergency legislation to triumph in wars. It was not only that—as George Washington put it, “[D]esperate diseases[] require desperate remedies”—but that the state constitutions actually empowered legislatures to enact such “desperate remedies.” In other words, crisis measures were lawful.

At the national level, the Continental Congress repeatedly enacted its own drastic measures. Its most notorious measure, passed in December of 1776, made a “dictator” of George Washington: Congress granted him the authority to raise armies, set pay, remove officers, take private property, detain civilians, and try them before military courts.

Congress’s less sweeping measures are also worth considering because, among other things, Congress repeatedly authorized the military trial of Americans. In its 1775 Articles of War, Congress created military rules and provided for courts-martial. By itself, the creation of courts-martial for the Army was noteworthy. It was far from obvious that the Continental Congress could provide military courts with the power to try officers and soldiers, thereby supplanting civilian juries. Indeed, among the Declaration of Independence’s grievances was King George III’s elevation of the military over “the Civil power,” which had deprived the people of their jury rights. When the Continental Congress authorized the military trial of soldiers, it both rendered the military supreme over the civilian court system and deprived soldiers of the traditional jury trial.

But Congress went further. In those 1775 Articles, Congress provided that “suttlers [sic] and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted [sic] soldiers” were subject

---

17. Id. at 1353–59.
18. Id. at 1354.
19. Id. at 1352–54, 1359.
23. THE DECLARATION OF INDEPENDENCE paras. 14, 20 (U.S. 1776) (“He has affected to render the Military independent of and superior to the Civil power . . . . [and has deprived] us in many cases, of the benefits of Trial by Jury.”).
to the Articles of War, including the provisions relating to courts-martial. 24

Precisely because sutlers, retailers, and field followers were civilians, a separate provision was needed to cover them. All the other Articles spoke of soldiers, officers, or members of the Army as their subjects. This extension of army discipline was extraordinarily broad, for the Army’s followers could consist of many people, including the spouses of Army personnel. 25 For instance, Martha Washington often camped with the Army for months at a time.

In November 1775, Congress amended the Articles of War to criminalize certain aid to the enemy: “All persons convicted of holding a treacherous correspondence with, or giving intelligence to the enemy, shall” be punished by death or some lesser punishment. 26 The use of “[a]ll persons,” last seen in the earlier provision relating to the Army’s field followers, signaled that the amended Article covered all Americans—not just members of the Army. 27 We know this because every other amendment expressly applied only to “commissioned officers,” “non-commissioned officers,” “officers,” “soldiers,” or some combination thereof. 28 We also know this because the prior version of the provision—the one being amended—only covered “[w]hosoever belonging to the continental army.” 29 There was absolutely no reason to amend that narrow language and use the quite expansive “[a]ll persons” if the actual aim was to exclude almost all Americans, and, indeed, exempt almost all persons. 30

Almost a year later, in August 1776, Congress amended the Articles again, this time declaring that spies could be tried before courts-martial. Congress recycled the “all persons” language used in the 1775 Articles and their

24. 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 22, at 116–117 (original spelling and capitalization conventions have been preserved when quoting from primary sources).
28. 3 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 26, at 331–34.
29. 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 22, at 116.
30. Professor Lederman notes that the original Articles of War only applied to those “belonging to the continental army” and asserts that the late 1775 amendment likewise covered the same people. Lederman, supra note 9, at 1605 n.379, 1607–10. He alternatively suggests that the correspondence and intelligence amendment was expanded to “all persons” in order to apply to “[w]hosoever belonging to the continental army,” the amended version applied to “all persons.” See id. In light of this explicit change, “all persons” cannot be understood as a reference to the same group of people as those “belonging to the continental army.” Second, “[s]utlers and ‘retailers’” were already subject to the rule against sharing intelligence because Article 32 of the 1775 Articles of War expressly provided as much. See 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 22, at 116–17. Hence, Professor Lederman’s explanation of the amendment is deeply problematic because it rests on an imaginary need. Finally, as noted in the text, Congress added the “all persons” provision to a series of amendments that were otherwise only applicable to the armed forces. In other words, no other amendment applied to “all persons.” In this context, “all persons” clearly extended beyond the Army and its retinue. One cannot escape the conclusion that “all persons” included American civilians.
amendments, albeit with two exceptions. The spy provision excluded, first, Americans and, second, all those owing allegiance to the states. But it clearly covered British and other foreigners, at least those not owing allegiance to the United States.

In September 1776, Congress replaced the 1775 Articles and enacted a new, broader series of rules. It again declared that sutlers and those accompanying a field army would be subject to trial for military crimes before military courts. Yet “retailers,” found in the 1775 Articles, was replaced with “retainers,” a change with unknown consequences. The 1776 Articles essentially recodified the correspondence and intelligence provision, this time providing that “[w]hossoever shall be convicted of holding correspondence with, or giving intelligence to the enemy” shall be punished. Congress also added a new, related provision: “Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbour or protect an enemy, shall suffer” punishment. The latter two provisions applied to all Americans because both used “whosoever,” a synonym for “all persons.” Strengthening this straightforward reading is Congress’s repeated pattern of crafting other rules that by their express terms only applied to soldiers, officers, or members of the army. Finally, the Congress reenacted the spy provision—which, as previously noted, applied to all those not owing allegiance to the United States. Hence, within the revised 1776 Articles of War, Congress enacted four provisions making some civilians subject to courts-martial.

The congressional authorization of military courts continued outside of the Articles of War. In 1777, Congress barred “any person, being an inhabitant” of the United States from serving as “a guide or pilot” of the enemy. Congress further prohibited “in any manner furnish[ing]” the enemy with intelligence, provisions, money, clothing, arms, forage, fuel, or any kinds of stores, and providing for military trial of such persons. This supply bar was broader than the general rule found in the Articles of War. First, it clearly covered contracts, while the Articles of War had only covered individuals who “relieve

31. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 693 (Worthington Chauncey Ford ed., Library of Congress 1906). (providing that “all persons, not members of, nor owing allegiance to, any of the United States of America . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies” shall suffer death or a lesser punishment).
32. Id. at 788, 800.
33. See id.
34. The Supreme Court has suggested that the two words are “similar.” See Madsen v. Kinsella, 343 U.S. 341, 349 n.15 (1952).
35. 5 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 31, at 799.
36. Id.
37. See id. at 788–807 (typically regulating the conduct of “soldiers,” “officers,” “commissioned officers,” and “non-commissioned officers”).
38. Id. at 693, 807 n.2.
40. Id.
the enemy”—a phrase that might have been limited to donations. Second, and more importantly, whereas the 1776 Articles covered just money, food, and ammunition, the 1777 rule encompassed any war provisions, including clothing, forage, and fuel.

In 1778, Congress criminalized the killing or kidnapping and conveyance of American citizens to the enemy or enemy territory. This provision only applied to killings and kidnappings that occurred within a seventy-mile perimeter around American military headquarters. It too provided that Americans could be prosecuted before military courts.

As late as 1782, Congress resolved that military contractors could be tried before courts-martial for “fraud, neglect of duty or other misconduct.” Army inspectors were to “take care that the contracts for supplying rations be duly executed by the contractors.” Inspectors were to report misconduct, with military commanders authorized to bring prosecutions before courts-martial.

Congress evidently had an appetite for strong and swift military justice, even for civilians. As it once declared, “It has been found, by the experience of all states, that, in times of invasion, the process of the municipal law is too feeble and dilatory to bring to a condign and exemplary punishment persons guilty” of crimes. What is more, these laws were not merely “on the books,” with no enforcement. To the contrary, civilians and spies were punished, with some suffering 200 lashes and others death, all pursuant to convictions rendered by military courts. For instance, John Brown, a civilian, was tried before a court-martial and convicted for corresponding with the enemy pursuant to the Articles of War. Recidivist Joseph Bettrys was tried by court-martial twice for spying.

41. 5 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 31, at 799.
42. Id.
44. 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 244 (Gaillard Hunt ed., Library of Congress 1914).
45. Id.
46. Id. at 244–45.
47. 9 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 39, at 784.
48. See General Orders (Mar. 1, 1778), in 14 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 1–3, 3 n.5 (David R. Hoth ed., 2004) (noting that “inhabitant” Jacob Cross was to receive 200 lashes and “inhabitant” Joseph Worrell “hangs [as] a spectacle”). These were not kangaroo courts, because many of the accused were acquitted and released. Id.
49. See 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 374 (Worthington Chauncey Ford ed., Library of Congress 1907); 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 382–83 (Worthington Chauncey Ford ed., Library of Congress 1907). Professor Lederman notes that there is nothing in the description of the court-martial that specifies Brown was a civilian. Lederman, supra note 9, at 1609 n.405. But the description of the proceedings and of the verdict lists a whole host of troubling behavior, mentions an alias, and yet never once mentions his membership in the US Army or his rank. In other parts of the letter, military officials have their rank designated. Moreover, other evidence signals that Brown was a civilian. In a letter, Philip Schuyler noted that Brown fell “within the Cognizance of the Military” because he was taken near enemy lines. If Brown had been a member of the American army, however, that fact alone would have made military jurisdiction
After a guilty verdict in his first trial, George Washington pardoned him. But Bettys returned to his spying ways and was reapprehended, convicted anew, and executed. It is safe to say that dozens of civilians were tried before courts-martial, with dozens actually convicted. Congress got its rapid and tough justice.

Under the Articles of Confederation, proposed in 1777 and finally ratified in 1781, the Continental Congress lacked an express power to use military courts to try members of the Army and Navy, much less civilians. But Congress had such power under its undoubted authority to win the war that engulfed the fledgling nation. A power to “determin[e] on . . . war” included concomitant authority to pass measures necessary to win the authorized wars. If the Continental Congress believed that military trials of soldiers, spies, and civilians were necessary, it could authorize all three, as it did repeatedly.

Professor Lederman attempts to minimize certain of these early congressional resolutions, reading them rather narrowly. Despite the clear text, he spiritedly denies that there were provisions of the Articles of War authorizing the use of courts-martial to try all Americans (“all persons” or “whosoever”) that sheltered the enemy or supplied information, money, food, or ammunition to the enemy. But the conspicuous textual change wrought by Congress, from “whosoever belonging to the continental army” to “all persons,” made in a context in which every other 1775 Amendment mentioned soldiers, officers, or both, is extremely difficult to explain away or dismiss as inconsequential.

In any event, Professor Lederman recognizes that Congress clearly authorized the use of military courts to try spies, killers, kidnappers, and those who aided the enemy around military camps. He further notes that some of these rules were in the Articles of War, meaning that they covered individuals who were not members of the Army. Finally, Congress made sutlers, retailers, and the Army’s followers subject to courts-martial, a telling detail largely ignored in Professor Lederman’s treatment. Relatedly, Congress subjected contractors to courts-martial for fraud, neglect, and misconduct.

All in all, it is hard to escape the conclusion that Professor Lederman has validated the notion that the Continental Congress exercised broad authority to appropriate, and Schuyler would have mentioned Brown’s status as a soldier as the basis for military jurisdiction.

---

51. Id.
52. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.
53. 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 22, at 116; see supra notes 26–29, and accompanying text.
54. Lederman, supra note 9, at 1595–610.
55. Id.
56. Supra note 24, and accompanying text.
57. Supra notes 44–46, and accompanying text.
win the Revolutionary War, a power that extended to trying civilians and the enemy in military courts. This power extended to spies, kidnappers, killers, and those who supplied the enemy. Moreover, because his article omits a discussion of sutlers, retailers, retainers, army followers, and contractors, Professor Lederman actually understates congressional authority. In this context, his attempts to minimize two particular Articles of War related to aiding the enemy are puzzling and do nothing to detract from the general picture that emerges from the Revolutionary War: Congress exercised expansive power to use courts-martial to try soldiers, civilians, and the enemy.

No one tracing this history can doubt that over the course of the Revolutionary War, Congress was quite willing to employ rather extreme measures. Delegates in Congress perceived that the civilian courts were too slow and weak to try spies and those assisting the enemy. Hence, Congress repeatedly turned to courts-martial to try civilians and the enemy. In reliance on this statutory authority, military officials regularly employed courts-martial to try spies and civilians. Indeed, it is fair to say that such use of courts-martial was a regular feature of the War.

II. A TALE OF CONTINUITY: THE SWEEPING WAR POWER UNDER THE CONSTITUTION

The Constitution was innovative in many ways. It rested upon the consent of “We the People.” It created a separation of powers, with independent branches. It nationalized certain subjects by granting significant new legislative powers to Congress. Despite these and other momentous changes, the new and improved Congress continued to enjoy the power to adopt measures necessary to prevail in wars. While Congress’s authority is at its height during a domestic war, because the threat to the nation is then greatest, Congress also wields considerable power during the course of foreign wars. For our purposes, Congress’s war power extends to subjecting Americans and foreigners to military trials. Subject to important exceptions, Congress can do what it believes is necessary to win America’s wars.

A. Congress’s Power to Prevail in Wars

The Constitution granted Congress additional authority over war, greater power than the Continental Congress had under the Articles of Confederation.

58. U.S. CONST. pmbl.
59. See id. art. I; id. art II; id. art III.
61. See Prakash, Sweeping Domestic War Powers, supra note 5, 1371 n.248 (discussing the powers the Constitution grants Congress in a foreign war setting).
Our Congress acquired significant authority to raise taxes, armies, and a navy.\(^62\) It also gained power to federalize the state militias and subject them to federal regulation.\(^63\) Finally, the Constitution imposed new duties with respect to invasions and rebellions.\(^64\)

Consider the Constitution’s grants of power. By providing that Congress retained the power to declare war, the Constitution implied that Congress could continue to pass laws needed to defeat foreign enemies.\(^65\) Given the Necessary and Proper Clause,\(^66\) powers that previously rested on a broad reading of the power to “determin[e] on . . . . war”\(^67\) now relied upon a Sweeping Clause\(^68\) that left no doubt that Congress had incidental powers. Congress could continue to enact laws necessary to prevail in wars, including laws concentrating powers, taking property, and suspending liberties, including the privilege of the writ of habeas corpus.

Take the particular issue of military invasions. Although Congress lacks an express repulsing power, it unquestionably may enact laws to defeat invaders.\(^69\) The Constitution references invasions repeatedly, signaling that they are a federal concern.\(^70\) In repelling invasions, Congress is not limited to employing the state militias and suspending habeas corpus merely because the Constitution mentions only these two measures in conjunction with invasions. Put another way, the partial enumeration of certain means of suppressing rebellions should not be construed to forbid the use of other means. Instead, the war power and the Sweeping Clause empower Congress to pass all useful and appropriate measures to thwart invaders. For instance, no one doubts that Congress can use the army and navy to repel invaders even though neither branch is mentioned in regard to invaders. Furthermore, Congress also may take property, delegate discretion to the executive, and, if need be, impose martial law.\(^71\) Such laws can be necessary and proper for carrying federal powers into execution because they ensure that federal authority extends across the nation. Absent broad power to expel

\(^{63}\) Id. cls. 15–16.
\(^{64}\) Id. art. IV, § 4.
\(^{65}\) See id. art. I, § 8, cls. 11, 12–16.
\(^{66}\) Id. cl. 18.
\(^{67}\) Articles of Confederation of 1781, art. IX, para. 1.
\(^{68}\) The Federalist No. 33, at 159 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (“And it is expressly to execute these powers, that the sweeping clause, as it has been affectionately called, authorizes the national legislature to pass all necessary and proper laws.”).
\(^{70}\) U.S. Const. art. I, § 8, cl. 15; id. § 9, cl. 2; id. art. IV, § 4. Invasions are not solely a federal concern. States have concurrent power to thwart invaders. See id. art. I, § 10, cl. 3 (describing what states may do when invaded).
\(^{71}\) See Prakash, Sweeping Domestic Power, supra note 5, at 1370, 1375, 1377.
invaders, Congress cannot ensure that the federal powers—executive, legislative, and judicial—reign supreme over the nation.

Likewise, though there is no express crushing power, Congress may enact laws to pacify rebellions. The federal obligation to counter “domestic Violence,” a duty triggered by a state request, hints that the federal government has the power to subdue rebellions. The express power to call the militias for the purpose of suppressing insurrections likewise implies a general power to subdue such insurrections. The Habeas Clause presupposes authority to quash rebels, as it merely constrains when Congress may adopt a particular measure to do so (suspension of the privilege). Thus, as in the case of invasions, the government is not limited to summoning the state militias and suspending the privilege of the writ of habeas corpus when suppressing rebellions merely because those are the only means enumerated in the Constitution. In the Civil War, the government committed no constitutional wrong when it used the army and navy to suppress the so-called Confederate States of America.

Congress’s undoubted powers to repel invaders and to crush rebellions can be conceived of as two parts of a single “domestic war power,” a power to defeat foreign and domestic enemies on American soil. This domestic war power, arising out of the Sweeping Clause and its interaction with provisions related to war, invasions, and rebellions, authorizes measures necessary and proper to vindicate federal authority across the nation.

Congress has a slightly less potent power to prevail in foreign wars. If Congress concludes that using military courts to try civilians and the enemy during such wars is conducive to victory (because such tribunals are more apt to convict), it may use such courts. The expediency of military courts does not decrease in foreign wars, even as the compulsion for their use arguably does. One can imagine domestic wars where military trials are wholly unnecessary, say in the context of a pathetic invasion. And one can envision foreign wars where no invasion or rebellion is imminent, and yet there is a sincere and deeply felt sense in the halls of Congress that vigorous measures, including military trial of civilians and the enemy, might be necessary to defeat an ominous and

---

72. See U.S. Const. art. IV, § 4.
73. See id. art. I, § 8, cl. 15.
74. See id. § 9, cl. 2; Debates of the Virginia Convention (June 16, 1788), in 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 449 (Jonathan Elliot ed., 2d ed. 1836) (observing that if the Habeas Clause did not restrict suspension, Congress clearly could suspend without limitation).
75. Cf. Resolution of the Legislature of the Commonwealth of Massachusetts (Feb. 9, 1799), in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533, 534–35 (Jonathan Elliot ed., 2d ed. 1836) (declaring that Congress has the right to protect against internal and external enemies and that the federal government is empowered to repel invasions and suppress insurrections); A Slave and a Son of Liberty, N.Y. J. (Oct. 25, 1787), reprinted in 19 The Documentary History of the Ratification of the Constitution 133, 134 (John P. Kaminski et al. eds., 2003) (claiming that under the Constitution there will be a “power, and spirit, to . . . prevent encroachments, and repel invasions”).
aggressive enemy. When relying upon the Sweeping Clause, context necessarily matters.

All things considered, the Constitution shares the basic structure of the many American frameworks (including the Articles of Confederation) that preceded it, at least where war powers are concerned. The legislature (Congress) continued to enjoy the power to enact measures necessary to triumph in wars. To use the *McCulloch* framework, when it comes to wars, there are legitimate ends—winning wars—that are clearly within the scope of the Constitution.\(^{76}\) Laws delegating broad powers and curtailing civil liberties during wars can be plainly adapted to those legitimate ends.\(^ {77}\) And the “letter and spirit of the [C]onstitution”\(^ {78}\) accommodate emergency measures, sanctioning them when necessary to defeat the enemy.

Writing as Publius, Alexander Hamilton made these exact points. One of the “principal purposes” of the Union was “the preservation of the public peace, as well against internal convulsions as external attacks.”\(^ {79}\) Those “from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.”\(^ {80}\) In every case, the “means ought to be proportioned to the end.”\(^ {81}\) By making the federal government the protector against invasions and rebellions and by giving the war power to Congress, the Constitution also conveyed to Congress the power to prevail in war.

To sum up, the Constitution was written against the backdrop of the Continental Congress using desperate measures to combat desperate diseases. The Constitution continues the same basic regime. The Constitution contains many indications (the Preamble and the Guarantee, Habeas, and Militia Clauses) that prevailing in war is a paramount federal concern. The Sweeping Clause makes express what was implicit under the Articles of Confederation: It authorizes Congress to take measures to ensure that the federal government triumphs in wars—to carry into execution the federal government’s power to defeat America’s enemies.

### B. Congress’s Power to Authorize Military Trials

There is, of course, the narrower question of whether Congress may authorize the trial of civilians and the enemy in military courts. To my mind, there are two related inquiries. First, does the Constitution implicitly authorize the use of military trial of civilians? Second, what are we to make of the jury-trial rights found in Article III and the Bill of Rights?

---

\(^{76}\) See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

\(^{77}\) *Id.*

\(^{78}\) *Id.*


\(^{80}\) *Id.*

\(^{81}\) *Id.*
Although the Constitution does not specifically authorize military trials, Congress has such power nonetheless. To see why, consider the related use of courts-martial to try members of the military. The power to make “rules for the Government and Regulation” of the armed forces does not specifically grant Congress the power to create courts-martial that may try military personnel. Indeed, one may doubt whether that Clause authorizes the use of military courts, for the power to create rules, without more, seems to address the creation of criminal offenses, but not necessarily the method of adjudicating alleged crimes. Yet from before the Founding, Congress has been understood to enjoy authority to sanction the military trial of offenses. Moreover, members of the armed forces, both before and after the Constitution’s ratification, have been tried and convicted before courts-martial.

The same sort of argument can be made with respect to the use of military courts to try civilians and the enemy. Though there is no express authority to try either before military courts, Congress nevertheless has such authority. Again, the war power and the Sweeping Clause, taken together, grant Congress broad authority to enact measures reasonably necessary to prevail in military conflicts. Should Congress conclude that the use of military courts to try civilians or enemy combatants were a “necessary” measure to prevail in a war, either foreign or domestic, it could enact such laws.

The Sweeping Clause also stands as the foundation for a host of federal crimes, including treason and related offenses. Although Article III carefully defines treason, it neither makes it a crime nor authorizes Congress to make it a crime. Rather, the authority to make treason a crime stems from the Sweeping Clause. Criminalizing treason helps carry into execution the other federal powers because doing so makes it more likely that the lawful government of the United States remains in power. Likewise, the Sweeping Clause authorizes Congress to enact a host of other crimes related to the national security of the United States, including laws against spying, sabotage, and aiding enemies. A clause that authorizes the creation of crimes not specifically mentioned in the Constitution can likewise serve as a basis for a process nowhere mentioned in the Constitution, namely, the use of military courts to try civilians and enemies.

If these arguments about the Sweeping Clause seem a stretch, consider this: the Sweeping Clause (and not the Habeas Clause) authorizes suspensions of the privilege of the writ of habeas corpus. The Habeas Clause authorizes nothing. By its terms, it grants no authority and is found in a section of Article I that limits legislative power. The natural implication is that the Habeas Clause is meant to limit authority that would otherwise exist, meaning that it is a constraint on the use of legislative power granted elsewhere. In other words, the authority to

---

83. See 2 Journals of the Continental Congress, supra note 22, at 111–23 (outlining crimes and punishments and providing for trials before military courts).
84. U.S. Const. art. III, § 3.
suspend—the authority to permit indefinite detentions—must come from elsewhere in the Constitution. In my view, suspensions of the privilege of the writ can be necessary and proper to carry into execution federal war powers, including the authority to prevail in wars. In this context, the Habeas Clause merely reveals that suspensions of the privilege are improper except in cases of invasion or rebellion.

One additional but rather consequential textual point must be made about the Constitution and military trials. The state militias, when called into federal service, may be subjected to courts-martial. By authorizing Congress to summon the militias to thwart invasions and rebellions and to execute federal statutes, and by providing that Congress may “regulate” the state militias when in federal service, the Constitution sanctions the imposition of military justice on the militias. It is hard to overstate the breadth of this authority, for it may be used during the most pacific times. In particular, if Congress wishes to routinely use the state militias as a means of ensuring the steady enforcement of federal laws, it may subject those state militias to courts-martial. Essentially, Congress has the power to impose military justice on a broad swath of the populace through the Militia Clauses.

To conclude that Congress lost the authority to try soldiers, civilians, and spies in military courts, we must somehow suppose that the Constitution granted the federal government far less crisis authority than its predecessor wielded, even as that new regime acquired new war and military powers and new duties with respect to rebellions. This is implausible. The far better reading is that Congress generally inherited the crisis powers of the Continental Congress, with the Constitution granting greater powers still to the federal government. Congress grew stronger, not weaker.

Had the Founders actually meant to impose new curbs on military courts, they would not have beaten around the bush and left such an important matter to vague implication. When they wanted to check suspensions of the privilege of the writ, the Founders added the Habeas Clause. Similarly, when they sought to bar punishment without trial, they barred Bills of Attainder, at the federal and state levels. Hence, had the Founders wished to utterly reject the established and useful practice of using military courts to try civilians and the enemy, they would have explicitly barred that practice.

If I am right, what are we to make of the jury trial rights? The Constitution’s jury trial provisions do not erect an insuperable barrier to the use of military courts to try civilians. The analogy to courts-martial for soldiers again proves instructive. Though there is no express exemption for courts-martial from the jury trial rights protected by the original Constitution and the Bill of Rights,

---

85. U.S. Const. art. I, § 8, cl. 15–16.
86. U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1.
87. I assume that a trial before a jury composed solely of members of the military does not satisfy the jury-trial guarantee found in Article III and the Sixth Amendment.
everyone understands that Congress may suspend the application of those rights when it comes to members of the armed forces. As noted earlier, those jury trial rights have not applied with full force to American military personnel since before the Founding.

Similarly, one ought to read the Constitution’s jury trial rights as containing an implicit exception permitting the trial of civilians before military courts in some circumstances. Congress can lawfully conclude that during a war, jury trials for civilians and the enemy would impede the successful defense of the country from its enemies, foreign or domestic. Going beyond this narrow point, Congress also has some authority to bypass the jury provisions with respect to the trial of civilians and the enemy, even when there is no war, as early practices and statutes reveal.88

Professor Lederman disagrees with at least some of the claims in the last paragraph. He argues that Article III “generates two important guarantees—one related to the [civilian] jury, the other to the [independent] judge,” with military trials dishonoring both.89

His reading of the text proves far too much. He does not really believe that these guarantees are required in all federal criminal cases. And he could not, given longstanding practices and understandings. The first guarantee—the right to a trial by a civilian jury—is nowhere near as absolute as he would prefer. And the second constitutional guarantee he perceives—life tenure and guaranteed compensation for judges presiding over criminal trials—simply does not exist. To be clear, I do not take issue with any policy arguments that Professor Lederman makes about civilian juries and independent judges. I only hope to show that his constitutional claims are mistaken.

The jury trial right is “as unconditional as constitutional language gets,” he observes.90 Yet Professor Lederman admits that members of the armed forces do not enjoy the Article III jury guarantee for “all Crimes.”91 Indeed, soldiers and sailors do not enjoy it for a veritable host of military crimes. He also notes that the trial of certain petty criminal offenses does not entail a jury right.92 Once one acknowledges there are implied exceptions to the jury right, the only question is how far they extend. I believe that Congress has constitutional authority to depart from that jury right, particularly in times of war.

As for the “judge” guarantee—the right to have a presiding judge with good-behavior tenure and salary protections—there simply is no such constitutional right, either as a matter of text or practice. As Professor Lederman concedes, the Constitution does not require the creation of lower federal courts,

88. See infra notes 101–114, and accompanying text.
89. Lederman, supra note 9, at 1545.
90. Id.
91. Id. at 1533 (quoting U.S. CONST. art. III, § 2, cl. 3).
92. Id. at 1554–55.
much less that all federal criminal cases must be heard in Article III courts. 93 Sometimes he writes as if treason in particular must be tried before Article III courts, but there is no text requiring this, either. The Constitution carefully specifies the definition and punishment of treason, not who may preside over, or try, treason cases. 94 More generally, as Professor Lederman admits, the Constitution clearly contemplates that state courts might hear federal cases, including federal criminal cases. 95 That Congress has always opted to reserve federal criminal cases for federal tribunals does not establish that the Constitution requires Article III courts for the trial of federal crimes. Put simply, those charged with federal crimes are not entitled to a presiding judge with tenure during good behavior or salary protections. 96

Professor Lederman’s second argument, although couched in terms of an Article III guarantee, 97 seems to be actually grounded in practice and policy. Because federal offenses have always been heard in Article III courts and because judicial independence is valuable, he appears to argue, statutes like the 2006 Military Commissions Act are unconstitutional because they permit trials before military tribunals, where the presiding judges lack good-behavior tenure and salary protections. 98 Yet he is wrong about our nation’s practice. Military courts, most prominently courts-martial, have long tried offenses without these supposed guarantees, for military judges lack these protections. In other words, if the Military Commissions Act is unconstitutional merely because presiding judges of military tribunals lack good-behavior tenure and salary protections, so are the courts-martial that have, for centuries, tried soldiers and sailors.

In sum, Congress has the constitutional authority to depart from the default rule of jury trial, which arises from Congress’s considerable war powers and its sweeping power to carry into execution federal powers. Moreover, there is no constitutional rule, either absolute or default, that the judges presiding over the trial of federal offenses must enjoy good-behavior tenure and salary protections.

In deciding to depart from the default rule in favor of jury trials, Congress should consider a host of factors necessary to make a reasoned judgment that military trials would be necessary and proper to carry into execution Congress’s power to prevail in times of war and to safeguard the national security of the United States. Among the factors for Congress to consider: How necessary is military justice? How closely tethered is the potential defendant to the military? Are we at war? Is there a war on domestic soil or the likelihood of such a war?

---

93.  Id. at 1547; see also U.S. CONST. art. III, § 1.
94.  U.S. CONST. art. III, § 3.
95.  See Lederman, supra note 9, at 1547.
96.  I do not mean to deprecate either structural provision but only the claim that the Constitution requires that all federal offenses be tried before judges with salary and good-behavior protections. For an unconventional argument about the meaning of good-behavior tenure, see Saikrishna Bangalore Prakash & Stephen D. Smith, How to Remove a Federal Judge, 116 YALE L.J. 72 (2006).
97.  Lederman, supra note 9, at 1537.
98.  See id. at 1545.
How slow are the civilian courts (and how fast are the military courts)? How difficult is it to secure a criminal conviction in civilian courts as opposed to military courts? Is the potential defendant aligned with the enemy? These and other factors inform whether Congress should conclude that it is necessary and proper to try anyone—soldier, civilian, or enemy—before military courts.

III. EARLY EXERCISES OF THE SWEEPING WAR POWER

These arguments may seem a tad bold. After all, the Constitution never says that Congress may use military courts to try civilians or the enemy. But, of course, the Constitution never declares that Congress can use courts-martial to try soldiers and sailors, either. In truth, the arguments in Part II are no more speculative than other claims about general clauses authorizing specific legislation. For instance, does the Commerce Clause authorize the regulation of navigation? The Constitution does not specifically answer the question. But there are textual clues (the Port Preference Clause\(^99\)) and historical signs (early statutes) that point the way. As Chief Justice John Marshall said in *Gibbons v. Ogden*: “All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation.”\(^100\)

Can something similar be said about the scope of the war power and the Necessary and Proper Clause? Did America understand them to authorize Congress to criminalize activities that jeopardize the nation? Did America understand them to encompass the authority to try Americans before military courts? The answer to these questions is “yes.” The more difficult question is the extent of these powers, not whether they exist.

Early Congresses criminalized acts found nowhere in the Constitution and provided that a subset of those crimes could be tried before military courts. Consider early federal crimes. The 1790 Crimes Act outlawed treason.\(^101\) Although Article III defines treason and limits its punishment, it neither makes treason a crime nor empowers Congress to criminalize it. Nonetheless, Congress could prohibit treason under the Necessary and Proper Clause because treason undermines the federal government’s ability to implement its powers. The Crimes Act also enacted other offenses, many of which the Constitution nowhere specifically authorizes, including bars on freeing convicts, bribery, perjury, obstruction of process, and misprision (concealment) of treason.\(^102\) Each proscription was constitutional because each helped “carry[] into Execution” federal legislative, executive, and judicial powers.\(^103\)

---

100. 22 U.S. (9 Wheat.) 1, 190 (1824).
101. An Act for the Punishment of Certain Crimes Against the United States (Crimes Act of 1790), ch. 9, § 1, 1 Stat. 112, 112 (1790).
102. See generally id. at 112–17.
103. See U.S. CONST. art. I, § 8, cl. 18.
Other early statutes also helped safeguard the United States and its powers. In the Alien Enemies Act, Congress granted the President the power to deport any enemy alien upon a declaration of war or a planned or actual invasion of the United States. While modern doctrine frowns on alienage classifications, expulsion of enemy aliens was a somewhat common feature of warfare in the eighteenth century. Yet Congress lacks specific textual authority to deport, despite its authority over naturalization and migration. Nonetheless, it could grant the President the power to deport enemy migrants, in part because deporting enemy aliens (who might form a fifth column) might be necessary and proper to defeating wartime enemies. Again, Congress has the power to wage and win wars and to enact measures to further those ends.

Early federal legislation also made Americans and civilians subject to courts-martial. In 1789, Congress reenacted, in a wholesale manner, the extant Articles of War for the Army. It thereby recodified provisions (previously discussed) that made civilians subject to courts-martial, namely the aiding the enemy provisions, the sutler and retainer provision, and the spying provision. An 1800 statute recreating the Navy’s Articles of War made it an offense subject to courts-martial to spy or to seduce or corrupt naval personnel. These rules extended to individuals not part of the Navy.

These Articles of War are important for three reasons. First, despite the absence of a specific power to criminalize spying and other assistance to the enemy, Congress concluded that it could take measures designed to deter and punish those undermining the security of the United States during wartime. Congress likely concluded that it could deter and punish enemy abettors as necessary and proper for the execution of the federal government’s powers. Second, the Articles of War revealed that, Article III notwithstanding, Congress could continue to subject soldiers and sailors to courts-martial. Third, and most relevant for our purposes, the reenactment of the Articles of War suggests that Congress believed it could continue to use military courts to punish civilians, especially in wartime. The advent of Article III did not mean that the use of such military courts to try civilians was categorically unconstitutional. Rather, the use

---

105. E.g., Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”).
108. See An Act to Recognize and Adopt to the Constitution of the United States the Establishment of the Troops Raised Under the Resolves of the United States in Congress Assembled, and for Other Purposes Therein Mentioned, ch. 25, 1 Stat. 95, 96 (1789).
109. See An Act for the Better Government of the Navy of the United States, ch. 33, § 1, 2 Stat. 45, 47 (1800) (providing in the naval articles of war that all spies shall be subject to court-martial and may be executed); An Act for the Government of the Navy of the United States, ch. 24, § 1, 1 Stat. 709, 712 (1799) (same).
of such courts could be justified as a necessary and proper means of ensuring the swift punishment of those who aid the enemy in wartime.\footnote{9 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 39, at 784; cf. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1862–1863, at 264 (Roy P. Basler ed., 1953) (noting that “[n]othing is better known to history than that courts of justice are utterly incompetent” in rebellions and that during rebellions a jury often has “one member[,] more ready to hang the panel than to hang the traitor”).}

Sections 4 and 5 of the Militia Act of 1792 confirm the earlier assertion that the Constitution authorizes Congress to subject members of the state militias to courts-martial. Section 4 subjected members of the summoned militias to the Articles of War.\footnote{An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections and Repel Invasions, ch. 28, § 4, 1 Stat. 264, 264 (1792).} Section 5 provided that those who disobeyed presidential orders could be fined, cashiered, or imprisoned by courts-martial.\footnote{Id. § 5.} Because the militia consisted of all able-bodied white male citizens between eighteen and forty-five years of age,\footnote{An Act More Effectively to Provide for the National Defence by Establishing an Uniform Militia Throughout the United States, ch. 33, § 1, 1 Stat. 271, 271 (1792).} Congress made perhaps a majority of the white male populace potentially subject to military rules and courts-martial.

That Congress, in its early years, enacted laws not traceable to any express authorization in the Constitution is well known. In McCulloch, Chief Justice Marshall made much of the fact that Congress criminalized interference with the mails, arguing that the law was necessary and proper for implementing the mail power.\footnote{McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 385 (1819).} What has been perhaps overlooked is the extent to which Congress believed it could enact laws designed to ensure the federal government’s continued existence, including laws authorizing deportation of enemy aliens, laws against spying for or aiding an enemy, and provisions making the latter set of offenses subject to trial before courts-martial.

CONCLUSION

“[W]ar is Hell,” said William Tecumseh Sherman.\footnote{Anthony King, The Combat Soldier: Infantry Tactics and Cohesion in the Twentieth and Twenty-First Centuries 1 (2013).} It stands to reason that to successfully navigate our way out of that hell—to prevail in war—it sometimes will be necessary to do dreadful things, including killing the enemy’s soldiers and sailors. There are but a few absolute constraints on that considerable war power, such as those found in the Habeas and Bill of Attainder Clauses.

In our system, Congress generally may decide which war and military measures to adopt and which to shun.\footnote{See generally Saikrishna Bangalore Prakash, The Separation and Overlap of War and Military Powers, 87 TEX. L. REV. 299 (2008) (arguing that Congress has broad authority over the conduct of war).} In times of peace, Congress may choose to limit military trials to soldiers and sailors. In times of war, however, Congress
may decide that far bolder measures and stiffer medicines are necessary. If, in times of war, Congress supposes that the military trial of civilians and the enemy is necessary and proper, Congress may order military courts to try both. There is no absolute constitutional bar to such trials.

These are momentous decisions, and they are bound to raise legitimate fears about the desirability of meting out justice via military courts. Yet however much outsiders may oppose any congressional decision to subject civilians and the enemy to military justice, the Constitution authorizes Congress to make that portentous and controversial choice.