

HISTORY AND TRADITION IN AMERICAN MILITARY JUSTICE

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ABSTRACT

At present, there are two military commission cases involving terrorism defendants incarcerated at Guantánamo Bay making their way through the appellate courts. In both cases, the defendants are challenging their convictions for “providing material support for terrorism.” While this is a federal offense that could be prosecuted in an Article III court, the legal issue in these appeals is whether providing material support is also a war crime subject to the jurisdiction of a military tribunal. Congress incorporated the offense into the Military Commissions Act, but that is not dispositive, since it is arguably beyond Congress’s legislative competence to create war crimes out of whole cloth and then impose them on foreign nationals having no jurisdictional nexus to the United States.

As a result, the Government has not disputed that there must be at least some historical evidence that the conduct now styled “providing material support” to an enemy previously has been treated as a war crime, where the defendant was a non-resident alien who owed no duty of allegiance to the injured state. In what might be fairly described as a desperate attempt to discharge its burden of persuasion, the Government has now embraced the only “precedent” that comes close to fitting this description. This is problematic, however, because it is also one of the most notorious episodes in the history of American military justice.

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In 1818, then Major General Andrew Jackson led an armed invasion of Spanish Florida, thereby instigating the First Seminole War. In the course of the conflict, his troops captured two British citizens who had been living in Florida among the Seminole Indians. In his inimitable style, Jackson impetuously ordered the summary trial and execution of these men, allegedly for “inciting” the Seminoles to engage in “savage warfare” against the United States. Worse yet, Jackson’s immediate motivation for the invasion was to recapture fugitive slaves, who had escaped from the adjacent States and found refuge among the Seminoles. In addition to territorial expansion, his mission was to return this “property” to their “rightful” owners and prevent Florida from serving as a safe haven for runaway slaves.

Remarkably, the legal basis of the Government’s assertion of military jurisdiction over material support charges therefore rests on Jackson’s decision to execute two men, who were almost certainly innocent, in the context of a war of aggression waged to vindicate the property rights of antebellum Southern slaveholders. The purpose of this essay is to reintroduce the episode to a wider audience, and to reflect on the implications of the Government’s decision to rely on it as a precedent for a modern war crimes prosecution.

“Nations frequently rush into the arms of despotism for the avowed reason of finding security against anarchy Liberty requires that every one should be judged by his common court. All despots insist on extraordinary courts, courts of commission, and an easy application of martial law.”¹

1. INTRODUCTION

The outer boundaries of Congress’s discretion to “define and punish . . . Offences against the Law of Nations”² as a matter of municipal penal legislation remains an open question. In 1865, the Attorney General put down a marker when he opined that while Congress has largely unfettered discretion “to make” rules for the management of the armed forces that did not previously exist, “[t]o *define* is to give the limits or precise meaning of a word or thing

¹ FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 17, 228 (1853).

² U.S. CONST. art. I, § 8, cl. 10.

[already] in being . . . Congress has the power to *define*, not to make, the laws of nations.”³ If the distinction between “making” and “defining” is substantially correct, it suggests that Congress has the flexibility to “modify on some points of indifference” when it acts to incorporate the laws of war into the domestic code, but could not reasonably be construed as having a license to create new offenses out of whole cloth under the guise of providing definitional certainty.⁴ Insofar as originalism matters in constitutional interpretation, there is an impressive body of evidence that supports this reading of the original meaning of the Define and Punish Clause.⁵

For this reason, in ongoing litigation under the Military Commissions Act (MCA),⁶ the Government has not disputed the

³ Military Comm’ns, 11 Op. Att’y Gen. 297, 299 (1865).

⁴ See *id.* (citing Who Privileged From Arrest, 1 Op. Att’y Gen. 26, 27 (1792)) (“The law of nations, although not specifically adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of indifference.”).

⁵ See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 141 (2007).

[T]his is not to say that the founders intended to give Congress free rein to *determine* offenses against the law of nations It is clear from the drafting history of the Clause that only offenses established by the “consent” of nations, to use [Chief Justice] Marshall’s phrase, would qualify. Congress could not create offenses, but retained only the second-order authority to assign more definitional certainty to those offenses already existing under the law of nations at the time it legislated.

Id.; Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 220, 225 (2008) (“Necessarily, any modification of the law of nations had to be [on a point] of indifference Congress was given a non-exclusive power to ‘define’ or at least to clarify offenses against the law of nations”); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 474 (2000) (“The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses.”).

⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.), *amended by* Military Commissions Act of 2009, Pub. L. No. 111-84, tit. 18, 123 Stat. 2574 (codified in scattered sections of 10 U.S.C.). For the purposes of this Article, the differences between the 2006 and 2009 versions of the MCA need not detain us.

proposition that there must be at least some relevant historical evidence that “the *conduct* now criminalized by the [statute] has [previously] been recognized as a violation of the law of war.”⁷ Yet, several of the offenses codified in the MCA notoriously have no grounding in the standard menu of sources for identifying the substantive content of customary international law, namely “the works of jurists,” “the general usage and practice of nations,” and “judicial decisions recognising and enforcing that law.”⁸ Perhaps most conspicuously, Congress incorporated the federal crime of “providing material support for terrorism” into the MCA,⁹ despite the fact that this is a novel statutory offense that was not even conceived until the mid-1990s, and has never been considered a law-of-war offense by any other nation.¹⁰

⁷ United States v. Hamdan, 2 M.C. 1, 5 (2008). Importantly, the Government has also conceded that the source of Congress’s authority to enact the MCA is derived from the Define and Punish Clause. Compare Appellee’s Response to the Specified Issues at 1-2, United States v. al Bahlul, CMCR Case No. 09-001 (U.S. Ct. Mil. Comm’n Rev. Mar. 11, 2011) [hereinafter Gov’t Response (al Bahlul)], with Appellant’s Reply on the Certified Issues, United States v. al Bahlul, CMCR Case No. 09-001 (U.S. Ct. Mil. Comm’n Rev. Mar. 15, 2011). See also WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d rev. ed. 1920).

The Constitution confers upon Congress the power ‘to define and punish offences against the law of nations,’ and in the instances of the legislation of Congress during the [Civil War] by which it was enacted that spies and guerillas should be punishable by sentence of military commission, such commission may be regarded as deriving its authority from this constitutional power.

Id.

⁸ United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

⁹ 10 U.S.C. § 950(t)(25) (2006) (defining the offense of “providing material support for terrorism” by reference to the parallel federal criminal statute, 18 U.S.C. § 2339A, which was enacted in 1994). To date, most detainees at Guantánamo Bay, against whom charges have been referred, have been charged with at least one count of providing material support for terrorism. See U.S. DEP’T OF DEF., OFFICE OF MIL. COMM’N, *Military Commissions Cases*, available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (providing case files for Military Commission cases).

¹⁰ See *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Serv.*, 111th Cong. 7-9 (2009).

After careful study, the administration has concluded that appellate courts may find that “material support for terrorism” . . . is not a traditional violation of the law of war. The President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of

Remarkably, in what might charitably be described as a desperate attempt to discharge its burden of persuasion, the Government has now fully embraced the only “precedent” that comes close to fitting this description. This is problematic, however, because it is also one of the most notorious episodes in the annals of American military justice. In 1818, then Major General Andrew Jackson led an armed invasion of Spanish Florida, thereby instigating what historians have since designated the First Seminole War. In the course of the conflict, his troops captured two British citizens, Alexander Arbuthnot and Robert Ambrister, who had been living in Indian Territory before the outbreak of the war. In his inimitable style, Jackson managed to precipitate a major international incident, as well as the first full-scale congressional investigation in the nation’s history, when he impetuously ordered the summary trial and execution of these men, allegedly for “inciting” the Seminoles and their black allies to engage in “savage warfare” against the United States. If the jingoistic overtone does not seem like a promising beginning to the story, it gets worse. William Winthrop, who is widely

offenses triable by military commission, which would fit better with the statute’s existing declarative statement.

Id. (statement of Jeh C. Johnson, Gen. Counsel, Dep’t of Def.).

[T]here are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the system’s legitimacy.

Id. at 9–12 (statement of David S. Kris, Assistant Att’y Gen., Nat’l Sec. Div., Dep’t of Justice); JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 40752, THE MILITARY COMMISSIONS ACT OF 2006: BACKGROUND AND PROPOSED AMENDMENTS 10 (2009) (“[D]efining as a war crime the ‘material support for terrorism’ does not appear to be supported by historical precedent.”); Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Human Rights Council, ¶ 20, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) (by Martin Scheinin) (“[T]he offences listed in Section [950t](24)–(28) of the [MCA] (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war.”); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 177 (2008) (“[W]hile providing material support to terrorism is clearly an offense against U.S. federal law, its trial as a war crime seems unprecedented.”).

acknowledged to be the leading authority on American military law,¹¹ actually concluded that Jackson himself was guilty of *murder* for ordering the execution of Ambrister contrary to the court martial's verdict.¹²

Although Jackson's role in the executions of Arbuthnot and Ambrister is perhaps familiar ground for scholars who specialize in antebellum American history, the Government's decision to rely on the incident to legitimize a modern war crimes prosecution casts it in an entirely new light. The purpose of this Article, then, is to reintroduce the episode to a wider audience, and to reflect on implications of the Government's decision to invoke the case for the contemporary use of military commissions. Part 2 briefly sets the stage by situating the discussion in the context of the justification of the State's imposition of criminal sanctions as such. Part 3 explains the Government's theory for the extraordinary assertion of military jurisdiction over non-resident aliens who provide material support to those engaged in hostilities against the United States. The heart of the Article is Parts 4 and 5, which examine in some detail Jackson's conduct of the First Seminole War and the court martial proceedings resulting in the executions of Arbuthnot and Ambrister. Finally, I conclude that the prosecutors' dubious invocation of this case, purportedly in furtherance of the public good, reveals the moral bankruptcy of its legal position.

2. POLITICAL LEGITIMACY AND THE PRACTICE OF PUNISHMENT

The nature and source of political obligation has been a vexing theoretical question since at least the seventeenth century, when Thomas Hobbes suggested that the best way to quell religiously inspired violence was to submit all questions of social morality to the Sovereign's unfettered discretion.¹³ As we know from bitter experience, this doesn't work. To be sure, the threat of coercion

¹¹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (referring to Winthrop as "the Blackstone of Military Law" (citing *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957))).

¹² WINTHROP, *supra* note 7, at 464-65 (describing Jackson's order to execute Ambrister as "wholly arbitrary and illegal," and opining that "[f]or such an order and its execution a military commander would *now* be indictable for murder").

¹³ See generally THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., 1962) (1651).

might be sufficient to induce compliance in the short run, but no government, even the most autocratic, can in the long run govern exclusively through brute force. This is true for the simple reason that the actual exercise of political power is continuously dependent on the willingness of substantial numbers of people to comply with the dictates of the regime, including, among others, “the hand that holds the key, the judge that shuffles the papers, and the person who chooses whether or not to file charges.”¹⁴ Power alone thus cannot be the exclusive source of the obligation of obedience, contra Hobbes, since that power itself is the product of widespread allegiance to the State.

As such, the official infliction of criminal sanctions is never *merely* a naked instrument for utilizing collective violence as a means of exercising social control. Instead, as Keally McBride has persuasively argued, the practice of punishment is also the simultaneous expression of the ideals inherent in a political order, the manifestation of some greater good that purports to justify the State’s exercise of coercive authority over the lives and property of those subject to its jurisdiction, “whether that be service to God, impartial courts, the light of reason, or the necessity of power.”¹⁵ The bureaucrats who administer the system of punishment must therefore “demonstrate that they deserve their unique privileges because they serve the larger interest of justice As soon as punishment is entirely about the power of command[,] it . . . will quickly destroy the tenuous connection between power and justice cultivated by all regimes.”¹⁶

Accordingly, a regime stakes its legitimacy on the extent to which its penal practices conform to its professed ideals. Where theory and practice persistently conflict, the resulting cognitive dissonance tends to undermine the stability of the legal system and, in extreme cases, provokes active resistance. In Hannah Arendt’s striking phrase, a vibrant public sphere can be maintained “only where word and deed have not parted company, where words are not empty and deeds not brutal”¹⁷ Where this “tenuous connection” is broken, and public discourse about

¹⁴ KEALLY MCBRIDE, PUNISHMENT AND POLITICAL ORDER 79 (2007).

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 150.

¹⁷ HANNAH ARENDT, THE HUMAN CONDITION 200 (1958).

social justice comes to be widely regarded as insincere and oppressive, the resulting distrust will invariably cause civic life to be governed by force and violence rather than persuasion.

The practice of punishment thus involves an intricate balancing act in which the state attempts to fill the normative gap between an ideal of social order and the disorderly reality of the human condition. In the United States, the animating political creed includes above all a basic commitment to the inherent moral equality of each individual. This principle is affirmed, for example, in the enigmatic rhetoric of the Declaration of Independence. But it would be anachronistic to read the Declaration's famous assertion that "all men are created equal" as an endorsement of the modern conception of egalitarianism.¹⁸

Instead, it was meant in the classical liberal sense that no one is by nature subject to the authority of another person without his consent, and that political freedom consists in preserving the security of natural rights under the rule of law. "Freedom of Men under Government," Locke wrote, "is, to have a standing Rule to live by, common to every one of that Society . . . A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man."¹⁹ Hence, Francis Lieber's maxim that civil liberty depends on the existence of a "common court" to adjudicate legal disputes, as opposed to an "easy application" of *ad hoc* military tribunals.²⁰

¹⁸ THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776). As John Diggins points out, it was Lincoln, not Jefferson, who transformed our understanding of the Declaration "by explaining equality as a moral imperative rather than as a scientific postulate, an ideal to be pursued rather than a fact to be assumed, a 'proposition' rather than a truism." John P. Diggins, *Slavery, Race, and Equality: Jefferson and the Pathos of the Enlightenment*, 28 AM. Q. (SPECIAL ISSUE) 206, 217 (1976).

¹⁹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 302 (Peter Laslett ed. 1960) (1690).

²⁰ See LIEBER, *supra* note 1, at 228 ("Liberty requires that every one should be judged by his common court. All despots insist on extraordinary courts, courts of commission, and an easy application of martial law.").

[T]he law shall be superior to all and every one and every branch of government; that there is nowhere a mysterious, supreme and unattainable power, which, despite of the clearest law, may still dispense with it, or arrest its course. This is the sum total of modern civil liberty, the great, firm, and solid commons' liberty.

On the Lockean account, when human beings quit the state of nature and enter into civil society, it is rational for them to “give up . . . [the] power of punishing to be exercised by such alone as shall be appointed to it amongst them; and by such Rules as the Community, or those authorised by them to that purpose, shall agree on.”²¹ Each member of a political community thus alienates or transfers his or her natural right to punish those who violate their rights to the State, which is charged with the responsibility to exercise this “executive power” on their behalf in furtherance of “the common good.”²² In this view, the practice of punishment is thus legitimate insofar as it secures “the two core elements of a liberal regime,” namely “the rights of individuals and the bounds upon state power.”²³

Broadly speaking, these principles find constitutional expression in a complex web of institutions that are meant to demarcate a robust sphere of personal liberty, ranging from the prohibitions on *ex post facto* prosecution, compelled self-incrimination and cruel punishments to the guarantees of equal protection and trial by a politically independent judiciary. As George Kateb reminds us:

Whatever the actual adherence to these ideals by officials of the law . . . the Constitution’s system of criminal law is a model of almost delicate restraint and inhibition in the exercise of state power and hence in the manner in which those who are caught in the toils of the law are to be treated.²⁴

As Kateb suggests, the point of imposing such procedural constraints on the State’s prosecution of crime is not merely to protect the rights of the innocent or the truth-finding function of a trial, as opposed to the preservation of other social values. For example, the normative justification of the privilege against self-

2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 294 (1839).

²¹ LOCKE, *supra* note 19, at 370.

²² *See id.* at 347, 368, 389 (discussing generally individuals’ surrender of the right to punish wrongdoers to an executive authority as part of the Lockean social contract).

²³ MCBRIDE, *supra* note 14, at 122.

²⁴ George Kateb, *Punishment and the Spirit of Democracy*, 74 *SOC. RES.* 269, 276 (2007).

incrimination is not solely to avoid the risk of false convictions. On the contrary, practicing lawyers are typically reluctant to allow their clients to testify precisely because it might prove too revealing.

Rather, the injunction against self-incrimination arises largely because there is something deeply disquieting about the State's coercing even a guilty person to implicate himself in a crime. From a liberal perspective anyway, such a spectacle is offensive because it is degrading and accords insufficient respect for the equal worth of the defendant as a member of the moral community, notwithstanding his offense. Indeed, even Hobbes, though frequently portrayed as an apologist for absolutism, maintained that an individual has an inalienable right of self-preservation and is thus never required to cooperate in his own punishment.²⁵ This remains true, even though faithful adherence to such constraints almost certainly frustrates the State's efforts to give the guilty the punishment they arguably deserve. In this way, then, constitutional norms establish a moral minimum that the State may not transgress in the pursuit of social order, thereby preserving and to some extent instantiating competing moral values like respect and personal dignity.

3. AIDING THE ENEMY UNDER THE LAW OF WAR

In the grand tradition of American military justice, the foregoing principles of legality have been extended even to enemy aliens captured on the battlefield, much less to civilian non-combatants. "These principles would reach every man's case," Henry Clay said in 1819, "native or foreigner, citizen or alien. The instant quarters are granted to a prisoner, the majesty of the law surrounds and sustains him, and he cannot lawfully be punished" unless "the law condemns [his actions] and . . . [the sentence] is pronounced by that tribunal which is authorized by the law to try him."²⁶

Yet, the continuing vitality of these ideals is thrown into stark relief by the Government's contemporary invocation of military

²⁵ For an illuminating discussion of Hobbes's philosophy of punishment, see Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009).

²⁶ 33 ANNALS OF CONG. 645 (1819) (statement of Henry Clay).

commissions in the ongoing “war on terrorism.” Historically, Congress had incorporated the entire corpus of the common law of war into the Articles of War by oblique reference, leaving it to the courts to assess the application of the law on a case-by-case basis.²⁷ In sharp contrast, the MCA adds an entirely new subchapter to the Uniform Code of Military Justice (UCMJ), which applies only to non-citizens deemed to be “unprivileged belligerents,” who are subjected to trial by military commission for thirty specific statutory law-of-war offenses.²⁸ In a transparent attempt to insulate the statute from serious jurisdictional and *ex post facto* challenges,²⁹ Congress disclaimed that it had engaged in any legislative innovation when codifying these offenses in the MCA.³⁰

²⁷ See *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”). When the Articles of War were reenacted as the Uniform Code of Military Justice in 1950, Congress retained this provision (now codified as Article 21), which “preserved what power, under the Constitution and the common law of war, the President [previously] had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 592–93 (2006).

²⁸ See 10 U.S.C. § 948a(7) (2009) (defining “unprivileged enemy belligerent as one who has engaged in hostilities against or has purposefully and materially supported hostiles against the United States, or was a part of al Qaeda); 10 U.S.C. § 948c (2009) (subjecting alien unprivileged enemy belligerents to trial by a military commission); 10 U.S.C. § 950t(1)–(30) (2009) (listing offenses triable by military commission).

²⁹ See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 151 (2009) (arguing that the “Define and Punish Clause limits Congress’s power to criminalize conduct that lacks a U.S. nexus.”); Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SEC. L. & POL’Y 295 (2010) (detailing the legal history of and constitutional limitations on the jurisdiction of military commissions).

³⁰ See 10 U.S.C. § 950p(d) (2009).

The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter . . . but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter

Id.

Of course, the mere fact that Congress says so does not necessarily make it true, *ipse dixit*. Indeed, the most natural reading of the statute's declarative statement is that Congress must have intended the offenses enumerated in the MCA to possess a certain historical pedigree in international humanitarian law. In an effort to discharge this jurisdictional burden, the Government has taken the position that the offense of providing material support for terrorism as codified in the MCA is—in substance if not in name—a version of “aiding the enemy,” which does have a longstanding provenance in American military law.³¹

Taken at face value, this is a singularly unconvincing argument. Logically, it begs the question to suggest that an enemy alien violates the injunction against “aiding the enemy” by providing material support to his own co-belligerents, at least in the absence of special circumstances giving rise to a duty of allegiance to the injured State. Without this factual predicate, the concept of “aiding the enemy” would have no limiting principle. In that case, it would follow that *any* enemy alien, including the members of an enemy's armed forces, could be subjected to prosecution for war crimes merely for engaging in hostilities against the United States, even if the conduct at issue otherwise scrupulously complied with the laws of war. But this amounts to the absurd proposition that United States may unilaterally declare itself to be legally immune *tout court* from the hazards of armed conflict. No plausible construction of the law of war supports such a conclusion.

Rather, as William Winthrop explained more than a century ago, the prohibition on aiding the enemy is grounded in the rule of non-intercourse, a principle of customary international law which provides that “all the inhabitants of the belligerent nations or districts become, upon the declaration or initiation of a foreign war, or of a civil war, . . . the enemies both of the adverse government and of each other, and all intercourse between them is

³¹ See Gov't Response (al Bahlul), *supra* note 7, at 21 (“Appellant's material support for terrorism can legitimately be characterized as equivalent to conduct constituting the offense of Aiding the Enemy, as historically punished under the laws of war by military commissions.”); Appellee's Response to the Specified Issues at 14–15, *United States v. Hamdan*, CMCR Case No. 09-002 (U.S. Ct. Military Commission Review Mar. 11, 2011) [hereinafter Gov't Response (Hamdan)] (using the same language as Gov't Response (al Bahlul) to describe the offense of Aiding the Enemy).

terminated and interdicted.”³² The Supreme Court regularly embraced the logic of the rule during the Civil War, observing that:

The people of the loyal States . . . and the people of the Confederate States . . . became enemies to each other, and were liable to be dealt with as such without reference to their individual opinions and dispositions. Commercial intercourse and correspondence between them were prohibited . . . by the accepted doctrines of public law. The enforcement of contracts previously made between them was suspended, partnerships were dissolved, and the courts of each belligerent were closed to the citizens of the other³³

The rule of non-intercourse was invoked as recently as the Korean War, when several U.S. soldiers who had provided propaganda for their captors were prosecuted under the UCMJ’s version of aiding the enemy, now codified at Article 104.³⁴ The defendants’ status as prisoners of war being held on foreign soil was not dispositive, because in the case of citizens, the “impassable ‘line’ between belligerents is not geographic. . . . Whatever the place, whether within or without an area controlled by the United States, there can be no unauthorized intercourse between a citizen of the United States and an enemy.”³⁵ To be sure, a duty of

³² WINTHROP, *supra* note 7, at 776–77 (footnotes omitted); *see also* HENRY W. HALLECK, *INTERNATIONAL LAW* 357 (1861) (“[A] declaration, or recognition of war, effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries.”); Joseph Story, *Additional Note on the Principles and Practice in Prize Causes*, reprinted in *NOTES ON THE PRINCIPLES AND PRACTICE OF PRIZE COURTS* 28, 69 (Frederick Thomas Pratt ed., 1854) (“It is a fundamental principle of Prize Law, that all trade with the enemy is prohibited to all persons, whether natives, naturalised citizens, or foreigners domiciled in the country during the time of their residence, under the penalty of confiscation.”).

³³ *Dow v. Johnson*, 100 U.S. 158, 164–65 (1879). Given the absence of a formal declaration of war, Congress codified the rule with the enactment of the Non-Intercourse Act, in order to give unequivocal notice of the illegality of continued business dealings between residents of the Northern and Southern states. *See Matthews v. McStea*, 91 U.S. 7, 12–13 (1875) (citing Act of July 13, 1861, ch. 3, § 5, 12 Stat. 255, 257 (1859–1863) (codified as amended at 50 U.S.C. § 205 (2006))).

³⁴ 10 U.S.C. § 904 (2006).

³⁵ *United States v. Dickenson*, 6 C.M.A. 438, 450–51 (C.M.A. 1955); *see also United States v. Olson*, 7 C.M.A. 460, 466 (C.M.A. 1957) (“Accused’s position is not essentially different from that of American citizens interned within enemy territory. . . . The obligation of allegiance which attaches to citizenship continues to rest upon the shoulders of one so situated.”); *United States v. Batchelor*, 7

allegiance is not an express element of the offense under Article 104, but in practice this invariably has been assumed.³⁶ Congress presumably agrees, moreover, because the counterpart to Article 104 in the MCA makes explicit the necessary “breach of an allegiance or duty to the United States”³⁷

C.M.A. 354, 368 (C.M.A. 1956) (describing aiding the enemy as “closely akin to treason”).

³⁶ See *Hamdan v. Rumsfeld*, 584 U.S. 557, 600 n.32 (2006) (“[T]he crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U.S.C. § 904.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 558–59 (2004) (Scalia, J., dissenting) (citation omitted) (“[A] plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.”); *Olson*, 7 C.M.A. at 464 (“[W]hether or not an offense [under Article 104] has been alleged depends upon the facts alleged, and the factual allegations are to be found in the specifications, not in the designation of the charge or article.”). Importantly, the same principle applied in war crimes prosecutions after the Second World War. For example, in 1948, a Nazi officer who had served as a prison warden in the Netherlands during the war was convicted of various law-of-war offenses and sentenced to seven years imprisonment. See *Trial of Willy Zuehlke*, 14 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 139 (1949). In an effort to secure a longer sentence, the prosecutor argued that the defendant’s crimes fell within the terms of the Dutch penal code’s version of aiding the enemy, which provided that whoever “in time of war intentionally lends assistance to the enemy or prejudices the State with respect to the enemy, shall be punished with imprisonment not exceeding fifteen years.” *Id.* at 141 n.1. The court rejected this argument because “[i]f the latter were to be applied it would mean that the defendant, being an enemy, would have ‘lent assistance’ to himself, and this was not the type of case covered by [the statute].” *Id.* at 141. This was true despite the fact that the Nazi occupation of the Netherlands was itself a criminal act of aggression, but that did not render every subsequent act by a Nazi official within occupied territory a war crime. *Id.* at 144. Thus, a Nazi official could not be convicted of “aiding the enemy” merely for lending assistance to his own government within territory under the occupation of the German military, because in these circumstances he owed no duty of allegiance to the Netherlands.

³⁷ 10 U.S.C.A. § 950t(26); see also U.S. DEP’T OF DEF., OFFICE OF MIL. COMM’N, *Manual for Military Commissions*, Part 21(26), cmt. 3 (April 27, 2010), available at http://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf.

The requirement that conduct be wrongful for this crime necessitates that the accused owe allegiance or some duty to the United States of America. For example, citizenship, resident alien status, or a contractual relationship in or with the United States is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

Accordingly, the gravamen of aiding the enemy is *not* merely that support is given, but the breach of fidelity it entails, where the obligation of allegiance attaches to those who by reason of their citizenship or residence enjoy the reciprocal protection of the injured State. The "obligation of fidelity and obedience which the individual owes to the government under which he lives" is thus assumed "in return for the protection he receives."³⁸ Whereas a citizen owes "an absolute and permanent allegiance to his government," a resident alien owes "a local and temporary allegiance," which obligates him "to obey all the laws of the country" during the period of residency "not immediately relating to citizenship," and makes him "equally amenable with citizens for any infraction of those laws."³⁹

Although the status of the recipient of the material support as an enemy is a necessary element of the offense, this is not sufficient to establish a violation of the norm. Rather, the critical question is the relationship between the putative defendant and the offended belligerent. Simply put, providing material support to the enemies of the United States, by itself, has never been considered a war crime, unless the provider is under a legal obligation to refrain. It follows that violations of the injunction against aiding the enemy are necessarily "treasonable in their nature."⁴⁰

Id.

³⁸ *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872).

³⁹ *Id.*

⁴⁰ WINTHROP, *supra* note 7, at 629; *see also* JOHN O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL: WITH SUGGESTIONS FOR THEIR IMPROVEMENT 148 (Philadelphia, Lea & Blanchard 1846) (explaining that aiding the enemy can only apply "to those owing allegiance, either permanently or temporarily, (as in the case of foreign occupied conquered provinces) to the United States" but "could never be supposed to apply to an alien enemy . . ."); Jabez W. Loane, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 80 (1965) (characterizing aiding the enemy under Article 104 as "the military law of treason"); Thomas Marmon, et al., *Military Commissions 22-23* (April 1953) (unpublished LL.M. Thesis, The Judge Advocate General's School) (on file with The Judge Advocate General's School Library), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/mil_commissions.pdf.

[Article 104] is a strictly national offense that can be committed in the United States by resident aliens and at any place of contact with enemy persons by United States citizens [N]ational treason and the statutory offense of aiding the enemy are based on the higher duty, although it may be one arising from temporary residence, of allegiance to the injured state.

Not surprisingly, both civilian and military tribunals have consistently held that a U.S. citizen or a resident alien violates the rule of non-intercourse if he provides material support to an opposing belligerent by, for example, "running or attempting to run a blockade; unauthorized contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, [or] medicines."⁴¹ Conversely, a non-resident alien commits no offense under international law merely by providing the same sort of material support to insurgents engaged in hostilities against the United States, because all else equal, he is under no legal obligation to abstain from such activities.⁴²

Confronted with the weight of contrary authority, the Government argues that:

[T]he offense of Aiding the Enemy has also been applied to situations in which a person providing aid or support to an enemy has done so in violation of some [other] duty . . . to a sovereign, namely a duty not to provide aid or support to an enemy waging an unlawful belligerency, or who is

Id.

⁴¹ WINTHROP, *supra* note 7, at 839-40; *see also* WAR DEP'T, BUREAU OF MILITARY JUSTICE, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY ch. II, ¶ 14, at 79 (1865) ("Because blockade-running involves a forfeiture of goods, it does not follow that it is not triable by a military commission. It involves a criminal responsibility also, and when engaged in by citizens of the United States, owing allegiance to its government, it is clearly so triable."); War Dep't, Adjutant General's Office, G.C.M.O., No. 254 (1864) (approving the findings and sentence of the military commission of J. B. Sabels, "a citizen owing allegiance to the United States," who was found guilty of giving "aid and comfort [to] the enemy," by using a blockade running vessel to deliver substantial quantities of munitions "to enemies in arms against the United States").

⁴² *See* Young v. United States, 97 U.S. 39, 66 (1877) (holding that a non-resident British citizen "committed no crime against the laws of the United States or the laws of nations" by providing material support to the Confederacy, including arms, ammunition and money, because in the absence of a duty of allegiance he was "not a traitor"); Green v. United States, 8 Ct. Cl. 412, 420 (1872) (holding that "no crime can be imputed" to a non-resident alien for giving "material aid . . . to the rebellion"); La Plante v. United States, 6 Ct. Cl. 311, 311 (1870) (holding that the rule of non-intercourse does not apply to non-resident aliens); Report of Maj. L. C. Turner to Col. James A. Hardie (June 4, 1864), in THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Ser. 2, vol. 7, at 194-95 (U.S. War Dep't ed., Washington, Gov't Printing Office 1899) (discussing the decision of a military commission which held that non-resident aliens did not violate the laws of war by serving on blockade running vessels carrying contraband to the Confederacy).

waging a belligerency that violates the laws and customs of war.⁴³

Although its briefs are conspicuously silent on the source of this purported duty, the Government does manage to locate a single instance in which a non-resident alien was punished by an American military tribunal for what might be fairly described as providing material support to a party engaged in hostilities against the United States, namely Andrew Jackson's decision to execute Arbuthnot and Ambrister for aiding the Seminoles Indians and their black allies during the First Seminole War. At best, one anomalous result is an exceedingly thin reed to support the Government's burden of persuasion. In any event, whether this is a morally respectable precedent depends entirely on the facts of the case and the quality of Jackson's decision.

4. "A SAVAGE NEGRO WAR"

Given the dearth of historical evidence supporting its legal position, the Government resorts to the argument that Jackson's decision to execute Arbuthnot and Ambrister may serve as a legitimate precedent for trying alien enemies on material support charges under the MCA, even though the defendants admittedly did not receive "a fair and impartial trial."⁴⁴ For present purposes, the procedural irregularities that infected the underlying proceedings are a matter of indifference, the Government suggests, because Jackson would have been justified under the extant law of war if he had ordered the men to be executed without affording them any due process whatsoever. The defendants were not entitled to such consideration, the argument goes, because by joining in league with the functional equivalent of a terrorist organization engaged in "unlawful hostilities" against the United States, they had forfeited the right to be treated any better than their "savage" associates. While recognizing that international law no longer permits suspected terrorists to be summarily executed after being taken into custody, the Government insists that the case is sufficient to establish the legal principle that non-resident aliens

⁴³ Gov't Response (al Bahlul), *supra* note 7, at 19; *see also* Gov't Response (Hamdan), *supra* note 31, at 15-16.

⁴⁴ Gov't Response (al Bahlul), *supra* note 7, at 24 n.13; *see also* Gov't Response (Hamdan), *supra* note 31, at 18 n.39.

“may today be the subject of war crimes charges” if they provide material support to those engaged in an unlawful belligerency, even in the absence of a duty of allegiance to the United States.⁴⁵

Even so, the logic of this argument depends entirely upon the assumption that the Seminoles’ mode of warfare made them the functional equivalent of present-day terrorists. Otherwise, the defendants’ trial and execution on the ostensible grounds that they were guilty of aiding unlawful belligerents cannot possibly be good law, particularly given the serious procedural defects in the underlying proceedings, which the Government does not contest. By its own lights, if the Seminoles weren’t actually engaged in an unlawful belligerency, Arbuthnot and Ambrister must have been wrongfully executed, and the case is a worthless precedent. Hence, without citing a shred of credible historical evidence to substantiate the charge, the Government baldly asserts that:

[N]ot only was the Seminole belligerency unlawful, but, much like modern-day al Qaeda, the very way in which the Seminoles waged war against U.S. targets itself violated the customs and usages of war. Because Ambrister and Arbuthnot aided the Seminoles both to carry on an unlawful belligerency and to violate the laws of war, their conduct was wrongful and punishable.⁴⁶

⁴⁵ Gov’t Response (al Bahlul), *supra* note 7, at 19; *see also* Gov’t Response (Hamdan), *supra* note 31, at 15–18. The Government’s stance ignores Justice Douglas’s admonition that it “is foreign to our thought to defend a mock hearing on the ground that in any event it was a mere gratuity. Hearings that are arbitrary and unfair are no hearings at all under our system of government.” *Ludecke v. Watkins*, 335 U.S. 160, 187 (1948) (Douglas, J., dissenting).

⁴⁶ Gov’t Response (al Bahlul), *supra* note 7, at 25; *see also* Gov’t Response (Hamdan), *supra* note 31, at 19 (arguing that the case constitutes “evidence [that] the United States has punished conduct like Appellant’s material support for terrorism at military commissions, even in the absence of any duty or allegiance on the part of the accused. Consequently, Appellant’s conviction for material support to al Qaeda is not *ex post facto*.”). At oral argument before the CMCR, counsel for the Government in *Hamdan* reiterated the comparison, stating that “the substance” of Arbuthnot and Ambrister’s crimes “was the savage killing of civilians,” whereas “the goal . . . of al Qaeda is the savage killing of Americans wherever they find them throughout the world.” Col. (Ret.) Francis Gilligan, Oral Argument at 34:15, *United States v. Hamdan*, CMCR Case No. 09-002 (U.S. Ct. Mil. Comm’n Rev. Mar. 17, 2011), *available at* <http://www.mc.mil/CASES/USCourtOfMilitaryCommissionReview.aspx> (follow “Salim Ahmed Hamdan” hyperlink under “Case Name”; then follow “Recording of Oral Argument” hyperlink).

The *only* “evidence” the Government presents to support this depiction of the Seminoles is (1) Jackson’s own justification of his order to execute the defendants, (2) several *post hoc* statements issued by President Monroe and Secretary of State John Quincy Adams in an effort to quell the political fallout caused by the controversy, and (3) the fact that Jackson’s partisan supporters in the House of Representatives narrowly defeated the recommendation of the Military Affairs Committee to issue an official censure of the general’s actions.⁴⁷ In particular, the Government highlights President Monroe’s State of the Union message to Congress in 1819, in which he reiterates the claim that Arbuthnot and Ambrister were not entitled to any legal protections in virtue of their association with unlawful belligerents:

Men who thus connect themselves with savage communities, and stimulate them to war, which is always attended, on their part, with acts of barbarity the most shocking, deserve to be viewed in a worse light than the savages. They would certainly have no claim to an immunity from the punishment, which, according to the rule of warfare practised by the savages, might justly be inflicted on the savages themselves.⁴⁸

While the Government dutifully acknowledges that “Jackson’s actions were not without controversy,” it recites the foregoing facts as if they are sufficient to vindicate the legitimacy of the asserted legal principle.⁴⁹ “[I]n the end,” the Government credulously asserts, “his actions were supported by the President and Secretary of State, and the House of Representative expressly voted down a resolution of disapproval.”⁵⁰ But this is plainly insufficient to discharge the Government’s burden of persuasion, because the mere fact that Jackson and his political defenders issued a series of self-serving rationalizations for what he had done quite obviously does not necessarily mean his actions were legally defensible. It

⁴⁷ See Gov’t Response (al Bahlul), *supra* note 7, at 23–25; see also Gov’t Response (Hamdan), *supra* note 31, at 16–18 (same).

⁴⁸ 33 ANNALS OF CONG. 13 (1818), *quoted in* Gov’t Response (al Bahlul), *supra* note 7, at 23–24 and Gov’t Response (Hamdan), *supra* note 31, at 17.

⁴⁹ Gov’t Response (al Bahlul), *supra* note 7, at 25; Gov’t Response (Hamdan), *supra* note 31, at 18.

⁵⁰ *Id.*

might just as easily mean they were trying to obfuscate Jackson's illegal execution of two British citizens, who were actually innocent of any crime under the law of war.

Indeed, when viewed in context, the evidence strongly suggests that is exactly what occurred. Over and above the execution of two British citizens, Jackson's decision to occupy the Spanish garrisons at St. Marks and Pensacola without clear justification "caught [the Monroe Administration] in a diplomatic bind," and the cabinet was sharply divided on the appropriate response.⁵¹ Behind closed doors, Jackson's only staunch defender was the Secretary of State, who saw the dislocation caused by the invasion as an opportunity to gain leverage in his negotiations with Spain over the final disposition of Florida. For these unrelated political reasons, Adams therefore urged the President to defend the invasion as an act of preemptive self-defense and the executions as legitimate acts of retributive justice.⁵²

In contrast, Secretary of War John C. Calhoun, with the concurrence of the Attorney General and the Secretary of the Treasury, argued that Jackson had waged an undeclared war against a nation in amity with the United States, in violation of Calhoun's explicit orders.⁵³ For that reason, they "secretly urged [Jackson's] censure and roundly called for an investigation."⁵⁴

In July 1818, after procrastinating for more than a month, President Monroe ultimately decided against issuing a public censure, largely because he "was loath to own up to his share in Jackson's aggression," going so far as to suggest that several

⁵¹ ANDREW BURSTEIN, *THE PASSIONS OF ANDREW JACKSON* 131 (2003).

⁵² Adams did indeed take advantage of the situation to promptly negotiate a treaty with his Spanish counterpart, Don Luis de Onís, "acquiring the whole of Florida for the United States and mapping the long border between Spanish and American possessions extending all the way to the Pacific." *Id.* at 132-33; see also Deborah A. Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 *J. EARLY REPUBLIC* 559, 589 (2008) (explaining senators' unwillingness to discuss censuring Jackson's behavior in Florida while the Adams-Onís Transcontinental Treaty was pending, because many Americans credited Jackson with creating the diplomatic environment in which the treaty was negotiated).

⁵³ See *infra* text accompanying notes 99-100.

⁵⁴ BURSTEIN, *supra* note 51, at 132; see also 1 ROBERT V. REMINI, *ANDREW JACKSON: THE COURSE OF AMERICAN EMPIRE, 1767-1821* 366-67 (2d ed. 1998) ("Calhoun [was] furious because Jackson . . . had gone over his head to Monroe for authorization to seize Florida . . .").

incriminating letters Jackson had written from the battlefield should be doctored, supposedly in the interests of national security.⁵⁵ Although he secretly drafted a critical note that was evidently meant to mollify the Spanish foreign minister and promised to return Pensacola and St. Marks, the President was reluctant to adopt a more confrontational strategy with Jackson, because he feared that it might prove politically unpopular given Jackson's growing status as a cult hero.⁵⁶ Moreover, as he said in a confidential letter to Senator Rufus King, if he "disavow[ed] [Jackson's] measures [and brought] the General to trial," it might interfere with "the cession of Florida Spain must see by this occurrence . . . that she cannot retain Florida."⁵⁷ Accordingly, President Monroe's decision to mount a public defense of his conduct was hardly a matter of principle and therefore lends little if any weight to the precedential value of the case.

Instead, by any reasonable measure, as Rep. Charles Mercer remarked during the congressional debates over Jackson's censure, the trial and execution of Arbuthnot and Ambrister is nothing less than "a stain on the records of the judicial proceedings of this nation."⁵⁸ Given that this is the *only* known instance of a military

⁵⁵ BURSTEIN, *supra* note 51, at 133; REMINI, *supra* note 54, at 368. After reviewing one particularly incriminating letter, Monroe cryptically wrote in the margin that he hoped Jackson's "conduct will be approved, which shows, that he had acted on his own responsibility." DAVID S. HEIDLER & JEANNE T. HEIDLER, *OLD HICKORY'S WAR: ANDREW JACKSON AND THE QUEST FOR EMPIRE* 181 (2d ed. 2003) (quoting Letter from Andrew Jackson to James Monroe, President of the United States, (June 2, 1818) (on file with the New York Public Library)).

⁵⁶ See, e.g., REMINI, *supra* note 54, at 366-67.

In April and May 1818, the newspapers were filled with stories of the capture of St. Marks and the executions of Arbuthnot and Ambrister, which delighted a large segment of the American public. . . . Obviously the President could not censure Jackson because . . . it might not sit well with the American people.

Id.; David S. Heidler, *The Politics of National Aggression: Congress and the First Seminole War*, 13 J. EARLY REPUBLIC 501, 507 (1993) (footnotes omitted) ("Anyone who doubted Jackson's popularity or challenged his power did so at high peril. Monroe had spent a good deal of time mollifying Jackson's prickly sensitivity over a variety of concerns and often did so at the expense of the principle of civilian control of the military.")

⁵⁷ Letter from James Monroe to R. King (July 22, 1818), in 6 THE LIFE AND CORRESPONDENCE OF RUFUS KING, 1816-1827, at 155, 156 (Charles R. King ed., 1900).

⁵⁸ 33 ANNALS OF CONG. 818-19 (1819).

prosecution of a non-resident alien for conduct that resembles providing material support to the enemy, it is important to correct the Government's tendentious account of the matter. Before turning to the myriad legal infirmities that infected the court martial proceedings, however, it is appropriate to pause for a moment to consider the unseemly historical background of the case.

In the judgment of historians who have studied the First Seminole War, it is a "distortion simply to say that fugitive Negroes and hostile Indians stirred up by unscrupulous British subjects were making unprovoked attacks on innocent American frontiersmen,"⁵⁹ as the Monroe Administration belatedly claimed. On the contrary, the conflict that ensnared Arbuthnot and Ambrister was essentially a war of aggression waged by the United States against the sovereign territory of Spain, primarily at the instigation of American slave-holding interests. In the early nineteenth century, what is today Florida was a largely undeveloped frontier: "a wild borderland where Indian tribes, the United States, Spain, and Great Britain competed fiercely for supremacy."⁶⁰ After the War of 1812, it remained under the nominal control of Spain, but Spanish authorities were unable to "enforce peace on the border," and perhaps more importantly, "were unable to prevent black slaves from fleeing to Florida and joining the Seminole Indians."⁶¹

In fact, more than 1,000 black persons—including former slaves who had escaped from captivity in the United States and their offspring—lived peacefully among the closely-related indigenous tribes known collectively as the Seminoles, in a series of villages in Spanish Florida. The American plantation owners living in the neighboring states greatly resented this development, both because they considered the escaped slaves to be their chattel property, and because the existence of thriving communities of people of color in such close proximity to themselves was considered an existential threat to their "peculiar" way of life. While the motivation for the invasion of Florida was thus partly inspired by the desire for

⁵⁹ J. Leitch Wright, Jr., *A Note on the First Seminole War as Seen by the Indians, Negroes, and Their British Advisers*, 34 J. S. HIST. 565, 574 (1968).

⁶⁰ John K. Mahon, *The First Seminole War, November 21, 1817–May 24, 1818*, 77 FLA. HIST. Q. 62, 62 (1998).

⁶¹ *Id.*

territorial expansion which necessitated the forcible removal of the indigenous inhabitants, the “principal objective was to break up the free Negro frontier settlements which were becoming increasingly a menace to the slave systems of adjacent states.”⁶² It bears emphasizing that *these* were the “savage communities” to which President Monroe was principally referring in the State of the Union speech which the Government cites in justification of the execution of Arbuthnot and Ambrister.⁶³

The prologue to the war occurred in July 1816, when Jackson, under pressure from frontier citizens, ordered the destruction of the so-called Negro Fort, which was home to more than 300 black men, women, and children.⁶⁴ The fort, its surrounding fields, and pasture land, which extended fifty miles along the Apalachicola River, had become “a beacon light to restless slaves for miles around” and its mere existence was considered “an unceasing threat to the property rights of the slave-owners along the border and as such its abatement was demanded.”⁶⁵ Although the garrison itself was located some sixty miles within Spanish territory, Jackson rationalized the incursion as an act of national self-defense since as he informed the Governor of Pensacola, the Spanish authorities had failed to, “return to our citizens . . . those

⁶² Kenneth Wiggins Porter, *Negroes and the Seminole War, 1817-1818*, 36 J. NEGRO HIST. 249, 280 (1951). See also Heidler, *supra* note 56, at 504 (“Americans interpreted [Indian land] claims as open hostility, especially when Seminoles began providing a refuge for runaway slaves.”); Linda K. Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 275 (1975) (“Because the raids had begun as retribution for the harboring of runaway slaves, the debate also became one on slavery and the extent to which the national government was responsible for its protection.”); Mahon, *supra* note 60, at 62 (“Slaveholders considered [a garrison of black troops substantially made up of “runaway slaves” as] renegades and . . . a menace to their lives and property.”); Rosen, *supra* note 52, at 562-63 (“Jackson invaded Florida with the stated goal of stopping the ongoing border conflict with the Indians, but with the additional underlying objectives of ousting the Spanish from Florida and ending the territory’s role as a sanctuary for fugitive slaves.”).

⁶³ See *supra* text accompanying note 48 (quoting President Monroe’s 1819 State of the Union Address in which he referred to “savage communities”). In this sense, the First Seminole War might fairly be characterized as the opening act in the conflict that ultimately culminated in the Civil War.

⁶⁴ See Porter, *supra* note 62, at 260-61 (describing the inhabitants of the garrison at the “Negro Fort” as “[s]omething over 300 Negroes, including women and children, together with about 20 renegade Choctaw and a few Seminole warriors . . .”).

⁶⁵ *Id.* at 261.

negroes now in [the] fort" who had been "stolen and enticed" from "the service of their masters."⁶⁶ In his orders to General Edmund Gaines, Jackson said that he harbored "little doubt . . . that this fort has been established by some villains for the purpose of rapine and plunder, and that it ought to be blown up, regardless of the ground on which it stands."⁶⁷ "[D]estroy it," he emphatically concluded, "and return the *stolen negroes* and property to their rightful owners."⁶⁸

Nothing could have been further from the truth. As Jackson was well aware, the fort originally had been built by the British Army in 1814.⁶⁹ When the British pulled their forces out of Florida the following summer, they left the garrison and its armaments in the custody of fugitive slaves, who had been recruited with the promise of freedom and land in exchange for their service to the British Government.⁷⁰ As Joshua Giddings, a prominent abolitionist politician from Ohio, observed with the perspective of forty years:

Perhaps no portion of our national history exhibits such disregard of international law, as this unprovoked invasion of Florida. For thirty years, the slaves of our Southern

⁶⁶ See Letter from General Jackson to the Governor of Pensacola, 23 April 1816, AMERICAN STATE PAPERS: FOREIGN RELATIONS 4:555-56 (Walter Lowrie & Walter S. Franklin eds., 1834) (instructing Governor Zuniga, as the authority of Spanish Florida, to take action against the Fort, or expect U.S. forces to cross the border and destroy the settlement in order to defend U.S. citizens' property rights).

⁶⁷ JOSHUA R. GIDDINGS, THE EXILES OF FLORIDA 37 (1858) (quoting Jackson's order to General Gaines).

⁶⁸ *Id.*; see also Letter from General Jackson to the Secretary of War, 15 June 1816, AMERICAN STATE PAPERS: FOREIGN RELATIONS 4:557 ("[T]here can be no fear of disturbing the good understanding that exists between us and Spain, by destroying the negro fort, and restoring to the owners the negroes that may be captured. The 4th and 7th infantry will be sufficient to destroy it.").

⁶⁹ See, e.g., Report of Captain Amelung to General Jackson, 4 June 1816, AMERICAN STATE PAPERS: FOREIGN RELATIONS 4:557 (providing General Jackson intelligence on the fort, including that it was constructed by "Nichols and Woodbine" of the British army).

⁷⁰ See Wright, *supra* note 59, at 569 (stating that black soldiers who served under the British at the fort were promised freedom as well as land and that most remained living at the fort or in nearby settlements); see also Porter, *supra* note 62, at 260 (noting that after the British forces left the fort they relinquished their armaments to refugee slaves who had been recruited by the promise of freedom at war's end).

States have been in the habit of fleeing to the British Provinces. Here they are admitted to all the rights of citizenship, in the same manner as they were in Florida. They vote and hold office under British laws; and when our Government demanded that the English Ministry should disregard the rights of these people and return them to slavery, the British Minister contemptuously refused even to hold correspondence with our Secretary of State on a subject so abhorrent to every principle of national law and self-respect. Our Government coolly submitted to the scornful arrogance of England; but did not hesitate to invade Florida with an armed force, and to seize faithful subjects of Spain, and enslave them.⁷¹

Moreover, the allegation that the Black Seminole population of Spanish Florida was a genuine military threat to the United States was a sheer pretext for aggression. It is true, of course, that the Seminoles and their black allies aggressively defended themselves against the encroachments of white settlers and bounty-hunters searching for escaped slaves. The Indians, however, ineffectually pressed claims for the return of lands that they believed were rightfully theirs.⁷² As a result, periodic outbursts of violence, followed by the inevitable cycle of reprisal and counter-reprisal, were endemic in the Apalachicola River region.⁷³

⁷¹ GIDDINGS, *supra* note 67, at 37 n.1.

⁷² See, e.g., Porter, *supra* note 62, at 255 (observing that “to the numerous free Negroes and the runaways living among the Indians [annexation] meant the loss of hard-won freedom”). Wright, *supra* note 59, at 565 (“There is no doubt . . . that [the Seminoles] considered that part of their lands lay in the United States above the Florida boundary, that the Americans were the aggressors, and that, rather than making unprovoked attacks, the Indians were merely defending their homeland.”) (footnote omitted).

⁷³ David Mitchell was a respected former Governor of Georgia, who served as the official U.S. envoy to the Indians in the region during this period. During the Senate investigation into Jackson’s conduct of the war, Mitchell testified that, in his experience:

The peace of the frontier of Georgia has always been exposed and disturbed, more or less, by acts of violence, committed as well by the whites as the Indians; and a spirit of retaliation has mutually prevailed . . . I believe the first outrage committed on the frontier of Georgia, after the treaty of Fort Jackson, was by these [white] banditti, who plundered a party of Seminole Indians, on their way to Georgia for the purpose of trade, and killed one of them. This produced retaliation on the part of the Indians.

But the notion that the Black Seminoles were preparing to launch a campaign of “rapine and plunder” against the white citizenry of Georgia or Alabama was preposterous. Quite the opposite, as one disinterested observer reported, the prospect of facing Jackson’s army left the native population “terrified, not hostile.”⁷⁴ While it amounted to little more than thinly-veiled racist demagoguery, the accusation nevertheless became part of the standard repertoire of Jackson’s partisan defenders. As one ardent congressional supporter put it, Ambrister’s execution had been justified because he supposedly “came to Florida to command the runaway negroes of Georgia, slaves who had absconded from their masters, and were organized by him to return to our country, and visit it with all the horrors of a savage negro war.”⁷⁵

In any event, Jackson’s forces quite literally blew up Negro Fort by deliberately firing a cannon ball into the fort’s ammunition depot. Some 270 men, women, and children were killed in the explosion and the ensuing battle. The Americans reportedly took 64 prisoners, including two men who were identified as the resident Negro and Choctaw chiefs. In a nascent version of extraordinary rendition, they were turned over to friendly Creek Indians who had been recruited to fight alongside the U.S. Army. The two men were immediately executed in retaliation for the death of an American prisoner, although not before the Choctaw chief was scalped alive.⁷⁶

Sworn statement of D. B. Mitchell, 23 February 1819, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:748-49 (Walter Lowrie & Matthew St. Claire Clarke eds., 1832). See also HEIDLER & HEIDLER, *supra* note 55, at 79-80 (detailing David Mitchell’s appointment as the U.S. agent to the Creek Indian tribe under President Madison).

⁷⁴ HEIDLER & HEIDLER, *supra* note 55, at 123.

⁷⁵ 33 ANNALS OF CONG. 1039 (1819). In 1830, then-President Jackson rewarded Representative Henry Baldwin’s loyalty with an appointment to the Supreme Court where he earned “the dubious distinction of being the first Supreme Court Justice to expound the principle of substantive due process—to protect slave-owners against possible congressional action.” Donald M. Roper, *Judicial Unanimity and the Marshall Court – A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118, 131 (1965). See also *Groves v. Slaughter*, 40 U.S. 449, 510-17 (1841) (Baldwin, J., concurring) (stating that for the federal scheme of government to work, slaves must be considered nothing more than legal property).

⁷⁶ See Letter from General Jackson to the Governor of Pensacola, 23 April 1816, AMERICAN STATE PAPERS: FOREIGN RELATIONS 4:555 (urging that the “negro fort” needed to be subdued because it posed a threat to peaceful diplomatic relations between the United States and Spain); GIDDINGS, *supra* note 67, at 41-42

The few remaining prisoners who survived their wounds were returned to Georgia and sold into slavery, thereby fulfilling Jackson's charge. In most cases, it was impossible to establish who had a valid claim of ownership to these persons, considering there was no reliable "proof of identity, nor was there any court authorized to take testimony, or enter decree in such case."⁷⁷ In order to clear any cloud over the title, the survivors "were delivered over upon *claim*, taken to the interior, and sold to different planters" where they were "swallowed up" in the mass of African-Americans being held in slavery.⁷⁸

The atrocity at Negro Fort effectively ended the presence of free blacks in the Apalachicola River region, with approximately one-third of the entire population living in Spanish Florida having been either killed or enslaved. The survivors of the Negro Fort settlement who managed to escape the massacre fled east to the Suwanee River. There, they found refuge with another branch of the Seminole moieties living under the protection of Chief Bowlegs.⁷⁹ In early 1817, Alexander Arbuthnot, a seventy year-old Scottish merchant, arrived at the Seminole settlement on the Suwanee in his schooner *Chance*. Having obtained a license from the Spanish governor of Cuba, Arbuthnot had loaded his vessel with merchandise and set off for Indian country with the intention of establishing a trading-house.⁸⁰ Although he was undoubtedly a shrewd businessman in search of profits, he also took a genuine interest in the welfare of the Seminoles. As such, he "frequently wrote on . . . Bowlegs's behalf to American officers and officials,"

(describing the massacre at the fort and the execution of the Negro and Choctaw chiefs); Porter, *supra* note 62, at 264 (stating that the Negro and Choctaw chiefs were executed in retaliation for an American prisoner's death). In exchange for assisting in the attack, the Creeks were promised booty seized at Negro Fort, as well as a bounty of \$50 for each American-owned slave they captured. KENNETH W. PORTER, *THE BLACK SEMINOLES: HISTORY OF A FREEDOM-SEEKING PEOPLE* 17 (Alcione M. Amos & Thomas P. Senter eds., 1996).

⁷⁷ GIDDINGS, *supra* note 67, at 42.

⁷⁸ *Id.*

⁷⁹ See Porter, *supra* note 62, at 264-65 (explaining that those who were able to escape the massacre at the Negro Fort settlement fled to Bowlegs's villages on the Suwanee).

⁸⁰ See *id.* at 266 (detailing Arbuthnot's 1817 arrival to Suwanee in order to establish a trading-house); Wright, *supra* note 59, at 573 (noting that by 1817, Arbuthnot had established stores along the Suwanee river with the approval of the Spanish governor of Cuba).

urging the return of territory which they felt had been taken by the United States in violation of its treaty obligations. Arbuthnot's letters "were later remembered and held against him."⁸¹

Several months later, Arbuthnot's schooner returned to the Suwanee settlement from a trip to the West Indies with a number of white passengers. Among them was a young Robert Ambrister, who had recently lost his commission in the British Royal Marines reportedly for engaging in an illegal duel, the scion of a prominent Bahamian family.⁸² In need of employment, Ambrister had accepted the invitation of his former captain, George Woodbine, who had trained pro-British Indians and fugitive slaves to fight the Americans in a previous conflict, to return to Florida.⁸³ Now soldiers of fortune, the purpose of their mission was frankly paramilitary; namely, to "work[] with Indians and blacks to drive the Spanish out of Florida."⁸⁴

Although Woodbine soon left, Ambrister decided to remain. According to the testimony at his court martial, he reportedly said that he intended "to see the Negroes righted" and encouraged them not to retreat before the advancing Americans "for, if they ran any further [sic], they would be driven into the sea."⁸⁵ Given his military experience, he thus took over the task of "drilling . . . the Negro warriors" as well as acting as a counselor to Chief Bowlegs.⁸⁶ It was for these actions, rather than any actual war

⁸¹ Porter, *supra* note 62, at 266-67. See Rosen, *supra* note 52, at 561 ("In Florida, Arbuthnot served as an advocate for the restoration of Creek lands in Alabama and Georgia, which they had ceded to the United States.").

⁸² See HEIDLER & HEIDLER, *supra* note 55, at 151-52 (summarizing Ambrister's Bahamian heritage and the rumor that he lost his commission with the British Royal Marines due to an illegal duel); PORTER, *supra* note 76, at 18 (identifying the two white men Arbuthnot returned from the West Indies with as British Captain Woodbine and Robert C. Ambrister). Ambrister's father was a successful merchant and the Secretary of the Bahamian legislature, while his uncle was the Provincial Governor. See Frank L. Owsley, Jr., *Ambrister and Arbuthnot: Adventurers or Martyrs for British Honor*, 5 J. EARLY REPUBLIC 289, 299, 305 (1985) (providing background on Arbuthnot and Ambrister's executions).

⁸³ See Owsley, *supra* note 82, at 296-98 (detailing Woodbine's history as a British agent and recruiter of pro-British Indians and slaves in Florida).

⁸⁴ Rosen, *supra* note 52, at 562; see also Owsley, *supra* note 82, at 305 ("Although Jackson was certain that Ambrister's expedition was aimed at the United States, it was in fact directed at the Spanish in Florida.").

⁸⁵ 28 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:732.

⁸⁶ Porter, *supra* note 62, at 267.

crimes, that Arbuthnot and Ambrister would incur the wrath of Old Hickory.

Meanwhile, the Fort Negro massacre dramatically ratcheted up the level of tension between the parties, making the outbreak of further violence almost inevitable. Lest there be any doubt about the Americans' motives, in August 1817, General Gaines sent a letter to Kenhadjo, the chief of the largest of the Seminole bands, whose settlement stretched for several miles on the shore of Lake Miccosukee, near present-day Tallahassee.⁸⁷ After complaining that the Seminoles were "bad people" who had "murdered many of my people, and stolen my cattle and many good horses,"⁸⁸ Gaines finally got to the point of his missive: "You harbor a great many of my black people among you at Sahwahnee," he wrote, "[i]f you give me leave to go by you against them, I shall not hurt any thing belonging to you."⁸⁹ In response, the chief curtly rejected this "olive branch":

You charge me with killing your people, stealing your cattle, and burning your houses; it is I that have cause to complain of the Americans I harbor no negros. When the Englishmen were at war with America, some took shelter among them; and it is for you white people to settle those things among yourselves I shall use force to stop any armed Americans from passing my towns or my lands.⁹⁰

As Kenneth Porter has observed: "[a] U.S. general had demanded, from a Seminole chief, the right to go slave hunting in Spanish territory and been refused. Kenhadjo, previously uninvolved in the hostilities surrounding him, was now an enemy."⁹¹ As they would soon learn, the Miccosukee band would pay a heavy price for their chief's defiance.

⁸⁷ See *id.* (describing the letter that General Gaines sent Chief Kenhadjo on August 1817); see also HEIDLER & HEIDLER, *supra* note 55, at 39, 99 (detailing the content of the letter General Gaines sent to Kenhadjo in August of 1817).

⁸⁸ Letter from General Gaines to the Seminole Chief, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:723.

⁸⁹ *Id.*

⁹⁰ Letter from King Hatchy to General Gaines, In Answer to the Foregoing, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:723.

⁹¹ PORTER, *supra* note 76, at 19; see also HEIDLER & HEIDLER, *supra* note 55, at 99-100.

The immediate *casus belli* was a bloody incident that occurred at Fowltown, a small Seminole village, which had been a persistent source of tension because it sat on land claimed by white settlers under the Treaty of Fort Jackson, on the Flint River just north of the Florida border.⁹² In November 1817, a detachment of U.S. soldiers from nearby Fort Scott crossed the river to the Seminole side to gather wood. In response, the chief of Fowltown, Neamathla, informed General Gaines in no uncertain terms “not to cross or cut a stick of wood on the east side of Flint River, alleging that the land was his . . . [and] that he was directed . . . to protect and defend it, and should do so.”⁹³

Such a challenge would prove “irresistible to an American frontier commander,” and Gaines demanded a meeting with Neamathla to resolve the matter.⁹⁴ The chief refused the general’s invitation, and Gaines promptly sent a detachment of 250 soldiers to retrieve him and his warriors, albeit with instructions that “in the event of resistance . . . treat them as enemies.”⁹⁵ Inevitably, in defense of their village, the Seminoles fired on the approaching troops, who proceeded to kill an unknown number of warriors, drive the survivors into the swamps, and then plunder the village and burn it to the ground. As Gaines explained the incident in a report to his superiors, he claimed he was a reasonable and peace-loving man, but “[t]he poisonous cup of barbarism cannot be taken from the lips of the savage by the mild voice of reason alone; the strong mandate of justice must be resorted to and enforced.”⁹⁶

⁹² See PORTER, *supra* note 76, at 19 (attributing the outbreak of the First Seminole War to the clash at Fowltown); see also REMINI, *supra* note 54, at 345 (noting that the Seminoles “did not want war” with the U.S. at the time).

⁹³ Extract of a Letter from General Gaines to Major General Andrew Jackson, 21 November 1817, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:686.

⁹⁴ REMINI, *supra* note 54, at 346; see also HEIDLER & HEIDLER, *supra* note 55, at 100 (explaining that Fowlton would be an “easy” target for the U.S. Army and that General Gaines had concluded that “the only recourse [against the Indians there] was force”).

⁹⁵ Extract of a Letter from General Gaines to Major General Andrew Jackson, 21 November 1817, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:686; see also HEIDLER & HEIDLER, *supra* note 55, at 104 (explaining that after Neumathla declined General Gaines’s invitation to meet, Gaines mobilized 250 men to Fowlton).

⁹⁶ Extract of a letter from General Gaines to the Secretary of War, 4 December 1817, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:688.

It is generally agreed that the First Seminole War began in earnest with the unprovoked destruction of Fowltown.⁹⁷ The Seminoles wasted no time in exacting revenge. Nine days later, a large open boat was slowly moving up the Apalachicola River toward Fort Scott carrying forty soldiers, most of whom were sick, as well as seven women and four children. Lying in wait, the Seminoles ambushed the boat when it drifted close to the shoreline and killed everyone on board with the exception of one woman who was taken hostage and four soldiers who managed to escape.⁹⁸ On December 16, after news of the bloodbath reached Washington, D.C., Calhoun authorized Gaines to “consider [him]self at liberty to march across the Florida line and to attack [the Seminoles] within its limits, should it be found necessary, unless they should shelter themselves under a Spanish post. In the last event, [he was to] immediately notify [the War] Department.”⁹⁹ Ten days later, Calhoun ordered Jackson to take over command of the campaign at Fort Scott and “to adopt the necessary measures to terminate [the] conflict” with the Seminoles.¹⁰⁰

When the ground invasion began the following spring, Jackson’s principal targets were the Black Seminole villages on the Suwanee River. But other than a few skirmishes along the way, his army of some 3,300 men encountered remarkably little armed

⁹⁷ According to David Mitchell, “General Gaines . . . sent for the chief of Fowltown, and for his contumacy in not immediately appearing before [sic] him, the town was attacked and destroyed by the [sic] troops of the United States, by order of General Gaines. This fact was, I conceive, the immediate cause of the Seminole war.” No. 16, 23 February 1819, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:749.

⁹⁸ See HEIDLER & HEIDLER, *supra* note 55, at 105, 107 (describing the passengers and the ensuing ambush); Porter, *supra* note 62, at 268–69 (detailing the Indians’ and Negroes’ ambush and slaughter of U.S. troops, women, and children on board a boat traveling up the Apalachicola river); see also REMINI, *supra* note 54, at 346.

⁹⁹ Letter of J.C. Calhoun, 16 December 1817, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:689.

¹⁰⁰ Letter of J.C. Calhoun, 26 December 1817, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:690. The newly-minted Secretary of War assumed, naively perhaps, that his instructions to Jackson did not rescind the previous limitation on taking possession of Spanish territory without prior Department approval. Although well aware of Gaines’s orders, Jackson was determined to seize Florida anyway, and made his intentions clear in a letter to President Monroe several weeks later, to which the President never responded. 4 THE PAPERS OF ANDREW JACKSON 1816–1820, 166–67 (Harold D. Moser et al. eds., 1994); see also HEIDLER & HEIDLER, *supra* note 55, at 117–21 (discussing the history and implication of “Calhoun’s 26 Decemeber 1817 order to Jackson”).

resistance, which arguably undermines any claim that the offensive had been justified as an act of preemptive self-defense. On April 1, Jackson's campaign began by destroying the Miccosukee settlement, apparently in retaliation for Kenhadjo's refusal to permit the Americans to traverse his territory in search of fugitive slaves. During the battle, one American soldier was killed and several were wounded. Although definitive casualty figures for the Seminoles are not known, Jackson reported to his superiors with apparent satisfaction "that his forces had burned 300 houses and made off with ample corn and cattle."¹⁰¹

A week later, he notified the Spanish commander of St. Marks with some rhetorical license that he had been ordered by the President to "chastise a savage foe who combined with a lawless band of Negro brigands, have for some time past been carrying on a cruel and unprovoked war against the citizens of the United States [T]he next day, he occupied St. Marks without a fight."¹⁰² The next day, he occupied St. Marks without resistance. There were no Negro "brigands" or Indian "savages" anywhere in sight, but Jackson did find Arbuthnot huddled in the Governor's quarters and captured him.¹⁰³ His men also managed to capture two Seminole chieftains, Imala Micco and Prophet Francis, who had been lured aboard an American naval vessel in the harbor that was falsely flying a British flag. While the white European was afforded the courtesy of a trial before being executed, Jackson spitefully ordered the Indians to be "hung without trial, and with little ceremony."¹⁰⁴

¹⁰¹ Mahon, *supra* note 60, at 65. As David and Jeanne Heidler point out, the Miccosukee Seminoles did not want war, and they sent talks to Gaines stating it. They only wanted whites to stop stealing their cattle and killing their people The headmen were old men, tired of running and wary of fighting, fearful of losing everything and destroying their people.

HEIDLER & HEIDLER, *supra* note 55, at 99. The Miccosukee settlement thus does not appear to have been a legitimate military target.

¹⁰² Mahon, *supra* note 60, at 65.

¹⁰³ See Owsley, *supra* note 82, at 293-94 (noting that Arbuthnot was captured inside the governor's quarters at St. Marks).

¹⁰⁴ 33 ANNALS OF CONG. 261 (1819). See also Porter, *supra* note 62, at 270 (stating that "Jackson had the chiefs summarily hanged"); Mahon, *supra* note 60, at 65-66 (noting that the Indians captured were executed without a trial while Arbuthnot was court-martialed).

The irony is that earlier in the conflict, warriors under the leadership of Prophet Francis had captured Duncan McKrimmon, a young soldier in the Georgia militia, and condemned him to death in reprisal for the Americans' killing of Indian civilians. While they were preparing to carry out the execution, the chief's oldest daughter, Milly, interceded for the terrified soldier's life, apparently out of a sheer sense of compassion. The warriors relented with the chief's blessing, and not only didn't kill the man, but eventually ransomed him to the Spaniards for several gallons of rum. After the war, McKrimmon was so grateful to Milly for saving his life that he brought her a modest gift of money he had collected from the citizens of his home town and offered to marry her, although she politely declined.¹⁰⁵ Savagery, it seems, is in the eye of the beholder.¹⁰⁶

Jackson then turned his attention to Bowleg's Town, the largest of the settlements under the leadership of Chief Bowlegs, which was about 100 miles away on the Suwanee River. He reached the town on April 16, where after a brief engagement, the majority of the Seminoles and black settlers broke into small groups and disappeared into the woods. Frustrated at his inability to engage the enemy, Jackson ordered the town to be looted and destroyed; his forces suffered no casualties.¹⁰⁷ While Jackson's men were busy plundering the town for food and cattle, Ambrister

¹⁰⁵ See 33 ANNALS OF CONG. 753 (1819) (summarizing Milly's intervention on behalf of the condemned McKrimmon to save him from execution); HEIDLER & HEIDLER, *supra* note 55, at 138-39 (chronicling the history and meeting between McKrimmon and Milly); T. Frederick Davis, *Milly Francis and Duncan McKrimmon: An Authentic Florida Pocahontas*, 21 FLA. HIST. Q. 254, 256-60 (1943) (detailing Milly's intervention to prevent the execution of McKrimmon, as well as his subsequent gift of gratitude and offer of marriage).

¹⁰⁶ The story of McKrimmon's reprieve was recounted by Representative Henry Storrs during the debate over Jackson's censure. To his credit, Storrs included Jackson's execution of the Indians in his indictment of the general's actions. "We profess to be the only free Government on earth[.]" Storrs said in his floor speech, "that our intercourse with foreign nations is characterized by moderation and justice . . . that our national character is beyond reproach . . . Let our vote, on this occasion, wash out the stains which have tarnished our reputation by the execution of the Indian chiefs and the death of Arbuthnot and Ambrister. If, however, these deeds of cruelty are to receive the sanction of this House, here, before God and man, I wash my hands of their blood." 33 ANNALS OF CONG. 753-54 (1819).

¹⁰⁷ See Mahon, *supra* note 60, at 65-66 (describing Jackson's assault on Bowlegs Town); see also Porter, *supra* note 62, at 273-75 (pointing out that in the destruction of Bowlegs Town, Jackson's men suffered no casualties).

“blundered into the camp at midnight on [his] way back to Suwanee, not having heard of its capture” and was promptly taken into custody.¹⁰⁸

5. THE TRIAL AND EXECUTION OF ARBUTHNOT AND AMBRISTER

Although Jackson’s troops would go on to occupy Pensacola, again without firing a shot in anger, the active phase of military operations in the First Seminole War was at an end. Jackson returned to St. Marks with Ambrister in tow, and informed Calhoun that he would be leaving for his home in Tennessee since his continued “presence in this country can be no longer necessary.”¹⁰⁹ But first he had to take care of some unfinished business. On April 26, he convened what was styled a “special court-martial” comprised of a panel of 12 Army officers, with General Gaines serving as the presiding officer, to hear the charges and specifications against the defendants.

The outcome was largely a foregone conclusion. As Jackson had informed Calhoun when Arbuthnot was apprehended several weeks earlier, the elderly Scot was “suspected as an instigator of this savage war” and would be held “in confinement, until evidences of his guilt can be collected.”¹¹⁰ When a cache of his letters was found on board his schooner, Jackson had all the evidence he needed, even if their contents did not logically support the theory that Arbuthnot deliberately incited the Seminoles to engage in an unlawful belligerency.¹¹¹ Not wanting to leave

¹⁰⁸ Porter, *supra* note 62, at 276; *see also* Owsley, *supra* note 82, at 303 (describing the circumstances of Ambrister’s arrest by Jackson’s forces).

¹⁰⁹ 33 ANNALS OF CONG. 261 (1819); *see also* REMINI, *supra* note 54, at 356–57 (“As far as [Jackson] could tell the war against the Seminoles was over. No appreciable hostile force appeared to do battle. Indians simply vanished . . . whenever he appeared. Obviously they could not wage war and probably had never been prepared for one in the first place.”).

¹¹⁰ Letter from General Jackson to Secretary of War John C. Calhoun, 8 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:699–700.

¹¹¹ The Seminoles’ strategic decision to retreat at Suwanee was informed by Arbuthnot’s warning that resistance to Jackson’s forces would be futile. On April 2, 1818, word of Jackson’s invasion had reached Arbuthnot at St. Marks, and he immediately wrote a letter to his son. *See* Letter from A. Arbuthnot to his son, John Arbuthnot, 2 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:722. “The main drift of the Americans,” he pointed out, “is to destroy the black

anything to chance, five of the members Jackson chose to serve on the panel “were Volunteer officers whom [he] had personally recruited for the campaign.”¹¹² The proceedings then moved with breathtaking alacrity; over the course of the next *seventy-two hours*, the defendants were formally charged, tried, convicted, and executed.¹¹³

The only glitch occurred with respect to the sentence given to Ambrister, who chose to throw himself on the mercy of the court rather than contest the validity of the charges. The panel had initially sentenced both men to death but, upon reconsideration, reduced Ambrister’s sentence to fifty lashes and one year’s confinement at hard labor, whereupon “the court adjourned *sine die*.”¹¹⁴ Never a stickler for legal formalities, Jackson was not inclined to let a mere verdict stand in the way of exacting vengeance. As such, he presumed as the convening authority to approve the findings and sentence with respect to Arbuthnot, but “disapprove[d] the reconsideration of the sentence” given to

population of Suwany. Tell my friend Bowleck that it is throwing away his people to attempt to resist such a powerful force” *Id.* While this letter was introduced by the prosecution in an unsuccessful attempt to prove that Arbuthnot was guilty of being a spy, it plainly undermines the notion he instigated the Indians to engage in hostilities, lawful or otherwise, against the United States. As Arbuthnot said in his closing argument, “[n]othing . . . of an inflammatory nature can be found on reading the document . . . authorizing the opinion that I was prompting the Indians to war.” See Defence (K.) of A. Arbuthnot, 26 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:730. If anything, he did precisely the opposite. Given the illogic of the charge, it is difficult to resist the conclusion that Jackson’s animosity toward Arbuthnot was motivated, at least in part, by his belief that Arbuthnot’s warning had deprived him of the opportunity to inflict greater casualties at Suwanee. See REMINI, *supra* note 54, at 356 (noting Jackson’s intention to execute Arbuthnot and Ambrister after discovering that the two men warned the Seminoles when Jackson’s army was approaching); see also Letter from General Jackson to Governor of Pensacola Don Jose Masot, 23 May 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:712-13 (providing an account of the battle for Suwanee and the limited number of casualties inflicted by Jackson’s army).

¹¹² HEIDLER & HEIDLER, *supra* note 55, at 153.

¹¹³ See, e.g., Robert Butler, Adjutant General, Head-Quarters Division of the South, General Orders, 29 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:734 (promulgating order of Maj. Gen. Jackson approving the conviction and death sentence of Arbuthnot and Ambrister, respectively, following “a special court-martial, commenced on the 26th instant at St. Marks, and continued until the night of the 28th”).

¹¹⁴ *Id.*

Ambrister and reimposed the death penalty.¹¹⁵ Shortly thereafter, Arbuthnot was hanged from the yardarm of his schooner, while Ambrister was given the military honor of being shot by a firing squad.¹¹⁶

Perhaps not surprisingly, the proceedings were infected with significant jurisdictional and procedural errors. In particular, both men were convicted of "aiding, abetting, and comforting the enemy" and "supplying them with the means of war," while being "subject[s] of Great Britain."¹¹⁷ In addition, Arbuthnot was convicted of "[e]xciting and stirring up the Creek Indians to war against the United States," whereas Ambrister was convicted of "[l]eading and commanding the Lower Creek Indians in carrying on a war against the United States."¹¹⁸

Unlike Ambrister, Arbuthnot requested the appointment of counsel and mounted a vigorous defense on the merits. Except for a series of letters which showed that he had repeatedly advocated for the Seminoles' treaty rights and attempted to dissuade them from engaging in an armed conflict that they were certain to lose,¹¹⁹ the evidence against Arbuthnot consisted almost entirely of hearsay that conspicuously tracked the prosecution's theory of the

¹¹⁵ *Id.*

¹¹⁶ See Rosen, *supra* note 52, at 563 (describing the circumstances surrounding Ambrister and Arbuthnot's executions); see also HEIDLER & HEIDLER, *supra* note 55, at 156 (same).

¹¹⁷ Robert Butler, Adjutant General, Head-Quarters Division of the South, General Orders, 29 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:734.

¹¹⁸ *Id.*

¹¹⁹ In addition to the letter advising Bowlegs that armed resistance to Jackson's forces was futile, the prosecution introduced into evidence a letter from Arbuthnot to David Mitchell, in which he wrote that:

In taking this liberty of addressing you . . . in behalf of the unfortunate Indians, believe me I have no wish but to see an end put to a war, which, if persisted in, I foresee must eventually be their ruin; and as they were not the aggressors, if, in the height of their rage, they commit excesses, that you will overlook them as the just ebullitions of an indignant spirit against an invading foe.

Extract from Letter written by A. Arbuthnot to General Mitchell, 19 January 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:729. Not to belabor the obvious, but while this letter clearly constitutes evidence that Arbuthnot advocated on behalf of the Seminoles in an attempt to resolve an ongoing conflict in which, as he rightly says, "they were not the aggressors," it can hardly be construed as evincing his intention to incite them to engage in unlawful belligerency against the United States. *Id.*

case. The chief witness against him was William Hambly, an employee of a rival trading company, who bitterly resented Arbuthnot's competition.¹²⁰ Hambly testified, over Arbuthnot's objection, that he had been "told by chiefs and Indians . . . that [Arbuthnot] advised them to go to war with the United States, if they did not surrender them the lands which had been taken from them, and that the British government would support them in it."¹²¹ He was also permitted to testify that, in his opinion, the Seminoles would not have "commenced the business of murder and depredation on the white settlements" but for Arbuthnot's alleged assurances that they would receive "British protection."¹²²

Other than Hambly, the most important prosecution witness was Peter Cook, a disgruntled former employee of Arbuthnot's trading house, whose previous employer had fired him after

¹²⁰ See Owsley, *supra* note 82, at 295, 303-04 (arguing that Hambly's association with the Forbes company rendered suspect the credibility of his testimony against Arbuthnot); see also Rosen, *supra* note 52, at 568 (discussing how those who disagreed with the trial's outcome denounced Hambly's and Cook's testimony as unreliable given "their bias against Arbuthnot").

¹²¹ Testimony of William Hambly, 27 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:729.

¹²² *Id.* In another of the cruel ironies in this case, Hambly had collaborated with the Americans in the destruction of Negro Fort, acting "as a guide to point out the location of the fort's magazines." Owsley, *supra* note 82, at 293; see also HEIDLER & HEIDLER, *supra* note 55, at 72 (chronicling how Hambly led American forces to the Negro Fort); Petition of the chiefs of the Lower Creek nation to Governor Cameron, 27 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:728 (discussing Hambly's "instrumental" role in the destruction of the fort); The humble representations of the chiefs of the Creek nation to his excellency Governor Cameron, 27 January 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:723 (identifying Hambly as left "in charge of the fort at Prospect Bluff"). Hambly also acted as a middleman in the transactions that sold fugitive slaves captured at the fort back into slavery. PORTER, *supra* note 76, at 20. From the Seminoles' perspective, Hambly was further implicated in the attack on Fowltown because he had sold supplies to the American soldiers who destroyed the village. HEIDLER & HEIDLER, *supra* note 55, at 112. In December 1817, warriors from Fowltown captured Hambly and a colleague, and brought them to Bowleg's Town where they were put on trial for their complicity in the Fort Negro massacre. PORTER, *supra* note 76, at 20. Although "[m]any suggested that they should be turned over to the few Choctaw survivors of the catastrophe for punishment[.]" the Black Seminole chief intervened and got them off "to St. Mark's, where [they were kept in] 'protective custody.'" PORTER, *supra* note 76, at 20. Thus, Hambly survived to testify against Arbuthnot only because a Black Seminole leader exercised his discretion to spare Hambly from an almost certain death sentence.

accusing him of theft.¹²³ To be sure, the evidence showed that Arbuthnot had sold a sizable quantity of gunpowder and ammunition to the Seminoles at Bowleg's Town. But as Arbuthnot pointed out in closing, the material was not sufficient to sustain a large fighting force for more than a short period, and had been sold to the Seminoles in the course of his regular business for hunting purposes, which was their primary source of food.¹²⁴ In order to counter this innocent explanation, Cook was permitted to testify that, while he had never actually seen any weapons cache, he allegedly "was told by Bowlegs that he had a great quantity" of ammunition that was being kept in reserve "to fight with."¹²⁵

In addition, the prosecution introduced a letter from Arbuthnot to Charles Bagot, the British Minister to the United States, bringing to his attention "the deplorable situation in which [the Seminoles] are placed by the wanton aggressions of the Americans"¹²⁶ The back of the letter contained an incriminating note, which appeared to be an inventory of arms and ammunition needed by Kenhadjo, Bowlegs, Prophet Francis, and others for the purpose of "attacking those Americans who have made inroads on their territory."¹²⁷ However, "[t]his note was never identified as having been written by Arbuthnot."¹²⁸

Over and above these sorts of evidentiary deficiencies, it was clear to all but the most partisan observers that the tribunal lacked jurisdiction over both the subject matter of the proceedings and the defendants. In the first place, under the existing Articles of War, none of the charges against the men stated a statutorily authorized

¹²³ See Owsley, *supra* note 82, at 295 (arguing that given Cook's history, he "could [not] have been considered a reliable witness"); see also HEIDLER & HEIDLER, *supra* note 55, at 154-55 (asserting that the panel never questioned Cook's integrity despite his dubious past).

¹²⁴ See, e.g., Defence (K.) of A. Arbuthnot, 26 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:730-31 (contending the amount of gunpowder sold to the Seminoles would not have "lasted more than two months for hunting").

¹²⁵ Testimony of Peter B. Cook, 26 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:728.

¹²⁶ Letter from A. Arbuthnot to the Honorable Charles Bagot, 27 January 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:723.

¹²⁷ *Id.*

¹²⁸ Owsley, *supra* note 82, at 295. Although there was no evidence that Arbuthnot wrote the note, it would not have been a violation of the law of war for a non-resident alien to sell weapons to insurgents engaged in hostilities against the United States. See *infra* text accompanying notes 146-51.

offense, with the exception of spying, of which Arbuthnot had been acquitted.¹²⁹ As Speaker Henry Clay noted, Arbuthnot's actions, in particular, were not wrongful in any event, because they merely:

consisted in his trading, without the limits of the United States, with the Seminole Indians, in the accustomed commodities which form the subject of the Indian trade; and that he sought to ingratiate himself with his customers by espousing their interests, in regard to the provision of the Treaty of Ghent, which he may honestly have believed entitled them to the restoration of their lands.¹³⁰

Moreover, as Rep. Charles Mercer pointed out, "[i]n th[e] enumeration of persons subject to the cognizance of an American court martial, a search will be made in vain for a description corresponding with Arbuthnot and Ambrister, after the former had been acquitted of being a spy."¹³¹ On the contrary, the charges against them alleged, at best, municipal offenses, which could not

¹²⁹ See Defence (K.) of A. Arbuthnot, 26 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:730 (illustrating how the defendant was not found guilty of "acting as a spy"); Defense (M.) of Robert Christy Ambrister, 28 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:734 (stating the charges brought against Ambrister). See generally Act for Establishing Rules and Articles for the Government of the Armies of the United States, 2 Stat. 359 (1806) (setting forth the regulations by which the armies of the United States were to be governed).

¹³⁰ 33 ANNALS OF CONG. 641 (1819).

Their case was not within the jurisdiction of a court martial. Courts martial, among us, are but the mere creatures of positive law. All their authority is derived from the statute which creates them . . . They can take cognizance of no offences whatever, except those specifically named in the statute.

33 ANNALS OF CONG. 752 (statement of Henry Storrs).

Admit the truth of the facts contained in these charges, are they declared penal in any part of the rules and articles of war? Or are they therein declared to be proper subject matters for trial before a court martial? If they were not, it follow[s] . . . that [Jackson] . . . transcended his powers in ordering the court, and that the court itself had stretched its powers to an unwarrantable length, in acting upon matters not cognizable before them.

33 ANNALS OF CONG. 584–85 (statement of Thomas Cobb).

¹³¹ See 33 ANNALS OF CONG. 817 (1819) ("Even where a particular offence is cognizable by a court martial, the character 'of the person determines whether it may be tried by a civil or military tribunal.'" (quoting ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW AND COURTS MARTIAL 19 (1809)).

properly reach foreign nationals who owed no duty of allegiance to the United States. As Rep. Philip Reed explained:

These offenses can only apply . . . to our own citizens or others within the limits or the territories of the United States, who may engage in . . . unlawful acts against the public authority. The law provides for offences of this sort [conspiracies, confederacies, and combinations], but it cannot apply to persons out of the limits of the United States, owing no obligations or allegiance to the United States.¹³²

Jackson's supporters in Congress certainly made an effort to justify his actions by claiming that he could have executed the men without any due process, and that the tribunal should be construed as merely an advisory "council of war," which Jackson was free to disregard in his discretion. The Government strikes a similar pose of uncertainty, stating, "it is not even clear at this juncture whether the military tribunal which tried them was a court martial or a military commission."¹³³ But aside from the fact that the concept of a military commission as we currently know it was invented by Major General Winfield Scott during the Mexican War in 1847,¹³⁴ this sort of equivocation is a fairly desperate dodge, because no one doubted that the proceedings were considered a court martial until it became clear, in hindsight, that his actions were legally indefensible under that rubric.

After all, Jackson's own order affirming the convictions had denominated the tribunal a "special court-martial."¹³⁵ Moreover,

¹³² 33 ANNALS OF CONG. 1069 (1819).

¹³³ Gov't Response (al Bahlul), *supra* note 7, at 25-26; Gov't Response (Hamdan), *supra* note 31, at 18.

¹³⁴ See WINTHROP, *supra* note 7, at 822-23, 832 (describing the U.S. occupation of Mexico during the Mexican War and Major General Scott's institution of martial law and military commissions); see also David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 31-40 (2005) (same).

¹³⁵ Robert Butler, Adjutant General, Head-Quarters Division of the South, General Orders, 29 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:734; see also 33 ANNALS OF CONG. 645-46 (1819) (arguing that Jackson "evidently intended to proceed under the rules and articles of war" and that the tribunal "understood itself to be acting as a court martial"); *id.* at 815-17, 1086 (arguing that the tribunal bore the traditional indicia of a court martial); *id.* at 891-92 (arguing that the tribunal "was a court martial, and was so considered by the General who ordered it, and the officers who sat upon it"); *id.* at 1067

several days after the executions, in a revealing self-congratulatory letter to Calhoun, Jackson did not intimate that the proceedings had been anything other than an ordinary exercise of military justice. In typically florid terms, he explained that Arbuthnot and Ambrister had been:

tried under my orders by a special court of select officers, legally convicted as excitors of this savage and negro war, legally condemned, and most justly punished for their iniquities. The proceedings of the court martial in this case, with the volume of testimony justifying their condemnation, present scenes of wickedness, corruption, and barbarity, at which the heart sickens¹³⁶

Two years later, *after* the congressional debates had revealed the poverty of that position, Jackson adopted the view of his supporters, namely that the tribunal had never been intended to be a court martial. "In organizing the court of inquiry," he wrote in his response to the report of the Senate Military Affairs Committee, "it was only intended (as in councils of war) that the opinion [of the panel members] should operate directory, and as advice, not to become binding."¹³⁷ As a result, the most serious charge against him, the decision to order Ambrister's execution despite the contrary verdict of the panel members, had been entirely appropriate. "Besides, Ambrister was the most criminal," Jackson added, because he had the temerity to have "commanded, in person, a corps of negroes, with the view of anticipating [his] occupation of St. Marks"¹³⁸

(characterizing the tribunal as "to all intents and purposes, a general court martial").

¹³⁶ Letter from Major General Andrew Jackson to Secretary of War J.C. Calhoun, 5 May 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:702. The Government suggests that there is some legitimate doubt as to whether the tribunal was a court martial by citing William Birkhimer's treatise on military law. Gov't Response (al Bahlul), *supra* note 7, at 26 n.15; Gov't Response (Hamdan), *supra* note 31, at 18 n.41. But Birkhimer's analysis is suspect, because he simply adopts *in toto* the revisionist Jacksonian view, which ignores the contemporaneous designation that Jackson himself used to describe the tribunal.

¹³⁷ Memorial of Andrew Jackson to the United States Senate, 23 February 1820, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:758.

¹³⁸ *Id.* Of course, if this is true, one wonders why the panel bothered to render its decision in the form of a verdict, as opposed to issuing a set of factual findings. Under the extant Articles of War, a "court of inquiry" was limited to a

Indeed, it is highly instructive that Jackson's supporters made no serious attempt to defend his actions as a legitimate assertion of court martial jurisdiction, perhaps because the charge sheets conspicuously omitted any reference to the existing Articles of War. Nevertheless, at least two provisions of the code might have been logical candidates. Articles 45 and 46 (now codified as Article 104) prohibited anyone ("whosoever") from "reliev[ing] the enemy with money, victuals, or ammunition" and "hold[ing] correspondence with, or giv[ing] intelligence to, the enemy."¹³⁹ Yet, it apparently never occurred to Jackson's supporters to argue that Arbuthnot and Ambrister's actions had violated these statutory provisions, although the allegations might easily have been couched in those terms. The obvious reason, as already noted, is that "[t]he offenses . . . which are the subject of these two Articles" were commonly understood to be "treasonable in their nature," which necessarily presupposes that they cannot be committed by foreign nationals owing no duty of allegiance to the United States.¹⁴⁰

Instead, Jackson's allies in Congress typically avoided "offering a systematic legal argument for excluding Arbuthnot and Ambrister from the protections of the law," but rather "were content to aver that no law at all protected the two men because they themselves had acted illegally, without being explicit about

maximum of three commissioned officers, whose function was "to reduce the proceedings and evidence to writing," but were generally not permitted to "give their opinion on the merits of the case" Act for Establishing Rules and Articles for the Gov't of Armies of the U.S., art. 91, 2 Stat. 370 (1806). Moreover, the Articles provided that the use of such bodies was disfavored, because Congress recognized that they "may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants" Act for Establishing Rules and Articles for the Gov't of Armies of the U.S., art. 92, 2 Stat. 370 (1806). As such, courts of inquiry were prohibited "unless directed by the President of the United States, or demanded by the accused." *Id.* Needless to say, Jackson did not bother to follow these procedural rules either. In any event, if the panel really was intended to be an advisory body, then it did not function as a judicial tribunal of any sort, much less a "regularly constituted court," and its advice thus cannot plausibly serve as precedent for criminal proceedings in a modern military commission. Arguably, the Government cannot have it both ways.

¹³⁹ WINTHROP, *supra* note 7, at 629.

¹⁴⁰ *Id.*; see also 33 ANNALS OF CONG. 618 (1819) ("The fifty-sixth and seventh articles cannot be construed to extend to foreigners, but are evidently intended to operate on our own citizens only, who shall be found guilty of aiding, abetting, comforting, or corresponding with the enemy.").

what made them outlaws Jackson's allies derided their opponents' arguments as narrowly legalistic, and . . . generally adopted aggressive antilegalist positions."¹⁴¹ This position should temper any comfort the Government derives from the fact that Congress, divided sharply along partisan lines, failed to censure Jackson, which hardly constitutes a ringing vindication of the legality of his conduct. Tellingly, once the political crisis had passed, the next Congress (including eighteen members who had taken Jackson's side in the censure debate) quietly voted to eliminate his position as a Major General under the guise of reducing the size of the Army in a cost-cutting measure. "Ostensibly in the interest of the budget," Heidler notes, Congress thus "removed Andrew Jackson from the military establishment of the United States" with the assent of President Monroe and Secretary Calhoun.¹⁴²

Lastly, even if one assumes (against the weight of the evidence) that the tribunal was intended to be a military commission, rather than an illegally constituted court martial, Jackson's rationalization for the executions was cast in sweeping and ambiguous terms. "It is an established principle of the law of nations," Jackson asserted, "that any individual of a nation making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and pirate" ¹⁴³

While it is not entirely clear what Jackson meant to assert, he cannot be reasonably interpreted as literally accusing Arbuthnot and Ambrister of piracy, which as he surely knew was defined as robbery on the high seas.¹⁴⁴ Nor could the pair technically have been described as "outlaws" as that term was understood at common law.¹⁴⁵ Instead, the most plausible interpretation of

¹⁴¹ Rosen, *supra* note 52, at 577-79.

¹⁴² Heidler, *supra* note 56, at 529. The idea of eliminating Jackson's position had been proposed as an alternative to censure during the House debate. See 33 ANNALS OF CONG. 799 (1819) ("The adoption of the resolution is . . . essential to the preservation of our present Military Establishment. If the resolutions fail, the army ought to be, and will be reduced.").

¹⁴³ Robert Butler, Adjutant General, Head-Quarters Division of the South, General Orders, 29 April 1818, AMERICAN STATE PAPERS: MILITARY AFFAIRS 1:734.

¹⁴⁴ See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (Story, J.) (holding that "piracy, by the law of nations, is robbery upon the sea").

¹⁴⁵ If a defendant repeatedly failed to appear after being indicted, a writ of outlawry could be issued to compel his submission to the court's jurisdiction. In the medieval period, this must have been a frightening prospect because it put the

Jackson's dictum is that, by voluntarily taking sides in a conflict in which their own government was neutral, Arbuthnot and Ambrister had been engaged in a kind of illegitimate, private warfare. As a result, like pirates captured on the high seas, Jackson regarded them as *de facto* stateless persons who had forfeited the protection of the law and were therefore subject to summary battlefield execution.

Aside from the fact that no military exigency justified depriving the defendants of the rudimentary incidents of due process, it is by no means clear that Arbuthnot and Ambrister had engaged in hostilities against the United States. In particular, Jackson's purported outrage that British neutrals would supply goods and services to the Seminoles was flatly inconsistent with the prevailing American understanding of the law of neutrality. Throughout the nineteenth century, the United States was the leading proponent of the freedom of neutral commerce,¹⁴⁶ a policy it would consistently maintain even when it was in the position of a belligerent.¹⁴⁷ As early as 1796, when the French foreign minister insisted that the United States was obligated to prevent its merchants from selling contraband goods to the British, Attorney General Charles Lee advised President Washington that:

offender beyond the protection of the law and the offender thus "might be killed with impunity and his lands forfeited to the state." G. S. Rowe, *Outlawry in Pennsylvania, 1782-1788 and the Achievement of an Independent State Judiciary*, 20 AM. J. LEGAL HIST. 227, 229 (1976). Even so, the practice of subjecting fugitives to summary execution was effectively prohibited by judicial decision by the late 14th century. See Ralph B. Pugh, *Early Registers of English Outlaws*, 27 AM. J. LEGAL HIST. 319, 319 (1983) ("Until Edward III's early days offenders could be killed on sight, but thenceforth, by an oblique judicial decision, such a fate was effectively forbidden . . .").

¹⁴⁶ See William C. Morley, *The Sale of Munitions of War*, 10 AM. J. INT'L L. 467, 472 (1916) ("It was the policy of the United States, more than any other single influence, that tended to give definiteness to [the law of neutrality]. In the midst of the European wars that followed the French Revolution, the United States was the chief neutral nation whose commercial rights were placed in jeopardy.").

¹⁴⁷ See 2 JAMES W. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 384-85 (1920).

The policy of the United States, when it was a belligerent, in respect of the right of neutrals to sell and export munitions of war, has uniformly been in accordance with the view which it has defended as a neutral, and it does not appear that in any war in which it was a belligerent formal protest by the government against the furnishing of war supplies to the enemy was ever made.

Id.

If a citizen of a neutral State, for hire, serves as a mariner on board of a neutral ship employed in contraband commerce with either of the belligerent powers, he is not . . . punishable personally, according to the law of nations, though taken in the fact, by that belligerent nation to whose detriment the prohibited trade would operate. In such a case, the contraband merchandise, and the vessel too, (unless excepted by treaty,) may be seized and confiscated; . . . but the mariner, rendering personal service, suffers no penalty or loss whatever . . .¹⁴⁸

The same rule applied when the contraband goods were being furnished to insurgents waging an undeclared war of independence against their sovereign. Thus, in the context of a conflict between Spain and rebels in the colony of Buenos Aries, Justice Story merely expressed the conventional view when he observed that:

[T]here is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation.¹⁴⁹

Accordingly, Arbuthnot and Ambrister's provision of material support to the Seminoles did not necessarily violate their neutral status vis-à-vis the United States. By all appearances, Ambrister's training program had been directed primarily at Spain, and when the actual fighting began, he withdrew rather than take up arms against Jackson's forces. Meanwhile, Arbuthnot's sale of goods to the Seminoles in the ordinary course of his business was clearly

¹⁴⁸ Neutrality, 1 Op. Att'y. Gen. 61, 62 (1796); see also 7 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 955-73 (1906) (citing additional U.S. diplomatic sources).

¹⁴⁹ *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 340 (1822).

[N]eutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles subject to the right of seizure, *in transit*. . . . The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.

See also 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 141-42 (1840) (1826).

legitimate neutral commerce, even if the Seminoles used them in combat. As subsequently codified in the Hague Neutrality Convention of 1907, which was merely declaratory of extant international law,¹⁵⁰ “[s]upplies furnished or loans made to one of the belligerents” were not considered “hostile acts against [the other] belligerent,” provided the supplier violated no duty of allegiance by reason of his presence in territory under the jurisdiction of the injured State.¹⁵¹

Moreover, Jackson’s dictum begs the question in any event because the mere fact that the citizen of a neutral State abandons his neutrality is not *ipso facto* a violation of the law of war. It is perfectly true, of course, that private citizens do not have a license to engage in acts of violence in the context of an armed conflict. Private citizens who commit acts of violence “without the authority or sanction of their own government,” Henry Halleck explained on the eve of the Civil War, are not considered “enemies, legitimately in arms,” and thus are not entitled “to plead the laws of war in . . . justification” of their actions.¹⁵² In the absence of combatant immunity, it follows that “when captured, they are not treated as prisoners of war, but as criminals, subject to the punishment due their crimes.”¹⁵³ Hence, “[t]he taking of property by such forces . . . is not a belligerent act authorized by the law of nations, but a *robbery*,” and “the killing of an enemy by such forces . . . is not an act of war, but a *murder*,” unless the defendant acted in self-defense.¹⁵⁴ And while civilian offenses of this sort might be tried by military authorities in circumstances justifying the imposition of martial law or military government, Halleck does not suggest that such defendants, though “regarded as outlaws” in a colloquial sense, were placed beyond the pale of due process.¹⁵⁵

¹⁵⁰ See generally Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 (entered into force Jan. 26, 1910).

¹⁵¹ *Id.* art. 17-18.

¹⁵² HALLECK, *supra* note 32, at 386.

¹⁵³ *Id.* at 386-87.

¹⁵⁴ *Id.* at 386.

¹⁵⁵ *Id.* at 387; see also WINTHROP, *supra* note 7, at 842 (explaining that military commissions “will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied”); Jno. C. Kelton, Assistant

Thus, even on the counterfactual assumption that Arbuthnot and Ambrister were “individuals waging private war,” Henry Clay observed, they were not properly subject to the jurisdiction of Jackson’s military tribunal, but rather “should have been turned over to the civil authority.”¹⁵⁶

Conversely, Clay’s analysis continued, if one assumes that Arbuthnot and Ambrister abandoned their neutral status by directly joining the Seminoles’ cause, they were no more subject to immediate execution than the Seminoles themselves:

A foreigner, connecting himself with a belligerent, becomes an enemy of the party to whom that belligerent is opposed, subject to whatever he may be subject, entitled to whatever he is entitled. Arbuthnot and Ambrister, by associating themselves, became identified with the Indians; they became our enemies, and . . . all that we could possibly have a right to do was to apply to them the rules which we had a right to enforce against the Indians. . . . [I]f the law regulating Indian hostilities . . . [gives us] no moral right to retaliate upon them, we consequently had no right to retaliate upon Arbuthnot and Ambrister.¹⁵⁷

Adjutant-Gen., Hdqrs. Dept. of the Missouri, General Orders No. 1 (Jan. 1, 1862), in 1 WAR OF REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, 247, 248 (Series 2, 1894) (promulgating order of Maj. Gen. Halleck directing that military commissions “should be . . . constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise”).

¹⁵⁶ 33 ANNALS OF CONG. 641 (1819).

¹⁵⁷ *Id.* at 641–42. This principle of parity is also supported by the Hague Convention, which provides that if a neutral citizen “enlists in the ranks of the armed force of one of the parties . . . [he] shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.” See Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, *supra* note 150, at art. 17(b).

If war be declared by the Cherokee nation, and one of them kill one of the people against whom the war is declared, he is not therefore subject to be punished as a criminal, because he is acting under the authority and laws of his nation. He can not, by carrying on war against us, be treated as a traitor or rebel

Holland v. Pack, 7 Tenn. (Peck) 151, 153 (1823); WINTHROP, *supra* note 7, at 639, 667, 670, 778 (noting that the laws of war apply to armed conflict with an Indian tribe).

Indeed, as the House Military Affairs Committee pointed out, the implications of Jackson's dictum were quite far reaching. If this was a correct statement of the law of war, it would imply that "Lafayette, who volunteered his services in the cause of America, in the war which established our independence, forfeited his allegiance, became an outlaw, and subjected himself to an ignominious death, had he fallen into the hands of the English."¹⁵⁸

6. CONCLUSION

The judgment of history has not been kind to Andrew Jackson's conduct during the First Seminole War. As one historian summarizes the evidence, "his actions were a study in flagrant disobedience, gross inequality, and premeditated ruthlessness. . . . He swept through Florida, crushed the Indians, executed . . . Arbuthnot and Ambrister, and . . . violated nearly every standard of justice."¹⁵⁹ Not surprisingly, once the Government's embrace of this episode as a precedent for a contemporary war crimes prosecution filtered into the public consciousness, it prompted a sharply-worded response from the Native American community. In a letter submitted to the court, the National Congress of American Indians (NCAI) castigated the prosecutors' decision to rely on a direct comparison between the Seminoles and al Qaeda as "an astonishing statement of revisionist history," which, in turn, "calls into question the reasoning and judgment of those who are representing the United States in this case."¹⁶⁰

Stung by this criticism, the Government filed a rejoinder to the NCAI's letter, but its attempt at "clarification" arguably descends from the merely offensive into incoherence. Perhaps most importantly, the Government flatly contradicts itself by suggesting

¹⁵⁸ 33 ANNALS OF CONG. 517 (1819).

¹⁵⁹ Bertram Wyatt-Brown, *Andrew Jackson's Honor*, 17 J. EARLY REP. 1, 3 (1997) (quoting historian John William Ward).

¹⁶⁰ Brief for National Congress of American Indians as Amicus Curiae to Appellee, *United States v. al Bahlul* at *1-2, CMCR Case No. 09-001, 2011 WL 3836524 (U.S. Ct. Mil. Comm'n Rev. Mar. 17, 2011). In addition, representatives of the 3,600 living descendants of the Seminoles wrote letters to President Obama and Secretary of Defense Gates protesting the Government's brief. See generally Letter from Mitchell Cypress, Chairman, Seminole Tribe of Fla., to Barack Obama, President of the United States (Mar. 24, 2011) (on file with author); Letter from Jim Shore, General Counsel, Seminole Tribe of Fla., to Robert M. Gates, United States Secretary of Defense (Mar. 24, 2011) (on file with author).

that it had never intended to “equate the conduct of the Seminoles . . . with that of al Qaeda and its affiliated terrorist groups,” which abandons the major premise of the argument.¹⁶¹ We should recall, if need be, that this is an exercise in the familiar common law method of reasoning by analogy. Hence, if the conduct of the Seminoles and their black allies during the First Seminole War is *not* relevantly similar to the tactics employed by present-day terrorists, as the Government belatedly seems to concede, it follows that the execution of Arbuthnot and Ambrister was based on *the mistaken belief* that they were aiding “savages” engaged in an unlawful belligerency. And in that case, it is unreasonable to conclude that their deaths were anything other than a tragedy.

The Government attempts to resist this conclusion by further abandoning any pretense of moral legitimacy, arguing instead that the executions are not being cited “as an example of moral right, but as legal precedent; the morality or propriety of General Jackson’s military operation in Florida is irrelevant.”¹⁶² While allowing that “Jackson’s campaign into northern Florida in 1818, and his treatment of the Seminoles during that campaign” were “repugnan[t],” the Government makes the striking claim that “the relevance of the Ambrister and Arbuthnot precedent” is grounded on nothing more than “Jackson’s *treatment* of those acts as violations of the law of war,” which was subsequently ratified by “the then-Secretary of State and the then-President of the United States.”¹⁶³ “[F]or the purposes of this case,” the Government submits, “the *true facts* concerning . . . Jackson’s campaign into northern Florida” may be safely “[p]ut[] aside.”¹⁶⁴ We are thus entitled to conclude that the legal basis of the Government’s assertion of military jurisdiction over material support charges rests entirely on a naked exercise of power by a general officer, divorced entirely from the constraints of moral principle, in the

¹⁶¹ Appellee’s Response to Letter Brief Amicus Curiae of National Congress of American Indians [hereinafter Government’s Response to NCAI] at 1–2, *United States v. al Bahlul*, CMCR Case No. 09-001, 2011 WL 3836524 (U.S. Ct. Mil. Comm’n Rev. Mar. 21, 2011). It is simply not possible to square this denial with the Government’s initial response to the court’s certified questions, in which it equates the Seminole’s conduct with the conduct of al-Qaeda. *See also supra* text accompanying notes 43–46.

¹⁶² Government’s Response to NCAI, *supra* note 161, at 2.

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ *Id.* (emphasis added).

context of a war of aggression waged to vindicate the property rights of antebellum Southern slaveholders.

For the Government to suggest that this precedent remains good law in a modern war crimes prosecution is not unlike citing *Dred Scott* for the sanctity of property rights, while remaining willfully blind to the fact that it has been decisively repudiated as a respectable constitutional precedent. Indeed, *Dred Scott* has never been formally overruled by the Supreme Court, and one might even construct a plausible argument that, viewed in its historical context, the case was “correctly” decided given the existing state of the law.¹⁶⁵ But while that might be an interesting pedagogical exercise, an experienced constitutional lawyer would surely consider it a professional gaffe to cite the decision on its merits in a living case. “There is a broader point that extends beyond doctrinal minutiae,” Jamal Greene writes, “*Dred Scott* does not gnaw at us because it misused syllogism or invented constitutional rights; we hate it because it abided constitutional evil.”¹⁶⁶ The decision to reject such a case from the canon of acceptable precedent thus involves a deliberative moral judgment that expresses “the attitude the [relevant] constitutional interpretive community takes toward the ethical propositions that the decision has come to represent.”¹⁶⁷ The cases that fail to satisfy this normative test “are not the law; they are its opposite. Their holdings cannot reasonably be relied upon”¹⁶⁸

From a critical moral perspective, my suggestion is that in its zeal to defend a tenuous legal theory, the Government has overlooked the profound conceptual difference between history and tradition. As Stephen Macedo observes, “[a] nation’s history [including its legal history] is simply the record of its past, some good, some bad. America’s history includes lynching and racism and other practices that no decent and reasonable person could be

¹⁶⁵ See generally MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 1 (2006) (arguing that “the result in *Dred Scott* . . . may have been constitutionally correct” as decided, in light of the fact that the “constitutional text and tradition [were] saturated with concessions to evil”).

¹⁶⁶ Jamal Greene, *The Anticanon*, HARV. L. REV. (forthcoming) (manuscript at *31), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776488.

¹⁶⁷ *Id.* at *2.

¹⁶⁸ *Id.* at *3.

proud of.”¹⁶⁹ America’s tradition, on the other hand, “is made up of those practices and ideals that her people properly take pride in. Tradition is a critical distillation of the past, a rendering that seeks to be true not to the past entire but to what is best in it, to what is most honourable and most worth carrying forward.”¹⁷⁰

A legal tradition thus has a certain moral authority that makes a claim on our allegiance, insofar as it embodies a conception of justice that coheres “with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.”¹⁷¹ In this sense, we should be loath to accept the Government’s jarring invitation to incorporate Andrew Jackson’s summary trial and execution of two innocent men into the tradition of American military justice.¹⁷²

¹⁶⁹ STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 171 (1990).

¹⁷⁰ *Id.*

¹⁷¹ John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980).

¹⁷² As this essay was about to go to press, the CMCR issued its long awaited decisions in Hamdan and al Bahlul. In Hamdan, the court uncritically accepted the Government’s assertion that this incident supports the proposition that material support for “irregular warfare” is an established war crime, even where the defendant owes no duty of allegiance to the injured State, albeit professing to take “no comfort in the historical context in which these events occurred.” *United States v. Hamdan*, No. 09-002, 2011 WL 2923945, at *29 (U.S. Ct. Mil. Comm’n Rev. June 24, 2011) (en banc). To be sure, the court cites a variety of additional legal materials that purportedly support its holding, including cases that the Government had conceded were irrelevant, while conspicuously omitting any reference to the contrary authority cited by the appellant. *See supra* text accompanying notes 32–42. In al Bahlul, the court also affirmed the appellant’s conviction for providing material support for terrorism, but omitted any reference to Jackson’s execution of Arbuthnot and Ambrister. *See United States v. al Bahlul*, No. 09-001, 2011 WL 4916373 (U.S. Ct. Mil. Comm’n Rev. Sept. 9, 2011) (en banc). A full analysis of these opinions is beyond the scope of this essay. I am content to allow readers to exercise their own judgment, in light of the evidence presented here, about whether the CMCR’s reliance on this precedent undermines the persuasive authority of its reasoning.