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# Hijacking Trials Overseas: The Need for an Article III Court

Maryellen Fullerton

*Brooklyn Law School*, [maryellen.fullerton@brooklaw.edu](mailto:maryellen.fullerton@brooklaw.edu)

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## HIJACKING TRIALS OVERSEAS: THE NEED FOR AN ARTICLE III COURT

MARYELLEN FULLERTON\*

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\* Professor of Law, Brooklyn Law School; B.A., Duke University; J.D., Antioch School of Law. The author wishes to thank Dean David G. Trager for the Brooklyn Law School Research Stipend that aided in the preparation of this Article.

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## I. INTRODUCTION

When an East German citizen hijacked a Polish airliner and diverted it to the United States Air Base in West Berlin on a summer day in 1978, he set off a series of complicated diplomatic maneuvers that months later resulted in his criminal trial in an American court in Berlin. Convened as a court authorized by article II of the Constitution, the United States Court for Berlin was presided over by an American judge appointed by the United States Ambassador to West Germany. Teams of American prosecutors and American defense lawyers flew into Berlin to handle the proceedings. Months later, in May 1979, the court convicted Detlef Tiede, the East German accused of air piracy, of taking a hostage but acquitted him of all other counts. The judge sentenced him to time served—nine months.

Although all the participants viewed this American trial overseas of a civilian accused of committing a crime outside the territory of the United States as a total anomaly, current events suggest that similar scenarios may develop in the future. For example, the June 1985 hijacking of an American airplane to Beirut, Lebanon involved a number of criminal acts that the United States would like to see punished. As did Tiede in 1978, the 1985 hijackers diverted a commercial airliner. They held a number of American civilians hostage for seventeen days, and killed an American sailor. After the hostages were released, President Reagan publicly demanded that the Lebanese either try the hijackers or deliver them to the Americans for trial. In addition, to encourage their apprehension, he offered a reward for information leading to the arrest and conviction of the hijackers.

More recently, in October 1985, hijackers seized an Italian cruise ship and executed an American passenger. After the hostages were released, American military planes intercepted the plane carrying the hijackers and forced it to land in Italy. President Reagan again demanded the delivery of the hijackers to the Americans for trial.

Hijackings are a phenomenon that the United States will continue to face, and they may trigger, in the future, the convening of American courts overseas. Using the American decision to try a hijacker in Berlin in 1978 as precedent, the President of the United States may, in an effort to deter terrorist activity directed at American citizens and American property located beyond the borders of the United States, assign criminal trials of hijackers to an overseas American court.

Whether an American court convenes to deal with hijackers in Berlin, Beirut, Italy, or anywhere else beyond the borders of the United States, a fundamental question is raised: does the United States Constitution permit the criminal trial of a civilian in a federal court overseas that lacks the safeguards of judicial independence required by article III? This Article examines that question. The Article reviews the policies underlying the constitutional requirement that the judicial power of the United States be confined to article III federal courts and investigates the historical evidence concerning federal criminal trials that have been permitted to proceed in non-article III tribunals. It recounts the circumstances that led the United States to hold a criminal trial in Berlin in 1979 in a

federal court constituted under article II of the United States Constitution and describes the legal justifications advanced for the constitutionality of the American court in Berlin. After examining the two plausible bases for permitting the President to convene an article II court to try hijacking cases overseas—the Executive's war power and foreign relations power—this Article concludes that these powers do not justify the evasion of article III safeguards. The criminal proceeding in the United States Court for Berlin violated the Constitution. Similarly, trials of hijackers in executive branch courts in Beirut or Italy would violate the Constitution. When the United States chooses to prosecute a civilian hijacker in an American court, the Constitution requires that the government proceed in an article III court.

## II. FEDERAL COURTS AND THE SEPARATION OF POWERS DOCTRINE

The Constitution of the United States divides the national government into three branches and provides for the powers and limitations of each branch. Article I of the Constitution enumerates the legislative powers assigned to Congress; article II catalogues the executive powers assigned to the President; article III requires that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."<sup>1</sup> The framers of the Constitution compartmentalized the federal government in this manner because they believed that tyranny would result if one group controlled the legislative, executive, and judicial functions of government.<sup>2</sup> Fearing that compartmentalization itself might fail to protect adequately one branch against encroachment by the

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1. U.S. CONST. art. III, § 1, cl. 1.

2. No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

THE FEDERALIST No. 47, at 300-08 (J. Madison) (C. Rossiter ed. 1961). Indeed, the accepted political theory in the United States in the late eighteenth century was that government should be compartmentalized in order to avoid an unhealthy concentration of power. See Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385, 394-419 (1935). At the time of the federal constitutional convention, a majority of state constitutions required compartmentalized governments. *Id.* at 419.

other branches, the framers drafted additional safeguards. In order to guarantee that the judicial branch remained independent of the political branches, article III provides that judges of the judicial branch shall be guaranteed life tenure<sup>3</sup> and protection against reduction in salary.<sup>4</sup> The framers intended that this judicial independence achieve three goals: to prevent the other branches from effectively engaging in adjudication by influencing the judges' decisions,<sup>5</sup> to enable the judiciary to check the unconstitutional acts that the other branches might take,<sup>6</sup> and to guarantee that the litigants receive impartial adjudication.<sup>7</sup> These goals remain fundamental to our system of government. Because judicial independence furthers these goals, exceptions to article III's judicial independence requirements meet with strong disfavor. Nonetheless, some exceptions do exist.

Certain federal "courts" have been established in which judges lack life tenure and salary protection. As catalogued recently in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>8</sup> these exceptions "reduce to three narrow situations."<sup>9</sup> Territorial courts, military courts, and courts or agencies that adjudicate "public rights"<sup>10</sup> exist as exceptions to article III justified by "circumstance[s] in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the

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3. Article III provides: "The Judges, both of the supreme and inferior courts, shall hold their offices during good Behavior. . . ." U.S. CONST. art. III, § 1, cl. 1.

4. Article III provides: "The Judges, both of the supreme and inferior courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." *Id.*

5. See J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 126-27 (1978); THE FEDERALIST No. 47, *supra* note 2, at 303-08; THE FEDERALIST No. 78, at 465-72 (A. Hamilton) (C. Rossiter, ed. 1961).

6. See THE FEDERALIST No. 48, at 308-13 (J. Madison) (C. Rossiter ed. 1961); Sharp, *supra* note 2, at 422-34. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), made explicit the power of the judicial branch to restrain actions of the other branches.

7. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion).

8. 458 U.S. 50 (1982) (plurality opinion).

9. *Id.* at 64.

10. *Id.* at 64-67. For a full discussion of the needs giving rise to these exceptions, see *infra* text accompanying notes 212-25.

constitutional mandate of separation of powers."<sup>11</sup> Emphasizing the limited nature of these exceptions, the *Marathon* plurality adopted a restrictive view of the circumstances in which non-article III federal courts are permissible.<sup>12</sup>

The opinion in *Marathon* did not define the outer limits of the judicial power of the United States that the Constitution vests in the federal judiciary. It did identify, however, certain matters that federal courts lacking the constitutionally prescribed safeguards of judicial independence may not consider: "all private adjudications in federal courts within the States and *all criminal matters with the narrow exception of military crimes*. There is no doubt that when the Framers assigned the 'judicial power' to an independent Article III branch, these matters lay at what they perceived to be the protected core of that power."<sup>13</sup>

### III. THE UNITED STATES COURT FOR BERLIN

#### A. *The Hijacking and the Trial*

Undoubtedly, no one on the Polish commercial airliner headed for East Berlin on August 30, 1978, pondered the Supreme Court's view of judicial independence and separation of powers. Shortly before the airplane reached its destination, a hijacker walked into the cockpit, gun in hand, and convinced the pilot to fly to West Berlin.<sup>14</sup> The pilot made an emergency landing at the United

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11. *Id.* at 64. Although the opinion emphasized legislative courts created by Congress pursuant to article I, the same analysis and policy considerations apply to courts created by the President in exercise of his article II powers. Indeed, American military courts, which clearly are not part of the independent federal judiciary mandated by article III, in some instances have been established by legislation and in other instances have been created solely by presidential order. *See infra* text accompanying notes 60-73.

12. [O]ur Constitution unambiguously enunciates a fundamental principle—that the "judicial power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

*Id.* at 60.

13. *Id.* at 70 n.25 (emphasis added).

14. *See generally* STERN, JUDGMENT IN BERLIN (1984) (recounting the facts about the hijacking itself and about the eventual trial). The author, Herbert J. Stern, is a member of the United States District Court for the District of New Jersey. He served as one of the three judges assigned to the United States Court for Berlin to handle the hijacking case. *See infra* notes 22, 26.

States Air Base at Tempelhof Airport.<sup>15</sup> Hans Detlef Tiede, the hijacker, Ingrid Ruske, the woman who accompanied him, and Sabine Ruske, Ingrid's twelve-year-old daughter, walked off the Polish airliner and into a diplomatic imbroglio. Because they landed at a United States Air Base, American officials took these three East German citizens into custody, but the Americans expected the West German authorities to handle the case.

An international treaty, to which West Germany, East Germany, Poland, and the United States are signatories, requires each country either to prosecute or to extradite hijackers.<sup>16</sup> A more recent

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15. Tempelhof Airport, built by Hitler in 1936, is located in the United States sector of West Berlin. It served civilian air traffic in the post-World War II era until Tegel Airport, located in the French sector, was built. By 1978 Tempelhof had become an American Air Force base serving only American military air traffic. Stern, *supra* note 14, at 3.

16. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (the Hague Convention) provides:

The contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

At the time of the hijacking to Berlin in 1978, 78 countries had ratified the Hague Convention, including the United States, the Soviet Union, Poland, the German Democratic Republic, and the Federal Republic of Germany. The Federal Republic of Germany had signed with the express understanding that the Convention applied to Berlin. 1977-78 TREATIES IN FORCE 275.

In addition to the Hague Convention, the international community has joined in several other treaties to ensure that countries may deal with instances of air piracy and other offenses on board aircraft in flight in a uniform and effective manner. The Convention of Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219, (the Tokyo Convention) (in force Dec. 4, 1969), covers criminal offenses, acts that endanger safety of aircraft, persons, property on board, acts that jeopardize good order and discipline on board the aircraft, and hijacking of aircraft. It has limited jurisdictional provisions, no mandatory prosecution provisions, and no provisions for extradition or penalties.

The Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (the Hague Convention) concerns itself solely with the offense of hijacking, which it defines in article 1. Its jurisdictional provisions are more expansive than those of the Tokyo Convention. As mentioned above, the Hague Convention requires the country with custody of the offender either to extradite the hijacker to the country of registration of the aircraft, or to institute proceedings for the purpose of prosecution. The convention contains various measures to facilitate extradition proceedings and calls for the imposition of severe penalties.

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (the Montreal Convention), fills in the gaps left by the Tokyo and Hague Conventions. Whereas the earlier conventions applied only to offenses committed by persons on board the aircraft, the Montreal Convention does not require that the offender be on board, but merely that the offense be against an aircraft



international declaration calls for the suspension of air traffic to countries that provide sanctuary to hijackers.<sup>17</sup> Faced with Tiede's hijacking, the West Germans wanted to comply with the air piracy treaty. They wanted no part, however, of prosecuting East Germans who, according to the West German Constitution, have a right to enter and reside in West Germany.<sup>18</sup> Extraditing Tiede and the Ruskes to East Germany was out of the question. The West Germans therefore pressured the United States to handle the case.<sup>19</sup>

After a month of diplomatic lobbying and consultation, the United States Department of State made a decision that it must now regret. Relying on an ordinance promulgated by the United States High Commissioner for Germany in 1955<sup>20</sup> and never before utilized, the United States agreed to convene, at West German expense, an American court in West Berlin. Thus, the United States Court for Berlin sprang to life. Tiede and Ruske would be prose-

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in flight or in service. Provisions on jurisdiction, extradition, and penalties are the same as those set out in the Hague Convention.

The three conventions only pertain to flights in which the place of take-off or the place of actual landing is outside the territory of the country of registration of the aircraft. The conventions do not apply to military, police, or customs services.

17. In 1978 in a declaration issued at a meeting in Bonn in the Federal Republic of Germany, Japan and seven Western countries stated that they would cease flights to and from any country that refuses to prosecute or extradite air hijackers. 78 Department of State Bulletin No. 201B, 14 WEEKLY COMP. PRES. DOC. 1308 (July 17, 1978).

18. "All Germans shall enjoy freedom of movement throughout the federal territory." Grundgesetz [GG] art 11, § 2; *see also id.*, art 16, § 2 ("Persons persecuted on political grounds shall enjoy the right to asylum.").

19. *See Stern*, *supra* note 14, at 27-28.

The United States would prosecute the case. For the first time in nearly thirty years an occupation court could be convened in Berlin. Why? To save the Germans the embarrassment of having to prosecute two fugitives whom their constitution gave the right to defect—a highly unpopular prosecution in Germany, that is, West Germany.

*Id.* at 31.

20. OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY, Law No. 46, Apr. 28, 1955, *reprinted in* United States v. Tiede, 86 F.R.D. 227, 237 (1979). This ordinance establishes a United States Court for Berlin composed of one or more United States Judges for Berlin appointed by the chief of the United States diplomatic mission in Germany. Article 3 of Law No. 46 grants this court "original jurisdiction to hear and decide any criminal case arising under any legislation in effect in the United States Sector of Berlin if the offense was committed within the area of Greater Berlin." Article 6 grants this court jurisdiction in certain civil cases that can be removed, transferred, or referred from a German court.

cuted under the German Penal Code<sup>21</sup> but in an American court following American trial procedure.<sup>22</sup> Two Americans, assisted by two Germans, would prosecute the case,<sup>23</sup> and a German lawyer and two American defense counsel would represent each defendant.<sup>24</sup>

Into this setting came Herbert Stern, a federal district judge from New Jersey.<sup>25</sup> At the request of a friend in the Justice Department, Stern accepted the temporary assignment in Berlin.<sup>26</sup> The United States Ambassador to West Germany officially ap-

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21. The formal information alleging that Tiede had violated German law contained five counts: air piracy, taking a hostage, depriving persons of their liberty, assault, and unlawful possession of a firearm. Stern, *supra* note 14, at 59.

22. Article 3 of Law No. 46, *supra* note 20, grants the United States Court for Berlin power "to establish consistently with applicable legislation rules of practice and proceedings." Judge Dudley D. Bonsal, Senior United States District Judge of the United States District Court for the Southern District of New York, was appointed in November 1978 as the first judge of the United States Court for Berlin. On November 30, Judge Bonsal promulgated Rules of Criminal Procedure for the court. *United States v. Tiede*, 86 F.R.D. 227, 229 (1979). The rules were similar to the Federal Rules of Criminal Procedure promulgated by the United States Supreme Court to guide criminal proceedings in American federal courts. *Id.* at 238.

23. Andre M. Surena and Roger M. Adelman served as the American prosecutors. Surena, who at the time of the hijacking was serving as Legal Adviser to the United States Mission in Berlin, served as United States Attorney for Berlin for purposes of the Tiede-Ruske prosecution. Adelman, an Assistant United States Attorney for the District of Columbia, acted as Special Prosecutor for Berlin for purposes of the Tiede-Ruske proceedings. Stern, *supra* note 14, at 46.

Marianne Fischer, Regierungsdirektorin, Office of the Senator of Justice, Berlin, and Gisela Wolf, Oberstaatsanwältin, Berlin, were the German prosecutors who assisted the American prosecutors. *United States v. Tiede*, 86 F.R.D. 227, 227 (1979).

24. Dietrich Hermann, a member of the Berlin Bar, represented Detlef Tiede. Ulrich E. Biel, also a member of the Berlin Bar, represented Ingrid Ruske. *Id.*

In addition, Herbert J. Stern, the third person designated to serve as judge of the United States Court for Berlin, appointed Judah Best, a criminal lawyer in Washington, D.C., best known for his representation of Spiro Agnew, and Kenneth L. Adams, a lawyer in Best's firm, to represent Detlef Tiede. Stern appointed Bernard Hellring, a member of the New Jersey Bar, and Richard D. Shapiro, one of Hellring's partners, to represent Ingrid Ruske. Stern, *supra* note 14, at 64. Later Stern appointed an American lawyer, Jesse Climenko, to represent Ruske's daughter, Sabine. *Id.* at 192.

25. President Nixon appointed Herbert J. Stern to the United States District Court for the District of New Jersey in 1973. ALMANAC OF THE FEDERAL JUDICIARY: PROFILES OF ALL ACTIVE UNITED STATES DISTRICT COURT JUDGES 15 (Supp. 1984).

26. Bruno A. Ristau, Director of the Office of Foreign Litigation, United States Department of Justice, telephoned Stern in December 1978 to ask him to serve on the United States Court for Berlin. After discussions between Stern and Mark B. Feldman, Assistant Legal Adviser of the State Department, and written approval by Warren Burger, Chief Jus-

pointed him judge of the American occupation court in Berlin.<sup>27</sup> In accepting this job, Stern became temporarily an employee of the executive branch of the United States government.<sup>28</sup>

Stern soon saw that the trial in Berlin involved complicated legal issues. He learned the outlines of the defendants' stories and became sympathetic to their plight. As pretrial proceedings

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tice of the United States, Stern accepted the assignment. Ristau agreed to serve as Clerk of the United States Court for Berlin. Stern, *supra* note 14, at 51-55.

Stern was actually the third person appointed to the United States Court for Berlin. Judge Bonsal served for a short time. See *supra* note 22. Shortly after promulgating the rules for the court in Berlin, Judge Bonsal resigned. Stern, *supra* note 14, at 47-48. Leo M. Goodman, who was simultaneously serving as Judge of the United States Court of the Allied High Commission for Germany, temporarily succeeded Judge Bonsal as United States Judge for Berlin. *United States v. Tiede*, 86 F.R.D. at 229. After one month, Judge Goodman was succeeded by Judge Stern. *Id.*

27. Article 2 of Law No. 46, *supra* note 20, provides that the judges of the United States Court for Berlin "shall be appointed by the 'Chief of Mission', who may terminate such appointment at any time. As used in this law the term 'Chief of Mission' means . . . the chief of the United States diplomatic mission in Germany." Acting pursuant to this provision, Walter J. Stoessel, Jr., United States Ambassador to the Federal Republic of Germany, appointed Stern judge of the United States Court for Berlin in January 1979. Stern, *supra* note 14, at 356. Commenting about his appointment as judge, Stern said: "Actually, of course, the judge had been selected by the State Department in Washington and the ambassador had made the appointment because he had received instructions to do so." *Id.*

28. The Eleventh Circuit recently examined the propriety, or indeed constitutionality, of an article III judge performing executive branch assignments in *In re Application of the President's Commission on Organized Crime*, 763 F.2d 1191 (11th Cir. 1985). The court found that the appointment of article III federal judges (retired Supreme Court Justice Potter Stewart and Judge Irving Kaufman of the United States Court of Appeals for the Second Circuit) to an executive branch commission (the President's Commission on Organized Crime) violated the doctrine of separation of powers. *Id.* at 1198. This ruling casts some doubt on the validity of Stern's appointment in Berlin because Stern's assignment in Berlin was clearly an executive branch matter. He served at the pleasure of the United States Ambassador. Thus, under the Eleventh Circuit's reasoning, the appointment of Stern, a member of the judicial branch, to an executive branch assignment, may have violated the separation of powers doctrine.

In contrast to the facts of the Eleventh Circuit case, however, Stern's executive branch assignment required an article III judge to exercise judicial rather than executive or legislative functions. Although Stern did not exercise article III power as United States Judge for Berlin—indeed, Stern's predecessor as United States Judge for Berlin had never served as an article III judge—his assignment in Berlin called on him to carry out the traditional judicial tasks of deciding questions of law and presiding over a trial. Despite the Eleventh Circuit's ruling, therefore, the situation involving Stern and his assignment to Berlin may be sufficiently distinct that the separation of powers doctrine is not threatened.

progressed, Stern bridled at the American prosecution team and ruled in favor of the defendants on a number of issues.<sup>29</sup>

The atmosphere surrounding the case became increasingly politicized. The West German government wanted the matter to disappear. The American government, nervous about the hijacking

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29. Stern ruled that under the United States Constitution the defendants were entitled to a trial by jury. Stern, *supra* note 14, at 128. Based on the fifth amendment, he also granted the defendants' motion to suppress the incriminating statements made by Ingrid Ruske to the government's chief investigator. *Id.* at 212. As a result of the suppression of evidence, the government was forced to drop its case against Ruske.

After the indictment was dismissed, Stern appointed Hellring and Shapiro, Ruske's defense attorneys, as co-counsel with Best and Adams for Tiede, who had been Ruske's co-defendant. Stern, *supra* note 14, at 227.

Stern's more surprising ruling was his conclusion that the sixth amendment to the United States Constitution guaranteed the defendants a trial by a jury of West German citizens. He announced that he would dismiss the case if the government did not provide a jury trial in Berlin. Stern took this action despite the fact that juries have never played a role in the German legal system, an inquisitorial system in which typically a panel of judges takes the lead in identifying issues and questioning witnesses, and despite the fact that German citizens consequently have no obligation to report for jury duty. When the government decided to proceed, Stern ordered 500 Berliners to report to the newly constructed courtroom on the American air base in Berlin for jury duty, an order later criticized by the United States Court of Appeals for the District of Columbia Circuit. *Dostal v. Haig*, 652 F.2d 173, 176 (1981) (Stern "ordered that 500 unsuspecting Berliners be rounded up to make a venire for the trial. . .").

In Stern's opinion granting the defense motions for a jury trial, *United States v. Tiede*, 86 F.R.D. 227 (1979), he recognized that juries do not decide criminal trials in American military courts and that juries have played no role in consular and occupation court trials of American civilians overseas. Stern concluded, however, that recent court decisions extending the right to trial by jury to individuals tried in state courts in the United States and to American civilians prosecuted for capital crimes by military authorities undermined the tradition of non-jury trials overseas. Stern's reliance on inapposite precedent concerning trials occurring within the United States where the jury system is firmly established makes his constitutional ruling questionable at best.

In making this ruling, Stern also ignored the statutory requirements that jurors for federal trial courts must speak English and be United States citizens, 28 U.S.C. § 1865, requirements that apply to article III courts within the United States and to non-article III courts beyond the borders of the United States. 28 U.S.C. § 1869(f).

Once he had concluded that the right to a jury trial did attach to Tiede and Ruske, Stern did not seriously consider the possibility that the United States Court for Berlin, which, like all the American military occupation courts in Germany that preceded it, had not been granted the power to conduct jury trials, lacked the competence to try the case against Tiede and Ruske. Rather, Stern simply ordered that the rules of the court be amended to provide for trial by jury.

Although Stern's ruling that the United States Constitution entitled Tiede and Ruske to a trial by a jury of West German citizens and his subsequent summoning of a jury of Berliners are highly debatable, the issues raised by these actions are beyond the scope of this Article.

of American planes, wanted other countries to have no excuse in the future for refusing to prosecute hijackers. International repercussions were easy to imagine. Indeed, they were vivid to Stern: "How would the State Department explain to the Poles whose plane was diverted, to the East Germans whose citizens were passengers, and to the Russians who were closely monitoring the proceedings, the dismissal of a case against a self-confessed airplane hijacker?"<sup>30</sup>

In Stern's view, foreign policy concerns dominated the trial strategy of the government attorneys who prosecuted the case. With the State Department calling the shots, Stern believed that crucial decisions about prosecution strategy—whether to challenge the applicability of the United States Constitution in Berlin, the suppression of Ruske's statements, or the right of Tiede to a jury trial—were made solely to protect diplomatic interests.<sup>31</sup> Stern felt pressured to provide "a quick nonjury trial, followed by a moderate sentence, substantial enough to satisfy the Russians—but not unduly harsh."<sup>32</sup> The location of the trial and its timing contributed to the political aura Stern thought surrounded the trial. The courtroom for the United States Court for Berlin was erected on the American air base in a portion of the Tempelhof terminal where American airplanes once landed around the clock in an effort to sustain the citizens of Berlin during the Soviet blockade of their city. The weekend before the trial began Tempelhof hosted the thirtieth anniversary celebration of the Berlin airlift. Five hundred thousand Berliners visited Tempelhof that weekend to honor the United States airmen, and those of England and France, who provided the lifeline between Berlin and the rest of the western

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30. Stern, *supra* note 14, at 57.

31. In a sense they [the prosecutors] would face their own choice of evils. They could, of course, admit to violations of Ingrid Ruske's rights, and accept the suppression of her statements. But that would be bad for foreign policy. So instead, they would defend what had been done. They could accord Detlef Tiede the same rights he would have received in any American court—but that, too, was perceived as bad for the country. So in Berlin—a historic place for such a choice—the State Department took the other course. To protect important interests, it chose the lesser evil.

Stern, *supra* note 14, at 60.

32. *Id.* at 59.

world.<sup>33</sup> This pro-American outpouring, Stern worried, would strengthen the government's hand in its rush to convict Tiede.<sup>34</sup>

According to Stern, the State Department's eagerness to control the trial for diplomatic purposes led to some subtle and not-so-subtle encounters. Stern was treated to box seats at the Berlin Philharmonic and invited to dinner at the United States Ambassador's residence.<sup>35</sup> Over dinner the conversation turned to the legal arguments presented in court by the American attorneys whom the Ambassador had appointed to prosecute the case.<sup>36</sup> Later the second-ranking American diplomat in Berlin invited Stern to dinner at his home.<sup>37</sup> Again the conversation shifted to the Tiede trial and the diplomatic problems the case created for the United States and its allies.<sup>38</sup> Stern felt pressured to protect United States diplomatic interests even if those interests conflicted with the rights of the individuals accused of hijacking.

The trial itself provided visible testimony that this case had triggered foreign relations concerns. Uniformed Soviet Army officers photographed jurors as they arrived at the courtroom.<sup>39</sup> The Prosecutor General of Warsaw personally escorted the crew of the Polish airliner to Berlin to testify at the hijacking trial. In addition, Polish intelligence agents sat in the front row of the courtroom to remind the crew that its testimony should toe the Polish government's line.<sup>40</sup>

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33. *Id.* at 226. For a description of the Berlin Airlift, see *infra* note 144.

34. Ironically, but for his questionable ruling on the defendants' demand for a jury trial, see *supra* note 29, Stern would not have worried about any possibility of prejudice from this celebration.

35. Walter J. Stoessel, the United States Ambassador to the Federal Republic of Germany from 1976-1981, was a career member of the foreign service. Prior to his assignment in Germany, Stoessel had been the American Ambassador to the Soviet Union. *THE INTERNATIONAL WHO'S WHO*, 1984-85, at 1369 (48th ed. 1984). In Germany, Stoessel's main residence was in Bonn, but he also maintained a residence in Berlin, where he entertained Stern. Stern, *supra* note 14, at 91-92.

36. Stern, *supra* note 14, at 91-92.

37. The American minister to Berlin, David Anderson, was the highest-ranking State Department official assigned to Berlin. In the absence of Ambassador Walter Stoessel, who generally resided in the American Embassy in Bonn, see *supra* note 35, Anderson entertained Stern. Stern, *supra* note 14, at 167.

38. Stern, *supra* note 14, at 168-70.

39. *Id.* at 235.

40. *Id.* at 274.

Somewhat to Stern's surprise, the end of the trial—in which Tiede was found guilty of taking a hostage but acquitted of hijacking<sup>41</sup>—did not end the diplomatic pressure. As the criminal trial concluded, a group of West German citizens filed a civil suit in the United States Court for Berlin. Buoyed by Stern's earlier ruling that the United States Constitution applied in West Berlin,<sup>42</sup> they alleged that the recent construction of United States military housing in Berlin violated a German zoning law, and claimed that the United States Constitution guaranteed them judicial review. The German citizens asked Stern either to hear the case himself or to order the German courts to do so.<sup>43</sup>

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41. The jury returned with a split verdict. It found Tiede not guilty of hijacking, but guilty of taking a hostage, a conviction with a mandatory minimum sentence of three years. Stern sentenced Tiede to time served—nine months. Stern, *supra* note 14, at 370.

The maximum sentence for conviction of taking a hostage is 15 years; a conviction also imposes a mandatory minimum sentence of 3 years. *Id.* at 351. Although one cannot tell what provisions Stern relied on, he concluded that the applicable minimum sentence was 6 months rather than 3 years because the jury, despite ultimately finding Tiede guilty, weighed Tiede's justification for his act against the threat to society. *Id.* at 359.

42. Strictly speaking, because the sole issue before Stern was the defense motion for a trial by jury, Stern ruled only that the sixth amendment to the United States Constitution applied to the prosecution of Ruske and Tiede. He phrased his March 14, 1979, opinion more broadly, however, and included an extensive discussion of the extraterritorial application of the United States Constitution in general. *United States v. Tiede*, 86 F.R.D. 227, 238-53 (1979). Furthermore, the public, and perhaps Stern as well, perceived that a broader ruling had been issued: "[T]he American Sector of Berlin is and will be governed by the Constitution of the United States." Stern, *supra* note 14, at 236. "When Americans governed in Berlin, the judge ruled, they must obey their own Constitution and give due process to those whom they governed." *Id.* at 342.

43. This lawsuit sought to enjoin the construction of housing for American military personnel on the basis that German zoning law had not been fully observed by the Berlin city government, which had acquired title to the land and had agreed to finance the construction. The plaintiffs first filed suit against the city government in the Berlin Administrative Court, but the court dismissed the case for lack of jurisdiction based on lack of consent of the American occupation authority. The plaintiffs then filed suit against the United States State Department in federal court in Washington, D.C., but that court also dismissed the case for lack of jurisdiction. Stern, *supra* note 14, at 341.

The plaintiffs filed suit again in the German court. Again the American occupation authority refused to consent to jurisdiction. Shortly thereafter, Stern stated in the Ruske and Tiede case that the United States Constitution guaranteed due process to the citizens of Berlin. The plaintiffs in the zoning case quickly asked the German court to transfer the case to the United States Court for Berlin. Shortly thereafter, the plaintiffs appeared in the United States Court for Berlin and petitioned Judge Stern to hear the case. In the alternative, they requested him to order the American authorities to consent to jurisdiction in the German court. *Id.* at 340-42.

In response, the American Ambassador to West Germany sent a letter to Stern outlining the government's position that the United States Court for Berlin lacked jurisdiction over this civil suit<sup>44</sup> and that the terms of Stern's appointment to the court in Berlin limited him to the criminal proceedings against Tiede and Ruske.<sup>45</sup> Incensed, Stern refused to take any action on the case unless the Ambassador withdrew his letter.<sup>46</sup> The next morning, the Ambassador notified Stern that his appointment as judge in Berlin had been terminated.<sup>47</sup> One day later, Stern left Berlin.

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The plaintiffs later made this same argument in a suit filed in federal court in Washington, D.C. The district court's dismissal of the suit was affirmed in *Dostal v. Haig*, 652 F.2d 173 (D.C. Cir. 1981). The United States Court of Appeals for the District of Columbia Circuit held that, assuming *arguendo* that the due process clause of the United States Constitution applied to the Berlin plaintiffs, the denial of judicial review concerning the housing construction did not violate due process. *Id.* at 175.

44. Although article 3 of Law No. 46, *supra* note 20, grants the United States Court for Berlin original jurisdiction over most criminal cases in Berlin, article 6 confers a much more limited grant of jurisdiction over civil cases: "Power conferred upon the Court under this law may be exercised by the Court in any case removed, transferred or referred to the Court under the provisions of Allied Kommandatura Law No. 7."

45. The text of the letter follows:

I have been advised that a motion has been made in the United States Court . . . for Berlin calling on the Court to exercise jurisdiction with respect to a matter involving the construction of certain housing in the Dueppel Sued area of Berlin.

Please be advised that under United States High Commission Law No. 46 of April 28, 1955, the jurisdiction of the U.S. Court for Berlin is restricted solely to criminal matters arising under the law in force in Berlin, except for specific cases removed, referred or transferred to the Court from a German court by the Commandant. The Dueppel matter has not been so removed, referred or transferred.

Further, in accordance with Article 2(5) of the U.S. High Commissioner Law 46, and as Chief of the United States Diplomatic Mission in Germany, I should like to state that your appointment as a Judge of the United States Court for Berlin does not extend to this matter.

46. Stern, *supra* note 14, at 372-73.

47. Stoessel's letter to Stern read:

I have been informed that the defendant in United States as United States element, Allied Kommandatura, Berlin v. Tiede, has been sentenced and that the criminal proceeding for which the United States Court for Berlin was convened has thus been concluded.

Accordingly, as Chief of the United States Diplomatic Mission in Germany, acting pursuant to Article 2(5) of U.S. High Commissioner Law No. 46, I hereby terminate your appointment as a judge of the United States Court for Berlin, effective May 28, 1979.



### B. *An Executive Branch Tribunal*

Stern faced difficult issues. The creation of a United States court in Germany in 1979 to try a case against an East German citizen accused of violating the German Penal Code was an aberration. Novel questions of what American law applied and how it applied arose daily. The threshold legal issue, however, escaped attention. No one examined the constitutionality of prosecuting Detlef Tiede, a German civilian charged with committing a non-military crime in Germany, in an article II American court.<sup>48</sup>

The United States Court for Berlin is a federal tribunal, established in 1955 by an ordinance promulgated by the post-war Office of the United States High Commissioner for Germany.<sup>49</sup> It possesses "original jurisdiction [over] any criminal case arising under legislation in effect in the United States Sector of Berlin if the offense was committed within the area of Greater Berlin."<sup>50</sup> The United States Ambassador to West Germany appoints its judges.<sup>51</sup> They serve at the Ambassador's pleasure, and they enjoy no guaranteed protection against reductions in salary.<sup>52</sup> Clearly, therefore, the United States Court for Berlin does not exist pursuant to article III of the United States Constitution.

48. In *JUDGMENT IN BERLIN*, *supra* note 14, Stern never mentioned the potential unconstitutionality of the criminal trial of a civilian in the United States Court for Berlin. The defendants lacked any incentive to challenge the jurisdiction of the American court because the alternatives to this proceeding were prosecution in a West German court, without a jury, or extradition to East Germany. The prosecution, which had initiated the case in the United States Court for Berlin, did not address the constitutionality of assigning non-military cases to that tribunal, but emphasized in related matters the unique status of Berlin as a zone occupied by United States military forces. Brief for the United States at 4-18, *United States v. Tiede*, 86 F.R.D. 227 (1979).

49. Law No. 46, *supra* note 20. This ordinance established on paper an American court that never once convened between 1955 and 1978. Stern, *supra* note 14, at 53.

50. Article 3 of Law No. 46, *supra* note 20.

51. The personnel [United States Judge for Berlin, United States Attorney for Berlin, Special Assistant United States Attorneys for Berlin, Clerk-Marshall of the United States Court for Berlin] shall be appointed by the Chief of Mission. . . . [T]he term "Chief of Mission" means the United States High Commissioner for Germany as well as the chief of the United States diplomatic mission in Germany.

*Id.* at article 2.

52. "The Chief of Mission may terminate such appointment [of the personnel he appoints] at any time." *Id.* With regard to salaries of personnel appointed to the United States Court for Berlin, Law No. 46 is silent.

At first glance, the United States Court for Berlin does not fall within any of *Marathon's* three categories of permissible non-article III federal courts.<sup>53</sup> From an historical perspective, however,

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53. The three categories are military courts, territorial courts, and courts adjudicating public rights. See *supra* text accompanying notes 9-13. For a discussion of the first category, military courts, see *infra* text accompanying notes 58-105. The third category, public rights courts, refers to adjudication by administrative agencies of statutory rights created by Congress. The criminal prosecution of Tiede bears no resemblance to the type of case adjudicated in the public rights category.

The territorial court category, at first glance, appears to offer a possible rationale for the existence of the United States Court for Berlin because the ordinance creating the United States Court for Berlin places a geographical limitation on the court. Article 4 of Law No. 46, *supra* note 20 provides: "Process . . . shall run throughout the United States Sector of Berlin." Article 3 grants the court jurisdiction over "any criminal case arising under any legislation in effect in the United States Sector of Berlin if the offense was committed within the area of Greater Berlin." One could therefore argue that the United States Court for Berlin is a territorial court and, as such, is an exception to article III condoned by the Supreme Court.

Examination of the territorial court exception to article III and of the facts giving rise to the United States Court for Berlin belies such an assertion, however. First, the United States always has indicated quite explicitly that the United States court is one established pursuant to the President's war power. The government never has hinted that this tribunal was established as a territorial court.

Second, the territorial court exception rests on the Constitution's express grant to Congress of power over the territories of the United States. U.S. CONST. art. IV, § 3. Courts created by Congress pursuant to this plenary grant of power are allowed to adjudicate federal judicial matters in the territories. Congress did not establish the United States Court for Berlin pursuant to its territorial powers. In fact, the court was not established by Congress at all; it was established solely by the executive branch.

Third, the framers gave Congress plenary powers over the territories because no state acted as sovereign in those areas. No government existed in the territories until Congress acted. Any government established would necessarily be federal. See *Glidden v. Zdanok*, 370 U.S. 530, 545 (1962) (plurality opinion). By investing broad powers in Congress, the framers ensured that Congress would have the flexibility to organize the governance of the territories in ways that would best accommodate the needs of the nation and the particular characteristics of a territory. The policy behind congressional control of territories is inapplicable when the President rather than the Congress controls the area. More fundamentally, West Berlin is not analogous to the Louisiana Purchase or the Oklahoma Territory. No government void exists in West Berlin that Congress needs to fill. West Berlin possesses a well-established indigenous government that has been carrying out municipal and state functions for more than three decades. Functioning court systems exist and carry on the judicial tasks similar to those that a state court system would assume in the United States. See *infra* notes 103-04.

Fourth, a major justification for permitting a system of non-article III courts in the territories is a logistical one. As explained in *Glidden v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion):

[Because the] entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon

the United States Court for Berlin is a military court. Its antecedents are the military tribunals established in Germany by the American occupying forces in 1945. As this Article discusses below,<sup>54</sup> the President established these tribunals pursuant to his war power.<sup>55</sup> Because these courts were article II courts, they were not a part of the judicial branch of the federal government nor were their judges members of the federal judiciary.

Based on the diplomatic maneuvering triggered by Tiede's hijacking, one can also characterize the United States Court for Berlin as a court convened by the President of the United States pursuant to his power to conduct foreign relations.<sup>56</sup> Whether a "foreign relations" court or a military court, the American court in

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the National Government, . . . courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State. But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge.

*Id.* at 545. This rationale does not apply to the American court in Berlin. The rationale is predicated on the assumption that a territory is a temporary status for a geographical area belonging to the sovereign and on the assumption that territories are incipient states. Although the United States occupies Berlin only temporarily, the United States has never assumed—and has no apparent intention of assuming—sovereignty over Berlin. Nor does the United States intend to confer statehood on Berlin or integrate Berlin into the United States in any permanent way.

54. See *infra* text accompanying notes 58-105.

55. "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." U.S. CONST. art. II, § 2. This constitutional grant of power is the basis for the executive branch's control over the military, over the methods of carrying on warfare, and over incidents to warfare such as military tribunals. For a survey of military courts created by the executive branch, see *infra* text accompanying notes 58-105.

56. "[The President] shall have Power . . . to make Treaties . . . and . . . shall appoint Ambassadors, other public Ministers and Consuls. . . ." U.S. CONST. art. II, § 2, cl. 2. "He shall . . . receive Ambassadors and other public Ministers. . . ." U.S. CONST. art. II, § 3. Although the text of the Constitution does not grant plenary executive power over foreign affairs to the President, the traditional view is that the President has primary authority in conducting the foreign affairs of the United States. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 5, at 172. As a unanimous Supreme Court stated in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936): "[T]he President alone has the power to speak or listen as a representative of the nation. . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

Berlin exists as an executive tribunal and is not part of the federal judicial branch. Consequently, in order to decide whether this court can adjudicate federal criminal charges without running afoul of article III of the Constitution, one must examine the facts of the 1978 hijacking case in light of the President's war power and foreign relations power.

A similar analysis will apply to other instances of criminal trials assigned to non-article III federal courts. If the President of the United States in the future decides to establish an American court outside the geographical boundaries of the United States in order to try hijackers who seize American citizens or property, he is likely to rely either on his war power or on his foreign relations power. Such an executive branch tribunal<sup>57</sup> would lack an independent judiciary insulated from the political pressures to which the executive branch is exposed. The creation of such a court would thus trigger serious separation of powers concerns. Accordingly, because assigning federal criminal cases to executive branch tribunals threatens the constitutional structure of three separate and independent branches of government, an examination of the President's war power and foreign relations power to see if they provide legitimate justifications for convening American courts overseas to adjudicate hijacking charges becomes crucial.

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57. The Constitution does not preclude establishing article III courts overseas. Article III does not limit the federal judicial branch in any geographical dimension. Rather, article III limits the federal judicial branch to the exercise of the judicial power of the United States in cases or controversies that fall within nine enumerated categories. As long as a federal court overseas exercises the judicial power of the United States, as defined by the nine categories enumerated in article III, and is staffed by judges protected by the article III safeguards of judicial independence, Congress may establish that court as an article III court. That article III courts overseas can be constitutionally established does not mean that doing so would be wise. Certainly, article III courts overseas would face many more difficulties in issuing effective process and in enforcing judgments than would article III courts in the United States. One should note, however, that difficulties with enforcing process and judgments would present the same problems for non-article III courts overseas that they would for article III courts overseas. Thus, an overseas executive branch tribunal would not be more advantageous from the point of view of enforcement of court orders. An article II court would offer one practical advantage, however. It could be created overnight by presidential proclamation, whereas an act of Congress is required to establish a new article III court.

#### IV. EXECUTIVE BRANCH FEDERAL COURTS AND THE WAR POWER

Although the framers of the Constitution confined the judicial power of the United States to an independent branch, created by article III, in order to prevent the President or Congress from controlling the federal courts, a system of federal military courts developed outside article III. Congress and the Executive created these courts pursuant to their constitutional powers to regulate the armed forces.<sup>58</sup>

The military courts have been justified because the nation's need for an efficient, well-disciplined fighting force requires that the military possess authority to adjudicate matters without the "often deliberately cumbersome concepts of civilian jurisprudence."<sup>59</sup> Historical evidence that the framers contemplated a military court system existing outside the judicial branch further justifies the constitutionality of these non-article III military courts. The historical evidence, discussed below, clearly indicates that military courts are a time-honored exception to article III. They have been part of the federal government for as long as the nation has existed.

##### A. *Federal Military Courts: An Historical Overview*

###### 1. *Courts-martial*

Military tribunals commonly known as courts-martial long predated the United States Constitution.<sup>60</sup> The Articles of War, enacted by the Continental Congress in 1775 to govern the American Revolutionary Army, expressly provided for trial by court-martial of soldiers and civilians serving with the army.<sup>61</sup> In 1789, soon after

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58. "The Congress shall have Power To . . . make Rules for the Government and Regulation of the land and naval Forces. . . ." U.S. CONST. art. I, § 8, cl. 14. "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." U.S. CONST. art. II, § 2, cl. 1.

59. Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion); see also O'Callahan v. Parker, 395 U.S. 258, 261 (1969).

60. Madsen v. Kinsella, 343 U.S. 341, 349 n.15 (1952).

61. Article 32 of the American Articles of War of 1775 provided: "All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers are to be subject to the articles, rules and regulations of the continental army." *Madsen*, 343 U.S. at 349 n.15; see also *Kinsella v. Singleton*, 361 U.S. 234, 266 (1960) (Whittaker, J., concurring in part and dissenting in part).

the ratification of the Constitution, the new Congress adopted the 1775 Articles of War, including provisions for courts-martial.<sup>62</sup> Although revised from time to time, congressional authorization for courts-martial has remained constant since 1789.<sup>63</sup> Consequently, a military justice system developed that differs in significant ways from civilian courts. The Supreme Court has described some of the differences:

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.<sup>64</sup>

Despite the vast differences between article III courts and courts-martial, the constitutionality of trying serious criminal offenses by court-martial is well-established.<sup>65</sup> Nonetheless, the Supreme Court warned against permitting an expansive court-martial jurisdiction:

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline

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62. *Singleton*, 361 U.S. at 269 (Whittaker, J., concurring in part and dissenting in part).

63. *Madsen*, 343 U.S. at 349-50.

64. *O'Callahan v. Parker*, 395 U.S. 258, 263-64 (1969) (footnotes omitted).

65. *E.g.*, *Relford v. Commandant*, 401 U.S. 355 (1971) (trial by court-martial on charges of rape and kidnapping).

beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, but in examining the reach of their jurisdiction, it has recognized that "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . ."<sup>66</sup>

Troubled by the dangers inherent in military courts, the Supreme Court has significantly limited court-martial jurisdiction during the last thirty years. For example, the Supreme Court prohibits trial by court-martial of soldiers discharged from the armed forces for crimes committed during military service.<sup>67</sup> It also forbids trials of civilians.<sup>68</sup> Even soldiers on active duty may not be tried by court-martial if charged with non-service-connected crimes.<sup>69</sup>

## 2. *Military Commissions*

Courts-martial are not the only authorized military tribunals. Military commissions held trials during the Revolutionary War, the Mexican War, the Civil War, Reconstruction, the Spanish-American War, World War I, and World War II.<sup>70</sup> They came into wide use during the Mexican War. General Winfield Scott convened them to try offenses outside the narrow jurisdiction given to courts-martial by Congress.<sup>71</sup> Following Scott, military commanders during the Civil War and Reconstruction assigned

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66. *O'Callahan*, 395 U.S. at 265 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

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

68. *Kinsella v. Singleton*, 361 U.S. 234 (1960) (holding unconstitutional court-martial of civilians charged with noncapital offense); *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion) (reversing conviction by court-martial of civilian charged with capital offense in non-occupation zone in peacetime).

69. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

70. Cowles, *The Trial of War Criminals by Military Tribunals*, 30 A.B.A. J. 330 (1944).

71. *Id.* at 331; see also *Madsen*, 343 U.S. at 353 n.20 (quoting S. Rep. No. 229, 63rd Cong., 2d Sess. 53, 98-99 (General Crowder)).

thousands of cases to military commissions.<sup>72</sup> In contrast to courts-martial, the commissions have been convened without legislative authorization, based solely on the executive's war power.<sup>73</sup>

Although usually convened during wartime, in some instances the commissions continued to try cases after hostilities ended.<sup>74</sup> Military officers generally serve as judges of these commissions, but on occasion civilians preside over them.<sup>75</sup> The President, in his capacity as Commander-in-Chief of the Army and Navy, appoints the judges, whether military or civilian.<sup>76</sup> They serve for the terms set forth in the appointment and do not receive a guarantee of life tenure or protection against a reduction in their salaries.<sup>77</sup>

Despite the lack of these safeguards of judicial independence, a number of military commissions have tried notorious cases. For example, a military commission tried those accused of assassinating President Lincoln.<sup>78</sup> In *Ex parte Quirin*,<sup>79</sup> a military commission tried German spies put ashore by submarine on Long Island and in

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72. *Madsen*, 343 U.S. at 347; Cowles, *supra* note 70, at 330.

73. *Madsen*, 343 U.S. at 348, 353 n.20; Cowles, *supra* note 70, at 331. Commissions were originally established to serve as war courts for cases over which courts-martial did not have jurisdiction. The Supreme Court said:

[T]he jurisdiction of the court-martial . . . is restricted by statute almost exclusively to members of the military force and to certain specific offenses. . . .

It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. . . .

*Madsen*, 343 U.S. at 346 n.9 (citing WINTHROP, *MILITARY LAW AND PRECEDENTS* 836 (2d ed. 1920 reprint)).

74. *Madsen*, 343 U.S. at 348, 360; Cowles, *supra* note 70, at 331.

75. Cowles, *supra* note 70, at 331.

76. *Madsen*, 343 U.S. at 348.

77. *Toth*, 350 U.S. at 17; *O'Callahan*, 395 U.S. at 264.

78. Cowles, *supra* note 70, at 330.

79. 317 U.S. 1 (1942). On June 14, 1942, four German soldiers were landed by submarine on Amagansett Beach on Long Island, New York. On June 17, 1942, four German soldiers were landed at Porte Vedra Beach, Florida. All eight carried explosives, fuses, and incendiary and timing devices. All were captured by the FBI. Six of the defendants were citizens of Germany. One, although born and residing in Germany, alleged that he was a naturalized citizen of the United States.

The President of the United States, invoking his war power, appointed a military commission consisting of five military officers to try the defendants on charges of spying and attempted sabotage. A civilian, the Attorney General of the United States, prosecuted the case. The commission followed procedures prescribed by the President that entitled the defendants to defense counsel, to notice of the charges against them, to present evidence on their behalf, and to confront witnesses against them. They were not afforded a jury trial, however, nor were they indicted by a grand jury.



Florida in 1942. In *Quirin* the defendants challenged the jurisdiction of the military court, composed of five military officers appointed by the President, asserting that the Constitution required that they be tried in an article III court before a jury of their peers. The Supreme Court rejected this argument. Even though the article III courts were open and functioning throughout the United States, the Supreme Court ruled that, at least in wartime, the President could constitutionally assign espionage and sabotage cases to a military court.<sup>80</sup>

### 3. *Occupation Courts*

In addition to courts-martial and military commissions, a third category of military tribunals, occupation courts, has long existed as part of the American military court tradition. Established by order of military commanders in hostile areas occupied by American military forces, these courts have their genesis in military commissions. The Supreme Court has acknowledged the legitimacy of occupation courts:

Since our nation's earliest days [United States military commissions and occupation courts in the nature of such commissions] have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common-law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth. In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms.<sup>81</sup>

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80. *Id.* at 46.

81. *Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952).

The most elaborate organization of American occupation courts existed in Germany in the 1940's and 1950's. Immediately after World War II, the United States Armed Forces occupying Germany instituted a system of Military Government Courts.<sup>82</sup> In his role as Supreme Commander of the Allied Forces, General Eisenhower ordered the Military Government Courts to apply the German Criminal Code, stripped of its Nazi provisions and amended by any special laws enacted by the occupying forces.<sup>83</sup> These American occupation courts totally supplanted the German court system<sup>84</sup> and heard thousands of garden-variety criminal cases.<sup>85</sup>

In 1949, the American occupation government in Germany underwent a transformation from military to civilian status. The United States Courts of the Allied High Commission, a court system under the aegis of the State Department rather than the Department of the Army, replaced the Military Government Courts.<sup>86</sup> The new American courts, located throughout the area occupied by United States forces, continued to decide cases under the German Criminal Code.<sup>87</sup> Together, these occupation courts decided more than 600,000 criminal cases between 1945 and 1953, trying Americans as well as Germans.<sup>88</sup>

Challenges to the jurisdiction that American occupation courts exercised over civilians thus far have been unsuccessful. In 1952, in *Madsen v. Kinsella*,<sup>89</sup> the Supreme Court upheld the homicide conviction of an American civilian tried in Germany by an American occupation court. Yvette Madsen shot and killed her husband, an American military officer, at their residence in Germany in 1949. Both Madsens were American citizens. Yvette Madsen had

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82. Nobleman, *The Administration of Justice in the United States Zone of Germany*, 8 FED. B.J. 70 (1946).

83. *Id.* at 71, 75.

84. *Id.* at 91.

85. *See, e.g., Madsen*, 343 U.S. at 358 n.23; McCauley, *American Courts in Germany: 600,000 Cases Later*, 40 A.B.A. J. 1041, 1042-43 (1954).

86. *Madsen*, 343 U.S. at 357. In 1948 the Military Government had replaced the military courts with a system of "civilian" courts. These courts, an arm of the military occupying forces, were called United States Military Government Courts. For a description of Ordinance No. 31, see *infra* notes 90-91. *See also Tiede*, 86 F.R.D. at 236.

87. *Madsen*, 343 U.S. at 356, 361-62.

88. McCauley, *supra* note 85, at 1041-45.

89. 343 U.S. 341 (1952).

accompanied her husband to his assignment in the zone of Germany occupied by the United States. Soon after the shooting, United States Military Police arrested Yvette Madsen and charged her with murder in violation of the German Criminal Code. The American occupation court that heard the case consisted of three American civilians appointed by the United States Military Governor to serve as judges.<sup>90</sup> The court convicted Madsen of murder and sentenced her to 15 years in prison, and the occupation appeals court, composed of five civilians appointed by the Military Governor, affirmed. Madsen was confined in the federal penitentiary for women in West Virginia.<sup>91</sup>

From prison Madsen petitioned for a writ of habeas corpus, alleging that the occupation court in Germany lacked jurisdiction to try her. Both the federal district court in West Virginia<sup>92</sup> and the United States Court of Appeals for the Fourth Circuit<sup>93</sup> denied Madsen's petition. The Supreme Court affirmed the lower courts. In a lengthy opinion for the eight-member majority, Justice Burton reviewed the history of American occupation courts in general and the post-World War II occupation courts in Germany in particular. He noted that as the United States government in Germany changed from a military to a civilian government, the occupation court system underwent a similar transformation.<sup>94</sup> Nonetheless, he emphasized that the civilian occupation courts

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90. *Id.* at 362. Two of the civilians were appointed as district judges; the third was appointed as a magistrate. 343 U.S. at 344. On August 18, 1948, United States Military Government Ordinance No. 31 established a system of United States Military Government Courts. Article 3 of this ordinance created a district court in each judicial district within the United States area of control and authorized each district court to consist of one or more district judges and one or more magistrates, who sat both singly and as a panel. Capital crimes were heard by panels of three, and the death penalty could only be imposed by a unanimous decision of the court. *Madsen*, 343 U.S. at 365 app.

91. Article 13 of Ordinance No. 31, *supra* note 90, established a Court of Appeals of the United States Military Government Courts. On December 28, 1949, the United States High Commission for Germany changed the name of the court to the Court of Appeals of the United States Courts of the Allied High Commission for Germany. *Madsen*, 343 U.S. at 370-71 (citing Allied High Commission Law No. 1, 15 Fed. Reg. 2086 (effective date January 1, 1950)).

92. 93 F. Supp. 319 (S.D.W. Va. 1950), *aff'd*, 188 F.2d 272 (4th Cir. 1951), *aff'd*, 343 U.S. 341 (1952).

93. 188 F.2d 272 (4th Cir. 1951), *aff'd*, 343 U.S. 341 (1952).

94. *Madsen*, 343 U.S. at 356-60.

derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops. Although the local government was no longer a "Military Government," it was a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory.

The government of the occupied area thus passed merely from the control of the United States Department of Defense to that of the United States Department of State. The military functions continued to be important and were administered under the direction of the Commander of the United States Armed Forces in Germany. He remained under orders to take the necessary measures, on request of the United States High Commissioner, for the maintenance of law and order and to take such other action as might be required to support the policy of the United States in Germany.<sup>95</sup>

Further, the Supreme Court approved the civilian nature of the occupation court that convicted Madsen, noting that "[t]he volume of business, the size of the area, the number of civilians affected, the duration of the occupation and the need for establishing confidence in civilian procedure emphasized the propriety of tribunals of a nonmilitary character."<sup>96</sup> In closing, the Court added that, although the basis for an occupation court is military conquest, "[t]he authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully."<sup>97</sup>

The United States Court for Berlin, over which Stern presided, is a direct descendant of the court that convicted Madsen. It still exists because technically the military occupation of Berlin still continues.

In 1955, the United States, England, and France terminated their military occupation of West Germany.<sup>98</sup> At that time, the Federal Republic of Germany took over all the government func-

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95. *Id.* at 357.

96. *Id.* at 358.

97. *Id.* at 360.

98. Protocol on Termination of the Occupation Regime, October 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425, 331 U.N.T.S. 253.

tions, judicial and otherwise, that the occupiers had exercised. Thus, the occupation courts ceased to exist.<sup>99</sup> The three occupying powers did not end their occupation of West Berlin, however. Instead, they remained in force, as did the Soviets who occupied East Berlin. Shortly before his position was eliminated in 1955, the United States High Commissioner of Germany, foreseeing the potential future need for an American court in the remaining occupied territory, promulgated a regulation establishing the United States Court for Berlin.<sup>100</sup> The regulation defined the jurisdiction of the court, according it jurisdiction over criminal offenses committed in Berlin and over certain selected civil cases.<sup>101</sup>

Today, the United States, England, and France still continue to maintain military forces in West Berlin. Officially they state that the "governments [of England, France and the United States] . . . continue . . . to exercise supreme authority in the Western Sectors of Berlin."<sup>102</sup> Despite such statements by the occupying powers, the Germans carry out the daily functions of government in West Berlin.<sup>103</sup> For example, a full-fledged system of German courts exists in Berlin.<sup>104</sup> This German judicial system has handled all criminal and civil proceedings initiated in West Berlin since 1955. Ac-

99. *United States v. Tiede*, 86 F.R.D. 227, 237 (1979).

100. Law No. 46, *supra* note 20.

101. Law No. 46, *supra* note 20, at articles 3, 6.

102. Quadripartite Agreement on Berlin, Sept. 3, 1971, 24 U.S.T. 283, 343 T.I.A.S. 7551. See *infra* text accompanying notes 135-37.

103. Although the Allied Kommandatura reserves to itself ultimate control over the foreign relations of Berlin, the Federal Republic of Germany represents Berlin abroad. In most respects Berlin functions as a *Land* (state) of the Federal Republic. Most treaties of the Federal Republic of Germany apply to Berlin.

With regard to the legislature, Berlin sends 22 representatives to the Bundestag and 4 to the Bundesrat. On occasion a Berlin representative sitting as Chairman of the Bundesrat has acted as chief of state in the absence of the president of the Federal Republic. Willy Brandt, a mayor of Berlin, became the Chancellor of the Federal Republic. Lush, *The Relationship Between Berlin and the Federal Republic of Germany*, 14 INT'L & COMP. L.Q. 742, 771, 780 (1965).

Indeed, in light of the extension of the laws and judicial system of the Federal Republic of Germany to Berlin, some German constitutional lawyers argue that Berlin has become a *Land* of the Federal Republic. Bathurst, *Legal Aspects of the Berlin Problem*, 38 BR. Y.B. INT'L L. 255, 270-71 (1962).

104. The judicial system of the Federal Republic of Germany includes Berlin. Parties may appeal cases from the Berlin courts to all but one of the superior Federal Republic courts. Two of the superior Federal courts, the Federal Administrative Court (Bundesverwaltungsgericht) and the Federal Disciplinary Court (Bundesdisziplinarhof), are actually located in

cordingly, the United States Court for Berlin never convened in more than two decades.<sup>105</sup> In the fall of 1978, however, the dormant American court in Berlin slowly and reluctantly came to life at the insistence of the government of West Germany.

*B. The Military Occupation Court in Berlin: A Contemporary Perspective*

The history of American military tribunals indicates that they are part of a flexible court system existing outside of the federal judicial branch created by article III. The composition and jurisdiction of these courts are not fixed; they change to fit changing circumstances. Nonetheless, whatever the form of military court, it may hear trials only to the extent necessary to maintain military order. If allowing military courts to preside over a trial fails to further this goal, then the military trial is not a legitimate exercise of the war power.

Although American military forces are stationed today in Berlin and official papers proclaim that the United States occupies a sector of West Berlin as a result of military conquest, four decades have passed since hostilities ended between Germany and the United States. Three decades have elapsed since the Allied military occupation forces that governed Germany withdrew in favor of German civilian government. Additionally, the social dysfunction that characterized post-war Germany in the immediate aftermath of World War II—and that justified the occupation government's existence—no longer exists. The United States occupies West Berlin in name only. The American "occupiers" no longer concern themselves with maintaining military order over an exhausted and resentful civilian population. Instead, the American military personnel in Berlin today seek to bolster an ally. They are not forces whose right to be there is based solely on military conquest.

As a result of these changes, one can say that the United States "occupation" of Berlin justified convening an American military court there in 1979 to try a civilian charged with air piracy only by elevating form over substance. The German courts in Berlin were

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Berlin, as is the Fifth (Criminal) Division of the Federal Supreme Court (Bundesgerichtshof). Lush, *supra* note 103, at 780.

105. Stern, *supra* note 14, at 53.

fully capable and competent to try the case without in any way interfering with any American interest in a continued military presence in Berlin. Consequently, the military rationale does not satisfy the constitutional requirement limiting the jurisdiction of military tribunals to those cases that further the goal of maintaining military order. In light of the circumstances in Berlin at the time Tiede arrived in 1978, therefore, his criminal trial in a military court was improper.

An analysis of the justifications advanced for convening military courts in the past and their application to the facts of the Tiede hijacking demonstrates that Tiede's prosecution before an American military court violated the Constitution. During the two hundred year history of American military courts, a number of factors have been significant in determining whether a military tribunal rather than an article III court may adjudicate cases. A paramount consideration has been the status of the accused. If he is a member of the United States military forces, a presumption exists that a military court may hear his case based on the "need for a prompt ready-at-hand means of compelling obedience and order [within the military ranks.]"<sup>106</sup> On the other hand, if the accused is a civilian, military courts rarely possess authority to try the case.<sup>107</sup> As the Supreme Court explained:

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106. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). This presumption is overridden in certain circumstances. If the defendant has been accused of a non-service connected offense committed off post in the United States during peacetime, he is entitled to an article III court. *O'Callahan*, 359 U.S. at 274. If a serviceman is charged with an offense committed on a military base and violates the security of a person or property there, however, that offense is "service-connected" and may be tried by a court-martial. *Relford v. Commandant*, 401 U.S. 355, 369 (1971).

107. The Supreme Court said:

Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently, considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.

Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "*the least possible power adequate to the end proposed.*" We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other

*The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury [in a civil court]. This privilege is a vital principle underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.<sup>108</sup>*

Although article III courts usually try civilians like Tiede accused of criminal offenses, in certain circumstances military courts have tried civilians, justifying their actions as necessary incidents to the maintenance of military order. For example, during time of war military courts have tried civilians in areas where actual hostilities occur.<sup>109</sup> Similarly, during a military occupation, the military's need to control the conquered territory has justified assigning trials of civilians to military courts.<sup>110</sup> Thus, if a state of war, a military occupation, or some other significant military reason<sup>111</sup> exists, the maintenance of military order may justify constitutionally the trial of a civilian in a military court.

Because Tiede was not a member of the United States military when he diverted the Polish plane to Berlin in 1978, his status can-

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civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.

United States *ex rel.* Toth v. Quarles, 350 U.S. at 22-23 (footnotes omitted).

108. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) (emphasis added).

109. *See, e.g., id.* at 127.

110. *See e.g.,* Reid v. Covert, 354 U.S. at 35 n.63 (plurality opinion); Madsen v. Kinsella, 343 U.S. at 356-60.

111. For example, the location or type of crime may have a serious impact on the military. *See Relford*, 401 U.S. 355 (1971) (offense committed on military base gave rise to trial by court-martial); *Quirin*, 317 U.S. 1 (1942) (espionage and sabotage charges during wartime gave rise to trial by military commission); *Bell v. Clark*, 437 F.2d 200 (4th Cir. 1971) (rape by American soldier stationed in Germany gave rise to trial by court-martial).



not justify assigning his criminal prosecution to an American military court. Accordingly, some other reason must exist in order to justify allowing an American military court to adjudicate his case.

An examination of the facts of Tiede's hijacking reveals the presence of some factors that in the past have led to military trials of civilians. For example, World War II has never been concluded by a treaty of peace between the United States and Germany.<sup>112</sup> Furthermore, the Allied occupation of Berlin technically has never ended.<sup>113</sup> In addition, significant numbers of American troops remain in West Berlin. Some of these soldiers in fact reside at the very American air base where Tiede's plane landed. Closer analysis, however, reveals that each of these factors fails to justify assigning Tiede's criminal trial to a military court.

### 1. *Declared War*

When the United States has declared war and is engaged in actual hostilities, the President's war power in some instances justifies convening military courts to try civilians. Indeed, historical evidence indicates that the framers envisioned that military courts would exert criminal jurisdiction over certain civilians in wartime. For example, in colonial times a number of civilians who provisioned the armies faced trial by court-martial.<sup>114</sup> The Supreme Court, however, has steadily narrowed the jurisdiction of military courts over civilians. During the Civil War, the Supreme Court

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112. The state of war between the United States and Germany was formally terminated by Presidential Proclamation, Proclamation No. 2950, 16 Fed. Reg. 10,915 (1951), and Joint Resolution of Congress, H.J. Res. 289, 82nd Cong., 1st Sess. (1951). The United States never concluded a peace treaty with Germany, however, although the United States has concluded peace treaties with Italy, Treaty of Peace, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. No. 1648, 49 U.N.T.S. 3, and Japan, Treaty of Peace, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45. Apparently, the United States is waiting to conclude a peace treaty with a reunited Germany. See Brief for the United States at 8, *United States v. Tiede*, 86 F.R.D. 227 (1979). The United States and the Federal Republic of Germany have entered into several treaties, however. *E.g.*, Treaty of Friendship, Commerce and Navigation with Protocol and Exchange of Notes, Oct. 29, 1954, 7 U.S.T. 1839; T.I.A.S. No. 3593, 273 U.N.T.S. 3; Mutual Defense Assistance Agreement, June 30, 1955, 6 U.S.T. 5999; T.I.A.S. No. 3443; 240 U.N.T.S. 47.

113. See *supra* text accompanying note 102.

114. Suttlers, retailers, and other civilians who performed services for the armed forces in the field during wartime were subject to trial by court-martial. *Reid*, 354 U.S. at 33 n.60 (plurality opinion); *Madsen*, 243 U.S. at 349 n.15.

struck down a military court's conviction of a civilian in Indiana in *Ex parte Milligan*.<sup>115</sup> The defendant in that case stood convicted of conspiring to aid the rebellious southern forces. Despite the fact that Indiana was a military district at the time the defendant was arrested, that the Confederacy still existed, and that the defendant was charged with aiding the enemy, the Supreme Court stated that a military trial violated the Constitution so long as the civilian courts functioned.<sup>116</sup> The Court further emphasized that military trials of civilians may exist only in "the locality of actual war"<sup>117</sup> or in an area in imminent threat of foreign invasion.<sup>118</sup> The Court clearly indicated that it would look behind the formalities to evaluate the realities of military action.

During World War II, the Supreme Court also faced a challenge to trial by military court. In *Ex parte Quirin*,<sup>119</sup> the Court upheld a military court's conviction of seven defendants accused of attempted espionage and sabotage in the United States. The Court rejected the defendants' contention that the availability of civilian courts throughout the United States made a military trial unconstitutional. Emphasizing that the United States was at war with Germany, that the defendants were citizens of Germany, that the defendants had entered the United States surreptitiously on a military mission to sabotage American war industries, and that the law of war outlaws sabotage and espionage behind enemy lines, the Court ruled that, pursuant to his war power, the President could assign this trial to a military court rather than to an article III court.<sup>120</sup> As in *Milligan*, the Supreme Court examined the factual

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115. 71 U.S. (4 Wall.) 2 (1866).

116. The concurrence based its decision on statutory grounds and explicitly disavowed the sweep of the majority's constitutional holding. Specifically, the concurrence found that Congress had not authorized military commissions to try and sentence civilians in states such as Indiana where the civil courts had remained open and uninterrupted throughout the course of the war. The concurrence concluded, however, that in wartime Congress does have the power, should it so choose, to authorize military trials for crimes against the security and safety of the armed forces in localities it deems to be threatened by great public danger. *Id.* at 136, 140-42 (Chase, J., concurring).

117. *Id.* at 127.

118. *Id.*

119. 317 U.S. 1 (1942).

120. *Id.* at 25. According to the *Quirin* opinion, the law of war includes "that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as of enemy individuals." *Id.* at 27-28. The law of war draws a distinc-

circumstances of the case, not merely the government's formal characterization of it. The defendants' status as enemy belligerents who had entered the territory of the United States to carry out acts of war against the United States, especially during a period of actual hostilities when the threat of invasion was significant, was crucial to the court's analysis.

The trial of a hijacker in a military court in Berlin in 1979 technically stems from the same military conflict involved in *Quirin*. The United States declared war against Germany in December 1941.<sup>121</sup> Although Germany surrendered in May 1945<sup>122</sup> and the Allied High Commission transferred the reins of government to the Federal Republic of Germany in 1955,<sup>123</sup> the United States has not yet concluded a treaty of peace with Germany.<sup>124</sup> One could say, therefore, that the state of war declared in 1941 still exists.<sup>125</sup> Such an unrealistic assertion, however, cannot serve as a legitimate basis for the extraordinary assignment of the criminal trial of a civilian to a military court.

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tion between lawful and unlawful combatants. Lawful combatants (typically soldiers in uniform) are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants (such as those who during war secretly and without uniform cross military lines in order to destroy life and property or gather military information) are not entitled to be treated as prisoners of war, but are subject to trial and punishment by military commissions. *Id.* at 30-31. United States citizens who align themselves with enemy military forces and who enter this country with the aid and guidance of the enemy for the purpose of committing hostile acts are unlawful combatants and are not exempt from the consequences of violating the law of war. *Id.* at 37-38. Like alien enemies, citizen enemies are outside the constitutional guarantee of trial by jury because they have violated the law of war by committing offenses constitutionally triable by a military tribunal. *Id.* at 44.

121. On December 11, 1941, Congress issued a declaration of war against Germany, S.J. Res. 119, 77th Cong., 1st Sess., Pub. L. No. 331, 55 Stat. 796 (1941) and Italy, S.J. Res. 120, 77th Cong., 1st Sess., Pub. L. No. 332, 55 Stat. 797 (1941). Three days earlier, Congress had declared war against Japan, S.J. Res. 116, 77th Cong., 1st Sess., Pub. L. No. 328, 55 Stat. 795 (1941).

122. In May 1945, the German Army surrendered to the Allied Forces at Reims, France. The surrender was signed on May 7, to become effective on May 8-9, 1945. 23 *ENCYCLOPÆDIA BRITANNICA* 775 (1969). The Japanese proclaimed an unconditional surrender to the Allied Forces on August 14, 1945. The formal surrender was signed on September 2, 1945, aboard the U.S.S. *Missouri* in Tokyo Bay. *Id.* at 782.

123. See *supra* note 98 and accompanying text.

124. See *supra* note 112.

125. The Presidential Proclamation and Joint Resolution of Congress, *supra* note 112, declaring an end to hostilities belie this contention, however.

Furthermore, Tiede did not enter the United States zone of Berlin during a time of actual combat in order to commit an act of war. Moreover, no imminent danger of invasion of the United States by East or West Germany existed when Tiede's hijacking occurred and was tried. The political tension between East Berlin and the United States sector of West Berlin and the presence of opposing military forces garrisoned in each zone also fail to justify trying Tiede in an American military court. The *Milligan* case makes clear that military courts may not adjudicate criminal charges against civilians based on the threat of armed conflict with a potential military enemy.<sup>126</sup>

In these circumstances, the *Milligan* and *Quirin* cases teach that the lack of a peace treaty between the United States and Germany fails to justify trying a German civilian in an American military court. If such a court possesses the power to try Tiede under the President's war power, another justification must exist.

## 2. Occupation

One can argue that, although the armed combat of World War II has ended, the continuing United States military occupation of Berlin justifies assigning criminal trials of civilians to a military court. In many instances in the past, American military courts have tried civilians during a military occupation. The need to maintain military order in recently conquered territories is a legitimate basis for convening military commissions and occupation courts.<sup>127</sup> In an occupation, military forces replace the civilian government, and the situation is most likely precarious, even though armed combat may have ended. The military commander needs to protect the physical safety of the occupying troops, subdue pockets of resistance, and control the local civilian population so that looting and destruction of weaker citizens does not become rampant. In light of these factors and the social disruption and resentment likely to exist during a military occupation, judges in the occupation courts must understand the military consequences of the decisions they make. Acknowledging the desirability of having courts sensitive to military requirements and able to adjudicate swiftly

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126. *Milligan*, 71 U.S. (4 Wall.) at 127.

127. See, e.g., *Madsen*, 343 U.S. at 348, 356.

the problems that arise in an occupation, the Supreme Court stated, "in enemy territory . . . conquered and held by force of arms and . . . governed at the time by our military forces . . . the army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the army or not."<sup>128</sup> Thus, in situations where United States forces occupy enemy territory, the President's war power may justify military trials of civilians even after actual hostilities cease.

In fact, the Supreme Court explicitly ruled that American military occupation courts could try civilians charged with serious criminal offenses committed in Germany even though the incidents and crimes took place four and one-half years after armed combat had ended. In *Madsen v. Kinsella*,<sup>129</sup> the Court recognized American occupation courts in Germany in the decade following World War II as an essential component of the military government that administered Germany and deemed them a practical necessity and constitutionally permissible. German society was in disarray, German courts had ceased functioning, and American military forces governed Germany. Some American forum for resolving disputes was therefore necessary. Moreover, because the American occupation courts were expected to disappear when German civilian government again functioned, granting life tenure to the judges of the American occupation courts would have been extremely unwieldy.<sup>130</sup> Thus, establishing article III courts overseas to try cases during the occupation of Germany was not a viable option.<sup>131</sup> In-

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128. *Reid*, 354 U.S. at 35 n.63.

129. 343 U.S. 341, 356 (1952). For a discussion of this case, see *supra* text accompanying notes 89-97. The *Madsen* holding was reaffirmed in *Reid v. Covert*, 354 U.S. 1, 35 n.63 (plurality opinion), in which the plurality distinguished between military courts in occupied areas held by force of arms and military trials of civilians accompanying American soldiers overseas in areas where there are no actual hostilities underway.

130. In this respect the rationale for non-article III occupation courts is similar to one of the rationales for territorial courts. See *supra* note 53 (discussing territorial courts).

131. On the other hand, no territorial limitation exists on article III courts in the Constitution. Article III courts can be established overseas so long as they exercise the judicial power of the United States. If the American military controls the country where the article III court is authorized to sit, enforcement of subpoenas and judgments will not present practical problems. See *supra* note 57.

stead, the American military commander in Germany convened military courts staffed by military personnel.<sup>132</sup>

Within a decade after Germany surrendered, the American occupation of Germany and all but one American occupation court ceased. In 1955 the occupying powers relinquished control of West Germany to the Federal Republic of Germany, but they did not relinquish their status as occupiers of West Berlin. In its role as one of the conquerors, the United States still maintains American military forces in the American zone of Berlin. Thus, as a result of the military conquest of 1945, the American military has maintained an uninterrupted presence in West Berlin for forty years.

In addition to the physical presence of American servicemen, legal instruments still formally acknowledge American troops as occupying forces in Berlin. In 1944, before the surrender of Germany, the United States, United Kingdom, and Soviet Union agreed to occupy Berlin jointly after Germany surrendered.<sup>133</sup> In the summer of 1945, the United States, United Kingdom, Soviet Union, and France formally established a joint command to administer the city of Berlin. They assigned each of the military forces to a separate sector, and placed a military commander in charge of administering each sector.<sup>134</sup> In the late 1940's and 1950's, the United States signed additional declarations authorizing the local Berlin authorities to exercise greater control of local matters, but continuing to reserve certain powers to the allied forces.<sup>135</sup> As recently as 1971 the four wartime allies signed another agreement concerning

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132. In the precarious situation of an armed occupation of enemy territory, affording life tenure to occupation court judges may lead to a problem unrelated to the number of surplus life-tenured judges when the occupation terminates. If a "rogue" judge begins undermining the occupying forces and unsettling the local population, the military commander will need to be able to remove him from the situation quickly. The impeachment process, the only constitutional method for removing article III judges, would likely work too slowly to ensure that the situation would be remedied without threatening the viability of the occupation.

133. Protocol on Zones of Occupation in Germany and Administration of "Greater Berlin," approved by the European Advisory Commission, September 12, 1944, 5 U.S.T. 2078, T.I.A.S. No. 3071, 227 U.N.T.S. 279.

134. *United States v. Tiede*, 86 F.R.D. at 232.

135. Committee on Foreign Relations, Declaration on Berlin Governing Relations Between Allied (Western) Kommandatura and Berlin, U.S. Senate, 92nd Cong., 1st Sess. 208 (1971), *reprinted in* DOCUMENTS ON GERMANY, 1944-1971; Statement of Principles Governing the Relationship Between the Allied Kommandatura and Greater Berlin, DOCUMENTS ON GERMANY, at 158.

the status of Berlin.<sup>136</sup> This Quadripartite Agreement, which the Federal Republic of Germany did not sign, includes detailed promises and obligations regarding travel between East and West Berlin, travel between West Germany and West Berlin, and similar matters. It demonstrates that the United States and the other allies still exercise some degree of control over aspects of life in West Berlin. In conjunction with these written agreements, the allied forces continue to assert publicly their status as occupiers. Following the signing of the 1971 compact, the United States, United Kingdom, and France notified West Germany that their "governments will continue, as heretofore, to exercise supreme authority in the Western Sectors of Berlin."<sup>137</sup>

Although American, British, and French forces still technically may occupy West Berlin, they do so in name only. The allied military forces do not govern the city. German officials and German judges staff the municipal machinery<sup>138</sup> unsupervised by the allied forces; they do not seek approval from the allies for government decisions. West Berlin today functions—and has functioned for decades—under a civilian German government.<sup>139</sup> The American military forces, despite their historical antecedents as occupiers who entered West Berlin as a result of military conquest and remained to preserve order over an enemy population defeated in war, now remain in Berlin as reinforcements of a trusted ally.

Not only has the function served by the United States military forces in Berlin changed dramatically over the last forty years, but the judicial void that American military courts filled in Germany in the decade after hostilities ended in 1945 is no longer present. German courts have tried all the criminal and civil cases litigated by civilians in West Berlin since 1955. Furthermore, German trials during that time did not interfere in any way with the continued American interest in Berlin, nor did the Tiede hijacking affect American military interests arising from the presence of American troops in Berlin in 1978. Consequently, one cannot defend Tiede's criminal trial in a military court as incidental to the military's

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136. Quadripartite Agreement on Berlin, Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551.

137. 24 U.S.T. at 343.

138. See *supra* note 104.

139. See *supra* note 103.

need to govern the German population during the occupation. Nor can one defend it as a legitimate response to the social dysfunction of German society in the aftermath of World War II. In the absence of the need for occupying forces to govern and control a war-torn society, and in the absence of any threat to the military interests of the vestigial occupying force, a military occupation rationale fails to justify the trial of Tiede in a military court. His trial violated the constitutional command limiting the jurisdiction of military courts to cases that further the need of the armed forces to maintain military order.

Admittedly, applying the analysis outlined above may require federal courts in some situations in the future to undertake the delicate task of reviewing whether the need for military order has diminished to such an extent that occupation courts can no longer try civilians. In light of the deference the executive branch deserves in matters affecting the military and foreign policy, courts will hesitate to declare that a military occupation has effectively terminated. Nevertheless, federal courts must uphold article III of the Constitution. When such an attenuated connection exists between the initial military conquest and the current state of society, the courts should discount the legal fiction of occupation and protect the defendant's right to trial in an article III federal court.<sup>140</sup> The Berlin hijacking trial is such a case.<sup>141</sup> The nature of the American "occupation" of Berlin does not permit a military trial. If the war power is to be considered the justification for this trial, another rationale must be identified.

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140. The Constitution does not guarantee every defendant a trial in an article III court. Under the Constitution, a defendant may be tried in a state court or in another country's court, neither of which is established under article III. The Constitution does guarantee the defendant a trial in an article III court if he is tried by the federal government, however, unless, of course, his case falls within one of the exceptions to article III recognized by *Marathon* and its predecessors.

141. If an active Nazi guerilla force still operated in Germany, and the United States military forces in Berlin sought to suppress this force, perhaps the occupation of Berlin still could be characterized legitimately as a direct result of the military conflict in World War II. That, however, was not the case in the 1970's in Berlin.



### 3. *Cold War Reinforcements For An Ally*

Legal documents and declarations of war notwithstanding, *realpolitik* is the main reason United States military forces have remained in Berlin for forty years. The government stations American troops there to reinforce the Federal Republic of Germany against the Soviet Union and Eastern Europe. Forty years of East-West confrontation over Berlin prove the truth of this assertion.

Relations between the war-time allies occupying Berlin grew strained in the late 1940's. Although four nations jointly occupied Berlin, the Soviet Union alone occupied the area surrounding the city.<sup>142</sup> In 1948 the Soviet Union prohibited land traffic from entering Berlin,<sup>143</sup> thus threatening to strangle West Berlin. Accordingly, the United States and Great Britain organized and successfully carried out an airlift for more than eleven months.<sup>144</sup> The Soviet forces relaxed the blockade, but political tensions between the occupying forces continued to run high throughout the 1950's.

The occupation effectively partitioned Berlin into East and West, with free movement allowed between the western zones occupied by the United States, the United Kingdom, and France, but restricted access permitted to the eastern sector occupied by the Soviet Union.<sup>145</sup> Hundreds of thousands of East Germans traveled to West Berlin and never returned home.<sup>146</sup> To halt this continuing hemorrhage of its citizenry, the East Germans erected the Berlin Wall in 1961.<sup>147</sup> Since that time tensions between the United

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142. 3 ENCYCLOPAEDIA BRITANNICA 516 (1969); Stern, *supra* note 14, at 22.

143. 3 ENCYCLOPAEDIA BRITANNICA 516 (1969); Stern, *supra* note 14, at 23.

144. In an effort to push the Western Allies out of Berlin, the Soviet Union began a blockade of the city on June 24, 1948, stopping all communication by rail, road, and waterway with the Western sectors. In response to this blockade, on June 26, the United States and Great Britain began an airlift of vital supplies to West Berlin. At a cost of \$224 million, more than two million tons of food, fuel, machinery and other necessary goods were flown into West Berlin, mostly by U.S. aircraft. The blockade, frustrated by the airlift, also proved damaging to the East German economy because essential railroads and waterways passed through West Berlin. The Soviet Union finally agreed to lift the blockade on May 4, 1949, but the airlift continued until Sept. 30, 1949. 3 ENCYCLOPAEDIA BRITANNICA 516 (1969).

145. Stern, *supra* note 14, at 23.

146. Four million, or approximately one-fifth of the population, fled East Germany from 1945-1961 through West Berlin. 3 ENCYCLOPAEDIA BRITANNICA 517 (1969); Stern, *supra* note 14, at 23.

147. The construction of the wall began on August 13, 1961. 3 ENCYCLOPAEDIA BRITANNICA 517 (1969); Stern, *supra* note 14, at 19, 24.

States and the Soviet Union have waxed and waned, but a war of nerves continues in Berlin, surrounded as it is by the German Democratic Republic and isolated from West Germany.

The continued stationing of American soldiers in West Berlin without doubt serves a contemporary political purpose. The United States maintains troops in Berlin not out of any fear of the Nazi forces that were conquered in 1945, but out of fear of the Soviet Union, one of America's allies in World War II. The United States government has acknowledged this purpose explicitly:

[A] termination of the occupation in Berlin along the lines of any of the proposals acceptable to the Soviet Union would result in the Berliners' loss of freedom and the abandonment of the immediate post-war goal of a reunified, democratic Germany. . . . Instead [the United States] has committed itself to fulfill its "fundamental political and moral obligation" to continue the occupation in order to protect Berlin and its long-term objective of a reunified, democratic Germany. . . . [Further, the] existence of this *island of democracy* outside the territory of, but surrounded by the German Democratic Republic, serves[s] as a constant psychological and political irritant to the communists.<sup>148</sup>

In other words, the Cold War, not World War II, keeps American soldiers in Berlin. That an East-West conflict brought to life the United States Court for Berlin, therefore, is no surprise.

The United States' stationing of military forces overseas to reinforce an ally during times of geopolitical tension fails to justify assigning criminal trials of civilians accused of committing non-military offenses to military courts. In 1960 the Supreme Court faced this issue in *Kinsella v. Singleton*.<sup>149</sup> In that case the Court struck

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148. Brief for the United States at 7-8, *United States v. Tiede*, 86 F.R.D. 227 (1979).

149. 361 U.S. 234 (1960). The court-martial took place in Germany in 1957. Seven justices of the United States Supreme Court agreed that the defendant, a civilian dependent of a member of the armed forces, could not be subjected to court-martial for a non-capital offense. Two of the seven, however, refused to join the majority's broader holding that no court-martial could try a civilian accompanying the armed forces overseas for an offense committed during peacetime. The concurrence, written by Justice Whittaker, determined that civilian employees who perform essential services for the military, who are subject to the orders, directions, and control of military command, and who are entitled to similar privileges and benefits as members of the military are an integral part of the armed forces and, therefore, can, under article I, § 8, cl. 14 of the United States Constitution, be sub-

down the conviction of a civilian tried by court-martial in Germany. The defendant, the wife of an American soldier, lived with her husband in American housing in Germany. After the death of one of their children, she and her husband were first charged with murder and later with involuntary manslaughter.<sup>150</sup> A court-martial tried both defendants. In upholding the wife's challenge to the assignment of her case to a military court, the Court ruled that civilians tried by the American government in peacetime<sup>151</sup> possess the right to trial in an article III court.<sup>152</sup> The presence of American troops overseas, in an effort to bolster the military forces of an ally, did not justify trial by a military court.<sup>153</sup>

Similarly, the military presence of American soldiers in West Berlin in 1978 cannot provide a sufficient reason to consign Tiede's

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jected to trial by military court-martial for crimes committed overseas in peacetime. *Id.* at 265, 276-77 (Whittaker, J., concurring).

The two-member dissenting opinion disagreed with the plurality's focus on the "status" of the defendant, and instead asserted that the "closeness" or "remoteness" of a defendant's relationship with the military was crucial to deciding the constitutionality of an exercise of military jurisdiction. *Id.* at 253, 257 (Harlan, J., dissenting). Reading clause 14 of article I, § 8, in conjunction with the necessary and proper clause, the dissent concluded that Congress has broad power to make any law considered necessary for the good order of the land and naval forces, including laws conferring military jurisdiction over civilians who have close relationships with the military. *Id.* at 253, 257 (Harlan, J., dissenting).

150. They were charged with unpremeditated murder under article 118(2) of the Uniform Code of Military Justice. The charges were withdrawn in order to allow the defendants to plead guilty to involuntary manslaughter under article 119 of the Code. *Id.* at 236.

151. The Court examined a situation that did not involve an occupation of enemy territory. Although *Kinsella v. Singleton* did not explicitly refer to *Madsen v. Kinsella*, it also did not hint that it had been overturned. See *Reid v. Covert*, 354 U.S. at 35 n.63 (plurality opinion).

152. The Court said: "We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not permissible." *Singleton*, 361 U.S. at 249.

153. "We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses." *Id.* at 248. Thus, the *Singleton* holding extends *Reid v. Covert* to non-capital crimes. *Singleton* does not directly control the *Tiede* case, however. Two obvious distinguishing factors exist: first, the status of the American military in Berlin differs from the status of American forces elsewhere in Germany due to the technical occupation that continues to exist in Berlin; and second, unlike the petitioner in *Singleton*, Tiede is not a United States citizen. Although no cases address the issue of citizenship, courts possibly would be more protective of the right to a trial by an article III court if that right were asserted by a citizen of the United States. See *infra* note 181 (discussing the equal protection considerations that would arise if aliens were denied article III courts).

hijacking trial to a military court. Although the United States may continue to deploy troops to West Berlin because of continuing tension with the Soviet Union,<sup>154</sup> civilian courts in Berlin still function despite this state of political tension.<sup>155</sup> Under *Milligan* as well as *Singleton*, the threat of armed conflict is not enough of a basis on which to allow military courts to try civilians.<sup>156</sup>

Furthermore, from a policy point of view, the mere presence of American forces should not be significant. Allowing the President to set up military tribunals to try civilians wherever American military troops reinforce an ally's ability to withstand military and political pressure would eviscerate the constitutional system of separation of powers. It would give the President, who may station American troops in various locations around the world in response to saber-rattling and other pressures, free rein over civilian adjudication in a wide variety of settings. Although the executive branch needs a significant amount of flexibility to deal with political and diplomatic pressures and to deploy United States military forces, it should not have authority to sidestep so easily the constitutional command that the judicial power of the United States be vested in an independent judicial branch. Accordingly, the presence of American military forces in West Berlin as reinforcements for an ally and as pawns in a Cold War does not release the United States government from the requirement that article III courts shall exercise the judicial power of the United States.

In sum, the nature of the American relationship with Berlin does not permit the trial of Tiede in an American military court. Whether one characterizes the situation as declared war, Cold

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154. Because the Cold War was well in progress at the time of the court-martial in *Kinsella v. Singleton* and the Supreme Court forbade a trial by court-martial of the civilian defendant, the argument that East-West tension justifies a military trial rather than a trial by jury in an article III court now appears untenable.

155. Not only were the civilian German courts functioning in 1978, *see supra* note 104, but the civilian courts in the United States were also functioning. Once the United States determined to try Tiede, it could have flown Tiede to the United States for trial. The United States could presumably have exercised jurisdiction over Tiede's hijacking based on 49 U.S.C. § 1472(n) (1982), which makes the offense of air piracy as defined in the Hague Convention, *see supra* note 16, punishable by 20 years imprisonment. Federal statutes provide that "if the [air piracy] offense is committed out of the jurisdiction of any particular state or district, the trial shall be in the district where the offender . . . is arrested or is first brought." 49 U.S.C. § 1473(a) (1982).

156. *See supra* text accompanying notes 115-18, 126, 149-53.

War, or occupation resulting from war, trying Tiede in a military rather than a civilian court fails to advance significantly American military order in Berlin. If the war power justifies Tiede's trial, another rationale for invoking it must be identified.

#### 4. *Impact on American Military Forces*

The war power analysis of Tiede's trial by an article II court thus far has focused on the need for military courts as a method of achieving military order in situations involving conflict and tension between the United States and other governments. At this point, an examination of the constitutionality of military trials of civilians from another perspective, the need to maintain a well-disciplined and efficient American army, may prove useful. Examined in this light, Tiede's actions may have had sufficient impact on the functioning of the American army to warrant trial by a military tribunal.

Although Tiede did not hijack a military airplane or evince any military purpose in the hijacking, the circumstances surrounding Tiede's arrival in West Berlin in 1978 demonstrate that his actions had some impact on the American military. American military forces were stationed in Berlin at the time of the hijacking, the hijacked plane landed at an American military installation, and American military equipment and personnel would have faced potential injury had the emergency landing failed.

The Polish airliner that Tiede hijacked in August 1978 landed at an American air base in West Berlin. American military flight controllers guided the jet onto the runway, and American soldiers surrounded the plane when it halted and took Tiede into custody. One might posit that these circumstances had a sufficient impact on the American military in Berlin to permit assigning the case to an American military court. This contention is unsupportable, however. Although a visible connection existed between the hijacking and the American military installation—the airliner landed on the American air base—this connection was totally fortuitous. The hijacker apparently even lacked the intention of landing at a military airport.<sup>157</sup> He did not give the pilot landing instructions.

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157. Stern, *supra* note 14, at 18.

Tiede wanted simply to divert the plane from East Germany. The pilot decided to land on the underutilized air base runways rather than at the busy commercial airport.<sup>158</sup> The coincidental relationship between this crime and the American military provides a very fragile reed on which to base a military trial for the hijacker. Without more, it cannot support assigning his criminal trial to a military tribunal.

Precedent quite clearly precludes relying on the landing of Tiede's plane at a United States air base to justify trying Tiede by a military court. *Reid v. Covert*<sup>159</sup> and *Kinsella v. Singleton*<sup>160</sup> are dispositive. In both cases the Supreme Court forbade military trials of civilians. Both cases involved crimes that occurred on an American military installation overseas. The victims and the assailants lived in military quarters, and events leading up to the crimes took place on the military posts. Despite the more substantial connections with the military in *Reid* and *Singleton*, the Supreme Court held that a military court could not constitutionally adjudicate the cases. The civilian defendants possessed the right to trial by an article III American court or to trial by the civilian courts of the host country.<sup>161</sup>

Tiede's hijacking no doubt disrupted military air traffic to some extent and caused moments of consternation to the military personnel at Tempelhof Air Base in West Berlin.<sup>162</sup> Although the emergency landing caused no one physical injury, the landing did pose a threat of such injury. Viewing military trials as an instrument of maintaining an efficient and effective American army, one perhaps could argue that this potential injury to American servicemen was a significant factor in Tiede's offense.<sup>163</sup>

The facts of *Reid v. Covert*<sup>164</sup> also undercut this justification for a military trial, however. *Reid* involved more than a potential in-

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158. Stern, *supra* note 14, at 1.

159. 354 U.S. 1 (1957) (plurality opinion).

160. 361 U.S. 234 (1960).

161. *Kinsella*, 361 U.S. at 249; *Reid*, 354 U.S. at 39.

162. "The sergeant in charge pushed the alarm." Stern, *supra* note 14, at 1-2.

163. The Polish pilot, the chief prosecution witness, testified that landing the Polish aircraft at Tempelhof was dangerous because of the length of the runway, the pilot's ignorance of the airport, and the pilot's lack of data about navigation aids and flight patterns at Tempelhof. Stern, *supra* note 14, at 261-63.

164. 354 U.S. 1 (1957) (plurality opinion).

jury to a member of the American military. In *Reid*, the victim, a member of the military, was killed on an American military post overseas while on active duty in the United States armed forces. Moreover, the defendant in *Reid* had an ongoing relationship with the American military. She was an American serviceman's wife who had accompanied her husband to his military assignment. The military literally transported her to England and gave her military housing there.<sup>165</sup> Despite these facts the Supreme Court did not consider the crime to have enough of an impact on the American military to warrant a trial by a military court. Instead, the Supreme Court ruled that the United States must afford the defendant a trial in an article III court.<sup>166</sup> Accordingly, the theoretical possibility of an injury to American military personnel does not provide a sufficient constitutional basis for convening an American military court in Germany in 1979 to try civilians for hijacking a commercial airliner.

Furthermore, the hijacking caused no tangible injury to American personnel or property. It did not disrupt significant military operations.<sup>167</sup> In fact, in light of the contemporary underutilization of Tempelhof Air Base,<sup>168</sup> no injury to American military interests was likely. The military impact of this case was therefore utterly conjectural. Such an ephemeral military impact cannot affect significantly the discipline and efficiency of the United States armed forces. If potential impact justifies military adjudication of civilians, military courts around the world have authority to decide criminal trials of civilians. With so many members of the American military stationed overseas, such a result would allow a huge expansion in the number and types of trials in American military courts.

Moreover, an approach focusing on injury to American military personnel might raise questions about adjudication of crimes against other Americans overseas. To some extent, whenever an American is the victim of a crime, American interests are in-

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165. *Id.* at 3.

166. *Id.* at 39. That the defendant in *Reid* was a United States citizen and Tiede is a German citizen is not significant. See *infra* note 181 (discussing constitutional implications of denial of article III adjudication to aliens).

167. Stern, *supra* note 14, at 1-2, 26-28.

168. Stern, *supra* note 14, at 1.

volved.<sup>169</sup> Therefore, one might argue that American military courts or similar non-article III tribunals may adjudicate crimes by civilians against American embassy personnel—or even American businessmen or tourists. The specter of a vast expansion of American executive branch courts again looms. Allowing the status or duty assignment of the victim of a crime to determine whether the accused is afforded a trial in an article III court or a military court makes a constitutional right too dependent on chance.

One of the factors central to the Supreme Court's analysis in *Ex parte Quirin*<sup>170</sup> was the nature of the offense that the defendants had committed. The Court emphasized that the defendants were accused of violating the law of war by engaging in espionage and sabotage behind enemy lines.<sup>171</sup> After an extensive historical analysis, the Court concluded that the framers of the Constitution intended that military courts could try such offenses, and that military tribunals had heard such trials on a number of occasions during the first 150 years of United States history.<sup>172</sup>

Nonetheless, the military offense rationale provides no support for trying Tiede in a military court. Tiede was charged not with acts of war, but with hijacking, taking a hostage, and carrying a pistol.<sup>173</sup> Although these offenses may occur during times of war, they have not historically constituted violations of the law of war. Furthermore, no one alleged that Tiede's offenses possessed any military significance. The nature of the crimes that Tiede allegedly committed thus had little, if any, relationship to military order and

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169. Of course, the extent of the interest may vary with the nature of the American's assignment overseas. A foreign government's interference with American diplomats in an American embassy overseas is likely to threaten more seriously important American interests than would the arrest of an American tourist overseas.

170. 317 U.S. 1 (1942).

171. The defendants in *Quirin* were charged with: (1) violation of the law of war (including, inter alia, engaging in unlawful belligerency by entering enemy territory surreptitiously and in civilian dress for the purpose of destroying war utilities, war industries, and war materials); (2) violation of article 81 of the Articles of War, which defines the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to the enemy; (3) violation of article 82, which defines the crime of spying; and (4) conspiracy to commit the offenses alleged in charges 1, 2 and 3. *Id.* at 15.

172. *Id.* at 28-30 n.14.

173. Tiede was charged with: (1) hijacking an airplane; (2) taking a hostage (the stewardess); (3) depriving the passengers of their liberty; (4) doing bodily harm to another (the stewardess); and (5) possessing a firearm without a license. Stern, *supra* note 14, at 59.



discipline. Tiede's case does not fall within the ambit of the *Quirin* holding.

In summary, whether one looks at the location of the crime, the potential victims, or the nature of the offense, Tiede's acts had minimal impact on the American military. The facts of Tiede's case do not support trying him in an American military court as part of the effort to maintain a well-disciplined and efficient American fighting force. Attempts to justify a military trial of Tiede based on geopolitical concerns of the 1970's and their impact on the need for American military order prove similarly unavailing. The President's war power, therefore, does not provide a constitutional justification for assigning Tiede's case to an American military court.

### C. A Beirut Scenario

Shifting the focus from Berlin in 1979 to Beirut in 1985 provides another contemporary perspective on the constitutionality of military adjudication of criminal charges against civilians. Although a United States Court in Beirut may seem less likely than an American court in Berlin, the American military has maintained a presence in force in Lebanon on more than one occasion.<sup>174</sup> Because American military intervention in Lebanon has been sporadic, however, almost no tradition of American military courts exists in Lebanon. Yet, the American troops in Beirut from 1983 to 1985 experienced more war-like conditions than did their counterparts in Berlin. The sound of machine guns and artillery is routine in Beirut, with armed conflict between bands of militia occurring daily.<sup>175</sup> Terrorists destroyed American military barracks in Beirut

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174. On July 15, 1958, President Eisenhower ordered U.S. Marines into Lebanon at the request of Lebanese President Camille Chamoun, who feared that Lebanon could not survive against Moslem rebels allegedly backed by the UAR and USSR. After calm was restored, U.S. troops began their withdrawal on Aug. 12th. *THE TWENTIETH CENTURY, AN ALMANAC* 345 (1984).

In 1982, the United States sent 1200 Marines to Lebanon, at the request of the Lebanese government, as part of a four-nation peace-keeping force. During the 17-month mission, which ended on February 26, 1984, 262 servicemen lost their lives. *N.Y. Times*, Aug. 29, 1983, § 1, at 8, col. 3; *Id.*, Aug. 30, 1983, § 1, at 1, col. 6.

175. *N.Y. Times*, Jan. 18, 1985, § 1, at 1, col. 4.

by bombs,<sup>176</sup> and American warships stationed off the coast of Lebanon have bombarded selected Lebanese sites.<sup>177</sup>

If the commander of an American military task force located off the shores of Lebanon gained custody of the accused hijackers of the TWA jet, he might be tempted to convene an American military court in Beirut to try them. Assigning this trial to a military court would violate the Constitution, however. Despite the current military conflict in Beirut, the President's war power fails to justify establishing military courts there to try civilians. An examination of the various factors that can justify assigning trials of civilians to military courts reveals that none supports a military trial in Beirut.<sup>178</sup>

First, Congress has never declared war against Lebanon.<sup>179</sup> The Lebanese situation in 1985 therefore lacks the legitimacy of military action, and its attendant restrictions on civil liberties, that derives from a decision by two branches of the government that war is necessary. When the United States is not at war, a strong presumption exists against the suspension of any rights of civilians, including the right to trial in an article III court.<sup>180</sup> Moreover, de-

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176. N.Y. Times, Oct. 24, 1983, § 1, at 1, col. 6.

177. After the destruction of their barracks by a suicide truck bomb, the Marines were withdrawn from their barracks to warships off shore. Only a few Marines who guard the United States embassy remain ashore in Beirut now. N.Y. Times, Feb. 27, 1984, § 1, at 1, col. 6.

178. Characterizing the hijackers as members of a military force engaged in guerrilla warfare against Israel would not lead to a different conclusion. The military status of the accused may justify trial in an American military court when the accused is a member of the American military forces. The rationale for criminal trials in non-article III courts in such instances is that quick and sure adjudication will enforce the discipline among American soldiers that is necessary to the efficiency and effectiveness of the American military forces. See *supra* text accompanying notes 106-08 and *infra* text accompanying notes 212-14. When members of another nation's military forces have been tried in American military courts, the nature of the offense and the existence of actual warfare or imminent threat of invasion, not the military status of the accused, has been the significant factor. See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942).

179. U.S. CONST. art. I, § 8, cl. 11, grants Congress the power to declare war. When they decide whether civilians may be tried by a court-martial, some courts have accorded great significance to whether there has been a formal declaration of war by Congress. E.g., *United States v. Averette*, 19 C.M.A. 363, 41 C.M.R. 363 (1970) (court-martial of civilian employee of Army contractor in Vietnam improper in absence of formal declaration of war by Congress).

180. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866). Although the case described in note 179, *supra*, was decided on statutory grounds, the court relied heavily on the consti-

spite the conflict in Lebanon, the American civilian government still functions and the American courts are open. Furthermore, the Beirut fighting, albeit grim, poses no threat of imminent danger to the United States. The hostilities in Beirut, therefore, though real and capable of endangering American military forces, do not warrant assigning criminal trials of civilians to military courts.

Second, the occupation rationale that justified American military trials of German civilians in the decade after World War II does not apply in Beirut. The United States armed forces have never conquered and occupied Lebanon as they did Germany, no one has attempted to supplant the Lebanese government with an American occupation government, and American military forces have not tried to consolidate and protect military objectives while subduing the civilian population of Lebanon. Thus, no American military need to establish American occupation courts in order to keep Lebanese society functioning has existed.

Third, although American military troops in Lebanon seek to reinforce allies and prevent the Soviet Union from dominating the Middle East, the fact that this aspect of the Cold War has led to a shooting war does not justify military trials of civilians. As in Berlin, the geopolitical considerations and the East-West conflict provide an insufficient reason to assign civilian trials to an American military court. If political tension coupled with gunfire warranted military trials of civilians, American military tribunals around the world would be crowded with cases.

Fourth, the hijackers of the American airliner in June 1985 had little, if any, impact on the American military. The hijackers did not divert a military plane or land on a military installation, and the victims of the hijacking were, by and large, civilians. A few passengers were members of the American armed forces traveling in civilian clothes to a duty assignment elsewhere in the world. In fact, one of these men was singled out, apparently because he was in the military, and murdered. As heinous as this crime was, however, the victim's military status insufficiently justifies consigning the murder trial to an American military court. If military courts

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tutional analysis in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and in *O'Callahan v. Parker*, 395 U.S. 258 (1969), limiting trials by non-article III courts in peacetime.

cannot try civilians accused of murdering an American serviceman on an American military post overseas, then they may not try the Beirut hijackers either.<sup>181</sup>

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181. See *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion). In both *Reid* and the TWA hijacking, the victims were American servicemen and the accused were civilians. Neither incident occurred during an American occupation of another country. The situations differ in two respects, however. First, *Reid* involved a domestic dispute—a wife killed her husband—whereas the TWA hijacking clearly had a political, if not military, motive. Nothing in the analysis adopted by the Supreme Court in *Reid* suggests its holding should be limited to domestic violence, however. Furthermore, the need for the judicial independence of an article III court would be even more pressing in a politicized case than in a family dispute.

Second, the defendant in *Reid* was an American citizen whereas the TWA hijackers probably are not citizens of the United States. Again, however, little in *Reid* suggests that its holding should be limited to American defendants. Certainly, one could make a powerful equal protection argument if the United States began affording criminal defendants in American courts fewer rights based on their nationality. Nothing in article III suggests that its courts are only to be open to citizens. Indeed, article III itself, while limiting the jurisdiction that the judicial branch may exercise, expressly extends that jurisdiction to suits involving aliens. U.S. CONST. art. III, § 2.

Furthermore, the policies underlying the judicial independence of article III courts—to protect against biased adjudication, to protect the courts from pressure exerted by the political branches to decide the case in the manner most convenient from a political point of view, and to protect the ability of the courts to strike down unlawful action taken by the executive or the legislature—are even more relevant when litigation involves aliens than when it involves citizens. Aliens are less likely to have powerful interest groups that mobilize on their behalf and exert political pressure to counter the majority's view. Aliens are more likely to be viewed with suspicion or hostility by the population, so that those whose jobs depend on responsiveness to the political climate may well be more susceptible to intemperate decisions in cases affecting aliens. The need for an article III court rather than an executive tribunal is particularly great when an alien is accused of a terrible crime and the atmosphere is highly politicized.

Even more fundamentally, however, the framers devised article III as a restraint on all federal government action, not just a restraint on action against citizens. When the framers structured the federal government to embody the separation of powers doctrine they were attempting to limit the intrusion by one branch into the affairs of another branch. They were conscious of the potential dangers of a strong central government and attempted to prevent the executive or legislature from exercising too much power. The political theory that animated the framers and has guided the United States for 200 years is thwarted if the executive branch is allowed to run its own courts, particularly when the threat of allowing political considerations to influence adjudication is so great. Thus, a foreign relations exception to article III based on suits involving aliens overseas is unsatisfactory. Even if one could justify affording an alien an article III adjudication in the United States and denying him one in an identical case overseas, and even if one could ignore the admonition that “all criminal matters, with the narrow exceptions of military crimes” are at “the protected core of [the judicial] power” assigned by the framers to the independent article III branch, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 n.25 (1982) (plurality opinion), one could not allow courts that are dependent on the will of the executive branch to try cases against civilian aliens overseas without violating the central thrust of the

Thus, although the United States currently has personnel stationed in and off the coast of Lebanon, and although an American military man was killed during the June 1985 hijacking, the President, in the exercise of his war power, cannot establish military courts overseas to try the Beirut hijackers. If these circumstances enabled the President to bypass trials in an article III court, he could assign criminal trials of civilians to military courts wherever United States military forces are stationed.<sup>182</sup> In light of the far-flung foreign interests of the United States, American military courts throughout the world could preside over criminal trials against civilians. The military court exception to article III would swallow the rule.

#### *D. An Italian Option*

The Palestinian hijackers who commandeered an Italian cruise ship off the coast of Egypt in October 1985 finally relinquished control of the ship when Egyptian authorities guaranteed them safe conduct.<sup>183</sup> American military planes intercepted the Egyptian airplane carrying the hijackers away from Egypt, however, and forced it to land at a military air base in Italy.<sup>184</sup> When the plane landed, a United States military unit quickly surrounded it, intent on arresting the hijackers who had killed an American passenger.<sup>185</sup> Once the hijackers were in American custody, the United States could have prosecuted them in an American court. Instead, the American forces withdrew and allowed the Italians to arrest and imprison the hijackers, while the United States investigated the possibility of exercising criminal jurisdiction in the case and contemplated filing a formal request for extradition of the hijackers and their accomplices.<sup>186</sup> The Italian government, meanwhile,

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framers' purpose in assigning the judicial power of the United States to an independent article III court system.

182. Although one could attempt to limit these situations by arguing that the President can only assign criminal trials of civilians to military courts where United States military forces are stationed and active military conflict exists, the broad American presence overseas and the frequency with which political disagreements escalate into gunfire would significantly undermine such a limitation.

183. N.Y. Times, Oct. 10, 1985, at A1, col. 6.

184. N.Y. Times, Oct. 11, 1985, at A1, col. 6; *id.*, Oct. 12, 1985, § 1, at 1, col. 6.

185. N.Y. Times, Oct. 11, 1985, at A1, col. 6.

186. N.Y. Times, Oct. 12, 1985, § 1, at 6, col. 1.

quickly released the individual believed by the United States to have masterminded the hijacking.<sup>187</sup> While expressing outrage at the Italian decision to release some of the individuals involved, the United States continued to seek extradition of the hijackers who remained in Italian custody so that the United States could prosecute them on American charges after the Italian case against them concluded.<sup>188</sup>

In retrospect, President Reagan may well wish that the American soldiers had not relinquished control of the Egyptian airliner or may wish that the intercepting planes had diverted the Egyptian airliner to an air base controlled solely by American military forces. Once in American military custody, the Palestinian hijackers and accomplices could have been prosecuted in the first instance under American criminal law. The American trial could have proceeded overseas, as in Berlin in 1979, or in the United States.

In light of the diplomatic repercussions of this case, or of similar cases in the future, convening an American court overseas to try the hijackers might seem particularly attractive to the President. The defendants would already be present overseas; threats of further interceptions of the flight carrying the hijackers would be avoided. Additionally, the host country, which would likely have a stake in the matter, could more easily observe the American proceedings if they took place overseas. If the host country wished to proceed against the defendants on different grounds after the American trial concluded, the United States could easily transfer custody of the defendants.

Although logistical concerns might make this course desirable, the President's war power does not justify assigning such a trial to a military tribunal overseas. The factors that sometimes justify such assignments fail to support a military trial for the Palestinian hijackers of the Italian cruise ship.<sup>189</sup> First, the United States

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187. N.Y. Times, Oct. 13, 1985, § 1, at 1, col. 6. This individual, Mohammed Abbas, left Italy for Yugoslavia on October 12. On October 26, 1985, an Italian magistrate issued an arrest warrant for Mohammed Abbas, the Palestinian leader the United States has accused of masterminding the cruise ship hijacking. *Id.*, Oct. 29, 1985, at A12, col. 3.

188. N.Y. Times, Oct. 13, 1985, § 1, at 1, col. 6.

189. Whether the hijackers are deemed civilians or members of a Palestinian military force is not significant. See *supra* note 178.

clearly has not declared war against the Palestinians. Although government officials have called for a "war on terrorism," and one might even argue that American aid to Israel implicates the United States in the war between the Israelis and the Palestinians, Congress has not voted a declaration of war. Second, the United States does not occupy Palestinian land and has never attempted to supplant the indigenous government with an American military government. Third, the *realpolitik* rationale examined and rejected in analyzing the Berlin and Beirut scenarios has even less validity here. The cruise ship situation involved no American decision to send military reinforcements to aid an ally.<sup>190</sup> Additionally, the geopolitical concerns that have led the United States to station military forces overseas did not trigger the American response to the hijacking of the Italian cruise ship. Although one can argue persuasively that punishing and deterring terrorist attacks on Americans overseas is a legitimate American goal, such a goal does not justify assigning criminal trials of civilians to military courts.<sup>191</sup> Fourth, the hijacking of the cruise ship had little, if any, impact on American military interests. The crime did not occur on a military installation, the victim was not a member of the military, and the nature of the crime had no relation to military order and discipline. Indeed, the only American military involvement occurred after the crime. The military intervened only to prevent the hijackers from escaping from custody and prosecution.<sup>192</sup>

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190. The United States armed forces that intercepted the hijackers and the American troops that surrounded the airplane when it landed in Italy were present pursuant to the United States' obligations as a member of the North Atlantic Treaty Organization. See N.Y. Times, Oct. 11, 1985, § 1, at 1, col. 6. Thus, while they were present in the area as general reinforcements for Italy, a NATO ally, the decision to station American troops in Italy was made for political reasons quite different from those underlying the role of American forces in West Berlin, surrounded on all sides as it is by East Germany. Additionally, the American military's role at the end of the cruise ship hijacking, which occurred in the Mediterranean Sea off the shore of Egypt, was due to the interest of the United States in bringing the executioners of an American citizen to justice, not to any interest the United States has in reinforcing its NATO allies.

191. See *infra* text accompanying notes 226-39.

192. See *supra* note 190. Although American military intelligence no doubt was involved in tracking the hijacked cruise ship, and the possibility of using a military special commando unit to end the hijacking may have been considered, these constitute only peripheral military aspects of the situation.

*E. Limits on the War Power*

In sum, the President's war power is not so broad as to justify a military court system with jurisdiction over civilians based either on an agreement to station American military forces in an ally's territory or on a fictional state of war and military occupation. Nor is this power so expansive as to allow military tribunals to adjudicate cases of civilians charged with crimes that have little, if any, impact on the military. If the war-making power were so sweeping, military tribunals could supplant civilian courts, thus vitiating the framers' separation of powers plan.

Pursuant to his war power, the President can establish military courts with jurisdiction over civilians in certain limited instances. War and its immediate aftermath may justify these courts. The post-war reconstruction of a society also may justify such courts. Once the war-torn country recovers, however, the continued existence of these courts becomes constitutionally suspect. Unless a military prosecution of a civilian relates closely to the maintenance of military order or to the maintenance of a disciplined and efficient fighting force, the war power of the President does not provide an adequate basis to permit holding the trial in a military court.

The hijacking trial of a civilian in the United States Court for Berlin in 1979 cannot, therefore, be justified. Because of the tenuous connection between the current quartering of American military forces in Berlin and the military conflict that spawned the occupation, the cessation of actual hostilities more than forty years ago, the complete recovery of the occupied territory since the war, and the fact that Germany has become a viable independent ally of the United States, the President could not convene the American court in Berlin in 1979 to try Tiede based on his war power alone. If the United States wanted to try Tiede, it should have done so in an article III court.

Similarly, an American military court could not constitutionally try the Beirut hijackers. The sporadic American military presence in Beirut, coupled with the lack of connection between the crime and the American government's interest in maintaining American military order and discipline, reveal that the President's war power does not provide a satisfactory rationale for assigning the hijacking trial to an American military court in Beirut. In addition, the in-



sufficient connection between the hijacking of the Italian cruise ship and the need to maintain American military order and discipline precludes trying those defendants in an American military court. If the Constitution permits an executive branch tribunal to adjudicate the criminal prosecutions of the hijacking cases that ended with the hijackers on Berlin, Beirut, or Italian soil, the authority must derive from another source of executive power.

#### V. EXECUTIVE BRANCH FEDERAL COURTS AND THE FOREIGN RELATIONS POWER

The Berlin hijacking in 1978, the Beirut hijacking in 1985, and the October 1985 hijacking of the Italian cruise ship all resulted in extensive diplomatic maneuvering. Such cases produce a flurry of activity at the State Department and numerous consultations with other governments.<sup>193</sup> In view of these facts, the President's power to conduct foreign relations may emerge as a basis for authorizing an executive branch tribunal to adjudicate these hijacking cases. One can argue that, similar to military courts that the Constitution permits in certain circumstances in order to maintain military order and discipline, diplomatic or "foreign policy" courts are justified in situations where they are necessary to assist the President to carry on foreign relations.

In its recent enumeration of permissible federal courts that lack article III safeguards, the *Marathon* opinion listed military courts, territorial courts, and courts adjudicating public rights.<sup>194</sup> The opinion did not elevate diplomatic courts to this approved list. Diplomatic or consular courts do not fit comfortably into any of these three categories.<sup>195</sup> Yet in the past American diplomats con-

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193. Cf. Stern, *supra* note 14, at 27-28, 194-95.

194. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion). See *supra* text accompanying notes 8-13.

195. Diplomatic courts charged with adjudicating criminal offenses have little in common with administrative agencies that adjudicate public rights. The subject matter assigned to these two courts differs dramatically, as does the role of the government in the proceedings (prosecutor in the former, as opposed to distributor of benefits in the latter). In terms of subject matter, diplomatic courts are more similar to territorial courts, which do exercise criminal as well as civil jurisdiction. The rationales justifying the creation of territorial courts, see *supra* note 53, do not apply to diplomatic courts, however. For a comparison of consular courts and military, territorial, and public rights courts, see *infra* text accompanying notes 227-29.

vened courts overseas, and, sitting as judges, tried criminal cases against civilians.<sup>196</sup> Precedent, thus, supports the proposition that in pursuit of his constitutional duty to conduct the foreign relations of the United States, the President may establish specialized federal tribunals that do not conform to the requirements of article III. Without relying on precedent, one may also formulate a related foreign relations power argument: in the pursuit of his constitutional duty to conduct foreign relations, the President may establish an executive tribunal to assist the allies of the United States in the exercise of their own judicial power. Under this second rationale, the President can rely on his foreign relations power to convene an American court overseas so long as the court applies the host country's—rather than American—judicial power.

The facts of the Berlin, Beirut, and Italian hijackings provide useful situations in which to analyze whether support exists for these views of the constitutionality of non-article III diplomatic courts. Although the United States Court for Berlin grew out of the occupation court system established in post-war Germany, the tribunal was more an instrument of the foreign policy of the United States than an instrument for maintaining military order.<sup>197</sup> Despite the fact that no one articulated the President's power to conduct foreign relations as the justification for assigning the 1979 hijacking trial to the United States Court for Berlin, American diplomatic concerns played the most important part in the decision to prosecute Detlef Tiede in an American court.<sup>198</sup> From this perspective, the President's power to conduct the foreign relations of the United States provided the authority for convening the United States Court for Berlin.<sup>199</sup> As a result, the court does not violate article III unless this alternative rationale for an article III exception is also unfounded.

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196. See, e.g., *In re Ross*, 140 U.S. 453 (1891); see also *infra* text accompanying notes 201-05.

197. By 1955, when the United States Court for Berlin was established, the occupied population was not hostile to the United States. Key German institutions were functioning. See *supra* notes 103-04. The East-West confrontation, however, was already underway. See *supra* notes 144, 146-47.

198. The diplomatic maneuverings were intense, and military considerations were never raised. Stern, *supra* note 14, at 27-28, 194-95.

199. See *supra* note 56.

Similarly, diplomatic concerns about ensuring the safety of American citizens and property overseas and about the enforcement of international treaties against air piracy will play a significant role if the United States obtains custody of the Beirut hijackers. Hijackings are fraught with foreign policy implications. The angry responses of the Egyptian and Italian governments to the American interception of the cruise ship hijackers demonstrated the heightened diplomatic concerns that can arise in hijacking situations. One can argue that foreign policy concerns justify convening an article II diplomatic court in Beirut and in Italy to try the hijackers that landed there, just as these concerns may have justified assigning the Tiede trial to the United States Court for Berlin. The extensive diplomatic maneuvering triggered by all three hijackings supports such an assertion, as does the American judiciary's traditional deference to executive action in matters concerning foreign policy. To decide whether the Constitution permits criminal trials to be assigned to diplomatic courts in situations such as these, fraught as they are with foreign policy implications, one must analyze whether the separation of powers doctrine and its requirement of judicial independence square with executive "foreign policy courts" overseas.

#### A. *American Diplomatic Courts: An Historical Overview*

Historical support exists for American tribunals established as an incident to the President's power to carry on foreign relations with other nations. Consular courts, in disuse now, once were a normal part of diplomatic missions in foreign countries.<sup>200</sup> American diplomatic personnel who lacked life tenure presided over these courts.<sup>201</sup> On occasion diplomatic courts even handled serious criminal cases. Indeed, in the most famous consular court case, *In*

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200. See, e.g., *In re Ross*, 140 U.S. 453, 462 (1891); see also *Reid v. Covert*, 354 U.S. 1, 11-12 (1957) (plurality opinion). Consular courts, which exercised criminal jurisdiction over U.S. citizens, were at one time or another provided for in treaties with Japan, Borneo, Madagascar, the Samoan Islands, Korea, the Tonga Islands, Tripoli, Persia, the Congo, Ethiopia, Morocco, Algiers, Tunis, and Muscat. *Reid*, 354 U.S. at 61-62 (Frankfurter, J., concurring).

201. Diplomatic personnel serve at the will of the President. Approximately two-thirds of United States ambassadors are career foreign service officers, while the other one-third are "political" appointees. None has life tenure. See generally CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN AFFAIRS* 33-70 (1917, reprinted 1970).

*re Ross*,<sup>202</sup> the Supreme Court of the United States upheld the murder conviction of a seaman tried by the American consul in Yokohama, Japan. The defendant, who alleged British citizenship, challenged the constitutionality of the consular court. Finding that the defendant served aboard an American ship and that the homicide occurred while the ship lay anchored in Yokohama harbor, the Supreme Court ruled that the consular court had the power to try the case.<sup>203</sup>

In *Ross* the Court emphasized the diplomatic aspects of consular courts. It first examined the treaties between the United States and Japan to discover if the treaties granted jurisdiction over this type of case to the American court. After concluding that the treaties in force provided jurisdiction,<sup>204</sup> the Court recounted the historical background of consular courts. It described these courts as an attempt by the United States to protect Americans overseas and viewed consular courts as a means of providing Americans accused of crimes with a modicum of procedural regularity that the legal systems of the host country might lack or deny to Americans and other foreigners.<sup>205</sup> The Court neither acknowledged nor analyzed any threat that consular courts posed to the separation of

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202. 140 U.S. 453 (1891).

203. *Id.* at 464-65.

204. *Id.* at 465. The Treaty of June 17, 1857, between Japan and the United States gave the American consul in Japan the authority to try Americans committing offenses in that country and to punish them according to American laws. The Treaty with Japan of July 29, 1858, granted a slightly different judicial authority to American consular courts. It gave them jurisdiction to try Americans charged with committing offenses *against Japanese* and to hear claims of Japanese creditors seeking to recover against American citizens. Because the Treaty of 1858 incorporated those provisions of the 1857 treaty that were not in conflict with it, the United States consular courts in Japan continued to exercise jurisdiction over Americans who committed offenses against other Americans, as well as against Japanese. *Id.* at 465-67.

205. American consular courts were established in countries whose legal systems were considered so inferior to that of the United States that American citizens could not obtain justice in them. *Reid v. Covert*, 354 U.S. 1, 64 (1957) (Frankfurter, J., concurring in the result). Consular courts had their genesis in the period preceding the Middle Ages when European governments, seeking to protect their subjects living abroad from harsh treatment by the tribunals of non-Christian countries, sent officers to those countries to exercise limited jurisdiction over their subjects, to watch out for their interests, and to assist them in adjudicating their disputes. Fear of unequal treatment abroad, of cruel and barbaric punishment, and of the use of torture to elicit confessions fueled the desire to attain consular jurisdiction. *In re Ross*, 140 U.S. 453, 462-63 (1891).

powers doctrine. Nor did it examine the possibility that the American consular court exercised the judicial power of the host country.

Although the existence of consular courts and the *Ross* opinion provide historical support for a foreign relations exception to article III, this support is weaker than the historical support for the military court exception to article III discussed earlier.<sup>206</sup> Unlike consular courts, military courts have existed throughout the history of the United States and continue in active use. Moreover, although later decisions undermined the *Ross* opinion,<sup>207</sup> courts continue to uphold the constitutionality of military tribunals.<sup>208</sup> *Marathon's* review of constitutional non-article III American courts contained a prominent discussion and analysis of military courts,<sup>209</sup> yet it only mentioned consular courts in a footnote.<sup>210</sup> In its analysis of the three approved categories of non-article III courts,<sup>211</sup> *Marathon* provides little support.

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206. See *supra* text accompanying notes 60-105.

207. In recent years, the Supreme Court has retreated from the *Ross* opinion. More recent opinions have required greater procedural safeguards than provided in *Ross* for Americans tried in American courts overseas, and have criticized the *Ross* opinion's benighted views of foreign lands. *E.g.*, *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion). Although not overruling *Ross*, the plurality opinion in *Reid v. Covert* described the reasoning in *Ross* as resting in part "on a fundamental misconception." *Id.* at 12. A more basic constitutional weakness in *Ross* than its distrust of foreign judicial proceedings, however, is its failure to consider the violence done to the separation of powers principle when cases with foreign relations implications can be routed away from the independent federal judiciary and into a system of executive tribunals.

*Ross* was also based on the premise that the United States Constitution has no extraterritorial effect, and therefore does not restrain American government action abroad. *In re Ross*, 140 U.S. 453, 464 (1891). Although the extraterritorial effect of the United States Constitution is a complicated issue that is still hotly disputed, few would argue today that American officials abroad are totally unrestrained by the Constitution. See generally Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, 27 WM. & MARY L. REV. 11 (1985).

To illustrate the point, imagine that the American military authorities at the air base in Berlin had decided on the day Tiede arrived that he was guilty of hijacking, had told him that he would be incarcerated for 15 years, and had immediately confined him in a jail cell on the air base. Tiede's petition for a writ of habeas corpus alleging that the American officials had violated due process by sentencing him to prison without a judicial hearing would almost certainly have to be granted.

208. *E.g.*, *Relford v. Commandant*, 401 U.S. 355 (1971).

209. 458 U.S. 50, 66 (1982) (plurality opinion).

210. *Id.* at 65 n.16.

211. *Id.* at 63-70.

*B. Diplomatic Courts: Specialized Needs**1. Pragmatic Considerations in the Past*

In each of the three article III exceptions recognized in *Marathon*, history demonstrated a genuine need for assigning adjudication to non-article III tribunals. An examination of the requirements that gave rise to the executive and legislative tribunals sanctioned by *Marathon* and a comparison of those conditions with the exigencies that might give rise to a non-article III diplomatic court prove useful. Courts-martial perhaps show best the type of specialized needs that in the past have justified the creation of federal courts outside article III. Military forces require discipline and often require swift administration of that discipline.<sup>212</sup> A scheme that withheld discipline from military forces until an article III court could convene and rule on the case would impede the swift disposition of military cases. Furthermore, for the good of the morale and efficiency of the officer corps, fellow officers familiar with military needs and problems, not civilians independent and aloof from military life, must check attempts to impose discipline.<sup>213</sup> Allowing civilians to second-guess military discipline might seriously undermine the obedience necessary to a fighting force. In addition, the person imposing discipline and the person disciplined are more likely to have a continuing relationship in military cases than in civilian cases. The officer bringing the charge and the soldier charged likely will continue working with each other every day until the resolution of the charge. If the charge required adjudication by a slower article III decision-maker rather than by the more expeditious court-martial system, the underlying dispute would often poison the daily routine for a significant length of time; clearly an undesirable result. Accordingly, the military's need for speedy decisions by a tribunal familiar with the military situation in which the dispute arose justifies the decision by Congress and the President to establish military tribunals rather than article III courts in certain situations.<sup>214</sup>

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212. Cf. *Reid v. Covert*, 354 U.S. 1, 35-36 (1957) (plurality opinion) (describing need for special courts in the armed services).

213. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955).

214. The President's power to establish military tribunals derives from his authority as Commander in Chief of the armed forces. U.S. CONST. art. II, § 2, cl. 1. Congress, pursuant to

Territorial courts also present a specialized need for adjudication outside article III courts. Territorial courts grew up when the United States occupied only a stretch of the eastern seaboard of North America.<sup>215</sup> Even then, however, the country's power extended beyond its borders. The United States controlled, as territories, extensive land on the North American continent. In these territories, by definition beyond the states, no state government existed. The apparatus established by the federal authorities provided the only government.<sup>216</sup> The federal authorities decided that a need existed in the territories for a judicial forum to resolve disputes. The government therefore established territorial courts. Because the local government was solely federal, the territorial courts handled both local and national adjudication.<sup>217</sup>

Judges without life tenure staffed the territorial courts. These judges did not possess article III's life tenure and protection against salary reduction for two reasons. First, as horse-drawn transportation was the fastest method available, it took an enormous amount of time to travel from the nation's capital to the territories. Due to the long travel time, many believed that the territories did not need article III protections because no realistic danger existed that members of the federal legislative or executive branches would pressure territorial judges.<sup>218</sup> Second, the territorial judges lacked life tenure because many believed that most of the territories would eventually become states. Once state governments began operating, state courts would hear local disputes. Federal courts would continue to hear matters of federal law, but they would constitute only a small portion of the case load for-

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its constitutional authority "to make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, enacted in 1950 the Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801-940 (1982), which defines the jurisdiction of military tribunals and grants the President broad discretion to establish rules governing them.

215. The Supreme Court recognized the constitutionality of territorial courts in 1828. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

216. *Cf.* U.S. CONST. art. IV, § 3, cl. 2 (stating that Congress shall have power to make all necessary rules and regulations respecting territory or other property of the United States).

217. *See e.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 545 n.14 (1962) (plurality opinion).

218. *Zdanok*, 370 U.S. at 546.

merly assigned to the territorial courts.<sup>219</sup> Thus, if Congress established article III territorial courts, as the territories became states and the need for federal adjudication diminished, the federal government would inherit a large number of superfluous federal judges with life tenure but little work to do.<sup>220</sup>

Federal courts adjudicating public rights, popularly known as administrative agencies, present still different needs for specialized adjudication outside article III courts.<sup>221</sup> The judges of these courts are selected for and are expected to have expertise in the work done by a particular agency.<sup>222</sup> Unlike article III judges, they are not generalists expected to handle all sorts of criminal cases as well as the infinite variety of civil cases created by statute and known to common law. Furthermore, administrative agencies developed as experiments designed to yield more efficient methods of running the federal government in a highly complex, fast-changing world.<sup>223</sup> If all administrative law judges possessed life tenure, this would limit future congressional attempts to reorganize or experiment with different models of agency adjudication.<sup>224</sup> Also, the huge growth in the administrative agency arm of the federal government mitigates against giving these courts article III status. The addition of 2,000 specialized article III judges would swell the judicial branch enormously and change its character significantly.<sup>225</sup>

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219. *Id.* at 545-46. No general grant of federal question jurisdiction to the federal district courts existed until 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 90 (4th ed. 1983).

220. *Glidden Co. v. Zdanok*, 370 U.S. 530, 545-46 (1962) (plurality opinion).

221. The public rights doctrine applies to matters arising "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50 (1932). The power of Congress to create legislative courts in public rights cases authorizes Congress to create administrative agencies to regulate and adjudicate public rights matters. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 n.18 (1982) (plurality opinion).

222. See B. MEZINES, J. STEIN, & J. GRUFF, *ADMINISTRATIVE LAW* § 5.02 (revised 1986).

223. *Id.* at § 1.01[3]. See also K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 18-24 (2d ed. 1978).

224. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 118 (1982) (White, J., dissenting).

225. *Id.*



## 2. *Pragmatic Considerations Overseas*

As happened in Berlin in 1978—and could have happened in Beirut or Italy in 1985—Americans stationed overseas occasionally find themselves with custody of civilians charged with committing crimes overseas. Usually when this happens, the United States quickly delivers the individuals to the police force of the host country and American involvement ends. Only in rare cases—like Tiede in Berlin—does the United States maintain custody and contemplate convening an American court to adjudicate the matter. In deciding how to proceed in these rare cases, the United States faces three possibilities: it can ask the host country to try the case, it can convene an executive branch court, or it can assign the case to an article III court. The United States normally follows the first option, which raises no article III problem because it does not involve the judicial power of the United States. Obviously no article III problem exists in the third option either, although practical difficulties may exist with moving the defendant to an article III court or moving an article III court to the defendant. The second option, which may involve fewer practical difficulties, on its face violates article III.

In light of the recognized exceptions to article III, however, compelling foreign policy needs theoretically could permit a trial in a diplomatic tribunal rather than in an article III court. The needs that gave rise to the constitutionally approved non-article III court systems provide a useful starting point for analyzing the constitutionality of diplomatic courts. In addition to the factors that have justified the military, territorial, and administrative agency exceptions to article III—speed of discipline, morale, continuing relationship, lack of available courts, distance, superfluous life-tenured judges, expertise, and transformation of the federal judiciary—needs peculiar to the world of diplomacy may also exist. Preventing difficulties or embarrassment to an ally or appeasing an adversary, both legitimate diplomatic concerns, may lend some diplomatic urgency to thoughts of convening an American tribunal overseas. Analysis of each of these factors in light of the realities of twentieth century American life should reveal whether any constitutional justification exists for allowing an American diplomatic court overseas to try civilians on criminal charges that arose there.

Before examining each of the relevant factors, two fundamental points deserve mentioning.

Convening a "diplomatic" court within the United States to try criminal charges clearly violates the Constitution. If Tiede had been brought to the United States for trial in 1979—or if those accused of hijacking the TWA airplane to Beirut or the Italian cruise ship were extradited to the United States—the criminal trials would have to take place before an article III court.<sup>226</sup> American diplomatic courts could therefore only handle trials overseas. Restricting diplomatic courts to overseas trials would not suffice to pass constitutional muster, however. The crimes forming the basis

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226. The idea that the government can, based on potential diplomatic repercussions, assign criminal cases against civilians in the United States to an executive branch tribunal rather than to an article III court is so untenable that extended discussion is unwarranted. In these diplomatically sensitive criminal cases, the potential for political interference with adjudication by an executive tribunal would be so great, and the possible consequences to the defendant so severe, that all three goals behind the framers' creation of an independent judicial branch would be thwarted: there would be no guarantee of impartial adjudication, no significant ability of the court to check unconstitutional actions by the executive branch, and no method to assure that the Executive did not effectively pressure the court into ruling in accordance with the Executive's wishes.

Although Congress has not generally granted jurisdiction over offenses committed beyond the borders of the United States to article III courts, Congress has always allowed certain crimes committed outside the country to be tried in the United States. *E.g.*, 18 U.S.C. §§ 113, 114, 661, 662, 1111, 1113, 2111 (1982) (within maritime jurisdiction of the United States); 18 U.S.C. § 1116(c) (1982) (murder or manslaughter of internationally protected persons wherever killed). Federal courts have upheld trials in the United States for crimes committed abroad involving delivery of confidential United States information, *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980) (defendant violated 18 U.S.C. § 794(a) (1982) by delivering top-secret material to a Soviet agent in Greece); involving bribery and conspiracy to defraud the United States, *Harlow v. United States*, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962) (defendant violated 18 U.S.C. § 371 (1982) by soliciting bribes and kickbacks from vendors to military facilities overseas and deposited bribery payments in Swiss bank accounts); and involving conspiracy to defraud a corporation in which the United States is a stockholder, *United States v. Bowman*, 260 U.S. 94 (1922) (defendants conspired while on the high seas on a ship owned by the United States to obtain false payments for the delivery of fuel oil).

By enacting 18 U.S.C. § 3238 (1982), which provides for venue in the United States for offenses committed upon the high seas or elsewhere out of the jurisdiction of a state, Congress contemplated that certain crimes that occurred beyond the borders of the United States could be tried in the United States. Recently, Congress made hijacking an American plane anywhere abroad or harming Americans in an act of hijacking a federal offense. 18 U.S.C. § 32 (current version of 18 U.S.C.A. § 32 (West Supp. 1986); 49 U.S.C. § 1472. Under these new statutes, many more crimes committed outside the United States can be tried within the United States by article III courts.

of the prosecution must also have occurred overseas. Trying a defendant charged with committing a federal crime in the United States in an American court overseas merely because he was apprehended overseas violates the Constitution. If the federal government must afford an article III tribunal to a defendant accused of committing an offense in the United States when it catches him in New York, it cannot ignore article III and set up an executive court for the trial simply because the defendant managed to elude detection and leave the United States.

These obvious restrictions on diplomatic courts do not invalidate Tiede's trial, however. His trial, like the consular trials in the past, took place in an American court outside the United States for offenses that occurred beyond the borders of the United States. Similarly, the Beirut and cruise ship hijackings occurred beyond the territory of the United States.

Restricting American diplomatic courts to overseas trials for overseas crimes, while it reduces the instances in which such courts will be authorized, does not necessarily make these courts a constitutionally permissible exception to article III. A comparison of diplomatic courts with military courts, territorial courts, and agency adjudication is illuminating, but does not bode well for diplomatic courts. The factors that justify military courts provide no support for concluding that assigning criminal trials to diplomatic courts is constitutional. The speed with which the court can try the accused is much less critical in a criminal case assigned to an executive branch court overseas than it is in a military setting. Although the speedy disposition of criminal charges is always desirable,<sup>227</sup> the civilian context lacks the exigencies of military life that require quick resolution of military charges. The diplomatic exception also differs from the military exception in another important regard. Little if any disruption of the functioning of the diplomatic corps overseas would result if a defendant were flown to the United States for trial, whereas tremendous disruption would occur if every soldier accused of an offense against military law were sepa-

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227. In order to assure speedy disposition of criminal charges, Congress has enacted the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982), which requires an indictment or information to be filed within 30 days of arrest, § 3161(b), and a trial to begin within 70 days of the filing of the indictment or information, § 3161(c)(1).

rated from his unit and delivered to an article III court for trial. Additionally, the morale of the diplomatic corps will likely not play a role in "foreign relations" cases. Unlike military officers, diplomats do not view enforcing discipline and punishing crime as a central part of their duties. Thus, they should not resent the assignment of criminal cases to independent decision-makers removed from the daily routine of the diplomatic corps. Also, although a continuing relationship likely will exist between the parties involved in the military cases, such a relationship is unlikely in criminal cases in consular courts overseas. A diplomat judge would probably not have any dealings with the defendant other than those in the trial. Therefore, there is little justification for having a diplomat instead of an article III judge resolve the problem.

Nor do the needs that gave rise to the territorial courts justify assigning criminal cases today to diplomatic courts overseas. The territorial courts were a nineteenth century creation. The difficulty and slowness of travel precluded transporting litigants and witnesses back to the states where they could be tried by article III federal courts, but the ease and speed of modern communications and transportation have changed that. The United States can deliver the defendant and witnesses to an article III court in the United States in less than twenty-four hours from practically anywhere in the world. This ability strongly argues against any practical necessity to try the defendant overseas.

Furthermore, the territorial courts were created in areas where there were no alternative tribunals; the federal government provided the only courts available. This is generally not the case overseas today. The courts of the host country are almost always open to try criminal offenses that occur within their borders. In addition, diplomatic courts do not face the problem of appointing life-tenured judges to a large number of courts that likely will vanish in the near future. The American foreign service stations abroad will probably not experience significant reduction in the foreseeable future. Thus, if article III judges were appointed to adjudicate criminal matters that arose in American diplomatic outposts overseas, the specter of large numbers of life-tenured article III judges without a docket would be most unlikely.

Similarly, the expertise rationale does not justify convening consular courts to adjudicate criminal offenses. Diplomatic personnel probably have not developed expertise in either criminal law or in running a courtroom. Adjudication is not a major function of the foreign service. No advantage exists, therefore, in consigning criminal trials to the diplomatic corps or their surrogates rather than to article III judges.<sup>228</sup> Because the consular courts in the past, and those suggested for the future, have convened to try criminal cases, which form a significant part of the federal district court docket,<sup>229</sup> requiring article III judges to staff diplomatic courts would not change the character of the judiciary by means of a vast infusion of specialists. Thus, the rationales that undergird the public rights exception to article III do not support a diplomatic court exception any more than do the needs that gave rise to military and territorial courts.

That the specific needs giving rise to the three exceptions recognized in *Marathon* do not apply to diplomatic courts does not preclude the possibility of other imperatives that might justify a fourth exception to article III. *Marathon's* caution that exceptions to article III must be narrowly formulated,<sup>230</sup> however, mandates that any rationales proffered to support diplomatic courts overseas be given careful scrutiny. One such rationale could be based on the desire of the United States to increase the stability of its allies. As the 1978 hijacking in Berlin and the 1985 hijackings of the airplane in Beirut and the cruise ship in the Mediterranean Sea illustrate, situations may occur in which an ally presses the United States to convene an American court overseas to hear a criminal case. The

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228. Situations may arise—Ambassador Mike Mansfield in Japan comes to mind—in which the American consular officer's expertise with the host country's culture is helpful. Michael J. Mansfield, former Majority Leader of the Senate (1961-1976) was appointed Ambassador to Japan in 1977. *THE INTERNATIONAL WHO'S WHO*, 1984-85, at 916 (48th ed., 1984). For example, a consular officer may be familiar enough with the society that he can take judicial notice of aspects of the culture where the crime occurred and the defendant perhaps lived. Nonetheless, this familiarity should not be crucial. If the defendant is allowed to make a full record, he can educate the judge about all that is necessary to understand the case.

229. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 178-79 (1985).

230. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-64 (1982) (plurality opinion).

ally may fear internal political protest if it tries the case itself or may fear external protest from other nations about the trial.

While helping an ally by trying the accused in an American court may be a legitimate goal of American foreign policy, trying the case in an article III court would achieve this goal just as easily as would trial by a consular court. If the ally demands a trial by a consular court, rather than by an article III court, the desire to please an ally should not allow the United States government to ignore article III. Although another country might have a genuine interest in having an American court handle the case, it is difficult to grant that the country's desire for a consular court in particular should rise to the level of previously recognized article III exceptions. The only real advantage to the ally of having the case tried by an executive branch tribunal rather than by an article III court is that the diplomatic court, unprotected by life tenure, might accept orders—or succumb to pressure—to impose a conviction. Under this rationale of appeasing an ally, the United States might just as well incarcerate the defendant without the charade of a trial.<sup>231</sup> Fortunately, neither article III nor the due process clause of the Constitution permits such a procedure.

One might argue that at times it is better American foreign policy to sacrifice a defendant than to have an ally overthrown or to face war over the incident, and that accordingly in such situations a diplomatic court should be convened to assure a conviction. One might attempt to bolster this argument by pointing to the high rate of convictions in courts-martial and arguing that courts-martial exist, by and large, to assure convictions as a method of enforcing the discipline necessary in an army.<sup>232</sup> Such a view must be rejected. Many have expressed doubts about the impartiality of

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231. This example highlights the interrelationship of the judicial independence requirements of article III and the due process clause. Although due process analysis focuses on the rights of individuals vis-à-vis the government in contrast to the structural approach of article III which focuses on the role of the judicial branch vis-à-vis the executive and legislative branches, both share a fundamental commitment to a process of impartial adjudication. While the framers imposed the judicial independence requirements of article III on the courts in an attempt to compartmentalize and balance government power, they believed that fairer government decision making would be one of the primary benefits of a compartmentalized national government. *See supra* notes 2-7 and accompanying text.

232. *See O'Callahan v. Parker*, 395 U.S. 258, 261 (1969).

courts-martial,<sup>233</sup> but the perceived lack of impartiality has been deemed a problem with courts-martial rather than a justification for them. In fact, concerns about lack of impartiality have made contemporary society quite hesitant about military courts and have led the Supreme Court to circumscribe greatly their jurisdiction.<sup>234</sup> Military courts aside, if an ally will fall or war will break out unless the United States tries a defendant, the solution is to try him in an article III court. More to the heart of the issue, if an ally will fall or war will break out unless the United States convicts a defendant—and therefore an article II court is preferable because the executive branch both prosecutes and adjudicates—then the ally demands in fact that no real trial take place. The diplomatic stakes in this scenario are high, but the constitutional requirement of judicial independence ensures impartial decision making in just such politicized situations as this.

In light of the relatively scant historical support for non-article III diplomatic courts, the relative ease with which overseas defendants can be brought before an article III court in the United States today, and the constitutional presumption that article III courts adjudicate criminal charges against civilians, the executive branch must not convene non-article III courts overseas to try hijacking cases. Accordingly, other trial alternatives must be considered.

### 3. *Alternatives to Executive Branch Courts*

If the defendant and crucial witnesses can come to the United States, the trial should proceed in an article III court.<sup>235</sup> Admittedly, transporting the defendant away from the scene of the crime may raise some practical difficulties, but they are not insurmountable. For example, in the Tiede case most of the prosecution wit-

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233. *Id.* at 264; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18 (1955).

234. *E.g.*, *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955).

235. Venue in the United States for crimes committed beyond the borders of the United States is permitted by the Constitution and by statute. "The trial . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. CONST. art. III, § 2, cl. 3.

"The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or first brought. . . ." 18 U.S.C. § 3238 (1982).

nesses had to be flown from Poland to West Berlin. They could have been flown relatively easily to the United States instead. The United States could also have easily transported other witnesses, the American military at the air base in Berlin and Ingrid Ruske, who accompanied Tiede to West Berlin, to the United States. In the Beirut case, most of the witnesses—the passengers and the crew of the hijacked plane—already live in the United States. Others, such as the air traffic controllers and the diplomats in the various countries involved in the plane's odyssey, would have to be flown to the site of the trial whether it be Beirut or Washington, D.C. Similarly, many of the witnesses to the cruise ship hijacking are scattered in countries around the Mediterranean as well as in North America. Whether the trial took place in Italy or the United States, witnesses would have to be gathered and flown to the chosen site.

Despite the relative ease of air transportation, trying a defendant in the United States for crimes committed overseas would raise problems. The subpoena power of the court might not reach important witnesses, and the defendant might legitimately claim that lack of witnesses hampered him in presenting his defense. Moreover, situations may arise in which the host country will not allow the United States to remove a defendant and fly him back to the United States for trial in an article III court.<sup>236</sup> If trial in the United States becomes difficult or impossible, the United States has two choices: allow the host country to try the defendant or authorize an article III court to act overseas to try the case. Although article III courts currently lack jurisdiction to sit overseas and try criminal cases that arise in another country, Congress could expand article III jurisdiction to allow trials overseas of individuals charged with violations of United States criminal statutes.<sup>237</sup> Article III judges could travel overseas quickly enough to

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236. This was the case in Italy in October 1985. *See supra* text accompanying notes 183-88.

237. Currently, the statutory grants of criminal jurisdiction to federal courts over crimes occurring beyond American borders are limited to fairly narrow circumstances, *see supra* note 226. Article III places no geographical limitations on the location of federal district courts, however. *See supra* note 57.



ensure that defendants receive a speedy trial.<sup>238</sup>

If an American criminal hijacking trial takes place overseas, therefore, it should—and could—proceed in an article III court. Nonetheless, practical problems of court administration would weigh against setting up an American court overseas. Unless the court were located in West Berlin, or some area with a similarly unique relationship to the United States, relatively straightforward matters such as enforcing subpoenas might prove extremely difficult. Of course, similar obstacles also would encumber any type of American court established in another country. Although these practical difficulties bear on the wisdom rather than the constitutionality of establishing article III courts overseas, they are strong reasons not to convene American courts to adjudicate offenses committed by civilians beyond the borders of the United States. Rather, the United States should allow the host country, which has primary jurisdiction over offenses committed within its borders,<sup>239</sup> to try those cases.

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238. For example, Stern easily and quickly flew to Berlin to convene the court and adjudicate Tiede's case. See Stern, *supra* note 14, at 55, 94.

239. The North Atlantic Treaty Regarding Status of Forces, June 19, 1951, art. VII, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67, provides that the sending country has the right to exercise in the host country criminal and disciplinary jurisdiction under the law of the sending country over persons subject to the military law of the sending country; that the host country has the right to exercise jurisdiction over military and civilian personnel from the sending country for violations within the host country of the host country's law; that the sending country has the right to exercise exclusive jurisdiction over persons subject to the sending country's military law for offenses punishable under the law of the sending country, but not punishable under the law of the host country; that the host country has the right to exercise exclusive jurisdiction over offenses punishable under the law of the host country, but not punishable under the law of the sending country; that when there is concurrent jurisdiction the sending country has the primary right to exercise jurisdiction over the sending country's armed forces or accompanying civilian components when the offense is solely against the property or security of the sending country, or solely against the property or person of another of the sending country's armed forces or accompanying civilian components, or when the offense arises out of an act or omission done in the performance of official duty; that in all other instances of concurrent jurisdiction the host country has primary jurisdiction. The country with the primary jurisdiction shall give "sympathetic consideration" to a request from the other country that it waive its right to exercise jurisdiction. Art. VII (3)(c).

Under the Hague Convention, *supra* note 16, the United States, West Germany, Poland, and possibly East Germany had concurrent jurisdiction over the Tiede hijacking. The Convention contains no provisions for establishing priorities. In drafting the Convention, the United States had favored giving primary jurisdiction to the country where the aircraft was registered. S. AGRAWALA, AIRCRAFT HIJACKING AND INTERNATIONAL LAW 42 (1973).

In sum, the exigencies that justify the military, territorial, and public rights exceptions to article III do not support the creation of diplomatic courts overseas to try criminal charges. Nor do any American foreign policy interests override the requirement for an article III court and warrant assigning criminal cases to article II courts. When an American court convenes overseas to exercise the judicial power of the United States, therefore, it must meet the requirements of article III. In most cases, however, the courts of the host country should try crimes committed by civilians overseas.

### *C. Diplomatic Courts: An Exercise of Foreign Judicial Power*

Although it was not articulated as a basis for convening the United States Court for Berlin in 1978, one can argue that the executive power to conduct foreign relations allows the President to convene an executive branch tribunal overseas in order to help an ally exercise its judicial power.<sup>240</sup> This view rests on two premises:

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240. A few hypotheticals illustrate the foreign judicial power analysis. Suppose, for example, that the government of the Philippines, deciding that its own judicial system was seriously compromised or at least unable to provide the appearance of independence and impartiality, asked the United States to set up an American tribunal in Manila to try those accused of the Aquino assassination. The President agreed and appointed the American ambassador to the Philippines to serve as the judge of that tribunal. The ambassador/judge, serving in both positions at the will of the President, conducted a trial using American trial procedure and Philippine criminal law. The judge found the defendants guilty and sentenced them to death. Because the government of the Philippines has the legal authority to decide whether to enforce the American court's judgment, this proceeding could be considered an exercise of Philippine judicial power by its American ally. If the Philippine government decided to release the defendants and expunge the convictions, the American government's only legal recourse would be a diplomatic protest, or perhaps an effort to exert diplomatic pressure on the Philippines to honor the decisions issued by the American tribunal. Because the United States tribunal's decision would be, in the end, only advisory, the court arguably exercised Philippine rather than American judicial power. Consequently, the judicial independence requirements of article III would not be activated.

To take an example closer to home, suppose the United States by treaty agreed to convene an American court to exercise an ally's judicial power in certain enumerated situations, such as political assassinations, hijacking, and gun-running. Mexico, a signatory to the treaty, decided that gun-running from Mexico to Central American countries had gotten out of hand. Invoking the treaty, the Mexican government asked the United States to help stabilize the situation by providing courts to try the Mexican gun-running cases. The United States, seriously concerned about the problem and aware of the severe backlog of criminal cases in Mexican courts, agreed to have American consular officers in Mexico set up tribunals and try the criminal charges of gun-running. Although staffed by executive branch officials who lack life tenure, the consular courts observed the fundamentals of due process: notice, opportunity to be heard, and impartial decision making. Under the foreign judicial

first, that American courts overseas can be authorized to exercise the judicial power of another country, and second, that determining whether an American court overseas exercises American judicial power or foreign judicial power is possible. If these premises are correct, article III may not pose an obstacle to the creation of these executive courts. By its terms article III limits only the judicial power of the United States.<sup>241</sup> If the power exercised by an American tribunal is not the judicial power of the United States, the policies underlying article III are not thwarted by a tribunal that lacks the article III safeguards of judicial independence.

Although little precedent exists to support it, logic indicates that the first premise is correct. At first glance, this premise appears to contradict the maxim that one sovereign may not exercise the penal law of another sovereign.<sup>242</sup> This proposition does not apply to

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power analysis, this scenario would not violate article III. American tribunals that do not exercise the judicial power of the United States do not need the article III attributes of judicial independence. Because the government of Mexico is legally the sovereign and thus makes the ultimate decision to enforce the judgment, the consular courts could be said to exercise Mexican judicial power.

The principles undergirding the separation of powers doctrine expose a serious flaw in the foreign judicial power rationale. *See infra* text accompanying notes 250-253. This rationale would allow courts subject to pressure from the political branches of government to try cases in a number of situations that appear to warrant trial by an independent judicial branch. For example, a United States citizen on trial in a consular court for gun-running could persuasively argue that he is entitled to a trial in an article III court. He could argue that the risk of political pressure on the American fact finder would be great. The consular officer would have an incentive to please the Mexican authorities, with whom he must work on a number of issues. In addition, the American diplomatic officers might feel compelled to set a good image in order to encourage other Central American countries to crack down on gun-running. Therefore, the article III guarantees of judicial independence, which were designed to prevent the political branches of the federal government from unfairly influencing federal adjudication, are warranted in this situation. To retort that the United States Constitution does not guarantee American citizens arrested by a foreign government article III trials, no matter how politicized the situation, is unsatisfactory in light of article III's goal of an independent American judiciary. In the hypothetical, after all, American officials convene the consular courts and sit as judges, and American tribunals are susceptible to the pressure of the political branches of the American government.

241. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

242. *Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (rejecting the claim that state courts may decline to enforce *federal* penal statutes); *The Antelope*, 23 U.S. (10 Wheat.) 66, 122-23 (1825); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89 (1969); 2 W. BLACKSTONE, COMMENTARIES 437-38.

the current inquiry, however. The maxim contemplates a case tried by a traditional court of general jurisdiction applying domestic law, rather than a case involving two sovereigns that have decided as a matter of foreign policy that it is to their mutual advantage to have one nation establish a mechanism to resolve a conflict that is politically difficult for the other nation to handle. Not surprisingly, few situations exist in which two sovereigns have made such a decision. The convocation of the United States Court for Berlin in 1978 may be the only case in recent times that can be said to present such a situation.

Because courts have shied away from reviewing action involved in the execution of foreign policy, stating that "resolution of such issues frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature,"<sup>243</sup> precedent concerning the exercise of foreign judicial power is unavailing. Nonetheless, the long tradition of deference to the executive branch in diplomatic matters indicates that article III courts will hesitate before ruling that the President cannot respond to an ally's request by convening an American court overseas to exercise the judicial power of another country. The maxim forbidding one sovereign to exercise the judicial power of another would therefore probably not preclude a President's attempt to help an ally by establishing a mechanism, administered by American diplomatic personnel, in that ally's country to resolve a dispute the ally did not wish to assign to its own courts.

The second premise, that determining whether an American court overseas is exercising foreign or American judicial power is possible, proves more problematic. Because article III forbids criminal trials in American diplomatic courts overseas when these courts attempt to exercise the judicial power of the United States,<sup>244</sup> determining whether an American tribunal is exercising American judicial power or the judicial power of another nation becomes crucial. A look at the Tiede trial in the United States Court for Berlin illustrates the difficulties of making this determination. In 1979 the American court in Berlin applied the German

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243. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

244. See *supra* text accompanying notes 227-39.

Penal Code. The defendant was not charged with any violations of the criminal laws of the United States. Both prosecution and defense teams included Germans as well as Americans. German citizens sitting as jurors decided the case.<sup>245</sup>

On the other hand, the American prosecutors totally controlled the prosecution, and American lawyers dominated the defense.<sup>246</sup> The judge presiding over the trial was an American, and he applied the constitutional law of the United States in deciding questions fundamental to the proceedings.<sup>247</sup> In addition, the court followed American procedural law.<sup>248</sup> Moreover, the trial took place in American buildings guarded by American soldiers on an American air base. The United States could have, on its own, enforced the American court's judgment against Tiede. If Tiede had been found guilty of hijacking and sentenced to years in prison by Stern, and the West German government, faced with a public outcry, had decided to release Tiede and expunge his conviction, the United States could have ignored the West German government's decision and confined Tiede to prison.

The United States had the power to take such an extraordinary step and ignore the West German government because of the unusual legal status of West Berlin. As the occupying force in West Berlin, the United States, not West Germany, has the supreme authority over incidents that occur in the United States sector of West Berlin. That the United States has the ultimate power in the American sector of West Berlin was illustrated by an incident that occurred during the criminal proceedings in 1979. Shortly before the trial began, Stern granted a motion to suppress the statements given by co-defendant Ruske. This ruling forced the United States to dismiss the charges against Ruske. American officials stated that the United States would "not cooperate in any prosecution by anyone else . . . [and would] use [its] occupation authority in Berlin,

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245. See generally *United States v. Tiede*, 86 F.R.D. 227, 228-29 (1979); Stern, *supra* note 14, at 31-32.

246. The four American defense attorneys conducted most of the direct examination and cross-examination of witnesses, and argued most motions. See generally Stern, *supra* note 14.

247. *Tiede*, 86 F.R.D. at 228.

248. *Id.* at 229.

over the local German courts, to forbid any German court to prosecute [Ruske]."<sup>249</sup>

In light of the extent of American participation and control, it is unconvincing to assert that the 1979 hijacking trial in Berlin was an exercise of German judicial power. While the proceedings were a hybrid German-American effort, the American court ultimately exercised the power of the United States. Accordingly, the constitutional demand that the judicial power of the United States be vested in an article III court applied. If the Americans wanted to try Tiede—whether out of a desire to please their ally or a desire to “look tough” on hijacking—they should have done so in an article III court.

Because of West Berlin's unique status, the United States Court for Berlin is not a paradigm for American diplomatic courts overseas. If the prosecution of Tiede had occurred in an American court anywhere else in Germany or in any other country, it might have been much more difficult to determine which country's judicial power was actually exercised. Nonetheless, article III's command that the judicial power of the United States be vested in an independent judiciary demands that this determination be made. The following factors may help in determining the source of the judicial power exercised by a diplomatic court: the extent, if any, of the legal authority the United States exercises in the territory where the American court is convened; the ability of the United States to enforce the judgment of the American court; and the genuineness of the delegation of foreign judicial power to the American court.

### *1. Legal Authority of United States Forces Overseas*

Suppose that Tiede had diverted the Polish plane to the United States Air Base in Frankfurt am Main and that the American Ambassador to West Germany, in response to a West German request that the United States handle the prosecution, had set up an American court in Frankfurt to try the case. Suppose further that Tiede was charged with violating the German Penal Code and prosecuted by a joint team of German and American prosecutors.

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249. Stern, *supra* note 14, at 220. The prosecution also promised that “[h]aving been prosecuted, [Ruske] will not now be extradited.” *Id.*

Although this hypothetical resembles the real case, one could argue more persuasively that this court exercised German judicial power than that the American court in Berlin did. In the Frankfurt hypothetical the United States would have no legal basis for insisting on enforcement of the American tribunal's decision, if the Germans decided to ignore the results of the prosecution. In Frankfurt the United States has no occupation authority over German territory.<sup>250</sup> Accordingly, if the German government concluded that its delegation of judicial power had been unwise and decided to rescind the delegation, it could do so even after conviction or acquittal. Because the German government has the ultimate legal authority to enforce or vacate the judgment rendered by the American court in the hypothetical, one can argue that the judicial power at stake is German. Exercising German judicial power does not implicate article III. Arguably, therefore, the Constitution would not bar the President, in the exercise of his foreign relations power, from assigning this hypothetical case to a non-article III American tribunal.

This analysis, although facile, has troubling implications. It would permit the United States, by treaty, to set up American executive branch courts in foreign countries around the world. These courts, staffed by judges who owe their positions to the President and are not protected by life tenure, could conduct serious criminal trials. In most instances the host country would possess the supreme legal power and thus would have the ultimate legal authority to decide whether to enforce or vacate the American court's judgment. Accordingly, the President could assert that, because the United States lacks the ultimate legal authority, the American courts are exercising foreign judicial power.<sup>251</sup> American diplomatic courts could circle the globe.

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250. The United States military forces in the Federal Republic of Germany are there pursuant to an arrangement between the United States and the Federal Republic of Germany, promulgated under the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241; T.I.A.S. No. 1964; 34 U.N.T.S. 243.

251. Under this analysis, which relies on the President's foreign relations power, the President could convene diplomatic courts in any situation that might potentially involve some aspect of American foreign relations.

## 2. *The Power of the United States to Enforce Judgments*

The realities of United States power overseas belie this reliance on legal formalities. Although a country may have legal authority over an individual charged with a crime within its borders, in reality once the accused is in United States custody he is under the power of the United States. If he is on an American installation overseas, the United States can easily enforce the American court's judgment—and thwart the host country's decision to ignore the judgment—by bringing the defendant to the United States to serve his sentence or to go free. Thus, by and large, the United States will have the ability to enforce the judgments of American courts overseas.

When the American government not only convenes the court, but also has the power to enforce the results of the American court proceeding, concluding that the court is exercising the judicial power of the United States becomes almost irresistible. Ignoring the power to enforce the judgments entered by the American court, and instead focusing only on the legal authority of the host country, elevates form over substance and is unwarranted in interpreting the Constitution of the United States.<sup>252</sup>

## 3. *Coerced Delegation of Judicial Power*

Furthermore, even if one ignores the power that the United States can exert once it has physical custody of the defendant, other questions arise if American diplomatic courts convene overseas on the premise that they exercise foreign judicial power. De-

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252. The significance of the ultimate power to enforce the judgment entered by the American tribunal can be seen by contemplating an article II "foreign policy" court within the borders of the United States. Even if an ally officially requested the United States to convene a court to try a serious criminal case, explicitly delegated its judicial power to the United States for that trial, and made clear that it retained the final decision about enforcing the court's judgment—thus taking all steps possible to demonstrate that the ally's judicial power is at stake—this scheme could not be squared with article III. Once the American court trying the "Mexican" gun-running case was convened in Texas, *see supra* note 240, or the American court trying the "Philippine" murder case against the Aquino assailants was convened in Washington, D.C., *id.*, it would be utterly clear that the United States had the power to enforce the judgment of the court. No matter how important the underlying American foreign policy concerns, allowing criminal charges against civilians in peacetime to be adjudicated in the United States by a tribunal staffed by judges who serve at the pleasure of the President would violate article III.



termining whether the host country truly delegated its judicial authority to the American court or whether the United States pressured that country into letting the United States adjudicate the matter would prove extremely difficult, for example. If the American government wants to try civilians overseas, it has an arsenal of subtle and not-so-subtle pressures that it can exert to convince another country that it should "delegate" its judicial power to an American court. The executive branch could thus cajole dependent foreign governments into arresting individuals selected by American authorities, accusing these individuals of violating the foreign government's law, and then "delegating" foreign judicial power to the United States to try the individuals.<sup>253</sup> American executive branch tribunals, staffed by judges dependent on the President for their jobs and salaries, could then adjudicate cases against the individuals selected for prosecution by the executive branch.

Even if this cynical scenario is unlikely actually to occur, courts should apply article III in such a manner that the scenario becomes impossible. Removing politically sensitive cases from the independent judicial branch and assigning them to tribunals established by one of the political branches creates the appearance of kangaroo courts and casts doubt on the impartiality of American adjudication. Determining whether diplomatic pressures led to a sham delegation would prove extremely difficult. As trials by these overseas American tribunals would be constitutionally permissible only if another sovereign genuinely delegated its judicial power, subsequent habeas corpus petitions would undoubtedly challenge the genuineness of the delegation. Because individuals convicted by American courts have the right to contest the constitutionality of the court's exercise of jurisdiction over them,<sup>254</sup> defendants

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253. Some exceptional circumstances may arise in which the possibility of coercion by the United States against the host country is so unlikely, and the power of the United States to remove the defendant from the country over its government's objections so limited, that one could say with assurance that the judicial power of the United States was not involved. For example, the Soviet Union theoretically could ask the United States to convene an executive branch court in Moscow. In such circumstances, when the American court is clearly exercising foreign judicial power, the criminal trial of a civilian in an article II court might pass constitutional muster.

254. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. . . ." U.S. CONST. art. I, § 9. Historically, a writ of habeas corpus was granted when the petitioner could demonstrate

would attempt to show that, because the tribunal that convicted them had in reality exercised American rather than foreign judicial power, the tribunal violated article III. Article III courts faced with these habeas suits would then be forced to evaluate whether the host country had voluntarily delegated its judicial power or had been pressured by the Americans to let the Americans try the case.

The difficult and sensitive nature of such an evaluation is obvious. Defendants would argue that American diplomats instrumental in convening the diplomatic court must appear in the habeas hearing to face questioning about their dealings with their counterparts and about American pressure on the host country to "delegate" its judicial power to an American court. The government, on the other hand, would no doubt respond to such habeas challenges by urging the court not to interfere with executive decisions on foreign policy matters. The habeas court would thus need to undertake difficult factual evaluations that implicate delicate matters of international relations or refuse to examine constitutional challenges to the defendant's criminal conviction. Rather than force the judiciary to make a choice between two such undesirable options, executive branch courts should not adjudicate criminal trials of civilians overseas.

#### *D. An American Court in Beirut*

Contemplating the creation of a United States Court in Beirut highlights the problems involved in determining whether an American court overseas is exercising foreign judicial power. Suppose Lebanese government officials arrested a number of individuals involved in the June 1985 hijacking of the TWA jet and delivered them to United States custody. Suppose further that the government of the United States announced that it would convene an American court in Beirut to try the hijackers and would assign the United States Ambassador to Lebanon to preside as judge. Ameri-

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that the court in which he had been convicted had lacked jurisdiction. *See, e.g., Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202, 209 (1830) (refusing petition for writ because of the sufficiency of the trial court's jurisdiction). For a discussion of the gradual expansion of the grounds for habeas corpus relief, see *Stone v. Powell*, 428 U.S. 465, 474-78 (1976). *See generally* C. WRIGHT, *THE LAW OF FEDERAL COURTS* 330-46 (4th ed. 1983) (general discussion of writ of habeas corpus).

can procedural law would govern the trial. The prosecution team, composed of American and Lebanese lawyers, would prosecute the defendants under the criminal law of Lebanon, and each defendant would be afforded Lebanese and American defense counsel.

Defense lawyers would undoubtedly immediately challenge the power of an article II American court to adjudicate the serious criminal charges lodged against the defendants. In responding that the American tribunal could adjudicate the case because the court was not exercising American judicial power, the prosecutors could point to three factors. First, the court will apply Lebanese rather than American penal law. Second, the government of Lebanon, as sovereign over the territory containing Beirut, has the ultimate legal authority to decide whether to enforce the judgment of the American tribunal. Finally, the creation of an American tribunal to exercise the judicial power delegated by the Lebanese government is a legitimate exercise of American foreign policy that the judicial branch should not disturb.

None of these factors, however, is persuasive. First, whatever substantive law the court applies, adjudication takes place in an American federal court: the American federal government created the court, the court will follow American procedures, an American judge appointed by the President will preside, and Americans will serve as the chief lawyers. In light of these facts, asserting that this court is a Lebanese court is comparable to asserting that a state court located in New York is an Illinois court when it applies the substantive law of Illinois.

Second, although the United States has claimed no sovereignty over Lebanon, once the defendants are present in the American court in Beirut the United States has the power to enforce the court's judgment against them. The courtroom presence of the American military guards who provide security for the court, coupled with the offshore American military presence, ensures American physical power over the defendants.

Third, determining that Lebanon voluntarily delegated Lebanese judicial power to the American court would prove difficult. Indeed, one cannot even say with certainty that the civilian government of Lebanon actually governs Beirut, much less Lebanon. Although the government may technically embody the sovereignty of Lebanon, in reality other countries and their proxy forces control much of

Lebanon.<sup>255</sup> With so little control, so much chaos, and so many enemies, the Lebanese government can hardly ignore diplomatic and military pressure exerted by the United States.

Moreover, when examined in light of the policies underlying article III, a trial in an executive branch tribunal in these circumstances becomes particularly troubling. The United States has a great incentive to exert political pressure because it has a significant interest in the trial and conviction of those who hijacked an American airplane, murdered an American serviceman, assaulted Americans aboard the plane, and held other Americans hostage for two weeks. Not only does the United States wish to see the hijackers punished for these specific offenses, but the United States also wants to deter future hijackings of American airliners. Because the weak position of the Lebanon government suggests that a Lebanese trial may never even begin, American authorities might have decided that convening an American forum was the only way to ensure a trial. If so, the possibility would be great that American political pressure led to this "delegation" of Lebanese judicial power to an American court. The United States therefore might have convened the American court in Beirut because it wanted to ensure that an American court would try the hijackers rather than because the United States merely wanted to do a disinterested favor for an ally. Whatever the facts, one could not say with certainty that the American court in Beirut exercised the judicial power of Lebanon rather than that of the United States.

If an American court were convened in Beirut on the articulated rationale that it would exercise Lebanese judicial power, the defendants were convicted, and the defendants subsequently filed habeas corpus petitions, the reviewing court would face a mass of difficult issues. The defendants would no doubt assert that the delegation of Lebanese judicial power had been a sham and that their convictions were invalid because they had not been tried in an article III court. In order to prove their contention, they might seek the testimony of diplomats from the United States, Lebanon, Syria, and Israel, military commanders leading the American, Druse, and Amal forces in Lebanon, and spokesmen for other political and religious groups in the Middle East. American courts

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255. N.Y. Times, June 18, 1985, § 1, at 10, col. 3.

have not attempted in the past to evaluate such politically freighted decisions, and nothing in the Beirut situation makes the task appear any more amenable to judicial action now. Confronted with a fundamental constitutional challenge to the legitimacy of the criminal proceedings, faced with facts that suggest an American incentive to pressure its ally to allow an American trial, and ill-equipped to determine whether the United States Court for Beirut had exercised the judicial power of the United States in violation of article III, the court would be justified in granting the habeas corpus petition and requiring the government to prosecute the defendants in an article III court if it desired to try them again. In light of article III's goal of protecting judges from political pressures and the Supreme Court's hesitance to allow exceptions to article III, a decision to grant habeas relief would be correct. Nonetheless, it would yield an undesirable result. In order to protect federal courts from having to examine such politically sensitive situations and to prevent the duplication of judicial resources that new trials would entail, the executive branch should refrain from convening article II courts overseas to try hijackers.

#### *E. An American Court in Italy*

Although the American troops surrounding the airplane carrying the Palestinian hijackers of the cruise ship allowed the Italian forces on the NATO air base in Sicily to take the hijackers into custody, a slightly different scenario is easy to imagine. If the hijackers had instead been taken into American custody, the United States would have faced three options: deliver the hijackers to the Italian government for trial, send the hijackers to the United States for trial in an article III court, or try the hijackers in an American court convened in Italy. The first two alternatives would, of course, pose no constitutional problems. The third alternative, which might prove palatable to the Italian government, would also be constitutional so long as the court were established under article III. An attempt by the President to convene an American executive branch tribunal in Italy and to justify this court as a mechanism for the exercise of Italian judicial power would violate the Constitution, however. The trial of a notorious and politicized crime in a civilian setting is the very situation in which the judicial independence required by article III is most necessary. As the

*Marathon* opinion emphasized, "[a]ll criminal matters with the narrow exception of military crimes . . . [are] at the protected core of [the judicial] power . . . assigned . . . to an independent Article III branch."<sup>256</sup> At the least, therefore, claims that an American trial can proceed without the safeguards of an article III court should be viewed with skepticism.

Nonetheless, one might argue that a trial in an American court in Italy is actually an exercise of Italian rather than American judicial power and, as such, falls outside the bounds of article III. Emphasizing the following factors might bolster this contention: the American court was convened in response to a request by the Italian government, sovereign in Italy; the court would apply Italian penal law; Italian and American lawyers would serve on both the prosecution and defense teams. While these facts distinguish this court from the typical American federal court, they do not make a persuasive case that the court is exercising Italian judicial power. As in the Beirut hypothetical previously discussed,<sup>257</sup> the Italian government in this case may have the ultimate legal authority to carry out or overturn the American court's decision, but the United States in all likelihood has the ultimate power to enforce the court's judgment. The specter of a coerced delegation of judicial power also looms. Although more stable than the government of Lebanon, the Italian government is a shaky coalition. As recent events have shown, disregarding requests by the United States can bring down the government of Italy.<sup>258</sup> The United States also has other diplomatic pressures at its disposal, raising questions about which judicial power the American tribunal in fact will exercise. In light of the presumption against permitting federal adjudication outside article III, the policy reasons that trigger the need for judicial independence—and its appearance—in highly politicized criminal trials, and the metaphysical investigation that a subsequent habeas corpus petition would require if American courts were authorized to evade the requirements of article III on the rationale that they exercised foreign judicial power, an American diplomatic

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256. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.25 (1982) (plurality opinion).

257. See *supra* text accompanying note 255.

258. *N.Y. Times*, Oct. 20, 1985, § 1, at 1, col. 6.

court should not be convened in Italy to try the hijackers of the Italian cruise ship.

## VI. CONCLUSION

Article III of the Constitution confines the judicial power of the United States to an independent branch staffed by judges whose judicial independence is safeguarded by life tenure and protection against salary reductions. Although exceptions exist that permit military courts, territorial courts, and courts assigned public rights cases to adjudicate certain federal matters despite these courts' lack of article III safeguards, these exceptions must be construed narrowly. If American courts are convened overseas to try civilians accused of hijacking—or any other non-military crimes—the courts must be established under article III. Neither the President's war power nor his power to conduct foreign relations is so extensive as to allow him to ignore the requirements of article III.

The existence of the United States Court for Berlin, an article II tribunal, highlights the threat to article III raised by American trials of civilians for crimes committed overseas. Indeed, the threat materialized in Tiede's hijacking trial in the United States Court for Berlin. Tiede did not raise an article III challenge to his trial by an executive branch court, however, and no court reviewed the constitutionality of his conviction.<sup>259</sup> Nonetheless, from an article III perspective the 1979 hijacking trial in Berlin provides a classic example of the need for judicial independence in American courts overseas. American executive branch officials in Berlin were sensi-

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259. Tiede filed no subsequent attack on his trial conviction. Indeed, he had little incentive either to appeal or to file a habeas corpus petition. Stern sentenced Tiede to time served, so at the end of the trial Tiede walked out of the courtroom a free man. Although he had been convicted of a crime and had the right to appeal, OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY, Law No. 46, Apr. 28, 1955, art. 5, *reprinted in* United States v. Tiede, 86 F.R.D. 227, 237 (1979) (providing that any defendant can petition the Chief of Mission to review his conviction), a defendant in Tiede's position would be reluctant to attempt to overturn his conviction. If Tiede had succeeded in reversing the trial results, he might well have faced another trial with the risk of another conviction and a more severe sentence. Furthermore, if on appeal it had been decided that the United States Court for Berlin lacked jurisdiction over Tiede's hijacking trial, Tiede would probably have been forced to defend himself against criminal charges in a German court, with no jury and no prior cases in which German courts had recognized the necessity to escape as a defense to otherwise criminal activity. See Stern, *supra* note 14, at 58.

tive to the diplomatic repercussions of the case. The Soviets, Poles, and East Germans clearly wanted a conviction, while the Americans, pressured by an ally to handle the case, wanted to uphold the air piracy treaties so that other countries would in the future punish hijackers of American planes. In this politicized situation, the executive branch appointed both the prosecutors and the judge.<sup>260</sup> The very threat that article III aims to prevent—the control of a federal court by the executive branch—was palpably present.

Neither the war power nor the foreign relations power of the President justified trying Tiede for hijacking in an article II court. His trial in the United States Court for Berlin was unconstitutional. Convening executive branch courts to try similar hijacking cases involving American citizens in Beirut or Italy or elsewhere beyond the territory of the United States would also violate article III. To prevent unconstitutional trials overseas in the future, only courts established under article III should try hijacking cases.

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260. Judge Stern was appointed to the United States Court for Berlin by the President's delegate, the United States Ambassador to West Germany. He was fired by the same man. Stern was also an article III judge appointed to the United States District Court for the District of New Jersey. Whether this coincidence might have saved the United States Court for Berlin from an unconstitutional exercise of power in the Tiede case is an interesting question. Although guaranteed life tenure by his prior appointment to the federal court in New Jersey, and therefore not totally dependent on his Berlin appointment for his livelihood, Stern was dependent on the good will of the executive branch to continue on in his special position as the only American judge in Berlin. While Stern himself may not have valued that particular position highly or may have been glad to limit his future European travel to vacation trips, one can easily hypothesize a situation in which the extra emoluments or prestige would be important to an individual. In such a situation a judge might well find pressure from the executive branch hard to resist. The policies animating the judicial independence requirements of article III would have been much less at risk if the judge presiding over Tiede's criminal trial had not been subject to any potential punishment by the President, including dismissal from a temporary position.



