

2013

A Few Good Angry Men: Application of the Jury Trial Clause of the Sixth Amendment to Non-Citizens Detained at Guantanamo Bay

Thomas McDonald

American University Washington College of Law

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Recommended Citation

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A Few Good Angry Men: Application of the Jury Trial Clause of the Sixth Amendment to Non-Citizens Detained at Guantanamo Bay

A FEW GOOD ANGRY MEN: APPLICATION OF THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT TO NON-CITIZENS DETAINED AT GUANTANAMO BAY

THOMAS McDONALD*

Despite the substantial amount of writing on the Guantanamo Bay detention center, there has been very little discussion regarding which substantive constitutional rights are applicable to those being detained at the base. The Jury Trial Clause of the Sixth Amendment—as important as it is to the ultimate disposition of the detainees—has not been discussed in any detail at all. However, the history and jurisprudence surrounding the Jury Trial Clause suggests that it should apply in full in Guantanamo Bay.

*While there is some general debate as to which constitutional provisions apply extraterritorially, the fundamental nature of the right to jury trial indicates that it should apply in Guantanamo even if it is found to be an unincorporated territory. Additionally, arguing, as the government has thus far, that the detainees are not entitled to a jury trial based on the rule created in *Ex parte Quirin*—that is, because they are enemy combatants charged with violating the law of war—may be applicable in some cases but would be inappropriate to extend as a categorical rule. To that end, the government’s reliance on *Quirin* in Guantanamo is somewhat telling, as this argument actually presupposes that detainees would be entitled to the right to jury trial if *Quirin* were found not to apply. Therefore, the government cannot lawfully conduct trials in Guantanamo Bay without adhering to the Jury Trial Clause of the Sixth Amendment.*

* Junior Staff Member, *American University Law Review*, Volume 62; J.D. Candidate May 2014, *American University, Washington College of Law*; B.A. Communication Studies, 2011, *Clemson University*. Special thanks to Professor Stephen Vladeck for providing the advice and feedback that made this Comment possible. I’d also like to thank my editor Pasha Sternberg and the rest of the *Law Review* staff for their hard work, meticulous edits, and helpful suggestions every step of the way. Finally, to my family and friends for their support and patience throughout this process—I cannot express my appreciation enough. Any remaining errors are mine alone.

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“I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.”¹

INTRODUCTION

In recent years, there has been a considerable amount of discussion concerning the extraterritorial reach of the U.S.

1. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 269 (Julian P. Boyd ed., 1958).

Constitution.² In particular, the Supreme Court's decision in *Boumediene v. Bush*³ raised the interesting and controversial question of which constitutional rights should apply at the Guantanamo Bay detention center.⁴ One provision that has received surprisingly little attention in this regard is the Jury Trial Clause of the Sixth Amendment.⁵ By guaranteeing the right to an impartial jury for the accused in all criminal proceedings, the Jury Trial Clause adds an element of underlying fairness to the American criminal justice system.⁶ However, while the right to jury trial has come to be a highly valued component of the American legal system,⁷ questions concerning who can claim the title of "the accused" for Sixth Amendment purposes have not yet been fully settled.

Relevant case law has clarified some areas of this debate more than others. For example, with the exception of members of the U.S. military,⁸ it is generally true that American citizens against whom criminal proceedings are brought are entitled to a jury trial regardless of the geographic location⁹ of the trial itself.¹⁰ However, it

2. See, e.g., Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 273 (2009) (observing that the Supreme Court's decision in *Boumediene v. Bush* failed to provide a bright-line rule regarding the geographical scope of constitutional rights).

3. 553 U.S. 723 (2008).

4. See *id.* at 771 (extending the Suspension Clause to non-citizens held in Guantanamo Bay detention center); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2108 (2009) (noting that one of the questions raised by *Boumediene* concerns whether Constitutional provisions other than the Suspension Clause "ha[ve] full effect" in Guantanamo (alteration in original)).

5. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . ."). Although a separate issue might arise concerning the requirements of Article III's Jury Trial Clause, the Supreme Court has consistently read that provision *in pari materia* with the Sixth Amendment's right to jury trial. See, e.g., *Reid v. Covert*, 354 U.S. 1, 5 (1957) (describing the defendants' right to jury trial as being conferred by Article III and the Sixth Amendment concurrently). Thus, this Comment's analysis focuses specifically on the Sixth Amendment question discussed herein.

6. See *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) (asserting that juries are particularly important in criminal trials, where they make "judicial or prosecutorial unfairness less likely").

7. See *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part) (referring to the right to jury trial as "the spinal column of American democracy").

8. See *infra* notes 37–42 and accompanying text (detailing the exception to the Jury Trial Clause, based on Congress's Article I plenary power over the armed forces, for members of the U.S. military who are servicemembers at the time charges are brought).

9. This idea is part of the broader argument that the Constitution should "follow the flag"—that is, that certain constitutional provisions should apply in response to government action, regardless of where that action is taken. See Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926) (noting the heated debate in the early 20th century over whether

is much less clear how the Clause relates to non-citizens in similar situations. The Supreme Court partially answered this question in *Ex parte Quirin*¹¹ by stating that the right to jury trial does not apply to non-citizens designated as enemy combatants that are charged with violating the laws of war.¹² In creating this exception to the Jury Trial Clause,¹³ the Court focused heavily on the defendants' status as enemy combatants and the nature of their alleged offenses, but said nothing about whether the defendants would otherwise have been entitled to a jury trial.¹⁴

In the context of Guantanamo Bay, the question of whether detainees are entitled to the right to jury trial has been discussed strictly through the lens of *Quirin*'s law of war exception.¹⁵ For example, the U.S. Court of Appeals for the District of Columbia Circuit recently considered two cases concerning whether it is appropriate to try Guantanamo detainees under *Quirin* for offenses such as conspiracy and providing material support for terrorism.¹⁶

the Constitution "follows the flag"); see also John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT'L L. & POL. 287, 298–99 (1985) (opining that the Framers intended the Bill of Rights as a whole to apply to government action regardless of geographical constraints).

10. See, e.g., *Reid v. Covert*, 354 U.S. 1, 19–20 (1957) (plurality opinion) (extending the Jury Trial Clause to civilian dependents of U.S. servicemembers living on an overseas military base). There is some recent debate as to whether independent contractors—regardless of citizenship—who are working with the U.S. military overseas are entitled to trial by jury in criminal cases during wartime. See *United States v. Ali*, 71 M.J. 256, 271 (C.A.A.F. 2012) (Baker, C.J., concurring in part and in the result) (suggesting that those accompanying the U.S. military during combat operations should not be entitled to constitutional rights beyond what is afforded to the service members themselves). But see Steve Vladeck, *Analysis of U.S. v. Ali: A Flawed Majority, Conflicting Concurrences, and the Future of Military Jurisdiction*, LAWFARE (July 19, 2012, 8:09 PM), <http://www.lawfareblog.com/2012/07/analysis-of-caaf-decision-in-ali> (noting the lack of precedent supporting the decision to treat independent contractors as U.S. servicemembers for purposes of constitutional analysis).

11. 317 U.S. 1 (1942).

12. *Id.* at 41, 44.

13. See *infra* notes 43–47 and accompanying text (describing *Quirin*'s limitation on the Jury Trial Clause based on the citizenship of the offender and the nature of the alleged offense).

14. See *Quirin*, 317 U.S. at 19.

15. See, e.g., *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1166–67 (C.M.C.R. 2011) (en banc) (applying the test set out in *Quirin* in the prosecution of a Guantanamo detainee charged with conspiracy and providing material support for terrorism), *vacated*, No. 11-1324 (D.C. Cir. Jan. 25, 2013).

16. See *Hamdan v. United States*, 969 F.3d 1238, 1252–53 (D.C. Cir. 2012) (holding that providing material support for terrorism is not a violation of the Law of Nations and is therefore not subject to *Quirin*'s law of war exception); see also *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (vacating the defendant's conviction in the Court of Military Commission Review on the ground that the crimes with which the defendant had been charged were not triable by military commission per the court's decision in *Hamdan*).

Both of these cases, however, gloss over a more basic, but equally fundamental, question: Outside the bounds of the *Quirin* exception, are Guantanamo detainees entitled to invoke the protections of the Jury Trial Clause at all, or are they a group to whom the right to jury trial categorically does not apply? Despite the D.C. Circuit's failure to issue a definitive ruling on this question in either case,¹⁷ the answer could have profound implications—both for the meaning of the Jury Trial Clause itself and for the rest of the Sixth Amendment in Guantanamo Bay.

This Comment will argue that the Jury Trial Clause of the Sixth Amendment applies to non-citizens detained in Guantanamo Bay because the Supreme Court has held that the Clause is fundamental to the American scheme of justice for individuals against whom the government has affirmatively commenced criminal proceedings. The protection offered by the Clause is no less fundamental to Guantanamo detainees, and the Supreme Court's refusal to categorically deny the right to jury trial to similarly situated individuals in *Quirin* signifies the Court's belief that such a sweeping departure from the Sixth Amendment would be inappropriate.

Part I of this Comment will provide a brief overview of the history and Supreme Court jurisprudence on the right to jury trial, the extraterritorial constitution, and the legal status of Guantanamo Bay. Part II will argue that the history and jurisprudence surrounding the Jury Trial Clause indicate that it should extend to Guantanamo detainees. In doing so, Part II will discuss the fundamental nature of the right to jury trial and attempt to clarify the somewhat disorganized precedent left behind by the *Insular Cases*.¹⁸ Part II will

17. The military courts in *Al Bahlul* and *Hamdan* ruled that the defendants were not entitled to a jury trial under *Quirin*, without mentioning the possible argument that Guantanamo detainees simply were not entitled to invoke the Jury Trial Clause. See Brief of the National Institute of Military Justice as Amicus Curiae in Support of the Petitioner at 22–24, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Jan. 25, 2013), 2012 WL 894499, at *22–24 [hereinafter *Al Bahlul*, Amicus Brief] (observing that the government has yet to argue that the right to jury trial categorically does not apply in Guantanamo Bay). Given this framing, the D.C. Circuit ruled specifically on whether the *Quirin* exception applies in these cases rather than speaking more broadly to the categorical applicability of the Jury Trial Clause. See *Hamdan*, 696 F.3d at 1252–53.

18. The *Insular Cases* are a line of cases decided by the Supreme Court between 1901 and 1922 which dealt with the application of various constitutional provisions in newly acquired U.S. territories. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 240–41 (1996) (describing the *Insular Cases* line as including twenty-two cases arising in Puerto Rico, Hawaii, Alaska, and the Philippine Islands). Four of the twenty-two cases typically discussed in the *Insular Cases* line deal with the right to jury trial. See *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (denying access to a jury for a Puerto Rican citizen facing misdemeanor libel charges); *Dorr v. United States*, 195 U.S. 138,

also contend that an argument against applying the Jury Trial Clause based on *Quirin*—while possibly applicable in some specific circumstances—is inappropriate to extend as a categorical rule. Additionally, Part II will argue that precedent surrounding the Jury Trial Clause, as well as the role of the jury in preserving the underlying fairness of American criminal proceedings, indicates that the Jury Trial Clause should extend to Guantanamo detainees. Finally, this Comment will conclude that, although the Jury Trial Clause may not categorically apply to all Guantanamo detainees, trial by jury should serve as the norm in Guantanamo Bay—at least until an exception to the Clause is found to apply.

I. BACKGROUND

A. *An Overview of the Right to Jury Trial*

The Jury Trial Clause of the Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury.”¹⁹ Alexander Hamilton noted in Federalist No. 83 that the right to jury trial was one of the few points of agreement between the Federalists and Anti-Federalists at the Constitutional Convention.²⁰ Even before the Founders met at the Convention, the right to jury trial in criminal cases was present in every state constitution in effect at the time.²¹ The importance of the Jury Trial Clause was hardly a novel concept to the Framers; the right to jury played a pivotal role in the English legal system as well.²² Indeed, the Framers’ unanimous respect for the jury trial as an institution—as

149 (1904) (holding that the Jury Trial Clause does not apply in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197, 214–16 (1903) (refusing to replace existing Hawaiian criminal procedural rules with an Anglo-American jury); *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (holding that some constitutional rights, including trial by jury, do not automatically attach in newly acquired territories).

19. U.S. CONST. amend. VI.

20. See THE FEDERALIST NO. 83, at 562 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961) (observing that if the two competing groups agreed on nothing else, they “concur[red] at least in the value they set upon the trial by jury”). Hamilton further commented that “if there is any difference between [the Federalists and Anti-Federalists], it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.” *Id.*

21. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994) (noting that the right to jury trial for criminal defendants was the only right unanimously conferred by every state’s constitution).

22. See 3 WILLIAM BLACKSTONE, COMMENTARIES *379 (“[T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.”); see also *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (observing that English use of trial by jury in criminal cases can be traced back as far as the Magna Carta in 1215).

well as their desire to preserve the right to jury in the American legal system²³—is apparent through even the most cursory reading of the Constitution.²⁴

The Court first expressed its opinion on the importance of trial by jury in *Ex parte Milligan*.²⁵ Declaring that “[n]o graver question was ever considered by this court,”²⁶ Justice Davis concluded that the right to jury trial could not constitutionally be withheld from a member of the Confederate Army charged with several offenses against the Union in Indiana.²⁷ This decision was by no means intended to be construed narrowly; rather, the Court went on to conclude in sweeping and absolute fashion:

[I]f ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,” language broad enough to embrace all persons and cases . . .²⁸

Thus, Justice Davis concluded that the right to jury trial could not be denied to anyone charged in a U.S. court, so long as the courts are open and unobstructed.²⁹

The Court continued along this line of reasoning by incorporating the Jury Trial Clause against the states in *Duncan v. Louisiana*.³⁰ In *Duncan*, the Court was faced with the question of whether a state government could constitutionally circumvent the right to a jury in a criminal proceeding where the defendant, if convicted, faced up to two years in prison.³¹ Writing for a 7–2 Court,³² Justice White’s

23. See THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (listing deprivation of the right to jury trial as a grievance against the King).

24. See Alschuler & Deiss, *supra* note 21, at 870 (observing that the right to jury trial is the only right conferred both in the body of the Constitution and in the Bill of Rights); see also Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2052 (2008) (positing that the right to jury trial’s position in both Article III and the Sixth Amendment embeds the role of the jury in the framework of American government).

25. 71 U.S. (4 Wall.) 2 (1866).

26. *Id.* at 118.

27. See *id.* at 122 (stating that a “guarantee of freedom” was broken by denying Milligan the protection of the Jury Trial Clause).

28. *Id.* at 123.

29. See *id.* at 127 (arguing that the right to jury trial could only constitutionally be withheld when doing so is absolutely necessary).

30. 391 U.S. 145, 149–50 (1968).

31. See *id.* at 146 (describing the sentencing guidelines for simple battery under Louisiana state law).

32. The point of disagreement that sparked a dissent from Justices Harlan and Stewart was not over the fundamental nature of the Jury Trial Clause, but rather over

opinion rehashed the functions of the jury trial—preventing oppressive government action and preserving the underlying fairness of U.S. criminal proceedings—that the Framers found so valuable.³³ Justice White then concluded that the right to jury trial in all serious criminal cases³⁴ is “fundamental to the American scheme of justice,”³⁵ and cannot be suspended via state law.³⁶

Despite the crucial role of the Jury Trial Clause in U.S. criminal proceedings, there are certain circumstances under which it can be withheld. For example, the Supreme Court held in *Solorio v. United States*³⁷ that the government can subject members of the U.S. military to trial without the protection of the Jury Trial Clause for crimes alleged to have taken place during their time of service.³⁸ However, this exception is limited strictly to defendants who are service members at the time charges are brought. This distinction was highlighted in *United States ex rel. Toth v. Quarles*,³⁹ where the Court held that the Jury Trial Clause extended to a defendant who was charged with a murder that took place during his service in Korea because the defendant was not arrested until five months after he was honorably discharged.⁴⁰ The Court in *Toth* also spoke more generally about the right to jury trial, stating that this particular right “ranks

the amount of latitude given to states in determining how to adjudicate misdemeanor offenses. *See id.* at 171–72 (Harlan, J., dissenting) (“The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall.”).

33. *See id.* at 152 (majority opinion) (relaying a declaration by the First Congress of the American Colonies in 1765 that the right to jury trial is an “inherent and invaluable right”).

34. Duncan had been charged with simple battery, a misdemeanor in Louisiana punishable by a \$300 fine and up to two years in prison. *Id.* at 146. The Court identified this charge as “serious,” notwithstanding its classification as a misdemeanor or the fact that Duncan was only sentenced to sixty days in prison. *See id.* at 159 (arguing that the penalty given for a particular crime is highly relevant in determining whether the crime should be considered “serious”).

35. *Id.* at 149.

36. *See id.* at 148 (mandating that the Jury Trial Clause be implemented uniformly between federal and state law).

37. 483 U.S. 435 (1987).

38. *Id.* at 450–51 (stating that Congress’s Article I, section 8, clause 14 power to “make Rules for the Government and Regulation of the land and naval Forces” grants Congress the ability to try U.S. servicemembers by military commission without a jury).

39. 350 U.S. 11 (1955).

40. *See id.* at 22–23 (stating that servicemembers who have severed all ties with the armed forces are subject to full constitutional protections).

very high in our catalogue of constitutional safeguards”⁴¹ and should not be withheld absent a compelling reason to do so.⁴²

The Court identified an additional circumstance under which the right to jury trial may be withheld in *Quirin*. In *Quirin*, eight German saboteurs were captured in the United States and charged with violating several provisions of the Articles of War.⁴³ Pursuant to an Executive Order issued by President Roosevelt, the trial was conducted by a military commission without the benefit of a jury.⁴⁴ The Supreme Court upheld Roosevelt’s denial of the right to jury for the defendants, holding that the Jury Trial Clause is inapplicable to enemy combatants charged with violating the laws of war.⁴⁵ Whatever the merits of this decision,⁴⁶ *Quirin* has been followed as precedent in several post-World War II Supreme Court decisions.⁴⁷

41. *Id.* at 16.

42. *Id.* at 23 n.22 (“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care.”).

43. *Ex parte Quirin* 317 U.S. 1, 22–23 (1942) (providing that the defendants were charged with violations of Article 81, corresponding or giving intelligence to the enemy, Article 82, spying, and conspiracy).

44. *Id.* (referring to Roosevelt’s declaration and recognizing that it denied access to the courts and subjected all citizens of countries with which the United States was at war and who were charged with “committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war” to the jurisdiction of the military courts). It should be noted here that the events in *Quirin* took place during a formally declared war, giving the President expanded powers in his role as Commander in Chief. *See id.* at 26 (“The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared . . .”). However, the Court did not rely very heavily on the President’s expanded powers, choosing instead to base its decision on the defendants’ status as combatants and the nature of the offenses with which they were charged.

45. *See id.* at 41 (asserting that enemy belligerents charged with offenses against the law of war are not entitled to constitutional protections). The Court argued that trying enemy spies without a jury was consistent with traditional practice, citing a provision from the 1806 Articles of War authorizing the death penalty for enemy spies sentenced by a general court martial without the benefit of a jury. *Id.* *But see* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SEC. L. & POL’Y 295, 317–18 (2010) (observing that the 1806 Articles of War is the only statutory authority cited in *Quirin* to support the Court’s decision to withhold a jury from enemy spies).

46. *Quirin* has been sharply criticized by judges and academics alike. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (referring to the decision in *Quirin* as “not this Court’s finest hour”); G. Edward White, *Felix Frankfurter’s ‘Soliloquy’ in Ex Parte Quirin: Nazi Sabotage & Constitutional Conundrums*, 5 GREEN BAG 2D 423, 436 (2002) (noting that Justice Frankfurter—despite joining Chief Justice Stone’s opinion—later referred to *Quirin* as “not a happy precedent”); Vladeck, *supra* note 45, at 341 (describing *Quirin* as an “unfortunate decision borne out of unique and fortuitous circumstances”).

47. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341, 354–55 (1952) (upholding the use of a military commission without a jury in a German occupation court);

B. The Extraterritorial Constitution

Equally important to this discussion is the extent to which the Jury Trial Clause—along with the rest of the Constitution—has been held to apply overseas. The Supreme Court’s modern extraterritoriality jurisprudence began in the late nineteenth and early twentieth centuries in a line of cases known as the *Insular Cases*.⁴⁸ These cases addressed the scope of the Constitution’s applicability in territories that the United States acquired following the Spanish-American war.⁴⁹ The solution that the Court reached, which was later referred to as “territorial incorporation,”⁵⁰ was to deal with each territory based on whether it was destined for statehood.⁵¹ In the territories destined to become states—which were categorized as incorporated territories—the Court held that the Constitution applied in full.⁵² In areas not destined for statehood, however, the Court held that the only provisions of the Constitution that applied were those that were deemed fundamental.⁵³ The Court declined to extend the Jury Trial Clause to several of these unincorporated territories—including Puerto Rico, Hawaii, and the Philippines—during this time, albeit based upon considerations almost wholly separate from whether the right to jury trial was fundamental.⁵⁴

In re Yamashita, 327 U.S. 1, 25 (1946) (declining to grant a jury trial to a Japanese general charged with war crimes in the Philippines).

48. This Comment will focus on the four *Insular Cases* that dealt specifically with jury trials. See *supra* note 18 (describing the Court’s early position on the right to jury trial as expressed in *Downes*, *Mankichi*, *Dorr*, and *Balzac*).

49. See Ramos, *supra* note 18, at 226 (explaining that the United States acquired Puerto Rico, Guam, the Philippines, Hawaii, and Cuba in 1898).

50. *Id.* at 248 (recounting the process by which the Supreme Court distinguished between incorporated and unincorporated territories to determine which constitutional provisions would apply to a given territory).

51. See Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 75 (1997) (describing Justice White’s belief that a given territory’s relationship to the United States should dictate the measure of constitutional protection that the territory receives).

52. See *id.* (positing that territories intended to become states were considered part of the United States and were accordingly given access to the entire arsenal of constitutional rights).

53. See *id.* (stating that territories the United States held briefly and did not intend to grant independence in the future were not part of the United States but were “merely appurtenant thereto as a possession,” and therefore were only entitled to the “‘general prohibitions’ in the Constitution protecting the liberty and property of the people” (quoting *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring))).

54. See *infra* notes 55–78 and accompanying text (discussing the main factors that the Court took into account when declining to extend the Jury Trial Clause to unincorporated territories in the *Insular Cases*, such as the practical limitations of replacing the indigenous legal system).

The Supreme Court's guidance on the right to jury trial in the *Insular Cases* began with *Downes v. Bidwell*,⁵⁵ when the Court first considered Puerto Rico's legal status as a newly acquired territory.⁵⁶ In *Downes*, the Court stated—separately from its actual holding⁵⁷—that not all constitutional provisions apply in all circumstances in every U.S. territory.⁵⁸ The distinction that the Court originally made in *Downes* was between “natural” rights⁵⁹ conferred in the Constitution and “remedial rights which are peculiar to [the American] system of jurisprudence.”⁶⁰ According to the Court, the right to jury trial was the latter.⁶¹

The Court more directly addressed the right to jury trial extraterritorially two years later in *Hawaii v. Mankichi*.⁶² However, the main issue for the Court in *Mankichi* was not whether the right to jury was fundamental, but whether it would be appropriate to substitute a traditional jury trial, as required by the Sixth Amendment, for the equivalent criminal procedure already in place in Hawaii at the time.⁶³ For a 5–4 Court, and over several strong dissenting opinions,⁶⁴

55. 182 U.S. 244 (1901).

56. *Id.* at 247–48 (plurality opinion) (analyzing whether the newly-acquired territory of Puerto Rico was a foreign country for purposes of the Foraker Act).

57. The Court in *Downes* spoke in part to the extraterritorial Constitution in general, but its main concern was Puerto Rico's status as a territory for purposes of tariff legislation. *See id.* at 247–48 (specifying the main issue in the case as being whether merchandise brought to New York from Puerto Rico was exempt from duties under the Foraker Act); *see also* *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Peckham, J., concurring in the result) (stating that *Downes* is only good authority for determining recovery of duties under the Foraker Act).

58. *See Downes*, 182 U.S. at 279 (opining that Congress's power to acquire territories includes the power to determine the specific terms of the territories' governance).

59. *See id.* at 282–83 (asserting that certain rights, including freedom of speech and freedom from cruel and unusual punishment, are conferred “naturally” on everyone within U.S. jurisdiction).

60. *See id.* (explaining that remedial rights include the rights to citizenship, to suffrage, and to procedural methods found in the Constitution, “which are peculiar to Anglo-Saxon jurisprudence, and . . . held by the states to be unnecessary to the proper protection of individuals”).

61. *See id.* at 270–71 (holding that the Constitution does not apply to trials conducted by foreign legal systems and that, therefore, Congress can “provide for such trials before consular tribunals, without the intervention of a grand or petit jury”). While the Court did not explicitly state that the right to jury trial is remedial, declining to grant *Downes* a jury trial implies that the Court believed it to be a remedial right. *See id.* at 282–83 (suggesting that natural rights cannot be withheld or infringed upon under any circumstances).

62. 190 U.S. 197 (1903).

63. *See id.* at 211 (explaining that the municipal legislation of the islands did not include the common law concepts of the grand and petit jury); *see also* *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (noting that the former Spanish colonies at issue in the *Insular Cases* had no experience with the use of grand and petit juries). The defendant's specific issue in *Mankichi* was that he had been convicted pursuant to a verdict by only nine of twelve jurors, which was permissible

Justice Brown concluded that such a substitution would be unnecessary.⁶⁵ The *Mankichi* Court therefore held that the difficulties inherent in establishing an Anglo-American jury trial system in a court otherwise governed by civil law made it inappropriate to extend the Jury Trial Clause to the Hawaiian Islands.⁶⁶

The doctrine of territorial incorporation was formally introduced in 1904 in *Dorr v. United States*,⁶⁷ where, similar to *Mankichi*, the Court declined to implement a jury trial system in the Philippine Islands.⁶⁸ Writing for the majority, Justice Day argued that it would be unreasonable to replace a territory's criminal system with more constitutionally acceptable methods if that territory was not intended to become a part of the United States.⁶⁹ In this specific instance, Justice Day noted Congress's intent not to keep the Philippines as a territory⁷⁰ as evidence that implementing a jury trial system would be inappropriate.⁷¹ Thus, Justice Day argued that the right to jury trial was inapplicable in the Philippines.⁷²

The final installment of the *Insular Cases* came in 1922 in *Balzac v. Porto Rico*.⁷³ In *Balzac*, the Court denied a jury trial to a Puerto Rican newspaper editor facing misdemeanor libel charges.⁷⁴ In his opinion, Chief Justice Taft reaffirmed the proposition that the Constitution

under Hawaii's civil-law system but would have been insufficient under the Sixth Amendment. *Mankichi*, 190 U.S. at 212.

64. See *Mankichi*, 190 U.S. at 225–26 (Fuller, C.J., dissenting) (arguing that conviction by a unanimous jury is among the fundamental rights guaranteed to everyone living within U.S. jurisdiction); see also *id.* at 238 (Harlan, J., dissenting) (“[I]t cannot . . . be said, with any show of reason, that the constitutional provision relating to petit juries was inapplicable in Hawaii after its annexation to this country.”).

65. See *id.* at 218 (majority opinion) (refusing to upend Hawaii's existing jury trial system that, in the eyes of the Court, was already well suited to preserve the rights of the Hawaiian population).

66. *Id.*

67. 195 U.S. 138 (1904).

68. See *id.* at 144 (relying on *Mankichi* in stating that implementing jury trials would be unnecessarily disruptive).

69. See *id.* at 148 (arguing that forcing all U.S. territories to adopt the jury trial system regardless of past practice would be more disruptive than beneficial when the existing system of jurisprudence was “fair,” “orderly,” and “long-established”).

70. See *id.* at 143–44 (explaining that Congress had taken legislative action to grant certain “organized” territories constitutional protection but had explicitly excluded the Philippines from this category).

71. See *id.* at 149 (arguing that Congress should have the final word in determining the appropriate steps to take in establishing local territorial governments).

72. See *id.* (holding that without supporting legislation, the Jury Trial Clause does not automatically extend to trials conducted in the Philippines).

73. 258 U.S. 298 (1922).

74. See *id.* at 300. Puerto Rican procedure at the time granted jury trials only to defendants in felony cases. *Id.* Under Puerto Rican law, a felony was defined as a crime punishable either by death or imprisonment. *Id.* at 302.

does not apply of its own force in unincorporated territories⁷⁵ and that Puerto Rico was an unincorporated territory under *Downes*.⁷⁶ After finding that Congress had not taken any action to incorporate Puerto Rico since *Downes* was decided,⁷⁷ the Court denied Balzac's request for a jury trial.⁷⁸

The Supreme Court revisited the extraterritorial application of the right to jury trial thirty-five years after the conclusion of the *Insular Cases* in *Reid v. Covert*.⁷⁹ Writing for the plurality, Justice Black held that the Bill of Rights protected two women, who were U.S. citizens, on trial for the murder of their husbands on a U.S. Air Force Base in Great Britain.⁸⁰ Justice Black additionally stated that the defendants' rights to jury trial could not be withdrawn in this case by treaty⁸¹ or by Congress via the Necessary and Proper Clause.⁸² Justices Frankfurter and Harlan each concurred in the judgment separately on the narrower ground that the defendants could not be tried without a jury for capital offenses overseas.⁸³

75. *See id.* at 305 (stating that the Jury Trial Clause does not extend to unincorporated territories (citing *Dorr*, 195 U.S. at 149)).

76. *Id.*

77. *See id.* at 306 (noting the absence of a plain statement of Congressional intent to incorporate Puerto Rico in any legislation between 1900 and 1922).

78. *See id.* at 312–13 (holding that the right to jury trial is not among the rights intended to be extended to Puerto Rico).

79. 354 U.S. 1 (1957).

80. *See id.* at 20 (plurality opinion) (reasoning that the Jury Trial Clause attaches as tightly at a U.S. military post overseas as it would within the territorial United States).

81. *Id.* at 17 (acknowledging that the government's power to make treaties is limited by the guarantees enshrined in the Constitution).

82. *Id.* at 20. Because the defendants were family members of U.S. servicemembers and were living on military bases, the government argued that Congress could deem it "necessary and proper" to subject them to trial by military commission as if they were members of the military themselves. *Id.* The Court rejected this argument, holding that such an outcome would be "inconsistent with both the letter and spirit of the constitution." *Id.* at 22 (internal quotation marks omitted).

83. *Id.* at 45 (Frankfurter, J., concurring in the result) (emphasizing that the narrow question before the Court was whether civilian dependents of U.S. servicemembers could be tried without a jury in capital cases during peacetime); *id.* at 65 (Harlan, J., concurring in the result) (positing that the right to jury was too significant in capital cases to be withheld simply because the trial took place outside the United States). The concurrences written by Justices Frankfurter and Harlan left open the possibility that the Jury Trial Clause could be suspended in cases involving lesser offenses. *See id.* at 77–78 (Harlan, J., concurring in the result) (joining the Court's opinion only as it applied to capital cases). However, this possibility was closed off three years later when the Court extended *Reid* to include non-capital offenses. *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 242–43 (1960) (noting the lack of a constitutional distinction between capital and non-capital offenses).

Justice Harlan's concurrence in particular focused on the practical implications of applying a constitutional right extraterritorially.⁸⁴ This analysis stemmed largely from an innovative reading of the *Insular Cases*; rather than finding that the *Insular Cases* preclude the right to jury trial from applying overseas,⁸⁵ Justice Harlan interpreted the cases as standing for the proposition that certain constitutional provisions do not *necessarily* apply extraterritorially in all circumstances.⁸⁶ Using this functional approach, Justice Harlan stated that "the particular local setting, the practical necessities, and the possible alternatives" were all valid considerations in determining the reach of the Constitution, and that extending a certain right would be appropriate where doing so would not be "altogether impracticable and anomalous."⁸⁷ Thus, while Justice Harlan believed that, in some circumstances, civilians on military bases overseas could be subject to trial without a jury, he concluded that the right to a jury was too significant in capital cases for the Jury Trial Clause to be withheld in *Reid*.⁸⁸

Having been put to rest by *Reid* and its progeny for a number of years, the concept of extraterritoriality did not arise again until 1990 with *United States v. Verdugo-Urquidez*.⁸⁹ By a 6–3 vote, the Court held that no Fourth Amendment violation occurred during a warrantless Drug Enforcement Administration (DEA) search of a non-citizen's home in Mexico,⁹⁰ though the majority was sharply divided as to the decision's scope. Chief Justice Rehnquist wrote a majority opinion stating that the defendant, as a non-citizen who did not previously have any significant voluntary connection to the United States, had no right to claim any constitutional protection for a search that took place extraterritorially.⁹¹ Justice Stevens concurred in the judgment,

84. *Reid*, 354 U.S. at 67 (Harlan, J., concurring in the result) (noting the Court's error in reading precedent to mean that the right to jury trial either categorically does or does not apply overseas).

85. *See id.* (rejecting a reading of the *Insular Cases* that categorically bars jury trials for American citizens tried abroad).

86. *Id.* at 74.

87. *Id.* at 74–75.

88. *See id.* at 77–78 (analogizing the right to jury trial in capital cases to the government's concession that allegations of treason are so grave that they should be heard in U.S. courts, notwithstanding any potential difficulties that would accompany such a hearing).

89. 494 U.S. 259 (1990).

90. *Id.* at 274–75.

91. *See id.* at 271–72 (arguing that the defendant's lawful but involuntary presence in the United States was not a sufficient ground to establish a substantial connection). *But see* Neuman, *supra* note 2, at 272 ("Abducting an innocent foreigner and then denying him all constitutional protection precisely because he was abducted is too perverse a doctrine to maintain in the modern era.").

agreeing that no Fourth Amendment violation had occurred but suggesting that the majority swept too broadly by saying that the defendant was not entitled to *any* constitutional protection.⁹²

Justice Kennedy also wrote a concurring opinion—which is typically viewed as the controlling opinion of the case⁹³—that questioned the broad strokes drawn by the majority. Unlike the previous two opinions, however, Justice Kennedy sought to define the extraterritorial reach of the Constitution based on government action.⁹⁴ Justice Kennedy speculated that non-citizens could in certain circumstances be afforded additional constitutional rights once the U.S. government had affirmatively commenced criminal proceedings against them, even absent any previous connection to the United States.⁹⁵ Justice Kennedy also took issue with the majority’s assertion that the Constitution offered no protection to the defendant.⁹⁶ Quoting heavily from Justice Harlan’s concurrence in *Reid*, Justice Kennedy concluded that the correct measure of protection that the Constitution requires turns on the question of what process is “due” to a defendant in particular circumstances.⁹⁷ Justice Kennedy’s use of the functional approach led him to agree with the majority in its conclusion that extending Fourth Amendment protection to this particular defendant would be “impracticable and anomalous.”⁹⁸

92. See *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment) (arguing that non-citizens who are lawfully present in the United States are entitled to seek the protection of the Fourth Amendment and the rest of the Bill of Rights). Justice Stevens further speculated that the defendant in *Verdugo-Urquidez* should be within the scope of Fourth Amendment protection because he was brought into the United States against his will. *Id.*

93. See Michael Bahar, *As Necessity Creates the Rule: Eisentrager, Boumediene, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century*, 11 U. PA. J. CONST. L. 277, 315 (2009) (observing that Justice Kennedy’s concurrence in *Verdugo-Urquidez* is widely viewed as the controlling opinion on the issue of constitutional extraterritoriality).

94. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (positing that the government’s action in reference to an alien should be the correct medium for determining constitutional protection).

95. See *id.* at 278 (“The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.”).

96. See *id.* (noting that the Court’s decision was specific to the Fourth Amendment and did not preclude similarly situated individuals from invoking any form of constitutional protection).

97. See *id.* (stating that even the majority accepted that the defendant was entitled to Fifth Amendment protections due to his trial in a U.S. court).

98. *Id.* The factors that led Justice Kennedy to this conclusion included “[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials.” *Id.*

C. *Brief History and Legal Status of Guantanamo Bay*

While Cuba maintains de jure sovereignty over Guantanamo Bay,⁹⁹ the area has never actually been under Cuban control.¹⁰⁰ Spain relinquished control of the entire island of Cuba to the United States in 1898 at the end of the Spanish-American War,¹⁰¹ and the United States held the area “in trust” until the Cuban Republic was formed in 1902.¹⁰² At that time, the United States formally transferred control of the island to the Cuban government but retained control of Guantanamo Bay pursuant to a lease agreement between the two countries.¹⁰³ The agreement was later amended to require consent from both the United States and Cuba in order to alter or abrogate its terms.¹⁰⁴ The lease agreement did not contain a time frame for the termination of U.S. control or any other indication that control of the area will revert back to Cuba in the foreseeable future.¹⁰⁵

The Guantanamo Bay detention center has housed 779 detainees since it was opened in 2002.¹⁰⁶ As of February 2013, 166 detainees having citizenship in twenty-seven countries were being held in the detention center.¹⁰⁷ Detainees were transferred into Guantanamo as recently as 2008, though most have been detained there since 2002.¹⁰⁸ Outside the detention center, Guantanamo Bay naval base is a self-sufficient military base with an independent water plant, school

99. See *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (recognizing Cuba’s ultimate sovereignty over the Guantanamo Bay area).

100. See Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2536 (2005) (noting that the lease for Guantanamo Bay was drafted by the U.S. while it still formally controlled Cuba and was implemented immediately upon granting Cuba its independence).

101. See *Boumediene v. Bush*, 553 U.S. 723, 764 (2008) (noting Spain’s specific relinquishment of “all claim[s] of sovereignty and . . . title” to the United States (alteration in original) (quoting Treaty of Paris, U.S.-Spain, art. I, Dec. 10, 1898, 30 Stat. 1755)).

102. *Id.*

103. Cuban-American Treaty, U.S.-Cuba, art. 3, Feb. 16–23, 1903, T.S. No. 418 [hereinafter 1903 Lease Agreement] (allowing the United States to exercise “complete jurisdiction and control” over Guantanamo for the duration of the lease).

104. See Treaty on Relations with Cuba, U.S.-Cuba, art. 3, May 29, 1934, 48 Stat. 1682 [hereinafter 1934 Lease Agreement] (stating that the terms of the 1903 Lease Agreement were to remain in effect indefinitely absent a contrary agreement between the United States and Cuba or an abandonment of the area by the United States).

105. See *id.* (noting that any transfer of ownership or reversion back to Cuban control would require consent from both parties).

106. *The Guantanamo Docket*, N.Y. TIMES & NPR, <http://projects.nytimes.com/guantanamo> (last updated Dec. 11, 2012).

107. *Id.*

108. See *id.* (noting that more than 75% of the detainees currently being held at Guantanamo are in their tenth year of detention).

system, transportation system, and entertainment facilities.¹⁰⁹ The atmosphere of the base—at least in terms of the U.S. servicemembers and their families stationed there—has been described as “small-town America.”¹¹⁰

The Supreme Court has held that certain constitutional provisions attach in the Guantanamo detention center. For example, in *Boumediene*, the Court stated both that the Suspension Clause¹¹¹ “has full effect” in Guantanamo,¹¹² and that the Guantanamo detainees are entitled to due process (albeit in a limited form).¹¹³ Writing for the majority, Justice Kennedy came to this conclusion first by dismissing the notion that the Constitution does not apply because the United States does not retain formal sovereignty over Guantanamo.¹¹⁴ Justice Kennedy stated that although Cuba maintained ultimate sovereignty over the area, the plenary control that the United States exercised over Guantanamo confirmed the United States as its de facto sovereign.¹¹⁵ For this reason, Justice Kennedy concluded that Guantanamo should not be considered “abroad” for purposes of constitutional analysis.¹¹⁶

The Court’s decision in *Boumediene* rejected the government’s formalistic arguments¹¹⁷ in favor of a functional approach to extraterritoriality.¹¹⁸ Through this approach, Justice Kennedy asserted that the Constitution has independent force outside the

109. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 35 (2004).

110. Carol Rosenberg, *New Chief Brings Guantanamo Up to Date*, MIAMI HERALD, Oct. 25, 2003, at A15.

111. U.S. CONST. art. I, § 9, cl. 2 (“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.”).

112. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

113. *See id.* at 785 (holding that the risk of error in the Combatant Status Review Tribunals (CBST) conducted at Guantanamo was so high as to constitute a violation of the detainees’ due process rights). The Court made clear in *Boumediene* that the detainees are entitled to *some* due process rights, though it never explicitly detailed the extent to which the Due Process Clause applies. *See id.* at 801 (Roberts, C.J., dissenting).

114. *See id.* at 754 (majority opinion) (asserting that Cuba’s de jure sovereignty over Guantanamo Bay does not preclude further inquiry into the level of control that Cuba actually exerts over the area).

115. *See id.* at 755 (calling attention to the “obvious and uncontested fact” that the United States exercises complete control over Guantanamo Bay).

116. *See id.* at 769.

117. *See id.* at 739 (recounting the government’s contention that non-citizens designated as enemy combatants and held outside the territorial United States are not afforded any constitutional rights).

118. *See id.* at 764 (emphasizing reliance on “objective factors and practical concerns, not formalism” as the common theme of the Court’s modern extraterritoriality jurisprudence).

United States,¹¹⁹ but that case-specific practical difficulties should be taken into account when determining the Constitution's extraterritorial scope.¹²⁰ Specifically, Justice Kennedy found that the difficulties inherent in extending the Suspension Clause to Guantanamo were not particularly severe and that affording the right to detainees at Guantanamo would not be "impracticable or anomalous."¹²¹

The right to jury trial in the context of Guantanamo Bay has never been discussed by the Supreme Court, but has been addressed by lower courts in several instances. In *United States v. Al Bahlul*,¹²² the U.S. Court of Military Commission Review considered whether the Jury Trial Clause extended to a Yemeni citizen on trial for several alleged offenses stemming from his role as a member of al Qaeda.¹²³ Relying primarily on *Quirin*,¹²⁴ the court declined to extend the Jury Trial Clause on the ground that Al Bahlul was an enemy combatant¹²⁵ and that his conduct amounted to a violation of the laws of war.¹²⁶ The case has since been appealed and is currently pending in the D.C. Circuit Court.¹²⁷

119. *See id.* at 757 (acknowledging that, at least in some circumstances, the Constitution applies extraterritorially and without legislative support).

120. *Id.* at 764 (echoing the functionalist tests emphasized by the Court in *Reid* and in Justice Kennedy's concurrence in *Verdugo-Urquidez*).

121. *See id.* at 770 (stating that the difficulties of implementing the Suspension Clause in Guantanamo were too few to justify denying detainees the right to invoke habeas corpus).

122. 820 F. Supp. 2d 1141 (C.M.C.R. 2011) (en banc), *vacated*, No. 11-1324 (D.C. Cir. Jan. 25, 2013).

123. *See id.* at 1161 (indicating al Bahlul's direct communication with Osama bin Laden and his participation in al Qaeda's media office). By his own admission, al Bahlul had extensive connections with al Qaeda and created a video designed to recruit new members to participate in al Qaeda's jihad against the United States. *Id.* Charges against al Bahlul included providing material support for terrorism, conspiracy to commit murder and other terrorist acts, and solicitation to recruit others to do the same. *Id.* at 1159.

124. *See id.* at 1166-67 (identifying the main issue of the case as being similar to that in *Quirin*; namely, whether the government is constitutionally permitted to try the defendant before a military commission without the benefit of a jury).

125. *See id.* at 1188 (finding the defendant to be an alien unlawful enemy combatant under the Military Commissions Act of 2006).

126. *See id.* at 1217-18 (concluding that membership in an international terrorist organization is an offense against the law of armed conflict and is triable without the benefit of a jury).

127. *See Al Bahlul*, Amicus Brief, *supra* note 16, at 17 (arguing that the Court of Military Commission Review's reliance on *Quirin* was misplaced and that al Bahlul is constitutionally entitled to a jury trial).

II. THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT APPLIES IN GUANTANAMO BAY

There is no precedent that would support a categorical bar of the Jury Trial Clause in Guantanamo Bay. While several of the *Insular Cases* declined to extend the Jury Trial Clause extraterritorially, the rationale of each case was so circumstance-specific that none is controlling in the context of Guantanamo Bay.¹²⁸ However, when considering the doctrine of territorial incorporation left behind by the *Insular Cases* collectively, and because the right to jury trial is fundamental, the Jury Trial Clause should attach in Guantanamo. Additionally, the applicability of the Jury Trial Clause in Guantanamo is further validated by an analysis of Justice Harlan's impracticable and anomalous test, which was originally used in *Reid* and was recently employed in *Boumediene*.

Further, while the exception created in *Quirin*—removing the right to jury trial for enemy combatants charged with violating the law of war—would certainly apply to some Guantanamo detainees, it does not serve as a categorical rule because it is based on both the status of the offender and the nature of the offense charged.¹²⁹ To that end, the government's reliance on *Quirin* in Guantanamo Bay cases such as *Al Bahlul* presupposes that the Jury Trial Clause would apply to defendants who do not meet *Quirin*'s specific requirements.¹³⁰ Moreover, the language of the Jury Trial Clause, and the underlying fairness that it provides to all U.S. criminal proceedings, further suggests that the Jury Trial Clause should attach in Guantanamo.¹³¹ As a result, categorically withholding the right to jury trial from all Guantanamo detainees would violate the Jury Trial Clause of the Sixth Amendment.

128. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 247 (1901) (examining whether certain goods transported from Puerto Rico to New York were exempt from duties under the Foraker Act).

129. See *Ex parte Quirin*, 317 U.S. 1, 47–48 (1942) (stressing that the defendants' status as "admitted enemy invaders" and the nature of the charges as offenses "against the law of war" supported the decision that a military commission was an appropriate tribunal).

130. See *id.* at 29 (noting that there are certain offenses against the laws of war that are not triable by a military tribunal and are constitutionally triable only by jury); *Al Bahlul*, 820 F. Supp. 2d at 1166 (citing *Quirin*, 317 U.S. at 29).

131. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (identifying the right to jury trial as being "fundamental to the American scheme of justice"); see also *supra* Part I.A (outlining the significance of the Jury Trial Clause in criminal proceedings and stressing its pivotal role in the U.S. legal system).

A. *The Doctrine of Territorial Incorporation Supports the Application of the Jury Trial Clause in Guantanamo Bay*

The first barrier to extending the Jury Trial Clause to Guantanamo—both analytically and chronologically—is the precedent created by the *Insular Cases*.¹³² If Guantanamo Bay is not destined for statehood, and the right to jury trial has already been deemed not fundamental, then at first glance the *Insular Cases* would seem to suggest that the Jury Trial Clause should not apply.¹³³ However, there are several significant factual distinctions between the *Insular Cases* and the question at issue in this Comment. The most important of these differences is that the *Insular Cases* focused more on case-specific practical hindrances to the Jury Trial Clause's application rather than focusing on the fundamental nature of the right itself.¹³⁴ Importantly, none of the practical considerations discussed in the *Insular Cases* presents a problem in the context of Guantanamo.¹³⁵ Further, in light of the considerable examples in U.S. jurisprudence regarding the right to jury trial as fundamental, the doctrine left behind by the *Insular Cases* collectively hints strongly in favor of granting Guantanamo detainees the right to jury trial.¹³⁶

1. *None of the specific holdings from the Insular Cases preclude the application of the Jury Trial Clause in Guantanamo Bay*

As previously stated, there is a significant difference between the specific holdings of each of the *Insular Cases* and the precedent left behind by the doctrine collectively. This distinction is most evident

132. See Neuman, *supra* note 2, at 286 (offering the *Insular Cases* as the primary reason that the right to jury would have some difficulty attaching to defendants held in Guantanamo).

133. See *supra* notes 48–54 and accompanying text (explaining the Court's decision not to implement the right to jury trial in territories not destined for statehood).

134. See *Boumediene v. Bush*, 553 U.S. 723, 757–59 (2008) (detailing the limiting factors considered in the *Insular Cases*, such as the instability and uncertainty resulting from implementing a completely foreign legal system, despite an understanding that the Constitution must extend to the territories to some extent).

135. Cf. *id.* at 768 (explaining that there were no practical obstacles, like those described in the *Insular Cases*, to enforcing the Suspension Clause of the Constitution in Guantanamo because unlike the territories at issue in the *Insular Cases*, Guantanamo is not a “transient possession” where temporarily enforcing the Constitution would be pointless).

136. See *id.* at 758 (explaining that constitutional provisions could still apply in unincorporated territories if the ties between the United States and those territories were to strengthen over time (citing *Torres v. Puerto Rico*, 442 U.S. 465, 475–76 (1979))); see also *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) (explaining that even in unincorporated territories, the United States was bound to provide non-citizen inhabitants “guaranties of certain fundamental personal rights declared in the Constitution”).

in the cases concerning jury trials. The Spanish civil-law system employed by the territories at issue in the *Insular Cases* contained a completely different set of criminal procedure rules than the common-law system used in the United States.¹³⁷ These two systems conflicted in such a way that certain constitutional protections—including the Jury Trial Clause—were not able to apply seamlessly in the territories.¹³⁸ Viewed in this light, the Court’s decision not to extend the Jury Trial Clause in the *Insular Cases* can be understood as an issue of cultural inappropriateness rather than a comment on the right to jury trial.¹³⁹ In other words, the question that these cases turned on was not whether the right to jury trial was fundamental, but rather whether it could be incorporated into a particular territory’s legal system without causing a significant disruption.¹⁴⁰

In the context of Guantanamo Bay, there is little local culture to disturb. Unlike the territories in the *Insular Cases*, courts in Guantanamo Bay are established and governed pursuant to U.S. law.¹⁴¹ The area is inhabited chiefly by U.S. servicemembers working on the base and their families.¹⁴² In fact, there is very little separating Guantanamo Bay from a military base in the territorial United States.¹⁴³ These factual distinctions suggest that the “wholly dissimilar

137. See *Boumediene*, 553 U.S. at 757 (noting that the Spanish colonies in the *Insular Cases* had no experience with the use of grand or petit juries before being introduced to the American common-law system).

138. See *id.* (noting that the territorial incorporation doctrine stemmed from the Court’s “reluctan[ce] to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories”).

139. See Neuman, *supra* note 2, at 269 (noting the Court’s hesitancy to impose the Jury Trial Clause in the *Insular Cases* in part because of a possible negative impact on societies that were not accustomed to it).

140. See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197, 211 (1903) (concluding that the process in place in Hawaii was so similar to the Anglo-American jury trial that their need for Sixth Amendment protection did not outweigh the disruption that would follow from its implementation). The distinction between fundamentality and practicality makes Justice Kennedy’s classification of the *Insular Cases* in *Boumediene* easier to reconcile. See *Boumediene*, 553 U.S. at 759 (describing the *Insular Cases* as devising “a doctrine that allowed [the Court] to use its power sparingly and where it would be most needed”). Assuming, as the court appears to have done in *Mankichi*, that the existing fact-finding methods employed in the Hawaiian Islands at the time offered similar protection to that of a jury trial, the need to incorporate the Jury Trial Clause would not have been particularly dire. See *Mankichi*, 190 U.S. at 218 (describing the Hawaiian equivalent to a jury trial as “well calculated to conserve the rights of their citizens to their lives, their property and their well being”).

141. See Neuman, *supra* note 109, at 39 (stating that the United States is “accountable only to itself” in Guantanamo).

142. See *supra* notes 109–10 and accompanying text (describing the population and living conditions of the military base at Guantanamo Bay).

143. See Neuman, *supra* note 109, at 35 (comparing the Guantanamo Bay area to a similarly populated area in “small-town America” (quoting Rosenberg, *supra* note 110)).

traditions and institutions” that hindered the application of the Jury Trial Clause in the *Insular Cases* would likely not be an issue in Guantanamo.¹⁴⁴

Another distinguishing factor is the time period for which the United States intends to retain control over Guantanamo. In the *Insular Cases*, the United States held many of the unincorporated territories temporarily but intended to grant them independence shortly thereafter.¹⁴⁵ This was a significant contributing factor in the Court’s decision that it would be unnecessary to implement the Jury Trial Clause.¹⁴⁶ Conversely, “[t]he authority of the United States at Guantanamo is plenary, exclusive, secure, and temporally indefinite.”¹⁴⁷ The lease granting the United States control over Guantanamo makes no mention of a possible reversion back to Cuba,¹⁴⁸ and there has been no indication that the United States plans to cede control of Guantanamo in the foreseeable future.¹⁴⁹

An additional distinction between the *Insular Cases* and the trials in Guantanamo is the locality of the offenses with which the defendants have been charged. The *Insular Cases* all concerned local offenses that took place while the defendants were present within their respective territories.¹⁵⁰ Conversely, the offenses with which most Guantanamo detainees have been charged can by no means be considered “local.”¹⁵¹ The detainees in Guantanamo have all been transported there from other parts of the world to stand trial for

144. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

145. *See Boumediene*, 553 U.S. at 757 (asserting that there was no need for the Court in *Dorr* to implement the Jury Trial Clause in the Philippines because the United States intended to recognize the Philippines’ independence once it established a stable government).

146. *Id.*

147. Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 399 (2009).

148. *See* 1903 Lease Agreement, *supra* note 103, art. 1 (giving the United States control over Guantanamo Bay “for the time required for the purposes of coaling and naval stations,” without mention of a possible end date). Additionally, article 3 of the 1903 Lease Agreement grants complete control of the Guantanamo Bay area to the United States “during the period of the occupation,” again making no mention of a time limit for U.S. control. *Id.* art. 3.

149. *See supra* notes 106–10 and accompanying text (describing the extensive detention center and military base still in use at Guantanamo Bay).

150. *See, e.g., Hawaii v. Mankichi*, 190 U.S. 197, 203 (1903) (noting that the defendant stood trial for a murder committed within Hawaiian jurisdiction).

151. *Compare Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006) (plurality opinion) (involving a detainee captured in Afghanistan and charged with crimes alleged to have taken place in several countries in the area but who would be tried in Guantanamo), *with Balzac v. Porto Rico*, 258 U.S. 298, 300 (1922) (concerning a Puerto Rican citizen being charged with libel that allegedly took place in Puerto Rico).

crimes committed abroad.¹⁵² This lack of connection between the Guantanamo detainees and the land where they are being detained further distinguishes the Guantanamo trials from the *Insular Cases* and thereby weakens the precedential value any of the *Insular Cases* may have.

The conclusion that the *Insular Cases* are not individually controlling seems to have been followed by lower courts as well. For example, in *King v. Andrus*,¹⁵³ the U.S. District Court for the District of Columbia held that the right to jury trial applied to criminal proceedings in American Samoa.¹⁵⁴ The court based its analysis solely on the practical difficulties of extending the right to jury trial,¹⁵⁵ eventually concluding that the jury system could be implemented in American Samoa without any significant logistical or administrative hindrances.¹⁵⁶

Accordingly, in deciding the four *Insular Cases* that deal with the right to jury trial, the Supreme Court based its decisions on practical concerns that were specific to each individual case, rather than focusing on the right to jury trial itself. Additionally, many of the major issues justifying the Court's decision not to extend the Jury Trial Clause in the *Insular Cases* are not present in Guantanamo.¹⁵⁷ It would therefore be inaccurate to say that any of these specific cases preclude the Jury Trial Clause from applying in Guantanamo Bay.¹⁵⁸

152. *E.g.*, *Rasul v. Bush*, 542 U.S. 466, 470–71 (2004) (plurality opinion) (explaining that the petitioners, like all Guantanamo detainees, were captured abroad during the conflict between the United States and the Taliban).

153. 452 F. Supp. 11 (D.D.C. 1977).

154. *See id.* at 17 (holding that Samoan policies denying the right to jury were facially unconstitutional).

155. *See id.* at 12 (identifying the main question in the case as whether establishing a jury trial system in American Samoa would be impractical and anomalous). The opinion was devoid of the *Insular Cases*' buzzwords such as "fundamental," "incorporated," or any other language that would indicate a belief that the *Insular Cases* were controlling. *Id.*

156. *Id.* at 16.

157. *See supra* notes 137–52 and accompanying text (discussing several of the Court's reasons for declining to apply the Jury Trial Clause in the *Insular Cases*, including the significant disruptive effect that implementing the Jury Trial Clause would have had on the territories' existing legal systems).

158. *See Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring in the result) ("To take but one example: *Balzac v. Porto Rico* is not good authority for the proposition that jury trials need never be provided for American citizens tried by the United States abroad; but the case *is* good authority for the proposition that there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." (citation omitted)); Ragosta, *supra* note 9, at 297 (suggesting that the Bill of Rights was intentionally drafted in universal language and that the framers intended the rights conferred therein to apply regardless of citizenship).

2. *Although none of the Insular Cases specifically are controlling, the doctrine of territorial incorporation as expressed by the Insular Cases collectively supports applying the Jury Trial Clause in Guantanamo*

While the specific holdings of the *Insular Cases* are not themselves controlling, the collective doctrine for which the cases are cited—that is, the idea of territorial incorporation—is still applied to questions of extraterritoriality today.¹⁵⁹ With that in mind, two questions follow. First, is Guantanamo Bay an incorporated territory where the Constitution applies in full?¹⁶⁰ Second, if Guantanamo Bay is an unincorporated territory, is the right to jury trial considered fundamental such that it would apply regardless?¹⁶¹

The Supreme Court's jurisprudence lacks a clear answer as to whether Guantanamo Bay is considered an incorporated territory.¹⁶² Given that Cuba still retains de jure sovereignty over the area, it is fairly clear that Guantanamo Bay will not achieve statehood in the near future,¹⁶³ but the area is also very different from the territories deemed unincorporated in the *Insular Cases*.¹⁶⁴ However, even assuming arguendo that Guantanamo is clearly an unincorporated territory, the fundamental nature of the Jury Trial Clause suggests that it would still attach under the *Insular Cases* doctrine.

Indeed, there is overwhelming historical evidence supporting categorization of the right to jury trial as a fundamental right in the United States. This much has been evident since the Constitution's drafting, at which time the right to jury trial was referred to as "the very palladium of free government."¹⁶⁵ The Supreme Court spoke

159. See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 270–71 (2010) (discussing the role that the *Insular Cases* played in influencing Justice Kennedy's opinion in *Boumediene*).

160. See *supra* notes 48–52 and accompanying text (explaining that incorporated territories were treated similarly to states for purposes of constitutional analysis).

161. See *supra* note 53 and accompanying text (stating that only those rights deemed fundamental apply in unincorporated territories).

162. See *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (asserting that questions of sovereignty in Guantanamo could have implications for government action in all unincorporated U.S. territories). The lower courts have assumed from this language that Guantanamo is unincorporated. See, e.g., *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 33 (D.P.R. 2008) (citing *Boumediene* for the proposition that Guantanamo is an unincorporated territory). However, the Court in *Boumediene* did not expressly state Guantanamo's status as a territory. 553 U.S. at 765.

163. See 1903 Lease Agreement, *supra* note 103, art. 3 (recognizing Cuba's ultimate sovereignty over Guantanamo Bay).

164. See *supra* notes 132–52 and accompanying text (discussing the factual discrepancies between Guantanamo and the territories in the *Insular Cases*).

165. THE FEDERALIST NO. 83, *supra* 20, at 562; see also Alschuler & Deiss, *supra* note 21, at 871 (noting that the Framers enthusiastically supported the right to jury trial because of the large part it played in resisting the English before the Revolutionary War).

just as fervently about the right to jury trial in *Ex parte Milligan* when it wrote that the Jury Trial Clause could not be withheld from a non-service member defendant in a criminal trial so long as “ideas can be expressed in words, and language has any meaning.”¹⁶⁶ Further, the Court directly addressed the question of whether the right to jury trial is fundamental in *Duncan v. Louisiana*¹⁶⁷ and answered—emphatically—in the affirmative.¹⁶⁸ Justice White stated:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.¹⁶⁹

Justice White’s words, in combination with those of Justice Davis in *Milligan* and Alexander Hamilton’s in the Federalist Papers, leave very little room for an argument that the Jury Trial Clause is anything less than a fundamental right. Because the right to jury trial is recognized as fundamental, the Jury Trial Clause applies to Guantanamo Bay even if it is an unincorporated territory.¹⁷⁰

3. *Applying the Jury Trial Clause in Guantanamo would not be “impracticable and anomalous”*

In his concurring opinion in *Reid*, Justice Harlan stated that the threshold question in adjudicating questions of extraterritoriality based on the *Insular Cases* is whether extending a particular right

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

167. 391 U.S. 145 (1968).

168. *See id.* at 149 (declaring that the right to jury trial is “fundamental to the American scheme of justice”).

169. *Id.* at 155–56 (footnote omitted).

170. The Ninth Circuit has held that *Duncan*’s incorporation of the Sixth Amendment against the states does not apply to U.S. territories. *See N. Mar. I. v. Atalig*, 723 F.2d 682, 689 (9th Cir. 1984) (holding that *Duncan* does not prevent local territorial governments from establishing their own set of procedural rules). This reasoning, however, would not apply in Guantanamo, as the area is controlled by the U.S. military rather than by an independent local government. *See supra* notes 141–43 and accompanying text (noting the absence of any cultural repercussions that could follow from implementing constitutional rights on a U.S. military base with no local population).

would be “altogether impracticable and anomalous.”¹⁷¹ This concept has since become an important one in determining the extraterritorial reach of the Constitution.¹⁷² In *Boumediene*, for example, Justice Kennedy discussed at length whether it would be impracticable and anomalous to extend the Suspension Clause to Guantanamo.¹⁷³ After discussing several potential hindrances to the Clause’s application,¹⁷⁴ Justice Kennedy concluded that there were no existing practical obstacles making it impracticable and anomalous to allow Guantanamo detainees the right to pursue habeas corpus.¹⁷⁵ Applying this particular part of *Boumediene*’s analytical framework to the Jury Trial Clause compels the same conclusion.

Imposition of the American jury trial system at Guantanamo presents no risk of conflict with a local culture because Guantanamo has never actually been under Cuban control or inhabited by its population.¹⁷⁶ Additionally, as the Cuban courts have no jurisdiction within Guantanamo, Justice Kennedy’s conclusion that there could be no potential friction with the Cuban government also applies with respect to application of the Jury Trial Clause.¹⁷⁷ Therefore, the only practical obstacle to applying the Jury Trial Clause in Guantanamo—at least as articulated in *Boumediene*—is the potential cost of its application.¹⁷⁸

171. See *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result) (emphasizing the importance of a functional approach to determining constitutional extraterritoriality).

172. See *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (relying on Justice Harlan’s concurrence in *Reid* in arguing for a functional approach to extraterritoriality); see also Neuman, *supra* note 2, at 259 (observing that the functional approach that Justice Harlan employed in *Reid* is “the best fit, both descriptively and normatively, to the Court’s modern case law”).

173. See *Boumediene*, 553 U.S. at 766 (stating that one of the main considerations in determining whether to extend the Suspension Clause to Guantanamo involved the practical obstacles inherent in its application).

174. See *id.* at 768–70 (listing cost, potential friction with the Cuban government, and interference with the local population as practical considerations specific to Guantanamo).

175. See *id.* at 771 (holding that the Suspension Clause “has full effect at Guantanamo”).

176. See Raustiala, *supra* note 100, at 2536 (noting that Guantanamo Bay “has remained in U.S. hands continuously since Cuba’s capture in the Spanish-American War”); see also *supra* notes 141–44 (arguing that the military base at Guantanamo Bay does not possess any “wholly dissimilar traditions and institutions” that could potentially be disrupted by the implementation of the Jury Trial Clause).

177. See *Boumediene*, 553 U.S. at 770 (noting that while obligated to abide by the terms of its lease, the United States is not answerable to another sovereign for its actions on the base).

178. See *id.* at 769 (conceding that the cost associated with implementing constitutional rights in Guantanamo Bay should be taken into account as a potential inhibiting factor).

It is true that the cost of implementing the Jury Trial Clause in Guantanamo may be different than the costs considered in *Boumediene*, but the same basic principles still apply. Significantly, while the Court in *Boumediene* acknowledged the sensitivity of cost in extending constitutional rights extraterritorially, it nevertheless concluded that such considerations should not be dispositive.¹⁷⁹ In stating that “[c]ompliance with any judicial process requires some incremental expenditure of resources,” Justice Kennedy dismissed the idea that potential cost was enough to make implementation of the Suspension Clause impracticable and anomalous.¹⁸⁰

The same can be said of the costs associated with extending the Jury Trial Clause to Guantanamo. While it is certainly a valid consideration, cost as an isolated issue is not significant enough a barrier that it should determine who is allowed access to fundamental constitutional rights.¹⁸¹ The Court in *Boumediene* made clear that cost-related concerns did not sufficiently show that the government’s military mission would be thwarted should it be required to grant detainees access to certain constitutional rights.¹⁸² Given the relatively small number of cases affected by this issue,¹⁸³ it is unlikely that the Court’s stance would change with reference to the Jury Trial Clause.

One additional consideration that was not present in *Boumediene* is the composition of the jury veneer in the event that the Jury Trial Clause is extended to Guantanamo. The base population at Guantanamo—estimated at roughly 5500¹⁸⁴—is fairly small, but no other U.S. territory has been prevented from implementing jury trials based on population size.¹⁸⁵ Given the limited number of possible

179. *Id.* at 769.

180. *Id.*

181. *See supra* notes 165–70 and accompanying text (describing the right to jury trial’s fundamental role in the American legal system).

182. *See Boumediene*, 553 U.S. at 769 (suggesting that in order to be considered impracticable and anomalous, implementation of a right in Guantanamo would have to compromise the government’s military mission in the area).

183. *See Reid v. Covert*, 354 U.S. 1, 77–78 (1957) (Harlan, J., concurring in the result) (positing that the practical problems associated with extending the right to jury trial are lessened when the caseload is fairly limited).

184. *Welcome Aboard*, CNIC: NAVAL STATION GUANTANAMO BAY, <http://www.cnic.navy.mil/guantanamo/About/Command/WelcomeAboard/index.htm> (last visited Feb. 20, 2013).

185. The Northern Mariana Islands, for example, implement a jury trial system—albeit one that is implemented statutorily rather than constitutionally—despite having a population of only 17,000 spread across three islands. *See N. Mar. I. v. Atalig*, 723 F.2d 682, 685 (9th Cir. 1984) (describing a local statute implementing a similar jury trial system to what is provided in the U.S. Constitution).

trials at issue,¹⁸⁶ roughly a third of the base's population would be called upon for each of Guantanamo's 166 detainees to be given a jury of twelve.¹⁸⁷ It is difficult to imagine how this could be construed as an "anomalous" endeavor.

At present, there are no inherent practical obstacles that would make it "impracticable and anomalous" to apply the Jury Trial Clause in Guantanamo. While there are several considerations to which the Court should remain sensitive, there is no indication that the government's military mission at Guantanamo would be compromised if detainees were allowed the right to jury trial.¹⁸⁸ Therefore, withholding the right to jury trial from Guantanamo detainees would be inconsistent with the Court's modern extraterritoriality jurisprudence.

B. There is No Recognized Exception to the Jury Trial Clause That Would Categorically Exclude Guantanamo Detainees

Aside from the *Insular Cases*, the only hindrance to the application of the Jury Trial Clause in Guantanamo Bay is *Quirin*.¹⁸⁹ The argument against jury trials in Guantanamo—as the government has articulated it to this point—has been that certain detainees should not be granted a jury trial because they are enemy combatants and have violated the law of war.¹⁹⁰ While this rule may be functional in certain circumstances, it does not speak to the availability of the Jury Trial Clause for detainees who do not meet these requirements. Further, arguing against the application of the Jury Trial Clause based on the exception created in *Quirin* actually presupposes that

186. See *The Guantanamo Docket*, *supra* note 106 (listing the total number of detainees currently in Guantanamo at 166).

187. It could be argued that a jury comprised mainly of members of the military community and their families may not be an "impartial jury" as is required by the Sixth Amendment. However, such high profile cases are unlikely to garner a truly unbiased jury even if jurors were flown in from other parts of the country. Cf. John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y.L. SCH. L. REV. 981, 1004–12 (2011) (discussing the effect that media bias and alleged intimidation attempts had on the jurors in the trial of John Gotti, Jr.).

188. See *Boumediene v. Bush*, 553 U.S., 723, 769 (2008) (indicating that implementation of a constitutional right in Guantanamo would have to frustrate the government's mission at the base in order to be considered impracticable and anomalous).

189. See Vladeck, *supra* note 45, at 322 n.152 (observing that the government's original argument against the application of the Jury Trial Clause in Guantanamo was based largely on *Quirin*).

190. See, e.g., *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1184 (C.M.C.R. 2011) (en banc) (quoting *Quirin* in making the determination that the appellant was appropriately tried by military commission without the benefit of a jury), *vacated*, No. 11-1324 (D.C. Cir. Jan. 25, 2013).

the detainees would be entitled to a jury trial if the exception is found not to apply. If this was not the case, and the Jury Trial Clause simply did not apply to the defendants in *Quirin*, the exception created therein would have been unnecessary.

1. *Quirin does not categorically bar Guantanamo detainees from invoking the Jury Trial Clause*

In *Quirin*, the Court held that the Jury Trial Clause is inapplicable to enemy combatants charged with violating the law of war.¹⁹¹ This decision has received a significant amount of criticism¹⁹² but has nonetheless been treated as precedent in the post-World War II era, including in Guantanamo Bay.¹⁹³ Equally as important as the holding in *Quirin*, however, is the scope of the “law of war exception” that it created.

The defendants in *Quirin* were non-citizens¹⁹⁴ and were not lawfully present in the United States at the time of their trial.¹⁹⁵ It is conceivable that the Court could have found these facts alone sufficient to bar the defendants from utilizing the protection of the Jury Trial Clause.¹⁹⁶ Such a holding, in addition to being a significant departure from traditional thoughts on jury trial availability,¹⁹⁷ would also have precluded the application of the Jury Trial Clause in many more circumstances. However, the Court did not—and never has—come to such a sweeping conclusion.¹⁹⁸ Instead, the Court

191. *Ex parte Quirin*, 317 U.S. 1, 41 (1942).

192. *See supra* note 46 (acknowledging the dubious grounds on which *Quirin* was decided).

193. *See supra* notes 122–28 and accompanying text (discussing *Quirin*’s application in Guantanamo as exemplified in *Al Bahlul*).

194. *Quirin*, 317 U.S. at 20. One of the defendants was a U.S. citizen at the time of the trial, but the Court found that his status as an enemy combatant placed him in the same grouping as the rest of the defendants. *Id.*

195. *See id.* at 36 (noting that secretly entering an enemy country in civilian dress is “contrary to the law of war”).

196. The Court of Appeals for the Armed Forces has recently issued a similar ruling, stating that non-citizen independent contractors cannot invoke Sixth Amendment protection without having a substantial connection to the United States. *See United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012) (holding that a non-citizen U.S. Army translator could not invoke Fifth and Sixth Amendment protection while on trial for an alleged assault committed in Iraq (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990))). For a critical examination of this argument, see Vladeck, *supra* note 10, which criticizes *Ali* as being profoundly flawed and based on dubious precedential support.

197. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (asserting that the right to jury trial is available to anyone accused in a U.S. court that is not a member of the U.S. army, navy, or militia in actual service).

198. *See Al Bahlul*, Amicus Brief, *supra* note 16, at 18–19 (stating that the Supreme Court has never categorically denied non-citizens unlawfully present in the United States the right to a trial by jury).

unanimously chose to rest its analysis on the much narrower ground that the defendants (1) were enemy combatants and (2) had been charged with violating the law of war.¹⁹⁹

There was no dispute as to whether the *Quirin* defendants met either of these requirements. The defendants' status as enemy combatants was uncontested as a result of a full confession given by one of the would-be saboteurs.²⁰⁰ Likewise, the offenses alleged against the defendants—including spying, moving through the United States in civilian dress, and relaying illegally obtained intelligence to enemy forces—were clearly established violations of the law of war.²⁰¹ Because the defendants clearly met both elements of this test, the Court denied them the right to jury trial.²⁰²

The narrowness of *Quirin*'s holding significantly affects its application in Guantanamo Bay. If the Court in *Quirin* had broadened its holding to include all non-citizen defendants not lawfully present within the United States, it would logically follow that Guantanamo detainees were categorically unable to invoke the Jury Trial Clause.²⁰³ Conversely, applying *Quirin*'s law of war exception would produce far less consistent results due to the exception's inherent limitations based on status of the offender and the nature of the alleged offense.²⁰⁴ Simply put, for *Quirin* to apply to a particular

199. See *Quirin*, 317 U.S. at 41 (“An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trial of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.”).

200. See Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 62 (1980) (explaining one of the saboteurs' decision to give a full confession to the FBI upon concluding that their eventual discovery was inevitable).

201. *Quirin*, 317 U.S. at 23. The information obtained in the defecting defendant's confession was sufficient to charge all eight defendants with violating Articles 81 and 82 of the Articles of War. See *id.* (describing the charges against the defendants as specific violations of the law of war).

202. See *id.* at 40 (arguing that the jury trial provisions of the Constitution had never been understood to extend to trials for offenses against the law of war).

203. To date, there has been only one Guantanamo detainee with U.S. citizenship. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion) (describing the circumstances under which Yaser Hamdi, a U.S. citizen, was briefly detained at Guantanamo Bay); see also *The Guantanamo Docket*, *supra* note 106 (listing the citizenship status of all current and former Guantanamo detainees). However, the government transferred Hamdi to a military base in Norfolk, Virginia, upon realizing that he was a U.S. citizen. *Hamdi*, 542 U.S. at 510 (plurality opinion).

204. Defendants who are not designated enemy combatants or who have not been charged with violating the law of war cannot be prosecuted under *Quirin*. See Vladeck, *supra* note 45, at 337–38 (arguing that *Quirin*'s application should be limited to cases in which the defendant falls neatly into both categories). Given the lack of clarity regarding Guantanamo detainees' status both as offenders and

detainee, two factors must be present: the detainee must be an officially designated enemy combatant, and the detainee must have been charged with violating the law of war.

However, the law of war exception does not apply to all Guantanamo detainees with the certainty that was present in *Quirin*. While it was perfectly clear that both requirements of the exception applied to each *Quirin* defendant, the same cannot be said about detainees in Guantanamo with respect to their status as offenders²⁰⁵ or the offenses with which many of them have been charged.²⁰⁶ If one or both of these requirements is not met in a particular detainee's case, the law of war exception cannot apply.

*United States v. Hamdan*²⁰⁷ provides a particularly illuminating example of this point. Salim Hamdan was originally charged with providing material support for terrorism²⁰⁸ and was convicted by the U.S. Court of Military Commission Review.²⁰⁹ The D.C. Circuit overturned his conviction, holding that material support is not a violation of the law of war and is therefore not triable by military commission.²¹⁰ In addition to its obvious implications for other detainees charged with material support, the standard articulated in *Hamdan* for what constitutes a violation of the law of war could have a significant impact on detainees charged with other crimes as well.²¹¹ This new rule, combined with the uncertainty surrounding several

whether the offenses actually constitute violations of the law of war, it is unlikely that *Quirin* would be found to control every detainee's case. *Infra* notes 205–06.

205. See *Boumediene v. Bush*, 553 U.S. 723, 767 (2008) (holding that the CSRTs, which were conducted by the government to determine Guantanamo detainees' status as enemy combatants, did not pass constitutional muster). Despite the inadequacy of the CSRTs, the process that they afforded detainees was far greater than what had previously been available to them. See *id.* at 733 (noting that the CSRTs were created in response to *Hamdi's* initial declaration that Guantanamo detainees were entitled to at least some constitutional protection).

206. See *Vladeck*, *supra* note 45, at 339 (acknowledging the lack of a uniform opinion as to whether the crimes of terrorism or providing material support for terrorism are violations of the law of war).

207. 696 F.3d 1238 (D.C. Cir. 2012).

208. Specifically, Hamdan was charged both with providing material support for carrying out an act of terrorism and for providing material support for a terrorist organization based on his alleged support to al Qaeda in Afghanistan by serving as Osama bin Laden's driver. See *id.* at 1244.

209. *Id.*

210. See *id.* at 1250–53 (holding that in the absence of international law support, the charge could not be classified as a war crime).

211. See, e.g., *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1246 (C.M.C.R. 2011) (en banc) (listing the charges against the defendant, including material support for terrorism, conspiracy to commit terrorism, and solicitation of other persons to commit terrorism), *vacated*, No. 11-1324 (D.C. Cir. Jan. 25, 2013); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (plurality opinion) (asserting that it is inappropriate to recognize an offense as a violation of the law of war unless precedent supporting such a classification is "plain and unambiguous").

other crimes with which detainees have been charged, lends significant support to the assertion that *Quirin* is not categorically applicable in Guantanamo Bay.

The uncertainty surrounding *Quirin's* application in Guantanamo is magnified when considered in light of *Toth*. In *Toth*, the Court stated that the right to jury trial is so significant that any exception to it should be limited to "the least possible power adequate to the end proposed."²¹² This rule signifies the Court's belief that any curtailment of the right to jury trial must be limited to its narrowest possible interpretation in order to satisfy constitutional demands.²¹³ In the context of Guantanamo, this limitation means that detainees who are not clearly within *Quirin's* scope are not subject to the law of war exception.²¹⁴ Therefore, when there is any question regarding whether one or both of *Quirin's* requirements is met in a given case, courts should lean towards finding that the defendant has a right to jury trial.

The purpose of this distinction is not to argue against *Quirin's* application in Guantanamo Bay. Rather, this distinction serves to point out that *Quirin's* application in Guantanamo cannot be considered a categorical rule. The Supreme Court's hesitance to limit the right to jury trial, considered in combination with *Quirin's* already erratic applicability in Guantanamo, makes it nearly inevitable that *Quirin* will not be applicable to every Guantanamo detainee in every circumstance.²¹⁵ If *Quirin* is found to be inapplicable, the previous discussion of the Jury Trial Clause as a fundamental right suggests that it should apply in Guantanamo Bay.²¹⁶

212. United States *ex rel.* *Toth v. Quarles*, 350 U.S. 11, 23 (1955) (emphasis omitted) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

213. See *id.* at 23 n.22 (stating that the right to jury trial plays such a crucial role in our legal system that any attempt to limit or withhold it should be carefully scrutinized); see also Vladeck, *supra* note 45, at 337 (emphasizing the importance of a "lenity-based approach" to *Quirin's* law of war exception).

214. See Vladeck, *supra* note 45, at 337–38 (arguing that *Quirin* should only be applied in situations where it is clear both that the defendant is an enemy combatant and that the defendant is charged with violating a clearly defined law of war).

215. See *id.* at 337 (contending that *Quirin's* exception should be read narrowly when considered in light of the *Toth* Court's emphasis on the importance of the jury as a fact-finder).

216. See *supra* notes 165–70 and accompanying text (identifying the right to jury trial as a fundamental right that attaches in both incorporated and unincorporated territories).

2. *Applying Quirin in Guantanamo presupposes that the Jury Trial Clause would otherwise be available to Guantanamo detainees*

In refusing to issue a more sweeping rule in *Quirin*, the Court hinted at its opinion of the Jury Trial Clause in general. If the Court believed that the Jury Trial Clause was categorically inapplicable to non-citizens not lawfully present within the United States, then the law of war exception that made up the bulk of the Court's argument in *Quirin* would have been unnecessary.²¹⁷ It is therefore likely that the Court believed certain individuals who were similarly situated to the *Quirin* defendants, but who fell outside the scope of the law of war exception, would be entitled to a trial by jury.

This presupposition is even more apparent in the context of Guantanamo Bay. In *Al Bahlul*, for example, arguments against the application of the Jury Trial Clause in the defendant's trial are based primarily on *Quirin*.²¹⁸ The Court of Military Commission Review denied al Bahlul a jury trial because the court labeled him an enemy combatant who had violated the law of war.²¹⁹ As in *Quirin*, the *Al Bahlul* court made no mention of whether the defendant would have been initially entitled to a jury before the law of war exception was found to apply.²²⁰ Even the government's brief on appeal to the D.C. Circuit is devoid of any language suggesting that the Jury Trial Clause simply does not apply to Guantanamo detainees.²²¹

The government's reliance on *Quirin* in Guantanamo Bay rests on the same assumption that was originally relied upon in *Quirin* itself; if the government believed that Guantanamo detainees were simply not entitled to the protection of the Jury Trial Clause as a matter of

217. See *Al Bahlul*, Amicus Brief, *supra* note 16, at 19 (noting that there would be no need for *Quirin*'s law of war exception if the defendants—non-citizens being detained outside the territorial United States—simply were categorically excluded from invoking the Jury Trial Clause).

218. See *supra* notes 122–27 and accompanying text (recounting the government's reliance on *Quirin* in arguing against al Bahlul's right to jury trial).

219. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1183–84, 1188 (C.M.C.R. 2011) (en banc) (concluding that al Bahlul was properly subjected to trial by military commission), *vacated*, No. 11-1324 (D.C. Cir. Jan. 25, 2013).

220. See generally *Ex parte Quirin*, 317 U.S. 1, 29–48 (1942) (establishing the determination of a violation of a law of war as a precursor to evaluating the constitutional right to jury trial); *Al Bahlul*, 820 F. Supp. 2d at 1166–67 (applying *Quirin*'s threshold question of determining whether a defendant violated the law of war).

221. See generally Brief for the United States at 22–69, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Jan. 25, 2013), 2012 WL 1743629, at *22–69 (outlining the government's argument regarding whether trial by military commission—without the benefit of a jury—is constitutionally appropriate in al Bahlul's case). The government's argument here is again based heavily on *Quirin*, referencing the case nineteen times but making no mention of a possible categorical bar on the Jury Trial Clause in Guantanamo. *Id.*

course, the government would have presented this argument outright at some point. The absence of any such argument made by either the court or the government suggests a belief that categorically barring the Jury Trial Clause's application in Guantanamo would be inappropriate.

C. As a Constitutional Provision that "Follows the Flag," the Jury Trial Clause Extends to Guantanamo Based on the Government's Action in the Area

Modern thoughts on extraterritoriality suggest that certain constitutional provisions, particularly those in the Bill of Rights, should "follow the flag"—that is, that these rights should be applied wherever the government affirmatively acts without regard to geographical constraints.²²² The language of the Jury Trial Clause suggests that it should follow this interpretation. There is no indication that the Jury Trial Clause is intended to protect only U.S. citizens tried within the United States;²²³ rather, the right to jury trial as conferred by the Sixth Amendment is given to a group referred to as "the accused" in the context of "all criminal proceedings."²²⁴ Given the Framers' thoughts on the importance of the right to jury trial,²²⁵ it

222. See *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." (footnotes omitted)); see also Ragosta, *supra* note 9, at 295 (observing that "the [constitutional] principles that protect aliens domestically and citizens abroad generally apply to interactions abroad between the government and aliens"). But see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990) (refusing to apply the Fourth Amendment to a search of a non-citizen's home in Mexico).

223. See *Verdugo-Urquidez*, 494 U.S. at 265 (postulating that the Fourth Amendment's reference to "the people" implies that the right is reserved for members of the "national community" of the United States). Chief Justice Rehnquist specifically contrasts the language of the Fourth Amendment to that of the Sixth Amendment, which refers more broadly to the accused in criminal proceedings. *Id.* at 265–66.

224. U.S. CONST. amend. VI. Although the procedure followed by courts in Guantanamo may differ in some ways from traditional Article III courts, it can be assumed that trials intended to assess the merits of claims of terrorism would still be considered "criminal proceedings" for Sixth Amendment purposes. See, e.g., *Al Bahlul*, 820 F. Supp. 2d at 1194 (discussing certain conduct that is subject to individual criminal liability under the Military Commissions Act of 2006). The Supreme Court has held that other provisions of the Sixth Amendment attach in Guantanamo, further suggesting that the cases can be considered criminal proceedings. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion) (holding that the Sixth Amendment right to counsel applies in Guantanamo).

225. See *supra* notes 20–24 and accompanying text (describing the Framers' unanimous respect for the jury trial and its role in shaping the U.S. legal system).

can be assumed that the terms describing the scope of the Jury Trial Clause are intentionally broad.²²⁶

This idea is supported by case law, which in large part has followed Justice Kennedy's concurrence in *Verdugo-Urquidez*.²²⁷ Justice Kennedy's concurrence stated that the constitutional calculus shifts in favor of the rights of the accused when the United States affirmatively commences criminal proceedings against a non-citizen.²²⁸ The basic premise behind this reasoning is that certain constitutional rights exist primarily as defensive measures to protect individuals from a potentially abusive government.²²⁹ If these rights attach as a result of government action, it would make very little sense to allow the government to subsequently withhold them in certain circumstances depending on the identity or location of the accused.²³⁰

While it is not necessary here to create an exhaustive list of the rights that meet this classification, the right to jury trial would undoubtedly be high on such a list. The Jury Trial Clause is—and always has been—necessary to the underlying fairness of criminal proceedings in the U.S. legal system.²³¹ The role of the jury in criminal proceedings has repeatedly been held “fundamental to the American scheme of justice”²³² with little regard for whom is claiming the status of “the accused.”²³³ In fact, it has been held that *Duncan's*

226. See Ragosta, *supra* note 222, at 297 (asserting that the Bill of Rights was written in intentionally universal language to reflect the inalienability of the rights therein).

227. See *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (arguing that additional constitutional safeguards attach to non-citizens against whom the United States has affirmatively commenced criminal proceedings); see also *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 986, 997 (9th Cir. 2012) (allowing a Malaysian citizen living in Malaysia to bring First and Fifth Amendment claims in a U.S. court challenging her placement on a no-fly list); *United States v. Tiede*, 86 F.R.D. 227, 260 (U.S. Ct. Berlin 1979) (holding that non-citizens tried before a U.S. court in Berlin were entitled to a jury under the Sixth Amendment); *Bahar*, *supra* note 93, at 315 (noting that both the Second and Third Circuits have cited Justice Kennedy's concurrence in *Verdugo-Urquidez* as controlling).

228. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (stating that a different set of constitutional standards apply to non-citizens against whom the U.S. government affirmatively acts “within its sphere of foreign operations”).

229. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (discussing the role of the jury as placing a check on an otherwise easily abused government power).

230. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (“No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government.”).

231. See *supra* notes 165–70 and accompanying text (rehashing the right to jury trial's consistent classification as fundamental throughout American history).

232. *Duncan*, 391 U.S. at 149.

233. See, e.g., *id.* at 161–62 (granting a jury trial to a defendant charged with a misdemeanor offense); *Reid v. Covert*, 354 U.S. 1, 40–41 (1957) (plurality opinion)

classification of the Jury Trial Clause as “fundamental”²³⁴ has a direct effect on American courts overseas, even when the defendants are not U.S. citizens.²³⁵ The Court’s willingness to extend the right to jury trial in such a wide variety of circumstances signifies the same level of respect for the role of the jury in modern case law as was present during the Constitutional Convention.²³⁶

The importance of the right to jury trial is especially evident in Guantanamo Bay. The impartiality that a jury provides is especially necessary in Guantanamo proceedings, where it is often unclear whether some detainees are actually “enemy combatants” as the government claims.²³⁷ As prisoners facing potentially grave consequences if convicted, the presence of a neutral jury to determine the validity of the government’s allegations is imperative.²³⁸ Failure to implement this constitutional safeguard would perpetuate the current practice of allowing the military to be responsible both for capturing detainees and for subsequently making determinations as to their guilt. Continuing this system would cut against the freedom from arbitrary government action that the Court has sought to preserve since its decision in *Ex parte Milligan*.²³⁹

(holding that the Jury Trial Clause attached in the trial of U.S. citizens on a military base outside the United States); *United States v. Tiede*, 86 F.R.D. 227, 260 (U.S. Ct. Berlin 1979) (granting a jury trial to a group of non-citizens on trial in a U.S. court in Berlin).

234. *Duncan*, 391 U.S. at 154.

235. See *Tiede*, 86 F.R.D. at 252 (“The combined holdings of *Reid* and *Duncan* dictate that, absent the most extraordinary circumstances, the rights accorded defendants tried in *American courts* abroad should not differ from those accorded defendants tried in American courts in the United States.”).

236. See *supra* note 20 and accompanying text (noting that the importance of the right to jury trial was one of the few points of agreement between the Federalists and the Anti-Federalists when the Constitution was drafted).

237. See *supra* note 205 and accompanying text (emphasizing the district court’s finding that the affidavit pursuant to which the defendant was detained fell “far short” of factually supporting his detention); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 513 (2004) (plurality opinion) (noting that, according to the district court, the declaration pursuant to which the defendant was detained fell “far short” of factually supporting his detention and that, therefore, the defendant should be allowed to provide counter-evidence to respond to the claims raised by the declaration).

238. See *Reid*, 354 U.S. at 77 (Harlan, J., concurring in the result) (noting the government’s concession that the gravity of certain cases is such that they should be heard by a traditional court—including a jury—notwithstanding any potential difficulties that may be involved).

239. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126 (1866) (stating that a fair trial with the assistance of an impartial jury is “the only sure way of protecting the citizen against oppression and wrong”).

CONCLUSION

There is currently no Supreme Court precedent supporting a categorical refusal to apply the Jury Trial Clause at the Guantanamo Bay detention center. In fact, a review of the relevant case law suggests the opposite. This Comment has demonstrated that a contemporary application of the *Insular Cases* weighs in favor of applying the Jury Trial Clause in Guantanamo, notwithstanding a few factual distinctions that may suggest otherwise. Additionally, the Court's decision in *Ex parte Quirin* offers a helpful but incomplete understanding of the Jury Trial Clause's categorical application in Guantanamo, and suggests that defendants should be entitled to the right to a jury when *Quirin* is found to be inapposite. Further, as it has already been established that the fact-finding procedures in Guantanamo to this point have been substantially lacking,²⁴⁰ the role of the jury in providing an essential element of fairness in U.S. criminal proceedings and protecting defendants in U.S. courts from potential government abuse justifies extending the right to jury trial to detainees in Guantanamo Bay.²⁴¹

Despite speaking of the inappropriateness of a categorical bar on the Jury Trial Clause, this Comment is not meant to suggest that Guantanamo detainees should be categorically *allowed* to invoke the right to jury trial. It is likely that, despite *Quirin*'s shortcomings, it will serve as precedent in a number of Guantanamo cases. Rather, this Comment is meant to suggest that the right to invoke the Jury Trial Clause should serve as the constitutional norm in Guantanamo unless an exception to the Clause is found to apply. Failure to apply the Jury Trial Clause in this context would be a deviation from the Sixth Amendment that our Constitution simply does not tolerate.

240. See *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (noting the “considerable risk of error” associated with the CSRTs’ fact-finding procedures).

241. See *id.* at 800–01 (Souter, J., concurring) (observing several appellants’ detention for six years without trial as evidence of the government’s failure to resolve pending legal issues in Guantanamo in a timely manner). Justice Souter’s concerns regarding timeliness are just as relevant today, as more than 75% of the current population of Guantanamo detainees have been held there since 2002. See *The Guantanamo Docket*, *supra* note 106 (acknowledging that 133 of Guantanamo’s 166 current detainees are in their eleventh year of detention).