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## Trust Me, I'm a Judge: Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial

William M. Carter Jr.

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# **“Trust Me, I’m a Judge”: Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial**

*William M. Carter, Jr.\**

*“[T]he Constitution does not trust judges to make  
determinations of criminal guilt.”<sup>1</sup>*

## I. INTRODUCTION

The conventional model of criminal trials holds that the prosecution is required to prove every element of the offense beyond the jury’s reasonable doubt. The American criminal justice system is premised on the right of the accused to have all facts relevant to his guilt or innocence decided by a jury of his peers. The role of the judge is seen as limited to deciding issues of law and facilitating the jury’s fact-finding. Despite these principles, judges are reluctant to submit to the jury elements of the offense that the judge perceives to be routine, uncontroversial or uncontested.

One such element is found in federal criminal statutes that require proof that the offense occurred within the federal government’s “special maritime and territorial jurisdiction.”<sup>2</sup> Judges routinely decide this jurisdictional element themselves, presumably believing that it would be a waste of time to submit such a picayune issue to the jury, given that federal jurisdiction over land simply does not feel like other “substantive” elements of the offense. Thus, where the federal offense of kidnapping is charged, for example, the court may remove from the jury the issue of whether the kidnapping occurred within an area subject to federal jurisdiction, despite the fact that the statute explicitly makes this an element of the offense. This seems to be a valid, common-sense judgment until one realizes that the mere denomination of land as “federal” does not necessarily fulfill the jurisdictional element of the offense. Federal military bases, for example, may contain land that does not meet the constitutional and statutory

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\* William Carter is an assistant professor of law at Case Western Reserve University School of Law. The author thanks Michael Heise, Juliet Kostritsky, Kevin McMunigal, Andy Morriss, and Calvin Sharpe and his research assistants, John Glerum and Amy Klosterman, for their valuable suggestions and input. The author especially thanks Abigail Horn, for her patience and support.

1. *Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., dissenting).

2. This jurisdiction is defined in 18 U.S.C. § 7 (2000). It is also referred to as “federal legislative jurisdiction” and this Article will use the terms “federal legislative jurisdiction” and “special and territorial jurisdiction of the United States” interchangeably.

requirements for federal jurisdiction, either because of procedural defects at the time of acquisition or because jurisdiction was subsequently ceded.<sup>3</sup>

Judges have traditionally been permitted to decide a limited class of factual issues themselves, even in criminal cases. By incorporating the common law mechanism of judicial notice into Federal Rule of Evidence 201,<sup>4</sup> Congress intended that federal judges, in the interest of efficiency, be permitted to resolve certain generally known or readily ascertainable facts themselves instead of submitting such issues to the jury. Congress, however, also placed an important limitation on judicial notice in criminal cases. Rule 201(g) provides that “[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.” Federal courts, therefore, may take judicial notice in criminal cases, but must instruct the jury that they are free to disregard the court’s judicial notice and find the matter not proven. While this limitation may be somewhat inelegant, given that a judge must submit facts to the jury in a criminal case that she could decide herself in a civil case, it is required if judicial notice is to be permitted in criminal cases. Without such a limitation, federal courts could effectively direct verdicts in favor of the prosecution, which is clearly prohibited by the Sixth Amendment.

While the Federal Rules, in theory, adequately protect the right to jury trial, federal courts in practice routinely issue partial directed verdicts in favor of the prosecution on the jurisdictional element of federal offenses. This trend toward diminishing the jury’s role with regard to jurisdictional elements of federal crimes is in substantial tension with the Supreme Court’s recent reinvigoration of the jury’s role in the sentencing context.<sup>5</sup> This Article contends that the

3. In *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984) (“Williams II”), (discussed in detail in Part IV *infra*), for example, the court found that the United States had never acquired exclusive or concurrent jurisdiction over almost 50,000 acres of Fort Hood. *Id.* at 214.

4. Federal Rule of Evidence 201 provides:

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

....

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

5. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (applying *Append* in invalidating Arizona’s capital punishment scheme, under which the judge could decide facts leading to imposition of the death penalty, although the maximum authorized by the jury’s verdict was life imprisonment); *Append v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that

predominant practice of federal courts of completely removing the jurisdictional element from the jury violates the Sixth Amendment right to jury trial and Rule 201.

Part II of this Article discusses the problems raised by binding judicial notice of the jurisdictional element of federal criminal offenses. Part III gives an overview of the factual, constitutional, and statutory prerequisites for land to fall within the special territorial jurisdiction of the United States. Part IV briefly describes the circumstances in which courts may properly take judicial notice under Rule 201. Part V discusses the requirements for judicial notice in criminal cases and the legislative history and purpose of Rule 201(g). Part VI examines selected criminal cases regarding judicial notice of jurisdictional facts. Part VII examines Supreme Court precedent on the proper division between the judge and the jury in criminal trials and explains why appellate courts should not apply the harmless error standard of review where the trial court has effectively directed a verdict in favor of the prosecution. I conclude in Part VIII by providing a proposal whereby federal courts can respect the Sixth Amendment and Rule 201(g) while still attending to the practicalities of real-world criminal litigation.

## II. PROBLEMS RAISED BY REMOVING THE JURISDICTIONAL ELEMENT FROM THE JURY

Many federal criminal statutes require proof that the crime occurred within the “special maritime and territorial jurisdiction of the United States.”<sup>6</sup> Some

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any fact, other than a prior conviction, which raises the sentence above the statutory maximum must be alleged in the indictment and proved beyond the jury’s reasonable doubt).

6. For federal criminal offenses requiring proof of this element, see 15 U.S.C. § 1175 (2000) (manufacture of gambling devices), 15 U.S.C. § 1243 (2000) (possession, sale or manufacture of switchblade knives), 15 U.S.C. § 1245 (2000) (possession or use of ballistic knives), 18 U.S.C. § 81 (2000) (arson), 18 U.S.C. § 113 (2000) (assault), 18 U.S.C. § 114 (2000) (maiming), 18 U.S.C. § 661 (2000) (theft), 18 U.S.C. § 662 (2000) (possession of stolen property), 18 U.S.C. § 1111 (2000) (murder), 18 U.S.C. § 1112 (2000) (manslaughter), 18 U.S.C. § 1113 (2000) (attempted murder or manslaughter), 18 U.S.C. § 1201 (2000) (kidnapping), 18 U.S.C. § 1363 (2000) (malicious harm to real or personal property), 18 U.S.C. § 1460 (2000) (possession of obscene material), 18 U.S.C. § 2111 (2000) (robbery), 18 U.S.C. § 2119 (2000) (motor vehicle theft), 18 U.S.C. § 2241 (2000) (aggravated sexual abuse), 18 U.S.C. § 2242 (2000) (sexual abuse), 18 U.S.C. § 2243 (2000) (sexual abuse of a minor), 18 U.S.C. § 2244 (2000) (abusive sexual contact), 18 U.S.C. § 2252 (2000) (sexual exploitation of minors), 18 U.S.C. § 2252A (2000) (child pornography), 18 U.S.C. § 2261 (2000) (domestic violence), 18 U.S.C. § 2261A (2000) (stalking), 18 U.S.C. § 2315 (2000) (sale or receipt of stolen goods), 18 U.S.C. § 2318 (2000) (trafficking in counterfeit labels for music, movies or computer programs) and 18 U.S.C. § 2422 (2000) (coercion or enticement of minors). Examples of other federal statutes requiring proof of a jurisdictional element are 18 U.S.C. § 2113

courts of appeals have upheld trial judges' instructions taking judicial notice of this jurisdictional element, despite the trial court's failure to instruct the jury that it need not accept such judicial notice as binding.<sup>7</sup> Many of these courts have affirmed such instructions even where the prosecution did not present any evidence—for consideration by the jury or the judge—proving this element of the offense. Other reviewing courts, to the contrary, have held that binding judicial notice of jurisdictional facts amounts to an unconstitutional directed verdict in favor of the prosecution in violation of the defendant's right to jury trial.<sup>8</sup>

The cases are not only in tension with each other, but also with recent Supreme Court cases reinvigorating the role of the jury in criminal cases. The practice of wholly removing the jurisdictional element of federal criminal offenses from the jury's consideration is part of a broader judicial and legislative trend. Criminal and civil juries are widely seen as bothersome, inefficient and irrational.<sup>9</sup> The Supreme Court has recently stopped this trend with regard to

(2000) (proof of bank's FDIC-insured status as an element of bank robbery) and 18 U.S.C. § 2314 (2000) (requiring that the stolen merchandise be worth a certain amount in U.S. dollars). Judicial notice of such jurisdictional elements, absent a Rule 201(g) instruction, also violates the right to jury trial. "Special territorial jurisdiction" is the focus of this Article because first, it requires a more complicated and fact-bound inquiry than other jurisdictional elements, thus providing a clear illustration of the dangers of judicial notice in criminal cases; and second, a large number of federal criminal statutes rely on this element to convert traditionally state crimes into federal offenses.

7. See, e.g., *United States v. Lee*, No. 00-4150, 2000 U.S. App. LEXIS 23827, at \*12 (4th Cir. Sept. 26, 2000); *United States v. Hernandez-Fundora*, 58 F.3d 802, 810-11 (2d Cir. 1995); *United States v. Bowers*, 660 F.2d 527, 530-31 (5th Cir. 1981); *United States v. Piggie*, 622 F.2d 486, 487-88 (10th Cir. 1980); *United States v. Lavender*, 602 F.2d 639, 641 (4th Cir. 1979).

8. See, e.g., *United States v. Mentz*, 840 F.2d 315, 320 (6th Cir. 1988); *United States v. Dior*, 671 F.2d 351, 357-58 (9th Cir. 1982); *United States v. Irvin*, 21 M.J. 184, 186 (C.M.A. 1986); *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984) ("Williams II"). But see *United States v. Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977) (stating in dicta that the trial court would have been justified in taking judicial notice of the jurisdictional element of the offense, despite the absence of any proof on the issue). The First and Third Circuits have also stated (but not yet squarely held) that the right to jury trial is violated where the trial court takes judicial notice of the jurisdictional element of a federal offense without giving a Rule 201(g) instruction. See *United States v. Bello*, 194 F.3d 18, 25 (1st Cir. 1999); *United States v. Thomas*, 610 F.2d 1166, 1171 n.10 (3d Cir. 1979).

9. See, e.g., Ricky J. Poole & Kimberly S. Keller, *Jury Erosion: The Effects of Robinson, Havner, & Gammill on the Role of Texas Juries*, 32 ST. MARY'S L.J. 383, 385-86 (2001) (noting the diminishment the jury's role via courts' determinations of expert witnesses' reliability); Mike Reck, Note, *A Community With No Conscience: The Further Reduction of a Jury's Right to Nullify in People v. Sanchez*, 21 WHITTIER L. REV. 285 (1999) (discussing cases holding that the jury may be specifically instructed that they

sentencing determinations. In *Apprendi v. New Jersey*<sup>10</sup> and *Ring v. Arizona*,<sup>11</sup> the Court held that any fact increasing a sentence beyond the statutory maximum, even if it is labeled a “sentencing factor,” must be alleged in the indictment and proved beyond the jury’s reasonable doubt.<sup>12</sup> *Apprendi* and *Ring*, in holding that these facts must be found by the jury, reasoned that the Framers would have considered these factors the functional equivalent of an element of an aggravated crime.<sup>13</sup> *A fortiori*, then, the Court’s Sixth Amendment jurisprudence, as elaborated upon in *Apprendi* and *Ring*, requires that the jury must find all facts necessary to prove the statutorily defined elements of the offense. While the Court has refused to extend *Apprendi*’s specific holding beyond cases involving sentencing factors that increase the sentence above the statutory maximum,<sup>14</sup> it is difficult to see how *Apprendi*’s reasoning could not apply to factual determinations establishing that the defendant can be punished at all. Absent a jury determination of a statutorily defined element of the offense, the level of punishment authorized by the jury’s verdict is zero.

The Sixth Amendment permits criminal defendants to decide whether to proceed before a judge or a jury. There is no doubt that the judge is more well-versed in the law and may be more likely to reach an “accurate” result than the jury. It may also be efficient to permit judges to make certain routine factual determinations, such as federal jurisdiction. A defendant may choose to proceed before a jury, however, believing that the jury’s common sense evaluation of the facts will inure to his benefit. Whether the defendant’s choice is the “best” is immaterial as a constitutional matter, because the Constitution delegates this choice exclusively to him.<sup>15</sup> It is for this reason the Supreme Court has held that the Constitution prohibits a judge from directing a verdict of guilty, no matter

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cannot nullify). The trend toward statutory damages caps is perhaps the best-known example of diminished jury power in the civil context.

10. 530 U.S. 466 (2000).

11. 536 U.S. 584 (2002).

12. *See Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 490.

13. *See Ring*, 536 U.S. at 584 (Scalia, J. & Thomas, J., concurring) (“[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”).

14. *See Harris v. United States*, 536 U.S. 545, 568 (2002) (holding that *Apprendi* does not apply where the judge, rather than the jury, decides facts triggering mandatory *minimum* sentencing).

15. The Supreme Court has recently reiterated criminal defendants’ unfettered right to have this choice respected by the judicial system. *Ring*, 536 U.S. at 587 (rejecting the state’s argument that judicial factfinding of aggravating factors “may be a better way to guarantee against the arbitrary imposition of the death penalty” because “[t]he Sixth Amendment jury trial right does not turn on the relative rationality, fairness, or efficiency of potential factfinders”).

how overwhelming the evidence against the defendant. The Court has held that even uncontested<sup>16</sup> facts may not be removed from the jury's consideration.<sup>17</sup>

A judge's decision to remove any element of the offense from the jury's consideration is inconsistent with this constitutional framework. Whether the directed verdict is whole or partial does not change the fact that the court has infringed upon the defendant's right to jury trial, because that right permits him to choose to have *all* elements of the offense decided by the jury. This analysis also is not dependent upon whether the element is labeled "substantive" (e.g., whether the defendant acted with malice in a murder prosecution) or "procedural" (e.g., whether the defendant committed the crime in a place subject to federal jurisdiction). As long as the matter is functionally an element of the offense, the Sixth Amendment presumptively requires that a jury have the last word.

Binding judicial notice of federal jurisdiction over the location of the offense raises other troublesome issues. First, it risks disrupting the division of prosecutorial authority between the federal and state governments.<sup>18</sup> While federal criminal prosecutions are increasing,<sup>19</sup> crimes in the United States are predominately prosecuted by the states.<sup>20</sup> The constitutional division of law

16. "Uncontested" is a misnomer in a criminal trial unless the defendant pleads guilty or stipulates to certain facts. *See United States v. Mentz*, 840 F.2d 315, 320 (6th Cir. 1988) ("A plea of not guilty places all issues in dispute, 'even the most patent truths.'") (quoting *Roe v. United States*, 287 F.2d 435, 440 (5th Cir. 1961)). The Supreme Court, in its recent harmless error cases, has encouraged the tendency of courts to implicitly shift the burden of proof to the defendant, by holding that a key element of the harmless error analysis is whether the defendant attempted to contest the element the government failed to prove at trial. *See, e.g., Neder v. United States*, 527 U.S. 1, 16-20 (1999). This sort of backdoor burden-shifting undermines the constitutional requirement that the government actually prove every element of its case. *See infra* Part VII.B (discussing *Neder*).

17. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

18. I believe that the Supreme Court's fairly recent over-solicitousness toward states' rights is misplaced and constitutionally unsound, particularly in the area of federal civil rights law, given the history demonstrating that civil rights issues are indeed issues of national concern. However, where defendants are swept into the federal criminal system, I believe, unremarkably, that the link to federal jurisdiction must actually be proven and found by a jury beyond a reasonable doubt.

19. *See BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 1999: WITH TRENDS 1982-99*, NCJ 186180, at 1 (2001), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp99.pdf>. The report notes, *inter alia*, the following: (1) between 1994 and 1999, investigations initiated by U.S. Attorneys have increased 18.9 percent, and (2) there was a twenty-eight percent increase between 1994 and 1999 in criminal charges filed in U.S. district courts.

20. *See Apprendi v. New Jersey*, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting) (noting that in 1998, federal prosecutions were about 0.4 percent of total

enforcement authority between the federal and state governments implies that only crimes directly impacting the federal government, or those otherwise of national concern, are to be prosecuted in federal court.<sup>21</sup> The significance of federal legislative jurisdiction as an element of federal criminal offenses is illustrated by the scope of the Assimilative Crimes Act,<sup>22</sup> which makes it a federal crime to commit any act within the special maritime and territorial jurisdiction of the United States that would be a crime in the state where the act occurred.<sup>23</sup> There is no doubt that the federal government may define and punish crimes within the scope of its enumerated or implied powers. In the context of crimes requiring proof of federal jurisdiction over the location of the offense, the source of that power is quite simple: the federal government must be constitutionally able to proscribe and prosecute crimes on land that it owns or controls. Rendering this jurisdictional link a nullity implies an unlimited federal police power not mentioned or implied in the Constitution. It creates a federal offense without proof of the “federal” portion of the crime. Regardless of where one stands on the increasing “federalization” of criminal law,<sup>24</sup> federal courts must at least take seriously the jurisdictional element of criminal offenses that, but for the existence of that element, would otherwise be prosecuted by the state in which they occurred.

Another concern is the increased possibility of error when courts make factual determinations outside of the normal adversary process. Because judicial notice excuses the prosecution from presenting evidence of the facts judicially noticed to the jury, courts should take judicial notice in criminal cases only with great caution. Determining whether the federal government enjoys jurisdiction over land requires a complex inquiry with many subsidiary factual questions that properly fall within the jury’s province. When courts routinely misapply or misunderstand the constitutional and evidentiary restrictions on judicial notice in criminal cases, they are more likely to overlook the complexities of determining whether the jurisdictional element exists in a particular case. Taking judicial notice of this element in accordance with the letter of Rule 201(b)(2) and Rule 201(g) not only protects the defendant’s right to jury trial in the abstract,

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criminal prosecutions).

21. See *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000) (“Federal criminal jurisdiction is limited by federalism concerns; states retain primary criminal jurisdiction in our system.”); cf. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (federal gun-control act struck down because it was not shown that guns near schools had any direct impact on interstate commerce). See also L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 LAW & CONTEMP. PROBS. 64, 65 (1948).

22. 18 U.S.C. § 13 (2000).

23. For an overview of the Assimilative Crimes Act, see Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685 (1957).

24. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645 n.3 (1997), for a good summary of the ongoing debate.



but also requires the court to make an initial judgment about the reliability of the sources purportedly demonstrating federal jurisdiction.

Additionally, there may be significant differences between federal and state criminal systems in terms of procedure and punishment. Generally, compared to state prosecution, defendants in the federal system may be subject to more severe penalties, receive longer sentences, serve a greater portion of the sentence imposed, more frequently be denied bail, have fewer opportunities for suppression of evidence, and receive less pretrial discovery.<sup>25</sup> Particularly disturbing is the possibility of a death sentence where the federal government prosecutes a crime that occurred in a non-death penalty jurisdiction.<sup>26</sup> Given such potential differences in outcome and procedure, courts should be highly reluctant to remove the jurisdictional element from the jury.

Significant separation of powers issues are also raised when courts disregard or manipulate Rule 201(g) because they believe the Rule is unsound as a matter of policy. In exercising its constitutional power to create lower federal courts, Congress has the power to prescribe rules of evidence and procedure for those courts.<sup>27</sup> Under basic separation of powers doctrine, a policy argument against Rule 201(g) should take place in the halls of Congress rather than in the courtroom.

There are several factors that contribute to courts' willingness to remove the jurisdictional element of the offense from the jury. First, many courts simply misunderstand the rules governing when judicial notice may be taken at all and further misunderstand when it is constitutionally permissible to take judicial notice in a criminal case. Because courts believe federal legislative jurisdiction (and, more generally, the jurisdictional element of federal criminal offenses) is an easy and routine matter, there is also a powerful incentive not to expend time and resources in presenting these "indisputable" facts to the jury. Moreover, courts may fear that instructing the jury that it can disregard the court's judicial notice may provide an excuse for the jury to nullify, under the pretense of inadequacy of proof.<sup>28</sup> Further, it is easy for judges to believe that they are better

25. See Clymer, *supra* note 24, at 668-75.

26. See generally Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1166-67 (1995).

27. See U.S. CONST. art. III; see also Rules Enabling Act, 28 U.S.C. §§ 2071-2074 (2000).

28. The debate about jury nullification is largely beyond the scope of this Article. There are substantial arguments for why the potential for jury nullification is part of the Sixth Amendment right to jury trial. See, e.g., Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191 (1996) (a historical and contemporary analysis of the debate over of jury nullification). Nonetheless, I tend to agree with Professor Turner, who has argued that it is extremely unlikely that the jury would seize on the absence of proof on the esoteric jurisdictional element of the offense as an excuse to nullify. It is more likely that the jury would simply

sued than the jury to determine whether the complicated factual bases for federal legislative jurisdiction have been proven.<sup>29</sup>

This Article acknowledges these disincentives to strictly following the Sixth Amendment and Rule 201(g) when it comes to jurisdictional elements of federal crimes. Courts may reasonably feel that requiring a jury determination of the facts underlying the jurisdictional element is wasteful, particularly given the increasing federal criminal caseload.<sup>30</sup> Yet efficiency cannot be the only concern, nor can it be allowed to trump the right to jury trial. It is possible to strike a balance that adequately protects the right to jury trial without ignoring efficiency concerns. A proper understanding of the Federal Rules of Evidence and the accused's right to jury trial requires that judicial notice of federal legislative jurisdiction is appropriate only when the following conditions are met:

(1) the court bases its judicial notice on sources of reasonably unquestionable accuracy,<sup>31</sup> presented by the prosecution in a preliminary hearing limited to the jurisdictional issue;

(2) if the material presented at such a hearing raises any questions about the existence of federal jurisdiction over the location of the offense, the court cannot take judicial notice. Rather, the matter must be resolved through the normal adversary process at trial, where the prosecution must produce evidence proving this element of the offense beyond the jury's reasonable doubt, and;

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refuse to convict, despite the evidence. See Dennis J. Turner, *Judicial Notice and Federal Rule of Evidence 201—A Rule Ready for Change*, 45 U. PITT. L. REV. 181, 199 (1983).

29. This last ground, of course, conflicts with the second, i.e., the perception that the jurisdictional element is an "easy call." If the jurisdictional element of the offense is readily determinable, then efficiency concerns should carry less weight, since the matter could be sent to the jury at relatively little cost. On the other hand, if federal jurisdiction is a complicated factual matter (as this Article contends), then Sixth Amendment principles require that the jury resolve the question.

30. See *supra* note 19.

31. FED. R. EVID. 201(b)(2). The limitation that judicial notice of federal legislative jurisdiction rest only on this prong of Rule 201(b), rather than on the "generally known" prong of Rule 201(b)(1), is correct as a matter of the intent of those provisions. Moreover, taking judicial notice under this Subsection requires the government to actually produce the sources of reasonably unquestionable accuracy required by Rule 201(b)(2) and therefore greatly lessens the risk that the court will erroneously conclude that the jurisdictional element exists based solely on its own assumptions about federal jurisdiction. See *infra* Parts IV.B & C for a discussion of the differences between Rule 201(b)(1) and 201(b)(2).

(3) if the material submitted at the hearing is such that the facts are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,”<sup>32</sup> the court may take judicial notice. However, the court must explicitly<sup>33</sup> and separately<sup>34</sup> instruct the jury that it need not accept such judicial notice as binding.<sup>35</sup>

This framework provides a reasonable balance between the judicial system’s interest in efficiency and the defendant’s right to an actual jury determination of all elements of the offense.<sup>36</sup>

32. FED. R. EVID. 201(b)(2).

33. I do not suggest that a court errs simply by failing to use Rule 201(g)’s precise language. Rule 201(g) is satisfied as long as the instruction fairly states that the jury is not required to accept the court’s judicial notice as binding. *See United States v. Anderson*, 528 F.2d 590, 592 (5th Cir. 1976) (per curiam).

34. One rationale courts have offered for affirming convictions despite the trial court’s failure to give a Rule 201(g) instruction is that “the jury under the general instructions was free to treat the matter [judicially noticed] as it would [any] other evidence.” *United States v. Piggie*, 622 F.2d 486, 489-90 (10th Cir. 1980); *see Anderson*, 528 F.2d at 591; *see also* Brief of the United States in Opposition to Petition for Certiorari at 2, 5, *United States v. Lee*, cert. denied, 532 U.S. 994 (2001) (No. 00-1030). In other words, the reasoning is that the general reasonable doubt instruction adequately protects the defendant’s right to jury trial. Although Rule 201(g) does not explicitly require that the instruction specified therein be given separately, such a requirement is implicit in the Rule. Rule 201(g) would be superfluous if Congress believed that a general prefatory “reasonable doubt” instruction was sufficient, since such an instruction is required in all criminal cases. Moreover, as a practical matter, a court’s general instruction at the beginning that all elements must be proven beyond a reasonable doubt cannot erase the jury’s later impression that a certain matter has been conclusively decided by the court. *Cf. United States v. Bello*, 194 F.3d 18, 25 (1st Cir. 1999) (noting that the trial court “meticulously” complied with Rule 201(g) by issuing a separate instruction that the jury was not required to accept the court’s judicial notice as binding, in addition to “having instructed the jury generally on presumption of innocence and burden of proof”).

35. Specifically, courts should hold a limited hearing along the lines required by the Court of Military Appeals in *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984) (“Williams II”) (discussed in detail *infra*), wherein the prosecution is required to submit proof establishing federal legislative jurisdiction. Failure to follow all of these procedures should be grounds for automatic reversal on appeal and not subject to the harmless or plain error standards, as discussed in Part VII.B *infra*. The appellate remedy should be a new trial.

36. Taking this position to its logical extreme would appear to lead to the conclusion that federal courts may take judicial notice of any element of a criminal offense, even those that are clearly “substantive,” as long as it gives a Rule 201(g) instruction and holds a limited evidentiary hearing. This logical extension is limited, however, by the fact that Rule 201 limits the types of facts subject to judicial notice.

### III. THE REQUIREMENTS FOR FEDERAL JURISDICTION OVER LAND

The process of determining whether an offense occurred in an area subject to federal jurisdiction can be quite complex. The term “special maritime and territorial jurisdiction” is defined in 18 U.S.C. Section 7.<sup>37</sup> The most common basis for such jurisdiction is found in Subsection (3) of that Section, which includes within the statutory definition:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by the consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.<sup>38</sup>

The statute therefore requires resolution of several discrete factual and legal questions:

- (1) Was the land at issue reserved, purchased or otherwise acquired for the federal government’s use?
- (2) Did the legislature of the state where the property is located give its consent to the acquisition?
- (3) Was the purpose of the acquisition for the erection of a fort, magazine, arsenal, dockyard, or other needful building?

Thus, the mere fact that the federal government owns or makes use of a parcel of land is not sufficient to establish federal jurisdiction over that land.<sup>39</sup>

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Most elements of criminal offenses would never meet the requirements of Rule 201 because, e.g., whether the defendant used force in sexually assaulting the victim would never be “generally known” (Rule 201(b)(1)), nor “capable of accurate and ready determination” (Rule 201(b)(2)) by reference to sources such as maps, letters, legislation, etc.

37. 18 U.S.C. § 7 (2000).

38. *Id.* § 7(3).

39. The Supreme Court of Virginia (a state containing a large number of federal installations) has also recognized the need for resolution of several discrete questions before property can validly be determined to fall within federal legislative jurisdiction:

The question of whether a Federal area within a State is subject to exclusive jurisdiction of the United States is complicated and often difficult to decide. A determination depends upon many factors, jurisdiction being subject to the terms, conditions, restrictions, limitations and provisions of the acquisition by

Certain constitutional requirements must also be met for property to come within the legislative jurisdiction of the United States. The Supreme Court has held that exclusive or concurrent federal jurisdiction under the Constitution requires the consent of the state where the property is located. Absent such consent, possession by the United States is in the nature of an ordinary proprietor.<sup>40</sup> An ordinary proprietor, of course, has no constitutional basis to exercise legislative jurisdiction (exclusive or otherwise) over the property; rather, that right remains with the state in which the property is located.<sup>41</sup>

Moreover, the procedures by which the federal government may acquire property for its legislative jurisdiction have changed. For property acquired by the United States prior to 1940, acceptance of the state's cession of jurisdiction was presumed absent evidence to the contrary.<sup>42</sup> As to property acquired after 1940, however, the state must have formally ceded jurisdiction and the federal government must have formally accepted jurisdiction by filing a notice of acceptance with the governor of the state or in another manner provided under state law, in order for the property to become subject to federal legislative jurisdiction.<sup>43</sup> Accordingly, in addition to the resolution of the geographic question (whether the precise location of the crime is subject to federal legislative jurisdiction) there is also a subsidiary temporal question, because the date of federal acquisition determines the type of proof the government must adduce regarding cession and acceptance of jurisdiction.

#### IV. JUDICIAL NOTICE UNDER THE FEDERAL RULES OF EVIDENCE

Despite the complexities involved in determining whether the offense occurred in an area within the special territorial jurisdiction of the United States, courts routinely take binding judicial notice of this element with little or no analysis.<sup>44</sup> Quite often, in addition to failing to conduct the analysis described above for determining the existence of federal legislative jurisdiction over the place of the crime,<sup>45</sup> and apart from considering the consequences of failing to give a Rule 201(g) instruction in a criminal case,<sup>46</sup> courts also more generally

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the United States, including the consent of the State . . . and acceptance by the United States.

*Western Union Tel. Co. v. Commonwealth ex rel. State Corp. Comm'n*, 132 S.E.2d 407, 411 (Va. 1963) (internal citations omitted).

40. *Paul v. United States*, 371 U.S. 245, 264 (1963) (citing *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937)).

41. *Id.*

42. *See Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 528 (1885).

43. *See* 40 U.S.C. § 255 (2000); *see also Paul*, 371 U.S. at 265.

44. *See supra* note 7.

45. *See supra* Part III.

46. *See infra* Part V.

misunderstand when the Federal Rules of Evidence permit a court to take judicial notice at all.

### A. Judicial Notice Under Federal Rule of Evidence 201

The concept of judicial notice is ancient at common law.<sup>47</sup> Under Rule 201, federal courts can only take judicial notice of facts where those facts are not subject to reasonable dispute because they are (1) generally known or (2) capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned.<sup>48</sup> The drafters of Rule 201 intended that judicial notice be the exception rather than the rule. “The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of testimony of the witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is an essential prerequisite.”<sup>49</sup>

The mechanism of judicial notice applies a distinction between “legislative” and “adjudicative” facts. Rule 201, by its terms, only applies to judicial notice of adjudicative facts.<sup>50</sup> Thus, if federal legislative jurisdiction is treated as an issue of legislative rather than adjudicative fact, Rule 201 does not apply. The traditional view broadly characterizes as “legislative” any facts that do not change from case to case, such as geography.<sup>51</sup> This categorical view would always classify federal legislative jurisdiction as involving “legislative” facts

47. According to James Bradley Thayer, judicial notice at common law is traceable to two ancient legal maxims: *manifesta non indigent probatione* (that which is known need not be proved) and *non refert quid notum sit iudici, si notum non sit in forma iudicii* (it matters not what is known to a judge if it is not known in judicial form). JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 277 (1898).

48. FED. R. EVID. 201(b).

49. *United States v. Bello*, 194 F.3d 18, 23 (1st Cir.1999) (quoting FED. R. EVID. 201 advisory committee’s note).

50. FED. R. EVID. 201(a).

51. Much has been written on the theoretical distinction between “adjudicative” and “legislative” facts. A leading administrative law treatise defines the distinction as follows: “Whether 123 C Street is inside or outside the city is a question about 123 C Street, not about a party. The question whether X lives in the city is a question of adjudicative fact, but, even though X lives at 123 C Street, the fact that that address is within the city is not an adjudicative fact.” 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.6, at 155 (3d ed. 1994) (cited in *United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995)). Similarly, the Second Circuit has stated that “[l]egislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case.” *Hernandez-Fundora*, 58 F.3d at 812 (quoting *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976)).

because the federal government's jurisdiction over a federal fort, for example, presumably does not change from case to case. If Defendant A is convicted of assault in a federal fort, the federal government presumably retains jurisdiction over that fort in the case of Defendant B who commits an assault there two years later. In other words, the existence of special territorial jurisdiction does not change depending on the particular facts of Defendant B's case.

This analysis, however, is "dubious" at best.<sup>52</sup> Under the traditional distinction between legislative and adjudicative facts, a fact is adjudicative if it answers who did what, where, how, when or with what intent.<sup>53</sup> Whether the federal government acquired legislative jurisdiction over the location of the offense answers the question of "where" the crime occurred. As the Advisory Committee Notes to Rule 201 explain, the better view of the legislative/adjudicative facts distinction is a functional one:

Whether a fact is adjudicative or legislative depends not on the nature of the fact—e.g., who owns the land—but rather on the use made of it (i.e., whether it is a fact germane to what happened in the case or a fact useful in formulating common law policy or interpreting a statute) and the same fact can play either role depending on context.<sup>54</sup>

An example helps illustrate the logical flaws in treating federal jurisdiction over land as a legislative fact. If a kidnapping occurred in an area near, but not on, the recognized grounds of Fort Leavenworth, the precise location where the defendant abducted the victim is clearly an adjudicative fact. Without resolving this question, it cannot be determined whether the defendant committed the federal offense of kidnapping, an element of which is that the kidnapping occurred in an area within the special territorial jurisdiction of the United States.<sup>55</sup> This understanding also holds true if the kidnapping occurred on the fort's recognized grounds. Even if it is undisputed that the offense occurred on the grounds of Fort Leavenworth, at least three critical factual questions remain unresolved: (1) whether the government ever validly acquired exclusive or concurrent jurisdiction over the geographic area comprising Fort Leavenworth in the manner prescribed by the Constitution and relevant statutes; (2) whether the initial acquisition of Fort Leavenworth encompassed the particular area where the offense occurred; and (3) even if it did, whether the federal government subsequently ceded jurisdiction over all or part of the land. Thus,

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52. 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5103, at 253 (Supp. 2003) (criticizing *Hernandez-Fundora*) (discussed in Part IV.B *infra*).

53. See Turner, *supra* note 28, at 191.

54. *Bello*, 194 F.3d at 22.

55. 18 U.S.C. § 1201 (2000).

the question of whether the location of the offense at the time it was committed was within the special territorial jurisdiction of the United States is asked to resolve “what happened in the case.” It is a factual question,<sup>56</sup> the resolution of which determines whether a federal or state crime was committed.<sup>57</sup>

Most importantly, in the context of a criminal trial, formalistic labeling of jurisdictional facts as “legislative” or “adjudicative” begs the Sixth Amendment question. Formalistic reliance on the legislative/adjudicative facts distinction reflects the same tendency toward treating labels as definitive that was rejected by the Supreme Court in *Apprendi*<sup>58</sup> and *Ring*.<sup>59</sup> Just as legislatures may not remove the issue of racial motivation in a hate crime prosecution from the jury merely by calling it a sentencing factor,<sup>60</sup> courts also cannot eliminate the jurisdictional element of an offense by labeling that element “legislative.” The Sixth Amendment jury trial guarantee requires that any facts that are functionally elements of the offense must be found by the jury and are therefore “adjudicative.”

### B. *Is Jurisdictional Status “Generally Known”?*

Since federal jurisdiction over the location of the crime involves adjudicative facts, federal courts can only take judicial notice of such facts as provided in Rule 201.<sup>61</sup> As noted above, federal courts may only take judicial notice of adjudicative facts that are “not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial

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56. Even if the element of federal legislative jurisdiction is a mixed question of law and fact, Supreme Court precedent requires that the jury resolve this question. See *United States v. Gaudin*, 515 U.S. 506, 510-15 (1995) (holding that the materiality of a false statement is a mixed question of law and fact that must be decided by the jury).

57. Treating federal jurisdiction as an immutable legislative fact may also be incorrect as a factual matter. The federal government may cede jurisdiction at any time by, e.g., transferring property located within a federal fort to a private party without stating in the deed that it intends to retain exclusive or concurrent legislative jurisdiction. See, e.g., *United States v. Goings*, 504 F.2d 809, 812 (8th Cir. 1974) (holding that the federal government divested itself of jurisdiction over the area of the fort where the assault occurred when it transferred the property to a private corporation without expressly retaining jurisdiction). Thus, if the government, before Defendant B’s assault, sold a parcel of the property where both assaults A and B in the example above occurred, the location of the second offense may in fact no longer have been within the special territorial jurisdiction of the United States.

58. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

59. *Ring v. Arizona*, 536 U.S. 584 (2002).

60. See *Apprendi*, 530 U.S. at 494 (“[T]he relevant inquiry is not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”).

61. FED. R. EVID. 201(a).



court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>62</sup> Several courts of appeals have held that federal legislative jurisdiction over land is “generally known.”<sup>63</sup> The argument is that everyone knows that Leavenworth Penitentiary, for example, is a federal prison. Accordingly, judicial economy permits judicial notice of that fact, thereby saving the government and the defendant from having to litigate an issue about which there is no reasonable dispute.

This reasoning does not hold up upon examination. The jurisdictional status of the location of the offense—not its use by the federal government or denomination as a federal installation—is what is at issue in statutes requiring proof of this element. Rule 201(b)(1)’s “generally known” prong is only intended to encompass such facts as a reasonable layperson within the territorial jurisdiction of the trial court would know through her unaided memory.<sup>64</sup> While the average reasonable person might know of the existence or nominally federal character of a federal installation, it is highly unlikely that such a person has any familiarity with that installation’s jurisdictional status as defined by the Constitution, relevant statutes, case law and the historical facts.<sup>65</sup> Thus, judicial notice of the federal government’s jurisdiction over the location of the offense, if it is to be taken at all, must rest on Rule 201(b)(2).

### *C. Can Jurisdictional Status be Ascertained by Reference to Sources of Reasonably Unquestionable Accuracy?*

Because jurisdictional status is not something a reasonable person would know from her unaided memory, judicial notice of federal jurisdiction can only be taken under Rule 201(b)(2). Whether the federal government ever actually

62. FED. R. EVID. 201(b).

63. *See, e.g.,* *United States v. Lee*, No. 00-4150, 2000 U.S. App. LEXIS 23827, at \*10 (4th Cir. Sept. 26, 2000) (“Here, the indictment charged that the crime occurred at Fort Belvoir, Virginia. Fort Belvoir’s location was generally known in the Alexandria Division of the Eastern District of Virginia.”).

64. 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5105, at 489 (1977) (“[I]f the fact is one that a reasonable person would not know from memory, but would know where to find, it falls within subdivision (2),” rather than (1)).

65. *See United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999) (“Although the label ‘federal penitentiary’ might suggest to the average person that MDC-Guaynabo is under the jurisdiction of the United States, it is unlikely that the ‘reasonable person’ has any familiarity with MDC-Guaynabo at all, let alone its jurisdictional status.”). The Fourth Circuit recently made this error in *Lee*, 2000 U.S. App. LEXIS 23827, conflating whether Fort Belvoir’s existence and use by the federal government were “generally known” with whether Fort Belvoir’s jurisdictional status and boundaries were “generally known.” *See infra* Part VI (discussing the Fourth Circuit’s reasoning in *Lee*).

acquired exclusive or concurrent jurisdiction over the location in question can be determined by reference to sources such as letters or legislation by the state ceding jurisdiction,<sup>66</sup> letters from the United States accepting jurisdiction,<sup>67</sup> and official, verified government maps delineating the areas of the property where the federal government currently enjoys exclusive or concurrent jurisdiction.<sup>68</sup> Federal prosecutors can obtain the evidence from the federal agencies within their districts<sup>69</sup> and introduce such evidence at a limited evidentiary hearing held specifically to address jurisdictional issues.

Requiring judicial notice of the jurisdictional element of federal criminal offenses to be taken under Rule 201(b)(2), rather than Rule 201(b)(1), is more than merely a procedural hoop through which the government and the court should be required to jump. Should the trial court decide to take judicial notice under Rule 201(b)(2), it must do so based upon actual sources of reasonably unquestionable accuracy, rather than upon conjecture about what a reasonable person “knows” about a federal installation’s jurisdictional status and boundaries. A preliminary hearing wherein the prosecution is required to produce such sources may reveal that there is a sufficient factual question regarding the federal government’s jurisdiction over the location of the offense that the court cannot take judicial notice.<sup>70</sup> If the prosecution does produce materials of sufficient indisputability, the court may take judicial notice, provided it instructs the jury that they are free to disregard the matter judicially noticed and find the element not proven.

## V. JUDICIAL NOTICE IN CRIMINAL CASES: FEDERAL RULE 201(G)

The defendant’s right to jury trial requires that the jury have the ultimate say on whether the jurisdictional element of the offense has been proven beyond a reasonable doubt. In that sense, Rule 201(g) is unremarkable. After all, “proof of [a jurisdictional element] is no different from proof of any other element of a federal crime.”<sup>71</sup> It must be alleged in the indictment and proved beyond the

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66. See, e.g., *Bello*, 194 F.3d at 23-24.

67. *Id.*

68. *Id.*; see also *Gov’t of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979).

69. See U.S. Attorneys’ Manual, Criminal Resource Manual, No. 665 (Supp. 2000) (“Each United States Attorney would be well advised to request from each agency within the district a report on the jurisdictional status claimed for each of its facilities and assurance that documentation is available.”).

70. See *infra* Part VI (discussing the Court of Military Appeals’ opinion in *Williams II*, which determined that 50,000 acres of Fort Hood were not within federal legislative jurisdiction).

71. *United States v. Prentiss*, 206 F.3d 960, 969 (10th Cir. 2000) (quoting *Hugi v. United States*, 164 F.3d 378, 381 (7th Cir. 1999)).

jury's reasonable doubt. Rule 201(g) represents Congress's attempt to balance the interests of judicial efficiency with the jury trial rights of the accused.

The legislative history of Rule 201(g) demonstrates that Congress gave substantial thought to how to reconcile the competing interests implicated by judicial notice in criminal cases. The proposal for Rule 201(g) that emerged from the Senate would have made judicial notice binding on the jury in both civil and criminal cases.<sup>72</sup> The House version, which was adopted in conference, rejected making judicial notice binding in criminal cases. Congress reasoned that while a "mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to jury trial . . . a discretionary instruction in criminal trials" would be constitutional.<sup>73</sup> The congressional reasoning in favor of the constitutionality of the Rule 201(g) procedure was that the jury would retain the ultimate power to decide whether the element had been proven. The Advisory Committee's Notes on the subsequently adopted draft also reflect this view. The Committee noted that:

The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seem to foreclose the judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case. However, this view presents no obstacle to the judge's advising the jury as to a matter judicially noticed, if he instructs them that it need not be taken as conclusive.<sup>74</sup>

Of course, Congress's view that Rule 201(g) sufficiently protects the right to jury trial is not conclusive. The reasoning in *Apprendi* and *Ring*,<sup>75</sup> taken to its logical conclusion, calls into question Rule 201(g)'s constitutionality, because the Rule does not actually require the prosecution to submit evidence to the jury proving the matter beyond a reasonable doubt. Rather, the Rule only requires that the jury have the *opportunity to reject* the court's judicial notice. This Article, however, makes a less sweeping proposition: a court violates the defendant's right to jury trial by taking judicial notice without instructing the jury

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72. See H.R. REP. NO. 93-650, at 6-7 (1973), reprinted in 1973 U.S.C.C.A.N. 7075, 7079-80 (cited in *Bello*, 194 F.3d at 25).

73. *Id.* at 7. Congress was not operating in a jurisprudential vacuum when it decided to make judicial notice binding only in civil cases. Many state rules of evidence make the court's judicial notice binding on the jury in both civil and criminal cases. See Turner, *supra* note 28, at 199.

74. 1 WEINSTEIN'S FEDERAL EVIDENCE § 201, at app. 01(3) (quoting FED. R. EVID. 201 advisory committee's note (March 1969 draft)) (cited in *Bello*, 194 F.3d at 25).

75. See *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

that they must make the final determination. The few pre-*Apprendi* decisions directly addressing the issue have held that a Rule 201(g) instruction adequately protects the right to jury trial.<sup>76</sup> The fallout from *Apprendi* and *Ring* may well result in the invalidation of Rule 201(g) and similar state procedures. In the event that it does not, the framework suggested by this Article<sup>77</sup> is consistent with existing Sixth Amendment jurisprudence.

## VI. PERTINENT CASES IN THE COURTS OF APPEALS

Despite Rule 201(g)'s clear language, the courts of appeals are split on whether the failure to give a Rule 201(g) instruction requires reversal.<sup>78</sup> Appellate opinions on the issue fall into four categories: (1) misunderstanding or misapplication of Rule 201 in general or Rule 201(g) specifically; (2) explicit disregard of the mandatory nature of Rule 201(g) because of disagreement with the policy expressed in the Rule (e.g., a belief that Rule 201(g) is irrational or inefficient); (3) recognition that the trial court's failure to give a Rule 201(g) instruction may violate the defendant's right to jury trial, but affirming the conviction nonetheless for other independently valid reasons; or (4) finding that failure to give a Rule 201(g) instruction requires reversal. Most opinions addressing Rule 201(g) fall within the first and third categories.

Examples abound of courts misunderstanding or misapplying the rules governing judicial notice in criminal cases. Most recently, in *United States v. Lee*,<sup>79</sup> the Fourth Circuit rejected the appellant's challenge to his conviction based in part on the trial court's failure to give a Rule 201(g) instruction and the government's failure to introduce at trial any evidence indicating that the place of the assault was within federal jurisdiction.<sup>80</sup> The Fourth Circuit held that it

76. See, e.g., *Bello*, 194 F.3d at 25 ("Of course, compliance with Rule 201 does not establish that application of Rule 201 in this case was constitutional. . . . Nonetheless, there is widespread agreement that Rule 201(g), which makes judicial notice non-conclusive in criminal cases, adequately safeguards the criminal defendant's Sixth Amendment right to a trial by jury.").

77. See *infra* Part VIII.

78. See *supra* notes 7-8.

79. No. 00-4150, 2000 U.S. App. LEXIS 23827 (4th Cir. Sept. 26, 2000).

80. The trial court in *Lee* instructed the jury as follows:

The Government has offered evidence that the assault or the aggravated assault charged in the indictment occurred at Fort Belvoir, Virginia. The Court has taken judicial notice that Fort Belvoir, Virginia is within the jurisdiction of the United States for purposes of this statute. If you find that the offense occurred at Fort Belvoir, Virginia, then you may find that this element has been proved. If you find that the offense did not occur at Fort Belvoir, Virginia, then it is your duty to find the defendant not guilty.

Petition for Writ of Certiorari at 5, *Lee v. United States*, 230 F.3d 1355 (4th Cir. 2000) (No. 00-1030).

was proper for the trial court to remove this element of the offense from the jury's consideration. The court reasoned as follows:

[T]he indictment charged that the crime occurred at Fort Belvoir, Virginia. Fort Belvoir's location was generally known in the Alexandria Division of the Eastern District of Virginia and verifiable from "sources whose accuracy cannot reasonably be questioned." Accordingly, we find no error in the district court's taking judicial notice of this fact.<sup>81</sup>

The opinion in *Lee* illustrates many of the problems with judicial notice in criminal cases. First, likely because of its unwillingness to confront the issue, the *Lee* court did not even address defendant's argument that the trial court's failure to give a Rule 201(g) instruction warranted reversal.<sup>82</sup> Second, as a factual matter, the correct question under a Rule 201(b)(1) analysis<sup>83</sup> was not whether

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This instruction left open the possibility that the jury could find that the assault did not occur at Fort Belvoir. However, it effectively prevented the jury from finding that, although the offense occurred at Fort Belvoir, Fort Belvoir itself (or the specific location at Fort Belvoir where the assault occurred) was not within the federal government's special territorial jurisdiction. The clear import of the instruction, despite the "may" in the third sentence, was that the only question left for the jury to resolve on this element was whether the offense occurred on the grounds of Fort Belvoir, not whether Fort Belvoir was within the special territorial jurisdiction of the United States.

81. *Lee*, 2000 U.S. App. LEXIS 23827, at \*10. The Fourth Circuit in *Lee* relied, inter alia, on its earlier and oft-cited decision in *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979). In *Lavender*, the defendants were convicted under the Assimilative Crimes Act of burglary and larceny at a place within the special territorial jurisdiction of the United States. *Id.* at 640, 641. The court rejected the defendants' argument that proof that the offense occurred on a federal highway was insufficient to establish the jurisdictional element of the offense. *Id.* at 641. Although no proof was submitted to show that the highway was within federal jurisdiction, and the trial court in fact declined to take judicial notice of this element, the Fourth Circuit held that it could take judicial notice of federal jurisdiction in the first instance on appeal. *Id.* The *Lavender* court's holding raises another issue: whether appellate courts may take judicial notice in the first instance. See the discussion of *Burjan* and *Williams II*, *infra* Part VI, both of which held that judicial notice in a criminal case in the first instance on appeal violates the right to jury trial. An appellate court's taking judicial notice in the first instance in a criminal case is effectively the same as the trial court's taking judicial notice but failing to give a Rule 201(g) instruction. In either case, Rule 201(g) and the defendant's right to jury trial are violated because the jury has had no opportunity to pass on the facts judicially noticed.

82. See Brief for Appellant at 48, *United States v. Lee*, No. 00-4150, 2000 U.S. App. LEXIS 23827 (4th Cir. Sept. 26, 2000); see also *Lee*, 2000 U.S. App. LEXIS 23827.

83. As already noted, Rule 201(b)(1) does not provide a proper basis for judicial

Fort Belvoir's *location* was generally known, but whether its *jurisdictional status* was generally known.<sup>84</sup> Third, if the *Lee* court intended to rely on Rule 201(b)(2), as well as Rule 201(b)(1), it failed to consider that the prosecution in *Lee* had not presented—and the trial court therefore could not have considered—any sources of reasonably unquestionable accuracy supporting judicial notice of this element of the offense.<sup>85</sup>

The court's opinion in *United States v. Hernandez-Fundora*<sup>86</sup> also demonstrates a misunderstanding of the rules governing judicial notice in federal criminal cases. The defendant in that case was convicted of assaulting another prisoner.<sup>87</sup> He challenged the conviction on the ground that the court's judicial notice that the prison was within the special territorial jurisdiction of the United States was improper, since the court did not instruct the jury as required by Rule 201(g).<sup>88</sup> The Second Circuit rejected this challenge on two grounds. First, the court held that the trial court properly left the "factual" element (whether the assault occurred at the prison) to the jury, while merely removing the "legal" question (whether the federal government had jurisdiction over the prison) from the jury's consideration. Second, the court believed that the jurisdictional issue only involved legislative facts, meaning that Rule 201(g) was inapplicable.<sup>89</sup>

The first rationale for the *Hernandez-Fundora* court's decision is incorrect for the same reason as in *Lee*. The question was not only whether the offense actually occurred at the federal prison, but also whether the prison was within the special territorial jurisdiction of the United States, an element of the charged

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notice of special territorial jurisdiction.

84. See *supra* Part IV.B.

85. See *supra* Part IV.C; see also Brief for Appellant, *supra* note 82, at 47-48.

86. 58 F.3d 802 (2d Cir. 1995).

87. *Id.* at 804-05.

88. *Id.* at 809-10. The trial court instructed the jury as follows:

[T]he government must prove the alleged assault took place within the special maritime and territorial jurisdiction of the United States. This simply means that the alleged assault must have occurred in any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof. I charge you now that [the prison] is a place that falls within the territorial jurisdiction of the United States. Therefore, if you find beyond a reasonable doubt that the [act] alleged occurred at [the prison], the sixth element of the offense has been met.

*Id.* at 809.

89. *Id.* at 811.

offense.<sup>90</sup> This question could only be resolved by answering subsidiary factual determinations that fell within the jury's province.<sup>91</sup>

*Burjan*<sup>92</sup> provides a good example of the third category of cases: those recognizing the restrictions on judicial notice in criminal cases, but nevertheless affirming the conviction for other independently valid reasons.<sup>93</sup> The defendant in *Burjan* argued that the government failed to prove that the offenses occurred within the Canal Zone (the jurisdictional element of the charged offenses). The trial court did not take judicial notice of this element. The Fifth Circuit held that it could, upon the introduction of proper evidence, take judicial notice in the first instance on appeal.<sup>94</sup> The court recognized that, in the usual case, Rule 201(g) would be rendered a nullity if appellate courts could take judicial notice of an element of the offense in the first instance on appeal, since the jury would be bypassed contrary to Rule 201(g).<sup>95</sup> This problem was not presented in *Burjan*, however, which was a non-jury trial. Accordingly, where the defendant has waived the right to jury trial, an appellate court's judicial notice of an element of the offense is not inconsistent with Rule 201(g).

The *Burjan* court also, unlike *Lee* or *Hernandez-Fundora*, took judicial notice under Rule 201(b)(2), based on actual evidence establishing the Canal Zone's boundaries.<sup>96</sup> Because there was record evidence proving the location of the offense, the *Burjan* court held that its judicial notice of the Canal Zone's

90. The defendant in *Hernandez-Fundora* was convicted under 18 U.S.C. § 113(c) (1988), which provides:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

.....

(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than \$1,000 or imprisonment for not more than five years, or both.

91. See *supra* Part III. The second basis for the *Hernandez-Fundora* court's holding—that the jurisdictional element involved legislative facts—fares no better upon examination. See *supra* Part IV.A; cf. Turner, *supra* note 28, at 191-92 (discussing *United States v. Bowers*, 660 F.2d 527 (5th Cir. 1981), and characterizing treatment of the jurisdictional element as “legislative” in that case as a misapplication of Rule 201).

92. *Gov't of Canal Zone v. Burjan*, 596 F.2d 690 (5th Cir. 1979).

93. Cases finding that the failure to give a Rule 201(g) instruction is error, but harmless, could be included in this category, but are discussed separately in Part VII.B *infra*, because the harmless error doctrine is not an “independently valid” reason for affirming the conviction. The Supreme Court's harmless error cases make clear that complete removal from the jury of any element of a criminal offense is such a fundamental structural error in the trial process that automatic reversal is required.

94. *Burjan*, 596 F.2d at 693-94.

95. *Id.* at 694; cf. *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984) (“Williams II”) (discussed in more detail *infra*).

96. *Burjan*, 596 F.2d at 693-94.

boundaries was sufficient to affirm the first count of the conviction.<sup>97</sup> The *Burjan* court, therefore, demonstrated sensitivity to the Sixth Amendment concerns raised by judicial notice in criminal cases because it: (1) recognized that removing this element of the offense from the jury, whether via judicial notice in the first instance on appeal or the trial court's failure to give a Rule 201(g) instruction, would raise substantial Sixth Amendment issues;<sup>98</sup> and (2) based its judicial notice on actual evidence, rather than speculating that an element of the offense had been fulfilled.

The "disregard" problem concerning Rule 201(g) is vividly illustrated by the Tenth Circuit's opinion in *United States v. Piggie*.<sup>99</sup> In *Piggie*, the defendant challenged his conviction under the Assimilative Crimes Act for sodomy committed at Leavenworth Penitentiary on the grounds that the government failed to offer any proof that the prison was within the special territorial jurisdiction of the United States. The defendant further argued that the trial court's error in taking judicial notice without such proof was compounded by its failure to give a Rule 201(g) instruction, thereby depriving him of his right to jury trial.<sup>100</sup> While the court believed there was sufficient evidence establishing federal jurisdiction,<sup>101</sup> and also rested its holding on the plain error and harmless error doctrines,<sup>102</sup> the clear motivation for the court's decision was its disagreement with the policy choice embodied in Rule 201(g). Recognizing the mandatory nature of Rule 201(g), the court nonetheless forthrightly stated that

97. The court refused, however, to take judicial notice as to the second count of the offense because the evidence of the location of that offense was insufficiently precise. *Id.* at 695.

98. The *Burjan* court did not explicitly so hold; rather, it held that the Sixth Amendment was not implicated because the defendant had waived his right to jury trial. *Id.* at 694. Nonetheless, the *Burjan* court at least recognized the Sixth Amendment concerns raised by bypassing the jury on any element of the offense. *Id.*

99. 622 F.2d 486 (10th Cir. 1980).

100. *Id.* at 487-88.

101. *Id.* at 488-89. The only actual evidence the court pointed to as sufficient to establish the jurisdictional element did not actually bear on the issue. The court cited witnesses' testimony that they were employees or inmates of Leavenworth. *Id.* at 489. This, of course, was not probative of whether the federal government had exclusive or concurrent jurisdiction over their place of employment or detention. At most, it told the court that those witnesses believed they worked or were imprisoned in a nominally federal facility. The court also cited various jury instructions given by the trial court, which were not "evidence" that could properly be considered in a sufficiency of the evidence challenge to a sentence or conviction. *Id.*

102. *Id.* at 488, 489 (citing FED. R. CRIM. P. 52(b) (plain error); *Chapman v. California*, 386 U.S. 18 (1967) (harmless error)). See the harmless error discussion in Part VII *infra*.



“we cannot bring ourselves to give effect to [Rule 201(g)]. To do so would be an exercise in the absurd.”<sup>103</sup>

Rule 201(g) provoked the following statement by the *Piggie* court: “With deference, [Rule 201(g)] is irrational. Actual application of the [Rule] makes fools of the judge, the law and the jury. . . . Under the Congressional rule, in the morning when the judge tries a civil case the world is round. That afternoon when he tries a criminal case the world is flat.”<sup>104</sup> Indeed, the *Piggie* court went so far as to state that applying Rule 201(g) would be “unjust and illogical” and that courts were therefore “loath to meet this provision head on.”<sup>105</sup>

103. *Piggie*, 622 F.2d at 488. Indeed, the *Piggie* court felt so strongly about the irrationality of Rule 201(g) that it included a separate appendix criticizing the Rule. *Id.* at 488-90.

104. *Id.* at 489-90 (quoting 10 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 201.70).

105. *Id.* at 490. In fairness, the *Piggie* decision is not the only place such strong criticism is found. See generally Turner, *supra* note 28. See also Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330 (June 1997). Both Professor Turner’s article and the recommendations of the Proposed Revision suggest, *inter alia*, making judicial notice binding in both civil and criminal cases, but explicitly providing for an opportunity for the defendant to submit evidence rebutting the court’s judicial notice. While these proposals are arguably better than the predominant current practice of courts applying Rule 201(g) (which is simply to ignore the Rule, wrongly classify the fact judicially noticed as legislative, or hold that the failure to give a Rule 201(g) instruction was harmless error), they share a common flaw. Namely, these proposals suggest that the defendant’s right to jury trial is adequately protected by allowing the defendant to submit evidence rebutting the court’s judicial notice. This clearly flips the ordinary process of a criminal trial on its head. It is not the defendant’s burden to disprove elements of the offense. Rather, it is the prosecution’s duty to affirmatively prove them beyond the jury’s reasonable doubt. Moreover, these proposals do not adequately address circumstances where the prosecution fails to submit any evidence at all on the judicially noticed element. Further, both proposals still recognize that eliminating Rule 201(g)’s permissive instruction in criminal cases raises concerns of fairness and accuracy. The commentary to the Proposed Revision recognizes that, even under its proposal,

[i]t may be necessary for the appellate court to remand the case for further evidence on the issue if it is unclear whether a fact is beyond reasonable dispute within the territorial jurisdiction of the trial court. Courts are warned that “[o]n any issue about which there is a hint of [reasonable] dispute, the prosecution must submit proof, the defense may submit rebuttal evidence, and the jury must consider [the issue].”

Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330, 399 (June 1997) (quoting Turner, *supra* note 28, at 205). Under Professor Turner’s proposal, the defendant would be entitled to submit evidence challenging the judicial notice and “should the court determine that the submitted evidence raises any doubt as to the accuracy of the fact in question, judicial notice of said fact shall not be taken.” Turner, *supra* note 28, at 204.

*Piggie* is notable for the court's candor. Although the court acknowledged that Rule 201(g) is mandatory, it nevertheless refused to enforce the Rule because it believed the Rule was "irrational." While this candor is perhaps refreshing, and certainly more intellectually honest than cases grasping for a way to find Rule 201(g) inapplicable, policy disagreement or concerns about efficiency are not a sufficient basis for a federal court to ignore a congressionally-mandated rule of evidence.<sup>106</sup> The hearsay rules are perhaps the most glaring example of evidentiary restrictions that require a court to ignore probative evidence. Yet the rules of hearsay (with all their exceptions, of course) are routinely enforced by federal courts. The same holds true for the exclusionary rule and a variety of other doctrines and rules that are thought to outweigh simple efficiency.

A few courts have found that judicial notice of federal legislative jurisdiction violates the right to jury trial where the trial court fails to give a Rule 201(g) instruction. In *United States v. Williams*,<sup>107</sup> the prosecution charged the defendant with a kidnapping at Fort Hood. On appeal, the Court of Military Appeals found that there was insufficient evidence supporting the jurisdictional element of the offense and ordered the trial court to hold an evidentiary hearing to determine whether the specific location of the alleged kidnapping was under federal jurisdiction.<sup>108</sup> Specifically, the court ordered the trial judge to hold a hearing limited to determining the following: (1) the boundaries of Fort Hood; (2) the types of federal jurisdiction over the entirety of Fort Hood; (3) the history of and documents relating to the federal government's acquisition of jurisdiction over Fort Hood, including (a) Texas's cession of jurisdiction over the land comprising Fort Hood and (b) the acceptance of jurisdiction by the United States; and (4) the location of places described in the indictment as pertaining to the events of the offense.<sup>109</sup>

As a result of the evidence presented at the hearing, it became apparent that the federal government never acquired jurisdiction over almost 50,000 acres of

106. Or, for that matter, to construe the right to jury trial to apply only to those elements of the offense a particular court believes it is "rational" for the jury to decide.

107. 14 M.J. 428, 429 (C.M.A. 1983) ("Williams I").

108. *Id.* at 429.

109. *Id.* The court referred to this truncated evidentiary proceeding as a "*DuBay* hearing," referring to its earlier decision in *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). The *Williams I* court concluded that a *DuBay* hearing was triggered by the military procedure rule requiring the prosecution in non-capital offenses to establish the geographical boundaries of the areas in which the statute applies. *Williams I*, 14 M.J. at 429 (citing MANUAL FOR COURTS-MARTIAL ¶ 213(e)(2) (Rev. ed. 1969)). It is not suggested that this provision directly applies to non-military federal prosecutions. Nonetheless, *Williams I* provides a useful framework for assessing the constitutional, statutory and evidentiary requirements for federal jurisdiction as an element of the offense in ordinary federal criminal prosecutions.

the fort because it did not follow the required constitutional and statutory procedures.<sup>110</sup> Subsequent to this evidentiary hearing, the matter was again appealed. On appeal, the *Williams II* court refused to take judicial notice of the jurisdictional status of the location of the alleged kidnapping.

The *Williams II* court's reasoning is instructive. First, it held that judicial notice under Rule 201(b)(1)<sup>111</sup> was not appropriate because the government had submitted no evidence showing that Fort Hood's jurisdictional status and boundaries were "generally known."<sup>112</sup> The court noted that "[a]lthough some may assume that a military installation automatically comes within Federal jurisdiction, that assumption is incorrect."<sup>113</sup> The court also held that, given the complexities of determining those jurisdictional boundaries, it could not take judicial notice under Rule 201(b)(2) because the jurisdictional issue was not capable of accurate and ready determination by resort to sources of reasonably unquestionable accuracy.<sup>114</sup> Finally, even assuming the evidence would have permitted the trial court to take judicial notice of the jurisdictional element of the offense, the *Williams II* court refused to take judicial notice on appeal, because doing so would infringe the defendant's right to jury trial: "[A]ll factual issues concerning guilt or innocence—including any issue of territorial jurisdiction—must be submitted to the [jury] for determination. Even as to adjudicative facts which the judge judicially notices, the court-martial members have the final word, as they must be instructed under [Rule] 201(g)."<sup>115</sup>

*Williams II* is important for several reasons. The *Williams II* court, unlike most courts to address the issue, recognized that the assumption that a federal

110. *United States v. Williams*, 17 M.J. 207, 212 (C.M.A. 1984) ("Williams II"). See *supra* Part III for a description of these procedures.

111. Although the court was applying the Military Rules of Evidence rather than Federal Rules of Evidence, Rule 201 is substantially the same in both sets of rules. Military Rule of Evidence 201(b)(1) requires that a judicially noticed fact be one that is "generally known universally, locally, or in the area pertinent to the event"; Military Rule of Evidence 201(b)(2) is the same as Federal Rule of Evidence 201(b)(2); and Military Rule of Evidence 201(g) provides that "[t]he military judge shall instruct the members [of the court-martial] that they may, but are not required to, accept as conclusive any matter judicially noticed."

112. *Williams II*, 17 M.J. at 214.

113. *Id.* at 211.

114. *Id.* at 214-15.

115. *Id.* at 215. The Court of Military Appeals, which is well-versed in these matters, has adhered to *Williams II* in subsequent decisions. See, e.g., *United States v. Irvin*, 21 M.J. 184, 186-89 (C.M.A. 1986) (following *Williams II* and noting that the *DuBay* hearing ordered in *Williams I* "alert[ed] [the court] to the problems latent in determining the extent of Federal jurisdiction over military installations"). Significantly, the *Irvin* court held, unlike *Williams II*, that it would not allow the prosecution to remedy its failure of proof on the jurisdictional element by conducting a *DuBay* hearing. *Id.* at 187.

installation automatically falls within the special territorial jurisdiction of the United States as defined in 18 U.S.C. Section 7(3) and the Constitution is incorrect.<sup>116</sup> *Williams II* demonstrates that a factual inquiry is necessary to make this determination. Moreover, the *Williams II* court recognized that, even when the trial court can properly take judicial notice of federal jurisdiction, Rule 201(g) and the Sixth Amendment require that the jury have the last word on the issue.

Even though it set the bar higher than most courts by requiring an evidentiary hearing on the jurisdictional issue, the *Williams II* court held that such an evidentiary hearing alone was insufficient to protect the defendant's right to jury trial. The court held that "[o]bviously, the *DuBay* hearing which we ordered did not provide the [jury] an opportunity to participate in determining if appellant's offense was committed within 'the special maritime and territorial jurisdiction of the United States.'"<sup>117</sup> Thus, a *DuBay* hearing (and the limited evidentiary hearing proposed by this Article) cannot be seen as a substitute for a jury determination of all elements of the offense. Rather, such an evidentiary hearing serves a screening function. The court cannot take judicial notice unless sources of reasonably unquestionable accuracy upon evaluation demonstrate beyond dispute that the jurisdictional element exists. Where this is the case, the court may take judicial notice, but still must instruct the jury pursuant to Rule 201(g). If there is any reasonable dispute, the court cannot take judicial notice *at all*; rather, the government must produce admissible<sup>118</sup> evidence sufficient to prove the matter beyond the jury's reasonable doubt.

The *Williams II* procedure raises the question of why there is a judicial notice mechanism in criminal cases, if the matter must still be submitted to the jury. The sounder practice in a constitutional sense would indeed be to deal with the jurisdictional matter the same as all other elements of the offense—i.e., to submit proof of it to the jury. Yet the *Williams II* procedure does serve several important functions if courts continue to take judicial notice of elements of criminal offenses. The initial evidentiary hearing allows the court to screen out those cases where there is any dispute as to the existence of the jurisdictional element, either because the government fails to present sources satisfying Rule

116. See *supra* Part III.B.

117. *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984) ("Williams II").

118. A limited evidentiary hearing under Rule 201(b)(2) would not require the sources supporting judicial notice to be admissible in evidence. See *United States v. Bello*, 194 F.3d 18, 24 n.8 (1st Cir. 1999) ("[A] judge can consult materials not otherwise admissible in order to take judicial notice.") (quoting 21 WRIGHT & GRAHAM, JR., *supra* note 64, § 5102, at 465). Thus, in a *DuBay* Rule 201(b)(2) hearing, the court would be allowed to consider, for example, a military official's testimony that he had seen the letter from the federal government formally accepting the state's cession of jurisdiction, even though this testimony might not be admissible at trial under the Federal Rules of Evidence.

201(b)(2) or because the defendant offers rebuttal evidence tending to show that the jurisdictional element does not exist. In other words, it sensitizes courts to the need to conduct an actual examination of the facts before taking judicial notice, rather than assuming that the federal government enjoys jurisdiction over the location of the offense.

Moreover, the pertinent evidence need not be introduced at trial when the court is properly satisfied that it can take judicial notice after holding the evidentiary hearing, thereby saving time in most cases.<sup>119</sup> In a *DuBay* Rule 201(b)(2) hearing, the court may consider evidence that would not be admissible at trial, which also streamlines the determination.<sup>120</sup> In any event, if the prosecution sees it as unnecessarily duplicative to have an initial evidentiary hearing on the jurisdictional issue, it can simply not request that the court take judicial notice and submit the evidence directly to the jury.

*United States v. Mentz*,<sup>121</sup> like *Williams II*, held that removal of the jurisdictional element of a federal criminal offense from the jury's consideration violated the defendant's right to jury trial. *Mentz* involved the trial court's judicial notice of the FDIC-insured status<sup>122</sup> of two banks, an element of the federal offense of bank robbery.<sup>123</sup> Unlike the cases discussed above, the prosecution in *Mentz* actually submitted evidence to the jury proving this element of the offense.<sup>124</sup> On appeal, defendant argued that the court's jury instruction removed the jurisdictional element from the jury's consideration in violation of

119. "In a criminal case, Rule 201(g) treats judicial notice like a presumption; it relieves one party of the need to produce evidence but does not prevent the other party from contesting' the noticed fact with evidence and argument to the jury." *Bello*, 194 F.3d at 24 (quoting 21 WRIGHT & GRAHAM, JR., *supra* note 64, § 5111, at 534). In other words, the difference is between submitting the *matter* to the jury (as the Sixth Amendment and Rule 201(g) require) and submitting *evidence* of the matter to the jury (which is not necessary when the court properly takes judicial notice). Once the court takes judicial notice, the jury generally will not receive evidence on the issue unless the defendant submits evidence rebutting the existence of the jurisdictional element.

120. *See supra* note 119.

121. 840 F.2d 315 (6th Cir. 1988).

122. *Id.* at 319. Although *Mentz* dealt with FDIC-insured status rather than special territorial jurisdiction, there is nothing in the Sixth Circuit's opinion that limits its holding to this particular jurisdictional element. Indeed, FDIC-insured status is subject to an even more "accurate and ready determination" via judicial notice than special territorial jurisdiction, given the complexity of determining when federal legislative jurisdiction exists under 18 U.S.C. § 7(3).

123. 18 U.S.C. § 2113(a) (2000). The offense in *Mentz*, 18 U.S.C. § 2113(a), requires the government to prove that the deposits of the institution robbed were FDIC-insured at the time of the robbery. *See id.* § 2113(f).

124. Two witnesses testified that the banks were FDIC-insured at the time of the robberies. *Mentz*, 840 F.2d at 318.

the Sixth Amendment.<sup>125</sup> The Sixth Circuit agreed, not on the ground that the evidence was insufficient,<sup>126</sup> but rather on the basis that the trial court had unconstitutionally arrogated to itself the jury's role. Thus, *Mentz* squarely addressed the question of whether it is reversible error<sup>127</sup> for a court to remove the jurisdictional element of the offense from the jury's actual consideration, even where the record evidence would be sufficient for the jury to find that the elements had been proven.<sup>128</sup>

The *Mentz* court began with the proposition that the Sixth Amendment and the Due Process Clause prohibit the trial judge from directing the jury to come forward with a finding that an element of the offense has been proven.<sup>129</sup> The court went on to hold that the trial judge's conclusive statement that the banks were FDIC-insured at the time of the robbery amounted to an unconstitutional directed verdict in favor of the prosecution, because the instruction "had the effect of relieving the government of its burden of proving, beyond the *jury's* reasonable doubt, that the accused committed the crimes charged."<sup>130</sup> Importantly, the *Mentz* court also held that the jury instruction could not be rehabilitated via principles of judicial notice,<sup>131</sup> since the trial court failed to give a Rule 201(g) instruction. Noting that Rule 201(g) preserves the jury's traditional prerogative in a criminal case to ignore even uncontroverted facts in reaching a verdict, the court held:

A trial court commits constitutional error when it takes judicial notice of facts constituting an essential element of the crime charged, but fails

125. The trial court instructed the jury that each bank's deposits "were insured by the Federal Deposit Insurance Corporation at the time of the offenses alleged in the indictment." *Id.* at 318-19. The trial court did not instruct the jury pursuant to Rule 201(g) that they were not required to accept this instruction as binding. *Id.* at 322.

126. *Id.* at 320 ("It is not important that the jury might have reached a similar conclusion had it been given an opportunity to decide the issue under a correct instruction.").

127. The court, as discussed in more detail *infra*, also rejected the government's argument that the constitutional error was harmless.

128. *Mentz* also implicitly rejects the argument (discussed in note 34, *supra*) that a general prefatory "reasonable doubt" instruction cures the jury's later impression that an element has been completely removed from its consideration. The trial court in *Mentz* preliminarily instructed the jury that the government was required to prove the elements of the offense "beyond a reasonable doubt to warrant your finding of guilty in this case." *Mentz*, 840 F.2d at 318.

129. *Id.* at 320.

130. *Id.* (emphasis in original).

131. The *Mentz* court correctly noted that even if the trial court had taken judicial notice, such judicial notice would have been subject to Rule 201 since the jurisdictional element involved adjudicative facts. *Id.* at 322 n.13; *see also supra* Part IV.A (explaining why the element of special territorial jurisdiction is an adjudicative fact).

to instruct the jury according to Rule 201(g). The court's decision to accept the element as established conflicts with the bedrock principle that the government must prove, beyond the *jury's* reasonable doubt, every essential element of the crime.<sup>132</sup>

Taken together, *Williams II* and *Mentz* therefore stand for the following six key principles:

- (1) The jurisdictional element of a federal criminal offense is an adjudicative fact, of which the trial court can only take judicial notice subject to the requirements of Rule 201;<sup>133</sup>
- (2) The trial court may not render even a partial directed verdict in favor of the prosecution;<sup>134</sup>
- (3) Removing the jurisdictional element of a criminal offense from the jury, by judicial notice or otherwise, amounts to a partial directed verdict in violation of the defendant's right to jury trial;<sup>135</sup>
- (4) The court can only take judicial notice of the jurisdictional element based upon actual sources of reasonably unquestionable accuracy;<sup>136</sup>
- (5) When taking judicial notice, the court must separately<sup>137</sup> instruct the jury under Rule 201(g) that it retains its traditional prerogative to disregard the court's judicial notice and;

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132. *Mentz*, 840 F.2d at 322 (emphasis in original). The court's Rule 201 discussion can perhaps be characterized as dicta since it appears that the district court did not actually take judicial notice of the jurisdictional element. *Id.*

133. *Mentz*, 840 F.2d at 322; *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984) ("Williams II").

134. *Mentz*, 840 F.2d at 320.

135. *See Mentz*, 840 F.2d 315 (where the trial court did not actually take judicial notice, but its instruction removed the jurisdictional issue from the jury's consideration); *Williams II*, 17 M.J. at 214-15 (refusing to take judicial notice in the first instance on appeal, since doing so would bypass the jury).

136. *Mentz*, 840 F.2d at 322 ("Care should be taken by the court to identify the fact it is noticing, and its justification for doing so.") (quoting *Colonial Leasing Co. of New England, Inc. v. Logistics Control Group Int'l*, 762 F.2d 454, 459 (5th Cir. 1985)); *Williams II*, 17 M.J. at 214 (ordering a *DuBay* hearing in order to evaluate such sources).

137. *Mentz*, 840 F.2d at 321, 321 n.10 (reversing the conviction, despite the trial court's general prefatory reasonable doubt jury instruction).

(6) As discussed in detail *infra*, the trial court's failure to give a Rule 201(g) instruction is not subject to harmless error analysis, but rather requires reversal.<sup>138</sup>

## VII. ROSE-COLORED GLASSES? CONSTITUTIONAL PROHIBITIONS ON DIRECTED VERDICTS IN FAVOR OF THE PROSECUTION

### A. *The Right to a Jury Determination of All Elements of the Offense Beyond a Reasonable Doubt*

The Due Process Clause requires that the government prove every element of the crime beyond a reasonable doubt, and the Sixth Amendment requires that the jury make the determination of whether the government has met its burden.<sup>139</sup> These principles are the bedrock of the criminal justice system in the United States.<sup>140</sup> The Supreme Court recently reiterated the historical purpose of the right to jury trial:

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138. The *Bello* court, although affirming the appellant's conviction, also recognized that failure to give a Rule 201(g) instruction unconstitutionally deprives the defendant of his right to jury trial. *See United States v. Bello*, 194 F.3d 18, 25 (1st Cir. 1999) (holding that the trial court's judicial notice of special territorial jurisdiction in that case was permissible only because it gave a Rule 201(g) instruction, which "adequately safeguard[ed] the criminal defendant's Sixth Amendment right to a trial by jury"); *see also United States v. Prentiss*, 206 F.3d 960 (10th Cir. 2000). Although *Prentiss* did not involve judicial notice, the court's reasoning is important because it conducted an exhaustive inquiry into the nature of determining whether the jurisdictional element of a federal crime has been proven. In *Prentiss*, the defendant was convicted of arson under 18 U.S.C. § 1152, which requires proof both that the offense occurred in "Indian country" and that the crime occurred between an Indian and a non-Indian. *Id.* at 966. The court vacated the conviction because the indictment failed to allege (and the government introduced no proof of) the non-Indian status of the victim. *Id.* at 977. The *Prentiss* court held that this fundamental jurisdictional defect, in violation of defendant's Fifth Amendment grand jury indictment right, was not subject to harmless error analysis. *Id.*

139. *See United States v. Gaudin*, 515 U.S. 506, 510-15 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *In re Winship*, 397 U.S. 358, 364 (1970).

140. Justice Scalia, reviewing the historical evidence, has gone as far as to call the jury trial guarantee—the only one that appears both in the body of the Constitution and the Bill of Rights—the "spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting). Professor Akhil Reed Amar has also persuasively demonstrated the centrality of the right to jury trial in our constitutional system. *See generally Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169-72 (1995).



[T]o guard against a spirit of oppression and tyranny on the part of . . . rulers,” and “as the great bulwark of [our] civil and political liberties,” trial by jury has been understood to require that “the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.<sup>141</sup>

The Court has also directly addressed the trial court’s role in evidentiary matters in criminal cases:

[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors’ independent judgment in a manner contrary to the interests of the accused.<sup>142</sup>

Nonetheless, when it comes to jurisdictional elements of federal crimes, federal courts have regularly undermined these constitutional principles. It is clear, however, that at least as to elements that are clearly part of the statutory definition of the offense<sup>143</sup> (such as whether the offense occurred within “federal

141. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (internal citations omitted).

142. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (internal citations omitted).

143. The continuing debates regarding what is properly considered an element of the offense and when sentencing factors must be found by the jury are largely beyond the scope of this Article. It need only be noted here that the Supreme Court has made clear that it intends lower courts to take the role of the jury seriously in all contexts:

We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers’ fears “that the jury right could be lost not only by gross denial, but by erosion.”

But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.

*Apprendi*, 530 U.S. at 483-84 (internal citations omitted); *see also id.* at 500 (Thomas, J., concurring) (discussing the Court’s jurisprudence on what constitutes an element of the offense). In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* in invalidating Arizona’s capital punishment scheme, under which a judge rather than the jury finds the facts justifying a death sentence. As previously noted, *Apprendi* and *Ring* in fact provide a substantial basis for arguing that Rule 201(g) itself is unconstitutional because, even under the procedure outlined in this Article, the government need not actually submit proof of the jurisdictional element to the jury for determination beyond a reasonable doubt. While *Apprendi* and *Ring* are sentencing decisions, they may well be on a collision course with judicial notice of elements of criminal offenses in any

jurisdiction”), Supreme Court precedent requires that the jury determine whether the elements have been proved beyond a reasonable doubt. The predominant practice of today’s federal courts of completely removing the jurisdictional element from the jury’s consideration cannot be squared with these precedents. Convictions under these circumstances could nonetheless be affirmed on appeal, despite the constitutional error, under the harmless error doctrine. A proper understanding of the Supreme Court’s harmless error cases, however, indicates that the harmless error doctrine should not apply when the trial court has removed an element of the offense from the jury.

*B. Is Failure to Instruct the Jury that It Is Not Bound by the Court’s Judicial Notice Harmless Error?*

Courts looking for a reason to affirm a conviction despite fundamental constitutional error can find easy comfort in the harmless error doctrine.<sup>144</sup> Even where a court holds that the failure to give a Rule 201(g) instruction violates the right to jury trial, it may conclude that the error was harmless and that the conviction must therefore be affirmed. Harmless error review applies where the defendant has made an objection to the issue at trial and the error is one which is not so “fundamental” that it renders the verdict constitutionally unfair. If the error falls within the category of errors to which harmless error review applies, the reviewing court must then reverse unless the prosecution demonstrates that the error was actually harmless beyond a reasonable doubt.<sup>145</sup> A proper

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circumstance.

144. Actually, both the doctrines of plain error and harmless error are relevant to the issues raised by binding judicial notice in criminal cases. The plain error doctrine, incorporated in Federal Rule of Criminal Procedure 52(b), provides that an error not objected to at trial will only be grounds for reversal where: (1) there was an error; (2) that was clear or obvious under current law; (3) that affected defendant’s substantial rights; and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 734-36 (1993). Whether the appellate court is reviewing the error under the plain error or harmless error doctrine can make a difference. *See, e.g., United States v. Kerley*, 838 F.2d 932, 942 (7th Cir. 1988) (holding that the trial court’s failure to instruct the jury on the element of guilty knowledge was not plain error, but reversing nonetheless because the government failed to argue it was harmless). The discussion here, as a shorthand, refers only to the harmless error doctrine. Complete removal of the jurisdictional element from the jury would also be plain error because: (1) the Court’s Sixth Amendment cases clearly prohibit directed verdicts in favor of the prosecution; (2) the defendant enjoys a substantial right to an actual jury determination of all elements of the offense; and (3) given the fundamental nature of the jury trial guarantee, the fairness and integrity of criminal prosecutions suffer where the court substitutes its own judgment for the jury’s.

145. *See Neder*, 527 U.S. at 2.

understanding of the effect of the trial court's binding judicial notice in a criminal case indicates that harmless error review should not apply in such cases.<sup>146</sup>

There is a substantial body of Supreme Court and lower court precedent indicating that the complete removal of any element of a criminal offense from the jury is not subject to the harmless error rule.<sup>147</sup> In *Rose v. Clark*,<sup>148</sup> the defendant challenged a jury instruction stating that all homicides were presumed to be malicious, thus excusing the prosecution from proving this element of the offense.<sup>149</sup> The Court held that harmless error review applied to this constitutionally defective jury instruction.<sup>150</sup> The Court distinguished the instruction in *Rose* from those errors that render the verdict fundamentally unfair and therefore "require reversal without regard to the evidence in the particular

146. Application of the harmless error rule to constitutional errors first took root in *Chapman v. California*, 386 U.S. 18 (1967). The *Chapman* Court rejected the view that harmless error review could never apply to constitutional errors. Rather, the Court held, certain constitutional errors may "in the setting of a particular case [be] so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. The *Chapman* rule (that a limited class of constitutional errors may be subject to harmless error analysis) has been upended by more recent Supreme Court cases, which have made application of harmless error review to constitutional error the rule rather than the exception. See the discussion of *Neder*, 527 U.S. 1, and *Arizona v. Fulminante*, 499 U.S. 279 (1991), *infra*.

147. The Supreme Court has not yet squarely addressed the split in the circuits over whether completely removing an element of the offense from the jury's consideration can ever be harmless error. See *Teel v. Tennessee*, 498 U.S. 1007, 1008 (1990) (White, J., dissenting). The Court may soon be forced to confront the issue. The *Ring* Court remanded the case to the Arizona courts, noting that the determination of whether the error in that case (the judge, rather than the jury, finding the facts supporting the "pecuniary gain" aggravating factor triggering the death penalty) was harmless should be made by lower courts in the first instance. *Ring*, 536 U.S. at 609 n.7 (citing *Neder*, 527 U.S. at 25). In *Summerlin v. Stewart*, No. 98-99002, 2003 WL 22038399 (9th Cir. Sept. 2, 2003), the Ninth Circuit, in deciding to apply *Ring* retroactively, held that harmless error analysis did not apply to those pre-*Ring* cases where the judge, rather than the jury, found the aggravating factors triggering the death penalty. *Id.* at \*\*25-35. This case, also arising from Arizona's capital sentencing scheme, is likely to prompt Supreme Court review because of the importance of the decision and the now clear circuit split on whether *Ring* error is subject to harmless error review.

148. 478 U.S. 570 (1986).

149. *Id.* at 574-75 (citing *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979)); see also *In re Winship*, 397 U.S. 358, 364 (1970).

150. *Rose*, 478 U.S. at 582. The Court remanded the case to the court of appeals to determine whether the error was in fact harmless beyond a reasonable doubt. *Id.* at 584.

case.”<sup>151</sup> The Court included in that category those cases where a court directs a verdict for the prosecution, because in such cases “the [s]tate cannot contend that the deprivation was harmless because the evidence established the defendant’s guilt; the error in such a case is that the wrong entity judged the defendant guilty.”<sup>152</sup> Thus, the *Rose* Court reasoned that a finding of guilt by the wrong factfinder inherently renders the verdict fundamentally unfair. The Court distinguished the instruction in *Rose* from a directed verdict for the prosecution on the issue, because the instruction only created a presumption of malice; the jury still had to find the existence of the facts supporting malice beyond a reasonable doubt, and was free to reject the presumption.<sup>153</sup> Had the instruction in *Rose* stated that the judge found that malice existed, the Court’s opinion makes clear that harmless error review would not have applied and automatic reversal would have been required. This is the same framework required by Rule 201(g) since judicial notice, when taken subject to Rule 201(g), operates as a presumption that the jury may accept or reject.<sup>154</sup> When the court transforms this presumption into a partial directed verdict by failing to issue a Rule 201(g) instruction, *Rose* indicates that harmless error review should not apply. Moreover, as the Seventh Circuit has cogently explained, the fact that the directed verdict in such a case is partial rather than whole is a distinction without a constitutional difference. Harmless error review “also does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime . . . has been proved beyond a reasonable doubt, so that jury needn’t worry its collective head over that one.”<sup>155</sup>

Certain lower courts have followed *Rose*’s reasoning and held that the complete removal of an element of the offense from the jury’s consideration can never be considered harmless error. In *Mentz*, the Sixth Circuit concluded that

151. *Id.* at 577 (citing examples of errors never subject to harmless error analysis).

152. *Id.* at 578.

153. *Rose*, 478 U.S. at 580-81 n.8 (“Because a presumption does not remove the issue of intent from the jury’s consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue.”).

154. *See supra* note 119.

155. *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988). The defendant in *Kerley* challenged his conviction on the ground that, inter alia, the trial court’s instructions effectively removed from the jury the element of knowledge of the duty to register under the Selective Service Act. *Id.* at 935. After examining the theoretical basis for the harmless error doctrine, the court stated that “it is enough to note that among the errors to which the harmless-error rule does not apply is an error that has the *practical effect* of withdrawing the issue of guilt from the jury.” *Id.* at 938 (emphasis added); *cf.* *United States v. Gonzalez*, 110 F.3d 936, 946-48 (2d Cir. 1997) (holding that the alleged partial directed verdict in that case was not “structural error” requiring reversal without regard to the plain or harmless error doctrines because it was not a case where “the judge determines that the government’s evidence alone proves the element and thus takes it from the jury”) (citing *United States v. Mentz*, 840 F.2d 315, 320 (6th Cir. 1988)).

the trial court's taking judicial notice of the FDIC-insured status of the banks that were robbed, while failing to give a Rule 201(g) instruction, was not subject to harmless error review.<sup>156</sup> The court reasoned that "[b]y placing a judicial imprimatur on the government's proof with respect to an element of the offense, the faulty instruction directed a partial verdict for the prosecution, ensuring that the jury would not find *all* elements beyond a reasonable doubt . . . thereby rendering the trial fundamentally unfair."<sup>157</sup> Because the error was one that transcended the trial process, as opposed to an error in how the trial proceeded, the court held that removal of this element from the jury was not subject to harmless error review.

More recently, in *Summerlin v. Stewart*,<sup>158</sup> the Ninth Circuit, relying on *Sullivan*,<sup>159</sup> *Rose*,<sup>160</sup> and *Fulminante*,<sup>161</sup> held that *Ring*<sup>162</sup> error—a judge, rather than a jury, deciding the facts that lead to the death penalty—is not subject to harmless error review. The court reasoned that such an error is so fundamental that harmless error review does not apply.<sup>163</sup> The court held that the effect of the error in allowing a judge to find the facts triggering a death sentence meant that:

[T]he wrong entity found [the defendant] to be guilty of a capital crime. . . . A complete deprivation of the right to a jury is an error that does not arise during a presentation to a jury. . . . This type of error

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156. *Mentz*, 840 F.2d at 324.

157. *Id.* (emphasis in original) (internal citations omitted); see also *United States v. Prentiss*, 206 F.2d 960, 975 (10th Cir. 2000) (rejecting harmless error analysis in that case because "the [indictment's] complete omission of an essential element of the crime . . . is a fundamental jurisdictional defect that is not subject to harmless error analysis," despite the absence of prejudice to the defendant).

158. No. 98-99002, 2003 WL 22038399 (9th Cir. Sept. 2, 2003).

159. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

160. *Rose v. Clark*, 478 U.S. 570 (1986).

161. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

162. *Ring v. Arizona*, 536 U.S. 584 (2002).

163. The court's harmless error discussion was relevant to its determination under *Teague v. Lane*, 489 U.S. 288 (1989), that *Ring* applies retroactively to persons who had exhausted their direct appeals prior to *Ring*. The second element of the *Teague* analysis requires the court to determine whether the new procedural rule for which retroactive application is sought is a "'watershed rule of criminal procedure' that . . . alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction." *Summerlin*, 2003 WL 22038399, at \*15 (quoting *Teague*, 489 U.S. at 311). The court reasoned that constitutional errors that are not subject to harmless error review are by definition "structural" or "fundamental" and that such fundamental errors satisfy the second *Teague* requirement because the newly announced rule repudiating the error changes the understanding of essential procedural elements of the law. *Id.* at \*\*25-35.

cannot be cured, or determined harmless, by examining other [evidence] that may have been presented at trial.<sup>164</sup>

It must be recognized that recent Supreme Court cases<sup>165</sup> have struck a serious, but not fatal, blow to the reasoning of *Rose* and *Martin Linen*. In a sharply divided opinion, the Court in *Neder v. United States*<sup>166</sup> held that a jury instruction completely omitting an element of the offense (materiality of false statements in that case) was subject to harmless error review.<sup>167</sup> The *Neder* Court reasoned that all constitutional errors, aside from a limited class of cases, are subject to harmless error review.<sup>168</sup> Specifically, the Court held that there is only a very limited class of errors that are so “structural” that they transcend the trial process and require automatic reversal.<sup>169</sup> A jury instruction omitting an element of the offense, in the *Neder* Court’s view, is a “trial error” that does not necessarily render the verdict fundamentally unfair.<sup>170</sup> Moreover, the *Neder* Court held that the omission of an element of the offense from the jury instructions was in fact harmless in that case because evidence in the record incontrovertibly established materiality.<sup>171</sup>

At first blush, *Neder* appears to be the death-knell for cases such as *Rose* and *Martin Linen*. The *Neder* Court held that harmless error review applies where the trial court effectively prevents the jury from considering an element of the offense and decides the issue itself. But *Neder* did not purport to abrogate *Rose*.<sup>172</sup> The *Neder* Court, in fact, explicitly reaffirmed the validity of *Rose*’s

164. *Summerlin*, 2003 WL 22038399, at \*31.

165. *Neder v. United States*, 527 U.S. 1 (1999); *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Arizona v. Fulminante*, 499 U.S. 279 (1991).

166. 527 U.S. 1 (1999).

167. *Id.* at 7-8. The effect of the erroneous instruction in *Neder* was, at least on its face, the same as the type of binding judicial notice discussed in this Article: the trial court erred by “deciding the materiality element of [the] offense itself, rather than submitting the issue to the jury.” *Id.* at 8.

168. *Id.* at 7.

169. *See id.* at 8 (citing examples of structural errors requiring automatic reversal).

170. *Id.* at 8-9.

171. The Court found that there was evidence in the record proving that *Neder* failed to report over \$5 million in income, and that this evidence of materiality was overwhelming. *Id.* at 16. Accordingly, the error was harmless because the jury verdict would have been the same absent the error. *Id.* at 16-17.

172. There is also a substantial argument that the *Neder* Court simply got it wrong. *See Neder*, 527 U.S. at 30-40 (Scalia, J., concurring in part & dissenting in part). Four Justices agreed that the harmless error doctrine should not apply where the jury was deprived of the opportunity to actually find the defendant guilty of every element of the offense. *See id.* (Scalia, J., concurring in part & dissenting in part) (joined by Justices Souter & Ginsburg); *id.* at 28-30 (Stevens, J., concurring in part & concurring in the judgment). Justice Scalia’s opinion, although arguing that harmless error analysis should

holding that the government may not direct a verdict in favor of the prosecution.<sup>173</sup> The Court distinguished *Rose* on the ground that the instruction in *Neder* did not amount to a partial directed verdict because the jury still had the opportunity to consider evidence presented at trial establishing materiality.

Moreover, binding judicial notice of the jurisdictional element of the offense is, even under *Neder*, “so intrinsically harmful as to require automatic reversal . . . without regard to [its] effect on the outcome.”<sup>174</sup> It is important to understand what *Neder* actually held. The debate in *Neder* centered on whether harmless error review applies when the jury *could* have concluded, *based on evidence in the record*, that the element was proven (the majority’s view) or whether automatic reversal is required where the jury did not *actually* make a determination on the omitted element (the dissent’s view).<sup>175</sup> *Neder* therefore actually held that harmless error review applied in that case because there was evidence in the trial record from which the jury *could* have concluded that the missing element had been proven beyond a reasonable doubt.

Even under *Neder*, judicial notice of federal jurisdiction, absent a Rule 201(g) instruction, should not be subject to harmless error analysis. In such a case, no amount of speculation regarding what the jury “could” have found will help. The jury could not have possibly found that the evidence established the jurisdictional element because there was no evidence in the record regarding that element. The purpose of judicial notice is that it excuses the party with the burden of proof on the issue from having to submit evidence to the jury proving it.<sup>176</sup> Thus, even reading *Neder* broadly, binding judicial notice of the jurisdictional element of the offense is “structural error” requiring automatic reversal. Such an error defies harmless error analysis because it is not one that can “be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.”<sup>177</sup> How could the jury have rationally reached the same conclusion absent the error if there was no evidence from which it could have done so?<sup>178</sup>

not be applied, stated that the error would not be reversible under the plain error doctrine, which applies where the defendant has failed to object at trial. *Id.* at 34-35 (Scalia, J., concurring in part & dissenting in part).

173. *Id.* at 17 n.2 (“We have no hesitation reaffirming *Rose* at the same time that we subject the narrow class of cases like the present one to harmless error review.”).

174. *Id.* at 7.

175. *Id.* at 38 (Scalia, J., concurring in part & dissenting in part) (“Harmless-error review applies only when the jury *actually renders* a verdict—that is, when it has found the defendant guilty of all the elements of the crime.”) (emphasis in original).

176. *See supra* note 119 (stating that judicial notice relieves a party of the necessity of submitting proof to the jury on the issue).

177. *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991).

178. The question is important for appellate review. Even allowing the sort of speculation approved in *Neder* about what the jury “could” have found, how can an

Furthermore, even if binding judicial notice of an element of the offense were subject to harmless error analysis, the error would almost never actually be harmless. When harmless error review applies, the reviewing court must review the remainder of the evidence against the defendant to determine whether the error was harmless beyond a reasonable doubt.<sup>179</sup> For the same reasons as discussed above, binding judicial notice of the jurisdictional element would seldom actually be harmless. Where judicial notice is taken, there simply is no other evidence against the defendant proving the judicially noticed element of the offense, because judicial notice, by definition, excuses the prosecution from presenting the relevant evidence to the jury. The only circumstance where this type of error could be harmless is in the highly unusual case where the government actually submitted evidence to the jury sufficient to prove the matter beyond a reasonable doubt, but the trial court nonetheless took judicial notice and failed to give a Rule 201(g) instruction.<sup>180</sup>

### VIII. PROPOSAL AND CONCLUSION

The Sixth Amendment, Rule 201(g) and relevant Supreme Court precedent dictate that courts be extremely cautious when taking judicial notice in criminal cases. This Article suggests the use of the following procedure when courts take judicial notice of the jurisdictional element of federal criminal offenses.

*First*, the trial court may only take judicial notice of special territorial jurisdiction when the prosecution presents, at a preliminary hearing held specifically to resolve the issue, sources of reasonably unquestionable accuracy demonstrating that the federal government properly acquired (and did not subsequently cede) jurisdiction over the exact location of the offense. Such sources include official, verified government maps delineating the jurisdictional boundaries and letters ceding and accepting jurisdiction. These sources need not be admissible in evidence.

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appellate court intelligently engage in such speculation where there is no evidentiary basis for it?

179. *Neder*, 527 U.S. at 7; *Fulminanté*, 499 U.S. at 310.

180. *Mentz* provides an example of such a circumstance. In *Mentz*, the government produced evidence at trial proving that the banks were FDIC-insured. *See United States v. Mentz*, 840 F.2d 315, 320 (6th Cir. 1988). The *Mentz* court held that the presence of evidence in the record from which the jury could have concluded that the banks were FDIC-insured did not render the error harmless. *See id.* at 320 (“It is not important that the jury might have reached a similar conclusion had it been given an opportunity to decide the issue under a correct instruction.”). Reading *Neder* as broadly as possible, however, the error in *Mentz* could be subject to harmless error review, since the jury in *Mentz* could have concluded, based on record evidence, that the banks were FDIC-insured. *See Neder*, 527 U.S. at 16-17.



This requirement resolves several issues. First, the risk of error is reduced because the prosecution is required to actually submit sources establishing the jurisdictional element. By requiring the court to hold a preliminary hearing on the issue, this aspect of the proposal allows the court to screen out those cases where judicial notice is not appropriate, and permits the prosecution to prepare evidence establishing this element to present to the jury if judicial notice is inappropriate. Furthermore, it recognizes that the proper Section of Rule 201 supporting judicial notice in this circumstance is 201(b)(2), because a federal installation's jurisdictional status is not "generally known" to an average layperson. Finally, this first requirement acknowledges that judicial notice is not intended to be a mini-trial subject to the same limitations as trial on the merits. Rather, the court's judicial notice can be based on sources that would not be admissible in evidence.

*Second*, the sources the prosecution presents must establish to a high degree of indisputability that the offense occurred within the federal government's special territorial jurisdiction. If the sources submitted in support of federal jurisdiction or material submitted in rebuttal by the defendant raise any doubts as to the existence of special territorial jurisdiction, the trial court cannot take judicial notice and the matter must be proven to the jury.

This element of the proposal recognizes that the normal manner of establishing facts is through the adversary process, i.e., presentation of evidence to the jury, cross-examination, and proof in rebuttal. The drafters of the Federal Rules intended that judicial notice be the exception rather than the rule and that it be used only in those cases where there is a high degree of indisputability concerning the judicially noticed facts. When this level of certainty does not exist, the case should revert to the normal adversary process. Thus, where the prosecution fails to submit proper proof of the existence of the jurisdictional element; or where the material submitted, standing alone, does not show a high degree of indisputability; or where the defendant submits materials sufficiently rebutting the prosecution's proof; or where the court is simply unsure of whether the federal government enjoys jurisdiction over the area in question, the court cannot take judicial notice.

*Third*, if the court can properly take judicial notice, it must separately instruct the jury that they need not accept the court's judicial notice as binding and that they may find that the matter has not been established beyond their own reasonable doubt. The instruction need not follow a particular form as long as it fairly informs the jury that the court's judicial notice is not binding.

This element of the proposal requires that federal courts actually follow Rule 201(g), in order to protect the accused's Sixth Amendment right to a jury determination of all elements of the offense. In accordance with cases addressing the issue, this aspect of the proposal recognizes that the instruction need not track the exact language of Rule 201(g), as long as it truly conveys to the jury that they are free to reject the court's judicial notice. It is not sufficient that the court generally instruct the jury as to proof beyond a reasonable doubt.

To ensure that the jury appreciates that it is free to disregard the court's judicial notice, the Rule 201(g) instruction should be given separately.

*Fourth*, the trial court's failure to give such an instruction should be considered structural error requiring automatic reversal. This element is grounded in the Supreme Court's harmless error cases. An error is only subject to harmless error review where it can be quantitatively assessed in light of other evidence establishing the matter. Because judicial notice in a criminal case excuses the prosecution from presenting to the jury any evidence establishing the matter judicially noticed, a partial directed verdict by virtue of the court's failure to give a Rule 201(g) instruction cannot be so assessed. In such a case, there is no way that the jury could have found, based on other evidence in the record, that the matter was proven beyond a reasonable doubt. Such an error should therefore be the basis for reversal and a new trial.

Critics of Rule 201(g) (and the proposal above) may contend that it is a mere technicality and a new trial should not be granted where there is substantial evidence that the defendant is in fact guilty.<sup>181</sup> Indeed, the Tenth Circuit in *Piggie* justified its refusal to apply Rule 201(g) by stating that "[t]he evidence establishing guilt is not merely sufficient, it is overwhelming."<sup>182</sup> In other words, we all know the defendant is guilty; why should he be granted a new trial based on a technicality?

While this argument admittedly carries some emotional appeal, it misses the critical question raised in this Article. The defendant may be "guilty," but guilty of what? The defendant, for example, may have in fact stolen the car, and may therefore be "guilty" in the lay sense. But he is not guilty of the federal crime specified in 18 U.S.C. Section 2119 unless the prosecution proves that the car was stolen from an area within the special territorial jurisdiction of the United States.<sup>183</sup> The state in which the car was stolen is capable of prosecuting this offense, and a state jury may find the defendant guilty of a state crime that does not include a federal jurisdictional element. The fact that the defendant may have done the "substantive" acts that the prosecution alleges does not mean he is guilty of the federal crime with which he was charged.

Some commentators have suggested that Congress amend Rule 201(g) to make the court's judicial notice binding in both civil and criminal cases, for the

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181. See Turner, *supra* note 28, at 200 (stating that such reversal is not troubling "to those who regard the trial process as the judicial equivalent of the 'mother may I' game—a game in which one loses if mother has not been asked for her permission to take 'two giant steps forward'").

182. United States v. Piggie, 622 F.2d 486, 488 (10th Cir. 1980).

183. Cf. United States v. Prentiss, 206 F.3d 960, 969 (10th Cir. 2000) ("The government must allege and prove [the jurisdictional element of the offense]; otherwise, 'there can be no federal crime.'") (quoting Hugi v. United States, 164 F.3d 378, 381 (7th Cir. 1999)).

sake of jurisprudential honesty and consistency.<sup>184</sup> This has the advantage of simplicity and avoids the undermining of faith in the criminal justice system that occurs when courts manipulate and avoid legal rules they find distasteful. Congress is of course free to amend Rule 201(g) to make the court's judicial notice binding in all cases.<sup>185</sup> There is, however, a simpler way of resolving this quandary. That is for the prosecution to introduce evidence at trial or, at a minimum, in an abbreviated evidentiary hearing of the nature suggested above, establishing the existence of the jurisdictional element of the charged offense. Federal courts should not, through misapplication of judicial notice or over-eager application of the harmless error doctrine, substitute their own judgment for that of the jury.<sup>186</sup> This is particularly true given Rule 201(g)'s express requirement that federal trial courts inform the jury that they retain the responsibility to consider whether *every* element of the offense has been proved beyond a reasonable doubt. Federal courts may find the Sixth Amendment and Rule 201(g) to be inefficient when it comes to jurisdictional elements of criminal offenses. Nonetheless, the desire for efficiency should not trump the defendant's right to jury trial.

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184. See, e.g., Turner, *supra* note 28.

185. Eliminating Rule 201(g)'s limitation on judicial notice in criminal cases would, however, raise substantial Sixth Amendment concerns, as discussed in this Article.

186. As demonstrated above, routine application of the harmless error doctrine to constitutional error encourages courts and prosecutors to undermine the right to jury trial: An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case. It is particularly striking to compare the Court's apparent willingness to forgive constitutional errors that redound to the prosecutor's benefit with the Court's determination to give conclusive effect to trivial errors that obstruct a defendant's ability to raise meritorious constitutional arguments.

Rose v. Clark, 478 U.S. 570, 588-89 (1986) (Stevens, J., concurring).