NEITHER CONSTITUTIONALLY DEMANDED NOR ACCURATELY INTERPRETED HISTORY: THE JUDICIAL CONSERVATIVES' POCKMARKED PATHWAY OF MILITARY LAW TO THE UNITARY EXECUTIVE

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INTRODUCTION

On July 7, 1894, in the midst of the Pullman Strike, a railroad executive penned to Secretary of War Daniel Lamont. "The present labor strikes across throughout the country have prostrated business beyond anything that has ever occurred . . . . As I heard one of the judges in our Supreme Court say: 'There is a higher law, even if it comes to the law of necessity.'"[1] The executive's letter does not identify the particular justice, but by the time it was written, President Grover Cleveland had ordered General Nelson Miles to use regular army forces for the protection of federal buildings, the mails, and other interests including railroads.[2] The continuation of the strike after a federal judge issued an injunction against Eugene Debs and other strike leaders created one basis for the use of federal military forces in a domestic operation.[3] And, while the 1878 Posse Comitatus Act set limits on employing the army as a domestic police force, Cleveland did not believe the law prohibited him from doing so.[4] In reality, his Attorney General, Richard Olney, determined, without publicly articulating such, that the act was an unconstitutional infringement on presidential power.[5] Outside of the legal

1. Letter from Jas. J. Hill, President, Great N. Ry. to D.S. Lamont, Colonel (July 7, 1894) (on file with the Library of Congress).

2. *See* JERRY MARVIN COOPER, THE ARMY AND CIVIL DISORDER: FEDERAL MILITARY INTERVENTION IN AMERICAN LABOR DISPUTES, 1877–1900, at 232 (Univ. of Wisconsin, ed. 1971).

3. *Id.*; *see In re* Debs, 158 U.S. 564, 570 (1895).

4. Posse Comitatus Act, 18 U.S.C. 1385 (1878). On Cleveland's basis for ordering federal military forces, see Steven I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE. L. J., 149, 185 (2004). For an older interpretation of the Court siding with both the railroads and recognizing a grant of power to Cleveland, see Francis D. Wormuth, *The Nixon Theory of War Power: A Critique*, 60 CAL. L. REV. 623, 668–69 (1972).

5. Letter from Richard Olney to W.H. Miller (July 13, 1894) (on file with the Library of Congress). Miller was the attorney general during Benjamin Harrison's presidency. *Id.*

record, it is noteworthy that Justice Stephen J. Field—one of the justices that upheld a contempt determination against Debs for violating the injunction—had earlier corresponded with Miles about the use of the army for domestic policing.[6] It is not merely a coincidence of chronology that in the waning days of Cleveland's second term, Field, along with a unanimous Court, issued *Swaim v. United States*, recognizing an unusual degree of presidential power over courts-martial.[7]

Although Field's discussions with Miles might be viewed as a judicial disregard of the Constitution's separation of powers, it is important to recognize that the soldiers commanded into strike duty fell under a unique jurisdiction with an exceedingly limited access to an independent judicial branch.[8] A failure to follow either Cleveland's or Miles' orders, along with a number of other violations of the military law, could result in a court-martial which, at the time, was a trial substantially dissimilar to a contemporary federal criminal trial.[9] For instance, until 1968, courts-martial did not have a military trial judge, and prior to World War II, a judge advocate served in a triple role as prosecutor, defense counsel, and legal advisor to the court members.[10] Moreover, as political scientist Clinton Rossiter once stated, a president is "the fountainhead of military justice," meaning that as commander in chief, a president has control over the military's trials.[11] Perhaps, then, it may be surprising to make a claim that had such an event occurred less than a half century before the strike, a court-martialed soldier would have had greater access to the civil courts, and would have been subject to a system of military discipline with a lesser degree of presidential

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6. *See* Joshua E. Kastenberg, *National Security and Judicial Ethics: The Exception to the Rule of Keeping Judicial Conduct Judicial and the Politicization of the Judiciary*, 122 ELON L. REV. 282, 298–99 (2020).

7. *See generally* Swaim v. United States, 165 U.S. 553 (1897).

8. *See* Kastenberg, *supra* note 6, at 298–301.

9. On obedience to orders, see WILLIAM CHETWOOD DE HART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL: WITH A SUMMARY OF THE LAW OF EVIDENCE, AS APPLICABLE TO MILITARY TRIALS ADAPTED TO THE LAWS, REGULATIONS, AND CUSTOMS OF THE ARMY AND NAVY OF THE UNITED STATES, 165 (D. Appelton & Co. 1869). De Hart related, "Hesitancy in the execution of a military order is clearly, under most circumstances, a serious offence, and would subject one to severe penalties; but actual disobedience is a crime which the law has stigmatized as of the highest degree." *Id.* On courts-martial procedure prior to the 1950 Uniform Code of Military Justice, see Frank E. Taylor, *Military Courts-Martial Procedure Under the Revised Articles of War*, 12 VA. L. REV. 463–94 (1926); JOSHUA E. KASTENBERG, WAR AS LAW, LAW AS WAR: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865, at 57–71 (2011).

10. James A. Mounts, Jr. & Myron G. Sugarman, *The Military Justice Act of 1968*, 55 A.B.A. J. 470, 470 (1969). Courts-martial operated without a trial judge until the passage of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; *see also* Weiss v. United States, 510 U.S. 163, 167 (1994).

11. CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 108–09 (expanded ed. 1979).

authority.[12] Nonetheless, this last statement, no matter how remarkable, is a fact of United States history.[13]

This aspect of legal history has been, including most recently in the Court and on the Court of Appeals for the Armed Forces (CAAF), ignored in a manner that is dually deleterious to the due process rights of service-members as well as to the constitutional relationship between service-members and their Commander in Chief. Additionally, there has been a misinterpretation of the underlying facts and holdings in post-Civil War judicial decisions, and some of those decisions have enabled an "imperial presidency," partly because of the embedding of dicta.[14] As an example, in *Jacobson v. Massachusetts*, an opinion involving state power to mandate vaccines for public school attendance, there is a statement that a male citizen

> may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and, risk the chance of being shot down in its defense.[15]

Justice John Marshal Harlan, the author of *Jacobson*, provided no citation to support this statement.[16] While Harlan's military compulsion statement may be theoretically correct, it was hardly applicable to Jacobson's appeal and the expanse of this compulsion has never been employed to the extent he supposed it could be.[17] However, a government that can compel citizens into the ranks of the military may also subject them to a disciplinary scheme resident in the executive branch rather than a system of criminal and civil justice that are overseen by an independent judiciary, which is precisely what occurred to over four million male United States citizens less than a decade after *Jacobson*.[18]

Three recent judicial decisions highlight the "pockmarked path" referenced in the title: Justice Samuel Alito's dissent in *Ortiz v. United States* Judge Gregory E. Maggs's concurrences in the 2021 CAAF decision, *United*

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12. *See* John F. O'Conner, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIA. L. REV. 177, 188 n.89 (1997).

13. *See id.*

14. *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

15. *Id.* at 29.

16. *Id.*

17. *See, e.g.*, Spencer E. Davis, *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exceptions*, 19 FLA. ST. U. L. REV. 191, 195–96 (1991). For the long history of conscientious objection, see R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH L. REV. 409, 414 (1952); John Whiteclay Chambers II, *Conscientious Objectors and the American State from Colonial Times to the Present*, *in* THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 23, 25–28 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993).

18. *See generally* Selective Draft Law Cases, 245 U.S. 366 (1918); United States *ex rel* Bergdoll v. Drum, 107 F.2d 897, 900–01 (2d Cir. 1939).

States v. Begani, and the 2020 CAAF decision, *United States v. Bergdahl*.[19] *Ortiz* arose as a challenge against a military judge's appointment to also serve as a judge on the Court of Military Commission Review (CMCR), but the Court spent much of its time analyzing its own jurisdictional reach to courts-martial through *certiorari*.[20] (The CMCR is the appellate review court for captured belligerents held at Guantanamo Naval Base and in other areas under United States custody who have been tried in military commissions.)[21] *Begani* arose from an unsuccessful challenge to the continued extension of military jurisdiction over retired service-members in receipt of a "pension."[22] *Bergdahl*, perhaps the most publicly known of the three decisions, originated with former President Donald Trump's false and inflammatory claims against a service-member who pled guilty to desertion.[23] Because Trump was the Commander in Chief of the Armed Forces at the time of Bergdahl's court-martial, he also had the authority to issue orders to the military judge, prosecutor, defense counsel, and several potential witnesses.[24]

This Article is divided into four parts, though in a skipped chronological-thematic hybrid format. Part I analyzes *Tarble's Case*, including its Civil War origins as well as the statutory history and intent underlying the extension of military jurisdiction over retired military officers.[25] Authored by Field, the Court in *Tarble* dismantled a part of the military law which had existed since the nation's beginning: state court authority to issue writs to federal military officers.[26] This Part also touches upon the influence of William Winthrop and Frederick Bernays Wiener, two of the more prominent military law scholars on the judiciary's views of military jurisdiction.[27] Part II travels back to the Early Republic to provide a historic analysis of the practice of courts-martial in light of the Framers'

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19. Ortiz v. United States, 138 S. Ct. 2165, 2189–2206 (2018) (Alito, J., dissenting); United States v. Bergdahl, 80 M.J. 230, 248 (C.A.A.F. 2020) (Maggs, J., concurring); *see generally* United States v. Begani, 81 M.J. 273 (C.A.A.F. 2021) (Maggs, J., concurring).

20. *Ortiz*, 138 S. Ct. at 2170. The Court's focus on its jurisdictional reach was largely a product of an amicus brief from Professor Aditya Bamzai at the University of Virginia. *See* Mike Fox, *U.S. Supreme Court Opinion Centers Largely on Professor Aditya Bamzai's Argument*, UNIV. OF VA. SCH. OF L. (June 26, 2018), https://www.law.virginia.edu/news/201806/us-supreme-court-opinion-centers-largely-professor-aditya-bamzais-argument.

21. 10 U.S.C. § 950f.

22. *See, e.g.*, United States v. Begani, 79 M.J. 767 (N.M.C.C.A. 2020).

23. *Berghani*, 80 M.J. at 232–34. *See* Justin Oshana, *Opinion: I Led the Prosecution Against Bergdahl*, WASH. POST (Aug. 31, 2020), https://www.washingtonpost.com/opinions/2020/08/31/i-led-prosecution-against-bowe-bergdahl-trump-made-my-job-much-harder/.

24. *See* U.S. CONST. art. II, § 2, cl. 1 which reads in pertinent part: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . . . " On the matter of presidential authority to issue orders, see generally Martin v. Mott, 25 U.S. 19 (1827).

25. *See infra* Part I (analyzing the origins, intent, and impact of *Tarble's Case*).

26. *See infra* Part I (analyzing the impact of the decision in *Tarble's Case*).

27. *See infra* Part I (discussing the influence of two prominent military law scholars on military jurisdiction).

standing army fears.[28] In doing so, both state and federal court action are considered because state judicial officials issued writs on federal military officers holding service-members and militia alike in custody and, in doing so, shaped the practice of military law.[29] This Part also draws a distinction in broad presidential authority over naval courts-martial than existed in army courts-martial.

Having begun the Article with an analysis of later nineteenth century judicial opinions and statutory law and then transiting to pre-Civil War practice, Part III returns to the post-Civil War and examines the extension of military jurisdiction over the nation's enlisted service-members, including the establishment of enlisted retirements with the possibility of a lifetime amenability to court-martial jurisdiction.[30] This Part also notes the role of William Howard Taft in the shaping of military law. Part IV analyzes the diminution of the standing army fears in the federal judiciary as well as the shaping of a military legal construct that enabled an overseas empire and a military force that would be on notice of a heightened degree of obedience to presidential authority, including in constitutionally questionable operations.[31] In doing so, particular attention is paid to *Swaim* and *Hamilton v. McClaughry*.[32] Part IV also dissects Justice Alito's *Ortiz* dissent as well as Judge Maggs' *Begani* and *Bergdahl* concurrences and argues that both jurists have not engaged a viable historic method but rather chosen a path that favors executive supremacy to the detriment of service-member rights.[33] The Article concludes with an argument that the flawed historicism in the field of military law has led to an uncompelled pathway of executive authority based on a perceived necessity rather than on the original construct of the nation.[34]

Before proceeding to the first part, it is critical to recognize that United States military law developed in a dichotomous manner, which was constrained both by a fear of a standing army as well as the Constitution on the one hand and with the military becoming its own law-maker on the other. The Constitution's Framers created limits on the executive's control of the military as a textual matter in emplacing into the document the "Make Rules Clause," the "Militia Clauses," and how the military is funded.[35] Until the

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28. *See infra* Part II (discussing the history of the practice of courts-martial).

29. *See infra* Part II (discussing the impact that the practice of courts-martial had on military law).

30. *See infra* Part III (examining post-Civil War military and courts-martial jurisdiction).

31. *See infra* Part IV (analyzing the reduction in fear of standing armies).

32. *See infra* Part IV (discussing *Swaim* and *Hamilton v. McClaughry*).

33. *See infra* Part IV (discussing the reasoning in two jurists' opinions in three different military law cases).

34. *See infra* Part IV (arguing the impact that flawed historicism has had on military law).

35. *See* U.S. CONST. art. I, § 8, cl. 14 (which places in Congress, rather than the president, the power to "make Rules for the Government and Regulation of the land and naval Forces."). The Constitution proscribes to Congress the authority to limit predicate conditions for calling the militias into federal service. *See id.* art. I, § 8, cl. 15. While the Constitution authorized Congress to "provide for organizing, arming, and disciplining the militia," it also left to state governments the authority to appoint officers and authorize militia training. *See id.* art. I, § 8, cl. 16. Finally, in mirroring the earlier British Mutiny Act,

enactment of the Uniform Code of Military Justice (UCMJ) in 1950, the Army and Navy were governed by separate laws with distinctive differences, particularly in regard to presidential authority.[36] For the Army, Congress created the Articles of War, and the Navy's discipline was governed by the Rules and Regulations for the Government of the Navy.[37]

The supremacy of the civil law over the military, including claims of military necessity, became evident during the Revolution when General Nathanael Greene insisted to Chief Justice Thomas McKean on the Pennsylvania Supreme Court that a subordinate officer accused of a crime was essential to the war effort, and McKean answered that a sitting judge was under no obligation to obtain the Army's consent prior to arresting an officer.[38] Also evidencing the supremacy of the civil law is the 1778 court-martial record of Lieutenant Carpenter.[39] He was accused by his colonel of abandoning his post, but before the court-martial took evidence, it delayed commencing so that he could seek habeas from a local civil magistrate with the following statement:

> The court having taken into consideration the objection and the plea of Lieutenant Carpenter are of the opinion that he has a right to object to the jurisdiction of this court and is entitled to be tried agreeable to the first article of the 17th section of the rules and regulations for the better government of the troops.[40]

While it is true that Carpenter's court-martial was one of thousands of military trials, the record indicates that the supremacy of the civil courts also meant that the civil courts could decide a subject matter jurisdiction issue before a court-martial proceeded.[41] After the Constitution became the supreme law, access to both the federal and state courts continued, in effect maintaining the superiority of civil law over the military.[42] In November of

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Congress has the authority to fund the army but for no more than a two-year period of time. *See id*. art. I, § 8, cl. 14; *see also* Stephen Skinner, *Blackstone's Support for the Militia*, 44 AM. J. LEGAL HIST. 1, 10 (2000).

36. *See* Captain John T. Wills, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39, 51–54 (1972).

37. David J. Barron & Martin S. Lenderman*, The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 971–72 (2008).

38. Herbert A. Johnson, *American Constitutionalism and the War for Independence*, 14 EARLY AM. STUD. 140, 146 (2016) (citing E. WAYNE CARP, TO STARVE AN ARMY: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE, 1775-1783, 3–4 (1984)).

39. Proceedings of a General Court Martial Held at White Plains, NY (July 10, 1778).

40. *Id.*

41. The First Article of the 17th section of the 1776 Articles of War read, in pertinent part: "That such militia and minute-men as are now in service, and have, by particular contract with the respective states, engaged to be governed by particular regulations while in the continental service, shall not be subject to the above articles of war." 1776 Articles of War, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 970 (2d Ed. 1920).

42. *See* O'Conner, *supra* note 12, at 188–90.

1814, Congressman Nathaniel Macon (R-NC) gave his thoughts to Joseph Hopper Nicholson, a former member of Congress from Maryland serving as a judge on Maryland's highest court that, while the Constitution could enable obligatory military service for citizens not enrolled in a militia, the citizens would not lose their right to seek habeas in the nation's courts.[43] That this discussion was occurring during the midst of an unpopular war with Britain by two men who supported President James Madison's decision for war makes it all the more poignant.[44]

And, while in 1827, in *Martin v. Mott*, perhaps the first definitive statement on presidential authority in crisis times to order the full-military into the defense of the country without waiting for the sanction of the courts, the Court did not upend the ability of a citizen ordered into the service to later seek redress for wrongs committed by the federal government in the courts, including the state courts.[45] In 1818, a citizen named Jacob E. Mott who was court-martialed for his failure to muster into the militia when called to do so appealed through New York's courts.[46] Nowhere in *Mott* did the Court terminate the ability to undertake this process.[47] *Mott's* contentions, such as the court-martial not meeting the strict standards of the Articles of War in terms of the numbers of officers sitting on the court-martial, were determined by the justices not to be a basis for overturning the court-martial conviction, but the opinion left open the possibility for other claims of due process deficits.[48]

Nowhere in Justice Alito's dissent or in Judge Maggs's concurrences is there a mention that the superiority of the civil law was a feature of military law in the Early Republic.[49] Nor does either jurist seem to avail himself of

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43. Letter from Nathaniel Macon to Joseph Hopper Nicholson, (Nov. 5, 1814) (on file with the Library of Congress). Macon's first letter read:

> Can a man, under the Constitution of the U.S., be put in the regular army without his consent? Is not the authority to raise an army as obligatory on one class as another. If it is, cannot a man be compelled to serve as an officer as well as a soldier . . . . The regular army has been recruited by voluntary enlistment . . . and as far as I have understood of the Constitution of the U.S. has been that the regulars need to be recruited, and the militia could only be forced into the service. It is true that the Constitution does not limit the time that the militia may be kept in service, but the time what it may, they are to be commanded by officers appointed by the states and not by the U.S. Can a man, except in the militia, be put under military law, without his consent, and what has become of the habeas corpus if he can be put in the regular army where the military law governs?

Id. Macon's second later stated in pertinent part: "But still I conceive there is some difference between the service of a juror, and overseer of a road, and that of a regular soldier, neither of the two kinds are for a moment deprived of the rights of Habeas Corpus." Letter from Nathaniel Macon to Joseph Hopper Micholson (Nov. 14, 1814) (on file with the Library of Congress).

44. SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 156 (2005).

45. *See generally* Martin v. Mott, 25 U.S. 19 (1827).

46. *Id.* at 21–23.

47. *See generally id.*

48. *Id.* at 34–35.

49. *See generally* Ortiz v. United States, 138 S. Ct. 2165 (2018) (Alito, J., dissenting); United States v. Bergdahl, 80 M.J. 230, 248 (C.A.A.F. 2020).

the two major historic repositories that contain courts-martial records and other data from the Early Republic: the Library of Congress and the National Archives and Records Administration.[50] This is problematic for several reasons beyond the fact that both courts and both repositories are located very close to the courts in the nation's capital.[51] Chiefly, the military law was unique because while the Constitution emplaced the authority to craft it in the Congress rather than the executive, military law was not only resident in statutes but also by the application of an extra-legislative *lex non scripta* (custom of the service) and the origins of various practices are partly found in these repositories.[52]

In 1812, the Supreme Court, in *United States v. Hudson and Goodwin*, created the essential basis for federal criminal law by eliminating the common law crimes from the federal criminal construct.[53] But the military law contained a general article as well as a prohibition against conduct unbecoming an officer and gentleman, and this exempted the military establishment from *Hudson and Goodwin*.[54] Congress also created federal criminal law procedure such as the jury of twelve citizens.[55] But the military was exempt from both this construct and the rule of lenity, and not because Congress specified this to be the case but because the legislative branch embedded both a *lex non scripta* flexibility and procedural flexibility into the military law.[56]

An early example of this embedded flexibility is that the Sixty-Fourth Article of War required a minimum of five officers and a maximum of thirteen, and the number could only be reduced below thirteen if maintaining the thirteen would be of a "manifest injury to the service."[57] "In 1819, Attorney General William Wirt issued an opinion that unless a court-martial explained why manifest injury to the army would occur . . . , the court-martial would not be considered to have possessed jurisdiction."[58] During the War of 1812, when the War Department court-martialed one of its senior-most generals, Isaac Hull, the court-martial departed from these

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50. *See generally Ortiz*, 138 S. Ct. at 2189 (Alito, J., dissenting); *Bergdahl*, 80 M.J. at 240.

51. *See generally Ortiz*, 138 S. Ct. at 2189 (Alito, J., dissenting); *Bergdahl*, 80 M.J. at 240.

52. On the military law also being composed of *lex non scripta*, see Taylor, *supra* note 9, at 463.

53. *See generally* United States v. Hudson, 11 U.S. 32 (1812); *see also* Gary D. Rowe, *The Sound of Silence: United States v. Hudson and Goodwin, the Jeffersonian Ascendancy, and the Abolition of Common Law Crimes*, 101 YALE L. J. 919, 920 (1992).

54. *See* JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE, AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I 53–55 (2017).

55. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 CHI. L. REV. 867, 870 (1994); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 n.2 (5th ed. 1891).

56. Taylor, *supra* note 9, at 463 (explaining the embedded flexibility of military law).

57. WINTHROP, *supra* note 41, at 982.

58. Joshua E. Kastenberg, *The Limits of Executive Power in Crisis in the Early Republic:* Martin v. Mott*—An Old Gray Mare—Reexamined Through Its Own History*, 82 LA. L. REV. 161, 178–79 (2021).

norms by necessity.[59] Although the court-martial did not fall below thirteen officers, all but one of the officers were junior to Hull, and some of the officers who decided Hull's guilt and sentenced him to death were not present during parts of the trial, though they read the trial record prior to voting to convict.[60] In other words, Hull's court-martial suffered from the equivalency of absent jurors who were permitted to deliberate and vote for his execution.[61]

Martin Van Buren, a New York legislator and future president, served as a judge advocate (the equivalent of a prosecutor) who was responsible for both prosecuting the charges as well as advising the officers serving as members.[62] In response to an objection from Hull regarding the absence of members, Van Buren sought advice from Secretary of War John Armstrong who responded that members absented from the presentation of evidence remained on the court and could take part in the deliberations including voting for guilt.[63] Hull had been a distinguished officer in the Revolution and was aged at the time of his offense of surrendering his forces at Fort Detroit to the British.[64] Hull's record, seniority, and offense made his military trial unique in comparison to the hundreds of enlisted soldiers and younger officers who were prosecuted in courts-martial during the War of 1812.[65]

Armstrong's advice to Van Buren was rational for the conditions of such an unusual court-martial, yet it ultimately had the force of law for reasons other than the trial itself.[66] In the non-descript Civil War court-martial of Captain Samuel Black, several officers were absent from the court-martial, but Black was able to hire Thomas Ewing for his appeal.[67] Ewing had tremendous stature with the Lincoln administration in that he was a founding member of the Republican Party and had served as a Senator, a Treasury Secretary, and a Secretary of the Interior, and he was a surrogate father to General William Tecumseh Sherman along with having two sons serving as

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59. On the Hull court-martial, see William B. Skelton, *High Army Leadership in the Era of the War of 1812: The Making and Remaking of the Officer Corp*s, 51 WM. & MARY Q. 253, 265 (1994).

60. Letter from Armstrong to Van Buren (Mar. 7, 1814); REPORT OF THE TRIAL OF BRIG. GENERAL WILLIAM HULL, COMMANDING THE NORTH-WESTERN ARMY OF THE UNITED STATES: BY A COURT MARTIAL HELD AT ALBANY ON MONDAY, 3RD JANUARY 1814, AND SUCCEEDING DAYS 3 (Lt. Col. Forbes ed. 1814). The officers serving on the court-martial were Major General Henry Dearborn, Brigadier General Joseph Little, four colonels, and seven lieutenant colonels. *Id.*

61. *See id.*

62. 1 Op. Att'y Gen. 299, 300 (1819).

63. Letter from Van Buren to Armstrong (Feb. 23, 1814); Letter from Armstrong to Van Buren, *supra* note 60.

64. Letter from Van Buren to Armstrong, *supra* note 63; Letter from Armstrong to Van Buren, *supra* note 60.

65. Letter from Van Buren to Armstrong, *supra* note 63; Letter from Armstrong to Van Buren, *supra* note 60.

66. Letter from Van Buren to Armstrong, *supra* note 63; Letter from Armstrong to Van Buren, *supra* note 60.

67. Letter from Lt. Col. Hardie to Maj. General Durnside & Brig. Gen. Bogie (Nov. 9, 1863), *in* 9 THE PAPERS OF ULYSSES S. GRANT 634 (John Y. Simon ed. 1932).

Union Army generals.[68] Unfazed by Ewing's stature, General Joseph Holt, the Judge Advocate General of the Army, informed President Abraham Lincoln that Armstrong's advice in regard to absent members as well as courts-martial which fell below thirteen officers or had junior officers sitting in judgement were legally permissible.[69] In effect, Holt made Armstrong's earlier advice a broader procedural law rather than Congress had originally or plainly meant to do.

There is an irony to Holt's conduct as well as his conduct becoming an unlegislated part of the military law. This irony could be as easily applicable to the *Ortiz* dissent and the *Bergdahl* and *Begani* concurrences.[70] In 1993, as the Court, in its *Weiss v. United States* conference, deliberated the applicability of the Constitution's Appointments Clause to military trial judges, Justice Antonin Scalia penned to Chief Justice William Rehnquist: "I am on record in support of the proposition that any process which was around at the beginning of the Republic, and has continued to be used ever since, is *ipso facto* 'due process.'"[71] In the Republic's beginnings there were constraints on presidential involvement in army courts-martial and limits on both the subject matter jurisdiction of military crimes as well as the personal jurisdiction of courts-martial that are dispensed with today.[72] So too has the fears of a standing army been minimized from a real fear at the convention to a "valid consideration," in Judge Maggs's opinion.[73]

I. *TARBLE'S CASE* AND BEYOND: THE SCHOLARS OF MILITARY LAW EMPOWER THE EXECUTIVE

In 1887, Judge Henry Billings Brown, while serving on the United States District Court for the District of Eastern Michigan, dismissed an indictment against a soldier in a decision titled *United States v. Clark*.[74] Private Clark shot and killed another soldier attempting to escape from prison, and the United States Attorney charged him with murder.[75] Because, at the time, the Articles of War—the predecessor to the Uniform Code of

68. On Ewing, see RONALD D. SMITH, THOMAS EWING JR: FRONTIER LAWYER AND CIVIL WAR GENERAL 1–12 (2008).

69. Letter from Holt to Secretary of War Edwin Stanton and President Abraham Lincoln (Mar. 26, 1864).

70. *See* Ortiz v. United States, 138 S. Ct. 2165, 2189–2206 (Alito, J., dissenting) (explaining that courts-martial fall to the executive branch); United States v. Bergdahl, 80 M.J. 230, 245 (C.A.A.F. 2020) (Stacky, J., concurring in part) (noting the breadth of the president's control over the military); United States v. Begani, 81 M.J. 273, 282–87 (C.A.A.F. 2021) (Maggs, J., concurring) (determining appellant was subject to military law).

71. Letter from Scalia to Rehnquist (Dec. 14, 1993) (on file with the Hoover Inst. Archives).

72. *See* 1 JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775–1950 (1992).

73. *Begani*, 81 M.J. at 286 (2021) (Maggs, J., concurring).

74. United States v. Clark, 31 F. 710, 711 (C.C.E.D. Mich. 1887).

75. *Id.*

Military Justice—limited court-martial jurisdiction to purely military offenses, Clark faced a federal criminal trial rather than a court-martial.[76] In Brown's opinion, Clark had followed a superior's orders, and even if the orders were illegal, he was absolved of the crime.[77] As a prelude to his decision, Brown noted that "[a]n army is a necessity—perhaps I ought to say an unfortunate necessity—under every system of government, and no civilized state in modern times has been able to dispense with one."[78] He also added that "[t]o insure efficiency, an army must be, to a certain extent, a despotism."[79] It was for this reason that Brown began his order with the observation that had the court not taken jurisdiction of the crime, it would have been an abdication of the civil courts to the military.[80]

In addition to Brown's concern that the civil courts maintain their superior status over the military's tribunals, *Clark* might also stand for the twofold proposition that the federal courts were presumably competent to assess military matters such as the lawfulness of orders, and more importantly, that the Bill of Rights applied to service-members by limiting court-martial exposure through a narrow subject matter jurisdiction.[81] Yet, *Clark* was issued at a time where the judiciary had narrowed the ability of service-members to seek redress in the courts once it was determined that a crime fell within the subject matter scope of the military.[82] Three years after *Clark*, President Benjamin Harrison nominated Brown to the Supreme Court, and on December 29, 1890, the Senate unanimously voted in favor of him.[83]

By the time President Ulysses S. Grant appointed Brown to the federal bench in 1875, the Court issued several opinions governing the extent of military authority over the nation.[84] Two of the opinions, however, were directly related to the question of the military's personal jurisdiction over

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76. *Id.* (citing ALEXANDER TYTLER, AN ESSAY ON MILITARY LAW AND THE PRACTICE OF COURTS MARTIAL (1800)). Interestingly, the Army conducted a court or inquiry as a means of assessing whether a military crime had occurred and the inquiry determined that

> [a] court of inquiry, called for the purpose of fully investigating the circumstances, was of the opinion that if Clark had not performed his duty as efficiently as he did, by firing on deceased, he certainly would have effected his escape; and found that no further action was necessary in the case.

Id. at 713. However, Brown did not believe the federal courts were bound by the Army's court of inquiry. *Id.* at 715.

77. *Id.* at 716.

78. *Id.* at 713.

79. *Id.*

80. *Id.*

81. *Id.* at 710.

82. *See generally id.*

83. MELVIN UROFSKY, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 111 (1994)

84. *See, e.g.*, Mechs.' & Traders' Bank v. Union Bank, 89 U.S. 276, 297–98 (1875) (upholding military authority to create military civil courts in insurgent states during wartime); Orleans v. S.S. Co., 87 U.S. 387, 395 (1874) (upholding authority of a military-appointed mayor to enter into leases with private corporation).

citizens.[85] In *Ex parte Milligan*, the Court, in 1866, determined that where the civil courts functioned in the United States, the Army could not constitutionally possess jurisdiction over citizens who were not in the military.[86] Lambdin Milligan and his fellow conspirators were not soldiers, marines, or sailors; they were citizens of Indiana. But during the Civil War he and the others actively plotted an armed attack against the United States in the hopes of a Confederate victory.[87] In response, the federal government, after uncovering the plot and capturing its participants, enabled a military trial which denied them a grand jury, but, as cautioned by the Court's majority, it did so during the fears and passions of war.[88] Such military trials—even though they continued in the states under Reconstruction—were antithetical to liberty, and *Milligan* has since been recognized as one of the more important opinions in the nation's history.[89]

For a variety of reasons, Civil War and Reconstruction scholars, if not United States historians in general, are likely less familiar with *Tarble's Case* than they are in regard to *Milligan*. While the attorneys who argued on behalf of Lambdin Milligan as well as the government were well-known persons such as James Garfield, Jeremiah Sullivan Black, and Benjamin Butler, the young Tarble did not enjoy a publicly renowned defense team, although his attorney, John Spooner, would later become a United States senator.[90] Another reason is that while *Tarble* was shaped by the war, it neither originated during it nor did it arise in the southern states during Reconstruction.[91] Yet, there is something of an irony that *Tarble* was decided by referencing *Ableman v. Booth*, an opinion which earlier buttressed the "slave power," and in fact, *Ableman* was the only opinion Justice Field cited in *Tarble*.[92]

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85. *See Mechs.' & Traders' Bank*, 89 U.S. at 298–308 (Field, J., dissenting); *Orleans*, 876 U.S. at 394.

86. *Ex parte* Milligan, 71 U.S. 2, 121–22 (1866).

87. *See* WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 75–89 (1998).

88. *Ex parte Milligan*, 71 U.S. at 122–23.

89. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 556–57 (2004) (Scalia, J., dissenting); Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 YALE L. J. 489, 524 (1945).

90. On Spooner's role in the Senate, see James R. Parker, *Paternalism and Racism: Senator John C. Spooner and American Minorities, 1897–1907*, 57 WIS. MAG. OF HIST. 195, 195 (1974). Known as "the fiery midget" Spooner backed President Theodore Roosevelt's summary dismissal of 167 African-American soldiers in the so-called Brownsville Affair incident. *See* JOHN D. WEAVER, THE BROWNSVILLE RAID 132–37 (W.W. Norton & Co. 1970) (1992). On Milligan's counsel, see ALAN PESKIN, GARFIELD, 27–73 (1978).

91. *See In re* Tarble (*Tarble's Case*), 80 U.S. 397 (1871).

92. *Id.* at 403.

II. SOLIDIFICATION OF THE JURISDICTION: *TARBLE'S CASE* AND *COLEMAN V. TENNESSEE*

On the eve of the Civil War, the Court, in *Ableman v. Booth*, determined that the state courts lacked the power to usurp the Fugitive Slave Act.[93] Authored by Chief Justice Taney, *Ableman*, like *Dred Scott v. Sanford*, was not only reflective of the division in the nation between pro-slavery and anti-slavery forces, it also highlighted that the "slave-power" of the nation was overrepresented in the nation's institutions of power.[94] *Ableman* originated when a Wisconsin abolitionist, Sherman M. Booth, stirred a crowd to free Joshua Glover, a runaway slave, from the custody of a federal marshal.[95] Federal authorities arrested Booth, along with other citizens who forcibly freed Glover, but the Wisconsin Supreme Court issued a habeas writ on the authorities and then declared that the Fugitive Slave Act was unconstitutional.[96] There were, in fact, two state decisions regarding Booth. The second of the two decisions arose when Booth was tried and convicted in a United States district court and the state supreme court intervened by granting habeas, hearing Booth's appeal, once more finding the Fugitive Slave Act unconstitutional, and ordering Booth freed. [97] In 1859, Taney led the Court to unanimously overturn Wisconsin's assertion of authority and in doing so, determined that the state courts lacked the constitutional authority to nullify federal law.[98] One might conclude that, however unfortunate, if not evil, the effect of *Ableman* was, given the Supremacy Clause, the Court's action was unsurprising.[99]

For almost a century, as noted in this Article's second Part, state judicial officials had issued habeas writs on military officers who held soldiers and sailors in custody, and prior to the Civil War, this basic construct went unchallenged. After 1859, there were state court judges in the northern states who acted as though *Ableman* only applied to the Fugitive Slave Act or in matters that Congress had explicitly stated that were exclusive to the federal government but not the broader application of federal law.[100] There was nothing in either the Articles of War or the Naval Articles to preclude state judicial intervention. However, several incidents in the Civil War

93. *See* Ableman v. Booth, 62 U.S. 506, 517–18 (1858).

94. *See, e.g.*, BRIAN MCGINTY, LINCOLN AND THE COURT 60 (2008); WILLIAM H. FREEHLING, THE ROAD TO DISUNION, VOL II: SECESSIONISTS TRIUMPHANT 435–36 (2007).

95. *See, e.g.*, DONALD FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 236 (Ward M. McAfee, ed., 2001).

96. *In re* Booth, 3 Wis. 1, 67–69 (1854).

97. *Ableman*, 62 U.S. at 510.

98. *Id.* at 517–18; *see also* DAVID M. POTTER, THE IMPENDING CRISIS: *1848–1861*, 294–95 (Om E. Fehrenbacher ed., 1976).

99. *See, e.g.*, *Ableman*, 62 U.S. at 517–18 (determining Wisconsin had no authority to authorize the proceedings because the Supremacy Clause made clear that the issue was a matter for the federal courts).

100. *See, e.g.*, *In re* McConologue, 107 Mass. 154, 167 (1871).

prominently displayed the possibility of state judicial officers issuing orders intending to hinder the Union's military operations.[101] In 1863, George Vickers, a Maryland state judge, instructed a grand jury to indict two Union Army officers for "enticing slaves to run away" and was in turn arrested by army officers.[102] The Army arrested the chief justice of the Kentucky Court of Appeals as well as judges in Chicago and Maryland, and the chief justice of Indiana's supreme court had been threatened with arrest after he issued a writ on an Army officer.[103] In 1861, when Judge William Merrick issued a habeas writ on a general to release a minor who enlisted into the Army without parental permission, Secretary of State William Henry Seward ordered a marshal to prevent the writ from being delivered.[104]

In 1871, the Court issued *Tarble's Case* which upended the practice of state restraints on courts-martial.[105] On July 27, 1869, seventeen year-old Frank Tarble enlisted into the Army under a false name with the claim that he was, in fact, over the age of twenty-one.[106] Tarble might have been intoxicated at the time of his enlistment.[107] Following a precedent of pre-Civil War cases, a county commissioner, (on the motion of Abijah Tarble, Frank Tarble's father) and then the Wisconsin Supreme Court determined that the state courts could exercise a habeas writ and order Tarble released from service.[108] The facts presented to the Dane County commissioner and state supreme court, in light of pre-Civil War precedent, made it unsurprising that a state official would issue a habeas writ on a military officer.[109] Because the desertion occurred only one day after taking an oath and receiving a uniform and pay, Edward Tarble had not yet been shipped to a training depot or assigned to a regiment.[110] In addition to the possible intoxication, two other

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101. *Id.*

102. KASTENBERG, *supra* note 9, at 325 (providing an example of a state judge instructing to indict federal officers).

103. *Id.* at 325–26.

104. *See* United States *ex rel.* Murphy, 2 F. Cas. 544, 602 (C.C.D. D.C. 1861); *see also* Martin Lederman, *The Law(?) of the Lincoln Assassination*, 118 COL. L. REV. 323, 394 (2018). In 1863, Congress abolished the appellate court, in effect removing the judges from their positions. *See* Howard C. Westwood, *Questioned Loyalty in the District of Columbia Government*, 75 GEO. L. J. 1455, 1459 (1987).

105. *In re* Tarble (*Tarble's Case*), 80 U.S. 397, 411–12 (1871).

106. *In re* Tarble, 25 Wis. 390, 391 (1870).

107. For an excellent background on *Tarble*, see Ann Woolhander and Michael G. Collins, *The Story of Tarble's Case: State Habeas and Federal Detention, Federal Courts Stories*, *in* FEDERAL COURT STORIES 141–61 (Vicki C. Jackson & Judith Resnik, eds., 2010).

108. *Tarble*, 25 Wis. at 394. Justice Byron Paine began the court's decision with a reaffirmation of the important of the "great writ," writing: "[t]his great writ is the [ae]gis of personal liberty. It was established by the founders of constitutional freedom in England, and was ever upheld by them with a strong hand against all the encroachments of arbitrary power." *Id.* at 394–95.

109. *See* Transcript of Record at 11–12, 17–18, *In re* Tarble (*Tarble's Case*), 80 U.S. 397 (1871) (No. 235–54) (depositions of H.L. Stone, Edward Tarble, alias Frank Brown, and Abijah Tarble).

110. *See id.* at 16. On recruiting depots and rudimentary training, see DON RICKEY, JR., FORTY MILES A DAY ON BEANS AND HAY: THE ENLISTED SOLDIER FIGHTING THE INDIAN WARS 33–42 (1963) (discussing recruiting depots and rudimentary training).

facts bear mention: a sergeant may have encouraged him to lie about his age, and the Army intended to court-martial him.[111]

Justice Byron Paine, a staunch abolitionist and recently discharged Union Army colonel, highlighted the state supreme court's actions in 1858 in refusing to treat the Fugitive Slave Law as enforceable in Wisconsin, a state which had expressly determined slavery to be antithetical to the Constitution.[112] Paine argued that although *Ableman* held that neither a state judiciary nor the state legislature had the authority to nullify a federal law, other state tribunals had decided that a notable exception existed to this doctrine.[113] He pointed out that the Iowa Supreme Court in *Ex parte Anderson* determined that there was a difference between a state court exercising habeas over a person in judicial detention and a person under the detention of a "mere ministerial officer[]," such as an Army officer who refused to release a minor who had enlisted into the Army.[114] But, Paine disavowed that doctrine and instead insisted that because Frank Tarble was not lawfully in the Army as a result of his age, the state retained jurisdiction to enforce an act of Congress against the Army.[115]

Justice Field began *Tarble* with the observation that if a state commissioner could order a military officer to produce a soldier, then a state could interfere with any instance in which a person was held in custody by the federal government including duly convicted prisoners.[116] Field then transited to *Ableman*, ignoring the Fugitive Slave Law aspects of that opinion for the broader proposition that no state judiciary had the authority to issue a habeas writ that would upset a constitutional function of the federal government.[117] Put another way, Field articulated the obvious point, rooted in the Supremacy Clause, that when state and federal laws conflicted, the federal laws were supreme.[118] Field, and the majority with him, were not swayed by the argument that rather than a conflict between the state and federal laws, there was a conflict between a state's highest court and the jurisdiction of an "inferior" federal tribunal—the non-Article III court-martial—which had been customarily subject to state judicially ordered habeas.[119]

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111. *See* Transcript of Record, *supra* note 109, at 11, 14–16 (depositions of H.L. Stone and Edward Tarble, alias Frank Brown).

112. *See* H. Robert Baker, *The Fugitive Slave Clause and the Antebelleum Constitution*, 30 L. & HIST. REV. 1113, 1169 n.125 (2012). Although Wisconsin had prohibited slavery, its constitution did not permit freedmen the right to vote. WILENTZ, *supra* note 44, at 590.

113. *Tarble*, 25 Wis. at 395–96.

114. *Id.* at 396 (citing to *Ex parte* Anderson, 16 Iowa 595 (1864)).

115. *Id.* at 413.

116. *In re* Tarble (*Tarble's Case*), 80 U.S. 397, 401 (1871).

117. *Id.* at 404.

118. *Id.* at 407.

119. *See id.* at 406–07.

Field did not, in fact, pronounce a compelling point of constitutional law but rather based the Court's opinion on military necessity.[120] After he emplaced into *Tarble* the authority of Congress to "raise and support armies," he warned that the state practice of issuing the great writ would destroy the Army itself.[121] Military commanders, he insisted, would be paralyzed from ordering soldiers to drill, if not campaign, by a fear of judicial interference.[122] And to give proof to this assertion, he harkened to the Civil War in which state courts had, on occasion, issued writs on military officers to aid the Confederacy.[123] But Field did not list any of the examples noted above.

While Field was correct that some state judges had issued the writ to impede the Union's war efforts against secession, this alone did not create a clearly stated constitutional predicate for the Court's opinion.[124] Chief Justice Salmon Chase's brief dissent argued that the Constitutional Convention understood and accepted the power of state judges to issue writs to inquire into the validity of an arrest or detention.[125] There are other ironies that the Court took exception to the Wisconsin Supreme Court's decision.[126] Little was said about the protection of minors from military service.[127] Absent from the opinion was an assurance—or even recognition—of the fears of standing armies, such as Justice Story had conceded existed in *Mott*.[128] *Tarble* has stretched beyond preventing state judicial officers from impeding courts-martial.[129] In 2012, the Court of Appeals for the Armed Forces held that a state court's grant of a conservatorship over an enlisted marine who was unable to function without his grandmother's guidance was neither binding nor required to be given credit in a court-martial.[130]

The Court's insistence that only the federal judiciary could take jurisdiction over federal courts-martial and that state courts could not issue

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120. *See id.* at 407.

121. *Id.* at 408.

122. *Id.* at 409.

123. *Id.* at 408–09. Field noted:

> The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of *habeas corpus* for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service.

Id.

124. *See id.*

125. *See id.* (Chase, C.J., dissenting). Chief Justice Chase, who only lived a brief time after *Tarble*'s issuance, wrote to a friend that he regretted that the state of his health prevented him from writing a more robust dissent. *See* SALMON P. CHASE, THE SALMON P. CHASE PAPERS, VOLUME 5: CORRESPONDENCE, 1865–1873, at 672 (John Niven eds., 1998).

126. *See Tarble's Case*, 80 U.S. at 397–412.

127. *See id.* at 398, 401.

128. *See id.* 397–412; Martin v. Mott, 25 U.S. 19, 29 (1827).

129. *See, e.g.*, United States v. Fry, 70 M.J. 465, 468 (C.A.A.F. 2012).

130. *Id.*

writs against federal officers was logical in light of not only the Civil War experience but also from incidents nearer to the beginning of the nation's existence.[131] For instance, in 1825, Georgia's governor George Michael Troup threatened President John Quincy Adams that the Georgia militia would fight against any federal attempt—including the federal army—to enforce a treaty guarantee to the Creek Indian Nation.[132] In theory, if a Georgia governor could threaten war against a president, then the state's judges could also use the law as a means to disrupt the enforcement of the federal law by issuing writs on officers. Twice in New York, during the War of 1812, the Supreme Court of Judicature upheld the authority of judges to require federal army officers to release civilians in custody.[133]

On March 27, 1865, the Army court-martialed one of its soldiers, Pryor Coleman, for the murder of Mourning Ann Bell.[134] The court-martial, which was held in the Military District of Tennessee, determined that Coleman was guilty and sentenced him "to be hung by the neck until he is dead."[135] On July 21, 1865, Major General George Thomas approved of the findings and sentence, but for unknown reasons, it was never carried out.[136] In 1874, a Tennessee state grand jury indicted Coleman for the murder, and he raised an objection based on a violation of the Constitution's protection against double jeopardy.[137] (In 1866 Tennessee was readmitted into the Union and, shortly after, the civil courts returned to adjudicate the state's criminal trials.)[138]

In *Coleman v. Tennessee*, also authored by Justice Field, the Court determined that while a state could prosecute a soldier because the Articles of War did not confer exclusive army jurisdiction over soldiers, during a war,

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131. *See, e.g.*, WILENTZ, *supra* note 44, at 262–64.

132. *See id.* Governor Troup sent the following message to Secretary of War James Barbour:

> From the first decisive act of hostility, you will be considered and treated as a public enemy; and, with the less repugnance, because you, to whom we might constitutionally have appealed for our own defense against invasion, are yourselves the invaders, and, what is more, the unblushing allies of the savages whose cause you have adopted.

Id.

133. *In re* Stacy, 10 Johns. 328, 338 (N.Y. Sup. Ct. 1813); *see* McConnell v. Hampton, 12 Johns. 234 (N.Y. Sup. Ct. 1815). In *Hamdi v. Rumsfeld*, Justice Antonin Scalia cited to both *Stacey* and *Hampton* for the proposition that it had been long held that citizens not in the service of the military were not amenable to military jurisdiction. Hamdi v. Rumsfeld, 542 U.S. 507, 565–66 (Scalia, J., dissenting). However, Justice Sandra O'Connor noted that these were civil suits and not on point to the issue of military jurisdiction. *Id.* at 520. Justice Scalia's interpretation, in the opinion of the author, was correct because the suits arose in the theory of law vehicle that was deemed effective at that time. *See, e.g.*, Percival v. Jones, 2 Johns. Cas. 49 (N.Y. Sup. Ct. 1800).

134. Coleman v. Tennessee, 97 U.S. 509, 511 (1878). In addition to the charge of murder, the Army court-martialed Coleman for desertion, robbery, and assault. *See* Transcript of Record, Coleman v. Tennessee, 97 U.S. 509 (1878). Record of Court-Martial in transcript. *Id.*

135. Transcript of Record, *supra* note 134.

136. *Coleman*, 97 U.S. at 510.

137. *Id.* at 511.

138. Peter H. Argersinger, *The Conservative as Radical: A Reconstruction Dilemma*, 34 TENN. HIST. Q. 168, 183 (1975).

soldiers were not amenable to the jurisdiction of an enemy's courts.[139] In other words, during wartime and when in a foreign or hostile territory, the military had exclusive jurisdiction over its soldiers.[140] *Coleman* was partly based on prevailing international law norms.[141] The eighteenth century international law scholar Emerich de Vattel noted that even when an army traverses through a neutral country, the army maintains its internal discipline, and its soldiers do not become subject to the neutral's courts.[142] Although Field did not cite to de Vattel for this point, he cited to the 1812 opinion *Schooner Exchange v. McFaddon* in which the Court partly rested on de Vattel.[143] It is noteworthy, however, that the Court's majority determined that Coleman was not protected by the Constitution's bar on double jeopardy but rather that the military had exclusive provenance over trials held in enemy territory.[144]

A final note on Field and his association with ranking army generals bears interest. In between *Tarble* and *Coleman*, he undertook efforts to shield William Tecumseh Sherman, the Army's commanding general, from accusations that he failed to enforce the law by resigning from the California militia during an upheaval of lawlessness and the formation of private vigilance committees in 1856.[145] Field informed Sherman of his opinion that the resignation was justified because "[a]ny attempt to overthrow the insurrectionary movement[s] without the possession of arms to equip the volunteers would have been an idle and futile proceeding."[146] Equally important, Sherman obtained Field's advice on the preparation of an article expressing his views on military law that he also pronounced before the House of Representatives in 1879.[147] In his testimony, Sherman expressed that while the civil law had as its object the protection of liberty, security, safety, and happiness, the military law was designed on the basis of obedience to one man and "to be capable of exercising the largest measure of force at the will of the nation."[148] While Field crafted the military law and Sherman exercised it, two scholars, among many, have embedded similar military law jurisprudence into the federal courts.

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139. *Coleman*, 97 U.S. at 515.

140. *See id.*

141. *See id.* at 517–18.

142. *See* EMERICH DE VATTEL, THE LAW OF NATIONS 343 (7th ed. 1883). For the influence of de Vattel on early United States law, see Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations to Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1345–51 (2007).

143. *Coleman*, 97 U.S. at 515 (citing Schooner Exchange v. McFaddon, 11 U.S. 116, 139 (1812)).

144. *Id.* at 535.

145. Letter from Stephen Field to William Sherman (Oct. 28, 1893), *in William T. Therman Papers*, LIBR. OF. CONG. On the vigilance committee's and Sherman's view of it, see WILLIAM T. SHERMAN, MEMOIRS OF WILLIAM T. SHERMAN, 120–31 (1875).

146. *Id.*

147. *See* JOHN F. MARSZALEK, SHERMAN: A SOLDIER'S PASSION FOR ORDER 440 (1993).

148. *See* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 5 (1970).

III. WILLIAM WOOLSEY WINTHROP: ADVOCATE OF EXPANDED MILITARY JURISDICTION

Titled by the Supreme Court as "the Blackstone of Military Law," William Winthrop has been considered the leading military law scholar of the late nineteenth and early twentieth centuries, and indeed, he is still cited today.[149] There is much to commend in Winthrop's life and scholarship both in the use of his work to professionalize the military, as well as in his nonmilitary work, which included his efforts to abolish slavery prior to the Civil War.[150] And, he worked to create equal treatment under the military law for persons regardless of race.[151] Winthrop was not only a scholar; he began his military service as a junior officer during the Civil War where he saw front line service in the Peninsula Campaign as well as at the Second Battle of Manassas, the Battle of Antietam, and the Battle of Fredericksburg.[152] The apex of Winthrop's military law scholarship is found in *Military Law and Precedents*, a two-volume book first published in 1896.[153] Detailed further in Sections III and IV, Winthrop pushed for the idea that "retired officers are a part of the army and so triable by court-martial—a fact never admitting of question—is adjudged in *Tyler v. U[nited] S[tates]*."[154] But, shortly after the publication of *Military Law and Precedents*, Winthrop did, in fact, cast doubt on the efficacy of the military's jurisdiction over retirees.[155]

Winthrop's robust scholarship includes several important considerations on his advocacy for expanding military jurisdiction. Among his depth of analysis, he took exception to the Court's majority in *Ex parte Milligan*.[156] In essence, Winthrop argued that the military may remain an arm of the executive branch to enforce the law in times of war or when Congress has authorized it to do so, including establishing military trials that could

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149. JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP 1, 3 (2009).

150. *Id.* at 12–13, 168.

151. *Id.* at 39–38.

152. *Id.*; *see also* George S. Prugh, Jr., *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A. J. 126, 127 (1956).

153. WINTHROP, *supra* note 41. However, *Military Law and Precedents* was an expansion on his earlier *Military Law*, published in 1886. *Compare id.*, *with* WILLIAM WINTHROP, MILITARY LAW (1886).

154. WINTHROP, *supra* note 41, at 87 n.3. In addition to *Tyler*, Winthrop listed *Runkle v. United States*, 122 U.S. 543 (1887) and *Hill v. Territory*, 2 Wash. Terr. 147 (1882). *Id.* All three of the opinions are noted in Part VII. *See infra* Part VII (explaining the opinions of *Runkle Hill* and *Tyler*).

155. *See, e.g.*, Flower v. United States, 31 Ct. Cl. 35, 37 (1895); KASTENBERG, *supra* note 149, at 306–07.

156. WINTHROP, *supra* note 41, at 817. Winthrop stated:

> It is the opinion of the author that the view of the minority of the court is a sounder and more reasonable one, and that the *dictum* of the majority was influenced by a confusing of martial law proper with that *military government* which exists only at a time and on the theatre of war, and which was clearly distinguished from martial law by the Chief Justice, in the dissenting opinion—the first complete judicial definition on the subject.

Id.

sentence citizens to death. On several occasions, Winthrop highlighted his role in the military trial of Benjamin Gwinn Harris, a sitting member of Congress.[157] Perhaps unthinkable today, in 1865 Winthrop served as a judge advocate in the military commission trial of a sitting member of the House of Representatives which found him guilty and sentenced him to a term in jail prohibited him from further government service.[158] In doing so, Winthrop saw no constitutional incompatibility with the military preventing the legislative branch from determining its own membership.[159]

There is a further troubling aspect of Winthrop's views on military jurisdiction in regard to his presentment of the Harris trial. In justifying a sentence that included Harris's permanent removal from government service, Winthrop relied on neither the Constitution nor statute but rather an opaque legal justification titled as "usage."[160] Winthrop would have certainly known that Louis Napoleon, the democratically elected president of France's Second Republic had the assistance of the French Army in 1851 to launch a *coup d'etat*, arrest legislators, and be crowned emperor, in the process destroying the republic.[161] In essence, between his view of the Posse Comitatus Act being an unconstitutional embarrassment and his embrace of usage to remove duly elected members of Congress through military force, Winthrop was apparently willing to accept a military government antithetical to the very Republic he had earlier fought to preserve.[162]

IV. FREDERICK BERNAYS WIENER: SUPPORTER FOR THE INTERNMENT OF UNITED STATES CITIZENS OF JAPANESE DESCENT

In 1945, Yale Law professor Eugene V. Rostow authored a law review article excoriating the unconstitutional internment of United States citizens of Japanese descent during World War II.[163] Rostow argued that in the wartime cases to come before the Court, the justices—with the exception of Owen Roberts and Frank Murphy—"weakened society's control over military authority . . . and gave the prestige of its support to dangerous racial

157. *See, e.g.*, *id.* at 206.

158. KASTENBERG, *supra* note 149, at 155–59; JOSHUA E. KASTENBERG, A CONFEDERATE IN CONGRESS: THE CIVIL WAR TREASON TRIAL OF BENJAMIN GWINN HARRIS 125–46 (2016).

159. *See* KASTENBERG, *supra* note 149, at 157–60.

160. WINTHROP, *supra* note 41, at 409.

161. On Louis Napoleon and the Army's role in the 1851 coup d'etat, see ROGER PRICE, THE FRENCH SECOND EMPIRE: AN ANATOMY OF POLITICAL POWER 27–40 (2001). Winthrop would have also known of the Boulanger Affair in France in which a retired general had unsuccessfully attempted to break the Third Republic and set up military rule. *Id.* On Georges Boulanger, see Patrick Hutton, *Popular Boulangism and the Advent of Mass Politics in France, 1886–90*, 11 J. CONTEMP. HIST. 85 (1976). For a sample of the reporting of the Boulanger Affair in the United States, see *Boulanger is a Dictator*, WASH. POST, May 24, 1887; *Boulanger's Electoral Address: He Again Denounces His Opponents and Says France Wants Justice*, N.Y. TIMES, Jan. 4, 1889.

162. *See* WINTHROP, *supra* note 41, at 409, 867–69.

163. Rostow, *supra* note 89, at 490.

myths about a minority group, in arguments [that could] be applied easily to any other minority group in our society."[164] Echoing Rostow, there is a consensus that the federal government's treatment of United States citizens of Japanese descent during World War II was both unconstitutional and based on racism.[165] But, Weiner never joined this consensus and vehemently supported the government's actions until his death in 1996.[166] On September 14, 1983, Wiener expressed his opposition to John J. McCloy over the government investigation's conclusion that the wartime imprisonment of Japanese Americans was in gross error by attacking the investigation's composition. "Of the 33 staff members listed, eleven had Japanese names, and a twelfth was married to one of the eleven," he penned.[167] Whatever else might be observed about this comment, Wiener was clearly incapable of accepting that race and ethnicity are not determinants of a person's commitment to constitutional law or, for that matter, their objectivity or lack thereof.[168]

A graduate of Harvard Law and frequent correspondent to Justice Felix Frankfurter, Wiener was a leading military law scholar of his generation, and his two-part law review article *Courts-Martial and the Bill of Rights: The Original Practice* has been cited by the federal judiciary on several occasions.[169] He also authored several other influential articles including an examination of the Constitution's Militia Clause and commentary on the constitutionality of the UCMJs "general articles."[170] While it is true he

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164. *Id.* at 503–04. Another excellent early criticism of the Court's willingness to permit racism to be coupled to military deference is Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 157, 239 (1945).

165. *See* Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 166–74 (2003).

166. *Recommendations of the Commission on Wartime Internment and Relocation of Citizens: Hearing on S. 2116 Before the Subcomm. on Civ. Serv. Post. Off., & Gen. Serv. of U.S.S. Comm. on Governmental Aff.,* 98th Cong. 264–99 (1984) (statement of Frederick B. Weiner, Colonel, Army of the U.S., retired).

167. Letter from Frederick Bernays Wiener, Colonel Army of the U.S., retired, to John J. McCloy, U.S. Assistant Sec. of War (Sept. 14, 1983).

168. *See generally id.*

169. *See, e.g.*, Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958). Wiener's first correspondence to Frankfurter in the Frankfurter papers is dated August 31, 1933. *See* Letter from Frederick Bernays Weiner, Colonel Army of the U.S., retired, to Associate J. Frankfurter (Aug. 31, 1933) (on file with author).

170. *See* Frederick Bernays Weiner, *The Militia Clause and the Constitution*, 54 HARV. L. REV. 181 (1940). This article has been cited in the following federal court decisions: Dukakis v. Dept. of Def., 686 F. Supp. 30, 33 (D. Mass. 1988) (providing background history on the militia's inefficiency prior to the National Guard Act of 1903); Zister v. Walsh, 352 F. Supp. 438, 440 (D. Conn. 1972) (describing the modern National Guard as the lineal descendant of the militia). *See also* Frederick Wiener, A*merican Mutiny Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 67–68 (1989) [hereinafter Weiner, *American Mutiny Law*] (discussing legislative attempts to narrow reach of courts-martial jurisdiction); Frederick Bernays Wiener, *Are the General Military Articles*

convinced the Court to determine that military jurisdiction could not extend to civilians whose connection to the military was a matter of family relation to a service-member, he vigorously defended the preservation of the military law's *lex non scripta* in the realm of speech regulation during the Vietnam Conflict.[171] In 1974 Solicitor General Robert Bork sought Wiener's help in writing the government's briefs for *Parker v. Levy* and *Avrech* v. *Secretary of the Navy*—two companion cases involving the limits of free speech in the military.[172]

During the Court's deliberations in *Ex Parte Quirin*, Frankfurter reached out to Wiener to obtain his sense of the Court's denial of habeas.[173] Although Wiener believed that the Court was right to deny the great writ's protections, he also argued that President Roosevelt should have permitted a general officer, such as the commanding general in New York or Florida, to order the military trial of the German and United States citizen saboteurs, rather than use a proclamation to create the trial.[174] Yet, he also insisted that in the absence of congressional legislation, a presidentially ordered military commission was free to depart from the rules for courts-martial as embedded in the Articles of War.[175] Perhaps the most telling aspect of Wiener's view of the Bill of Rights limitations against presidential excess was in his second letter where he criticized *Milligan* as being replete with "extravagant dicta."[176] Wiener, in fact, informed Frankfurter that the *Quirin* opinion "narrows *Ex Parte Milligan* and presumably foreshadows repudiation of the oft-quoted dictum that martial law can never arise from a threatened

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Unconstitutionally Vague?, 57 A.B.A.J. 357, 362–64 (1968) [hereinafter Weiner, *General Military Articles*] (arguing that the general articles enhance flexibility of military law).

171. *See* Weiner, *American Mutiny Law*, *supra* note 170, at 68–70.

172. *See* Letter from Frederick Bernays Wiener, Colonel Army of the U.S., retired to Hon. Robert H. Bork, The Solic. Gen. Dep't of Just. (Apr. 2, 1974).

173. *Ex parte* Quirin, 317 U.S. 1, 24 (1942); *see* Letter from Frederick Bernays Wiener, Colonel Army of the U.S., retired, to Associate J. Frankfurter (Jan. 13, 1943).

174. *See* G. Edward White, *Felix Frankfurter's "Soliloquy" in* Ex Parte Quirin, 5 GREEN BAG 423, 436 (2002).

175. Letter from Frederick Bernays Wiener, Colonel Army of the U.S., retired, to Ass. J. Felix Frankfurter (Jan. 13, 1943) (on file with author). Wiener penned to Frankfurter:

> No one has ever suggested that presidential GCMs prior to 1920 were governed by any different rules than those in force for non-presidential GCMs. Nor can it be contended that a presidential military commission is, except where statute makes it so, subject to procedure which arises from ordinary military commissions. Congress has the power "to define and punish offenses against the law of nations." I think that power broad enough to impose limitations upon the exercise of the President's war powers with respect to the trial of war criminals, and as indicated above, I think it clear that the AW 46 and 92 of the AW 50 ½ it has imposed such limitations.

Id. Thus, while Wiener believed that courts-martial procedure was sacrosanct, the absence of clear statute gave a president more authority to depart from legal norms than an ordinary military commission trial. *See id.*

176. *See* Letter from Frederick Bernays Wiener, Colonel Army of the U.S., retired, to Associate Felix Frankfurter (Jan. 13, 1943) (on file with the author of this Article).

invasion."[177] In a third letter to Frankfurter, Wiener argued once more that *Milligan* was a narrow opinion that only addressed whether a military commission could prosecute a citizen who was not already subject to the law of war and not whether Congress could have made citizens such as Milligan subject to the law of war.[178] Thus, like Winthrop, Wiener was willing to tolerate an expanded military jurisdiction beyond what the Court determined in 1866.[179] But Wiener was able, as a product of the times in which he wrote, to celebrate something Winthrop could not do: a Court opinion that, in his opinion, was "the first judicial step towards whittling away the authority of the majority opinion in the *Milligan* case."[180]

Wiener began his legal career as a "New Deal Democrat," having joined the Public Works Administration before becoming a judge advocate on the eve of World War II.[181] After the war he worked in the Solicitor General's office and then went into private practice where he convinced the Court to reverse its position in *Reid v. Covert*, a significant jurisdiction appeal in which the Court determined that the military could not prosecute United States citizens who were located in foreign countries with their military spouses.[182] When he authored *Courts-Martial and the Bill of Rights*, Frankfurter lobbied the Harvard Law School to publish it.[183] Both Wiener and Frankfurter wanted to counter a previous article in the Harvard Law Review written by Professor Gordon Henderson who urged that the Bill of Rights, with the exception of the Fifth Amendment's Grand Jury Clause, applied to courts-martial.[184] While it is difficult to know whether there was a singular basis for Wiener's insistence that the government had the authority to deprive United States citizens of Japanese descent their basic rights after World War II, there is more than a hint of racism in his letters to Frankfurter as well as in one law review article in which he defended MacArthur's justification for prosecuting General Yamashita in a war crimes trial in 1946.[185]

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177. *Id.*

178. Letter from Frederick Bernays Wiener to Associate J. Frankfurter (Aug. 1, 1943) (on file with the author).

179. *See generally id.*

180. *Id.*

181. Jed S. Rakoff, *Frederick Bernays Wiener, Master of Advocacy*, 81 LA . REV. 943, 944 (2021).

182. *Id.*

183. Letter from Frankfurter to Richard M. Goodwin, Esq., (carbon copying Weiner) (Apr. 10, 1958).

184. *Id.*; Associate J. Henderson's article is *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

185. As an example of Wiener's racist language, see Frederick Bernays Wiener to Associate J. Frankfurter (Feb. 8, 1935). The author has omitted the actual language used, but Wiener disparaged persons of African ancestry. *See* Frederick Wiener, Comment, *Two Years of MacArthur, Vol III: MacArthur Unjustifiably Accused of Meting Out "Victors' Justice*," 113 MIL. L. REV. 203, 206 (1986) (arguing Yamashita's guilt was partly established as "the sack of Manila was a direct consequence of ingrained Japanese attitudes"). Western military history is replete with massacres of a similar nature from the siege of Magdeburg in 1631 to the My Lai Massacre in 1968. *See generally* Hans Medick & Pamela

V. MILITARY RETIREES: UNINTENDED PERMANENCY OF COMMANDER IN CHIEF AUTHORITY

During the Civil War, the Union Army court-martialed over 80,000 soldiers in general courts-martial—the most severe type—for offenses ranging from drunkenness on duty, desertion, conduct unbecoming an officer and gentleman, and under the general article.[186] There was an even greater, albeit underreported, number of lesser courts-martial in which soldiers were fined or placed into short periods of imprisonment but not dishonorably discharged.[187] Between 1861 and 1866, traditional state court avenues of appeal were likely narrowed in proportion to the numbers of soldiers mustered into the army, more by wartime exigency than by operation of law.[188] General courts-martial were reviewed by the Bureau of Military Justice, a part of the War Department in a quasi-appellate process.[189] Even after the Bureau's completion of its review—which at times recommended disapproving a conviction and sentence—the general officer who convened the court-martial could order the court-martial reopened to reconsider its findings and sentence.[190] Known as the "revisory authority," this presidential power lasted until 1920.[191]

During the period 1861–1866, hundreds of thousands of citizens serving in the army were subjected to the orders of a commander in chief as well as to an austere military justice system; at the conclusion of their service, they were able to return to the protections of the Bill of Rights as well as the protections of the various state constitutions that were absent from military trials.[192] In 1861, with the creation of the first military pension program, there was an extraordinary expansion of commander in chief authority that, for the first time in the nation's history, created a class of citizen continuously subject to military law, the retired officer.[193] (In 1885, Congress enacted the first pension plan for enlisted soldiers, but it was silent on whether military jurisdiction continued into retirement).[194] On July 6, 1861, Senator Henry

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Selwyn, *Historical Event and Contemporary Experience: The Capture and Destruction of Magdeburg in 1631*, 52 HIST. WORKSHOP J. 23 (2001); *My Lai Massacre*, HIST. (Apr. 17, 2020), https://www.history.com/topics/vietnam-war/my-lai-massacre-1.

186. STEVEN J. RAMOLD, BARING THE IRON HAND: DISCIPLINE IN THE UNION ARMY 326 (2010).

187. *Id.*

188. *Id.*

189. *See, e.g.*, KASTENBERG, *supra* note 9, at 57–63; Gayla Koerting, *For Law and Order: Joseph Holt, the Civil War, and the Judge Advocate General's Department*, 97 REG. KY. HIST. SOC'Y 1, 12 (1999).

190. *See* KASTENBERG, *supra* note 54, at 90–92.

191. *See id.*

192. *See generally* J.W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 324–26 (1964).

193. *See id.* at 341–57.

194. Act of Feb. 14, 1885, Ch. 67, 23 Stat. 305 (1885) (titled "An Act to Authorize a Retired List for Privates and Non-Commissioned Officers of the United States Army who have Served for a Period of Thirty Years or Upward."). For the effect of the act on the Army, see DON RICKEY JR., FORTY MILES A

Wilson (R-MA) introduced to the Senate, S.B. 4, titled "An Act Providing for the better Organization of the Military Establishment."[195] On August 3, 1861, Congress passed the act.[196] Under this law, officers who served thirty years of duty would obtain a pension equating to seventy-five percent of their monthly pay while on active duty.[197] (In 1863, Wilson, who had been a long-time abolitionist, accused Judge Merrick and the courts in Washington D.C. of "sweltering with treason.")[198] Wilson's crafting of S.B. 4 should be examined, in part, by its author's determination to rid the government of pro-slavery actors he justifiably believed to be treasonous.[199]

The 1861 Act was a comprehensive measure passed during a time when Congress debated other wartime bills, such as supporting the executive branch's suspension of habeas and a property tax on slave-owners.[200] Wilson's bill included the creation of an assistant secretary of war, enlargements of the inspector general and adjutant general staff, the presidential appointment of regimental chaplains, increasing the numbers of medical personnel, the acceptance of women into nursing positions, and a uniform oath of office for soldiers.[201] The fifteenth section of the Act permitted army and marine officers with forty years of service to retire and remain on the Army and Navy Register where they would still receive officer pay.[202] (All active-duty officers were placed in the Army or Navy Register, noting the dates of their commission and seniority).[203] The eighteenth section of this law permitted these retired officers to maintain and wear their uniform and in doing so "shall be subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles."[204] A similar section was emplaced into the bill for naval officers.[205] But it was unclear whether court-martial jurisdiction applied only when the retired officer wore a uniform or held himself to the public as an officer with some military authority or at any time.[206] The Act's history is contextually important to the

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DAY ON BEANS AND HAY: THE ENLISTED SOLDIER FIGHTING THE INDIAN WARS, 341–42 (1963); *see also* Bishop, Jr., *supra* note 192, at 332–33.

195. *See* S.B. 3, S. Exec. J., (1861); Cong. Globe, 37th Cong., 1st Sess. 16 (1861).

196. Act of Aug. 3, 1861, Ch. 42, 12 Stat. 287.

197. *Id.* In 1882, Congress amended the retirement law to prohibit naval officers from being promoted to a higher grade while in their retirement and having pensions reflect the higher grade. *See* Act of August 5, 1882, 18 Stat. 192.

198. Cong. Globe, 37th Cong., 3rd Sess. 1139 (1863) (statement of Sen. Wilson). On Wilson, see *Ernest A. McKay, Henry Wilson and the Coalition of 1851*, 36 NEW ENG. Q. 338, 339–41 (1963).

199. *Id.*

200. *See, e.g.*, David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1138 (2006). On the property tax on slave owners, see Cong. Globe, 37th Cong., 1st. Sess. 301–03 (1861).

201. Act of Aug. 3, 1861, ch. 42, 12 Stat. 287 (1861) ("A[n] [act] providing for the better organization of the military establishment.").

202. *Id.* at § 15, at 289.

203. Act of Congress on April 27, 1816 (3 Stat. 342).

204. *Id.* at § 18, 12 Stat. at 290.

205. *Id.* at § 21, at 290.

206. *House of Representatives*, N.Y. TIMES (Aug. 4, 1861), https://www.nytimes.com/1861/08/04/

issue of jurisdiction over retirees and the expansion of a permanent army establishment, and it bears importance to the contemporary federal and military judiciary's decisions on presidential control over the military.[207]

Initially, Wilson's bill contained no provision to place retired naval and army officers in the "Register" or pay pensions that were interlocked with either the articles of war or the naval articles.[208] Shortly after introducing the bill, Senator James Grimes (R-IA) noted that the need to replace incapacitated naval officers was even more pronounced than that in the army.[209] On July 15, Wilson introduced a third set of amendments to S.B. 3.[210] One of the amendments Wilson added was designed to repeal a 1850 law requiring the secretary of war to discharge all minors from the army.[211] Another amendment would maintain retired army and naval officers in the active-duty "Register" and pay them a pension but maintain the military's court-martial jurisdiction over them.[212] Notably, the act entitled retired officers to receive subsistence rations in addition to their pensions and continue to wear their uniforms.[213] The Senate voted in favor of the act on July 19.[214]

After Wilson submitted the third round of amendments to the Senate, Congressman Francis P. Blair, Jr (R-MO) introduced H.R. 37 to the House mirroring S.B. 3.[215] It was Blair's influence which enables a conclusion that the continuing jurisdiction served a two-fold purpose: clearing out the senior most army positions for younger officers and maintaining a loyal reserve of senior officers.[216] While it is true that Winfield Scott and several other senior officers remained loyal to the United States, Samuel Cooper, Albert Sidney Johnson, Joseph E. Johnson, and Robert E. Lee defected to the Confederacy and became that army's senior officers.[217] Indeed, there is a long list of Army

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archives/house-of-representatives.html.

207. *Id.*

208. *See* S.B. 3, Sen. Exec. J. (June 6, 1861).

209. Cong. Globe, 37th Cong., 1st. Sess. 16–17. Grimes stated: "There are lieutenants at the Navy who have for four years been the inmates of insane asylums, and who are regarded as utterly incurable. They stand in the way of the promotion of junior meritorious officers, and such men ought to be assigned to a retired list." *Id.* at 17.

210. *See* S.B. 3, Sen. Exec. J. (June 15, 1861).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Cong. Globe, 37th Cong. 1st. Sess. 128 (1861). The House Military Affairs Committee consisted of Francis Blair (R-MO), Samuel Curtis (R-IA); William Richardson (D-IL); James Buffington (R-MA); William Allen (D-OH); Gilman Marston (R-NH); and James Jackson (U-KY). *See House of Representatives*, N. Y. TIMES (July 9, 1861), https://www.nytimes.com/1861/07/09/archives/house-of-representatives.html. At some point, Abram Olin (R-NY) became a member of the committee. *See* N. Y. TIMES, supra note 206.

216. CONG. GLOBE, 37th Cong., 1st. Sess. 389 (1861).

217. *See generally* JOHN H. EICHER & DAVID J. EICHER, CIVIL WAR HIGH COMMANDS (2002).

officers who defected to the Confederacy.[218] On April 18, 1861, Blair—while serving simultaneously as an Army colonel and member of Congress—penned a letter to Secretary of War Simon Cameron, noting that pro-Union Missourians suspected that the theatre commander, General William S. Harney, sympathized with the Confederacy.[219] Although Blair professed no opinion on Harney's loyalty to the Union, he did note Harney's attempts to achieve a rapprochement with Missouri's pro-southern governor, Sterling Price, and his advanced age as raising the possibility of disloyalty.[220] Born in Tennessee in 1800 and having served in several Indian campaigns as well as during the Mexican-American War, Harney was, in fact, one of the oldest officers in the Union Army; He retired in 1863 after serving the last two years in administrative positions, and he remained loyal to the Union.[221] Thus, it was Blair's concerns over Harney that led to H.R. 37 containing jurisdiction over retirees.

There was dissension, including among Republican legislators, to the pension aspects of Wilson's bill.[222] Senator John Sherman (R-OH) objected to maintaining retired officers on a pension list because it added to the government's debt.[223] Senator John Hale (R-NH) likewise objected to maintaining retired officers on the government's payroll.[224] Representative Abram Baldwin Olin (R-NY) insisted that Congress place retired officers on the register at full, rather than half-pay, by highlighting both General Winfield Scott, a successful general from the War of 1812 against the British Empire and the Mexican-American War, and General John Ellis Wool, who likewise commanded forces in the prior two wars and continued to do so.[225] Implicit in Olin's argument was that to maintain jurisdiction over retirees, their pensions would have to remain identical to their salaries.[226]

Sherman likely had another reason for his objections. The continuance of military jurisdiction over retired officers expanded the Executive Branch's authority over the citizenry in an unusual way. One day prior to the vote, Grimes introduced a joint resolution asking Congress to proclaim the constitutionality of all of Lincoln's actions up until that date.[227] Sherman, once more, objected to such a resolution because, in his opinion, Lincoln never possessed the power to suspend the writ of habeas and insisted instead

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218. *See* WAYNE WEI-SIANG HSIEH, WEST POINTERS AND THE CIVIL WAR: THE OLD ARMY IN WAR AND PEACE, 112–33 (1st ed. 2009).

219. Letter from Francis B. Blair, Jr., Former U.S. Rep. to Simon Cameron, Former U.S. Sec'y of War (Apr. 16, 1861) (on file with the Library of Congress).

220. *See id.*

221. *See generally* EICHER & EICHER, *supra* note 217.

222. *See generally* Letter from Francis P. Blair Jr., *supra* note 219.

223. CONG. GLOBE, 37th Cong., 1st Sess. 164–91.

224. *Id.* at 158–62.

225. *Id.* at 389–90.

226. *See id.* at 389–90.

227. *Id.* at 393.

that a decision to suspend habeas solely resided in the Congress.[228] In other words, he worried about the creation of a military government headed by a commander in chief.[229]

In 1916, Major General Enoch Crowder, the Judge Advocate General of the Army, testified that in his experience the majority of recalled officers were court-martialed for a failure to pay debts.[230] Most importantly, the pension law, in creating lifetime amenability to military jurisdiction, coupled with *Tarble* meant that a greater possible number of citizens would not only be subject to military jurisdiction, and in the case of citizens who retired from the military, be subject to a body of law that was applicable to conduct based on discipline and necessity, but also have an avenue of appeal closed to them that had existed for the first century of the United States' existence.[231]

VI. FEAR OF STANDING ARMIES AND THE PRACTICE OF COURTS-MARTIAL, 1788–1866

Fear of standing armies was one of the paramount themes at the Constitution's drafting.[232] Professor Richard Kohn, in his *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802*, observed "no principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime."[233] James Madison, in *Federalist XLI* assured the public that a constitutional diffusion of power over the military establishment was one of the best guarantors of preventing the usurpation of the government by a standing army.[234] Another bulwark against a standing army overtaking the Constitution was the federal government's reliance on militia.[235] Prior to the

228. *Id.*

229. *See id.*

230. *Revision of the Articles of War Before the Committee on Military Affairs*, 64th Cong. 6 (1916) (statement of Enoch Crowder, Judge Advocate General of the United States Army). Under the Act of July 24, 1876, retired officers were still permitted to wear their uniform but were withdrawn from promotion lists and remained amendable to military jurisdiction for any infraction under the Articles of War. Sec. 1256, Rev. Stat. XXXIII; *see also* W. WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 433 (1880).

231. *See generally supra* notes 212–14 and accompanying text (discussing the pension law).

232. ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 515–25 (1941).

233. RICHARD KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 2 (1975). Kohn further observed that "a standing army represented the ultimate in uncontrolled and uncontrollable power" and that any nation that maintained permanent forces surely risked the overthrow of legitimate government and the introduction of tyranny and despotism. *Id.*

234. THE FEDERALIST No. XLI 207 (James Madison). Madison penned: "Next to the effectual establishment of the union, the best possible precaution against danger from standing armies, is a limitation of the term for which revenue may be appropriated to their support. This precaution the constitution has prudently added." *Id.*

235. *See, e.g.*, Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1516–1818 (1969); Lawrence Delbert Cress, *An Armed Community: The Origins*

Civil War it was evident that the federal and state courts constrained the War and Naval Departments, both by deferring to the federal and state legislative branches and protecting the rights of citizens brought into military service.[236] Indeed, Justice Scalia appears to have recognized this facet of history in his *Hamdi* dissent.[237]

In 1817, the Tennessee Supreme Court held, for instance, that its state courts had the authority to decide court-martial jurisdiction following a presidential order for militia to muster.[238] The Tennessee Supreme Court's decision is unsurprising in light of the fact that in *Wise v. Withers*, the Court, in 1806, determined that a court-martial possessed personal jurisdiction only over persons classified as amenable for militia service.[239] *Meade v. Deputy Marchal* provides perhaps the most poignant example of a judicial determination that the Bill of Rights had some degree of application to courts-martial.[240] Issued by Chief Justice Marshall in his circuit capacity in 1815, *Mead* established that courts-martial are required to adhere to due process standards of notice.[241] If *Meade* should stand for any principle in contemporary law, it is that Justice Alito's expressed doubts in *Ortiz* that the Bill of Rights applied to the practice of court-martial in the early Republic are doubts of personal choice.[242] Clearly, Justice Marshall at least assumed that the due process right to notice was judicially enforceable when a court-martial abridged that right.[243]

There were, to be sure, significant jurisdictional limits on what the courts would do. Decided in 1953, Justice Robert Jackson in *Orloff v. Willoughby* emphasized that "judges are not given the task of running the Army."[244] The premise of Jackson's statement, though he did not cite to a specific source, appears to have originated much earlier. In 1817, in *Ex Parte Dunbar*, the Massachusetts' Supreme Judicial Court of Massachusetts

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and the Meaning of the Right to Bear Arms, 71 J. AM. HIST. 22, 23 (1984); Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 J. HIST. IDEAS 43, 49–51 (1979) (discussing the British Whig views on the necessity of a militia).

236. *See, e.g.*, White v. McBride, 7 Ky. (4 Bibb.) 61 (1815) (holding the state constitution enshrined conscientious objection as a fundamental right over mandatory militia service); Coffin v. Wilbur, 24 Mass. (7 Pick.) 149 (1828) (involving a court-martial in which the officers were unsworn and that in contravention of statute, the judge advocate's legal advice provided to them was only oral and was devoid of jurisdiction); Brook v. Adams, 28 Mass. (11 Pick.) 441 (1831) (involving a court-martial in which the judge advocate who was not properly appointed was devoid of jurisdiction).

237. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 565–67 (Scalia, J., dissenting).

238. Durham v. United States, 5 Tenn. (4 Hayw.) 54 (1817).

239. Wise v. Withers, 7 U.S. (3 Cranch) 331, 336–37 (1806). In *Wise*, the Court determined, consistent with its earlier opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that a justice of the peace was a judicial officer and, therefore, as Congress had exempted judicial officers in the Capitol from militia service, a court-martial could not possess personal jurisdiction over justices of the peace. *Id.*

240. *See generally* Meade v. Deputy Marshal, 16 F. Cas. 1291 (C.C.D. Va. 1815) (no. 9372).

241. *Id.*

242. *See infra* Section VII.E.I (discussing Justice Alito's dissent).

243. *See Meade*, 16 F. Cas. at 1293.

244. Orloff v. Willougby, 345 U.S. 83, 93 (1953).

determined that it would not exercise its general supervisory power over militia courts-martial because a convicted soldier aggrieved by a court-martial error had a remedy in law to challenge the veracity of the court-martial verdict.[245] Massachusetts' justices recognized that the superintending power of their court existed to protect the liberties of the state's citizens, but an extension of this power over the state militia would be an unprecedential "inconvenience" to the state's operation of its militia.[246]

Between 1789 and 1861, the fear of standing armies remained a part of political and legal discourse at the national level. In 1835, President Andrew Jackson addressed Congress, insisting that:

> [a] large standing military force is not consonant to the spirit of our institutions nor to the feelings of our countrymen, and the lessons of former days and those also of our own times show the danger as well as the enormous expense of these permanent and extensive military organizations.[247]

In 1848, following the Mexican-American War, President James Polk proclaimed to Congress that he opposed a large standing army.[248] "Our standing army is to be found in the bosom of society. It is composed of free citizens, who are ever ready to take up arms in the service of their country when an emergency requires it," Polk insisted.[249] "Sound policy requires that we should avoid the creation of a large standing army in a period of peace. No public exigency requires it. Such armies are not only expensive and unnecessary, but may become dangerous to liberty."[250]

In contrast to the fear of a standing army, the Framers, including Jefferson, did not fear a standing navy, as the Navy was important to guarding commerce and often at sea and away from the seat of government.[251] Even some of the anti-Federalists conceded that a standing navy would be important to the new nation, though they cautioned against the misuse of presidential power over the Navy.[252] The different views of the army as a threat and the navy as a necessary expense are evidenced in the early laws

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245. *See generally Ex parte* Dunbar, 14 Mass. 393 (1817).

246. *Id.*

247. President Andrew Jackson, Seventh Annual Message (Dec. 8, 1835) (on file with the Library of Congress).

248. President James K. Polk, Special Message (July 7, 1848) (on file with the Library of Congress).

249. *Id.*

250. *Id.*

251. *See, e.g.*, THE FEDERALIST No. 41 (James Madison). "The batteries most capable of repelling foreign enterprises on our safety, are happily such as can never be turned by a perfidious government against our liberties." *Id. But see* MARGARET SPROUT & HAROLD SPROUT, RISE OF AMERICAN NAVAL POWER 17–21 (2015 ed. 1966) (noting Jefferson heartily approved of a powerful navy).

252. SPROUT & SPROUT, *supra* note 251, at 23 (noting that anti-Federalists opposed "imperial ambitions" and feared a navy would become the instrument for an empire).

governing the discipline of both military branches as well as the different relationship between the branches and the commander in chief.[253]

A. Differing Presidential Controls Over Army and Navy Discipline

Shortly after the Constitution's adoption, Congress placed a civilian-led structure over the military and crafted a separation between the Army and Navy, which resulted in different commander in chief relationships between soldiers and sailors on one side and their commander in chief on the other.[254] This separation also defined the nation's relationship to its military establishment.[255] On August 7, 1789, Congress established the Department of War as a cabinet-level department, and its responsibilities included ensuring the Army was capable of defending the United States from a foreign invasion or an insurrection.[256] It was also charged with governing designated tracts of land, and both Indian and naval affairs.[257] The standing Army available to the nation as administered by the secretary of war was quite small, numbering roughly 595 soldiers.[258] This was basically a slightly reduced continuation of the 700 men that General Knox inherited on January 3, 1784, when General Washington stepped aside as commanding general.[259]

Early on, the secretary of war was given an enlarged "quasi-judicial" responsibility in regard to veterans who were, as a result of injury or age, considered invalids and therefore qualifiable for a congressionally appropriated pension.[260] In 1792, Congress enacted the first military pension

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253. *See generally supra* notes 251–52 and accompanying text (discussing the differing views).

254. *See* William J. Murphy, Jr., *John Adams: The Politics of the Additional Army, 1798–1800*, 52 NEW ENG. Q. 234, 235–36 (1979).

255. *Id.*

256. An Act to Establish an Executive Department to be Denominated the Department of War, 1 Stat. 49, ch. 7, 49–50 (1789). The statute read:

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, [t]hat there shall be an executive department to be denominated the Department of War, [] and that there shall be a principal officer therein to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military or naval affairs, as the President of the United States shall assign to the said department, or relative to the granting of lands to persons entitled thereto, for military services rendered to the United States, or relative to Indian affairs; and furthermore, that the said principal officer shall conduct the business of the said department in such manner, as the President of the United States shall form time to time order or instruct.

Id.

257. WILLIAM GANOE, THE HISTORY OF THE UNITED STATES ARMY 95 (1924).

258. *Id.*

259. *Id.* at 91. Ganoe also notes that Knox inherited command over the army at a time when the Congress determined by official resolution that a standing army was a menace to liberty. *Id.* For the text of the resolution, see 27 Journals of the Continental Congress, 1774–1789, at 433 (Worthington C. Ford, ed., 1904–37).

260. *See* Act of Mar. 23, 1792, ch. 11, § 1 Stat. 243 (1792) (repealed in 1793).

act which disabled veterans from the War for Independence could petition the federal circuit courts for a pension, subject to final approval by the secretary of war.[261] Shortly after, the Court, in *Hayburn's Case*, expressed doubts as to a legal construct that placed the Article III judiciary subject to the secretary of war, but held over Hayburn's appeal for another term, and during the interregnum, Congress modified the law to emplace the entire application process within the War Department.[262]

Congress specifically gave power to convene army general courts-martial—the most severe military tribunal—to "[a]ny general officer commanding an army, or [c]olonel commanding a separate department."[263] Notably, the President was absent from any of the statutory language empowering commanding officers to organize and direct courts-martial to occur.[264] It was not until 1830 that Congress passed legislation enabling a president to convene a general court-martial, but only in instances when a commanding general or colonel accused another general officer of violating the Articles of War and the commanding general or colonel would have also served as the convening authority.[265] In its plain language, this law hardly enabled a president to serve as a universal convening authority.[266]

In 1775, the Massachusetts legislature and, a year later, the Continental Congress adopted the Articles of War almost wholesale from the British Army.[267] It has been noted that this adoption occurred in part because many of the colonists who took up arms against Britain in the War for Independence had served the British Empire in the French and Indian War and on the frontier as militia.[268] In 1806, Congress legislated a new articles of war which remained in place until a new set of laws were adopted in 1874.[269] Captain William Chetwood De Hart—one of the earliest military law commentators—claimed that Congress, in legislating the 1806 Articles of

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261. *See* Laurel Daen, *Revolutionary War Invalid Pensions and the Bureaucratic Language of Disability in the Early Republic*, 52 EARLY AM. LIT. 141, 154–56 (2017).

262. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). On the Court dismissing for a lack of jurisdiction in *Hayburn*, Justice Alito, in *Ortiz,* penned "a court whose judgments are not self-executing no more complies with Article III than a tribunal whose judges are not life tenured. For that reason alone, we dismissed for lack of jurisdiction the first time a party appealed a Court of Claims decision directly to our Court." Ortiz v. United States, 138 S. Ct. 2165, 2193 (2018). Yet, Justice James Iredell and Justice Wilson, who wrote separate letters to President George Washington made it clear that the pension act was an intrusion into the separation of powers. *See Hayburn's Case*, 2 U.S. at 410.

263. WINTHROP, *supra* note 41, at 982.

264. *See id.*

265. *See* An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, 2 Stat. 359 (1806) (amended 1830).

266. *See id.*(discussing legislation enabling a president to convene a general court-martial).

267. See WINTHROP, *supra* note 41, at 22.

268. *See* WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 1–7 (1846); GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 340–43 (3rd ed. rev. 1915); Eugene O. Porter, *The Articles of War*, 8 HIST. 77, 89 (1946).

269. DAVIS, *supra* note 268, at 340–43.

War implied, but never expressly stated, that the President was competent "at all times to appoint general courts-martial."[270] But this appears to be an overstatement because the 1830 legislative change, which included the president, was limited to only those instances in which a commanding general had accused a subordinate officer of a crime. And, General Alexander Macomb—one of the few professional military generals of the Early Republic—wrote in his *A Treatise on Martial Law and Courts-Martial* that a president could neither direct the proceedings of an army court-martial nor order a specific outcome.[271]

Congress established the office of the Secretary of the Navy as a separate cabinet department on April 30, 1798.[272] The separate department alleviated the Secretary of War of responsibility over the naval defense of the United States.[273] In 1800, Congress legislated a separate military law for the Navy titled An Act for the Better Government of the Navy.[274] In 1818, The House Naval Affairs Committee advised Congress that the Naval Articles were not in need of reform, even though two prominent courts-martial had led to a public excitement.[275] One of the Naval courts-martial involved Captain Oliver Hazard Perry, who was found guilty of striking a subordinate officer and using improper language but was only sentenced to a private reprimand.[276] The committee concluded, after expressing its regret at having to do so, that notwithstanding Perry's status as a military hero, a "much more rigorous sentence of the court[-]martial" would have been justified.[277] Another court-martial arising from a captain in command of a warship striking a midshipman, also resulted in an acquittal with a similar legislative approbation.[278] After reviewing the two courts-martial, the House intoned that one means to prevent a devolution into a despotic government was for naval officers to have due regard for the laws governing courts-martial and to "exert themselves to heal the wounds from which the discipline of the Navy has been threatened."[279] Once respect for the law was lost, they cautioned, the Navy "itself would be a useless burden on the community."[280]

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270. DE HART, *supra* note 268, at 5.

271. ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL AS PRACTICED IN THE UNITED STATES OF AMERICA 7–8 (1809).

272. *See* Act to Establish an Executive Department to be Denominated the Department of the Navy, ch. 35, 1 Stat. 553 (1798).

273. *See id.*; *see also* Robert G. Albion, *The Administration of the Navy, 1798–1945*, 5 PUB. ADMIN. REV. 293–302 (1945).

274. An Act for the Better Government of the Navy of the United States, ch. 33, 2 Stat. 45 (1800).

275. H.R. REP. NO. 15-154, at 470 (1818).

276. *See* David F. Long, *William Bainbridge and the Barron-Decatur Duel: Mere Participant or Active Plotter*, 103 PA MAG. OF HIST. AND BIOGRAPHY 34–36 (1979).

277. Review of the Laws for the Government of the Navy, Communicated to the House of Representative (Apr. 1, 1818).

278. *See* H.R. REP. NO. 15-158, at 496 (1818).

279. Review of the Laws for the Government of the Navy, Communicated to the House of Representative (Apr. 1, 1818).

280. *Id.*

In contrast to the more limited presidential control over Army courts-martial, a president, in the direct language of the Naval Articles, was empowered to convene general courts-martial "as often as . . . [deemed] necessary."[281] Partly, this was a result of the absence of a fear of a standing navy, but there was another reason. Because Naval officers have, as a result of their duties, the ability to effect the foreign policy of the United States, Congress was also willing to vest a fuller presidential authority over Naval courts-martial than the Army.[282] In the 1825 naval court-martial of Commodore Charles Stewart, several accusations were leveled at him, including that he assisted persons rebelling against Peru, a neutral country.[283] That same year, the Navy court-martialed Captain David Porter for seizing a town in Spanish-held Puerto Rico without presidential approval.[284] As evidenced by Secretary of the Navy Samuel Southard's order to convene a board of inquiry, Porter's actions could have launched the United States into a war with Spain when there was no presidential authorization or plan to do so.[285] Yet, it was Southard rather than President James Monroe who ordered both the court of inquiry and subsequent court-martial, which found Porter guilty and sentenced him to a suspension from duties for six months.[286]

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281. *See* An Act for the Better Government of the Navy of the United States, Ch. 33, 2 Stat. 45, 50 (1800).

282. *See, e.g.*, *id.* at 46; *see also* H.R. REP. NO. 10-283 at 487 (1826). Captain Charles Stewart was charged with multiple counts of conduct deleterious to the government of Peru. H.R. REP. NO. 10-823 at 489.

283. *See, e.g.*, CLAUDE BERUBE & JOHN RODGAARD, A CALL TO THE SEA: CAPTAIN CHARLES STEWART OF THE USS CONSTITUTION (2006); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 34 (1958).

284. *See* James Russell Solely, *Admiral Porter*, 8 AM. HIST. REV. 588, 588 (1913).

285. *See* Letter from Samuel Southard, Sec'y of the Navy, to Captain Isaac Chauncey, Commandant of the N.Y. Navy Yard (Apr. 19, 1825) (on file with the Library of Congress). The order read, in pertinent part:

> Having been made to appear to the President of the United States, that on or about the fourteenth day of November in the year of our Lord one thousand eight hundred and twenty four David Porter Esquire a Captain in the Navy of the United States, then in command of the Naval forces of the United States in the West Indies and Gulf of Mexico, did, with a part of the military force under his command, forcibly land upon the island of Porto Rico a part of the dominions of His Catholic Majesty the King of Spain then and still at peace and in amity with the Government of the United States, and did then and there commit acts of hostility within the territories, and against the subjects of the said King of Spain.
>
> The President of the United States has deemed an enquiry into the conduct of the said David Porter on that occasion, as well as into the causes which led to the same, to be necessary and proper.

Id. Porter evidently believed that members of his crew as well as private United States merchantmen were unlawfully harassed by Spanish citizens or pirates and had complained to the local authorities who promised to intervene but did not, to Porter's satisfaction, do so. *See* Letter from Francisco Dionsio Vivez, the Spanish General, to Commodore Daniel Porter (July 14, 1823).

286. *See Commodore Porter's Defense*, 28 WKLY. REG. 231 (June 11, 1825), https://books.google usercontent.com/books/content?req=AKW5QaeXMjseJUIJGfthipJMtl-f8XtGyWpSAd3ckBt5YYPbeD2 xLN_WQtquHS2CbUJ6BV_OY5hHpeU05nHmd3LJpRUH7GPUzh1tzyL3M4beQLwfcp3g7m7WP8ts VqRJhq1D-HsxqqIr17pjBmlnK-YDInPcTDer0mmlDTcpZdGeWEpJvYVFdJ2fH64eA-VULRV5Ubheo

Southard, in fact, charged Porter with several specifications of disobedience of orders and insubordinate conduct.[287] Prior to the court-martial, Porter obtained unusual permission from Southard to have the court of inquiry published in Peter Force's *National Journal*, a leading political newspaper of the era published by the one-time mayor of Washington, D.C.[288] Shortly after his court-martial, Porter took leave from the Navy and was hired by Guadalupe Victoria, Mexico's first President, to assume command of that country's navy. [289] President John Quincy Adams was sympathetic to Porter and, at the end of his presidency, reinstated Porter to a command position.[290] The Constitution's Framers and the Early Republic's political leaders were likely aware that in 1757, the British Royal Navy court-martialed and executed Admiral John Byng for his failure to defeat a French siege on the British-held island possession of Minorca.[291] Although King George II did not order the court-martial, he was the sole authority who could have granted Byng clemency.[292] Over the objections of his own First Lord of the Admiralty and senior naval officers, he chose not to do so, and Byng was executed.[293] There are at least two worthwhile observations to Porter's court-martial for contemporary consideration. Unlike President Chester Alan Arthur's conduct in *Swaim*—as analyzed below—Monroe remained distant from Porter's court-martial, and unlike

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287. S REP. NO. 19-270, at 372.

288. Letter from R. Coxe to Peter Force (June 10, 1825); Letter from Southard to Peter Force (Aug. 23, 1825). Southard's letter read:

> Commander Porter having applied to me for permission to have published in your Journal the opinion of the Court of Inquiry as to the employment of the West Indies Squadron under his command, I have no objection to your publishing the whole report and finding of the court of inquiry, whenever Commodore Porter should think proper.

Id. According to one biography, Peter Force's *National Journal* was a pro-John Quincy Adams newspaper. *See* Louis Kaplan, *Peter Force, Collector*, 14 LIB. Q. INFO. CMTY. POL'Y 234, 234 (1944).

289. Elmer W. Flaccus, *Commodore David Porter and the Mexican Navy*, 34 HISP. AM. HIST. REV. 365, 365–66 (1954).

290. It may have helped that when Porter published his defense in the *National Journal*, he dedicated it "[t]o [President John Quincy Adams]." *See generally* DAVID PORTER, AN EXPOSITION OF THE FACTS AND CIRCUMSTANCES WHICH JUSTIFIED THE EXPEDITION TO FOXARDO (Nobu Press 2010) (1825).

291. *See* CHARLES FEARNE, THE TRIAL OF JOHN BYNG AT A COURT-MARTIAL 130 (Gale, Making of Modern Law 2012) (1757). Prior to the court-martial, Byng was regarded in the British press as an outstanding naval officer. *See* Steven Moore, "*A Nation of Harlequins"? Politics and Masculinity in Mid-Eighteenth Century England*, 49 J. BRIT. STUDS., 514, 518–20 (2010).

292. *See generally* CHRIS WARE, ADMIRAL BYNG: HIS RISE AND EXECUTION (2009); *see also* Sarah Kinkel*, Disorder, Discipline, and Naval Reform in Mid-Eighteenth-Century Britain*, 128 ENG. HIST. REV. 1451, 1481 (2013). Professor Kinkel points out that austere "reforms" in Britain's naval laws led to Byng's court-martial and execution. Kinkel, *supra* at 1481.

293. Sarah Kinkel, *Saving Admiral Byng: Imperial Debates, Military Governance and Popular Politics at the Outbreak of the Seven Years' War*, 13 J. FOR MAR. RSCH. 3, 14 (2011).

King George II, John Quincy Adams recognized that lenity had a role in the presidential oversight of courts-martial.[294]

It is important to note that in spite of a president's power to order a Naval court-martial, there were limits to the expanded presidential authority to do so.[295] In 1812, Attorney General William Pinkney issued an opinion that in instances where a ship is in a domestic port, common law crimes such as murder, assault, or larceny had to be tried by the civil courts, which would relegate the Navy to prosecute only military specific crimes such as desertion.[296] Six years later, the Court in *United States v. Bevans* determined that the federal courts did not possess jurisdiction to adjudicate a murder that had occurred on the naval warship, USS *Independence*, while it was berthed in Boston's port.[297] There are two military jurisdictional issues evident in *Bevans*, as well as a noteworthy observation on the attorneys involved in the appeal.[298] Represented by Daniel Webster at the same time he argued the Dartmouth College case, the defendant, William Bevans, was a United States Marine who murdered a sailor on board a ship.[299] (During the War of 1812, Webster sought to minimize the military's influence over the United States when he successfully led congressional opposition to a national conscription program.)[300]

Although Bevans's crime occurred on board a Naval vessel and while he was on duty, Congress prohibited courts-martial prosecutions for murder while a Naval ship was in dock.[301] The second jurisdictional issue, which the Court decided in full regard to the Constitution's grant of authority to the federal judiciary over admiralty claims, is that because the *Independence* was

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294. *See infra* Part VI.C (explaining how the Naval establishment and judiciary add to the fear around standing armies in regards to the practice of courts-martial); *see, e.g.*, *Miscellaneous: Naval Court Martial*, 28 WKLY. REG. 180 (May 21, 1825), https://books.googleusercontent.com/books/content?req=AKW5QaeXMjseJUIJGfthipJMtl-f8XtGyWpSAd3ckBt5YYPbeD2xLN_WQtquHS2CbUJ6BV_OY5hHpeU05nHmd3LJpRUH7GPUzh1tzyL3M4beQLwfcp3g7m7WP8tsVqRJhq1D-HsxqqIr17pjBmlnK-YDInPcTDer0mmlDTcpZdGeWEpJvYVFdJ2fH64eA-VULRV5UbheoDuxkKEnZ2_snmHT4f9nxDNgaJ_ZNGPELeJ3Ps1lGVZaeRFFZtmUNGLxEpC4h9l16qx00MF0EiaXaEpb1U-6pnhRyQ (reporting that President Adams did not approve a court's findings that a midshipman was guilty when inadequate evidence was presented).

295. *See* United States v. Devons, 16 U.S. 366, 391 (1818).

296. WILLIAM PINKING, OFFICIAL OPINIONS OF THE ATTORNEY GENERAL 172 (1813). Appointed Attorney General by James Madison, Pinkney fought in the War of 1812 and was wounded at the Battle of Bladensburg in 1814. *Id.* He had also served in Congress prior to and after his executive branch tenure. He had also served as President George Washington's emissary in Britain. *See* Monroe Johnson, *William Pinkney*, *Legal Pedant*, 22 A.B.A. J. 639, 640 (1936). Thus, he had worked in both the foreign affairs and national security arena. *Id.*

297. United States v. Bevans, 16 U.S. 366, 391 (1818).

298. *See id.* at 339.

299. *Id.*

300. ROBERT REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 127–29 (1997).

301. *See Bevans*, 16 U.S. at 337 (citing Act for the Punishment of Certain Crimes against the United States, ch. 9, 1 Stat. 112, 113–14 (1790)). In what might be deemed as a clash of legal titans, Henry Wheaton, a leading admiralty lawyer and the Supreme Court's reporter, represented the government. *See id.* at 348.

berthed in a port, the state courts, consistent with Pinkney's opinion, had jurisdiction over the murder prosecution.[302] The reason a state court possessed jurisdiction over the offense was not, in the Court's estimation, because of a constitutional limitation on naval courts-martial, but rather because Congress had curtailed the court-martial authority.[303] This facet of the Court's opinion made the jurisdiction of Naval courts-martial different than Army courts-martial.[304] Thus, while the Court gave something of an advisory opinion to Congress, the Justices also, as an indirect result of their opinion, relegated jurisdiction to a state court and denied the federal government's argument that a port was extraterritorial.[305] Finally, although the President enjoyed more authority over Naval courts-martial, the practice of Naval courts-martial still comported to the concept of minimizing jurisdiction over sailors while in the United States and the belief that the individual states were the proper possessors of forums to adjudicate military crimes.[306]

B. Congress and Army Courts-Martial in the Early Nineteenth Century

While the Constitution vested Congress with the authority to enact laws governing the military establishment, legislative oversight of military discipline in the early period extended beyond courts-martial.[307] In 1792, the House of Representatives investigated the failure of General Arthur St. Clair's expedition against Indian tribes in Indiana.[308] The House's investigation into General St. Clair occurred in the aftermath of two military failures.[309] In 1790, an expedition under the command of General Josiah Harmer was defeated by a Miami-led tribal confederation after the poorly equipped Kentucky and Pennsylvania militia retreated, some without firing their weapons.[310] To the House, it was clear that the military establishment's

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302. *Id.* at 368–88. U.S. Constitution Article III, § 2, Clause 1 reads: "The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1.

303. *Bevans*, 16 U.S. at 390. Chief Justice Marshall penned:

> That a government which possesses the broad power of war; which 'may provide and maintain a navy;' which 'may make rules for the government and regulation of the land and navel [sic] forces,' has power to punish an offence committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. *Id.*

304. *See* An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, 2 Stat. 359, 371 (1805) (stating that all non-capital crimes are subject to court-martial).

305. *Bevans*, 16 U.S. at 390.

306. *See, e.g.*, An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 114 (1790) (stating that crimes committed at sea or outside of a state's jurisdiction are to be tried where the offender is apprehended or brought to).

307. *See, e.g.*, S. REP. NO. 11-101, at 295 (1810).

308. *See, e.g.*, H.R. REP. NO. 2-5, at 36 (1792). On the defeat of St. Clair, see Leroy V. Eid, *American Indian Military Leadership: St. Clair's 1791 Defeat*, 57 J. MIL. HIST. 71 (1993).

309. H.R. REP. NO. 2-5, at 36 (1792).

310. THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 94 (1988).

ability to guard the frontier was in considerable doubt, yet it did not propose a vast enlargement of the standing army or move to create a new Articles of War.[311] In spite of the fact that Congress initiated several investigations into the military's readiness, including courts-martial, it would not become an appellate court.

Winthrop cited to two congressional actions predating the Civil War for the proposition that Congress had, on its own, determined that it would not become an avenue for appeals from courts-martial.[312] The House Committee on Military Affairs, in 1826 and again in 1832, determined after reading the trial records related to Colonel Talbot Chambers and Lieutenant Colonel Wooley that Congress was not authorized to revise civil or military judicial judgments.[313] Put another way, the legislative ranch determined it did not possess a judicial power over courts-martial.[314] Winthrop added that had Congress exercised such authority, "[it] would be subversive of discipline and highly injurious to the service."[315] In the War Department's correspondence on Wooley's court-martial to Congress, it appears that the Department recognized a jurisdictional error, and there was little else to discern from the episode, but Chambers presents a more poignant example of legislatively self-imposed congressional limitations and authorities.[316]

On May 16, 1826, President Adams, in compliance with a Senate Resolution, transmitted a copy of the Chambers court-martial.[317] Like many officers from his time of service, Chambers was charged with drunkenness and being incapacitated for duty.[318] The Articles of War required that a court-martial be composed of thirteen officers, all of whom were supposed to outrank the accused officer, unless there were exigent circumstances.[319] But the court-martial that convicted Chambers consisted of five officers, all junior in rank to him.[320] Although the House Military Affairs Committee recognized that the Army had violated the two jurisdictional constraints

311. *See* List of the Public Acts of Congress, 1 Stat. xviii, xx–xxxviiii (1790–1799).

312. WINTHROP, *supra* note 41, at 52.

313. *Id.*

314. *Id.*

315. *Id.* (citing H.R. REP. NO. 19-332, at 327 (1826)).

316. H.R. REP. NO. 22-508, at 850 (1832).

317. S. REP. NO. 19-330, at 307 (1826).

318. For an understanding of Chambers as an officer, see EDWARD COFFMAN, THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784–1898 185 (1986); L.B.S., *Report of Inspection of the Ninth Military Department, 1819*, 7 MISS. VALLEY HIST. REV., 261, 263 (1920). On Chambers's offenses, see S. REP. NO. 19-330, at 309 (1826). Chambers was charged with nine instances of being drunk on duty or in public, three instances of violating regulations including the unauthorized discharge of firearms, and once instance of conduct unbecoming an officer and gentleman. *Id.*

319. *See* H.R. REP. NO. 19-332, at 327 (1826). Article 64 of the Articles of War required that a general court-martial number thirteen officers. *See* An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, 2 Stat. 359, 367 (1806). Article 75 of the Articles of War stated that "[n]o officer shall be tried but by general court[-]martial, nor by officers of inferior rank, if it can be avoided." *Id.*

320. H.R. REP. NO. 19-332, at 327 (1826).

related to Chambers' court-martial, it then determined that it rested with the executive branch to cure, and that Congress's role in the matter, if it chose to do so, would be to change the two articles to become an absolute mandate on military courts-martial.[321] The Committee also reported that it hoped Adams would take into account Chambers's "past services and gallant distinction . . . during the late war."[322] What can be discerned from the Committee's decision is that Congress can amend military law in response to perceived defects in fairness and that members of Congress can seek clemency for convicted or accused service-members, but the legislative branch cannot directly provide appellate relief.[323] Echoing this view, in 1882, Senator John A. Logan (R-IL), a Civil War veteran, while opposing the rehabilitation of Fitz John Porter, a court-martialed and disgraced former Union Army general, conceded that Congress could pass a law to give the President the authority to reappoint Porter to the Army but insisted that Congress could not overturn the court-martial verdict.[324]

C. The Federal Judiciary and the Naval Establishment

In *United States v. Mackenzie*, the Southern District of New York refused a petition from a widow to indict a naval captain who had detected a mutiny and then, after meeting with his senior officers, ordered the summary execution of four crew-members.[325] The incident, known as the "Somers Mutiny," proved politically contentious as its alleged leader, Philip Spencer, was also the son of the Secretary of War.[326] While it may, at first, appear that the federal court decided not to interfere in military affairs because a naval court of inquiry had convened and a court-martial was to follow, in this instance, the United States Attorney who had decided not to seek an indictment had also been appointed as the judge advocate prosecuting the

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321. *Id.* at 327–28. The Committee reported:

> [I]f it were proper in this case now to do anything, that the remedy does not belong to this House. The Constitution of the United States has given the command of the army to the President, who has full power to cause any defect in the application of law, or misapprehension of fact, in relation to trials by courts-martial, to be reversed or remedied in the exercise of the ulterior discretion vested in him . . . .

Id.

322. *Id.*

323. *Id.* at 327–28.

324. JOHN A. LOGAN, SPEECH OF HONORABLE JOHN ALEXANDER LOGAN OF ILLINOIS IN THE SENATE OF THE UNITED STATES 1–3 (Hansebooks 2017) (1833). The court-martial of Fitz John Porter in 1863 was politically contentious. *See* KASTENBERG, *supra* note 9, at 118.

325. United States v. Mackenzie, 26 F. Cas 1118, No. 15,690 (S.D.N.Y. 1843). While there may have been a question before the court as to whether Philip Spencer's wife had standing to force a federal prosecutor to convene a grand jury, the district court's decision is not unusual. In 1973, the Court reaffirmed a principle that there is no private right to force a criminal prosecution. *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973); *see also* Diamond v. Charles, 476 U.S. 54, 64 (1986).

326. *See* LURIE, *supra* 72, at 22–29; *see also* Scott W. Stucky, *Appellate Review of Courts-Martial in the United States*, 69 CATH. U. L. REV. 797, 800–01 (2020).

court of inquiry.[327] Captain MacKenzie was the recipient of public opprobrium and had requested his court-martial, possibly to avoid a criminal prosecution in federal court. The acquittal did not, at the time, serve as a bar to a civil suit, though the chances of succeeding in a civil suit against MacKenzie were likely low.[328]

While, under the Naval Articles, courts-martial were mostly limited to naval-specific offenses, once at sea or in foreign lands, a ship captain maintained an incredible array of quasi-judicial power over sailors and marines assigned to his command, as evidenced in the 1849 Court opinion *Wilkes v. Dinsman*.[329] In 1836, Congress authorized a naval surveying exploration across the Pacific, and shortly after Samuel Dinsman enlisted into the Marine Corps.[330] After enlisting, Congress passed another law which required a ship captain to release a sailor or marine who completed their enlistment unless their continued service was "essential to the public interests."[331]

Dinsman's difficulties were two-fold. In October of 1837, all of the enlisted sailors and marines who were nearing the end of their enlistments were offered a three-month bounty to serve the duration of the expedition, and Dinsman accepted the bounty.[332] The next year, Lieutenant Charles Wilkes—a future admiral—assumed command of the squadron only to be informed by the Treasury Department that the bounties were unlawful, and the Secretary of the Navy ordered him to recoup the monies from Dinsman and the dozens of others who accepted them.[333] Commissioned in 1828, Wilkes was a noted explorer and scientist, but he had a reputation for being a martinet.[334]

Shortly after Wilkes took command of the expedition, Dinsman's term of enlistment had expired and, failing to obtain a release from service, he refused to follow orders or do his assigned duties.[335] In response, Wilkes ordered Dinsman to receive twelve lashes, the maximum penalty under naval regulations that could be administered without a court-martial.[336] Wilkes also placed Dinsman in an Oahu prison while the expedition's vessels underwent

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327. *Id.*

328. *Id.*

329. *See generally* Wilkes v. Dinsman, 48 U.S. 89 (1849).

330. *Id.*

331. *Id.* at 90 (citing 5 Stat. at Large, 153. Entitled, "An act to provide for the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen.").

332. *Id.* at 94.

333. *Id.* at 91.

334. On Wilkes, see W. Patrick Strauss, *Preparing the Wilkes Expedition: A Study in Disorganization*, 28 PAC. HIST. REV. 221 (1959); William W. Jeffries, *The Civil War Career of Charles Wilkes*, 11 J. S. HIST. 324 (1945); C. Ian Jackson, *Exploration as Science: Charles Wilkes and the U.S. Exploring Expedition, 1838–42: A Controversial Leader*, 73 AM. SCIENTIST 450, 453 (1985).

335. Strauss, *supra* note 334; Jeffries, *supra* note 334; Jackson, *supra* note 334.

336. Strauss, *supra* note 334; Jeffries, *supra* note 334; Jackson, *supra* note 334.

repair.[337] When Dinsman returned to the United States, he filed suit against Wilkes.[338] Based on the complaints of Dinsman and others, the Secretary of the Navy charged Wilkes with cruelty and oppression and convened a court-martial, but the court-martial resulted in a finding of "not guilty."[339]

In a civil trial in the District of Columbia, twelve citizens determined that Wilkes had unlawfully assaulted and imprisoned Dinsman and issued Dinsman an award of $500.[340] The trial court in the District of Columbia rejected the record of Wilkes' court-martial acquittal as immaterial to Dinsman's suit.[341] In an assignment of opinions which was ethical at the time but in 2021 might draw public concern, if not condemnation, Justice Levi Woodbury authored the Court's unanimous opinion.[342] Between 1831 and 1834, Woodbury had served as Secretary of the Navy and during this time Wilkes directly reported to him on geographic and coastal surveying matters.[343] In other words, Woodbury had, at one time, been in charge of Wilkes' career and oversaw his advancement.

The Court overturned Dinsman's award, based on the nature of naval command.[344] Woodbury's opinion assured the nation that the law did, in fact, protect the "humblest seaman or marine" but then determined that the trial court had erred because Dinsman had an legal obligation to do his duties.[345] The Court did not entirely rule against Dinsman in the sense that the opinion enabled a new civil trial, but the standard for the jury to determine whether a trespass had occurred was whether Wilkes, in ordering the twelve lashes and placing Dinsman in a foreign prison, exceeded the authority granted to him under the Naval Articles, and not whether Dinsman was unlawfully subject

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337. Strauss, *supra* note 334; Jeffries, *supra* note 334; Jackson, *supra* note 334.

338. Strauss, *supra* note 334; Jeffries, *supra* note 334; Jackson, *supra* note 334. While in Oahu, Dinsman and other Marines continued to refuse to do military duties and were imprisoned in fort overseen by King Kamehameha. *See* Transcript at 24, Wilkes v. Dinsman, 48 U.S. 89 (1849).

339. *See generally* Wilkes v. Dinsman, 48 U.S. 89 (1849).

340. *Id.* at 92. Wilkes also prevailed in his civil suit against two other naval officers, William Speiden and Joseph Drayton. *Id.*

341. *Id.* at 123. It may be the case that Wilkes made it more likely he would face a court-martial for cruelty after he charged one of his officers for cruelty and maltreatment of sailors on the USS Flying Fish. *See* Letter from Charles Wilkes to Abel Upshur (July 8, 1842). Secretary of the Navy Abel Upshur appeared not to trust Wilkes's account of his own conduct toward the sailors and marines under his command after the surgeon's reports were missing. *See* Letter from Abel Upshur to Charles Wilkes (Feb. 15, 1843). Upshur penned the following:

> Assistant surgeon Whittle has applied to the department for the return of a sealed package addressed to the Secretary of the Navy [c]ontaining, as is alleged, his most private words and declared to you as commanding officer of the Exploring Expedition. No such package can be found in the department. Will you be pleased to inform me if it was transmitted, and when and whether it is yet in your possession.

Id.

342. *Wilkes*, 48 U.S. at 122.

343. *See, e.g.*, CHARLES WILKES, AUTOBIOGRAPHY OF CHARLES WILKES, U.S. NAVY, 1798–1877, at 296 (1978).

344. *Wilkes*, 48 U.S. at 132.

345. *Id.* at 125.

to Wilkes's command.[346] In essence, the Court relegated the liability of naval officers to acts that exceeded their lawful authority, and given the broad power conferred on naval officers, the Court made it more difficult to challenge the actions of naval officers.[347]

In 1852, the Court in *Dinsman v. Wilkes*, granted review on the issue of Wilkes's liability once more.[348] This time, in a unanimous opinion authored by Chief Justice Taney, the Court concluded that, as a commanding officer, Wilkes had the lawful authority to inflict punishments on sailors and marines to uphold the discipline of his command and Dinsman had a duty of obedience to Wilkes's orders.[349] However, the Court did not terminate the possibility of a trespass suit against Wilkes.[350] Instead, the Court determined that at a civil trial, the sole question for a jury to consider was whether Wilkes had acted out of a nefarious motive.[351] In other words, the Court left open the possibility that a martinet could be sued in the civil courts, but only for actions that did not clearly comport with the law such as an assault on a sailor who actually did his duties and was therefore the target of the officer's malfeasance.[352]

The last Court opinion on courts-martial to occur before the Civil War was *Dynes v. Hoover*.[353] One of the salient facts of *Dynes* is that Frank Dynes, the court-martialed sailor, conceded at his Navy court-martial before the circuit court and through the Court that the court-martial possessed personal jurisdiction over him.[354] His challenge was based on a subject matter jurisdiction argument.[355] And the facts of the case may be somewhat odd from the perspective of the twenty-first century, if for no other reason than Dynes conceded that he would not have had a meritorious appeal if the court-martial found him guilty of the original charged offense.[356] (The court-martial acquitted him of the charged offense of desertion but convicted him of attempted desertion.)[357] The 1806 Articles of War did not, in plain

346. *Id.*
347. *See generally id.*
348. *See* Dinsman v. Wilkes, 53 U.S. 390 (1851).
349. *Id.*
350. *Id.*
351. *Id.*
352. *See generally id.*
353. Dynes v. Hoover, 61 U.S. 65 (1857).
354. *See generally id.*
355. *Dynes*, 61 U.S. at 78. Secretary of the Navy James C. Dobbin appointed the court-martial. *See* Letter from James C. Dobbin to Commander William Hudson (Sept. 18, 1854). Moreover, Dynes did not object to any of the officers appointed by Dobbins to his court-martial. Transcript of Record at 8, *Dynes*, 61 U.S. 65 (No. 155).
356. *Dynes*, 61 U.S. at 79.
357. *Id.* Desertion was listed as a crime under the Seventeenth Article of the Naval Article. *See* Act for the Better Government of the Navy of the United States, Ch. 33, 2 Stat. 45 (1800). Article XVII read:

> If any person in the [N]avy shall desert, or shall entice others to desert, he shall suffer death, or such other punishment as a court martial shall adjudge; and if any officer or other person belonging to the [N]avy, shall receive or entertain any deserter from any other vessel of the

language, contain the crime of attempted desertion, but as a common law matter, attempts were already a part of the criminal law.[358] Dynes appealed on a subject matter jurisdiction argument, and in this regard the appeal differed from *Withers* and *Mott*, neither of whom contested the legality of the charges against them, but rather, whether personal jurisdiction existed.[359]

At the time that the Court was deciding *Dynes*, one naval court-martial was reported in the *New York Times* as a matter of national interest.[360] Lieutenant James Rowan, the commander of the USS *Bainbridge* had been accused of being drunk on duty and committing conduct destructive to "good morals" while crossing through the Straits of Magellan.[361] *Dynes* was also overshadowed in the national media by the Court's earlier issuance of *Dred Scott v. Sanford*.[362] The actual underlying facts of *Dynes* were not as compelling as Rowan's court-martial, and certainly not nationally divisive.[363] Several lower-ranking sailors assigned to the USS *Independence* fell off of a boom into the ocean, but Dynes was not returned to his ship following a rescue from another ship.[364] It is possible that the men sought to commandeer a lifeboat and flee to Brooklyn, but it is also possible that an accident occurred and Dynes simply was derelict in trying to return to his vessel.[365] On September 26, 1854, Dynes was court-martialed on the USS *North Carolina* along with two other sailors.[366] The court-martial sentenced Dynes to six-months confinement, John McNenny to three-years confinement, and David Hazard to "hard labor, without pay, during the period of his natural life."[367]

> navy, knowing him to be such, and shall not, with all convenient speed, give notice of such deserter to the commander of the vessel to which he belongs, or to the commander in chief, or to the commander of the squadron, he shall on conviction thereof be cashiered, or be punished at the discretion of a court martial. All offen[s]es committed by persons belonging to the Navy while on shore, shall be punished in the same manner, as if they had been committed at sea.

Id.

358. The law of attempts enabled a finding of guilt for inchoate crimes. *See generally* Commonwealth v. McDonald, 50 Mass. 365 (1850) (dealing with attempted larceny); People v. Bush, 4 Hill 133 (N.Y. 1843) (dealing with attempted arson); Lignon v. Ford, 19 Va. 10 (1816) (providing that attempted rape should be charged as rape).

359. *Dynes*, 61 U.S. at 67; Wise v. Withers, 7 U.S. 331, 333 (1806); Martin v. Mott, 25 U.S. 19, 25 (1827).

360. *See generally Naval Courts Martial: Trial of Commander James R Rowan of the Brig Bainbridge for Misconduct*, N.Y. TIMES (Jan. 7, 1857); Sentence of the Court Martial on Commander Rowan, January 27, 1852. The court-martial "cashiered." *Id.*

361. *Id.*

362. *See* Joshua E. Kastenberg, *A Sesquicentennial Historic Analysis of* Dynes v. Hoover *and the Supreme Court's Bow to Military Necessity: From its Relationship to* Dred Scott v. Sanford *to its Contemporary Influence*, 39 U. MEM. L. REV. 596, 599–602 (2008). *Dred Scott* was issued on March 6, 1857. *Id. Dynes v. Hoover* was issued on February 1, 1858. *Id.*

363. *Id.* at 646–47.

364. Transcript of Record, *supra* note, at 9–10.

365. *Id*. at 10–11.

366. *Id*. at 14.

367. *Id.* President Pierce commuted Hazard's sentence to a period not to exceed Hazard's enlistment. *Id.*

In 1857, the Court in *Dynes* noted that Sailor Dynes—like Jacob Mott—filed suit against the marshal who arrested him.[368] But the Court, with the exception of Justice John McLean, departed from *Mott*, noting that the marshal was simply executing the sentence of a court-martial which had been ordered and approved by the Secretary of the Navy, and then, the commander in chief, President Franklin Pierce ordered the marshal to arrest Dynes.[369] Apparently this ministerial duty absolved the marshal from liability for false imprisonment in a manner that did not trouble Justice Story and a unanimous Court in *Mott* to address.[370] Although Wayne and the majority could have emplaced the law of attempts into the opinion, they did not do so, and instead, the Court determined that as long as the court-martial possessed personal jurisdiction over the accused sailor and the subject matter of the charge, the federal judiciary would not inquire into the proceedings.[371]

Dynes was a step toward distancing the federal courts from reviewing courts-martial, but it certainly did not shut the door on doing so, because there were, as noted in the previous section as well as below in the discussion of state juridical intervention, avenues of appeal remaining.[372] And, as *Dynes* arose from a naval court-martial, one could consider that the Court did not alter the relationship between all service-members and the President, nor distance the judiciary from the Founders' standing army fears. The post-Civil War judiciary would use *Dynes*, like *Mott*, to strengthen presidential control over persons amenable to court-martial jurisdiction and insulate Army court-martials from judicial review.[373]

D. State Judicial Power Over the Military Establishment

An examination of the 1799 New York Supreme Court of Judicature's decision, *The Case of Husted, a Soldier*, results in an observation that four of New York's five earliest justices believed that state judges possessed the authority to issue a writ of habeas on a federal army officer to produce a

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368. Dynes v. Hoover, 61 U.S. 65, 80 (1851). Wayne applauded Dynes's counsel's acumen on getting the appeal to the court through the doctrine of false imprisonment, but then noted the argument merely substituted an imputed effort on the court-martial:

> [S]eeking to make the marshal answerable for his mere ministerial execution of a sentence, which the court passed, the Secretary of the Navy approved, and which the President of the United States, as constitutional commander-in-chief of the army and navy of the United States, directed the marshal to execute, by receiving the prisoner and convict.

Id.

369. Transcript of Record, *supra* note 355, at 14.

370. *Compare Dynes*, 61 U.S. at 80, with Martin v. Mott, 25 U.S. 19 (1827).

371. *Dynes*, 61 U.S. at 83.

372. *See supra* Section V.B (discussing state judicial intervention); *infra* Section V.D (discussing state judicial intervention).

373. *See* Joshua E. Kastenberg, *Fears of Tyranny: The Fine Line between Presidential Authority over Military Discipline and Unlawful Command Influence through the Lens of Military Legal History in the Era of Bergdahl*, 49 HOFSTRA L. REV. 11 (2020).

soldier.[374] The four justices reflected a prevailing norm of law existing until the Civil War, and this prevailing norm—a significant state check against a perceived military tyranny—was rooted in the fear of standing armies.[375] In 1809, a similar event occurred in regard to the Navy when Judge Joseph Hopper Nicholson on the Maryland Court of Appeals acknowledged a judicial power to issue a habeas writ on a captain to produce Emmanuel Reynolds, a minor enlisted into the crew of the United States Brig *Syren*.[376] Three years later, Chief Justice William Tilghman of the Pennsylvania Supreme Court determined that a state judge had the authority to issue the writ on a naval officers.[377] In 1796, Connecticut's Circuit Court for Middlesex County excoriated an army officer who recruited an indented servant without a master's consent while it issued a writ on the officer.[378] The Court, in *Houston v. Moore* in 1820, accepted—with the exception of Justice Joseph Story who dissented—a dual federal and state sovereign oversight of courts-martial as well.[379]

In *United States v. Bainbridge*, in 1816, Justice Story, while in his circuit capacity, determined that Congress's constitutional authority to "provide and maintain a navy" and to "make all laws, which shall be necessary and proper" to effect this authority meant that Congress could enable the enlistment of children into the Navy.[380] Although Justice Story was not only a Supreme Court Justice but also one of the leading legal commentators, the state courts appeared to be hardly constrained by his

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374. 1 Johns. Cas. (NY) 136 (1799). Justices Jacob Radcliff and James Kent opined that Husted's application for habeas had to be refused in his specific case because he could not prevail. Justice Egbert Benson was the only justice to insist that a state judge could not issue a writ on a federal officer. Benson was a noted lawyer prior to the Revolution and took part in it. *See* Robert Ernest, *Egbert Benson: Forgotten Statesman of Revolutionary New York*, 78 N.Y. HIST. 4, 6–9 (1997). He was New York's first elected attorney general and he also was in charge of a committee of public safety to discovery pro-Tory conspiracies in the early post-revolutionary war period. *Id.* at 16.

375. RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 2 (1975). Professor Kohn noted "no principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime." *Id.*

376. *See In re* Reynolds, 20 F. Cas. 592, 599 (N.D. N. Y. 1867) (describing the facts of *Roberts*).

377. Commonwealth v. Murray, 4 Binn. 487, 492 (Pa. 1812).

378. Merriman v. Bissel, 2 Root 378, 378 (Conn. 1796). The state court, in a brief opinion held:

> There is no law that will justify recruiting officers, enlisting indented servants and apprentices under age, into the army, without their master's consent. The defendant being a recruiting officer, and acting for the public service, having the line of his duty marked out before him, like other public officers, acted at his peril, and must be answerable for damages caused by any misconduct of his. His being a public officer, cannot excuse or justify his violating the private rights of a citizen.

Id. at 380.

While this decision might be viewed as a property rights case, it could be interpreted of placing a citizen's right over that of the national defense.

379. Houston v. Moore, 18 U.S. 1, 32 (1820) (Johnson, J., concurring). Justice Johnson in his concurrence agreed with the dual sovereignty principle. *Id.*

380. United States v. Bainbridge, 24 F. Cas. 946, 949 (Cir. Ct. D. Mass. 1816).

opinions.[381] In 1809, the North Carolina Supreme Court, invalidated a minor's enlistment into the regular army because he had not obtained his mother's consent to enlist in the first place.[382]

Massachusetts provides another example of how a state judicial branch could impact the practice of federal courts-martial, even though the appeals arose from militia courts-martial.[383] In 1831, the Massachusetts Supreme Judicial Court, in *Brooks v. Adams*, determined that because a court-martial was a court of "limited and special jurisdiction" and only created for a particular duty, the permanent state courts would not accord a presumption of regularity for the benefit of the government.[384] That is, where a party introduced a court-martial conviction in a civil trial for the collection of a fine or another purpose, the civil court would not credit the court-martial with being lawful unless the other evidence supported a conclusion of lawfulness.[385] The New York Supreme Court of Judicature, in 1843, held that based on the state statutory language, an enforcement of a court-martial sentence could not be done by a civil suit "in the name of the people," but rather, with the presiding officer's name as the plaintiff.[386] In effect, this removed the court-martial from being considered a trial representing the government and instead, demarked it as an inferior tribunal.[387] Perhaps most strikingly, the Vermont Supreme Court determined, in 1843, that the civil courts had the authority to review challenges to both the subject matter and personal jurisdiction of courts-martial.[388]

Prior to the Civil War, state court exercise of jurisdiction over the enlistment of minors into the Navy arose on several occasions.[389] Of course, the status of minor males amenable to military service was far different in the nineteenth century than the present, and the Royal Navy as well as Britain's army had long enlisted young men.[390] In *Commonwealth v. Murray,* the Pennsylvania Supreme Court determined that a minor could, on his own,

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381. *See generally id.*

382. *Ex parte* Mason, 5 N.C. 336, 337 (1809).

383. *See generally*, Edward Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 487–89 (1969).

384. Brooks v. Adams, 28 Mass. 441, 444 (1831) (failure to have a properly appointed judge advocate invalidated a court-martial verdict and sentence). However, in 1841, the Maine Supreme Court in *Rawson v. Brown* determined that the state legislature could, in a property collection appeal, enact laws in which the presiding officer of a court-martial's signature on the record evidenced the court-martial's regularity. Rawson v. Brown, 18 Me. 216, 216–18 (1841).

385. *See Rawson*, 18 Me. at 219.

386. People v. Hazard, 4 Hill 207, 207 (N.Y. Sup. Ct. 1843).

387. *See generally id.*

388. Brown v. Wadsworth, 15 Vt. 170, 171–72 (1843).

389. Frances M. Clarke & Rebecca Jo Plant, *No Minor Matter: Underage Soldiers, Parents, and the Nationalization of Habeas Corpus in Civil War America*, CAMBRIDGE UNIV. PRESS (Sept. 20, 2017), cambridge.org/core/journals/law-and-history-review/article/no-minor-matters-underage-soldiers-parents-and-the-nationalization-of-habeas-corpus-in-civil-war-america/B338BBEF28AB7A3B874FAE4D62DC89B0.

390. *Id.*

enlist in the Navy and do so even over the opposition of his mother.[391] Under the law, a minor could only enlist with his father's consent.[392] *Murray* arose when Commodore Murray enlisted seventeen-year-old John Connor without the permission of his father—who was deceased—and Connor's mother sought her son's release (Connor was "sickly," but the petition for a habeas writ was based on a challenge to the law).[393] In representing Murray, Secretary of the Treasury Alexander Dallas argued that the law requiring a father's permission to enlist did not extend to a mother and therefore Connor's enlistment—which worked to his personal benefit as well of that of the national defense—was lawful.[394] Dallas, a federal cabinet officer, did not object to state jurisdiction.[395]

Murray is practically a seriatim opinion.[396] Chief Justice Tilghman determined that there was no inconsistency with the law protecting minors, but permitting minors of an age who could comprehend their enlistment, to do so when no father was present.[397] This, to Tilghman, fell under Congress's authority to "raise and support" a navy.[398] Justice Jasper Yeates agreed with Tilghman but adopted Dallas's argument that the rights of a mother could be of a lesser quantum than the rights of a father.[399] Justice Hugh Brackenridge also agreed that a minor could contract an enlistment, but he cautioned this was true only because the state legislature permitted it.[400] Brackenridge expressly rejected Congress's authority to enlist minors and warned that if the justices were to agree with Dallas, it would create a "monstrous" federal authority over the state's citizens.[401] Like Dallas, none of the three justices disavowed the power of the state judges to issue a habeas writ or, for that matter, interpret federal law to assess the power of Congress or the Executive over the military establishment.[402]

In 1824, the Pennsylvania Supreme Court in *Commonwealth v. Gamble*, an opinion authored by Justice John Gibson, determined that because the Marines were a part of the Naval Department, Congress's prohibition against minors enlisting in the Army did not apply, and the national defense favored minors voluntarily enlisting into the Navy.[403] Gibson's separation of the

391. Commonwealth v. Murray, 4 Binn. 437, 487 (Pa. Comm. Ct. 1812).
392. *Id.*
393. *Id.* at 491.
394. *Id.* at 488. Dallas specifically argued: "Although he has resided with his mother, and owes her reverence and respect, yet the law gives her no control over him. She is not entitled to the fruit of his labor, nor is her consent material to any contract he may make." *Id.*
395. *Id.* at 491.
396. *See generally id.*
397. *Id.* at 492–93 (Tilghman, J., opinion).
398. *Id.* at 492.
399. *Id.* at 493–94 (Yeates, J., opinion).
400. *Id.* at 495–96 (Brackenridge, J., opinion).
401. *Id.* at 497.
402. *See generally id.*
403. Commonwealth v. Gamble, 11 Serge & Rawle 93, 93–94 (Pa. 1824).

navy's needs from that of the Army—based on British common law as well as Congress's authority—is only one notable aspect to *Gamble*.[404] The other notable aspect is that Gibson, in denying the power of the courts to issue a habeas writ to remove the minor from the naval service, expressly left intact the power of the state courts to issue the writ once a court-martial had commenced.[405] In essence, Gibson denied a writ of prohibition but favored the issuance of habeas writs.[406] His reasoning for doing so was premised on military necessity, because if the courts were to enable minors to cease any pending court-martial, a minor could also betray secrets to an enemy and escape punishment.[407]

On January 1, 1812, a full six months before Congress, at President James Madison's request, declared war on Great Britain, the Tennessee Supreme Court upheld a state trial judge's authority to issue a writ of habeas on a senior army officer to produce a minor who had enlisted without his father's permission.[408] (On June 18th, the Senate voted to declare war 19-3 and the House 79-49).[409] After analyzing the federal Constitution, the state's justices concluded, contrary to the War Department's position, that Congress could not constitutionally pass a law vesting the military with a power that superseded the writ of habeas corpus.[410] Two years later, the Massachusetts Supreme Court issued a decision mirroring that of Tennessee.[411]

As long as state judicial officers and state courts were empowered to issue habeas writs, in theory, federal courts-martial could be upended not only in the War and Naval Departments and by a president, but also in the state courts. Indeed, state trial and appellate judges could, if they deemed it necessary, stop a court-martial from commencing as well as directly, if not collaterally, nullify a verdict and sentence.[412] There were limits against this practice, but they appear to be situationally unique, such as the prevention of third parties who were owed an obligation from a soldier petitioning the courts for the soldier's release.[413]

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404. *See id.* at 94.

405. *Id.*

406. *See generally id.*

407. *Id.*

408. *See generally* United States v. Anderson, 2 F. Cas. 813 (C.C.D. Tenn. 1812).

409. *See, e.g.*, Jasper M. Trautsch, "*Mr. Madison's War" or the Dynamic of Early American Nationalism*? 10 EARLY AM. STUD. 630, 659 (2012); J.C.A. STAGG, THE WAR OF 1812: CONFLICT FOR A CONTINENT 18 (2012).

410. *Anderson*, 2 F. Cas. at 814.

411. *See generally* Commonwealth v. Chandler, 11 Mass. 83 (1814).

412. State action in courts-martial was not a departure from other state judicial practice. *See, e.g.*, *In re* Stacy, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813) (arguing that a state court has an "indispensable duty" to protect the liberty of its citizens from illegal confinement); *In re* Bryan, 60 N.C. (Win.) 1, 28 (1863) (arguing that a state has no higher duty than "protecting all her citizens in the full and free enjoyment of life, liberty and private property").

413. Johnson v. Medtart, 4 H. & J. 24 (Md. 1815). In a brief decision, the appellate judges determined that it was inappropriate to issue a writ de homine replegiando against an army officer to produce a soldier during the height of the 1812 War with Britain. *Id.* The soldier was likely indebted to another state citizen.

VII. THE MILITARY LAW OF PERSONAL AND SUBJECT MATTER JURISDICTION

In 1908, while campaigning for the presidency, William Howard Taft informed an Ohio Bar Association meeting that there was "an indefinite, elusive, but influential impression in the minds of many that there is something in a regular army, inconsistent with the purpose of a republic."[414] In addition to Taft minimizing the standing-army fears of his predecessors, he insisted that the United States needed a powerful army for the national security—he called it "an indispensable instrument in carrying out our established policy"—including the suppression of insurrection and civil strife.[415] Taft served as Solicitor General of the United States, a federal judge on the Court of Appeals for the Sixth Circuit, Governor General of the Philippines, and most recently as Secretary of War.[416] In each of these positions he would have an influence on military law. While serving as Solicitor General, he successfully argued two personal jurisdiction claims in courts-martial appeals.[417] And, *Grafton v. United States*, analyzed below, was one of the more significant Court opinions on courts-martial jurisdiction that arose from the time he served as Governor General of the Philippines.[418] Taft was not only instrumental in the creation of the civil and criminal courts in the Philippines that prosecuted Private Homer Grafton, he permitted the Army's uniformed attorneys to represent Grafton to the Supreme Court where they argued against the Justice Department.[419]

The military, at the time of Taft's Secretary of War and Presidential tenure was, for the first time in United States history, stationed in overseas territories including the Panama Canal Zone, Cuba, Puerto Rico, Guam, the Philippines, and China.[420] Even the annexation of the Hawaiian Islands

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Id. To issue this type of writ, to Maryland's justice, would be a "mischief of interfering in time of war with the recruiting service." *Id*. at 29. But, Maryland's justices conceded that a habeas writ could be issued to protect a basic right. *Id.* On this type of writ, see Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. CHI. L. REV. 243, 280–83 (1965).

414. WILLIAM HOWARD TAFT, *The Army of the United States: Address Before the Board of Trade of Columbus Ohio, April 2, 1908*, *in* WILLIAM HOWARD TAFT, PRESENT DAY PROBLEMS: A COLLECTIVE OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS 79 (reprt. 1967).

415. *Id*. at 80.

416. *See William Howard Taft*, HIST. (Oct. 29, 2009), http://www.history.com/topics/us-presiDents/william-howard-taft.

417. *See generally William Howard Taft (Sept. 15, 1837–Mar. 8, 1930)*, SUP. CT. OF OHIO, SupremeCourt.ohio.goc./MJC/plases/whTaft.asp (last visited Feb. 17, 2022).

418. *See* Brian D. Korn & David C. Dziengowski, *Article 83 Marooned: Jurisdiction in the Aftermath of United States v. Kuemmurk*, 62 NAVAL L. REV. 38, 39 (2013).

419. *See* David Cecil Johnson, *Courts in the Philippines: Old and New*, 14 MICH. L. REV. 300, 314 (1916).

420. *See* Warren Zimmerman, *Jingoes, Goo-Goos, and the Rise of American Empire*, 22 WILSON QTR. 42, 62–63 (1998); H.W. BRANDS, BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES 81–84 (1992).

necessitated a military presence.[421] This empire not only required an enlarged Navy and Army, it also brought the possibility of military conflict with not only past opponents such as Britain, France, or Mexico, but against an emergent Japan, Russia, or unified Germany.[422] Moreover, during the prior quarter century, Presidents Grover Cleveland and William McKinley both controversially ordered the Army to curb massive labor strikes, and it remained possible that the use of the Army as a police force would continue.[423]

In the late nineteenth and early twentieth century, it was an open question as to whether the military establishment could support the national security policy as it applied to the new overseas empire against a first-rate European power or Japan.[424] The Army was small—numbering only 27,000—in comparison to the professional European armies, in particular, France's and Germany's.[425] The Army, as characterized by Professor John Whiteclay Chambers in his *To Raise an Army: The Draft Comes to Modern America*, suffered not simply from governmental neglect but also from the outright hostility of white, southern politicians who believed that during Reconstruction, the Army had destroyed their rights, and from northern "business pacifists" who viewed the Army as a drag on the economy.[426] Earlier, Professor Russell Weigley highlighted a truism of military service in the period between the Civil War and Spanish American War: "the Army offered few attractions for enlisted service, the names on its muster rolls were full of Irish, German, and Italian immigrants."[427] Pay was low, and in 1866 the lowest ranks saw their monthly salary slashed from sixteen dollars to thirteen dollars.[428] Desertion became so commonplace that in 1871 a full third

421. BRANDS, *supra* note 420, at 82.

422. *Id.*; J.A.S. Grenville, *Diplomacy and War Plans in the United States, 1890–1917*, 11 TRANSACTIONS ROYAL HIST. SOC'Y 1, 2–6 (1961).

423. On Cleveland and the use of the Army during the Pullman Strike, see CLAYTON D. LURIE, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877–1945, at 124–31 (1997). On McKinley's ordering of federal troops into Idaho on the request of the state governor, see MICHAEL L. TATE, THE FRONTIER ARMY AND THE SETTLEMENT OF THE WEST 109–10 (Univ. of Okla. Press, Red River Books eds., 2001) (1999). The House Military Affairs Committee investigated McKinley's use of the Army and a minority report condemned the use of the military for domestic policing. *See* House Military Affairs Committee Report No. 1999, 56th Cong., 69–125.

424. *See generally The United States Becomes a World Power*, DIGIT. HIST., digital.history.uh.edu/dusp_textbook.cfm?smtiu=2&psid=3158 (last visited Feb. 17, 2022).

425. JOHN WHITECLAY CHAMBERS, TO RAISE AND DISCIPLINE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 65–66 (1987).

426. *Id.*; *see also* Lester D. Langley, *The Democratic Tradition and Military Reform, 1878–1885*, 48 SW. SOC. SCI. Q. 192–200 (1967); *See generally* SAMUEL P. HUNTINGTON, SOLDIER AND THE STATE (Belknap Press 1957); GANOE, *supra* note 257, at 348.

427. WEIGLEY, *supra* note 257. According to Professor Edward M. Coffman, between 1880 and 1897, 34.5% of the Army's enlisted ranks were foreign born. EDWARD R. COFFMAN, THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784–1898, at 330 (1986). From 1865 until 1880, 50% were foreign born. *Id.*; *see also* GANOE, *supra* note 257, at 349.

428. WEIGLEY, *supra* note 257, at 270; *see also* COFFMAN, *supra* note 318, at 346.

of the Army was on deserter status.[429] At times the Army's leadership understood that it was the conditions of service that led to high rates of desertion rather than the immorality of soldiers.[430] In 1888, the Army's Adjutant General, General John C. Kelton, observed "in nine cases out of ten, the deserter is not the proper person to arrest, it is those who compelled him to desert who should be arrested."[431]

The Navy underwent a technological transformation as a result of European imperialism and the corresponding growth of their navies beginning in 1883, with the construction of four armored cruisers powered primarily by coal generated steam.[432] In 1885, Cleveland convinced Congress to fund newer and heavier armored ships including the armored cruiser *Maine*, which became central to the war with Spain in 1897.[433] In 1901, a brief war scare with Chile erupted over the "Baltimore incident" and had war occurred, the Navy would have steamed thousands of miles to South America.[434] In 1903, President Theodore Roosevelt's naval advisors called for the construction of forty-eight battleships with commensurate numbers of smaller supporting vessels.[435] Roosevelt's naval program was centered on the theories of Admiral Alfred Thayer Mahan who argued that the United States' growing economy and population with an attendant growth of international commerce required an enlarged navy.[436] Mahan noted that while the United States had a leading role in the world's commerce, it was reliant on foreign shipping and foreign navies for its protection and this had to change.[437] Later in his life, he authored *The Problem of Asia* in which he described the development of China—the establishment of Western institutions and Christianity—as a duty of the Western nations and Japan.[438] And he opposed Russian expansion, believing that Japan would be instrumental in containing

429. WEIGLEY, *supra* note 257, at 270; *see also* COFFMAN, *supra* note 318, at 346.

430. *See* WEIGLEY, *supra* note 257.

431. *See The Evil of Army Desertion: Necessity Now of Modifying the Supposed Successful Remedy*, N. Y. TIMES, May 7, 1892, at 9; *see also* COFFMAN, *supra* note 318, at 374. Coffman noted, however, that after 1891, desertion rates began to drop as the conditions of military service improved. COFFMAN, *supra* note 318, at 374.

432. *See, e.g.*, Walter LaFeber, *A Note on the Mercantilist Imperialism of Alfred Thayer Mahan*, 48 MISS. VALLEY HIST. REV. 674 (1962) (noting that Mahan influenced Theodore Roosevelt, Henry Cabot Lodge, John Hay, and at least two secretaries of the navy); *see also* Peter Karsten, *The Nature of Influence: Roosevelt, Mahan, and the Concept of Sea Power*, 23 AM. Q. 585, 589 (1971) (arguing that while Roosevelt praised Mahan the two men worked in a partnership for naval growth).

433. *See* WALTER HERRICK, THE AMERICAN NAVAL REVOLUTION 33–37 (1966).

434. *Id.* at 105.

435. *Hearings Before Comm. on Naval Affs. of the H.R. on Estimates Submitted by the Sec'y of the Navy* 569 (1914) (Statement of Rear Admiral C.E. Vreeland of the General Board).

436. LaFeber, *supra* 432, at 678.

437. ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783, at 84 (Dover Publ'ns rev. ed. 1987).

438. Tyler Dennett, *Mahan's The Problem of Asia*, 13 FOREIGN AFFS. 464, 465–66 (1935) (book review).

Russia from further expansion in China and along the far Western Pacific.[439] By the end of the Spanish-American War, Mahan's standing was so prominent that President McKinley appointed him as a representative to the 1899 Hague Peace Conference as well.[440] All of this translated into more sailors with greater numbers of persons subject to presidential control and the military undertaking limited preparations to fight in distant China both to protect the nation's commercial interests as well as to stem Russian expansion.[441]

A. Consolidation of Jurisdiction and the End of the Standing Army Fears: The Nature of Army Service: 1865–1903

Between 1866 and 1870, the Regular Army shrunk from 54,302 to 25,000 soldiers.[442] The Regular Army's projected duties, once Reconstruction ended in 1877, were to "police" the Western frontier as a constabulary, serve in the coastal artillery defending the eastern and gulf coasts, and maintain the United States Military Academy and the Fort Leavenworth Military Prison.[443] The Regular Army was not designed to fight in a war overseas, but the government had a system of augmentation to the Regular Army.[444] In the three major conflicts following the War of 1812, the nation possessed three types of soldiers: "regulars," "volunteers," and militia.[445] These three categories require further explanation because they were treated somewhat differently in regard to court-martial procedure.[446]

In the War of 1812, the nation relied on a small standing army composed entirely of regulars and a large mass of barely synchronized and often unreliable, militia.[447] The term "Regular Army" denoted the permanent standing army.[448] Between 1815 and 1845 the regular army and the militia, in addition to naval forces, constituted the military establishment.[449] The Army sent into Mexico during the Mexican-American War (1846–47) was larger than the Army during the War of 1812, but by then, the Army also

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439. *Id.* at 466. Dennett wrote: "In Washington it had become apparent by 1920 that cooperation. . . . to secure peace in China would always fail because of Japan's published desire to dominate China both politically and commercially. . . . Neither [Hong Kong] nor the Philippines are now regarded as strategically located. Japan, not Russia, is the aggressor." *Id.* at 468.

440. *See, e.g.*, David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L. L. 4, 30 (2000).

441. *See, e.g.*, Dennett, *supra* note 438, at 464–72.

442. ROBERT UTLEY, FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN, 1866-1891, at 13–16 (Bison Books reprt. ed. 1984) (1973).

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. Joshua E. Kastenberg, *The Limits of Executive Power in Crisis in the Early Republic:* Martin v. Mott*—An Old Gray Mare—Reexamined through Its Own History*, 82 LA. L. REV. 161, 178–79 (2021).

448. *Id*. at 170 n.40.

449. *Id.*

consisted of "United States Volunteers," a temporary third category of soldier.[450] Volunteer soldiers were not formally part of a state militia though they may have enlisted into the volunteer army from a state militia.[451] Volunteers were also not soldiers enlisted for the traditional long duration of service.[452] A "regular" army soldier served for a five-year term of enlistment.[453] During the Civil War (1861–1865), Spanish-American War (1898), ensuing conflicts in the Philippines (1899–1902), and Boxer Rebellion in China (1899–1901), Congress brought back this category of soldier and it would become the focus of one Supreme Court opinion and another significant federal court of appeals decision.[454]

The "Volunteer Army" came into being because there was a constitutional question as to whether militia forces could be ordered to fight in a foreign war.[455] By the Mexican-American War, most, if not all, of the states had either dropped or ceased enforcing state laws that required all white male citizens to be enrolled in the state militias.[456] Courts-martial of regular army soldiers and federal courts-martial of militia soldiers both operated under the Articles of War, but there were notably different rules between the two courts-martial which reflected the standing Army fears.[457] Namely, the Articles of War excluded regular Army officers from serving on courts-martial of militia soldiers.[458]

One of the earliest descriptions of volunteer forces and their relationship to the Regular Army was articulated in *United States v. Sweeny*, an opinion arising from the government's appeal over the claims court decision on a longevity pay claim.[459] Brigadier General Thomas Sweeny was commissioned into the volunteers as a lieutenant in 1846 and served in that capacity until 1848 when he was commissioned as an officer in the Regular Army.[460] After a long career, including an injury in the war with Mexico

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450. *See* Act of May 13, 1846 ch. XVI. Pub. L. No. 29–16, 9 Stat. 9 (repealed 1848).

451. *See generally id.*

452. *Id.* The act specified that soldiers enlisted as volunteers would serve for a minimum of one year, or until the end of the war. *Id.*

453. Act of May 13, 1846, ch. XVII Pub. L. No. 29–16, 9 Stat. 11 (repealed 1848).

454. *See, e.g.*, Volunteer Army Act, ch. 187, 30 Stat. 361; Act of Mar. 2 1899, 30 Stat. 977; *see generally* United States v. Sweeny, 151 U.S. 281 (1895).

455. *See, e.g.*, BRIAN MCALLISTER LINN, THE PHILIPPINE WAR, 1899–1902, at 9–11 (2000).

456. BERNARD ROSTKER, I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE 21 (2006). It should also be noted that after the War of 1812 receded from the public's experience, when a state government sought to enlarge its militia, there could be intense opposition. *See id.* For instance, even after John Brown and the Harper's Ferry raid, when Democrat Virginia legislators tried to enlarge their state militia, opponents claimed it was unnecessarily dangerous to White liberty and expensive. *See, e.g.*, WILLIAM LINK, ROOTS OF SECESSION: SLAVERY AND POLITICS IN ANTEBELLUM VIRGINIA 194 (2003).

457. KASTENBERG, s*upra* note 447, at 175.

458. Militia Act of 1795, ch. 36, § 6, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C §§ 331–335). This section of the Militia Act reads: "And be it further enacted, [t]hat courts-martial for the trial of militia shall be composed of militia officers only." *Id.*

459. *Sweeny*, 157 U.S. at 284–85.

460. *Id.* at 281–82.

which resulted in his right arm being amputated, several engagements against Native American tribes, and commanding Union forces in some of the bloodiest Civil War battles, the War Department sought to garnish $182 from him.[461] Military longevity pay was based on five-year increments.[462] Enacted in 1838, the longevity pay statute predated the Mexican-American and not surprisingly was silent on whether volunteer officers qualified because no such part of the army existed at that time.[463]

The Court, in a unanimous opinion authored by Justice Henry Brown, concluded that because in 1798 Congress, in response to a possible war with France, authorized the creation of a "Volunteer Army" there must have been an intentional exclusion of volunteers in the longevity pay act and, therefore, the government prevailed in recovering monies.[464] The irony to the Court's opinion, however, is that Brown recognized that in 1867 Congress did, in fact, pass an act which required all military service to count for longevity pay as long as the military service began after April 1, 1861, and this made the prior exclusion all the more viable, even though no law stated such.[465] Brown also conceded that volunteer officers and regular officers alike received the same pay and were subject to the president's orders, and until 1902, it appeared that they were subject to courts-martial where regular army officers could be assigned.[466]

In 1902, in *McClaughry v. Deming*, the Court determined that "volunteer soldiers" were statutorily in the same category as militia in regard to courts-martial.[467] That is, volunteer soldiers accused of military offenses had the statutory protection of being tried by a court-martial composed of volunteer officers to the exclusion of regular Army officers.[468] But, it was also during the appeal where the Court abandoned the standing army fear in their analysis. On February 2, 1902, the United States Court of Appeals for the Eighth Circuit, in *Deming v. McClaughry*, overturned Captain Peter Deming's court-martial conviction and sentence for embezzling federal monies, forgery, and conduct unbecoming an officer and gentleman.[469] The Eighth Circuit's decision was remarkable in several respects. Deming had pled guilty to the offense and did not object to the jurisdiction of the court-martial when it occurred two years earlier.[470] Unsurprisingly, in light

461. On *Sweeny*, see JOHN EICHER & DAVID EICHER, CIVIL WAR HIGH COMMANDS 519 (2002); DONALD B. CONNELLY, JOHN M. SCHOFIELD AND THE POLITICS OF GENERALSHIP 27–32 (2006) (detailing Sweeny's early actions in the Civil War).

462. *Sweeny*, 157 U.S. at 284.

463. *Id.* at 283–84.

464. *Id.* at 284–86.

465. *Id.*

466. *Id.* at 284–85.

467. McClaughry v. Deming, 186 U.S. 49, 69 (1902).

468. *Id.* at 60–61.

469. Deming v. McClaughry, 113 F. 639, 652 (8th Cir. 1902).

470. *Id.* at 652.

of the guilty plea, the Judge Advocate General, in his review, articulated that there were no unusual aspects to the court-martial.[471] However, the Eighth Circuit, in siding with Deming noted that while from the beginning of the nation's history, militia soldiers were protected against Regular Army courts-martial, in the absence of a statute creating a uniform court-martial practice, volunteers should be protected from the disciplinary mandate of the Regular Army precisely because soldiering was not a lifetime avocation for volunteers.[472] Absent from the Eighth Circuit's decision (and the Court approved of this analysis) was any mention of the standing Army fears that resided in the Constitutional Convention over a century earlier.[473]

In *Grafton*, an opinion authored by Justice Harlan, the Court determined that a soldier prosecuted in a court-martial in the Philippines could not be retried in a federal trial without violating the prohibition against double jeopardy.[474] After a court-martial acquitted Private Homer Grafton of murdering two Philippine nationals, the local federally-appointed prosecutors obtained a conviction in the Court of First Instance, a tribunal staffed with presidentially appointed judges.[475] Justice Harlan did not determine that the double jeopardy prohibition extended to state trials, and in essence, while for the first time the Court extended the prohibition against double jeopardy to courts-martial, the opinion insulated the military from the federal government's colonial administrators and other courts of special jurisdiction.[476]

Grafton, however, reaffirmed other aspects of the military law which shielded Commander in Chief authority from the judiciary.[477] The Court cited to the 1882 opinion *Ex parte Mason* for the proposition that as long as the military possessed personal jurisdiction over the accused service member, the judiciary could not overturn a court-martial based on procedural or

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471. Letter from G.N. Lieber, J. Advoc.War Department, Office of the Judge Advocate General to the Secretary of War, May 9, 1900 [NA RG 153, 15 AA R 17090]. The Judge Advocate General's review states:

> The accused offered no evidence; but at the suggestion of his counsel, the judge advocate admitted for the prosecution that restitution had been made to Mr. Hirschfelder and Mrs. Ogden, though it appears as to the latter that the attempt to defraud her was unsuccessful. The record shows that no restitution has been made to the United States. The officer ordering the court, Major General Shafter, has approved the proceedings, finding, and sentence. The sentence is legal and it is recommended that it be confirmed.

Id.

472. *Deming*, 113 F. at 645.

473. *McClaughry*, 186 U.S. at 56.

474. Grafton v. United States, 206 U.S. 333, 355 (1907).

475. *Id.* at 341. On the Court of the First Instance, see Lebbeus Wilfley, *The New Philippine Judiciary*, 178 N. AM. REV. 730–41 (1904). At the time of the article, Wilfley was the Attorney General for the Philippines. *Id.* at 730.

476. *Grafton*, 206 U.S. at 351–52.

477. *See id.* at 346–48.

evidentiary errors.[478] There was a question as to whether the petitioner in that opinion, Sergeant Mason, had committed a crime recognized by the Articles of War as a military offense.[479] He had, while on guard duty, tried to murder Charles Guiteau, the assassin of President Garfield, and this was clearly a federal offense.[480] But the Court determined that as long as the offense had a military nexus, the military could take jurisdiction over the crime.[481] Similarly, in citing to two opinions arising from the court-martial of a disgraced engineer, Captain Oberlin Carter, the Court in *Grafton* reaffirmed that even presidential errors would not deprive the court-martial of jurisdiction.[482] One final note on *Grafton* bears importance to the insulation of military law within the military. *Grafton* occurred during a debate over the existence of military courts in the Philippines and the ability of the military to keep the civil government out of its affairs.[483]

B. Enlisted Retirements and the Growth of Dicta

On February 18, 1884 Lewis Beach (D-NY) introduced H.R. 5229 to the House of Representatives that would, if it became law, establish a retirement for soldiers and marines who served for thirty years.[484] The House voted in favor of the bill on June 24, 1884 without a debate.[485] The House Military Affairs Committee report accompanying H.R. 5670—the bill's number—was brief in comparison to the 1861 act authorizing officer retirements. It simply noted that desertion rates in the Army remained high and that more financial stability as well as social status would alleviate this issue.[486] According to Samuel Maxey (D-TX), one of its proponents, a second purpose behind the bill was to bring an equality to the army so that the wealthiest men in it—the highest ranking officers—did not benefit from a

478. *Id.*; *Ex parte* Mason, 105 U.S. 696, 698 (1881). For a fuller discussion of the facts leading up to *Ex parte Mason*, see James A. Young, *The President, His Assassin, and the Court-Martial of Sergeant James A. Mason*, 77 A.F. L. REV. 1 (2017).

479. *Mason*, 105 U.S. at 698.

480. *Id.* at 696.

481. *Id.*

482. *Grafton*, 206 U.S. at 347 (citing to Carter v. Roberts, 177 U.S. 496, 498 (1900)) (determining that the Court would not determine whether a violation of jeopardy occurred when an officer was charged with more than one crime under the Articles of War from the same offense because the court-martial possessed jurisdiction); Carter v. McClaughry, 183 U.S. 365, 380 (1902) (determined that the President was under no requirement to revise a sentence after disapproving some of the charges the court-martial found Carter guilty of).

483. RONALD G. MACHOIAN, WILLIAM HARDING CARTER AND THE AMERICAN ARMY: A SOLDIER'S STORY 210 (2006).

484. CONG. REC. 1199 (1884).

485. *See Diverse Military Matters*, N. Y. TIMES, June 25, 1885.

486. CONG. REC. 1368 (1885). The report stated, "If he could feel that he would have a proper provision for his old age he would be more likely to support the monotonous life of the service contentedly." *Id.*

pension while the Army's rank and file retired with no financial support.[487] Moreover, the bill was crafted with the Commanding General of the Army, Lieutenant General Philip Sheridan's, assistance.[488] On February 7, 1884, Senator James Cameron (R-PA) motioned the Senate to debate and then vote on H.R.5670.[489] Opposition to the bill was led by Eli Saulsbury (D-DE), an anti-civil rights senator wary of federal power and opposed to Reconstruction, who had succeeded his "Copperhead" brother, Willard Saulsbury, into the Senate.[490] Thirty-seven senators voted in favor of the bill, thirty-four were absent, and Saulsbury, Alfred Colquitt (D-GA), Isham Harris (D-TN), George Vest (D-MO), and Richard Coke (D-TX) opposed.[491] Colquitt served as a Confederate general during the Civil War.[492] While serving as Tennessee's governor in 1861, he led his state to secede from the Union and fought for the Confederacy.[493] Vest likewise served in the Confederate government during the war, and Coke fought in the Confederate Army.[494]

Importantly, there was no statement in the language of the 1884 Act, which created jurisdiction over enlisted retirees, and given that the 1861 Act specifically extended jurisdiction over retired officers, it is reasonable to conclude that Congress disavowed any intention to keep the majority of the army and marine corps retirees, that is, the enlisted force, subject to presidential orders.[495] In 1889 in General Orders No. 55, the Army's Adjutant General noted that retired soldiers would not be given formal discharges, used the operative statement "the [retired] soldier will be regarded as continuing in service on the retired list, but will be dropped from the rolls of his former command."[496] This statement cannot have had the force of law to extend court-martial jurisdiction because Congress did not provide for it, and it was tied to the ability of the War Department's continuation of pay and

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487. *Id.* (statement of Sen. Samuel Maxey).

488. *See id.*

489. *Id.*

490. *Id.*; *see also* Bertram Wyatt-Brown, *The Civil Rights of 1875*, 18 W. POL. Q. 763, 765 (1965); Michael W. McConnell*, Originalism and Desegregation Decisions*, 81 VA. L. REV. 947, 1047 (1995). Saulsbury argued "the people of this country are all alike. I do not see why men engaged in the military service should be put upon retired lists to be supported, after a certain period by the taxes drawn from the people any more than other classes of worthy citizens." CONG. REC. 1368 (1885); *see* William C. Harris, *His Loyal Opposition: Lincoln's Border States' Critics*, 32 J. ABRAHAM LINCOLN ASS'N 1–17 (2011); DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 503 (2006).

491. CONG. REC. 1370 (1885).

492. C. Vann Woodward, *Bourbonism in Georgia*, 16 N. C. HIST. REV. 23, 27–29 (1939).

493. *See* J. Rueben Sheeler, *Secession and the Unionist Revolt*, 29 J. NEGRO HIST. 175, 177–79 (1944).

494. Marian F. Dawes, The Senatorial Career of George Graham Vest (1932) (M.A. thesis, University of Missouri), https://mospace.umsystem.edu/xmlui/handle/10355/81341.

495. 10 U.S.C. §§ 802(a)(4)–(5)

496. *See* Headquarters of the Army, General Orders No. 43, May 2, 1889, superseding General Orders No. 55.

provisions such as rations and firewood for retirees.[497] Congress passed a similar law for sailors in 1899, and this law likewise was silent on the extension of court-martial jurisdiction over retirees.[498]

In his 1895 *Military Law and Precedents*, Winthrop insisted that the military's jurisdiction over enlisted soldiers continued into their retirement, but in doing so, he expressed an army policy, rather than the law.[499] In essence, Winthrop followed the same path as Holt's incorporation of Attorney General Pinkney's advice that was created for a singular unique court-martial to become grafted to the Army as a whole.[500] Given that enlisted soldiers were expressly prohibited from serving on court-martial as members—one of the basis for the military maintaining jurisdiction over retired officers—it is a reasonable assumption that Winthrop was trying to turn his advocacy for jurisdiction into law by fiat.[501] Indeed, one only need consider that the Court had, prior to the passage of the enlisted retirement law, issued one decision touching upon the continuation of military jurisdiction over retirees.[502] The Court's opinion in *United States v. Tyler*, was not drafted broadly enough to apply to enlisted retirements.[503] However, *Tyler* did not arise from a court-martial; rather, from an officer retired for a medical disability who argued that when Congress enacted a pay raise for officers, the raise also applied to retired officers.[504] The Court, in a unanimous opinion authored by Justice Samuel Miller, determined that the officer was correct, and one of the basis the opinion rested on was that retired officers remained subject to military duties such as being detailed as professors to colleges and to continue to wear a military uniform.[505] The Court also recognized that retired officers remained on the Army Register.[506] That the Court specified the unique nature of the relationship between officers and a president, and Winthrop did not distinguish this point in *Military Law and Precedents*, leads to a further reasonable conclusion that he attempted to create, rather than examine, an extra-legislative grant of jurisdiction to the military.[507]

In 1912, during a congressional hearing on revising the Articles of War, General Enoch Crowder, the Judge Advocate General, advised Congress that unless an enlisted retiree committed an offense that was directly prejudicial

497. *Id.*

498. *See* Act of March 3, 1899, ch. 414, 30 Stat. 1008 (U.S. Comp. St. 1901, p. 1008) (revised statutes not amended in terms by act).

499. WINTHROP, *supra* note 57, at 87.

500. *Id.*

501. *See id.*

502. *See* United States v. Tyler, 105 U.S. 244, 245 (1881).

503. *See generally id.*

504. *Id.* at 244–45.

505. *Id.* at 246.

506. *Id.*

507. *See generally id.*; WINTHROP, *supra* note 57, at 87.

to good order and discipline, court-martial jurisdiction could not legally exist "because the act of a man on the retired list, away from any military post, [cannot] reasonably be said to affect military discipline."[508] Crowder also testified that, contrary to Winthrop's assertion, it was not until 1901 that Congress specified court-martial jurisdiction over enlisted service- members in retirement status.[509] He was partially correct on that point. The Act of March 2, 1899 titled *An Act to Increase the Efficiency of the Permanent Military Establishment of the United States*, included in its definition of Regular Army, "officers and enlisted men of the Army on the retired list. . . ."[510] This operative language did not mention courts-martial or the articles of war, and at best it created an inference of jurisdiction.[511] Nonetheless, the inferential statement of law was the first of its kind to extend court-martial jurisdiction to retired soldiers.[512] The Act of February 2, 1901, titled *An Act to Increase the Efficiency of the Permanent Military Establishment of the United States*, also contained identical inferential language.[513]

Military jurisdiction was extended in another fashion as well. In 1892, Congress created the crime of fraudulent enlistment, which meant, for the first time, that a soldier could be court-martialed for lying about age or concealing important facts from recruiters even though the concealment and lies occurred prior to taking the oath of service and receiving pay.[514] The purpose underlying this act was to thwart the practice of soldiers illicitly reenlisting before their discharge to receive bounties.[515] However, because the law enabled a citizen to be prosecuted for criminal conduct which occurred prior to induction into the Army, it also extended military jurisdiction to the citizenry beyond what had existed for the first century of the United States' existence.[516] Congress created a similar crime for the Navy one year later.[517]

In August 1916, after the House and Senate had passed their respective versions of a bill significantly increasing the size of the military,

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508. *Hearing on H.R. 23628 Before the H. Comm. on Mil. Affs.*, 62nd Cong. 83 (1912) (statement of General Enoch Crowder, J. Advocate. General of the United States Army). Crowder advocated for an expansion of court-martial jurisdiction, noting that there were several cases in which retired enlisted soldiers abandoned their families and creditors had sought his office's assistance; however, the Army could not assert jurisdiction because the crimes were not connected to the military. *Id.* at 84.

509. *See id.*

510. Act of March 2, 1899, ch. 192, 30 Stat. 1064 (U.S. Comp. St. 1901, p.748) (revised statutes not amended in terms of this act).

511. *See generally id.*

512. *See id.*

513. Act of February 2, 1901, 2 Supp. Rev. Stat 760, 30.

514. *See, e.g.*, Act of July 27, 1892, ch. 227, sec. 3 (1892).

515. *The Evil of Arms Desertion.; Necessity Now Modifying the Supposed Successful Remedy*, N. Y. TIMES, May 9, 1892, at 9.

516. *See, e.g.*, *Ex parte* Dostal, 243 F. 664, 671 (N.D. Ohio 1917).

517. Act March 3, 1893, ch. 212, 27 Stat. 716 (1893); *see also* Dillingham v. Booker, 163 F. 696, 697 (4th Cir. 1908).

Congressman James Hay (D-VA) emplaced a measure into the bill removing court-martial jurisdiction for retirees.[518] President Woodrow Wilson vetoed the bill and insisted that the provision enabling military jurisdiction over retired officers remain.[519] Ultimately, Hay acquiesced to Wilson, and Congress enabled the military's jurisdiction over retired officers to continue.[520] Wilson's reasons for the veto included the nation's need for the military to protect its overseas possessions and the changing political conditions across the globe.[521] Wilson conceded, however, the Articles of War were over a century old and "do not always furnish the means of meeting promptly and directly the needs of discipline under modern conditions."[522] In a 2021 brief to the Court of Appeals for the District of Columbia in *Harker v. Larrabee*, a case challenging the jurisdiction over retirees, the government's attorneys cited to Wilson's veto for the proposition that the extension of military jurisdiction remains constitutionally viable.[523] But, beyond the fact that the 1916 veto has no apparent precedential value to the courts, had the government's representatives delved deeper into the historic record, they might have discovered a letter that Wilson penned to Secretary of War Newton Baker asking Baker to author the veto message and in doing so evidencing a degree of uncertainty on the part of Wilson over the continued extension of jurisdiction.[524]

C. Personal Jurisdiction in Tarble*'s Aftermath*

In 1890, the Court issued two opinions on the nature of enlistment contracts, and Solicitor General Taft argued both: *In Re Grimley* and *In re Morrissey*.[525] In 1884, John Grimley enlisted at the age of forty, but the law only permitted enlistments up to the age of thirty-five.[526] It appears from the record that Grimley lied about his age; but later, when he was court-martialed for desertion, he attacked the army's jurisdiction over him claiming he was too old to join.[527] That is, he argued that had the army known of his true age,

518. *Wilson Puts Veto on Army Measure*, ATLANTA CONST., Aug. 19, 1916; *Wilson Vetoes Army Measure: Joker is Cause*, CHI. TRIB., Aug. 19, 1916; *Army Bill Veto May Deadlock Congress*, WASH. POST, Aug. 19, 1916.

519. *Army Bill Vetoed: May Cause a Fight*, N. Y. TIMES, Aug. 19, 1919.

520. *Id.*

521. *Id.*

522. *Id.*

523. Brief of Plaintiff-Appellee at 35, Harker v. Larrabee, No. 21-5012 (D.C. Cir. May 26, 2021).

524. *See* Letter from Wilson to Newton Baker, August 10, 1916 (Newton Baker Papers/R-1). The letter read: "Would I be asking something unreasonable if I were to ask you to sketch me a veto message on the Army Bill based on my inability to accept the exemption of Army officers from the Articles of War? If I would, please say so. I ask only because you have the reasons why exemption is objectionable so much more fully in mind than I have." *Id.*

525. *In re* Grimley, 137 U.S. 147, 150 (1890); *In re* Morrisey, 137 U.S. 157, 159 (1890).

526. *Grimley*, 137 U.S at 159. Grimley was somewhat emblematic of the army's composition. *Id.* He was born in Ireland and immigrated to the United States. *Id.*

527. *Id.*

he would not have been able to enlist and therefore his court-martial was devoid of jurisdiction.[528] Grimley's argument prevailed at the United States District Court for Massachusetts and on appeal, but, the Court, in an opinion authored by Justice David Brewer, unanimously reversed and determined that the Army did possess jurisdiction to court martial the errant Grimley.[529] The Court conceded that the district and circuit courts did not stray from the strict liability test and had not granted *habeas* to overcome a trial error but countered that enlistment into the military was more than a mere contract.[530] To the Court, enlistment into the Army changed the status of civilian into a soldier—Brewer drew an analogy to marriage—and Grimley was bound by the "correlative rights and duties" of a soldier.[531] Brewer then turned the decision back to military necessity in penning that while the army was small in comparison to European nations.[532]

> [I]ts vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.[533]

While Brewer did not cite to *Martin v. Mott*, the language of soldierly obedience has a similarity to Justice Story's opinion issued sixty-three years earlier.[534] Although, unlike like Jacob Mott who owed obedience to his governor because of his militia status, John Grimley had willingly enlisted into the military, the two men nonetheless were not ordinary citizens subjected to an austere executive authority.[535] Brewer also incorporated military necessity into the opinion just as Field had earlier accomplished in *Tarble*.[536]

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528. *Id.* Judge Lebaron Colt, in the beginning of his brief decision, observed:

> Now, I cannot but think that under these circumstances the fact that Grimley was over 40 years of age at the time of the alleged enlistment renders the enlistment void. The military tribunal could not acquire jurisdiction over the petitioner for the purpose of punishing him for desertion, because he was not a proper subject for, and had not entered upon, actual military service.

In re Grimley*,* 38 F. 84, 84–85 (Cir. Ct. Mass. 1889).

529. *Grimley*, 137 U.S. at 150.

530. *Id.* at 150–51.

531. *Id.* at 152. Brewer also observed that a naturalized citizen could not claim that he had obtained citizenship through perjury as a defense to treason. *Id.* at 153.

532. *Id.* at 153; *see also* John A.T. Hull, *The Organization of the Army*, 168 N. AM. REV. 394–96 (1899) (noting that the Army numbered only 26,610 soldiers compared the larger and more highly trained armies of France and Germany). Hull (R-IA), a Civil War veteran of the Union Army was a representative who served on the House Military Affairs Committee. *Id.*

533. *Grimley*, 137 U.S. at 153.

534. *See* Martin v. Mott, 25 U.S. 19, 31–32 (1827).

535. *Compare Martin* 25 U.S. at 20, *with Grimley*, 137 U.S. at 155.

536. *Martin*, 25 U.S. at 20.

While the law had long placed children into a category apart from adults, in *Morrissey* the Court gave deference to the military in regard to minors who lied about their age.[537] Both opinions were issued on the same day.[538] Morrissey enlisted into the army at the age of seventeen, but he had concealed his age from the recruiter and under the law, a male under the age of twenty-one had to obtain a parent's permission to enlist.[539] Like Grimley, he deserted and then attempted to argue that the court-martial had no jurisdiction to prosecute him because he should not have been permitted to enlist in the first place.[540] While Morrisey's arguments predated the crime of fraudulent enlistment by two years, his argument was different than Tarble's in that he insisted the military possessed no lawful jurisdiction over him.[541] In authoring the opinion, Brewer reached back to ancient British military law to conclude that the statutory requirement of parental permission only created a right in the parent, and therefore, Morrissey remained subject to the Army's jurisdiction.[542] Brewer also cited to *Commonwealth v. Gamble*, an 1824 Pennsylvania Supreme Court decision, for the proposition that if a minor could deprive a court-martial of jurisdiction, then a minor in the military service could also commit treason and aid an enemy with impunity.[543] But, Brewer ignored the fact that treason was a crime that only the federal courts could try.[544]

As a President, Taft was reticent to grant clemency to dishonorably discharged service members or even those seeking an early release from jail.[545] In 1912, the sergeant at arms for the Republican National Committee approached Taft to release a seventeen-year-old Navy deserter named Albert Bell from the last year of his two-year sentence to hard labor.[546] Bell's sisters did not argue innocence but appealed on humanitarian grounds.[547] In spite of the fact that Bell had enlisted into the Navy as a minor, Taft's administration in denying clemency parroted *Grimley* and *Morrissey* and focused on the

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537. Solicitor General William Howard Taft and Morrissey's attorneys submitted their respective arguments on October 21, 1890, and the Court issued its opinion on November 17th of the same year. *See* Morrissey v. Perry, 137 U.S. 157, 158 (1890). Taft and Grimley's attorneys submitted their respective arguments to the Court on October 21st and the Court issued its opinion on November 17th as well. *See Grimley*, 137 U.S. at 149.

538. *Morrissey*, 137 U.S. at 158; *Grimley*, 137 U.S. at 149.

539. *Morrissey*, 137 U.S. at 158.

540. *Id.*

541. *Id.*

542. *Id.* at 159 (first citing The King v. The Inhabitants of Rotherford Greys, 2 Dow. & Ryl. 628, 634; S.C. 1 B. & C. 345, 350; and then citing The King v. The Inhabitants of Lytchet Matravers, 1 Man. & Ryl. 25, 31; S.C. 7 B. & C. 226, 231).

543. *Morrissey*, 137 U.S. at 159 (citing Commonwealth v. Gamble, 11 Serg. & Rawle 93, 84 (Pa. 1824)).

544. WINTHROP, *supra* note 57, at 629.

545. *See* Letter from William F. Stone to WHT (July 23, 1912).

546. *Id.*

547. Letter from Sultzer to Stone (July 22, 1912); Letter from William B. McKinley to John J. Hanson (May 28, 1912).

seriousness of desertion rather than the status of the minor.[548] Thus, Taft's influence in crafting the military law into an increasingly austere and expanded jurisdictional body while serving as solicitor general became a part of his presidential history as well.

VIII. THE JUDICIARY AND THE RISE OF COMMANDER IN CHIEF AUTHORITY: FROM *CHESTER ARTHUR* AND *SWAIM* TO *ORTIZ*, *BEGANI*, AND *BERGDAHL*

Just as Judge Henry Billings Brown added observations about the nature of the relationship between soldiers and a "despotic system" of law in *Clark*, the Court did so in *Kurtz v. Moffit*, in 1885.[549] *Moffit* originated in a San Francisco police arrest of an Army deserter, but without a warrant as required by federal law.[550] Stephen Kurtz enlisted into the Army under a false name in 1876 and deserted three years later.[551] The issues before the Court did not involve a question on whether the Army had jurisdiction over Kurtz.[552] Rather, the twin issues were whether the arrest itself was lawful and if the state courts had any authority to adjudicate a challenge to the arrest.[553] In a unanimous opinion, authored by Justice Horace Gray, the Court undertook a historical review regarding the warrantless arrest of military deserters by civil authorities.[554] The Court also described courts-martial as not being a part of the judicial system of the United States, and that desertion was a purely military crime.[555] None of this part of the opinion is surprising, but it is noteworthy that the Court cited to Winthrop's *Digest of Opinions of the Judge Advocate General* to make this point as it was a step toward cementing his authority as the nation's preeminent military law scholar.[556] Gray noted at the end of the opinion that Congress could, within its authority, enable the warrantless arrest of deserters, but the Court—much as in the case of *Houston*

548. Letter from Acting Navy Secretary to John J. Hanson (May 25, 1912). The acting secretary responded:

> Desertion is so serious an offense that it is necessary in the interest of the service and in order to maintain discipline, in the Navy, the guilty person should be adequately punished. The sentence imposed by the court is not a severe one when the seriousness of the offense committed is considered, especially as the Department exercises clemency toward a prisoner by remitting one third of the term of confinement.

Id.; *see also* Letter from Acting Secretary of the Navy to WHT (Aug. 3, 1912).

The acting secretary penned to Taft that desertion was a serious offense and the two-year sentence justified, and even though Bell had been an "excellent" prisoner in terms of behavior, "a careful examination of the record in this case fails to disclose the existence of any circumstances in mitigation." *Id.*

549. Kurtz v. Moffit, 115 U.S. 487, 501–02 (1885).

550. *Id.* at 487.

551. *Id.* at 488–89.

552. *Id.* at 494.

553. *Id.*

554. *Id.* at 498–99.

555. *Id.*

556. *Id.*; *see* KASTENBERG, *supra* note 151, at 172–84.

v. Moore—would not override the limitations set by Congress.[557] However, as Gray concluded, he added, "Army Regulations derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority."[558] Whether this was necessary to add may be debatable, but it reminded the nation that a president was a commander in chief and his or her orders required unquestioning obedience.

There was, to be sure, nothing revolutionary in Gray's comment. The eighteenth century international law scholar de Vattel advised the *civilized nations* that "every military officer, from the ensign to the general, enjoys the rights and authority assigned [to] him by the sovereign; and the will of the sovereign, in this respect, is known by his express declarations."[559] In 1882, the Court, for the first time, determined that the President's duty to review officer courts-martial was more than ministerial, and the failure of a president to either approve or disapprove a conviction or sentence would inure to the benefit of the court-martialed officer.[560] The opinion, *Runkle v. United States,* was limited in its application in that it applied to court-martialed officers and rested on statute.[561] But, *Runkle* also reinforced a presidential authority that it earlier recognized in *Blake v. United States*, to remove officers from the military without a court-martial.[562] In 1893, in *United States v. Fletcher*, the Court determined that a judicial presumption of regularity in presidential actions over courts-martial existed, and this presumption could render arguments such as *Runkle* had articulated, into a practical nullity.[563]

Given that the federal government had begun to reshape the Army and Navy, it is important to highlight the role of some of the justices who participated in *Swaim* to the national security.[564] While the United States was not at war with a foreign country prior to *Swaim*, the peace was, at best, tenuous.[565] In 1894, Attorney General Richard Olney advised naval commanders in the Bering Sea that it was permissible to seize or fire upon British vessels engaged in disputed seal hunting.[566] Contemporaneously, Justice Harlan represented the United States in the Bering Sea Arbitration with Britain.[567] The following year, Cleveland asked Chief Justice Melville Weston Fuller and Justice David Brewer to serve on the Venezuela

557. *Kurtz*, 115 U.S. at 503.
558. *Id.*
559. DE VATTEL, *supra* note 142, at 300.
560. Runkle v. United States, 122 U.S. 543, 558 (1887).
561. *Id.*
562. Blake v. United States, 103 U.S. 227, 231 (1880).
563. United States v. Fletcher, 148 U.S. 84, 89–90 (1893).
564. *See generally* Swaim v. United States, 165 U.S. 553 (1897).
565. *See, e.g.*, Letter from C.E. Clark to Olney (June 3, 1894).
566. *Id.*; Letter from Navy Secretary C.E. Clark (June 18, 1894).
567. *See, e.g.*, John W. Foster, *Results of the Bering Sea Arbitration*, 161 N. AM. REV. 693, 702 (1895). Foster was the former Secretary of State. *Id.* at 693.

Arbitration in an attempt to bring peace with Britain while reinforcing that the preservation of the Monroe Doctrine could be accomplished by military force as a last resort.[568] While Cleveland wanted to avoid armed conflict, "jingoistic" American political leaders were willing to risk war over Britain's intrusion into Venezuelan territory.[569] Yet, on December 17, 1896, Cleveland issued a belligerent message declaring that the United States Government had a duty to protect Venezuela against foreign aggression.[570] The possibility of a war with Spain remained strong.[571] When *Swaim* was decided in early 1897, the opinion was sandwiched between the Pullman Strike and the possibility of a war with the world's foremost naval power on one side and the Spanish-American War on the other.[572]

A. The Rise of the National Defense and Internal Security: 1876–1914

In 1866, when Prussia defeated the Austro-Hungarian Empire, it rapidly fielded an army of 700,000 soldiers from a system of active and reserve forces.[573] In the decade before that conflict, the Prussian army had undergone reforms in which the Landwehr—the equivalent of the state militias—had been significantly reduced, making the military force that went to war in 1866 a *federal* force directly under the control of the sovereign from the very beginning of the callup.[574] The diminution of the Landwehr also meant the reduction of political and social forces that were often at odds with the centralized power of the German monarchy and more reflective of social and political progressivism than the German state would allow.[575] It is noteworthy that the Prussian military underwent changes that were desired in the United States' military establishment, particularly as advocated by General Emory

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568. Letter from Olney to Cleveland (Dec. 28, 1896).

569. *See, e.g.*, Henry Cabot Lodge, *England, Venezuela, and the Monroe Doctrine*, 160 N. AM. REV. 651, 658 (1895). Cleveland was worried about jingoism. Letter from Cleveland to Bayard, ambassador (Dec. 29, 1895). Cleveland wrote:

> Events accompanying the growth of this Venezuelan question have recently forced a fuller examination of this [Monroe Doctrine] question and have also compelled us to assume a position in regard to it. I am entirely clear that the doctrine is not obsolete and that it should be defended and maintained for its value and importance to our government and welfare, and its defense and maintenance involve its application wen a state of facts arises regarding it. It would have been exceedingly gratifying and a handsome thing for Great Britain to do, if in the midst of all this Administration has had to do in its attempts to stem the tide of "jingoism," she yielded or rather conceded something.

Id.

570. ALLAN NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE 639 (1934).

571. *Id.*

572. *See generally* Harvey Wish, *The Pullman Strike: A Study in Industrial Warfare*, 32 J. ILL. ST. HIST. SOC'Y 288, 300 (1939).

573. Dierk Walter, *Roon, the Prussian Landwehr, and the Reorganization of 1859–1860*, 16 WAR HIST. 269, 285 (2009).

574. *Id.* at 282–85; *see also* H.W. KOCH, A HISTORY OF PRUSSIA 251–53 (1978).

575. *Id.*

Upton, an influential military thinker in the later nineteenth century.[576] Upton controversially and selectively used various statements of George Washington to argue a permanent enlarged army establishment.[577] Upton's view of the Army—he died in 1881—was notional in that he did not foresee the Spanish-American War, the Boxer Rebellion, or World War I.[578] But, he argued for diminishing the influence of state militia and creating a national expandable force modeled on the Prussian-German Army, so that the military could be reliable in operations ranging from crushing mass labor strikes to fighting a European invader.[579]

Upton was not alone in his thinking regarding the use of the Army to suppress strikes.[580] In May 1894, the Pullman Strike threatened to paralyze the national economy, and because it was led by persons such as Eugene Debs, the possibility of a socialist upheaval became a reality.[581] On June 6, 1894, Olney asked Secretary of War, Lamont, to order the Army to Idaho to enforce judicial orders related to the strike.[582] One month later, Olney advised General John McAlister Schofield that the Union Pacific and Northwest Pacific corporate charters provided the justification to order the Army to protect federal properties, such as the mail, and suppress the strike by enforcing judicial injunctions against the strike.[583] In regards to the 1878 Posse Comitatus Act, Olney informed former Attorney General William Miller that the law was an unconstitutional restraint against the power of the presidency.[584] Olney had an agreeable military lawyer in Winthrop who, in 1895, referred to the Act as an "embarrassment" and also advised his War Department contemporaries as well as following generations of military officers that the act was unconstitutional.[585]

In effect, Winthrop, Olney, and Upton had pushed for a Commander in Chief authority that was contrary to the view of Congress at the time of the

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576. HUNTINGTON, *supra* note 426. Upton advocated the adoption of the German general staff system that evolved from the Prussian Army after German unification in 1871. *See* David Axeen, *"Heroes of the Engine Room": American "Civilization" and the War with Spain*, 36 AM. Q. 481, 484–92 (1984). For a different view of Upton's influence, see Andrew Bacevich, *Whose Army?*, 140 DAEDALUS: J. AM. ARTS & SCIS. 122, 124–25 (2011).

577. *See, e.g.*, Phillip L. Ralph, *The Founding Fathers and Conscription*, 32 BULL. AM. ASS'N U. PROFESSORS 443, 444 (1946) (pointing out that General John Palmer criticized Upton on this point in 1944).

578. STEPHEN E. AMBROSE, UPTON AND THE ARMY 90–105 (1992).

579. *Id.*

580. *See* H. Wayne Morgan, *The Utopia of Eugene V. Debs*, 11 AM. Q. 120, 123 (1959).

581. *Id.*

582. Letter from Olney to Daniel Lamont (June 6, 1894).

583. Letter from Olney to Schofield (July 7, 1894).

584. Letter from Miller to Olney (July 11, 1894).

585. WINTHROP, *supra* note 57, at 867. Winthrop also penned:

> This legislation, evolved as it was out of a temporary political antagonism on the question of the extent of the authority of the President to employ the military to preserve order at elections in the States, remains, now that the occasion for the enactment has passed, a mere impediment to the constitutional exercise of the executive power of the nation.

Id.

Posse Comitatus's passage, if not the Constitution's framers.[586] The Pullman Strike was a labor-based assault on corporate wealth, but it was hardly an attempt at an insurrection against the government, and both Olney and General Nelson A. Miles—who commanded forces during the strike—had financial relationships with the railroads involved in the strike.[587] And Illinois governor, John Altgeld, openly opposed the use of the Army in his state.[588]

In 1902, Secretary of War Elihu Root set out to model, to the extent possible, the regular army as well as the National Guard, on Upton's plans.[589] By this time, the federal judiciary made such a change possible by diminishing the standing army fears of the founders, aligning naval law with the Articles of War, and removing avenues of appeal to the courts from aggrieved service members.[590] In 1915, the Court in *Stearns v. Wood* signaled that it would not grant appeals from challenges against the application of War Department policies to the National Guard.[591] At the same time, the Navy grew in the numbers of personnel and began to compete in size and power with the European navies of the era beginning in the late 1880s.[592]

B. Ex parte Reed*: Prelude to* Swaim

In 1879, the Court in *Ex parte Reed* further solidified the strict *habeas* test in holding that the federal judiciary could not overturn a court-martial on the basis of a procedural error.[593]A paymaster's clerk, Alvin Reed, was court-martialed in early 1878 and then unsuccessfully motioned Judge Thomas Nelson for release from confinement.[594] The court-martial found Reed guilty of paying sailors without proper authorization as well as taking monies for his own use and sentenced him to a fine of $500, a dishonorable discharge, and imprisonment for a year but added that if Reed failed to pay the fine, he would remain in prison until the fine was paid.[595] Rear Admiral Edward Nichols, the convening authority, ordered the court-martial back into deliberation because the manner in which the fine would be collected was impermissible, as it placed the treasury department responsible for the fine

586. *See id.*
587. WISH, *supra* note 573, at 288–89.
588. *Id.*; *see also* ROBERT MCELROY, GROVER CLEVELAND: THE MAN AND THE STATESMAN 151 (1923).
589. HUNTINGTON, *supra* note 426, at 242.
590. *Id.*
591. Stearns v. Wood, 236 U.S. 75, 78 (1915).
592. KENNETH J. HAGAN, THIS PEOPLE'S NAVY: THE MAKING OF AMERICAN SEA POWER 177–79 (1991); WALTER HERRICK, THE AMERICAN NAVAL REVOLUTION 105 (1967); DUDLEY KNOX, A HISTORY OF THE UNITED STATES NAVY 427 (1948).
593. *Ex parte* Reed, 100 U.S. 13, 23 (1879).
594. *Id.*
595. *Id.* at 14.

rather than Reed.[596] The court-martial, in reconsidering its sentence removed the fine but added a year to Reed's imprisonment.[597] In essence, the court-martial was not ordered to elevate Reed's sentence, and because it issued an unlawful sentence in its initial findings, Nichols could not permit it to be executed.[598]

Reed's fate garnered enough interest for Senator, and former treasury secretary, George S. Boutwell (R-MA), to appeal Reed's conviction to the Court.[599] Boutwell argued that a paymaster's clerk was not a part of the Navy but rather a civilian aboard a naval vessel and, therefore, a court-martial did not possess jurisdiction.[600] This was a losing proposition because, as the Court observed, Congress had empowered the Secretary of the Navy to create this position, and having done so, clerks wore the naval uniform and were eligible to receive a pension.[601] "If these officers are not in the naval service, it may well be asked who are," the Court concluded.[602] Boutwell's other two arguments were summarily dismissed with the observation that Admiral Nichols, consistent with the naval articles, had not dissolved the court-martial before he directed its officers to reconsider their sentence and the manner in which Nichols acted was not inconsistent with that law.[603]

Although the Court did not cite to *Milligan*, it made clear that as Reed was a part of the Navy and specifically amenable to its jurisdiction, it would only grant *habeas* if Nichols had acted outside of the scope of the law.[604] As a matter of both deference to Congress and the Navy, *Reed* left the revisory authority intact because Nichols had not ordered the court-martial to issue a more severe sentence, even though this may have been implied.[605] Yet, the opinion also left open the possibility that the revisory authority was not absolute and that a federal judge could issue a writ on a military officer.[606] As a second matter, the Court made it clear—in a sense departing from the Massachusetts Supreme Judicial Court's 1831 decision *Brooks v. Adams*—that the federal judiciary was required to give to courts-martial a presumption of regularity.[607]

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596. Letter from Nichols to the court-martial (July 19, 1878). Nichols wrote to the court-martial: "I regret to be compelled to differ with the court as to the adequacy of the sentence. . . . The fine imposed upon Mr. Reed is actually paid by the United States, for the court grants to him fifty dollars per month of his pay while in confinement." *Id*.

597. *Reed*, 100 U.S. at 13.

598. *See id.*

599. *Id.*

600. *Id.*

601. *Id.*

602. *Id.* at 22.

603. *Id.*

604. *Id.* at 23.

605. *Id.*

606. *Id.*

607. *Id.* at 21.

C. Swaim v. United States*: Presidential Command and Control Over Courts-Martial*

On April 22, 1884, Secretary of War Robert Todd Lincoln advised President Chester Alan Arthur to order a court of inquiry—the predecessor to the modern Article 32 investigation or rough form of a grand jury—to investigate alleged financial improprieties on the part of Major General David Swaim, the Judge Advocate General of the Army.[608] Arthur agreed to do so, and on May 5, 1884, the court of inquiry, pursuant to Arthur's order, began its investigation.[609] Based on the court of inquiry's findings, as well as Lincoln's assessment of Swaim's lack of integrity, Lincoln ordered charges to be drafted against Swaim.[610] The charges included conduct unbecoming an officer and gentleman and neglect of duty.[611] One basis for Swaim's eventual appeal against his court-martial conviction and sentence was that Lieutenant General Philip Sheridan, the Commanding General of the Army, did not charge Swaim, direct the court of inquiry, or order the court-martial.[612]

On June 30, 1884, Arthur directed the court-martial against Swaim.[613] Indeed, this was the first time in United States history that a President directed an Army court-martial to convene.[614] On February 5, 1885, the court-martial convicted Swaim of some of the offenses and sentenced him to be suspended from rank and duty for a three-year period.[615] On February 11, 1885, Arthur ordered the court-martial to reopen and the officers serving on it to reassess their sentence with the admonition:

> The record in the foregoing case of Brigadier-General David G. Swaim, Judge-Advocate-General U.S.A., is hereby returned to the general court-martial before which the proceedings were had, for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offenses as found by the court in the first and third specifications under the first charge.[616]

It is possible that Arthur gave an order to the court-martial to increase the severity of the sentence, but his order does not expressly state that the

608. *See, e.g.*, William R. Robie, *The Court-Martial of a Judge Advocate General: Brigadier General David G. Swaim*, 56 MIL. L. REV. 211 (1972); KASTENBERG, *supra* note 149, at 215.

609. War Department Order, April 22, 1884. The court of inquiry consisted of Major General John Pope, Brigadier General Christopher C. Augur, and Brigadier General Delos Sackett. *Id.*

610. Acting Adjutant General C. McKeever to Major R.N. Scott, June 30, 1884 in Swaim Case File, 10.

611. Swaim v. United States, 28 Ct. Cl. 173, 185 (1893), *aff'd*, 165 U.S. 553 (1897).

612. *Id.*

613. *Id.* at 183.

614. *Id*. at 220–21.

615. *Id.*

616. *Id.* at 195.

court-martial had to do so.[617] Part of the difficulty in assessing Arthur's conduct is that at his behest, Attorney General Benjamin Brewster advised the court-martial that it unnecessarily altered the nature of the charges in finding Swaim guilty because it excepted language from the charge of conduct unbecoming an officer and gentleman.[618]

In response to Arthur's order, the court-martial reconsidered, but maintained, the verdict as it was originally announced.[619] However, it altered General Swaim's sentence to be suspended from rank and duty for one year and to be reduced to the rank of major.[620] The problem with this second sentence is that it was contrary to law, and on February 14, 1885, Arthur ordered the court-martial to reconvene and reconsider its sentence a second time.[621] This time, the court-martial sentenced Swaim to be suspended for twelve years.[622] It should be noted that Arthur was a *lame duck president* because, on March 4, 1885, Grover Cleveland was to be inaugurated President.[623] It should also be noted that in reviewing the specific order to reconvene, there is absolutely no directive to increase the severity of the sentence.[624]

Represented by two members of Congress, Swaim raised several issues to the Court of Claims, including the bias of the officers appointed to the court-martial, the improper appointment of judge advocate ed, and the court-martial "flagrantly violat[ing] the laws of evidence."[625] In a decision issued by Judge Charles C. Nott, the court answered these contentions with the observation that "[w]hen a person enters the military service, whether as officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights."[626] And, these rights, while enforceable if the trial were held in a civil court, were not so in a military trial.[627]

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617. *Id.*

618. *Id.* at 196–97.

619. *Id.* at 200.

620. *Id.*

621. *Id*. at 200–01.

622. *Id.* at 201.

623. *See, e.g.*, Grover Cleveland, *March 4, 1885: First Inaugural Address* (Mar. 4, 1885), https://millercenter.org/the-presidency/presidential-speeches/march-4-1885-first-inaugural-address.

624. *See Swaim*, 28 Ct. Cl. at 195.

625. *Id.* at 218.

626. *Id.* at 217. Judge Nott's influence has lasted into the modern period of military law. *See id.* Justice Harry Blackmun specifically referenced Nott in *Parker v. Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring). Blackmun responded to the clerk of the claims court who had first brought his attention to Nott: "He apparently was a very great judge. I think it is good to remind ourselves of the obligations we have to those who have contributed so much." Letter from Justice Harry Blackmun to Mr. Frank Peartree (June 26, 1974). At the time of *Swaim*'s issuance, Nott led an effort to move the inauguration date closer to the election and enlisted Chief Justice Melville Weston Fuller's help to do so. *See* Letter from Charles C. Nott to Justice Melville Weston Fuller (Mar. 24, 1897).

627. *Swaim*, 28 Ct. Cl. at 217.

Judge Nott concluded that even though the Constitution was silent on the authority of a President to order a court-martial, and the Articles of War did not expressly give Arthur the authority to do so, the authority itself was implied in the Constitution.[628] And Nott interpreted the 1830 Act authorizing a President, under narrow circumstances, to convene a court-martial to limit military officers from doing so, rather than a narrow grant of power to a President.[629] Nott criticized the actions of Brewster, but this criticism was centered on Brewster's analysis of what constituted fraud.[630] However, regarding the regulation permitting the convening authority to order the court-martial reopened, Nott was emphatically clear that nowhere in the regulation could it be inferred that a convening authority could insist on an increased severity of a sentence.[631] Finally, Nott made it clear that Arthur did not give a direct order to increase the severity of the sentence.[632]

The Court, in an opinion authored by Justice George Shiras Jr., unanimously agreed with Nott.[633] *Swaim v. United States* was issued in the concluding days of Cleveland's second term, on March 1, 1897.[634] The Court found it helpful that on February 7, 1885, the Senate's judiciary committee concluded that a President could convene courts-martial regardless of the statute because doing so was an inherent constitutional power.[635] True enough, a majority of the committee agreed on this point, but Shiras neglected to note that the committee vote was not unanimous.[636] And, nowhere in the opinion is there a recognition that Arthur's actions in February 1885 were roundly disparaged in the Senate.[637]

On February 25, 1885, in the midst of a Senate Appropriations Committee debate on an Army appropriations bill, Senator William Boyd Allison (R-IA) introduced a measure to repeal the Ninety-Fourth Article of War, which permitted a court-martial to depart from the ordinary order of holding trial between the hours of eight in the morning and three in the afternoon.[638] At first blush, it might appear that it was a mere coincidence that the Senate committee considered a seemingly innocuous measure in the immediate aftermath of Swaim's court-martial. But, Allison noted he introduced this measure as a result of Swaim's court-martial.[639] Senator John James Ingalls (R-KS) responded that although the Military Affairs

628. *Id.* at 221.
629. *Id.* at 223.
630. *Id.* at 231.
631. *Id.* at 235.
632. *Id.*
633. Swaim v. United States, 165 U.S. 553, 554 (1897).
634. *Id.*
635. *Id.* at 558.
636. H.R. REP. NO. 1337 (1885).
637. *See Swaim*, 165 U.S. at 553–66.
638. 16 CONG. REC. 2118 (1885).
639. *Id.*

Committee was a more appropriate committee to debate the measure, Swaim's court-martial, and in particular Arthur's actions, were "a disgrace to civilization."[640] Senator Eugene Hale (R-ME) conceded that the court-martial rendered a *severe decision* but insisted that the generals sitting in judgment of Swaim were not "unduly impressed by superior authority."[641] In contrast, Senator Omar Conger (R-MI) insisted on his conviction that "Swaim has been the victim of a conspiracy to destroy him."[642] This debate, in essence, consisted of Republicans in the Senate criticizing a Republican President.[643]

In regard to Swaim's other arguments to the Court, such as the court-martial consisting of officers who were inferior in rank to him, the Justices responded that in *Mott*, this issue had already been resolved against such claims.[644] So too did the Court adopt Nott's reasoning that Swaim's other arguments were not matters of which the judiciary could take jurisdiction of.[645] Up until this point, none of the Court's opinion was particularly shocking as it followed the post-*Tarble* view of military authority.[646] However, regarding Arthur's actions, Swaim argued that the British Mutiny Act, which existed at the time of the United States' founding, prevented the Crown from ordering the court-martial to reconvene more than once.[647] The Court determined that this was of no import because Congress gave greater authority to a President than the British law recognized for its own monarch.[648] This may be the first time in United States legal history where the Court accepted that a President's authority was greater than that of the very Crown that a war for independence was fought against.[649] Yet, it cannot be said that the opinion enabled an unbridled executive power.

D. Hamilton v. McClaughry*: Military Jurisdiction in Undeclared Wars*

On February 4, 1901, the Army court-martialed Private Fred Hamilton, a regular Army soldier, for the unlawful killing of another soldier, found him guilty, and sentenced him to life in prison.[650] What made Hamilton's

640. *Id.* at 2119. Ingalls later issued a more forceful condemnation of Swaim's court martial in stating: "I make no accusation against any officer or Department of this Government; but no man can read the history of these proceedings without having a settled and established conviction that there was a deliberate purpose somewhere not to do justice but to accomplish vengeance against General Swaim." *Id.* at 2123.

641. *Id.* at 2121.

642. *Id.* at 2124.

643. *See id.* at 2121.

644. Swaim v. United States, 165 U.S. 553, 559 (1897).

645. *Id.* at 642; *see* Swaim v. United States, 28 Ct. Cl. 173 (1893).

646. *See Swaim*, 165 U.S. at 553–66; *In re* Tarble (*Tarble's Case*), 80 U.S. 397 (1871).

647. *Swaim*, 165 U.S. at 564.

648. *Id.*

649. *See generally id.* (giving greater authority to a President than British law recognizes for its monarch).

650. Hamilton v. McClaughry, 136 F. 445, 446 (C.C.D. Kan. 1905).

court-martial remarkable was that it became the first time a federal court granted a review on a challenge to a court-martial's determination that a capital crime could be charged without a declaration of war, insurrection, or rebellion.[651] Hamilton killed the other soldier in China during the *Relief Expedition* in which President William McKinley ordered 5,000 soldiers into China from the Philippines without the sanction of Congress.[652] While it is true that the Navy conducted courts-martial, including capital murder cases, across the globe, the Articles of War expressly prevented the Army from doing so unless there was a war, insurrection, or rebellion.[653] Judge John Calvin Pollock, a Theodore Roosevelt appointee, presided over Hamilton's appeal for release from military confinement.[654] In response to Hamilton's argument that there was no war that could trigger the jurisdiction of the crime he had been charged with, Pollock began by observing that if Hamilton were correct that no state of war had existed, the court-martial was invalid.[655]

However, Pollock noted that the Army conducted 271 courts-martial and 244 of these resulted in a conviction.[656] He then turned to *Coleman* and noted that while the Army traversed through China, international law militated against the Chinese government having jurisdiction over United States soldiers because China was, in fact, an enemy.[657] On this point, he added, that in the 1863 *Prize Cases,* the Court determined that a formal declaration of war was unnecessary for a court to conclude that a war existed.[658] Pollock also noted that a formal command structure had been created and that the United States contributed its 5,000 soldiers to an allied force of 15,000 who fought in several battles against the "Boxer Rebellion."[659] Additionally, he found it dispositive that the War Department had increased the pay of these soldiers consistent with a pay statute that

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651. *Id.*

652. *See War Powers Legislation*: Hearings Before the Committee on Foreign Relations, 92d Cong. 1st Sess. on S. 731, S.J. Res. 18 and S.J. Res 59, 366 (1971).

653. Article 58 read:

> In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which the offense may have been committed.

Act of March 3, 1875, ch. 144, 18 Stat. 479 (1875) (revised 1920).

654. *War Powers Legislation*, *supra* note 652.

655. *Hamilton*, 136 F. at 448.

656. *Id.* On the types of courts-martial and lack of discipline of military forces in China, see KASTENBERG, *supra* note 54, at 65–67.

657. *Hamilton*, 136 F. at 448.

658. *Id.* at 449 (citing The Prize Cases, 67 U.S. 635, 666 (1863)); *see also* MCGINTY, *supra* note 94, at 133–43 (analyzing The Prize Cases).

659. *Hamilton*, 136 F. at 449–50; *see also*, Walter Laferber, *"A Lion in the Path:" The U.S. Emergence as a World Power*, 101 POL. SCI. Q. 705, 714 (1986) (analyzing the Boxer Rebellion and McKinley's actions).

mandated the increase in a time of war.[660] Based on McKinley's decision and the pay increase, Pollock determined that the court-martial was lawful and because Hamilton did not appeal further from this ruling, it became a part of the military law.[661] In 1967, Justices William O. Douglas and Potter Stewart vainly tried to have the Court determine whether it was constitutional to send conscripted citizens overseas into a conflict where Congress had not declared war, and it remains today that courts-martial jurisdiction is universal and expansive.[662]

E. Interregnum

In between *Swaim* and 2016, the United States Armed Forces fought in the Spanish-American War, two World Wars, the Korean War, the Vietnam Conflict, Iraq, Afghanistan, and dozens of other military operations across the globe.[663] From 1940 to the present, there has been an almost continuous national conscription program, though no citizen since 1973 has been drafted into the military.[664] No President since Grover Cleveland has avoided commanding military forces in a foreign conflict or operation.[665] President Herbert Hoover ordered the Army to suppress a demonstration composed of veterans demanding an earlier payment of promised monies.[666] Known as the "Bonus March" or "Bonus Riot," Hoover, believing that the demonstrators were the vanguard of a socialist or communist insurgency, directed General Douglas MacArthur to use Army units in Washington, D.C. to forcibly clear the city of veteran demonstrators.[667] Like the soldiers ordered into strike suppression duty, the solders ordered to forcibly remove the Bonus Marchers from the Capital were also under the President's orders and amenable to court-martial jurisdiction.[668] In 2020, President Donald Trump threatened to use the military to police cities during civil rights protests that, at times, turned violent.[669] Trump may also have considered using the Army to

660. *Hamilton*, 136 F. at 451.

661. *Id.*

662. *See, e.g.*, Massachusetts v. Laird, 400 U.S. 886, 900 (1970) (Douglas J., dissenting).

663. *America's Wars*, DEP'T OF VETERANS AFFS., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited Mar. 7, 2022).

664. *Induction Statistics*, SELECTIVE SERV. SYS., https://www.sss.gov/history-and-records/induction-statistics/ (last visited Mar. 7, 2022).

665. *See generally* MCELROY, *supra* note 587, at 249–50.

666. DONALD J. LISIO, THE PRESIDENT AND PROTEST: HOOVER, MACARTHUR, AND THE BONUS RIOT 297–98 (Fordham Univ. Press, 2d ed. 1994).

667. *Id.*; *see also* Jennifer Keene, *1932: The Bonus March*, 32 WASH. HIST. 30, 30–32 (2020).

668. *See* Secretary of War Patrick J. Hurley to General Douglas MacArthur, Troops Ordered to Cooperate with District Police to Maintain Law and Order in the District, July 28, 1932, *in* THE GENERAL GEORGE VAN HORN MOSELEY PAPERS (1855–1960).

669. *See President Trump Threatens to Use Army to Stop US Protests*, BBC (June 2, 2020), https://www.bbc.co.uk/newsround/52888358.

maintain his hold on the presidency after being defeated at the polls in November 2020.[670]

Although after World War II, Congress legislated the modern UCMJ to bring a greater degree of fairness to courts-martial; in doing so, Congress created an expansive subject matter and personal jurisdiction to military law in peacetime.[671] Under the UCMJ, courts-martial, for the first time, had a formal appellate review process, including the possibility of review before an Article I court with civilian judges.[672] Additionally, the Court relaxed the strict *habeas* jurisdictional test in 1953, replacing that test with a standard of determining whether the military courts have "fully and fairly" reviewed assertions of errors, and if not, the federal courts can grant review.[673] It was not, however, until 1968 that military trial judges were placed into courts-martial.[674] In 1969, the Court in *O'Callahan v. Parker* analyzed the intent of the framers in regard to subject matter jurisdiction and reduced this jurisdiction to military type offenses.[675] Authored by Justice William O. Douglas, *O'Callahan* was roundly criticized for its perceived slovenly history, political nature, and being detrimental to the national security.[676] In 1986, the Court reversed *O'Callahan* in *Solorio v. United States* and the military's subject matter jurisdiction once more because expansive beyond that which existed at the time of the Constitution. [677]

In enacting the UCMJ, Congress used its plenary authority over military law to expand personal jurisdiction to civilians, including family members who followed their military sponsor to overseas bases and civilian employees on overseas military bases.[678] Servicemembers who served less time than that required for a retirement pension also remained amenable to courts-martial jurisdiction if their alleged criminal activity occurred while on active duty.[679] The Court, in a series of opinions between 1954 and 1960, eviscerated this degree of personal jurisdiction.[680] In the first of these opinions, *Toth v.*

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670. Tamic Gangel et. al., *'They're Not Going to F**king Succeed': Top Generals Feared Trump Would Attempt a Coupe after Election, According to New Book*, CNN POL. (July 14, 2021, 9:03 PM), https://www.cnn.com/2021/07/14/politics/donald-trump-election-coup-new-book-excerpt/index.html.

671. 10 U.S.C. § 802(a)(4); *see generally* Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L. REV. 1398 (1973).

672. 10 U.S.C. § 802(a).

673. Burns v. Wilson, 346 U.S. 137, 142 (1953).

674. Weiss v. United States, 510 U.S. 163, 167–68 (1994).

675. O'Callahan v. Parker, 395 U.S. 258, 268–70 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

676. *See, e.g.*, Joshua Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas' Anti-Military Ideology from World War II to* O'Callahan v. Parker, 26 T.M. COOLEY L. REV. 163, 263–69 (2009) (detailing responses to *O'Callahan*).

677. Solorio v. United States, 483 U.S. 435, 436 (1987).

678. 10 U.S.C. § 802.

679. *Id.* § 802(c).

680. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955); McElroy v. Guargliardo, 361 U.S. 281, 287 (1960); Grisham v. Hagan, 361 U.S. 278, 280 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960); Reid v. Covert, 354 U.S. 1, 40 (1956).

Quarles, authored by Justice Hugo Black, the Court observed, "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[681] A truism followed this observation that "[f]ree countries . . . restrict military [jurisdiction] to the narrowest jurisdiction deemed absolutely essential to maintaining jurisdiction among troops in active service."[682] But, at no time has the Court assessed the constitutional viability of maintaining jurisdiction over military retirees, or since 1897, the degree—or excess of it—of influence that a President might exert over courts-martial such as President Arthur had committed in *Swaim*.[683] These two areas are currently under review in the federal judiciary as well as in Congress.

While Congress, in enacting the UCMJ intended for courts-martial to become trials more akin to federal criminal trials, there remains significant differences between the two.[684] There is, at present and with the exception of death penalty sentencing, no requirement in courts-martial for a unanimous jury verdict.[685] All other criminal trials, including state criminal trials require jury verdicts.[686] Court-martial jurors—titled as "members"—are selected by the very commanding officer who convenes the court-martial.[687] It is not a *per se* violation of due process to have one member directly subordinate to the command of another member.[688] While Congress enacted a prohibition against unlawful command influence—that is, the ability of a commanding officer to influence a court-martial to a verdict or sentence—at no time since 1950 has a person subject to this prohibition been prosecuted for violating it, even though the CAAF and service courts of appeal have addressed this issue.[689] The military trial judge is not a part of an independent judiciary and is subject to the influence of command, as well as the direction of the Judge Advocate General.[690]

1. Flawed History: Justice Alito and the Ortiz *Dissent*

Justice Alito's dissent in *Ortiz* presents a view of military legal history at odds with the historic record, both in its incompleteness as well as in broad characterizations.[691] He insisted, as a matter of history, on a military justice

681. *Toth*, 350 U.S. at 22.
682. *Id.*
683. *See* Swaim v. United States, 165 U.S. 553, 558 (1897).
684. *See infra* notes 686–90 and accompanying text (explaining key differences between federal criminal trials and courts-martial).
685. 10 U.S.C. § 825(a).
686. Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).
687. 10 U.S.C. § 825(e)(2).
688. United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010).
689. 10 U.S.C. § 837; Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 37 (2019).
690. United States v. Salyer, 75 M.J. 415, 421 (C.A.A.F. 2013).
691. Ortiz v. United States, 138 S. Ct. 2165, 2189–2206 (2018) (Alito, J., dissenting).

system constitutionally insulated from the judiciary.[692] One need only consider the following line presented in his *Ortiz* dissent when he cited to *Swaim*: "until 1920 the President and commanding officers could disapprove a court-martial sentence and order that a more severe one be imposed instead, for whatever reason. We twice upheld the constitutionality of this practice."[693] The Court, in *Swaim*, did not uphold the constitutionality of an unlimited disapproval authority and, as previously noted, President Arthur never issued a specific order for a more severe sentence.[694] In short, there is nothing in the history of *Swaim* to sustain Alito's comment.[695] Perhaps, other than his doubts on the Bill of Rights applying to courts-martial, the most troubling aspect of Alito's dissent is the claim that "[c]ourts-martial fit effortlessly into the structure of government established by the Constitution."[696]

To this end, he cited to *The Works of John Adams* for the proposition that Adams and Jefferson proposed adopting the British Articles of War in their totality during the exigencies of the War for Independence, as a prelude to the Constitution.[697] But, in citing to *The Works*, he omitted describing how the British articles maintained the supremacy of the law over the military and enabled judges to intervene in courts-martial.[698] Thus, Alito's *effortless* observation would only be true if there is a recognition that the Articles of War had a very limited subject matter jurisdiction, the personal jurisdiction of the military covered a tiny fraction of the population, and the President's authority over Army courts-martial was far more limited than over naval courts-martial.[699] He even failed to note, following his statement that courts-martial were older than the United States, that there were limits placed upon the British Crown over its army's courts-martial.[700] And, of course, there is no mention in Alito's dissent that this structure was a compromise hemmed by the fears of standing armies in the Early Republic.[701]

There are other misstatements of history in his dissent. For instance, in analyzing *Ex parte Vallandigham* for the proposition that the Court does not possess *certiorari* jurisdiction over CAAF decisions, Alito noted "[b]ut

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692. *Id.* at 2220–21 ("It is precisely because Article II authorizes the President to discipline the military without invoking the judicial power of the United States that that the Constitution has always been understood to permit courts-martial to operate in the manner described above.").

693. *Id.* at 2201 (first citing Swaim v. United States, 165 U.S. 553, 564–66 (1879); and then citing *Ex Parte* Reed, 100 U.S. 13, 20 (1879)).

694. *Swaim*, 165 U.S. at 558.

695. *See supra* Section VII.C (providing an analysis of *Swaim*).

696. *Ortiz*, 138 S. Ct. at 2199 (Alito, J., dissenting).

697. *Id.* (citing to JOHN ADAMS, THE WORKS OF JOHN ADAMS 68 (Charles F. Adams ed., 1851)). Justice Alito's citation, however, did not mention that General Washington had opined that the British Articles were insufficient. *See id.*

698. ADAMS, *supra* note 697.

699. *See id.*

700. *Id.*

701. *See Ortiz*, 138 S. Ct. at 2189–2206 (Alito, J., dissenting).

unlike Vallandigham and Ortiz, Milligan and Yerger first sought relief in a lower federal court."[702] One might well wonder whether Justice Alito forgot, or chose to ignore, that former Congressman, Clement Vallandigham, did apply for relief from both his arrest and the military commission trial to Judge Humphrey Leavitt on the United States District Court for the District of Ohio prior to his appeal to the Court.[703] Of course, the Court did not grant *certiorari* on a challenge against the fairness of the military trial that condemned Vallandigham to prison.[704] But, Leavitt's ruling was adverse to Vallandigham when he refused Vallandigham's claim that *habeas* had not been suspended in Ohio.[705] And, Justice Alito appears to pay no regard to the fact that *Vallandigham* was decided in the heat of a war in which the very existence of the United States was in question while *Milligan* was decided after the threat of the war was over.[706] True enough, the date of an opinion is not dispositive to an opinion's continued viability, but it certainly does provide context to the conditions of the opinion.

Alito's interpretation of military law in the Early Republic did not form in a vacuum. He cited to selected passages in *Military Law and Precedents* but does not appear to have considered the fuller array of Winthrop's view of military jurisdiction including: that *Milligan* was wrongly decided, that the military courts had the authority to prosecute an elected member of the legislative branch and impose a sentence of prohibition from further government service, or that Winthrop himself later doubted the full range of jurisdiction he championed.[707] Alito also cited to Wiener for the proposition that the "historical evidence strongly suggests that the provisions of the Bill of Rights were not originally understood to apply to courts-martial."[708] Perhaps Alito is unaware of Wiener's utterly racist views on the internment of United States citizens of Japanese descent, but Wiener's arguments on the inapplicability of the Bill of Rights to courts-martial—in contrast to Professor Gordon Henderson's article—cannot reasonably be separated from his belief in the constitutionality of one of the twentieth century's more racist programs

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702. *Id.* at 2195 (citations omitted).

703. *Ex parte* Vallandigham, 28 F. Cas. 874, 874–79 (C.C.S.D. Ohio 1863); MCGINTY, *supra* note 94, at 186–87; KASTENBERG, *supra* note 9 at 108–09. Perhaps most surprisingly, Chief Justice William Rehnquist noted the very fact that Vallandigham appealed to Leavitt two days after the military trial. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 67 (1998).

704. *Vallandigham*, 28 F. Cas. at 874.

705. *Id.*

706. *Id.*

707. *Ortiz*, 138 S. Ct. at 2220 (citing WINTHROP, *supra* note 57).

708. *Id.* (first citing Saikrishna B. Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1346 (2015); then citing Wiener, *supra* note 169, at 290–91, 294; then citing WINTHROP, *supra* note 57, at 54, 241, 430, 605; and then citing *Ex parte* Milligan, 71 U.S. 2, 87 (1866) (Chase, C.J., concurring in judgment)). Alito also cites to Prakash, *supra*, for the proposition that "[j]ust as there are implicit court-martial exceptions to the Constitution's jury trial rights, so too might there be implied exceptions to other individual rights." *Id.* (citing Prakash, *supra*). Professor Prakash does not provide any support for such implied exceptions in his article. *See* Prakash, *supra*.

overseen by the executive branch through its military authority.[709] Just as Frankfurter's lobbying for Weiner's prominence was a choice of pathway, so too is Alito's continued use of Wiener, and Frankfurter, like Weiner, never retreated from his insistence that the internment of United States citizens of Japanese descent was fully constitutional.

2. Judge Maggs and Begani

In *United States v. Overton*, the Court of Military Appeals—the predecessor to CAAF—in 1987 upheld the constitutionality of the extension of military jurisdiction over retirees.[710] A court-martial determined that Clifford Overton, a retired Marine Sergeant. was guilty of larceny and sentenced him to a dishonorable discharge.[711] As a result of his sentence, he forfeited the entirety of his retirement pension—or retainer pay.[712] The Court of Military Appeals partly rested its opinion on the constitutionality of jurisdiction over retirees on the *dicta* of *Tyler*, though the military judges deciding Overton's appeal never recognized that *Tyler* was, in fact, *dicta*.[713] Importantly, at the time of *Overton,* military retirements were based on a century-old, non-contributory cliff vested system.[714] Moreover, the military's traditional health-care.[715] Thus, a current retiree might have the ability to raise an unlawful takings argument in regard to the loss of a retirement where Overton did not.[716]

On November 5, 2020, Judge Richard J. Leon on the United States District Court for the District of Columbia ruled that military jurisdiction could no longer extend to retirees.[717] The decision, *Larrabee v. Braithwaite,* arose from a guilty plea in a court martial by retired Marine Corps sergeant, Steven Larrabee. [718] Larrabee first unsuccessfully challenged the military's jurisdiction through the Navy-Marine Corps Court of Appeal (NMCCA) and then through the CAAF.[719] The government's arguments in *Larrabee* included the fact that in 1916, President Woodrow Wilson vetoed the military appropriations bill that would have removed retirees from military jurisdiction.[720] The government did not, however, note that Wilson himself

709. *See supra* Part III (discussing Wiener's support for the internment of Japanese United States citizens).

710. United States v. Overton, 24 M.J. 309, 311 (1987).

711. *Id.*

712. *Id.*

713. *Id.*

714. *See, e.g.*, *Military Retirement: Background and Recent Developments*, CONG. RSCH. SERV. (Mar. 7, 2021), https://crsreports.congress.gov/product/pdf/RL/RL34751.

715. *See, e.g.*, Schism v. United States, 316 F.3d 1259, 1293–94 (2002).

716. *Id.*

717. Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 333 (D.C. Cir. 2020).

718. *Id.*

719. *See* Larrabee v. United States, 139 S. Ct. 1164 (2019) (denying petition for writ of certiorari).

720. *Larrabee*, 502 F. Supp. 3d at 332.

had doubts on the constitutionality of retiree jurisdiction.[721] Although Judge Leon did not undertake an originalist analysis, he adopted the language of the Court in *Toth* that military jurisdiction "must be limited to the least possible power adequate to the end proposed."[722] Because the government failed, in Judge Leon's estimation, to prove that retiree jurisdiction is important to military discipline, there was no lawful justification for departing from *Toth*'s holding that military jurisdiction should be limited to the least necessary means.[723]

In 2021, in *United States v. Begani*, the CAAF reached a different result than Judge Leon.[724] All five judges concluded that the extension of military jurisdiction over retirees remained constitutionally sustainable.[725] Judge Maggs, with Judge Liam Hardy and Senior Judge Susan Crawford, concurred.[726] As a key to Judge Maggs's jurisprudence, he minimized the fears of standing armies into "valid concerns," when discussing *The Federalist No. 41*.[727] He cited Winthrop's statement "[t]hat retired officers are a part of the army and so triable by court-martial [is] a fact indeed never admitted of question" without considering that after Winthrop authored *Military Law and Precedents*, he had a change of heart on this point or the other troubling aspects of Winthrop's jurisprudence.[728] And while Maggs noted that the practice of courts-martial in the Early Republic could be dispositive to determining the constitutionality of retiree jurisdiction, he did not delve into the Civil War history of retiree jurisdiction.[729] Instead, he rested his concurrence on the fact that the Continental Army furloughed soldiers with the expectation that they would be recalled to duty in an emergency, and as such, remained in the military.[730] Some of these furloughed soldiers were court-martialed for mutiny, a military offense.

The analogy to a furlough is not particularly compelling to the issue of retiree jurisdiction. The furloughed soldiers were not amenable to a presidential order because no commander in chief existed at the time. Soldiers in the Early Republic served fixed terms of enlistments, and a furlough lasted until the end of the enlisted term, not for a lifetime.[731] The

721. *Id.*

722. *Id.* at 327 (citing United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955)).

723. *Id.* at 332.

724. United States v. Begani, 81 M.J. 273, 273–75 (C.A.A.F. 2021).

725. *Id.* at 275.

726. *Id.* at 282 (Maggs, J., concurring).

727. *Id.* at 286.

728. *Id.* at 282 (quoting WINTHROP, *supra* note 57, at 87 n.27); *see also* KASTENBERG, *supra* note 149, at 306–07; *In re* Winthrop, 31 Ct. Cl. 35, 35 (1895). The Court of Claims in *Hooper v. United States* later opined on retiree jurisdiction: "In the case at bar, while we have certain doubts, we cannot say that the act is clearly unconstitutional." Hooper v. United States, 326 F.2d 982, 986 (Ct. Cl. 1964).

729. *Begani*, 81 M.J. at 285 (Maggs, J., concurring).

730. *Id.* at 284 (citing to 20 WORTHINGTON CHAUNCEY FORD ET AL., JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 656–57 (1781)).

731. *Id.*

furloughing of soldiers in the Revolution occurred because a peace treaty which would end the war with Britain had not yet been accomplished.[732] Aside from the obvious current distinction between a furloughed service-member and a citizen who has received a military discharge, including retirees, Maggs's analogy is tenuous stretch for other reasons, such as it ignores the realities of the eighteenth century profession at arms.[733] The scholarly articles that Maggs cited to provide no evidence that the soldiers court-martialed for mutiny even tried to appeal to a civil court.[734] The war was not over at the time of the furloughs and courts-martial that Judge Maggs points to.[735] And, all of the soldiers court-martialed under furlough were accused of mutiny, clearly a military offense.[736] However deplorable Begani's crime of rape is, it is doubtful that it could be considered a military offense; and based on the historic record, neither Winthrop nor Crowder would have likely considered it so.[737]

Militaristic European states, such as Prussia, maintained large professional armies, composed of soldiers obligated to serve between twenty years to the end of their lives, in proportion to the small size of the population and practiced economy through the use of the furlough.[738] The late eighteenth century British Army treated furloughs in a similar fashion to that of Frederick the Great's Prussian forces.[739] In North America, furloughed British soldiers were prosecuted for desertion when they failed to return to their regiments at the designated time, but this seems to be the only reason for it.[740] These soldiers were permitted to venture to designated areas, such as their farms where they could maintain a livelihood, but by no means was a furlough a license to travel to distant lands.[741] This same dynamic occurred in the colonies, leading to a tightening of grants of authority to issue furloughs.[742] But for nonmilitary crimes, the furloughed soldiers, like their

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732. *See generally* 24 WORTHINGTON CHAUNCEY FORD ET AL., JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 (1904–1937).

733. *See Begani*, 81 M.J. at 288 (Maggs, J., concurring).

734. *Id.* (first citing Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 PENN. MAG. OF HIST. & BIOG. 419, 423 (1977); and then citing Mary A. Y. Gallagher, *Reinterpreting the "Very Trifling Mutiny" at Philadelphia in June 1783*, 119 PENN. MAG. HIST. & BIOG. 3, 3–4 (1995)).

735. *Id.*

736. *Id.*

737. *See Begani*, 81 M.J. at 285 (Maggs, J., concurring).

738. Mark Hewiston, *Prince's Wars, Wars of People, or Total War? Mass Armies and the Question of a Military Revolution in Germany, 1792–1815*, 20 WAR HIST., 452, 486 (2013); Hans Speier, *Militarism in the Eighteenth Century*, 3 SOC. RSCH. 304, 313 (1936).

739. *Id.*

740. Arthur N. Gilbert, *Why Men Deserted from the Eighteenth-Century British Army*, 6 ARMED FORCES & SOC'Y 553, 362–64 (1980).

741. *Id.*

742. *Id.*; *see also* Thomas Agnosti, *"Deserted His Majesty's Service" Military Runaways, the British-American Press and the Problem of Desertion During the Seven Years War*, 40 J. SOC. HIST. 957, 966–71 (2007).

serving counterparts, were not amenable to courts-martial.[743] The Revolutionary government and Army, cited by Maggs, was simply following a practice of economizing by temporarily sending soldiers to their homes and only making them amenable to a small set of military crimes.[744] Thus, the furlough analogy is hardly applicable to the question of retiree jurisdiction.

3. Judge Maggs and Bergdahl.

The court-martial of Robert Bowe Bergdahl has perhaps been reported on to a degree that, in contemporary times, is unsurpassed by other courts-martial. On August 27, 2020, the CAAF issued *United States v. Bergdahl*.[745] In 1950, all five of the judges agreed that a President is not shielded from the military's internal rules prohibition against unlawful command influence.[746] The majority also applied this analysis to Senator John McCain, a decorated military retiree who publicly insisted on greater punishment for Bergdahl.[747] Judge Kevin Ohlson and Senior Judge Margaret Ryan determined that while President Trump had committed apparent unlawful command influence, under the Rules for Courts-Martial (RCM), a neutral observer would conclude that the court-martial was untainted by it because there was no "intolerable strain on the military justice system."[748]

In his concurrence, Judge Maggs agreed with the majority that under certain conditions, both the RCM and the statutory prohibition against unlawful command influence apply to the president, but he disagreed that President Trump committed unlawful command influence because he was not the convening authority in Bergdahl's court-martial.[749] Judge Maggs's strict reading of both the statute and the internal RCM reflect a view of absolutist presidential authority, as articulated in *Swaim*.[750] That is, as long as a President, while serving as Commander in Chief, does not direct the court-martial by convening it, the President cannot be said to interfere with the court-martial regardless of other conduct. This view ignores the tremendous power of the presidency, much of which has grown since the time of *Swaim*.[751] While Judge Maggs produced some historic examples to buttress his *Begani* concurrence, he chose not to examine historic limitations

743. *See* Gilbert, *supra* note 740; Agnosti, *supra* note 742.

744. *See* United States v. Begani, 81 M.J. 273, 288 (C.A.A.F. 2021) (Maggs, J., concurring).

745. United States v. Bergdahl, 80 M.J. 230, 230–31 (C.A.A.F. 2020).

746. *Id.* at 234.

747. *Id.* at 234–35.

748. *Id.* at 239.

749. *Id.* at 251–53 (Maggs, J., concurring). Judge Maggs has approached this issue without regard to the power of the President, and at no time does he note that the President is also the Commander in Chief over the Armed Forces. *Id.*

750. *Id.*

751. *See, e.g.*, Christopher S. Yoo et al., *The Unitary Executive in the Modern Era*, 91 IOWA L. REV. 601 (2005).

against a sovereign in command of a military, to a degree such as had occurred in *Swaim*.[752] One might then conclude, that he believes there is no possible constitutional infirmity to subjecting military retirees to the possibility of a legal system that, in the paraphrased words of Justice Scalia, would be intolerable for civilians and the fairness of it subject to the politically-driven whims of a president.[753] That is, a president could order courts-martial against his or her retired political opponents. At a minimum, one would hope that a theory of originalism could be articulated that would justify such a view that, in effect, creates a modern "Prussian corps," but none has been forthcoming.

IX. CONCLUSION

In 2020, the United States Government Accountability Office published data that there are significant racial disparities in charging service-members with crimes under the UCMJ.[754] Put another way, African-American and Hispanic males are more than twice as likely to be court-martialed for specific infractions than White service members. In *United States v. Bess*, the CAAF determined that absent visible proof of racial discrimination, an all-Caucasian court-martial panel did not violate a service-member's equal protection rights.[755] While it is true that the Court denied *certiorari*, the denial of *certiorari* is not dispositive to the whether the Bill of Rights applies to courts-martial.[756] Substitute *Bess* with the 2013 Washington Supreme Court decision *State v. Saintcalle* and a different result is reached.[757] One fundamental difference between the two jurisdictions is that Washington State selects jurors through a system shielded from prosecutorial control and the court-martial members are selected by the commander who referred the accused service-member to trial.[758] Bess's commander, the court-martial members, and the military judge assigned to Bess's court-martial were subject to presidential orders. Had Bess been a retiree accused of a crime and recalled to duty, this still would have held true. It is difficult to reconcile early court-martial practice with this degree of presidential control, even though

752. *See* United States v. Begani, 81 M.J. 273, 285 (C.A.A.F. 2021) (Maggs, J., concurring).

753. Weiss v. United States, 510 U.S. 163, 196–98 (1994) (Scalia, J., concurring) (stating that "no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive").

754. *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities*, U.S. GOV'T ACCOUNTABILITY OFF. (June 16, 2020), https://www.gao.gov/products/gao-20-648t.

755. United States v. Bess, 80 M.J. 1, 4 (C.A.A.F. 2020).

756. *See, e.g.*, Maryland v. Balt. Radio Show, 338 U.S. 912, 919 (1950).

757. *Bess*, 80 M.J. at 4; State v. Saintcalle, 309 P.3d 326, 329 (2013), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

758. *Bess*, 80 M.J. at 4; *Saintcalle*, 309 P.3d at 329–330.

arguably it might be necessary in regard to service-members in uniform and not retirees.

There is little in the historic record to suggest that the early practice of military law permitted the degree of direct presidential involvement that either Presidents Chester Alan Arthur or Donald Trump engaged in. There is also little in the historic record to tip the balance of courts-martial away from the Bill of Rights as a protection for service-members accused of crimes and to the austere system of discipline proclaimed by Justice Alito. The system of military discipline he recognized developed as a result of *Tarble's Case* and the growth of an American Empire.[759] This system includes the extension of military jurisdiction over retirees, even though the retirement and veterans' medical programs that existed in 1861, or for that matter in 1988, no longer exists. And Alito's jurisprudence—as well as that of Judge Maggs—would consign a greater number of citizens to presidential control and in a disciplinary system that Justice Scalia articulated would be intolerable for civilians. While it is true that a dissent does not have the force of law over the government, a dissent creates both a historic statement as well as a possibility for an evolution into a majority opinion. Between Justice Alito's dissent and the present, Justice Ruth Bader Ginsburg died and Justice Anthony Kennedy retired from the Court, to be replaced by Justices Brett Kavanaugh and Amy Comey Barrett. Thus, if Justices Kavanaugh and Barrett were to join with Justices Alito and Neil Gorsuch, and another justice joins with them, the *Ortiz* dissent's "pathway" would define the relationship between the military and the commander in chief as Justice Alito envisioned it. Such a pathway would further enable a pockmarked pathway for end-state minded jurists to further augment presidential control over the military in a departure from the original practice, but under the guise of originalism, and such a pathway may well be deleterious to the structures and liberties of the nation.

759. *See In re* Tarble (*Tarble's Case*), 80 U.S. 397, 411–12 (1871).