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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*

*Joshua Kastenber**

I. INTRODUCTION

The President is not only the Commander-in-Chief of the armed forces of the United States—he or she serves at the pinnacle of the military’s chain-of-command, and the nation’s military forces are subject to his or her orders.¹ As Commander-in-Chief, control over the military includes the authority to place the military around the world and have its servicemembers conform to other presidential authorities in the arenas of foreign policy, national security, and certain domestic policy.² For the first time in over a century, a President has confidently intruded into a court-martial, not merely to the detriment of the accused servicemember—Robert Bowe Bergdahl—but also in a manner that is

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1. Article II, Section 2, Clause 1 of the United States Constitution reads in full:

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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

U.S. CONST. art. II, § 2, cl. 1; *see also* Fleming v. Page, 50 U.S. (9 How.) 603, 615-16 (1850). In Federalist 69, Hamilton wrote that the President as Commander-in-Chief is “nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.” THE FEDERALIST NO. 69 (Alexander Hamilton).

2. *Fleming*, 50 U.S. (9 How.) at 615-16.

deleterious to a basic constitutional foundation recognized at the nation's founding: the prevention of tyranny through the subordination of the military to both the civil government and the laws governing the military.³ Although Congress should expressly prohibit the type of intrusion which has occurred in Bergdahl's case, the federal judiciary, as well as the military courts, must assess claims of presidential unlawful command influence (and that of senior civil officers in the military establishment) by considering the historic underpinnings of the prohibition against unlawful command influence as well as the nation's military law history which is rooted, in part, in the fear of standing armies.

In 1827, in *Martin v. Mott*,⁴ Associate Justice Joseph Story, in writing the Court's opinion regarding military jurisdiction over state militia when ordered into federal military service, penned, "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the Commander-in-Chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance."⁵ Yet, Justice Story also dichotomously reminded the nation that "[a] free people are naturally jealous of the exercise of military power."⁶ Justice Story's comment on this point is perhaps best reflected by the fact that historically, with the exception of wartime, courts-martial could not be used to prosecute soldiers for common crimes when they occurred within state jurisdiction as a matter of distrusting military trials.⁷ In point of fact, the 1806 Articles of War governing courts-martial made it an offense for a commanding officer to neglect the duty of strict adherence to the narrow jurisdictional limits of courts-martial by failing to ensure that soldiers accused of crimes were brought into civil court.⁸ Moreover, it is clear that the nation's founders

3. STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 715-17 (1993).

4. 25 U.S. (12 Wheat.) 19 (1827).

5. *Id.* at 30.

6. *Id.* at 29. In *Wise v. Withers*, the Court made clear that citizens who, by virtue of their office, were statutorily exempted from militia duty, could not be court-martialed as such persons were not amenable to military jurisdiction. 7 U.S. (3 Cranch.) 331, 337 (1806).

7. See Articles of War, ch. 20, art. 33, 2 Stat. 359, 364 (1806) (requiring commanding officers "to deliver over such accused person, or persons, to the civil magistrate"). On the early American Army see, for example, GEORGE B. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 339-43, 589 (3d ed. 1915).

8. Article 33 concludes:

If any commanding officer, or officers, shall willfully neglect, or shall refuse, upon the application aforesaid, to deliver over such accused person, or persons, to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person, or persons, the officer, or officers, so offending, shall be cashiered.

See Art. 33, 2 Stat. at 364.

sought to minimize presidential authority over courts-martial through reliance on militia control of courts-martial when called to federal duty.⁹

Justice Story's observation on the exercise and restraint of military power is applicable in viewing how Congress and the courts assess President Donald Trump's interactions with military justice, including his pardons and eviscerations of the courts-martial in cases involving servicemembers accused of "war crime-type" offenses.¹⁰ His conduct in those cases, which has benefitted servicemembers who acted contrary to the laws of war, illuminate the gravity of his "unlawful command influence" in the court-martial in *United States v. Bergdahl*,¹¹ if, for no other reason, because of the early fears of a standing army. This is all the more important because the Constitution's framers sought to limit the ability of a President to become a tyrant by diffusing control over the Army in at least two ways applicable to the issue of unlawful command influence.¹² First, the standing army was designed as a small force with state militias as the larger military.¹³ Secondly, the jurisdiction of Army courts-martial was narrowly tailored to strictly military offenses when held in the states.¹⁴

Two opinions issued by the United States Supreme Court in the 1950s highlight fears of an expansive military justice system under

9. See, for example, Section 6 of the Militia Act of 1795, which reads: "And be it further enacted, That courts martial for the trial of militia shall be composed of militia officers only." Militia Act of 1795, ch. 36, § 6, 1 Stat. 424 (1795). Congressional reluctance to empower the President over courts-martial continued into the Civil War. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, 121 HARV. L. REV. 941, 1017-18 (2008).

10. On November 15, 2019, President Trump exercised his constitutional authority and granted pardons to two servicemembers—one accused of, and the other convicted of, offenses properly labeled as war crimes. See Dave Philipps, *Trump's Pardons for War Crimes Stir Unease in Military*, N.Y. TIMES, Nov. 17, 2019, at 22. He also restored the rank of a third service member convicted of a war crime. See Idrees Ali, *Trump Pardons Army Officers, Restores Navy SEAL's Rank in War Crimes Cases*, REUTERS (Nov. 15, 2019, 6:57 PM), <https://www.reuters.com/article/us-usa-trump-warcrimes-pardon/trump-pardons-army-officers-resto-res-navy-seals-rank-in-war-crimes-cases-idUSKBN1XP2G4>. The President earlier pardoned a convicted war criminal soldier in May 2019. See Bill Chappell, *Trump Pardons Michael Behenna, Former Soldier Convicted of Killing Iraqi Prisoner*, NPR (May 7, 2019, 10:17 AM), <https://www.npr.org/2019/05/07/720967513/trump-pardons-former-soldier-convicted-ofkilling-iraq-prisoner>. President Trump also chastised Navy judge advocates serving as prosecutors, and revoked the military medals awarded to them following the court-martial of a Navy SEAL convicted of war crimes, after pardoning the servicemember. See Peter Baker, *Trump Tells Navy to Strip Medals from Prosecutors in War Crimes Trial*, N.Y. TIMES, Aug. 1, 2019, at A18.

11. See *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019).

12. See, e.g., WALTER MILLIS, *ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY* 47-49 (1956).

13. On the small size of the first post-Constitution standing army and the historic reliance on militia, see generally JOHN R. MAASS, *DEFENDING A NEW NATION 1783-1811* (U.S. Army Ctr. of Mil. Hist. ed. 2013).

14. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13-15, 23 (1955).

presidential control. In *United States ex rel. Toth v. Quarles*,¹⁵ the Court, in an opinion authored by Justice Hugo Black, noted, “There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.”¹⁶ *Quarles* dealt with the question of whether former, non-retired servicemembers remained subject to military jurisdiction.¹⁷ In *Reid v. Covert*,¹⁸ an opinion arising from a challenge to the military’s jurisdiction over civilians residing on United States military bases overseas, the Court held that narrowing military jurisdiction to servicemembers was necessary to “[t]he tradition of keeping the military subordinate to civilian authority.”¹⁹ It is a reasonable observation that a President who subverts the current military law construct risks imperiling this critical constitutional tradition.

The prohibition against unlawful command influence over military trials is a check against a President’s arbitrary exertion of power. This Article argues that in assessing the dangers of presidential unlawful command influence, in light of the current executive branch’s conduct over military justice, the federal legislative and judicial branches, as well as the judiciary of the military justice system, must take into account the President’s vast authority—not only to ensure fair military trials, but also as a means to protect the nation’s democratic institutions.²⁰ Although most of the case law on unlawful command influence comes from the Court of Appeals for the Armed Forces (“CAAF”) and its predecessor, the Court of Military Appeals, as well as from the service courts of appeal, there is worthy precedent in both the Supreme Court’s late nineteenth and early twentieth century opinions and through a deeper understanding of the nation’s military legal history.²¹ Such an

15. 350 U.S. 11 (1955).

16. *Id.* at 22.

17. For a background on *Quarles*, see JOSHUA E. KASTENBERG & ERIC MERRIAM, IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE - 1940-1954, at 236-37 (2016).

18. 354 U.S. 1 (1957).

19. *Id.* at 23, 40.

20. See *infra* Parts III, IV.D.

21. Established by Congress in 1950, the Court of Appeals for the Armed Forces (“CAAF”) has five judges appointed by the President and confirmed by the United States Senate. 10 U.S.C. § 942. Unlike Article III judges, judges appointed to the CAAF serve for fifteen-year terms. *Id.* The court resides in the Department of Defense as an Article I Court and is limited to strict questions of law and appeals within its governing statutes. *Id.* §§ 867, 941; see also *Clinton v. Goldsmith*, 526 U.S. 529, 531 (1999) (prohibiting use of the All Writs Act to enjoin the President from “dropping [an officer] from the rolls”). As civilian judges, this Article does not argue that the CAAF is subject to unlawful command influence. However, the Department of Defense and the President have a duty not to coercively interfere in the internal functions. See, e.g., *Mundy v. Weinberger*, 554 F. Supp. 811, 821-22 (D.D.C. 1982).

Below the CAAF are the service courts of appeal. Established by Congress, any servicemember who receives a sentence of six months or a punitive discharge is entitled to review by these courts. See 10 U.S.C. § 866. There are four such courts: the United States Army Court of

understanding can be obtained through a historic approach relying not merely on case law, but also relevant primary source material.

This Article is divided into three main Parts, each with an analysis of the relationship between the Commander-in-Chief and military justice. Part II briefly defines unlawful command influence and then presents an overview of unlawful command influence prior to 1950, featuring one instance of presidential influence which, under Article 37, would amount to the deprivation of the right to a fair trial.²² Part II is divided into three Subparts. The first Subpart details one application of the prohibition of courts-martial prior to 1950 and juxtaposes the prohibition against questionable and unpopular, but not illegal, presidential actions.²³ The second Subpart presents restraints on monarchical control over English and Dutch courts-martial predating the Constitution and argues that these historic restraints are persuasive to shaping United States military law, if for no other reason than for the protection of democratic institutions.²⁴ Included in this Subpart are recognized presidential authorities over the military.²⁵ The third Subpart focuses on a historically flawed reliance on *Swaim v. United States*,²⁶ a decision issued in 1897, which, unfortunately, has been used as a basis to uphold presidential authority without judicial oversight and other means of restraint.²⁷

Part III of the Article presents a legal history of three pre-Uniform Code of Military Justice (“UCMJ”) Court opinions for the purpose of showing the existence of judicially recognized constitutional restraints against Commander-in-Chief influence over courts-martial.²⁸ These opinions—*Runkle v. United States*,²⁹ *McClaghry v. Deming*,³⁰ and *Grafton v. United States*³¹—present historic evidence that there has been

Criminal Appeals; the United States Navy-Marine Corps Court of Criminal Appeals; the United States Air Force Court of Criminal Appeals; and the United States Coast Guard Court of Criminal Appeals. See *Edmond v. United States*, 520 U.S. 651, 653 (1997). The judges serving on these courts are usually military officers appointed by the judge advocate generals of the Army, Navy, and Air Force. See § 866. In terms of the Coast Guard, the Secretary of Transportation is vested with the appointment authority. *Edmond*, 520 U.S. at 656. Moreover, the Court has enabled the appointment of civilians to the Coast Guard Court of Criminal Appeals. *Id.* at 653-54, 666.

22. See *infra* Part II.

23. See *infra* Part II.A.

24. See *infra* Part II.B.

25. See *infra* Part II.B.

26. 165 U.S. 553 (1897).

27. See *infra* Part II.C.

28. See *infra* Part III. Additionally, it was not until after World War II that a court-martial could include an enlisted member to serve as a “juror.” See Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 176 (1953).

29. 122 U.S. 543 (1887).

30. 186 U.S. 49 (1902).

31. 206 U.S. 333 (1907).

an acceptance as to restraints against Commander-in-Chief influence over courts-martial as well as an understanding of the effects of such limits on the broader scope of Commander-in-Chief authorities over the military.³²

Part IV compares President Trump's conduct with the rectitude of past administrations as a matter of *lex non scripta*.³³ Defined as an unwritten law found in custom, *lex non scripta* remains a source of military law.³⁴ Finally, the Article concludes with the argument that President Trump's conduct over military justice presents, for the first time in the nation's history, the type of Commander-in-Chief exertions that are antithetical to the military's constitutional place in the nation.³⁵

II. UNLAWFUL COMMAND INFLUENCE AND THE SKIRTING OF MILITARY LEGAL HISTORY

Unlawful command influence has long been considered "the mortal enemy of military justice."³⁶ The phrase "mortal enemy of military justice" does not, to be sure, explain what unlawful command influence is under the United States' military laws, or capture that a *de facto* prohibition against a chain-of-command undermining the fairness of courts-martial predates the UCMJ. Nor does the phrase note the impact of unlawful command influence on the United States Constitution, particularly in terms of overarching executive branch authority. Since the UCMJ's enactment in 1950, the prohibition against unlawful command influence has centered around the conduct of senior uniformed military personnel and how this conduct may erode an accused servicemember's right to a fair trial.³⁷ Indeed, from the time of its

32. See *infra* Part III.

33. See *infra* Part IV.

34. 1 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 42 (2d ed. 1896). As defined by Winthrop, the military's *lex non scripta* consists of "the customs of the service," and "the unwritten laws and customs of war." *Id.*; see also *United States v. Pitasi*, 20 C.M.A. 601, 606 (1971). Winthrop maintained the importance of military law throughout the Articles of War and courts-martial procedures. See, e.g., JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP* 237-38 (Martin Gordon ed., 2009).

35. See *infra* Part V.

36. See, e.g., *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (first quoting *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004); and then quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

37. For an example of the reasoning behind the prohibition, see *United States v. Littrice*, 3 C.M.A. 487, 490-91 (1953). In this decision, the (then) Court of Military Appeals quoted, in pertinent part, from a 1948 Report of the Committee on Military Justice of the New York County Lawyers Association to the Subcommittee of the House Armed Services Committee:

The system of military justice laid down in the Manual for Courts Martial not infrequently broke down because of the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgments; and who conceived it the duty of command to interfere for disciplinary

creation, one of the UCMJ's fundamental goals was to eradicate unlawful command influence over military trials.³⁸

Article 37 of the UCMJ prohibits a convening authority or other senior officer and non-commissioned officers from coercively interfering with an accused servicemember's right to a fair trial.³⁹ The military's judicial focus on fair trial rights makes perfect sense since, after all, a court-martial is a trial of a servicemember, and the servicemember has the right to a fair trial.⁴⁰ One of the aspects of a court-martial that distinguishes it from a state or federal criminal trial is that within the unique structure of the military, servicemembers who serve as witnesses, military judges, and as "jurors," are subject to the direct orders as well as subtle influences of a chain-of-command.⁴¹ Congress determined that, following the experiences of tens of thousands of courts-martial in the preceding two world wars and Civil War, some type of safeguard was necessary and crafted Article 37 in response.⁴² Indeed, in World War II, courts-martial comprised one-third

purposes.

Id. at 491. The Court continued: "While it struck a compromise, Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused." *Id.*

38. *United States v. Cole*, 38 C.M.R. 94, 95 (C.M.A. 1967). In *Cole*, the court held:

One of the basic objectives of the Uniform Code of Military Justice is to eradicate this misuse of command power, but unfortunately total success has not yet been realized. Perhaps it never will be because of the vagaries of human nature. This Court, however, is dedicated to the Code's objective to protect the court-martial processes from improper command influence.

Id. at 95.

39. 10 U.S.C. § 837 reads, in pertinent part:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

40. *See Morgan, supra* note 28, at 183-84.

41. *See, e.g., Luther C. West, A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 9, 14, 19 (1970); *Morgan, supra* note 28, at 183-84. In a court-martial, the term "member" is used in place of "juror." There are distinct differences between a member and a juror. A member is selected by the general court-martial convening authority. *See* 10 U.S.C. § 825; *United States v. Gooch*, 69 M.J. 353, 356 (C.A.A.F. 2011). No member serving on a court-martial may be inferior in rank to the accused servicemember on trial unless such cannot be avoided. *Gooch*, 69 M.J. at 357-58.

42. *See, e.g., Rachel E. VanLandingham, Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 18-19, 24 (2019). In point of fact, one of the notable aspects of Article 37 is that it prohibits an admonishment of law officers. *See id.* at 27. It was not until 1968 when Congress mandated that general court-martial have an independent military judge. *See, e.g., Weiss v. United States*, 510 U.S. 163, 167-68 (1994).

of all criminal trials held in United States courts.⁴³ On the other hand, as Professor Rachel VanLandingham points out, not once in the seventy-year history of Article 37 has any violator been prosecuted in a court-martial.⁴⁴ Finally, the efficiency, reliability, and discipline of the military rely on the prevention of unlawful command influence to a degree broader than courts-martial.⁴⁵ The prohibition against unlawful command influence also extends into administrative procedures.⁴⁶

For the purpose of this Article, it is unnecessary to examine the full range of unlawful command influence actions in focusing on presidential conduct such as has occurred in Bergdahl's case. To effectively do so, it is critical to note certain prohibited actions amounting to unlawful command influence. Coercive methods arising to unlawful command influence include both general policy statements in which a command makes clear that it wants particularized results in courts-martial, as well as command statements pointing out what should occur to a specific servicemember.⁴⁷ Harassment of a military judge also may give rise to unlawful command influence.⁴⁸ This includes admonishing a military

43. See Delmar Karlen & Louis H. Pepper, *The Scope of Military Justice*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 285, 298 (1952).

44. VanLandingham, *supra* note 42, at 31-32. Professor VanLandingham brings up a critical point overlooked by other scholars. That is, if the prohibitory practices in the military are not enforced through the UCMJ, the prohibition cannot be said to serve as a complete deterrent. *See id.* at 64. In contrast to her point is the following statement from Professor Peter Margulies:

As U.S. military justice has developed, it has ensured procedural fairness to the accused and insulated judges and fact-finders from command influence. In establishing procedures governing courts-martial in the Uniform Code of Military Justice, Congress assured that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."

Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305, 336 (2015).

45. See VanLandingham, *supra* note 42, at 20.

46. See *N.G. v. United States*, 94 Fed. Cl. 375, 387 (2010) (citing *Werking v. United States*, 4 Cl. Ct. 101, 105 (1983)). In *Skinner v. United States*, the Court of Claims determined that it possessed jurisdiction to review officer evaluation reports that were the subject of improper command influence. *Skinner v. United States*, 594 F.2d 824 (Ct. Cl. 1979); *see also N.G.*, 94 Fed. Cl. at 387.

47. See *United States v. Hawthorne*, 7 C.M.A. 293, 299 (1956); *United States v. Faulkner*, 7 C.M.A. 304, 305 (1956) (Latimer, J., concurring); *United States v. Danzine*, 12 C.M.A. 350, 354 (1961) (Ferguson, J., dissenting). It should be noted that Judge Homer Ferguson had, prior to his appointment on the Court of Military Appeals, served as a United States Senator and voted in favor of the UCMJ. See John T. Willis, *Judge Ferguson: Guardian of Individual Rights*, ADVOCATE, Jan.-Feb. 1972, at 1, 1. On Ferguson's vote for the UCMJ see *HR 4080. Unite, Consolidate, Revise and Clarify the Articles of War, the Articles for the Gov't of the Navy, and the Disciplinary Laws of the Coast Guard, and Enact and Establish a Uniform Code of Military Justice. McCarran Motion to Refer to the Judiciary Committee.*, GOVTRACK, <https://www.govtrack.us/congress/votes/81-1950/s243> (last visited Nov. 7, 2020) (voting "yea").

48. *United States v. Salyer*, 72 M.J. 415, 417 & n.1 (C.A.A.F. 2013). The military judge position was created as a result of the Military Justice Act of 1968. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968). This Act created a system intended to ensure that, where

trial judge for issuing a ruling verdict or sentence unfavorable to the government.⁴⁹ Article 37 is primarily focused on a military chain-of-command, but it does not, in its plain language, specifically exclude a President, the Secretary of Defense, or service secretaries. Instead, Article 37 is silent on the role of those officers, though each has the authority to convene general courts-martial.⁵⁰

A. Unlawful Command Influence Prior to 1950: Homcy v. Resor and Wilson v. Girard

In assessing the expanse of the Commander-in-Chief's authority over both individual servicemembers accused of crimes and the armed forces as a whole on the one side, and unlawful command influence by the executive branch on the other, it is helpful to consider two judicial decisions external to the military courts of appeals: *Homcy v. Resor*⁵¹ and *Wilson v. Girard*.⁵² In *Homcy*, the Court of Appeals for the District of Columbia granted relief to a court-martialed officer on the basis of improper command influence.⁵³ Importantly, Mr. Albert Homcy's court-martial occurred before the UCMJ's enactment. Although prior to 1950 there was no statutory prohibition against unlawful command influence, and at that time, no federal appellate court had specifically granted relief on a claim that the fairness of a court-martial was undermined by unlawful command influence, the Court of Appeals applied the prohibition and granted Homcy relief.⁵⁴ *Homcy* is easily interpretable for a conclusion that the prohibition against unlawful command influence not only predates the UCMJ's statutory recognition of its dangers, but also that the prohibition is more expansive than the plain language of Article 37.⁵⁵ That is, while Article 37 does not list civilian officers in the military establishment, the absence of the service

possible, the presiding officer of a court-martial would be a professional military judge, not directly subordinate to the convening authority. See *id.* § 826; see also *O'Callahan v. Parker*, 395 U.S. 258, 264 (1969).

49. See, e.g., *United States v. Lewis*, 63 M.J. 405, 412 (C.A.A.F. 2006) (citing 10 U.S.C. § 837(a)).

50. See 10 U.S.C. § 822(a).

51. 455 F.2d 1345 (D.C. Cir. 1971).

52. 354 U.S. 524 (1957).

53. *Homcy*, 455 F.2d at 1352.

54. *Id.* at 1349, 1352-53. Whether the court-martial conviction was overturned, or the Army was simply required to issue an honorable discharge is not relevant to the instant issue. However, for more information, see Bart Barnes, *World War II Army Officer Albert C. Homcy Dies at 71*, WASH. POST (Apr. 3, 1987), <https://www.washingtonpost.com/archive/local/1987/04/03/world-war-ii-army-officer-albert-c-homcy-dies-at-71/c99a656d-e37c-4e79-973f-8573619ab8c7>; Fred L. Borch, *Misbehavior Before the Enemy and Unlawful Command Influence in World War II: The Strange Case of Albert C. Homcy*, ARMY LAW., Feb. 2014, at 1-7.

55. Compare *Homcy*, 455 F.2d at 1345, with 10 U.S.C. § 837.

secretaries, the Secretary of Defense, Vice President, and President within the text of the statute does not preclude military and federal courts from determining a court-martial verdict adversely to the United States when unlawful command influence has been caused by one of these civilians.

It is equally important to note that not all questionable or unpopular presidential actions over servicemembers constitute unlawful command influence. Indeed, there is a difference between presidential interference with courts-martial and presidential authority over courts-martial. For instance, in *between Homcy's World War II court-martial and the 1971 appellate decision bearing his name*, the Court issued *Wilson*. This appeal originated from a challenge to the Eisenhower administration's transfer of a soldier into Japanese jurisdiction even though a status of forces agreement between the United States and Japan gave the United States military primary jurisdiction over American servicemembers when the alleged crime occurred in the course of duty.⁵⁶ Private Girard was accused of killing a Japanese national who trespassed onto a United States military weapons range.⁵⁷ Despite opposition from senior Army officers and judge advocates, Secretary of Defense Charles Wilson and Secretary of State John Foster Dulles speciously insisted that Girard was not in the performance of his official duties at the time of the killing, even though Girard's immediate commanding officer signed an affidavit claiming that he was on duty.⁵⁸ In essence, Dulles and Wilson tried to claim that Girard's conduct was outside of the military's jurisdiction as a result of the bilateral agreement with Japan.⁵⁹ They also publicly acknowledged that, while they believed the Japanese would conduct the court "with utmost fairness," they gave no finite assurances that Girard would receive a fair trial in a Japanese court.⁶⁰

On appeal, contrary to Dulles's and Wilson's assertion, the Court observed that Girard was in the performance of his military duties at the time he killed a Japanese citizen, but concluded that the 1951 security

56. *Wilson*, 354 U.S. at 525-28. On the agreement between the United States and Japan, see Security Treaty, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3329; Administrative Agreement, Japan-U.S., Feb. 28, 1952, 3 U.S.T. 3341.

57. *Wilson*, 354 U.S. at 525-26.

58. *See id.* at 526, 529, 536-38; *Testimony of Department of Defense and Department of State: Hearing on the Case of United States Army Specialist Third Class William S. Girard, Involving the Death of a Japanese Woman on January 30, 1957 Before a Subcomm. of the S. Comm. on Armed Servs.*, 85th Cong. 3 (1957) (joint statement of John Foster Dulles, United States Secretary of State, and Charles E. Wilson, United States Secretary of Defense) [hereinafter *Girard Testimony*].

59. *See Girard Testimony*, *supra* note 58, at 3.

60. *See id.* at 4. Secretary of Defense Wilson and Secretary of State Dulles merely stated that "[t]here is every reason to believe that trial of United States Army [Specialist 3d Class] William S. Girard in the Japanese courts will be conducted with the utmost fairness." *Id.*

agreement recognizing the military's primary jurisdiction did not afford him legal protection against being transferred to Japanese jurisdiction.⁶¹ The Court was fully aware that the Eisenhower administration considered relations with the government of Japan—which lobbied for prosecuting Girard in their domestic courts—to be more important than maintaining jurisdiction over Girard.⁶² Members of Congress, along with a strong public opinion, opposed Eisenhower's decision to transfer Girard to Japan.⁶³ Nonetheless, the Court determined that a President could use international relations as a consideration in determining the future trial location of a servicemember—even when such location is within a foreign government.⁶⁴ Thus, a President may remove a servicemember to a foreign jurisdiction—a considerable authority over servicemembers—and doing so is not an unlawful use of his or her authority.⁶⁵

While Homcy was denied the right to a fair trial in his court-martial, and Girard was denied a court-martial altogether, it is contextually critical to understand that prior to 1950, appeals from general courts-martial were directed to the Judge Advocate General of the Army or the Navy, and then onto the Secretary of War or Secretary of the Navy.⁶⁶ The Articles of War did not establish an appellate court to

61. *Wilson*, 354 U.S. at 530. The Court held:

The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.

Id.

62. See Affidavit with Respect to Facts at 6-8, *Wilson*, 354 U.S. 524 (No. 1103).

63. See, e.g., STEPHEN G. CRAFT, *AMERICAN JUSTICE IN TAIWAN: THE 1957 RIOTS AND COLD WAR FOREIGN POLICY* 154-55 (2016); E.W. Kenworthy, *Eisenhower Sees Fair Girard Trial: Voices Confidence in Japan's Courts - but Criticism on Waiving Rights Mounts*, N.Y. TIMES, June 6, 1957, at 1, 8; *D.A.R. Criticizes Pact: Opposes Turning Girard over to Japanese for Trial*, N.Y. TIMES, June 14, 1957, at 4; The Associated Press, *Girard's Home Town Sends a Petition to White House*, N.Y. TIMES, June 11, 1957, at 1, 15.

64. See, e.g., *Munaf v. Geren*, 553 U.S. 674, 697 (2008); *United States v. Odom*, 53 M.J. 526, 537 (N-M. Ct. Crim. App. 2000).

65. *Wilson*, 354 U.S. at 530.

66. See, e.g., *Smith v. Whitney*, 116 U.S. 167, 170 (1886); *Ex parte Reed*, 100 U.S. 13, 20 (1879). On the functional limitations of habeas in military law, 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* 93 (2017); JOSHUA E. KASTENBERG, *LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861-1865*, at 59 (2011); Jacob E. Meusch, *A "Judicial" System in the Executive Branch: Ortiz v. United States and the Due Process Implications for Congress and Convening Authorities*, 35 J.L. & POL. 19, 48 (2019).

review courts-martial, but rather vested responsibility for appellate review in a single person or a board responsible to the Judge Advocate General.⁶⁷ Usually, the review of general courts-martial was conducted by the Judge Advocate General of the Army or Navy to advise whether a court-martial was lawfully convened and whether the proceedings comported with military law.⁶⁸ In lieu of using the term “appellate,” the Judge Advocate’s examination of the trial record was often labelled as the “reviewing authority.”⁶⁹ The President was the final appellate authority (or “reviewing authority”) unless a federal court granted review under the strict habeas test.⁷⁰ This test, as articulated by the Court in *Dynes v. Hoover*⁷¹ in 1857, merely and narrowly evaluated whether the court-martial possessed jurisdiction over the servicemember, and not whether the servicemember received a fair trial.⁷² As a result, judicial decisions prior to 1950, that determined a cause in favor of an aggrieved court-martialed servicemember, were both noteworthy and rare. On the other hand, beginning with *Burns v. Wilson*⁷³ in 1953, the strict habeas test was gradually replaced with a standard wherein an Article III court considers whether the military justice system “fully and fairly” considered an appeal.⁷⁴

67. WINTHROP, *supra* note 34, at 683, 685, 687, 708-09.

68. See William F. Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15, 40-41 (1949).

69. See, e.g., William M. Connor, *Reviewing Authority Action in Court-Martial Proceedings*, 12 VA. L. REV. 43, 44 (1925).

70. *Id.* at 43-44; see also JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE 10-15 (Carole Maurer et al. eds., 2013). For a further exposition on the limits of judicial review in the early Republic, see *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 209 (1830). Courts-martial are inferior tribunals and therefore not judicial; as a result, the judicial branch may only collaterally review these trials. *Id.*

71. 61 U.S. (20 How.) 65 (1857).

72. *Id.* at 80-81. In *Dynes*, the Court held that the power to convene courts-martial “is given without any connection between it and the 3d article of the Constitution.” *Id.* at 79. For a further description of the strict habeas test, see *Ex parte Reed*, 100 U.S. at 23. For the legal history of *Dynes v. Hoover* and its connection to the ability of the federal government to enforce the Fugitive Slave Act, see generally Joshua 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. Sandford to its Contemporary Influence*, 39 U. MEM. L. REV. 595 (2009). Another worthy articulation of the test is found in *Carter v. Roberts*, 177 U.S. 496 (1900). The *Carter* Court held that:

Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

Id. at 498; see also *Reilly v. Pescor*, 156 F.2d 632, 634 (8th Cir. 1946).

73. 346 U.S. 137 (1953).

74. *Id.* at 142; see also *Daigle v. Warner*, 490 F.2d 358, 366 (9th Cir. 1973). For a background on and the influence of *Burns*, see KASTENBERG & MERRIAM, *supra* note 17, at

B. Executive Branch Supremacy and the Precedent of Nascent Democracies

It cannot be doubted that a President has the authority to issue orders to the entire military, and those orders cannot be countermanded by a lower-ranking entity within the military establishment.⁷⁵ Indeed, military law requires servicemembers to presume that such orders are lawful.⁷⁶ In a general sense, officers, service secretaries, the Secretary of Defense, and the President are vested with the authority to command their forces to conform to orders.⁷⁷ Thus, a servicemember subject to the orders of a command from a person within their chain-of-command may be required to exercise at certain hours of the day or to wear a foreign uniform.⁷⁸ A servicemember may also be required to report for duty to participate in an unpopular conflict as well as prepare and train others to participate in the conflict.⁷⁹ However, Commander-in-Chief authority is far more expansive than the general authority to command, and not only so simply because a President can order forces into foreign lands, remove officers from duty, and depart from the military personnel laws in wartime.⁸⁰ A President is protected against disparagement by servicemembers, as well as by the uniformed defense lawyers representing servicemembers.⁸¹

A brief and concededly incomplete survey of executive branch authority evidences the power of the President over the military.⁸² It is broad enough to send National Guard forces to foreign nations for the

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75. WINTHROP, *supra* note 34, at 38. Winthrop noted:

As constitutional Commander-in-[C]hief of the Army, and independently of course of any authorization or action of Congress, the President is empowered to issue orders to his command; and the orders duly issued by him in this capacity, while ordinarily of but temporary importance as compared with his general army regulations, are obligatory and binding upon whom they concern, and so properly classed as a portion of the general law military.

Id.

76. 10 U.S.C. § 892(1); *United States v. Dykes*, 6 M.J. 744, 747-48 (N.C.M.R. 1978).

77. *See, e.g.*, *United States v. Johnson*, 17 C.M.A. 246, 247 (1967); *United States v. Oblighart*, 3 C.M.A. 627, 627-28 (1954).

78. *See, e.g.*, *United States ex rel. New v. Perry*, 919 F. Supp. 491, 492-493, 499 (D.D.C. 1996).

79. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 736-37, 758-59 (1974).

80. *See, e.g.*, 10 U.S.C. § 123; *Commander in Chief Power: Doctrine and Practice*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII_S2_C1_1_2 (last visited Nov. 7, 2020).

81. *See, e.g.*, *United States v. Howe*, 17 C.M.A. 165, 167-70 (1967); *United States v. Wilcox*, 66 M.J. 442, 457 (C.A.A.F. 2008) (Baker, J., dissenting).

82. *See, e.g.*, Exec. Order No. 13825, 83 Fed. Reg. 9889 (Mar. 8, 2018) (using his constitutional power over the military to amend military rules); Exec. Order No. 13919, 85 Fed. Reg. 26591 (May 4, 2020) (exercising his constitutional power over the military to order members of the armed forces into active duty).

purpose of training, pending Congress' approval.⁸³ A servicemember may be court-martialed in a military operation in foreign lands even when the operation is not sanctioned by Congress.⁸⁴ When, in 1905, a federal court first addressed a challenge against court-martial jurisdiction based on the soldier being sent to China during the so-called "Boxer Uprising"—an operation Congress never formally approved—the Court of Appeals for the Eighth Circuit determined, on international law principles, that the Army maintained jurisdiction.⁸⁵ Indeed, to this day, the federal judiciary will not take jurisdiction over questions involving the use of the military overseas.⁸⁶ Nor will the federal courts grant congressional standing to challenge a President's refusal to comply with international agreements, such as United Nations sanctions, against an unpopular or "illegal regime."⁸⁷ The military can bring a retired servicemember back on active duty for the purpose of court-martialing the retiree, regardless of whether the crime is service-connected or occurred after the end of formal military service.⁸⁸ Indeed, a retired servicemember may be prosecuted for so-called "public morals offenses" which occurred after retirement and have no military connections whatsoever.⁸⁹ The President may also prevent former servicemembers from immediately seeking specified types of employment to a degree beyond that of the federal government over its former civil service employees.⁹⁰ And finally, the UCMJ enables military jurisdiction over United States civilians, including citizens, under some circumstances.⁹¹

Whether these judicial decisions and statutes are justified or not, they each enable the possibility of ordering military forces into a foreign conflict where they remain subject to presidential orders as well as to the UCMJ's full jurisdiction. This is because the President may also send military forces into an undeclared war without judicial determination of

83. See, e.g., *Perpich v. Dep't of Def.*, 496 U.S. 334, 336, 349-50 (1990).

84. See, e.g., *Collins v. McDonald*, 258 U.S. 416, 417-20 (1922). In *Collins*, the appellant raised, as a secondary issue, the fact that he was ordered to Vladivostok on a mission not directly part of the war against Germany. See KASTENBERG, *supra* note 70, at 242. Although the Court did not directly address this challenge, Justice Clarke, in writing for the majority, called it "trivial." See *id.*; *Collins*, 258 U.S. at 421.

85. *Hamilton v. McClaughry*, 136 F. 445, 447-49 (C.C.D. Kan. 1905).

86. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 19, 23 (D.C. Cir. 2000).

87. See, e.g., *Diggs v. Shultz*, 470 F.2d 461, 463-66 (D.C. Cir. 1972).

88. See 10 U.S.C. § 802(a)(4)–(5); see also *United States v. Miller*, 78 M.J. 835, 844 (A. Ct. Crim. App. 2019).

89. See *Hooper v. Hartman*, 163 F. Supp. 437, 439, 442 (S.D. Cal. 1958); *Hooper v. United States*, 326 F.2d 982, 983-84, 987 (Ct. Cl. 1964).

90. See *Taussig v. McNamara*, 219 F. Supp. 757, 758, 761-62 (D.D.C. 1963); see also 18 U.S.C. § 207.

91. See 10 U.S.C. § 802(a)(10)–(12); see also *United States v. Ali*, 71 M.J. 256, 269-70, 269 n.24 (C.A.A.F. 2012).

its legality.⁹² And, with congressional authorization, the President may proscribe rules compelling citizens into military service.⁹³ Apart from constitutional and statutory Commander-in-Chief authorities recognized by the Court, the President also has apparent powers, resulting from the non-justiciable political question doctrine, which include removing the United States from a treaty obligation.⁹⁴ This, too, can have a potential effect on where the military is sent.

While the purpose of this Article is not to diminish presidential authority in any of the matters presented above, it is clear that none of these powers have been balanced against pre-constitutional limits on executive authority over the military, yet such a balance is possible. William Winthrop informed practitioners that military law is partly formed by an unwritten *lex non scripta* and noted that the Dutch military codes and military experience are included in this *lex non scripta*.⁹⁵ The Swedish warrior king and military innovator, Gustavus Adolphus, adopted a philosophy of military law and discipline from the Dutch, and, in turn, the English borrowed from the Swedish Army.⁹⁶ And in such experience, with more than nominal relevance, the case of Colonel Moise Pain et Vin highlights the incompatibility of executive interference in the military justice process for a people desirous of democracy.

During the Franco-Dutch War (1672-1678), a Dutch court-martial sentenced Colonel Pain et Vin to be removed from the military for surrendering his command without resistance.⁹⁷ At that time, the Dutch Republic's armies were governed by a military code in which the *Hoge Krijgsraad* (High Military Court) had jurisdiction over soldiers accused of both military and common-law crimes.⁹⁸ A public outcry led by

92. See *Mora v. McNamara*, 389 U.S. 934, 938 (1967) (Douglas, J., dissenting).

93. See *Rostker v. Goldberg*, 453 U.S. 57, 59, 61 (1981).

94. See *Goldwater v. Carter*, 444 U.S. 996, 1002-05 (1979) (Rehnquist, J., concurring).

95. See WINTHROP, *supra* note 34, at 4-6, 42-46; KASTENBERG, *supra* note 34, at 236-37. It should also not be missed that the military reforms of the early Dutch Republic influenced the Swedish military of Gustavus Adolphus and the French military of both Louis XIV and Napoleon Bonaparte. See generally, e.g., John A. Lynn, *Forging the Western Army in Seventeenth-Century France*, in *THE DYNAMICS OF MILITARY REVOLUTION 1300-2050*, at 35 (Macgregor Knox & Williamson Murray eds., 2001).

96. See, e.g., David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 132-34, 136 (1980); KASTENBERG, *supra* note 34, at 236-37.

97. See DONALD HAKS, *VADERLAND EN VREDE, 1672-1713: PUBLICITEIT OVER DE NEDERLANDSE REPUBLIEK IN OORLOG* [FATHERLAND AND PEACE, 1672-1713: PUBLICITY ABOUT THE DUTCH REPUBLIC AT WAR] 50 (2013); see also OLAF VAN NIMWEGEN, *THE DUTCH ARMY AND THE MILITARY REVOLUTIONS, 1588-1688*, at 343 (Andrew May trans., English ed., The Boydell Press 2010) (2006).

98. HAKS, *supra* note 97, at 23; WARFARE AND THE AGE OF PRINTING: CATALOGUE OF EARLY PRINTED BOOKS FROM BEFORE 1801 IN DUTCH MILITARY COLLECTIONS 105 (Louis Ph. Sloos ed., 2008).

clergy and prominent citizens at The Hague demanded Stadtholder William III mete out “the most severe punishment against the colonel.”⁹⁹ William III interposed with the *Hoge Krijgsraad* and demanded it sentence Pain et Vin to death.¹⁰⁰ Based on the Stadtholder’s order, the *Hoge Krijgsraad* resented Pain et Vin to death and he was beheaded.¹⁰¹ Anti-monarchist Republicans in the Second “Stadtholderless era” used William III’s actions as proof that a stadtholder could not be entrusted with the command of prosecuting crimes through military courts.¹⁰² By the late eighteenth century, the elected Dutch government removed common crimes from the military courts and required that sentences of death adjudged in military trials and stadtholder pardons be approved by the Council of State, the highest civil court of the Dutch Republic.¹⁰³ While it is true that the example of Pain et Vin is absent from United States case law, it should be recognized that even in an emerging democracy, the distrust of sovereign interference in courts-martial has not been deemed trivial to the rights of the accused nor those of the nation.

As has been noted, at the United States’ founding, the Constitution’s framers believed that a standing army was a danger to the liberties of citizens.¹⁰⁴ In the words of Professor Richard Kohn, “No principle of government was more widely understood or more completely accepted . . . than the danger of a standing army in peacetime.”¹⁰⁵ The Court has also observed that the founders adopted the Whig’s fears of standing armies, which became an influence in shaping the Constitution.¹⁰⁶ Nonetheless, a small degree of elaboration highlights the coupling of the fear of a standing army with an executive who

99. HAKS, *supra* note 97, at 23.

100. *Id.*; VAN NIMWEGEN, *supra* note 97, at 343-44.

101. HAKS, *supra* note 97, at 23; VAN NIMWEGEN, *supra* note 97, at 343.

102. HAKS, *supra* note 97, at 23; VAN NIMWEGEN, *supra* note 97, at 517.

103. See H.H.A. de Graaff, *Some Problems of Military Law Which Have Arisen as a Consequence of the Use of Armies of International Composition by the Republic of the United Netherlands*, 7 MIL. L. & L. WAR REV. 229, 234-35 (1968).

104. Their fear emanated from the English Whig concerns regarding standing armies. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 350 (1868); Earl F. Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 144-147 (2006).

105. RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 2 (1975).

106. *Loving v. United States*, 517 U.S. 748, 760-61, 765-66 (1996). The Court noted that: Mindful of the historical dangers of autocratic military justice and of the limits Parliament set on the peacetime jurisdiction of courts-martial over capital crimes in the first Mutiny Act, 1 Wm. & Mary, ch. 5 (1689), and having experienced the military excesses of the Crown in colonial America, the Framers harbored a deep distrust of executive military power and military tribunals.

Id. at 760.

commands in ignorance of the laws governing the military. In 1642, John March articulated Parliament's claim that the Crown could not be considered a supreme commander over the militia.¹⁰⁷ In 1689, with the passage of the Mutiny Act, William and Mary were precluded from determining the extent of military jurisdiction in Britain, and the maintenance of the standing army in Britain was subject to annual renewal by Parliament.¹⁰⁸ In the Mutiny Act, Parliament declared a general military law principle that "noe man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall Law, or in any other manner than by the Judgement of his Peeres, and according to the knowne and Established Laws of this Realme."¹⁰⁹ In 1697, John Trenchard, a well-known political writer, or "pamphleteer," of the late seventeenth century, warned that where there is a standing army, "[T]he King is perpetual General, may model the Army as he pleases, and it will be called High-Treason to oppose him."¹¹⁰ Trenchard also argued that a sovereign's use of standing armies could lead to the destruction of a constitution.¹¹¹

In the rebelling colonies that became the United States, King George III's use of a standing army (with the addition of Hessian mercenaries) was "bitterly resented, and appears among the grievances listed in the Declaration of Independence."¹¹² Shortly after arriving as the Ambassador to France, Thomas Jefferson made it known to the new nation that standing armies were antithetical to the new republic.¹¹³ Likewise, Delegate Edmund Randolph noted at the Virginia ratifying

107. See Lois G. Schworer, *"The Fittest Subject for a King's Quarrel": An Essay on the Militia Controversy 1641-1642*, 11 J. BRIT. STUD. 45, 67-68, 71-72 (1971); see also JANELLE GREENBERG, *THE RADICAL FACE OF THE ANCIENT CONSTITUTION: ST EDWARD'S "LAWS" IN EARLY MODERN POLITICAL THOUGHT* 201-02 (2001).

108. Bill of Rights 1688, 1 W. & M., c. 2 (Eng.); The First Mutiny Act 1689, 1 W. & M., c. 5 (Eng.); see also F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED* 328-29 (1931).

109. The First Mutiny Act 1689, 1 W. & M., c. 5 (Eng.). The act, however, decreed swift and capital punishment for mutinies and desertions. *Id.*

110. John Trenchard, *An Argument Shewing, that a Standing Army Is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy*, in JOHN TRENCHARD & THOMAS GORDON, *A COLLECTION OF TRACTS* 1, 11 (1697). The radical Whigs, among them John Trenchard, "are remembered today as rigid defenders of personal liberties in the face of Britain's increasingly powerful fiscal-military state." Adam Lebovitz, *An Economy of Violence: Financial Crisis and Whig Constitutional Thought, 1720-1721*, 29 YALE J.L. & HUMANS. 165, 168-169 (2017).

111. Trenchard, *supra* note 110, at 11-13.

112. See, e.g., David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 518 (2008).

113. Letter from Thomas Jefferson, Ambassador to Fr., to James Madison, Va. Delegate to the Continental Cong. (Dec. 20, 1787) (*reprinted in* THOMAS JEFFERSON, *WRITINGS* 914, 916, 918 (Merrill D. Peterson ed., 1984)); see also Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* 1, 72 HARV. L. REV. 1, 6 (1958).

convention that “there was not a member in the federal Convention, who did not feel indignation” at the idea of a standing army.¹¹⁴ One only need recall that James Madison, in *The Federalist Papers*, argued:

[T]he liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution.¹¹⁵

Finally, coupled with the fear of standing armies, and only for the purposes of the central point of this Article, is the ancient principle that neither a monarch nor a President is above the law.¹¹⁶ Long ago, in *Entick v. Carrington*,¹¹⁷ Lord Camden established the rule important to constitutional law that a sovereign may only act in accordance with the established law.¹¹⁸ While *Entick* is usually cited in the realm of Fourth Amendment analysis, it has also been incorporated into military law.¹¹⁹ Congress and the federal judiciary alike have acknowledged that the fear of standing armies was an original concern of the framers and shaped military law.¹²⁰

C. *Misinterpreted History and Misplaced Analysis: Swaim v. United States*

Prior to Bergdahl’s court-martial, perhaps the most deleterious presidential action over military justice was President Chester Alan Arthur’s attempt to have a court-martial increase the sentence of a

114. 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 401 (2d ed. 1901).

115. THE FEDERALIST NO. 41, at 262 (James Madison) (Clinton Rossiter ed., 1961).

116. See, e.g., *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring) (“In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President.”).

117. (1765) 95 Eng. Rep. 807.

118. *Id.* at 817-18; see also *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d). This decision is an early judicial ruling in which a United States court determined that a President was subject to the law of the courts. *Id.* Chief Justice John Marshall, while acting as a circuit judge, determined that President Jefferson was not immunized from giving testimony on important matters under adjudication. *Id.*; see also Archibald Cox, *Executive Privilege*, 122 U. PENN. L. REV. 1383, 1385 (1974).

119. See, e.g., *United States v. Hillan*, 26 C.M.R. 771, 793 (N.B.R. 1958).

120. See, e.g., *United States v. Miller*, 307 U.S. 174, 179 (1939). In *Miller*, the Court recognized “[t]he sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.” *Id.*; see also *United States v. Culp*, 14 C.M.A. 199, 204 (1963).

convicted general officer.¹²¹ Of course, the Army in Arthur's time was quite small, numbering less than 27,000 soldiers and officers.¹²² Arthur, who served as President from 1881 to 1885, was unhappy with a court-martial's sentence for Brigadier General David Swaim, the Army's Judge Advocate General.¹²³ In the closing days of Rutherford Hayes's presidency, Swaim was elevated from the rank of major to brigadier general, largely owing to his close friendship with President-elect James A. Garfield, and this may have led to anger within the Army's officer corps.¹²⁴ Arthur apparently distrusted Swaim for at least one other reason. After Sergeant John A. Mason, while on guard duty, tried to murder Charles Guiteau (the assassin of President Garfield), the Army court-martialed Mason.¹²⁵ Swaim, in his duty as Judge Advocate General, advised disapproving the conviction as the charge against Mason was civil in nature and therefore fell outside of the Army's jurisdiction.¹²⁶ Arthur disagreed, and when Mason appealed to the Court, Arthur ordered Swaim to be shut out of the process.¹²⁷ Mason's court-martial and appeal garnered considerable newspaper reporting, including negative aspersions on the President's decisions.¹²⁸

On April 22, 1884, Arthur acted as a convening authority and ordered a court of inquiry (a predecessor to the modern Article 32 investigation) to investigate Swaim.¹²⁹ Based on the court of inquiry's findings, on June 30, 1884, Secretary of War Robert Todd Lincoln appointed a general court-martial to prosecute Swaim, and on July 22,

121. William R. Robie, *The Court-Martial of a Judge Advocate General: Brigadier General David G. Swaim* (1884), 56 MIL. L. REV. 211, 225-27 (1972).

122. See 1 SEC'Y OF WAR ANN. REP. 17 (1881); see also ROBERT M. UTLEY, *FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN 1866-1891*, at 15-16 (1973).

123. JOSHUA E. KASTENBERG, *SHAPING U.S. MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY* 9 (2014).

124. Robie, *supra* note 121, at 211-12; KASTENBERG, *supra* note 34, at 215.

125. See, e.g., *Ex parte Mason*, 105 U.S. 696, 696-97 (1881).

126. Letter from David G. Swaim, J. Advoc. Gen., U.S. Army, to Robert T. Lincoln, U.S. Sec'y of War (Apr. 12, 1882) (on file with the National Archives and Records Administration, Washington, D.C.). Swaim wrote to Lincoln that the charge against Mason "was exclusively for the consideration of the criminal court of the District [of Columbia]." *Id.*

127. Letter from Robert Lincoln, U.S. Sec'y of War, to David D. Swaim, J. Advoc. Gen., U.S. Army (Apr. 15, 1882). After informing Swaim that he was acting at the "direction of the President," Lincoln noted that he had assigned Major Asa Bird Gardiner, who had acted as judge advocate at Mason's court-martial, to work with the Attorney General in representing the government. *Id.* Lincoln concluded his letter with a caustic note: "I am advised by the Attorney General that he will require no further aid [from you]." *Id.* Perhaps emboldening Arthur's later actions against Swaim, the Court in *Ex parte Mason* applied the traditional habeas test and upheld the conviction on the basis that "the offence charged . . . was clearly one to the prejudice of good order and military discipline," which enabled the Army's jurisdiction. *Mason*, 105 U.S. at 698-700.

128. See, e.g., *The Invalid Sentence of Sergt. Mason*, N.Y. TIMES, Mar. 29, 1882, at 2.

129. *Swaim v. United States*, 28 Ct. Cl. 173, 178 (1893). On courts of inquiry, see generally WINTHROP, *supra* note 34, at 795-822.

1884, Lincoln ordered Swaim arrested and confined to Washington, D.C.'s geographical limits.¹³⁰ Composed of "a veritable 'who's-who'" of Civil War veterans including Generals John McAlister Schofield, Alfred Terry, and Nelson A. Miles, the court-martial found Swaim guilty of some, but not all of the charges and sentenced him to be suspended from rank and duty for three years.¹³¹ The sentence displeased the President who obtained support from Attorney General Benjamin Brewster to reopen the court-martial and directly express his displeasure to the officers sitting in judgment of Swaim.¹³² The next day, Arthur ordered the court-martial reconvened and provided Brewster's written advice to the officers while at the same time ordering them to reconsider their finding of not guilty to one of the charges and the appropriateness of the overall sentence.¹³³ Brewster's advice was clearly an admonishment of the court-martial's initial sentence as evidenced by the following statement:

The action of the court as a whole seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and the glory of our military service, and which was expressed on a memorable occasion by the great Commander-in-[C]hief of our Revolutionary armies, when reluctantly compelled to reprimand a brother officer, in these words: "Our profession is the chastest of all; even the shadow of a fault tarnishes the luster of our finest achievements."¹³⁴

130. *Swaim*, 28 Ct. Cl. at 181.

131. *Id.* at 190-91, 94; KASTENBERG, *supra* note 34, at 227 (discussing the officers assigned to the court-martial of Swaim). Swaim was confronted with a second court-martial, but that trial quickly acquitted him. *See* Robie, *supra* note 124, at 227, 234.

132. *See* Letter from Benjamin Harris Brewster, U.S. Att'y Gen., to Chester A. Arthur, U.S. President (Feb. 10, 1885), in 18 OFFICIAL OPINIONS OF THE ATTORNEYS-GENERAL OF THE UNITED STATES 113-20 (A.J. Bentley ed., 1890); Letter from Chester A. Arthur, U.S. President, to the General Court-Martial (Feb. 11, 1885) (on file with National Archives and Records Administration, Washington, D.C.).

133. Letter from Chester A. Arthur, to the General Court-Martial, *supra* note 132. Arthur informed the court-martial:

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. The attention of the Court is invited to the accompanying communication of the Attorney General under date of the 10th instant, whose views upon the matter submitted for reconsideration have any concurrence.

Id.

134. *See* Letter from Benjamin Harris Brewster, to Chester A. Arthur, *supra* note 132.

This time, the court-martial sentenced Swaim to a one-year suspension and a reduction of rank to major on his return to the army.¹³⁵ The court-martial, however, did not have the lawful authority to sentence Swaim to a reduction in rank, and this caused Arthur to order the court-martial to reconsider its sentence for a second time.¹³⁶ The President conveyed to the court-martial his belief that while it had intended to sentence Swaim more harshly than the original sentence, it did so improperly.¹³⁷ After reconsidering its second sentence, the court-martial sentenced Swaim to be suspended from duty for twelve years and to forfeit half of his monthly pay during this period.¹³⁸ Arthur approved of this sentence, though he chastised the court-martial for being too lenient.¹³⁹ Although the court-martial increased Swaim's sentence, the final sentence did not include a dismissal, and Swaim remained on the War Department's payroll as an officer.¹⁴⁰ Moreover, the court-martial garnered media attention from outlets such as the *New York Times*.¹⁴¹ Indeed, *The New York Times* published the President's three statements to the court-martial after the final sentence was announced.¹⁴²

After Grover Cleveland succeeded Chester Arthur as President, Swaim alleged to Secretary of War William Endicott (Secretary of War

135. *Swaim*, 28 Ct. Cl. at 200.

136. See Letter from Chester A. Arthur, U.S. President, to the General Court-Martial (Feb. 14, 1885) (on file with National Archives and Records Administration, Washington, D.C.).

137. *Id.* On February 14, Arthur instructed the court-martial:

It is apparent from the terms of the amended sentence that it was the intention of the Court to award a punishment of greater severity and more nearly commensurate with the offenses of which the accused has been found guilty than was the penalty adjudged in the original proceedings; and if the terms of the amended sentence were such as could be legally carried out, the purpose of the Court in that regard would have been accomplished.

Id.

138. *Swaim*, 28 Ct. Cl. at 201.

139. Letter from Chester A. Arthur, U.S. President, to the General Court-Martial (Feb. 24, 1885) (on file with National Archives and Records Administration, Washington, D.C.). President Arthur admonished the court-martial, stating:

[I]t is difficult to understand how the Court could be willing to have the officer tried, retained as a pensioner upon the Army Register, while it expressed its sense of his unfitness to perform the duties of his important office by the imposition of two different sentences, under either of which he would be deprived permanently of his functions.

Id.

140. See *Swaim*, 28 Ct. Cl. at 201; *Swaim's Remarkable Sentence*, N.Y. TIMES, Feb. 26, 1885, at 1.

141. See, e.g., *The Swaim Court-Martial*, N.Y. TIMES, Nov. 12, 1884, at 3; see also *Swaim Court Martial Concluded—Dynamite Resolutions*, INDIANAPOLIS SENTINEL, Feb. 4, 1885, at 1; *The Swaim Court Martial Decision Causes Some of the Senators to Express Themselves*, DUBUQUE DAILY HERALD, Feb. 26, 1885, at 1.

142. *General Swaim's Punishment: Suspended from Rank and Duty for Twelve Years*, N.Y. TIMES, Feb. 25, 1885, at 3.

Robert Lincoln's successor) that when Arthur caused Brewster's advice to be presented to the court-martial, he did so without informing counsel for Swaim nor Swaim himself.¹⁴³ In turn, President Cleveland publicly articulated his disgust with the Army's court-martial process in his first annual message to Congress:

If some of the proceedings of courts-martial which I have had occasion to examine present the ideas of justice which generally prevail in these tribunals, I am satisfied that they should be much reformed if the honor and the honesty of the Army and Navy are by their instrumentality to be vindicated and protected.¹⁴⁴

Cleveland was not alone in his disgust. Senator John Ingalls, a Kansas Republican, called Swaim's court-martial "a disgrace to civilization" and chastised his fellow Republican, Chester Arthur, for compelling the court to render a harsher verdict.¹⁴⁵ Republican Senators Henry Dawes, George Frisbie Hoar, and John Sherman likewise excoriated the conduct of the court-martial.¹⁴⁶

Swaim urged the Cleveland administration that Arthur's and Bristow's actions "invad[ed] the province of the Court to persuade, if not dictate what should be its finding and sentence."¹⁴⁷ The surviving court-martial record, now housed at the National Archives and Records Administration, supports Swaim's argument that he was absent from both the reconvening of the court-martial, and therefore unable to quickly reply to Bristow's written opinions to the court-martial.¹⁴⁸ He is not listed on record of trial for February 3 or February 12, 1885, when Arthur "invited" the reconvened court-martial to consider the "accompanying communication of the Attorney General."¹⁴⁹ It is likely the case that Cleveland believed Arthur, Lincoln, and Bristow had denied Swaim a fair trial, but also believed that he could not lawfully

143. Letter from David G. Swaim, J. Advoc. Gen., U.S. Army, to William C. Endicott, U.S. Sec'y of War (Dec. 30, 1885) (on file with National Archives and Records Administration, Washington, D.C.). Swaim claimed to Endicott that Arthur had caused to occur a "carefully prepared argument by the Attorney General of the United States, which was read to the court by the Judge Advocate." *Id.*

144. Grover Cleveland, First Annual Message to Congress (Dec. 8, 1885), in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 53 (James D. Richardson ed., 2005) (ebook).

145. *Swaim's Remarkable Sentence*, *supra* note 140.

146. *See id.*; *see also* *Members of the 51st Congress*, C-SPAN, <https://www.c-span.org/congress/members/?chamber=senate&congress=51&all> (last visited Nov. 7, 2020).

147. Letter from David G. Swaim to William C. Endicott, *supra* note 143.

148. *Id.*

149. *See* Statement of Chester A. Arthur, *supra* note 132; Transcript of Record, Swaim v. United States, 28 Ct. Cl. 173 (1893) (No. 16859) (on file with National Archives and Records Administration, Washington, D.C.).

remedy the wrong.¹⁵⁰ In the end, Cleveland, in his first term, did not give any relief to Swaim, apparently deferring until a civil court determined the issue.¹⁵¹

In 1891, Swaim filed suit against the United States in the Court of Claims in an attempt to recoup the half pay he forfeited.¹⁵² Swaim's leading argument was that Arthur did not have the statutory authority to order the court-martial in the first place, and not that Arthur had committed unlawful command influence.¹⁵³ In a decision authored by Judge Charles Nott, a Civil War Union Army veteran, the Court of Claims determined that a President could, in fact, convene a court-martial.¹⁵⁴ Oddly, as Judge Nott noted, on February 7, 1885—in the midst of Swaim's court-martial—the United States Senate affirmed in a resolution that a President could order a general court-martial convened against an officer.¹⁵⁵ However, Judge Nott never determined that a President had absolute control over courts-martial and, indeed, observed that even as Commander-in-Chief, the President would have to conform his or her actions over courts-martial to Congress' authority to "make rules for the government and regulation of the land and naval forces."¹⁵⁶ Perhaps because Swaim did not argue that Arthur had supreme authority over the military, Judge Nott, writing for the Court of Claims, did not express a concern that the President had used his Commander-in-Chief authority to unlawfully influence the court-martial.

While Judge Nott found that Arthur ordered the court-martial to reconsider its sentence, he did not find that the President required it to impose a harsher one.¹⁵⁷ Judge Nott opined that had the President

150. See, e.g., *The Case of Gen. Swaim*, N.Y. TIMES, Jan. 17, 1889, at 4. The *Times* reported, "This, then, is the situation which Mr. Cleveland found on his accession to the Presidency, less than a fortnight afterward . . . Several ways of relieving the army from the embarrassment have been suggested, but objections have been found to all." *Id.*

151. See Robie, *supra* note 124, at 235-37.

152. *Swaim*, 28 Ct. Cl. at 236.

153. *Id.* at 213.

154. *Id.* at 221. Judge Nott observed:

It may be historically true that the [C]ommander[-]in[-]C[hief] during the Revolution ascribed his power to order courts-martial directly to the Continental Congress; and it may also be true that at the time of the adoption of the Constitution the annual consent of Parliament to the existence of a standing army was conditioned upon statutory provisions relating to such military tribunals, though upon these historical questions the court expresses no opinion; but nevertheless there remains the significant fact in our military system that the President is always the [C]ommander[-]in[-]C[hief]. Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress cannot take away from the President the supreme command.

Id.

155. *Swaim v. United States*, 165 U.S. 553, 557-58 (1897).

156. *Swaim*, 28 Ct. Cl. at 221-22 (quoting U.S. CONST. art. I, § 8, cl. 14).

157. *Id.* at 235-36. Indeed, Judge Nott stated:

On the one hand, it may be said of this case that the President did not interfere with the

required a harsher sentence, such an action would be unlawful in a civil tribunal, but consideration of the issue was not within the jurisdiction of the Court of Claims because the court was limited to the strict habeas test.¹⁵⁸ Thus, Judge Nott never addressed the issue of presidential influence over courts-martial. Rather, he determined that undue influence in courts-martial was non-reviewable by the civil courts.¹⁵⁹ The Supreme Court, in an opinion authored by Justice George Shiras, likewise determined it did not possess jurisdiction over Swaim's appeal because the court-martial was lawfully constituted, and the President had the authority to order the court-martial into being, as well as to comply with his constitutional and statutory authorities.¹⁶⁰ Additionally, the justices made it clear that the British Mutiny Act's prohibitions against the crown (or other convening authority) sending findings or sentences back to a court-martial for a second reconsideration were inapplicable to courts-martial because Congress had statutorily authorized the President to do so.¹⁶¹

As an opinion oft-cited by adherents of executive authority and in judicial decisions, *Swaim* does not, despite inaccurate claims to the contrary, uphold presidential power to have almost unfettered control over courts-martial.¹⁶² This fundamental misunderstanding regarding *Swaim* was most recently evidenced in Justice Samuel Alito's dissent in *Ortiz v. United States*.¹⁶³ Justice Alito insisted that "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."¹⁶⁴ Justice Alito clearly missed Judge Nott's observation

discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one.

Id.

158. *Id.* (citing *Ex parte Reed*, 100 U.S. 13, 23 (1879)).

159. *Id.* at 220.

160. *Swaim*, 165 U.S. at 558, 566.

161. *Id.* at 564-65.

162. Frederick Bernays Wiener was among the scholars who argued that the Court in *Swaim* recognized presidential influence in courts-martial. See Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 273 (1958).

163. *Ortiz v. United States*, 138 S. Ct. 2165, 2200 (2018) (Alito, J., dissenting). Not surprisingly, Justice Alito cites to Wiener in support of his argument. *Id.* It should be noted, however, that Wiener championed executive branch supremacy to the point that he insisted, as late as 1984, that President Roosevelt had the constitutional authority to intern United States citizens of Japanese descent during World War II. See *Recommendations of the Commission on Wartime Internment and Relocation of Citizens: Hearing on S. 2116 Before the Subcomm. on Civ. Serv., Post Off., and Gen. Servs. of the S. Comm. on Governmental Affs.*, 98th Cong. 264-68 (1986) (statement of Frederick Bernays Wiener).

164. *Ortiz*, 138 S. Ct. at 2201. Even allowing for his not reading the Court of Claims decision and merely relying on the Supreme Court's opinion in *Swaim*, Justice Alito failed to note that the

(notwithstanding the criticism of prominent senators) that the judiciary could not determine whether Arthur had ordered the court-martial to assess a tougher sentence. In addition to Justice Alito's erroneous claim that a President could order a harsher sentence "for whatever reason," he missed another important fact: the *Swaim* Court never addressed the constitutionality of the practice of disapproving a court-martial sentence, but simply focused on the limited jurisdiction of federal courts and on the Army's adherence to its own procedures.¹⁶⁵ It did so because the justices had earlier established, in *Keyes v. United States*,¹⁶⁶ that as long as a court-martial possessed lawful jurisdiction over an accused servicemember, the federal judiciary could not collaterally review the findings or sentence imposed, even with evidence of procedural irregularities to the accused servicemember's detriment.¹⁶⁷

Stated plainly: in *Swaim*, the Court did not uphold the constitutionality of Arthur's actions in trying to influence the court-martial. The justices merely held that the President's actions did not violate prescribed regulations at the time, and therefore, the federal judiciary did not possess habeas jurisdiction over *Swaim*'s appeal.¹⁶⁸ Nor did the Court, in neither *Swaim* nor the second opinion Justice Alito cited to, *Ex Parte Reed*,¹⁶⁹ hold that an order for a court-martial to reconvene for the purpose of issuing a stricter punishment comported

Supreme Court relied on the Army regulations at the time and cited to them in the following passage from the 1897 opinion:

When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it an opportunity to reconsider the record for the purpose of correcting or modifying any conclusions thereupon, and to make any amendments of the record necessary to perfect it.

Swaim, at 165 U.S. at 564-65. Even liberally interpreting this passage, it cannot be said that a President could order a court-martial sentence increased "for any reason." While it is true that there were occasions in which courts-martial may have violated the prohibition against double jeopardy—according to Frederick Bernays Wiener, the 1806 Articles of War expressly prohibited double jeopardy trials, and Winthrop never wrote that acquittals were subject to revision—there were a small number of lamentable instances in which this occurred, despite its illegality. See Wiener, *supra* note 162, at 272-77, 273 n.362. However, in 1919, Congress put a stop to the practice. See *id.* at 273-74, 274 n.366.

165. See *Swaim*, 165 U.S. at 561, 566; see also Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 132 (1999). Judge (and current professor) Maggs penned, "The Court in *Swaim* did not indicate what limits, if any, exist on the President's power to act with respect to courts-martial absent statutory authority." Maggs, *supra*, at 132.

166. 109 U.S. 336 (1883).

167. *Id.* at 340. Earlier, in *Wise v. Withers*, the Court determined that where a court-martial did not possess jurisdiction, the judiciary could exercise jurisdiction through habeas. 7. U.S. (3 Cranch) 331, 331, 337 (1806).

168. *Swaim*, 165 U.S. at 561-66.

169. 100 U.S. 13, 22 (1879).

with the Constitution. To the contrary, the Court in *Reed* held that as long as a naval court-martial had not been “dissolved,” a commander could reconvene the court-martial to reconsider a sentence because of a mistake of law made by the court-martial.¹⁷⁰ There is one other consideration which Justice Alito apparently did not entertain: Arthur, like his two immediate predecessors and successors through 1917, was also restrained by the Posse Comitatus Act.¹⁷¹ Enacted in 1878, this congressional act barred the use of the Army to serve in a domestic law enforcement capacity unless authorized to do so by Congress.¹⁷² Thus, the Court decided *Swaim* during a time when presidential authority over the Army was considerably curbed. The most that can be said of *Swaim*, in reality, is that the federal judiciary should, in deciding whether to grant an appeal from a court-martial review, operate with the presumption that the President acted in conformance with his or her statutory duties.¹⁷³ Such a presumption, as noted in Part IV, is no longer possible in the case of the current administration.¹⁷⁴

III. THE SOUND HISTORY OF UNITED STATES MILITARY LAW: LIMITS ON PRESIDENTIAL CONTROL OVER MILITARY JUSTICE

Between 1875 and 1908, the Court issued three opinions which, at a minimum, evidence a constitutional tolerance for limiting Commander-in-Chief authority when a President acts contrary to accepted fair trial standards in courts-martial. Each of the three opinions, *Runkle v. United States*,¹⁷⁵ *McClaghry v. Deming*,¹⁷⁶ and *Grafton v. United States*,¹⁷⁷ illustrate that a President cannot command military justice without adhering to statutory obligations or other fundamental due process rights to a fair trial.¹⁷⁸ A fuller understanding as to why

170. *See id.* at 22.

171. 18 U.S.C. § 1385. For a brief history of the Act, see generally Andrew Buttarro, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135 (2015). While the Act is still in existence, it has been considerably defanged. *See id.* at 182-83 (listing various exceptions that have been carved out of the Posse Comitatus Act).

172. *See Buttarro, supra* note 171, at 181-82.

173. *See In re Chapman*, 166 U.S. 661, 671 (1897). In *Chapman*, the Court, in an opinion authored by Chief Justice Melvin Fuller, briefly noted that *Swaim* narrowed *Runkle* in favor of such a presumption. *See id.* at 670-71. It should be noted, however, that *Chapman* did not arise from a court-martial appeal. Rather, it arose from a citizen refusing to answer questions before a “special committee of the Senate,” and then being prosecuted in the United States District Court for the District of Columbia (then, the Supreme Court of the District of Columbia). *See In re Chapman*, 156 U.S. 211, 212-13 (1895).

174. *See infra* Part IV.D.

175. 19 Ct. Cl. 396 (1884).

176. 186 U.S. 49 (1902).

177. 206 U.S. 333 (1907).

178. *See infra* Part III.A–C.

these cases are important to the current problem of presidential unlawful command influence is possible through a historic examination of the traverse of each of the opinions. Moreover, each of these opinions places *Swaim* into a proper context. Rather than *Swaim* standing for the proposition that a President can act in a manner independent of due process constraints, these opinions cabin *Swaim* in a narrower category, as an opinion issued prior to the end of the strict habeas test and the enactment of Article 32 and other applicable rules and modern military law jurisprudence.¹⁷⁹

A. *Runkle v. United States: Statutory Obligations on the Executive*

In *Runkle v. United States*,¹⁸⁰ in 1887, the Court held that, if a President failed to comply with the statutory requirement of approving an officer's court-martial conviction and sentence, the court-martial's determination of guilt and its corresponding sentence was rendered into a nullity.¹⁸¹ Major Benjamin Runkle, a Union Army Civil War veteran, was commissioned into the Freedmen's Bureau after retiring from the Army.¹⁸² Established in 1865, the Freedmen's Bureau was a part of the Department of War and was charged with various duties endemic to Reconstruction, such as providing food, medical care, and education to recently freed persons of color, as well as ensuring that voting rights were not destroyed by southern whites.¹⁸³ A senior military commander accused Runkle of misappropriating federal funds for his personal use.¹⁸⁴ Runkle was charged, under the 67th Article of War, for defrauding the widow of a black soldier, along with twelve other black soldiers or their dependents.¹⁸⁵ After being convicted and sentenced to a dismissal, Runkle appealed to Secretary of War William Belknap, claiming that the

179. See *infra* Part III.D.

180. *Runkle v. United States*, 122 U.S. 543 (1887).

181. *Id.* at 558.

182. See *Runkle v. United States*, 19 Ct. Cl. 396, 405 (1884); see also Ross A. Webb, "The Past Is Never Dead, It's Not Even Past": Benjamin P. Runkle and the Freedmen's Bureau in Kentucky, 1866-1870, 84 REG. KY. HIST. SOC'Y 343, 350-51 (1986).

183. See Robert C. Lieberman, *The Freedmen's Bureau and the Politics of Institutional Structure*, 18 SOC. SCI. HIST. 405, 412, 414, 416-17, 420, 422-23 (1994).

184. See Webb, *supra* note 182, at 356-57.

185. See *id.* at 353; Letter from Joseph Holt, J. Advoc. Gen., U.S. Army, to William Belknap, Sec'y of War (Aug. 15, 1872) (on file with National Archives and Records Administration, Washington, D.C.); see also *Runkle*, 19 Ct. Cl. at 406. Runkle became controversial with the white city leaders in Memphis after accusing the mayor of the city of fomenting riots against colored soldiers under his command, and later, Runkle served as the Freedmen's Bureau superintendent for Kentucky. See also Marius Carriere, *An Irresponsible Press: Memphis Newspapers and the 1866 Riot*, in WORDS AT WAR: THE CIVIL WAR AND AMERICAN JOURNALISM 339-40 (David B. Sachsman et al eds., 2008); Webb, *supra* note 182, at 350.

President had appointed the court-martial without a statutory grant of authority.¹⁸⁶

To this end, Judge Advocate General Joseph Holt, in conformance with the duties of his office as a reviewing authority, advised President Ulysses Grant on Runkle's objections to the court-martial.¹⁸⁷ Perhaps presaging *Swaim*, Holt insisted that it was doubtful Congress "could constitutionally take away from the President a power so essential to the efficacy of his office as Commander[-]in[-]Chief."¹⁸⁸ To Holt, the Commander-in-Chief power essential to preserve was the ability for a President to forgo strict compliance with a statutory requirement in courts-martial oversight.¹⁸⁹ In one sense, Holt's position was undercut by the Court in 1958. In *Harmon v. Brucker*,¹⁹⁰ the Court determined that the military had to fully comply with its own regulations, and these regulations could not narrow statutes governing the military.¹⁹¹ While this issue was not central to Runkle's eventual judicial appeal, Holt echoed a belief that presidential authority over military justice was both broad and deep, if not unlimited.¹⁹² In contrast to Holt, the Court in

186. See *Runkle*, 19 Ct. Cl. at 407.

187. See Letter from Joseph Holt to William Belknap, *supra* note 185.

188. See *id.* Holt's full comment is as follows:

The most important is the objection that the President or Secretary of War had no power to appoint the Court, because either could derive such a power only from Congress, which has legislated on the subject only by the Act of Congress of May 29, 1830, chapter 179, entitled, An Act to [A]lter and [A]mend the 65th of the Articles [of War] and providing that in case where a Department Commander is the Accuser the Court shall be appointed by the President . . . Doubtless in England, parliament, in what has been called its omnipotence, could, with the royal assent, forbid the King to convene Courts Martial; but it may well be questioned whether Congress could, constitutionally, take away from the President a power so essential to the efficacy of his office as Commander-in[-]Chief, although there is no reason of fundamental law why inferior officers should not be authorized, as they are by the 65th Article [of War], to participate in the exercise of the same power.

Id.

189. *Id.* Interestingly, during the Civil War, Attorney General Edward Bates took a position opposite to Holt's. In a formal opinion, Bates determined:

Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law.

11 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 21 (J. Hubley Ashton ed., 1869). In *Runkle*, the Court cited to Bates's view as dispositive. *Runkle v. United States*, 122 U.S. 543, 557-58 (1887).

190. 355 U.S. 579 (1958).

191. See *id.* at 582-83. *Harmon* arose from two related appeals in which the military issued undesirable discharges to otherwise honorable servicemembers after discovering that both servicemembers had been affiliated with organizations listed on the Attorney General's Subversive Organizations List. See *id.* at 580; KASTENBERG & MERRIAM, *supra* note 17, at 206.

192. See Letter from Joseph Holt to William W. Belknap, *supra* note 185.

Runkle ultimately determined there is a corollary and enforceable duty for a President to act judicially over courts-martial.¹⁹³

Runkle, a decision authored by Chief Justice Morrison Waite, arose from Runkle's demand for back-dated retirement pay against the government's insistence that he was not entitled to such pay because the President was without authority to restore him to duty since he had been removed from the military by a court-martial.¹⁹⁴ In 1875, Holt had retired and Brigadier General William McKee Dunn replaced him.¹⁹⁵ Dunn apparently had a different view than Holt on the fairness of Runkle's trial and advised Secretary of War Alphonso Taft (William Belknap's successor) to have President Rutherford Hayes overturn the court-martial since Grant had never approved of the findings or sentence.¹⁹⁶ Moreover, Runkle had other supporters such as then-Congressman James A. Garfield and then-Treasury Secretary Benjamin Bristow, who likewise lobbied Taft.¹⁹⁷ And Runkle's restoration was well-reported in the news.¹⁹⁸ Indeed, unlike in Bergdahl's case, shortly after the court-martial, a number of legislators had passed resolutions supporting Runkle.¹⁹⁹

On August 4, 1877, on Dunn's advice, Hayes disapproved of the court-martial and restored Runkle to duty for the purposes of retirement.²⁰⁰ Runkle then sought backpay from the Court of Claims but lost before that court after it determined that Hayes could not restore a court-martialed officer to rank and service.²⁰¹ Therefore, according to the Court of Claims, Runkle was not entitled to retirement backpay.²⁰² The United States Supreme Court, however, disagreed and determined that the duty placed on Grant was more than ministerial.²⁰³ Instead, the presidential duty to formally approve the proceedings was a judicial act

193. *Runkle*, 122 U.S. at 557.

194. *See id.* at 550.

195. On Dunn replacing Holt, see ELIZABETH D. LEONARD, LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY 300 (2011).

196. *See* Letter from William McKee Dunn, J. Advoc. Gen., U.S. Army, to Alphonso Taft, Sec'y of War (May 3, 1876) (on file with National Archives and Records Administration, Washington, D.C.); *Runkle v. United States*, 122 U.S. 543, 560-61 (1887).

197. *See* Webb, *supra* note 182, at 357.

198. *See, e.g., Dishonoring the Army and Navy: Restoration of Dismissed Officers on Microscopic Technicalities—Draper's and Runkle's Cases—Questionable Legality of the Acts—Congressional Inquiry Probable*, N.Y. TIMES, Dec. 24, 1877, at 1.

199. *See* Webb, *supra* note 182, at 357 & n.56.

200. *Runkle*, 122 U.S. at 548-49.

201. *Runkle v. United States*, 19 Ct. Cl. 396, 407, 417-19 (1884). Adding complexity and context to Runkle's suit was that the Senate investigated Runkle's case and determined that President Hayes had acted improperly in restoring Runkle to duty. *See* Webb, *supra* note 182, at 358-59.

202. *Runkle*, 19 Ct. Cl. at 419.

203. *Runkle*, 122 U.S. at 557.

rather than an administrative requirement and, as a result, the court-martial could not be concluded as final.²⁰⁴ As an example of how *Runkle* has been characterized by scholars who advocate for judicial non-interference, if not unitary executive control over military justice, Professor Margulies merely notes that *Runkle* places a “judicial duty” on the President, but he excludes the fact that the failure to do so was considered to be of a jurisdictional nature in which, even under the strict habeas test, the judiciary could review.²⁰⁵ Thus, when Congress places an affirmative duty on the President to act judicially, the ignorance of this duty deprives a court-martial of jurisdiction.²⁰⁶

B. *McClaghry v. Deming: Statutory Restraints Against the Executive*

On February 10, 1902, the United States Court of Appeals for the Eighth Circuit, in *Deming v. McClaghry*,²⁰⁷ overturned Captain Peter Deming’s court-martial conviction and sentence for embezzling federal monies, forgery, and conduct unbecoming of an officer and gentleman.²⁰⁸ 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.²⁰⁹ Unsurprisingly, in light of the guilty plea, the Judge Advocate General, in his review, did not articulate any unusual aspects of the court-martial.²¹⁰ Yet the appellate court elaborated that *Runkle* had required a court-martial not only to possess jurisdiction over the parties, but also required “that all the statutory regulations governing its proceedings had been complied with, and that its sentence was

204. *See id.* at 557-58, 560-61.

205. *See* Margulies, *supra* note 44, at 335-36.

206. *See id.*; *Runkle*, 122 U.S. at 555-56.

207. 113 F. 639 (8th Cir. 1902).

208. *Id.* at 651-52; *Capt. Deming’s Appeal: Supreme Court Hears Argument in the Case of a Volunteer Officer Convicted of Fraud*, N.Y. TIMES, Apr. 30, 1902, at 8; *Capt. Deming’s Courtmartial: United States Supreme Court Decides that It Was Illegal*, N.Y. TIMES, May 20, 1902, at 3.

209. *Deming*, 113 F. at 649; *Capt. Deming’s Courtmartial: United States Supreme Court Decides that It Was Illegal*, *supra* note 208.

210. Letter from G.N. Lieber, J. Advoc. Gen., U.S. Army, to Elihu Root, U.S. Sec’y of War (May 9, 1900) (on file with National Archives and Records Administration, Washington, D.C.). 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 not successful. 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, findings, and sentence. The sentence is legal and it is recommended that it be confirmed.

Id.

conformable to law.”²¹¹ In essence, the Court of Appeals served notice to the executive branch that Congress could place statutory restraints against the exercise of military discipline, and the executive branch’s failure to conform to these statutory restraints deprived the court-martial of jurisdiction. The Supreme Court upheld the lower court’s reasoning, calling it “a very clear and satisfactory opinion.”²¹²

The traverse of Deming’s appeal from his court-martial to the Eighth Circuit and onto the Supreme Court is fascinating in that, like *Runkle*, the appeal evolved from its original claims into a broader, if not unintended, constitutional holding. Shortly after Deming began serving his sentence at Fort Leavenworth, his counsel, John H. Atwood, discovered that the court-martial was composed of regular Army officers rather than militia and volunteer officers.²¹³ Atwood argued to the Eighth Circuit that the absence of militia officers violated Article 77 of the 1874 Articles of War.²¹⁴ Secretary of War, Elihu Root, assigned Major Enoch Crowder, the future Judge Advocate General and Provost Marshal of the United States during World War I, to represent the Government.²¹⁵ In this instance, Crowder and the Government did not prevail; the Eighth Circuit agreed with Atwood and determined that Deming’s court-martial was devoid of jurisdiction.²¹⁶ Moreover, the Court of Appeals reasoned that since the beginning of the nation, there had been prohibitions against regular Army officers sitting in judgment of volunteers and militia soldiers, so Deming’s waiver resulting from his guilty plea was not an issue of simple error, but rather, one of constitutional magnitude.²¹⁷

Crowder remained on the appeal, representing the United States through to the Supreme Court.²¹⁸ He argued that, because Congress had

211. *Deming*, 113 F. at 652 (quoting *Runkle*, 122 U.S. at 556).

212. *McClaghry v. Deming*, 186 U.S. 49, 53 (1902).

213. *See McClaghry v. Deming*, 113 F. 639, 640 (8th Cir. 1902).

214. *See id.*; WILLIAM E. CONNELLY, 3 A STANDARD HISTORY OF KANSAS AND KANSANS 1364 (1918). On Article 77 and the executive branch’s response, see Letter from Philander Knox, U.S. Att’y Gen., to Elihu Root, U.S. Sec’y of War (Oct. 31, 1901) (on file with National Archives and Records Administration, Washington, D.C.). Article 77 stated: “Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.” 1 THE FEDERAL STATUTES ANNOTATED 498 (William M. McKinney & Charles C. Moore eds., 1903).

215. *See Capt. Deming’s Appeal: Supreme Court Hears Argument in the Case of a Volunteer Officer Convicted of Fraud*, *supra* note 208; KASTENBERG, *supra* note 66, at 12, 14.

216. *See Deming*, 113 F. at 650-52.

217. *See id.* at 644.

218. Letter from Enoch Crowder, J. Advoc., U.S. Army, to George B. Davis, J. Advoc. Gen., U.S. Army (Feb. 13, 1902) (on file with National Archives and Records Administration, Washington, D.C.); *McClaghry v. Deming*, 186 U.S. 49, 53 (1902). In regard to the issue of Deming’s waiver of the right to militia and the Eighth Circuit not considering this a waiver of appeal, Crowder penned to General Davis: “[T]he overwhelming weight of authority is that a

not created a separate Articles of War for the militia or volunteers, but rather required a court-martial composed of militia officers, Deming's appeal and the lower court's decision was based on a technicality that, if upheld, could erode the Commander-in-Chief's fullest authority over the Army.²¹⁹ Moreover, Crowder cautioned that if the lower court's ruling were upheld, hundreds of court-martialed soldiers, including those from the Spanish-American War and Philippine Insurrection, would have to be freed from prison and restored to duty.²²⁰ The Court, in issuing *Deming*, was apparently not persuaded by Crowder's argument. Instead, in an opinion authored by Justice Rufus Peckham, the justices determined that a court-martial—as “a court of special and limited jurisdiction”—could not have had jurisdiction over an accused servicemember if the members appointed to the court-martial were incompetent.²²¹ Notably, the Court determined that regular Army officers could not be considered competent to serve on the courts-martial of militia or volunteers.²²² Moreover, it should not be ignored that the very category of officer most subject to the President's orders—the regular Army officer—could not, under law, be trusted to adjudge a volunteer or militia member.²²³ In essence, *Deming* represents a

verdict rendered by incompetent juror or jurors is not void, but voidable only, and that unless timely challenge or objection is resorted to the incompetency is held to be waived.” Letter from Enoch Crowder to George B. Davis, *supra*.

219. Letter from Enoch Crowder to George B. Davis, *supra* note 218.

220. See *id.* Crowder informed Davis that he argued in regard to the ability of the Army to assign regular army officers to serve on courts-martial and that “unless this point can be made good, all trials of volunteers of the army of 1898 by either regular or mixed courts must fail.” *Id.* On Crowder's argument to the Court, see *Capt. Deming's Appeal: Supreme Court Hears Argument in the Case of a Volunteer Officer Convicted of Fraud*, *supra* note 208. Crowder quietly complained to Judge Advocate General Davis that the three judges on the Court of Appeals for the Eighth Circuit were prejudiced against the government's position because each of the judges had served as volunteers in the Union Army during the Civil War. Letter from Enoch Crowder to George B. Davis, *supra* note 218. Crowder penned:

With the discussion limited to that proposition alone, I know of no case to more likely turn upon the personal equation of the judges than this one. All three of the judges were volunteer officers of the Civil War, and I wrote you how Caldwell interrupted my oral argument with the remark that his observation was that the volunteers of 1861 detested the regular army, and that, as nearly as he could determine, the feeling was cordially reciprocated.

Id. Crowder apparently believed that because the three judges, Henry Clay Caldwell, Walter Henry Sanborn, and Amos Madden Thayer, were volunteer officers rather than professional officers during the Civil War, they were biased toward Deming, a fellow volunteer officer. *Id.* On Henry Clay Caldwell's Civil War service, see Richard S. Arnold & George C. Freeman III, *Judge Henry Clay Caldwell*, 23 U. ARK. LITTLE ROCK L. REV. 317, 319-21 (2001). On Amos Thayer's Civil War service, see THE BIOGRAPHICAL ENCYCLOPEDIA OF THE UNITED STATES 446 (Am. Biographical Publ'g Co. 1901).

221. *Deming*, 186 U.S. at 63-64.

222. *Id.*

223. *Id.* at 57.

significant restraint on presidential control over military justice, even though Congress has, since this time, ended the court-martial distinction between National Guard, Reserve, and Active forces.

C. Grafton v. United States

In 1907, the Court in *Grafton v. United States*²²⁴ determined that the Fifth Amendment's prohibition against double jeopardy applied to servicemembers insofar as a court-martial is a federal judicial trial and once a servicemember has been prosecuted in a court-martial, another federal tribunal is constitutionally barred from prosecuting the servicemember for the same conduct.²²⁵ As in *Deming* and *Runkle*, the legal history of *Grafton* provides further context to the limits of presidential control over military justice beyond the decision itself. *Grafton*'s transit to the Court pitted Solicitor General Henry Hoyt against the Office of the Judge Advocate General. Hoyt, of course, represented the United States and, impliedly, President Theodore Roosevelt.²²⁶ Alongside John H. Atwood, Captain Clarence S. Nettles, an acting judge advocate, represented Private Homer E. Grafton, the respondent in the appeal.²²⁷

In reality, Nettles was not the only judge advocate to represent Grafton, as Major John Hull, the judge advocate for the Philippine Islands, and General George Breckenridge Davis, the Judge Advocate General of the Army at the time, also impliedly sided with Grafton over Roosevelt.²²⁸ This point should not be disregarded for two reasons. First, advocates of the unitary executive theory, such as John Yoo and Greg Sulmasy, have argued that judge advocates—like all commissioned officers—owe their allegiance to the President and that since September 11, 2001, this has not occurred.²²⁹ Instead, well before the September 11th attacks, the transit of Grafton's court-martial and appeal provides

224. 206 U.S. 333 (1907).

225. *Id.* at 354-55. *Grafton* has been dispositive in the Court's expansion of the single sovereign doctrine in which a state cannot prosecute a defendant for the same offense if one of the state's municipalities has already done so. *See, e.g., Waller v. Florida*, 397 U.S. 387, 394-95 (1970).

226. *See Grafton*, 206 U.S. at 336.

227. *See id.* at 334.

228. *See* Letter from John Hull, J. Advoc., U.S. Army, to George B. Davis, J. Advoc. Gen., U.S. Army (Apr. 5, 1906) (on file with National Archives and Records Administration, Washington, D.C.).

229. *See, e.g., Glenn Sulmasy & John Yoo, Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1842-44 (2007). Several scholars, including writers that Sulmasy and Yoo quoted, have criticized their article. *See, e.g., Victor Hansen, Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 623-25, 635 (2009); Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, YALE J. INT'L AFFS., Winter 2008, at 146, 150-52.

examples of judge advocates opposing a Commander-in-Chief while acting with fidelity to the Constitution. Second, while *Grafton* was primarily decided on the basis of whether double jeopardy applied to different trials conducted within the domain of a single sovereign (in this case the executive branch), it should not be missed that the President would have possessed more expansive control over servicemembers if the Court were to have decided *Grafton*'s appeal in opposite.

A more complete legal history of the decision provides further context to the historic acceptance of limitations on the President's authority over military justice. On August 15, 1904, a general court-martial convened at Camp Jossman, Guimaras to try Private Homer E. Grafton.²³⁰ At the time of the court-martial, Grafton had served in the Army for four years and had taken part in suppressing insurrection on Samar three years earlier.²³¹ Accused of murdering Florentino Castro and Felix Villanueva, two Philippine civilians, on July 24 of that year, he pled not guilty.²³² The Army specifically charged him with shooting the two civilians without provocation and, he admitted to firing his rifle but doing so out of self-defense and while on guard duty.²³³ Corporal Jacob B. Skarr delivered perhaps the most compelling evidence against Grafton. Skarr testified, over Grafton's objection, that Grafton had been ordered to leave his rifle with quartermaster sergeant, but that he maintained his rifle for sentry duty, in Grafton's words, "in case of there being trouble of any kind on the road."²³⁴ Grafton testified in his own defense that while he was assigned to sentry duty on a wooden pier, Castro and Villanueva "advanced rapidly" toward him with one of them holding a knife.²³⁵ As a result, he believed his actions were necessary in order to save himself.²³⁶ In addition to his own testimony, he called his company sergeant who testified to what is now called a

230. Brief in Error to Supreme Court of the Philippine Islands at 6, *Grafton v. United States*, 206 U.S. 333 (1907) (No. 358).

231. See Transcript of Record at 33, *Grafton*, 206 U.S. 333 (No. 358).

232. *Grafton*, 206 U.S. at 341-42.

233. *Id.* Grafton's charges were as follows:

Specification I. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Florentino Castro, a Philippino, by shooting him with a U.S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P.I., July 24th 1904. Specification II. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felix Villanueva, a Philippino, by shooting him with a U.S. magazine rifle, caliber .30 This at Buena Vista Landing, Guimaras, P.I., July 24, 1904.

Id.

234. Transcript of Record at 26, *Grafton*, 206 U.S. 333 (No. 358). However, Skarr later testified that he "did not attach any special significance to Grafton's remarks." *Id.* at 27.

235. *Id.* at 29.

236. *Id.* at 32.

“good soldier defense.”²³⁷ Ultimately, the court-martial determined that Grafton was not guilty of murder and had acted in self-defense.²³⁸

Apparently, Grafton’s acquittal offended the civil authorities, and acting under the governor general’s orders, James Ross, the Supervisor of Fiscal Affairs, and Ruperto Mantinola, a local prosecutor, charged Grafton with the crime of “assassination” under the Philippine criminal code.²³⁹ Ross argued to Judge Henry C. Bates, the presiding judge of the Court of First Instance, that assassination and Article 62 were not duplicative, and therefore, a civil trial was not precluded by the prohibition against double jeopardy.²⁴⁰ Judge Bates agreed, commenting, “I think it is hardly the same offense. This is a complaint for assassination. The proceedings by which he was tried . . . charge as an offense for the breach of the 62nd Article of War.”²⁴¹ However, there was a larger question as to whether jeopardy prevented the civil authorities in the Philippines from prosecuting Grafton for the deaths of the two civilians because, unlike a state prosecution, the Philippine criminal courts were federal in nature and were overseen by presidentially-appointed federal representatives.²⁴²

On appeal to the United States Supreme Court, Grafton argued that: (1) the Philippine criminal trial denied him the right to a jury trial as guaranteed by the Bill of Rights; (2) that the Philippine courts did not have jurisdiction to try soldiers who acted in the performance of their duties; and (3) that double jeopardy prevented the federally-managed civil courts from prosecuting him at all since a court-martial and the Philippine courts were both federal tribunals.²⁴³ Grafton’s appeal to the Court was supported by both Major Hull and Judge Advocate General Davis against the Attorney General.²⁴⁴ Hull concluded to Davis a

237. *Id.* at 33. Sergeant Edward J. Little testified:

His character is excellent as a man and for knowing his duties as a soldier there is none better in the regiment. He is a man of very few words, never gets excited, as I have noticed in the company. I would further state that if I had a detail to go out on an expedition of any kind, or anything serious, I would naturally pick out Private Grafton.

Id. Grafton also called Captain F.D. Wickham who testified Grafton’s character “was excellent as a soldier.” *Id.* at 33-34. The “good soldier defense,” is essentially a character defense akin to advancing a character of law-abidingness. *See, e.g.,* United States v. Tipton, 34 M.J. 1153, 1156 (A.C.M.R. 1992).

238. *Grafton*, 206 U.S. at 342. On August 25, Brigadier General William H. Carter approved the verdict and restored Grafton to his duties. *Id.*

239. Brief in Error to Supreme Court of the Philippine Islands, *supra* note 230.

240. *See id.*

241. *Id.*

242. *See Grafton*, 206 U.S. at 354-55.

243. Brief in Error to Supreme Court of the Philippine Islands, *supra* note 230; *Grafton*, 206 U.S. at 345.

244. Letter from John Hull to George B. Davis, *supra* note 228. Hull observed, “The importance of this case to the Army, and its far reaching influence on the troops and the natives of

promise that “no stone should be left unturned to secure justice for Grafton.”²⁴⁵ In this respect, Hull and the Judge Advocate General argued against not only the Justice Department, but also, by an arguable implication, Roosevelt.

D. Scholars Have Misplaced the Role of Swaim and Executive Control

Executive control over military justice has been argued in practically absolute terms, often through a mistakenly oversimplified historic, if not anti-historic, lens. For instance, Professor Clinton Rossiter, who captured the presidential oversight of courts-martial and other aspects of military discipline by calling the Commander-in-Chief “the fountainhead of military justice,” declared that in *Swaim*, the Court had practically eviscerated *Runkle*, and spoke, in approving terms, of the inherent constitutional authority for a President to convene a court.²⁴⁶ Like Justice Alito, Rossiter missed the point that the Court took comfort in the fact that the Senate had, on the eve of Swaim’s court-martial, expressed its opinion that a President could convene a court-martial.²⁴⁷ Instead, Justice Alito, and before him, Rossiter, tended toward Thomas Macaulay’s thesis that military law had to be both austere and kept from the civil courts, lest the military be incorporated into civil government to a degree that it becomes a threat to it.²⁴⁸

Rossiter’s treatment of *Deming* and *Grafton*, like *Runkle*, is dismissive as to the opinions’ effects on limiting presidential authority. He relegated *Deming* to two inconsequential footnotes and *Grafton* to one.²⁴⁹ He focused some of his writing on preventing the civil courts from reviewing courts-martial in contravention of the strict habeas test and not on whether a President could upend due process in

these islands can not be over estimated.” *Id.* Hull was also critical of the Philippine Supreme Court, writing:

I am sorry to see that Judge Tracey, in his decision, has seen fit to inject certain views of the facts that are not borne out by the record. For instance, on page 4, he holds that Grafton is a new comer and unacquainted with conditions, although he had served one enlistment in the Islands, and Tracey had been here but a few days when the case was heard.

Id.

245. *Id.*

246. See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 108-09 (Expanded ed. 1976). In describing *Swaim*, Rossiter took the liberty of penning a soliloquy between Swaim and Justice Shiras that is not found in the record. See *id.* at 107-08. Perhaps Rossiter modeled his statements on Justice Felix Frankfurter’s soliloquy to the Court during their deliberations over the fate of Nazi saboteurs in 1942. See 12 WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953*, at 317 (2006).

247. See *supra* Part II.C.

248. See Margulies, *supra* note 44, at 331-32.

249. See ROSSITER, *supra* note 246, at 15 n.4, 104 n.75, 105 n.79.

courts-martial.²⁵⁰ Moreover, his scholarship rests on the texts of judicial decisions rather than on a more in-depth study of the legal history underlying the cases, including the arguments advanced by counsel and the important political and social forces contextualizing constitutional and statutory interpretation.²⁵¹ As a signal of the weakness in Rossiter's approach, in *Deming*, 1,600 soldiers were freed from confinement—a point Rossiter never mentioned.²⁵² Rossiter's approach to merely scratching the surface of legal history is a current practice among advocates who apply the unitary executive theory to military justice.²⁵³ Simply, Rossiter and other advocates of broad, if not unfettered, executive control, do not delve into the history of these decisions in their work. Yet the legal history of *Runkle*, *Deming*, and *Grafton* provides evidence that curbs presidential authority over servicemembers, subjecting such authority to both constitutional due process constraints and those imposed through Congress' statutory intent.²⁵⁴

IV. *LEX NON SCRIPTA* OF PRESIDENTIAL CONDUCT

Although the twentieth century—the era of “modern warfare”—may provide the most poignant examples of presidential non-interference with courts-martial during crisis periods such as World War II and the Cold War, the examples of President George Washington during one of the earliest military campaigns, and of President James Madison during the War of 1812, might present the best starting point for establishing a baseline for presidential conduct. For the purposes of this Article, Washington's conduct need only be briefly considered.

250. See *id.* at 111-12, 114.

251. See generally *id.*

252. CONNELLY, *supra* note 214, at 1364.

253. See, e.g., Brief of Professor Aditya Bamzai as Amici Curiae in Support of Neither Party at *2, *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (No. 16-1423) [hereinafter Brief of Bamzai]; *Ortiz*, 138 S. Ct. at 2173-74. Professor Bamzai posits that the original strict habeas test, as articulated in *Ex parte Vallandigham*, militates against the federal judiciary taking a more expansive jurisdiction as statutorily crafted by Congress in 1982. See Brief of Bamzai, *supra*, at *4 (citing 28 U.S.C. § 1259); see also *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1863). In citing to both the majority opinion in *Sprint Communications Co. v. APCC Services* and Justice Frankfurter's concurrence in *Coleman v. Miller* for the proposition that “history and tradition offer a meaningful guide to the type of cases that Article III empowers federal courts to consider,” Bamzai failed to present a meaningful historic argument. Brief of Bamzai, *supra*, at *11; see also *Sprint Commc'ns Co. v. APCC Servs. Inc.*, 554 U.S. 269, 274 (2008); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). Indeed, Professor Bamzai presented no analysis of *Martin v. Mott*, the seminal opinion on military justice and presidential authority over it, or *Swain*, for that matter. Nor did he mention *Grafton* or *Deming*. His one appreciable statement regarding *Runkle* was a bare recognition that a President is required to act judicially in certain circumstances, but he failed to note that a presidential omission to do so vested the courts with jurisdiction over specific courts-martial. Brief of Bamzai, *supra*, at *28.

254. See *supra* Part III.A–C.

Following the Army's defeat at the Battle of the Wabash on November 4, 1791, Washington had the opportunity to subject General Arthur St. Clair to public approbation or court-martial, but chose to do neither.²⁵⁵ St. Clair sought a court of inquiry to clear his name and this could have resulted in a court-martial.²⁵⁶ Clearly, the defeat was troubling to the security of the nation and to the public's confidence in the military, and Congress, for the first time in history, investigated the War Department.²⁵⁷ Washington, who could have turned St. Clair into a scapegoat, publicly responded to an aide's query: "General St. Clair shall have justice. . . . I will hear him without prejudice, he shall have full justice."²⁵⁸

Fought between 1812 and 1815, the so-called War of 1812 was hardly a United States military victory, and the United States did not possess a unified polity toward the conflict with Great Britain.²⁵⁹ Federalists, particularly in the north, who were out of the White House and in the minority in Congress since Thomas Jefferson defeated John Adams for the presidency in 1800, opposed the war and argued that Britain was far less of an enemy than Napoleonic France.²⁶⁰ In turn, Republican loyalists to James Madison, who were supportive of the war, accused Federalists of treason.²⁶¹ Throughout the war, there were mass desertions and refusals to enter into state militias.²⁶² Near war's end, the Army court-martialed General William Hull for cowardice after he surrendered his forces to the British and lost Detroit without first giving battle.²⁶³ Perhaps because of the unpopularity of the war, Madison's

255. See WILEY SWORD, *PRESIDENT WASHINGTON'S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 1790-1795*, at 201-02 (1985).

256. *Id.* at 202.

257. *Id.* at 202-03.

258. *Id.* at 201.

259. On the unpopularity and political dissension surrounding the War of 1812, see SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 153-55 (2005) (discussing the Federalist opposition to the war); ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 121-28 (1997) (discussing Daniel Webster and the Federalists' attacks on President James Madison's war policies); C. EDWARD SKEEN, *CITIZEN SOLDIERS IN THE WAR OF 1812*, at 28-30 (1999) (noting that northern state militias, as guided by state governments, placed restrictions on their duties, such as refusing to take offensive action against British forces, and only defended their states from invasion).

260. See JAMES H. BROUSSARD, *THE SOUTHERN FEDERALISTS: 1800-1816*, at 160-64 (1978).

261. See *id.* at 160.

262. See ANTHONY J. YANIK, *THE FALL AND RECAPTURE OF DETROIT IN THE WAR OF 1812: IN DEFENSE OF WILLIAM HULL* 96 (2011); SKEEN, *supra* note 259, at 29-30.

263. See YANIK, *supra* note 262, at 106, 112. Yanik notes that, in regard to Martin Van Buren and another civilian attorney serving as judge advocates, "Having civilians in charge of a military trial again was a departure from the norm." *Id.* at 110. On General Hull's view of his court-martial, see generally, WILLIAM HULL, *MEMOIRS OF THE CAMPAIGN OF THE NORTH WESTERN ARMY OF THE UNITED STATES, A.D. 1812* (1824). Hull lamented that the American general he blamed as most responsible for the defeat of his forces, General Dearborn, sat as the presiding officer on the

administration needed a scapegoat and Hull served this purpose.²⁶⁴ Madison had, in his role as Commander-in-Chief, selected Hull to command the nation's regular and militia forces on the northern frontier.²⁶⁵

Political newspapers of the time, such as the *Niles Weekly Register*, reported on the trial and questioned Hull's loyalty to the nation, and former President Thomas Jefferson openly accused Hull of "treachery."²⁶⁶ Evidencing the political nature of courts-martial, the Secretary of the Army appointed Martin Van Buren, a civilian New York State Legislator who had not taken part in the war, to serve as the judge advocate for the court-martial.²⁶⁷ On March 26, 1814, the court-martial determined that Hull was guilty and sentenced him to "be shot to death," but Madison, after approving the sentence and the recommendation of some of the officers on the court-martial, determined that because Hull had faithfully served in the Continental Army in the Revolutionary War against Britain, the sentence would be set aside, allowing Hull to retire.²⁶⁸ Thus, in the politically charged court-martial of a general, Madison appears to have been reticent to openly proclaim Hull's guilt or demand a sentence to death, and, whether Madison believed Hull had received a fair trial—something Hull did not receive—he exercised leniency.

A. Polk, Lincoln, Roosevelt, and Roosevelt: Pre-UCMJ Conduct

At the end of the war with Mexico, President James K. Polk intruded into the potential court-martial of one of his political supporters, General Gideon Johnson Pillow.²⁶⁹ Commanding General of

court-martial. *Id.* at 13.

264. YANIK, *supra* note 262, at 104.

265. DANIEL S. HEIDLER & JEANNE T. HEIDLER, *THE WAR OF 1812*, at 59 (2002). The Heilders' note, "Hull's surrender of Detroit did more than shatter U.S. confidence in the opening weeks of the war; it squandered one of the best opportunities for the United States to win a significant victory." *Id.* at 60.

266. See *Trial of General Hull*, NILES WKLY. REG., May 7, 1814, at 154-62; see also TROY BICKHAM, *THE WEIGHT OF VENGEANCE: THE UNITED STATES, THE BRITISH EMPIRE, AND THE WAR OF 1812*, at 105 (2012). Bickham points out that western newspapers sympathetic to Madison, such as the *Missouri Gazette*, accused Hull of Treason, as did former President Thomas Jefferson. *Id.*

267. DONALD B. COLE, *MARTIN VAN BUREN AND THE AMERICAN POLITICAL SYSTEM* 40-41 (1984).

268. CONG. GLOBE, 37th Cong., 2d Sess. 1665 (1862); 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, 3D JANUARY, 1814, AND SUCCEEDING DAYS 119 (Eastburn, Kirk, & Co. 1844).

269. See ALLAN PESKIN, WINFIELD SCOTT AND THE PROFESSION OF ARMS 198-200 (2003). Pillow had also informed Polk of a fictitious bribery scheme from Antonio López de Santa Anna, the commander of the Mexican Army, to Winfield Scott to end the war. *Id.* at 173-74; Ramon Alcaraz, *Santa Anna Did a Lot More than Kill Davy Crockett*, STRAUSMEDIA (Feb. 17, 2015, 1:29

the Army, Winfield Scott, accused Pillow of spreading falsehoods to the point of conduct unbecoming of an officer and gentleman, and in turn, Polk removed Scott from Mexico back to the United States.²⁷⁰ The President also established a court of inquiry—akin to a grand jury—and after stacking the inquiry with pro-Pillow officers, the inquiry determined that Pillow's exaggerations and conduct were not worthy of a court-martial.²⁷¹ However Polk may have manipulated the courts-martial system to insulate a favorite general, he did not undermine the fairness of a court-martial to the detriment of an accused servicemember, nor did he act without conformity to the Articles of War.

From November 27, 1862, through January 21, 1863, the Army court-martialed General Fitz-John Porter for disobeying lawful orders and misbehavior before the enemy at the Second Battle of Manassas.²⁷² Porter had, in fact, used disparaging language toward General John Pope, the commanding general at the battle.²⁷³ While Judge Advocate General Holt's conduct (as well as that of Secretary of War Edwin Stanton) during and after the trial has come under question, at no time did President Abraham Lincoln issue a public statement regarding the trial to Porter's detriment or demand the court-martial reach a specific result.²⁷⁴ And, prior to his court-martial, Porter had published articles in the *New York World* that were highly critical of Lincoln's cabinet as well as against other generals.²⁷⁵

PM), <http://www.nypress.com/news/santa-anna-did-a-lot-more-than-kill-davy-crockett-LFNP1020020910309109999>. In his diary, Polk noted that both Nicholas Trist and Scott "seem to have entered into a conspiracy to embarrass the government." James K. Polk Papers: Series 1, Diaries, 1845-1849 (Jan. 24, 1848), https://www.loc.gov/resource/mss36509.003_0010_0743/?st=gallery.

270. JOHN S.D. EISENHOWER, *AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT* 314-17, 320 (1997); Roy P. Stonesifer, Jr., *Gideon J. Pillow: A Study in Egotism*, 25 TENN. HIST. Q. 340, 342-44 (1966).

271. See Stonesifer, *supra* note 270, at 344.

272. See KASTENBERG, *supra* note 66, at 86, 89; see also JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 528 (1988).

273. MCPHERSON, *supra* note 272, at 528.

274. See REVERDY JOHNSON, *A REPLY TO THE REVIEW OF JUDGE ADVOCATE GENERAL HOLT OF THE PROCEEDINGS, FINDINGS AND SENTENCE, OF THE GENERAL COURT MARTIAL, IN THE CASE OF MAJOR GENERAL FITZ JOHN PORTER, AND A VINDICATION OF THAT OFFICER* 9, 55 (1863). Senator Reverdy Johnson, a pro-Union democrat representing Maryland, served as Porter's defense counsel and later as a defense counsel in the military commissions trial of Mary Surratt. See BERNARD C. STEINER, *THE LIFE OF REVERDY JOHNSON* 55, 115 (1914). He also was a pallbearer at President Lincoln's funeral. See *id.* at 115.

275. See, e.g., ETHAN S. RAFUSE, *MCCLELLAN'S WAR: THE FAILURE OF MODERATION IN THE STRUGGLE FOR THE UNION* 342 (2005). Perhaps one of the most critical accounts of Lincoln was by his former postmaster general, Montgomery Blair, who later argued that Lincoln had the duty to appoint the officers to Porter's court-martial but permitted Stanton to do so. See MONTGOMERY BLAIR, *POSTMASTER-GENERAL DURING PRESIDENT LINCOLN'S ADMINISTRATION TO MAJ.-GEN. FITZ JOHN PORTER* 1-2, 5-6 (1874). Porter's chief defense counsel, Senator Reverdy Johnson, in

Theodore Roosevelt, in 1902, publicly articulated his disgust with the lenient court-martial sentence of General Jacob Hurd Smith, who had been convicted of “conduct to the prejudice of good order and military discipline,” and sentenced to an admonishment.²⁷⁶ Smith not only oversaw the murder of Philippine civilians, he perjured himself in the court-martial of a subordinate officer who was court-martialed for commanding the actual killings.²⁷⁷ However, under the Articles of War and military procedures at the time, either the President or then-Secretary of War Elihu Root could have acted as Arthur had with Swaim and sought a more severe sentence, but chose not to do so.²⁷⁸ Moreover, since the sentence for Smith was an admonishment, it is arguable that Roosevelt merely carried out the court-martial sentence in his public comments.

In 1938, retired General George Van Horn Moseley openly accused President Franklin Roosevelt of being a communist and claimed that the President was unfit to serve as Commander-in-Chief.²⁷⁹ Roosevelt opted not to recall Moseley to active duty for a court-martial.²⁸⁰ One year after the Japanese attack on Pearl Harbor, Moseley wrote to former President Herbert Hoover that Roosevelt’s policies were responsible for the war with Japan.²⁸¹ Toward the end of the war, Moseley argued to Senator Homer Ferguson of Michigan that Roosevelt was responsible for the attack at Pearl Harbor.²⁸² In 1942, Roosevelt asked Supreme Court

evidencing Lincoln’s hands-off approach to the Porter trial, complained that “[t]he President’s time, however, was perhaps so engrossed by matters which he supposed to be of more pressing national moment” that he was unable to give the court-martial the attention it merited. See JOHNSON, *supra* note 274, at 8-9.

276. *President Retires Gen. Jacob H. Smith: Philippine Officer Reprimanded for “Kill and Burn” Order*, N.Y. TIMES, July 17, 1902, at 1.

277. *Id.*

278. *Id.*

279. See, e.g., *Moseley Aims to Save Nation: Replies to Charge He Heads Un-American Group*, N.Y. SUN, May 20, 1939, at 2; FRANCIS MACDONNELL, *INSIDIOUS FOES: THE AXIS FIFTH COLUMN AND THE AMERICAN HOME FRONT* 41 (1995).

280. See *Court Martial of Mosely for Insubordination Sought*, JEWISH TELEGRAPHIC AGENCY, June 5, 1939, at 5.

281. See Letter from George Van Horn Moseley, Gen., U.S. Army, to Herbert Hoover (Dec. 18, 1942). In his letter, Moseley said:

Mr. Roosevelt tells us that there will be 10,000,000 men in our fighting forces—the cream of American manpower. While they are away from home—out of the country—are we going to allow the home country to be taken over by a lot of un-Americans, communists and Jews? That is actually taking place today. The evidence of this trend is voluminous and very clear.

Id. Moseley openly reiterated his allegations to Republican senators. See, e.g., Letter from George Van Horn Moseley, Gen., U.S. Army, to Homer Ferguson, U.S. Senator (Dec. 26, 1945). Hoover disagreed with Moseley. See Letter from Herbert Hoover to George Van Horn Moseley, Gen., U.S. Army (Dec. 20, 1942).

282. See, e.g., Letter from George Van Horn Moseley to Homer Ferguson, *supra* note 281.

Justice Owen Roberts to lead an investigation into the Japanese attack on Pearl Harbor.²⁸³ While Roberts's agreement to do so brings forth interesting questions of judicial ethics and the erosion of the important separation of powers doctrine, his presence on a board of critical national security importance also gave confidence to the public that Roosevelt would be unable to direct the investigation to a specific result.²⁸⁴ After all, Roberts was not appointed to the Court by Roosevelt; it was Hoover who did so.²⁸⁵

B. Truman and Eisenhower: Presidential Conduct Under the UCMJ

President Harry S. Truman, like Abraham Lincoln and Franklin Roosevelt, evidenced particular caution to avoid influencing military proceedings that had the potential to become politically or socially important. Truman was President during the well-publicized court-martial of Major General Robert Grow, who was accused of negligently permitting classified information to be captured by Soviet intelligence.²⁸⁶ General Grow's court-martial was well reported in the press, and Truman received public pressure over the military's handling of the trial.²⁸⁷ The historic record contains no statements from Truman regarding the court-martial, although in response to a reporter's questions on the political activities of generals, Truman responded: "I have no comment. The Army is handling that."²⁸⁸ Grow's court-martial, conducted at the height of the Korean War, was not the only publicized military proceeding Truman responded to without demanding a specified outcome.

In early August 1951, ninety United States Military Academy ("USMA") cadets were expelled after being accused of cheating on

283. See John J. McCloy, *Owen J. Roberts' Extra Curiam Activities*, 104 U. PENN. L. REV. 350, 350, 352 (1955).

284. That Roberts dissented in *Korematsu v. United States* evidences that he was likely independent in assessing Roosevelt's wartime decisions. *Korematsu v. United States*, 323 U.S. 214, 225-33 (Roberts J., dissenting). Roosevelt was not alone in appointing justices to serve on military investigations. In 1942, the Governor General of Canada appointed Chief Justice Sir Lyman Duff of the Supreme Court of Canada to lead an investigation into the defeat of Canadian forces against the Japanese in Hong Kong. See *WAR AND DIPLOMACY ACROSS THE PACIFIC, 1919-1952*, at 158-59 (A. Hamish Ion & Barry D. Hunt eds., 1988). Duff, like Roberts, would lend credence to the public belief in the fairness of the investigation.

285. See *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 383 (Melvin I. Urofsky ed., 1994).

286. GEORGE F. HOFMANN, *COLD WAR CASUALTY: THE COURT-MARTIAL OF MAJOR GENERAL ROBERT W. GROW* 7-9 (1993).

287. *Id.* at 43-50. For an example of the front-page reporting on the trial, see *Grow Court-Martial Is Started in Secret*, N.Y. TIMES, July 24, 1952, at 30.

288. The President's News Conference of June 12, 1952, 4 PUB. PAPERS 416 (June 12, 1952).

exams.²⁸⁹ The cheating scandal—in violation of the West Point honor code—garnered front page headlines.²⁹⁰ Over a third of the expelled cadets were football players, leading to further media and national interest in the scandal.²⁹¹ Although the cadets were not yet commissioned officers, they were subject to the recently enacted UCMJ.²⁹² Truman's reaction to the scandal was not to press for a court-martial prosecution, but rather to affix blame on the prominence of college football as a lure for academically underperforming students to cheat.²⁹³ Indeed, his Military Aide, General Harry Vaughan, believed that to diffuse public calls for a court-martial, Truman should simply hold the cadets back one year.²⁹⁴ Truman did not follow Vaughan's advice and instead appointed Judge Learned Hand to lead an investigation into the cadets who were accused of cheating.²⁹⁵ Based on

289. See STEVEN E. AMBROSE, *DUTY, HONOR, COUNTRY: A HISTORY OF WEST POINT* 318 (Johns Hopkins Paperbacks ed. 1999) (1966).

290. *Id.*; see, e.g., *West Point Ousts 90 Cadets for Cheating in Classroom; Football Players Involved*, N.Y. TIMES, Aug. 4, 1951, at 1.

291. See Stephen H. Norwood, *Scandals and Controversies in Football*, in TOUCHDOWN: AN AMERICAN OBSESSION 59, 69-70 (Gerald R. Gems & Gertrud Pfister eds., 2019). According to Norwood, based on a September 1951 Gallup Poll, more Americans knew of the West Point Football cheating scandal than of the Senate's hearings on Douglas MacArthur's conduct in Korea and subsequent dismissal. *Id.* at 70.

292. See, e.g., *United States v. Ellman*, 25 C.M.R. 588, 591 (A.B.R. 1958). However, the military must afford a cadet due process before an administrative board resulting in expulsion. *Hagopian v. Knowlton*, 470 F.2d 201, 210-11 (2d Cir. 1972). In *Hagopian*, the Court of Appeals for the Second Circuit determined that while the USMA's system of cadet demerits was sound, the discharge process utilizing demerits failed administrative due process. *Id.* at 210-12.

293. See Letter from Harry S. Truman, U.S. President, to Mrs. Charles R. Howard (Aug. 17, 1951). Truman wrote to Howard: "It is my opinion that the commercializing of football and the extra curricula and things these young men had to do brought about the situation. There is nothing I can do about what is past but I am taking steps to cure the situation for the future." *Id.* However, as a biography of legendary football coach, Vince Lombardi—who began his coaching career at the USMA before moving to other coaching positions and ending with the Green Bay Packers—notes, Republican congressional opponents of Truman blamed the Truman administration for the scandal and claimed the athletes were "scapegoats." DAVID MARANISS, *WHEN PRIDE STILL MATTERED: A LIFE OF VINCE LOMBARDI* 133 (1999). For a background on Lombardi's career, see generally *id.*

294. See Memorandum for the President from Harry H. Vaughan, Mil. Aid to the U.S. President, to Harry Truman, U.S. President (Aug. 7, 1951). Vaughan advised Truman that:

The ninety men who are to be dismissed have undoubtedly broken the law and should be penalized but there are several other matters which should be considered. These men have been caught, or have confessed, and it is entirely possible that there are a hundred other men who are equally guilty and have not confessed. Also, there are hundreds who have done exactly as these men have done but have been permitted to graduate and given commissions in the United States Army. Would it not be possible to serve the same purpose by turning all these men back one year rather than dismissing them? This, of course, might not meet with the approval of the Superintendent of the Academy or the Chief of Staff, but it is one solution and I believe worth considering.

Id.

295. On the idea for an investigation headed by a judge, see Memorandum for the President from Robert L. Dennison, Aide to the U.S. President, to Harry Truman, U.S. President (Aug. 9,

Judge Hand's advice, and with Truman's approval, the investigation resulted in over eighty administrative dismissals, although some of the dismissed cadets later obtained military commissions from other sources and served in the Vietnam Conflict.²⁹⁶

On May 23, 1956, during a news conference, a reporter asked President Dwight D. Eisenhower a question on the persistent infighting between the service branches over funding and whether inter-service rivalry eroded discipline.²⁹⁷ Broadening his answer beyond inter-service rivalry, Eisenhower responded, "[T]he day that discipline disappears from our forces, we will have no forces, and we would be foolish to put a nickel into them."²⁹⁸ One year earlier, Eisenhower was presented with a public outcry demanding that the so-called "turncoat" prisoners of war from the Korean War be court-martialed.²⁹⁹ Following the end of the Korean War, thousands of allied soldiers who were held as prisoners by the People's Republic of China and North Korea were repatriated, and a small number were accused of collaborating with the enemy at the expense of loyal prisoners of war.³⁰⁰ A smaller number of United States service members initially refused repatriation after being accused of collaboration, but returned to the United States after the formal prisoner of war exchanges ceased.³⁰¹

1951). An advisor to Truman, Dennison recommended "corrective measures to enable that school to pursue with optimum effect its primary objective of developing career officers. Such a commission might include a Supreme Court Justice . . ." *Id.*; see also MARANISS, *supra* note 293, at 126-27.

296. See MARANISS, *supra* note 293, at 127, 132. Although judges' extra-judicial duties on behalf of the executive branch have come into question, Judge Hand's appointment undoubtedly reduced congressional criticism of Truman's response since Truman followed the investigation's recommendations. On the conclusion of the investigation, see AMBROSE, *supra* note 289, at 318.

297. The President's News Conference of May 23, 1956, 7 PUB. PAPERS 511, 513-14 (May 23, 1956).

298. *Id.* Eisenhower added:

Now, there comes a place in the military hierarchy where someone must make a decision, and that decision must stick. The President, constitutionally, is the Commander[-]in[-]Chief, and what he decides to do in these things, in the form and the way that you arm and organize and command your forces, must be carried out.

Id. at 514.

299. See CHRISTINE KNAUER, LET US FIGHT AS FREE MEN: BLACK SOLDIERS AND CIVIL RIGHTS 213-14 (2014).

300. Elizabeth Lutes Hillman, *Disloyalty Among "Men in Arms": Korean War POWs at Court-Martial*, 82 N.C. L. REV. 1629, 1640, 1642-43 (2004). Professor Hillman writes, in assessing among the many factors that led to courts-martial: "The court-martialed POWs became symbols of the weakness and disloyalty that military and civilian leaders felt obliged to purge from the ranks of the Cold War armed forces." *Id.* at 1631-32. For one example of an actual court-martial, see *United States v. Dickenson*, 6 C.M.A. 438 (1955). Among the various charges referred to the court-martial were Article 104, "Aiding the enemy" and Article 105, "Misconduct as a prisoner" of the UCMJ. *Id.* at 447, 449; see also *United States v. Batchelor*, 19 C.M.R. 452, 465, 507 (A.B.R. 1955).

301. SUSAN L. CARRUTHERS, COLD WAR CAPTIVES: IMPRISONMENT, ESCAPE, AND BRAINWASHING 218-20 (2009).

Newspaper headlines from 1953 through 1955 illustrate that the weight of public sentiment—including a number of congressmen—assessed these prisoners of war as criminals deserving of courts-martial, and the public, as well as members of Congress, were further angered to learn that in some cases, the military had lost jurisdiction to do so.³⁰² The Court, in an opinion authored by Justice Potter Stewart, in determining that three of the former prisoners of war were entitled to backpay, began its opinion with the following statement: “The petitioners were enlisted men in the United States Army who were captured during the hostilities in Korea in 1950 and 1951. In the prison camps to which they were taken they behaved with utter disloyalty to their comrades and to their country.”³⁰³ Yet Eisenhower, perhaps because of his extensive military service and rectitude for limiting the powers of his office, decided to refer to the so-called “turncoat” prisoners in softer, biblical terms such as “prodigal sons” and “lost sheep.”³⁰⁴

C. Nixon: *The Court-Martial of Lieutenant William Calley*

On December 9, 1969, in response to a reporter’s question regarding the My Lai massacre, President Richard Milhous Nixon conceded that a “massacre” had occurred and then stated: “That’s why I’m going to do everything . . . to see that all the facts in this incident are brought to light, and that those who are charged, if they are found guilty, are punished.”³⁰⁵ Nixon did not name Lieutenant William Calley in this statement, and he later counseled caution against speaking of Calley’s guilt.³⁰⁶ On November 26, 1969, Secretary of the Army Stanley Resor lobbied the House of Representatives against demanding trials or making public statements that could prejudice the over one dozen courts-martial the Army contemplated for the massacre.³⁰⁷

302. Adam J. Zweiback, *The 21 “Turncoat G.I.s”: Nonrepatriations and the Political Culture of the Korean War*, 60 *HISTORIAN* 345, 346-47, 350-53 (1998).

303. *Bell v. United States*, 366 U.S. 393, 394 (1961). While Justice Stewart’s opinion was likely a sincere encapsulation of the conduct and character of the three former prisoners of war, this type of editorializing might be unhealthy for assuring the public that the Court is impartial in its judgments.

304. Zweiback, *supra* note 302, at 353.

305. *Calley v. Callaway*, 382 F. Supp. 650, 674 (M.D. Ga. 1974).

306. *See id.* at 676.

307. *Id.* at 663. It should not be interpreted from this Article that the author believes Nixon operated solely with the interest of a fair trial for Calley. For instance, Daniel Moynihan, later a Democratic senator, while serving as counsel to Nixon, advised Nixon to characterize the massacre as part of a war of “liberal anti-communism.” *See Memorandum from Daniel P. Moynihan, Advisor to U.S. President, to Richard Nixon, U.S. President (Nov. 25, 1969)* (on file with the Richard Nixon Presidential Library and Museum). National Security Advisor, Henry Kissinger, advised that a court-martial of the participants, if properly conducted, would cause Senator Charles Goodell to “abandon his plans for a Senate investigation.” *Memorandum from Henry A. Kissinger, U.S. Nat’l*

On April 1, 1971, in the midst of the Calley court-martial, White House Counsel John Dean advised Nixon to refrain from taking action before the Army Court of Military Review and the convening authority had acted on Calley's conviction.³⁰⁸ Among the reasons Dean listed for refraining from presidential action was Article 37. Dean warned, "Any Presidential statement about the specifics of this case would be subject to criticism as an exertion of command influence."³⁰⁹ Although Nixon later granted Calley relief in the sense that he ordered Calley into house arrest, he refrained from making public comments that had the potential to affect the military appeal process either to the detriment of Calley or the prosecution.³¹⁰ In comparison, in 1970, Nixon publicly commented on his belief of Charles Manson's guilt in a pending California murder trial.³¹¹ However, White House Press Secretary Ronald Zeigler quickly disavowed any presidential intent to influence the jury.³¹² When

Sec. Advisor, to H.R. Haldeman, White House Chief of Staff (Nov. 21, 1969) (on file with the Richard Nixon Presidential Library and Museum). Finally, on the eve of Calley's trial, Nixon obtained the opinions of loyal congressmen as to how the administration should proceed with the court-martial in order to limit criticism. See Memorandum from Dick Cook, Special Assistant to the U.S. President, to John Ehrlichman, Counsel to U.S. President (Apr. 7, 1971) (on file with the Richard Nixon Presidential Library and Museum).

308. See Memorandum from John Dean, Counsel to U.S. President, to John Ehrlichman, Counsel to U.S. President, & H. R. Haldeman, White House Chief of Staff (Apr. 1, 1971) (on file with the Richard Nixon Presidential Library and Museum).

309. *Id.* While Dean did not conclude that a President was bound by Article 37, he cautioned that presidential statements that could be taken as a directive to the military chain-of-command involved in the Calley court-martial "would run counter to the spirit of the prohibition of command influence." See *id.*

310. See Ian Shapira, *He Was America's Most Notorious War Criminal, but Nixon Helped Him Anyway*, WASH. POST (May 25, 2019, 7:00 AM), <https://www.washingtonpost.com/history/2019/05/25/he-was-americas-most-notorious-war-criminal-nixon-helped-him-anyway>. On December 8, 1970, in response to a reporter's question, Nixon conceded that a "massacre" had occurred, and then stated: "That's why I'm going to do everything . . . to see that all the facts in this incident are brought to light and that those who are charged, if they are found guilty, are punished." *Calley*, 382 F. Supp. at 674. On April 16, 1971, Nixon stated the following in a press conference, in response to a question predicated on the prosecutor claiming he had undermined military justice by not requiring Calley to be imprisoned: "Captain Daniel is a fine officer. And, incidentally, the six members of that court had very distinguished military records. Five of the six, as you know, Mr. Risher, had served with distinction in Vietnam." Panel Interview at the Annual Convention of the American Society of Newspaper Editors, 2 PUB. PAPERS 537 (Apr. 16, 1971). On April 29, 1971, in response to another press conference question on why he intervened in the *Calley* case, Nixon responded:

Well, Mr. Jarriel, to comment upon the Calley case, on its merits, at a time when it is up for appeal would not be a proper thing for me to do, because, as you know, I have indicated that I would review the case at an appropriate time in my capacity as the final reviewing officer.

The President's News Conference of April 29, 1971, 2 PUB. PAPERS 596 (Apr. 29, 1971).

311. Ken W. Clawson, *Nixon 'Slips,' Refers to Manson as Guilty: Criticizes Coverage of Trial*, WASH. POST, Aug. 4, 1970, at A1.

312. See *id.*

juxtaposing Nixon's conduct toward Calley with his statements on Manson, it highlights a degree of presidential caution over influencing the military justice system.

D. The Conduct of President Trump and the Decay of Lex Non Scripta

The last three presidential administrations have, with increasing severity, ignored the *lex non scripta* examples of their predecessors. In 2004, President George W. Bush commented on servicemembers accused of criminality in the Abu Ghraib scandal, prior to their courts-martial, as not representing the values of the United States armed forces.³¹³ In 2013, President Barack Obama publicly called for dishonorable discharges for servicemembers convicted of sexual assault offenses, prompting then-Secretary of Defense Charles Hagel to instruct all servicemembers that while serving on courts-martial, they had the duty to fairly and impartially assess evidence presented at trial to the exclusion of external pressures.³¹⁴

As noted in Part I, during the 2016 presidential campaign and after, candidate, and eventual president, Donald Trump, articulated often false and misleading comments about Robert Bowe Bergdahl.³¹⁵ On October 17, 2017, Trump used the term "traitor" to characterize Bergdahl.³¹⁶ Trump's statement was made before a military judge issued a sentence.³¹⁷ After Bergdahl was sentenced to a dishonorable discharge, without jail time, Trump cast aspersions on the sentence.³¹⁸ Even as Bergdahl's case was advancing through the appellate process, Trump publicly attacked the verdict.³¹⁹ It is a reasonable assumption that, in addition to seeking to become elected, as well as maintaining the energy

313. *Just a Few Bad Apples?*, ECONOMIST (Jan. 20, 2005), <https://www.economist.com/united-states/2005/01/20/just-a-few-bad-apples> (quoting President George W. Bush, who said that "[t]he 'disgraceful conduct' had been the work of 'a few bad apples' who would be brought to justice").

314. Jennifer Steinhauer, *Hagel Tries to Blunt Effect of Obama Words on Sex Assault Cases*, N.Y. TIMES, Aug. 15, 2013, at A14.

315. For a small sampling of President Trump's comments, see, for example, Richard A. Oppel, Jr., *Documents Show Army Initially Pursued Softer Course on Bergdahl*, N.Y. TIMES, Mar. 17, 2016, at A11; Richard A. Oppel, Jr., *Bergdahl Is Spared Prison, to President's Chagrin*, N.Y. TIMES, Nov. 4, 2017, at A1.

316. Richard A. Oppel, Jr., *Soldier Called "Traitor" by Trump Pleads Guilty to Desertion and Endangering*, N.Y. TIMES, Oct. 17, 2017, at A10.

317. *See id.*

318. *See* Meghan Keneally, *President Trump Slams Bowe Bergdahl's Sentence: 'Complete Disgrace'*, ABC NEWS (Nov. 3, 2017, 1:01 PM), <https://abcnews.go.com/Politics/president-trump-bowe-bergdahl/story?id=50912155>; Daniella Diaz, *Trump Slams Bergdahl Decision: 'Complete and Total Disgrace'*, CNN (Nov. 3, 2017, 4:23 PM), <https://www.cnn.com/2017/11/03/politics/donald-trump-bowe-bergdahl-twitter/index.html>.

319. *Trump Rails Against Bowe Bergdahl and Chelsea Manning*, WASH. POST (Nov. 25, 2019, 3:32 PM), https://www.washingtonpost.com/video/politics/trump-rails-against-bowe-bergdahl-and-chelsea-manning/2019/11/25/5b5b52ed-8446-48f9-b7af-1f34547eb614_video.html.

of his supporters to a cause, Trump did, in fact, seek to maximize Bergdahl's punishment through influencing the court-martial.

On July 16, 2019, the Army Court of Criminal Appeals determined in *United States v. Bergdahl*,³²⁰ that while "there was some evidence of unlawful command influence adduced at trial and in the post-trial process," the Government had met its burden of proof to "demonstrate that an objective disinterested observer would not harbor a significant doubt as to the fairness of the proceedings."³²¹ At his court-martial, Bergdahl had opted for a court-martial by a military judge, rather than by a panel, but only made the selection for a bench trial because Trump had made a fair trial by a panel an impossibility.³²² Unfortunately, the two judges in the majority delivered a paltry legal analysis, stating that "[i]ncendiary remarks by private citizens, even influential ones, do not constitute evidence of [unlawful command influence]," without acknowledging that the President is also the Commander-in-Chief, imbued with the great powers that title carries.³²³

Government appellate counsel argued that the President could only have committed unlawful command influence when serving as a convening authority and then only under the Rules for Courts-Martial ("RCM").³²⁴ RCM 104(a)(1) carries language similar to Article 37.³²⁵ The two judges in the majority determined that Article 37 did not apply to the President, nor, by implication, to civilian officers in the military establishment, but rather, the RCM does.³²⁶ The distinction between the

320. 79 M.J. 512 (A. Ct. Crim. App. 2019).

321. *Id.* at 517. In addition to alleging that Trump committed unlawful command influence, Bergdahl also alleged Senator John McCain did as well. *See id.* at 521. While Senator McCain served as chair of the Senate Armed Services Committee and had persuasive ability over the promotion of officers and the allocation of expenditures, Article 37 does not mention the legislative branch either directly or by implication. *See id.* Bergdahl's argument on expanding the prohibition to Congress, while it may be meritorious, is not addressed in this Article. *See id.* at 522.

322. *See* Jonathan Drew, *Bergdahl Chooses to Have Trial Heard by Judge, Not Jury*, ARMY TIMES (Aug. 21, 2017), <https://www.armytimes.com/news/your-army/2017/08/21/bergdahl-chooses-to-have-trial-heard-by-judge-not-jury>.

323. *Bergdahl*, 79 M.J. at 523.

324. *Id.* at 524-25.

325. *Id.*

326. *Id.* at 525. Rules for Courts-Martial 104(a)(1) states, in pertinent part:

(a) *General prohibitions.*

(1) *Convening authorities and commanders.* No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104(a)(1) (2019); *see also Bergdahl*, 79 M.J. at 525. The Army Court, in citing to the applicability of this rule, did not note that on March 1, 2018, President Trump issued Executive Order No. 13825, reaffirming the rule's existence. This

RCM and Article 37 is important for two reasons. First, the Army Court acknowledged that while Article 37 applies to the convening authority who referred the charges against Bergdahl to trial by court-martial, the RCM applies to *all* convening authorities.³²⁷ Second, the RCM are rules promulgated by the President, and the UCMJ is law.³²⁸ There is an important legal, if not political, difference between violating an administrative rule and violating the law, and the Army Court's decision places the President's conduct in the lesser category of egregiousness. Such a position is at odds with the weight of military law presented in this Article.

It should be noted that the Army Court possesses, in contrast to the federal appellate courts, unusual fact-finding authorities,³²⁹ but it did not exercise such authorities in this case. The three judges, all subject to the President's orders, could have sought a statement of retraction or assurance from the President that no member would be adversely affected if the case were overturned or the sentence reassessed, such as had occurred with Secretary of Defense Hagel. The court could have also issued a cautionary statement against further intrusions into the military justice system, but it did not do so.

On August 27, 2020, the CAAF issued its decision in *United States v. Bergdahl*.³³⁰ All five of the judges agreed that a President is not shielded from the prohibition against unlawful command influence.³³¹ The majority also applied this analysis to Senator John McCain, a decorated military retiree who publicly insisted on greater punishment for Bergdahl.³³² However, Judge Kevin Ohlson and Senior Judge Margaret Ryan determined that while Trump had committed apparent unlawful command influence under RCM 104(a)(1), a neutral observer would conclude that the court-martial was untainted by it because there was no "intolerable strain on the Military Justice System."³³³ In his concurrence, Judge Gregory Maggs agreed with the majority that under

reaffirmation evidences that the administration knew of the rule's existence as well as the requirement that it follow it.

327. *Bergdahl*, 79 M.J. at 525.

328. See 10 U.S.C. § 836. In addition to the majority's deficient analysis of the law, it failed to note that the President is required to comply with his own rules. See *United States v. McDonald*, 55 M.J. 173, 177 (C.A.A.F. 2001).

329. 10 U.S.C. § 866(d)(1); see also *United States v. Smith*, 39 M.J. 448, 451 (C.M.A. 1994); *United States v. Tyler*, 34 M.J. 293, 295 (C.M.A. 1992). The Supreme Court has upheld the authority of the service courts of appeal to reassess sentences which the appellate courts believe to be unjust without sending the new offenses back to the trial level. See *Jackson v. Taylor*, 353 U.S. 569, 579-80 (1957).

330. 80 M.J. 230 (C.A.A.F. 2020).

331. *Id.* at 234.

332. *Id.* at 234-35. However, it should be noted that this Article is not concerned with the conduct of the legislative branch.

333. *Id.* at 239.

certain conditions, both RCM 104 and Article 37 apply to the President, but he disagreed that Trump committed unlawful command influence because he was not the convening authority in Bergdahl's court-martial.³³⁴ Judge Maggs's strict reading of both Article 37 and RCM 104 ignore the military legal history underlying the prohibition as well as the long-time constitutional and pre-constitutional limitations on presidential conduct over military justice.

Chief Judge Scott W. Stucky concurred with the majority but argued that the President's conduct created an intolerable strain on the military and, therefore, the only appropriate remedy was a dismissal with prejudice.³³⁵ Finally, Judge John E. Sparks concurred with the majority, but, like Judge Stucky, he urged that charges against Bergdahl be dismissed with prejudice.³³⁶ Unlike the other judges, Judge Sparks recognized the vast powers of a President, but he, too, failed to juxtapose those powers against the framers' fears of a standing army.

There are other noteworthy aspects of the decision. The Government's appellate lawyers never noted in their written briefs to the Court that the President is the Commander-in-Chief vested with enormous control over the military; instead, with the exception of a scant argument that Trump did not adversely impact any officer's career through the exercise of his Commander-in-Chief authority, they presented the President as a normal citizen and not an elected official in command of the armed forces with the requirement to faithfully execute the laws of the country. After the CAAF released this decision, the original prosecutor in the case published an opinion piece in *The Washington Post* in which he decried Trump's conduct, including outright lies about Bergdahl, and their effect on the trial.³³⁷ The prosecutor did not claim that Trump had committed unlawful command influence, but he conceded that the President vocally conveyed several lies which were detrimental to Bergdahl.³³⁸ It remains to be seen whether

334. *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.*

335. *Id.* at 244-45 (Stucky, C.J., concurring in part and dissenting in part).

336. *Id.* at 246-48 (Sparks, J., concurring in part and dissenting in part).

337. Justin Oshana, Opinion, *I Led the Prosecution Against Bowe Bergdahl. Trump Made My Job Much Harder*, WASH. POST (Aug. 31, 2020, 2:24 PM), <https://www.washingtonpost.com/opinions/2020/08/31/i-led-prosecution-against-bowe-bergdahl-trump-made-my-job-much-harder>.

338. *Id.* It should be noted that Bergdahl's defense counsel discovered that the military trial judge, Colonel Jeffrey Nance, failed to disclose that he sought a position as an immigration judge and used his ruling in *Bergdahl* as a writing sample. See, e.g., Petition for a Writ of Error Coram Nobis at 3, *Bergdahl v. United States*, No. ARMY MISC 20200588 (A. Ct. Crim. App. Oct. 23, 2020). The Army Court of Criminal Appeals has not issued a ruling at the time of this Article's publication. However, Judge Nance's omission in failing to disclose that he sought a federal administrative judicial position with the Trump administration at the time he issued a ruling upholding Trump's authority to court-martial Bergdahl is troubling. On the requirements of military

the Supreme Court will grant certiorari in this case, or whether other avenues will make clear that there are limitations to presidential conduct over courts-martial.

V. CONCLUSION

Due process in courts-martial is governed by the unique regime of law as applied to the necessities of military service and the national defense.³³⁹ Unfortunately, the Army Court of Criminal Appeals' allusion to President Trump as an influential citizen is nothing more than a gross understatement of the President's power as Commander-in-Chief. While it is true, as Professor Richard Neustadt once penned, that the power of the President is the power to persuade, this statement is inapplicable when the President serves as the Commander-in-Chief.³⁴⁰ Former Postmaster General Montgomery Blair, in his defense of Fitz-John Porter also articulated a sad truism that is readily applicable to Trump's treatment of military justice: "It is no new thing to sacrifice a soldier to serve a political turn."³⁴¹ By his conduct, Trump has expanded Commander-in-Chief authorities over military justice into a monarchical trajectory.

Perhaps supporters of Trump's conduct regarding military justice, and the appellate counsel who argued to uphold Bergdahl's conviction and sentence—if not the President himself—might disagree with the parallel between his treatment of Bergdahl and that of Arthur's toward a court-martialed general. Yet the parallel is all the more real, since neither Trump nor Arthur served in the military—indeed, both used the national conscription laws to be exempted from wartime service—and both took an extreme view of their authority over military justice in the courts-martial of servicemembers they believed did not deserve fair treatment.³⁴² Both presidents abandoned the model of rectitude developed through the examples of Presidents Washington and Lincoln. In President Trump's case, the examples of Presidents Truman, Eisenhower, and even Nixon have also been disregarded. Thus, for the second time in history, presidential conduct designed to undermine the right to a fair trial through coercive influence has occurred. And, unlike in Arthur's time, when the Regular Army's numbers were quite small,

trial judges to disclose, see *In re Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019).

339. See, e.g., *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

340. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 30 (First Free Press Paperback ed. 1991) (1990).

341. BLAIR, *supra* note 275, at 6.

342. On Arthur's purchase of a substitute to serve in the Union Army in his place, see JAMES M. VOLO, *A HISTORY OF WAR RESISTANCE IN AMERICA* 240 (2010).

the current administration, which commands an enormous military, has crossed over into the very behavior that early presidents avoided and nascent democracies saw as a threat. Regardless of whether the President repeats his conduct in Bergdahl's case or treats war-crimes as something less serious than to be desired, or whether Congress fails to include the civilian chain-of-command in Article 37 in the future or if the courts adjudicating Bergdahl's appeal refuse to find that presidential unlawful command influence constitutes more than a danger to the fair trial aspects of courts-martial, a future President will be enabled to use the military to ends feared most at the nation's beginning: a tyranny of the executive.