

REVERSING A DEVOLUTIONARY PATHWAY OF SHODDY HISTORY
 PROTECTING COMMANDER IN CHIEF “AUTHORITIES” IN THE ARTICLE I
 COURTS: A DUAL CALL FOR JUDICIAL RIGOR AND A BROADER
 AMICUS PRACTICE IN ADJUDICATING MILITARY AND VETERANS
 APPEALS

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Suppose that an appellate court judge authors an opinion arising from a challenge against presidential authority and in upholding the presidential authority—in this case a statute-based extension of military jurisdiction as described by a judicial concurrence in *United States v. Begani*—the court cites to the work of two distinguished historians who studied aspects of the formation of law and the military in the Early Republic.¹ But the historians, on reading the judge’s opinion, take exception to the judge’s conclusion. One historian expresses a sentiment to the effect of: “[T]he research in my article and my article itself would have led the concurrence to the opposite conclusion.”² This professor, Mary A.Y. Gallagher, previously served as an editor of *The Selected Papers of John Jay* and, in addition to her other scholarship, is very familiar with the Early Republic’s legal conditions.³ Another historian cited, Professor Kenneth Bowling, labelled the judicial opinion “untenable.”⁴ Added to this dynamic, an oft-cited leading scholar on the formation of the military establishment during the period of the Constitution’s formation and immediately after, Professor Richard Kohn, observed: “The judge confuses the issue by citing soldiers ‘on furlough’ as though they were somehow in civilian status” and “makes a fundamental

¹ 81 M.J. 273, 285 (C.A.A.F. 2021).

² E-mail from Joshua Kastenberg, Assoc. Professor of L., Univ. of N.M. Sch. of L., to Mary A.Y. Gallagher, Assoc. Ed. *THE SELECTED PAPERS OF JOHN JAY*, Columbia Univ. (Feb. 7, 2022, 07:51 EST) (on file with the Baylor Law Review and author).

³ See *JOHN JAY, THE SELECTED PAPERS OF JOHN JAY: 1788–1794* (Mary A.Y. Gallagher et al. eds., 2018).

⁴ E-mail from Kenneth Bowling, Adjunct Professor of Hist., Geo. Wash. Univ., to author (Feb. 9, 2022, 08:32 MST) (on file with the Baylor Law Review and author).

error.”⁵ The statements given by these three distinguished historians were given in response to open-ended questions which did not presuppose the quality of the judicial opinion.⁶

For decades, if not centuries, debates have raged over scholarly methods of historical research and writing.⁷ Since the end of World War II, historians have accused the nation’s courts of engaging in “lawyers’ history,” or the selective distortion of historical data to buttress contemporary policy outcomes.⁸ Criticisms of historians were not relegated to jurists but expanded to the legal academy, and it is helpful to tie the academy to the courts as a matter of context. In early 1941, Daniel Boorstin, one of his generation’s preeminent historians, observed that legal historians tended to “categorize” their studies into defined subjects, such as the histories of torts or contracts, without undertaking the rigor of placing their subject into a larger context of history.⁹ Boorstin also argued that even broader legal histories, such as Sir

⁵ E-mail from Richard Kohn, Professor Emeritus of Hist. & Peace, War, & Defense, Univ. of N.C., to author (Feb. 7, 2022, 15:12 MST) (on file with the Baylor Law Review and author).

⁶ See e-mail from Joshua Kastenber, Assoc. Professor of L., Univ. of N.M. School of L., to Richard Kohn, Professor Emeritus of Hist. & Peace, War, & Defense, Univ. of N.C. (Dec. 23, 2021, 14:12 MST) (on file with the Baylor Law Review and author); see also email from Joshua Kastenber, Assoc. Professor of L., Univ. of N.M. School of L., to Mary A.Y. Gallagher, Assoc. Ed. THE SELECTED PAPERS OF JOHN JAY, Columbia Univ. (Feb. 9, 2022, 08:32 MST) (on file with the Baylor Law Review and author).

⁷ See, e.g., J.A.S. Evans, *Father of History or Father of Lies: The Reputation of Herodotus*, 64 CLASSICAL J. 1, 11–17 (1968) (providing a history of critiques on the so-called “father” of history). For more on ancient debates on responsible history, see ROSALIND THOMAS, *HERODOTUS IN CONTEXT: ETHNOGRAPHY, SCIENCE & THE ART OF PERSUASION* (2000) (noting that while Herodotus is still considered the “father of history,” he was, even in the post-Greek world, also called a liar). See also FRANCOIS HERTO, *THE MIRROR OF HERODOTUS: THE REPRESENTATION OF THE OTHER IN THE WRITING OF HISTORY*, xv (Janet Lloyd trans., 1988). For more contemporary criticisms of historical methodologies, see Robert William Fogel, *The Limits of Quantitative Methods in History*, 80 AM. HIST. REV. 329, 330–31 (1975) (illustrating an ongoing debate in quantitative history through Andrew Jackson and the Second Bank of the United States); Christopher Lloyd, *The Methodologies of Social History: A Critical Survey and Defense of Structurism*, 30 HIST. & THEORY 180, 180 (1991) (highlighting debates on methodologies in social history).

⁸ See G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 488 (2001). White cited to the criticisms of noted historians, Laura Kalman, Charles Miller, and Morton J. Horwitz as evidence of poor judicial history. *Id.*

⁹ See Daniel Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 426 (1941). On Boorstin, see *Daniel J. Boorstin, RIP*, NEW ATLANTIS, Spring 2004, at 97; see also Robert D. McFadden, *Daniel Boorstin, 89, Former Librarian of Congress Who Won Pulitzer in History Dies*, N.Y. TIMES, Feb. 29, 2004, at 36. Professor Gordon S. Wood has likewise observed

William Holdsworth's *History of English Law*, remained compartmentalized, and therefore without context.¹⁰ His critique of legal history has since been addressed, and not simply because context became important to contemporary legal historians, but also because deeper scholarly methodologies have become a part of legal history scholarship. Yet, in some instances, jurists have not followed suit.

In 1973, Lawrence Friedman published *A History of American Law*, in which he posited that evolutions in legal doctrine were often brought about by changes in the distribution of economic and political power in society.¹¹ Later, G. Edward White presented a "canon of detachment" for the study of legal history.¹² The canon contained two elements: an interpretative detachment and a truth detachment.¹³ To White, the interpretative detachment was a suspension of prejudgment toward the historical evidence under examination, and the truth detachment assumed that the organizing interpretive principle on which a historical narrative rested had to be capable of being refuted through reference to the evidence on which the interpretive detachment was based.¹⁴ Finally, and perhaps most obvious to the study of history, Roscoe Pound cautioned against "discovering" legal and constitutional rules by conducting history by analogy.¹⁵ Pound's stated

that legal historians have become "less interested in the decisions of Chief Justice Marshall and more interested in the relation between law and society." GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 741–42* (2009).

¹⁰Boorstin, *supra* note 9, at 424, 426–27. Boorstin was referring to Sir William Searle Holdsworth's (1871–1944) multi-volume work published between 1903 and his death. *See id.* Support for Boorstin's critique is found in Edward Gaffney, Jr., *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 CATH. L. REV. 207, 208–09 (1976). However, in contrast to Boorstin's criticism, Allen Bogue noted that while it was once true that American legal historians had disregarded context, by the 1970s legal historians had begun to place the judicial decisions and statutes within the context of social and economic development and of exploring the reasons why the law and its interpretation changed. *See* Allen G. Bogue, *The New Political History of the 1970s*, in *THE PAST BEFORE US: CONTEMPORARY HISTORICAL WRITING IN THE UNITED STATES* 231, 246–48 (1980).

¹¹LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW*, at xvii (1973).

¹²G. Edward White, *Truth and Interpretation in Legal History*, 79 MICH. L. REV. 594, 597 (1981).

¹³*Id.*

¹⁴*Id.*

¹⁵*See* Roscoe Pound, *What Do We Ask of Legal History*, 11 AM. U.L. REV. 117, 120 (1960) [hereinafter *What Do We Ask*]; *see also* Roscoe Pound, Former Dean, Harvard L. Sch., Address at the Annual Conference of the Northeastern States Branch of the Society for Legal History at the Boston College Law School: *What Do We Ask of Legal History* (Sept. 30, 1961).

concern specifically focused on judges claiming the historicity of rules based on analogy, and therefore using “history” for predetermined decisional outcomes.¹⁶ Pound was hardly the first influential thinker on the nature of law to warn against reasoning by analogy to cement a historic consensus. The sixteenth-century philosopher, Michel de Montaigne, argued “[a]s no event and no shape is entirely like another, so none is entirely different than another.”¹⁷

There is, in my opinion, a usability to White’s arguments, Friedman’s approach, and Montaigne’s and Pound’s caution in judicial opinion writing, particularly when an opinion presents a historical narrative. Given that Alfred H. Kelly’s *Clio and the Court: An Illicit Love Affair* was published in 1965, I am hardly the first professor to criticize the jurists’ uses of history in decision writing.¹⁸ But my arguments are based in the present and toward specified courts, and I also criticize the jurists for failing to import a history-based analysis into a decision when an appellate issue calls for it. Historic context and historic accuracy are important when addressing claims of commander in chief authority. This is true in regard to textualist interpretations of the authority as defined by how the Constitution’s terms might be understood at the time of the ratification.¹⁹ It is also true in regard

¹⁶ See *What Do We Ask*, *supra* note 15, at 120. Pound penned, “A main cause of such failure, however, is in the dangers of reasoning from analogies supplied by history to which judges and legislators and jurists turn in providing for new conditions and situations which continually arise in a changing world.” *Id.* Pound expressed his concern with predetermined outcomes in the judiciary in a letter to another professor and how the American Society for Legal History might protect against this. See Correspondence from Roscoe Pound, former Dean, Harvard L. Sch., to Morris D. Forkosch, former professor, Brooklyn L. Sch. (Aug. 15, 1961) (on file with author). Other historians and social scientists have cautioned against the use of historical analogy. See, e.g., Alejandro Portes, *Hazards of Historical Analogy*, 28 SOC. PROBS. 517, 518–19 (1981); George O. Kent, *Clio the Tyrant: Historical Analogies and the Meaning of History*, 32 HISTORIAN, at 99 (1969) (explaining the overuse of the rise of Nazism and Hitlerian aggression as an analogy).

¹⁷ MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS OF MONTAIGNE 819 (Donald M. Frame trans., Stanford Univ. Press ed. 1957). There are further points to be made regarding Montaigne. After expressing his view on analogy, he discussed how, in the context of justice and punishment, the law can be interpreted to constrain people from exercising their morality and freedom. *Id.*

¹⁸ See generally Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

¹⁹ See, e.g., JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURT AND THE LAW 23–38 (Amy Gutman ed., 1997); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998); see also Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1281 (2020) (describing the objections of textualists to judicial use of legislative intent as well as the textualists’ tools for interpreting the plain meaning of statutes).

to originalism, as defined by what former Solicitor General and federal judge, Robert Bork, argued, which is the original intent of the people who drafted, proposed, adopted, or ratified the Constitution to determine what those people wanted to convey through the text.²⁰

Three Article I courts—the Court of Appeals for the Armed Forces (CAAF), the Court of Appeals for Veterans Claims (CAVC), and the Court of Federal Claims—have both directly and indirectly issued decisions that involve constitutional questions of commander in chief authority. And, in particular, the CAAF’s judges have produced historic narrative-based decisions as well as avoided historic analysis to the detriment of the rule of law and the institution that court serves.²¹ The institution, I argue, impacts more than the military justice system, or even the armed forces, but rather the nation. Historic analysis is commonplace in the Supreme Court on the subject of military authority over society and presidential authority over the military.²² Unlike their Article III peers, Article I judges serve for fixed terms

²⁰ See, e.g., ROBERT BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW: THE FRANCIS BOYER LECTURES ON PUBLIC POLICY 10 (1984). For a more modern explanation of originalism, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 644–50 (2013) (describing “Framework Originalism”). See also John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1172 (1999). Yoo argued that although Originalism focuses both on what the Framers believed and what they did, the understandings of those who ratified the Constitution are important to originalist interpretation. *Id.* at 1173.

²¹ See, e.g., *United States v. Ali*, 71 M.J. 256, 263 (C.A.A.F. 2017) (providing a very brief history of the terms “serving with or accompanying an armed force” and “in the field” in deciding whether military jurisdiction over a civilian is statutorily and under historic precedent viable). In *Ali*, in addition to military amicus, a University of Washington law student supervised by an attorney was accepted by the CAAF as amicus curiae. *Id.* at 256. See also *United States v. Gnibus*, 21 M.J. 1, 4 (C.M.A. 1985) (using military legal history as a means of finding that although the regulations in the appointment and retention of defense counsel were not followed to the accused service-member’s detriment of a regulatory right of having defense counsel of choice, there was no due process infirmity to the court-martial).

²² See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22–23 (1995) (discussing fears of the historic standing armies and the relationship of such fears to limited court-martial jurisdiction); *O’Callahan v. Parker*, 395 U.S. 258, 268 (1969) (discussing fears of standing armies), *overruled by Solorio v. United States*, 483 U.S. 435 (1987); *Ortiz v. United States*, 138 S. Ct. 2165, 2192 (2018) (Alito, J., dissenting) (discussing the early practice of insulating courts-martial from Article III and the Bill of Rights). It should not be taken that I believe that these opinions contained sound historic methodology. For a criticism contemporaneous with *O’Callahan*’s issuance, see Joseph W. Bishop, *The Quality of Military Justice*, N.Y. TIMES, Feb. 22, 1970, at 17. For my own criticism of *O’Callahan*, see JOSHUA E. KASTENBERG, SHAPING U.S. MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY 49 (2014). For my criticism of Justice Alito’s dissent see, Joshua E.

and may be removed from their judicial offices in processes far short of impeachment.²³ Noted further below, the judges on the three Article I courts do not have other bulwark Article III protections that enable judicial independence. This places Article I courts in a weaker position in regard to independently adjudicating presidential authority, or, as Alexander Hamilton postulated about the dangers of a not fully independent judiciary, “[I]nflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”²⁴

Clearly the judges appointed under Article I, like their Article III counterparts, are first and foremost responsible for the quality of their opinion writing, including accuracy in their historical analysis. Counsel representing the parties also play a role, but the extent to which the federal courts adjudicating commander in chief authority should supervise counsel is open to question. As an example, in 1970, several civilian litigants who were involved in the 1970 Kent State University shooting sued Ohio governor John J. Gilligan in federal district court seeking for the court to take a supervisory role in the governance of the state national guard.²⁵ When the appeal came before the Court, Chief Justice Warren Burger expressed his disgust at the poor quality of the Ohio Solicitor General’s arguments and lobbied the Court to have the briefs returned so that the appeal could be calendared to a later date.²⁶ Some of the other justices opposed Burger’s suggestion because it would give an appearance of the Court favoring a military authority before a

Kastenberg, *Neither Constitutionally Demanded nor Accurately Interpreted History: The Judicial Conservatives’ Pockmarked Pathway of Military Law to the Unitary Executive*, 54 *Tex. Tech. L. Rev.* (forthcoming 2022).

²³ See, e.g., Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 *MO. L. REV.* 813, 833 (2011).

²⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean ed., 1788).

²⁵ *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973). Ironically, perhaps, Governor Gilligan was a liberal Democrat who opposed the war. At the time of the Kent State shootings, Ohio’s governor was Republican James Rhodes. See SCOTT L. BILLS, *ECHOES THROUGH A DECADE* 127 (1988).

²⁶ On February 26, 1973, Chief Justice Warren Burger conveyed his disgust with the Ohio solicitor general’s brief. He sought out the conference’s opinion to reject the briefs filed by both sides and issued an order that read as follows: “The briefs filed by the state of Ohio do not meet the minimum standards for adequate consideration of a case presenting important constitutional issues. Accordingly, the briefs filed by Ohio are stricken and the case will be calendared when adequate briefs are filed . . .” Letter from Warren E. Burger, former C.J., Sup. Ct., to the Conference (Feb. 26, 1973) (on file with the Baylor Law Review and author).

significant constitutional question could be determined.²⁷ Burger's entreaty to the Court to delay counsels' oral arguments failed, but in a sense, the Ohio governor—and the concept of the fifty state executive branches and the President's military authorities insulation from judicial review—prevailed when the Court reaffirmed an earlier principle that judges are not tasked with running the military.²⁸

There is another potential check against slovenly or misleading history in judicial opinions, the *amicus curiae*. Unlike the thousands of law reviews published every year, *amicus* briefs are placed before judges, making it more likely that the judges will consider *amicus* arguments than they will law review articles.²⁹ This is particularly important in the three Article I courts

²⁷ Powell agreed with Burger's suggestion. Letter from Lewis F. Powell, former Assoc. J., Sup. Ct., to Warren E. Burger, former C.J., Sup. Ct. (Feb. 27, 1973) (on file with the Baylor Law Review and author). But, Stewart, Douglas, Brennan, and Marshall opposed. See Letter from Potter Stewart, former Assoc. J., Sup. Ct., to Warren E. Burger, former Chief Just., Sup. Ct. (Feb. 28, 1973) (on file with the Baylor Law Review and author); Letter from William O. Douglas, former Assoc. J., Sup. Ct., to Warren E. Burger, former C.J., Sup. Ct. (Feb. 28, 1973) (on file with the Baylor Law Review and author); Letter from William J. Brennan, Jr., former Assoc. J., Sup. Ct., to Warren E. Burger, former C.J., Sup. Ct. (Feb. 28, 1973) (on file with the Baylor Law Review and author); Letter from Thurgood Marshall, former Assoc. J., Sup. Ct., to Warren E. Burger, former C.J., Sup. Ct. (Mar. 1, 1973) (on file with the Baylor Law Review and author). Implicit in Marshall's opposition was that in giving the Ohio solicitor general another opportunity, the Court would be favoring a state governor over other litigants, when he penned the following: "[I]n the first place I do not think we should establish the policy of passing on the merits of briefs duly filed which comply with the technicalities of our rules. Secondly, I do not think the State of Ohio should be given a second chance to do its job." *Id.* After failing to convince the Court to delay argument, Burger campaigned for better brief writing and oral arguments to the state attorney generals and other government agencies. See Letter from Francis B. Burch, Att'y Gen., Md. to Warren E. Burger, former C.J., Sup. Ct. (Jan. 31, 1978) (on file with the Baylor Law Review and author). In *Exxon v. Maryland*, Burch mentioned Burger's concern with poor quality brief writing and asked for divided argument as a means to overcome this. *Id.*

²⁸ *Gilligan*, 413 U.S. at 12 (citing *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)).

²⁹ See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744–46 (2000); see also Jenna Becker Kane, *Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making*, 17 STATE POLS. & POL'Y Q., 251, 268–71 (2017) (concluding that *amicus* briefs have a likelihood of influencing state supreme court judicial votes). For a poignant criticism of *amicus* practice including the use of pressure groups presenting incomplete (or non-existent data) as facts, see Allison Orr Larson, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1761–64 (2014) (noting, by using plagiarism software, that the Court has used the language of *amicus* briefs without delving into the data or citation that the *amicus* relied on). See also Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2051–54 (2012) (noting that *amicus* briefs have contributed to courts of appeal accepting "evidence" that was not introduced in at the trial stage).

which touch upon, if not adjudicate, commander in chief power. Judges on these courts should consider, when producing a simplistic historical narrative, including “incorporating” history by analogy, that they undermine the credibility of their judicial status. Likewise, the avoidance of history can prove problematic as it may permit the expansion of commander in chief power without justification.

Divided into three sections, this article centers on a lack of judicial rigor and a proposed expansion of amicus in the absence of judicial willingness to prevent poor historicism from becoming embedded in the laws regarding commander in chief authority. Section I presents the statutory construct of the three Article I courts, as well as the constitutionality of their jurisdiction. It also provides an analysis of amicus rules as well as an example of how an appeal may traverse through two of the three courts. Section II presents how each of the three courts may impact the constitutional relationship between the commander in chief and the nation as a whole. It does not specifically focus on appeals involving Congress’ power under the “Make Rules Clause,” but rather, on presidential conduct such as in ordering a military uniform change to include international markers, or presidential conduct designed to undermine the fairness of courts-martial.³⁰

Divided into two parts, Section III first presents a model for historic approaches in judicial opinion writing. Again, the purpose of this section is not to convince judges to become historians, but rather, to argue that if a judge is going to take on the role of historian in an Article I court where the power of the presidency is a direct or palpably indirect part of the opinion, a greater degree of historic rigor should be accomplished. The second part of this section dissects the three-judge concurrence in *United States v. Begani*, a CAAF decision issued in 2021, and presents it as a model of poor history scholarship.³¹ The *Begani* concurrence is highlighted as a model of poor historicism not only because of its recency, but also because the Solicitor General of the United States did not disavow it in their argument opposing *Begani*’s petition for a writ of certiorari.³² The article concludes with a reiteration of its now supported premise: A broader acceptance, if not invitation for amicus curiae, in such cases may serve as a check against a presentment of significant constitutional issues wrapped in a slovenly or

³⁰ See U.S. CONST. art. I, § 8, cl. 14.

³¹ 81 M.J. 273, 380 (C.A.A.F. 2021) (Maggs, J., concurring).

³² See Brief for Respondent at 10, *Begani v. United States*, 142 S. Ct. 711 (2021) (No. 21-335). The Court denied *Begani*’s petition on December 13, 2021. *Begani*, 142 S. Ct. 711 (mem.).

flawed historicism. But, while an amicus brief may serve as one “bookend” to encouraging judicial rigor, the other, and perhaps most important, “bookend” are the judges themselves.

In writing this article, I am not arguing that any of the judges on the Article I courts are unqualified. Yet, a “corporate memory” of an Article I court which had been criticized during the Cold War is a reminder for contemporary Article I jurists. In 1978, the CAAF’s predecessor court—the Court of Military Appeals—came under criticism for poor decision writing and the utility of its existence was questioned. This criticism came both from within the Department of Defense as well as from Senator Strom Thurmond (R-SC) and his Senate allies.³³ Thurmond believed that the military appellate court had produced shoddy decisions and he allied with the Department of Defense’s general counsel to propose a bill that would move appeals from courts-martial to the Article III United States Court of Appeals for the Fourth Circuit.³⁴ Although Chief Judge Clement Haynsworth and the other Fourth Circuit judges opposed any transfer of jurisdiction into their court, they too did not believe that the military appellate court had issued decisions of sufficient constitutional rigor.³⁵ Indeed, Haynsworth penned to his court, “I have no doubt that the Court of Military Appeals is not working well. Its judgeships are not calculated to attract people of outstanding ability.”³⁶

³³ Letter from Clement Haynsworth, former Cir. J., 4th Cir., to Robert Martin, Jr. (Aug. 2, 1978) (on file with the Baylor Law Review and author).

³⁴ Letter from Clement Haynsworth, former Cir. J., 4th Cir., to the Cir. JJ. (July 12, 1978) (on file with the Baylor Law Review and author). Haynsworth noted that Thurmond believed the Court of Military Appeals had become liberal. *Id.*

³⁵ *Id.*; see also Herbert Boreman, former Cir. J., 4th Cir., to Clement Haynsworth, former Cir. J., 4th Cir. (May 1, 1978) (on file with the Baylor Law Review and author). It should be noted, however, that unlike Thurmond, Deanne Siemer argued as follows:

There is substantial support for the position that the Military Justice System no longer needs a special court at the top to protect it against the constitutional or procedural requirements that might be imposed by a civilian court. There may be a substantial benefit to the system if the constitutional rights of military personnel are assured to be the equivalent of the rights of civilians to the maximum extent permitted by the legitimate needs of the military by submitting those constitutional questions to an established civilian court.

Deanne Siemer, Life Member, Am. L. Inst., Remarks Concerning the Court of Military Appeals (March 6, 1978).

³⁶ Letter from Clement Haynsworth, former Cir. J., 4th Cir., to the Conference (May 25, 1979) (on file with the Baylor Law Review and author). Of other interest, Robinson O. Everett, a former Court of Military Appeals judge, also sided with Haynsworth against Thurmond and Siemer. *See*

Five final comments about the three courts in this article's focus are important before continuing to the first section. First, the article is premised on a principle that the word limits applicable to law reviews make it impossible to provide a detailed history on any of the cases cited. Second, while the majority of published federal appellate judicial decisions are issued by courts resident in Article III of the Constitution, Congress has created specialized federal judicial bodies under Article I and placed these under the control of the executive branch.³⁷ Although there have been challenges to the appointment of term-limited judges in regard to the Constitution's Appointments Clause, there is little doubt of the constitutionality of Article I courts, and this article does not challenge the existence of those courts.³⁸

Third, in examining the *Begani* concurrence, this article refers to a "small-scale" mutiny in Pennsylvania. The mutiny was not actually of small scale to those confronted by it. There were angry grievances in the ranks of soldiers and an evacuation of a state capitol.³⁹ But the mutiny had been referred to at the time as a "Very Trifling Mutiny" and therefore I have taken some license with the characterization of the mutiny being "small-scale."⁴⁰ Fourth, I recognize that contemporary disagreements on the importance and direction of history have become not merely politically charged, but a leading part of campaign platforms, as in the case of Critical Race Theory. The politicizing of history is not new. One only need recall the National History Standards debates in the 1990s in which the Senate ultimately voted 99-1 for a resolution against them.⁴¹ That said, poor judicial scholarship enables the politicization of history because it lends to the appearance of an outcome-driven judiciary. Finally, this article does not address the merits of the myriad variations of textualism and originalism, but because both jurisprudential schools are employed by members of federal judiciary, and both rely on history, a call for greater rigor is applicable to both. In that light, this article

Letter from Robinson O. Everett, former J., Ct. of Mil. Appeals, to James O. Eastland, Former Senator, Miss. (July 13, 1978) (on file with the Baylor Law Review and author).

³⁷ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipeline*, 458 U.S. 50, 67 (1982); *Commodity Trading Futures v. Schor*, 478 U.S. 833, 841 (1986); see also 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE - CIVIL* § 1.03 (Matthew Bender & Co. 3d ed. 2016).

³⁸ See *Samuels, Kraemer & Co. v. Comm'r*, 930 F.2d 975, 979 (2d Cir. 1991).

³⁹ Mary A.Y. Gallagher, *Reinterpreting the "Very Trifling Mutiny" at Philadelphia in June 1783*, 119 PENN. MAG. HIST. & BIOGRAPHY 3, 25 (1995).

⁴⁰ See *id.* at 3.

⁴¹ See, e.g., JEREMY POPKIN, *FROM HERODOTUS TO H-NET: THE STUDY OF HISTORIOGRAPHY* 160 (2016); see also JEREMY BLACK, *CLIO'S BATTLES: HISTORIOGRAPHY IN PRACTICE* 144 (2015).

does not argue that any of the decisions presented for criticism are wrongly decided or untenable, but rather, as legal historian Martin S. Flaherty observed in regard to constitutional historic scholarship, are burdened by “poorly supported generalization[s]—which at times fall below even the standards of undergraduate history writing.”⁴²

I. ARTICLE I COURTS: JURISDICTION, PROCEDURE, AND INTERPLAY

Three of the nation’s Article I courts may, depending on the nature of an appeal, have a consequential bearing on the relationship between service members and the commander in chief, and between the nation’s citizenry and the military establishment. Established in 1982, the CAVC possesses exclusive jurisdiction to review administrative decisions from the Board of Veterans Appeals.⁴³ This court may sit as a single judge, in three judge panels, or en banc.⁴⁴ The United States Court of Appeals for the Federal Circuit hears appeals from the United States Court of Federal Claims.⁴⁵ Although the Federal Circuit Court is an Article III court, the Court of Federal Claims is an Article I trial court.⁴⁶ The claims court has its origins in 1855 and determines suits against the government, including from military plaintiffs.⁴⁷ In this regard, the claims court has occasionally decided cases directly impacting military authority including cases arising from claims of

⁴²Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525–26 (1995).

⁴³38 U.S.C. §§ 7251–7252. *See* *Young v. Shinseki*, 25 Vet. App. 201, 202–03 (2012). In *Young*, the CAVC noted that although it has exclusive jurisdiction of the administrative board’s decisions, the board can continue to rule on the merits of a claim even though an appeal arising from a procedural challenge against the board has been granted. *Id.* at 203. *See also* Sarah M. Haley, *Single Judge Adjudication in Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 536–37 (2004); Charles G. Mills, *Is the Veterans’ Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?*, 17 TOURO L. REV. 695, 697–98 (2016).

⁴⁴*See* *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992).

⁴⁵28 U.S.C. § 1295(a)(3).

⁴⁶For a description of the Court of Federal Claims as an Article I Court, see *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009).

⁴⁷28 U.S.C. § 171. *See also* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 607 (2003).

unlawful command influence.⁴⁸ In *Swaim v. United States*, the Claims Court, in 1893, issued a significant decision on the authority of a commander in chief to influence courts-martial.⁴⁹ In 1992, the Court of Claims was renamed the CAAF was established in 1950 as the highest Article I appellate court with jurisdiction over courts-martial appeals.⁵⁰

A. *Amicus Rules in General*

Under certain circumstances, the federal courts have an inherent authority to invite amicus participation.⁵¹ The Supreme Court regulates amicus through its inherent rule-making power as codified in Rule 37.⁵² The Federal Rules of Appellate Procedure (FRAP) permit the filing of amicus briefs during a federal court of appeals' initial consideration of a case on its merits.⁵³ This rule favors the federal and state governments and their agencies, which have an automatic right of amicus filing, while all other amici must obtain the consent of the parties or by leave of the court.⁵⁴ That said, under the FRAP,

⁴⁸ See, e.g., *Albino v. United States*, 104 Fed. Cl. 801 (2012) (disapproving jurisdiction over a claim for military backpay based on a promotion that was never authorized); see also *Exnicios v. United States*, 140 Fed. Cl. 339 (2018).

⁴⁹ 28 Ct. Cl. 173 (1893), *aff'd*, 165 U.S. 553 (1897).

⁵⁰ 10 U.S.C. § 941. For the past history of the Court and the Uniform Code of Military Justice, see Act of May 5, 1950, 50 U.S.C. §§ 551–736 (1950) (repealed 1956). See also JONATHAN LURIE, *ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950*, at 233–55 (1992); William B. Aycock, *The Court of Military Appeals: The First Year*, 4 N.C.L. REV. 1 (1952).

⁵¹ See *Mathews v. Weber*, 423 U.S. 261, 262 (1976); see also *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (citing *Auer v. Robbins*, 519 U.S. 452, 461–62 (2011)).

⁵² SUP. CT. R. 37. The rule states as follows:

An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored. An amicus curiae brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

Id. See, e.g., *Lee v. United States*, 343 U.S. 294 (1952).

⁵³ FED. R. APP. P. 29.

⁵⁴ *Id.* Rule 29(a)(2) reads as follows:

The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court

there is no requirement that a party seeking amicus status be “totally disinterested” in the litigation.⁵⁵ And while there appears to be a split between the federal appellate courts regarding the acceptance or disfavoring of amicus briefs, in 2002 the United States Court of Appeals for the Third Circuit noted that it is “preferable” for a court to err on the side of granting leave to file an amicus.⁵⁶

Although the Federal Rules of Civil Procedure governing the federal district courts are silent on amicus briefs, there are recent noteworthy examples found in the treatment of amici by the federal district courts.⁵⁷ In 2021, the United States District Court for the Central District of California, over the objections of the plaintiffs, granted the Japanese Ministry of Economy, Trade, and Industry (METI) amicus status.⁵⁸ Judge Dean Ferguson, in recognizing METI’s amicus status, conceded that the ministry had an interest in another pending suit, but that it also had unique information that could assist the court.⁵⁹ METI, as a Japanese governmental agency, also had a specific duty to promote the Japanese economy and therefore could not be considered as a wholly disinterested party.⁶⁰ And, in this instance, the defendant corporation was embroiled in a shareholder lawsuit that had the

of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification.

Id. For a further analysis of the FRAP and Supreme Court amicus rules favoring the federal government, see Joshua E. Kastenberg, *Safeguarding Judicial Integrity by Making the Executive Branch’s Unfettered Amicus Gateway Transparent: An Argument for the Supreme Court to Exercise Its Inherent Authority to Make Public the President’s Tax and Investment Records*, 38 N. ILL. L. REV. 1, 13–18 (2017).

⁵⁵ See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982).

⁵⁶ *Neonatal Assocs., P.A., v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002).

⁵⁷ See, e.g., *In re Nazi Era Cases Against Ger. Defendants Litig.*, 153 F. App’x 819, 827 (3d Cir. 2005); *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1284 (N.D. Ga. 2001).

⁵⁸ *Stoyas v. Toshiba Corp.*, No. 15-cv-4194, 2021 U.S. Dist. LEXIS 106487, at *4 (C.D. Cal. June 7, 2021).

⁵⁹ See *id.* at *3–4. For a background on METI—formerly titled the Ministry of International Trade—see MIKIO SUMIYA, *A HISTORY OF JAPANESE TRADE AND INDUSTRY POLICY* 13 (2000). See also Mark Manger, *Competition and Bilateralism in Trade Policy: The Case of Japan’s Free Trade Agreements*, 12 REV. INT’L ECON. 804, 813–14 (2005).

⁶⁰ See, e.g., MISSION OF METI 3, https://www.meti.go.jp/english/publications/pdf/e_book.pdf (last visited May 15, 2022).

potential to disrupt the Japanese economy.⁶¹ Judge Ferguson's decision to grant METI amicus status is not without precedent. In 2017, Judge Otis D. Wright II on the United States District Court for the Central District of California noted that even in instances where a plaintiff consulted with prospective amici prior to a hearing, this did not create a de-facto co-counsel between amici and the plaintiff.⁶²

In *Alliance of Auto Manufacturers v. Gwadowsky*, Judge John A. Woodcock on the United States District Court for the District of Maine observed that although the Federal Rules of Civil Procedure are silent as to ability of amici to file legal briefs, the federal courts possess the discretion to permit amici to educate the court through the filing process.⁶³ Judge Woodcock titled the amici Maine Auto Dealers Association as "amicus plus" and permitted them to not only present briefs, but also participate in arguments and in depositions, and with the permission of the plaintiff—the Maine attorney general—question witnesses.⁶⁴ Judge Woodcock's action in *Alliance Manufacturers* illustrates that on one end of the amici spectrum is the authority of courts to enable amici to participate in more than the presentation of a legal argument.⁶⁵

Like their Article III counterparts, Article I courts possess an authority to permit amici participation.⁶⁶ Congress authorized the CAVC to promulgate its own procedural rules and provided to the judges the authority to hold persons and agencies in contempt.⁶⁷ The CAVC issued its current rules

⁶¹ Jody Godoy, *Japan Government can Weigh in on U.S. Investor's Toshiba Lawsuit*, REUTERS (June 8, 2021), <https://www.reuters.com/legal/litigation/japan-govt-can-weigh-us-investors-toshiba-lawsuit-2021-06-08>.

⁶² *Duronslet v. County of L.A.*, No. 16-cv-08933, 2017 U.S. Dist. LEXIS 213736, at *6 (C.D. Cal. Jan. 23, 2017).

⁶³ 297 F. Supp. 2d 305, 306 (D. Me. 2003).

⁶⁴ *Id.* at 308.

⁶⁵ *See id.* at 306. Judge Woodcock based his ruling, in part, on the United States District Court for the Western District of Michigan's decision in *United States v. Michigan*, 116 F.R.D. 655 (W.D. Mich. 1987), to grant amicus a status title as "litigating amicus." *Id.* at 307.

⁶⁶ *See, e.g.*, *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *Harvey v. Shinseki*, 24 Vet. App. 284, 291–92 (2011) (upholding a contempt finding against the Secretary of Veterans Affairs and ordering the secretary to pay filing costs to amici); *Behrens v. United States*, 135 Fed. Cl. 66, 69 (2017); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285–86 (1996).

⁶⁷ 38 U.S.C. § 7264. On the power to hold a party or person in contempt, see 38 U.S.C. § 7265. The authority to hold a person or agency official in contempt was recently articulated by the appellate court in *Pousson v. Shinseki*, 22 Vet. App. 432, 436–37 (2008).

regarding amicus filing in 2003.⁶⁸ The CAVC does not, consistent with the FRAP, permit amicus to cite to unpublished, non-precedential decisions.⁶⁹ While this article does not challenge the propriety of such a rule, the majority of the CAVC decisions are unpublished. On occasion, judges appointed to the CAVC are subject to a president's commander in chief orders due to their military status.⁷⁰ Congress provided to the Court of Federal Claims the authority to promulgate its own procedural rules with the commensurate authority to enforce them.⁷¹ The Court of Federal Claims accepts amicus briefs as a part of its perceived inherent authority to do so.⁷² Like the CACV and the Court of Federal Claims, the CAAF's judges also possesses statutory authority to promulgate their own rules of practice and procedure.⁷³ In turn, it has issued rules on the acceptance of amicus briefs.⁷⁴ In *United States Navy-Marine Corps Court of Review v. Carlucci*, the Court of Military Appeals—the predecessor to CAAF—determined that even in the absence of a statute, it possessed the inherent contempt authority resident in the federal Article III courts.⁷⁵ Arguably, the CAAF could permit an amicus-plus just as Judge Woodcock enabled.

B. Article I Courts Generally

The Constitution is silent on Article I Courts, but Article I empowers Congress to “constitute Tribunals inferior to the supreme Court.”⁷⁶ Referred to as “legislative courts,” Article I courts are not bound by Article III

⁶⁸ *In re* Rules of Prac. & Proc., No. 1-03, 2003 U.S. App. Vet. Claims LEXIS 29 (Jan. 15, 2003) (amended in 2007).

⁶⁹ *See, e.g.*, *Evans v. Greenfield Banking Co.*, 774 F.3d 1117, 1123–24 (7th Cir. 2014) (explaining that the federal courts of appeal, even assuming that the Federal Circuit Court's jurisdiction was not exclusive, will honor the prohibition in Vet. App. R. 30(a)).

⁷⁰ *See, e.g.*, *About the Court: Judge William A. Moorman*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/moorman.php>. Moorman was a retired air force general. *Id.* On retired service-members remaining subject to the Uniform Code of Military Justice (UCMJ), see 10 U.S.C. § 801(4), (6). *See also* *United States v. Hooper*, 26 C.M.R. 417, 421 (C.M.A. 1958).

⁷¹ 28 U.S.C. § 2503. On the enforcement authority, see *Pac. Gas & Elec. Co. v. United States*, 82 Fed. Cl. 474, 479–80 (2008).

⁷² *See* *Advanced Sys. Tech., Inc. v. United States*, 69 Fed. Cl. 355, 357 (2006).

⁷³ 10 U.S.C. § 944.

⁷⁴ C.A.A.F.R. 26 (2017).

⁷⁵ 26 M.J. 328, 334 (C.M.A. 1988).

⁷⁶ U.S. CONST. art. I, § 8, cl. 9.

restrictions.⁷⁷ In 1929, the Court in *Ex parte Bakelite Corp.* upheld the constitutionality of the Court of Customs Appeals as an Article I court.⁷⁸ *Bakelite's* origins began with the world's first plastics manufacturing company, the Bakelite Corporation, obtaining a favorable ruling against foreign importers from the United States Tariff Commission—an executive branch agency—but then its attorneys objected to the jurisdiction of the customs court to decide whether the commission had correctly ruled.⁷⁹ In an opinion authored by Justice Willis Van Devanter, the Court determined that Congress had the authority to create a legislative branch court, and its duties, including the requirement that it provide advisory opinions, did not erode its judicial power or judicial status.⁸⁰ And because the customs court had not taken actions outside of its legislated jurisdiction, the Court held that it did not have the authority to issue a writ of prohibition against the Article I court from proceeding.⁸¹

Bakelite was not the first time that the Court granted an appeal from a party arguing that the Article I court was unconstitutional. In 1828, in *American Insurance Co. v. Canter*, the Court, in an opinion authored by Chief Justice Marshall, held that Congress could create courts with limited tenure to determine issues that did not arise under the “cases and controversies” language in Article III.⁸² In 1856, the Court in *Murray v. Hoboken Land &*

⁷⁷ *Parisi v. Davidson*, 405 U.S. 34, 41 n.7 (1972). According to (then) Professor Felix Frankfurter and James Landis, the momentum for establishing specialized Article I courts occurred during the Industrial Revolution. See FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 147 (Transaction Publishers 2007) (1928). Frankfurter noted, “The American adaptation of the English judicial system, which in turn had its roots in the seventeenth century, was found inadequate for modern industrialized America.” *Id.*

⁷⁸ 279 U.S. 438, 460–61 (1929).

⁷⁹ *Id.* at 447–48.

⁸⁰ *Id.* at 454 (citing *In re Sanborn*, 148 U.S. 222 (1893)). However, the Court also determined in *Bakelite* that Congress’s creation of judges that remained on the customs court for the duration of life or “during good behavior” neither converted the customs court into an Article III court nor an invalid court. *Id.* at 459. In 1962, the Court, in an opinion authored by Justice Harlan, held that the statutory scheme which later gave the judges “life tenure” in a recreation of the Court of Claims and a new Court of Customs and Patent Appeals permitted their judges to serve by designation on United States District Courts and Courts of Appeals. *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962).

⁸¹ *Bakelite*, 279 U.S. at 461.

⁸² 26 U.S. 511, 545–46 (1828). *Canter*, however, arose as a challenge to the jurisdiction of federal territorial court, which, unlike a state, did not have an overlap with state or other Article III federal courts. *Id.* at 511. However, the Court in *Glidden* rejected Marshall’s contention that courts

Improvement Co. articulated that there were areas that Congress could determine to bring within the Article III courts' jurisdiction or to exclude from the Article III courts altogether.⁸³ In 1880, the Court in *McElrath v. United States* determined that the Court of Claims possessed the jurisdictional authority to adjudicate claims against the government by aggrieved military officers, as well as counterclaims from the government, without violating the Seventh Amendment.⁸⁴ But, because the government possesses inherent immunity from the type of lawsuit that McElrath raised, and because Congress had given statutory consent for such suits, *McElrath* is unsurprising.⁸⁵

In 1933, the Court, in *Williams v. United States*, unanimously determined that Congress could reduce the pay of Article I judges during their tenure.⁸⁶ This stands in stark contrast to the Constitution's explicit language regarding Article III judges.⁸⁷ In 1929, President Herbert Hoover appointed

created under Article I were "incapable of receiving" federal question jurisdiction. *Glidden*, 370 U.S. at 545 n.13.

⁸³ 59 U.S. 272, 284 (1855). The category of rights referred to as "Public Rights" does provide some context to the issue presented in this article in the sense that the public should have an interest in the growth or containment of presidential power by implication. The Court noted the following:

There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id. On the matter of public rights originating from challenges to the government's collection of revenue and disbursement of monies, see Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919 (1988).

⁸⁴ 102 U.S. 426, 440 (1880).

⁸⁵ *Id.* The Court, in an opinion authored by Justice Harlan, noted the following:

Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any setoff or counterclaim which the government may assert are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued except with its own consent.

Id.

⁸⁶ 289 U.S. 553, 580 (1933).

⁸⁷ U.S. CONST. art. III, § 1 states, in pertinent part, "Compensation" for federal judges "shall not be diminished during their Continuance in Office." In *United States v. Will*, a unanimous Court not only reaffirmed that the Compensation Clause protected judicial independence, including statutorily enacted scheduled pay raises, it "has served to attract able lawyers to the bench and thereby enhances the quality of justice." 449 U.S. 200, 221 (1980) (citing *Evans v. Gore*, 253 U.S. 245, 553 (1920));

Congressman Thomas Sutler Williams to the Court of Claims.⁸⁸ As a result of the significant economic downturn caused by the Great Depression, Congress passed into law a pay reduction act that included Article I judges.⁸⁹ This act reduced Williams's salary by \$2,000 per year, and he sued in the federal courts arguing that the Compensation Clause protected his salary and, by implication, his independence.⁹⁰ The Court, however, determined that the Constitution only protected judges appointed to Article III tribunals.⁹¹ Thus, while Article I judges are nominated by a president and confirmed by the United States Senate, their independence from the executive branch is not constitutionally protected anywhere near the degree as the Article III judiciary is in areas of pay and compensation, or protection from removal or censure. And while an appellant or plaintiff can argue for a judge to recuse, this lack of independence has not been a basis for a blanket recusal.

C. Court of Appeals for the Armed Forces

It is far outside of the scope of this article to provide a history of military law as a general matter. However, it is contextually helpful to note that courts-martial predate the United States, and indeed, have their roots in the legions of Rome, if not before.⁹² Although military courts existed in Europe since the Middle Ages—courts of chivalry are an example—it was not until the reign of King Gustavus Adolphus of Sweden in which a defined set of military laws and courts-martial came into existence.⁹³ And, in 1689, Parliament passed the First Mutiny Act, which permitted military crimes to be tried in courts-martial but placed the military trials under certain limits, which included Parliamentary discretion to disband the standing army.⁹⁴ The system of military trials incorporated into United States laws was largely British in origin and until 1950 did not include a system of appeals outside

see also Beer v. United States, 696 F.3d 1174, 1177 (Fed. Cir. 2012) (holding Congress may not alter statutorily created cost of living adjustments to the detriment of the Article III judiciary).

⁸⁸ *Williams*, 289 U.S. at 559.

⁸⁹ *Id.* at 560.

⁹⁰ *Id.*

⁹¹ *Id.* at 561, 580.

⁹² *See, e.g.*, Dan Maurer, *Martial Misconduct and Weak Defenses: A History Repeating Itself (Except When it Doesn't)*, 54 U. ILL. CHI. L. REV. 867, 873–83 (2021); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 17 (1920).

⁹³ *See* WINTHROP, *supra* note 92, at 18–19; *see also* MAURICE KEEN, *CHIVALRY* 174–78 (1984) (describing courts of chivalry).

⁹⁴ *See* Winthrop, *supra* note 92, at 19–20.

of a strict habeas test in the federal courts, which was largely confined to questions of jurisdiction.⁹⁵ And, it was not until 1968 that a judicial position was created for overseeing courts-martial.⁹⁶

Today, the military courts exist in three tiers, all of which have been established under Article I.⁹⁷ There is the court-martial itself, followed by a military branch's service court of appeals (or intermediate appellate courts), and then the CAAF.⁹⁸ There are four intermediate courts of appeals: the United States Army Court of 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.⁹⁹ These intermediate courts, with limited exceptions, have uniformed officers, commissioned as judge advocates—and therefore subject to the direct orders of the President and subordinate personnel with command authority—serving as judges.¹⁰⁰ With the exception of the Coast Guard's appellate and trial courts, this system resides in the Department of Defense.¹⁰¹

The CAAF consists of five civilian judges appointed by the President and confirmed by the Senate.¹⁰² These judges serve for a fifteen-year term of office.¹⁰³ If there is a vacancy on the CAAF, the chief judge may assign a senior (retired) CAAF judge or request the Chief Justice of the United States Supreme Court temporarily assign an Article III judge to the court.¹⁰⁴ In 1953,

⁹⁵ See, e.g., Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 5 WAKE FOREST INTRAMURAL L. REV. 223, 240 (1969). However, it should be noted that until 1871, state court justices issued habeas writs on the army and naval officers holding soldiers and sailors in custody as a result of a court-martial or prior to a court-martial. See James Snedeker, *Habeas Corpus and Court-Martial Prisoners*, 6 VAND. L. REV. 288, 290 (1953).

⁹⁶ 10 U.S.C. § 866(a)(1). For a contemporary synopsis, see James A. Mounts & Myron G. Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470, 470–73 (1969). For a recognition of this brief history, see *Weiss v. United States*, 510 U.S. 163, 167–69 (1994).

⁹⁷ *Weiss*, 510 U.S. at 167.

⁹⁸ *Id.* at 167–68.

⁹⁹ *Id.* at 168; see also 10 U.S.C. § 866(a)(1).

¹⁰⁰ See *Weiss*, 501 U.S. at 168–69. However, unlike the CAAF, the rules for practice and procedure, including the use of amici, is vested in the Judge Advocate General and not in the military's intermediate service appellate courts. See, e.g., 10 U.S.C. § 866(a)(1).

¹⁰¹ 10 U.S.C. § 941. On the Coast Guard, see *Edmond v. United States*, 520 U.S. 651, 655–57 (1997). See also 49 U.S.C. § 323(a).

¹⁰² 10 U.S.C. § 942(a)–(b).

¹⁰³ *Id.* § 942(b)(2)(A)(i)–(ii).

¹⁰⁴ *Id.* For an example of an Article III judge serving on the CAAF, see *United States v. Hughes*, 45 M.J. 137 (C.A.A.F. 1996). Because of an unsolvable vacancy within the CAAF, Chief Justice

in *Burns v. Wilson*, Chief Justice Fredrick Vinson, in writing for the majority, lauded the creation of the Uniform Code of Military Justice (UCMJ), and with it the formation of a civilian-staffed military court of appeals.¹⁰⁵ There have been criticisms of CAAF and its predecessor since that time.¹⁰⁶ CAAF's jurisdiction is limited to appeals from courts-martial as well as appeals that are within its narrow jurisdiction under the All Writs Act.¹⁰⁷ Given the military establishment's size, this may appear to consist of both a small personal and subject-matter jurisdiction, but as it may include retirees, reservists and national guard members during specified times, certain retired reservists, service-members who are held past the date of their service-commitment (stop-loss), a swath of civilians violating the UCMJ and regulations and orders arising from the powers granted to commanding officers in deployment zones, or if the Selective Service System were to be employed for actual conscription, a potentially enormous number of persons could fall within its jurisdiction.¹⁰⁸ Thus, while the shaping of commander in chief authority by the CAAF may appear incidental, it can have profound effects of a constitutional nature on the whole of the nation. Moreover, twice in the last three decades, the Court has taken appeals from the CAAF that generally apply to criminal trials.¹⁰⁹

There are two types of courts-martial convictions that the CAAF is either statutorily precluded from reviewing or unlikely to review. A summary court-martial does not have the jurisdiction to sentence an enlisted service-member below the grade of sergeant (or its E-5 equivalent) to more than thirty days

Rehnquist assigned Judge James Robertson of the United States District Court for the District of Columbia. *Id.* at n.1; *see also* *United States v. Schneider*, 38 M.J. 387, 389 n.1 (C.M.A. 1993). In *Schneider*, Judge Robert Haldane Mayer of the Federal Circuit and Judge Stanley Sporkin of the United States District Court for the District of Columbia served on the CMA. *Id.*; *see also* *Schneider v. United States*, 38 Fed. Cl. 383, 383 (1997), *aff'd*, 173 F.3d 436 (Fed. Cir. 1998).

¹⁰⁵ 346 U.S. 137, 140–42 (1953).

¹⁰⁶ *See, e.g.*, Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 132–35 (1970).

¹⁰⁷ *See, e.g.*, *United States v. Brown*, 81 M.J. 1, 3 (C.A.A.F. 2021). The All Writs Act is codified at 28 U.S.C. § 1651(a).

¹⁰⁸ *See* 50 U.S.C. § 3809. On stop-loss, *see* *Qualls v. Rumsfeld*, 412 F. Supp. 2d 40 (D.C. Cir. 2006). On Selective Service, *see* *Rostker v. Goldberg*, 453 U.S. 57 (1981).

¹⁰⁹ *See* *United States v. Scheffer*, 523 U.S. 303, 305 (1998) (finding polygraphs impermissible in federal criminal trials); *see also* *Davis v. United States*, 512 U.S. 452, 462 (1994) (finding ambiguous assertions for counsel in custodial interrogations do not require a cessation of police questioning).

in confinement and cannot adjudge a punitive discharge.¹¹⁰ Moreover, Congress denoted that a guilty finding at a summary court-martial is not a criminal conviction.¹¹¹ In 1976, the Court upheld the constitutionality of the summary court-martial statute even though it contained no redressability in the military appellate courts.¹¹² The second type of court-martial involves the sentence. If an accused service-member is sentenced to a punishment which includes less than a year in prison or no punitive discharge, the military appellate courts are not required to accept an appeal.¹¹³ Finally, the CAAF is precluded from reviewing administrative actions including a decision not to release a service-member on conscientious objection grounds or a judge advocate general's act to decertify a lawyer from practice.¹¹⁴

D. Court of Federal Claims

The act creating the Court of Federal Claims does not create any enforceable substantive right against the United States, except for the limits which Congress established in creating the tribunal.¹¹⁵ Indeed, the Tucker Act—a fundamental basis for this court—is nothing more than a waiver of sovereign immunity for specified claims against the federal government.¹¹⁶ The court's jurisdiction is limited to claims against the government, and third party non-defendants cannot be impleaded into suits in the court.¹¹⁷ And, the

¹¹⁰ 10 U.S.C. § 820(a). Other punishments can include hard-labor without confinement for no more than forty-five days, restriction to the limits of an installation or a part thereof for two months, or a forfeiture of no more than two-thirds of one month's pay. *Id.*

¹¹¹ *Id.* § 820(b). In *Bolton v. Department of the Navy Board for Corrections of Naval Records*, 914 F.3d 401, 407–09 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit upheld the Naval Board's determination that it was precluded by statute from expunging the record of a summary court-martial which adjudged Bolton guilty, even when the summary court-martial failed due process.

¹¹² *Middendorf v. Henry*, 425 U.S. 25, 63 (1976).

¹¹³ 10 U.S.C. § 876(a). However, an accused may petition the CAAF for review of a finding or sentence. *See* 10 U.S.C. § 876(b); *see also* *Cole v. Laird*, 468 F.2d 829, 830 (5th Cir. 1972).

¹¹⁴ *New v. Cohen*, 129 F.3d. 639, 647 (D.C. Cir. 1997); *In re Taylor*, 31 C.M.R. 13, 15–16 (1961).

¹¹⁵ *See, e.g.*, *United States v. Gleeson*, 124 U.S. 255, 258 (1888); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 398 (1976).

¹¹⁶ *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988); *McGuire v. United States*, 550 F.3d 903, 906 (9th Cir. 2008); *Willis v. United States*, 96 Fed. Cl. 467, 470 (2011).

¹¹⁷ *Naumenko v. United States*, 277 Fed. App'x. 1009, 1011 (Fed. Cir. 2008). In July 2021, the claims court in *D'Aville v. United States* explained that suits against the federal government must have a cognizable claim for monetary relief based on the Tucker Act, and when a plaintiff names a

Claims Court does not have the authority to grant declaratory relief.¹¹⁸ Regardless of its limited jurisdiction, the court may enforce its orders through a sanction authority analogous to the Federal Rule of Civil Procedure 11, including against the United States.¹¹⁹ Thus, in addition to preserving its authority through the contempt power, the Claims Court may punish the very sovereign that waived its immunity that enabled the court's creation.

There is a century and a half of an interplay between the Claims Court and military law, including the prevention of retired military officers serving as attorneys in suits involving the military.¹²⁰ The Court of Federal Claims does possess jurisdiction over a service member's collateral attack on their court-martial.¹²¹ In *Schneider v. United States*, the plaintiff, a former military officer, claimed that a court-martial that had convicted him and sentenced him to twenty-three years of confinement and a dismissal from the military (the equivalent of a dishonorable discharge) lacked jurisdiction to do so.¹²² While the Claims Court agreed that the court-martial had proceeded in error because one of the officers adjudging Schneider's guilt was junior in rank to him in violation of the UCMJ, the error was not of a constitutional nature and had already been reviewed by the military's appellate courts.¹²³ Generally,

private, non-governmental party as a defendant, the court does not have jurisdiction. No. 21-cv-1076, 2021 WL 3196449, at *1-3 (Fed. Cl. July 28, 2021). D'Aville alleged that he provided information to the Central Intelligence Agency (CIA), and the agency did not act on this information; that he also provided the Federal Bureau of Investigation (FBI) the information, which likewise did not act; and then named a pharmaceutical corporation as a defendant. He sought an order from the court to the CIA to produce information that it had processed his information, and for the FBI to remove his file. *Id.*

¹¹⁸ *Int'l Eng'g Co. v. Richardson*, 512 F.2d 573, 577 (D.C. Cir. 1975).

¹¹⁹ *See* *M.A. Mortenson Co. v. United States*, 15 Cl. Ct. 362, 364-65 (1988) (discussing the power to levy sanctions against the United States); *see also* *Tinsley v. United States*, 72 Fed. Cl. 326, 334 (2006) (discussing sanctions against abusive lawsuit filing).

¹²⁰ *See, e.g.*, *Wooley v. United States*, 1857 U.S. Ct. Cl. LEXIS 148 (Cl. Ct. Dec. 15, 1857); *Mullan v. United States*, 42 Cl. Ct. 157 (1907); *Williams v. United States*, 24 Cl. Ct. 306 (1889). In *In re Winthrop*, the Claims Court upheld a prohibition against William Winthrop, perhaps the foremost scholar of military law and a retired officer from representing parties adverse to the government before it. 31 Cl. Ct. 35 (1895); *see also*, JOSHUA KASTENBERG, *THE BLACKSTONE OF MILITARY LAW* 306-07 (2009).

¹²¹ *Moore v. United States*, 61 Fed. Cl. 146, 149 (2004).

¹²² 38 Fed. Cl. 383, 383-84 (1997).

¹²³ *Id.* at 384. The statute prohibiting an officer or enlisted service-member from serving on a court-martial junior in rank to the accused is not written in absolute language. 10 U.S.C. § 825(e)(1) states, "When it can be avoided, no member of an armed force may be tried by a court-martial any

for the Claims Court to determine that it possesses jurisdiction over courts-martial convictions, a plaintiff must allege a serious constitutional defect.¹²⁴ In contrast to the serious constitutional defect standard attended with courts-martial review, the Claims Court possesses jurisdiction over administrative discharges where the discharge was involuntary.¹²⁵

E. Court of Appeals for Veterans Claims

The CAVC was created in 1988, thirty-eight years after the CAAF and almost a century and a half after the Court of Federal Claims' predecessor.¹²⁶ Prior to the CAVC's establishment, it was exceedingly difficult for a veteran to appeal an administrative determination in the federal courts.¹²⁷ As a contextual note, the CAVC was also created in the aftermath of expensive litigation stemming from the military's use of Agent Orange during the Vietnam War in which thousands of service members had been harmed from exposure to the carcinogenic defoliant.¹²⁸ Unlike the CAAF, however, the CAVC reviews administrative determinations strictly centering on whether a claimant is entitled to benefits arising from their veteran status. When the CAVC was founded, the Veterans Administration had recently been upgraded to a cabinet-level status and was the largest independent federal agency in the government.¹²⁹ The CAVC is unique in that only an aggrieved veteran, and not the Secretary of Veterans Affairs, may invoke the court's jurisdiction.¹³⁰ And, the Court has noted that in the adjudication of veterans'

member of which is junior to him in rank or grade." That this language is permissive can be ascertained in the pre-UCMJ Court opinion, *Mullan v. United States*, 140 U.S. 240, 245 (1891).

¹²⁴ See, e.g., *Randolph v. United States*, 129 Fed. Cl. 301, 306 (2016); see also *Bowling v. United States*, 713 F.2d 1558, 1561 (Fed. Cir. 1983).

¹²⁵ See, e.g., *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006).

¹²⁶ James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 225–28 (2001). O'Reilly noted that the absence of attorneys involved in the lower administrative stages resulted in the inability of claimants to develop a record for appeal. *Id.*

¹²⁷ See *Henderson v. Shinseki*, 562 U.S. 428, 432 (2011).

¹²⁸ See, e.g., Sandra Murphy, *A Critique of the Veterans Administration Claims Process*, 52 BROOK. L. REV. 533, 533–36 (1986).

¹²⁹ Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans Benefits Proceedings*, 41 ADMIN. L. REV. 365, 366–67 (1989).

¹³⁰ 38 U.S.C. § 7252(a). This section reads as follows:

The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any

claims, Congress had “placed the thumb on the scale” in a veteran’s favor for the purpose of interpreting procedural rules.¹³¹

The CAVC is limited to adjudicating disputes over a veteran’s disability status.¹³² The CAVC cannot issue writs beyond its limited jurisdiction and therefore cannot assist veterans who attempt to collaterally attack a demotion, removal from military service determination, service discharge characterization, or a court-martial.¹³³ The CAVC’s jurisdiction begins when a claimant who has been denied benefits by the lower administrative board appeals to the court, and the court possesses the power to affirm, modify, or reverse the board’s decision.¹³⁴ In this regard, the CAVC, in comparison to the Court of Federal Claims or the CAAF, is the least likely, or able, to define the parameters of commander in chief authority. Yet, the CAVC might, in narrow circumstances, determine the disability status of veterans who were directly impacted by the commander in chief authority through the military’s discharge, demotion, or court-martial processes.

It is helpful to more fully understand how a case comes to the CAVC. Certain decisions of the Secretary of Veterans Affairs may be challenged at the Board of Veterans Appeals.¹³⁵ The Board is composed of a chairperson appointed by the President and confirmed to a six-year term with the advice and consent of the Senate, as well as a vice-chairperson appointed by the secretary.¹³⁶ The secretary may appoint other members to the board as well,

such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Id.

¹³¹ *Shinseki*, 562 U.S. at 440.

¹³² A veteran’s application for benefits has five necessary elements: status as a veteran, the existence of disability, a connection between the veteran’s service and the disability, the degree of the disability, and the effective date of the disability. *See Maggitt v. West*, 202 F.3d 1370, 1374–75 (Fed. Cir. 2000).

¹³³ *See, e.g., Gardner-Dickson v. Wilkie*, 33 Vet. App. 50, 55–56 (2020) (finding CAVC does not have the jurisdiction to force the Secretary to make a determination in accordance with claimant’s view of the law, or for the court to determine that its remand order to the administrative board constitutes a final decision).

¹³⁴ *Id.*

¹³⁵ 38 U.S.C. § 7104.

¹³⁶ *Id.* § 7101(b)(1). The President may also remove the chairperson for “misconduct, inefficiency, neglect of duty, engaging in the practice of law or for physical or mental disability.”

Id.

although Congress never specified the number of members.¹³⁷ The CAVC has exclusive jurisdiction to adjudicate a veteran's appeal against Board decisions.¹³⁸ Likewise, the Court of Appeals for the Federal Circuit possesses exclusive jurisdiction over appeals from the CAVC.¹³⁹ However, the Federal Circuit is barred from reviewing the CAVC's factual determinations.¹⁴⁰ As a result, if amicus practice at the CAVC may assist the CAVC in contextualizing facts developed in the administrative process, the contextualization will be embedded in Article III review.

F. MacLean v. United States: The Armor of a Shield

The traverse of an appeal titled *MacLean v. United States* illustrates that there are instances of a continuous military role over a veteran claimant.¹⁴¹ In 1991, Norbert MacLean III, an enlisted sailor in the Navy, had been punished through a non-judicial administrative punishment assessed against him by his commanding officer.¹⁴² The commanding officer determined that MacLean had been guilty of absence without leave (AWOL).¹⁴³ MacLean availed himself of an administrative process known at the time as a "complaint of wrongs," alleging that his commander abused his authority in the non-judicial process.¹⁴⁴ The investigation determined that the commanding officer was in the wrong but discovered other misconduct, and on the commanding officer's recommendation, a senior officer serving as a convening authority preferred court-martial charges against MacLean, including AWOL.¹⁴⁵ The ensuing

¹³⁷ *Id.* The statute states as follows: "The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner." *Id.* § 7101(a).

¹³⁸ *Id.* § 7252.

¹³⁹ *Id.* § 7292(c).

¹⁴⁰ See *Johnson v. Derwinski*, 949 F.2d 394, 395 (Fed. Cir. 1991).

¹⁴¹ 454 F.3d 1334 (Fed. Cir. 2006).

¹⁴² *Id.* at 1335. Non-judicial punishments are assessed by officers against subordinate enlisted personnel and subordinate officers for infractions of military law or standards. See 10 U.S.C. § 815 (UCMJ Art. 15. Commanding officer's non-judicial punishment).

¹⁴³ *MacLean*, 454 F.3d at 1335. Absence without leave is codified at 10 U.S.C. § 886 (UCMJ Art. 86. Absence without Leave). This offense, which applies to service-members who temporarily absent themselves from their duty but who intend to return to duty, is a lesser included offense of desertion, which applies to service-members who intend to permanently depart from the military. See, e.g., *United States v. Bush*, 57 M.J. 603, 604 (N-M. Ct. Crim. App. 2002).

¹⁴⁴ *MacLean*, 454 F.3d at 1335. The complaint of wrongs is authorized in statute. 10 U.S.C. § 936. (UCMJ Art. 138 Complaint of Wrongs).

¹⁴⁵ *MacLean*, 454 F.3d at 1335.

court-martial acquitted MacLean of AWOL, but convicted him of writing eight bad checks and sentenced him to a dishonorable discharge.¹⁴⁶ In 1994, the Navy-Marine Corps Court of Appeals determined that this did not create a jurisdictional or due process defect.¹⁴⁷ The CAAF, in 2002, upheld MacLean's court-martial against a *coram nobis* challenge.¹⁴⁸ In 2006, the Federal Circuit pointed out that the same commanding officer who administered the non-judicial punishment also appointed an investigating officer to inquire into MacLean's complaint of wrongs, but determined it could do nothing about it.¹⁴⁹

MacLean's *coram nobis* challenge requires a short explanation. Eight years after concluding the military's appellate review of his court-martial verdict and sentence, MacLean unsuccessfully filed a writ of *coram nobis* in the Navy-Marine Corps Court of Appeal, claiming vindictive prosecution.¹⁵⁰ Vindictive prosecution is recognized in military law as a denial of due process, but an allegation of vindictive prosecution places a heavy burden of proof on the service member, because the military law also assumes that the officers deciding to prosecute a service-member act without bias.¹⁵¹ Obtaining no relief through the military courts, MacLean commensurately filed for relief in the United States District Court for the Southern District of California and to the Court of Federal Claims.¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ *MacLean v. United States*, No. NMCM 9202821, 2002 WL 1880764, at *1–2 (N-M. Ct. Crim. App. Aug. 12, 2002).

¹⁴⁸ *MacLean*, 454 F.3d. at 1335–36; *see also* *United States v. MacLean*, 62 M.J. 230. (C.A.A.F. 2005). It should be noted that MacLean never filed a direct appeal from the Navy-Mary Court of Criminal Appeal.

¹⁴⁹ *MacLean*, 454 F.3d. at 1335–36. In *Ayala v. United States*, the United States District Court for the Southern District of New York determined that while discretionary relief under the Article 138 process is non-reviewable by the federal courts, the military's failure to follow procedure or the military's refusal to conduct an investigation under this article is reviewable. 624 F. Supp. 259, 263 (S.D.N.Y. 1985).

¹⁵⁰ *See, e.g., MacLean*, 454 F.3d at 1335–36 (citing *United States v. MacLean*, 57 M.J. 467 (C.A.A.F. 2002); *United States v. MacLean*, 59 M.J. 340 (C.A.A.F. 2004)). Vindictive prosecution violates due process. *See Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974).

¹⁵¹ *United States v. Hagen*, 25 M.J. 78, 85–86 (C.M.A. 1987). A writ of *coram nobis* is recognized under military law but obtaining relief through this extraordinary writ is difficult. *See, e.g., United States v. Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017) (citing *United States v. Denedo*, 556 U.S. 904, 911 (2009)).

¹⁵² *MacLean*, 454 F.3d. at 1335.

As an initial observation, judge advocates—military officers subject to a chain of command—either served as lead counsel or on a government litigation team at every judicial hearing arising from MacLean’s appeals, including in the Article III courts.¹⁵³ This is not to argue any impropriety or unusual departure from a norm, but rather to stress that the military establishment maintains an interest in shaping the confines of a federal judicial decision as much as it does in the direct result of the decision in the military courts. The procedural issue before the Court of Federal Claims was whether MacLean’s suit against the United States was barred by a statute of limitations.¹⁵⁴ Under the Tucker Act—the law enabling the type of suit in which MacLean sought relief—appeals had to be filed within six years of a perceived wrong.¹⁵⁵ MacLean argued that his *coram nobis* claim tolled the statute and both the claims court and the Federal Circuit disagreed.¹⁵⁶

It is unsurprising that neither the Court of Claims nor the Federal Circuit discussed the nature of vindictive prosecution in the military law nor addressed a likely relationship between vindictive prosecution and unlawful command influence. In an earlier appeal titled *Martinez v. United States*, the Federal Circuit upheld the principle that in the military context, for claims filed under the Tucker Act, the statute of limitations begins at the time of release from military service or a discharge.¹⁵⁷ In reviewing the traverse of MacLean’s appeals, it does not appear that any amicus briefs were filed or, if a brief had been filed, accepted by an Article I Court. This too may be unsurprising because, after all, questions of claims against the government may be perceived as individual affairs and MacLean’s *coram nobis* efforts do not appear to have been reported in the national media. Yet, his military appeal—that his commander was biased and vindictive—certainly touched on the role of the commander in chief, beyond the fact that the officers involved in MacLean’s court-martial were commissioned officers expected

¹⁵³In *MacLean v. United States*, a uniformed officer of the Naval Department represented the government before the Court of Claims. 67 Fed. Cl. 14, 15 (Fed. Cl. 2005). In *MacLean v. United States Department of the Army*, the lead attorney for the United States Army Legal Services Agency and the lead attorney for the United States Air Force Legal Operations Agency joined with the Department of Justice. No. 05-CV-1519 WGH(CAB), 2007 U.S. Dist. LEXIS 16162, at *1 (S.D. Cal. Mar. 6, 2007).

¹⁵⁴*MacLean*, 454 F.3d at 1335.

¹⁵⁵*Id.* The Tucker Act is a partial waiver of sovereign immunity that authorizes certain actions for monetary relief against the United States Government. See 28 U.S.C. § 1491.

¹⁵⁶*MacLean*, 454 F.3d. at 1337.

¹⁵⁷*Martinez v. United States*, 333 F.3d. 1295, 1310 (Fed. Cir. 2003).

to carry out the orders of the president. When, in 2021 and well after his court-martial appeals exhausted, Bowe Bergdahl discovered that the military judge presiding at his court-martial failed to articulate a full statement of his retirement plans; both the Army Court of Criminal Appeals and CAAF did not grant review to Bergdahl's *coram nobis* filing.¹⁵⁸ Specifically, the military judge used his rulings favoring (then) President Trump to obtain a quasi-judicial position as an immigration judge with the Justice Department overseen by a Trump appointed Attorney General who had argued in the Article III courts to shield presidential privacy, if not misconduct.¹⁵⁹ For reasons addressed further below, as well as the Court of Appeals for the District of Columbia's poignant criticism of a similar issue involving the military justice system's intersection with the Justice Department in *In re Al-Nashiri*, CAAF's refusal to grant may well undermine confidence in the military's judicial system.¹⁶⁰

II. ARTICLE I COURTS AND THE ADJUDICATION OF COMMANDER IN CHIEF AUTHORITY

Chief Justice William Howard Taft once referred to *Bakelite* as "one of the most important constitutional cases that [the Court] had to consider."¹⁶¹ In 1956, the Court of Military Appeals applied *Bakelite* as a dispositive answer to challenges against the extension of military jurisdiction over civilians accompanying the armed forces overseas.¹⁶² But *Bakelite* had nothing to do with subjecting citizens to commander in chief authority. In 1960, the Court, in *McElroy v. United States ex rel Guagliardo* determined

¹⁵⁸ See, e.g., Bergdahl v. United States, No. ARMY MISC 20200588, 2020 CCA LEXIS 443, at *11–12 (A. Ct. Crim. App. Dec. 11, 2020).

¹⁵⁹ See Bergdahl Lawyers Say Judge's Job Application Posed Conflict, WASH. POST, Sep. 18, 2020; Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 21 (2018) (pointing out that an immigration judge is essentially an attorney for the Attorney General of the United States); Kevin Johnson, *DOJ Drops Case Against Former Trump Adviser Michael Flynn in Boldest Step Yet to Undermine Mueller Probe*, USA TODAY, May 7, 2020 (discussing Trump-appointed Attorney General Barr).

¹⁶⁰ *In re Al-Nashiri*, 921 F.3d 224, 239–40 (D.C. Cir. 2019).

¹⁶¹ See Letter from Chief Just. William Howard Taft to Charles Phelps Taft (May 12, 1929) (on file with the Library of Congress). If Taft's view were correct, it would place *Bakelite* as a more important opinion than *McGrain v. Daugherty*, which arose from the Teapot Dome Scandal of the Harding Administration and recognized the power of the legislative branch to investigate the executive branch. See *McGrain v. Daugherty*, 273 U.S. 135, 180 (1927).

¹⁶² *United States v Burney*, 6 C.M.A. 776, 791 (C.M.A. 1956).

in opposite of the Court of Military Appeals.¹⁶³ It is true that Congress crafted the jurisdictional reach of the military when it enacted the UCMJ, but clearly, the Court's curbing of military jurisdiction in *Guagliardo* reduced some degree of presidential authority over the totality of the military establishment.¹⁶⁴ That is, the right to a criminal trial also means the right to an impartial jury of one's peers with a unanimous verdict of guilt requirement and before an independent and impartial judge.¹⁶⁵ Military trials do not require unanimous verdicts and the service-members appointed by a commanding officer to serve on the court-martial are not, by reason of both their rank superiority and being subject to the orders from a chain of command including a president, thought of as a jury of one's peers.¹⁶⁶ In short, the Court of Military Appeals reference to *Bakelite* to justify a broad extension of military jurisdiction is a poignant example of the misuse of history, albeit a dated example.

It cannot be doubted that as commander in chief of the nation's armed forces, a president has the lawful authority to issue orders or publish punitive regulations to the military.¹⁶⁷ From the beginning of the Republic, Congress also protected a president's commander in chief authority by criminalizing contemptuous words or conduct against his or her office.¹⁶⁸ In enacting the UCMJ, Congress specifically authorized a president to prescribe procedural rules for courts-martial, including evidentiary rules and modes of proof.¹⁶⁹ This authority also extends to administrative proceedings which may result in the demotion of personnel or their removal from the military under

¹⁶³ 361 U.S. 281, 287 (1960).

¹⁶⁴ *Id.* at 286.

¹⁶⁵ *Ramos v. Louisiana*, 140 S.Ct. 1390, 1402 (2020) (stating that the Sixth Amendment includes the right to a unanimous jury verdict).

¹⁶⁶ *See, e.g., United States v. Bess*, 80 M.J. 1, 7–10 (C.A.A.F. 2020) (finding unintentional exclusion of court-martial members by race is not grounds for overturning a guilty verdict).

¹⁶⁷ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 26–38 (1896). Winthrop penned, “[H]is function as Commander in Chief authorizes him to issue, personally, or through his military subordinates, such orders and directions as are necessary and proper to ensure order and discipline in the Army.” *Id.* at 27.

¹⁶⁸ 10 U.S.C. § 888; *see United States v. Howe*, 17 C.M.A. 165, 174 (C.M.A. 1967). It should be noted that this protection has been in place since the first Articles of War were enacted in 1807. *See Howe*, 17 C.M.A. at 174; THEODORE J. CRACKEL, *MR. JEFFERSON'S ARMY: POLITICAL AND SOCIAL REFORM OF THE MILITARY ESTABLISHMENT, 1801–09, 1865–88* (1987).

¹⁶⁹ 10 U.S.C. § 836. The regulations and rules for courts-martial are presumed to be valid unless such rules conflict with statute or a constitutional guarantee to accused persons that does not exempt courts-martial. *See United States v. Johnson*, 19 C.M.A. 464, 465 (C.M.A. 1970).

unfavorable terms.¹⁷⁰ Whether a service-member is court-martialed and punitively discharged or involuntarily administratively separated from the military, either path of departure from the armed services is likely to result in deleterious economic and social consequences.¹⁷¹ Although military courts have a duty to protect the due process rights of an accused, these rights are often much narrower than rights that apply to federal and state criminal trials.¹⁷² And presidential rulemaking authority over courts-martial and administrative processes extend beyond service-members subject to the UCMJ, reaching to civilians participating in the litigation.¹⁷³ This is unsurprising in light of the Court's decision in *Fleming v. Page*, which delineated a president's commander in chief authority as a "military commander" who "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."¹⁷⁴

When a defense secretary, service secretary, commissioned officers appointed as a chief of a military service, or select subordinate officers issue orders or promulgate regulations, they do so as an auxiliary of a president's commander in chief authority.¹⁷⁵ That is, because a military commander or a

¹⁷⁰ See, e.g., *United States ex rel. French v. Weeks*, 259 U.S. 326, 333 (1922).

¹⁷¹ See, e.g., John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 2–16 (2012).

¹⁷² See, e.g., *Owens v. Markley*, 289 F.2d 751, 752 (7th Cir. 1961); *Hackworth v. Taylor*, 283 F.2d 250, 251–52 (10th Cir. 1960); see Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 49 (1958); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 279 (1958). For my criticism of Wiener, see Joshua Kastenberg, *Reassessing the Ahistorical Use of William Winthrop and Frederick Bernays Wiener*, J. NAT'L SEC. L. (forthcoming 2022). There are exceptions to the "narrower rights" statement, to include, in theory, an accused's broader discovery rights to the prosecution's evidence. See *United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986). Yet even this right appears to have been diminished. See *United States v. Behenna*, 70 M.J. 521, 527–29 (C.A.A.F. 2011) (finding prosecution's failure to disclose evidence favorable to the accused not a grounds for reversing conviction).

¹⁷³ See *Partington v. Houck*, 723 F.3d 280, 286 (D.C. Cir. 2013).

¹⁷⁴ *Fleming v. Page*, 50 U.S. 603, 615 (1850).

¹⁷⁵ See, e.g., *United States v. Eliason*, 41 U.S. 291, 302 (1842). The Court, in *Eliason*, held:

The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly

service secretary possesses the authority to issue orders or publish regulations, they are presumed to be acting in concert with an authority delegated from the president.¹⁷⁶ The late nineteenth century Supreme Court Justice Henry Billings Brown once characterized this authority as a “necessary despotism.”¹⁷⁷ And former Chief Justice Earl Warren conceded that not all of the rights contained in the Bill of Rights were applicable to service-members, because discipline remained important for the military.¹⁷⁸

Under the military law, orders are presumed to be lawful.¹⁷⁹ This is true in regard to regulations as long as the regulation does not contradict a statute.¹⁸⁰ The UCMJ contains two articles directly mandating adherence to lawful orders and regulations. Article 90 punishes the willful disobedience of “superior commissioned officers.”¹⁸¹ Article 91 punishes a failure to obey a lawful order or regulation.¹⁸² All three of the Article I courts that this article focuses on have directly or indirectly reviewed claims that an offense, or an order or regulation, failed due process. In *Cooper v. United States*, the Court of Federal Claims reviewed a discharged officer’s claim that UCMJ Article

promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.

Such regulations cannot be questioned or denied because they may be thought unwise or mistaken. The right of so considering and treating the authority of the executive, vested as it is with the command of the military and naval forces, could not be entrusted to officers of any grade inferior to the commander-in-chief; its consequences, if tolerated, would be a complete disorganization of both the army and navy.

Id.; see also *United States v. Page*, 137 U.S. 673, 678 (1891); *United States v. Fletcher*, 148 U.S. 84, 89 (1893); *Id. v. United States*, 150 U.S. 517, 518 (1893).

¹⁷⁶ See, e.g., *United States v. Lwin*, 42 M.J. 279, 281–82 (C.A.A.F. 1995).

¹⁷⁷ See *United States v. Clark*, 31 F. 710, 713 (E.D. Mich. 1887).

¹⁷⁸ Earl Warren, *The Bill of Rights and the Military*, 4 A.F. L. REV. 6, 16 (1962).

¹⁷⁹ See, e.g., *United States v. Kisala*, 64 M.J. 50, 52 (C.A.A.F. 2006) (holding that a refusal to submit to a vaccination against Anthrax was a violation of lawful orders).

¹⁸⁰ See, e.g., *Harmon v. Brucker*, 355 U.S. 579, 582 (1958). But see *Goldman v. Weinberger* 475 US 503, 507–10 (1986) (discussing how the discipline of the military may triumph over the rights of service-members, including rights that are expressly delineated in the Bill of Rights).

¹⁸¹ 10 U.S.C. § 890 (Willfully disobeying superior commissioned officer). The seriousness of this offense is evident in the maximum punishment, which includes death in time of war, or a sentence not including death in time of peace. *Id.*

¹⁸² 10 U.S.C. § 892 (Failure to obey order or regulation). For a discussion of notice and imputed knowledge of an order or regulation, see *United States v. Arnovits*, 3 C.M.A. 538, 539 (1953).

134 was unconstitutionally vague.¹⁸³ In *Hurley v. McDonough*, the CAVC, in an unpublished opinion, remanded a board determination that had been adverse to the claimant, in part because the board failed to examine whether a deterioration of mental health had effected the claimant's inability to follow orders or regulations.¹⁸⁴ The Federal Circuit has likewise adjudicated claims arising under a failure to follow orders or regulations.¹⁸⁵

A. *Court of Federal Claims and the Possibility for Collateral Review of Presidential Authority*

The claims court has long adjudicated appeals from service-members and veterans. In 1972, the Court of Claims determined that a decedent's widow was owed \$5000 because her civilian husband had been wrongly court-martialed, as the military had no jurisdiction over him.¹⁸⁶ Robert J. Poor, the decedent, was a civilian engineer employed by the Navy and assigned to Vietnam where he was accused of violating a lawful general order.¹⁸⁷ The UCMJ enables jurisdiction over civilians who accompany the armed forces in time of war.¹⁸⁸ The court-martial found Poor guilty and fined him \$5000, but he died shortly after.¹⁸⁹ The claims court found it persuasive that the Court of Military Appeals had earlier determined, in *United States v. Averette*, that in spite of active combat, no state of war existed in Vietnam to trigger jurisdiction over civilians because Congress had not declared war.¹⁹⁰

¹⁸³ 20 Cl. Ct. 770, 775 (1990). The Court of Military Appeals did not review this appeal because the court-martial did not sentence Cooper to a punitive discharge or any time in prison. *Id.* However, because the Court in *Parker v. Levy* determined that Article 134 was not unconstitutionally vague, the claims court did not grant Cooper relief. *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 757 (1974)); see also *Pipes v. United States*, 150 Fed. Cl. 76, 83–84 (2020).

¹⁸⁴ No. 19-7589, 2021 U.S. Vet. App. Claims LEXIS 669, at *12 (Apr. 19, 2020).

¹⁸⁵ See, e.g., *Barna v. United States*, 127 Fed. Cl. 253, 259 (2016).

¹⁸⁶ *Robb v. United States*, 197 Ct. Cl. 534, 541 (1972).

¹⁸⁷ *Id.* at 536–37.

¹⁸⁸ See 10 U.S.C. § 802(a)(10) (“The following persons are subject to this chapter . . . (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”).

¹⁸⁹ *Robb*, 197 Ct. Cl. at 536–37.

¹⁹⁰ *Id.* at 539 (citing *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970)). However, at the time of *Robb* and *Averette*, 10 USC § 802(a)(10) did not contain the “contingency operation” language. Since that time, Congress has added “contingency operation” language. See *United States v. Ali*, 71 M.J. 256, 262 (C.A.A.F. 2012). The *Ali* decision has come under criticism. See Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the*

The Court of Federal Claims has also assessed the impact of unlawful command influence on court-martialed claimants. In *United States v. Pittman*, the claims court noted that because of the due-process nature of unlawful command influence, it had the authority to review the fairness of courts-martial convictions that were alleged to have been tainted by it.¹⁹¹ Pittman had been convicted in a special court-martial, but not sentenced to a punitive discharge or a year in prison, and therefore he was not entitled to an appeal in the military's appellate system.¹⁹² The claims court has also reviewed claims of unlawful command influence arising from non-criminal administrative actions taken by the military against service-members.¹⁹³ Collateral review of courts-martial in the claims court, and commensurately on appeal in the Federal Circuit, is generally limited to instances in which the claims of the service-member or veteran were not addressed by the military courts of appeal.¹⁹⁴ However, the failure at a trial level to allege unlawful command influence does not create waiver for the purpose of the claims court.¹⁹⁵ And it is possible, as the claims court recognized in 2018 in *Waters v. United States*, that even where a claimant is retired, the court possesses jurisdiction to determine whether an administrative finding that resulted in the officer's reduced officer grade was tainted by unlawful command influence.¹⁹⁶ In neither *Pittman* nor *Waters*, however, did a president interfere or seek to influence a military adjudicative process.

The Court of Federal Claims, like its predecessor, has also indicated that it possesses the authority to review administrative regulations for their compliance with statutory law. In 1975, in *Richardson v. United States*, the

Constitutionality of Wartime Military Tribunals, 105 GEO. L.J. 1529,1565 n.190 (2017); Stephen Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 955 (2015).

¹⁹¹ 135 Fed. Cl. 507, 521 (2017). The claims court also reviewed Pittman's argument that a regulation was void for vagueness and therefore a violation of due process. *Id.* at 524. On the void for vagueness doctrine, see *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁹² 135 Fed. Cl. at 516, 523; 10 USC § 865 (Transmittal and Review of records); 10 U.S.C. § 866.

¹⁹³ See, e.g., *Exnicios v. United States*, 140 Fed. Cl. 339, 382 (2018) (discussing officer removed from the Army through an Army Board of Review); *N.G. v. United States*, 94 Fed. Cl. 375, 387 (2010) (discussing sailor removed from the Navy through a naval administrative discharge proceeding).

¹⁹⁴ See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975); *Martinez v. United States*, 914 F.2d 1486, 1488 (Fed. Cir. 1990).

¹⁹⁵ *Pittmann*, 135 Fed. Cl. at 528.

¹⁹⁶ 139 Fed. Cl. 9, 18, 20 (2018) (concluding that the court has jurisdiction, but that Waters's claim lacked merit).

claims court reaffirmed that while no enlisted service-member had a right to remain on active duty through a term of enlistment, the court could also invalidate a discharge if the regulation governing the discharge ran afoul of a congressional grant of authority.¹⁹⁷ In 1985, in *McCarthy v. United States* the claims court recognized that while a president is accorded the sole power to appoint officers—subject to senatorial approval—the court, over the objections of the government, determined that the removal of officers from a temporary promotion list was within its jurisdiction.¹⁹⁸ Thus, there are issues of presidential power beyond unlawful command influence that have come before the Court of Federal Claims.

It is difficult to understand the potential impact of an amicus brief in the Court of Federal Claims without understanding the authority of the Court of Appeals for the Federal Circuit. In addition to the inherent authority vested in federal courts to accept and invite amicus curiae, the FRAP authorize the federal appellate courts to invite amicus briefs when adjudicating writs of mandamus, writs of prohibition, or other extraordinary writs.¹⁹⁹ In 2005, the Court of Federal Claims in *ATK Thiokol, Inc. v. United States* issued an almost open-ended invitation for amicus curiae to participate in a complex litigation arising from a question of the interplay between defense-related federal funding and private-enterprise profiting through the sale of non-military products developed as a result of the funding.²⁰⁰ Nowhere in the Court of Federal Appeals decision, which upheld the claims court, is there a criticism of the broad-based amicus invitation.²⁰¹ Indeed, the appellate court judges appeared to have appreciated the comprehensive analysis conducted by the lower court that was partly attributable to the extensive amicus participation.²⁰²

¹⁹⁷209 Ct. Cl. 754, 757 (1976) (citing *Birt v. United States*, 180 Ct. Cl. 910 (1967)).

¹⁹⁸7 Cl. Ct. 390, 395 n.5 (1985).

¹⁹⁹FED. R. APP. P. 21(b)(4). For illustrations in the federal courts of appeals of the application of this rule, see *United States v. Chagra*, 701 F.2d 354, 366 (5th Cir. 1983) (discussing appointment of attorney as amicus curiae to support a district court's interlocutory order under challenge from a non-party with limited standing); *Palmer v. Barram*, 184 F.3d 1373, 1376 (Fed. Cir. 1999) (inviting amicus curiae to address a specific jurisdictional issue).

²⁰⁰68 Fed. Cl. 612, 615 (2005), *aff'd*, 598 F.3d 1329 (Fed. Cir. 2010). The court noted: "On January 28, 2005, the court invited the submission of *amicus curiae* briefs from bar associations, trade and industrial associations, law professors and other interested parties by April 15, 2005." *Id.* at 625.

²⁰¹See *ATK Thiokol, Inc. v. United States*, 598 F.3d 1329 (Fed. Cir. 2010).

²⁰²*Id.* at 1333 n.2.

The Court of Federal Claims and the Federal Circuit have safeguards to prevent wasteful amicus practice as illustrated in traverse of *Fairholme Funds Inc. v. United States*, a 2017 Federal Circuit Court of Appeals opinion, and in subsequent litigation before the Article I Claims Court.²⁰³ Arising out of the 2008 housing crisis, a class of preferred stockholders of the Federal National Mortgage Association (Fanny Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) sued the government in the claims court alleging that the government's program to restructure both chartered organizations constituted an unconstitutional taking in violation of the Fifth Amendment.²⁰⁴ Mr. Sammons, a non-party to the lawsuit who, like the plaintiffs, held preferred stock in both Freddie Mac and Fanny Mae, filed as an intervenor before the claims court arguing that as an Article I court, it did not possess jurisdiction to adjudge a constitutional claim under the Fifth Amendment.²⁰⁵

There is a specific Federal Court of Claims rule which requires the court, under certain circumstances, to recognize intervenor status as a matter of right.²⁰⁶ To intervene as a matter of right, the intended intervenor must prove that she or he possesses a "direct, immediate, legally protectable interest in proceedings, and . . . must demonstrate that she or he would either gain or lose by direct legal operation and effect of judgment."²⁰⁷ There is also a corresponding rule which enables permissive intervention.²⁰⁸ When an

²⁰³ 132 Fed. Cl. 49 (2017); *Fairholme Funds, Inc. v. United States*, 678 F. App'x 981 (Fed. Cir. 2017).

²⁰⁴ See *Fairholme Funds, Inc.*, 678 F. App'x at 985.

²⁰⁵ *Fairholme Funds, Inc.*, 132 Fed. Cl. at 50.

²⁰⁶ RCFC 24 states:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

²⁰⁷ See, e.g., *Hage v. United States*, 35 Fed. Cl. 737, 739–741 (1996).

²⁰⁸ RCFC 24(b) states:

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

intervenor applicant cannot meet the standards of either rule, there is a presumption that if the erstwhile intervenor applicant has specialized knowledge they will be accorded amicus status.²⁰⁹ In *Wolfchild v. United States*, the claims court, for instance, noted that while there is no rule-based right of amicus similar to the right of intervention, one of the factors that the court has to consider in granting amicus status is “the usefulness of the information and argument presented by the potential *amicus*.”²¹⁰

Both the claims court and the Federal Circuit denied Sammons’ standing as an intervenor under the claims court rules. Judge Margaret Sweeney on the claims court ultimately denied Sammons amicus status for reasons which evidence the court protecting not only its judicial economy but also against potential abuse from irrelevant matters.²¹¹ Sammons had already filed a lawsuit related to his amicus argument in the United States District Court for the Western District of Texas, and the Court of Appeals for the Federal Circuit had already determined in reviewing the denial of intervenor status that Sammons could best protect his claim through independent litigation.²¹² The district court, on assigning Sammons’s suit to a federal magistrate decided Sammons’s separation of powers claims had already been adversely determined by other federal courts of appeal.²¹³ In addition to the Article III

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. [Not used.]

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.

²⁰⁹ *Hage*, 35 Fed. Cl. at 742; *see also* 441 4th St. Ltd. P’ship v. United States 26 Cl. Ct. 1233, 1234 (1992) (granting Comptroller General of the United States amicus status as the Comptroller General has an interest in the proper interpretation of the nation’s laws).

²¹⁰ 62 Fed. Cl. 521,536 (2004) (citing *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285 (1996)). The claims court recognized other factors including the strength of the named parties’ arguments, whether the named parties oppose the amicus motion, the timeliness of the amicus motion, and the strength of the information presented in the amicus motion. *Id.*

²¹¹ *Fairholme Funds, Inc. v. United States*, 132 Fed. Cl. 49, 50 (1017).

²¹² *Fairholme Funds, Inc. v. United States*, 678 F. App’x. 981 (Fed. Cir. 2017).

²¹³ *Fairholme Funds, Inc.*, 132 Fed. Cl. at 51 (citing *Sammons v. United States*, No. 5:16-cv-01054-FB, ECF No. 30, 2017 U.S. Dist. LEXIS 66207, *9–10 (W.D. Tex. Feb. 7, 2017)). However, the federal magistrate noted that the Court in *Stern v. Marshall*, 564 U.S. 462 (2011), determined that the Bankruptcy Court lacked the constitutional authority to enter a judgement on a common law tort claim because this type of jurisdiction was solely the providence of the Article III courts.

litigation, Sammons had raised his amicus arguments in at least four other claims court litigations.²¹⁴ Judge Sweeney also found it dispositive that a law review article Sammons had relied on in his amicus brief on was already noted by the Court of Appeals for the Federal Circuit on the very jurisdictional issue central to his amicus arguments.²¹⁵ Finally, Sammons's arguments were mirrored in at least one of the parties' arguments and his brief could not be "fairly described as providing specialized knowledge" to the court.²¹⁶ The denial of amicus status to Sammons makes sense as he was attempting to try his case though another party's suit against the government in an Article I court, while losing his case in United States District Court. Moreover, the Federal Circuit's and Federal Court of Claims' treatment of Sammons provides a usable model for the CAVC and CAAF if either decides to open their amicus rules to amicus plus.

B. Court of Appeals for Veterans Claims: A Limited Possibility for Oblique Review of Presidential Authority

The majority of CAVC decisions are unpublished single-judge decisions and therefore not precedential.²¹⁷ Consistent with the FRAP, the CAVC does not permit amicus to cite to unpublished non-precedential decisions.²¹⁸ Like the Court of Appeals for Federal Claims, the Federal Circuit has exclusive review over CAVC decisions.²¹⁹ The CAVC has reviewed appeals that include courts-martial and administrative adverse actions as a part of the underlying basis for the appeals.²²⁰ But it cannot overturn the decisions of

Fairholme Funds, Inc., 132 Fed. Cl. at 51. Finally, the United States District Court adopted the magistrate's determination adverse to Sammons. *Id.* at 52.

²¹⁴*Id.* at 50. In the instance referred to—*Trin-Co Inv. v. United States*—Judge Lynn J. Bush determined that Sammons's amicus brief would not facilitate resolution of the case at the claims court and was best presented to an Article III court. 130 Fed. Cl. 592 (2017); *Fairholme Funds, Inc.*, 132 Fed. Cl. at 53.

²¹⁵*Fairholme Funds, Inc.*, 132 Fed. Cl. at 53.

²¹⁶*Id.*

²¹⁷Natsumi Antweiler, Note, *Creating an Unprecedented Number of Precedents at the U.S. Court of Appeals for Veterans Claims*, 60 WM. & MARY L. REV. 2311, 2323–24 (2019); Haley, *supra* note 43, at 547.

²¹⁸*See* Evans v. Greenfield Banking Co., 774 F.3d 1117, 1123–24 (7th Cir. 2014) (explaining that the federal courts of appeal, even assuming that the Federal Circuit Court's jurisdiction was not exclusive, will honor the prohibition in Vet. App. R. 30(a)).

²¹⁹38 U.S.C. § 7292(a).

²²⁰*See, e.g.*, Stanley v. McDonough, No. 19-8075, 2021 U.S. Vet. App. Claims LEXIS 640, *10–11 (Apr. 13, 2021).

either the lower administrative board or the military's administrative discharge characterizations arising from both courts-martial and administrative actions.²²¹ For instance, in *Stringham v. Brown* the CAVC rejected a claimant's argument that it had the authority to revoke the board's determination that a less than honorable discharge was based on "willful and persistent misconduct" under any standard short of "clearly erroneous."²²²

In one sense, the CAVC has already provided evidence for an occasional need for historic rigor. In 2008 in *Burch v. Bush*, the CAVC determined, in a single-judge unpublished decision, that it lacked the authority to review a presidential action.²²³ Burch, a Vietnam War veteran suffering from Agent Orange exposure had attempted to serve a notice on President George W. Bush, after failing to get relief in the courts for cancer treatment and an increased disability rating.²²⁴ Judge Robert N. Davis could have simply noted that the court did not statutorily possess jurisdiction to review presidential actions, but instead relied on *Nixon v. Fitzgerald*, a 1982 Court opinion which held that because of a president's vast constitutional responsibilities and status, the nation's federal judges had to exercise deference and restraint in challenges to presidential authority by precluding private tort suits against a president.²²⁵ It is difficult to ascertain whether the CAVC, or for that matter any Article I court, stealthily applies *Fitzgerald* to all presidential actions, although the CAVC has cited to *Fitzgerald* in one other unpublished decision.²²⁶

Fitzgerald is worthy of mention for several reasons.²²⁷ In the words of one scholar, the opinion stands for the proposition that the judicial power of the United States does not include the authority to punish a president who

²²¹ *Stringham v. Brown*, 8 Vet. App. 445, 448 (Vet. App. 1995).

²²² *Id.* The Supreme Court has defined "clearly erroneous" as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." See *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018).

²²³ No. 08-0954, 2008 U.S. Vet. App. Claims LEXIS 880, *2-3 (Jul. 23, 2008). Initially, the CAVC determined that the petitioner, a Marine Corps veteran had failed to serve process on President George W. Bush. *Id.*

²²⁴ *Id.*

²²⁵ *Id.* (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)).

²²⁶ See *Crosby v. Bush*, No. 08-2357, 2008 U.S. Vet. App. Claims LEXIS 1491, at *2 (Sept. 8, 2008) (order dismissing President George W. Bush from complaint).

²²⁷ See Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1353 (1983).

acts outside of the laws, which “in a society premised on the rule of law, ought to be controversial.”²²⁸ Ernest Fitzgerald was a civil servant who had uncovered government largesse in military contracting, and his actions were well-publicized and investigated in the Congress.²²⁹ The Nixon administration determined to eliminate Fitzgerald’s position rather than fire him, and a number of memoranda uncovered after Nixon left office evidenced Fitzgerald suffered retaliation.²³⁰ Indeed, Nixon publicly took personal responsibility for Fitzgerald’s treatment.²³¹ The Court granted *certiorari* to determine the extent of presidential immunity, and then recognized a broad immunity against civil suits.²³² But, *Fitzgerald* predated the Whistleblower Protection Act—which Fitzgerald might have succeeded in pursuing—and Burch did not sue a president for a remedy outside of a statute.²³³ *Fitzgerald*’s applicability to Burch’s appeal is questionable for another reason.²³⁴ The Court in *Fitzgerald* was concerned with the use of civil suits as a means of upending presidential policy and it clarified this point in *Clinton v. Jones*.²³⁵ In short, *Burch* evidences a single judge permitting an expansion of commander in chief authority in the CAVC that Congress unlikely considered existed.²³⁶ If such an applicability of *Fitzgerald*’s immunity determination exists in appeals such as Burch’s, there should be a statement of where in the nation’s legal history this applicability found.

²²⁸ *Id.* at 1343.

²²⁹ *Fitzgerald*, 457 U.S. at 734.

²³⁰ *Id.* at 735–36.

²³¹ *Id.* at 737; see *Nixon Ordered C-5 Aide Ousted: He Asserts that “I stand by Removal of Fitzgerald,”* N.Y. TIMES, Feb. 1, 1973; *Nixon on Tape: ‘Get Rid of’ Analyst*, CHI. TRIB., Mar. 7, 1979.

²³² *Fitzgerald*, 457 U.S. at 741–758.

²³³ See 5 U.S.C. § 2302(b)(8)–(9). Enacted in 1989, the Whistleblower Protection Act protects federal employees who report fraud, mismanagement, abuse of authority, and waste. See, e.g., Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 534–36 (1999) (describing the background, including President Ronald Reagan’s “pocket veto” of the bill and Congress’s overriding of the veto).

²³⁴ See *Clinton v. Jones*, 520 U.S. 681, 714 (1997) (Breyer, J., concurring).

²³⁵ *Id.* On this point, see also Saikrishna Bangalore Prakash, “*Not a Single Privilege is Annexed to his Character*”: *Necessary and Proper Executive Privileges and Immunities*, 2021 SUP. CT. REV. 229, 249 (2021).

²³⁶ See *Fitzgerald*, 457 U.S. at 753–54.

C. Court of Appeals for the Armed Services: A Shield for Presidential Authority

As noted earlier, the CAAF has a mixed record on accepting amicus briefs.²³⁷ There are at least two instances where the CAAF has encouraged amicus filing. In *Murray v. Haldeman*, the Court of Military Appeals appeared to applaud the “extensive briefs” of amici.²³⁸ In *United States v. Green*, Judge Baker and Judge Effron noted in their dissent that even where another military accused filed an amicus brief, the appellate court should permit the brief’s filing and then consider its merits.²³⁹ It does not appear in the CAAF record that there has ever been an open invitation for amicus in recent cases directly involving presidential power.

Opening up to amicus curiae might alleviate a concern articulated in *Mundy v. Weinberger*, a 1981 United States District Court for the District of Columbia decision highlighting CAAF’s unique position.²⁴⁰ Albert Fletcher, the chief judge of the Court of Military Appeals, twice attempted to have Richard Ward Mundy, that court’s chief executive officer, promoted, only to be thwarted by the Department of Defense.²⁴¹ Mundy also had openly accused the Department of Defense of infringing on the judicial independence of the military court by acting against him after he criticized the department.²⁴² The Department of Defense attempted to have Mundy’s claim dismissed on several technical grounds, including on sovereign immunity.²⁴³ The Department of Defense’s argument on the merits was that it had treated Mundy in a manner consistent with all its civilian employees.²⁴⁴ But, this argument illuminates a greater need for scholarly rigor because there was another possibility for the basis of the Department of Defense’s treatment of Mundy. That is, Mundy previously provided his assistance to

²³⁷ See discussion *infra* Section 1.a.

²³⁸ 16 M.J. 74, 75 (C.M.A. 1983).

²³⁹ 68 M.J. 206 (C.A.A.F. 2009) (Baker, J., dissenting).

²⁴⁰ 554 F. Supp. 811, 814 (D.D.C. 1981).

²⁴¹ *Id.* at 817. Several of the defendants tried to have the case moved on the basis of venue, but the district court determined that as the Pentagon was sufficiently close to the Capitol, geographic objections to venue were not merited. Additionally, because the CMA was located in Washington D.C., the claims arose there rather than the Pentagon. *Id.* at 817–818.

²⁴² *Id.* at 817.

²⁴³ *Id.* at 820. The district court responded against the sovereign claim, “Sovereign immunity does not bar a suit where one ‘had [sic] been denied the benefit of the position to which he was appointed.’” *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 402 (1975)).

²⁴⁴ *Id.* at 821.

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the Court of Appeals for the Fourth Circuit to defeat Thurmond's proposal.²⁴⁵ This adds to a possibility that, like Fitzgerald, he was treated in a vindictive manner.

In a decision authored by Judge Harold Greene, a World War II veteran, there is no mention of Mundy's assistance to Haynsworth.²⁴⁶ Judge Green recognized that the two primary reasons for both the creation of the UCMJ and the Court of Military Appeals were to assure uniformity in the application of military law and to reduce the degree of command control over courts-martial.²⁴⁷ In that light, Greene determined that the Department of Defense had "wholly failed to appreciate" the unique nature of the military's highest appellate court and that the department's position had undermined the appellate court's ability to operate in an autonomous manner as Congress had intended it to do.²⁴⁸ Perhaps, the rhetorical flourish Greene concluded his decision with is helpful to understanding that the CAAF's lack of scholarly historic analytical rigor, as well as its partial insulation against amici in the long-term, may undermine public confidence.²⁴⁹ That is, Greene noted, "Objectivity cannot last long, however, when the very people being judged by the court are in turn judging the court and its personnel."²⁵⁰

1. The Avoidance of History and the Grafting of Presidential Power: *United States v. New*

One model of how the CAAF treats presidential power can be viewed in the case of Michael G. New, in which the military's highest court grafted the political question doctrine into its Article I jurisprudence.²⁵¹ The Supreme Court has described the political question doctrine as a matter in which the Constitution textually places commitment of the issue to a coordinate political department or that there is a lack of judicially discoverable and

²⁴⁵ Letter from Ward Mundy to Samuel Phillips, Circuit Executive, Fourth Circuit (July 18, 1978); Letter from William K. Slate, Clerk, Fourth Circuit, to Clement F. Haynsworth, Chief Judge, Fourth Circuit (July 14, 1978).

²⁴⁶ See generally *Mundy*, 554 F. Supp. at 811.

²⁴⁷ *Id.* at 820.

²⁴⁸ *Id.* at 822.

²⁴⁹ See *id.* at 824.

²⁵⁰ *Id.* In *United States Navy-Marine Corps Court of Military Review v. Cheney*, the NMCCMR (a predecessor to the NMCCA) cited Mundy for the proposition that the judicial power of the military appellate courts must be protected against "[e]xecutive encroachment in the same manner as any Article III Court." 29 M.J. 98, 102 n.1 (C.M.A. 1989).

²⁵¹ *United States v. New*, 50 M.J. 729, 739 (A. Ct. Crim. App. 1999).

manageable standards for resolving the issue.²⁵² The doctrine is also describable where there is a declination of jurisdiction because there is another branch of government that is capable and better suited for resolving a “political question.”²⁵³ In 1918, the Court determined that the conduct of foreign relations is not subject to judicial review.²⁵⁴ In the aftermath of the Ohio National Guard opening fire and killing and injuring Kent State University students, the Court upheld the principle that the Article III judiciary is not competent to oversee military training and operations.²⁵⁵ When an Article III court determines that an appeal is non-justiciable, it is rejecting an argument that it does not possess jurisdiction but determines that the matter is inappropriate for judicial resolution because the responsibility is with another branch of government.²⁵⁶

As a soldier in the Army and subject to the UCMJ, Private New refused to wear a regulatory United Nations insignia on his uniform under the claim that doing so would alter his loyalty from the United States to a foreign government.²⁵⁷ The CAAF disagreed with New and upheld his conviction, but neither the judges in the majority or the concurrence appeared to consider that as Article I judges who could be dismissed by a president in a process far short of impeachment, their decision, while correct in law, might be open to later criticism based on their position.²⁵⁸ That is, the political question doctrine was unlikely necessary to deciding New’s appeal.²⁵⁹ There was a similar absence of acknowledging the president’s vast powers over the military by the three Army judges on the Army Court of Criminal Appeals,

²⁵²Nixon v. United States, 506 U.S. 224, 228 (1993) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

²⁵³See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 278 (2004); Japan Whaling Ass’n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986).

²⁵⁴Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

²⁵⁵Gilligan v. Morgan, 413 U.S. 1, 8 (1973).

²⁵⁶See, e.g., Lane v. Haliburton, 529 F.3d 548, 557 (5th Cir. 2008) (citing Baker v. Carr, 369 U.S. 186, 198 (1962)).

²⁵⁷United States v. New, 50 M.J. 729, 734 (A. Ct. Crim. App. 1999). In addition to challenging the Army regulation, New claimed that President William J. Clinton misled Congress and failed to comply with the United Nations Participation Act. *Id.* at 736. Enacted into law in 1945 and codified at 22 U.S.C. §§ 287-287e (1988), the Act empowered a president to use military forces for the preservation of peace under United Nations auspices but placed limitations on such use. See Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 614–15 (1993).

²⁵⁸*New*, 50 M.J. at 733.

²⁵⁹See *id.* at 740.

which first adjudged New's appeal.²⁶⁰ New's case garnered headline reporting and congressional interest.²⁶¹ Yet, one can search in vain for a rigorous historic analysis in *New*.²⁶² Indeed, the CAAF could have listed a number of past instances where the United States Armed Forces served in coalition operations beginning with the "China Relief Expedition" during the administration of President William McKinley, but it chose not to do so.²⁶³

In deciding *New*, CAAF aligned the political question doctrine with the principle that orders are presumed to be lawful and therefore, a president's orders or regulations are presumed to be lawful.²⁶⁴ The CAAF issued *New* in 2001.²⁶⁵ However, in 1999 the Army Court of Criminal Appeals in *United States v. Rockwood* provided a brief synopsis of the political question doctrine, and the CAAF on *Rockwood*'s appeal did not address the Army court's synopsis.²⁶⁶ In *United States v. Huet-Vaughn*, the CAAF, in 1995, determined that a military judge's suppression of the accused's testimony that she decided not to deploy to Operation Desert Storm because of her questions on the military operation's morality was not in error.²⁶⁷ The CAAF's

²⁶⁰ *See id.*

²⁶¹ *See, e.g.*, Alan Cowell, *G.I. Gets Support for Shunning U.S. Insignia*, N.Y. TIMES, Nov. 24, 1995, at A14; Toni Locy, *Judge Stays Out of Medic's Case*, WASH. POST, Mar. 29, 1996 at A20; John Mintz, *Air Force-German Alliance Draws Right-Wing Flak*, WASH. POST, May 28, 1996. However, as the Army Court of Criminal Appeals noted, some of the news interest in *New*'s case came about as a result of his family members and his own conduct:

"[A]ppellant's concerns were spread on the internet by appellant's father; were reported by the media, including the Stars and Stripes newspaper; and were publicly noted by several members of Congress and political candidates." *New*, 50 M.J. at 733.

²⁶² *See generally New*, 50 M.J. at 729.

²⁶³ *See generally* 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 (2017).

²⁶⁴ *New*, 55 M.J. 95, 107 (C.A.A.F. 2001).

²⁶⁵ *Id.* at 95.

²⁶⁶ 48 M.J. 501, 507 (A. Ct. Crim. App. 1998). In *Rockwood*, the Army Court took up an appeal from an officer who undertook a personal investigation of a Haitian prison but abandoned his post in defiance of lawful orders to do so. *Id.* at 504. The officer claimed as a defense that he followed President William Clinton's intent in investigating the prison, and in response the Army Court determined it would not review this defense as it would require it to delve into political questions. *Id.* at 507. For the CAAF review of the Army Court's decision, see *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). Several students supervised by Professor Frederic Lederer at the William and Mary Law School participated as Amicus Curiae and were permitted to argue. None of the judges who served on the CAAF in 1999 are currently on the Court. *Id.* at 100 n.1.

²⁶⁷ 43 M.J. 105, 113–114 (C.A.A.F. 1995).

reasoning was that questions on the legality of military operations were a political question.²⁶⁸ Although in *New*, the government's position was that the orders to wear the United Nations insignia were lawful and that the trial judge had correctly ruled on the matter, the government also prevailed on an argument that the insignia wear was also a political question that was outside of the realm of judicial review.²⁶⁹

The CAAF claimed that prior to *New*'s appeal, in *United States v. Padgett*, it had performed such a "graft" in regard to deployment orders being non-justiciable.²⁷⁰ *Padgett*, however, involved the legality of a relatively junior authority's order not to have a relationship with a minor.²⁷¹ No amicus are listed as participating in either the Army court or CAAF's issuance of *New*.²⁷² This absence might be explainable because *New* unsuccessfully petitioned the United States District Court of the District of Columbia, and then the Court of Appeals for the District of Columbia, to enjoin his prosecution from proceeding.²⁷³ Yet, given the political and media exposure of *New*'s appeal one might well wonder whether CAAF's amicus rules precluded the possibility of interested amici.

There is a difference between an Article III court determining that an appeal contains a non-justiciable political question and an Article I court doing so. As an example, in *Goldwater v. Carter*, Justice Rehnquist concluded in his concurrence that President James Earl Carter's decision to rescind the Mutual Defense Treaty with the Republic of China constituted a political question that could only be resolved by the Congress and executive branch exercising their persuasion or powers.²⁷⁴ The Court's intent in this

²⁶⁸ *Id.* at 115. The CAAF noted, "[T]o the extent that CPT Huet-Vaughn intended to contest the legality of the decision to employ military forces in the Persian Gulf, the evidence was irrelevant, because it pertained to a non-justiciable political question." *Id.*

²⁶⁹ *United States v. New*, 50 M.J. 729, 740 (A. Ct. Crim. App. 1999).

²⁷⁰ *United States v. New*, 55 M.J. 95, 109 (C.A.A.F. 2001) (stating "[t]he determination whether lawfulness of the order to deploy is a political question and thus nonjusticiable is reviewed on a de novo standard").

²⁷¹ *Padgett*, 48 M.J. at 278.

²⁷² *New*, 55 M.J. at 96.

²⁷³ See *United States ex rel. New v. Perry*, 919 F. Supp. 491, 499 (D.D.C. 1996) (finding that although the UCMJ does not divest the Article III courts of their jurisdiction, the principle of comity requires respect for the military courts to determine the legality of orders); *United States ex rel. New v. Perry*, No. CIV. A. 96-0033 (PLF), 1996 WL 420175, *1 (D.D.C. Jan. 16, 1996) (acknowledging that *New* had raised important issues of constitutional law); *New v. Cohen*, 129 F.3d 639, 647 (D.C. Cir. 1997).

²⁷⁴ 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

decision was not facially intended to strengthen presidential power, but rather to avoid intruding into the political process.²⁷⁵ Whatever the CAAF's intent was in its grafting the political question doctrine onto the more judicially solid review of the legality of orders, it opens the possibility of increasing presidential authority by informing the very courts that adjudicate military and veterans appeals not to apply any rigor to the question of presidential authority by avoidance through the political question doctrine.

2. Shielding Presidential Power by Avoiding History: *United States v. Bergdahl*

In 2020, the CAAF in *United States v. Bergdahl* accepted one amicus brief but denied, without comment, two other amicus applicants.²⁷⁶ *Bergdahl* is important as it assessed presidential interference in courts-martial for the first time since the UCMJ came into being.²⁷⁷ The CAAF determined that although a president is not subject to the UCMJ, a president nonetheless could undermine due process in a court-martial by committing unlawful command influence.²⁷⁸ The CAAF also decided that former Senator John McCain, in threatening to use his position on the United States Senate Armed Services Committee to inquire into the conduct of officers weighing whether to bring Bergdahl to trial, created an appearance of unlawful command influence.²⁷⁹ (That the CAAF determined McCain was amenable to the prohibition against unlawful command influence was relegated to the fact that McCain was a retired officer and therefore subject to the UCMJ).²⁸⁰

In 1950, Congress enacted a statute prohibiting unlawful command influence.²⁸¹ The purpose underlying the prohibition was to prohibit a

²⁷⁵ See, e.g., Harold Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J.F. 432, 432–33 (2018).

²⁷⁶ See C.A.A.F. Daily Journal (Feb. 24, 2020) (interlocutory orders); *United States v. Bergdahl*, 80 M.J. 70, 70 (2020); *United States v. Bergdahl*, 80 M.J. 68, 68 (2020). The amicus brief of this article's author was accepted by the CAAF and approvingly referenced by the dissent. See *United States v. Bergdahl*, 80 M.J. 230, 246 (2020) (Sparks, J., dissenting).

²⁷⁷ See Joshua Kastenberg, *Fears of Tyranny: The Fine Line Between Presidential Authority Over Military Discipline and Unlawful Command Influence Through the Lens of Military Legal History in the Era of Bergdahl*, 49 HOFSTRA L. REV. 11, 11 (2021).

²⁷⁸ *Bergdahl*, 80 M.J. at 234.

²⁷⁹ *Id.* at 236.

²⁸⁰ *Id.* at 234–35.

²⁸¹ See *United States v. Hutchins*, 72 M.J. 294, 302 (C.A.A.F. 2013) (Ryan, J., concurring); *United States v. Harvey*, 64 M.J. 13, 17 (C.A.A.F. 2006).

convening authority (senior officer who ordered the court-martial into existence) or other commanding officers from censuring, reprimanding, or admonishing the court-martial because of its findings or sentence.²⁸² The prohibition also serves to protect defense counsel and military judges from fear of retribution.²⁸³

There are two types of unlawful command influence that can be alleged in military law: actual unlawful command influence and apparent unlawful command influence. The former occurs when there is an improper manipulation of the criminal justice process which negatively affects the rights of an accused service-member in a court-martial.²⁸⁴ Apparent unlawful command influence occurs when an “objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.”²⁸⁵ When a service-member presents some evidence of unlawful command influence, the government has a burden of proof beyond a reasonable doubt that either the evidence purported by the accused service-member does not exist or is irrelevant to the question of unlawful command influence, or, that even if there is evidence of unlawful command influence, it does not create an intolerable strain upon the public’s perception of the military justice system.²⁸⁶ Although the CAAF has determined that unlawful command influence has, in the past, occurred, not once in the history of the UCMJ has an officer ever been court-martialed for violating the prohibition against unlawful command influence.²⁸⁷

As President Trump was not the convening authority, the CAAF’s majority limited its framing of President Trump’s actions to a military regulation prohibiting unlawful command influence and not whether Congress had extended the prohibition against unlawful command influence to a president.²⁸⁸ This is an important distinction because a president can later

²⁸²United States v. Navarre, 17 C.M.R. 32, 37 (1954).

²⁸³See, e.g., United States v. Pack, 9 M.J. 752, 756 (N.C.M.R. 1982); United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013) (discussing unlawful command influence). However, as the military judge position only came into existence in 1969, the original prohibition against unlawful command influence did not apply to military trial judges.

²⁸⁴United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017).

²⁸⁵*Id.* at 248; United States v. Proctor, 81 M.J. 250, 256 (C.A.A.F. 2021).

²⁸⁶*Proctor*, 81 M.J. at 256.

²⁸⁷Rachel E. Vanlandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV 1, 31 (2019).

²⁸⁸United States v. Bergdahl, 80 M.J. 230, 238 (C.A.A.F. 2020). In 1971, the Court of Appeals for the District of Columbia in *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971), implied that the

replace the regulation, and CAAF’s decision did not appear to consider the regulatory prohibition as a reflection of due process, but rather, as an attenuated self-imposed limit against influencing a court-martial.²⁸⁹ A concurrence authored by Judge Maggs likewise avoided any analysis of presidential authority over courts-martial or the possible limits against the exercise of such powers.²⁹⁰ Thus, it appears that it remains an open question as to whether a president who interferes in the fairness of a courts-martial can be reviewed under a statutory or constitutional rubric, or whether the original practice of courts-martial might militate against presidential conduct of the type experienced in *Bergdahl*.²⁹¹

Although Congress recognized a vast commander in chief authority in crafting the UCMJ, it was specifically concerned with the danger of unlawful command influence.²⁹² In addressing Congress’s efforts to insulate appellate review of courts-martial, the Court in *Schlesinger v. Councilman* noted that because the military’s highest appellate court was composed of civilian judges, it was “completely removed from all military influence or persuasion.”²⁹³ But since that time, there have been doubts expressed as to the independence of CAAF, most recently by Justice Samuel Alito.²⁹⁴ In addition to pointing out the fact that a president can dismiss the civilian judges appointed to the CAAF, Alito also argued that a judge advocate general—a commissioned military officer—possesses an authority to order the CAAF to grant review of an appeal.²⁹⁵ Given that the majority and

prohibition against unlawful command influence predated the UCMJ, as it found an army officer had been subjected to unlawful command influence in a World War II court-martial. *Id.* at 1352. The appellate court used the term “improper command influence” rather than “unlawful command influence.” *Id.*

²⁸⁹ See *Bergdahl*, 80 M.J. at 245.

²⁹⁰ See *id.* at 248.

²⁹¹ See Joshua E. Kastenberg, *Fears of Tyranny: The Fine Line Between Presidential Authority over Military Discipline and Unlawful Command Influence Through the Lens of Legal History in the Era of Bergdahl*, 40 HOFSTRA L. REV. 11, 60–61 (2020).

²⁹² See *Curry v. Sec’y of the Army*, 595 F.2d 873, 879 (D.D.C. 1979) (referencing Constitutional Rights of Military Personnel: Hearings Before Subcomm. on Constitutional Rights of Senate Comm. on Judiciary, 87th Cong., 2d Sess. 137-38, 222, 233 (1962); 96 Cong. Rec. 1443 (1950) (remarks of Sen. Kefauver)).

²⁹³ *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975).

²⁹⁴ See *Ortiz v. United States*, 138 S.Ct. 2165, 2204 (2018) (Alito, J., dissenting).

²⁹⁵ *Id.* at 2204 (citing to 10 U.S.C § 867). This statute states in pertinent part:

(a) The Court of Appeals for the Armed Forces shall review the record in . . .

concurrence in *Bergdahl* “punted” on a scholarly analysis, it is a reasonable conclusion that the CAAF insulated assertions of presidential power from judicial review.

CAAF’s treatment of presidential authority in *Bergdahl* and its consideration of unlawful command influence originating from senior government personnel in the military establishment have differed.²⁹⁶ In 2017, the CAAF overturned a conviction and determined that when the Secretary of the Air Force and Chief of Staff of the Air Force warned a convening authority to retire or be fired, this warning created an appearance of unlawful command influence.²⁹⁷ A service secretary is created by statute and a uniformed chief of a military department is subject to the UCMJ.²⁹⁸ Both the service secretary and the uniformed chief obtain their positions through the Senate’s consent.²⁹⁹ This places them in a different category than a president, but they remain subject to a presidential order.³⁰⁰

The CAAF further insulated presidential authority over the military in *United States v. Lane* when it determined that Senator Lindsay Graham, a reserve officer in the United States Air Force Judge Advocate General’s Corps, was, per the Constitution’s Incompatibility Clause, ineligible to serve on the Air Force Court of Criminal Appeals.³⁰¹ The Court, in *Schlesinger v.*

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review[.]

Id. As noted by the language of the statute above, Justice Alito overstated the power of an inferior officer—the judge advocate general—to order the CAAF to do anything. However, the CAAF is obligated to review all cases forwarded by Judge Advocate General of services, regardless of whether action results in affirmance or reversal. *United States v. Engle*, 11 C.M.R. 41, 43 (C.M.A. 1953). Yet, the CAAF may dismiss appeals certified by the judge advocate general if the judge advocate general has violated one of CAAF’s rules. *See, e.g., United States v. Williams*, 75 M.J. 244, 245 (C.A.A.F. 2016). A judge advocate general has a minimum rank of lieutenant general, or in the case of the Navy, rear admiral. *See* 10 U.S.C. § 8088 (Navy and Marine Corps); 10 U.S.C. § 7037 (Army); 10 U.S.C. § 9037.

²⁹⁶ *See, e.g., Boyce v. United States*, 76 M.J. 242, 242 (C.A.A.F. 2017).

²⁹⁷ *Id.* at 244.

²⁹⁸ *See United States v. Begani*, 79 M.J. 767, 772 (C.A.A.F. 2020).

²⁹⁹ *See, e.g., 10 U.S.C. § 7013(a)(1).*

³⁰⁰ *Id.* § 7013(b).

³⁰¹ *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). The Incompatibility Clause states:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have

Reservists Committee to Stop the War, determined that citizens did not possess standing to challenge the executive branch from having members of Congress serve in the reserves.³⁰² But the appellant in *Lane* could overcome a barrier based on standing because his appeal from a court-martial was pending before the very Air Force Court of Criminal Appeals to which the senator was assigned as a judge.³⁰³ While it is true that Graham's continued service on the Air Force appellate court might work to the detriment of court-martialed service-members seeking redress in the Senate, and in particular, the Armed Services Committee, there was little discussion of this factor in *Lane*, and it also can be observed that the CAAF, in disqualifying a senator from serving on a lower court, also provided a degree of insulation to the presidency.³⁰⁴

In *Ryder v. United States*, the Court, a decade before *Lane*, determined that a violation of the Appointment Clause in the appointment of two civilian judges on the Coast Guard Court of Criminal Appeals deprived a service-member appellant of a full appellate review.³⁰⁵ One scholar has argued that the Court in *Ryder* strengthened presidential authority in the sense that in having a general counsel to the Department of Transportation appoint the judges on the Coast Guard court instead of the Secretary of Transportation, the president was divested of say in the court's adjudicative capacity.³⁰⁶

been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2.

³⁰² 418 U.S. 208, 209 (1974).

³⁰³ *Lane*, 64 M.J. at 3. For a succinct comment that reserve officers are officers for the purpose of the Incompatibility Clause, see David L. Shaw, Note, *An Officer and a Congressman: The Unconstitutionality of Officers in the Armed Forces Reserve*, 97 GEO. L.J. 1739, 1744 (2009). Shaw illustrates that the issue of legislators holding reserve commissions became a topic of debate in the Senate in 1963. See *id.* at 1756 (describing the debate between Senator Albert Gore (D-TN) and Senator Barry Goldwater (R-AZ) in 1973).

³⁰⁴ See *Lane*, 64 M.J. at 3–4.

³⁰⁵ *Ryder v. United States*, 515 U.S. 177, 179 (1995). The Court determined that the civilian judges assigned to the Coast Guard Court of Criminal Appeals were not appointed in accordance with the Appointments Clause of the Constitution. *Id.* That clause reads: “[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2.

³⁰⁶ Harold J. Krent, *Executive Discretion and the Administrative State: Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. L. REV. 1083, 1092–94 (2015).

The issues raised in *Bergdahl* cannot be solved by a plain reading of the Constitution's text. Yet, a study of presidential authority over courts-martial was available for the CAAF's judges to consider.³⁰⁷ For instance, while the president had authority to convene naval court-martial since the nation's founding, it was not until 1830 that Congress recognized a limited authority to convene army courts-martial.³⁰⁸ The CAAF could have examined the Court's treatment of presidential conduct in *Swaim v. United States* where President Chester Alan Arthur thrice reviewed the court-martial sentence of a convicted general.³⁰⁹ And, finally, because the Court of Appeals for the District of Columbia intimated in 1971 in *Homcy v. Resor* that a prohibition against unlawful command influence predated the 1950 enactment of the UCMJ, the CAAF should have addressed historic restraints against executive control of courts-martial, perhaps dating to the 1689 Mutiny Act.³¹⁰

Homcy illustrates the importance of historic scholarship, because as in the case of *Bergdahl*, there is an absence of it in the decision.³¹¹ Yet, in an examination of the papers of Judge George MacKinnon, it is clear that MacKinnon along with Chief Judge J. Skelly Wright and Judge David Bazelon (the three Article III judges assigned to *Homcy*) accepted that a prohibition against unlawful command influence predated the UCMJ.³¹² On

³⁰⁷ See Joshua Kastenberg, *Neither Constitutionally Demanded nor Accurately Interpreted History: The Judicial Conservatives' Pockmarked Pathway of Military Law to the Unitary Executive*, Tex. Tech L. Rev. (forthcoming 2022) (manuscript at 24) (on file with author).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 51–54. See also R.W. Bennet, *Military Law in 1839*, 48 J. SOC'Y FOR ARMY RSCH., 226–228 (1970).

³¹⁰ 455 F.2d 1345, 1348, 1355 (D.C. Cir. 1971). See 1 Wm. & Mary ch. 5 § 3, 6 Stat. Realm 55 (1819); THE STATUTES AT LARGE FROM MAGNA CHARTA TO THE END OF THE LAST PARLIAMENT, 1761 416.

³¹¹ See *Homcy*, 455 F.2d at 1357.

³¹² See Bench Memo, *Homcy v. Resor*, No. 23,954 (Nov. 4, 1970). (George MacKinnon Papers-Minnesota Historical Society). The memorandum notes that the three judges were only concerned with whether affidavits attesting to improper command influence were prepared for the district court or for a previous administrative hearing, and not whether the doctrine prohibiting improper command influence predated the UCMJ. In a correspondence to Judge MacKinnon, Chief Judge J. Skelly Wright penned, in seeking for a minor change to MacKinnon's proposed draft:

I concur in Judge MacKinnon's excellent opinion in this case. I would appreciate it if he would give consideration to changing the second sentence of the first full paragraph on page 20 to read as follows (or something similar thereto): We recognize that the facts compelled a conviction for the offense and that under the circumstances a severe sentence

the other hand, it should not be missed that the Article III judges who are protected from intrusions into their independence and impartiality were willing to consider the limits of unlawful command influence, while the Article I judges in both the majority and concurrence adjudicating *Bergdahl* avoided a historical examination of the intersection of unlawful command influence and presidential power altogether.³¹³

III. TOWARD A MODEL OF IRRESPONSIBLE HISTORY: THE *BEGANI* CONCURRENCE

The extension of court-martial jurisdiction over retirees presents a question to the courts that should not be answered without a historic analysis on whether those who shaped the nation's laws at the signing and ratification of the Constitution would have tolerated such an extension. This is partly because, as a result of the fears of standing armies being used to supplant civil law and establish tyrannies, the Constitution itself placed limits on executive control over the army, and there was no continuous military jurisdiction recognized in the nation's early laws.³¹⁴ And it may be said that the extension of court-martial jurisdiction over roughly two million military retirees creates a class of citizens who are potentially subject to the whims of a president for the duration of their lives as such citizens remain subject to a commander in chief orders. It is not enough to cite to past scholars of isolated historic events to prove that a continuous jurisdiction would have been constitutionally tolerable. Judges who invoke the writings of historic persons as well as historic events as a matter of scholarly, if not intellectual, integrity should treat their subjects candidly and "take them as a whole."³¹⁵ No Article I court, to date, has addressed this continuous jurisdiction in a scholarly manner.

could have been imposed, but this does not authorize improper interference with the court in its adjudication of sentence.

See Memorandum from Chief Judge J. Skelly Wright to Judge George MacKinnon and Judge David Bazelon (Nov. 22, 1971) (George MacKinnon Papers-Minnesota Historical Society). Thus, Wright, like MacKinnon did not question a prohibition against improper influence predating the UCMJ.

³¹³ Compare *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971) with *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020).

³¹⁴ See U.S. CONST. art. II, § 4; *id.* art. II, § 8, cl. 11.

³¹⁵ See, e.g., David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 758 (2000).

The Framers of the Constitution and those who ratified it did fear the creation of a standing army.³¹⁶ It was for this reason that there were limits to control over the very miniscule army.³¹⁷ While not the central topic to this article, the fear of military authority was not embryonic to those who fought for independence against the Crown.³¹⁸ Although Alexander Hamilton has been thought of as the most militaristic pro-national government Framer of the Constitution, in the Federalist No. 21, he warned of the examples set by Cromwell and Caesar.³¹⁹ It is helpful to understand the historic memory of Oliver Cromwell that was imported to the Early Republic, because Cromwell and the actions of the English army between English Civil War (1642–1651) and past his death to the Act of Settlement of 1701 were known to those who shaped the laws and governmental structures of the early United States.³²⁰ In John Adams’s estimation, the Revolution’s origins began with the English experience and, as he phrased it, “ought to be traced back for two hundred

³¹⁶On this topic, see RICHARD KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802* 2 (1975). Kohn observed that “a standing army represented the ultimate in uncontrolled and uncontrollable power,” and that any nation that maintained permanent forces surely risked the overthrow of legitimate government and the introduction of tyranny and despotism. *Id.* See also ARTHUR TAYLOR PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 515–25 (1941); Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 *VAND. L. REV.* 435, 445 (1960); REGINALD C. STUART, *CIVIL-MILITARY RELATIONS DURING THE WAR OF 1812*, 23–24 (2009); Earl F. Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 *MISS. L. J.* 135, 145–47 (2005); Hasan Bashir & Phillip W. Gray, *Arms of the Republic: Republicanism and Militia Reforms During the Constitutional Convention and the First Federal Congress*, 36 *HIST. OF POL. THOUGHT* 310, 314–17 (2015).

³¹⁷See WILLIAM ADDLEMAN GANOE, *THE HISTORY OF THE UNITED STATES ARMY* 95 (1924).

³¹⁸See TONY HAYTER, *THE ARMY AND THE CROWD IN MID-GEORGIAN ENGLAND* 20 (1978) (noting that in 1738 in Parliament, a leading member of parliament Sir George Barclay stated, “I have heard it said, Sir, that if we do not keep up a standing-army, everything must run into confusion. Sir, I am one of those who think that a standing-army is worse than the worst confusion.”); Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 *J. OF THE HIST. OF IDEAS* 43, 49–51 (1979) (noting British Whig views on the necessity of a militia).

³¹⁹THE FEDERALIST NO. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³²⁰See Griffin Bovée, *Standing Armies: The Constitutional Debate*, *J. OF THE AM. REVOLUTION* (May 8, 2018), <https://allthingsliberty.com/2018/05/standing-armies-the-anti-federalists-and-federalists-constitutional-debate/>.

years and sought in the history of the country from the first plantations in America.”³²¹

Britain possessed its first standing army—later titled the “New Model Army”—under Cromwell, following the removal of Charles I in a violent civil war.³²² After the defeat of the Royalists, Parliament attempted to disband this army but was unsuccessful in doing so.³²³ And the most radical factions of the anti-monarchists had control of the New Model Army to the point where they were able to employ it to prevent a full parliamentary session, which might have prevented the execution of Charles I.³²⁴ After the death of Cromwell, the army’s leadership removed his successor and dissolved Parliament once more, before the restoration of the monarchy.³²⁵ In fifteen years, Britain underwent five military coups, and whatever else might be said about Parliament, despite it not meeting regularly, it was the one body in Britain which approximated something of a step toward a republican form of government.³²⁶ That this legislative body had fallen victim to the power of a standing army, under the command authority of persons acting as executives, lent to the Framers’ reticence to have an army at all. Partly out of this experience Blackstone cautioned, “In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms.”³²⁷

³²¹ See Michelle Orihel, “All Those Truly Acquainted with the History of Those Times”: John Adams and Opposition Politics of Revolutionary England, ca 1640-41, 86 *NEW ENG. Q.*, 433, 465–466 (2013) (quoting John Adams to Hezekiah Niles, Feb. 13, 1818).

³²² See, e.g., DEREK HIRST, *ENGLAND IN CONFLICT, 1603–1660: KINGDOM, COMMUNITY, COMMONWEALTH* 230–39 (1999); MARK STOYLE, *SOLDIERS AND STRANGERS: AN ETHNIC HISTORY OF THE ENGLISH CIVIL WAR* 115–51 (2005) (detailing the history of the New Model Army).

³²³ HIRST, *supra* note 322, at 239.

³²⁴ *Id.* at 239. See also SARAH BARBER, *REGICIDE AND REPUBLICANISM: POLITICS AND ETHICS IN THE ENGLISH REVOLUTION, 1646-1649* 121 (1998); WILLIAM C. BANKS AND STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* 16–19 (2016).

³²⁵ HIRST, *supra* note 322, at 239. See Henry Reece, *The Army in Cromwellian England*, 173–225 (2005).

³²⁶ On the nature of the coups, see BLAIR WORDEN, *GOD’S INSTRUMENTS: POLITICAL CONDUCT IN THE ENGLAND OF OLIVER CROMWELL* 249–59 (2012).

³²⁷ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *395.

A. *The Setting: Case Law and History Preceding United States v. Begani*

In 1882 the Court issued *United States v. Tyler* in which it determined, as a matter of statutory interpretation, retired army officers were entitled to the same pay raise as active duty officers.³²⁸ Authored by Justice Samuel Freeman Miller, *Tyler* was a brief two-page issuance in which, as a matter of dicta, the justices observed that retired officers remained subject to court-martial jurisdiction.³²⁹ In 1861, Congress crafted the first-ever retirement program in United States history for officers and it extended the army's and navy's court-martial jurisdiction over retirees.³³⁰ *Tyler* contains no historic analysis as to why court-martial jurisdiction over retirees might be constitutionally feasible.³³¹ In addition to *Tyler*'s lack of constitutional and historic analysis, there is nothing to suggest Miller or the other eight justices considered jurisdiction necessary to maintaining a disciplined and ready army in issuing the following phrase:

[O]fficers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof.³³²

Ironically, the retirement system was mainly designed in the Civil War to lure aged and infirm senior officers into leaving the army with a promise of a pension, but not to create a New Model Army or a Praetorian Guard.³³³ Yet, since 1882, courts have assumed that the extension of military jurisdiction over retirees is constitutionally sound. And William Winthrop, in his *Military*

³²⁸ 105 U.S. 244, 245 (1882).

³²⁹ *Id.* The Court of Claims decision likewise only notes that because, among other facts, retired officers are subject to court-martial jurisdiction, and they are entitled to the raise. *Tyler's Case*, 16 Ct. Cl. 223, 235 (1880).

³³⁰ Kastenberg, *supra* note 307, at 17–18. By 1900 a similar retirement system existed for enlisted service-members. *Id.*

³³¹ *Tyler's Case*, 16 Ct. Cl. at 235.

³³² *Tyler*, 105 U.S. at 245.

³³³ See *McCarty v. McCarty*, 453 U.S. 210, 212, 246 n.2 (1981) (citing statements of Senator James W. Grimes (R-IA) in CONG. GLOBE, 37th Cong., 1st Sess. 16 (1861)). Senator Grimes articulated that “some of the commanders of regiments in the regular service are utterly incapacitated for the performance of their duty, and they ought to be retired upon some terms, and efficient men placed in their stead.” *Id.*

Law and Precedents, penned, “[R]etired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question—is adjudged in *Tyler v. U.S.*”³³⁴ Winthrop would also claim, without citing to a judicial decision, that retired enlisted soldiers were also subject to military jurisdiction.³³⁵

The issue of court-martial jurisdiction over retired service-members does not create an exclusive question as to whether the executive branch can recall retirees to active duty in the event of an emergency, any more than it would be to subject citizens who receive a draft notice to immediate court-martial jurisdiction.³³⁶ This is because Congress could create a military offense for a retired service-member to refuse to return to active duty when ordered to do so.³³⁷ And it might be added that although Congress had determined that it was important to maintain a reserve of military personnel, the military does not subject retirees to annual fitness tests, medical evaluations, grooming standards, or even the current Covid-19 vaccine mandate.³³⁸ In addition to the glaring possibility of selective or vindictive prosecutions, two important questions arise in the context of military jurisdiction over retirees. The first is whether the potential lifetime denial of the full protections of the Bill of Rights are consistent with the Constitution, and secondly, whether the Framers’ standing army fears would have served as a prevention against this type of jurisdiction, which could lead toward the very type of tyranny new Republic sought to distant itself from.

Although there have been several Article I decisions in both the military appellate courts and the Court of Claims recognizing the principle of court-martial jurisdiction over retirees, recently, in *Larrabee v. Harker*, the Court of Appeals for the District of Columbia held oral argument to determine

³³⁴ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 113 n.3 (1896). In addition to *Tyler*, Winthrop listed *Runkle v. United States*, 19 Ct Cl. 396 (1884) and *Hill v. Territory*, 2 Wash. Ter. 147 (Wash. 1882) as dispositive of the issue on jurisdiction, but none of the decisions support an argument for the constitutionality of military jurisdiction. *Id.* As an aside, Winthrop and Tyler may have been personally acquainted since both served in the same regiment, the First United States Sharpshooters, in the Civil War. See GUY V. HENRY, *MILITARY RECORD OF CIVILIAN APPOINTMENTS IN THE UNITED STATES ARMY, VOL. I* 479 (1869).

³³⁵ See Kastenberg, *supra* note 307, at 43.

³³⁶ See, e.g., *Billings v. Truesdell*, 321 U.S. 542, 546–47 (1944).

³³⁷ See, e.g., *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885).

³³⁸ See, e.g., Brief for Plaintiff-Appellee at 25–26, *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322, 324 (D.D.C. 2020), *appeal docketed*, *Larrabee v. Harker*, 2021 WL 2156928 (D.C. Cir.) (No. 21-5012); see U.S. Dep’t of Defense, Memorandum for Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DOD Field Activity Directors (Dec. 20, 2021).

whether a district court decision denying the constitutionality of the government's extension of retiree jurisdiction should be upheld.³³⁹ Two Article I decisions, issued prior to *Begani* and relied on by the concurrence, are worthy of note before proceeding. In *United States v. Overton*, the Court of Military Appeals determined that military jurisdiction over retired Navy and Marine Corps service-members was constitutionally permissible.³⁴⁰ For reasons noted below, the CAAF's reliance in *Begani*, including the concurrence's, on *Overton* is nothing less than a misguided reliance on a flawed decision.³⁴¹ The other decision also relied on by the CAAF concurrence, *United States v. Hooper*, has a different history worthy of a brief analysis, including illustrating the dangers of a political prosecution if not selective prosecution. After all, Hooper had been court-martialed, in part, for associating with "known sexual deviates," which was a term applied to gays or lesbians.³⁴²

In 1957, the Navy court-martialed Admiral Selden Hooper, a retired flag officer.³⁴³ A decorated World War II veteran who commanded naval forces against the Japanese, the now-retired Hooper was caught in a homosexual sting operation and court-martialed for conduct unbecoming an officer and gentleman and sodomy.³⁴⁴ On appeal, Hooper argued that he was not a part of the active duty navy, and in the absence of an order to return to active duty he was not amenable to court-martial jurisdiction.³⁴⁵ The Court of Military Appeals, in an opinion authored by its chief judge, Robert Quinn, rested on *Tyler* as well as two Court of Claims opinions for the purpose of upholding

³³⁹ See, e.g., *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322, 324 (D.D.C. 2020), *appeal docketed*, *Larrabee v. Harker*, 2021 WL 2156928 (D.C. Cir.).

³⁴⁰ 24 M.J. 309, 311 (C.M.A. 1987).

³⁴¹ *Infra* note 409.

³⁴² *United States v. Hooper*, 28 C.M.R. 352, 354 (C.M.A. 1960) (Ferguson, J., dissenting). On classifying homosexuals as "deviates," see BERTRAM J. COHLER & ROBERT M. GALATZER-LEVY, *THE COURSE OF GAY AND LESBIAN LIVES: SOCIAL AND PSYCHOANALYTIC PERSPECTIVES* 293 (2000).

³⁴³ See *Hooper v. Hartman*, 274 F.2d 429, 429 (9th Cir. 1959); ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* 114 (2005); Jamie McIntyre, *Retired General to Plead Guilty on some Charges*, CNN, Mar. 16, 1999.

³⁴⁴ *United States v. Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958). On Hooper's career, see HILLMAN, *supra* note 343, at 115.

³⁴⁵ *Hooper*, 26 C.M.R. at 421. The Court of Military Appeals determined that the UCMJ provision on retiree jurisdiction superseded any formal statutory requirement for the Secretary of the Navy to recall him to duty. *Id.*

jurisdiction.³⁴⁶ In 1958, the Court of Appeals for the Ninth Circuit and the United States District Court for the Southern District of California determined that the federal courts could not intervene while Hooper's appeals transited through the military appellate courts, but neither Article III court examined the constitutionality of the military's jurisdiction assuming the military courts would do so.³⁴⁷

Hooper spent the rest of his life unsuccessfully trying to convince the military and federal courts that as a retiree, his conduct had no bearing on the military and therefore no jurisdiction could be sustained.³⁴⁸ In 1964, the Court of Claims, in addressing Hooper's suit against the government, expressed doubts on the constitutionality of jurisdiction over retirees, but then concluded "while we have certain doubts, we cannot say that the act is clearly unconstitutional."³⁴⁹ The claims court judges, in making their doubts known, did not provide any historic or constitutional analysis to their decision in favor of the government.³⁵⁰

The one Article III court to address the merits of his appeal occurred in 1973 in *Hooper v. Laird* in the United States Court of Appeals for the District of Columbia.³⁵¹ But that court simply determined that it did not possess the authority to overturn Hooper's conviction for sodomy.³⁵² For reasons

³⁴⁶ *Id.* at 422. The Court of Military Appeals also relied on *United States ex rel. Closson v. Armes*, 7 App. D.C. 460 (D.C. Cir. 1895). However, in this instance, Armes was arrested for the purpose of a court-martial and he did not challenge court-martial jurisdiction, but rather, the power to arrest him. *Armes*, 7 App. D.C. at 472. The Court of Military Appeals also took cognizance of *United States ex rel. Pasela v. Fenno*, 167 F.2d 593, 593 (2d Cir., 1948). However, in that case, the crime Fenno was accused of had a direct military nexus. *Id.* at 593. That is, he committed larceny of Navy property. *Id.* And the Second Circuit, like in *Tyler*, conducted no constitutional analysis other than to state that the recall and jurisdictional statute did not violate the Fifth Amendment. *Id.* at 595.

³⁴⁷ *See* *Hooper v. Hartman*, 163 F. Supp. 437, 441 (S.D. Cal. 1958), *aff'd*, 274 F.2d 429 (9th Cir. 1959).

³⁴⁸ *See, e.g.*, *Hooper v. United States*, 164 Ct. Cl. 151 (1964); *Hooper v. Laird*, 41 C.M.R. 329 (C.M.A. 1970).

³⁴⁹ *Hooper v. United States*, 164 Ct. Cl. 151, 159 (1964). Instead of one judge sitting in judgement, the entire claims court did so. The decision was authored by Don Nelson Laramore, an Eisenhower appointee. *See Don N. Laramore, 82, Dies*, WASH. POST, Aug. 10, 1989. Judges Samuel Whitaker, James Durfee, and Oscar Davis signed the decision.

³⁵⁰ *See* *Hooper v. United States*, 164 Ct. Cl. 151, 160 (1964).

³⁵¹ *Hooper v. Laird*, 482 F.2d. 784, 785 (D.C. Cir. 1973).

³⁵² *Id.* The Court of Appeals for the District of Columbia, in *Avrech v. Sec. of the Navy*, had determined that the general article (Article 134) was unconstitutionally vague and as a result voided that part of Hooper's conviction. 477 F.2d 1237, 1244 (D.C. Cir. 1973).

unrelated to the constitutional question of retiree jurisdiction, the court determined that the Article 133 conduct unbecoming an officer and gentleman charge was unconstitutionally vague.³⁵³ And yet, the Article III judges who participated in the appellate court's *Hooper v. Laird* per curiam not only articulated their distrust of the military justice system, in their personal correspondences and memorandum, they too doubted the constitutionality of retiree jurisdiction.³⁵⁴ For instance, Judge Edward Tamm penned to Judges Carl McGowan and George Edwards that "this case raises for me what is a rather difficult question as to the application of the Uniform Code of Military Justice committed by a retired member of the armed forces off a military post or base."³⁵⁵ But as Hooper's appeal was based off of the recent Court decision – *O'Callahan v. Parker* – that had limited all courts-martial to military offenses, Hooper did not try to reassert the argument that jurisdiction over retirees was unconstitutional, and Tamm's concerns were apparently not thought to be proper for the court.³⁵⁶ On the other hand, the court expressed its distrust of the military justice system in deciding not to order a resentencing for Hooper.³⁵⁷

B. Historic Methods and Sources Applicable to Begani, if not Commander in Chief Authority

Justice Harold Hitz Burton once opined, "To read any statute or decision without reference to its legal history is to read it out of context. It is like a fish out of water."³⁵⁸ Although Chief Justice John Roberts has called the

³⁵³ *Laird*, 482 F.2d at 785.

³⁵⁴ Tamm to McGowan and Edwards, January 15, 1973 [Carl McGowan Papers-Library of Congress].

³⁵⁵ *Id.*

³⁵⁶ See McGowan to Tamm and Edwards, January 26, 1973 [Carl McGowan Papers-Library of Congress].

³⁵⁷ See McGowan to Edwards, January 15, 1973 [Carl McGowan Papers-Library of Congress]. McGowan penned:

We considered this matter here at some length before issuing the opinion. We concluded that the Navy, being what it is, there is no likelihood that a different sentence would be imposed by the military court, whether Hooper was convicted of one count of sodomy with an enlisted man or 10 such counts. Ed Tamm authorizes me to say he shares this view.

Id.

³⁵⁸ Letter from Justice Harold H. Burton to Professor Morris D. Forkosch (May 26, 1958), in *THE LEGAL HISTORIAN* (Am. Soc'y Legal Hist.).

papers and other memoranda of judges an “unfortunate source,” he specifically referenced the Papers of Justice Harry A. Blackmun in a 2021 oral argument.³⁵⁹ Some caution is important in utilizing these papers as an overreliance on them could take a decision out of context. Yet, at a minimum, Robert’s statement is a concession that the mindset and efforts at judicial compromise have some applicability to present and future challenges against federal and state law. The entire case history of *Tyler*, for example, is locatable in an online research library.³⁶⁰ Such papers might also illuminate the conditions under which past appeals were taken up and issues decided.

The same might be said of the papers contained in presidential administrations and, as one example, the Richard Nixon Library has listed papers relevant to Ernest Fitzgerald and the traverse of his suit and appeals.³⁶¹ For that matter, the papers of Justices Harry A. Blackmun and William Brennan in the Library of Congress also contain extensive files on *Fitzgerald*.³⁶² While the judicial decision in *Fitzgerald* provides the law of presidential immunity from civil suits, rather than the correspondences of the justices, a familiarity with the conditions of that lawsuit and appeals would have readily evidenced *Fitzgerald*’s complete inapplicability to *Burch*.³⁶³ Although the plain reading of *Fitzgerald* makes it clear that the Court focused on shielding a president from being bottled up in civil suits and therefore unable to conduct duties, certainly the justices’ papers evidence this.³⁶⁴

³⁵⁹ Joan Biskupic, *Why John Roberts Cited the Private Papers of the Justice Who Wrote Roe v. Wade*, CNN (Dec. 2, 2021, 5:57 PM), <https://www.cnn.com/2021/12/02/politics/roberts-blackmun-roe-papers/index.html>.

³⁶⁰ See, e.g., Making of Modern Law (US Supreme Court Records and Briefs, 1832-1978), GALE Research Library, https://go-gale-com.unmlawlibrary.idm.oclc.org/ps/start.do?p=SCRIB&u=nm_a_unmsol.

³⁶¹ See, e.g., NAT’L ARCHIVES, https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/textual/files/name_files.pdf (last visited Apr. 5, 2022).

³⁶² LIBR. OF CONG., <https://catalog.loc.gov/vwebv/holdingsInfo?searchId=21685&recCount=25&recPointer=1&bibId=11792262> (last visited Apr. 5, 2022); LIBR. OF CONG., https://findingaids.loc.gov/db/search/xq/searchITFA02.xq?_q=fitzgerald&_type=all&select=all&_id=loc.mss.eadmss.ms002010&_displayTerm=Fitzgerald&_zx=go&_raw_mfer_q=Fitzgerald (last visited Apr. 5, 2022).

³⁶³ For an example, see Warren Burger, C.J., U.S. Sup. Ct., to Lewis Powell, J., U.S. Sup. Ct. (March 18, 1982). In this letter Burger expresses his disagreement with the majority’s decision to recognize immunity for presidential aides and rather focus solely on a president’s ability to conduct executive duties.

³⁶⁴ *Id.*

In 1931, Homer Carey Hockett, an Ohio State University history professor, noted that much of American history relies on the competence of the observer.³⁶⁵ For judicial originalists, Hockett's warnings about observers have importance beyond the poignant example he offered on James Madison and the now obscure Major William Jackson. Both Madison and Jackson reported on the Federal Convention debates in 1787, but while Madison was an assiduous note-taker, Jackson, who might have owed his position to connections rather than ability, provided George Washington a stack of disorganized notes charitably characterized as disorderly.³⁶⁶ And, according to Hockett, Jackson disposed of loose scraps of paper which might have given greater context to the Convention's important documents.³⁶⁷ In other words, we are left to trust Madison's capture of events as a guiding source.³⁶⁸ And it might also be considered that we cannot assume that observers of centuries-old events held the principle of accuracy with the same degree as the current readers.³⁶⁹ Although the loss of original sources might lead to conjecture, the importance of primary source material for a historian writing on the reasoning for human action remains paramount. Put another way, history by conjecture or history through analogy might be an acceptable bridge for reaching conclusions provided that there is sufficient data to reach the conclusion.

Certainly, a loss of original data does not mean the outright dismissal of texts such as Max Farrand's *Records of the Federal Convention of 1787*. Farrand, a Princeton University history professor and the director of the Huntington Library, authored the *Records* as a three-volume set in 1911, and

³⁶⁵ HOMER CAREY HOCKETT, INTRODUCTION TO RESEARCH IN AMERICAN HISTORY 82–90 (1932). While Hockett is not particularly well cited today, his work was influential in the Puerto-Rican Judiciary. See *Vélez v. Tribunal Superior De. P.R.*, 75 P.R. Dec. 585, 630 (P.R. 1953). For a recent positive evaluation of Hockett, see Buckner F. Melton, *Clio at the Bar: A Guide to Historical Method for Legalists and Jurists*, 83 MINN. L. REV. 377, 435 n.298 (1998) (stating “[o]ne of the best guides to historical source criticism appears in Homer Carey Hockett, *The Critical Method in Historical Research and Writing* 13–62 (1955)”).

³⁶⁶ HOCKETT, *supra* note 365, at 85.

³⁶⁷ *Id.* On the abandonment of the classic formulation of historic method in the United States, see Susan Grigg, *Archival Practice and the Foundations of Historical Method*, 78 J. AM. HIST. 228, 228 (1991).

³⁶⁸ See Mary Sarah Bilder, *How Bad Were Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1624–25 (2012) (noting that the available records of the Convention differ from Madison's “powerful narrative” of them).

³⁶⁹ See, e.g., David Henige, *HISTORICAL EVIDENCE AND ARGUMENT* 106 (2005).

it has remained a staple of the federal courts since.³⁷⁰ Far more than Farrand, the Federalist Papers are the most widely cited historic document in the nation's courts.³⁷¹ How these papers are cited are a topic outside of this article, and although there is hardly a uniform acceptance to their use, they remain important to the understanding of constitutional law.³⁷² Several of the Federalist Papers touch on military power and restraints against such power.³⁷³

In terms of underused primary source material, the National Archives and Records Administration and the Library of Congress contain troves of data on military authority and courts-martial in the Early Republic. Record Group 153 consists of all army courts-martial from 1809 through 1917.³⁷⁴ Similar data is reachable for the Navy.³⁷⁵ Additionally, the records of the adjutant generals and the War Department reside at the Archives, a building located within walking distance of all three Article I courts. The personal correspondences of presidents, war and naval secretaries, judges, and flag officers may be found in the Library of Congress. Again, the Library of Congress—all three buildings—are within walking distance of the three Article I courts. Archival sources are important, but as one archivist has pointed out, there has been an abandonment of the “classical formulation of historical method” dating to the 1960s which placed primacy on original—or primary—source material.³⁷⁶ To the archivist, “the classic formulation of historical method in the United States had three elements: research, or the

³⁷⁰ On Farrand, see Anon, *Dr. Max Farrand*, 9 HUNTINGTON LIBR. Q., Nov. 1945, at 1, 1–3. For a sample of his use by the Court, see *Ex parte Grossman*, 267 U.S. 87, 112 (1925) (deciding that the presidential pardon power includes the power of pardons over judicial criminal contempt findings); and *Nixon v. United States*, 506 U.S. 224, 244 (1993) (Powell, J., concurring) (describing the historic debates over the impeachment power).

³⁷¹ See, e.g., Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of The Federalist Papers*, 58 POL. RSCH. Q. 329, 330 (2005); Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1330 (1998); Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996*, 85 KY. L.J. 243 (1997).

³⁷² See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 49 n.204 (1998); William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist Papers but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302 (1998).

³⁷³ See, e.g., THE FEDERALIST NOS. 8, 24, 25, 29 (Alexander Hamilton), NOS. 41, 46 (James Madison).

³⁷⁴ NAT'L ARCHIVES, <https://www.archives.gov/research/military/army/court-martial-case-files> (last visited Apr. 5, 2022).

³⁷⁵ NAT'L ARCHIVES, <https://www.archives.gov/research/military> (last visited Apr. 5, 2022).

³⁷⁶ Grigg, *supra* note 367, at 229.

identification and location of sources and the selection of evidence from them; analysis, usually divided into external and internal criticism; and synthesis or interpretation.”³⁷⁷ Of course, not all material which is claimed as “primary” is so, and there is a temptation to treat primary source material as if it contains the desired end data.³⁷⁸

Secondary sources of historic military law jurisprudence are varied, but a focus on two commentators in addition to Blackstone is helpful to explaining the shortcomings of the jurists’ historic scholarship. Jurists have frequently turned to Blackstone for questions of military law.³⁷⁹ Blackstone, of course, is important to United States law even though he lived in Britain and wrote prior to the Constitution.³⁸⁰ Additionally, Article I jurists cite to William Winthrop and Frederick Bernays Wiener.³⁸¹ None of this usage is surprising, but the nation’s Article I judges do not appear to have questioned the motivations of either Winthrop or Wiener or sought to reassess their paramountcy.³⁸² Winthrop, a Civil War veteran and scholar who has been called the “Blackstone of Military Law,” argued that “usage” enabled expanded military jurisdiction, including a military supremacy over the legislative branch.³⁸³ The acceptance of “usage” to establish an executive branch supremacy is hardly rooted in the Constitution or in the nation’s legal

³⁷⁷ *Id.* at 228.

³⁷⁸ Henige, *supra* note 369, at 45.

³⁷⁹ *See, e.g.,* *Loving v. United States*, 517 U.S. 748, 765–68 (1996) (using English “Constitutional History” to determine that the Framers’ would have permitted Congress to delegate to the President the authority to impose a military death penalty in peacetime by the crafting of procedural rules); *Solorio v. United States*, 483 U.S. 435, 446 n.12 (1987) (stating that Blackstone’s condemnation of military trials is not sufficient to overcome the Make Rules Clause); *United States v. Culp*, 14 C.M.R. 199, 208 (C.M.A. 1963) (explaining that in Blackstone’s time there was no right to a jury in military and naval trials and therefore no right exists in the present). *See also* Wierman v. *United States*, 36 Ct. Cl. 236, 238 (1901) (highlighting Blackstone’s aversion to military trials). In the CAVC, see *Palomer v. MacDonald*, 27 Vet. App. 245, 251 n.3 (2015) (using Blackstone for the proposition that the court cannot depart from a strict statutory reading for purposes of equity in favor of veteran). Of importance to this last decision is that the Congress expected lenity in favor of the veteran applicant, and here, the CAVC uses Blackstone to triumph over that principle.

³⁸⁰ *See, e.g.,* DANIEL BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 202 (1958); *see* Richard A. Posner, *Blackstone, and Bentham*, 19 J. L. & ECON. 569, 597 (1976). *See also* Howard L. Lubert, *Sovereignty and Liberty in Blackstone’s Commentaries on the Laws of England*, 72 REV. POL. 271, 272 (2010).

³⁸¹ *See, e.g.,* Joshua E. Kastenberg, *Reassessing the Ahistorical Judicial Use of William Winthrop and Frederick Bernays Wiener*, [vol. #] J. NAT. SEC. POL. (forthcoming).

³⁸² *Id.* at 1.

³⁸³ *Id.* at 6.

history. Indeed, “usage” would appear to be an anathema in the sense that the military would become its own government if accepted as law.

Wiener claimed that although the army’s early courts-martial records were destroyed, he could still affirm that the Bill of Rights did not apply to courts-martial.³⁸⁴ Yet, he did not consider that there were other sources, particularly state court judges who, prior to *Tarble’s Case*, in which the Court, in 1872, determined that courts-martial were a purely federal enclave, issued writs on military officers and published decisions on jurisdiction and by implication the limited subject matter and personal jurisdiction of courts-martial.³⁸⁵ Wiener opposed the creation of a court of military appeals in 1949, and yet the military courts of appeals consider him a viable source of law.³⁸⁶ Unlike Wiener, Justice Antonin Scalia implied an importance to pre-*Tarble* state sources in his dissent in *Hamdi v. Rumsfeld* in 2004.³⁸⁷ I do not argue for a return to pre-*Tarble* jurisprudence, but state supreme court decisions on the restrictions against federal military power exist to provide historic context.³⁸⁸ Wiener’s continued acceptance in the courts is troubling for other reasons. He defended the internment of United States citizens of Japanese descent and other governmentally sanctioned racist programs as well as the executive branch’s power—including the use of the military—to police the population.³⁸⁹

There are other secondary texts worthy of consideration on the issue of executive power. Both Professor John Yoo and Professor Martin S. Flaherty produced a list of scholars who presented detailed analysis on the origins of the Constitution.³⁹⁰ This list includes Bernard Bailyn, Gordon Wood,

³⁸⁴Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 44 (1958).

³⁸⁵See Joshua E. Kastenberg, *The Limits of Executive Power in Crisis in the Early Republic: Martin v. Mott—An Old Gray Mare—Reexamined Through Its Own History*, 82 LA. L. REV. 161, 197 (2021).

³⁸⁶*Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Servs.*, 81 Cong. 128–40 (1949) (statement of Frederick B. Wiener).

³⁸⁷See *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

³⁸⁸See Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg is Now (or Ever Was) Good Law*, 44 TEX. TECH. L. REV. 1, 27 (2011).

³⁸⁹Kastenberg, *supra* note 381, at 10.

³⁹⁰John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 COLO. L. REV. 1169, 1189 (1999); Flaherty, *supra* note 42, at 536, 540.

Edmund Morgan, Jack Rakove, and J.G.A. Pocock.³⁹¹ Added to this list should be Richard S. Kohn who, in his *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802*, observed “no principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime.”³⁹² Unlike the other historians, Professor Kohn focused on the development of the army in the Early Republic.³⁹³ None of the judicial decisions cited in this article reference any of these distinguished scholars.

C. Begani and the Military Retirement Puzzle: The Unscholarly Model of History

On July 31, 2019, the United States Navy court-martialed retired Chief Petty Officer Steven Begani under the congressionally prescribed jurisdiction found in UCMJ Article 2(a)(6).³⁹⁴ Begani had served twenty-four years in the Navy and had retired into the “Fleet Reserve.”³⁹⁵ The CAAF in *United States v. Begani* determined that retired sailors in the Fleet Reserve remained amenable to military jurisdiction, but contrary to the government’s assertion, Begani himself had not waived this issue by pleading guilty at his court-martial, or waived his right to a preliminary hearing.³⁹⁶ Begani had argued that as a retired active-duty service-member, he could not be constitutionally sentenced to a dishonorable discharge, and that subjecting retired active-duty service-members to continuous jurisdiction, but exempting retired reservists

³⁹¹ Yoo, *supra* note 390390, at 1189; *see also* Flaherty, *supra* note 42, at 536, 540.

³⁹² RICHARD KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, 2 (1975). Kohn further observed that “a standing army represented the ultimate in uncontrolled and uncontrollable power,” and that “any nation that maintained permanent forces surely risked the overthrow of legitimate government and the introduction of tyranny and despotism.” *Id.*

³⁹³ *Id.*

³⁹⁴ *United States v. Begani*, 79 M.J. 767, 769 (NMCCA 2020). The court-martial found Begani guilty of one specification of attempted sexual assault of a child and two specifications of attempted sexual abuse of a child in violation of UCMJ, Article 80. 10 U.S.C. § 802. Art. 2(a)(6) reads: “The following persons are subject to this chapter . . . Members of the Fleet Reserve and Fleet Marine Corps Reserve.” *Id.* The term “Fleet Reserve” connotes a retirement status specific to the Department of the Navy but analogous to retired service-members from other service branches. *See United States v. Begani*, 81 M.J. 273, 277 (CAAF 2021).

³⁹⁵ *Begani*, 81 M.J. at 275.

³⁹⁶ *Id.* at 276.

constituted, an equal protection violation.³⁹⁷ In a nutshell, Begani raised, as a part of his appeal, an argument that because he was not currently part of the serving military and therefore not directly subject to the orders of a commander, he could not be deprived of his Fifth Amendment right to a grand jury.³⁹⁸ He also argued that the Court had implicitly overrode its *Tyler* dicta in recharacterizing the nature of military retirements in *Barker v. Kansas*, an opinion originating from a division of property resulted from a divorce.³⁹⁹ Begani's arguments failed, and the CAAF did not overturn either his conviction or the lower service appellate court.⁴⁰⁰

The three-judge concurrence, as authored by Judge Maggs, began by citing to *Overton*, *Hooper*, and *Tyler* as well as by quoting Winthrop's *Military Law and Precedents*.⁴⁰¹ The citation to Winthrop leaves an impression that the concurrence adopts his view of the law as unquestionably correct, whether it applied to officers or enlisted forces. The concurrence also cited to Farrand's work, but merely for the observation that the Framers "did not address the specific issue in this case."⁴⁰² The concurrence did commend Begani's appellate counsel for arguing that *Overton* was incorrectly decided based on the original meanings of the Fifth Amendment's Grand Jury Clause and the "Make Rules Clause."⁴⁰³ But then the judges placed the entire onus

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 277 (citing *Barker v. Kansas*, 503 U.S. 594 (1992)). While judicial memoranda are generally not a part of the court's consideration, it is important to point out, in fairness to Chief Judge Stucky, that the Court who authored the majority opinion, that in *Barker*, the Court specifically designed their opinion to preserve *Tyler*. On April 8, 1992, Justice Antonin Scalia penned to Justice Byron White, the author of *Barker*:

It seems to me unnecessary to run the risk of destroying *Tyler*, especially since no one has urged that be done. Your opinion quite persuasively demonstrates that nothing in *Tyler* or in our subsequent case establishes that military retired pay is in all respects indistinguishable from ordinary compensation.

Letter from Scalia to White, April 8, 1992 (on file with the Baylor Law Review and the author). Justice O'Connor agreed that it was important to "limit the rejection of *Tyler*." See also Letter from Justice O'Connor to White, April 8, 1992 (on file with the Baylor Law Review and the author).

⁴⁰⁰ *Begani*, 81 M.J. at 282.

⁴⁰¹ *Id.* (Maggs, J., concurring).

⁴⁰² *Id.* at 286.

⁴⁰³ *Id.* at 282.

on Begani to prove that this precedent is inconsistent with the Constitution's original meaning.⁴⁰⁴

Tyler, as noted, is dicta and, as Chief Justice John Marshall cautioned in *Cohens v. Virginia*, that dicta may be respected but it is hardly controlling.⁴⁰⁵ Certainly, *Overton* was the military law at the time of Begani's appeal, but in that case, the Court of Military Appeals, in its brief four-page decision, erroneously claimed that in issuing *Tyler* and *McCarty v. McCarty*, the Court recognized jurisdiction over retirees as "constitutional."⁴⁰⁶ Like *Tyler*, however, *McCarty* did not arise as a challenge to military jurisdiction, but rather as a challenge to California's division of property after marital dissolution.⁴⁰⁷ During the Court's limited analysis of military retirement pay in *McCarty*, it focused not only on *Tyler*, but also on the claims court decision issued in *Hooper*, without ever determining the constitutionality of the extension of military jurisdiction.⁴⁰⁸ In other words, in *Overton*, the military appellate court performed no constitutional or historical analysis whatsoever on the issue of jurisdiction over retirees, but wrongly claimed this had occurred in the nation's highest court.⁴⁰⁹ This fact alone should have compelled a judicial scholarly historic analysis of Begani's appeal, but it did not. Instead, the concurrence, in maintaining the dicta of *Tyler*—and *Overton*—emphasized words over constitutional concepts.⁴¹⁰

Unfortunately, the *Begani* concurrence not only sanctified the unscholarly *Overton*, it compounded the historic deficiency by adding failing analogies to support a continuing military jurisdiction theory.⁴¹¹ Namely, the concurrence focused on furlough grants issued at the end of the Revolutionary War and the army's treatment of a small-scale mutiny of Pennsylvanian soldiers, that followed the more well-known "Newburgh

⁴⁰⁴ *Id.* Ironically, in making this point, the concurrence cites to *Gamble v. United States*, 139 S.Ct. 1960 (2019). *Id.* Given that the Court, in an opinion written by Justice Alito cautioned against determining constitutional issues by conjecture. *Gamble*, 139 S. Ct. at 1965. This is precisely what the concurrence did in *Begani* in their use of furloughs to shape the question of jurisdiction.

⁴⁰⁵ 19 U.S. 264, 399 (1821).

⁴⁰⁶ *United States v. Overton*, 24 M.J. 309, 311 (1987). The Court of Military Appeals also bizarrely found that *Goldman v. Weinberger*, a decision arising from a challenge based on religious freedom, reinforced the constitutionality of retiree jurisdiction. *Id.*

⁴⁰⁷ *McCarty v. McCarty*, 453 U.S. 210, 216 (1981).

⁴⁰⁸ *Id.* at 221–23.

⁴⁰⁹ *Overton*, 24 M.J. at 311.

⁴¹⁰ On the phenomena of the judicial adoption of words over constitutional substance, see Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV., 245–48 (2010).

⁴¹¹ See *United States v. Begani*, 81 M.J. 273, 284–85 (Maggs, J., concurring).

Conspiracy.⁴¹² Before discussing either the small-scale mutiny or the Newburgh Conspiracy, it is important to note that at the time of the furlough grants, the army did not have a system of leave in place.⁴¹³ And the War and Naval Departments, as well as their successor departments, have never equated retirement with furloughs, as the retirement system originated in 1861 and furloughs remained a part of the military law long-after.⁴¹⁴ On this basis alone, the concurrence's use of analogy is a contrivance. Perhaps the greatest error in the concurrence's analogy is the most obvious of all. Even if court-martial jurisdiction was universally accepted over the furloughed soldiers, this type of jurisdiction subjected them to congressional, rather than executive, authority, because no presidency existed at the time.⁴¹⁵

The Newburgh Conspiracy was either an alleged or actual plotted *coup d'état* by senior army officers against the Continental Congress.⁴¹⁶ The coup disbanded after General George Washington pleaded with its leaders for it to do so.⁴¹⁷ That conspiracy had to do with the Continental Congress's determination to renege on its promise for officers who served the duration

⁴¹²*Id.* at 284–85. On the issue of furlough grants until the conclusion of hostilities, see Alexander W. Armor, *War Discharges*, 21 WM. & MARY Q., 344, 347–48 (1941). Judge Maggs' simplistic presentation of furlough grants omits other pertinent facts. The furloughs given prior to the signing of peace were a compromise between the civilian leadership who wanted to keep the armies in the field as long as British forces remained in the former colonies, and those who wanted to disband the army. *Id.* In the present time there are no foreign hostile military forces occupying United States territory. Secondly there was a reasonable expectation in the nation's political leadership that the peace with Britain would fail. *Id.* Finally, the furloughed soldiers were permitted to bring their arms with them to the location of their homes. *Id.*

⁴¹³ Armed Forces Leave Act of 1946, 79th Cong. Ch. 931, 60 Stat. 963 (1946). See also Hearing Before the Committee on Military Affairs, United States Senate, Seventy-Eighth Congress; Statement of Senator William Knowland (R-CA) on July 23, 1946, Cong. Rec. 9722 (seeking wartime compensation for soldiers who lost furlough time).

⁴¹⁴ See, e.g., JOHN C. SPARROW, HISTORY OF PERSONAL DEMOBILIZATION IN THE UNITED STATES ARMY, DA PAM 20-210, 9–13 (1952) (discussing demobilization after the Spanish-American War and World War I and the uses of furloughs); SEAN M ZIEGLER, ET AL., THE EVOLUTION OF MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT, VOLUME II, 35 (2020). The second source is a comprehensive RAND study on military policies, which noted that the 1912 army personnel laws placed enlisted soldiers on a seven-year enlistment with the first four years on active service and the next three years in a "furlough" status. Given that a furlough has a fixed date of termination, it can hardly be equated to a lifetime jurisdictional matter.

⁴¹⁵ See *Begani*, 81 M.J. at 285 (Maggs, J., concurring).

⁴¹⁶ Richard H. Kohn, *The Inside Story of the Newburgh Conspiracy: America and the Coup d'Etat*, 27 WM. & MARY Q. 187, 189–90 (1970).

⁴¹⁷ *Id.*; see also Edward Skeen & Richard Kohn, *The Newburgh Conspiracy Reconsidered*, 31 WM. & MARY Q. 273, 281 (1974).

of the war to receive a lifetime pension of “half-pay.”⁴¹⁸ Nowhere does the *Begani* concurrence acknowledge the existence of the Newburgh Conspiracy or how it might have had a relation to the small-scale mutiny in Pennsylvania that apparently the three concurring judges determined was compelling to the issue of military jurisdiction over retirees.⁴¹⁹ But, the fact that no officer who took part in the Newburgh Conspiracy was court-martialed, demoted, or dismissed from the Army may evidence that there was no universal acceptance of court-martial jurisdiction over soldiers who were on furlough status.⁴²⁰ Rather, in regards to the court-martial of the small-scale Pennsylvania mutiny, there was simply a judgment call made, and the historic record is missing the reasons for holding courts-martial over civil trials.⁴²¹

It is true, as the concurrence pointed out, that the power to issue furloughs was restricted to senior military authorities and that furloughed soldiers remained subject to military service for the duration of the war.⁴²² However, the concurrence does not explain the relevance of this fact, and it does not appear to have any bearing on the issue of jurisdiction.⁴²³ Finally, there is the history of the Pennsylvania mutiny to consider. In the summer of 1783, some of the furloughed soldiers mutinied in Pennsylvania and were court-martialed for that offense.⁴²⁴ Mutiny is a military-specific offense, and the soldiers that were court-martialed were not subject to a lifetime of military jurisdiction.⁴²⁵ Put another way, the furloughed soldiers were not prosecuted for blasphemy in a church, highway robbery, or indebtedness, or for that matter the crimes *Begani* was convicted of (attempted sexual assault of a child and attempted sexual abuse of a child), but rather were prosecuted for a specifically military crime with no civilian analog.⁴²⁶

The concurrence cited to two sources on the 1783 mutiny in Pennsylvania, both of which were published in the *Pennsylvania Magazine*

⁴¹⁸ Paul David Nelson, *Horatio Gates at Newburgh, 1783: A Misunderstood Role*, 29 WM. & MARY Q. 143, 143 (1972); and STEPHEN R. TAAFE, WASHINGTON’S REVOLUTIONARY WAR GENERALS 249–50 (2019).

⁴¹⁹ See *Begani*, 81 M.J. at 282–86 (Maggs, J., concurring).

⁴²⁰ *Id.* at 285.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ See *id.*

⁴²⁴ *Id.* (citing Mary A.Y. Gallagher, *Reinterpreting the “Very Trifling Mutiny” at Philadelphia in June 1783*, 119 PA. MAG. OF HIST. & BIOGRAPHY 3, 3–4 (1995)).

⁴²⁵ *Begani*, 81 M.J. at 285 (Maggs, J., concurring).

⁴²⁶ *Id.*

of *History and Biography*.⁴²⁷ Founded in 1877, this history journal is a peer-reviewed publication, and the authors of both articles researched through the National Archives and Records Administration.⁴²⁸ The first source, Professor Kenneth R. Bowling's *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, was published in 1977.⁴²⁹ Professor Bowling focused his article on the soldiers' dissatisfaction which led to them marching on the state house to demand wages, and the effect of the mutiny on the government, specifically the Pennsylvania state government and not the Confederation Congress.⁴³⁰ He spends one paragraph on the courts-martial and noted that Congress pardoned all of the sentenced soldiers.⁴³¹ Importantly, Professor Bowling highlights that "the soldiers aimed their demonstration at the Supreme Executive Council—Pennsylvania's government—because the [Confederation] Congress had no source of income except requisitions on the states that were not always paid. Pennsylvania had an impost (tariff) that raised thousands of dollars annually."⁴³²

According to Professor Bowling, there was a problem with the Congressional action against the soldiers in that it did not possess a quorum that would have legally enabled the extension of jurisdiction, and that Hamilton succeeded in convincing the members present to act for two reasons: the alleged threat of a military coup and to prevent the Confederation Congress from allowing a state to assume a federal debt obligation.⁴³³ In

⁴²⁷ *Id.*

⁴²⁸ See generally *Pennsylvania Magazine of History and Biography*, HIST. SOC'Y OF PA., <https://hsp.org/publications/pennsylvania-magazine-history-and-biography> (last visited March 22, 2022).

⁴²⁹ Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 PA. MAG. OF HIST. & BIOGRAPHY 419, 423 (1977). Professor Bowling earned his Ph.D. in history at the University of Wisconsin-Madison in 1968 and is an affiliated faculty member at the George Washington University's history department.

⁴³⁰ *Id.* at 440. Professor Bowling explains that there is a mistake in arguing that the mutiny was aimed at the Congress, and indeed this fallacy-turned-history has been used to explain why the Congress has jurisdiction over Washington D.C. See e-mail from Kenneth Bowling, Adjunct Professor of Hist., Geo. Wash. Univ. (Feb. 9, 2022).

⁴³¹ Bowling, *supra* note 429, at 445.

⁴³² See Bowling, e-mail dated 9 February 2022.

⁴³³ See Bowling, e-mail dated 9 February 2022. Professor Bowling specifically noted:

Hamilton got the president of Congress to call a special session so that it could claim to be the object of the demonstration—the historic threat to republics, a military coup. Also

essence, the courts-martial, according to Professor Bowling occurred for a political, rather than legal, action.⁴³⁴ The *Begani* concurrence mentions the pardons and juxtaposes these against the later actions of Secretary of War John Knox who concluded that discharged soldiers were not amenable to military jurisdiction, but given that the nation's early jurists were loath to have any trappings of a military state, it might also have been the case that the pardons were a congressional recognition of error in the assertion of military jurisdiction over the furloughed soldiers.⁴³⁵ After reviewing the concurrence, Professor Bowling called its conclusion's untenable.⁴³⁶

The second source, Professor Mary A.Y. Gallagher's *Reinterpreting the "Very Trifling Mutiny" at Philadelphia in June 1783*, was published in 1995.⁴³⁷ Professor Gallagher's study on the mutiny had very little to do with courts-martial and instead focused on Pennsylvania's citizens'—both in its militia and in the Continental Army—disaffections with social, economic, and political conditions, including the fact that they had gone unpaid for a considerable period of time.⁴³⁸ Indeed, the mutiny that the *Begani* concurrence mentioned occurred in a timeline of several acts of indiscipline in the militia and army.⁴³⁹ Professor Gallagher dedicated one paragraph to the courts-martial of furloughed soldiers, in an otherwise illuminating article that gives no evidence of the conditions of the courts-martial, including whether the soldiers conceded jurisdiction at all.⁴⁴⁰ The primary source material Professor Gallagher cites to is available both at the National Archives and

he wanted to prevent the state from assuming any of federal debt (money owed the soldiers), one of the few things that bound the states together under the Articles. The special session never achieved a quorum so legally it never even met during the demonstration. The Continental Congress ceased to exist on March 1, 1783, when the Articles went into effect.

From that date until the Constitution went into effect it was the Confederation Congress.

Id.

⁴³⁴ *See id.*

⁴³⁵ *Begani*, 81 M.J. at 285 n.2 (Maggs, J., concurring).

⁴³⁶ Bowling, e-mail dated 9 February 2022. One additional reason for the concurrence's failure to appreciate the mutiny's limited aims is that the mutineers did not target Congress because Congress did not have the ability to pay them, and the mutiny began on a Saturday by design because the Congress was not in session. *Id.*

⁴³⁷ *See* Gallagher, *supra* note 39, at 3.

⁴³⁸ *Id.* at 3–9.

⁴³⁹ *Id.* at 9–11.

⁴⁴⁰ *Id.* at 28.

Records Administration in Washington D.C. and on-line through the Library of Congress.⁴⁴¹

One of the most interesting and seemingly relevant facets of the Pennsylvania mutiny is that its alleged ring-leader Captain Carbery briefly fled to England, and the Continental Congress ordered his arrest, but then determined to place him under the authority of Pennsylvania's Supreme Executive Council.⁴⁴² This council was the part of Pennsylvania's government that met year-round, while its unicameral Assembly did not and was replaced in 1790.⁴⁴³ When Carbery returned to the United States, he went to his home in Maryland.⁴⁴⁴ Maryland's judicial branch questioned Pennsylvania's jurisdictional claims over Carbery, as well as which court might have jurisdiction.⁴⁴⁵ Carbery remained in Maryland and was permitted to rejoin the army.⁴⁴⁶ Indeed, he once more became an officer and served with

⁴⁴¹ For the online volumes of the Letters of Delegates to Congress, particularly in Vol. XXI, see: LIBR. OF CONG., <https://memory.loc.gov/ammem/amlaw/lwdg.html> (last visited Mar. 29, 2022). For the specific letter, referenced by Gallagher, see, Samuel Holten to Luke Webster (Oct. 2, 1783) (on file with the Library of Congress). Holten wrote, in pertinent part:

Last week two of the sergeants that were concerned in the late mutiny, being under sentence of death, were carried to the place of execution, & every formality gone through with, except the final stroke, when a full & general pardon was proclaimed from Congress, not only for these two, but for all that were under sentences, for corporal punishment, on acct. of said mutiny; it can be better conceived [sic] of by you than expressed by me, how the poor criminals feel upon so sudden a change in one moment as they supposed they were to lanch [sic] into eternity; and the next moment not only set at full liberty, but their offences forgiven; It has given me great satisfaction in being concerned in shewing mercy to such persons as seemed to have little or no mercy for us.

Id.

⁴⁴² Letter from Committee of Congress to Henry Gassaway (Apr. 24, 1784) (on file with the Library of Congress); Letter from Committee of Congress to Mr. Clayton, Sec'y to the Governor of Md. (Apr. 28, 1784) (on file with the Library of Congress); Letter from Edward Hand to Jasper Yeates (May 7, 1784) (on file with the Library of Congress); Pennsylvania Delegates to John Dickinson (May 18, 1784) (on file with the Library of Congress).

⁴⁴³ See Carlton F.W. Larson, *The Revolutionary American Jury: A Case Study of the 1778-79 Philadelphia Treason Trials*, 61 S.M.U. L. REV. 1441, 1449 (2008).

⁴⁴⁴ Journal and Correspondence of the State Council of Maryland, 1781-1784, Archives of Maryland Online, vol. 48, pps. 536-37.

⁴⁴⁵ *Id.*

⁴⁴⁶ See JEFFREY M. DOWART, *INVASION AND INSURRECTION: SECURITY, DEFENSE, AND WAR IN THE DELAWARE VALLEY, 1621-1815* 166 (2008). See also THE PAPERS OF HENRY LAURENS VOLUME SIXTEEN: SEPTEMBER 1, 1782-December 17, 1792 252-53 (David R. Chesnutt & C. James Taylor eds., 2003).

distinction in the War of 1812.⁴⁴⁷ That judges in the Early Republic expressed doubts over the military prosecution of the mutiny's ringleader should not have gone unnoticed or unreported by the *Begani* concurrence. That it did evidences, as a charitable criticism, a slovenly historic methodology. But it also raises the possibility of an outcome-driven judiciary that supports commander in chief authority at the expense of the historic record, if not at the rights and liberties of retired service-members.

Before the concurrence moved on to *Begani*'s arguments regarding the Fifth Amendment's Grand Jury Clause, it noted two observations that encapsulate its shoddy historical approach. The first was that the concurrence noted that *Begani* did not cite to "evidence from other sources that courts typically consult to discern the original meaning of the Constitution."⁴⁴⁸ Perhaps this is true, but neither did the concurrence. The concurrence then went on to pithily describe the Constitutional Convention's discussions regarding the army as solely focused on limitations of the land and naval forces.⁴⁴⁹ And finally, the concurrence characterized the Federalist Papers as containing "valid concerns" about standing armies, but "mostly address[ing] the President's role as commander-in-chief, the funding of the military, and the need for some permanent forces"⁴⁵⁰ More than one scholar has articulated a different opinion on the Federalist Paper's treatment of the standing army fears.⁴⁵¹

CONCLUSION

Perhaps it is not surprising that on reading the *Begani* concurrence, Professor Gallagher—who as noted previously served as the editor of the John Jay Papers—informed me and commensurately the readers of this article that her opinion of the concurrence ranged from "puzzlement to astonishment" in how the concurrence could have possibly arrived at its

⁴⁴⁷ Alan C. Clark, *Mayors of the Corporation of Washington: Thomas Carbery*, 19 RECS. OF THE COLUM. HIST. SOC'Y, WASH. D.C. 61, 64–65 (1916).

⁴⁴⁸ *United States v. Begani*, 81 M.J. 273, 285. Having made this statement, the concurrence cited to an article authored by Judge Maggs' himself. *Id.* at 286 n.3 (citing Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 382–92 (2014)).

⁴⁴⁹ *Begani*, 81 M.J. at 286 (Maggs, J., concurring) (citing to 2 Farrand's Records at 330–31).

⁴⁵⁰ *Id.*

⁴⁵¹ See, e.g., Martin, *supra* note 316,316 at 173–74; Jonathan Turley, *The Military Pocket Republic*, 97 NW. UNIV. L. REV. 1, 7–11 (2002).

historic conclusion.⁴⁵² Her views were echoed by both Professor Bowling and Professor Kohn.⁴⁵³ Professor Bowling concluded his analysis of the concurrence with the statement: “[T]he idea that an eighteenth-century constitution arising out of English legal tradition and two thousand years of historical precedent, accurate or inaccurate, would support the position that the military had lifetime jurisdiction over anyone who had once served in the military is untenable.”⁴⁵⁴ And Professor Kohn finalized his criticism with the observation that there can be no comparison between soldiers on furlough while British Army forces remained a direct threat and complied with the peace terms by exiting the new nation and the issue before the court in *Begani*.⁴⁵⁵ “Bottom line,” he concluded, “I think the authors of the Constitution would be appalled by the idea that a soldier, any soldier, could be court martialed from civilian life.”⁴⁵⁶

Professor Mark Tushnet recently articulated a poignant criticism about originalist scholars in observing that their “history-indexed-to-law” is a practice that allows them to breach the norm in academic history against making stuff up.⁴⁵⁷ Sadly, this appears to be the case in the *Begani* concurrence, and it is exacerbated by the Solicitor General’s reliance on the concurrence in successfully defeating *Begani*’s *certiorari* application to the Court.⁴⁵⁸ The Court might take up the outcome of the Court of Appeals for the District of Columbia’s decision in *Larrabee*, and perhaps the Solicitor General will try to have the Court adopt the *Begani* concurrence. But this concurrence detracts from a standard of scholarly rigor that should be demanded of the judiciary. Indeed, the concurrence embodies a defect often found in works of “public history”: “[W]hat happens when studies under contract belong to people who have a vested history in ignoring or hiding past mistakes?”⁴⁵⁹ Although the concurrence is not a public history in the traditional sense, given its flaws it has certain attributes of one, since the very

⁴⁵² E-mail from Mary Gallagher to Joshua Kastenberg, *supra* note 2.

⁴⁵³ *See generally* e-mail from Kenneth Bowling, *supra* note 4; *see also* e-mail from Richard Kohn, *supra* note 5.

⁴⁵⁴ E-mail from Kenneth Bowling, *supra* note 4.

⁴⁵⁵ E-mail from Richard Kohn, *supra* note 5.

⁴⁵⁶ *Id.*

⁴⁵⁷ Mark Tushnet, *Some Pet Peeves About Legal Scholarship*, BALKINIZATION (Dec. 1, 2021, 5:57 PM), <https://balkin.blogspot.com/2021/12/some-pet-peeves-about-legal-scholarship.html>.

⁴⁵⁸ *See generally* United States v. *Begani*, 81 M.J. 273, 284–86 (2021) (Maggs, J., concurring).

⁴⁵⁹ *See* Howard Green, *A Critique of the Professional Public History Movement*, PUBLIC HISTORY READINGS 121, 124 (Phillis K. Leffler & Joseph Brent eds., 1992).

judges are a part of the executive branch and are upholding an extension of commander in chief power. Opening up the Article I courts to amicus curiae by invitation is one means to contribute to a presentation of history based on something other than irrelevant analogies or conjecture. It might also assure the public that the decisions were arrived at with the greatest degree of intellect that the judiciary can muster, rather than the ease of decisions created by slipshod approaches.

In 1962, Chief Justice Earl Warren presented a lecture at New York University School of Law titled *The Bill of Rights and the Military*.⁴⁶⁰ After detailing a well-understood history that the Constitution's Framers feared military authority—and specifically a standing army—Warren warned that because of the growth of military power from the beginning of the Republic, it could be seen as inevitable that the Article III judiciary might take on an enhanced role of review in place of the traditional strict habeas test.⁴⁶¹ Specifically, Warren urged, “When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.”⁴⁶² It should not go unnoticed that the general public was greeted with headlines such as the *San Francisco Chronicle*'s “Justice Warren Warns of Military Rule by Default.”⁴⁶³ But equally important, and certainly less known, was the Court of Military Appeals chief judge Robert E. Quinn's note to Warren that he had profited from Warren's speech.⁴⁶⁴ Sadly, the current CAAF does not appear to share in Judge Quinn's “profiting.”

Warren, of course, did not call for a greater rigor in legal scholarship by the Court of Military Appeals. His concerns were, in part, preventing the establishment of a military authority that became a government of its own and threatened the liberties of the nation. Perhaps every decision criticized in this article is tenable as a matter of law, but only so for reasons other than those articulated by their judicial authors. And it might be observed that an increase of judicial rigor would also serve as a bulwark against the potential for a tyranny that the Framers feared, as much as it would prevent an

⁴⁶⁰ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

⁴⁶¹ *See id.* at 190.

⁴⁶² *Id.* at 188.

⁴⁶³ *Justice Warren Warns of Military Rule by Default*, S.F. CHRON., Feb. 2, 1962, at 9.

⁴⁶⁴ Letter from Robert E. Quinn, C.J. of the U.S.C.M.A., to Earl Warren, C.J. U.S. (Feb. 6, 1962). On Quinn, *see* Robinson O. Everett, *The United States Court of Military Appeals*, W. RSRV. L. REV., 45, 46–47 (1955).

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unnecessary devolution of military readiness. Unfortunately, both the avoidance of history and the lamentable presentation of it in the Article I courts, such as the *Begani* concurrence, and more broadly in the CAAF, add to the possibility for either a tyranny antithetical to the Framers' design, or breakdown in trust in the judiciary, or both.