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

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FEARS OF TYRANNY: THE FINE LINE BETWEEN PRESIDENTIAL AUTHORITY OVER MILITARY DISCIPLINE AND UNLAWFUL COMMAND INFLUENCE THROUGH THE LENS OF MILITARY LEGAL HISTORY IN THE ERA OF BERGDAHL

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The President is not only the Commander in Chief of the armed forces of the United States, he or she serves at the pinnacle of the military's chain of command, and the nation's military forces are subject to his or her orders.[1] As Commander in Chief, control over the military includes the authority to place the military around the world and have its service-members conform to other presidential authorities in the foreign policy, national security, and certain domestic policies arena. For the first time in over a century, a president has gleefully intruded into a court-martial not merely to the detriment of the accused service-member – Robert Bowe Bergdahl – but also in a manner that is deleterious to a basic constitutional foundation, recognized at the nation's founding: the prevention of tyranny through the subordination of the military to both

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1. U.S. Const. Art II, Sec. 2 Cl. 1 reads in full:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Id. See also, Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). In The Federalist, No. 69, Hamilton wrote that the president as commander in chief is "nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy." Id.

the civil government and the laws governing the military.[2] Although Congress should expressly prohibit the type of intrusion which has occurred in Bergdahl's case, the federal judiciary as well as the military courts must assess claims of presidential unlawful command influence (and that of senior civil officers in the military establishment) by considering the historic underpinnings of the prohibition against unlawful command influence as well as the nation's military law history which is rooted, in part, in the fear of standing armies.

In 1827, in *Martin v. Mott*, Associate Justice Joseph Story, in writing the Court's opinion regarding military jurisdiction over state militia when ordered into federal military service, penned "while subordinate officers or soldiers are pausing to consider whether they ought to obey or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance."[3] Yet, Story also dichotomously reminded the nation that "a free people are naturally jealous of the exercise of military power."[4] Story's comment on this point is perhaps best reflected by fact that, with the exception of wartime, historically courts-martial could not be used to prosecute soldiers for common crimes when these occurred within state jurisdiction, as a matter of distrusting military trials.[5] In point of fact, the 1806 Articles of War governing courts-martial made it an offense for a commanding officer to neglect the duty of strict adherence to the narrow jurisdictional limits of courts-martial by failing to ensure that soldiers accused of crimes were brought into civil court.[6] Moreover, it is clear that the Nation's Founders sought to minimize presidential authority over courts-martial through reliance on militia control of courts-martial when called to federal duty.[7]

2. STANLEY ELKINS AND ERIC MCKITTRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, 715-720 (1993).

3. 25 U.S. 19, 30 (1827).

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

5. 2 Stat. 359, art.33 (1806). Article 33 of the 1806 Articles of War required commanding officers to deliver "… over such accused person, or persons, to the civil magistrate…" On the early American Army see e.g., George B. Davis, Military Law of the United States 581, 589 (1915).

6. 2 Stat. 359, art.33 (1806). The article concluded:

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

Id.

7. See, e.g., Militia Act of 1795, ch. 36, 2, 1 Stat. 424, 424. Section (6) of the Militia Act reads: "And be it further enacted, that courts martial for the trial of militia shall be composed of

Story's observation on the exercise of military power and restraint is applicable to how Congress and the courts assess President Donald Trump's conduct over military justice, including his pardons and eviscerations of the courts-martial of service-members accused of "war crime" type offenses.[8] His conduct in those cases, which has benefitted service-members who acted contrary to the laws of war, illuminate the gravity of his "unlawful command influence" in the Bergdahl court-martial, if, for no other reason, then early fears of a standing army. Thus is all the more important because the Constitution's framers sought to limit the ability of a president to become a tyrant by diffusing control over the army in at least two ways applicable to the issue of unlawful command influence.[9] First, the standing army was designed as a small force with state militias as the larger military.[10] Secondly, army courts-martial jurisdiction was narrowly tailored to strictly military offenses when held in the states.[11]

Two opinions issued by the Court in the 1950s highlight fears of an expansive military justice system under presidential control. In *United States ex rel Toth v. Quarles*, the Court, in an opinion authored by Justice Hugo Black, noted"[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[12] *Toth* dealt with a question of whether former, non-retired, service-members remained subject to military jurisdiction.[13] In *Reid v. Covert*, an opinion arising from a challenge to the military's

militia officers only." Congressional reluctance to empower the president over courts-martial continued into the Civil War. *See, e.g.*, David S. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 114 Harv. L. Rev, 941, 1017-1019 (2008).

8. On November 15, 2019, President Trump exercised his constitutional authority and granted pardons to two service-members — one accused of, and the other convicted of, offenses properly labeled as war crimes; he also restored the rank of a third service member convicted of a war crime. See, e.g., Dave Phillips, "Trump's Pardons for Servicemen Raise Fears That Laws of War Are History," November 16, 2019. The president earlier pardoned a convicted war criminal soldier in May 2019. See, e.g., Bill Chappell, "Trump Pardons Michael Behenna, Former Soldier Convicted of Killing Iraqi Prisoner," NPR, May 7, 2019. President Trump also chastised Navy judge advocates serving as prosecutors and revoked military medals following the court-martial of a Navy Seal who was convicted. See, Trump Orders Navy to Strip Medals From Prosecutors in War Crimes Trial, New York Times, July 31, 2019.

9. See e.g., WALTER MILLIS, ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY, 48 (1956).

10. On the small size of the first post-constitution standing army and reliance on militia see, ,JOHN MAAS, DEFENDING A NEW NATION, 1783-1811 (2013).

11. JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865-1920, 1-17 (2007).

12. 350 U.S. 11, 22 (1955).

13. For the background on Toth, see See e.g., JOSHUA E. KASTENBERG AND ERIC MERRIAM, IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE, 236-237 (2016).

jurisdiction over civilians residing on United States military bases overseas, the Court held that narrowing military jurisdiction to service-members was necessary to the "tradition of keeping the military subordinate to civilian authority."[14] It is a reasonable observation that a president who subverts the current military law construct risks imperiling this critical constitutional tradition.

The prohibition against unlawful command influence over military trials is a check against a president's arbitrary exertion of power. This article argues, that, in light of the current executive branch's conduct over military justice, the legislative and judicial branches, as well as military justice system's judiciary, must take into account the president's vast authorities in assessing the dangers of presidential unlawful command influence, not only to ensure fair military trials, but also as a means to protect the nation's democratic institutions. Although most of the case law on unlawful command influence comes from the Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, as well as from the service courts of appeal, there is worthy precedent in both the Court's late nineteenth and early twentieth century opinions as well as in a deeper understanding of the nation's military legal history.[15] Such an understanding can be obtained through a historic approach relying not merely on case law, but also relevant primary source material.

This article is divided into three sections, each with an analysis on the relationship between the commander in chief and military justice. Section I briefly defines unlawful command influence and then presents

14. 354 U.S.1, 23 (1957).

15. Established by Congress in 1950, the Court of Appeals for the Armed Forces has five judges appointed by the president and confirmed by the United States Senate. 10 U.S.C. § 867, and 10 U.S.C. § 941. Unlike Article III judges, judges appointed to the Court of Appeals for the Armed Forces serve for fifteen year terms. 10 U.S.C. § 942. The court resides in the Department of Defense as an Article I Court as is limited to strict questions of law and appeals within its governing statutes. See e.g., Clinton v. Goldsmith, 526 U.S. 529 (1999) [prohibiting use of the All Writs Act to enjoin the president from "dropping an officer from the rolls."] As civilian judges, this article does not argue that the Court of Appeals for the Armed Forces is subject to unlawful command influence. However, the Department of Defense and the President have a duty from coercively interfering in its internal functions. See e.g., Mundy v. Weinberger, 554 F. Supp. 811, 821-822 (DC 1982).

Below the Court of Appeals for the Armed Forces as the service courts of appeal. Established by Congress any service-member who receives a sentence of six months or a punitive discharge is entitled to review by these courts. See, 10 USCS § 866. There are four such courts as follows: The United States Army Court of Criminal Appeals. The United States Navy-Marine Corps Court of Criminal Appeals; the United State Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. Id. The judges serving on these courts are usually military officers, appointed by the judge advocate generals of the Army, Navy, and Air Force. Id. In terms of the Coast Guard, the Secretary of Transportation is vested with the appointment authority. Id. Moreover, the Court has enabled the appointment of civilians to Coast Guard Court of Criminal Appeals. See e.g., Edmond v. United States, 520 U.S. 651 (1997).

an overview of unlawful command influence prior to 1950 and one instance of presidential influence which, under Article 37, would amount to the deprivation of the right to a fair trial. This section is divided into three parts. The first part details one application of the prohibition to courts-martial prior to 1950 as well as juxtaposes the prohibition against questionable and unpopular, but not illegal presidential actions. The section's second part presents restraints on monarchal control over English and Dutch courts-martial predating the Constitution, and argues that these historic restraints are persuasive to shaping United States military law, if, for no other reason than for the protection of democratic institutions. Included in this part are recognized presidential authorities over the military. The third part focuses on a historically flawed reliance of *Swaim v. United States*, a decision issued in 1897, which has, unfortunately been used as a basis to uphold presidential authority without judicial oversight and other means of restraint.[16]

Section II of the article presents a legal history of three pre-Uniform Code of Military Justice (UCMJ) Court opinions for the purpose of showing the existence of judicially recognized constitutional restraints against commander in chief influence over courts-martial. These opinions: *Runkle v. United States*,[17] *McClaughry v. Deming*,[18] and *Grafton v. United States*,[19] present historic evidence that there has been an acceptance not only as to restraints against commander in chief influence over courts-martial, but also an understanding of the effects of such limits on the broader scope of commander chief authorities over the military. Section III compares the President Trump's conduct with the rectitude of past administrations as a matter of *lex non-scripta*. Defined as an unwritten law found in custom, *lex non-scripta* remains a source of military law.[20] Finally, the article concludes with the argument that President Trump's conduct over military justice presents, for the first time in the nation's history, the type of commander in chief exertions that are antithetical to the military's constitutional place in the nation.

16. 165 U.S. 563 (1897).

17. 122 U.S. 543 (1887).

18. 186 U.S. 49 (1902). Additionally, it was not until after World War II that a court-martial could include an enlisted member to serve as a "juror." See e.g., The Background of the Uniform Code of Military Justice, 6; and

19. 206 U.S. 333 (1907).

20. William Winthrop, Military Law and Precedents, 42 (1896). As defined by Winthrop, the *military's lex non scripta* consists of "the customs of the service," and "the unwritten laws and customs of war." Id. See also, United States v. Pitasi, 20 U.S.C.M.A. 601 (CMA 1971). Winthrop maintained the importance of military law throughout the Articles of War and courts-martial procedures. See e.g., JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW, 237-238 (2009).

I: UNLAWFUL COMMAND INFLUENCE AND THE SKIRTING OF MILITARY LEGAL HISTORY

Unlawful command influence has long been considered "the mortal enemy of military justice."[21] The phrase "mortal enemy of military justice" does not, to be sure, explain what unlawful command influence is under the United States' military laws, or capture that a *de-facto* prohibition against a chain of command undermining the fairness of courts-martial predates the UCMJ. Nor does the phrase note the impact of unlawful command influence on the United States Constitution, particularly in terms of overarching executive branch authority. Since the UCMJ's enactment in 1950, the prohibition against unlawful command influence has centered on the conduct of senior uniformed military personnel and how this conduct may erode an accused service-member's right to a fair trial.[22] Indeed, from the time of its creation, one of UCMJ's fundamental goals was to eradicate unlawful command influence over military trials.[23]

Article 37 of the UCMJ prohibits a convening authority or other senior officers and non-commissioned officers from coercively interfering in an accused service-member's right to a fair trial.[24] The

21. See *e.g.*, United States v. Biagese, 50 M.J. 143, 140 (CAAF 1999).

22. For the reasoning behind the prohibition, see e.g. United States v. Littrice, 3 U.S.C.M.A. 487 (CMA 1953). In this decision, the (then) Court of Military Appeals quoted, in pertinent part, from the 1948, Report of the Committee on Military Justice of the New York County Lawyers Association to the Subcommittee of the House Armed Services Committee:

> The system of military justice laid down in the Manual for Courts Martial not infrequently broke down because of the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgments; and who conceived it the duty of command to interfere for disciplinary purposes… While it struck a compromise, Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused.

Id., at 491.

23. United States v. Cole, 38 C.M.R. 94 (CMA 1967). In Cole, the court held: One of the basic objectives of the Uniform Code of Military Justice is to eradicate this misuse of command power, but unfortunately total success has not yet been realized. Perhaps it never will be because of the vagaries of human nature. This Court, however, is dedicated to the Code's objective to protect the court-martial processes from improper command influence. Id., at 96.

24. 10 U.S.C. 837 reads, in pertinent part:

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

military's judicial focus on fair trial rights makes perfect sense since, after all, a court-martial is a trial of a service-member and the service-member has the right to a fair trial. One of the aspects of a court-martial that distinguish it from a state or federal criminal trial is that within the unique structure of the military, service-members who serve as witnesses, military judges, and as "jurors," are subject to the direct orders as well as subtle influences of a chain of command.[25] Congress determined that, following the experiences of tens of thousands of courts-martial in the preceding two world wars and Civil War, some type of safeguard was necessary and crafted Article 37.[26] Indeed, in World War II, courts-martial comprised one-third of all criminal trials held in United States courts.[27] On the other hand, as Professor Rachel Vanlandingham points out, not once in the seventy-year history of Article 37 has any violator been prosecuted in a court-martial.[28] Finally, the efficiency, reliability, and discipline of the military rely on the prevention of unlawful command influence to a degree broader than courts-martial. The prohibition against unlawful command influence also extends into administrative procedures.[29]

Id.

25. See e.g., Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 10–11 (1970); and *Edmund M. Morgan, The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). In a court-martial, the term "member" is used in place of "juror". There are distinct differences between a member and a juror. A member is selected by the general court-martial convening authority. See 10 U.S.C.S. § 825; and United States v. Gooch, 69 M.J. 353 (CAAF 2011). No member serving on a court-martial may be inferior in rank to the accused service-member on trial. Id.

26. See e.g., Rachel Vanlandingham*, Military Due Process: Less Military & More Process*, 94 TULANE L. REV 1, 37 (2019). In point of fact, one of the notable aspects of Article 37 is that it prohibits an admonishment of law officers. It was not until 1968 where Congress mandated that general court-martial have an independent military judge. See e.g. Weiss v. United States, 510 U.S. 163, 168 (1994).

27. See, Delmar Karlen and Louis Pepper, *The Scope of Military Justice*, 43 CRIM. L. C, & P.S., 285, 297 (1952).

28. Rachel Vanlandingham, Military Due Process: Less Military & More Process, supra note __ at 31-32. Professor Vanlandingham brings up a critical point overlooked by other scholars. That is, if the prohibitory practices in the military are not enforced through the UCMJ, the prohibition cannot be said to serve as a complete deterrent. In contrast to her point is the following statement from Professor Peter Margulies:

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

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

29. *See e.g.*, N.G. v. United States, 94 Fed. Cl., at 387 citing Werking v. United States, 4 Cl. Ct. 101 (Cl. Ct. 1983). In Skinner v. United States, 219 Ct. Cl. 322 (Ct. Cl. 1979) the Court of Claims determined that it possessed jurisdiction to review officer evaluation reports that were the

For the purpose of this article, it is unnecessary to examine the full range of unlawful command influence actions and focus on a presidential conduct such as has occurred in Bergdahl's case. To effectively do so, it is critical to note certain prohibited actions amounting to unlawful command influence. Coercive methods arising to unlawful command influence include both general policy statements in which a command makes clear that it wants particularized results in courts-martial as well as command statements pointing out what should occur to a specific service-member.[30] Harassment of a military judge also may give rise to unlawful command influence.[31] This includes admonishing a military trial judge for issuing a ruling verdict, or sentence unfavorable to the government.[32] Article 37 is primarily focused on a military chain of command, but it does not, in its plain language, specifically exclude a president, or the secretary of defense or service secretaries. Instead, the article is silent on the role of those officers, though each has the authority to convene general courts-martial.[33]

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

In assessing the expanse of the Commander in Chief's authority, over both individual service-members accused of crimes and the armed forces as a whole, on the one side, and unlawful command influence by the executive branch on the other, it is helpful to consider two judicial decisions external to the military courts of appeals. In *Homcy v. Resor*, the Court of Appeals for the District of Columbia granted a court-martialed officer relief on the basis of improper command influence.[34] Importantly, Homcy's court-martial occurred before the UCMJ's enactment. Although prior to 1950 there was no statutory prohibition

subject of improper command influence. Id., at 329.

30. See, United States v. Hawthorne, 7 C.M.A. 293, (CMA 1956); United States v Faulkner, 7 C.M.A. 304 (1956); and United States v. Danzine, 12 U.S.C.M.A 350, 354 [Ferguson, J., dissenting]. It should be noted that Judge Homer Ferguson had, prior to his appointment on the Court of Military Appeals, served as a United States Senator and voted in favor of the UCMJ. See John T. Willis, *Judge Ferguson: Guardian of Individual Rights*, 4, The Advocate, 1-6 (1972).

31. United States v. Salyer, 72 M.J. 415 (CAAF 2014). The military judge position was created as a result of the Military Justice Act of 1968, 82 Stat. 1335. This act created a system intended to insure that where possible the presiding officer of a court-martial would be a professional military judge, not directly subordinate to the convening authority. See e.g., O'Callahan v. Parker, 395 U.S. 258, 264 (1969); and Weiss v. United States, 510 U.S. 163, 167 (1994).

32. *See e.g.*, United States v. Lewis, 63 M.J. 405 (CAAF 2006).

33. See, 10 U.S. Code § 822.

34. 455 F.2d 1345 (CA DC 1971).

against unlawful command influence, and to that time, no federal appellate court had specifically granted relief on a claim that the fairness of a court-martial was undermined by unlawful command influence, the Court of Appeals applied the prohibition and granted Homcy relief.[35] *Homcy* is easily interpretable for a conclusion that the prohibition against unlawful command influence not only predates the UCMJ's statutory recognition of its dangers, but also that the prohibition is also more expansive than the plain language of Article 37. That is, while Article 37 does not list civilian officers in the military establishment, the absence, within the article, of the service secretaries, secretary of defense, vice president, and president does not preclude military and federal courts from enforcing the prohibition against a civilian chain of command.

It is equally important to note that not all questionable or unpopular presidential actions over service-members constitute unlawful command influence. Indeed, there is a difference between presidential interference in courts-martial and presidential authority over courts-martial. For instance, in between Homcy's World War II court-martial and the 1971 appellate decision bearing his name, the Court issued *Wilson v. Girard*.[36] This appeal originated from a challenge to the Eisenhower administration transferring a solder into Japanese jurisdiction even though a status of forces agreement between the United States and Japan gave the United States military primary jurisdiction over American service-members, when the alleged crime occurred in the course of duty.[37] Private Girard was accused of killing a Japanese national who trespassed onto a United States military weapons range. Despite opposition from senior Army officers and judge advocates, Secretary of Defense Charles Wilson and Secretary of State John Foster Dulles speciously insisted that Girard was not in the performance of his official duties at the time of the killing, even though Girard was in uniform and following his duty orders. To guard the range[38] In essence, Dulles and Wilson tried to claim that Girard's conduct was outside of the military's

35. 455 F.2d, at 1352-53. Whether the court-martial conviction was overturned or the Army was simply required to issue an honorable discharge is not relevant to the instant issue. However, for more information, see e.g., "World War II Army Officer, Albert C. Homcy Dies at 71" Washington Post, April 3, 1987; and Fred Borch, Misbehavior Before the Enemy and Unlawful Command Influence in World War II: The Strange case of Albert C. Homcy, 1 (Army Lawyer, 2014).

36. 354 U.S. 524 (1957).

37. Id., at 525. On the agreement between the United States and Japan, see 3 U.S. Treaties and Other International Agreements 3329; T. I. A. S. No. 2491 and, U.S. Treaties and Other International Agreements 3341; T. I. A. S. No. 2492

38. Joint Statement of Secretary of State John Foster Dulles and Secretary of Defense, Charles E. Wilson, June 4, 1957 [WJB/I:7].

jurisdiction as a result of the bilateral agreement with Japan. They also publicly acknowledged that there were no finite assurances Girard would receive a fair trial in a Japanese court.[39]

On appeal the Court observed, contrary to Dulles' and Wilson's assertion, that Girard was in the performance of his military duties at the time he killed a Japanese citizen, but then concluded that the 1951 security agreement recognizing the military's primary jurisdiction did not afford him legal protection against being transferred to Japanese jurisdiction.[40] The Court was fully aware that Eisenhower considered relations with the government of Japan – which lobbied for prosecuting Girard in their domestic courts - to be more important than maintaining jurisdiction over Girard.[41] Members of Congress, along with a strong public opinion, opposed Eisenhower's decision to transfer Girard to Japan.[42] Nonetheless, the Court determined that a president could use international relations as a consideration in determining the future trial location of a service-member, even to a foreign government.[43] Thus, while a president may remove a service-member to a foreign jurisdiction – a considerable authority over service-members – doing so is not an unlawful use of that authority.

While Homcy was denied the right to a fair trial in his court-martial, and Girard was denied a court-martial altogether, it is

39. Id. Secretary of Defense Wilson and Secretary of State John Foster Dulles merely stated "they stated "there is every reason to believe that trial of U.S. Army Specialist 3d Class, William S. Girard in the Japanese courts will be conducted with the utmost fairness." Id.

40. 354 U.S.., at 530. The Court held:

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

Id.

41. In regard to the Court's knowledge of the Eisenhower Administration using political considerations for the removal of Girard to Japanese jurisdiction as well as the uniformed command over Girard insisting that he had acted in a duty status, one only need look into Justice William Brennan's files. See, Carl C. Alligood to Chief Procurator, Japan, February 7, 1957 [WJB/ I:7]; Affidavit of Robert Dechert, June 8, 1957 [WJB/I:7].

42. *See e.g*., "Eisenhower Sees Fair Girard Trial, Voices Confidence in Japan's Courts – But Criticism on Waiving Rights Mounts," New York Times, June 6, 1957; Stephen G. Craft, American Justice in Taiwan: The 1957 Riots and Cold War Foreign Policy, 150-160 (2016); "D.A.R. Criticizes Pacts: Opposes Turning Girard Over to Japanese for Trial," New York Times, June 14, 1957; "Fair trial of G.I. Stressed by Kishi: He Defends Japanese Claim to Rights in Girard Case," New York Times, June 14, 1957; Girard's Home Town Sends a Petition to White House," New York Times, June 11, 1957.

43. See e.g. *Munaf v. Greene*, 553 U.S. 674, 697 (2008); and United States v. Odom, 53 M.J. 526, 537 (NMCCA, 2007).

contextually critical to understand that prior to 1950, appeals from general courts-martial were directed to the Judge Advocate General of the Army or the Navy, and then onto the Secretary of War or Secretary of the Navy.[44] The Articles of War did not establish an appellate court to review courts-martial, but rather, vested responsibility for appellate review in a single person, or a board responsible to the judge advocate general.[45] Usually, the review of general courts-martial were conducted by the judge advocate general of the Army or Navy to advise whether a court-martial was lawfully convened and whether the proceedings comported with military law.[46] In lieu of using the term "appellate," the judge advocate examination of the record of trial was often labelled as the "reviewing authority."[47] The President was the final appellate authority (or "reviewing authority"), unless a federal court granted review under the strict habeas test.[48] This test, as articulated by the Court in *Dynes v. Hoover*, in 1857, merely and narrowly evaluated whether the court-martial possessed jurisdiction over the service-member, and not whether the service member received a fair trial.[49] As a result, judicial

44. See e.g., Ex Parte Reed, 100 U.S. 13 (1879); and Smith v. Whitney, 116 U.S. 167 (1888). On the functional limitations of habeas in military law, see e.g., JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE, AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I, 93 (2017); JOSHUA E. KASTENBERG, LAW IN WAR WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S OFFICE IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 58-59 (2011); and Jacob E. Meusch, *A "Judicial System in the Executive Branch: Ortiz v. United States and the Due Process Implications for Congress and Convening Authorities*, 35 J.L. & POLITICS, 19, 32-34 (2019).

45. WINTHROP, MILITARY LAW AND PRECEDENTS, supra note __ at 447-452.

46. Id.

47. See e.g., William M. Connor, *Reviewing Authority in Court-Martial Proceedings*, 12 VIRGINIA L. REV. 43-60 (1925).

48. Id. See also, JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE, 9-17 (2013). For a further exposition on the limits of judicial review in the early Republic see, Ex parte Watkins, 28 U.S. 193, 209 (1830). [Courts-martial are inferior tribunals and therefore not judicial. As a result, the judicial branch may only collaterally review these trials. Id.

49. 61 U.S. 65 (1857). In Dynes, the Court held that the power to convene courts-martial "is given without any connection between it and the 3d Article of the Constitution." Id., at 79. For a further description of the strict habeas test, see e.g., Reed, 100 U.S., at 23. For the legal history of Dynes v. Hoover and its connection to the ability for the federal government to enforce the Fugitive Slave Act, see, Joshua E. Kastenberg, A Sesquicentennial Historic Analysis of Dynes v. Hoover and the Supreme Court's Bow to Military Necessity: From its Relationship to Dred Scott v. Sandford to its Contemporary Influence, 39 U. Mem. L. Rev. 595, 600-601 (2009). Another worthy articulation of the test is found in Carter v. Roberts, 177 U.S. 496 (1900).

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

decisions prior to 1950 which determined a cause in favor of an aggrieved court-martialed service-member were both noteworthy and rare. On the other hand, beginning with *Burns v. Wilson* in 1953, the strict habeas test was gradually replaced with a standard where an Article III court considers whether the military justice system "fully and fairly" considered an appeal.[50]

B. Executive Branch Supremacy and the Precedent of Nascent Democracies

It cannot be doubted that a president has the authority to issue orders to the entire military, and those orders cannot be countermanded by a lower ranking entity within the military establishment.[51] Indeed, military law requires service-members to presume that such orders are lawful.[52] In a general sense, an officer, service secretary, secretary of defense, and president are vested with the authority to command their forces to conform to orders.[53] Thus, a service-member subject to the orders of a command from a person within their chain of command may be required to exercise at certain hours of the day or wear a foreign uniform.[54] A service-member may also be required to report for duty to participate in an unpopular conflict as well as prepare and train others to participate in the conflict.[55] However, commander-in-chief authority is far more expansive than the general authority to command, and not only so simply because a president can order forces into foreign lands, remove officers from duty, or depart from the military personnel laws in wartime[56] A president is protected against disparagement by service-members, as well as from the uniformed defense lawyers representing service-members.[57]

Id., at 498. See also, Reilly v. Pescor, 156 F.2d 632, 634 (CA 8, 1946).

50. 346 U.S. 147 (1953). See also, Daigle v. Warner, 490 F.2d 358, 366 (CA 9, 1973). For a background and the influence of Burns, see JOSHUA E. KASTENBERG AND ERIC MERRIAM, IN A TIME OF TOTAL WAR, supra note__ at 214-229.

51. Winthrop, Military Law and Precedents, supra note __ at 38. Winthrop noted: As constitutional Commander in Chief of the Army, and independent of any authorization of action of Congress, the President is empowered to issue orders to his command, and the orders issued by him in this capacity, while ordinarily of but temporary importance as compared to general Army regulations, are obligatory and binding upon who they concern, and so properly classed as a portion of the general law military." Id.

52. 10 U.S. Code § 892(1); and United States v. Dykes, 6 M.J. 744.

53. *See, e.g.*, United States v. Obligenhart, 3 U.S.C.M.A. 627 (C.M.A. 1954); and United States v. Johnson, 17 C.M.A. 246 (C.M.A. 1967).

54. *See e.g.,* United States ex rel. New v. Perry, 919 F. Supp. 491 (DC DC 1996).

55. *See e.g.*, Parker v Levy, 417 U.S. 733 (1974).

56. *See, e.g.*, 10 U.S.C. § 123 (2019).

57. *See e.g.*, United States v. Wilcox, 66 M.J. 222 (2008); and United States v. Howe, 17

A brief, and concededly incomplete, survey of executive branch authority evidences the power of the president over the military. It is broad enough to send National Guard forces to foreign nations for the purpose of training.[58] A service-member may be court-martialed in a military operation in foreign lands even when the operation is not sanctioned by Congress.[59] When, in 1905 a federal court first addressed a challenge against court-martial jurisdiction based on the soldier being sent to China during the so-called "Boxer Rebellion" – an operation Congress never formally approved – the Court of Appeals for the Eighth Circuit determined, on international law principles, that the Army maintained jurisdiction.[60] Indeed, to this day, the federal judiciary will not take jurisdiction over questions involving the use of the military overseas.[61] Nor will the federal courts grant congressional standing to challenge a president's refusal to comply with international agreements such as United Nations sanctions against an unpopular or "illegal regime."[62] The military can bring a retired service member back on active duty for the purpose of court-martialing the retiree, regardless of whether the crime is service-connected or occurred after the end of formal military service.[63] Indeed, a retired service-member may be prosecuted for so-called "public morals" offenses which occurred after retirement and have no military connections whatsoever.[64] The president may also prevent former service-members from immediately seeking specified types of employment to a degree beyond that of the federal government over its former civil-service employees.[65] And finally, the UCMJ enables military jurisdiction over United States civilians, including citizens, under some circumstances.[66]

Whether these judicial decisions and statutes are justified or not, they each enable the possibility of ordering military forces into a foreign

C.M.A. 165, 177 (1967).

58. *See, e.g.*, Perpich v. Department of Defense, 496 U.S. 334 (1990).

59. *See, e.g.*, Collins v. McDonald, 258 U.S. 416 (1922). In *Collins*, the Appellant raised as a secondary issue the fact that he was ordered to Vladivostok in a mission not directly a part of the war against Germany. Although the Court did not directly address this challenge, Justice Clarke, in writing for the majority, called it "trivial." Collins, 258 U.S. at 421. *SEE*, JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I, 242 (2017).

60. Hamilton v. McClaughry, 136 F. 445, 448-49 (CA 8, 1905).

61. *See, e.g.*, Campbell v. Clinton, 203 F. 3d 19 (CA DC 2000).

62. *See, e.g.*, Diggs v. Shultz, 470 F. 2d 461 (CA DC 1972).

63. United States v. Miller, 78 M.J. 835 (CAAF 2019).

64. See, Hooper v Hartman, 163 F.Supp. 437 (SD CA 1958); Hooper v. United States, 326 F. 2d 982 (Ct Cl. 1964).

65. See, Taussig v. McNamara, 219 F. Supp. 757 (DC DC 1963).

66. See 10 U.S.C. §802. Art. 2(a)(10). See also,. United States v. Ali, 71 M.J. 256 (2012).

conflict where they remain subject to presidential orders as well as the UCMJ's full jurisdiction. This is because the President may also send military forces into an undeclared war without judicial determination of its legality.[67] And, with a congressional authorization, the president may proscribe rules compelling citizens into military service.[68] Apart from constitutional and statutory commander-in-chief authorities recognized by the Court, the president also has apparent powers resulting from the non-justiciable political question doctrine to include removing the United States from a treaty obligation.[69] This too can have a potential effect on where the military is sent.

While the purpose of this article is not to diminish presidential authority in any of the matters presented above, it is clear, that none of these powers has been balanced against pre-constitutional limits on executive authority over the military. Yet, such a balance is possible. Winthrop, informed practitioners that military law is partly formed by an unwritten *lex non scripta* and noted that the Dutch military codes and military experience are included in this *lex non-scripta*.[70] The Swedish warrior king and military innovator Gustavus Adolphus adopted a philosophy of military law and discipline from the Dutch, and in turn, the English borrowed from the Swedish Army.[71] And in such experience, with more than nominal relevance, the case of Colonel Moise Pain et Vin highlights the incompatibility of executive interference in the military justice process for a people desirous of democracy.

During the Franco-Dutch War (1672-1678) a Dutch court-martial sentencedColonel Pain et Vin to be removed from the military for surrendering his command without resistance.[72] At that time, the Dutch Republic's armies were governed by a military code in which the Hoge

67. See Mora v. McNamara, 389 U.S. 934 (1967) [Stewart J., dissenting].

68. See Rostker v. Goldberg, 453 U.S. 57 (1981).

69. See Goldwater v. Carter, 444 U.S. 966 (1979).

70. Winthrop, Military Law and Precedents, supra note __ at 5-6. It should also not be missed that the military reforms of the early Dutch Republic influenced the Swedish military of Gustavus Adolphus, and the French military of both Louis IIV and Napoleon Bonaparte. See e.g., John A. Lynn, Forging the Western Army in Seventeenth Century France, 35-49, in MCGREGOR KNOX, THE DYNAMICS OF MILITARY REVOLUTION, 1300-2050 (2001).

71. See e.g. HENK J.M. NELLES, HUGO GROTIUS: A LIFELONG STRUGGLE FOR PEACE IN CHURCH AND STATE, 1583-1645, 471-475 (2007); and, David Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

72. See, DONALD HAKS, FATHERLAND AND PEACE: PUBLICITY ABOUT THE DUTCH REPUBLIC AT WAR, 1672-1713. (Ttitle translated from Vaderland & Vrede: Publiciteit over de Nederlandse Republiek in oorlog, 1672-1713), 50. The passage is translated from "Men eiste het hoofd de kolonel Pain et Vin als straf voor het verlaten van zjin post." Id., at 50. See also, OLAF VAN NIMWEGEN, THE DUTCH ARMY AND THE MILITARY REVOLUTIONS, 1588-1688, 343 (2010).

Krijgsraad (High Military Court) had jurisdiction over soldiers accused of both military and common-law crimes.[73] A public outcry led by clergy and prominent citizens at The Hague demanded Stadtholder William III mete out "the most severe punishment against the colonel."[74] William III interposed with the Hoge Krijgsraad and demanded it sentence Pain et Vin to death.[75] Based on the Stadtholder's order, the Hoge Krijgsraad resentenced Pain et Vin to death and he was beheaded.[76] Anti-monarchist Republicans in the Second "Staadholderless era" used William III's actions as proof that a stadtholder could not be entrusted with the command of prosecuting crimes through military courts.[77] By the late Eighteenth Century, the elected Dutch government removed common crimes from the military courts, and required that sentences of death adjudged in military trials and stadtholder pardons had to be approved by the Council of State, the highest civil court of the Dutch Republic.[78] While it is true that the example of Pain et Vin is absent from United States case law, it should be recognized that even in an emerging democracy, the distrust of sovereign interference in courts-martial has not been deemed trivial either to the rights of the accused or that of the nation.

As has been noted, at the United States' founding, the Constitution's framers believed that a standing army was a danger to the liberties of citizens.[79] In the words of Professor Richard Kohn "no principle of government was more widely understood or more completely accepted… than the danger of a standing army in peacetime."[80] The Court has also observed that the founders adopted the Whig's fears of standing armies and this became an influence in shaping the Constitution.[81] Nonetheless, a small degree of elaboration highlights

73. HAKS, AT 23. (Translated from: "Januari werd Pain et Vin in Alphen onthoofd. Het oorpronkelijke vonnis en het verzoek William III tot herziening werden via de drukker van overheid public gemaak.")

74. Id.

75. Id.

76. Id.

77. Id.

78. *See e.g.*, H.H.A. de Graaf, Some Problems of Military Law Which have arisen as a consequence of the use of Armies of international Composition by the Republic of the Netherlands, 7 MIL. L. & L. WAR REV. 229, 234 (1968).

79. Their fear emanated from the English Whig concerns regarding standing armies. See Earl F. Martin, America's Anti-Standing Army Tradition and the Separate Community Doctrine, 76 MISS. L. J. 135, 145-147 (2005); and, THOMAS COOLEY, A TREATISE OF CONSTITUTIONAL LIMITATIONS, 350 (1868).

80. See Richard H. Kohn, Eagle and Sword: The Federalists and the Creation of the Military Establishment in America 2 (1975).

81. Loving v. United States, 517 U.S. 748Mindful of the historical dangers of autocratic military justice and of the limits Parliament set on the peacetime jurisdiction of courts-martial over

the coupling of the fear of a standing army with an executive who commands in ignorance of the laws governing the military. In 1642 John March articulated Parliament's claim that the Crown could not be considered a supreme commander over the militia.[82] In 1689, with the passage of the Mutiny Act, William and Mary were precluded from determining the extent of military jurisdiction in Britain, and the maintenance of the standing army in Britain was subject to annual renewal by Parliament.[83] In the Mutiny Act, Parliament declared a general military law principle that "noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme. [sic]."[84] In 1697 John Trenchard – a well-known political writer, of "pamphleteer" of the late seventeenth century - warned that where there is a standing army, "the King is a perpetual General, may model the Army as he pleases, and will be high treason to oppose him."[85] Trenchard also argued that a sovereign's use of standing armies could lead to the destruction of a constitution.[86]

In the rebelling colonies that became the United States George III's use of a standing army (with the addition of Hessian mercenaries) was bitterly resented and appears among the grievances listed in the Declaration of Independence.[87] Shortly after arriving as the ambassador to France, Thomas Jefferson made it known to the new nation that standing armies were antithetical to the new republic.[88] Likewise,

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capital crimes in the first Mutiny Act, 1 Wm. & Mary, ch. 5 (1689), and having experienced the military excesses of the Crown in colonial America, the Framers harbored a deep distrust of executive military power and military tribunals.

82. See e.g., JOHN MARCH, AN ARGUMENT, OR DEBATE IN LAW, OF THE GREAT QUESTION CONCERNING THE MILITIA, AS IT IS NOW SETTLED BY ORDINANCE OF BOTH THE HOUSES OF PARLIAMENT (1642) Note: This treatise is available for viewing at the Library of Congress, Rare Books Collection. See also, Janelle Greenberg, The Radical Face of the Ancient Constitution: St Edward's Laws in Early Modern Political Thought, 200-203 (2001).

83. 1 W. & M. Sess. 2, c. 2. See also F.W. MAITLAND, THE CONSTITUTIONAL LAW OF ENGLAND: A COURSE OF LECTURES DELIVERED, 328 (2001 ed).

84. 1 Wm. & Mary, ch. 5. The act, however, decreed swift and capital punishment for mutinies and desertions. Id.

85. TRENCHARD, AN ARGUMENT SHEWING THAT A STANDING ARMY IS INCONSISTENT TO THE CONSTITUTION OF THE ENGLISH MONARCH (1687). The radical Whigs, among them John Trenchard, are remembered today as rigid defenders of personal liberties in the face of Britain's increasingly powerful fiscal-military state. See, Adam Leibovitz, *An Economy of Violence, Financial Crisis and Whig Constitutional Thought, 1720-1721*, 29 YALE J.L. & HUMAN. 165,168-169 (2017).

86. TRENCHARD, supra note __ at 11.

87. *See e.g.*, David Luban, *On the Commander in Chief Power*, 81 S. CAL L. REV, 447, 518 (2008).

88. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in M.

Delegate Edmund Randolph noted at the Virginia ratifying convention "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army.[89] One only need recall that James Madison, in the Federalist Papers argued:

> The liberties of Rome proved the final victim to her military triumphs: and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale, it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution.[90]

Finally, coupled with the fear of standing armies, and only for the purposes of the central point of this article, is the ancient principle that neither a monarch nor a president is above the law. Long ago in *Entick v Carrington*, Lord Camden established the rule important to constitutional law that a sovereign may only act in accordance with the established law.[91] While *Entick* has usually been cited in Fourth Amendment analysis, it has also been incorporated into military law.[92] Congress and the federal judiciary alike have acknowledged the fear of standing armies was an original fear of the framers and shaped military law.[93]

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

Prior to Bergdahl's court-martial, perhaps the most deleterious presidential action over military justice was President Chester Alan

Peterson, Thomas Jefferson, Writings 914 (1984). See also, Frederick Bernays Weiner, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 6 (1958).

89. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (1901).

90. The Federalist No. 41, at 262 (James Madison) (Clinton Rossiter ed., 1961).

91. 95 Eng. Rep R 807 (1765). See also United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807). This decision is an early judicial ruling in which a United States court determined that a President was subject to the law of the courts. Chief Justice John Marshall, while acting as a circuit judge determined that President Jefferson was not immunized from giving testimony on important matters under adjudication. See, Archibald Cox, Executive Privilege, 122 U. PENN. L. REV.1383, 1385 (1974).

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

93. *See, e.g.*, United States v. Miller, 307 U.S. 174, 179 (1939) In *Miller*, the Court recognized "the sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia -- civilians primarily, soldiers on occasion." United States v. Miller, 307 U.S. 174 (1939). See also, and, United States v. Culp, 14 U.S.C.M.A. 199, 202 (C.M.A. 1963).

Arthur's attempts to have a court-martial increase the sentence of a convicted general officer. Of course, the Army in Arthur's time was quite small, numbering less than 27,000 soldiers and officers.[94] Arthur, who served as president from 1881 to 1885 was unhappy with a court-martial's sentence for Brigadier General David Swaim, the Army's Judge Advocate General.[95] In the closing days of Rutherford Hayes's presidency, Swaim was elevated from the rank of major to brigadier general largely owing to his close friendship with President-elect James A. Garfield, and this may have led to anger within the Army's officer corps.[96] Arthur apparently distrusted Swaim for at least one other reason. After a Sergeant named John A. Mason, while on guard duty, tried to murder Charles Guiteau (the assassin of President James Garfield), the Army court-martialed Mason.[97] Swaim, in his duty as judge advocate general advised disapproving the conviction as the charge against Mason was civil in nature and therefore fell outside of the Army's jurisdiction.[98] Arthur disagreed and when Mason appealed to the Court, Arthur ordered Swaim to be shut out of the process.[99] Mason's court-martial and appeal garnered considerable newspaper reporting, including negative aspersions on Arthur's decisions.[100]

On April 22, 1884, Arthur acted as a convening authority and ordered a court of inquiry (a predecessor to the modern Article 32 investigation) to investigate Swaim.[101] Based on the court of inquiry's

94. *See e.g.*, Robert Utley, Frontier Regulars: The United States Army and the Indian, 1866-1891 (1973).

95. Joshua E. Kastenberg, Shaping Military Law: Governing a Constitutional History 4-11 (2014).

96. See e.g., William S. Robie, The Court-Martial of a Judge Advocate General: Brigadier General David G. Swaim, 56 Mil L. Rev 209 (1972); and Kastenberg, The Blackstone of Military Law, supra note __ at 215.

97. See e.g., Ex Parte Mason, 105 U.S. 696 (1881).

98. Swaim to Secretary of War Robert Todd Lincoln, April 12, 1882 [NARA] Swaim wrote to Lincoln that the charge against Mason "was exclusively for the jurisdiction of the criminal court of the District of Columbia.." Id.

99. Lincoln to Swaim, April 15, 1882 [NARA]. After informing Swaim that he was acting at "the direction of the President," Lincoln noted that he had assigned Major Asa Bird Gardner, who had acted as judge advocate at Mason's court-martial, to work with the Attorney General in representing the government. Id. Lincoln concluded his letter with a caustic note "I am advised by the Attorney General that he will need no further aid [from you]." Id Prehaps emboldening Arthur's later actions against Swaim, the Court, in Ex Parte Mason applied the traditional habeas test and upheld the conviction as well as on the basis that the specific article "conduct to the prejudice of good order and discipline," enabled the Army's jurisdiction. Mason, 105 U.S.., at 698.

100. *See e.g.,* "The Invalid Sentence of Sergeant Mason: Report of the Judge Advocate General Swaim Disapproving the Court-Martial," New York Times, March 29, 1882. For other negative commentary on the court-martial, see e.g. Villainous and Brutal Attack, WASH. POST, Mar. 16, 1882, at 2 (quoting from the Chicago Tribune of "a day or two ago").

101. Swaim v. United States, 28 Ct. Cl. 173, 178 (1893). On courts of inquiry, see Winthrop,

findings, on June 30, 1884, Arthur appointed a general court-martial to prosecute Swaim, and on July 22, 1884, Secretary of War Robert Todd Lincoln ordered Swaim arrested and confined to Washington D.C.'s geographical limits.[102] Composed of a veritable "who's who" of Civil War veterans including Generals John McAlister Schofield, Alfred Terry, and Nelson A. Miles, the court-martial found Swaim guilty of some, but not all, of the charges and sentenced him to be suspended from rank and duty for three years.[103] The sentence displeased Arthur who obtained support from Attorney General Benjamin Brewster to reopen the court-martial and directly express his displeasure to the officers sitting in judgment of Swaim.[104] The next day, Arthur ordered the court-martial reconvened and provided Brewster's written advice to the officers while at the same time ordering them to reconsider their finding of not guilty to one of the charges and on the appropriateness of the overall sentence.[105] Brewster's advice was clearly an admonishment of the court-martial's initial sentence as evidenced by the statement:

> the action of the court as a whole seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and the glory of our Military Service, of which was expressed on a memorable occasion by the great Commander in Chief of our Revolutionary armies, when reluctantly compelled to reprimand a brother officer, in these words: "Our profession is the chastest of all: even the shadow of fault tarnished the lustre of our finest achievements." [106]

Military law and Precedents, supra note __ at 795-799.

102. Swaim, 28 Cl. Ct., at 181.

103. Id., at 194. On the officers assigned to the court-martial of Swaim, see, Kastenberg, The Blackstone of Military Law, supra note __ at 227. Swaim was confronted with a second court-martial, but that trial quickly acquitted him. See Robie, The Court-Martial of a Judge Advocate General, supra note __ at 234.

104. Brewster to Arthur, February 10, 1885[NARA RG 153 Court Martial Case Files, RR 889]; Statement of President Arthur to the court-martial, February 11, 1885 [NARA RG 153 Court Martial Case Files, RR 889].

105. Id. Arthur informed the court-martial:

> The record in the foregoing case of Brigadier General David G. Swaim, Judge Advocate General is hereby returned to the General Court-Martial before which the proceedings were had for reconsideration as to the finding of the first charge only, and as to the sentence, neither of which is believed to be commensurate with the offenses as found by the Court in the first and third specifications under the first charge. The attention to the Court is invited to the accompanying communication of the Attorney General under the date of the 10th instant whose views upon the matter submitted for reconsideration have any concurrence.

Id.

106. Brewster to Arthur, February 10, 1885.

This time, the court-martial sentenced Swaim to a one year suspension and a reduction of rank to major on his return to the army.[107] The court-martial however, did not have the lawful authority to sentence Swaim to a reduction in rank and this caused Arthur to order the court-martial to reconsider its sentence for a second time.[108] Arthur conveyed to the court-martial his belief that they had intended to sentence Swaim more harshly than the original sentence, but should properly do so.[109] After reconsidering its second sentence, the court-martial sentenced Swaim to be suspended from duty for twelve years and to forfeit half of his monthly pay during this period. Arthur approved of this sentence, though he chastised the court-martial for being too lenient.[110] Although the court-martial increased Swaim's sentence, the final sentence did not include a dismissal and Swaim remained on the War Department's payroll as an officer. Moreover, the court-martial garnered media attention, including, by the *New York Times*.[111] Indeed, the *Times* published Arthur's three statements to the court-martial, after the final sentence was announced.[112]

After Grover Cleveland succeeded Arthur as president, Swaim alleged to Secretary of War William Endicott (Secretary of War Lincoln's successor) that when Arthur caused Brewster's advice to be presented to the court-martial, he did so without informing any counsel

107. 28 Ct. Cl.., at 200.

108. Statement of President Arthur to the court-martial, February 14, 1885 [NARA RG 153 Court Martial Case Files, RR 889].

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

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

Id.

110. President Arthur, statement to the court-martial, February 24, 1885[NARA RG 153 Court Martial Case Files, RR 889] Arthur admonished the court-martial

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

Id.

111. The Swaim Court-Martial, New York Times, November 12, 1884; "Swaim Court-Martial Concluded," Indiana Sentinel, February 4, 1885; "Swaim Trial," Dubuque Daily Herald, February 26, 1885.

112. "General Swaim's Punishment: Suspended from Rank and Duty for Twelve Years," New York Times, February 25, 1885.

for Swaim, or Swaim himself.[113] In turn, President Cleveland publicly articulated his disgust with the Army's court-martial process in his first annual message to Congress:

> If some of the proceedings of courts-martial which I had occasion to examine present the ideas of justice which generally prevail in these tribunals, I am satisfied that they should be much reformed if the honor of the Army and Navy are, by their instrumentality to be vindicated and protected.[114]

Cleveland was not alone in his disgust. Senator John Ingalls, a Kansas Republican, called Swaim's court-martial "a disgrace to civilization" and chastised his fellow Republican, Arthur, for compelling the court to a harsher verdict.[115] Republican Senators Henry Dawes, George Frisbee Hoar, and John Sherman, likewise excoriated the conduct of the court-martial.[116]

Swaim urged Cleveland's administration that Arthur's and Bristow's actions "invaded the province of the court to persuade, if not dictate, what should be its finding and sentence."[117] The surviving court-martial record, now housed at the National Archives and Records Administration, supports Swaim's argument that he was absent from both reconvening of the court-martial, and therefore unable to quickly reply to Bristow's written opinions to the court-martial. He is not listed on record of trial for February 3 or February 10, 1885, when President Arthur "invited" the reconvened court-martial to consider the "accompanying communication of the Attorney General."[118] It is likely the case that Cleveland believed Arthur, Lincoln, and Bristow had denied Swaim a fair trial, but also believed that he could not lawfully remedy the wrong.[119] In the end, Cleveland, in his first term, did not give any relief to Swaim, deferring apparently, until a civil court determined the issue.[120]

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113. Swaim to Endicott, December 30, 1885 [NARA RG 153 Court Martial Case Files, RR 889]. Swaim claimed to Endicott that Arthur had caused a "carefully prepared argument by the Attorney General of the United States that was read to the court by the Judge Advocate" to occur.

114. "Statement of Grover Cleveland," December 1, 1885, A Compilation of the Messages and Papers of the Presidents, Vol X 1933 (1885).

115. "Swaim's Remarkable Sentence," New York Times, February 26, 1885.

116. Id.

117. Id.

118. Statement of President Arthur to the court-martial, February 11, 1885; Record of Trial, Swaim [NARA RG 153 Court Martial Case Files, RR 889.

119. See e.g. The Case of General Swaim, New York Times, January 17, 1889. The Times reported "This then is the situation that Cleveland found on his accession to the presidency less than a fortnight afterward. Several ways of relieving the Army from the embarrassment have been suggested , but objections have been found to all." Id.

120. Robie, supra note __ at 236-237.

In 1891 Swaim filed suit against the United States in the Court of Claims in an attempt to recoup the half pay he forfeited. Swaim's leading argument was that Arthur did not have the statutory authority to order the court-martial in the first place, and not that Arthur had committed unlawful command influence.[121] In a decision authored by Judge Charles Nott, a Civil War Union Army veteran, the claims court determined that a president could, in fact, convene a court-martial.[122] Oddly, as Nott noted, on February 7, 1885 – in the midst of Swaim's court-martial – the United States Senate affirmed in a resolution that a president could order a general court-martial convened against an officer.[123] However, Nott never determined that a president had absolute control over courts-martial and, indeed, observed that even as commander in chief, the president would have to conform his or her actions over courts-martial to Congress' authority to "make rules for the government and regulation of the land and naval forces."[124] Perhaps because Swaim did not argue that Arthur had supreme authority over the military, Nott, and later the Court, did not express a concern that Arthur had used his commander in chief authority to unlawfully influence the court-martial.

While Nott found that Arthur ordered the court-martial to reconsider its sentence, he did not find that the President required it to impose a harsher one.[125] Nott opined that had the president required a harsher sentence, such an action would be unlawful in a civil tribunal, but consideration of the issue was not within the jurisdiction of claims court because the court was limited to the strict habeas test.[126] Thus Nott

121. Swaim v. United States, 28 Ct. Cl. 173, 209-221 (1893).

122. Id., at 221. Nott observed

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

Id.

123. Swaim v. United States, 165 U.S. 553, 557-8 (1897).

124. Id., at 221-222.

125. Id., at 235-236. Indeed Nott stated

> On the one hand, it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to re-impose the same sentence or to impose a milder one or a more severe one.

Id.

126. Id.

never addressed the issue of presidential influence over courts-martial. Rather, he determined, that undue influence in court-martial was non-reviewable by the civil courts.[127] The Court, in an opinion authored by Justice George Shiras, likewise determined it did not possess jurisdiction over Swaim's appeal because the court-martial was lawfully constituted, and that Arthur had the authority to order the court-martial into being, as well as comply with his constitutional and statutory authorities.[128] Additionally, the justices made it clear that the British Mutiny Act's prohibitions against the crown (or other convening authority) sending a findings or sentence back to a court-martial for a second reconsideration were inapplicable to courts-martial because Congress had statutorily authorized the president to do so.[129]

As an opinion oft-cited by adherents of executive authority and in judicial decisions, *Swaim* does not, despite inaccurate contrary claims, uphold presidential power to have almost unfettered control over courts-martial.[130] This fundamental misunderstanding regarding *Swaim* is most recently evidenced in Justice Samuel Alito's dissent in *Ortiz v. United States*.[131] Justice Alito insisted that "until 1920 the President and commanding officers could disapprove a court-martial sentence and order that a more severe one be imposed instead, for whatever reason. We twice upheld the constitutionality of this practice."[132] Justice Alito

127. Id.

128. Id., at 566.

129. Id., at 564.

130. Among the scholars who argue that the Court, in Swaim, recognized presidential influence in courts-martial, see e.g., Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV, 273 (1958).

131. Ortiz v. United States, 138 S. Ct. 2165, 2201 [Alito J., dissenting]. Not surprisingly, Justice Alito cites to Wiener in support of his argument. Id., at. It should be noted, however, that Wiener championed executive branch supremacy to the point that he insisted, as late as 1984, that President Roosevelt had the constitutional authority to intern United States citizens of Japanese descent during World War II. See, statement of Frederick Weiner, RECOMMENDATIONS OF THE COMMISSION ON WARTIME INTERNMENT AND RELOCATION OF CITIZENS, 98th Cong. 2. Sess (1986)

132. Id., at 2201. Even allowing for not reading the Court of Claims decision and merely relying on the Court's opinion in Swaim, Alito failed to note that the Court had relied on the Army regulations at the time and cited to them in following passage from the 1897 opinion:

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

165 U.S., at 564. Even liberally interpreting this passage, it cannot be said that a president could order a court-martial sentence increased "for any reason." While it is true that there were occasions in which courts-martial may have violated the prohibition against double jeopardy, according to

clearly missed Judge Nott's observation (notwithstanding the criticism of prominent senators) that it could not judicially be determined as to whether Arthur had ordered the court-martial to assess a tougher sentence. In addition to Justice Alito's erroneous claim that a president could order a harsher sentence "for whatever reason," he missed another important fact: namely, that the Court, in *Swaim* never addressed the constitutionality of the practice of disapproving a court-martial sentence: it simply focused on the limited jurisdiction of federal courts and on the Army's adherence to its own procedures.[133] It did so because the justices had earlier established in *Keyes v. United States*, that as long as a court-martial possessed lawful jurisdiction over an accused service-member, the federal judiciary could not collaterally review the findings or sentence imposed, even with evidence of procedural irregularities to the accused service-member's detriment.[134]

Stated plainly: in *Swaim*, the Court did not uphold the constitutionality of President Arthur's actions in trying to influence the court-martial. The justices merely held that President Arthur's actions did not violate prescribed regulations at the time, and therefore the federal judiciary did not possess habeas jurisdiction over Swaim's appeal. Nor did the Court, in either *Swaim* or the second opinion Justice Alito cited to, *Ex Parte Reed*, hold that an order for a court-martial to reconvene for the purpose of issuing a stricter punishment comported with the Constitution.[135] To the contrary, the Court in *Reed* held that as long as a naval court-martial had not been "dissolved," a commander could reconvene the court-martial to reconsider a sentence because of a mistake of law made by the court-martial.[136] There is one other consideration which apparently Justice Alito did not entertain. Arthur, like his immediate two predecessors and successors through 1917 were also restrained by the Posse Comitatus Act.[137] Enacted in 1878,

Frederick Bernays Wiener, noted that the 1806 Articles of War expressly prohibited double jeopardy trials, and Winthrop never wrote that acquittals were subject to revision, there were a small number of lamentable instances in which this occurred, despite the illegality of it. However, in 1919, Congress put a stop to the practice. See e.g. Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, supra note at 272-276.

133. *See* Gregory Maggs, *Judicial Review of the Manual for Courts-Martial,* 160 MIL. L. REV. 96, 132 (1999). Judge (and former professor) Maggs penned, "[t]he Court in Swaim did not indicate what limits, if any, exist on the President's power to act with respect to courts-martial absent statutory authority." Id., at 132.

134. 109 U.S. 336, 340 (1883). Earlier, in Wise v. Withers, 7. U.S. 331 (1806), the Court determined that where a court-martial did not possess jurisdiction, the judiciary could exercise jurisdiction through habeas.

135. 100 U.S. 13, 22 (1879).

136. Id.

137. 18 U.S.C. § 1385; For a brief history of the act, see, Andrew Buttaro, The Posse Comitatus Act of 1878 and the End of Reconstruction, 47 St. Mary's L. J. 135, 163-168 (2015).

Congress barred the use of the Army to serve as in a domestic law enforcement capacity unless authorized by Congress to do so.[138] Thus the Court determined Swaim at a time when presidential authority over the Army was considerably curbed. The most that can be said of *Swaim*, in reality, is that the federal judiciary should, in deciding whether to grant an appeal from a court-martial review, operate with the presumption that the president acted in conformance with his or her statutory duties.[139] Such a presumption, as noted in Section III is no longer possible in the case of the current administration.

II: SOUND U.S. MILITARY LAW HISTORY: LIMITS ON PRESIDENTIAL CONTROL OVER MILITARY JUSTICE

Between 1875 and 1908, the Court issued three opinions which, at a minimum, evidence a constitutional tolerance for limiting commander in chief authority, when a president acts contrary to accepted fair trial standards in courts-martial. Each of the three opinions, *Runkle v. United States*, *McClaughry v. Deming*, and *Grafton v. United States*, illustrate that a president cannot command military justice without adhering to statute or other fundamental due process rights to a fair trial. A fuller understanding as to why the Court opinions are important to the current problem of presidential unlawful command influence, is possible through a historic examination of the traverse of each of the opinions. Moreover, each of these opinions places *Swaim* into a proper context. Rather than *Swaim* standing for the proposition that a president can act in a manner independent of due process constraints, the opinions cabin *Swaim* in a narrower category of an opinion issued prior to the end of the strict habeas test and the enactment of Article 32 as well as other applicable rules and modern military law jurisprudence.

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

In *Runkle*, the Court, in 1887, held that if a president failed to comply with the statutory requirement of approving an officer's court-martial conviction and sentence, then the court-martial's determination

While the act is still in existence, it has been considerably defanged.

138. See e.g., Bissonette v. Haig, 800 F.2d 812, 813 (CA 8, 1986).

139. See e.g., In re Chapman, 166 U.S. 661, 670. In Chapman, the Court, in an opinion authored by Chief Justice Melvin Fuller, briefly noted that Swaim narrowed Runkle in favor of such a presumption. Id., at 670-71. It should be noted, however, that Chapman did not arise from a court-martial appeal. Rather, it arose from a citizen refusing to appear in conformance with a congressional subpoena and then being prosecuted in the Supreme Court for the District of Columbia. See, In re Chapman, 156 U.S. 211 (1895).

of guilt and its corresponding sentence was rendered into a nullity.[140] Major Benjamin Runkle, a Union Army Civil War veteran was commissioned into the Freedmen's Bureau after retiring from the Army.[141] Established in 1865, the Freedmen's Bureau was a part of the Department of War and charged with various duties endemic to Reconstruction such as providing food, medical care, and education to recently freed persons of color as well as ensuring that voting rights were not destroyed by southern whites.[142] A senior military commander accused Runkle of misappropriating federal funds for his personal use.[143] Runkle was charged, under the Sixty-Seventh Article of War, for defrauding the widow of a colored soldier, along with twelve other colored soldiers or their dependents.[144] After being convicted and sentenced to a dismissal, Runkle appealed to Secretary of War William Belknap that President Ulysses Grant had appointed the court-martial, without a statutory grant of authority.[145]

To this end, Judge Advocate General Joseph Holt, in conformance with the duties of his office as a reviewing authority, advised Grant on Runkle's objections to the court-martial. Perhaps presaging *Swaim*, Holt insisted that that it was doubtful Congress "could constitutionally take away from the President, a power essential to the efficacy of his office as commander in chief."[146] To Holt, the commander in chief power

140. 122 U.S. 543 (1887).

141. *See e.g.*, Runkle v. United States, 19 Cl. Ct 396, 398-99 (Ct Cl 1884); and and Ross A. Webb, *"The Past Is Never Dead, It's Not Even Past": Benjamin P. Runkle and the Freedmen's Bureau in Kentucky, 1866-1870*, 84 THE REGISTER OF THE KENTUCKY HISTORICAL SOCIETY, 343-360 (1986).

142. PAUL A. CIMBALA, UNDER THE GUARDIANSHIP OF THE NATION: THE FREEDMAN'S BUREAU AND THE RECONSTRUCTION OF GEORGIA, 1865-1870, 1-8 (1997).

143. Runkle 19 Cl. Ct. 398-99.

144. Id. Also, and Ross A. Webb, *"The Past is Never Dead,"* supra note __ at 356. Runkle became controversial with the white city leaders in Memphis after accusing the sheriff of fomenting riots against colored soldiers under his command, and later he served as the Freedman's Bureau superintendant for Kentucky. See e.g., DAVID B. SACHSMAN, S. KITTRELL RUSHING, AND ROY MORRIS, JR, WORDS AT WAR: THE CIVIL WAR OF AMERICAN JOURNALISM, 339-340 (2008).

145. Brief: Case of Major Runkle, USA Retired.[NARA RG 153 Court Martial Records PP-2868]

146. Judge Advocate General Holt to Secretary of War Belknap, December 21, 1972 [NARA RG 153 Court Martial Records PP-2868]. Holt's full comment is as follows:

> The most important objection is that the President or Secretary of War had no power to appoint the Court because either could derive such power only from Congress, which has legislated on the subject only by the Act of Congress of May 29, 1830, chapter 119, entitled an Act to Alter and Amend the Sixty-Fifth Article of War and providing that in case where a Department Commander is the Accuser the Court shall be appointed by the President….
>
> Doubtless in England, Parliament in what has been called its omnipotence could with the Royal Assent (Mutiny Acts) forbid the King to convene courts-martial; but it may well be questioned whether Congress could constitutionally take away from the President, a

essential to preserve was the ability for a president to forgo strict compliance with a statutory requirement in courts-martial oversight.[147] In one sense, Holt's position was undercut by the Court in 1958. In *Harmon v. Brucker*, the Court determined that the military had to fully comply with its own regulations and these regulations could not narrow statutes governing the military.[148] While this issue was not central to Runkle's eventual judicial appeal, Holt echoed a belief that presidential authority over military justice was both broad and deep, if not unlimited. In contrast to Holt, the Court, in *Runkle,* ultimately determined there is a corollary and enforceable duty for a president to act judicially over courts-martial.

Runkle, a decision authored by Chief Justice Morrison Waite, arose from Runkle's demand for back-dated retirement pay against the government's insistence that he was not entitled to such pay because a president was without authority to restore him to duty since he had been removed from the military by a court-martial. In 1876 Holt had retired and Brigadier General William McKee Dunn replaced him. [149] Dunn had a different view on the fairness of Runkle's trial than Holt and advised Secretary of War Alphonso Taft (William Belknap's successor), to have President Rutherford Hayes overturn the court-martial since Grant had never approved of the findings or sentence.[150] Moreover, Runkle had other supporters such as Congressman James A. Garfield and (then) Treasury Secretary Benjamin Bristow, who likewise lobbied Taft.[151] And Runkle's restoration was well-reported in the news.[152] Indeed,

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> power essential to the efficacy of his office as commander in chief, although there is no reason why inferior officers should not be authorized, as they are, to participate in the exercise of the same power.

Id.

147. Id. Interestingly, during the Civil War, Attorney General Edwin Bates took an opposite position than Holt. In a formal opinion, Bates determined: "Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law." 11 Opinions Attorneys General, 21, March 12, 1864. In *Runkle* the Court cited to Bates' view as dispositive. Runkle, 122 U.S. at 558.

148. 355 U.S. 579 (1958). Harmon's arose from two related appeals in which the military issued undesirable discharges to otherwise honorably service service-members after discovering that both service-members had been affiliated with organizations listed on the Attorney General's Subversive Organizations List. See e.g., JOSHUA E. KASTENBERG AND ERIC MERRIAM, IN A TIME OF TOTAL WAR, supra note __ at 206.

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

150. Judge Advocate General William McKee Dunn, to Secretary of War Alphonso Taft, May 3, 1876 [NARA RG 153 Court Martial Records PP-2868].

151. Ross A. Webb, "The Past is Never Dead," supra note __ at 357.

152. "Dishonoring the Army and Navy: Restoration of Dismissed Officers on Microscopic

unlike Bergdahl, shortly after the court-martial, a number of legislators had passed resolutions supporting Runkle and calling the court-martial conviction unfounded.[153]

On August 4, 1877, on Dunn's advice, Hayes disapproved of the court-martial and restored Runkle to duty for the purposes of retirement.[154] Runkle then sought back-pay from the Court of Claims but lost before that court after it determined that Hayes could not restore a court-martialed officer to rank and service. Therefore, to the claims court, Runkle was not entitled to retirement back-pay.[155] The Court, however, disagreed and determined that the duty placed on Grant was more than ministerial. Instead, the presidential duty to formally approve the proceedings was a judicial act rather than an administrative requirement and as a result, the court-martial could not be concluded as final.[156] As an example of how Runkle has been characterized by scholars who advocate for judicial non-interference, if not unitary executive control over military justice, Professor Margulies merely notes that *Runkle* places a 'judicial duty' on a president but he excludes the fact that the failure to do so was considered to be of a jurisdictional nature in which, even under the strict habeas test, the judiciary could review.[157] Thus, when Congress placed an affirmative duty on a president to act judicially, the ignorance of this duty deprives a court-martial of jurisdiction.[158]

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

On February 2, 1902, the United States Court of Appeals for the Eighth Circuit, in *Deming v. McClaughry*, overturned Captain Peter Deming's court-martial conviction and sentence for embezzling federal monies, forgery, and conduct unbecoming an officer and gentleman.[159] The Eighth Circuit's decision was remarkable in several respects. Deming had pled guilty to the offense and did not object to the jurisdiction of the court-martial when it occurred two years earlier.[160]

Technicalities… Congressional Inquiry Probable," New York Times, December 24, 1877.

153. H. R. 3996 and S. 1003, 44th Cong., 1st sess. Similar bills were introduced into both houses to restore Runkle "with rank and pay of Major" to the United States Army.

154. Special Orders No 166, dated August 4, 1877.

155. Runkle 19 Cl. Ct. 398-99. Adding complexity and context to Runkle's suit was that the Senate investigated Runkle and determined that Hayes had acted improperly in restoring Runkle to duty. See and Ross A. Webb, "The Past is Never Dead," supra note __ at 358.

156. 122 U.S. at 557.

157. Peter Margulies, *Justice at War: Military Tribunals and Article III*, supra note __ at 336.

158. Id.

159. Deming v. McClaughry, 113 F. 639 (CA 8, 1902).

160. Id.

Unsurprisingly, in light of the guilty plea, the Judge Advocate General, in his review, articulated that there were no unusual aspects to the court-martial.[161] Yet, the appellate court elaborated that *Runkle* had required a court-martial to not only possess jurisdiction, but "that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law."[162] In essence, the court of appeals served notice to the executive branch that Congress could place statutory restraints against the exercise of military discipline and the executive branch's failure to conform to these statutory restraints deprived the court-martial of jurisdiction. The Court would uphold the lower court's reasoning, calling it "a very clear and satisfactory opinion."[163]

The traverse of Deming's appeal from his court-martial to the Eighth Circuit and onto the Court is fascinating in that, like *Runkle*, the appeal evolved from its original claims into a broader, if not unintended, constitutional holding. Shortly after Deming began serving his sentence at Fort Leavenworth, his counsel, John H. Atwood, discovered that the court-martial was composed of regular Army officers rather than militia and volunteer officers. Atwood argued to the Eighth Circuit that the absence of militia officers violated of Article 77 of the 1874 Articles of War.[164] Secretary of War Elihu Root assigned Major Enoch Crowder – the future Judge Advocate General and Provost Marshal of the United States during World War I – to represent the government.[165] In this instance, Crowder and the government did not prevail. The Eighth Circuit agreed with Atwood and determined that Deming's court-martial was devoid of jurisdiction. Moreover, the appellate court reasoned, that since the beginning of the nation, there were prohibitions against regular Army officers sitting in judgment of volunteers and militia soldiers,

161. War Department, Office of the Judge Advocate General to the Secretary of War, May 9, 1900 [NA RG 153, 15 AA R 17090]. The Judge Advocate General's review states:

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

Id.

162. 113 F. 639, 652.

163. Deming, 186 U.S., at 53.

164. William E. Connelly, A Standard History of Kansas and Kansans, Volume 3, 1363-1364 (1919). On Article 77 and the executive branch's response, see Attorney General of the United States Philander Knox to Secretary of War Elihu Root, October 31, 1901 [NA RG 153, 15 AA R 17090]. Article 77 stated, "Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces except as provided in article 78."

165. Crowder to Judge Advocate General George Breckenridge Davis, February 13, 1902 [NA RG 153, 15 AA R 17090].

Deming's waiver resulting from his guilty plea was not one of simple error, but rather, an issue of constitutional magnitude.[166]

Crowder remained on the appeal, representing the United States through to the Court.[167] He argued that because Congress had not created a separate Articles of War for the militia or volunteers, but rather, required a court-martial composed of militia officers, Deming's appeal and the lower court's decision was based on a technicality that, if upheld, could erode the commander in chief's fullest authority over the Army.[168] Moreover, Crowder cautioned that if the lower court's ruling were upheld, hundreds of court-martialed soldiers from the Spanish-American War and Philippine Insurrection would have to be freed from prison and restored to duty.[169] The Court, apparently, in issuing *Deming*, was not persuaded by Crowder's argument. Instead, in an opinion authored by Justice Rufus Peckham, the justices determined that a court-

166. 113 F., at 643-644.

167. Crowder to Judge Advocate General George Breckenridge Davis, February 13, 1902, supra note ___. In regard to the issue of Deming's waiver of the right to militia and the Eighth Circuit not considering this a waiver of appeal, Crowder penned to General Davis:

> Prior to the argument before the Court, Crowder argued to Davis that "the overwhelming weight of authority is that a verdict rendered by incompetent juror or jurors is not void, but voidable only, and that unless timely challenge or objection is resorted to the incompetency is held to be waived." Thus Deming should not have been granted an appeal in the first place.

Id.

168. Id. Crowder urged that if the Eighth Circuit's decision were allowed to stand "all trials of volunteers of the Army of 1898 by either regular or mixed courts must fail." Id.

169. *See e.g.*, Crowder to Judge Advocate General Davis, February 13, 1903 supra note ___. Crowder informed Davis that he argued in regards to the ability of the army to assign regular army officers to serve on courts-martial, "Unless this point can be made good, all trials of volunteers of the army of 1898 by either regular or mixed courts must fail." Id. On Crowder's argument to the Court, see e.g., Captain Deming's Appeal: Supreme Court Hears Argument in the Case of a Volunteer Officer Convicted of Fraud," New York Times, April 30, 1902. Crowder quietly complained to Judge Advocate General Davis that the three judges on the Court of Appeals for the Eighth Circuit were prejudiced against the government's position because each of the judges had served as volunteers in the Union Army during the Civil War. Crowder to Davis, supra note __. Crowder penned:

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

Id. Crowder apparently believed that because the three judges Henry Clay Caldwell, Walter Henry Sanborn, and Amos Thayer, were volunteer officers rather than professional officers during the Civil War, they were biased toward Deming, a fellow volunteer officer. On Henry Clay Caldwell's Civil War service, see Richard S. Arnold, Judge Henry Clay Caldwell, 23 U. Ark. L. Rev 317, 318-21 (2001). On Amos Thayer's Civil War service, see H.C. Cooper, The Bibliographic Encyclopedia of the United States, 446 (1901).

martial – as "a court of special and limited jurisdiction" – could not have jurisdiction over an accused service-member if the members appointed on the court-martial were incompetent.[170] Notably, the Court determined that Regular Army officers could not be considered competent to serve on the courts-martial of militia or volunteers. Moreover, it should not be ignored that the very category of officer most subject to the president's orders – the Regular Army officer - could not, under law, be trusted to adjudge a volunteer or militia member. In essence, *Deming* represents a significant restraint on presidential control over military justice, even though Congress has, since this time, ended the court-marital distinction between National Guard, Reserve, and Active forces. Finally, as a result of *Deming* – a point Rossiter never mentioned – 1,600 soldiers were freed from confinement.[171]

C. Grafton v. United States

In 1907, the Court, in *Grafton,* determined that the Fifth Amendment's prohibition against double jeopardy applied to service-members insofar as a court-martial was a federal judicial trial and once a service-member was prosecuted in a court-martial, another federal tribunal would be constitutionally barred from prosecuting the service-member for the same conduct.[172] As in *Deming* and *Runkle*, the legal history of *Grafton* provides further context to the limits of presidential control over military justice beyond the decision itself. Grafton's transit to the Court pitted Solicitor General Henry Hoyt against the office of the Judge Advocate General. Hoyt, of course, represented the United States and specifically, President Theodore Roosevelt.[173] Alongside of John H. Atwood, Captain Clarence E. Nettles, an acting judge advocate, represented Private Homer E. Grafton, the respondent in the appeal.[174]

In reality, Nettles was not the only judge advocate to represent Grafton, as Major John Hull, the judge advocate for the Philippine Islands and General George Breckenridge Davis, the (then) Judge Advocate General of the Army also sided with Grafton over President Roosevelt. This point should not be disregarded for two reasons. First,

170. 186 U.S., at 63-64.

171. CONNELLY, A STANDARD HISTORY OF KANSAS AND KANSANS, supra note __ at 1364; "Capt Demings Court-Martial: United States Supreme Court decides it was illegal," New York Times, May 20, 1902.

172. 206 U.S., at 354-355. Grafton has been dispositive in the Court's expansion of the single sovereign doctrine in which a state cannot prosecute a defendant for the same offense if one of the state's municipalities has already done so. See e.g. Waller v. Florida, 397 U.S. 387, 994 (1970).

173. 206 U.S. 338.

174. Id. On Nettles' military service, see e.g., REPORT OF THE JUDGE-ADVOCATE-GENERAL, U.S.A., TO THE SECRETARY OF WAR FOR, 1904, 12.

advocates of the unitary executive theory such as John Yoo and Greg Sulmasy have argued that judge advocates – like all commissioned officers – owe their allegiance to the president, and that since September 11, 2001, this has not occurred.[175] Instead, well before the September 11 attacks, the transit of Grafton's court-martial and appeal gives examples of judge advocates opposing a commander in chief while acting with fidelity to the Constitution. Second, while *Grafton* was primarily decided on the basis of whether double jeopardy applied to different trials conducted within the domain of a single sovereign (in this case the executive branch), it should not be missed that the president would have possessed more expansive control over service-members if the Court were to have decided *Grafton's* appeal in opposite.

A more complete legal history of the decision provides further context to the historic acceptance of limitations on the president over military justice. On August 15, 1904 a general court-martial convened at Camp Jossman, Guimaras to try Private Homer E. Grafton. At the time of the court-martial, Grafton had served in the Army for four years and had taken part in suppressing insurrection on Samar three years earlier.[176] Accused of murdering Florentio Castro and Felis Villanueva, two Philippine civilians, on July 24 of that year, he pled not guilty.[177] The Army specifically charged him with shooting the two civilians without provocation and he admitted to firing his rifle, but doing so out of self-defense and while on guard duty.[178] Perhaps Corporal Jacob B. Skarr delivered the most compelling evidence against Grafton. Skarr testified, over Grafton's objection, that Grafton had been ordered to

175. *See e.g.*, Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1842-1846 (2007). Several scholars, including writers that Yoo and Sulamsy quoted, have criticized their article. See e.g., Victor Hansen, *Law, Ethics, and the War on Terrorism: Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations,* 50 S. TEX. L. REV. 617 (2009); Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress,* 44 HOUS. L. REV. 553 (2007); Charles J. Dunlap, Jr., *Lawfare Today: A Perspective,* 3 YALE J. INT'L AFF. 146 (2008).

176. Grafton, GCM transcript[NARA RG 153 Court Martial Records PC-1917], pg 33.

177. Id., at 4.

178. Id. The transcript states: Charge: Violation of the 62d Article of War

Specification 1. In that Pvt. Homer E. Grafton, Co "G" 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Florentino Castro, a Phlippino, by shooting him with a U.S. magazine rifle, Calibre .30. This at Buenavista Landing, Guimaras, P.I., July 24, 1904

Specification 2. In that Pvt. Homer E. Grafton, Co "G" 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felis Villanueva, a Phlippino, by shooting him with a U.S. magazine rifle, Calibre .30 This at Buenavista Landing, Guimaras, P.I., July 24, 1904.

Id.

leave his rifle with quartermaster sergeant, but that he maintained his rifle for sentry duty in Grafton's words, "in case of there being trouble of any kind on the road.[179] Grafton testified in his own defense that while he was assigned to sentry duty on a wooden pier Castro and Villanueva "advanced rapidly" toward him with one of them holding a knife.[180] As a result, he believed his actions were necessary in order to save himself.[181] In addition to his own testimony, he called his company sergeant who testified to what today is called a "good soldier defense."[182] Ultimately the court-martial determined that Grafton was not guilty of murder and had acted in self-defense.[183]

Apparently, Grafton's acquittal offended the civil authorities and acting under the governor general's orders, James Ross, the director of fiscal affairs, and Ruperto Matinola, a local prosecutor charged Grafton with the crime of "assassination" under the Philippine criminal code.[184] Ross argued to Judge Henry C. Bates, the presiding judge of the Court of First Instance, that assassination and Article 62 were not duplicative and therefore a civil trial was not precluded by the prohibition against double jeopardy. Judge Bates agreed, commenting "I think it is hardly the same offense. This is a complaint for assassination."[185] However, there was a larger question as to whether jeopardy prevented the civil authorities in the Philippines from prosecuting Grafton for the deaths of the two civilians because unlike a state prosecution, the Philippine criminal courts were federal in nature, and overseen by presidentially appointed federal representatives.[186]

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179. Grafton, GCM transcript, [NARA RG 153 Court Martial Records PC-1917], pg 26. However, Skarr later testified that he "did not attach any special significance to Grafton's remarks." Id., at 27.

180. Id., at 29.

181. Id., at 32.

182. Id., at 33. Sergeant Edward J. Little testified:

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

Id. Grafton also called Captain F.D. Wickham who testified Grafton's character "was excellent as a soldier." Id., at 33-34. The "Good Soldier defense," is a essentially a character defense akin to advancing a character of law-abidingness. See e.g., United States v. Tipton, 34 M.J. 1113 (CMA 1992).

183. Id., at 35. On August 25, Brigadier General William H. Carter approved the verdict and restored Grafton to his duties. Id.

184. Grafton, Supreme Court Brief "in Error to Supreme Court of the Philippine Islands," November 24, 1904[NARA RG 153 Court Martial Records PC-1917].

185. Id.

186. 206 U.S. 342.

On appeal to the Supreme Court, Grafton argued that the Philippine criminal trial denied him the right to a jury trial as guaranteed by the Bill of Rights; that the Philippine courts did not have jurisdiction to try soldiers who acted in the performance of their duties; and that double jeopardy prevented the federally managed civil courts from prosecuting him at all since a court-martial and the Philippine courts were both federal tribunals.[187] Grafton's appeal to the Court was supported by both Hull, and Judge Advocate General Davis against the Attorney General of the United States.[188] Hull concluded to Davis a promise that "no stone should be left unturned to secure justice for Grafton."[189] In this respect, Hull and the Judge Advocate General went against not only the Justice Department but also President Theodore Roosevelt.

D. Scholars have Misplaced the Role of Swaim *and Executive Control*

Executive control over military justice has been argued in practically absolute terms, often through a mistakenly oversimplified historic, if not anti-historic, lens. For instance, in 1970, Professor Clinton Rossiter, who captured the presidential oversight of courts-martial and other aspects of military discipline by calling the commander in chief, "the fountainhead of military justice," declared that in *Swaim*, the Court had practically eviscerated *Runkle*, and spoke in approving terms of the inherent constitutional authority for a president to convene a court.[190] Like Justice Alito, Rossiter missed the point that the Court took comfort in the fact that the Senate had, on the eve of Swaim's court-martial, expressed its opinion that a president could convene a court-martial. Instead, Justice Alito, and before him, Rossiter, tended toward

187. Grafton, Supreme Court Brief[NARA RG 153 Court Martial Records PC-1917].

188. Lt Col J.A. Hull, Headquarters, Philippine Division, Office of the Judge Advocate, Manila P.I., to the Judge Advocate General. April 5, 190 [NARA RG 153 Court Martial Records PC-1917], 6. Hull observed "the importance of this case to the Army and it far reaching influence on the troops and the natives of these islands can-not be overestimated. Id Hull was also critical of the Philippine Supreme Court writing:

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

Id.

189. Id.

190. Clinton Rossiter, The Supreme Court and the Commander in Chief, 103-107 (1976). In describing Swaim, Rossiter took the liberty of penning a soliloquy between Swaim and Justice Shiras that is not found in the record. Perhaps Rossiter modeled his statements on Justice Felix Frankfurter's soliloquy to the Court during their deliberations over the fate of Nazi saboteurs in 1942. See William Wicek, The Birth of the Modern Constitution: The History of the Supreme Court, 1941-1953, Vol XII ,317 (2006).

Thomas Macaulay's thesis that military law had to be both austere, and kept from the civil courts, lest the military be incorporated into civil government to a degree that it becomes a threat to the civil government.[191]

Rossiter's treatment of *Deming*, and *Grafton,* like *Runkle*, is dismissive as to the opinions' effects on limiting presidential authority. He relegated *Deming* to three inconsequential footnotes, and *Grafton* to two.[192] Moreover, he focused some of his writing on preventing the civil courts from reviewing courts-martial in contravention of the strict habeas test and not on whether a president could upend due process in courts-martial. Moreover, his scholarship rested on the texts of judicial decisions rather than a more in-depth study of the legal history underlying the cases, including the arguments advanced by counsel and the important political and social forces contextualizing constitutional and statutory interpretation. Rossiter's approach to merely scratching the surface of legal history is a current practice among advocates who apply the unitary executive theory to military justice.[193] Simply, Rossiter, and other advocates of broad, if not unfettered executive control, do not delve into the history of these decisions in their work. Yet, the legal history of *Runkle*, *Deming*, and *Grafton* provides evidence that curbs on presidential authority of service-members are subject to both constitutional due process constraints and Congress' statutory intent.

III: LEX NON-SCRIPTA OF PRESIDENTIAL CONDUCT

Although the twentieth century – the era of "modern warfare" – may provide the most poignant examples of presidential non-interference with courts-martial during crisis periods such as World War II and the Cold War, the examples of President George Washington during one of the earliest military campaigns, and of President James

191. 3 THOMAS MACAULAY, HISTORY OF ENGLAND 35 (2012).

192. Rossiter, supra note __ at 15; 105.

193. *See e.g.*, Brief of Professor Adam Bamzai in United States v. Ortiz. Professor Bamzai posits that the original strict habeas test, such as articulated in Ex Parte Vallandingham 68 U.S. 243 (1863) militates against the federal judiciary taking a more expansive jurisdiction as statutorily crafted by Congress in 1982. Id., at 4 citing to 28 U.S.C. § 1259. In citing to both Sprint Communications Co. v. APCC Services In., 554 U.S. 259, 274 (2008); and Justice Felix Frankfurter's concurrence in Coleman v. Miller, 307 U.S. 433, 460 (1939) for the proposition that "history and tradition offer a meaningful guide to the type of cases that Article III empowers federal court to consider," Bamzai failed to present a meaningful historic argument. Bamzai, brief at 11. Indeed, Professor Bamzai presented no analysis of Martin v. Mott, the seminal opinion on military justice and presidential authority over it, or for that matter Swaim. Nor did he mention Grafton or Deming. His one appreciable statement regarding Runkle was a bare recognition a president is required to act judicially in certain circumstances, but he failed to note that a presidential omission to do so, vested the courts with jurisdiction over specific courts-martial. Id., at 29.

Madison during the War of 1812 might present the best starting point for establishing a base-line for presidential conduct. For the purposes of this article, Washington's conduct need only be briefly considered. Following the Army's defeat at Battle of the Wabash on November 4, 1791, Washington had the opportunity to subject General Arthur St. Clair to public approbation or court-martial, but chose to do neither.[194] St Clair sought a court of inquiry to clear his name and this could have resulted in a court-martial.[195] Clearly the defeat was troubling to the security of the nation and to the public's confidence in the military, and Congress, for the first time in history, investigated the War Department. Washington, who could have turned St. Clair into a scapegoat, publicly responded to an aide's query "General S. Clair hall have justice, I will hear him without prejudice, he shall have full justice."[196]

Fought between 1812 and 1815, the so-called War of 1812 was hardly a United States military victory and the United States did not possess a unified polity toward the conflict with Great Britain.[197] Federalists, particularly in the north, who were out of the White House and in the minority in Congress since Thomas Jefferson defeated John Adams for the presidency in 1800, opposed the war, and argued that Britain was far less of an enemy than Napoleonic France.[198] In turn, Republican loyalists to James Madison and supportive of the war, accused Federalists of treason.[199] Throughout the war, there were mass desertions and refusals to enter into state militias. Near war's end, the Army court-martialed General William Hull for cowardice after he surrendered his forces to the British and lost Detroit without first giving battle.[200] Perhaps, because of the unpopularity of the war, Madison's

194. See WILEY SWORD, PRESIDENT WASHINGTON'S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 201-02 (1974).

195. Id.

196. Id.

197. On the unpopularity and political dissension surrounding the war, see, SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN, 153-155 (2005)[discussing the federalist opposition to the war; and ROBERT REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME, 121-128 (2005); [discussing Daniel Webster and the Federalists attacks on President James Madison's war policies]; and Edward Skeen, Citizen Soldiers in the War of 1812, 28-30 (1999)[noting that northern state militias, as guided by state governments, placed restrictions on their duties such as refusing to take offensive action against British forces and only defend their states from invasion].

198. *See e.g.*, JAMES H. BROUSSARD, THE SOUTHERN FEDERALISTS: 1800-1816, 161-164 (1978); and, DONALD R. HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT, 51-54 (2012).

199. Id.

200. See, ANTHONY YANIK, THE FALL AND RECAPTURE OF DETROIT IN THE WAR OF 1812: IN DEFENSE OF WILLIAM HULL, 110 (2011). Yanik notes that in regard to Van Buren and another civilian attorney serving as judge advocates, "having civilians in charge of a military trial was against the norm." Id On General Hull's view of his court-martial, see, William Hull, Memoirs of

administration needed a scapegoat and Hull served this purpose.[201] Madison had, in his role as Commander in Chief, selected Hull to command the nation's regular and militia forces on the northern frontier.[202]

Political newspapers of the time, such as the *Niles Weekly Register*, reported on the trial and questioned Hull's loyalty to the nation, and former president Thomas Jefferson openly accused Hull of "treachery."[203] Evidencing the political nature of courts-martial, the Secretary of the Army appointed Martin Van Buren, a civilian New York state legislator, who had not taken part in the war, to serve as the judge advocate for the court-martial.[204] On March 26, 1814, the court-martial determined that Hull was guilty and sentenced him to "be shot to death," but Madison, after approving the sentence and the recommendation of some of the officers on the court-martial, determined that because Hull had faithfully served in the Continental Army in the Revolutionary War against Britain, the sentence would be set-aside and Hull allowed to retire.[205] Thus, in the politically charged court-martial of a general, Madison appears to have been reticent to openly proclaim Hull's guilt or demand a sentence to death, and, whether Madison believed Hull had received a fair trial – something Hull did not – he exercised leniency.

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

At the end of the war with Mexico, President James K. Polk intruded into the potential court-martial of one of his political supporters, General Gideon Johnson Pillow.[206] General Winfield Scott,

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the Campaign of the Northwestern Army of the United States (1824). Hull lamented that the American general he blamed as most responsible for the defeat of his forces, General Dearborn, sat as the presiding officer on the court-martial. Id., at 24.

201. YANIK, THE FALL AND RECAPTURE OF DETROIT, supra note __ at 102-105.

202. DANIEL S. HEIDLER AND JEANNE T. HEIDLER, THE WAR OF 1812, 58-61 (2002). The Heilders note, "Hull's surrender of Detroit did more than shatter U.S. confidence the opening weeks of the war, it squandered on of the best opportunities for the U.S. to win a significant victory. Id., at 60.

203. See, T"rial of General Hull," *Niles Weekly Register*, Vol VI, May 7, 1814, 157-162. See also, TROY BRICKHAM, THE WEIGHT OF VENGEANCE: THE UNITED STATES, THE BRITISH EMPIRE, AND THE WAR OF 1812, 105-106. Brickham points out that western newspapers sympathetic to Madison, such as the Missouri Gazette accused Hull of Treason as did former president, Thomas Jefferson. Id.

204. Donald B. Coe, Martin Van Buren and the American Political System, 41-44 (1984).

205. Order of General Dearborn, March 23, 1814 in Hull, supra note __ at 119.

206. See, Alan Peskin, Winfield Scott and the Profession of Arms, 199-203 (2003). Pillow had also informed Polk of a fictitious bribery scheme from Antonio López de Santa Anna, the commander of the Mexican Army to Scott to end the war. Id. In his diary, Polk noted that both Nicholas Trist and Scott "seemed to have entered into a conspiracy to embarrass the government."

the Commanding General of the Army accused Pillow of spreading falsehoods to the point of conduct unbecoming and officers and gentleman, and in turn Polk removed Scott from Mexico to the United States.[207] Polk also established a court of inquiry – akin to a grand jury – and after stacking the inquiry with pro-Pillow officers, the inquiry determined that Pillow's exaggerations and conduct were not worthy of a court-martial.[208] However Polk may have manipulated the courts-martial system to insulate a favorite general, he did not undermine the fairness of a court-martial to the detriment of an accused service-member, nor did he act without conformity to the Articles of War.

From November 25, 1862 through January 22, 1863, the Army court-martialed General Fitz John-Porter for disobeying lawful orders and misbehavior before the enemy at the Second Battle of Manassas.[209] Porter had, in fact, used disparaging language toward General John Pope, the commanding general at the battle.[210] While Judge Advocate General Holt's conduct (as well as Secretary of War Stanton's) during and after the trial has come under question, at no time did President Abraham Lincoln issue a public statement on the trial to Porter's detriment or demand the court-martial reach a specific result.[211] And, prior to his court-martial, Porter had published articles in the *New York World* that were highly critical of Lincoln's cabinet as well as against other generals.[212]

Polk, diary, January 24, 1848 [JKP/LOC].

207. John D. Eisenhower, Agent of Destiny: The Life and Times of General Winfield Scott, 315-321 (1997); and, Roy P. Stonesifer, Jr., Gideon J. Pillow : A Study in Egotism, 25 Tennessee Historical Quarterly 341-343 (1966).

208. Id., at 343-345.

209. JOSHUA E. KASTENBERG, LAW IN WAR, LAW AS WAR, supra note __ at, 78-93; and James M. McPherson, Battle Cry of Freedom: The Civil War Era, 528 (1998).

210. Id.

211. *See* REVERDY JOHNSON, REPLY TO THE REVIEW OF THE JUDGE ADVOCATE GENERAL JOSEPH HOLT, OF THE PROCEEDINGS, FINDING, AND SENTENCE OF THE GENERAL COURT-MARTIAL: IN THE CASE OF MAJOR GENERAL FITZ JOHN PORTER, AND A VINDICATION OF THAT OFFICER (1863). Senator Reverdy Johnson, a pro-Union democrat representing Maryland, served as Porter's defense counsel and later as a defense counsel in the military commissions trial of Mary Surratt. He also was a pall-bearer at President Lincoln's funeral. See, BERNARD STEINER, LIFE OF REVERDY JOHNSON (1914). See also, DONALD R. JERMANN, FITZ-JOHN PORTER: SCAPEGOAT OF SECOND MANASSAS, 190 (2009).

212. *See e.g.*, ETHAN RAFUSE, MCCLELLAN'S WAR, 342 (2005). Perhaps one of the most critical account of Lincoln was by his former postmaster general, Montgomery Blair who later argued that Lincoln had the duty to appoint the officers to Porter's court-martial, but permitted Stanton to do so. See, HON. MONTGOMERY BLAIR, POSTMASTER GENERAL DURING PRESIDENT LINCOLNS ADMINISTRATION TO MAJ GEN FITZ-JOHN PORTER BLAIR, JANUARY 26, 1874 (1883). Porter's chief defense counsel, Senator Reverdy Johnson, in evidencing Lincoln's hands-off approach to the Porter trial complained that "the President's time was perhaps so engrossed by matters which he supposed to be of more pressing national moment" that he was unable to give the

President Theodore Roosevelt, in 1902, publicly articulated his disgust at the lenient court-martial sentence of General Jacob Hurd Smith who had been convicted of "conduct to the prejudice of good order and military discipline," and sentenced to an admonishment.[213] Smith, not only oversaw the murder of Philippine civilians, he perjured himself in the court-martial of a subordinate officer who was court-martialed for commanding the actual killings.[214] However, under the Articles of War and military procedures at the time, either Roosevelt, or Secretary of War Elihu Root, could have acted as Arthur had done with Swaim and sought a more severe sentence, but chose not to do so.[215] Moreover, since the sentence for Smith was an admonishment, it is arguable that Roosevelt merely carried out the court-martial sentence in his public comments.

In 1938, retired general George Van Horne Moseley openly accused President Franklin Roosevelt of being a communist and claimed that the president was unfit to serve as commander in chief.[216] Roosevelt opted not to recall Mosely to active duty for a court-martial.[217] Shortly after the Japanese attack on Pearl Harbor, Mosely wrote to former President Herbert Hoover, that Roosevelt had wanted the attack to occur and had to be replaced.[218] Once more, Mosely was permitted to retain his status as a retired general in receipt of his retirement pay. In 1942, Roosevelt asked Supreme Court Justice Owen Roberts to lead an investigation into the Japanese attack on Pearl Harbor.[219] While

court-martial the attention it merited. See, REVERDY JOHNSON A REPLY TO THE REVIEW OF JUDGE ADVOCATE GENERAL HOLT, OF THE PROCEEDINGS IN THE CASE OF MAJ GEN FITZ JOHN PORTER, AND A VINDICATION OF THAT OFFICE, 8-9 (1863).

213. *See e.g.*, "President Retires Gen. Jacob Smith: Philippine Officer Reprimanded for "Kill and Burn Order," New York Times, July 17, 1902; and Brian McAliister Linn, The Philippine War, 1899-1902, 326-28 (2000).

214. Id.

215. Id.

216. See e.g. and "Mosely Aims to Save Nation: Replies to Charge he Heads Un-American Group," The Sun, May 20, 1939; and, Francis McDonald, Insidious Foes: The Axis Fifth Column and the American Home Front, 41-42 (1995).

217. Id.

218. See. Von Horne Mosely to Herbert Hoover, December 18, 1942 [GVHM/4]

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

Id. Mosely openly reiterated his allegations to Republican senators. GVHM to Senator Homer Ferguson, December 24, 1945 [GVHM/4]. Hoover, disagreed with Mosely. See Hoover to GVHM, December 20, 1942 [GVHM/4].

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

Roberts's agreement to do so brings forth interesting questions of judicial ethics and the erosion of the important separation of powers doctrine, his presence on a board of critical national security importance also gave confidence to the public that Roosevelt would be unable to direct the investigation to a specific result.[220] After all, Roberts was not appointed to the Court by Roosevelt, it was Hoover who did so.[221]

B. Truman and Eisenhower: Presidential Conduct under the UCMJ

President Harry S. Truman, like Lincoln and Franklin Roosevelt, evidenced particular caution to avoid influencing military proceedings that had the potential to become politically or socially important. Truman was president during the well-publicized court-martial of Major General Robert Grow who was accused of negligently permitting classified information to be captured by Soviet intelligence.[222] General Grow's court-martial was well-reported in the press, and Truman received public pressure over the military's handling of the trial.[223] The historic record contains no statements from Truman regarding the court-martial, although in response to a reporter's questions on the political activities of generals, Truman responded: "I have no comment. The Army is handling that."[224] Grow's court-martial, conducted at the height of the Korean War, was not the only publicized military proceeding Truman responded to without demanding a specified outcome.

On August 3, 1951, ninety United States Military Academy (USMA) cadets were expelled after being accused of cheating on exams.[225] The cheating scandal – in violation of the West Point honor cade – garnered front page headlines.[226] Over a third of the cadets were

220. *See* HEARINGS BEFORE THE JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, 79th Cong., 1st Sess., pt. 7, at 2967 (1946). That Roberts dissented in Korematsu v. United States, 323 U.S. 214, 225 [Roberts J., dissenting] evidences that he was likely independent in assessing Roosevelt's wartime decisions. Roosevelt was not alone in appointing justices to serve on military investigations. In 1942, the Governor General of Canada appointed Chief Justice Lyman Duff of the Supreme Court of Canada to lead an investigation into the defeat of Canadian forces against the Japanese in Hong Kong. Duff, like Roberts, would lend credence to the public belief in the fairness of the investigation. *See* A. HAMISH ION AND BARRY D. HUNT, WAR AND DIPLOMACY ACROSS THE PACIFIC, 1919-1952, 159-160 (1988).

221. MELVIN UROFSKY, THE SUPREME COURT: A BIOGRAPHICAL DICTIONARY, 383 (1994).

222. GEORGE F. HOFFMAN, COLD WAR CASUALTY: THE COURT-MARTIAL OF MAJOR GENERAL ROBERT W. GROW, 7 (1993).

223. Id., at 42-55. As an example of the front-page reporting on the trial, see, "Grow Court-Martial is started in Secret," New York Times, July 24, 1952.

224. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, HARRY S. TRUMAN, 1952, 416 (1959).

225. Steven Ambrose, Duty, Honor, Country: A History of West Point, 318 (1966).

226. *See e.g.*, New York Times, August 4, 1951; "West Point Inquiry Opposed," New York Times, December 3, 1951.

football players leading to further media and national interest in the scandal.[227] Although the cadets were not yet commissioned officers, they were subject to the recently enacted UCMJ.[228] Truman's reaction to the scandal was not to press for a court-martial prosecution, but rather, to affix blame on the prominence of college football as a lure for academically underperforming students to cheat.[229] Indeed, his chief of staff, General Harry Vaughan believed that to diffuse public calls for a court-martial, Truman should simply hold the cadets back one-year.[230] Truman did not follow Vaughan's advice and instead appointed Judge Learned Hand to lead an investigation into the cadets accused of cheating.[231] Based on Hand's advice and with Truman's approval, the investigation resulted in over eighty administrative dismissals, although

227. Stephen F. Norwood, Scandals and Controversies in Football, 59-80, in GERALD GEMS, ED., TOUCHDOWN: AN AMERICAN OBSESSION, (2019). According to Norwood, based on a September, 1951 Gallup Poll, more Americans knew of the West Point Football cheating scandal than the Senate's hearings on Douglas MacArthur's conduct in Korea and dismissal. Id., at 70.

228. *See e.g.*, United States v. Ellman, 25 C.M.R. 588, 591 (CMR 1958). However, the military must afford a cadet due process before an administrative board resulting in expulsion. See e.g., Hagopian v. Knowlton, 470 F. 2d 201, 208-211 (CA 2, 1972). In Hagopian, the Court of Appeals for the Second Circuit determined that while the USMA's system of cadet demerits was sound, the discharge process utilizing demerits failed administrative due process. Id.

229. Truman to Mrs. Charles R. Howard, August 17, 1951 Harry Truman Papers, Office Files Pt II/Reel 26]. Truman wrote to Howard: "It is my opinion that the commercialization of football and the extra-curricular things these young men had to do brought about the situation. There is nothing I can do about what is past, but I am taking steps to cure the situation for the future." Id. See also, DAVID MCCULLOUGH, TRUMAN, 1031 (1992). However, as a biography of legendary coach Vince Lombardi, who began his coaching career at the USMA before moving to other coaching positions and ending with the professional Green Bay Packers notes that Republican congressional opponents of Truman blamed the Truman administration and claimed the athletes were "scapegoats." DAVID MARANISS, WHEN PRIDE STILL MATTERED: A LIFE OF VINCE LOMBARDI, 132-134 (1999).

230. Harry H Vaughan to Truman, August 7, 1951[Harry Truman Papers, Office Files Pt II/Reel 26]. Vaughan advised Truman:

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

Id.

231. On the idea for an investigation headed by a judge, see., Robert Dennison to Truman, 9 August 1951 [Harry Truman Papers, Office Files Pt II/Reel 26]. An advisor to Truman, Dennison penned "corrective measures to enable the school to pursue with optimum effect its primary objective of developing career officers. Such a commission might include a Supreme Court Justice…" Id.

some of the dismissed cadets later obtained military commissions from other sources and served in the Vietnam Conflict.[232]

On May 23, 1956, during a news conference, a Saint Louis reporter asked President Eisenhower a question on the persistent in-fighting between the service branches over funding and whether inter-service rivalry eroded discipline. Broadening his answer beyond inter-service rivalry, Eisenhower responded, "the day that discipline disappears from our armed forces, we will have no forces, and we would be foolish to put a nickel in them."[233] One year earlier, Eisenhower was presented with a public and congressional outcry demanding that the so-called "turn-coat prisoners of war" from the Korean War be court-martialed.[234] Following the end of the Korean War, thousands of allied soldiers who were held as prisoners by the People's Republic of China and North Korea were repatriated and a small number were accused of collaborating with the enemy at the expense of loyal prisoners of war.[235] A smaller number of United States service-members initially refused repatriation after being accused of collaboration, but returned to the United States after the formal prisoner of war exchanges ceased.[236]

Newspaper headlines from 1953 through 1955 illustrates that the weight of public sentiment – including a number of congressman - assessed these prisoners of war as criminals deserving of courts-martial, and the public as well as members of congress were further angered to learn that in some cases, the military had lost jurisdiction to do so.[237]

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232. DAVID MARANISS, WHEN PRIDE STILL MATTERED, supra note __ at 127-128. Although judges' extra-judicial duties on behalf of the executive branch has come into question, Hand's appointment undoubtedly reduced congressional criticism of Truman's response since Truman followed the investigation's recommendations. For the conclusion of the investigation, see e.g., STEVEN AMBROSE, DUTY, HONOR, COUNTRY, supra note __ at 318.

233. Public Papers of the Presidents of the United States, Dwight D. Eisenhower, 1956, 513 (1959). Eisenhower added: "No there comes a place in the military hierarchy where someone must make a decision and that decision must stick. The President, constitutionally is the commander in chief and what he decides to do in these things in the form and the way that you arm and organize and command your forces must be carried out."

234. *See e.g.*, Christine Knauer, Let Us Fight as Free Men: Black Soldiers and Civil Rights, 213-214 (2014).

235. Elizabeth Lutes Hillman, *Disloyalty Among Men At Arms: Korean War POWs at Court-Martial*, 82 U.N.C. L. REV 1630 (2004). Professor Hillman writes, in assessing among the many factors that led to courts-martial: The court-martialed POWs became symbols of the weakness and disloyalty that military and civilian leaders felt obliged to purge from the ranks of the Cold War armed forces. Id., at 1361. For one example of actual courts-martial see, United States v. Dickenson, 20 C.M.R. 154 (CMA 1955); and . Among the various charges referred to court-martial was UCMJ, Article 104, "Aiding the Enemy" and, Article 105, "Misconduct as a Prisoner." Id., at 165. See also, United States v. Batchelor, 19 C.M.R. 452 (Army Board of Review (1955).

236. SUSAN LISA CARRUTHERS, COLD WAR CAPTIVES: IMPRISONMENT, ESCAPE, AND BRAINWASHING, 218-220 (2009).

237. Fred L. Borch, *Lore of the Corps: The Trial of a Korean War Turncoat: The Court-*

Even the Court, in an opinion authored by Justice Potter Stewart, in determining that three of the former prisoners of war were entitled to back-pay began the opinion with that statement: "The petitioners were enlisted men in the United States Army who were captured during the hostilities in Korea in 1950 and 1951. In the prison camps to which they were taken they behaved with utter disloyalty to their comrades and to their country."[238] Yet, Eisenhower, perhaps because of his extensive military service and rectitude for limiting the powers of his office, decided to refer to the so-called "turncoat" prisoners in softer-biblical terms such as "prodigal sons", and "lost sheep".[239]

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

On December 8, 1970, in response to a reporter's question regarding the My Lai Massacre, President Richard Milhous Nixon conceded that a "massacre" had occurred and then stated: "That's why I'm going to do everything…to see that all the facts in this incident are brought to light and that those who are charged, if they are found guilty, are punished."[240] Nixon did not name Lieutenant William Calley in this statement, and he later counseled caution against speaking of Calley's guilt. On November 26, 1969, Secretary of the Army Stanley Resor lobbied the House of Representatives against demanding trials or making public statements that could prejudice the over dozen courts-martial the Army contemplated for the massacre.[241]

Martial of Corporal Edward S. Dickenson, 30 ARMY L. 30 (2014); Adam J. Zweiback, The *21 "Turncoat GIs": Nonrepatriations and the Culture of the Korean War*, 60 THE HISTORIAN, 345-362 (WINTER 1998).

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

239. Zweiback, supra note __ at 353. For other examples of Eisenhower's rectitude for fair military trials see, "Eisenhower Speech Swayed Turncoats," *New York Times*, July 25, 1955.

240. See, Calley v. Callaway, 519 F.2d 184, 214-220 (CA 5, 1975).

241. November 26, 1969: Statement of Stanley Resor to the House of Representatives, Special Subcommittee; [Richard Nixon – National Security Files, UPA Reel 9]. It should not be interpreted from this article that the author believes Nixon operated solely with the interest of a fair trial for Calley. For instance, Daniel Moynihan, later a Democratic senator, while serving as counsel to Nixon advised Nixon to characterize the massacre as part of a "liberal anti-communist" war. See e.g., Moynihan to RN, November 25, 1969[Richard Nixon – National Security Files, UPA Reel 9]. National Security Advisor Henry Kissinger advised that a court-martial of the participants, if properly conducted, would ward off attempt by Senators Charles Goodell (R-NY) and Margaret Chase Smith (R-ME) to "abandon plans for a Senate investigation. HK to H.R. Haldeman, November 21, 1969[Richard Nixon – National Security Files, UPA Reel 9]. Finally, on the eve of Calley's trial, Nixon obtained the opinions of loyal congressmen as to how the administration should proceed with the court-martial in order to limit criticism. See, Dick Cook to John Ehlichman,

On April 1, 1971, in the midst of the Calley court-martial, White House Counsel, John Dean advised President Richard Nixon to refrain from taking action before the Army Court of Military Review and convening authority had acted on Calley's conviction. Among the reasons Dean listed for refraining from presidential action was Article 37. Dean warned, "[a]ny presidential statement about the specifics of this case would be subject to criticism as an exertion of unlawful command influence."[242] Although Nixon later granted Calley relief in the sense that he ordered Calley into house arrest, he refrained from making public comments that had the potential to effect the military appeal process either to the detriment of Calley or the prosecution.[243] In comparison, in 1971, Nixon publicly commented on his belief of Charles Manson's guilt in a pending the California murder trial. However, his aide, Ronald Zeigler quickly disavowed any presidential intent to influence the jury.[244] When juxtaposing Nixon's conduct toward Calley with his statements on Manson, it highlights a degree of presidential caution over influencing the military justice system.

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

The last three presidential administrations have, with increasing severity, ignored the *lex non-scripta* examples of their predecessors. In 2004, President George W. Bush commented on service-members accused of criminality in the Abu Ghraib scandal prior to their courts-

April 7, 1971 [John Dean Papers, Box 15].

242. While Dean did not conclude that a president was bound by Article 37, he cautioned that presidential statements that could be taken as a directive to the military chain of command involved in the Calley court-martial "would run counter to the spirit of the prohibition against unlawful command influence." *See* Dean to Nixon, April 1, 1971.

243. *See*, Calley v. Callaway, 519 F.2d 184, 214-220 (CA 5, 1975). On December 8, 1970, in response to a reporter's question, Nixon conceded that a "massacre" had occurred and then stated: "That's why I'm going to do everything…to see that all the facts in this incident are brought to light and that those who are charged, if they are found guilty, are punished." Nixon did not name Calley in this statement. On April 16, 1971 Nixon, in a press conference stated in response to a question predicated on the prosecutor claiming he had undermined military justice by not requiring Calley to be imprisoned stated: "Captain Daniel is a fine officer, and incidentally, the six members of that court had very distinguished military records. Five of the six, as you know, Mr. Risher, served with distinction in Vietnam." On April 29, 1971 in response to another press conference question on why he intervened in the Calley case, Nixon responded:

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

Public Papers of the Presidents of the United States, Richard M. Nixon, 537 (1971).

244. *See* Ken W. Clawson, "Nixon Slips Refers to Manson as Guilty: Criticizes Coverage of Trial," Washington Post, August 4, 1970, pg 1.

martial, as not representing the values of the United States armed forces.[245] In 2013, President Barack Obama publicly called for dishonorable discharges for service-members convicted of sexual assault offenses, prompting then-Secretary of Defense Charles Hagel to instruct all service-members that while serving on courts-martial, they had the duty to fairly and impartially assess evidence presented at trial to the exclusion of external pressures.[246]

As noted in the introduction, during the 2016 presidential campaign and after, candidate and then President Trump articulated often false and misleading comments about Robert Bowe Bergdahl.[247] On October 17, 2017, Trump used the term "traitor" to characterize Bergdahl. Trump's statement occurred before a military judge issued a sentence.[248] After Bergdahl was sentenced to a dishonorable discharge, but without jail time, Trump cast aspersions on the sentence.[249] Even as Bergdahl's case was advancing through the appellate process Trump publicly attacked the verdict.[250] It is a reasonable assumption that in addition to seeking to become elected, as well as maintaining the energy of his supporters to a cause, Trump did, in fact, seek to maximize Bergdahl's punishment through influencing the court-martial.

On July 19, 2019, the Army Court of Criminal Appeals determined in *United States v. Bergdahl*, there while there was "some evidence of unlawful command influence adduced at trial and in the post-trial process," the government had met its burden of proof to "demonstrate that an objective disinterested observer would not harbor a significant doubt as to the fairness of the proceedings."[251] At his court-martial,

245. See, "Civil Liberties: Just a Few Bad Apples," The Economist, January 20, 2005. The "disgraceful conduct" had been the work of "a few bad apples" who would be brought to justice.

246. "Hagel Tries to Blunt Effect of Obama Words on Sexual Assault Cases", New York Times, August 14, 2013.

247. As a small sampling of President Trump's comments, see e.g.,"New Documents Reveal Army Once Pursued Softer Approach on Bergdahl," New York Times, March 16, 2016; "Bergdahl Is Spared Prison, to President's Chagrin," New York Times, November 4, 2017.

248. "Bowe Bergdahl, called a Traitor by President Trump, Pleads Guilty," New York Times, October 17, 2017.

249. See, President Trump slams Bowe Bergdahl's sentence: 'Complete disgrace' ABC News, November 3, 2017, at https://abcnews.go.com/Politics/president-trump-bowe-bergdahl/story?id=50912155; and, Trump slams Bergdahl decision: 'Complete and total disgrace,' November 3, 2017 at https://www.cnn.com/2017/11/03/politics/donald-trump-bowe-bergdahl-twitter/index.html.

250. Trump rails against Bowe Bergdahl and Chelsea Manning, Washington Post, November 25, 2019.

251. United States v. Bergdahl, 79 M.J. 512, 517 (ACCA, 2019). In addition to alleging that Trump committed unlawful command influence, Bergdahl also alleged Senator John McCain did as well. While Senator McCain served as chair of the Senate Armed Services Committee and had persuasive ability over the promotion of officers and the allocation of expenditures, Article 37 does not mention the Legislative Branch either directly or by implication. Bergdahl's argument on

Bergdahl had opted for a court-martial by military judge, rather than a panel, but only made the selection for a bench trial because Trump had made a fair trial with a panel an impossibility.[252] The two judges in the majority, unfortunately, delivered a paltry legal analysis in stating "incendiary remarks by private citizens, even influential ones, do not constitute evidence of [unlawful command influence]," without acknowledging that the president is also the commander in chief, imbued with the great powers that title carries.

Government appellate counsel argued that the president could only have committed unlawful command influence when serving as a convening authority, and then only under the Rules for Courts-Martial (RCM). RCMJ 104(c) carries similar language as Article 37. The two judges in the majority determined that Article 37 did not apply to the president, nor, by implication, civilian officers in the military establishment, but rather the RCM does.[253] The distinction between the RCM and the Article have importance for two reasons. First, the Army Court acknowledged that while Article 37 applies to the convening authority who referred the charges against Bergdahl to trial by court-martial, the RCM applies to all convening authorities.[254] Second, the RCM, however, are rules promulgated by the president, and the UCMJ is law.[255] There is an important legal, if not political, difference between violating an administrative rule and violating the law, and the Army Court's decision places the president's conduct in the lesser category of egregiousness. Such a position is at odds with the weight of military law presented in this article.

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expanding the prohibition to Congress, while it may be meritorious, is not addressed in this article. See Id., at 522.

252. Brief of Bergdahl.

253. Bergdahl, 79 M.J.., at 525. RCM 104(c) states, in pertinent part:

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

Id. The Army Court, in citing to the applicability of this rule, did not note that on March 1, 2018 President Trump issued Executive Order No. 13825, reaffirming the rule's existence. This reaffirmation evidences that the administration knew of the rule's existence as well as the requirement that it follow it.

254. Bergdahl, 75 M.J.., at 525.

255. See, 10 USCS § 836. In addition to the majority's deficient analysis, it failed to note that the president is required to comply with his own rules. See e.g., Harmon v. Brucker, 355 U.S. 579 (1958); Vitarelli v. Seaton, 359 M.J. 535 (1959); and United States v. McDonald, 55 M.J. 173 (CAAF 2001).

It should be noted that the Army Court possesses, in contrast to the federal appellate courts, unusual fact-finding authorities, but it did not exercise these authorities in this case.[256] The three judges, all subject to the president's orders, could have sought a statement of retraction or assurance from the president that no member would be adversely affected if the case were overturned or the sentence reassessed, such as had occurred in with Secretary of Defense Hagel. The court could have also issued a cautionary statement against further intrusions into the military justice system, but it did not do so. It now rests with the Court of Appeals for the Armed Forces or an Article III court to resolve Bergdahl's claims, or that of the government if Bergdahl were to prevail at the Court of Appeals for the Armed Forces.

IV. CONCLUSION

Due process in courts-martial is governed by the unique regime of law as applied to the necessities of military service and the national defense.[257] Unfortunately, the Army Court of Criminal Appeals allusion to President Trump as an influential citizen is nothing more than a gross understatement of the president's power as commander in chief. While it is true, as Professor Richard Neustadt once penned, that the power of the President is the power to persuade, his statement is inapplicable when the president serves as a commander in chief.[258] Sadly, former Postmaster General Montgomery Blair, in his defense of Fitz-John Porter also articulated a truism that is readily applicable to Trump's treatment of military justice: "It is no new thing to sacrifice a soldier to serve a political turn."[259] By his conduct, President Trump has expanded commander in chief authorities over military justice into a monarchal trajectory.

Perhaps supporters of President Trump's conduct regarding military justice, and the appellate counsel who argued to uphold Bergdahl's conviction and sentence – if not the president himself – might disagree with the parallel between his treatment of Bergdahl and that of President

256. 10 USCS § 866(d)(1). See e.g. United States v. Smith, 39 M.J. 448 (CAAF, 1994); and United States v. Tyler, 34 M.J. 293 (CMA 1992). The Supreme Court has upheld the authority of the service-courts of appeal to reassess sentences in which the appellate courts believe to be unjust, without sending the new offenses back to the trial level. See e.g., Jackson v. Taylor, 353 U.S. 569 (1957).

257. *See, e.g.*, Middendorf v. Henry, 425 US 25, 43 (1976).

258. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP, 30 (1990).

259. HON. MONTGOMERY BLAIR, POSTMASTER GENERAL DURING PRESIDENT LINCOLNS ADMINISTRATION TO MAJ GEN FITZ-JOHN PORTER BLAIR, supra note __ at 6.

Arthur's toward a court-martialed general. Yet, the parallel is all the more real since neither President Trump nor President Arthur served in a military position to experience war firsthand – indeed, President Trump apparently used the national conscription laws to be exempted from wartime service and President Arthur's political connections to New York's governor enabled him to remain in New York, albeit with militia duties – and both took an extreme view of their authority over military justice in the courts-martial of service-members they believed did not deserve the fair treatment.[260] Both presidents abandoned the model of rectitude developed through the examples of Presidents Washington and Lincoln. In President Trump's case, the examples of Presidents Truman, Eisenhower, and even Nixon have also been disregarded. Thus, for the second time in history, presidential conduct designed to undermine the right to a fair trial through coercive influence has occurred. And unlike in Arthur's time, when the Regular Army's numbers were quite small, the current administration, which commands an enormous military, has crossed over into the very behavior that early presidents avoided, and nascent democracies saw as a threat. Regardless of whether President Trump repeats his conduct in Bergdahl's case or treat war-crimes as something less serious than to be desired, a future failure of Congress to include the civilian chain of command in Article 37 or if the courts adjudicating Bergdahl's appeal refuse to find that presidential unlawful command influence constitutes more than a danger to the fair trial aspects of courts-martial, a future president will be enabled to use the military to ends feared most at the nation's beginning and recognized by the judiciary: a tyranny of the executive.

260. On Arthur's wartime service, SEE CAROLE CHANDLER WALDROP, WIVES OF THE AMERICAN PRESIDENTS, 2D, 134 (2006). Waldrop writes, "During his militia service, Chester and Ellen lived in a family hotel which was well-furnished and comfortable." Id.