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Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial

JOHN F. O'CONNOR*

[J]udges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Justice Robert H. Jackson¹

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I. INTRODUCTION

On the evening of December 12, 1988, Christopher L. Fay, a private in the United States Army, went to his off-duty job as a cab driver

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1. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

in Killeen, Texas.² At about 8:00 p.m. that night, he was dispatched to take a passenger from the Handy Grocery Store in Killeen to Fort Hood, a nearby Army base.³ Fay picked up his passenger, Dwight J. Loving, who directed him to drive to a secluded part of Fort Hood, where Loving then robbed Fay at gunpoint.⁴ After Fay gave Loving the money he had, Loving shot Fay in the back of the head.⁵ Seeing the blood “gushing out” the back of Fay’s head, Loving shot Fay a second time in the head and left him there to die.⁶ About fifteen minutes later, with the same plan in mind, Loving called for a second cab to take him from Fort Hood back to Killeen. Similarly, Loving directed the cab driver, Bobby Sharbino, to a secluded part of Killeen, where Loving robbed and killed him with a gunshot to the head.⁷

Later that evening, Loving went to a nightclub with his girlfriend. Convinced that a patron was staring at her, Loving brandished his pistol in the club, but accidentally dropped it, causing the gun to discharge inside the club.⁸ Loving and his girlfriend hurriedly left the club and hailed a taxi. After having the driver, Howard Harrison, drop his girlfriend at her home in Killeen, Loving displayed his gun and directed Harrison to a deserted part of town.⁹ Loving then, as he had twice before that evening, demanded that the cab driver turn over all the money in his possession.¹⁰ After Harrison gave Loving about \$94.00, Loving “jerked Harrison’s head around and told him to open his mouth.”¹¹ Believing he was about to be shot, Harrison grabbed for the gun and a struggle ensued. Harrison ended up with the gun and tried to shoot Loving, but the gun would not fire. Eventually, Harrison escaped on foot and gave a full report to the police, including a description of his assailant.¹² Loving was arrested the next day and, after initially denying any involvement in the crimes, eventually confessed to murdering Fay and Sharbino, and to robbing all three cab drivers.¹³

Loving was tried for the offenses involving the three cab drivers, as well as for two convenience store robberies that occurred a day earlier. The evidence of Loving’s guilt was overwhelming. He was convicted of

2. *See* United States v. Loving, 41 M.J. 213, 229 (C.A.A.F. 1994).

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *Id.*

12. *Id.* at 230.

13. *Id.*

the premeditated and felony-murders of Fay and Sharbino, of robbing all three cab drivers, and of robbing the two convenience stores.¹⁴ The findings of guilt were unanimous as to felony-murder of Fay, and as to the premeditated and felony-murder of Sharbino, making Loving eligible for the death penalty.¹⁵ Loving was convicted of the premeditated murder of Fay by a non-unanimous vote.¹⁶ The governing law required only a two-thirds concurrence to convict Loving of the premeditated murder of Fay, but the lack of unanimity did not make Loving death-eligible based on that offense.¹⁷ The jury, after deliberating on sentence, unanimously determined that the accused should be put to death.¹⁸

The senseless and cold-hearted character of Loving's crimes sadly resembles many of the other death penalty cases in modern American jurisprudence. However, there is one omitted fact that makes Loving's case extraordinarily unique, and something that has not been seen in over thirty-five years—Dwight J. Loving was a private in the United States Army at the time of his crimes. While Loving could have been tried in civilian courts for his crimes, he was not; his fate was instead decided by a court-martial administered by the United States Army.¹⁹ That Loving was tried by court-martial is important for several reasons. First, the Fifth Amendment guarantees persons facing the death penalty the right to a grand jury indictment.²⁰ The Fifth Amendment, however, explicitly excludes "cases arising in the land or naval forces" from the grand jury right.²¹ Thus, while Loving did have the right to a formal pretrial investigation of the charges against him,²² he did not receive, nor

14. *Id.* at 231.

15. *See id.*; R. CT. MARTIAL 1004(b)(4), MANUAL FOR COURTS-MARTIAL (1995) [hereinafter R.C.M.] (providing that the death penalty may be adjudged upon unanimous findings of guilt to death-eligible offenses such as premeditated murder and felony-murder).

16. *See Loving*, 41 M.J. at 231.

17. *See* R.C.M. 921(c)(2)(B) (requiring two-thirds concurrence for a finding of guilty in non-death penalty offenses).

18. *See Loving*, 41 M.J. at 232.

19. *See id.* at 231.

20. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . ." *Id.*

21. *Id.* While the Fifth Amendment could be read as denying a grand jury right only for courts-martial conducted "in time of War, or public danger," the Supreme Court has held that the quoted language only modifies that part of the Fifth Amendment pertaining to the militia. *See Johnson v. Sayre*, 158 U.S. 109, 114 (1895). The construction adopted by the Court comports with the Framers' intention to limit the exception only to persons subject to military law, which would include land and naval forces, as well as members of the militia in actual service. *See id.*; Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 304 n.78 (1957-1958).

22. *See* UNIF. CODE OF MIL. JUST., art. 32, 10 U.S.C. § 832 (a) (1994) (creating the right to a pretrial investigation of charges before those charges may be referred to a general court-martial,

did he have a right to receive, a grand jury indictment. Second, Loving did not have a right to a trial by a jury of his peers.²³ Instead, he had a choice between being tried by a panel comprised entirely of military officers, or by a panel of military officers and enlisted persons, with at least one-third of the panel being enlisted.²⁴ Loving elected to be tried by a panel of military officers. Finally, by virtue of his military status, Loving was subject to different rights on appeal. His first level of appeal was to the Court of Criminal Appeals, a body comprised of senior Army officers, typically colonels and civilian lawyers.²⁵ That court affirmed Loving's conviction and sentence in two separate opinions in 1992.²⁶ Loving's next level of appeal was to the United States Court of Appeals for the Armed Forces, a body of five civilian judges appointed by the President and confirmed by the Senate for fifteen-year terms.²⁷ That court affirmed the findings and sentence in 1994.²⁸ Loving's final avenue of appeal was through petition to the United States Supreme Court for a writ of certiorari. The Court granted Loving's petition²⁹ and unanimously affirmed his sentence to death.³⁰ Thus, Dwight J. Loving stands as the first soldier in over thirty-five years to be sentenced to death by the court-martial and to have had his sentence affirmed at every level of appeal. In all likelihood, he will be the first soldier since 1961 to receive the death penalty based upon the sentence of a military court-martial.³¹

The Supreme Court's grant of certiorari in *Loving* was extremely limited. In military law, the President, through the *Manual for Courts-Martial*,³² establishes the procedure for military courts-martial, includ-

the only court-martial empowered to adjudge the death penalty or confinement in excess of six months).

23. See U.S. CONST. amend. VI (creating the right to an impartial jury in all criminal prosecutions). But see *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (holding that the explicit exception of courts-martial from the Fifth Amendment's grand jury right also applied to the right to a jury trial contained in the Sixth Amendment); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (same).

24. See UNIF. CODE OF MIL. JUST., art. 25(c)(1).

25. See *id.* art. 66. At the time of Loving's appeal, the intermediate military appellate courts were called Courts of Military Review. In 1994, those courts were renamed the Courts of Criminal Appeals. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(b)(1), 108 Stat. 2663, 2831 (1994).

26. See *U.S. v. Loving*, 34 M.J. 956, 970 (A.C.M.R. 1992); 34 M.J. 1065, 1069 (A.C.M.R. 1992).

27. See UNIF. CODE OF MIL. JUST., art. 67.

28. See *U.S. v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994).

29. *U.S. v. Loving*, 116 S. Ct. 39 (1995).

30. See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996).

31. See Richard A. Serrano, *Last Soldier to Die at Leavenworth Hanged in an April Storm*, L.A. TIMES, July 12, 1994, at A14.

32. See R.C.M., at Rules 1004, 1207.

ing the enumeration of aggravating factors authorizing imposition of the death penalty.³³ The Court granted certiorari to consider whether it violated the principle of separation of powers for the President, rather than Congress, to establish the aggravating factors.³⁴ The Court held that the Constitution's grant to Congress of the power "to make Rules for the Government and Regulation of the land and naval Forces"³⁵ permitted Congress to delegate to the President, with minimal guidance, the duty to promulgate the military's capital sentencing scheme.³⁶ The result in *Loving* was not unexpected; the only real surprise was that all nine Justices agreed that there was no violation of the separation of powers doctrine.³⁷ Although *Loving* was a separation of powers case, its most interesting aspect might be the Justices' discussion of Congress' authority to establish the jurisdiction of courts-martial.

From the founding of the Republic until 1969, the courts placed no constraints on Congress' authority to fix the subject-matter jurisdiction of courts-martial. In 1969, however, the Supreme Court changed course and held in *O'Callahan v. Parker*³⁸ that Congress lacked the power to create court-martial jurisdiction over offenses that were not connected to the accused's military service.³⁹ The *O'Callahan* principle survived eighteen years until the Court explicitly overruled it in *Solorio v. United States*,⁴⁰ where the Court held that Congress could establish court-martial jurisdiction for any offense committed while the accused servicemember was on active duty in the armed forces.⁴¹

The *Solorio* rule—that there were no constitutional limits on Congress' power to set the subject-matter jurisdiction of courts-martial—

33. See R.C.M., at Rules 1004, 1004, 1207.

34. See *Loving*, 116 S. Ct. at 1742 (the Court also considered the question of whether granting President the power to establish the aggravating factor violated the Eighth Amendment).

35. U.S. CONST. art. I, § 8, cl. 14.

36. *Loving*, 116 S. Ct. at 1751. The Court noted that because the Constitution grants the President considerable powers over the military and foreign affairs, Congress may delegate regulation of military matters to the President without the same level of statutory guidance that might be necessary to delegate regulatory power to an entity not recognized in the Constitution as having some cognizance over the subject matter. *Id.* at 1750; *cf.* *Mistretta v. United States*, 488 U.S. 361, 374-79 (1989) (upholding congressional delegation to newly-created United States Sentencing Commission only because of explicit statutory constraints on agency discretion). For a fine discussion of the Court's decision in *Loving*, see Cody M. Weston, Note, *United States v. Loving: The Resurrection of Military Capital Punishment*, 76 OR. L. REV. ____ (forthcoming May 1998).

37. *Loving*, 116 S. Ct. at 1751. The Court's recent separation of powers cases, such as *Morrison v. Olson*, 487 U.S. 654 (1988), and *Mistretta*, 488 U.S. 361 (1989), demonstrated deep theoretical differences among the Justices on the issue of delegation of legislative powers.

38. 395 U.S. 258 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

39. See *id.* at 272-73.

40. 483 U.S. 435 (1987).

41. See *id.* at 440-41.

had, until recently, appeared unassailable. The continued viability of *Solorio* was brought into question, however, by Justice Stevens' concurring opinion in *Loving*.⁴² In the opinion joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens expressly noted that he was voting to affirm the death penalty in *Loving* only because he was convinced from the record that the crimes were service-connected.⁴³ According to Justice Stevens:

The question whether a "service connection" requirement should obtain in capital cases is an open one both because *Solorio* was not a capital case, and because *Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try non-capital ones.⁴⁴

Thus, it appears that at least four Justices are poised to hold that Congress lacks the authority to give courts-martial jurisdiction over capital cases where the offense charged is not related to the accused's military service.

The questions raised by Justice Stevens' concurrence in *Loving* are not the typical issues of subject-matter jurisdiction. This is not a question of whether Congress has conferred jurisdiction upon courts-martial to try capital cases where there is no service connection; Congress clearly has done so.⁴⁵ Justice Stevens' concurrence instead challenges whether Congress can grant such jurisdiction pursuant to its powers under Article I of the Constitution.

Part I of this article will undertake an analysis of the historical practice which forms the foundation of Justice Stevens' argument in *Loving*. Particular attention will be given to the availability of the death penalty under American military law for common-law offenses such as murder and rape. A review of the historical materials makes clear that Congress had, until 1951, generally granted courts-martial narrower jurisdiction over capital crimes than it had over non-capital offenses. Nevertheless, the manner in which Congress expanded court-martial jurisdiction over the years does not lead to the conclusion that Congress believed it lacked

42. See *Loving*, 116 S. Ct. at 1751 (Stevens, J., concurring).

43. See *id.* The factors in *Loving* that Justice Stevens found service-connected were that the first victim was an active duty servicemember moonlighting as a cab driver, and that the second victim was a retired servicemember who had picked *Loving* up at his barracks aboard Fort Hood, Texas. See *id.*

44. *Id.*

45. UNIF. CODE OF MIL. JUST., art. 18, 10 U.S.C. § 818 (1994) ("[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.").

the power to eliminate subject-matter constraints on capital offenses. Part II will examine the appropriate interpretation of Congress' constitutional power to set court-martial jurisdiction. The pertinent provision—Article I, Section 8, Clause 14—imposes no literal restrictions on Congress' power to regulate the armed forces, and a review of the Framers' intent supports an interpretation that Clause 14 is a plenary grant of power to Congress. Finally, Part III, examines Supreme Court precedent bearing on Clause 14 of Article I, Section 8 of the Constitution. It becomes clear, from one hundred fifty years of precedent on the matter, that the Court would have to ignore and/or overrule an immense body of case law in order to adopt Justice Stevens' view that Congress' power to create jurisdiction over capital offenses is narrower than its ability to do so for non-capital offenses. This examination of historical practice, the Framers' intent, and Supreme Court precedent, leads to one inescapable conclusion—though Congress has, at times, created a narrow death penalty jurisdiction, Congress was, and is, free at any time to change course and disregard its previous practice vis-a-vis courts-martial. Article I of the Constitution grants Congress, not the judiciary, the power to govern the armed forces, and that power encompasses the authority to establish and regulate courts-martial. So long as Congress' court-martial regulations do not violate other constitutional provisions, such as the Fifth Amendment's guarantee of due process, the judiciary is without power to strike them down or otherwise modify them.

II. A BRIEF HISTORY OF COURT-MARTIAL JURISDICTION

In the early days of the Republic, the armed forces were not nearly as integrated as they are today. In fact, Congress created two distinct systems of military law—one for the Army and one for the Navy—until the passage of the Uniform Code of Military Justice in 1950. The Navy, owing to the long tradition of dictatorial power by ship captains, was not highly regulated by Congress. As a result, there was little written naval law before 1950, with the naval justice system being based mostly on the ancient traditions of the law of the sea. On the other hand, military law for the Army was established by positive law enacted by Congress, and was often revised as exigencies required. The Army's military law, as enacted by Congress, was promulgated in a series of statutes known as the Army Articles of War. Congress' legislation of military law, from the offenses made punishable by death to ancillary provisions relating to the imposition of the death penalty, gives a clear picture of the development of military death penalty jurisprudence and of Congress' view of its role in that development.

A. *The Army Articles of War*

1. THE 1775 ARTICLES OF WAR

American courts-martial predate the Constitution; indeed, the colonists provided for courts-martial before the colonies won their independence from Great Britain.⁴⁶ Of course, while the colonies were under British control, the British Articles of War governing courts-martial applied to Americans fighting under the British flag. The first truly American provision for courts-martial was the Articles of War of 1775.⁴⁷ Those Articles, applying only to the governance of the Continental Army, were prepared by a committee consisting of founding fathers George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes, and were adopted by the Second Continental Congress on June 30, 1775.⁴⁸ Those Articles were revised in November of 1775,⁴⁹ and replaced the next year by the Articles of War of 1776.⁵⁰ The 1775 Articles, as originally enacted, authorized the death penalty for only three offenses, all purely military in nature: shamefully abandoning one's post,⁵¹ disclosing the watch-word or giving a false watch-word,⁵² and compelling a senior officer to surrender his command to the enemy.⁵³ The November revision to the 1775 Articles added two other purely military capital offenses: treacherous correspondence with the enemy,⁵⁴ and causing or joining in mutiny or sedition.⁵⁵ Thus, the first Articles of War had an extremely limited class of death penalty offenses, and each of those offenses was a military offense for which there was no analogous civilian crime.

2. THE 1776 ARTICLES OF WAR

The 1776 Code, drafted by a committee comprised of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R.R. Livingston, greatly enlarged the class of capital crimes cognizable under military law. Where the 1775 Articles had limited the death penalty to three purely military offenses, the 1776 Articles permitted capital punishment

46. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 47 (2d ed. 1920).

47. Articles of War of 1775, reprinted in WINTHROP, *supra* note 46, at 953.

48. See WINTHROP, *supra* note 46, at 21.

49. See Additional Articles of War of Nov. 7, 1775, reprinted in WINTHROP, *supra* note 46, at 959-60.

50. Articles of War of 1776, reprinted in WINTHROP, *supra* note 46, at 961.

51. See Articles of War of 1775, art. 25, reprinted in WINTHROP, *supra* note 46, at 955.

52. See *id.* art. 26, at 955.

53. See *id.* art. 31, at 956.

54. See Additional Articles of War of Nov. 7, 1775, art. 1, reprinted in WINTHROP, *supra* note 46, at 959.

55. See *id.* art. 5, at 959.

for sixteen different crimes. Like the 1775 Code, the crimes punishable by death under the 1776 Articles tended to be purely military offenses, including such crimes as mutiny and sedition, desertion, aiding the enemy, and sleeping on post.⁵⁶ However, the 1776 Articles added two capital offenses that although not purely military in nature, would have a direct effect on good order and discipline. The first of these offenses was striking or offering violence against a superior officer in the execution of his office.⁵⁷ While the military necessity of this article is apparent, such an offense generally would have been cognizable under civilian law as an assault and/or battery. But, the committee recognized that this type of assaultive behavior as particularly dangerous in the military context. Assault on superior officers could destroy unit discipline, justifying court-martial jurisdiction over an offense triable by civilian courts.

The second capital offense not purely military in character was committing violence to any person bringing provisions or other necessities into camp.⁵⁸ Again, this article prohibited a crime of violence that certainly would be prohibited by local law, whether it is assault, battery, or even murder. But, much like assaults against superior officers, there existed an obvious military interest in safeguarding camp suppliers. At the time of these amendments, an army in the field relied heavily upon supplies provided by local civilian merchants and by civilians who followed the army from camp to camp.⁵⁹ A commander who could not guarantee the safety of his camp followers faced the possibility of not receiving necessary supplies. By giving commanders the latitude to punish soldiers menacing civilian resuppliers, instead of requiring resort to the civilian courts, the 1776 Articles gave commanders the tools necessary to guarantee the availability of ammunition, foodstuffs, and other supplies.

Apart from creating new capital military offenses, the 1776 Articles introduced a provision (one that would remain in effect until 1951) that

56. The complete list of capital offenses under the 1776 Articles is mutiny and sedition (§ 2, art. 3); failure to suppress mutiny and sedition (§ 2, art. 4); striking a superior officer in the execution of his duties (§ 2, art. 5); desertion (§ 6, art. 1); sleeping on post (§ 13, art. 6); causing a false alarm in camp (§ 13, art. 9); causing violence to persons bringing provisions into camp (§ 13, art. 11); misbehavior before the enemy (§ 13, art. 12); inducing others to misbehave before the enemy (§ 13, art. 13); casting away arms or ammunition (§ 13, art. 14); disclosing the watchword (§ 13, art. 15); forcing a safeguard (§ 13, art. 17); aiding the enemy (§ 13, art. 18); correspondence with the enemy (§ 13, art. 19); abandoning post in search of plunder (§ 13, art. 21); and subordinate compelling surrender (§ 13, art. 22). See *Articles of War of 1776, reprinted in WINTHROP, supra* note 46, at 961.

57. See *id.* § 2, art. 5, at 962.

58. See *id.* § 13, art. 11, at 966.

59. See WILLIAM C. DE HART, *OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL* 22-25 (1859).

would go straight to the heart of the overlapping capital jurisdiction of military and civilian courts.⁶⁰ The turnover provision of the 1776 Articles required military commanders to deliver to civilian authorities any soldier accused of committing serious common-law crimes against the person or property of an American citizen.⁶¹ By its terms, this article only required a commander to turn over a soldier so accused "upon application duly made by or in behalf of the party or parties injured."⁶² The intent behind this provision and its bearing on court-martial jurisdiction has long been debated. Colonel Winthrop, author of the definitive treatise on military law and called "the Blackstone of military law" by the Supreme Court,⁶³ asserted that this article was intended to emphasize the subordination of military jurisdiction to civilian jurisdiction in time of peace.⁶⁴ However, as Winthrop recognized, this subordination of military jurisdiction is extremely nuanced. Given that the superiority of civilian jurisdiction is triggered upon application by the victims, it is evident the turnover article was not enacted in order to protect the rights of the accused soldier. For instance, the 1776 Articles of War made violence upon a camp supplier a capital offense,⁶⁵ therefore, if a member of the Continental Army killed someone bringing provisions or other necessities into camp, it would have been a capital offense in violation of Section 13, Article 11 of the 1776 Articles of War.⁶⁶ That offense also would have been triable as murder in the civilian courts. If the victim's family, or presumably the civilian authorities, were satisfied that the offense would be handled adequately by the military courts, then they could allow the court-martial to proceed. If the civilian victims preferred a civilian trial, for whatever reason, then they could apply to

60. See Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 12 (1958).

61. See Articles of War of 1776, § 10, art. 1, reprinted in WINTHROP, *supra* note 46, at 964-65. The article reads in pertinent part:

Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to trial.

Id. at 964.

62. *Id.*

63. Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion).

64. See WINTHROP, *supra* note 46, at 691.

65. See *supra* notes 58-59.

66. See *supra* note 58.

the accused's commanding officer, who was obliged to hand over the soldier.

In fact, this very phenomenon of forum-shopping by a victim can be seen in the case of *Ex parte Mason*,⁶⁷ where the military courts took cognizance of a case that, upon application, rightfully would have been tried in civilian court. In *Mason*, the accused was an Army sergeant on duty as a guard at the Washington, D.C. jail which housed the notorious Charles J. Guiteau, who was being held for assassinating President Garfield.⁶⁸ Sergeant Mason, perhaps acting out of a misguided sense of patriotism, attempted to kill Guiteau by firing his musket into Guiteau's cell.⁶⁹ Mason was tried and convicted by a court-martial even though his offense, attempted murder, plainly was triable under local law.⁷⁰ Although Mason was not charged with a capital offense, the crime triggered the turnover provision because the charged offense was a crime "against the person or property of any citizen of the United States."⁷¹ The Court rejected Mason's claim that this article affected the jurisdiction of the accused's court-martial:

It is not pretended that any application was ever made under this Article for the surrender of Mason to the civil authorities for trial. So far as it appears, the person injured by the offense committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. . . . As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction.⁷²

Thus, the subordination of military jurisdiction was not intended to protect the rights of the accused, nor was it a recognition of the substantive superiority of civilian tribunals. Rather, this article was designed primarily to protect local citizens from marauding soldiers and to prevent military commanders from shielding their soldiers from punishment for their crimes against the civilian populace.⁷³ As one court characterized

67. 105 U.S. 696 (1881).

68. *See id.* at 697.

69. *See id.*

70. *Id.*

71. Articles of War of 1874, § 1342, art. 59, tit. XIV, ch. 5, 18 Stat. 229, 235, reprinted in WINTHROP, *supra* note 46, at 990; *see also* Articles of War of 1776 § 13, art. 11, reprinted in WINTHROP, *supra* note 46, at 966 (using similar language).

72. *Mason*, 105 U.S. at 699.

73. As Colonel Winthrop stated:

[N]otwithstanding this independence of the military power within its peculiar field, the further principle is uniformly asserted of the subordination, in time of peace and on common ground, of the military authority to the civil, and of the consequent amenability of military persons, in their civil capacity, to the civil jurisdiction, for breaches of the criminal law of the land.

it, this article was intended "to aid the civil authorities in the administration of justice, and to place it out of the power of a criminal to escape the just civil penalties of his acts, by entering the military service or claiming its protection when in it."⁷⁴

Thus, in relation to the death penalty, the 1776 Articles can be seen as a departure from the 1775 Articles in three ways. First, the 1776 Articles greatly expanded the number of purely military offenses subject to the punishment by death. That result is not overly surprising, considering that the committee that drafted the 1776 Articles previously had been assigned "to consider what is proper to be done with persons giving intelligence to the enemy or supplying them with provisions."⁷⁵ The second departure is more subtle, but more important for the purposes of this article. The 1775 Articles of War permitted the death penalty for only purely military offenses. The 1776 Articles expanded death penalty jurisdiction from purely military offenses to crimes that, while cognizable under civilian law, were of such importance to the readiness of the Continental Army that the drafters thought it advisable to have courts-martial try them. Finally, the 1776 Articles gave victims of serious crimes committed by soldiers the right to demand that a civilian court try the case. This provision did not, however, demonstrate the superiority of civilian jurisdiction; rather, it was designed to ensure that a soldier could not shield himself from punishment for his crimes by virtue of his service in the Army.

3. FROM THE AMERICAN REVOLUTION TO THE CIVIL WAR

The 1776 Articles remained in force without any change to death penalty jurisdiction through the adoption of the Constitution. Article I of the Constitution provides that "Congress shall have the power . . . To

WINTHROP, *supra* note 46, at 691 (emphasis added). Misconduct by soldiers against the civilian populace was considered a significant problem by Congress. See *Coleman v. Tennessee*, 97 U.S. 509, 513 (1878) ("It is a matter well known that the march even of an army not hostile is often accompanied with acts of violence and pillage by straggling parties of soldiers, which the most rigid discipline is hardly able to prevent."). This desire to protect local citizens from the crimes of an army on the march also can be seen in section 13, article 16 of the 1776 Articles, which read in pertinent part:

[W]hoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses or gardens, corn-fields, enclosures or meadows, or shall maliciously destroy any property whatsoever belonging to the good people of the United States, . . . shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offence, by the judgment of a regimental or general court-martial.

Articles of War of 1776, § XII, art. 16, *reprinted in* WINTHROP, *supra* note 46, at 967.

74. *Ex parte McRoberts*, 16 Iowa 600, 603 (1864), *quoted in* WINTHROP, *supra* note 43, at 691.

75. 1 JOUR. CONT. CONG. 365 (1776), *quoted in* WINTHROP, *supra* note 46, at 22.

make Rules for the Government and Regulation of the land and naval Forces.”⁷⁶ That provision became the authority under which Congress enacted subsequent Articles of War, making it clear that Congress, rather than the President, would have cognizance over regulating court-martial practice.⁷⁷ The Fifth Amendment to the Constitution also explicitly recognized the existence of courts-martial by excepting “cases arising in the land and naval forces” from the Fifth Amendment right to a grand jury indictment for capital and infamous crimes.⁷⁸ Pursuant to its explicit power to regulate the armed forces, the new Congress reenacted the 1776 Articles of War in 1789,⁷⁹ and periodically thereafter.⁸⁰ In 1806, Congress revamped the 1776 Articles and enacted a new Code.⁸¹ The 1806 Articles of War did not effect any change whatsoever in the substantive jurisdiction of courts-martial. Much like the 1776 Articles, the 1806 Articles of War made the death penalty applicable to a variety of purely military offenses.⁸² It also authorized the death penalty for the same two arguably common-law offenses for which death was authorized under 1776 Articles: offering violence against a superior officer in the execution of his office,⁸³ and violence to persons supplying the camp.⁸⁴

In fact, the first substantive change to the death penalty jurisdiction of the 1776 Articles of War occurred a full eighty-seven years later when Congress, at the height of the Civil War, authorized court-martial jurisdiction over a bevy of common-law offenses.⁸⁵ The 1863 revision authorized courts-martial to try, in time of war or rebellion, cases of soldiers charged with “murder, assault and battery with an intent to commit murder, manslaughter, mayhem, wounding by shooting or stabbing

76. U.S. CONST. art. I, § 8, cl. 14.

77. See 1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 412-13 (1953) (stating that the purpose of art. I, § 8, cl. 14 was to remove any doubt that regulation of the land and naval forces was to be vested in Congress rather than in the Executive).

78. U.S. CONST. amend. V.

79. See Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96.

80. See WINTHROP, *supra* note 46, at 23 & n.43 (listing subsequent reenactments of the Articles).

81. See Articles of War of 1806, reprinted in WINTHROP, *supra* note 46, at 976.

82. The purely military offenses punishable by death under the 1806 Articles were: mutiny and sedition (art. 7); failure to suppress mutiny and sedition (art. 8); disobeying lawful commands of a superior officer (art. 9); desertion (art. 20); advising another to desert (art. 23); sleeping on post (art. 46); giving a false alarm in camp (art. 49); misbehavior before the enemy, shamefully abandoning post, inciting others to shamefully abandon their post, casting away arms or ammunition, and plundering (art. 52); disclosing the watchword (art. 53); forcing a safeguard (art. 55); giving comfort to the enemy (art. 56); correspondence with the enemy (art. 57); and subordinate compelling surrender (art. 59). See *id.* at 976-81.

83. See *id.* art. 9, at 976-77.

84. See *id.* art. 51, at 980-81.

85. See Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736.

with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny.”⁸⁶ This grant of jurisdiction marked the first time that Congress gave Army courts-martial jurisdiction over common-law crimes, which by their very nature did not directly affect the good order and discipline of the military.⁸⁷ This statute further provided that the punishment for any soldier convicted of these enumerated crimes “shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed.”⁸⁸ This language as to the authorized punishment is significant for two reasons. First, by referencing the maximum punishment of the jurisdiction where the crime occurred, it is clear that the local courts need not have been rendered inoperable by the war or insurrection for courts-martial to have jurisdiction over these offenses. The Supreme Court made this point in the case of *Coleman v. Tennessee*.⁸⁹ In that case, Coleman, a Union soldier at the time of his offense, was sentenced to death by a court-martial for an 1865 murder that took place in Tennessee.⁹⁰ He subsequently escaped, was tried by a Tennessee state court, and again sentenced to death.⁹¹ Coleman appealed his state court death sentence on the grounds that the court lacked jurisdiction because the 1863 Act gave courts-martial exclusive jurisdiction over murders committed by soldiers in time of war. The Supreme Court rejected Coleman’s assertion, holding that the 1863 law did not give courts-martial exclusive jurisdiction, but created concurrent jurisdiction with that exercised by any federal or state court.⁹² Thus, Congress did not design the provision to replace civilian court jurisdiction when those courts ceased to operate, but rather, designed it in recognition that, during time of war, a military commander has a paramount interest in being able to punish the criminal conduct of his soldiers, whether the crime has a direct effect on unit discipline or not.

86. *Id.*

87. See WINTHROP, *supra* note 46, at 667. Because of the different character of naval service, Congress had allowed naval courts-martial to try various common-law offenses much sooner than that power was conferred upon Army courts-martial. See *infra* notes 107-28 and accompanying text.

88. Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736.

89. 97 U.S. 509, 513 (1878).

90. See *id.* at 510-11.

91. See *id.* at 511.

92. See *id.* at 513-14. In the end, the Court reversed Coleman’s state court conviction because at the time of the offense, the state of Tennessee was at war against the United States. The Court relied on the international law maxim that a soldier is not bound by the laws of the enemy, even when he is in enemy territory. See *id.* at 515. Nevertheless, Coleman’s victory in the Supreme Court was truly bittersweet. In the last line of the Court’s opinion, it suggested that Coleman, having been sentenced to death by a general court-martial, be turned over to the Federal Government to have his unexecuted death sentence carried out. See *id.* at 519-20.

The second significant characteristic of the authorized punishment for these common-law crimes is that it greatly expanded the death penalty jurisdiction of courts-martial. If the local law made death the mandatory punishment for any of the listed offenses, then the court-martial was required to adjudge a death sentence upon a conviction.⁹³ Moreover, a court-martial could sentence a soldier to death if local law made death one of the authorized punishments. If the offense were not committed in a state, such as in crimes committed in the District of Columbia or at sea, the governing federal law in 1863 authorized courts-martial to adjudge the death penalty for any common-law murder, rape, or arson committed in time of war.⁹⁴ Far from a quick-fix for the problems caused by the Civil War, Congress never repealed the 1863 expansion of court-martial jurisdiction. To the contrary, Congress, since 1863, has repeatedly, albeit incrementally, expanded the jurisdiction of courts-martial over common-law offenses.

4. THE 1916 ARTICLES OF WAR

The Articles of War were revised and reissued by Congress in 1874;⁹⁵ however, that revision made no changes in the offenses punishable by the death penalty. The plethora of purely military offenses remained from the 1776 Articles,⁹⁶ including the offenses of striking an officer and doing violence to civilians resupplying the camp (offenses that, while not purely military in nature, have an obvious effect on unit discipline and readiness).⁹⁷ Moreover, through Article 58, Congress retained the 1863 provision granting courts-martial jurisdiction over several common-law felonies in time of war (crimes possibly classified as capital offenses depending on local law).⁹⁸

After 1863, the first substantive change in the death penalty jurisdiction of Army courts-martial occurred with the enactment of the Articles of War of 1916.⁹⁹ Under the 1916 Articles, committing violence upon persons bringing necessities into camp, a capital offense under the

93. See WINTHROP, *supra* note 46, at 689.

94. See *id.* at 690.

95. Articles of War of 1874, tit. XIV, ch. 5, 18 Stat. 229, *reprinted in* WINTHROP, *supra* note 46, at 986.

96. See *id.* art. 22 (mutiny and sedition); art. 23 (failure to suppress mutiny or sedition); art. 39 (sleeping on post); art. 41 (giving a false alarm); art. 42 (misbehavior before the enemy); art. 43 (subordinate compelling surrender); art. 44 (disclosing the watch-word); art. 45 (giving comfort to the enemy); art. 46 (correspondence with the enemy); art. 47 (desertion in time of war); and art. 51 (advising another to desert in time of war), at 988-90.

97. See *id.* art. 21 (striking superior officer); art. 56 (violence to persons bringing necessities into camp), at 987, 990.

98. *Id.* art. 58, at 990.

99. Act of Aug. 29, 1916, ch. 418, § 1342, 39 Stat. 619, 650.

1874 Articles, became a non-capital offense.¹⁰⁰ Moreover, the 1916 Articles of War changed court-martial jurisdiction over common-law felonies in several important ways. First, Congress gave courts-martial unconditional jurisdiction over manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit a felony, and assault with intent to commit bodily harm.¹⁰¹ Unlike the 1863 statute, jurisdiction over these offenses was not predicated on the United States being at war. Congress also eliminated the requirement that the punishment for these common-law crimes match the punishment in force in the locality where the crime occurred. Instead, Congress provided that all of these offenses were to be punished "as a court-martial may direct,"¹⁰² meaning that these offenses were to be non-capital offenses.¹⁰³ As for murder and rape, Article 92 of the 1916 Articles expressly made those crimes capital offenses, without regard to the law in the community where the crime occurred.¹⁰⁴ The only limitation on the exercise of court-martial jurisdiction over murder and rape was that a court-martial could not exercise jurisdiction over a murder or rape committed within any state or the District of Columbia in time of peace.¹⁰⁵ Thus, while the 1863 statute had limited jurisdiction over the capital offenses of murder and rape to wartime, the 1916 Articles created court-martial jurisdiction over wartime murder and rape, as well as to peacetime murder and rape committed outside the continental United States.

Article 92 was reenacted without change in 1920.¹⁰⁶ In 1948, Congress amended Article 92, tinkering with its authorization of the death penalty for murder and rape. Courts-martial retained jurisdiction over all wartime murder and rape, and all peacetime murder and rape committed outside the continental United States. Congress, however, for the first time differentiated between classes of murder. By its 1948 enactment, Congress continued the death penalty as an authorized punishment for any rape triable by court-martial, but made only premeditated murder a capital offense.¹⁰⁷ Subsequent revisions to the 1948 Articles were purely procedural. The next substantive change to the Army's death penalty jurisprudence occurred when Congress enacted the Uniform Code of Military Justice ("UCMJ") in 1950. At the time of the UCMJ's enactment, the Articles of War permitted the death penalty for a bevy of

100. *See id.* art. 88.

101. *See id.* art. 93.

102. *Id.*

103. *See id.* art. 43 (providing that the death penalty must be explicitly authorized in an article for it to be a capital offense).

104. *See id.* art. 92.

105. *See id.*

106. National Defense Act Amendments of 1920, ch. 227, art. 92, 41 Stat. 759, 805.

107. Selective Service Act of 1948 (Elston Act), ch. 625, § 235, 62 Stat. 604, 640.

purely military offenses: striking a superior officer, wartime rape and premeditated murder, and for peacetime rape and premeditated murder outside the continental United States.

B. *Death Penalty Jurisdiction Under Naval Law*

For many reasons, Congress maintained separate Army and Navy military justice systems until the passage of the UCMJ in 1950. The law of the high seas has always been steeped in ancient traditions. Until 1950, naval military law, like maritime civil law and maritime insurance law, tended to be based largely on centuries-old practices. For instance, in 1799, Congress provided that sailors could be tried and punished for offenses not set out in the Navy Articles according to the laws and customs of the sea.¹⁰⁸ That provision was reenacted in 1800 and remained a part of naval law until the passage of the UCMJ.¹⁰⁹ Another reason for the separate development of naval law from the law of land forces, beyond mere tradition, had to do with the nature of naval service. Unlike the Army, naval personnel spent a great majority of their time outside the United States, either at sea or in foreign ports. For that reason, sailors committing crimes were often outside the jurisdiction of American civilian courts. Thus, courts-martial provided the only means for American courts to punish serious criminal misbehavior by sailors. The alternative to courts-martial was leaving accused sailors subject to foreign law, where anti-American animus could result in unfair proceedings. Additionally, the prospect of leaving a sailor in a foreign jail awaiting trial while the ship carried on with its mission was both impractical and undesirable.

Congress' first attempt to establish regulations for naval courts-martial was the 1799 Act "for the Government of the Navy."¹¹⁰ Senior naval officers drafted the Articles, which were reported to the House by Representative Josiah Parker of Virginia, who remarked that as "the bill was very long, and related entirely to the government of the Navy, he did not think it necessary to detain the House in reading it."¹¹¹ The bill passed both houses without recorded debate or amendment.¹¹² Perhaps the members of the House should have read it. The 1799 Navy Articles were plagued by poor draftsmanship, giving many articles ambiguous meanings. The 1799 Articles authorized the death penalty for seven

108. See Act of Mar. 2, 1799, ch. 24, § 1, art. 46, 1 Stat. 709, 715.

109. See Act of Apr. 23, 1800, ch. 33, § 1, art. XXXII, 2 Stat. 45, 49.

110. See Act of Mar. 2, 1799, ch. 24.

111. 9 ANNALS OF CONG. 2753 (1799), quoted in Wiener, *supra* note 60, at 14.

112. Wiener, *supra* note 60, at 14.

purely military offenses,¹¹³ as well as for all murders,¹¹⁴ spying,¹¹⁵ and burning public property.¹¹⁶ The most curious part of the 1799 Articles was Article 44, which provided:

Every person guilty of mutiny, desertion or disobedience to his superior officer on shore, acting in the proper line of his duty, shall be tried by a court martial, and suffer the like punishment for every such offence, as if the same had been committed at sea, on board any ship or vessel of war in the service of the United States.¹¹⁷

The ambiguity of that article is two-fold, both of which directly affect the subject-matter jurisdiction of Navy courts-martial. First, Article 44 stated that three specific crimes were cognizable by court-martial if committed on shore.¹¹⁸ By implication, that provision seems to deny courts-martial jurisdiction over other crimes, such as murder and spying, that did not occur at sea or aboard ship. Second, the use of the phrase "acting in the proper line of his duty" leaves unanswered whether a naval court-martial would have had jurisdiction over mutiny, desertion or disobedience that occurred while the sailor was off duty.

These ambiguities are of little moment, however, because Congress expressed its dissatisfaction with the 1799 Navy Articles a year later by replacing them with a better crafted set of articles. Thus, it is probably no coincidence that the 1800 Navy Articles were enacted in a bill entitled, "An Act for the *better* government of the Navy of the United States."¹¹⁹ The 1800 Navy Articles made sixteen crimes punishable by death. Of those, twelve offenses were purely military offenses (i.e., they were offenses that generally would not be illegal if committed by a civilian).¹²⁰ Article XII added spying as a capital offense.¹²¹ Although spy-

113. See generally Act of Mar. 2, 1799, ch. 24. The purely military offenses made capital by the 1799 Articles were desertion in sight of the enemy (§ 1, art. 23); disobeying a superior officer (§ 1, art. 24); mutiny and sedition (§ 1, art. 24); correspondence with the enemy (§ 1, art. 33); failing to reveal messages received from the enemy (§ 1, art. 34); giving comfort to the enemy (§ 1, art. 36); and treacherously surrendering to the enemy (§ 1, art. 37). *Id.*

114. *Id.* art. 29.

115. See *id.* art. 35.

116. See *id.* art. 41.

117. *Id.* art. 44.

118. See *id.* (listing mutiny, desertion and disobedience to a superior officer).

119. Act of Apr. 23, 1800, ch. 33, 1 Stat. 45 (emphasis added).

120. The purely military capital offenses in the 1800 statute include: failing to clear a ship for battle upon command (§ 1, art. IV); treacherously yielding or pusillanimously crying for quarter (§ 1, art. IV); disobeying the commanding officer during battle (§ 1, art. V); desertion of duty in sight of the enemy (§ 1, art. V); wrongful withdrawal from battle (§ 1, art. VI); correspondence with the enemy (§ 1, art. X); failure to reveal correspondence received from the enemy (§ 1, art. XI); mutiny and attempted mutiny (§ 1, art. XIII); disobeying a superior officer (§ 1, art. XIV); desertion to the enemy (§ 1, art. XVI); desertion and enticing others to desert (§ 1, art. XVII); and misbehavior by watchstanders (§ 1, art. XX). See *id.* § 1.

121. See *id.* art. XII.

ing has a direct effect on military operations, it is not a purely military offense because it is typically illegal whether committed by civilian or servicemember. Congress also made striking a superior officer in the execution of his office a capital offense,¹²² much as it had done in the Army Articles of War.¹²³ Two other enumerated capital offenses carried over from the failed 1799 Navy Articles, both of which were neither purely military offenses, nor by definition, injurious to unit discipline or readiness.

The first and most important of these crimes was murder committed by sailors whose ship was outside the territorial jurisdiction of the United States.¹²⁴ While crimes committed aboard ship clearly have a direct and palpable effect on the ship's ability to accomplish its mission, this is not necessarily true of all murders committed while ships are outside American waters.

The second capital offense not necessarily service-connected was setting fire to public property.¹²⁵ Again, many acts falling under this article would have had a direct effect on a ship's readiness; offenses such as setting fire to a ship, or its supplies, come readily to mind. There are a great many other cases, however, that have nothing to do with the offender's naval service. For instance, setting fire to a post office or a state-owned bridge while on leave would have been a capital offense under Article XXV, regardless of the nexus between the act and the offender's status as a member of the Navy. Moreover, Article XVII clarified congressional intent as to offenses committed on shore, an area left highly ambiguous by Article 44 of the 1799 Navy Articles: "All offenses committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea."¹²⁶

Thus, as far back as 1799, Congress had determined that it was appropriate to give naval courts-martial death penalty jurisdiction over not just military offenses, but for selected non-military offenses having a direct effect on a ship's discipline and readiness. Moreover, by 1800, Congress explicitly and unambiguously created naval court-martial jurisdiction over two capital offenses—murder committed abroad and burning public property—which, depending on the circumstances, may have had nothing to do with the offender's service in the United States Navy. Congress did not revise the 1800 Navy Articles until 1862.¹²⁷

122. *See id.* art. XIV.

123. *See supra* note 57.

124. *See* Act of Apr. 23, 1800, ch. 33, § 1, art. XXI, 1 Stat. 45, 48.

125. *See id.* art. XXV.

126. *See id.* art. XVII.

127. *See* Act of Jul. 17, 1862, ch. 204, 12 Stat. 600.

While the 1862 and subsequent revisions to the Navy Articles made some changes in naval law, such as a prohibition on flogging,¹²⁸ they did not effect any substantial change on the number of offenses subject to the death penalty. In one last paean to the traditions and customs of the sea, while the Army Articles were revised in 1916, 1920, and 1948, the Navy Articles remained essentially intact from 1862 until the passage of the UCMJ in 1950.¹²⁹

C. *The Uniform Code of Military Justice*

The UCMJ movement was born at a time when, as Colonel Wiener appropriately put it, "uniformity became a near fetish."¹³⁰ Congress had established the Air Force in 1947, and all the services were housed within the newly-created Department of Defense.¹³¹ Citizen-soldiers returning from the Second World War had complained bitterly about the inadequacies they perceived in the military justice system.¹³² Congress, sensing the public's desire to modernize court-martial practice, determined that the time had come for the services to operate under a single system of justice.

The UCMJ adopted many of its provisions from the Army Articles of War of 1916, along with the amendments of 1920 and 1948. However, Congress radically altered court-martial jurisdiction over common-law capital offenses. Under the 1916 Articles, courts-martial did not have jurisdiction to try rape or murder offenses committed in the United States during peace.¹³³ The UCMJ removed this restriction, permitting courts-martial to try all enumerated capital offenses no matter where or when the crime was committed.¹³⁴ The UCMJ also made felony-murder a capital offense whenever the underlying felony was an actual or attempted burglary, sodomy, rape, robbery, or aggravated arson.¹³⁵ Finally, the UCMJ made striking a superior officer in the execution of his duties, an offense punishable by death since 1776, a non-capital crime whenever the crime was committed in time of peace.¹³⁶

Furthermore, the UCMJ made two other changes that significantly

128. *See id.* art. 8.

129. *See* Frederick B. Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 *MIL. L. REV.* 1, 25 (1989).

130. *Id.* at 32-33.

131. *See* National Security Act of 1947, ch. 343, 61 Stat. 495.

132. *See* *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) (noting enactment of the UCMJ was "prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II").

133. *See* Act of Aug. 29, 1916, ch. 418, § 1342, art. 92, 39 Stat. 619, 654.

134. *See* Act of May 5, 1950, ch. 169, arts. 118, 120, 64 Stat. 107, 140.

135. *See id.* art. 118(4).

136. *See id.* art. 90.

affected court-martial jurisdiction. First, Congress eliminated the turnover provision, which, since 1776, had required commanders to deliver accused soldiers to the civil authorities for trial upon application by the victim.¹³⁷ This change was consistent with Congress' decision to give courts-martial jurisdiction over all common-law felonies, whether capital or not. Second, in what was perhaps the most controversial part of the UCMJ, Congress attempted to broaden the personal jurisdiction of courts-martial. Where court-martial jurisdiction had been limited in the past to active-duty servicemembers and camp-followers during time of war,¹³⁸ Article 2 of the UCMJ purported to give courts-martial jurisdiction over government employees and dependents accompanying an armed force outside the United States.¹³⁹ Article 3(a) of the UCMJ created court-martial jurisdiction over discharged servicemembers for serious crimes committed during their military service whenever the crime would not be cognizable by an American civilian court.¹⁴⁰ Essentially, the reach of Article 3(a) was limited to crimes committed overseas. Broadening the personal jurisdiction of courts-martial to include these classes of people engendered scholarly debate¹⁴¹ and, one by one, judicial rebuke. In 1955, the Supreme Court held in *United States ex rel. Toth v. Quarles*¹⁴² that Congress could not empower courts-martial to try a fully-discharged former servicemember for a murder he committed in Korea while on active duty.¹⁴³ The Court recognized that the Constitution empowered Congress to establish court-martial jurisdiction, but stated that "the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."¹⁴⁴

The Supreme Court was more incremental in rejecting Congress' power to subject dependents and government employees to military law. In 1956, the Court held in *Reid v. Covert*¹⁴⁵ that a dependent wife charged with murdering her husband, an active duty soldier stationed in Germany, could be tried by court-martial for that offense.¹⁴⁶ The Court

137. See Wiener, *supra* note 60, at 12.

138. See, e.g., Act of Aug. 29, 1916, ch. 418, § 1342, art. 2.

139. See Act of May 5, 1950, ch. 169, art. 2(11), 64 Stat. 107, 109.

140. See *id.* art. 3(a).

141. See generally Robinson O. Everett, *Persons Who Can Be Tried By Court-Martial*, 5 J. PUB. L. 148 (1956). Everett later served as Chief Judge of the Court of Military Appeals.

142. 350 U.S. 11 (1955).

143. See *id.* at 21-25.

144. *Id.* at 15.

145. 351 U.S. 487 (1956).

146. See *id.* at 491.

eventually granted a petition for rehearing¹⁴⁷ and, upon reargument, reversed itself. In a fractured opinion, a plurality of four Justices held that civilian dependents were not members of the land and naval forces; therefore, Congress could not use its power to regulate those forces to justify creating jurisdiction over Ms. Covert.¹⁴⁸ Justices Frankfurter and Harlan concurred in the result, asserting that Congress could not subject civilian dependents to trial by court-martial for capital offenses.¹⁴⁹ Justices Clark and Burton dissented, arguing that Congress had the same power over capital and non-capital offenses, and that subjecting civilian dependents living overseas to courts-martial fell within those powers.¹⁵⁰

Although the *Covert* opinions left open the possibility that Congress could authorize courts-martial to try civilian dependents for non-capital offenses, the Court closed the door on that possibility in *Kinsella v. United States ex rel. Singleton*.¹⁵¹ In *Singleton*, the Court explicitly held that there was no distinction between capital and non-capital offenses for purposes of court-martial jurisdiction over civilian dependents; thus, *Covert* applied to all offenses, whether capital or not.¹⁵² In two other opinions issued the same day as *Singleton*, the Court struck down that part of Article 2 creating court-martial jurisdiction over civilian employees for both capital and non-capital offenses.¹⁵³

While *Toth*, *Covert* and their progeny quickly disposed of Congress' overreaching in the area of personal jurisdiction, courts imposed no constraints on the subject-matter jurisdiction of courts-martial during UMCJ's first eighteen years. In 1969, however, the Supreme Court issued a landmark opinion in the case of *O'Callahan v. Parker*,¹⁵⁴ holding that Congress lacked the constitutional power to create court-martial jurisdiction over offenses unrelated to the accused's military service.¹⁵⁵ The *O'Callahan* court relied heavily on historical practice, asserting that materials relating to the jurisdiction of British and early American courts-martial demonstrated an aversion to having military courts try offenses that could be tried in civilian courts.¹⁵⁶ The Court also relied

147. *Reid v. Covert*, 352 U.S. 901 (1956).

148. *See Covert*, 354 U.S. at 19-21.

149. *See id.* at 49 (Frankfurter, J., concurring); *id.* at 65 (Harlan, J., concurring).

150. *See id.* at 78 (Clark, J., dissenting).

151. 361 U.S. 234 (1960).

152. *See id.* at 246.

153. *See* *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284 (1960) (striking down jurisdiction over civilian employees for non-capital offenses); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (striking down jurisdiction over civilian employees for capital offenses).

154. 395 U.S. 258 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

155. *See id.* at 272-73.

156. *See id.* at 268 ("Both in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion.") (footnote omitted).

on language in *Toth* to the effect that court-martial jurisdiction should be confined to "the least possible power adequate to the end proposed."¹⁵⁷ Finally, the majority opinion justified its decision with a lengthy harangue against the military justice system as a whole.¹⁵⁸

The Court's decision in *O'Callahan* was sharply criticized by Justice Harlan in his dissenting opinion,¹⁵⁹ and launched a flurry of scholarly criticism.¹⁶⁰ The Court subsequently announced that the service-connection test would not be applied retroactively. Moreover, military courts applied the *O'Callahan* rule in a manner that limited its reach, creating a service-connection threshold that at times seemed ridiculously low given the language of *O'Callahan*.¹⁶¹ While military courts since

157. *Id.* at 265 (quoting United States *ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955)).

158. *See id.* at 265-66 (calling courts-martial "singularly inept in dealing with the nice subtleties of constitutional law").

159. *Id.* at 274-83.

160. *See, e.g.*, Robinson O. Everett, *O'Callahan v. Parker, Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853 (1969); Grant S. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); Ronald L. Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker*, 9 WASHBURN L.J. 193 (1969); Peter W. Bowie, Comment, *O'Callahan v. Parker: Sounding the Death Knell of Military Justice?*, 7 SAN DIEGO L. REV. 55 (1970); John F. DePue, Comment, *O'Callahan and its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial*, 15 VILL. L. REV. 712 (1970); Don A. Wetzel, Note, *O'Callahan v. Parker, A Military Jurisdictional Dilemma*, 22 BAYLOR L. REV. 64 (1970); David F. O'Connor & Teresa M. Schwartz, *Recent Decisions: Military Law*, 38 GEO. WASH. L. REV. 170 (1969-1970).

161. *See, e.g.*, United States v. Goldman, 40 C.M.R. 228, 229 (C.M.A. 1969) (holding a counterfeiting offense committed in Vietnam was service connected because it was committed in the "zone of conflict"); United States v. Weinstein, 41 C.M.R. 29, 30 (C.M.A. 1969) (holding that the off base possession of marijuana by a serviceman in Germany was service connected because it otherwise would not be cognizable by American courts); United States v. Sharkey, 41 C.M.R. 26, 28 (C.M.A. 1969) (holding that *O'Callahan* did not apply to petty offenses); United States v. Keaton, 41 C.M.R. 64, 68 (C.M.A. 1969) (holding that *O'Callahan* was "inapplicable to courts-martial held outside the territorial limits of the United States"); United States v. Newvine, 48 C.M.R. 960, 962 (C.M.A. 1974) (finding the overseas exception to *O'Callahan* applicable even when serviceman's offense occurred while he was overseas on vacation); United States v. Moore, 1 M.J. 448, 450 (C.M.A. 1976) (holding that offenses occurring on base are *per se* service connected); Murray v. Haldeman, 16 M.J. 74, 77 (C.M.A. 1983) (holding that off-post drug use, even when occurring on leave far from the accused's duty station, is service connected if the accused ever entered a military base while subject to the effects of the drug); United States v. Garries, 19 M.J. 845, 851 (A.F.C.M.R. 1985) (holding that serviceman's murder of his wife was service connected merely because it was committed on base), *aff'd*, 22 M.J. 288 (C.M.A.), *cert. denied*, 479 U.S. 985 (1986); United States v. Williamson, 19 M.J. 617 (A.C.M.R. 1984) (finding service connection where serviceman committed lewd acts upon the minor daughter of his subordinate soldier where offense occurred off base), *petition denied*, 21 M.J. 24 (C.M.A. 1985); United States v. Mauck, 17 M.J. 1033, 1034-35 (A.C.M.R.) (finding service-connection in attempted murder case where serviceman had met his victim, a military retiree's daughter, on base that evening and left her body fifteen feet outside the base, even though crime occurred off base), *petition denied*, 19 M.J. 106 (C.M.A. 1984). *See generally* Jonathan P. Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F. L. REV. 1 (1985) (asserting that, by 1985, the *O'Callahan* doctrine had been rendered nugatory by judicial precedent).

1969 had effectively side-stepped *O'Callahan*, finding it illogical, unworkable, or both, the Supreme Court finally followed suit in the 1987 case of *Solorio v. United States*.¹⁶² In *Solorio*, the Court explicitly abandoned the service-connection test, finding the historical materials far too ambiguous to support the jurisdictional limitation created by the *O'Callahan* court.¹⁶³ The Court replaced the service-connection test with the mere status test that had existed before *O'Callahan*. If the accused had the status of an active duty servicemember at the time of the alleged offense, such that he or she was amenable to military jurisdiction, then the court-martial had authority to exercise jurisdiction over the accused.¹⁶⁴

D. *The Lesson of Historical Practice*

In his concurring opinion in *Loving*, Justice Stevens, speaking for himself and three other Justices, asserted that a death penalty offense might have to be connected to the accused's service for the crime to be cognizable by courts-martial.¹⁶⁵ Justice Stevens' justified this assertion by stating that a "review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try non-capital ones."¹⁶⁶ Thus, Justice Stevens makes two interrelated arguments. The first is a factual assertion that the death penalty jurisdiction of courts-martial has historically been narrower than the jurisdiction for non-capital offenses. Assuming this factual assertion is true, Justice Stevens' argument advances into its legal phase, that an historical aversion on the part of Congress to granting death penalty jurisdiction over civilian offenses affects Congress' power to later change course and confer greater jurisdiction over such cases.

A review of the historical death penalty jurisdiction of courts-martial demonstrates that there have been times when the court-martial jurisdiction over some capital offenses—particularly murder and rape—was narrower than the jurisdiction over other offenses. For enumerated non-capital offenses, Congress has always made status the only test for jurisdiction; if the accused belonged to one of the classes subject to military law, then the inquiry was over. In the Navy, however, courts-martial did not have jurisdiction over murders committed in the United States until the UCMJ took effect in 1951.¹⁶⁷ In the Army, the first Articles of War

162. 483 U.S. 435 (1987).

163. *See id.* at 445-46.

164. *See id.* at 450-51.

165. *See Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring).

166. *Id.*

167. *See supra* notes 107-29 and accompanying text.

made only purely military offenses eligible for the death penalty.¹⁶⁸ The 1776 Articles created several additional capital offenses, including two—striking a superior officer and assaulting a camp supplier—which, if committed in the United States, would be triable in civilian courts.¹⁶⁹ In 1863, Congress for the first time gave courts-martial jurisdiction over murder and rape, but only when committed in wartime, and the availability of the death penalty depended on local law.¹⁷⁰ Congress took this jurisdiction over capital murder and rape two steps further in 1916. First, Congress explicitly made those offenses capital offenses, without resort to local punishment tables.¹⁷¹ Second, Congress went beyond wartime murders and rapes and gave Army courts-martial jurisdiction over peacetime murders and rapes committed outside the continental United States.¹⁷² In 1950, Congress finally removed any restriction on the authority of Army and Navy courts-martial to try capital offenses; like non-capital offenses, status became the only test.¹⁷³

Thus, there is some truth in Justice Stevens' factual premise. For example, a soldier who committed murder in the United States in 1910, when the nation was not at war, could not be haled before a court-martial for that crime, although he could be tried for any non-capital offense he may have committed. Nevertheless, Justice Stevens' view of the historical jurisdiction of courts-martial is overly simplistic, and relies on isolated enactments without regard to their proper place in the development of court-martial jurisdiction.

Historically, there can be no dispute that Congress has repeatedly and consistently expanded the death penalty jurisdiction of courts-martial every time it has passed on the matter. The qualifications that Congress has placed upon capital murder and rape must be considered in light of the fact that Congress was not reining in court-martial jurisdiction with any of those enactments. Rather, with each new statute, Congress was granting courts-martial increased death penalty jurisdiction and was merely limiting the rate of its expansion. The history of capital murder jurisdiction is illustrative of this point.

In 1863, Congress created potential death penalty jurisdiction over murder, but limited it to wartime offenses. When Congress revisited the Articles of War in 1916, it apparently believed that jurisdiction over common-law capital offenses had passed the test of time and expanded it once more, to cover peacetime murder committed overseas. For

168. *See supra* notes 51-55 and accompanying text.

169. *See supra* notes 57-59 and accompanying text.

170. *See supra* notes 85-94 and accompanying text.

171. *See supra* notes 101-03 and accompanying text.

172. *See supra* notes 104-05 and accompanying text.

173. *See* Act of May 5, 1950, ch. 169, arts. 118, 120, 64 Stat. 107, 140.

instance, in *Kahn v. Anderson*,¹⁷⁴ the Supreme Court noted that “the differences between the articles of 1874 and those of 1916 show[] a purpose to rearrange the jurisdiction of courts-martial.”¹⁷⁵ Thirty-four years later, Congress must have believed that the 1916 experience had proven fruitful because it eliminated the jurisdictional prohibition on peacetime domestic murder—the last jurisdictional difference between capital murder and non-capital offenses. It is, therefore, illogical to look at restrictions Congress placed on jurisdiction over murder as an attempt to restrain the exercise of jurisdiction. A more appropriate way to view this series of legislation is that Congress, in expanding death penalty jurisdiction, preferred to move in small steps, view the outcome, and then reevaluate the issue in light of the test of time. It was through these small steps that Congress, from 1775 to 1950, embarked on a steady, one hundred seventy-five-year forced march from an extremely limited death penalty jurisdiction to the current jurisdiction covering most, if not all, civilian capital offenses.¹⁷⁶

Thus, where Justice Stevens’ factual premise errs is in the assertion that historical practice evidences congressional reluctance to give courts-martial jurisdiction over civilian capital crimes. But, even if Justice Stevens’ factual premise were correct, there are serious deficiencies with his argument that historical practice mandates a service-connection test for capital offenses.

The first problem with this legal conclusion is one of pure logic. The Constitution grants Congress the power to establish the jurisdiction of courts-martial.¹⁷⁷ In doing so, Congress must work within two parameters: The Constitution and legislative policy. Obviously, Congress can create jurisdiction no broader than the Constitution permits. Within that range of permissible jurisdiction, Congress must make policy decisions as to the jurisdiction it will create. Although the Constitution might permit Congress to criminalize driving an automobile with any alcohol in one’s system, Congress can also make the policy determination to criminalize such activity only when the driver’s blood-alcohol content exceeds a certain level.¹⁷⁸ The Supreme Court made this very point in *Coleman v. Tennessee*.¹⁷⁹ In holding that the 1863 statute creating court-martial jurisdiction over capital murder in time of war did not deprive state courts of the power to try such offenses, the Court stated:

We do not mean to intimate that it was not within the competency of

174. 255 U.S. 1 (1921).

175. *Id.* at 10.

176. *See Wiener, supra* note 60, at 11.

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

178. *See, e.g., UNIF. CODE OF MIL. JUST.*, art. 111, 10 U.S.C. § 911 (1994).

179. 97 U.S. 509 (1878).

Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution “to raise and support armies,” and “to make rules for the government and regulation of the land and naval forces,” its control over the whole subject of the formation, organization and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary.¹⁸⁰

The Court recognized that Congress made a prudential decision at that time not to use the full extent of its constitutional power to regulate the armed forces. That prudential decision cannot be said to have narrowed Congress’ constitutional power to create court-martial jurisdiction simply because Congress decided in 1863 not to use the full complement of its power.¹⁸¹ Such a contention would elevate the 1863 statute from legislation to a *de facto* constitutional amendment—an amendment effected without the procedure prescribed by the Constitution.¹⁸² Similarly, in the formative years of the Republic, Congress enacted almost no legislation relating to the regulation of commerce; that policy decision not to regulate certainly did not limit Congress’ *constitutional* power to regulate interstate commerce in the 1990s.¹⁸³ As the Court stated in *Madsen v. Kinsella*,¹⁸⁴ another case dealing with Congress’ war powers, “[t]he policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate.”¹⁸⁵ Historical practice may be a useful tool in pursuit of the Framers’ interpretation of the Constitution they created. However, that sort of argument cannot rest on historical practice alone; instead, it requires a consideration of other evidence of the Framers’ intent in placing a provision in the Constitution,

180. *Id.* at 514.

181. *See id.*

182. *See* U.S. CONST. art. V (requiring that all constitutional amendments be ratified by three-fourths of the states).

183. For example, the Supreme Court has found it constitutional for Congress to regulate local loansharking activities, *United States v. Perez*, 402 U.S. 146 (1971), and to prohibit segregation of local diners, *Katzenbach v. McClung*, 379 U.S. 294 (1964), under the auspices of its commerce powers, even though Congress had not regulated such local activities during the first 150 years of the Republic.

184. 343 U.S. 341 (1952).

185. *Id.* at 348-49. In *O’Callahan v. Parker*, 395 U.S. 258 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987), Justice Harlan said the following about the value of historical practice:

Even if the practice of early American courts-martial had been otherwise, this would hardly lead to the conclusion that Congress lacked the power to authorize military trials under the present circumstances. It cannot be seriously argued as a general matter that the constitutional limits of congressional power are coterminous with the extent of its exercise in the late 18th and early 19th centuries.

Id. at 280 (Harlan, J., dissenting) (footnote omitted).

including the concerns of the times and the Framers' statements at the Constitutional Convention and during the ratification process. That inquiry will be taken up elsewhere in this article; needless to say, there is no evidence that early congressional action vis-a-vis court-martial jurisdiction was anything other than a pure policy choice.

The other weakness in Justice Stevens' argument is that, even if his historical analysis were accurate, it does not lead to the remedy—a service-connection test for death penalty jurisdiction—proposed in the *Loving* concurrence. Assuming that historical practice logically bears on Congress' current power to create court-martial jurisdiction, and assuming that the historical materials did not support an unfettered death penalty jurisdiction, the solution would not be the imposition of a service-connection test. If history dictated current constitutional powers, the rule would have to be that Congress could create jurisdiction no broader than it historically had. The first problem with this is rather obvious. At what time in history are we talking about? Let us not forget that for a full one-fifth of United States history—since 1951—congressional practice created a death penalty jurisdiction equally as broad as non-death penalty jurisdiction.¹⁸⁶ Beyond that, none of Congress' previous enactments created a strict service-connection test for capital jurisdiction.

Congress' grant of murder jurisdiction to the Navy in 1800 was based on the ship being outside United States waters when the murder was committed.¹⁸⁷ Imagine the case of a sailor, in uniform, who goes to a local watering hole on shore leave and has too much to drink. He sees his petty officer, for whom he has little regard, and proceeds to tell the petty officer what he thinks of his leadership ability. The argument ends when the sailor invites his petty officer outside and stabs him to death. That offense plainly would be service-connected under any definition of the term. However, under the 1800 statute, that offense would be triable by court-martial if committed in, say, Naples, but not if it occurred in Philadelphia. Thus, the 1800 statute was based not on service-connection, but rather on pure geography. Similarly, the "time of war" qualifications on murder and rape jurisdiction passed by Congress in 1863 and 1916 did not establish a service connection test.¹⁸⁸ Therefore, Justice

186. See generally Act of May 5, 1950, ch. 169, 64 Stat. 140 (eliminating temporal and geographic constraints on death penalty jurisdiction).

187. See *supra* note 124.

188. See *supra* notes 85-105 and accompanying text. For example, during the Spanish-American War, a conflict that never reached American shores, capital murder was a court-martial offense, even if it occurred in the soldier's hometown, out of uniform, and during an extended period of leave. Conversely, a soldier who murdered his sergeant on base and in uniform only could be tried in civilian courts if the crime occurred in 1910, simply because the nation was not at war.

Stevens' assertion in *Loving*, that past congressional practice mandates a service connection rule, ignores that such a rule has *never* been part of any past congressional practice.

If historical practice did impact Congress' power to create court-martial jurisdiction, then the rule would not be service-connection, but an amalgam of previous qualifications on murder and rape jurisdiction. Jurisdiction over all overseas offenses would be constitutional,¹⁸⁹ as would jurisdiction over domestic offenses committed during time of war.¹⁹⁰ That would leave all domestic, peacetime murder and rape offenses as being barred from court-martial jurisdiction, whether those offenses were service-connected or not. And, of course, such a rule would have to conveniently explain away the forty-six-year history—1951 to 1997—where the jurisdiction of capital offenses has been exactly the same as for non-capital offenses.

While Justice Stevens' proposed remedy does not coincide with historical practice, it still leaves as an open question whether past congressional practice is a clue as to the Framers' intentions for Congress' power to create court-martial jurisdiction. To make this assessment, it is necessary to consider the issues facing the Framers as they crafted the Constitution and the views of the Framers as expressed at the Convention and during the ratification debates. Finally, it is necessary to consider Supreme Court precedent in order to divine what the Court, as the final arbiter of constitutional interpretation, has had to say about Congress' power to regulate the armed forces.

III. A REEXAMINATION OF CONGRESS' POWER TO REGULATE THE ARMED FORCES

In *Solorio*, a majority of the Court found the history of court-martial jurisdiction "far too ambiguous to justify the restriction of the plain language of Clause 14" and the imposition of a blanket service-connection test.¹⁹¹ The same must be said for Justice Stevens' attempt to resurrect the service-connection test for capital cases. Historical qualifications on death penalty jurisdiction, in the context of Congress' repeated expansion of such jurisdiction, do not, by themselves, support a constitutional prohibition on Congress taking the final step along the trail and removing all qualifications on death penalty jurisdiction. Moreover, the logical problems inherent in basing constitutional interpretation on historical exercise of a discretionary power cannot be over-

189. See *supra* note 124.

190. See *supra* notes 85-94 and accompanying text.

191. *Solorio v. United States*, 483 U.S. 435, 445 (1987).

stated.¹⁹² However, historical analysis, by itself, does not demonstrate that the Constitution necessarily grants Congress the unqualified power to establish the jurisdiction over capital offenses as broad as it is over non-capital offenses. Thus, a review of historical practice, as urged by Justice Stevens, brings us back to where we started, with a constitutional provision in need of interpretation. That interpretation requires a consideration of the language in the Constitution, the intentions of the Framers, and judicial precedent bearing on Congress' power to regulate the Armed Forces. A careful review of all of those areas makes clear that the Constitution grants Congress a plenary power to set the subject-matter jurisdiction of courts-martial. Once an accused is determined to be a member of the "land and naval forces," and therefore, amenable to trial by court-martial, the jurisdictional inquiry ends. Personal amenability to military law is the touchstone of court-martial jurisdiction; whether the offenses charged are punishable by death has no jurisdictional significance.

A. *The Plain Language of Clause 14*

In discussing statutory interpretation, Justice Frankfurter once said, "Though we may not end with the words in construing a disputed statute, one certainly begins there."¹⁹³ The same is true of constitutional interpretation, for the language of the Constitution, if unambiguous, most probably reflects the intentions of the Framers who drafted it and the states that ratified it.¹⁹⁴ Congress' power to establish the jurisdiction of courts-martial is most clearly contained in Article I, Section 8, Clause 14, which states that Congress shall have the power "To make Rules for the Government and Regulation of the land and naval Forces."¹⁹⁵ The first important fact about the text itself is that the clause contains absolutely no express limitation on this grant of power to Congress. Moreover, the clause appears in Article I, Section 8, which contains a series of unrestricted congressional powers such as the commerce power and the power to coin money.¹⁹⁶ Additionally, Clause 14 does not mention the death penalty as being separate and distinct from non-capital offenses from a jurisdictional standpoint. Only the most ardent literalist, however, would stop there and conclude that the absence of express limitations in the text forecloses the possibility that any limitations exist.

192. See *supra* notes 177-85 and accompanying text.

193. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947).

194. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 401, at 306 (Melville M. Bigelow ed., 5th ed. 1891).

195. U.S. CONST. art. I, § 8, cl. 14.

196. See *id.* art. I, § 8, cls. 3 (commerce power), 5 (power to coin money).

Despite the grandeur of the document, the Constitution is not free of poor draftsmanship, or places where the express language most likely does not coincide with the Framers' intent.

To take a familiar example, the Fifth Amendment excepts courts-martial from the requirement of a grand jury indictment.¹⁹⁷ The Sixth Amendment, however, does not except courts-martial from the right to a jury trial.¹⁹⁸ The Supreme Court, however, recognized early on that the Framers clearly did not intend for the right to a jury trial to extend to courts-martial. Thus, in *Ex parte Milligan*,¹⁹⁹ the Court essentially grafted the Fifth Amendment's exception for military cases onto the Sixth Amendment.²⁰⁰ This decision has been applauded by experts on military law as being consistent with the Framers' true intention.²⁰¹

At a minimum, the plain language of Clause 14 lends support to the premise that Congress' power to set court-martial jurisdiction is plenary and that there is no constitutional difference between Congress' power over capital cases and over non-capital cases. To the extent that the clause's plain language, and an ambiguous historical practice, leaves open the theoretical possibility that there might exist constitutional restrictions on court-martial jurisdiction, that possibility is firmly foreclosed by analysis of the Framers' actual intent and of Supreme Court precedent.

B. *The Framers' Intent for Clause 14*

The Framers gathered in Philadelphia during the summer of 1787 because the Articles of Confederation had proven to be a singular failure. Although the delegates to the Constitutional Convention had been sent by their respective states with the understanding that they were to propose amendments to the current Articles, the delegates came to realize that the Republic could be saved only by a complete rewriting of the Articles, one that would fundamentally reorder the division of powers between the states and the fledgling federal government.²⁰² As delegate James Madison put it, the Convention was gathered "now to decide forever the fate of Republican government."²⁰³ The basic problem with the Articles of Confederation was that the federal government was impotent in any matter that was not supported unanimously by the states. Under the Articles, Congress lacked the power of direct taxation; the most it

197. *See id.* amend. V.

198. *See id.* amend. VI.

199. 71 U.S. (4 Wall.) 2 (1866).

200. *See id.* at 124.

201. *See, e.g.*, WINTHROP, *supra* note 46, at 105; Henderson, *supra* note 21, at 304-05.

202. *See* CHARLES A. BEARD, *THE ENDURING FEDERALIST* 30 (1948).

203. MAX FARRAND, *THE FATHERS OF THE CONSTITUTION* 108 (1921).

could do was assign each state a monetary quota, with each state to raise the money through taxation or other means.²⁰⁴ State legislatures tended to drag their feet or otherwise refuse to raise money for any quota going toward something that state opposed. Thus, the federal government fell into debt and saw its legislation frustrated because each individual state had the power of the purse.²⁰⁵ Even when the Congress could fund the laws it passed, it was powerless to enforce them against recalcitrant states because the Articles made no provision for an executive branch to enforce laws or a federal judiciary to interpret congressional enactments or the Articles themselves.²⁰⁶ Similarly, the Articles of Confederation gave Congress the power to make treaties, but Congress could not force the individual states to comply with them.²⁰⁷

While those problems were significant, perhaps the most pressing deficiency in the Articles of Confederation was the complete lack of power by the federal government to defend the Republic against foreign invasion or domestic insurrection. Similar to its inability to raise revenue, Congress could not raise an army without relying on the states. The Articles of Confederation made no provisions for a standing army, and Congress could raise militia forces only by giving each state a quota to fill.²⁰⁸ Shays' Rebellion, which occurred less than a year before the Framers met in Philadelphia, made clear that the federal government could not operate under such a system. Shays' Rebellion was a revolt by farmers in western Massachusetts against all levels of government.²⁰⁹ Frustrated by debts and heavy taxation, these farmers seized the Northampton county courthouse and disrupted legal proceedings in five other Massachusetts counties.²¹⁰ The Articles of Confederation did not authorize Congress to call out the militia in the face of a domestic rebellion.²¹¹ In fact, the Articles did not even permit Congress to use force to protect the federal arsenal at Springfield from capture.²¹² Nevertheless, Congress reacted to the revolt by resolving to raise 1,300 militiamen from the New England states, using the pretext of an Indian conflict to

204. See BEARD, *supra* note 202, at 28.

205. See *id.* at 29; see also THE FEDERALIST No. 15, at 95 (Alexander Hamilton) (Paul Leicester Ford ed., 1918) ("The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of the national government and brought them to an awful stand.").

206. See BEARD, *supra* note 202, at 28.

207. See *id.* at 29.

208. See RICHARD H. KOHN, EAGLE AND SWORD 75 (1975).

209. See BEARD, *supra* note 202, at 28.

210. See KOHN, *supra* note 208, at 74.

211. See *id.* at 75.

212. See *id.*

justify its action.²¹³ Shays' Rebellion was eventually put down after about six months by militiamen raised primarily from eastern Massachusetts.²¹⁴ Congress' attempt to raise a federal militia demonstrated the impotence of federal power. Under the Articles of Confederation, the vast majority of the militia quotas established by Congress went unfilled, as states far from the conflict were reluctant to comply with any sense of urgency.²¹⁵

Shays's Rebellion crystallized for the Framers the problems inherent in the Articles of Confederation. Requiring Congress to go through the states to raise armies and revenue was both unreliable and inefficient. Moreover, under the Articles, Congress lacked the power to put down domestic unrest. Furthermore, Great Britain, France, and Spain all owned possessions in the New World, creating the likelihood of future armed conflict.²¹⁶ Thus, one of the primary purposes of the Constitutional Convention was to give the federal government sufficient power to protect the nation both against foreign foes and against rebellion at home.²¹⁷ As Ebenezer Wales of Massachusetts prophetically said of Shays's Rebellion, "I believe that the Tumults here, in this State will Alarm the other States; and by that Means Congress will Soon have Suffict Powers For the Benefit of the Whole."²¹⁸

This is not to suggest that the Framers were unconcerned with giving the federal government control of the nation's military power. A mere decade earlier, the colonists had revolted against the suffocating control exercised by the British Crown over every aspect of colonial life.²¹⁹ The Framers were quite leery of the possibility that arming the federal government could result in trading one monarchy for another, a

213. See *id.* at 74; see also JACKSON T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION* 63 (1961).

214. See KOHN, *supra* note 208, at 74.

215. Alexander Hamilton was particularly concerned with the tendency of states not to support conflicts far from their borders. See *THE FEDERALIST* No. 22, at 134 (Alexander Hamilton) (Paul Leicester Ford ed., 1918) ("The States near the seat of war, influenced by motives of self-preservation, made efforts to furnish their quotas, which even exceeded their abilities; while those at a distance from danger were for, the most part, as remiss as the others were diligent in their exertions.").

216. See BEARD, *supra* note 202, at 29; see also *THE FEDERALIST* No. 4, at 18-19 (John Jay) (Paul Leicester Ford ed., 1918) (noting the likelihood of territorial disputes with the great European powers).

217. See STEVEN R. BOYD, *THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION* 5 (1979) ("Shays' Rebellion, . . . also induced some former opponents of a convention to support it . . ."); KOHN, *supra* note 208, at 75 (citing remarks of Edmund Randolph at Constitutional Convention).

218. Letter from Ebenezer Wales to Caleb Davis (Nov. 4, 1786), *quoted in* MAIN, *supra* note 213, at 64.

219. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 145 (1969).

concern the Anti-Federalists voiced both at the Convention and during the ratification debates.²²⁰ The Anti-Federalists, in particular, were concerned that the federal government, by its very nature, could not help but become an oppressive force.²²¹ Specifically, the Anti-Federalists believed the greatest potential for oppression came from the executive branch.²²² The greatest blame for the excesses of British rule fell, in the Anti-Federalists' eyes, on the use of executive prerogative by the British Crown.²²³ This fear of an overweening executive certainly was a major reason why the Articles of Confederation did not provide for a federal executive.²²⁴ Thus, where the Anti-Federalists were concerned with the dangers of a power of federal taxation, the creation of a national standing army reinforced their fears of federal oppression.²²⁵ Against this backdrop of competing interests—the need for a more effective federal government and the fear of federal oppression—the Framers crafted the variety of provisions that provided for a national defense.

The delegates to the Constitutional Convention balanced these competing interests by dividing power over the military between the President and Congress. The Constitution made the President the Commander-in-Chief of the army and navy, as well as of the militia when in actual service.²²⁶ The President was also authorized to negotiate treaties

220. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 286 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND]; see LETTER FROM THE "FEDERAL FARMER" (Jan. 7, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 281, 285 (Herbert J. Storing ed., 1981); LETTER FROM THE "FEDERAL FARMER" (Jan 14, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST at 301, 302 (Herbert J. Storing ed., 1981) ("We all agree, that a large standing army has a strong tendency to depress and enslave the people . . .").

221. See DAVID G. SMITH, THE CONVENTION AND THE CONSTITUTION: THE POLITICAL IDEAS OF THE FOUNDING FATHERS 35-36 (1965).

222. See FORREST McDONALD, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 28-29 (1982).

223. See STEPHEN SAUNDERS WEBB, THE GOVERNORS-GENERAL: THE ENGLISH ARMY AND THE DEFINITION OF THE EMPIRE, 1569-1681, 4 (1979) ("The officers and governors who ruled British towns and American colonies were the instruments of an overweening prerogative power, the agents of an actual executive conspiracy.").

224. See generally THE ESSENTIAL ANTIFEDERALIST viii (W.B. Allen & Gordon Lloyd eds., 1985).

225. As Benjamin Workman, one of the leading Anti-Federalist pamphlet writers of the ratification period wrote, "There is no doubt, but to carry the arbitrary decrees of the federal judges into execution, and to protect the *tax gatherers* in collecting the revenue, will be ample employment for the military . . ." LETTER FROM "PHILADELPHIENSIS" [BENJAMIN WORKMAN] (Dec. 12, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION 494, 496 (Bernard Bailyn ed., 1993); see also LETTER FROM "CENTINEL" TO THE FREEMEN OF PENNSYLVANIA (Oct. 5, 1787), reprinted in THE ANTIFEDERALISTS 2, 8-9 (Cecelia M. Kenyon ed., 1985) ("[T]o grant all the great executive powers of a confederation, and a standing army in time of peace, that grand engine of oppression, and moreover the absolute control over the commerce of the United States and all the external objects of revenue . . . they are to be vested with every species of *internal* taxation . . .").

226. See U.S. CONST. art. II, § 2, cl. 1.

and to appoint ambassadors to other nations.²²⁷ On the other hand, the Framers vested the powers to declare war and to raise an army and navy in the Congress.²²⁸ The Constitution limited Congress' power to maintain a standing army by providing that Congress could not appropriate funds for a standing army for any period of more than two years.²²⁹

Early drafts of the Constitution did not even contain a provision granting Congress the power to regulate the armed forces.²³⁰ Even though the Necessary and Proper Clause probably made Clause 14 redundant in light of Congress's power to maintain an army and navy, the delegates added that provision to the draft without objection.²³¹ There is no evidence of discussion at the Constitutional Convention of the propriety of what became Clause 14.²³² Justice Story and others have speculated that the Clause was inserted not as a declaration that the federal government would have the power to regulate its own armed forces, but rather to ensure that this federal power was vested in the Congress rather than the President.²³³ The Supreme Court has agreed that Clause 14 appears to speak not to whether the federal government would have this power; instead, the clause establishes which part of the federal government would have it. Whatever concerns the public might have had about court-martial jurisdiction over civilian crimes, the Court has held that such concerns "were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military."²³⁴ Thus, Clause 14 follows a trend that can be seen throughout the Constitution: when the Framers were faced with a power needed by the federal government, but potentially dangerous to state sovereignty, the Framers struck the balance by giving the power to the Congress rather than the President.²³⁵

The need for an effective federal military power, made clear to the

227. *See id.* art. II, § 2, cl. 2.

228. *See id.* art. I, § 8, cls. 11, 12.

229. *See id.* art. I, § 8, cl. 12.

230. *See* 2 STORY, *supra* note 194, § 1197, at 113-14.

231. *See id.* at 114.

232. *See id.*

233. *See id.* ("The whole power is far more safe in the hands of Congress than of the executive; since, otherwise, the most summary and severe punishments might be inflicted at the mere will of the executive."); 1 CROSSKEY, *supra* note 77, at 412-13 (stating that the Framers considered regulation of the military an arguably executive power under existing law, necessitating a provision explicitly conferring that power on Congress).

234. *Solorio v. United States*, 483 U.S. 435, 446 (1987).

235. *See* McDONALD, *supra* note 222, at 29 (noting that the Framers gave executive powers, such as the power to declare war and the power to coin money, to the Congress); *see also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 97-98 (Jonathan Elliot ed., 1836) (providing remarks of Thomas Dawes at the Massachusetts convention).

Framers during the embarrassing federal response to Shays' Rebellion, is strong evidence that the delegates did not intend to restrain Congress by imposing amorphous, yet judicially-cognizable, restrictions on regulation of the armed forces. Moreover, a broad power to regulate the armed forces is consistent with the delegates' demonstrated tendency to limit the threat of the new federal government, not by making potentially dangerous federal powers nugatory, but by ensuring those powers were vested in Congress. While these observations provide strong circumstantial evidence of the original intent for Clause 14, the best direct evidence of the Framers' intent exists within the framework of the ratification debates.

Once the contents of the draft Constitution became public, proponents and opponents of the Constitution engaged in a battle of pamphlets and newspaper articles designed to drive public opinion either in favor of or against the new compact.²³⁶ As any student of constitutional history knows, the most important tool of the Constitution's supporters was *The Federalist Papers*, a series of eighty-five articles that systematically addressed the various provisions in the new Constitution, along with arguments why the Constitution would not be a threat to the liberty of states or their citizens. The authors of *The Federalist Papers*, particularly Alexander Hamilton, wrote a great deal about the military power created by the proposed Constitution, something unsurprising considering that a substantial portion of the Anti-Federalist invective focused on that very issue.

A recurring theme of *The Federalist Papers* is the difference between granting control over the military to Congress and granting that power to the Executive.²³⁷ In *Federalist Number 23*, Alexander Hamilton offered a three-part argument for the military establishment authorized by the Constitution. First, the experience under the Articles of Confederation had demonstrated that an effective common defense was necessary for the survival of the nation.²³⁸ Second, that an effective common defense required that the federal government be permitted to raise, support, and regulate armies and navies.²³⁹ Having recognized that these powers were essential to an effective defense, Hamilton argued that the least dangerous place to vest those powers was in the Congress:²⁴⁰

To the powers proposed to be conferred upon the federal gov-

236. See BEARD, *supra* note 202, at 32.

237. See *supra* notes 224-33 and accompanying text.

238. See THE FEDERALIST NO. 23, at 145-46 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

239. See *id.* at 145.

240. See *id.* at 147-48.

ernment in respect to the creation and direction of the national forces, I have met with but one specific objection . . . that proper provision has not been made against the existence of standing armies in time of peace; an objection which, I shall now endeavor to show, rests on weak and unsubstantial foundations.

. . . The propriety of this remark will appear the moment it is recollected that the objection under consideration turns upon a supposed necessity of restraining the LEGISLATIVE authority of the nation, in the article of military establishments; a principle unheard of, except in one or two of our State constitutions, and rejected in all the rest.²⁴¹

Thus, *The Federalist Papers* certainly support the view that the Framers adopted Clause 14 in order to limit the dangers inherent in creating a standing federal army, by giving control over the military to the Congress rather than to the President. There is, however, another possibility that must be examined. The authors of *The Federalist Papers* were, first and foremost, advocates. This means that every assertion made in the various papers must be viewed in light of the authors' primary objective—to secure passage of the Constitution. As historian Charles Beard has noted, the authors of *The Federalist Papers* were no doubt patriotic and civic-minded Americans, but “[t]his is not to say that they were never disingenuous, that they never ‘shaded’ their facts, or that they never revealed any prejudices.”²⁴² For instance, it is possible that Hamilton never believed that congressional power over the military was inherently less oppressive, but he might have latched onto that argument as a means of countering Anti-Federalist criticism of the Constitution. With regard to this matter, at least, it does not appear that Hamilton's papers misrepresented the views of the Framers. The pathetic military performance of the federal government under the Articles, and the obvious tendency throughout the Constitution to give potentially oppressive powers to Congress, clearly corroborate Hamilton's repeated assertions that the main purpose of Clause 14 was to allocate military powers within the federal government.

As we have seen, the Convention offers little evidence as to the substantive meaning of Clause 14—that provision having been added without debate or objection.²⁴³ *The Federalist Papers*, in contrast to the records of the Convention, give us the best, and nearly only, evidence of the extent of the power the Framers intended to give Congress through Clause 14. In *Federalist Number 23*, Alexander Hamilton's discussion of Clause 14 completely forestalls any argument that the Framers did not

241. THE FEDERALIST No. 24, at 150 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

242. BEARD, *supra* note 202, at 34.

243. See *supra* notes 230-35 and accompanying text.

intend Congress' power to be plenary in this area. After asserting that the federal government must be able to provide a common defense, Hamilton set out the powers required to achieve that goal:

The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

. . . .

. . . And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinable limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES.²⁴⁴

In two paragraphs, Hamilton provides a thorough and credible statement of the Framers' intentions when they granted Congress the power to raise, support, and regulate the armed forces. The first premise, that the federal government's power over the military should be plenary, is necessary, according to Hamilton, because it was impossible for the Framers to foresee in 1787 every possible turn of events that might occur with the passage of time. Moreover, according to Hamilton, the Constitution correctly provides that the war powers "ought to be under the direction of the same councils who are appointed to preside over the common defence."²⁴⁵ Those councils are, of course, the two houses of Congress. That notion dovetails nicely with Hamilton's argument in Federalist Number 24 that the Constitution eliminated, or at least limited, the danger of federal oppression by denying the President control over the army.²⁴⁶ Thus, to Hamilton, the power to regulate the armed forces was vested in the Congress and was without limitation. It was for

244. THE FEDERALIST No. 23, at 145 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

245. *Id.*

246. THE FEDERALIST No. 24, at 150-51 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

Congress, not for the states or other branches of the federal government, to decide how best to deal with the “variety of national exigencies.”²⁴⁷

While Hamilton makes this argument in *The Federalist Papers*, we must return to an examination of his biases in determining the value of his assertions. Was Hamilton giving an honest evaluation of Clause 14, or was he “shading” his facts to win ratification of the Constitution? Remember, Jay, Hamilton, and Madison penned *The Federalist Papers* with one objective in mind—to counter Anti-Federalist propaganda against the Constitution. That Anti-Federalist propaganda criticized the extent of the federal powers created in the proposed Constitution, particularly those related to the authorization of a federal standing army. Typical of Anti-Federalist views, The Federal Farmer, likely a pseudonym of Richard Henry Lee, expressed:

The general government, organized as it is, may be adequate to many valuable objects, and be able to carry its laws into execution on proper principles in several cases; but I think its warmest friends will not contend, that it can carry all the powers proposed to be lodged in it into effect, without calling into its aid a military force, which must very soon destroy all elective governments in the country, produce anarchy, or establish despotism.²⁴⁸

Pamphleteer Benjamin Workman, under the pseudonym Philadelphiensis, went one step further, and criticized the Constitution on the grounds that Congress would have absolute control over the federal army:

But this consolidation of all the states into one general government, renders this project [of building state navies] impossible; the federal government having an unlimited power in taxation, which, no doubt, they will exercise to the utmost; leaves the states without the means of building even a boat. But had they the money, they dare not use it for that purpose, for, Congress are to have an absolute power over the *standing army, navy, and militia*. . . .²⁴⁹

At first glance, the Philadelphiensis letter seems to confirm that at least one leading opponent of the Constitution agreed with Hamilton that Congress had an absolute control over the armed forces. But a closer look at the two authors’ biases makes this less certain. Philadelphiensis, a virulent opponent of the proposed Constitution, had an incentive to enhance his argument by overstating the dangers inherent in the Constitution. Thus, it is possible that Philadelphiensis did not believe that Congress had plenary control over the military, but that he made that

247. *Id.*

248. LETTER FROM THE “FEDERAL FARMER” TO THE REPUBLICAN (Oct. 9, 1787), reprinted in THE ANTIFEDERALIST, *supra* note 225, at 213-14.

249. LETTER FROM “PHILADELPHIENSIS” (Dec. 12, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 225, at 497-98.

assertion in his writings because it made for a forceful argument against the Constitution.

On the other hand, Hamilton's objectives in writing *Federalist Number 23* only enhances the credibility of his argument. In countering Anti-Federalist claims that unfettered federal control over the military created the danger of despotism, Hamilton conceded the Anti-Federalist interpretation of Clause 14. Hamilton admitted that the provision gave Congress a plenary power to regulate the military, but downplayed the potential for federal oppression.²⁵⁰ If the Framers believed that the Constitution gave Congress anything less than plenary control over the armed forces, then that would have been a strong argument why a federal standing army did not create a threat of oppression. Hamilton, however, never made such an argument. Instead, he made two related, but weaker arguments. First, in *Federalist Number 23*, Hamilton argued that the federal government had to have plenary control over the armed forces.²⁵¹ He based that argument on the military impotence of the federal government under the Articles of Confederation and upon the danger of restricting the war powers without an ability to foresee national emergencies that might arise in the future.²⁵² Then, in *Federalist Number 24*, Hamilton argued that this plenary power was not dangerous because it was vested in Congress and not in the President.²⁵³

In *Federalist Number 23*, Hamilton plainly asserted that Clause 14 grants Congress an absolute power to regulate the armed forces, and then sets out to defend that grant of power. That assertion leaves open two possibilities: (1) that Hamilton forthrightly spoke of the Framers' intent for Clause 14; or (2) that Hamilton, ever the advocate, was shading the facts to curry support for the Constitution. The second possibility is clearly untenable. By conceding absolute congressional control over the military, Hamilton would not have allayed fears of this new, powerful federal government; he only would have fueled those fears. Thus, by conceding that Clause 14 is a plenary grant of power, when a Federalist advocate would have had an incentive to deny this plenary grant, Hamilton's view of Clause 14 should be considered inherently reliable.

Beyond giving substantive meaning to Clause 14, Hamilton's argument also makes a significant point about the value of historical practice in interpreting constitutional powers. The *O'Callahan* Court created the

250. See generally THE FEDERALIST NOS. 23, 24 (Alexander Hamilton).

251. See THE FEDERALIST NO. 23, at 146 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

252. See *id.* at 145-46.

253. THE FEDERALIST NO. 24, at 151 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

service-connection test after finding that the historical materials showed a traditional aversion to military jurisdiction over civilian offenses.²⁵⁴ Again, in *Solorio*,²⁵⁵ the Court overruled *O'Callahan*, not by denying the value of historical analysis, but by finding the historical materials too ambiguous to justify departure from the plain language of Clause 14.²⁵⁶ Historical practice certainly has value in constitutional interpretation because it demonstrates the context in which the Framers drafted the Constitution. From that context, we can formulate opinions about the intent of the Framers who drafted and ratified the Constitution. However, in the case of Clause 14, the Framers themselves seemed to have signalled that historical practice would be irrelevant. As Hamilton stated in *Federalist Number 23*, the Framers wanted Clause 14 to be flexible, with Congress having the power to change its regulatory practices with the times.²⁵⁷ Where, as with Clause 14, the Framers acknowledged that a grant of power should be flexible enough to allow the recipient of that power to meet the exigencies of an uncertain future, then historical practice at the time the Framers drafted the Constitution is of little value in assessing original intent.

IV. SUPREME COURT PRECEDENT ON CLAUSE 14 AND OTHER WAR POWERS

Thus far, the analysis provides that Justice Stevens is technically correct when he asserts in *Loving v. United States*²⁵⁸ that Congress has, at times, treated death penalty jurisdiction differently than jurisdiction over non-capital offenses.²⁵⁹ Nevertheless, a closer examination of the historical materials demonstrates that court-martial jurisdiction has steadily evolved from a bare-bones death penalty jurisdiction to the present state, where death penalty jurisdiction is as broad as the jurisdiction over any other offense.²⁶⁰ Thus, there are definite problems with the conclusions Justice Stevens draws from the historical materials, not the least of which is that, to the extent there has been different treatment of death penalty jurisdiction, it has not centered around the service-connection test.²⁶¹ As discussed, all evidence from the constitutional era suggests that the Framers fully intended Congress to have the unfettered

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

255. 483 U.S. 435 (1987).

256. See *id.* at 445.

257. THE FEDERALIST NO. 23, at 145 (Alexander Hamilton) (Paul Leicester Ford ed., 1918).

258. 116 S. Ct. 1737 (1996).

259. See *id.* at 1751.

260. See *supra* text accompanying notes 167-72.

261. See *supra* notes 186-90 and accompanying text.

power to regulate the military it raised and supported.²⁶² That analysis might seem to foreclose Justice Stevens' position; however, there is more. There is a large body of case law bearing on the substantive interpretation of Clause 14. The Supreme Court never writes on an empty slate and precedent must be duly considered.²⁶³

Supreme Court cases bearing on court-martial jurisdiction fall into four general categories. Because Justice Stevens' concurrence in *Loving* challenges Congress' power to set subject-matter jurisdiction, cases bearing on that issue are of paramount importance. The second pertinent category involves cases where the Court, while not considering issues of subject-matter jurisdiction, has explicitly deferred to Congress' judgment in its regulation of the armed forces. The third group is more specific than the deference cases, and consists of cases interpreting Clause 14, but not necessarily speaking to court-martial jurisdiction. The final category are the cases discussed earlier dealing with the personal jurisdiction of courts-martial and the differences between Congress' power over personal jurisdiction and its power over subject-matter jurisdiction. In each of these categories, the Supreme Court cases clearly support the proposition that the courts have no role in second-guessing Congress' determination of the appropriate subject-matter jurisdiction of courts-martial.

A. *The Subject-Matter Jurisdiction Cases*

During the past one hundred fifty years, the Supreme Court has heard a great number of cases challenging various aspects of courts-martial, and has rejected the vast majority of those claims. Many cases have addressed the constitutionality of personal jurisdiction over various civilians and quasi-civilians.²⁶⁴ Others have been subject-matter jurisdiction claims based on statutory interpretation. For example, in *Kahn v. Anderson*,²⁶⁵ the petitioner claimed his court-martial lacked subject matter jurisdiction because Congress had given courts-martial jurisdiction over domestic murder in time of war only, and the accused had commit-

262. See *supra* notes 202-57 and accompanying text.

263. See, e.g., *Radovich v. National Football League*, 352 U.S. 445, 452 (1957) ("If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question . . . for the first time upon a clean slate we would have no doubts." (footnote omitted)).

264. See, e.g., *Grisham v. Hagan*, 361 U.S. 278 (1960) (civilian employees); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (same); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (servicemembers' dependents); *Reid v. Covert*, 354 U.S. 1 (1957) (same); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (discharged soldiers); *Ex parte Reed*, 100 U.S. 13 (1879) (civilian clerk to naval paymaster).

265. 255 U.S. 1 (1921).

ted his offense after the cessation of hostilities.²⁶⁶ The Court rejected Kahn's claim, holding that the statute permitted jurisdiction any time prior to a complete, legal peace, even if open fighting had ceased.²⁶⁷ In any event, cases dealing with whether a court-martial exceeded the subject-matter jurisdiction Congress created have no bearing on the issues confronted in this article. *Kahn*, and cases like it, challenge whether Congress has created jurisdiction, not whether Congress can create the jurisdiction that was exercised in a particular case. In fact, the Court never ruled in a case challenging the constitutionality of a particular subject-matter jurisdiction until 1969, when it decided *O'Callahan*.²⁶⁸ When evaluating precedent to determine whether Justice Stevens is correct, it is logical to begin at the source, with an examination of *O'Callahan* and *Solorio*.

In *O'Callahan*, the petitioner, an army sergeant on authorized liberty, had broken into the hotel room of a young girl, assaulted her, and attempted to rape her.²⁶⁹ After describing the procedural history of the case, the Court contrasted the rights afforded to court-martial accuseds and the rights of defendants in civilian courts. A soldier facing trial by court-martial has no right to a grand jury indictment or the right to a trial by a jury of his peers.²⁷⁰ At the time of *O'Callahan's* trial, courts-martial did not have judges, and those performing judicial functions at courts-martial had no fixed term of office.²⁷¹ The Court also opined that "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."²⁷² Having established its view that courts-martial were less protective of defendants' rights than civilian courts, the *O'Callahan* Court next examined the history of court-martial jurisdiction in England and the United States. That history, according to the majority, demonstrated an historical aversion to court-martial jurisdiction over civilian-type offenses.²⁷³ The Court took these three premises—the overall inferiority of courts-martial, the inferior rights afforded a court-martial accused, and a historical preference that civilian crimes be tried in civilian courts—and determined that Congress could only create court-martial

266. *See id.* at 9.

267. *See id.* at 10. The Court later came to the opposite conclusion in *Lee v. Madigan*, 358 U.S. 228, 236 (1959).

268. 395 U.S. 258 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

269. *See O'Callahan*, 395 U.S. at 259-60.

270. *See id.* at 261-62.

271. *See id.* at 263.

272. *Id.* at 262-63.

273. *See id.* at 268-71.

jurisdiction over crimes that were service-connected.²⁷⁴

Before *O'Callahan*, there had been no subject-matter constraints on court-martial jurisdiction. If the accused was a member of the "land and naval forces," and his conduct violated the UCMJ, then a court-martial had jurisdiction. It was irrelevant whether the offense was capital or non-capital. After *O'Callahan*, offenses were triable by court-martial only if the accused was a servicemember, his offense violated the UCMJ, and the facts of his alleged offense made the crime service-connected. Just as it had been before *O'Callahan*, the jurisdiction of courts-martial after *O'Callahan* did not hinge on whether the offense was capital or non-capital; the same jurisdictional test applied to both types of crimes.

In *Solorio*, the majority's analysis followed a very different path than that taken by the *O'Callahan* Court. After describing the facts of the case and its procedural history, the Court began with the premise that Congress was granted the power under Clause 14 to establish the jurisdiction of courts-martial.²⁷⁵ The Court then noted that until *O'Callahan*, the Court had repeatedly interpreted the Constitution as placing only one limitation on Congress' power to create court-martial jurisdiction: the accused, by virtue of his status, must be personally amenable to trial by court-martial.²⁷⁶ Beyond citing the wealth of precedent on this issue, the Court noted that the status test, unlike the service-connection test of *O'Callahan*, comported with the plain meaning of Clause 14.²⁷⁷ After describing the decision in *O'Callahan*, the Court announced that "[o]n reexamination of *O'Callahan*, we have decided that the service connection test announced in that decision should be abandoned."²⁷⁸

The *Solorio* Court justified its holding on several grounds. First, the plain meaning of Clause 14 imposed no limitations on Congress' power to regulate members of the armed forces.²⁷⁹ Second, the Court could find no support in the debates over the Constitution for deviating from Clause 14's plain meaning.²⁸⁰ Third, the Court took issue with the *O'Callahan* Court's characterization of historical practice.²⁸¹ The *Solorio* majority did not interpret the historical materials to support con-

274. See *id.* at 273-74.

275. See *Solorio*, 483 U.S. at 438.

276. *Id.* at 439 ("In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

277. See *id.* at 440-41.

278. *Id.*

279. See *id.* at 441.

280. See *id.*

281. See *id.* at 442.

stitutional limits on Congress' power over courts-martial.²⁸² Instead, the Court found that "the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of Clause 14 which *O'Callahan* imported into it."²⁸³ Fourth, the Court stated that the judiciary, unlike Congress, is "ill equipped" to determine appropriate policies for governing the military and, as such, should give Congress wide berth in regulating the armed forces.²⁸⁴ Finally, the Court examined the experience under the *O'Callahan* rule, and found the service-connection test confusing and unworkable.²⁸⁵

From an examination of *O'Callahan* and *Solorio*, it becomes clear that neither was decided on capital/non-capital grounds. *O'Callahan*, a case dealing with non-capital offenses, created a service-connection test applicable to all offenses, whether capital or not. The *Solorio* Court, by its own terms, eradicated the test created in *O'Callahan*. The *Solorio* majority never mentioned that the offenses at issue—a variety of "indecent liberties, lascivious acts, and indecent assaults"²⁸⁶—were of the non-capital variety. From the various opinions, there is no indication that any one of the Justices based their vote on the punishment authorized for the offenses. Justice Stevens, concurring in the result, opined that the Court should not have overruled *O'Callahan*, and should have based its decision on the narrower ground that jurisdiction was permissible because *Solorio*'s offenses were service-connected.²⁸⁷ The *Solorio* dissenters—Justices Brennan, Marshall, and Blackmun—also did not treat the severity of the charged offenses as having any constitutional significance.²⁸⁸ According to the dissent, the *O'Callahan* Court had it right—all offenses, capital and non-capital, had to be service-connected for jurisdiction to be constitutional.²⁸⁹

Thus, neither *O'Callahan*, the case creating the service-connection test, nor *Solorio*, the case destroying that test, have even one sentence in their majority opinions suggesting that the severity of the punishment is of any jurisdictional significance. Neither case even mentions whether the charged offenses were capital crimes. It appears from *Loving* that

282. *See id.* at 446 ("But such disapproval in England at the time of William and Mary hardly proves that the Framers of the Constitution, contrary to the plenary language in which they conferred the power on Congress, meant to freeze court-martial usage at a particular time in such a way that Congress might not change it.").

283. *Id.* at 445 (footnote omitted).

284. *See id.* at 447-48.

285. *See id.* at 449-50.

286. *Id.* at 437 n.1.

287. *See id.* at 451 (Stevens, J., concurring).

288. *See id.* at 452 (Marshall, J., dissenting).

289. *See id.* at 461-63.

the four concurring Justices might prefer to limit *Solorio* strictly to its facts. It is true that *Solorio* was a non-capital case; nevertheless, the Court's holding was not punishment-dependent. *O'Callahan's* service-connection test, applicable to all offenses whether capital or not, was overruled in *Solorio* in no uncertain words: "On reexamination of *O'Callahan*, we have decided that the service connection test announced in that decision should be abandoned."²⁹⁰ Therefore, the Court would have to be extremely dexterous, if not disingenuous, to revive a service-connection test for death penalty cases without acknowledging that it is overruling at least part of *Solorio*. Of course, that is not to say that the Court will not do just that, just as *Solorio* explicitly overruled *O'Callahan*.

There are, however, compelling reasons why the Court should not, and likely will not, resurrect the *O'Callahan* test for capital offenses. Several of those reasons have already been discussed. There is no historical support for constitutional limits on death penalty jurisdiction. The plain language of Clause 14 does not differentiate between capital and non-capital offenses. Additionally, the evidence of original intent points strongly toward the conclusion that Clause 14 grants Congress a plenary power in this area. Moreover, an analysis of the case law considering the appropriate roles of Congress and the judiciary in overseeing military law demonstrates that the Court would have to disregard, if not overrule, a tremendous body of case law if it were to strike down any portion of the subject-matter jurisdiction enacted by Congress pursuant to Clause 14.

B. *Judicial Deference to Congress in Military Matters*

The concept of judicial deference to military decisions first appeared in *Martin v. Mott*,²⁹¹ a case dating back to 1827. *Martin* dealt with a statute by which Congress gave the President the power to call out the militia if the United States was faced with imminent invasion.²⁹² President Madison called out the New York militia pursuant to this grant of authority in 1814 to aid the standing army in the War of 1812.²⁹³ Mott did not join the militia as required, and defended at his court-martial on the grounds that the President's order was illegal because there was no national emergency.²⁹⁴ The Supreme Court rejected Mott's claim, holding that it was for the President to decide whether a national

290. *Id.* at 440-41.

291. 25 U.S. (12 Wheat.) 19 (1827).

292. *See id.* at 29.

293. *See id.* at 20.

294. *See id.* at 20-23.

emergency existed, and that the courts were not to second-guess that determination.²⁹⁵ It must be noted that this case does not deal with deference to Congress; it is about deferring to the President's determinations. Also, *Martin v. Mott* is a case about statutory interpretation and not constitutional interpretation. Nevertheless, this case is the genesis of themes that repeat themselves through 150 years of congressional deference cases.

The first such theme is the reality of military service. An effective military requires that soldiers unhesitatingly obey the orders of their superiors. If courts could review the President's determination that a national emergency existed, the President would lose his ability to respond to such emergencies because any citizen who preferred not to serve could delay his call to arms by filing suit. "The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests."²⁹⁶ This recognition that military service differs from civilian life has caused the Court to give Congress and the President wide latitude in fashioning rules that, when applied to the civilian populace, might not withstand a constitutional challenge.

An excellent example of this phenomenon is *Feres v. United States*.²⁹⁷ That case interpreted the Federal Tort Claims Act,²⁹⁸ which grants persons injured through the negligence of government employees the right to sue the federal government for damages.²⁹⁹ The plain language of the Act did not prohibit recovery by injured servicemembers.³⁰⁰ The Court held in *Feres*, however, that servicemembers could not collect under the Federal Tort Claims Act for any injury related to their military service.³⁰¹ The Court reasoned that a soldier has a different relationship with the federal government than does an ordinary citizen; that relationship is primarily federal in character, and it would be inappropriate to allow state tort law to govern a soldier's negligence claim.³⁰² The Court later explained the *Feres* doctrine as follows:

In the last analysis, *Feres* seems best explained by the "peculiar and

295. *See id.* at 30.

296. *Id.*

297. 340 U.S. 135 (1950).

298. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994).

299. *See Feres*, 340 U.S. at 138.

300. *See id.* at 140-41 ("[T]he Act goes on to prescribe the test of allowable claims, which is, 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances'" (alteration in original).

301. *See id.* at 146.

302. *See id.* at 143-44.

special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . ."³⁰³

The "military is different" justification for deference to the political branches also can be seen in a series of First Amendment cases. In *Parker v. Levy*,³⁰⁴ the Court rejected a First Amendment challenge to Article 133 of the UCMJ, which prohibits conduct unbecoming an officer and a gentleman.³⁰⁵ Captain Levy, a Vietnam-era Army physician, was convicted of violating Article 133 for urging soldiers on his base to refuse orders to Vietnam and to refuse to fight if sent to Vietnam.³⁰⁶ The Court held that the nature of military service required that Levy's conduct be held to a different standard than that of civilians: "While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community."³⁰⁷ In *Brown v. Glines*,³⁰⁸ the Court held that the different First Amendment rights of servicemembers permitted a prohibition on distributing petitions on base, where such an activity clearly would be protected off base.³⁰⁹ Similarly, in *Goldman v. Weinberger*,³¹⁰ the Court held that the Free Exercise Clause of the First Amendment did not give an Air Force chap-

303. *United States v. Muniz*, 374 U.S. 150, 162 (1963) (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

304. 417 U.S. 733 (1974).

305. *Id.*

306. *See id.* at 736-37. Specifically, Captain Levy made statements such as the following to enlisted soldiers aboard base:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Vietnam or if sent refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Id.

307. *Id.* at 751.

308. 444 U.S. 348 (1980).

309. *See id.* at 354 ("Thus, while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'" (quoting *Parker*, 417 U.S. at 758)).

310. 475 U.S. 503 (1986).

lain the right to wear a yarmulke in uniform.³¹¹

Another theme relied upon by the Court in *Martin v. Mott* was the lack of judicially cognizable standards in determining whether a national emergency existed, or whether the President reasonably believed such an emergency existed. The President, unlike the judiciary or the individual servicemember, has access to sensitive military intelligence, and is in a better position than the courts to determine whether an invasion or other emergency is imminent.³¹² This point was most starkly made in *Korematsu v. United States*,³¹³ where the Court denied relief to Asian-Americans interned during World War II.³¹⁴ The Court asserted that the political branches and the military had the best access to information justifying this most extreme action.³¹⁵ Justice Frankfurter perhaps best summed up the Court's stance in his concurring opinion: "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."³¹⁶ In *Gilligan v. Morgan*,³¹⁷ the Court recognized that the judiciary is less able than the political branches to make informed policy decisions for the armed forces.³¹⁸ The courts, unlike Congress and the President, cannot commission policy studies, hold fact-finding hearings, or create committees to become experts on difficult policy matters. In *Gilligan*, the Court rejected challenges to the training and tactics of the Ohio National Guard, a suit arising in the aftermath of the Kent State tragedy. In deferring to the political branches, the Court stated:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in the branches of the government which are periodically subject to electoral accountability. It is this power of

311. *See id.* at 510.

312. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). The Court stated that:

[T]he evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

Id. at 31.

313. 323 U.S. 214 (1944).

314. *Id.*

315. *See id.* at 218-19.

316. *Id.* at 225 (Frankfurter, J., concurring).

317. 413 U.S. 1 (1973).

318. *Id.*

oversight and control of military force by elected representatives and officials which underlies our entire constitutional system³¹⁹

Recognizing that Congress and the President have greater fact-finding capabilities, whether it be their ability to gather intelligence, hold hearings, or consult the Pentagon, the Court has often declared that it is by comparison incompetent to determine the needs of the military services, or the impact any action might have on national readiness. In *Chappell v. Wallace*,³²⁰ the Court explicitly confessed that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."³²¹

A final theme justifying deference first appeared in the 1849 case of *Wilkes v. Dinsman*.³²² Dinsman was a Marine stationed aboard a naval vessel surveying the Pacific Ocean and South Seas.³²³ While on the surveying expedition, Dinsman claimed to have completed his enlistment and refused to follow orders.³²⁴ The squadron commander, Wilkes, ordered Dinsman flogged, placed in irons, and imprisoned in an Oahu jail.³²⁵ Dinsman sued Commander Wilkes, claiming, among other things, that the punishment inflicted was illegal. The Court disposed of Dinsman's assertion, holding that Congress had given naval commanders authority to flog their men without court-martial proceedings, and that it was within Wilkes' discretion to imprison Dinsman rather than to risk the spread of his mutinous behavior.³²⁶ The Court noted that the law gave Commander Wilkes the discretion to take appropriate measures while commanding his surveying squadron, and that it would be inappropriate to leave those decisions open to judicial review. "Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it."³²⁷ Thus, *Wilkes* reiterates a point made in *Martin v. Mott*—the need for unflinching obedience within the ranks counsels against judicial relief for those who disobey orders. *Wilkes* also speaks to the allocation of powers. The power to punish Dinsman's actions had been vested in

319. *Id.* at 10.

320. 462 U.S. 296 (1983).

321. *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)). The Court has made similar statements in *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (holding that the Court would defer to Air Force's determination that chaplains may not wear yarmulkes in uniform), and *Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988) (refusing to second-guess Navy's determination to classify respondent as a security risk).

322. 48 U.S. (7 How.) 89 (1849).

323. *See id.* at 91-92.

324. *See id.* at 92.

325. *See id.* at 104.

326. *See id.* at 126-30.

327. *Id.* at 129.

Commander Wilkes; therefore, the Court reasoned Commander Wilkes must be given the discretion to make choices about the exercise of that power. The theme also arises regarding Congress' war powers.³²⁸

The Court has time and time again justified deference to Congress, by relying on Congress' constitutional grants of power to regulate the armed forces with no explicit restrictions. Typical of this view is the Court's statement in *Hirabayashi v. United States*:³²⁹

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.³³⁰

Similarly, in *Burns v. Wilson*,³³¹ the Court explicitly deferred to Congress in a case dealing with various evidentiary and constitutional claims arising from court-martial proceedings.³³² The Court quickly disposed of these issues, holding that the petitioners had not demonstrated why their claims could not be treated adequately by the trial court and the military appellate courts. The Court once again made reference to the Constitution's granting of power over courts-martial to Congress, not the judiciary:

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.³³³

328. This strain of analysis, that Congress has the unfettered discretion to select the appropriate means of accomplishing powers granted it by the Constitution, arguably has its roots in the great case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In that case, the Court held that Congress, in pursuing its constitutionally-granted powers to collect taxes, borrow money, and regulate commerce, had the discretion to create a national bank to facilitate exercise of those powers. See *id.* at 322-26.

329. 320 U.S. 81 (1943).

330. *Id.* at 93 (citations omitted).

331. 346 U.S. 137 (1953).

332. *Id.*

333. *Id.* at 140 (footnotes omitted).

It should be noted that at the time of the *Burns* decision, courts-martial were not appealable to the Supreme Court except by writ of habeas corpus. Thus, when the *Burns* Court stated that it had no supervisory control over military justice, that was in fact true at the time. The Military Justice Act of 1983 changed that, by giving accuseds the opportunity to petition for certiorari in any case reviewed by the Court of Appeals for the Armed Forces.³³⁴ Nevertheless, the tenor of *Burns* remains unchanged. The Constitution granted Congress the power to create an appropriate court-martial system, and the Court has indicated repeatedly that it will respect those policy judgments.³³⁵

In more recent cases, the Court has been apt to spend little time explaining how the facts of a particular case make the court ill-equipped to make an informed ruling, and to rely instead on the Constitution's grant of regulatory power to Congress. For instance, in *Weiss v. United States*,³³⁶ the Court had no difficulty holding that the due process test for military law is much more lenient than that for civilian laws, requiring the Court to consider "whether factors militating in favor of [the servicemember's position] are so extraordinarily weighty as to overcome the balance struck by Congress."³³⁷ The *Weiss* Court also relied on a

334. See Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405-06 (codified as UNIF. CODE OF MIL. JUST. art. 67(a), 10 U.S.C. § 867(a) (1994)).

335. In *Middendorf v. Henry*, 425 U.S. 25, 43 (1976), the Court held that the Constitution did not require a right to counsel for summary court-martial proceedings. A summary court-martial is a trial where one officer is appointed to gather the facts, both for those and against an accused, subject to the Military Rules of Evidence, and to make findings as to guilt and, if necessary, as to an appropriate sentence, which cannot exceed thirty days confinement. See UNIF. CODE OF MIL. JUST., art. 20, 10 U.S.C. § 820 (1994). In so holding, the Court stated that "[i]n making such an analysis we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, that counsel should not be provided." *Middendorf*, 425 U.S. at 43 (citation omitted).

The Court also held that a former servicemember cannot maintain a tort action against the government for the government's secret administration of LSD to him, again relying on the Constitution's grant of regulatory power to Congress:

The Court also held that a former servicemember cannot maintain a tort action against the government for the government's secret administration of LSD to him, again relying on the Constitution's grant of regulatory power to Congress:

What is distinctive here is the specificity of [Clause 14,] that technically superfluous grant of power, and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches. . . .

. . . .

. . . The "special factor" that "counsels hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.

United States v. Stanley, 483 U.S. 669, 682-83 (1987) (footnote omitted).

336. 510 U.S. 163 (1994).

337. *Id.* at 177-78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

judicial maxim that has appeared repeatedly in military cases over the last half-century: "Judicial deference . . . 'is at its apogee' when reviewing congressional decisionmaking in this area."³³⁸

While the concept of judicial deference does not mean that all judicial review is foreclosed to servicemembers, its recent elevation from a pragmatic philosophy to a dogmatic rule of law demonstrates that, in the Court's eyes, Congress is to be the primary arbiter of military issues. The deference cases do not eliminate the role of courts in protecting servicemembers' rights, but they certainly reduce the likelihood that an accused can rely on civilian case law for any type of relief. Taking the issue of service-connection test for death penalty cases, the deference cases paint a dim picture for the accused members of the military. Black-letter law indicates that Congress has the benefit of judicial deference based upon its constitutionally-conferred role in regulating the military. Beyond that, the logic underlying the notion of judicial deference applies fully to this issue. The reasoning behind the *O'Callahan* doctrine was the notion from *United States ex rel. Toth v. Quarles*³³⁹ that courts-martial jurisdiction should be limited to the narrowest jurisdiction possible consistent with the needs of the military.³⁴⁰ The cases since *Toth*, and particularly since *O'Callahan*, make clear that even if that maxim were true, the Court has determined that the balance is to be struck by Congress and not by the courts.³⁴¹ Not only has Congress been entrusted with that task by the Constitution, it also is in a far better position to determine when, if at all, certain crimes may be excluded from military jurisdiction without affecting good order and discipline.³⁴²

C. *Substantive Analysis of Clause 14: The "Plenary Power" Cases*

Deference can be viewed as the notion that the Court will side with Congress in close cases. More cynically, it might be seen as a means of justifying any enactment the Justices have no qualms with from a policy standpoint. Either way, it is a thin reed to lean upon as a matter of constitutional argument, because deference can be highly unpredictable. One can never be sure when the Court will say that deference is inappro-

338. *Id.* at 177 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). See also *Loving v. United States*, 116 S. Ct. 1737, 1748 (1996) ("[W]e give Congress the highest deference in ordering military affairs."); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Solorio v. United States*, 483 U.S. 435, 447 (1987) (noting that "[j]udicial deference . . . is at its apogee"); *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (same).

339. 350 U.S. 11 (1955).

340. See *id.* at 23.

341. See *supra* notes 336-38 and accompanying text.

342. See *supra* notes 312-21 and accompanying text.

priate, or when the Court will not find the case a close enough call to side with the Congress.³⁴³ There have been several cases, however, where the Court has gone beyond its traditional paean to deference and made explicit statements regarding the extent of Congress' powers under Clause 14. A review of that body of authority demonstrates that when Congress has sought to regulate actual members of the armed forces, the Court has repeatedly stated that Clause 14 is a plenary grant of power, making judicial interference like that proposed by Justice Stevens wholly inappropriate.

The Supreme Court's first statement about the substantive meaning of Clause 14 came in the case of *Dynes v. Hoover*.³⁴⁴ In that case, Dynes had been tried for desertion, convicted of attempted desertion, and sentenced to imprisonment.³⁴⁵ Dynes sued, alleging false imprisonment on the grounds that his sentence was illegal and void.³⁴⁶ In rejecting Dynes' contention, the Court first remarked that courts-martial are not part of the judicial power of the United States.³⁴⁷ Responding to Congress' power to establish courts-martial, the Court stated that it "is given without any connection between it and the 3d article of the Constitution."³⁴⁸ Even given that courts-martial were not, at that time, appealable to civilian courts,³⁴⁹ the Court, for the first time, intimated that there were no substantive restrictions on Congress' power to establish and regulate courts-martial:

With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdic-

343. This unpredictability of judicial deference certainly affects the manner in which military appellate counsel present argument on constitutional issues. Cynically, but somewhat justifiably, it has been said that the government presents the same argument before the appellate courts in every case where constitutional error has been alleged:

- (1) The trial judge was right; there was no error;
- (2) If there was error, it was waived by failure to object at trial;
- (3) If there was error, it was harmless error; and as a last resort
- (4) The military is different, meaning you have to disregard civilian case law, so there really was no error in the first place.

344. 61 U.S. (20 How.) 65 (1857).

345. *See id.* at 77.

346. *See id.* at 78.

347. *See id.* at 79.

348. *Id.*

349. It was not until 1983 that Congress authorized appeal of courts-martial by way of petition for certiorari to the Supreme Court. *See supra* note 334 and accompanying text.

tion of any kind has been given to the civil magistrate or civil courts.³⁵⁰

While the *Dynes* Court had suggested that Congress' power to regulate the armed forces was plenary, the Court expressly stated as much two decades later in *Coleman v. Tennessee*.³⁵¹ Recall that *Coleman* addressed the 1863 statute granting courts-martial jurisdiction over common-law felonies committed in time of war.³⁵² *Coleman* argued that this statute deprived state courts of concurrent jurisdiction over such crimes—an assertion the Court flatly rejected.³⁵³ In so holding, the Court also stated that Congress had the power to deprive state courts of concurrent jurisdiction, but had not done so in the 1863 statute.³⁵⁴ The Court justified that notion by resort to Clause 14:

As Congress is expressly authorized by the Constitution "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary.³⁵⁵

Just a year later, the Court stated in *Ex parte Reed*³⁵⁶ that "[t]he constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court."³⁵⁷ Thus, when Justice Stevens asserts in *Loving* that case law has not established that death penalty jurisdiction must be as broad as non-capital jurisdiction, he makes something of a curious argument.³⁵⁸ It is true that the Court has never ruled in a death penalty case where the issue was whether the crime must be service-connected. Over a century ago, however, the Court interpreted Clause 14, the provision under which Congress creates court-martial jurisdiction, to be a plenary grant of power to Congress.³⁵⁹

The Court's explicit statements that Clause 14 creates a plenary power did not stop with *Dynes* and *Reed*. In 1950, the Court heard arguments in *Whelchel v. McDonald*.³⁶⁰ In that case, *Whelchel* had been

350. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857) (emphasis added).

351. 97 U.S. 509 (1878).

352. See *supra* notes 89-92 and accompanying text for a more complete discussion of the facts in *Coleman*.

353. See *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878).

354. See *id.* at 514.

355. *Id.*

356. 100 U.S. 13 (1879).

357. *Id.* at 21.

358. See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring).

359. See *supra* notes 344-57 and accompanying text.

360. 340 U.S. 122 (1950).

convicted of rape while on active duty in Germany.³⁶¹ The jury was comprised completely of military officers.³⁶² After *Whelchel's* trial, Congress amended Article 4 of the Army Articles of War, and thereby granted servicemembers the right to request that enlisted soldiers be included in the jury.³⁶³ *Whelchel* appealed his conviction on the grounds that he was denied his right to have a jury composed of officers and enlisted soldiers.³⁶⁴ The Court rejected that notion, holding that the Sixth Amendment right to a jury trial did not apply to courts-martial, and that Congress had not created the right to enlisted members at the time of *Whelchel's* trial.³⁶⁵ Ominously, the Court summed up its view of the judiciary's role in overseeing the court-martial system created by Congress, stating that "[t]he constitution of courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action."³⁶⁶ While the *Whelchel* Court made no broad pronouncement about Congress' power under Clause 14, the plenary nature of that power is implicit in the Court's holding. The Court treated its role as ensuring that the court-martial did not deviate from the jurisdiction and procedures created by Congress. That was the end of the inquiry. The last sentence of the opinion, quoted above, made clear that persons unhappy with the court-martial system created by Congress should take that up with Congress and not with the courts.³⁶⁷

Perhaps the strongest statement of the breadth of Clause 14 can be found in *Chappell v. Wallace*.³⁶⁸ In that case, the Court ruled that enlisted sailors had no right to bring a civil rights suit against their superior officers for alleged racial discrimination in duty assignments and performance evaluations.³⁶⁹ The Court based its holding on the special nature of military service, and the detrimental effect the potential of civil litigation would have on national defense and military readiness.³⁷⁰ After recognizing these pragmatic concerns, the Court went on to characterize Congress' power over the armed forces:

Many of the Framers of the Constitution had recently experienced the

361. *See id.* at 123.

362. *See id.* at 126.

363. *See id.* at 126 & n.6.

364. *See id.* at 126-27. *Whelchel* also appealed on the grounds that the court-martial lacked jurisdiction because it had erroneously evaluated evidence suggesting *Whelchel* was legally insane. The Court found that contention without merit. *See id.* at 125-26.

365. *See id.* at 127.

366. *Id.* (citations omitted).

367. *See also* *Burns v. Wilson*, 346 U.S. 137, 147 (1953) (Minton, J., concurring) ("Due process of law for military personnel is what Congress has provided for them in the military hierarchy in courts established according to law.").

368. 462 U.S. 296 (1983).

369. *See id.* at 304.

370. *See id.* at 298-300.

rigors of military life and were well aware of the differences between it and civilian life. In drafting the Constitution they anticipated the kinds of issues raised in this case. Their response was an explicit grant of plenary authority "To raise and support Armies"; "To provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval Forces." It is clear that the Constitution contemplated that the Legislative Branch have plenary control over the rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.³⁷¹

Four years after *Chappell*, the Court restated this view in *United States v. Stanley*,³⁷² which presented one of the bleaker examples of governmental mistreatment of its citizens. Stanley had been subjected to government LSD experiments, without his knowledge, while he served in the United States Army.³⁷³ Years later, he sought money damages under the Federal Tort Claims Act and under the Civil Rights Act. The Court held that Stanley could not recover damages because Congress had not created such a remedy.³⁷⁴ In its holding, the Court acknowledged that Clause 14 provides an explicit grant of power to Congress over the armed forces, and stated that, "What is distinctive here is the specificity of that technically superfluous grant of power, and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches."³⁷⁵

Finally, in *Loving v. United States*,³⁷⁶ its most recent case bearing on military law, the Court reaffirmed its historical view that Clause 14 is a plenary grant of power. In so doing, the Court compared Congress' power to its other powers under Article I of the Constitution, finding Clause 14 no less plenary a grant.³⁷⁷ Thus, Congress' power under

371. *Id.* at 300-01 (citation omitted). The Court quoted this language from *Chappell* with approval in *Weiss v. United States*, 510 U.S. 163, 177 (1994), where the Court held that current court-martial procedure was not unconstitutional even though military judges did not have a fixed term of office and were not given a special presidential appointment as a military judge. The court held that military judges' appointments as commissioned officers by the President satisfied the Appointments Clause. *See id.* at 176.

372. 483 U.S. 669 (1987).

373. *See id.* at 671.

374. *See id.* at 682-84.

375. *See id.* at 682 (footnote omitted).

376. 116 S. Ct. 1737 (1996).

377. *See id.* at 1748 ("This power [under Clause 14] is no less plenary than other Article I powers, and we discern no reasons why Congress should have less capacity to make measured and appropriate delegations of this power than of any other.") (citations omitted).

Clause 14 is no different than its tax power,³⁷⁸ its commerce power,³⁷⁹ or its power to coin money.³⁸⁰

Of course, comparing Clause 14 to other Article I powers opens a completely different can of worms. Although Congress has a plenary power over commerce, the courts have a role in determining whether a particular statute is within that commerce power. If a statute is in fact regulating commerce, the inquiry ends. However, if the courts determine that a law enacted under Congress' commerce power does not regulate interstate commerce, then the courts are more than willing to strike down that law.³⁸¹ Thus, to say that Clause 14 is a plenary power does nothing more than establish that the courts may not strike down a congressional regulation, as being outside Congress' Article I powers, so long as it is in fact a regulation of the land and naval forces.³⁸² This raises the question of when court-martial regulations fall within the scope of regulation of the "land and naval forces," and when such regulations fall outside that grant of power. The answers to these questions lie in a series of cases in which the Court passed on the personal jurisdiction which courts-martial may exercise.

D. *The Personal Jurisdiction Cases*

The preceding discussion identified a great number of cases in which the Supreme Court explicitly deferred to congressional policy decisions in regard to the armed forces. The Court has acquiesced in the creation of a separate First Amendment jurisprudence within the military,³⁸³ a different due process analysis,³⁸⁴ as well as an inferior right to bring certain civil suits.³⁸⁵ The Court has also gone out of its way to characterize Congress' power over the armed forces as plenary.³⁸⁶ In fact, based on the foregoing sections, it might seem that Congress and the President have carte blanche in establishing a court-martial system.

378. See U.S. CONST. art. I, § 8, cl. 1.

379. See *id.* art. I, § 8, cl. 3.

380. See *id.* art. I, § 8, cl. 5.

381. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (striking down the Gun-Free School Zones Act of 1990 as being outside Congress's Commerce Clause powers).

382. Of course, the courts will also strike down a law if it falls within Clause 14, but violates some other constitutional provision. This Article, however, asserts only that it is within the breadth of Clause 14 to create court-martial jurisdiction over death penalty offenses, whether service-connected or not. Beyond that, of course, Congress must ensure that its procedures comply with the other pertinent provisions of the Constitution.

383. See *supra* notes 304-10 and accompanying text.

384. See *Weiss v. United States*, 510 U.S. 163, 177-78 (1994) (holding that due process test for military regulations is "whether the factors militating in favor" of the servicemember's position "are so extraordinarily weighty as to overcome the balance struck by Congress").

385. See *supra* notes 297-303 and accompanying text.

386. See *supra* notes 344-75 and accompanying text.

That view might very well be correct, and justifiable in light of the language of Clause 14, with one prominent exception. The one area where the Court has evinced discomfort with the court-martial system is the area of personal jurisdiction. Other than *O'Callahan* (the since-overruled case establishing the service-connection test) the only cases where the Court has had any inclination to meddle in congressional regulation of courts-martial has been when Congress has attempted to impose martial or military law on civilians.

As far back as 1866, the Court distinguished the rights of civilian defendants with those of soldiers in *Ex parte Milligan*.³⁸⁷ In that case, the Court held that the military commission that sentenced Milligan to death for treason was unconstitutional because Milligan had been denied the right to a grand jury and to a jury of his peers.³⁸⁸ The Court noted that soldiers did not have these procedural rights, but that this was part and parcel of military service.³⁸⁹ The Framers determined that military exigencies demanded that courts-martial be permitted to act without these procedural niceties, and Congress had not created such a right through statutory law.³⁹⁰ Milligan, however, was not a soldier, and there was no justification for denying him his Fifth and Sixth Amendment rights on the grounds of military exigency.³⁹¹ This difference between citizen and soldier was summed up by the Court twenty-four years after *Milligan* in *United States v. Grimley*:³⁹² "By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties"³⁹³

Milligan and *Grimley*, while touching tangentially on the issue of courts-martial and personal jurisdiction, foreshadowed the series of personal jurisdiction cases that would erupt in the 1950's and 1960's. With enactment of the UCMJ in 1950, Congress sought to greatly expand the personal jurisdiction of courts-martial.³⁹⁴ Discharged soldiers, government employees working overseas, and dependents living overseas were swept within the jurisdiction of courts-martial. The Court's rejection of

387. 71 U.S. (4 Wall.) 2 (1866).

388. *See id.* at 122-23.

389. *See id.* at 123.

390. *Id.*

391. *Id.*

392. 137 U.S. 147 (1890).

393. *Id.* at 152; *see also* *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding unconstitutional the establishment of military tribunals in Hawaii during World War II to try civilians for common-law crimes). The *Duncan* Court made the point to differentiate between the rights of soldiers and those of civilians: "Both cases thus involve the rights of individuals charged with crime *and not connected with the armed forces* to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards." *Id.* at 307 (emphasis added).

394. *See supra* notes 134-49 and accompanying text.

this new jurisdiction was fast and furious. In striking down this expanded jurisdiction, the Court for the first time set out to define the meaning of the term "land and naval Forces" as that phrase is used in Clause 14. In holding that Clause 14 did not permit Congress to create court-martial jurisdiction over discharged soldiers, the Court stated in *United States ex rel. Toth v. Quarles*³⁹⁵ that "the power 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."³⁹⁶ In *Reid v. Covert*,³⁹⁷ the Court held that Congress could not subject civilian dependents to trial by court-martial.³⁹⁸ As in *Toth*, the plurality in *Covert* relied on the plain language of Clause 14, holding that it did not give Congress the power to try civilians by court-martial: "The term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents."³⁹⁹

Although the language employed by the *Covert* plurality—that Clause 14 only granted Congress the power to create court-martial jurisdiction over actual servicemembers—seemed to bode ill for court-martial jurisdiction over any civilians, at the time that was no certainty. The reason for this confusion was that the *Covert* plurality was just that, a plurality. Two Justices concurred in the judgment solely on the grounds that *Covert* was a capital case; thus, only four Justices had adopted the view that Clause 14 permitted jurisdiction only over actual servicemembers.⁴⁰⁰ The uncertainty ended in 1960 when the Court issued three opinions striking down all court-martial jurisdiction over civilian employees and dependents. In *Kinsella v. United States ex rel. Singleton*,⁴⁰¹ the Court held that Congress could not create court-martial jurisdiction over civilian dependents for non-capital offenses.⁴⁰² The *Singleton* Court expressly adopted the statement of the *Covert* plurality that the language "land and naval Forces" in Clause 14 gave Congress the power to create court-martial jurisdiction over only persons actually in the armed forces.⁴⁰³ Because civilian dependents were not part of the land and naval forces, they were not amenable to court-martial jurisdiction, regardless of the severity of their crime.⁴⁰⁴ That view was rein-

395. 350 U.S. 11 (1955).

396. *Id.* at 15.

397. 354 U.S. 1 (1957) (plurality opinion).

398. *Id.* at 19-29.

399. *Id.*

400. *See id.* at 41 (Frankfurter, J., concurring); *id.* at 65 (Harlan, J., concurring).

401. 361 U.S. 234 (1960).

402. *See id.* at 249.

403. *See id.* at 240.

404. *See id.* at 242-43.

forced in the companion cases of *McElroy v. United States ex rel. Guagliardo*⁴⁰⁵ and *Grisham v. Hagan*,⁴⁰⁶ each holding that Congress could not constitutionally create court-martial jurisdiction over civilian government employees for capital or non-capital offenses.⁴⁰⁷

The personal jurisdiction cases are important because they forced the Court to define Congress' power under Clause 14. In those cases, the Court firmly established that the term "land and naval Forces" within Clause 14 referred to people, not organizations. Therefore, Congress could not justify court-martial jurisdiction over civilians by asserting that the jurisdiction related to their regulation of the military. Thus, when Clause 14 grants Congress the power to regulate the land and naval forces, it grant Congress the power to create court-martial jurisdiction over a class of people, active duty members of the armed forces. The Court said as much in *Ex parte Quirin*,⁴⁰⁸ a case considering constitutional claims made by Nazi spies tried by military commission:

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.⁴⁰⁹

This view is quite consistent with the Court's willingness to acquiesce to congressional decisions regarding court-martial procedure, so long as that procedure applies only to servicemembers. When Congress or the President has sought to subject civilians to courts-martial or to military commissions, the Court has stepped into the fray. Chief Justice Warren made this very point in an influential law review article entitled *The Bill of Rights and the Military*.⁴¹⁰ In that article, Warren contrasted the Court's involvement in Congress' regulation of servicemembers under its war powers and in Congress' attempts to regulate civilians under those same powers:

So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the [Supreme

405. 361 U.S. 281 (1960).

406. 361 U.S. 278 (1960).

407. See *McElroy*, 361 U.S. at 283-84; *Grisham*, 361 U.S. at 280.

408. 317 U.S. 1 (1942).

409. *Id.* at 43 (emphasis added).

410. Warren, *supra* note 321, at 181.

Court's] jurisdiction is most limited. . . . The cases in which the Court has ordered the release of persons convicted by courts martial have, to date, been limited to instances in which it found lack of military jurisdiction over the person so tried, using the term "jurisdiction" in its narrowest sense. That is, they were all cases in which the defendant was found to be such that he was not constitutionally, or statutorily, amenable to military justice. Such was the classic formulation of the relation between civil courts and courts martial as expressed in *Dynes v. Hoover*, decided in 1857.

This "hands off" attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.⁴¹¹

Beyond establishing that the Clause 14 grant of power over the "land and naval Forces" extends to all persons actually in the military, the personal jurisdiction cases are important precedent on the very issue raised by Justice Stevens in *Loving*—the constitutional significance of death penalty cases under Clause 14. Recall that Justices Frankfurter and Harlan concurred in *Reid v. Covert* only because Mrs. Covert was on trial for a capital offense. Because the lead opinion, which did not distinguish between capital and non-capital offenses, was the opinion of only four Justices, it was unclear whether Congress' powers under Clause 14 were less expansive in capital cases.⁴¹² In *Singleton*, the Court tackled the very issue pressed by Justice Stevens in *Loving*, and unanimously held that there was no constitutional distinction between Congress' power to establish jurisdiction over capital offenses and its power to do so for non-capital offenses.⁴¹³ In *Covert*, the Government, confident that non-capital jurisdiction was constitutional, argued that Congress had the same power to set capital jurisdiction as non-capital

411. *Id.* at 186-87 (footnotes omitted).

412. *See supra* note 393 and accompanying text. In *Covert*, Justices Frankfurter and Harlan were the only two of the eight Justices participating in the case to find a distinction between capital and non-capital cases. The plurality opinion stated that Congress could not create court-martial jurisdiction over civilian dependents. *See Reid v. Covert*, 354 U.S. 1, 19-20 (1957) (plurality opinion). The two dissenting Justices rejected such a constitutional distinction. *See id.* at 89 (Clark, J., dissenting). Thus, the argument could be made that a majority of the Court in *Covert* rejected the notion that there was a distinction between Congress' Clause 14 powers in capital and non-capital cases, though the plurality and the dissenters disagreed sharply about the extent of those powers. *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (discussing the various opinions in *Reid v. Covert*).

413. *See Singleton*, 361 U.S. at 243-46.

jurisdiction.⁴¹⁴

Singleton, however, was the reverse of *Covert*. Mrs. Dial, the prisoner at issue in *Singleton*, had been tried for a non-capital offense. The Government reversed course from its *Covert* position and adopted the view urged by Justices Frankfurter and Harlan in *Covert*. The Government argued that the Court should permit jurisdiction over Mrs. Dial, a dependent living overseas with her husband, because Congress' power under Clause 14 was broader for non-capital offenses.⁴¹⁵ The Court rejected this position, and held that because Mrs. Dial was not part of the "land and naval Forces," she could not be tried by court-martial, no matter what her alleged offense.⁴¹⁶ In denying jurisdiction over Mrs. Dial, the Court stated that "[t]he test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"⁴¹⁷ Directly confronting the premise that Congress' Clause 14 power depended on the nature of the offense, the Court stated:

Likewise in the Government's historical material—dealing with court-martial jurisdiction during peace . . . it has been unable to point out one court-martial which drew any distinction, insofar as the grant of power to the Congress under Clause 14 was concerned, between capital and noncapital crimes. . . . Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status'" is to defy unambiguous language of art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.⁴¹⁸

Thus, the issue raised by Justice Stevens in his *Loving* concurrence is not one of first impression. The Court considered and rejected the argument that Clause 14 contains some hidden distinction between capital and non-capital offenses. Before Justice Stevens wrote the four-Justice concurrence in *Loving*, this distinction had never captured more than two votes on the Court—those being Justices Frankfurter and Harlan in *Covert*. Moreover, that view was repudiated unanimously by the Court in *Singleton*. For that reason, Justice Stevens' view of Clause 14 cannot prevail without directly overruling the Court's unanimous opinion in *Singleton*, an opinion that found no distinction within Clause 14 between capital and non-capital offenses.

414. See *id.* at 241-42 (characterizing the Government's position in *Covert*).

415. See *id.* at 242.

416. See *id.* at 246.

417. *Id.* at 240-41.

418. *Id.* at 242-43 (footnotes and citations omitted).

V. CONCLUSION

As the foregoing analysis illustrates, Justice Stevens is mistaken in his *Loving* concurrence when he asserts that Congress' power to fix the death penalty jurisdiction of courts-martial is anything less than plenary. The plain language of Clause 14 imposes no limits on Congress' power in this area; nor does it suggest any constitutional distinction between capital offenses and non-capital offenses. The Supreme Court has repeatedly characterized Clause 14 as a plenary grant of power, to say nothing of its repeated assertions that Congress, and not the courts, is to be the primary arbiter of servicemembers' rights. Justice Stevens bases his argument largely on historical practice, but evidence from the constitutional era demonstrates that the Framers desired that regulation of the armed forces evolve with changing times and exigencies. As the Court put it in *Solorio*:

But such disapproval [of court-martial jurisdiction over common-law crimes] in England at the time of William and Mary hardly proves that the Framers of the Constitution, contrary to the plenary language in which they conferred the power on Congress, meant to freeze court-martial usage at a particular time in such a way that Congress might not change it.⁴¹⁹

Furthermore, even if that desire were not so plainly evident, there is nothing in the historical materials to suggest that historical practice was anything more than a series of policy choices, just as the current subject-matter jurisdiction of courts-martial is a policy choice.

Nevertheless, while this Article has endeavored to provide an understanding of what Clause 14 is, it is equally important to recognize what Clause 14 is not. Clause 14 provides that Congress can create whatever subject-matter jurisdiction for courts-martial that it sees fit. That is not to say that the courts are without a role in overseeing the court-martial process. The judiciary, as the final authority in constitutional interpretation, must determine whether a particular statute falls within the regulation of the "land and naval forces," as required by Clause 14. The Supreme Court has spoken in this regard. The test is whether the person regulated is part of the armed forces, such that he is amenable to trial by court-martial. Once Congress passes that jurisdictional hurdle, the courts have no place to second-guess the wisdom of the subject-matter jurisdiction created by Congress.

Beyond enforcing the status test that governs Clause 14, the courts have a second role in military justice matters. The Court of Military Appeals held long ago that the Bill of Rights applies to courts-martial,

419. *Solorio v. United States*, 483 U.S. 435, 446 (1987).

excepting, of course, the indictment and jury rights of the Fifth and Sixth Amendments.⁴²⁰ For example, if Congress were to make certain types of larceny capital offenses under the UMCJ, it would be appropriate for the judiciary to consider whether that would violate the Eighth Amendment. But if the court-martial system itself passes constitutional muster, the courts may not interfere with Congress' decision to allow selected criminal offenses to be tried in that forum.

Having considered the proper roles for Congress and the judiciary in setting and overseeing court-martial jurisdiction, the next question is whether it really matters. The experience under the service-connection test demonstrated that servicemembers were found to be amenable to court-martial jurisdiction upon a very low threshold of service-connection.⁴²¹ Thus, if Justice Stevens' view were to prevail, it is possible that little would change in the death penalty jurisdiction of courts-martial. There are, however, several reasons why it matters. First, if the rationale of Justice Stevens' concurrence prevailed service-connection would be an issue in practically every court-martial where the death penalty is authorized. This is because the death penalty is almost never adjudged for a purely military offense. Between 1942 and 1950, the armed forces executed 148 servicemembers as a result of court-martial sentences.⁴²² Of those cases, 106 were for murder, forty-one were for rape, and one was for desertion in the face of the enemy.⁴²³ The military just does not execute many soldiers for disclosing the watch-word these days. Thus, all the military's capital trials are destined to be for crimes cognizable by civilian courts, which would make service-connection an important consideration in each case if Justice Stevens' view were to prevail. Second, the defense bar considers it a viable issue, ensuring future litigation. At the death penalty defense class taught at the Naval Justice School, one of the first classes is entitled, "Service Connection: The Resurrection of *O'Callahan?*"⁴²⁴ Thus, we can expect the service-connection issue to be raised at every capital trial until the Supreme Court settles the matter

420. See *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (1960). In *Loving*, Justice Thomas expressed an uncertainty as to whether the Bill of Rights applies to courts-martial. See *Loving v. United States*, 116 S. Ct. 1737, 1753 (Thomas, J., concurring) ("It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military, and this Court has never so held.") (citations omitted). It seems highly unlikely that such a view will ever command a majority of the Court.

421. See *supra* note 161 and accompanying text.

422. See John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 40 n.4 (1972).

423. See *id.*

424. See NJS Death Penalty Defense Seminar Syllabus, Sept. 16-18, 1996 class (on file with author).

once and for all.⁴²⁵

As of April of 1997, there were ten servicemembers on the military's death row. Not surprisingly, all are there for murder. It seems likely that each of their crimes would be service-connected under the permissive standard that preceded *Solorio*, but some are closer cases than others.⁴²⁶ Nevertheless, the availability of the death penalty in the military can lead to some very unseemly practices, even when the accuseds facing the death penalty are generally tried for crimes at least

425. This process has already begun. See Defense Motion to Dismiss for Deprivation of the Right to Presentment and Indictment Before a Grand Jury (Oct. 16, 1996), *United States v. Quintanilla* (on file with author). In *Quintanilla*, the defense demanded a grand jury indictment, citing Justice Stevens' concurrence in *Loving*. *Quintanilla* was convicted in November 1996 of murdering his Executive Officer and wounding his Commanding Officer while they were in their on-base offices, during the work day. At the time of the offenses, Sergeant *Quintanilla* was wearing his Marine Corps-issued coveralls, and the evidence suggested that the murders were motivated by what the accused perceived as unfair treatment by his superiors. The raising of a service-connection challenge in *Quintanilla* demonstrates that the defense bar has accepted Justice Stevens' invitation to pursue this issue, though they might not be particularly discerning in selecting appropriate cases in which to raise it.

426. Army Sergeant William Kreutzer, Jr. murdered an officer from his own unit during a sniper attack at Fort Bragg, North Carolina. See generally Nick Adde, *Ruling Clears Way for Execution*, NAVY TIMES (MARINE CORPS ED.), July 1, 1996, at 16. Marine Lance Corporal Kenneth Park and Private First Class Wade Walker murdered two Marines just outside Camp Lejeune, North Carolina. *Id.* Air Force Senior Airman Jose Simoy murdered a fellow base security policeman at Andersen Air Force Base, Guam. The victim was an escort for a bank deposit by a commissary employee. *Id.* Marine Sergeant Jessie *Quintanilla* murdered his Executive Officer. See Tony Perry, *Marine Held in Officer's Slaying*, L.A. TIMES, Mar. 6, 1996, at A3. Marine Lance Corporal Ronnie Curtis murdered his lieutenant and his lieutenant's wife at the lieutenant's home on board Camp Lejeune, North Carolina. See *United States v. Curtis*, 44 M.J. 106, 117 (C.A.A.F. 1996). Marine Sergeant Joseph Thomas murdered his wife in their home aboard Marine Corps Air Station Tustin, California. See *United States v. Thomas*, 43 M.J. 550, 564 (N.M.C.C.A. 1995). Significant parts of the planning of the murder occurred on board Marine Corps Air Station, El Toro, California. See *id.* at 563-64. Private Dwight *Loving* murdered two cab drivers on and near Fort Hood, Texas. See *United States v. Loving*, 41 M.J. 213, 229 (C.A.A.F. 1994), *aff'd*, 116 S. Ct. 1737 (1996). One of the cab drivers was an active duty soldier and the other was a retired soldier. See *id.* Army Specialist Ronald Gray raped and murdered two women near Fort Bragg. See *United States v. Gray*, 37 M.J. 730, 736 (A.C.M.R. 1992). One of the victims was a private in the Army. See *id.* Army Sergeant James Murphy murdered his estranged wife, her five year-old son, and their infant son in Mrs. Murphy's Mannheim, Germany apartment. See *United States v. Murphy*, 36 M.J. 1137, 1140-41 (A.C.M.R. 1993). Clearly, the murders committed by Kreutzer, Parker, Walker, Simoy, Curtis, Thomas, *Loving*, and *Quintanilla* would be service-connected. Gray's offenses are a much closer call. One of his victims was an army private, and the crimes occurred near Gray's base. See *Gray*, 37 M.J. at 730. But the second murder was of a civilian, and Gray was tried and convicted of two additional murders committed during the same general time frame in civilian court. See *id.* at 733 n.1. Murphy's murders might be service-connected merely because they occurred overseas. See *supra* note 159. The Court of Appeals for the Armed Forces recently reversed the death sentence adjudged to Lance Corporal Curtis and Sergeant Thomas. Their convictions of death-eligible murder offenses remain undisturbed. Thus, the fate of these two accuseds is uncertain, pending resentencing hearings. See *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997).

somewhat service-connected. On June 3, 1996, the Honolulu, Hawaii police found the decomposed body of Marine Lance Corporal Juan Guerrero. He had been shot in the head. Four Marines were arrested for the murder. Eventually, the four suspects were turned over to the military for trial. The Navy Times reported the turnover to the military as follows: "Honolulu City Prosecutor Keith Kaneshiro has agreed to let the military try the four Marines because Corps officials have assured him they will seek the death penalty. . . ."⁴²⁷ It is the thesis of this article that the military was free to seek the death penalty on these Marines because of their status, whether their alleged crimes were service-connected or not. But that does not mean the military should exercise jurisdiction just because it can. Hawaii does not have the death penalty, and the fact that the suspects are Marines allows Hawaiian officials to avoid their own law and have these cases before a capital forum. As unfortunate as that state of affairs might be, the culprit assuredly is not the permissive jurisdiction of courts-martial. Even if Justice Stevens' view were to prevail, these suspects would be in the same situation. The facts appear to be that the four Marines conspired to kill a fifth Marine. The offense, in all likelihood, occurred somewhat near their military base, and the conspiracy may have originated there. Thus, this case is as service-connected as *Loving*, a case Justice Stevens found passed the *O'Callahan* test. The potential gamesmanship of dual sovereigns would exist under either situation, and can be solved only by the exercise of wise discretion.⁴²⁸ In the end, the Marine Corps agreed not to seek the death penalty in return for guilty pleas.⁴²⁹ Perhaps this decision was in part attributable to the exercise of discretion necessary in any dual sovereign situation.

Some might read this article and find the limited role of the judiciary in overseeing courts-martial disconcerting. It must be remembered, however, that the thesis of this article is not that servicemembers have no recourse against what they perceive as unfairness within the military

427. *4 Marines Accused of Killing Another*, NAVY TIMES (MARINE CORPS ED.), June 24, 1996, at 2.

428. Forum shopping in light of overlapping sovereigns is not a new phenomenon in criminal law, and is not limited to the military context. Before the Supreme Court applied the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), it was not uncommon for federal agents to pass the fruits of an illegal search to state authorities, who could avoid the exclusionary rule by trying the case in state court. More recently, this practice, known as the "silver platter doctrine," has given way to the "reverse silver platter doctrine," whereby state agents can avoid expansive rights granted by state constitutions by passing the case to federal officials, who can try the case in federal court, without regard to state evidentiary rules. See generally James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223 (1996).

429. See Letter from Major L.S. Powell to author (June 16, 1997) (on file with author).

justice system; rather, it is that the primary guarantor of servicemembers' rights is Congress and not the courts. Congress has proven, time and time again, that it is receptive to the clarion call for reform. The 1920 amendments to the Articles of War came after soldiers returning from the First World War complained about inequities in the military justice system.⁴³⁰ The passage of the UCMJ was another example of Congress heeding the public's call for an overhaul of courts-martial.⁴³¹ Congress mandated warnings about the right against self-incrimination before the Supreme Court required the same of civilians.⁴³² In *Goldman v. Weinberger*,⁴³³ the Supreme Court held that the Air Force could prevent a Jewish chaplain from wearing a yarmulke in uniform.⁴³⁴ Congress stepped in and passed legislation overruling the Air Force regulation at issue in *Goldman*.⁴³⁵

This article has not attempted any sort of broad defense of the military justice system. The reason is that this article is concerned with whether Congress can create court-martial jurisdiction over non-service-connected capital offenses. The question of whether the court-martial system Congress has created is constitutional is a matter for the judiciary. Assuming that the current system is constitutional, it is for Congress to decide whether the system itself is defensible from a moral standpoint, and to make changes if they are desirable. But it is interesting to note that in many ways, Congress has been a more progressive guarantor of servicemembers' rights than the judiciary. The judiciary is concerned with whether the military can enforce a particular regulation, not with whether the regulation is a good idea. Because the Constitution vests such decisions in the political branches, the courts invariably find military regulations well within the discretion of those two branches. Congress, on the other hand, is the body that determines not whether it can enact military legislation, but whether it should. Thus, complaints that courts-martial may impose the death penalty for non-service-connected offenses should be directed to Congress, and not to the courts. The Constitution surely permits such courts-martial. Congress *can create*, and *has created*, court-martial jurisdiction over capital offenses without regard to whether they are service-connected. Whether Con-

430. See Wiener, *supra* note 129, at 21-22.

431. See *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion).

432. Compare Act of May 5, 1950, ch. 169, art. 31, 64 Stat. 107, 118 (requiring warnings about the right to remain silent) with *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating a similar rule for civilian law enforcement officers).

433. 475 U.S. 503 (1986).

434. See *id.* at 509-10.

435. Act of Dec. 4, 1987, Pub. L. No. 100-180, § 508, 101 Stat. 1019, 1086 (codified as 10 U.S.C. § 774 (1994)); see also Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 *MIL. L. REV.* 125 (1988).

gress will continue to authorize such courts-martial is a question for Congress alone to decide, with appropriate input from the American people.