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Commander-in-Chief Authority and the Religious Rights of Service Members in Crisis Times: The Vaccine Mandate as a Call for Reincorporating the Standing Army Fears in Jurisprudence and Depoliticizing the Bench

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INTRODUCTION

> [A]t that moment, the Court wondered what General George Washington would think of this battle between the Executive branch, the First Amendment and RFRA. In fact, the Court asked counsel that question. As America's first and perhaps finest general, Washington's watchwords completely captured this Court's own thinking in a way that borders the prescient.[1]

On March 31, 2022, Judge Matthew McFarland of the United States District Court for the Southern District of Ohio emplaced the above quote into his grant of a preliminary injunction against the Secretary of the Air Force from making any deleterious, administrative decisions against a class of service member plaintiffs.[2] The plaintiffs objected to the COVID-19 vaccine based on their sincere, religious beliefs and faced the possibility of administrative discipline or a less than honorable discharge from military service.[3] That is, the Uniform Code of Military Justice (UCMJ) codifies the failure to obey a lawful order or regulation as a crime, and a vaccine order is presumed, as noted further below, to be a lawful order.[4] McFarland insisted that General George Washington

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1. Doster v. Kendall, No. 22-cv-84, 2022 WL 982299, at *17–18 (S.D. Ohio Mar. 31, 2022).

2. *See generally id.*

3. *Id.* at *2–4. In *United States v. Seeger*, the Supreme Court in 1965 noted that in the conscription law, Congress did not intend to favor one belief over another, and, therefore, the test of sincerity is one in which "meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God . . . ." U.S. v. Seeger, 380 U.S. 163, 176 (1965).

4. 10 U.S.C. § 892. This offense reads:

> Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who–
> (1) violates or fails to obey any lawful general order or regulation;
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
> (3) is derelict in the performance of his duties;
> shall be punished as a court-martial may direct.

Id. Although not noted in the statute, orders are presumed to be lawful. *See, e.g.*, U.S. v. Coombs, 25 C.M.R. 253 (C.M.A. 1958).

would not have tolerated the military denying service members religious exemptions against the vaccine.[5] Such a claim requires a scholarly examination, if, for no other reason than it is difficult to know how a president would use his or her constitutional commander-in-chief powers to confront a unique crisis in the Early Republic.[6] Although most of the Early Republic's leaders openly feared a standing army and Washington recognized these dangers, as president, he argued "a few Troops, under certain circumstances, are not only safe, but indispensably necessary."[7] In his capacity as the commanding general of the Continental Army, he established a policy for the forces under his command to be inoculated through a process known as variolation against smallpox.[8] Moreover, Washington and all presidents succeeding him through the enactment of the UCMJ presided over an austere, military-justice system that was mostly immune from judicial review.[9]

Judicial articulation of history regarding the constitutional powers of a commander in chief is critical to understanding and adjudicating the parameters of the national defense. McFarland's words and the history he reached to without significant elaboration may, if not reassessed in his court or addressed by the higher courts, jeopardize the constitutional governance of the military, including the military's internal discipline. In part, this is because his use of history is imprecise, lacks context, and fails undergraduate standards of rigor.[10] Even if his misuse of the title *general* instead of *president* is a scrivener's error, it illuminates a judicial

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5. *Doster*, 2022 WL 982299, at *18.

6. U.S. CONST. art. II, § 2, cl. 1 states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." Historians have used a variety of dates to define Early Republic. *See generally* Ronald P. Formisano, *Deferential-Participant Politics: The Early Republic's Political Culture, 1789–1840*, 68 AM. POL. SCI. REV. 473 (1974).

7. George Washington, WRITINGS 26:374–76, 388–91, MAY 2, 1783. *See also* WALTER MILLIS, ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY 43 (1956).

8. Ann M. Becker, *Smallpox in Washington's Army: Strategic Implications of the Disease during the American Revolutionary War*, 68 J. MIL. HIST. 381, 422–23 (2004); ELIZABETH A. FENN, POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775–1782 94–95 (2001).

9. *See, e.g.*, Dynes v. Hoover, 61 U.S. 65 (1857); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 52 (2d ed. 1920).

10. On the dearth of historic rigor in the courts, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995).

decision that is shoddy and a disservice to the nation.[11] His ruling does not stand alone. Indeed, three other federal judges noted in this article have unfortunately laced their preliminary injunction grants with irrelevancies and inflammatory comments in lieu of the rigor that the collision of religious freedom and commander-in-chief authority requires to resolve. Those decisions are: the United States District Court for the Southern District of Ohio in *Poffenbarger v. Kendall*,[12] the United States District Court for the Northern District of Texas in *United States Navy Seals 1-26 v. Biden* (*US Navy Seals 1-26*),[13] and the United States District Court for the Middle District of Florida in *Navy Seal 1 v. Biden*.[14] Whether by design or accident, the language of the four preliminary injunction grants shortchange the President's commander-in-chief powers and place the religious rights of future service members in peril. If left to stand, the preliminary injunctions may very well undermine the "good order and discipline" of the military that is central to national security.[15] Yet these preliminary injunction grants are constitutionally feasible. That is, the sincere religious beliefs of service members are a significant constitutional right, and the military should not constrict service members with sincere religious objections to choose between taking the vaccine or facing disciplinary punishment.[16]

It may seem odd then that this law review article chastises four members of the federal bench while endorsing their conclusions. But in

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11. *See, e.g.*, U.S. v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016). The Manual for Courts-Martial states: "'[T]he dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.'" *Id.* (alteration in original) (quoting U.S. MARINE CORPS, MANUAL FOR COURTS-MARTIAL pt. IV, para. 14.c.(2)(a)(iv) (2019)).

12. Poffenbarger v. Kendall, 588 F. Supp. 3d 770 (S.D. Ohio 2022).

13. U.S. Navy Seals 1-26 v. Biden, 578 F. Supp. 3d 822 (N.D. Tex. 2022). The United States Court of Appeals for the Fifth Circuit upheld the preliminary injunction. *See* U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 353 (5th Cir. 2022).

14. Navy Seal 1 v. Biden, 574 F. Supp. 3d 1124 (M.D. Fla. 2021).

15. *See* U.S. v. Brown, 45 M.J. 389, 396 (C.A.A.F. 1996). The military appellate court noted:

> Because of the hostile environment faced by servicemembers, there must be an instinctive obedience to orders from superiors. This instinct must be internalized to accomplish the military mission of protecting the nation to deter war, and if necessary, to successfully fight wars.

Id. See also Brown v. Glines, 444 U.S. 348, 354 (1980).

16. *See, e.g.*, Rigdon v. Perry, 962 F. Supp. 150, 164–65 (D.D.C. 1997) (holding that the military cannot regulate the religious speech of commissioned chaplains made in the course of their religious duties).

doing so, this article has a goal that in the future, the judiciary will utilize a historic model reflective of the nation's military legal history. This article has a secondary objective: the judiciary should be reminded that the use of hyperbole, self-vouching, and the dearth of historic rigor may lead to a reprise of a statement penned by Justice Stephen J. Field into *Tarble's Case* in which he opined that judges, albeit in the state courts, had tried to upend the Union's war efforts during the Civil War.[17] That is, the approach of the four district court judges invites analogies to the "'Copperhead' judges of the Civil-War."[18] Yet there is a path of originalism for the federal judiciary to follow: acknowledgement of the standing army fears endemic to the Early Republic. The standing army fears are not extinct in modern jurisprudence. The Court, as late as 2008, recognized that fears of a standing army were a central philosophy that shaped the Constitution in a compelling Second Amendment opinion.[19]

This article is divided into three parts. Part I, in presenting a historic model for future use, contains two sections. The first section examines the role of religion in the formation of Britain's standing army between the reign of Charles I (1625–1629) and the War for Independence (1775–1783). The second section then examines a significant point of departure from the British treatment of religion in the army during the small United States Army of the Early Republic. The point of departure is that while the British military law mandated religious uniformity through punitive

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17. *In re* Tarble, 80 U.S. 397, 408 (1871). Justice Field noted:

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

Id. at 408–09. *See also* FRANK L. KLEMENT, THE COPPERHEADS IN THE MIDDLE WEST 133 (1960) (describing Sidney Breese, a justice on the Illinois Supreme Court, who argued for the state to restore fraternal relations with the South).

18. On Copperheads, see Jennifer L. Weber, *Lincoln's Critics: The Copperheads*, 32 J. ABRAHAM LINCOLN ASS'N 33, 34–35 (2011). During the Civil War, Republicans derisively referred to "Peace Democrats" who dissented against the war as "Copperheads." *Id.*

19. D.C. v. Heller, 554 U.S. 570, 598 (2008). The Court, in an opinion authored by Justice Scalia, noted: "During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." *Id.*

laws, the United States military law, as noted below, specifically rejected this mandate. Part I analyzes opposition to a standing army in England and in the Early Republic, including in the design and ratification of the Constitution as well as in the 1806 Articles of War. Part II analyzes several judicial opinions and provides an assessment that deference for the military and *dicta* have led the courts to abandon a path of rigor for expediency. This part particularly highlights *Goldman v. Weinberger*.[20] One unique feature of this part's analysis is that it incorporates the judicial correspondences of federal judges to present the motivations underlying the deference. Although Chief Justice John Roberts recently labeled the papers of Harry A. Blackmun an "unfortunate source," for the legal historian, these papers are anything but unfortunate.[21] Part III presents a critical analysis of the four preliminary injunctions noted above. The article concludes with the argument that in the future, the standing army fears should be revived in adjudicating challenges to commander-in-chief authority. Further, the objecting service members should be accorded nothing less than the option of an honorable discharge.

There are seven contextual points important to the article before proceeding to the parts. First, in assessing challenges against the military's myriad of exemption application processes, the courts should give weight to the scientific data and the military's medical expertise that the approved vaccines reduce the possibility of severe illness and that the greater numbers of unvaccinated service members places the military at greater risk.[22] Second, although this article does not delve into the administrative processes that service members must undergo in seeking a religious exemption, the Department of Defense and the three military departments in issuing regulations and policies did so in a process that involves significant legal oversight.[23]

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20. Goldman v. Weinberger, 475 U.S. 503 (1986).

21. *See* Mark Walsh, *Roberts' reference to memos of Blackmun on Roe v. Wade raises questions about SCOTUS justices' private papers*, ABA J. (Dec. 23, 2021, 8:58 AM CST), https://www.abajournal.com/web/article/chief-justice-roberts-refer ence-to-memos-of-justice-blackmun-on-roe-v-wade-raises-questions-about-justice s-private-papers [https://perma.cc/VW65-CLXR].

22. For the Department of Defense's data on the COVID-19 vaccine and military readiness, see *Coronavirus: DOD Response*, U.S DEP'T OF DEF., https:// www.defense.gov/Spotlights/Coronavirus-DOD-Response/ [https://perma.cc/325 G-6F7L] (last visited Oct. 5, 2022).

23. *See* U.S. Dep't of Def., DoD Instruction 5025.01, DoD Issuances Program § 6.1 (2019); Dep't of the Army, Army Regulation 25-50: Preparing and Managing Correspondence (2020); Army Regulation 25-30, Army

Third, this article does not seek to undermine the authority of a commander in chief over the armed forces. In 1827, the Supreme Court in *Martin v. Mott* made it clear that commander-in-chief authority in a crisis time was both supreme and immune from judicial interference.[24] In 1850, the Court in *Fleming v. Page* characterized the military authority of a president as "authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[25] In light of these two early Court opinions, it is unsurprising that the Court held in *Department of the Navy v. Egan* that the federal courts have been, and by implication should continue to be, reluctant to intrude on the authority of the Executive in military and national security affairs.[26] The judiciary, as evidenced in *Rostker v. Goldberg*, particularly defers when Congress enacts military laws.[27] But

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Publishing Program § 1-9 (2015). The Judge Advocate General is the proponent for all legal service publications and will review all DA policy publications for compliance with controlling laws, directives, regulations, and other DA publications. *See* Dep't of the Air Force, Instruction 90-160 § 2.3 (2022) (requiring Judge Advocate review of all departmental publications). *See also id.* § 2.4 (requiring Department of the Air Force General Counsel review of the same).

24. Martin v. Mott, 25 U.S. 19, 30 (1827). In an opinion authored by Justice Story, in regard to presidential orders, the Court stated:

> A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. 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. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.

Id. For a recent study on the limits of Mott, see Joshua E. Kastenberg, *The Limits of Executive Power in Crisis in the Early Republic:* Martin v. Mott*—An Old Gray Mare—Reexamined Through Its Own History*, 82 LA. L. REV. 161 (2021) [hereinafter Kastenberg, *The Limits of Executive Power in Crisis in the Early Republic*].

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

26. Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).

27. Rostker v. Goldberg, 453 U.S. 57, 59 (1981) (upholding the Selective Service Act of 1976 which only required male citizen registrants).

the level of reluctance is lessened when Congress has not specifically authorized a military function.[28]

Fourth, under the Constitution, Congress has the plenary authority to make rules for the armed forces.[29] Although Congress did not specifically pass the Religious Freedom and Restoration Act (RFRA) for the military, this law nonetheless applies to the military, and, therefore, it is a part of the Constitution's "Make Rules" Clause.[30] Indeed, Congress enacted the RFRA to provide for a protection for religious exercise that was broader than the Free Exercise Clause.[31] Therefore, when the military substantially burdens a service member's sincere religious exercise, it must demonstrate a compelling interest and that its policy is the least restrictive means of furthering that interest.[32] The military is not immune from the strict scrutiny standard the RFRA requires.[33]

Fifth, the Constitution's Free Exercise Clause applies to the military and should, in the context of vaccine mandates, be examined through the lens of originalism. As for the Free Exercise Clause, all of the district courts issuing preliminary injunctions against the military relied on *Roman Catholic Diocese v. Cuomo*, in which the Court upheld an injunction against New York's occupancy rules during the COVID-19 crisis.[34] But this reliance is only partially useful. New York is a state free of the demands of military discipline, and its citizens are not immediately subject to a commander in chief's orders.[35] In short, New York's citizens are not a part of the military establishment. A better approach would be

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28. *See, e.g.*, Harmon v. Brucker, 355 U.S. 579, 583 (1958).

29. U.S. CONST. art. I, § 8, cl. 14.

30. U.S. v. Sterling, 75 M.J. 407, 415 (C.A.A.F. 2016). For a recent discussion on the application of the RFRA to the military, see *Roth v. Austin*, 22CV3038, 2022 WL 1568830, at *3–5 (D. Neb. May 18, 2022).

31. *See* Holt v. Hobbs, 574 U.S. 352, 357 (2015); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014); Little Sisters of the Poor Saints Peter and Paul Home v. Pa., 140 S. Ct. 2367, 2383 (2020).

32. *See, e.g.*, Roman Cath. Archbishop of Wash. v. Bowser, 531 F. Supp. 3d 22, 32 (D.D.C. 2021).

33. *Id.*; *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430 (2006).

34. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020). In *Roman Catholic Diocese*, the per curiam noted that rules mandating maximum occupancy limits differed between essential businesses from houses of worship, and those differences were, therefore, not neutral or narrowly tailored to serve a compelling state interest. *Id.* at 66–67.

35. *See* Solorio v. U.S., 483 U.S. 435 (1987). The Supreme Court held that whether a person is subject to court-martial jurisdiction turns "on one factor: the military status of the accused." *Id.* at 439.

to understand how freedom of religion was a part of early United States military law and that suppression of religious faith would create a tyranny not only for the soldiers in the small federal army but also an instrument of tyranny to suppress freedoms in general. In this regard, the Free Exercise Clause should be considered as a part of military legal history rather than separate from it.

Sixth, in order to address the issue of mandatory vaccination before the courts, or for that matter any Free Exercise claim, federal judges should undertake a departure from a half-century of unscholarly deference without harming the chain of command principle. As a most recent example of problematic deference, Justice Samuel Alito in his 2018 dissent in *Ortiz v. United States* argued: "Courts-martial fit effortlessly into the structure of government established by the Constitution. They were instruments of military command."[36] Historically, the federal courts would have deferred to the military.[37] Therefore, if the *effortless* fit into the structure of government is to be taken as a standard for review, it would appear that the federal courts would either side with the military's vaccine policy or not grant review of the various appellants challenges. After all, as Justice Scalia once observed as the Court deliberated the applicability of the Constitution's Appointments Clause to military trial judges, "I am on record in support of the proposition that any process which was around at the beginning of the Republic, and has continued to be used ever since, is *ipso facto* 'due process.'"[38]

Finally, and perhaps most importantly, the historic model, as described in Part I, is a start and by no means the final word on the relationship between the standing army fears, religious freedom in the military, and commander-in-chief authority. Nonetheless, this start is critical to judicial review of the military's vaccine mandate or for other future Free Exercise and RFRA-based challenges to military policies and orders.

I. RELIGION AND THE FEAR OF STANDING ARMIES

There are several differences between the British Army of 1776 and that of the Early Republic. British Army officers obtained their

36. Ortiz v. U.S., 138 S. Ct. 2165, 2199 (2018) (Alito, J., dissenting).

37. *See generally* Stephen B. Lichtman, *The Justice and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907 (2006).

38. Letter from Justice Scalia to Chief Justice Rehnquist, Harry A. Blackmun Papers/638 (Dec. 14, 1993) (on file with the Library of Congress).

commissions through a system of purchase, which resulted in aristocracy and other landed gentry leading the army.[39] The United States's small federal army was not encumbered by the purchase system, as it engendered a social structure antithetical to democracy and Jeffersonians tended to believe that even the small army would become a danger to the republic as a result.[40] In the British Army, *divine service* attendance was a requirement while it was not in the Continental Army fighting the British. Indeed, the 1775 Articles of War, governing the *Continentals* in Article 2, only encouraged attendance at divine service. There were other differences, including in the British punishing of soldiers convicted of *blasphemy*-type offenses. Religious freedom in the Early Republic's federal army can best be understood by the departure from the construct of Britain's standing army as well as Britain's preceding two centuries of religious strife. That is, from the seating of the "Reformation Parliament" in 1529 and Henry VIII's establishment of the Church of England, until the reign of George I (1714–1727), religious warfare in England was commonplace and devastating.[41] And Jacobite insurrectionary challenges to monarchal succession after the final removal of the Stuart Line came with the support of the French Crown.[42] England, between 1538 and 1776, shifted toward the Latin dictum, *cuius regio eius religio*.[43] Translated to "whose realm, their religion," the phrase signified that a

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39. *See, e.g.*, THE ARMY PURCHASE QUESTION AND REPORT AND MINUTES OF EVIDENCE OF THE ROYAL COMMISSION CONSIDERED; WITH A PARTICULAR EXAMINATION OF THE EVIDENCE OF SIR CHARLES TREVELYAN 6 (1858); R. E. Scouller, *Purchase of Commissions and Promotions*, 62 J. SOC'Y FOR ARMY HIST. RSCH. 217, 218–19 (1984); ANTHONY BRUCE, THE PURCHASE SYSTEM IN THE BRITISH ARMY, 1660–1871 20 (1980).

40. Jean M. Yarbrough, *Afterward: The Role of Military Virtues in Preserving Our Republican Institutions*, *in* ROBERT M.S. MCDONALD, THOMAS JEFFERSON'S MILITARY ACADEMY: FOUNDING WEST POINT 207, 208 (2018)

41. On the early Reformation in England, see G. W. BERNARD, THE KING'S REFORMATION: HENRY VIII AND THE REMAKING OF THE ENGLISH CHURCH 26–37 (2005). On warfare, see MARK KONNERT, EARLY MODERN EUROPE: THE AGE OF RELIGIOUS WAR, 1559–1715 133–144 (Higher Educ. Univ. of Toronto Press 2008) (2006); IAN GENTLES, THE ENGLISH REVOLUTION AND THE WARS IN THE THREE KINGDOMS 1638–1652 433–54 (2007).

42. DANIEL SZECHI, THE JACOBITES: BRITAIN AND EUROPE 1688–1788 55 (1994); Michael Schaich, *Introduction*, *in* THE HANOVERIAN SUCCESSION: DYNASTIC POLITICS AND MONARCHIAL CULTURE 1, 18–21 (Andreas Gestrich & Michael Schaich eds., 2016).

43. Sydney E. Ahlstrom, *Religion, Revolution and the Rise of Modern Nationalism: Reflections on the American Experience*, 44 CHURCH HIST. 492, 498 (1975).

ruler's faith was to become the faith of his or her people, regardless of their own desires, and Britain's standing army appeared, in the two centuries before the War for Independence, poised to enforce this dictum.[44]

By 1776, Britain's standing army was not viewed as a tyranny, not only because it usurped Parliament and was used as a political tool, but also because its standing army suppressed religious freedom both in its ranks and over the peoples subject to its power.[45] Despite opposition to a standing army, there are two concessions regarding its establishment and maintenance. First, by the mid-1600's, England's standing army was small in comparison to its continental European counterparts.[46] Second, given the continuous wars in Europe from the Treaty of Westphalia (1648) that involved England and the domestic strife attendant in the period, a standing army likely prevented Britain from becoming a vassal state of France or Spain.[47] In other words, Britain's standing army was likely "a Necessary Evil."[48]

A. England and the Standing Army: A Force for Suppression of Faith

William Winthrop, an influential late-nineteenth-century scholar of military law who authored *Military Law and Precedents*, analyzed the successor to Article 2 of the 1806 Articles of War, which in 1874 had been re-enumerated to the Fifty-Second Article of War.[49] He noted that the origins of the British law on mandatory divine service attendance dated to the *Lawes and Ordinances of War for the Royal Army* in 1639 as well as to the Articles for the Scottish Army and the Code of James II.[50]

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44. *See, e.g.*, FELICITY HEAL, OXFORD HISTORY OF THE CHRISTIAN CHURCH: REFORMATION IN BRITAIN AND IRELAND 3–4 (2003).

45. *See* JOHN TRENCHARD, A SHORT HISTORY OF STANDING ARMIES IN ENGLAND 10–16 (1698); SOME FURTHER CONSIDERATIONS ABOUT A STANDING ARMY 6–7 (1699).

46. *See, e.g.*, Austin Woolrych, *The Cromwellian Protectorate: A Military Dictatorship?*, 75 HIST. 207, 217 (1990).

47. On the wars of the period and Spanish military power, see GEOFFREY PARKER, THE ARMY OF FLANDERS AND THE SPANISH ROAD 1567–1659 35–37 (2004).

48. *See* SOME FURTHER CONSIDERATIONS ABOUT A STANDING ARMY, *supra* note 45, at 3.

49. WINTHROP, *supra* note 9, at 655. The Court in *Reid v. Covert* titled Winthrop as "the Blackstone of Military Law." Reid v. Covert, 354 U.S. 1, 19 n.38 (1957). This titling of Winthrop has continued to the present. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006).

50. WINTHROP, *supra* note 9, at 655.

In comparing the American military law to its British counterpart, Winthrop highlighted a fundamental difference between the British article, which required attendance, versus the United States article, which recommended it. Winthrop argued that the difference between the two articles was constitutional in nature arising from the Establishment Clause.[51] He also recommended that at some future date Congress revoke the article, as it was "clumsy and antiquated, and having now no material value or significance . . . ."[52] Winthrop was not anti-religious as evidenced in his treatise when he insisted that the faith of a witness, including Chinese and Indian witnesses, be accorded a presumption of trustworthiness.[53] He was also instrumental in having the Military Academy build a Catholic Chapel and having witness oaths reflect the faith of the witness rather than that of the court-martial.[54]

There appears to be an absence of modern legal scholarship contextualizing the intersection between military affairs in Britain's history and the impact of the rise of standing armies on British society and law. As the late Professor Pauline Maier noted, "Any student of England's history, particularly of the Stuart period, could list other policies tending toward repression."[55] Near the top of this list, according to Maier, would be the use of a standing army to suppress the population, or, as she observed: "Above all, rulers wanting arbitrary oppression and power would seek standing armies, a final sign that they could not rely on public support through the militia, and that the goals of authority were no longer those of the people."[56] Professor Henry Reece, an emeritus

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51. Winthrop argued: "A statute making it obligatory upon officers or soldiers to attend religious services on Sunday (or other day) would be of doubtful constitutionality, as opposed to the spirit if not the to letter of the organic law." *Id.* at 656.

52. *Id.*

53. *Id.* at 285–86.

54. JOSHUA KASTENBERG, THE BLACKSTONE OF MILITARY LAW 231 (2009).

55. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776 45–46 (1972)

56. *Id.* Professor Pauline Maier (1938–2013) taught at the Massachusetts Institute of Technology and was a distinguished historian of the Early Republic. *See* Gordon Wood, *Pauline Maier: In Memoriam*, 2 AM. POL. THOUGHT V–VI (2013); Matt Schudel, *Pauline Maier, historian of the American Revolution, dies at 75*, WASH. POST (Aug. 15, 2013), https://www.washingtonpost.com/entertainment/books/pauline-maier-historian-of-american-revolution-dies-at-75/2013/08/15/cb306502-05c6-11e3-88d6-d5795fab4637_story.html [https://perma.cc/BE49-LMZ7].

fellow of Jesus College at Oxford University, recently argued that during Oliver Cromwell's tenure as Lord Protector (1642–1660), England experienced outright rule by a standing army for the only time in its history.[57] And it was the creation of this standing army that embedded a fear of standing armies into dissenters during Cromwell's tenure even if the various monarchs of Britain were neither beloved nor humanitarian.[58]

Perhaps, it is a quaint notion that, in a nation governed by the whims of a monarch, Parliament was viewed as a guardian of the English liberties as well as the Protestant faith, which had, at the time of the English Civil War (1642–1651), a slight majority in numbers over England's Catholics. However, there was a division between the Church of England and the Calvinist-leaning Protestants, particularly in Scotland, and as a result, the slight Protestant majority was hardly aligned.[59] When Parliament went to war against Charles I in 1642, he relied on the traditional means of building an army: the various militia levies from the counties.[60] Earlier, in 1639, Charles I mobilized a militia force against Scotland, in what has been titled the "Bishops Wars," in an attempt to militarily impose the Church of England's dictates on more Calvinist Church of Scotland.[61] This system of levies had been in place since the Norman invasion, if not before, and produced a mob rather than a disciplined army by assembling groupings of armed men who were not required to travel great distances from their homes.[62] That is, Charles I pieced together an army of nobility, militia, and pressed men without Parliament's sanction.[63] In 1628, Parliament declared that military law was not permitted in times of peace so that there was a significant

57. HENRY REECE, THE ARMY IN CROMWELLIAN ENGLAND, 1649–1660 1 (2013).

58. JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 11 (Louis Morton ed., 1983).

59. *See, e.g.*, MARK STOYLE, SOLDIERS AND STRANGERS: AN ETHNIC HISTORY OF THE ENGLISH CIVIL WAR 132 (2005); WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY 15 (2016).

60. RICHARD CUST, CHARLES I AND THE ARISTOCRACY, 1625–1642 271–78 (2013).

61. MARK CHARLES FISSEL, THE BISHOPS' WARS: CHARLES I'S CAMPAIGNS AGAINST SCOTLAND, 1638–1640 8 (1994).

62. BANKS & DYCUS, *supra* note 59, at 15. For an apt description of the pre-Norman Saxon militia, see C. WARREN HOLLISTER, THE MILITARY ORGANIZATION OF NORMAN ENGLAND 16 (1965).

63. FISSEL, *supra* note 61, at 8.

limitation on the ability to form a disciplined army had Charles I tried to create such a force.[64]

During the Civil War, Parliament's army, in contrast to Charles I's, was constructed as a standing army based on the European model of Sweden and France.[65] An example of an early national standing army was that of King Gustavus Adolphus who led a Swedish Army to victory over Catholic forces in the 1631 Battle of Breitenfeld.[66] Scottish officers had served in Gustavus's army and contributed to the construction of Parliament's standing army.[67] Later titled the "New Model Army," this force—led by men such as Oliver Cromwell, George Monck, and Thomas Fairfax—stopped a parliamentary vote that would have likely spared Charles I from execution.[68] Moreover, during Cromwell's tenure as the Lord Protector of England, Scotland, and Ireland, he sat at the head of a military government over the peoples of all three lands.[69]

There was a dark side to military rule. In 15 years, Britain underwent military coups that maintained military supremacy under Cromwell and his allies, and they used the Army to suppress Parliament.[70] Whatever

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64. Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 2–3 (1989).

65. STOYLE, *supra* note 59, at 132–38. For a broader overview of the military-political situation in Britain between 1639 and 1660, see BRIAN SANDBERG, WAR AND CONFLICT IN THE EARLY MODERN WORLD 1500–1700 248–51 (2016).

66. C.V. WEDGWOOD, THE THIRTY YEARS WAR 240 (1938).

67. ROGER B. MANNING, AN APPRENTICESHIP IN ARMS: THE ORIGINS OF THE BRITISH ARMY, 1585–1702 60–85 (2006).

68. SARAH BARBER, REGICIDE AND REPUBLICANISM: POLITICS AND ETHICS IN THE ENGLISH REVOLUTION, 1646–1659 121 (1998). Professor Barber noted that in England, the High Court of Justice was comprised of soldiers and members of Parliament, thereby placing the New Model Army on an equal footing with the civil government rather than subordinate to it. *Id.* Neither Monck nor Fairfax ordered the army to purge Parliament. *Id.*

69. *See* CHRISTOPHER DURSTON, CROMWELL'S MAJOR GENERALS: GODLY GOVERNMENT DURING THE ENGLISH REVOLUTION 3–5 (2001).

70. On the nature of the coups, see BLAIR WORDEN, GOD'S INSTRUMENTS: POLITICAL CONDUCT IN THE ENGLAND OF OLIVER CROMWELL, 249–59 (2012); RICHARD DURSTON: CROMWELL'S MAJOR GENERALS: GODLY GOVERNMENT DURING THE ENGLISH REVOLUTION, 1–12 (2001); Joshua E. Kastenberg, *Reversing a Devolutionary Pathway of Shoddy History Protecting Commander in Chief "Authorities" in the Article I Courts: A Dual Call for Judicial Rigor and a Broader Amicus Practice in Adjudicating Military and Veterans Appeals*, 74 BAYLOR L. REV. 396, 449 (2022) [hereinafter Kastenberg, *Reversing a Devolutionary Pathway of Shoddy History*].

else might be said about Parliament, that despite it not meeting regularly or not representing all of the people, it was the one body in Britain that approximated something of a step toward a republican form of government.[71] And while Cromwell and others commanded a parliamentary army, they used it to suppress Parliament when they believed that that body would vote contrary to their interests.

There was a clear religious aspect to Cromwell's New Model Army. It was not only designed to be a permanent force but also to be both religious in nature and religiously intolerant.[72] Its officers were exclusively Protestant and often puritanical.[73] After conquering an Irish garrison at Drogheda, Cromwell's forces murdered the garrison's priests, which, even at that time, was a violation of the laws of war.[74] One recent study notes that after its victory at the Battle of Naseby in 1645, the New Model Army's soldiers murdered women who had accompanied the Charles I's Royalist forces.[75] This atrocity occurred, in part, as a result of propaganda, which claimed that the women who "trudged behind the king's army were a tribe of plundering, immoral, blood-thirsty, Popish, strangers whose hands were still steeped in English blood [from an earlier massacre]."[76] This was hardly an army that would be tolerable in the United States.

After the return of the Stuart Monarchy with the ascension of Charles II (1660–1685), Britain retained its standing army, and Parliament granted the monarch a recognition that he held the supreme command over the nation's militia.[77] In 1673, thirteen years after the monarchy's restoration, Parliament passed "[a]n Act for preventing Dangers which may happen from Popish Recusants," or the "First Test Act."[78] This law prohibited Catholics from filling military and civil offices, and it

71. WORDEN, *supra* note 70, at 249–59.

72. George Drake, *The Ideology of Oliver Cromwell*, 35 CHURCH HIST. 259, 265 (1966).

73. *See* Ian Gentles, *The New Model Officer Corps in 1647: A Collective Portrait*, 22 SOCIAL HIST. 127, 131 (1997).

74. Drake, *supra* note 72, at 265. On the law of war, see Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 25 (1992); Barbara Donagan, *Atrocity, War Crime, and Treason in the English Civil War*, 99 AM. HIST. REV. 1137, 1142 (1994).

75. STOYLE, *supra* note 59, at 139.

76. *Id.* at 141. For a further explanation of religious-based military massacres of civilians during the English Civil War, see Will Coster, *Massacre and Codes of Conduct in the English Civil War*, *in* THE MASSACRE IN HISTORY 89, 92–95 (Mark Levene & Penny Roberts eds., 1999).

77. BANKS & DYCUS, *supra* note 59, at 18.

78. *See* First Test Act 1672, 25 Car. II. c. 2 (Eng.).

required all officers to give an oath denying key aspects of Catholic dogma as well as recognized that the Crown was the head of the Church of England.[79] The Act did not specifically prevent Puritans from holding office, but it certainly discriminated against their faith.[80] Five years later, Parliament passed a Second Test Act that extended a prohibition against Catholics being placed in the House of Lords.[81]

In a sense, the first standing army in peacetime was not Cromwell's New Model Army because that force was created in the English Civil War, but rather the army that was formed when the monarchy returned under Charles II.[82] When Charles II landed at Dover in May of 1660, the New Model Army existed, and, in theory, he was able to take command of its forces by appointing loyal officers to lead it.[83] Shortly after his return to the throne, however, Parliament disbanded the New Model Army because of perceived threats to the throne from its former Puritan officers.[84] In turn, Parliament created a new "Restoration Army" that was in the estimation of John Childs—an emeritus professor of military history at the University of Leeds—designed to protect the restored monarchy and the Church of England.[85] By 1674, any Catholic and Puritan officers commissioned into the army were removed from their positions as a result of the First Test Act.[86] The importance of Childs's scholarship to the field of military law and commander-in-chief authority was most recently made evident in *Larrabee v. Del Toro* where Judge Naomi Rao, in writing for the majority, cited to him on the question of whether the extension of court-martial jurisdiction over retired service

79. Gary S. De Krey, *The First Restoration Crisis: Conscience and Coercion in London*, 1667-73, 25 ALBION: A Q.J. CONCERNED WITH BRIT. STUD. 565, 575–76 (1993).

80. VICTORIA HENSHAW, SCOTLAND AND THE BRITISH ARMY, 1700–1750: DEFENDING THE UNION 38 (2014).

81. BRIAN BEST, WILLIAM OF ORANGE AND THE FIGHT FOR THE CROWN OF ENGLAND: THE GLORIOUS REVOLUTION viii (2021).

82. JOHN CHILDS, THE ARMY OF CHARLES II 7–9 (Harold Perkins & Eric J. Evans eds., 1976) [hereinafter CHILDS, THE ARMY OF CHARLES II].

83. *Id.* at 7. Professor Childs notes that Charles II had the assistance of George Monck, one of the surviving generals of the New Model Army to assist him. *Id.* at 7–8. *See also* ROLAND BAINTON, CHRISTIANITY 312–14 (2000).

84. CHILDS, THE ARMY OF CHARLES II, *supra* note 82, at 9.

85. *Id.* at 17–18.

86. *Id.* at 25. Professor Childs observed: "Seventeenth-century Englishmen regarded [C]atholics with much the same suspicion and hatred that Americans held towards communists after the Second World War." *Id.*

members was compatible with the original understanding of the Constitution.[87]

It is difficult to ascertain how the presence of non-Church of England officers affected the enforcement of the requirement to attend divine service. That is, although there were religious purity requirements for officers in the army and there was a military law requiring attendance at divine service, the court-martial was hardly ever used during this time, and instead, the common law courts usually adjudicated crimes of blasphemy.[88] In other words, refusing to go to church may have been civilly prosecuted as a blasphemy. As a result, one might conclude that there was little certainty as to how the army disciplined dissenting Protestant or Catholic soldiers. Yet as a signal of religious uniformity, a court-martial was permitted to sentence a blasphemous soldier to such punishments as having a tongue "bored with a red-hot iron."[89] This punishment, as noted below, was not permitted in either the Continental Army or the post-Continental Army.

While Parliament was willing to tolerate a standing army under Charles II's command, this would not be the case under that of his successor, James II, who remained a committed Catholic. Indeed, the Whig Party in Britain formed at the end of Charles II's reign to prevent the presumptive Catholic heir James the Duke of York—later James II—from becoming king.[90] Led by the Earl of Shaftsbury, the Whigs believed in a Protestant-led nation, and the fact that James, a Catholic, had refused to take the oath that the Second Test Act proscribed led to the introduction of two bills designed to exclude James from the throne so that he could not officer the army as he desired.[91] In spite of these efforts, James II ascended to the throne and had limited success in placing Catholic officers into the standing army.[92] In 1685, a rebellion

87. Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022). It should be noted that I along with Professor J. Wesley Moore filed an amicus in this appeal opposed to the court's ruling. *Id.* at 103 (Tatel, J., concurring in part and dissenting in part) (citing to the amicus brief).

88. CHILDS, THE ARMY OF CHARLES II, *supra* note 82, at 82; ANTHONY CLAYTON, THE BRITISH OFFICER: LEADING THE ARMY FROM 1660 TO THE PRESENT 56 (2006).

89. *Military Prisons and Punishments*, 9 BRIT. ARMY & NAVY REV. 368, 369 (1866).

90. J.R. JONES, THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS 5–6 (1961).

91. *Id.*; *see also* MICHAEL MULLETT, JAMES II AND ENGLISH POLITICS, 1678–1688 12–20 (1993).

92. MULLETT, *supra* note 91.

presaging James II's removal arose in which the Duke of Monmouth, an illegitimate son of Charles II and a general, unsuccessfully tried to overthrow the government for violating the Test Act and presumably permitting a Catholic revival.[93] This led to the "Bloody Assizes," which bought James II a brief period of peace on the court but ultimately could not save him from being overthrown.[94] And Monmouth's rebellion had both military and religious aspects in the sense that his ministerial supporters preached for James II's Protestant soldiery to rebel against their Catholic officers.[95] In other words, there were external appeals to the army's rank and file to mutiny claiming that a Catholic unlawfully commanded the army.

In 1688, Britain's standing army ceased to exist once more in the sense that it became leaderless with the ouster of James II. With the ascension of William III from the Netherlands to the British monarchy, Parliament issued an order effectively removing all Catholic officers, and by 1691, there were also purges of Protestant officers who were thought loyal to James II.[96] It was not until the passage of the Catholic Relief Act of 1793 where Parliament enabled a Catholic to obtain a military officer commission, and until 1817 Catholics were expressly forbidden from serving as commissioned officers outside of Ireland.[97] The standing army under William III should be viewed in terms of its relationship to Parliament. That is, with William III on the throne, Parliament considered the question of how to prevent the army from becoming a political force and answered this question with fiscal limitations but without altering the singular, religious restrictions placed upon officers.[98]

The 1689 Bill of Rights contained protections against the suspension of law, limited the power of the king, and recognized the right of

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93. JOHN MILLER, JAMES II 139–43 (2000).

94. Mark Goldie, *The Damning of King Monmouth: Pulpit Toryism in the Reign of James II*, *in* THE FINAL CRISIS OF THE STUART MONARCHY: THE REVOLUTIONS OF 1688–91 IN THEIR BRITISH, ATLANTIC AND EUROPEAN CONTEXTS 33, 33–37 (Tim Harris & Stephen Taylor eds., 2013).

95. Melinda Zook, *"The Bloody Assizes:" Whig Martyrdom and Memory after the Glorious Revolution*, 27 ALBION 373, 377–78 (1995).

96. JAMES CHILDS, THE BRITISH ARMY OF WILLIAM III, 1689–1702 4–13 (1987).

97. *See* Catriona Kennedy, '*True Britons and Real Irish': Irish Catholics in the British Army during the Revolutionary and Napoleonic Wars*, *in* SOLDIERING IN BRITAIN AND IRELAND, 1750–1850: MEN OF ARMS 37, 42 (Catriona Kennedy & Matthew McCormack eds., 2013).

98. STEPHEN B. BAXTER, WILLIAM III AND THE DEFENSE OF EUROPEAN LIBERTY, 1650–1702 250 (1966).

Protestants to bear arms.[99] The Bill of Rights also prohibited the maintenance of a standing army without Parliament's consent.[100] In spite of this limitation, Parliament was content to enlarge the army as evidenced that between 1680 and 1780 the army trebled in size and there was a sharp increase in the commitment of national resources for the military accompanied by increased taxes and a growth of national debt.[101] In 1689, Parliament also passed the First Mutiny Act, which in its preamble declared that "[t]he raising or keeping a Standing Army within [the United Kingdom] in time of Peace, unless it be with Consent of Parl[i]ament is against Law . . . ."[102] The act made desertion and mutiny punishable by death.[103] Further, it mandated that soldiers were to be afforded ordinary protections of law, but it did not apply overseas.[104] The annual renewal of the Mutiny Act—a parliamentary requirement with a consequence of disbanding the army if not renewed—was met, in the words of a post-World War II military law scholar Frederick Bernays Wiener, with Jacobite resistance.[105] However, over time and with the numbers of Britain's foreign enemies, the renewal became *a recital*.[106]

While Britain's standing army was quite successful at times, as evidenced by the command of John Churchill, the Duke of Marlborough in the War of Spanish Succession (1701–1715), the concept of a standing army remained unpopular in Georgian Britain particularly amongst the Whigs.[107] Even in regard to the conservative Tory leaders, there was a

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99. English Bill of Rights 1689, 1 W. & M. c. 2.

100. *Id.*

101. *See* John Brewer, *The Eighteenth-Century British State: Context and Issues*, *in* AN IMPERIAL STATE AT WAR: BRITAIN FROM 1689–1815 52 (Lawrence Stone ed., 1994). *See also* Joanna Innes, *The Domestic Face of the Military-Fiscal State: Government and society in eighteenth-century Britain*, *in id.* 96, 108 (noting that in the 1690s, Britain's army grew to over 100,000).

102. First Mutiny Act, 1 W. & M. c. 5 (1688).

103. *Id.*

104. *Id.*

105. Wiener, *supra* note 64, at 4.

106. *Id.* (citing F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 325 (1908)) (posthumous publication of a series of lectures actually delivered in 1888). As far back as the 15th century, there was a division between military and civil law in England with the former viewed as inconsistent with rudimentary due process. *See* David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 7 (1971).

107. TONY HAYTER, THE ARMY AND THE CROWN IN MID-GEORGIAN ENGLAND 12 (1978). Hayter points out that that in 1722, Attorney General Sir Robert Raymond, who later became its chief justice, advised King George I after

consensus that the only means to prevent a tyranny was for the military to remain subject to the power of the civil magistrates.[108] In 1738 during a Parliamentary debate on a proposed expansion to 17,000 soldiers, Sir George Barclay argued: "I have heard it said, Sir, that if we do keep a standing-army, every thing must run into confusion. Sir, I am one of those who think that a standing-army is worse than the worst confusion . . . ."[109]

On the eve of the American Revolution and throughout it, and in spite of the Whig standing army fears, the British Articles of War still contained the following penal statute:

> All officers and soldiers are to frequent divine service and sermon, in the places appointed by the assembling of the regiment, or, [] to which they belong; and if any officer who shall behave there indecently, or irreverently, he shall *be brought before a court martial, there to be publicly and severely reprimanded by the president of the court-martial*.[110]

This article was accompanied by another article of war which reads: "If any officer or soldier shall speak against any known article of the Christian faith, he shall be delivered over to the civil magistrate *to be proceeded against according to law*."[111] The punishments that could result from this offense were, as noted above, fairly severe. Thus, not only did the military law retain its religious character, but it also continued to exist as a protection for the faith of the government—that is, the Church of England—and the British Army that fought to retain the colonies was also being used to retain the Church of England's supremacy in the colonies. This was a part of the colonists' rebellion against the Crown, and it manifested in an important, yet not often articulated, change in the American military law.

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widespread riots that soldiers could only be used to assist in suppressing the riots if the army was overseen by a civil magistrate. *Id.*

108. *Id.*

109. WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, Vol X. A.D. 1737–1739 375 (1812). *See also* HAYTER, *supra* note 107, at 20. Professor Hayter noted that Barclay articulated the Whig position. *Id.*

110. *Mutiny Act, 15 Geo. III, Divine Worship Article I*, *in* WILLIAM ADDINGTON, AN ABRIDGEMENT OF PENAL STATUTES WHICH EXHIBITS AT ONE VIEW, 26 GEO. III, 564 (1786) (emphasis added).

111. *Id.* (emphasis added).

B. The Federal Army of the United States

The nature and conduct of the English Army were well known in the colonies, and the standing army fears were as strong in the colonies as in Britain.[112] In 1768 when British soldiers fired their muskets into a crowd assembled outside of the King's Bench Prison in London, the colonial press widely documented the "Saint George's Field Massacre."[113] The chronological leap from that event to the Boston Massacre was a mere two years, and the colonists who were inclined to rebel saw the two events as parallel.[114] In 1774, the Continental Congress adopted a resolution insisting that Britain's practice of keeping a standing army in the Colonies in a time of peace "without the consent of the legislature of that colony in which such army is kept, is against law."[115] Walter Millis, a military historian during the early Cold War, observed in his book *Arms and Men: A Study in American Military History* that the Redcoats of 1775 were the products of a system that was traceable to the armies of Gustavus Adolphus and had been imported into England with the creation of Cromwell's New Model Army.[116] In rebelling against the Crown, the colonists were also rebelling against the irresponsible use of power enabled by the Crown's standing army.[117]

When the War for Independence began, the British Articles of War governed the Continental Army.[118] However, there was a significant modification in that there was no requirement to attend divine service, and the punishments for blasphemy-type offenses were limited.[119] In 1776, a congressional committee consisting of George Washington, John Adams, Thomas Jefferson, John Rutledge, James Wilson, and Robert Livingston modified the British Articles which the Continental Congress shortly after approved.[120] When Thomas Jefferson entered into his

112. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 60–65 (1967); William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 74 (1990).

113. MAIER, *supra* note 55, at 172.

114. *Id.* at 194; BAILYN, *supra* note at 112.

115. JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 73 (Worthington Chauncey Ford ed., 1904).

116. MILLIS, *supra* note 7, at 14.

117. *Id.* at 39.

118. WINTHROP, *supra* note 9, at 655–66.

119. *Id.*

120. *1 Articles of War adopted September 20, 1776*, *in* LIBRARY OF CONGRESS, 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 788–807 (1906).

second term as president, the government concluded that the 1776 Articles of War were outmoded for the obvious reason that the laws predated the Constitution.[121] The first post-Constitution legislated articles—the 1806 Articles of War—should not only be studied both in the standing-army-fears context but also in light of the Constitution's structure. An additional aspect should also be considered. In 1786, the Virginia Statute for Religious Freedom was brought into law through Jefferson's efforts.[122] Once in the White House, Jefferson intended for the Army to be "republicanized" and removed "all vestiges of monarchal Federalism . . . ."[123] After independence from Britain, the new nation experienced rebellions and perceived threats from Europe. The army also experienced defeats in conflicts with Native Americans. Even with these crises, there is no record in the congressional debates of any effort undertaken to adopt the British military law model in regard to religious conformity.

One of the noted scholars of military affairs in the Early Republic observed: "No principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army . . . ."[124] This fear is evident in many areas. The Federalist Papers contain important expressions of the standing army fears.[125] While the standing army fear originated in Britain, it also came to the Colonies early on as evidenced by John Winthrop (1588–1649), the Puritan migrant and governor of the Massachusetts Bay Colony who penned into his diary, "[H]ow dangerous it might be to erect a standing authority of military men, which might easily, in time, overthrow the civil power . . . ."[126] During the period preceding the War for Independence, the presence of

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121. THEODORE CRACKEL, MR. JEFFERSON'S ARMY: POLITICAL AND SOCIAL REFORM OF THE MILITARY ESTABLISHMENT, 1801-1809 85 (1987).

122. *Virginia Statute for Religious Freedom*, MONTICELLO, https://www.mont icello.org/site/research-and-collections/virginia-statute-religious-freedom [https: //perma.cc/7HZF-EENQ] (last visited May 29, 2022).

123. Theodore J. Crackel*, Jefferson, Politics, and the Army: An Examination of the Military Peace Establishment Act of 1802*, 2 J. EARLY REPUBLIC 21, 25 (1982).

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

125. *See* William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEG. HIST. 393, 420–24 (1991).

126. FRANCIS J. BREMER, JOHN WINTHROP: AMERICA'S FOUNDING FATHER 309 (2003).

the British Army in the Colonies was not merely regarded with benign suspicion.[127] American Whigs coupled the arrival of the "Redcoats" in Boston with the "reinvigoration of the Anglican Church" and the Crown's establishment of admiralty courts, as proof that trials by jury—a fundamental right of the people—were destined for elimination to be replaced by military law.[128] Sir William Blackstone's observation that

> [i]n a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. . . . The laws, therefore, and constitutions of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war . . .

was subsumed into United States jurisprudence and politics alike.[129]

The Constitution was designed to dilute executive power over the military, and it erected a series of hedges against the possibility that military power might evolve into military despotism.[130] Like the Mutiny Act, the existence of an army was predicated on legislative appropriations, and the Constitution limited the length of appropriations to two years.[131] The only part of the Bill of Rights that specifically

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127. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 241 (1998).

128. *Id.*

129. ROBERT MALCOLM KERR, 1 THE COMMENTARIES ON THE LAWS OF ENGLAND OF SIR WILLIAM BLACKSTONE, KNT., FORMERLY ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS 376 (William Clowes and Sons 4th ed. 1876). Blackstone noted, however:

> The discipline, however, of a standing army, cannot be maintained without the means of punishing military offenses more promptly than could be possible by the ordinary tribunals; and the mutiny act (which invariably and punctiliously recites the illegality of a standing army in time of peace, without the consent of parliament,) by creating courtsmartial, completes the legal constitution of the army.

SAMUEL WARREN, BLACKSTONE'S COMMENTARIES SYSTEMATICALLY ABRIDGED AND ADAPTED TO THE EXISTING STATE OF THE LAW AND CONSTITUTION WITH GREAT ADDITIONS 323 (W. Maxwell, Bell Yard, Lincoln's Inn, 4th ed. 1856).

130. RUSSELL WEIGLEY, HISTORY OF THE UNITED STATES ARMY 86 (1967).

131. U.S. CONST. art I, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"). *See also* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 904–05 (Bernard Bailyn ed., 1993) (highlighting the speech of Thomas Dawes Jr. titled, "Legitimate

exempts the military law is in the Fifth Amendment's Grand Jury Clause.[132] The Third Amendment prohibits the forcible quartering of soldiers in private houses in peacetime, and even in wartime, the amendment mandates a legal process.[133] The overwhelming majority of national strength was entrusted to the state militias, and the standing army was kept remarkably small.[134] The Constitution's prohibition of a religious test meant that the federal army's commissioned officers were not required to be of one religion and that religion would not be a marker of loyalty to the new nation.[135] State courts recognized conscientious objection based on faith to militia service.[136] Prior to *Tarble's Case*, state courts granted *habeas* writs to court-martialed soldiers and sailors, upending military authority in the process.[137] One Pennsylvania Supreme Court justice articulated that this state power was necessary to sustain the Republic.[138] These hedges give clear indication that the federal army was not an instrument to regulate or suppress a soldier's faith, and never once was there a reversion to the British model.

As Professor Edward Coffman (1929–2020) noted, "During the three decades after the War for Independence, the American [A]rmy struggled

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Standing Armies" in which Dawes noted, "the army must expire of itself in two years after it shall be raised, unless renewed by representatives, who at that time will have just come fresh from the body of the people.").

132. U.S. CONST. amend. V. The relevant part of the amendment reads: "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.*

133. U.S. CONST. amend. III. The amendment reads: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.*

134. *See, e.g.*, TONY R. MULLIS, PEACEKEEPING ON THE PLAINS: ARMY OPERATIONS IN BLEEDING KANSAS 10 (2004).

135. Note, however, that state constitutions possessed religious qualifications for office. *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

136. White v. McBride, 7 Ky. 61, 62 (Ky. 1815) (holding that the state constitution enshrined conscientious objection as a fundamental right over mandatory militia service); Durham v. U.S., 5 Tenn. 54 (Tenn. 1817).

137. Commonwealth v. Murray, 4 Binn. 487 (Pa. 1812); *In re* Roberts, 2 Am. L.J. 192 (Md. D.C. 1809); *In re* Reynolds, 20 F. Cas. 592, 599 (N.D.N.Y. 1867) (describing the facts of *Roberts*).

138. *Murray*, 4 Binn. at 489.

into existence."[139] In the early 1790s, the United States Army only numbered slightly less than 3,000 soldiers.[140] But as fears of Revolutionary France arose and the "Quasi-War" with that nation occurred, the Adams administration sought to enlarge the standing army.[141] This led to discontent as the federal budget strained, and eventually a public uprising occurred in Pennsylvania that was militarily suppressed.[142] True, the Federalist-dominated Congress enabled the creation of an "Eventual Army" of up to 10,000 men, but this army never came into being.[143] Even at the start of the War of 1812, the army remained at slightly less than 3,000 soldiers.[144] This small number of professional soldiery existed because the standing army fears remained at the forefront of Congress and the nation.[145]

Professor Coffman observed in his scholarship on the early army that there is "virtually nothing" known about the enlisted men in the Early Republic except that many were deserted and many were foreign born.[146] On November 8, 1800, a fire destroyed the War Department's court-martial files, and as a result, there are no recorded proceedings of military trials prior to 1801.[147] This much can be certain: in theory, all violations of the Articles of War are prosecutable. Article 2 of the 1806

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139. EDWARD M. COFFMAN, THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784–1898 3 (1986). *See Edward Coffman (1931–2020)*, DEP'T OF HIST., UNIV. OF WIS.-MADISON (Sept. 22, 2020), https://history.wisc.edu/2020/09/22/edward-coffman-1931-2020/ [https://perma.cc/6TCR-XVGV] (discussing Coffman's reputation as a military historian).

140. PAUL DOUGLAS NEWMAN, FRIES' REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION 69 (2004); ROBERT HENDRICKSON, 2 HAMILTON 456 (1976).

141. ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801 191–98 (1966).

142. *Id.*

143. *See* WILLIAM ADDLEMAN GANOE, THE HISTORY OF THE UNITED STATES ARMY 104 (1924); NEWMAN, *supra* note 140, at 69.

144. RUSSELL F. WEIGLEY, THE AMERICAN WAR OF WAR: A HISTORY OF THE U.S. MILITARY STRATEGY AND POLICY 46 (1973).

145. *See* JAMES M. MCCAFFREY, THE ARMY IN TRANSFORMATION, 1790–1860 1–4 (2006).

146. COFFMAN, *supra* note 139, at 17. Coffman conducted a survey of courts-martial under the command of General Anthony Wayne between 1792 and 1793 and noted that over half of all courts-martial were for desertion and attempted desertion. *Id.*

147. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 27 (1958).

Articles of War "earnestly recommended to all officers and soldiers, diligently to attend divine service . . . ."[148] It would be difficult to prosecute this offense in a court-martial because of the less than commanding language in the article. However, the article did contain a specific prohibition that if an officer behaved "indecently or irreverently at any place of divine worship," the officer would be brought before a court-martial "there to be publicly and severely reprimanded by the president . . . ."[149] Non-commissioned officers—sergeants—and soldiers committing this offense were to be fined *one sixth* of a dollar, and a second offense could result in confinement for 24 hours.[150] The prohibition against uttering *profane oaths* or *execrations* derived from Article 3 and was punishable by a fine.[151] However embarrassing a court-martial might have been for those who committed such offenses, the penalties were far less severe than having one's tongue bored with a hot iron or suffering being lashed.

In spite of the War Department fire, some scholars have researched the records of individual commands in the Early Republic and been able to assess the nature of military discipline. For instance, in 1969 Francis Paul Prucha in his *Sword of the Republic* reviewed courts-martial conducted during a fourteen-month time frame under the command of General Anthony Wayne between 1792 and 1793.[152] Professor Prucha noted that during this period the army held over 190 courts-martial, and of these 84 were for desertion and another 16 for attempted desertion.[153] A total of 49 arose from "bad conduct" offenses that involved alcohol.[154] The sentences were severe, ranging from flogging by 100 lashes to execution in 10% of the cases.[155] Prucha does not mention that any courts-martial arose from a violation of Article 2 or from an act of blasphemy.[156] One can, therefore, deduce that even if such a court-martial had occurred, the sentence would have been remarkably light in comparison to the desertion cases. But this would not be the only logical deduction to make, and one could also surmise that religious freedom was practiced in a manner free from military intrusion.

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148. Act of Apr. 10, 1806, ch. 20, art. 2, 2 Stat. 360 (1806).
149. *Id.*
150. *Id.*
151. *Id.* art. 3.
152. FRANCIS PAUL PRUCHA, THE SWORD OF THE REPUBLIC: THE UNITED STATES ARMY ON THE FRONTIER 1783-1846 31 (1969).
153. *Id.*
154. *Id.*
155. *Id.*
156. *See id.*

In 1846, Lieutenant John Paul Jones O'Brien published *A Treatise on American Military Laws, and the Practice of Courts-Martial; with Suggestions for their Improvement*.[157] In it, he cautioned that Article 2 of the Articles of War only "displays an extreme desire on the part of the legislature, that officers and soldiers" attend divine service.[158] The reasons the article could not command soldiers to attend, O'Brien argued, was because the Constitution prevented Congress from establishing a religion.[159] But he also insisted that "a fundamental axion" is that the government had "no right to meddle, in the remotest manner, with religion in any way . . . ."[160] For this reason, the army could not command its soldiers to attend a divine service or engage in any activity that was contrary to their sincere faith.[161] O'Brien noted, as an example, that the army could not lawfully issue an order to a Jewish soldier to violate Kosher laws and consume "the flesh of unclean animals."[162] Various courts have cited to O'Brien's text including the Court of Military Appeals and the Supreme Court.[163] Interestingly, in 1843, a senior officer tried to court-martial O'Brien after he refused to attend Protestant service.[164] O'Brien was a devout Catholic and believed that his faith provided a defense to the order.[165] President John Tyler agreed with O'Brien and ordered the court-martial quashed while stating "no man's right of conscience should be infringed."[166]

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157. JOHN O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL; WITH SUGGESTIONS FOR THEIR IMPROVEMENT (Lea & Blanchard ed., 1846).

158. *Id.* at 59.

159. *Id.*

160. *Id.* at 60.

161. *Id.*

162. *Id.*

163. Wilkes v. Dinsman, 48 U.S. 89, 124 (1849) (noting that civil courts have jurisdiction over "wrongs" and not military tribunals); Swaim v. U.S., 28 Ct. Cl. 173 (Ct. Cl. 1893) (President cannot interfere with Congress's power over legislating military tribunals); U.S. v. Varacalle, 4 M.J. 181, 182 n.4 (C.M.A. 1978) (general deterrence in sentencing has long been a part of military law).

164. *See, e.g.*, ISABEL M. O'REILLY, ONE OF PHILADELPHIA'S SOLDIERS IN THE MEXICAN WAR: A LIFE SKETCH OF BREVET-MAJOR JOHN P.J. O'BRIEN. A.D. 1818–1850 411–20 (1902).

165. *Id.*

166. *Id. See also* HERMAN ALBERT NORTON, STRUGGLING FOR RECOGNITION: THE UNITED STATES ARMY CHAPLAINCY 1781–1865 52–53 (1977).

My own research at the National Archives and Records Administration concluded that at no time in the court-martial case files listed under Record Group 153—the records of the Judge Advocate General—is there a single court-martial for either a violation of Article 2 or for a blasphemy offense in Article 3.[167] There are eight volumes of federal—non-militia—courts-martial records dating between 1808 and 1815 containing hundreds of courts-martial notations.[168] The trial of Captain T. Crane is likely the closest court-martial to a morals offense in that he was prosecuted for supplying alcohol to his soldiers under the pretense that the alcohol was medicine and for "countenancing the abode of Leah Davis (a common prostitute) in the camp of New Utrecht."[169] However, Captain Crane was acquitted of the offenses.[170] But the bottom line is that there are no courts-martials for violations of either article or analogous courts-martials under the rubric of conduct unbecoming an officer in the Early Republic's standing army. This absence is interpretable that the military establishment, for all of its other draconian aspects, had maximized the practice of religious freedom in that its leadership did not dictate a single, or any, religious tenet. Thus, the army did not merely tolerate religious practices of varying faiths; the 1806 Articles of War, and their predecessors in 1775 and 1776, were designed to maximize religious freedom in a manner wholly alien to their British counterparts. In other words, the standing army fears in the Early Republic led to the creation of an army that would not dictate the faiths of its soldiers.

II. THE JUDICIARY AND THE "INSULATION OF DEFERENCE" FOR A SEPARATE SOCIETY

The military deference doctrine has been characterized as a heightened judicial leniency in reviewing constitutional challenges to

167. National Archives and Records Administration, Record Group 153 (Judge Advocate General Courts-Martial Registers, 1808-1815).

168. *Id.*

169. Court-martial of Captain T Crane in *id.* Vol. I. The specification on the distribution of alcohol read: "aiding the soldiers of his company to purchase and obtain spirituous liquors from the sutlers under the pretense of medicine and pretending to prescribe for the diseases of his soldiers when there were sufficient surgeons attached to the post 'well knowing that the sale of spirituous liquors has been by order of the garrison, forbidden.'" *Id.*

170. *Id.*

military legislation or executive regulations in the military context.[171] During the Court's deliberations on *Rostker v. Goldberg*, Justice Thurgood Marshall argued that the upholding of the registration program would authorize a peacetime draft.[172] To that end, Justice William Rehnquist penned to the majority, "Certainly Congress and the Executive do not have to await the actual outbreak of hostilities if they decide there exists a need for a draft of combat or combat-eligible troops."[173] Justice Blackmun, who joined with Rehnquist, added in the conference discussions that Congress had not acted *unthinkingly* or *reflexively* in developing the Selective Service laws.[174] And Justice Lewis Powell argued that Congress' War Powers were broad and that the post-Vietnam "All Volunteer Force" was a "disaster."[175] However logical Rehnquist's, Blackmun's, and Powell's positions were, the Court designed the majority opinion with the intention of protecting a peacetime conscription that excluded women if a president believed there to be a need for one.

In *United States v. Stanley*, the Supreme Court in a brief opinion determined that soldiers who were secretly administered doses of lysergic acid diethylamide (LSD) and suffered debilitating lifetime injuries could not, without the express language of a statute, sue military officials or others involved in the LSD testing, as the secret tests were part of a bona-fide military program.[176] Part of the Court's reasoning for this decision rested in *Feres v. United States* in which the Court in 1950 determined that the United States is not liable under the Federal Tort

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171. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 162 (2000). *See also* Dianne H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701 (2002). Professor Mazur noted:

> The bedrock premise underlying this judicial deference to the military has been that the military's purpose to fight and win wars was so singular and so fundamentally important to the nation's security that standard judicial review of military-based decisions imposed unacceptable risk.

Id. at 703.

172. Memorandum from Justice Rehnquist to Justices Burger, Stewart, Blackmun, Powell, and Stevens, HAB/333 (June 12, 1981) (on file with the Library of Congress).

173. *Id.*

174. Letter from Justice Blackmun to Justice Rehnquist, HAB/333 (May 13, 1981) (on file with the Library of Congress).

175. Rostker v. Goldberg case notes, Justice Blackmun, HAB/333 (Mar. 27, 1981) (on file with the Library of Congress).

176. U.S. v. Stanley, 483 U.S. 669, 686 (1987).

Claims Act (FTCA) for service member injuries that occur incident to duty.[177] Even though in *Bivens v. Six Unknown Agents* the Court decided that in the absence of the FTCA's express language a civilian could sue the government for deprivation of Fourth Amendment rights, in *Stanley*, the Court made it clear that *Bivens* did not apply to the military.[178] Another part of the Court's rationale in *Stanley* had to do with the more recent decision, *Chappell v. Wallace*.[179]

Chappell originated in a lawsuit filed by several African-American sailors who alleged that their commanding officers racially discriminated against them in violation of the Equal Protection Clause.[180] Once more, the Court, albeit in a unanimous opinion, made it clear that while such suits against the United States might in a civilian context be permitted outside of the FTCA's express language, *Bivens* did not apply to the military unless Congress specifically authorized it.[181] *Feres* again guided the Court to a conclusion that injuries arising out of the specialized hierarchical relationships in the military and the military's need for discipline were matters outside of the judicial branch's competence.[182] Both *Stanley* and *Chappell* are important to the military's vaccine mandate in the sense that both contextualize poor judicial scholarship, and both focus on military discipline. Neither opinion reached back to the standing army fears of the Framers. The Court in *Chappell* pithily noted, "Many of the Framers of the Constitution had recently experienced the 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."[183] Having articulated this point, however, the Court provided no historic basis for it, and one can argue that the Court provided a layer of insulation to the military with an unsupported historic assertion.

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177. *See* Feres v. U.S., 340 U.S. 135 (1950). In regard to *Feres* applying to *Stanley*, see *Stanley*, 483 U.S. at 680–81.

178. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). In regard to *Bivens* applying to the military, see *Stanley*, 483 U.S. at 684.

179. Chappell v. Wallace, 462 U.S. 296 (1983).

180. *See* Wallace v. Chappell, 661 F.2d 729, 730 (9th Cir. 1981).

181. *Chappell*, 462 U.S. at 304. The Court held:

> Taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.

Id.

182. *Id.* at 299.

183. *Id.* at 300–01.

A. Orloff v. Willoughby *and* Gilligan v. Morgan*: Deference to a Chain of Command*

In 1911, the Supreme Court, in *Reaves v. Ainsworth*, first articulated a principle that "[t]o those in the military or naval service of the United States the military law is due process."[184] This principle, which has since been reaffirmed and most recently highlighted by Justice Alito in his *Ortiz v. United States* dissent, is a poignant reminder that the rights of service members are significantly limited in comparison to civilians.[185] For instance, in *Parker v. Levy*, the Supreme Court in 1974 upheld a significant limitation on speech when it had a tendency to undermine good order and discipline.[186] And, in the same opinion, the Court also held that the military's ability to enforce discipline was not subject to the same "void for vagueness" protections that are fundamental to ordinary criminal law.[187] In *Brown v. Glines*, the Supreme Court upheld the military's requirement that service members seek the permission of commanding officers prior to circulating petitions on base even though the petitions were intended to be destined to Congress.[188]

The Supreme Court in *Orloff v. Willoughby* recognized a vast commander-in-chief power by insulating its decisions from judicial review based in the oft-used argument that judges are not tasked with running the Army.[189] Decided in 1953, *Orloff*'s history is pertinent to the issue of military medical policy, including vaccine mandates. Private

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184. Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

185. Ortiz v. U.S., 138 S. Ct. 2165, 2201 (2018) (Alito, J., dissenting).

186. Parker v. Levy, 417 U.S. 733, 758 (1974). The Court, in an opinion authored by Justice William Rehnquist, held:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. See also U.S. *ex rel* Creary v. Weeks, 259 U.S. 336, 344 (1922); U.S. *ex rel* French v. Weeks, 259 U.S. 326, 335 (1922).

187. *Parker*, 417 U.S. at 756.

188. Brown v. Glines, 444 U.S. 348, 374–75 (1980). The Constitution states in the First Amendment: "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

189. Orloff v. Willoughby, 345 U.S. 83, 93 (1953). *See also* Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988); Gilligan v. Morgan, 413 U.S. 1 (1973).

Orloff alleged that the military establishment mistreated him on the basis of his suspected sympathy for communism by placing him in an enlisted position when Congress had earlier assured the American Medical Association that all drafted doctors would be commissioned into the military as doctors.[190] Had Orloff not been drafted as a doctor, he would have been ineligible for conscription because of his age.[191] In other words, although Congress in enacting the draft law recognized a need for military doctors as well as a shortage of doctors in the United States, the military establishment believed it was at liberty to consign Orloff to a position in which he was neither assigned as a doctor nor commissioned as an officer in spite of a legislative assurance to the contrary. During deliberations, the Justices initially agreed that a remand to the district court for further fact finding was important, but Justice Robert Jackson convinced a majority of the Court to decide in favor of the military based on a seemingly irrelevant fact.[192] In a note to Justice Jackson, Justice Sherman Minton penned, "[Y]our opinion throws new light on this view, showing that there had been tendered a commission but Orloff refused it upon the terms on which it was offered. . . . He has rejected a commission, except on his terms."[193] Justices Jackson and Minton were wrong. Orloff did not try to dictate any terms to the military; he tried to preserve what he believed to be an individual right. *Orloff* has been cited as a basis for non-interference in military medical judgements.[194]

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190. *See* JOSHUA E. KASTENBERG & ERIC MERRIAM, IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE – 1940–1954 202–03 (2016).

191. *Id. See also* DIANNE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 42–44 (2010).

192. Memorandum from Justice Jackson to the Members of the Conference, RHJ/183 (Feb. 3, 1953) (on file with the Library of Congress); Orloff v. Willoughby case notes, Justice Jackson, RJH/183 (Mar. 9, 1953) (on file with the Library of Congress).

193. Letter from Justice Sherman Minton to Justice Jackson, RHJ/183 (Feb. 4, 1953) (on file with the Library of Congress).

194. *See, e.g.*, Rank v. Gleszer, 288 F. Supp 174 (D. Colo. 1968) (holding that federal courts not competent to intervene ordering the military to discharge a medically unfit service member); Pro. Helicopter Pilots Ass'n v. Carlucci, 731 F. Supp. 440 (M.D. Ala. 1990) (finding that courts are not competent to assess the military's medical requirements for civilian flight instructors); Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969) (finding courts not competent to assess medical determination that a reservist was fit for active duty); Conte v. Dep't of the Navy, 756 F. Supp. 201 (D.N.J.1991) (holding a determination of fitness for deployment non-reviewable by the courts).

Orloff is hardly alone for the proposition that the federal courts remain observers rather than arbiters in almost all military matters. In 1973, the Supreme Court in *Gilligan v. Morgan* observed that in regard to military operations, "it is difficult to conceive of an area of governmental activity in which the courts have less competence."[195] *Gilligan* arose from an unsuccessful lawsuit seeking judicial oversight over the Ohio National Guard following the Kent State University killings.[196] University students argued that the state military violated their rights of speech and assembly, and instead of seeking monetary damages or injunctive relief, they argued for the Court to establish standards of training and a continuing surveillance over the Guard.[197] In essence, the students wanted an Article III judge injected into the chain of command. It is telling that the majority's conclusion rested on *Orloff* to uphold the principle that the courts are not competent to do so.[198]

B. Dicta as Commander-in-Chief Insulation:

It is not unusual for the Court to both rely on dicta and unsupported historic claims in military law decisions. In his concurrence in *Greer v. Spock*, Chief Justice Warren Burger, without any citation, noted: "It is only a little more than a century ago that some officers of the Armed Forces, then in combat, sought to exercise undue influence either for President Lincoln or for his opponent, General McClellan, in the election of 1864."[199] Although Burger may have been generally correct, he did not cite to any historic or legal sources. Even in non-military matters, the Court's use of military history is suspect. For instance, in *De Coteau v. District County Court for Tenth Judicial District*, the Court, in an opinion authored by Justice Potter Stewart, espoused that the Sioux

195. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
196. *Id.* at 2.
197. *Id.* at 6.
198. *Id.* at 12.
199. Greer v. Spock, 424 U.S. 828, 842 (1976) (Burger, C.J., concurring). *See* JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 12 (1915). Dr Benton concluded that the Democrats were uniform in trying to disenfranchise soldier votes, and this had an effect on the percentage of soldiers who voted for a candidate. *Id.* at 306–10. A recent study indicates that despite the pressures placed on McClellan supporters, they continued to support the general over Lincoln. *See also* ZACHARY A. FRY, A REPUBLIC IN THE RANKS: LOYALTY AND DISSENT IN THE ARMY OF THE POTOMAC 14 (2020).

Nation in 1862 rebelled against the United States.[200] The Sioux in Minnesota did not rebel against the government, and they certainly did not join the Confederacy. Instead, they waged a war in the hopes of reclaiming lands after the federal government violated a treaty and failed to permit land encroachments by settlers.[201] Given that the government failed to enforce the treaty with the Sioux, the term *rebellion* is hardly appropriate.

Two cases, albeit not directly relevant to the military vaccine mandate, highlight the creation and effects of dicta on commander-in-chief authority in the absence of historic analysis. In 1905, the Court in *Jacobson v. Massachusetts* unanimously upheld a state's police power to protect the public health and safety through a compulsory vaccine law.[202] Smallpox had scourged through Massachusetts, and the state legislature responded by enabling municipal governments to determine when a mandatory vaccination program could take effect.[203] Justice John Marshal Harlan, the author of *Jacobson*, fought for the Union in the Civil War until the death of his father in 1863.[204] While the war was still ongoing, he was elected as Kentucky's attorney general with the promise to prosecute matters that would aid the war effort in the state courts.[205] In the middle of *Jacobson* resides interesting yet seemingly irrelevant dicta about the coercive power of the government to protect the health of the public:

> [Y]et he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense.[206]

Perhaps the insertion of seemingly irrelevant dicta regarding military duties into *Jacobson* can be contextualized through Harlan's own

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200. De Coteau v. Dist. Cty. Ct. for Tenth Jud. Dist., 420 US 425, 431 (1975). The New York Times questioned this point. *See Are the Indians Allies of the Rebels?*, N.Y. TIMES, Oct. 1, 1862, at 4, https://www.nytimes.com/1862/10/01/archives/are-the-indians-allies-of-the-rebels.html [https://perma.cc/VD4R-FJ2X].

201. *See, e.g.*, Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 15–20 (1990).

202. Jacobson v. Commonwealth of Mass., 197 U.S. 11 (1905).

203. *See* Commonwealth v. Pear, 183 Mass. 242, 244–45 (Mass. 1903).

204. *See* LOREN P. BETH, JOHN MARSHAL HARLAN: THE LAST WHIG JUSTICE 121–54 (1992).

205. *Id.*

206. *Jacobson*, 197 U.S. at 29.

experiences where, during the Civil War, there was a limited conscription program that brought civilians into the military and subjected them to the orders of a commander in chief.[207] One of Harlan's recent biographers noted that he had great trust in the military.[208] Illustrating the power of *Jacobson's* dicta, Article I military courts of appeals have cited to the opinion on five occasions, including vaccine orders, prior to the outbreak of COVID-19.[209]

Another troubling form of dicta has taken root in regard to the extension of military jurisdiction over a class of veterans who have reentered into civilian society. During the Civil War, Congress passed the first-ever military retirement law, which tied the receipt of a pension to court-martial jurisdiction.[210] In other words, a retired officer in receipt of a pension would be subject to a commander in chief's authority for the duration of the pension or life of the veteran-recipient. The Supreme Court first addressed this law in *United States v. Tyler*.[211] However, *Tyler* did not arise from a court-martial but rather from an officer retired for a medical disability who argued that when Congress enacted a pay raise for officers, the raise also applied to retired officers.[212] The Court, in a unanimous opinion authored by Justice Samuel Miller, determined that the officer was correct, and one of the bases the opinion rested on was that retired officers remained subject to military duties, such as

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207. *See* JOHN WHITECLAY CHAMBERS II, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 50–53 (1987).

208. LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 144–45 (1999).

209. *See* U.S. v. Schwartz, 61 M.J. 567 (N-M Ct. Crim. App. 2005) (upholding a conviction for a failure to obey a lawful order to submit to an Anthrax vaccine); U.S. v. Negron, 28 M.J. 775 (A.C.M.R. 1989) (upholding conviction for willful disobedience of a lawful order to conform to safe-sex practices after being diagnosed as HIV positive); U.S. v. Sargeant, 29 M.J. 812 (A.C.M.R. 1989) (upholding conviction for willful disobedience of a lawful order to conform to safe-sex practices after being diagnosed as HIV positive); U.S. v. Young, 1 M.J. 433 (C.M.A. 1976) (upholding a conviction for failing to obey a lawful order to have his hair trimmed); U.S. v. Chadwell, 36 CMR 741 (N.B.R. 1965) (upholding a conviction for willful disobedience of orders after refusing to submit to smallpox vaccinations).

210. Joshua E. Kastenberg, *Neither Constitutionally Demanded Nor Accurately Interpreted History: The Judicial Conservatives' Pockmarked Pathway of Military Law to the Unitary Executive*, 54 TEX. TECH L. REV. 451, 475–79 (2022) [hereinafter Kastenberg, *Neither Constitutionally Demanded Nor Accurately Interpreted History*].

211. U.S. v. Tyler, 105 U.S. 244 (1881).

212. *Id.* at 244–45.

being detailed as professors to colleges and to continue to wear a military uniform.[213] The Court also recognized that retired officers remained on the *Army Register*, meaning that the government considered the officer on some form of active duty.[214] Since that time, both the Article I courts adjudicating the military establishment's decisions and the Article III courts have considered that the extension of military jurisdiction is compatible with the Constitution.[215] But not once have the courts conducted any meaningful analysis as to why the Constitution would have permitted this jurisdictional extension.[216]

In the Supreme Court's conference leading to *Barker v. Kansas*, an opinion arising from a challenge to a state taxing scheme on military pensions, Justice Antonin Scalia penned to Justice Byron White, the opinion's author, "[I]t seems to me unnecessary to run the risk of destroying *Tyler*, especially since no one has urged that be done."[217] Justice Sandra O'Connor agreed that it was important to "limit the rejection of *Tyler*."[218] Thus, *Tyler*'s dicta has been kept alive as a legal force to stretch military jurisdiction, and with it commander-in-chief authority over retirees, intact. But in theory, if the federal courts were to uphold the military's vaccine mandate, they would also be upholding a potential mandate for the nation's retired veteran population as well.

C. Goldman v. Weinberger*: Insulating the Chain of Command from Religious Freedom*

Perhaps there is no greater poignant example of the military deference doctrine overcoming the First Amendment than Justice William Rehnquist's majority opinion in *Goldman v. Weinberger*.[219] Although not embedded into the actual opinion, in a memorandum to the

213. *Id.* at 246.

214. *Id.*

215. Kastenberg, *Reversing a Devolutionary Pathway of Shoddy History*, *supra* note 70, at 451–54.

216. *Id.* at 460–68.

217. Letter from Justice Antonin Scalia, U.S. Supreme Court Justice, to Justice Byron R. White, U.S. Supreme Court Justice (Apr. 8, 1992) (on file with the Library of Congress). Scalia finished his analysis with "[y]our opinion quite persuasively demonstrates that nothing in *Tyler* or in our subsequent cases establishes that military retired pay is *in all respects* indistinguishable from ordinary compensation." *Id.* (emphasis added).

218. Letter from Justice Sandra Day O'Connor, U.S. Supreme Court Justice, to Justice Byron R. White, U.S. Supreme Court Justice (Apr. 8, 1992) (on file with the Library of Congress).

219. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

conference before *Goldman*'s release for publication, Rehnquist noted that one of the appeals held for Goldman involved a prisoner seeking an exemption for hair length requirements but advised the Court that the prisoner's appeal was inappropriate for a remand because of the unique military separate society nature of *Goldman*.[220] The comparison of prisoners who are involuntary confined and citizens who volunteer for military service may be one of the more unfortunate comparisons a court can make, and yet, one appeal could be affected by the other.

In 1981, Air Force officers threatened a Captain Simcha Goldman with potentially career-ending discipline if he continued to wear his religious headgear.[221] Goldman, a psychologist and an orthodox Jew, had worn a yarmulke at his duty station for several years before the threat.[222] It was not until he testified in a court-martial on behalf of an accused service member that his command sought to penalize his religious exercise.[223]

Prior to his Air Force service, Goldman served with the Marines, and during the Nixon Administration, he appeared with Secretary of Defense Melvin Laird while wearing his yarmulke.[224] It was only after he testified

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220. Memorandum by Justice William H. Rehnquist, U.S. Supreme Court Justice, to the Conference (Mar. 26, 1986) (on file with the Library of Congress).

> The Goldman decision indicates that our review of military regulations is far more deferential than constitutional review of similar laws or regulations designed for civilian society. This is based on the premise that the military is a specialized society sperate from civilian society that required greater discipline and unity. The fact that prison life is similarly distinct from ordinary civilian life implies that a similar degree of deference is appropriate for review of prison regulations restricting the First Amendment rights.

Id. Rehnquist also penned, in an early draft, that the yarmulke wear of idiosyncratic, but on the advice of Brennan who cautioned that such a statement would be considered offensive, altered this in later draft. *See* Letter from Justice William J. Brennan, Jr., U.S. Supreme Court Justice, to William H. Rehnquist, U.S. Supreme Court Justice (Feb. 14, 1986) (on file with the Library of Congress); Letter from William H. Rehnquist, U.S. Supreme Court Justice, to Justice William J. Brennan, Jr., U.S. Supreme Court Justice (Feb. 18, 1986) (on file with the Library of Congress).

221. *Goldman*, 475 U.S. at 505.

222. *Id.* at 504.

223. *Id.* at 505.

224. For the detailed facts of this appeal, see *Goldman v. Sec'y of Def.*, 530 F. Supp. 12, 13 (D.D.C. 1981). *See also* Samuel J. Levine, *Untold Stories of* Goldman v. Weinberger*: Religious Freedom Confronts Military Uniformity*, 66

for an accused service member in a court-martial that his command—which effectuated the court-martial—disciplined him.[225] It is not, in this light, surprising that he sued the Air Force for religious discrimination.[226] Given the Court's repeated upholding of the separate-society doctrine, it is also not unsurprising that Goldman lost in the Court. *Goldman* has generated dozens of law review articles on the intersection of good order and discipline and religious freedom as well as charges against the Court rubber-stamping anti-Semitism in the military. It also resulted in Congress enacting statutory religious rights in the military.[227] The majority in upholding the Air Force's yarmulke ban specifically took pains to separate conventional judicial analysis on religious discrimination and rested its decision on the separate society doctrine it pronounced in *Parker*, *Glines*, and *Orloff*.[228]

As an initial observation, in using the separate-society doctrine to uphold the Air Force's actions, the Court did not provide any standard of scrutiny approximating the strict scrutiny or rational basis standards found in non-military challenges.[229] Instead, the Court adopted the lower court's view that where a military regulation serves a legitimate military goal, the regulation will be upheld.[230] Indeed, Justice Brennan in his

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A.F. L. REV. 205, 209 (2010). The Court knew some of this fact as evidenced by Blackmun's clerk David Sklansky's memorandum which read: "Following his ordination in 1970, he served for two years as a Navy chaplain, during which time he wore the yarmulke without incident." Memorandum from David Sklansky to Harry A. Blackmun, HAB/439 (Dec. 30, 1985) (on file with the Library of Congress).

225. *Goldman*, 475 U.S. at 505.

226. *Id.* at 506.

227. For a brief analysis of the statutory process on this issue, see Louis Fisher, *Statutory Exemptions for Religious Freedom*, 44 J. CHURCH & STATE, 291, 310–12 (2002).

228. *Goldman*, 475 U.S. at 506.

229. *Id.* The Court specifically rejected the application of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) to Goldman's appeal. In *Sherbert*, the Court held that the Free Exercise Clause required the government to demonstrate a compelling interest and that the law in question was narrowly tailored to that compelling interest. *Sherbert*, 374 U.S. at 407–08.

230. *Goldman*, 475 U.S. at 507. The Court stated: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* For an almost contemporary criticism of the majority in *Goldman*, see C. Thomas Dienes, *When the First Amendment is not Preferred: The Military and Other "Special Contexts*,*"* 56 U. CIN. L. REV. 779, 800–05 (1988).

dissent scolded the majority for adopting "a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.'"[231] According to Justice Blackmun, Chief Justice Burger believed that because Goldman had voluntarily joined the military, this added a factor favoring the military over the officer.[232] But given that a selective service law existed, this issue should have been considered irrelevant to the appeal because the nation's male population was—and is—a theoretical step from being compelled into military service. A deeper review of the majority's decision uncovers that the limits of its historic review were confined to the Cold-War era case law. That is, the majority did not cite to an opinion predating *Orloff*.[233] In short, the opinion, as authored by Justice Rehnquist—an acknowledged originalist—is devoid of originalism.[234] Justice Stevens, in concurring, added little to the opinion other than to opine that while Goldman "present[ed] an especially attractive case for an exception from the uniform regulations," if granted, it would lead to other exceptions that could prove deleterious to the military mission.[235]

Goldman served as a basis for overturning the Supreme Court's 1969 opinion, which had limited the military's subject matter jurisdiction to military offenses, of *United States v. Solorio*.[236] In his dissent, Justice Brennan noted that the majority opinion, authored by Rehnquist, not only ignored constitutional limitations on the military but also had a "singleminded determination to subject members of our Armed Forces to the unrestrained control of the military in the area of criminal justice."[237] The Court, in *United States v. Johnson*, cited to *Goldman* for the proposition that the *Feres* immunity extends to non-military federal employees who harm service members in the line of duty.[238] Although

231. *Goldman*, 475 U.S. at 515 (Brennan, J., dissenting).

232. Goldman v. Weinberger case notes, Harry A. Blackmun, HAB/439 (Jan. 17, 1986) (on file with the Library of Congress).

233. *See generally Goldman*, 475 U.S. 503.

234. On Rehnquist's view of originalism, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976).

235. *Goldman*, 475 U.S. at 510 (Stevens, J., concurring).

236. U.S. v. Solorio, 483 U.S. 435, 448 (1987). Rehnquist authored the majority opinion. On the 1969 opinion, see O'Callahan v. Parker, 395 U.S. 258 (1969).

237. *Solorio*, 483 U.S. at 452 (Brennan, J., dissenting).

238. U.S. v. Johnson, 481 U.S. 681, 690–91 (1987). The Court listed *Goldman* alongside of *Parker* and *U.S. v. Shearer*, 473 U.S. 52 (1985) in articulating: "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Johnson*, 481 U.S. at 691 (alteration in original) (citing *Goldman*, 475 U.S. at 507). In *Shearer*, the Court

Justice Scalia did not, in his *Johnson* dissent, criticize this citation, he argued that the Court had no basis in which to extend *Feres* to areas of injury that Congress had not directly specified as exempt from suit.[239] Federal courts have cited to *Goldman* as a basis to uphold the military's ban on homosexuals.[240] There is an interesting aspect to *Goldman* in the lower court in that then-Judges Ruth Bader Ginsburg, Antonin Scalia, and Kenneth Starr dissented from the appellate court's denial of an *en banc* review.[241]

D. Anderson v. Laird*: An Early Clash of Uniformity and Religion*

An earlier example of a clash between the military establishment's stated need for conformity and religious rights occurred in the Court of Appeals for the District of Columbia in *Anderson v. Laird*.[242] Eleven cadets at three of the nation's military academies sued to force the service academies to end mandatory chapel service.[243] The academies offered three chapel services—Protestant, Catholic, and Jewish—but did not allow for cadets to opt out or attend other services without parental permission.[244] At the district court, Judge Howard Francis Corcoran upheld the mandatory attendance rule. However, he noted that achieving a balance between religious rights and military necessity was difficult because the military establishment's leaders had determined that there was a nexus between producing officers worthy of the public's trust who could lead and the Constitution's prohibition against a governmental established religion.[245] The military argued that because officers would

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denied a challenge to Feres immunity even though the military was on notice that one of its service members presented a clear danger to the public safety. *Shearer*, 473 U.S. at 57.

239. *Johnson*, 481 U.S. at 692 (Scalia, J., dissenting). Justices Brennan, Stevens, and O'Connor joined with Scalia in the dissent. *Id.* Brennan recorded in his notes, "When an FTCA case brought by a serviceman does not imperil military discipline, it should go forward." U.S. v. Johnson case notes, William J. Brennan, WJB/738 (undated) (on file with the Library of Congress).

240. Woodward v. U.S., 871 F.2d 1068, 1076 (Fed. Cir. 1989); Thomasson v. Perry, 895 F. Supp. 820, 825 (E.D. Va. 1995).

241. Goldman v. Sec'y of Def., 739 F.2d 657, 658 (D.C. Cir. 1984) (Starr, J., dissenting); *id.* at 660 (Ginsburg, J., with Scalia, J., dissenting).

242. Anderson v. Laird, 316 F. Supp. 1081 (D.D.C. 1970).

243. *Id.* at 1083.

244. *Id.*

245. The problem here facing the Court is but one facet of the age-old problem of how to balance the requirements of the military and its needs for

have to lead diverse service members, chapel service would provide greater knowledge and appreciation of their future officer duties.[246] He also noted that Admiral Thomas Hinman Moorer, the Chairman of the Joint Chief of Staff, had testified that mandatory chapel attendance would enhance an officer's knowledge of duties.[247]

Although Judge Corcoran observed that the United States Military Academy had required chapel attendance since 1821 and the United States Naval Academy required it since 1853, he did not conduct a deeper historical analysis as to what compelled attendance might have meant other than to note, "Tradition—and the continuous public acceptance of practice—carries weight and demands recognition."[248] There is nothing in Judge Corcoran's decision, however, that cites to tradition as having legal weight.

In a decision authored by Chief Judge David Bazelon, the appellate court observed that the nation's history of religious liberty was important to the issue the cadets raised in their suit against the military. [249] Indeed, he noted that "[c]ompulsory church attendance was one of the primary restrictions on religious freedom which the Framers of our Constitution sought to abolish" and that non-attendance was punished as a means to enforce loyalty to an "established sect."[250] Bazelon gave brief treatment to Jefferson's and Madison's insistence on religious liberty, but he did not give any recognition to the 1806 Articles of War.[251] He found, however, that the military violated both the Establishment Clause and the Free Exercise Clause.[252]

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discipline and training with the constitutionally protected rights and privileges of the civilian society.

246. *Anderson*, 316 F. Supp. at 1088–89.

247. *Id.* at 1089.

248. *Id.* at 1087. Judge Corcoran noted "that long continued use cannot turn a constitutional violation into a right. However, the purpose of a statute or regulation can change over the years from 'the impermissible purpose of supporting religion' to the 'permissible purpose of furthering overwhelmingly secular ends.'" *Id.* at 1088.

249. Anderson v. Laird, 466 F.2d 283, 287 (D.C. Cir. 1973).

250. *Id.* at 286. Bazelon insisted that the deference the district court provided to the military would have been intolerable in other governmental functions. *Id.* at 293.

251. *Id.*

252. *Id.* at 286.

Judge Harold Leventhal concurred in the decision but concluded solely that the military had violated the Establishment Clause.[253] In a dissent, Judge George MacKinnon not only would have had the court defer to the military but also argued that the "unfettered power to raise armies and provide a navy" was a constitutional power of the government, and this power limited the First Amendment rights of service members.[254] Instead of focusing on the Army, he insisted that because the Navy's regulations as early as 1800 required naval commanders to cause as many of the ship's sailors as possible "to attend every performance of worship of Almighty God," the Constitution would permit precisely what the service academies required of their cadets.[255] MacKinnon was closer to embracing the British military law than any of the judges listed in this article in the sense that he would have permitted the military to require attendance at singular religious services for all, regardless of the individualized faiths of the service members and cadets.

In addition to the difficulty of demarcating the line between freedom of religion and the Establishment Clause in the military context, *Anderson* illustrates two other aspects of the judicial treatment of religion. The first is that the appellant-cadets had argued that because Article VI of the Constitution prohibits the imposition of any religious qualification for holding office, this would have prohibited mandatory chapel attendance.[256] The appellate court did not consider this issue in striking down the mandatory chapel attendance requirement even though Leventhal indicated that it was significant issue in conference.[257] In essence, the appellate court had an opportunity to articulate that there could be no "Test Act" applied to the military but decided the case on other grounds. The second aspect has to do with the military itself.

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253. *Id.* at 297 (Leventhal, J., concurring).

254. *Id.* at 308 (MacKinnon, J., dissenting).

255. *Id.* at 310.

256. *Id.* at 284. *See also* Memorandum from Judge MacKinnon to Judge Leventhal, HL/69 (June 2, 1971) (on file with the Library of Congress). MacKinnon noted he "would reverse the District Court on the Article VI point." *Id.*

257. Memorandum from Judge Leventhal to Judge Bazelon and Judge MacKinnon, HL/69 (May 13, 1971) (on file with the Library of Congress). Leventhal penned:

> The issue is whether compulsory chapel-attendance regulations for the three service academies violate the establishment and free exercise clauses of the First Amendment, and constitute a religious test for public office in violation of the Sixth Amendment. These points deserve full argument.

Id.

Second, during the appellate court's deliberations, the Air Force Academy superintendent issued a news release claiming that successful military leaders were invariably men of profound faith and then arguing that the academy's purpose for mandatory chapel attendance was to produce such leaders.[258] The superintendent's statement was at odds with the government's argument that the reason for the mandatory attendance was to expose future military leaders to the faiths of men and women they would later lead.[259] There is nothing in the judicial correspondences indicating that this affected the decision, but it certainly gives rise to the possibility that ulterior motives existed in a military policy on religion.

III. THE PROBLEM OF THE LOWER COURTS

Notwithstanding the need for a reincorporation of the standing army fears in cases arising from challenges to command authority, there is a narrow path to challenge a deleterious administrative decision by the military. In 1958, the Supreme Court in *Harmon v. Brucker* determined that where an administrative action by the military violates a statute or exceeds the military's own regulations, the courts may take jurisdiction and grant an aggrieved party relief.[260] In 1971, the United States Court of Appeals for the Fifth Circuit in *Mindes v. Seaman* created a several-part test to determine when the judiciary can review an adverse administrative decision against a service member.[261] *Mindes* originated with a discharged officer's fruitless efforts to convince the military to remove a flawed annual report from his official file that resulted in his removal

258. *See* Motion to Supplement Appendix at 3, Anderson v. Laird, 316 F. Supp. 1081 (D.C. Cir. 1970) (No. 24,617). This news release was attached as an exhibit to the government's filings. *Id.*

259. *Id.* at 1. On June 7, 1971, the attorney representing the appellant cadets filed a motion to supplement their brief to the court with a news release from the Lieutenant General A.P. Clark, the Superintendent of the Air Force Academy. The statement, according to the appellants "establishes the true purpose of the chapel requirement is to imbue the future officers with religious faith, in contradiction to the testimony of the appellees in this case." *Id.* at 3. On May 4, 1971, Clark noted in a news release,

> [W]e are convinced of the need to expose our future Air Force leaders to religion. The power of faith and the spiritual dimensions of leadership have played no small part in the history of our country. And one is hard put to name a successful American military leader in our history who has not at the same time been a man of deep faith.

Id.

260. Harmon v. Brucker, 355 U.S. 579 (1958).

261. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

from active duty.[262] In granting review, the appellate court noted that judicial review not only encompassed the violation of military regulations but also the constitutionality of military statutes, orders, and regulations.[263] Since that time, other courts of appeal have adopted the *Mindes* standard, including the most recent adoption in 2017 by the United States Court of Appeals for the Sixth Circuit in *Harkness v. Secretary of the Navy*.[264]

There are two stages to the *Mindes* test. First, a plaintiff must either allege a violation of a constitutional right or that the military has violated its own statutes or regulations.[265] Then, the plaintiff must have also exhausted available intra-service, corrective measures.[266] If both a violation and exhaustion have been proven, the courts must then weigh four factors to determine justiciability, which include: (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff of withholding review; (3) the degree of interference with the military function; and (4) the extent to which military expertise or discretion is involved.[267] In none of the preliminary injunction grants issued in the past year have the judges considered the standing army fears and their relation to religious freedom in the military, but such a consideration is viable of assessing the first factor. As noted in the introduction, in each of the four preliminary injunction grants, the judges engaged in a constitutionally sustainable analysis, but the conduct of the judges is troubling as it appears—either by intent or accident—to undermine trust in the chain of command.[268] An adoption of the model in Part I would not only make their analysis stronger but would also replace damaging invective with a greater understanding of military law.

A final note on the RFRA is contextually important to the conduct of the district courts. While legislative history has decreased as a tool of statutory interpretation, it is helpful to recall the legislative history of the RFRA and that Congress did intend for it to apply to the military. But

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262. *Id.* at 198–99.
263. *Id.* at 200.
264. Harkness v. Sec'y of the Navy, 858 F.3d 437, 444 (6th Cir. 2017).
265. *Id.*
266. *Id.*
267. *Id.*
268. On trust in leadership, see Peter D. Feaver & Richard H. Kohn, *Civil-Military Relations in the United States: What Senior Leaders Need to Know (and Usually Don't)*, 15 STRATEGIC STUD. Q. 12, 33 (2021). *See also* U.S. v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.").

Congress did so with regard to the unique needs of the military.[269] The House Report on RFRA recognized the *separate society* aspects of the military and then noted that religious liberty claims in the context of the military presented "different problems" for the "operation of the institution."[270] One such difference noted is the military's maintenance of discipline, which the committee noted was a governmental interest of "the highest order."[271] And the Senate Report articulated that they expected little change to the judicial deference to the military in noting: "The courts have always recognized the compelling nature of the military's interests in these objectives [maintaining good order, discipline, and security] in the regulation of our armed services."[272] This historic model presented in Part I arose from the unique environment of military service.

A. Judge Tilman Eugene "Tripp" Self III: A "Mirror of William O. Douglas" in Air Force Officer v. Austin

Although another district court issued a preliminary injunction six weeks earlier, the preliminary injunction issued in *Air Force Officer v. Austin* stands out as one of the two most poignant examples of a judicial work product that contains assertions that may undermine the efficacy of the chain of command.[273] On February 15, 2022, Judge Tilman E. Self of the United States District Court for the Middle District of Georgia enjoined the Air Force from forcing a retirement eligible officer into retirement or disciplining the officer for a refusal to obey a vaccination order.[274] The officer, according to the court record, had previously contracted COVID-19 and fully recovered.[275] Correctly, Judge Self observed that "for more than a half century, federal judges have heeded

269. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

270. Jack Brooks, Religious Freedom Restoration Act of 1993: Report Together with Additional Views 7–9, 103d Cong. 1st Sess., Report 103-88.

271. *Id.*

272. S. Rep. No. 103-111 (1993).

273. Air Force Officer v. Austin, 588 F. Supp. 3d 1338 (M.D. Ga. 2022). Judge Tilman began his preliminary injunction order with the following quote which allegedly came from the plaintiff's chain of command: "Your religious beliefs are sincere, it's just not compatible with military service." *Id.* at 1343. Judge Self then noted in a footnote, "True, he undoubtedly spoke for himself, but when considering the Air Force's abysmal record regarding religious accommodations requests, it turns out he was dead on target." *Id.* at 1343 n.1.

274. *Id.* at 1357.

275. *Id.* at 1345.

the 'abiding reluctance to interfere with military affairs.'"[276] But he also accused the senior military leaders involved—which would include the Secretary of Defense as the named party—of violating the Constitution.[277]

Judge Self found the court had jurisdiction under the *Mindes* test, and he noted that the RFRA provides broader protections than the Free Exercise Clause.[278] But then he cast doubt on the efficacy of the vaccines in a manner that stepped toward that of Judge Roger Benitez of the United States District Court for the District of Southern California who wrongly claimed that the vaccine itself has resulted in more deaths than COVID-19.[279] Judge Self also cast ridicule on the military establishment accusing it of "thumb twiddling" instead of carefully considering the constitutional claims of service members seeking an exemption.[280] He also accused the Air Force of insincerity.[281] He might have recognized that given the judiciary's history of deference to the military, the military's response to COVID-19 is fully understandable, even if in error. Instead, while he recognized the Court's reasoning in *Orloff* that "judges don't make good generals," he countered, "it's a two-way street: Generals don't make good judges—especially when it comes to nuanced constitutional issues."[282]

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276. *Id.* at 1348 (citing Winck v. Eng., 327 F.3d 1296, 1302 (11th Cir. 2003)).

277. *Id.* at 1347. The court penned into its conclusion: "And, what real interest can our military leaders have in furthering a requirement that violates the very document they swore to support and defend?" *Id.* at 1357.

278. *Id.* at 1348–52.

279. *Id.* Self opined:

> Does a COVID-19 vaccine really provide more sufficient protection? This is especially curious given the number of people who have been and continue to be infected after becoming fully vaccinated and receiving a booster—including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Commandant of the Marine Corps.

Id. at 1354; *see* Miller v. Bonta, 542 F. Supp. 3d 1009 (S.D. Cal. 2021).

280. *Austin*, 588 F. Supp. 3d at 1348.

281. *Id.* at 1354.

282. *Id.* at 1351. For a judicial criticism of Judge Self's ruling, see *Short v. Berger*, No. CV 22-1151, 2022 WL 1051852 (C.D. Cal. Mar. 3, 2022). Judge Dolly M. Gee of the United States District Court for the Central District of California found that the military, based on the following articulated data, had acted rationally:

> An unvaccinated person has a 10-times greater chance of getting infected with the virus, a 17-times greater chance of getting hospitalized, and a 20-times greater chance of dying compared to a

And then he engaged in self-vouching by presenting his former military experience, which included his service as an artillery officer as contextual proof that he had a better grasp on the issues before the court than might otherwise be assumed.[283] A graduate of the Citadel in 1990, Self was commissioned into the Army and served for four years on active duty.[284] Whatever the merits of the preliminary injunction grant, Self's ruling is pitiable for two reasons. The first is that it displays his ignorance of military affairs. As noted in the introduction, the Department of Defense and the military departments are staffed with teams of lawyers who examined the constitutionality of the vaccination issues and advised the levels of command on the implementation of orders.[285]

Secondly, by injecting his resume into the preliminary injunction order, Self also parroted Justice William O. Douglas. In *Secretary of the Navy v. Avrech*, Douglas, in his dissent, penned: "[I]n World War I, we were free to lambast General 'Black Jack' Pershing who was distant,

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> vaccinated person. Among active-duty military servicemembers, between July and November 2021, those who were less than fully vaccinated were 14.6-times more likely to be hospitalized than those who were fully vaccinated.

Id. at *1 (internal citations omitted). Additionally, in contrast to Judge Self's ruling, see *Navy Seal 1 v. Austin*, No. 22-0688, 2022 WL 1294486 (D.D.C. Apr. 29, 2022). Issued on April 29, 2022, Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia determined that the court could not enter a redundant preliminary injunction. *Id.* at *17. That is, the plaintiff in *Navy Seal 1* was also a plaintiff in *Navy Seal 1-26*. *Id.* at *6. Moreover, Judge Kollar-Kotelly determined that the prevention of a reassignment order was outside of the court's jurisdiction. *Id.* (citing Harkness v. Sec'y of the Navy, 858 F.3d 437, 444–45 (6th Cir. 2017)).

283. *Austin*, 588 F. Supp. 3d at 1348.

284. *See* Greg Land & John Disney, *Ga. Appeals Court Judge 'Tripp' Self Confirmed to Federal Bench*, TODAY (June 6, 2018, 12:00), https://today.citadel.edu /ga-appeals-court-judge-tripp-self-confirmed-to-federal-bench/ [https://perma.cc/4 VKJ-CW2S]. Judge Self attended the Citadel prior to the admission of women. *See* ALEXANDER MACAULEY, MARCHING IN STEP: MASCULINITY, CITIZENSHIP, AND THE CITADEL IN POST-WORLD WAR II AMERICA 192–212 (2009).

285. *See, e.g.*, U.S. DEP'T OF DEFENSE, DOD INSTRUCTION 5025.01, DOD ISSUANCES PROGRAM § 6.1 (2019); U.S. DEP'T OF THE NAVY, NAVY DIRECTIVES MANAGEMENT PROGRAM MANUAL 5215.1 A-3 (2016).

remote, and mythical."[286] While the public cannot know whether Self has fully thought of the consequences in a mature, scholarly manner, it is possible that, like Douglas, he has sought to upend a governmental policy based on his personal aversion to a presidential administration and its military and foreign policies.[287] Douglas' papers, which are housed at the Library of Congress and are open to the public, evidence his animus toward military leadership and his exaggeration about the importance of his own albeit-short military service.[288]

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286. Sec'y of the Navy v. Avrech, 418 U.S. 676, 680 (1974) (Douglas, J., dissenting). Douglas finished this thought by penning: "We also groused about the bankers' war, the munitions makers' war in which we had volunteered. What we said would have offended our military superiors. But since we could write our Congressmen or Senators about it, we saw no reason why we could not talk it out among ourselves." *Id.*

287. JOSHUA E. KASTENBERG, THE CAMPAIGN TO IMPEACH JUSTICE WILLIAM O. DOUGLAS: NIXON, VIETNAM, AND THE CONSERVATIVE ATTACK ON JUDICIAL INDEPENDENCE 50 (2019); M. MARGARET MCKEOWN, CITIZEN JUSTICE: THE ENVIRONMENTAL LEGACY OF WILLIAM O. DOUGLAS: PUBLIC ADVOCATE AND CONSERVATION CHAMPION 90–97 (2022).

288. In Douglas' draft dissent, he omitted more cutting language. *See* Sec'y of the Navy v. Avrech Draft Opinion, William O. Douglas, WOD/1652 (July 1974) (on file with the Library of Congress). The draft dissent read:

> Soldiers are entitled to grouse. It is indeed endemic in every armed force. They may not substitute grousing for action when a command is given. But in their spare time they can speak their minds about the situation they are in. What respondent wrote out was on the lips of millions of Americans on the street; our papers were filled with it; the late Senator Gruening was saying the same thing in the Senate. The open society permits it; and the open society does not end when one enters a barracks or a rifle range or an encampment or a first line bivouac.
>
> During World War I we made more bitter statements than respondent proposed to make. That was an unpopular war even for those of us who volunteered and were not drafted. We heard lurid tales about General "Black Jack" Pershing that may have been false; but we were ready believers. That it was a banker's war and a munition maker's war. At least we thought so and groused about it. No one went AWOL by reason of our complaints; we shaped up when on duty. But rebellion would have been imminent had we been punished for exchanging views on the nature of the particular war ideas that would have shocked the officers had they overheard our discussions.

Id.

B. Judge Reed O'Connor and the Fifth Circuit: USN Seals v. Biden

The first preliminary injunction issued against the military occurred on January 2, 2022, when Judge Reed O'Connor of the United States District Court for the Northern District of Texas enjoined the Department of the Navy from undertaking any adverse administrative actions against a plaintiff class of Navy Special Warfare service members (SEALs).[289] Initially, the case was titled *USN Seals v. Biden*, but the government succeeded in moving O'Connor to dismiss President Biden as a party.[290] However, this was the administration's only success, as O'Connor, in applying the *Mindes* Test to the plaintiffs' RFRA and First Amendment claims, found for the plaintiffs. O'Connor determined that the Navy had predetermined the denial of the exemptions before any applications were filed.[291] He also noted that aspects unique to the Navy's Special Warfare service, including the wearing of the "Seals Trident" and the loss of deployment qualifications, were at risk for Seals who obtained a religious exemption.[292] O'Connor acknowledged that the Navy had a compelling interest in preventing the spread of COVID-19 but observed that the medical exemption policy—a secular comparison—that granted exemptions for medical reasons did not have the same deleterious, administrative effects that came with a grant of religious exemption.[293] There is nothing offensive about this preliminary injunction grant, but the same cannot be said of the appeal. On February 28, 2022, a *per curiam* decision from the Fifth Circuit upheld the lower court.[294] Although the *per curiam* decision recognized that President Biden had been dropped from the appeal, the court elected to keep the president's name on the decision.[295]

The Fifth Circuit in upholding the preliminary injunction did not even acknowledge President Biden as the commander in chief. The three

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289. U.S. Navy Seals 1-26 v. Austin, Civil Action No. 21-cv-01236, 2022 WL 1025144, at *13 (N.D. Tex. March 28, 2022).

290. *Id.* In *Newdow v. Roberts*, the Court of Appeals for the District of Columbia determined that the federal courts do not have the power to enjoin a president. Newdow v. Roberts, 603 F.3d 1002, 1013 (D.C. Cir. 2010).

291. *U.S. Navy Seals 1-26*, 2022 WL 1025144, at *9.

292. *Id.* O'Connor noted that service members who received religious exemptions were medically disqualified from deploying, but service members that were medically exempted were not medically disqualified from deploying. *Id.*

293. *Id.*

294. US Navy Seals 1-26 v. Biden, 27 F.4th 336, 353 (5th Cir. 2022).

295. *Id.*

judges, however, cast doubt on whether the *Mindes* doctrine of abstention remains in effect for claims arising under the RFRA because the statute displaced the normal operation of other federal laws.[296] Therefore, the plaintiffs would not have had to exhaust their administrative remedies. Nonetheless, the appellate court determined that upholding an injunction against the 35 plaintiffs would not "seriously impede" the official duties of the Navy and when coupled with service members who were deemed medically exempt, the Navy's policies failed the compelling argument test.[297] The judges, however, lapsed into an irrational hyperbole in commenting on the *Orloff-Gilligan* doctrine by incorporating Judge Self's flawed reasoning about generals making constitutional decisions.[298]

C. Judge Thomas M. Rose: Poffenbarger v. Kendall

On February 28, 2022, Judge Thomas M. Rose, a senior district court judge of the United States District Court for the Southern District of Ohio, issued an injunction against the Air Force imposing any adverse administrative actions against Lieutenant Michael Poffenbarger, a reservist who applied for and was denied a religious exemption.[299] Although Judge Rose cited to *Air Force Officer* and *Navy Seals*, he did not distance his preliminary injunction grant from the language of those courts. After being denied an exemption, Poffenbarger refused an order to comply with the vaccine mandate and was issued a letter of reprimand.[300] This is an administrative admonishment that can have adverse effects on an officer's career.[301] Judge Rose noted that while the Air Force had granted 1,513 temporary medical exemptions, it granted

296. *Id.* at 346.

297. *Id.*

298. *Id.* at 349 n.18. Footnote 18 reads: "Judge Tilman E. Self III is a former Army artillery officer." *Id.*

299. Poffenbarger v. Kendall, 588 F. Supp. 3d 770, 777 (S.D. Ohio 2022). Poffenbarger sought a broader exemption that would apply to the whole of the Air Force, but Judge Rose limited the preliminary injunction to the specific case before the court. *Id.* As an intelligence officer, Poffenbarger was assigned to a duty station which, the court acknowledged, would have created an impossibility in regard to social distancing. *Id.* Poffenbarger also had been an active duty enlisted member prior to his commissioning, and while the district court did not note the length of his enlisted service, the loss of his career as a reservist could also mean the loss of a reserve retirement. *Id.*

300. *Id.*

301. SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-2907 § 4.4 (2014).

only nine exemptions based on religion out of a total number of applicants exceeding 3,500.[302]

Judge Rose recognized that the military has the authority to create a universal vaccine program for service members, and this authority dates back to Washington's order that the Continental Army be vaccinated against smallpox.[303] However, even with this authority, he determined that Poffenbarger had a strong likelihood of succeeding on the merits of his claims.[304] He reasoned that this is because the RFRA applies to the military, and while military members have constrained First Amendment rights, those rights nonetheless protect service members.[305] Judge Rose recognized that in *Parker* and *Rostker*, the Court had held that constitutional protections in the military are different than in society at large but then found that Poffenbarger satisfied all four parts of the *Mindes* test.[306] Regarding an injunction impeding a military function—the third part of the *Mindes* test—the court found it compelling that Poffenbarger was a junior officer who, as a reservist, served one weekend a month.[307] Judge Rose then determined that the military failed to protect Poffenbarger's rights under both the RFRA and the First Amendment.[308] Nowhere in his ruling was there a mention of standing army fears.

D. Judge Steven Merryday: Navy Seal 1 v. Biden

On February 18, 2022, Judge Steven D. Merryday of the United States District Court for the Middle District of Florida issued a preliminary injunction against the Department of Defense from altering the military status of two commissioned officers who objected, on the basis of their religious beliefs, to being vaccinated.[309] Earlier on November 22, 2021, in a preliminary order titled *Navy Seal v. Biden*, Merryday ordered the military to provide evidence to the court every fourteen days on the aggregate number of religious exemption requests

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302. *Poffenbarger*, 588 F. Supp. 3d at 779–80.
303. *Id.*
304. *Id.* at 783–84.
305. *Id.* at 785–86.
306. *Id.* at 786.
307. *Id.* at 785.
308. *Id.*
309. Navy Seal 1 v. Austin, 586 F. Supp. 3d 1180, 1183 (M.D. Fla. 2022). Prior to Merryday's issuance of an injunction, the Department of the Navy and the Department of the Air Force provided exemption statistics to the district court pursuant to the district court's order.

as well as the numbers of denials.[310] Merryday's February 18 ruling, retitled as *Navy Seal 1 v. Austin*, concluded that the plaintiffs held sincere, religious-based objections to the COIVD-19 vaccine, and he permitted them to remain anonymous litigants.[311] One of the plaintiffs was the commanding officer of a naval warship, a position that carries with it a unique command role.[312] The other was a Marine Corps officer.[313]

In his order, Merryday presented a detailed exposition on the Establishment Clause, including the writings of Jefferson and Madison, and he briefly noted to the fact that the facts which arose in *Goldman* did not lend themselves to the result.[314] He also concluded that the RFRA applies to the military.[315] But his evaluation of commander-in-chief authority was practically non-existent in the injunction, and there was no mention of *Orloff* or the proper role of the judiciary in reviewing military decisions. However, Judge Merryday highlighted an important aspect of the military justice system, albeit one in which he relegated to a footnote. In the preliminary injunction order, he noted that "[w]ithin minutes of the conclusion of the February 10, 2022 hearing" two other officers provided the court affidavits related to the removal of the naval commander.[316] In according a lesser degree of weight to these documents, he recognized

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310. *Id.*

311. *Id.*

312. *Id.* On the uniqueness of vessel command, see 10 U.S.C. § 8166. This statute reads: "The commanding officer of a vessel or of a naval station takes precedence over all officers under his command." *See also* 32 C.F.R. § 700.802(a) (2022). The Code of Federal Regulations states: "The responsibility of the commanding officer for his or her command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations." *Id.*

313. *Austin*, 586 F. Supp. 3d at 1183.

314. *See id.* at 1194. Judge Merryday noted:

> Without a lucid expression of the applicable standard of scrutiny and an explanation of how the result in *Goldman* follows reasonably from the facts of *Goldman*, the opinion leaves the reader mystified about how a mere yarmulke, worn under a regulation Air Force cap outdoors on the base and in the confines of a psychologist's consulting rooms and clinic on the base, erodes "hierarchical unity" . . . .

Id. (quoting Goldman v. Weinberger, 475 U.S. 503, 508 (1986)).

315. *Id.*

316. *Id.* at 1187 n.3.

the possibility of command influence affecting the affidavits the government provided to the court.[317]

On March 2, 2022, in response to a government motion for the court to stay part of the preliminary injunction grant so that the Navy could reassign the vessel commander, Merryday scolded the Navy's reasons.[318] Senior commanders had "lost confidence" in the plaintiff commander, a common reason for dismissing an officer from command.[319] Judge Merryday expressed doubts as to the senior command authority to dismiss the plaintiff from a command position in the face of a RFRA appeal and ordered naval officials against removing the commander.[320] In other words, he injected the court into the chain of command.

E. Judge Matthew McFarland: Doster v. Kendall

On March 31, 2022, the United States District Court for the Southern District of Ohio issued a preliminary injunction against the Air Force proceeding with disciplinary actions against several of its military personnel who were denied exemptions.[321] Judge McFarland noted that from the nation's beginning, religious freedom was a core liberty.[322] He cited to a John Adams letter to Benjamin Rush, "Nothing is more

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317. *Id.* Unlawful command influence has been called the mortal enemy of military justice. See *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) for a recent analysis of unlawful command influence resident at the highest level of command and the Court of Appeals. For the Armed Forces dismissive nature of it, see Joshua Kastenberg, *Fears of Tyranny: The Fine Line between Presidential Authority over Military Discipline and Unlawful Command Influence through the Lens of Military Legal History in the Era of* Bergdahl, 49 HOFSTRA L. REV. 11, 57–62 (2020). *See also* Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 31–32 (2019) (noting that although the violation against committing unlawful command influence is a crime, not once since the UCMJ's enactment has a violator been disciplined).

318. *See generally* Navy Seal 1 v. Austin, 588 F. Supp. 3d 1276 (M.D. Fla. 2022).

319. *See, e.g.*, Jason A. Vogt, *Revisiting the Navy's Moral Compass: Has Commanding Officer Conduct Improved?*, 68 NAVAL WAR COLL. REV. 1 (2015).

320. *Id.*

321. Doster v. Kendall, No. 22-cv-84, 2022 WL 982299, at *1 (S.D. Ohio Mar. 31, 2022).

322. *Id.* (citing Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting)).

dreaded than the national government meddling with religion."[323] And he also noted James Madison's entreaty that "[t]he Religion then of every man must be left to the conviction and conscience of every man: and it is the right of every man to exercise it as these may dictate."[324] Most importantly, McFarland illuminated the fact that during the colonial period and in even during the War for Independence, the government recognized the importance of conscientious objection.[325] But unfortunately, this was the limit of his military legal history analysis, and it is open to criticism because conscientious objection was, as evidenced in the case law, a matter for the state militias, and it often came with a pecuniary penalty.[326] However, the best means for confronting such criticism is to point out that the early practice of military recognized the supremacy of the civil law over the military.[327]

Judge McFarland recognized that ordinarily the courts require a service member to exhaust administrative remedies in the military before a court can take jurisdiction of a suit.[328] He then went on to rely on *Navy Seal 1*, *USN Seals*, and *Poffenbarger* in applying the plaintiffs' suit to the *Mindes* test.[329] Like the prior three rulings, McFarland concluded that the plaintiffs were likely to prevail on the merits. As a final observation, there was no mention of *Orloff* and a bare recognition of the deference that the courts have employed in challenges to military authority.[330] While McFarland reached to the history of the Early Republic in a manner that surpassed the other three decisions, there was an absence of the standing army fears at the nation's beginnings.

There is another observation worth making. Judge McFarland's insistence that General George Washington would not have tolerated the vaccine mandate's imposition against the plaintiffs is, in addition to

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323. *Id.* (citing Letter from John Adams to Benjamin Rush, June 12, 1812, https://founders.archives.gov/documents/Adams/99-02-02-5807 [https://perma.cc/3JS9-QN4D] (on file with the National Archives)).

324. *Id.* (citing James Madison, *Memorial and Remonstrance against Religious Assessment, [ca. 20 June] 1785*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/5F8D-HN85] (last visited Mar. 28, 2022)).

325. *Id.*

326. Kastenberg, *The Limits of Executive Power in Crisis in the Early Republic*, *supra* note 24 at 195–97.

327. Kastenberg, *Neither Constitutionally Demanded Nor Accurately Interpreted History*, *supra* note 210, at 456–58.

328. *Doster*, 2022 WL 982299, at *9 (citing Parisi v. Davidson, 405 U.S. 34, 38 (1972)).

329. *Id.*

330. *Id.*

presenting a questionable historic evaluation, reminiscent of Judge MacKinnon's conduct in *Edwards v. Carter*, a decision which arose from a challenge against the return of the Panama Canal to Panama.[331] During the arguments in *Edwards*, MacKinnon quizzed the United States Attorney about the Battle of San Juan Hill, a battle that had been fought in Cuba during the Spanish American War and had little to do with the issue before the court.[332] When the government's attorney, in MacKinnon's estimation, did not express sufficient historic knowledge of the battle, MacKinnon delivered a lecture from the bench.[333]

CONCLUSION

On March 25, 2022, the Supreme Court, in a *per curiam* opinion, granted a partial stay against the enforcement of the preliminary injunction in *Austin v. United States Navy Seals 1-26*.[334] The partial stay specifically applied to Judge Merryday's injunction against the Navy from undertaking personnel decisions on deployments, assignments, and "other operational decisions" against the plaintiffs.[335] Justice Brett Kavanaugh concurred with the *per curiam* but charitably penned that Judge Merryday was well-intentioned.[336] In citing to *Department of the Navy v. Egan*, he observed that there is a traditional reluctance for courts "to intrude upon the authority of the Executive in military and national security affairs."[337] He also cited to *Gilligan* for the proposition that courts generally do not possess the competence to inquire into "professional military judgments."[338] Justice Kavanaugh expressed his belief that the district court was well-intentioned but had inserted itself into the Navy's chain of command.[339]

If the concurrence is overly charitable toward a single judge, Justice Alito's dissent is outright problematic.[340] There was no consideration shown as to how constitutional restraints against a commander in chief might have formed at the nation's beginning or how the principle of

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331. *See* Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978).

332. HISTORICAL SOCIETY OF THE DISTRICT OF COLUMBIA CIRCUIT, ORAL HISTORY AGREEMENT OF ROBERT E. KOPP (July 30, 2014).

333. *Id.*

334. Austin v. U.S. Navy Seals 1-26 v. Biden, 142 S. Ct. 1301, 1302 (2022).

335. *Id.* at 1301.

336. *Id.* at 1302–08 (Kavanaugh, J., concurring).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* (Alito, J., dissenting).

religious freedom might have been such a restraint. Instead, Justice Samuel Alito, and Justice Neil Gorsuch who joined with him, complained of a difficult administrative process for exemptions and then sought specificity from the military as to what duties the unvaccinated plaintiffs might be assigned to.[341] And they groused about the "shabby treatment" given to the plaintiffs. To be sure, they argued that the Free Exercise Clause applied to the military, but the only decision that they cited to for the application of the Free Exercise Clause was *Goldman*.[342] And they relied on *Chappell* for the proposition that the courts are not closed to service members. Both of the opinions ought to have been reconsidered by the dissent. "Shabby treatment" is not a legal standard. After all, the military has subjected service members to LSD and to nuclear testing, which have caused great harm, but time and again, the judiciary has insulated the military from liability. And yet, Justice Alito's statement is not the first time that "shabby treatment" has been articulated by a member of the bench. During the *Orloff* deliberations, Justice Felix Frankfurter criticized Justice Jackson's argument on Dr. Orloff's alleged attempt to gain a commission on his own terms rather than reviewing Orloff's assertion of a constitutional right:

> I do not see how we can dispose of this case with total indifference to this issue. This seems to me the more inadmissible in view of the change of the government's position, which seems to me shabby, by the Government as it is driven from position to position to keep this fellow, at all hazards, in the Army, though he could not be drafted under the general draft law.[343]

Whether the military legal historic model highlighting the standing army fears and the departure from the British military law mandates on

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341. *Id.* The dissent cited to the Department of Defense Dictionary of Military and Associated Terms in arriving at the conclusion that the majority enabled the Navy to assign the plaintiffs to menial tasks. *Id.* at 1306.

342. *Id.* at 1306–07.

343. Memorandum from Justice Frankfurter to the Members of the Conference, RHJ/183 (Feb. 3, 1953) (on file with the Library of Congress). Jackson penned on Frankfurter's memorandum:

> This would be a great situation—any Communist can simply refuse to state as to loyalty, and can completely avoid the draft while loyal doctors serve. If Congress had plainly required it, we would have to say so, but we should be reluctant to read in such a requirement on the basis of legislative history.

Id.

religion in the New Republic are sufficient to convince jurists that service members who, based on their sincere faith, object to a vaccine should be accorded a ruling that permits them to work alongside their peers without restriction is not the purpose of this article. The military's ability to defend the nation's interests is of paramount importance, and as a part of this defense, the commander-in-chief authorities of a president and senior officials must be preserved. But religiously objecting service members should also be accorded the full respect of the courts and the military and should not be penalized for their beliefs. That is, the issuance of administrative discipline, or worse: courts-martial, should be abated until a fuller consideration of religious freedom in the military is undertaken, and nothing more drastic than an honorable discharge be offered. Such a consideration should also result in a reassessment of the deference doctrine and, in particular, *Goldman*.[344]

Again, it is possible to arrive at the preliminary injunction grants of the lower courts, but their reasoning is hyperbolic, bereft of rigor, and unbecoming of the judiciary. In 1962, Frederick Bernays Wiener delivered a lecture of the Selden Society in London titled "Uses and Abuses of Legal History: A Practitioner's View."[345] He concluded his lecture with the admonition:

> Indeed, I will submit to you on this occasion, as my firmly settled conviction the view that a lawyer who is ignorant of legal history, who is not trained to use the techniques of historical scholarship, and who is unable to defend his client's case against fictitious history and unproved or unprovable historical assertions when those are used against it, is not simply unlearned, he is poorly equipped, and therefore ineffective. He is, in short, not truly a lawyer; he is only a member of the legal profession.[346]

I agree with Wiener on this point, and it is as applicable to judges as it is to lawyers. Except, when a United States District Court judge ignores the history of the nation's military law as it applies to commander-in-chief authority and substitutes his or her own personal resume into the ruling, it is not merely unbecoming of the judiciary; it erodes the principle of commander-in-chief authority and sets up the

344. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

345. FREDERICK BERNAYS WIENER, USES AND ABUSES OF LEGAL HISTORY: A PRACTITIONER'S VIEW (1962).

346. *Id.* at 32.

service members who have submitted to this authority to make poor choices.

The objecting service members are not without historic precedent for their defense. Indeed, their sincere, religious objections are a part of the continuum of standing army fears, which resulted in a significant departure from the British military law. Had these service members been in the standing armies of Cromwell, Charles II, William III, Anne, or the three Georges, then the answer would have been simple: the service members would have been court-martialed and subject to the possibility of heinous punishment. But from the beginning of the Early Republic, their objections would have been considered an act of religious freedom, and while they may have been honorably discharged, it is unlikely they would have suffered any deleterious penalty. This is because religious freedom in the Continental Army, as well as its successor small permanent army, was a part of the fears of standing army construct underlying the creation of the military law itself.