Can Grandpa Really be Court-Martialed? The Constitutionality of Imposing Military Law upon Retired Personnel

MAJOR MARC J. EMOND*

> *And like the old soldier of that ballad, I now close my military career and just fade away—an old soldier who tried to do his duty . . . .*[1]

I. Introduction

Reaching the twenty years of service mark and being able to retire is the dream of every member of the Armed Forces. Retirees continue to receive monthly retirement pay[2] but can live a life indistinguishable from their civilian neighbors. They do not have to worry about formations, superior officers, physical fitness tests, or consistently moving from one place to another. The only daily reminders of their military service are the memorabilia on their walls and the retirement identification in their wallets. Their military service can slowly fade to a distant memory marked by photos and stories to their grandchildren.

---

* Judge Advocate, United States Army. Presently assigned as Special Trail Counsel, Office of the Special Trial Counsel-Alaska Field Office, Joint Base Elmendorf-Richardson, Alaska. L.L.M., 2022, The Judge Advocate General's Legal Center and School. J.D., 2012, Boston College Law School; B.A., 2009, The Citadel, The Military College of South Carolina. Previous assignments include Government Appellate Attorney, United States Legal Services Agency, Fort Belvoir, Virginia, 2019–2021; Command Judge Advocate, Mission Command Element, Poland, 2019; Administrative Law Attorney, 1st Infantry Division, Fort Riley, Kansas, 2018–2019; Senior Trial Counsel, 1st Infantry Division, Fort Riley, Kansas, 2016–2018; Trial Counsel, Cyber Center of Excellence and Fort Gordon, Fort Gordon, Georgia, 2014–2016; Special Victim Counsel and Legal Assistance Attorney, Cyber Center of Excellence and Fort Gordon, Fort Gordon, Georgia, 2013–2014. Member of the Bars of Massachusetts, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States. A previous version of this paper was submitted in partial completion of the Master of Laws requirements of the 70th Judge Advocate Officer Graduate Course.

[1] Gen. Douglas MacArthur, Address to U.S. Congress (Apr. 19, 1951) (transcript available in the Library of Congress).

[2] *See* 10 U.S.C. § 12731 (providing for retired pay after twenty years of service).

But do retirees truly fade away after their careers have ended? While they may resemble the civilians around them, the military still subjects them to military law under the Uniform Code of Military Justice (UCMJ).[3] Through the UCMJ, Congress has provided court-martial jurisdiction over all retired personnel who receive pay.[4] This jurisdiction applies not only to those receiving retired pay due to length of service,[5] but also those who receive pay from the Department of Veterans Affairs because they have been deemed unfit for future service due to permanent disability.[6]

Congress derives its authority to implement the UCMJ from its power to "make Rules for the Government and Regulation of the land and naval [f]orces" as well as the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[7] The determinative question is therefore one of status, namely, whether retirees fall within the term "land and naval [f]orces."[8]

Addressing this question of whether military retirees can constitutionally be subject to military law is not inconsequential. The Supreme Court has routinely viewed the military as separate from civilian society and entitled to lesser rights in the pursuit of good order and discipline.[9] Even though military law has expanded the protections afforded to the accused,[10] they still pale in comparison to those rights entitled to civilians within the

[3] UCMJ art. 2(a)(4) (2019); 10 U.S.C. § 802(a)(4) (stating that "[r]etired members of a regular component of the [A]rmed [F]orces who are entitled to pay" are subject to the UCMJ). Additionally, those who complete at least twenty years of enlisted service within the U.S. Navy or Marine Corps may preliminarily retire to the Fleet Reserve. 10 U.S.C. § 8330(b). These individuals also remain subject to the UCMJ under Article 2(a)(6). UCMJ art. 2(a)(6) (2022).
[4] UCMJ art. 2(a)(4) (2019).
[5] *See, e.g.*, United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).
[6] *See* United States v. Bowie, 34 C.M.R. 411, 412 (C.M.A. 1964); *see also* United States v. Reynolds, No. 201600415, 2017 CCA LEXIS 282 (N-M. Ct. Crim. App. 2017).
[7] U.S. CONST. art. I, § 8, cls. 14, 18 (original style retained).
[8] Kinsella v. United States, 361 U.S. 234, 240–41 (1960).
[9] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955); Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion).
[10] *See* Ortiz v. United States, 138 S. Ct. 2165, 2174 (2018) ("The procedural protections afforded to a [S]ervice member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or [F]ederal." (citation omitted)).

constitutional Article III courts.[11] For instance, unlike their civilian counterparts, military defendants are not entitled to: a grand jury indictment;[12] a unanimous verdict in all felony cases;[13] a randomly selected jury of peers from across the community;[14] or a wholly independent judiciary.[15] Furthermore, those within the Armed Forces are significantly restrained, compared to their civilian counterparts, in what they are at liberty to say or do.[16]

The number of individuals impacted by continued military jurisdiction after retirement is also far-reaching. In fiscal year 2019, the combined number of regular retirees and disability retirees amounted to nearly 1.6 million people.[17] As such, the population of military retirees exceeds the populations found within ten states as well as the District of Columbia.[18]

---

[11] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 327–28 (D.D.C. 2020) ("[T]he UCMJ's protections provide much less comfort to the accused than constitutionally guaranteed rights do because either Congress or the Court of Military Appeals could potentially amend the UCMJ at any time to remove or limit certain procedures or rights.").

[12] U.S. CONST. amend. V (requiring "presentment or indictment of a Grand Jury, except for cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger" (original style retained)).

[13] *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(c)(2) (2019) (requiring only a three-fourths majority to convict) *with* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (requiring unanimous verdicts in both state and Federal courts).

[14] United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) ("A [S]ervice member has no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen."). Instead, the jury in a military case is selected by the commander who convenes the court-martial. 10 U.S.C. § 825(e)(2), (3).

[15] *See* United States v. Norfleet, 53 M.J. 262, 268 (C.A.A.F. 2000) (explaining that military judges are subject to "involuntary assignment to a position outside the judiciary, involuntary geographic reassignment, review by promotion and retention boards that are not limited to considering military judges, and absence of tenure in the position").

[16] Parker v. Levy, 417 U.S. 733, 749 (1974) ("While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the [UCMJ] essays more varied regulation of a much larger segment of the activities of the more tightly knit military community."). Examples of such activity that are criminal under the UCMJ but protected civilian activity include: UCMJ art. 88 (2022), Contempt Toward Officials (criminalizing "contemptuous words" against public officials) and UCMJ art. 134 (2022) (criminalizing all conduct "of a nature to bring discredit upon the Armed Forces" or is "to the prejudice of good order and discipline in the Armed Forces").

[17] KRISTY N. KAMARCK, CONG. RSCH. SERV., RL34751, MILITARY RETIREMENT: BACKGROUND AND RECENT DEVELOPMENTS 2 (2021).

[18] Hawaii is the fortieth most populous state with a population of 1,455,271. *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021),

Even if the jurisdiction is rarely exercised, the threat of criminal sanction alone is enough to shape behavior.[19]

While the Supreme Court has struck down the imposition of military law upon several other classes of individuals deemed outside of the land and naval forces,[20] the question surrounding retirees has never been squarely addressed. Thus, whether retirees fall within the land and naval forces and are, therefore, constitutionally subject to military law under the UCMJ remains an open question.

The Court of Appeals for the Armed Forces (CAAF), the highest appeals court for military cases,[21] has long held that continuing to subject retirees to military law is indeed constitutional.[22] For more than sixty years, there was little debate about the constitutionality of extending military law to retired personnel.[23] The CAAF reiterated their holding as recently as 2021.[24]

Within Article III courts, however, a collateral challenge to a court-martial conviction has recently achieved a novel modicum of success; it has thereby injected new vigor into the debate surrounding whether retired personnel remain part of the Armed Forces and constitutionally subject to

---

https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html.

[19] For example, the 2021 *U.S. Army Retired Soldier Handbook* advises retirees that:

> Retired Soldiers are subject to the UCMJ and may be tried by court-martial for violations of the UCMJ that occurred while they were on active duty or while in a retired status. Department of the Army policy provides that Retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present.

U.S. DEP'T OF THE ARMY, U.S. ARMY RETIRED SOLDIER HANDBOOK, 12 (2020).

[20] *See* McElroy v. United States, 361 U.S. 281, 286 (1960) (holding that court-martial cannot try peacetime civilian employees of overseas military forces); Kinsella v. United States, 361 U.S. 234 (1960) (holding that court-martial cannot try civilian dependents of military personnel); United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955) (holding that court-martial cannot try discharged Service members).

[21] *See* UCMJ art. 67 (2019).

[22] *See, e.g.*, United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[23] *Id.*

[24] United States v. Begani, 81 M.J. 273, 281 (C.A.A.F. 2021).

military law after they retire.[25] In 2020, the U.S. District Court for the District of Columbia found that continuing to subject retired personnel to military law while they are in a retired status is unconstitutional.[26] Even though the district court's decision was subsequently overturned on appeal, the U.S. Court of Appeals, D.C. Circuit rejected important underpinnings of CAAF's rationale in upholding the constitutionality of jurisdiction over retirees.[27] In addition to the majority rejecting CAAF's rationale, the dissenting judge strongly argued that such jurisdiction was an unconstitutional expansion of military law.[28] These novel victories represent new legal footing for challenges to CAAF, which has ruled as recently as 2021 that continuing to subject retirees to military law is indeed constitutional.[29]

The novel victories within the Article III courts provide new legal footing to challenge CAAF's holding either within CAAF itself or ultimately at the Supreme Court. In anticipation of this potential battle within the highest Court, this paper will analyze the question of whether military retirees do indeed fall within Congress's power over the land and naval forces. First, it will explore the recent opinions and rationales of both CAAF and D.C. District Court. Second, it will look to the Supreme Court's prior interpretations regarding the proper scope of military law. Third, it will assess the authority granted to Congress within the Constitution and whether retirees fall within the scope of the land and naval forces as it was originally understood. Next, it will assess whether Congress's authority should be expanded beyond the original understanding. In conclusion, the paper will recommend courses of action to meet the proper scope of Congress's authority.

---

[25] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322 (D.D.C. 2020).
[26] *See id.* at 332. While the question before the court was whether court-martial jurisdiction over Fleet Reservists under UCMJ Article 2(a)(6) is constitutional, the court examined the constitutionality as it pertains to the entirety of the retiree population. *Id.* at 328–33.
[27] *Compare* Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022), *with Begani*, 81 M.J. 273.
[28] *See Del Toro*, 45 F.4th at 101 (Tatel, J., concurring in part and dissenting in part).
[29] *Begani*, 81 M.J. at 281.

II. Setting the Battlefield: Article III Courts Raise Questions Surrounding Military Courts' Rationale

Court-martial jurisdiction over retirees is not a new creation. Retirees have been subject to court-martial jurisdiction since 3 August 1861.[30] Since that time, courts-martial of retirees have been extremely rare, especially for post-retirement acts. Within the few cases presented, multiple Article III courts have declared that court-martial jurisdiction over retirees is proper.[31] Similarly, military courts have consistently upheld the constitutionality of subjecting retirees to military law.[32] The Supreme Court has never directly addressed the issue.[33]

In the 2021 case of *United States v. Begani*, CAAF most recently addressed the constitutionality of continued imposition of military law over retirees.[34] In line with their prior precedent, CAAF held that retirees are still members of the land and naval forces because they "have not severed all relationship with the military."[35] The court reasoned that even though retirees "ha[ve] no ongoing military responsibilities," continued

---

[30] *See* PUBLIC LAWS OF THE UNITED STATES OF AMERICA, PASSED AT THE FIRST SESSION OF THE THIRTY-SEVENTH CONGRESS 287–90 (1861) (stating that those "partially retired" were to receive continuing monetary payments over the remainder of their lives, entitled to wear the uniform of their rank, subject to recall to active duty, and "*subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles*" (emphasis added)).

[31] *See, e.g.*, Chambers v. Russell, 192 F.Supp. 425 (N.D. Cal. 1961); Hooper v. Hartman, 163 F.Supp. 437 (S.D. Cal. 1958), *aff'd* 274 F.2d 429 (9th Cir. 1959); United States *ex. rel*. Pasela v. Fenno, 167 F.2d 593 (2d Cir. 1948); Closson v. United States, 7 App. D.C. 460 (D.C. Cir.1896); Runkle v. United States, 19 Ct. Cl. 396 (Ct. Cl.1884).

[32] *See, e.g.*, Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989); United States v. Overton, 24 M.J. 309 (C.M.A. 1987); United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[33] The Supreme Court has never squarely addressed the issue; however, they have made reference to it tangentially when addressing whether a retiree was entitled to a pay increase granted to the Army as a whole. *See* United States v. Tyler, 105 U.S. 244, 246 (1881) ("We are of the opinion that retired officers are in the military service of the government . . . ."). The court was not asked about the constitutionality of subjecting retirees to courts-martial but instead whether retirees warranted the pay increase granted to the Army when a parallel section declared them to be included within the Army by law. *Id.* This opinion caused Colonel William Winthrop to conclude the matter settled, however, stating that "retired officers are a part of the [A]rmy and so triable by court-martial [is] a fact indeed never admitted of question." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 n.27 (2d ed., Gov't Printing Off. 1920) (1895).

[34] *Begani*, 81 M.J. 273.

[35] *Id.* at 278.

retainer pay and the ability to be recalled provide sufficient reason to accept Congress's determination that retirees fall within the land and naval forces and must be subject to the UCMJ.[36] The court provided "broad deference" to Congress in reaching this conclusion.[37] Given this deference afforded to Congress, the court seemingly placed the burden upon the appellant to establish that he fell outside of the land and naval forces and that jurisdiction was improper.[38] Within his concurring opinion, however, Judge Gregory E. Maggs, joined by two other judges, acknowledged the possibility that their precedent may be overturned if it "is inconsistent with the original meaning of the Constitution."[39]

Less than one year prior to the *Begani* opinion, a district court within the D.C. circuit became the first Article III court to deny the constitutionality of exerting the UCMJ upon retirees.[40] The D.C. Court summarily rejected similar arguments, as would be presented to CAAF, regarding the receipt of retainer pay and the ability to be recalled to active duty place retirees within the land and naval forces.[41] The court found that, "neither factor . . . suffices to demonstrate why military retirees *plainly* fall within the 'land and naval forces' or why subjecting them to court-martial jurisdiction is *necessary* to maintain good order and discipline."[42] In reaching this conclusion, the court offered little deference to Congress. Instead, the court put the burden upon the Government to establish that court-martial jurisdiction was both constitutionally permissible and necessary.[43]

---

[36] *Id.* at 278–79. The reference to pay is to the fact that retirees are paid a portion of the amount that they were paid on active duty based upon their time in service under 10 U.S.C. § 12731. The reference to recall is to the fact that retirees are subject to recall to active duty at any time by order of their Service Secretary under 10 U.S.C. § 688.

[37] *Begani*, 81 M.J. at 279 (citing Solorio v. United States, 483 U.S. 435, 447 (1987)).

[38] *See id.* at 277–80. The reason that the court likely placed the onus upon the appellant is due to the fact that he was asking them to overturn established precedent. The Court of Appeals for the Armed Forces, and its predecessor, the Court of Military Appeals, have both held that retirees are properly subject to court-martial jurisdiction on multiple occasions. *See, e.g.*, United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018); Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989); United States v. Overton, 24 M.J. 309 (C.M.A. 1987); United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[39] *Begani*, 81 M.J. at 282 (Maggs, G., concurring).

[40] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 332 (D.D.C. 2020).

[41] *Id.* at 329.

[42] *Id.* (emphasis in original).

[43] *Id.* at 327–33 (relying upon United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955)).

On appeal, the D.C. Circuit Court reversed the district court's holding. Within their opinion, however, the D.C Circuit Court flatly rejected the notion that any deference was owed to Congress in determining whom may be subjected to court-martial jurisdiction.[44] The court reasoned that the sole question regarding whether court-martial jurisdiction is permissible is whether the accused falls within the land and naval forces under the Constitution.[45] Using this framework, the court held in a 2-1 opinion that retirees do fall within the land and naval forces because they have "a formal relationship with the [A]rmed [F]orces that includes a duty to obey military orders."[46] While the dissent concurred with much of the majority's reasoning, it disagreed as to the result.[47] The dissent argued that a recall order is unlike any other order and that such a broad expansion of court-martial jurisdiction is unconstitutional.[48]

The difference in the two opinions' approaches and conclusions is striking. The difference in the amount of deference provided to Congress's determination to extend court-martial jurisdiction to retirees is particularly noteworthy. The CAAF opinion provided Congress broad deference, while the Article III courts' opinions provided a much narrower view. The majority at the D.C. Circuit refused to provide Congress with deference over who falls within the land and naval forces; however, it did provide that Congress can decide whom within that class may be subject to court-martial. Alternatively, both the district court majority and the circuit court dissent provided almost no deference to Congress; instead, they required the Government to show the necessity of the extension of court-martial jurisdiction over retirees. Based upon the level of deference given, diametrically opposing positions developed regarding whether retirees properly fall within the land and naval forces under the Constitution.

III. Supreme Court Precedent: Limited and Narrow as Necessary for Discipline

The deference that CAAF afforded to Congress is inconsistent with the Supreme Court's prior practice and precedent. The Court has

---

[44] *Larrabee v. Del Toro*, 45 F.4th 81, 87–89 (D.C. Cir. 2022).
[45] *Id.* at 89.
[46] *Id.* at 91.
[47] *Id.* at 101–04 (Tatel, J., concurring in part and dissenting in part).
[48] *Id.*

previously struck down congressional action as unconstitutional that subjected military law upon: civilian employees of overseas military forces;[49] civilian dependents of military personnel;[50] and discharged Service members.[51] Within all of these decisions, the Court did not provide Congress deference in their determination that these populations fell within Congress's authority over the land and naval forces but instead looked to the scope of authority granted in the Constitution.[52]

The Supreme Court has found that the Constitution outlines that civilian courts—rather than military courts—are the default venue to try individuals charged with crimes against the United States.[53] These courts, along with their procedures, are outlined under Article III of the Constitution.[54] Within these civilian courts, there is a strong emphasis placed upon the "value and integrity of the individual."[55] This emphasis on the individual resulted in the creation of robust due process protections including, among other things, the right to a grand jury indictment and a unanimous verdict by a jury of their peers in front of a wholly independent judge.[56]

The Framers, however, recognized that robust due process rights likely would impede the discipline and duty required to maintain a strong military force. Accordingly, the Framers provided Congress a separate authority to "make [r]ules for the Government and [r]egulation of the land and naval [f]orces" as well as the power to "make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers."[57] These provisions provide a means to enforce good order and discipline through the use of military courts-martial and the creation of

---

[49] McElroy v. United States, 361 U.S. 281, 286 (1960).
[50] Kinsella v. United States, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion).
[51] United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 23 (1955).
[52] *See id.* at 20–23; *Reid*, 354 U.S. at 34–35.
[53] *Reid*, 354 U.S. at 21 ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States."); *see also* U.S. CONST. art. III, § 2 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." (original style retained)).
[54] *See* U.S. CONST. art. III.
[55] *Reid*, 354 U.S. at 39.
[56] *Id.* at 37.
[57] U.S. CONST. art. I, § 8, cls. 14, 18.

military law.[58] The Court has recognized that, "the rights of men in the Armed Forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[59]

The Supreme Court has appreciated that "the task of balancing the rights of servicemen against the needs of the military" rests with Congress.[60] In pursuit of maintaining discipline and duty, Congress has determined that military courts-martial may greatly emphasize efficiency and place "less emphasis . . . on protecting the rights of the individual than in civilian society and civilian courts."[61] Consequently, individuals who are tried by courts-martial are not afforded many of the fundamental constitutional protections that civilian courts provide.[62] Furthermore, military law criminalizes a greater amount of individual behavior—including behavior that is constitutionally protected within civil society.[63] The Court has historically granted broad discretion to Congress's determinations to limit the constitutional rights afforded within court-martial procedure and the acts that are criminalized under military law.[64] It is this application of discretion that CAAF mistakenly relied upon in upholding the imposition of military law upon retired personnel.[65]

In sharp contrast to the Supreme Court's extreme deference to Congress's determinations of what rights to provide under military law

---

[58] *See* U.S. CONST. art. I, § 8, cls. 14, 18.
[59] Burns v. Wilson, 346 U.S. 137, 140 (1953); *see also* Parker v. Levy, 417 U.S. 733, 744 (1974).
[60] Solorio v. United States, 483 U.S. 435, 447 (1987).
[61] *Reid*, 354 U.S. at 21*; see also* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22 (1955) ("Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hands means of compelling obedience and order.").
[62] *Reid*, 354 U.S. at 19 ("[Article I, § 8, cl. 14] creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights.").
[63] *See Parker*, 417 U.S. at 749 ("While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the [UCMJ] essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.").
[64] *See Solorio*, 483 U.S. at 447–48 (stating that "judicial deference . . . is at its apogee" in contexts implicating the constitutional rights of Service members and citing to numerous examples).
[65] United States v. Begani, 81 M.J. 273, 279-80 (C.A.A.F. 2021) (citing *Solorio*, 483 U.S. at 447).

and procedure, the Court has provided no deference to Congress's determinations regarding who falls subject to it.[66] In assessing these determinations, the Court has utilized an exacting standard to ensure that court-martial jurisdiction is imposed upon no more of the population than necessary. They have instructed that, "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed*.'"[67]

The Supreme Court's limitation on the constitutional power to authorize trial by court-martial upon an individual mirrors the Court's requirement to other areas that the Government impose the "least restrictive means" toward the end proposed.[68] This requirement places "a heavy burden on the [s]tate," requiring it to show that the end proposed cannot be met by any narrower means.[69] This is the harshest level of scrutiny the Court implements and is even more exacting than the "strict scrutiny test."[70] Consequently, the burden is upon the Government to show that the imposition of military law is necessary to meet the "demands of discipline and duty."[71] The Supreme Court's language makes clear that little deference should be afforded to Congress in their determinations of who should be subject to military law to meet this end.

It is unsurprising that the Court would require such exacting scrutiny over the scope of the population exposed to court-martial jurisdiction given the multitude of fundamental constitutional rights that are burdened

---

[66] *See, e.g.*, *Toth*, 350 U.S. 20–23; Kinsella v. United States, 361 U.S. 234, 242-47 (1960).
[67] *Toth*, 350 U.S. at 22 (emphasis in original).
[68] *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").
[69] Board of Trustees v. Fox, 492 U.S. 469, 476–77 (1989); *see also Shelton*, 364 U.S. at 488.
[70] *See Fox*, 492 U.S. at 476–77 (explaining that requiring the "least restrictive means" imposes a higher burden upon the State than the "strict scrutiny test" and comparing the two levels of review).
[71] *See Toth*, 350 U.S. at 22 (calling for court-martial jurisdiction to be limited to "*the least possible power adequate to the end proposed*") (emphasis in original); *see also* Burns v. Wilson, 346 U.S. 137, 140 (1953) (recognizing that the purpose behind military law is "to meet certain overriding demands of discipline and duty").

by its imposition.[72] The Court has recognized that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts."[73] Accordingly, it follows that Congress should have to justify its use of the "very limited and extraordinary jurisdiction derived from the cryptic language in [Article I, Section 8, that] at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."[74]

Thus, the Supreme Court has determined that it is the role of the judiciary to ensure that the legislature does not exceed its authority regarding who may be subject to military law.[75] In making this determination, the Court has repeatedly looked to the Framers' original intent and understanding.[76] Their review of this intent has directed their analysis to center solely on the status of the accused and restricted Congress's authority "to persons who are actually members or part of the Armed Forces."[77] Accordingly, whether an individual is actually a member of the land and naval forces as articulated within the Constitution is the pivotal question in determining whether they may be subject to military law.

IV. Understanding the Framers' Intent Surrounding the Land and Naval Forces

When determining the limits to the imposition of military law, the Court has focused its attention upon trying to understand the Framers' original intent and understanding.[78] This is typical of the Court when

---

[72] *See supra* text accompanying notes 12-15 (unlike their civilian counterparts, military defendants are not entitled to: a grand jury indictment; a unanimous verdict in all felony cases; a randomly selected jury of peers from across the community; or a wholly independent judiciary).
[73] Reid v. Covert, 354 U.S. 1, 21 (1957).
[74] *Id.*
[75] *See Toth,* 350 U.S. at 21-22.
[76] *See Reid*, 354 U.S. at 23–31 (outlining the Founders' distrust of military law in shaping the authority granted to Congress to impose it); Kinsella v. United States, 361 U.S. 234, 248-49 (1960) (looking to the Articles of War prior to and after the Constitutional Convention in determining whether jurisdiction was proper).
[77] *Toth*, 350 U.S. at 15; *see also* Solorio v. United States, 483 U.S. 435, 439-40 (1987).
[78] *See, e.g.*, *Kinsella*, 361 U.S. 234; *Reid*, 354 U.S. 1; *Ex parte Milligan*, 4 Wall. 2 (1866); *Toth*, 350 U.S. 11.

interpreting the Constitution and its meaning. The Supreme Court has repeatedly looked to the Framers' original intent and understanding to determine the proper application of constitutional provisions.[79] Justice Elena Kagan famously said during her confirmation hearings that "we're all originalists."[80] Simply put, the key to understanding constitutional provisions—and how the Supreme Court will interpret them—is to understand the original meaning and intent behind them. Thus, the key to understanding whether retirees fall within the authority granted to Congress over the land and naval forces is to determine the original meaning of those terms.[81]

Both history and experience taught the Framers to distrust the military in general and the expansion of the jurisdiction of military law in particular.[82] The Founders were keenly aware of the historical threat that militaries posed to the liberties of the populace.[83] Given this, the military was viewed as a necessary evil, required to protect the citizenry, but one that should be limited in its size and influence.[84]

---

[79] *See e.g.* District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008) ("Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence."); Alden v. Maine, 527 U.S. 706, 734 (1999) ("By the same token, the contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law.").

[80] *Clip of Kagan Confirmation Hearing, Day 2, Part 1*, C-SPAN, https://www.c-span.org/video/?c4910015/user-clip-originalists (last visited Feb. 5, 2024). Originalism is defined as, "a legal philosophy that the words in documents and especially the U.S. Constitution should be interpreted as they were understood at the time they were written." *Originalism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/originalism (last visited Apr. 5, 2023).

[81] Judge Maggs of CAAF recognized as such, saying "[a] party urging this court to overturn its precedent on a constitutional issue at a minimum should show that the precedent is inconsistent with the original meaning of the Constitution." United States v. Begani, 81 M.J. 273, 282 (C.A.A.F. 2021) (Maggs, G., concurring).

[82] *See* Reid v. Covert, 354 U.S. 1, 24–31 (1957).

[83] THE FEDERALIST NO. 41 (James Madison) ("[T]he liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of military establishments.").

[84] *See* THE FEDERALIST NO. 8 (Alexander Hamilton) ("[The citizens] view [the army] with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights."); *see also* THE FEDERALIST NO. 41 (James Madison) ("A standing force, therefore, is dangerous, at the same time that

A. British Beginnings: Military Jurisdiction Applied Only to Those in Actual Service

While the Framers were influenced by the study of many historical civilizations and governments in their drafting of the Constitution, British law and history imposed the greatest influence upon them.[85] The Supreme Court has made a repeated practice of looking to British practice and law at the time of the founding as a means to decipher the original meaning of the Constitution.[86] Indeed, the Court has previously recognized that the law and practice surrounding our military jurisdiction directly traces its lineage to the British system.[87] Thus, the importance of understanding British law and practice surrounding military law at the time of the ratification of the Constitution cannot be understated.

As former Englishmen, British custom and law served as the bedrock upon which the legal,[88] military,[89] and governmental[90] entities of the

---

it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution.").

[85] *See, e.g.*, THE FEDERALIST NO. 26 (Alexander Hamilton) (recognizing that "national sentiment . . . must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these [s]tates have in general sprung").

[86] *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019) (excessive fines); District of Columbia v. Heller, 554 U.S. 570, 582, 592–94 (2008) (militia and right to bear arms); Alden v. Maine, 527 U.S. 706, 715-16 (1999) (sovereign immunity).

[87] *See, e.g.*, Loving v. United States, 517 U.S. 748, 759–67 (1996) (outlining the direct effect of the British practice surrounding military jurisdiction upon our own and noting that "[w]e have undertaken before, in resolving other issues, the difficult task of interpreting Clause 14 [of Article I, § 8] by drawing upon English constitutional history") (citations omitted); Weiss v. United States, 510 U.S. 163, 178 (1994) (highlighting that our military justice system was modeled after the early English military tribunals); Parker v. Levy, 417 U.S. 733, 745 (1974) (recognizing the "British antecedents of our military law").

[88] *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 797–805 (1951) (explaining that both before and after the Revolution, British criminal and common law formed the basis for the law and jurisprudence of the United States).

[89] The American Articles of War of 1776 are nearly a carbon copy of the English Articles of War of 1774 on which they were based. Jan Horbaly, Court-Martial Jurisdiction 34 (June 10, 1986) (J.S.D. dissertation, Yale Law School) (on file with the Library of Congress).

[90] Much of the governmental structure and ideals within the U.S. Constitution are shared with the British government and laws of the time. For example, many of those rights outlined within the Bill of Rights in the U.S. Constitution were first laid out in the English

United States were built. The Founders relied upon the British experience, in the not-so-distant past, as a lesson in the proper construction of these institutions to protect the individual liberties of the populace. Englishmen were proud of the rights that had been granted to them by the Magna Carta in 1215 and jealously guarded them as much as possible.[91] Among these rights were the right to due process and to be tried by a jury of one's peers based upon the law of the land.[92] The Framers would adopt many of these same protections in the Constitution.

1. British Historical Background: Limited Imposition of Military Law

The founding generation appreciated the fact that throughout their long history, the British had repeatedly experienced a denial of liberty through standing armies and imposition of military law upon them by the crown.[93] An example of this was seen in 1628 when King Charles I subjected both soldiers and citizens alike to military law.[94] In reaction, both Houses of Parliament joined together and voiced in the Petition of Right that such actions violated the long standing rights of due process and to a jury of their peers that the Magna Carta afforded them in 1215.[95] Later, Parliament would also declare the rights of their citizens within the English Bill of Rights of 1689.[96] These various declarations of rights include many of the rights incorporated by the Framers in the Constitution's Bill of Rights.

Based upon those rights that they enjoyed, the Petition of Right declared it was illegal for the civilian populace to ever be subjected to

---

Bill of Rights from 1689. *Compare* U.S. CONST. amends. I–VIII, *with* Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.), https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction.

[91] *See* McDonald v. City of Chicago, 561 U.S. 742, 815–19 (2010).

[92] Magna Carta, 9 Hen. 3, cl. 39 (1215) (Eng.) ("No free man shall be seized or imprisoned, or stripped of his rights or possession, or outlawed or exiled . . . , except by the lawful judgment of his equals or by the law of the land.").

[93] *See, e.g.*, THE FEDERALIST NO. 26 (Alexander Hamilton) (outlining the British history surrounding the negative effect standing armies have on the liberty of the people).

[94] 1 CHARLES M. CLODE, THE MILITARY FORCES OF THE CROWN; THEIR ADMINISTRATION AND GOVERNMENT 19 (1869) (cited with approval in Reid v. Covert, 354 U.S. 1, 6 (1957)).

[95] Petition of Right 1627, 3 Car., c. 1, https://www.legislation.gov.uk/aep/Cha1/3/1 (last visited Apr. 10, 2023); *see also* Magna Carta, 9 Hen. 3, cl. 39 (1215) (Eng.).

[96] Bill of Rights 1688, 1 W. & M., sess. 1 (Eng.).

military law.[97] Parliament further declared the imposition of martial law during peacetime against any person to be contrary to the laws and statutes of Britain.[98] Thus, in an effort to protect liberty to the greatest extent, the Petition of Right prohibited the imposition of military law on both the civilian and military populations during times of peace.

Parliament soon discovered that some allowance for military law during times of peace was necessary should a standing army be permitted to exist.[99] Accordingly, in 1689, Parliament began the annual practice of passing the Mutiny Act, which not only served as a "Parliamentary license to the Crown to maintain a body of troops: it also enable[d] the Crown to try offenders against military discipline by court martial."[100] In addition to those crimes made punishable by the act itself, it empowered the Crown to make articles or rules governing the discipline of the forces. This was historically conducted through the Articles of War.[101]

Within the original Mutiny Act, Parliament recognized that any extension of military law infringed upon both civilian court jurisdiction and the rights of the people to due process and a trial by a jury of their peers.[102] They emphasized the importance of these historical rights the civilian courts afforded and that the use of military law was merely out of

---

[97] CLODE, *supra* note 94, at 19.
[98] *Id.*
[99] *See* I JOHN MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL 23 (2d ed. 1805). In 1688, after the overthrow of King James II by King William III, a mutiny of soldiers loyal to James II broke out. *See* Loving v. United States, 517 U.S. 748, 763 (1996). As this was a time of peace, military law could not be imposed. *Id.* at 762. Under common law, mutiny was not a criminal offense so there was no means to hold the soldiers accountable. *See id.* at 23.
[100] HARRIS PRENDERGAST, THE LAW RELATING TO OFFICERS IN THE ARMY 3 (Parker, Funivall, and Parker, Whitehall rev. ed. 1855). In addition to providing the means for military discipline, the Mutiny Act also authorized the Crown to raise and maintain a certain number of troops for a specified period of time. This fulfilled the requirement of Parliamentary consent for the Crown to maintain a standing army under the British Bill of Rights of 1688. However, it was required to be renewed annually. *Id.* This provided Parliament with both the power over authorization of the existence of a military altogether and the power of the purse to fund them. *See id.* The Crown, however, maintained their role as the paramount military authority. *Id.*
[101] *Id.*
[102] An Act for Punishing Officers or Soldiers Who Shall Mutiny or Desert Their Majestyes Service 1688, 1 W. & M. c. 5 (Eng.), https://www.british-history.ac.uk/statutesrealm/vol6/pp55-56#h3-0008 [hereinafter "Mutiny Act of 1688"].

necessity.[103] Parliament, however, admitted that "a more exemplary and speedy punishment [than] the usual forms of law will allow" was necessary for retaining forces and their discipline during their duty.[104] Consistent with this principle, Sir William Blackstone later observed that military law is "in truth and reality no law, but something indulged, rather than allowed as law: the necessity of order and discipline in an army is the only thing which can give it countenance . . . ."[105] These principles—that military jurisdiction is an exception to the normal means of justice and is used out of necessity for discipline and duty—are the same as those outlined by the Supreme Court when determining the limits of Congress's authority to impose court-martial jurisdiction upon individuals under the Constitution.[106]

2. Military Law Imposed on Only Those in Actual Service

Consistent with the principles outlined in the original Mutiny Act, Parliament jealously guarded the rights of their citizens to the greatest extent possible and prudently limited the reach of military jurisdiction only to those necessary.[107] For nearly one hundred years, leading up to the drafting of the Constitution in 1787, the British Parliament carefully perfected the proper scope of military law along this principle.[108]

Thus, from 1756 until March of 1786, the Mutiny Act specified that it only applied to those officers and soldiers who were "mustered or in

---

[103] *Id.*
[104] *Id.*
[105] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (1765). The Supreme Court has described Sir William Blackstone's works as "the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999). The Supreme Court has approvingly cited this passage in particular. *See* Loving v. United States, 517 U.S. 748, 765 (1996).
[106] *See* Reid v. Covert, 354 U.S. 1, 21 (1957) ("Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial."); United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955) (calling for court-martial jurisdiction to be limited to "*the least possible power adequate to the end proposed*") (emphasis in original); *see also* Burns v. Wilson, 346 U.S. 137, 140 (1953) (recognizing that the purpose behind military law is "to meet certain overriding demands of discipline and duty").
[107] *See Reid*, 354 U.S. at 24–27; *see also* Solorio v. United States, 483 U.S. 435, 442–46 (1987).
[108] *See Solorio*, 483 U.S. at 442–46; *see also Loving*, 517 U.S. at 760–66.

pay."[109] Under these terms, "the militia were under military law when embodied in a militia, but were freed from it, after they returned into the mass of the people, and the character of the Soldier was sunk in that of the citizen."[110] The justification for this exercise of military jurisdiction was that it was necessary to keep members of the militia in order when they were called into service.[111] Further, the term "in pay" had legal significance and meant those who were employed and in full pay.[112] Therefore, the Mutiny Act only applied to two segments of the population from 1756 until the founding of the United States: those employed in full pay and the militia when called into actual service. Indeed, in 1786, General John Burgoyne[113] synthesized the Englishman's view of military law to that point in time:

> The whole system of martial law, as it infringed upon the natural and constitutional rights of the subject, [is] only defensible upon the strict ground of necessity and ought therefore, in times of peace more especially, to be narrowed if possible, instead of being extended. That the general principle, as recognized both in theory and practice of our constitution, [is] that the military law should be confined to actual military service alone.[114]

---

[109] MCARTHUR, *supra* note 99, at 196–97. In 1786, Parliament amended the Mutiny Act to apply to officers who were "commissioned or in pay." *Id.* at 196–201. This change however did not make half-pay officers subject to military law unless they held brevet rank. PRENDERGAST, *supra* note 100, at 26.

[110] MCARTHUR, *supra* note 99, at 198.

[111] BLACKSTONE, *supra* note 105, at 413.

[112] *See* MCARTHUR, *supra* note 99, at 187 (explaining that the attempted inclusion of half-pay officers in 1749 rendered them "subject to martial law, in the same manner as if they were on whole pay").

[113] General John Burgoyne served in the British military from 1744 until his death in 1792. He attained the rank of lieutenant general in 1777 and is infamous for surrendering his forces at Saratoga during the American Revolution. He also served within the House of Commons in Parliament from 1761–1792. John Brooke, *BURGOYNE, John (1723–92)*, HIST. OF PARLIAMENT, https://www.historyofparliamentonline.org/volume/1754-1790/member/burgoyne-john-1723-92 (last visited Jan. 5, 2024).

[114] MCARTHUR, *supra* note 99, at 198.

3. Treatment of Individuals on "Half-Pay" Including "Half-Pay" Retirees

The fact that the term "in pay" under the Mutiny Act applied only to those employed within the military on full pay is best exemplified by the British treatment of half-pay officers.[115] While in a half-pay status, British law treated retired soldiers much the same as those who were within the militia.[116] Half-pay retirees were exempt from being subject to military law while in a retired status consistent with British practice of imposing military law only to those engaged in actual active service.[117] Immediately upon receiving an order to return to active duty, however, retirees were once again subject to military jurisdiction.[118]

While there are instances of half-pay reduction as early as 1640, the half-pay establishment within the British military did not truly take shape until 169. [119] Individuals within the half-pay establishment were individuals who were "reduced, wounded, or infirm."[120] The half-pay establishment took two forms. First, half-pay was provided to individuals whose units had disbanded, leaving them as supernumerary.[121] Second, half-pay was provided to "such officers who were maimed or lost their limbs in the late wars, or to such others as, by reason of their long service or otherwise . . . ."[122] All individuals who received half-pay were subject to involuntary recall into active service.[123] Moreover, half-pay officers maintained their rank while they occupied a retired status.[124]

Given these attributes, the British military retirement system at the time of the drafting of the Constitution was a near replica of the current

---

[115] *See infra* pp. 21–23.
[116] MCARTHUR, *supra* note 99, at 198.
[117] *Id.*
[118] PRENDERGAST, *supra* note 100, at 76–77 ("when the Commander-in-Chief thinks proper to appoint an officer on the half-pay list to a regiment, or other military employment, accompanied by full-pay, he becomes subject at once to the provision of the Mutiny Act").
[119] CLODE, *supra* note 94, at 26, 369.
[120] *Id.* at 368–69.
[121] *Id.* at 368–71.
[122] *Id.* at 375–76.
[123] PRENDERGAST, *supra* note 100, at 76–77; *see also* CLODE, *supra* note 94, at 372–73 (explaining an instance where half-pay retirees were called back into active service in 1715).
[124] PRENDERGAST, *supra* note 100, at 50; *see also* MCARTHUR, *supra* note 99, at 196.

retirement system in the United States.[125] Indeed, the British system included all of the features—reduced pay and ability to be recalled—that have been used to argue for continued imposition of military law upon retirees.[126] Consequently, the British treatment of retired personnel under military law is instructive towards gleaning whether the Founders would have understood retirees within the scope of the congressional authority to impose military jurisdiction outlined in the "make rules" clause.

a. Individuals on Half-Pay Not Subject to Military Law

At the time of the drafting of the Constitution, the fact that those on half-pay were exempt from military law was settled under British law.[127] For a short period from 1749–1751, Parliament attempted to impose military jurisdiction upon officers in half-pay by specifically revising the Mutiny Act to apply to those "on half-pay," even though the judiciary was evenly split on whether such an extension was even legally permissible.[128] This clause extending jurisdiction to those on half-pay was provided for in addition to those "mustered or in pay."[129] Given the specific articulation that the Mutiny Act applied to both those in pay and those on half-pay, it is clear that half-pay individuals were not included within the term "in pay." Indeed, the term "in pay" has been treated synonymously with "whole pay."[130]

---

[125] *Compare supra* notes 122–26 and accompanying text, *with* 10 U.S.C. § 1201 (providing for medical retirement within the Armed Forces); 10 U.S.C. § 12731 (providing for retired pay after twenty years of service); 10 U.S.C. § 688 (authorizing the recall of retired members of the Armed Forces); and 10 U.S.C. § 772(c) (authorizing retirees to bear the title and wear the uniform of his retired grade).

[126] *See e.g.* United States v. Begani, 81 M.J. 273, 278-80 (C.A.A.F. 2021) (reasoning that continued imposition of military law is justified based upon retirees receipt of pay and ability to be recalled); United States v. Overton, 24 M.J. 309, 311 (C.M.A. 1987).

[127] *See* MCARTHUR, *supra* note 99, at 195–96 (detailing that in 1787 the Court of Exchequer Chamber unanimously held that half-pay retirees were not subject to military law).

[128] The judiciary was split when consulted in 1749 about whether half-pay retirees could in-fact be included within the Mutiny Act and subject to military law. MCARTHUR, *supra* note 99, at 191. Nonetheless, for the first time, in 1749 Parliament included a provision that applied the Mutiny Act to both those "in pay" and those in "half pay." *Id.*

[129] *Id.*

[130] *See id.* at 187 (explaining that the attempted inclusion of half-pay officers rendered them "subject to martial law, in the same manner as if they were on whole pay").

In 1751, however, both Houses of Parliament affirmatively struck down the clause extending the Mutiny Act to those on half-pay.[131] Since that time, Parliament has not attempted to extend military law against those within a half-pay status.[132] Thus, from 1751 until March of 1786, the Mutiny Act specified that it only applied to those "mustered or in pay."[133]

This application of military law—that it only extended to those in full pay and the militia when called into actual service—was, therefore, settled practice for more than thirty years prior to the gathering of the Constitutional Convention.[134] This period included the entirety of the colonial experience with the British military during the French and Indian War.[135] During that campaign, thousands of colonists served alongside British regular units or under the command of British regular officers.[136] This included officers of the "American Regiment" who were activated from a half-pay retired status and who were clearly familiar with the British practice surrounding military law, including its applications to

---

[131] *Id.* at 197–98. When explaining the general principle of the British to apply military only while in actual service, General John Burgoyne used Parliament striking half-pay officers from its inclusion as evidence to his point that military law is confined to actual service. He stated, "That officers on half-pay, though at first included in the mutiny act, had been exempted from its operation, by the deliberate voice of both houses of Parliament: circumstances which clearly proved that the prevalent idea, in all ages, had been to confine military law to actual military service." *Id.*

[132] *Id.* Indeed, the practice of retirees being outside the jurisdiction of military law while in a retired status has continued to the present time. *See* Armed Forces Act 2006, c. 52, § 367 (Eng.) (stating that service law is applicable to "member[s] of the regular forces" and "members of the reserve forces" in certain circumstances that do not list retired personnel). Section 368 of that same act defines "members of the regular forces" as those on the active list. *Id.* § 368.

[133] MCARTHUR, *supra* note 99, at 196–97. In 1786, Parliament amended the Mutiny Act to apply to officers who were "commissioned or in pay." *Id.* at 196–201. This change, however, did not make half-pay officers subject to military law unless they held brevet rank. PRENDERGAST, *supra* note 100, at 26.

[134] *See* MCARTHUR, *supra* note 99, at 196–97 (detailing that the last extension of military law to those on half-pay in Britain occurred in 1751); *see also* Moore v. Harper, 143 S.Ct. 2065, 2080 (2023) (stating that the Constitutional Convention convened in the summer of 1787).

[135] The French and Indian War lasted from 1754–1763. *French and Indian War/Seven Year's War, 1754–63*, DEP'T OF STATE: OFF. OF HISTORIAN, [hereinafter *French and Indian War*], https://history.state.gov/milestones/1750-1775/french-indian-war (last visited Jan. 5, 2024).

[136] Matthew C. Ward, *Mobilization, French and Indian War*, ENCYCLOPEDIA.COM (Mar. 9, 2022), https://www.encyclopedia.com/defense/energy-government-and-defense-magazines/mobilization-french-and-indian-war.

retirees.[137] Notably, among these colonists who served alongside the British Army were Benjamin Franklin[138] and George Washington,[139] both of whom were extremely influential during the Constitutional Convention.[140] Thus, the founding generation would have been keenly aware of the limitations on military law that the British exercised at the time.[141]

b. The Case of Major General Ross

Further evidence that military law did not extend outside of those in whole pay or the militia when called into actual service was seen in April of 1785.[142] At that point, the "twelve judges of England"—the Court of Exchequer Chamber[143]—unanimously held that half-pay retirees were not

---

[137] *See To George Washington from William Fairfax, 5 September 1754*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/02-01-02-0098 (last visited Feb. 6, 2024) ("We have some intimation that the King has orders all the Officers of the late American Regiment now on half pay to repair thither & do duty").

[138] Brooke C. Stoddard, *When Ben Franklin Met the Battlefield*, SMITHSONIAN MAG. (OCT. 7, 2010), https://www.smithsonianmag.com/history/when-ben-franklin-met-the-battlefield-65116256.

[139] *French and Indian War, supra* note 135.

[140] Furthermore, numerous high-ranking officers within the Continental Army were former British officers who had retired on half-pay status and were familiar with the British practice of military law and how it applied to retired personnel. This included individuals as Major General Charles Lee and Brigadier General Horatio Gates. *See From George Washington to the Officers of Five Virginia Independent Companies, 20 June 1775*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/03-01-02-0008 (last visited Feb. 5, 2024).

[141] In fact, in 1756, Pennsylvania adopted their own Militia Act, which Benjamin Franklin drafted; it directly incorporated the British Mutiny Act and Articles of War upon the militia of Pennsylvania and applied to the same personnel as the British Mutiny Act: those "commissioned and in pay" and those "enlisted and in pay." *Mutiny Act, [15 April 1756]*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Franklin/01-06-02-0189 (last visited Apr. 5, 2024).

[142] *See* MCARTHUR, *supra* note 99, at 195–96.

[143] The "twelve judges of England" refers to the Exchequer Chamber, which has been described as "a super-en-banc court including all of England's judicial officers." *Hart v. Massanari*, 266 F.3d 1155, 1165 n.13 (9th Cir. 2001). "Decisions reached by the Exchequer Chamber were considered binding precedent" and settled matters of law for all of England. *Id.*

subject to courts-martial.[144] The question of military jurisdiction over half-pay retirees made its way to the Exchequer Chamber when a court-martial was appointed to try retired Major General Charles Ross for submitting a post-retirement letter to a newspaper for publication that attacked the character of his former commander, Lieutenant General Robert Boyd.[145]

The case was adjourned for the Exchequer Chamber to answer the preliminary question of whether, as an officer retired on half-pay, General Ross was subject to military law for his actions while in a retired status.[146] The judges gave a unanimous opinion that General Ross was not, as a half-pay retiree, subject to military law.[147] "They stated their answer on two points, and in both declared it as their opinion, that neither his warrant as a general officer, nor his annuity of half pay, rendered him obnoxious to military trial."[148] In accord, General Ross was released and the court-martial was disbanded.[149]

The case and outcome of Major General Ross's court-martial was well-known immediately preceding the drafting and ratification of the Constitution in 1787 and 1788 respectively.[150] It was widely publicized[151] (news of it traveled as far as India by 1786[152]), referenced within parliamentary debates in both 1786 and 1787,[153] and included in numerous

---

[144] MCARTHUR, *supra* note 99, at 195–96; *see also Monthly Chronology*, LONDON MAG., May 1785, at 386. Unfortunately, the official record of this case was unable to be located by either the Judge Advocate General of The British Armed Forces or the United Kingdom National Archives. Email from His Honor Judge Alan Large, Judge Advocate General, The British Armed Forces, to Eugene Fidell (Mar. 30, 2022) (on file with author). It is believed that the record may have been destroyed during the bombing of the Office of the Judge Advocate General during World War II. *Id.* The author deeply appreciates their assistance on this matter.

[145] *General Ross's Court Martial*, CALCUTTA GAZETTE, Aug. 3, 1786, at 5.

[146] *Monthly Chronology*, *supra* note 144, at 386; *see also* MCARTHUR, *supra* note 99, at 196.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See infra* notes 153–56.

[151] *See, e.g.*, *Monthly Chronology*, *supra* note 144, at 386; *Court Martial on Major General Ross*, DERBY MERCURY, Mar. 3, 1785, at 2; *General Ross's Trial*, CHELMSFORD CHRON., Apr. 29, 1785 at 3; *Chronicle, in* ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEARS 1784 AND 1785, at 230–31 (J. Dodsley ed., 1786).

[152] *See General Ross's Court Martial*, *supra* note 145, at 5.

[153] *See, e.g.*, 20 THE PARLIAMENTARY REGISTER 18, 20 (1786); 22 THE PARLIAMENTARY REGISTER 126, 129, 130 (1787).

early nineteenth-century treatises.[154] This is unsurprising, as it involved a public disagreement between two flag officers that resulted in the court-martial of a major general and the rare occurrence of an Exchequer Chamber opinion disposed of the case.[155] News of the case was so widespread, and the result so clear from the state of the law leading up to it, that Lord Loughborough, a judge who sat on the court, stated that he "had heard from an infinite number of officers, that they should have been excessively surprised had he delivered any other opinion."[156] Given this notoriety, the case and its holding, that subjecting retirees to military law while in a retired status was unconstitutional, could hardly have escaped the notice of the members of the Constitutional Convention who met two years later in 1787.[157]

Thus, more than 200 years ago and prior to the drafting of the Constitution, the British court settled the law that subjecting individuals in a retired status to military law was contrary to their Constitution—the foundational basis for our own.[158] In so doing, they explicitly rejected the same arguments put forth today to support military jurisdiction over retirees while they occupy a retired status, and they confirmed that military jurisdiction did not extend to retired personnel. This additional evidence made abundantly clear that the only individuals subject to military law were those in actual service and limited to those employed in full pay or in the militia while in actual service.

B. The Framers' Intent: Adoption of the British System

Application of the British views of military law and practice is only relevant to define the powers conferred to Congress if there is evidence to

---

[154] *See, e.g.*, MCARTHUR, *supra* note 99, at 196 (published in 1805); JOHN DELAFONS, A TREATISE ON NAVAL COURTS MARTIAL 62–63 (1805).

[155] *See* Hart v. Massanari, 266 F.3d 1155, 1165 n.13 (9th Cir. 2001) (noting that the Exchequer Chamber only met on "particularly vexing legal issue[s]" and issued "few decisions").

[156] 22 THE PARLIAMENTARY REGISTER 130 (1787).

[157] *Id.* Even if the case did somehow escape their attention, the constitutional principles and underlying rationale would have been as apparent to the Founders as it was to the "infinite number of officers" who wrote Lord Loughborough. *See id.*

[158] *See supra* notes 88–92 and accompanying text.

support its adoption by the Framers.[159] With that said, evidence that the founding era and the Framers adopted the British practice and principles surrounding military law is readily apparent. Indeed, the Supreme Court has repeatedly recognized that the substance and practice surrounding our military law directly derives from British military law.[160]

Guided by their joint history with the British as well as their own recent history of subjugation to martial law,[161] the Founders abided by the principles espoused by their British forefathers.[162] They sought to ensure that military jurisdiction was limited to the greatest extent possible and would remain subordinate to the civil courts that served as the primary arbiters of justice.[163] Further, the Framers based the creation and exercise of military jurisdiction within the Constitution upon the need for order and discipline.[164] The Supreme Court has consistently recognized that a separate jurisdiction and law within the military exists based upon a need

---

[159] *See* Alden v. Maine, 527 U.S. 706, 715 (1999) (relying upon English practice surrounding sovereign immunity given adoption by the founding era).

[160] *See, e.g.*, Loving v. United States, 517 U.S. 748, 759–67 (1996) (outlining the direct effect of the British practice surrounding military jurisdiction upon our own and noting "[w]e have undertaken before, in resolving other issues, the difficult task of interpreting Clause 14 [of Article I § 8] by drawing upon English constitutional history") (citations omitted); Weiss v. United States, 510 U.S. 163, 178 (1994) (highlighting that "[t]he early English military tribunals . . . served as the model for our own military justice system"); Parker v. Levy, 417 U.S. 733, 745 (1974) (recognizing the "British antecedents of our military law").

[161] The Massachusetts Government Act of 1774 allowed the King to appoint the governor of Massachusetts and for the governor to appoint all judges, the attorney general, sheriffs, and other court officers in the province. MASSACHUSETTS GOVERNMENT ACT 1744, 14 Geo. 3 c. 45, https://avalon.law.yale.edu/18th_century/mass_gov_act.asp). The King had appointed General Thomas Gage, the commander of the British Army in North America, as governor who later imposed martial law. *See* Reid v. Covert, 354 U.S. 1, 28 n.49 (1957) (citations omitted). Furthermore, martial law had been imposed upon the colonies of Virginia and South Carolina. *Id.*

[162] *See Loving*, 517 U.S. at 761–67; Reid v. Covert, 354 U.S. 1, 23–30 (1957).

[163] The American Articles of War from 1776 were narrow in their application as they applied only to officers and Soldiers. The limited number of offenses focused upon the need for good order and discipline within the military. *See* Articles of War of 1776, sec. X, art. 1, *reprinted in* WINTHROP, *supra* note 33, app. X. When Soldiers committed civil offenses or offenses against the public, commanders were required to "deliver over such accused person or persons to the civil magistrate" or otherwise face punishment. *Id.*

[164] *See* THE FEDERALIST NO. 29 (Alexander Hamilton) (justifying the government and regulation of the militia while in service upon the need for "uniformity and discipline").

for order and discipline.[165] These guiding principles would likewise lead the Framers of the Constitution to follow the British practice of limiting the application of military law and jurisdiction upon only those who were in actual service, namely those in employed in whole pay and the militia when in actual service.

1. The Continental Congress's Adoption of the British System

There is no clearer evidence that the Founders wished to adopt the British practice surrounding military law than their creation of the American military criminal code of the era.[166] In 1776, John Adams suggested adopting the British Articles of War in total, noting that,

> There was [in existence] one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of discipline.[167]

The committee submitted a copy of the British Article of War with minor changes to the Continental Congress for approval, and they were adopted on 20 September 1776.[168]

This act by the Continental Congress not only adopted the British military law but it likewise adopted—or even narrowed—who was subject

---

[165] *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion"); Parker v. Levy, 417 U.S. 733, 758 (1974) (recognizing the different constitutional protections afforded to service-members due to "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline"); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty").

[166] *See infra* notes 169-70 and accompanying text.

[167] *Diary of John Adams, [Monday August 19. 1776.]*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/01-03-02-0016-0172.

[168] *Id.; see also* 5 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1776, at 788-807 (Gov't Printing Off. 1906).

to it. By its title, the American Articles of War only applied to "troops raised, or to be raised, and kept *in pay*, by, and at the [e]xpense of the United States of America."[169] The limitation to troops who were "in pay" is an adoption of the language from the Mutiny Act.[170] As previously discussed, the term "in pay" under the Mutiny Act had legal significance and was limited to those employed with full pay in actual service.[171] The term "raised" is likewise consistent with actual service.[172] Thus, the American Articles of War applied only to those troops who were employed with full pay in actual service.[173]

The American Articles of War similarly applied to the militia forces who were "mustered and in continental pay."[174] This application was likewise consistent with the British model.[175] Accordingly, the Continental Congress clearly adopted the British practice regarding who was subject to military law and limited it only to those in actual service. These Articles of War would remain in effect years after the Constitution's ratification process was complete.[176] Consequently, from the time of the

---

[169] 7 JOURNALS OF THE CONTINENTAL CONGRESS 264–65 (Gov't Printing Off. 1907) (emphasis added). The full title of the act was "The Rules and Articles for the Better Government of the Troops Raised, or to be Raised, and Kept in Pay, by, and at the Expence of the United States of America." *Id.* (original style retained).

[170] *Compare* 7 JOURNALS OF THE CONTINENTAL CONGRESS 264–65 (Gov't Printing Off. 1907), *with* MCARTHUR, *supra* note 99, at 196–97 (stating that from 1751 onward, the Mutiny Act applied to those officers, non-commissioned officers, and soldiers who were "mustered or in pay").

[171] *See supra* Part IV.A.2–3

[172] *Raise*, SAMUEL JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) [hereinafter JOHNSON'S DICTIONARY] (defining raise as "to collect; to assemble; to levy").

[173] *See* Felix Frankfurter, *Some Reflections on Reading Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it") (quoted in Sekhar v. United States, 570 U.S. 729, 732–33 (2013)).

[174] Articles of War of 1776, sec. XVII, art. 1, *reprinted in* WINTHROP, *supra* note 33, app. X.

[175] *See* CLODE, *supra* note 94, at 181.

[176] *See To John Adams From James McHenry, 6 April 1798,* NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-2400 (last visited Feb. 6, 2024) (referencing "the rules and articles for the better government of the Troops, raised or to be raised, and kept in pay, by and at the expense of the United States of America" in effect at the time). At the time of the letter, James McHenry was serving as the Secretary of War and had previously represented Maryland in the Constitutional Convention. ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., CTR. OF MIL. HIST., SOLDIER-STATESMEN OF THE CONSTITUTION 106–08 (Gov't Printing Off. 1987).

Revolution through the ratification of the Constitution, military law was understood to only apply to two populations: those employed in full pay and the militia when called to actual service.

2. Adoption of the British Practices Surrounding the "Half-Pay" Establishment

The fact that Congress limited jurisdiction to "troops raised and kept in pay" is significant for the discussion surrounding retirees given that the Continental Congress also adopted the half-pay practice followed by the British. Indeed, both Congress and General Washington sought to institute a half-pay establishment, which, in line with the British model, provided half-pay to officers for life who were either severely injured[177] or served to the end of the Revolution.[178] Neither of these approved provisions made reference to subjecting half-pay retirees to congressional regulation or court-martial even though earlier versions of the proposal contemplated such.[179] Thus, without express inclusion or amendment to the title of the law implementing the Articles of War—as Parliament had attempted in 1749—it is clear that these half-pay officers were not subject to military law.

While the creation of half-pay retirements surely is instructive of whether modern-day retirees may be subject to military law, the Continental Congress's treatment of supernumerary officers is even more so. In December of 1781, Congress reduced all general officers who were "not necessary to be in the field" and placed them on the "half pay

---

[177] 5 JOURNALS OF THE CONTINENTAL CONGRESS 702–3 (Gov't Printing Off. 1906) (establishing half-pay for life to those "who shall lose a limb in any engagement, or be so disabled in the service of the United States of America as to render him incapable afterwards of getting a livelihood").

[178] 18 JOURNALS OF THE CONTINENTAL CONGRESS 958–61 (Gov't Printing Off. 1910) (providing "That officers who shall continue in the service to the end of the war, shall also be entitled to half pay during life, to commence from the time of their reduction"); *see From George Washington to a Continental Congress Camp Committee, 29 January 1778*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/03-13-02-0335 (calling for a "half pay and pensionary establishment").

[179] 10 JOURNALS OF THE CONTINENTAL CONGRESS 285–6 (Gov't Printing Off. 1908) (proposing half-pay for life and "that such half pay Officers shall at all times be subject to the regulations of Congress, and hold themselves in readiness for, and be liable to be called into actual service").

establishment."[180] Similar to their creation of the half-pay retirements, Congress did not expressly extend military law upon these reduced officers or amend the title of the act implementing the Articles of War.[181] In contrast, Congress explicitly made other populations subject to courts-martial who did not clearly fall within the term "troops raised . . . and kept in pay."[182] Congress did, however, in line with the British model, make clear that such supernumerary officers were "liable to be called into the field," and that, if recalled, they "shall receive during his continuance of command every allowance and emolument incident to his rank."[183] Thus, just as the British, the Continental Congress viewed officers who both received half-pay and were subject to recall as not subject to military law.

3. The Constitution: A Continuation of Prior Practice by the British and Continental Congress

Turning to the text of the Constitution itself, there is nothing to indicate any deviation from the prior practice of either the British or the Continental Congress. There are three separate constitutional provisions applicable to military jurisdiction. These include: Congress's authority under Article I;[184] the President's designation as the Commander-in-Chief under Article II;[185] and the Fifth Amendment.[186] The populations these sections cover—the Land Forces (Army), the Naval Forces (Navy), and the militia when in actual service—are consistent with both the British

---

[180] 11 JOURNALS OF THE CONTINENTAL CONGRESS 1179–80 (Gov't Printing Off. 1908).
[181] *See id.*
[182] *See, e.g.*, 7 JOURNALS OF THE CONTINENTAL CONGRESS 235 (Gov't Printing Off. 1907) (specifying that "regimental surgeons and their mates . . . may be brought to trial by court-martial for misbehavior"); 18 JOURNALS OF THE CONTINENTAL CONGRESS 882 (Gov't Printing Off. 1910) (specifying that army regimental surgeons "may be brought to trial by court-martial for misbehavior"); 12 JOURNALS OF THE CONTINENTAL CONGRESS 244–5 (Gov't Printing Off. 1908) (outlining the manner in which finance inspectors and contractors may be subject to courts-martial).
[183] 11 JOURNALS OF THE CONTINENTAL CONGRESS 1179–80 (Gov't Printing Off. 1908).
[184] U.S. CONST. art. I, § 8, cls. 14, 16.
[185] U.S. CONST. art. II, § 2, cl. 1.
[186] U.S. CONST. amend. V. One could argue based upon the sentence construction that the phrase "when in actual service, in time of War, or public danger" applies to both "the militia" and the land and naval forces; however, this is unnecessary to establish that jurisdiction is tied to service. It is more likely that the latter clause is meant to only apply to the militia in this instance consistent with the descriptions in both Article I and Article II. *See id.*

practice and the American practice leading up to, and after, the ratification of the Constitution.

a. The Militia When in Actual Service

The Constitution is explicit regarding the militia in that military jurisdiction was to be applied only to those in actual service.[187] Simply put, military jurisdiction surrounding the militia is conditioned upon one singular factor: whether they are in actual service. Congress explicitly applying military jurisdiction only when an individual was in actual service is unsurprising because, at the time of the framing, "the Militia comprised all males physically capable of acting in concert for the common defense."[188] Thus, it was not until the militia was in actual service that they bore military character akin to those within the Army or Navy. It is only in this instance that Federal governance necessitated the imposition of military law to instill discipline.[189] Likewise, it was this military character through actual service that justified deviating from the normal practice afforded within the civilian courts.[190] This treatment of the militia shows that the Framers explicitly delineated between civilian and military jurisdiction over military service. Consequently, in conformity with the British practice, the Framers saw no need to authorize the exceptional jurisdiction within the military unless the militia were in actual service.[191]

b. The Land and Naval Forces

The Founders saw fit to extend military jurisdiction upon the militia only when in actual service; for this reason, there is little reason to think that application of the same should be viewed differently regarding those

---

[187] *See* U.S. CONST. art. I, § 8, cls. 16; *see also* U.S. CONST. amend. V.
[188] District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)); *see also* THE FEDERALIST NO. 29 (Alexander Hamilton) (describing "all the militia of the United States" as including "the great body of the yeomanry, and of the other classes of the citizen").
[189] *See* THE FEDERALIST NO. 29 (Alexander Hamilton) ("It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense").
[190] *See* U.S. CONST. amend. V.
[191] *See* THE FEDERALIST NO. 29 (Alexander Hamilton).

within the land and naval forces. While the Framers did not explicitly condition jurisdiction over the land and naval forces upon actual service, the terms themselves would have been self-evident.[192] This is especially the case given that such a read is consistent with the application of military law prior to, and after, the ratification of the Constitution, which extended military law only to those "in pay."[193] Numerous state constitutions of the era explicitly tied punishment by military law to service or employment within the Armed Forces.[194] It can hardly be argued that these states ratified a U.S. Constitution that violated their own with regard to whom may be subject to military law.

Unlike the militia, the land and naval forces (the Army and the Navy) were a population that existed separate and apart from the general populace.[195] The existence of the Army and Navy were conditioned upon the need for national defense, and, therefore, their position in actual service would have been obvious to the founding era. Indeed, documents from that time consistently connect reference to the land and naval forces with necessary duties and operations.[196] In sharp contrast, a well-trained

---

[192] *See* JOHNSON'S DICTIONARY, *supra* note 172 (defining: "land forces" as "warlike powers not naval; Soldiers that serve on land"; "forces" as "armament," which is defined as "a force equipped for war"; "Naval" as "consisting of ships; or belonging of ships"; "Army" as "a collection of armed men obliged to obey one man"; and "Soldier" as "a fighting man; a warrior. Originally one who served for pay").

[193] *See supra* notes 171-75 and accompanying text.

[194] *See, e.g.*, MD. CONST. art. XXIX (1776) ("That no person, except regular soldiers, mariners, and marines *in the service of this State*, or militia *when in actual service*, ought to be subject to or punishable by martial law") (emphasis added); MASS. CONST. art. XXVIII (1780) ("No person can in any case be subjected to law-martial . . . except those *employed* in the army or navy, and except the militia *in actual service*") (emphasis added); N.H. CONST. art. XXXIV (1784) ("No person can in any case be subjected to law martial . . . except those *employed* in the army or navy, and except the militia *in actual service*") (emphasis added).

[195] *See* THE FEDERALIST NO. 29 (Alexander Hamilton) (arguing that in contrast to a standing army, the militia are "men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests").

[196] *See, e.g.*, THE FEDERALIST NO. 24 (Alexander Hamilton) (arguing in support of a "permanent corps in the pay of the government" to man garrisons and "a navy" as necessary for protection from outside forces); ARTICLES OF CONFEDERATION of 1781, art. VI, cl. 4 ("nor shall any body of forces be kept up by any state, in time of peace, except such number only . . . deemed requisite to garrison the forts necessary for the defence of such state"); *id.* art. IX, cl. 4 (providing Congress the power to appoint "all officers of the land [and naval]

militia was viewed as merely "ready to take the field whenever the defense of the [s]tate shall require it."[197] The militia was ready to enter into actual service when necessary, but the Army and Navy were already acting within the scope of such service. Consequently, military jurisdiction over the land and naval forces only applied to those who were engaged in actual service.

4. Refuting the Purported Counterexample of the Mutiny of 1783

In his concurrence in *Begani*, Judge Maggs attempts to offer a counterexample that military law was imposed on those not in actual service by looking to the court-martial of the Soldiers engaged in the Philadelphia Mutiny of 1783.[198] He argues that these Soldiers were furloughed and, therefore, "had no ongoing duties, but they were in the Army, and they were subject to court-martial for offenses committed while furloughed."[199] His account, however, misses several salient points that negate his premise of using this event as a counterexample.

Importantly, immediately after receiving the furlough order on 13 June 1783, the Soldiers were verbally presented with the option to remain in service if they preferred it to being furloughed.[200] In accord, the Soldiers drafted a letter to Congress refusing to accept the furlough.[201] On 19 June 1783, the furlough orders were officially amended to "allow [Soldiers] to remain in service . . . if they prefer it to being furloughed."[202] It was not

forces, in the service of the United States" and to "mak[e] rules for the government and regulation of said land and naval forces, and directing their operations").

[197] THE FEDERALIST NO. 29 (Alexander Hamilton).

[198] United States v. Begani, 81 M.J. 273, 284-86 (C.A.A.F. 2021) (Maggs, G., concurring).

[199] *Id.* at 285.

[200] *See* Mary A. Gallagher, *Reinterpreting the "Very Trifling Mutiny" at Philadelphia in June 1783*, 119 PA. MAG. OF HIST. & BIOGRAPHY, Jan/Apr. 1995, at 3, 17–18. "Furthermore, Humpton reported that the furlough option [to remain in service instead of being furloughed if desired] was announced to the troops at the Philadelphia barracks in the 'After Orders' of June 13, six days before Congress officially approved Washington's modification." *Id.* at 33.

[201] *See id.* (explaining that the furlough order was conveyed on 13 June 1783 and quoting a letter from John Armstrong Jr. to Horatio Gates, 16 June 1783, stating that the Soldiers' letter declared "we will not accept your furloughs & demand a Settlement").

[202] *From Alexander Hamilton to Major William Jackson, [19 June 1783]*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0253

until after this official amendment, which permitted the Soldiers to remain in service, that the Soldiers engaged in an armed march upon Congress and the Pennsylvania State House on 21 June 1783 and thereby effectuated their mutiny.[203] Consequently, the Soldiers were engaged in actual service at the time of the mutiny and were subject to both military law and courts-martial. Thus, rather than provide a counterexample, this event only supports that imposition of military law extended to those engaged in actual service.

5. Original Constitutional Authority in the "Make Rules" Clause Relates to Only Those in Actual Service

Putting it all together, determining the proper scope of the population subject to military law becomes clear. Constitutional language merely continued the British and Continental Congress's practice of imposing military law only on those who were in actual service. Only upon these individuals was it necessary to deviate from the normal rule of justice within the civilian courts and impose military jurisdiction. This practice ensured that military jurisdiction was narrowly construed and limited to the least possible power adequate to promote order and discipline, which conforms to Supreme Court precedent.[204] Consequently, the authority provided to Congress within the make rules clause must be limited to this understanding, and any extension beyond it should be viewed with sharp scrutiny given the plethora of fundamental protections at issue.

V. Extension Beyond Original Authority is Improper and Unnecessary

The current status of retirees shows that nothing necessitates expanding the original reach of military jurisdiction by adding retirees to

---

(last visited Apr. 5, 2024); *see also* 24 JOURNALS OF THE CONTINENTAL CONGRESS 403 (Gov't Printing Off. 1922) (recognizing a "variation . . . in the manner of furloughing troops").

[203] *See Elias Boudinot to George Washington, June 21, 1783*, AM. MEMORY, https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(dg020306)) (last visited Mar. 16, 2024) (explaining that 400–500 Soldiers surrounded the state house, with fixed bayonets, during a special session of Congress on 21 June 1783); *see also* Gallagher, *supra* note 200, at 24–26 (accounting for the insurrection on 21 June 1783 as well as the events that followed).

[204] *See, e.g.*, United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22 (1955).

the land and naval forces ranks and continuing to impose military law upon them. Indeed, the modern arguments that continued jurisdiction is supported by retirees' collection of pay and potential recall[205] was similarly present when the Continental Congress—and the British system upon which their military practice was derived—neglected to impose military law upon half-pay officers.[206] A review of the other aspects of the treatment of military retirees likewise shows that subjecting them to military law is unnecessary.

Once an individual retires from service, they essentially fall back into the civilian populace and are nearly indistinguishable from their civilian counterparts. They do not have any day-to-day military requirements, muster formations, or perform any activities that remotely resemble military service. They do not have to report to an established chain of command. The U.S. Court of Appeals, D.C. Circuit long ago recognized that the "duties of a retired officer . . . are of an exceedingly limited character."[207] Indeed, retired personnel bear far more resemblance to the militia at the time of the founding. They are analogous to the select corps that Hamilton described as "an excellent body of well-trained militia, ready to take the field whenever the defense of the State shall require it."[208] Further, like Hamilton explained of the militia, retirees "are daily mingling with the rest of their countrymen and . . . participate with them in the same feelings, sentiments, habits, and interests."[209] Accordingly, there is no reason to treat retired personnel differently than the militia and limit their subjugation to military law to when they are called back into service.

In contrast to their inclusion within civilian society, Congress has specifically alienated retired personnel from the military ranks.[210] Retired officers statutorily have no right to command except when they are recalled onto active duty.[211] They are forbidden from sitting as a member

---

[205] *See, e.g.*, United States v. Begani, 81 M.J. 273, 278–79 (C.A.A.F. 2021).
[206] *See supra* Part IV.A.2–3; Part IV.B.1–2.
[207] Closson v. United States, 7 App. D.C. 460, 470 (D.C. Cir. 1896).
[208] THE FEDERALIST NO. 29 (Alexander Hamilton); *see also Militia*, JOHNSON'S DICTIONARY, *supra* note 172 (defining militia as "trainbands; the standing force of a nation"; and "trainbands" as "the militia; the part of the community trained to martial exercise").
[209] THE FEDERALIST NO. 29 (Alexander Hamilton).
[210] *See infra* notes 214–18 and accompanying text.
[211] 10 U.S.C. § 750.

upon a court-martial panel.[212] They are only permitted to wear their uniform in certain circumstances by Service regulations.[213] The code they are subject to is not even statutorily made available to them directly.[214] Even within the UCMJ, Congress contemplates retirees as being within "civilian life."[215] Simply put, the limited connection and contact that retired personnel have with the military do not necessitate continued imposition of military law upon them while in a retired status.

Even ignoring the original understanding of the constitutional authority provided, the Government's justifications to support continued jurisdiction over retirees are left wanting. As a preliminary matter, Congress did not provide any justification within their debates when they first extended jurisdiction over retirees in 1861.[216] Ignoring this, retired pay is insufficient grounds for continued jurisdiction. Indeed, the Supreme Court has stated that congressional actions have shown that they view retired pay as recognition of past service rather than continued salary for current reduced service.[217] Further, the manner in which congress pays retirees is consistent with deferred compensation akin to a pension rather than continued pay.[218] These facts make the continued pay of retired

---

[212] 10 U.S.C. § 825 (limiting "who may serve on courts-martial" to active duty members).
[213] 10 U.S.C. §772 authorizes retirees to wear their uniform; however, Service regulations limit this authorization. For example, within the Army, wear of the uniform by retirees is generally reserved for ceremonial events. *See* U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF UNIFORMS AND INSIGNIA para. 23-1 (28 Jan. 2021).
[214] *See* 10 U.S.C. § 937(d) (stating that "[t]he text of this chapter and the text of the regulations prescribed by the President under this chapter shall be – available to a member *on active duty* or to *a member of a reserve component*.") (emphasis added).
[215] *See* 10 U.S.C. §§ 942(b)(1), (4) (requiring CAAF judges to be "appointed from civilian life" and specifying "[a] person may not be appointed . . . within seven years after retirement from active duty").
[216] *See* CONG. GLOBE, 37th Cong., 1st Sess., 2, 16–17, 40, 117–18 (1861).
[217] Barker v. Kansas, 503 U.S. 594, 603 (1992) (reasoning that Congress has treated military retirement pay as deferred compensation, given how it is federally taxed and that Congress permitted states to consider it a marital asset).
[218] Since 1985, Congress has placed a portion of the annual Department of Defense (DoD) appropriation in the Military Retirement Fund (MRF) based upon anticipated *future* retirement payments to current Service members, not the amount of retired pay actually paid to current retirees. KAMARCK, *supra* note 17, at 16. "Once military personnel retire, payments to them are made from the accumulated amounts in the MRF, not from the annual DoD budget." *Id.* The MRF is also used to fund civilian retirement annuities. 10 U.S.C. § 945(h).

personnel even less apt to justify their continued subjugation to military law no matter their ability to be recalled.

Furthermore, there is negligible necessity to justify imposing military law upon retirees for the sake of discipline. Indeed, even though members of the Reserve are likewise subject to involuntary recall to active duty,[219] they are only subject to military law while serving on their regular active-duty periods and while on inactive-duty training, but not when in inactive status.[220] Reserve component members, however, may still be prosecuted for actions committed while on active duty or inactive duty status afterward.[221] Given this treatment of a similarly situated population, it can hardly be said that continuing to subject retired personnel to military law in perpetuity is necessary beyond the ability to hold them accountable for actions committed on active duty prior to retirement.[222] In fact, Reserve component members are even more important to the national defense structure, as retired personnel will only be mobilized "when there is not enough active or qualified Reserve manpower available."[223] Based upon these factors, imposing military law upon retired personnel more broadly than reservists is inequitable and unnecessary.

If Congress merely wishes to ensure that retired pay ceases upon bad behavior, they can expound upon the list of civilian convictions that result in the termination of retired pay, such as a felony conviction in a state or Federal court. [224] This type of action is already contemplated for officers.[225] Such an act would ensure that retired personnel are afforded

---

[219] 10 U.S.C. § 12302.
[220] *See* 10 U.S.C. § 802(a)(3)).
[221] 10 U.S.C. § 803(d); *see also* United States v. Wheeler, 10 U.S.C.M.A. 646 (C.M.A. 1959).
[222] *See Wheeler*, 10 U.S.C.M.A at 655–57 (explaining that reservists should only be subject to military prosecution for acts committed while on active duty even though they may be recalled to active duty "at the scratch of the Presidential pen" and serve as a "ready reserve qualified for immediate duty").
[223] U.S. DEP'T OF DEF., INSTR. 1352.01, MANAGEMENT OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS para. 3.3a (8 Dec. 2016).
[224] *See* 5 U.S.C. § 8312 (providing for termination of retired pay based upon convictions of certain Federal codes).
[225] *See* 10 U.S.C. § 1161 (permitting dismissal of an officer "who is sentenced to confinement in a Federal or [s]tate penitentiary or correctional institution . . . whose sentence has become final"); *see also* Allen v. United States, 91 F.Supp. 933 (Ct. Cl. 1950) (affirming dismissal from the retired rolls by a similar prior provision).

the constitutional safeguards provided in both Article III and the Bill of Rights. Likewise, this type of act would protect the Government's interest in retired personnel being capable of service and not, for example, being prohibited from carrying a firearm.[226]

Quite simply, there is insufficient reason to expand upon the original authority granted to Congress to subject retired personnel to military law continuously for the remainder of their lives. Such an imposition is beyond "the least possible power adequate to the end proposed" as it is unnecessary for either the discipline of the Armed Forces or national security.[227]

VI. Remedy and Conclusion

If the United States Supreme Court were presented with the question of whether Congress's authority to govern and regulate the land and naval forces includes continued imposition of military law upon retirees in perpetuity, they likely would find that it does not. Such imposition exceeds the original authority granted to Congress, and there is little need to justify its expansion. Consequently, both UCMJ Articles 2(a)(4) and (6)already exceed Congress's power under Article I of the Constitution and are unconstitutional.

Rather than wait for the Supreme Court to strike down both UCMJ Articles 2(4) and (6), Congress should amend the UCMJ to conform to the original scope of their authority: namely, that military law is only imposed upon those in or called into actual service. This rule would place retirees in uniform treatment with active-duty personnel,[228] Reserve personnel,[229] members of the Army and Air National Guards,[230] and civilians on the selective service list.[231] Rather than complicate things, this bright-line rule would simplify the delineation between civilian and military courts. Further, it would comply with Supreme Court precedent that calls for limiting the imposition of military law only to the extent necessary for

---

[226] *See* 18 U.S.C. § 921.
[227] United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22 (1955).
[228] *See* UCMJ art. 2(a)(1) (2019).
[229] *See* UCMJ art. 2(a)(3) (2019).
[230] *See id.*
[231] *See* Billings v. Truesdall, 321 U.S. 542, 544 (1944).

good order and discipline. Until such act occurs, the military services should refrain from exercising jurisdiction under UCMJ Articles 2(a)(4) and (6) for actions committed by those occupying a retired status.

Retired personnel have devoted the prime of their lives protecting constitutional rights. It is only proper that they get to enjoy them after they "close [their] military career and just fade away."[232]

[232] MacArthur, *supra* note 1.