THE MILITARY'S DILUTION OF DOUBLE JEOPARDY: WHY *UNITED STATES v. EASTON* SHOULD BE OVERTURNED

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The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.[1]

I. Introduction

For over thirty years, Supreme Court case law on Double Jeopardy stood in stark conflict with the military's double jeopardy clause found in Article 44, Uniform Code of Military Justice (UCMJ). In 1978, in *Crist v. Bretz*, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment mandates that jeopardy attach upon a jury being empaneled.[2] The Court explained that a defendant's interest "in retaining a chosen jury . . . is now within the protection of the constitutional guarantee against double jeopardy."[3] Yet Article 44, the double jeopardy clause of the UCMJ, states that jeopardy attaches "after the introduction of evidence."[4] On June 4th, 2012, the Court of Appeals for the Armed Forces (CAAF), in the case of *United States v. Easton*, held that despite this conflict, Article 44 is constitutional.[5] In *Easton*, the CAAF rescued Article 44 by casually dismissing the defendant's interest "in retaining a chosen jury" as inapplicable to the military.[6]

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[1] Crist v. Bretz, 437 U.S. 28, 38 (1978).

[2] *Id*.

[3] *Id*. at 36.

[4] UCMJ art. 44 (2012).

[5] United States v. Easton, 71 M.J. 168, 170 (C.A.A.F. 2012).

[6] *Easton*, 71 M.J. at 174.

Six months later, the Supreme Court denied Easton's petition for certiorari.[7] This article argues that Congress should amend Article 44 to align with civilian law. Not only was *Easton* decided on faulty logical grounds, but it also set a dangerous precedent in which the CAAF was permitted to ignore the Supreme Court's interpretation of a core constitutional right, and on the flimsiest of justifications. This article first introduces *Easton*'s facts, holding, and logic. Then, the article examines *Easton*'s failings. First, the CAAF erroneously concluded that Congress did not intend for the attachment standards mandated by *Crist* to apply to the military. The history of both the Double Jeopardy Clause and the UCMJ tell otherwise. Second, the CAAF failed to confront decades of Supreme Court case law that outline the underlying purposes of the Double Jeopardy Clause, which run counter to *Easton*'s central holding. Finally, the CAAF failed to acknowledge that a military defendant's interest in a particular jury is likely to be greater than that of a civilian.

II. Introduction to *United States v. Easton*

In *United States v. Easton*, the CAAF confronted the constitutionality of Article 44.[8] Lieutenant Easton faced a charge of missing movement. Prior to jury empanelment, the military judge pointed out that two videotaped depositions were inaudible. The government decided to proceed anyway. Voir dire took place and a panel was sworn and assembled. However, before introduction of evidence, the charge was dismissed. Nearly a year later, identical charges were referred to a new court-martial. Easton was convicted of the later charges. The Army Court of Criminal Appeals avoided the constitutional question and held that there was manifest necessity for a new trial, and thus there was no double jeopardy violation.[9]

The CAAF disagreed with the lower court and found that there was no manifest necessity for a second trial.[10] Consequently, the CAAF directly confronted the question of whether the military is obligated to

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[7] Easton v. United States, 133 S. Ct. 930 (2013).
[8] *Easton*, 71 M.J. at 174.
[9] United States v. Easton, 70 M. J. 507, 513 (A. Ct. Crim. App. 2011). Manifest necessity is the standard adopted by the Supreme Court in 1824 to measure whether a retrial is justified due to unique or unforeseeable circumstances, such as a mistrial. United States v. Perez, 22 U.S. 579, 580 (1824).
[10] *Easton*, 71 M.J. at 174.

follow the Supreme Court's holding in *Crist* that jeopardy attaches when the jury is empaneled and sworn.[11] The CAAF held that, despite *Crist*, Article 44's designation of attachment at the introduction of evidence was constitutional.

According to the CAAF, *Crist* does not apply to the military because "in the military context, the accused does not have the same protected interest in retaining the panel of his choosing, and therefore jeopardy does not attach in a court-martial until evidence is introduced."[12] The court offered several bases for its conclusion. First, the court noted that the Sixth Amendment right to a jury was held, in 1942, not to apply to military commissions, and therefore "protecting the interest of an accused in retaining a chosen military 'jury' does not directly apply."[13] As further support for this proposition, the court noted that under Article 29, UCMJ, military judges have the authority to excuse members "for physical disability or other good cause" and that convening authorities may also excuse members "for good cause."[14] This "illustrates that, due to the unique nature of the military, an accused's chosen panel will not necessarily remain intact throughout a trial."[15] Consequently, the court concluded that "the Supreme Court's reasoning [in *Crist* does not] neatly or clearly apply in military practice, where the UCMJ and the courts have long held that a servicemember does not have a right to a particular jury."[16]

The CAAF's second major foundation for its conclusion lay in Congress's exercise of its constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces."[17] According to the CAAF, Congress evinced "a different purpose and legislative intent" from *Crist* in enacting the UCMJ.[18] First, Congress not only enacted Article 44, but it also enacted Article 29 which, as explained above, permits members to be excused under various circumstances. Furthermore, the CAAF noted that Article 16 permits three members without a military judge to sit as a court-martial, but they must be sworn before the accused is arraigned. The court noted, "[s]uch a panel could not properly function if jeopardy attached when members

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[11] Crist v. Bretz, 437 U.S. 28, 35 (1978).
[12] *Easton*, 71 M.J. at 169.
[13] *Id*. at 175.
[14] *Id.*
[15] *Id*.
[16] *Id.* at 176.
[17] *Id.* (quoting U.S. CONST. art. I, § 8).
[18] *Id.* at 175.

were sworn since they would not be able to perform any duties without jeopardy attaching."[19] For these reasons, the court found "[t]hat Congress was purposeful in selecting the point at which jeopardy attaches."[20] Therefore, the court refused to overturn the rule that Congress established in enacting Article 44.[21]

III. The Historical Failings of *Easton*

A. Antebellum Development of Double Jeopardy Jurisprudence

A brief examination of Double Jeopardy Clause history demonstrates that the Supreme Court's holding in *Crist* has deep roots which the CAAF was too quick to dismiss. Although double jeopardy concepts can be found in ancient Greek and Roman law, the Double Jeopardy Clause of the Fifth Amendment derives, not surprisingly, from English common law.[22] The English common law plea of *autrefois acquit* (former acquittal) prevented the state from prosecuting individuals for crimes of which they had already been acquitted.[23] As the American Revolution neared, William Blackstone declared it a "universal maxim of the common law" that "no man is to be brought into jeopardy of his life, more than once for the same offense."[24] This maxim and the common law plea of former acquittal were largely adopted by the colonies prior to ratification of the U.S. Constitution.[25]

In 1791, after various edits to the phrasing, the Double Jeopardy Clause of the Fifth Amendment was ratified by the States.[26] The antebellum understanding of the clause is quite different from U.S. modern double jeopardy jurisprudence. First, before ratification of the Fourteenth Amendment in 1868, the Double Jeopardy Clause only

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[19] *Id.* at 176.
[20] *Id*.
[21] *Id* at 177.
[22] JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 21 (1969).
[23] GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 83 (1998).
[24] 4 WILLIAM BLACKSTONE, COMMENTARIES *335.
[25] DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12 (2004).
[26] *Id*. at 15.

restricted federal action.[27] Second, most antebellum jurists interpreted the Clause to bar only retrials in cases that had reached acquittal or conviction.[28] Thus, there was no widely-accepted concept of jeopardy attaching prior to acquittal or conviction. As Joseph Story explained in 1833, the Clause does not mean "that he shall not be tried for the offence a second time, if the jury has been discharged without giving any verdict . . . for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy."[29] Similarly, Justice Washington declared in 1823 that "jeopardy" means "nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon."[30]

As the nineteenth century progressed, however, numerous states and state courts began to place the point of jeopardy attachment earlier in the trial. Numerous state courts rejected the notion of giving a prosecutor or judge discretion to discharge a jury in cases where the evidence or the jury seemed unfavorable. As the Court of Appeals of Kentucky explained in 1873,

> If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is [the] boasted right [to be free of double jeopardy]? [31]

By the mid-twentieth century, the majority of states, whether through statute, constitution, or judicial interpretation, had decided that jeopardy attaches either at the point a jury is empanelled or when evidence is introduced.[32] Notably, however, the states remained split as to whether

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[27] Benton v. Maryland, 395 U.S. 784, 794 (1969). Regardless, the Supreme Court did not recognize the Double Jeopardy Clause as incorporated by the Fourteenth Amendment, and thus applicable against the states, until over a century later.

[28] *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1839 (1997).

[29] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 659 (1833).

[30] United States v. Haskell, 26 F. Cas. 207, 212 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 15,321). United States v. Haskell, 26 Fed.Cas. 207, 212 (No. 15,321) (CC Pa. 1823)

[31] O'Brian v. Commonwealth, 72 Ky. 333, 339 (Ky. 1873). For a similar discussion in a mid-century Iowa case, see State v. Calendine, 8 Iowa 288, 292 (1859).

[32] SIGLER, *supra* note 22, at 84.

jeopardy attached at jury empanelment or at the introduction of evidence. Although by the mid-twentieth century, most jurisdictions placed attachment at empanelment, numerous states, including New York, placed attachment at the introduction of evidence.[33]

Although the Double Jeopardy Clause is silent about when jeopardy attaches, the federal courts moved in relative lock-step with the states and thus discarded Justice Story's more rigid framework. By 1949, the Supreme Court had yet to delineate the exact point at which jeopardy attaches. Although there is no case exactly on point, in *Wade v. Hunter*, the Court first noted that a defendant has a "valued right to have his trial completed by a particular tribunal."[34] Although the Court failed to expound on this right, the right became central to the Court's Double Jeopardy jurisprudence in the coming decades.

B. Enactment of the Uniform Code of Military Justice

Meanwhile, just months before *Wade* was decided, congressional hearings were held on the newly-drafted UCMJ. Although *Wade* would soon settle in the affirmative the question of whether the Double Jeopardy Clause of the Fifth Amendment applied to the military, at the time of the hearings, the issue was in doubt: the Supreme Court had never said one way or another whether the Double Jeopardy Clause applied to the military. Consequently, the draft included Article 44, which forbids prosecution of servicemembers a second time for the same offense.[35]

The *Wade* opinion was issued amidst the hearings.[36] In *Wade*, the convening authority dissolved a battlefield court-martial after introduction of evidence, due to witness unavailability during a rapidly changing tactical situation.[37] When the tactical situation permitted, a

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[33] *Id*. at 85–86.
[34] Wade v. Hunter, 336 U.S. 684, 689 (1949).
[35] Major Daniel J. Everett, *Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial*, ARMY LAW., Apr. 2011, at 15.
[36] *Wade*, 336 U.S. at 685. *Wade* was decided April 25, 1949 while the congressional hearings began March 7, 1949 and ended May 27, 1949; *see Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 669 (1949).
[37] *Id.* at 691–92.

new convening authority re-referred the charges to a new court-martial.[38] The Court held that re-prosecution of Wade did not violate the Double Jeopardy Clause since the court-martial had been dissolved due to manifest necessity.[39] The UCMJ drafters, in an apparent desire to avoid a future repeat of *Wade*, added a third and final clause to Article 44: "A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article."[40]

In so doing, the drafters explicitly designated the introduction of evidence as the point at which jeopardy attached. This provision, according to the Senate Report on the bill, "represent[s] a substantial strengthening of the rights of an accused."[41] The UCMJ was signed into law in 1950.[42] Article 44's language remains unchanged to this day.[43]

C. The Development of Modern Double Jeopardy Jurisprudence

Seven years after the UCMJ was signed into law, the Supreme Court issued one of the seminal Double Jeopardy opinions that outlined the foundational principles of the Clause.[44] In *Green v. United States*, the Court confronted an issue unrelated to attachment, but the Court's opinion presented the most thorough explanation for the purpose of the Double Jeopardy Clause. The Court explained:

> The underlying idea [of the Double Jeopardy Clause] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and

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[38] *Id.*
[39] *Id.* at 692.
[40] S. REP. NO. 81-486, at 2244 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 1949 WL 1929.
[41] *Id.*
[42] *See* 64 Stat. 108 (1950) (enacting the UCMJ).
[43] UCMJ art. 44 (1951).
[44] Green v. United States, 355 U.S. 184 (1957).

> insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[45]

The Court went on to reiterate that once a jury has been discharged in the absence of manifest necessity, the Double Jeopardy Clause prevents re-prosecution. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears the jury might not convict."[46] Although the Court did not specifically hold that jeopardy attaches at the point of jury empanelment, the Court's holding indicated that the Court was moving in that direction.

In 1963, the Supreme Court first directly confronted the issue of attachment in *Downum v. United States.*[47] Downum had been convicted by a second jury after his first jury had been discharged due to a missing prosecution witness.[48] The jury was discharged immediately after they had been empanelled, and before any evidence had been introduced. The Court held that although no evidence had been introduced, re-prosecution violated the Double Jeopardy Clause. The Court explained, "There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses."[49] The dissent argued that although the failure to secure witnesses was potentially negligent, the Court should take a more flexible approach in finding manifest necessity here, since the jury had heard no evidence.[50] The majority rejected this approach and, without explicitly saying so, determined that jeopardy had attached upon the jury being sworn.[51]

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[45] *Id.* at 187–88.
[46] *Id*. at 188.
[47] Downum v. United States, 372 U.S. 734, 736 (1963).
[48] *Id.* at 735.
[49] *Id.* at 737–38.
[50] *Id.* at 741–42 (Clark, J., dissenting).
[51] *Id.* at 737. A decade later, the Court faced the related question of whether jeopardy can attach prior to empanelment, at the pre-trial motion stages. The Court reiterated that, in a jury trial, jeopardy attaches at empanelment and neither before nor after. The Court explained, "When a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial." Serfass v. United States, 420 U.S. 377, 391 (1975). Thus, again, the Court based its attachment analysis in the defendant's right to avoid expense and embarrassment.

Eight years later, the Court took another step in embracing the defendant's "valued right to have his trial completed by a particular tribunal" that had been explicitly recognized in *Wade* in 1949.[52] In *United States v. Jorn*, the Court confronted a case of an erroneous mistrial, declared by the military judge without the consent of the defendant and without sufficient cause.[53] In overturning the defendant's re-prosecution, the Court began by again recognizing "the heavy personal strain which a criminal trial represents for the individual defendant."[54] Turning to the interest in a particular tribunal, the Court explained why re-prosecution is permissible after a defendant mounts a successful appeal as opposed to re-prosecution after a judge erroneously declares a mistrial: In a case of re-prosecution following appeal by the defendant, "the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal."[55] Later, the Court noted "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."[56]

Thus, the Court again built upon the foundational principle referenced in *Wade* that a defendant has an interest in having his case tried by a particular jury.[57]

Although in *Downum* the Court had decided that jeopardy attaches at jury empanelment as a federal rule, the Court had left open the question whether this rule was mandated by the Double Jeopardy Clause of the Fifth Amendment.[58] In 1978, the Court faced this question when a defendant appealed his re-prosecution by the state of Montana.[59] Similar to Article 44, UCMJ, a Montana statute provided that jeopardy did not attach in state courts until the first witness is sworn. Defendant Bretz's first trial had been properly discharged after the jury had been empanelled, but before the first witness had been sworn. Relying on the

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[52] United States v. Jorn, 400 U.S. 470, 480 (1971).
[53] *Id.* at 473.
[54] *Id*. at 479.
[55] *Id*. at 484 (plurality decision).
[56] *Id.* at 486.
[57] A year later, the Court faced a similar case and in dicta declared, "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one." Illinois v. Somerville, 410 U.S. 458, 471 (1972) (citing *Jorn*, 400 U.S. at 470).
[58] Downum v. United States, 372 U.S. 734, 737 (1963).
[59] Crist v. Bretz, 437 U.S. 28 (1978).

Montana double jeopardy statute, the state successfully re-prosecuted Bretz at a later date.[60]

By the time of *Crist*, the Court had already ruled that the Double Jeopardy Clause was binding on the states through the Fourteenth Amendment.[61] In *Crist*, however, the Court had to decide whether the Clause mandated that jeopardy attached at jury empanelment or whether this rule was merely one of expediency binding only on federal courts. The Court held that "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."[62] The Court rejected Montana's argument that the exact point of attachment was "an arbitrarily chosen rule of convenience."[63] To the contrary, the Court hearkened back to the defendant's interest in a chosen jury which, by 1978, had repeatedly been espoused by the Court over the preceding three decades. The Court explained:

> The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. . . . It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. . . . Regardless of its historic origin, however, the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn.[64]

Consequently, Montana's statute that declared jeopardy attached upon the swearing of the first witness was unconstitutional. Bretz's conviction was overturned and all remaining states that had previously failed to adopt the rule of attachment laid down for federal courts were forced to amend their statutes and constitutions to abide by the Court's ruling.

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[60] *Id.* at 29–30.
[61] *See supra* text accompanying note 23.
[62] *Crist*, 437 U.S. at 38.
[63] *Id*. at 37.
[64] *Id*. at 35–36 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

Whether willfully or by oversight, Congress did not amend Article 44 following the *Crist* opinion. Today's Article 44 is precisely as it was enacted in 1951. Notwithstanding the Court's seemingly unambiguous commands in *Crist*, Article 44(c) still declares, much as Montana's now-overturned statute did, that jeopardy does not attach until evidence is presented.[65] Over three decades after *Crist*, in *Easton*, the inevitable challenge finally arose as to the constitutionality of Article 44's attachment provision.

IV. The Logical Failings of *Easton*

A. A Brief Recap of the *Easton* Dissent

The *Easton* opinion yielded one dissent, whose major points are briefly recounted here and expanded upon in the sections that follow. First, as noted above, the majority placed great weight upon the power of judges and convening authorities to excuse panel members for the proposition that servicemembers lack the same interest in a chosen panel. Yet, as the dissent duly noted, civilian judges also have the authority to excuse jurors.[66] Federal Rule of Criminal Procedure 24(c) provides that when a judge excuses a juror, that juror may be replaced by an alternate juror even in the middle of trial.[67] Furthermore, Rule 23(b)(3) provides that even after a jury has retired to deliberate on findings, the judge still has the authority to excuse a juror, "if the court finds good cause" and the remaining eleven jurors may return a verdict.[68] As the dissent noted, "[i]n this regard, there appears to be little difference between the federal rule and UCMJ provisions."[69]

Of course, as the majority emphasized, in a court-martial, "if excusal of a court-martial member does not reduce the panel below quorum, the defendant is not entitled to an additional member."[70] Yet, as noted, in a civilian trial as well, if a juror is excused during deliberations, the

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[65] UCMJ art. 44 (2012).

[66] United States v. Easton, 71 M.J. 168, 180 n.3 (C.A.A.F. 2012) (Erdmann, J., dissenting) ("Reasons for excusing jurors in federal trials have included: illness, travel plans, family emergency, medical emergencies, emotional instability, and religious holidays.").

[67] FED. R. CRIM. P. 24(c).

[68] *Id.* 23(b)(3).

[69] *Easton*, 71 M.J. at 178 (Erdmann, J., dissenting).

[70] *Id*. at 176 n.10 (Erdmann, J., dissenting).

accused is also not entitled to an additional juror. Furthermore, this difference is also partly due to the differences in jury size between the military and civilian practice. Federal Rule of Criminal Procedure 23(b) provides that juries shall consist of twelve jurors while Articles 16 and 25a of the UCMJ provide that general courts-martial shall consist of no fewer than five members for non-capital cases and no fewer than twelve members for capital cases. However, it is worth noting that the twelve-man jury in civilian practice is not mandated by the Constitution. The Supreme Court has made clear that while twelve-man juries have a deep history in American jurisprudence, the twelve-man "requirement" is "not of constitutional stature."[71] The Court explained, "[t]he performance of [the jury's] role is not a function of the particular number of the body which makes up the jury."[72] Rather than being mandated by the Constitution, Rule 23(b)'s twelve-man requirement was promulgated by the Judicial Conference of the United States pursuant to that body's delegation of power in the Rules Enabling Act.[73] Thus, the difference between the size of civilian juries and military panels is not required by the Constitution.

B. Congressional Intent in Enacting Article 44

At its heart, the *Easton* opinion relies upon deference to Congress's Article I authority, and, more specifically, on the notion that when Congress enacted Article 44(c) of the UCMJ, Congress willfully intended for a different rule from civilian practice. Yet, as noted previously, when the UCMJ was drafted, debated, and enacted from 1949 to 1951, the state of the law of jeopardy attachment was unclear. State courts were split and the Supreme Court had yet to weigh in on the federal side as to when jeopardy attached. Meanwhile, the applicable Article of War was silent as to when jeopardy attached.[74]

In 1948, the Secretary of Defense appointed a committee to draft a uniform code for all Services. The committee, chaired by Harvard Law School professor Edmund Morgan, presented its draft a year later. The committee's draft of Article 44 is virtually identical to the Articles of

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[71] Apodaca v. Oregon, 406 U.S. 404, 406 (1972).
[72] Williams v. Florida, 399 U.S. 78, 100 (1970).
[73] Rules Enabling Act, 28 U.S.C. § 2072 (1990); Peter G. Mccabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1678 (1995).
[74] Article of War 40 (1920).

War double jeopardy provision and the current UCMJ Article, except it lacked the current section (c), the section which, among other things, designates the point of jeopardy attachment as when evidence is introduced.[75] Consequently, the "Morgan Draft" was silent as to when jeopardy attached.

Soon after congressional hearings began, the Supreme Court issued its *Wade* opinion. As explained previously, *Wade* not only upheld re-prosecution of a servicemember where the original charges had been withdrawn under dire circumstances, but it also clarified that the Double Jeopardy Clause of the Fifth Amendment applied to the military. In response to *Wade*, several members of the committee fought to amend Article 44. General Benjamin Franklin Riter, an Army reserve officer in the Judge Advocate General's Corps, testified before the House and Senate.[76] When he testified regarding the proposed Article 44, he noted, derisively, that Article of War 40 had been drafted with the erroneous view that the Double Jeopardy Clause of the Fifth Amendment did not apply to the military.[77] As noted previously, the Morgan Draft of Article 44 of the UCMJ being debated by Congress was virtually identical to Article of War 40. In his testimony to the Senate, General Riter noted that *Wade* had clarified that the Double Jeopardy Clause did in fact apply to the military. General Riter testified, "if I do not leave any impression here this morning other than this, gentlemen, in view of the *Wade* case, . . . we must get rid of that archaic idea that there cannot be jeopardy before verdict."[78]

Similarly, before the House, General Riter railed against Article 44 as drafted and urged for an amendment. Notably, he explained to the House,

> [Article 44] is archaic in the sense that it keeps only "autre fois acquit; autre fois convict"—the old common law idea that there had to be a verdict before jeopardy could attach.

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[75] Committee on a Uniform Code of Military Justice, Uniform Code of Military Justice: Text, References and Commentary (1949).

[76] *Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 168 (1949) [hereinafter *Senate UCMJ Hearings*] (statement of General Franklin Riter). General Riter was introduced as the department commander of the American Legion of Utah.

[77] *Id.*

[78] *Id*. at 170.

> That is, a man had to be acquitted or he had to be convicted before he could plead [double jeopardy]. We know that that is not the law under the Fifth Amendment today—that jeopardy can attach in our civil courts *as soon as the jury is sworn and the first witness sworn*.[79]

General Riter's testimony highlights once again that when the UCMJ was drafted, the Supreme Court had yet to clarify the precise point at when jeopardy attaches. Many civilian jurisdictions still permitted jeopardy to attach after the first witness was sworn, as opposed to when the jury was sworn. Before the Senate, General Riter testified that as a result of *Wade*, "[t]he new article must recognize that jeopardy may attach before findings and that the doctrine of 'imperious necessity' is now part of the military law."[80] Similarly, Felix Larkin, the Assistant General Counsel to the Secretary of Defense, testified "double jeopardy obtains or applies or starts, if you will, in many civil jurisdictions *either* when the jury is sworn or the first witness is heard, and from then on the man is in jeopardy."[81]

Furthermore, the primary basis for General Riter's recommendation that Article 44 be amended was the *Wade* case. In his House testimony, he declared that Article 44 "must go, because the day before yesterday there was argued in the Supreme Court, just a few blocks down the street here, the famous *Wade* case."[82] *Wade* was not a case that turned on whether jeopardy attached at empanelment or at the introduction of evidence, although it did make clear that jeopardy attached in a court-martial at least after the introduction of evidence. Instead, *Wade* turned on whether manifest necessity existed for the convening authority to dismiss the first court-martial. General Riter explained to the Senate that Article 44 as drafted could lead convening authorities to the mistaken conclusion that they could withdraw charges at any point prior to findings and double jeopardy would not be implicated.[83] Consequently,

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[79] *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 669 (1949) [hereinafter *House UCMJ Hearings*] (statement of General Franklin Riter) (emphasis added).

[80] *Senate UCMJ Hearings*, *supra* note 76, at 186 (statement of General Riter).

[81] *Id.* at 322 (statement of Felix Larkin) (emphasis added).

[82] *House UCMJ Hearings*, *supra* note 79, at 669 (statement of General Riter).

[83] *Senate UCMJ Hearings*, *supra* note 76, at 186. General Riter noted that prior to *Wade*, "[t]here always existed the temptation for an appointing authority to withdraw a charge when he learned that the prosecution was going to fail in his case." *Id.*

he fought to amend Article 44 to put military law in conformity with civilian law, specifically the *Wade* opinion.

Later, before the Senate Armed Services Committee, the chair of the drafting committee, Edmund Morgan, held an extended exchange with the committee regarding Article 44.[84] Not surprisingly, they never discussed whether jeopardy should attach at empanelment or at the introduction of evidence.[85] Again, it would be another two decades before the Supreme Court held that the point of attachment was a constitutional matter. *Wade* merely clarified that jeopardy attached before findings. Consequently, the discussion centered on ensuring that Professor Morgan and his drafting committee would re-draft Article 44 to align it with the holding in *Wade*. As in General Riter's testimony, the committee repeatedly expressed concern for deterring convening authorities and prosecutors from dismissing charges in the middle of trial, thinking that they could re-prosecute at a later date, except in cases of true manifest necessity.[86] After a lengthy discussion regarding *Wade* and automatic appeals, Senator Kefauver instructed Professor Morgan to re-draft Article 44 "to [put] in that extra protection in one way or another."[87] After a brief exchange, Professor Morgan closed the discussion on Article 44 by remarking, "I really am just as anxious as you Senators are to have the double jeopardy clause apply, and apply the way it does in civil courts."[88]

The majority opinion in *Easton* declares, "Congress was purposeful in selecting the point at which jeopardy attaches."[89] Clearly, however, the House and Senate hearings on the UCMJ support the opposite conclusion. Not once during countless extended debates on Article 44 did the participants debate whether jeopardy should attach at jury empanelment or at the introduction of evidence. As noted, both General Riter and Felix Larkin explained to the committee that in "civil" practice, jeopardy attaches either at empanelment or the introduction of evidence.

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[84] *Id.* at 323.
[85] *Id.*
[86] *Id*. As the Subcommittee Chairman, Senator Estes Kefauver explained, "If they go to trial, and then the prosecuting attorney finds that he probably did not have as good a case as he thought he had, and he gets the case postponed, or deferred, or something or other, or whatnot, I think double jeopardy ought to apply." *Id.* (statement of Sen. Estes Kefauver).
[87] *Id.* at 325.
[88] *Id*. at 324 (statement of Prof. Edmund Morgan).
[89] United States v. Easton, 71 M.J. 168, 176 (C.A.A.F. 2012).

Essentially, their testimony indicated to the committee that *either* would be fine; so long as Article 44 was amended to clarify that convening authorities could not simply terminate a proceeding mid-trial, the article would be in conformity with *Wade*. Rather than concerning themselves with whether jeopardy attaches at empanelment or at introduction of evidence, the senators, representatives, and the drafting committee expressed concern for ensuring that Article 44's double jeopardy provision would operate in conformity with civilian practice.[90] Article 44(c)'s phrase "after the introduction of evidence" is little more than a reflection of what the drafters believed to be the state of the law in civilian court at the time.

C. *Easton*'s Structural Argument

For its conclusion that "Congress was purposeful" in selecting the point of attachment at the introduction of evidence, the majority also relied on other articles of the UCMJ. The majority concluded that various articles and Rules for Courts-Martial taken together demonstrated congressional intent. The majority concluded that applying *Crist* to the military "would negate numerous portions of the UCMJ."[91]

First, the CAAF offered Article 29, discussed previously, as an article "which only function[s] properly if the Article 44, UCMJ, standard for jeopardy is applied."[92] Yet, as discussed earlier, federal courts have similar powers as those provided to military judges in Article 29. It is unclear how Article 29 would function any differently if jeopardy attached at jury empanelment. Whether at voir dire or during the middle of trial, military judges, like federal judges, can excuse a member for good cause.

Second, the court offered Article 16 of the UCMJ to support its structural argument. Article 16 authorized three-member special courts-martial without a military judge. Since the members are sworn before arraignment, the majority concludes that "[s]uch a panel could not properly function if jeopardy attached when members were sworn since

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[90] *See Senate UCMJ Hearings*, *supra* note 76, at 323.
[91] *Easton*, 71 M.J. at 175.
[92] *Id.* at 176.

they would not be able to perform any duties without jeopardy attaching."[93]

The dissent simply ignored this argument, in all likelihood due to its obvious weakness. The issue presented to the court was not a court-martial of this obscure variety. In such a court-martial, the "members" also operate as the military judge.[94] The majority first assumed that complying with *Crist* would automatically mean that jeopardy would attach when the three quasi-military judge-members are first sworn.[95] Again, this is a novel question that a court should consider when such a case arises; unlike normal general and special courts-martial, this type of court is both rare and unique in that the panel also fills the role of military judge. Second, the court concluded, if jeopardy *did* attach when the three members were sworn, "the panel could not properly function."[96] It is unclear why the panel could not properly function. Certainly, there would be a much greater price to dismissing the court, since jeopardy would have attached. But this would have no bearing on whether the panel could function. In summary, three-member courts-martial, in the unlikely event that one will be held in the next decade, could function just fine under the *Crist* rule.

Finally, the majority concludes that complying with *Crist* would also require undermining the President's authority as Commander in Chief, since it would "negate application of certain rules established by the [Manual for Courts-Martial]."[97] In support of this proposition, the majority only offers the example of a single rule, namely Rule for Courts-Martial (RCM) 604(b): "'[c]harges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.'" Of course, this RCM merely restates Article 44(c) in the language of manifest necessity. It is not, as the court seems to suggest, an independently-operating rule issued under the President's Article II authority that would be negated. Certainly, abiding by *Crist* would require amending the RCM, but only because it is a restatement of the UCMJ article in question.

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[93] *Id*.
[94] UCMJ art. 16(2)(A) (2012).
[95] *Easton*, 71 M.J. at 176.
[96] *Id.*
[97] *Id* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 604(b) (2012) [hereinafter MCM]).

D. The Servicemember's Interest in a Particular Tribunal

The ultimate failure of *Easton* is that the opinion failed to even consider the logical underpinnings for a defendant's interest in a particular tribunal. Instead, the court discarded the interest out of hand simply by arguing that Congress and the President did not intend for servicemembers to have that interest. The preceding paragraphs have shown why that is erroneous. The drafters' priority was ensuring the military's double jeopardy clause operated the same as the Double Jeopardy Clause of the Fifth Amendment. At the time of the drafting, the Supreme Court had yet to expound upon a defendant's interest in a particular tribunal.

In the decades following enactment of the UCMJ, the Court explained time and again that a defendant's interest in a particular tribunal is inextricably tied to the other fundamental interests protected by the Double Jeopardy Clause: (1) guarding the defendant from unnecessary "embarrassment, expense, anxiety and insecurity"; and (2) preventing the state from unfairly testing its case and dismissing it when the case looks unpromising. Regarding the latter interest, the Court's attachment rule prevents the state from empaneling a jury, then dismissing it in hopes of obtaining a more favorable one. Regarding the former, more fundamental interest, the connections between the interest in a particular jury and the purpose of the Clause are myriad. First, empaneling a jury consumes time and expense. Once sworn, the *Crist* rule prevents prosecutors from starting the process over, thus subjecting the defendant to days more of the process and days more of anxiety and expense. Second, once a jury is empaneled, the jury is at that point sitting in judgment of the defendant. Although the U.S. system values the principle of innocence until proven guilty, facing a jury of one's peers for the first time standing accused of a crime is perhaps the most dramatic point of "embarrassment" and "anxiety" for an accused. The *Crist* rule fulfills the fundamental purpose of the Clause by ensuring that, absent remarkable circumstances, an accused has to experience this only once. Prior to *Crist*, prosecutors could empanel ten juries in a single case without violating the Clause, even though this would subject the defendant to significant unnecessary embarrassment and anxiety.

Although it is easy to get sidetracked by the differences between military and civilian law, two legal propositions remain: (1) the Double Jeopardy Clause applies to the military; and (2) the purpose of the Clause is to protect defendants from the embarrassment, expense, anxiety, and

insecurity from multiple trials. As explained, the *Crist* rule helps fulfill the second prong. In the military context, servicemembers accused of crimes undoubtedly feel the same embarrassment, anxiety, and insecurity as their civilian counterparts do. In fact, it is likely that their interest in a particular jury is *greater* than that of a civilian defendant because of the nature of military society. Military panels are typically culled from the same installation as the defendant, and usually from the same unit.[98] Unlike in the civilian context, it is common for military defendants to routinely cross-paths with the men and women who sat in judgment of them. Furthermore, unlike civilian juries, military members are from the same profession and are senior in rank to the defendant.[99] Unlike civilian defendants, military defendants face the added anxiety and embarrassment of knowing that the men and women who compose their panel could someday be their boss, or at least, be a colleague of a future boss. In the insular world of the military, military defendants must fear the loss of reputation incident to standing accused of a crime to a degree unknown to civilian defendants.[100] A military defendant is likely to face a greater degree of embarrassment and anxiety than a civilian facing multiple panels.

V. Conclusion

As noted previously, the Supreme Court denied Easton's petition for a writ of certiorari.[101] In all likelihood, the Supreme Court recognized that it had no good options. The Court could uphold the opinion and thus sanction a lower court's refusal to follow unambiguous Court precedent. The Court could overrule *Crist*, which has stood for over three decades. Finally, the Court could rule an act of Congress unconstitutional. None of these options would be particularly appealing to the Court. Consequently, *Easton* remains "good law."

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[98] Rule for Courts-Martial 503 prevents detailing members of the "same unit" as the accused, but per Article 25(c)(2) of the UCMJ, this refers to a company-level command; instead, members may typically be detailed from the next higher subdivision. MCM, *supra* note 97, R.C.M. 503.

[99] *Id.* R.C.M. 503(a)(1).

[100] Consider as a hypothetical a career employee of, say, United Parcel Service (UPS) who is accused of a crime. Clearly, his embarrassment would be greater if his panel were composed of other career employees of UPS in his region rather than random men and women from all walks of life.

[101] *See supra* note 7.

Regardless, the glaring problems with the opinion remain. In order to rescue a provision of the UCMJ, the Court went to great lengths to justify ignoring *Crist*. The Court relied on a dubious conclusion that Congress intended for a different rule from civilian courts to reach the conclusion that *Crist* need not apply since the military is different. The military *is* different, but, as explained, the evils guarded against by the Double Jeopardy Clause are just as great, if not greater, in the military context. *Easton* is dangerous not because military prosecutors are going to routinely dismiss panels. *Easton* is dangerous because it dispensed so effortlessly with an "integral" part of a fundamental constitutional right.