OLD SOLDIERS NEVER DIE: PRIOR MILITARY SERVICE AND THE DOCTRINE OF MILITARY DEFERENCE ON THE SUPREME COURT

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I. Introduction

One summer afternoon in 1942, a field telephone posted on the side of a tree in Fort Benning, Georgia rang to announce a call for Lieutenant Colonel Frank Murphy.[1] The caller requested that he take temporary leave from his military training exercises to report to the Supreme Court, which had convened during its summer recess to rule on the validity of a military tribunal assembled to prosecute eight Nazi spies.[2] Duty was calling upon Frank Murphy, and it was doing so not in his capacity as an officer of the United States Army Reserve, but rather as a Justice of the Supreme Court of the United States.[3]

Any observer would have been hard pressed to distinguish these two functions when Justice Murphy returned to the Court. He ascended its

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[1] Sidney Fine, *Mr. Justice Murphy in World War II*, 53 AM. J. LEGAL HIST. 90, 98 (1966) (citing N.Y. TIMES, July 28, 30, 1942).

[2] Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 70 (1980). This special session ultimately heard the case of *Ex parte* Quirin, 317 U.S. 1 (1942).

[3] Justice Murphy had previously served in the Army for a year during World War I. *See* J. WOODFORD HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 14 (1968). After the Japanese attack on Pearl Harbor, Justice Murphy asked General George C. Marshall if he could serve in the United States Army once again. *Id.* General Marshall denied the request, concerned with Justice Murphy's age. *Id.* Justice Murphy, however, relentlessly persisted in his pleas until General Marshall finally agreed to allow him to undergo training as a lieutenant colonel in the Army Reserve during the Court's summer recess. *Id.* He became the first acting Justice to accept a commission from and undergo training with the military. *See* Fine, *supra* note 1, at 93-95. Murphy, proud of his ability to rough standard Army conditions and thrilled to be wearing the uniform again, fancied himself once again one of the boys. "I am a field soldier, and I am not immodest when I tell you I stood up under the drive and the sleepless nights better than the young officers." *Id.* at 99 (quoting Letter from Frank Murphy to Frank Parker (Aug. 9, 1942), Frank Murphy Papers (Michigan Historical Collections, Ann Arbor)).

marble steps in July dressed not in black robes, but rather in his United States Army Reserve uniform.[4] This unprecedented sartorial statement "served but to dramatize the peculiar status of the Michigan jurist."[5] And this status did not go unchallenged. Many of the other Justices expressed misgivings about having an officer of the Army Reserve hear a case calling the legitimacy of a military body into question.[6] Alerted of these misgivings and wishing to avoid any criticism of the Court, Justice Murphy ultimately elected to recuse himself from the case.[7]

This symbolic image of a uniformed officer in the United States Army Reserve sitting alongside eight robed Supreme Court Justices evokes important questions of the relationship between the military and the Court by way of a unique set of intermediaries: Supreme Court Justices with prior military experience. How does firsthand insight into the mechanics of the military apparatus impact the approach Justices take toward the military when the issue of military deference is at hand? How do these Justices view their current roles on the Court in relation to their prior roles on the battlefield?[8] What does the military composition of the Court mean for both the present and future of the doctrine of military deference?

These questions have been asked, but never answered.[9] It is precisely this conspicuous void in research that this article aims to fill.

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[4] Fine, *supra* note 1.

[5] *Id.*

[6] A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 322 (noting that Justice Felix Frankfurter, himself a veteran of the First World War, expressed such misgivings).

[7] Belknap, *supra* note 2, at 78 ("[A]fter 'some remarks were passed in Conference' about the propriety of his participation, Murphy elected to withdraw, 'lest a breath of criticism be leveled at the Court.'" (quoting Note to Ed (Kemp), Sep. 10, 1942, Box 47, Frank Murphy MSS, Michigan Historical Collections, University of Michigan)).

[8] Justice Frank Murphy served *simultaneous* roles on the Court and in the military.

[9] *See, e.g.*, Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 949 (2006) ("Later research will . . . place Justices' military case voting record within a biographical context, paying close attention to the military case voting records of the [men and women who] have sat on the Supreme Court while having previously served in the military."); John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 671 (2006) [hereinafter O'Connor, *Statistics and Deference*] (suggesting research into how the composition of the Court has changed and how such change will affect the future development of the doctrine); *cf.* Gregory C. Sisk et al., *Charting the Influences on the*

While the doctrine of military deference, the impact of service in the military, and the process of judicial decision-making have all been studied in their own right, the overlap between the three has heretofore been neglected in the literature. This article aims to correct that neglect, illuminating, at the level of the individual Justice, the relationship between prior military service and judicial behavior in military deference cases. By way of statistical analysis, and contrary to intuition, it finds that Justices with prior military service who served on the Supreme Court between 1942 and 2008 tended to be less deferential in military deference cases than those without.

This article proceeds in four parts. After the introduction in Part I, Part II provides the background and context necessary to understand the analysis conducted in this article and its greater stakes. Part III then investigates the impact of military service on the doctrine of military deference by the numbers, continuing the newly emerging trend in statistical analysis of the military deference doctrine. Through analyzing a catalog of sixty-eight military deference cases and the corresponding voting record,[10] this article finds that the Justices with prior military service who served on the Supreme Court between 1942 and 2008 tended to be less deferential toward the military than those without. This analysis also finds strong evidence of an association between military service and a more liberal judicial ideology, which is a statistically significant predictor of deferential voting behavior. Part IV, in conclusion, reflects on the scope and implications of these findings and sets the stage for further inquiry into the nuanced interplay between military service and judicial cognition.

II. The Military and the Court: A Background

When Justice John Paul Stevens—a World War II veteran with three years of naval intelligence experience—retired from the Supreme Court in 2010, he left behind a bench, the likes of which had not been seen since 1936: not a single Justice on the Court had any military

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Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. REV. 1377, 1478 (1998) ("Military experience has received little attention in empirical studies as a potential influence on judicial behavior.").

[10] This record contains votes cast by thirty-six Justices, twenty of whom are military veterans.

experience.[11] This dearth of military insight persists to this day.[12] Regarding this conspicuous gap that he would leave behind, Justice Stevens remarked, "Somebody was saying that there ought to be at least one person on the Court who had military experience . . . . I sort of feel that it is important. I have to confess that."[13]

The background and analysis discussed in this article lend credence to Justice Stevens's confession. It first provides a working definition of the Court's doctrine of military deference, before surveying the current state of research on the topic. This initial analysis is then followed by a second, limited exploration—setting the stage for Part III—of the myriad ways in which military service shapes the way veterans think.

A. Defining the Military Deference Doctrine

The military has forever occupied a unique place in American society, and this is no less true in the context of the judiciary. Indeed, the Supreme Court has historically afforded the United States military an unprecedented level of deference when the military is involved in the case at bar.[14] This doctrine of military deference is exemplified in the case of *Goldman v. Weinberger*,[15] in which Justice Rehnquist,[16] writing for the majority, noted that the Court's "review of military regulations challenged on First Amendment grounds [was] far more deferential than constitutional review of similar laws or regulations designed for civilian society."[17] When it comes to the military, he instructed, "courts must

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[11] *See* Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC (Aug. 13, 2012), http://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973.

[12] While it is true that Justices Breyer and Alito served in the Unites States Army Reserve and Justice Kennedy served in the California National Guard, none of these men ever saw combat. *Id.*

[13] Jeffrey Toobin, *After Stevens*, THE NEW YORKER (Mar. 22, 2010), http://www.newyorker.com/magazine/2010/03/22/after-stevens.

[14] Lichtman, *supra* note 9, at 910 ("While all litigants are granted presumptions of subject-matter expertise, only the military's subject-matter expertise is habitually shielded from rigorous constitutional evaluation.").

[15] Goldman v. Weinberger, 475 U.S. 503 (1986).

[16] Justice Rehnquist was himself a veteran of the United States Army Air Corps and served abroad during World War II. Charles Lane, *Head of the Class*, STAN. MAG. (July/Aug. 2005), http://alumni.stanford.edu/get/page/magazine/article/?article_id=33966.

[17] *Goldman*, 475 U.S. at 507.

give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[18] The Court has employed four primary rationales in *Goldman* and like cases to justify its unparalleled deference to the military: the separation of powers, institutional competence, military necessity, and the separateness of the military community.[19]

1. The Separation of Powers

The Supreme Court's doctrine of military deference has often been tethered to the Constitution's separation of powers.[20] Perhaps the most obvious grant of military power in the Constitution is Article II's christening of the President as the "commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States."[21] Congress, likewise, is granted a host of military powers in Article I. It may "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."[22] It may "raise and support armies"[23] and "provide and maintain a navy."[24] It may "make rules" for governing these forces[25]; "call[] forth the militia to execute the laws of the union, suppress insurrections and repel invasions"[26]; and "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."[27] Any search for a similar charge among the judiciary's responsibilities, however, will come up short, as Article III contains absolutely no mention of the military.[28]

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[18] *Id.*

[19] *See, e.g.*, Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L. REV. AM. U. 1273, 1276-79 (1995) (listing three historical justifications for the doctrine of military deference: "separation of powers," "the military as a 'separate community,'" and "the perceived limits of the courts' competence in dealing with the complex aspects of the military establishment").

[20] *See id.*

[21] U.S. CONST. art. II, § 2.

[22] U.S. CONST. art. I, § 8, cl. 11.

[23] U.S. CONST. art. I, § 8, cl. 12.

[24] U.S. CONST. art. I, § 8, cl. 13.

[25] U.S. CONST. art. I, § 8, cl. 14.

[26] U.S. CONST. art. I, § 8, cl. 15.

[27] U.S. CONST. art. I, § 8, cl. 16.

[28] U.S. CONST. art. III.

This separation of powers rationale maintains that, given the constitutional allocation of military powers, the Court should leave it to the political branches to make those military decisions the Constitution placed exclusively in their hands. Chief Justice Rehnquist, the purported father of the military deference doctrine,[29] famously noted in *Rostker v. Goldberg*[30] that "judicial deference to [any] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[31] The Court likewise declared in *United States v. O'Brien*[32] that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[33] With respect to the military authority of the Commander in Chief, the majority in *Loving v. United States*[34] "[gave] Congress the highest deference in ordering military affairs. And it would be contrary to the respect owed the president as commander-in-chief to hold that he may not be given wide discretion and authority."[35]

2. Institutional Competence

Logically following the rationale that Congress and the President were granted constitutional powers to lead and regulate the armed forces is the argument that the Supreme Court lacks the necessary expertise to decide on military matters. This logic is epitomized in the majority opinion for *Gilligan v. Morgan*:[36]

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[29] O'Connor, *Statistics and Deference*, *supra* note 9, at 703 ("That being said, however, the modern military deference doctrine is very much the brainchild of Chief Justice Rehnquist, in that he authored virtually every majority opinion since 1974 in which the Court has applied the military deference doctrine.").

[30] Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that requiring only males to register for the draft did not violate Fifth Amendment equal protection guarantees).

[31] *Id.* at 67.

[32] United States v. O'Brien, 391 U.S. 367 (1968) (finding no constitutional defect in jailing an anti-war protestor for burning his draft card).

[33] *Id.* at 377.

[34] Loving v. United States, 517 U.S. 748 (1996) (granting the president, as commander-in-chief, deference in declaring aggravating factors that allow for capital punishment in courts-martial).

[35] *Id.* at 768.

[36] Gilligan v. Morgan, 413 U.S. 1 (1973). While this case, involving the governor of Ohio's employment of the National Guard in quelling a student demonstration, is not itself a military deference case, its language has been adopted as one of the doctrine's

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[37]

The Court similarly noted in *Chappell v. Wallace*[38] that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[39] Put succinctly,[40] "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."[41]

3. Military Necessity

In the words of Chief Justice Earl Warren, "the action in question [in military deference cases] is generally defended in the name of military necessity, or, to put it another way, in the name of national survival."[42] This argument of military necessity stands as perhaps the quintessential justification of military deference. Courts should be reluctant to interfere in military matters, the argument goes, lest they hinder the effectiveness of our fighting force and leave our nation and the liberties it embodies vulnerable to outside attack.[43] The Court accordingly opined in *Chappell*

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most cited justifications. *See, e.g.*, Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008); United States v. Shearer, 473 U.S. 52, 58 (1985); Chappell v. Wallace, 462 U.S. 296, 301-02 (1983).

[37] *Gilligan*, 413 U.S. at 10.

[38] Chappell v. Wallace, 462 U.S. 296 (1983) (holding that enlisted military personnel cannot sue their military superiors for damages over alleged constitutional violations).

[39] *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)) (internal quotations omitted).

[40] Boumediene v. Bush, 553 U.S. 723, 797 (2008) (holding that detainees at the military prison at Guantanamo Bay have a constitutional right to habeas corpus).

[41] *Chappell*, 462 U.S. at 797.

[42] Earl Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181, 183 (1962).

[43] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205 (2001) ("Judicial

that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."[44] In *Wayte v. United States*,[45] Justice Powell likewise noted that "[f]ew interests can be more compelling than a nation's need to ensure its own security . . . . Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning."[46]

But these same protections can be robbed of their meaning by the very argument Justice Powell espouses to safeguard them. Should the Court lean too heavily on the crutch of military necessity, it risks allowing the nation to fall prey to equally ruinous forces at home. This is, regrettably, exactly what happened in *Korematsu v. United States*.[47] In what is perhaps the Court's most notorious military deference case, it upheld an exclusion order demanding internment of Japanese Americans. The Court held: "because the properly constituted military authorities feared an invasion of our West Coast . . . they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily."[48] This outcome highlights the inherent danger in the quasi-balancing approach to deference the Court employed in *Korematsu*: it is always possible for the balance to tip in the wrong direction.

4. The Separateness of the Military Community

Finally, in a variation on the military necessity argument, the Supreme Court has often noted the unique nature of the military

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inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'"); Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 23-24 (1980) ("Supreme Court decisions of the past six years have contributed to the formation of a significant, even controlling, doctrine of military law that overrides constitutional considerations whenever there is a significant governmental interest in upholding command discipline and authority.").

[44] *Chappell*, 462 U.S. at 300.

[45] Wayte v. United States, 470 U.S. 598 (1985) (holding that "passive enforcement" of draft registration laws did not violate the First and Fifth Amendments).

[46] *Id.* at 611-12.

[47] Korematsu v. United States, 323 U.S. 214 (1944).

[48] *Id.* at 223.

community in applying the doctrine of deference. The military apparatus is built on a foundation of strict order and obedience that has no exact analogue in civilian society. This foundation is *so* different, the Court argues, that it justifies a different application of the Constitution within the military's ranks. The Court famously made this argument in *Parker v. Levy*,[49] deeming the military, "by necessity, a specialized society separate from civilian society."[50] This uniqueness rationale cropped up again in *Schlesinger v. Councilman*[51]: "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline . . . are founded on unique military exigencies as powerful now as in the past."[52] The Court, in *Orloff v. Willoughby*,[53] presented what some consider an extreme twist on this uniqueness justification.[54] Recognizing that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," it concluded that "the judiciary [need] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[55]

B. Studying the Military Deference Doctrine

The Court's application of the military deference doctrine has been the subject of intense debate both within the Court and among legal scholars. Before delving into this debate, this article will highlight two of its most prominent voices. First, is Steven Lichtman, author of a groundbreaking statistical analysis of the military deference doctrine.[56]

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[49] Parker v. Levy, 417 U.S. 733 (1974) (upholding the conviction of an Army doctor who not only criticized American involvement in Vietnam, but also urged soldiers to refuse orders to deploy to Vietnam, himself refusing orders to train special forces soldiers).

[50] *Id.* at 743.

[51] Schlesinger v. Councilman, 420 U.S. 738 (1975) (finding that federal courts should refrain from involvement in the military criminal process until all military appeals options have been exhausted).

[52] *Id.* at 757.

[53] Orloff v. Willoughby, 345 U.S. 83 (1953).

[54] *See* Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 1 (1975) ("Military intervention in judicial matters in the United States is so unthinkable it is difficult to believe the Supreme Court seriously intended to put judicial interference with military matters in the same category.").

[55] *Orloff*, 345 U.S. at 94.

[56] *See* Lichtman, *supra* note 9, at 907.

Second is John O'Connor, who is perhaps Lichtman's most vocal critic. These two voices stand as the foremost pioneers of statistical analysis of the military deference doctrine.

In the last few decades, research into the origins and application of the military deference doctrine has increased dramatically. In a comprehensive study on the origins of the doctrine, John O'Connor outlines the history and development of the tradition of military deference as consisting of three distinct phases.[57] The noninterference phase, during which the Court generally stayed out of military matters entirely, lasted until the mid-1950s.[58] From the 1950s to the 1960s, in the era of the much more skeptical Warren Court, the jurisdiction of the military courts was interpreted very narrowly as the Court increased its scrutiny of military activities.[59] Since that time, according to O'Connor, the Court has been less skeptical and come to embrace the doctrine of military deference as we know it today.[60]

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[57] John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 164 (2000) [hereinafter O'Connor, *Origins and Application*].

[58] *Id.* at 165 (During this period, "[i]f a court-martial properly had jurisdiction over the person tried, then the Court summarily would reject the petitioner's constitutional challenge."); *see also* Hiatt v. Brown, 339 U.S. 103, 111 (1950) ("In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."); Kurtz v. Moffitt, 115 U.S. 487, 500 (1885) ("Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts."); Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 4 (1980) ("During the 19th and early 20th centuries, federal court review of military decisions was strictly limited to jurisdictional issues.").

[59] O'Connor, *Origins and Application*, *supra* note 57, at 197-214; *see also* O'Callahan v. Parker, 395 U.S. 258, 265 (1969) ("[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."), *overruled by* Solorio v. United States, 483 U.S. 435 (1987); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955) ("There are dangers lurking in military trials . . . . [C]onsiderations of discipline provide no excuse for new expansion of courts-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.").

[60] This approach toward the military "charts a middle course between, on the one hand, the extreme anti-military-justice views of the Warren Court and, on the other, the early Court's extreme laissez-faire attitude toward military matters." O'Connor, *Origins and Application*, *supra* note 57, at 214-61; *see also* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[W]hen a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention."); Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for

In 2006, Steven Lichtman published what is to date the most comprehensive empirical study of the military deference doctrine.[61] Deviating from the norm of organizing and analyzing decisions by date,[62] Lichtman grouped cases according to the specific issues involved and ultimately finds this a much more useful method of studying the nuance of the Court's deferential trends. What further differentiates Lichtman's study from others is its statistical nature. Rather than examining the language of the cases, Lichtman analyzes the win/loss record of the military in all military cases.[63] His findings indicate that "the military stands the most risk of Supreme Court defeat when the question at bar can be boiled down to the following core: Does the military have authority over this person?"[64] This article adopts the same, relatively new, statistical approach to the military deference doctrine.

John O'Connor provides a critical response to Lichtman's research, in which he takes issue with a number of perceived flaws in Lichtman's analysis.[65] The primary target of O'Connor's criticism is Lichtman's one-dimensional approach to analyzing the doctrine. A mere statistical analysis of "wins" and "losses," O'Connor argues, fails to consider the source from which the doctrine originates: the logic and arguments of

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imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[61] *See* Lichtman, *supra* note 9, at 907. Published six years after O'Connor's history, this study followed by just two years the prominent deference cases of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), both of which dealt with the contemporary issue of military enemy detainees, both American and foreign.

[62] *See, e.g.*, Peck, *supra* note 54, at 4-5 ("To fully appreciate the current state of the law, a careful examination of the origin and development of this so-called doctrine of non-reviewability is necessary.").

[63] Lichtman defines a "military case" as a case in which

> any one of two factors [is] present: (1) questions of military policy or procedure were before the Court or (2) the military was present as a party to the litigation *in some sort of official capacity*. In other words, a soldier accused of murdering a civilian does not satisfy the military-as-party requirement, but a military tribunal attempting to try Nazi saboteurs most definitely does.

Lichtman, *supra* note 9, at 912 (emphasis in original).

[64] *Id.* at 939.

[65] O'Connor, *Statistics and Deference*, *supra* note 9.

the cases themselves.[66] Were he to examine this logic, according to O'Connor, Lichtman would realize that his catalog contains primarily cases in which the doctrine of deference was not at all considered.[67]

A statistical analysis akin to Lichtman's has yet to be conducted using cases in which the language of the opinions invokes or actively chooses not to invoke the doctrine of military deference. Part III aims to conduct such an analysis, using a narrower catalog of strictly military deference cases.

C. Influencing the Judicial Mind

While they do illuminate trends in the Court's overall usage of the doctrine of military deference, studies like Lichtman's and O'Connor's pay little attention to one of the most important characteristics of the Court: its ever-rotating composition of nine individual Justices. Each new Justice brings with her new experiences and modes of thinking, which in turn affect her voting behavior and shape the trends of the Court as a whole. The life experiences of individual Justices, including pre-judicial careers, shape their experiences on the bench.[68] An investigation into the demonstrated impacts of military service both on and off the Supreme Court, then, will elucidate the more specific mechanisms through which military service may impact Justices' thinking in military deference cases.

Prior to this investigation, it is worthwhile to outline a few models scholars have suggested to explain judicial decision-making. To begin, the widely accepted attitudinal model of judicial decision-making maintains that it is not merely the letter of the law that guides judges' decisions.[69] Rather, it is their ideological beliefs and values.[70] Jeffrey

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[66] *Id.* at 670.
[67] *Id.* at 668.
[68] *See* Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 TEMP. POL. & CIV. RTS. L. REV. 83, 83 (2007) ("Justices' life experiences, including familial influences, political socialization, formal education, and pre-judicial careers can undoubtedly help to shape judicial attitudes, policy preferences, strategic thinking, and intended audiences.").
[69] For further discussion of the attitudinal model of judicial decision-making, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86-97 (2002).

Segal and Harold Spaeth, two prominent scholars of the attitudinal model, describe the model in a nutshell: "Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way he did because he was extremely liberal."[71] Given that military service has been shown to explain, at least in part, an individual's values and priorities,[72] this model provides a useful lens through which to consider this article's findings.

Two other models are worth noting here. Standing in contrast to the attitudinal model, the legal model of judicial decision-making contends that it is the strict letter of the law, not personal values and preferences,

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[70] *Id.* at 86 ("The attitudinal model . . . holds that the Supreme court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."). Segal and Spaeth emphasize that measures of judicial ideology—including "partisanship and appointing president—. . . are useful for predicting [judicial] attitudes, but are of less help in explaining them." JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 232 (1993); *see, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17-18 (2006) (finding statistically significant differences in the voting behavior of Democratic and Republican circuit court judges); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998) ("Partisanship clearly affects how appellate courts review agency discretion."); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718-19 (1997) ("[I]deology significantly influences judicial decision-making on the D.C. Circuit."); Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Court of Appeals*, 74 JUDICATURE 133, 137 (1990) (noting differences in Republican-appointed and Democrat-appointed judges' decisions).

[71] SEGAL & SPAETH, *supra* note 70, at 65.

[72] *See, e.g.*, Jeremy M. Teigen, *Enduring Effects of the Uniform: Previous Military Experience and Voting Turnout*, 59 POL. RES. Q. 601, 604 (2006) (finding that veterans have a higher turnout rate than nonveterans do, but noting a break in this trend among veterans of the Vietnam War); M. Kent Jennings & Gregory B. Markus, *The Effect of Military Service on Political Attitudes: A Panel Study*, 71 AM. POL. SCI. REV. 131, 146 (1977) (finding modest evidence of attitudinal and political differences between veterans and nonveterans); Elizabeth G. French & Raymond R. Ernest, *The Relation Between Authoritarianism and Acceptance of Military Ideology*, 24 J. PERSONALITY 181, 185-87 (1955) (finding support for the contention that the authoritarian personality does—to an extent—correlate with military service, but not for the contention that those with authoritarian personalities prior to service are more likely than those without to opt to serve in the military); Donald T. Campbell & Thelma H. McCormack, *Military Experience and Attitudes Toward Authority*, 62 AM. J. SOC. 482, 488 (1957) (finding evidence that authoritarianism decreases with increased length of military service).

which guides judges in their legal decisions.[73] Prior precedent, naturally, plays a role in predicting behavior in accordance with this model.[74] One could also see military service playing a role in this model, coloring a Justice's interpretation of law as it relates to the military. Alternatively, the rational choice model holds that judges are rational actors who are able to order their preferences and, as such, choose the alternative that will bring them the greatest satisfaction.[75] The incidence of military service may also play a role in predicting judicial decision-making under this model, as identification with the military could reasonably influence the preferences of Justices in military deference cases.

Bearing these models in mind, scholars have identified many factors that influence judicial behavior on the Supreme Court.[76] Among these is military service. In a comprehensive study of biographical influences on the judicial mind, scholars found military service statistically significant in predicting decision-making in cases involving the realignment of the Sentencing Commission with another branch of the government, as requested by the Department of Justice.[77] According to their analysis, this may be a display of recognition by former soldiers of direct orders.[78] Some studies have investigated social factors, finding evidence that agricultural origins, southern origins, father's service as a government official, and prosecutor/judicial service are impactful in predicting

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[73] *See* Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 468-70 (2001).

[74] *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decision-making and Theory*, 60 GEO. WASH. L. REV. 68, 139 (1991) ("The gloss added to the Constitution in the form of precedents is an integral part of most dialogues among the Justices about the Constitution.").

[75] Judges may consider, for example, the impact of their votes on their reputations. *See* Thomas J. Miceli & Metin M. Coşgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 32 (1994). For more on the rational choice model, see Segal and Spaeth's discussion in SEGAL & SPAETH, *supra* note 69, at 97-110.

[76] *See infra* Part III (including many of these variables in its analysis).

[77] Sisk et al., *supra* note 9, at 1479 (finding the prior military service variable insignificant when cases are merely divided in terms of constitutional ruling, but strongly correlated with Justices' resistance to realigning the Sentencing Commission with another branch of government).

[78] *Id.* ("Given that the statute does clearly designate the entity as 'an independent commission in the judicial branch of the United States,' we might conclude that a former soldier recognizes a direct order when he hears it." (quoting 28 U.S.C. § 991(a) (1994))).

judicial voting behavior in civil rights, civil liberties, and economics.[79] Still another factor is the amount of time a Justice has served on the bench.[80] There is evidence that newcomers to the Court may undergo an "acclimation effect."[81] In particular, scholars have shown that Justices who serve longer on the bench are more likely to vote preferentially as opposed to strictly adhering to established precedent.[82] Further, public opinion may also impact judicial preferences, thereby influencing voting behavior on the bench.[83] This brief list amounts to just the tip of the iceberg.

Numerous distinguishing qualities of prior military service make it a rich characteristic for analysis in the context of judicial decision-making. First, while certain factors—for instance, institution of legal education and place of residence—limit other influences on the judicial mind, these factors play no role in keeping American citizens from military service. Additionally, military service necessarily predates a Justice's behavior on the bench, easily sidestepping the problem of strict endogeneity.[84] Further, the occurrence of prior military service is measured easily and clearly with little room for discrepancy. Finally, analysis of military service on the Supreme Court will also hint at the more generalizable effects of such service beyond the bench. An experience shared by

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[79] *See* C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 474 (1991).

[80] *See, e.g.*, Timothy M. Hagle, *'Freshman Effects' for Supreme Court Justices*, 37 AM. J. POL. SCI. 1142, 1153 (1993) ("Acclimation effects do exist. Nine of the [thirteen] Justices examined revealed significant voting instability in at least one major issue area.").

[81] *Id.*

[82] *See* Mark S. Hurwitz & Oseph V. Stefko, *Acclimation and Attitudes: 'Newcomer' Justices and Precedent Conformance on the Supreme Court*, 57 POL. RES. Q. 121, 127 (2004) ("Preferential votes become far more prominent as a Justice's tenure grows, while the likelihood is much greater for a Justice to comply with precedent during the early years on the bench as Justices acclimate to their new institution.").

[83] *See, e.g.*, David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985) ("[T]he Supreme Court on [post-New Deal minority rights] issues could decide in favor of the rights of minorities and still enjoy the support of an existing majority or at least a growing minority of Americans."); Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 303 (2008) ("Our results suggest that the most likely explanation for the direct linkage between public mood and justices' liberalism observed in past studies is through the mechanism of attitudinal change.").

[84] Nonrandom assignment, however, remains a problem.

millions of diverse Americans, military service serves as a beneficial avenue of analysis in bettering our understanding of both our Supreme Court Justices and the greater American population.

D. The Veteran on the Bench

Of the 112 Justices who have served on Supreme Court, thirty-nine have served in the military in some capacity.[85] For the purpose of this article, military service is defined as service in the Army, Navy, Air Force, National Guard, or Army Reserve. The frequency with which Justices who have served in the military are appointed to the bench has increased dramatically in the last half-century. Between 1851 and 1880, just 14.3% of Justices appointed to the court had served in the military, all in the Army. Since 1953, however, nearly half (48%) of the Justices on the Court have served in the military.[86] Three members of the contemporary Supreme Court—Justices Alito, Kennedy, and Breyer—have served in the military, though none has seen combat.[87]

Linking Supreme Court jurisprudence with the military composition of the bench, the findings of this article have important implications on our understanding of the consequences of Supreme Court nominations. Today, for the first time in nearly eighty years, the Supreme Court is devoid of wartime military experience. What does this mean for the future of the military deference doctrine, or the future of American justice in general? And what has it already meant?[88] As this article illustrates, prior military service is an important characteristic to consider when filling future vacancies on the Supreme Court.

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[85] SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010, at 12 (2010).

[86] *Id.* at 25-27.

[87] Cohen, *supra* note 11. "Combat" here refers to "active, wartime military experience." *Id.*

[88] *Id.* ("Just think for a moment about what a [combat] perspective at the Court might have offered the terror-law debate over the past decade . . . . The Court still needs more diversity in many ways, but none more so than diversity of background and experience.").

III. The Statistics of Deference and Prior Military Service

Few would deny that military service leaves its mark. Justice John Paul Stevens, for example, told the Chicago Bar Association that his brush with the assassination of Japanese General Yamamoto, while he was working as a Navy code breaker in World War II, impacted his views on capital punishment.[89] Similarly, scholars believe that "Civil War duty led Justice Holmes to esteem conflict and abhor human rights. More recently, Justices who had served in uniform divided on whether the Constitution forbids criminal punishment for burning the American flag."[90] Fueled by such stories from the bench, this Part endeavors to shed light on the precise nature of the mark military service has left on the Justices of the Supreme Court.

A. The Model

To test whether Justices with prior military experience are more or less likely to defer to military authorities, this article conducts an analysis of the voting behavior of Justices in military deference cases. It seeks to find a statistically significant trend in the way Justices with prior military service vote in cases that involve the doctrine of military deference, specifically whether or not the opinions they author or join tend to defer to military judgments and necessity. An analysis of this behavior versus that of Justices with no service experience will shed light on the relationship between prior military service and military deference on the United States Supreme Court.

The probability of a deferential vote is modeled in the following form:

$$\Pr(v_i = \mathrm{D}) = f(\alpha + \beta_{service} x_i)$$

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[89] Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1583 (2005) ("Appearing before the Chicago Bar Association decades later . . . Stevens affirmed that the Yamamoto incident led him to conclude that '[t]he targeting of a particular individual with the intent to kill him was a lot different than killing a soldier in battle and dealing with a statistic . . . .'" (quoting Telephone Interview with Justice John Paul Stevens, United States Supreme Court (June 22, 2005))).

[90] *Id.* at 1598.

where

$$f(t) = 1 / (1 + e^{-t})$$

This model, where f is the logistic function, represents the probability that a Justice's vote (v_i) will be deferential (D) based on the incidence of prior military service (x_i). Then, it poses the following hypotheses to test the significance of $\beta_{service}$:

$$H_{0_1}: \beta_{service} = 0$$
$$H_1: \beta_{service} \neq 0$$

In other words, this article expects to find an association between prior military experience and judicial voting behavior in military deference cases. This is a two-sided hypothesis test. But how does this association manifest itself? Does prior military experience make Justices more likely or less likely to defer to the military?

One could make the case that $\beta_{service}$ should be positive, implying that military service increases the likelihood of a Justice deferring to the military in military deference cases. This intuitively stems from the insight and loyalty to the military former members may carry. Soldiers have firsthand insight into that institution of duty and discipline that is the last line of defense between our nation and its enemies. They know exactly what it takes to command the troops and the problems an intervening legal body could pose in the execution of orders crucial to our national security. Further, the lifelong commitment to patriotism and respect of the service that Justices with prior military experience have demonstrated in their opinions may seem to point to their favoring this institution that they so deeply admire and respect.[91] This, too, would

[91] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 509 (1986) ("The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."); Duncan v. Kahanamoku**,** 327 U.S. 304, 325 (1946) (Murphy, J., concurring) ("[Those who founded this nation] shed their blood to win independence from a ruler who they alleged was attempting to render the 'Military independent of and superior to the Civil power.' . . . This supremacy of the civil over the military is one of our great heritages."). These sentiments are especially apparent in Justice Stevens's dissents in the flag-burning cases. *See* United States v. Eichman, 496 U.S. 310, 323 (1990) (Stevens, J., dissenting) ("The symbolic value of the American flag is not the same today as it was yesterday. . . . [S]ome now have difficulty understanding the message that the flag conveyed to their parents and grandparents—whether born abroad and naturalized or

indicate that justices with prior military experience may be more likely to allow the military more constitutional latitude than would those Justices without this sense of personal loyalty to the military.

However, a far more convincing case exists for the argument that $\beta_{service}$ should be negative, indicating that Justices who have served in our nation's armed forces are less likely to defer to the military in military deference cases.[92] One reason for this may be the professional confidence of Justices with firsthand experience in the military in deciding military deference cases, which often involve somewhat specialized military knowledge. A sense of understanding and familiarity with the military apparatus may cause those Justices with prior military experience to feel better qualified to question the judgments of military commanders and policymakers.[93] Those Justices without military experience, on the other hand, boast no such bank of military knowledge to use in challenging the decisions of military authorities and those who regulate them. Eugene Fidell puts it nicely: "Justices (and judges generally) without active military experience may be (or may feel, which can amount to the same thing) at a disadvantage when dealing with cases that involve military matters."[94]

Further, one may expect that the military instills in its personnel an unwavering dedication to the protection of American freedom and ideals, both in the courtroom and on the battlefield. Indeed, Justice Stevens is remembered as relentlessly pursuing his "enduring quest to uphold

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native born."); Texas v. Johnson, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting) ("If [liberty and equality] are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.").

[92] Smith, *supra* note 68, at 85 ("It also is possible that a Justice's judicial performance is, in effect, counterintuitive when viewed in light of the presumptive values and policy priorities that might have emerged from a particular set of life experiences."); *see also* Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 U.C. DAVIS L. REV. 999, 1018 (2010) ("Counterintuitive though it may seem, judges with real military experience may be less likely to defer, at least around the edges, than those with none.").

[93] Justice Stevens—himself a veteran—hinted at this potential impact of military service while concurring in *Goldman v. Weinberger*, 475 U.S. 503 (1986), when he cautioned that "personal experience or admiration for the performance of the 'rag-tag band of soldiers' that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of [uniformity]." *Id.* at 512 (Stevens, J., concurring).

[94] Fidell, *supra* note 92.

American values, at home and abroad."[95] Such a quest captures the sense that the myriad sacrifices and hardships service members have endured through the ages would all be for naught should the Court undermine the very freedoms and liberties those men and women fought to defend. In the words of Justice Frank Murphy, unconstitutional and immoral behavior on the part of the military "is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind."[96] The military, by this reasoning, is all the more obligated to uphold the Constitution it is defending on the battlefield.

Bearing these arguments in mind, this article proposes another hypothesis. Despite their feelings of respect for, and loyalty to, the armed forces, Justices with prior military service may be less hesitant to curb the military's governing authorities. The Justices with prior military service considered in this analysis would thus prove less likely to defer to the military than those Justices with no firsthand military experience. As such, an alternative one-sided hypothesis test is proposed:

$$H_{0_2}: \beta_{service} = 0$$
$$H_2: \beta_{service} < 0$$

B. The Data

The first step in testing these hypotheses was identifying the Supreme Court's corpus of military deference cases. Lichtman's 2006 catalog of 178 military cases heard by the Supreme Court between 1918 and 2004 served as the starting point.[97] Additional cases mentioned or cited in other prominent studies on the military deference doctrine, such as those by O'Connor, were then added. Also added were cases decided after 2004—the cut-off point of Lichtman's catalog—that involve military policy or the military as party to the litigation.

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[95] Toobin, *supra* note 13.

[96] Murphy is speaking about the military tribunal that was convened to try Japanese General Yamashita in *In re Yamashita*, 327 U.S. 1, 28 (1946) (Murphy, J., dissenting).

[97] This catalog can be found in Appendix A of Steven B. Lichtman's *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, *supra* note 9, at 950. Lichtman compiled this catalog using a series of *Lexis* searches. *Id.* at 911.

As O'Connor noted in his response to Lichtman's study, not all "military cases" are "deference cases."[98] Given this article's pointed interest in the Court's doctrine of military deference, all cases that were not deference cases were removed from the master list.

Defining "deference case" is no easy task. Legal scholars have offered an array of definitions. As Steven Lichtman explains, "While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny."[99] In his criticism of Lichtman's analysis, O'Connor argues that "the Court's military deference jurisprudence recognizes that constitutional rights appropriately may apply differently in the military context than in civilian society as a whole."[100] In other words, only those cases in which the Court weighs the needs of the military against the guarantees of the Constitution have the potential to be decided by the doctrine of military deference. Other scholars refer to the military deference doctrine as a "dilemma of reconciling our constitutional aspirations toward civil liberty with the demands of military need,"[101] a recognition "that the military necessity for order and discipline may outweigh the need for constitutional safeguards for service members."[102]

A number of elements run as common threads through these proposed definitions. First, a tension between constitutional guarantees and the needs of the military is highlighted. Given this tension, it is the duty of the Supreme Court to decide which of the two forces is stronger: the longstanding constitutional guarantees backed by American tradition and history, or the military instrument that protects and defends our nation so that those guarantees may continue to exist. The Supreme Court, acknowledging the military as a separate society under the control of the political branches, accepts its non-expert status in the realm of

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[98] O'Connor, *Statistics and Deference*, *supra* note 9, at 672 ("[T]he military deference doctrine has no application in the vast majority of the 'military' cases that come before the Court.").

[99] Lichtman, *supra* note 9, at 907.

[100] O'Connor, *Statistics and Deference*, *supra* note 9, at 673.

[101] Stephanie A. Levin, *The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1012 (1990).

[102] Levine, *supra* note 43, at 6.

military affairs and bows to the determinations of Congress and the President in ruling and regulating the armed forces. In short, and as per the doctrine's name, the Court defers to the military's powers that be. Thus, there are three primary identifiers of military deference cases:

> (1) the weighing of military necessity against constitutional liberties and protections, as contained in the Constitution;
> (2) a questioning of the special nature and unique place of the military in American society; and,
> (3) a consideration of the unique application of the law in the military context due to the military's critical role and special needs.

A case in which the Court grants deference is a case in which the needs of the military and the constitutional powers of the political branches (with regard to the military) are deemed worthy of deference over whatever rights or liberties happen to be at stake. To say that a case involves the doctrine of deference, however, is not to say that the Court ultimately defers. Rather, the Court may also choose to reject the opportunity to apply the doctrine as presented in these cases. This definition guided the textual analysis of the Court's opinion in each case included in the master catalog. Any case in which the Court invoked any number of the various deference rationales—including those listed above and those outlined in Part II—was deemed a "deference case" and included in the data set.[103]

The data set included both cases in which the Court ultimately and explicitly deferred to the military,[104] and those in which they explicitly

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[103] This determination was conducted by reading in full the opinion of the Court in each of the nearly 200 cases in the master list. If the rationale of deference was explicitly mentioned in the Court's opinion, it was included as a deference case. There was no assumption that the military deference doctrine was used or considered without explicit indicators in the text of the opinion. In short, the three requirements identified above had to be met for inclusion, though the Court could have used any number of arguments to meet them. These arguments included mention of a separate society, military necessity, the military powers of Congress and the president, institutional competence, or any of the other commonly used rationales for the military deference doctrine.

[104] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he fundamental necessity for obedience . . . may render permissible within the military that which would be constitutionally impermissible outside it."); Burns v. Wilson, 346 U.S. 137, 140 (1953)

opted to reject the doctrine of military deference,[105] for these are the cases in which the Court's tradition of deference played an apparent role. The majority of these cases 73.5% fell into the former, deferential category.

Given that cases were selected through content analysis and coded based on the fit of their content with an established set of requirements for selection, a certain degree of discretion was necessary. As previously noted, different legal scholars and authorities have varying definitions of military deference. As such, these different scholars might hold slightly different views on certain cases and their identification as deference cases. However, this sort of discretion and interpretation cannot be totally avoided while considering the full content and meaning of the opinions. It can be largely accounted for, though, with strict adherence to an accurate definition and comprehensive set of requirements, which, as described above, is exactly what has been done in this study.

The final case list consists of sixty-eight deference cases.[106] The subject matter of these cases range from the rights of detained enemy combatants[107] to official lysergic acid diethylamide (LSD) testing conducted by the military.[108] Another cluster of cases deals with the construction, jurisdiction, and execution of courts-martial and other military courts, both at home and abroad.[109] Another large subset of the deference cases are those cases involving the treatment of Japanese American citizens by the United States government during the Second

("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."); Whelchel v. McDonald, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.").

105 *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 624 (2006) ("[E]xigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections."); Reid v. Covert, 354 U.S. 1, 35 (1957) ("[W]e reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists.").

106 See *infra* Appendix A for the full catalog of deference cases.

107 *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

108 *See* United States v. Stanley, 483 U.S. 669 (1987).

109 *See In re* Yamashita, 327 U.S. 1, 25 (1946) (holding that a military commission convened to try a Japanese General for war crimes was lawful and thus had the necessary authority to try the general).

World War, the most prominent of which is *Korematsu v. United States*.[110] Also included in the data are a number of deference cases involving the First Amendment rights of servicemembers, and others, who reside on military installations.[111] These clusters of cases by no means account for the entire catalog, but they do represent those topics that arise relatively frequently in military deference cases.

A number of case groupings are also conspicuously absent from the final catalog. First and foremost among them are cases related to the Selective Training and Service Act of 1940. While a couple of these cases do involve weighing constitutional guarantees against military necessity and expediency, most amount to little more than statutory interpretation. When the Court is merely parsing the text of a congressional statute, the unique nature and needs of the military are absent from consideration, as are the spirit and protections of the Constitution. The Court is neither deferring to nor refusing to defer to the military; it is merely interpreting the letter of the existing law. As such, these cases are not deference cases. For similar reasons, cases involving the Freedom of Information Act are also excluded from the final catalog. Additionally, cases in which the Court determined that it lacked jurisdiction were removed, since this determination involves no recognition of the military as a unique institution, where constitutional protections may be applied differently.

It would be fruitful to elaborate upon the time bounds of the catalog of deference cases used in this analysis. For a variety of reasons, the earliest case included is that of *Ex parte Quirin*.[112] First, a large number of Justices with military service experience were appointed to the Court in the late 1930s. Between the years of 1937 and 1940, all five of the Justices appointed to the Court were veterans.[113] This influx of veteran

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[110] *See* Korematsu v. United States, 23 U.S. 214 (1944).

[111] *See e.g.*, Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) ("[T]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations."); Greer v. Spock, 424 U.S. 828, 838 (1975) (holding that political candidates "had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix," and that the regulation allowing commanders to exclude people from the base was constitutional); United States v. O'Brien, 391 U.S. 367, 396-72 (1968) (reinstating the conviction of a man for burning his draft certificate).

[112] *Ex parte* Quirin, 317 U.S. 1 (1942).

[113] These are Justices Hugo Black, Stanley Forman Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy. *See infra* Appendix B.

Justices coincides with two important beginnings, as 1941 saw both America's entry into World War II, and the appointment of Harlan Fiske Stone as Chief Justice of the Supreme Court of the United States. Further, as many scholars of the doctrine would agree, the military deference doctrine, as understood and applied today, did not emerge until the latter half of the twentieth century.[114] Before this time, the Court's treatment of the military and its command structure was dominated by an attitude of noninterference.[115] After the end of the Second World War, however, this changed. The Court briefly took a more active stance toward the military before moving on to craft the modern doctrine of deference in the 1970s.[116] Given these changes in the Court's attitude, the deference cases heard before World War II were few and far between, let alone vaguely related to the military deference doctrine as studied in this article. As such, including cases prior to the advent of the Stone Court and Second World War rings inappropriate. *Ex Parte Quirin* thus provides a natural lower bound for this study. In terms of the upper bound, this study includes all deference cases decided between 1942 and 2009. This represents an extension of the cases Lichtman considered and adds timeliness to this study.

Having compiled a catalog of cases, the next step was to construct a record of the voting behavior of the individual Justices in each of these cases. The binary voting behavior variable (v_i) serves as the primary dependent variable in this study. For each case, the votes of all participating Justices are considered, yielding a comprehensive deferential voting record of 588 votes. These votes were coded as either in favor of deferring to the military (D) or against deferring to the military (N).[117] The language and arguments used in each of the opinions guided this determination. Only votes for opinions that explicitly deferred to the military, for any of the reasons listed above, were coded as deferential votes.

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[114] O'Connor, *Origins and Application*, *supra* note 57, at 215; Diane Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 704 (2002) (calling the modern military deference doctrine "only a creation of the post-Vietnam, all-volunteer military").

[115] *See* sources cited *supra* note 58.

[116] *See* sources cited *supra* notes 59–60.

[117] In coding the binary variable of military service, a vote of D was denoted with a (1), while a vote of N was recorded as (0). Of the 588 votes cast, 376 were deferential and 212 were non-deferential.

Meanwhile, those Justices who determined that the needs of the military were not so great or unique as to justify robbing servicemembers, or others affiliated with the military, of their constitutional guarantees are coded as having cast non-deferential votes. Also coded as having cast non-deferential votes are those Justices who, in the face of deferential arguments, opted to decide the case on statutory or jurisdictional grounds and not acknowledge the military as a unique body to which the Constitution may be applied differently.

A total of thirty-six Justices voted in the sixty-eight deference cases considered.[118] Of these Justices, twenty (or approximately 56%) had served previously in either the Army, Navy, Army Air Force, National Guard, or Army Reserve.[119] Of those Justices who had served in the military, just 70% served as officers. Many of them spent their time in the military working in intelligence or with the Judge Advocate General's Corps, the legal organization within each branch of the military. The branch with the most representation on the bench is the Army, accounting for half of those Justices who are also military veterans. All but three of the twenty Justices—Justices Alito, Kennedy, and Breyer—served during wartime. The only armed conflicts represented in the Court's overall record of wartime service are the First and Second World Wars. None of the Justices on the Court served in conflicts in Vietnam, Korea, the Persian Gulf, Iraq, or Afghanistan, conflicts markedly different in nature from the World Wars.[120]

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[118] *See infra* Appendix B for a full list of these Justices and their military affiliations. This list of Justices does not account for all Justices appointed to the bench since 1942. Because he did not participate in any of the cases included in the catalog, Justice Arthur Goldberg, who served on the Court from 1962 to 1965, is not included. Goldberg was a two-time veteran of the armed forces with service in the Army during World War II and in the Air Force in 1976, after he retired from the bench.

[119] Also included in the data, in addition to those with personal military experience, are a number of Justices with extra-personal military ties. Justice O'Connor, for example, is the wife of an Army veteran; her husband was a Judge Advocate. Dennis Hevesi, *John J. O'Connor III, Husband of Former Justice, Is Dead at 79*, N.Y. TIMES (Nov. 11, 2009), http://www.nytimes.com/2009/11/12/us/12oconnor.html. Justice Scalia was the father of a West Point graduate and lieutenant colonel in the Army. *See* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 324 (2009).

[120] The nature of warfare has changed significantly since World War II. *See* JONATHAN MALLORY HOUSE, TOWARD COMBINED ARMS WARFARE: A SURVEY OF 20TH-CENTURY TACTICS, DOCTRINE, AND ORGANIZATION 187-88 (1984) ("Since 1945, the atomic bomb has called into question the entire role of land combat and has certainly made massing on the World War II model quite dangerous."); MARTIN VAN KREVELD, TRANSFORMATION OF

In terms of representing this service in the data, another binary variable was introduced, this one independent. The service variable is coded as either having served (1) or never having served (0). Service here refers to any length of time of service in any branch of the United States military, its Reserves, or the National Guard. The branches represented in this data set include the Army, Navy, Army Air Force, National Guard, and Army Reserve.

A number of other variables that could potentially aid in illuminating this military–Court relationship, as noted below,[121] were also considered. First among these is ideology, a characteristic many contend is intimately linked to a Justice's voting behavior.[122] The gender of each Justice is also noted. Time-related independent variables are similarly accounted for. Acknowledging that the deferential tendencies of Justices may change as they gain more experience and confidence in their roles on the Court,[123] the time spent on the bench in years before each vote was cast is examined. For similar reasons, this article considers the amount of experience a Justice has in deference cases. This experience is measured by the number of deference cases a Justice had heard prior to the casting of each vote. As a nation currently engaged in war may feel the passions and fears of wartime and the military effort differently than a nation in peacetime, another factor considered is whether each case was decided in wartime. The official beginning and termination dates provided in the Code of Federal Regulations were used to decide which periods

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WAR 11 (1991) ("[T]he effect of nuclear weapons . . . has been to push conventional war into the nooks and crannies of the international system."); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 677 (2004) ("Shifts in the nature of security threats have broken down once clear distinctions between armed conflict and 'internal disturbances' . . . ; between states and non-state actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring."); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004) ("Threats [of war] now come from at least three primary sources: the easy availability of the knowledge and technology to create weapons of mass destruction, the emergence of rogue nations, and the rise of international terrorism of the kind practiced by the al Qaeda terrorist organization.").

121 *See infra* Part III.C.

122 *See* sources cited *supra*, note 70.

123 *See* Hagle, *supra* note 80; Hurwitz & Stefko, *supra* note 82.

constitute wartime.[124] Finally, the year of decision for each case is also noted.

C. Results

First, a summary statistic for the relationship between prior military service and votes for military deference is provided.[125] Whereas the Justices contained in this data set with military service deferred to the military at a rate of 61.7%, those Justices with no prior military experience deferred at a rate of 69.1%. This 7.4% difference in rates of deference hints at a contrast between the deferential behavior of Justices with military service and those without.

A binary logistic regression analysis further elucidates the association between the dependent variable of deference (v_i) and military service (x_i)[126]:

$$\Pr(v_i = \mathrm{D}) = f(0.805 - 0.328x_i)$$

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[124] *See* BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RS21405, U.S. PERIODS OF WAR AND DATES OF CURRENT CONFLICTS (2012).

[125] For this cross tabulation, the Pearson Chi-Square value of 2.943 bears a likelihood ratio of 2.984 and a significance of 0.086, indicating statistical significance at the 0.1 level. The results of this cross tabulation are:

			Deference		Total
			0	1	
Military Service	0	Count	55	123	178
		% within Military Service	30.9%	69.1%	100%
	1	Count	157	253	410
		% within Military Service	38.3%	61.7%	100%
Total		Count	212	376	588
		% within Military Service	36.1%	63.9%	100%

[126] The results of this binary logistic regression analysis are:

	B	S.E.	Wald	Df	Sig.	Exp(B)
Service	-.328	.191	2.931	1	.087	.721
Constant	.805	.162	24.619	1	.000	2.236

As indicated in this regression, Justices with prior military service are roughly one-third less likely to defer, where $\beta_{service} = -0.328$, in military deference cases. In the two-sided hypothesis test, this result bears a significance of $p = 0.087$, which is statistically significant at the 0.1 level. Given these findings, the data provide modest support for the rejection of H_{0_1} in the two-sided test, testing if military service is associated with deferential voting behavior of Supreme Court Justices in military deference cases. Seeing the results of the two-sided test, we then turn to the one-sided test and find that the p-value is statistically significant at the 0.05 level. This allows for the rejection of H_{0_2}, that the likelihood of deference for Justices with military experience is no different than that for Justices without, in favor of H_2.[127] With 95% confidence, this finding indicates that Justices with military experience who served on the Court between 1942 and 2008 were typically less deferential than those without.[128]

Six additional covariates were then added into the regression: ideology as captured in the Segal-Cover scores ($x_{i,ideology}$), the length of time that a Justice has served on the bench ($x_{i,time}$), the amount of experience a Justice has with deference cases ($x_{i,experience}$), the issuance of the decision during wartime ($x_{i,wartime}$), the year the case was issued ($x_{i,year}$), and the biological sex of a Justice ($x_{i,gender}$).[129] Each of these variables is included for its potential impact upon the decision of a Justice to defer to the military or not.

Ideology. As explained above, the contention that Justices vote according to their own values and policy preferences is widely accepted by scholars.[130] These Justices arrive at the Court with their own sets of personal preferences, values, and beliefs, and it would only be natural to acknowledge that these beliefs could color their behavior on the bench,

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[127] Though this one-sided test is easier to prove, it remains important to this study as the side of the relationship between service and deference with which the author is primarily concerned.

[128] *See supra* note 126.

[129] Although the logistic regression does not assume anything about the distribution of the covariates, it generally assumes independence between them. Here, the author reasonably assumes independence between all of the covariates, with the exception of service and ideology, the association between which is explored later in this Part. Because of the ultimate strength of the correlation between service and ideology, the model should not be sensitive to this association.

[130] *See supra* Part II.C.

in military deference cases just as in other cases.[131] The ideological scores calculated by Jeffrey Segal and Albert Cover,[132] which have fast become "the disciplinary standard for measuring the political ideology of Supreme Court Justices," supply a measure of ideology.[133]

Years on the bench. Scholarship on the Supreme Court suggests that the length of time a Justice has been on the bench may influence his or her voting behavior, as well.[134] Given this evidence that acclimation effects do, in fact, exist,[135] the length of time a Justice has served on the bench stands as a potential factor in judicial decision-making in military deference cases as well as in others.

Prior deference experience. In the same way that the number of years a Justice has served on the bench may impact that Justice's judicial ideology, it may be that the amount of experience a Justice has with deference cases, as measured by the number of deference cases a Justice has previously heard, influences that Justice's deferential behavior and attitude toward the military.

Decided in wartime. Whether or not a decision was made in wartime, amidst the fears and passions that hang over a nation at war, is a

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131 *See supra* note 70 and accompanying sources.

132 Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 (1989). Unlike other measures of judicial behavior that rely on past voting records, the Segal-Cover score is calculated based on an analysis of the content of newspaper editorials published in leading newspapers during the time between a Justice's nomination and her confirmation. *Id.* at 559. This analysis yields a score between most conservative (0) and most liberal (1) for each Justice. *Id.* at 559. As a result of Segal and Cover's updating and backdating of these scores, a Segal-Cover score exists for every Justice included in this study with the exception of Owen Roberts. *See* Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 814 (1995); Jeffrey A. Segal, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012*, at 1, http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf (last visited Jan. 25, 2016). As such, he is regrettably excluded from the data set when considering ideology in the regression. This removes just four votes from the data set.

133 Christopher Zorn & Gregory A. Caldeira, *Measuring Supreme Court Ideology* 4 (2006), http://www.adm.wustl.edu/media/courses/supct/ZC2.pdf (containing the paper presented at the Annual Meeting of the Southern Political Science Association).

134 *See* Hagle, *supra* note 80; Hurwitz & Stefko, *supra* note 82, at 127 ("Preferential votes become far more prominent as a Justice's tenure grows.").

135 Hagle, *supra* note 80, at 1147 ("Of the [thirteen] justices examined, six experienced significant acclimation effects . . . . [S]even justices experienced a significant acclimation effect in the criminal procedure issue area.").

factor the Court itself has identified as a potential motivator to defer to national security via military necessity. In *Hamdi v. Rumsfeld*,[136] Justice O'Connor addressed the danger of this impact of wartime conditions when she wrote "that a state of war is not a blank check."[137] Sixty years earlier, the Court noted that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger," again hinting at the impact of a state of war on the judicial decision–making process.[138] As the Court itself is willing to recognize, the passions and priorities of wartime may very well factor into judicial decisions.

Year of decision. Scholars of the military deference doctrine, most notably John O'Connor, have identified a change in the Court's deferential behavior in military cases over time.[139] This change in the general attitude of the Court toward military deference may also account, at least in part, for the deferential voting behavior of the individual Justices.

Gender. Two of the Justices included in the data—Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg—are women. Neither of these female Justices served in the military in any capacity. In fact, as of today, no female Supreme Court Justice has ever served in the military. Although not enough data exists to draw meaningful conclusions about the gender variable, gender is included in the model to detect if female or male Justices are more inclined to defer to the military.

Running a binary logistic regression with these added covariates yields the model:

$$\Pr(v_i = \mathrm{D}) = f(38.903 - 0.091x_{i,service} - 3.344x_{i,ideology} - 0.065x_{i,time} + 0.029x_{i,experience} + 0.143x_{i,wartime} - 0.018x_{i,year} + 0.050x_{i,gender})$$

In this updated model, the service variable is no longer statistically significant in explaining judicial voting behavior in military deference

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136 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
137 *Id.* at 535.
138 Korematsu v. United States, 323 U.S. 214, 220 (1944).
139 O'Connor, *Origins and Application*, *supra* note 57, at 215; *see supra* Part II.B.

cases.[140] The only covariates that prove statistically significant in this model are ideology, the number of years a Justice has sat on the bench, and the year the decision was issued, all of which bear a statistical significance of $p < 0.01$.[141] Given these results and the inconsistency in the significance of the military experience explanatory variable, one would suspect that the change in deference may be better explained using one or more of the covariates that proved meaningful in the second model.

Correlating the military service variables with each of the covariates that proved useful in the second model can begin to answer this question.[142] The relationship between the year an opinion is issued and the incidence of prior military experience would reveal little more than the military composition of the Court over time. Similarly, the relationship between the occurrence of past military experience and the amount of time a Justice has spent on the Court when votes are cast

[140] The results of this binary logistic regression analysis are:

	B	S.E.	Wald	df	Sig.	Exp(B)
Service	-.091	.250	.133	1	.715	.913
Year	-.018	.008	4.999	1	.025	.982
Time on Bench	-.065	.031	4.433	1	.035	.937
Wartime	.143	.219	.427	1	.514	1.154
Segal Cover	-3.344	.414	65.269	1	.000	.035
Gender	.050	.522	.009	1	.924	1.051
Number Case	.029	.030	.929	1	.335	1.030
Constant	38.903	16.152	5.801	1	.016	7.858E + 16

[141] The variables for prior military service, prior deference experience, the issuance of a decision during wartime, and gender fail are not statistically significant in this model.

[142] The correlation coefficients between these variables are:

Variables Correlated	Pearson Correlation Coefficient	2-Tailed Significance
Military Service Ideology (Segal-Cover)	0.201	0.000
Military Service Time on the Bench	0.160	0.000
Military Service Year Opinion Issued	-0.274	0.000

seems an unproductive relationship to explore. On the other hand, as mentioned in Part II, military service has been shown to impact the values and ideology of service members, even after their time in the military.[143]

Given this established relationship, this article refocuses its analysis on the ideology variable. A correlation of military service and ideology yields a Pearson correlation coefficient of 0.201, statistically significant at the 0.01 level. This correlation suggests a positive association between prior military service and judicial ideology. Given that higher Segal-Cover scores indicate liberal leanings, this correlation suggests that the occurrence of military service is associated with a more liberal judicial ideology.

In order to better understand the magnitude of this association, a linear regression analysis that focuses on military service (x_i) as an independent variable and ideology (y_i) as the dependent variable is used.[144] It finds a linear relationship of the form:

$$y_i = 0.463 + 0.143x_i .$$

These results indicate that prior military service, as captured in this data set, explains a 0.143 higher Segal-Cover score for those Justices who had served in the military and were on the Court between 1942 and 2008. This result is both impactful and statistically significant, with a significance of $p < 0.001$, and thus provides strong support for the contention that military service does not make Justices less liberal. Rather, it suggests that military service is at least correlated with a more liberal judicial ideology.

[143] *See supra* note 72 and accompanying sources.

[144] The results of this linear regression analysis are:

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
Constant	.463	.024	.201	19.154	.000
Military Service	.143	.029		4.942	.000

D. Discussion

This analysis provides support for the hypothesis (H_2) that, on the level of the individual Supreme Court Justice, prior military service is associated with less deferential voting behavior in the military deference cases included in the data. Other significant relationships that came to light in the course of analysis suggest that this link may not be direct. First, this analysis provides strong evidence that the Justices included in this data set with military service tended to be more liberal on the Segal-Cover scale than those Justices with no prior military service. Additionally, strong evidence is found that judicial ideology was a strong indicator of deferential voting behavior in the cases included in this study.

These findings immediately provide two potential relationships between service, ideology, and deference. It is important to remember that, as the active military service performed on the behalf of the Justices necessarily preceded the judicial ideology exhibited on the bench in all of these cases,[145] the problem of strict endogeneity is avoided. As per the first potential relationship, it may be that military service directly impacts ideology, which then acts as a reliable predictor for deference. Second, this impact may be mixed with the influence of some unknown factor that also affects whether or not one serves in the military. These potential relationships suggest a more complicated mechanism through which prior military service via ideology has an impact on the deferential voting behavior of Supreme Court Justices.

E. Avenues for Future Research

The stage is thus set for further investigation into the rich and nuanced relationship between military service, military deference, and judicial ideology. To begin, future studies may flesh out the relationship between military service and judicial ideology, exploring the causal link between these two variables and the reasons therefor. Second, while this study looks at the catalog of military deference cases as a whole, future research may break this catalog into topic-based categories to determine

[145] The only case worth noting in this discussion of strict endogeneity is that of Justice Frank Murphy, who served in the military both before and while on the Court. This service, though, still preceded any of his votes that were considered in this study.

whether deferential tendencies vary across areas of the law. Further, military service means something different to everyone who serves, and thus affects people in different ways.[146] Though beyond the scope of this note, such divergent impacts are ripe for future research that would look closely for parallels or patterns among them, specifically as they cut through the field of military deference.

IV. Conclusion

As Justice Murphy once wrote in a letter to a friend, "A soldier is trained for action and for him action never ceases. In a sense we have never put our uniforms away."[147] This article suggests that, contrary to popular intuition, military veterans on the Supreme Court may wear this metaphorical "uniform" in their "enduring quest to uphold American values, at home and abroad."[148] Particularly, it suggests that these veteran Justices are less deferential in military deference cases than those Justices with no prior military experience. As those Justices with military experience also proved more liberal in their judicial ideologies, it also suggests that military service may, in one way or another, impact deferential voting behavior via judicial ideology.

On today's military-dominated political stage, this inverse association between prior military service and deferential voting behavior is particularly salient. With the nature of warfare, and the military, undergoing significant changes, both new and old legal and constitutional concerns are rising to the level of the Supreme Court. The recent lift of all gender-based military service restrictions will unearth old questions of a male-only draft.[149] The need to work ever more

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[146] Amann, *supra* note 89, at 1598 ("But while military service is formative, it does not set everyone on the same path. Civil War duty led Justice Holmes to esteem conflict and abhor human rights. More recently, Justices who had served in uniform divided on whether the Constitution forbids criminal punishment for burning the American flag." (internal citation omitted)).

[147] HOWARD, *supra* note 3, at 272 (quoting Letter from Frank Murphy to Harry Levinson (Dec. 25, 1941), Box 100, Frank Murphy Papers (Michigan Historical Collections, Ann Arbor)).

[148] Amann, *supra* note 89, at 1573.

[149] *See* Dan Lamothe, *Why the Pentagon Opening All Combat Roles to Women Could Subject Them to a Military Draft*, N.Y. TIMES (Dec. 4, 2015), https://www.washington

closely with foreign nationals in today's age of unconventional warfare raises questions of trying foreign national employees of the United States military in courts-martial.[150] Trying enemy combatants and suspected terrorists detained at Guantanamo Bay has proven similarly problematic.[151] Paradoxically, were the Court to welcome an old soldier into its ranks today, in this time of great social scrutiny of military practices, it might just be welcoming a challenge to its tradition of military deference.

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post.com/news/checkpoint/wp/2015/12/04/why-the-pentagon-opening-all-combat-roles-to-women-could-subject-them-to-a-military-draft. For the Court's stance on an all-male draft, see *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

[150] *See* United States v. Ali, 71 M.J. 256, 259 (C.A.A.F. 2012) ("[T]he congressional exercise of jurisdiction . . . [over] a non-United States citizen Iraqi national, subject to court-martial outside the United States during a contingency operation, does not violate the Constitution.").

[151] *See, e.g.*, Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 274 (2002) ("In 2001, Bush's Order to establish military commissions was widely viewed (at least among elites) to be illegitimate, inappropriate, unprecedented, unauthorized, unconstitutional, undemocratic, violative of basic civil liberties, harmful to the war effort, and self-defeating.").

Appendix A: Catalog of Deference Cases

Table 1: Catalog of Deference Cases

Case	Citation	Year	Deferential
Ex Parte Quirin	317 U.S. 1	1942	1
Hirabayashi v. United States	320 U.S. 81	1943	1
Korematsu v. United States	323 U.S. 214	1944	1
Falbo v. United States	320 U.S. 549	1944	1
Gibson v. United States	329 U.S. 338	1946	0
Duncan v. Kahanamoku	327 U.S. 304	1946	0
In re Yamashita	327 U.S. 1	1946	1
Patterson v. Lamb	329 U.S. 539	1947	1
Wade v. Hunter	336 U.S. 684	1949	1
United States ex rel. Hirshberg v. Cooke	336 U.S. 210	1949	0
Feres v. United States	340 U.S. 135	1950	1
Whelchel v. McDonald	340 U.S. 122	1950	1
Johnson v. Eisentrager	339 U.S. 763	1950	1

Case	Citation	Year	Deferential
Hiatt v. Brown	339 U.S. 103	1950	1
United States v. Caltex (Philippines) Inc.	344 U.S. 149	1952	1
Madsen v. Kinsella	343 U.S. 341	1952	1
Burns v. Wilson	346 U.S. 137	1953	1
United States v. Nugent	346 U.S. 1	1953	1
Orloff v. Willoughby	345 U.S. 83	1953	1
United States v. Reynolds	345 U.S. 1	1953	1
United States ex rel. Toth v. Quarles	350 U.S. 11	1955	0
Kinsella v. Krueger	351 U.S. 470	1956	1
Wilson v. Girard	354 U.S. 524	1957	1
Reid v. Covert	354 U.S. 1	1957	0
Trop v. Dulles	356 U.S. 86	1958	0
Lee v. Madigan	358 U.S. 228	1959	0
McElroy v. United States ex rel. Guagliardo	361 U.S. 281	1960	0

Case	Citation	Year	Deferential
Grisham v. Hagan	361 U.S. 278	1960	0
Kinsella v. United States ex rel. Singleton	361 U.S. 234	1960	0
United States v. O'Brien	391 U.S. 367	1968	1
Noyd v. Bond	395 U.S. 683	1969	1
O'Callahan v. Parker	395 U.S. 258	1969	0
Schacht v. United States	398 U.S. 58	1970	0
Gillette v. United States	401 U.S. 437	1971	1
Relford v. Commandant	401 U.S. 355	1971	1
Laird v. Tatum	408 U.S. 1	1972	1
Flower v. United States	407 U.S. 197	1972	0
Parisi v. Davidson	405 U.S. 34	1972	0
Gosa v. Mayden	413 U.S. 665	1973	1
Parker v. Levy	417 U.S. 733	1974	1
McLucas v. DeChamplain	421 U.S. 21	1975	1

Case	Citation	Year	Deferential
Schlesinger v. Councilman	420 U.S. 738	1975	1
Schlesinger v. Ballard	419 U.S. 498	1975	1
Middendorf v. Henry	425 U.S. 25	1976	1
Greer v. Spock	424 U.S. 828	1976	1
Stencel Engineering Corp. v. United States	431 U.S. 666	1977	1
Secretary of the Navy v. Huff	444 U.S. 453	1980	1
Brown v. Glines	444 U.S. 348	1980	1
Rostker v. Goldberg	453 U.S. 57	1981	1
Chappell v. Wallace	462 U.S. 296	1983	1
United States v. Shearer	473 U.S. 52	1985	1
United States v. Albertini	472 U.S. 675	1985	1
Wayte v. United States	470 U.S. 598	1985	1
Goldman v. Weinberger	475 U.S. 503	1986	1

Case	Citation	Year	Deferential
United States v. Stanley	483 U.S. 669	1987	1
Solorio v. United States	483 U.S. 435	1987	1
United States v. Johnson	481 U.S. 681	1987	1
Department of the Navy v. Egan	484 U.S. 518	1988	1
Perpich v. Department of Defense	496 U.S. 334	1990	1
Weiss v. United States	510 U.S. 163	1994	1
Loving v. United States	517 U.S. 748	1996	1
Hamdi v. Rumsfeld	542 U.S. 507	2004	0
Rasul v. Bush	542 U.S. 466	2004	0
Hamdan v. Rumsfeld	548 U.S. 557	2006	0
Rumsfeld v. Fair	547 U.S. 47	2006	1
Winter v. Natural Resources Defense Council	555 U.S. 7	2008	1
Munaf v. Geren	553 U.S. 674	2008	1

Case	Citation	Year	Deferential
Boumediene v. Bush	553 U.S. 723	2008	0

Table 2:
Number of Military Deference Cases Decided
Deferentially by Each Court

	Cases	Deferential	%
Stone	6	5	83.3%
Vinson	14	12	85.7%
Warren	12	4	33.3%
Burger	22	19	86.4%
Rehnquist	9	7	77.8%
Roberts	5	3	60%
Total	68	50	73.5%

Appendix B: List of Justices Considered

Table 3:
Justices Considered

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
Harlan F. Stone	1925 - 1946	No				83.33%
Owen Roberts	1930 - 1945	No				75.00%
Hugo Black	1937 - 1971	Yes	U.S. Army	World War I	2	40.00%
Stanley Forman Reed	1938 - 1957	Yes	U.S. Army	World War I	1	86.36%
Felix Frankfurter	1939 - 1962	Yes	U.S. Army	World War I	5	66.67%
William O. Douglas	1939 - 1975	Yes	U.S. Army	World War I	2	31.71%
Frank Murphy	1940 - 1949	Yes	U.S. Army	World War I, World War II	2	22.22%
James F. Byrnes	1941 - 1942	No				100.00%
Robert H. Jackson	1941 - 1954	No				76.47%

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
Wiley Blount Rutledge	1943 - 1949	No				44.44%
Harold Hitz Burton	1945 - 1958	Yes	U.S. Army	World War I	2	85.71%
Fred M. Vinson	1946 - 1953	Yes	U.S. Army	World War I	2	85.71%
Tom C. Clark	1949 - 1967	Yes	TX Natl. Guard	World War I	1	78.95%
Sherman Minton	1949 - 1956	Yes	U.S. Army	World War I	2	100.00%
Earl Warren	1953 - 1969	Yes	U.S. Army	World War I	1	25.00%
John Marshall Harlan II	1955 - 1971	Yes	U.S. Army Air Forces	World War II	2	73.33%
William J. Brennan, Jr.	1956 - 1990	Yes	U.S. Army	World War II	4	21.62%
Charles Evans Whittaker	1957 - 1962	No				66.67%

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
Potter Stewart	1958 - 1981	Yes	U.S. Navy	World War II	5	62.50%
Byron White	1962 - 1993	Yes	U.S. Navy	World War II	4	76.67%
Abe Fortas	1965 - 1969	No				100.00%
Thurgood Marshall	1967 - 1991	No				23.08%
Warren E. Burger	1969 - 1986	No				86.36%
Harry Blackmun	1970 - 1994	No				85.19%
Lewis F. Powell, Jr.	1972 - 1987	Yes	U.S. Army Air Forces	World War II	4	95.00%
William Rehnquist	1972 - 2005	Yes	U.S. Army Air Forces	World War II	3	96.30%
John Paul Stevens	1975 - 2010	Yes	U.S. Navy	World War II	3	52.17%
Sandra Day	1981 - 2006	No				71.43%

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
O'Connor						
Antonin Scalia	1986 - 2016	No				92.86%
Anthony Kennedy	1988 - Present	Yes	CA Army Natl. Guard		1	60.00%
David Souter	1990 - 2009	No				44.44%
Clarence Thomas	1991 - Present	No				100.00%
Ruth Bader Ginsburg	1993 - Present	No				44.44%
Stephen Breyer	1994 - Present	Yes	U.S. Army Res.		8	37.50%
John G. Roberts	2005 - Present	No				100.00%
Samuel Alito	2006 - Present	Yes	U.S. Army Res.		8	100.00%