RETIRING MILITARY JURISDICTION OVER MILITARY RETIREES

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ABSTRACT

In *Solorio v. United States*, 483 U.S. 435 (1987), the Supreme Court held that the constitutionality of subjecting individuals to court-martial jurisdiction and military law turns solely on whether those individuals have a "military status." Although the Supreme Court never defined what it meant by "military status," lower courts have understood this rule to mean that Congress may subject everyone who is formally enrolled in the U.S. Armed Forces to military law at all times. Both the U.S. Court of Appeals for the Armed Forces and the U.S. Court of Appeals for the District of Columbia Circuit have upheld court-martialing military retirees for conduct unrelated to military service because active-duty retirees remain technically enrolled in the military, even though they have no continuing military duties except primarily to report for future service if called.

This Article argues that these courts have misunderstood the Constitution's status-based test for military jurisdiction. The Constitution recognizes two military statuses, not one: a member of the regular forces (armies and navy) and a militiaman. Legally, the distinction between a member of the regular forces and a militiaman depends on the person's primary occupation. The primary occupation of a member of the regular forces is war (and preparation for war), while a militiaman

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has a civilian occupation but is subject to occasional military service. Consistent with this professionalism distinction, only members of the regular forces traditionally have been subject to military law based on their status as members of the military. Militiamen have been subject to military law only when in active service and, to a more limited degree, when in training. Notwithstanding their statutory classifications as members of the federal armed forces, reservists, Guardsmen, retirees, and most other civil-military hybrids are species of militiamen: they are individuals who lead primarily civilian lives but who are subject to occasional, temporary military service. As de facto militiamen, these individuals are subject to military law only when they are performing military service. At other times, the Constitution requires them to be treated as civilians and secures to them their full common-law rights, including the right of trial by jury.

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INTRODUCTION

STEVEN Larrabee retired from the U.S. Marine Corps after twenty years of active service. Regular enlisted Marines have two retirement options. They may retire after thirty years of active service.[1] Or, after twenty years of active service, they may request a transfer to an inactive component called the "Fleet Marine Reserve" and then retire after thirty years of combined active and inactive service.[2] Larrabee chose to join the Fleet Marine Reserve.

As a Fleet Marine Reservist, Larrabee theoretically could be subjected to future military service.[3] The federal government could require Larrabee to report for training for up to two months in any four-year period.[4] The government could also recall Larrabee for temporary periods of active service in peacetime and for indefinite periods during certain national emergencies.[5] But such recalls, whether for training or for active service, rarely happen.[6] In fact, Larrabee was retired, collecting his pension, and living a civilian life working three jobs.[7]

Three months after retiring, Larrabee sexually assaulted a woman at a bar that he was managing in Japan.[8] For this, the military filed charges under the Uniform Code of Military Justice (UCMJ) under a provision that authorizes charges against "Members of the Fleet Reserve and Fleet Marine Corps Reserve."[9] This is a special jurisdictional provision for members of a naval component that retire after twenty years but before thirty years. But had Larrabee been formally retired, it would not have mattered; the military could have charged him under an analogous provision granting jurisdiction over "[r]etired members of a regular component of the armed forces who are entitled to pay."[10] Although Larrabee pleaded guilty, he challenged the military's jurisdiction to try him.[11] Larrabee argued that, as a retiree, he was not effectively part of the "land [or] naval [f]orces" amenable to military law.[12]

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1. 10 U.S.C. § 8326(a) (2018).

2. *Id.* § 8330(b).

3. The Fleet Marine Reserve should not be confused with the U.S. Marine Corps Reserve, which is the organized reserve force of the Marines (i.e., the Marines who serve "one weekend a month, two weeks a year"). *See id.* § 10101(4) (providing for the reserve components of the armed forces). The Fleet Marine Reserve is a component solely for Marines leaving the regular Marine Corps after twenty years of full-time service.

4. *Id.* § 8385(b).

5. *Id.* §§ 8385(a), 688.

6. Brief for Plaintiff-Appellee at 26 & n.9, 32 & n.15, Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022) (No. 21-05012).

7. *Larrabee*, 45 F.4th at 84.

8. Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 325 (D.D.C. 2020), *rev'd*, 45 F.4th 81 (D.C. Cir. 2022).

9. UCMJ, art. 2(a)(6), 10 U.S.C. § 802(a)(6).

10. *Id.* § 802(a)(4).

11. *See* United States v. Larrabee, 77 M.J. 328, 328 (C.A.A.F. 2018) (granting review of Larrabee's appeal); *Larrabee*, 502 F. Supp. 3d at 325.

12. *Larrabee*, 45 F.4th at 85 (quoting U.S. CONST. art. 1, § 8, cl. 14).

Larrabee's case, and others like his, raise difficult questions about how far the separate military criminal justice system can reach into civilian life. As a Fleet Marine Reservist, Larrabee maintained a relationship with the armed forces and he could be ordered into future service. But as a retired member of the military, he was also primarily living as a civilian, with a civilian occupation. Does Congress have the authority, using its constitutional power to make "Rules for the Government and Regulation of the land and naval Forces,"[13] to subject retired members of the armed forces to military law for conduct that occurs in their civilian life?

Sixty years ago, scholar Joseph W. Bishop framed this as Congress's power to apply military law to "military-civilian hybrids."[14] Within this category, Bishop placed formal military retirees, members of the Fleet Reserve and Fleet Marine Reserve (who are de facto regular retirees), reservists, and discharged prisoners.[15] In the decades since he has written, this jurisdiction has only expanded, both de facto and de jure. From the best information we have available, the military is prosecuting more military retirees for essentially civilian offenses, particularly those who have committed sex crimes.[16] And Congress has expanded military jurisdiction over reservists during inactive duty training.[17] While the expansion of jurisdiction over reservists remains small at this time, it nevertheless triggers inquiries about how far Congress may constitutionally reach in applying military law to military-civilian hybrids who are not in active service.

This Article will focus primarily on the military retiree question because Congress has extended the same broad status-based military jurisdiction over regular retirees that it extends to the regular forces in active service.[18] In contrast, Congress has not extended broad military jurisdiction over military reservists, although it is slowly creeping in that direction.[19] Although this Article is framed around military retirees, the arguments in this Article also apply to the reserve forces.[20]

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13. U.S. CONST. art. I, § 8, cl. 14.

14. Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 317 (1964).

15. *Id.* at 318 n.3.

16. *See infra* note 430 and accompanying text.

17. Uniform Code of Military Justice, ch. 169, art. 2(3), 64 Stat. 107, 109 (1950) (codified as amended at 10 U.S.C. §§ 800–946) (subjecting reservists during inactive duty training, but only where the reservist voluntarily accepts orders that "specify that they are subject to this code"); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 804, 100 Stat. 3816, 3906–07 (1986) (expanding jurisdiction for all inactive duty training); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894–95 (2016) (further extending jurisdiction to travel to and from training).

18. *Compare* UCMJ, art. 2(a)(1), 10 U.S.C. § 802(a)(1) (active duty), *with id.* § 802(a)(4) (regular retirees), *and id.* § 802(a)(6) (Fleet Reserve and Fleet Marine Reserve).

19. *See id.* § 802(a)(3), (5); *supra* note 17 and accompanying text.

20. I am unsure about my arguments' applicability to discharged prisoners, who may present different questions of military law.

At present, there are two schools of thought regarding the Uniform Code of Military Justice's extension of military jurisdiction to regular retirees. The first is that military retiree jurisdiction is unconstitutional because retirees do not remain in actual military service.[21] The second (and opposite) view is that the military may constitutionally exercise jurisdiction over retirees because retirees remain members of the armed forces and must be ready for future recall.[22] Military retirees are simply receiving "reduced compensation for reduced [military] service," but they remain in service.[23]

This debate, I believe, offers a false dichotomy. That false dichotomy results from solely examining the constitutional military clauses that govern the armies and navy. The Constitution, however, recognizes two separate kinds of military status. The first is the "land and naval [f]orces" (armies and navy).[24] The second is the "[m]ilitia."[25]

The distinction between these types of military forces is crucial, yet ignored. As originally understood, the land and naval forces fell under the heading of regular forces, while the militia consisted of nonprofessional citizen-soldiers. To quote the Supreme Court, militiamen were individuals who were "civilians primarily, soldiers on occasion,"[26] and they stood in contrast to their regular counterparts, for whom the military was their primary or exclusive occupation.[27] The constitutional limits on military criminal jurisdiction paralleled this basic distinction. Commensurate with their status as full-time soldiers and sailors, members of the regular forces were traditionally subject to military law at all times.[28] Simply being a member of the regular forces was sufficient to trigger jurisdiction. Military jurisdiction over the militia, however, was more limited. As nonprofessional citizen-soldiers, militiamen were subject to military law when in active service and, to some degree, when in training.[29] But they were not subject to military law in their civilian lives, despite their status as members of the militia and despite their amenability to military

21. *See* Marc J. Emond, Can Grandpa Really be Court-Martialed? The Constitutionality of Imposing Military Law Upon Retired Personnel (Apr. 21, 2022) (LL.M dissertation, The Judge Advocate General's Legal Center and School), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089746 [https://perma.cc/DPZ9-PC8T]; Tyler R. Smotherman, *Unnecessary and Improper: Why It Is Time For UCMJ Jurisdiction Over Retirees To ETS*, 35 REGENT U. L. REV. 207, 215–21 (2022); Bishop, *supra* note 14, at 337.

22. *See* Frank O. House, *The Retired Regular Officer: Status, Duties, and Responsibilities*, 26 A.F. L. REV. 111, 121 (1987); Larrabee v. Del Toro, 45 F.4th 81, 85 (D.C. Cir. 2022); United States v. Begani, 81 M.J. 273, 277–80 (2021).

23. *See, e.g.*, Thad Moyseowicz, *Army Retiree with a Tradition of Service*, U.S. ARMY (Aug. 28, 2009), https://www.army.mil/article/26720/army_retiree_with_a_tradition_of_service [https://perma.cc/4JW9-48RT].

24. U.S. CONST. art. I, § 8, cls. 12–14.

25. *Id.* § 8, cls. 15–16.

26. United States v. Miller, 307 U.S. 174, 179 (1939).

27. *See, e.g.*, *id.* at 179–82 (explaining that "militia" differed from "troops").

28. *See infra* note 287 and accompanying text.

29. *See infra* note 281 and accompanying text.

training and recall. Military jurisdiction over militiamen was functional, not status-based.

With these critical constitutional distinctions in mind, I want to offer a third alternative in the debates over military-civilian hybrids. This alternative better accords with the original understanding of the Constitution's military clauses. Military retirees and reservists have a military affiliation; but they retain this affiliation as de facto militiamen, not as regular soldiers and sailors.[30]

Military-civilian hybrids are not full-time soldiers and sailors. Quite the opposite. Upon retirement, a regular retired soldier's status changes from a person who performs military service as his principal occupation to a person who is primarily a civilian but who may be called up in an emergency. Active reservists similarly perform only occasional military exercises in peacetime, with a view to supplement the regular forces in war. And inactive reserve forces perform no active training but are a pool of manpower by which the federal government may expand the regular forces in emergencies.[31] When a military component walks like a militia and quacks like a militia, then it is a militia, regardless of how Congress labels it by statute. And if a military component is a militia, then Congress may only exercise military jurisdiction when members of that component are in active service or in training. Full status-based jurisdiction is reserved for active members of the regular components only.

Part I examines the background of military-civilian hybrids. It also explains why current judicial precedent fails to grapple adequately with the constitutional problems posed by this category of military personnel. Part II offers a solution to the military-civilian hybrid problem grounded in the original understanding of the Constitution's military clauses. Full status-based military jurisdiction should be applied only to those kinds of military personnel who would have fallen within the "land or naval Forces" at the Framing—active members of the regular forces. In support, this Part looks at the original meaning of "armies," "navy," and "militia," and it examines the traditional limits on military jurisdiction over regular and part-time forces. This Part also explains the importance of maintaining these traditional jurisdictional categories. Finally, Part III raises and responds to actual and potential counterarguments. It will look at the peculiar cases of British half-pay officers and American furloughed soldiers during the Revolutionary War. And it will examine whether Congress's decision to impose military jurisdiction upon some

30. Emond's article probably comes closest to my views in this Article. *See* Emond, *supra* note 21, at 36 ("Indeed, retired personnel bear far more resemblance to the militia at the time of the founding."). My claim is not only that retirees bear "resemblance to the militia." Retirees functionally *are* militiamen, as are other military-civilian hybrids (e.g., reservists).

31. For the formal categories of reservists, see MICHAEL D. DOUBLER, THE NATIONAL GUARD AND RESERVE: A REFERENCE HANDBOOK 3–4 (2008).

regular retired officers beginning in 1861 should be deemed a settlement of the constitutional question.

I. THE MILITARY-CIVILIAN HYBRID PROBLEM

Jurisdictional disputes created by military-civilian hybrids have existed for almost as long as the British standing army. But in the twentieth century, the problem grew more acute because of the bureaucratic reorganization of the armed forces. This reorganization expanded the categories of military-civilian hybrids and the raw number of people who fit within them. Modern jurisprudence on military jurisdiction has failed to recognize the peculiar problem posed by forces that are statutorily defined as part of the armed forces raised under the Constitution's army and navy clauses, but which operate like a militia.

A. *The Constitutional Categories and Regulation of Military Forces*

The regulatory regime that a person or entity faces often depends on its legal category. For example, whether a business is a partnership or a corporation determines whether the owners will face personal liability or have limited liability but be subject to double taxation. A business cannot both declare itself to be a corporation and avoid double taxation; double taxation follows from the decision to incorporate.

Military governance was supposed to be analogous. In traditional Anglo-American law, the regulatory regime that applied to a military force depended on that force's legal category. Anglo-American law recognized three military systems: armies, navy, and militia. Different rules and obligations applied to each type of force, with the most pronounced differences being between the militia and the two regular forces.

British law recognized two "totally opposed conceptions"[32] of military land forces: the standing army and the militia.[33] In WEALTH OF NATIONS, Adam Smith explained the definitional distinctions between these two types of military forces. "The practice of military exercises," he said, "is the sole or principal occupation of the soldiers of a standing army, and the maintenance or pay which the state affords them is the principal and ordinary fund of their subsistence."[34] He contrasted this with the militia, in which the "practice of military exercises is only the occasional occupation of the soldiers of a militia, and they derive the principal and ordinary fund of their subsistence from some other occupation."[35] This full-time/part-time distinction "seems to consist the essential difference between those two different species of military force."[36]

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32. CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 116 (1970).

33. *See, e.g.*, Kneedler v. Lane, 45 Pa. 238, 241 (1863) (op. of Lowrie, C.J.).

34. 5 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 541–42 (Sálvio Marcelo Soares ed., 2007) (1776).

35. *Id.*

36. *Id.* at 542.

In Britain, soldiers in the standing army traditionally made military service their careers. Except for temporary soldiers enrolled in wartime, soldiers in the standing army usually enlisted for long terms of service, such as for life or twenty-one years.[37]

The navy loosely paralleled the regular army. Similar to the army, it comprised regular forces—those for whom naval service became their primary occupation. But sailors served under different customary terms from land soldiers in the army. The officers of a ship would enlist a crew, with a preference for volunteers who had seafaring experience because becoming a proficient sailor required years of training.[38] The crew would serve while the ship was commissioned, often two to three years.[39] After that period, the crew might find naval employment on another ship; otherwise, they would be discharged from the service.[40] In contrast, officers would receive full pay when they were in active service and attached to a ship; otherwise, they remained at home on half pay unless otherwise employed.[41]

Unlike regular soldiers and sailors, a militiaman did not perform full-time military service.[42] At least in theory, militia service was compulsory for all able-bodied men, although conscripted men could find substitutes or pay a fine.[43] So actual service was often voluntary in practice. During many periods, moreover, the militia was divided into active volunteer units and a general or common militia.[44] In peacetime, the active component of the militia often performed a cumulative total of about one to two weeks of training a year.[45] But the amount of training could vary widely depending on whether war was imminent,[46] and it was

37. H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 58–59 (1977); H. ST. CLAIR FEILDEN, A SHORT CONSTITUTIONAL HISTORY OF ENGLAND 315 (W. Gray Etheridge rev. ed., 3d ed. 1897); BARNETT, *supra* note 32, at 280.

38. J. ROSS DANCY, THE MYTH OF THE PRESS GANG: VOLUNTEERS, IMPRESSMENT AND THE NAVAL MANPOWER PROBLEM IN THE LATE EIGHTEENTH CENTURY 2, 56–57 (2015).

39. *Id.* at 2, 101.

40. *Id.* at 101.

41. Evan Wilson, *Britain: Practising Aggression*, *in* EIGHTEENTH-CENTURY NAVAL OFFICERS: A TRANSNATIONAL PERSPECTIVE 11, 25 (Evan Wilson, AnnaSara Hammar & Jakob Seerup eds., 2019).

42. MATTHEW MCCORMACK, EMBODYING THE MILITIA IN GEORGIAN ENGLAND 103 (2015) ("Militiamen were required, 'on a just Occasion, to perform the Business of a Soldier,' rather than to become one fully or permanently." (quoting PROPOSALS FOR AMENDING THE MILITIA ACT, SO AS TO ESTABLISH A STRONG AND WELL-DISCIPLINED NATIONAL MILITIA 40 (1759))).

43. Michael Prestwich, *The English Medieval Army to 1485*, *in* THE OXFORD HISTORY OF THE BRITISH ARMY 1, 7 (David Chandler & Ian Beckett eds., 1996) [hereinafter OXFORD HISTORY]; BARNETT, *supra* note 32, at 34, 172; Ian Beckett, *The Amateur Military Tradition*, *in* OXFORD HISTORY, *supra*, at 385, 386.

44. JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 18 (Louis Morton ed., 1983); RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 230 (1984).

45. F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 455 (Cambridge Univ. Press 1920) (1908).

46. MAHON, *supra* note 44, at 18.

not unusual for the militia (and particularly the general militia) to be inactive during stable periods of peace.[47]

Different legal regimes grew around these species of military forces. Professional soldiers were "supposed to be . . . volunteer[s]."[48] The English never accepted mandatory military service in the professional army.[49] Impressment was normally unlawful, and while on rare wartime occasions Parliament authorized it, impressment was limited to criminals, debtors, and the unemployed.[50] This stood in contrast to the militia, in which all free men had the duty to perform service when called.[51] And naval recruitment was somewhere in between army and militia recruitment, although closer to the army. In general, the navy sought volunteers.[52] But if not enough qualified volunteers for ships could be found (which was primarily a wartime problem[53]), then civilians could be pressed into service. Impressment was "used . . . more as a means to improve the skill quality, not quantity, of the men aboard."[54] Sources differ over whether naval impressment was actually lawful or unconstitutional but tolerated.[55] In either case, unlike militia service, naval impressment was not a countrywide draft; it was limited to seafaring subjects.[56]

Because militia service could be made legally compulsory, it was also limited. A subject's duty was to "defend the realm,"[57] not to engage in offensive war abroad.[58] The militia, therefore, could only be embodied for actual military service "in 'case of imminent national danger or of great emergency,'"[59] generally to protect against invasion or rebellion.[60] Even when embodied, an English subject could not be sent abroad for war without his consent.[61] Thus, as A.V. Dicey explained,

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47. BARNETT, *supra* note 32, at 117, 174; MCCORMACK, *supra* note 42, at 103; MAITLAND, *supra* note 45, at 60, 455.

48. Alan J. Guy, *The Army of the Georges 1714–1783*, *in* OXFORD HISTORY, *supra* note 43, at 92, 97.

49. *See* Prestwich, *supra* note 43, at 20; Beckett, *supra* note 43, at 385, 387, 397.

50. MAITLAND, *supra* note 45, at 453; BARNETT, *supra* note 32, at 140.

51. Prestwich, *supra* note 43, at 6.

52. *See* DANCY, *supra* note 38, at 2, 56–57.

53. *Id.* at 69. In the late seventeenth century, the Royal Navy would expand from "up to 4,000" men in peacetime to 20,000 or more in wartime. J.D. Davies, *A Permanent National Maritime Fighting Force 1642–1689*, *in* THE OXFORD ILLUSTRATED HISTORY OF THE ROYAL NAVY 56, 64 (J.R. Hill ed., 1995).

54. DANCY, *supra* note 38, at 2.

55. *Compare* MAITLAND, *supra* note 45, at 461–62 (lawful prerogative power of the Crown), *with* David Hume, *Of Some Remarkable Customs*, *in* ESSAYS AND TREATISES ON SEVERAL SUBJECTS 203, 207 (1758) (illegal but tolerated).

56. Hume, *supra* note 55, at 207.

57. BARNETT, *supra* note 32, at 173.

58. Prestwich, *supra* note 43, at 7, 9.

59. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 285 (3d ed. 1889).

60. Beckett, *supra* note 43, at 391; BARNETT, *supra* note 32, at 41; Militia Act 1776, 16 Geo. III, c. 3.

61. BARNETT, *supra* note 32, at 41; DICEY, *supra* note 59, at 285.

"[e]mbodiment . . . converts the militia for the time being into a regular army, though an army which cannot be required to serve abroad."[62] Regular soldiers and sailors lacked these protections. They could be used for offensive or defensive wars, and they could be deployed at home or abroad.[63]

After the ratification of the U.S. Constitution, this bifurcated system of regular forces and militia had additional federal dimensions. The Constitution empowers Congress to create both temporary war armies and a standing (peacetime) army and to fund them for up to two years.[64] The Constitution assigns the President the role of Commander-in-Chief, and it vests the national government with the authority to appoint military officers.[65] The armies thus raised are entirely national forces; the states have no role in concurrently governing them. Importantly for military justice, the Constitution also authorizes Congress to regulate and govern members of the armies.[66]

The constitutional provisions governing the navy largely parallel those governing the armies. The Constitution authorizes Congress "[t]o provide and maintain a Navy."[67] The major difference between this power and the army power is that the Constitution does not restrict naval appropriations to two-year terms.[68] As with the armies, the Constitution vests Congress with plenary authority to regulate and govern members of the navy, and the President is, again, the Commander-in-Chief and appoints the officers.[69]

Less appreciated is that the Constitution also regulates the ability of states to raise their own armies and navies. Article I, Section 10 prohibits states from "keep[ing] Troops, or Ships of War in time of Peace" unless Congress consents.[70] This provision bans states from raising standing armies and navies on their own authority. In wartime, however, states may raise their own armies and navies without restriction.[71] Unlike with the national army and navy, the Constitution does not specify who commands state armies and navies or who governs them, presumably leaving these questions to state law. Nor is there any method specifically authorized by the Constitution to place state armies under national command in wartime.

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62. DICEY, *supra* note 59, at 285.

63. *See* BARNETT, *supra* note 32, at 196.

64. U.S. CONST. art. I, § 8, cl. 12.

65. *Id.* art. II, § 2.

66. *Id.* art. I, § 8, cl. 14; *see also* Tarble's Case, 80 U.S. (13 Wall.) 397, 408 (1871) (recognizing congressional power under this provision to define and punish military offenses).

67. U.S. CONST. art. I, § 8, cl. 13.

68. *See id.* § 8, cl. 12–13.

69. *Id.* § 8, cl. 14; *id.* art. II, § 2.

70. *Id.* art. I, § 10, cl. 3.

71. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398, at 272–73 (1833).

Finally, the Constitution provides for the militia. Unlike the standing army and navy, which are generally national institutions, the militia is a cooperative federal force, with power shared between the national and state governments. The Constitution authorizes Congress to set militia policy—to provide for its arms, organization, and discipline.[72] Congress may also nationalize the militia to enforce federal law and to engage in defensive warfare.[73] When nationalized, the federal government also has the power to govern the militia.[74] The training of the militia and the appointment of the officers are explicitly left to the states.[75] And implicitly, states have concurrent power to organize and arm the militia, to govern the militia when not in federal service, and to use the militia for domestic law enforcement and for defensive purposes.[76]

The traditional legal categories of military service came with inconvenient legal regimes. Only the regular army and navy could be used for unrestricted duty—that is, for offensive or defensive wars, at home and abroad.[77] But while the standing forces were adequate for some peacetime needs, they were not large enough to meet wartime contingencies. This often left the government scrambling to enroll new soldiers and sailors in wartime.[78]

In theory, the militia acted as the reserve force, but it came with severe limitations. It was only available for defensive wars, with persistent questions whether militiamen were ever allowed to serve outside the national borders.[79] This became an increasing problem; American wars are primarily foreign wars, and, except for the Civil War, few conflicts after the War of 1812 were fought inside the United States in any significant way. Even during defensive conflicts, the federalized militia system created problems. In the United States, state governments retained significant operational control over their respective militia forces, and they used this control to obstruct national military policy. State governments sometimes did not heed the call for militiamen in wartime (or when war was threatened).[80] States were also unreliable about ensuring that their militiamen were adequately armed and trained.[81] All this made it

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72. U.S. CONST. art. I, § 8, cl. 16.

73. *Id.* § 8, cl. 15.

74. *Id.* § 8, cl. 16.

75. *Id.*

76. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 9, 16–17 (1820); U.S. CONST. art. I, § 10, cl. 3 (allowing states to make war when invaded or in imminent danger).

77. WEIGLEY, *supra* note 44, at 120.

78. *E.g.*, *id.* at 182–83, 297–98.

79. *E.g.*, *id.* at 120; ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 4–5 (1984); Auth. of President to Send Militia Into a Foreign Country, 29 Op. Att'ys Gen. 322, 324–25 (1912); U.S. WAR DEP'T GEN. STAFF, REPORT ON THE ORGANIZATION OF THE LAND FORCES OF THE UNITED STATES 56–57 (1912).

80. WEIGLEY, *supra* note 44, at 118–19, 124–26, 208.

81. *Id.* at 162; MILLETT & MASLOWSKI, *supra* note 79, at 90; JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 13–14 (1997).

difficult for the federal government to expand the regular military with the militia to meet wartime needs.

The growth of military-civilian hybrids responded to these logistical problems. Standing forces are expensive to maintain, and it is impractical to keep regular forces at full wartime strength during peacetime. The federal government needed individuals who were essentially militiamen—people who were civilians primarily but who also could be called into temporary service during war. The federal government, moreover, needed these forces without the legal regulations that obstructed its ability to use the militia.

B. *The Growth of Military-Civilian Hybrids*

Eighty years ago, Frederick Wiener recognized that the constitutional provisions governing the militia had crippled the ability to make the militia "a workable instrument of national defense."[82] As a result, he said, the federal government could regulate nonprofessional soldiers effectively only through "avoidance and evasion" of the traditional legal framework governing the militia.[83] Military-civilian hybrids are just that: an effort to gain the benefits of having nonprofessional soldiers (i.e., militiamen) while evading the legal restrictions around their use.

1. *War Volunteers, Reserves, and Guardsmen*

Even before the Constitution was ratified, the colonies looked for ways to escape the strictures of the militia system. The colonies principally relied on the militia for their defense. The colonies were "much too poor" to hire regular soldiers,[84] and until the French and Indian War, Britain did not supply them in meaningful quantities.[85] For defense, the colonies organized citizens into militia units, in which they would perform temporary military service and training.[86] As the colonies' security improved, the militia was often divided into a frontline volunteer militia (e.g., the Minutemen) and a common or general militia that served as a secondary reserve force and trained rarely if at all.[87] Militiamen could not generally serve outside the colony and, by law or custom, often had limited terms of active service (e.g., ninety days at a time without rotation).[88]

To avoid these restrictions, colonies raised "war volunteers," a de facto military-civilian hybrid. Like militiamen, war volunteers were

82. Frederick Barclays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 181 (1940).

83. *Id.*

84. WEIGLEY, *supra* note 44, at 4.

85. *Id.* at 13–14.

86. *Id.* at 3–8.

87. *Id.* at 8–9; MILLETT & MASLOWSKI, *supra* note 79, at 4–5; JAMES T. CURRIE & RICHARD B. CROSSLAND, TWICE THE CITIZEN: A HISTORY OF THE UNITED STATES ARMY RESERVE, 1908–1995, at 2 (2d ed. 2018).

88. MAHON, *supra* note 44, at 19, 38.

nonprofessional citizen-soldiers. But the volunteers signed on for specific campaigns or for longer terms of service than militiamen were liable.[89] And the volunteers were not treated as subject to the geographical constraints of militiamen.[90] The volunteers thus functioned as a quasi-standing army, mixing the nonprofessional service of militia with the army's availability for service abroad.[91]

The reliance on war volunteers continued after the ratification of the U.S. Constitution. Beginning in the 1790s, the federal government experimented with ways to expand the military temporarily outside the constitutional militia system. During the Quasi-War with France in 1798, Congress authorized the President to enroll volunteers and to raise a provisional army that would be under the exclusive control of the national government.[92] The effort was to gain a reserve of potential wartime forces without relying on state governments to supply the troops or binding those forces to the other structures of the Militia Clauses.

The authorization of these forces triggered constitutional debates over whether their members were army soldiers or militia because these nonprofessional soldiers straddled the army/militia divide.[93] Many thought that, as part-time forces, these volunteers were a species of militia.[94] Others argued that, as volunteers not subject to the limitations of the Militia Clauses, they were army soldiers under the Constitution.[95] Congress would reverse itself several times on the army/militia question.[96] By the 1830s, however, Justice Story thought the constitutional question had liquidated in favor of considering the volunteers to be part of the constitutional armies when they were in active service.[97]

Federal officials also sought ways of compelling civilians to perform national military service, without the interference of state governments. During the War of 1812, the Madison Administration unsuccessfully proposed conscription into the national forces to bypass recalcitrant New England states.[98] Fifty years later, during the Civil War, Congress first implemented a limited conscription system.[99] Conscription supplemented the regular army with nonprofessional citizen-soldiers in

89. *Id.* at 32.

90. *Id.*

91. *Id.*

92. An Act Authorizing the President of the United States to Raise a Provisional Army, ch. 47, §§ 1, 3, 1 Stat. 558, 558 (1798).

93. For a description of the debates, see 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 248–50 (1997); Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 1051–53 (2020).

94. Leider, *supra* note 93, at 1051–52.

95. *Id.*

96. *Id.* at 1055–56.

97. 3 STORY, *supra* note 71, § 1187, at 75–76.

98. 1 CURRIE, *supra* note 93, at 157–58; *see also* CURRIE & CROSSLAND, *supra* note 87, at 7 (noting the refusal of the militia to invade Canada and the use of federal volunteers to evade the limitations on militia service).

99. An Act for Enrolling and Calling Out the National Force, and for Other Purposes, ch. 75, § 1, 12 Stat. 731, 731 (1863).

wartime, effectively supplementing the regular forces with militiamen.[100] As with the volunteers, conscription was attacked as an unconstitutional circumvention of the Militia Clauses, again with judges split on its constitutionality.[101]

Notwithstanding any constitutional concerns, for most conflicts throughout the nineteenth century, the United States relied on war volunteers to supplement the regular army. And a primary recruiting ground for war volunteers was the volunteer militia, whose members would often sign on to fight on behalf of the federal government.[102]

Thus, the nineteenth-century methods of raising wartime military forces became more nuanced than the tripartite system provided in the Constitution of the regular army, navy, and militia. In peacetime, the federal government maintained a small standing army of regular troops and a navy.[103] During wartime, Congress would increase the size of these forces, supplemented usually by temporary war volunteers.[104] After the war, the military would return to its small state. Depending on whether the conflict was domestic and defensive, the militia might also play some role during the war.[105] In other conflicts where the militia (as an institution) could not be called into service, individual militiamen and units frequently served as war volunteers.[106] Active training and organization of the general militia gradually disappeared following the War of 1812, meaning that the general population had little familiarity with the art of war.[107] The result was that, in wartime, the United States chaotically raised a hodgepodge of forces.

At the end of the nineteenth century, the United States fought the Spanish-American War, which would be a watershed moment in American military organization. With the militia unavailable for a foreign conflict, the federal government sought war volunteers from the organized

100. WEIGLEY, *supra* note 44, at 208; MILLETT & MASLOWSKI, *supra* note 79, at 198.

101. *See, e.g.*, Kneedler v. Lane, 45 Pa. 238 (1863); LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863, at 279–85 (2003); MAHON, *supra* note 44, at 103. Chief Justice Roger Taney had also drafted an opinion declaring the draft unconstitutional, but he never had occasion to deliver it. Robert B. Taney, *Thoughts on the Conscription Law of the United States*, *in* THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 209 (Martin Anderson ed., 1982). Several judicial decisions examine the constitutionality of Civil War conscription under analogous provisions of the Confederate Constitution. *See, e.g.*, *Ex parte* Hill, 38 Ala. 429, 433–44 (1863); Jeffers v. Fair, 33 Ga. 347, 349–50 (1862); Parker v. Kaughman, 34 Ga. 136, 142–43 (1865); Simmons v. Miller, 40 Miss. 19, 22–24 (1864); Gatlin v. Walton, 60 N.C. 325, 331–34 (1864); *Ex parte* Coupland, 26 Tex. 386, 392–94 (1862); Burroughs v. Peyton, 57 Va. (16 Gratt.) 470, 473–78 (1864).

102. WEIGLEY, *supra* note 44, at 183, 296–97; MILLETT & MASLOWSKI, *supra* note 79, at 142, 166.

103. MILLETT & MASLOWSKI, *supra* note 79, at 98.

104. *Id.*; WEIGLEY, *supra* note 44, at 182–83 (Mexican War); *id.* at 208 (Civil War); *id.* at 296–97 (Spanish-American War).

105. *See, e.g.*, WEIGLEY, *supra* note 44, at 118–20 (discussing militia's participation in the War of 1812); *id.* at 162 (same for Seminole War).

106. *Id.* at 183, 296–97; MILLETT & MASLOWSKI, *supra* note 79, at 142, 166.

107. MAHON, *supra* note 44, at 81–83.

militia, by then generally known as the "National Guard."[108] But many state Guard units had poor training, and the mobilization of Guardsmen for federal overseas duties led to a variety of logistical challenges.[109]

In response both to the shortcomings of the American military during the Spanish-American War and to early twentieth-century military crises, Congress fundamentally reorganized the U.S. military. This reorganization would emphasize national control of all forces, whether they were regular forces, part-time forces, or temporary war forces.

Initially, Congress embarked on militia reform. Congress replaced the universal militia established by the 1792 Militia Act with an organized militia, composed of the National Guard and naval militia, and a reserve militia, which consisted of the remaining able-bodied men.[110] Using the Spending Clause, Congress imposed national training standards on the National Guard and provided military equipment.[111] Congress also required National Guard officers to meet federal standards.[112]

At the same time, Congress debated whether to continue the National Guard system or to have fully national reserve forces.[113] Ultimately, Congress chose both paths.

Between 1908 and 1920, Congress established an organized reserve system for both enlisted personnel and officers of the U.S. military.[114] This would evolve into the modern reserve components.[115] The reserve components would consist of individuals who were liable to part-time and emergency military service; but these individuals, when not in active service, lived as civilians and performed civilian jobs.[116] In peacetime, the common military obligation of active reservists was to serve one weekend a month and two weeks per year.[117] For the land forces, this reserve system is purportedly raised under the Armies Clause. By raising them under the Armies Clauses, the federal government assumed access to a body of part-time citizen-soldiers that it could directly raise, govern, and deploy without either interference from the states or the constitutional limitations of the Militia Clauses.[118]

Congress also continued the National Guard system, but, in 1933, gave it a "dual status."[119] The National Guard became two coextensive, but legally separate, organizations. The National Guard of a state is the

108. WEIGLEY, *supra* note 44, at 296–97.

109. *See* MILLETT & MASLOWSKI, *supra* note 79, at 273–74; COOPER, *supra* note 81, at 98.

110. Militia Act of 1903 (Dick Act), ch. 196, § 1, 32 Stat. 775.

111. RAPHAEL S. COHEN, DEMYSTIFYING THE CITIZEN SOLDIER 18–19 (2015) (ebook).

112. Militia Act of 1903 (Dick Act) § 19; Wiener, *supra* note 82, at 200.

113. DOUBLER, *supra* note 31, at 27; MAHON, *supra* note 44, at 143–44, 147.

114. CURRIE & CROSSLAND, *supra* note 87, at 14–23.

115. DOUBLER, *supra* note 31, at 72–76.

116. *Id.* at 75.

117. *Everything You Need to Know About Joining the Guard and Reserve*, MILITARY.COM, https://www.military.com/join-armed-forces/guard-and-reserve-faqs.html [https://perma.cc/2RMK-U2G3] (last visited Dec. 8, 2023).

118. MAHON, *supra* note 44, at 148; Wiener, *supra* note 82, at 200.

119. National Guard Act of 1933, ch. 87, § 1, 48 Stat. 153.

organized militia of that state, authorized to do all the domestic activities traditionally done by militia forces.[120] But individuals who enrolled in the National Guard simultaneously enrolled in a second organization, called the "National Guard of the United States."[121] This organization was a federal reserve force, created under the Armies Clause, that could be deployed abroad and used for offensive warfare.[122]

As Americans entered World War I, Congress also sought to compel service from able-bodied civilians in wartime unconstrained by the Militia Clauses. The result was the establishment of a workable system of national conscription into the army. Through the Selective Service System, the federal government directly drafted individuals from civilian life into the national army.[123] Draft registration affected all able-bodied men, and the pool of registrants heavily resembled that of the general militia of the Framing.[124] During World War I, the Supreme Court upheld the constitutionality of the draft in the *Selective Draft Law Cases*.[125] The architecture of the Selective Service System remains in place, providing a system to draft citizens in wartime.[126]

The legal theories underpinning this bureaucratic reorganization of the armed forces are fictions. In theory, Congress was relying on its constitutional armies and naval powers to conscript citizens and to organize the reserve forces.[127] By asserting that these forces are raised pursuant to the Armies and Navy Clauses, not the Militia Clauses, the federal government has claimed that it may exercise the same plenary control over them that it has traditionally exercised over the regular Army and Navy of the United States.[128] The federal government thus contends that it is not limited to conscripting citizens through the states, that it may conscript citizens for offensive warfare, that it may train part-time forces and deploy them abroad, and that it may appoint the officers instead of state governments.

In substance, however, the Reserve Components and National Guard are not regular forces. They comprise nonprofessional citizen-soldiers. The active, drilling component of the military reserve forces, called the Selected Reserve, performs a weekend per month plus two weeks per year

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120. *Id.* §§ 58, 72–73.

121. *Id.* § 58.

122. Wiener, *supra* note 82, at 208–09.

123. An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States, ch. 15, § 2, 40 Stat. 76, 77–78 (1917).

124. Robert Leider, *Deciphering the "Armed Forces of the United States"*, 57 WAKE FOREST L. REV. 1195, 1233, 1260 (2022).

125. Arver v. United States (*Selective Draft Law Cases*), 245 U.S. 366, 376–78 (1918).

126. *Who Needs to Register*, SELECTIVE SERV. SYS., https://www.sss.gov/register/who-needs-to-register/#p5 [https://perma.cc/DY5D-HRZY] (last visited Dec. 8, 2023).

127. *Arver*, 245 U.S. at 376–78; Perpich v. Dep't of Def., 496 U.S. 334, 351–52 (1990).

128. *Supra* note 127.

of military training.[129] The other reserve components generally undergo no training.[130] Both the Selected Reserve and the various inactive components comprise volunteer soldiers upon whom the government may call during war and other emergencies to supplement the regular forces. Essentially, the military reserves and the National Guard are the successors of the volunteer militia and the war volunteers.[131]

The Selective Service System, meanwhile, is the functional successor to the general militia. All men are required to register with the Selective Service System upon turning eighteen years old.[132] During a national emergency when volunteers do not provide sufficient manpower for the armed forces, the Selective Service System allows the federal government to increase the military using able-bodied civilians. The Selective Service System thus fulfills the same function that, at the Framing, would have occurred during a draft from a general militia muster.[133]

2. *Regular Retirees*

In addition to war volunteers, reservists, and conscripts, retirees of the regular forces are another military-civilian hybrid. These hybrids have a long history. In the seventeenth century, Britain developed a half-pay system for inactive officers. Beginning in 1668, the British navy awarded half-pay to certain high-ranking officers who were no longer in active service.[134] Initially, the government offered half-pay to reward wartime service.[135] By 1700, however, the government was providing half-pay both as a reward for previous service and to retain competent officers in case the navy needed to expand in wartime.[136] Despite this dual purpose, half-pay also served as a de facto pension system for those officers physically or mentally unfit for further service.[137] A half-pay system also developed for inactive British army officers in the late seventeenth century.[138]

The United States never enacted a half-pay system for inactive officers similar to that in Britain. Instead, the country first offered pensions to officers and (later) to enlisted personnel who were veterans of the Revolutionary War.[139] When Congress first provided military pensions,

129. Leider, *supra* note 124, at 1251.

130. *Id.* at 1258.

131. *Id.* at 1254–55, 1258.

132. 50 U.S.C. § 3802(a) (2018).

133. Leider, *supra* note 124, at 1259–61.

134. N.A.M. Rodger, *Commissioned Officers' Careers in the Royal Navy, 1690–1815*, 3 J. FOR MAR. RSCH. 85, 90 (2001).

135. *Id.*

136. *Id.*

137. *Id.* at 90–91.

138. *See* Larrabee v. Del Toro, 45 F.4th 81, 92 (D.C. Cir. 2022) (recounting the history of the British half-pay system).

139. Philip D. Cave & Kevin M. Hagey, *Military Retiree Court-Martial Jurisdiction: Trials and Tribulations*, J. NAT'L SEC. L. & POL'Y (Apr. 2022) (citing *Revolutionary War Pension and Bounty—Land—Warrant Application Files*, VETERANS ADMIN. 1–2 (1974),

Congress did not link payment with military criminal jurisdiction. Congress "gave the pensions for service alone," and retired soldiers were not subject to military orders or future call-up.[140]

During the Civil War, however, that changed. Facing problems caused by "physically and mentally decrepit officers" occupying senior officer ranks, the federal government established the first true military retirement system.[141] Initially, Congress authorized the retirement of military officers after forty years of active service or for disability.[142] Retired officers would be retained on the military rolls, except in certain circumstances in which they would be "wholly retired from the service, with one year's pay and allowances."[143] For those "partially retired," Congress also provided that officers "shall be entitled to wear the uniform of their respective grades, shall continue to be borne upon the army register, or navy register, . . . and shall be subject to the rules and articles of war."[144]

Then, in 1878, Congress formally authorized two retirement systems. Officers could retire and be discharged from the service with one year's severance pay or they could retire from active service but remain in the military and receive reduced pay.[145] In 1885 and 1907, Congress extended retirement to enlisted personnel of the Army/Marines and Navy, respectively, who had served for thirty years.[146]

Today, the federal government uses regular retirees as another de facto reserve component. Congress has authorized the military to recall retirees for temporary periods up to twelve months in any two-year period.[147] Congress has further authorized the military to recall retirees for indefinite periods of service during "time of war or of national emergency."[148] Similar provisions govern the Fleet Reserve and Fleet Marine Reserve, to which Navy and Marine Corps enlisted personnel are assigned if they retire after twenty years of active service but before being legally retired after thirty years.[149] Members of the Fleet Reserve and Fleet Marine Reserve may be required to serve on indefinite active duty during "war or national emergency declared by Congress, for the duration of the war or national emergency and for six months

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https://www.archives.gov/files/research/microfilm/m804.pdf [https://perma.cc/M7CP-BDKP]), https://jnslp.com/wp-content/uploads/2022/04/Military_Justice_Cave_Hagey_Military_Retiree_Court-Martial_Jurisdiction_2.pdf [https://perma.cc/S5WA-5PMT].

140. *Id.*

141. Bishop, *supra* note 14, at 332; *see also* J. Mackey Ives & Michael J. Davidson, *Court-Martial Jurisdiction Over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1, 3 (2003); WEIGLEY, *supra* note 44, at 230.

142. Act of Aug. 3, 1861, ch. 42, §§ 15–16, 12 Stat. 287, 289.

143. *Id.* § 17.

144. *Id.* § 18.

145. Ives & Davidson, *supra* note 141, at 3.

146. *Id.* at 4.

147. 10 U.S.C. § 688(e) (2018).

148. *Id.* § 688(f).

149. *Id.* § 8330(b).

thereafter."[150] They may also be recalled "in time of national emergency declared by the President"[151] or "when otherwise authorized by law,"[152] including for temporary twelve-month recalls under the same terms as other retirees.[153] And Fleet Reservists and Fleet Marine Reservists "may be required" in peacetime "to perform not more than two months' active duty for training in each four-year period."[154]

Regular retirees undergo a fundamental change in status upon retirement. Before retirement, members of the regular components are quintessential members of the "land or naval forces," serving on full-time active duty. After retirement, however, they cease primarily being soldiers. As Marc Emond explains, retirees lack the basic powers and duties of regular forces: "[t]hey do not have any day-to-day military requirements, muster formations, or perform any activities which remotely resemble military service. They do not have to routinely report to an established chain of command."[155] Except when in active service, federal law prohibits military retirees from serving on court-martial panels,[156] prevents officers from exercising any command,[157] and restricts their ability to wear the uniform.[158] Instead, retirees transition to civilian jobs and live civilian lives. If they incur any future military service at all (and most do not), it is temporary service. Thus, although Congress statutorily defines regular retirees to be part of the regular forces,[159] retirees lack the essential characteristic that defines the regular forces: "continuous service on active duty in both peace and war."[160]

Nor are the Fleet Reserve and Fleet Marine Reserve regular forces. Their terms of service are almost identical to the militia: up to two months of training in any four-year period, with indefinite active service during war or national emergencies, plus liability to temporary duty as other retirees. At all other times, members of the Fleet Reserve and Fleet Marine Reserve live civilian lives with civilian occupations.

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In sum, the Reserve Component, draftees, regular retirees, and Fleet Reservists/Fleet Marine Reservists do not meet the traditional definition of regular forces. They are not "employ[ed] . . . in the constant

150. *Id.* § 8385(a)(1).
151. *Id.* § 8385(a)(2).
152. *Id.* § 8385(a)(3).
153. *Id.* § 688.
154. *Id.* § 8385(b).
155. Emond, *supra* note 21, at 36.
156. UCMJ, art. 25, 10 U.S.C. § 825.
157. *Id.* § 750.
158. *Id.* § 772(c). For a discussion of this and the other examples, see Emond, *supra* note 21, at 36.
159. *See, e.g.*, 10 U.S.C. § 7075(b)(3) (Army); *id.* § 9066(b)(3) (Regular Air Force); *id.* § 9085(b)(2) (Regular Space Force).
160. *Supra* note 159.

practice of military exercises."[161] Instead, they fall within the traditional definition of "militia" because "when not engaged at stated periods in drilling and other exercises, they return to their usual avocations" and they "are subject to call when the public exigencies demand it."[162] They are, to quote the Supreme Court's definition of "militia," "civilians primarily, soldiers on occasion."[163]

Given this, the fundamental complication of the service branches of the modern armed forces is that they do not comprise any single military system. The U.S. Army and Air Force are a combination regular army, volunteer militia, and war volunteers. The U.S. Navy is a combination regular navy, volunteer naval militia, and war volunteers. The contemporary U.S. Marine Corps operates as a combination regular force, volunteer militia, and war volunteers, and, for reasons I have explained elsewhere,[164] the force itself occupies a fuzzy position in between a land force and a naval force.[165] The modern branches of the armed forces are a conglomeration of multiple military systems authorized by the Constitution.

C. *Military Jurisdiction Over Regular Retirees: Military-Civilian Hybrids as a Jurisprudential Blindspot*

Since the creation of the retired list, Congress has imposed military law on regular retirees for conduct that takes place when they are living essentially as civilians. Initially, that jurisdiction extended only to a maximum of 300 officers who were retired from active service but not formally discharged.[166] Today, that jurisdiction extends to all officers and enlisted personnel who are retired from a regular component.[167] That means approximately 1.5 million Americans are subject to military law, even though they are not in active military service.[168] This is a tremendous incursion of military law into the civilian realm.

Nevertheless, federal courts have rejected constitutional challenges to the incursion. They hold that military retirees remain part of the land and naval forces, despite their retirement. At least one court has ruled that Congress may subject to military law anyone who has a military status and "a duty to obey military orders," including a duty to report for future duty.[169] This rule would permit Congress to expand sweeping military jurisdiction on the entire active and inactive reserve components.

161. 5 SMITH, *supra* note 34, at 541.

162. Dunne v. People, 94 Ill. 120, 138 (1879).

163. United States v. Miller, 307 U.S. 174, 179 (1939).

164. Leider, *supra* note 124, at 1248 n.396.

165. The British Marines, too, have been labeled "neither military nor naval, and yet both." CLIFFORD WALTON, HISTORY OF THE BRITISH STANDING ARMY: 1660 TO 1700, at 502 (1894).

166. Bishop, *supra* note 14, at 332 n.70.

167. UCMJ, art. 2(a)(4), 10 U.S.C. § 802(a)(4) (2018) (regular retirees); *id.* § 802(a)(6) (Fleet Reserve and Fleet Marine Reserve).

168. *See infra* note 306 and accompanying text.

169. Larrabee v. Del Toro, 45 F.4th 81, 83 (D.C. Cir. 2022).

These cases, however, have missed the basic issue. Presently, federal law is applying traditional jurisdictional rules governing regular forces to military components that are not, in fact, regular forces. This should raise constitutional red flags, for the Constitution provides for *two* military statuses, not one: a member of the regular forces and a militiaman.

Yet, these red flags have been ignored. In 1886, William Winthrop published his first influential treatise MILITARY LAW.[170] In a footnote, Winthrop wrote, "[t]hat retired officers are a part of the army and so triable by court-martial" was "a fact indeed never admitting of question."[171] Perhaps to illustrate this claim, Winthrop himself failed to engage in a serious analysis of the issue. As it turns out, though, Winthrop's comment was literally true; military jurisdiction over retirees had not been questioned by the time he wrote. But that was only because no one had bothered to ask. Early Supreme Court opinions never opined on its constitutionality. They just noted in dicta that Congress had statutorily extended that jurisdiction.

In *United States v. Tyler*,[172] the Supreme Court faced a military pay dispute. A captain of the United States Army retired in December 1870, but sought to take advantage of a pay increase that Congress had authorized for certain commissioned officers.[173] In a brief opinion, the Court held that "retired officers are in the military service of the government" and that the pay increase applied to them.[174] Congress had created two retirement systems, one that allowed soldiers to "retir[e] from active service" while the other permitted "retiring wholly and altogether from the service."[175] Officers in the first category, the Court noted, were "by statute declared to be part of the army," they could "wear its uniform," they were listed on the army's register, they could "be assigned by their superior officers to specified duties," and they were "subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and . . . dismissed on such trial from the service in disgrace."[176] At no point, however, did any party challenge Congress's authority to subject military retirees to court-martial jurisdiction. Consequently, the Court never considered whether the extension of military law to retirees from active service was proper under the Fifth Amendment.

Despite that lack of consideration, lower courts followed similar reasoning to approve military jurisdiction over retirees. In 1884, the U.S. Court of Claims decided another longevity pay dispute in *Runkle v. United*

170. 1 WILLIAM WINTHROP, MILITARY LAW (1886); *see* JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP 167 (2009).

171. 1 WINTHROP, *supra* note 170, at 101 n.3. Winthrop repeated the footnote in later editions of MILITARY LAW AND PRECEDENTS. *See* 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 113 n.3 (2d ed. 1896).

172. 105 U.S. 244 (1881).

173. *Id.* at 244–45.

174. *Id.* at 245.

175. *Id.*

176. *Id.*

States.[177] Runkle was a retired military officer who was court-martialed for acts done both during active service and retirement.[178] The validity of the court-martial was a collateral matter; the pay dispute involved whether the court-martial judgment had broken Runkle's service. In explaining why Runkle could be court-martialed for the portion of his acts done in retirement, the Court of Claims simply referred to the statute of Congress authorizing military jurisdiction.[179]

When a military criminal case reached the D.C. Court of Appeals in 1896, the court engaged in a similar perfunctory analysis. In *Closson v. United States ex rel. Armes*,[180] George Armes, a retired military officer, was arrested after sending "a letter of an offensive character" to General John Schofield.[181] Armes was charged with purely military offenses, "conduct to the prejudice of good order and military discipline" and "conduct unbecoming an officer and gentleman."[182] Armes was arrested by military authorities, but he obtained a writ of habeas corpus from a justice of the Supreme Court of the District of Columbia.[183]

On appeal, the Court of Appeals reversed the grant of the writ. In its brief analysis, the court held that Armes was "an officer of the army of the United States, entitled to wear its uniform and to draw pay as such, and by express provision . . . made subject to the rules and articles of war."[184] Under federal law of that time, military retirees were limited to being paid, reporting their address to the War Department, and could be assigned either to a soldiers' home or as a professor.[185] Yet, the court found it irrelevant that retired officers have military duties "of an exceedingly limited character" and that retired military officers could take on civilian occupations.[186] Again, the court failed to seriously analyze whether Congress's extension of military jurisdiction to those not in active service comported with the Fifth Amendment and the Rules and Regulations Clause.

It was not until the middle of the twentieth century that courts began to grapple with the constitutional question more seriously. In 1948, the Second Circuit in *United States ex rel. Pasela v. Fenno*[187] denied a writ of habeas corpus to a member of the Fleet Reserve convicted in a court-martial of stealing government property while employed as a civilian on a naval submarine base.[188] The court found that military

177. 19 Ct. Cl. 396, 419–20 (1884), *rev'd on other grounds*, 122 U.S. 543, 560 (1887).
178. *Id.* at 412–13.
179. *Id.* at 413.
180. 7 App. D.C. 460 (1896).
181. *Id.* at 461.
182. *Id.*
183. *Id.*
184. *Id.* at 470.
185. *Id.* at 471.
186. *Id.*
187. 167 F.2d 593 (2d Cir. 1948).
188. *Id.*

jurisdiction was constitutional because the Fleet Reserve was part of the U.S. Naval Forces and Fleet Reservists could be recalled into active duty.[189] But here, again, the court's explanation was brief.

A decade later, the Court of Military Appeals gave the constitutionality of military retiree jurisdiction its first thorough judicial analysis in *United States v. Hooper*.[190] *Hooper* was the first prosecution of a retired service member under the newly adopted Uniform Code of Military Justice.[191] The case involved Rear Admiral Selden G. Hooper, who was found to have engaged in consensual same-sex relationships after his retirement.[192] He was nevertheless convicted under military law for sodomy, conduct unbecoming an officer, and conduct prejudicial to good order and discipline.[193] He was required to forfeit all his pay, and he was dismissed from the service.[194] The Court of Military Appeals held that the exercise of military jurisdiction was constitutional because retirees remain in military service.[195] The court explained that "[o]fficers on the retired list are not mere pensioners" but are "relied upon heavily in times of emergency."[196] Their pay, according to the court, both compensated past service and ensured their availability for future service.[197] And the court heavily relied on the authority of *Tyler*, *Runkle*, *Closson*, *Fenno*, and Winthrop.[198] Thus, the perfunctory analysis of earlier decisions had matured into a precedent that could not easily be displaced.[199]

The jurisprudential story might have ended there. But the military's recent increase in retiree prosecutions has prompted retirees to challenge the jurisdiction of military courts for violating the Fifth Amendment and the Rules and Regulation Clause. This has led both the U.S. Court of Appeals for the Armed Forces and the D.C. Circuit to analyze the constitutionality of subjecting retirees to military law.

In *United States v. Begani*,[200] the Court of Appeals for the Armed Forces reexamined whether members of the Navy's Fleet Reserve could constitutionally be subject to military jurisdiction. The court, again, upheld the jurisdiction, but with a more thoroughly reasoned opinion. The court rested the constitutionality of retiree jurisdiction on several facts. Retirees receive pay, which is in exchange for them maintaining military affiliation.[201] That pay is, in part, to compensate retirees

189. *Id.* at 595.
190. 26 C.M.R. 417 (1958).
191. ELIZABETH LUTES HILLMAN, DEFENDING AMERICA 114 (2005).
192. *Id.*
193. *Hooper*, 26 C.M.R. at 419–20.
194. *Id.* at 419.
195. *Id.* at 425.
196. *Id.*
197. *Id.*
198. *Id.* at 422–25.
199. *See, e.g.*, United States v. Overton, 24 M.J. 309, 311 (1987) (reaffirming retiree jurisdiction largely on the basis of prior precedent).
200. 81 M.J. 273 (C.A.A.F. 2021).
201. *Id.* at 278.

to maintain military readiness and for the possibility of future recall.[202] The possibility of recall was real, the court claimed, particularly during wartime.[203] Moreover, over a century of precedent had held that retirees continued to be members of the armed forces.[204] Finally, the court believed it owed Congress deference about precisely who fell within the land and naval forces.[205]

While the majority did not provide any historical support for its understanding of the Constitution's Military Clauses, Judge Maggs wrote a concurring opinion that filled the gap. Based on historical precedent, he argued that a person could remain a member of the armed forces even if the person has no "ongoing military duties and authority."[206] In support, he relied on the example of Revolutionary War soldiers who were furloughed at the conclusion of the Revolutionary War but before the final peace treaty was signed.[207] These soldiers were given conditional discharge papers that allowed them to return home, but these papers provided that the soldiers were not technically discharged until the peace treaty was ratified. If peace negotiations failed and war resumed, they could be called back into active service. Some of the furloughed soldiers were later court-martialed for mutiny when they demonstrated against Congress for unpaid wages.[208] The example of furloughed soldiers, according to Judge Maggs, demonstrated that soldiers legally could remain in the military when they had no further military duties except the possibility of future recall.[209] Retirees were just another example of individuals essentially indefinitely furloughed but still subject to recall.[210]

Perhaps the most thorough analysis of the military retiree question occurred in the D.C. Circuit's decision to deny a writ of habeas corpus in *Larrabee*.[211] The D.C. Circuit explained that amenability to military jurisdiction "turns 'on one factor: the military status of the accused.'"[212] The court then held that Larrabee, as a Fleet Marine Reservist, remained a member of the armed forces because he maintained a relationship with the armed forces that included the duty to obey at least one military order (e.g., the duty to report if called).[213] Finally, the court backed this analysis with two primary historical examples. One example, borrowed from Judge Maggs, was the furloughed Revolutionary War soldiers.[214]

202. *Id.* at 278–79.
203. *Id.* at 279.
204. *Id.* at 277.
205. *Id.* at 279.
206. *Id.* at 283 (Maggs, J., concurring).
207. *Id.* at 284–85.
208. *Id.* at 285.
209. *Id.* at 284.
210. *See id.* at 285.
211. Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022).
212. *Id.* at 89 (quoting Solorio v. United States, 483 U.S. 435, 439 (1987)).
213. *Id.* at 96, 98.
214. *Id.* at 93–94.

The other example was that of British half-pay officers, who had been subject to intermittent military jurisdiction during the first half of the eighteenth century.[215] I will return to the historical examples in Part III. For now, I will focus on the broader arguments.

In all these cases, courts have treated retiree jurisdiction as though it presents the question whether a defendant is a member of the land or naval forces or a civilian.[216] This reasoning is particularly pronounced in *Larrabee*. The court's argument effectively has three premises. First, the constitutionality of subjecting a person to military jurisdiction depends solely on a person's military status so a member of the armed forces is subject to military jurisdiction at all times, while a civilian is not.[217] Second, a person falls within the "land or naval forces," as that term is used in the Constitution, "if he has a formal relationship with the armed forces that includes a duty to obey military orders."[218] Third, Larrabee had a duty to obey military orders because he could be ordered to reenter active service in a war or national emergency and because he could be required to report for training for up to two months in any four-year period.[219] Therefore, the court concluded, Larrabee was subject to military law at all times, despite being retired.

The first premise, however, rests on a false dichotomy. For military justice purposes, Anglo-American law recognizes three statuses, not two: member of a regular force (regular soldier or sailor), nonprofessional soldier, and civilian. Only professional soldiers and sailors were subject to military law at all times, even when off duty, based solely on their "status." Militiamen—nonprofessional soldiers—were different. Anglo-American law had a functional relationship to military justice. Nonprofessional soldiers were subject to military law while in active service; but they were subject to civilian law—and retained their full common-law rights—when they acted as civilians.[220]

Larrabee's test for military jurisdiction has further problems. *Larrabee* concluded that a person falls within the land or naval forces if the person "has a formal relationship with the armed forces that includes a duty to obey military orders."[221] But this is too simple and overinclusive. Both regular soldiers and militiamen have a formal relationship with the military, including the duty to obey orders. Some of the early cases cited by the D.C. Circuit involve courts-martial of militiamen, not professional

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215. *Id.* at 91–93.

216. *E.g.*, *id.* at 89; United States v. Begani, 81 M.J. 273, 278 (C.A.A.F. 2021).

217. *Larrabee*, 45 F.4th at 83 (quoting *Solorio*, 483 U.S. at 439).

218. *Id.* at 83, 95.

219. *Id.* at 95–96.

220. For the argument in support of the claims in this paragraph, see *infra* Section II.B; *see also* Kneedler v. Lane, 45 Pa. 238, 260 (1863) (Woodward, J., concurring) (explaining that militiamen retain common-law rights, except when in actual service); State v. Peake, 135 N.W. 197, 199 (N.D. 1912) (citing People *ex rel.* Smith v. Hoffman, 60 N.E. 187, 190 (N.Y. 1901)) (recognizing distinction).

221. *Larrabee*, 45 F.4th at 83, 95.

soldiers.[222] Like Larrabee, these militiamen were enrolled in a military force pursuant to federal law.[223] Also like Larrabee, they were obligated to obey military orders, including to report for duty if ordered.[224] In fact, the militiamen in these cases were subject to courts-martial for failing to report for duty.[225] But members of the militia cannot and have never been subject to sweeping status-based military jurisdiction that lets them be court-martialed for criminal conduct that occurs in their civilian life. The retention of civilian life under civilian law is a core aspect of the nonprofessional armed forces when its members are not in active service.

Larrabee's analysis points to an ambiguity in the Supreme Court's decision in *Solorio v. United States*,[226] which the lower courts have exploited. In *Solorio*, the Supreme Court held that Congress may impose military law criminal jurisdiction upon all members of the "land and naval forces" for any crime they commit on duty or off duty, whether or not the crime relates to their military service.[227] The Constitution, the Court has said, authorizes court-martial jurisdiction over an offense based "on one factor: the military status of the accused."[228]

The Court's holding must be carefully understood. By holding that military jurisdiction turns on military status, the Court overturned its previous rule that the Fifth Amendment barred court-martialing military members for offenses that were not connected to their service.[229] Instead of trying to limit the military's separate system by constraining subject-matter jurisdiction, *Solorio* held that military law was constrained by personal jurisdiction; military jurisdiction was constitutional if, but only if, the person was a member of the land or naval forces.

But *Solorio* neither considered nor defined the precise "military status" that is dispositive to have military jurisdiction. The Court never held that any relationship with the statutory entity called the "armed forces"[230] is sufficient to trigger full status-based jurisdiction. Nor did it have any occasion to do so. Solorio was on active duty in the Coast Guard when the offense was committed.[231] It thus never reached the question whether status-based jurisdiction could be applied to nonprofessional members of the armed forces for offenses committed when not on active duty or in training.

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222. *Id.* at 90 (first citing Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); and then citing Martin v. Mott, 25 U.S. (12 Wheat.) 19, 34–36 (1827)).

223. Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903).

224. *Houston*, 18 U.S. (5 Wheat.) at 20; *Martin*, 25 U.S. (12 Wheat.) at 21–22.

225. *Houston*, 18 U.S. (5 Wheat.) at 1–2 (statement of case); *Martin*, 25 U.S. (12 Wheat.) at 20–22 (statement of case).

226. 483 U.S. 435 (1987).

227. *Id.* at 439 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240–41 (1960)).

228. *Id.*

229. O'Callahan v. Parker, 395 U.S. 258, 261–62 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

230. 10 U.S.C. § 101(a)(4) (2018).

231. *Solorio*, 483 U.S. at 436.

In sum, one of the most significant mistakes in reasoning by these decisions is the assumption that the statutory entity called the "armed forces" directly corresponds to the constitutional armies and navy. For reasons I will give in the next Part, I do not believe this assumption to be justified. The modern "armed forces" are a conglomeration of regular armies, navies, and militia. The proper constitutional status of a soldier depends on the military component of which he is a member. A full-time army soldier in the Regular Army is quintessentially part of the constitutional land forces. A part-time Guardsman, Reservist, or retiree is not.

II. ADAPTING THE ORIGINAL UNDERSTANDING OF MILITARY JURISDICTION IN THE CONSTITUTION TO MODERN MILITARY-CIVILIAN HYBRIDS

The creation of military-civilian hybrids outside the militia system has destabilized the traditional constitutional limits on military law. The Constitution's Rules and Regulation Clause and the status-based exemptions for members of the "land or naval Forces" in the Fifth Amendment presupposed that the armies and navy were regular forces.[232] Meanwhile, the more limited power to subject militiamen to military law only when in active service was predicated on the assumption that nonprofessional citizen-soldiers were militiamen.[233] This constitutional framework does not translate easily to the modern military because the branches of the armed forces do not consist of a single type of constitutional force.

This Part offers a solution to the problem. In substance, military-civilian hybrids are de facto militiamen because they are individuals who are primarily civilians but are subject to occasional military service. Consequently, they should be bound by the traditional rules on military jurisdiction that applied to members of the militia. The legal fiction that they are part of the land or naval forces, which is used to evade the traditional limitations on the organization and deployment of the militia, should not extend to military justice.

A. *The Original Understanding of "Armies," "Navy," and "Land and Naval Forces"*

The Constitution gives Congress the power to "raise and support Armies," "to provide and maintain a Navy" and to make "Rules for the Government and Regulation of the land and naval Forces."[234] The Fifth Amendment meanwhile exempts "cases arising in the land or naval forces" from common-law criminal procedure requirements.[235] These provisions stand in contrast to the militia. Congress may only govern the militia when "employed in the Service of the United States,"[236] and

232. State v. Peake, 135 N.W. 197, 200 (N.D. 1912); *see also* People *ex rel.* Smith v. Hoffman, 60 N.E. 187, 190 (N.Y. 1901) (similar).

233. *Peake*, 135 N.W. at 200; *Hoffman*, 60 N.E. at 190.

234. U.S. CONST. art. I, § 8, cls. 12–14.

235. *Id.* amend. V.

236. *Id.* art. I, § 8, cl. 16.

Congress may only apply military law to them "when in actual service in time of War or public danger."[237] The constitutional provisions governing the military, thus, require separating the "militia" from the army and navy.

The Framing-era evidence decisively demonstrates that the original public meaning of the "militia" was a force comprised of nonprofessional soldiers, while the "armies" comprised regular troops. I have provided this evidence at length elsewhere.[238] I will give a few illustrative examples here. As described earlier, Adam Smith wrote that "[t]he practice of military exercises is the sole or principal occupation of the soldiers of a standing army," which distinguished them from the part-time militia.[239] The same definitional distinction was recognized in America. In the FEDERALIST PAPERS, Alexander Hamilton explained that garrisons must be manned either "by occasional detachments from the militia, or by permanent corps in the pay of the government. . . . The latter resource . . . amounts to a standing army . . . ."[240] The Anti-Federalists agreed. In the ANTI-FEDERALIST PAPERS, Richard Henry Lee wrote, "[t]he military forces of a free country may be considered under three general descriptions—1. The militia. 2. the navy—and 3. the regular troops."[241]

An intratextualist analysis of the Constitution confirms the same understanding.[242] Article I, Section 10 bans states from having "Troops" and "Ships of War" in peacetime without congressional consent.[243] This provision contrasts with Article I, Section 8, Clause 16, which recognizes the state's role in maintaining and training the militia in peacetime.[244] If militiamen were a species of troops, these provisions would conflict. But they do not conflict because, as the Supreme Court has explained, "Troops" and "militia" referred to different kinds of forces:

> The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.[245]

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237. *Id.* amend. V.

238. Leider, *supra* note 93, at 1023–29; Leider, *supra* note 124, at 1203–05.

239. 5 SMITH, *supra* note 34, at 541.

240. THE FEDERALIST NO. 24, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

241. Richard Henry Lee, Letter XVIII (Jan. 25, 1788), *in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 362 (John P. Kaminski, Gaspare J. Saladino, Richard Leefler & Charles H. Schoenleber eds., 1995).

242. On determining meaning by examining text across constitutional provisions using the same language, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

243. U.S. CONST. art. I, § 10, cl. 3.

244. *Id.* art. I, § 8, cl. 16.

245. United States v. Miller, 307 U.S. 174, 178–79 (1939).

The Constitution, thus, recognized that a militia differed from both a standing army and navy. Article I, Section 10 banned states from having regular forces.[246]

For the first century, American courts largely agreed that whether a person was principally employed as a soldier was the fundamental distinction between an army soldier and a militiaman. In *Kneedler v. Lane*,[247] which addressed the constitutionality of the Civil War draft, the opinion of the Chief Justice explained that the "[C]onstitution, adopting our historical experience, recognises two sorts of military land forces—the militia and the army, sometimes called the regular, and sometimes the standing army."[248] The regular army was "the permanent and active forces of the government" and stood in contrast to "the usually dormant force, the militia."[249]

A concurring opinion was even more explicit. With references to military justice, the opinion explained the fundamental distinctions between the land and naval forces and the militia:

> The land or naval forces mean the regular military organization of the government, the standing army and navy, into which citizens are introduced by military education from boyhood, or by enlistments, and become, by their own consent, subject to the military code, and liable to be tried and punished without any of the forms or safeguards of the common law. In like manner the militia, when duly called out and placed "in actual service," are subject to the rules and articles of war, all their common law rights of personal freedom being for the time suspended.[250]

As these quotations indicate, the Constitution recognizes two forms of military service: regular military service (in the army and navy), for whom the members are subject to military law at all times; and nonprofessional service (in the militia), for whom the members are subject to military law only when in actual service.

Confederate courts, ruling under analogous provisions of the Confederate Constitution, agreed. In *Jeffers v. Fair*,[251] the Supreme Court of Georgia explained:

> The individuals composing armies are separated from the mass of our population, and withdrawn from the ordinary civil pursuits

246. 3 STORY, *supra* note 71, § 1398, at 272–73; THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 89 (1880) ("By troops here are meant a standing force, in distinction to the militia which the States are expected to enrol[l], officer, equip, and instruct."); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA app. D at 311 (1803).

247. 45 Pa. 238 (1863).

248. *Id.* at 241.

249. *Id.* at 242.

250. *Id.* at 261 (Woodward, J., concurring).

251. 33 Ga. 347 (1862).

> during the time of their enlistment, whether in peace or in war. Armies are at all times and in all places, subject to the Government of the Confederate States; they are at no time and under no circumstances, subject to any State authority. The militia may be defined a body of citizens enrolled for military discipline. . . . They, are not separated from the mass of their fellow-citizens, nor withdrawn from their ordinary pursuits, save occasionally for drill or for special and usually short service in the field.[252]

Likewise, the Virginia Supreme Court of Appeals defined an "army" to be "a body of men whose business is war" while a "militia" is "a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it."[253]

The full-time/part-time distinction held throughout the nineteenth century. In the 1870s, many states established a National Guard system, effectively a limited select militia rather than a militia comprising the entire able-bodied male population as federal law then required.[254] In Illinois, the National Guard system was challenged as a violation of the constitutional prohibition on states keeping troops in peacetime without Congress's consent. The Illinois Supreme Court rejected the challenge.[255] National Guardsmen, the court explained, were "militia" because "when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it."[256] Troops, in contrast, "conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army."[257]

To understand the constitutional limits on military jurisdiction, one has to first understand how the Framers divided the country's military forces. The constitutional power "[t]o make Rules for the Government and Regulation of the land and naval Forces"[258] was not a blank check to exercise plenary power over every species of military force. The Constitution uses "land and naval Forces" (or "armies" and "navy") in contradistinction to the militia. The land and naval forces are the regular forces. The militia comprises individuals who are civilians but subject to occasional military service. The constitutional provisions authorizing (and limiting) the application of military law are predicated on this

252. *Id.* at 349.

253. Burroughs v. Peyton, 57 Va. (16 Gratt.) 470, 475 (1864) (emphases omitted).

254. COOPER, *supra* note 81, at 24–32.

255. Dunne v. People, 94 Ill. 120, 124, 141 (1879).

256. *Id.* at 138.

257. *Id.*

258. U.S. CONST. art. I, § 8, cl. 14.

professionalism dichotomy. The Constitution thus recognizes two military statuses, not one.

B. *Traditional Constitutional Limits on Military Jurisdiction*

Traditional Anglo-American law took a narrow view of military jurisdiction. The Supreme Court has explained that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections."[259] Although Anglo-American law evolved to accept the necessity of separate military courts, it also evolved to severely limit the persons whom military law governed.

Before the seventeenth century, the British haphazardly subjected a variety of individuals to martial law, which then included military law. As J.V. Capua has explained, "[b]etween the fourteenth and the seventeenth centuries, in addition to those subject to military law, rebels and traitors, discharged soldiers and sailors, thieves, brigands, vagabonds, rioters, publishers and possessors of seditious books, even poachers, were condemned or threatened with the justice of martial law."[260]

These practices naturally led to objections. Martial law is a summary form of justice and lacked the fundamental protections of common law, including trial by jury.[261] In response to these objections, in the 1628 Petition of Right, the Crown renounced any authority to subject civilians to military law in peacetime.[262]

Meanwhile, Britain began developing a system of military law for the regular forces. The navy came first. Before the mid-seventeenth century, commanders of naval campaigns issued orders that provided for military discipline among the naval crew.[263] Those disciplinary orders were temporary and "lapsed with the various occasions which called them into being."[264] In 1652, Parliament passed rules that governed the entire navy, and it formally adopted an expanded Articles of War for the navy in 1661.[265] Officers and sailors of the navy thus were subject to military law while in actual service, whether in combat or in peace.

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259. Reid v. Covert, 354 U.S. 1, 21 (1957).

260. J.V. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L.J. 152, 153 (1977).

261. *Reid*, 354 U.S. at 21. *See generally* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958) (arguing that the constitutional right to counsel is not applicable for military proceedings); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958) (arguing that most other criminal procedure rights are not applicable).

262. Capua, *supra* note 260, at 171–72 & n.77; Petition of Right, 1628, 3 Car., c. 10. (Eng.).

263. 2 WILLIAM LAIRD CLOWES, THE ROYAL NAVY: A HISTORY FROM THE EARLIEST TIMES TO THE PRESENT 102 (1898); THOMAS MALCOMSON, ORDER AND DISORDER IN THE BRITISH NAVY, 1793–1815, at 23 n.33 (2016).

264. 2 CLOWES, *supra* note 263, at 102.

265. *Id.* at 102–03.

But that system only governed the navy. As the standing army developed in the mid-seventeenth century, Britain did not initially have a separate military justice system that applied to professional soldiers. As one history of England explains, "[b]efore the Mutiny Act came into operation, it was thought that there could not be in time of peace any martial law applied even to soldiers."[266] Consequently, discipline in the standing army "was lax" because "[t]he common law of England knew nothing of courts martial, and made no distinction, in time of peace, between a soldier and any other subject."[267] Failure to perform military duties was not a crime and, at most, would be a breach of contract.[268] Striking a superior officer was simply a battery, indictable no differently from a private citizen hitting another.[269] In wartime, however, military forces in the field could be subject to Articles of War promulgated by the Crown and punished with martial law.[270]

That regime lasted until 1689, when Parliament first enacted a Mutiny Act.[271] The Mutiny Act authorized punishment, whether in war or in peace, for mutiny, sedition, and desertion.[272] The trial of these offenses would be by courts-martial, not through common-law trials,[273] so as to provide "a more [e]xemplary and speedy [p]unishment than the usual[] Forms of Law will allow."[274] The crimes listed in the Mutiny Act supplemented the inherent power of the Crown to punish other war crimes on the battlefield.[275]

Importantly, however, the Mutiny Act only applied to the regular army.[276] Section VII provided that the Act "shall not extend or be any wayes construed to extend to or concerne any of the Militia Forces of this Kingdome."[277] This left the militia in its status quo ante position: in war, the Crown could promulgate Articles of War that would make militiamen subject to military law when in active service.[278] Moreover, because of the limitations of calling forth the militia, the Crown could embody the militia "only 'in case of imminent national danger or of great emergency,'"[279]

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266. 4 DAVID HUME & TOBIAS SMOLLETT, THE HISTORY OF ENGLAND 426 (1873).

267. 1 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II, at 230–31 (1877).

268. *See id.* at 231.

269. *Id.*

270. Bishop, *supra* note 14, at 322 & n.17; Capua, *supra* note 260, at 153; MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 42 (Charles Runnington ed., 6th ed. 1820).

271. Bishop, *supra* note 14, at 322.

272. *Id.* at 323.

273. *Id.* at 322–23.

274. Mutiny Act 1689, 1 W. & M., c. 5, § I, *reprinted in* 6 STATUTES OF THE REALM 55 (John Raithby ed., 1819).

275. Bishop, *supra* note 14, at 323 n.22.

276. *Id.* at 323.

277. Mutiny Act 1689 § VII, *reprinted in* 6 STATUTES OF THE REALM, *supra* note 274, at 56.

278. DICEY, *supra* note 59, at 285.

279. *Id.*

usually invasion or rebellion.[280] At all other times (except perhaps when conducting peacetime training[281]), militiamen were subject only to civilian law and retained their full common-law rights including to trial by jury.[282]

This system endured. By the time of the Framing, British law recognized three statuses: regular soldiers and sailors, militia, and civilians. Regular soldiers and sailors, as English subjects, were amenable to British law and to trial by jury for any civilian offense.[283] Additionally, they were subject to the offenses and court-martial procedures provided by the Mutiny Act and the Articles of War, which applied to them both in peace and in war. A regular soldier, thus, "stands in a twofold relation" and has "duties and rights as a citizen as well as duties and rights as a soldier."[284] Civilians, in contrast, were not subject to military law in peacetime. They were triable only for civilian offenses and only using the recognized common-law modes of trial. For militiamen, who were civilians subject to occasional military service, British law took a functional approach to military justice. When in actual service, they were subject to military discipline and the penalties and procedures of military law.[285] When living as civilians, they were amenable only to civilian law and to civilian modes of trial.

This system became the foundation for the U.S. constitutional provisions governing the military. For military justice purposes, the Constitution recognized two different military statuses: (1) members of the army or navy and (2) members of the militia. The Constitution grants Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," which includes the power to subject members of those forces to military law.[286] Nothing in the original Constitution limited Congress's power to make members of the "land and naval Forces" amenable to military law to wartime.

Interestingly, such proposals were made during the ratification debates. During the Virginia Convention, the Richmond Antifederal Committee proposed a bill of rights providing that traditional British criminal procedure rules would apply "except in the Government of the Land and Naval Forces in time of actual War, Invasion, or Rebellion."[287]

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280. *Id.*

281. *Id.* Although the Fifth Amendment exempts from military law only offenses that take place in "actual service in time of War or public danger," U.S. CONST. amend. V, some courts have held that the power to apply military law to those in peacetime training is incidental to the power to train the militia. *See* People *ex rel.* Underwood v. Daniell, 50 N.Y. 274, 281 (1872); State *ex rel.* Madigan v. Wagener, 77 N.W. 424, 426 (Minn. 1898).

282. *See* Kneedler v. Lane, 45 Pa. 238, 261 (1863) (Woodward, J., concurring).

283. DICEY, *supra* note 59, at 276.

284. *Id.*

285. *Id.* at 285.

286. U.S. CONST. art. I, § 8, cl. 14.

287. George Mason, Richmond Antifederal Committee Proposed Bill of Rights (June 11, 1788), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY

An analogous provision was suggested, but not adopted, during the New York Convention.[288] Other proposals, however, entirely exempted the land and naval forces from the common-law criminal procedure requirements without regard to whether the country was immersed in a conflict.[289]

Congress ultimately took the latter approach. The Fifth Amendment exempted from common-law criminal procedure "cases arising in the land or naval forces" without any limitation to war.[290] This provision has long been understood to exempt members of the military from the requirement of civilian trials, whether or not the alleged crimes have any connection to the battlefield or the military.[291] Importantly, however, this exemption only extended to what the Constitution calls the "land or naval forces."[292]

The Constitution also authorized Congress to regulate the militia, albeit with lesser powers than the land and naval forces. The Constitution authorized Congress to prescribe a code of discipline for the militia.[293] But Congress could only directly govern the militia when it was "employed in the [s]ervice of the United States,"[294] and Congress could only call forth the militia to "execute the Laws of the Union, suppress Insurrections and repel Invasions."[295]

These limited provisions, however, did not placate the Anti-Federalists. They feared that Congress might abuse its authority to discipline the militia by subjecting the entire able-bodied male community to military law at all times. Congress could do this, they contended, because all able-bodied men of military age were technically in the militia and subject to being called into actual service.[296] The Anti-Federalists thus

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HISTORY OF THE BILL OF RIGHTS 388, 389 (David E. Young ed., 2d ed. 1995).

288. New York Convention, Proceedings (July 7, 1788), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, *supra* note 287, at 473.

289. *See, e.g.*, Virginia Convention, Proposed Declaration of Rights and Other Amendments (June 27, 1788), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, *supra* note 287, at 456–58; North Carolina Convention, Refusal to Ratify the United States Constitution (Aug. 1, 1788), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, *supra* note 287, at 503–04.

290. U.S. CONST. amend. V.

291. United States v. Grimley, 137 U.S. 147, 153 (1890); Solorio v. United States, 483 U.S. 435, 439 (1987).

292. U.S. CONST. amend. V.

293. *Id.* art. I, § 8, cl. 16.

294. *Id.*

295. *Id.* art. I, § 8, cl. 15; *see* Abbott v. Biden, 70 F.4th 817, 830–33 (5th Cir. 2023) (distinguishing governing the militia from providing for its discipline).

296. *See, e.g.*, Maryland Ratifying Convention (1788) (remarking that "all other provisions in favor of the rights of men would be vain and nugatory, if the power of subjecting all men, able to bear arms, to martial law at any moment should remain vested in Congress"), *reprinted in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 729, 734 (1971); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, PENN. PACKET & DAILY ADVERTISER, Dec. 18, 1787 ("[T]he personal liberty of every man, probably from sixteen to sixty

wanted the Constitution to deny Congress explicitly the power to make individuals amenable to military law, notwithstanding that they were enrolled in an armed force (the militia) and that they were liable to perform future military service if called.

The First Congress obliged. It added to the Fifth Amendment that the militia could not be subjected to military law except "when in actual service in time of War or public danger."[297] So the Fifth Amendment embodied the principle, then well-established in Britain, that part-time forces would be subject to military law only when they were in actual service. At all other times, militiamen were subject only to civilian law and had their full common-law rights. In perpetuating the traditional British framework, the Framing generation did not contemplate that there could be such a thing as a part-time (non-militia) soldier. Instead, they were creating different jurisdictional rules for when individuals could be subject to military justice based on whether they were regular or nonprofessional soldiers.[298]

Further evidence for the regular/part-time soldier distinction can be seen in contemporary state declarations of rights. For example, Maryland enacted a state declaration of rights in 1776 that allowed military law to be applied to "regular soldiers, mariners, and marines."[299] Likewise, the Massachusetts Declaration of Rights in the 1780 Constitution provided that "[n]o person can in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature."[300]

At the Framing, the meaning of the Fifth Amendment's Exceptions Clause was clear. The status-based exemption for the "land and naval forces" would have applied only to the regular forces. The functional military jurisdiction over the militia meant that part-time soldiers would have been subject to military law only when they were in active service, even though they had a military status and a duty to obey future orders, including a duty to report for service if called.

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years of age, may be destroyed by the power Congress ha[s] in [the] organizing and governing of the militia."), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 164 (Herbert J. Storing ed., 1981); Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Carolina, with the Minorities of Pennsylvania and Maryland, by a Foreign Spectator: Number VIII*, PHILA. FED. GAZETTE, Nov. 14, 1788 ("A citizen, as a militia man is to perform duties which are different from the usual transactions of civil society; and which consequently must be enforced by congenial laws and regulation."), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, *supra* note 287, at 567, 569.

297. U.S. CONST. amend. V.

298. *See* State v. Peake, 135 N.W. 197, 200 (N.D. 1912) (citing People *ex rel.* Smith v. Hoffman, 60 N.E. 187, 190 (N.Y. 1901)) (distinguishing the type of military jurisdiction based on whether the person is principally employed as a soldier).

299. Maryland Declaration of Rights, para. 29 (Nov. 11, 1776), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, *supra* note 287, at 755, 758.

300. MASS. CONST. art. 28 (1780).

C. *Maintaining the Traditional Constitutional Limits on Military Justice*

By federal law, military-civilian hybrids are deemed part of the Armed Forces of the United States. They are, thus, generally thought of as part of the armies and navy for constitutional purposes. But this designation, as explained, is largely a fiction designed to evade the constitutional limits on federal use of nonprofessional soldiers. For purposes of the Fifth Amendment, courts should apply the traditional distinctions. The "land or naval forces," as used in that Amendment, should refer only to the regular components of the armed forces. Nonprofessional forces (e.g., reserves and retirees) should be treated as the nonprofessional militiamen that they functionally are, and their amenability to military law should be limited to when they are in actual service or in training.

In many ways, military law is incompatible with civilian law and common law, particularly in a republic of equal citizens. "[T]he military," the Supreme Court has said, "is, by necessity, a specialized society separate from civilian society."[301] In that separate society, obedience, not freedom, is prized: "No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[302] The result is a military culture that is antagonistic to civilian values. As Bonnie Vest explains, "[c]ivilian society's concern with atomization, pursuit of comfort, freedom of choice, equality, and readiness for discussion and compromise, contrast with the military's emphasis on unity, endurance, obedience, hierarchy, and readiness for violence."[303]

The application of military law to military-civilian hybrids greatly expands the number of citizens who are bound by military law. At present, there are more than 330 million Americans.[304] Of these, a little more than 1.3 million are active members of the regular forces and thus properly amenable to military law at all times.[305] And even this number is high by historical standards for a peacetime army. Subjecting regular retirees to the Uniform Code of Military Justice, as the law does presently, adds over 1.5 million additional Americans to the burdens of military justice.[306] Indeed, as these numbers indicate, the retired rolls are greater than the entire active component of the regular forces, an enormous expansion of the separate military justice system. And if Congress added reservists to status-based jurisdiction, which the D.C. Circuit's opinion in *Larrabee* would allow, yet another 1.2 million Americans would be subject

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301. Parker v. Levy, 417 U.S. 733, 743 (1974).

302. United States v. Grimley, 137 U.S. 147, 153 (1890).

303. Bonnie M. Vest, *Finding Balance: Individuals, Agency, and Dual Belonging in the United States National Guard*, 73 HUM. ORG. 106, 107 (2014) (citation omitted).

304. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045222 [https://perma.cc/CYN2-M9VL] (last visited Dec. 8, 2023) (population estimate as of July 1, 2022).

305. *See* U.S. DEP'T DEF., 2021 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 13 (2021), https://download.militaryonesource.mil/12038/MOS/Reports/2021-d.emographics-report.pdf [perma link unavailable].

306. *Id.* at 51.

to military law.[307] The application of military law to military-civilian hybrids thus has the potential to triple the number of Americans subject to the military justice system. And approximately two-thirds of these personnel would be retired or part-time soldiers primarily living as civilians.

Applying military law against those affiliated with the armed forces, but not in active service, also drives a dangerous wedge between the military and civilian realms. Military law leaves soldiers without the basic freedoms that they protect for everyone else.[308] Individuals subject to the Uniform Code of Military Justice can be punished for violating orders against wearing articles of religious faith or (for officers) using inappropriate language against the President and other senior officials.[309] And even where Congress has restored some of these—servicemembers may now wear yarmulkes[310]—it has done so as a legislative privilege rather than a constitutional right. Civilians, in contrast, have broader constitutional rights to practice their religious faiths or to speak (even coarsely) against political leaders.[311] Soldiers also lack basic civil liberties, including the ability to decide where to live, with whom to associate, and whether they want to continue or quit their jobs.[312]

The current law, which subjects all regular retirees to the Uniform Code of Military Justice, is dangerous enough. Career soldiers, who have given twenty years of their lives to dangerous public service, are rewarded with the forfeiture of their constitutional rights and civil liberties for the rest of their lives. Worse, these military laws may be weaponized against political opponents. From George Marshall to Colin Powell, retired high-ranking officers often become high-profile public figures. Some, like retired Army Lt. Gen. Michael Flynn, are controversial. If these individuals are subject to military law long after they have retired from active service, unhappy political leaders may seek to court-martial retired officers who are political opponents.[313]

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307. *See id.* at iii (sum of all reserve forces). There are 1,017,495 members of the U.S. Department of Defense Ready Reserve and Department of Homeland Security Coast Guard Reserve, 187,597 members of the Retired Reserve, and 5,398 members of the Standby Reserve.

308. In addition to the rights discussed here, see sources cited *supra* note 261 (arguing that constitutional criminal procedure rights do not apply to military proceedings).

309. Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986); UCMJ, art. 88, 10 U.S.C. § 888 (2018).

310. 10 U.S.C. § 774.

311. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (explaining that citizens have a right to subject public officials to "vehement, caustic, and sometimes unpleasantly sharp attacks" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

312. *See* Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 692 (2021) (explaining that "the military justice system penalizes acts or omissions not criminalized by civilian law").

313. This is not a hypothetical problem. There have been calls to court-martial retired generals, which prompted a warning against such action from then-chairman of the Joint Chiefs of Staff Mark Milley. *See* Rebecca Kheel, *Milley Advised Against*

The application of military law to military-civilian hybrids also disturbs federalism by enhancing federal power at the expense of the states' power. Ordinary citizens are subject to the plenary power of state governments and to the limited enumerated powers of the federal government.[314] Members of the land and naval forces, in contrast, are subject to the plenary authority of both the federal government and state governments (at least where state governmental power does not conflict with federal policy). The larger the land and naval forces, the larger the scope of federal power vis-à-vis the states over the citizens of the United States. If the Constitution were to allow military jurisdiction over all military-civilian hybrids, it would expand the plenary power of the federal government over considerably more citizens.

The expansion of military jurisdiction to military-civilian hybrids also creates separation of powers problems. Many members of Congress have been retired regular military officers, such as Sen. John McCain, or reservists such as Sen. Lindsey Graham.[315] If courts are correct, for example, that retired officers of the armed forces continue to be military officers, then the Constitution's Incompatibility Clause prevents their service in Congress.[316] And with good reason: the President ought not have the power to court-martial members of Congress and send them to a military prison for offenses such as disparaging the President or another high government officer. Excluding retired military officers from Congress, again, alienates the military from the civilian realm.

To the extent this problem has not materialized previously, this is only because retiree jurisdiction has largely been ignored. From the Civil War until relatively recently, it has been exceedingly rare for the military to exercise its jurisdiction over retired personnel.[317] Indeed, military norms (and doubts about the legitimacy of the jurisdiction) may have prevented it.[318] Technically, the law as it stands today would allow the

Court-Martialing Flynn and Retired Generals Critical of Trump, Jan. 6 Testimony Reveals, MILITARY.COM (Jan. 4, 2023), https://www.military.com/daily-news/2023/01/04/milley-advised-against-court-martialing-flynn-and-retired-generals-critical-of-trump-jan-6-testimony.html [https://perma.cc/FTP9-FLRA].

314. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995).

315. *John S. McCain III: A Brief Navy Biography*, SUBMARINE FORCE LIBR. & MUSEUM ASS'N (Sept. 2, 2018), https://ussnautilus.org/john-s-mccain-iii-a-brief-navy-biography/ [https://perma.cc/CKG9-WXLG]; *Rear Admiral Joseph Sestak Jr.*, AM.'S NAVY, https://www.navy.mil/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=692&Article=2235968 [https://perma.cc/EKB2-PEPV] (last visited Dec. 8, 2023); Leo Shane III, *Veterans in the 117th Congress, By the Numbers*, MIL. TIMES (Dec. 28, 2020), https://www.militarytimes.com/news/pentagon-congress/2020/12/28/veterans-in-the-117th-congress-by-the-numbers/ [https://perma.cc/4DXD-U9MA].

316. U.S. CONST. art. I, § 6, cl. 2; *see, e.g.*, *In re* Winthrop, 31 Ct. Cl. 35, 43–44 (1895); Congressman—Retired Army Officer, 20 U.S. Op. Att'y Gen. 686 (1893) (calling the question whether a Member of Congress could receive both a congressional salary and military retired pay to be one of "grave doubt"); United States v. Lane, 64 M.J. 1, 7 (C.A.A.F. 2006) (holding that a sitting Senator cannot also serve as a military judge); Leider, *supra* note 93, at 1009–10 (discussing Van Ness affair).

317. *See infra* notes 430–32 and accompanying text.

318. *See infra* notes 424–26 and accompanying text; *see also* U.S. ARMY, RETIRED SOLDIER HANDBOOK 11 (2024) (describing Department of the Army policy that "Retired

President to court-martial a member of Congress who was a retired officer for disparaging him on the campaign trail.[319] But the military has judiciously refused to go down that path. Recently, however, our political norms have been disintegrating. The breakdown of these norms only enhances the importance of formal legal constraints.

Admittedly, this proposal will introduce inconsistency in the doctrine. Reservists, retirees, and draftees will be deemed members of the land and naval forces for the structural provisions in Article I, Section 8. As such, they will be deployable abroad for offensive wars, and they will be led by officers appointed by the President rather than by the states. But for Fifth Amendment purposes, they will be treated as the militiamen that they are.

Although "[c]oherence has a claim on the law,"[320] the price for consistency and coherence here is to undermine the core of the Fifth and Sixth Amendments. The Fifth Amendment's Exceptions Clause limits the application of military law. It followed Anti-Federalist objections that "all other provisions in favor of the rights of men would be vain and nugatory, if the power of subjecting all men, able to bear arms, to martial law at any moment should remain vested in Congress."[321] Yet, that is precisely what *Larrabee* provides when it defines military status as having "a formal relationship with the armed forces that includes a duty to obey military orders" and then recognizes that a duty to report for future service when called satisfies the duty to obey orders.[322] Under the D.C. Circuit's test, Congress could draft all able-bodied citizens at age eighteen and induct them into the military. It could then furlough everyone it has drafted indefinitely, with a requirement that they report for service if called during a national emergency. Under the D.C. Circuit's test, this would be sufficient to subject all adults to military law throughout their adult lives, even when indefinitely furloughed with virtually no prospect of recall. *A fortiori*, Congress could do this for the entire reserve forces, including the inactive components. This interpretation thus directly undermines the core guarantee of the Exceptions Clause's militia provision: that Congress may not apply military law to

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Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present").

319. *See, e.g.*, U.S. ARMY, *supra* note 318, at 17 (warning that "Retired Regular Army commissioned officers who use contemptuous words in speech or print against the President [and certain other officers] are subject to trial by courts martial under the Uniform Code of Military Justice (UCMJ)").

320. Mathis v. United States, 579 U.S. 500, 520 (2016).

321. Maryland Ratifying Convention (1788), *reprinted in* THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 296, at 734.

322. Larrabee v. Del Toro, 45 F.4th 81, 91 (D.C. Cir. 2022); *see also id.* at 83, 89, 98.

those who are primarily civilians, except when they are called into actual service.[323]

III. RESPONDING TO COUNTERARGUMENTS IN FAVOR OF MILITARY JURISDICTION OVER MILITARY-CIVILIAN HYBRIDS

This Part responds to some counterarguments that might support the constitutionality of military jurisdiction over retirees and other military-civilian hybrids. I look at two issues specifically: historical counterexamples, including the application of military law to British half-pay officers and furloughed Revolutionary War soldiers, and whether the meaning of "land and naval forces" has liquidated to include military-civilian hybrids, to which Congress may apply military jurisdiction.

A. *Half-Pay Officers and Furloughed Revolutionary War Soldiers*

Larrabee and Judge Maggs's concurrence in *Begani* offered two historical examples to support the exercise of military jurisdiction over retirees not in active service.[324] The first consists of British half-pay officers. The second is the court-martialing of furloughed Revolutionary War soldiers for an attempted mutiny at the close of the Revolutionary War. With respect to military justice, neither historical example demonstrates the constitutionality of subjecting retired and reserve military personnel to military law when they are not in active service.[325]

1. *Half-Pay Officers*

Initially, British half-pay officers were not amenable to military jurisdiction. The early Mutiny Acts applied only to officers who were both "mustered" and "in [p]ay,"[326] and half-pay officers were not mustered. Around 1706, however, a revision to the jurisdiction component provided that the Mutiny Act applied to officers who were "mustered

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323. One might further object here that my proposal does not close this loophole. If the constitutionality of the draft is conceded, Congress could subject all able-bodied adults to military law by placing them on regular active duty in the armed forces. Perhaps. But as Alexander Hamilton and James Madison argued in THE FEDERALIST PAPERS, the sheer expense of regular forces will limit their size. THE FEDERALIST NO. 28, at 178–79 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961). No such soft-power constraints limit the size of unpaid inactive and furloughed forces.

324. *Larrabee*, 45 F.4th at 92–95; United States v. Begani, 81 M.J. 273, 285 (C.A.A.F. 2021) (Maggs, J., concurring).

325. I have discussed both examples previously and argued that they are not counterexamples to the principle that the land and naval forces consist of regular forces in active service. Leider, *supra* note 124, at 1274–77. Many of those arguments are relevant also to explain why they do not support Congress's decision to subject those with a military status, but not in active service, to military law.

326. *See, e.g.*, Mutiny Act 1704, 3 & 4 Anne, c. 5, *reprinted in* 8 STATUTES OF THE REALM 339 (John Raithby ed., 1821); Mutiny Act 1705, 4 & 5 Anne, c. 22 (continuing former act), *reprinted in* 8 STATUTES OF THE REALM, *supra*, at 506.

or in [p]ay."[327] Apparently, this provision was designed to ensure that military law applied to aristocratic officers in active service who declined their wages.[328]

By changing "and" to "or," the amenability of half-pay officers to military law became ambiguous. Half-pay officers were neither clearly "in pay" nor out of it. Notwithstanding the ambiguity, some half-pay officers faced military trial. Most notably, four half-pay officers were executed for participating in the Jacobite rising in 1715.[329] But as explained momentarily, these actions never settled the legality of the practice.

The ambiguity over half-pay officers lasted until 1747, when Parliament clarified the issue by statute. A provision added to the end of the Mutiny Act acknowledged the ambiguity of half-pay officers' amenability to military jurisdiction.[330] After recognizing the uncertainty, the Mutiny Act of that year provided that:

> [T]he reduced Officers of his Majesty's Land Forces and Marines, on the British and Irish Establishments of half Pay, be at all Times subject to all the Penalties and Punishments mentioned in this Act, and shall in all respects whatsoever be holden to be within the Intent and Meaning of every Part of this Act, during the Continuance of the same.[331]

The same provision was included in the Mutiny Act of 1748.[332]

In 1749, however, the provision was abandoned after it created tremendous controversy in Parliament. The issue first came to a head when Parliament debated a bill to reform naval discipline. A provision of that bill explicitly applied military law to half-pay naval officers.[333] The effort to subject half-pay naval officers to military law produced "the most violent contest" in Parliament,[334] where it aroused "strong Opposition" in the Commons.[335] The naval bill also spurned a protest petition signed by "three Admirals and forty-seven Captains."[336] In response, the provision

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327. Mutiny Act 1706, 6 Anne, c. 18 (emphasis added), *reprinted in* 8 STATUTES OF THE REALM, *supra* note 326, at 590.

328. 14 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 482–83 (1813).

329. THOMAS FREDERICK SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL § 60, at 27 n.7 (7th ed. 1875).

330. Mutiny Act 1747, 21 Geo. II, c. 6 ("And whereas it may be otherwise doubted, whether . . . the reduced Officers . . . of half Pay, be within the Intent and Meaning of this Act . . . .").

331. *Id.*

332. Mutiny Act 1748, 22 Geo. II, c. 5.

333. THE DEBATES AND PROCEEDINGS OF THE BRITISH HOUSE OF COMMONS, FROM 1746, TO THE DEATH OF HIS LATE MAJESTY GEORGE II IN 1760, at 253–55 (1770) [hereinafter THE DEBATES AND PROCEEDINGS].

334. 3 TOBIAS SMOLLET, THE HISTORY OF ENGLAND 214 (1827).

335. THE DEBATES AND PROCEEDINGS, *supra* note 333, at 253.

336. *Id.* at 254.

subjecting half-pay naval officers to military law was stripped out of the naval bill before the bill was sent to the House of Lords.[337]

Parliament then considered the question a second time when it debated the Mutiny Act, which governed the army. After vigorous debate, a provision applying military law to half-pay army officers passed the Commons, but it "excited another violent contest" in the House of Lords.[338] Members of Parliament disputed two issues: first, whether half-pay officers were already within the scope of military law, and second, whether it was proper for Parliament to subject them.

On the first question, opponents of deeming half-pay officers as already "in pay" leveled several arguments. They argued that "half-pay" was not "in pay," just like it would be wrong to say that "half a year is a year."[339] They further argued that placing half-pay officers under military law increased the size of the army beyond the strength authorized by Parliament in the preamble of the Mutiny Acts.[340] Although half-pay officers had duties to certify that they were still alive, opponents claimed that such a basic reporting requirement did not place them in service.[341] And half-pay officers, opponents claimed, were not required to accept assignments for further service. If they declined to serve, they would lose their half pay, not be shot for desertion.[342] With respect to the Jacobite rebellion, William Pulteney, who as Secretary at War in 1715 transmitted the orders to execute the half-pay officers during the Jacobite rebellion, later described the executions as unlawful actions taken in the heat of the moment.[343] In any event, to the extent the matter was ambiguous, opponents argued that the Mutiny Act should be strictly construed because it contained severe penalties and was in derogation of the common law.[344]

On the second question, opponents argued that placing half-pay officers under military law was "highly dangerous to the constitution."[345] The proposed provisions would disrupt basic separation of powers. The executive branch would gain more influence by "increasing the number of officers depending upon the crown, and subject to military law."[346] Because officers came from the aristocracy, executive ministers in charge of the army and navy would gain leverage over "men of great fortunes and families, which might have a dreadful influence at the general election."[347] The desire to limit the number of people amenable to military law also resulted from the fact that military law and military trials:

337. *Id.* at 283–84.
338. 3 SMOLLET, *supra* note 334, at 217.
339. 14 COBBETT, *supra* note 328, at 473.
340. *Id.* at 472.
341. *Id.* at 474.
342. *Id.* at 474–75.
343. *Id.* at 476.
344. *Id.* at 482.
345. *Id.* at 397.
346. *Id.*
347. *Id.* at 461 n.* (quoting London Magazine).

> [E]ncroach[ed] upon the liberties of the subject, the chief part of which consists in their being tried, when accused of any crime, by God and their country; that is to say, by an impartial judge, and a jury of their neighbours in the country; and in their not being subjected even to a trial, till a jury of neighbours has found sufficient cause to suspect their being guilty, by finding the bill of indictment against them.[348]

Supporters challenged these points. They claimed that half-pay is pay.[349] In response to opponents' use of the proverb "half a loaf is no bread," one member responded, "if I saw, that a man had eat half a loaf to his dinner, it would be impossible to convince me, that he had eat no bread."[350] Half-pay officers, further, had continuing duties to report their status, and they accepted pay from the public. Consequently, they believed it proper to subject half-pay officers to military rules and discipline.[351] The subjugation of half-pay officers to military law would also deter them from "joining in any insurrection or rebellion,"[352] and they felt that the executions during the Jacobite rising acted as a deterrent.[353] Both sides also disputed whether half pay was primarily remuneration for past service or a retaining fee for future service.[354] During the debates, Parliament consulted the judges about whether half-pay officers were subject to military law. But even their opinion was divided.[355]

Parliament dropped the half-pay provision in the Mutiny Act of 1749,[356] and it rejected another attempt to include it in the Mutiny Act the following year.[357] The half-pay provision never reappeared.[358] By the time of America's separation from Britain in 1776, it had been clear for over twenty-five years that half-pay officers were not amenable to military jurisdiction. And except for a brief controversial period from 1747 until 1749, half-pay officers had never clearly been within the Mutiny Act. Half-pay officers were treated analogously to militiamen and subjected to military jurisdiction when ordered into actual service.[359]

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348. *Id.* at 409.
349. *Id.* at 469.
350. *Id.* at 477.
351. *Id.* at 470, 977.
352. *Id.* at 471.
353. *Id.* at 488.
354. *Id.* at 462, 478.
355. *Id.* at 461 n.*.
356. *See* Mutiny Act 1749, 23 Geo. II, c. 4 (extending the Mutiny Act only to those "Officers and Persons employed in the Trains of Artillery" with no further mention in that provision of half-pay officers).
357. 1 CHARLES M. CLODE, THE MILITARY FORCES OF THE CROWN; THEIR ADMINISTRATION AND GOVERNMENT § 103, at 179 (1869).
358. 1 JOHN MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL 196–97 (2d ed. 1805).
359. Emond, *supra* note 21, at 20 (citing HARRIS PRENDERGAST, THE LAW RELATING TO OFFICERS IN THE ARMY 76–77 (rev. ed. 1854)).

Following the American Revolution, the story took one additional twist in Britain. In 1785, Britain attempted to court martial Major General Charles Ross, a half-pay officer holding a brevet rank, for sending a letter to a newspaper derogatory of his former commander.[360] The judges of the Exchequer Chamber unanimously decided that half-pay officers were not amenable to military jurisdiction either on account of their commissions as officers or because of their receipt of half pay.[361]

In response, Parliament partially overturned the decision in the Mutiny Act of 1786 by applying military law to anyone who was "commissioned or in pay."[362] By changing "mustered" to "commissioned," Parliament brought both active officers and those holding brevet rank under the Mutiny Act.[363] Half-pay officers not holding brevet rank remained not amenable to military jurisdiction.

This amendment to the Mutiny Act brought another significant debate in Parliament about the constitutional limits of military jurisdiction. One member argued that "no man shall be liable to martial law but those who are mustered and in the pay of the nation" and compared the half-pay officers to militia officers, who were subject to military law only when in service.[364] Another member contended that the expansion of military law "constitute[d] an infringement on the trial by jury" because "it took a description of persons out of that mode of trial and placed them under a military tribunal."[365] This amendment, he further argued, was "a material alteration of the law of the land."[366] Supporters argued that brevet officers were military officers and might, in some circumstances, succeed to command.[367] The provision subjecting brevet officers to the Mutiny Act remained, although non-brevet half-pay officers were not amenable to military law.

Although this history appears to cut against subjecting retirees to military law, the majority in *Larrabee* reaches the opposite conclusion. In support, the majority makes two points. First, the majority contends that "although it was contested throughout the eighteenth century whether half-pay officers should be legislatively subject to court-martial jurisdiction, it was beyond controversy that they were part of Britain's armed 'forces' amenable to military jurisdiction."[368] Second, the majority claims that "[t]he Americans who ratified the Constitution were familiar with the structure of the British military generally, and with the half-pay

360. *Id.* at 23; MCARTHUR, *supra* note 358, at 195–96.

361. Emond, *supra* note 21, at 24; SIMMONS, *supra* note 329, at 27 n.8; 27 ANNUAL REGISTER 230 (1787).

362. Mutiny Act 1786, 26 Geo. III, c. 10.

363. 26 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 639 (1816); SIMMONS, *supra* note 329, § 60, at 27; MCARTHUR, *supra* note 355, at 196–97.

364. 26 COBBETT, *supra* note 363, at 640.

365. *Id.* at 644.

366. *Id.*

367. *Id.* at 641–42.

368. Larrabee v. Del Toro, 45 F.4th 81, 93 (D.C. Cir. 2022).

system specifically."[369] The majority then provides the example of Charles Lee, an American general who had been on the British half-pay list until 1775.[370] But the majority's first point is wrong, while the second point is irrelevant.

The *Larrabee* majority's first point starts with a mistaken view of the British constitution. Consider two curious statements by the majority:

(1) Parliament's "*authority* to [make half-pay officers subject to courts-martial] was not disputed."[371]
(2) Although the Court of Exchequer Chamber opined in 1785 "that half-pay officers did not come within the scope of the Mutiny Act's original terms . . . that judicial decision did not limit the legislature's authority to subject half pay officers to military jurisdiction."[372]

These statements presuppose a mistaken view of the British constitution. In eighteenth-century Britain, Parliament had total legislative supremacy.[373] In Britain, the constitution is by convention, and "legal but unconstitutional" is not a contradiction.[374] (The easiest example of "legal but unconstitutional" is if the King vetoed a bill against the advice of her government.[375]) Because of Parliamentary supremacy, Parliament could legalize unconstitutional acts.[376] Indeed, Parliament had done just that when it created and perpetuated the standing army by annual Mutiny Acts.[377] So, of course, Parliament had the raw power to subject half-pay officers to military law, and no British court could limit Parliament's authority. That did not mean that Parliament exercised its authority constitutionally when it did so.

Contrary to the majority's assertions, the debates about whether half-pay officers should fall within the Mutiny Act were fundamentally constitutional disputes, not merely policy debates. Those who objected to including half-pay officers made several constitutional arguments: that half-pay officers should retain their common-law rights, including to trial by jury; that military law was only justified by military necessity, which did not exist if the officer was not in actual service; and that subjecting half-pay officers to military law would increase the power of the Crown.[378]

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369. *Id.*
370. *Id.*
371. *Id.* at 93 n.8.
372. *Id.* at 93 (citations omitted).
373. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *91 (denying the power of judges to reject acts of Parliament, even those that are unreasonable).
374. Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 290 (2015).
375. Jeremy Waldron, *Are Constitutional Norms* Legal *Norms?*, 75 FORDHAM L. REV. 1697, 1703–04 (2006).
376. JOHN PHILLIP REID, IN DEFIANCE OF THE LAW 45 (1981).
377. *Id.* at 45–46.
378. *See supra* notes 345–48, 365–66.

Parties to the debate expressly referenced the British constitution and constitutional rights.[379]

This history, moreover, does not support the majority's claim that Parliament had recognized constitutional authority to subject retirees to military jurisdiction. Half-pay officers were only clearly subjected to military jurisdiction for two years, after which Parliament did not include them again because of fierce opposition. Inactive brevet officers were included after 1786—ten years after the United States had separated from Britain. There are strong arguments that the inclusion of brevet officers violated traditional British conventions of limiting military law to those in active service.[380] Moreover, brevet officers were included because they might reasonably assume future command.[381] Parliament thus was distinguishing brevet officers, who might reasonably be expected to assume command in the future, from half-pay officers who were essentially being paid for prior service. This hardly evidences the constitutional legitimacy of applying military law to retirees. To the contrary, if the legal question settled at all in Britain, it appears to have settled the other way—against the susceptibility of retired officers to military law.

Worse, the majority has no reason to believe that the constitutional legitimacy of applying military law to those not in active service was settled in America. Before the Revolution, Virginia and Pennsylvania adopted Mutiny Acts that limited the applicability of military law to those officers and soldiers in active service. Virginia's 1752 Mutiny Act only applied to officers who were "mustered, or in pay as an officer" and to those who were "enlisted or in pay as a soldier, and shall remain in such service."[382] Virginia adopted another Mutiny Act in 1762 that applied to officers "mustered, or in pay" and to those "enlisted or in pay as a soldier."[383] Pennsylvania passed a Mutiny Act in 1756 that only applied to officers "commissioned and in pay" and to soldiers "regularly enlisted . . . [who are] paid and maintained by the Crown."[384] I have not exhaustively surveyed all the colonies. But I have yet to find one that applied military law to anyone not in active service.

The best the majority can say is that the Framing generation was "familiar . . . with the half-pay system" and early American Congresses

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379. *See supra* notes 345 (executive power), 365 (trial by jury).

380. *See, e.g.*, MCARTHUR, *supra* note 355, at 198 (recounting arguments raised in Parliament).

381. *Id.* at 197.

382. Virginia Mutiny Act, ch. 1, 6 Va. Laws 560 (Feb. 17, 1752).

383. An Act for Preventing Mutiny and Desertion, 2 Geo. III, c. 2 (1762), *reprinted in* 7 STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 502 (William Waller Hening ed., 1820).

384. Act of December 8, 1756, Ch. CCCCXV ("An Act for Extending Several Sections of an Act of Parliament Passed in the Twenty-Ninth Year of the Present Reign, Entitled 'An Act for Punishing Mutiny and Desertion and for the Better Payment of the Army and Their Quarters.'"), *reprinted in* 5 THE STATUTES OF PENNSYLVANIA 266–67, 269 (James T. Mitchell & Henry Flanders eds., 1898).

thought about adopting it.[385] But so what? The majority offers no evidence that early Congresses intended to require half-pay officers to forfeit their common-law rights and be perpetually bound to military law. Without such evidence, the mere consideration of a half-pay system does not prove that these Congresses accepted that those on half pay could be subjected to military law. And while another commentator has unearthed references to an early half-pay proposal containing a provision that "such half pay [o]fficers shall at all times be subject to the regulations of Congress,"[386] the JOURNALS OF THE CONTINENTAL CONGRESS report the proposal with that language stricken.[387] The language was entirely omitted from later drafts.[388] This hardly demonstrates that Congress accepted the amenability of inactive half-pay officers to perpetual military law.

Moreover, American legislatures had less sweeping authority than British Parliament. Unlike in Britain, Congress and the state legislatures operated under written constitutions that legally prevented the legislature from doing unconstitutional acts. While the British Parliament may have had the raw power to subject half-pay officers to military law in violation of the British constitution, American legislatures could not do the same in violation of the written constitutions governing them.

In sum, there was no practice in America (and certainly not a settled practice) demonstrating the constitutionality of subjecting inactive officers and soldiers to military law. I will close with the *Larrabee* majority's own example of an American who was a half-pay British officer—that of Charles Lee.[389] The majority uses Lee as an example to show that Americans were familiar with the British half-pay system. But the majority omits the best part of his story. When Lee decided to join the American cause in 1775, he had to resign his British commission and give up his half pay. Lee made a public display of his resignation by drafting a letter to Viscount Barrington, the Secretary at War, which he then had published in colonial newspapers. His nominal reason for resigning? The "erroneous and absurd" opinion "that an officer on half pay is to be considered in the service."[390]

2. *Furloughed Soldiers*

Faced with this lack of evidence, the *Larrabee* majority then tries to bolster its analysis with another example: court-martialing furloughed

385. Larrabee v. Del Toro, 45 F.4th 81, 93 (D.C. Cir. 2022).

386. Emond, *supra* note 21, at 29 n.153 (quoting 10 JOURNALS OF THE CONTINENTAL CONGRESS 285–86 (Worthington Chauncy Ford ed., Wash. Gov. Printing Off. 1908) (1778)).

387. 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 386, at 285–86.

388. Emond, *supra* note 21, at 29 n.152 (citing 18 JOURNALS OF THE CONTINENTAL CONGRESS 958–61 (Gaillard Hunt ed., Wash. Gov. Printing Off. 1910) (1780)).

389. *Larrabee*, 45 F.4th at 93.

390. Letter from Charles Lee to Lord Barrington (June 22, 1775), *in* 9 THE COLONIAL RECORDS OF NORTH CAROLINA 1217 (William L. Saunders ed., 1890).

troops at the close of the Revolutionary War.[391] This example is unsatisfactory for two independent reasons.

First, the majority may be wrong on the facts. A forthcoming article studying this issue contends that the soldiers who were court-martialed may have remained on active service by rejecting their furloughs.[392] So the premise of the argument may be wrong.

Second, even if they were furloughed, it would not matter. Traditionally, members of the regular army and navy were amenable to military law based on their status as members of the regular forces. There was no requirement that a soldier commit a crime while he was in the discharge of official duties. A furlough is nothing more than a temporary leave from military duty. A soldier on furlough remains principally employed as a soldier, just like a teacher on sabbatical remains principally employed as a teacher.

This particular furlough was unusual because it was combined with a discharge conditioned on the United States and Britain ratifying a peace treaty. Unlike the average furloughed soldier, Revolutionary War soldiers could reasonably anticipate that they would not be called back into further military service. Still, this expectation did not deprive them of military status. These soldiers were in a transitional state from active service to civilian life. The British had surrendered but had not yet signed the final peace treaty. The war was likely over, and these soldiers were probably done fighting. But they had not been formally discharged because there was some chance that hostilities would resume. When determining who is in active service, there will always be borderline cases. Today, for example, a soldier could commit an offense after his last military assignment but before he is formally discharged from the service.[393] The existence of borderline cases about who remains in active service does not establish the broad proposition that active service is not an essential attribute of membership in an "army" or "navy."

Stretching the furlough concept in this way improperly blurs basic definitions. One could define an active reservist to be a regular soldier who spends 326 days on furlough per year. Similarly, a retiree might be thought of as a regular soldier on permanent furlough. But this is to play word games. Each definition contains an ironic expression, in which the qualifying phrase guts the essential attribute of the purported synonym. One could just as easily define a single-story building to be "a skyscraper with just one floor." When a military force consists of individuals who primarily live civilian lives, but who have part-time military duties, that force is a militia. Retirees and reservists lack the essential attributes of regular forces and thus do not fall within the land and naval forces contemplated by the Constitution.

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391. *Larrabee*, 45 F.4th at 94.

392. Emond, *supra* note 21, at 34.

393. *Cf.* UCMJ, art. 2(a)(1), 10 U.S.C. § 802(a)(1) (2018) (providing for court-martial jurisdiction including for those awaiting discharge).

B. *Tradition or Liquidation*

Alternatively, a person might rely on long usage and custom to argue that the application of military law to retirees is settled. Constitutional liquidation is the idea that constitutional indeterminacies may be resolved through a course of deliberate practice that settles the constitutional question.[394] In the words of Justice Story, the resolution should receive "the deliberate assent of the nation," including those who formerly held the opposite opinion.[395] No such settlement has occurred in favor of full status-based jurisdiction over military-civilian hybrids.

1. *Early Military-Civilian Hybrids*

The status of regular retirees is anomalous with the treatment of the war volunteers, the military-civilian hybrid most known to the Framing generation in America. Even if volunteers were deemed part of the Army for purposes of deployment and use in offensive wars, Congress always treated them as equivalent to militiamen for purposes of military justice. Beginning with the early American Articles of War, volunteers, like militiamen, were subject to military law only when they mustered into actual service.[396] Volunteers, again like militiamen, also had the right not to have officers of the regular forces compose their courts-martial panel.[397] Similar rules for volunteers prevailed in Britain.[398]

The special treatment afforded the volunteers reflected that they too were not regular soldiers. In 1902, the Supreme Court faced whether the volunteers fell within the Articles of War provision providing that certain "troops, whether militia or others" shall have courts-martial "composed entirely of militia officers."[399] The Court held that the volunteers fell within this provision. The Court explained that "the provision in question recognized . . . the difference there was between the two bodies, the regulars and the militia or volunteers."[400] The provision protected both militia and volunteers because nonprofessional forces "lack actual experience which the regulars have," and consequently, "gives the regulars the feeling of superiority."[401]

The traditional jurisdictional differences between regular and nonprofessional soldiers have survived the adoption of the Uniform Code of Military Justice. Federal law imposes full-time military jurisdiction upon "[m]embers of a regular component of the armed forces."[402] But it imposes functional jurisdiction upon nonprofessional components.

394. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

395. 3 STORY, *supra* note 71, § 1187, at 75–76.

396. *See* Articles of War of 1806, ch. 20, art. 97, 2 Stat. 359, 371; UCMJ, art 2, 10 U.S.C. § 802; 1 WINTHROP, *supra* note 171, at 114.

397. McClaughry v. Deming, 186 U.S. 49, 56–57 (1902) (giving history).

398. WAR OFF., MANUAL OF MILITARY LAW 264–65 (1899).

399. *McClaughry*, 186 U.S. at 56–57 (quoting Articles of War of 1806, art. 97).

400. *Id.* at 57.

401. *Id.*

402. UCMJ, art. 2(a)(1), 10 U.S.C. § 802(a)(1) (2018).

Volunteers are subject to military jurisdiction "from the time of their muster or acceptance into the armed forces."[403] Reservists are subject to military jurisdiction only when on active duty or in training.[404] And state National Guardsmen called into actual service by the federal government are subject to military law "from the time when they are required to respond to the call."[405]

Given this, courts have not answered whether Congress constitutionally may extend federal military jurisdiction to active or inactive reservists for conduct that occurs in their civilian lives. In litigation, however, the federal government has not recognized any constitutional limitations upon the federal government's authority. When *Larrabee* initially petitioned the Supreme Court to review his case, the government said in a footnote that Congress's decision not to make "inactive reservists subject to the UCMJ when they are not serving on active duty or inactive-duty training . . . simply reflects Congress's evaluation of policy considerations specific to reserve service, not a constitutional limitation on Congress's Article I power."[406]

The government's argument betrays the confusion created by combining regular and nonprofessional forces under the same bureaucratic umbrella. All-encompassing status-based jurisdiction for members of the armed forces is the traditional rule of military jurisdiction only for *regular* forces—those whose principal or sole occupation is that of war. But inactive reservists are not regular forces; they are part-time forces. The UCMJ treats volunteers and reservists not as soldiers of a regular army, but as the de facto militiamen that they are. Thus, the UCMJ's separate jurisdictional rules for regular and reserve soldiers accord with deeply held Anglo-American constitutional norms; they are not mere policy choices. Congress has long treated most military-civilian hybrids as equivalent to militiamen for purposes of military justice.

2. *Retired Members of the Regular Components*

The broad military jurisdiction applied to regular retirees is anomalous. Although Congress has acted differently for retired members of the regular components, the actions of Congress in subjecting regular retirees to military law at all times should not be deemed an authoritative settlement of the constitutional question. To borrow from the framework of Madisonian liquidation, liquidation of a constitutional question generally requires three things: (1) constitutional deliberation of the question, (2) that results in a course of practice, and that (3) settles the

403. *Id.*

404. *Id.* § 802(a)(3). Jurisdiction also now extends to other incidental periods such as travel to and from training. *Id.* § 802(a)(3)(B).

405. *Id.* § 12405.

406. Brief for the United States in Opposition at 22 n.4, Larrabee v. United States, 45 F.4th 81 (D.C. Cir. 2022) (No. 18-306) (citations omitted).

constitutional issue in the public's mind.[407] None of these criteria is met here.

First, it does not appear that Congress has ever determined, after serious deliberations, that it has the constitutional power to subject military retirees to military law. When Congress created the first military retirement system in 1861, there is no evidence that Congress, faced with Civil War exigencies, even considered the constitutionality of its actions.[408] Nor did it receive any congressional debate over the ensuing decades as Congress expanded the system.[409]

Perhaps Congress gave the issue so little attention because military retiree jurisdiction was something of a jurisdictional backwater. The retired list was initially limited to 300 officers.[410] Even with the addition of retired enlisted army soldiers in 1885, the retired list contained only 1562 men.[411] The court-martialing of retired soldiers was likely exceedingly rare,[412] and consequently, "[f]or the next fifty-five years, although the jurisdiction remained on the books, few subjects seem to have concerned Congress less than the constitutional rights of retired regulars."[413] Moreover, in the early 1900s, the Navy determined that retired enlisted sailors were not subject to military law after their retirement.[414]

The propriety of court-martialing retired soldiers received some attention from the political branches between 1916 and 1931. In 1916, Rep. James Hay of Virginia, who was the outgoing Chairman of the House Committee on Military Affairs, attached an amendment to a bill appropriating money for the Army that stripped military jurisdiction over retired army officers.[415] Rep. Hay claimed to have been upset about a previous court-martial and believed that applying military law to retired personnel was "unnecessary and foolish."[416] But there were rumors that Hay's amendment was motivated by a dispute between two retired Major Generals, one of whom planned to write a book that would have presumably attacked the other general.[417]

Regardless of the source of the amendment, President Wilson responded by "veto[ing] the entire bill, including the appropriations" for the military.[418] In his veto message, President Wilson argued that because retired soldiers were still part of the military and could wear the uniform, they must remain "exemplars of discipline" and not "become

407. Baude, *supra* note 394, at 13–21.
408. Bishop, *supra* note 14, at 332–33.
409. *Id.*
410. *Supra* note 408.
411. Ives & Davidson, *supra* note 141, at 4.
412. For examples of early isolated cases, see Ives & Davidson, *supra* note 141, at 16–18.
413. Bishop, *supra* note 14, at 332 (footnote omitted).
414. Ives & Davidson, *supra* note 141, at 14.
415. Bishop, *supra* note 14, at 333.
416. *Army Bill Vetoed; May Cause a Fight*, N.Y. TIMES, Aug. 19, 1916, at 4.
417. *Id.*
418. Bishop, *supra* note 14, at 333 (footnote omitted).

a source of tendencies which would weaken the discipline of the active land forces."[419] Congress relented and repassed the bill without the amendment removing jurisdiction over retired soldiers.[420] Again, none of the congressional debate concerned whether Congress had constitutional authority to subject military retirees to the Articles of War. Despite the restoration of the provision, there were apparently no reported cases of court-martialing retired military personnel between 1916 and 1931.[421]

Then, in 1931, a retired Army major was convicted of conduct unbecoming an officer and a gentleman and dismissed from the service.[422] The retiree was alleged to have become drunk, had a prostitute in a hotel room, and battered her.[423] On appeal, the Board of Review affirmed the sentence, albeit only for the lesser charge of "conduct of a nature to bring discredit on the service."[424]

After the Board of Review, President Herbert Hoover reviewed the conviction and sentence. A cover letter from his Secretary of War raised strenuous objections. Calling the precedent "dangerous," the Secretary of War recommended that the sentence be disapproved because:

> It has been the immutable custom of the service that officers when retired, unless some extraordinary circumstances were involved linking them to the military establishment or involving them in conduct inimical to the welfare of the nation, would be subject only to the same police restrictions and jurisprudential processes as the ordinary civilian.[425]

President Hoover concurred with his Secretary of War and "disapproved the entire proceedings, including the sentence."[426] Professor Bishop commented in 1964 that "[s]ince then, the Army has never (or hardly ever) attempted to court-martial a retired officer or enlisted man, and neither has the Air Force."[427]

Although the jurisdiction largely lay fallow, Congress retained military jurisdiction over retirees when it passed the Uniform Code of Military Justice in 1950. The UCMJ provided that military law applied to "[r]etired members of a regular component of the armed forces who are entitled to pay" and to "[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve," who are in a de facto retirement status.[428] The

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419. *Id.* at 333–34 (quoting President Wilson's veto message, 53 Cong. Rec. 12844-45 (1916)); H.R.J. Res. 971, 972, 64th Cong. (1916).

420. Bishop, *supra* note 14, at 338.

421. Ives & Davidson, *supra* note 141, at 17–18.

422. *Id.* at 18 (citing United States v. Kearney, 3 B.R. 63 (1931)).

423. Bishop, *supra* note 14, at 338; Ives & Davidson, *supra* note 141, at 18.

424. Bishop, *supra* note 14, at 339.

425. *Id.* (quoting letter).

426. *Id.*

427. *Id.* at 339–40 (footnote omitted); *see also id.* at 360 ("[T]he Navy seems for some reason to have supposed that recall to active duty was a prerequisite to the military trial of a Fleet Reservist.").

428. UCMJ art. 2(a)(4), (6), 10 U.S.C. § 802(a)(4), (6) (2018).

UCMJ thus applied military law to all retirees, officers and enlisted, without regard to which branch they were enrolled. Again, the provision for retirees seems to have received no debate about its constitutionality. The House and Senate reports simply state that the provision "retains existing jurisdiction over retired personnel of a Regular component who are entitled to receive pay."[429]

Throughout our history, it appears that prosecutions of military retirees have remained rare. Although we lack data about the raw number of prosecutions, Brenner Fissell has reported that a search of Westlaw's databases has produced thirty appellate opinions involving retired military personnel.[430] Over a seventy-six-year span, from 1896 through 1972, there are six reported decisions involving military retirees.[431] There are fifteen such cases listed in the twenty-three years since 2000. Of the collected appellate opinions since 2000, the vast majority involve sex offenses.

This data, unfortunately, is not a comprehensive listing of all military retiree prosecutions. But it nevertheless lends some support that prosecutions of military retirees for non-military conduct have remained rare and never resulted in a settled course of practice. The recent uptick in such cases, primarily involving sexual assault, has been an aberration from the usual method of proceeding through the civilian justice system. Even today, Army policy prohibits court-martialing retired soldiers "unless extraordinary circumstances are present."[432]

Thus, the creation and retention of military retiree jurisdiction is not the product of history, tradition, precedent, or considered legislative judgment. As Bishop noted in 1964, "[t]he constitutionality of such jurisdiction has, at any rate, whatever solidly derives from long congressional acquiescence."[433] But acquiescence is a long way from either correctness as an originalist matter or subsequent liquidation. Congress's decision to subject military retirees to full status-based military jurisdiction was never the product of any thoughtful constitutional consideration by Congress. Nor has it ever resulted in any settled course of practice. The exercise of military jurisdiction over regular retirees for non-military conduct remains rare and exceptional.

CONCLUSION

Military-civilian hybrids are a legal anomaly and challenge the traditional constitutional limits on military jurisdiction. Congress statutorily deems military-civilian hybrids to be part of the Army and Navy to avoid

429. Establishing a Uniform Code of Military Justice, S. REP. NO. 81-486, at 7 (1949); Uniform Code of Military Justice, H. REP. NO. 81-491, at 10 (1949).

430. Brenner Fissell, *Retiree Prosecution*, NAT'L INST. MIL. JUST. (Jan. 5, 2021), http://www.caaflog.org/home/retiree-prosecution [https://perma.cc/4R8B-CWZD] (reporting results conducted by Lt. Chris Clifton, who searched Westlaw's database).

431. *Id.*

432. U.S. ARMY, *supra* note 318, at 11.

433. Bishop, *supra* note 14, at 332.

the structural limitations on federal power over part-time forces. In substance, however, they are a species of militia. These military components are comprised of individuals who live primarily as civilians but who are subject to occasional or emergency military service.

For the volunteers and members of the reserve components, Congress has long recognized that, for military justice purposes, these soldiers are de facto militiamen. Accordingly, Congress has limited military jurisdiction to when these part-time soldiers were performing military service. At other times, they lead civilian lives and have not been amenable to military law.

Not so for regular retirees. Congress has imposed the same full status-based jurisdiction over them that Congress extends over the active regular forces. Military jurisdiction over regular retirees thus stands as an outlier among military-civilian hybrids. For the reasons identified, this jurisdiction threatens civil liberty, creates separation of powers problems, widens the civil-military gap, and damages federalism. Congress's power to make military-civilian hybrids amenable to military law is a constitutional problem, not merely a policy problem.

Congress and the courts should recognize that the Fifth Amendment's Exceptions Clause was designed to prevent Congress from making nonprofessional citizen-soldiers amenable to military law, except when they were performing military service. Accordingly, Congress should not expand military jurisdiction over the reserve components any further than it has. And regular retirees should be subject to military law only when they are recalled into active service. In all other cases, it is time to retire military jurisdiction over regular retirees.