

COURT-MARTIAL JURISDICTION AND THE CONSTITUTION: AN HISTORICAL AND TEXTUAL ANALYSIS

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INTRODUCTION

Warfare has been an element of American life since its colonization.¹ From its inception as a sovereign nation, the United States has been dependent upon a mix of military professionals and citizen-

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1. See generally, A. MILLETT & P. MASLOWSKI, FOR THE COMMON DEFENSE (1984); T.H. WILLIAMS, THE HISTORY OF AMERICAN WARS (1981).

soldiers (or militia) to provide for the common defense.² There is, however, an engrained hostility toward things military, an attitude which largely stems from a fear of standing armies which emerged in seventeenth century England.³ This hostility is no more apparent than when the subject of military law (or martial law as it was called in the seventeenth and eighteenth centuries) is discussed. As Blackstone wrote:

When the nation was engaged in war, more veteran troops and more regular discipline may perhaps be necessary, than can be expected from a mere militia. And therefore at such times particular provisions have been usually made for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.⁴

This hostility notwithstanding, Article I of the U.S. Constitution grants to Congress the power to raise and support armies,⁵ to provide and maintain a navy,⁶ to make rules for the government and regulation of the land and naval forces,⁷ to provide for the calling forth of the militia,⁸ and to provide for organizing, arming and disciplining the militia.⁹ Pursuant to this power, Congress enacted the Uniform Code of Military Justice¹⁰ which authorizes the convening of courts-

2. A. MILLETT & P. MASLOWSKI, *supra* note 1, at xii.

3. See J. REID, IN DEFIANCE OF THE LAW (1981).

4. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (1765).

5. U.S. CONST. art. I, § 8, cl. 12.

6. *Id.* cl. 13.

7. *Id.* cl. 14.

8. *Id.* cl. 15.

9. *Id.* cl. 16.

10. 10 U.S.C. §§ 801-940. A court-martial is a tribunal convened by the express order of the convening authority on a case-by-case basis. There are three types of courts-martial: general, special and summary. A general court-martial consists of not less than five members who may adjudge any punishment permitted by law. A special court-martial consists of not less than three members who may adjudge limited sentences to confinement, forfeiture of pay, reduction in rank, and, if the court-martial is convened by a general court-martial convening authority, a bad conduct discharge. A summary court-martial consists of one officer who may adjudge minor punishment for noncapital offenses. General courts-martial are convened by the commanding of-

martial to try servicemen for breaches of military duty and virtually all crimes punishable at common law. But, in *O'Callahan v. Parker*,¹¹ the United States Supreme Court substantially curtailed the subject matter jurisdiction of courts-martial. It held that, before a court-martial could try an offense, the offense had to be "service connected."¹² In so doing, the Court upset decades of decisional law which had held that the military or naval status of the offender alone was sufficient to give a court-martial jurisdiction over the offense.¹³

Writing for the Court in *O'Callahan*, Justice Douglas reasoned that, inasmuch as the "[a]buses of the court-martial power were an important grievance of the parliamentary forces in the English constitutional crises of the 17th century,"¹⁴ Parliament authorized courts-martial to exercise jurisdiction only in cases of mutiny, sedition and desertion; and, in all other cases, "military personnel were to be subject to the 'Ordinary Processe of Law.'"¹⁵ Although recognizing the military's need for a system of specialized military courts,¹⁶ Justice Douglas reasoned that "the crime . . . must be service connected, lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers."¹⁷ Congress' plenary powers under Article I, therefore, were "to be exercised in harmony with express guarantees of the Bill of Rights."¹⁸

This term, in *Solorio v. United States*,¹⁹ the Supreme Court had

ficers of major commands. Special and summary courts-martial are convened by subordinate commanders. The court members determine guilt or innocence and, in the event of conviction, the appropriate sentence. In general and special courts-martial, a military judge is appointed who controls the proceedings, rules on evidentiary matters, and instructs the court members. In addition, the government and the accused are each represented by counsel in general and special courts-martial. All convictions are reviewed by the convening authority who has the power to approve the findings and sentence or to disapprove findings of guilt and to impose a lesser sentence or no sentence at all. All convictions resulting in sentences to death, dismissal, punitive discharge, or confinement in excess of one year are subject to automatic appeal, unless waived, to one of the Courts of Military Review. An accused may petition the Court of Military Appeals and then the Supreme Court for further review. See *infra* note 31.

11. 395 U.S. 258 (1969).

12. *Id.* at 273.

13. See, e.g., *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Coleman v. Tennessee*, 97 U.S. 509, 513-514 (1879).

14. 395 U.S. at 268.

15. *Id.* at 268-269.

16. *Id.* at 265.

17. *Id.* at 272-273.

18. *Id.* at 273.

19. 107 S. Ct. 2924 (1987).

occasion to reexamine the doctrine of *O'Callahan*. Finding the "*O'Callahan* Court's representation of English history . . . less than accurate,"²⁰ the Court concluded that "the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of [Article I] which *O'Callahan* imported into it."²¹ The plain language of Article I, the Court concluded, should be conclusive; and deference should be given to Congress' exercise of that authority.²² The Court accordingly overruled *O'Callahan* and held that military status alone was sufficient to vest a court-martial with jurisdiction over the offender, irrespective of any service connection of the offense.²³

The dissent disputed the Court's treatment of the *O'Callahan* analysis of court-martial jurisdiction. It argued that *O'Callahan* was premised not on a construction of Article I, but on the limitation placed thereon by the Fifth Amendment.²⁴ Further, "[t]he Fifth Amendment's exception covers only 'cases arising in the land and naval forces' . . . It makes no reference to the *status* of the individual committing the crime."²⁵ Because the rights afforded "by the Fifth and Sixth Amendments are central to our constitutional scheme of justice,"²⁶ the dissent argued that "the exception in the Fifth Amendment for cases arising in the armed forces must be strictly construed."²⁷ The dissent found that the historical evidence demonstrated that "[t]he reach of military law in Britain at the time of the Revolution . . . permitted courts-martial only for offenses committed by members of the armed forces that had some connection with their military service."²⁸ The Fifth Amendment, the dissent concluded, must be construed in accordance with the practice that prevailed at the time of its adoption.²⁹

At first blush, the decision in *Solorio* would appear to be an anachronism. The constitutional protections afforded to service members have been expanding.³⁰ The trend is toward narrowing the

20. *Id.* at 2928.

21. *Id.* at 2930.

22. *Id.* at 2931.

23. *Id.* at 2933.

24. *Id.* at 2934 (Marshall, J., dissenting).

25. *Id.* (Marhsall, J., dissenting).

26. *Id.* at 2935 (Marshall, J., dissenting).

27. *Id.* (Marshall, J., dissenting).

28. *Id.* at 2937 (Marshall, J., dissenting).

29. *Id.* at 2936-2939 (Marshall, J., dissenting).

30. Compare Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972) with Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958) and Wiener, *Courts-Martial And The Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958).

jurisdiction of federal courts created outside of Article III.³¹ The Supreme Court itself has recently been given direct appellate review of courts-martial cases,³² thereby signalling a greater role of civilian courts in the military justice system. Indeed, there are recommendations that the Court of Military Appeals, the principal appellate court charged with supervising the military justice system, be reconstituted as an Article III court.³³

The purpose of this article is to establish that, rather than being an anachronism, the decision in *Solorio* is consistent with fundamental constitutional principles. To that end, the remainder of this article will be divided into two parts. The first part will, in light of English and American history, trace the development of legislative supremacy over the raising and governing of military and naval forces.³⁴ The second part will establish that courts-martial are, and were intended to be, outside the federal judiciary created by Article III and the procedural guarantees pertaining to the federal courts.³⁵ As a consequence, it is concluded that Congress has plenary power over the manner in which servicemembers are disciplined; and, the extent to which courts-martial may try servicemembers for offenses unrelated to military duties is a matter of legislative policy.³⁶

THE CONSTITUTIONAL HISTORY OF THE GOVERNMENT OF THE LAND AND NAVAL FORCES

A. THE ENGLISH CONSTITUTIONAL EXPERIENCE

1. *The Threshold of the Seventeenth Century*

a. *The State of the Army and Navy*

The modern standing army had its beginnings in 1445 when Charles VII of France established a system of permanent "compagnies d'ordonnance."³⁷ It was not until nearly a century later, however, that the English took the initial steps toward a standing

31. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (bankruptcy courts); *United States v. Raddatz*, 447 U.S. 667 (1980) (federal magistrates). See generally, Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, [1983] DUKE L.J. 197; Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983).

32. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405-1406 (codified at 28 U.S.C. § 1259).

33. See Mueller & Sterritt, *Article III Status for the U.S. Court of Military Appeals—The Evolution Continues*, 34 FED. BAR NEWS & J. 132 (1987).

34. See *infra* notes 36 through 507 and accompanying text.

35. See *infra* notes 508 through 541 and accompanying text.

36. See *infra* notes 433 through 507 and accompanying text.

37. F. GIES, *THE KNIGHT IN HISTORY* 196 (1984); R. DUPUY & T. DUPUY, *THE ENCYCLOPEDIA OF MILITARY HISTORY* 409 (2d rev. ed. 1986).

army of their own.³⁸ By the reign of Henry VII, the feudal levy had been virtually extinguished.³⁹ In the last year of Philip and Mary, the militia system, which had been based upon the Statute of Westminster of 1285, was reformed and the military obligations of their subjects were redefined.⁴⁰ From the pool of reservists created by the militia, expeditionary forces were levied and assembled for foreign service.⁴¹ Yet, by the end of Elizabeth's reign, the English had a military system "incapable of striking an effective blow in a continental war, and a militia for home defence incapable of resisting a small number of trained soldiers."⁴²

The navy was in a somewhat better position. Henry VIII stimulated the development of English warships which incorporated the use of guns.⁴³ These warships were used with great effect against the Spanish in 1588.⁴⁴ But, at the end of Elizabeth's reign, the navy did not exist as a separate entity; nor was there yet a fully developed system of tactics and strategy distinctive to naval warfare.⁴⁵ Indeed, owing to the great cost incident to maintaining a navy, the crown relied heavily upon privateers (and even pirates) to further its foreign policy goals.⁴⁶

At the beginning of the seventeenth century, then, the English had an army and navy that were simply not up to the tasks of de-

38. C. CRUICKSHANK, *ELIZABETH'S ARMY* 1 (2d ed. 1966).

39. C. BARNETT, *BRITAIN AND HER ARMY* 10 (1970). Under the *Summa de legibus* of William the Conqueror, those persons who held fiefs or lived in towns delegated for military service were bound to provide military service for forty days upon the call of the prince. After the completion of forty days of service, the prince could demand further service, but at his expense. *Summa de legibus*, reprinted in 4 UNIVERSITY OF CHI. READINGS IN W. CIV. 68, 69-70 (J. Kirshner & K. Morrison 1986). See generally Tabuteau, *Definitions of Feudal Military Obligations in Eleventh-Century Normandy*, reprinted in ON THE LAWS AND CUSTOMS OF ENGLAND 18-59 (1981).

40. 4 & 5 Phil. & M., ch. 3 (1557-58). See generally, C. CRUICKSHANK, *supra* note 38, at 17-20. The Act, among other things, called for citizens to provide arms for the militia in quantities proportionate to their incomes, and failure to comply resulted in substantial penalties. *Id.*

41. BARNETT, *supra* note 39, at 37. Theoretically, the militia could not legally be called upon for foreign service; and, indeed, it was often asserted that the militia units could not be called upon to serve outside their respective counties. In practice, however, these limitations were often ignored. C. CRUICKSHANK, *supra* note 37, at 5-13.

42. C. FIRTH, *CROMWELL'S ARMY* 11 (3d ed. 1921).

43. R. DUPUY & T. DUPUY, *supra* note 37, at 463.

44. D. HOWARTH, *SOVEREIGN OF THE SEAS* 142-153 (1974).

45. *Id.* at 190. It was not until about 1670 that the navy was first called the Royal Navy. While rudimentary flag signals had been devised, it was not until the middle of the seventeenth century that Robert Blake and his contemporaries produced a set of rules for naval warfare, the so-called Fighting Instructions. *Id.* See J. STOKESBURY, *NAVY AND EMPIRE* 60 (1983).

46. See generally, R. RITCHIE, *CAPTAIN KIDD AND THE WAR AGAINST THE PIRATES* 11-20 (1986) (discussing the great upsurge of piracy throughout the empires by governments, merchants, and entrepreneurs.).

fending the nation and of fulfilling imperial aspirations. A wholesale reformation of these institutions would have to be effected if England were to possess the power that a modern state must have. As a part of this reformation, fundamental changes needed to be made with respect to the raising, organization, maintenance, and discipline of the armed forces.

b. The State of Military and Naval Discipline

As is evident from the foregoing, armies and navies were raised on an *ad hoc* basis. Each time a force was raised, the crown or the commander-in-chief promulgated a disciplinary code to govern it. The earliest complete code is that of Richard II issued in 1385 during a phase of the Hundred Years War.⁴⁷ Later codes were based on this model, albeit more complex. By the reign of Elizabeth, these codes, such as that of the Earl of Leicester,⁴⁸ were comprehensive in that they dealt not only with matters of discipline, but also such concerns as divine worship,⁴⁹ gambling,⁵⁰ habitual drunkenness,⁵¹ rape⁵² and arson.⁵³

These codes applied to every person in the crown's pay, whether in the field or in garrison.⁵⁴ At the beginning of the campaign, the code was read to the captains who, in turn, read it to their companies.⁵⁵ Thereafter, the men swore allegiance to the crown and their commander and swore obedience "to keep and fulfill all such lawful ordinances as his Exelencie hath or shall set forth and establish for the better ordering of this Army as much as concerns us, so long as we shall serve under him. . ." ⁵⁶

Punishment varied depending upon the gravity of the offense. The lesser offenses were punishable by loss of wages, imprisonment, whipping, discharge or banishment.⁵⁷ The most serious offenses were punishable by death or, in some cases, death by torture.⁵⁸ In some

47. 2 W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 1412-15 (2d ed. 1896).

48. LEICESTER'S DISCIPLINARY CODE, reprinted in C. CRUICKSHANK, *supra* note 38, at 296-303.

49. C. CRUICKSHANK, *supra* note 38, at 297-98.

50. *Id.* at 298.

51. *Id.*

52. *Id.*

53. *Id.* at 301.

54. *Id.* at 297.

55. *Id.* at 164.

56. *Id.* at 293. It appears that even if a man had not taken the oath, he was deemed to be subject to the regulations. *Id.* at 162-63.

57. *Id.* at 300. For example, under Leicester's Code failure to keep one's armor and weapon clean and serviceable was punishable by discharge. *Id.*

58. *Id.* at 298-99. While mutiny was punishable by death under Leicester's Code, concealment of treason or any dangerous conspiracy or practice which may imperil the

cases, no punishment was prescribed but was left at the discretion of the designated person.⁵⁹ Indeed, the Lieutenant General was authorized to punish, as he saw fit, offenses and acts tending to disorder that were not otherwise set forth in the Code.⁶⁰

The task of maintaining discipline fell principally upon the high marshal and the provost marshal.⁶¹ Soldiers on active service were generally immune from civil authority.⁶² A notable exception, however, obtained with respect to desertion. As early as the reign of Henry VI, the justices of the peace were authorized to arrest and try deserters for felony without benefit of clergy.⁶³ The immunity of soldiers from civil authority (other than in this limited circumstance) was the source of great controversy.⁶⁴

Apart from the impermanent disciplinary regimes as prevailed at the beginning of the seventeenth century, there remained the theoretical existence of the Court of Constable (or Court of Chivalry). This court, which formed a part of the curia regis,⁶⁵ had jurisdiction over all contracts and other matters touching deeds of arms and war out of the realm, as well as matters touching war within the realm, which cannot be discussed by the common law.⁶⁶ It is a matter of controversy as to whether the Court of Constable ever exercised jurisdiction over matters of military discipline.⁶⁷ It is clear, however, that, in times of war or rebellion, this court exercised jurisdiction over criminal matters involving the forces of the king and of his enemies, including treason.⁶⁸

crown, the general, or the army, was punishable by death "with torments." *Id.* There was little consistency as to what offense deserved mere death or death with torture. *Id.* at 163.

59. *Id.* at 299. For brawling, Leicester prescribed the loss of life or limb, at the discretion of the general or marshal. *Id.*

60. *Id.* at 303.

61. *Id.* at 164. See Boynton, *The Tudor Provost-Marshal*, 77 ENG. HIST. REV. 437 (1962) (discussing the background of the development of the office of provost marshal).

62. The general theory was that the army was the property of the king and that it was answerable only to the prerogative law and not to the common law. J. CHILDS, *THE ARMY OF CHARLES II* 78 (1976). By contrast, the navy has never been considered a prerogative force inasmuch as, until Edward VII, naval commissions were issued by the admiralty and not by the king. C. BARNETT, *supra* note 39, at 133.

63. See 18 Hen. 6, ch. 19 (1439); 7 Hen. 7, ch. 1 (1491); 3 Hen. 8, ch. 5 (1511-12); 2 & 3 Edw. 6, ch. 2, § 3 (1548); 4 & 5 Phil. & M., ch. 3, § 8 (1557-58); 5 Eliz., ch. 5, § 18 (1562-63) (extended to mariners and gunners). See also, *The Case of Soldiers*, 77 Eng. Rep. 293 (K.B. 1601); *King v. Beal*, 87 Eng. Rep. 80 (K.B. 1687), also reported *sub nom. King v. Dale*, 89 Eng. Rep. 1071 (K.B. 1687).

64. See *infra* notes 81-105 and accompanying text.

65. MINISTRY OF DEFENCE, *MANUAL OF MILITARY LAW* (reprint 1939).

66. 8 Rich. 2, ch. 5 (1384); 13 Rich. 2, ch. 2 (1389-90); 1 Hen. 4, ch. 14 (1399).

67. See G. SQUIBB, *THE HIGH COURT OF CHIVALRY* 1-28 (1959).

68. Keen, *Treason Trials under the Law of Arms* in 12 TRANS. ROYAL HIST. SOC'Y 85 (1962).

Whatever the proper jurisdiction of the court, it had largely ceased to function by the close of the Fifteenth Century.⁶⁹ Thereafter, the court was convened on rare occasion to decide matters relating to arms and heralds.⁷⁰

2. *The Early Stuarts*

In 1603, Elizabeth died and was succeeded by James I. The meeting of Parliament in the following year set the theme for the history of the entire century. The propertied classes were represented exclusively by Parliament;⁷¹ and the government was increasingly dependent upon the taxes voted by Parliament.⁷² Exacerbated by James' view regarding the royal prerogative, a mutual distrust developed between king and Parliament which led to Parliament's refusal to vote the subsidies sought by the King.⁷³ Attempts by James to exploit extra-parliamentary methods of taxation made Parliament more intractable.⁷⁴ Thus, while the government went into deeper debt, Parliament became increasingly vocal in its grievances.⁷⁵

Shortly after acceding to the throne, James I concluded peace with Spain, thereby ending a war which endured nineteen years.⁷⁶ The military structure that was expanded and reformed under Elizabeth was dismantled.⁷⁷ Even the reforms regarding the militia were repealed.⁷⁸ The navy declined more from fraud and neglect than from purposeful design.⁷⁹ England was consequently bereft of any military power. Even with the outbreak of the Thirty Years War in

69. G. SQUIBB, *supra* note 67, at 30-31. Squibb disputes claims that the court's inactivity was attributable to the attainder and execution in 1521 of Edward, Duke of Buckingham, the then High Constable. *Id.*

70. Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 LAW Q. REV. 478, 481 (1969). Indeed, the case of *Manchester Corporation v. Manchester Palace of Varieties Ltd.*, [1955] P. 133, was the only case for the court to hear in over two hundred years.

71. C. HILL, *THE CENTURY OF REVOLUTION* 43 (1961).

72. *Id.* at 46-47.

73. C. RUSSELL, *THE CRISIS OF PARLIAMENTS* 271-77 (1971).

74. *See generally*, J. KENYON, *THE STUART CONSTITUTION* 53-62 (1966).

75. *Id. see generally* C. RUSSELL, *supra* note 73, at 256-99. During James' reign, three Parliaments were held: 1604-11, 1614 (the so-called Addled Parliament) and 1621-22. The relations between king and Parliament became increasingly acrimonious. Apart from the issues regarding finances and the extent of the king's sovereignty, a primary source of conflict was the question of religious minorities. When James succeeded Elizabeth, he resolved to make no fundamental departure from the Elizabethan settlement that the monarchy and the Anglican church were inseparable. This obviously frustrated the members of religious minorities who aspired to political and economic power.

76. C. HILL, *supra* note 71, at 9.

77. C. BARNETT, *supra* note 39, at 59.

78. *Id.*

79. D. HOWARTH, *supra* note 44, at 180-83.

1618, neither king nor Parliament were prepared to commit the funds needed to raise a professional force necessary to have any effect upon events in Europe.⁸⁰ Instead, men were hastily raised to meet particular emergencies who possessed neither adequate training organization nor logistical support to be called an army.⁸¹ This state of affairs became worse when Charles I ascended to the throne in 1625.

When Charles ascended the throne, he was saddled with an enormous war debt; but Parliament was unwilling to grant him the necessary subsidies to finance this debt.⁸² To compound his problems, Charles decided in 1625 to raid Cadiz, the first of several military fiascoes during his reign.⁸³ Some of the troops for this expedition were drawn from the mercenaries serving in the Low Countries,⁸⁴ but most were raw recruits collected by press gangs.⁸⁵ These troops (which numbered about 10,000) poured into Plymouth for transportation to the continent.⁸⁶ With nonexistent organization and logistical support, these troops were little more than a rabble billeted amongst the unwilling civilians of the southern counties.⁸⁷ For the civilians forced to feed and house these troops, this was little different from a tax inasmuch as the likelihood of reimbursement was remote.⁸⁸

This pattern was repeated in later expeditions in 1627 against Rhe and La Rochelle.⁸⁹ Through no fault of their own, the soldiers were unpaid and starving.⁹⁰ But, their lack of discipline and outrageous behavior toward the civilians alienated any sympathy.⁹¹ In the case of the Isle of Wight, for example, a Scottish regiment was placed there so it could not run away.⁹² In addition to having to provide food and lodging for these soldiers, the inhabitants came to suffer

80. C. BARNETT, *supra* note 39, at 60-63. Instead, the king sent merely a small contingent of volunteers. *Id.* at 61. During this time, however, Englishmen served as mercenaries under the Dutch; and, in so doing, a nucleus of English soldiers skilled in the art of modern warfare was formed. See I J. FORTESCUE, *A HISTORY OF THE BRITISH ARMY 168-72* (1910).

81. C. BARNETT, *supra* note 39, at 62.

82. C. RUSSELL, *supra* note 73 at 300.

83. J. FORTESCUE, *supra* note 80, at 191-93.

84. See *supra* note 80.

85. J. FORTESCUE, *supra* note 80, at 191-93.

86. *Id.*

87. See generally Boynton, *Billeting: The Example of the Isle of Wight*, 74 ENG. HIST. REV. 23, 23 (1959) (recounting the history of billeting on the Isle of Wight and its subsequent prohibition).

88. *Id.*

89. *Id.*

90. Boynton, *Martial Law and the Petition of Right*, 79 ENG. HIST. REV. 255, 257 (1964).

91. *Id.*

92. Boynton, 74 ENG. HIST. REV. at 26.

“murders, rapes, robberies, burglaries, getting of bastards and almost the undoing of the whole Island—they became fearful to our countrymen, insomuch as none dared to apprehend the malefactor.”⁹³

Attempts by civil authorities to prosecute disorderly soldiers were frustrated by the lack of cooperation, if not actual obstruction, by the soldiers’ officers.⁹⁴ To remedy this situation, the Privy Council appointed commissioners for martial law with powers to employ summary justice and public execution following trial by martial law,⁹⁵ which powers extended to soldiers and sailors alike.⁹⁶ Doubts as to the legality of these commissions were assuaged by coupling commissions of oyer and terminer with those of martial law.⁹⁷

Despite the fact that the commissions for martial law were issued in response to popular demands, the Parliament of 1628 seized upon these commissions as a disparagement of the common law.⁹⁸ In the House of Commons, J. Selden argued that English history dictated that martial law could only be executed through the Court of Constable or when the army was in the field against rebels and enemies.⁹⁹

We have a new law, the law of State . . . can any man tell me what Martiall law is? Only it hath reference to Instructions by the Councill and it was never knowne in England that

93. *Id.* (quoting A ROYALIST’S NOTEBOOK 146 (F. Bamford ed. —)).

94. *Id.* at 32. It was not until *The Case of Captain C.*, 86 Eng. Rep. 167 (K.B. 1673), that it was held that soldiers were subject to the king’s writ. In that case, a soldier had been arrested for debt. While being taken to Ludgate prison, others in the soldier’s regiment, under the command of his captain and sergeant, assaulted the bailiffs and freed their prisoner. When brought before the court, the captain of these soldiers contended that an agreement existed which exempted soldiers from civil arrest without leave of their officer. Lord Chief Justice Hale wrote:

You are the King’s servants, and intended for his defence against his enemies, and to preserve the peace of the Kingdom; not to exempt yourself from the authority of the laws. And indeed it were a vain thing to talk of Courts and laws, if military men shall thus give the law, and controul legal proceedings; and for that agreement you speak of, I know nothing of it; and if there were any such thing, it could be nothing but a civility.

Captain C., 86 Eng. Rep. at 168.

95. Boynton, 79 ENG. HIST. REV. at 258. See 1 C. CLODE, THE MILITARY FORCES OF THE CROWN, THEIR ADMINISTRATION AND GOVERNMENT 422-23 (1869) (presenting a copy of the actual commissions).

96. Boynton, 79 ENG. HIST. REV. at 264. As in the case of the army, naval commanders were generally authorized to convene courts-martial and to try sailors for crimes at sea. MINISTRY OF DEFENCE, MANUAL OF NAVAL LAW *xiv-xv* (1981).

97. Boynton, 79 ENG. HIST. REV. at 265-66.

98. See generally, S. WHITE, SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH” 1621-1628, 213-74 (1979).

99. Boynton, 79 ENG. HIST. REV. at 276. Selden’s position, of course, was quite wrong in that, as recently as in the Tudor era, the provost marshal executed broad powers against soldiers and civilians alike. See Boynton, 77 ENG. HIST. REV. 437 *passim*.

any law was made but by custome or act of Parliament.¹⁰⁰

Together with complaints concerning billeting, forced loans to finance the costs of war, and other matters, Parliament presented to the King a Petition of Right which prayed that the commissions of martial law be revoked and annulled.¹⁰¹ Justifying its prayer, the Petition of Right stated:

And whereas alsoe by authoritie of Parliament in the five and twentieth yeare of the Raigne of King Edward the third it is declared and enacted that no man should be forejudged of life and limbe against the forme of the Great Charter and the Lawe of the Land, And by the said Great Charter, and other the Lawes and Statutes of this your Realme no man ought to be adjudged to death but by the Lawes established in this your Realme, either by the customes of the same Realme or by Acts of Parliament. And whereas no offendor of what kind soever is exempted from the precedings to be used and punishments to be inflicted by the Lawes and Statutes of this your Realme, Nevertheless of late [tyme] divers Comissions under your Majesties great Seale have issued forth, by which certaine persons have been assigned and appointed Commissioners with power and authoritie to proceed within the land according to the Justice of Martiall Lawe against such Souldiers or Marriners or other dissolute persons joyning with them as should committ any murther robbery felony mutiny or other outrage or misdemeanor whatsoever, and by such sumary course and order as is agreeable to Martiall Lawe and as is used in Armies in tyme of Warr to proceed to the tryall and condemncion of such offenders, and then to cause to be executed and putt to death according to the Lawe Martiall.

By pretext whereof some of your Majesties Subjects have been by some of the said Comissioners put to death, when and where, if by the Lawes and Statutes of the land they had deserved death, by the same Lawes and Statutes al-
soe they might and by no other ought to have byn judged and executed.

And also sundrie grievous offenders by colour thereof clayming an exempcion have escaped the punishments due to them by the Lawes and Statutes of this your Realme, by reason that divers of your Officers and ministers of Justice have unjustlie refused or forborne to proceed against such Offendors according to the same Lawes and Statutes uppon pretence that the said offenders were punishable onelie by

100. Boynton, 79 ENG. HIST. REV. at 276 (quoting a contemporary manuscript of Selden's speeches).

101. 3 Car. 1, c. 1, § 8 (1627).

Martiall law and by authoritie of such Comissions as afore-said. Which Comissions and all other of like nature are wholly and directlie contrary to the said Lawes and Statutes of this your Realme.¹⁰²

The constitutional position taken by Parliament in the Petition of Right is questionable. The historical record is too meager to support it; and, if anything, the record tended to refute it.¹⁰³ In any event, the number of persons executed appear to have been few, none of which were civilians.¹⁰⁴ Moreover, circumstances warranted that emergency powers of a temporary nature be imposed if order were to be restored. As one historian has observed, "Altogether it is not surprising that the privy councillors made a good showing in answering the charges levelled against the government, and when the Commons declared martial law to be illegal there is reason to ask whether their declaration did not conceal more than met the eye."¹⁰⁵ But, this was an era when anything which smacked of the royal prerogative was suspect, especially anything which tended to invade the jurisdiction of the common law.¹⁰⁶ It is not surprising, then, that, inasmuch as the commissions for martial law were issued at the discretion of the king and his councillors, they were subject to attack.

In order to obtain needed subsidies, Charles agreed to the Petition of Right.¹⁰⁷ He continued, however, to use extra-parliamentary means of obtaining revenue.¹⁰⁸ When Parliament attempted to intervene in 1629, Charles dissolved Parliament.¹⁰⁹ It would not be called again until 1640. During this period of rule without Parliament, Charles successfully employed new devices to raise revenues, the most infamous being the imposition of "Ship Money" to finance the navy.¹¹⁰

When Charles unilaterally attempted to impose a liturgy upon the Scottish church, the Scots rebelled.¹¹¹ Owing to lack of organiza-

102. *Id.* § 7.

103. Boynton, 79 ENG. HIST. REV. at 277-78; see Boynton, 77 ENG. HIST. REV. at 437.

104. Boynton, 79 ENG. HIST. REV. at 277.

105. *Id.* at 278 (footnotes omitted).

106. See C. HILL, *supra* note 71, at 60-68.

107. C. RUSSELL, *supra* note 73, at 307.

108. C. HILL, *supra* note 71, at 53-54.

109. *Id.*

110. C. RUSSELL, *supra* note 73, at 317-322. Under the guise of precedent which permitted the King to conscript ships in times of emergency, Charles financed his navy by declaring an emergency every year from 1634 to 1640 and conscripting ships. *Id.* at 320-322. The King's position was upheld in *Rex. v. Hampden* (Exch. Chamber 1637-38), reprinted in J. KENYON, *supra* note 74, at 109-116. Owing to a massive campaign of tax refusal, however, by 1640 only a third of Ship Money was coming to the Treasurer of the Navy. C. RUSSELL, *supra* note 73, at 322.

111. See generally, 5 D. HUME, THE HISTORY OF ENGLAND 249-269 (1778).

tion and of funds, Charles was unable to field an effective force.¹¹² As David Hume observed:

[S]everal mutinies had arisen among the English troops, when marching to join the army; and some officers had been murdered, merely on suspicion of their being papists. The petition of right had abolished all martial law; and by an inconvenience, which naturally attended the plan, as yet new and unformed, of regular and rigid liberty, it was found absolutely impossible for the generals to govern the army, by all the authority, which the king could legally confer upon them. The lawyers had declared, that martial law could not be exercised, except in the very presence of an enemy; and because it had been found necessary to execute a mutineer, the generals thought it advisable, for their own safety, to apply for a pardon from the crown. This weakness, however, was carefully concealed from the army; and Lord Conway said, that, if any lawyer were so imprudent as to discover the secret to the soldiers, it would be necessary instantly to refute him, and to hang the lawyer himself, by sentence of a court-martial.¹¹³

To pay the debts incurred by this ill-starred military adventure, Charles called Parliament (the so-called Short Parliament) to vote subsidies.¹¹⁴ Parliament voted no subsidies but instead expressed its discontent.¹¹⁵ Charles dissolved the Short Parliament.¹¹⁶ When efforts to finance the government through extra-parliamentary measures failed, Charles recalled Parliament in November, 1640 (the so-called Long Parliament). This Parliament promptly impeached several of Charles' most unpopular ministers, forbade the King from dissolving Parliament without its consent, outlawed various extra-parliamentary taxes including Ship Money, and abolished several prerogative courts such as the Court of Star Chamber.¹¹⁷ In November of 1641, a rebellion took place in Ireland;¹¹⁸ but Parliament opposed entrusting a royal nominee to command an army against the Irish.¹¹⁹ Parliament issued the Grand Remonstrance indicting royal policy.¹²⁰ Events leading to the Civil Wars were now in motion.¹²¹

112. 1 J. FORTESCUE, *supra* note 80, at 194-198.

113. 5 D. HUME, *supra* note 111, at 281-82. For an extract of a letter from Lord Conway concerning the illegality of executing men under martial law, *See* 1 C. CLODE, *supra* note 95, at 440-441. *See id.* at 429-440 (setting out the articles of war promulgated for this campaign).

114. *See* PROCEEDINGS OF THE SHORT PARLIAMENT OF 1640 7-9 (E. Cope ed. 1977).

115. *Id.*

116. *Id.*

117. C. HILL, *supra* note 71, at 111.

118. *Id.*

119. *Id.*

120. *Id.* at 112.

3. *The Civil Wars and the Interregnum*

In 1642, neither king nor Parliament had an army.¹²² To raise his army, the king issued the traditional commissions of array to his Lords-Lieutenant.¹²³ Parliament, in commissioning the Earl of Essex to command its army, gave him broad powers to bring the militia into a condition of readiness and to levy such other forces for the war.¹²⁴ In addition, Essex was empowered:

[T]o give Rules, Instructions, and Directions, for the Governing, Leading and Conducting the said Army; and for the Punishing of all Mutinies, Tumults, Rapines and other Crimes, and Misdemeanors of any Person whatsoever in the same, according to the Course and Custom of the Wars, and Law of the Land; and the same Rules and Instructions to cause to be proclaimed, performed and executed; straitly charging and requiring both the said Lieutenant-Generals, Provost-Martial, and all other Officers and Soldiers, of the said Army; as likewise all Lieutenants of Counties, Sheriffs, Deputy Lieutenants, Officers of the Ordnance, Commanders of Forts, Justices of Peace, Mayors, Bailiffs, and other his Majesty's Officers and Subjects whatsoever, to be aiding and assisting, and obedient to him, the said Earl, in the Execution of the said Office of Captain-General, for the Ends and Purposes, and in the Manner aforesaid.¹²⁵

Soon thereafter, Essex published his *Laws and Ordinances of War established for the better conduct of the Army*.¹²⁶ These articles of war were, in substance, quite similar to those promulgated in prior centuries. In addition to a myriad of military offenses, these articles compelled divine worship and forbade such crimes as drunkenness, rape, adultery, theft and murder.¹²⁷ Moreover, the articles provided that no civil magistrate was to imprison any soldier without permission, except for capital offenses.¹²⁸ In short, then, Essex, with the consent of Parliament, imposed martial law which came to be used against civilians and soldiers alike.¹²⁹

The Royalist army adopted articles of war similar to those drawn

121. *Id.*

122. C. BARNETT, *supra* note 39, at 79.

123. *Id.*; See also C. FIRTH, *supra* note 42, at 15.

124. 1 ACTS AND ORDINANCES OF THE INTERREGNUM 14-16 (C. Firth & R. Rait eds. 1911).

125. *Id.* at 15-16.

126. C. FIRTH, *supra* note 42, at 280. See *id.* at 400-412 (reproducing these articles of war).

127. C. FIRTH, *supra* note 42, at 400, 403.

128. *Id.* at 411.

129. S. WEBB, *THE GOVERNORS-GENERAL* 27-29 (1979).

for the campaign against the Scots.¹³⁰ Both king and Parliament found that the then existing militia was inadequate to serve their needs,¹³¹ and instead called upon volunteers to fill the ranks of their respective armies.¹³² By 1643, however, both sides resorted to impressment, as in times before, of rogues and misfits as soldiers.¹³³

Poor generalship, inferior quality of troops, poor organization, and localism prevented Parliament from securing a victory despite having greater resources than the King.¹³⁴ Parliament responded by creating the 'New Model' Army, a national army with a standardized organization.¹³⁵ Command was given to Sir Thomas Fairfax; and, like Essex, he was empowered to issue articles of war.¹³⁶

Under Fairfax and Cromwell, the New Model Army defeated the Royalists at Naseby in 1645.¹³⁷ Although the war continued until 1647, these were mainly a series of mopping-up operations.¹³⁸ The King surrendered to the Scots who in turn subsequently delivered him to Parliament.¹³⁹ When Parliament proposed to disband the army, with wages unpaid, the army mutinied and arrested the king.¹⁴⁰ The radicalized army then purged Parliament of its leading "incendiaries" and coerced the rest into voting taxes that the army believed due to it.¹⁴¹ The king, having escaped, concluded a secret agreement with the Scots that he establish Presbyterianism throughout his dominions if they restored him to the throne.¹⁴² The Second Civil War followed, but this war consisted of scattered risings which were quickly put down.¹⁴³ The King was recaptured, tried and executed for treason.¹⁴⁴

After the King's execution, Parliament abolished the office of king and the House of Lords and declared England to be governed as a Commonwealth.¹⁴⁵ The execution of the King, however, alienated many elements of the English people, as well as the major European states.¹⁴⁶ Surrounded by enemies, the Commonwealth became an

130. C. FIRTH, *supra* note 42, at 280. *See supra* note 112.

131. C. FIRTH, *supra* note 42, at 16-17.

132. *Id.* at 19-20.

133. C. BARNETT, *supra* note 39, at 84.

134. *Id.* at 89; C. FIRTH, *supra* note 42, at 30.

135. C. BARNETT, *supra* note 39, at 90.

136. 1 ACTS AND ORDINANCES OF THE INTERREGNUM, *supra* note 124, at 660-662.

137. C. HILL, *supra* note 71, at 113.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. D. WILLSON, A HISTORY OF ENGLAND 410 (1967).

143. *Id.*

144. *See* 5 D. HUME, *supra* note 111, at 532-540.

145. D. WILLSON, *supra* note 142, at 411.

146. *Id.* at 412.

military state with an army of 44,000 men.¹⁴⁷

During the First Civil War, the navy sided with Parliament.¹⁴⁸ But, during the Second Civil War, a segment of the fleet deserted and sided with the King, in part because of a practice of placing radical army officers in command of warships.¹⁴⁹ The revolt of the fleet having been quelled, Cromwell instituted widespread changes in the navy's organization, including replacing the office of the Lord High Admiral with a committee of senior naval officers known as the Lords Commissioners of the Admiralty.¹⁵⁰ The Admiralty implemented reforms similar to those in the formation of the New Model Army.¹⁵¹ While the navy in 1645 had for the first time laid down the rules of discipline, these rules were recast in 1653 so as to be similar to the courts-martial practice then obtaining in the army.¹⁵² Finally, there was an infusion of army officers into the highest ranks of the naval service—the most famous being Robert Blake—who ultimately established Britain's supremacy of the seas.¹⁵³

The death of Cromwell in 1658 precipitated the disintegration of the Protectorate. Government became impossible without the use of military violence.¹⁵⁴ Thus, despite the impressive military and naval forces at its disposal, the army was forced to capitulate its control.¹⁵⁵ Under pressure from General George Monck, Parliament restored the House of Lords and accepted the Declaration of Breda, thereby allowing the return of Charles II as king.¹⁵⁶

4. *From the Restoration to the Glorious Revolution of 1688*

The army, having been at the center of political events during the civil wars and the interregnum, was the focus of attention upon the restoration of Charles II. While the Declaration of Breda provided "for the full satisfaction of all arrears due to the officers and soldiers under the command of General Monck, and that they shall be received into our service upon as good pay and conditions as they

147. *Id.* at 413. In 1653, the army expelled Parliament and produced a new constitution, the Instrument of Government. Cromwell was named Lord Protector and served as the head of state until his death in 1658. See generally A. FRASER, CROMWELL: THE LORD PROTECTOR (1973).

148. J. STOKESBURY, *supra* note 45, at 54.

149. Kennedy, *The English Naval Revolt of 1648*, 77 ENG. HIST. REV. 247, 248 (1962).

150. J. STOKESBURY, *supra* note 45, at 55-56.

151. *Id.* at 56.

152. MINISTRY OF DEFENSE, *supra* note 96, at xv.

153. J. STOKESBURY, *supra* note 45, at 56; D. HOWARTH, *supra* note 44, at 188.

154. C. HILL, *supra* note 71, at 117.

155. *Id.*

156. *Id.* at 118.

now enjoy,"¹⁵⁷ Parliament passed a series of acts which called for the systematic disbandment of the New Model Army.¹⁵⁸ To this end, Parliament enacted legislation which funded the payment of all arrearages in pay¹⁵⁹ and which eased the entry of ex-soldiers into the trades.¹⁶⁰ While the army was to be totally disbanded, Parliament called for only a partial disbandment of the navy,¹⁶¹ thereby retaining a navy, presumably, sufficient to protect maritime trade and to prevent invasion by any of the hostile European states.

Charles II was not content with these attempts to pacify what remained of the New Model Army.¹⁶² Parliament, however, refused to acknowledge the King's absolute power of the armed forces, for which, in January, 1661, Charles II dissolved Parliament.¹⁶³ Several days later, a group of rebels under the leadership of Thomas Venner seized St. Paul's and attacked the King's bodyguard.¹⁶⁴ The rebels were eventually defeated; but, Charles II used the occasion to order the effective cessation of the disbandment of the army.¹⁶⁵ Charles accomplished this by having the commissioners disband regiments of the New Model Army in accordance with the Disbandment Acts and then immediately re-engage their services with only minor changes in personnel.¹⁶⁶

Venner's rebellion, together with other attacks and rumors of insurrection, raised the alarm that the safety of the kingdom was threatened.¹⁶⁷ Parliament was recalled and was urged by Lord Chancellor Clarendon "to consider the state of the militia and settle it as soon as possible due to the uncertain mood of the country."¹⁶⁸

Parliament followed Clarendon's advice. In 1661, it enacted legislation which, while, postponing the reestablishment of the militia, provided that the Lords Lieutenants and their deputies were to continue to exercise their powers over the existing militia and land forces "in such manner as the same now is actually exercised ordered and managed according to such Commissions and Instructions as they formerly have or from time to time shall receive from His Maj-

157. The Declaration of Breda 1660 reprinted in J. KENYON, *supra* note 74, at 357-58.

158. 12 Car. 2, ch. 9, 10, 15, 20, 27 & 28 (1660).

159. *Id.*

160. 12 Car. 2, c. 16 (1660).

161. 12 Car. 2, c. 20 (1660).

162. 6 D. HUME, *supra* note 111, at 163.

163. S. WEBB, *supra* note 129, at 59.

164. J. CHILDS, *supra* note 62, at 15-16.

165. *Id.* at 16.

166. C. BARNETT, *supra* note 39, at 113.

167. J. CHILDS, *supra* note 62, at 14.

168. *Id.*

esty."¹⁶⁹ More importantly, Parliament made a fundamental concession to the King. It provided:

[W]ithin all His Majesties Realmes and Dominions the sole Supreme Government Command and Disposition of the Militia and of all Forces by Sea and Land and of all Forts and Places of strength is and by the Lawes of England ever was the undoubted Right of His Majesty and His Royall Predecessors Kings and Queenes of England and that both or either of the Houses of Parliament cannot nor ought to pretend to the same nor can nor lawfully may raise or leavy any Warr Offensive or Defensive against His Majesty His Heires or lawfull Successors.¹⁷⁰

The following year, Parliament reiterated this statement when it finally passed the Militia Act.¹⁷¹

Given the breadth of this language, one's immediate conclusion would be that Parliament had no powers with respect to the disciplining of the army and navy. Indeed, it could be argued that the Petition of Right,¹⁷² which proscribed the exercise of martial law, was implicitly repealed. The contrary, however, appears to be the case. In 1661, Parliament enacted "An Act for the Establishing Articles and Orders for the regulating and better Government of His Majesties Navies Ships of Warr & Forces by Sea."¹⁷³ This act provided for the punishment of such offenses as derelictions of duty,¹⁷⁴ desertion,¹⁷⁵ quarreling with a superior officer,¹⁷⁶ sedition,¹⁷⁷ mutiny,¹⁷⁸ murder,¹⁷⁹ robbery,¹⁸⁰ theft¹⁸¹ and sodomy.¹⁸² Such offenses were to be tried by courts-martial consisting of commanders and captains and, where the death penalty could be inflicted, of no less than five captains.¹⁸³ No penalty of death could be executed without leave of the Lord High Admiral if the offense was committed within the Narrow Seas; but, if the offense was committed beyond the Narrow Seas, execution could be made at the order of the accused's commander in

169. 13 Car. 2, ch. 6 (1661).

170. *Id.*

171. 14 Car. 2, ch. 3 (1662).

172. *See supra* note 101 and accompanying text.

173. 13 Car. 2, ch. 9 (1661).

174. *Id.* § 10. For example, it was unlawful for a captain or commander, upon signal or order of fight, to "not put all things in his ship in a fitt posture for fight." *Id.*

175. *Id.* § 17.

176. *Id.* § 21.

177. *Id.* § 19.

178. *Id.*

179. *Id.* § 28.

180. *Id.* § 29.

181. *Id.*

182. *Id.* § 32.

183. *Id.* § 34.

chief.¹⁸⁴ A proviso to this act stated that it was not to be construed as extending to the Lord Admiral, his deputies or to any other person claiming admiralty jurisdiction,

“any other Power Right Jurisdiction Preheminence or Authority than he or they or any of them lawfully have hath or had or ought to have and enjoye before the making of this Act other than for such of the Offences specified in the severall Articles conteyned in this Act as hereafter shall be done upon the main Sea or in Ships or Vessells being and hovering in the maine Streame of great Rivers onley beneath the Bridges of the same Rivers nigh to the Sea within the Jurisdiction of the Admiralty and in none other places whatsoever and comitted only by such persons as shall be in actual Service and Pay in his Majesties Fleete or Ships of War.”¹⁸⁵

The Milita Act of 1662¹⁸⁶ similarly belied any claim that Parliament held no powers to regulate the disciplinarity of the militia. That act provided that the Lords Lieutenant and their deputies

shall and may imprison Mutineers and such Souldiers as doe not their Duties as Souldiers at the day of their Musters and Training and shall and may inflict for punishment for every such Offence any pecuniary Mulct not exceeding five shillings or the penalty of Imprisonment without Bail or Mainprise not exceeding twenty dayes.¹⁸⁷

While the legal status of the navy and the militia was clear, the same could not be said with regard to the standing army. At no time during the reign of Charles II did Parliament recognize the existence of the army as a legal entity. To the contrary, Parliament appears to have been quite hostile to the idea. The acts calling for the disbandment of the New Model Army and the act recreating the militia suggest that Parliament considered the militia the only constitutional land force. In 1666, Charles II drafted articles of war for a standing army and brought them before Parliament as a bill.¹⁸⁸ Parliament rejected this bill after only one reading.¹⁸⁹

On the other hand, Parliament conceded that the King could raise what forces he pleased, as long as he paid for them himself.¹⁹⁰ Owing to the King's limited financial resources, he could afford no more than six regiments and had to go to Parliament for funds to

184. *Id.*

185. *Id.* § 35.

186. See *supra* note 171 and accompanying text.

187. 14 Car. 2, ch. 3 § 7 (1662).

188. J. CHILDS, *supra* note 62, at 79.

189. *Id.*

190. *Id.* at 219.

raise a larger force.¹⁹¹ While Parliament from time to time complained about the army, it felt sufficiently secure in the belief that no sizeable land force could be raised without its consent. This security was shaken, however, in 1677 when war with France appeared imminent.¹⁹² Charles II asked for Parliament's aid in supplying ninety ships and in raising 40,000 men.¹⁹³ Parliament granted him a subsidy, but with the proviso that he declare war immediately against France,¹⁹⁴ lest the army be maintained in England and the sums thus be misapplied. The king raised 30,000 men but did not declare war.¹⁹⁵ Parliament pressed him to declare war or disband the army.¹⁹⁶ The King did neither but instead asked for a supply to maintain the army.¹⁹⁷ Parliament then enacted legislation which provided that all forces were to be paid and disbanded.¹⁹⁸ The King ignored this legislation and spent the appropriations for the maintenance of the army rather than for its disbandment.¹⁹⁹ Parliament passed another statute for the immediate disbandment of the army²⁰⁰ and prepared articles of impeachment against Edward Seymour, the Treasurer of the Navy, for misapplying navy funds for the support and continuance of the army.²⁰¹ Similar measures were taken against Sir Thomas Danby,²⁰² the Lord Treasurer, for traitorously endeavoring to subvert the government and to introduce arbitrary power by levying and continuing an army contrary to act of Parliament. Charles II disbanded the army and neither impeachment was prosecuted.²⁰³

Charles II promulgated military codes in 1666 and 1673.²⁰⁴ Martial law, however, was never proclaimed during his reign²⁰⁵ and there are records of only twenty-one courts-martial being convened in England until 1685.²⁰⁶ In practice, whenever an officer or soldier committed a crime in England he was turned over to the civil authorities for punishment according to common law.²⁰⁷ Desertion, mutiny, and

191. *Id.*

192. 1 C. CLODE, *supra* note 95, at 63.

193. *Id.*

194. *Id.* at 63-64.

195. *Id.* at 64.

196. *Id.*

197. *Id.*

198. 30 Car. 2, ch. 1 (1678).

199. J. CHILDS, *supra* note 62, at 227.

200. 31 Car. 2, ch. 1 (1679).

201. C. CLODE, *supra* note 95, at 66-67.

202. *Id.* at 67.

203. *Id.*

204. J. CHILDS, *supra* note 62, at 254.

205. *Id.* at 77.

206. *Id.* at 82.

207. *Id.*

disobedience could be punished as either treason or felony,²⁰⁸ although the statutes respecting desertion appeared to have limited applicability to a standing army.²⁰⁹ Courts-martial could still be convened in England, but they were not resorted to except to banish a soldier or cashier an officer.²¹⁰

Courts-martial were more frequently convened to try soldiers and officers serving in foreign places.²¹¹ Unlike in England, the army regularly meted out harsh punishment to those convicted by court-martial for any breach of the military codes, including death sentences.²¹²

If Charles II was respectful toward the Petition of Right's prohibition against imposing martial law, the same cannot be said with regard to its prohibition against compulsory quartering of soldiers. The army construed this prohibition as only extending to private homes, thereby permitting quartering troops in public houses.²¹³ Even this distinction, however, fell by the wayside such that not only were soldiers openly quartered in private and public houses alike, but the army was able to charge householders for the privilege of not having troops quartered on them.²¹⁴ Apparently having enough of this practice, Parliament announced compulsory quartering to be illegal. In the Disbanding Act of 1679, it provided:

And whereas by the Lawes and Customes of this Realme the Inhabitants thereof cannot be compelled against their wills to receive Souldiers into their Houses and to sojourne them there. Bee it declared and enacted by the Authoritie aforesaid That noe Officer Military or Civill nor any other person whatever shall from henceforth presume to place quarter or billet any Souldier or Souldiers upon any Subject or Inhabitant of this Realme of any degree quality or profession whatever without his consent. And that it shall and may be lawful for every such Subject and Inhabitant to refuse to sojourne or quarter any Souldier or Souldiers notwithstanding any Command Order or Billeting whatever.²¹⁵

For the remainder of Charles II's reign, the army paid for its quarters *en route*.²¹⁶

Charles II died in February, 1685 leaving his brother, James II,

208. *Id.* at 83.

209. *See supra* note 63 and accompanying text.

210. J. CHILDS, *supra* note 62, at 82.

211. *Id.* at 85.

212. *Id.*

213. *Id.* at 87.

214. *Id.*

215. 31 Car. 2, ch. 1 (1679).

216. J. CHILDS, *supra* note 62, at 89.

with an English army of under nine thousand men.²¹⁷ Within a few months after acceding to the throne, James II was faced with the invasions of the Earl of Argyle and the Duke of Monmouth.²¹⁸ The army was rapidly augmented and six regiments were brought over from the Anglo-Dutch Brigade in the United Provinces.²¹⁹ By early July, the English army numbered nearly 16,000 and by the end of 1685, nearly 20,000.²²⁰

Argyle and Monmouth were defeated within a matter of weeks.²²¹ The army, however, was not reduced. To aggravate matters, Catholic officers held commands in defiance of the Test Acts.²²² When, in November of 1685, James II announced to Parliament his intentions to maintain a standing army (with a subsidy voted by Parliament) and to dispense with the law disabling Catholics to hold office, Parliament was alarmed.²²³ As David Hume observed:

Such violent aversion did this parliament bear to opposition; so great dread had been instilled of the consequences attending any breach with the King; that it is probable, had he used his dispensing power without declaring it, no enquiries would have been made, and time might have reconciled the nation to this dangerous exercise of prerogative. But to invade at once their constitution, to threaten their religion, to establish a standing army, and even to require them, by their concurrence, to contribute towards all these measures, exceed the bounds of their patience.²²⁴

Parliament refused to grant James a subsidy expressly for the army; instead, it voted a general subsidy of half the amount requested.²²⁵ James answered with a reprimand and prorogued Parliament.²²⁶

In *Godden v. Hales*,²²⁷ the King secured a court decision in favor of his ability to dispense with the laws and to allow a Catholic to hold a commission without complying with the Test Acts.²²⁸ The King then began to purge the army, particularly the Irish army, of Protes-

217. J. CHILDS, *THE ARMY, JAMES II, AND THE GLORIOUS REVOLUTION* 1 (1980).

218. *Id.* at 2.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 19. The Test Acts, 1673, 25 Car. 2, ch. 2 & 1678, 30 Car. 2, st. 2, ch. 1 (requiring all persons holding any civil or military office or a seat in Parliament to disavow under oath certain Catholic doctrines or else be disqualified to hold such office or seat).

223. 6 D. HUME, *THE HISTORY OF ENGLAND*, 468 (1778).

224. *Id.*

225. J. CHILDS, *supra* note 217, at 13.

226. *Id.* at 14.

227. 11 State Tr. 1196 (K.B. 1686).

228. *Id.*

tant officers in favor of Catholics.²²⁹ Additionally, James expanded the army to a strength of over 34,000 by 1688.²³⁰

Illegal quartering of troops reappeared, albeit without royal approval.²³¹ Although the English army still depended upon the law courts to maintain discipline, it did so out of necessity rather than respect.²³² The soldiers behaved abominably toward the civilians, there being frequent instances of robbery and murder.²³³ The relations between the army and the civilian population were deplorable.

In 1688, James II had a son, giving rise to heightened fears of a return of Catholicism.²³⁴ A movement began calling for the invasion of William of Orange to displace James and to reinstate a Protestant kingdom.²³⁵ Although James II had raised a sizeable army and fleet, his purges of Protestant officers had alienated much of the officer corps.²³⁶ A conspiracy was formed within the army and navy to desert to William upon his arrival.²³⁷ The navy failed to either intercept or fight William's armada.²³⁸ And, when William arrived, a number of officers defected thereby demoralizing James and the army.²³⁹ Instead of giving battle, James retreated, precipitating wholesale defections and the loss of the army's support.²⁴⁰ In the words of Thomas Babington Macaulay:

A regular army such as had never before marched to battle under the royal standard of England, had retreated precipitately before an invader, and had then, without a struggle, submitted to him. That great force had been absolutely of no account in the late change, had done nothing towards keeping William out, and had done nothing towards bringing him in.²⁴¹

James II fled.²⁴² A group of peers declared themselves to William, who then summoned a convention.²⁴³ This convention declared James to have abdicated and declared William and Mary to be king

229. J. CHILDS, *supra* note 217, at 46-50, 56-79.

230. *Id.* at 3.

231. *Id.* at 85-89.

232. *Id.* at 95.

233. *Id.*

234. 6 D. HUME, *supra* note 223, at 494-95.

235. *Id.* at 501-02.

236. J. CHILDS, *supra* note 217, at 49.

237. *Id.* at 138-64.

238. C. BARNETT, *supra* note 39, at 121.

239. *Id.*

240. C. HILL, *supra* note 71, at 199.

241. 3 T. MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II* 3 (P. Rowland ed. 1986).

242. C. HILL, *supra* note 71, at 199.

243. See E. WILLIAMS, *THE EIGHTEENTH-CENTURY CONSTITUTION* 16-18 (1960).

and queen.²⁴⁴ A Bill of Rights was promulgated which restated "ancient rights and liberties,"²⁴⁵ including a declaration "[t]hat the raising or keeping a Standing Army Within the Kingdom in Time of Peace, unless it be with Consent of Parliament, is against Law."²⁴⁶

When France declared war against the States General, the States General demanded assistance from England under a mutual defense treaty.²⁴⁷ Troops assembled for the expedition; but, a mutiny arose at Ipswich and there were rumors of similar events elsewhere.²⁴⁸ The mutineers were quelled by Dutch troops and the ringleaders were tried for high treason.²⁴⁹

This mutiny, and the panic it created, engendered a fundamental change of policy toward the standing army. As Macaulay observed:

The Revolution, by altering the relative position of the sovereign and the Parliament, had altered also the relative position of the army and the nation. The King and the Commons were now at unity; and both were alike menaced by the greatest military power which had existed in Europe since the downfall of the Roman empire. In a few weeks thirty thousand veterans, accustomed to conquer, and led by able and experienced captains, might cross from the ports of Normandy and Brittany to our shores. That such a force would with little difficulty scatter three times that number of militia, no man well acquainted with war could doubt. There must then be regular soldiers; and, if there were to be regular soldiers, it must be indispensable, both to their efficiency, and to the security of every other class, that they should be kept under a strict discipline. An ill disciplined army has ever been a more costly and a more licentious militia, impotent against a foreign enemy, and formidable only to the country which it is paid to defend. A strong line of demarcation must therefore be drawn between the soldiers and the rest of the community. For the sake of public freedom, they must, in the midst of freedom, be placed under a despotic rule. They must be subject to a sharper penal code, and to a more stringent code of procedure, than are administered by the ordinary tribunals. Some acts which in the citizen are innocent must in the soldier be crimes. Some acts which in the citizen are punished with fine or imprisonment must in the soldier be punished with death. The machinery by which courts of law ascertain the guilt or innocence of an

244. C. HILL, *supra* note 71, at 257.

245. 1 W. & M., sess. 2, ch. 2 (1689).

246. *Id.*

247. T. MACAULAY, *supra* note 241, at 29.

248. *Id.*

249. *Id.* at 32.

accused citizen is too slow and too intricate to be applied to an accused soldier. For, of all the maladies incident to the body politic, military insubordination is that which requires the most prompt and drastic remedies. If the evil be not stopped as soon as it appears, it is certain to spread; and it cannot spread far without danger to the very vitals of the commonwealth. For the general safety, therefore, a summary jurisdiction of terrible extent must, in camps, be entrusted to rude tribunals composed of men of the sword.²⁵⁰

Albeit with reluctance, Parliament enacted the first Mutiny Act.²⁵¹ This Act reiterated that the raising or keeping of a standing army within the kingdom in time of peace, unless with consent of Parliament, was against law.²⁵² The Act then provided that

every Person being in Their Majestyes Service in the Army and being Mustered and in Pay as an Officer or Soldier who shall . . . Excite Cause or Joyne in any Mutiny or Sedition in the Army or shall desert Their Majestyes Service in the Army shall suffer Death or such other Punishment as by a Court-Martiall shall be Inflicted."²⁵³

The Act made it clear, however, that it did not extend to the militia and it was not to be "construed to exempt any Officer or Soldier whatsoever from the Ordinary Processe of Law."²⁵⁴

5. *The Constitutional Settlement and Its Aftermath*

The Mutiny Act of 1689 represented a fundamental step in the development of the English constitution. For the first time, Parliament recognized—albeit implicitly—the legitimacy of an English standing army in peace time. It further conceded that, in cases of mutiny, sedition or desertion, soldiers should "be brought to a more Exemplary and speedy Punishment than the usual Forms of Law will allow."²⁵⁵ In so doing, the raising and regulation of the army was brought under the direct control of Parliament at the cost of depriving a class of persons its rights under the common law. To be sure, there were dissenters who found a standing army to be abhorrent and, indeed, who argued that even the consent of Parliament did not give the army constitutional legitimacy.²⁵⁶

No one knew at the time, of course, that the Mutiny Act of 1689 would be the first of a series of annual enactments over the following

250. *Id.* at 33.

251. 1 W. & M., ch. 5 (1689).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*; See also J. REID, *supra* note 3, at 85-92.

centuries. Less than two decades later, however, the Mutiny Act developed from a statute of a mere ten articles to one containing seventy articles. By 1708, the Mutiny Act²⁵⁷ came to regulate such matters as the making of false musters,²⁵⁸ the payment of soldiers,²⁵⁹ the quartering of troops,²⁶⁰ the requisitioning of transport,²⁶¹ the killing of game by officers and soldiers,²⁶² and the granting of leave.²⁶³ While the Act prescribed the number and rank of officers composing courts-martial²⁶⁴ and the number who shall concur in a sentence to death,²⁶⁵ few procedural matters were detailed. On the other hand, the Act made it plain that court-martial jurisdiction extended to the punishment of

every person being in Her Majesties Service in the Army or mustered or in Pay as an Officer or which have been listed or in Pay as a Soldier . . . [who shall] excite cause or joyn in any Mutiny or Sedition in the Army or desert Her Majesties Service . . . or being a Soldier actually listed in any Regiment Troop or Company [who] shall list himself into any other Regiment Troop or Company without a Discharge produced in Writing."²⁶⁶

Moreover, the Act made it plain that it extended to the Marine Regiments while on shore and to "the Officers and Persons employed in the trains of Artillery."²⁶⁷

Whereas the Mutiny Act of 1689 provided that officers and soldiers were not exempt from ordinary process of law, the Mutiny Act of 1708 provided that no volunteer "shall be liable to be taken out of Her Majesties Service by any Process other than for some criminal matter."²⁶⁸ Elsewhere in the Mutiny Act of 1708, Parliament enlisted the aid of the common law courts by declaring that any officer or soldier who corresponds with the enemy at sea or upon land out of Great Britain was punishable for High Treason;²⁶⁹ and that any mutiny or sedition committed at sea or on land out of Great

257. Mutiny Act of 1708, 7 Anne, ch. 4.

258. *Id.* § 10.

259. *Id.* § 15.

260. *Id.* § 19.

261. *Id.* § 35.

262. *Id.* § 41.

263. *Id.* § 65.

264. *Id.* § 3.

265. *Id.* § 8.

266. *Id.* § 1.

267. *Id.* § 58. A permanent corps of artillery forming a part of the army was not founded until 1716 and, in 1727, it was named the Royal Regiment of Artillery. C. BARNETT, *supra* note 39, at 178.

268. Mutiny Act of 1708, 7 Anne, ch. 4, § 67.

269. *Id.* § 48.

Britain was punishable as a felony.²⁷⁰ Moreover, the constables were empowered to arrest and detain suspected deserters and to make an account thereof to the Secretary at War;²⁷¹ and the justices of the peace were empowered to punish persons who knowingly harbored, concealed or assisted deserters.²⁷²

The legal status of the articles of war that were from time to time promulgated by the crown was in doubt after the Mutiny Act of 1689. To be sure, the Mutiny Act of 1689 necessarily adopted the court-martial as the form of tribunal, which had heretofore been established by the articles of war. But, the Mutiny Act of 1689 only authorized the punishment of mutiny, sedition or desertion and not of the myriad of offenses articulated in the articles of war.²⁷³ In the Mutiny Act of 1702, Parliament provided that the Act did not extend to abridge the Queen's power to make and establish articles of war and erecting and constituting courts-martial in such manner as might have been done by Her Majesty beyond the seas in time of War before the making of the Act.²⁷⁴ In the Mutiny Act of 1716, Parliament permitted the making of articles of war within Great Britain and Ireland;²⁷⁵ but, this was objected to as vesting the sole legislative power in the Crown.²⁷⁶ A proposal to incorporate the articles of war into the Mutiny Act, as was done in the case of the navy in 1661,²⁷⁷ was rejected in favor of a provision stating that offenses under the articles of war were not punishable by life or limb except for those crimes so punishable by the Mutiny Act.²⁷⁸

As is evident, the Mutiny Acts only applied to the punishment of officers and soldiers for mutiny, sedition or desertion committed in Great Britain and Ireland. The decision of *Barwis v. Keppel*²⁷⁹ outlined the respective constitutional boundaries of the king's and Parliament's power to govern the army.²⁸⁰ In that case, the plaintiff served as a sergeant in the army in Germany during the Seven Year War.²⁸¹ Charged with disobedience of an order of his commander-in-chief, in violation of the articles of war, Sergeant Barwis was tried by regimental court-martial.²⁸² He was sentenced to suspension of rank

270. *Id.* § 49.

271. *Id.* § 43.

272. *Id.* § 45.

273. *See supra* notes 251 through 255 and accompanying text.

274. 1 Anne St. 2, ch. 20, § 39 (1702).

275. 3 Geo. 1, ch. 2, § 41 (1716).

276. 1 C. CLODE, *supra* note 95, at 147.

277. *See supra* notes 173 through 185 and accompanying text.

278. 1 C. CLODE, *supra* note 95, at 147-48.

279. 95 Eng. Rep. 831 (K.B. 1766).

280. *Id.* at 833.

281. *Id.* at 832.

282. *Id.*

for one month and to serve as a private during that time.²⁸³ His regimental commander refused to confirm the sentence and, instead, ordered him permanently reduced in rank to private.²⁸⁴ When he returned to England, the plaintiff brought an action against his commander alleging that his actions were maliciously done.²⁸⁵ The court ruled:

By the Act of Parliament to punish mutiny and desertion the King's power to make Articles of War is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or Articles of War; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and flagrante bello, the common law has never interfered with the army: *inter arma silent leges*. We think (as at present advised) we have no jurisdiction at all in this case.²⁸⁶

This residue of the royal prerogative, however, was abrogated in the Mutiny Act of 1803²⁸⁷ which provided that the Act, and the Articles of War promulgated thereunder, extended to the army whether within or without the dominions of the Crown. In 1813, when war with Napoleon again erupted, the Mutiny Act, and the Articles of War promulgated thereunder, were extended to the troops wherever they may be stationed.²⁸⁸

The jurisdiction of courts-martial over common law crimes was a matter of controversy in the Eighteenth Century. As discussed above, the articles of war that existed prior to the Mutiny Act of 1689 proscribed a variety of crimes punishable at common law. The Mutiny Act of 1689, however, allowed punishment by court-martial only for mutiny, sedition and desertion. In 1716, a soldier stationed in England was tried and condemned for murder; but, in the opinion of the solicitor-general, the proceedings were null and void on the ground that a court-martial had no jurisdiction of such a crime in time of peace.²⁸⁹ The following year, the articles of war, under the authority of the Mutiny Act of 1716, made punishable any ordinary civil offense committed by soldiers and provided that an acquittal or conviction thereof barred indictment for the same offense.²⁹⁰ This provision stirred some controversy and the Mutiny Act was

283. *Id.*

284. *Id.* at 832-833.

285. *Id.* at 833.

286. *Id.*

287. 43 Geo. 3, ch. 20.

288. 53 Geo. 3, ch. 17, 146.

289. 1 C. CLODE, *supra* note 95, at 519-20.

290. *Id.* at 147.

amended²⁹¹ restricting the punishment imposable for violations of the articles of war.²⁹² The articles of war subsequently deleted any express provision for the punishment of civil offenses. Instead, the Mutiny Act and the articles of war required the delivery to civil authorities, upon application, of any officer or soldier accused of a capital crime or a crime against the person or property of any subject.²⁹³

The power for courts-martial to punish civil offenses, however, was never denied. On the contrary, under the Army Act of 1955²⁹⁴ and the Naval Discipline Act of 1957,²⁹⁵ all offenses punishable under the laws of England may be tried by court-martial except for the crimes of treason, murder, manslaughter, treason-felony, rape, genocide, or offenses under the Biological Weapons Act of 1974, which are committed in the United Kingdom.

The notion that a court-martial could only try cases that were "service-connected" appears to stem from the case of *Grant v. Gould*.²⁹⁶ In that case, the plaintiff sought a writ of prohibition from the Court of Common Pleas to prevent the execution of the sentence of a court-martial. The plaintiff, having been convicted of aiding and procuring desertion in connection with a recruiting scheme, urged that the court-martial had no jurisdiction over him on the ground that his enlistment was a sham.²⁹⁷ After finding that the plaintiff was in the pay of the army, the court held that the court-martial properly had jurisdiction and, accordingly, it refused to issue the writ.²⁹⁸ In arriving at its decision, however, the court stated in *obiter dicta*:

In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offenses against the civil peace, they are triable by the law courts. The object of the mutiny act . . . is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by the extensive power granted by the Legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are

291. 7 Geo. 1, ch. 6.

292. 1 C. CLODE, *supra* note 95, at 147-48.

293. See, e.g., Articles of War of 1765, § 11, art. 1, *reprinted in* 2 W. WINTHROP, *supra* note 47, at 937.

294. Army Act of 1955.

295. 5 & 6 Eliz. 2, ch. 53, § 42; MINISTRY OF DEFENCE, *supra* note 95, at § J.0126.

296. 126 Eng. Rep. 434 (C.P. 1792).

297. *Id.* at 451-52.

298. *Id.* at 452.

thought necessary to the regularity and due discipline of the army. Breaches of military duty are in many instances strictly defined; they are so in all cases where capital punishment is to be inflicted: and in other instances, where the degree of offence may vary, it may be necessary to give a discretion with regard to the punishment, and, in some cases it is impossible more strictly to mark the crime than to call it a neglect of discipline.²⁹⁹

Rather than manifesting a fixed constitutional principle, this passage is merely an exercise of statutory interpretation, viz. that any provision of the articles of war which does not relate to the government of the army is *ultra vires*.³⁰⁰ As is evident by current law,³⁰¹ the extent to which a court-martial may try an offense not related to military duty is simply a matter of legislative will.

In sum, with the enactment of the Mutiny Act of 1689, Parliament assumed direct control of the raising and governing of the army in the same manner it had done so with the navy in 1661. By the beginning of the Nineteenth Century, the crown had been stripped of any prerogative powers with respect to the disciplining of the army. Instead, the crown now has only those powers which Parliament may give it; and, there seems to be no limit as to what powers Parliament may grant or withhold.

B. THE AMERICAN CONSTITUTIONAL EXPERIENCE

1. *The Colonial Era*

Nearly a century had passed after the discovery of the Americas before the English attempted to establish settlements there.³⁰² The economic circumstances and military posture of England at the close of the Sixteenth Century prevented it from supplying but a small portion of the needs of a colony.³⁰³ After several failures and near failures, it became clear that, for a colony to succeed, "it had to be strong enough to provide for its own defences against native and European armies, and possess the manpower, the organization and the experience to enable it to live off the land."³⁰⁴ Thus, while accompanied by a few military experts, the colonists were expected to assemble and arm themselves for their common defense.³⁰⁵

299. *Id.* at 450.

300. See 1 C. CLODE, *supra* note 95, at 150.

301. See *supra* notes 294 through 295 and accompanying text.

302. G. GRAHAM, *A CONCISE HISTORY OF THE BRITISH EMPIRE* 16 (1970).

303. *Id.* at 14; D. LEACH, *ARMS FOR EMPIRE* 50 (1973).

304. G. GRAHAM, *supra* note 302, at 16.

305. J. MAHON, *HISTORY OF THE MILITIA AND THE NATIONAL GUARD* 14-34 (1983); A. MILLETT & P. MASLOWSKI, *supra* note 1, at 1-20; R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 3-12 (Enl. ed. 1984).

Because of the need to provide for their subsistence as well as their defense, the colonists could not practicably organize a defense force along the lines of a contemporary European army.³⁰⁶ Instead, each colony responded by creating a militia system which obligated all able-bodied male citizens to be trained in the military arts and to be subject to call to military service. Patterned after the English militia system,³⁰⁷ this system required every militiaman to provide and maintain his own weapon and to participate in periodic musters for inspection and training.³⁰⁸ Failure to meet these requirements resulted in the levying of fines against the delinquent.³⁰⁹ Although subject to call by the colonial governors, the militia was organized into regional units, usually the county, under the command and supervision of local officers.³¹⁰

Typically, the colonial militia was intended to meet sudden threats to a local area, such as an Indian raid or an invasion of pirates.³¹¹ Where its English counterpart could not be called or transported out of the Kingdom,³¹² the colonial militia could not be called to serve beyond the colony's boundaries.³¹³ Moreover, the colonial militia did not serve beyond three months in duration.³¹⁴ It was, as a consequence, inadequate as an institution where a permanent force was needed, such as manning an expedition to distant parts or a frontier garrison.³¹⁵

This inadequacy did not become apparent until the latter part of the Seventeenth Century when the colonies were increasingly embroiled in the wars between Great Britain and other European states, principally France, who had colonial ambitions in North America.³¹⁶ When faced against a highly organized enemy in a large-scale theatre of operations, the militia was not appropriately constituted to provide the colonies an effective defense. The colonies were thus compelled to turn to alternative defense organizations.

306. Aside from the unacceptable financial burden that the adoption of such an army would have on a colony, the creation of a class of military professionals would have led necessarily to a reduction of much-needed manpower for food production.

307. See Militia Act of 1662, 14 Char. 2, ch. 3; Militia Act of 1757, 30 Geo. 2, ch. 25; Militia Act of 1786, 26 Geo. 3, ch. 107.

308. See, e.g., LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS 39-43 (1648); W. SHEA, THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY 39-72 (1983).

309. LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS, *supra* note 308, at 39-43.

310. A. MILLETT & P. MASLOWSKI, *supra* note 1, at 3-5.

311. D. LEACH, *supra* note 300, at 21.

312. Militia Act of 1757, 30 Geo. 2, ch. 25, § 51.

313. J. MAHON, *supra* note 305, at 19; L. CRESS, CITIZENS IN ARMS 4 (1982).

314. J. MAHON, *supra* note 305, at 19.

315. *Id.* at 19-21.

316. See generally, G. GRAHAM, *supra* note 302, at 59-85.

The first alternative was to hire mercenaries or to raise volunteer forces, often under threat of conscription.³¹⁷ Although these soldiers were theoretically drawn from the same ranks as the militia, in actuality they tended to be from the lowest economic stratum of the colony.³¹⁸ Whereas command of the militia was widely diffused, the colonial governors commanded these forces and appointed their officers.³¹⁹ But, inasmuch as the colonial legislatures appropriated the funds to support such forces, the legislatures often intruded into such matters as the planning of military operations and the deployment of troops.³²⁰

The second alternative was to import British regulars to serve under the command of the colonial governors. Beginning in 1664 with the ouster of the Dutch from North America, regulars began to appear, albeit few in numbers.³²¹ Once the Royal Navy established supremacy of the seas, however, a large, relatively permanent contingent of regulars arrived to protect imperial territory, whether offensively or defensively, and to preserve internal order.³²² Support of these troops was provided in large part by the colonial legislatures.³²³

British regulars in North America were governed by the King's articles of war in times of war.³²⁴ Provincial troops, on the other hand, were governed by provincial law. When commissioned, the governors of royal colonies were typically given the instruction:

And whereas there is no power given you by your commission to execute martial law in time of peace upon soldiers in pay, and that nevertheless it may be necessary that some care be taken for the keeping of good discipline amongst THOSE that we may at any time think fit to send into our said province, which may properly be provided by the legislative power of the same; you are therefore to recommend unto the general assembly of our said province that (if not already done) they prepare such act or law for the punishing of mutiny, desertion, and false musters and for the better preserving of good discipline amongst the said soldiers as may best answer those ends.³²⁵

Massachusetts, for example, enacted mutiny acts which permitted

317. J. MAHON, *supra* note 305, at 21.

318. L. CRESS, *supra* note 313, at 6-8.

319. *Id.* at 8.

320. *Id.*

321. J. SHY, TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION 20-36 (1965).

322. A. MILLETT & P. MASLOWSKI, *supra* note 1, at 22.

323. See J. SHY, *supra* note 321, at 20-36.

324. See *supra* notes 271-77 and accompanying text.

325. ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS: 1670-1776 398 (L. Labaree, ed., 1967).

courts-martial to try soldiers during times of war for mutiny, sedition and desertion or for incitement of any of these offenses.³²⁶ These mutiny acts were generally limited in operation to one year or until the year's provinces were discharged from service.³²⁷ As in the case of their English counterparts, these mutiny acts provided that they were not to be construed as exempting soldiers from the ordinary process of the law.³²⁸

Although the colonial mutiny acts permitted the death sentence in cases of mutiny, sedition, or desertion, the punishments inflicted were actually much less severe.³²⁹ Indeed, it appears that the preferred punishment amongst the provincial forces was banishment, to the great distress of the British commanders.³³⁰

With the outbreak of renewed hostilities in North America (in what came to be called the Great War for Empire or the Seven Years War), the relation between the crown and the colonies were greatly altered. Early disasters compelled British ministers to rely on army regulars as the backbone of the war effort, with provincial forces performing an auxiliary role.³³¹ The Mutiny Act of 1755 extended its provisions to provincial troops while serving in conjunction with British regulars.³³² Owing to disputes of rank which had arisen in India between regulars and East India company troops, the articles of war were amended so as to reduce all provincial field officers serving with regulars to a status of the most junior captain in the British army.³³³ Initially, this latter provision was of no great moment insofar as the highest ranking provincial officer with the regular army was a captain;³³⁴ but, when Lord Loudoun arrived to act as commander in chief of the British forces, the situation became quite different. Loudoun held a commission which granted him "more central authority than any British general in England or on the Continent."³³⁵ Loudoun was a virtual viceroy. His immediate plan was to launch an expedition consisting of both regulars and provincials and, to that end, he took the initiative "to direct the military resources of eleven colonies as a unit in a general plan of opera-

326. 3 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 753 (1908).

327. *Id.*

328. *Id.* see *supra* note 248-70 and accompanying text.

329. F. ANDERSON, A PEOPLE'S ARMY 125 (1984).

330. *Id.* at 131.

331. J. SHY, *supra* note 321, at 35.

332. 28 Geo. 2, c. 4 (1755).

333. S. PARGELLIS, LORD LOUDOUN IN NORTH AMERICA 86 (1933).

334. *Id.* at 88.

335. L. CRESS, *supra* note 313, at 9.

tions."³³⁶ This plan outraged the provincial forces and their officers as a violation of their rights and dissolution was threatened.³³⁷

To aggravate matters, Loudoun proceeded to coerce the colonial legislatures to provide, without subsequent reimbursement, for the quartering of troops, under threat of forced quarter.³³⁸ In the absence of any clear legal authority, Loudoun interpreted his instructions to mean that "he was allowed to take quarters, both for officers and men, either in public or private houses, whenever he deemed it necessary for the good of the service."³³⁹ To the colonial legislatures and governors, this position suggested a subordination of civil authority to the military and a violation of their fundamental rights as British subjects.³⁴⁰ The crisis was resolved by the colonies providing for the sheltering of troops; but, in so doing, it made the British military presence dependent upon colonial sanction.³⁴¹

Owing to mounting criticism and suspicions of political intrigue, William Pitt, the Secretary of State, recalled Loudoun in 1757 and put an end to Loudoun's plan to unify the colonies militarily.³⁴² Pitt took full charge of the war and the discretionary powers of subsequent commanders were greatly reduced.³⁴³

Of even greater importance, Pitt's promise of monetary reimbursement eliminated the need to cajole and coerce most of the colonies into furnishing men and material. Thus the apparent threat of Cromwellian military rule to colonial liberties was, for the moment, averted.³⁴⁴

Although actual hostilities in North America ended in 1760, France and Great Britain did not formally end the conflict until 1763.³⁴⁵ During this interim period, Pitt resigned from the cabinet because of disagreement with his colleagues on the conduct of the war in Europe.³⁴⁶ The King and his new cabinet formulated a policy of maintaining in the Americas a large peacetime army of ten thousand British regulars for the purpose of achieving imperial security.³⁴⁷ This policy provided, however, that the expense of this army

336. S. PARGELLIS, *supra* note 333, at 212.

337. F. ANDERSON, *supra* note 329, at 172. *See generally*, D. LEACH, *ROOTS OF CONFLICT 107-33* (1986).

338. S. PARGELLIS, *supra* note 333, at 193; L. CRESS, *supra* note 313, at 10.

339. S. PARGELLIS, *supra* note 333, at 193.

340. L. CRESS, *supra* note 313, at 10.

341. *Id.*

342. S. PARGELLIS, *supra* note 333, at 337-65.

343. *Id.*; J. SHY *supra* note 321, at 36.

344. J. SHY, *supra* note 321, at 36.

345. F. ANDERSON, *supra* note 329, at 19-22.

346. D. WILLSON, *supra* note 142, at 546.

347. Bullion, "The Ten Thousand in America:" *More Light on the Decision on the American Army, 1762-1763*, 43 *WILL. & MARY Q.* (3d Ser.) 646 (1986).

would be borne by the colonies commencing in 1764.³⁴⁸

Because of their elation over the victory over France, the Americans were slow to object to the retention of a large peacetime regular army.³⁴⁹ But in 1764, the Massachusetts House of Representatives complained to the Privy Council:

We conceive nothing could restrain your liberty of opposing so burthensome a Scheme as that of obliging the colonies to maintain an army. What merit could there be in a Submission to such an unconstitutional Measure?³⁵⁰

This complaint, amongst others, was not an objection to the army as such, but rather against the taxation necessary to support the army.³⁵¹

The colonial governors had a different ground for complaint. Because of the size of the army, it was decided that the wartime office of commander in chief, previously held by Loudoun, should be continued.³⁵² Thomas Pownall, the former governor of Massachusetts, argued:

Where the office and power, as now exercised, of a military commander in chief, are not absolutely necessary; neither prudence, justice, nor sound policy can justify such an establishment. In time of peace, it cannot be necessary. . . . If there be, in time of peace, in the civil governors, and other officers of the crown, the least subordination to this military commander in chief; it will be found a dangerous thing to have given so much of civil power out of the King's hands, and to have done so little to maintain those, into whose hands it is entrusted.³⁵³

A single military establishment under a unified command, therefore, "introduced a center of authority that lay outside the political structure of the colony, and reduced the prestige of the governor accordingly."³⁵⁴

These criticisms apparently fell on deaf ears. In 1765, Parliament passed the Stamp Act³⁵⁵ and the Mutiny Act for North America³⁵⁶ (also known as the Quartering Act).

The Stamp Act required the use of stamped paper, upon which a tax had to be paid, for all legal documents, deeds, bonds, ships' pa-

348. *Id.*

349. J. SHY, *supra* note 321, at 143-48.

350. *Id.* at 141.

351. *Id.* at 142-43.

352. *Id.* at 149.

353. *Id.*

354. *Id.* at 422.

355. 5 Geo. 3, ch. 12 (1765).

356. *Id.* ch. 33.

pers, as well as for almanacs, newspapers and advertisements.³⁵⁷ The Quartering Act required, upon due notice, colonial authorities to provide British officers and soldiers with quarters and billeting at the expense of the colony.³⁵⁸ If sufficient quarters and billets were unavailable, they were to provide space in public houses or in uninhabited buildings or outbuildings. The provision of transport and other goods was similarly required. The act further authorized civil officers to arrest suspected deserters and to make an account thereof to the commander in chief. Penalties were provided for persons who knowingly harbored deserters or who knowingly came into possession of arms, clothing, and the like, of any soldier or deserter. The act forbade British officers from breaking open any house to search for deserters without a warrant; but, it authorized the army to arrest civilians for committing offenses not within the jurisdiction of any civil government who were then to be delivered to the civil magistrates of the nearest adjoining province for trial in accordance with the law.

American reaction to the Stamp Act was vehement. Rioters burned the stamped paper and intimidated the distributors of the paper.³⁵⁹ Virginia claimed the right to be taxed only with its consent,³⁶⁰ and, nine other colonies sent delegates to a Stamp Act Congress which rejected any claim of Parliament to tax the colonies.³⁶¹

The reaction to the Quartering Act was less vigorous inasmuch as it could be easily resisted by the legislature simply neglecting to appropriate the funds.³⁶²

The Quartering Act was an abortion, especially from the military point of view. Previously, local officials had usually quartered and supplied the troops as necessity dictated, including putting them in private houses when unavoidable. It was a loose arrangement, and there occasionally had been resistance, as at Albany, but seldom if ever without provocation. Under the new law, however, the very omission of private houses made it illegal to put soldiers in them under any circumstances. In fact, its provisions were largely inapplicable to the problem which had been uppermost in [General] Gage's mind—troops on the march—and instead required the colonies to help support troops on *station*, a burden

357. See *supra* note 355.

358. See *supra* note 356.

359. D. WILLSON, *supra* note 142, at 558. See generally R. MIDDLEKAUFF, *THE GLORIOUS CAUSE* 70-152 (1982).

360. R. MIDDLEKAUFF, *supra* note 359, at 123.

361. *Id.* at 124-25.

362. J. SHY, *supra* note 321, at 189.

borne largely by the Crown in the past. Moreover, the law required the action of provincial legislatures; no local magistrate would dare make a move to furnish firewood or the other supplies if his legislature had not acted.³⁶³

The Stamp Act was repealed in 1766;³⁶⁴ but the Quartering Act continued in force despite resistance. When the New York assembly refused to appropriate funds to comply with the Quartering Act, Parliament suspended its right to pass laws.³⁶⁵ When resistance was met to it and other revenue measures, troops were used to bring order.³⁶⁶ In so doing, however, the army reinforced the resolve of colonists to resist further encroachments on their rights.³⁶⁷

In September, 1768, a contingent of British troops, under cover of a line of warships, occupied Boston to quell disturbances there.³⁶⁸ The townspeople, despite this overwhelming display of force, refused to provide quarters and supplies.³⁶⁹ Relations between the troops and the colonists were abominable. The townspeople were revulsed by the seemingly barbarous discipline meted out to the troops.³⁷⁰ The army blamed the civilians for enticing soldiers to desert, resulting in "clashes between patrols looking for deserters and citizens all too willing to hide them."³⁷¹ The local courts began prosecuting officers and soldiers haled before them with increased severity, usually for brawling³⁷² with colonists. Events culminated in the Boston Massacre of 1770 when British soldiers, being attacked by a mob, killed five townsmen and wounded six others.³⁷³

For the next three years, relations improved. But, in 1773 the Tea Act was passed, which precipitated the Boston Tea Party.³⁷⁴ Parliament responded by passing the Coercive Acts which closed Boston harbor until payment was made for the destroyed tea; put an end to representative government in Massachusetts; and, put Boston under the military rule of General Gage.³⁷⁵

The First Continental Congress was convened in September

363. *Id.* at 188-89.

364. D. WILLSON, *supra* note 142, at 558. At the same time, however, parliament declared it sovereign right to make statutes binding the colonies in all cases. *Id.*

365. R. MIDDLEKAUFF, *supra* note 359, at 150-51.

366. *Id.* at 192-93.

367. *Id.* at 192.

368. *Id.* at 193. See G. NASH, *THE URBAN CRUCIBLE* (1986) (discussing the role of the northern seaports with regard to the origins of the American Revolution).

369. R. MIDDLEKAUFF, *supra* note 359, at 193.

370. *Id.* at 195.

371. *Id.*

372. *Id.* at 197.

373. *Id.* at 203-07.

374. *Id.* at 221-27; G. NASH, *supra* note 368, at 228-29.

375. G. NASH, *supra* note 368, at 229.

1774.³⁷⁶ It declared its allegiance to the Crown, but would not accept acts of Parliament which violated their rights.³⁷⁷ Moreover, the colonies formed an "Association" which would enforce agreed upon trade restrictions.³⁷⁸

Instead of acceding to the demands of the colonies, Parliament declared the colonies in rebellion and called for forceful measures to ensure obedience to its laws.³⁷⁹ The colonists began making military preparations.³⁸⁰ General Gage ordered a force to proceed to Concord to destroy military supplies.³⁸¹ This force was met by a small number of militiamen along the way; but, on its return, thousands of militiamen joined in battling the regulars, resulting in 273 British casualties and 85 American casualties.³⁸² The Revolutionary War had thus begun.

2. *The Revolutionary War*

a. *The Continental Army*

In response to the demands of the colonies, the Second Continental Congress approved in June, 1775 a plan to raise the Continental army with George Washington as its commander.³⁸³ While the militia had effectively occupied the field against the British so far, it was recognized that some battles would be fought in the open which would require well-trained regulars in greater numbers than the militia could always supply.³⁸⁴

Congress' initial commitment to a standing army was less than vigorous. Low pay and a lack of popular identity of the common interests with that of the army's resulted in difficulty in obtaining sufficient officers and recruits.³⁸⁵ Congress promulgated articles of war³⁸⁶ which, unlike that of the British, were restrained so as to reflect a citizen army lest it "subvert the integrity and resilience of the citizen while in arms."³⁸⁷ Although the death penalty was expressly authorized in a few cases,³⁸⁸ the penalty imposable by a court-mar-

376. R. MIDDLEKAUFF, *supra* note 359, at 234-49.

377. *Id.* at 247.

378. *Id.* at 247-48.

379. *Id.* at 264.

380. *Id.*

381. *Id.* at 266-73.

382. *Id.* at 273.

383. *Id.* at 281.

384. D. HIGGINBOTHAM, *THE WAR OF AMERICAN INDEPENDENCE* 77 (1971).

385. L. CRESS, *supra* note 313, at 57.

386. 2 *JOURNALS OF THE CONTINENTAL CONGRESS* 111 (W. Ford ed. 1905).

387. D. HIGGINBOTHAM, *supra* note 384, at 93.

388. *See e.g.*, 2 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 386, at art. 25 (shamefully abandoning a post); *id.* at art. 26 (wrongfully revealing watch-word); *id.* at art. 31 (compelling commander to abandon command).

tial was generally at its discretion even in cases of mutiny³⁸⁹ and desertion.³⁹⁰ The articles of war further provided:

That no persons shall be sentenced by a court-martial to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall any punishment be inflicted at the discretion of a court-martial, other than degrading, cashiering, drumming out of the army, whipping not exceeding thirty-nine lashes, fine not exceeding two months pay of the offender, imprisonment not exceeding one month.³⁹¹

Apparently recognizing the inadequacy of this system of punishments, at least in the case of serious offenses, Congress amended the articles of war in November of 1775.³⁹² The offenses of mutiny,³⁹³ desertion to the enemy,³⁹⁴ and misbehavior before the enemy,³⁹⁵ became punishable by death.

The restraint exercised by Congress reflected the division of opinion at the time regarding standing armies. This division was personified by the conflicting views held by Charles Lee and George Washington. Premised on the notion that standing armies were incompatible with a republican form of government, Lee argued against a professional army; and, instead, called for an army drawn directly from the state militias.³⁹⁶ Washington, on the other hand, argued for a professional army. In a letter to the President of Congress, he stated:

To place any dependence upon militia is assuredly resting upon a broken staff. Men just dragged from the tender scenes of domestic life, unaccustomed to the din of arms, totally unacquainted with every kind of military skill, (which being followed by want of confidence in themselves, when opposed to troops regularly trained, disciplined, and appointed, superior in knowledge and superior in arms,) makes them timid and ready to fly from their own shadows. Besides the sudden change in their manner of living, (particularly in the lodging,) brings on sickness in many, impatience in all, and such an unconquerable desire of returning to their respective homes, that it not only produces shameful and scandalous desertions among themselves, but infuses the

389. *Id.* art. 5.

390. *Id.* art. 8.

391. *Id.* art. 51.

392. 3 JOURNALS OF THE CONTINENTAL CONGRESS 331 (W. Ford ed. 1905). See 22 THE PAPERS OF BENJAMIN FRANKLIN 230-33 (W. Willcox, ed. 1982) (providing a legislative history of these amendments).

393. 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, § 5.

394. *Id.* § 6.

395. *Id.* § 10.

396. L. CRESS, *supra* note 313, at 54-56.

like spirit in others. Again, men accustomed to unbounded freedom and no control cannot brooke the restraint, which is indispensably necessary to the good order and government of any army; without which, licentiousness and every kind of disorder triumphantly reign. To bring men to a proper degree of subordination is not the work of a day, a month, or even a year; and unhappily for us and the cause we are engaged in, the little discipline I have been laboring to establish in the army under my immediate command is in a manner done away, by having such a mixture of troops, as have been called together within these few months.³⁹⁷

Events resolved the conflict when state militiamen left General Montgomery standing at the gates of Quebec when their enlistments expired.³⁹⁸ By the spring of 1776, Congress moved toward creating a professional army which relied on enlistment bonuses and bounties to fill its ranks.³⁹⁹

Washington was given considerable latitude as Commander in Chief. Congress, however, reserved for itself ultimate control over the army.⁴⁰⁰

Washington was to "observe and follow" any and all orders from the lawmakers. As the civil government, Congress determined *policy*: it decided the objectives of the war, the number of troops, and the quantity of material for the Continental forces; in addition, it conducted foreign relations and financed military expenses.⁴⁰¹

As a consequence, Washington had to go to Congress to obtain changes of policy with respect to the disciplining of his troops. Washington believed in a strict discipline. He wrote:

To bring men [to be] well acquainted with the duties of a soldier, requires time. To bring them under proper discipline and subordination, not only requires time, but is a work of great difficulty, and, in this army, where there is so little distinction between the officers and soldiers, requires an uncommon degree of attention. To expect, then, the same service from raw and undisciplined recruits, as from veteran soldiers, is to expect what never did and perhaps never will happen. Men, who are familiarized to danger, meet it without shrinking; whereas troops unused to service often apprehend danger where no danger is. Three things prompt men

397. 4 THE WRITINGS OF GEORGE WASHINGTON 443-44 (W. Ford ed. 1889). This view of the militia came to be a persistent argument in favor of a professional army. See, e.g., E. UPTON, THE MILITARY POLICY OF THE UNITED STATES FROM 1775 (1904).

398. L. CRESS, *supra* note 313, at 58.

399. *Id.*

400. D. HIGGINBOTHAM, *supra* note 384, at 91.

401. *Id.*

to a regular discharge of their duty in time of action; natural bravery, hope of reward, and fear of punishment. The two first are common to the untutored and the disciplined soldier; but the last most obviously distinguishes the one from the other. A coward, when taught to believe, that, if he breaks his ranks and abandons his colors, will be punished with death by his own party, will take his chance against the enemy; but a man, who thinks little of the one, and is fearful of the other, acts from present feelings, regardless of consequences.⁴⁰²

Washington advised Congress that the articles of war were not adequate to this purpose. He complained that the militia did not think themselves subject to the articles.⁴⁰³ Even more importantly, he complained, was that with but few exceptions, "[f]or the most atrocious offences . . . a man receives no more than thirty-nine lashes; and these, perhaps, through the collusion of the officer, who is to see it inflicted, are given in such a manner as to become rather a matter of sport than punishment."⁴⁰⁴

In addition, Washington was concerned about a growing practice of soldiers deserting *en bloc* to plunder Tory property.⁴⁰⁵

For, under the idea of Tory property, or property that may fall into the hands of the enemy, no man is secure in his effects, and scarcely in his person. In order to get at them, we have several instances of people being frightened out of their houses, under pretence of those houses being ordered to be burnt, and this is done with a view of seizing the goods; nay, in order that the villany may be more effectually concealed, some houses have actually been burnt, to cover the theft. I have, with some others, used my utmost endeavors to stop this horrid practice; but under the present lust after plunder, and want of laws to punish offenders, I might almost as well attempt to remove Mount Atlas. I have ordered instant corporal punishment upon every man, who passes our lines, or is seen with plunder, that the offenders might be punished for disobedience of orders.⁴⁰⁶

402. 3 THE WRITINGS OF GEORGE WASHINGTON 408-09 (W. Ford ed. 1889). Washington wrote:

But it may not be amiss for the Troops to know, that if any man in action shall presume to skulk, hide himself, or retreat from the enemy, without the orders of his commanding officer, he will be *instantly shot down*, as an example of Cowardice; Cowards having too frequently disconcerted the best formed Troops, by their dastardly behaviour.

Id. at 440.

403. 4 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 397, at 444.

404. *Id.* at 448.

405. *Id.* at 424-45, 448.

406. *Id.* at 448-49. British soldiers plundered civilian property as well; however, the British command was divided whether to put a stop to this practice so as to win the

For this offense, Washington requested Congress to adopt an express article of war.⁴⁰⁷

Congress appointed the Committee of Spies, which included John Adams and Thomas Jefferson, among others, to address the revision of the articles of war.⁴⁰⁸ John Adams observed:

It was a very difficult and unpopular Subject: and I observed to Jefferson, that Whatever Alteration We should report with the least Ennergy in it, or the least tendency to a necessary discipline of the Army, would be opposed with as much Vehemence as if it were the most perfect: We might as well therefore report a compleat System at once and let it meet its fate. Some thing perhaps might be gained. There was extant one System of Articles of War, which had carried two Empires to the head of Mankind, the Roman And the British: for the British Articles of War were only a littler Translation of the Roman: it would be in vain for Us to seek, in our own Inventions or the Records of Warlike nations for a more compleat System of military discipline: it was an Observation founded in undoubted facts that the Prosperity of Nations had been in proportion to the discipline of their forces by Sea and Land: I was therefore for reporting the British Articles of War, totidem Verbis. Jefferson in those days never failed to agree with me, in every Thing of a political nature, and he very cordially concurred in this. The British Articles of War were Accordingly reported and defended in Congress, by me Assisted by some others, and finally carried. They laid the foundation of a discipline, which in time brought our Troops to a Capacity of contending with British Veterans, and a rivalry with the best Troops of France.⁴⁰⁹

Congress adopted this new system of articles of war.⁴¹⁰

The Articles of War of 1776 extended to every officer,⁴¹¹ non-commissioned officer,⁴¹² and soldier⁴¹³ retained or enlisted in the army of the United States. They also extended to all officers and soldiers of the militia serving in conjunction with the regular

people's goodwill or to encourage it to coerce the colonists into submission. See Conway, *To Subdue America: British Army Officers and the Conduct of the Revolutionary War*, 43 WILL. & MARY Q. (3d Ser.) 381 (1986).

407. 4 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 397, at 424-25.

408. 5 JOURNALS OF THE CONTINENTAL CONGRESS 442 (W. Ford ed. 1906).

409. 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 409-10 (L. Butterfield ed. 1962).

410. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 408, at 788.

411. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 408, at § 1, art. 1.

412. *Id.* § 3, art. 1.

413. *Id.*

forces;⁴¹⁴ and, to resolve questions of rank, officers of the regular army were to have seniority over militia officers of the same rank, regardless of their respective dates of commissioning.⁴¹⁵ Jurisdiction was further extended to all "suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war."⁴¹⁶

All serious military offenses, such as mutiny,⁴¹⁷ desertion,⁴¹⁸ assaulting a superior officer,⁴¹⁹ and sleeping upon one's post,⁴²⁰ were punishable by death or by such other punishment as a court-martial may inflict.⁴²¹ In addition to a wide variety of offenses, the Articles of War provided that:

[a]ll crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in [these] articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and punished at their

414. *Id.* § 17, art. 1. An exception, however, extended to militiamen who contracted with their respective states to be governed by particular regulations while in continental service. *Id.*

415. *Id.* § 17, art. 2.

416. *Id.* § 13, art. 23. Article 32 of the Articles of War of 1775, provided that all "suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 386, at 116-17. It is unclear what the difference in wording was intended to accomplish; but, it appears reasonable to conclude that such civilians, employees or dependents were subject, not to the Articles of War generally, but to martial law in time of war. *See e.g.*, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 234-36, 348 (1960) (holding that trial by court-martial of "all persons . . . accompanying the armed forces" could not be applied to a civilian dependent accompanying a service member overseas who had committed a non-capital crime while there); *Girsham v. Hagan*, 361 U.S. 278, 278-80 (1960) (holding that trial by court-martial of "all persons employed by . . . the armed forces" who are overseas could not be applied to a civilian employee of the armed services serving overseas). *See generally*, McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV. 153 (1987).

417. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 408, at § 2, art. 3.

418. *Id.* § 6, art. 1.

419. *Id.* § 2, art. 5.

420. *Id.* § 13, art. 6.

421. *See supra* notes 417-20. The Articles of War of 1776 provided that "[n]o person shall be sentenced to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall more than one hundred lashes be inflicted on any offender, at the discretion of a court-martial." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 408, at § 18, art. 3. Washington complained that, in order to preserve some proportion between crime and punishment, courts-martial felt obliged to pronounce sentence to death. 9 THE WRITINGS OF GEORGE WASHINGTON 127 (W. Ford ed. 1891). He recommended an extension of corporal punishment to either an unlimited number of lashes or, if the number were to be fixed, five hundred lashes. *Id.* at 127-28.

discretion.⁴²²

In response to Washington, the Articles of War of 1776 made several provisions to deter plundering. First, every officer commanding in quarters, garrison, or on a march was admonished to keep good order and to redress all such abuses or disorders which may be committed by an officer or soldier under his command, including "disturbing fairs or markets, or of committing any kind of riots to the disquieting of the good people of the United States."⁴²³ Second, any officer or soldier accused of a capital crime or of having used violence, or committed any offense against the persons or property of the people of the United States was to be delivered, upon application, to the civil magistrates.⁴²⁴ Third, all officers and soldiers were to behave themselves orderly in quarters and on the march; and,

whosoever shall commit any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses or gardens, cornfields, enclosures or meadows, or shall maliciously destroy any property whatsoever belonging to the good people of the United States . . . [and] shall be found guilty . . . shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offence.⁴²⁵

Fourth, the Articles of War provided that if any officer or soldiers who leaves his post or colors in search of plunder, shall, upon conviction, suffer death or such other punishment as a court-martial may inflict.⁴²⁶ Pursuant to these powers, Washington punished soldiers who committed crimes against the civilian populace.⁴²⁷

In adopting the Articles of War of 1776, Congress did what Parliament had refrained from doing. Whereas Parliament had delegated the production of articles of war to the Crown, Congress took upon itself to promulgate a comprehensive code of military law oriented to the needs of a standing professional army. Whereas Parliament chose to have the common law courts exclusively try soldiers for crimes committed in England against the King's subjects, Con-

422. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 408, at § 18, art. 5.

423. *Id.* § 9, art. 1.

424. *Id.* § 10, art. 1.

425. *Id.* § 13, art. 16.

426. *Id.* § 13, art. 21.

427. See Comment, *O'Callahan and its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial*, 15 VILL. L. REV. 712, 719 n.38 (1970) (including collected courts-martial orders). It would appear that the involvement of civilians with courts-martial proceedings was more frequent than one would expect. In 1779, Congress "recommended to the executive authority of their respective states, upon the application of the judge advocate for that purpose, to grant proper writs requiring and compelling the person or persons whose attendance shall be requested by the said judge, to appear and give testimony in any cause depending before a court martial." 15 JOURNALS OF THE CONTINENTAL CONGRESS 1277-78 (W. Ford ed. 1909).

gress did not refrain from using military law to protect citizens from Continental soldiers in addition to such redress as may be afforded by civil authority. Contrary to the opinion of Blackstone,⁴²⁸ military law was no longer the product of arbitrary rule, but rather the equal to civil law.

Nowhere is this better reflected than in a letter of 1777 from John Adams to his wife, Abigail.

There is such a Mixture of the Sublime, and the Beautifull, together with the Usefull, in military Discipline, that I wonder, every Officer We have is not charmed with it.—Much remains yet to be done. Our soldiers have not yet quite the Air of Soldiers, They dont step exactly in Time. They dont hold up their Heads, quite erect, nor turn out their Toes, so exactly as they ought. They dont all of them cock their Hats—and such as do, dont all wear them the same Way.

A Disciplinarian has affixed to him commonly the Ideas of Cruelty, severity, Tyranny &c. But if I were an Officer I am convinced I should be the most decisive Disciplinarian in the Army. I am convinced there is no other effectual Way of indulging Benevolence, Humanity, and the tender Social Passions, in an Army. There is no other Way of preserving the Health and Spirits of the Men. There is no other Way of making them active, and skillful, in War—no other Method of guarding an Army against Destruction by surprizes, and no other Method of giving them Confidence in one another, or making them stand by one another, in the Hour of Battle.

Discipline in an Army, is like the Laws, in civil Society.

There can be no Liberty, in a Commonwealth, where the Laws are not revered, and most sacredly observed, nor can there be Happiness or Safety in an Army, for a single Hour, where the Discipline is not observed.

Obedience is the only Thing wanting now for our Salvation—Obedience to the Laws, in the States, and Obedience to Officers, in the Army.⁴²⁹

Military law, as the instrument of discipline, had become legitimized.

b. *The Continental Navy*

When the Continental Navy was formed in 1775, Congress immediately adopted a system of rules for its government.⁴³⁰ These Rules

428. See *supra* note 4.

429. THE BOOK OF ABIGAIL AND JOHN 192 (L. Butterfield ed. 1975). In this quotation, John Adams alludes to a phenomenon of the emerging modern army—the close connection of regular drill with discipline and with the development of social bonds amongst soldiers. See generally W. McNEILL, THE PURSUIT OF POWER 130-131 (1982).

430. 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 392, at 378.

for the Regulation of the Navy of the United Colonies, while not as exhaustive or as sanguinary as their English counterpart,⁴³¹ were certainly more formidable than the Articles of War of 1775. The death penalty was authorized for mutiny, desertion before the enemy and murder. Other offenses were punishable at the discretion of a court-martial; and, there were no limits upon the exercise of that discretion.⁴³²

The Rules expressly proscribed murder, robbery and theft. Furthermore, a general article provided for the punishment of:

All other faults, disorders, and misdemeanors, which shall be committed on board any ship belonging to the thirteen United Colonies, and which are not herein mentioned, shall be punished according to the laws and customs in such cases at sea.⁴³³

There was no requirement that, to be punishable under the Rules, murder, robbery or theft be committed on board ship. Consequently, inasmuch as Congress could have made the same restriction on these offenses as it did in the general article, a strong argument existed that they were punishable even if committed on shore.⁴³⁴ Indeed, it should be observed that, unlike the case with the Articles of War,⁴³⁵ there was no requirement that an officer, seaman, or marine be delivered to civil authorities if accused of committing a civil offense. This evidence, while not conclusive, strongly suggests that no service connection was necessary before the offenses of murder, robbery and theft could be punishable under the Rules.

3. *From the Confederation to the Framing of the Constitution*

As evident from the foregoing, a major cause of the American Revolution was Britain's policy of requiring the colonies to pay for the maintenance of British regulars in times of peace.⁴³⁶ Indeed, as proof of "a history of repeated injuries and usurpations"⁴³⁷ by the king, the Declaration of Independence charged: "He has kept among us, in times of Peace, Standing Armies, without the Consent of our

431. Naval Discipline Act of 1749, 22 Geo. 2, ch. 33.

432. No punishment in excess of twelve lashes, however, could be inflicted without the consent of the commander in chief.

433. 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 392, at 382.

434. This is especially true insofar as the Rules contained no proviso as to its jurisdiction as in the Naval Discipline Act of 1661. *See supra* note 172.

435. *See supra* note 424.

436. *See supra* note 331-82 and accompanying text.

437. The Declaration of Independence in 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 408, at 510, 511-12.

legislatures."⁴³⁸ When the definitive treaty of peace between the United States and Great Britain was executed in 1783,⁴³⁹ an obvious question was the fate of the army and navy.

For the navy, resolution of the question was relatively easy. The navy, having only five warships in commission by 1780, had practically disappeared by war's end.⁴⁴⁰ In any event, inasmuch as the new nation was near bankruptcy, it could not afford an investment in ships that a navy would require.⁴⁴¹ There was, therefore, no credible support for the continuance of the navy.

For the army, the question was much more difficult. Of immediate concern was the payment of arrearages in pay to the soldiers. Only through the personal intervention of Washington was a revolt by the army averted.⁴⁴² The decision was made, against Washington's advice, to pay off the troops and discharge all but eighty men needed to guard military stores.⁴⁴³ As envisioned under the Articles of Confederation, the nation would rely thenceforth upon the states to provide troops⁴⁴⁴ and funds⁴⁴⁵ for the common defense, albeit under the command of general officers appointed by Congress.⁴⁴⁶

Congress eliminated all political danger of the Continental Army by disbanding it. Nonetheless, Congress had to field a credible force to meet the danger presented by the Indians and the forts garrisoned by the British in the Northwest despite the treaty of peace.⁴⁴⁷ In 1784, a call was made upon several states to furnish men sufficient to form a regiment of 700 men.⁴⁴⁸ This army, such as it was, was governed by the Articles of War of 1776, as amended by Congress in 1786.⁴⁴⁹

438. *Id.* at 512. The Royal Navy also was the cause of much conflict between the colonists and the crown. See D. LEACH, *supra* note 337, at 134-62.

439. For a summary of the peace negotiations and their settlement, see R. RANDLE, *THE ORIGINS OF PEACE* 217-22 (1973).

440. A. MILLETT & P. MASLOWSKI, *supra* note 1, at 77.

441. E. BEACH, *THE UNITED STATES NAVY* 24-25 (1986).

442. See J. FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 168-75 (1974). Rebellions within the army were not an uncommon occurrence during the war. See Martin, *A "Most Undisciplined, Profligate Crew." Protest and Defiance in the Continental Ranks, 1776-1783* in *ARMS AND INDEPENDENCE: THE MILITARY CHARACTER OF THE AMERICAN REVOLUTION* 119-40 (R. Hoffman & P. Albert eds. 1984).

443. R. WEIGLEY, *supra* note 305, at 80-81. See 10 *THE WRITINGS OF GEORGE WASHINGTON* 312-15 (W. Ford ed. 1891) (providing Washington's view on peace establishment).

444. *ARTICLES OF CONFEDERATION* art. 6-7.

445. *Id.* art. 8.

446. *Id.* art. 9.

447. R. WEIGLEY, *supra* note 305, at 81-82.

448. *Id.* at 82.

449. 30 *JOURNALS OF THE CONTINENTAL CONGRES* 316 (W. Ford ed. 1934). See R. KOHN, *EAGLE & SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT 1783-180* 70-71 (1975) (providing background on these amendments).

The army was obviously insufficient to meet the needs of defending the frontier. When Shay's Rebellion erupted in 1786, the army did not have even enough men to defend the newly-established Springfield Arsenal.⁴⁵⁰ Although Shay's Rebellion was principally a taxpayers' revolt local to Massachusetts, the Confederation's seeming ineffectiveness stimulated the call of a constitutional convention in Philadelphia.⁴⁵¹

At the Constitutional Convention of 1787, it was contended that the Confederation was inadequate to provide security against foreign invasion inasmuch as it did not have independent authority to prevent or support a war.⁴⁵² It was thus agreed that Congress should have the power to declare war.⁴⁵³ As incident to this power, it was proposed that Congress be empowered to raise and support an army,⁴⁵⁴ to provide and maintain a navy,⁴⁵⁵ to make rules for the government and regulation of the land and naval forces,⁴⁵⁶ to provide for calling forth the militia,⁴⁵⁷ and to provide for organizing, arming, and disciplining the militia as may be employed in the service of the United States.⁴⁵⁸ There was no controversy as to the establishment of the navy. There was a division, however, as to the powers of the general government over the creation of the army and the regulation of the militia.

George Mason proposed that Congress be given the power to regulate the militia inasmuch as the several "States will never concur in any one system, if the displying [sic] of the militia be left in their hands."⁴⁵⁹ He hoped that there would be no standing army in peace, except for a few garrisons.⁴⁶⁰ Others, such as Roger Sherman and Elbridge Gerry, objected that the states would not give up their right to a militia to provide for their own defense.⁴⁶¹ Oliver Ellsworth's views appear to have captured the essence of this opposition.

Mr. Ellsworth [sic] was going far in submitting the militia to the Genl Government as might be necessary, but thought the motion of Mr. Mason too far. He (moved) that the militia should have the same arms (& exercise and be under rules established by the Genl Govt. when in actual service of the

450. J. FLEXNER, *supra* note 442, at 200-01.

451. F. McDONALD, *NOVUS ORDO SECLORUM* 177-78 (1985).

452. 1 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 19 (1937).

453. 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION*, 321-22 (1937).

454. *Id.* at 329.

455. *Id.* at 330.

456. *Id.*

457. *Id.* at 316-18.

458. *Id.* at 330-33.

459. *Id.* at 326, 330.

460. *Id.* at 326.

461. *Id.* at 332.

U. States and when States neglect to provide regulations for militia, it shd. be regulated and established by the legislature of U.S.) The whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.⁴⁶²

Mason conceded that the states should be allowed authority over such part of the militia as may be required for their own use.⁴⁶³ It was subsequently agreed in committee to grant Congress the power "to make laws for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers, and the authority of training the militia according to the discipline prescribed by the United States."⁴⁶⁴ Mason, with whom Madison agreed, sought to amend this language by adding the phrase "And that the liberties of the people may be better secured against the danger of standing armies in time of peace."⁴⁶⁵ This was rejected on the ground that it set a "dishonorable mark of distinction on the military class of Citizens."⁴⁶⁶

As for the power to raise and support armies, Gerry objected that there was no check against standing armies in time of peace.⁴⁶⁷ Gerry, together with Luther Martin, moved that a numerical restriction be placed upon the size of the army in time of peace.⁴⁶⁸ This proposal was rejected, it being argued that the best guard against a military government was Mason's suggestion that a limit be placed upon the appropriations of revenue for the army.⁴⁶⁹

During the ratification process of the proposed constitution, a major point of disagreement concerned the war powers granted to Congress. In favor of these powers, Alexander Hamilton wrote:

The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their oper-

462. *Id.* at 330-31.

463. *Id.* at 332-33.

464. *Id.* at 352. It would appear that the term "discipline," as used in the phrase "the discipline prescribed by the United States" meant a system of tactical training, rather than its more common connotation as a system of maintaining order. The term "governing" was clearly intended to convey the latter. *Id.* at 384-88.

465. *Id.* at 617.

466. *Id.*

467. *Id.* at 329.

468. *Id.* at 330.

469. *Id.* Mason, together Madison, proposed that the legislature be restrained from establishing a perpetual revenue. *Id.* at 325-27. The Committee of Style subsequently inserted such a provision with respect to the army, thereby limiting appropriations for a period no longer than two years. *Id.* at 595.

ations; to provide for their support. These powers ought to exist without limitation; *because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.⁴⁷⁰

Echoing Washington, Hamilton argued that reliance upon the militia to provide the nation's defense was misplaced.

The facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. . . . War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.⁴⁷¹

The Anti-Federalists found these unrestricted powers anathema.

It is admitted that to prohibit the general government, from keeping up standing armies, while yet they were authorized to raise them in case of exigency, would be an insufficient guard against the danger. A discretion of such latitude would give room to elude the force of the provision.

It is also admitted that an absolute prohibition against raising troops, except in case of actual war, would be improper; because it will be requisite to raise and support a small number of troops to garrison the important frontier posts, and to guard arsenals; and it may happen, that the danger of an attack from a foreign power may be so imminent, as to render it highly proper we should raise an army, in order to be prepared to resist them. But to raise and keep up forces for such purposes and on such occasions, is not included in the idea, of keeping up standing armies in time of peace.⁴⁷²

George Mason, who refused to sign the final draft of the Constitution, argued against Congress' powers over the militia.

I abominate and detest the idea of a government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before. That is, by rendering them useless, by disarming them. Under various pretences, congress may neglect to provide for arming and disciplining the militia, and

470. THE FEDERALIST No. 23, at 195-96 (A. Hamilton) (J. Hamilton ed. 1880).

471. *Id.* THE FEDERALIST No. 25 (A. Hamilton) (J. Hamilton ed. 1880).

472. Brutus No. 10 in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 290-291 (R. Ketcham ed. 1986).

the state governments cannot do it, for congress has an exclusive right to arm them, & c. . . . Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

. . . .
The English parliament never pass[ed] a mutiny bill but for one year. This is necessary, for otherwise the soldiers would be on the same footing with the officers, and the army would be dissolved. One mutiny bill has been here in force since the revolution. I humbly conceive there is extreme danger of establishing cruel martial regulations. If at any time our rulers should have unjust and iniquitous designs against our liberties, and should wish to establish a standing army, the first attempt would be to render the service and use of militia odious to the people themselves; subjecting them to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much, as to make them cry out, *give us a standing army*.⁴⁷³

To similar effect, Luther Martin argued that the power over the militia "gives a compleat power, and subjects the yeomanry of this country, at any, and all times, to *martial* law, which is not restrained in this Constitution, as it is in Great-Britain."⁴⁷⁴

It is apparent that proponents and opponents to the Constitution alike agreed that the war powers were unlimited. As evidenced by the arguments of Mason and Martin, it was believed that these powers enabled Congress to impose martial law upon the militia when in service of the United States. It would seem to follow, then, that there was no dispute that such power extended over the regular land and naval forces. Indeed, as Martin pointed out, the constitutional restrictions which existed in Great Britain under the Petition of Right, the Bill of Rights, and the annual Mutiny Acts were of no force under the new Constitution.

4. *The Land and Naval Forces During the Early Republic*

Within weeks after the First Congress convened in 1789, amendments to the Constitution were proposed. Among James Madison's proposed amendments was the following:

That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments,

473. 3 THE PAPERS OF GEORGE MASON 1074-1075 (R. Rutland ed. 1970).

474. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 293 (J. Hutson ed. 1987).

and cases arising in the land and naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.⁴⁷⁵

A Committee of The House of Representatives adopted a proposed amendment substantially the same as that of Madison.⁴⁷⁶

As for the states, Massachusetts proposed, "That no person shall be tried for any crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government & regulation of the Land & Naval forces."⁴⁷⁷ New Hampshire proposed an amendment similar to Massachusetts,⁴⁷⁸ and that no standing army be kept in time of peace unless with the consent of three-fourths of the members of each branch of Congress.⁴⁷⁹

Virginia proposed that a two-thirds majority be required to sustain a standing army and that no soldier be enlisted for more than four years except in time of war. In apparent response to Mason's criticism, Virginia further proposed an amendment:

That each State respectively shall have the power to provide for organizing, arming and disciplining it's own Militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion or rebellion; and when not in the actual service of the United

475. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES 11 (C. Bickford & H. Veit eds. 1986) [hereinafter DOCUMENTARY HISTORY]. When Madison campaigned for a seat in the House of Representatives, he pledged to introduce amendments to the Constitution which would "render certain vexatious abuses of power impossible." 11 THE PAPERS OF JAMES MADISON 428 (R. Rutland ed. 1977). He recognized that a bill of rights could not serve as an absolute guarantee against the power of the community; but, he argued that "they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to controul the majority from those acts to which they might be otherwise inclined." 12 THE PAPERS OF JAMES MADISON 204-205 (C. Hobson ed. 1979).

476. 4 DOCUMENTARY HISTORY, *supra* note 475, at 30.

477. *Id.* at 12-13.

478. *Id.* at 14.

479. *Id.* at 15.

States, shall be subject only to such fines, penalties and punishments as shall be directed or inflicted by the laws of its own State.⁴⁸⁰

North Carolina adopted similar proposed amendments.⁴⁸¹ New York also proposed that the militia should not be subject to martial law except in time of war, rebellion or insurrection and "[t]hat (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury."⁴⁸²

The House of Representatives adopted a resolution containing seventeen amendments to the Constitution. These amendments included the recommendation of its committee⁴⁸³ and the following amendment:

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.⁴⁸⁴

The Senate altered this language so as to read:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.⁴⁸⁵

The Senate struck the House's proposed amendment modelled after Madison's proposal.⁴⁸⁶ The Senate's version was submitted by to the

480. *Id.* at 18.

481. 4 ELLIOT'S DEBATES 245 (1836).

482. 4 DOCUMENTARY HISTORY, *supra* note 475, at 20.

483. *See supra* note 476.

484. 4 DOCUMENTARY HISTORY, *supra* note 475, at 37.

485. *Id.* at 46.

486. *Id.* at 44. The import of this deletion is difficult to judge. The Senate accepted the House's proposal guaranteeing the right to speedy trial, confrontation of witnesses, compulsory process, and the assistance of counsel. *Id.* at 37, 44. In conference, the two

states by both Houses and was ratified.

From the foregoing, it can be concluded that a consensus existed as to the unavailability of certain procedural guarantees in criminal cases arising in the land and naval forces or in the militia when in actual service. Cases arising in the land and naval forces were consistently excepted from the right to grand jury presentment and to trial by jury.⁴⁸⁷ As revealed by Mason's arguments, inasmuch as all able-bodied adult males were subject to serve in the militia, imposition of martial law (i.e. military law) upon it as a matter of course would be intolerable. Hence, the militia should only be subject to the articles of war when in actual service; and, then, only in time of war or public danger.

This conclusion becomes even more apparent when legislation of this era pertaining to the army, navy and militia is examined. The Troops Act of 1789 recognized the army as had been established during the Confederation.⁴⁸⁸ It further provided:

[T]hat the said troops shall be governed by the rules of and articles of war, which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established.⁴⁸⁹

In the following year, this act was supplanted by the Military Establishment Act of 1790.⁴⁹⁰ It provided:

That the commissioned officers, non-commissioned officers, privates, and musicians aforesaid, shall be governed by the rules and articles of war, which have been established by the United States in Congress assembled, as far as the same may be applicable to the Constitution of the United States, or by such rules and articles as may hereafter by law be established.⁴⁹¹

This act, moreover, authorized the President to call the militia, which

Houses amended this proposal in the form that came to be the sixth amendment. *Id.* at 47-48. It would appear that, given the consensus of opinion on the reach of the right to trial by jury in criminal cases, the ultimate division of Madison's proposal into two separate amendments was largely stylistic rather than substantive. Hence, a strong argument can be made that the right to trial by jury as guaranteed by the Sixth Amendment was not intended to apply to cases arising in the land and naval forces or in the militia when in actual service. Even Thomas Jefferson was in agreement that there should be no right to trial by jury in "cases cognisable before a court martial concerning only the regular officers & souldiers of the U.S. or members of the militia in actual service in time of war or insurrection." 12 THE PAPERS OF JAMES MADISON, *supra* note 475, at 363.

487. *See supra* note 486.

488. The Troops Act of 1789, 1 Stat. 95.

489. *Id.* at 96, § 4.

490. Military Establishment Act of 1790, 1 Stat. 119.

491. *Id.* at 121, § 13.

"shall be subject to the rules and Articles of War" while in service,⁴⁹² a pattern which was to be repeated in the Military Establishment Act of 1795.⁴⁹³ In the Militia Act of 1792, however, Congress provided "[t]hat courts-martial for the trial of militia shall be composed of militia officers only".⁴⁹⁴ The Articles of War of 1776, as amended, thus continued to apply in the early republic.

In 1806, Congress enacted new articles of war which replaced the Articles of War of 1776.⁴⁹⁵ During the floor debates regarding these new articles of war, amendments were proposed to strike provisions for the death penalty for failure to endeavor to suppress a mutiny or for offering violence to his officer.⁴⁹⁶

In support of this amendment, Mr. CAMPBELL reprobated the idea of the lives of citizens being in the power of a court martial. He compared soldiers to mere machines, from the severity of the military law; he said almost every article in the bill was stained with blood; he drew a parallel between them and the civil penal laws; and that when men know how small offences subjected them to death, they would be deterred from or disgusted in serving their country.

Mr. SOUTHARD and Mr. COOK followed with similar observations and arguments, in favor of the amendment.

This was strenuously opposed by Mr. R. NELSON, Mr. SMILIE, Mr. MACON, and Mr. TALLMADGE.

These gentlemen represented the necessity of the bill standing as it had hitherto done in this respect. They drew a picture of the Army without discipline, where every soldier might think himself at his own disposal— of an army being ordered to attack the enemy, and an officer refusing, and drawing his sword on his commanding officer. The necessity of a code of laws for the military differing from the civil law was demonstrated; and having, by the law as it stands, gone through the Revolutionary war with success, and in peace

492. *Id.* § 15.

493. Military Establishment Act of 1795, 1 Stat. 430, 432, § 14.

494. Militia Act of 1792, 1 Stat. 264, § 6. This was repeated in the Militia Act of 1795, 1 Stat. 424, § 6.

495. Act for Establishing Rules and Articles for the Government of the Armies of the United States of 1806, 2 Stat. 359. It should be observed that these Articles of War of 1806 were adopted during the Jefferson presidency. Jefferson was a staunch opponent of standing armies during times of peace and was a staunch advocate of the militia to repel invasion. See THOMAS JEFFERSON, WRITINGS 505-506 (M. Peterson ed. 1984). Nonetheless, he saw the need to have a small regular force. See Military Peace Establishment Act of 1802, 2 Stat. 132. See generally, J. STAGG, MR. MADISON'S WAR 120-144 (1983). A more detailed account will appear in the forthcoming publication T. CRACKEL, MR. JEFFERSON'S ARMY: POLITICAL AND SOCIAL REFORM OF THE MILITARY ESTABLISHMENT, 1801-1809 (1987).

496. 15 ANNALS OF CONGRESS 326-327 (1852).

found no ill consequence arising therefrom, they thought it neither prudent nor safe to adopt the amendment.

Mr. TALLMADGE said, that in the Revolutionary war, the disobedience of soldiers to their officers' commands, had, at one time gone to such a length as threatened a mutiny. The Adjutant General, Lee, was struck by a soldier on being ordered to do his duty. The commander ordered him to be tried by a general court martial. He was found guilty and sentenced to be shot. The army was drawn up, to attend the execution; upon the spot appointed for that purpose General Lee interceded in behalf of the soldier, who was, in consequence pardoned. This, however, produced a good effect in the army. Mr. TALLMADGE, brought forward other instances of danger, when soldiers were not subject to severe laws. Soldiers, he observed, were a description of men that must be ruled with severity— and though officers were invested with this authority, they were ever careful in exerting it. So far from it, than an officer had an esteem for the soldiers he commands—while the soldier himself, acting up to the tenor of his duty, respected his officer.

The question being now called for on Mr. CAMPBELL'S amendment, was lost. The affirmative only 20.⁴⁹⁷

The Articles of War of 1806 were substantially the same as the Articles of War of 1776. Being enacted in a time of relative peace (save for the frontier wars), Congress thus reaffirmed John Adams' equation of military discipline with the civil laws.⁴⁹⁸

In 1794, Congress reestablished the navy.⁴⁹⁹ As in the case of the army, Congress adopted the Rules and Regulations of the Navy as obtained during the Revolutionary War,⁵⁰⁰ and in the Act for the Government of the Navy of the United States of 1799, these rules were enacted substantially verbatim.⁵⁰¹ Two notable additions, however, were the provisions:

44. Every person guilty of mutiny, desertion or disobedience to his superior officer on shore, acting in the proper line of his duty, shall be tried by a court martial, and suffer the like punishment for every such offence, as if the same

497. *Id.* Article 87 of the Articles of War of 1806 reduced the maximum number of lashes to be inflicted on an offender from one hundred to fifty. *See supra* note 421. In 1812, authorization for the infliction of corporal punishment was abolished. Act of May 16, 1812, 2 Stat. 735, at § 7.

498. *See supra* note 429 and accompanying text.

499. E. BEACH, *supra* note 441, at 27.

500. Act of July 1, 1797, 1 Stat. 525 at § 8. When the Marine Corps was reestablished in 1798, its officers, non-commissioned officers, privates and musicians were subject to both the Articles of War of 1776 and the Rules and Regulations of the Navy. Act of July 11, 1798, 1 Stat. 594-95 at § 4. *See generally* 2 Op. Att'y Gen. 311 (1830).

501. Act for the Government of the Navy of the United States of 1799, 1 Stat. 709.

had been committed at sea, on board any ship or vessel of war in the service of the United States.

45. If any person belonging to any ship or vessel of war in the service of the United States, shall, when on shore, on duty, or otherwise, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, such person shall be punished as a court martial shall direct.⁵⁰²

In the following year, these rules were replaced by a entirely new code.⁵⁰³ All offenses committed by persons belonging to the navy while on shore were punishable as if committed at sea;⁵⁰⁴ and, if any such person, when on shore, should "plunder, abuse or maltreat any inhabitant, or injure his property in any way," he was subject to punishment by court-martial.⁵⁰⁵ That persons in the navy were considered subject to civil authority as well is evident in the provision respecting murder.

The crime of murder, when committed by any officer, seamen or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court martial.⁵⁰⁶

In *United States v. Bevans*,⁵⁰⁷ it was held that jurisdiction over murders committed on board warships within the territory of the United States devolved upon the courts of the state in which they were committed. In arriving at this decision, however, Chief Justice Marshall observed:

That a government which possesses the broad power of war; which 'may provide and maintain a navy;' which 'may make rules for the government and regulation of the land and naval forces,' has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section . . . the inquiry respects, not the extent of the power of Congress, but the extent to which that power has been exercised.⁵⁰⁸

As Chief Justice Marshall makes clear, the power of Congress over the government of the land and naval forces is plenary. Whatever constitutional restrictions as may have existed under the

502. *Id.* at 713, art. 44-45.

503. Act of April 23, 1800, 2 Stat. 45.

504. *Id.* at 47, art. 17.

505. *Id.* at 48, art. 27.

506. *Id.* art. 21.

507. 16 U.S. (3 Wheat.) 336 (1818).

508. *Id.* at 390.

English constitution⁵⁰⁹ are of no avail once Congress has spoken. The unavoidable conclusion, then, is that Congress has the power to subject members of the land and naval forces to trial by court-martial irrespective of subject matter or place of commission.

COURTS-MARTIAL AND THE FEDERAL JUDICIARY

In the previous section it was established that Congress has plenary power over the governing of the land and naval forces; and, as a consequence, members of such forces are subject to punishment for any offense, irrespective of subject matter or of place committed, once Congress so determines. Indeed, Congress has the power to make members of the land and naval forces subject to its exclusive regulation.⁵¹⁰

Having such plenary power, however, does not explain why members of the land and naval forces are triable by court-martial, rather than by the federal judiciary established under Article III of the Constitution. To be sure, the Fifth Amendment excepts cases arising in the land and naval forces from the requirement of presentment or indictment by grand jury; and, arguably, this exception extends to the right to trial by jury as well. But, with the judicial power of the United States being vested in the federal courts,⁵¹¹ one would think that, if cases arising in the land and naval forces were to be tried by federal authority, trials would be conducted by a trial judge alone upon information or complaint; provided, that the judge was expressly granted jurisdiction to hear such cases.⁵¹² In *Dynes v. Hoover*,⁵¹³ however, a contrary conclusion was reached.

In *Dynes*, a seaman was convicted by naval court-martial for attempted desertion and was confined in the penitentiary of the Dis-

509. See *supra* notes 173-87 and accompanying text.

510. *Coleman v. Tennessee*, 97 U.S. 509 (1879).

511. U.S. CONST. art. III, § 1.

512. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (holding that the federal courts established under Article III did not have jurisdiction over common law crimes; but, rather, they only had jurisdiction over those offenses expressly conferred by legislative act). To have jurisdiction over cases arising in the land and naval forces, then, a federal court must point to an express grant of jurisdiction. Because the articles of war never conferred such jurisdiction upon the federal courts, these courts would have to find their jurisdictional source elsewhere. Although most offenses subject to punishment under current military law are not cognizable by federal courts, some offenses, such as distribution of illicit drugs, are subject to their jurisdiction. In these instances, military tribunals and the federal courts would have concurrent jurisdiction. See generally DEPARTMENT OF THE ARMY, ARMY REGULATION 27-10, at 5-9 (1987). See also, *United States v. Colon-Padilla*, 770 F.2d 1328, 1330 (5th Cir. 1985) (stating that courts-martial do not exercise exclusive jurisdiction over service connected crimes).

513. 61 U.S. (20 How.) 65 (1858).

trict of Columbia. He brought suit against the marshal of the penitentiary alleging false imprisonment on the ground that the court-martial did not have jurisdiction over him. After noting Congress' powers to provide and maintain a navy and to make rules for the government of the land and naval forces, together with the President's power as commander-in-chief, the Court observed:

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.

.....
With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the courts jurisdiction, and give him redress.⁵¹⁴

This is an extraordinary statement. Less than twenty years before, the Court had said that "in every well organized government the judicial power should be co-extensive with the legislative."⁵¹⁵ To argue that Congress' or the President's powers over a given subject matter necessarily exclude the federal judiciary from reviewing the exercise of those powers would appear to be absurd. The federal courts would have little function if they could not review the acts of Congress or of the President, if this argument were accepted.⁵¹⁶ Yet, this statement can be reconciled by examining the relationship of cases arising in the land and naval forces with the text of Article III itself.

514. *Id.* at 79, 82-83.

515. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Peters) 524, 619 (1838).

516. *Marbury v. Madison*, 5 U.S. (2 Cranch) 137 (1803) (teaching an opposing assertion).

Article III, Section 2 provides:

Section 2. [1] The judicial power shall extend to all Cases, in Law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under the grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

[2] In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all crimes, except in cases of Impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.⁵¹⁷

Under the decision of *Marbury v. Madison*,⁵¹⁸ a federal court may exercise jurisdiction no greater than is allowed by this section, irrespective of an act of Congress. For the federal courts to have jurisdiction over cases arising in the land and naval forces, therefore, such cases must be within one or more of the classes of cases or controversies specified in section 2.

There are three classes of cases or controversies which may arguably extend to cases arising in the land and naval forces. These are: (1) all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority; (2) all cases of admiralty and maritime jurisdiction; and (3) controversies to which the United States shall be a party.

As for the first class of cases, it would be disingenuous to argue that cases arising in the land and naval forces did not arise under the Constitution⁵¹⁹ or the laws of the United States.⁵²⁰ The key limita-

517. U.S. CONST. art. III, § 2.

518. See *Marbury v. Madison*, 5 U.S. (2 Cranch) 137 (1803).

519. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823-24 (1824) (Chief Justice Marshall apparently contending that whenever the power of Congress

tion upon this class of cases is that these cases must be "in law and equity." The terms law and equity obviously derive from their usage in the English common law courts.⁵²¹ As Blackstone declared, the common law courts had cognizance of "all possible injuries whatsoever, that did not fall within the cognizance of either the ecclesiastical, military, or maritime tribunals."⁵²² That the Supreme Court was able to hear *Dyne v. Hoover*⁵²³ at all was owing to the fact that it was a common law action in which a court-martial proceeding was collaterally attacked.⁵²⁴

As for cases of admiralty and maritime jurisdiction, it would seem that at least cases arising in the naval forces would fall thereunder. In England, the High Court of Admiralty had jurisdiction over crimes at sea such as piracy;⁵²⁵ but, it never controlled naval policy or administration.⁵²⁶ In *DeLovio v. Boit*,⁵²⁷ Justice Joseph Story held the Constitution enlarged admiralty jurisdiction to include

becomes an issue, although other questions of fact or law may be involved, it is a case arising under the Constitution). Inasmuch as cases arising in the land and naval forces necessarily implicate the powers of Congress to govern such forces, a colorable argument could be made that such cases always arise under the Constitution.

520. Not all acts of Congress are deemed to be laws of the United States. In *Key v. Doyle*, 434 U.S. 59, 67-68 (1977), it was held that a Congressional enactment applying only in the District of Columbia was not a statute of the United States for the purposes of 28 U.S.C. § 1257(1), which provides for the Supreme Court's powers of appellate review. There are also decisions disagreeing as to whether the Uniform Code of Military Justice is "an enactment of Congress" for purposes of the Assimilative Crimes Act (18 U.S.C. § 13). Compare *United States v. Walker*, 552 F.2d 566 (4th Cir. 1977) with *United States v. Smith*, 614 F. Supp. 454 (D.C. Me. 1985). These cases, however, appear to revolve around particular policy questions pertaining to specific statutes. It would be absurd to argue that the Uniform Code of Military Justice is not a law of the United States inasmuch as it applied to millions of individuals throughout the world. Few statutes have such a broad reach; and, indeed, if the general applicability of the law were the test, few Congressional statutes would pass muster.

521. In Section 11 of the Judiciary Act of 1789, 1 Stat. 73, 78, the circuit courts were given jurisdiction "of all suits of a civil nature at common law or in equity" of a value exceeding \$500 in connection with controversies in which the United States or an alien was a party or in which there was a diversity of citizenship between the parties. Because domestic relations and probate cases were historically heard in ecclesiastical courts, such cases were held not to be cognizable in the circuit courts in that they did not fit the statutory description. See 13B C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3609-3610 (2d ed. 1984).

522. 3 W. BLACKSTONE, *supra* note 4, at 109.

523. See *supra* note 513.

524. *Grant v. Gould*, 126 Eng. Rep. 434 (C.P. 1792) (proceedings of courts-martial reviewable under petition for writ of prohibition to the extent of want of jurisdiction); see *supra* notes 296-99. See also *King v. M'Lean Asylum*, 64 F. 331, 332-33 (1st Cir. 1894) (determining petitions for writ of habeas corpus cognizable in circuit courts). This raises a significant question as to whether the Supreme Court may constitutionally hear appeals from the Court of Military Appeals pursuant to 28 U.S.C. § 1259, except in limited cases. That question, however, is beyond the scope of this article.

525. 28 Hen. 8, ch. 15 (1536).

526. MINISTRY OF DEFENCE, *supra* note 96, at xiii.

527. 7 Fed. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776).

not only what was cognizable by the High Court of Admiralty, but also all maritime contracts, torts and injuries.⁵²⁸ The exact boundaries of admiralty and maritime jurisdiction have proved incapable of precise definition even today;⁵²⁹ but, the courts have consistently held that it depends on what has been received as law in the maritime usages in this country and on such legislation as may have been competent to affect it.⁵³⁰ As evidenced by the rules and regulations governing the navy as enacted in 1797, 1799, and 1800,⁵³¹ a strong tradition exists that the naval forces were not considered subject to the admiralty and maritime jurisdiction. Moreover, as indicated by Chief Justice Marshall in *United States v. Bevans*,⁵³² Congress never extended admiralty jurisdiction to warships, whether within or without the territorial jurisdiction of the United States. It seems fair to conclude, therefore, that the term "cases of admiralty and maritime jurisdiction" does not include cases arising in the naval forces.

The term controversies as used in section 2 is not defined and has received no fixed meaning as a term of art. Those actions under the Judiciary Act of 1789, which derived their jurisdiction from the controversies specified in that section, are civil suits.⁵³³ And, in *Chisolm v. Georgia*,⁵³⁴ Justice Iredell said that the term "controversies" only applies to cases of a civil nature. Joseph Story indicated that judicial power over controversies to which the United States is a party was a necessary "means of enforcing civil rights, or compelling the performance, either civilly or criminally, of public duties on the part of the citizens;"⁵³⁵ but, this appears to contemplate only criminal contempt powers rather than an expansive view of criminal jurisdiction. Indeed, inasmuch as the United States is always a party in federal criminal prosecutions, an expansive view of the term "controversies" would give the United States unlimited power to try criminal offenses of all descriptions, rather than those based upon powers expressly granted to Congress. Cases arising in the land and naval forces, then, are not controversies to which the United States is a party.

The question arises as to whether the Fifth and Sixth Amendments in any way alter the foregoing conclusion. Recall that, as orig-

528. *Id.* at 442.

529. 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3671 at 409 (2d ed. 1985).

530. *Id.* at 420. (Citing *The Lottawanna*, 88 U.S. (32 Wall.) 558, 574-476 (1874)).

531. See *supra* notes 500-06 and accompanying text.

532. See *supra* note 507.

533. See *supra* note 521.

534. 2 U.S. (2 Dall.) 419, 431-32 (1793).

535. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1668 (1833).

inally proposed by Madison,⁵³⁶ the Amendments were intended to replace clause 3 of section 2. The legislative history is sparse as to his purposes; but, it would seem that his purpose was to remove an ambiguity in clause 3, rather than to promote the rights of soldiers and sailors. In its original form, clause 3 provided that all crimes, except in cases or impeachment, shall be tried by jury.⁵³⁷ Presumably, triable crimes would consist of cases of treason, felony or misdemeanor; but courts-martial were also considered criminal proceedings.⁵³⁸ Courts-martial were tried by panels of officers appointed by the commander, which made findings and passed sentence subject to confirmation by the commander that convened the court.⁵³⁹ Courts-martial were not presided over by a judge; rather, the court itself controlled the proceedings and made rulings of law and evidence as may arise before it.⁵⁴⁰ Unanimity for conviction was not required, nor was it required for meting out the death penalty.⁵⁴¹ As with cases of impeachment,⁵⁴² therefore, courts-martial procedures were wholly unlike those known to common law jury trials; and, it was precisely the latter's procedures that courts-martial procedures were intended to avoid.⁵⁴³ Hence, there was need to amend clause 3 to obviate the ambiguity.

CONCLUSION

Doubtlessly, there are those who find the *Solorio* decision to be a reactionary retreat from the enlightened jurisprudence of *O'Callahan*. But the English constitutional history of the seventeenth and eighteenth centuries and the history surrounding the framing of the Constitution strongly support the conclusion that Congress has plenary power to govern the land and naval forces. While it may be wise for Congress to temper the exercise of this power by

536. See *supra* note 475 and accompanying text.

537. See *supra* note 517 and accompanying text.

538. For example, in the preamble to the 1786 amendments to the Articles of War of 1776, the number of officers needed to empanel a general court-martial was reduced so that "crimes committed by officers and soliders serving with small detachments" would not escape punishment. See *supra* note 449. But see, *Middendorf v. Henry*, 425 U.S. 25, 34 (1976) (finding summary court-martial not a "criminal prosecution" within meaning of sixth amendment).

539. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 386, at § 14, art. 2, 3.

540. 1 W. WINTRHOP, *supra* note 47, at 252. A judge advocate was appointed to prosecute in the name of the United States and to serve as counsel to the accused. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 386, at § 14, art. 6 (as amended). For lawyers trained in the adversarial system of justice, the judge advocate would appear to have an irreconcilable conflict of interest in serving both the prosecution and accused.

541. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 386, at § 14, art. 8.

542. U.S. CONST. art. I, § 3, cl. 6-7.

543. See *supra* note 248 and accompanying text.

requiring a service connection before offenses may be triable by court-martial, that is properly a matter of legislative policy and not of constitutional doctrine.

