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ABSTRACT

The Supreme Court's 2003 affirmative action decisions contained an interesting development that on the surface had little to do with minority rights in higher education. Among the friend-of-the-Court briefs that the Supreme Court reviewed was one filed by two dozen current and former high-ranking military officials. The "Becton brief" (so named after its lead amicus, Lt. Gen. Julius Becton) urged the Court to safeguard the service academies' ability to engage in affirmative action, on the grounds that the practice enabled the creation and preservation of an integrated officer corps. The Court was not only persuaded by this argument, but also regarded it as crucial evidence supporting its reaffirmance of race-conscious admissions and quoted from the Becton brief at length in Grutter v. Bollinger.

The Court's reliance on—and implicit trust in—the military's guidance is not at all surprising. Indeed, the Court has a long history of deferring to military judgment. While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny. Nonmilitary claimants typically have to persuade the Court that their evaluation of what is proper in their particular field is consistent with constitutional imperatives. By contrast, once the military informs the Court of what is proper vis-à-vis the Armed Forces, the Court rarely determines that this reasoned evaluation violates the Constitution. While all litigants are granted presumptions of subject-matter exper-

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tise, only the military's subject-matter expertise is habitually shielded from rigorous constitutional evaluation.

This Article will track this tradition of Supreme Court deference to the military. It will be a systematic review of the relevant precedents, one which will detail the circumstances in which the military has typically been brought before the Court (or voluntarily appeared as amicus), the military's "success rate" in persuading the Court, and the philosophical patterns that emerge from the various decisions.

INTRODUCTION

When the Supreme Court reasserted the constitutionality, at least conceptually, of affirmative action in higher education admissions in the spring of 2003,[1] much of the commentary focused on how both the result reached and the reasoning deployed were a reflection of the traditionally pragmatic jurisprudence of Justice Sandra Day

1. Grutter v. Bollinger, 539 U.S. 306 (2003); *see also* Gratz v. Bollinger, 539 U.S. 244 (2003) (reiterating that the use of race in higher education admissions was not a per se violation of the Fourteenth Amendment; the specific program in *Gratz*, however, in which minority candidates were automatically granted a fixed amount of "points" in the University of Michigan's admissions process, was found unconstitutional).

O'Connor, who wrote the relevant opinions.[2] A less noticed but still important dimension of the University of Michigan affirmative action cases is that they fit perfectly within another, wholly separate tradition.

Among the 170 friend-of-the-court briefs submitted in the two cases was a brief submitted in *Grutter v. Bollinger* by twenty-nine decorated military and government officials.[3] The brief—informally referred to as the "Becton brief" after Lt. Gen. Julius Becton, whose name appeared first in the list—was filed in support of the University and specifically asked the Supreme Court to uphold the practice of race-conscious admissions. The officials' argument was not so much about civil rights or even educational equality as it was about military necessity. Invoking "the absolute imperative of integrating its officer corps in furtherance of the compelling national security interest in an effective military,"[4] the Becton amici insisted that "[a]t present, the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies."[5]

The Supreme Court was clearly persuaded by this line of argument and by this particular language, going so far as to include the latter quotation in its opinion.[6] While amicus briefs from other sectors of American life (such as the corporate sphere) were referenced in the Court's opinion for their arguments favoring race-conscious ad-

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2. *See* Joan Biskupic, *2 Justices' Influence Felt in Latest Term*, USA TODAY, June 27, 2003, at 4A ("Together, the rulings reflected a pragmatic conservatism on the court that stems from O'Connor regularly joining forces with Rehnquist, her old Stanford law school classmate, but also breaking from him in significant ways that push the court toward the nation's political center."); Sanford Levinson, *Redefining the Center*, VILLAGE VOICE (New York), July 8, 2003, at 38 (arguing that recent affirmative action decisions "are best understood in terms of how the court—and especially Justice O'Connor—perceives the current American center of gravity on such matters"); Glenn C. Loury, *Affirmed . . . For Now the Supreme Court's Decision Made Affirmative Action Resoundingly Legal. Now Comes the Hard Part—Making It Unnecessary*, BOSTON GLOBE, June 29, 2003, at D1 ("The first thing to note is that the court's reasoning is pragmatic, not ideological. This is in sharp contrast to the posture of most advocates on either side of the issue.").

3. The list includes two former Secretaries of Defense (William Cohen and William Perry), three former Chairmen of the Joint Chiefs of Staff (William Crowe, John Shalikashvili, and Hugh Shelton), three former Commanders in Chief of the U.S. Central Command (Joseph Hoar, Norman Schwarzkopf, and Anthony Zinni), a former National Security Advisor (Robert McFarlane), four U.S. Senators (Max Cleland, Bob Kerrey, Carl Levin, and Jack Reed), and four former heads of the service academies (Daniel Christman and Howard Graves, Military Academy; Joseph Prueher, Naval Academy; and Tad Oelstrom, Air Force Academy).

4. Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 10, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

5. *Id.* at 5.

6. *Grutter*, 539 U.S. at 331.

missions, the Becton brief was among the few amicus briefs which were directly quoted. And the Becton brief, from which Justice O'Connor pulled five separate quotations, stood alone as the only amicus brief quoted more than twice.[7]

That the Supreme Court would be especially swayed by arguments made by military figures about matters of military policy is utterly unremarkable. Indeed, the Court has a long history of deferring to military judgment. While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny. Nonmilitary claimants typically have to persuade the Court that their evaluation of what is proper in their particular field is consistent with constitutional imperatives. By contrast, once the military informs the Court of what is proper vis-à-vis the U.S. Armed Forces, the Court rarely determines that this reasoned evaluation violates the Constitution. While all litigants are granted presumptions of subject-matter expertise, only the military's subject-matter expertise is habitually shielded from rigorous constitutional evaluation.

The Supreme Court's tradition of deference to the military has been duly noted by scholars and commentators, but it has not really been catalogued. This Article is the first step in that direction, a step which will be followed by several others in the months and years ahead. Its analysis is based on a comprehensive assembled listing of all of the military cases that the Supreme Court has decided dating back to World War I. The tandem goals of this Article are to systematically examine just how successful the military has been before the Supreme Court and to extract from the cases the jurisprudential and philosophical explanations for that success. The Article will close by analyzing the Court's recent opinions in the Guantanamo detentions within the context of the deferential tradition.

I. METHODOLOGY OF THIS PROJECT

Prominent accounts of the Supreme Court's tradition of deference to the military have analyzed the phenomenon in exclusively

7. *Id.* The only other amicus brief to be quoted more than once was the brief of the United States. Out of 101 amicus briefs filed in *Grutter*, the Court quoted from or referred to only eleven in its opinion. Counting Becton and the United States, the other nine referenced amici were the dean of Georgetown Law School, Amherst College, the American Educational Research Center, the Association of American Law Schools, the Law School Admission Council, the Harvard Black Law Students Association, the National Urban League, 3M, and General Motors Corp.

chronological fashion.[8] Although political development approaches to understanding legal phenomena are usually preferable (especially vis-à-vis the modification of doctrine), this Article utilizes a subject-specific approach. Although scrutinizing every single fact pattern within the Court's military jurisprudence is hopelessly unworkable, a few of the most common recurring fact patterns are ideal jumping-off points to asking and answering a series of broader questions:

- How successful is the military when it is a party before the Supreme Court or when issues of military policy are litigated before the Supreme Court?
- Is the success rate dependent upon the nature of the case?
- What, if any, subprinciples can we extract from the general deference instinct?

The list of cases that appears in Appendix A was compiled by generating a master list using a series of Lexis searches[9] and then reviewing that list, case by case, to screen out false positives.[10] Once the final

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8. *E.g.*, John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000); Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. REV. 1 (2002); Jonathan Turley, Pax Militaris: *The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1 (2003); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002). Other treatments of the subject combine something resembling an American political development approach with a more subject-specific analytical construct. *See, e.g.*, Earl F. Martin, *Separating United States Service Members from the Bill of Rights*, 54 SYRACUSE L. REV. 599, 602 (2004) (organizing the Court's post-1969 work into "strong, moderate, and weak separate community cases").

9. The queries searched the headnotes of all Supreme Court cases from 1918 to the present, looking for words such as "military," "armed forces," "army," "navy," "air force," "marines," and "coast guard." Any case that had any of these search terms appear even once in the headnotes was flagged for my review.

10. The obvious apocryphal examples of a false positive generated by these searches would have been a case involving an interstate shipment of Navy bean soup or a copyright suit over the Elvis Costello song *Oliver's Army* (sadly, neither fact pattern was a real case). Some false positives were very clear. The search terms picked up *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which referenced Harry Truman as the commander in chief of the Armed Forces.

Others were not so obvious; they were cases that looked like they were going to count but upon closer inspection did not. Perhaps the strangest example of this was *Caldwell v. Parker*, in which a serviceman was convicted of murder by a civilian court in Alabama after the local military authorities declined to court-martial him. 252 U.S. 376 (1920). The military's surprising demurral made this an ordinary murder case, with no questions of military policy at bar, and no litigants appearing in an official military capacity.

Some false positives required some nuanced decisionmaking. The issue in *Hamilton v. Regents of the University of California* was whether students could be exempted from compulsory college courses in military science on the basis of religious objections. 293 U.S. 245 (1934). While the Court's decision to deny this exemption may shed some light on the Court's philosophical posture in these cases, in the end it was decided that this case should not count in the compilation of the military's success rate because the military itself was

list of military cases had been assembled, each case was studied in terms of the result achieved—did the military win or lose the case?—and the reasoning used by the Court in arriving at this result.

The obvious question, then, is "what is a military case?" The criteria were very simple. A case was identified as a military case if any one of two factors were present: (1) questions of military policy or procedure were before the Court or (2) the military was present as a party to the litigation *in some sort of official capacity.* In other words, a soldier accused of murdering a civilian does not satisfy the military-as-party requirement, but a military tribunal attempting to try Nazi saboteurs most definitely does.

There are a few other necessary explanations for decisions that were made in the research design. This portion of the overall project stopped at World War I simply to keep the caseload manageable at present; one future undertaking will be an expansion of this analysis to the years before 1918. Also excluded was a class of cases which at first glance may have appeared to be quite relevant: disputes over veterans' benefits. The reason these cases were not included in my final tabulations is that the "military" litigants were not really military personnel; they were civilian bureaucrats, usually working for the Veterans Administration. This has two implications. First, it means that the Supreme Court could not be dazzled (or intimidated) by the presence of military brass because there was no military brass in the room. Second, it means that to the point that the civilian bureaucrats were implementing military policy, they were doing so as officials who are traditionally not entitled to deference from the Supreme Court.[11]

For the same reasons, also omitted was the string of war-risk insurance cases that emerged shortly after the outbreak of World War I and persisted into the late 1930s. The insurance program was overseen by the Bureau of War Risk Insurance, which was created in September of 1914.[12] As with the Veterans Administration, then, the "military" party in these cases was in fact a civilian agency, which means that these

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not a party to the case and because much of the Court's reasoning turned on the University's status as a land grant college, which meant that it could be required to teach a variety of subjects—including military science—as a condition of accepting the federal money. *Id.* at 254. This placed the case a level far enough removed from the requirement that military policy questions be before the Court to militate against its inclusion in the final list.

11. This is especially true of bureaucrats in comparison to members of Congress, who generally get some degree of Supreme Court deference based on their elected status.

12. For a contemporary overview of the program, see Samuel McCune Lindsay, *Purpose and Scope of War Risk Insurance,* 79 ANNALS AM. ACAD. POL. & SOC. SCI. 52 (1918).

cases are generally not on point for the purposes of analyzing Supreme Court deference to military parties or policies.[13]

There is also a technical problem. There were inevitably cases, such as *Wallace v. United States*,[14] in which the military could be said to be on *both* sides of a legal dispute. In *Wallace*, a former colonel in the Quartermaster Corps had filed suit for back pay, claiming that he had been improperly removed from his position without the benefit of a hearing when the president, as commander in chief, appointed someone else in his place.[15] In cases such as these, for the purposes of determining whether the military has "won" or "lost" the case, a case was coded as a military "win" if a preferred military policy was upheld or if the chain of command was vindicated. Because the Supreme Court in *Wallace* sided with the policy choice of the superior officer, in this case the president,[16] *Wallace* counts as a "win."[17]

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13. One war risk insurance case, however, provides ample support in dicta for the deference tradition. In *United States v. Williams*, the parents of a Navy seaman who was killed were denied recovery on his war risk insurance policy because their son had cancelled the policy, though he initially enlisted in the Navy while under the age of eighteen with his parents' consent conditioned on the maintenance of the insurance policy. 302 U.S. 46, 47 (1937). Under the terms of the statute, minors between the ages of fourteen and eighteen were competent to enlist with parental permission. *Id.* at 49. Justice Pierce Butler's language for a unanimous Court recognized that the statute did not afford parents any right to condition their consent and then starkly noted how the parents must subsequently fade into the background in terms of the care of and authority over the child:

> Enlistment is more than a contract; it effects a change of status. It operates to emancipate minors at least to the extent that by enlistment they become bound to serve subject to rules governing enlisted men and entitled to have and freely to dispose of their pay. Upon enlistment of plaintiff's son, and until his death, he became entirely subject to the control of the United States in respect of all things pertaining to or affecting his service.

Id. at 49-50 (footnotes omitted).

14. 257 U.S. 541 (1922).

15. *Id.* at 542, 544.

16. The Court specifically held that the limits on the president's power to remove Army officers did not apply when the president was simply appointing a new officer and obtaining Senate confirmation for the new appointment. *Id.* at 544.

17. It should also be pointed out that the tabulation of the military's win-loss record omits intervening procedural and jurisdictional decisions that were handed down earlier in a given litigation separate from the eventual decision on the merits. For example, in the mid-1950s, the Court took on two separate cases in which the wife of an American military official was accused of murdering her husband and initially subjected to a military court-martial: *Kinsella v. Krueger*, 351 U.S. 470 (1956), and *Reid v. Covert*, 354 U.S. 1 (1957). Preliminary Court rulings first had to establish the constitutionality of the relevant provisions of the then-recently enacted Uniform Code of Military Justice (UCMJ). Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801-941 (2000)); *see infra* note 47. This procedural determination was done in *Kinsella*. 351 U.S. at 474-75. However, the following year, in *Reid*, the Court issued a ruling on the merits of the reach of courts-martial, a ruling which covered both the *Reid* murder and the *Krueger* murder. *Reid*, 354 U.S. at 39-41. Because this project is tracking the military's ultimate success rate before

Also not included in the tabulation of win-loss records were individual Justice's orders which had accompanying explanations. At times such orders were of an intermediate procedural nature; at other times, the orders were simply one Justice hearing an application for a stay of a ruling. These cases are referenced in the Appendix, but their results are not part of the statistical dossier; only cases decided by the Court sitting as a whole are tabulated in the win-loss record.[18]

Finally, it must be pointed out that there is a degree to which the forthcoming analysis is going to be somewhat inexact. Just because the military emerges victorious in a certain case does not mean that their success was predicated on a semblance of Supreme Court deference to military prerogatives or expertise. For example, in *ETSI Pipeline Project v. Missouri*, the Court's rejection of the Secretary of the Interior's claim that he had the power to sell water from an Army reservoir for use in a coal slurry without first obtaining approval from the Secretary of the Army was the result of jurisprudential analysis of questions of statutory construction with no relation to the military deference tradition.[19] However, these cases are more the exception than rule.

II. THE DATA

From 1918 through 2004, up to and including the three Guantanamo cases, the Supreme Court has issued rulings in 178 military cases.[20] The military's record in these cases is 118 wins and 60 losses for a success rate of 66.3%.[21] A more detailed breakdown of the military's success rate can be found in the Appendices; some of these figures will be discussed shortly. For the moment, let us proceed to some substantive analysis.

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the Supreme Court, interim rulings are not counted. Consequently, *Reid* is included in the data, but *Kinsella* is not.

18. A trio of orders filed in the lawsuit over the United States' bombing of Cambodia is included in the tabulation in the Appendix, but cannot be coded as either a military win or loss since they are intermediate procedural orders. Holtzman v. Schlesinger, 414 U.S. 1304, 414 U.S. 1316, and 414 U.S. 1321 (1973). Also included in the Appendix are four additional procedural orders not counted in the tabulations: *Lopez v. United States*, 404 U.S. 1213 (1971) (ordering bail possibility for applicant for conscientious objector status); *Peeples v. Brown*, 444 U.S. 1303 (1979) (denying stay of discharge order sought by Navy seaman discharged for sexual misconduct); *Jones v. LeMond*, 396 U.S. 1227 (1969) (granting stay to AWOL conscientious objector claimant protesting confinement in Navy brig and ordering him held in open restricted barracks instead); and *Scaggs v. Larsen*, 396 U.S. 1206 (1969) (ordering a reservist contesting his renewal to be released on his own recognizance).

19. 484 U.S. 495, 505-06 (1988).

20. *See infra* app. A.

21. *See infra* app. B.

A. *The Tradition of Deference: The Basics*

To begin, it must be noted that the Supreme Court's tradition of deference to the military is not something that needs to be inferred or extracted via analysis. It is on the pages of Court opinions in explicit concessional language. The Court's blunt use of the term in *Middendorf v. Henry*—"Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference"—is hardly atypical.[22] In *Rostker v. Goldberg*, the Court confirmed that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[23]

This tradition has also undergone a subtle evolution. As John O'Connor has pointed out, in the early days of the tradition, the Supreme Court's deferential posture took the form of what he called "noninterference," in which the Court opted to screen off military matters from judicial consideration entirely, engaging in a pointed "refusal to conduct a substantive review, no matter how lenient, of military practices."[24] It was only later that the Court's approach took on a more affirmatively deferential tone, in which the Court would consider the military's position on a given subject and accord that view significant weight in its own deliberations. Although the duration of this purported era of noninterference can certainly be debated,[25] what cannot be debated is that over time, the Supreme Court adopted an explicitly obeisant posture towards military judgment.

One of the most important components of the Court's tradition of deference is the notion that the military stands as a society wholly separate from civilian life. This notion has been given emphatic voice on many occasions. As the Court stated in *Orloff v. Willoughby*, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."[26] Similarly, the Court remarked in *Parker v. Levy*, "[t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We

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22. 425 U.S. 25, 43 (1976).

23. 453 U.S. 57, 70 (1981).

24. O'Connor, *supra* note 8, at 170.

25. O'Connor places its end in the 1950s. *Id.* at 193. However, in his institutional history of the Court of Appeals for the Armed Forces, Jonathan Lurie noted that up through the 1990s, "the contemporary attitude of both Congress and the U.S. Supreme Court toward critical oversight of military justice [was] one of simple disinterest." JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980, at 320 (rev. & abr. ed. 2001).

26. 345 U.S. 83, 94 (1953).

have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."[27] And the Court's comparison of military enlistment and a marriage contract in *In re Grimley* is yet another example of the development of the separation principle:

> Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. . . .
>
> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status.[28]

The Court has not merely pressed for separation as a principle; it has augmented its theorizing with some pragmatic rules and erected a wall of separation between the military and civilian sectors. The most prominent practical manifestation of the separation principle is the Court's insistence that civilian courts lack capacity to review the decisions of military tribunals. In *Reaves v. Ainsworth*, the Court stressed, "[t]o those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."[29]

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27. 417 U.S. 733, 743 (1974).

28. 137 U.S. 147, 151-52 (1890).

29. 219 U.S. 296, 304 (1911). This seems to be the earliest pronouncement of this rule in such explicit terms, although it has antecedents. *See* Johnson v. Sayre, 158 U.S. 109, 114 (1895) ("All persons in the military or naval service of the United States are subject to the military law; the members of the regular army and navy, at all times; the militia, so long as they are in such service."); Kurtz v. Moffitt, 115 U.S. 487, 500 (1885) ("Courts martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts."); Dynes v. Hoover,

The jurisdictional moat separating the military and workaday civilian parties and interests was also drawn in *Ex parte Quirin*,[30] in which eight accused Nazi saboteurs claimed the right to be tried in civilian courts and not before a military tribunal. Rejecting their arguments for a unanimous Court, Chief Justice Harlan Fiske Stone explained why habeas corpus was not appropriate for enemy combatants in time of war:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[31]

Perhaps the starkest and most direct description of the relationship, or lack thereof, between the Supreme Court and military law comes from *Burns v. Wilson*:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed

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61 U.S. (20 How.) 65, 79 (1857) ("Congress has the power to provide for the trial and punishment of military and naval offences 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."); Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) ("It follows, from this opinion, that a court martial has no jurisdiction over a justice of the peace, as a militiaman; he could never be legally enrolled: and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.").

30. 317 U.S. 1 (1942).

31. *Id.* at 30-31 (footnotes omitted).

> forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.[32]

However, this principle also works in reverse, as the Court has conditioned its willingness to defer to the military in repeated reminders that the military's rules for courts-martial have certain limits. In *United States ex rel. Toth v. Quarles*,[33] an airman who was accused of committing a murder in Korea while still in the service was hauled before a court-martial in Asia five months after his honorable discharge from the Air Force. Invalidating the court-martial, Justice Hugo Black held that the discharge made the airman a civilian unreachable by military discipline, reasoning that a post-discharge court-martial served no military purpose: "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function."[34]

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32. 346 U.S. 137, 140 (1953) (footnotes omitted). Still another good example is *Rogers v. United States*, in which an Army major contesting his forced retirement appealed to the Supreme Court and claimed that the military tribunal hearing his challenge to the retirement orders improperly refused to let him offer certain testimony. 270 U.S. 154, 161 (1926). The tribunal's apparent refusal, which would have been completely out of place in a civilian court, was supported by military law, and the Court rejected Rogers's argument to void those rules. *Id.* at 162. Chief Justice (and former president) William Howard Taft wrote for a unanimous Court:

> It is argued to us that the attitude of the court was in effect and as a matter of military law a military order preventing the submission of further evidence and making it a military offence for the plaintiff to have insisted on introducing his witnesses. Were the matter important, we should have difficulty in yielding to such a view.

Id. Chief Justice Taft applied a spoonful of sugar, of sorts, to this harsh dismissal, further supporting his argument by noting that Rogers's attorneys had ample opportunity to protest the procedures being followed by the tribunal during the actual hearing and opted not to do so. *Id.* This parceling of blame to marginally competent counsel seems to have enabled Chief Justice Taft to rescue the opinion from being an overt rhetorical statement that the military can run its affairs however it sees fit; that this is the practical meaning of the opinion, however, cannot be gainsaid.

33. 350 U.S. 11 (1955).

34. *Id.* at 17. This logic, however, was not operating in *United States ex. rel. Hirshberg v. Cooke*, when Justice Black denied the Navy the right to court-martial a seaman who had mistreated Japanese prisoners of war. 336 U.S. 210 (1949). The mistreatment had occurred during Hirshberg's wartime service. *Id.* at 211. He was subsequently granted an honorable discharge upon expiration of his enlistment and then immediately reenlisted the day after his honorable discharge; his offense was not discovered until his second period of enlistment. *Id.* To allow for Hirshberg's court-martial would have served a valid military purpose, and there is no question that the Navy had the requisite military authority over him. *Id.* at 212-13. But Justice Black held to a literal reading of a discharge as the equivalent to the expiration of a statute of limitation. *Id.* at 213.

Two years later, in *Reid v. Covert*,[35] the Supreme Court invalidated the military's attempt to try via court-martial the wife of an Air Force sergeant after she was accused of murdering her husband while they were stationed overseas. The rule that courts-martial have no peacetime jurisdiction over the dependents of military personnel while accompanying them overseas was reaffirmed in *Kinsella v. United States ex rel. Singleton*.[36] The rule was also extended to bar trial by military tribunal of civilian employees of the Armed Forces who commit crimes while overseas in *McElroy v. United States ex rel. Guagliardo*[37] and *Grisham v. Hagan*.[38]

During this period, there was a brief and controversial foray by the Court into micromanagement of the jurisdiction of military tribunals. On July 20, 1956, an Army sergeant stationed at Fort Shafter in Oahu, Hawaii, broke into a woman's hotel room and attempted to rape her.[39] At the time of the attack, the sergeant was off the post on an evening pass and dressed in civilian clothes.[40] He was court-martialed, but appealed his conviction in civilian court, claiming that the military had no power to court-martial him for a nonmilitary offense.[41] In a break with preexisting practice, the Supreme Court declared in *O'Callahan v. Parker* that military tribunals could not try service personnel for crimes that were not service-related, as long as they were committed during peacetime.[42] Just as civil courts have no competence to decide military matters, military courts had no competence to decide civilian matters.

While the *O'Callahan* rule was certainly a furtherance of the separation principle, it was hardly deferential to the military to suggest that it had to stay confined to its cage. In fact, as he highlighted *Toth* and *Covert*, Justice William O. Douglas offered up one of the rare instances in which the Supreme Court has been openly critical of military practice:

> [C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. Article 134, already quoted, punishes as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Does this satisfy the standards of vagueness as

35. 354 U.S. 1 (1957).
36. 361 U.S. 234 (1960).
37. 361 U.S. 281 (1960).
38. 361 U.S. 278 (1960).
39. O'Callahan v. Parker, 395 U.S. 258, 259-60 (1969).
40. *Id.* at 259.
41. *Id.* at 260-61.
42. *Id.* at 273-74.

> developed by the civil courts? It is not enough to say that a court-martial may be reversed on appeal. One of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise. A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.[43]

There was a practical limit to Justice Douglas's contumacy: the Court shortly held in *Gosa v. Mayden*[44] that the *O'Callahan* rule was not to be applied retroactively.

Eventually, however, the Court reverted to a more cooperative embrace of the separate society principle and abandoned Justice Douglas's curmudgeonly approach. In 1987, the Court discarded the *O'Callahan* rule in *Solorio v. United States*,[45] holding that the military did indeed have the power to court-martial service personnel even for offenses that were not service-related. Building on *Rostker*'s language of deference, Chief Justice William Rehnquist reestablished the Supreme Court's laissez faire approach to military justice and did so by noting civilian courts' lack of competence in the area:

> The notion that civil courts are "ill equipped" to establish policies regarding matters of military concern is substantiated by experience under the service connection approach. . . . In fact, within two years after *O'Callahan*, this Court found it necessary to expound on the meaning of the decision, enumerating a myriad of factors for courts to weigh in determining whether an offense is service connected. *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971). Yet the service connection approach, even as eluci-

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43. *Id.* at 265-66 (citation omitted). It should be pointed out that to a certain extent, Justice Douglas was following the example set by his great friend Justice Black, who had raised similar concerns in *Toth*, albeit in less vituperative fashion:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955). And of course, doubts about of the fairness of military tribunals—arguably one of America's more underrated founding principles—have frequently been voiced by the Supreme Court. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866) (noting that trial by military tribunal does not satisfy the Constitutional guarantee of right to trial by jury).

44. 413 U.S. 665 (1973).

45. 483 U.S. 435 (1987).

dated in *Relford*, has proved confusing and difficult for military courts to apply.[46]

The segregation of military and civilian law is further shown by the existence of appellate courts put in place for the exclusive purpose of deciding appeals from military proceedings. The United States Court of Military Appeals (COMA) was created in 1950 as a provision in the new Uniform Code of Military Justice (UCMJ);[47] the Court was renamed the Court of Appeals for the Armed Forces (CAAF) in 1994.[48] Cases from these courts are currently eligible for the certiorari process, but that is a recent development. Direct appeals from COMA were not statutorily authorized until a 1983 amendment to the UCMJ;[49] prior to this amendment, military convictions could only be appealed indirectly via collateral attack through civilian courts.[50] Consequently, the Supreme Court's docket from these courts has been sharply limited. As of 2004, the Supreme Court has decided only eight cases appealed to it from COMA or CAAF.

An added explanation for the paucity of Supreme Court cases which emerge from CAAF and COMA is that appeals in these courts can only commence after all options for military justice and appeals have been exhausted. This general rule, based on a principle of administrative law, was a prominent consideration in *Falbo v. United States*,[51] in which a minister accorded conscientious objector status who had subsequently refused to perform the alternative duties imposed on him by his local draft board attempted to obtain pre-induction judicial review of the sanction imposed upon him. Justice Black

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46. *Id.* at 448 (quoting Chappell v. Wallace, 462 U.S. 296, 305 (1983)).

47. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801-941 (2000)). The UCMJ was drafted pursuant to a sweeping call for reform that accompanied the return of World War II veterans to civilian life; having been exposed during the war to military justice, many veterans called for an overhaul of a process that they had often seen abused. Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 12 (1987). Another factor in the creation of the UCMJ was the existence of separate disciplinary codes for the Army and the Navy. *Id.* For an account of the creation of the UCMJ, see *id.*

48. U.S. Court of Appeals for the Armed Forces, Establishment of the Court, http://www.armfor.uscourts.gov/Establis.htm (last visited Mar. 26, 2006). In terms of their constitutional situs, these military appellate courts (as well as the military trial courts which were also created) are Article I courts which were created pursuant to congressional authority and not Article III courts considered part of the judicial branch per se. Cox, *supra* note 47, at 15.

49. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983) (codified as amended in scattered sections of 10 U.S.C.).

50. Cox, *supra* note 47, at 20.

51. 320 U.S. 549 (1944).

held that such review was unavailable; Falbo first had to submit to induction and take his appeal through the existing military channels.[52]

In extending the rule beyond its administrative beginnings, the Court further emphasized both the distinctive nature of military life and underscored its own desire to allow the military maximum freedom to adjudicate its own affairs. In 1950, in *Gusik v. Schilder*,[53] Justice Douglas held for a unanimous Court that military prisoners should not be allowed to file habeas corpus petitions unless they had tried and failed to secure all existing military remedies. In 1969, in *Noyd v. Bond*, the Court reiterated the practical wisdom of this rule through Justice John Harlan:

> Petitioner emphasizes that in the present case we are not called upon to review prematurely the merits of the court-martial proceeding itself. Instead, we are merely asked to determine the legality of petitioner's confinement while he is exercising his right of appeal to the higher military courts. It is said that there is less justification for deference to military tribunals in ancillary matters of this sort. We cannot agree. All of the reasons supporting this Court's decision in *Gusik v. Schilder, supra*, are applicable here. If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance. Moreover, if we were to reach the merits of petitioner's claim for relief pending his military appeal, we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.[54]

B. Three Isolated Cases

The Supreme Court's instinct to let the military govern itself has manifested in a variety of cases and fact patterns, some of which recur frequently. While these clusters of recurring fact patterns will be especially useful in determining the contours of the Supreme Court's deferential tradition (and will be examined momentarily), valuable

52. *Id.* at 554-55.
53. 340 U.S. 128 (1950).
54. 395 U.S. 683, 695-96 (1969).

insight can be gleaned from certain isolated cases in which military interests emerged victorious from direct conflict with crucial civil liberties that the Supreme Court had historically defended with vigor.

Goldman v. Weinberger[55] is perhaps the most blatant example of the Supreme Court deferring to military policy at the expense of important civil liberties. Captain S. Simcha Goldman, a clinical psychologist and ordained rabbi, was fulfilling his obligations under the Armed Forces Health Professions Scholarship Program by submitting to active military duty, serving as a psychologist at the mental health clinic at March Air Force base in California.[56] In April 1981, after Goldman testified as a defense witness at a court-martial hearing while wearing his yarmulke, the hospital commander sent him a notice reminding him that an Air Force regulation prohibited the wearing of headgear while indoors and ordering him not to wear his yarmulke outside the hospital.[57] After Goldman protested this order to the Air Force general counsel, the hospital commander, in a seemingly vindictive gesture, modified the order so that it forbade Goldman from wearing his yarmulke even in the hospital and specifically warned him that failure to comply would result in a court-martial.[58]

Although there was little question that the regulation was a significant impediment to Goldman's ability to freely exercise his religion (and by 1986, the Supreme Court had developed a sizable record of knocking down regulations that had this effect), the Supreme Court rejected Goldman's argument that the no-headgear regulation constituted a violation of his First Amendment right to freely exercise his religion.[59] They did so by doing something that they had rarely done in the context of the Free Exercise Clause: they balanced away the right as against a more important governmental concern.[60]

The fact that Goldman's free exercise rights were being oppressed (and in what at least in part appeared to be in retaliatory fashion) did not escape the Court's notice.[61] Nevertheless, the Court subordinated Goldman's rights to the military's self-professed interest

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55. 475 U.S. 503 (1986).

56. *Id.* at 504-05.

57. *Id.* at 505.

58. *Id.*

59. *Id.* at 510.

60. *See id.* at 509-10. Up to this point, the only other time that the Court had balanced away a free exercise right was *United States v. Lee*, when the Court turned down the claim of an Old Order Amish employer to be broadly exempt from federal taxation. 455 U.S. 252 (1982).

61. *See Goldman*, 475 U.S. at 510-11 (Stevens, J., concurring) (noting the religious significance of wearing a yarmulke and the possibility that the hospital commander's motive was vindictive).

in uniformity. The Court first justified this decision by subordinating their own judgment to that of the military:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.[62]

The Court then operationalized this deference by uncritically endorsing the military's pronouncements:

> The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.[63]

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62. *Id.* at 507.

63. *Id.* at 508. A contemporary controversy which reaches back at least to the 1970s may shed additional light on the treatment of Captain Goldman. The Air Force Academy—and thus by extension the Air Force proper—has long been a hotbed of evangelical Christianity with nonevangelical Christian cadets reporting that they are subjected to campaigns of proselytizing and non-Christian cadets claiming to be targets of harassment and bigotry. T.R. Reid, *Critic of Evangelicals Relieved of Air Force Post*, BOSTON GLOBE, May 14, 2005, at A2. In the summer of 2004, the Academy brought a task force from Yale Divinity School to observe cadet orientation, and the task force emphatically confirmed the charges. *Id.* "What we found was this very strong evangelical Christian voice just dominating. We thought that just didn't make sense in light of their mission, which was to protect and train cadets, not to win religious converts," noted task force member Kristen Leslie. *Id.* A 1977 academy graduate who was Jewish asserted that he was a victim of this kind of treatment in his cadet days. *Id.* Even more disturbingly, in May of 2005, a Lutheran Air Force chaplain who corroborated with the conclusions of the "Yale Report" was summarily relieved of her duties. *Id.* The Air Force subsequently issued new guidelines that seemed to clamp down on proselytizing, to the consternation of Christian groups and many members of Congress, only to water down the restrictions within months. Alan Cooperman, *A Noisy Takeoff for Air Force Guidelines on Religion*, WASH. POST, Oct. 31, 2005, at A20; Alan Cooperman, *Air Force Eases Rules on Religion*, WASH. POST, Feb. 10, 2006, at A5.

If these various reports are true—and the sheer quantum of available evidence seems to suggest that there is at least some truth to them—then the crackdown on Captain Goldman's yarmulke may not have been a benign attempt to enforce a military uniform policy, but rather one manifestation of the overt religious bias (which included anti-Semi-

The Free Exercise Clause is not the only First Amendment right that was forced to take a back seat to military policy. The Supreme Court opted to let purported military necessity trump freedom of speech in *United States v. O'Brien*,[64] upholding the six-year prison term handed out to a Vietnam War protestor who had burned his draft card on the steps of the South Boston courthouse. At the time of David O'Brien's appeal, there was an open question as to whether he had engaged in actual "speech" at all by burning his draft card; critics of the very concept of "symbolic speech" were legion and included in their ranks Chief Justice Earl Warren. O'Brien's "victory," such as it was, was in persuading the Court that expressive conduct could qualify for First Amendment shelter,[65] even to the point of getting Chief Justice Warren to write the opinion. His victory was most certainly Pyrrhic, however, as Chief Justice Warren held that O'Brien had indeed been "speaking," but that military imperatives trumped his speech.[66]

Chief Justice Warren's four-part test for expressive conduct was a compromise—allowing such conduct to enjoy the protective benefits of the Free Speech Clause while simultaneously allowing those benefits to be abrogated under appropriate circumstances.[67] Given the elasticity of the test, the fact of O'Brien's defeat is not remarkable. What is remarkable, however, is the reason for his defeat, an explanation which serves to further highlight the degree of Supreme Court acquiescence to military judgment.

The new test for symbolic speech required the government to put forth an "important or substantial" interest justifying the regulation in dispute and further required that this interest be "unrelated to the suppression of free expression."[68] The interest that the government cited in its prosecution of O'Brien was the need to have the Selective Service system operate efficiently, and a component of this interest was a requirement that registrants have their draft cards on their persons at all times. In an already extraordinary display of defer-

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tism) that has apparently infested the Air Force for decades. This would mean that *Goldman v. Weinberger* stands, much like *United States v. Reynolds*, 345 U.S. 1 (1953), as an instance in which the Supreme Court's uncritical deference to the military's claims abetted the concealment of outright official misconduct. *See infra* notes 110-113 and accompanying text.

64. 391 U.S. 367 (1968).

65. *Id.* at 376.

66. *Id.* at 377.

67. In the most obvious illustration of the need for some sort of balancing act, to say that symbolic speech was just as resistant to regulation as actual speech could conceivably immunize political assassination—an expressive act if ever there was one—from prosecution.

68. *Id.*

ence, the Court accepted the contention that the bureaucratic efficiency of the system would be hampered if this requirement were not in force.

To describe the arguments justifying this conclusion as specious rationalizations would be derogatory to specious rationalizations.[69] But it was not only the logic of the justification that was deeply flawed; the very fact that the Court was even entertaining such arguments was astonishingly disingenuous and even contradictory.

The problem lay in the Court's new requirement that a challenged regulation not be an attempt to stifle political expression, either in obvious form or hidden behind some procedural disguise. And there was little question that the Draft Card Mutilation Act of 1965—the law that criminalized the action David O'Brien undertook—was overtly censorial. The evidence was right there in the Congressional Record. The legislation's sponsor in the House of Representatives, L. Mendel Rivers (who was the chairman of the House Armed Services Committee), flatly stated on the floor of the House that the bill was

> a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.
>
> . . . . [I]f it can be proved that a person knowingly destroyed or mutilated his DRAFT CARD, then . . . he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.[70]

The bill's Senate co-sponsor, Strom Thurmond, likewise made it plain that the new legislation was aimed at more than flamboyant protest; it was inspired by general distaste for political dissent: "[D]efiance of the warmaking powers of the Government . . . should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom."[71]

The comments of the Draft Card Mutilation Act's sponsors thus revealed an unequivocally censorial motive behind the legislation and

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69. One of the silliest justifications proferred was the notion that "in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board." *Id.* at 379. This apparently meant that having the card handy obviated the burdensome requirement of asking someone to defend themself against an invasion force advancing from up the street.

70. 111 CONG. REC. 19871, 19871 (1965).

71. 111 CONG. REC. 20433, 20433 (1965).

accordingly represented patent violations of multiple prongs of the new *O'Brien* test. Yet the Court opted to disregard these stated intentions, cavalierly suggesting that legislative debate is fundamentally irrelevant to the purpose of divining the intent behind an unambiguously worded law:

> [W]e are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.[72]

This was wholesale disingenuousness because the Court possessed as a matter of record the boastfully repressive objectives of the legislation's drafters and not merely the lonely rantings of a few overwrought commentators.[73]

Consequently, it is just about impossible to avoid the conclusion that the Court simply did not want O'Brien to get away with his protest, to the extent that they were prepared to completely contradict themselves within the space of a few pages. *United States v. O'Brien* thus went beyond mere deference to military prerogative; the Supreme Court transformed itself into an offensive weapon designed to substantively ward off any critics of military procedures and perhaps of military policy initiatives as well.[74]

Military deference also led the Court to temper its zeal to protect the rights of racial minorities in *Chappell v. Wallace*.[75] Five naval enlisted men charged that their commanding officer and several deputies had taken their race into account when meting out discipline, assigning shipboard duties, and compiling performance evaluations.[76] The lawsuit they brought was a so-called "*Bivens* action," named for the Supreme Court's ruling in *Bivens v. Six Unknown Named Agents of*

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72. *O'Brien*, 391 U.S. at 384.

73. Indeed, calling this tactic disingenuous is to be rather kind to the Supreme Court in comparison with other more notable observers. Rodney Smolla has blasted this move as "sheer hypocrisy." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 61 (1992); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 328 (2000) (describing *O'Brien* as "one of the most shameful moments of the Warren court").

74. The fact that they were also prepared to uphold an unusually harsh sentence (at six years, O'Brien's sentence was considerably longer than the one to three years typically meted out to someone who refused induction) further underscores just how committed the Court was in its alliance with the military. POWE, *supra* note 73, at 326-27. O'Brien would serve two years of his sentence before being released. *Id.*

75. 462 U.S. 296 (1983).

76. *Id.* at 297.

the Federal Bureau of Narcotics[77] that damages suits may be brought against federal officials accused of violating someone's civil rights, despite the fact that Congress had not specifically authorized such lawsuits. As we have seen, the concept of congressional authorization is a key proponent of the Court's traditional military deference. Congressional intent to give the military leeway to operate has often been cited by the Court as a central justification for its posture towards military parties and procedures. This meant that the *Bivens* principle (courts may assert jurisdiction even without explicit congressional permission)[78] was in conflict with the Court's history on the jurisdiction of civilian courts in military matters (civilian courts, lacking explicit congressional permission to assert jurisdiction over courts-martial and other military proceedings, may not do so).

Unsurprisingly, the *Bivens* principle gave way, unanimously. The Court reminded the enlisted men of its hedge in *Bivens* that such lawsuits might not be available in the event of "special factors counselling hesitation."[79] Legislative (and judicial) intention to give the military maximum freedom to operate, of course, constituted one such special factor.[80] The Court pointed out that it had counseled hesitation in *Feres v. United States*,[81] forbidding soldiers injured during military service from bringing tort actions to recover damages for their wounds. The reasons to bar such suits in *Feres* were no less applicable in *Chappell*:

> [C]onduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.[82]

77. 403 U.S. 388 (1971).
78. *Id.* at 397.
79. *Id.* at 396.
80. *Chappell*, 462 U.S. at 305.
81. 340 U.S. 135 (1950).
82. *Chappell*, 462 U.S. at 300.

C. *Substantive Clusters*

As mentioned earlier, however, there are several clusters of recurring cases which provide an especially illuminating look at the Court's relationship with the military. Two clusters in particular represent areas in which the military is anomalously unsuccessful in the Supreme Court. When these two clusters, totaling fifty-one cases, are removed from the overall tabulations, the military's win-loss record is 95-32 for a success rate of 74.8%.

1. The Conscientious Objector and Draft Exemption Cases.—Thirty-three out of the 179 military cases the Supreme Court has decided since 1918 deal with attempts by potential draftees to be exempted from military service, either as conscientious objectors or pursuant to a specific statutory exemption (such as a student deferment or a clergy exception). These cases are one of two areas in which the military's rate of success is well below its normal rate. While the military's overall success rate is over sixty-six percent, in the cases in which a potential draftee sought an exemption from military service, the military lost more than it won—going 16-17 (48.5%).[83]

The exemption cases can be grouped into two subcategories: (1) disputes over the procedures governing hearings to determine exemption status[84] and (2) disputes over the contours of exemption policy—who gets to claim status as a conscientious objector or other exempt registrant and why they are so entitled. Only eight of the thirty-seven cases are classified in this second category.[85] As it turns out, there is no variation in the two subcategories: the military went 12-13 (48.0%) in the procedure cases, and 4-4 (50.0%) in the policy cases.[86]

While the exemption cases are an area in which the military appears to take it on the chin much more often than it does in other cases, there is a significant catch to these rulings. Most of these cases do not really involve the military per se, but rather local draft boards made up of local members of the community far removed from the hierarchy of military policymaking. Although theoretically governed by a set of military-promulgated rules, these boards based their decisions not on notions of military wisdom, but rather on workaday politics. This in turn meant that attitudinally, individual members of the board (who had often volunteered for this responsibility out of personal enthusiasm for the military and for whatever military initiative

83. *See infra* app. B.
84. These cases are a haze of procedural variations.
85. *See infra* app. B.
86. *See infra* app. B.

was being contemporarily prosecuted) were usually at philosophical daggers drawn with the registrants that appealed to them for leniency.[87] At times, the local boards were at times petty and vengeful, such as in *Oestereich v. Selective Service System Local Board No. 11*,[88] when a Cheyenne, Wyoming board revoked the draft exemption of a divinity student who returned his draft card in protest of the Vietnam War. Holding that the student could not have his exemption revoked (and was entitled to appeal the revocation without having to submit for induction and begin habeas corpus proceedings), Justice Douglas acerbically described the Cheyenne board's actions:

> We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served.[89]

Thus, although the basic data generated by the exemption cases seems to show a limit to the Supreme Court's deference to the military (based on the military's comparatively poor win-loss record in these cases), there is ample reason to suggest that this data may be misleading.

2. The Soldier Pay Cases.—The second group of cases in which the military suffers an inordinate number of Supreme Court losses is the cluster of eighteen disputes about soldier pay. There are a variety of different fact patterns within this cluster, e.g., requests for back pay, longevity pay allowances, and salary level. The military won just seven of these eighteen cases (38.9%).[90]

One of the more unusual aspects of this cluster is the chronology. Just as there was an explosion of conscientious objector cases during the Vietnam Era, there was a rash of soldier pay cases in the 1920s;

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87. It was only later in the Vietnam War (or after it) that people began volunteering for draft boards because of their antiwar sentiments, attempting to insinuate themselves into the machinery of war as a means of ending it or avoiding it altogether. Matthew L. Wald, *New Draft Boards: Diversity Is Greater Than in 1960's*, N.Y. TIMES, Jan. 11, 1982, at A1.

For a good account of the experiences of conscientious objectors, see GERALD R. GIOGLIO, DAYS OF DECISION: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS IN THE MILITARY DURING THE VIETNAM WAR (1989).

88. 393 U.S. 233 (1968).

89. *Id.* at 237.

90. *See infra* app. B.

fourteen of the eighteen soldier pay cases were decided between 1923 and 1929.[91] However, unlike the increase in conscientious objector cases during Vietnam (which have a logical explanation), there does not appear to be a satisfying explanation for the concentration of soldier pay cases around this particular time period. My initial research into this phenomenon has come up empty, leading to nothing other than the inferable fact that military paymasters were simply acting in a miserly fashion at this particular time in history. Some of the military's maneuvers, in fact, would have made Ebenezer Scrooge blush. In *United States v. Slaymaker*,[92] the government tried to charge a naval reservist for the cost of his uniform when he left the reserves and joined the Navy proper. In *Unites States v. Royer*,[93] an Army officer who had been officially promoted to the rank of captain was inadvertently designated a major by his commanding officer; after the officer discharged the customary duties of a major for four months, the error was discovered and an actual promotion to major was initiated, along with a demand for four months of overpaid wages (the difference between the captain's salary Royer should have been drawing and the major's salary he was paid) that were disbursed only because of the military's own errors.

Absent any other explanation for the military's behavior in these cases, and factoring in the Court's more laconic style in opinion-writing in this era (which means much less comment on military interests and prerogatives), definitive conclusions about the broad significance of this cluster of cases are hard to find, and the implications of the military's comparatively weaker success rate on the overall concept of the Supreme Court's deferential tradition are merely inferential.

3. The Reach of Courts-Martial.—By contrast, there is much that can be learned from the thirty-nine cases dealing with courts-martial and other military tribunals that were decided between 1918 and 1999.[94] The military's win-loss record in these cases is 29-10 (74.4%), a significantly better rate than their overall success rate of 66.3%.[95] However, when the abovementioned two clusters in which the military was anomalously unsuccessful are removed from the overall rate, the

91. Only two such cases were decided after Pearl Harbor, none since 1974.

92. 263 U.S. 94 (1923).

93. 268 U.S. 394 (1925).

94. Because these cases will be used as a means of explaining the decisions in the three recent enemy combatant cases, those recent cases have been omitted from the tabulation within this cluster.

95. *See infra* app. B.

military's success rate rises to 74.8%, which makes the court-martial cases an almost exact match with the military's adjusted "normal" rate.

A further distinction can be drawn between the military's attempts to exercise court-martial or tribunal jurisdiction over military personnel and attempts to exercise such jurisdiction over civilians (either civilian employees of the military or dependents of military personnel). There are five instances of the latter—*Duncan v. Kahanamoku*,[96] *Madsen v. Kinsella*,[97] *Kinsella v. United States ex rel. Singleton*,[98] *McElroy v. United States ex rel. Guagliardo*,[99] and *Grisham v. Hagan*[100]—and the military lost four of those cases, emerging victorious only in their attempt in *Madsen* to haul a woman who had in 1949 murdered her husband, an Air Force lieutenant, before the Occupation Court in Germany.[101] This means that the military's record before the Supreme Court when its attempts to court-martial military personnel are challenged is 28-6 for an astonishing success rate of 82.4%.

Theoretically, the Court's eventually-abandoned nondeferential decision in *O'Callahan* could also be accommodated as a further instance of a potentially misleading military defeat, but that would be both unwise and unnecessary. It would be unwise because the fact of the eventual *O'Callahan* reversal does not alter the reality that this is a case in which the military appeared as a litigant and lost, despite being accustomed to deferential treatment by the Court.[102] In the long run, the reversal of *O'Callahan* may mean that the case is insignificant jurisprudentially, but this does not make the military's instant defeat in that case any less probative for the purposes of examining their success as litigants. Disregarding *O'Callahan* as an indicator of misleading military litigation failures is also unnecessary because *O'Callahan* did not lead to any subsequent Supreme Court defeats on the grounds that the military tried to court-martial service personnel who committed offenses that were not service-related. Indeed, in *Relford v. Commandant, U.S. Disciplinary Barracks*,[103] the Court declared that the *O'Callahan* rule did not apply when the non-service-related offense was committed on a military base and allowed a court-martial to go forward.

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96. 327 U.S. 304 (1946).
97. 343 U.S. 341 (1952).
98. 361 U.S. 234 (1960).
99. 361 U.S. 281 (1960).
100. 361 U.S. 278 (1960).
101. *Madsen*, 343 U.S. at 343-44.
102. *See supra* notes 42-46 and accompanying text.
103. 401 U.S. 355 (1971).

Overwhelming the military's rebuffed attempts to court-martial civilian employees, dependents of service personnel, and discharged service personnel is a long variegated history of successful appearances in court-martial cases. The Supreme Court has turned aside a right-to-counsel claim in a summary court-martial (a proceeding covering minor infractions),[104] sharply limited civilian review of courts-martial,[105] permitted the military to bar the presentation of potentially exculpatory polygraph evidence in courts-martial,[106] and even authorized the military to conduct a court-martial without engaging in a pre-hearing investigation.[107] In this particular cluster of cases, then, the Supreme Court's tradition of deference is at its most vibrant.

4. The Tort Liability Cases.—The Supreme Court has ruled in eleven lawsuits in which the military was sued in tort for damages resulting from the negligence of military personnel, employees, or contractors.[108] The military has come out with a win eight times for a success rate of 72.8%.[109]

The fact patterns and the reasoning used in these cases are even more evocative of the Supreme Court's deferential instinct than the raw win-loss data. Not only does the Supreme Court habitually shield the military from financial liability, it at times grants the military other extraordinary powers.

In one of the most notorious cases in the entire history of the Supreme Court's military jurisprudence, the Court in *United States v. Reynolds*[110] unhesitatingly accepted the military's claim of national security interests as the explanation for refusing to turn over accident reports about a fatal crash of a B-29 bomber, thus depriving the families of the deceased servicemen of not only financial recovery (the government's default in the suit was overturned), but also of even the basic information about what happened to their loved ones. The opinion, written by Chief Justice Fred Vinson, is a monument to the Court's contentedness to swallow whatever line the military serves up

104. Middendorf v. Henry, 425 U.S. 25 (1976).

105. McLucas v. DeChamplain, 421 U.S. 21 (1975).

106. United States v. Scheffer, 523 U.S. 303 (1998).

107. Humphrey v. Smith, 336 U.S. 695 (1949).

108. Omitted from this cluster is one tort liability case that the military lost, because the point of examining this cluster is to see how successful the military has been at obtaining Supreme Court protection from liability as a defendant, and in the omitted case—*United States v. Standard Oil Co.*, 332 U.S. 301 (1947)—the military was in fact the plaintiff seeking recovery (of money it had to pay to treat one of its servicemen who was injured by one of the company's trucks).

109. *See infra* app. B.

110. 345 U.S. 1 (1953).

without engaging in the critical substantive evaluation that it deploys with other litigants:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.
>
> In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.[111]

In this particular case, some critical evaluation of the claim of privilege would have revealed the depth of the military's deception. The Air Force had claimed that there was a substantial risk of the revelation of state or military secrets related to experiments being conducted on the plane and that these experiments had caused the crash (even intimating that the bomber might have been brought down by an act of sabotage).[112] Some fifty years later, Internet-aided pursuit by the dead crewmen's families of crash survivors revealed that no confidential research was being done; the likely cause of the crash was a

111. *Id.* at 9-10.

112. Barry Siegel, *The Secret of the B-29*, L.A. TIMES, Apr. 19, 2004, at A1.

combination of pilot error and the appalling maintenance of the plane.[113]

In *Boyle v. United Technologies Corp.*,[114] a narrowly divided Court reaffirmed the general principle of giving the military latitude to conduct its affairs by immunizing a governmental contractor from a civil suit stemming from an alleged design defect in the exit hatch of a military helicopter (the craft had crashed into water during a training exercise; the pilot, who had survived the impact, was unable to escape and drowned). Justice Antonin Scalia couched his 5-4 opinion in the familiar language of deference:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function . . . . It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the [statutory] exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.[115]

In addition to providing additional evidence that the Supreme Court is preternaturally deferential to military claims, these cases also show the consequences of this posture. *United States v. Reynolds*, for example, is the constitutional predicate for the encroachments on civil liberties in the name of guaranteeing security that were passed in

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113. *Id.* The crewmen's families eventually sought a writ of *error coram nobis* from the Supreme Court, not to overturn the *Reynolds* case but simply to recover the lost money judgment. *Id.* The Court denied the request. *Id.*

114. 487 U.S. 500 (1988).

115. *Id.* at 511-12 (internal citation omitted).

the aftermath of the September 11 attacks, including the USA Patriot Act.[116]

There is one other recurring fact pattern that is worth highlighting alongside these four large clusters of cases:

5. The Japanese Relocation Cases: Hirabayashi, Korematsu, and Endo.—The World War II Japanese internment cases are probably the most glaring and notorious examples of the Court's willingness to kowtow before military judgment. When American citizens of Japanese ancestry challenged the imposition of curfews and forced relocation into camps,[117] the Supreme Court—which had a few years earlier announced an increased skepticism for "statutes directed at . . . discrete and insular minorities"[118]—sacrificed its newfound skittishness about laws that attacked entire ethnic groups upon the altar of perceived military necessity. In *Hirabayashi v. United States*,[119] the Court turned aside the complaint of a Japanese-American college student who refused to submit to the curfew; in *Korematsu v. United States*,[120] the Court similarly rejected the appeal of a Japanese-American defense worker who defied a relocation order.

The key to the Court's approval of the curfew and relocation orders is their finding in both that the military deemed these policies necessary. The language of the two cases reveals just how much latitude the Court was prepared to extend to the military, essentially establishing the low threshold that these policy decisions need only avoid being completely unsustainable.[121] In *Hirabayashi*, they subordinated their qualms about the sweeping nature of the orders to their belief that the military has to be allowed to do its job in times of national crisis:

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116. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 8, 15, 18, 22, 31, 42, 49 & 50 U.S.C.).

117. The curfew and relocation orders were imposed by General John DeWitt, who was in charge of the defense of the West Coast (the Tom Ridge of his day?). DeWitt was acting pursuant to authority granted by President Roosevelt, who had issued two executive orders in early 1942 designed to enable the rounding-up and confining of all Japanese Americans, in the belief that some of them might pose a threat of subversion. Hirabayashi v. United States, 320 U.S. 81, 85-86 (1943).

118. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

119. 320 U.S. at 81.

120. 323 U.S. 214 (1944).

121. It is at this point that O'Connor's suggestion that the Supreme Court took until the mid-1950s to shift from a "noninterference" approach to one which was explicitly deferential can be questioned. *See* O'Connor, *supra* note 8, at 164. The Court's opinions in *Hirabayashi* and *Korematsu* are not passive justifications for staying out of the military's way; they are belligerently deferential endorsements of the military's expertise.

> Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.[122]

The following year, Justice Black built on *Hirabayashi* in *Korematsu* and maintained that the military's refusal to separate out loyal Japanese Americans from the relocation process was entirely justified:

> It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.[123]

The fact that it was the military nature of these decisions that swayed the Court was readily apparent in *Ex parte Endo*,[124] in which an American citizen of Japanese ancestry who had declared her loyalty to the United States was nevertheless subject to confinement to a relocation camp in Utah. In ordering her release, the Court through Justice Douglas noted that the decision to continue the confinement of Mitsuye Endo was made under civilian, and not military, auspices:

> It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan*, or in *Ex parte Quirin*, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of re-

122. *Hirabayashi*, 320 U.S. at 99.
123. *Korematsu*, 323 U.S. at 219.
124. 323 U.S. 283 (1944).

> sponsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.[125]

The crucial distinguishing fact was that unlike the faceless mob subject to the orders in *Hirabayashi* and *Korematsu*, Mitsuye Endo had been specifically asked to declare her loyalty in the process of obtaining a permit to leave the camp.[126] Once she had affirmed her loyalty, there was no longer any military justification to hold her; the fig leaf that was the military's plea that sifting the loyal from the disloyal was too burdensome a task simply fell away.[127]

III. ANALYSIS

The Framers of the Constitution had a well-documented sense of mistrust of standing armies, and many of the choices they made in setting up the Republic were made with at least one eye on keeping the military on a leash. Whether it was George Washington laying down his sword and retiring after the Battle of Yorktown rather than assuming automatic leadership of the new nation, the creation of the Third Amendment banning quartering of soldiers, or the very notion of congressional oversight over the Armed Forces, events were managed and procedures were drafted in the spirit of erecting bulwarks against domestic military encroachment power. Of course, at the same time the Framers were establishing a Supreme Court with hazily defined powers, so it is not entirely surprising that the Court has proven to be an insufficient check on military power. This is not to say that the Framers anticipated that the Court would be complicit in military aggrandizement, but what the foregoing cases have shown is that this is exactly what has occurred. It is simply not enough to suggest that the Supreme Court prefers to merely avoid interfering in the military's business. The very act of noninterference creates knowledge among the military that civilian capability to restrain their deci-

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125. *Id.* at 297-98 (internal citations omitted).

126. *Id.* at 292 n.10.

127. *Endo* was a unanimous decision, which means that the authors of *Hirabayashi* (Justice Stone) and *Korematsu* (Justice Black) signed on to Justice Douglas's opinion. Howard Ball and Phillip J. Cooper's joint biography of Justices Black and Douglas, which takes notice of "the Court's deferential posture during time of war," sheds light onto Justice Black's thinking in *Endo*: "Clearly, for Black, the issue raised by *Endo* was not that of the earlier Japanese exclusion cases, the constitutionality of the congressional war powers. Endo's case, coming toward the end of the war, involved a series of procedural questions rather than the central issue of military powers in wartime." HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 116 (1992).

sions will be limited. Furthermore, the Court's work has traveled well beyond mere noninterference or even deference; at times, the Court has been an enabler of military misconduct.[128]

Specific investigation of the military's success rate when it appears before (or is hauled before) the Supreme Court shows that the deferential tradition is multifaceted. We can observe, for example, that the military's Supreme Court defeats tend to be concentrated in wartime, when the military tends the most towards overreaching. Out of the sixty-three Supreme Court defeats the military has endured since 1918, fifteen of them were concentrated between 1968 and 1972, when the Vietnam War had devolved into a quagmire. But this may be a question better analyzed in terms of quality, not quantity. While the military may have lost a lot of wartime court battles, the fact still remains that they win the battles that posed the most potential for abrogating liberty, such as *Korematsu* and *O'Brien.*

As for the question of *why* the military loses cases (or, put another way, does the military do anything in particular that reduces its odds of Supreme Court success?), the research here seems to support a seemingly counterintuitive notion: we can interpret the military's comparatively spotty record of success in the exemption cases the same way we can interpret their overwhelming success in the court-martial cases. What both clusters of cases show is that the military stands the most risk of Supreme Court defeat when the question at bar can be boiled down to the following core: *Does the military have authority over this person?*

The conscientious objector cases, in which the military is comparatively unsuccessful, are about who the military can take in. They are not about how such people are to be treated once they are part of the Armed Forces. Similarly, most (but not all) of the military's defeats in the court-martial cases come when the military is attempting to court-martial someone over whom they have no real authority, such as servicemen's wives who commit crimes during peacetime. There is a common link between the attempted court-martial of a soldier's wife accused of murdering one of the couple's children[129] and the military's unsuccessful attempt to prosecute a conscientious objector

128. Michal Belknap has argued that the use of military commissions to try crimes committed on American soil is invariably "rife with procedural irregularities and substantive injustice." Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective,* 38 CAL. W. L. REV. 433, 441 (2002); *see also supra* Parts II.B, II.C.4 (discussing Goldman v. Weinberger and United States v. Reynolds).

129. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

claimant who refused to take the oath of induction.[130] What these cases show is the one dimension of the Supreme Court's relationship with the military in which their workaday deference drops away: the Supreme Court's tradition of deference to the military does not extend—and, logically, *should* not extend—to cases encompassing nonmilitary persons. Instead, in these cases we see the Supreme Court taking an active role in reaffirming the constitutional guarantees of everyday citizens; to a certain extent, then, these cases really are not about the military at all.[131]

While the military's choices about who they wish to control are subject to Court scrutiny, the military's policy choices about how they will treat people over whom they validly exercise authority are rarely subjected to rigorous review, and it is here that the Court's tradition of deference is at its apex. Simply stated, the military as a profession gets much greater latitude to manage its own affairs than other professions. When military policy decisions are on a collision course with constitutional guarantees, such as in *Goldman v. Weinberger*, the military gets a pass. Similarly, the military's decisions about how to treat persons who are unquestionably within the reach of military authority also go mostly unchallenged.[132]

But when policy decisions in other professions brush up against the Constitution, those decisions stand a much greater chance of being invalidated. In fact, when professional expertise stemming from nonmilitary sources has been submitted, the Supreme Court has exhibited a remarkable unwillingness to concede that those who know better actually know better. One glaring example is *Edenfield v. Fane*,[133] in which the accounting profession's rules banning its members from engaging in face-to-face uninvited solicitation of business were thrown out by the Court as violative of the free speech rights of accountants who wished to solicit business in that fashion. In a marked contrast to its refusal to require the military to present evidence justifying its claim to state secrets privilege, the Court de-

130. Billings v. Truesdell, 321 U.S. 542 (1944).

131. This pattern of protecting the rights of nonmilitary persons is revealed in other settings. In *United States v. Causby*, the military's use of an airfield outside Greensboro, North Carolina, had the effect of destroying a local chicken farm (which could no longer operate because of the lights and noise coming from bombers taking off and landing). 328 U.S. 256, 259 (1946). The Supreme Court held that this was a taking of private property requiring just compensation to the beleaguered owners of the chicken farm. *Id.* at 261.

132. *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83 (1953) (allowing the military to withhold an officer's earned commission because he refused to take an oath that he had never been a communist).

133. 507 U.S. 761 (1993).

manded evidentiary proof of the wisdom of the accounting profession's judgment:

> The Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies that suggest personal solicitation of prospective business clients by CPA's [sic] creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.[134]

Edenfield, however, is not the only example of the Supreme Court's selective professional deference. A more recent commercial speech case also illustrates this phenomenon. In *Thompson v. Western States Medical Center*,[135] the Court invalidated a restriction on pharmacists advertising their drug "compounding" services. "Compounding" refers to the time-honored practice of customizing prescriptions to meet the needs of individual customers who, for varying reasons (often allergy-related), may be unable to take a certain medicine; the compounding pharmacist can add or subtract ingredients from a given drug, for example.[136] One potential downside to compounding is that the new compounded drug has not been subjected to rigorous safety testing by the Food and Drug Administration (FDA).[137] In allowing the practice of compounding to continue, but attempting to limit its reach, the FDA had essentially relied on its professional judgment to draw a utilitarian line. The FDA felt that the best approach to compounding was to craft a compromise that would allow individual patients with acute needs for custom-tailored medicines to receive their necessary treatments, while at the same time warding off the possibility that unnecessary and potentially unsafe compounds could be produced by pharmacists trying to generate demand for customized drugs or produced for customers who decide that they simply must have a more personalized prescription experience and who pressure pharmacists to satisfy this urge.[138]

However, the FDA's considered expertise about the responsibilities and imperatives of the pharmacy profession was cavalierly dismissed by the Supreme Court, which offered up a series of alternative solutions to the dilemma, many of which were more burdensome on the practice of pharmacy than a mere advertising ban. Among the

134. *Id.* at 771.
135. 535 U.S. 357 (2002).
136. *Id.* at 360-61.
137. *Id.* at 362-63.
138. *Id.* at 369-70.

ideas deemed better by the Court were an outright ban on the use of certain equipment for compounding purposes, a cap on the number of compounded prescriptions (regardless of need) a pharmacist could dispense, and a cap on out-of-state compounding transactions.[139] The Court's invocation of the principle that "regulating speech must be a last—not first—resort,"[140] while well-intentioned and admirably speech-protective, was a facile response to a complicated problem. There was nothing redeeming, however, in the hubris of five lawyers[141] with a complete lack of pharmaceutical experience dispositively substituting their dilettantish notions of good responses to a public health problem in place of the solution promulgated by exhaustively trained industry experts.[142]

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139. *Id.* at 372.

140. *Id.* at 373.

141. Justice Sandra Day O'Connor wrote *Western States Medical Center*, joined by Justices Anthony Kennedy, Antonin Scalia, David Souter, and Clarence Thomas; Justice Stephen Breyer authored a ripping dissent, joined by Chief Justice William Rehnquist and Justices Ruth Bader Ginsburg and John Paul Stevens. It is not surprising that the Court's practical solutions would be put forth by Justice O'Connor, long-renowned (for better or worse) for opinions that eschewed broad interpretive pronouncements in favor of pragmatic approaches. Nor is it surprising that her invalidation of an advertising ban would be supported by Justice Clarence Thomas, who has emerged in the last decade as the Court's most orthodox advocate for extending First Amendment protection to commercial speech identical to the protection afforded to noncommercial speech.

142. There is one profession that, at least for a time, received Supreme Court indulgence on par with what was extended to the military: the legal profession. For years, even as the Court was expanding the constitutional protections afforded to commercial speech, the Court refused to throw out bar associations' rules against advertising and business solicitation by lawyers. In *Florida Bar v. Went for It, Inc.*, the Court let stand a rule prohibiting attorneys from mailing out targeted direct mail solicitations to accident victims within thirty days of the accident. 515 U.S. 618 (1995). A decade earlier, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Court reaffirmed the Ohio Bar's prerogative to punish lawyers who overreach in their advertising (even as they invalidated the particular sanction in that case). 471 U.S. 626 (1985). In *Ohralik v. Ohio State Bar Ass'n*, the Court upheld a sanction for an overaggressive and pressurized in-person solicitation of an accident victim by an ambulance chaser. 436 U.S. 447 (1978).

The fact that lawyering is the only profession that receives a degree of deference that even approaches that which is extended to the military does not, of course, dilute the significance of the Supreme Court's pro-military posture. Plainly, the members of the Supreme Court, sitting atop the legal profession, have a personal stake in the outcome; the nine most important lawyers in the country have a natural policy preference to preserve bar associations' ability to police the field and punish renegade lawyers who besmirch the noble calling. The opinion of the court in *Ohralik*, in fact, was written by a former president of the American Bar Association, Justice Lewis Powell. Other members of the nine-lawyer elite have openly expressed their disdain for the huckstering tactics of their downmarket colleagues; Chief Justice Warren Burger, for example, repeatedly referred to attorney advertising as "sheer shysterism." Linda Greenhouse, *Friends for Decades, but Years on Court Left Them Strangers*, N.Y. TIMES, Mar. 5, 2004, at A1.

Recently, however, this willingness to give lawyering the benefit of the professional doubt—a benefit not extended to other industries outside of the armed forces—has been

Institutions of higher education are yet another type of litigant which receives only selective deference from the Supreme Court. At times, the Court is willing to bow to colleges and universities' educational mission, as expressed in the concept of academic freedom. On the one hand, in *Grutter v. Bollinger*, the Court went out of its way to subordinate its own judgment to that of the University of Michigan (which argued that securing a diverse student body was so compelling a state interest that it satisfied strict scrutiny) and did so explicitly: "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."[143] This language on academic freedom matched the spirit of *Regents of the University of California v. Bakke*: "The freedom of a university to make its own judgments as to education includes the selection of its student body."[144] Similarly, in *Board of Regents of the University of Wisconsin v. Southworth*, the Court celebrated the special functions of institutions of higher learning and intimated that a university's decisions made in furtherance of the school's educational mission would be accorded significant weight:

> The University may determine that its mission is well-served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in the extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.[145]

On the other hand, the Court was not so indulgent in *Rosenberger v. Rector & Visitors of University of Virginia*.[146] Even as they celebrated the mission of higher education conceptually,[147] in practice they gave

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received coolly even within the Court itself. As Justice Kennedy archly noted in his *Went for It, Inc.* dissent, "[i]t is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the bar." 513 U.S. at 641.

143. 539 U.S. 306, 328 (2003). For a detailed examination of the Court's decision to defer to admissions officials in *Grutter*, see Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133 (2004) (arguing that the case was as much a matter of deference to policymakers as it was a matter of constitutional interpretation).

144. 438 U.S. 265, 312 (1978).

145. 529 U.S. 217, 233 (2000).

146. 515 U.S. 819 (1995).

147. Most notably, Justice Kennedy's majority opinion observed:

> In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks

the University the back of its hand. The University had denied an evangelical Christian magazine a place on the school's Student Activities Fund because the magazine would be advancing a religious message.[148] The Court's decision in *Rosenberger* to force the University to fund the magazine ran directly counter to its past (and future) insistence that institutions of higher learning get to make the call on their educational mission unencumbered by judicial meddling. *Rosenberger* can be in part explained by the fact that the University's decision not to fund the magazine was both an institutional matter (academic freedom) and a constitutional matter. The University had determined that to fund the magazine would violate the Establishment Clause, but the Court had been reorienting its establishment jurisprudence around the concept of state "neutrality" (as opposed to outright noninvolvement) and informed the University that its interpretation of the Clause—the very fulcrum upon which the school's decision-making was balanced—was misguided, at least as far as the Court saw it.[149] Whatever the Court's core motivations, *Rosenberger* ties to *Southworth* and other higher education cases as examples of the Court's selectively deferential approach to nonmilitary litigants.

To a certain extent, the military's success rate as a repeat litigant is consistent with the success of other repeat litigants. The seminal work of Marc Galanter on this subject[150] has been ably augmented by the findings of scholars such as Reginald S. Sheehan, William Mishler, and Donald R. Songer, who determined that resource advantages for certain categories of repeat litigants were to an extent subordinated to the ideological makeup of the Supreme Court at a given time, even when the parties were as divergent as the federal government squaring off against a poor litigant.[151]

> the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

Id. at 836 (internal citation omitted).

148. *Id.* at 822-23. The magazine was entitled *Wide Awake: A Christian Perspective at the University of Virginia*, and its stated mission was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826.

149. *Id.* at 845-46. And of course, the University of Michigan only enjoyed Supreme Court deference in one of the two challenges to its race-conscious admissions policies; no such deference was forthcoming in *Gratz*.

150. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

151. Reginald S. Sheehan, William Mishler & Donald R. Songer, *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464 (1992).

Kevin T. McGuire has pushed this argument further by suggesting that it is not merely confined to the litigants, arguing that lawyers with experience arguing before the Supreme Court are much more likely to win cases in which they were opposed by lawyers with less

What differentiates the military's repeat-player success from the success of other repeat litigants is that the military's success at the Supreme Court level is not a mere function of resources. The Supreme Court's reflexively deferential posture may in some way be informed by the military's status as a repeat player, as well as the status of many of the military's opposing litigants as one-shotters (and acutely undermanned one-shotters, to boot). But the military's success rate is an instance in which there is an "ideology" backstopping the success of this particular repeat player. The Supreme Court's pro-military decisions are not a happy accident of structural litigational characteristics; instead, they are the affirmative product of an intellectual perspective that the Court unabashedly promotes. The military often gets the benefit of the doubt from the Supreme Court not as a byproduct of advantages in resources and experience; rather, the military often gets the benefit of the doubt from the Supreme Court precisely because the Supreme Court *wants* to give them the benefit of the doubt.[152]

This project also demonstrates that conventional scholarly wisdom about the contours of the military deference tradition is hit-or-miss. Diane Mazur has argued that the Court's deference habit is a recent development: "[T]his deference departs from constitutional text and from a line of Supreme Court precedent concerning civilian-military relations extending back before the Civil War. Broad judicial deference to military discretion is only a creation of the post-Vietnam, all-volunteer military . . . ."[153] This assertion runs counter to the data presented here, which shows that the deference tradition has distant roots and that if anything, the Court was much more deferential to the military before the Vietnam War. However, Mazur has also argued that the Court's deferential posture is "only a creation of one single Justice of the Supreme Court, William H. Rehnquist."[154] Here, she appears to be on solid ground. Although a comprehensive analysis of the voting patterns of individual Justices in military cases has not been

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Supreme Court experience. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995). At the same time, however, McGuire has also determined that the success rate of the solicitor general is no different from that of other experienced Supreme Court advocates; that office's institutional prestige seems to have no impact on Supreme Court outcomes in and of itself. Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998).

152. A conclusion that would likely be seconded by Sheehan, Mishler, and Songer. *See supra* note 151.

153. Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 704 (2002).

154. *Id.*

presented here, it is worth pointing out that the military's success rate of 84.2% (sixteen wins, three losses) during the Rehnquist Court is higher than its rate under the preceding six Chief Justices.[155]

IV. THE GUANTANAMO/ENEMY COMBATANT DECISIONS OF 2004

The three most recent entries in the list of military cases—*Hamdi v. Rumsfeld*,[156] *Rumsfeld v. Padilla*,[157] and *Rasul v. Bush*[158]—at first glance appear to fly squarely in the face of the Supreme Court's deferential tradition. The challenges to military procedures were upheld in *Hamdi*, in which the Court rejected the government's claim to be able to hold enemy combatants indefinitely without affording them the opportunity to challenge their confinement,[159] and in *Rasul*, in which the Court declared that civilian courts did indeed have jurisdiction to hear challenges to the detention of enemy combatants at Guantanamo.[160] The military's lone "win" in these cases is an especially tenuous one. Although the Court in *Padilla* rejected the accused's contention that Secretary of Defense Donald Rumsfeld was the appropriate legal custodian to be sued (thus compelling Padilla to refile the lawsuit), the Court pointedly refused to rule on the important question of whether the detention of Padilla was lawful.[161]

However, the *Rasul* case may in fact fit the deferential model in one important aspect. *Rasul* was the only one of the three enemy combatant cases that saw military personnel submit amicus briefs. Three such briefs were submitted: one by retired military officers only and the other two by combinations of retired military officers, former attorneys general, and other governmental figures.[162] The exclusively military amicus brief is the one that is the most fascinating because it was submitted in support of Rasul and in opposition to the military policy that Rasul was challenging.

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155. Then again, as an Associate Justice, Rehnquist did join Justice Byron White's opinion in *Weinberger v. Romero-Barcelo* and voted to allow equitable relief against the Navy as a consequence of its training exercises is Vieques, Puerto Rico. 456 U.S. 305 (1982).

156. 542 U.S. 507 (2004).

157. 542 U.S. 426 (2004).

158. 542 U.S. 466 (2004).

159. *Hamdi*, 542 U.S. at 537.

160. *Rasul*, 542 U.S. at 484.

161. *Padilla*, 542 U.S. at 430. On September 9, 2005, the Fourth Circuit upheld the indefinite holding of Padilla as an enemy combatant. Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

162. There was still yet other notable amicus in *Rasul*: Fred Korematsu also submitted a brief supporting Rasul's arguments for access to the legal process. Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343, 03-6696).

Specifically, the brief contained a section headed *Failure to Provide Any Judicial Review of the Government's Actions Could Have Grave Consequences for U.S. Military Forces Captured in Future Conflicts.*[163] Beneath this heading, the military officers noted that "even as American officials condemn other nations for detaining people indefinitely without access to a court or tribunal, authoritarian regimes elsewhere are pointing to U.S. treatment of the Guantanamo prisoners as justification for such actions."[164] They followed up with a dire warning that was squarely rooted in military expertise:

> If American detention of the Guantanamo prisoners—indefinite confinement without any type of review by a court or tribunal—is regarded as precedent for similar actions by countries with which we are at *peace*, it is obvious that it may be similarly regarded by *enemies* who capture American soldiers in an existing or future conflict. As a result, the lives of captured American military forces may well be endangered by the United States' failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.[165]

Notwithstanding the fact that the retired military officers had joined what proved to be the winning side, their admonitions were not a major factor in the opinion. Justice Stevens's majority opinion did not touch on these issues at all, and Justice Kennedy's concurrence made only an oblique reference to the military dimensions of the detentions.[166] The brief itself was neither quoted nor even mentioned in the opinion.[167]

Consequently, there is a definite limit to the similarity between the Retired Military Officers brief in *Rasul* and the Becton brief[168]

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163. Brief Amicus Curiae of Retired Military Officers in Support of Petitioners at 11, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343).

164. *Id.* at 14.

165. *Id.* at 14-15.

166. *See Rasul*, 542 U.S. at 466. Justice Kennedy wrote:

> Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

Id. at 488 (Kennedy, J., concurring).

167. In fact, none of the thirty-one amicus briefs were even referenced.

168. Brief of Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents, *supra* note 4.

which featured so prominently in *Grutter v. Bollinger*. Nevertheless, it is fair to pose the question of whether the *Rasul* brief may well represent a subtle continuation of the military deference tradition. As we have seen, this tradition is at its most potent when the Supreme Court is presented with questions of military policy; the Court hardly ever countermands the military's judgment in such cases. While at first glance the Court's critique of the Guantanamo detentions seems to be a departure from that trend, the military brief in *Rasul* underscores an important distinction—the Guantanamo detentions may be less a matter of *military* policy than one of *civilian political* policy.[169] The brief makes it very clear that from a purely military standpoint, the Guantanamo detentions are a bad policy choice.[170] In so noting, it calls attention to the fact that the key decisions implementing these detentions were made by civilian politicians ensconced in Washington.[171] Although the Court did not latch onto this distinction in its opinion, it will be intriguing to see how the Court deals with the resumption of the *Padilla* lawsuit, as well as other inevitable challenges to the accoutrements to the war on terror.[172]

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169. Brief Amicus Curiae of Retired Military Officers, *supra* note 163.

170. *Id.* at 1.

171. *Id.* at 8-11.

172. Kim Lane Scheppele has recently argued that the immediate response to the September 11 attacks was less threatening to civil liberties than what followed it.

> [T]he Bush administration's response to 9/11 in both domestic and foreign policy is not what one would typically expect of a true emergency; namely, quick responses that violate the constitutional order followed by a progressive normalization. Instead, the American government (including all three branches working together) responded with much constitutional care right after 9/11, fully aware that the temptation would be to overreact. The greater abuses have come as 9/11 recedes and executive policy has turned toward larger and larger constitutional exceptions, with the active acquiescence so far of both Congress and the courts. The reaction to 9/11 was not the declaration of a sudden emergency that has gradually abated, but instead has involved a measured immediate response followed by ever-expanding justifications for the assertion of executive and unilateral power.

Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1003 (2004).

It may be that the Court's skepticism about military power is finally catching up to the skepticism that has developed among the public in the post-Vietnam era. Jack Goldsmith and Cass Sunstein have noted that the public's general sense of unconditional approval of Franklin Roosevelt's decision to have Nazi saboteurs tried by military tribunal (in what eventually became *Ex parte Quirin*) stands in contrast to a much more ambivalent endorsement of George W. Bush's order to enable the 9/11 terrorists to be subjected to similar procedures: "The legal and social world of 2001 is radically different from the legal and social world of 1942. In this new world, it was much more natural to think that the displacement of civilian courts in favor of a more expeditious military procedure would offend constitutional values." Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 284 (2002).

CONCLUSION: AVENUES FOR FUTURE RESEARCH

As indicated at the outset, this Article represents the first step on the road to a larger endeavor. The findings that have been summarized will later be complemented by a number of additional inquiries, which will not be limited to exploring the military's Supreme Court voting record pre-1918. A full accounting of the dynamics of the Supreme Court's tradition of deference must also examine the voting records of individual Justices. Later research will not only compile this information, but it will also place Justices' military case voting record within a biographical context, paying close attention to the military case voting records of the thirty-five men (out of 110 individuals) to have sat on the Supreme Court while having previously served in the military.[173] It is also necessary to examine in detail the precise scenario with which this Article began and ended—the military's success rate as amicus curiae.[174] There is obviously much that can still be learned about the Supreme Court's habit of deferring to military judgment; this Article has hopefully begun to reveal the dynamics of this tradition.

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173. Three members of the most recent Supreme Court—Chief Justice Rehnquist and Justices Stevens and Kennedy—served in the Armed Forces, though only Chief Justice Rehnquist and Justice Stevens saw active duty, both in World War II. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 240-41 (1994). Other than Justice Kennedy's 1961 stint in the California Army National Guard, nobody who has served in the Armed Forces after 1946 has gone on to the Supreme Court. *Id.*

Justice Samuel Alito, President Bush's appointee to the seat vacated by Justice O'Connor, was commissioned as a second lieutenant in the Army upon his graduation from Princeton in 1972 (one of only twelve members of Princeton's R.O.T.C. program, which was being phased out). Neil A. Lewis & Scott Shane, *The Methodical Jurist*, N.Y. TIMES, Nov. 1, 2005, at A1. After law school, he went on active duty for three months. *Id.*

174. There is already excellent work on how the repeat-player literature translates to the amicus process, with scholars analyzing whether the success of repeat players can be offset by multiple amicus brief filings on the other side. *See* Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339 (1993) (finding no evidence that increased amici support increased the chances of Supreme Court success). For the purposes of the expansion of this project, a specific compilation of whether having the military as an amicus increases a litigant's chance of success is something that must be measured.

APPENDIX A: MILITARY CASES DECIDED BY THE SUPREME COURT 1918-2004

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Rumsfeld v. Padilla, 542 U.S. 426 (2004)	*Is the Secretary of Defense the legal custodian of a designated "enemy combatant"?*	*No—must refile suit*	WIN
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)	*Can the government indefinitely hold a designated "enemy combatant" without providing an opportunity to challenge?*	*No*	LOSS
Rasul v. Bush, 542 U.S. 466 (2004)	*Do civilian courts have jurisdiction to hear challenges to the detention of suspected terrorists at Guantanamo Bay, Cuba?*	*Yes*	LOSS
Clinton v. Goldsmith, 526 U.S. 529 (1999)	*Can a civilian court enjoin the Air Force from dropping an HIV-positive officer from its rolls?*	*No*	WIN
Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999)	*Is government immune from a third-party lien on funds held by the Army for a construction project?*	*Yes*	WIN
Rumsfeld v. Padilla, 542 U.S. 426 (2004)	*Does a military rule barring use of polygraph evidence in courts-martial interfere with defendant's fair trial rights?*	*No—rule upheld*	WIN
Edmond v. United States, 520 U.S. 651 (1997)	*Does the Appointments Clause bar the Secretary of Transportation from appointing civilian judges to the Coast Guard Court?*	*No*	WIN
Loving v. United States, 517 U.S. 748 (1996)	*Can the president, as commander in chief, prescribe aggravating factors for death penalty in courts-martial?*	*Yes—no separation of powers violation*	WIN
Ryder v. United States, 515 U.S. 177 (1995)	*Does the de facto officer doctrine apply to civilian judges on military courts if the constitutionality of the appointment is at issue?*	*No*	LOSS
Davis v. United States, 512 U.S. 452 (1994)	*Do* Miranda *rights attach to an ambiguous statement regarding counsel at a Navy custodial interrogation?*	*No*	WIN
Key Tronic Corp. v. United States, 511 U.S. 809 (1994)	*Can a company suing the Air Force for the costs of environmental-cleanup work recover attorney's fees?*	*No*	WIN
Weiss v. United States, 510 U.S. 163 (1994)	*Does the Appointments Clause bar JAG from assigning military officers to be judges at courts-martial and the initial appeal level?*	*No*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Perpich v. Dep't of Defense, 496 U.S. 334 (1990)	*Must a state governor consent to federal training of state National Guard troops outside the United States?*	*No—no Militia Clause violation*	WIN
Boyle v. United Techs. Corp., 487 U.S. 500 (1988)	*Can military contractors be immune from tort suits even absent an explicit statutory grant of immunity?*	*Yes*	WIN
Dep't of the Navy v. Egan, 484 U.S. 518 (1988)	*Can a civilian review board review the merits of a denial of security clearance cited as basis for firing a federal employee?*	*No*	WIN
ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988)	*Does the Secretary of the Interior have the power to sell water from an Army reservoir without the Secretary of Army's consent?*	*No*	WIN
United States v. Stanley, 483 U.S. 669 (1987)	*Are tort actions available to serviceman suing over being exposed to LSD experimentation incident to military service?*	*No*	WIN
Solorio v. United States, 483 U.S. 435 (1987)	*Can the military initiate a court-martial even if the offenses charged are not military in nature?*	*Yes*	WIN
United States v. Johnson, 481 U.S. 681 (1987)	*Can service personnel sue for damages incurred incident to service because of the negligence of federal civilian employees?*	*No*	WIN
Goldman v. Weinberger, 475 U.S. 503 (1986)	*Does the Free Exercise Clause bar the Air Force from refusing to allow an officer to wear a yarmulke while indoors?*	*No*	WIN
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)	*Can the Army Corps of Engineers enjoin a property owner from dumping fill material into wetlands next to navigable waters?*	*Yes*	WIN
United States v. Shearer, 473 U.S. 52 (1985)	*Can service personnel sue the government for failing to protect them from being assaulted by fellow service personnel?*	*No*	WIN
United States v. Albertini, 472 U.S. 675 (1985)	*Can a "bar letter" be enforced after nine years as against a visitor to a military open house during a protest?*	*Yes*	WIN
Wayte v. United States, 470 U.S. 598 (1985)	*Does the government's "passive enforcement" of draft registration laws violate the First and Fifth Amendments?*	*No*	WIN
Sel. Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841 (1984)	*Can federal student aid be denied to students who refuse to register for the draft?*	*Yes*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)	*Are confidential statements obtained during an Air Force crash probe protected from disclosure by Exemption 5 of the Freedom of Information Act (FOIA)?*	*Yes*	WIN
Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983)	*Does the Federal Employees' Compensation Act bar third-party recovery against the United States for the crash of an Air Force jet?*	*No*	LOSS
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)	*Can courts grant equitable relief to people suing the Navy for environmental damages in Vieques training exercises?*	*Yes*	LOSS
Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981)	*Must the Navy prepare and release a statement on storage of nuclear weapons, pursuant to the National Environmental Policy Act?*	*No*	WIN
Roskter v. Goldberg, 453 U.S. 57 (1981)	*Does requiring only males to register for the draft violate the Fifth Amendment's Equal Protection Clause?*	*No*	WIN
Peeples v. Brown, 444 U.S. 1303 (1979)	*Is a Navy seaman ordered discharged for sexual misconduct entitled to a stay of the discharge order?*	*No*	N/A
Sec'y of the Navy v. Huff, 444 U.S. 453 (1980)	*Can the Navy and Marine Corps require service personnel to secure permission to circulate petitions?*	*Yes*	WIN
Brown v. Glines, 444 U.S. 348 (1980)	*Can the Air Force require service personnel to secure permission to circulate petitions?*	*Yes*	WIN
Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977)	*Must the government indemnify third-party suppliers for lawsuits filed over malfunctioning military aircraft?*	*No—original suit is barred*	WIN
Dep't of the Air Force v. Rose, 425 U.S. 352 (1976)	*Does FOIA apply to a request for redacted summaries of service academies' records of ethics code violation cases?*	*Yes*	LOSS
Greer v. Spock, 424 U.S. 828 (1975)	*Can the military bar political candidates or their supporters from portions of a military base that allow civilian access?*	*Yes—base is not a public forum*	WIN
Middendorf v. Henry, 425 U.S. 25 (1975)	*Does the right to counsel apply in summary courts-martial procedures to deal with minor offenses?*	*No*	WIN
McLucas v. DeChamplain, 421 U.S. 21 (1975)	*Is a serviceman entitled to civilian review of an injunction against court-martial when the decision backing injunction was reversed?*	*No*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Schlesinger v. Councilman, 420 U.S. 738 (1975)	*Is an Army officer entitled to an injunction of his court-martial for marijuana possession since offense is not "service-related"?*	*No*	WIN
Schlesinger v. Ballard, 419 U.S. 498 (1975)	*Can the military use different criteria for promotion based on a candidate's gender?*	*Yes*	WIN
Sec'y of the Navy v. Avrech, 418 U.S. 676 (1974)	*Is a rule against service personnel publishing disloyal statement adversely affecting troops unconstitutionally vague?*	*No (jurisdiction issue ducked)*	WIN
Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974)	*Does the status of several members of Congress as Army reservists give rise to the taxpayer standing of a protest group?*	*No*	WIN
Parker v. Levy, 417 U.S. 733 (1974)	*Are military disciplinary regulations vague or overbroad, thus preventing court-martial of disobedient personnel?*	*No*	WIN
Davis v. United States, 417 U.S. 333 (1974)	*Can a prisoner convicted of failing to report for the draft get a new hearing based on intervening change in law* (Gutknecht)*?*	*Yes*	LOSS
Cass v. United States, 417 U.S. 72 (1974)	*Can the military deny readjustment pay to a reservist who serves six months less than the five years required for such pay?*	*Yes*	WIN
Musser v. United States, 414 U.S. 31 (1973)	*Are induction orders invalid if the local board refused to reopen the file of a registrant claiming conscientious objector (CO) status after orders were issued?*	*No*	WIN
Holtzman v. Schlesinger, 414 U.S. 1304 (1973); Holtzman v. Schlesinger, 414 U.S. 1316 (1973); Schlesinger v. Holtzman, 414 U.S. 1321 (1973)	*After federal district court permanently enjoined the U.S. bombing of Cambodia as unconstitutional (unauthorized by Congress), the government received a stay of this order from the 2d Cir.; Justice Marshall rejected plaintiffs' appeal to vacate the 2d Cir.'s stay (1304); Justice Douglas vacated 2d Cir.'s stay (1316); Justice Marshall stayed district court's original injunction (1321).*		N/A
Gosa v. Mayden, 413 U.S. 665 (1973)	*Can the* O'Callahan *rule that courts-martial cannot be conducted for offenses not service-related apply retroactively?*	*No—old case not reopened*	WIN
Frontiero v. Richardson, 411 U.S. 677 (1973)	*Can the military force female personnel to prove dependency of husbands, but presume dependency of male personnel's wives?*	*No*	LOSS

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Laird v. Tatum, 408 U.S. 1 (1972)	*Is military plan to gather information via surveillance to prevent domestic disturbances subject to a class action challenge?*	*No—claim is nonjusticiable*	WIN
Flower v. United States, 407 U.S. 197 (1972)	*Can leaflet distributor previously barred from an Army post be arrested for distributing on a widely-used public street within post limits?*	*No*	LOSS
Strait v. Laird, 406 U.S. 341 (1972)	*Can the military assert command via an Indiana reservist personnel center over a reservist domiciled in California?*	*No—upheld Cal. discharge order*	LOSS
Fein v. Sel. Serv. Sys. Local Bd. No. 7, 405 U.S. 365 (1972)	*Can a registrant reclassified in an appeal he could not attend as 1-A (rejecting local CO grant) file pre-induction challenge of appeal?*	*No*	WIN
Parisi v. Davidson, 405 U.S. 34 (1972)	*Should a civilian court stay its grant of a habeas petition in CO claim pending resolution of subsequent court-martial?*	*No*	LOSS
Lopez v. United States, 404 U.S. 1213 (1971)	*Is CO applicant arguing for a post-induction hearing on CO status (in light of* Ehlert v. United States*) bailworthy?*	*Yes—def. ordered released on recognizance (ROR)*	N/A
Clay v. United States, 403 U.S. 698 (1971)	*Can the government sustain a failure to report conviction when it gives no grounds for denial of CO status appeal?*	*No*	LOSS
McGee v. United States, 402 U.S. 479 (1971)	*Can defendant claim unlawful rejection of CO claim on appeal when he failed to appear before local board to contest the denial?*	*No*	WIN
Ehlert v. United States, 402 U.S. 99 (1971)	*Can a local board refuse to reopen the status of registrant claiming CO after induction notice was sent, but before induction?*	*Yes, if other forums exist*	WIN
Schlanger v. Seamans, 401 U.S. 487 (1971)	*Can an Air Force cadet arguing he was removed from officer training for his political activities sue for breach of employment?*	*No*	WIN
Gillette v. United States, 401 U.S. 437 (1971)	*Can the government refuse to grant "selective" CO status (objection to a particular war) and insist on objection only to all war?*	*Yes*	WIN
Relford v. Commandant U.S. Disciplinary Barracks, 401 U.S. 355 (1971)	*Does the* O'Callahan *rule apply when offenses arguably not service-related are committed on the military base?*	*No—court-martial allowed*	WIN
United States v. Weller, 401 U.S. 254 (1971)	*Is the rule barring registrants to appear before draft boards with counsel "inextricably intertwined" with statute jurisdictionally?*	*No*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
United States v. Sisson, 399 U.S. 267 (1970)	*Is CO's jury conviction, which was set aside by the trial judge, subject to appeal by the government?*	*No*	LOSS
Mulloy v. United States, 398 U.S. 410 (1970)	*Must a draft board reopen a CO case if the registrant makes factual statements not previously offered that would have merited CO status?*	*Yes*	LOSS
Welsh v. United States, 398 U.S. 333 (1970)	*Can CO status be conditioned upon religious objections to war, denying eligibility for ethical and spiritual objections to war?*	*No*	LOSS
Schacht v. United States, 398 U.S. 58 (1970)	*Can government arrest an antiwar protestor who wears his uniform while acting in a protest skit that tends to discredit the Armed Forces?*	*No*	LOSS
Toussie v. United States, 397 U.S. 112 (1970)	*Is failing to register for the draft a continuing offense, or one that ends upon initial failure, for statute of limitations purposes?*	*Ends on initial failure*	LOSS
Jones v. Lemond, 396 U.S. 1227 (1969)	*AWOL CO claimant's request for stay barring the Navy from holding him in the brig and ordering him held in open restricted barracks.*	*Stay granted*	N/A
Scaggs v. Larsen, 396 U.S. 1206 (1969)	*Renewed reservist charging violation of enlistment contract requested a release pending appeal of habeas denial.*	*Ordered ROR*	N/A
Breen v. Sel. Serv. Bd. Local No. 16, 396 U.S. 460 (1970)	*Can a student deferee who surrendered his draft card in protest receive pre-induction review of his delinquency reclassification?*	*Yes*	LOSS
Gutknecht v. United States, 396 U.S. 295 (1970)	*Can the Selective Service System accelerate the induction status of delinquent CO registrants?*	*No—this is punitive*	LOSS
Noyd v. Bond, 395 U.S. 683 (1969)	*Must service personnel exhaust all military remedies before appealing military convictions in civilian courts?*	*Yes*	WIN
O'Callahan v. Parker, 395 U.S. 258 (1969)	*Can the military court-martial service personnel for offenses that are not service-related?*	*No*	LOSS
McKart v. United States, 395 U.S. 185 (1969)	*Can the government revoke "sole surviving son" exemption upon subsequent death of only living parent?*	*No*	LOSS
United States v. Augenblick, 393 U.S. 348 (1968)	*In collateral attack on court-martial (made in Court of Claims suit for back pay), are evidentiary defects constitutional errors?*	*No*	WIN
Clark v. Gabriel, 393 U.S. 256 (1968)	*Can appeals of denial of CO status be restricted to post-induction (or post-refusal-to-submit)?*	*Yes*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Oestereich v. Sel. Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968)	*Can an exempt divinity student who returned his draft card in protest be reclassified as service-eligible?*	*No*	LOSS
United States v. O'Brien, 391 U.S. 367 (1968)	*Does jailing an antiwar protestor for burning his draft card (and thus threatening administration of draft system) violate the First Amendment?*	*No*	WIN
Md. *ex rel.* Levin v. United States, 381 U.S. 41 (1965)	*Is the United States liable for the negligence of a Maryland National Guard pilot who collided with a civilian airliner?*	*No*	WIN
United States v. Seeger, 380 U.S. 163 (1965)	*Does the belief in a "Supreme Being" requirement condition CO status eligibility upon membership in a religious sect?*	*No*	LOSS
Beard v. Stahr, 370 U.S. 41 (1962)	*Can officer whose discharge was recommended to the Secretary of Army by an inquiry board appeal discharge before the Secretary acts?*	*No*	WIN
Bell v. United States, 366 U.S. 393 (1961)	*Are former POWs who fraternized with the enemy while in captivity in Korea and later refused repatriation entitled to back pay?*	*Yes*	LOSS
Gonzales v. United States, 364 U.S. 59 (1960)	*Was failure to provide CO claimant a hearing officer's report and other evidence denial of due process in failure to report the trial?*	*No*	WIN
McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960)	*Can a civilian employee of the Armed Forces be court-martialed for a crime committed overseas?*	*No*	LOSS
Grisham v. Hagan, 361 U.S. 278 (1960)	*Can a civilian employee of the Armed Forces be court-martialed for a capital crime committed overseas?*	*No*	LOSS
Kinsella v. Singleton, 361 U.S. 234 (1960)	*Can a soldier's wife be court-martialed for a crime committed while accompanying her husband overseas?*	*No*	LOSS
Howard v. Lyons, 360 U.S. 593 (1959)	*Are officer's comments about fellow servicemen, submitted to Congress as part of official duties, privileged in a libel suit?*	*Yes*	WIN
Tak Shan Fong v. United States, 359 U.S. 102 (1959)	*Does subsequent military service render irrelevant an initial failure to enter the United States lawfully in an application for citizenship?*	*No*	WIN
Lee v. Madigan, 358 U.S. 228 (1959)	*Is a crime committed after the end of hostilities but before the termination of the war proclaimed by the president "in time of peace"?*	*Yes—cannot court-martial*	LOSS

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Nishikawa v. Dulles, 356 U.S. 129 (1958)	*Did the government prove the voluntary enlistment into Japanese army of a U.S. citizen and Japanese national claiming he was conscripted?*	*No*	LOSS
Trop v. Dulles, 356 U.S. 86 (1958)	*Can wartime desertion from the military be used as the basis for revoking U.S. citizenship?*	*No*	LOSS
Harmon v. Brucker, 355 U.S. 579 (1958)	*Can Secretary of the Army issue less than "honorable" discharges based on activities prior to induction?*	*No*	LOSS
Wilson v. Girard, 354 U.S. 524 (1957)	*Can the Army hand over an American soldier to foreign authorities to prosecute a crime the soldier committed there?*	*Yes*	WIN
Reid v. Covert, 354 U.S. 1 (1957)	*Can civilian dependents of overseas service personnel be court-martialed for crimes committed overseas?*	*No*	LOSS
Johnston v. United States, 351 U.S. 215 (1956)	*If CO's refuse to report for assigned civilian work, is venue for their failure their home district or the district they were to report to?*	*District they were to report to*	WIN
United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955)	*Can a former serviceman be retroactively court-martialed after discharge for crime committed while in service?*	*No*	LOSS
Gonzales v. United States, 348 U.S. 407 (1955)	*Must the government furnish a CO claimant with a copy of the DOJ recommendation to deny submitted to local board?*	*Yes*	LOSS
Simmons v. United States, 348 U.S. 397 (1955)	*Can the government refuse to furnish a CO claimant with a summary of adverse information at hearing?*	*No*	LOSS
Sicurella v. United States, 348 U.S. 385 (1955)	*Can CO status be denied if the claimant professes a willingness to engage in a spiritual fight for his religious beliefs?*	*No*	LOSS
Witmer v. United States, 348 U.S. 375 (1955)	*Can denials of CO status that have basis in fact for administrative decision be overturned by courts?*	*No*	WIN
Dickinson v. United States, 346 U.S. 389 (1953)	*Does an incidental amount of secular employment invalidate a clergy draft exemption?*	*No*	LOSS
United States v. Nugent, 346 U.S. 1 (1953)	*Are CO claimants entitled to see their FBI files in a DOJ hearing?*	*No*	WIN
Orloff v. Willoughby, 345 U.S. 83 (1953)	*Can the military deny an Army doctor an officer's commission if the doctor refuses to swear that he has never been a Communist?*	*Yes*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
United States v. Reynolds, 345 U.S. 1 (1953)	*Can the government cite national security concerns as a reason to withhold documents in a tort suit filed over the crash of Army jet?*	*Yes*	WIN
United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952)	*Is the destruction of private property during wartime so that it does not fall into enemy hands a taking requiring compensation?*	*No*	WIN
Madsen v. Kinsella, 343 U.S. 341 (1952)	*Can the spouse of a serviceman in Germany be tried by the Occupation Court for a crime committed in Germany?*	*Yes*	WIN
Robertson v. Chambers, 341 U.S. 37 (1951)	*Did the Army Disability Review Board properly rely on service records for its decision to discharge an officer?*	*Yes*	WIN
Gusik v. Schilder, 340 U.S. 128 (1950)	*Must servicemen pursue a new military remedy before seeking habeas corpus even if the remedy was created after the case began?*	*Yes*	WIN
Whelchel v. McDonald, 340 U.S. 122 (1950)	*Is habeas corpus available to a court-martialed serviceman because of the way the tribunal handled his insanity plea?*	*No*	WIN
Snyder v. Buck, 340 U.S. 15 (1950)	*Did the failure to substitute in timely fashion new Navy paymaster as party void suit for death gratuity?*	*Yes*	WIN
Johnson v. Eisentrager, 339 U.S. 763 (1950)	*Are German nationals arrested for crimes committed in China during wartime entitled to habeas corpus relief?*	*No*	WIN
United States v. Spelar, 338 U.S. 217 (1949)	*Can a widow of a flight engineer killed at Newfoundland Air Force Base recover tort damages against the United States over managing the base?*	*No*	WIN
Hirota v. MacArthur, 338 U.S. 197 (1948)	*Is the military tribunal in occupied Japan set up by General MacArthur subject to Supreme Court review?*	*No*	WIN
Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)	*Must the United States provide compensation for the lost "trade routes" of laundry it condemned for use during World War II?*	*Yes*	LOSS
Brooks v. United States, 337 U.S. 49 (1949)	*Are estates of servicemen killed when an Army truck hit their car entitled to tort recovery against the Army?*	*Yes*	LOSS
Humphrey v. Smith, 336 U.S. 695 (1949)	*Does lack of pretrial investigation deprive a court-martial of jurisdiction or open it up to habeas corpus review?*	*No*	WIN
Wade v. Hunter, 336 U.S. 684 (1949)	*Does double jeopardy attach when a court-martial has to be cancelled because of distance from all witnesses?*	*No*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210	*Can Navy court-martial a reenlisted soldier for an offense committed during the first term of enlistment if he was then discharged?*	*No*	LOSS
Hilton v. Sullivan, 334 U.S. 323 (1948)	*Must the government consider length of service in determining the employment status of returning veteran employees?*	*No*	WIN
Mogall v. United States, 333 U.S. 424 (1948)	*Is an employer required to furnish a draft board information about an employee that might result in a different draft classification?*	*No*	LOSS
Mitchell v. Cohen, 333 U.S. 411 (1948)	*Are former temporary workers in the Volunteer Port Security Force "ex-servicemen" for the purposes of veterans' job preferences?*	*No*	WIN
Cox v. United States, 332 U.S. 442 (1947)	*Was draft board's refusal to grant ministerial exemptions to Jehovah's Witnesses appropriate?*	*Yes*	WIN
United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947)	*Can the government recover tort damages for compensation it had to pay to a serviceman injured by one of the company's trucks?*	*No*	LOSS
Sunal v. Large, 332 U.S. 174 (1947)	*Can a registrant who did not appeal improper denial of a defense to refusing to serve obtain habeas corpus relief?*	*No*	WIN
United States v. Bayer, 331 U.S. 532 (1947)	*Does a court-martial conviction preclude subsequent civil recovery by the United States in an action over depriving the United States of an officer?*	*No*	WIN
Patterson v. Lamb, 329 U.S. 539 (1947)	*Is an Army draftee sent back before induction due to the cessation of hostilities entitled to an honorable discharge?*	*No*	WIN
Gibson v. United States, 329 U.S. 338 (1947)	*Is a CO claimant required to report to civilian camp in order to complete the administrative process and offer CO defense?*	*No*	LOSS
Eagles v. United States *ex rel.* Horowitz, 329 U.S. 317 (1947)	*Did the draft board illegally induct a rabbinical student into the Army when it determined that his rabbinical study was insincere?*	*No*	WIN
Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1947)	*Did the draft board illegally induct a rabbinical student into the Army when it determined that his rabbinical study was insincere?*	*No*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
United States v. Anderson, 328 U.S. 699 (1946)	*Is the venue for a failure to report a prosecution the district where the draft board was located or where the induction oath was refused?*	*Where refusal occurred*	WIN
United States v. Causby, 328 U.S. 256 (1946)	*Is the government's use of a local airfield such that it ruined a chicken farm a "taking" requiring compensation?*	*Yes*	LOSS
Duncan v. Kahanamoku, 327 U.S. 304 (1946)	*Did military tribunals in Hawaii have the power to convict civilians?*	*No*	LOSS
Estep v. United States, 327 U.S. 114 (1946)	*Are rejected applicants for service exemptions entitled to full judicial review of the denial?*	*Yes*	LOSS
In re Yamashita, 327 U.S. 1 (1946)	*Can a former general of the Japanese Army accused of allowing his troops to commit atrocities be tried by a U.S. military tribunal?*	*Yes*	WIN
Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945)	*Can a contractor maintain suit against the Navy Undersecretary personally as means of preventing him from stopping gov't payments?*	*No*	WIN
Keegan v. United States, 325 U.S. 478 (1945)	*Was there sufficient evidence to convict members of German-American Bund of conspiracy to counsel for draft evasion?*	*No*	LOSS
Korematsu v. United States, 323 U.S. 214 (1944)	*Can American citizen of Japanese ancestry be convicted for refusing to obey an exclusion order during World War II?*	*Yes*	WIN
Billings v. Truesdell, 321 U.S. 542 (1944)	*Is a CO claimant who refuses to take the oath of induction subject to court-martial or civilian prosecution?*	*Civilian prosecution*	LOSS
Falbo v. United States, 320 U.S. 549 (1944)	*Can a CO registrant who refused to perform alternative duties obtain judicial review before induction?*	*No*	WIN
Yasui v. United States, 320 U.S. 115 (1943)	*Can an American citizen of Japanese ancestry be convicted for refusing to obey curfew orders during World War II?*	*Yes*	WIN
Hirabayashi v. United States, 320 U.S. 81 (1943)	*Can an American citizen of Japanese ancestry be convicted for refusing to obey curfew and relocation orders during World War II?*	*Yes*	WIN
Bartchy v. United States, 319 U.S. 484 (1943)	*Is it enough that a draft registrant furnish a draft board in good faith with a chain of forwarding addresses?*	*Yes*	LOSS
Bowles v. United States, 319 U.S. 33 (1943)	*Can a rejected CO claimant challenge a denial by alleging that the board misapplied statute?*	*No*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Ex parte Quirin, 317 U.S. 1 (1942)	*Are suspected Nazi saboteurs properly tried before a military commission?*	*Yes*	WIN
United States v. Goltra, 312 U.S. 203 (1941)	*If an Army officer seizes property without proper authorization, can the property owner sue the government?*	*No*	WIN
United States v. Dickerson, 310 U.S. 554 (1940)	*Was the government allowed to deny a soldier a re-enlistment allowance?*	*Yes*	WIN
Miguel v. McCarl, 291 U.S. 442 (1934)	*Is the Comptroller General of the Army subject to a writ of mandamus to deliver back pay?*	*Yes*	LOSS
United States *ex rel.* Greathouse v Dern, 289 U.S. 352 (1933)	*Can landowners obtain a writ of mandamus from the Secretary of War to consummate a sale so that a wharf can be built?*	*No*	WIN
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930)	*Does a state relinquish its right to tax improvements made on land within its borders sold to the U.S. government for a military base?*	*Yes*	WIN
United States v. Unzeuta, 281 U.S. 138 (1930)	*Does the United States have the power to prosecute a murder on a train car traveling through a military reservation?*	*Yes*	WIN
Leonard v. United States, 279 U.S. 40 (1929)	*Is a retired Marine who received longevity pay for wounds entitled to have his years on retired list counted for base pay?*	*No*	WIN
United States v. Lenson, 278 U.S. 60 (1928)	*Was a lieutenant of the Staff Corps of the Navy properly denied pay?*	*Yes*	WIN
Culver v. United States, 271 U.S. 315 (1926)	*Is a War College student entitled to extra pay because he volunteered for flights?*	*Yes, though not as much*	LOSS
Rogers v. United States, 270 U.S. 154 (1926)	*Can an Army major appeal forced retirement in civilian court, claiming that the military tribunal denied him a right to give evidence?*	*No*	WIN
United States v. Swift & Co., 270 U.S. 124 (1926)	*Was the United States liable for a contract for Army food signed for by the quartermaster officers?*	*Yes*	LOSS
Interocean Oil Co. v. United States, 270 U.S. 65 (1926)	*Can a company that contracted with an Army officer knowing he needed confirmation from superiors recover for breach of contract?*	*No*	WIN
United States v. Noce, 268 U.S. 613 (1925)	*Is an Army officer entitled to count his service as a cadet at the U.S. Military Academy in computing longevity pay?*	*No*	WIN
United States v. Royer, 268 U.S. 394 (1925)	*Can Army recover extra pay given to an officer inadvertently promoted to major when he should only have been captain?*	*No*	LOSS

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
United States v. Moser, 266 U.S. 236 (1924)	*Can the United States recover sea pay against a captain in a dispute over whether his cadet service was within the "civil war"?*	*No*	LOSS
United States v. Ferris, 265 U.S. 165 (1924)	*Is the commander of a domestic military instruction camp "serving with troops operating against an enemy" for pay computation?*	*No*	WIN
United States v. Gay, 264 U.S. 353 (1924)	*Did the Navy unlawfully withhold pay from a retired warrant machinist who had returned to Switzerland?*	*Yes*	LOSS
United States v. Slaymaker, 263 U.S. 94 (1923)	*Can the Navy deduct "gratuity" pay for the uniforms of a Naval reservist who leaves the reserves to join the regular Navy?*	*No*	LOSS
Denby v. Berry, 263 U.S. 29 (1923)	*Can the Navy Secretary be required by mandamus to revoke an order retiring an officer to inactive duty?*	*No*	WIN
United States v. Luskey, 262 U.S. 62 (1923)	*Is additional pay for enlisted men in the Navy and Marines on flight detail to be made irrespective of number of flights made?*	*Yes*	LOSS
United States v. Rider, 261 U.S. 363 (1923)	*Are enlisted men in officer training entitled to the temporary pay increase in the Signal Corps?*	*No*	WIN
United States v. Moran, 261 U.S. 321 (1923)	*Was a yeoman in the Coast Guard properly denied pay based on a decision to fix pay grades by the Secretary of the Navy?*	*No*	LOSS
United States v. Allen, 261 U.S. 317 (1923)	*Was a seaman in the Coast Guard properly denied pay based on a decision to fix pay grades by the Secretary of the Navy?*	*No*	LOSS
U.S. Grain Corp. v. Phillips, 261 U.S. 106 (1923)	*Is a naval officer entitled to extra pay for transporting gold for a private corporation as part of his public duty?*	*No*	LOSS
United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922)	*Can a military tribunal's reclassification of an officer be challenged in civilian court?*	*No*	WIN
United States. *ex rel.* French v. Weeks, 259 U.S. 326 (1922)	*Can a military tribunal's reclassification of an officer be challenged in civilian court?*	*No*	WIN
Collins v. McDonald, 258 U.S. 416 (1922)	*Must a habeas corpus appeal of a court-martial be limited to the jurisdiction of the court-martial?*	*Yes*	WIN
Wallace v. United States, 257 U.S. 541 (1922)	*Can the president remove an Army officer by appointing another officer in his place with Senate consent?*	*Yes*	WIN

CASE	QUESTION OR ISSUE AT BAR	DISPOSITION	WIN OR LOSS?
Givens v. Zerbst, 255 U.S. 11 (1921)	*Was a court-martial properly convened?*	*Yes*	WIN
Kahn v. Anderson, 255 U.S. 1 (1921)	*Is the number of officers that comprise a court-martial panel subject to judicial review?*	*No*	WIN
Cartas v. United States, 250 U.S. 545 (1919)	*Does the commander of a Navy ship's discretionary choice to take private property onboard create a contract obligation for the United States?*	*No*	WIN
United States v. Babcock, 250 U.S. 328 (1919)	*Was the United States within its rights to refuse to compensate Army officers for private property losses?*	*Yes*	WIN
Cox v. Wood, 247 U.S. 3 (1918)	*Is compulsory conscription constitutional or is it ruled out by the Militia Clause?*	*Constitutional*	WIN
Bethlehem Steel Co. v. United States, 246 U.S. 523 (1918)	*Did a company that continued to make bond payments have the right of action against the United States, claiming they should have cancelled bond?*	*No*	WIN
Ruthenberg v. United States, 245 U.S. 480 (1918)	*Is the Selective Draft Law constitutional?*	*Yes*	WIN
Kramer v. United States, 245 U.S. 478 (1918)	*Is the Selective Draft Law constitutional?*	*Yes*	WIN
Goldman v. United States, 245 U.S. 474 (1918)	*Is the Selective Draft Law constitutional?*	*Yes*	WIN
Jones v. Perkins, 245 U.S. 390 (1918)	*Is the Selective Draft law constitutional?*	*Yes*	WIN
Selective Draft Law Cases, 245 U.S. 366 (1918)	*Is the Selective Draft Law constitutional?*	*Yes*	WIN

APPENDIX B: SELECTED STATISTICAL BREAKDOWNS OF MILITARY CASES

MILITARY'S OVERALL WIN-LOSS RECORD	118-60	(66.3%)
WIN-LOSS RECORD IN DRAFT EXEMPTION CASES[175]	16-17	(48.5%)
Subcategory 1: exemption procedures	*12-13*	*(48.0%)*
Subcategory 2: exemption eligibility	*4-4*	*(50.0%)*
Overall win-loss record without draft exemption cases	102-43	(70.3%)
WIN-LOSS RECORD IN SOLDIER PAY CASES[176]	7-11	(38.9%)
Overall win-loss record without soldier pay cases	112-49	(69.6%)
Overall win-loss record without soldier pay or draft exemption cases	95-32 (74.8%)	
WIN-LOSS RECORD IN COURT-MARTIAL CASES[177]	29-10	(74.4%)
Court-martial of military personnel	28-6	(82.4%)
Court martial of civilians[178]	1-4	(20.0%)
WIN-LOSS RECORD IN TORT LIABILITY CASES[179]	8-3	(72.8%)

175. Cases in which challenges were launched against either the substantive decisions of draft boards or other bodies assessing eligibility for conscientious objector status or other exemption from military service, or the procedures to be used in the relevant proceedings. This list thus includes the following cases (in reverse chronological order): *Musser, Fein, Parisi, Clay, McGee, Ehlert, Gillette, Sisson, Mulloy, Welsh, Breen, Gutknecht, McKart, Clark, Oestereich, Seeger, Gonzales* (1960), *Johnston, Gonzales* (1955), *Simmons, Sicurella, Witmer, Dickinson, Nugent, Mogall, Cox, Sunal, Gibson, Horowitz, Samuels, Estep, Billings, Falbo, Bowles.*

176. In reverse chronological order: *Cass, Bell, Dickerson, Miguel, Leonard, Lenson, Culver, Noce, Royer, Moser, Gay, Ferris, Slaymaker, Luskey, Rider, Moran, Allen, Grain.*

177. Also included are cases involving trial by military tribunal or Occupation Court. This category does not include conscientious objector (CO) cases that ended up as court-martials; the CO cases and these cases have been coded in mutually exclusive fashion. This list thus includes the following cases (in reverse chronological order): *Scheffer, Loving, Solorio, Peeples, Middendorf, McLucas, Councilman, Parker, Gosa, Parisi, Relford, Noyd, O'Callahan, Augenblick, Grisham, McElroy, Singleton, Madigan, Covert, Toth, Madsen, Gusik, Whelchel, Eisentrager, Hirota, Humphrey, Wade, Hirshberg, Bayer, Anderson, Kahanamoku, Yamashita, Quirin, Unzeuta, French, Creary, Collins, Givens, Kahn.* As explained earlier, because these cases are being used as a means of explaining the decisions in *Hamdi, Rasul,* and *Padilla,* those three cases have been omitted from the tabulation within this cluster.

178. In reverse chronological order: *Grisham, McElroy, Singleton, Madsen, Kahanamoku.*

179. In reverse chronological order: *Boyle, Johnson, Shearer, Weber Aircraft, Lockheed Aircraft, Romero-Barcelo, Stencel, Levin, Reynolds, Spelar, Brooks.*

MILITARY'S WIN-LOSS RECORD BY CHIEF JUSTICESHIP[180]		
Edward White (1918-1921) *(Sel. Draft Law → Givens)*	11-0	(100.0%)
William Howard Taft (1921-1930) *(Wallace → Leonard)*	12-10	(54.5%)
Charles Evans Hughes (1930-1941) *(Unzeuta → Goltra)*	5-1	(83.3%)
Harlan Fiske Stone (1941-1946) *(Quirin → Kahanamoku)*	8-5	(61.5%)
Fred Vinson (1946-1953) *(Causby → Orloff)*	22-7	(75.9%)
Earl Warren (1953-1969) *(Nugent → Noyd)*	12-15	(44.4%)
Warren Burger (1970-1986) *(Gutknecht → Goldman)*	32-19	(62.7%)
William Rehnquist (1986-2005) *(U.S. v. Johnson → Hamdi)*	16-3	(84.2%)

180. Opinions are categorized opinions here by the date they were announced. This category is merely a chronological tracking; it does not track individual Justices' votes (that will be a future project).