A Sesquicentennial Historic Analysis of Dynes v. Hoover and the Supreme Court’s Bow to Military Necessity: From its Relationship to Dred Scott v. Sanford to its Contemporary Influence

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A Sesquicentennial Historic Analysis of *Dynes v. Hoover* and the Supreme Court's Bow to Military Necessity: From its Relationship to *Dred Scott v. Sandford* to its Contemporary Influence

*Joshua Kastenberg*

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In his 1857 inauguration address, James Buchanan referenced the impending Supreme Court decision, *Dred Scott v. Sand-
ford, and encouraged the "citizenry" of the United States to "cheerfully submit, whatever [the decision] may be." It was a disingenuous comment because, as was readily and correctly suspected by northern abolitionists, Buchanan knew the details of Chief Justice Roger B. Taney's majority decision prior to its pronouncement, as well as the accompanying concurring and dissenting positions. Buchanan, his predecessor Franklin Pierce, and the Court's majority believed the decision constituted the final verdict on slavery's constitutional compatibility. Moreover, the nation as a whole awaited the verdict in that case with more intense interest than any other in United States history.

Shortly after Dred Scott, the Court adopted, in Dynes v. Hoover, a doctrine that provides courts-martial as a uniquely exclusive instrument of the executive branch, which is not subject to the checks and balances inherent to American jurisprudence. This

1. 60 U.S. (19 How.) 393 (1856). The Dred Scott case originated, in part, in the Army. John Emerson, Scott's second owner, was an Army surgeon who purchased Scott in St. Louis in 1830. However, when the Army transferred Emerson to Illinois and Fort Snelling, located in the Minnesota Territory, he took Scott with him. See Brian McGinty, Lincoln and the Court 41–42 (2008).


3. Letter from Justice John Catron to President Elect James Buchanan (Feb. 19, 1857), in The Works of James Buchanan, supra note 2, at 106. Catron noted to Buchanan, "how good the opportunity is to settle the agitation by an affirmative decision of the Supreme Court." Id.; see also Alexander A. Lawrence, James Moore Wayne: Southern Unionist 147–53 (1943); Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 307–12 (1978); James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers 113–20 (2006). Fehrenbacher notes that Buchanan received information on the Court's deliberations from both Justice Grier and Justice Catron. This was not known until correspondence between Grier and Buchanan was discovered in the 1920s. See, e.g., Philip Auchampaugh, James Buchanan, the Court, and the Dred Scott Case, 9 Tenn. Hist. Mag. 231, 238 (1926).


5. 61 U.S. (20 How.) 65 (1857). Commentators often write that Dynes was decided in 1857. It was published in 1858 but decided during the 1857 term.
doctrine is known as executive exclusivity. While *Dred Scott* resulted in a lengthy decision, with almost equally lengthy concurrences and dissents, *Dynes* was very brief. Yet, the ruling in *Dynes*, as in the case of *Dred Scott*, was far broader than the initial issue required, and as this Article will demonstrate, the practical implications of the two cases were interrelated.

The Court ruled, in an eight-to-one decision, that neither it nor lesser Article III courts had jurisdiction over military courts-martial, except in the seemingly rare instance where the individual prosecuted by a military-court challenged the military's *in personam* jurisdiction. Prior to *Dynes*, the doctrine of executive branch exclusivity largely went unchallenged, but it existed without formal judicial sanction.\(^6\) Although *Dynes* arose under the Naval Articles of War, which were originally issued in 1775—as distinct from the Army's 1806 Articles of War—the Court determined the executive exclusivity doctrine applied equally to both naval and land forces.\(^7\)

The nation did not have nearly the level of interest in *Dynes* that it had held in *Dred Scott*. Perhaps because of its current status as a case limited to military law, *Dynes v. Hoover* has attracted little attention by modern legal scholars and historians writing on the era in which it was decided.\(^8\) Likewise, a contemporary legal...

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6. Article I, Section 8 of the United States Constitution enumerates Congressional responsibility, including: "To make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 14. Article II, Section 2 of the United States Constitution confers to the President the title of "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const. art. II, § 2, cl. 1. Article III does not specifically prohibit the Supreme Court from jurisdiction over military cases. See U.S. Const. art. III.

7. See, e.g., WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 15 (1920 reprint).

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In the federal system is a government that operates much like a pocket republic that is both contained within and insulated from the larger Madisonian democracy. The military system has grown steadily in both size and scope of operations since the very beginning of the country. Long recognized by the Supreme Court as a “specialized society separate from civilian society with laws and traditions of its own,” the military system of governance has been expressly given a status akin to a sovereign state system. In addition to its unique legal status, the system has many of the elements of a distinct republic with its own unique governmental structure, history, culture, lexicon, and values.


9. A sample of thirty major works commenting on military trials of civilians does not include Dynes as a cornerstone of such trials. This list includes books on historic courts-martial such as that of Major General Fitz John Porter. See, e.g., CURT ANDERS, *INJUSTICE ON TRIAL: SECOND BULL RUN, GENERAL FITZ JOHN PORTER’S COURT-MARTIAL, AND THE SCHOFIELD BOARD INVESTIGATION THAT RESTORED HIS GOOD NAME* (2002); OTTO EISENSCHIML, *THE CELEBRATED CASE OF FITZ JOHN PORTER: AN AMERICAN DREYFUS AFFAIR* (1950). Also, any discussion of Dynes is absent in the recent treatise analyzing the trial of William "Billy" Mitchell. See, e.g., DOUGLAS WALLER, *A QUESTION OF LOYALTY: GEN. BILLY MITCHELL AND THE COURT-MARTIAL THAT GRIPPED THE NATION* (2004). Although the prosecution of Lieutenant William Calley is a more recent court-martial, the authority of Dynes remained unchallenged in the courts at the time of the trial, despite the fact that the military appellate courts turned to Dynes for guidance in upholding Calley’s conviction. Yet, Dynes does not appear in MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2002).
absence of primary documents such as correspondences, writings, and speeches of the principal proponents.

An understanding of the case’s historic context is important for a number of reasons. As a matter of legal history, Dynes not only represents the high-water mark of the executive branch’s exclusivity in the oversight of its military legal system, but it also has continued to influence military law to the present day, though not always without criticism and certainly with far less strength than the case once possessed. It is worth noting that in 1962, Chief Justice Earl Warren, while speaking to the student body at the New York University Law School, singled out Dynes as the “classic formulation of the relation between civil courts and courts-martial.”10 That is, Warren found Dynes as the instrument which precluded judicial review of the majority of courts-martial.11 Warren went on to argue executive exclusivity was an antiquated view which the Court had only recently altered.12

While the Court may not have visibly manifested a specific design to link Dred Scott to Dynes, the relationship and proximity in time between the two cases is not merely coincidental. Dred Scott provided pro-slavery Southerners and their Northern allies the authority of law to enforce the Fugitive Slave Act, and it enabled the expansion of slavery into the territories by nullifying the Missouri Compromise. Dynes provided the President with an additional tool to use the Army to enforce what Dred Scott permitted. Prior to Dynes, the nascent Republican Party’s leaders opposed using the Army to enforce the Fugitive Slave Act or protect pro-slavery interests.13 Additionally, in at least one instance, an

11. Id. Warren prefaced his criticism of Dynes as:

The cases in which the Court has ordered the release of persons convicted by court-martial have to date, been limited to instances in which it found lack of military jurisdiction over the person so tried, using the term “jurisdiction” in its narrowest sense. That is, they were cases in which the defendant was found to be such that he was not constitutionally or statutorily amenable to military justice.

Id.
12. Id.
13. See, e.g., Congressman John Bingham, Increase of the Army (Mar. 17, 1858), in CONG. GLOBE, 35th Cong., 1st Sess. 1171 (1858); Senator William
officer had been court-martialed for refusing to order his soldiers to enforce the Fugitive Slave Act, because he believed the act immoral.  

Evidence for a nexus between *Dred Scott* and *Dynes* exists in the four primary proponents’ ideologies and intents in *Dynes*, as this Article will demonstrate by a historical analysis of each of their attitudes toward federalism, slavery, and military law. It will likewise show how *Dynes v. Hoover* represented a significant departure from those ideologies. These individuals are Chief Justice Roger B. Taney, Associate Justice James Moore Wayne (the judicial author of *Dynes*), Attorney General Caleb Cushing, and his assistant Ransom Hooker Gillet, who forcefully and successfully argued the executive branch’s position to the Court. This is an important point since each man possessed, as a common denominator, a political ideology centered in Jeffersonian anti-Federalism and its successor, Jacksonian Democracy. The idea of executive branch exclusivity in any domestic function was an anathema to

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15. See, e.g., 1 JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1775–1950, at 29–32 (1998) [hereinafter PURSUING MILITARY JUSTICE]. Lurie’s otherwise comprehensive treatise contains one mistake—he writes that Caleb Cushing argued the case before the Court. Ransom Hooker Gillet, Cushing’s assistant, argued and drafted the brief under Cushing’s supervision.  

this ideology. Since Dynes ultimately resulted in a holding that empowered the executive branch and severely limited judicial review in courts-martial, analysis of the attitudes of these key proponents is useful.

Within a decade of Dynes, the case was effectively utilized in manner wholly at odds with the intent of its initial proponents, none of whom envisioned a Civil War. Interestingly, Wayne broke with his three peers during the war and supported President Lincoln’s expansion of military law over certain classes of civilians. Had the other three proponents of Dynes not believed in the finality of Dred Scott or foreseen the possibility of a civil war, Dynes would have been decided on narrow principles, limited to naval law. For instance, the case was forcefully used by Joseph Holt, the Army’s Judge Advocate General from 1862 to 1875, in arguing Ex parte Vallandigham. The Civil War era Supreme Court accepted its prior dicta established in Dynes, that it had no jurisdiction to review the procedures or subject matter of military trials and then extended it to instances when the military trial was of a civilian. This result was hardly what the case’s proponents would have expected in 1858.

This Article is a legal history of a case cited by the Court thirty-six times in determining issues ranging from military jurisdiction over war crimes to the shaping of how the military punitively governs its own members. That is, this Article analyzes the ideologies of the proponents of Dynes, and what those proponents hoped to achieve, as well as how the case has evolved to influence military law to the present day. Part I provides a synopsis of the pre-Civil War development of military law, as well as the factual background and ultimate decision in Dynes. Part II analyzes the principal proponents’ ideologies involved in the case and how these establish a direct link between Dred Scott and Dynes. Part III illustrates how Dynes was utilized in the century and a half after its publication. Dynes enabled the military to craft its internal legal development without overarching external influence, at least until

18. Id. at 254. Justice Wayne’s Ex parte Vallandigham opinion in denying certiorari referenced Dynes as follows: “And as to the President’s action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court, in the cases of Martin v. Mott, and Dynes v. Hoover.” Id.
1919, if not the adoption of the Uniform Code of Military Justice ("UCMJ") in 1950. As a result, the military law has been able to maintain aspects of criminal law, such as non-enumerated common law crimes, no longer permissible under federal or state criminal law. Part III also analyzes the continuing use of Dynes, albeit as a hidden artifact, in the present time, as well as the likelihood it will not be overtly reversed in the foreseeable future.

I. MILITARY LAW IN AMERICAN JURISPRUDENCE AND THE DYNES V. HOOVER DECISION

There were at least two instances prior to Dynes in which the Supreme Court could squarely have ruled that courts-martial were either an exclusive instrument of the executive branch or subject to judicial review but chose not to do so. The discussion below, as well as in Part II, analyzes both instances in greater detail. However, a brief contextual note framing the condition of military law in the United States is helpful throughout this Article, beginning with Martin v. Mott.

During the 1812 War with Great Britain, President Madison called the militia into federal service, but a number of militia men refused to serve, and the New England states attempted to restrict the use of their militias to defending their own territory. One of these men, a New York militia soldier, Jacob E. Mott, was court-martialed, "for having failed, neglected, and refused to rendezvous, and enter into the service of the United States, in obedience to orders. . . ." In Martin v. Mott, the Court did not rule on the efficacy of courts-martial. Instead, it ruled on executive branch authority to determine the quality and quantity of a national emergency and how this authority related to the president's constitutional authority to order militia into federal service. As explained in greater detail in Subsection B, Martin v. Mott is impli-

19. Pub. L. No. 81-506, 64 Stat. 107 (1950). For an excellent history of the Uniform Code of Military Justice (UCMJ) as well as the pre-1950 governance of military law, see 1 JONATHAN LURIE, ARMING MILITARY JUSTICE (1992). For the most comprehensive analytical history of the Articles of War prior to 1895, see WINTHROP, MILITARY LAW AND PRECEDENTS, supra note 7.
cated in *Dynes*, as Gillet cited the case on behalf of the executive branch.

In 1841, Rhode Island's population of disenfranchised working class revolted against the state government. The state's antiquated charter of laws limited its voting franchise to its property owners. Essentially, this was the same franchise which existed prior to the Declaration of Independence. Led by Thomas Dorr, the revolt became widespread to the point that the state governor implored President John Tyler to either call the militia into federal service or use the Army to suppress the revolt.

Tyler refused both requests, though he openly expressed sympathy with the governor and landed gentry of the state. Ultimately, forces loyal to the governor suppressed the revolt and in doing so, made multiple arrests and damaged private property. The case of one aggrieved party reached the Court in *Luther v. Borden*. In an otherwise lengthy decision, the Court briefly noted the efficacy of the 1806 Articles of War but did not address the question of whether courts-martial were solely in the province of the executive branch. The Court's brief commentary on the 1806 Articles of War is further addressed below, but at this point it will suffice to note that the Court supported the military's disciplinary laws without any criticism. It was likely the case that this lack of criticism stemmed from the fact that Taney recognized the Articles of War had limited jurisdiction to persons in the military as well as military offenses. Common offenses committed in peacetime by soldiers such as rape and murder were tried in the civil courts. Only during wartime were soldiers prosecuted in courts-martial for such offenses.

In both *Martin v. Mott* and *Luther v. Borden*, the Court may very well have accepted (without commenting as such) Lord Blackstone's dicta that "the discretionary power of a court-martial

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24. Luther v. Borden, 48 U.S. 1, 44 (1849); see also Gettleman, supra note 23, at 109.


26. Id. at 140–42.

27. 48 U.S. 1 (1849).
is indeed to be guided by the directions of the crown, which, with regard to military offenses, has an almost absolute legislative pow-
er.28 Blackstone also writes of the inherent oddity of believing standing armies a danger to republican government and yet accept-
ing exclusive executive branch control over the military’s courts. Blackstone, like the anti-Federalist Jeffersonians at the constitu-
tional convention, believed standing armies were a potential me-
nace to liberty.29 However, he also clearly understood the realities of having France, possessing a large professional army, as a neigh-
bor.30

In Luther, the Court recognized this disconnect, ruling:

It is said that this power in the President is danger-
ous to liberty, and may be abused. All power may
be abused if placed in unworthy hands. But it would
be difficult, we think, to point out any other hands
in which this power would be safer, and at the same
time equally effectual.31

Although the Court appeared to adopt Blackstone’s dicta, state judicial bodies had already chipped away at this dicta. While the authority of state court decisions extended only to a particular state’s militia, these rulings evidence a trend from federalism to Jeffersonian limitations on military law. By 1830 there was an established consensus in such states that courts-martial were courts of limited jurisdiction with unfettered rulings. For instance, in 1815, at the height of the 1812 War, the Kentucky Supreme Court reversed a court-martial conviction. The court judicially recog-
nized—for the first time in American legal history—a doctrine of conscientious objection to obligated service.32 In 1815, the Su-
preme Court of Judicature of New York held that courts-martial were limited by subject matter and personal jurisdiction, and the

28. Id.
29. WILLIAM BLACKSTONE, 1 COMMENTARIES *415. Blackstone noted, “nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary, to be kept on foot, a body too distinct from the people.” Id.
30. Id.
31. Luther, 48 U.S. at 44.
state courts could review those determinations. In 1816, the New Jersey Supreme Court adopted a doctrine of appellate review for state courts-martial.

A. The Status of Military Law and its Subjects Prior to Dynes

The concept of the new nation possessing a standing army was contentious during debates on the Constitution's ratification, as well as during an attempt to increase the size of the standing army during President John Adams' administration. The Constitution's framers understood that potential threats of a British or French invasion existed; in addition, they contended with a constant threat of conflict with Native American tribes on the frontier and a possibility of internal insurrection. However, anti-federalists believed state militias were sufficient to meet most threats to national security. Additionally, local militias served as a check against the possibility of a tyrannical central government. Despite certain fears of a standing army, the framers empowered

34. State v. Davis, 4 N.J.L. 358 (1816).

The constitutional debates about the militia clauses focused almost exclusively on the extent of power the federal government and the states, respectively, would and should have over the militia. That is, all parties desired a militia to provide for the security of the nation, with reliance on a standing army, if at all, only as a last resort.

_Id._
Congress to "make Rules for the Government and Regulation of the land and Naval forces."\textsuperscript{38}

Politicians of the day wrote less frequently about the fear of slave uprisings, but in 1798, South Carolina Congressman Robert Goodloe Harper argued that an increase in the size of the army was essential to suppress slave insurrections as well as stave off a possible invasion of black soldiers from the Dominican Republic.\textsuperscript{39} Slave uprisings did occur throughout the early Republic. Of these, the two most notable were the so-called Denmark Vesey uprising and Nat Turner rebellion.\textsuperscript{40} Both uprisings were symbolically used to further suppress African-Americans and generate widespread fear of a race-war.\textsuperscript{41}

The legislature responded to the concerns raised by these arguments. In 1806, Congress crafted the Articles of War to govern the Army's discipline. Although Congress implemented this body of rules to the satisfaction of Jeffersonian Democrats who earlier objected to a standing professional army, the 1806 Articles of War expanded on a code adopted during the War for Independence and actually originated in European antecedents.\textsuperscript{42} Signifi-

\textsuperscript{38} U.S. Const. art. I, § 8, cl 14.
\textsuperscript{39} ELKINS & MCKITTRICK, supra note 35, at 595–99.
\textsuperscript{40} WILENTZ, THE RISE OF AMERICAN DEMOCRACY, supra note 2, at 338–41; see also JOHN LOFTON, DENMARK VESEY'S REVOLT: THE SLAVE PLOT THAT LED TO FORT SUMTER 5–63 (1964).
\textsuperscript{41} WILENTZ, THE RISE OF AMERICAN DEMOCRACY, supra note 2, at 338–41.
\textsuperscript{42} See, e.g., David A. Schlueter, The Court-Martial: A Historical Survey, 87 MIL. L. REV. 129 (1980). For John Adams' autobiographical account of the revision of the articles, explaining why they were essentially "the British Articles of War, totidem Verbis," see 3 John Adams, The Adams Papers: Diary and Autobiography of John Adams 409–10 (L.H. Butterfield ed., 1961). The two greatest influences on the 1806 Articles of War were its contemporaneous British counterpart, the "Mutiny Acts," and the early seventeenth century Swedish military code of King Gustavus Adolphus. GEORGE BRECKENRIDGE DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (2d ed., 1909); see also WINTHROP, MILITARY LAW AND PRECEDENTS, supra note 7, at 47–49. Winthrop noted that the British Articles of War incorporated those established under the Swedish warrior king, Gustavus Adolphus (1594–1632). WINTHROP, MILITARY LAW AND PRECEDENTS, supra note 7, at 47–49. Winthrop wrote that in some instances—he called them "identical quaint expressions"—there were vestiges of Adolphus' military code in the Articles of War. Id.; see also Colonel
cantly, nowhere did the 1806 Articles of War preclude judicial review of courts-martial.

Also notable in 1806, the Supreme Court in *Wise v. Withers*\(^43\) held that a justice of the peace was exempt from obligated militia service, and therefore, a court-martial did not possess jurisdiction over him.\(^44\) The facts underlying *Withers* bear brief mention in explaining the limited reach of the case. In 1803, Congress enacted a law requiring the enrollment of all white males into the militia.\(^45\) However, the law exempted federal officials from militia duty.\(^46\) The Court did not mention the Articles of War, nor did it address the nature of military law. In a very brief decision authored by Chief Justice John Marshall, the Court held, without any dissent, justices of the peace were government officers and therefore, exempt from a requirement to serve in a militia.\(^47\)

Marshall had occasion to comment on *Withers* in a later case, *Ex Parte Watkins.*\(^48\) Although *Watkins* did not involve a question of military law, the respondent’s counsel urged the Court to adopt its *Watkins* dicta for guidance. In response, Marshall held, “This decision [*Wise v. Withers*] proves only that a court martial was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court

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43. 7 U.S. (3 Cranch) 331 (1806).
44. *Id.* at 333.
45. *Id.* at 332.
46. *Id.* at 333–34. The law exempted from militia duty:
The Vice-President of the United States; the officers, judicial and executive, of the government of the United States; the members of both houses of congress, and their respective officers; all custom-house officers, with their clerks; all post-officers, and stage-drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen, employed at any ferry on the post-road; all inspectors of exports; all pilots; all mariners actually employed in the sea-service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be, exempted by the laws of the respective states.

*Id.*

47. *Id.*
48. 28 U.S. 193 (1830).
While Marshall's contemporaries might have viewed his statement on courts-martial as an anecdotal aside, it certainly evidenced his opinion that courts-martial were open to a wide latitude of judicial review. It is important to note that Justice Wayne's opinion in Dynes nowhere mentions either Marshall's wording or his philosophy on military jurisdiction.

Turning now from the regulation of the conduct of the Army to the regulation of the conduct of the Navy, this discussion warrants a look at the Naval Articles of War. The United States Naval Articles of War were largely authored by the future federalist President, John Adams, in 1775. Like their land counterparts, the naval articles were based almost entirely on British law. They were titled the "Rules for the Regulation of the Navy of the United Colonies" and changed little for decades. This remained true even after the adoption of a new name, the "Articles for the Government of the Navy," in 1799, and the "Rules for the Betterment of the Navy" the following year. At the time of Dynes v. Hoover, the philosophical ideals on which the 1775 Naval Articles were based were still largely in effect.

There was a fundamental philosophical difference amongst anti-federalist Jeffersonians between the nation possessing a standing army and possessing a standing navy. Jeffersonian Democrats welcomed a professional navy to protect commerce and dissuade Britain and France from expanding imperial designs in the western hemisphere. This was in contrast to their concern over a standing army. The Jeffersonians' anti-standing army philosophy undermined public confidence in the efficacy of courts-martial. There were also controversial military trials in the early Republic that, to some degree, undermined public confidence as well. This point should not be overlooked because public fear of a standing army contributed to the popularity of Jeffersonian democracy. In 1814

49. Watkins, 28 U.S. at 209.
50. See, e.g., 3 ROBERT J. TAYLOR, PAPERS OF JOHN ADAMS 152-53 (1995). While the Naval Articles were determined by a committee, it was Adams' pen which authored the rules. Id. The rules are currently found in 3 J. CONTINENTAL CONGRESS 382-83 (1775).
New Orleans, General Andrew Jackson subverted a federal judge's grant of habeas corpus to a civilian imprisoned by Jackson's order. While Jackson was idolized by the public, Congress did not universally approve his actions. Moreover, Democrats, after Andrew Jackson's presidency, for the most part abhorred centralized power and aristocracy, and they saw both elements in a standing army. Jackson's actions in 1814 were not the only source of controversy, however.

The most controversial court-martial in the early nineteenth century arose from the so-called "Somers Mutiny" in 1842. During a voyage, the USS Somers' commanding officer, Alexander Slidell MacKenzie, became convinced that an eighteen-year-old midshipman fostered a mutiny aboard the vessel. MacKenzie oversaw the court-martial and execution of three sailors, including the midshipman. The trial might not have garnered public attention, except that the midshipman was the son of President Tyler's Secretary of War. MacKenzie was investigated before a court of inquiry which recommended MacKenzie acted properly in suppressing the mutiny. However, in an effort to further vindicate himself, MacKenzie demanded a court-martial and was subsequently acquitted.

54. CONG. GLOBE, 27th Cong., 2d Sess. 304 (1842); ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767–1821 310 (2001); see also LURIE, ARMING MILITARY JUSTICE, supra note 19, at 11–12.
55. REMINI, supra note 54, 310–20.
58. LURIE, ARMING MILITARY JUSTICE, supra note 19, at 21.
59. PROCEEDINGS IN THE COURT OF INQUIRY APPOINTED TO INQUIRE IN THE INTENDED MUTINY ON BOARD THE UNITED STATES BRIG OF WAR, SOMERS ON THE HIGH SEAS, infra note 57, at 21.
60. See THE NAVAL COURT MARTIAL IN THE CASE OF ALEXANDER SLIDELL MACKENZIE: A COMMANDER IN THE UNITED STATES NAVY 273–75 (1844). MacKenzie was charged under the Naval Articles with three specifications of committing "murder upon the high seas," three specifications of "oppression," and three specifications of "illegal punishment." Id. at 2–3; see also
Both Jackson’s actions and the MacKenzie “show trial” drew the public’s attention to the enforcement of discipline in the early Republic’s standing army and navy, which was less a constitutional process than a bow to military necessity. These events showed that courts-martial, the primary instrument of enforcing discipline and prosecuting crimes, lacked many of the due process safeguards American criminal trials contained. This is true even by late eighteenth century standards of due process.

For example, the Sixth Amendment guarantees an accused person “to have the Assistance of Counsel for his defence.” At common law, this meant a counsel who not only could independently and zealously defend an accused in court but also do so while holding the confidences of the accused. Moreover, the attorney-client privilege was a sacrosanct relationship that dated to Elizabethan England, if not before, and was already incorporated into American trials by the nation’s founding. Anti-federalist Jeffersonians held the right to counsel as a fundamental right in all felony trials and argued the right extended to trials of lesser

LURIE, ARMING MILITARY JUSTICE, supra note 19, at 21–22. Lurie notes that the Navy acted improperly during the two proceedings by allowing MacKenzie to remain in command of his crew, thereby keeping witnesses under his control. Id. at 24. The trial drew the interest of such American notables as author James Fenimore Cooper, Senator Charles Sumner, and it may have served as inspiration for Herman Melville’s Billy Budd. See Andrew Ferris, Military Justice: Removing the Probability of Injustice, 63 U. CIN. L. REV 439, 439–40 (1994); Alfred F. Konefsky, The Accidental Legal Historian: Herman Melville and the History of American Law, 52 BUFF. L. REV. 1179, 1247–48 (2004); see also LURIE, ARMING MILITARY JUSTICE, supra note 19, at 25–27.


62. U.S. CONST. amend. VI.


64. Thompson & Kastenberg, supra note 63, at 2–5.
crimes. As noted in the following paragraph, courts-martial significantly modified this right. Indeed, it was not until 1865 when the right to an independent defense counsel in courts-martial was first discussed as a right, rather than as a permissive practice. This "independent right," however, came at a personal expense to the accused because the military did not provide defense counsel.

From the beginning of the colonial army through the nineteenth century, judge advocates were generally line officers selected by commanders to serve on specified trials. A judge advocate served as a legal advisor to a board of officers, who in turn fulfilled the role of a jury. This meant the judge advocate served in a quasi-judicial capacity but did not have the authority to dismiss jurors or order the compulsion of witnesses without limit. At the same time, the judge advocate also served as a prosecutor, as

65. See, e.g., Powell v. Alabama, 287 U.S. 45, 61 (1932). Justice Sutherland in his majority decision noted:

But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

_id_. Note, however, that in 1932, the role of the judge advocate had not changed from the nineteenth century, although by 1932 defense counsel were present in the majority of cases. See generally Sam J. Ervin, Jr., The Military Justice Act of 1968, 45 MIL. L. REV. 77 (1969).

66. See, e.g., WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 36 (1865) ("[T]he accused is entitled to counsel as a right and this right the court cannot refuse to accede to him. Whenever it is refused, the proceedings should be refused."); see also WINTHROP, MILITARY LAW AND PRECEDENTS, supra note 7, at 220–22.

67. WILLIAM DEHART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION, AND PRACTICE OF COURTS-MARTIAL 132 (William Chetwood ed., 1846) [hereinafter OBSERVATIONS ON MILITARY LAW]; WINTHROP, MILITARY LAW AND PRECEDENTS, supra note 7, at 220.


well as a defense counsel.\textsuperscript{70} The judge advocate's duties included preparing, perfecting, and serving charges against an accused; summoning witnesses; and ensuring the accused was able to present favorable evidence in his defense.\textsuperscript{71} Because most of the individuals prosecuted were undefended, the judge advocate also filled the role of protecting the accused's rights.\textsuperscript{72} However, the judge advocate did not serve as a defense counsel in any traditional sense, since he could not zealously serve both sides equally in an adversarial proceeding or hold any confidences of the accused.\textsuperscript{73}

Another fundamental difference between courts-martial and civilian trials rested in the military law's use of its \textit{lex non scripta}, or common law, to define offenses.\textsuperscript{74} Judge advocates advising courts-martial often turned to British military law, as did the judge advocate general in advising the Secretary of War on the proper disposition of cases. British law, in the eighteenth and nineteenth centuries, was replete with non-enumerated common law of-

\begin{itemize}
  \item \textsuperscript{70} COPPEE, \textit{FIELD MANUAL OF COURTS-MARTIAL}, \textit{supra} note 68 at 58–59; DEHART, \textit{OBSERVATIONS ON MILITARY LAW}, \textit{supra} note 67, at 308–10.
  \item \textsuperscript{71} COPPEE, \textit{FIELD MANUAL OF COURTS-MARTIAL}, \textit{supra} note 68 at 58–59; DEHART, \textit{OBSERVATIONS ON MILITARY LAW}, \textit{supra} note 67, at 308–10.
  \item \textsuperscript{72} COPPEE, \textit{FIELD MANUAL OF COURTS-MARTIAL}, \textit{supra} note 68 at 58–59; DEHART, \textit{OBSERVATIONS ON MILITARY LAW} (1846), \textit{supra} note 67, at 308–10.
  \item \textsuperscript{73} DEHART, \textit{OBSERVATIONS ON MILITARY LAW}, \textit{supra} note 67, at 323. However, DeHart stressed the importance of impartiality of judge advocates, noting, "he is neither to omit anything which the prisoner ought to appear, nor on the other hand, is he to permit the interests of the public to suffer and a criminal to go unpunished." \textit{Id}. COPPEE added that judge advocates "must be fair to all parties, patient and respectful." COPPEE, \textit{FIELD MANUAL OF COURTS-MARTIAL}, \textit{supra} note 68, at 60.
  \item \textsuperscript{74} See, e.g., WINTHROP, \textit{MILITARY LAW AND PRECEDENTS}, \textit{supra} note 7, at 41. Winthrop noted:

While the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code, it has also \textit{a lex non scripta}, or unwritten common law, of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service, and which though unenacted are recognized in the 84\textsuperscript{th} Article of War, under the designation of "the custom of war," as a means for the guiding of courts-martial in the administration of justice in doubtful cases.

\textit{Id}.\textsuperscript{74}
Some enumerated British offenses were repugnant to American free speech ideals. Public criticism against the crown, for instance, could be construed as a crime in Britain.76

Early on in American jurisprudence, non-enumerated offenses were generally believed contrary to the demands of a fair trial.77 One of the fundamental due process guarantees underlying criminal trials is the issue of “notice.” The Constitution’s First Amendment guarantee of freedom of assembly made it unlikely such a prosecution could occur in the United States, although Federalists attempted this with the Alien and Sedition Acts. Jeffersonians tended to view common law crimes as an unchecked form of judicial tyranny.78 This Jeffersonian ideal would eventually be adopted by the Supreme Court and some states as well.

In 1812, the Supreme Court decided, in United States v. Hudson & Goodwin,79 that federal common law crimes were unconstitutional.80 In effect, the Court held that non-enumerated common law crimes violated the principle of notice. While Hudson & Goodwin applied only to federal law, a number of state courts followed the trend of minimizing the use of common law crimes under the same Jeffersonian reasoning.81 There remained,

75. FRIEDMAN, supra note 8, at 50. Friedman points that the movement away from common law occurred prior to the Declaration of Independence. Id.
76. See, e.g., 1 JOHN McARTHUR, PRINCIPLES AND PRACTICE OF MILITARY AND NAVAL COURTS MARTIAL WITH AN APPENDIX 42 (1813). McArthur, a British military law commentator, noted in 1813 that in British Military law under the Mutiny Act, “there are offenses in the army and navy to which no specific punishment is annexed by the articles of war; but it is left to the court-martial to discriminate the shades of guilt and to inflict punishment proportionate to the offence, not affecting life and limb.” McArthur also noted that common law offenses such as “blasphemies against God and the Christian religion,” “traitorous or disrespectful words against the king, or any of the royal family,” and “contemptuous or disrespectful behavior towards the general,” were all offenses. Id. at 48.
78. Id.
79. 11 U.S. (7 Cranch) 32 (1812).
80. Id. at 34 (holding “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence”).
81. FRIEDMAN, A HISTORY OF AMERICAN LAW, supra note 8, at 215.
however, some limited situations where non-enumerated common law criminal provisions persisted in military jurisprudence.

The 1806 Articles of War, which governed the Army until 1874, contained two fundamental non-enumerated common law criminal provisions. Article 83, (the predecessor to the modern UCMJ, Article 133) prohibiting "conduct unbecoming an officer and a gentleman," was purely a common law offense. Likewise, Article 99 of the 1806 Articles of War criminalized "disorders and neglects . . . to the prejudice of good order and discipline," without enumerating any specific disorderly or neglectful behavior. In essence if an officer, in the case of Article 83, or any soldier, in the case of Article 99, was accused of some conduct believed to violate military custom, a court-martial panel first determined whether the behavior violated military custom, and then the panel decided if its effect warranted a finding of guilty. Although both the 1806 Articles of War and the Naval Articles contained a rudimentary notice requirement in that commanding officers were required to have the articles read to enlisted men under their command at various times, this reading only placed officers, soldiers,

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82. WINTHROP, MILITARY LAW AND PRECEDENTS, supra note 7, at 41. Interestingly, Winthrop's contemporary, General David Swaim—the Judge Advocate General—disagreed with Winthrop on the efficacy of common law offenses. Swaim opined that the prohibition against conduct unbecoming an officer violated the legal maxim of notice. He argued that Dynes v. Hoover enabled the military courts to "make law, rather than enforce it." Swaim also attacked the article prohibiting "general disorders," calling it the "Devil's article," for similar reasons. See General D.G. Swaim to Secretary of War Lincoln, in MESSAGE FROM THE PRESIDENT TO THE TWO HOUSES OF CONGRESS FOR 1883 386–87 (Ben Perley Poore ed., 1883). However, Swaim was court-martialed in 1886, leaving his arguments without an audience. See Swaim v. U.S., 165 U.S. 553, 563 (1897) (discussing the circumstances of Swaim's court-martial).

83. Article 83 of the 1806 Articles of War read, "Any commissioned officer convicted before a general court martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service." WINTHROP, supra note 7, app. at 983 (1806 Articles of War). Article 99 of the 1806 Articles of War read:

All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

Id.
and sailors on notice of the actual articles and not the specific criminalized behavior.\textsuperscript{84}

These features of courts-martial and the evolving ideologies regarding principles of notice and process of law were important, historically, in evaluating the role of \textit{Dynes}. The author and proponents of \textit{Dynes} gained influence from other critical sources. While the influence of British military law remained a salient feature of courts-martial, both courts-martial and federal courts also relied on American treatises on the subject. By the time of \textit{Dynes}, the most used of these treatises was Captain William DeHart’s, \textit{Observations on Military Law and the Constitution, and Practice of Courts-Martial}.\textsuperscript{85}

Prior to assisting in drafting the executive branch’s brief, Attorney General Cushing contracted with a bookseller to ensure that both his assistant Ransom Gillet and the Court were provided copies of DeHart’s \textit{Observations on Military Law}.\textsuperscript{86} First published in 1846, it was considered one of the primary treatises on military law until it was replaced in 1886 by (then) Major William Winthrop’s \textit{Military Law}.\textsuperscript{87} This point is important because both Gillet and the Court relied on DeHart’s treatise.

DeHart’s treatise was not a casebook. Rather, it was a formalistic recitation of legal principles underlying the practice of military law. It was not a holistic treatise either, and it contained nothing, for example, on the law of war, or on the employment and treatment of civilians or slaves by the Army outside of their presence as witnesses in courts-martial. As to the competency of free-men or slaves to testify in courts-martial, DeHart suggested the

\begin{itemize}
\item[84.] Article 1 of the Naval Articles required a monthly reading. Article 10 of the 1806 Articles of War required enlisted soldiers be read the Articles and swear to understanding their contents. \textit{Winthrop, supra} note 7, at 977.
\item[86.] Miscellaneous Files, in \textit{PAPERS OF CALEB CUSHING} (undated as to month, 1857) (on file at the Library of Congress).
\item[87.] \textit{See Edward Coffman, The Old Army: A Portrait of the American Army in Peacetime}, 1784–1898 370 (1986). In crediting Winthrop with contributing to the professional growth of the Army’s officer corps, he noted, “Officers were more conscious of their need to know military law, and in the recently published \textit{Military Law} by Lieber’s deputy, William Winthrop, they had a text to prepare them for their courts duties.” \textit{Id}.\end{itemize}
local state or territorial law in which a court-martial was held should govern the admissibility of testimony.88

B. Dynes v. Hoover: Facts and Decision

The following section provides a detailed discussion of the facts of Dynes v. Hoover.89 Following a synopsis of the facts, the section will analyze the arguments put forth by Dynes and his attorney, as well as the executive branch’s response to these arguments. The section then turns to the Court’s decision, discussing the Court’s holdings on non-enumerated crimes as provided in the Naval Articles and the Articles of War, as well as the standard for judicial review of courts-martial. Analysis of the opinion shows how the Court upheld the non-enumerated crimes provisions of these sets of rules despite the Supreme Court’s 1812 holding that non-enumerated common law crimes were unconstitutional. The section next addresses the very high standard that one must meet in order to obtain judicial review of a court-martial. Specifically, since the courts-martial derive their jurisdiction and are regulated by Congress, so long as the court-martial had jurisdiction over the charge and proceeded legally, civil courts could not interfere.

On September 12, 1854, Franklin Dynes, a United States Navy sailor abandoned his post on board the USS Independence.90 Within two weeks Dynes was captured, court-martialed, found guilty, and sentenced to four months in prison.91 Although he was charged with desertion, the court-martial convicted Dynes of the

88. DeHART, OBSERVATIONS ON MILITARY LAW supra note 67, at 402-05. DeHart saw a link between the right to own slaves and testimonial competency, writing:

As it is a subject upon which the minds of many persons in the free and slave holding states are directly at variance and also one which from the circumstances attending slavery to the present day cannot be approached without more or less danger, certainly of agitation and violence, the writer . . . recommends courts martial, be governed by the same rules which regulate the United States ordinary courts of law, and which in unison with the laws of evidence of the particular states or territories which they may be held.

Id.

89. Dynes v. Hoover, 61 U.S. (1 How.) 65, 65 (1857)
90. Id.; LURIE, ARMING MILITARY JUSTICE, supra note 19, at 29.
91. Dynes, 61 U.S. (1 How.) at 65.
lesser-included offense of "attempting to desert." Unlike the enumerated offense of desertion, the lesser-included offense was not enumerated in the Naval Articles of War. Instead, it was incorporated by custom under the thirty-second article which generally prohibited "disorders." At the time of Dynes' attempted desertion, Franklin Pierce was President and James C. Dobbin served as Secretary of the Navy. Consistent with the Naval Articles of War and standard military practice, Dobbin approved the verdict and sentence. On Dobbin's order, Dynes was taken from New York to Washington in the custody of Jonah D. Hoover, a United States Marshal, who in turn imprisoned Dynes in the District of Columbia's penitentiary.

As no appellate court existed within the Naval or War Departments, Dynes appealed the verdict and sentence through the judiciary to the Supreme Court. By the time the case was argued to the Supreme Court, James Buchanan had replaced Pierce as President, and Isaac Toucey replaced Dobbins as Secretary of the

92. *Id.* at 75. The specific finding was as follows: "The court 'do find the accused, Frank Dynes, seaman of the United States navy, as follows: Of the specification of the charge, guilty of attempting to desert; of the charge, not guilty of deserting, but guilty of attempting to desert.'" *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Act of April 10, 1806, ch. 20, 2 Stat. 367 (1806). Article 65, as adopted in the 1806 Articles of War, authorized any general officer commanding an army to appoint general courts-martial. *Id.* Only in cases of loss of life or the dismissal of a commissioned officer would the proceedings be transmitted to the Secretary of War, to be laid before the President for confirmation or approval. *Id.* All other sentences could be confirmed and executed by the officer who ordered the court to assemble. *Id.* As in the case of the other due process guarantees found in civil trials but absent in courts-martial, neither the Court, Jeffersonian Republicans, nor military law commentators, found this aspect troubling. *See*, e.g., JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 271-72 (2007); Samuel T. Ansell, Military Justice, Address Before the Pennsylvania Bar Association 5-6 (June 26, 1919) (Ansell served as Acting Judge Advocate General of the Army during America's participation in World War One).
Navy. Attorney General Cushing and his assistant Ransom Gillett remained on the case despite the change in administrations.

Notwithstanding a number of collateral attacks tangentially related to the actual court-martial, Dynes' counsel, Charles Lee Jones, challenged the court-martial's verdict, sentence, and actual imprisonment in two distinct arguments. Relying on DeHart, as well as other military law texts and a number of cases and treatises on criminal law, Jones argued the verdict was in error because Dynes had been convicted of an offense that had not been charged. Jones argued Dynes was originally charged with a "felony" of desertion but convicted of a "misdemeanor" with a "distinct legal character."

In its thirty-second article, the Naval Articles of War did not expressly enumerate the crime of "attempting to desert," and as Jones pointed out, the catch-all charge which permitted prosecu-

98. CHARLES LANMAN, BIOGRAPHICAL ANNALS OF CIVIL GOVERNMENT OF THE UNITED STATES DURING ITS FIRST CENTURY 508 (Gale Research Co. 1976) (1876); see also MARY L. HINSDALE, A HISTORY OF THE PRESIDENT'S CABINET 159 (1911).

99. LURIE, ARMING MILITARY JUSTICE, supra note 19, at 30. Lurie, however, is mistaken as to Cushing's role in the argument before the Court. Gillet drafted the brief and represented the executive branch during oral arguments.

100. Dynes v. Hoover, 61 U.S. (1 How.) 65, at 75 (1857). In addition to DeHart's work, Jones directed the Court's attention to ALEXANDER MACOMB, THE PRACTICE OF COURTS MARTIAL (1841), and ALEXANDER TYTLER, AN ESSAY ON MILITARY LAW, AND THE PRACTICE OF COURTS MARTIAL (1800). Tytler, also known by his title, Lord Woodhouslee, was a British military officer writing on British military law. SAMUEL GRISWOLD GODRICH, POPULAR BIOGRAPHY: EMBRACING THE EMINENT CHARACTERS OF EVERY AGE, NATION, AND PROFESSION 487 (1876).

101. Dynes, 61 U.S. (1 How.) at 69. On this point, Jones argued:
But on an indictment for felony he cannot be convicted of a misdemeanor, because the offences are distinct in their nature, and of a distinct legal character. Nor can a party be convicted, on an indictment for a specific offence, of an attempt to commit that offence. Thus, on an indictment for burglariously breaking and entering a dwelling-house and stealing the goods mentioned, the party may be acquitted of the burglary, and convicted of the larceny, it being included in the charge; but he cannot be acquitted of the burglary and stealing, and convicted of a burglary with intent to steal, or to commit any other felony, for they are distinct offences.

Id. (internal citations omitted).
tion for all non-enumerated offenses ended with the phrase, "ac-
cording to the laws and customs at sea." Jones argued the gener-
al article's subject matter jurisdiction did not extend past the shore-
line because the offense for which the court-martial found Dynes
guilty had occurred on land. To Jones, Dynes' conviction under
these circumstances was all the more in error because it occurred
in a court, coram non judice, or a court without a judge.

In countering Jones' arguments, Gillet argued to the Court
that while Congress enumerated offenses such as desertion, it also
expressly gave to the Navy the thirty-second article to prosecute
"all possible cases which could occur in naval service." To Gil-
let, the phrase, "according to the laws and customs at sea," meant
any offense which occurred while a sailor was in the service of the
Navy. In his brief, Gillet argued Congress could not have enu-
merated all possible offenses because it could not foresee the
whole quantum of misconduct. He also noted that Congress
enacted a similar article under the Articles of War for the same
purposes. Gillet's clear purpose in including the Army's Articles
of War into Dynes was to make the case as broad as possible. In
turn, this maximized executive control over the discipline in its
armed forces.

102. Id. at 70.
103. Id. Jones argued:
"[A]ttempting to desert" is not enumerated by the articles for
the government of the navy as an offence within the cogniz-
ance of a naval court martial. A naval court martial derives its
sole being from, and is the mere creature of, the act of Con-
gress, and has no jurisdiction of any other offences than such
as are therein enumerated as within their cognizance. When a
new court is erected, it can have no other jurisdiction than that
which is expressly conferred, for a new court cannot prescribe.

Id. (internal citation omitted).
104. Id. at 72.
105. Id.
106. Id. at 71–72.
107. Brief for Dynes v. Hoover (Dec. 1856), in CALEB CUSHING PAPERS,
supra note 86 (on file at the Library of Congress). Note, this file contains both
the filed brief and draft briefs. It does not contain correspondence between
Cushing and Gillet. If such correspondence existed at one time, it is not located
in the Cushing Papers or Gillet collections.
108. Id.
Gillet then delivered a substantive argument to the court on the nature of lesser-included offenses in civil and military practice, arguing, "where the crime proved is of the same generic character with that charged," the offense remained within the jurisdiction of the court. Turning to the constitutional nature of courts-martial, Gillet argued that the doctrine of original jurisdiction for military courts excluded judicial review in cases in which the court-martial was lawfully constituted. In other words, so long as the military tribunal had jurisdiction over the person and offense, it remained an exclusive executive instrument, not subject to executive review. As to the issue of whether the jurisdiction of the thirty-second article ended at the shoreline, Gillet argued the question of subject matter jurisdiction was for the court-martial to decide and not for the judiciary to determine. In closing, Gillet intoned:

The very points now in dispute were legitimately before the court-martial for its determination. The accused could be heard upon all questions of law and fact. He gave such evidence, as to both, as he saw fit. The court considered the case as presented, and disposed of these same questions as part of its duty, and thus they become finally and conclusively settled; and the proceeding having been approved by the Secretary, this court is bound to consider them rightfully settled. But, if it should not, still the

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109. *Id.* In making this argument, Gillet impressed on the Court a number of civil cases and treatises such as *People v. Jackson*, 3 Hill. 92 (N.Y. Sup. Ct. 1842), and *People v. White*, 22 Wend. 167 (N.Y. Sup. Ct. 1842). He also drew the courts attention to the leading criminal and evidence treatises including *Joseph Chitty, A Practical Treatise on the Criminal Law* 250-51 (Richard Peters ed., 1819); *Henry Roscoe, Digest of the Law of Evidence in Criminal Cases* (1832). Both Roscoe and Chitty were English legal commentators. For proof of standard military practice mirroring civil law, Gillet pointed the Court to the classic treatises on military law including *John O'Brien, A Treatise on American Military Laws, and Practice of Courts Martial* (1848), and *William DeHart, Observations on Military Law and the Constitution, and Practice of Courts-Martial* (1846). O'Brien and DeHart were American military officers. For a brief character sketch of O'Brien, see Andrew Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. Cin. L. Rev. 439, 447-48 (1994).

110. *Dynes*, 61 U.S. (1 How.) at 76.

111. *Id.*
adjudication is binding upon it. This view of the case is sustained by the highest authority.\footnote{112}{Id.}

In order to further bolster the executive branch’s position on its exclusivity over military discipline, Gillet turned the Court’s attention to its prior decision, Martin v. Mott,\footnote{113}{Id. (citing Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827)).} but that particular case was not squarely on point to the issue in Dynes. Decided in 1827, Martin v. Mott primarily determined the nature of executive authority over the nation’s armed forces and in particular the extent of executive authority over its militia when called upon during national emergencies.\footnote{114}{25 U.S. at 25.} However, Dynes’ offense did not occur during a period of national emergency.

Justice Joseph Story, authoring the majority opinion in Mott, eloquently held the Court’s views on command authority and military discipline:

A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object; the service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardy public interests.\footnote{115}{Id. at 26.}

Story’s expression on the importance of military discipline, however powerful, was a merely contextual note to the central issue in the case.\footnote{116}{JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 418 (Ronald D. Rotunda & John E. Nowak eds., 1987).} The issues specific to Mott did not directly raise...
the question of whether courts-martial were the sole province of the executive branch or whether non-enumerated common law offenses under military law were constitutional. The Court in *Mott* likewise did not address the fairness of courts-martial. However, the Court adopted principles into American military law which shaped the character of courts-martial practice. These principles included universal jurisdiction of the military law over soldiers whether the nation was at war or at peace;\(^1\) flexibility to balance necessity against rigid rules in terms of the number of officers sitting in judgment of an accused soldier;\(^2\) and militia men (for example, citizen soliders) do not possess the independent authority to object to an executive decision over whether an exigency exists.\(^3\)

Justice Wayne began his opinion in *Dynes* with a brief overview of the facts and arguments underlying the case. Although he did not frame the fundamental issue of the suit until the middle of his opinion, Wayne noted Dynes sought to make Hoover responsible for "his mere ministerial execution of a sentence."\(^4\) To Wayne, Hoover's responsibility in the suit was *de minimis*, as he merely carried out the executive branch's order.

Wayne recognized that both parties agreed the Naval court-martial was lawfully constituted and the charged offense was lawfully enumerated in the Naval Articles of War.\(^5\) He also touched on Congress' constitutional authority to provide and maintain a navy as well as its authority to "make rules for the government of

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\(^1\) *Id.*

\(^2\) *Id.*

\(^3\) *Id.*

\(^4\) *Id.* at 80. Wayne held:

[S]eeking to make the marshal answerable for his mere ministerial execution of a sentence, which the court passed, the Secretary of the Navy approved, and which the President of the United States, as constitutional commander-in-chief of the army and navy of the United States, directed the marshal to execute, by receiving the prisoner and convict, Dynes, from the naval officer then having him in custody, to transfer him to the penitentiary, in accordance with the sentence which the court had passed upon him.

*Id.*

\(^5\) *Id.*
the land and naval forces."\textsuperscript{122} Finally, he noted the President's authority as commander in chief included the prosecution of offenses under the Articles of War.\textsuperscript{123}

The Court next upheld the Navy's general article, which provided that "all crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea," as permissible and not a violation of notice requirements. Although, as previously noted, the Court held in 1812 that non-enumerated common law crimes were unconstitutional, Wayne did not find the Naval "general article" offensive. To enforce that the finding of guilt for a non-enumerated offense was not offensive to due process, Wayne turned to British military precedent.\textsuperscript{124}

As to Dynes' argument that the court-martial had no subject matter jurisdiction over the offense to which he was found guilty, because that offense occurred on land rather than at sea as required under a strict reading of the language in the thirty-second article, Wayne outright dismissed it, stating, "The objection is ingeniously worded, was very ably argued . . . but without merit."\textsuperscript{125} That Wayne did not address the article's geographic jurisdiction is a curiosity. The 1775 Articles required non-enumerated offenses to occur on board ship.\textsuperscript{126} However, the "on board ship" jurisdictional requirement is absent from the 1800 Articles, and although

\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 83. Wayne wrote:

Such is the law of England. By the mutiny acts, courts martial have been created, with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether courts martial have exceeded the jurisdiction given them, though it is said, "not, however, after the sentence has been ratified and carried into execution."

\textit{Dynes}, 61 U.S. at 70.

\textsuperscript{125} \textit{Id.} at 80.

\textsuperscript{126} Article 38 reads, "All other faults, disorders and misdemeanors which shall be committed on board any ship belonging to the Thirteen United Colonies and which are not herein mentioned, shall be punished according to the laws and customs in such cases used at sea." 3 \textsc{Worthington Chauncey Ford}, JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 382 (1905); 1 \textsc{James Kent}, JOURNALS OF THE CONTINENTAL CONGRESS 188 (1829).
Wayne did not note the difference between the 1775 and 1800 set of rules, he may have known the difference.\footnote{Dynes, 61 U.S. at 80. Wayne noted, "The 32d article is: 'All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs at sea.'"}

Concluding his opinion, Justice Wayne noted that individuals serving in the military and subject to either the Articles of War or the Naval Articles were not to be subjected to "illegal" or "irresponsible" courts-martial, and he accepted that civil courts could intervene in such cases.\footnote{Id.} Thus, Wayne set a very high bar for judicial review of courts-martial. However, he also noted a caveat in which civil courts could not intervene on the basis of "mere irregularities" or "mistaken rulings in respect to evidence of law."\footnote{Id.} Having set the stage for the ultimate issue, Wayne then delivered a brief but succinct ruling on the nature of court-martial jurisdiction.

He noted courts-martial "derive their jurisdiction and are regulated," by Congress, which in turn legislated court-martial jurisdiction, punishments, and procedures.\footnote{Id.} The nature of this jurisdiction excluded civil court review when courts-martial were assumed to have "proceeded legally." The one exception to civil

\begin{itemize}
\item Wayne noted:
\begin{quote}
When offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance.
\end{quote}
\end{itemize}

\textit{Id.}
court interference Wayne accorded an accused was in instances where a court-martial "has no jurisdiction over the subject matter of the charge."\textsuperscript{131} He reasoned:

If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been conferred by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.\textsuperscript{132}

In other words, judicial review of lawfully constituted courts-martial was tantamount to an unconstitutional encroachment into the executive branch, even when those courts-martial unjustly abrogated evidentiary rules or due process requirements.

Thus ended Wayne's succinct yet broad decision, and although Justice McLean dissented without publishing his reasoning, the case appeared to go into dormancy. For all the controversy surrounding standing armies a generation earlier, Wayne's decision did not immediately spark an outcry. Yet, it placed almost unfettered power in the executive branch to shape and influence courts-martial and in turn, to place almost unlimited authority in commanding officers, including the President, to order soldiers and sailors to comply with the will of the commander. This brings an important question to the fore: what were the ideologies and military interests of the people central to Dynes v. Hoover?

II. IDEOLOGIES AND INTENTS OF THE JUDICIAL AND EXECUTIVE BRANCHES

Federalists readily accepted the idea that military law is an autonomous anomaly to the constitutional system of checks and balances and is, therefore, not subject to republicanist whims. This belief was contrary to Democratic Jeffersonian and Jacksonian ideals. The existence of non-enumerated common law offenses in the military was contrary to democratic views of due process. While these unique features of military law served a pragmatic

\textsuperscript{131} Id.  
\textsuperscript{132} Id.
purpose, it was not pragmatism alone which resulted in four prominent, essentially Jeffersonian intellects authoring *Dynes*. The bow to military necessity was indeed a significant departure from their ideology, and it occurred both from pragmatism and the twin belief that *Dred Scott* put to rest the issue of slavery, negating the possibility of a civil war. That particular case also empowered the Secretary of War or President to order the Army into a *posse comitatus* role to enforce the Fugitive Slave Act.

A. Chief Justice Roger B. Taney

Justice Taney was a Jacksonian Democrat, not merely because President Andrew Jackson appointed him to the Court, but rather, because the two men shared similar beliefs in the limits of federal government. Had Taney served on the Supreme Court during the Republic's founding, he would not have likely given the executive branch unlimited deference in military law, as he had Jeffersonian rather than Federalist ties. There is a consensus amongst historians that his jurisprudence embraced preserving as much state authority as possible and with the exception of slavery, preserving the checks and balances contained in the Constitution.

Until the early 1840s, Taney did not view slavery as a burning constitutional issue, but it became so with the emergence of political anti-slavery movements in the north. In *Prigg v. Pennsylvania*, Taney intimated the potential for a sectional crisis but concluded that the states had to yield to the federal government in


> The Taney Court was, in some ways, the product of the cross-class and cross-sectional political movement that generated the Democratic Party. By the early 1840s, seven of the Court’s nine members owed their positions, in part, to their loyalty to either President Andrew Jackson or his successor and protege Martin Van Buren, and the Justices’ participation in the defining debates of the 1820s and 1830s decisively shaped the Court’s jurisprudence.

*Id.*


terms of enforcing the fugitive slave act. In authoring his con-
currence, Taney noted his belief that the individual states pos-
sessed a concurrent right to enforce the Fugitive Slave Act. By
1857, Taney believed the nation was in its worst crisis which could
result in dissolution if the question of slavery’s constitutional le-
gality in new states and territories was not firmly addressed.

Admittedly, if slavery was not Taney’s central interest until
the 1840s, military law was an even more remote feature. This too
was to change by 1857. There were three occasions prior to Dynes
in which he ruled on the jurisdictional reach of military law. In
Dinsman v. Wilkes, Taney authored a decision as to whether a
naval officer could be held liable for inflicting physical punish-
ment on a sailor. Yet, that particular case was an oddity in that it
originated from a prior decision (authored by Associate Justice
Levi Woodbury) affirming that the Navy had the authority to sub-
ject a sailor or marine to its jurisdiction after the expiration of
the individual’s enlistment under the limited circumstance when the
individual remained at sea.

In Dinsman (the second appearance of the case before the
Court), Taney held that instructions to a civil jury had to be written
so that the determination of the court hinged on whether the com-
manding officer had the lawful authority to punish, or whether “he
acted from improper feelings, and abused the power confided in
him to the injury of the [marine].” Of importance, Taney’s deci-

137. Id. at 626, 627 (Taney, C.J., concurring); see also Paul Finkelman,
139. Jack M. Balkin & Sanford Levinson, Symposium: 150th Anniversary
of the Dred Scott Decision: Thirteen Ways of Looking at Dred Scott, 82 CHI–
142. Dinsman, 53 U.S. (12 How.) at 404. Taney noted:
[I]t is essential to its security and efficiency that the authority
and command confided to the officer, when it has been exer-
cised from proper motives, should be firmly supported in the
courts of justice, as well as on shipboard. And if it is not, the
flag of the United States would soon be dishonored in every
sea. But at the same time it must be borne in mind that the na-
tion would be equally dishonored, if it permitted the humblest
individual in its service to be oppressed and injured by his
commanding officer, from malice or ill-will, or the wanton-
sion permitted judicial review of a commander’s prerogative in adjudging courts-martial. *Dynes* significantly narrowed judicial review of courts-martial to a point of near impossibility, further evidencing Taney’s shift of views between pre- and post-*Dred Scott*.

In *Luther v. Borden*, Taney had occasion to comment on the executive branch’s authority to call forth a militia in a crisis. In response to the so-called 1842 “Dorr Rebellion,” in Rhode Island, where the state arrested and tried individuals for treason, Taney posited that the President did have broad authoritative power over military forces during a war. In this particular case, however, President Tyler opted not to use the United States Army to do so.144

Taney briefly addressed military law in *Luther* but only in the context of martial law, writing:

[S]o, in this country, legislation as to the military is usually confined to the general government, where the great powers of war and peace reside. And hence, under those powers, Congress, by the act of 1806 has created the Articles of War, ‘by which the armies of the United States shall be governed,’ and the militia when in actual service, and only they.145

Taney did not expound on the legal efficacy of the Articles of War, but he contained their authority in recognizing that in both English and United States law, “[s]o it is a settled principle even in England, that, ‘under the British constitution, the military law does in no respect either supersede or interfere with the civil law of the realm,’ and that ‘the former is, in general, subordinate to the latter.’”146

In *Mitchell v. Harmony*, Taney enunciated the rule of “non-intercourse” with the population or government of an enemy

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143. 48 U.S. (7 How.) 1 (1849).
144. GETTLEMAN, *supra* note 23, at 104.
145. *Id.* at 138.
146. *Id.*
147. 54 U.S. (13 How.) 115 (1851).
state during time of war.\textsuperscript{148} Important to the case for the purpose of military law, however, was the nature of obedience to orders. \textit{Mitchell} arose from the seizure of a United States citizen's private property by an officer during the Mexican-American War. The officer committing the seizure of private property acted under superior orders, on a mere suspicion of the civilian's intent to trade with the enemy. The civilian successfully sued the officer in federal court, but on appeal the officer raised the defense of "obedience to orders."\textsuperscript{149}

In \textit{Harmony}, Taney relied on British law to determine that obedience to an unlawful order did not shield a soldier from any liability.\textsuperscript{150} In doing so, Taney suggested in dicta that the defense

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 133. Taney acknowledged: "It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic, his goods are liable to seizure and confiscation." \textit{Id.} However, Taney also noted this particular case was an exception to that general rule because the evidence against the property owner's intent to trade with the Mexican population in violation of the "non-intercourse prohibition," was tenuous. \textit{See id.} This led Taney to opine, "[M]ere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence." \textit{Id.}
\item \textsuperscript{149} \textit{Mitchell v. Harmony, 54 U.S. (13 How.) 115, 128-33 (1851).}
\item \textsuperscript{150} \textit{Id.} at 136. Taney concluded:

The case mentioned by Lord Mansfield, in delivering his opinion in \textit{Mostyn v. Fabrigas}, illustrates the principle of which we are speaking Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States. \textit{Id.} (citing \textit{Mostyn v. Fabrigas}, (1774) 98 Eng. Rep. 1021 (K.B.)) (internal citations omitted). Interestingly, Taney did not have to turn to Mansfield in making this determination. In \textit{Little v. Bareae}, Justice Marshall concluded that the following of unlawful orders does not shield a soldier or sailor from liability. \textit{See}
of following orders had its limits.151 He did not, however, comment on the efficacy of the 1806 Articles of War or on executive exclusivity in courts-martial review. If anything, Harmony, like Dinsman, indicates Taney was unwilling to embrace unlimited executive authority over the military (and its attendant laws) because he left it possible for citizens to sue military officers for constitutional or law of war violations.

Arguably, the central issues brought before Taney in Harmony, Dinsman, and Borden, like that in Martin v. Mott, were not squarely on point to Dynes. They are valuable, however, in elucidating Taney's philosophy on military law. The first two cases show that Taney took a cautious approach to military law, not granting to the executive branch an exclusive province. Luther involved the authority of a government, either federal or state, to suppress a rebellious faction by declaring martial law.152 It did not


151. Mitchell, 54 U.S. (13 How.) at 137. Taney wrote "it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify." Id. This dicta has yet to be repudiated and remains in effect today. See, e.g., United States v. New, 55 M.J. 95 (C.A.A.F. 2001) (citing Rules for Courts Martial 916(d), "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful"); United States v. Calley, 22 C.M.A. 534 (1973).

152. Luther v. Borden, 48 U.S. (7 How.) 1, 95 (1849). Taney relied, in part, on British military law in arriving at his decision, in particular the treatises by MacArthur and Hough. Taney may have later regretted his decision, in particular his phrasing:

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the
address the jurisdiction of the Articles of War over civilians, and the executive branch did not receive the decision as such. Indeed, the first executive claim of Luther empowering the executive branch to suppress a rebellion predated the Civil War, when, in 1857, tensions between Mormon settlers in the Utah Territory and the federal government led to the threat of military suppression in the territory. However, there was never any discussion as to prosecuting participants in the so-called “Mormon rebellion,” in military trials.

Taney was not naïve in military affairs; he had served as Jackson’s interim Secretary of War in 1831 and criticized the failure of militia in the 1812 War. After his brief interim service as War Secretary, Jackson nominated Taney as Attorney General. In response to Martin v. Mott, Taney authored an official opinion of the Attorney General touching on whether due process requirements in numbers of jurors existed in courts-martial. While the Naval Articles of War recommended thirteen officers detailed to courts-martial adjudicating capital offenses, the Articles permitted

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United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

Id. at 36.

153. See, e.g., James Buchanan, Second Annual Address, in THE WORKS OF JAMES BUCHANAN, COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE 204 (John Bassett Moore ed., 1910). Buchanan stated his reasoning as follows:

This is a rebellion against the government to which you owe allegiance. It is levying war against the United States and involves you in the guilt of treason. . . . Do not deceive yourselves nor try to mislead others by propagating the idea that this is a crusade against your religion. The Constitution and laws of this country can take no notice of your creed, be it true or false.

Id.

154. CARL B. SWISHER, ROGER B. TANEY 143 (1935). Taney believed that disparate militia were critical to the defense of the nation and had to come under centralized control during a war. Id. at 66.

155. Id.
fewer numbers to prevent a "manifest injury to the service." Ta-ney concluded the "manifest injury to the service" standard was an assignment of discretion to the commander under the Articles, and once a determination was made, was "conclusive." This opinion placed deference in the executive branch, but it was a branch of which Taney was part at the time he tendered his opinion. As Chief Justice during the Mexican-American War, he saw the Army's one-sided successes against its Mexican opponents. He also saw a fellow Democrat, President James K. Polk, launch the country into a war that was not universally popular. Indeed, the opposition Whig Party did not endorse the war at all, and some of its leaders argued that the war was fought for the expansion of slavery.

Finally, Taney's ruling in *Dred Scott* was broader than initially expected, and the breadth of the ruling resulted in an increased anger toward the Court by Northern abolitionists and moderate Republicans. Rather than determine whether Dred Scott merely had standing to sue, or remained a slave, Taney's decision eviscerated any possibility for freedmen or slaves alike to become citizens of equal standing. Moreover, Taney determined that the 1820 Missouri Compromise was unconstitutional.

**B. Associate Justice James Moore Wayne**

Although Taney towered over the Court, having written the majority opinion in *Dred Scott*, he assigned to Justice James Moore Wayne the majority authorship for *Dynes v. Hoover*. The

157. *Id.*
158. SWISHER, *supra* note 154, at 143; WILLIAM C. TODD, BIOGRAPHICAL AND OTHER ARTICLES 39 (1890) (noting that the Mexican War was unpopular in New England, as New Enganders viewed it as a means to extend slavery).
161. FRIEDMAN, *supra* note 8 at 158.
162. Salmon Chase and William Seward, both abolitionists, viewed Taney as loyal to the constitution prior to the decision. While they were aware Taney likely sided with southerners, they also believed he would approach slavery issues as matters of state government rights. This approach opened the possibility to prevent slavery's spread into new territories. Neither Chase nor Seward appears to have guessed Taney's ruling in *Dred Scott* would have the broad sweep to it that Taney ultimately authored.
relationship between the two judges requires a further comment. It was Wayne who pushed Taney to abandon a narrow ruling in *Dred Scott*, believing a sweeping ruling in favor of slavery would put an end to congressional bickering and, in the language of the day, agitation over the subject. Wayne also sought to politically emasculate the newly formed Republican Party.

Wayne was a commissioned officer in the Georgia Militia during the 1812 War, at one point fighting under Andrew Jackson's command. From 1829 to 1835, Wayne served in Congress, alongside James Buchanan, John Bell, Caleb Cushing, and Ransom Gillet. In 1835, Jackson appointed Wayne to the Supreme Court.

Wayne's legislative record and surviving correspondence evidence a personal interest in military affairs. For instance, in 1832, he introduced a bill to terminate the "spirit ration" for soldiers. Moreover, prior to *Dred Scott*, Wayne agreed with Taney's determination in both *Dinsman* and *Harmony*, indicating he too did not fully embrace executive branch exclusivity over the full expanse of military law. His son, Henry Constable Wayne, was an Army major at the time of *Dynes* and had served temporarily as a judge advocate assigned to oversee several courts-martial. In one instance, Justice Wayne conveyed to his son his opinions on the competency of negro witnesses in courts-martial.

The specific question Major Wayne raised to his father was whether slaves could competently testify as witnesses in military trial. Justice Wayne noted that while the individual states had differing rules regarding witness competency, none were helpful to...
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determine proper procedure in courts-martial. He turned to British precedent concluding:

[Slaves] are competent witnesses on trials in the courts-martial of the United States; the objection of slavery goes to the credit and not the competency of slaves as witnesses and the credit due them an oath is to be appreciated by the same rules which determine that of persons of another color.\(^{169}\)

Wayne’s conclusion on the issue of the witness competency of slaves in courts-martial was more progressive than DeHart’s, and it evidenced Wayne’s belief that state law should have less influence in courts-martial than either British law or other military custom.

Wayne, unlike Taney and for reasons noted below, unlike Cushing and Gillet, likely had no cause to regret *Dynes*. Unique amongst Southerners, Wayne remained a staunchly committed unionist.\(^{170}\) While he never approved of legal equality, he accepted Lincoln’s view of emancipation, causing no less an abolitionist proponent than Senator Charles Sumner to remark favorably about Wayne.\(^{171}\)

C. Attorney General Caleb Cushing

Eclipsed, perhaps, only by Daniel Webster and Henry Clay, Attorney General Caleb Cushing was one of the foremost attorneys in mid-nineteenth century America.\(^{172}\) Born into a Boston Brahmin

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171. *2 Selected Letters of Charles Sumner* 226–27 (Beverly Palmer ed., 1990). Sumner noted to Francis Lieber, “Considering the age and character of the Judge, a Judge of the Supreme Court, I thought this illustration of change of sentiment which now seems to be moving like a Bay of Fundy Tide.” *Id.*
172. *Robert Remini, Daniel Webster: The Man and His Time* 434–40 (1997). In his biography on Daniel Webster, Remini points out Webster was frequently indebted to his friends. At one point, Cushing loaned Webster nine thousand dollars, which Webster only partially repaid before his death. *Id.* at 600. For an addition source of Cushing’s standing in law and politics in mid-nineteenth century America, see *Holt, supra* note 159, at 641. (2000). Since the enactment of the UCMJ in 1950, military appellate courts have twice referenced Cushing in their published decisions. *See*, e.g., United States v. Troxell, 12 C.M.A. 6 (1960); United States v. French, 25 C.M.R. 851 (1958). In *French*, the Air Force Court of Review noted:
family in 1800, he attended Harvard at thirteen years of age. As a nineteen year old, he was employed as a mathematics and natural philosophy tutor at that university, and in 1821, he abandoned academia for the law, studying under one of Boston’s prominent attorneys. In 1825, Cushing was elected to the Massachusetts legislature. In 1834, he successfully ran for Congress as a Whig. After the death of President William Henry Harrison, Cushing supported John Tyler instead of mainstream Whigs led by Henry Clay. In return for his support, Tyler appointed Cushing United States ambassador to China, where he negotiated the first treaty between China and the United States.

When the Whig Party nominated Clay to run against Democrat James K. Polk, Cushing returned to the United States and successfully campaigned, this time as a Democrat, for the Massachusetts state legislature. His second stay in the state legislature was brief. When the war between the United States and Mexico erupted, Cushing raised a volunteer regiment. President Polk promoted Cushing to the rank of brigadier general, and during his

In 1854, one of our greatest Attorneys General, Caleb Cushing, rendered an opinion that an officer of the Army was properly chargeable with the military offense of conduct unbecoming an officer and a gentleman for a felonious homicide, notwithstanding the exclusionary language as to capital offenses in the general article. The Attorney General’s opinion also stated that the officer’s conviction or acquittal by the civil authorities of the offense against the general law could not discharge him from responsibility for the military offense involved in the same facts.

French, 25 C.M.R. at 860-61 (citation omitted).

173. JOHN SAVAGE, OUR LIVING REPRESENTATIVE MEN 142-46 (1860).
174. Id. at 142; see also JOHN M. BELOHLAVEK, BROKEN GLASS: CALEB CUSHING AND THE SHATTERING OF THE UNION 1-30 (2005).
175. REMINI, DANIEL WEBSTER, supra note 172, at 434-40; SAVAGE, supra note 169, at 142-46.
176. HOLT, supra note 159, at 149-50.
177. A MEMORIAL OF CALEB CUSHING FROM THE CITY OF NEWBURYPORT 69 (1879) [hereinafter MEMORIAL OF CALEB CUSHING]; see also REMINI, DANIEL WEBSTER, supra note 172, at 578-79; SAVAGE, supra note 173, at 142-46. Cushing’s appointment as minister to China occurred as a result of Webster lobbying President Tyler on his behalf while Webster served as Tyler’s Secretary of State.
178. MEMORIAL OF CALEB CUSHING, supra note 177, at 114-18; BELOHLAVEK, supra note 170, at 193-95.
war service, the future Attorney General befriended a fellow militia officer, Franklin Pierce.\(^{179}\)

Cushing had a firsthand knowledge of military law. While in Matamoros, he declared martial law, closed gambling halls, and established curfews.\(^{180}\) He also defended General Gideon J. Pillow against allegations made by Winfield Scott in a court of inquiry.\(^{181}\) By the time the court of inquiry concluded, Polk was replaced first by a Whig, Zachary Taylor and, after Taylor’s death, Millard Fillmore. During the four years of the Whig presidency, Cushing entered into the private practice of law.\(^{182}\) However, when Franklin Pierce was elected in 1852, he appointed Cushing as his Attorney General. The two men shared similar constitutional ideals, namely, that democracy was best protected when governance occurred closest to the populace.\(^{183}\)

Though never a slave owner, Cushing opposed the abolition of slavery, and he fully endorsed Taney’s opinion in *Dred Scott*.\(^{184}\) Cushing lauded Taney as “the very incarnation of judicial integrity, purity, science, and wisdom.”\(^{185}\) Indeed, Cushing personally thanked Taney for his decision in *Dred Scott*.\(^{186}\) Until South Carolina militia fired on Fort Sumter in 1861, Cushing was an unabashed states’ rights Democrat.

As Attorney General, Cushing had addressed questions in military law prior to *Dynes v. Hoover*. On January 31, 1857, three months prior to Buchanan’s inauguration, Cushing prepared a memorandum detailing the President’s authority over the administra-

\(179\). *BELOHLAVEK*, supra note 174, at 206.
\(180\). *Id.* at 198; see also *TODD*, supra note 158, at 42.
\(181\). *BELOHLAVEK*, supra note 174, at 206.
\(182\). *MEMORIAL OF CALEB CUSHING*, supra note 177, at 114–18; see also *BELOHLAVEK*, supra note 174, at 206.
\(183\). *OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, HELD IN 1860 AT CHARLESTON AND BALTIMORE 16–17* (1860); see also *TODD*, supra note 158, at 42.
\(184\). Speech of Caleb Cushing, in *V GREAT DEBATES IN AMERICAN HISTORY* 241 (1913). At the Convention, Cushing sought to legislate *Dred Scott* into United States law, requiring the executive branch to enforce the Fugitive Slave Act. *Id.; see also BELOHLAVEK, BROKEN GLASS: CALEB CUSHING*, supra note 174, at 270–73. Cushing believed northern abolitionists were destroying the United States stability by encouraging slaves to flee to Canada. *Id.*
\(185\). *FERHENBACHER*, supra note 3, at 427.
\(186\). File 244, in *PAPERS OF CALEB CUSHING* (Nov. 9, 1857) (on file at the Library of Congress).
tion of discipline in the Navy.\(^\text{187}\) This memorandum included the authority to order boards of inquiry for naval officers, the requirement of impartiality of judges advocates assigned to courts-martial duty, and the meaning of the statement, "[A] court-martial is governed by the usages of the service."\(^\text{188}\) He noted that the Articles of War for the Army operated similarly and assured the President that both the Army’s and Navy’s separate courts-martial procedures favorably compared to England’s rules and procedures.\(^\text{189}\) Critical to Cushing’s brief was a notation that he believed Justice Taney concurred in his opinions as to the term, “usages of the service.”\(^\text{190}\)

In another instance, Cushing sought to protect soldiers from abuses stemming out of overly liberal interpretations in the Articles of War’s statute of limitations. The War Department’s position on the statute of limitations, enumerated in Article Eighty-Eight of the 1806 Articles of War, was that an accused soldier waived the protections of the statute if he failed to object at trial.\(^\text{191}\) Advocates of the waiver argument concluded that despite the fact that the majority of soldiers accused of offenses were unrepresented at trial, the average accused soldier had enough knowledge and an obligation to object to jurisdiction.\(^\text{192}\) Cushing disagreed with the War Department’s premise and notified Secretary of War Jefferson Davis and Winfield Scott, the Army’s commanding general, that “This limitation cannot be waived by the accused nor can

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188. \textit{id.} In his memorandum, Cushing echoed the principles of impartiality found in DeHart’s treatise. DeHart wrote, “[A] judge advocate is also counsel for the prisoner and has a duty to prevent, in many instances, the perpetration of injustice.” \textit{See} DeHart, \textit{supra} note 67, at 82. Cushing noted, “[A] judge advocate must be disinterested in the outcome of a court of inquiry or court-martial.” \textit{id.}


190. \textit{id.}

191. \textit{id.}

192. \textit{id.}
he even with his consent be tried by a general court ordered after
the time prescribed by statute."\(^{193}\)

In another matter, Cushing discussed the sources of mili-
tary law with the army’s judge advocate general, Major John F.
Lee.\(^{194}\) Unlike the domestic federal law, Cushing accepted that
common law offenses were an intrinsic component of military
law.\(^{195}\) Cushing wrote to Lee:

> The military law as it exists in the United States and
in Great Britain from which country the substance
of our jurisprudence was derived is an exception
code, applicable to a class of persons in given rela-
tions but not abrogating or derogating from the gen-
eral law of the land.\(^{196}\)

He further stated:

> An officer of the Army is bound by law to be a
good citizen and therefore liable under such qualifi-
cations as the law prescribes to the same punish-
ment with any other citizen for a given act, but he is
also bound by law to be a gentleman and an officer
whether in, or under command; and if he fails is to
be punished by military law according to the judg-
ment and sentence of his fellow officers.\(^{197}\)

The implications of Cushing’s views were clear: conduct of a non-
criminal, yet repugnant, nature could still be prosecuted under the
Articles of War as a criminal matter, even though no codified pro-
hibition against the conduct existed.

Aside from his deference to courts-martial practice, Cush-
ing was conservative in regard to the use of a professional army.
Following Jeffersonian dicta, he did not approve of the use of fed-
eral troops or calling forth state militias to coerce a population un-

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194. Caleb Cushing to Major Lee (1853), in National Archives of the U.S.,
153.1, Vol I.
195. Id.
196. Id.
197. Id. Cushing’s views were later published as a formal Attorney Gen-
less the population was in open rebellion and threatened the Constitution.\textsuperscript{198} For instance, on July 19, 1856, he drafted an Attorney General opinion that Army forces could only be used in limited circumstances to suppress a "vigilance committee" which had usurped law enforcement and judicial authority in San Francisco. Cushing opined that there was a difference between a flagrant obstruction of law and an armed insurrection. The governor and state militia were responsible for dealing with the former, which was essentially what had occurred.\textsuperscript{199}

There was one exception to Cushing's Jeffersonian/Jacksonian conservatism in regard to the use of federal troops for domestic purposes. He argued that federal military forces could be utilized to enforce the Fugitive Slave Act.\textsuperscript{200} In espousing the legality of a \textit{posse comitatus} to capture runaway slaves, Cushing conveyed to President Pierce that his opinion applied "as well to the military as to the civil force employed."\textsuperscript{201} If the Supreme Court had ruled neither slaves nor freedman were citizens, an order to the Army to enforce the Fugitive Slave Act would have additional constitutional sanction. Thus, \textit{Dred Scott} gave Cushing's opinion greater legal force.

\begin{itemize}
\item \textsuperscript{198} Caleb Cushing to Major Lee, \textit{supra} note 194.
\item \textsuperscript{199} 8 Op. Att'y Gen. 8 (1856) (incorporating Cushing's advice to Pierce). The vigilance committee had formed to combat crime and political corruption in the city, but its members lynched prisoners and extracted confessions from citizens without due process. Its members also seized a shipment of federal arms and attempted to prosecute the chief justice of the state supreme court. Notably, however, the committee did not attempt to overthrow or replace the elected state government as had Thomas Dorr in the prior decade in Rhode Island.
\item \textsuperscript{200} 6 Op. Att'y Gen. 466 (1854) (incorporating Cushing's advice to Pierce). Cushing believed northern abolitionists were destroying national unity and encouraging fugitive slaves. See also ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 133–34 (1992), and TONY R. MULLIS, PEACEKEEPING ON THE PLAINS: ARMY OPERATIONS IN BLEEDING KANSAS 14–15 (2004). Mullis writes that Cushing intended to expedite the enforcement of the fugitive slave laws, because the judiciary was unresponsive to the owner's claims. \textit{Id.} Mullis also argued that officers involved in the Kansas peacekeeping operations during Franklin Pierce's administration were often partisan to either the free state or slave state causes, which caused dissension in the commissioned ranks. \textit{Id.} at 209–10.
\item \textsuperscript{201} 6 Op. Att'y Gen. 466 (1854) (incorporating Cushing's advice to Pierce).
\end{itemize}
Cushing's two opinions stand diametrically opposed to each other, and the only reasonable explanation for his inconsistency had to do with his core beliefs on slavery. He saw it as a national, rather than a state institution. This accorded with Pierce's views as well. That is, the right to own slaves could only be curtailed by individual states within their individual borders without creating a detriment to slave owners in other states. Cushing, and commensurately Chief Justice Taney, as well as a majority of the Court, believed that the Congress did not have the authority to outlaw slavery in the territories.\textsuperscript{202}

Although Cushing modified his political affiliation during the Civil War, he maintained his belief in the Constitutional efficacy of slavery, until it was expressly outlawed by amendment.\textsuperscript{203} Despite his considering Lincoln's suspension of habeas corpus a folly, Cushing supported Lincoln over McClellan in 1864.\textsuperscript{204} In 1873, President Ulysses Grant considered nominating Cushing to the Supreme Court, but in the face of mounting criticism from Radical Republicans, Cushing withdrew the nomination.\textsuperscript{205}

\textbf{D. Assistant Attorney General, Ransom Hooker Gillet}

It was Cushing's assistant, Ransom Hooker Gillet, who wrote the executive's brief and argued the executive's position on Dynes to the court, and the historic record shows he influenced the outcome of the case more than Cushing. The historic records indicate Gillet was a talented attorney. Prior to his tenure as Assistant Attorney General, Gillet argued twelve cases before the Court.\textsuperscript{206}

\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Edith Ellen Ware, Political Opinion in Massachusetts} 43--44 (1916); \textit{see also} Savage, \textit{supra} note 173, at 154. On the eve of the Civil War, Cushing spoke to the Massachusetts General Assembly. His speech included the following line:

\begin{quote}
I admit to an equality with me sir, the \textit{white} man, my blood and my race, whether he be the Saxon of England or the Celt of Ireland. But I do not admit as my equals the red men of America, or the yellow men of Asia, or the black men of Africa.
\end{quote}

\textit{Ware, Political Opinion in Massachusetts} 43--44 (1916) (emphasis in original).
\textsuperscript{204} \textit{Belohlavek, supra} note 174, at 329--30.
\textsuperscript{205} \textit{Todd, supra} note 158, at 44.
\textsuperscript{206} These cases include \textit{Burchell v. Marsh}, 58 U.S. (17 How.) 344 (1854); \textit{Monticello v. Mollison}, 58 U.S. (17 How.) 152 (1854); \textit{Web v. Den}, 58
The subject matter of these cases included maritime law, patents, and suits against the United States Government for breach of contract. Two of Gillet’s clients, Samuel Morse and Cyrus McCormick, were well known inventors, and on one occasion, Gillet worked alongside Edwin Stanton, Lincoln’s second Secretary of War.\(^\text{207}\)

Born in New Lebanon, New York, in 1800, he worked on his father’s farm, attended the St. Lawrence Academy, and studied law under a prestigious New York politician, Silas Wright.\(^\text{208}\) Perhaps owing to Wright’s position as a brigadier general in the New York militia, Governor DeWitt Clinton appointed Gillet inspector general of militia with the rank of major in 1824.\(^\text{209}\) In this post he developed a friendship with a New York politician and militia general, John A. Dix, who later left Democrat politics for the Free Soil Party.\(^\text{210}\) During the Civil War, Dix served as one of the senior major generals in the Union Army. This move, however, did not lower Gillet’s estimation of Dix, and during the Civil War, Gillet opined Dix was the Union’s most capable officer.\(^\text{211}\) Moreover, by 1860, Dix had returned to the Democrat party, though unlike Gillet, he was an avowed Unionist.

In both 1824 and 1828, Gillet campaigned for Andrew Jackson’s presidency and was rewarded in 1829 with an appoint-


208. CHARLES LANMAN, BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES DURING ITS FIRST CENTURY 164 (1876). For another biographical sketch of Gillet, see RANSOM H. GILLET, DEMOCRACY IN THE UNITED STATES: WHAT IT HAS DONE, WHAT IT IS DOING, AND WHAT IT WILL DO (1868). The sketch notes Justice Taney thought highly of Gillet. This is confirmed by Gideon Welles, Lincoln’s Secretary of the Navy, in his diary. See 2 GIDEON WELLES, Diary entry for November 25, 1864, in DIARY OF GIDEON WELLES 184 (Howard K. Beale ed., 1960) (1911).

209. See GILLET, supra note 203, at chs. vii–ix.

210. Id.

211. Id.
ment as postmaster for Ogdensburg, New York. 212 Additionally, Gillet was elected as a Democrat to the Twenty-Third and Twenty-Fourth Congresses where he served alongside Caleb Cushing. 213 While serving in Congress, Gillet took particular interest in military affairs. In 1836, he argued for an expansion of state militia responsibilities in suppressing rebellion over that of the Army. 214 The year prior, he sought to increase the pay of naval officers. 215

In 1837, President Martin Van Buren appointed Gillet as a special commissioner to negotiate treaties with Indian tribes. 216 His stamp on Indian relations continues in federal jurisprudence to the present time. 217 However, when William Henry Harrison, the Whig Party candidate, defeated Van Buren in 1840, Gillet was dismissed from government service. Turmoil within the Whig Party after Harrison’s death enabled the Democrats to return to power in four years. In 1845, President James K. Polk named Gillet Treasury Register. In 1847, he was nominated as Solicitor to the United States Treasury. Gillet returned to private practice during Zachary Taylor’s and Millard Fillmore’s presidencies. In 1855, Franklin Pierce, at Caleb Cushing’s request, appointed Gillet Assistant Attorney General. 218

That Gillet was a pro-slavery Democrat is evident in his government service and legal career during the Civil War. 219 As he

212. Id.
213. Id.; see also LANMAN, supra note 203, at 164.
214. In advocating for militia increases, Gillet argued, “Two purposes were had in view—to aid in the public defense, and to relieve the people from the burden of providing themselves with arms.” CONG. GLOBE, 24th Cong., 1st Sess. 235, 237 (1836).
215. CONG. GLOBE, 23rd Cong., 1st Sess. 408 (1835).
216. LANMAN, supra note 203, at 164.
217. For Gillet’s influence in jurisprudence on Indian affairs, see City of Sherrill, New York v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), and New York Indians v. United States, 170 U.S. 1 (1898).
218. GILLET, supra note 203, at chs. vii–ix.
219. See, e.g., The Venice, 69 U.S. 258 (1864); The Slavers, 69 U.S. 350 (1864). During the Civil War, Gillet engaged in a busy appellate practice representing merchantmen before the Supreme Court on four occasions, and teaming with Maryland Senator Reverdy Johnson in one trial. In another case, titled by the Court as “The Slavers,” Gillet represented the owners of a vessel fitted out as a slave ship which was seized by the government. He argued that since no slaves were actually found, the owners were entitled to recoup the vessel. The vessel was empty at the time of the seizure, but, as Justice Chase noted,
was also a legal scholar, he recorded his fundamental political beliefs, albeit after the Civil War. Gillet’s postwar writings, in particular a text titled, Democracy in the United States: What it has Done, What it is Doing, and What it Will Do, establish that he also was an unapologetic “copperhead.” The term “copperhead” denoted anti-war Democrat Northerners who possessed pro-Southern sympathies and sought to end the Civil War without a Union victory. They were vigorously opposed to the abolition of slavery, and believed Lincoln subverted constitutional rights to the point of establishing a tyranny.

Gillet blamed the Civil War on Northern abolitionists and industrialists. “War was desired by two classes: one who staked everything on abolition and the other wishing for rapid and easy means of making fortunes by furnishing supplies to the Army and Navy,” he concluded. Echoing a theme common to copperheads, Gillet accused Lincoln of prolonging the war to achieve abolitionism. His evidence for this charge was in Lincoln’s firing of General George B. McClellan and respective replacements of John Pope, Ambrose Burnside, Joseph Hooker, and George Meade.

“The equipment of the bark was somewhat peculiar. She had an unusually large number of spars and sails; was provided with the water-casks and tanks necessary for a slaver: and had a large quantity of articles, not on her manifest, suited to the purposes of the trade.” 69 U.S. at 364–65.

220. See Ransom Gillet, Democracy in the United States: What it Has Done, What it is Doing, and What it Will Do (1868).

221. Of Franklin Pierce, Gillet recorded “[f]ew men have adhered more closely to the Constitution or struggled more manfully to sustain it.” Gillet, supra note 208, at 248. By that time, a number of government officials concluded Pierce committed treason during the war. Gillet also defended James Buchanan, writing, “[i]t became fashionable to excuse everybody else, and heap all faults on him; but Truth has awakened from her slumbers, and History, brushing away the clouds and mists, is doing him justice.” Id. at 249.

222. Jennifer L. Weber, Copperheads: The Rise and Fall of Lincoln’s Opponents in the North, at 3–8 (2005). The term “copperhead” was first used by Republicans to describe Democrat opponents to the war in the summer of 1861. Id.; see also Cowden, supra note 16, at 6.


224. Gillet, supra note 208, at 225.

225. Id. at 292.

226. Gillet was a fervent believer in the efficacy of slavery as well as the inferiority of African-Americans. He argued that the majority of slaves endorsed their own servitude and supported the Confederacy. Gillet, supra note
It was in another treatise, titled *The Federal Government, Its Officers and Their Duties*, in which Gillet evidenced his regret for *Dynes v. Hoover*. He took aim at Judge Advocate General, Joseph Holt, writing, "in practice, the judge advocate general performs other duties than those prescribed by statute; he goes beyond making rules and regulations and directs the forms and proceedings of particular cases." To prove his point, Gillet argued that the trial of Mary Surratt was an abuse of military authority. By 1872, a sizeable number of citizens believed Holt deprived Surratt of a fair trial and that he also failed to convey to Andrew Johnson clemency requests from the military officers serving in her trial to commute their sentence of execution to a prison term.

As to the common practice of courts-martial, Gillet argued that inherent flaws denied any accused soldier a fair trial. Again, he took aim at the judge advocates overseeing these cases. "Although in theory he protects the accused and causes justice to be done to him, whether he has counsel or not, still in practice in most cases, the judge advocate is a severe public prosecutor and resorts to all possible means to secure a conviction," he noted. This was

208, at 360. To Gillet, slavery was part of a natural order, proved by the impoverished state of African-Americans. He specifically noted that freed slaves, "are too ignorant, lazy, or vicious to [provide] for themselves." *Id.* at 301. Moreover, he wrote, "The testimony is abundant that the southern negroes heartily espoused the cause of their masters and rendered them assistance, all the could in a hundred ways." *Id.* at 360. Additionally, he argued the Freedman's Bureau was, "a political machine, designed to keep Republicans in power." *Id.* at 301. Furthermore, Lincoln's successor, Andrew Johnson, was "a bold rebuke of wrongs, worthy of a better fate than impeachment." *Id.* at 336.


228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* Gillet's arguments were not quite unique. In 1863, Coppee warned:

> The danger in most cases is that as a prosecutor, he is inclined to be too severe upon the accused; to accept his guilt as a foregone conclusion, and rather to aim to prove it, than simply, as is his sole duty, to exhaust all evidence, pro and con and let that determine the guilt or innocence of the accused.

COPPEE, *FIELD MANUAL OF COURTS-MARTIAL*, supra note 68, at 60. Moreover, in Britain, a similar movement towards removing the Judge Advocate from serving both as legal advisor to the court-martial and prosecutor was underway. *See*
hardly consistent with Gillet's position a decade earlier when arguing *Dynes* to the Court.

Clearly what had changed his opinion on military law was what the Army was used for: the destruction of slavery and enforcement of Reconstruction laws mandating the basis of equality such as universal male suffrage. Whatever inherent or perceived unfairness existed in military trials after the Civil War also existed in those trials before it. The 1806 Articles of War governing these trials were unchanged and courts-martial were conducted identically—albeit in greater number in 1858 as in the years 1861 to 1865. While military trials of civilians were a new and clearly overused feature of military law, the 1806 Articles of War permitted these trials under limited circumstances (which also existed during the Civil War).

III. THE EVOLUTION AND SURVIVAL OF *DYNES V. HOOVER*

The following Part discusses the evolution of *Dynes*, beginning with an analysis of the pre-Civil War impact of the case. At its outset, President Buchanan's used the holding of the case with its grant of executive power to enforce the Fugitive Slave Act. This was useful because *Dred Scott* did not effectively dissipate the intense controversy over the spread of slavery that its authors and proponents had hoped. In the years that followed in the post-Civil War era, the expansive grant of executive power to control the military and courts-martial continued to influence subsequent individual cases. Even after World War II, *Dynes* continued to survive, leaving imprints of the exclusive power of the executive branch. At that time, both the legislative and judicial branches took steps to diminish the importance of *Dynes*, through Congress' enactment of the Uniform Code of Military Justice to replace the Articles of War and the post-World War II Supreme Court's decisions that expanded judicial review. In particular, Justice Douglas overtly attacked *Dynes*. This Part will discuss the practical effect of these reforms and the continued influence of the *Dynes* doctrine. Finally, the analysis turns to the most recent judicial attitudes to-

R.M. Hughes, The Duties of Judge Advocates, Compiled from Her Majesty's and the Honorable East India Company's Military Regulations and from the Works of Various Writers on Military Law 111 (1845).
ward the doctrine, which are best described as a failure to cite to the case when the opportunity was present. This final chapter in the history of Dynes v. Hoover indicates a move away from the ideas of limited judicial review for courts-martial and acceptance of non-enumerated common law crimes.

The analysis of the case begins before the decision was even announced. After argument on Dynes v. Hoover, but before the published decision, President Buchanan petitioned Congress to increase the size of the regular army. In Buchanan’s First Annual Message to the nation, he articulated two reasons for this increase. The first involved quelling public agitation in the Kansas Territory, and the second involved the question of whether Mormon settlers in the Utah Territory had created their own government with the intention of establishing an independent nation.

Turning to the first reason, Buchanan focused on quelling public agitation in the Kansas Territory, which was directly linked to the question of whether Kansas would be a free or slave state. Both President Franklin Pierce and Buchanan had ordered the army to bring order to the territory. Not all army officers endorsed the concept of using soldiers to enforce the Fugitive Slave Act, or to keep the two political factions in the Kansas territory from open warfare. In Buchanan’s thinking, Dred Scott provided pro-slavery Southerners and their Northern allies the authority of law to enforce the Fugitive Slave Act, and Dynes provided the President with an additional tool to use the Army to enforce what Dred Scott permitted.

Buchanan’s additional reason for supporting an increase in the size of the Navy involved the issue of whether Mormon settlers in the Utah Territory had created their own government with the intention of establishing an independent nation. Unlike Dred Scott, Buchanan did not reference Dynes in any of his national addresses, even though Dynes reinforced his constitutional authority to order the army into Kansas or Utah.


233. See generally DURWOOD BALL, ARMY REGULARS ON THE WESTERN FRONTIER, 1848–1861 (2001); MULLIS, supra note 200.

234. Buchanan, supra note 232, at 159.
Dynes might never have become a controversial decision had Dred Scott accomplished what Buchanan, Taney, Wayne, Cushing, and Gillet had hoped for: a settlement of the slavery question and an end to factionalism. However, the Northern public was not swayed by Dred Scott, and within four years of its announcement, the nation was engaged in a full-fledged war within itself. If Dred Scott contributed to the outbreak of the war, Dynes contributed to the Union’s ultimate victory over secession, albeit in actions of questionable constitutionality. Thousands of courts-martial and military commissions were adjudicated during the war, but few of these cases were graced with a meaningful appellate review. In denying its jurisdiction to hear Clement Vallandigham’s military trial, the Court also noted that on the basis of Dynes, it could not review the fairness of the proceedings of his military trial.

There were other effects from Dynes as well. For example, in 1848 Attorney General Isaac Toucey opined that once an officer was mustered out of the military, the military no longer possessed jurisdiction to prosecute the officer, even for a crime committed while on duty. In 1866, Attorney General Henry Stanberry, in approving of Civil War legislation that reversed the jurisdictional limitations crafted by Toucey, informed President Andrew Johnson


236. Clement Vallandingham was an Ohio politician who opposed Lincoln’s presidency. He was tried in a military court and applied for a writ of habeas corpus during his imprisonment. Ex parte Vallandingham, 68 U.S. (1 Wall.) 243, 244 (1863). The Supreme Court denied this writ, however, holding in Ex parte Vallandingham that it did not have the power to grant habeas on a military commission. Vallandigham, 68 U.S. (1 Wall.) at 248.

237. Id. at 254 (concluding “And as to the President’s action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court, in the cases of Martin v. Mott, and Dynes v. Hoover”). Recognizing a nexus between Ex parte Vallandigham and Dynes, Chief Justice Earl Warren stated in 1962, “So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter’s jurisdiction is most limited.” Warren, supra note 10, at 10. Warren did not approve of the Court’s historic reticence towards judicial review of courts-martial and sought to marginalize Dynes, but in his speech to the law students at New York University, he also noted that this goal had largely been achieved through recent Court rulings. Id.

238. 5 Op. Att’y Gen. 55, 58 (1848).
that courts-martial maintained jurisdiction after the discharge of a soldier for crimes committed while on duty. 239

Even after the Civil War, Dynes resonated with the Court. For instance, in criticizing the Court’s majority opinion in Ex Parte Milligan, 240 Chief Justice Salmon Chase noted to Chicago newspaper magnate Joseph Medill that Dynes governed all military law and the Court should have taken no cognizance of Milligan’s case. 241 His actual dissent, joined by Justice Wayne, primarily rested on the issue of whether Indiana was a military district to which military law applied, not whether the Court had the authority to review military trials for matters other than jurisdiction. 242 Although the Court’s ruling in Milligan diminished the reach of military jurisdiction, it did not alter the exclusivity of the executive branch’s control over military law. Indeed, the Court did not, at any time in Milligan, criticize Dynes.

Twenty years after Dynes, the Court in Ex Parte Reed, 243 determined a Navy paymaster clerk was subject to the Naval Articles of War as a result of the clerk’s acceptance of his position within the naval hierarchy. 244 Justice Noah Swayne, the decision’s author, in reaffirming Dynes’ authority, held, “The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer

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240. 71 U.S. (4 Wall.) 2 (1866) (holding that citizens unconnected to the military could not be tried in military courts, even when habeas relief is suspended, so long as the courts are operating).
243. 100 U.S. 18 (1879).
244. Id. at 21–22. Justice Swayne noted:

The place of paymaster’s clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the payroll, and are paid accordingly.

Id. (quoting United States v. Bogart, 25 F. Cas. 1184 (E.D.N.Y. 1869)).
an open question in this court." Two years later, in *Ex Parte Mason*, the Court reaffirmed the principle set in *Dynes* that military jurisdiction was limited only by an individual's status in the service, not whether the country was engaged in a war or rebellion.

The first apparent, albeit slight, departure from *Dynes* occurred in *Kurtz v. Moffit*. Decided in 1885 by a Court composed of none of the justices who served in 1858, the case involved a military deserter who argued that a court-martial did not possess jurisdiction to prosecute him because his arrest was conducted by

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245. *Ex parte Reed*, 100 U.S. at 19. In several cases, *Ex parte Reed* replaced *Dynes v. Hoover* as a case from which to determine whether a court-martial had proper jurisdiction. For instance, in *Ex parte Potens*, the District Court for the Eastern District of Wisconsin cited *Reed* and ruled that a court-martial had proper jurisdiction to adjudge a deserter, even where a question arose as to whether the deserter had actually taken an induction oath into the Army as required by law. *United States v. Potens*, 63 F. Supp. 582 (E.D. Wis. 1945). In *Ex parte Benton*, decided in 1945, the District Court for the Northern District of California ruled it had no legal authority to determine whether a convicted soldier's defense counsel was so deficient as to deprive the court-martial of jurisdiction. *Ex parte Benton*, 63 F. Supp. 808 (N.D. Cal. 1945). While not using *Dynes*, the district court accepted the doctrine that it could not review the judgments of courts-martial where the military had jurisdiction over the "offender," and where the sentence of the court-martial (or commission) was "within its power to pronounce." *Id.* at 809-10. These were the precise parameters that Justice Wayne noted in *Dynes*. Finally, in *Anthony v. Hunter*, the District Court for Kansas determined that a defense counsel's conduct was so deficient even within the parameters of the Articles of War, it could order the release of a convicted soldier from confinement on the basis of due process. *Anthony v. Hunter*, 71 F. Supp. 823, 831 (D. Kan. 1947). In that particular case, the district court determined a medical officer assigned to represent a soldier accused of rape performed "rather ineptly as might be expected," and the fact that the soldier was brought to trial only two days after the referral of charges was noxious to due process. *Id.*

246. *Ex parte Mason*, 105 U.S. 696 (1881). Sergeant John A. Mason, the petitioner in this case was prosecuted under the Sixty-Second Article of War, prohibiting "all disorders and neglects . . . to the prejudice of good order and military discipline." *Id.* at 697. Mason's underlying specific conduct, however, is of great interest. While serving as a military prison guard, Mason attempted to murder an inmate named Charles Guiteau. *Id.* at 697-98. This was the same Charles Guiteau who earlier assassinated President James A. Garfield.

247. *Id.* at 701.

248. 115 U.S. 487 (1885).
the San Francisco police rather than federal authorities. He was detained under a unique set of circumstances—the military had not ordered his arrest, and his crime (to the extent there was one) was not against the state of California but rather the federal government. In a unanimous opinion, Justice Horace Gray concluded that because Congress had not legislated to private citizens or municipal peace officers a right of arrest and detention, the Court would not uphold the military's jurisdiction over the individual.

With the exception of Kurtz, Dynes remained the stated basis for judicial reluctance to intervene in the operation of courts-martial throughout the remainder of the nineteenth century and well into the twentieth, occasionally for purposes which extended beyond courts-martial. For instance, in Smith v. Whitney, the Court determined that it did not possess jurisdiction to issue a writ of prohibition against a court-martial, based on a subject matter jurisdictional challenge. The accused in Whitney, a naval officer, was charged with "[s]candalous conduct tending to the destruction of good morals." Similar to one of the objections raised in Dynes, this offense was not specifically enumerated but could be

250. Id.
251. Id. at 504–05. Justice Gray continued the Court's reliance on British military law in holding, "If a police officer or a private citizen has the right, without warrant or express authority, to arrest a military deserter, the right must be derived either from some rule of the law of England which has become part of our law, or from the legislation of Congress." Id. at 500.
252. See, e.g., Givens v. Zerbst, 255 U.S. 11 (1922); Mullan v. United States, 212 U.S. 516 (1909); Runkle v. United States, 122 U.S. 543 (1887); Closson v. United States, 7 App. 460 (D.C. Cir. 1896). In Closson, the federal appellate court, in relying on Dynes, did not find the arrest of a retired officer who violated the Articles of War offensive. Closson, 7 App. at 481. A lower court on a writ of habeas corpus ordered the officer released from custody. Id. at 461. The federal appellate court reversed. The Court also relied on Dynes in upholding administrative decision in the reduction of Army personnel and retirements. See, e.g., United States ex. rel French v. Weeks, 259 U.S. 326 (1922); United States ex rel. Creary v. Weeks, 259 U.S. 336 (1922). Finally, the Court utilized Dynes in upholding military commissions over enemy prisoners of war and unlawful combatants. See, e.g., In re Yamashita, 327 U.S. 1 (1946); Ex parte Quirin, 317 U.S. 1 (1942).
253. 116 U.S. 167 (1886).
254. Id. at 175–77.
255. Id. at 181.
charged under the Thirty-Second Article under the Naval Articles. However, the Court, in a unanimous opinion, was not concerned with the common-law offense but rather, that the officer sought it to limit the ability of the executive branch's ability to maintain discipline. Displaying consistency with Justice Wayne in Dynes, Gray noted he would not undermine that exclusive authority of the executive branch.

After World War I, Congress undertook a concerted effort to reform military law, but the effort failed to achieve any wide-sweeping changes. The conclusion of World War II saw re-

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256. 116 U.S. at 183–84. Justice Gray noted:

In Dynes v. Hoover, above cited, this court held that the jurisdiction of courts-martial, under the articles for the government of the navy established by congress, was not limited to the crimes defined or specified in those articles, but extended to any offense which, by a fair deduction from the definition, congress meant to subject to punishment, being "one of a minor degree, of kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial;" or which, though not included, in terms or by construction, within the definition, came within "a comprehensive enactment, such as the thirty-second article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea."

Id. at 183.

257. 116 U.S. at 186. In expressing a lack of enthusiasm for limiting the executive branch in military affairs, Gray held the following:

To order a writ of prohibition to issue in the present case would be to declare that an officer of the navy, who, while serving by appointment of the President as chief of a bureau in the Navy Department, makes contracts or payments, in violation of law, in disregard of the interests of the government, and to promote the interests of contractors, cannot lawfully be tried by a court martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals, and to the dishonor of the naval service.

Id.

258. See, e.g., Establishment of Military Justice: Hearings before the Subcommittee of the Senate Committee on Military Affairs on S.64, 66th Cong.
newed reform attempts to make courts-martial subject to expanded judicial branch review. In 1950, Congress enacted the Uniform Code of Military Justice ("UCMJ"). Within a decade of the UCMJ’s enactment, a fully functional Article II appellate court reviewed courts-martial, and its decisions were subject to Supreme Court review. The replacement of the Articles of War by the UCMJ, however, did not fundamentally alter the strength or status of Dynes immediately after its inception. For instance, in Owens v. Markley, the District Court for the Southern District of Indiana in a habeas review cited Dynes to uphold a court-martial, while dismissing a challenge that the United States was not at war.

In tandem with legislative reform of courts-martial, the Court began to lessen the executive branch’s exclusivity over military law after World War II. In Gusik v. Schilder, the Court cited to Dynes as evidence, the judiciary could through a writ of habeas, entertain collateral attacks on courts-martial decisions when administrative remedies were exhausted. Authored by Associate Justice William O Douglas, eventually the Court’s foremost critic of Dynes, Gusik appears to be the first deliberate attempt to diminish the importance of Dynes.

Following Gusik, the Court again addressed the nature of military law in 1953 in Burns v. Wilson, a case authored by Chief Justice Carl Vinson. The issues raised in Burns, similar to those raised in Gusik, involved the judiciary’s authority to grant review of a court-martial decision through a habeas writ of a court-martial decision. Citing Dynes, Vinson acknowledged that the military law evolved without judicial influence. He noted with approval


259. For a detailed history on post WWII reform efforts, see generally LURIE, PURSUING MILITARY JUSTICE, supra note 15, at 127–258.

260. Id.
261. Id.
262. 186 F. Supp. 604 (S.D. Ind. 1960), aff’d, 289 F.2d 751 (7th Cir. 1961).
263. Id. at 606–07.
265. Id. at 133 n.3.
266. 346 U.S. 137 (1953).
267. Id. at 140. Justice Carl Vinson, writing for the majority, noted: Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal
that in the three years separating *Gusik* from *Burns*, Congress enacted the UCMJ and created appellate review mechanisms within the military which had the authority to overturn courts-martial.\(^\text{268}\)

After *Burns*, the Court decided two cases which significantly narrowed the jurisdictional reach of military law but in doing so, did not diminish the strength of *Dynes*. In *United States ex rel 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 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. The Framers expressly entrusted that task to Congress.

*Id.* at 150-55 (footnotes omitted). In a pattern of increasing predictability, Justice Douglas dissented from the majority. In *Wade v. Hunter*, 336 U.S. 684 (1949), the Court determined that where a court-martial was discontinued after receiving evidence and entering into deliberations. *Id.* at 686. The court-martial officers sitting in judgment determined, within the scope of their lawful authority, the need to hear further witness testimony, before voting on guilt or innocence. *Id.* Because the witnesses were unavailable, the commanding officer dismissed the charges against the accused soldier, only to have another commanding officer later prefer new charges after the requested witnesses were found. *Id.* at 686-87. Justice Black, authoring the majority decision, held that, in the absence of bad faith for the original dismissal of charges, double jeopardy did not apply. *Id.* at 692. Justice Douglas, evidencing his early hostility for the military justice system, joined Justice Murphy and Rutledge in a dissent. *Id.* at 692-94.

\(^{268}\) 346 U.S. at 140-41. In approving the adoption of the UCMJ over the Articles of War, Justice Vinson noted:

Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights. Only recently the Articles of War were completely revised, and thereafter, in conformity with its purpose to integrate the armed services, Congress established a Uniform Code of Military Justice applicable to all members of the military establishment. These enactments were prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II. Nor was this a patchwork effort to plug loopholes in the old system of military justice. The revised Articles and the new Code are the result of painstaking study; they reflect an effort to reform and modernize the system—from top to bottom.

*Id.* (footnotes omitted).
Toth v. Quarles,\textsuperscript{269} the Court in a decision authored by Associate Justice Hugo Black, determined that a serviceman who had since been discharged from the military could not be tried in a court-martial for an offense which had occurred on active duty.\textsuperscript{270} Congress, in legislating the UCMJ, permitted trial by court-martial of discharged servicemen when a crime occurred while on active duty, subject to the statute of limitations.\textsuperscript{271}

Justice Stanley Reed, who along with Justices Burton and Minton dissented, turned to Dynes, in arguing:

\begin{quote}
War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline. The power to regulate the armed forces must have been granted to Congress so that it would have the authority over its armed forces that other nations have long exercised, subject only to limitations of the Constitution.\textsuperscript{272}
\end{quote}

For the first time, Dynes found itself as part of a dissent in defense of the expansive executive authority over military law.

In Reid v. Covert,\textsuperscript{273} decided in 1957, the Court held that the full protections of the Bill of Rights extended to United States citizens residing overseas, and therefore, citizens could not be subject to courts-martial jurisdiction simply because they resided on a military installation.\textsuperscript{274} In Reid, two civilian wives of service-

\begin{itemize}
\item \textsuperscript{269} 350 U.S. 11 (1955).
\item \textsuperscript{270} Id. at 23.
\item \textsuperscript{271} Id. at 13 n.2.
\item \textsuperscript{272} 350 U.S. at 29 (Reed, J., dissenting).
\item \textsuperscript{273} 354 U.S. 1 (1957). While Reid was not a unanimous decision, the dissenting justices, Thomas Clark and Harold Burton, did not cite to Dynes, though Justice Frankfurter did in a concurring opinion.
\item \textsuperscript{274} The Court, in relying on Toth, held:
\begin{quote}
There are no supportable grounds upon which to distinguish the Toth case from the present cases. Toth, Mrs. Covert, and Mrs. Smith were all civilians. All three were American citizens. All three were tried for murder. All three alleged crimes were committed in a foreign country. The only differences were: (1) Toth was an ex-serviceman while they were wives of soldiers; (2) Toth was arrested in the United States while they
\end{quote}
\end{itemize}
members allegedly murdered their active duty husbands. Both women, one in Germany and one in Japan, were prosecuted in courts-martial. They both objected to the trial on the basis of jurisdiction. Specifically, the women objected to the absence of a grand jury indictment as guaranteed by the Fifth Amendment.

This type of appeal was precisely what Justice Wayne intended in *Dynes*. In reversing the convictions, the Court did not diminish the standing of *Dynes*. Writing for the majority, Justice Hugo Black contextualized *Dynes* as enabling courts-martial to be exempt from the grand jury provisions in the Bill of Rights, when jurisdictionally applied against service-members.

In 1960, the Court ruled that the same prohibition against prosecuting civilians in courts-martial for capital offenses applied to civilians charged with non-capital offenses. The first frontal attack on *Dynes* occurred in the context of the Vietnam War where a confluence of social and political dissatisfaction with military governance was taken cognizance of in the Court. Associate William O. Douglas' antipathy for the political power of the military was well publicized as early as 1952. In a *Look Magazine* article

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were seized in foreign countries. If anything, Toth had closer connection with the military than the two women for his crime was committed while he was actually serving in the Air Force. Mrs. Covert and Mrs. Smith had never been members of the army, had never been employed by the army, had never served in the army in any capacity.

*Id.* at 32.

275. *Id.* at 4.

276. *Id.*; see also U.S. CONST. amend V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...." U.S. CONST. amend V.

277. 354 U.S. at 19. Justice Black specifically held as follows: Article I, § 8, cl. 14 empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces." It has been held that this creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights.

*Id.* Justice Frankfurter concurred with the majority on this point. See *id.* at 41–42 (Frankfurter, J., concurring).

titled, "We Have Become Victims of the Military Mind," Douglas
included in his criticisms, his belief that the military culture im-
peded independent thought.279

In 1969, Douglas once more sought to diminish Dynes. Writing the majority opinion in O'Callahan v Parker,280 Douglas
significantly narrowed the reach of the military’s jurisdiction over
its own service members. The case involved a sergeant who was
accused of attempted rape and housebreaking. The offenses oc-
curred in a civilian residential area while the sergeant wore civilian
clothes and was on a “liberty pass.”281

Douglas framed the fundamental issue in O’Callahan as
one of time, purpose, and location in other words, context.282 The
Court noted the alleged crimes were not military in nature, and as a
result, the military’s interest in prosecuting the sergeant was less
than if the prosecution had resulted from a purely military infrac-
tion. More importantly, the Court reasoned that, because military
trials lacked fundamental due process safeguards, these tribunals
were antithetical to the intent of the founders as enumerated in the
Bill of Rights.283 Concluding his reasoning for severely restricting

279. William O. Douglas, We Have become Victims of the Military Mind,
LOOK MAG., Mar. 11, 1952. Douglas argued, “Today as a result of our military
mindedness there is less room for debate, less room for argument, less room for
persuasion, than almost any period in our history.” Id.
281. Id. at 260.
282. Id. at 261. The specific issue, framed by Douglas was written as
follows:

Does a court-martial, held under the Articles of War, have ju-
risdiction to try a member of the Armed Forces who is charged
with commission of a crime cognizable in a civilian court and
having no military significance, alleged to have been commit-
ted off-post and while on leave, thus depriving him of his con-
stitutional rights to indictment by a grand jury and trial by a
petit jury in a civilian court?

Id.
283. Id. at 265. The Court held as follows:

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

Id.
the reach of courts-martial to "service related" offenses, Douglas caustically noted, "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."  

Although Justice Douglas did not attack Dynes by name in O'Callahan, he would do so five years later in joining Justice Potter Stewart's dissent in Parker v. Levy. Parker arose in the context of a challenge to the non-enumerated common law offenses of "Conduct Unbecoming an Officer and a Gentleman" under Article 133, and "disorders and neglects to the prejudice of good order and discipline in the armed forces," under Article 134 of the UCMJ. As should be recalled, the military's continual practice of charging non-enumerated common law offenses was one of the fundamental legal issues raised in Dynes. Although Wayne did not articulate the issue of constitutionality in the manner as Douglas, the fundamental question remained the same, albeit argued by Douglas in late twentieth century terms: for example, whether Article 133 and Article 134 could withstand scrutiny based on the due process requirements of notice. Justice William Rehnquist, authoring the majority's decision, in citing Dynes, held, "Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134."

284. Id.

285. Parker v. Levy, 417 U.S. 774 (1974) (Stewart, J., dissenting). In addition to joining Stewart's dissent, Douglas added his own dissent as a result of Stewart's refusal to include a basis for dissent on First Amendment grounds. See id. at 768 (Douglas, J., dissenting). One historian ably concluded, the case was as much a political and cultural event as it was a legal decision. See Robert N. Strassfield, The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy, 1994 Wis. L. Rev. 839 (1994).

286. Levy, 417 U.S. at 774 (Stewart, P., dissenting). Stewart forcefully noted, "The Court today, reversing a unanimous judgment of the Court of Appeals, upholds the constitutionality of these statutes. I find it hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain general articles, and I would, accordingly, affirm the judgment before us." Id.

287. Id. at 754. In citing to Dynes again, Rehnquist went on to argue: The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover. It would be idle to pretend that there are not areas within the general confines of the articles' language
Led by Justice Stewart, the dissenting justices found it anachronistic that non-enumerated common law offenses still existed in American law. Noting that the historic environment during the period of *Dynes* was vastly different than in 1973, the dissent further argued, *Dynes* should be accorded no weight by the Court, and "would retire then from active service." In one respect, Douglas and Stewart succeeded in retiring *Dynes*. In matters of military law and executive authority, *Dynes* has been noticeably absent from Supreme Court decisions since *Parker v. Levy*. For instance, in *Solorio v. United States*, which reversed *O'Callahan*, the Court did not cite to *Dynes*. While the absence of *Dynes* from *Solorio* might have resulted from the lower courts avoiding

which have been left vague despite these narrowing constructions. But even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage.


288. 417 U.S. at 781.

It is true, of course, that a line of prior decisions of this Court, beginning with *Dynes v. Hoover*, supra, in 1858 and concluding with *Carter v. McClaughry*, 183 U.S. 365, in 1902, have upheld against constitutional attack the ancestors of today's general articles. With all respect for the principle of *stare decisis*, however, I believe that these decisions should be given no authoritative force in view of what is manifestly a vastly "altered historic environment."

*Id.* Stewart went on to comment:

In my view, we do a grave disservice to citizen soldiers in subjecting them to the uncertain regime of Arts. 133 and 134 simply because these provisions did not offend the sensibilities of the federal judiciary in a wholly different period of our history. In today's vastly "altered historic environment," the *Dynes* case and its progeny have become constitutional anachronisms, and I would retire them from active service.

*Id.* at 782–83.


290. The majority, authored by Justice Rehnquist noted, "In 1969, the Court in *O'Callahan v. Parker* departed from the military status test and announced the 'new constitutional principle' that a military tribunal may not try a serviceman charged with a crime that has no service connection." *Id.* at 440. But then went on to state, "On reexamination of *O'Callahan*, we have decided that the service connection test announced in that decision should be abandoned." *Id.*
the case, its absence is surprising given the Solario opinion’s detailed historical analysis on the 1776 Articles of War and general American military legal history.\footnote{291}

Nor did the Court mention Dynes in Weiss v. United States,\footnote{292} where it determined that the lack of a fixed term for military judges presiding over courts-martial neither violated the Constitution’s Appointments Clause nor its Fifth Amendment Due Process Clause.\footnote{293} Weiss presented a tailor-made legal issue for the Court to once again cite Dynes as supportive of its position. Normatively, the lower military court cited to Dynes for the proposition that Congress conferred to the executive branch the authority to govern its own judicial system.\footnote{294} Moreover, the government, in its brief to the Court, cited Dynes for the argument that neither the Constitution’s text nor its history requires military judges to serve under fixed terms of office.\footnote{295} However, for reasons not evident in the text of its decision or in the available correspondence between the justices, the Court excluded Dynes from its determination in Weiss. When viewed together, Weiss and Solario hint at a deliberate move away from viewing the case’s utility for any judicial decision.

Although Supreme Court jurisprudence was not the only evidence of the diminution of Dynes, lesser federal courts occasionally turned to the case, though in diminishing numbers. In 1983, the Fifth Circuit Court of Appeals in Wickham v. Hall\footnote{296} cited Dynes alongside a large number of other military cases in determining that a service-member’s fraudulent discharge did not divest

\begin{footnotes}
\footnote{291}{See, e.g., 483 U.S. at 444–50; see also United States v. Solorio, 21 M.J. 512 (C.M.R. 1985), aff’d, 21 M.J. 251 (C.M.A. 1986).}
\footnote{292}{510 U.S. 163 (1994).}
\footnote{293}{Id.}
\footnote{294}{United States v. Weiss, 36 M.J. 224, 239 (C.M.A. 1992).}
\footnote{295}{Brief for the United States at 50, Weiss v. United States, No. 921482 (Aug. 9, 1993). Taking a page from Dynes, the government further argued: [T]he absence of fixed terms for military judges is not an unexamined relic of our common law heritage, but reflects the contemporary and considered judgment of the political branches that judicial tenure is both unnecessary and unwise, This Court should not second-guess that judgment in the guise of applying a due process balancing test.
\footnote{Id.}{Id.} \footnote{296}{706 F.2d 713 (5th Cir. 1983).}}
a court-martial of jurisdiction. In 1983, in *Bozin v. Secretary of the Navy*, the United States District Court for the District of Columbia cited to *Dynes* in upholding the constitutionality of court-martial practice. *Bozin* involved five separate collateral attacks against military law, including the judicial tenure issue raised later in *Weiss* and the "service-connected" jurisdictional requirement eviscerated in *Solorio*. The district court saw no inconsistency between the needs of military discipline and meeting exigencies on the one hand, and the due process rights of service-members on the other.

In 2001, the United States District Court for the District of Columbia in *McKinney v. Caldera* determined it would not, as a collateral matter, investigate claims of prosecutorial misconduct which resulted in a court-martial conviction, through the Administrative Procedures Act. In making this decision, the district court noted *Dynes* for the proposition that courts-martial were a Constitutional instrument for maintaining discipline. In 2005, the Fed-

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297. *Id.* at 718–19. The issue of jurisdiction arose in the context of a constitutional challenge of UCMJ Article 3(b), codified at 10 U.S.C. § 803(b), which enabled the military to assert jurisdiction over former enlisted service-members who fraudulently obtained a discharge from the military. Normally, a discharge precludes further jurisdiction and leaves to the civil courts the prosecution of any crime that occurred while on active duty. *Id.* In *Wickham*, the Fifth Circuit ruled Article 3(b) was constitutional. *Id.*


299. *Id.* at 1465.

300. *Id.* at 1466. The Court, citing *Dynes*, noted:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

*Id.*

301. 141 F. Supp. 2d 25 (D.C. Cir. 2005). McKinney’s court-martial drew a considerable media interest during the time it was held. See, e.g., ABC v. Powell 47 M.J. 363 (C.A.A.F. 1997).


eral Circuit Court of Appeals, in assessing whether a former Air Force physician possessed standing to sue the United States over the question of a prior adverse administrative decision determining disability issues was the last Article III court to cite *Dynes*. In arguing against justiciability, the government had cited the court to a number of pre-UCMJ cases. In a concurring opinion, Judge Plager, citing *Dynes*, remarked:

The doctrine of non-reviewability held sway for a considerable period of time. It was still strong when the two cases cited to us by the Government, were decided. They followed in time a series of cases involving petitions for review of military courts-martial decisions, cases in which the Supreme Court made clear that it would not allow civil court review of the merits of such military tribunals.

Since 2005, the federal courts have not cited to *Dynes* in any military law context. While the military courts of appeal have occasionally cited *Dynes*, generally this has either been the result of the convicted appellant arguing *Dynes* supported reversal of a prior trial court determination or deficiency in appellate review, or to uphold the continued efficacy of non-enumerated common law offenses.

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305. *Id.* at 1185 (Plager, J., concurring) (citations omitted). Judge Prager cited *Dynes* to minimize the importance of two cases cited by the government for the proposition that the judiciary did not possess jurisdiction over the appellant’s claims. The two cases respectively were: *Reaves v. Ainsworth*, 219 U.S. 296 (1911); and *Denby v. Berry*, 263 U.S. 29 (1923).
306. See, e.g., Loving v. United States, 62 M.J. 235, 242 (C.A.A.F. 2004) (holding that the finality of the executive branch’s determination on death penalty execution requires executive determination); United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999) (holding that the UCMJ construct of a court-martial panel is not a denial of Sixth Amendment right to a jury trial in capital cases).
307. See, e.g., United States v. Appel, 31 M.J. 314, 319 (C.M.A. 1990). In upholding charging “fraternization” as an offense under Article 134, the Court of Military Appeals noted, “Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Articles 133 and 134.” *Id.*
CONCLUSION

Although *Dynes v. Hoover* has never been expressly overturned either by legislative act or by the Supreme Court, the status of the case has been significantly narrowed since World War II. Today, *Dynes* exists as an artifact, possessing an indirect influence on contemporary military law practice. Essentially, *Dynes* functions in the narrow medium as it should have: a case which enables Congress to create unique rules for military governance and the executive to manage the military legal process, but subject to judicial review. That is, *Dynes* permits Congress to sustain non-enumerated common law offenses unique to the military.

*Dynes* supported a federalist incorporation of Swedish and British military custom into United States jurisprudence. Undoubtedly, President John Adams and a number of other Federalists would have approved of *Dynes*. But the authors of *Dynes*, Justices Roger Taney and James Moore Wayne, as well as its other two proponents, Caleb Cushing and Ransom Gillet, created a decision contrary to their political ideology: namely, an exclusive arena of executive branch authority. They did so because they assumed *Dred Scott* solved the fundamental tension of slavery, then tearing the country apart, and that the Army could then be used to enforce the Fugitive Slave Act. It was a false assumption, but *Dynes* was never reversed by its authors, nor was there any judicial attempt to do so in the century following the Civil War. Instead, the case served as a bulwark for the military to discipline its forces and to internally develop its own parallel system of justice.

Had Justices Stewart and Douglas discerned the original intent of Taney, Moore, Cushing, and Gillet, they likely would have attacked *Dynes* more forcefully. Therein is the irony of *Dynes*: had Taney, Wayne, Cushing, and Gillet foresaw a Civil War, the Court would have narrowly ruled that non-enumerated common law offenses, while otherwise unconstitutional, could constitutionally exist in the nation’s military laws. Douglas’ assault on *Dynes*, unsuccessfully conducted with the intention of eviscerating the modern military justice system, ultimately reduced *Dynes* to the proper status in which it now exists.