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## **Cause and Effect: The Origins and Impact of Justice William O. Douglas' Anti-Military Ideology from World War II to O'Callahan v. Parker**

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BIG VALUE.**

# CAUSE AND EFFECT: THE ORIGINS AND IMPACT OF JUSTICE WILLIAM O. DOUGLAS'S ANTI-MILITARY IDEOLOGY FROM WORLD WAR II TO *O'CALLAHAN V. PARKER*

JOSHUA E. KASTENBERG\*

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This Article was written with the approach that primary source material is essential to analyze Justice William O. Douglas's intentions toward the military's legal construct. As a result, the Article utilizes original source materials, including the papers, draft opinions, and personal correspondences of Justices William O. Douglas, Harlan F. Stone, Earl Warren, William J. Brennan, Robert H. Jackson, Harold H. Burton, Felix Frankfurter, Abraham Fortas, and Hugo L. Black. Much of this material is publicly accessible and located at the Library of Congress (LOC). Without an emphasis on primary source material, a modern legal history cannot fully have merit. Additionally, in assessing the effect Douglas had on the military's legal construct, this Article juxtaposes Douglas's ideology, as it evolved, against the pronounced political events of his time on the Court. Due to the availability of the primary source material being limited to LOC patrons, it has been verified by the author only.

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Appointed to the United States Supreme Court by President Franklin Delano Roosevelt in 1939, William O. Douglas (1898-1980) was one of the foremost judicial activists in the field of individual rights and constitutional liberties in U.S. history.<sup>1</sup> Perhaps it is not surprising that among the

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1. For a consensus among legal historians on Douglas's individual rights and civil rights jurisprudence, see MICHAEL R. BELKNAP, *THE VINSON COURT: JUSTICES, RULINGS AND LEGACY* 63 (2004); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 194 (2004); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 239-40 (1993); see also Abe Fortas, *William O. Douglas: An Appreciation*, 51 *IND. L.J.* 3 (1975); Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in*

twentieth-century justices, Douglas was also the Court's most outspoken critic of the military's legal construct.<sup>2</sup> Throughout his judicial tenure, which spanned from 1939 to 1975, Douglas was both a principal advocate for reforming the military's legal construct—in particular the military's justice system—and, at the same time, a staunch and often unyielding critic of it.<sup>3</sup> Indeed, over time, his criticism of the military's legal construct increased rather than abated, even as many of the judicially imposed reforms he advocated for were enacted into law.

Douglas's anti-military ideology was not only a companion to his individual-rights and civil-rights ideology, but it was also predicated on a belief in the necessity of limiting what he perceived as an unhealthy expansion of the Executive Branch's power. He believed that a nexus existed between the Executive Branch's assertion of almost exclusive control over the military and its willingness to forgo constitutional checks and ignore popular opinion against policy decisions, such as when or how to commit the Nation into an armed conflict. To Douglas, even in a constitutional democracy, Executive Branch control over the military was a dangerous power requiring judicially imposed limitations. Thus, he sought a constitutional realignment that would, if successfully achieved, expand

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*Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002); Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133 (1991). Ray helpfully summarizes this consensus in her own words:

If Frankfurter wrote for the specialists and Black for the general public, then Douglas in one sense wrote for himself. The Court's premier individualist, Douglas saw himself as the champion of society's outsiders, and his constitutional jurisprudence consistently upholds the rights of minorities, workers, and assorted nonconformists in the face of restrictive statutes and doctrines.

Ray, *supra* at 205.

2. For the purposes of this Article, the term "military's legal construct" refers not only to the disciplinary rules of the military rooted in the Uniform Code of Military Justice (UCMJ), but is more expansive to include the presidential authority over the military, constraints enumerated under the law of war as well as customary international law, and the constitutional checks and balances inherent in the legislative and judicial branches. Although this definition might appear new, as this Article is its first use, its antecedents are deeply rooted in U.S. jurisprudence. *See, e.g.*, GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 1 (2d rev. ed. 1898); WILLIAM CHETWOOD DE HART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL; WITH A SUMMARY OF THE LAW OF EVIDENCE AS APPLICABLE TO MILITARY TRIALS 16 (1863); JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1196-97 (5th ed. 1891); *see also* Chappell v. Wallace, 462 U.S. 296, 300-01 (1983).

3. *See, e.g.*, Noyd v. Bond, 395 U.S. 683, 689-700 (1969).

judicial influence over military affairs, particularly in executive decision-making as to when and how armed conflict would be waged by the Nation's military forces. The Nation's reaction to post-World War II political currents, in particular its political and social response to the rise of Communism as both an internal and external enemy, drove Douglas to an anti-military ideology. Douglas never supported Communism; he believed it had to be defeated by due process and the expansion of constitutional liberties, rather than through a force of military might.

Although Douglas served on the Court through the tenures of four chief justices and was often joined in his anti-military law decisions by his allies, Justice Hugo Black and Chief Justice Earl Warren, his ideology was unique in two respects. With the exception of Warren, the justices who decided to limit military jurisdiction primarily did so on the basis of civil and individual rights, which they believed were lacking in courts-martial, rather than on limiting executive authority. Douglas was unique in that he sought not only to expand, to the maximum extent practicable, individual and civil rights into the military's legal construct and limit military jurisdiction over its service members, but in that he was also determined to undermine the establishment of a unitary executive branch.<sup>4</sup> In this latter respect he was

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4. Douglas was by no means alone in fearing an empowered Executive Branch. However, the term unitary executive did not exist in the Nation's mainstream lexicon. It was referred to as an imperial presidency. For instance, in 1973, political scientist Arthur Schlesinger warned of an imperial presidency, which disregarded the constitutional checks and balances traditional to U.S. politics. See ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* 216-18 (1973); see also ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 211-60 (2005). For a definition of the unitary Executive Branch, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). Calabresi and Rhodes state that "[u]nitary executive theorists claim that all federal officers exercising executive power must be subject to the direct control of the President." *Id.* at 1158; see also Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). Lessig and Sunstein believe that the unitary executive theory is new:

It is a creation of the twentieth century, not the eighteenth. It derives from twentieth century categories applied unreflectively to an eighteenth century document. It ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper.

*Id.* at 2. However, Lessig and Sunstein do not argue that all notions of a unitary executive are constitutionally wrong or unworkable. *Id.*

However, Professor John Yoo, perhaps the leading advocate of the unitary executive theory, argues that "[a] war may be constitutional, even if no declaration

joined by Warren, who also expressed a fear of expansive executive power exuding from its control over the military.<sup>5</sup> But Douglas alone sought to limit the Nation's involvement in an unpopular overseas conflict in Vietnam through judicial activism.<sup>6</sup>

This Article is not a biography of Douglas. Nor is this Article an analysis of courts-martial procedures during the evolution of the military justice system from the pre-World War II Articles of War through the

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of war has issued or if the President acted unilaterally, so long as one branch has not usurped the textually enumerated power of another." *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996). For a criticism of Yoo's thesis, see JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007). According to Goldsmith, a contemporary of Yoo's while serving President George W. Bush, "Yoo believed that when the Constitution vested the 'executive power' in the President, it gave him all of the military powers possessed by the King of England save those expressly given to Congress." *Id.* at 97.

It is this author's contention that Douglas presciently feared the establishment of a unitary executive as advocated for by Yoo and others, but that his judicial activism to diminish the President's command over the military was an unworkable constitutional realignment as much at odds with the founders' intents as is Yoo's thesis.

5. See, e.g., Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962). Despite significant ideological differences with some of his fellow justices, after his death, Douglas was not remembered by all as socially antagonistic. See, e.g., William J. Brennan, *Remembrances of William O. Douglas on the 50th Anniversary of his Appointment to the Supreme Court*, 1 SUP. CT. HIST. SOC. YEARBOOK 1 (1990); see also HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 130-32 (1996). But this was not always the case, and Douglas's mutual animosity to Frankfurter characterized the Court's conference deliberations. See Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L. J. 71 (1988); see also JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR., AND THE ERA OF JUDICIAL BALANCE 255 (1994). John C. Jeffries, a biographer of Justice Louis Powell, observed that Douglas feuded with Frankfurter and openly derided both Warren Burger and Thurgood Marshall, a justice who was his ideological ally. Douglas was far more friendly with Rehnquist than these men despite their differences in judicial ideology. *Id.* at 256. A recent biography of Justice Wiley Rutledge noted that Douglas had particularly warm relations with Rutledge and Frank Murphy, but Robert Jackson and Felix Frankfurter denigrated Douglas, and Douglas came to dislike these two men. See JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 278 (2004). To the extent that personalities on the Court matter in deliberations, these relationships are instructive as to the processes of publishing majority, concurring, and dissenting opinions.

6. See, e.g., Noyd, 395 U.S. 683.

enactment of the Uniform Code of Military Justice and the establishment of Article III judicial review.<sup>7</sup> The intention underlying this Article is to analyze the sources and effects of Douglas's antipathy for the military's legal construct, especially the practice of trial by courts-martial. Douglas did have an effect on the evolution of the military's legal construct, and he almost succeeded in narrowing the military's jurisdiction over its servicemen to a narrow fraction of what its jurisdictional reach is today. Along with Justices Hugo Black, Earl Warren, Felix Frankfurter, William Brennan, and shorter-tenured justices, he succeeded in judicially mandating due-process rights for servicemen accused of offenses.<sup>8</sup> However, in his ultimate goal, the extent to which he succeeded in lessening executive authority in direct matters of military law is questionable. Yet, to date, little analysis exists regarding the relationship between Douglas and the military's legal construct.

There is an important point to demarcate on the nature of military law. From the origins of the Nation through the 1950s military law was considered an area of jurisprudence almost under the exclusive control of the Executive Branch.<sup>9</sup> The U.S. Congress enacted the rules of disciplining soldiers and sailors and legislated appropriations necessary to maintain a military, but the governance of the military under its legal construct was an Executive-Branch zone of exclusivity without comparison to any other domestic legal arena.<sup>10</sup> In 1857, the Court, in *Dynes v. Hoover*,<sup>11</sup> sanctioned the Executive Branch's exclusive dominion over the adjudication of courts-martial and, without so stating, other military trials.<sup>12</sup>

Even before *Dynes*, through Douglas's tenure on the Court, justices frequently turned to legal treatises for guidance. In his final years on the Court, Douglas sought to overturn *Dynes* and lessen the federal judiciary's

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7. For an overview of the evolution of military justice, see Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987).

8. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957).

9. See, e.g., WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (reprint 1920). However, it should be noted that Winthrop also argued that courts-martial were judicial in nature and served as courts of justice. To Winthrop, as a result, courts-martial were bound to adhere to rules of law, including decisions of federal courts. *Id.* at 54.

10. See, e.g., Joshua E. Kastenberg, *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*, 39 U. MEM. L. REV. 595 (2009).

11. 61 U.S. (20 How.) 65 (1857).

12. Kastenberg, *supra* note 10, at 596. *Dynes v. Hoover* was a basis for *Ex parte Vallandigham*, 68 U.S. 243, 254 (1863).

reliance on older military-law texts, as well as to reduce the reach of courts-martial jurisdiction to cases arising in wartime to only offenses unique to the military, such as desertion and crimes committed in overseas installations.<sup>13</sup> Douglas was a keen scholar of legal history, and his decisions on military law were shaped by his interpretations of history. For instance, in a book entitled *An Almanac of Liberty*, he parsed through what he considered the more compelling legal acts and cases in U.S. history.<sup>14</sup> These included the Civil War cases *Ex parte Milligan*<sup>15</sup> and *Ex parte McCordle*.<sup>16</sup> Douglas believed that *Milligan* was “an outstanding declaration of the rights of man” and that *McCordle* was a product of the “military[’s] claim[] [to a] right to try him under the odious Reconstruction Acts.”<sup>17</sup> In essence, Douglas likely believed that because little separation existed between the Executive Branch’s symbolic exclusivity over military law and its actual exclusivity over it, the separation was easily crossed in the name of necessity. Douglas did not degrade the importance of the Nation possessing a military. In 1946, he argued that military service was essential to protecting democratic ideals, particularly when those ideals were challenged by foreign enemies.<sup>18</sup> But he also clarified this statement in writing:

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13. See *Parker v. Levy*, 417 U.S. 733, 766 (1974) (Douglas, J., dissenting).

14. WILLIAM O. DOUGLAS, *AN ALMANAC OF LIBERTY* (1954). Although Douglas criticized the expansion of military authority during the Civil War, he did not do so unequivocally. For instance, Douglas believed that President Abraham Lincoln treated the free press generally within the Constitution’s First Amendment guarantees: “But on the whole, the Civil War period was marked by a degree of tolerance for the press somewhat surprising in view of the fact that the enemy was at the gates and secret societies were operating from within.” *Id.* at 163.

15. 71 U.S. (4 Wall.) 2 (1866). In *Ex parte Milligan*, the Court upheld Lincoln’s suspension of habeas corpus but held that U.S. citizens were not amenable to military jurisdiction in areas where domestic civil courts functioned. For a recent analysis of *Milligan*, see BRIAN MCGINTY, *LINCOLN AND THE COURT* 255-61 (2008).

16. 74 U.S. (7 Wall.) 506 (1868). *Ex parte McCordle* originated with a Mississippi newspaper editor who published inflammatory articles against the Army and Reconstruction. A local Army commander arrested McCordle. After McCordle appealed his arrest, Congress withdrew the Court’s appellate jurisdiction over the case. It must have troubled Douglas that Chief Justice Samuel Chase upheld Congress’s authority to withdraw jurisdiction, particularly the statement, “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this [C]ourt is given by express words.” *Id.* at 514.

17. DOUGLAS, *ALMANAC OF LIBERTY*, *supra* note 14, at 176, 280.

18. *Girouard v. United States*, 328 U.S. 61 (1946). The petitioner in this case, Girouard, was a Canadian-born immigrant seeking U.S. citizenship who was a



The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions.<sup>19</sup>

Part I of this Article traces the evolution of Douglas's anti-military ideology from his youth through the end of the Truman Administration. In World War II, he often supported Roosevelt's expansion of executive authority through the Commander-in-Chief role, but this changed when the war ended. Douglas's anti-military ideology cannot be dissected without understanding its relationship to another political force that existed between the end of World War II and the mid 1960s. In what became known as "McCarthyism," an anti-Communist movement swept through all aspects of U.S. politics.<sup>20</sup> While Douglas did not support Communism, he believed that the nature of the anti-Communist movement both caused and empowered the Executive Branch to not only ignore due-process rights of individual citizens, but it also enabled the Executive Branch to embark on legally questionable military policies.<sup>21</sup>

Part II analyzes Douglas's continued alliance building to reduce the reach of the military's legal construct during the era of civil rights that characterized the Warren Court. It distinguishes Douglas as not only seeking a reduction in executive authority over the military as a matter of individual rights, but also as waging a judicial campaign to reduce the Executive Branch. Part III dissects Douglas's influence and intent in *O'Callahan v. Parker*.<sup>22</sup> This case was the high watermark of Douglas's efforts to curb the Executive Branch. While the unpopular Vietnam War provided a forum for Douglas's ideology, the war, for him, was simply proof of the need to curb the Executive Branch's control over the military because that control undergirded a far greater danger: an Executive Branch

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practicing Seventh Day Adventist. Based on his faith, he declared his refusal to "take up arms in the defense of [the U.S.]." *Id.* at 62. As a result of this answer, the government denied his citizenship application, and he challenged the decision. *Id.* The Court held for Girouard. *Id.* at 70.

19. *Id.* at 64.

20. See, e.g., RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 120-70 (1990).

21. See *infra* Part I.

22. 395 U.S. 258 (1969).

willing to push against its constitutional constraints. Of importance, *O'Callahan* has historically been viewed as a briefly lived case limiting military jurisdiction over service members.<sup>23</sup> But *O'Callahan* represented

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23. Even before the Court overruled *O'Callahan*, in *Solorio v. United States*, 483 U.S. 435 (1987), a legal scholar within the military legal community, in failing to see the broader intent underlying *O'Callahan*, wrote that the decision was “intended to restrict courts-martial jurisdiction to the greatest extent possible over crimes committed within the territorial limits of the United States during peacetime.” See, James B. Thwing, *Trial Counsel Forum: Trial Counsel Assistance Program: Service Connection: A Bridge Over Troubled Waters*, 1986 ARMY LAW. 19, 21 (May 1986); see also Frederick Bernays Weiner, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 57-58 (1989). Weiner was a retired judge advocate and well known scholar of military law. He argued a number of cases cited in this Article before the Court, which are noted on a case-by-case basis. In his article referenced here, he only nominally connected the Vietnam Conflict to the majority's intent in *O'Callahan*, arguing that the decision represented a flawed notion on the part of the majority that courts-martial were grossly lacking in due process.

For another, more contemporary analysis of *O'Callahan*, see also Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 919-20 (2006). Lichtman's analysis is simply that the Court has traditionally deferred to the military and *O'Callahan* was a significant departure from this deference, but the Court's purpose was to secure due-process rights of servicemen. *Id.* The author of this Article does not agree with Lichtman's argument:

[T]he Court has a long history of deferring to military judgment. While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny.

*Id.* at 910. The author's disagreement with Lichtman's article is that it failed to research or analyze the Court's deliberations in the period 1939-1975, and even beyond. It did not make use of the abundant original research, such as personal correspondences, drafts of opinions, and judicial memorandum available at the Library of Congress and other repositories. For further conventional views of *O'Callahan*, see also Cox, *supra* note 7, at 21; John A. Cohan, *Legal War: When Does it Exist, and When Does it End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 290-91 (2004). However, one author correctly argued that *O'Callahan* was an attempt at judicial oversight over the conduct of military operations. See Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L. J. 701, 705-06 (2002). Mazur correctly noted that *O'Callahan* “represents the height of judicial willingness to test the constitutionality of decisions made in the exercise of military discretion. *O'Callahan* also illustrated the careful line the Court once attempted to draw in defining the scope of military

far more than a jurisdictional decision. It was the culmination of Douglas's efforts to restrict presidential authority to enter the Nation into armed conflict.

### I. FROM YOUTH THROUGH WORLD WAR II: A SYNOPSIS OF DOUGLAS'S MILITARY RULINGS

There is little in Douglas's youth, college experience, or legal career that indicated an anti-military propensity. Douglas enlisted in the Army after the U.S. entered into World War I, but during the war he remained in the U.S.<sup>24</sup> Unlike his colleague, Justice Harold H. Burton, Douglas did not experience first-hand the horrors of trench warfare.<sup>25</sup> Nor did he receive a commission like Warren, Black, Frankfurter, and Murphy.<sup>26</sup> Nonetheless, Douglas's military service was laudable in his commanding officer's opinion. On Douglas's discharge papers, Captain Chris Jensen, U.S. Infantry, noted that Douglas possessed "excellent character" and labeled him "a trustworthy soldier in every respect."<sup>27</sup> Moreover, the discharge certificate indicated that the Army intended for Douglas to attend officers' training camp, and only the November 11, 1918 armistice precluded this advancement.<sup>28</sup>

Douglas was born in Minnesota in 1898, but, at the age of three, his family migrated to Yakima, Washington.<sup>29</sup> In 1904, his father died, leaving the family in poverty.<sup>30</sup> Despite the poverty of his youth, he excelled academically, graduated as valedictorian from his high school, and received

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powers granted to Congress and to the Commander-in-Chief under the Constitution." *Id.*

24. EDWIN P. HOYT, WILLIAM O. DOUGLAS: A BIOGRAPHY 19 (1979).

25. Burton saw extensive fighting on the western front during World War I. In the six months between May and November 1918, the U.S. Army, numbering some 1.5 million men in France, suffered 120,000 soldiers killed. For Burton's wartime experiences, see HAROLD H. BURTON, 600 DAYS' SERVICE: A HISTORY OF THE 361ST INFANTRY REGIMENT OF THE UNITED STATES ARMY (1921).

26. For Justice Murphy's military service, see SIDNEY FINE, FRANK MURPHY IN WORLD WAR I (1954). For Justice Black's military service, which included a commission in the artillery, see ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 47-49 (1994).

27. For Douglas's military experience, see Military Discharge Certificate, William O. Douglas (Dec. 20, 1918) (located in Papers of William O. Douglas, Box 1771, Library of Congress) [hereinafter WOD, Box \_\_\_\_].

28. *Id.*

29. See PHILIP J. COOPER, *William O. Douglas: Conscience of the Court*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 163 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

30. *Id.* at 163-64.

a scholarship to attend Whitman College.<sup>31</sup> In 1922, he enrolled in Columbia Law School.<sup>32</sup> Following graduation, he briefly worked at the Cravath firm in New York and then returned to Washington State.<sup>33</sup> Shortly thereafter, he accepted faculty positions at Columbia Law School and then at Yale Law School.<sup>34</sup> After a stint as a member of the Securities and Exchange Commission, he caught President Roosevelt's attention and was appointed as its chair in 1937.<sup>35</sup> In 1939, Roosevelt nominated him to the U.S. Supreme Court.<sup>36</sup>

In his autobiography, written after his retirement from the Court, Douglas expressed that the origins of his dislike of the military dated back to his military service; despite possessing a passionate love of the Nation, Douglas noted:

[M]y own experience in the Army taught me that it was largely the "doughboys" who made the supreme sacrifice. For many of the regular officers, the war had been a way to get promoted. It was the peace that was anathema to the officer corps. I also began to have grave doubts about top generals such as "Black Jack" Pershing, who headed our forces in World War I. I was not sorry to leave the Army.<sup>37</sup>

It is impossible to know whether Douglas's autobiography, written over fifty years after his military service, accurately reflected his beliefs at the times in his life that he referenced. He later equated his distrust of the military with his empathy for striking laborers and the Industrial Workers of the World who were suppressed at times through armed force.<sup>38</sup> Douglas did not leave any correspondences objecting to military service,

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31. *Id.* at 164.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 95 (1974). Douglas also recalled:

At the college ROTC we had a colonel obsessed with two ideas. First, we must become "leaping jaguars," ready with bayonet in hand to run any German through. Second, we must be in the right mood for our role and learn to hate the Germans. How was this to be achieved? By bayoneting dead horses, pretending they were Germans. I had more disgust for the colonel than I had hate for the Germans.

*Id.* at 93.

38. *See id.* at 80-82.

but his expression of distrust towards the military after 1952 accords with sentiments articulated in his autobiography.

*A. Deference to Roosevelt as Commander-in-Chief: Executive Authority, Internment of Citizens, and Selective Service*

During World War II, and in its immediate aftermath, Douglas seldom opposed the Executive Branch's wartime policies on military jurisdiction. In addition to Douglas's recognition of the exigent circumstances of World War II, this may have also resulted from his admiration for Franklin Roosevelt, the President who appointed him first as the Securities and Exchange Commission Director and then to the U.S. Supreme Court.<sup>39</sup> Douglas regularly corresponded with President Roosevelt, even after his Court appointment.<sup>40</sup> In one notable instance, Douglas implored Roosevelt to seek a third term and defeat the likely Republican nominee, Wendell Wilkie, in 1940 because he felt that Roosevelt was the only person who could legitimately threaten Hitler with the Nation's military forces.<sup>41</sup>

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39. See COOPER, *supra* note 29, at 164. Douglas penned, "[O]f the Presidents with whom I served, FDR was the most principled and had the greatest integrity in the political and constitutional sense, for never would he cross the bridge from peace to war by any connivance such as was used in Vietnam some twenty years later." WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 288 (1980). In a brief paragraph entitled, "What I Miss Most About Franklin D. Roosevelt," which was published in *Look Magazine* in 1952, Douglas penned:

FDR was a master of human relations who made the world his field. That is why there were heavy hearts in Asia's rice fields when he died. Since that time, we have been sadly out of touch with the forces that make revolutions. Being out of touch, we do not understand them, and out of that misunderstanding grow the mounting tensions in the world.

William O. Douglas, *What I Miss Most About Franklin D. Roosevelt*, LOOK MAGAZINE, Feb. 1, 1952 [WOD, Box 855]. Douglas was not alone in his reverence for Roosevelt. A biographer of Justice Wiley Rutledge noted that Rutledge did not dissent in the contentious Japanese internment cases out of loyalty for the President. See FERREN, *supra* note 5, at 255-57. Ferren wrote that Rutledge revered FDR and, at some level of consciousness, "was not going to turn his back on his president." *Id.* at 257.

40. In Box 368 of Douglas's papers there are over one hundred personal letters between Roosevelt and Douglas. [WOD, Box 368].

41. Letter from Justice William O. Douglas to President Franklin Delano Roosevelt, July 2, 1940 [WOD, Box 368]. An abbreviated text of the letter evidences Douglas's admiration for Roosevelt and may explain Douglas's reluctance to oppose the President:

Douglas's loyalty to Roosevelt—a loyalty that continued after Roosevelt's death—is evidenced by the fact that he did not dissent in *Yakus v. United States*,<sup>42</sup> a case in which the Court determined that the Congress, as an emergency wartime measure, could delegate to the Executive Branch certain authorities to regulate price controls and prosecute violations as crimes in federal court.<sup>43</sup> In *Cramer v. United States*, Douglas dissented from the Court's reversal of a treason conviction.<sup>44</sup> The Court held that for criminal treason to occur, an overt act beyond meeting with agents loyal to an enemy had to be proven.<sup>45</sup> Likewise, in *Hartzel v. United States*,<sup>46</sup>

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I view it this way. If Hitler licks England (and certainly his chances are at least fair), he will offer "peace to this country" . . . . He will make every possible appeal to American business, to greed for profits, etc. Many in this country already are saying that we could "do business with Hitler" if we only had a chance to do so . . . . To have a "business minded" President in the White House during these critical times would be fatal . . . . Once we started on that course, we would be at Hitler's mercy in world markets and tortured by him on the domestic scene. As a republic, we would face the gravest peril in our history. The Nazi dream of having us by 1944 might well come true. [Wendell] Wilkie would walk into the arms of Hitler as did the Cliveden set. Not only could you prevent that grave disaster. You see the issues clearly and have the public confidence and are the only one who could prevent it.

*Id.* In this same letter, Douglas argued to Roosevelt that New York Mayor, Fiorello LaGuardia, should be Roosevelt's vice presidential candidate, but not Postmaster General James Farley. *Id.*

42. 321 U.S. 414 (1944). The case arose under the Emergency Price Control Act, an anti-inflationary measure that vested an executive agency with the authority to create price controls. *Id.* at 419. The Act conferred jurisdiction to the U.S. District Courts to prosecute individuals who violated price control regulations. *Id.* at 418. The regulations were created by the Executive Branch rather than legislated through Congress. *Id.* at 419. Violations of the regulations, in some instances, were prosecuted criminally rather than civilly. *Id.* at 418.

43. *Id.* at 422-23.

44. 325 U.S. 1, 48 (1945) (Douglas, J., dissenting).

45. *Id.* at 29 (majority opinion). The Court noted:

A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if

Douglas sided with Justices Frankfurter, Robert Jackson, and Stanley Reed in dissenting from the Court's reversal of an espionage conviction.<sup>47</sup> The

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there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.

*Id.* Douglas opposed this view and argued that ample evidence existed to prove treasonous intent. *See id.* at 53-54 (Douglas, J., dissenting). Douglas closed his dissent with a caustic comment: "Such a result makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind." *Id.* at 67. In his 1954 book, *An Almanac of Liberty*, Douglas wrote:

The first treason case ever to be decided by the Supreme Court reached there in 1944 in the midst of World War II. It involved an American citizen charged with having given aid and comfort to Germany in time of war. His conviction was reversed by a divided Court. . . . The accused must have more than an intent to betray; he must translate the intent into action. Each act must have two witnesses. And the act of adherence must confer some actual, tangible benefit on the enemy. So ruled the Court in 1944. The construction given was so restrictive that some thought that no prosecutor would thereafter chance an indictment under the head of treason.

DOUGLAS, *ALMANAC OF LIBERTY*, *supra* note 14, at 347. Douglas did not note that he was a dissenting justice in the case. *See id.* Ironically, it was arguably the restrictive holding in *Cramer* that prevented a large volume of treason trials during the anti-Communist movement's heyday in the 1950s.

46. 322 U.S. 680 (1944).

47. *Id.* at 690 (Reed, J., dissenting). The Court, in reversing the conviction, noted that Hartzel, a World War I veteran, honorably discharged from the Army, and a native-born American, had never been a member of a subversive organization prior to World War II. *Id.* at 682-83. Hartzel mailed his pamphlets to the U.S. Army Air Force Chief-of-Staff, as well as a number of other military organizations. *Id.* at 683-84. The majority recognized the total-war nature of World War II:

We are not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal. For that reason our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty . . . . But the mere fact that such ideas are enunciated by a citizen is not enough by itself to warrant a finding of a criminal intent to violate Section 3 of the Espionage Act. Unless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917.

*Id.* at 689.

two individuals convicted of espionage under the 1917 Espionage Act had, shortly after the Japanese attack on Pearl Harbor, distributed pamphlets designed to undermine the government's efforts in recruiting for the armed forces.<sup>48</sup>

Douglas sided with the majority in *Hirabayashi v. United States*.<sup>49</sup> In that case, the Court upheld a military commander's curfew order directed at citizens and legal residents of Japanese, German, and Italian extraction.<sup>50</sup>

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48. See *United States v. Hartzel*, 138 F.2d 169, 170 (7th Cir. 1943), *rev'd*, 322 U.S. 680 (1944). As characterized by the appellate court, the pamphlets were anti-Roosevelt, anti-Semitic, and anti-British. *Id.* at 173. Hartzel admitted to the trial court that he authored and distributed hundreds of the pamphlets through the U.S. mail. *Id.* at 172-73. One such pamphlet contained a statement which read:

Wilson died an invalid; Roosevelt became president one. What is the social significance of his condition?

A clue is given in the statement that syphilis is "the result of an illness of moral, social and racial instincts" of which prostitution is an integral part. Similarly the breakdown of Wilson after the "peace" was probably connected with reactions from the emotional debauchery of preceding years. It is, therefore, suggested that the epidemic of paralysis in New York State at a later time had a source in the weakening of nervous systems, brought about by the emotional self-masturbation of stories of the "bad" Germans.

Our leader—safe in Washington—escaped the actual horrors of war, but he could not escape the virus of a child's disease. As with syphilis his paralysis is indicative of severe maladjustments within the nation. He reproduces within his body our internal breakdown; he is in fact a degenerate who now seeks ways of having us cure him of his ailment.

Hidden within the present program to save humanity are germs of infantilism, paralysis and death. For we now follow, not a little child, but a man with a child's disease.

*Id.* at 171. Given Douglas's stated affinity for Roosevelt, it is difficult not to conclude that Hartzel's attack on the President did not offend Douglas.

49. 320 U.S. 81, 105 (1943) (Douglas, J., concurring).

50. *Id.* at 92 (majority opinion). The order read,

[A]ll alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew."

*Id.* at 88. Of importance, the Court also held:

The war power of the national government is "the power to wage war successfully." It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the



Although Douglas agreed with the Court's view that in order to wage war successfully the national government could vest in a local military commander the authority to issue orders with criminal sanctions for violators, he wrote a concurring opinion detailing his reasons for the agreement.<sup>51</sup> Unlike the majority opinion, Douglas concentrated on the rights of an individual to challenge a military order based on civil rights rather than on the military's legal position over civilians in wartime.<sup>52</sup>

Notably, Douglas did not publish a dissent in *Korematsu v. United States*,<sup>53</sup> a case for which he later expressed regret.<sup>54</sup> Nor did he join in

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repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

*Id.* at 93 (citations omitted). Within two decades, Douglas significantly departed from the argument that the judiciary could not substitute its judgment for the Executive Branch's ability to wage war.

51. *Id.* at 105 (Douglas, J., concurring). Initially, Rutledge joined with Douglas in the concurrence but then withdrew and authored his own. *See id.* at 114 (Rutledge, J., concurring); FERREN, *supra* note 5, at 244.

52. *See Hirabayashi*, 320 U.S. at 105-09 (Douglas, J., concurring). Douglas argued that the government, at some point, had to create a means for loyal citizens to challenge their detention, since the reasons for the detention were based on the idea that a population sector contained disloyal persons. *Id.* at 108. To Justice Murphy, a number of factors, including Hirabayashi's non-violent Quaker faith, militated against any allegation of danger to national security. *See* SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 437 (1984). Murphy originally drafted a dissent, but Frankfurter convinced him to write a concurrence. *See id.* at 443. Douglas did not find this argument compelling in 1943, but based on his later jurisprudence, it is likely that had *Hirabayashi* been decided after Roosevelt's death, he would have sided with Murphy.

53. 323 U.S. 214 (1944). Chief Justice Harlan Stone assigned Black to write the majority opinion for the reason that Black had, by 1944, become considered as a guardian of civil liberties. *See* FINE, *supra* note 52, at 445. Black was angry with

Murphy's dissent even though Murphy's dissent embodied two themes that Douglas later incorporated into his military-law jurisprudence: civil rights and judicially curbing excessive executive authority.<sup>55</sup> Murphy argued that the majority's decision constituted a legalization of racism.<sup>56</sup> He conceded that in emergencies the decisions of military commanders had to be accorded deference.<sup>57</sup> But, in a caveat, he argued, "At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared."<sup>58</sup> At the time of the decision, Douglas was unmoved by Murphy's impassioned arguments, and though he later considered his reluctance to be a great mistake, he placed the blame for the relocation not on the President but on the military command in the western U.S.<sup>59</sup> Douglas's blame on the military was misplaced and, at best, reflected his regret for siding with General John DeWitt, the military's commander for the Nation's western defenses, who believed that the evacuation and relocation were both necessary.<sup>60</sup> It is true

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this assignment because the decision trammelled civil liberties, and he wanted his reputation to remain as it had been. See NEWMAN, *supra* note 26, at 313-16.

54. See DOUGLAS, THE COURT YEARS, *supra* note 39, at 38-39, 280.

55. See *Korematsu*, 323 U.S. at 234-35 (Murphy, J., dissenting).

56. *Id.* at 233 (arguing that "[s]uch exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism"). In conference, Murphy argued that the U.S. treatment of its citizens of Japanese descent was little different than the Nazi government's treatment of its minorities. See FINE, *supra* note 52, at 443.

57. See *Korematsu*, 323 U.S. at 233-34.

58. *Id.* at 234.

59. DOUGLAS, THE COURT YEARS, *supra* note 39, at 280. Douglas recorded, "Fine American citizens had been robbed of their properties by racists—crimes that might not have happened if the Court had not followed the Pentagon so literally." *Id.* He also argued, tellingly, that *Korematsu* had to be seen in light of *Ex parte Milligan*, a Civil War case determining the extent of military jurisdiction over civilians. *Id.* at 38. *Ex parte Milligan* narrowed the military's jurisdiction over U.S. citizens to places of actual conflict where civil courts were not functioning. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). Douglas penned:

Some think that the famous *Milligan* case—generally limiting the power of military courts to try civilians—would never have been written in the heat of the Civil War but mustered a majority of votes only because it was decided late in 1866 [when the war was over]

. . . .

It may be that [*Korematsu*] . . . would never have been sustained except in the climate of war.

DOUGLAS, THE COURT YEARS, *supra* note 39, at 38 (citation omitted).

60. A concise treatment of the military's role in the internment of Japanese Americans is found in Sidney Fine, *Mr. Justice Murphy and the Hirabayashi Case*,

that DeWitt grossly exaggerated the threat from Japanese persons to Congress, and, as for the thousands of innocent persons, he concluded, "A Jap's a Jap . . . . It makes no difference whether he's an American citizen or not. There is no way to determine their loyalty."<sup>61</sup> But the Army Chief of Staff, the Secretary of War, and President Roosevelt could have stopped the internment of Japanese citizens and nationals residing in the U.S.

Douglas initially drafted a concurring opinion that allowed the President the authority to remove citizens from one geographic area to another in times of national emergency but not the authority to imprison citizens in military encampments, which deprived them of basic liberties.<sup>62</sup> He specifically argued, "While [Korematsu] could not lawfully refuse to be evacuated, he could lawfully resist the indefinite detention which was in store for him if he submitted."<sup>63</sup> Importantly, his circulated draft dissent contained language acquiescing to the perceived needs of military security on the West Coast:

And in any aspect of the matter, it was a military decision which I do not believe we can disturb unless it had no substantial report as an espionage or sabotage measure. I think it plain that it had such support, unless we attribute to the military the selfish reasons which certain groups had for welcoming the evacuation. That we should not do, as the military decision had every earmark of good faith.<sup>64</sup>

More accurately than his blame on the military for the internment, Douglas later claimed that Black and Frankfurter bullied him from writing the dissent.<sup>65</sup> There is an important point in Douglas's alliance with both

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in THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS 76-78 (1994). It is important to note that General DeWitt and Justice Black were friends, dating back to Black's Senate tenure. NEWMAN, *supra* note 26, at 314. Roger K. Newman, one of Black's biographers, noted, "Black's faith in DeWitt added to his belief that the commander in the field had the right and the power to make the decision who should remain in an area." *Id.*

61. NEWMAN, *supra* note 26, at 313. The Court did not know of this comment. See FERREN, *supra* note 5, at 254. DeWitt had previously testified before Congress on the military necessity of the internment and had claimed, falsely, that Japanese Americans were detected signaling enemy ships from the coast and "conducting other subversive activities." *Id.* at 255.

62. William O. Douglas, draft dissent in *Korematsu*, circulated to the Court on Dec. 1, 1944 [WOD, Box 114].

63. *Id.*

64. *Id.*

65. DOUGLAS, THE COURT YEARS, *supra* note 39, at 280; see also BALL, *supra* note 5, at 176-77. Roger Newman accurately wrote of Black:

Black and Frankfurter. Douglas viewed Black as his closest ally on the Court, though during the Vietnam conflict Black refused to join Douglas in his attempts to judicially terminate the war, and during the height of the Vietnam conflict the two men spent three years without socially speaking.<sup>66</sup> Black's refusal placed him squarely in the individual-rights arena with regard to the military's legal construct. Unlike Douglas, Black did not see the judiciary's role as a means to check the executive's almost exclusive authority over the armed services to terminate the Nation's involvement in the Vietnam Conflict.<sup>67</sup> Whether Black ever harbored any regrets for *Korematsu* is unknown because, long after the war, he publicly argued that the Court's decision was correct.<sup>68</sup>

Douglas respected Frankfurter and considered him one of the Court's brightest justices in its history.<sup>69</sup> However, although the two men occasionally agreed on the outcome of cases, Douglas and Frankfurter developed an antagonism for each other.<sup>70</sup> Douglas later penned, "Most of Frankfurter's decisions at the constitutional level were eroded within a few years after he retired, in 1962, only to be refurbished when the Nixon appointees arrived."<sup>71</sup> Ironically, Douglas's description of Frankfurter's short-lived influence is precisely what occurred with Douglas's efforts to curb the military's legal construct in *O'Callahan*.

The same day that the Court decided *Korematsu* it also decided *Ex parte Endo*.<sup>72</sup> Douglas's role in *Endo* is as notable as it was in *Korematsu*, as he authored the majority's opinion.<sup>73</sup> He began the decision with a recitation, similar to that in *Hirabayashi*, of the reasons for the relocation

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Black wanted to immunize the military in wartime completely from judicial review. He looked at the case as one of administrative finality. General DeWitt's decision, he told his clerk, was the same as if it had been made by a court or regulatory agency.

NEWMAN, *supra* note 26, at 316.

66. NEWMAN, *supra* note 26, at 599-600.

67. *See id.* at 617.

68. JOHN R. VILE, GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 75 (2003).

69. *See* DOUGLAS, THE COURT YEARS, *supra* note 39, at 22-23. Douglas also noted that "[e]arly in his career [Frankfurter] was identified with leftist causes, notably the Sacco-Vanzetti case. But Frankfurter was not a leftist; he was always identified with the Establishment, though insistent that the Establishment proceed with meticulous care when it moved against a miscreant, whether he be left or right." *Id.* at 21.

70. BELKNAP, *supra* note 1, at 64.

71. DOUGLAS, THE COURT YEARS, *supra* note 39, at 21.

72. 323 U.S. 283 (1944). *See also* *Korematsu v. United States*, 323 U.S. 214 (1944).

73. *Id.* at 284.

of citizens of Japanese ancestry.<sup>74</sup> Douglas, however, ensured that the petitioner, Mitsuye Endo, was judicially noticed as a "loyal and law-abiding citizen" who had been forced into a relocation camp and, despite efforts to prove her loyalty, was unable to secure release.<sup>75</sup> But Douglas did not criticize the reasons for forced relocation or even reach a constitutional question regarding the internment camps.<sup>76</sup> Indeed, he did not criticize the military's role in the internment.<sup>77</sup> As in the case of *Korematsu*, he later claimed that the lack of criticism of the military occurred as a result of Frankfurter and Black putting pressure on him.<sup>78</sup>

Yet, unlike the result in *Korematsu*, Douglas determined that the government could not continue to intern citizens whose loyalty to the Nation was proven.<sup>79</sup> Also, unlike in *Korematsu*, Douglas articulated language that, while not condemning racism, made clear that loyalty to the U.S. was not a matter of race. "Loyalty is a matter of the heart and mind, not of race, creed, or color," he argued.<sup>80</sup> To Murphy, Douglas's determination did not go far enough, and he argued that any acceptance of constitutional authority to detain individuals based on ancestry or race was an "unconstitutional resort to racism."<sup>81</sup> What Murphy articulated in *Endo* Douglas later adopted in his civil rights jurisprudence. But Douglas's decision to refrain from criticizing Roosevelt's war policies resulted in diminishing Murphy's abilities to influence the introduction of greater due process into military law.

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74. *Id.* at 285.

75. *Id.* at 293-95.

76. *Id.* at 297. Instead, Douglas wrote,

It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan*, or in *Ex parte Quirin*, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings.

*Id.* (citations omitted).

77. *Id.* at 296-97.

78. DOUGLAS, *THE COURT YEARS*, *supra* note 39, at 280.

79. *Endo*, 323 U.S. at 302. Instead of criticizing the military's role, Douglas's decision stated,

Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.

*Id.* at 298.

80. *Id.* at 302.

81. *Id.* at 307-08 (Murphy, J., concurring).

### B. Selective-Service Cases

In addition to *Korematsu* and *Endo* showing Douglas's support of Roosevelt's war policies, Douglas's opinion in one prominent selective-service case that arose during the war evidenced his view that Roosevelt's wartime conscription policies were largely conducted within constitutional parameters. In *Falbo v. United States*,<sup>82</sup> a case determining whether a citizen who claimed conscientious-objector status was amenable to federal criminal law for a failure to "report for assignment to national service," Douglas sided with the majority opinion, upholding the legality of the selective-service process and, in effect, Falbo's conviction.<sup>83</sup>

The petitioner in that case argued that because the classification determinations of local selective-service boards were not subject to judicial review, the Selective Service Act requiring his attendance was unconstitutional.<sup>84</sup> Relying on *Martin v. Mott*,<sup>85</sup> a case arising from the War of 1812 that Douglas later found antiquated, the majority found that there was no constitutional requirement to enable individuals to challenge their local selective-service board determinations, though any final determination of amenability to military service was a different matter.<sup>86</sup>

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82. 320 U.S. 549 (1944), *reh'g denied*, 321 U.S. 802 (1944) (explaining that Falbo was convicted of violations of the Selective Service and Training Act of 1940 and sentenced to one year in prison).

83. *Id.* at 550-51, 555.

84. *Id.* at 554.

85. 25 U.S. (12 Wheat.) 19 (1827).

86. *Falbo*, 320 U.S. at 554 (summarizing *Mott*'s holding that "Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense"). However, *Mott* is worthy of note because it described the Executive Branch's authority in national emergencies, an authority Douglas later took exception to:

The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. 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 jeopard[ize] the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services

The majority also noted, however, that the local board determination of classification was only an intermediate step in an induction process into armed service, non-combatant duty, or national service and that judicial intervention was possible after a final determination of status.<sup>87</sup>

*Falbo* was decided on January 3, 1944.<sup>88</sup> On March 27 of the same year, the Court decided *Billings v. Truesdell*, a case authored by Douglas that narrowed the military's jurisdictional reach to citizens lawfully conscripted but not fully inducted into it.<sup>89</sup> In that case, Arthur G. Billings, a citizen, disagreed with his local board's determination of his amenability to military service.<sup>90</sup> He considered himself a conscientious objector, but not wanting to incur civil penalties, he protested administrative determinations of his fitness while meeting all legal requirements of mustering for duty.<sup>91</sup> At Fort Leavenworth, Billings refused to undertake an oath of military service or to be fingerprinted, and that is when Army officials notified him that he was already inducted into the military.<sup>92</sup> Billings disagreed with the local commander's view that he was already within military jurisdiction and continued to refuse to take the induction oath.<sup>93</sup> The Army charged him under the Articles of War with refusing to

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in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy."

*Mott*, 25 U.S. at 30 (quoting THE FEDERALIST NO. 29 (Alexander Hamilton)).

87. *Falbo*, 320 U.S. at 553 ("[A] board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.").

88. *Id.* at 549.

89. 321 U.S. 542 (1944). Billings's Socialist Party political affiliations, if known at the time of his induction activities, would have likely kept him from service. See, e.g., SUSAN R. RICHARDSON, *Reds, Race, and Research: Homer P. Rainey and the Grand Texas Tradition of Political Interference, 1939-1944* in 24 PERSPECTIVES ON THE HISTORY OF HIGHER EDUCATION 125, 158 (Roger L. Geiger ed., 2005). In 1944, he ran for the U.S. Senate as a Socialist Party candidate in Kansas. *Id.* In his court hearing, he testified that he believed Japanese and German atrocities were grossly exaggerated, if not fictitious. *Id.* After the war, he was removed from his faculty position. *Id.*

90. *Id.* at 543-44.

91. *Id.* at 544 (explaining that the local board found Billings unfit for service because of poor eyesight; however, the board of appeals reassessed this decision and found him amenable to military service); see also *Billings v. Truesdell*, 135 F.2d 505 (10th Cir. 1943).

92. *Ex parte Billings*, 46 F. Supp. 663, 664 (D. Kan. 1942).

93. *Id.*

obey lawful orders.<sup>94</sup> After filing a habeas writ, both the district court and appellate court determined that despite his refusal to undertake an oath, Billings was lawfully within the military's jurisdiction.<sup>95</sup>

Although both lower courts agreed that Billings had not taken the oath and recognized that the oath was a legal requirement to be amenable to military jurisdiction, they sided with the Army's argument that because the refusal to take the oath took place on a military installation, the Army possessed a limited jurisdiction over him.<sup>96</sup> Douglas disagreed, although he found a statutory and not a constitutional basis for Billings's status.<sup>97</sup> Indeed, he conceded that originally the Articles of War would have conferred jurisdiction to the Army over persons such as Billings.<sup>98</sup> But because Congress had vested "in the civil courts exclusive jurisdiction over all violations of the Act prior to actual induction," Douglas determined that the conviction required reversal.<sup>99</sup> Thus, in 1944, Douglas believed that the

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94. *Id.*

95. *Id.* at 664, 669. See also *Billings*, where the appellate court held that: When a selected man has reported for induction and been transported to the induction station and found acceptable, induction is not a matter of choice with him. Being subject to compulsory training and service, having reported for induction, and having passed the requisite examinations, it is the duty of the military authorities immediately to induct him and he cannot avoid induction by refusing to take the oath. The regulations, in effect, provide that refusal to take the oath shall not alter in any respect the selected man's obligation to the United States.

135 F.2d at 507.

96. *Billings*, 321 U.S. at 544-45; see also *Billings*, 135 F.2d. at 507.

97. *Billings*, 321 U.S. at 545-47.

98. *Id.*

99. *Id.* at 547. In a concurrence, Frankfurter articulated that the legal point of actual induction was too vague and the case required reversal. Specifically, he noted:

Under the Selective Service Act of 1940, unlike that of 1917, a selectee is not subject to trial by a military court martial until he has been "actually inducted" for training and service. But Congress did not define when he was so "inducted." It thus left to judicial construction when the civilian status ceased and the military status began. In a matter of this sort, involving as it does the process of compulsory recruiting of the nation's Army in the midst of war, it is of vital importance that the line be drawn as definitely as the legislation reasonably permits in order that ambiguity and controversy be reduced to a minimum.

*Id.* at 559 (Frankfurter, J., concurring).



Constitution granted wide authority to the Executive Branch, coupling military jurisdiction and conscripted citizens.

Almost immediately after the war's conclusion, Douglas sought further clarity to *Falbo*. He authored the majority opinion in *Estep v. United States*,<sup>100</sup> a decision that placed limits on the government's authority to prosecute individuals who refused to submit to military induction after the individuals exhausted all administrative avenues for redress. *Estep* and one other petitioner were Jehovah's Witnesses who claimed conscientious-objector status in compliance with the Selective Service Act.<sup>101</sup> However, the local boards and all other administrative hearings ruled against the two men.<sup>102</sup> Although both men reported on the date ordered for Navy duty, each refused to be inducted into military service.<sup>103</sup> At trial, both petitioners sought to defend on the ground that the local boards exceeded their statutory authority in classifying them as eligible for duty.<sup>104</sup> The trial courts refused these defenses, and both men were convicted.<sup>105</sup>

In a memorandum to his fellow Justices, prior to circulating a draft opinion, Douglas argued first that religious rights were the central issue for the Court to consider and second that the civil effects of convictions based on arbitrary decisions by the selective-service boards were not warranted in such instances as the case presented.<sup>106</sup> Douglas did not want, for example, *Estep* to lose the right to vote simply because, as a Jehovah's Witness, he sided with his faith against military service.<sup>107</sup>

Within his concern for religious rights, Douglas's decision rested on a broad principle that individual rights in conflict with the Executive Branch were proper matters for judicial review.<sup>108</sup> He recognized that the Selective Service Act did not expressly grant individuals access to the courts.<sup>109</sup> Yet he refused to accept congressional silence as a blanket approval for the boards to make determinations on individual cases without checks and

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100. 327 U.S. 114, 115 (1946).

101. *See id.* at 116-17.

102. *Id.*

103. *Id.*

104. *Id.* at 117-18.

105. *Id.*

106. Memorandum from Douglas to the Court (undated) [WOD, Box 130].

107. *Id.* Douglas was troubled by the lack of legislative history on religious exemptions for Jehovah's Witnesses within the Selective Service Act. He noted, "[T]his particular question did not receive much attention in the debates, either in the Senate or the House." *Id.*

108. *Id.*

109. *See Estep*, 327 U.S. at 121-22.

balances, particularly because some determinations exceeded a board's lawful authority.<sup>110</sup>

Although *Estep* later provided Douglas a springboard to narrow the Executive Branch's ability to wage war, it does not appear that he contemporaneously considered the case as providing such a possibility. In the twenty years after *Falbo*, Douglas's record in selective-service cases was mixed.<sup>111</sup> In 1947, Douglas authored *Sunal v. Large*,<sup>112</sup> an opinion that denied habeas to a petitioner who had been precluded from the same defense raised in *Estep*.<sup>113</sup> Timeliness was the basis for Douglas's denial.<sup>114</sup> Later, in *Witmer v. United States*,<sup>115</sup> the Court found that the board's denial of exemption from national service, based on conflicting claims of ministerial status, did not give rise to a rights violation.<sup>116</sup> Along with Black, Douglas dissented without comment.<sup>117</sup> In *Sicurella v. United States*,<sup>118</sup> the Court determined that exemption from military service based on conscientious-objector status did not require a person's faith to oppose all wars.<sup>119</sup> Here, Douglas sided with the majority's determination.<sup>120</sup> And,

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110. *See id.* The Court held,

We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency.

*Id.* at 122.

111. *See infra* notes 112-22 and accompanying text.

112. 332 U.S. 174 (1947).

113. *Id.* at 175-76.

114. *See id.* at 177-79, 181, 183-84.

115. 348 U.S. 375 (1955).

116. *See id.* at 382-83. The Court also took note that the petitioner attempted to obtain an agricultural exemption based on a specious claim. *Id.* at 382.

117. *Id.* at 384 (Douglas, J., dissenting).

118. 348 U.S. 385 (1955).

119. *See id.* at 390.

120. *Id.* at 385. Instructively, the Court held:

The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars

in *United States v. Seeger*,<sup>121</sup> Douglas concurred that conscientious objection to military service could be validly based on non-conventional beliefs.<sup>122</sup>

### C. Military Trials of Civilians, Saboteurs, and War Criminals

A number of other World War II-era decisions evidence that Douglas almost uncritically supported Roosevelt as a wartime Commander-in-Chief and was not yet hostile to the military's legal construct or the assertion of executive authority in wartime. In *Ex parte Quirin*,<sup>123</sup> Douglas wholeheartedly agreed with the majority's determination that the President possessed the constitutional authority to prosecute German saboteurs captured on U.S. soil in a military trial.<sup>124</sup> However, during the deliberations, Frankfurter insisted that the captured saboteurs could be summarily executed and that Chief Justice Stone, the author of the opinion, should state this fact in the decision.<sup>125</sup> Douglas disagreed, writing to Stone

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between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.

*Id.* at 390-91. Finally, in *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233 (1968), a case arising out of a board's denial of a conscientious-objector claim, Douglas extended the judiciary's authority to review board determinations prior to the filing of criminal charges for failure to report. *Id.* at 239.

121. 380 U.S. 163 (1965).

122. *Id.* at 188-93 (Douglas, J., concurring). Douglas articulated an argument that the requirement of a conventional belief in a higher being would result in discrimination against religions older than Christianity. *Id.* at 188-89. But he did not attack the Selective Service Act or conscription in general in this particular case. Significantly, he argued, "In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute." *Id.* at 192-93.

123. 317 U.S. 1 (1942).

124. *See id.* at 26, 48.

125. Frankfurter's insistence on the Court's recognition that summary execution was a legal and viable alternative to a military trial for unlawful combatants is found in a memorandum drafted by Frankfurter to read as a play. Known as "Frankfurter's Soliloquy," he used phrases towards the German saboteurs such as "curs," who "should be hung." The "Soliloquy" can be found in WOD, Box 77. Frankfurter's involvement in the case included extrajudicial advice to Secretary of War Henry Stimson on the creation of the military tribunal to prosecute the captured saboteurs. *See* MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON* 60 (Univ. of S.C. Press 1997). Frankfurter recommended to Stimson that the tribunal consist of military officers only and be administered by the War Department as opposed to the Justice

his insistence that no reference to summary execution be made in the published decision and that the published decision stress the rule of law.<sup>126</sup>

As a result of Douglas's insistence, the opinion contains the sentence: "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful"; there is no reference to summary execution.<sup>127</sup> In influencing the published decision, Douglas upheld Roosevelt's policy toward captured unlawful combatants without expanding the President's authority beyond what was challenged and without creating an unnecessary controversy with the inclusion of language on the right to summarily execute saboteurs.

Three years after *Quirin*, in *In re Yamashita*,<sup>128</sup> Douglas joined the majority in determining the military's jurisdiction to prosecute law-of-war offenses continued after the Japanese surrender and with little judicial oversight.<sup>129</sup> Like Nazi defendants tried at Nuremburg, Yamashita was

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Department. See *id.* Frankfurter's arguments for summary execution were in the minority.

Since the formation of the Constitution, few military officers, and never the Judicial Branch, have advocated for summary execution or lengthy prison sentences without trial. See David G. Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 79-80 (2005).

126. Memorandum from Justice William O. Douglas to Chief Justice Harlan F. Stone, (October 17, 1942) [WOD, Box 77]. Douglas disagreed with Frankfurter's arguments. Douglas's memorandum to Stone is as follows:

I would like to see the sentence which I have underlined on pg. 6 omitted. That sentence is susceptible of the interpretation that it would have been lawful for the Executive to have disposed of the petitioners summarily without a trial by a tribunal. That may be true, although if I had to vote today, I would be inclined to vote the other way. The proposition however, is not before us and I think that the omission of that sentence would not detract from the force and substance or the paragraph at the bottom of pg. 6.

*Id.*

127. See *Quirin*, 317 U.S. at 31.

128. 327 U.S. 1 (1946).

129. See *id.* at 8, 11-13. *Homma v. Patterson*, 327 U.S. 759 (1946), a similar case, decided concurrently with *In re Yamashita*, did not generate a lengthy opinion. In that case, the Court denied certiorari for the same reasons as in *Yamashita*. See *id.* at 759. However, Justices Murphy and Rutledge dissented in that case as well. *Id.* Douglas penned a memorandum to the other justices detailing his agreement with the majority in *Homma*. See Memorandum from Justice William O. Douglas on *Homma*, (1946) [WOD, Box 128]. *Homma*'s argument involved the fact that he commanded an army, which humiliatingly defeated

accused of war crimes that had not been expressly enumerated under any treaties<sup>130</sup> but were arguably common-law offenses in international law by 1939.<sup>131</sup> However, little jurisprudence existed on the issue of command responsibility to prevent atrocities, and Yamashita's failure to stop his forces from committing atrocities was one gravamen of the charges against him.<sup>132</sup>

Unlike the Nazis prosecuted in international tribunals, Yamashita was prosecuted in a wholly U.S. military commission for law-of-war offenses, which were drafted by U.S. Citizens with no allied oversight.<sup>133</sup> It was a tribunal similar to the Civil War military trials of Captain Henry Wirz, the superintendant of the Andersonville Prison, and individuals accused in the

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MacArthur's forces in the Philippines in 1941-1942. *Id.* As a result of this, MacArthur sought revenge, rather than a fair trial. Douglas dismissed this argument and responded:

Petitioner contends that he has been denied a fair trial because General MacArthur, whom he defeated, has appointed the commission, ordered the trial, and will be the reviewing authority. The substance of this seems to be that because of personal animosity, MacArthur will deprive him of the right to be tried fairly. There is no merit in this contention. If it were to apply here, I suppose that the same rationale would be greatly applicable to any trial of a former belligerent.

*Id.* Rutledge compared *Homma* to the Nazi and Russian purge trials. *See* FINE, *supra* note 52, at 459-60.

130. *See Yamashita*, 327 U.S. at 13-14. Yamashita was charged with failing to "control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies." *Id.* Yamashita's army massacred a large part of the civilian population, killed prisoners of war, and destroyed religious movements. *Id.* at 14.

131. *See* ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW, WITH A POSTLUDE ON THE EICHMANN CASE* 230-32, 235, 239, 245 (1962); William H. Parks, *Command Responsibility For War Crimes*, 62 MIL. L. REV. 1, 19-20 (1973); *see also* Report of Robert H. Jackson to the President, *Atrocities and War Crimes* (June 7, 1945), *reprinted in* 12 Dep't St. Bull. 1071 (1945).

132. *See Yamashita*, 327 U.S. at 13-14; *see also* Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 448 (2008) (noting that Yamashita was controversially convicted and hanged for failing to control those under his command and permitting them to commit brutal atrocities).

133. *See Yamashita*, 327 U.S. at 5.

conspiracy to assassinate President Abraham Lincoln.<sup>134</sup> In his defense before the Court, Yamashita asserted that the Executive Branch lacked jurisdiction to prosecute him in a military trial because the war had already concluded.<sup>135</sup> He also argued that the military commission lacked the due-process guarantees found in the Fifth Amendment, namely that he was charged with *ex post facto* offenses, and that the trial was contrary to the long-standing axiom of *nullum crimen sine lege*.<sup>136</sup> The majority determined that because the charges and evidence were outside of the Court's jurisdiction, it would not rule on that particular issue.<sup>137</sup> In siding with the majority, Douglas did not believe that the military tribunal's lack of due-process safeguards commonly found in civil trials were a matter of judicial concern.<sup>138</sup>

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134. See LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 62-63, 65-66 (2005) (explaining that Wertz was tried by a "nine-member military tribunal" and that the persons accused of assassinating Lincoln were also tried by a military commission composed of nine officers). For a recent expansive treatise on the military trial of the persons accused as conspirators in Lincoln's assassination, see ELIZABETH D. LEONARD, *LINCOLN'S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR* (2004).

Douglas believed that the Lincoln assassination conspirators were unconstitutionally prosecuted and sentenced in a military commission. See WILLIAM O. DOUGLAS, *THE ANATOMY OF LIBERTY: THE RIGHTS OF MAN WITHOUT FORCE* 32 (1963).

135. See *Yamashita*, 327 U.S. at 6.

136. *Id.* The majority disagreed and held that the offenses were properly constituted. See *id.* at 14-17. "*Nullum crimen sine lege*" translates to no crime without a law. See Theodore Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L., 817 (2005).

137. *Yamashita*, 327 U.S. at 22. The Court held:

For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied.

*Id.*

138. FINE, *supra* note 52, at 453-56. Of importance to Douglas's evolution to antipathy against the military's legal construct, Hugo Black threatened to depart from the majority when Chief Justice Stone initially wrote that military commission comported with due-process requirements in the Fifth Amendment. Black vehemently opposed this and argued that if the issue rested on due process, the

Justices Frank Murphy and Wiley Rutledge separately dissented from the majority's opinion, and, as in the case of their dissents in *Korematsu*, both justices used due-process language that Douglas later incorporated into his anti-military jurisprudence. Notably, Douglas did not consider Rutledge's criticism of due-process defects within Yamashita's tribunal a matter for judicial concern.<sup>139</sup> In light of his later positions, Douglas's

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commission was deficient, and that he would join Murphy's dissent. In an unpublished concurrence, Black argued,

I am wholly unable to agree with the Court's evaluation of our system of trial by jury. If the Due Process Clause applied to the proceedings here challenged, I could not justify them on the ground that "army officers are better trained," to disregard unreliable and to weigh conflicting evidence than are "untrained jurors." For it so happens that those liberty loving, and I think wise people, who were responsible for the Bill of Rights did not provide that officer, but did provide that jurors should resolve disputed testimony in cases involving life and liberty tried in our courts.

Unpublished Concurrence of Hugo Black on *In re Yamashita* (undated) (Located in Hugo Lafayette Black Papers, Box 283, Library of Congress [hereinafter Black, Box \_\_\_]). Black also argued that the excessive reliance on hearsay in Yamashita's trial violated the Sixth Amendment's confrontation clause. *Id.* He believed that absent a treaty or law, because Yamashita's trial was inherently part of war, the President had the authority to conduct the trial without judicial review. *Id.* While this argument may appear tangential to the subject of this Article, Douglas later insisted that Black reiterate his commentary on jurors in the *Reid v. Covert* and *Ex rel. Toth v. Quarles* cases explained *infra*.

Because of a desire to show unity, the Court determined that questions over the fairness of the tribunal were beyond its jurisdiction. *Id.* at 156. *See also* FERREN, *supra* note 5, at 317. That Douglas remained aloof to this argument might suggest that he initially sided with Stone and believed the commission entirely fair. This belief, however, did not last into the 1950s. In his ALMANAC OF LIBERTY, Douglas wrote of the war crimes trials:

By our standards, no one can be tried for violating an *ex post facto* law . . . . [T]he crimes for which the Nazis were tried had never been formalized as a crime with the definitiveness required by our legal standards . . . , nor outlawed with a death penalty by the international community. By our standards that crime arose under *ex post facto* law. Goering et al deserved severe punishment. But their guilt did not justify us in substituting power for principle.

DOUGLAS, ALMANAC OF LIBERTY, *supra* note 14, at 96.

139. *See* [WOD, Box 127]. Rutledge argued,

These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most flagrant, of departure not only from the

acceptance of the Court's dicta that military commissions' evidentiary rulings, and the actual conduct of the procedure, *were* beyond the Court's authority to review is surprising.<sup>140</sup> Less surprising is that Douglas did not join Murphy's dissent. Murphy criticized the Court's majority opinion as violating due process for what he believed to be a fictitious military necessity.<sup>141</sup> Had Yamashita been tried in a military commission in 1969, Douglas would certainly have sided with Rutledge in *Hiatt*. In 1946, Douglas sided with the majority in overturning the military trials of civilians in Hawaii.<sup>142</sup>

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express command of Congress against receiving such proof but from the whole British-American tradition of the common law and the Constitution.

*Yamashita*, 327 U.S. at 54-55 (Rutledge, J., dissenting). In a memorandum to Professor John Frank at Indiana University's law school and shared with Douglas, Rutledge penned, "[A] dissenter is apt to exaggerate in his view of what the majority do. Maybe I do so here. Nevertheless, in my honest and I hope sober judgment, this case will outrank *Dred Scott* in the annals of the Court." Memorandum from Justice Rutledge to John Frank (1946) (Located in the Wiley Rutledge Papers, Box 137, Library of Congress [hereinafter Rutledge, Box\_\_]). For a short period, Rutledge's fears that *In re Yamashita* would be used against American servicemen were well founded. In *Hiatt v. Brown*, the Court cited *In re Yamashita* for the proposition that its jurisdiction over courts-martial was limited. See *Hiatt v. Brown*, 339 U.S. 103, 111 (1950).

140. See HOWARD BALL & PHILLIP COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 124 (1992). In light of his later positions, it is odd that Douglas agreed with the Court's statement:

[T]he commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied.

*Yamashita*, 327 U.S. at 23.

141. *Yamashita*, 327 U.S. at 28 (Murphy, J., dissenting).

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today.

*Id.*

142. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Justice Black authored the majority opinion in *Duncan*. Douglas joined the majority and did not leave in personal correspondences any reasoning for doing so. Moreover, the Court's



Perhaps most surprising is that Douglas opposed the Court granting Yamashita's case review at all. In a memorandum to Chief Justice Stone, forwarded to Rutledge, Douglas dissented from the Court's grant of arguments to Yamashita's defense counsel.<sup>143</sup> It is not apparent that Douglas ever mentioned this point in his autobiographies or other biographical materials on Douglas cited throughout this Article, and they make no mention of Douglas's opposition either. However, mention of Douglas's opposition to granting arguments in *Yamashita* appears in Professor Sidney A. Fine's biography of Justice Frank Murphy.<sup>144</sup>

Shortly after *Yamashita*, Douglas began to argue for the Court to possess jurisdiction to review the jurisdictional reach of international-war-crimes tribunals, although his efforts resulted in no formal decisions.<sup>145</sup> Two years after *Yamashita*, Douglas took cognizance of Rutledge's concerns regarding the expansion of military jurisdiction in his concurring

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conclusion in overturning the military trials, which read, "Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy," must have satisfied Douglas at the time *Yamashita* was decided that the case posed little threat. *Id.* at 322.

143. Memorandum from Justice William O. Douglas to Chief Justice Stone (Dec. 20, 1945) [Rutledge, Box 137]. Douglas's memorandum to the judicial conference reads, "I am asking that the following be added to the order in the *Yamashita* Cases: Mr. Justice Douglas Dissents from the order of the Court setting these applications for oral argument." *Id.*

144. FINE, *supra* note 52, at 453. Fine does not cite to the actual memorandum to Stone, but instead wrote:

[Douglas] requested that the order calling for oral argument state that he dissented from the decision. The chief justice Reed, Frankfurter, [and] Burton . . . met with Douglas to explain that since the order had already been forwarded to Manila, it would be "silly" for him to dissent and would only "emphasize the dissension" on the Court.

*Id.*

145. See, e.g., *Milch v. United States*, 332 U.S. 789 (1947); *Everett v. Truman*, 334 U.S. 824 (1948); *In re Ehlen*, 334 U.S. 836 (1948); *In re Stattman*, 335 U.S. 805 (1948). In these cases, the Court denied certiorari. Chief Justice Vinson, and Justices Frankfurter, Burton, and Reed argued that it did not possess jurisdiction to review cases decided by international tribunals. Justices Douglas, Black, Murphy, and Rutledge argued that the Court had to at least rule on the expanse of the jurisdiction. Justice Jackson recused himself from these cases because of his participation on the International Military Tribunal at Nuremberg. As a result of the split in voting, no decision was published.

opinion in *Hirota v. MacArthur*.<sup>146</sup> In *Hirota*, the majority held that former Japanese Army officers and government officials prosecuted in military commissions for war crimes could not seek relief in U.S. courts.<sup>147</sup> Douglas concurred in this opinion but cautioned that a broad denial of habeas to individuals prosecuted in international military tribunals overseas posed dangers to due process.<sup>148</sup> Douglas argued that, while U.S. courts did not have the jurisdiction to rule on the decisions of international tribunals, the courts possessed jurisdiction to inquire into how an alien prisoner came into the control of the Executive Branch, as well as the lawfulness of the imprisonment.<sup>149</sup>

In a memorandum to his fellow justices, Douglas also expressed concern with *Eisentrager v. Forrestal*,<sup>150</sup> a decision of the U.S. District Court of Appeals for the District of Columbia.<sup>151</sup> The appellate court

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146. 338 U.S. 197 (1948). *Hirota v. MacArthur* might have never been reviewed by the Court save for the intervention of Justice Robert Jackson who had absented himself from considering jurisdictional questions on the trials of German war criminals. See *Hirota v. MacArthur*, 335 U.S. 876 (1948).

147. *Hirota*, 338 U.S. at 198.

148. *Id.* at 201-02 (Douglas, J., concurring). Douglas cautioned, "Such a holding would have grave and alarming consequences. Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or commission. If no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions, a new and alarming hold on us."

*Id.* (citations omitted).

149. *Id.* at 204. Douglas specifically argued, "I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of habeas corpus can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well."

*Id.*

150. 174 F.2d 961 (D.C. Cir. 1949). In this case, the appellate court determined that German citizens captured in China and convicted as unlawful combatants in a U.S. military commission were entitled to sue for release under a writ of habeas. The German nationals were accused of aiding Japan after the German surrender. See *id.* at 962-63.

151. Justice William O. Douglas, Draft Memorandum (May 17, 1949) [WOD, Box 186]. Douglas wrote, "*Eisentrager v. Forrestal* presents grave Constitutional questions," and agreed with the appellate court's decision. However, he did not

determined that alien Germans tried in a military commission and held by the U.S. in a foreign nation fell within the jurisdictional reach of the federal courts.<sup>152</sup> In a circulated draft dissent, Douglas entertained quoting an answer from one of President Harry Truman's recent press conferences, in which Truman responded to a question on military trials by saying that "the Constitution should follow the flag wherever it goes, and trials should be conducted as we usually conduct them in this country. That is my theory and I am trying to enforce it."<sup>153</sup> Instead of the full quote, with an attribution to Truman, Douglas's concurrence merely stated: "If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag."<sup>154</sup>

Based on Douglas's concurring opinion alone, it might have been a surprise that, in 1950, he joined in Black's dissent in *Johnson v. Eisentrager*,<sup>155</sup> a grant of review re-captioned from *Eisentrager v. Forrestal*. Black dissented on the basis of the separation-of-powers doctrine.<sup>156</sup> Although Black's dissent is brief, *Eisentrager* was the first case in which Douglas showed an overt concern for the military legal construct.

That, at the time of *Yamashita*, Douglas was not yet thought of as an activist in military law is anecdotally evidenced by one of Yamashita's defense counsel's memoirs of the case, entitled *The Case of General Yamashita*.<sup>157</sup> Its author, A. Frank Reel, concluded that the defense team arguing Yamashita's case before the U.S. Supreme Court knew prior to arguments that only Rutledge, Murphy, and Black would find that the commission lacked due process.<sup>158</sup> But based on his dissent in *Eisentrager*, by 1950 Douglas might have been considered an ally.

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elaborate on his opinion that *Hirota* and *Eisentrager* presented interrelated concerns. *Id.*

152. *Eisentrager*, 174 F.2d at 964 ("We think that any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ.").

153. Letter from Justice Thomas Clark to Justice William O. Douglas on Douglas's circulated draft concurrence (May 5, 1949) [WOD, Box 186]. Clark dissuaded Douglas from including Truman's quote, writing, "[M]y recollection is that Brandt's [the reporter] question referred to a trial of a G.I.'s wife charged with murder in Germany and not applicable here." *Id.*

154. *Hirota*, 338 U.S. at 204.

155. 339 U.S. 763, 791 (1950).

156. *Id.*

157. A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* 215 (1949).

158. *Id.* See also BALL & COOPER, *supra* note 140, at 124. Ball and Cooper wrote, "Douglas was strangely silent on this case; there were few notes in his file

*D. Early Decisions Indicating Douglas's Jurisprudential Evolution*

While Douglas was not yet an activist against the military's legal construct, there was a subtle change toward his deference to the Executive Branch on military policy after Roosevelt's death on April 12, 1945. Contextually, Douglas approved of Roosevelt's second Vice President, Henry Wallace, but not Roosevelt's successor and third Vice President, Harry S. Truman.<sup>159</sup> Douglas believed that Truman possessed integrity but "had an abysmal ignorance of what actually went on in the world."<sup>160</sup> It was in Truman's military policy that Douglas found great fault.<sup>161</sup> "One alarm that Hugo Black and I felt was the manner in which Truman militarized the nation," Douglas recalled.<sup>162</sup> "Military men were everywhere; the White House thought largely in military terms when foreign affairs were up for discussion. . . . [Truman] greatly conditioned the American mind to think in terms of military solutions to the problems of communism."<sup>163</sup> Douglas's criticism of Truman was not only relegated to the President's military policy, he also decried the quality of justices appointed to the Court. "Truman's appointees to the Court were Fred Vinson, Tom Clark, Sherman Minton, and Harold Burton," he noted.<sup>164</sup> "Under Truman the Court sank to its lowest professional level until the Burger Court arrived."<sup>165</sup>

Douglas appears to have first considered parameters to limit executive claims of wartime authority in his dissent in *Ludecke v. Watkins*,<sup>166</sup> a 1948 decision authored by Frankfurter. On December 8, 1941, the Attorney General, acting in conformity with the Alien Enemy Act, arrested a former Nazi immigrant to the U.S.<sup>167</sup> After the German Army's surrender in 1945,

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and his autobiography did not spend much time on it." *Id.* As an interesting coincidence, A. Frank Reel represented Eisentrager on appeal. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949).

159. See DOUGLAS, *THE COURT YEARS*, *supra* note 39, at 288-92.

160. *Id.*

161. *Id.* at 292.

162. *Id.*

163. *Id.*

164. *Id.* at 245.

165. *Id.* Justice Black shared Douglas's views on Truman's appointees. For instance, Black advised Truman against nominating Burton. When Truman argued that Burton was a "genuine liberal," Black had his doubts. NEWMAN, *supra* note 26, at 339.

166. 335 U.S. 160 (1948).

167. *Id.* at 162-63. Had the U.S. deported Ludecke to Nazi Germany immediately after the Nazi government declared war on the U.S., it is likely Ludecke would have been imprisoned or killed by the Nazi government. He was imprisoned in a concentration camp in 1933 for eight months and then offered an

the Attorney General sought to have Ludecke deported to Germany.<sup>168</sup> The Court determined that, as a matter of course, a decision for declaring when and where a war terminated was an executive decision and not a judicial one; therefore, Ludecke, as a designated alien, was entitled to only those protections inherent in the Act.<sup>169</sup>

In his dissent, Douglas did not overtly disagree with Frankfurter's view on the parameters of armed conflict, but Douglas also joined in Black's separate dissent in which Black severely criticized Frankfurter's view that the Court could not delve into the question of whether the Nation remained at war.<sup>170</sup> In one instance, Black, with Douglas's concurrence, argued,

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opportunity to leave Germany. After his immigration to the U.S. in 1934, he published works critical of Hitler. But because of a refusal to renounce Nazi tenets or all affiliation with the party's ideals, he was denied naturalization in the U.S. *Id.* at 162 n.3.

168. *Id.* at 163.

169. *Id.* at 167-69. The majority asserted,

War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled. Only a few months ago the Court rejected the contention that the state of war in relation to which the President has exercised the authority now challenged was terminated.

*Id.* (citations omitted).

170. *Id.* at 178 (Black, J., dissenting); *see also id.* at 184 (Douglas, J., dissenting). Ludecke wrote to Douglas and Black after the case's publication. The letter to Black still exists, though there is no evidence that either Black or Douglas responded. However, Ludecke not only thanked both justices, he argued, as Douglas would later argue, that the case was an example of an expanding Executive Branch. Additionally, he argued that the majority's opinion was at odds with the "United Nations Charter of Human Rights." His letter, in part, reads,

Frankfurter's decision is a fateful decision which indeed may serve as the decisive precedent for the detention and ruin of anyone of the millions of "alien enemies" who may be deemed "dangerous" by "arbitrary action" in case of war between the United States and Russia with its satellites. . . . Here is a case which shockingly illustrates the difference between what is preached and what is practiced. . . . Please argue for reconsideration so that Uncle Sam stands for honesty and not hypocrisy. . . . Your attitudes encourage

I do not reach the question of power to deport aliens of countries with which we are at war while we are at war, because I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction.<sup>171</sup>

In another instance, Black reiterated his criticism of Frankfurter's opinion, stating, "Of course it is nothing but a fiction to say that we are now at war with Germany. Whatever else that fiction might support, I refuse to agree that it affords a basis for today's holding . . . ."<sup>172</sup> Douglas considered Executive Branch claims of expansive authority in wartime as central to the issue in *Ludecke*.<sup>173</sup>

However, as World War II receded, Douglas mainly considered the military's legal construct in terms of its deficits in individual and civil rights. In 1949, Douglas joined in Murphy's dissents in *Wade v. Hunter*,<sup>174</sup> a case determining the applicability of double-jeopardy prohibitions to courts-martial, and *Humphrey v. Smith*,<sup>175</sup> a case involving due-process requirements for pretrial investigations conducted under the Articles of War. *Wade* originated in a court-martial conducted in the closing days of the war.<sup>176</sup> The court-martial sought further German-witness testimony after the presentation of evidence and closing arguments but before a verdict was rendered.<sup>177</sup> Because of the Army's rapid advance through Germany and the large numbers of refugees, the sought-after witnesses could not be timely found.<sup>178</sup>

Consistent with the Articles of War, the commanding general withdrew the charges against Wade but held the charges in abeyance until such time as the witnesses were located.<sup>179</sup> The unique rules governing courts-martial permitted the panel of officers sitting in judgment to call additional

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me to write this letter, not for the sake of my insignificant self, but for the greater principles involved.

Letter from Kurt Ludecke to Justice Hugo Black & Justice William O. Douglas (Nov. 16, 1949) [Black, Box 302]. While it is not possible to quantify the effect, if any, of this, or any of the other letters to Douglas referenced throughout this Article, on Douglas's jurisprudence, he maintained thousands of such letters and often responded. However, there is no evidence Douglas responded to Ludecke.

171. *Id.* at 175 (Black, J., dissenting).

172. *Id.* at 178 (footnote omitted).

173. *Id.* at 186 (Douglas, J., dissenting).

174. 336 U.S. 684, 692-94 (1949).

175. 336 U.S. 695, 701 (1949).

176. *Wade*, 336 U.S. at 685.

177. *Id.* at 686-87.

178. *Id.*

179. *Id.* at 686.

witnesses beyond what the prosecution or defense intended.<sup>180</sup> Once the witnesses were located, a new court-martial, with a different panel of officers, convened over Wade's objection on double-jeopardy grounds, resulting in his rape conviction and lengthy imprisonment.<sup>181</sup>

The Court held that in the absence of prosecutorial malfeasance, and despite the fact that under similar circumstances in a civil trial the Army's action constituted double jeopardy, the second court-martial did not violate the protection against double jeopardy.<sup>182</sup> In joining Murphy's dissent, Douglas argued that double jeopardy was a fundamental right more important than military exigency.<sup>183</sup> *Wade* was not a case that struck at the heart of executive authority more than it encompassed due-process rights for individual soldiers, and Murphy's language was not aggressively critical in comparison to Douglas's later cases. Douglas's correspondence files are sparse in regards to this particular case, and there is no evidence that he pushed for more critical language.

*Humphrey* presented an issue of an incomplete pretrial investigation into charges referred to a court-martial that later resulted in a conviction.<sup>184</sup> The Articles of War codified investigation procedures akin to a grand jury

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180. *Id.* at 686 n.2.

181. *Id.* at 687.

182. *Id.* at 692. Black argued the importance of military necessity, perhaps sarcastically, as a valid consideration to the dissenters, including Douglas: "[I]n the absence of bad faith on the part of the commanding general, courts should not attempt to review his actions in a fighting theatre to determine whether he should have rearranged his invasion plans in order to have a court-martial continue its trial of a simple case." Hugo Black, Un-typed Pencil Draft Decision, circulated (undated) [Black, Box 302].

Black's argument evolved into a more subdued concluding statement in the published opinion which read,

This case presents extraordinary reasons why the judgment of the Commanding General should be accepted by the courts. At least in the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges.

*Wade*, 336 U.S. at 692.

183. *Id.* at 694 (Murphy, J., dissenting). Douglas did not articulate in any correspondence his reasons for dissenting. What remains is a cryptic note: "Justice Douglas asked me to tell you that if the above case goes down Monday, please note his dissent. If someone else writes a dissent, he may wish to join. But do not hold the case for him." Letter from Edith Allen to Justice Hugo Black (Apr. 15, 1949) [Black, Box 302].

184. *Humphrey v. Smith*, 336 U.S. 695, 695-97 (1949).

but that significantly differed in operation.<sup>185</sup> Instead of a grand jury, the Articles of War mandated, through Article 70, that a pretrial investigation was conducted by a single officer.<sup>186</sup> That officer was required to be a neutral advisor when recommending to the commanding officer whether an accused be brought to trial or the charges be dismissed.<sup>187</sup>

Although the Court's majority recognized procedural shortcomings in the pretrial investigation, they declined to overturn the court-martial conviction, which they believed was conducted fully and fairly.<sup>188</sup> The dissent argued that the majority's decision frustrated congressionally mandated procedural safeguards in courts-martial, regardless of whether the court-martial was conducted fully and fairly.<sup>189</sup> In a civilian trial, a defective grand jury could divest a later trial of jurisdiction on due-process grounds, and certainly prosecutorial misconduct in a grand jury would divest a later court of jurisdiction.<sup>190</sup>

That Douglas did not write a passionate dissent in *Humphrey* further evidences that he did not fully embrace an anti-military ideology in 1949 because the facts of *Humphrey* were tailor-made for

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185. See *id.* at 690-97 n.3 (quoting Army Reorganization, Etc., Pub. L. No. 66-242, 41 Stat. 759, 802 (1920), as amended; Articles of War, Courts Martial, Pub. L. No. 75-325, 50 Stat. 724 (1937)).

186. *Id.*

187. *Id.*

188. *Id.* at 700-01. One undated Black memorandum to the Court is insightful as to the majority's views. In it, he stated that the authority to determine whether a pretrial investigation was defective rested solely in the Army's Judge Advocate General, an instrument of the Executive Branch. However, the Court could grant review of cases in which no pretrial investigation occurred. Memorandum from Justice Hugo Black to the Court (undated) [Black, Box 300].

189. *Id.* at 702 (Murphy, J., dissenting). Douglas's sparse commentary in this case is limited to a single correspondence through his secretary to Black, who wrote the majority opinion. Drafted on the same day as the correspondence related to *Wade v. Hunter*, his secretary notified Black, "Justice Douglas has asked me to tell you that if your opinion in the above case goes down on Monday, will you kindly note his dissent." Letter from Edith Allen to Justice Hugo Black (Apr. 15, 1949) [Black, Box 300].

190. *Humphrey* 336 U.S. at 701; see, e.g., *Hill v. Texas*, 316 U.S. 400 (1942); *Crowley v. United States*, 194 U.S. 461 (1904); see also *United States v. Claiborne*, 77 F.2d 682 (8th Cir. 1935). In *Claiborne*, the appellate court articulated,

The purpose of an indictment is to apprise the accused of the crime charged against him with such reasonable certainty that he can make his defense and not be taken by surprise by the evidence offered at the trial, and can be protected, after judgment, against another prosecution for the same offense.

*Id.* at 689.



the type of pointed criticism that marked Douglas's later decisions. Nonetheless, *Humphrey* is an important case in delineating Douglas's evolving ideology, which requires further explanation. *Humphrey* came to the Court through the U.S. Court of Appeals for the Third Circuit in a case with a different name, *Smith v. Hiatt*.<sup>191</sup> That court reversed a district court's determination that the investigating officer's misconduct, though egregious, did not create a reversible unfairness in the subsequent court-martial.<sup>192</sup>

*Hiatt* arose from an airman's court-martial conviction for rape in Britain during World War II.<sup>193</sup> The investigating officer, Lieutenant Todd, had also served as a provost marshal charged with the duty of maintaining order on the installation to which Hiatt was assigned.<sup>194</sup> Moreover, Todd commanded the military police who investigated the case.<sup>195</sup> Two judges from the Third Circuit felt that Todd clearly abandoned his role as an impartial investigator.<sup>196</sup> After Todd performed his duties as an investigator and recommended that Smith be prosecuted in a general court-martial, the base commander appointed him as an assistant judge advocate to prosecute the case.<sup>197</sup>

The appellate court recognized that it did not possess the authority to review the alleged errors within the court-martial but concluded

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191. 170 F.2d 61 (3d Cir. 1948).

192. *Id.* at 66, 67.

193. *Id.* at 62.

194. *Id.* at 64. Moreover, the appellate court noted that while Smith, the airman accused of rape, was represented by an officer with no legal training, the judge advocates prosecuting the case, and the investigating officer, Lieutenant Todd, were trained lawyers. However, the court also noted that this fact was not a means for granting relief under a habeas writ as it was not a matter of jurisdiction. *Id.*

195. *Id.*

196. *Id.* The appellate court noted:

But Lieutenant Todd's participation in the court-martial as assistant trial judge advocate is a matter of further serious concern. Todd as provost marshal had been in active charge of the investigation which resulted in Smith's being held. Todd then took over as the impartial investigator. There was nothing of any consequence added to the case against Smith during this period. Because of Todd's report and recommendation as investigator a general court-martial was convened, Smith tried before it for most serious offenses, and Todd, a lawyer, was one of the two members of the prosecution staff in court.

*Id.* at 63.

197. *Id.*

that, as a due-process matter, it could find that the court-martial lacked jurisdiction based on the defective pretrial investigation.<sup>198</sup> The Third Circuit also found that the Army's skirting of the requirement for the investigating officer to remain impartial was noxious to fairness.<sup>199</sup> And it surmised that Lieutenant Todd's testimony before the district court was untruthful.<sup>200</sup>

In reversing the district court, and in effect overturning the court-martial, the appellate court concluded its decision with a statement reflecting a growing consensus on the practice of courts-martial during the war: "We recognize the enormous exigencies of the then general conditions, but we cannot permit them to serve as an excuse for the failure to give the soldier involved the express safeguards with which Congress provided him."<sup>201</sup>

Although, in joining the Court's dissent, Douglas agreed with the Third Circuit's condemnation of the court-martial, he did not articulate equally strong criticism against the military's legal construct, which later marked his judicial tenure.<sup>202</sup> Indeed, Douglas would not vociferously do so until after 1953, during a Republican administration, with a politically powerful anti-Communism movement dominating U.S. politics. In 1950, Douglas took no part in *Hiatt v. Brown*,<sup>203</sup> a case in which the U.S. Supreme Court reversed a district court's determination that a court-martial lacked jurisdiction

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198. *Id.*

199. *Id.*

200. *Id.* Specifically, Todd had testified in district court that his role in questioning witnesses as an investigator was very limited. The appellate court noted:

These point to close cooperation between Todd, chief of the Military Police, and the civilian constables. The government's brief emphasizes the latter promotion of Lieutenant Todd to captain, which would merely confirm the impression that he was a zealous policeman. Exhibit B is not explained by the government. Its repetition of Todd's bald denial of seeing any witnesses until after his appointment as investigating officer hardly overcomes the implications in the photostat record.

*Id.*

201. *Id.* at 66.

202. *Wade v. Hunter*, 336 U.S. 684, 693 (1949) (Douglas, J., dissenting).

203. 339 U.S. 103, 111 (1950), *reh'g denied*, 339 U.S. 939 (1950). Douglas was recovering from an injury at the time of the hearing, but he could have noted a dissent in the case nonetheless.

because no qualified law-member (an individual serving in a quasi-judicial capacity charged with advising the court-martial panel) was appointed to advise the court-martial in contravention of the Articles of War.<sup>204</sup>

In upholding the district court's decision, the U.S. Court of Appeals for the Fifth Circuit derided the qualifications and performance of the law-member, concluding that "the arbitrary action of organizing this court-martial in complete disregard of the plain requirements of the 8th Article of War is manifestly reviewable, both as an abuse of discretion, and as a fatal organizational defect which effectually divests the court-martial of jurisdiction."<sup>205</sup> Douglas was, in retrospect, strangely absent from the U.S. Supreme Court's reversal of the lower courts' determination that the court-martial did not lack jurisdiction because the appointed legal advisor possessed no legal qualifications to serve in his appointed capacity. Indeed, that the Court relied on common Army practices listed in a law text, *Digest of Opinions of the Judge Advocate General*,<sup>206</sup> would have

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204. *Brown v. Hiatt*, 81 F. Supp. 647, 650 (N.D. Ga. 1948).

205. *Hiatt v. Brown*, 175 F.2d 273, 276 (5th Cir. 1949). In support of its conclusion, the Fifth Circuit specifically noted that the Army appointed two judge advocates to prosecute the case, but a colonel assigned to the field artillery to serve as the court-martial's legal advisor. These facts caused the following commentary:

We are of opinion the 8th Article of War requires, in order to insure the protection of fundamental and constitutional safeguards to members of our armed forces, certainly in times of peace, that the presence of a duly qualified law member from the Judge Advocate General's Department be made a jurisdictional prerequisite to the validity of such court-martial proceeding, except in the single instance where such officer is actually, and in fact, "not available."

*Id.*

206. *Hiatt*, 339 U.S. at 109. The Court articulated, The 8th Article has also been consistently interpreted and applied by the Army as vesting a discretion in the appointing authority, which when exercised is conclusive in determining not only the accessibility of personnel but also the suitability of the officer detailed as the law member of a general court-martial. CM 231963, *Hatteberg*, 18 B. R. 349, 366-369 (1943); CM ETO 804, *Ogletree*, 2 B. R. (ETO) 337, 346 (1943); CM 209988, *Cromwell*, 9 B. R. 169, 196 (1938); *Digest of Opinions of The Judge Advocate General* (1912-1940) § 365 (9). *This established interpretation is entitled to great weight in our determination of the meaning of the article.*

*Id.* (emphasis added).

later provoked Douglas's wrath at his judicial peers upholding the military legal construct makes his absence from *Hiatt v. Brown* puzzling.

Douglas's decision to completely absent himself from *Hiatt v. Brown* cannot fully be explained by his other judicial determinations contemporaneous with that case. It is true that, in 1950, he authored *Whelchel v. McDonald*,<sup>207</sup> a decision upholding a court-martial

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The *Digest of Opinions of the Judge Advocate General* was first authored in 1864-1865 by Colonel William Winthrop, the author of *Military Law and Precedents*, under the direction of General Joseph Holt, the Judge Advocate General. It was intended to serve as legal guidance to provide consistency in courts-martial practice. The *Digest* did not provide transcripts or texts of cases. Instead, it compiled opinions based on judge advocate general reviews of courts-martial determinations as well as other matters of military law. The *Digest* was periodically updated and distributed to judge advocates from 1865 to 1950. See DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Government Printing Office, 1865); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Government Printing Office, 1866); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Government Printing Office, 1880); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Government Printing Office, 1917); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Government Printing Office, 1919); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (Government Printing Office, 1942). Its status as a persuasive legal text was cemented by the Court in *Mechanics & Traders Bank v. Union Bank*, 89 U.S. 276 (1875). Justice Stephen Field noted, "An excellent digest of these opinions was prepared by Major W. Winthrop, of the United States Army, in 1868, and published by authority of the Secretary of War." *Id.* at 302 (Field, J., dissenting). For the *Digest's* continuing use, see also *United States v. Landers*, 92 U.S. 77, 79-80 (1876) and most recently, *Hamdan v. Rumsfeld*, 548 U.S. 557, 605 (2006).

207. 340 U.S. 122, 123 (1950). Whelchel was convicted in a court-martial for the rape of a minor girl and sentenced to death. The convening authority reduced the sentence to life. Whelchel argued that his court-martial was defective on two grounds—depriving the court-martial of jurisdiction. Tried under the pre-1948 Articles of War, his insanity defense was not as comprehensive as it would have been under the 1948 Articles of War. However, the Judge Advocate General reviewed the trial as well as a psychiatrist's evaluation and determined that Whelchel was legally sane at the time of his offense. Douglas was satisfied with this procedure, writing:

We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That

conviction in which Douglas noted his approval of modifications in the Articles of War. Although *Welchel*'s primary attack on the court-martial was centered on the military's interpretation of the insanity defense under the pre-1948 Articles of War, secondarily he argued that his court-martial, consisting of all officers, violated the Constitution's guarantee of a trial by one's peers.<sup>208</sup> Unlike its predecessor, which required courts-martial to be composed of officers only, the 1948 Articles of War permitted an enlisted soldier or airman to request a trial by court-martial consisting of enlisted members.<sup>209</sup> *Welchel* sought a new court-martial with enlisted members.<sup>210</sup> Surprisingly, in light of his later decisions, Douglas dismissed this argument entirely, commenting as follows:

Under Article 4 of the revised Articles of War, an accused may now request that enlisted men be included on the court-martial that tries him. There was no such provision of the law when petitioner was tried. But the fact that he was tried by a court-martial composed wholly of officers does not raise a question which goes to jurisdiction. Petitioner can gain no support from the analogy of trial by jury in the civil courts. The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.<sup>211</sup>

If anything, Douglas's decision in *Welchel* evidenced some amenability to the reforms then taking place in military law. But that amenability shifted in two cases prior to Truman's departure from the presidency in 1953. Both of these cases require some exposition to assess Douglas's later ideological evolution against the military's legal construct.

The first of these cases, *Gusik v. Schilder*,<sup>212</sup> arose in the context of a capital-murder trial in a court-martial. *Gusik* had been convicted of luring

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opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts.

*Id.* at 124.

208. *Id.* at 124. Under the Articles of War, courts-martial relied on the McNaughten standard of insanity. The standard was basically whether an accused could comprehend right from wrong. *Id.* at 124 n.1.

209. *Id.* at 126.

210. *See id.*

211. *Id.* at 126-27. *See also* *Kahn v. Anderson*, 255 U.S. 1, 8 (1921); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942).

212. 340 U.S. 128 (1950).

two Italian black-marketers onto a military base and then murdering both.<sup>213</sup> Commensurate with the Articles of War, the staff judge advocate at the military base, as well as the Judge Advocate General of the Army, reviewed the case after its conclusion and determined that there were no legal errors within the record of trial.<sup>214</sup> While in confinement, Gusik sued for release through a writ of habeas corpus to the U.S. District Court for the Southern District of Ohio challenging the court-martial's jurisdiction on the basis of a defective pretrial investigation.<sup>215</sup>

The central issue raised by Gusik was whether the lack of retroactivity of the review process in the new Articles of War denied him due process.<sup>216</sup> A new provision, Article 53, provided for a more complete appellate review procedure by the Army's Judge Advocate General before finding the results and sentences in courts-martial conclusive.<sup>217</sup> This would have been the point in which Gusik could claim a defective pretrial investigation, as well as claim an exhaustion of remedies appeal to a federal court. The district court subsequently ruled that the Army denied Gusik due process in failing to conduct a full and impartial pretrial investigation in compliance with Article 70 of the Articles of War.<sup>218</sup>

The appellate court reversed the district court, holding that Gusik was entitled to review based on the law at the time of his court-martial review and not a retroactive application of the new law.<sup>219</sup> Neither the district court nor the appellate court provided any detailed analysis on the nature of military law or the fairness of the Articles of War. Nor did Douglas, in authoring the unanimous opinion, criticize the military's legal construct. Instead, the majority upheld the appellate court's decision in denying habeas but differed from it by ordering the appellate proceedings abated until the Article 53 review was conducted.<sup>220</sup> Notably, Douglas's approach

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213. *Schilder v. Gusik*, 180 F.2d 662, 663 (6th Cir. 1950), *cert. granted*, 339 U.S. 977 (1950). The facts of the case are found in the intermediate appellate decision. Gusik was initially sentenced to life, but the sentence was reduced to sixteen years. After review, Gusik was transferred to a federal penitentiary in Ohio. Schilder was the warden of the penitentiary. *Id.*

214. *Id.* at 663.

215. *Id.*

216. *Id.* at 663, 664.

217. *See id.* at 663-64.

218. *Id.* at 663. The Articles of War that were in effect at the time of Gusik's court-martial were essentially the 1916 Articles of War. Gusik alleged he was denied effective assistance of counsel in his pretrial investigation because his trial counsel failed to call witnesses, which might have cast doubt on the charges in the case. *See Gusik v. Schilder*, 340 U.S. 128, 130-31 (1950).

219. *Gusik*, 340 U.S. at 132.

220. *Id.* at 134.

to courts-martial incorporated language that still evidenced trust in the military's separate judicial system.<sup>221</sup> However, Douglas criticized the Executive Branch's argument to the U.S. Supreme Court that the new provision reduced the ability of aggrieved, convicted servicemen to petition federal courts through habeas for redress.<sup>222</sup> In response to the argument of reducing habeas appeals, Douglas determined:

These tribunals have operated in a self-sufficient system, save only as habeas corpus was available to test their jurisdiction in specific cases . . . . If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose that we would have to give a strained construction in order to stir the constitutional issue that is tendered.<sup>223</sup>

In light of his later opinions and correspondences, Douglas clearly intended this language as a warning to the Executive Branch that he opposed the diminution of the rights of servicemen.<sup>224</sup>

In spite of his warning, and the Court's unanimous agreement in *Gusik*, Douglas was unable to convince his fellow justices to join a fundamental

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221. *See id.*

222. *Id.* at 132. Douglas noted, "It is argued that this clause deprives the courts of jurisdiction to review these military judgments and therefore amounts to a suspension of the writ." *Id.* In a memorandum to the Court, Douglas cautioned, "If this holding of the Sixth Circuit means that the decisions of the [Judge Advocate General] cannot be collaterally attacked, there is serious constitutional difficulty and courts-martial convictions will escape judicial scrutiny completely." *See* Memorandum from Justice William O. Douglas to the Court (1949) [WOD, Box 205].

223. *Id.* at 132-33. Douglas also detailed in a lengthy memorandum to the Court that the appellate courts in *Whelchel* and in *Gusik* were at odds, and that the Court had to make clear that *Whelchel* governed. "This view, while not the holding of the case, is in conflict with the opposite view in *Whelchel*. This point buttresses my feeling that cert should be granted." Memorandum from Justice William O. Douglas to the Court (1949) [WOD, Box 205].

224. *See, e.g.,* Memorandum from Justice William O. Douglas to the Court (1949) [WOD, Box 205].

criticism of executive reach in another case, *Burns v. Wilson*.<sup>225</sup> *Burns* arose from two capital-murder courts-martial held in Guam, a U.S. protectorate administered at the time by the Department of the Navy.<sup>226</sup> Both petitioners alleged that civilian law enforcement officials in Guam used torture and coercion to obtain confessions, as well as doctored evidence to secure convictions.<sup>227</sup> These allegations were reviewed by the newly established military appellate courts to the majority's satisfaction, who, in turn, upheld the convictions and sentences.<sup>228</sup> Within the majority's opinion, as well as in Justice Sherman Minton's concurrence, was a tacit acceptance that due-process standards differed for servicemen than for citizens.<sup>229</sup>

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225. 346 U.S. 137 (1953). *Burns* was argued on February 5, 1953, and decided on June 15, 1953. *Id.* The arguments occurred prior to President Eisenhower's inauguration. The decision was issued after the inauguration.

226. *Id.* at 138.

227. *Id.* at 143.

228. *Id.* at 144-45.

229. *See, e.g., id.* The majority held,

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.* at 140-41. Importantly, the Court relied on Professor Edmund Morgan in arriving at this opinion. The majority specifically cited to Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). *Id.* at 137 n.7. A professor of law at both Vanderbilt's and Harvard's law schools, Morgan served as a judge advocate in the Army during World War I. Shortly after the War, he became a leading critic of the Articles of War and was instrumental in the transition of military law from those Articles to the UCMJ. *See, e.g.,* Arthur E. Sutherland, *Edmund Morris Morgan: Lawyer-Professor and Citizen Soldier*, 28 MIL. L. REV. 3 (1965); Felix E. Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7 (1965); I JONATHAN LURIE, *ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950*, at 62, 157-61 (1992).

Chief Justice Warren, Douglas's ally on the Court, did not view *Burns* in the same manner as Douglas. In his speech to the New York University Law School



Although *Burns* can be properly categorized as a decision primarily impacting the individual due-process rights of uniformed servicemen, Douglas viewed the case as both a matter of due-process deficits within the military's justice system and an encroachment by the Executive Branch into the judiciary.<sup>230</sup> Importantly, in Douglas's correspondence to Black, he argued that military courts exceeded their jurisdiction when evidence

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student body, he argued that *Burns* enabled a greater judicial role in the oversight of courts-martial:

Thus it was hardly surprising to find that, in 1953, the Supreme Court indicated in *Burns v. Wilson* that court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights. The various opinions of the members of the Court in *Burns* are not, perhaps, as clear on this point as they might be. Nevertheless, I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.

Warren, *supra* note 5, at 4. Douglas did not agree with Warren's conclusions because the Court had not granted the two petitioners relief. However, Douglas particularly took exception to Justice Minton's concurring opinion, which articulated a traditional view of military law:

I do not agree that the federal civil courts sit to protect the constitutional rights of military defendants, except to the limited extent indicated below. Their rights are committed by the Constitution and by Congress acting in pursuance thereof to the protection of the military courts, with review in some instances by the President. Nor do we sit to review errors of law committed by military courts.

*Burns*, 346 U.S. at 146 (Minton, J., concurring).

230. *Burns*, 346 U.S. at 154 (Douglas, J., dissenting). Douglas articulated his opposition to the military's legal construct as:

If the military agency has fairly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate.

*Id.*

was obtained by means that violate due process, and this enabled the Executive Branch to ignore other checks and balances.<sup>231</sup>

*E. Torts: An Exception to Douglas's Antipathy to the Military's Legal Construct*

While Douglas possessed a growing hostility to the military's legal construct, it was not evident in all areas. In one notable instance, he concurred with the Court's majority decision in *Feres v. United States*<sup>232</sup> that barred active-duty members from suing the U.S. government in tort on the basis of negligence. Congress had recently enacted the Federal Tort Claims Act (FTCA), in part to provide an avenue for citizens to sue the government for injuries caused by negligent acts and as a means for reducing citizen petitions to Congress, the historical means of compensation.<sup>233</sup>

The issue of whether service members could sue the government was not entirely novel. A year prior to *Feres*, in *Brooks v. United States*,<sup>234</sup> the Court determined that the decedents of a soldier could sue the government under the FTCA for its negligent acts that were unrelated to actual military service.<sup>235</sup> Douglas, along with Frankfurter, dissented in the case without writing an opinion.<sup>236</sup> Instead, both justices adopted the lower court's determination that Congress failed to make an express provision for

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231. Letter from Justice William O. Douglas to Justice Hugo Black (June 9, 1953) [WOD, Box 232]; Letter from Justice Hugo Black to Justice William O. Douglas (June 10, 1953) [WOD, Box 232]. This correspondence also indicates Douglas's regret for joining the majority in *In re Yamashita*. Douglas feared that *Yamashita* enabled the trammeling of due-process rights of servicemen facing courts-martial. Black assured Douglas that *In re Yamashita* was a narrow ruling, inapplicable to courts-martial:

I agree but do not think *Yamashita* is applicable here even as to weight of evidence, hearsay . . . etc. His was a battle offence by the enemy and it was solely for that reason I agreed to the opinion and holding. I think the due process clause does have application to our soldiers who are tried by courts-martial or commissions, except for trial by jury.

*Id.*

232. 340 U.S. 135 (1950).

233. *Id.* at 138, 140.

234. 337 U.S. 49 (1949).

235. *Id.* at 51. In this case, a soldier on furlough was killed and another injured when an Army vehicle collided with their car. In upholding the right to bring suit, Justice Murphy, writing the majority opinion, concluded that "[w]e are not persuaded that 'any claim' means 'any claim but that of servicemen.'" *Id.* at 49-51.

236. *Id.* at 54.

servicemen under the FTCA, and this omission had to be construed against the serviceman.<sup>237</sup> Interestingly, Douglas, without any objection in his correspondence, did not comment on the appellate court's statement in his dissent:

The soldier, upon enlistment, acquires a special and unique military status, quite different from any relation between the Federal Government and civilians. The soldier is subject to military discipline even while at play, and his desertion is a serious crime, punishable at times by death. Rarely, if ever, is a soldier referred to by Congress as a "private individual."<sup>238</sup>

Frankfurter's acceptance of this language is unsurprising in light of his later opinions and past military associations. Douglas's joining with Frankfurter, however, was odd. If, in 1949, he wholly embraced the intent in the appellate court's verbiage, within a decade he departed from it. Moreover, as *Feres* involved egregious conduct on the part of government officers in several different instances (including wrongful death due to deficient fire-safety measures, medical malpractice by leaving a surgical towel in a patient's intestine, and wrongful death on the basis of another instance of medical malpractice),<sup>239</sup> Douglas's concurrence (without

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237. *Id.* The appellate court noted, "This problem of statutory interpretation is close and difficult, due primarily to the inept draftsmanship on the part of Congress in failing to make clear and express provision as to soldiers in the United States Army." *United States v. Brooks*, 169 F.2d 840, 842 (4th Cir. 1948). The appellate court also noted,

Our attention is called to the fact that in an early draft of the Federal Tort Claims Act (H. R. 181, introduced by Mr. Celler) there was an express exception with reference to soldiers, and the Act was finally enacted without this exception. The argument is made that when Congress, with this exception brought to its attention, deliberately omitted this exception from the final draft of the Act, it must fairly be inferred that Congress clearly intended to include soldiers within the scope of the Act.

*Id.* at 845.

238. *Brooks*, 169 F.2d at 842 (citations omitted).

239. *Feres v. United States*, 340 U.S. 135 (1950). For more detail on the nature of the three individual negligence cases, see *Feres v. United States*, 177 F.2d 535 (2nd Cir. 1949) (stating that a widow of an officer sued the federal government under the FTCA alleging a defective heating plant in a barracks caused the fire which resulted in the officer's death); *Jefferson v. United States*, 77 F. Supp. 706 (D.C. M.D. 1948) (negligence based on Army surgeons leaving a sanitary towel inside a soldier's intestine after surgery, which resulted in a necessary surgery eighteen months after the first surgery); *Griggs v. United States*, 178 F.2d 1 (10th

authoring an opinion) with the majority shows that he viewed the individual soldier as almost completely confined to the will of Congress in tort matters.<sup>240</sup> Douglas did not leave in his voluminous correspondence the reasons for his *Feres* and *Brooks* decisions, but at the time of these decisions the Korean Conflict did not appear to be abating, and it might have concerned Douglas that individual soldiers could hamper the Nation's war efforts through lawsuits. Douglas would later have no such concerns and even encouraged them to do so during the Vietnam Conflict.<sup>241</sup>

## II. FROM THE END OF THE TRUMAN ADMINISTRATION THROUGH MCCARTHYISM: DOUGLAS'S ATTEMPTS TO REDUCE THE SCOPE OF MILITARY JURISDICTION AND INDIVIDUAL RIGHTS

National military policy following World War II was unlike that of any other prior period in the Nation's history. After the termination of conflict in both the Civil War and World War I, the Nation's military forces rapidly demobilized. When the Civil War ended in 1865, the Union Army numbered over 1 million soldiers and officers, but by 1875 the national army numbered 25,000 soldiers.<sup>242</sup> In 1918, the U.S. Army numbered slightly over 4 million soldiers, but by 1921 its numbers decreased to slightly over 120,000.<sup>243</sup> This was not so after World War II. In 1945, the Army numbered over 8 million soldiers.<sup>244</sup> Truman sought reductions to slightly less than 4 million by 1946.<sup>245</sup> As a result, the U.S. possessed a peacetime military larger than at any time in history.<sup>246</sup> Moreover, this

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Cir. 1949) (officer's death resulting from "negligent, careless, and unskilled" medical personnel).

240. *Feres*, 340 U.S. at 136-38.

241. See discussion *infra* Part III.

242. EDWARD M. COFFMAN, *THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898*, at 215 (Oxford University Press 1986). See generally ROBERT M. UTLEY, *FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN, 1866-1890* (Macmillan Publishing Co., Inc. 1973).

243. See RONALD H. SPECTOR, *EAGLE AGAINST THE SUN 9-10* (The Free Press 1985); JOHN S. D. EISENHOWER, *YANKS: THE EPIC STORY OF THE AMERICAN ARMY IN WORLD WAR I 288-89* (The Free Press 2001).

244. RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF THE UNITED STATES MILITARY STRATEGY AND POLICY 368* (Macmillan Publishing Co., Inc. 1973).

245. *Id.* See generally THEODORE ROPP, *WAR IN THE MODERN WORLD* (Duke University Press 1959).

246. National Security Council Report 68 (1950), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/korea/large/week2/nsc68\\_51.htm](http://www.trumanlibrary.org/whistlestop/study_collections/korea/large/week2/nsc68_51.htm) (last visited Jan. 18, 2010) [hereinafter NSC-68].

force would have been considerably larger but for the Nation's nuclear-deterrence strategy.<sup>247</sup> Douglas does not appear to have fully understood the impetus for the buildup of large military forces in the sense that he was not included in the top-secret, executive-level national security deliberations; nothing indicates that Douglas knew of National Security Council Report 68. But he accurately connected the government's fears of its weaknesses in deterring Communism's expansion and the Executive Branch's assertion of exclusive control over its enlarged military to a social war on Communism.<sup>248</sup>

*A. McCarthyism and the Rise of Douglas's Antipathy for the Military's Legal Construct*

While it is difficult to pinpoint the exact origin of Douglas's distrust of the military, perhaps the best scholarly starting point for analyzing the maturation of his ideology is in his seldom-cited 1952 *Look Magazine*

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247. See, e.g., Lawrence Freedman, *The First Two Generations of Nuclear Strategists*, MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 748 (Peter Paret ed., Princeton University Press 1986). This strategy was first articulated in a classified document, NSC-68, dated April 7, 1950. NSC-68 noted that the Soviet Union's goal was world domination. It further argued:

The capabilities of the Soviet world are being exploited to the full because the Kremlin is inescapably militant. It is inescapably militant because it possesses and is possessed by a world-wide revolutionary movement, because it [sic] is the inheritor of Russian imperialism, and because it is a totalitarian dictatorship. Persistent crisis, conflict, and expansion are the essence of the Kremlins militancy. This dynamism serves to intensify all Soviet capabilities.

*Id.* at 22. NSC-68 reflected the reasons behind a nuclear deterrent strategy and the maintenance of the Nation's large standing military forces:

It is true that the United States armed forces are now stronger than ever before in other times of apparent peace; it is also true that there exists a sharp disparity between our actual military strength and our commitments. The relationship of our strength to our present commitments, however, is not alone the governing factor. The world situation, as well as commitments, should govern; hence, our military strength more properly should be related to the world situation confronting us. When our military strength is related to the world situation and balanced against the likely exigencies of such a situation, it is clear that our military strength is becoming dangerously inadequate.

*Id.* at 51.

248. See discussion *infra* Part II.A.

article entitled *We Have Become Victims of the Military Mind*.<sup>249</sup> Published during a stalemate, which characterized the later stages of the Korean War, Douglas warned that the military's unitary and regimented mindset invaded all levels of the government and would ultimately undermine confidence in the democratic government.<sup>250</sup> "The increasing influence of the military in our thinking and in our affairs is the most ominous aspect of our modern history," he argued.<sup>251</sup>

Douglas posited that because the military served only to fight wars, its leaders looked not to the cultural, economic, or political reasons for international conflict but simply to how to destroy an enemy by force of arms.<sup>252</sup> In turn, he cautioned, this bred into the military leadership an inherent conservatism that devalued minorities, devalued dissenting opinions, and quashed meaningful debate.<sup>253</sup> Without writing such, he likened the military mindset to what contemporaneously became coined as "McCarthyism."<sup>254</sup> He caustically concluded that "[t]he military mind does not know the give and take of public debate, the art of persuasion of people, the value and importance of dissent and disagreement, the importance of religious, political, [and] racial minorities in our midst."<sup>255</sup>

Publishing the article carried risks, including confronting national heroes, such as President Dwight Eisenhower, General Douglas MacArthur, General Omar Bradley, and General George C. Marshall. While Douglas overtly exempted these men from his otherwise pointed criticisms, he mildly criticized Bradley without naming the General who, in a companion article, challenged Douglas's fears as misplaced.<sup>256</sup> Douglas later articulated that he never believed Bradley was unintelligent or dishonest, but he felt that Bradley's beliefs in the efficacy of retired, high-ranking military officers employed as corporate executives bidding for contracts in the Pentagon horribly naïve.<sup>257</sup> To Douglas, this naivety permitted not only gross corruption, but it also undermined the Executive Branch's duty to exist as a servant of the public good.<sup>258</sup>

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249. William O. Douglas, *We Have Become Victims of the Military Mind*, LOOK, Mar. 11, 1952, at 34 [hereinafter LOOK article].

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. See FRIED, *supra* note 20.

255. LOOK article, *supra* note 249.

256. *Id.* at 35.

257. DOUGLAS, THE COURT YEARS, *supra* note 39, at 338 (writing that then-retired General Omar Bradley was an honest person who saw nothing wrong with serving as a high corporate officer in a company making bids at the Pentagon).

258. *Id.*

Douglas believed that Bradley's assertion that inherent protections existed because the government was primarily staffed by civilians, with civilians at the head of each agency, was a false check against the military's encroachment into the federal government.<sup>259</sup> He reasoned that career military officers serving in the Pentagon unduly influenced defense and foreign policy.<sup>260</sup> However, he concluded the article with an understanding that the Soviet Union and its support of Communism's spread were a menace to freedom.<sup>261</sup>

Douglas kept a number of supportive correspondences resulting from the article. The editor of Dartmouth College's newspaper notified Douglas that the placement of Reserve Officers Training Corps units at his college caused "the gradual disappearance of the free elective system, the theoretical basis of [Dartmouth]."<sup>262</sup> A group of psychologists in New Hampshire encouraged Douglas to seek the presidency based on his anti-military position.<sup>263</sup> Douglas also publicly received a "thank you" from the National Council Against Conscription.<sup>264</sup> He thanked each of these individuals and expressed his gratitude for their support. Oddly, he also received a commendation from the editors of the *Protestant Statesman and Nation*, an anti-immigration-focused newsletter, which noted an irony, arguing that "the Pentagon is going to give us a communist devised military state in order to DEFEAT communism."<sup>265</sup> His record of correspondence indicates that he did not respond to this organization.

As important as the contents of the published article and the responses to it are in contextualizing Douglas's anti-military ideology in his jurisprudence, his multiple handwritten and typed drafts of the article convey stauncher views than the actual print. In his first unpublished draft

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259. LOOK article, *supra* note 249.

260. *Id.*

261. *Id.*

262. William O. Douglas, *We Have Become Victims of the Military Mind* (undated) (draft of article for LOOK magazine) [WOD, Box 855] [hereinafter LOOK draft].

263. Letter from Kenneth Roman to Justice William O. Douglas (Feb. 28, 1952) [WOD, Box 602] Douglas's short response and "thank you" is located in the same file.

264. Letter from James M. Swomley, Jr., President, National Council Against Conscription to Justice William O. Douglas (June 30, 1952) [WOD, Box 602]

265. See Letter from George M. Haslerud to Justice William O. Douglas (1952) [WOD, Box 602]; see also letter from Edward James Smythe to Justice William O. Douglas (Feb. 23, 1952) [WOD, Box 602]. Smythe was the *Protestant Statesman and Nation* editor, and he noted to Douglas, "[T]his organization is dedicated to defending American Protestantism against the Un-American Activities of the Highly Organized and well financed alien-minded, self-proclaimed minorities." *Id.*

to *Look*, he aggressively criticized Bradley's statement that the civilian oversight of the military was a shield against militarism.<sup>266</sup> Douglas argued that because career military officers were viewed as experts, political appointees fell captive to the officers' ideals.<sup>267</sup> The drafts also contained criticisms of the military's narrow approach to Communism, including the statement that "communists fan the flames of the revolt against feudalism, but the revolts are historic processes, accelerated by communist propaganda—but not communist in origin. Their origin lies in the wide gulf between those at the top and those at the bottom."<sup>268</sup>

While his articulation that Communism was an exaggerated evil was absent from the final draft,<sup>269</sup> this omission could not have been done out of a fear of being labeled an appeaser. One year prior to the article, in *Dennis v. United States*,<sup>270</sup> Douglas effectively challenged the Court to take judicial notice of Communism's weakness as a political force in the Nation.<sup>271</sup> He did not use the same words that were present in his article drafts, but in stating that "it should not be difficult to conclude that *as a political party* they are of little consequence,"<sup>272</sup> Douglas made clear that the internal threat from Communism was artificially conflated to the point of the judiciary permitting the trammeling of the First Amendment.<sup>273</sup> Ironically, however, Douglas, in another book, warned of Communism's growth in Southwest Asia.<sup>274</sup>

To Douglas, McCarthy was "unscrupulous and fascist minded," and he could not understand why neither Truman nor Eisenhower confronted the anti-Communist craze then enveloping the Nation.<sup>275</sup> Douglas later wrote

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266. LOOK draft, *supra* note 262.

267. *Id.*

268. *Id.*

269. LOOK article, *supra* note 249.

270. 341 U.S. 494 (1951).

271. *Id.* at 588.

272. *Id.*

273. *Id.* at 590 (Douglas, J., dissenting); *see also id.* at 580 (Black, J., dissenting). Black dissented for similar reasons as Douglas; namely that the prohibited speech violated the First Amendment. *See generally* NEWMAN, *supra* note 26. Like Douglas, Black believed the Court's bow to McCarthyism was a surrender of its independence. *Id.*

274. WILLIAM O. DOUGLAS, NORTH FROM MALAYA: ADVENTURE ON FIVE FRONTS 9-10 (1953). Of Vietnam, Korea, Formosa, the Philippines, and Burma, Douglas warned, "Each front is indeed an overt front of a communist conspiracy to expand the Russian Empire." *Id.*

275. HOYT, *supra* note 24, at 181; *see also* DOUGLAS, GO EAST, YOUNG MAN, *supra* note 37, at 383 Douglas had personal friends such as Owen Lattimore who McCarthy targeted with disloyalty charges; *see also* Letter from Justice Felix



that right-wing Republicans led by McCarthy engaged in parallelism.<sup>276</sup> He recorded, "If one believed in free medical care, he was a communist because Russia had that system. If one proposed disarmament, as Henry Wallace often did, he was a communist because Russia proposed it too."<sup>277</sup> As a capstone indicator of Douglas's belief that the anti-Communist movement had gone too far, he granted a publicly controversial stay of execution for Ethel and Julius Rosenberg in 1953.<sup>278</sup>

Although Douglas's grant of a stay of execution generated controversy within the Court, and the Court overrode Douglas's stay, Douglas steadfastly believed that the Rosenbergs were denied due process.<sup>279</sup> To Douglas, the issue was not per se part of the military's legal construct, but it reflected pressures placed on the Executive Branch to deny due process to people branded as Communists or traitors.<sup>280</sup> Douglas believed that similar pressures affected the Executive Branch's control over military policy.<sup>281</sup> And granting the Rosenbergs a stay of execution was not the last time that Douglas would support granting stays against the government.<sup>282</sup>

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Frankfurter to Justice William O. Douglas (1948) [WOD, Box 33]. Even Frankfurter, a conservative justice, was not immune from allegations of Communist sympathies because he had worked alongside Alger Hiss. In 1948, Frankfurter sought Douglas's support in combating charges of Communist sympathies from a journalist named Westbrook Pegler. Frankfurter wrote, "Since Westbrook Pegler evidently intends to bring his poisonous pen into action against me in connection with the Alger Hiss affair, and since he will involve the Court, I should like you to see the attached memorandum by way of background." *Id.* The memorandum detailed Frankfurter's past association with Hiss, as well as Pegler's attempts to interview Frankfurter's secretary and law clerk in hopes of uncovering damaging information on the Court. To Douglas, this was further evidence on the corruption of government by McCarthyism.

276. DOUGLAS, GO EAST, YOUNG MAN, *supra* note 37, at 382.

277. *Id.*

278. See *Rosenberg v. United States*, 346 U.S. 273, 283 (1953); see also JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 301-03 (1980). For a summation of criticism regarding Douglas's stay of execution, see William Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 40 CORNELL L. REV. 211 (1985).

279. SIMON, *supra* note 278, at 307-10. This did not mean that Douglas believed that the Rosenbergs were innocent victims of a witch hunt. To Douglas, the fact that both might have been treasonous was different from the denial of a fair trial.

280. See *id.* at 311.

281. See *id.*

282. See *infra* Part III.A. During the Vietnam conflict, Douglas granted stays against the government in cases of reservists called to active duty.

*B. Ending the Military's Jurisdiction over United States Citizens*

In 1952, *Madsen v. Kinsella*, a quasi-military-jurisdictional case came before the Court.<sup>283</sup> In a pattern that became familiar to the Court during the decade, Madsen, the civilian wife of an Air Force lieutenant, murdered her husband.<sup>284</sup> As a result of an international agreement, Germany lacked jurisdiction to prosecute U.S. citizens employed by the victorious allied governments or their spouses.<sup>285</sup> The U.S. military governor convened a trial before the Fourth District of the U.S. Court of the Allied High Commission for Germany, a tribunal established by the U.S. government after the German surrender in 1945.<sup>286</sup> That court convicted Madsen and sentenced her to fifteen years imprisonment.<sup>287</sup>

On appeal, the Court of Appeals of the U.S. Court of the Allied High Commission for Germany, another tribunal established by the U.S., affirmed the conviction and remanded Madsen to the Attorney General's custody.<sup>288</sup> Each court consisted of civilian judges, and there were no servicemen sitting in judgment of Madsen.<sup>289</sup>

Black dissented in the case arguing that because the two courts were not created by Congress, the courts could not possess jurisdiction to try a civilian.<sup>290</sup> Douglas did not join in Black's dissent, and, as in the *Feres* and *Yamashita* cases, his correspondence regarding the case is sparse, leaving little insight into his thoughts. The fact that the two lower courts adjudicating Madsen's case were staffed by civilians, largely free from military command influences, was likely the reason for Douglas's quiet acquiescence to the majority. Had *Madsen* come to the Court in 1969, it is probable, for reasons later discussed, that Douglas would have joined in Black's dissent. But in 1952, Douglas had not yet fully viewed the military as enabling the creation of a unitary executive. However, even in 1952, the same year as *Madsen* and the *Look Magazine* article, Douglas attempted to

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283. 343 U.S. 341 (1952).

284. *Id.* at 343.

285. *Id.* at 345. The specific delineation of the authorities of the occupation courts is found in Allied High Commission Documents, 15 Fed. Reg. 2086 (Apr. 13, 1950). For a general history and discussion of the functions and purposes of the commission, see, for example, ELMER PLISCHKE, HISTORY OF THE ALLIED HIGH COMMISSION FOR GERMANY: ITS ESTABLISHMENT, STRUCTURE AND PROCEDURES 1 (1951). See also, Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A.B.A. J. 777, 778-79 (1947).

286. *Madsen*, 343 U.S. at 344.

287. *Id.* at 344-45.

288. *Id.* at 345.

289. *Id.* at 344-45.

290. See *id.* at 371-72 (Black, J., dissenting).

curb the expansion of executive authority in *Youngstown Sheet & Tube Co. v. Sawyer*, which, while not directly part of the military's legal construct, had a significant relation to it to require brief inclusion into an analysis of the evolution of Douglas's intent toward the military's legal construct.<sup>291</sup>

In 1952, President Truman ordered a number of the Nation's steel mills seized during a labor strike that occurred after the management of the mills and the steelworkers' unions failed to agree on wage increases.<sup>292</sup> Truman believed that the strike threatened the Nation's ability to supply its armed forces with the equipment and armaments necessary to continue its war effort.<sup>293</sup> The steel mill corporations sued in federal court challenging the seizure, and the issue swiftly came before the Supreme Court.<sup>294</sup> While the Court deliberated after hearing oral arguments, Truman answered questions during a news conference, which unnerved Douglas.<sup>295</sup> In particular, to Douglas, Truman advocated a position of extreme executive authority in matters of national defense.<sup>296</sup>

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291. 343 U.S. 579 (1952).

292. Exec. Order No. 10,340, 17 Fed. Reg. 3, 139 (Apr. 10, 1952).

293. *Id.*; see also BALL, *supra* note 5, at 178 (noting that Truman's belief in the constitutional efficacy of his authority to seize the steel mills stemmed in part from ex parte advice given to him by Chief Justice Frederick Vinson).

294. *Youngstown*, 343 U.S. at 579.

295. Special Message to the Congress on the Steel Strike, 8 PUB. PAPERS 161 (June 10, 1952). Truman's explanation to the U.S. press, given after the Court decided against his actions, was as follows:

When I took the extraordinary step of seizure in the absence of specific statutory authority, I pointed out that with American Troops facing the enemy on the field of battle, I would not be living up to my oath of office if I failed to do whatever is necessary to provide them with the weapons and ammunition for their survival. Now a majority of the Supreme Court have declared that I cannot take the action I believe necessary. But they have clearly said Congress can do it.

*Id.*

296. The President's News Conference, 8 PUB. PAPERS 136 (May 22, 1952). The pertinent part of Truman's news conference held on May 22, 1952, is as follows:

Question [Q] from reporter: Mr. President, as I understood you to say that the President has the power, that is, of seizure.

Answer [A] from Truman: That's correct.

Q: And they can't take it away?

A: That's correct.

Q: Who did you mean sir, Congress?

A: Yes.

Q: The courts, who?

It is now almost universally accepted that *Youngstown* constitutes a decision that defines executive authority in domestic affairs during the crisis of an armed conflict.<sup>297</sup> Although Black authored the majority opinion, Jackson's concurring opinion has ultimately been more influential than any of the other opinions rendered in *Youngstown*.<sup>298</sup> That Douglas concurred with the majority in overruling Truman's assertion of authority to seize control of steel mills during a strike is unsurprising when juxtaposed against his other decisions, but, again, his language in the case was largely subdued in its criticism toward Truman.

In his concurring opinion, Douglas conceded that Truman acted in what he believed were the Nation's critical interests in seizing the steel mills, but he worried over the precedent that Truman set.<sup>299</sup> Douglas argued, "The President with the armed services at his disposal can move with force as well as with speed. All executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency."<sup>300</sup> Just as Douglas publicly omitted President Eisenhower and Generals MacArthur, Bradley, and Marshall from his anti-military rubric, he did so with Truman in writing,

Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.<sup>301</sup>

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A: Nobody can take it away from the President because he is the chief executive of the nation and he has to be in a position to see that the welfare of the people is met . . . .

Q: It appears that you have said the [Supreme] Court can't take the power away.

A: Nobody can take it away from the President because it is inherent in the Constitution.

*Id.*

297. See, e.g., KERMIT L. HALL & JOHN J. PATRICK, *THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA* 118 (2006).

298. Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1738 (2006).

299. *Youngstown*, 343 U.S. at 629-32 (Douglas, J., concurring).

300. *Id.* at 629.

301. *Id.* at 634.

Douglas later considered *Youngstown* as “probably the most important in our history concerning the separation of powers between the President and the Congress and the role of the Court in enforcing the separation.”<sup>302</sup>

It is important to recognize the level and source of public support that the Court and, for the purpose of this Article, Black and Douglas received as a result of their *Youngstown* opinions. While traditionally liberal and Democratic Party organizations lauded Douglas’s concurring opinion, he also received letters of thanks from such conservative groups as the Frontier Club of Republican Women and the Independent Livestock Marketing Association.<sup>303</sup> Most surprising to Douglas and Black was an endorsement from the conservative *Chicago Tribune*.<sup>304</sup> Displaying humor, Douglas quipped to Black that they “might wish to rethink their logic.”<sup>305</sup>

In 1955, the Court in *United States ex rel. Toth v. Quarles*, an opinion authored by Black, decided that once an enlisted member of the armed forces was discharged, the military no longer possessed jurisdiction to prosecute an offense in a court-martial, even when that offense occurred while the former enlisted member was on active duty and subject to the Uniform Code of Military Justice (UCMJ).<sup>306</sup> Importantly, Congress expressly permitted prosecutions of this sort when it legislated the UCMJ in 1950 without making a distinction between military discharges secured by fraud and those occurring within operation of the law.<sup>307</sup> In preparing the decision, Douglas noted to Black that as of October 27, 1955, there were 22.61 million veterans living in the U.S. and almost 3 million active

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302. DOUGLAS, ALMANAC OF LIBERTY, *supra* note 14, at 293.

303. See Letter from James Lynde to Justice William O. Douglas (1952) [WOD, Box 221]. The letter stated, “I am happy to note that Justice Black and yourself were not swayed by any short-time political considerations.” *Id.*

304. See John Fisher, *Truman’s Seizure of Industry Voided by Supreme Court; Ruling Blasts His Usurpation of Authority*, CHI. TRIB., June 3, 1952, § 1, at 1.

305. Letter from Justice William O. Douglas to Justice Hugo Black (undated) [WOD, Box 221]. On reading the *Tribune*’s editorial, Douglas penned to Black, “Dear Hugo, are we sure you were right?” *Id.*

306. 350 U.S. 11, 14-15, 23 (1955). Douglas’s role in the case is evidenced in a letter to Black dated November 1, 1955, in which he wrote:

Dear Hugo, I like your *Toth* case and reach your result. I am troubled by the paragraph on pages 9-10 saying that ex-soldiers may be tried or could be tried in the federal district courts . . . . The trouble in the case of ex-soldiers who committed a crime overseas or sailors who did so while at sea will escape court-martial, while those who committed a crime in the United States will not.

Letter from Justice William O. Douglas to Justice Hugo Black (Nov. 1, 1955) [WOD, Box 309].

307. *Toth*, 350 U.S. at 19.

duty military personnel, totaling over 25 million citizens subject to military jurisdiction.<sup>308</sup> Douglas also joined with Black and contributed to language critical of the military's justice system.<sup>309</sup>

Significantly, the majority viewed the UCMJ's expanded jurisdiction as a matter of the Executive Branch encroaching into the Judicial Branch, thereby causing a diminution of civil rights.<sup>310</sup> The Court noted, "[A]ny expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."<sup>311</sup> Notably, it was Douglas who pushed for the following language in the decision: "Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."<sup>312</sup>

In a pretrial memorandum, Douglas was also critical of the justices' continuing reliance on military-law treatises and, in particular, Colonel William Winthrop's 1895 treatise, *Military Law and Precedents*.<sup>313</sup> First published in 1885, Winthrop's treatise had supplanted older texts and come into common judicial usage the same year as its citation in *Smith v. Whitney*.<sup>314</sup> In 1953, the Court complimented Winthrop as "the Blackstone

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308. Letter from Justice William O. Douglas to Justice Hugo Black (undated) [Black, Box 327]. Douglas's commentary was in response to Justice Sherman Minton's arguments for an expansive military jurisdiction. *Id.*

309. *Id.*

310. *Toth*, 350 U.S. at 14, 21-22.

311. *Id.* at 15.

312. *Id.* at 17; *see also* Letter from Justice William O. Douglas to Justice Hugo Black (Nov. 1, 1955) [WOD, Box 309].

313. Memorandum from Justice William O. Douglas to the Court (Nov. 1, 1955) [WOD, Box 309].

314. 116 U.S. 167, 185 (1885). Winthrop was born in 1831 and died in 1899. Educated at Yale and Harvard, he assisted in drafting the Minnesota State Constitution in 1858. Prior to the Civil War, he also defended fugitive slaves in Boston and joined in other abolitionist causes, including campaigning for William H. Seward's presidential bid in 1860. He enlisted in a New York militia unit after the South Carolina militia fired on Fort Sumter in 1861. After a brief service in this unit, he was commissioned as an officer in the First United States Sharpshooters and fought in the battles of Malvern Hill, Second Manassas, Antietam, and Fredericksburg. Following a severe injury at Fredericksburg, Winthrop was commissioned in the Judge Advocate General's Corps where he remained until retirement in 1895. His duties included investigating Mary Surratt and the other Lincoln assassination conspirators, as well as authoring arguments to the Supreme

of Military Law.”<sup>315</sup> Apparently, by 1954, Douglas believed that Winthrop’s work, among others, stood in the way of meaningful reform.

Douglas’s most significant role in this decision was his contribution to Black’s historic analysis, particularly the statement, “We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property.”<sup>316</sup> Another important aspect of the decision was Douglas’s insistence on including language that juries composed of laypersons were far superior to courts-martial composed of officers.<sup>317</sup> This additional language was unnecessary to the separation-of-

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Court in cases such as *Ex parte Vallandigham*. See JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP* (2009); *William Winthrop, Acting Judge Advocate General; 1881*, 28 MIL. L. REV. v,v, vi (1965) (biography of William Winthrop).

315. *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality opinion). Frankfurter’s insistence on the continuing viability of Winthrop’s work resulted in an angry exchange in conference with Douglas. Douglas interrogated Frankfurter on his continued reliance on Winthrop, and Frankfurter refused to acknowledge Douglas in return. Letter from Justice William O. Douglas to Justice Felix Frankfurter (June 1, 1956) [WOD, Box 330]. It was clear by this time that the relationship between Douglas and Frankfurter was strained. Douglas, in a private letter, scolded Frankfurter for his perceived rudeness while in conference discussing Winthrop. Frankfurter distributed the letter to the other justices. The letter read,

Today at conference I asked you a question concerning your memorandum. The question was not answered. An answer was refused, rather insolently. This was, so far as I recall, the first time one member of the conference refused to answer another member on a matter of Court business. We all know what a great burden your long discourses are. So I am not complaining. But I do register a protest at your degradation of the Conference and its deliberations.

*Id.*

316. Letter from Justice William O. Douglas to Justice Felix Frankfurter (June 1, 1956) [WOD, Box 330].

317. Letter from Justice Felix Frankfurter to Justices Warren, Black, and Douglas (Oct. 26, 1955) (Located in Papers of Earl Warren, Box 432, Library of Congress) [hereinafter Warren, Box \_\_\_\_]. Frankfurter argued, “I do not want to write separately in *Toth* and I do want to join your opinion. There will be no difficulty if you forgo a few references pertaining to trial by jury, the implications of which I do not think the Court should sponsor.” *Id.* In addition to his disagreement with Douglas’s belief in the superiority of civil lay juries over court-martial panels, he strongly opposed the Court adopting language from Justice Horace Gray’s dissent in *Sparf v. United States*, 156 U.S. 51 (1895). In *Sparf*, Gray argued that due process required judges to fully inform juries of their responsibility to adjudicate facts

powers issue, though it reflected Douglas's views on individual rights and his belief that the military's ignorance of due process rendered courts-martial unfair. That Douglas believed this to be uniformly the case arguably belied a focused irrationality on his part, and Frankfurter attempted to dislodge this language from the decision.<sup>318</sup> Even in 1956, the notion that lay juries, with the infectious prejudices of the time, were in any way superior to a panel of college-educated officers was doubtful. Nonetheless, long into his judicial tenure, Douglas believed *Toth* was a victory for individual rights as well as a protection against arbitrary executive authority.<sup>319</sup>

In 1957, Douglas took a leading role in the Court's reconsideration of two earlier cases determining the reach of military jurisdiction. The prior year, in the last days of the Court's term, Douglas dissented in *Reid v. Covert (Reid I)*<sup>320</sup> and *Kinsella v. Krueger*,<sup>321</sup> two decisions authored by Justice Tom C. Clark. A Truman appointee and loyalist, Clark seldom opposed Truman's policies.<sup>322</sup> Douglas believed that Clark was one of the Court's weakest minds—even to the point of considering Justice James C. McReynolds a superior judge to Clark.<sup>323</sup> Given Douglas's loyalty to Roosevelt and McReynolds's antipathy toward the New Deal, Douglas's

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and, on occasion, the law. *Id.* at 183 (Gray, J., dissenting). Frankfurter considered Gray, the author of *Plessy v. Ferguson*, an "unredeemable bigot" and did not want to give any judicial weight to his dissent. [Warren, Box 432].

318. This irrationality is borne out by the fact that Douglas was involved in several decisions critical of the jury selection processes. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 232 (1965) (Goldberg, J., dissenting); *Williams v. Georgia*, 349 U.S. 375 (1955); *Avery v. Georgia*, 345 U.S. 559 (1953). Douglas joined Golberg's dissent from the Court's affirmation of the exclusion of blacks from petit juries where purposeful discrimination was unproven. *Swain*, 380 U.S. at 232.

319. WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 194 (1954).

320. *Reid v. Covert*, 351 U.S. 487, 488, 492 (1956). *Reid I* was argued on May 3, 1956, and decided on June 11, 1956. Reargument was heard on February 27, 1957, and the *Reid II* decision was published on June 10, 1957. *Reid v. Covert*, 354 U.S. 1 (1957).

321. 351 U.S. 470 (1956). *Krueger* was argued and decided on the same dates as *Reid I*. The case was consolidated with *Reid I* and reargued on the same dates. *Reid II*, 354 U.S. 1.

322. BELKNAP, *supra* note 1, at 81.

323. DOUGLAS, *THE COURT YEARS*, *supra* note 39, at 245. For Douglas's views on McReynolds see *id.* at 13. Truman shared Douglas's view of Tom Clark. Truman once referred to Clark as his biggest mistake and called Clark "a dumb son of a bitch." SCHWARTZ, *supra* note 1, at 256. Schwartz himself is not particularly complimentary toward Clark, though he placed Clark's abilities above Justice Sherman Minton, another Truman appointee. See *id.*



placement of Clark below McReynolds clearly marked Douglas's belief that Clark was encumbered by a deficit in intellect and reasoning.

In both *Reid I* and *Krueger*, the Court's majority upheld a UCMJ provision extending courts-martial jurisdiction over civilians accompanying the Nation's armed forces overseas.<sup>324</sup> Billed within the Court's memorandum as "the murdering wives cases," Clark's pragmatic reasoning for upholding the provision rested less on constitutional principles than on the probability that foreign courts afforded a citizen less due process than a military trial.<sup>325</sup> In both the published decisions and in his correspondences to his fellow justices, Clark argued that because U.S. servicemen were located in sixty-three foreign countries and that their dependents could be subjected to trials by local courts, there was reason enough to uphold the UCMJ provision.<sup>326</sup> Clark's personal correspondence to his fellow judges was more direct than the actual decision. He argued,

V.P. Nixon is on his present mission to secure or break ground for more bases and agreements in other lands, including Africa . . . . The only remaining alternative would be to let prosecutions proceed in the local courts of the foreign sovereign and while England might be okay, but in Spain, the Middle East and Far East?<sup>327</sup>

But, to Douglas, Warren, and Black, Clark's pragmatism overlooked what they believed were inherent dangers in an expansive military jurisdiction. After the publication of *Reid I* and *Krueger*, Warren, with Douglas endorsing him, circulated a memorandum to the Court expressing his reservations with Clark's decision.<sup>328</sup> The memorandum began,

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324. *Reid I*, 351 U.S. at 492; *Krueger*, 351 U.S. at 474. In *Krueger*, Clark determined that courts-martial conducted under the UCMJ possessed enough guarantee of due process not to render it unconstitutional to try civilians accompanying the armed forces. *Id.* Clark also relied on *Ross v. McIntyre*, 140 U.S. 453 (1891), a nineteenth-century decision upholding the authority of consular courts to prosecute U.S. citizens overseas in nations permitting such courts through treaties. Douglas and Frankfurter found the concept of consular courts noxious to twentieth-century principles of comity and equality.

325. Letter from Justice Thomas Clark to Justice William Brennan (undated) (Located in Papers of William Brennan, Box 2, Library of Congress [hereinafter Brennan, Box \_\_]).

326. *Id.*

327. *Id.*

328. Memorandum from Chief Justice Earl Warren to the Court (Sept. 22, 1956) [Warren, Box 575].

The opinions of the majority in these cases concern me because they gravely threaten one of the fundamental relationships upon which our government is built—the supremacy of the civil over the military branch, and because they violate a personal right guaranteed to every American citizen in unequivocal language by the Constitution—the right to a trial by a jury after indicted by a grand jury.<sup>329</sup>

Douglas joined Warren and Black in a brief dissent, with the promise of expanding on it during the 1957 term.<sup>330</sup> In a judicial conference held immediately after the two decisions, Black and Douglas sought reconsideration of the two cases. Black and Douglas gained Warren's support for reconsideration along with Justices John M. Harlan and William Brennan.<sup>331</sup>

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329. *Id.*

330. *Kinsella v. Krueger*, 351 U.S. 470, 485 (Warren, C.J., dissenting). The dissent argued,

The decisions just announced have far-reaching importance. They subject to military court-martial, even in time of peace, the wives, mothers and children of members of the Armed Forces serving abroad even though these dependents have no connection whatever with the Armed Forces except their kinship to military personnel and their presence abroad. The questions raised are complex, the remedy drastic, and the consequences far-reaching upon the lives of civilians. The military is given new powers not hitherto thought consistent with our scheme of government.

For these reasons, we need more time than is available in these closing days of the Term in which to write our dissenting views. We will file our dissents during the next Term of Court.

*Id.*

331. Letter from Justice William O. Douglas to Justice Hugo Black (undated) [Black, Box 327]. However, Brennan remained concerned that the Court not inhibit the military from enforcing lesser violations, such as traffic offenses or the ability to conduct negotiations. In writing to Douglas and Black, he expressed this concern as:

I note that nothing is said about lesser offenses, for example, simple breach of the peace, traffic violations, disorderly conduct . . . etc. Do you think dispositions of such offenses (which I suppose are technically not "crimes" within Art. 3 sec. 2 and the Fifth and Sixth Amend) are within the holding of your opinion? And what of the power of the military to arrest for crimes, and if nothing said, in the opinion inhibits that power, what of arraignments, interrogations, etc?

Frankfurter only tepidly supported reconsideration because he feared that a reversal in *Reid I* and *Krueger* would lead to an endorsement of the Bricker Amendment, a controversial political movement seeking to limit presidential treaty-making power.<sup>332</sup> Named for Congressman John Bricker, a Republican isolationist and opponent of the North Atlantic Treaty Organization (NATO), Republican adherents to the Amendment wanted a new constitutional construct to require that the President obtain either the consent of both congressional branches or a popular vote through state legislatures before entering into a treaty.<sup>333</sup> Douglas argued that Frankfurter's concerns were unfounded.<sup>334</sup> Bricker was opposed by President Eisenhower as well as the Democratic Senate Majority Leader, Lyndon B. Johnson, and the Amendment ultimately receded into oblivion.<sup>335</sup>

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Letter from Justice William Brennan to Justices Douglas and Black (undated) [Brennan, Box 2].

332. Memorandum from Justice Felix Frankfurter to Justices Earl Warren, Hugo Black, and William O. Douglas (Sept. 19, 1956) [Black, Box 327]. Frankfurter wrote to Warren, Douglas, and Black a secret memorandum concerning the Bricker Amendment, calling it a "contentious controversy in the Senate." Clearly, Frankfurter, Black, Douglas, and Warren did not want to endorse, or unintentionally endorse, Bricker. Frankfurter did not want Clark or the other justices to know of his concerns. On May 20, 1957, Frankfurter wrote,

Now that Clark's dissenting opinion has made explicit how wholly uncalled for is the injection of the Bricker Amendment problem, for the disposition of these cases, I would feel derelict in my duty to the Court to suppress within the Court expression of my deep concern that injection of that controversy is a great disservice to the Court and the country.

Letter from Justice Felix Frankfurter to Justices Earl Warren, William O. Douglas, and Hugo Black (May 20, 1957) [Black, Box 327].

For an analytical discussion of the Bricker Amendment, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 527-41 (2003). See generally RICHARD O. DAVIES, *DEFENDER OF THE OLD GUARD: JOHN BRICKER AND AMERICAN POLITICS* (1993).

333. CARO, *supra* note 332, at 527-41; see generally DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

334. Letter from Justice William O. Douglas to Justice Felix Frankfurter (June 1, 1957) [WOD, Box 330].

335. CARO, *supra* note 332, at 527-41.

On reconsideration, the Court consolidated and, in a decision authored by Black, reversed the two cases.<sup>336</sup> The majority, joined by Douglas, declared that the full protection of the Bill of Rights extended to citizens accompanying the military overseas.<sup>337</sup> Therefore, civilians could not be subject to courts-martial jurisdiction simply because they resided on a military installation.<sup>338</sup> *Reid II* incorporated an extensive use of British and U.S. legal history, applying the distrust of standing armies to the issue of military jurisdiction over civilians. Despite Black's authorship, Douglas was largely responsible for these historic arguments in the decision.<sup>339</sup>

Between *Reid I* and *Reid II*, the Court issued *Jackson v. Taylor*,<sup>340</sup> another decision impacting the military's justice system, which Douglas

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336. *Reid v. Covert*, 354 U.S. 1 (1957) (*Reid II*). While *Reid II* was not a unanimous decision, the dissenting Justices, Clark and Burton, did not cite to *Dynes*, though Frankfurter did in a concurring opinion.

337. *Id.*

338. The Court, in relying on *Toth*, held:

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 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.

*Reid II*, 354 U.S. at 32.

339. Douglas wrote to Black disparaging Solicitor General John Rankin's arguments:

We have been listening to the arguments in *Covert* and *Kruger*, and I am surprised that the Court is not subjecting Rankin to more penetrating questioning. Here are some items from my memorandum which he undoubtedly cannot satisfactorily explain. Why not hit him with *Winthrop*, with *Toth*, with English precedent before 1789 and with early American law.

Letter from Justice William O. Douglas to Justice Hugo Black (undated) [Black, Box 327]. Perhaps because *Winthrop* had argued for limited jurisdiction, Douglas found his work usable for this particular argument. Douglas also urged Black to incorporate his unused legal historic analysis from *Yamashita*.

340. 353 U.S. 569 (1957). *Jackson* was decided on June 3, 1957. See also *Fowler v. Wilkinson*, 358 U.S. 583 (1957), a companion case in which the petitioner was tried for the same offenses as *Jackson*. The Court, in a decision again authored by Clark, held substantially similar to *Jackson*. *Id.*

found offensive and had a relationship to the ultimate outcome in *Reid II*. In a decision authored by Clark, the Court upheld a court-martial conviction and sentence, as well as the holdings of the military's appellate courts.<sup>341</sup> Jackson, the petitioner, had been convicted of both premeditated murder and attempted rape and was sentenced to life imprisonment.<sup>342</sup> Both the Army's Board of Review and the intermediate-level appellate court overturned the murder conviction and reassessed the sentence to twenty years.<sup>343</sup> This action was permissible under the UCMJ, except that it had not yet been tested by the federal appellate courts.<sup>344</sup>

The maximum sentence of imprisonment that a court-martial could adjudge for attempted rape was twenty years. Jackson argued that notwithstanding the UCMJ, as a matter of due process, the appellate court was required to return his case for a rehearing on sentencing, rather than reassessing the sentence itself.<sup>345</sup> The majority found two reasons to deny this argument. First, the Court essentially held that the law on aggregate sentences reflected military necessity and custom.<sup>346</sup> Second, and most appalling to Douglas, was the majority's deference to the UCMJ as constructed.<sup>347</sup> The majority noted, "Congress must have known of the problems inherent in rehearing and review proceedings for the procedures were adopted largely from prior law. It is not for us to question the judgment of the Congress in selecting the process it chose."<sup>348</sup>

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341. *Jackson*, 353 U.S. at 570-71.

342. *Id.* Under the UCMJ, courts-martial sentenced convicted servicemen by aggregating the offenses without delineating imprisonment lengths. As a result, both servicemen convicted of multiple offenses, as well as the appellate courts, were unaware of whether a court-martial imposed specific segments of time for individual offenses. At that time, this was codified as Article 66 of the UCMJ, 64 Stat. 128, 50 U.S.C. § 653 (1950).

343. *Jackson*, 353 U.S. at 571.

344. *Id.* at 572.

345. *Id.* at 578-79. Douglas found the majority's language offensive in this matter, specifically,

Military law provides that one aggregate sentence must be imposed and the board of review may modify that sentence in the manner it finds appropriate. To say in this case that a gross sentence was not imposed is to shut one's eyes to the realities of military law and custom.

*Id.*

346. *Id.* at 578-79.

347. *See id.* at 580-82.

348. *Id.* at 580.

Douglas, along with Black and Warren, joined Brennan's dissent.<sup>349</sup> These four Justices had become a core influence in military-justice cases, incorporating due-process standards into courts-martial. With the occasional exception of Warren, however, neither Black nor Brennan attempted to expand the Judicial Branch's influence in the Executive Branch's control of military matters. However, *Jackson* had a relationship to the *Reid I* and *Krueger* rehearings in that Douglas influenced Brennan to not subject civilians to a criminal-justice construct that he found offensive to soldiers.<sup>350</sup>

If, today, *Reid II* is an anachronism, it had an immediate effect on the reach of military jurisdiction over civilians. On January 18, 1960, the Court issued three decisions, authored by Clark, giving further definition to the military's jurisdiction. In *Grisham v. Hagan*, a capital case of an Army civilian employee, the Court retroactively applied *Reid II* and determined that the lower courts erred in denying a civilian habeas review, challenging the military's jurisdiction.<sup>351</sup> Without criticizing *Reid I*, Clark and the majority determined that *Reid II* solely controlled the issue.<sup>352</sup> In *McElroy v. United States ex rel. Guagliardo*, the Court applied *Reid II* to civilian defense contractors in non-capital cases.<sup>353</sup>

In *Kinsella v. United States ex rel. Singleton*, the lengthiest decision of the three, the Court also extended *Reid II* to non-capital cases of civilian dependents.<sup>354</sup> With Douglas's full approval, Clark noted that "we are not convinced that a critical impact upon discipline will result, as claimed by the Government (even if anyone deemed this a relevant consideration), if noncapital offenses are given the same treatment as capital ones by virtue

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349. *Id.* at 581.

350. Memorandum from Justice William O. Douglas to Justice William Brennan (undated) [Brennan, Box I: 2].

351. 361 U.S. 278 (1960). Frederick Bernays Weiner represented Grisham in arguments before the Court. *Id.* In his court-martial, Grisham was charged with premeditated murder but found guilty of unpremeditated murder and sentenced to life. His sentence was later reduced to thirty-five years. *Id.*

352. *Id.* at 280.

353. 361 U.S. 281 (1960). This case consolidated two petitioners. McElroy was a prison warden. The criminal defendant named Guagliardo was charged with larceny and conspiracy to commit larceny. The court-martial adjudged him guilty and sentenced him to ten years. The second case, *Wilson v. Bohlender*, involved a civilian charged in a court-martial with sodomy, found guilty, and sentenced to five years. Both Guagliardo and Wilson were defense contractors accompanying the Army. They were not dependents such as in *Reid II*. *Id.* at 281-83. Frederick Bernays Weiner represented Guagliardo in arguments before the Court. *Id.* at 281.

354. 361 U.S. 234 (1960). Frederick Bernays Weiner represented Singleton in arguments before the Court. *Id.* at 235.

of the second *Covert* case."<sup>355</sup> Not one to abandon pragmatism, Clark also noted, again with Douglas's approval, that the threat of a civilian prosecution in a foreign court would, in and of itself, serve as a deterrent.<sup>356</sup>

*Reid II* also served as a basis for due-process rights in civil cases. In *Gideon v. Wainright*, a non-military case, Clark viewed *Reid II* as guaranteeing the right to defense counsel in capital and non-capital cases alike.<sup>357</sup> Whatever offense Clark may have taken from the Court's reversal of his original decision, Clark found the majority's logic compelling enough to adopt.

### *C. Military Justice, Due Process, and Administrative Rights of Servicemen: Douglas's Jurisprudence Constrains the Executive Branch*

One year after *Youngstown*, Douglas dissented in *Orloff v. Willoughby*, a case involving one of the more unique challenges to the Executive Branch's control over the military.<sup>358</sup> The majority opinion held that the

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355. *Id.* at 243.

356. *Id.* at 245-46. Clark pointed out here,

We have no information as to the impact of that trial on civilian dependents. Strangely, this itself might prove to be quite an effective deterrent. Moreover, the immediate return to the United States permanently of such civilian dependents, or their subsequent prosecution in the United States for the more serious offenses when authorized by the Congress, might well be the answer to the disciplinary problem. Certainly such trials would not involve as much expense nor be as difficult of successful prosecution as capital offenses.

*Id.* Harlan and Frankfurter dissented to the removal of military jurisdiction in non-capital cases. *Id.* at 249-50 (Harlan, J., dissenting).

357. 372 U.S. 335, 348-49 (1963) (Clark, J., concurring). Clark penned,

Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, *Reid v. Covert*, 354 U.S. 1 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, as we noted that:

Obviously Fourteenth Amendment cases dealing with state action have no application here, but if they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . . would be as invalid under those cases as it would be in cases of a capital nature.

*Id.* at 348-49 (citation omitted).

358. 345 U.S. 83, 95 (1953).

President's authority to determine fitness for holding a military commission was not within the Court's discretion to review.<sup>359</sup> Relying on a constitutional privilege, Dr. Orloff refused to take a loyalty oath or disclose to the government whether he had ever been a member of the Communist Party.<sup>360</sup> As a licensed physician, Dr. Orloff was conscripted into the Army under a set of rules that should have resulted in his commission as a medical doctor.<sup>361</sup> Instead, the Army placed Dr. Orloff in an enlisted position and refused to discharge him upon his request.<sup>362</sup> The Court's majority conceded that while Dr. Orloff had a constitutional right to join a political organization as well as a right to refuse to answer questions, that particular right did not trump the Executive Branch's authority to exclude individuals from trusted national-security positions.<sup>363</sup>

Along with Black, Douglas joined in Frankfurter's dissent.<sup>364</sup> The dissent did not disagree with the majority regarding the President's authority to withhold a military commission.<sup>365</sup> But the dissent argued that the case was more complex than the majority admitted.<sup>366</sup> Dr. Orloff's claim was two-fold: first, that he possessed a right to the commission based on a statutory construction of the draft laws under which he was conscripted, regardless of his exercise of a constitutional privilege; and second, failing the Executive's conferring of a commission, that he was entitled to a discharge from the military.<sup>367</sup> The dissent reasoned that if Congress intended the particular draft laws and commissioning rules for doctors (dating to 1847) to result in either a commission or a discharge, then the Executive Branch could not keep Dr. Orloff in military service.<sup>368</sup> To do so strengthened the Executive Branch's authority beyond the Constitution's constraints on it.<sup>369</sup>

Although Douglas did not author the dissent, there are two notable features to his role in the case. The first was that he clearly approved of Frankfurter's criticism of the Executive Branch's conduct throughout the case, and nothing in the correspondence between the two justices evidences a desire to curb this criticism. Both the majority and dissents recognized that the Executive Branch had shifted its legal arguments from the initial

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359. *Id.* at 91-92.

360. *Id.* at 89-90.

361. *Id.* at 84.

362. *Id.* at 85.

363. *Id.* at 91-92.

364. *Id.* at 95 (Black, J., dissenting).

365. *Id.* at 97 (Frankfurter, J., dissenting).

366. *See id.* at 99.

367. *See id.* at 97-99.

368. *Id.* at 97-99.

369. *See id.* at 97-98.



hearing before the district court to the arguments before the Supreme Court.<sup>370</sup> The Court's majority found the shift commendable, while the dissent critically stated, "Only in its purpose to keep this man in the Army has the Government been undeviating."<sup>371</sup>

The second was Douglas's unpublished objection to the statement made in the majority's opinion:

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.<sup>372</sup>

Douglas saw the majority's logic as antiquated, and he feared its use by the government in the Nation's postwar political climate.<sup>373</sup> In a proposed, penciled draft, Douglas concluded that even though Dr. Orloff might not merit a commission as a matter of national security, the Executive Branch's assertion of authority to retain the doctor as an enlisted man was symbolic of an "authoritarianism alien to the country's principles."<sup>374</sup> Douglas did not insist that Frankfurter place this language in the dissent, and, as a result, his draft only gives insight into Douglas's mindset on the case.

In 1959, in *Lee v. Madigan*, Douglas authored the majority opinion limiting the military's jurisdiction to prosecute the capital crimes of rape and murder to periods of actual war.<sup>375</sup> Equal to any of Douglas's prior decisions, the facts and rulings in *Madigan* are instructive to his evolving belief that a dangerous nexus existed between the reach of the Executive

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370. *Id.* at 87 (majority opinion); *id.* at 95 (Black, J., dissenting); *id.* at 99 (Frankfurter, J., dissenting).

371. *Id.* at 87 (majority opinion) ("We think, however, that the Government is well advised in confessing error and that candid reversal of its position is commendable."); *id.* at 99 (Frankfurter, J., dissenting).

372. *Id.* at 93-94 (majority opinion). Douglas's disgust with this quote is found in the Hugo Black correspondence files. Memorandum from Justice William O. Douglas to Justice Hugo Black, copied to Justice Felix Frankfurter (1952) [Black, Box 315].

373. Memorandum from Justice William O. Douglas to Justice Hugo Black, copied to Justice Felix Frankfurter (1952) [Black, Box 315].

374. Justice William O. Douglas, draft dissent in *Orloff* (undated) [WOD, Box 221]. This dissent was incorporated into Black's dissent. See *Orloff*, 345 U.S. at 96-97 (Black, J., dissenting).

375. 358 U.S. 228 (1959).

Branch's exertion of its authority and the military's legal construct. Madigan was sentenced to twenty years after being court-martialed for a rape and murder that occurred in France during World War II.<sup>376</sup> While serving his sentence in a military prison in California in 1949, he conspired to murder another inmate; the Army court-martialed Madigan a second time, resulting in a second conviction.<sup>377</sup>

While the actual conflict concluded in August 1945 with the Japanese surrender, the Legislative and Executive Branches did not declare an end to hostilities with Germany until 1951 and Japan in 1952.<sup>378</sup> Under Article 92 of the Articles of War, the military did not have subject matter jurisdiction to prosecute murder during peacetime.<sup>379</sup> Although Congress had already rescinded a number of individual Articles of War by the time of Lee's second court-martial, Article 92 remained in effect because Congress considered the Nation still at war while U.S. forces occupied Germany and Japan and the allied political apparatus governed much of the administration of both countries.

Douglas's approach to the jurisdictional issue minimized the importance of the 1950 Congress's intent and focused on the historic opposition against expanded military jurisdiction. Douglas argued, "We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history."<sup>380</sup> Relying on the Court's reasoning in *Duncan v. Kahanamoku*,<sup>381</sup> a case involving martial law and the extent of its jurisdiction over civilians, the Court determined

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376. *Id.* at 229.

377. *Id.*

378. *Id.* at 230. ("The war with Germany terminated October 19, 1951, by a Joint Resolution of Congress and a [corresponding] Presidential Proclamation. And on April 28, 1952, the formal declaration of peace and termination of war with Japan was proclaimed by the President . . .")

379. *Id.* at 229. Article 92 read,

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: Provided, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

*Id.* at 229 n.2.

380. *Id.* at 232.

381. 327 U.S. 304 (1946).

the term "in time of peace" to mean an enemy state's surrender, truce, or armistice rather than a congressional or executive declaration of when a conflict actually terminated.<sup>382</sup>

While Douglas noted few facts to strengthen his view of legislative intent, he opined that the original congressional intent underlying Article 92 was consistent with the majority's opinion.<sup>383</sup> But the original congressional intent dated to 1916 when the relevant Articles of War were enacted and the law was far from settled over the question of which legislature's decision governed—the 1916 Congress or the 1950 Congress. Most telling, however, was Douglas's narrowing of the Executive Branch's authority to declare when a conflict terminated. It is true that a sizeable body of international law held that the law of war ceased when a belligerent surrendered or a truce existed.<sup>384</sup> But Douglas did not turn to international law in writing the majority's opinion and fashioned his own answer.

In a memorandum circulated to the Court detailing his jurisprudential approach to the case, he noted four points.<sup>385</sup> First, his willingness to have the Court define "in time of peace" was contrary to the Executive Branch's definition.<sup>386</sup> Second, Douglas professed a continued belief that civilian juries were superior to courts-martial.<sup>387</sup> Third, he argued that Congress's failure to repeal or amend the extension of Article 92 past the Japanese surrender had no bearing on the original purpose of the Article; therefore, the Court, consistent with the Articles of War's intent to curb Executive Branch control over military members in peacetime, restored Article 92 to its original purpose.<sup>388</sup> Important to this point is that the original purpose of the Article was its jurisdictional limitations. Finally, Douglas expressed anger at Frankfurter's absence from the decision.<sup>389</sup>

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382. *Lee*, 358 U.S. at 235-36.

383. *See id.* at 236.

384. *See, e.g.*, HENRY WAGER HALLECK, *INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* 340-54 (1861); L. OPPENHEIM, *INTERNATIONAL LAW* 300, 333-35 (7th ed. 1952); Jost Delbrueck, *A European Peace Order and the German Question: Legal and Political Aspects*, 11 MICH. J. INT'L L. 897 (1990) (explaining post-World War II discussions to unify Europe through treaties).

385. William O. Douglas, draft opinion in *Lee v. Madigan* (undated) [WOD, Box 1205].

386. *Id.*

387. *Id.*

388. *Id.* Douglas argued, "The failure to repeal, alter, or amend this law leaves the problem where it was at the time the law was enacted, but the failure has no bearing on the original purpose of the law's jurisdiction." *Id.*

389. *Id.*

In 1958, the Court, per curiam in *Harmon v. Bruker*, determined that the judiciary possessed jurisdiction to review the Secretary of the Army's administrative-discharge decisions on the basis of a claim that the Secretary exceeded his authority.<sup>390</sup> In 1952, Harmon was inducted into the Army, and for two years the Army described his service as excellent.<sup>391</sup> However, in 1954, the FBI provided the Army with information that Harmon's pre-service conduct was subversive, and the Army discharged Harmon with a "less than honorable" discharge.<sup>392</sup> After exhausting all administrative appeals, Harmon appealed the Army's decision to the U.S. District Court for the District of Columbia.<sup>393</sup> The trial judge sympathized with Harmon but concluded that the court lacked jurisdiction to review the Army's decision.<sup>394</sup> The U.S. Court of Appeals for the District of Columbia, partly

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390. 355 U.S. 579, 581-82 (1958). *Harmon* originated in a consolidated case from two petitioners. For a full recitation of the facts underlying this case, see *Harmon v. Bruker*, 243 F.2d 613 (D.C. Cir. 1957). From the appellate record, it appears that Harmon exhausted his administrative remedies prior to seeking redress in federal court. Initially, Chief Justice Warren assigned the case to Justice Charles Whittaker. However, Whittaker's per curiam decision was unsatisfactory to Douglas and Black, and Douglas expanded on it. See Letter from Charles E. Whittaker to Chief Justice Earl Warren (Feb. 11, 1958) [Warren, Box 634].

391. *Harmon v. Bruker*, 243 F.2d 613, 617 (D.C. Cir. 1957).

392. See *id.* at 616. At the time of *Harmon v. Bruker* (as in the present), administrative discharges fell into three categories: honorable; general, but under honorable conditions; and other than honorable. A number of veterans' benefits available under law and regulation were affected by the classification of the discharge. State veterans programs generally distinguished between the three types of administrative discharges to the benefit of those with honorable discharges. Moreover, then, as now, society placed a higher standing on honorable discharges than the lesser two. See, e.g., *Ives v. Franke*, 271 F.2d 469, 471 (D.C. Cir. 1959) (Bazelon, J., dissenting); *Schustack v. Herren*, 234 F.2d 134, 135 (2d Cir. 1956). Prior to *Harmon*, the Court unanimously—including Douglas—determined that it would not review the Secretary of the Army's policy on administrative discharges. *Patterson v. Lamb*, 329 U.S. 539 (1947).

393. *Harmon v. Bruker*, 137 F. Supp. 475, 476 (D.D.C. 1956). The district court noted that the Army's basis for Harmon's administrative discharge was that prior to his service, as a youth, his parents were associated with the Detroit Urban League and the American Labor Party. The Court caustically noted, "Save for plaintiff's continuing association with his parents and for writing one letter requesting contributions for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army." *Id.* at 476.

394. *Id.* at 477-78. The district court noted,

In his complaint, plaintiff states that he is not now and never has been a member of the Communist Party or any of its front

relying on *Orloff v. Willoughby*, likewise denied its jurisdiction to review Harmon's claim.<sup>395</sup>

Douglas did not view the case as a matter of constitutional rights but whether the Secretary of the Army exceeded the authority legislated by Congress. Douglas reasoned that a harmonious reading of the various provisions in the statute required a finding that the Secretary of the Army exceeded the authority enumerated by the laws on discharges.<sup>396</sup> Namely, the law required that discharges reflect the service of an individual rather than any pre-service affiliations.<sup>397</sup> Additionally, Douglas made it clear to the judicial conference that he believed that the petitioner in the case had suffered a legal harm.<sup>398</sup> One of the unique features of this case involved a dispute between the Attorney General and the Secretary of Defense, in

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organizations, or of any organization which has engaged in subversive activities of any kind. Plaintiff asserts that he has always been unswervingly loyal to the Government of the United States. To this the government responds that for lack of knowledge and information sufficient to form a belief, it denies plaintiffs assertion, but in its argument it concedes that it has never found plaintiff either disloyal or loyal.

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Although it may be true that the immediate case presents questions of law, it likewise involves a review of the findings upon which the separation was based, for while the vast majority of facts upon which the government relies occurred prior to induction, at least one such fact occurred during the term of military service. We feel constrained to hold, therefore, that under the present state of the law we lack requisite authority to review, control or compel the granting of particular types of discharge certificates. We would, nevertheless, be remiss if we failed to point out the inequities which may result, as in this case, from the lack of adequate Congressional circumscription of military action regarding discharges—action which is isolated from judicial review.

*Id.*

395. 243 F.2d at 618. The appellate court additionally took notice of what is considered the widespread dangers of the Communist Party infiltrating the national defense, stating that "[a]ctivity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country. The efforts of this movement to infiltrate all parts of the Government pose new problems, which must be met with new rules and regulations." *Id.* at 621-22. As noted previously in the body of this Article, by the time of *Harmon v. Brucker*, Douglas had derided this view.

396. *Harmon v. Brucker*, 355 U.S. 579, 582-83 (1958).

397. *Id.* at 583.

398. See Letter from Charles E. Whittaker to Chief Justice Earl Warren (Feb. 11, 1958) [Warren, Box 634] (providing a synopsis of the case).

which the Justice Department concluded that if the Army had overstepped its authority in including pre-service conduct as a deciding element in the characterizations of discharges, then the Supreme Court should rule against the Army.<sup>399</sup> The Court seized on this dispute in reaching its conclusion.<sup>400</sup>

In his dissent, Clark noted that the majority's decision was based on non-constitutional matters and criticized what he perceived as the Court's encroachment into the arena of executive exclusivity.<sup>401</sup> Moreover, to Clark, the majority's decision overturned *Orloff* and potentially enabled individuals to cripple national security.<sup>402</sup> While Clark's criticism of the Court's weakening of national security was a factor for congressional consideration, rather than judicial determination, his criticism reflected a later avenue of attack against Douglas. And while Clark exaggerated his accusation that the majority overturned *Orloff*, *Harmon* certainly narrowed the reach of *Orloff*.

Despite the Court's holdings that narrowed the military's legal construct in the 1950s, Douglas was not satisfied that he had curbed either the Executive Branch's authority over the military or the military's political influence. In 1958, he published *The Right of the People*, which, among other points, was highly critical of the military and its legal construct.<sup>403</sup> Reflecting his now-entrenched anti-military ideology, Douglas's attack on the U.S. military was two-fold. First, he argued that the military's disciplinary system lacked constitutional safeguards guaranteed to the Nation's citizens<sup>404</sup> and, second, that the military had grown into a powerful political force of its own making.<sup>405</sup>

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399. *Id.*

400. *Harmon*, 355 U.S. at 582. The Court noted:

The Solicitor General conceded that if the District Court had jurisdiction to review respondent's determinations as to the discharges he issued these petitioners and if petitioners had standing to bring these suits, the action of respondent is not sustainable. On the basis of that concession and our consideration of the law and this record we conclude that the actions of the Secretary of the Army cannot be sustained in law.

*Id.*

401. *Id.* at 584 (Clark, J., dissenting). Clark argued, "Throughout our history the function of granting discharge certificates has been entrusted by the Congress to the President and, through him, to the respective Secretaries of the Armed Forces. At no time until today have the courts interfered in the exercise of this military function." *Id.*

402. *See id.* at 585-86.

403. DOUGLAS, *THE RIGHT OF THE PEOPLE*, *supra* note 319.

404. *Id.* at 181-97.

405. *Id.* at 181-216.

In *The Right of the People*, Douglas conceded that the UCMJ contained safeguards against arbitrary and oppressive actions that existed under the Articles of War.<sup>406</sup> Nonetheless, he argued that military trials lacked fundamental due-process guarantees found in civil courts, which rendered military trials inherently opposed to standards of due process: "Military trials are trials where swift and severe action is often necessary for discipline. The sentences in the past have been notorious for their harshness. They are often rendered by men who have no foundation in law or in the democratic tradition of law administration."<sup>407</sup> These arguments were not new. Douglas, Warren, and Black had incorporated them into the case law of the 1950s. But Douglas's antipathy to the growth of the military, and consequently its legal construct, had become increasingly more open and placed him on a unique jurisprudential trajectory.<sup>408</sup>

He argued that a general, albeit nascent, democratic aversion to military law existed in Britain as early as 1628 and continued into modern U.S. political culture.<sup>409</sup> To Douglas, this aversion was manifested in such events as the passing of Pennsylvania's Constitution of 1776, which prohibited standing armies within the state, as well as the constitutional debates, in which the standing army issue was contentious among its members.<sup>410</sup> Lending later credibility for his judicial criticism of the Johnson and Nixon Administrations' conduct in Vietnam, Douglas warned that the military leadership in regard to Southeast Asia was unwittingly drawing the U.S. into armed conflict in that region. He wrote,

In 1955 our military [men] were so bold as to try to depose the progressive Ngo Dinh Diem as president of Vietnam . . . . But it indicates the manner in which well-meaning

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406. *Id.* at 182.

407. *Id.* at 183.

408. See discussion *supra* Part II.B.

409. DOUGLAS, *THE RIGHT OF THE PEOPLE*, *supra* note 319, at 170-72.

410. *Id.* at 172-74. Douglas was correct in Pennsylvania's early aversion to standing armies. Article XIII of the 1776 Pennsylvania Constitution read, That the people have a right to bear arms for the defence of themselves, and the state; and as standing armies in time of peace, are dangerous to liberty, they ought not to be kept up: and that the military should be kept under strict subordination to, and governed by the civil power.

PA. CONST. of 1776, art. XIII. Douglas's use of this document to reinforce his arguments for limiting standing armies is arguably flawed. Settled by Quakers, Pennsylvania also possessed a religious-based aversion to standing armies. This made Pennsylvania unique. No such aversion existed in its neighbors, New Jersey, Massachusetts, or New York. See, e.g., DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 48-54 (1958).

military men, without understanding of political forces, surreptitiously intrude in affairs assigned by our Constitution to the civil authority.<sup>411</sup>

From 1958 on, Douglas's two-tiered criticism was cemented in his literary efforts. In 1963, he published *The Anatomy of Liberty: The Rights of Man Without Force*.<sup>412</sup> While he once more conceded that the UCMJ was an improvement over the older Articles of War,<sup>413</sup> he cautioned that "[t]he growing influence of the Pentagon in American thinking is illustrative of how basic alterations in a constitutional scheme can be effected without a rewriting of the document."<sup>414</sup> In retirement, Douglas reflected on the military's strength in the context of President John F. Kennedy's role in the assassination of Ngo Dinh Diem, the South Vietnamese President, in 1963:

Diem was not sufficiently servile to the Pentagon demands; he was committed to rejection of any foreign expeditionary force. So he had to go. Jack's acquiescence was a tragic dereliction. Diem was the one barrier protecting America against the designs of the Pentagon. In reflecting on Jack's relation to the generals, I slowly realized that the military were so strong in our society that probably no President could stand against them.<sup>415</sup>

Although Douglas's statement on the military's influence over Kennedy and its role in the escalation of the Vietnam Conflict was an oversimplification of the reasons underlying the Conflict's escalation, his belief of Kennedy's acquiescence is clearly revealing to his later cases. After Kennedy's assassination, Lyndon Johnson assumed the presidency,

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411. DOUGLAS, *THE RIGHT OF THE PEOPLE*, *supra* note 319, at 212-13. Douglas first met Diem in 1952 at Yale University's club in New York City. Diem impressed Douglas, and he introduced the future Vietnamese President to other government officials. See SETH JACOBS, *COLD WAR MANDARIN: NGO DINH DIEM AND THE ORIGINS OF AMERICA'S WAR IN VIETNAM, 1950-1963*, 31 (2006).

412. WILLIAM O. DOUGLAS, *THE ANATOMY OF LIBERTY: THE RIGHTS OF MAN WITHOUT FORCE* (1963).

413. See *id.* at 63-66.

414. *Id.* at 72. It is noteworthy that Douglas also penned, "The military, though still subordinate to the civilian authority, has increased its influence since World War II. Its influence has mounted as its budget has increased." *Id.* at 70. In conceding the improvement of the UCMJ over the Articles of War, Douglas wrote that the UCMJ, "enacted in 1950, a court composed of civilians and designated as a Court of Military Appeal, was made the agency of final review of questions of law arising in cases of courts-martial." *Id.* at 63.

415. DOUGLAS, *THE COURT YEARS*, *supra* note 39, at 304-05.



and while the two men knew each other and were friendly dating back to Franklin Roosevelt's administration, Douglas grew to distrust Johnson because of his "Machiavellian character."<sup>416</sup> Johnson's escalation of the Vietnam Conflict emboldened Douglas to attempt to eviscerate the military's legal construct to the point where the Executive Branch could not commit the military to conflict unless it had the express declaration from Congress to do so.

### III. VIETNAM AND DOUGLAS: THE "NOT SO HIDDEN" INTENT UNDERLYING *O'CALLAHAN*

In 1974, Vern Countryman observed,

In recent years William O. Douglas has consistently dissented from the refusal of the Court to consider cases challenging the validity of our military operations in Vietnam and the validity of the use of the Selective Service Act to support those operations . . . because Congress has not declared a state of war to exist . . . .<sup>417</sup>

In essence, what Countryman had correctly articulated was that Douglas had migrated from narrowing the jurisdictional reach of military law to reducing executive authority and seeking to terminate what he considered an unjust and illegal war through the judiciary's power. But, by

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416. *Id.* at 317. For a thorough exposition of Douglas's views on Johnson, see *id.* at 310-19. Douglas acknowledged that Johnson accomplished the passage of important civil-rights legislation and had worked for the betterment of impoverished U.S. citizens. *Id.* at 336. But he also believed that Johnson possessed a personality defect of a need to be liked, as well as a need to convince his opponents to agree with him. *Id.* at 333. When either need failed to materialize, Douglas believed that Johnson became destructive. *Id.* at 336. Notably, Douglas penned, "LBJ—like Nixon after him—always spoke of peace and emphasized how peaceful the intentions of Americans in Vietnam were. That of course, was fraudulent talk. Almost every day of the Johnson term brought an escalation of the war effort." *Id.* at 324.

417. VERN COUNTRYMAN, *THE JUDICIAL RECORD OF WILLIAM O. DOUGLAS* 15 (1974). A veteran of World War II, Countryman was Douglas's law clerk and, later, Royall Professor of Law at Harvard Law. Nick Ravo, Obituary, *Vern Countryman*, 81, *Professor and Commercial Law Expert*, N.Y. TIMES, May 17, 1999. He later taught at Yale University but was denied a full professorship in 1954. *Id.* He had publicly criticized McCarthy and loyalty oaths, and he claimed that congressional investigations of suspected Communists were politicized witch-hunts, and he linked his anti-McCarthy stance to the denial of a full professorship. *Id.* Countryman was later appointed law school dean at the University of New Mexico and then hired as a full professor at Harvard Law School. *Id.*

1974, the Vietnam Conflict was, for practical purposes, at an end, and, although neither Douglas nor Countryman likely knew it at the time, Douglas had passed the apex of his influence. That apex had occurred five years earlier in *O'Callahan v. Parker*, a case that, at least symbolically, had the possibility to accomplish the very constitutional realignment that Douglas sought.<sup>418</sup>

Following Kennedy's death, the escalation of U.S. involvement in Vietnam was not universally popular.<sup>419</sup> By 1966, public protests against the war had emerged from university campuses and spilled into mainstream society.<sup>420</sup> Citizens not only avoided conscription, some even attempted to disrupt the military's ability to engage in the Conflict.<sup>421</sup> It has been aptly observed that during the Vietnam Conflict, the Court largely confined itself to determining cases on individual rights rather than addressing the constitutionality of presidential actions during the Conflict.<sup>422</sup> But this observation does not hold true for Douglas, who judicially attacked the Conflict.<sup>423</sup> He criticized his colleagues for refusing to decide on issues involving reservist call-ups, troop movements, and war-protester cases.<sup>424</sup>

#### *A. Conscription and Military Reservists: Douglas Breaks from Individual Rights and His Brethren*

No analysis of Douglas's intent in *O'Callahan* is complete without examining his now little-noted dissents in *Morse v. Boswell*<sup>425</sup> and other cases involving reservists challenging the government's decision to order them to active duty.<sup>426</sup> Nor can *O'Callahan* be fully analyzed without

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418. 395 U.S. 259 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

419. See NOAM CHOMSKY, *RETHINKING CAMELOT: JFK, THE VIETNAM WAR, AND U.S. POLITICAL CULTURE* 1-5 (South End Press 1993).

420. See MELVIN SMALL, *ANTIWARRIORS: THE VIETNAM WAR AND THE BATTLE FOR AMERICA'S HEARTS AND MINDS* 34-36 (2002).

421. See generally BALL, *supra* note 5, at 206. Two excellent histories detailing both the progress of the conflict and the national response are STANLEY KARNOW, *VIETNAM: A HISTORY* (Penguin Group 1997) (1983) and GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975* (2d ed. 1986).

422. See generally Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65 (1998); see also Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773 (1980).

423. See Belknap, *supra* note 422.

424. See *id.*

425. 393 U.S. 802, 802 (1968) (Douglas, J., dissenting).

426. See, e.g., *Winters v. United States*, 390 U.S. 993 (1968).

Douglas's positions on selective-service cases that arose during the Vietnam Conflict, such as *Sellers v. Laird*,<sup>427</sup> which was decided almost contemporaneously with *O'Callahan*. It is essential to note that, in each of these cases, when Douglas dissented from the Court's refusal to examine the merits of petitioners' claims by not granting stays against the Executive

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427. 395 U.S. 950 (1969) (Douglas, J., dissenting). Another example of Douglas's attempt to narrow the Executive's ability to commit forces to Vietnam without a formal declaration of war was in his dissent from the Court's denial of certiorari in *Holmes v. United States*, 391 U.S. 936 (1968). Douglas argued, correctly, that the Court had never fully tested the Executive's authority to oversee conscription during peacetime. *Id.* at 938 (Douglas, J., dissenting). He pointed out that during the Civil War, four justices, in 1863, dissented in the *Prize Cases* because they felt that the "President alone had no power to place an embargo under which a British Ship was seized while in Hampton Roads." *Id.* at 946-47. The *Prize Cases*, however, did not involve the question of conscription at all but whether the maritime decisions of the President during the Civil War were constitutional. *Id.* at 947.

To Douglas, the issue required a broad review to include conscription for domestic needs as well as for overseas conflicts. But within his reasoning, he clearly enunciated a belief in the validity of the argument that the conflict in Vietnam was an illegal war, specifically,

Putting down an internal insurrection, like defending our shores against an aggressor, is certainly quite different from launching hostilities against a nation or a people overseas. I express no opinion on the merits. But there is a weighty view that what has transpired respecting Vietnam is unconstitutional, absent a declaration of war; that the Tonkin Gulf Resolution is no constitutional substitute for a declaration of war; that the making of appropriations was not an adequate substitute; and that "executive war-making is illegal."

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As I said, the question whether there can be conscription when there has not been a declaration of war, has never been decided by this Court. It is an important question. It is a recurring question. It is coming to us in various forms in many cases as a result of the conflict in Vietnam. I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question.

*Id.* at 947-49. Although Douglas dissented alone in this case, Justice Potter Stewart commented separately that he would join Douglas if the issue were narrowed to whether the Executive Branch had the authority to compel conscription for an international armed conflict without a declaration of war. *Id.* at 936 (mem.).

Branch's conduct<sup>428</sup> or by refusing to grant review under a writ of certiorari,<sup>429</sup> he was not dissenting from the Court's opinion as to the actual issues of law raised by the affected parties. When Douglas acted on these cases, he often did so in his capacity as a circuit justice rather than as a Supreme Court justice. Ironically, his conduct occurred in a similar manner as a justice that he detested from a previous era, Chief Justice Roger B. Taney, in *Ex parte Merryman*.<sup>430</sup>

The roots of *Morse* originated in a presidential call-up of reservists to active duty.<sup>431</sup> On April 10, 1968, President Lyndon Johnson delegated authority to the Secretary of Defense to activate units from the Army's Ready Reserve, and, the following day, the Defense Secretary delegated this authority to the Secretary of the Army who, in turn, activated a number of reserve units to active duty.<sup>432</sup> The Army's purpose in this activation was both to counter allegations that the Ready Reserve had become a refuge for persons seeking to avoid service in Vietnam and to assume duties within the Continental U.S., which had primarily been the role of active forces.<sup>433</sup>

After a number of challenges from affected reservists, the lower federal courts issued contrary rulings.<sup>434</sup> Douglas granted a stay against the call to active duty for each reservist but centered on *Morse*, and the Court eventually overrode Douglas's stay.<sup>435</sup> In his dissent, Douglas noted that the call-up was inequitably enforced and, in some conditions, reservists were called up for twenty-four months beyond time already served.<sup>436</sup> Moreover, the enlistment contracts of some of the affected reservists noted that call-ups for active duty would occur only during periods of national

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428. See *Winters*, 390 U.S. at 993 (denying the application for a stay presented by Justice Harlan).

429. See *Holmes*, 391 U.S. at 949 (Douglas, J., dissenting).

430. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (holding that President Lincoln lacked the constitutional authority to suspend the writ of habeas corpus). Note, however, that despite Douglas's antipathy for Taney, he viewed Taney's conduct in *Merryman* as courageous. See DOUGLAS, ALMANAC OF LIBERTY, *supra* note 14, at 345. Douglas wrote, "Taney had no army to compel [the executive to his decision]. The authority of the Court was flouted; and its prestige suffered greatly." *Id.*

431. *Morse v. Boswell*, 393 U.S. 802 (1968).

432. *Id.* at 804 (Douglas, J., dissenting).

433. *Id.* at 806.

434. *Id.* at 803.

435. *Id.* at 802.

436. *Id.* at 806.

emergency.<sup>437</sup> Citing to a public statement opposing a call-up by Senator Russell Long, Douglas opined that no such national emergency existed.<sup>438</sup>

Douglas then turned to *Burns v. Wilson*,<sup>439</sup> *Orloff v. Willoughby*,<sup>440</sup> *Reid v. Covert (Reid II)*,<sup>441</sup> and *Harmon v. Bruker*<sup>442</sup> for the proposition that the Court possessed jurisdiction to review Executive Branch determinations made under the Constitution's enumerated war powers, including the employment conditions of reservists.<sup>443</sup> In retrospect, it could have been the case that, as early as 1949, Douglas intended the judiciary to have a supervisory role over the military during armed conflict, and he spent two decades building case law to that effect.<sup>444</sup> As noted later, his opponents

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437. *Id.* at 807.

438. *Id.* at 808. In 1966, Senator Russell Long, a Louisiana Democrat, stated in the Senate,

Mr. President, I cannot see how any realistic answer can be raised against this amendment [calling up the reserves]. They say, "You can call up the units." In the first place, it cannot be done, because the President of the United States has to declare a national emergency, and very naturally he does not want to declare a national emergency at this time after we have gone this far without it. . . . [A] declaration of a national emergency would make us look ridiculous in the eyes of the world—to declare a state of emergency in regard to a third-rate power like North Vietnam.

*Id.* (citing 112 CONG. REC. 19726 (1966) (statement of Sen. Russell)).

439. 346 U.S. 137 (1953).

440. 345 U.S. 83 (1953).

441. 354 U.S. 1 (1957).

442. 355 U.S. 579 (1958).

443. *Wilson*, 393 U.S. at 809-10 (Douglas, J., dissenting).

444. In *Winters v. United States*, 390 U.S. 993 (1968), Douglas, in his dissent, claimed that he did not seek to have the Judiciary govern the conduct of military operations. He argued:

Historically, one of the most important roles of civil courts has been to protect people from military discipline or punishment who have been placed beyond its reach by the Constitution and the laws enacted by Congress. If *Winters* is right, he is in one of those categories. *There are those who in tumultuous times turn their faces the other way saying that it is not the function of the courts to tell the Armed Forces how to run a war. Of course that is true.* But it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander.

*Winters v. United States*, 89 S.Ct. 57, 59-60 (1968) (emphasis added) (citations omitted). However, Douglas's assurance of the judiciary's non-intervention is not

accused him of doing so; though, given Douglas's concurrence with *Yamashita*, *Quirin*, and other World War II-era cases, this accusation proves hollow. However, the most compelling part of Douglas's dissent was in his *de facto* attempt to negatively define the legal character of U.S. participation in armed conflict in Vietnam. Douglas conceded that Congress had the power to alter laws without the interference of public estoppel.<sup>445</sup>

*Morse* was not the only reservist case in which Douglas dissented, and, indeed, he knew that his arguments to grant a full hearing would be defeated. A more complex and, for Douglas, fruitless case, *Winters v. United States*,<sup>446</sup> showed how isolated he had become in curbing the Vietnam Conflict through judicial intervention. The case involved the broad question of whether, by an enactment of law, Congress could unilaterally modify the terms of an enlistment contract; but the heart of the case, as fashioned by the district court Judge, John Francis Dooling, was whether the judiciary could intervene in the orders of commanders to military personnel serving under their command where the law underlying those orders was otherwise valid.<sup>447</sup> Judge Dooling answered the question in the negative and concluded that the reservist's contention—that his

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supported by his other opinions, draft dissents, or memoranda described throughout this Article.

445. *Morse v. Boswell*, 393 U.S. 802, 807 (1968) (Douglas, J., dissenting).

446. 390 U.S. 993 (1968). The case arose from a New York Federal District Court ruling captioned, *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y. 1968). On appeal, the U.S. Court of Appeals for the Second Circuit refused to grant a stay in the government's orders for Winters to report to duty. See *Winters v. United States*, 390 F.2d 879 (2nd Cir. 1968).

447. *Winters*, 281 F. Supp. at 299. Important to Douglas's arguments for granting certiorari was the following statement issued by District Court Judge Francis Dooling:

At the troublesome interface between the civil order and the sealed-off military sub-order with its own code of laws, system of justice and hierarchy of tribunals the task of the civil court is limited to determining whether or not the military has acted within the jurisdiction conferred on it by valid law; that includes the duty to determine, where an act of discretion is the bridge over which must lead the path of determining whether or not a quasi-civilian will be transferred from civilian to full military status, that the discretion has been exercised; the civil court would exceed its duty if it reviewed the exercise of discretion to see whether it was well or ill-founded by any substantial evidence rule.

*Id.* That Dooling was generally thought of as a liberal judge who sided with women's-rights issues and labor unions did not appear to salve Douglas.

original enlistment contract shielded him from congressional alterations—was without merit.<sup>448</sup>

On March 22, 1968, Justice Harlan refused to grant a stay in proceedings against a marine reservist who had challenged the government's orders to be called into active duty; Douglas disagreed with Harlan's determination.<sup>449</sup> On May 20 of the same year, the marine reservist sought a second stay, which Harlan denied once more.<sup>450</sup> In response, the reservist sought certiorari to the Court, which was denied on October 14, 1968.<sup>451</sup> Douglas dissented from the denial of certiorari but was the sole justice to do so. Harlan, along with seven other justices, believed, as Judge Dooling did, that the particular issues raised were beyond the Court's jurisdiction. In a memorandum to his law clerk, a puzzled Douglas noted,

In Justice Harlan's opinion in the *Winters* case, there is a suggestion that the judiciary has no business passing on questions concerning the relationship of members of the armed forces to the Pentagon. Would you prepare for me and leave on my desk for Saturday an addition to the Morse opinion showing this type of problem is within the traditional type of judiciary competence.<sup>452</sup>

Douglas's arguments to Black did not influence his support for Douglas's positions. Indeed, apparently by not joining in the dissent, Justice Thurgood Marshall, who staunchly allied with Douglas in *O'Callahan*, was not swayed by Douglas's position that the Court could review an individual military order for an individual amenable to military service to muster.

As a further sign of Douglas's isolation from his judicial peers, in *Johnson v. Powell* he criticized Black's refusal to grant a stay against the Army's shipment of reserves to Vietnam.<sup>453</sup> Douglas excoriated the Executive Branch's assertion that reservists were in a different category than the Constitution's aegis of militia and, therefore, were not entitled to the Constitution's view that the federal government was only empowered to call into federal service militia units "to execute the laws of the Union, suppress insurrections, and repel invasions . . . ."<sup>454</sup> However, based on

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448. *Id.* at 300.

449. *Winters*, 390 U.S. 993.

450. *Winters v. United States*, 391 U.S. 910 (1968).

451. *Winters v. United States*, 393 U.S. 896 (1968).

452. Memorandum from Justice William O. Douglas to the Law Clerk (Oct. 2, 1968) [WOD, Box 1451].

453. 393 U.S. 920 (1968).

454. *Id.* at 920 (citing U.S. CONST. art. I, § 8).

Black's denial of a stay against the transfer of reservists, Douglas admitted that he had no choice but to treat the issues raised by the petitioners as moot.<sup>455</sup>

Outside of the Court, institutions that had at least nominally sided with Douglas began to criticize his attempts to curb U.S. involvement in Vietnam through judicial fiat. On September 16, 1968, the *Washington Post*, in an editorial on the reservist cases, accused Douglas of a "shop around" on an issue of "slender legal merit."<sup>456</sup> In a pattern that was to become more common during the conflict, Douglas responded to the Post: "It is amazing just how little the press knows about Supreme Court procedures. A County paper that we read at Goose Prairie can be excused, but not the Washington Post whose editors could find someone to give them a seminar on judicial procedure any time they chose."<sup>457</sup>

Other issues that troubled Douglas and empowered his view of Vietnam as an unlawful war included social inequities within the military. In *Sellers v. Laird*, Douglas not only attempted, in concert with Warren and Marshall, to enable the judiciary to take a more active supervisory role in the Nation's conscription program, he also sought to correct a demographic imbalance within it.<sup>458</sup> As in the case of both World Wars, in the Vietnam-era conscription program local draft boards determined eligibility for military service.<sup>459</sup> Sellers, an African-American inductee from South Carolina, challenged his eligibility based on discrimination inherent in his board's decision-making process because the board was composed entirely of Caucasian citizens.<sup>460</sup> Sellers's arguments were not unique. In 1967, heavyweight boxing champion Muhammad Ali sought relief from military induction on similar grounds.<sup>461</sup>

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455. *Id.* at 921.

456. WASHINGTON POST, Sept. 16, 1968, at A20.

457. Douglas, Editorial Response (Sept. 27, 1968) [WOD, Box 1451].

458. 395 U.S. 950 (1969).

459. *Id.* at 950-51.

460. *Id.*

461. See *Clay v. United States*, 397 F.2d 901, 910 (5th Cir. 1968). In 1971, the Court reversed Ali's conviction based on the selective-service board's improper denial of Ali's conscientious-objector status. Douglas provided a synopsis as to Ali's Islamic views of a just war. He concurred in the per curiam decision, writing,

That is a matter of belief, of conscience, of religious principle. Both Clay and Negre were "by reason of religious training and belief" conscientiously opposed to participation in war of the character proscribed by their respective religions. That belief is a matter of conscience protected by the First Amendment which Congress has no power to qualify or dilute as it did in § 6(j) of the Military Selective Service Act of 1967, when it restricted the exemption to



Douglas noted that in South Carolina 34.8% of the state's population was African-American, but of its selective-service board members, only one was of that race.<sup>462</sup> He also recognized that in Georgia, the state in which Sellers filed his appeal of the South Carolina board's decision, less than 0.2% of the 509 selective-service board members were African-American, despite 28.5% of the state's population being African-American.<sup>463</sup>

Although not included in the final decision, Douglas's initial draft contained a brief history of African-American military experience. Drawing an analogy with the Indian caste system, Douglas noted that in the Nation's first experience with national conscription in World War I, "blacks were treated as untouchables."<sup>464</sup> Backing this observation, Douglas pointed out that in both World Wars "the Navy allowed [blacks] to serve in servile capacities, blacks were placed in separate units in the Army" while "the Marine Corps excluded them altogether."<sup>465</sup> He also noted, correctly, that the African-American experience in World War II was little different.<sup>466</sup> Turning to Vietnam, he excoriated the Nation's conscription program, writing,

While blacks constitute about one tenth of our country's population, they account for over one fifth of our combat fatalities in Vietnam. Their burden is great and yet their participation in imposing it is slight; of the fifty states polled in 1966, twenty-three maintained local boards

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those "conscientiously opposed to participation in war in any form." For the reasons I stated in *Negre* and in *Gillette v. United States*, that construction puts Clay in a class honored by the First Amendment, even though those schooled in a different conception of "just" wars may find it quite irrational.

Clay v. United States, 403 U.S. 698, 709-10 (1971) (Douglas, J., concurring) (citations omitted). For a more complete exposition of Ali's fight against conscription, see Andres Quintana, *Muhammad Ali: The Greatest in Court*, 18 MARQ. SPORTS L. REV. 171 (2007).

462. *Sellers*, 395 U.S. at 950-51. Douglas also noted that twenty-three states maintained local boards "without a single Negro member." *Id.* at 951 n.2 (citing REPORT, NATIONAL ADVISORY COMMISSION ON THE SELECTIVE SERVICE ACT (1967)).

463. *Id.*

464. Douglas, draft dissent memorandum (undated) [WOD, Box 1451]. The memorandum began, "The story of Negroes in the military is no happier than others of our racial heritage." *Id.*

465. *Id.*

466. *Id.* Douglas added, "Twenty years later, in WWII, the situation had hardly changed. Again, blacks were forced to serve in separate units." *Id.*

without a single Negro member and among those states were some in which Negroes constitute 20%, 30%, and even 40% of the general population.<sup>467</sup>

The memorandum circulated, but it was not incorporated into the dissent for reasons not apparent in the correspondences between Marshall, Warren, and Douglas. Nonetheless, the memorandum clearly evidenced Douglas's view that societal inequities were inherent in the national conscription program, and this fact was enough to warrant judicial oversight, if not another means of the judiciary forcing an end to the war.

*B. Points of Rebellion and Douglas's Grant of Bail for Captain Levy*

In 1969, Douglas published *Points of Rebellion*,<sup>468</sup> perhaps the most controversial book of his career.<sup>469</sup> The book was a damning account of U.S. political leadership, which linked the expansion of the military, the Executive Branch's assertions of exclusive control over the military, and the diminution of civil rights. In essence, it was a treatise that linked McCarthyism to an imperial—or unitary—presidency willing to forgo checks and balances against it, as well as popular opinion, in committing the armed forces into conflict.

Douglas argued that the U.S. had existed under a military state since Truman's administration.<sup>470</sup> To Douglas, the President was backed by the Pentagon or, perhaps, as Douglas conceded, a prisoner to its designs. As a result, he argued, President Johnson "avoided all constitutional procedures"

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467. *Id.* Prior to this quote, the memorandum also stated, "The situation now is, of course, different. For while the Armed Services, in the past, have often denied blacks their fair share of responsibility, they now appear to be giving them more than a fair burden. Of the young men in this country who for example are 'qualified for service,' those who are black are twice as likely to be drafted as their white counterparts."

*Id.*

468. WILLIAM O. DOUGLAS, *POINTS OF REBELLION* (1969). Portions of this book were published in *Playboy Magazine* prior to the book's publication. The controversy surrounding this book is discussed in Part D, *infra*.

469. JAMES E. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 101-02 (1995); HOYT, *supra* note 24, at 149-50; BELKNAP, *supra* note 1, at 62. For specific, right-wing literature calling for Douglas's removal from the Court, see, for example, JULIAN E. WILLIAMS, *THE CASE AGAINST JUSTICE WILLIAM O. DOUGLAS* 3-6 (1970); H.E. MCBRIDE, *IMPEACH JUSTICE DOUGLAS* 26 (1971).

470. DOUGLAS, *POINTS OF REBELLION*, *supra* note 468, at 43.

and “slyly maneuvered [the U.S.] into an Asian war.”<sup>471</sup> In addition to the Vietnam Conflict, Douglas argued that the Executive Branch had subjected over 20 million people to loyalty tests since the end of World War II, which resulted in the improper use of data.<sup>472</sup> To this end, Douglas wondered, “[W]here is the force that will restrain the Pentagon? Would a President dare face it down?”<sup>473</sup> These two questions were answered by Douglas the year that *Points of Rebellion* was published. He believed that the Nation could not rely on the President to face the Pentagon, and that the force to stop the military’s growth rested within himself and, as he hoped, a majority of the Court. This force manifested itself in *O’Callahan*.

On August 2, 1969, Douglas took the unusual step of ordering that bail be made for a military inmate named Captain Howard B. Levy.<sup>474</sup> Douglas admitted that his grant of bail was unusual, though mainly because the U.S. District Court for the District of Columbia, the U.S. Court of Appeals for the District of Columbia Circuit, and Justice Brennan had all previously denied bail.<sup>475</sup> As noted earlier, Douglas had once before granted a stay of execution in the Rosenberg case, contrary to the determination of another justice. But in this case, Levy had yet to argue the merits of his case before the district court.<sup>476</sup>

The grant of bail occurred one month after the Supreme Court issued *O’Callahan*, but because Douglas referenced Levy’s case in the *O’Callahan* decision, the grant of bail merits discussion prior to analyzing *O’Callahan*.<sup>477</sup> Levy was convicted of conduct unbecoming an officer and gentleman, among other offenses, and sought bail pending a lengthy appellate process.<sup>478</sup> Unlike *O’Callahan*, *Levy* was a well-reported, contentious case.<sup>479</sup>

Douglas’s reasons for granting bail to Levy have to be viewed in a holistic light of not only *O’Callahan* but also the judicial contentiousness of Levy’s case. In 1965, Captain Levy, a doctor assigned to Fort Jackson,

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471. *Id.* at 39.

472. *Id.* at 17.

473. *Id.* at 43-44.

474. *Levy v. Parker*, 396 U.S. 1204, 1205 (1969). Although *Parker v. Levy* is analyzed in the third article in this series (*The Rehnquist Court and the National Defense: Establishing a Reasonable Balance in the Practice of Military Law*), an excellent history of the case can be found in Robert N. Strassfield, *The Vietnam War on Trial: The Court Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839 (1994). See also *Levy v. Parker*, 487 F.2d 772 (3rd Cir. 1973).

475. *Levy*, 396 U.S. at 1204.

476. *Id.*

477. *O’Callahan v. Parker*, 395 U.S. 258, 266 (1969).

478. Strassfield, *supra* note 474, at 841.

479. *Id.* at 839-41.

engaged in activities designed to provoke enlisted personnel to refuse to obey orders or train for combat service in Vietnam.<sup>480</sup> The Army charged Levy with violating UCMJ Article 90 (failure to obey a lawful order), UCMJ Article 133 (conduct unbecoming an officer and gentleman), and UCMJ Article 134 (uttering various statements “with design to promote disloyalty and disaffection among the troops . . . to the prejudice of good order and discipline in the armed forces”).<sup>481</sup> He was court-martialed for this conduct, found guilty, and sentenced to three years confinement and a dismissal on June 3, 1967.<sup>482</sup> Prior to his court-martial, Levy unsuccessfully sought relief in the federal courts to stay any military proceedings against him.<sup>483</sup> After his court-martial, while incarcerated at Fort Leavenworth, Kansas, Levy unsuccessfully sought relief in an effort to better his confinement conditions in the U.S. District Court for the District of Kansas.<sup>484</sup>

To Douglas, the central issue in Levy’s case was not court-martial jurisdiction as there was an obvious nexus between Levy’s conduct and military service. Rather, Levy’s case presented an issue of charging, as a non-enumerated, common-law crime, conduct otherwise constituting free speech.<sup>485</sup> While it would be five years before the Supreme Court

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480. *United States v. Levy*, 39 C.M.R. 672, 673 (A.C.M.R. 1968); *see Levy v. Resor*, 37 C.M.R. 399 (A. Ct. Crim. App. 1967).

481. *Levy*, 39 C.M.R. at 674-75.

482. *Id.* at 672-73.

483. *See Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir. 1967), *stay denied*, 387 U.S. 915 (1967) (where Chief Justice Earl Warren, Douglas’s judicial ally, denied the stay of proceedings), *cert. denied*, 389 U.S. 960 (1967); *see also Levy v. Resor*, 384 F.2d 689 (4th Cir. 1967), *cert denied*, 389 U.S. 1049 (1968) (Douglas, J., dissenting).

484. *See Levy v. Dillon*, 286 F. Supp. 593 (D. Kan. 1968), *aff’d*, 415 F.2d 1263 (10th Cir. 1969).

485. *Levy v. Parker*, 396 U.S. 1204 (1969). Douglas argued:

Some of the problems tendered seem substantial to me. One charge on which applicant stands convicted rests on Article 134 which makes a crime “all disorders and neglects to the prejudice of good order and discipline in the armed forces.” In *O’Callahan v. Parker*, 395 U.S. 258, . . . which the lower courts did not have before them when they denied bail, we reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Apart from the question of vagueness is the question of First Amendment rights. While in the Armed Services, applicant spoke out against the war in Vietnam. The extent to which First Amendment rights available to civilians are not available to servicemen is a new and pressing problem.

*Id.* at 1205.

ultimately decided Levy's case, it is clear that Douglas envisioned further reducing the military's jurisdiction over service members by eliminating non-enumerated, common-law offenses.<sup>486</sup> A jurisdictional reduction of this sort, if successful, would diminish the military's legal construct as well as reduce the Executive Branch's authority over it.

*C. O'Callahan v. Parker: Douglas's Short-Lived Triumph in Limiting Military Jurisdiction*

Although *O'Callahan* is of little legal authority because the Court has since overturned it,<sup>487</sup> it was, for a brief moment, Douglas's triumph from the bench. Unlike both *Ex rel. Toth v. Quarles* (where the serviceman was no longer on active duty)<sup>488</sup> and *Reid v. Covert (Reid II)* (where the accused individual was a civilian),<sup>489</sup> the facts arising in *O'Callahan* merely reflected the common jurisdictional reach of courts-martial since the enactment of the UCMJ.<sup>490</sup>

While on an evening pass away from Fort Shafter, a military installation on Hawaii where he was stationed, Sergeant O'Callahan was arrested on suspicion of breaking into a hotel room and attempting to rape a teenage girl.<sup>491</sup> The civilian police arrested and interrogated O'Callahan, and, in turn, he confessed to committing the offenses.<sup>492</sup> O'Callahan was not in uniform during either the time of the charged offenses or the police interrogation.<sup>493</sup> Ultimately, the Army charged O'Callahan with housebreaking, assault with intent to commit rape, and attempted rape.<sup>494</sup> The ensuing court-martial sentenced O'Callahan to ten years in confinement and a dishonorable discharge.<sup>495</sup> O'Callahan's court-martial

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486. See *Parker v. Levy*, 417 U.S. 733, 766 (1974) (Douglas, J., dissenting).

487. *Solorio v. United States*, 483 U.S. 435, 436 (1987).

488. 350 U.S. 11, 13 (1955).

489. 351 U.S. 487, 488 (1956).

490. *O'Callahan v. Parker*, 395 U.S. 258, 273 (1969).

491. *Id.* at 259-60.

492. *Id.* at 260.

493. *Id.* at 259-60.

494. *Id.* at 260.

495. *Id.* at 260-61. Although six witnesses in addition to the victim testified against O'Callahan, the U.S. Court of Appeals for the Third Circuit later noted that the most damning testimony came from O'Callahan's peer, another soldier named Charles Redden. *O'Callahan v. Parker*, 390 F.2d. 360, 361-63 (3rd Cir. 1968). The appellate court noted:

Charles Redden, a soldier who had been a friend and companion of the petitioner, testified that on the evening in question, after they had drunk several beers, he and the petitioner made their way to the balcony outside of the fourth story hotel room where the intrusion

was not controversial when it occurred, and, perhaps reflecting the mundane aspect of the court-martial, it was not reported in the national media. The offenses occurred in July 1956, and the court-martial occurred four months later, during a time of national peace.<sup>496</sup>

O'Callahan appealed by way of a writ of *coram nobis* to the Court of Military Appeals in 1967.<sup>497</sup> His principal argument was not that the military lacked jurisdiction to prosecute him in a court-martial, but, rather, that the admission of deposition testimony over his objection had deprived him of due process.<sup>498</sup> Three years after O'Callahan's court-martial, the Court of Military Appeals ruled, in another case, that deposition testimony in lieu of actual witness presence deprived an accused of the Sixth Amendment's guarantee of the right of confrontation.<sup>499</sup> At issue, then, was whether the later decision could be retroactively applied to O'Callahan's case.

After the Court of Military Appeals denied relief, O'Callahan petitioned by way of a writ of habeas corpus to the U.S. District Court for the District of Massachusetts.<sup>500</sup> There, for the first time, he argued that the court-martial did not possess jurisdiction to prosecute him.<sup>501</sup> The district court denied relief.<sup>502</sup> The following year, O'Callahan appealed to the U.S. District Court for the Middle District of Pennsylvania, arguing that he was denied a fair trial because the prosecution introduced depositions into

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and assault allegedly occurred. Looking in they saw a girl in bed. The defendant suggested that they enter the room and that one of them should have intercourse with the girl while the other held her. Redden rejected the suggestion, warned the defendant that such conduct would be rape and left the scene.

*Id.* at 362.

496. *O'Callahan*, 395 U.S. at 259, 273.

497. *United States v. O'Callahan*, 37 C.M.R. 188 (A. Ct. Crim. App. 1967).

498. *Id.* at 188.

499. *Id.* The particular case on which O'Callahan sought relief was *United States v. Jacoby*, 29 C.M.R. 244 (A.F. Ct. Crim. App. 1960). *Id.* In *Jacoby*, the Court of Military Appeals determined that the Sixth Amendment right of confrontation applied to courts-martial. 29 C.M.R. at 249.

500. *O'Callahan v. Chief U.S. Marshal*, 293 F. Supp. 441 (D. Mass. 1966).

501. *Id.* at 441-42.

502. *Id.* at 442.

evidence.<sup>503</sup> Both that court and the U.S. Court of Appeals for the Third Circuit denied relief.<sup>504</sup>

The Supreme Court granted review of the case in the waning days of the Johnson Presidency.<sup>505</sup> It heard arguments prior to Nixon's inauguration. The Court published *O'Callahan* on June 2, 1969.<sup>506</sup> Between the grant of certiorari and the published decision, the composition of the Court changed. As a result of a threatened impeachment based on his scandalous conduct, Justice Abe Fortas departed from the Court and was replaced by Justice Harry Blackmun.<sup>507</sup> However, Blackmun took no part in the decision, resulting in only eight justices deciding the issue.<sup>508</sup> Ultimately, Douglas authored the majority opinion with Warren, Black, Marshall, and Brennan in agreement.<sup>509</sup> Justices Harlan, Byron White, and Potter Stewart dissented.<sup>510</sup>

Douglas began the majority opinion by enunciating the basic constitutional precept that while the Constitution conferred the power "to make Rules for the Government and Regulation of the land and naval forces," the Fifth and Sixth Amendments provided basic rights that existed in those rules.<sup>511</sup> The two fundamental rights Douglas focused on were the

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503. United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679, 681-82 (M.D. Pa. 1966). The district court denied release without ruling on the merits of the case. *See id.*

504. *Id.* at 682; United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360, 364 (3rd Cir. 1968). O'Callahan raised additional issues for the first time before the appellate court which commented,

The petitioner also makes belated claims that he did not have effective assistance of counsel and that Constitutional requirements were not met in the obtaining of his confession. These contentions have not been urged before the Military Court of Appeals or any other military tribunal. Without suggesting that they have merit, we decide merely that they are not ripe for consideration by way of collateral attack in a civil court.

*Id.* at 363.

505. O'Callahan v. Parker, 393 U.S. 822 (1968).

506. O'Callahan v. Parker, 395 U.S. 258 (1969).

507. *See* LAURA KALMAN, ABE FORTAS (1990).

508. *O'Callahan*, 395 U.S. 258.

509. *Id.* at 259, 274.

510. *Id.* at 274 (Harlan, J., dissenting). Byron White was appointed by John F. Kennedy to replace Charles Whittaker. HENRY JULIAN ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS; A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 46 (5th ed. 2008). President Dwight Eisenhower appointed Potter Stewart to replace Burton. *Id.*

511. *O'Callahan*, 395 U.S. at 261-62.

right to a grand jury and the right to trial by jury before a civilian court.<sup>512</sup> This latter right is also found, as Douglas noted, in the second section of Article III.<sup>513</sup>

It is not surprising that Douglas centered on individual rights from the start because the other justices focused their support for his position solely on the issue of individual rights. It also provided Douglas with ample opportunity to criticize the practice of courts-martial in comparison to civilian trials.<sup>514</sup> Douglas pointed out that a court-martial panel was “empowered to act by a two-thirds vote,” while a jury could only find guilt with unanimity.<sup>515</sup> He also degraded the military’s appointment of a presiding officer to oversee courts-martial instead of an objective and independent judge, protected by tenure and “nurtured by the judicial tradition.”<sup>516</sup> Douglas also opined that the UCMJ’s evidentiary rules handicapped an accused seeking a full and fair trial.<sup>517</sup>

Douglas conceded in the necessity of courts-martial to the effective functioning of the military, but in citing *Toth* he noted that the Court had already held that the military’s jurisdiction was limited “to ‘the least possible power adequate to the end proposed.’”<sup>518</sup> To Douglas, this meant that the military’s jurisdictional reach was limited to offenses committed in wartime, overseas, or enumerated as purely military offenses, such as desertion.<sup>519</sup> Although O’Callahan’s conduct did not implicate the non-enumerated, common-law offenses under Article 134, Douglas, nonetheless, focused on these two offenses as proof that courts-martial lacked the due-process guarantees found in civil trials.<sup>520</sup> And he turned to another case to prove the injustice of the military’s legal construct, which would, in four-years time, come before the Court. Citing to the case of Captain Howard B. Levy, discussed *infra*, Douglas quoted from a Columbia Law School journal: “None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.”<sup>521</sup>

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512. *Id.* at 262.

513. *Id.*

514. *Id.* at 263-65.

515. *Id.* at 263.

516. *Id.* at 264.

517. *Id.* at 262-64.

518. *Id.* at 265 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

519. *See id.* at 266-67.

520. *See id.* at 265-66.

521. *Id.* at 266 (quoting Ira Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969)).



Although the issue of military jurisdiction over civilians was settled earlier, Douglas argued that courts-martial did not possess unlimited jurisdiction over soldiers, and he criticized the government's arguments on this point.<sup>522</sup> His use of British and early U.S. history buttressed his basic tenet that most offenses committed by soldiers were traditionally prosecuted in civil courts instead of courts-martial because both governments feared the authority of their nations' executive.<sup>523</sup> To Douglas and the Court's majority, it was only nominally relevant that in both 1916, with the establishment of a new Articles of War, and in 1950, with the enactment of the UCMJ, Congress had legislated a vast expansion of military jurisdiction over servicemen.<sup>524</sup> This was because, as the Court held, Congress's authority to legislate military law had to be conducted in

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522. *O'Callahan*, 395 U.S. at 267. Douglas explained:

These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline. From these cases, the Government invites us to draw the conclusion that once it is established that the accused is a member of the Armed Forces, lack of relationship between the offense and identifiable military interests is irrelevant to the jurisdiction of a court-martial.

The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. The Government emphasizes that these decisions—especially *Kinsella v. Singleton*—establish that liability to trial by court-martial is a question of “status” . . . .

*Id.*

523. *Id.* at 269. Of British precedent, Douglas argued:

The jurisdiction of British courts-martial over military offenses which were also common-law felonies was from time to time extended, but, with the exception of one year, there was never any general military jurisdiction to try soldiers for ordinary crimes committed in the British Isles. It was, therefore, the rule in Britain at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain . . . .

*Id.* Douglas argued further that post-Revolutionary U.S. followed the British precedent through to the Civil War, expanding courts-martial jurisdiction for the duration of the war, but then returning to a limited jurisdiction thereafter. *Id.* at 270-71.

524. *Id.* at 271-72.

harmony with the Bill of Rights.<sup>525</sup> As noted throughout this Article, Douglas believed that such a harmony could seldom be achieved.

Douglas concluded the majority's opinion with a new enunciation of the "service connected" test, and, without noting *Ex parte Milligan*, he virtually quoted from it in arguing that O'Callahan was charged with peacetime offenses that were committed in a state with fully functioning civil courts rather than "a far-flung outpost."<sup>526</sup> In essence, the Court created a new jurisdictional test for courts-martial. *O'Callahan* meant that for the military to charge a serviceman with an offense, it had to prove that the criminal conduct occurred on an installation and that the criminal conduct in some manner directly affected the discipline of the military, that the victim of the offense was also in the service, or that the offense occurred overseas. There is one other important aspect of *O'Callahan*: the majority opinion did not, at any time, publish its cognizance of the dissent's arguments.<sup>527</sup>

#### D. O'Callahan: *The Arguments, the Court's Internal Debates, and the Response*

An analysis of the published opinion, without further noting the surrounding circumstances of the case, falls short of fully illustrating Douglas's intents behind *O'Callahan* for two reasons. First, the opinion does not completely evidence Douglas's intentions because, as in the case

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525. *Id.* at 273. The Court specifically held:

The power of Congress to make "[r]ules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights. We were advised on oral argument that Art. 134 is construed by the military to give it power to try a member of the armed services for income tax evasion. This article has been called "a catch-all" that "incorporates almost every Federal penal statute into the Uniform Code." The catalogue of cases put within reach of the military is indeed long; and we see no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial.

*Id.* (citation omitted).

526. *Id.* at 273-74 (referring to *Ex parte Milligan*, 71 U.S. 2 (1866)).

527. *Id.* at 274 (Harlan, J., dissenting). The dissent is not analyzed in this Article because it is the subject of the third article in this set. It was a short opinion, and the dissent correctly noted that in creating a new service-connected jurisdiction, the majority failed to explain its scope. *Id.* at 283.

of many opinions, it was the product of a compromise. As discussed further below, Douglas expected to be in the minority. He authored a stinging dissent against not only the military's jurisdictional claims but also against the Pentagon and, by incorporation, a nexus between the Vietnam Conflict and the Executive Branch's growth in political power through the military's expansion. Second, the majority opinion incorporated some of the exact language from O'Callahan's counsel, Mr. Victor Rabinowitz. This feature of decisions is not unheard of, but Rabinowitz was considered by many as a radical.

### 1. Douglas's Reaction to Petitioner's and Government's Arguments

An admitted Socialist, Rabinowitz had made a legal career of defending people accused of subversive un-American activity as well as labor unions. In 1948, he represented labor unions before the Court and later memorialized his admiration for both Douglas and Black.<sup>528</sup> He defended Alger Hiss, and his reputation was such that, in 1950, Julius Rosenberg sought his counsel.<sup>529</sup> In 1964, Rabinowitz was a named petitioner in a Court decision.<sup>530</sup> He unsuccessfully challenged the government's requirement of having to list himself under the Foreign Agents Registration Act as a result of representing the Cuban Government in U.S. courts.<sup>531</sup> However, O'Callahan did not seek Rabinowitz's counsel on his own: Rabinowitz's well-known client, Teamsters Union President James R. Hoffa, introduced O'Callahan to Rabinowitz during a visit to Hoffa in a federal penitentiary.<sup>532</sup>

Douglas wholeheartedly agreed with Rabinowitz's argument that "if the government is right [in arguing for expansive jurisdiction], it could try a member of the armed forces for any crime at all, including securities violations, violations of the anti-trust laws, or anything else."<sup>533</sup> Furthering his arguments, and gaining Douglas's angry approval, Rabinowitz noted that the Air Force had gone so far as to court-martial an airman for tax

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528. VICTOR RABINOWITZ, UNREPENTANT LEFTIST: A LAWYER'S MEMOIR 50, 52, 242-43, 293 (1996).

529. RONALD RADOSH & JOYCE MILTON, THE ROSENBERG FILE 89-90 (spec. ed., The Notable Trials Library 1999) (1983).

530. Rabinowitz v. Kennedy, 376 U.S. 605 (1964).

531. *Id.* at 610.

532. RABINOWITZ, *supra* note 528, at 291-92.

533. For the complete transcript, see Victor Rabinowitz, Oral Argument (Alderson Printing Co. Jan. 27, 1969) [Brennan, Box 197].

fraud.<sup>534</sup> Shortly after oral argument, Douglas personally commended Rabinowitz for defending individual servicemen.<sup>535</sup>

At the same time Douglas complimented Rabinowitz, he scathed the Solicitor General. For instance, in response to the Solicitor General's argument, "I am suggesting that there may be some cases where in fact the military man does benefit from a military trial as distinguished from a civil trial," Douglas cut him off with a curt, "[H]ave you ever been to an Army court-martial?"<sup>536</sup> Douglas did, in fact, know that the Solicitor General had never attended a court-martial, and when the Solicitor General responded that he had not witnessed a military proceeding, Douglas responded in a manner designed to showcase the Solicitor General's ignorance.<sup>537</sup>

## 2. Douglas and the *O'Callahan* Conference Compromise

More than Douglas's compliment to Rabinowitz or the incorporation of Rabinowitz's arguments into Douglas's decision, Douglas's conduct during conference sessions is insightful. Admittedly, the conference memoranda and personal correspondences regarding the case are few in number. However, Douglas did in fact expect to lose in *O'Callahan* and prepared a scathing dissent to a draft opinion authored by Justice Harlan.<sup>538</sup> Harlan included in his draft opinion a comment that—Douglas argued—lacked any efficacy, concluding, "[W]hatever may have been the infirmities of the seventeenth century English martial law, military personnel today are not summarily or arbitrarily treated, but enjoy a fair and enlightened system of criminal justice."<sup>539</sup>

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534. *Id.*

535. *Id.* It could not have escaped Douglas's attention that Rabinowitz had made a career of defending persons, such as Alger Hiss, who were accused of Communist ties, as well as foreign government officials, such as the Chilean President Salvador Allende, who were marked as unfriendly by the U.S. Government. See, e.g., Douglas Martin, *Victor Rabinowitz, 96, Leftist Lawyer Dies*, N.Y. TIMES, Nov. 20, 2007, at B. Moreover, Rabinowitz was the lead counsel for the appellant in *Harmon v. Bruker*, 355 U.S. 579 (1958).

536. For the complete transcript, see Victor Rabinowitz, Oral Argument (Alderson Printing Co. Jan. 27, 1969) [Brennan, Box 197].

537. *Id.* (responding, "Now I can see why you say it.").

538. Justice John M. Harlan, Draft Dissenting Opinion (Apr. 1, 1969) [Warren, Box 563] ("[I]t should be made clear that, although trial by court-martial does lack some of the traditional safeguards of civilian courts, it is attended by many others.").

539. *Id.*

Initially, it appeared that only Warren, White, and Stewart would join Douglas.<sup>540</sup> Douglas circulated his dissent on April 8, 1969. "The Court's opinion leaves me aghast," Douglas began, "The sweep of power of the Pentagon over members of the armed forces is now broad and seemingly limitless, save and unless the Pentagon exercises its discretion to let a civilian authority take over the prosecution."<sup>541</sup> It also included the statement, "[C]ourts-martial are singularly inept in dealing with the subtleties of constitutional law."<sup>542</sup> Finally, his draft dissent contained his belief that the judiciary had to establish the tightest control over the military legal construct in the Nation's history:

We have at stake the civil liberties of the citizen, not the image of the Pentagon which is made, or re-made, by the financial adventurers of the military industrial complex. I say that the image of the Pentagon is not tarnished by the luckless sergeant charged with rape in Honolulu.<sup>543</sup>

Expecting to lose, he also argued for a chance to have the case reheard and for the Court to designate Frederick B. Wiener to present an amicus brief to the Court.<sup>544</sup> One month after Douglas circulated his dissent, Fortas and Brennan rethought their initial vote for the early majority; so too did Black. Fortas had argued that the Court should order a remand to the lower court to determine whether O'Callahan's offenses fell under military jurisdiction, even under the rubric of an expansive jurisdiction.<sup>545</sup> On April 11, 1969, Fortas notified Harlan that he opted to join Douglas's opinion because the initial majority opposed a remand, and Harlan's draft opinion concluded that the military possessed almost unlimited jurisdiction over its members.<sup>546</sup> Three days later, Harlan replied to Fortas arguing that "little

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540. Chief Justice Earl Warren, Tally Sheet of *O'Callahan* [Warren, Box 565].

541. Justice William O. Douglas, Draft Dissenting Opinion (Apr. 8, 1969) [WOD, Folder 2, Box 1446].

542. *Id.* The sentence following stated, "A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice." *Id.*

543. *Id.*

544. *Id.*

545. Letter from Justice Abe Fortas to Justice John Harlan (Apr. 11, 1969) [Brennan, Box 197].

546. *Id.* Fortas's letter to Harlan, disagreeing with Harlan's view of overarching military jurisdiction, is instructive to the overall debate:

I am sorry to say that I cannot go along with your draft. I cannot agree that every person on active duty in the Armed Forces can be tried by military courts for every offense whatever, wherever committed, merely because he is in the military. At the conference, I

would be gained by a remand,” and that he considered Douglas’s restrictive test far too narrow.<sup>547</sup> Both Fortas’s change of heart and his resignation from the Court prevented Douglas’s dissent from being published, thereby depriving him of a judicial platform to use such terms as “military industrial complex” and “illegal war.”<sup>548</sup>

On May 1, 1969, Warren assigned Douglas to write the majority opinion. After a brief correspondence between Douglas, Warren, Black, Brennan, White, and Marshall, Douglas’s draft decision was accepted.<sup>549</sup> The sole circulated draft is almost identical to the published decision with only grammatical changes and case-cite corrections contained. But because neither Black nor Marshall appeared willing to accept Douglas’s scathing language, as evidenced in a conference memorandum, the dissent adopted a significantly different decision, lacking the poignant criticisms of the military’s criminal justice system that was found in Douglas’s draft dissent.<sup>550</sup>

### 3. Correspondence, Reaction, and Douglas’s Response

Douglas gladly accepted letters criticizing the military justice system from a number of military personnel as evidence of the system’s unjust character. For instance, he agreed with Captain Maureen Murphy at Barksdale Air Force Base, Louisiana, that the Air Force’s attempts to find and discharge homosexuals intruded on the fundamental privacy rights of airmen.<sup>551</sup> An Army Private and intended Vanderbilt law student stationed in Vietnam, in thanking Douglas for *O’Callahan*, wrote,

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voted to affirm, but only on narrow grounds. That although the point is debatable, we could conclude that petitioner’s offense had a sufficiently direct and immediate impact upon the performance of the Armed Force’s military mission to justify bringing this trial within the constitutional and statutory authority of courts-martial.

*Id.* Fortas had been one of Douglas’s law students while Douglas taught at Yale Law School. HOYT, *supra* note 24, at 43.

547. Letter from Justice John Harlan to Justice Abe Fortas (Apr. 14, 1969) [Brennan, Box 197].

548. *O’Callahan v. Parker*, 395 U.S. 258 (1969); Justice William O. Douglas, Draft Dissenting Opinion (Apr. 8, 1969) [WOD, Folder 2, Box 1446].

549. Chief Justice Earl Warren, Tally Sheet of *O’Callahan* [Warren, Box 565].

550. Supreme Court Conference Memorandum on *O’Callahan* [Warren, Box 565].

551. Letter from Captain Maureen Murphy to Justice William O. Douglas (June 16, 1969) [WOD, Box 1449]. Captain Murphy was the WAF commander at Barksdale Air Force Base when the letter was written. *Id.* Douglas penned a brief response concluding his total agreement with Murphy, but indicated that the

[A]bsolute control such as the army has over the enlisted men is, admittedly, in the interests of efficiency, but freedom sacrificed to expediency doesn't reflect the ideals of the Constitution. The position of the enlisted man, or in my case of involuntary servitude, is one of complete vulnerability, subject to the whims of the commanding officer.<sup>552</sup>

Douglas wholeheartedly endorsed the private's views and wished him success in his legal career.<sup>553</sup>

While many legal commentators lauded *O'Callahan*, a critical minority argued that the case was inconsistent with the disciplinary needs of the military.<sup>554</sup> Not surprisingly, criticism of *O'Callahan* appeared within the military legal community. One author noted, "A repudiation by the *O'Callahan* majority of the principle of law developed in . . . [the *Quirin* and *Kinsella*] cases would have been more admirable than the insistence

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*O'Callahan* decision did not address privacy rights. Letter from Justice William O. Douglas to Captain Maureen Murphy (1969) [WOD, Box 1449].

552. Letter from Private Ross Hassig to Justice William O. Douglas (June 16, 1969) [WOD, Box 1449]. Hassig never attended Vanderbilt Law. Instead, he earned a Doctorate in Anthropology and is today one of the world's leading scholars in Mesoamerican history and culture.

553. Letter from Justice William O. Douglas to Private Ross Hassig (June 16, 1969) [WOD, Box 1449].

554. See, e.g., MCBRIDE, *supra* note 469, at 58-59. On the subject of *O'Callahan*, McBride wrote, "[T]he Court's largely one sided discussion of the competing individual and governmental interests at stake, and its reliance upon what are at best wholly inconclusive historical data, fall far short of supporting the contrary conclusion which the majority has reached." *Id.*

See also G. Nelson & J. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); James B. St. John, Jr., Note, *Military Law—Constitutional Law—Court-Martial Jurisdiction Limited to "Service-Connected" Cases*, 44 TUL. L. REV. 417 (1970). St. John argued:

Although certain aspects of the decision will benefit the serviceman, it seems likely that this aspect will have unfavorable results. Moreover, the decision will almost certainly force the military to abdicate a portion of its *in loco parentis* role. Absent any service connection, the activities of armed forces personnel will no longer be subjected to the restraining influence of military discipline. Given the youth and inexperience of many young servicemen, this forced abdication of the military's *in loco parentis* role may be undesirable.

*Id.* at 425.

that *O'Callahan* is consistent with . . . [these] cases.”<sup>555</sup> Frederick Bernays Wiener, an attorney that Douglas admired and sought guidance from, and who had represented the petitioners in *Toth*, *Reid*, and *Kinsella*, argued:

The Court's opinion made no mention of the circumstance that the specific terms of the fifth amendment plainly made indictment by grand jury inapplicable to members of the armed forces, nor that such members had never since the beginning had the slightest claims to trial by petit jury. Indeed, with characteristic inconsistency, Justice Douglas failed even to cite his own unanimous opinion in *Whelchel v. McDonald* . . . .<sup>556</sup>

Just as Douglas received correspondences after the publication of his *Look Magazine* article, a large amount of mail came to him after both the *O'Callahan* decision and Captain Levy's release on bail. Douglas's responses to the mail show an increasingly entrenched anti-military position. For instance, in August 1969, Captain Frank E. Brown, the staff judge advocate at Incirlik Air Base, Turkey, in a three-page, single-spaced, typed letter, systematically challenged Douglas's belief that courts-martial were bereft of due-process protections.<sup>557</sup> Brown's letter to Douglas and Douglas's response are not only indicative that Douglas believed that the part of the military's legal construct responsible for discipline and criminal justice was inherently antiquated, if not corrupted by the Executive Branch, they are also evidence of Douglas's belief that the officers charged with the internal oversight of the military's legal construct were either untrustworthy or ignorant.<sup>558</sup>

After assuring Douglas that he “was a far cry from a career military apologist who rationalizes each situation with the end in mind of showing the military can do no wrong,” Brown conceded that Douglas's view had merit prior to the enactment of the UCMJ in 1950.<sup>559</sup> He also accepted the fact that courts-martial practices were imperfect and required

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555. Paul Jackson Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41, 56 (1971).

556. Weiner, *supra* note 23, at 57 (concluding that *O'Callahan* embodied an “anti-military shriek,” later found in the dissent in *Solorio*).

557. Letter from Captain Frank E. Brown to Justice William O. Douglas (Aug. 11, 1969) [WOD, Box 1449].

558. *Id.*; Letter from Justice William O. Douglas to Captain Frank E. Brown (Sept. 4, 1969) [WOD, Box 1449].

559. Letter from Captain Frank E. Brown to Justice William O. Douglas (Aug. 11, 1969) [WOD, Box 1449].



improvements, but so too did civil trials.<sup>560</sup> Brown pointedly challenged Douglas's assertion that laymen in civil trials were less biased toward defendants than college-educated officers assigned to courts-martial and that the legal officers charged with the duty of overseeing courts-martial were mere instrumentalities for a commander's view of discipline.<sup>561</sup>

Instead of engaging Brown in a philosophical dialogue, and ignoring Brown's respectful recognition that Douglas had a "distinguished career in the service of the United States," Douglas tersely replied,

Your views reflect one school of thought. But you overlook two things: You err in referring to the *O'Callahan* opinion as my opinion when it was written not for me but for the consensus. Secondly, you overlook the Sixth Amendment and Art. III of the Constitution; a habit more common among officers from Captain on up, than among those from lieutenant on down.<sup>562</sup>

As in the case of much of Douglas's writing, he prepared his own draft responses to Brown that were never sent but were kept in Douglas's files. One of these, dated August 27, 1969, caustically noted that most of the justices who concurred in *O'Callahan* had "extensive military service."<sup>563</sup> The insulting implication in Douglas's deleted comment was clear: Brown was a legal neophyte whose unwelcome beliefs on the efficacy of the modern military justice system were a nuisance rather than a bona fide intellectual defense.<sup>564</sup>

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560. *Id.*

561. *Id.* Brown noted,

The Judge Advocates of the military services are, for the most part, conscientious and dedicated individuals who are striving to make the military justice system the finest possible. The day is long past when military justice was administered as an adjunct of command prerogative . . . .

Comments such as made in the *O'Callahan* case, many of which were, in my opinion unnecessary to the final decision, only serve to make our job more difficult and hamper, rather than help, the administration of a fair and impartial system of justice. I might point out that your indictment of the military failed to mention that the law under which we operate is framed by one of the most elite groups of civilians in the world—the Congress of the United States.

*Id.*

562. Letter from Justice William O. Douglas to Captain Frank E. Brown (Sept. 4, 1969) [WOD, Box 1449].

563. Draft Letter from Justice William O. Douglas to Captain Frank E. Brown (Aug. 27, 1969) [WOD, Box 1449].

564. *Id.*

*O'Callahan* also resulted in intense criticism from congressional conservatives. Congressman F. Edward Hebert complained to Chief Justice Douglas Burger, "I cannot understand how Justice William O. Douglas is allowed to hamstring the military."<sup>565</sup> Hebert was a longtime critic of Douglas, and earlier that year, prior to the publication of *O'Callahan*, the congressman threatened Chief Justice Warren that if the Court did not stop Douglas's anti-military holdings, then he would sponsor legislation to curb the Court's jurisdiction.<sup>566</sup> It was a hollow threat, but it put the Court on notice that it had become a political cause. Indeed, Nixon had campaigned for the Presidency in 1968 with a promise to appoint justices who would undo the Warren Court's judicial activism.<sup>567</sup>

Of greater concern was a conservative congressional alliance, led by House Minority Leader Gerald Ford, formed specifically to force Douglas's removal.<sup>568</sup> But Douglas was not intimidated by critics such as Ford and Hebert. Indeed, Hebert was the type of reactionary politician whom Douglas did not shy from, and Douglas recognized that Ford was working as an agent of Nixon.<sup>569</sup> In 1948, Hebert served alongside Nixon in a subcommittee of the House Un-American Affairs Committee investigating Alger Hiss.<sup>570</sup> As previously noted, Hiss was one of Douglas's friends. In one of the modern era's more egregious displays of racism and sexism, Hebert, while serving as the House of Representative's Armed Services Committee Majority Chairman, refused to allocate two seats for Ronald Dellums, an African-American congressman, and Patricia Schroeder, a

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565. Letter from Congressman F. Edward Hebert to Chief Justice Warren E. Burger (Aug. 8, 1969) [WOD, Box 1468]. See also BALL & COOPER, *supra* note 140, at 306.

566. Letter from F. Edward Hebert to Chief Justice Earl Warren (Jan. 24, 1969) [WOD, Box 1648].

567. See LAMB & HALPERN, *supra* note 29, at 433; EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986*, at 11 (2000). Nixon considered Herbert Brownell, the Attorney General during Eisenhower's presidency, or Thomas Dewey, a former Republican New York Governor, to replace Earl Warren as Chief Justice, but decided on Warren Burger. In a press conference regarding Burger's nomination, Nixon stated his admiration for Felix Frankfurter, and his belief that Burger would be a strict constructionist. Press Conference of Richard Nixon 1 PUB. PAPERS 1003 (May 22, 1969). Douglas's opinion of Frankfurter by this time was very low and, as previously noted, he derided Burger.

568. See DOUGLAS BRINKLEY, *GERALD FORD 37-40* (2007). Brinkley notes that the idea behind impeachment was Nixon's, and "in the end Ford's effort to impeach Douglas failed miserably." *Id.*

569. See DOUGLAS, *THE COURT YEARS*, *supra* note 39, at 359-64.

570. CLARENCE L. MOHR, *TULANE, THE EMERGENCE OF A MODERN UNIVERSITY, 1945-1980*, at 71 (2001).

congresswoman.<sup>571</sup> Hebert claimed that each only merited half of a seat.<sup>572</sup> However, even if Douglas viewed Ford and Hebert as members of a political fringe, the fact that Fortas's resignation occurred after an impeachment threat could not have left him unaffected.<sup>573</sup>

#### IV. CONCLUSION

From the end of World War II through 1969, the Court influenced Congress and the Executive Branch to reform the military's justice system by incorporating due-process standards into courts-martial. Douglas's role in this process cannot be disputed. He was the leader of a judicial alliance that reduced the reach of the military's jurisdiction and forced standards of fairness that had never before existed in courts-martial. He also reduced the Executive Branch's almost unlimited control of the part of the military's legal construct that came into conflict with individual rights. But his efforts to reduce the Executive Branch's authority over the employment of the armed forces did not succeed, principally because his fellow justices and former peers did not join him and also because political currents began to work against him.

*O'Callahan* was a short-lived decision, through not visibly because Congress or the Court saw Douglas's intents in authoring it, but, rather, for reasons analyzed in the third article in this series: its jurisdictional requirements proved unworkable. However, as Douglas's assault on the military's legal construct resulted in little support in any of the three branches of government, *O'Callahan's* short life is not merely explainable simply because it narrowed the jurisdictional reach of courts-martial to the point where courts-martial became an irrelevancy.<sup>574</sup> In 1973, in *Holtzman v. Schlesinger*,<sup>575</sup> Douglas unsuccessfully attempted to convince the Court

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571. See ROBERT REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 444-46 (2006).

572. *Id.* at 445.

573. KALMAN, *supra* note 507, at 373.

574. However, Congress legislated the War Powers Act, which has yet to be tested in the Court. See, e.g., Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. 1541-48 (1988)); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988); Eugene v. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972); and John C. Cruden, *The War-Making Process*, 69 MIL. L. REV. 35 (1975).

575. 361 F. Supp. 553 (E.D.N.Y. 1972), *rev'd* 484 F.2d 1307 (2d Cir. 1973). Douglas's stay against U.S. Court of Appeals for the Second Circuit's holding was overturned by the Supreme Court. See *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973).

to determine whether the President could be enjoined from conducting military activities in a neutral country.<sup>576</sup> In this case, a congresswoman challenged Nixon's authority to order the Air Force to bomb targets in Cambodia, but the Court denied certiorari of the U.S. Court of Appeals for the Second Circuit's determination that it lacked jurisdiction to review the issue.<sup>577</sup>

Douglas was unable to significantly alter the military's legal construct in terms of the authority over the armed forces possessed by the Executive Branch. Indeed, the Executive Branch, on more than one occasion, has directed the military to engage in publicly unpopular military operations. A newer political ideology seeking the establishment of a unitary executive claims that the Executive Branch enjoys its greatest control over the military during periods in which the Executive Branch determines a national emergency exists or commits its military forces into conflict, apparently regardless of whether Congress legislatively approved of the action.

Unlike during the early McCarthy era, however, the Legislative Branch has increasingly resisted the Executive Branch's encroachment, and the new ideology, if not discredited, has at least seen its key adherents subjected to public opprobrium. Finally, it might very well have surprised Douglas that John Yoo, one of the well-known advocates of that ideology, recently criticized the Judge Advocate General for testifying in Congress that certain legal positions of the military's civilian leaders, such as the permissibility of torture and trials of insurgents without full disclosure of evidence, were contrary to standards of due process.<sup>578</sup> Their testimony

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576. *Holtzman*, 414 U.S. at 1305-06.

577. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). The appellate court introduced the case with the following language:

At the outset, as the parties agreed below and on the argument on appeal, we should emphasize that we are not deciding the wisdom, the propriety or the morality of the war in Indo-China and particularly the on-going bombing in Cambodia. This is the responsibility of the Executive and the Legislative branches of the government.

*Id.* at 1308. Whether Douglas agreed or not is unknown, but his grant of a stay clearly evidenced a desire for the Court to determine whether a member of the legislature had standing to enjoin the President through the Judiciary.

578. See Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1833-37 (2007). Sulmasy and Yoo believe that military attorneys defending enemy aliens in military tribunals could be lawfully prohibited from seeking redress in Congress or the media, or through habeas appeals. They also argue that appeals to customary international law as defenses could result in disciplining the attorneys.

exposed that politically appointed counsel, employed in the Defense Department and at the White House, departed from traditional interpretations regarding national obligations to uphold the laws of war and basic rights enumerated in treaties. Douglas's belief that the military's leadership and its law officers were a monolithic entity, uninterested in due process, was wrong.<sup>579</sup>

Douglas also narrowed *O'Callahan's* reach, voting to deny its retroactivity, in 1970, in *Relford v. Commandant*.<sup>580</sup> In 1974, Douglas dissented in *Parker v. Levy*,<sup>581</sup> in which the Court upheld the military's authority to regulate conduct and speech through non-enumerated, common-law offenses, and with the holding it upheld Captain Levy's conviction.<sup>582</sup> Although *Parker* is analyzed in another article, it is worth noting Douglas's criticism of the majority's decision in which he wrote:

The power to draft an army includes, of course, the power to curtail considerably the "liberty" of the people who make it up. But Congress in these articles has not undertaken to cross the forbidden First Amendment line. Making a speech or comment on one of the most important and controversial public issues of the past two decades cannot by any stretch of dictionary meaning be included in "disorders and neglects to the prejudice of good order and discipline in the armed forces." Nor can what Captain Levy said possibly be "conduct of a nature to bring discredit upon the armed forces." He was uttering his own belief—an article of faith that he sincerely held. This was no mere ploy to perform a "subversive" act. Many others who loved their country shared his views. They were not saboteurs. Uttering one's beliefs is sacrosanct under the

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Additionally, they claim that the Judge Advocates General, when testifying before Congress as to deficiencies in the Executive Branch's construct of military trials, created a dangerous precedent to the concept of civilian control over the military. *Id.*

It is this author's contention that Sulmasy & Yoo's article, in particular its use of military history, is either characterized by historic illiteracy or intentional malfeasance. Nonetheless, the complaints listed in this Article would surely have surprised Douglas.

579. *Id.*

580. 401 U.S. 355 (1971).

581. 417 U.S. 733, 766 (1974) (Douglas, J., dissenting).

582. *Id.* at 769-70.

First Amendment. Punishing the utterances is an “abridgment” of speech in the constitutional sense.<sup>583</sup>

Having narrowed the in personam reach of courts-martial, Douglas had tried, but failed, to reduce the military’s subject matter jurisdiction. Had Douglas fully succeeded, the military’s disciplinary enforcement would largely exist under the control of civilian courts, unaccustomed to the needs of military discipline. As a result, civilian juries would be asked to determine, for instance, whether a soldier had a right to kill a civilian in a zone of conflict without understanding the environment of that zone. Such a scenario could either work to the benefit or the detriment of the soldier, but the decision would not be arrived at by a jury of the soldier’s peers. While historically there have been a number of legal scholars who believe this is appropriate, Congress has thus far resisted calls to limit jurisdiction based on Douglas’s model. There is good reason for this resistance. The evidence of the overall conduct of uniformed U.S. forces in the current conflicts in Iraq and in Afghanistan, including courts-martial prosecutions and administrative determinations stemming from assignment to those theatres, clearly indicates that Douglas was wrong in deriding the need for a fully-jurisdictional-military discipline system, even in peacetime. The U.S. today fields the most disciplined fighting force in its history, and the military’s legal construct has not resulted in blindly monolithic commanders or uniformed lawyers.

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583. *Id.* at 772. Douglas also included:

I cannot imagine, however, that Congress would think it had the power to authorize the military to curtail the reading list of books, plays, poems, periodicals, papers, and the like which a person in the Armed Services may read. Nor can I believe Congress would assume authority to empower the military to suppress conversations at a bar, ban discussions of public affairs, prevent enlisted men or women or draftees from meeting in discussion groups at times and places and for such periods of time that do not interfere with the performance of military duties.

Congress has taken no such step here. By Art. 133 it has allowed punishment for “conduct unbecoming an officer and a gentleman.” In our society where diversities are supposed to flourish it never could be “unbecoming” to express one’s views, even on the most controversial public issue.

Article 134 covers only “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces.”

*Id.* at 769.

