

# Jury the Court-Martial and the Constitution

Eugene M. van Loan III

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# THE JURY, THE COURT-MARTIAL, AND THE CONSTITUTION\*

Eugene M. Van Loan III†

[T]here is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution.

Chief Justice Chase<sup>1</sup>

Military justice often has attracted the attention and interest of Americans. Events such as the Andersonville trial at the close of the Civil War, the court-martial of General Billy Mitchell in 1925,<sup>2</sup> and the Nuremberg trials after World War II<sup>3</sup> have been portrayed in the high drama of theater and screen. Significant military trials such as the court-martial of Major John André, Benedict Arnold's co-conspirator in the Revolutionary War,<sup>4</sup> the trial of the *Somers* mutineers in 1842,<sup>5</sup> and the prosecutions of the Korean prisoners of war in the 1950's<sup>6</sup> are also familiar to students of American history. The war in Vietnam, however, has probably raised public interest in military justice to its greatest intensity in our history. The trials of Captain Howard Levy,<sup>7</sup> Second Lieutenant Henry Howe,<sup>8</sup> and the

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† Member of the New Hampshire Bar. A.B. 1964, Yale University; LL.B. 1967, Harvard University.

<sup>1</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141 (1866) (concurring opinion).

<sup>2</sup> See Wigmore, *Demagogic Abuse of Courts-Martial: The Mitchell Trial*, 20 ILL. L. REV. 742 (1926); Wigmore, *The Mitchell Court-Martial*, 20 ILL. L. REV. 487 (1926).

<sup>3</sup> See, e.g., G. CREEL, *WAR CRIMINALS AND PUNISHMENT* (1944); S. GLUECK, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* (1944); R. STOREY, *THE FINAL JUDGMENT? PEARL HARBOR TO NUREMBERG* 77-156 (1968).

<sup>4</sup> See generally J. FLEXNER, *THE TRAITOR AND THE SPY: BENEDICT ARNOLD AND JOHN ANDRÉ* (1953); O. SHERWIN, *BENEDICT ARNOLD: PATRIOT AND TRAITOR* (1931); W. WALLACE, *TRAITOROUS HERO: THE LIFE AND FORTUNES OF BENEDICT ARNOLD* (1954).

<sup>5</sup> See E. BYRNE, *MILITARY LAW* 14-17 (1970).

<sup>6</sup> See A. BIDERMAN, *MARCH TO CALUMNY: THE STORY OF AMERICAN P.O.W.'S IN THE KOREAN WAR* (1963); E. KINKEAD, *IN EVERY WAR BUT ONE* (1959); Prugh, *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678 (1956); Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709 (1956).

<sup>7</sup> CM 416463, Levy, 39 C.M.R. 672 (1968). See R. SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* ch. 4 (1970); Note, *Military Law*, 9 HARV. INT'L L.J. 169 (1968).

<sup>8</sup> *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). See Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325, 334-52 (1971).

Presidio "mutineers"<sup>9</sup> all have attracted a great deal of publicity and served to focus domestic attention upon military justice.<sup>10</sup> War crimes prosecution in the Green Beret and My Lai cases has in particular converted casual concern to national distress.<sup>11</sup>

## I

### MILITARY PROCEEDINGS AND TRIAL BY JURY

In the recent flood of commentary about these cases and military justice in general, antagonists on both sides have reached many different conclusions about the quality of military justice. Each, however, has in part predicated his comparison of military and civilian justice upon an identical assumption: there is no right to trial by jury in the military.

#### A. *The Right to Jury Trial as a Limitation on Military Jurisdiction*

The Supreme Court itself encouraged this assumption in its major opinions respecting the jurisdictional reach of military justice. In 1955 the Court held in *United States ex rel. Toth v. Quarles*<sup>12</sup> that the military had no jurisdiction to try a civilian by court-martial for offenses committed while on active military duty. One rationale for this landmark case was that since both the right to indictment by grand jury and trial by petit jury as guaranteed by the fifth and sixth amendments were not extended to defendants in courts-martial, subjection of civilians to a military trial would result in a deprivation of

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<sup>9</sup> ACM 420276, Sood, 42 C.M.R. 635, *petition denied*, 20 U.S.C.M.A. 636, 42 C.M.R. 356 (1970). See R. SHERRILL, *supra* note 7, ch. 2.

<sup>10</sup> Although the *Pueblo* incident resulted in no court-martial, its aftermath also drew much public attention to the workings of military justice. See, e.g., Finer, *The Second Ordeal of the Pueblo Crew*, 55 A.B.A.J. 1029 (1969); Harvey & Newsome, *Rebuttals to "The Second Ordeal of the Pueblo Crew,"* 56 A.B.A.J. 148 (1970). Also of interest to observers of military justice, although they received less publicity, were the courts-martial of Lieutenant Susan Schnall and Captain Dale P. Noyd. Lieutenant Schnall had thrown antiwar leaflets from an airplane and participated in uniform in an antiwar rally. She was convicted of conduct unbecoming an officer and failure to obey an order. N.Y. Times, Feb. 1, 1969, at 14, col. 4. Captain Noyd had become a conscientious objector after having accepted his commission. He was convicted of failure to obey an order. *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

<sup>11</sup> See, e.g., W. GERBER, *WAR ATROCITIES AND THE LAW* (1970); *WAR CRIMES AND THE AMERICAN CONSCIENCE* (E. Knoll & J. McFadden eds. 1970); Keffe, *The Soldiers of My Lai and Courts-Martial*, 56 A.B.A.J. 192 (1970); Sherman, *Military Justice: Learning from the Green Berets*, THE NATION, Oct. 20, 1969, at 399; Comment, *My Lai Massacre: The Need for an International Investigation*, 58 CALIF. L. REV. 703 (1970).

<sup>12</sup> 350 U.S. 11 (1955).

their constitutional rights.<sup>13</sup> Two years later the Court in *Reid v. Covert*<sup>14</sup> reversed on similar grounds the conviction by court-martial of a serviceman's civilian dependent:<sup>15</sup>

Art. III, § 2 and the Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions—*safeguards which cannot be given in a military trial*.<sup>16</sup>

In 1969, the Court decided *O'Callahan v. Parker*.<sup>17</sup> Even with regard to persons subject to military law, the Court held, a court-martial possessed no peacetime domestic jurisdiction over offenses that were not "service connected."<sup>18</sup> According to the Court, such courts-martial would unconstitutionally infringe upon the right to indictment by grand jury and trial by petit jury available to the accused in civilian courts.<sup>19</sup> The full thrust of the Court's assumptions about military justice and its ability to conduct a fair trial was made apparent by Mr. Justice Douglas in the majority opinion:

[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.<sup>20</sup>

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<sup>13</sup> *Id.* at 16-19. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122-24 (1866); cf. *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806).

<sup>14</sup> 354 U.S. 1 (1957), *rev'g* 351 U.S. 487 (1956).

<sup>15</sup> See also *Kinsella v. Krueger*, 354 U.S. 1 (1957), *rev'g* 351 U.S. 470 (1956). The literature generated by these opinions and similar decisions (e.g., *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960)), is voluminous. For a sampling, see F. WIENER, *CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA* (1967); Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964); Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366; Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961); Harrison, *Court-Martial Jurisdiction of Civilians—A Glimpse at Some Constitutional Issues*, 7 MIL. L. REV. 61 (1960); Maurer, *The Court-Martialing of Camp Followers, World War I*, 9 AM. J. LEGAL HIST. 203 (1965); Wren, *Court-Martial Jurisdiction over Naval Reservists*, 17 JAG J. 5 (1963).

<sup>16</sup> 354 U.S. at 22 (emphasis added).

<sup>17</sup> 395 U.S. 258 (1969).

<sup>18</sup> *Id.* at 272-73. See also Miller, *Court-Martial Jurisdiction Since O'Callahan*, 51 MIL. L. REV. 77 (1971); Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service-Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41 (1971).

<sup>19</sup> 395 U.S. at 262.

<sup>20</sup> *Id.* at 265-66. But see Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962).

Undoubtedly one strand of the Court's logic in *Toth* and *O'Callahan* is an apparent conclusion that the Constitution grants no power to the President and Congress to convene courts-martial for the trial of civilians or non-service connected offenses.<sup>21</sup> On the other hand, the Court has not been satisfied to rest its decisions solely upon this purported lack of constitutional authorization; it has also held that such courts-martial work a deprivation of the constitutionally protected rights to a grand and petit jury.

But to the extent that reliance has been placed upon deprivation of these rights, the Court has shrouded its precise rationale in ambiguity. One possibility is that the Court has determined that the intrinsic nature of the court-martial precludes the military *in practice* from ever affording an accused the equivalent of a civilian jury trial. Douglas struck this note in *O'Callahan* in his description of military justice:

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.<sup>22</sup>

Douglas's sentiments echo the conclusions of many professional critics of the military justice system. Such an evaluation would appear to leave it open to Congress to alter the result of these cases by introducing a true jury system into military trials. Nothing in these cases, however, implies that such legislative manipulation would be constitutionally permissible.

An alternative argument is that the availability of grand and petit juries in civilian courts affords a sufficient justification for limiting

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<sup>21</sup> *O'Callahan v. Parker*, 395 U.S. 258, 267-73 (1969); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14-15 (1955); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 272, 41 C.M.R. 264, 272 (1970) (dissenting opinion).

<sup>22</sup> 395 U.S. at 263-65 (footnotes omitted). *See also Trop v. Dulles*, 356 U.S. 86, 104 (1958) (concurring opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18 (1955).

military jurisdiction. Although the Court has devoted no significant attention in its opinions to the existence or nature of such alternative courts, this thesis is satisfactory to explain the *Toth* line of cases.<sup>23</sup> In *Toth* and *Reid*, the offenses at issue were committed overseas and therefore could not have been tried in the courts of any state. Although no substantive federal civilian crimes then existed to cover these offenses, Congress could have created such crimes or could have merely granted jurisdiction to the federal courts to try the offenses already made punishable by military law.<sup>24</sup> In either case, the offenses would have been triable in the federal civilian courts and the right to indictment by grand jury and trial by petit jury would have unquestionably been constitutionally available.

The *O'Callahan* result similarly appears to be explicable as deriving from a concern over the military's deprivation of an accused's otherwise available constitutional rights. Sergeant James O'Callahan in 1956 had been tried by court-martial in the Territory of Hawaii. Since Hawaii had been "incorporated" into the United States in 1900,<sup>25</sup> the fifth and sixth amendment rights to indictment by grand jury and trial by petit jury would have been constitutionally available to any person tried in the federal territorial court.<sup>26</sup> Furthermore, there did exist at that time a substantive territorial offense which would have included the conduct for which Sergeant O'Callahan had been tried by court-martial.<sup>27</sup> Consequently, the exercise of military jurisdiction in lieu of civilian jurisdiction clearly did deprive the accused of rights which would have otherwise been constitutionally required.

The analytical difficulty comes with the recent Supreme Court pro-

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<sup>23</sup> Notes 12-19 *supra*.

<sup>24</sup> See United States *ex rel. Toth v. Quarles*, 350 U.S. 11, 21 (1955). See generally Schuck, *Trial of Civilian Personnel by Foreign Courts*, 2 MIL. L. REV. 37 (1958). The Court of Military Appeals has not taken this approach in its interpretation of the *O'Callahan* rule, however. Rather than rely upon the mere existence of congressional power to legislate over non-service connected offenses committed overseas, the Court of Military Appeals has searched for the actual exercise of such power. Where in fact Congress has not acted and no substantive federal civilian crime already exists, the court has concluded that an accused before an overseas court-martial has no constitutional rights to a grand jury or petit jury; consequently, the military has jurisdiction in such cases even if the offenses are not service connected. *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).

<sup>25</sup> Act of April 30, 1900, ch. 339, 31 Stat. 141.

<sup>26</sup> *Rasmussen v. United States*, 197 U.S. 516 (1905); *Thompson v. Utah*, 170 U.S. 343 (1898).

<sup>27</sup> The Court implied that there was a substantive territorial offense which O'Callahan committed. 395 U.S. at 273-74. Compare the more explicit language of the dissent in *United States v. Borys*, 18 U.S.C.M.A. 547, 553, 40 C.M.R. 259, 265 (1970).

nouncement in *Relford v. Commandant*.<sup>28</sup> This is the first case before the Court to involve an offense committed within a state of the United States and the first, therefore, in which there existed something other than a federal forum as an alternative to the court-martial. Defendant was convicted of rape in 1961 by a court-martial at Fort Dix, New Jersey. Although the Supreme Court upheld the exercise of military jurisdiction, it also noted that the "courts in New Jersey were open and available for the prosecution of Relford."<sup>29</sup> Although it is not unambiguous, this remark apparently refers to the state courts of New Jersey. If state courts are indeed viewed by the Supreme Court as appropriate alternatives to courts-martial, the suggested rationale of the *Toth* cases appears to break down. At the time of Relford's conviction in 1961, an accused in a state court did not yet have a constitutional right to trial by petit jury<sup>30</sup> or indictment by grand jury.<sup>31</sup> Although by the date of the *Relford* decision the Supreme Court had applied the sixth amendment right to trial by petit jury to the states,<sup>32</sup> its new rule could not have been retroactively applied to Relford's conviction.<sup>33</sup> Moreover, the Court gave no indication in *Relford* that it meant to presage an application of the fifth amendment's grand jury guaranty to the states<sup>34</sup> or even that it intended to base future decisions solely on the effect of military jurisdiction upon the right to a petit jury. Consequently, unless the apparent reference to the state courts of New Jersey is mere surplusage, the theory that the Supreme Court has justified its constriction of military jurisdiction because of the military's

<sup>28</sup> 401 U.S. 355 (1971).

<sup>29</sup> *Id.* at 366. In its enumeration of factors to be considered in determining whether or not a particular offense was cognizable by the military courts, the Court listed "[t]he presence and availability of a civilian court in which the case can be prosecuted." *Id.* at 365 (emphasis added).

<sup>30</sup> *Irwin v. Dowd*, 366 U.S. 717, 721 (1961); *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937); *Maxwell v. Dow*, 176 U.S. 581 (1900).

<sup>31</sup> *Hurtado v. California*, 110 U.S. 516 (1884); *accord*, *Beck v. Washington*, 369 U.S. 541, 545 (1962) (dictum).

<sup>32</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968); text accompanying note 46 *infra*.

<sup>33</sup> *De Stefano v. Woods*, 392 U.S. 631 (1968).

<sup>34</sup> *But see* 401 U.S. at 362-63:

This case, as did *O'Callahan*, obviously falls within the area of stress between the constitutional guarantees contained in the Constitution's Art. III, § 2, cl. 3, in the Sixth Amendment, and possibly in the Fifth Amendment, on the one hand, and, on the other, the power vested in the Congress, by the Constitution's Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces," with its supportive Necessary and Proper provision in cl. 18, and the Fifth Amendment's correlative exception for "cases arising in the land or naval forces."

(emphasis added).

deprivation of otherwise available constitutional rights is seriously called into question.<sup>35</sup>

### B. *The Jury Trial in Nonmilitary Proceedings*

Ironically, in the civilian sphere itself the Supreme Court has only recently fully implemented the Constitution's guaranties of trial by jury in criminal cases.<sup>36</sup> Despite early holdings that trial by jury was required in the District of Columbia<sup>37</sup> and the incorporated territories,<sup>38</sup> the Supreme Court determined that the Constitution's jury trial guaranties affected neither the unincorporated territories<sup>39</sup> nor overseas consular courts.<sup>40</sup> The sixth amendment, moreover, was at an early stage held not to apply to the states through the fourteenth amendment.<sup>41</sup> Finally, the right to trial by jury was not deemed to be constitutionally applicable to cases of criminal contempt<sup>42</sup> or petty offenses.<sup>43</sup> The language of many of these early cases, although taking

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<sup>35</sup> The Court of Military Appeals has taken seriously the Supreme Court's emphasis upon the deprivation of the rights to trial by petit jury and indictment by grand jury. For example, it has held that since there is no constitutional right to a trial by petit jury in petty offense cases (*Baldwin v. New York*, 399 U.S. 66 (1970)), the exercise of military jurisdiction in such cases is totally unrestricted. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

<sup>36</sup> Although they may involve substantial personal and financial deprivations, proceedings not in the nature of "criminal prosecutions" need not afford a trial by jury. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juvenile proceeding); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (imposition of customs penalty on transporter of alien immigrant); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (expulsion of alien). *Cf. Kenedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (denationalization of citizen); *Wong Wing v. United States*, 163 U.S. 228 (1896) (imprisonment and forfeiture of goods of alien for illegal entry into country).

<sup>37</sup> *Callan v. Wilson*, 127 U.S. 540 (1888); *see Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (civil jury).

<sup>38</sup> *See, e.g., Thompson v. Utah*, 170 U.S. 343, 346 (1898). The same proposition has been established for civil juries. *See, e.g., Black v. Jackson*, 177 U.S. 349 (1900).

<sup>39</sup> *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Puerto Rico); *Dorr v. United States*, 195 U.S. 138 (1904) (Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (Hawaii). *See generally Garner, The Right of Jury Trial in the Dependencies*, 40 AM. L. REV. 340 (1906); *McClain, The Hawaiian Case*, 17 HARV. L. REV. 386 (1904).

<sup>40</sup> *In re Ross*, 140 U.S. 453 (1891). *See also Reid v. Covert*, 354 U.S. 1, 10-14 (1957).

<sup>41</sup> *Maxwell v. Dow*, 176 U.S. 581 (1900).

<sup>42</sup> *Green v. United States*, 356 U.S. 165, 185-87 (1958); *but cf. Bloom v. Illinois*, 391 U.S. 194 (1968).

<sup>43</sup> *Schick v. United States*, 195 U.S. 65, 69-70 (1904). *See Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1969); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Bloom v. Illinois*, 391 U.S. 194 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930). *See generally Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

into account the jury's respected position in Anglo-American jurisprudence,<sup>44</sup> clearly indicated that the Court did not consider the jury a "necessary requisite of due process of law."<sup>45</sup>

An obvious change in thinking had occurred by 1968, however, when Mr. Justice White was able to state on behalf of the Court,

Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.<sup>46</sup>

This statement reflects more than just a refinement of the test for incorporation of the individual provisions of the Bill of Rights into the fourteenth amendment.<sup>47</sup> The language and the decision also manifest the Court's more recent concern with the reach and integrity of the jury trial itself.<sup>48</sup> Indeed, one might very well construe even *Toth v.*

<sup>44</sup> See, e.g., *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898):

Those who emigrated to this country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."

quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779 (3d ed. 1858) [hereinafter cited as STORY].

<sup>45</sup> *Maxwell v. Dow*, 176 U.S. 581, 603 (1900).

<sup>46</sup> *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968).

<sup>47</sup> The Court had moved from a requirement that the contested right be "implicit in the concept of ordered liberty" to a demand that it be "fundamental to the American scheme of justice." Compare *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), with *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). See generally THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY (L. Levy ed. 1970); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 CORNELL L.Q. 467 (1966); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049 (1956); Lacy, *The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine*, 23 WASH. & LEE L. REV. 37 (1966).

<sup>48</sup> See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (exclusion from jury of those opposed to capital punishment deprives one of right to impartial jury); *Bloom v. Illinois*, 391 U.S. 194 (1968) (applying jury trial to charges of serious criminal contempts); *Bruton v. United States*, 391 U.S. 123 (1968) (limiting instruction on effect of prejudicial evidence insufficient to guarantee that jury will disregard the evidence); *United States v. Jackson*, 390 U.S. 570 (1968) (permitting only jury to impose death penalty is an unconstitutional inducement to waive jury); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (requiring

*Quarles* not only as the initiation of a trend in the Supreme Court towards a limitation of military jurisdiction, but also as one of the first indications of an evolving judicial preoccupation with trial by jury and its auxiliary rights.<sup>49</sup>

Yet while the Supreme Court has been assiduously engaged in establishing the jury on all levels of our federal system and generally strengthening its role in our criminal process, the jury has increasingly become the target of criticism from sources both within and without the legal profession. In particular, the jury has been attacked as the root cause of the delay and backlog in the nation's courts.<sup>50</sup> Although the civil jury has borne the brunt of this particular criticism, the criminal jury has not escaped it. But inefficiency has always been the price of justice. The real and biting impact of the recent criticism is that it has been directed at not only the jury's facility for causing delay but also its inability even to perform the judicial and political functions which justify its existence. Critics have called into question the competence of juries composed of laymen to comprehend and digest the factual and legal complexities to which they are usually exposed in modern trials.<sup>51</sup> On the political level, the jury is being battered from two quite opposite directions. One school of thought holds that the traditional role of the jury as a bulwark against an absolute government and its judicial agents is atavistic in a democratic society where the law makers and the law enforcers are popularly selected through universal suffrage.<sup>52</sup> For these critics the jury is now merely an unnecessary

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jury for denationalization of American citizen); *but see* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (upholding the denial of jury in juvenile proceedings). Similar concern has been shown for juries in civil actions. *See, e.g., Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

<sup>49</sup> Another reflection of this concern may be found in the myriad of cases dealing with jury selection and composition. *E.g., Carter v. Jury Comm'n*, 396 U.S. 320 (1970); *Irwin v. Dowd*, 366 U.S. 717 (1961); *Dennis v. United States*, 339 U.S. 162 (1950); *Moore v. New York*, 333 U.S. 565 (1948).

<sup>50</sup> *See, e.g., H. JAMES, CRISIS IN THE COURTS 193-94 (1968); H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT (1959); BUIT, Progress in Trial by Jury*, 136 ANNALS 75 (1928); Callender, *Jury Trials in Criminal Cases*, 125 ANNALS 106 (1926); Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970).

<sup>51</sup> J. FRANK, *COURTS ON TRIAL 116-20 (1950); H. JAMES, supra note 50, at 196-99; Boston, Some Practical Remedies for Existing Defects in the Administration of Justice*, 61 U. PA. L. REV. 1, 10-18 (1912); Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 387-401 (1954).

<sup>52</sup> *E.g., Broeder, supra note 51, at 412-13; Kalven, The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1062-68 (1964); Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 305 (1914); *see also* H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* chs.

impediment to effective justice. On the other side are those who accept the political role of the jury but believe that it has ceased to perform this function. This group contends that the jury has insinuated itself into the "establishment" and that it has therefore abdicated its role as an obstacle to tyranny.<sup>53</sup> Indeed, these critics see the recent spate of "political" trials as evidence of this shift.<sup>54</sup> Perhaps the most telling reflection of the current unpopularity of the jury, however, is its recent history in England which has all but abolished it in civil cases<sup>55</sup> and substantially diminished its availability in criminal cases.<sup>56</sup>

### C. *The Constitutional Relationship of the Jury and the Court-Martial*

To the extent that the Supreme Court's rationale in *Toth, O'Callahan*, and their progeny is based upon the inherent advantages of a civilian jury trial over a court-martial and the practical unlikelihood that trial by jury would or could ever be transplanted into military soil, the current controversy over the efficacy and the merit of the civilian jury casts some doubt upon the viability of these decisions. On the other hand, to the extent that such cases are based upon the constitutional availability of a jury trial in civilian courts and its constitutional unavailability in military courts, the mention of state courts in the *Relford* case raises some serious questions about the logical integrity of this argument. Nevertheless, if the rationale is indeed derived from some notion of constitutional accessibility to trial by jury in civilian as opposed to military courts, it is at least appropriate at this juncture to lay to rest any lingering doubts about the validity of the military half of this premise. It is therefore the purpose of this article to establish that trial by jury was not ever and is not now constitutionally required in military tribunals.

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19-21 (1966); Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419 (1969); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172-73 (1964).

<sup>53</sup> E.g., Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969); see also Broeder, *supra* note 51, at 414-15.

<sup>54</sup> See, e.g., THE CONSPIRACY TRIAL (J. Clavir & J. Spitzer eds. 1970). In such trials the avowed aim of the defendants is not to rely upon the jury for their vindication and acquittal, but rather to expose the alleged tyranny of the establishment by intentional self-conviction and martyrdom at the hands of a supposedly mindless jury of institutional marionettes.

<sup>55</sup> See, e.g., Administration of Justice (Miscellaneous Provisions) Act, 23 & 24 Geo. 5, c. 36, § 6. See also Bok, *The Jury System in America*, 287 ANNALS 92 (1953); Hall, *Trial by Judge or Jury?*, 110 SOL. J. 42 (1966).

<sup>56</sup> See Administration of Justice (Miscellaneous Provisions) Act, 23 & 24 Geo. 5, c. 36, § 1. See also J. FRANK, *supra* note 51, at 109-10; Heyting, *The Abolition of Grand Juries in England*, 19 A.B.A.J. 648 (1933).

## II

## JURY TRIALS AND MILITARY JUSTICE BEFORE THE CONSTITUTION

The common assumption that there is no constitutional right to trial by jury in the military service has customarily been asserted by both supporters and critics of military justice without supporting historical documentation. The Constitution does indeed expressly provide for the right to trial by petit jury in criminal cases;<sup>57</sup> nowhere, however, does it expressly authorize the creation of courts-martial or any other separate military tribunal. Nevertheless, Congress's constitutional power "to make Rules for the Government and Regulation of the land and naval Forces"<sup>58</sup> has consistently been held to provide such authority.<sup>59</sup> There has never been any doubt that military trials conducted under such authority do not require initiation by a grand jury indictment, for the fifth amendment specifically exempts the military from its grand jury guaranty.<sup>60</sup> Moreover, the sixth amendment has been construed to contain a similar, but implied, exception for the

57 The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

*Id.* amend. VI.

58 *Id.* art. I, § 8.

59 *E.g.*, *Relford v. Commandant*, 401 U.S. 355 (1971); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79 (1857); *see Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137-38 (1866) (concurring opinion).

60 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

U.S. CONST. amend. V.

The phrase "when in actual service in time of war or public danger" modifies only the word "Militia" and not the words "the land or naval forces"; consequently, the regular federal armed forces are exempted from the strictures of the grand jury requirement at all times. *O'Callahan v. Parker*, 395 U.S. 258, 272 n.18 (1969); *Johnson v. Sayre*, 158 U.S. 109 (1895); *Ex parte Mason*, 105 U.S. 696, 701 (1882). The seventh amendment civil jury trial provision—"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."—has no application to the military whatsoever because of the absence of civil jurisdiction in military courts. *See W. WINTHROP, MILITARY LAW AND PRECEDENTS* 55 (2d rev. ed. 1920) [hereinafter cited as *WINTHROP*]. *But see* 10 OP. ATT'Y GEN. 168 (1862) (power of summary court-martial to disrate a seaman for unfitnes); *Peterson, Naval Courts Martial*, 20 IND. L.J. 167, 169 (1945).

military from its petit jury guaranty.<sup>61</sup> Despite its significance and its virtually universal acceptance, however, this conclusion has never been satisfactorily explored and validated.

### A. *Jury Trials*

Trial by jury in civilian criminal cases was from the first guaranteed by the indigenous American colonial charters, ordinances, and frames of government. The earliest such provision was that appearing in a 1623 ordinance of the Plymouth Colony in Massachusetts which provided that "all criminall facts . . . should be tried by the verdict of twelve honest men to be impanelled by authority in forme of a jury upon their oath."<sup>62</sup> In a more classic exposition of the common law right to trial by an impartial jury of peers from the vicinage,<sup>63</sup> the Fundamental Constitutions for the Province of East New Jersey of 1683 declared that all accused criminals were to be tried by "lawful judgment of their peers: . . . by twelve men, and as near as it may be, peers and

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<sup>61</sup> *E.g.*, Reid v. Covert, 354 U.S. 1, 37 n.68 (1957); Whelchel v. McDonald, 340 U.S. 122, 126-27 (1951); *Ex parte* Quirin, 317 U.S. 1, 40 (1942); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 137-38 (1866). See also C. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION—ITS ORIGIN AND DEVELOPMENT 262 (1922); W. DOUGLAS, A LIVING BILL OF RIGHTS 45-48 (1961); E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 370 (1964); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 54 (1951) [hereinafter cited as HELLER]; Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 872 (1960); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266, 280 (1958); but see, Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) [hereinafter cited as Henderson].

<sup>62</sup> THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 28 (W. Brigham ed. 1836). Even earlier, the instructions of King James I in 1606 to the first Virginia colony had provided that in all capital cases issues were to be decided by "twelve honest and indifferent persons sworne upon the Evangelists." 1 W. HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 67, 69 (1823). Many of the colonial charters authorized the creation of colonial legislative and judicial institutions for the enactment and enforcement of any laws not repugnant to the common law of England. *E.g.*, 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 533 (F. Thorpe ed. 1909) (Conn.) [hereinafter cited as CONSTITUTIONS]; 2 *id.* at 770, 773 (Ga.); 3 *id.* at 1628, 1638-39, 1642 (Me.); *id.* at 1680-81 (arts. 7-8) (Md.); *id.* at 1832 (New England); *id.* at 1853, 1857-58 (Mass.); 4 *id.* at 2442 (N.H.); *id.* at 2447 (Conn.); 5 *id.* at 2538 (art. 2) (N.J.); *id.* at 2745-46 (art. 5) 2764 (Carolina); *id.* at 3038 (Pa.); 6 *id.* at 3215 (R.I.); 7 *id.* at 3808-09 (Va.); see 1 *id.* at 560 (art. 6) (Del.).

<sup>63</sup> See generally P. DEVLIN, TRIAL BY JURY (1956); W. FORSYTH, HISTORY OF TRIAL BY JURY (1852); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 1-60, 299-386 (7th rev. ed. 1956); B. KEENEY, JUDGMENT BY PEERS (1949); M. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM (1894); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I ch. 2 (2d ed. 1899); Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 295, 357 (1892); Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45 (1891).

equals, and of the neighborhood, and men without just exception."<sup>64</sup> This classical form of the jury was not uniformly accepted throughout the colonies; indeed, the individual contents of the various colonial "parchment guarantees" were based upon widely differing local practices.<sup>65</sup> Nevertheless, there was unquestionably an underlying acceptance by the early colonists of trial by jury as a fundamental precept of liberty.<sup>66</sup>

Infringement by England upon what the colonists believed to be their natural and common law right to trial by jury appears prominently in the speeches and written remonstrances of the decade preceding the American Revolution and thus must be included among its precipitating causes.<sup>67</sup> Particularly obnoxious to the colonists was the expansion of the commercial jurisdiction of British vice-admiralty courts. Since the procedure in these courts accommodated the continental civil law which had no jury trial, every increase in their powers meant a concomitant decrease of the colonists' access to trial by jury.<sup>68</sup> In 1765 the Stamp Act Congress, composed of twenty-eight delegates from nine colonies, promulgated a Declaration of Rights which proclaimed that

trial by jury is the inherent and invaluable right of every British subject in these colonies.

. . . [T]he [Stamp] act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.<sup>69</sup>

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<sup>64</sup> 5 CONSTITUTIONS 2580-81 (art. 19). See also *id.* at 2550-51 (chs. 19, 22) (N.J.); *id.* at 2781 (art. 69), 2785 (art. 111) (Carolina); *id.* at 3060 (art. 8) (Pa.); see HELLER 13-20; B. LONG, GENESIS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA chs. 1-8 (1926); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, ch. 2 (1955).

<sup>65</sup> See generally HELLER 15-20; I H. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 187-90 (1904); 2 *id.* at 303-06; P. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (1970); J. SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639-1702), at 143-45 (1961); Chitwood, *Justice in Colonial Virginia*, 23 JOHNS HOPKINS U. STUDIES IN HIST. & POL. SCI. 399 (1905); Frankfurter & Corcoran, *supra* note 43, at 934-68; Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 320-26 (1966); Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 347 (1967); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 171-79 (1964).

<sup>66</sup> See C. ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 142, 146, 276, 388-91, 407 (1953).

<sup>67</sup> See, e.g., C. ANDREWS, THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION 135-37, 197-206 (1924); J. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 286-87 (1959).

<sup>68</sup> See Reid v. Covert, 354 U.S. 1, 28-30 (1957). See generally C. UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960).

<sup>69</sup> THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES 6 (W. Solberg ed. 1958).

Further imperial trespasses upon claimed colonial rights—acts such as the mandatory removal of colonists accused of treason to England for trial—ultimately stimulated the meeting of the First Continental Congress. In its Declaration and Resolves of October 14, 1774, the Congress asserted that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”<sup>70</sup> In the Declaration of Independence itself, the colonial authors of the terminal break with the mother country mention as one of England’s transgressions that the king “has combined with others . . . giving his Assent to their acts of pretended Legislation: . . . For depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offenses . . . .”<sup>71</sup> Indeed, insofar as political principles influenced the development of the American Revolution, it appears that concern over the deprivation of trial by jury played a strong supporting role to “no taxation without representation.”<sup>72</sup>

Even prior to the adoption of the Declaration of Independence, the colony of Virginia had adopted the first American bill of rights.<sup>73</sup> Drafted by one of the architects of the Constitution, George Mason, article 8 stated

[t]hat in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour,

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<sup>70</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 69 (Library of Congress ed. 1904-36) [hereinafter cited as JOURNALS]. Twelve days later, in a “Letter to the Inhabitants of the Province of Quebec,” the Continental Congress expressed its empathy with the Canadian colonists over the deprivation of their right to jury trial under the Quebec Act of June 1774. *Id.* at 107; *see also id.* at 90, 93, 99.

<sup>71</sup> Extension of British admiralty jurisdiction and the unprecedented removal to England of treason cases, both decried in the Declaration of Independence, had also previously been enumerated in the Declaration on Taking Arms passed on July 6, 1775, by the Second Continental Congress subsequent to the battles of Lexington and Concord. 2 JOURNALS 132, 145.

<sup>72</sup> The relationship of trial by jury to the principle of democracy was aptly characterized by Samuel Adams:

The two main provisions by which a certain share in the government is secured to the people are their Parliaments and their juries; by the former of which no laws can be made without their consent, and by the latter none can be executed without their judgment.

1 W. WELLS, *THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* 21 (1865). *See* R. MORRIS, *ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION* 484 (1957).

<sup>73</sup> SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION, 1764-1788, AND THE FORMATION OF THE FEDERAL CONSTITUTION 149-51 (S. Morison ed. 1929) [hereinafter cited as SOURCES]. *See generally* H. GRIGSBY, *THE VIRGINIA CONVENTION OF 1776* (1855); Anderson, *Jefferson and the Virginia Constitution*, 21 AM. HIST. REV. 750 (1916).

and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself . . . .<sup>74</sup>

Commencement of the Revolution and the formal declaration of independence initiated a spate of constitution making by the remainder of the newly formed American republics, most of which in some fashion similarly guaranteed the right to trial by jury in criminal cases.<sup>75</sup> Without question, these early state constitutional provisions—especially the Virginia bill of rights—exercised significant influence upon the framers of the guaranties of criminal jury trial incorporated into the federal Constitution.<sup>76</sup>

Nowhere in the Articles of Confederation<sup>77</sup> is the right to trial by jury in criminal cases mentioned. The reports of the debates in the Continental Congress are extremely cursory, and there is no indication that the jury issue was ever even raised. On the other hand, the concern of the Congress at that time was focused not upon threats to personal freedoms, but upon the exigencies of uniting the newly liberated states in the face of an armed conflict with England. Furthermore, there was little occasion or reason for the Continental Congress to consider the mode of trial in criminal cases because, except for the trial of piracy and felonies committed on the high seas,<sup>78</sup> the federal judicial power created under the Articles of Confederation extended only to civil cases.<sup>79</sup>

A committee appointed to formulate amendments to the Articles did recommend in 1786 that a provision be inserted to declare that "the trial of a fact by Jury shall ever be held sacred."<sup>80</sup> The proposals

<sup>74</sup> SOURCES 150 (emphasis added).

<sup>75</sup> *E.g.*, 2 CONSTITUTIONS 783, 785 (arts. 40-43, 61) (Ga.); 3 *id.* at 1686, 1688 (arts. 3, 19) (Md.); *id.* at 1891 (art. 12) (Mass.); 4 *id.* at 2455, 2456 (arts. 15-16, 21) (N.H.); 5 *id.* at 2598 (art. 22) (N.J.); *id.* at 2637 (art. 41) (N.Y.); *id.* at 2787 (art. 9) (N.C.); *id.* at 3083 (art. 9), 3088 (§ 25) (Pa.); 6 *id.* at 3257 (art. 41) (S.C.); *id.* at 3741 (art. 10), 3753 (art. 11) (Vt.); see 1 *id.* at 569 (art. 1, § 4) (Del.); 2 *id.* at 789 (art. 4, § 3) (Ga.); 4 *id.* at 2473 (arts. 15-16) (N.H.); 5 *id.* at 3100-01 (art. 9, § 10) (Pa.); 6 *id.* at 3264 (art. 9, §§ 2, 6) (S.C.); *id.* at 3763 (art. 10) (Vt.); *cf. id.* at 3223 (art. 1, § 10) (R.I.); 1 *id.* at 538 (art. I, §§ 9, 21) (Conn.). See also 4 THE WORKS OF JOHN ADAMS 226 (C.F. Adams ed. 1851); B. HAINES & C. HAINES, THE CONSTITUTION OF THE UNITED STATES: A BRIEF ACCOUNT OF ITS GROWTH AND MEANING 57-62 (1928); HELLER 22-24; H. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1776-1826: THE BLESSINGS OF LIBERTY 113-20 (1939).

<sup>76</sup> See E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 10-38, 50-56, 160-65 (1957) [hereinafter cited as BILL OF RIGHTS].

<sup>77</sup> Adopted November 15, 1777. 9 JOURNALS 907-28.

<sup>78</sup> See THE FEDERALIST No. 42, at 265-66 (C. Rossiter ed. 1961) (J. Madison).

<sup>79</sup> 9 JOURNALS 915-19 (art. 9).

<sup>80</sup> 31 *id.* at 497. This proposal, however, probably related to the civil, not the criminal, jury.

of this committee, however, were never acted upon by the Congress. Nevertheless, in its regular legislative enactments, the Confederation Congress did exhibit the traditional American reverence for trial by jury. In 1787 it passed the Northwest Ordinance, a statute for the governance of America's first frontier territory.<sup>81</sup> Article 2 of that law prescribed that

[t]he Inhabitants of the said territory shall always be entitled to the benefits of . . . trial by Jury; . . . no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land . . .<sup>82</sup>

Coming as it did in the same year as the Constitutional Convention of 1787, the Northwest Ordinance probably reflected accurately not only the general esteem in which the jury was held at that time, but also the particular cultural and intellectual baggage of the framers of the Constitution itself.<sup>83</sup>

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<sup>81</sup> See generally J. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787* (1891).

<sup>82</sup> 32 JOURNALS 340. The forerunner of this particular provision was a guaranty of trial by jury to all new purchasers of land in the Northwest Territory as proposed by a committee report in September 1786. 31 *id.* at 670.

<sup>83</sup> See Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A.J. 918, 920 (1964). The Confederation period (1777-1789) has seldom been treated by historians as an end unto itself; rather, it has been viewed as either an aftermath of the Revolution or a precursor of the Constitutional period. Johnson, *Toward a Reappraisal of the "Federal" Government: 1783-1789*, 8 AM. J. LEGAL HIST. 314 (1964); Morris, *The Confederation Period and the American Historian*, 13 WM. & MARY Q. 139 (3d ser. 1956). This "interlude" approach to the Confederation period dominates most of the general historical works which in part treat the colonial-Constitutional period (e.g., 3 E. CHANNING, *A HISTORY OF THE UNITED STATES* (1912); 1 G. CURTIS, *HISTORY OF THE ORIGIN, FORMATION AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* bk. 3 (1865); *FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION* (C. Friedrich & R. McCloskey eds. 1954); H. HOCKETT, *supra* note 75, chs. 8-10; R. SCHUYLER, *THE CONSTITUTION OF THE UNITED STATES: AN HISTORICAL SURVEY OF ITS FORMATION* chs. 1-2 (1923); 1 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* ch. 1 (1876)), as it does those pieces dealing more specifically with the background and framing of the Constitution (e.g., F. DONOVAN, *MR. MADISON'S CONSTITUTION: THE STORY BEHIND THE CONSTITUTIONAL CONVENTION* ch. 1 (1965); B. HAINES & C. HAINES, *supra* note 75, pt. 1, chs. 4-6; M. JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 21-27 (1964); A. MASON, *THE STATES RIGHTS DEBATE: ANTI-FEDERALISM AND THE CONSTITUTION* ch. 1 (1964); E. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89* chs. 7-9 (1956); C. WARREN, *THE MAKING OF THE CONSTITUTION* ch. I (1937) [hereinafter cited as WARREN]; *but see* 1 G. BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (1882)). Similarly, even those works which focus upon the era of the Confederation itself emphasize its relationship to the preceding Revolutionary period or the succeeding Constitutional period. E.g., J. FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789* (1888); M. JENSEN, *THE NEW NATION—A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789* (1950); B. WRIGHT, *CONSENSUS AND CONTINUITY, 1776-1787* (1958); Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511 (1925).

B. *Military Justice*

Familiarity with the art and ways of war was also a prominent part of the cultural heritage of the architects of the Constitution. All the original colonial grants and charters had either explicitly or implicitly authorized the formation of local defense establishments to meet the exigencies of a hostile and dangerous habitation in the New World.<sup>84</sup> In response to such authorizations, the individual colonies had enacted universal military training laws<sup>85</sup> and rudimentary articles of war.<sup>86</sup> Organizational and operational control of these earliest militia bodies was shared among the militia commanders, the colonial legislatures, and the royal governors.<sup>87</sup> Consequently, many of the colonists not only tasted the regimentation and discomfort of military service, but some also experienced the demands and responsibilities of military leadership.<sup>88</sup> Although initially eager and locally effective, the indigenous militia forces were too poorly trained and amateurishly led to conduct anything more than sporadic, defensive Indian engagements.<sup>89</sup>

But the colonists were not left totally to their own devices in military matters; even in the early stages of the colonial period, British regular troops had frequented the North American shores. For exam-

<sup>84</sup> See, e.g., 1 CONSTITUTIONS 534 (Conn.); 2 *id.* at 776 (Ga.); 3 *id.* at 1630 (Me.); *id.* at 1682 (art. 12) (Md.); *id.* at 1835-36 (New England); *id.* at 1858 (Mass.); 4 *id.* at 2448 (Conn.); 5 *id.* at 2539, 2576 (art. 7) (N.J.); *id.* at 2751 (art. 15) (Carolina); 6 *id.* at 3209 (art. 18) (R.I.); 7 *id.* at 3784 (Va.). See also 1 H. OSGOOD, *supra* note 65, at 496-526; 2 *id.* at 375-400.

<sup>85</sup> See generally R. DUPUY, *A COMPACT HISTORY OF THE UNITED STATES ARMY* 17-20 (rev. ed. 1961) [hereinafter cited as DUPUY]; J. HILL, *THE MINUTEMAN IN PEACE AND WAR: A HISTORY OF THE NATIONAL GUARD* 3-4 (1964); F. STERN, *THE CITIZEN ARMY: KEY TO DEFENSE IN THE ATOMIC AGE* 132-36 (1957); R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* ch. 1 (1967) [hereinafter cited as WEIGLEY]; Ansell, *Legal and Historical Aspects of the Militia*, 26 *YALE L.J.* 471 (1917); Clendenen, *A Little Known Period of American Military History*, 19 *MIL. AFFAIRS* 37 (1955); Radabaugh, *The Militia of Colonial Massachusetts*, 18 *MIL. AFFAIRS* 1 (1954); Sharp, *Leadership and Democracy in the Early New England System of Defense*, 50 *AM. HIST. REV.* 244 (1945). The colonial militia systems were modeled after their British forebears even though by this time England had moved from any measurable reliance upon its militia forces towards a paid, professional army. WEIGLEY 3-4.

<sup>86</sup> 1 CONSTITUTIONS 534 (Conn.); 2 *id.* at 776 (Ga.); 3 *id.* at 1630, 1639 (Me.); *id.* at 1682 (art. 13) (Md.); *id.* at 1833 (New England); 4 *id.* at 2448 (Conn.); 5 *id.* at 2752 (art. 16), 2770 (Carolina); 6 *id.* 3218 (R.I.). See 4 H. OSGOOD, *supra* note 65, at 352.

<sup>87</sup> WEIGLEY ch. 1.

<sup>88</sup> See Sharp, *supra* note 85.

<sup>89</sup> See, e.g., DUPUY 20-21; D. LEACH, *FLINTLOCK AND TOMAHAWK: NEW ENGLAND IN KING PHILIP'S WAR* (1958). An additional factor was the unavailability of the militia units for duty outside their respective colonies without the authorization of their colonial legislature.

ple, a contingent of regulars was continuously garrisoned in New York from 1664 to the Revolution.<sup>90</sup> From time to time, public courts-martial were convened by the commanders of these British units and in some cases such courts were even conducted under the authority of statutes passed by the colonial legislatures.<sup>91</sup> Owing perhaps to the spectacle of such courts-martial or perhaps to their inherited distrust of standing armies, the American colonists bore no good will towards British military justice. The New York Charter of Liberties and Privileges of 1683, for example, specifically prohibited the crown commissioners from proceeding "by Marshall Law against any of his Majestyes Subjects" who were civilians.<sup>92</sup>

With the advent of the French and Indian War (1754-1763), familiarity with the British articles of war became for many a very personal matter. To satisfy their need for a more competent and stable colonial military force, the British had authorized their royal governors to issue commissions for the recruitment of colonial volunteers. Numerous such regiments were in fact raised in North America and organized as quasi-regular British units. As such, they were directly subject to British discipline in arms and British military justice.<sup>93</sup> Many colonists were similarly recruited to serve with the British naval forces during this period and were consequently in immediate contact with England's system of naval justice.<sup>94</sup>

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<sup>90</sup> Pargellis, *The Four Independent Companies of New York*, in *ESSAYS IN COLONIAL HISTORY PRESENTED TO CHARLES MCLEAN ANDREWS BY HIS STUDENTS* 96 (L. Labaree ed. 1931). See also J. SHY, *TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION* 20-44 (1965).

<sup>91</sup> See J. SHY, *supra* note 90, at 163-85; Leder, "Dam'me Don't Stir a Man"—*Trial of New York Mutineers in 1700*, 42 N.Y. HIST. SOC. Q. 261 (1958).

<sup>92</sup> 1 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 114 (N.Y. Comm'n of Statutory Revision ed. 1894).

<sup>93</sup> See DUPUY 22-24; 4 H. OSGOOD, *supra* note 65, at 386-88, 402-10 (1924); WEIGLEY ch. 2; F. WIENER, *supra* note 15, at 37-63; Todd, *Our National Guard: An Introduction to Its History*, 5 MIL. AFFAIRS 73 (1941). The volunteer units also saw service under the British in putting down the Indian rebellion of 1763-1765 led by Chief Pontiac of the Ottawas. See generally F. PARKMAN, *HISTORY OF THE CONSPIRACY OF PONTIAC* (1885); H. PECKHAM, *PONTIAC AND THE INDIAN UPRISING* (1947). In 1765, the British Articles of War were specifically made applicable to colonial troop units raised in America:

The Officers and Soldiers of any Troops which are or shall be raised in *America*, being mustered and in Pay, shall, at all Times, and in all Places, when joined, or acting in Conjunction with Our *British* Forces, be governed by these Rules or Articles of War, and shall be subject to be tried by Courts-martial in like Manner with the Officers and Soldiers of Our *British* Troops.

WINTHROP 946 (emphasis in original). See also F. WIENER, *supra* note 15, at 68.

<sup>94</sup> J. SNEDEKER, *A BRIEF HISTORY OF COURTS-MARTIAL* 50 (1954) [hereinafter cited as SNEDEKER]; Williams, *On the History of Discipline in the Navy*, 45 U.S. NAVAL INST. PROC. 355, 358 (1919). Prior to the Revolutionary War, there existed no indigenous American

Exposure to the British military establishment apparently did nothing to endear England or her armed forces to the colonists. In particular, military enforcement of unpopular commercial legislation and frequent declarations of martial law by the royal governors inflamed the colonists and stimulated their desire for political severance from England.<sup>95</sup> For example, the First Continental Congress asserted in its Declaration and Resolves of 1774 that "the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."<sup>96</sup> Similarly, the Second Continental Congress listed as a prominent grievance the allegedly unwarranted declaration by the British of martial law in the city of Boston.<sup>97</sup> Finally, the Declaration of Independence, which accused King George III of numerous "injuries and usurpations," specifically emphasized that "[h]e has kept among us, in times of peace, Standing Armies without the Consent of our Legislature [and] has affected to render the Military independent of and superior to the Civil Power." Although primary emphasis in these and other Revolutionary remonstrances was placed upon the desired general political supremacy of the civil authority over the military, the underlying reasons for the abhorrence of British military authority must certainly have included an awareness of the military's propensity to supersede the civil justice system.<sup>98</sup>

As the colonies began to mobilize at the outbreak of the Revolution, however, the issue of domestic standing armies was rendered moot. The Second Continental Congress took over the combined war efforts of the states in June 1775. One of its first acts was to appoint a committee, of which George Washington was a prominent member, to prepare "Rules and regulations for the government of the army."<sup>99</sup> Using the British and colonial articles of war as models, the committee reported out a bill which became the basis of the first American

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navy, even on a militia basis. See generally E. MACLAY, A HISTORY OF AMERICAN PRIVATEERS (1899); C. PAULLIN, THE NAVY OF THE AMERICAN REVOLUTION: ITS ADMINISTRATION, ITS POLICY, AND ITS ACHIEVEMENTS (1906),

<sup>95</sup> See notes 66-68 *supra*.

<sup>96</sup> 1 JOURNALS 63, 70. Concern over British maintenance of a colonial standing army was also expressed by the First Continental Congress in its "Memorial to the Inhabitants of the British Colonies," October 21, 1774. *Id.* at 90, 93.

<sup>97</sup> 2 *id.* at 152. See note 71 *supra*.

<sup>98</sup> In 1774 Thomas Jefferson wrote that "[e]very state must judge for itself the number of armed men which they may safely trust among them, of whom they are to consist, and under what restrictions they shall be laid." 1 THE WRITINGS OF THOMAS JEFFERSON 445 (P. Ford ed. 1892). See PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 41-43, 71-74 (B. Bailyn ed. 1965).

<sup>99</sup> 2 JOURNALS 90.

Articles of War.<sup>100</sup> In November a different committee, appointed to obtain and fit out four new naval vessels, proposed a set of rules for the regulation of the projected American navy.<sup>101</sup> These proposals were adopted by the Congress as the first Rules for the Regulation of the Navy of the United States.<sup>102</sup>

John Adams, a member of the naval committee, had adapted the rules primarily from the British Naval Discipline Acts of 1661 and 1749<sup>103</sup> and the Regulations and Instructions Relating to His Majesty's Service at Sea of 1772.<sup>104</sup> Adams was also a key figure in a 1776 redrafting of the 1775 Army Articles of War.<sup>105</sup> In an illuminating passage written years later, Adams candidly stated,

[S]o undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day I scarcely know how it was possible that these articles could have been carried. They were adopted, however, and have governed our armies with little variation to this day.<sup>106</sup>

Adams's statement surely indicates an awareness on the part of the major participants in the Revolutionary War of the inherent antagonism between a separate system of military justice and the political liberties for which they were fighting.

The Continental Army and Navy were governed by the regulations of 1775 and 1776 for the duration of the war.<sup>107</sup> Contemporary

100 *Id.* at 110-11. The full Articles appear in *id.* at 111-23. These provisions were based essentially on earlier British Articles of War (WINTHROP 931) and the Massachusetts Articles of War of the previous April (*id.* at 947). See generally W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 9-10 (1955); SNEDEKER 20; J. SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 28 (1953); WINTHROP 21-22. Several minor amendments to the 1775 Articles of War were passed on November 7, 1775, and the Articles as amended were published and distributed to the field on November 13, 1775. 3 JOURNALS 331-34, 352. The 1775 Articles authorized two levels of Army courts-martial, the general court and the regimental or garrison court. The former was composed of 13 officers and the latter of five. Court members were appointed by the commander who convened the court, and such members served as both judge and jury. Verdicts and sentences of all courts were settled by majority vote. Clearly the Army court-martial of 1775 was not modeled upon the classical common law jury.

101 3 JOURNALS 364.

102 *Id.* at 375-76, 378, 393. The composition and structure of naval courts-martial were essentially identical to the Army's, with the exception that only one level of court-martial, a general court composed of 12 officers, was authorized.

103 22 Geo. 2, c.33.

104 SNEDEKER 49-50; DeVico, *Evolution of Military Law*, 21 JAG J. 63, 65 (1966-67).

105 See 5 JOURNALS 442, 636, 670-71, 764, 788-807.

106 3 THE WORKS OF JOHN ADAMS, *supra* note 75, at 83-84.

107 Several minor amendments were made during the Revolutionary War to the

sources indicate that courts-martial were indeed conducted pursuant to those regulations<sup>108</sup> and that the members of the Continental Congress were fully cognizant of such proceedings.<sup>109</sup> Courts-martial such as the spying trial of Major André<sup>110</sup> and the 1781 trial and summary execution of the New Jersey mutineers<sup>111</sup> received considerable public notoriety. The Continental Congress itself became deeply involved in the day-to-day operations of the war<sup>112</sup> and occasionally even directed the court-martial of members of the Continental Army and Navy.<sup>113</sup> In particular, the problem of widespread desertion from the Continental Army and colonial militia forces kept the Congress's attention focused on disciplinary matters.<sup>114</sup> In short, the leaders and participants

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Army Articles of War of 1776. *See, e.g.*, 7 JOURNALS 13, 250, 264-66. A significant alteration in the 1775 Articles for the Government of the Navy, however, was approved by the Continental Congress on June 2, 1782. In addition to authorizing any Navy captain to convene courts-martial for the trial of other than commissioned officers, the Congress provided that

for the future, a marine court of enquiry or court-martial for enquiring into or trying of all capital cases, shall consist of at least five commissioned navy and marine officers, two of whom shall be captains, and in all cases not capital it shall consist of three such officers, one of whom shall be a captain in the navy of the United States.

22 *id.* at 325. *See generally* Sargent, *The Evolution of Courts-Martial*, 9 U.S. NAVAL INST. PROC. 693, 706-07 (1883).

<sup>108</sup> *See* DUPUY 29; W. GANOE, *THE HISTORY OF THE UNITED STATES ARMY* 16-17 (1924); 2 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 175, 186, 201, 209, 1169 (W. Clark ed. 1966); WEIGLEY 63; WINTHROP 59 & nn.10-14; Maurer, *Military Justice Under Washington*, 28 MIL. AFFAIRS 8 (1964). The British also held numerous courts-martial during the Revolutionary War. *See, e.g.*, 2 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* at 31, 54, 55, 75-76, 84-85, 113, 189, 210, 264-65, 334-36, 371, 457; *see also* BROWN, *The Court Martial of Lord George Sackville, Whipping Boy of the Revolutionary War*, 9 WM. & MARY Q. 317 (3d ser. 1952). Without question, these British military trials were well known to the American revolutionaries since many of them were conducted in colonial cities and involved colonial citizens. *See* F. WIENER, *supra* note 15, chs. 5-6.

<sup>109</sup> *E.g.*, 5 JOURNALS 626; 9 *id.* at 783.

<sup>110</sup> *See* note 4 *supra*.

<sup>111</sup> *See* DUPUY 37; C. VAN DOREN, *MUTINY IN JANUARY* (1943); WEIGLEY 59.

<sup>112</sup> *See* SNEDEKER 50; WEIGLEY 30, 45-49.

<sup>113</sup> *E.g.*, on July 30, 1776, in response to a committee report on military miscarriages in Canada against the British, the Congress resolved:

That Colonel Bedel be tried by a court martial for leaving his command at the Cedars, and for declining to return to the same with Major Sherburne's reinforcement:

That Major Butterfield be tried by a court martial for surrendering to the enemy the post at the Cedars, and also such other officers as were with him, and consented to that surrender.

5 JOURNALS 618. *See also* 16 *id.* at 139-40 (court of inquiry for loss of naval vessel); WINTHROP 59 & n.10.

<sup>114</sup> M. JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781*, at 171-72 (1940). Until Baron Frederick von Steuben offered his services to the Continental Army and

in the American Revolution were no strangers to the articles of war and the court-martial.

Although the Army Articles of War of 1775 and 1776 and the Rules for the Regulation of the Navy of 1775 were undoubtedly enacted with the acquiescence of the colonies, the Continental Congress did not acquire formal authorization for such legislation until the Articles of Confederation were passed in 1777. Article 9 of the Articles of Confederation, adopted without recorded debate,<sup>115</sup> granted the Congress the power of "making rules for the government and regulation of the said land and naval forces."<sup>116</sup> The Confederation Congress exercised its authority under article 9 at least once, although it was after the conclusion of the war, when it amended the 1776 Army Articles of War.<sup>117</sup> These 1786 amendments are significant because they specifically dealt with the structure and procedure of courts-martial and therefore manifested the Congress's continuing concern and familiarity with military justice.<sup>118</sup>

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until his Regulations for the Order and Discipline of the Troops of the United States were adopted by the Continental Congress in 1779 (13 JOURNALS 384-85), the organization and training of the American forces was in such a deplorable state that only heavy doses of harsh and summary punishment were considered effective to maintain discipline. Mummy, *A Brief History of Summary Punishment in the Armies of the World*, 15 FED. B.J. 286, 302-03 (1955); note 108 *supra*.

<sup>115</sup> 9 JOURNALS 919. Portions of article 14 of the Committee of the Whole's draft had been variously debated and passed throughout October 1777. *Id.* at 803-06, 834-41, 844-46, 848-50. The Committee on Arrangement redesignated the amended article 14 as article 9 in the final version. *Id.* at 919.

<sup>116</sup> *Id.* In Benjamin Franklin's earlier proposal Congress had been given power over "the Regulation of our common Forces." 2 *id.* at 196.

<sup>117</sup> 30 *id.* at 316-22.

<sup>118</sup> The 1786 amendments were precipitated primarily by several notorious consequences of the post-Revolutionary War demobilization. After successful prosecution of the war and the signing of the Treaty of Paris in 1783, the new nation immediately began to disband its forces. The Navy was virtually extinguished by 1785. SNEDEKER 51. The Continental Army was reduced by 1784 to a force of 80 enlisted men and several officers. 27 JOURNALS 524. In June of 1784, several hundred militiamen were requisitioned from the states for garrison duty on the western frontier. 28 JOURNALS 247-48; J. JACOBS, *THE BEGINNING OF THE U.S. ARMY, 1783-1812*, at 16-18 (1947). Although the authorized size of the regular Army was also increased in 1786-87 to 1,340 men (30 JOURNALS 226-27; 33 *id.* at 602-03), the number of troops actually serving on duty remained consistently lower. Desertion had continued to plague the Army even after the cessation of hostilities with the British. Faced with a high desertion rate and confronted with an understaffing of officers, a frontier commander at Fort McIntosh in 1786 convened a general court-martial composed of only five officers. This action contravened article I, section 14 of the Articles of War of 1776 which required the appointment of 13 officers on all general courts. 5 *id.* at 800. Two men were convicted of desertion by this illegal court and sentenced to death. 30 *id.* at 119-21; see SNEDEKER 20-21. Although the Congress was distressed by the Fort McIntosh incident, it also recognized the plight of the small, detached command. In fact, this incident appears to have been a stimulus to the 1786 amendments to the Army

On the other hand, one year later the Confederation Congress also exhibited the traditional Anglo-American concern with civilian supremacy over the military. At the suggestion of Secretary of War Henry Knox,<sup>119</sup> a congressional committee had recommended in 1787 that until the civil government prescribed by the Northwest Ordinance had established itself, all persons in the Northwest Territory who caused injury to the Indians or otherwise breached the treaty with them should be tried and punished by martial law "in the same manner as the soldiers in the actual service of the United States."<sup>120</sup> This recommendation and others like it, however, were never acted upon by the Congress;<sup>121</sup> the Confederation Congress, although recognizing the necessity and propriety of a separate judicial system for the military, apparently preferred to maintain the supremacy of civil institutions in all but strictly military matters.

Military policy and military justice under the Confederation were not solely the province of the federal government. Article 6 of the Articles of Confederation expressly perpetuated the practice of each state maintaining its own militia.<sup>122</sup> The Continental Congress itself, although somewhat unwillingly, relied quite heavily upon the state militia units in the prosecution of the Revolutionary War.<sup>123</sup> These units, when acting alone in their local defense capacity, were often governed by their own individual articles of war. In fact, the states preceded the Continental Congress in adopting articles of war at the outbreak of hostilities with England. The Massachusetts Articles of War of April 1775 even served as a model for the first federal articles.<sup>124</sup> Although the states made numerous accommodations in their militia laws and practices to the principles of democracy,<sup>125</sup> court-

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Articles of War. One of the significant procedural alterations made by these amendments, for example, was the reduction of the general court-martial quorum from 13 to five and of the regimental/garrison court quorum from five to three. 30 JOURNALS 145.

<sup>119</sup> 32 *id.* at 327-32.

<sup>120</sup> 33 *id.* at 411.

<sup>121</sup> 33 *id.* at 385. See generally F. WIENER, *supra* note 15, at 68-69.

<sup>122</sup> "[B]ut every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred . . ." 9 JOURNALS 912. This provision was debated and passed by the Congress on October 23, 1777, without recorded objection. *Id.* at 834.

<sup>123</sup> See, e.g., DUPUY ch. 2; J. HILL, *supra* note 85, at 5-7; F. STERN, *supra* note 85, at 132-36; WEIGLEY chs. 3-4; Murphy, *The American Revolutionary Army and the Concept of Levee en Masse*, 23 MIL. AFFAIRS 13 (1959); Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 40-41 (1966).

<sup>124</sup> W. AYCOCK & S. WURFEL, *supra* note 100, at 9; SNEDEKER 20; WINTHROP 22. In addition to Massachusetts, at least Connecticut, Rhode Island, New Hampshire, Pennsylvania, and South Carolina also passed local articles of war for the governance of their militia forces. *Id.* at 22 & n.32.

<sup>125</sup> E.g., providing for the election of officers.

martial substance and procedure conformed essentially to that of the Continental Army and, for that matter, the British Army.<sup>126</sup> Military justice was not, however, totally immunized from civilian jurisprudence. In the states' insistence that militiamen in national service be tried by courts-martial composed only of militia officers from their own state,<sup>127</sup> for example, one may clearly discern an analogy to the civilian tradition of drawing the jury from the vicinage. While acknowledging the special role that a court-martial played in relation to military discipline, the colonists also indicated by this demand an apparent recognition of the court-martial as a genuine judicial institution.

In their various constitutions adopted between 1776 and 1787, the states effectively ratified their previous enactment of revolutionary articles of war and also provided for the future regulation of their militia forces.<sup>128</sup> On the other hand, the states in their early constitutions also recognized the inherent conflict between civilian and military justice. Several provisions of the New Hampshire bill of rights of 1784 are particularly instructive in this regard:

Nor shall the legislature make any law that shall subject any person to a capital punishment, excepting for the government of the army and navy, and the militia in actual service, without trial by jury.

. . . .

No person can in any case be subjected to law martial, or to any pains, or penalties, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.<sup>129</sup>

These sentiments and similar ones expressed in the other state bills of rights and constitutions of this period<sup>130</sup> are lineal ancestors of the

<sup>126</sup> The disciplinary laws of the states usually adopted the Articles of War of the Continental Congress as their base and then engrafted local regulations thereon.

<sup>127</sup> The Continental Congress apparently recognized this as an appropriate, or at least significant, demand because a specific requirement to this effect was incorporated into section 17, article 1, of the 1776 Articles of War. 5 JOURNALS 805.

<sup>128</sup> See, e.g., N.H. CONST. pt. II (1784):

The president . . . shall have full power . . . to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist, as occasion shall necessarily require . . . .

4 CONSTITUTIONS 2463-64. See also 3 *id.* at 1901 (ch. 2, art. 7) (Mass.); 5 *id.* at 2637 (art. 40) (N.Y.); 7 *id.* at 3817 (Va.).

<sup>129</sup> 4 *id.* at 2455 (art. 16), 2457 (art. 34).

<sup>130</sup> E.g., 3 *id.* 1688-89 (arts. 26-27, 29) (Md.); *id.* at 1892-93 (art. 17), 1901 (art. 7) (Mass.); 5 *id.* at 2788 (art. 17) (N.C.); *id.* at 3083 (art. 13) (Pa.); 6 *id.* at 3257 (art. 42) (S.C.); *id.* at 3741 (art. 15), 3753-54 (arts. 18-19) (Vt.); 7 *id.* at 3814 (art. 13) (Va.); see 1 *id.*

military provisions of the federal Constitution of 1789 and Bill of Rights of 1791.

### III

#### THE CONSTITUTIONAL CONVENTION

On May 14, 1787, the Constitutional Convention convened in Philadelphia. Many of the delegates, including George Washington himself, had either personally experienced military service in the Revolutionary War and the subsequent frontier Indian wars or had otherwise participated in the new nation's military affairs.<sup>131</sup> The goal of the convention was to revise the Articles of Confederation so as to "render the federal Constitution adequate to the exigencies of Government and the preservation of the Union."<sup>132</sup> The deficiencies and inadequacies of the Confederation, especially in military matters, were notorious.<sup>133</sup> In particular, the recent eruption of Shay's Rebellion in Massachusetts had thrust the weakness of the Confederation into the national consciousness.<sup>134</sup> The primary task of the delegates to the Constitutional Convention, therefore, was the creation of a strong and viable national government.<sup>135</sup>

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at 568-69 (art. 1, § 8) (Del.); 4 *id.* at 2473-74 (arts. 16, 25-26) (N.H.); 5 *id.* at 3100 (art. 9, § 10) (Pa.); 6 *id.* at 3264 (art. 9, § 3) (S.C.); *id.* at 3764 (arts. 16-17) (Vt.); *cf.* 1 *id.* at 538 (art. 1, § 9) (Conn.); 6 *id.* at 3223 (art. 1, § 7) (R.I.).

<sup>131</sup> See W. AYCOCK & S. WURFEL, *supra* note 100, at 11.

<sup>132</sup> 32 JOURNALS 74; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 14 (M. Farrand ed. 1911) [hereinafter cited as RECORDS]. Citations throughout this article for the proceedings of the Constitutional Convention of 1787 will be to RECORDS because of that work's utilization of the notes of all the known chroniclers of the Convention's debates: Madison, King, Yates and Lansing, McHenry, Hamilton, Paterson, and Pierce.

<sup>133</sup> See, e.g., C. ROSSITER, 1787: THE GRAND CONVENTION 41-57 (1966); THE FEDERALIST Nos. 2-5 (J. Jay), 6-9 (A. Hamilton), 18-20 (A. Hamilton & J. Madison), 23-26 (A. Hamilton); Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532 (1908).

<sup>134</sup> See, e.g., D. CHIDSEY, THE BIRTH OF THE CONSTITUTION: AN INFORMAL HISTORY 23 (1964); 1 RECORDS 18, 406-07; 2 *id.* at 332; 3 *id.* at 547. *But see* 2 *id.* at 317. See generally G. RIVERS, CAPTAIN SHAYS, A POPULIST OF 1786 (1897); M. STARKEY, A LITTLE REBELLION (1955); WEIGLEY 84.

<sup>135</sup> For detailed descriptions of the workings and results of the Constitutional Convention, see G. BACON, THE CONSTITUTION OF THE UNITED STATES IN SOME OF ITS FUNDAMENTAL ASPECTS ch. 1 (1928); 2 G. BANCROFT, *supra* note 83, bk. 3; 1 G. CURTIS, *supra* note 83, bk. 3, chs. 6-16; 2 *id.* bk. 4, chs. 1-16; F. DONOVAN, *supra* note 83, chs. 2-5 (1965); E. DUMBAULD, *supra* note 61, at 38-58; M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913) [hereinafter cited as FARRAND]; B. HAINES & C. HAINES, *supra* note 75, at 92-101; HELLER 29-33; B. HENDRICK, BULWARK OF THE REPUBLIC: A BIOGRAPHY OF THE CONSTITUTION bk. 1 (1937); H. HOCKETT, *supra* note 75, at 205-19; M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION chs. 6-12 (1964); B. LONG, *supra* note 64, ch. 17; A.

Much of the convention's time was consumed in debates over the various military and war provisions of the Constitution.<sup>136</sup> Ultimately, the delegates agreed that the proposed Congress was specifically to be granted the powers to "declare War,"<sup>137</sup> to "raise and support Armies" and "provide and maintain a Navy,"<sup>138</sup> to "grant Letters of Marque and Reprisal,"<sup>139</sup> to "make Rules concerning Captures on Land and Water,"<sup>140</sup> and to "define and punish . . . Offences against the Law of Nations."<sup>141</sup> The President was installed as the "Commander in Chief of the Army and Navy . . . and of the Militia . . . when called into . . . actual Service."<sup>142</sup> As between the federal government and the

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MASON, *supra* note 83, ch. 2; B. MITCHELL & L. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES: ITS ORIGIN, FORMATION, ADOPTION, INTERPRETATION ch. 3 (1964); E. MORGAN, *supra* note 83, ch. 10; J. ROOD, THE HISTORY OF BUILDING THE CONSTITUTION OF THE UNITED STATES 1-15 (1948); R. RUTLAND, *supra* note 64, ch. 6; R. SCHUYLER, *supra* note 83, ch. 3; Brantly, *Formation of the Federal Constitution*, 6 SO. L. REV. 352 (1880); Far-  
rand, *Compromises of the Constitution*, 9 AM. HIST. REV. 479 (1904).

136 Notes 137-46 *infra*. See generally E. CORWIN, TOTAL WAR AND THE CONSTITUTION (1947); J. ROGERS, WORLD POLICING AND THE CONSTITUTION (1945); W. WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES (43d ed. 1871).

137 U.S. CONST. art. I, § 8. See 1 RECORDS 18-19, 24-25, 65-66, 139-40, 144, 146, 292, 300, 316, 326, 329; 2 *id.* at 143, 168, 182, 313, 318-20, 570, 595.

138 U.S. CONST. art. I, § 8. See 1 RECORDS 285-87, 465; 2 *id.* at 143, 158, 168, 182, 323, 329-30, 333, 505-06, 508-09, 563, 570, 595, 616-17, 633, 635, 640. The dispute concerning the congressional power to raise and support armed forces echoed the traditional English controversy over the propriety of standing armies. *E.g.*, 2 G. BANCROFT, *supra* note 83, at 147; 2 G. CURTIS, *supra* note 83, at 333-34; THE FEDERALIST Nos. 24-26 (A. Hamilton), 41 (J. Madison); WARREN 482-84.

139 U.S. CONST. art. I, § 8. See 2 RECORDS 322, 326, 328, 505, 508, 570, 595.

140 U.S. CONST. art. I, § 8. See 1 RECORDS 22, 211; 2 *id.* at 143, 168, 182, 315, 320, 570, 595.

141 U.S. CONST. art. I, § 8. See 2 RECORDS 143, 168, 182, 312, 315-16, 320, 570, 595, 614-15. See also *Ex parte* Quirin, 317 U.S. 1, 27-28 (1942); *United States v. Adhel*, 43 U.S. (2 How.) 210, 232 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1826); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-62 (1820). See generally Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38 (1955).

142 U.S. CONST. art. II, § 2. See 1 RECORDS 65-66, 70, 244, 247, 292; 2 *id.* at 69-70, 145, 157-58, 172, 185, 422, 426, 575, 599, 621. See also 2 G. BANCROFT, *supra* note 83, at 188; 2 G. CURTIS, *supra* note 83, at 409-13; E. DUMBAULD, *supra* note 61, at 279-81; THE FEDERALIST Nos. 69 & 74 (A. Hamilton); Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49 (1965).

The Supreme Court has determined that solely by virtue of his constitutional position as Commander-in-Chief, the President possesses the inherent power to convene—and delegate to his subordinate commanders the power to convene—all courts-martial. *Swain v. United States*, 165 U.S. 553 (1897). The Constitutional authority of the President as Commander-in-Chief to issue general regulations pertaining to military justice has been consistently sustained by the Supreme Court. *Id.* at 565; *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885); *Ex parte* Reed, 100 U.S. 13, 22 (1879); see *Gratiot v. United States*, 45 U.S. (4 How.) 80, 117-18 (1846); *United States v. Freeman*, 44 U.S. (3 How.) 556, 567 (1845); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 301 (1842); see also WINTHROP 27-33. Currently the President also possesses statutory authority to regulate courts-martial:

states, the burdens and responsibilities of national defense were clearly allotted by the convention to the former. In return for an agreement not to "keep Troops, or Ships of War in time of Peace" or to "engage

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The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

10 U.S.C. § 836(a) (1970).

The Court of Military Appeals, however, has held that this power to promulgate military justice regulations must not be exercised in a manner inconsistent with the Constitution or federal statutes relative to military justice, and has in fact invalidated portions of the Presidential Manual for Courts-Martial (1951), which had been specifically issued (Exec. Order No. 10,214, 3 C.F.R. 408 (1949-53 comp.)) under its authority. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); *United States v. Simpson*, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959); *United States v. Smith*, 10 U.S.C.M.A. 152, 27 C.M.R. 227 (1959). See generally Fedele, *The Manual for Courts-Martial—Its Legal Status and the Effect of Decisions of the United States Court of Military Appeals*, 23 *FORDHAM L. REV.* 323 (1954); Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 *N.Y.U.L. REV.* 861 (1959); Greenberg, *Introduction to the Unofficial Changes to MCM, 1951*, 15 *JAG J.* 98 (1961); Murphy, *Manual for Courts-Martial: Modification by the Court of Military Appeals*, *JAG J.* Feb. 1956, at 3; Comment, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 *COLUM. L. REV.* 127, 137-39 (1964).

In particular, the Court of Military Appeals has clearly stated that the President's constitutional powers do not extend to the creation of substantive military crimes:

Nor is there any basis for the proposition that the President may create an offense under the Code. To the contrary, our forefathers reposed in the Congress alone the power "To make Rules for the Government and Regulation of the land and naval Forces." . . . The President's power as Commander-in-Chief does not embody legislative authority to provide crimes and offenses.

*United States v. McCormick*, 12 U.S.C.M.A. 26, 28, 30 C.M.R. 26, 28 (1960), quoting U.S. CONST. art. I, § 8. See *Reid v. Covert*, 354 U.S. 1, 38-39 (1957). On the other hand, in regard to one category of substantive crimes, the court has seemingly looked with favor upon Presidential exercise of quasi-legislative power. Article 134 of the UCMJ, the "general article," states,

Though not specifically mentioned in this chapter, 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, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (1970). In its decisions determining the sufficiency of particular allegations of an offense under this language, the court has tacitly accepted the President's power to legislate in the area by giving great weight to whether or not the President had already defined the crime by prescribing a form specification and a maximum punishment. See, e.g., *United States v. Kirskey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955); *United States v. Thompson*, 3 U.S.C.M.A. 620, 14 C.M.R. 38 (1954); *United States v. Blue*, 3 U.S.C.M.A. 550, 13 C.M.R. 106 (1953); *United States v. Patrick*, 2 U.S.C.M.A. 189, 7 C.M.R. 65 (1953); *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952); see also *United States v. Frantz*, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953); cf. *Jackley*, 4 C.M.R. (A.F.) 130, 138

in War, unless actually invaded"<sup>143</sup> and not to "grant Letters of Marque and Reprisal,"<sup>144</sup> the states bound the federal government to guarantee them "a Republican Form of Government" and to guard them "against Invasion; and . . . domestic Violence."<sup>145</sup>

Congress's formal power to promulgate articles of war and to establish a system of courts-martial derives, however, not from these provisions, but from its power "To make Rules for the Government and Regulation of the land and naval Forces."<sup>146</sup> This clause was in-

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(1950) (A.C.M. 2927); Deese, 3 C.M.R. (A.F.) 307 (1950) (A.C.M. 2693). See generally Ackroyd, *The General Articles, Article 133 and 134 of the Uniform Code of Military Justice*, 35 ST. JOHN'S L. REV. 264 (1961); Castro, *Conduct Unbecoming an Officer and a Gentleman*, JAG J., June 1949, at 10; *id.*, July 1949, at 14; Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. REV. 142 (1959); Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259 (1971); Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63 (1960); Lewis, *Limitations Upon Prosecution of Offenses Under Article 134*, 9 A.F. JAG L. REV. 35 (1967); Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97 (1964); Nichols, *The Devil's Article*, 22 MIL. L. REV. 111 (1963); Comment, *Military Personnel and the First Amendment: "Discreditable Conduct" as a Standard for Restricting Political Activity*, 65 YALE L.J. 1207 (1956).

<sup>143</sup> U.S. CONST. art. I, § 10. See 1 RECORDS 293; 2 *id.* at 135, 169, 187, 437, 443, 577, 597, 625-26.

<sup>144</sup> U.S. CONST. art. I, § 10. See 2 RECORDS 169, 187, 437, 443, 577, 597.

<sup>145</sup> U.S. CONST. art. IV, § 4. See 1 RECORDS 22, 28, 193-94, 202, 206, 227, 231, 237; 2 *id.* at 39, 47-49, 133, 144, 148, 151, 159, 168, 174, 182, 188, 459-61, 466-67, 470, 578, 602; 3 *id.* at 630; 4 *id.* at 45, 49. See generally *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

<sup>146</sup> U.S. CONST. art. 1, § 8. The President, Congress, and military commanders have often resorted to the use of "military commissions" which have not been classified technically as courts-martial and have not derived their authorization from the Congressional power to prescribe rules for the land and naval forces. Their use has instead been justified as an exercise of the other federal war powers previously described. However, although not usually dealing with military personnel or military offenses, military commissions have generally utilized the form, procedure, and even substantive law of the court-martial system. See S. BENÉT, *A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL* 203-14 (6th ed. 1868); G. TREADWELL, *MILITARY COURTS MANUAL* 1-14 (1945); F. WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 6-15 (1940); WINTHROP 831-46; Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949); Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948); Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT'L L. 958 (1911); Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. PA. L. REV. 119 (1943), 272 (1944). One appropriate instance for the use of the military commission is in conjunction with a declaration of martial law, *i.e.*, the temporary military preemption of a domestic civil government in the face of external invasion, internal revolt, or natural disaster. See generally J. ANTHONY, *HAWAII UNDER ARMY RULE* (1955); W. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* (3d rev. ed. 1914); C. FAIRMAN, *THE LAW OF MARTIAL RULE* (2d ed. 1943); B. RICH, *THE PRESIDENTS AND CIVIL DISORDER* 208-12 (1941); W. ROBINSON, *JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 383-419 (1941); G. TREADWELL, *supra* at 10-12; D. WALKER, *MILITARY LAW* 474-502 (1954); F. WIENER, *supra*; F.

cluded in none of the basic plans submitted to the convention. The first specific mention of it in the recorded proceedings was on August 18, 1787, when the provision was suggested in a floor debate as an amendment to the report of the Committee of Detail: "To make rules for the Government and regulation of the land & naval forces,"—added from the existing Articles of Confederation."<sup>147</sup> This provision was ultimately adopted by the convention without further debate or change.<sup>148</sup>

That the intent of this provision was to authorize legislation relating to military justice is persuasively evidenced by a draft of the Committee of Detail in the handwriting of Edmund Randolph. One of the "legislative powers" enumerated in this draft (which never reached the convention floor) had been the power "To enact articles

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WILSON, FEDERAL AID IN DOMESTIC DISTURBANCES 1903-1922, S. Doc. No. 263, 67th Cong., 2d Sess. (1922); WINTHROP 817-30; *Civil Defense*, Army Reg. 500-70 (1965); *Civil Disturbances*, Army Reg. 500-50 (1969); *Civil Disturbances and Disasters*, Dep't Army Field Manual 19-15 (1968); Fairman, *Martial Law and the Suppression of Insurrection*, 23 ILL. L. REV. 766 (1929); Holdsworth, *Martial Law Historically Considered*, 18 L.Q. REV. 117 (1902); Pollock, *What is Martial Law?*, 18 L.Q. REV. 152 (1902); Richards, *Martial Law*, 18 L.Q. REV. 133 (1902); Whitford, *Martial Law and Habeus Corpus*, JAG J., June 1948, at 4; Wiener, *Martial Law Today*, 55 A.B.A.J. 723 (1969).

Another proper occasion for the use of the military commission is as an adjunct to the operation of a military government, *i.e.*, the total military control of the organs of civil government characteristic of an army of occupation in a foreign territory. See generally W. BIRKHIMER, *supra*; G. DAVIS, *supra* note 100, at 300-13; G. TREADWELL, *supra* at 2-5, 14-60; D. WALKER, *supra* at 502-19; F. WIENER, *supra* note 15, at 92-159; WINTHROP 798-817, 846-56; *Civil Affairs Operations*, Dep't Army Field Manual 41-10 (1969); Ferrari, *Military Courts of Paris*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 5 (1918); 2 *International Law*, Dep't Army Pamphlet 27-161-2, at 169-73 (1962); *Joint Manual for Civil Affairs*, Dep't Army Field Manual 41-5 (1966); Nobleman, *American Military Government Courts in Germany*, 267 ANNALS 87 (Jan. 1950); *The Law of Land Warfare*, Dep't Army Field Manual 27-10, at 158-64 (1956).

Creation of military tribunals for the trial of war criminals is another example of the constitutional exercise of this quasi-court-martial jurisdiction. See generally J. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* (1954); G. TREADWELL, *supra* at 6-10, 105-10; D. WALKER, *supra* at 520-74; 2 *International Law*, *supra* at 221-51; *The Law of Land Warfare*, *supra* at 176-83; notes 3 & 11 *supra*. Military commissions have also been legitimately convened for the trial of enemy spies and saboteurs. See generally 2 *International Law*, *supra* at 57-64; Kaplan, *supra*; *The Law of Land Warfare*, *supra* at 31-34; Warren, *Spies and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunals*, 53 AM. L. REV. 195 (1919). Finally, the military commission has customarily provided the forum for the trial of enemy prisoners of war who have committed offenses while in captivity. See G. TREADWELL, *supra* at 61-67; 2 *International Law*, *supra* at 85-90; Jaworski, *Military Trial of Prisoners of War*, 7 TEX. B.J. 310 (1944); *The Law of Land Warfare*, *supra* at 62-72.

<sup>147</sup> 2 RECORDS 330; see also *id.* at 323, 333.

<sup>148</sup> See *id.* at 570, 595, 656. See generally E. DUMBAULD, *supra* note 61, at 172-73; SNEDEKER 51; 2 STORY 110-11; WARREN 482-84.

of war."<sup>149</sup> The floor debate amendment to the Committee of Detail's report may have been made with the intention to fill the legislative gap created by the deletion of this war power. Furthermore, since the provision offered on the floor was virtually identical to its predecessor in the Articles of Confederation,<sup>150</sup> one must assume that it was intended to grant the same power, the power, that is, to enact articles of war and establish courts-martial.<sup>151</sup>

Far more controversial at the convention were the militia clauses<sup>152</sup> which provoked perhaps as much debate as all the Constitution's other war and military provisions combined.<sup>153</sup> Undoubtedly, this disagreement among the delegates was attributable to their strong feelings on the sensitive issues of federalism, military preparedness, and standing armies, issues unavoidable in any discussion of the proper federal role of the state militia.

The Committee of Detail reported out the following provision:

[Congress shall have the power to] make laws for organizing arming and disciplining the Militia, and for governing such part of them as may be employed in the service of the U—S reserving to the States respectively, the appointment of the officers, and authority of training the Militia according to the discipline prescribed by the U. States.<sup>154</sup>

By its use of the word "govern" the convention clearly intended to authorize Congress to establish a system of military justice over the state militia while it was actually participating in federal service. Its intention with regard to Congress's power over state militia forces

<sup>149</sup> 2 RECORDS 144.

<sup>150</sup> Note 116 *supra*.

<sup>151</sup> *Id.*

<sup>152</sup> The Congress shall have Power . . .

. . . .

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

U.S. CONST. art. I, § 8.

<sup>153</sup> See 1 RECORDS 21, 47, 54, 61, 245, 247, 293, 301; 2 *id.* at 135-36, 144-45, 159, 168, 182, 323, 326, 330-33, 337, 344, 352, 356, 368, 377, 380-82, 384-90, 394, 570, 595, 616-17; 3 *id.* at 624, 628-29. See generally 2 G. CURTIS, *supra* note 83, at 334-38; E. DUMBAULD, *supra* note 61, at 173-77 (1964); FARRAND 142-43; J. SCOTT, *THE MILITIA*, S. Doc. No. 695, 64th Cong., 2d Sess. (1917); 2 STORY 114-17; *THE FEDERALIST* NO. 29 (A. Hamilton); Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940) [hereinafter cited as *Militia Clause*].

<sup>154</sup> 2 RECORDS 356.

when not in federal service remains, however, an enigma. Rufus King, a member of the committee, explained first that the term "disciplining" in the provision meant "prescribing the manual exercise evolutions &c."<sup>155</sup> When Madison added that "the term 'disciplining' [did not refer] to penalties & Courts martial for enforcing them,"<sup>156</sup> King reconsidered and stated "that *laws* for disciplining, must involve penalties and every thing necessary for enforcing penalties."<sup>157</sup> Jonathan Dayton then unsuccessfully proposed a substitute clause which would apparently have given the federal government no power whatever over the militia when not in actual federal service.<sup>158</sup> A similar proposal by Oliver Ellsworth and Roger Sherman to excise the ambiguous word "disciplining"<sup>159</sup>—thereby eliminating any possibility of its being construed to include the power to court-martial non-federal militiamen—was also defeated.<sup>160</sup> During the debate, General Charles Pinckney of South Carolina stated that he "preferred the clause reported by the Committee, extending the meaning of it to the case of fines &c—."<sup>161</sup> The provision as reported by the committee was in fact adopted almost verbatim by the convention.<sup>162</sup>

This progression in the convention's debate appears superficially to indicate that King's second interpretation of "discipline" (including the power to conduct courts-martial of members of the militia, even when they were not engaged in United States service) was accepted

<sup>155</sup> *Id.* at 385.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (emphasis in original). The same lack of clarity is reflected in an earlier debate upon a motion by Mason to add to the powers of the federal government the power "to make laws for the regulation and discipline of the Militia of the several States." *Id.* at 330. Without any indication of whether the relevant word for him is "regulation" or "discipline," Oliver Ellsworth's comments on Mason's proposition at least reveal an awareness that the power to legislate military justice was at issue: "The States will never submit to the same militia laws. Three or four shilling's [*sic*] as a penalty will enforce obedience better in New England, than forty lashes in some other places." *Id.* at 332. See also 1 *id.* at 293; 2 *id.* at 135-36, 144, 159, 168, 323, 326, 352, 356, 368, 380-81.

<sup>158</sup> 2 *id.* at 385-86. Dayton's proposition stated:

To establish an uniform & general system of discipline for the Militia of these States, and to make laws for organizing, arming, disciplining & governing *such part of them as may be employed in the service of the U. S.*, reserving to the States respectively the appointment of the officers, and all authority over the Militia not herein given to the General Government.

*Id.* (emphasis in original).

<sup>159</sup> Their proposal would have granted Congress the power "[t]o establish an uniformity of arms, exercise & organization for the Militia, and to provide for the Government of them when called into the service of the U. States." *Id.* at 386.

<sup>160</sup> *Id.* at 387.

<sup>161</sup> *Id.* at 386.

<sup>162</sup> *Id.* at 387-88.

by the delegates. Yet such a construction renders the word "governing" in the provision no more than meaningless surplusage. Furthermore, in light of the obvious sense of the term "discipline" in the provision's last clause as referring to a prescribed mode of training, this construction fails to offer an explanation why the earlier term "disciplining" would be used to mean something else. Subsequent history provides some clarification of this puzzle, but no really persuasive conclusions can be drawn solely from the debates of the convention.<sup>163</sup>

Since the Constitutional Convention concentrated upon the structure and powers of the new federal government, the military was amply provided for. The liberty side of the ledger, however, did not fare so well. Although several specific civil liberties were indeed incorporated into various provisions of the Constitution,<sup>164</sup> they were adopted essentially on a piecemeal basis. No serious consideration was given by the convention to the inclusion in the Constitution of a comprehensive bill of rights.<sup>165</sup>

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<sup>163</sup> The Supreme Court has specifically held that in at least one circumstance, refusal to obey the call of the President into federal service, militiamen not in federal service may be tried by a federal court-martial. Such a court-martial, however, has not been justified under the power to *govern* the militia granted by article I, section 8, but rather as an incident of Congress's power to *call forth* the militia into federal service. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820); see 32 U.S.C. § 101 (1970). See generally WINTHROP 96-97.

<sup>164</sup> *E.g.*, rights connected with writs of habeas corpus, bills of attainder, ex post facto laws, obligations of contracts, and convictions for treason. Charles Pinckney and Elbridge Gerry had moved to insert a declaration "that the liberty of the Press should be inviolably observed" (2 RECORDS 617), but the motion was rejected. The delegates felt that it was unnecessary since Congress had not been granted any power which extended control over the press. *Id.* at 617-18, 620; FARRAND 189.

<sup>165</sup> Commenting upon the delegates' failure to include a bill of rights, James Wilson said in the Pennsylvania ratification convention,

I believe the truth is, that such an idea never entered the mind of many of them. I do not recollect to have heard the subject mentioned till within about three days of the time of our rising; and even then, there was no direct motion offered for any thing of the kind.

2 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 435-36 (2d rev. ed. 1859) [hereinafter cited as ELLIOT]. Wilson's memory was not perfect, but it was essentially correct. On May 29, 1787, Pinckney had originally submitted a plan of government to be considered by the Committee of the Whole along with the Virginia Plan offered by Edmund Randolph the same day. 1 RECORDS 16, 23, 24. See generally 3 *id.* at 603-09; DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong., 1st Sess. 964-66 (C. Tiansill ed. 1927) [hereinafter cited as DOCUMENTS]; C. NOTT, *THE MYSTERY OF THE PINCKNEY DRAUGHT* (1908); Jameson, *Portions of Charles Pinckney's Plan for a Constitution, 1787*, 8 AM. HIST. REV. 509 (1903); Jameson, *Sketch of Pinckney's Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735 (1904).

Pinckney's initial proposals apparently did include guaranties for such personal liberties as freedom of speech and religion, and right to a jury trial. 3 RECORDS 609 & n.3. No

Because jury trial in criminal cases was one of the few guaranties of liberty adopted by the convention, the absence of a general bill of rights in the Constitution highlights the historical significance of the jury guaranty. No jury trial provision had been originally contained in the Virginia Plan or the New Jersey Plan, the two basic formulations from which the Constitution was ultimately constructed.<sup>166</sup> On August 6, 1787, however, the Committee of Detail reported a draft constitution which for the first time contained the following clause: "The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury."<sup>167</sup> The acceptability and familiarity of such a guaranty was apparently so universal that it provoked no recorded discussion on the convention floor.<sup>168</sup> In particular, no mention was made of its

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further mention, however, is made in the convention records of his plan until July 24, when it is noted that the Committee of the Whole was discharged from acting upon the plan and that it was referred to the Committee of Detail along with some other provisions. 2 *id.* at 98, 106. In August, Pinckney apparently submitted to the convention a second, smaller list, also referred to the Committee of Detail. *Id.* at 334-37, 340-42. This is the last mention in the convention records of the Pinckney Plan. Near the end of the convention, however, Gerry did make a motion to establish a committee to study the inclusion in the Constitution of a bill of rights. *Id.* at 587-88. Although he was incorrect about there not having been an earlier motion, Wilson was undoubtedly referring to Gerry's action. On the other hand, Wilson was correct in attributing no significance to the event because the motion was unanimously defeated by the state delegations. *Id.* at 582, 588. See generally FARRAND 185-86; WARREN 506-10. On the final day of deliberations in the convention, Randolph moved to authorize the states to propose amendments to the Constitution as approved by the convention and then to call a new convention to reconsider the whole matter. He was seconded by Gerry and Mason, but the motion was rejected and the Constitution adopted. 2 RECORDS 631-33, 634; see *id.* at 564. When the engrossed draft was presented to the delegates for their signatures on September 17, all signed but Randolph, Mason, and Gerry (*id.* at 648-49), and each of them gave as one reason for his refusal the absence of a bill of rights. See, e.g., Mason's *Objection to This Constitution of Government*, in *id.* at 637-40.

<sup>166</sup> See FARRAND 131. For the Virginia Plan, see 3 RECORDS app. C. For the New Jersey Plan, see *id.* app. E. The Hamilton Plan appears in *id.* app. F.

<sup>167</sup> 2 *id.* at 187. For the origin of this provision within the Committee of Detail, see E. DUMBAULD, *supra* note 61, at 368; 2 RECORDS 144, 173.

<sup>168</sup> FARRAND 156; WARREN 546-47. There was, however, a brief debate on September 12 regarding the propriety of including a guaranty of the right to trial by jury in civil cases. After comments by Roger Sherman and Nathaniel Gorham to the effect that no general prescription could be drafted which would adequately separate those cases in which a civil jury was appropriate from those in which it was not, the subject was dropped. 2 RECORDS 587-88. Pinckney and Gerry tried again on the date of the final vote on the Constitution by moving to annex at the end of the criminal jury trial provision the words, "And a trial by jury shall be preserved as usual in civil cases." *Id.* at 628. The objections were reiterated and this motion also failed. *Id.* See generally FARRAND 185; THE FEDERALIST No. 83 (A. Hamilton).

applicability to the military services.<sup>169</sup> After several minor changes,<sup>170</sup> it was adopted as part of section 2, article III:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.<sup>171</sup>

Taking the actions of the Constitutional Convention as a whole, several important conclusions may be drawn. First, the legislative history of the Constitution clearly indicates that the convention did intend to grant Congress the power to establish and regulate courts-martial for the military forces. Secondly, the express words of the Constitution guarantee the right to trial by jury in criminal cases. On the other hand, neither the words themselves nor the recorded legislative history specifically reveal what relationship, if any, the jury was meant to have to the court-martial. Nevertheless, the documented familiarity of the convention delegates with the nature of each institution may indicate that their silence suggests that the jury and the court-martial were contemplated to have no constitutional relationship whatever.<sup>172</sup>

#### IV

#### RATIFICATION OF THE CONSTITUTION

Before it could become effective, nine of the thirteen states had to ratify the new Constitution.<sup>173</sup> The failure to include a comprehen-

<sup>169</sup> See Henderson 300-01.

<sup>170</sup> 2 RECORDS 434, 438, 444, 576, 601.

<sup>171</sup> The bill of attainder clauses of the Constitution (art. I, §§ 9, 10) might also be construed as guaranties of the right to trial by jury, since to the extent that a bill of attainder is tantamount to a legislative conviction for a criminal act, it works a deprivation of the right to a jury trial in criminal cases. See Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867-68, 876-77 (1960). See also THE FEDERALIST, *supra* note 78, No. 44, at 282 (J. Madison).

<sup>172</sup> See Henderson 300-01. The Convention records indicate that on the same day the criminal jury trial guaranty was adopted, the delegates also passed the provision prohibiting suspension of the writ of habeas corpus "unless where in cases of Rebellion or invasion the public safety may require it." 2 RECORDS 438. At least this indicates an awareness by the delegates of an incompatibility and perhaps an irreconcilability between civilian liberties and military exigencies.

<sup>173</sup> U.S. CONST., art. VII; 2 RECORDS 665-66. For some specific material on ratification in the individual states, see F. BATES, RHODE ISLAND AND THE FORMATION OF THE UNION (1898); P. FORD, THE ORIGIN, PURPOSE AND RESULT OF THE HARRISBURG CONVENTION OF 1788 (1890); S. HARDING, THE CONTEST OVER THE RATIFICATION OF THE FEDERAL CONSTITUTION IN THE STATE OF MASSACHUSETTS (1896); D. KENT, PENNSYLVANIA AND THE FEDERAL CON-

sive bill of rights, however, soon proved to be one of the most criticized features of the Constitution.<sup>174</sup> Thomas Jefferson, writing to James Madison from Paris, said of the new Constitution,

I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.<sup>175</sup>

Even the existing constitutional guaranty of the right to trial by

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STITUTION (1964); H. LEFLER, A PLEA FOR FEDERAL UNION: NORTH CAROLINA, 1788 (1947); C. MINER, THE RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK (1921); D. MYERS, MASSACHUSETTS AND THE FIRST TEN AMENDMENTS TO THE CONSTITUTION, S. DOC. NO. 181, 74th Cong., 2d Sess. (1936); L. TRENHOLME, THE RATIFICATION OF THE FEDERAL CONSTITUTION IN NORTH CAROLINA (1932); J. WALKER, A HISTORY OF THE NEW HAMPSHIRE CONVENTION FOR THE INVESTIGATION, DISCUSSION AND DECISION OF THE FEDERAL CONSTITUTION (1888); Heslin, "Amendments are Necessary," 43 N.Y. HIST. SOC'Y Q. 425 (1959). For some original reports of the proceedings in the state ratifying conventions, see 10 N. BOUTON, MISCELLANEOUS DOCUMENTS AND RECORDS RELATING TO NEW HAMPSHIRE AT DIFFERENT PERIODS 1-22 (1877); DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA (D. Robertson ed. 2d ed. 1805); DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788 (C. Hale & B. Pierce eds. 1856); THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK (J. Sickley, A. Peckham & A. Peters eds. 1905); 1-2 DEBATES OF THE CONVENTION OF THE STATE OF PENNSYLVANIA (T. Lloyd ed. 1788); DEBATES WHICH AROSE IN THE HOUSE OF REPRESENTATIVES OF SOUTH CAROLINA, ON THE CONSTITUTION FRAMED FOR THE UNITED STATES (R. Haswell ed. 1788); 2, 3, & 4 ELLIOT; PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788 (J. McMaster & F. Stone eds. 1888); PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA (1789); VOTES AND PROCEEDINGS OF THE SENATE OF THE STATE OF MARYLAND, NOVEMBER SESSION, 1787 (1787).

<sup>174</sup> Before the Confederation Congress, under whose auspices the Constitutional Convention had been conducted, was even able to transmit the Constitution to the states for ratification, it first had to overcome an attempt by Richard Henry Lee of Virginia to append to the document a bill of rights which would ensure the rights of conscience, freedom of the press, trial by civil jury, security against unreasonable searches and seizures, petition, and freedom from excessive bail or punishments. His motion was defeated 11 states to one (New York). See 33 JOURNALS 540-42. See also 2 G. BANCROFT, *supra* note 83, at 225-30. For general discussions of the contemporary objections to the Constitution based on the absence of a bill of rights, see, e.g., M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 130-38 (1964); Mason, *supra* note 135, at 74-88. See generally ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (P. Ford ed. 1892); PAMPHLETS ON THE CONSTITUTION PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (P. Ford ed. 1888); THE FEDERALIST No. 84 (A. Hamilton).

<sup>175</sup> 12 THE PAPERS OF THOMAS JEFFERSON 440 (J. Boyd ed. 1955). Jefferson expressed similar sentiments in several other of his letters. See, e.g., 13 *id.* at 442-43; 14 *id.* at 688.

jury in criminal cases was not immune from criticism.<sup>176</sup> In particular, the Antifederalists contended that the right to a jury drawn only from the vicinage had been insufficiently protected<sup>177</sup> and that auxiliary rights such as indictment by grand jury,<sup>178</sup> the assistance of counsel,<sup>179</sup> and confrontation of witnesses<sup>180</sup> should have been specifically guaranteed by the Constitution.

The military provisions of the Constitution were also subjected to great Antifederalist criticism. As with the Constitutional Convention delegates, many of the delegates to the state ratifying conventions had had personal military experience and were therefore thoroughly familiar with the ways of the military, including its system of criminal justice.<sup>181</sup> Congress's power under the Constitution to raise and sup-

<sup>176</sup> Perhaps the most significant bone of contention between the Federalists and the Antifederalists regarding the bill of rights, however, was the dispute over the necessity and propriety of a civil jury trial provision. For the Federalist position see, e.g., 2 ELLIOT 112, 114 (Mass.); *id.* at 488, 515-19, 539-40 (Pa.); 3 *id.* at 68, 203-04, 468-69, 534, 550, 557-58, 561, 573 (Va.); 4 *id.* at 144-45, 147, 151-52, 164-66, 170-71, 208 (N.C.); *id.* at 259-60, 294-95, 306-08 (S.C.); Coxe, *An Examination of the Constitution, IV*, in ANTI-FEDERALISTS VERSUS FEDERALISTS 113, 115 (J. Lewis ed. 1967); Jay, *Address to the People of New York*, in *id.* at 101, 105; Wilson, *Defense in the State House of Pennsylvania*, in *id.* at 91-93; THE FEDERALIST No. 83 (A. Hamilton). For the Antifederalist argument see, e.g., 2 ELLIOT 338-39 (N.Y.); 3 *id.* at 218, 324, 446-47, 540-41, 544, 568, 610-11 (Va.); 4 *id.* at 143, 154-55, 167, 170, 202-03 (N.C.); *id.* at 290 (S.C.); Winthrop, *Letters of Agrippa*, in ANTI-FEDERALISTS VERSUS FEDERALISTS, *supra* at 161, 180; Gerry, *Observations by a Columbian Patriot*, in *id.* at 181, 183; Lee, *Letters of the Federal Farmer*, in *id.* at 202, 202-05; 12 THE PAPERS OF THOMAS JEFFERSON 440 (J. Boyd ed. 1955). See also Akerman, *The Seventh Amendment—The Right to Trial by Jury in Civil Cases*, 48 WOMEN LAW. J. 16 (1962); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). Despite the contention of the Antifederalists that the delegates to the Constitutional Convention had conspired to deprive the citizenry of its right to trial by civil jury, George Washington was undoubtedly correct when he wrote,

[T]here was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates for . . . *Tryal by Jury*. . . .

[I]t was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.

3 RECORDS 297-98 (emphasis in original).

<sup>177</sup> Compare 2 ELLIOT 112 (Mass.); *id.* at 400 (N.Y.); 3 *id.* at 447, 545, 568-69, 578-79 (Va.); 4 *id.* at 150, 154, 211 (N.C.); *with* 2 *id.* at 109-10 (Mass.); *id.* at 450 (Pa.); 3 *id.* at 467, 520-21, 537, 546-47, 558 (Va.). The issue of vicinage was often confused by the disputants with the issue of venue. HELLER 93. See generally Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944); Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. PA. L. REV. 197 (1909); Dobie, *Venue in Criminal Cases in the United States District Court*, 12 VA. L. REV. 287 (1926).

<sup>178</sup> E.g., 2 ELLIOT 110-11, 113.

<sup>179</sup> E.g., *id.* at 110-11.

<sup>180</sup> E.g., 3 *id.* at 467. See generally HELLER 26-27; 2 STORY 590-91.

<sup>181</sup> See, e.g., 4 ELLIOT 117 (remarks of Samuel Spencer).

port armies and navies especially caught their attention. The vesting of such authority in the federal government was viewed as an implicit grant of authority for the retention of a national standing army.<sup>182</sup> Some criticism was also directed at what many construed to be an undue grant of power to the President over the military forces.<sup>183</sup>

Most severe, however, were arguments relating to the issue of federal control over the state militia forces. The ambiguity concerning Congress's authority to prescribe military justice regulations and to conduct courts-martial of militia members when not in federal service<sup>184</sup> provoked comment from civil libertarians and states rightists alike. Apparently the critics were not mollified by the Constitution's supporters,<sup>185</sup> because their concern over the alleged federal power to court-martial militiamen not in federal service later found prominent expression in many of the proposed amendments to the Constitution suggested by the state conventions.

In general, the arguments and assurances of the Federalists<sup>186</sup>

<sup>182</sup> Compare 3 *id.* at 410, 588, 611 (Va.); with 2 *id.* at 97-98 (Mass.); *id.* at 468, 520-21 (Pa.); 3 *id.* at 413, 600 (Va.); and 4 *id.* at 260-61 (S.C.). See also *Letter of a Democratic Federalist*, in ANTI-FEDERALISTS VERSUS FEDERALISTS, *supra* note 176, at 152, 156-57; 3 RECORDS 207; THE FEDERALIST Nos. 24-26 (A. Hamilton), 41 (J. Madison).

<sup>183</sup> See, e.g., 3 ELLIOT 388, 392-93, 401, 496; 4 *id.* at 107-08, 114-15, 258. See also THE FEDERALIST Nos. 69, 74 (A. Hamilton).

<sup>184</sup> See notes 152-63 and accompanying text *supra*.

<sup>185</sup> Mr. LEE . . . [Mr. Mason] says, that organizing the militia gives Congress power to punish them when not in the actual service of the government. The gentleman is mistaken in the meaning of the word *organization*, to explain which would unnecessarily take up time. Suffice it to say, it does not include the infliction of punishments. The militia will be subject to the common regulations of war when in actual service; but not in time of peace.

<sup>3</sup> ELLIOT 407 (emphasis in original).

Mr. MASON [reported in the third person] . . . He was not satisfied with the explanation of the word *organization* by the gentleman in the military line, (Mr. Lee.)

He thought they were not confined to the technical explanation, but that Congress could inflict severe and ignominious punishments on the militia, as a necessary incident to the power of organizing and disciplining them. . . . The gentleman [Lee] had said that they would be only subject to martial law when in actual service. He [Mason] demanded what was to hinder Congress from inflicting it always, and making a general law for the purpose. If so, said he, it must finally produce, most infallibly, the annihilation of the state governments. . . .

Mr. MADISON replied, that the obvious explanation was, that the states were to appoint the officers, and *govern all* the militia except that part which was called into the actual service of the United States.

*Id.* at 415-16 (emphasis in original). See also *id.* at 380-81, 391, 400, 418, 421, 424, 426, 440. See generally 3 RECORDS 207-09; 2 STORY 114-16; THE FEDERALIST No. 29 (A. Hamilton); *Militia Clause* 214-15.

<sup>186</sup> For example, the Federalists pointed out that several of the states themselves had no bill of rights and yet apparently no one considered the people's liberties in those

regarding the security of personal liberties under the Constitution fell upon deaf ears. The proponents of a bill of rights were not to be placated by academic arguments; they wanted guaranties of substance written into the Constitution. Some Antifederalists even proposed the calling of a new convention to redraft the Constitution;<sup>187</sup> others suggested that ratification by the states be made conditional upon the annexation of a bill of rights.<sup>188</sup> These divisive measures were strongly resisted by Madison, Hamilton, and the other Federalists because they knew that postponement of universal ratification would only permit the dissenters to gather forces and mount a full-scale attack upon the proposed union.

By January 1788, the Federalists had succeeded in obtaining ratification in Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut.<sup>189</sup> But opposition to the Constitution was increasing in some of the other states, and the conventions of two of the most important states, New York and Virginia, had not even commenced.

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states to be in jeopardy. *E.g.*, 2 ELLIOT 436; THE FEDERALIST, *supra* note 78, No. 84, at 511 (A. Hamilton). The most frequent and perhaps most persuasive of the Federalists' arguments concerned the nature of a limited government. The speech of James Wilson in the Pennsylvania ratifying convention expressed this argument.

But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

2 ELLIOT 436 (emphasis in original). *See also* 3 *id.* at 466-69, 620; 4 *id.* at 315-16; THE FEDERALIST, *supra* note 78, No. 84, at 513-14 (A. Hamilton); 5 THE WRITINGS OF JAMES MADISON 271-72 (G. Hunt ed. 1904) [hereinafter cited as MADISON]. Charles Cotesworth Pinckney of South Carolina added a distinctly Southern reason for the undesirability of a bill of rights:

Such bills generally begin with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves.

4 ELLIOT 316.

187 *See, e.g.*, BILL OF RIGHTS 15 n.17, 27 n.54; R. RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788 ch. 15 (1966); Smith, *The Movement Towards a Second Constitutional Convention in 1788*, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD, 1775-1789, at 46 (J. Jameson ed. 1889).

188 Jefferson had advocated that four of the 13 states withhold ratification to pressure the other nine into adopting a bill of rights. *See* Dumbauld, *Thomas Jefferson and American Constitutional Law*, 2 J. PUB. L. 370, 381-83 (1953).

189 Delaware ratified on December 7, 1787, Pennsylvania on December 12, 1787, New Jersey on December 18, 1787, Georgia on January 2, 1788, and Connecticut on January 9, 1788. *See* WARREN app. D.

A solution to the deadlock over a bill of rights was finally provided by Massachusetts. Nine proposed amendments were appended to its act of ratification with an expression of "opinion" that they would "remove the fears and quiet the apprehensions of many of the good people of the commonwealth."<sup>190</sup> Thereafter Maryland was the only state to ratify without proposing any amendments.<sup>191</sup> South Carolina,<sup>192</sup> New Hampshire,<sup>193</sup> Virginia,<sup>194</sup> and New York<sup>195</sup> all followed the example of Massachusetts and attached numerous proposed amendments to their acts of ratification.<sup>196</sup> It seems quite clear that these proposed amendments were of fundamental significance in defeating the Antifederalists and assuring the ratification of the Constitution. On the other hand, the Federalists had in effect made a binding pledge to enact a bill of rights in the first Congress;<sup>197</sup> had this moral obligation been ignored, the legitimacy of the new federal government would have been severely impaired.

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<sup>190</sup> 2 ELLIOT 177. See also BILL OF RIGHTS 14. A series of amendments had been previously proposed by a minority delegation to the Pennsylvania convention (*id.* at 173-75), but they were rejected by the convention majority and Pennsylvania ratified the Constitution on December 12, 1787, without qualifications. The suggestions of the Pennsylvania minority, however, were published in local newspapers and also circulated by broadsheet. *Id.* at 10 & nn.2-5.

<sup>191</sup> April 28, 1788. DOCUMENTS 1021. A committee had been appointed by the Maryland convention to consider amendments. The committee filed majority and minority reports, but the convention decided to ratify the Constitution without formally considering them. See BILL OF RIGHTS 17-18. For the amendments approved by the committee majority, see 2 ELLIOT 550-52. For those approved by the minority, see *id.* at 552-53.

<sup>192</sup> DOCUMENTS 1022-24.

<sup>193</sup> *Id.* at 1024-27.

<sup>194</sup> *Id.* at 1027-34.

<sup>195</sup> *Id.* at 1034-44.

<sup>196</sup> North Carolina did not ratify until November 21, 1789, approximately one month after the Bill of Rights had already been adopted by the first Congress. The state had previously rejected the Constitution at a ratifying convention, because of, *inter alia*, the absence of a bill of rights. Nevertheless, the convention had proposed a series of amendments. See *id.* at 1044-51. Furthermore, the disgruntled Pennsylvania minority (note 190 *supra*) held a second convention at Harrisburg after Pennsylvania's ratification without amendments. The Harrisburg convention also proposed a series of amendments (2 ELLIOT 545-46) which the delegates considered essential to complete the Constitution. See generally P. FORD, *supra* note 173. Rhode Island, the last to ratify, also proposed amendments. DOCUMENTS 1052-59. However, since Rhode Island did not ratify until eight months after Congress had passed the Bill of Rights, its suggestions had no effect. See BILL OF RIGHTS 31-32.

<sup>197</sup> Madison had himself previously admitted a willingness to accept amendments in the form of a bill of rights, but only if required to by the pressure of public opinion. 5 MADISON 271. Apparently such pressure had been applied because support for a bill of rights was a major plank in his election platform when Madison ran for a seat in the first Congress. He clearly felt a moral obligation to fulfill his pledge. See BILL OF RIGHTS 33 & n.1; see also 5 MADISON 319 n.1; R. RUTLAND, *supra* note 187, at 297. Nevertheless,

## V

## THE BILL OF RIGHTS

The first Congress of the United States met in New York on March 4, 1789. On June 8, James Madison introduced in the House of Representatives a set of proposed amendments to the Constitution.<sup>198</sup> Despite the public clamor for a bill of rights, Madison's efforts in this regard did not go unhindered. Some Federalist members of Congress still believed amendments to be unnecessary.<sup>199</sup> Still other members desired first to complete the unfinished task of legislating the structure of the national government within the interstices of the new Constitution.<sup>200</sup> Although the House agreed to submit the propositions to a Committee of the Whole,<sup>201</sup> the subject was not further mentioned until July 21 when Madison again raised the issue. After more attempts to postpone discussion, the House finally voted to discharge the Committee of the Whole and refer the amendments to a select committee of one member from each state.<sup>202</sup>

Madison had introduced a total of nine separate propositions in June. His seventh proposition, from which the jury and grand jury provisions of the fifth and sixth amendments originally derived, was stated in the following terms:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other ac-

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it was definitely Madison's intention to advocate or support only those amendments which would not "injure the Constitution" (1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 432 (J. Gales ed. 1834) [hereinafter cited as DEBATES & PROCEEDINGS]) or weaken "its frame, or abridg[e] its usefulness" (*id.* at 441). See also 5 MADISON 309, 311, 405 n.1; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 112 (1923).

<sup>198</sup> 1 DEBATES & PROCEEDINGS 433-36. For general discussion of the origin, development in Congress, and ratification by the states of the Bill of Rights, see BILL OF RIGHTS 33-50; F. DONOVAN, *supra* note 83, ch. 7; HELLER 29-33; A. MASON, *supra* note 135, at 93-97; J. MILLER, THE FEDERALIST ERA, 1789-1801 ch. 2 (1960); R. RUTLAND, *supra* note 64, ch. 9. See generally Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Brant, *The Madison Heritage*, 35 N.Y.U.L. REV. 882 (1960); Risjord, *The Bill of Rights: Comments on Its Historical Development*, 1966 WIS. L. REV. 1201, 1201-04; Warren, *supra* note 197.

<sup>199</sup> See, e.g., 1 DEBATES & PROCEEDINGS 442, 447-49; see also Warren, *supra* note 197, at 116 & n.151.

<sup>200</sup> See, e.g., 1 DEBATES & PROCEEDINGS 444-46. See also Warren, *supra* note 197, at 115, 117-18.

<sup>201</sup> 1 DEBATES & PROCEEDINGS 450.

<sup>202</sup> *Id.* at 664-65.

customed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed.<sup>203</sup>

Madison had culled several different concepts from the various suggestions of the state ratifying conventions to form this seventh proposition. Virginia,<sup>204</sup> New York,<sup>205</sup> and North Carolina<sup>206</sup> had each offered a guaranty of the right to trial by petit jury in criminal cases.<sup>207</sup> Massachusetts,<sup>208</sup> New Hampshire,<sup>209</sup> and New York<sup>210</sup> had proposed a right to grand jury presentment or indictment in felony cases. All five states had excepted the land and naval forces from these guaranties.<sup>211</sup> Fin-

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<sup>203</sup> BILL OF RIGHTS 208-09. The last sentence of Madison's seventh proposition, not quoted in the text above, was a guaranty of trial by jury in civil cases: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." *Id.* at 209. Madison also suggested, in his fifth proposition, that trial by jury in criminal cases be guaranteed against infringement by the states: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Id.* at 208.

<sup>204</sup> *Id.* at 183-84 (art. 8).

<sup>205</sup> *Id.* at 190-91.

<sup>206</sup> *Id.* at 200 (art. 8).

<sup>207</sup> See also *id.* at 173 (art. 3) (Pa. minority resolution); cf. DOCUMENTS 1053 (art. 8) (R.I.). Regarding the particulars of the jury trial, Virginia, New York, and North Carolina had each specified that it be an "impartial jury of the vicinage." (Maryland asked only that trial be "according to the course of proceeding in the state where the offence is committed." BILL OF RIGHTS 177 (art. 2) (Md.)). All three states also stipulated that conviction must be by unanimous verdict. See also Pa. minority resolution, *supra*; cf. DOCUMENTS 1053 (art. 8) (R.I.). Finally, Virginia (BILL OF RIGHTS 188) and North Carolina (*id.* at 204) guaranteed the right of challenge to biased jurors. None of the states proposed, as did Madison in his seventh proposition, that the jury be of freeholders. But see Pa. minority resolution, *supra* ("no man be deprived of his liberty, except by . . . the judgment of his peers").

Upon presenting to Congress his proposed amendments, Madison said of trial by jury: [It] cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.

I DEBATES & PROCEEDINGS 437.

<sup>208</sup> BILL OF RIGHTS 176 (art. 6).

<sup>209</sup> *Id.* at 181 (art. 6).

<sup>210</sup> *Id.* at 190-91.

<sup>211</sup> *Id.* at 183-84 (art. 8) (petit jury) (Va.); *id.* at 190-91 (grand and petit jury) (N.Y.); *id.* at 181 (art. 6) (grand jury) (N.H.); *id.* at 176 (art. 6) (grand jury) (Mass.); *id.* at 200 (art. 8) (petit jury) (N.C.); see *id.* at 177 (art. 2) (petit jury) (Md.); cf. DOCUMENTS 1053 (art. 8) (petit jury) (R.I.).

ally, Virginia,<sup>212</sup> New York,<sup>213</sup> and North Carolina<sup>214</sup> had each proposed an identical amendment to the effect that "the militia shall not be subject to martial law, except when in actual service in time of war, invasion or rebellion."<sup>215</sup> Only New York had brought all of these

<sup>212</sup> BILL OF RIGHTS 187 (art. 11).

<sup>213</sup> *Id.* at 190.

<sup>214</sup> *Id.* at 203 (art. 11).

<sup>215</sup> *Id.* See *id.* at 178 (art. 13) (Md.); 2 ELLIOT 545-46 (art. 8) (Pa.); 4 *id.* at 249 (art. 3) (N.C.) (rejected); *cf.* DOCUMENTS 1055 (art. 17) (R.I.). See generally Henderson 308-09; Wiener, *supra* note 61, at 214.

Additional limitations upon the military were sprinkled throughout the proposals of the state ratifying conventions. They included guaranteeing the right to bear arms (BILL OF RIGHTS 185 (art. 17) (Va.); *id.* at 182 (art. 12) (N.H.); *id.* at 189 (N.Y.); *id.* at 201 (art. 17) (N.C.)), restricting the quartering of soldiers in private homes (*id.* at 185 (art. 18) (Va.); *id.* at 182 (art. 10) (N.H.); *id.* at 190 (N.Y.); *id.* at 201 (art. 18) (N.C.)), prohibiting a standing army (*id.* at 185 (art. 17) (Va.); *id.* at 187 (art. 9) (Va.); *id.* at 190, 194 (N.Y.); *id.* at 201 (art. 17) (N.C.); *id.* at 203 (art. 9) (N.C.)), declaring that the military should be strictly subordinated to civilian authority (*id.* at 185 (art. 17) (Va.); *id.* at 190 (N.Y.); *id.* at 201 (art. 17) (N.C.)), requiring a two-thirds congressional majority to declare war (*id.* at 195 (N.Y.)), placing restrictions on the President's personal command of armies in the field (*id.* at 196 (N.Y.)), limiting the use of foreign troops within the United States (*id.* at 205 (art. 26) (N.C.)), prohibiting the use of the militia outside their respective states (*id.* at 198 (N.Y.)), restricting militia duty in the federal service to a two-month period (2 ELLIOT 546 (art. 8) (Pa.)), limiting the period of military enlistment (BILL OF RIGHTS 187 (art. 10) (Va.); *id.* at 203 (art. 10) (N.C.)), and exempting conscientious objectors from all military service (*id.* at 185 (art. 19) (Va.); *id.* at 201 (art. 19) (N.C.)). Some members of the Maryland convention even wished to adopt the English practice of requiring the legislature periodically to renew its military justice laws. BILL OF RIGHTS 178 (art. 11) ("no mutiny bill [will] continue in force longer than two years").

Of all these military proposals, however, only two—the quartering provisions and the right to bear arms—bore any fruit in terms of final acceptance by the first Congress as amendments to the Constitution. The guaranty of the right to bear arms became the second amendment to the Constitution: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." See generally Rohner, *The Right To Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53 (1966); Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 665 (1965); Comment, *The Right To Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 ALBANY L. REV. 74 (1967).

The fourth clause of the fourth proposal introduced by Madison, from which the second amendment was derived, had also stated that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 DEBATES & PROCEEDINGS 434. This clause remained in the amendments as adopted by the House of Representatives on August 24, 1789 (BILL OF RIGHTS 214), having withstood a motion in the Committee of the Whole to eliminate it. 1 DEBATES & PROCEEDINGS 766-67. The Senate, however, voted to strike the clause from the amendment. BILL OF RIGHTS 46 & n.6, 217. The Senate then arranged the amendment in its present form and it was agreed to without alteration by the House of Representatives. *Id.* at 220. See generally Brahms, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-A-Vis In-Service Conscientious Objection*, 47 MIL. L. REV. 1, 4-11 (1970); Conklin, *Conscientious Objector Provisions: A View in the Light of Torcasco v. Watkins*, 51 GEO. L.J. 252, 263-64 (1963); Freeman, *A Remonstrance for Conscience*, 106 U. PA. L.

elements together in one amendment as Madison had in his seventh proposition.<sup>216</sup>

On July 28, 1789, the select committee made its report to the House of Representatives.<sup>217</sup> The committee had combined part of Madison's fourth proposition<sup>218</sup> with his seventh to produce its own proposal:

[1] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

[2] The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a

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REV. 806, 806-13 (1958); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 436-38 (1952). See also Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968); Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968); Comment, *The Conscientious Objector and the First Amendment: There But for the Grace of God . . .*, 34 U. CHI. L. REV. 79 (1966).

During the debate in the House on what ultimately became the second amendment, a motion was made but rejected to append a clause prohibiting a standing army and subordinating the military to the civil authority. 1 DEBATES & PROCEEDINGS 751-52. A similar motion was rejected by the Senate during its deliberation on the second amendment. BILL OF RIGHTS 46. On August 18, Thomas Tudor Tucker of South Carolina moved to refer to the House Committee of the Whole 17 additional amendments for its consideration. 1 DEBATES & PROCEEDINGS 760-62. Among them was a proposal to change the wording of the section on the President's powers over the military from the "commander in chief" to "power to direct (agreeable to law) the operations." *Id.* at 762. The motion to refer did not pass. *Id.* at 763. The remainder of the Virginia proposals (including the restriction on the period of military enlistments) which Madison had not incorporated into his amendments were submitted to the Senate on September 8 to be considered along with the House-passed amendments. They all were rejected by the Senate. BILL OF RIGHTS 47 & n.14.

<sup>216</sup> BILL OF RIGHTS 190-91. Although the Virginia bill of rights and the proposed amendments of the Virginia ratifying convention provided the primary bases for Madison's proposed amendments in the first Congress (text accompanying note 76 *supra*), the New York proposal appears to have been the model for his seventh proposition.

<sup>217</sup> 1 DEBATES & PROCEEDINGS 672.

<sup>218</sup> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

*Id.* at 435.

place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if it be committed in a place not within a State, the indictment and trial may be at such place or places as the law may have directed.<sup>219</sup>

A Committee of the Whole adopted both clauses on August 18.<sup>220</sup> The only change made by the Committee of the Whole was to accept a motion by Samuel Livermore to amend clause one so as "to secure to the criminal the right of being tried in the State where the offence was committed."<sup>221</sup> Since clause two already purported to accomplish this result,<sup>222</sup> and since no later recorded form of clause one reflects an amendment in this regard, it does not appear that Livermore's motion had any effect upon these provisions.<sup>223</sup>

The House itself adopted clauses one and two on August 20,<sup>224</sup> and referred all adopted amendments to a committee of three for final arrangement.<sup>225</sup> On August 24, the committee reported and the

<sup>219</sup> BILL OF RIGHTS 211-12.

<sup>220</sup> 1 DEBATES & PROCEEDINGS 759-60. Also passed was the third clause of the select committee's seventh proposition (BILL OF RIGHTS 212), originally the last sentence of Madison's seventh proposition (note 203 *supra*), which guaranteed the right to trial by jury in civil cases. 1 DEBATES & PROCEEDINGS 760. The select committee's and Madison's fifth proposal, prohibiting the states from limiting the right to a jury in criminal cases (BILL OF RIGHTS 209, 212), had already been adopted. 1 DEBATES & PROCEEDINGS 755.

<sup>221</sup> 1 DEBATES & PROCEEDINGS 756. Edanus Burke had attempted three alterations of clauses one and two of the seventh proposition, all of which had failed: (1) to add a right of the accused to obtain a continuance to serve process on material witnesses (*id.* at 756); (2) to prohibit prosecution by information (*id.* at 756, 760); and (3) to change the word "vicinage" to "district or county in which the offense has been committed" (*id.* at 760). See generally HELLER 31.

<sup>222</sup> See 1 DEBATES & PROCEEDINGS 756.

<sup>223</sup> When ultimately submitted by the House to the Senate, the jury trial provision mysteriously lacked the last sentence of the select committee's second clause relating to venue for trials of crimes not committed within a state. BILL OF RIGHTS 215. Livermore's motion possibly explains this deletion. It may be, however, that the reporter of the debate incorrectly recorded Livermore's motion as having passed when in fact it surely failed. See *id.* at 41 n.28.

<sup>224</sup> 1 DEBATES & PROCEEDINGS 767. Also approved that day was the select committee's fifth proposition, relating to criminal juries in the states (note 220 *supra*). 1 DEBATES & PROCEEDINGS 767. The next day the third clause of the select committee's seventh proposition, guaranteeing the civil jury (note 220 *supra*), was also adopted. 1 DEBATES & PROCEEDINGS 767.

<sup>225</sup> 1 DEBATES & PROCEEDINGS 778. Egbert Benson, Roger Sherman, and Theodore Sedgwick were the committee members. Rearrangement of the amendments by this committee so as to append them seriatim to the end of the Constitution was contrary to Madison's original plan. He had proposed that amendments be inserted at various appropriate locations throughout the body of the Constitution. Compare *id.* at 708 (Madison), 708-09 (Smith), 710 (Vining); with *id.* at 707-08 (Sherman), 709 (Livermore), 710 (Clymer). Duplication of the criminal jury trial provisions in article III and the sixth

House formally approved and transmitted to the Senate seventeen articles of amendment.<sup>226</sup> Clauses one and two<sup>227</sup> were now labeled as Article the Ninth and Article the Tenth, respectively.<sup>228</sup> The only two changes of significance made by the House in the propositions adopted by the Committee of the Whole were the deletion in what became Article the Tenth of the requirement that jurors be freeholders, and of the provision relating to the venue of trials for offenses committed outside a state. The recorded debates offer no explanation for either change.<sup>229</sup>

Legislative history to this point clearly indicates that at least the House of Representatives desired to exempt the military from trial by petit jury. Although it is possible to argue that syntax indicates no similar exception was originally intended with regard to the grand jury, the preceding legislative history and the sense of Madison's seventh proposition, taken as a whole, indicate that the House meant to exempt the military from the grand jury guaranty also.<sup>230</sup>

Although several changes were made by the Senate in the criminal jury trial provisions, no adequate record of the content of the Senate debates over these provisions is extant.<sup>231</sup> The House's ninth article, prescribing a speedy trial and the rights of notice, confrontation, compulsory process, and counsel, was renumbered by the Senate as Article the Eighth, but no substantive changes were made.<sup>232</sup> Significantly, however, the tenth article of the House amendments was totally stripped of its petit jury element. The remainder, guaranteeing only the right to a grand jury indictment in felony cases, was then inserted into the House-approved eighth article relating to double jeopardy, self-in-

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amendment is probably explained by the committee's alteration of Madison's method. Madison's seventh proposition, which ultimately formed the basis for the sixth amendment jury trial provision, had begun with the introductory suggestion, "That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following . . . ." *Id.* at 435. When the form of the Constitution's amendment changed from insertion to appendage, no attempt was made by Congress to eliminate or qualify the article III jury trial provision; consequently, it remained intact in the Constitution. The Supreme Court has decided that the criminal jury trial provisions of article III and the sixth amendment are virtually coterminous. *Patton v. United States*, 281 U.S. 276, 298 (1930); *Callan v. Wilson*, 127 U.S. 540, 548-50 (1888). *But see* *Cook v. United States*, 138 U.S. 157, 181 (1891); *United States v. Dawson*, 56 U.S. (15 How.) 467, 487 (1853). *See generally* E. DUMBAULD, *supra* note 61, at 370-71; *HELLER* 35-38.

<sup>226</sup> 1 DEBATES & PROCEEDINGS 779.

<sup>227</sup> Note 219 *supra*.

<sup>228</sup> BILL OF RIGHTS 214-15. *See generally id.* at 44 n.44.

<sup>229</sup> *But see* note 223 *supra*.

<sup>230</sup> *See* Henderson 310.

<sup>231</sup> The debates of the Senate at that time were held in secret.

<sup>232</sup> BILL OF RIGHTS 46 n.9, 218.

crimination, due process of law, and just compensation in eminent domain.<sup>233</sup> The combined provision was renumbered as Article the Seventh:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.<sup>234</sup>

This rearrangement of the House's proposals by the Senate for the first time placed the military exception in an indisputable relationship with the grand jury guaranty. That relationship was not thereafter disturbed by either the House or the Senate because the Senate's Article the Seventh was ultimately adopted verbatim by both houses and incorporated in that form into the Constitution.

The net effect of the Senate's manipulations was to reaffirm all

<sup>233</sup> *Id.* at 46 n.7; see Warren, *supra* note 197, at 120. The House's Article the Eighth had read:

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

BILL OF RIGHTS 214.

<sup>234</sup> BILL OF RIGHTS 218. See generally Henderson 312-13. The Senate made one deletion from the House's tenth article besides the petit jury guaranty: it eliminated the exception for "cases of impeachment." Presumably this occurred because retention of the provision as an exception to the grand jury guaranty would be unnecessary in light of the Constitution's already prescribed method of instituting impeachment proceedings (art. I, § 2). In any case, in view of the specific exception for impeachment cases in article III, section 2, no intent on the part of the members of the first Congress to apply the right to trial by petit jury or indictment by grand jury to cases of impeachment may be imputed. See generally Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 SO. CALIF. L. REV. 395 (1971); Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970); Thompson & Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C.L. REV. 87 (1970).

The House's civil jury amendment, Article the Twelfth, was also combined by the Senate with the House's Article the Eleventh relating to appeals in civil cases (BILL OF RIGHTS 215) and redesignated as Article the Ninth. *Id.* at 46 n.8, 218-19; see 1 DEBATES & PROCEEDINGS 76. Eventually this provision became the seventh amendment to the Constitution. See note 176 *supra*. For the relationship of this amendment to the Federal Judiciary Act of 1789 (Act of Sept. 24, 1789, ch. 20, 1 Stat. 73), see THE JOURNAL OF WILLIAM MACLAY 92-106 (C. Beard ed. 1927); Warren, *supra* note 197. The Senate totally rejected Madison's proposals relating to state jury trials. See 1 DEBATES & PROCEEDINGS 76; BILL OF RIGHTS 46-47 & n.11. See generally 1 DEBATES & PROCEEDINGS 755 (Madison); Warren, *supra* note 197, at 121.

the House proposals concerning the rights auxiliary to a jury trial, but to reject the basic jury guaranty itself. The probable explanation for this anomaly is provided by Madison in a contemporaneous letter to Edmund Pendleton:

The Senate have sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles. In many of the States juries even in criminal cases, are taken from the State at large; in others from districts of considerable extent; in very few from the County alone. Hence a [dislike] to the restraint with respect to *vicinage*, which has produced a negative on that clause.<sup>235</sup>

Apparently, in its frustration over failing to reach any agreement about the appropriate scope of the vicinage, the Senate preferred to discard the underlying jury guaranty.

Unwilling to accept all the Senate changes,<sup>236</sup> the House requested the appointment of a conference committee with the Senate.<sup>237</sup> Apparently the primary area of disagreement within the conference committee continued to be the House's demand for a petit jury guaranty and the Senate's concern over the extent of the vicinage.<sup>238</sup> The conference committee ultimately agreed upon a compromise: the Constitution was to guarantee that the jury be at least drawn from the state in which the crime was committed, and the Congress was to be permitted to narrow the vicinage through the legislative creation of judicial districts. The significant event for purposes of this article, however, is that the words which were to convey this compromise were not recombined with the grand jury guaranty in what was then the Senate's seventh article. Instead, they were inserted into the Senate's eighth article after the guaranty of a speedy and public trial:

<sup>235</sup> 5 MADISON 420 n.1 (emphasis in original). See generally HELLER 93-94; Henderson 313. The issue of the breadth of the vicinage for the criminal jury also bred substantial disagreement among the Congressmen in their debates on the first Judiciary Act. Warren, *supra* note 197, at 105-06. There were also problems caused by the confusion between venue and vicinage. See note 177 *supra*.

<sup>236</sup> The Senate made a total of 26 changes in the 17 propositions submitted to it by the House. See 1 DEBATES & PROCEEDINGS, 80, 85-86. See generally BILL OF RIGHTS 34-35 n.6.

<sup>237</sup> 1 DEBATES & PROCEEDINGS 905; *id.* at 83. Madison, Sherman, and John Vining were appointed as the House component of the committee.

<sup>238</sup> On September 23, Madison again wrote to Edmund Pendleton:

[The Senate is] inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term, too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word Juries, "with the accustomed requisites," leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. The truth is that in most of the States the practice is different, and hence the irreconcilable [*sic*] difference of ideas on the subject. In some States, jurors are drawn from the whole body of the community indiscriminately; in others, from large districts compre-

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation—to be confronted with the witnesses against him—to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.<sup>239</sup>

The conference committee report and the amendments over which there had been no dispute were all approved by the House<sup>240</sup> and Senate<sup>241</sup> and were transmitted to the states for ratification.<sup>242</sup> Upon ratification by Virginia on December 15, 1791,<sup>243</sup> the last ten of these became the Bill of Rights.<sup>244</sup> The first two amendments proposed by Congress to the states having been rejected,<sup>245</sup> the seventh article guaranteeing the right to a grand jury indictment became the fifth amendment and the eighth article guaranteeing the right to a trial by petit jury became the sixth amendment to the Constitution.<sup>246</sup>

Why the conference committee did not replace the petit jury guaranty in the fifth amendment from which it had come is impossible to say. The recorded debates fail to clarify this issue. Two plausible but admittedly speculative explanations may be offered. The first is that

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hending a number of Counties; and in a few only from a single County. The Senate suppose also that the provision for vicinage in the Judiciary bill, will sufficiently quiet the fears which called for an amendment on this point. On a few other points in the plan the Senate refuse to join the House of Reps.

5 MADISON 424 n.1 (emphasis in original).

239 1 DEBATES & PROCEEDINGS 913 (emphasis added).

240 *Id.* at 913.

241 *Id.* at 88; *see id.* at 914.

242 *Id.* at 923.

243 BILL OF RIGHTS 50. *See generally* 2 DEBATES & PROCEEDINGS 1983-89.

244 Unfortunately, no satisfactory body of literature exploring the ratification process of the Bill of Rights is available. Suffice it to say, however, that Congress's amendments did not receive universal and immediate approbation. Although not elaborately documented, the two-year delay between Congress's passage of the amendments and ratification by the requisite 11 states was occasioned by substantial opposition from the Antifederalists. A. MASON, *supra* note 83, at 95-97. Indeed, Massachusetts, Connecticut, and Georgia never ratified the Bill of Rights until 1939. *See* BILL OF RIGHTS 49-50; Dewey, *A Vote of Confidence for the Bill of Rights*, 1 AM. J. LEGAL HIST. 137, 139 & nn.6-8 (1963).

245 The first two amendments which the 1789 Congress proposed to the states related to the numerical size of the House of Representatives and the method of increasing the compensation of Senators and Representatives. BILL OF RIGHTS 220. These two amendments were never ratified by the states, leaving only the last 10 of the original amendments, which we have come to call the Bill of Rights.

246 Every state which has entered the Union since the ratification of the federal Bill of Rights in 1791 has a similar guaranty of the right to trial by jury and indictment by grand jury.

the rearrangement by the Senate of the propositions submitted to it by the House resulted in the language of the sixth amendment being more grammatically amenable than that of the fifth amendment to the compromise jury clause agreed upon by the conference committee.<sup>247</sup> On the other hand, it may well be that our familiarity with the language of the two amendments as we have inherited them is what gives this impression of linguistic neatness. The more likely explanation is that the sixth amendment insertion was merely an oversight. By the time the conference committee had been appointed on September 21, 1789, the members of Congress had become weary of their labors and were anxious to return home. Passage of amendments to the Constitution was the major obstacle to adjournment. Indeed, once the conference committee had been appointed, events moved rapidly; the committee's report was considered and accepted by the House on September 24,<sup>248</sup> and concurred in by the Senate on September 25.<sup>249</sup> By September 29 the amendments had been passed and both houses had adjourned.<sup>250</sup> Perhaps in its haste Congress neglected to notice the ambiguity it had left in regard to the jury and the military.<sup>251</sup>

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<sup>247</sup> Henderson 323.

<sup>248</sup> 1 DEBATES & PROCEEDINGS 913.

<sup>249</sup> *Id.* at 88.

<sup>250</sup> *Id.* at 94, 928.

<sup>251</sup> See Henderson 305, 324. The hypothesis that the restoration of the petit jury provision by the conference committee also effectively reinstated the military exception to that provision runs counter to the import of the Supreme Court's reasoning in the recent case of *Williams v. Florida*, 399 U.S. 78 (1970). The Court in that case construed the conference committee's use of the phrase "impartial jury" as an indication that unanimity for conviction, the right to challenge, and other accoutrements of the common law jury were not intended to be perpetuated in the Constitution. *Id.* at 96-97. The specific holding of the case was that the "accustomed requisite" of a 12-man jury was not mandated by the sixth amendment. With all due respect, I suggest that the Court was wrong in its conclusion. For one thing, such a construction renders the sixth amendment jury provision almost identical to the article III provision and therefore virtually meaningless. Secondly, if the Court is willing to accept only those accoutrements or exceptions to the common law jury which were explicitly delineated by the conference committee, it would perhaps be led to conclude that, despite the specific exemption in article III, the conference committee's deletion of the exception to the right to jury trial for cases of impeachment (see note 234 *supra*) indicated a desire to eliminate that exception. To respond that the exception was deleted because it was already provided for in article III proves too much, for the very right to trial by jury was also already provided for in article III. For these reasons the *Williams* case appears to have been based upon erroneous historical analysis. This does not mean that the case was therefore incorrectly decided, but only that the Court was incorrect in not construing the conference committee's phrase "impartial jury" to be a shorthand form for the full jury trial guaranty—except for the vicinage element—as it was originally proposed to the Congress by Madison and passed by the House of Representatives.

One flaw in the oversight theory is raised by a historical peculiarity contemporaneous

## CONCLUSION

Although neither of these theories supplies a totally satisfactory explanation for the discrepancy between the fifth and sixth amendments, there is at least nothing extant affirmatively indicating that the jury was ever actually intended to be required in military trials or even that the issue was consciously left constitutionally unresolved. Even the Senate, at whose feet lies the blame for the initial separation of the petit jury guaranty and the military exception, manifested no desire to apply trial by jury to the military. On the contrary, a motion to restore the petit jury guaranty—with its military exception—had been made in the Senate just prior to its return of the proposed constitutional amendments to the House on September 9.<sup>252</sup> Although it failed to pass because the vote resulted in a tie,<sup>253</sup> its defeat is undoubtedly attributable to the continuing dispute over the extent of the vicinage of the jury and not to any objections about its military exception. In any case, the familiarity of the framers of the Bill of Rights with the nature of the court-martial and the jury, the express exemption of the military from the criminal jury trial guaranty in both Madison's original proposals and those approved by the House, and the dearth of any evidence to indicate that the framers desired to depart from the traditions of their forefathers, almost inevitably lead to the conclusion that the failure expressly to exempt the military from the sixth amendment's jury trial guaranty was little more than a historical accident.<sup>254</sup>

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with Congress's 1789 passage of the Bill of Rights. In 1790, a Pennsylvania constitutional convention precisely duplicated the language of the fifth and sixth amendments to the Constitution of the United States in its state constitution of that year. 5 CONSTITUTIONS 3100-01 (art. 9, §§ 9-10); *see also* 1 *id.* at 568-69 (art. 1, §§ 5, 8) (Del.); *id.* at 538 (art. 1, § 9) (Conn.); 4 *id.* at 2473 (art. 16) (N.H.); 6 *id.* at 3223 (art. 1, §§ 7, 10) (R.I.); *id.* at 3764 (art. 17) (Vt.). *See generally* Henderson 313-14. In addition, the federal pattern was repeated again in 1861 when the so-called Confederate States of America perpetuated the petit jury-grand jury anomaly by incorporating verbatim the language of the fifth and sixth amendments into its own constitution. *See* C. LEE, *THE CONFEDERATE CONSTITUTIONS* 201-20 (1963).

<sup>252</sup> The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites.

*Quoted in* Henderson 313 n.120.

<sup>253</sup> *See id.*

<sup>254</sup> This is the position which has consistently been taken by the Supreme Court in regard to courts-martial. *E.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Whelchel v. McDonald*, 340 U.S. 122 (1950); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

Neither indictment by grand jury nor trial by petit jury has been judicially required

Congressional intention to exclude the military from the sixth amendment's petit jury provision is also clearly established by other actions taken by Congress contemporaneously with the passage of the Bill of Rights. For example, on September 17, 1789, a committee reported out to the House of Representatives an act "to recognise, and adapt to the Constitution of the United States, the establishment of the troops raised under the resolves of the United States in Congress assembled."<sup>255</sup> This measure first passed the House<sup>256</sup> and then passed the Senate with several amendments.<sup>257</sup> Succumbing to Senate desires for an amendment relating to activation of the militia,<sup>258</sup> the House agreed to the bill, and it was enacted into law.<sup>259</sup> Section 4 of that act prescribed that

the said troops [raised by the Continental Congress's resolve of October 3, 1787] shall be governed by the rules and articles of war, which have been established by the United States in Congress assembled, or by such rules and articles of war as may hereafter by law be established.<sup>260</sup>

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in the case of military commissions. *War criminals*: Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); see Hirota v. MacArthur, 338 U.S. 197 (1948); Flick v. Johnson, 174 F.2d 983 (D.C. Cir.), cert. denied, 338 U.S. 879 (1949). *Spies: Ex parte Quirin*, 317 U.S. 1 (1942); United States *ex rel.* Wessels v. McDonald, 265 F. 754 (E.D.N.Y. 1920); 40 OP. ATT'Y GEN. 561 (1919). *Military Government*: Duncan v. Kahanamoku, 327 U.S. 304 (1946); Neely v. Henkel, 180 U.S. 109, 122-23 (1901). *Prisoners of War: Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). *Martial Law: id.*; see Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See generally Kaplan, *supra* note 146.

Indeed, Congress has made it clear in the UCMJ that, except in the case of martial law or military government, criminal prosecutions of persons in the above categories need not be accomplished by a military commission, but may be by a court-martial itself. 10 U.S.C. §§ 801 (war criminals), 802(9) (prisoners of war), 906 (spies) (1970); see *id.* § 904 (aiding the enemy). Article 21 of the UCMJ makes it clear that these grants of jurisdiction to courts-martial are not meant to preclude the convening of military commissions:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

*Id.* § 821.

<sup>255</sup> 1 DEBATES & PROCEEDINGS 894.

<sup>256</sup> *Id.* at 85, 927.

<sup>257</sup> *Id.* at 91.

<sup>258</sup> The amendment expressed the Senate's desire,

for striking out all that respected the number of the militia to be called into service for the defence of the frontiers, from the States of Pennsylvania, Virginia, and Georgia, and to insert a clause instead thereof, empowering the President to call out the militia generally, for the purpose of protecting the frontiers against the hostile invasion of the Indians . . . .

*Id.* at 927; see also *id.* at 93-94.

<sup>259</sup> *Id.* at 927; *id.* at 93-94. The Senate's version of the clause quoted in note 258 *supra* was adopted as section 5 of the final act. 2 *id.* at 2200.

<sup>260</sup> *Id.*

Here is a manifestation of Congress's recognition—during the very period in which it passed the Bill of Rights—that the army was to continue to be governed by its traditional and separate system of courts-martial, unaffected by the proposed new constitutional amendment guaranteeing the right to a trial by petit jury.<sup>261</sup>

The only remaining unresolved issue regarding the fifth and sixth amendments' military exceptions relates to the militia. The fifth amendment—and therefore the sixth by implication—leaves no doubt that the militia is excepted from its provisions only "when in actual service in time of war or public danger." Within the context of the fifth amendment, it is clear that this language refers to federal service. However, by adopting the contention that Congress—under article I, section 8, of the Constitution—does in fact possess court-martial jurisdiction over the state militia forces at all times, it is admittedly possible to reach the anomalous conclusion that it must—by virtue of the fifth and sixth amendments—provide the right to indictment by grand jury and trial by petit jury in all courts-martial arising in units serving solely in a state capacity.

But the derivation of the militia portion of the military exemption from the fifth amendment does not sanction such a ludicrous result. The precursor of the militia clause was offered by Madison in direct response to Antifederalist fears about federal control over the state militia. Thus, the militia clause should properly be construed not only as an

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<sup>261</sup> Compare Henderson with Wiener, *supra* note 61. See generally W. AYCOCK & S. WURFEL, *supra* note 100, at 13; SNEDEKER 22. The act was repealed by the second session of the first Congress and replaced by "An Act for regulating the military establishment of the United States" of which section 13 stated:

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

2 DEBATES & PROCEEDINGS 2224-25 (emphasis added). See also WINTHROP 23 n.43. At the time of the passage of the Bill of Rights in 1789, Congress did not have occasion to accommodate the naval disciplinary regulations to the Constitution because no navy then existed. See note 118 *supra*. Five years later, however, Congress reestablished the American Navy. Act of March 27, 1794, ch. 12, 1 Stat. 350; see Smelser, *The Passage of the Naval Act of 1794*, 22 MIL. AFFAIRS 1 (1958). In 1797 Congress enacted a law similar to that relating to the Army, adopting the Articles for the Government of the Navy of 1775, as amended, "as far as the same may be applicable to the constitution." Act of July 1, 1797, ch. 8, § 8, 1 Stat. 523. The Navy's military justice system was completely revised two years later by the enactment of the Articles for the Government of the Navy of 1799. Act of March 2, 1799, ch. 24, 1 Stat. 709. This revision, however, in no way introduced trial by jury into naval courts-martial. See generally Devico, *supra* note 104, at 65; Sargent, *supra* note 107, at 707-08; Wiener, *supra* note 61, at 13-14; Williams, *supra* note 94, at 357.

exception to the federally secured rights to a grand and petit jury, but also as a limitation upon the federal powers over state military justice. If the fifth amendment is construed as complementary to article I, section 8, it would appear that the framers did not intend to authorize federal courts-martial of state militiamen when not in federal service. In fact, the framers implied as much by their passage in 1792 of the first Militia Act<sup>262</sup> by which the militia was subjected to the federal Army Articles of War only when in actual federal service.<sup>263</sup> Although such legislation is not conclusive of the issue, it certainly provides a persuasive indication of early congressional acceptance of its own lack of penal power over nonfederalized militia.<sup>264</sup>

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<sup>262</sup> Act of May 2, 1792, ch. 23, 1 Stat. 264 ("An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions"). For the debates in Congress concerning this act, see 3 DEBATES & PROCEEDINGS 555, 557, 574-80. This law was superseded by a similar provision in the Act of February 28, 1795, ch. 36, § 4, 1 Stat. 424. See also Act of May 8, 1792, ch. 33, 1 Stat. 271. See generally J. DUGGAN, THE LEGISLATIVE AND STATUTORY DEVELOPMENT OF THE FEDERAL CONCEPT OF CONSCRIPTION FOR MILITARY SERVICE (1946); 2 STORY 117; WINTHROP 75-77, 95; *Militia Clause* 187, 196. In the debates concerning these early militia bills, the term "discipline" was not used in the sense of military justice, but in the sense of military training or exercises. See, e.g., 2 DEBATES & PROCEEDINGS 1807, 2090-92, 2098-99; notes 154-63 & 184-85 and accompanying text *supra*.

<sup>263</sup> On September 8, 1789 the Senate rejected a motion to add the following clause to the proposed amendments to the Constitution:

That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service in time of war, invasion or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments as shall be directed or inflicted by the laws of its own State.

JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA, BEGUN AND HELD AT THE CITY OF NEW YORK 226 (1789). Although there is no contemporary explanation for the Senate's action, it may be suggested that the amendment was rejected because its terms were already implicit in article I, section 8, of the Constitution and what was ultimately to become the fifth amendment.

<sup>264</sup> In any case, Congress appears to have avoided this issue by legislative manipulation. Beginning with the National Defense Act of 1916, ch. 134, 39 Stat. 166, Congress has conditioned its distribution of federal monies and material to state militia units upon their securing a status known as "federal recognition." 32 U.S.C. §§ 108, 323 (1970); *Federal Recognition of Army National Guard Officers*, Nat'l Guard Reg. 600-102 (1965); *Organization and Federal Recognition of Army National Guard Units*, Nat'l Guard Reg. 10-1 (1971). As a condition of such federal recognition, Congress has required, *inter alia*, that the states utilize a federally-prescribed system of military justice for their militia units when not in federal service. National Defense Act of 1916, ch. 134, §§ 102-08, 39 Stat. 166. See generally *Military Affairs*, Dep't Army Pamphlet 27-187, at 34-36 (1966); *Militia Clause* 201-15; Shaw, *supra* note 123, at 70, 72-73.

The federal military justice system prescribed by the acts of Congress, however, is not self-executing and must be incorporated by the states into their own positive law. Some variation among the states is apparently permitted within the interstices of the federal

The purpose and scope of this article has been limited to a delineation of the historical constitutional relationship of the jury and the court-martial. Left for another day is the perhaps more significant

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scheme because that scheme is merely outlined by the federal statutes and is not itself comprehensive of military justice. See Bacon, *The Model State Guard Act*, 10 *FORDHAM L. REV.* 41 (1941). Furthermore, when courts-martial are convened for the trial of National Guardsmen not in federal service, the trials are conducted by state, not federal military personnel. 32 U.S.C. § 326 (1970); see also 10 *id.* § 802(1) (1970); Manual for Courts-Martial A2-3 (rev. ed. 1969); *id.* at 412 (1951); *DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940*, § 395(5) (1942).

Obvious constitutional questions were raised by this conditioning of the receipt of federal benefits upon the states' sacrifice of what is probably their constitutional right to determine the military justice scheme regulating their militia forces when not in federal service. See Ansell, *Status of the State Militia Under the Hay Bill*, 30 *HARV. L. REV.* 712 (1917); Chipfield, *The Legal Status of the National Guard Under the Army Reorganization Bill*, 7 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 672 (1917); *Militia Clause* 201-15; Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 *CALIF. L. REV.* 75, 92 (1924). See also Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 *COLUM. L. REV.* 321 (1935). Congress, however, appears to have surmounted this constitutional hurdle through the use of a legal fiction. Utilizing its constitutional power to raise armies rather than its power to regulate the militia, Congress in 1933 constituted the National Guards of the several states as a permanent reserve component of the United States Army, to be known as the National Guard of the United States. Act of June 15, 1933, ch. 87, 48 Stat. 153. By virtue of that and other legislation, every person who becomes a member of a federally-recognized state National Guard unit also automatically becomes a member of that state's element of the National Guard of the United States. See 10 U.S.C. §§ 101(11), 3261 (1970); 32 *id.* §§ 101(5), 301 (1970). Consequently, he is subject to the federal system of military justice prescribed for that component even when not in actual federal service. The net result is that Congress has apparently avoided the strictures placed by the Constitution upon its powers to regulate the penal systems of the state militia when not in federal service.

Nevertheless, wholly state-issued codes of military justice retain perhaps one area of continued vitality. This is in relation to those local military forces known as the State Guards which have occasionally been raised by the states solely for their own internal protection. The maintenance of such forces has not been prohibited by federal statutes except during peacetime. 32 U.S.C. § 109(c) (1970). They have in fact been expressly authorized by Congress on several separate occasions. *E.g.*, Act of Sept. 27, 1950, ch. 1058, 64 Stat. 1072; Act of Oct. 21, 1940, ch. 904, 54 Stat. 904; Act of June 14, 1917, ch. 28, 40 Stat. 181. See generally SENATE COMM. ON MILITARY AFFAIRS, *THE HOME GUARD*, S. REP. NO. 2138, 76th Cong., 3d Sess. (1940); *Militia Clause* 215-17; Shaw, *supra* note 123, at 76. Moreover, the Constitution itself appears to authorize the maintenance of such forces in wartime if accomplished with the consent of Congress. U.S. CONST. art. I, § 10. See note 143 and accompanying text *supra*. The State Guards have not been treated by Congress as part of the National Guards, nor have they been subjected to the federal laws governing the National Guards. Whether Congress could, on the one hand, treat them as part of the states' militia and deal with them under the National Guard laws or, on the other hand, condition its constitutional consent to their wartime existence upon their adoption of federally-imposed standards (including a federal system of military justice), are questions which as yet remain unresolved.

Moreover, there is a question about the constitutional and legislative status of the local forces of the District of Columbia and the federal territories. The delegates to the Constitutional Convention clearly contemplated granting Congress power only over the

inquiry into the history and current role of the two as judicial and political institutions. In his classic assertion of the incompatibility of military and civilian concepts of justice, General William T. Sherman expressed the prevailing attitude:

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence.<sup>265</sup>

On the other hand, the validity of this assessment is weakened by the increasingly successful and still evolving "civilianization" of military justice.<sup>266</sup> Despite the absence of a constitutional mandate, the

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militia of the several states. *E.g.*, 2 RECORDS 326, 330-33. Although the army clause of the Constitution probably would have authorized Congress to raise local troops in the District of Columbia and the territories, Congress's first legislative act in this regard apparently eschewed such an approach; it was entitled, "An act, more effectually to provide for the organization of the militia of the District of Columbia." Act of March 3, 1803, ch. 20, 2 Stat. 215 (emphasis added). On the other hand, although mentioning "militia," this act and its successors have been construed to be authorized not by Congress's constitutional power to regulate the militia but by its powers to "exercise exclusive Legislation" over the District of Columbia (U.S. CONST. art. I, § 8) and to "make all needful Rules and Regulations" for the territories (*id.* art. IV, § 3). *United States v. Stewart*, 2 F. Cas. 280 (No. 16) (D.C. Crim. Ct. 1857); WINTHROP 55 n.67.

Regardless of whether such legislation was authorized under the army clause or the clauses granting legislative power over the District and the territories, it would appear that the absence of an intervening sovereign would justify Congress's treating the local District and territorial forces as being constantly in federal service. Congress, however, has not chosen to do this. It has in fact treated these local defense forces as "militia" forces equivalent to the state National Guards (*see* 10 U.S.C. § 101(11) (1970); 32 *id.* §§ 101(5), 326-33; D.C. CODE ANN. § 39-106 (1967)) and therefore subject only to the same system of military justice when not in federal service as the state militia forces. *See Militia Clause* 213; Shaw, *supra* note 123, at 61. On the other hand, this action may well be a distinction without a difference. When called into federal service, the District and territorial National Guards—like the National Guards of the states—are subject to the military penal law of the United States armed forces, the Uniform Code of Military Justice, 10 U.S.C. § 802(1) (1970). As to the National Guard of the District of Columbia, Congress has filled out the military justice scheme of the federal laws relating to militia not in federal service by also prescribing the UCMJ. D.C. CODE ANN. § 39-704 (1967). Consequently, whether in federal or local service, such National Guard forces are governed by precisely the same penal regulations.

<sup>265</sup> Quoted in *Hearings on H.R. 2498 Before a Special Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 780 (1949).

<sup>266</sup> *See Sherman, The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970).

court-martial has progressively provided many of the traditional safeguards of the civilian jury. To what extent significant contrasts between the court-martial and the jury endure and to what extent these contrasts are based upon true functional distinctions between the institutions remain open questions. It just may be, however, that General Sherman was wrong and that the military can indeed afford the luxury of that institution which Blackstone once described as the "palladium" of English liberties.<sup>267</sup>

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<sup>267</sup> 4 W. BLACKSTONE, COMMENTARIES \*349. *See also* 2 STORY 597; THE BASIC IDEAS OF ALEXANDER HAMILTON 364 (R. MORRIS ed. 1956).