OLD SOLDIERS NEVER DIE, THEY JUST JOIN THE COURT:
Prior Military Service and the Doctrine of Military Deference
on the Supreme Court

Presented to the
Department of Government
in partial fulfillment of the requirements
for the degree with honors
of Bachelor of Arts

Harvard College
March 2014
Table of Contents

Chapter 1: Goldman v. Weinberger: An Introduction ..................................... 1

Chapter 2: Deference to the Military, by the Military: A Background ................. 6
  Defining The Military Deference Doctrine
  Studying The Military Deference Doctrine
  Influencing the Judicial Mind
  The Veteran on the Bench

Chapter 3: The Special Case of Justice Frank Murphy: A Case Study ............... 25
  A Justice in Officer’s Clothing: An Introduction
  A Soldier of the Army and a Soldier of the Law: The Life of Frank Murphy
  Winning the War on the Field and at Home: The Opinions of Justice Murphy
  Old Soldiers Never Die: A Conclusion

Chapter 4: The Statistics of Deference and Prior Military Service ................. 49
  The Model
  The Data
  Results
  Discussion

Chapter 5: Justice John Paul Stevens from Blue to Black: A Case Study ........... 70
  Anchors Aweigh: An Introduction
  From Dress Blues to Black Robes: The Life of John Paul Stevens
  Not Yet Begun to Fight: The Opinions of Justice Stevens
  Honor, Courage, Commitment: A Conclusion

Chapter 6: Toth v. Quarles: A Conclusion ................................................. 92
  Findings
  Avenues for Future Research
  Final Thoughts

Bibliography ........................................................................................................... 97
Appendix A: Catalog of Deference Cases ............................................. 102
Appendix B: List of Justices Considered ............................................. 104
Appendix C: Results ........................................................................ 105
List of Figures

**Figure 1**: Justice Murphy Performing his Court Duties in the Barracks ……………… 31

**Figure 2**: Cross Tabulation of Prior Military Service and Deference ……………… 63

**Figure 3**: Logistic Regression of Prior Military Service on Deference ……………… 63

**Figure 4**: Linear Regression of Prior Military Service on Ideology ……………… 67

**Figure 5**: Potential Relationships between Service, Ideology, and Deference ……… 69
In 1986, Simcha Goldman appeared before the Supreme Court arguing that the federal government, by way of United States Air Force regulations, had violated his First Amendment right to free exercise of religion. After giving defense testimony during a court-martial, Goldman, a commissioned Air Force Officer and ordained rabbi, had been told that Air Force regulations prohibited his wearing a yarmulke indoors. Contending that this prohibition impeded his free exercise of religion, Goldman submitted to the Supreme Court a petition for the writ of certiorari, which was granted. In 1986, Justice William Rehnquist, a veteran of the United States Army Air Forces who had served in Europe during World War II, issued the majority opinion of the Court. Apparent in Rehnquist’s opinion is his familiarity with the military instrument, in particular that of the Air Force. With respect to the ends achieved by the regulation in question, Rehnquist writes, “The Air Force considers [uniforms] as vital during peacetime as during war, because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.” Using rhetoric of the supremacy of military necessity, the Court places great emphasis on the distinct needs of military versus civilian societies. It ultimately holds that “the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations.”

---

1 The regulation in question ordered that no headgear may be worn indoors "except by armed security police in the performance of their duties." Goldman v. Weinberger, 475 U.S. 503, 509 (1986).

2 Ibid., 508.

3 This, as will be explained in Chapter 2, amounts to the use of the military deference doctrine. This doctrine is employed when the Court decides that, by virtue of its special nature and essential function, the military deserves (or requires) special application of the law.

4 Ibid., 509.
without, allowed the military instrument and its needs more sway than the strictures of the Constitution by a 5-4 vote.

Visible in the similarity between the composition of the Court in Goldman and its outcome, this military deference case raises important questions of the relationship between the military and the Court by way of a unique set of intermediaries: Supreme Court justices with prior military experience. How does firsthand insight into the mechanics of the military apparatus impact the approach justices take toward the military when the issue of military deference is at hand? How do these justices view their current roles on the Court in relation to their prior roles on the battlefield? What does the military composition of the Court mean for both the present and the future of the doctrine of military deference?

These questions have been asked, but not answered. After conducting his extensive statistical analysis of the Supreme Court's application of the military deference doctrine, Steven Lichtman writes, “Later research will . . . place Justices' military case voting record within a biographical context, paying close attention to the military case voting records of the [men and women who] have sat on the Supreme Court while having previously served in the military.”6 Similarly, John O’Connor suggests looking into how the composition of Court has changed and how such change will affect the future development of the doctrine.7 Noting the ways in which the ideologies and preferences of certain justices have been influential in the doctrine’s development, O’Connor pays no mind to the impact of a justice’s status as a military veteran.8

5 Or, in the case of Justice Frank Murphy presented in the next chapter, simultaneous roles on the Court and in the military.


8 O’Connor even goes so far as to suggest that the doctrine of deference as applied today may be the “brainchild of Chief Justice Rehnquist,” Ibid., 703.
It is precisely this conspicuous void in research that this thesis aims to fill. While the doctrine of military deference, the impact of service in the military, and the process of judicial decision-making have all been studied in their own right, as detailed in Chapter 2, the overlap between the three has heretofore been academically neglected. This thesis aims to correct that neglect, illuminating, at the level of the individual justice, the relationship between prior military service and judicial behavior in military deference cases. Through a combination of both qualitative and quantitative analyses, I find that, contrary to intuition, justices with prior military service on the Stone through Roberts Courts tend to be less deferential in military deference cases than those without.

The next chapter provides the background and context necessary to understand the analyses performed in this thesis and their greater stakes. Following that, in Chapter 3, I introduce the first of two case studies included in this thesis, the role of which will be addressed in more detail in the next paragraph. In analyzing the background and behavior of Justice Frank Murphy, the only justice to have ever served simultaneously on the Court and in the military, this case sets the stage and provides the backdrop of what is to follow. Further, this thesis makes an important contribution in its analysis of Justice Murphy’s behavior in military deference cases, as no such study has yet been performed. Chapter 4, continuing the newly emergent trend launched by Steven Lichtman’s statistical analysis of the military deference doctrine, serves as the crux of this thesis. It investigates the impact of military service on the doctrine of military deference by the numbers. Quantitatively analyzing a catalog of 68 military deference cases and the corresponding voting record, which contains votes by 36 justices and 20 military veterans, I find that the justices on the Stone through Roberts Courts with prior military service tended to be less deferential toward the military than those without. This analysis also finds strong evidence for an association between military service and a more liberal judicial ideology, which is revealed to be a statistically significant predictor of deferential
voting behavior. It is possible that, as seen in the two case studies, it may be through impacting judicial ideology that military service influences deferential voting behavior.

As John O’Connor, a prominent military deference scholar, has noted, numbers alone are insufficient in studying the doctrine on the Court. Using simple statistics to reach conclusions about the military deference doctrine rather than investigating “how the Court explains the doctrine in its opinions,” he argues, “is a little like trying to determine what the weather is like outside by studying a weather almanac to see what the weather is usually like on the date in question instead of simply walking outside.”

It is this very difficulty that lends Chapters 3 and 5 their significance. More than just a stage-setting vignette, the case of Justice Frank Murphy serves to validate Chapter 4’s findings. Chapter 5, a similar analysis of the military history and judicial behavior of Justice John Paul Stevens, does the same. In both of these case studies, I analyze legal scholarship, other secondary sources, interviews, and, most importantly, the text of the military deference opinions written by the justices.

The dual cases of Justice Murphy and Justice Stevens provide windows into the judicial minds of two prominent military veterans on the Supreme Court at two very different moments in history. Murphy, who issued opinions in a number of cases involving the treatment of Japanese Americans after World War II, spent his time on the Court defending the same individual rights he defended on the battlefield. A former intelligence officer at Pearl Harbor, Justice Stevens exhibited a confidence in military matters that lent itself to a healthy skepticism of the military’s justifications of constitutional supercession. Both of these justices, one serving on the Court at the lower time bound of the data considered and the other standing as the final justice with prior active military service, trend toward less deferential treatment of the military, as predicted in Chapter 4. Chapter 6, in conclusion, explores the lessons to be learned from the

---

9 Ibid., 685-686.
deferential attitudes of these two justices in light of the findings in Chapter 4, reflecting also on the scope and implications of these lessons.
Chapter 2

Deference to the Military, by the Military: A Background

Military deference cases stand as an important area for study by virtue of the contention they present with the constitutional protections and guarantees that characterize American liberty. When our nation was founded, it was founded amidst an attitude of distrust in a permanent standing army, in part because of the perceived threat this army would pose to individual liberties. Addressing this in “Federalist No. 26,” Alexander Hamilton writes, “the people of America may be said to have derived an hereditary impression of danger to liberty, from standing armies in time of peace.”10 In his “Political Observations,” James Madison provides the following warning:

Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. . . . In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people.11

This warning, which has proven legitimate in select military deference cases is not one that the Court should be quick to forget.12 Studies, such as this thesis, that add dimension to the dilemma of balancing military deference with the Constitution have important ramifications in the protection of traditional American liberties.

Defining the Military Deference Doctrine

The doctrine of military deference, logically rooted in the separation of powers, is exemplified in the above mentioned case of Goldman v. Weinberger.13 Traditionally, the Supreme Court has afforded the United States military an unprecedented level of

---


12 A number of these cases will be addressed in the case studies in Chapters 3 and 5.

deference. In granting the military this unparalleled slack with regard to judicial review, the Court has cited four primary arguments: the separation of powers and Congress’s power to regulate the military, the Court as insufficiently competent with respect to military matters, military necessity and the demands of national security, and the military as a separate community. Requisite to any discussion of the application and tradition of the military deference doctrine is a comprehensive understanding of these four primary arguments.

In invoking the doctrine of military deference, the Supreme Court nearly always explicitly acknowledges the constitutionally granted power of Congress “[t]o 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.” In *United States v. O’Brien*, the Court declared, “The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.” Chief Justice Rehnquist, purportedly the father of the modern doctrine of military deference, explains in the majority opinion for *Rostker v. Goldberg*:

> We, of course, do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. . . . [J]udicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.


16 U.S. Constitution, Article I, Section 8, Clause 16.

17 *United States v. O’Brien*, 391 U.S. 367, 377 (1968). Here, military deference took the form of the Court’s declaring constitutional the act of jailing an anti-war protestor for burning his draft card.

Occasionally, this acknowledgement of constitutionally granted military powers is also 
applied to the role of president as commander-in-chief in regulating the armed forces. 
This is the case in *Loving v. United States*, in which Justice Kennedy, writing for the 
majority, declared, “We give Congress the highest deference in ordering military affairs. 
And it would be contrary to the respect owed the president as commander-in-chief to hold 
that he may not be given wide discretion and authority.”

Following logically from the rationale that Congress and the president were 
granted constitutional powers to lead and regulate the armed forces is the argument that 
the Supreme Court lacks the expertise to decide on military matters. This logic is 
epitomized in the majority opinion for *Gilligan v. Morgan*: “[I]t is difficult to conceive of 
an area of governmental activity in which the courts have less competence. The complex, 
subtle, and professional decisions as to the composition, training, equipping, and control 
of a military force are essentially professional military judgments . . .”

Recognizing 
that it is not a military body, the Court, in this selection often cited verbatim in military 
deferece cases, cedes to the expertise of the legislative and executive branches in the 
realm of military affairs. Justice Murphy, as will be shown in Chapter 3, employs this 
same rationale in his dissent in *Korematsu v. United States*. “[Military commanders’] 
judgments ought not to be overruled lightly by those whose training and duties ill-equip 
them to deal intelligently with matters so vital to the physical security of the nation.”

---

19 *Loving v. United States*, 517 U.S. 748, 768 (1996). In this case, the Court granted the president, 
as commander-in-chief, deference in declaring aggravating factors that allow for capital 
punishment in courts-martial.

20 *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). While this case, involving the Governor of Ohio’s 
employment of the National Guard in quelling a student demonstration, is not itself a military 
deferece case, this precise wording is often found in military deference opinions. Though the 
logic in this case was not originally connected to the doctrine of military deference, it has since 
been adopted as one of the doctrine’s most used arguments. See *Chappell v. Wallace*, 462 U.S. 

21 *Korematsu v. United States*, 323 U.S. 214, 234 (1944). Here, the Court showed the military 
deferece in agreeing that internment of Japanese American citizens was necessary to the war 
effort and therefore not unconstitutional in this case.
Chief Justice Earl Warren notes in a 1962 speech that in military deference cases, “the action in question is generally defended in the name of military necessity, or, to put it another way, in the name of national survival.”22 This necessity sometimes takes the form of the special needs of command and control within the military, such as in *Chappell v. Wallace*. “The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.”23 It is necessary to military effectiveness that the demands of battle are already ingrained in habit. Military necessity, however, also encompasses the need to optimize the efficacy of our nation’s protective national security instrument. In *Wayte v. United States*, Justice Powell notes that “[f]ew interests can be more compelling than a nation's need to ensure its own security. . . . Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.”24

Finally, in a variation on the military necessity argument, the Supreme Court often notes the unique nature of the military community in applying the doctrine of deference. The community and apparatus of the military is built on a foundation of strict order and obedience. This foundation, and the military it supports, is different enough from civilian society, the Court argues, to justify unique application of the Constitution within its ranks. This logic appears in the First Amendment case of *Parker v. Levy*, when the Court evokes its tradition of seeing the military as, “by necessity, a specialized society


23 *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). Application of the military deference doctrine in this case led to the holding that enlisted military personnel lack the right to sue their military superiors for alleged constitutional violations.

24 *Wayte v. United States*, 470 U.S. 598, 611-12 (1985). Military deference in this case took the form of the Court’s assertion that “passive enforcement” of draft registration laws did not violate the First and Fifth Amendments.
separate from civilian society.”25 The Court goes on to explain the origin of these differences, quoting its own opinion in *United States ex rel. Toth v. Quarles*: “[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.”26 Similarly, in *Schlesinger v. Councilman*, the majority opinion notes, “To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.”27

As expected, a few of the military deference cases the Court has decided lend legitimacy to the previously mentioned fear of the American Founders — the fear of a lasting armed forces threatening American liberty. In perhaps the most notorious military deference case, *Korematsu v. United States*, the needs of the military were found to be sufficient justification for internment based on racial heritage and neglect of the Constitution’s equal protection guarantees.28 Similarly, as noted above, the case of *Goldman v. Weinberger* led to the decision that the First Amendment does not apply in

25 Parker v. Levy, 417 U.S. 733, 743 (1974). This landmark First Amendment case involved the military deference doctrine in its upholding of the conviction of an Army doctor who not only criticized American involvement in Vietnam, but also urged soldiers to refuse orders to deploy to Vietnam, himself refusing orders to train special forces soldiers.


27 Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). This case on the jurisdiction of military courts employed the military deference doctrine in finding that federal courts should refrain from involvement in the military criminal process until all military appeals options have been exhausted.

28 *Korematsu, supra*. Mentioned briefly above, this case involved the refusal of Fred Korematsu, a Japanese American living in California, to leave his home and report to a Japanese internment camp, pursuant to the Army’s Civilian Exclusion Order No. 34. This order demanded that all Japanese American citizens residing in the area in which Korematsu lived report to assembly centers until they were sent to more permanent relocation centers. This order, Korematsu contended before the Supreme Court, violated the Fifth Amendment, as it denied Japanese American citizens their due process guarantees. The Court, however, bowed to the military’s claims that such a denial of due process was necessary to the war effort and accordingly ruled that Exclusion Order No. 34 was constitutional. The infamy of this case stems from its obvious racial implications. In declaring the orders of the Army’s Civilian Exclusion Order No. 34 constitutional, the Court, in effect, declared discrimination based on race constitutional. Even more disturbing, it declared the denial of constitutional protections based on race constitutional.
the military context as it does in the ordinary, civilian context.\textsuperscript{29} Cases such as these demonstrate the very real danger to traditional American liberties posed by the doctrine of deference to the military.

Conversely, undue judicial interference in military matters and judgments could impede the training and regulating of an effective fighting force, putting our nation and the liberties it embodies at risk. It is this balance between the protection of liberties and the needs of national security that lies at the core of the military deference doctrine. This doctrine has existed for decades and is still influencing judicial behavior today, in an era “some scholars call an age of ‘endless war.’”\textsuperscript{30} An understanding of the mechanisms and intricacies involved in military deference cases, therefore, is essential to our understanding of the role and practices of the Supreme Court in American government and national security.

**Studying the Military Deference Doctrine**

As is the case with many, if not all, matters of constitutional supersession, the Court’s application of the military deference doctrine has been the subject of intense debate both within the Court and among legal scholars. Before delving into this debate and its content, I will highlight its two most prominent voices within the context of this thesis: Steven Lichtman and John O’Connor. Both rising to prominence around the turn of the turn of the twenty-first century, Lichtman and O’Connor, unlike most scholars on the military deference doctrine who discuss it from a normative perspective, address this controversial tradition of the Court from a positive standpoint.\textsuperscript{31} Steven Lichtman, author of a groundbreaking statistical analysis of the military deference doctrine, stands as

\textsuperscript{29} Goldman, supra.


\textsuperscript{31} “Normative” analysis involves value-based statements and opinions in making recommendations on how things should be. “Positive” analysis, on the other hand, involves purely facts in its attempt to describe things as they are.
perhaps the most influential contributor to this discussion. Examining the doctrine from both legal and statistical standpoints, the contributions of Steven Lichtman, though insightful and inspirational in the conception of this thesis, prove controversial. The most vocal critic of Lichtman is John O’Connor, equally renowned in the field of military deference. In addition to his note on the merits and shortcomings of Lichtman’s groundbreaking study, O’Connor has authored the most detailed history of the military deference doctrine to date. Although just two participants in the academic discussion on the military deference doctrine, Lichtman and O’Connor stand as its foremost pioneers, and, in this exploration of the military deference doctrine, as its guides. Their contrasting methods — statistical analysis and case content analysis, respectively — serve as inspirations for this thesis and its multi-faceted approach to the military deference doctrine.

Though considered an established tradition and practice of the Court, the constitutional legitimacy of the military deference doctrine is far from uncontested. Some scholars view the practice as a tool by which Congress is able to “use claims of military necessity – whether rational or irrational – as a means of resistance to evolving constitutional expectation.” An example of such resistance oft cited in recent literature is the military’s former “Don’t Ask, Don’t Tell” policy. One view expressed in the legal scholarship is that, contrary to the military’s claims of necessity, “military deference does not require that courts permit discrimination which violates the rights of lesbians and gay

32 See Lichtman, “Justices and Generals.”


34 This policy, which was repealed on September 20, 2001, was instituted under the Clinton Administration and amounted to the military’s official policy toward gay, lesbian, and bisexual service members in the armed forces. In an attempted solution to the problem of discrimination based on sexual orientation in the military, which many would argue backfired, the “Don’t Ask, Don’t Tell” policy prohibited this discrimination and its accompanying harassment toward gay, lesbian, and bisexual service members, but also prohibited those same service members from openly discussing their sexual orientations lest they be discharged from the service.
men to constitutional equal protection.” In this respect, some contend that the Court is failing in its duty to uphold the Constitution. Still others draw a crucial distinction between a separate community in wartime and a separate community in peacetime, seeing the latter as an insufficient justification for constitutional deference. There also exists another civic republican argument against the doctrine, which “accepts that the armed forces constitute a ‘separate sphere’ unlike any other institution” while, channeling the aforementioned fears of the American Founders, cautioning the Court to be “particularly skeptical of military decisions precisely because of the military’s unique characteristics.”

In the last two decades, research into the origins and application of this doctrine of deference to the military has increased dramatically. This upswing in research corresponds with the professionalization of the military, as well as with dramatic changes in the nature of warfare. In light of these changes in both the military and its purpose, new legal questions are arising within the context of the military, drawing attention to the manner in which the Court deals with such questions. In a comprehensive study on the origins of the doctrine published in 2000, John O’Connor outlines the history and


36 Henriksen, “Gays, Military, and Deference,” 1306.


39 The professionalization of the military will be discussed in greater detail shortly; For more on changes in the nature of warfare, see Jonathan Mallory House, Toward Combined Arms Warfare: A Survey of 20th-Century Tactics, Doctrine, and Organization (Darby, PA: Diane Publishing, 1984), 187-188. “Since 1945, the atomic bomb has called into question the entire role of land combat and has certainly made massing on the World War II model quite dangerous. . . . [The U.S. Army] faced challenges not only from nuclear warfare, but also from insurgencies and a variety of other conflicts around the world. The necessity to fight any war any place in time with only a handful of divisions places a tremendous burden on American doctrine and organization, a burden rarely understood by America’s allies or even the general public. . . . [M]ajor armies have tended to integrate more and more arms and services at progressively lower levels of organization, in order to combine different capabilities of mobility, protection, and firepower while posing more complicated threats to enemy units.”
development of the tradition of military deference as consisting of three distinct phases. The noninterference phase, during which the Court generally stayed out of military matters entirely and focused only on matters of jurisdiction, lasted until the mid-1950s. From the 1950s to the 1960s, during the time of the much more skeptical Warren Court, martial jurisdiction was interpreted very narrowly as the Court increased its scrutiny of military activities. Since that time, according to O’Connor, the Court has been less skeptical and come to embrace the doctrine of military deference as we know it today. Colonel Darrell L. Peck serves as a precursor to this study, having published another history of the military deference doctrine in 1975. In his study, Peck analyzes the history and development of the doctrine not only chronologically, but also in terms of subject matter. This study would serve as future inspiration for one of the most foundational studies of military deference, which also serves as the basis for this thesis.

Following Peck’s example 31 years later, Steven Lichtman performed in 2006 what is to date the most comprehensive empirical study of the military deference doctrine. Deviating from the norm of organizing and analyzing decisions by date, like Peck had done previously, Lichtman groups cases according to the specific issues involved and ultimately finds this a much more useful method of studying the intricacies of the Court’s deferential trends. What further differentiates Lichtman’s study of the doctrine of deference from Peck’s, however, is that it is statistical in nature. Rather than

---

40 This study came just four years after, in 1996, the Court in *Loving v. United States* addressed the question of the president’s powers to regulate courts-martial involving capital punishment. *Supra.* Further, just four years after this study, the Court in *Hamdi v. Rumsfeld* addressed the rights of detainees at the newly opened Guantanamo Bay. 542 U.S. 507 (2004). The case of *Rasul v. Bush,* decided in the same year as *Hamdi,* dealt with similar previously unheard questions of the rights of military detainees, given the changed nature of warfare. 542 U.S. 466 (2004).


43 In this case, Lichtman follows Peck’s example so far as to give his study the same title, “The Justices and the Generals.” Published six years after O’Connor’s history, this study followed by just two years the aforementioned cases of *Hamdi* and *Rasul,* both of which dealt with the uniquely contemporary issue of military enemy detainees, both American and foreign. *Supra; supra.*
examining the language of the cases, Lichtman analyzes the win/loss record of the military in all military cases. His findings indicate that “the military stands the most risk of Supreme Court defeat when the question at bar can be boiled down to the following core: *Does the military have authority over this person?*”44 Couched in terms of deference, Lichtman finds that the Court was least deferential in cases in which the question of military jurisdiction and sovereignty was involved.

Lichtman’s study stands as the catalyst for an important and emergent practice in military deference scholarship: the analysis of the doctrine through statistics. Prior to this study, the doctrine has been analyzed in a “purely chronological fashion” and exclusively by content.45 Lichtman, breaking from this tradition, uses a subject-specific approach that relies heavily on statistics, rather than purely case analysis, in drawing its conclusions. In this thesis, I take the same, relatively new, approach to the military deference doctrine.

John O’Connor provides a critical response to Lichtman’s research, in which he takes issue with a number of perceived flaws in Lichtman’s methods of analysis. The primary target of O’Connor’s criticism is the method used by Lichtman in analyzing the doctrine. A mere statistical analysis of “wins” and “losses,” O’Connor argues, fails to consider the source from which the doctrine originates: the logic and arguments of the cases themselves. Were he to examine this logic, according to O’Connor, Lichtman would realize that his catalog contains primarily cases in which the doctrine of deference was not at all considered.46 A statistical analysis akin to Lichtman’s has yet to be conducted using cases in which the language of the opinions invokes or actively chooses

---

44 Lichtman, “Justices and Generals,” 939. Chapter 4 provides a more detailed and insightful account of Lichtman’s definition of a military case and the implications this definition has for the results of his study.


not to invoke the doctrine of military deference. This thesis aims to conduct such an analysis, using a narrower catalog of strictly military deference cases.

**Influencing the Judicial Mind**

While they illuminate much on the trends of overall usage of the doctrine of military deference by the Supreme Court, studies like those of Lichtman and O'Connor pay little attention to one of the most important characteristics of the Court: its ever-rotating composition of nine individual justices. Each new justice brings with him or her to the Court new experiences and modes of thinking, which in turn affect his or her voting behavior and contributions to the trends of the Court as a whole. The life experiences of individual justices, including pre-judicial careers, “can undoubtedly help to shape judicial attitudes, policy preferences, strategic thinking, and intended audiences.”

Noting this influence of a prior military career on the judicial mind, an investigation into the demonstrated impacts of military service in a more general sense, both on and outside the Supreme Court, will elucidate the more specific mechanisms through which military service may impact justices in military deference cases.

While not focusing specifically on military deference, Sisk, Heise, and Morriss investigate the influence of prior military service, among other biographical traits, on the behavior of Supreme Court justices, finding military service statistically significant in decision-making in only certain types of cases. Sisk, Heise, and Morriss postulate that this may be a display of recognition by former soldiers of direct orders. They also

---


48 Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning," *New York University Law Review* 73 (1998): 1479, HeinOnline. Their analysis indicates that the prior military service variable was insignificant when cases were merely divided in terms of constitutional ruling but strongly correlated with justices’ resistance to realigning the Sentencing Commission, a body of the federal government, with another branch of the government, as requested by the Department of Justice.
believe it may indicate that justices who have served in the military have a unique view on the role of the executive.\textsuperscript{49}

Also informing this investigation of military deference is research that lies outside of the strictly Supreme Court-centric scholarship, specifically that research that has been performed on the psychological and ideological effects of military service. It is these effects that justices with prior military service would carry with them to the Court, allowing them the potential to impact the judicial mind. Looking into the realm of political influence, Jeremy Teigen, in a 2006 study, finds that veterans vote at a higher turnout rate than nonveterans do.\textsuperscript{50} Also looking into the political influence of the military, a 1977 study finds modest evidence of attitudinal and political differences between veterans and nonveterans. Of particular note is the contention that “as individuals progress through the life cycle they typically encounter a number of experiences which may either reinforce or alter pre-existing values,” values that may actually “constrain the potential impact which even a ‘total’ institution such as the military might have.”\textsuperscript{51} This point is important to bear in mind as this thesis investigates this very same impact in the specific realm of judicial behavior in military deference cases.

In terms of ideology, a number of studies were performed in the middle of the twentieth century to gauge the lasting effects of military service. A 1955 study examines the relationship between military service and the “authoritarian personality” in the short term. Finding that the authoritarian personality does, to an extent, correlate with military service, the researchers find no evidence that those with authoritarian personalities prior

\textsuperscript{49} Ibid.

\textsuperscript{50} Jeremy M. Teigen, “Enduring Effects of the Uniform: Previous Military Experience and Voting Turnout,” \textit{Political Research Quarterly} 59.4 (2006): 604, SagePub. Teigen qualifies his findings by pointing out that this trend is not so apparent among veterans of the Vietnam War, none of which have ever served on the Supreme Court.

\textsuperscript{51} M. Kent Jennings and Gregory B. Markus, “The Effect of Military Service on Political Attitudes: A Panel Study,” \textit{The American Political Science Review} 71.1 (1977): 131 and 147, JSTOR.
to service are more likely than those without to opt to serve in the military. The researchers also note that certain aspects of the authoritarian personality, most notably attitudes toward authority, are more significantly correlated than others.62 Two years later, another study examined the relationship between military service and authoritarianism in the long term, finding that authoritarianism and attitudes toward superiors decrease with increased length of military service. The study discusses the protection available through the military justice system, established pursuant to Congress’s regulatory powers, to soldiers against these superiors and figures of authority. Specifically addressing the nature of military law, it notes, “A rational legalistic bureaucracy offers protection against arbitrary exploitation of authority as well as machinery for the enforcement of legally constituted decisions. The bulk of military law designed to protect subordinates against the arbitrary use of power is probably as voluminous as the law insuring obedience to command.”63 Service members, in other words, though they respect the orders of their superiors, do not view these superiors with unquestioning and unremitting deference.

These ideological studies are important in answering the question of the impact of military service on judicial behavior given the widely accepted attitudinal model of judicial decision-making.64 By this model, it is not the text of the law, the tradition of the law, or the authority of precedent that serves as justices’ guiding factor in deciding cases. Rather, it is the views and ideological preferences of each justice that determine which way he or she will vote in each case. These personal preferences guide justices in

---

62 Elizabeth G. French and Raymond R. Ernest, "The Relation Between Authoritarianism and Acceptance of Military Ideology," *Journal of Personality* 24.2 (1955): 188, Wiley Online Library. Other aspects of the “authoritarian personality” that this study found to be statistically significant include conventionalism and “hardheadedness.”

63 Donald T. Campbell and Thelma H. McCormack, "Military Experience and Attitudes Toward Authority," *American Journal of Sociology* (1957): 489, JSTOR.

64 For further discussion of the attitudinal model of judicial decision-making, see Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK: Cambridge University Press, 2002).
interpreting and applying the law and therefore determine the way a justice will behave on the bench. Given that a Supreme Court justice's life experiences, which in many cases includes prior military service, seem to explain justices’ values and priorities, it is the attitudinal model that aligns most closely with this thesis in its exploration of judicial decision-making.\(^{55}\)

In the interest of placing this thesis within its greater context of the discussion on judicial decision-making, there are a couple of other models worth noting. Standing in contrast to the attitudinal model, the legal model of judicial decision-making contends that it is the strict letter of the law, not personal values and preferences, that guides Supreme Court justices in their decisions.\(^{56}\) One could see military service playing a role in this model as well, as firsthand experience with the military may color a justice’s interpretation of law as it relates to the military. Other scholars emphasize the role of legal precedent in the behavior of Supreme Court justices.\(^{57}\) Alternatively, the rational choice model holds that justices are rational actors who are able to order their preferences and, as such, choose the alternative that would bring them the greatest satisfaction.\(^{58}\) The incidence of military service may also play a role in the interpretation of judicial decision-making through this model, as identification with the military could reasonably influence the preferences of justices in military deference cases.

With these models in mind, scholars have noted a number of factors with demonstrated influence on judicial behavior on the Supreme Court, many of which are

---

\(^{55}\) Smith, “Stevens and Prisoners’ Rights,” 84.


\(^{58}\) For more on the rational choice model, see Segal and Spaeth’s discussion, which follows their discussion of the attitudinal model, in The Supreme Court and the Attitudinal Model Revisited, supra. One factor that may play into justices’ rational choice is their concern for their judicial and public reputations. See Thomas J. Miceli and Metin M. Cogol, "Reputation and Judicial Decision-Making," *Journal of Economic Behavior & Organization* 23.1 (1994): 31-51, ScienceDirect.
considered in this thesis’s statistical analysis in Chapter 4. One such factor is the amount of time a justice has served on the bench. After Hagle in 1993 found evidence for an acclimation effect in judicial behavior, Hurwitz and Stefko in 2004 find that justices who serve longer on the bench are more likely to vote preferentially as opposed to adhering to established precedent.\(^{59}\) In the previously mentioned study by Sisk, Heise, and Morriss, a number of factors are investigated as potential influences on the judicial mind, among which are an elite law school education, prior employment, ideology, American Bar Association rating, caseload, and promotion potential.\(^{60}\) Further, Giles, Blackstone, and Vining in 2008 find that public opinion may impact judicial preferences, thereby influencing voting behavior on the bench.\(^{61}\) A 1991 study investigates social factors on judicial preferences and behavior, among which agricultural origins, southern origins, father’s service as a government official, and judicial experience are found to be impactful.\(^{62}\) This study is meant to further investigate the findings of Ulmer’s 1970 study of whether a justice’s propensity to dissent is related to his or her social background.\(^{63}\) In short, many factors have been purported to influence the decision processes of Supreme Court justices, among which prior military service, the factor on which this thesis focuses, is just one.

Though just a single factor, military service stands as a very important factor to consider. Especially for Supreme Court justices serving the nation through their legal


\[\text{\footnotesize\(^{60}\) Sisk, Heise, and Morriss, "Charting the Influences," 1377-1500.}\]


work and thought, the experience of serving one’s nation by defending it in the armed services is a characteristic of interest. One aspect of military service that lends it uniqueness is that factors that serve to limit other influences on the judicial mind, such as institution of legal education and place of residence, do not preclude American citizens from military service. Additionally, military service necessarily comes before a justice’s behavior on the bench. Because of this, the problem of strict endogeneity is avoided.64 Further, the occurrence of prior military service is measured very easily and clearly with little room for discrepancy. These distinguishing qualities of prior military service make it a rich characteristic for analysis in the context of judicial decision-making.

Also adding relevance to this discussion of the impact of military service in contemporary society is the recent professionalization of the military. Samuel Huntington, premiere theorist in the field of civil-military relations, writes in his seminal work, *The Soldier and the State*, “[Whereas p]rior to the Civil War no significant professional military institutions existed in the United States,” “[t]he modern officer corps is a professional body and the modern military officer a professional man.”65 This professionalism largely occurred in the early twentieth century, when, after being isolated from civilian society following the end of the Civil War, the military officer “rejoined civilian society in World War I and World War II, . . . a fundamentally different creature” from the citizen soldier who had been isolated in the first place.66 The now professional serviceman returned to civilian society, “a stranger in his own household,” as “years of isolation had remade him into a professional with values and outlook” vastly different from his civilian peers.67 This professionalization of the American military, which

---

64 Non-random assignment, however, remains a problem.


occurred prior to the scope of this study, transformed military experience from secondary obligation into career, or rather into lifestyle; the citizen-soldier became purely soldier. As it professionalized in isolation from civilian society, the military built its own, as the Court refers to it, separate military society, which is still existent today.\(^ {68} \) The emergence of this uniquely military lifestyle in the twentieth century lends a “unique cast to the modern problem of civil-military relations,” the very problem addressed in this thesis on the level of the individual Supreme Court justice.\(^ {69} \)

This thesis adds color to the contemporary picture of the judicial mind through its analysis, both quantitative and qualitative, of prior military service on the Court and its investigation of the judicial decision-making process, specifically in military deference cases. But analysis of military service on the Supreme Court will also hint at more generalizable effects of service in the armed forces. An experience shared by millions of diverse Americans, military service serves as a beneficial avenue of analysis in bettering our understanding of the greater American population. The analysis of the relationship between prior military service and deference to the military on the Supreme Court offered in this thesis, then, would reveal much about both the judicial decision-making process and the nature and impact of service in the military.

**The Veteran on the Bench**

This thesis is one of the few forays into the relationship between prior military service and judicial behavior in military deference cases, the only to include both qualitative and quantitative analyses. Of the 112 justices who have served on Supreme Court, 39 have served in the military in some capacity. For the purpose of this thesis, I define military service as service in any of the Army, Navy, Air Force, National Guard, and Army Reserve. The frequency with which justices who have served in the military

\(^{68} \) Still today, soldiers live on gated bases, their families buy groceries at commissaries, their children attend schools run by the Department of Defense, and they have their teeth examined by military dentists.

\(^{69} \) Huntington, *Soldier and the State*, 7.
are appointed to the bench has increased dramatically in the last half-century. Between 1851 and 1880, just 14.3% of justices appointed to the court had served in the military, all in the Army. Since 1953, however, nearly half (48%) of the justices on the Court have served in the military. One-third of the contemporary Supreme Court — Justices Alito, Kennedy, and Breyer — has served in the military.

In terms of the ways in which this extensive connection manifests itself on the bench, in the words of legal scholar Diane Marie Amann in reference to the Supreme Court: “While military service is formative, it does not set everyone on the same path.” Justice John Paul Stevens, as noted in Chapter 5, told the Chicago Bar Association that an incident he witnessed during his time in the Navy in World War II had impacted his views on capital punishment. On the other hand, scholars have also noted that “Civil War duty led Justice Holmes to esteem conflict and abhor human rights. More recently, justices who had served in uniform divided on whether the Constitution forbids criminal punishment for burning the American flag.” This thesis explores Amann’s “paths,” looking closely for parallels or patterns among them as they cut through the field of military deference.

Linking Supreme Court traditions with the military composition of the bench, the findings of this thesis have important implications on our understanding of the consequences of Supreme Court nominations. Today, for the first time in nearly 80 years, the Supreme Court is devoid of wartime military experience. What does this mean for

---


72 Ibid., 1583.

73 Ibid., 1598.

74 Cohen, "None of the Justices;" Though current Justices Alito, Breyer, and Kennedy have military experience, none of them have seen combat.
the future of the military deference doctrine, or the future of American justice in general?
As this thesis shows, prior military service is an important characteristic to consider when
filling future vacancies on the Supreme Court.

Just think for a moment about what a [combat] perspective at the Court might
have offered the terror-law debate over the past decade. And just think of how
cloistered the current Court is today. . . . The Court still needs more diversity in
many ways, but none more so than diversity of background and experience.75

In a time when the Supreme Court lacks any active military service experience, this
thesis’s investigation into the implications of this absence is particularly salient. That
investigation begins in the next chapter with a case study on Justice Frank Murphy, the
living epitome of the overlap between military service and the Supreme Court.

75 Cohen, "None of the Justices."
Chapter 3

The Special Case of Justice Frank Murphy: A Case Study

A Justice in Officer’s Clothing: An Introduction

On a hot summer day in 1942, a field telephone hanging on the side of a tree at Fort Benning, Georgia rang announcing the arrival of a call from the Supreme Court of the United States for Lieutenant Colonel Frank Murphy. Lieutenant Colonel Murphy, then undergoing training exercises with the United States Army, was being summoned to the Court for a special session. A military tribunal to prosecute eight Nazi saboteurs had convened at the Department of Justice, pursuant to the orders of Commander-in-Chief Roosevelt. The Supreme Court, meeting during its summer recess to rule on the validity of this tribunal, demanded the participation of Lieutenant Colonel Murphy in making this decision, but not in his capacity as a military officer. Rather, the role he was to play in this special session of the Court could be derived from another office he held simultaneously: the office of Supreme Court justice.

Justice Frank Murphy arrived in Washington, D.C. at the end of July, the only Supreme Court justice to have ever simultaneously acted as soldier and justice. Before the case of Ex Parte Quirin officially began, the Supreme Court assembled for an informal hearing. While walking into the Supreme Court building that morning, Justice Murphy wore not the uniform of a Supreme Court justice, but rather the uniform of a Lieutenant Colonel in the United States Army Reserve. Upon catching a glimpse of Justice Murphy, a number of the other justices on the Court began to whisper questions of image and propriety. Justice Felix Frankfurter, himself a veteran of the First World War, expressed misgivings about having an officer of the United States Army Reserve hear a case in which the legitimacy of a military body was being called into question. Attuned

---


to the attitudes that existed among his fellow justices regarding the propriety of him hearing the case, Justice Murphy made the difficult decision to recuse himself. In the words of Murphy’s clerk, “it would not look too well for the Court if he participated in an appeal from a military tribunal,” and the last thing Justice Murphy wanted was for “a breath of criticism [to] be leveled at the Court.”

Murphy’s sartorial statement “served but to dramatize the peculiar status of the Michigan jurist.” The very image of a uniformed lieutenant colonel in the United States Army Reserve sitting alongside the robed figures of eight Supreme Court justices captures the very essence of the simultaneous services Justice Murphy was performing for the United States government. Seeing this clear image, the question on the collective mind of the American populace was, “However temporary, were the armed services or the civilian government well served by Supreme Court Justices . . . mixing their functions with war? . . . Did [Justice Murphy’s] war fever mean that he would permit the Constitution, like himself, to go to war?” As Justice Murphy would soon demonstrate, however, the answer was no.

This chapter contains an analysis of Justice Murphy’s background and opinions in military deference cases, the first of its kind. It ultimately finds that, despite his two stints with the United States Army, Justice Murphy’s time with the military did not cause him to deviate from his devotion to constitutional values and the Bill of Rights in military deference cases. Rather, the opposite seemed to ring true in his opinions. Justice Murphy, having developed a high opinion and deep respect for the American military and its commanders, held that military to the highest constitutional and moral standards. He was willing to accept nothing less than the exhibition of superior “physical strength of

---


self-defense and the moral strength of unflinching devotion to our own ideals” from what he saw as the finest fighting force in the world.\textsuperscript{81} Justice Murphy, a widely reputed champion of individual rights, relentlessly defended these rights from the dangers of wartime logic and rhetoric. In his eyes, the service and sacrifices of members of the armed forces would be in vain if the rights they were fighting to preserve were violated. Ultimately, I find that military service, far from instilling in Justice Frank Murphy a deferential attitude toward the military, instead served to bolster his relentless defense of the Constitution and individual rights from attacks at the hands of “the wishes and desires of the military.”\textsuperscript{82}

Justice Murphy provides what is perhaps the most compelling case for analysis in this study. Most notably, Justice Murphy is the only justice to have served in the military while on the bench. Not only was the military a part of his life prior to his tenure on the Court, but it was also a part of his tenure as it was happening. This simultaneous service provides the most immediate link between service and deference on the Court to date. Additionally, in his time on the Supreme Court, Justice Frank Murphy decided a number of military deference cases. Murphy, a natural activist, was rarely content in these cases to merely vote with the majority or sign onto a dissenting opinion. Rather, he himself penned a number of concurrences and dissents in which his experience in the military and the impacts it had on his non-deferential attitude toward the armed forces shine through in a variety of ways. Justice Murphy spared no harsh words in these military deference opinions, which were very critical of — and often fiery toward — the military instrument.\textsuperscript{83}

\textsuperscript{81} Frank Murphy, "In Defense of Democracy," \textit{International Conciliation} 20 (1940): 190, HeinOnline.

\textsuperscript{82} Duncan v. Kahanamoku, 327 U.S. 304, 332 (1946).

\textsuperscript{83} Even in cases when Justice Murphy opted to concur rather than dissent, in order to more closely align with the rest of the Court, he would issue concurrences full of much of the fiery and strong rhetoric contained in the original dissent he drafted.
At least in part, this clarity of opinion stems from the fact that traces of Justice Murphy’s service can be uncovered in his opinions through various recurring themes. In virtually all of Murphy’s opinions, he writes with an insider’s understanding and knowledge of the realities of the military, in terms of both tactics and lifestyle. His opinions also reflect a trust in government institutions performing their duties properly and efficiently. Further, Murphy nearly always evokes the rhetoric of the American tradition and its ideals in discussing the functions and costs of war. Noting these high costs, as soldiers who face them often do, Murphy also writes of a thirst for peace and the end of war. These themes, among others, run as common threads through the numerous special opinions Justice Murphy authored in military deference cases while on the Supreme Court. With these themes in mind, remembering that he represents the most direct link between military service and service on the bench to date, Justice Frank Murphy stands as the natural starting point in this chapter’s exploration of that very link.

**A Soldier of the Army and a Soldier of the Law: The Life of Frank Murphy**

Francis William Murphy was born in Sand Beach, Michigan on April 13, 1890 to John F. and Mary Brennan Murphy. Drawn to the law like his father, who was also a lawyer, Frank attended the University of Michigan Law School, receiving his Bachelor of Arts in 1912 and Bachelor of Laws in 1914. Murphy’s education would continue later when, on an Army fellowship, he would study the law at Lincoln’s Inn in London and Trinity College in Dublin. Immediately after leaving the University of Michigan, however, Frank Murphy found employment as a clerk in the law firm of Monaghan & Monaghan in Detroit.84

It was at this point that the First World War erupted in Europe. Murphy, feeling the strong pull of patriotic service, volunteered to join the United States Army. “Shortly after the outbreak of hostilities in 1917, he entered officer candidate school at Ft.

---

84 It was here that Murphy developed an interest in politics. Howard, *Mr. Justice Murphy*, 5-15.
Sheridan, Illinois, where he was commissioned as a first lieutenant in the infantry.”

To Murphy, war was a time for not only him, but also for all Americans to serve and protect the American ideals that he held so dear. Although he deployed to France and was soon thereafter promoted to captain in the 39th Infantry in July of 1918, the onset of armistice preempted Murphy’s participation in combat. It was at this time that Murphy took advantage of the Army’s resources to further his legal education, as noted previously. Twenty-four years before he would appear in uniform at the Supreme Court for the hearing of *Ex Parte Quirin*, Frank Murphy was already acting simultaneously as both a soldier of the military and a soldier of the law.

When he returned home from the war, Murphy was appointed as First Assistant United States Attorney for the Eastern District of Michigan. He later served for seven years on Detroit’s criminal court before moving on to become the city’s mayor. President Roosevelt, impressed with Murphy’s service as Mayor of Detroit, appointed him the Governor-General of the Philippines from 1933 to 1935. Upon his return from the Philippines, Murphy was elected Governor of Michigan. After just one term, Murphy left to assume the office of Attorney General of the United States. Murphy served in this capacity for just one year before he was again called upon by President Roosevelt to take up the mantle of a new federal position. Justice Frank Murphy took his seat on the

---

85 Ibid., 14.

86 Ibid.

87 Murphy never recovered from his time in the Philippines. While there, he not only acknowledged his role as a champion for the rights of the underdog, the very same reputation he would win for himself on the Supreme Court, but he also developed an “appreciation of his country’s idealist tradition in international affairs, which came to imbue his thought with a companion notion that the United States was ‘the only hope of civilization.’” Ibid., 116-17.

88 During his single term in office, Murphy employed the National Guard to protect the striking United Automobile Workers from the police during a strike that had turned violent, again mixing the military with his government functions. Richard Bak, "(Frank) Murphy's Law," *Hour Detroit*, September 2008, http://library.menloschool.org/content.php?pid=262726&sid=2235252.
Supreme Court on February 5, 1940, just two days after the first German plane of World War II was shot down over England.89

Justice Murphy, acutely aware of the uncertain future the world was facing, joined the Court at a time when a somber recognition of the gravity of the situation abroad hung over the United States. In a letter to a friend, he writes:

I am a judge, and judges do not have to concern themselves primarily with matters of national defense and foreign affairs. But I am a believer in democracy, also, and it is an impossible thing not to be distressed and sick at heart at the awful news that comes from abroad. It is hard to keep from wondering if the question now is not merely who will win in Europe, but whether there will remain in this world a society where courts of justice as we know them are necessary.90

Filled with patriotism and a desire to serve, Justice Frank Murphy longed to involve himself in the patriotic and selfless “adventure,” as he termed it, of war.91

Justice Murphy’s longing came to a head following the Japanese sneak attack on Pearl Harbor on December 7, 1941.92 After contributing roughly a year to the government’s propaganda efforts, in 1942 Justice Murphy took a decisive step toward more direct involvement in the war: he asked General George C. Marshall if he could serve in the United States Army once again. General Marshall responded with concerns about Murphy’s age, but this did not deter Murphy. Rather, Murphy relentlessly persisted in his pleas until General Marshall finally agreed to allow him to undergo training as a lieutenant colonel in the Army Reserve during the Court’s recess that coming summer.93

On June 8, 1942, Justice Murphy took an unprecedented step in the history of the Supreme Court when he became the first acting justice to accept a commission from and

89 Howard, Mr. Justice Murphy, 231.


91 See Howard, Mr. Justice Murphy, 14.

92 Within days, Murphy penned a letter to the Army Reserve offering his services to the war effort. Ultimately, however, Murphy chose not to send the letter, but not because of a lack of desire to serve. Fine, "Murphy in World War II," 93-95.

93 Howard, Mr. Justice Murphy, 273.
undergo training with the military. America curiously watched the aged justice training alongside young soldiers at Fort Benning, Georgia. Extensive press coverage — as sampled in Figure 1, which is taken from a news broadcast on Murphy’s simultaneous service — “pictured a 52-year-old judge zestfully driving tanks and shooting machine guns on maneuvers, sweating in bivouac, reading certiorari petitions in his barracks, and issuing rousing declarations calculated to inspire confidence in a fight.” Murphy sought uniformity with his new peers not only in duties and training maneuvers, but also in lifestyle. Turning down accommodations in the comfortable Officers’ Club, Murphy instead opted to reside in the barracks. His room resembled that of every other soldier, distinguishable only by the name on the door and the desk that had been installed so Murphy could perform his duties as a justice of the Supreme Court in the evening. Murphy, proud of his ability to rough standard Army conditions and thrilled to be wearing the uniform again, fancied himself once again one of the boys. “I am a field

---

94 Image of Murphy working at his desk from A Montage Shows Frank Murphy, a Supreme Court Justice, Performing Duties in the Military, 1942, BBC Motion Gallery, <http://www.bbcmotiongallery.com/gallery/clip/913116_004.do>; Howard, Mr. Justice Murphy, 274.

95 Fine, ”Murphy in World War II,” 98.
soldier, and I am not immodest when I tell you I stood up under the drive and the sleepless nights better than the young officers.”

Much like his appearance at the Court for Quirin, Murphy’s training in the summer of 1942 was met with varied responses. Many praised his patriotism and devotion to service, citing him as an inspiration. It was unusual for a high government official to leave his elite office for the Army life, which is anything but glamorous. To many, this illustrated the romantic fact that the United States Army is an army of the people and for the people, a universal force composed of soldiers from all walks of life. Others, however, expressed trepidation over the involvement of a high government official in military affairs. On the one hand, legality seemed to preclude it. Legislation existed preventing an officer of the federal government from simultaneously holding two federal offices, in Murphy’s case justice of the Supreme Court and officer in the United States Army. This issue, however, did not escape Justice Murphy’s consideration. In order to sidestep this legislation, Murphy was placed on inactive status rather than serving on active duty. This cost Murphy pay, travel allowance, and the ability to command, but it afforded him the opportunity he so deeply desired. Even outside of the legal considerations, Murphy’s service was criticized for its implications. Chief Justice Stone, whom Murphy had not informed of his plans, wondered if justices should be going to war rather than performing strictly their judicial duties. Americans wondered what it meant to have a justice of the country’s highest judicial body involved in the executive institution of the United States Army.

The impact of Murphy’s military service is undeniable. Most obviously, his hunger to participate in military wartime efforts was insatiable. Even after the summer of


98 Ibid., 96.

99 Howard, Mr. Justice Murphy, 276.
1942, Murphy felt the need to serve his country in the military still more, but medical problems before the Court’s recess in 1943 prevented it. In terms of habits and mannerisms, “as a civil administrator Murphy had impulses for discipline operations which irritated officials unaccustomed to limitations on personal telephone calls or to punctuality.” Murphy’s time in the service also gave him an opportunity to engage his devotion to individual and civil rights, taking every opportunity available to preach to his fellow service members about equality and other foundational American ideals. In the words of Murphy’s biographer, “Because war sharpened his libertarian premises and emotional force, on the one hand, he manifested a new willingness to take isolated positions and to evangelize the libertarian faith.”

These dual qualities of isolation and libertarianism are characteristic of Murphy’s general legal philosophy and career. He is remembered, in a tribute published after his death, as an “automatic defender of the underdog,” who “consistently, and with effective prose, sought to establish or to reinforce in American law basic constitutional principles of human freedom, and basic principles of social justice.” The legacy of Justice Frank Murphy, according to another postmortem tribute, is one of a “soft-spoken, hard-hitting humanitarian, with an abiding faith in democracy.” Frank Murphy, according to a third tribute, “was affected with a deep passion for the freedom of the individual, and . . . possessed an acute sensitivity in his solicitude for the legal rights of unpopular minorities.” A federal judge remembered of Murphy after his death, “If he thought a

---

100 Fine, “Murphy in World War II,” 102.
101 Howard, Mr. Justice Murphy, 14.
102 Ibid., 278.
person was losing any of his civil rights, Frank Murphy fought vigorously for him, no matter how painful the sting of public opinion.”\textsuperscript{106} Often, this sting was quite sharp. In the eyes of his critics, Justice Murphy was an incompetent judge who decided cases based not on legal principle and precedent, but rather on his own philosophy and agenda. He relied not just on the “arid instruments of precedent and logic,” but instead injected into his rulings bits of his own moral and patriotic codes.\textsuperscript{107} As he had been with respect to the military, Justice Murphy was a man of action when it came to the protection of civil liberties. No institution was immune to Murphy’s crusade for the rights of the individual, least of all the United States military.

Perhaps the most prominent effect of Murphy’s service was the profound respect he developed for the military and those who commanded it.\textsuperscript{108} While serving, Murphy “not only formed an extraordinarily high opinion of the Army and its commanders but also concluded that military leadership was more conscious of what was required to win the war.”\textsuperscript{109} One may intuitively expect Murphy’s favor toward the military to lend itself to a more deferential jurisprudence in military deference cases. However, as this chapter explains, this was not the case. Given this respect for the military and glorification of service therein, Murphy held the military to exceptionally high constitutional standards. He was willing to accept from it nothing less than the most steadfast devotion to American ideals. The curtailment of constitutionally guaranteed rights, even in wartime, fell short of devotion to the ideals and traditions of America. As such, Murphy would not hesitate to call into question the excuses of “necessity” commanders used to justify what he saw as improper and unconstitutional behavior. In Murphy’s words, “I do not believe

\textsuperscript{106} Duffy, “In Memoriam,” 87.

\textsuperscript{107} Scanlan, “Passing of Murphy,” 14.

\textsuperscript{108} Chapter 5 explains that Justice John Paul Stevens, a veteran of the United States Navy, exhibits this same respect.

\textsuperscript{109} Fine, "Murphy in World War II," 99.
that a democracy must necessarily become something other than a democracy in order to protect its national interests.”

Hand in hand with Murphy’s respect for the military is a demonstrated trust in the systems and institutions of the American government. Murphy believed that government institutions, many in which he had participated, could be left to properly perform their intended functions. In his speech “In Defense of Democracy,” Murphy reassures the American public that “[the delicate business of combating espionage] should be done and will be done by responsible employees of the Federal Government, acting in cooperation with the duly constituted law-enforcing agencies of State and local governments. . . . Enforcement officials will themselves obey the law of the land.”

In line with this trust and respect, it is possible that Justice Murphy’s time in the Army “played a part in establishing his strong conviction concerning the supremacy of the civil authority over the military.” The military, Murphy often argued, cannot be allowed to run amuck, making a mockery of the Constitution in the face of a too deferential Court. Rather, the civilian legal system must place upon the military the same standards of constitutional adherence.

From Murphy’s respect of the military institution itself was also born a respect for the sacrifices and ultimate functions of the armed forces. Since the beginning of the American experiment, soldiers had died to protect American liberties and values. “They fought to gain civil liberty, confident that those who followed, seeing its pricelessness, would never let it go. It is for us,” Murphy writes, “to prove ourselves worthy of that trust.” It was the military, as Murphy saw it, which served as the guardian of democracy and freedom. If individual rights and liberties, the liberties being defended by

---

110 Murphy, "Defense of Democracy," 187.

111 Ibid., 188.

112 Scanlan, “Passing of Murphy,” 8.

113 Murphy, "Defense of Democracy," 196.
the military, were curtailed in wartime, then the sacrifices of soldiers would have been made in vain. Murphy expected the American military to not only demonstrate its value as the world’s supreme fighting force, but also to relentlessly adhere to its nation’s supreme moral and democratic ideals. It was to this adherence that Justice Murphy, in his time on the Supreme Court, so actively sought to hold the military accountable, as shown in the following analysis of Justice Murphy’s five most illustrative military deference opinions: his concurrences in *Hirabayashi v. United States* and *Duncan v. Kahanamoku* and his dissents in *Korematsu v. United States*, *In re Yamashita*, and *Wade v. Hunter*.114

**Winning the War on the Field and at Home: The Opinions of Justice Murphy**

The first of the military deference cases that Justice Murphy encountered, having recused himself in the case of *Ex Parte Quirin*, was the notorious *Hirabayashi v. United States*, one of the many cases involving the wartime treatment of Japanese American citizens in which Justice Murphy penned an opinion. In this case, Gordon K. Hirabayashi, a University of Washington Student, was arrested and charged with violating curfew and relocation orders. These orders were given pursuant to the executive order of February 19, 1942, which was enacted by President Roosevelt in the wake of the attack on Pearl Harbor. Hirabayashi appealed his case on Fifth Amendment grounds, claiming that the executive order, in effect, discriminated against Japanese American citizens, denying them their constitutionally guaranteed due process of law. The majority of the Court, in an opinion written by Chief Justice Stone, disagrees:

Where, as they did here, the conditions call for the exercise of judgement and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgement for theirs.115

Despite the racial bounds of the curfew, which applied solely to Japanese American citizens, the executive order was necessitated by the nation being at war. The Court

---

114 These five opinions, of the seven special opinions Justice Murphy wrote in military deference cases, deal most directly with the doctrine of military deference.

deferred to the judgment of the military and government authorities that it would be impractical and detrimental to the war effort were those disloyal Japanese American citizens identified and dealt with individually.

Originally written to be a dissenting opinion, Justice Murphy’s concurring opinion in this case stands as a fiery condemnation of the arguably unwarranted deference afforded the military and its regulating powers by the majority of the Court. Acknowledging that certain exceptional situations do warrant curtailment of constitutional rights, reluctantly conforming with the Court in identifying this case as one such situation, Justice Murphy vehemently reminds the Court of the bounds of deference to the military. “We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold.”\textsuperscript{116} Concluding the opinion, Justice Murphy emphatically warns readers not to read into his opinion “that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens.”\textsuperscript{117} Deference to the military, in other words, is not boundless; war is not a blank check for the violation of constitutional rights, as the Court later states in \textit{Hamdi v. Rumsfeld}.\textsuperscript{118} The military, as the defender of freedom, must also be held accountable to protecting that freedom on the home front, and where they do not, it is the duty of the Court to intercede.

This idea of defending on the Court what is being defended on the battlefield is peppered throughout Murphy’s concurrence. On the issue of racism, one of Murphy’s primary causes throughout his career on the bench, he notes an inconsistency between Roosevelt’s policy and the military cause. “Distinctions based on color and ancestry are

\textsuperscript{116} Ibid., 110.
\textsuperscript{117} Ibid., 113.
utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war.”¹¹⁹ Racial distinctions, as Murphy would echo time and time again, are unquestionably un-American and unconstitutional. Before adding clauses to the effect of “except in this particular emergency situation” before or after each such proclamation, Murphy’s original dissenting opinion contained wording that equated these racial distinctions with losing the war:

[It would] avail us little to win the war on the battlefield and lose it at home. We do not win the war, on the contrary we lose it, if in the process of achieving military victory we destroy the constitutional safeguards and the best traditions of our country. What we want to do is win it on the field and also win it at home.¹²⁰ Using the rhetoric of military victory, Justice Murphy places constitutional defense within the realm of military duties. The very capable American military, in Murphy’s opinion, is charged with protecting not only the American homeland, but also its values.

This is not the only instance of military rhetoric in Murphy’s opinion. In the concurrence that he ultimately issued, Murphy uses language that borders on military jargon. He addresses the state of wartime technology and the tactical specifics of defensive operations in determining the extent to which this situation is exceptional. “Because of the damage wrought by the Japanese at Pearl Harbor and the availability of new weapons and new techniques with greater capacity for speed and deception in offensive operations, the immediate possibility of an attempt at invasion somewhere along the Pacific Coast had to be reckoned with.”¹²¹ Considering the implications and dangers of new technology, Murphy thus implies an understanding of such technologies and their uses. His mention of defensive operations similarly betrays an understanding of the tactics of such operations. Justice Murphy, in his opinion, not only writes with an

¹¹⁹ Hirabayashi, supra, 113.

¹²⁰ Frank Murphy, “It will avail us little . . .” in “Mr. Justice Murphy and the Hirabayashi Case,” by Sidney Fine, Pacific Historical Review 33.2 (May, 1964): 204, JSTOR.

¹²¹ Hirabayashi, supra, 112.
insider’s understanding of the military, but also factors this insider understanding into his judicial ruling.

The following year, in what is remembered as one of his finest opinions, Justice Murphy issued a powerful but succinct condemnation of unwarranted military deference in the case of Korematsu v. United States. This case, another questioning the constitutionality of the treatment of Japanese American citizens during World War II, is remembered as one of the darkest in the Court’s history. After the Army ordered the relocation of Japanese American citizens to certain relocation camps, pursuant to the same executive order that underlay the curfew at issue in Hirabayashi, Fred Korematsu refused to leave his home. Like Hirabayashi, he was subsequently arrested, charged with violating the Army’s orders, and appealed his case on Fifth Amendment grounds.

After granting certiorari and hearing the case, the Supreme Court, in a 6-3 decision, once again deferred to the military. Again accepting the military’s argument for necessity due to the logistical nightmare that would result from dealing with disloyal Japanese Americans individually, the Court distinguished between malicious acts of racism and “justified” acts of racism:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, . . . because [the military authorities] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this.¹²²

Justice Murphy saw the Court’s deference to the military as misplaced.¹²³ The reasons offered by the military in defense of their inexcusable orders were based not on military expertise, but rather on falsehoods. “Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn drawn

¹²³ Howard, “Mr. Justice Murphy,” 335.
from an unwarranted use of circumstantial evidence.” The military, Murphy argues, should stick to doing what the military does. Were that the case here, Justice Murphy writes, he would have been more willing to defer. Instead, relying on his understanding of what makes a judgment a specifically military, Murphy exploits his knowledge of military command in proclaiming the arguments cited by the military authorities decidedly un-military.

Murphy, again in this dissent, outlines his very restrictive conception of military deference:

We must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. . . . Their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

Despite this allowable deference, “the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.” Careful not to apply “too high” a standard of review, Justice Murphy nonetheless finds the actions of the military in this case unrelated to protection of the nation and constitutionally despicable. “Racial discrimination,” as Justice Murphy would echo time and time again, “in any form and in any degree has no justifiable part whatever in our democratic way of life.” Murphy, as a justice of the Court, executed his role as a defender of liberty and the American tradition. The military, once more, was held to a comparably high standard of constitutional adherence by one of its own veterans.

Also characteristic of Justice Murphy is the trust in bodies of the federal government apparent in his Korematsu dissent. Murphy expresses a faith in the intelligence efforts of the American government in wartime. “There was no adequate

124 Korematsu, supra, 236-237.
125 Ibid., 233-234.
126 Ibid., 234.
127 Ibid., 242.
proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period.  

In refusing to turn to these bodies for aid in identifying disloyal citizens, the military jumped the gun and refused to exhaust the available resources. The military orders in question in \textit{Korematsu}, according to Justice Murphy, were undeniably unnecessary in light of the competent government bodies that were performing their duties at the time.

A couple of years later, the Supreme Court decided another case in which it restricted the deference it was willing to afford the military and its commanding authorities. With the Court’s decision in \textit{Duncan v. Kahanamoku}, it was plain that “the deference of \textit{Korematsu} was over. More discriminating review of military trials, for American civilians at least, was on the way.”

In \textit{Duncan}, the Court decided on the jurisdiction of military tribunals operating under the Hawaiian Organic Act, and the martial law it established, in Hawaii prior to its being awarded statehood. Duncan, arrested by military police officer Kahanamoku during World War II, was charged and tried for public intoxication by a military tribunal. Upon appeal, the Supreme Court decided that the tribunal that had convened to hear Duncan’s case was unconstitutional:

\begin{quote}
Military tribunals have no such standing. . . . We believe that, when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law," it had in mind and did not wish to exceed the boundaries between military and civilian power in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions.
\end{quote}

Not content with merely signing onto the majority opinion, which dealt primarily with the act itself and Congress’s motivations and intentions for its passage, Justice Murphy opted to pen yet another concurring opinion in which he tackles the arguments cited by the military in defense of the military tribunals. The rhetoric of wartime 

\footnote{128 \textit{Ibid.}, 241.}

\footnote{129 Howard, “Mr. Justice Murphy,” 379.}

\footnote{130 \textit{Duncan, supra}, 324.}
sacrifice and bloodshed colors Murphy’s concurrence, which also discusses military subservience to civil rule. “[Those who founded this nation] shed their blood to win independence from a ruler who they alleged was attempting to render the ‘Military independent of and superior to the Civil power.’ . . . This supremacy of the civil over the military is one of our great heritages.”\textsuperscript{131} Just as in his prior opinions in military deference cases, Murphy’s concurrence in \textit{Duncan} employs the rhetoric of the American tradition and the defense of rights by the sacrifice of soldiers.

What also distinguishes Justice Murphy’s dissent is the bleak warning he offers against the dangers of militarism:

There is a very necessary part in our national life for the military; it has defended this country well in its darkest hours of trial. But militarism is not our way of life. . . . We must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties.\textsuperscript{132}

In offering this warning, Murphy displays none of the bright-eyed fondness that he had expressed so readily at the onset of the war. Rather, his opinion in \textit{Duncan} seems to betray a more jaded and cynical view of military power. After years of watching the military attempt to destroy the individual rights Murphy had devoted his life to defending, with both the sword and the pen, he seems to have come to a grim conclusion. America, at this point, has won the war. No longer are the fears of potential American defeat, present in \textit{Hirabayashi} and \textit{Korematsu}, weighing on Justice Murphy’s mind. Rather, his new concern becomes how America will handle its victory. Speaking from what he had seen while on the bench, Murphy seems to be warning the America of the future to make sure to continue doing what he had so relentlessly been doing on the bench: holding the military accountable to the Constitution of the United States and not allowing it to abuse its influence.

\textsuperscript{131} \textit{Ibid.}, 325.

\textsuperscript{132} \textit{Ibid.}, 335.
In denying the military deference in this case, Justice Murphy answers individually the justifications offered by the military in defense of the tribunals, expertly dispelling each one. He discounts the threat of invasion, danger of delay in judicial proceedings, lack of jurisdiction of civilian courts, and interruption in the wartime efforts of potential jurors as insufficient reason to deny the people rights. Painting the military as petulant, Murphy writes of the fear of political influence, “This is merely a military criticism of the proposition that in this nation the military is subordinate to the civil authority. It does not qualify as a recognizable reason for closing the civil courts to criminal cases.”133 Again tackling the issue of racism, which stood at the fore of the political stage at the time, Murphy remarks, “Racism has no place whatever in our civilization.”134 It is while throwing out the military’s argument of the threat to military authority posed by other judicial configurations that Murphy captures in a single sentence the essence of his attitude toward military deference. “Constitutional rights are rooted deeper than the wishes and desires of the military.”135 The case of *Duncan v. Kahananoku* did little to “dispel the belief that on the subject of war power, Justice Murphy had become a militant antimilitarist.”136

Justice Murphy’s newly apparent near antimilitarism, heightened since the American victory in the war, is similarly apparent in the later case of *In re Yamashita*. In this case, General Tomoyuki Yamashita challenged the military commission that had charged him with violating the laws of war by failing to adequately command his troops as they committed acts of violence and brutality. The Supreme Court, after hearing the case, ruled that not only was the military commission constitutionally legitimate and within its jurisdictional bounds in trying General Yamashita after the end of hostilities,

133 Ibid., 332.
134 Ibid., 334.
135 Ibid., 332.
136 Howard, *Mr. Justice Murphy*, 378.
but also that General Yamashita was legitimately tried for failing in his duty “as an army commander to control the operations of members of his command by 'permitting them to commit' the extensive and widespread atrocities.”\textsuperscript{137} In light of this ruling and that of the military commission, General Yamashita was later hanged.

Justice Murphy did not passively stand by as the life of General Yamashita was in jeopardy. Rather, he authored a dissenting opinion, similar to his opinion in \textit{Duncan}, in which he expressed his dismay at the post-war behavior of the American military and the “unadulterated legal lynching” executed by the opinion of the majority of his fellow justices.\textsuperscript{138} For Murphy, “[t]he question was not what Japanese generals had done, but how Americans were trying them; not how the Japanese military might have treated Americans in victory, but how far the American military would descend to that level.”\textsuperscript{139}

Further, this case for Murphy has great implications in the radical post-war American political climate. Murphy, the champion of the individual, found these racist implications to be entirely unacceptable. The strong and moral American military that Murphy lauded as the finest in the world was engaging in behavior that not only disregarded individual rights, but also threatened them. The American military, in Murphy’s eyes, was acting as the unethical victor oppressing the defeated.

In expressing his profound disappointment with the military, Murphy called upon all of his usual lines of reasoning. Once more noting the sacrifices made in wartime to secure the protection of individual rights, Murphy declares the behavior of the American military unbefitting of an institution born of the American tradition. “In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind.”\textsuperscript{140} He notes the danger this

\textsuperscript{137} \textit{In re Yamashita}, 327 U.S. 1, 14 (1946).
\textsuperscript{138} Frank, “Murphy: Goals Attempted,” 13.
\textsuperscript{139} Howard, “Mr. Justice Murphy,” 373.
\textsuperscript{140} \textit{Yamashita}, supra, 28.
behavior posed to the peace he, like his fellow soldiers who risked their lives to attain it, desired, for it “only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.”\textsuperscript{141} Considering these dangers and the need to protect against them, Justice Murphy yet again defends the role of the Court in reviewing such cases, proclaiming, “Judicial inquiry into these matters may proceed within its proper sphere.”\textsuperscript{142} Someone, after all, must keep the military in check, and protect the rights of the individual, for “not even the mightiest army in the world, can ever destroy [the immutable rights of the individual]. . . . They cannot be ignored by any branch of the government, even the military, except under the most extreme and urgent circumstances.”\textsuperscript{143}

Also underlying much of Justice Murphy’s dissent in \textit{Yamashita} is the logic of intimate familiarity with and understanding of the military reality.\textsuperscript{144} This comes largely in the form of sympathy for service members. Speaking directly to the situation of General Yamashita, Murphy acknowledges, “He was the leader of an army under constant and devastating attacks by a superior reinvading force.”\textsuperscript{145} Further developing his sympathetic view, Murphy takes note of the plight of the commander, having once been a military commander himself. Determining one’s duty as a commander, Murphy writes, is not simple. “Duties, as well as ability to control troops, vary according to the nature and intensity of a particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations.”\textsuperscript{146} To expect the commander to perform these calculations amidst the fog of war is placing upon him a huge burden. It is not just the commander who is awarded Justice Murphy’s sympathy, however. Rather,

\textsuperscript{141} \textit{Ibid.}, 29.
\textsuperscript{142} \textit{Ibid.}, 30.
\textsuperscript{143} \textit{Ibid.}, 26-27.
\textsuperscript{144} \textit{Ibid.}, 35.
\textsuperscript{145} \textit{Ibid.}, 37.
\textsuperscript{146} \textit{Ibid.}, 35.
Murphy also acknowledges the hardships faced by the average soldier with respect to the writ of *habeas corpus*, employing a looser standard of review than is used in civilian cases in which defendants do not face such barriers. Those in military custody lack the access to the judiciary enjoyed by ordinary criminals; “consequently the judicial review available by *habeas corpus* must be wider than usual in order that proper standards of justice may be enforceable.”

Justice Murphy displays a similar sympathy to the reality of the soldier in his succinct dissent in *Wade v. Hunter*, the final military deference case he heard before his death later that year. This case involved a petitioner’s contention that his right against double jeopardy had been violated when, after having been charged by one court-martial and having the charges withdrawn, the charges were transmitted, and he was tried by another court-martial. After the majority of the Court deferentially ruled that “courts should not attempt to review [the commander’s] on the spot decision that the tactical situation required transfer of the charges,” Justice Murphy urged his readers to think about the soldier.  

In the only dissenting opinion in this case, Justice Murphy disagrees vehemently. “With this reading of the Constitution, I cannot agree.” Rather than thinking of the commander and what is expedient to him as the enemy advances, Murphy is concerned with the underdog: the accused soldier:

The harassment to the defendant from being repeatedly tried is not less because the army is advancing. The guarantee of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions. The command of the Fifth Amendment does not allow temporizing with the basic rights it declares. Adaptations of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution.

---

147 Ibid., 31.


149 Ibid., 694.

150 Ibid.
While willing to offer the military commander a certain degree of deference and respect, this degree falls short of full-blown constitutional deference. Claims of efficiency and effectiveness cannot justify a commander’s harassment of his soldiers, especially when it comes in the form of constitutional violation. Military necessity, according to Murphy’s understanding of the military command and justice systems, did not necessitate this abridgment of constitutional guarantees. Looking out for the lowly soldier, Murphy yet again holds the military to the highest standard of constitutional compliance in his relentless crusade for individual rights.

Old Soldiers Never Die: A Conclusion

As Justice Frank Murphy expressed in a letter to a friend, “A soldier is trained for action and for him action never ceases. In a sense we have never put our uniforms away.”¹⁵¹ For Justice Murphy, the only justice to have ever worn the uniform while also on the Supreme Court, this was especially true. There is no doubt that Justice Murphy, having spent multiple years in United States Army, developed a deep and profound respect for the armed services and their commanders, but respect is not a blank check. Respect carries with it a burden of responsibility. For Justice Murphy, and as Chapter 5 later shows is also the case for Justice John Paul Stevens, this burden came in the form of the highest moral and constitutional standards for the military. He expected only the finest behavior from the finest military in the world. With regard to military deference, Justice Murphy saw “a double standard of the Bill of Rights [as] an anachronism in this democratic day.”¹⁵² The loss of individual rights at home, as well as on bases around the world, amounted to the loss of the war abroad. Justice Murphy was unwilling to blindly accept the military’s cry of “necessity.” Rather, he displayed an intimate familiarity with the military lifestyle and institution in the many opinions in which he called this claim into question, instead offering his own judgments on the needs and realities of the


¹⁵² Scanlan, “Passing of Murphy,” 29.
military. Just as Justice Frank Murphy devoted years of his life to fighting for individual rights and liberties in war, so too did he devote the years he spent on the Court to fighting for these same rights. As the famous military saying goes, “Old soldiers never die.” In the special case of Justice Frank Murphy, he just joined the Supreme Court.
Chapter 4

The Statistics of Deference and Prior Military Service

The Model

Setting the stage for the analysis to come, Justice Frank Murphy in Chapter 3 presents a qualitative case of a non-deferential Supreme Court justice with prior military service. What he had seen and experienced during both the First and Second World Wars reinforced his commitment to steadfast constitutional defense. Not merely important, but indispensable to the perpetuation of American liberties, the military, to Justice Murphy, had no business destroying the very liberties it sought to protect. But what do the numbers have to say about the jurisprudence of Justice Murphy? How does his behavior align with the behavior of his fellow justices with prior military service? This chapter uses statistical analysis to show that the case of Justice Frank Murphy does not stand alone, but rather is part of a broader trend in the relationship between military service and military deference on the level of the individual Supreme Court justice.

Given the exceptional nature of the insight offered through military service, a claim often cited in the Court’s deferential decisions and addressed in Chapter 2, one would expect military service to shape the justices’ approach to the military when it comes before the Court in military deference cases. Especially in light of the fairly recent professionalization of the American military, also detailed in Chapter 2, one would expect justices who are also veterans of the military to harbor attitudes and perspectives distinct from those of justices who are lifelong civilians. As Eugene Fidell notes in his study of Justice John Paul Stevens’s treatment of the military before the Court:

Those who have served in uniform can attest that military service is a vivid experience. This holds true even if one did not see action in combat and even if one’s period of service was brief. Indeed, lawyers who served in World War II recall details of cases tried a lifetime ago.

---


It is undeniable that military service leaves its mark, which is why it is not merely plausible but rather probable that prior military service impacts the way veteran justices treat the institution of the military in deciding cases.

To test whether justices with prior military experience are more or less likely to defer to military authorities, I conduct an analysis of the voting behavior of justices in military deference cases. I seek to find a statistically significant trend in the way justices with prior military service vote in cases that involve the doctrine of military deference, specifically whether or not the opinions they author or join tend to defer to military judgments and necessity. An analysis of this behavior versus that of justices with no service experience will shed light on the relationship between prior military service and military deference on the United States Supreme Court. I model the probability of a deferential vote in the following form:

$$\Pr(v_i = D) = f(\alpha + \beta_{\text{service}} x_i)$$

Where

$$f(t) = \frac{1}{1 + e^{-t}}$$

This model, where $f$ is the logistic function, represents the probability that a justice’s vote ($v_i$) will be deferential (D) based on the incidence of prior military service ($x_i$). I then pose the following hypotheses to test the significance of $\beta_{\text{service}}$:

$$H_0: \beta_{\text{service}} = 0$$

$$H_1: \beta_{\text{service}} \neq 0$$

In other words, this thesis expects to find an association between prior military experience and judicial voting behavior in military deference cases. This is my two-sided hypothesis test. But in what way is this association seen? Does prior military experience make justices more likely or less likely to defer to the military?
One could make the case that $\beta_{\text{service}}$ should be positive, implying that military service increases the likelihood of a justice deferring to the military in military deference cases. This intuitively stems from the insight and loyalty to the military carried by its former members. Soldiers have firsthand insight into that institution of duty and discipline that is the last line of defense between our nation and its enemies. They know exactly what it takes to command the troops and the problems an intervening legal body could pose in the execution of orders crucial to our national security. Further, the lifelong commitment to patriotism and loyalty to the service that justices with prior military experience have demonstrated in their opinions may seem to point to their favoring this institution that they so deeply admire and respect. This, too, would indicate that soldiers with prior military experience may be more likely to allow the military more constitutional latitude than would those justices without this sense of personal loyalty to the military.

However, as we are warned by legal Scholar Christopher Smith, “It also is possible that a justice's judicial performance is, in effect, counterintuitive when viewed in light of the presumptive values and policy priorities that might have emerged from a particular set of life experiences.”\textsuperscript{155} Indeed, a far more convincing case exists for the argument that $\beta_{\text{service}}$ should be negative, indicating that justices who have served in our nation’s armed forces are less likely to defer to the military in military deference cases. Eugene Fidell notes this exactly in his study of military deference in the case of Justice John Paul Stevens, discussed at length in Chapter 5. “Counterintuitive though it may seem, judges with real military experience may be less likely to defer, at least around the edges, than those with none.”\textsuperscript{156}

One reason for this may be the professional confidence of justices with firsthand experience in the military in deciding military deference cases, which often involve


\textsuperscript{156} Fidell, “Stevens and Judicial Deference,” 1018.
somewhat specialized military knowledge. As exemplified in Chapter 2’s study of Justice Frank Murphy, a sense of understanding and familiarity with the military apparatus may cause those justices with prior military experience to feel better qualified to question the judgments of military commanders and policymakers. Those justices without military experience, on the other hand, boast no such bank of military knowledge to use in challenging the decisions of military authorities and those who regulate them.

Justices (and judges generally) without active military experience may be (or may feel, which can amount to the same thing) at a disadvantage when dealing with cases that involve military matters, even though they seem utterly lacking in fear when it comes to tackling equally (or more) arcane or inaccessible areas of the law. Phrases like “deference . . . is at its apogee” or “separate society” come to mind.  

Further, one may expect that, rather than leading a justice to defer to the military out of loyalty, the profound respect justices with military experience have exhibited actually fosters in them an expectation for sterling behavior from the American armed forces. Believing the military to be a great institution that embodies and defends traditional American values and liberties, anything short of this in the regulation of that body is unacceptable. In the words of Justice Frank Murphy, as quoted in Chapter 3, unconstitutional and immoral behavior on the part of the military “is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind.”  

The military, by this reasoning, is all the more obligated to uphold the Constitution it is defending on the battlefield.

Considering this feeling of loyalty to and familiarity with the military, I propose another hypothesis. Despite the feelings of respect for and loyalty to the armed forces that that veteran justices have exhibited, I expect justices with prior military service to be more likely to curb the military’s governing authorities and defer to them less. In other words, I hypothesize that the justices with prior military service experience considered in

---

157 Ibid.

158 Murphy is here speaking about the military tribunal that was convened to try Japanese General Yamashita in In re Yamashita, 327 U.S. 1, 28 (1946).
this analysis will prove less likely to defer to the military than those justices with no firsthand military experience. I focus specifically on the subset of the two-sided test such that I arrive at the following one-sided hypothesis test:

\[ H_0: \beta_{\text{service}} = 0 \]
\[ H_1: \beta_{\text{service}} < 0 \]

The Data

In order to construct a catalog of cases for analysis, I turned to Lichtman’s 2006 catalog of 178 military cases heard by the Supreme Court between 1918 and 2004.\(^{159}\) As defined by Lichtman:

A case was identified as a military case if any one of two factors were present: (1) questions of military policy or procedure were before the Court or (2) the military was present as a party to the litigation in some sort of official capacity. In other words, a soldier accused of murdering a civilian does not satisfy the military-as-party requirement, but a military tribunal attempting to try Nazi saboteurs most definitely does.\(^{160}\)

To this catalog I then added the cases not mentioned in Lichtman’s catalog of military cases but outlined or cited in other prominent studies on the military deference doctrine, such as those by O’Connor. I also added cases decided since 2004, the cut-off point of Lichtman’s catalog, that involve military policy or the military as party to the litigation. This master list of cases involving the military served as my jumping-off point. As noted by O’Connor in his response to Lichtman’s study, “the military deference doctrine has no application in the vast majority of the ‘military’ cases that come before the Court.”\(^{161}\) As I am interested only in the Court’s tradition of deferring to the military pursuant to this doctrine and its reasoning, I cut from the master list all cases that were not deference cases.


\(^{160}\) \textit{Ibid.}, 912.

Before deciding which cases can truly be considered deference cases, however, the definition of what constitutes a “deference case” must be determined. Scholars in the field offer an array of definitions. Steven Lichtman explains the Court’s tradition in saying, “While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny.”

In his criticism of Lichtman’s analysis, O’Connor argues that “the Court's military deference jurisprudence recognizes that constitutional rights appropriately may apply differently in the military context than in civilian society as a whole.” In other words, only those cases in which the Court weighs the needs of the military against the guarantees of the Constitution have the potential to be decided by the doctrine of military deference. Other scholars refer to the military deference doctrine as a “dilemma of reconciling our constitutional aspirations toward civil liberty with the demands of military need,” a recognition “that the military necessity for order and discipline may outweigh the need for constitutional safeguards for service members.”

A number of elements run as common threads through these varying explanations of the military deference doctrine. First, a tension between constitutional guarantees and the needs of the military is highlighted. With regard to this tension, it is the duty of the Supreme Court to decide which of the two forces is stronger: the longstanding constitutional guarantees backed by American tradition and history or the military instrument that protects and defends our nation so that those guarantees may continue to exist. The Supreme Court, acknowledging the military as a separate society constitutionally placed under the control of the political branches, accepts its non-expert

status in the realm of military affairs and bows to the determinations of Congress and the
president in ruling and regulating the armed forces. In short, and as per the doctrine’s
name, the Court defers to the military’s powers that be. A case in which this occurs, in
which the needs of the military and the constitutional powers of the political branches
with regard to the military are deemed worthy of deference over the individual and civil
liberties protected by the Constitution, is a case in which the Court grants deference. To
say that a case involves the doctrine of deference, however, is not to say that the Court
ultimately defers. Rather, the Court may also choose to reject the opportunities to apply
the doctrine as presented in these cases. As such, a military deference case can be
identified by a few common elements:

(1) the weighing of military need against constitutional liberties and
 protections, as contained in the Constitution;

(2) a questioning of the special nature and unique place of the military in
 American society; and

(3) a consideration of the unique application of the law in the military context
due to the military’s critical role and special needs.

These are the requirements I sought in narrowing the catalog of military and related cases
to a catalog containing solely deference cases. I analyzed the text of the opinion of the
Court in each case in the master catalog and include only those cases in which the above
mentioned requirements appear in my data set. In meeting these requirements, the
Court may invoke any number of the various deference rationales, as outlined in Chapter

165 This determination was conducted by reading in full the opinion of the Court in each of the
nearly 200 cases in the master list. If the rationale of deference was explicitly mentioned in the
Court’s opinion, I included it as a deference case. I did not, for any of the cases, assume the
military deference doctrine was used or considered without explicit indicators in the text of the
opinion. In short, the three requirements identified above had to be met, though the Court could
have used a number of arguments to meet them. These arguments include mention of a separate
society, military necessity, the military powers of Congress and the president, the Court being ill-
equipped to decide on military matters, or any of the other commonly used rationales for the
military deference doctrine. Often, in conjunction with military necessity, the military’s unique
need for uniformity and discipline is cited. The rhetoric of national security, also in conjunction
with the argument of necessity, appears frequently in deference cases, as well.
1: the Militia Clauses, the Court’s non-expertise, military necessity, and the separate military community.

That a case was identified as a military deference case does not mean that the Court necessarily deferred to the military in its judgment. In most instances, the Court did determine that the needs and importance of the military necessitated that the rights of the individual be curtailed.\footnote{An example is the First Amendment case of \textit{Parker v. Levy}, when the Court decided that “the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” 417 U.S. 733, 758 (1974). See also the case of \textit{Burns v. Wilson}, wherein the Court explained that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.” 346 U.S. 137, 140 (1953). An additional example can be found in the Court’s argument in \textit{Whelchel v. McDonald} that “[t]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.” 340 U.S. 122, 127 (1950).}

These cases were coded as deferential and comprise 73.5% of the final catalog of deference cases. In other cases, however, the Court determined that the military’s claims of necessity were ill-founded or illegitimate and that civil and individual liberties must be protected at all costs.\footnote{One such case is the Guantanamo Bay military commission case of \textit{Hamdan v. Rumsfeld}, where the majority opinion, when addressing the procedures that governed the commission in question, reasoned that “exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.” 548 U.S. 557, 624 (2006). Further, see the Court’s statement in \textit{Reid v. Covert} that they “reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists.” 354 U.S. 1, 35 (1957).}

These cases were coded as non-deferential and account for the remainder of the final case catalog. In the data, I include both cases in which the Court ultimately and explicitly deferred to the military and those in which they explicitly opted to reject the doctrine of military deference, for these are the cases in which the Court’s tradition of deference played an apparent role.

Given that cases were selected through a content analysis and coded based on the fit of their content with an established set of requirements for selection, a certain amount of discretion was necessary. As previously noted, different legal scholars and authorities have varying definitions of military deference. As such, these different scholars might hold slightly different views on certain cases and their identification as deference cases.
However, this sort of discretion and interpretation cannot be totally avoided while considering the full content and meanings of the opinions. It can be largely accounted for, though, with strict adherence to an accurate definition and comprehensive set of requirements, which, as described above, is exactly what I have done in this study.

This content analysis yielded a final case list of 68 deference cases.\textsuperscript{168} The subject matter of these cases ranges from the rights of detained enemy combatants to official LSD testing conducted by the military. A number of these cases deal with the construction, jurisdiction, and execution of courts-martial and other military courts, both at home and abroad. These cases include issues ranging from the status of spouses of service members before courts-martial to the ability of a military tribunal to try a Japanese general after World War II.\textsuperscript{169} Another large subset of the deference cases is those cases involving the treatment by the United States government of Japanese American citizens during the Second World War, the most prominent of which is \textit{Korematsu v. United States} in 1944.\textsuperscript{170} Also included in the data are a number of deference cases involving the First Amendment rights of service members and others who reside on military bases. These cases raise issues including political speech, symbolic speech, and free exercise.\textsuperscript{171} These groups of cases by no means account for the entire catalog, but they do represent those topics that arise relatively frequently in military deference cases.

A number of subject matter areas are also conspicuously absent from the final catalog of cases. First and foremost among these are cases related to the Selective Training and Service Act. While a couple of these cases do involve the weighing of

\textsuperscript{168} For the full catalog of deference cases, see Appendix A.

\textsuperscript{169} Namely and respectively \textit{Kinsella v. United States ex rel. Singleton}, 361 U.S. 234 (1960), and \textit{In re Yamashita}, supra.

\textsuperscript{170} \textit{Korematsu v. United States}, 323 U.S. 214 (1944).

constitutional guarantees against military necessity and expediency, most amount to little more than statutory interpretation. When the Court is merely parsing the text of a congressional statute, the unique nature and needs of the military are absent from consideration, as are the spirit and protections of the Constitution. The Court is neither deferring to nor not deferring to the military, it is merely interpreting the letter of the existing law. Cases like these are not deference cases. For similar reasons, cases involving the Freedom of Information Act are also excluded from the final catalog of deference cases. Additionally, I cut cases in which the Court determined they lacked jurisdiction to hear the case, since this determination involves no recognition of the military as a unique institution in which constitutional protections may be applied differently.

It would here be fruitful to elaborate upon the time bounds of the catalog of deference cases used in this analysis. The earliest case included is that of *Ex Parte Quirin*, heard in 1942 in a special session of the Court, as explained in Chapter 3. I begin with this case for a number of reasons. First, a large number of justices with military service experience were appointed to the Court in the late 1930s. Between the years of 1937 and 1940, all five of the justices appointed to the Court were veterans. This large influx of veteran justices coincides with two important beginnings, as 1941 saw both America’s entry into World War II and the appointment of Harlan Fiske Stone as Chief Justice of the United States Supreme Court. Further, as most scholars on the doctrine would agree, the military deference doctrine as understood and applied today did not emerge until the latter half of the twentieth century.172 Prior to this time, the Court’s treatment of the military and its command structure was dominated by an attitude of

---

After the end of the Second World War, however, this changed. The Court first took a more active stance toward the military before crafting the modern doctrine of deference in the 1970s. Given these changes in the attitude of the Court, the deference cases heard prior to World War II were few and far between, let alone vaguely related to the military deference doctrine being studied here. As such, including cases prior to the advent of the Stone Court and Second World War seems inappropriate. Together, the influx of justices with military service, start of World War II, advent of the Stone Court, and changes in the Court’s attitudes toward the military make *Ex Parte Quirin* a natural lower bound for this study. In terms of the upper bound, I include all deference cases decided between 1942 and today. This represents an extension of the cases considered by Lichtman and adds relevance to this study.

Having compiled a catalog of cases, I then constructed a voting record in order to capture the voting behavior of the individual justices. For each case, the votes of all participating justices are considered, yielding a comprehensive deferential voting record of 588 votes. In coding these votes, I was interested in whether each vote cast was in favor of deferring to the military (D) or against deferring to the military (N). In making this determination, I read the exact language and considered the specific arguments cited in the opinions. Only votes attached to opinions that explicitly deferred to the military, for any of the reasons listed above that serve as the rationale for the military deference doctrine, were coded as deferential votes. Meanwhile, those justices who determined that the need of the military was not so great or unique as to justify robbing service members or others affiliated with the military of their constitutional guarantees are coded as having cast non-deferential votes. Also coded as having cast

---


174 In coding the binary variable of military service, a vote of D was denoted with a (1), while a vote of N was recorded as (0). Of the 588 votes cast, 376 were for deference and 212 were non-deferential.
votes that were not deferential are those justices who, in the face of deferential arguments, opted to decide the case on statutory or jurisdictional grounds and not acknowledge the military as a unique body to which the Constitution may be applied differently. This variable of voting behavior \( v \) is thus coded as a binary variable and serves as the primary primary dependent variable in this study.

A total of 36 justices voted in the 68 deference cases considered. Of these justices, 20 (or approximately 56%) had served previously in either the Army, Navy, Army Air Force, National Guard, or Army Reserve. Of those justices who had served in the military, just 70% served as an officer. Many of them spent their time in the military working in intelligence or with the Judge Advocate General’s Corps, the legal organization within each branch of the military. The branch with the most representation on the bench is the Army, accounting for half of those justices who are also military veterans. All but three of the twenty justices — Justices Alito, Kennedy, and Breyer — served during wartime. Justice Frank Murphy, as outlined in Chapter 3, was a proud veteran of the Army who served in both the First and Second World Wars, the latter wartime service occurring during his time as a justice on the Supreme Court. The only armed conflicts represented in the Court’s overall record of wartime service are the First and Second World Wars.

For a full list of these justices and their military affiliations, see Appendix B. This list of justices does not account for all justices appointed to the bench since 1942. Because he did not participate in any of the cases included in the catalog I used, Justice Arthur Goldberg, who served on the Court from 1962 to 1965, is not included. Goldberg was a two-time veteran of the armed forces with service in the Army during World War II and service in the Air Force in 1976.

Also included in the data, in addition to those with personal military experience, are a number of justices with extra-personal, though still close, military ties. Justice Sandra Day O’Connor, for example, is the wife of a former soldier in the Army, and Justice Antonin Scalia is the father of a West Point graduate and lieutenant colonel in the Army.

Both of these conflicts are represented in this thesis’s case studies, as Chapter 3 provides an analysis of a justice that was on active duty during World War I, while Chapter 5 provides a similar analysis of a justice that was active during World War II.
Vietnam, Korea, the Persian Gulf, Iraq, or Afghanistan, which are all very different in nature from the World Wars.¹⁷⁸

In terms of representing this service in the data, I introduce another binary variable, this one independent. The service variable is coded as either having served (1) or never having served (0). As service, I consider any length of time of service in any branch of the United States military, its reserves, or the National Guard. The branches represented in this data set include the Army, Navy, Army Air Force, National Guard, and Army Reserve.

In addition to strictly service, I also consider a number of other variables that could potentially aid in illuminating the relationship between the Supreme Court and the military. Naturally present in any discussion on the voting behavior of Supreme Court justices is the idea of ideology. In terms of measuring ideology on the Court, various methods have been introduced through the years. David Danielski provides a “modest step in the direction of developing a fairly detailed, dynamic, empirical theory of judicial decision-making” in his investigation of the role of values in Supreme Court decision-making, specifically in the cases of Justice Pierce Butler and Justice Louis Brandeis.¹⁷⁹ A few decades later, Jeffrey Segal and Albert Cover brake ground in this area with their derivation of an independent measure of Supreme Court ideology.¹⁸⁰ Relying on independent data from before a justice’s confirmation avoids the issue of endogeneity, of using voting behavior to determine voting behavior. As such, the Segal-Cover score has become “the disciplinary standard for measuring the political ideology of Supreme Court

---

¹⁷⁸ For more on changes in the nature of warfare, see Footnote 39 in Chapter 2.


¹⁸⁰ Unlike other measures of judicial behavior that rely on past voting records, the Segal-Cover score is calculated based on an analysis of the content of newspaper editorials published in leading newspapers during the time between a justice’s nomination and confirmation. This analysis yields a score between most conservative (0) and most liberal (1) for each justice. Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," *The American Political Science Review* (1989): 559, JSTOR.
justices.”181 For these reasons, I, too, use the Segal-Cover score as a measure of ideology for each justice.182

I also consider a couple of time-related independent variables. Acknowledging that the behavior and deferential tendencies of justices may change as they gain more experience and confidence in their roles on the Court, I look at the time spent on the bench in years before each vote was cast. As a nation currently engaged in war may feel the passions and fears of wartime and the military effort differently than a nation in peacetime, I consider whether each case was decided in wartime. In deciding which periods constitute wartime, I look to the federally declared official beginning and termination dates provided in the Code of Federal Regulations.183 Finally, the year of decision for each case is also noted.

Results

First, I provide a summary statistic for the relationship between prior military service and votes for military deference, exclusively. The cross tabulation in Figure 2 provides a cursory glimpse of this relationship.184 Whereas the justices contained in this data set with military service deferred to the military at a rate of 61.7%, those justices with no prior military experience deferred at a rate of 69.1%. This 7.4% difference in rates of deference hints at a contrast between the deferential behavior of justices with military service and those without.


182 As a result of Segal and Cover’s updating and backdating of these scores, a Segal-Cover score exists for every justice included in this study with the exception of Owen Roberts. As such, I must regrettably exclude him from the data set when I consider ideology in the regression. This removes just 4 votes from the data set.


184 For this cross tabulation, the Pearson Chi-Square value of 2.943 bears a likelihood ratio of 2.984 and a significance of 0.086, indicating statistical significance at the 0.1 level.
I then conduct a regression analysis to further elucidate this association.\footnote{For results, see Table 1 in Appendix C.} Given that the dependent variable of deference ($v_i$) is a binary variable, I use a simple binary logistic regression in my analysis. In terms of the model described above, I find:

$$\Pr(v_i = D) = f(0.805 - 0.328x_i)$$

As indicated in this regression, justices with prior military service are less likely to defer, where $\beta_{service} = -0.328$, in military deference cases (see Figure 3). In the two-sided hypothesis test, this result bears a significance of $p = 0.087$, which is statistically significant at the 0.1 level. Given these findings, the data provide modest support for the rejection of $H_0$ in the two-sided test, testing if military service is associated with deferential voting behavior of Supreme Court justices in military deference cases. Seeing

![Figure 2: Cross Tabulation of Prior Military Service and Deference](image)

<table>
<thead>
<tr>
<th>Military Service</th>
<th>Deference</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>0</td>
<td>55</td>
<td>123</td>
</tr>
<tr>
<td>% within Military Service</td>
<td>30.9%</td>
<td>69.1%</td>
</tr>
<tr>
<td>1</td>
<td>157</td>
<td>253</td>
</tr>
<tr>
<td>% within Military Service</td>
<td>38.3%</td>
<td>61.7%</td>
</tr>
<tr>
<td>Total</td>
<td>212</td>
<td>376</td>
</tr>
<tr>
<td>% within Military Service</td>
<td>36.1%</td>
<td>63.9%</td>
</tr>
</tbody>
</table>

![Figure 3: Logistic Regression of Prior Military Service on Deference](image)
the results of the two-sided test, I turn to the one-sided test and find that the \( p \)-value is statistically significant at the 0.05 level. This allows for the rejection of \( H_0 \), that the likelihood of deference for justices with military experience is no different than that for justices without, in favor of \( H_2 \). With 95% confidence, this finding indicates that justices with military experience on the Stone through Roberts Courts were less deferential than those without.

I now add four additional covariates into the regression: ideology as captured in the Segal-Cover scores (\( x_{i,\text{ideology}} \)), the length of time that a justice has served on the bench (\( x_{i,\text{time}} \)), the issuance of the decision during wartime (\( x_{i,\text{wartime}} \)), and the year the case was issued (\( x_{i,\text{year}} \)). Each of these variables is included for its potential impact upon the decision of a justice to defer to the military or not.

**Ideology.** As explained above, the contention that justices vote according to their own values and policy preferences is widely accepted by scholars. According to the attitudinal model of Supreme Court decision-making, as introduced in Chapter 2, Supreme Court justices arrive at the Court with their own sets of personal preferences, values, and beliefs, and it would only be natural to acknowledge that these beliefs would color their behavior on the bench, in military deference cases just as in other cases. This covariate has been shown to impact political behavior and values.  

---

186 This one-sided test is easier to prove, but it still is important in this study, as it is this side of the relationship between service and deference with which I am primarily concerned.

187 Although the logistic regression does not assume anything about the distribution of the covariates, it generally assumes independence between them. Here, I reasonably assume independence between all of the covariates, with the exception of service and ideology, the association between which I explore later in this chapter. Because of the ultimate strength of the correlation between service and ideology, the model should not be sensitive to this association.

Years on the bench. Scholarship on the Supreme Court suggests that the length of time a justice has been on the bench may influence his or her voting behavior, as well.\textsuperscript{189} In 2004, Hurwitz and Stefko, studying the impact of time spent on the bench on justices’ decisions to adhere to precedent, find:

Preferential votes become far more prominent as a justice’s tenure grows, while the likelihood is much greater for a justice to comply with precedent during the early years on the bench as justices acclimate to their new institution. In fact, even while controlling for the presence of other significant predictors of voting behavior . . . tenure length has a dramatic effect on the decision to vote for precedent.\textsuperscript{190}

Similarly, Timothy Hagle in 1993 found that “acclimation effects do exist,” as “nine of the 13 justices [Hagle] examined revealed significant voting instability in at least one major issue area.”\textsuperscript{191} In light of these findings, the length of time a justice has served on the bench stands as a potential factor in judicial decision-making in military deference cases as well as in others.

Decided in wartime. Whether or not a decision was made in wartime, amidst the fears and passions that hang over a nation at war, is a factor the Court itself has identified as a potential motivator to defer to national security via military necessity. In the 2004 case of \textit{Hamdi v. Rumsfeld}, the Court addressed the danger of this impact of wartime conditions on military deference when Justice O’Connor wrote in the plurality opinion “that a state of war is not a blank check.”\textsuperscript{192} Sixty years earlier, the Court in \textit{Korematsu} was of the opinion that “when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger,” again hinting at the impact of a state of war on the judicial decision-making.

\textsuperscript{189} This was also briefly noted in Chapter 2.


\textsuperscript{191} Timothy M. Hagle, "'Freshman Effects' for Supreme Court Justices," \textit{American Journal of Political Science} 37.4 (1993): 1153, JSTOR.

making process. As the Court itself is willing to recognize, the passions and priorities of wartime may very well factor into judicial decisions.

_Year of decision._ Scholars of the military deference doctrine, most notably John O’Connor, have identified a change in the Court’s deferential behavior in military cases over time. This change in the general attitude of the Court toward military deference may also account in part for the deferential voting behavior of the individual justices.

Again running a binary logistic regression with these added covariates I find:

$$\Pr(y_i = D) = f(45.419 - 0.118x_{i,\text{service}} - 3.350x_{i,\text{ideology}} - 0.038x_{i,\text{time}} + 0.046x_{i,\text{wartime}} - 0.021x_{i,\text{year}})$$

In this updated model, the service variable is no longer statistically significant in explaining judicial voting behavior in military deference cases. The only covariates that prove statistically significant in this model are ideology, the number of years a justice has sat on the bench, and the year the decision was issued, all of which bear a statistical significance of $p < 0.01$. Given these results and the inconsistency in the significance of the military experience explanatory variable, one would suspect that the change in deference may be better explained using one or more of the covariates that proved meaningful in the second model.

Correlating the military service variables with each of the covariates that proved useful in the second model can begin to answer this question. The year an opinion is issued and the incidence of prior military experience are two values, the relationship between which would reveal little more than the military composition of the Court over time. Similarly, the relationship between the occurrence of past military experience and

---

193 _Korematsu_, _supra_.

194 O’Connor, "Origins and Application," 215. For greater detail, see Chapter 2.

195 For results, see Tables 2 and 3 in Appendix C.

196 Neither the occurrence of prior military service nor the issuance of a decision during wartime proves statistically significant in this model.

197 For results, see Table 4 in Appendix C.
the amount of time a justice has spent on the Court when votes are cast seems an unproductive relationship to explore. On the other hand, as mentioned in Chapter 2, military service has been shown to impact the values and ideology of service members, even after their time in the military. Given this established relationship, I refocus my analysis on the ideology variable. A correlation of military service and ideology yields a Pearson correlation coefficient of 0.201, statistically significant at the 0.01 level. This correlation suggests a positive association between prior military service and judicial ideology. Given that higher Segal-Cover scores indicate liberal leanings, this correlation suggests that the occurrence of military service is associated with a more liberal judicial ideology.

In order to better understand the magnitude of this association, I use a linear regression analysis that focuses on military service \((x_i)\) as an independent variable and ideology \((y_i)\) as the dependent variable. I find a linear relationship of the form:

\[
y_i = 0.463 + 0.143x_i
\]

These results, as shown in Figure 4, indicate that prior military service, as captured in this data set, explains a 0.143 higher Segal-Cover score for those justices who had served in

![Figure 4: Linear Regression of Prior Military Service on Ideology](image)

198 See Footnote 188.

199 For results, see Table 5 in Appendix C.
the military on the Stone through Roberts Courts. This result is both impactful and statistically significant, with a significance of $p < 0.001$, and thus provides strong support for the contention that military service does not make justices less liberal in their judicial ideology. Rather, it suggests that military service is at least correlated with a more liberal judicial ideology.

**Discussion**

This analysis provides support for the hypothesis, $H_2$, that, on the level of the individual Supreme Court justice, prior military service is associated with less deferential voting behavior in the military deference cases included in the data. Other significant relationships that came to light in the course of analysis suggest that this link may not be direct. First, this analysis provides strong evidence that the justices included in this data set with military service tended to be more liberal on the Segal-Cover scale than those justices with no prior military service. Additionally, I find strong evidence that judicial ideology was a strong indicator of deferential voting behavior in the voting record of the cases included in this study.

These findings immediately provide two potential relationships between service, ideology, and deference, as illustrated in Figure 5. It is here important to remember that, as the active military service performed on the behalf of the justices necessarily preceded the judicial ideology exhibited on the bench in all of these cases, the problem of strict endogeneity is avoided.\(^{200}\) As per the first potential relationship, it may be that military service directly impacts ideology, which then acts as a reliable predictor for deference. Second, this impact may be mixed with the influence of some unknown factor that also affects the likelihood of service in the military. These potential relationships suggest a more complicated mechanism through which prior military service via ideology has an impact on the deferential voting behavior of Supreme Court justices. Such a mechanism

---

\(^{200}\) The only case worth note in this discussion of strict endogeneity is that of Justice Frank Murphy, who, as explained in Chapter 3, served in the military both before and while on the Court. This service, though, still preceded any of the votes he cast that were considered in this study.
was apparent in Chapter 3’s analysis of the deferential behavior of Justice Frank Murphy, the relentless veteran defender of individual rights, just as it will be in Chapter 5’s analysis of the jurisprudence of Justice John Paul Stevens. In looking into the experiences and jurisprudence of this individual justice, Chapter 5 illuminates the impact of Justice Stevens’s military service on his ideology as well as his opinions in military deference cases, allowing for a more qualitative and substantive test of the findings outlined above.
Chapter 5

Justice John Paul Stevens from Blue to Black: A Case Study

Anchors Aweigh: An Introduction

In the summer of 2010, Justice John Paul Stevens, a veteran of the Second World War with three years of naval intelligence experience, retired from the Court after 35 years on the bench, the third-longest tenure in Supreme Court history. His remarkably long career, however, was not the only historical implication of Justice Stevens’s retirement. Rather, with the absence of Justice Stevens, the composition of the Court transformed to a state that had not been seen in almost a century. For the first time since 1936, the Supreme Court found itself lacking in wartime military experience. It is true that three justices with military experience — Justices Kennedy, Alito, and Breyer — still sat, and continue to sit today, on the bench, but none of these three had ever served in wartime. With the retirement of Justice John Paul Stevens, the Court lost its only insight into these experiences. While legal scholars and political analysts may debate the merits of this status quo, Justice John Paul Stevens’s feelings are very clear. In an interview he gave with renowned legal scholar Jeffrey Toobin less than one year before his retirement from the Court, Justice Stevens addressed his views on the value of having military wartime experience on the bench. “Somebody was saying that there ought to be at least one person on the Court who had military experience. . . . I sort of feel that it is important. I have to confess that.”

This chapter contains an analysis of Justice John Paul Stevens’s deferential behavior in his opinions in military deference cases, taking special note of the impact of

---

201 The longest serving justice, with 36 years on the Supreme Court, is Justice William O. Douglas. He is followed by Justice Stephen Johnson Field, whose tenure on the bench lasted just three days longer than that of Justice Stevens.


his military experience in this behavior. As Justice Stevens himself will admit, his time in the Navy during World War II was undeniably important to his jurisprudence and career on the Supreme Court. Eugene Fidell speculates “that the approach apparent in Justice Stevens’s votes and writing in military-related cases reflect the three years he served in Hawaii.”204 Jeffrey Toobin, after speaking with the justice right before he retired, noticed a similar relationship between two of Justice Stevens’s most important life experiences. He notes, “The war helped shape his jurisprudence, and even today shapes his frame of reference.”205 Accordingly, the influence of Justice Stevens’s time in the Navy is reflected in the many opinions he authored in deference cases. His rhetoric and legal reasoning reflect a personal familiarity with the military instrument, an understanding of the attitudes and atmosphere of the military community, and an unwavering dedication to the protection of American freedom and ideals, both in the courtroom and on the battlefield.

However, as in the case of Justice Murphy, Justice Stevens’s military deference opinions, rather than constituting a departure from his overall judicial ideology, fall in line with his voting behavior in similar, non-deference cases. In military deference cases as in other cases, Justice Stevens still stands as an independent, a relentless defender of the rights of prisoners and the authority of precedent. While Justice Stevens’s service and the effects it had on him are apparent in the rhetoric and tone of the generally non-deferential opinions he authored in military deference cases while on the bench, his behavior in these cases is consistent with his general jurisprudence. This trend is in line with the findings of both Chapter 3’s case study of Justice Frank Murphy and Chapter 4’s statistical analysis.

The many opinions penned by Justice Stevens, both majority and special, make for a worthwhile case study for a number of reasons. First, there are so many of them.


205 Toobin, “After Stevens.”
Justice Stevens, like Justice Murphy, was remarkably motivated to share his opinion and did so with unparalleled frequency. Even in cases in which Justice Stevens agreed with the Court in the outcome but not completely in the logic used to reach it, he would write a concurring opinion (sometimes even a dissenting opinion) to highlight his alternative reasoning. This volume of authored opinions provides a rich bank of data for analysis. Further, Justice Stevens has been characterized by the semi-autobiographical air of a number of his opinions, occasionally writing explicitly about the lasting impacts of military service, as will be described in more detail later.206 This mixing of the biographical with the judicial is apparent in his previously mentioned statement to the bar, a formal legal institution, regarding the impact the Yamamoto incident had on his views on capital punishment. A former clerk of Justice Stevens’s refers to Stevens’s early concurrences as “personal statements.”207 This tendency of Justice Stevens’s allows for a clearer picture of the influence his prior service has on his judicial behavior.

Additionally, Justice Stevens provides a complement to Chapter 3’s case study on Justice Frank Murphy. Justice Stevens, in contrast with Justice Murphy who served in the 1940s at the start of the data considered in this study, provides a more current case of the impact of prior military service on deference. The last justice with wartime service to have served on the bench, Justice Stevens, in fact, provides the most current case of prior active duty military service on the Supreme Court. Further, Justice Stevens was active in the Second World War, unlike Justice Murphy who was only active during the First World War. The length of Justice Stevens’s wartime service is also three times that of Justice Murphy’s. Justice Stevens served in the Navy, which provides a contrast to the Army service of Justice Murphy. In terms of jurisprudence, Stevens is known for his defense of the rights of the prisoner, while Murphy is remembered for his focus on civil rights. Further, Justice Murphy was prone to judicial activism, whereas Justice Stevens harbored

206 See Fidell, “Stevens and Judicial Deference.”

207 Toobin, “After Stevens.”
a healthy respect for precedent. In spite of their differences, however, Justice Stevens and Justice Murphy both stand as outspoken justices with a habit of using the vocabulary of the military in their defense of the Constitution.

With these characteristics in mind, an analysis of the military deference opinions of Justice Stevens provides a fruitful lens for the examination of the relationship, found in Chapter 4, between prior military service and judicial decision-making in military deference cases. Through this lens, this thesis views another military veteran with a jurisprudence that tends toward the non-deferential.

*From Dress Blues to Black Robes: The Life of John Paul Stevens*

John Paul Stevens was born on April 20, 1920 in Chicago’s Hyde Park neighborhood into one of the city’s wealthiest families. With the money he had made in the insurance business, John’s grandfather, along with John’s father and uncle, had “built what was then the biggest hotel in the world, with three thousand rooms.” For roughly the first decade and a half of his life, John enjoyed an upbringing on the highest rung of society in Chicago. Then the Great Depression hit. When John was 13, his father was arrested in his home and found guilty of embezzlement. All hope was not lost, though. John’s father appealed the case, which was ultimately overturned by the Illinois State Supreme Court. At the young age of 13, John Paul Stevens gained a personal appreciation for a well-functioning appeals mechanism and the heroic potential of the American judicial system. Less than one decade later, while engaged in academic pursuits, Stevens was exposed to another incredibly meaningful form of heroism.

Born in the shadow of the University of Chicago into a family with extensive ties to the university, John Paul Stevens was fated for an academic future in one of the nation’s foremost intellectual institutions. As a young child, John attended the University of Chicago Laboratory Schools, continuing on to earn a Bachelor of Arts in English at the


University of Chicago before beginning graduate work in the same field.\textsuperscript{210} It was while Stevens was a senior undergraduate English student at the University of Chicago that the military came knocking. In the course of his studies, Stevens came to know Leon Perdue Smith, Jr., a dean of the undergraduate college. Unbeknownst to Stevens at the time, Smith was working as a recruiter for naval intelligence and had seen in John great potential for work in the fields of cryptology and intelligence. “With Smith’s encouragement, Stevens enrolled in a program that was not in the University of Chicago’s syllabus. . . . The course was less instruction than it was a way to screen for the students who were the best and brightest.”\textsuperscript{211} John Paul Stevens made the cut. On December 6, 1941, he enlisted in the United States Navy. The very next day, the Japanese bombed the American naval base at Pearl Harbor, the very duty station where Stevens would spend much of his career in the Navy.

After enlisting, Stevens was shipped to Washington for formal training, where he worked as a part of a watch team.\textsuperscript{212} Less than one year after starting this work, he was leading one of these watch teams.\textsuperscript{213} The following year, Stevens left Washington for Pearl Harbor and joined a top secret unit known as OP-G-20.\textsuperscript{214} Among both his superiors and his subordinates, Stevens was regarded as a capable and congenial leader. Rank played no role in the ways he interacted with those under his command, and he is remembered for the camaraderie and respect he inspired among those he led.\textsuperscript{215} He also refused to allow his junior rank to keep him from playing a role in the recognition of

\textsuperscript{210} Ibid., 40.
\textsuperscript{211} Ibid., 43.
\textsuperscript{212} The function of these teams was to analyze Japanese radio communications, to glean from them orders, coordinates, and other information that could be of use in the American war effort. See ibid, 44.
\textsuperscript{213} Ibid., 45.
\textsuperscript{214} Ibid., 44.
\textsuperscript{215} Ibid., 49.
vital components in the Allied war effort in the Pacific. Stevens’s superior work in the service did not go unrecognized, and he was awarded a Bronze Star for his unrelenting commitment to American values and victory abroad.

Perhaps the most formative moment of Justice Stevens’s military career occurred just a couple of days before his twenty-third birthday. On April 18, 1943, American planes, acting on orders from Commander-in-Chief Roosevelt, targeted the plane of Admiral Isoroku Yamamoto, the commander-in-chief of the Combined Fleet during the Second World War. After engaging in a dogfight with the American aircraft, Admiral Yamamoto’s plane was hit and crashed in the jungle below. Yamamoto was killed in the crash. This event was one Justice Stevens would never forget. Years later, while on the Supreme Court, it was still one of the stories his clerks remember hearing about his service in the war. What bothered Stevens about the incident was its targeting of a single individual. It was not the Japanese forces that the Americans sought to kill, but rather Admiral Yamamoto himself. For Stevens, this raised tremendous moral and humanitarian concerns, concerns that directly shaped his legal views throughout his career.

Appearing before the Chicago Bar Association decades later, Stevens alluded to the event without naming the target. The Justice told his audience that the experience had sown doubts in his mind about another instance in which the state takes the life of a named individual; that is, capital punishment.

After the Allied victory in 1945, John Paul Stevens left the Navy. Rather than return to his academic endeavors in the field of English, however, he followed the advice of his brother and began his legal education. In the ultimate showing of the impact of Stevens’s wartime experience on his judicial career, Stevens funded his Northwestern

216 Specifically, Stevens played a role in recognizing Station Hypo, an intelligence unit located in Hawaii that monitored signals and worked with cryptography, as a key part of the eventual Allied victory. See ibid., 46.

217 Toobin, “After Stevens.”

University School of Law education primarily with the G.I. Bill.\textsuperscript{219} Given his unparalleled performance in law school, having graduated with the highest GPA the school had ever seen, it was not surprising that Stevens was given a Supreme Court clerkship with Justice Wiley Rutledge during the 1947-1948 term.\textsuperscript{220} This clerkship, like Stevens’s military service, had an undeniable impact on Stevens’s views as a judge. Most notably here, he worked on the case of \textit{Ahrens v. Clark}, which involved questions of the rights of enemy aliens in the American legal system and emerged again in Stevens’s opinions in the Guantanamo Bay military deference cases. After his clerkship, Stevens worked in a law firm in Chicago briefly before returning to Washington to work as a lawyer on the Republican staff of the House Judiciary Committee. The insight Stevens gained into the workings of Washington politics, in tandem with Stevens’s time at Pearl Harbor, left him with the impression that “the value of the work done there — both before the war started and while it was being fought — was seriously underestimated by the folks in Washington.”\textsuperscript{221} Stevens then returned to Chicago again, where he and two of his former colleagues opened their own law firm and gained renown for their work in anti-trust cases. It was this prominent anti-trust work that led Senator Charles Percy, an Illinois Republican, to recommend Stevens as a judge for the Court of Appeals for the Seventh Circuit, a recommendation President Richard Nixon followed.\textsuperscript{222} Just five years later, John Paul Stevens joined the Supreme Court after a nomination by President Ford and a unanimous confirmation by the Senate.\textsuperscript{223}

While on the Supreme Court, Justice John Paul Stevens’s jurisprudence has been defined as independent. Indeed, one of his most prominent biographies is titled \textit{John

\textsuperscript{219} Ibid. \\
\textsuperscript{221} Barnhart and Schlickman, \textit{John Paul Stevens}, 51. \\
\textsuperscript{222} Toobin, “After Stevens.” \\
\textsuperscript{223} Ibid.}
Paul Stevens: An Independent Life, while scholar Bradley Canon titles his analysis of Stevens’s behavior on the bench during the Burger Court “The Lone Ranger in a Black Robe.” Stevens has no equal in his commitment to expressing his judicial opinion, regardless of the leanings of the rest of the Court. “Stevens consistently has been, by far, the Court’s most prolific writer of special opinions.” Among these special opinions are dissents that express dismay at the Court’s refusal to go far enough in the way that Justice Stevens wishes, even when the Court does take steps in that direction. This is particularly true in the area of prisoners’ rights cases. In Justice Stevens’s independent behavior on the bench, he was hard to peg as either a liberal or a conservative. Appointed by a Republican president, Stevens joined the Court amidst expectations of conservatism. His inability to live up to these expectations has led some to label him as an “unlikely liberal icon.” Stevens, however, denies that he has drifted to the left, insisting that the Court has instead drifted to the right.

In addition to an attitude of independence, Justice John Paul Stevens’s jurisprudence is also marked by a steadfast commitment to precedent and judicial restraint. He has shown a preference for “gradual change over sudden lurches and precedent over dramatic overrulings.” Justice Stevens himself addresses these tendencies in a number of speeches and articles he penned through the years. In a speech titled “Some Thoughts on Judicial Restraint” delivered in 1982, Stevens clearly explains, “In my opinion, the Court and the nation would be better served by re-examining the


225 Barnhart and Schlickman, John Paul Stevens, 4.


227 Toobin, “After Stevens.”

228 Barnhart and Schlickman, John Paul Stevens, 20.

229 Toobin, “After Stevens.”
doctrine of judicial restraint and by applying its teachings to the problems that confront us." In a keynote address he delivered nine years later, Justice Stevens expresses his disappointment in a Court that had become, in his opinion, too active. “In this country . . . an extraordinarily aggressive Supreme Court has reached out to announce a host of new rules narrowing the federal Constitution's protection of individual liberties.”

Stevens’s independence of opinion and commitment to precedent is also reflected in his logistical command of his chambers. He does all of the facts of each case himself, allegedly also drafting the opinions himself. For years his chambers was the only chambers that was not involved in the cert pool, but rather reviewed each petition for certiorari independently. Despite the sheer volume of petitions for certiorari arriving at the Court each term, Justice Stevens refused to bow to necessity and join the cert pool, opting to instead continue with the traditional method of having his chambers review each and every petition. The decision to join the cert pool, though, was not the only realm in which Stevens refused to bow to necessity and give up his independence of thought:

Consistent with his abstention from the “cert pool,” what emerges from his separate opinions in cases relating to the military — whether concurring, as in Goldman v. Weinberger and Solorio v. United States, or dissenting, as in United States v. Scheffer — is a determinedly independent perspective not easily pigeonholed as liberal, conservative, or “activist.”

Here, we see Justice Stevens’s characteristic jurisprudential habits surfacing in his voting patterns in military deference cases. Justice Stevens does not habitually vote differently because the military is involved, regardless of his wartime naval service, but rather

---


232 Toobin, “After Stevens.”

233 Fidell, “Stevens and Judicial Deference,” 1000.
behaves as he usually does, independently adhering to his own concepts of justice. But to say that Justice Stevens does not vote differently is not to say that his military experience is not reflected in his behavior on the Court.

As Jeffrey Toobin explains, in a contention few would argue with, Justice Stevens’s service in the Second World War “helped shape his jurisprudence.” Work in cryptology values strict attention to detail and adherence to established patterns, as well as an ability to work independently confidently. “Deviations from agreed procedures destroyed the uniformity vital to uncovering statistical probabilities in signal patterns. On the other hand, the work required solitary, creative thinking in detecting novel patterns.” Further, Stevens revealed the highly independent nature of his unit in his reflections on his wartime experiences. What these reflections reveal is that Stevens’s habit of independence defined his experience in the Navy long before it defined his experience on the Court.

Justice Stevens’s personal military experience, like Justice Murphy’s, is also reflected in his demonstrated respect for service members and the military for which they fight. In his memoir, *Five Chiefs*, while introducing his peers and fellow justices who had also served in the armed forces, consistently one of the first characteristics Justice Stevens addresses is their past military experience. The very first sentence in his chapter on Chief Justice William Rehnquist is, “Bill Rehnquist was a meteorologist in the Air Force during World War II.” Similarly, his introduction of Chief Justice Edward Douglass White begins, “A Civil War veteran who had fought for the Confederate army, he was appointed to the Court in 1894 by President Grover Cleveland.”

---

234 Toobin, “After Stevens.”


238 Stevens, *Five Chiefs*, 27.
Stevens quick to detail the service of others, but it is also apparent that he is proud of his own service. One clerk recalls his impression that “the Second World War was the defining experience of his life, and he is proud of being a veteran.” Another clerk, also a veteran of the Navy, remembers Justice Stevens’s friendly willingness to swap war stories over lunch.

Further, the naval experiences of Justice Stevens colored the way he viewed the law. As mentioned earlier, his experience with the Yamamoto incident shaped his views on capital punishment and the value of the life of the individual, as he himself admits. Moreover, his time in the Pacific during the Second World War may have shaped his views on the relationship between foreign citizens, courts, and the United States Constitution. “During World War II, Stevens himself shouldered a bit of the burden that attended U.S. leadership. The Navy officer's awareness of that burden may help to explain . . . why he has accorded to foreigners abroad some of the protections of that Constitution.” This sort of thinking shines through particularly brightly in Justice Stevens’s opinions in the Guantanamo Bay cases, in which he addresses the issue of constitutional guarantees for alien enemies. It is clear in these cases that Stevens is engaged in an “enduring quest to uphold American values, at home and abroad.”

At the same time, Justice Stevens was well aware of the danger of bowing blindly to military necessity. He mentions in his memoir with an air of regret the bending of law achieved in Chief Justice Stone’s wartime opinions, the very opinions to which Murphy so adamantly objected. For him as for Murphy, it was not the impending doom of national security concerns but rather a lifelong preoccupation with the morality of

---

239 Toobin, “After Stevens.”

240 Ibid.


242 Ibid.

243 Stevens, Five Chiefs, 36.
military action that stood at the forefront of his mind. Justice Stevens in military
deferece cases, as in other cases he heard, was not hesitant to independently question
assertions of military exigency and calls for military deference. Like Justice Murphy,
Justice John Paul Stevens had the highest esteem for the American armed forces and their
members and held the military to the highest standards of moral and constitutional
adherence, which translated often to a non-deferential stance in military deference cases.
In order to illuminate this pattern and Justice Stevens’s independent behavior in military
deferece cases, I turn to some of his more prominent military deference opinions, of
which there are many. This analysis focuses on the five of those cases that most
directly speak to the military deference doctrine: his dissent in United States v. Albertini;
concurrences in Goldman v. Weinberger and Loving v. United States; and majority

Not Yet Begun To Fight: The Opinions of Justice Stevens

The natural starting point for an analysis of Justice Stevens’s behavior in military
deferece cases is the 1985 case of United States v. Albertini, which involves First
Amendment and due process protections. Albertini, who had previously received a “bar
letter” banning him from Hickam Air Force Base in Hawaii, entered the base to
participate in peaceful demonstrations on the day of the Armed Forces Open House and
was consequently arrested. On the grounds of his First Amendment rights and the open
nature of the Armed Forces Open House, Albertini challenged his conviction. The case
was appealed and eventually granted certiorari by the Supreme Court, which ultimately
rejected Albertini’s assertions and reversed the opinion of the Court of Appeals. In the
opinion of the Court, Justice O’Connor writes:

We are persuaded that exclusion of holders of bar letters during military open
houses will promote an important Government interest in assuring the security of
military installations. Nothing in the First Amendment requires military

244 Toobin, “After Stevens.”

245 Justice Stevens authored opinions, both majority and special, in 10 of the 68 cases we consider
in this analysis, clearly displaying no departure from his generally prolific tenure on the Court.
commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house.\textsuperscript{246}

The Court, focusing on the discretion of the commander and the nature of military installations, defers to the powers and needs of the military and its regulating authorities.

Justice Stevens disagreed. In his dissenting opinion, he places limits on the deference that should be granted the military and Congress in regulating it:

In my opinion, respondent's visit to the open house in this case in response to a general invitation to the public extended nine years after he was removed from the base and ordered not to reenter does not involve the kind of reentry that Congress intended to prohibit when it enacted the 1909 statute.\textsuperscript{247}

In so doing, Justice Stevens reveals his faith in his own aptitude for determining the intent of Congress in the realm of military affairs. Intimately familiar with Hawaiian military bases, Justice Stevens takes it upon himself to question the policies of commanders in issuing bar letters and this practice’s adherence to congressional intent. “[T]he practice of issuing such bar letters is surely commendable, but it cannot, in my judgment, expand the coverage of the statute in the slightest.”\textsuperscript{248} Also on the topic of bar letters, Justice Stevens notes the myriad reasons for which people may be excluded from military bases, among which are “creating a disturbance, violating a traffic regulation, attempting to induce a soldier to visit a saloon or to engage in an immoral act, wandering into an area where a training exercise is in progress, or perhaps even ‘chewing gum in the wrong place.’”\textsuperscript{249} This mere hint at a separate community that exists on military bases is unaccompanied by any mention of the discipline it is meant to ensure. Also absent is any mention of the national security that this discipline is enforced to protect. Rather than deferring to the judgments of military officials in regulating their forces, Stevens declares these judgments ill-founded and improper. He instead turns to the judgments of the


\textsuperscript{247} Ibid., 693-694.

\textsuperscript{248} Ibid., 700.

\textsuperscript{249} Ibid., 694.
“reasonable person” in supplying his own. In a move characteristic of his general jurisprudence, Justice Stevens favors the rights of the individual before the Court. For Justice Stevens, familiar with what is really involved in disciplining a fighting force and keeping up a base, concerns similar to these prove insufficient to justify the curtailment of the liberties of the individual.

The following year, Justice Stevens authored a concurrence in Goldman v. Weinberger that, while ultimately deferring to “professionals in the military service,” places great emphasis on the religious liberties of the individual. In this case, a Jewish officer in the Air Force was punished for wearing a yarmulke while in uniform, as this was against regulation. Deciding that the Free Exercise clause applies differently in the military setting, the Court issued a deferential majority opinion. Writing for this majority, Chief Justice Rehnquist reasoned:

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

Justice Stevens, also finding the regulation legitimate, decides not to vote with the majority, but to issue a concurring opinion that is joined by two other former military service members — Justices White and Powell.

In his concurrence, Justice Stevens, while still respecting the needs of the military to maintain order and uniformity, presents this uniformity in a vastly different light. “The interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths.” For Justice Stevens, the interest in uniformity present in this case stems not

---

250 For a more in-depth discussion on this case and its outcome, see Chapter 1.


253 Goldman, supra, 512.
from a concern for national security and military discipline, but rather from a concern for the rights of the individual soldiers. For him, it is the uniform application of the regulation rather than the uniformity the regulation was designed to enforce that serves as his compass in deciding on this case. “[W]e must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands.”254 In so doing, Justice Stevens takes one of the Court’s most oft-cited arguments in the justification of deference to the military and bends it to stand for individual rights rather than military need.255

Perhaps of most interest in his Goldman concurrence is Justice Stevens’s direct mention of the influence of experience with the military:

Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the "rag-tag band of soldiers" that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of that interest.256

Here, Justice Stevens provides his most direct mention of a justice’s service in the military. Whether speaking about himself and his own experience in the Navy or his fellow justices on the bench who are also military veterans, the rhetoric in Stevens’s opinion directly points to the influence of military experience in deciding this case. Justice Stevens’s mention of “personal experience” with the military stands as an interesting piece of advice for his fellow, and future, justices with military experience, especially as it seems to contradict general trends in his deferential behavior. As Justice Stevens attests here, prior experience in the military should not necessarily prevent deferential voting behavior.

254 Ibid., 512.

255 For further discussion on and examples of the Court’s employment of this argument, the argument for the military’s need for uniformity and obedience, see Chapter 2’s discussion on defining the military deference doctrine.

256 Goldman, supra, 512.
In 1990, Stevens issued the majority opinion in another military deference case: *Perpich v. Department of Defense*. Involving the Constitution’s Militia Clauses, the case arose from the Governor of Minnesota’s challenge to the authorization of orders for members of the National Guard to be called to active duty and training. Perpich, the Governor of Minnesota, contended that this sort of authorization was illegitimate without the approval of the governor, as per America’s traditional stance on the relationship between the states and the federal government. Writing for the majority, Justice Stevens opines that this is not the case. Rather, in an opinion that looks into the history of the relationship between the military and the Constitution, the role of Congress in regulating and managing the military, and the deference Congress should be granted in filling that role, he finds that the Militia Clauses give Congress the power to call for federal active duty members of the National Guard without the permission of state governors.

Justice Stevens’s opinion is largely centered around the broad powers conferred upon Congress by the Constitution in the realm of military affairs, another argument that is often cited in support of deference to the military. Beginning with a look into history, he discusses the government’s relationship with a standing army at the time of the nation’s founding:

> [T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national Army and also to organize "the Militia."  

Here noting the threat of broad military discretion on the liberties of the individual, Stevens nonetheless reminds the Court that military necessity and concerns of national security necessitated the expansion of Congress’s powers over the military. Such an interpretation represents a more lenient rather than stricter interpretation of Congress’s military powers, an interpretation that would seem to allow for increased deference to

---

Congress. “The congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers.”

Such an interpretation on the part of Justice Stevens naturally leads to a case for deference to Congress in the area of military matters. In fact, he goes so far as to note, “If the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it.”

In this opinion, we see Justice Stevens, a veteran of both the military and Congressional bodies, opting to grant Congress, and by extension the military, greater discretion. He cautions the Court not to limit the powers of Congress conferred upon them by our founding document, citing concerns of national security as partial justification. Unlike in his Albertini and Goldman opinions, Justice Stevens in Perpich grants the military broader deference.

What is of note in this case is that the military instrument was up not against individual rights, as is the case in most of the military deference opinions Justice Stevens authored, but rather against the rights of the states and their governments. As such, this decision to defer is not inconsistent with Stevens’s other military deference opinions in which he decides not to defer in light of the nature of the relationship between the military and the individual. Unlike in Albertini and Goldman, Justice Stevens in Perpich was presented with no “threat to individual liberty,” as he terms such violations of individual rights in the opinion.

The next threat to this individual liberty with which Justice Stevens dealt came in the way of the 1996 case of Loving v. United States. This case involved the authority of the president as commander-in-chief in regulating courts-martial involving capital punishment. The majority of the Court found that the president does, indeed, have such

---

258 Ibid., 350.
259 Ibid., 350.
authority. Justice Stevens’s response to this majority opinion did not come as a surprise. Characteristically showing concern for the rights of prisoners and in his usual spirit of independent and expressive opinions, Justice Stevens penned a concurrence in which his care for the treatment of prisoners is compounded by his care for the service members who are sacrificing in order to defend our country. Revealing the impact of his respect for the armed services and their members, Justice Stevens emphasizes that “the question is a substantial one because, when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.”

In this selection from Justice Stevens’s concurrence, he also addresses the idea of a separate community and nonuniform application of the Constitution in civilian and military communities. For Justice Stevens, the rights of the prisoner should be consistent with the demands of the Constitution in both cases. Nothing about the nature of military service presented a need great enough to justify the curtailment of the rights of those citizens who were fighting to protect those rights. The rights of the individual, more specifically the rights of the prisoner, trump arguments of military authority and exigency. Noting the gravity of capital cases and the finality of their outcomes, Stevens rejects “any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones.”

The needs and security of the individual service member rather than the needs and security of the armed forces are dominant in Stevens’s judicial mind.

---

261 Ibid., 774.
One decade later, Justice Stevens wrote what some consider his most important military deference opinion. Like the Japanese internment cases of the 1940s in which Justice Frank Murphy repeatedly refused to allow the military and its regulating authorities to bend the Constitution, the Guantanamo Bay cases allowed Justice John Paul Stevens a chance to defend the Constitution just as vehemently. The most notable of these cases is *Hamdan v. Rumsfeld*. This 2006 case challenged the constitutionality of the military commissions established at Guantanamo Bay by President Bush to try enemy detainees. For the majority, Justice Stevens writes an openly non-deferential opinion:

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

Finding constitutional protections for prisoners, specifically enemy alien detainees, more important than the alleged needs of the military, Justice Stevens refuses the military, via its commander-in-chief, the deference for which it called.

In opting not to show the military deference, Justice Stevens does not outright condemn such judicial practice. Rather, he addresses directly the deference that ought to be shown judgments by military commanders. Speaking about the president’s determination that it would be impractical in Hamdan’s case to guarantee the normal protections given criminal cases in United States district courts, he writes, “We assume that complete deference is owed that determination.” The same, however, does not hold true for the distinction between courts-martial and military commissions, the latter of which is governed by procedures that “historically have been the same as those

---

262 *See* Toobin, “After Stevens,” in which he writes, “The summit of Stevens’s achievements on the bench came during the Bush Administration, in the series of decisions about the detention of prisoners at Guantánamo Bay, and he kept for himself the most important of these opinions.”


governing courts-martial.” 265 Stevens, on this point, writes, “[W]e conclude that the ‘practicability’ determination the President has made is insufficient to justify variances from the procedures governing courts-martial.” 266 The president’s justification of such deviation from established law was insufficient to allow for deference. Rather, as was usually the case with Justice Stevens, it is the rights of the prisoner, such as the one violated by the fact that “Hamdan has no right to appeal any conviction to the civilian judges of the Court of Military Appeals,” that reign supreme in Stevens’s mind. 267

In addition to addressing the argument of deference directly, Justice Stevens takes care throughout his opinion to reject, one by one, the most used arguments in favor of deference to the military. Already noted above is his outright rejection of the terrorism and national defense argument. “The only reason offered in support of [the government’s] determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.” 268 He notes an “inability on the Executive's part here to satisfy the most basic precondition — at least in the absence of specific congressional authorization — for establishment of military commissions: military necessity.” 269 Noting, “The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity,” Stevens goes on to limit the influence of that necessity on the military court system. 270 “Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.” 271 In Justice Stevens’s eyes, which had

265 Ibid., 617.
266 Ibid., 622.
267 Ibid., 587.
268 Ibid., 623.
269 Ibid., 612.
270 Ibid., 590.
271 Ibid., 624.
seen the realities of a nation at war, the context of Hamdan’s case falls short of such states of military emergency. The needs of the military are not so great as to warrant ignoring the needs of Hamdan. Casting his own semi-expert judgment on military affairs and what they necessitated, ignoring the advice he gives in his Goldman concurrence, Justice Stevens opts not to defer.

Further, Justice Stevens writes directly on the argument of the need for discipline in the military. “Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply.” Here, too, Justice Stevens casts his own judgment, which serves to replace that offered by active military commanders, on what is required in the way of discipline. Addressing also the military’s related interest in uniformity, Justice Stevens rejects another argument for deference. Justice Stevens also rejects the rationale of the constitutionally granted powers justification for military deference. He reasons that the president has no power to establish courts not contemplated by the Constitution, such as those set up at Guantanamo Bay. “That authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.” More than six decades after Justice Murphy defended the constitutional protections of Japanese Americans during the Second World War, Justice Stevens similarly rejects arguments of military necessity in not allowing the usual constitutional protections to enemy alien detainees at Guantanamo Bay during the conflicts in Iraq and Afghanistan.

**Honor, Courage, Commitment: A Conclusion**

Justice Stevens provides a compelling story of the impact of military service on judicial behavior in military deference cases. He, himself, admitted that what he experienced in the Navy during World War II impacted his legal and judicial views. With experience working under military commanders as well as commanding subordinates in

---

272 Ibid., 587.
273 Ibid., 591.
the Navy, Justice Stevens was not afraid to replace judgments of officers before the Court with his own, a practice not displayed by all of his peers. Familiar with the rules and regulations of the military, he, like Justice Murphy, exhibited skepticism regarding the strength and legitimacy of cries of necessity. While his rhetoric in military deference cases, with an air of the autobiographical, was slightly different from his rhetoric in other cases, Justice Stevens’s priorities and values remained constant. Demonstrated in his opinions is the idea that the rights of the individual, the rights of the disadvantaged before the Court, must take precedence in the judicial mind. This is consistent with Justice Stevens’s general jurisprudence as well as the jurisprudence of Justice Murphy, as outlined in Chapter 3. As he himself put it in Loving, “there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.”274 Here, Justice Stevens displays the same sense of brotherhood and camaraderie that is so essential to the functioning of our armed forces, indicating that, as was the case with Justice Murphy, the old soldier in him never died.

---

274 *Loving, supra,* 774.
Chapter 6

Toth v. Quarles: A Conclusion

On May 13, 1953, a detachment of Air Force military police showed up at a steel mill in Pittsburgh, Pennsylvania to arrest Robert W. Toth on charges of premeditated murder. In short time, Toth was herded aboard an Air Force plane and flown to Korea to await his court-martial.275 This court-martial, however, never happened. When the Air Force released Toth, the Secretary of the Air Force appealed the decision, ultimately to the Supreme Court. The case of Toth v. Quarles hinged on the question of whether or not a military court had jurisdiction in trying Toth, a former service member who had been honorably discharged five months prior, for a crime he allegedly committed while in the Air Force. The Court — holding “that Congress cannot subject civilians like Toth to trial by court-martial,” that he is “entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution” — responded with a resounding no.276

What makes this case noteworthy in the context of this thesis, in addition to its being a military deference case, is the composition of the Court that decided it. Of the nine justices that sat on the bench, not a single one lacked prior military experience. A military veteran wrote that “[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution,” that “Army discipline will not be improved by court-martiaing rather than trying by jury some civilian ex-soldier.”277 Speaking with an air of personal experience and semi-expertise in military matters, the majority of an entirely ex-service member Supreme Court explicitly denied the military deference. Even more surprising is their evocation of the deep-rooted

277 Ibid., 22.
American fear of the military as a threat to liberty.\textsuperscript{278} This thesis, through a series of qualitative and quantitative analyses, has shown that \textit{Toth} does not stand alone in this regard. Rather, this case is part of the larger paradox evidenced in the Stone through Roberts Courts, whereby justices with prior military experience are less likely to defer to the military than those without.

\textbf{Findings}

This thesis is centered upon the quantitative analysis presented in Chapter 4. One of few statistical analyses in the field of military deference, this study makes a unique contribution in its narrow scope of exclusively military deference cases, a precision lacking in Lichtman’s initial statistical analysis of the military deference doctrine. Evaluation of these 68 military deference cases, defined as cases that weigh military exigency and expertise against constitutional guarantees, brought to the fore two key findings:

(1) For those justices who served on the Stone through Roberts Courts, the evidence suggests that the occurrence of prior military service is associated with less deferential voting behavior in military deference cases. This counterintuitive relationship poses a challenge to the conventional wisdom governing the analysis of the Court and military affairs.

(2) Those justices with military experience also proved more liberal in their judicial ideologies, a variable shown to be explanatory of deferential behavior. When considered in light of the previous finding, this suggests that military service may impact deferential voting behavior via judicial ideology.

My attempt to avoid the trap that scholars of the Supreme Court are quick to warn about, namely evaluating the nuances of Court by numbers alone, makes these findings all the more compelling.

\textsuperscript{278} For more, see Chapter 2.
Supplementing and corroborating the quantitative analysis, a pair of case studies of two of the Court’s most prolific writers of military deference opinions add dimension to these findings. Both Justice Frank Murphy, in Chapter 3, and Justice John Paul Stevens, in Chapter 5, were demonstrably affected by their time in the military. Apparent in the military deference opinions of both of these iconoclastic justices are a sense of personal familiarity and confidence in military affairs and a high esteem for the American armed forces. This high esteem, however, compounded by an inhibition in questioning military “peers,” lends itself to an unwillingness to accept anything less than a steadfast dedication to the American tradition as embodied in the Constitution. In the case of Murphy, this manifested itself in a crusade for individual rights, which he perceived as endangered by a military that must be mindful not to abuse its power. Stevens, similarly concerned with individual rights, especially those of the prisoner, showed no hesitation in vocalizing his skepticism of the military’s cries of “necessity.” These two justices, acting via the vocabulary of the military, relentlessly fought to protect on the bench those same rights that they had defended on the battlefield. In most cases, this meant denying the military the deference it sought, reflecting the association found in Chapter 4.

**Avenues for Future Research**

As the first mixed methods study delving into the impact of military service on the behavior of Supreme Court justices in military deference cases, this thesis raises a number of questions and channels for further investigation. In many senses, the scope of this thesis serves as a limitation for its findings. Considering just military deference cases since 1942, it neglects hundreds of years of Supreme Court cases. Expanding the analysis to probe further into the Court’s history may reveal interesting trends and developments over time. For example, one could study the military deference behavior of justices with service experience from before the military was professionalized to further illuminate the impact of this institutional change. As this thesis presents just two case studies of individual justices, and 39 military veterans have served on the Court,
future research could also explore the same relationship between service and deference in the cases of other justices with military experience. Additionally, this thesis has considered the impact of prior military experience on Supreme Court justices in military deference cases alone. Further research on the impact of military service on the bench in other areas of cases — civil liberties, equal protection, separation of powers — would provide a comparison and contextualize this study’s findings.

**Final Thoughts**

On today’s military-dominated political stage, the inverse association found between prior military service and deferential voting behavior in this thesis is particularly salient. With the natures of warfare and the military undergoing significant changes, both new and old legal and constitutional concerns are rising to the level of the Supreme Court. The recent end of the Combat Exclusion Policy will unearth old questions of a male-only draft.\(^{279}\) The need to work ever more closely with foreign nationals in today’s age of unconventional warfare raises questions of trying foreign national employees of the United States military in courts-martial. Trying enemy combatants and suspected terrorists detained at Guantanamo Bay has proven similarly problematic.\(^{280}\)

In spite of the military’s prominence in the greater context of American government, the Supreme Court, for the first time since 1936, lacks even a single justice with prior combat experience.\(^{281}\) Further, no justice with military experience has been appointed by the current president, who potentially stands to fill a vacancy or two on the bench in the upcoming years. The justices that are nominated to fill these seats, taking the bench in a time of great social scrutiny of military practices, are poised to influence

\(^{279}\) The Combat Exclusion Policy, which dates to 1994, was lifted in 2013. When in place, this policy barred women from units whose primary function was direct ground combat. For the Court’s initial stance on an all-male draft, from before combat positions were opened to female service members, see *Rostker v. Goldberg*, 453 U.S. 57 (1981).


the future of the doctrine of military deference. Military veterans, with the experience and insight necessary to confidently question the military and its “exigencies,” seem properly suited to wield that influence on the Court. Paradoxically, were the Court to welcome an old soldier into its ranks today, it might just be welcoming a challenge to its tradition of military deference.
Bibliography


## Appendix A: Catalog of Deference Cases

### Table 1: Catalog of Deference Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Year</th>
<th>Court</th>
<th>Deferential</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex Parte Quirin</td>
<td>317 U.S. 1</td>
<td>1942</td>
<td>Stone</td>
<td>1</td>
</tr>
<tr>
<td>Hirabayashi v. United States</td>
<td>320 U.S. 81</td>
<td>1943</td>
<td>Stone</td>
<td>1</td>
</tr>
<tr>
<td>Falbo v. United States</td>
<td>320 U.S. 549</td>
<td>1944</td>
<td>Stone</td>
<td>1</td>
</tr>
<tr>
<td>Korematsu v. United States</td>
<td>323 U.S. 214</td>
<td>1944</td>
<td>Stone</td>
<td>1</td>
</tr>
<tr>
<td>Duncan v. Kahanamoku</td>
<td>327 U.S. 304</td>
<td>1946</td>
<td>Stone</td>
<td>0</td>
</tr>
<tr>
<td>Gibson v. United States</td>
<td>329 U.S. 338</td>
<td>1945</td>
<td>Vinson</td>
<td>0</td>
</tr>
<tr>
<td>In re Yamashita</td>
<td>327 U.S. 1</td>
<td>1948</td>
<td>Stone</td>
<td>1</td>
</tr>
<tr>
<td>Patterson v. Lamb</td>
<td>329 U.S. 539</td>
<td>1947</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>United States ex rel. Hirshberg v. Cooke</td>
<td>336 U.S. 210</td>
<td>1943</td>
<td>Vinson</td>
<td>0</td>
</tr>
<tr>
<td>Wade v. Hunter</td>
<td>336 U.S. 684</td>
<td>1949</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Feres v. United States</td>
<td>340 U.S. 135</td>
<td>1950</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Hiatt v. Brown</td>
<td>339 U.S. 103</td>
<td>1950</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Johnson v. Eisentrager</td>
<td>339 U.S. 763</td>
<td>1950</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Whelchel v. McDonald</td>
<td>340 U.S. 122</td>
<td>1950</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Madsen v. Kinsella</td>
<td>343 U.S. 341</td>
<td>1952</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Caltex (Philippines) Inc.</td>
<td>344 U.S. 149</td>
<td>1952</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Burns v. Wilson</td>
<td>346 U.S. 137</td>
<td>1953</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>Orloff v. Willoughby</td>
<td>345 U.S. 83</td>
<td>1953</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Nugent</td>
<td>346 U.S. 1</td>
<td>1953</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Reynolds</td>
<td>345 U.S. 1</td>
<td>1953</td>
<td>Vinson</td>
<td>1</td>
</tr>
<tr>
<td>United States ex rel. Toth v. Quaries</td>
<td>350 U.S. 11</td>
<td>1955</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>Kinsella v. Krueger</td>
<td>351 U.S. 470</td>
<td>1956</td>
<td>Warren</td>
<td>1</td>
</tr>
<tr>
<td>Reid v. Covert</td>
<td>354 U.S. 1</td>
<td>1957</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>Wilson v. Girard</td>
<td>354 U.S. 524</td>
<td>1957</td>
<td>Warren</td>
<td>1</td>
</tr>
<tr>
<td>Trop v. Dulles</td>
<td>356 U.S. 86</td>
<td>1958</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>Lee v. Madigan</td>
<td>358 U.S. 228</td>
<td>1959</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>Grisham v. Hagan</td>
<td>361 U.S. 278</td>
<td>1960</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>Kinsella v. United States ex rel. Singleton</td>
<td>361 U.S. 234</td>
<td>1960</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>McElroy v. United States ex rel. Guagliardo</td>
<td>361 U.S. 281</td>
<td>1960</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>United States v. O'Brien</td>
<td>391 U.S. 367</td>
<td>1968</td>
<td>Warren</td>
<td>1</td>
</tr>
<tr>
<td>Noyd v. Bond</td>
<td>395 U.S. 683</td>
<td>1969</td>
<td>Warren</td>
<td>1</td>
</tr>
<tr>
<td>O'Callahan v. Parker</td>
<td>395 U.S. 258</td>
<td>1969</td>
<td>Warren</td>
<td>0</td>
</tr>
<tr>
<td>Schacht v. United States</td>
<td>398 U.S. 68</td>
<td>1970</td>
<td>Burger</td>
<td>0</td>
</tr>
<tr>
<td>Gillette v. United States</td>
<td>401 U.S. 437</td>
<td>1971</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Relford v. Commandant</td>
<td>401 U.S. 355</td>
<td>1971</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Case</td>
<td>Citation</td>
<td>Year</td>
<td>Court</td>
<td>Deferential</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>-------------</td>
<td>------</td>
<td>-----------</td>
<td>-------------</td>
</tr>
<tr>
<td>Flower v. United States</td>
<td>407 U.S. 197</td>
<td>1972</td>
<td>Burger</td>
<td>0</td>
</tr>
<tr>
<td>Laird v. Tatum</td>
<td>408 U.S. 1</td>
<td>1972</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Parisi v. Davidson</td>
<td>415 U.S. 34</td>
<td>1972</td>
<td>Burger</td>
<td>0</td>
</tr>
<tr>
<td>Gosse v. Mayden</td>
<td>413 U.S. 665</td>
<td>1973</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Parker v. Levy</td>
<td>417 U.S. 733</td>
<td>1974</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>McLucas v. DeChamplain</td>
<td>421 U.S. 21</td>
<td>1975</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Schlesinger v. Ballard</td>
<td>419 U.S. 498</td>
<td>1975</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Schlesinger v. Councilman</td>
<td>420 U.S. 738</td>
<td>1975</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Greer v. Spock</td>
<td>424 U.S. 828</td>
<td>1976</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Stencel Engineering Corp. v. United States</td>
<td>431 U.S. 666</td>
<td>1977</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Brown v. Glines</td>
<td>444 U.S. 348</td>
<td>1980</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Secretary of the Navy v. Huff</td>
<td>444 U.S. 453</td>
<td>1980</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Rostker v. Goldberg</td>
<td>453 U.S. 57</td>
<td>1981</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Chappell v. Wallace</td>
<td>462 U.S. 296</td>
<td>1983</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Albertini</td>
<td>472 U.S. 675</td>
<td>1985</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Shearer</td>
<td>473 U.S. 52</td>
<td>1985</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Wayte v. United States</td>
<td>470 U.S. 598</td>
<td>1985</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Goldman v. Weinberger</td>
<td>475 U.S. 503</td>
<td>1986</td>
<td>Burger</td>
<td>1</td>
</tr>
<tr>
<td>Solorio v. United States</td>
<td>493 U.S. 435</td>
<td>1987</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Johnson</td>
<td>481 U.S. 661</td>
<td>1987</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>United States v. Stanley</td>
<td>483 U.S. 669</td>
<td>1987</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>Department of the Navy v. Egan</td>
<td>484 U.S. 518</td>
<td>1988</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>Perpich v. Department of Defense</td>
<td>496 U.S. 334</td>
<td>1990</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>Weiss v. United States</td>
<td>510 U.S. 163</td>
<td>1994</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>Loving v. United States</td>
<td>517 U.S. 748</td>
<td>1996</td>
<td>Rehnquist</td>
<td>1</td>
</tr>
<tr>
<td>Hamdi v. Rumsfeld</td>
<td>542 U.S. 507</td>
<td>2004</td>
<td>Rehnquist</td>
<td>0</td>
</tr>
<tr>
<td>Rasul v. Bush</td>
<td>542 U.S. 466</td>
<td>2004</td>
<td>Rehnquist</td>
<td>0</td>
</tr>
<tr>
<td>Hamdan v. Rumsfeld</td>
<td>548 U.S. 557</td>
<td>2006</td>
<td>Roberts</td>
<td>0</td>
</tr>
<tr>
<td>Rumsfeld v. Fair</td>
<td>547 U.S. 47</td>
<td>2006</td>
<td>Roberts</td>
<td>1</td>
</tr>
<tr>
<td>Boumediene v. Bush</td>
<td>553 U.S. 723</td>
<td>2008</td>
<td>Roberts</td>
<td>0</td>
</tr>
<tr>
<td>Munaf v. Geren</td>
<td>553 U.S. 674</td>
<td>2008</td>
<td>Roberts</td>
<td>1</td>
</tr>
<tr>
<td>Winter v. Natural Resources Defense Council</td>
<td>555 U.S. 7</td>
<td>2008</td>
<td>Roberts</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 2: Number of Deference Cases Decided Deferentially by Each Court

<table>
<thead>
<tr>
<th>Cases</th>
<th>Deference</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>68</td>
<td>73.53%</td>
</tr>
<tr>
<td>Roberts</td>
<td>5</td>
<td>60.00%</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>9</td>
<td>77.78%</td>
</tr>
<tr>
<td>Burger</td>
<td>22</td>
<td>86.36%</td>
</tr>
<tr>
<td>Warren</td>
<td>12</td>
<td>33.33%</td>
</tr>
<tr>
<td>Vinson</td>
<td>14</td>
<td>85.71%</td>
</tr>
<tr>
<td>Stone</td>
<td>6</td>
<td>83.33%</td>
</tr>
</tbody>
</table>
Appendix B: List of Justices Considered

<table>
<thead>
<tr>
<th>Justice Name</th>
<th>Active Service on the Court</th>
<th>Prior Military Service?</th>
<th>Branch</th>
<th>War(s) Served In</th>
<th>Years of Military Service</th>
<th>Percentage of Votes Deferential</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harlan F. Stone</td>
<td>1925 - 1946</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>83.33%</td>
</tr>
<tr>
<td>Owen Roberts</td>
<td>1930 - 1945</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>75.00%</td>
</tr>
<tr>
<td>Hugo Black</td>
<td>1937 - 1971</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>2</td>
<td>40.00%</td>
</tr>
<tr>
<td>Stanley Forman Reed</td>
<td>1938 - 1957</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>1</td>
<td>86.36%</td>
</tr>
<tr>
<td>Felix Frankfurter</td>
<td>1939 - 1962</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>5</td>
<td>66.67%</td>
</tr>
<tr>
<td>William O. Douglas</td>
<td>1939 - 1975</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>2</td>
<td>31.71%</td>
</tr>
<tr>
<td>Frank Murphy</td>
<td>1940 - 1949</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I, World War II</td>
<td>2</td>
<td>22.22%</td>
</tr>
<tr>
<td>James F. Byrnes</td>
<td>1941 - 1942</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>100.00%</td>
</tr>
<tr>
<td>Robert H. Jackson</td>
<td>1941 - 1954</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>76.47%</td>
</tr>
<tr>
<td>Wiley Blount Rutledge</td>
<td>1943 - 1949</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>44.44%</td>
</tr>
<tr>
<td>Harold Hitz Burton</td>
<td>1945 - 1958</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>2</td>
<td>85.71%</td>
</tr>
<tr>
<td>Fred M. Vinson</td>
<td>1946 - 1953</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>2</td>
<td>85.71%</td>
</tr>
<tr>
<td>Tom C. Clark</td>
<td>1949 - 1967</td>
<td>Yes</td>
<td>TX Natl. Guard</td>
<td>World War I</td>
<td>1</td>
<td>78.95%</td>
</tr>
<tr>
<td>Sherman Minton</td>
<td>1949 - 1956</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>2</td>
<td>100.00%</td>
</tr>
<tr>
<td>Earl Warren</td>
<td>1953 - 1969</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War I</td>
<td>1</td>
<td>25.00%</td>
</tr>
<tr>
<td>John Marshall Harlan II</td>
<td>1955 - 1971</td>
<td>Yes</td>
<td>U.S. Army Air Forces</td>
<td>World War II</td>
<td>2</td>
<td>73.33%</td>
</tr>
<tr>
<td>William J. Brennan, Jr.</td>
<td>1956 - 1990</td>
<td>Yes</td>
<td>U.S. Army</td>
<td>World War II</td>
<td>4</td>
<td>31.62%</td>
</tr>
<tr>
<td>Charles Evans Whittaker</td>
<td>1957 - 1962</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>66.67%</td>
</tr>
<tr>
<td>Potter Stewart</td>
<td>1958 - 1981</td>
<td>Yes</td>
<td>U.S. Navy</td>
<td>World War II</td>
<td>5</td>
<td>62.50%</td>
</tr>
<tr>
<td>Byron White</td>
<td>1962 - 1993</td>
<td>Yes</td>
<td>U.S. Navy</td>
<td>World War II</td>
<td>4</td>
<td>76.67%</td>
</tr>
<tr>
<td>Abe Fortas</td>
<td>1965 - 1989</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>100.00%</td>
</tr>
<tr>
<td>Thurgood Marshall</td>
<td>1967 - 1991</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>23.08%</td>
</tr>
<tr>
<td>Warren E. Burger</td>
<td>1969 - 1986</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>86.36%</td>
</tr>
<tr>
<td>Harry Blackmun</td>
<td>1970 - 1994</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>85.19%</td>
</tr>
<tr>
<td>Lewis F. Powell, Jr.</td>
<td>1972 - 1987</td>
<td>Yes</td>
<td>U.S. Army Air Forces</td>
<td>World War II</td>
<td>4</td>
<td>95.00%</td>
</tr>
<tr>
<td>William Rehnquist</td>
<td>1972 - 2005</td>
<td>Yes</td>
<td>U.S. Army Air Forces</td>
<td>World War II</td>
<td>3</td>
<td>96.30%</td>
</tr>
<tr>
<td>John Paul Stevens</td>
<td>1975 - 2010</td>
<td>Yes</td>
<td>U.S. Navy</td>
<td>World War II</td>
<td>3</td>
<td>52.17%</td>
</tr>
<tr>
<td>Sandra Day O’Connor</td>
<td>1981 - 2006</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>71.43%</td>
</tr>
<tr>
<td>Antonin Scalia</td>
<td>1986 - Present</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>92.86%</td>
</tr>
<tr>
<td>Anthony Kennedy</td>
<td>1988 - Present Yes</td>
<td>CA Army Natl. Guard</td>
<td></td>
<td></td>
<td></td>
<td>60.00%</td>
</tr>
<tr>
<td>David Souter</td>
<td>1990 - 2009</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
<td>44.44%</td>
</tr>
<tr>
<td>Clarence Thomas</td>
<td>1991 - Present No</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100.00%</td>
</tr>
<tr>
<td>Ruth Bader Ginsburg</td>
<td>1993 - Present No</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>44.44%</td>
</tr>
<tr>
<td>Stephen Breyer</td>
<td>1994 - Present Yes</td>
<td>U.S. Army Reserve</td>
<td></td>
<td></td>
<td></td>
<td>37.50%</td>
</tr>
<tr>
<td>John G. Roberts</td>
<td>2005 - Present No</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100.00%</td>
</tr>
<tr>
<td>Samuel Alito</td>
<td>2006 - Present Yes</td>
<td>U.S. Army Reserve</td>
<td></td>
<td></td>
<td></td>
<td>100.00%</td>
</tr>
</tbody>
</table>
Appendix C: Results

Table 1: Binary Logistic Regression of Military Service on Deference

<table>
<thead>
<tr>
<th>Variables in the Equation</th>
<th>B</th>
<th>S.E.</th>
<th>Wald</th>
<th>df</th>
<th>Sig.</th>
<th>Exp(B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1* service</td>
<td>-.328</td>
<td>.191</td>
<td>2.931</td>
<td>1</td>
<td>.087</td>
<td>.721</td>
</tr>
<tr>
<td>Constant</td>
<td>.805</td>
<td>.162</td>
<td>24.619</td>
<td>1</td>
<td>.000</td>
<td>2.236</td>
</tr>
</tbody>
</table>

a. Variable(s) entered on step 1: service.

Table 2: Binary Logistic Regression with Multiple Covariates

<table>
<thead>
<tr>
<th>Variables in the Equation</th>
<th>B</th>
<th>S.E.</th>
<th>Wald</th>
<th>df</th>
<th>Sig.</th>
<th>Exp(B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1* service</td>
<td>-.118</td>
<td>.243</td>
<td>.236</td>
<td>1</td>
<td>.627</td>
<td>.889</td>
</tr>
<tr>
<td>wartime</td>
<td>.046</td>
<td>.194</td>
<td>.056</td>
<td>1</td>
<td>.812</td>
<td>1.047</td>
</tr>
<tr>
<td>year</td>
<td>-.021</td>
<td>.007</td>
<td>8.813</td>
<td>1</td>
<td>.003</td>
<td>.979</td>
</tr>
<tr>
<td>timeonbench</td>
<td>-.038</td>
<td>.014</td>
<td>7.622</td>
<td>1</td>
<td>.006</td>
<td>.962</td>
</tr>
<tr>
<td>segalcover</td>
<td>-.350</td>
<td>.411</td>
<td>66.295</td>
<td>1</td>
<td>.000</td>
<td>.035</td>
</tr>
<tr>
<td>Constant</td>
<td>45.419</td>
<td>14.379</td>
<td>9.977</td>
<td>1</td>
<td>.002</td>
<td>5.313E+19</td>
</tr>
</tbody>
</table>

a. Variable(s) entered on step 1: service, wartime, year, timeonbench, segalcover.

Table 3: Binary Logistic Regression with Normalized Covariates

<table>
<thead>
<tr>
<th>Variables in the Equation</th>
<th>B</th>
<th>S.E.</th>
<th>Wald</th>
<th>df</th>
<th>Sig.</th>
<th>Exp(B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1* service</td>
<td>-.118</td>
<td>.243</td>
<td>.236</td>
<td>1</td>
<td>.627</td>
<td>.889</td>
</tr>
<tr>
<td>wartime</td>
<td>.046</td>
<td>.194</td>
<td>.056</td>
<td>1</td>
<td>.812</td>
<td>1.047</td>
</tr>
<tr>
<td>segalcover</td>
<td>-.350</td>
<td>.411</td>
<td>66.295</td>
<td>1</td>
<td>.000</td>
<td>.035</td>
</tr>
<tr>
<td>norm_year</td>
<td>-.147</td>
<td>.477</td>
<td>8.813</td>
<td>1</td>
<td>.003</td>
<td>.242</td>
</tr>
<tr>
<td>norm_timeonbench</td>
<td>-.1385</td>
<td>.502</td>
<td>7.622</td>
<td>1</td>
<td>.006</td>
<td>.250</td>
</tr>
<tr>
<td>Constant</td>
<td>3.717</td>
<td>.456</td>
<td>66.557</td>
<td>1</td>
<td>.000</td>
<td>41.138</td>
</tr>
</tbody>
</table>

a. Variable(s) entered on step 1: service, wartime, segalcover, norm_year, norm_timeonbench.
Table 4: Correlations between Military Service and Other Covariates

<table>
<thead>
<tr>
<th>Variables Correlated</th>
<th>Pearson Correlation Coefficient</th>
<th>2-Tailed Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Military Service</td>
<td>0.201</td>
<td>0.000</td>
</tr>
<tr>
<td>Ideology (Segal-Cover)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military Service</td>
<td>0.160</td>
<td>0.000</td>
</tr>
<tr>
<td>Time on the Bench</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military Service</td>
<td>-0.274</td>
<td>0.000</td>
</tr>
<tr>
<td>Year Opinion Issued</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 5: Linear Regression of Military Service on Ideology

<table>
<thead>
<tr>
<th>Model</th>
<th>Unstandardized Coefficients</th>
<th>Standardized Coefficients</th>
<th>t</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B</td>
<td>Std. Error</td>
<td>Beta</td>
<td></td>
</tr>
<tr>
<td>(Constant)</td>
<td>.463</td>
<td>.024</td>
<td>.201</td>
<td>.000</td>
</tr>
<tr>
<td>Military Service</td>
<td>.143</td>
<td>.029</td>
<td>.201</td>
<td>.000</td>
</tr>
</tbody>
</table>

a. Dependent Variable: Segal Cover Score