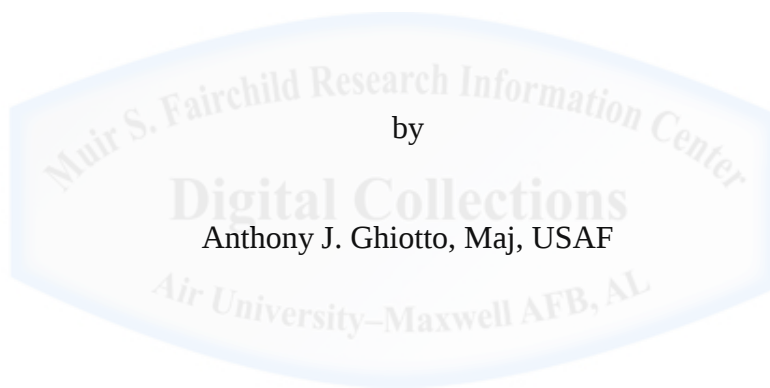


AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

**BACK TO THE FUTURE WITH THE UNIFORM CODE OF MILITARY JUSTICE:
THE NEED TO RECALIBRATE THE RELATIONSHIP BETWEEN THE MILITARY
JUSTICE SYSTEM, DUE PROCESS, AND GOOD ORDER AND DISCIPLINE**



A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements

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Abstract

In recent years, the military justice system has come under increased Congressional and public scrutiny. Driving much of this increased scrutiny is the issue of sexual assault. The dramatic increase in reported sexual assaults, coupled with the military's response, resulted in public officials calling for dramatic reform of the military justice system. These calls for reform included limiting, and even removing, the role commanders play in the military justice system. The military departments must proceed carefully, though, with these calls for reform. Dramatic reforms designed to correct the apparent flaws in the military justice system may in turn undermine the system. Any reform effort must be built upon a solid understanding of what underlying factors account for the increase in service member misconduct.

This paper argues that both the explanation and the solution for the apparent increase in service member misconduct lies in good order and discipline. The supposed purpose of good order and discipline is to create a state of mind within service members where they will follow the orders of their superiors with obedience and dedication, subjecting personal interests to the unit good. Under this logic, good order and discipline should prevent issues such as service member on service member sexual assault or the murder of non-combatants in combat zones. Good order and discipline failed commanders in these cases because good order and discipline does not operate individually. Instead, good order and discipline is a prong in the military justice trinity, consisting of the military justice system, due process, and good order and discipline. Taken together, the trinity guides service member misconduct and prevents such misconduct from arising. To have this effect, though, the trinity must be balanced. A balanced trinity exists when due process legitimizes the military justice system, which in turn provides the capacity for commanders to effectuate good order and discipline within their units.

In today's military, the military justice trinity is not balanced. Since World War I, the military departments and Congress gradually infused due process rights into the trinity. As the due process prong grew, it impacted the military justice system prong. The court-martial process, the most severe disciplinary tool available to commanders, became a time and resource consuming process. Commanders wanted swift and efficient justice and as a consequence, rejected the court-martial process. In its place, they utilized nonjudicial punishment and administrative punishment. The marginalization of the court-martial process in turn impacted good order and discipline. A central requirement for good order and discipline is the commander's ability to deter misconduct through punishment. A commander can only do so, though, if he or she has the punishment tools to deter misconduct. The current system, with an infrequent and laborious court-martial process, nonjudicial punishment, and administrative discharges, does not present the commander with that capability.

Pursuant to the military justice trinity construct, the recent bout of misconduct can be characterized as a breakdown in good order and discipline. For commanders to be able to remedy these breakdowns, the military justice trinity requires balance. Consequently, the military departments must drive Congress to constrain the extra-due process rights afforded to accused service members. Recognizing that fundamental constitutionally afforded due process rights legitimize the military justice system and provide a sense of fairness to good order and discipline, the military departments should seek to identify those extra-due process rights that serve to unnecessarily impede the court-martial process. Through this reform, the court-martial will again become an effective tool for commanders to preserve good order and discipline; thereby increasingly deterring service member misconduct in the future.

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I. Introduction

Despite the wears of Iraq and Afghanistan, the United States continues to possess the world's preeminent military force. At the core of any successful military unit is good order and discipline. Good order and discipline is, as George Washington remarked, "the soul of an Army."¹ During the recent decade of war, however, cracks emerged in the military's foundation of good order and discipline, both in garrison and in the deployed environment. Two events have come to symbolize these cracks: the killing of 24 innocent Iraqi civilians by service members in Haditha, Iraq and the dramatic increase in service members sexually assaulted by other service members.²

The intense nature of these events captured the public's attention as to the apparent breakdown of good order and discipline within the military, but the military's responses to these events have led to calls for dramatic reforms. In Haditha, only one of the Marines involved was convicted in a court-martial, which resulted in the convening authority approving no confinement.³ Regarding sexual assault, two Air Force convening authorities set-aside the sexual assault convictions of two officers, undermining the sexual assault reform efforts of senior military leaders.⁴ Multiplied by several acts of sexual misconduct across the military departments, the military command's failure to adequately address these events resulted in Senator Kirsten Gillibrand introducing legislation to dramatically alter the military justice system.⁵ Supported by several legal scholars and victim advocates, Senator Gillibrand proposed removing the commander's authority to prosecute service members for any offense that could result in an excess of one year of confinement, with some exceptions for military specific offenses, and instead reside such authority in a judge advocate in the rank of O-6 or above.⁶

Although Senator Gillibrand's bill failed to receive the 60 Senate votes necessary to survive a filibuster, 55 Senators voted in favor of the bill.⁷ Most strikingly, the bill received bipartisan support, with 44 Democrats and 11 Republicans voting for the bill.⁸ Beyond the Senate vote, sexual assault and the military's supposed inability to address it now permeate American culture, serving as the subject of the Academy Award nominated documentary *The Invisible War* and as a major plotline on *House of Cards*, a popular television show.⁹ The military departments must heed the Senate vote and the continued public interest as an indication that reform to the military justice system is coming and it may be dramatic.

Acknowledging that reform is inevitable, the military departments must first answer the why question – why the increase in the severity and frequency of service member misconduct? Only after answering that question can they move onto the how question – how do we fix it? These are complicated questions, with each proposed answer having second and third order effects, but the military departments possess the strategic framework to tackle these questions. Military professionals tend to turn to Carl von Clausewitz when faced with perplexing strategic questions.¹⁰ In *On War*, Clausewitz views war as a “paradoxical trinity – composed of primordial violence, hatred, and enmity.”¹¹ Each of these prongs “are like three different codes of law, deep-rooted in their subject and yet variable in their relationship to one another.”¹² A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless.”¹³ As such, Clausewitz burdens the strategist with developing “a theory that maintains a balance between these three tendencies, like an object suspended between three magnets.”¹⁴

The Clausewitzian trinity can be applied to the rash of service member misconduct to not only understand why it has occurred, but also to guide reform efforts. Instead of a paradoxical

trinity composed of primordial violence, hatred, and enmity, however, service member misconduct consists of a paradoxical trinity composed of good order and discipline, the military justice system, and due process. Military justice, good order and discipline, and due process are all unique and operate independently of one another. Simultaneously, they depend upon one another, as the military justice system serves as the legal structure by which the military enforces good order and discipline and due process provides legitimacy and a sense of justice to both the military justice system and good order and discipline. Problems arise when reform efforts fail to maintain the appropriate balance between these tendencies, as strengthening one prong potentially weakens the other two.

As the governmental branch ultimately responsible for the military justice system, Congress failed to maintain an appropriate balance between these three tendencies. Following World War I, Congress incrementally increased the amount of due process afforded to accused service members. With the increased strength of the due process prong, the military justice system and good order and discipline suffered. The military justice system, specifically the court-martial process, became an ineffective tool for commanders to effectuate good order and discipline. In turn, good order and discipline waned, culminating in the recent breakdowns. Therefore, the military departments should drive Congress to aim its reform efforts at developing the appropriate balance between good order and discipline, the military justice system, and due process.

Section II analyzes the historical development of military justice, highlighting that military justice originally consisted of a military justice system conflated with good order and discipline, with few due process rights afforded to accused service members. Gradually, though, Congress and the military departments increased the role of due process, resulting in the military

justice trinity present today. Section III assesses the impact that the increased role of due process has on the military justice system, arguing that the increase in due process has severely limited commanders' use of the court-martial as a tool to preserve good order and discipline. Section IV examines the relationship between the marginalization of the court-martial as a tool for good order and discipline, positing that without the court-martial, commanders are limited in their ability to deter misconduct within their units. Section V provides recommendation designed to balance the military justice trinity.

II. The Formation of the Military Justice Trinity: From a Military Justice System Dominated by Good Order and Discipline to One Dominated by Due Process

Depending on whom one speaks to, the United States' system of military justice is either the gold standard¹⁵ or "is to justice what military music is to music."¹⁶ The difference in opinion stems from the military justice trinity, weighing and balancing due process, good order and discipline, and the military justice system. In different times, one prong may weigh more heavily than the others and interested observers, including service members, policy makers, and scholars, assess the system based on which prong is most individually important at that time. The military justice system is dynamic and the relationship between each prong is ever changing. If one narrative stretches throughout the history of military justice, however, it is the increased role of due process. At its inception, military justice was not a trinity, but consisted of a military justice system designed solely to effectuate good order and discipline. The Articles of War constricted due process in favor of commanders being able to exercise quick and severe discipline. As the services grew and more Americans encountered the military justice system service members began to demand due process rights. The Congress and the military responded with incremental due process rights, creating the trinity and today's system.

A. The Military Justice System Under the Articles of War

1. The Articles of War: The Primacy of Good Order and Discipline

The Constitution provides Congress the authority to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them.¹⁷ Under these provisions, the nation's founders interpreted that the authority for military justice resided not in the civilian, Article III courts, but rather with Congress.¹⁸ Pursuant to this authority, Congress implemented the Navy and Army Articles of War, which provided the legal mechanism to ensure good order and discipline within the nascent American Armies and Navies.¹⁹

In balancing an accused service members due process rights against the need for good order and discipline, these Articles captured General William Sherman's oft quoted description of military justice:

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

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.²⁰

Legal scholars in the post-Civil War era formalized Sherman's view of military justice solely as a means to ensure strict discipline. William Winthrop, an Army Judge Advocate, published the leading treatise on military justice at the end of the 19th Century.²¹ In his treatise, Winthrop provided that "it follows that courts-martial must pertain to the executive department; and they

are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline within.”²²

As such, the Articles of War conflated good order and discipline with the military justice system, finding little role for due process rights. A commander had the authority to charge service members, without conducting an investigation or rendering an oath, and accused service members did not possess the right to an attorney.²³ In fact, attorneys were marginalized from the process, with the Articles not requiring a military judge or a defense attorney.²⁴ The Articles did not even require the prosecutor to be an attorney.²⁵ The commander selected the court officers who would decide the case and then had the sole authority to review the case upon its completion.²⁶ At that stage, the commander possessed the authority to set-aside a conviction, but to also find a service member guilty if the court-martial found him not guilty.²⁷ The commander was then subject to little, if any, review of his determinations.²⁸ With the absence of due process, commanders utilized courts-martial to rapidly mete out discipline and secure good order and discipline.

2. World War I and the Calls for Reform

At the onset of World War I, service member misconduct remained governed by nearly the same Articles of War present since the Revolution. The events of the war led some to question whether the military justice system required modernization, specifically increased due process rights for accused service members. Brigadier General Samuel Ansell led the calls for reform. Ansell served as the Army’s Acting Judge Advocate General (JAG), after the Army’s JAG, Major General Enoch Crowder, left to serve temporarily as the Provost Marshall General.²⁹ Upon assuming his position, Ansell “suffered from a number of frustrations.”³⁰ Primarily, he was

“repeatedly shocked by the sentences handed down by Army courts-martial, and his utter powerlessness to do anything to correct them.”³¹ A case involving thirteen African American soldiers tried for mutiny in Texas, who were tried, sentenced to death, and executed, before any higher authority was even notified of the trial especially concerned Ansell.³²

Ansell’s experiences during World War I led him to advocate for a dramatic overhaul of the military justice system. He advocated for a “radically new concept of military law, one which would divorce the court-martial from the commanding officer and move into the vacuum thus created lawyers, civilianlike [sic] rules of procedure and evidence, and a complex system of appellate review to filter out whatever remnants of past attitudes still remained.”³³ To Ansell, the Articles of War, with their lack of due process, “was designed for the Government of the professional military serf of another age.”³⁴ Spurred by Ansell’s advocacy, Congress introduced sweeping legislation that would require commanders to make charges under oath and thoroughly investigate the charges before being brought to trial; establish a “court judge advocate” who would perform the duties of trial judge; provide that court members would be selected by the staff judge advocate from a panel of officers supplied to him by the convening authority; require a sufficient number of enlisted court members when the accused was enlisted; abolish the reviewing power of the commanding officer except for clemency authority; and establish a court of military appeals, where judges would have life tenure and cases involving certain severe punishments would warrant automatic review.³⁵

Congress declined to pass Ansell’s dramatic reforms. However, Congress did provide additional due process protections to accused service members in the 1920 Articles of War.³⁶ The new Articles “greatly changed pretrial procedure by requiring sworn charges, a ‘thorough and impartial’ investigation, and expert legal advice for the commanding officer before he

convened a court.³⁷ Furthermore, the 1920 Articles created a “law member” who served as a voting member of the court and was assigned some duties of a traditional trial judge, mainly the authority to rule of admissibility of evidence and instructing the court on its responsibilities and on the applicable law.³⁸ Also, it required defense attorneys for all “but the lowest form of court-martial.”³⁹ The 1920 revisions additionally prevented commanders from imposing findings of guilty when accused service members were acquitted in trial.⁴⁰

Despite the increased due process, the 1920 Articles of War continued to emphasize the interconnectedness of the military justice system and good order and discipline, at the cost of due process. The Articles afforded a “law member,” but did not require that this individual actually be an attorney.⁴¹ These provisions also limited the law member’s power by allowing the other court members to out-vote any ruling or determination made by the law member.⁴² Most dramatically, the first page of the revised Articles of War provided that “military law is due process of law to those in the military service of the United States.”⁴³ To support this statement, the Articles cite to two Supreme Court cases, *Reaves v. Ainsworth* and *U.S. ex rel. French v. Weeks*.⁴⁴ In both these cases, the Supreme Court recognized that “the courts are not the only instrumentalities of government. They cannot command or regulate the Army.”⁴⁵ Consequently, under these cases, due process rights for accused service members arise not out of the Constitution or the courts, but from Congress’ power to regulate the military.

3. World War II and the Increased Call for Due Process

Wars tend to serve as watershed moments for military justice, whereas interest in military justice wanes in peacetime. Although the trinity remained largely untouched after World War I, World War II proved to be a dramatic turning point in military justice. During the course of the war, approximately 80,000 service members were convicted by general court-martial, “an

average of nearly sixty convictions by the highest form of military court ... every day of the war.”⁴⁶ Overall, courts-martial of all types returned approximately two million convictions during the war.⁴⁷ These dramatic numbers, coupled with the overwhelming force used to fight the war, brought many Americans face-to-face with the military justice system. When faced with the reality of a military justice system with limited due process, returning service members called for reform.

These calls for reforms led the department secretaries to establish several committees to examine military justice during World War II.⁴⁸ The majority of these studies reflected flaws in the military system, mostly focusing on the lack of due process. For example, the Vanderbilt Committee found fault with seven major areas: (1) a lack of attention to, emphasis on, and planning regarding military justice matters as a whole; (2) not enough qualified service members to serve as court officers and officials; (3) commanding officers frequently dominated the courts; (4) inadequate defense counsel; (5) sentences were frequently disproportionately severe; (6) discrimination between officers and enlisted members, both in the preferral of charges and in handing down convictions and sentences; and (7) inefficient and inadequate pretrial investigations.⁴⁹ Another study lamented that in their review of 2,115 cases, nearly half of them contained “flagrant miscarriages of justice.”⁵⁰ A civilian judge at this time described a 1948 court-martial as “saturated with tyranny.”⁵¹

The consensus arose from these committees that the military justice system and good order and discipline could not be conflated with one another. The committees began to view military justice as a balance between the military justice system and good order and discipline. Before Congress, Professor Edmund Morgan, the head of the Vanderbilt Committee, provided that, “we are convinced that a Code of Military Justice cannot ignore the military circumstances

under which it must operate but we are equally determined that it must be designated to administer justice.”⁵² Similarly, the Vanderbilt Committee report concluded that:

A high military commander pressed by the awful responsibilities of his position and the need for speedy action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment, and he does not always perceive that the more closely he can adhere to civilian standards of justice, the more likely he will be to maintain the respect and the morale of the troops.”

Some of the critics of the Army system err on the other side and demand the meticulous preservation of the safeguards of the civil courts in the administration of justice in the courts of the Army. We reject this view for we think there is a middle ground between the viewpoint of the lawyer and the viewpoint of the general.⁵³

Thus, at the end of World War II, justice was no longer viewed merely as an impediment to good order and discipline. Instead, critics of the system began to assert that justice could enhance good order and discipline by providing a sense of legitimacy and fairness to the commander’s efforts to preserve good order and discipline. The question then turned to how the military justice system could achieve that balance, providing for a sense of justice and fairness to the process, while also enabling the commander to preserve good order and discipline. Reformers found the answer in due process and the Uniform Code of Military Justice (UCMJ).

C. Reform Is Here: The Uniform Code of Military Justice and the Manual for Courts-Martial

1. The Uniform Code of Military Justice

Congress enacted the UCMJ in an attempt to strike the appropriate balance between good order and discipline and the military justice system; primarily, through increasing the due process rights afforded to accused service members. The Congressional debate over the UCMJ focused on the role of commanders.⁵⁴ Advocates of reform argued in favor of placing increased

restrictions on the commander, thereby increasing the role played by attorneys.⁵⁵ In contrast, opponents of reform insisted that “you cannot maintain discipline by administering justice” and warned about the costs of increasing the role of attorneys.⁵⁶ Ultimately, the passed UCMJ reflected a compromise between these views. Commanders would prefer charges, direct the pretrial investigation, refer charges to trial and appoint counsel, law officer, and court members.⁵⁷ Commanders would also serve as the first “reviewer” of the results of trial.⁵⁸ Furthermore, the UCMJ failed to require attorneys to serve as military judges.⁵⁹ Nonetheless, the UCMJ provided for a lawyer at the pretrial investigation, prosecutorial and defense lawyers at the trial and appellate level, and an all-civilian Court of Military appeals.⁶⁰ Overall, the UCMJ established “a procedural and substantive criminal law that applied across the Army, Navy, Air Force, Marine Corps, and Coast Guard,” with an increased emphasis on due process rights.⁶¹

2. The Manual for Courts-Martial

Once President Truman signed the UCMJ into law in 1950, military attorneys began to advocate for a Manual for Courts-Martial (MCM).⁶² To many, the UCMJ amounted to a “skeleton whose framework will be filled in by a law manual.”⁶³ The drafters of the UCMJ anticipated this need for a manual in drafting the UCMJ and created Article 36 that provided the President with the authority to “prescribe rules . . . [of] procedure, including modes of proof, in cases before courts-martial.”⁶⁴ To guide the President, the UCMJ provided that he “shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court.”⁶⁵ The only Congressional oversight required by the provision was the requirement that the President report annually the rules to Congress.⁶⁶ By establishing the authority to create the MCM and providing

it with the Presidency, Congress provided an additional means to provide accused service members with due process rights, with the President now having the authority to do so. Similarly, the MCM provided a means to increase the “civilianization” of the military justice system by allowing the President to apply principles of law and evidence recognized in the federal system.

D. Military Justice Under the UCMJ and MCM

1. The Increased Role of the Court of Military Appeals

While military justice was deployed in Korea, the military appellate courts increased due process in the military justice system. Traditionally, the military departments viewed due process as arising from Congress, not the courts. The Court of Military Appeals (CoMA), though, found differently. In a 1951 case, the court found that “Congress intended, insofar as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system.”⁶⁷ Based on this ruling, the court determined that it was within the province of the CoMA to determine what due process an accused service member was entitled to under the UCMJ and MCM. Specifically, the court “described the procedural protections required at court-martial, including the right to be informed of the charges, to confront and cross-examine witnesses, to be represented by counsel, to avoid self-incrimination, to be represented by counsel, to avoid self-incrimination, and to appeal a conviction.”⁶⁸ Although this ruling recognized that due process rights for service members arise from the UCMJ and MCM instead of the Constitution, it is significant as the court in effect warned “the services that if those rights granted GI’s by Congress which parallel the Constitutional rights enjoyed by civilians were violated by proper procedure at courts-martial, CoMA would not consider such infringements harmless and would reverse the convictions that

followed.”⁶⁹ Thus, service members now had an avenue to not only define their due process rights, but to protect them as well.

2. Reform during Vietnam

The military justice system faced unique circumstances in Vietnam. In Vietnam, commanders faced a near breakdown in good order and discipline, with service members openly disobeying orders, deserting, and committing acts of misconduct such as fragging, drug abuse, rape, and murder.⁷⁰ These commanders sought tools to effectively address this misconduct, even at the cost of accused service members’ due process rights.⁷¹ In the United States, though, the vocal opposition to the war led critics to argue that the problem in Vietnam was not due process, but rather not enough due process.⁷² Hence, critics argued for further civilianization of the military justice system, with an increased role for attorneys and less authority for commanders.⁷³ The call for further form resulted in the 1968 Military Justice Act. The Act required that service members receive defense counsel for all special courts-martial where a bad conduct discharge was possible and for all special courts-martial, unless deemed impractical because of military service.⁷⁴ Additionally, the Act created an independent trial judiciary, where active duty attorneys would serve as military judges, have the authority to rule on pretrial motions as well as issues of law, and serve under a separate chain of command from the convening authority.⁷⁵ The accused service member now had the right to request trial by military judge alone and to refuse a trial by summary court-martial.⁷⁶

E. The Current Military Justice Trinity: The Balance of the Military Justice System, Due Process, and Good Order and Discipline

Upon the passing of the 1968 Military Justice Act, the military justice trinity present today was intact. Commanders, carrying the responsibility to preserve good order and discipline within their units, remained at the center of the military justice system. Simultaneously, due

process rights permeated the military justice system, increasing the role of attorneys and altering how commanders utilized the military justice system. Before assessing the effectiveness of this trinity, however, a basic framework of the current military justice system and the role played by due process is necessary.

1. The Current Military Justice System

a. The Purpose of Military Law

The current military justice system attempts to balance the need for good order and discipline with due process and the interests of the military justice. Specifically, the 2012 MCM provides that the nature and purpose of military law as:

Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. *The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.*⁷⁷

Under this stated purpose, the current military justice trinity considers the role of justice and good order and discipline as being equal, but not competing, purposes that when taken together, positively impact national security. Inherent in this framework is the continued role of military commanders.

b. Commander Driven System

Perhaps the most unique aspect of the military justice system is the primacy of commanders. The military justice system is predicated upon the “commander’s authority and control discretion within his or her unit.”⁷⁸ To ensure this authority, the military justice system

involves commanders at every part of the process, to include: directing preliminary investigations into misconduct, evaluating the results of investigations, disposing of cases, preferral and referral of charges, selecting panel members, and taking final action on both the court-martial's adjudged findings and sentence after the court-martial concludes.⁷⁹

The commander's most significant role in the military justice process is that of convening authority. Courts-martial are not standing courts; instead, they are convened when the need arises. Department secretaries establish their department's convening authorities, which are seasoned and established military officers, who have extensive command authority.⁸⁰ Generally, convening authorities involve themselves in cases only after the preferral of charges.⁸¹ Upon receiving the evidence and charges, the convening authority may dismiss the charges, refer the charges to a court-martial, return the charges to the immediate commander for a lesser disposition, forward the charges with his or her recommendations to a higher convening authority, or direct further investigation takes place.⁸² Should the convening authority refer the case to trial, he or she then selects the court members, who serve the equivalent role as a civilian jury.⁸³ Prior to trial, the convening authority is responsible for responding to any pretrial agreement offered by the accused service member, granting immunity for military witnesses, paying for any expert witnesses or consultants, and funding witness travel.⁸⁴

After the court-martial, the case returns to the convening authority for final action.⁸⁵ The convening authority may grant clemency by suspending or disapproving a portion of the accused service member's sentence, but may not increase the sentence.⁸⁶ Historically, the commander also had the ability to set-aside a finding of guilty.⁸⁷ In the wake of recent cases, however, Congress restricted that right and now convening authorities are prohibited from setting aside for any felony offense where the adjudged sentence is longer than six months or carries a

discharge.⁸⁸ Congress also prohibited convening authorities from setting-aside convictions for any sexual offense, regardless of the adjudged sentence.⁸⁹ Convening authorities remain unable to impose a finding of guilty when the court-martial returns a finding of not guilty.⁹⁰

2. Due Process⁹¹

Although not explicitly stated in the MCM's purpose and nature of military law, due process is a key component to the current military justice purpose. Due process is the means that justice impacts the military justice system and good order and discipline. The current military justice system affords accused service members due process rights throughout the court-martial process. These rights fall into several different categories: application of constitutional protections during pretrial processing of cases; military discovery practices; appointment and role of counsel; Article 32 hearings; use of military judges; trial procedures; and the appellate review of court-martial convictions.⁹²

a. Application of the Bill of Rights Protections Pretrial Processing

The UCMJ affords service members constitutional due process rights during the pretrial investigation and processing of charges.⁹³ Specifically, the Fourth Amendment applies in military proceedings to any search and seizure conducted pursuant to the investigation, whether conducted by military or civilian authorities.⁹⁴ Similarly, the Fifth Amendment privilege against self-incrimination applies to any interrogations of an accused service member or to any request to produce incriminating information.⁹⁵ Furthermore, an accused service member's Sixth Amendment right to counsel attaches immediately upon questioning.⁹⁶

b. Military Discovery Practices

Military discovery rules arise from accused service members' due process rights.⁹⁷ The UCMJ provides for a liberal discovery approach, specifically designed to be broader than in

civilian federal criminal proceedings “in an effort to eliminate pretrial gamesmanship.”⁹⁸ The discovery rights afforded to accused service members include the right to compel the appearance of both military and civilian witnesses; the ability to request from the government an expert consultant or witness to assist the defense before trial and potentially testify during trial; and to have the prosecution automatically disclose names and contact information of prosecution witnesses, evidence which is favorable to the accused, evidence of any prior convictions, and evidence of statements made by the accused, evidence seized from the accused, and evidence of any eyewitness identifications.⁹⁹ Often, these services, especially the witness travel expenses and expert consultant or witness fees, are paid for by the government.¹⁰⁰

In addition to any exculpatory evidence, the military discovery rules subject impeachment evidence to discovery.¹⁰¹ Impeachment evidence “includes disclosure of evidence that may affect the credibility of a government witness.”¹⁰² This information does not need to be admissible at trial for it to be discoverable.¹⁰³ Beyond the items required for discovery, the military discovery rules require government counsel to actively seek out potentially discoverable items and to do so in a timely manner.¹⁰⁴ Prosecutors must exercise due diligence to discover information that is material to the preparation of the defense, regardless of whether the defense could have discovered the information on its own.¹⁰⁵

c. Appointment and Role of Counsel

The UCMJ affords accused service members their Sixth Amendment right to counsel.¹⁰⁶ An accused service member is provided with a military defense counsel free of cost.¹⁰⁷ The accused service member is able to obtain the services of the military defense counsel immediately and the attorney will then represent the accused throughout the pretrial and court-martial process.¹⁰⁸ Generally, the military defense counsel will be outside the installation

commander's chain-of-command, ensuring the defense attorney is able to freely represent his or her client, without fearing reprisal or adverse career implications.¹⁰⁹ The accused service member's communications with the military defense counsel are also protected under the attorney-client privilege.¹¹⁰ Accused service members also receive free representation at the appellate process, although it is often a different attorney than the one that represented them before or during the trial; however, the new attorney often specializes in appellate practice.¹¹¹

d. Article 32 Hearings

The UCMJ provides any accused service member subject to a general court-martial the right to an Article 32 hearing.¹¹² The intent behind an Article 32 hearing is threefold: "to inquire as to the truth of the matter set forth in the charges, consideration of the form of the charges, and recommendation as to the disposition which should be made of the case in the interest of justice and discipline."¹¹³ Conducted prior to the referral charges, an investigating officer, appointed by the convening authority, will hear evidence, investigate the charges, and then provide a non-binding recommendation to the convening authority as to the disposition of the charges.¹¹⁴ The UCMJ does not provide a standard of proof for the investigating officer's recommendation. Instead, Rule for Court-Martial 405(j)(2)(H) provides that the investigation officer should base his or her recommendation on "reasonable grounds to believe that the accused committed the offense allege."¹¹⁵

The Article 32 hearing affords the accused substantial due process rights. The accused has the right to be present for the investigation, to be represented by counsel, to cross-examine witnesses, to object to irrelevant or privileged evidence, to call witnesses and introduce evidence in his or her defense and mitigation, to all evidence presented by the government, and to receive a copy of the investigation officer's report, to include the summary of all the testimony taken at

the hearing.¹¹⁶ Additionally, the recent National Defense Authorization provides that when reasonably available, a judge advocate should serve as the investigating officer.¹¹⁷ This provision advances due process as, while the services differed in their approach, non-attorney line officers were often used as investigating officers.

e. Use of Military Judges

Although not required by the United States Supreme Court, the UCMJ provides that accused service members have the right to a military judge to preside over their special or general courts-martial.¹¹⁸ The role of military judges is central to the due process rung of the trinity as it shifts the ability to meter out justice away from the commander and to a judge, who is then entrusted within “ensuring that the rules of procedure and evidence are applied and enforced.”¹¹⁹

f. Trial Procedures

Due process dominates court-martial trial procedures. During the process, an accused service member is entitled to file motions to dismiss, motions to suppress evidence, motions for appropriate relief, and motions for continuances.¹²⁰ Likewise, the military justice system affords accused service members the right to select their trial forum, with enlisted service members possessing the right to select trial by military judge alone, officer members, or officer and enlisted members.¹²¹ Officer members may elect trial by military judge alone or officer members.¹²² Accused service members are also able to exert their trial procedure specific constitutional rights, such as their Sixth Amendment right to confront any witness against them.¹²³ This provision is especially evident in the military justice system as based upon the confrontation clause, the government cannot utilize video teleconference (VTC) or other

alternative means to secure remote witness testimony over the accused service member's objection.¹²⁴

g. Appellate Review

The UCMJ requires that each military department establish a court of criminal appeals.¹²⁵ Accused service members may then appeal their court-martial conviction to their department's appellate court.¹²⁶ Appellate review is mandatory if the sentence includes death, a punitive discharge, or confinement of one year or more.¹²⁷ Upon complete of appellate review at the department level, accused service members may then appeal an adverse decision to the Court of Appeal for the Armed Forces (CAAF).¹²⁸ CAAF's decisions may then be reviewed by the United States Supreme Court.¹²⁹ The military justice system embeds within the appellate process several other due process rights. Specifically, these courts have independent "fact-finding powers which provide a convicted service member with an opportunity to argue that the conviction should be set aside because the evidence was insufficient."¹³⁰ Similarly, the appellate courts can review the sentence approved by the convening authority, to include comparing it to sentences adjudged in other cases.¹³¹ Lastly, the appellate courts may remand the case to the trial court for a hearing on a specified issue.¹³²

III. Due Process and the Military Justice System – How the Expansion of Due Process Marginalized the Court-Martial within the Military Justice System

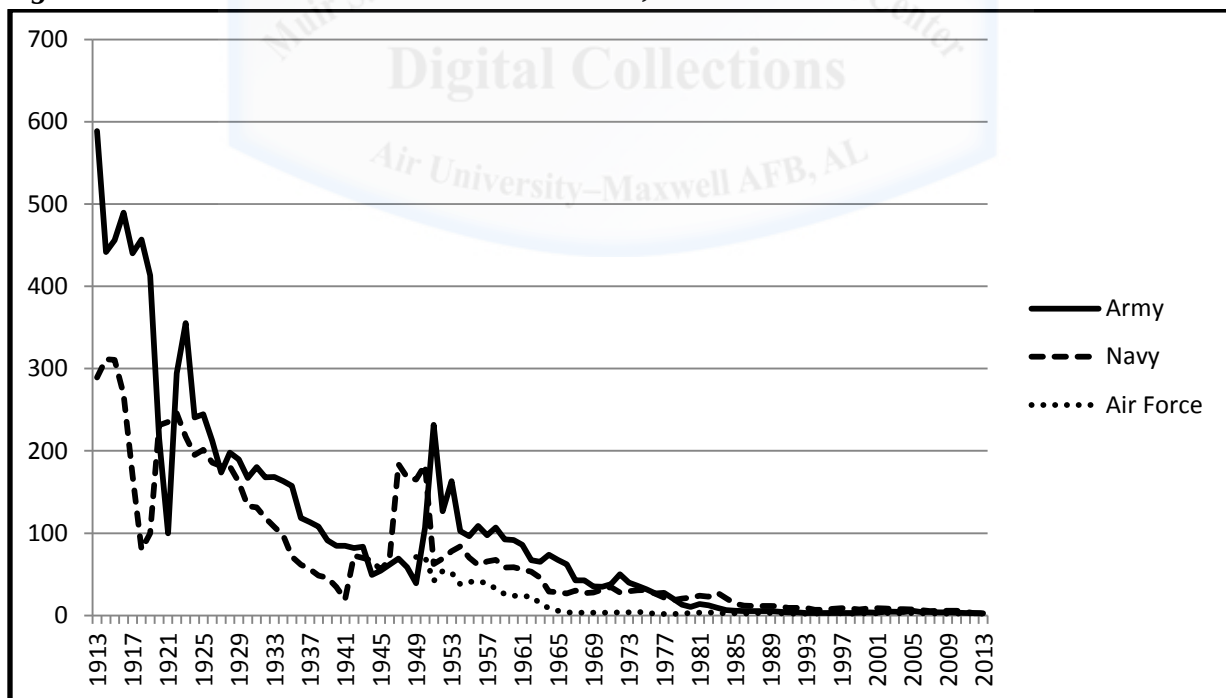
The increase in due process greatly altered the military justice trinity. By strengthening the due process prong, Congress impacted the military justice system. Specifically, the increase in due process resulted in the court-martial process becoming costly and time-consuming. Seeking expedited discipline, commanders turned away from the court-martial process and instead turned towards lesser, but quicker, means of punishment, especially nonjudicial punishment and administrative discharges.

A. The Consequences of All This Due Process

1. Courts-Martial Utilized With Much Less Frequency

The cumulative effect of the due process evolution was to marginalize the court-martial as a tool for commanders to effectuate good order and discipline. Figure 3.0 below reflects the court-martial rates per thousand for each military department, beginning in 1913. In 1913, under the Articles of War, commanders often utilized courts-martial, with 588 soldiers and 239 sailors or Marines per thousand facing court-martial. Since then, commanders have utilized courts-martial less frequently, with the court-martial rate gradually decreasing, to the point where in 2013, only 2.77 Soldiers, 2.48 Sailors or Marines, and 2.33 Airmen per thousand faced trial by court-martial.¹³³

Figure 3.0: Courts-Martial Rates Per Thousand, 1913-2013



While societal factors may have contributed to this decrease, “this decline in criminal trials is unique to the military.”¹³⁴ In fact, the “rates of criminal trials reported in the FBI’s annual survey went up” during many of the military’s declining years.¹³⁵ Instead, as Professor Elizabeth

Hillman noted, “the developing legal culture of the armed forces, with its emphasis on due process, legal representation, and civilian review, led directly to less frequent use of courts-martial.”¹³⁶ Consequently, “facing court-martial became an increasingly rare fate for wayward” service members as “criminal censure now occupied the extreme end of commanders’ methods for promoting obedience and preserving good order among troops.”¹³⁷ Ultimately, these statistics reflect that commanders rarely utilize the court-martial to preserve good order and discipline within their units.

2. When Utilized, Courts-Martial Are a Timely and Cumbersome Process

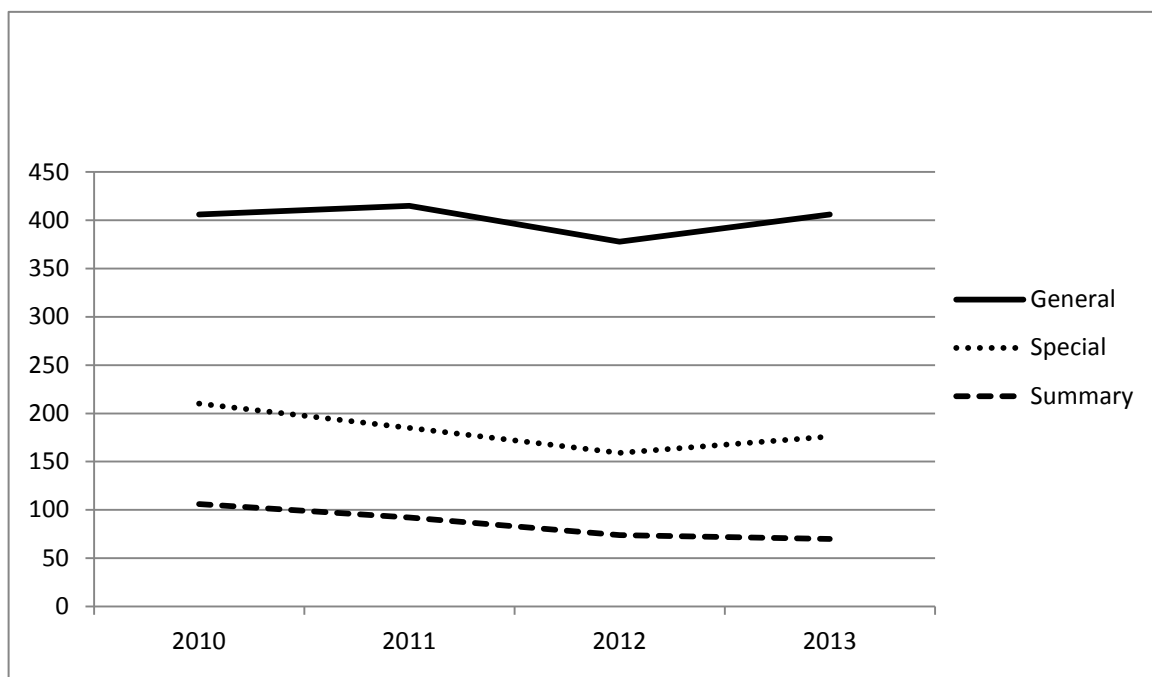
Due process marginalized the court-martial as a capability for commander’s to effectuate good order and discipline because it rendered the court-martial overly cumbersome and time consuming. Almost immediately upon its passing in 1951, war in Korea tested the UCMJ. Commanders utilized the court-martial in Korea to varying levels of success, but found that the UCMJ hindered, more than assisted, in preserving good order and discipline.¹³⁸ In 1953, a Congressional committee consisting of military commanders, none of which were attorneys, concluded that “professional standards have been permitted to deteriorate through lack of disciplinary control. The adoption of the Uniform Code of Military Justice, with its unwieldy legal procedure, has made the effective administration of military discipline within the Armed Forces more difficult.”¹³⁹

Commanders in Vietnam expressed similar dissatisfaction with the UCMJ. While they attempted to use the military justice system to deter increased misconduct, the military justice system proved unresponsive.¹⁴⁰ The due process rights afforded to service members, to include the right to an attorney, a military judge, and an Article 32 investigation, “took a great deal of time, and caseloads on the few military lawyers in Vietnam were heavy.”¹⁴¹ Consequently,

commanders often accepted favorable pretrial agreements or dismissed charges to avoid the laborious court-martial process.¹⁴² This apparent ineffectiveness of the military justice system to effectuate good order and discipline led some critics to wonder whether “due process has become a fetish,” creating a system that was “exceedingly expensive, complicated and slow moving.”¹⁴³

Recent statistics suggest that the courts-martial process continues to be time consuming. Figure 3.1 depicts the processing times of Air Force courts-martial from 2010 to 2013.¹⁴⁴ The Air Force initiates processing times at the date the offense was discovered and terminates the processing time when the convening authority takes final action. For all four years, the processing times for general courts-martial averaged around 400 days. In contrast, processing times for special courts-martial fluctuated between 159 and 210 days, while summary courts-martial ranged from 38 to 56 days. As such, when an Airman engages in misconduct, the commander faces the possibility that should he or she proceed with a court-martial, the misconduct may not be resolved for another 200 or 400 days. To many commanders, the prospect of deferring resolution for 400 days renders the court-martial an unrealistic option.

Figure 3.1: USAF Courts-Martial Processing Times, Date of Discovery to Action (days), 2010-2013



B. The Rise of Alternative Means to Achieve Good Order and Discipline

1. Nonjudicial Punishment

With the advent of increased due process rights, commanders turned away from courts-martial and instead embraced nonjudicial punishment and administrative discharges to address misconduct within their units. The initial UCJM afforded commanders the power to impose nonjudicial punishment via Article 15, but allowed for commanders to impose confinement as punishment.¹⁴⁵ The severe nature of the confinement option led to commanders continuing to use the court-martial, where more due process rights were afforded, then nonjudicial punishment.¹⁴⁶ In the early 1960s, however, the military departments advocated to reform Article 15, mainly by removing commanders' authority to impose confinement.¹⁴⁷ As such, in 1962 Congress lessened the punishment afforded under Article 15.¹⁴⁸ In turn, commanders began to utilize nonjudicial punishment with increased frequency, leading to a steep decline in courts-martial.¹⁴⁹ Figure 3.2 represents the steep decline in Navy and Air Force court-martial rates with the increased ability for commanders to impose nonjudicial punishment.¹⁵⁰

Figure 3.2: Court-Martial Rates per Thousand, 1963-1965

	Army	Navy	Air Force
1963	65.4	45.7	14.8
1964	73.0	29.2	8.8
1965	67.5	28.4	5.9

In recent years, the relationship between nonjudicial punishment and courts-martial rates appears to have stabilized. Figures 3.3, 3.4, and 3.5 represent the courts-martial rates per thousand compared to the nonjudicial punishment rates per thousand, for each department from 1979 to 2013.¹⁵¹ These figures are pertinent for several reasons. First, they represent that each department experienced a dramatic decline in nonjudicial punishment rates in the 1980s, from which they have not recovered. Second, with the decline in nonjudicial punishment rates per

thousand, none of the departments experienced a significant increase in courts-martial rates per thousand. Taken together, these figures indicate that beginning in the 1980s, commanders have either failed to address allegations of misconduct, or, more likely, they have increasingly relied upon administrative discharges.

Figure 3.3: Army Courts-Martial and NJP Rates Per Thousand, 1979-2013

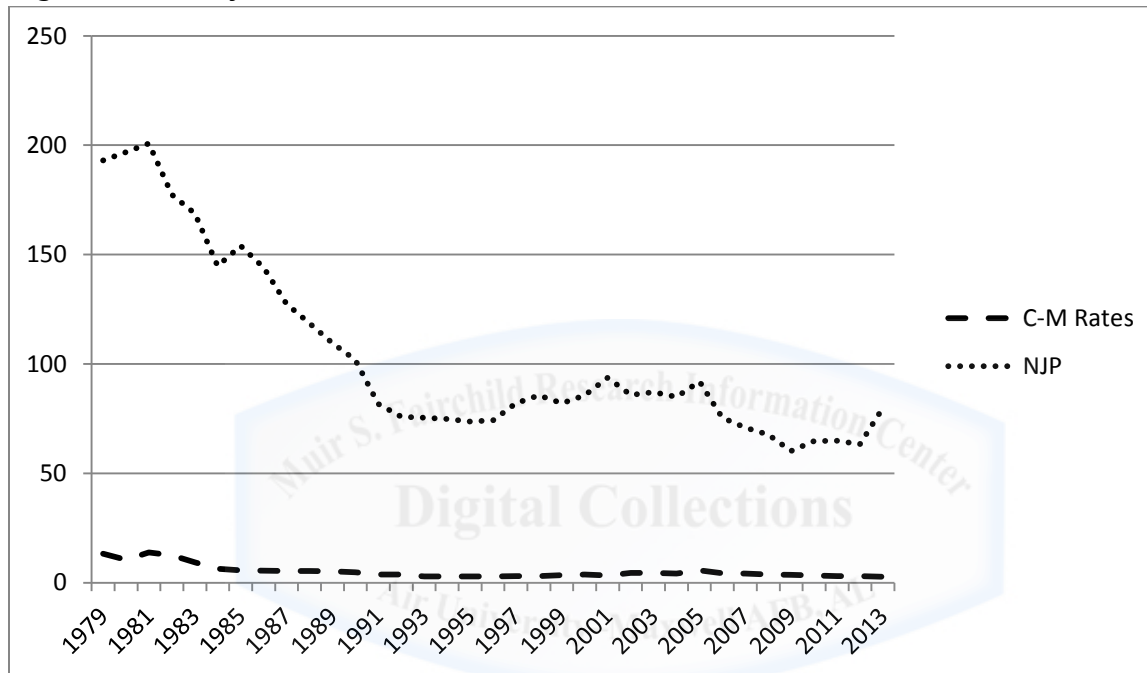


Figure 3.4: Navy Courts-Martial and NJP Rates per Thousand, 1979-2013

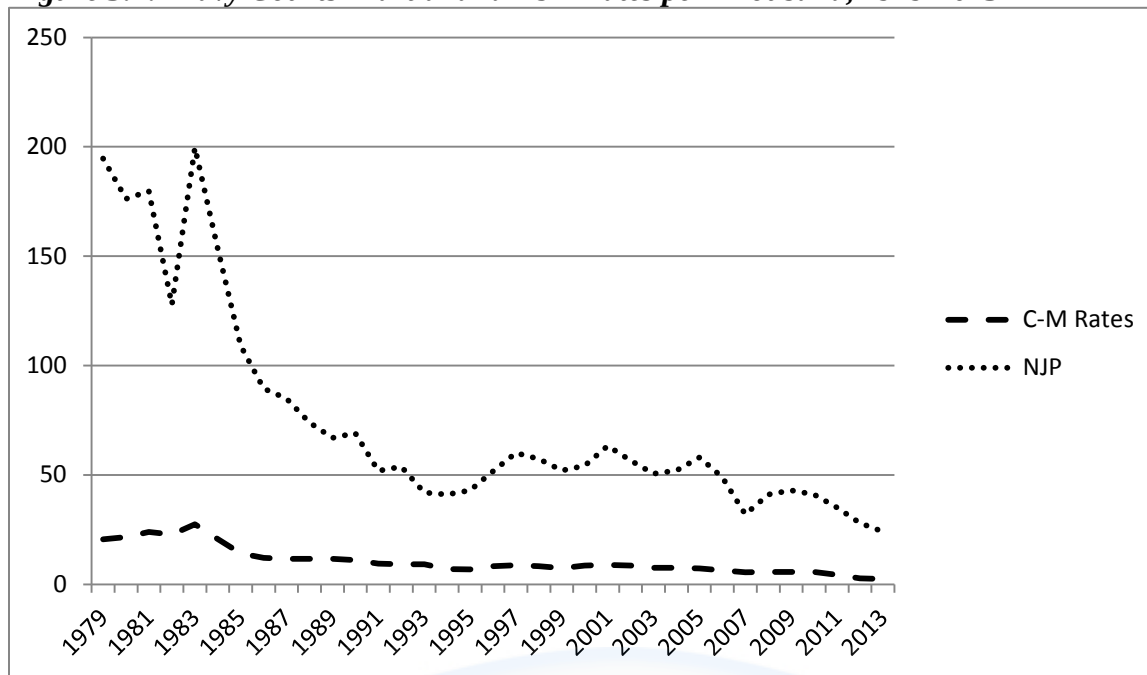
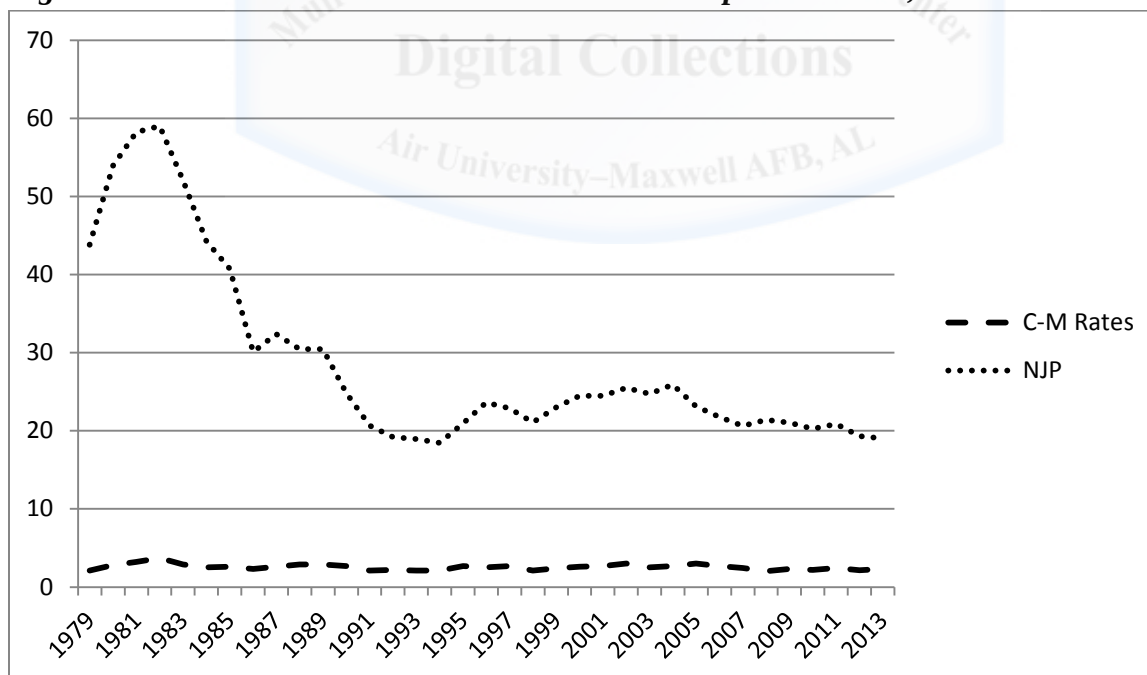


Figure 3.5: Air Force Courts-Martial and NJP Rates per Thousand, 1979-2013



2. Administrative Discharges

There is strong evidence to suggest that commanders are increasingly turning towards administrative discharges when faced with allegations of misconduct. Commanders began

turning away from court-martial and towards administrative discharges almost immediately upon the UCMJ's implementation. In 1958, the Air Force Judge Advocate General, Major General Reginald Harmon, attributed the decrease in the Air Force's courts-martial rate to the fact that "many commanders are using the legally authorized administrative discharge procedures instead of trial by court-martial to take care of and get rid of offenders."¹⁵² Commanders throughout the service became "overwhelmed by what they regarded as unreasonable complexities in court-martial law and practices" and as such, "looked for simpler ways to handle their delinquency problems."¹⁵³

This trend continued into the 1970s as the Army Judge Advocate General acknowledged that an increase in commanders electing to administratively discharge soldiers accused of misconduct was responsible for the decrease in courts-martial rates.¹⁵⁴ Within the military leadership at this time, the commonly held viewpoint became "administrative separations could eliminate servicemembers quickly and quietly."¹⁵⁵ Overall, between 1950 and 1973, corresponding to the development of the UCMJ and subsequent due process reforms, "the percentage of undesirable discharges issued through administrative, rather than court-martial, proceedings climbed dramatically, from 64 percent in the early 1950s Army to 92 percent by the early 1970s, and from 40 percent in the early 1950s Navy to 66 percent by the early 1970s."¹⁵⁶

The preference for the speed and efficiency for administrative discharges remains today. In its Annual Military Justice Report for Fiscal Year 2013, the Marine Corps compared its total number of special courts-martial against the total number of administrative discharge boards from 2007 to 2013.¹⁵⁷ In fiscal year 2007, the Marine Corps conducted approximately 800 special courts-martial and only 300 administrative discharge boards.¹⁵⁸ By FY 2010, however, they performed approximately the same amount of administrative discharge boards and special

courts-martial, around 600 of each.¹⁵⁹ In FY 2013, though, they performed approximately 800 administrative discharge boards, as compared to only 300 special courts-martial.¹⁶⁰ This dramatic reversal of fortunes reflects that commanders are increasingly selecting the more expedient option of administrative discharge over the more costly and time consuming option of a court-martial.

In sum, since World War I, Congress gradually increased the amount of due process afforded to accused service members. By increasing the weight of the due process prong of the military justice trinity, Congress greatly impacted the military justice system. The court-martial process, once the primary tool of the commander to achieve good order and discipline, became a timely and consuming process, dominated by due process. As a result, commanders utilized the court-martial with increasingly less frequency and instead turned to less restrictive means to deal with instances of misconduct, specifically nonjudicial punishment and administrative discharge.

IV. Good Order and Discipline Without the Court-Martial – How Due Process’ Marginalizing of the Court-Martial Process Prevents a Commander from Preserving Good Order and Discipline

What then is the impact of due process’ marginalization of the court-martial process on good order and discipline? This section argues that the court-martial is an essential capability that commanders require to effectuate good order and discipline. To effectively preserve good order and discipline, commanders must be able to use punishment to deter misconduct. It is the court-martial, more so than non-judicial punishment or administrative discharge, which provides that capability to commanders. As such, without the court-martial, commanders lose the ability to effectively preserve good order and discipline.

The relationship between good order and discipline and the other two prongs is of vital importance as it is through good order and discipline that Congress and the military departments

may find the root cause and solution of the recent bouts of service member misconduct. To understand the role and importance of good order and discipline, as well as its relationship to the military justice system and due process, it is necessary to establish a thorough understanding of what exactly good order and discipline is, why it is important, who is responsible for it, and how it is achieved.

A. What is Good Order and Discipline?

Good order and discipline has long been an essential component of military campaigns. In studying the jurist Quintus Sertorius' successes against the Roman army, Plutarch focused on Sertorius' ability to bring good order and discipline to the seemingly barbaric tribes of the Roman frontier.¹⁶¹ Plutarch noted that after the campaigns against Rome, Sertorius was "highly honored for his introducing discipline and good order amongst them, for he altered their furious savage manner of fighting . . . out of a confused number of thieves and robbers he constituted a regular, well-disciplined army."¹⁶² In modern times, the primacy of good order and discipline to achieve military objectives remains. Operation Enduring Freedom veterans regularly comment on the capability of Taliban forces in Afghanistan. Expecting disorganized and undisciplined fighters, these veterans instead faced a highly organized and structured force, where Taliban commanders exercised good order and discipline to achieve military objectives.¹⁶³

Despite the accepted norm that good order and discipline is important, the actual definition of it is murky at best. Part of the problem is that the relationship between good order and discipline and the military justice system is generally tackled by attorneys, both civilian and military, as opposed to military commanders. Attorneys tend to follow the Supreme Court and accept that war is a separate sphere, best left to combat professionals, and good order and discipline falls within that sphere.¹⁶⁴ These scholars tend to acknowledge that good order and

discipline is important and then move onto the more legally-centered military justice system. Military doctrine does not directly define good order and discipline. Joint Publication 1, the doctrine behind the joint force, establishes who is responsible for discipline in the joint environment, but fails to define it.¹⁶⁵ Army and Air Force leadership doctrine discuss the need for leaders to exercise self-discipline and exercise discipline within their units, but both focus on how to achieve discipline as opposed to what it is.¹⁶⁶

Attempts to define it in the past have focused more on the discipline portion than the good order portion. For example, a 1960 commission consisting of high-ranking officers defined it as “a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed.”¹⁶⁷ A more thorough definition is utilized by the Air Force in its annual Air Force Officer’s Guide. There, the Air Force defines good order and discipline as:

Military discipline is intelligent, willing, and positive obedience to the will of the leader. Its basis rests upon the voluntary subordination of the individual to the welfare of the group. It is the cohesive force that binds the members of a unit, and its strict enforcement is a benefit for all. Its constraint must be felt not so much in the fear of punishment as in the moral obligation it imposes on the individual to heed the common interests of the group. Discipline establishes a state of mind that produces proper action and prompt cooperation under all circumstances regardless of obstacles. It creates in the individual a desire and determination to undertake and accomplish any mission assigned by the leader.¹⁶⁸

This definition has proven to be enduring, as it appears unchanged in 35 editions, encompassing most of the Air Force’s existence. It is also thorough, addressing obedience to military leaders, the primacy of such obedience to mission readiness, and also the need for unit cohesion, which speaks to the good order portion of good order and discipline. As such, this

definition shall provide the basis for the understanding of good order and discipline in the following discussions.

B. Why Does Good Order and Discipline Matter?

In addressing why good order and discipline matters, it is easy to rely solely on the argument that good order and discipline enables successful military operations. The answer is more nuanced, however. In combat, the military requires service members to do three things often against human nature: put oneself at risk to be killed, to kill, and, at times, not to kill when threatened.¹⁶⁹ Additionally, both before and during combat, the military mandates that service members subordinate personal interests in favor of the group to foster unit cohesion. Made possible through good order and discipline, these elements help ensure mission success.

1. The Need to Place Service Members at Risk

American history is peppered with instances of commanders ordering service members to put themselves at near risk of death. Whether storming Bunker Hill, Pickett's Hill, the beaches of Normandy, or the urban landscape of Fallujah, service members have faced an overwhelming risk of death to achieve military objectives.¹⁷⁰ At times, the risk presented even guaranteed death. During the combined bomber offensive in World War II, the Army Air Corps suffered dramatic losses. Army statisticians used 8th Air Force's loss rates and the number of flights required to return home to calculate that Army Air Corps' pilots faced a 100% certainty of death during the course of the war.¹⁷¹ Despite these daunting odds, service members continue to engage in these operations. It is good order and discipline, with its emphasis on creating a state of mind within service members to follow the will of their commanders, that enables commanders to order their service members at risk to achieve mission objectives and to have their service members follow the orders.

2. The Need to Have Service Members Kill

The harsh reality of war is that commanders must ask their service members to kill to achieve mission success.¹⁷² Commanders cannot assume obedience from their service members when it comes to killing. Studies reflect that service members are often reluctant to “actually engage the enemy once in contact.”¹⁷³ For example, during World War II only 15 to 20 percent of combat infantry were willing to fire their rifles.¹⁷⁴ This reluctance relates to the idea that “within each person a force that understands at some gut level that all humanity is inextricably interdependent and that to harm any part is to harm the whole.”¹⁷⁵ Marcus Aurelius contemplated this inner belief in his command of the Roman Army, positing that “every individual dispensation is one of the causes of the prosperity, success, and even survival of that which administers the universe. To break of any particle, no matter how small, from the continuous concatenation – whether of cause or of any other elements – is to injure the whole.”¹⁷⁶ In combat, though, commanders must rely upon good order and discipline to break their service members of this mindset and instead, develop the willingness to kill when ordered to do so.

3. The Need to Have Service Members Not Kill

Today’s military is not limited to conventional warfare. The joint force is organized “across a range that extends from military engagement, security cooperation, and deterrence activities to crisis response and limited contingency operations and, if necessary, to major operations.”¹⁷⁷ Within this range of military operations fall several operations, such as civil support, foreign humanitarian assistance, and counterinsurgency (COIN), where the use of lethal force will impede and damage the mission.¹⁷⁸

Restraint, though, may be easier said than done. COIN speaks to the inherent difficulty of exercising restraint in a kinetic environment. Commanders leading COIN operations utilize their service members to win the hearts and minds of the local population.¹⁷⁹ They do so with the understanding that by killing one innocent civilian, a service member may create five insurgents.¹⁸⁰ To the service member conducting COIN, however, he or she must be “ready to be greeted with either handshake or a hand grenade while taking on missions.”¹⁸¹ When operating in a combat environment, it is natural for a service member to utilize lethal force when threatened. In COIN, the service member must show restraint when threatened because if the grenade is actually a handshake, the effect of killing may have dire strategic consequences.¹⁸² As such, it falls upon the commander to instill within his or her service members the restraint necessary to not kill, when the mission requires.

4. Unit Cohesion

Unit cohesion is essential for military operations. It is unit cohesion that allows for a group of disparate service members to subject their personal fears and desires to the collective well-being and the success of the fighting force. Research indicates that “the primary factor that motivates a soldier to do the things that no sane man wants to do in combat (that is, killing and dying) is not the force of self-preservation but a powerful sense of accountability to his comrades in the battlefield.”¹⁸³ The importance of unit cohesion extends from the battlefield to the home station. In garrison, unit cohesion speaks to the readiness of the unit and the ties that bind them as a potential fighting force. A breakdown in unit cohesion in garrison is likely to lead to a further breakdown in combat, leading to potentially tragic results. Inherent in the definition of good order and discipline is its duty to serve as the “cohesive force that binds the members of a unit.”¹⁸⁴

C. Who Bears the Responsibility for Good Order and Discipline?

In the debate about the continued role of commanders in the military justice system, there is one consistent point of agreement between critics and advocates – that commanders are responsible for good order and discipline within their units. Commanders bear the responsibility of the welfare, morale, mission readiness, and safety of their service members and, in combat, direct the actions of their service members that may result in their death. Consequently, the responsibility for good order and discipline can only fall upon the commander. But what commander? In today's increasingly bureaucratic and joint military, service members have several different commanders. Service members serve under their immediate commander, but often at times under at least three superior commanders. As the level of command grows, the more likely it is that the superior commander will be geographically separated from the service members.¹⁸⁵ The identification of the commander becomes even more difficult if the service member deploys. There, a service member may serve under a joint commander, a service commander, and under the command of the service member's home station.¹⁸⁶ The multiple layers of command make it difficult to assess which of these commanders is ultimately responsible for good order and discipline.

Studies reflect that military service places the immediate commander in the best position to bear the responsibility for good order and discipline. Proximity is the key. A World War II study examined instances where American soldiers engaged enemy forces with fire and incidents when they did not.¹⁸⁷ The study found that “almost all soldiers would fire their weapons while their leaders observed and encouraged them in a combat situation.”¹⁸⁸ In comparison, when the commander left, “the firing rate immediately dropped to 15 to 20 percent.”¹⁸⁹ Similarly, in 2013, a number of commanders testified before the Department of Defense's Defense Legal Policy

Board concerning their experiences commanding in Iraq and Afghanistan.¹⁹⁰ Each commander testified that they bore the ultimate and immediate responsibility of good order and discipline for each of the service member's under their joint command, even if an individual service member fell under the command of several other levels of service-specific command.¹⁹¹ As one Army commander noted, "I was there. I saw these troops every day. I made sure they had food to eat, toilet paper to wipe themselves, and a place to sleep. I was the one that was going to ask them to kill and I was the one going to ask them to die. An Airman, Sailor, or Marine may have answered to a different commander somewhere, but when he was in my battlespace, he was my responsibility."¹⁹²

D. How Do Commanders Achieve Good Order and Discipline?

Good order and discipline presents a daunting task for commanders. A commander needs to instil into his or her service members' mindset a sense of uncompromising obedience and duty. This mindset must then lead to service members putting themselves at grave risk, to kill, and not to kill, all at the order of their commander. How does the commander make the seemingly impossible possible? What tools does he or she need to make this mindset a reality? The answer lies in both positive and negative means, with the negative means linking the good order and discipline prong of the trinity to the military justice prong.

1. Positive Means

Positive rewards and reinforcement enable a commander to achieve good order and discipline by ascribing a sense of loyalty and affection amongst his or her service members.¹⁹³ In describing Sertorius' ability to achieve good order and discipline within his troops, Plutarch did not mention discipline or fear; instead, he noted that Sertorius "bestowed silver and gold upon them liberally to gild and adorn their helmets, he had their shields worked with various

figures and designs, he brought them into the mode of wearing flowered and embroidered cloaks and coats, and by supplying money for these purposes, and joining with them in all improvements, he won the hearts of all.”¹⁹⁴ Sertorius recognized that to obtain the uncontested obedience of his disparate troops, they would have to feel ties of affection and loyalty to him; otherwise, they would not willingly submit to his command. Recent studies confirm that bonds of loyalty are essential to commanders exercising good order and discipline.¹⁹⁵ A 1973 study demonstrated that “the primary factor in ensuring the will to fight is identification with the direct commanding officer.”¹⁹⁶ In this study, respected and established commanders were able to gain compliance from soldiers in combat much more effectively than unknown or disrespected leaders.¹⁹⁷ While commanders today cannot provide their service members with gold or money, they can provide positive rewards and reinforcement through a variety of means, including: awards, decorations, promotions, positive performance reviews, and morale activities.

2. Negative Means

Commanders cannot rely on positive reinforcement alone to effectuate good order and discipline. To ensure good order and discipline within their units, commanders must be able to hold service members accountable for acts of misconduct.¹⁹⁸ Commanders do so via the ability impose punishment.¹⁹⁹ Beyond accountability, one of the primary purposes of punishment is deterrence, both specific and general. By punishing service members for misconduct that strikes at good order and discipline, commanders are not only able to deter the offending service member from again committing misconduct, but are also able to deter the other members of the unit from committing misconduct. It is here that good order and discipline and the military justice system meet. The UCMJ serves as the “primary tool for administering legal consequences for breaches of discipline.”²⁰⁰ Under the UCMJ, commanders possess a range of

punishment options, ranging from the administrative, to the nonjudicial, to the court-martial. Through this ability, commanders are supposed to be able to deter misconduct; thereby ensuring good order and discipline within their units.

E. How Effective is the Current Military Justice Trinity in Achieving Good Order and Discipline?

Commanders increasingly utilize the nonjudicial punishment and administrative discharge tools to address service member misconduct. Consequently, the question then turns to how well do these lesser forms of punishment, as compared to the more severe option of the court-martial, deter service member misconduct. Criminology provides a basic framework to understand what factors best deter crime. This framework can be applied to service member misconduct and proves helpful in determining what means of punishment – the court-martial, nonjudicial punishment, or administrative discharge – best deters service member misconduct.

1. Deterrence Theory: How Best to Deter Misconduct

Deterrence theory identifies several factors that deter crime: credibility of punishment, severity of punishment, celerity of punishment, and collateral effects of punishment.²⁰¹ Of these factors, studies reflect that the credibility of punishment – the belief that if an individual engages in the crime that he or she will be caught and punished – best deters crime.²⁰² The more an individual believes that he or she will be caught, the less likely he or she is to commit the offense.²⁰³ Closely related to credibility of punishment is the severity of the punishment. On its own, severity of punishment has little correlation to deterrence.²⁰⁴ A rationale actor is unlikely to be deterred by the severity of the punishment if he or she does not believe there is a credible change that he or she will be caught and punished.²⁰⁵ If, however, there is a high degree of credibility, the severity of punishment correlates to deterrence.²⁰⁶ The likelihood of individuals

engaging in a crime if they believe they will be caught further decreases as the level of severity in punishment increases.²⁰⁷

Concerning celerity, classical deterrence theory posited that for punishment to have a deterrent effect, it must be swift and immediately proceed the misconduct.²⁰⁸ While recent studies reflect a minimal correlation between the celerity of a punishment and deterrence, it appears too soon to discount the deterrent effect of celerity.²⁰⁹ Criminologists suggest that celerity may still play an important role in deterrence, warranting further research and studies.²¹⁰

Recent studies indicate that the collateral effects of punishment may also have a deterrent effect.²¹¹ For example, in a study examining the deterrence effects of driving under the influence (DUI) of alcohol policies, researchers indicated that the “extra-legal” consequences of a DUI conviction, to include the shame of a conviction, the inability to drive, and the future recognition that they were convicted of a DUI, deterred DUIs with as much correlation as the legal sanctions of confinement and fines.²¹² Overall, deterrence theory establishes that a high credibility of punishment, coupled with severity, best deters crime, with collateral effects and celerity of punishment also providing deterrent effects.

2. Deterrence Theory Applied to the Current Military Justice Trinity

Applying this framework to the current military justice trinity, none of the current forms of punishment effectively deter service member misconduct. In its current state, the court-martial process cannot deter misconduct. To be deterred, a service member must find the risk of being caught and punished to be credible. With a court-martial rate averaging around two service members per thousand, the court-martial process does not support a credible belief that service members will be caught and punished.²¹³ A service member is unlikely to know someone who has been subject to court-martial, hear of a service member facing a court-martial

for similar misconduct, or exposed to the consequences of a court-martial. Thus, with a marginalized court-martial process, service members do not find the risk of punishment to be credible. Similarly, celerity in the court-martial process is lacking. Courts-martial, especially general courts-martial, take a long time from the discovery of the offense to final action.²¹⁴ Hence, a service member is likely to change assignments, deploy, or separate prior to the completion of a court-martial action, reducing further the deterrent effect of the current court-martial process. While courts-martial continue to provide for severe punishments and collateral consequences, the lack of credibility and celerity provided by the court-martial process undermine the deterrent value of the present day court-martial system.

Likewise, nonjudicial punishment and administrative discharges provide little deterrent effect to service member misconduct. The frequency of nonjudicial punishment and the ever increasing frequency of administrative discharges may enhance the credibility of punishment. As more service members receive nonjudicial punishment or are administratively discharged for instances of misconduct, other service members are likely to find it more credible that they will be caught and punished for similar misconduct. However, the non-public nature of nonjudicial punishment and administrative discharges undercuts the credibility that these punishments provide. Unlike a court-martial, nonjudicial proceedings are private.²¹⁵ While other service members may be aware that a service member received nonjudicial punishment and the offending service members may publically display such punishment through a visible reduction in rank, the underlying offense is not necessarily publicized or apparent. Similarly, while an administrative discharge board may be public, administrative discharges are often handled absent a public hearing.²¹⁶ While an individual's separation is apparent, the basis for the separation may not be.

Even if nonjudicial punishment and administrative discharges provide a certain amount of credibility to a service member being caught and punished for misconduct, the lack of severity of punishment further undermines the deterrent effectiveness of the credibility of punishment. Nonjudicial punishment does not allow for confinement or separation, either administratively or punitively.²¹⁷ As such, the most a commander can do is fine an accused, provide additional duties, reprimand, restrict an individual to base, or reduce a service member in rank.²¹⁸ The options lessen when the accused service member is an officer and the commander loses the ability to reduce the officer in rank.²¹⁹ Concerning administrative discharges, separation from the military may not even be a punishment to many accused service members. With service commitments and the prospects of deploying to a combat zone, many service members may welcome the opportunity to separate early, regardless of their service characterization.²²⁰ For those service members who do not desire an early separation, administrative discharges fail to provide severe punishment. While a service member will be effectively “fired,” the lasting effects are minimal. The commander may separate the service member with an honorable, general, or under other than honorable conditions (UOTHC) discharge.²²¹ Both a general and UOTCH discharge characterization prevents the service member from enjoying the full benefits of previous military service, but neither of these characterizations involve confinement or the negative legal and social stigmas of a bad conduct or dishonorable discharge.²²² Overall, the lack of confinement or punitive discharge options prevents nonjudicial punishment or administrative discharges from providing effective deterrence of service member misconduct.

A court-martial, though, used frequently and with celerity, provides the most effective deterrence for a commander. If commanders utilize a court-martial with increased frequency, service members will begin to believe that if they engage in misconduct, they will not only be

caught, but will also be punished. Similarly, the severity of punishment afforded by the court-martial, to include substantial confinement and punitive discharges, will increase deterrence when coupled with the increased level of credibility of punishment.²²³ Furthermore, the court-martial carries with it several collateral effects. Convicted service members will in most cases be convicted felons and lose federal rights accordingly.²²⁴ They will carry with them the shame of a federal conviction and the possibility of a punitive discharge, which will limit future employment options.²²⁵ Therefore, to achieve the appropriate level of deterrence to ensure good order and discipline, commanders need a frequent and efficient court-martial process.

The need for a fully realized court-martial process, however, should not blind commanders. Underlying the need to use punishment for good order and discipline is the requirement that service members view this punishment as legitimate.²²⁶ Here lies the continued role for due process in the military justice trinity. While the increase in due process may have rendered the court-martial process an ineffective tool for commanders to deter service member misconduct, due process also provides a sense of fairness and legitimacy to the court-martial process. Thus, commanders cannot neglect due process when relying upon the court-martial process to preserve good order and discipline.

In sum, commanders can only preserve good order and discipline within their units if they have the ability to deter misconduct through punishment. According to deterrence theory, commanders need punishment that is credible, severe, swift, and possesses collateral consequences to be able to effectively deter misconduct. Additionally, the punishment imposed must be viewed as legitimate and just to have a deterrent effect. The military justice trinity fails in its responsibility to provide that deterrent effect. While the due process prong provides legitimacy and fairness, it renders the court-martial a marginalized tool. Consequently, the

current court-martial process is not credible. The alternative means of punishment, nonjudicial punishment and administrative discharges, provide some credibility, but lack the severity and collateral effects of punishment, minimize their deterrent effects. It is the fully realized court-martial process, with its allotment of severe punishment and collateral effects, when used with frequency and celerity that best provides the commander with the capacity to deter through punishment.

V. Restoring the Trinity – Recommendations for Reform

The current military justice trinity is not properly balanced. Congress, the military appellate courts, and the military departments expanded due process at the cost of the military justice system. By rendering the court-martial process an overly cumbersome and time-consuming process, the expansion of due process restricted commanders' ability to effectuate good order and discipline; the results of which are apparent in the recent high-profile bouts of misconduct throughout the military departments. The question then turns to how should Congress and the military departments balance the military justice trinity?

The Articles of War represent the ultimate emphasis on good order and discipline. Absent of much due process, the Articles of War allowed a commander to quickly and directly utilize the court-martial process to effectuate good order and discipline. Nonetheless, as evidenced by the calls for reform in World War I and World War II, the confluence of good order and discipline and the military justice system at the expense of due process was not the proper balance. Discipline must be legitimate and without due process, the rampant use of the court-martial process was de-legitimized. Additionally, a return to the limited, if any, due process model would not be a realistic option today. The fact that Congress, the military appellate courts, and the military departments have provided due process rights to accused

service members creates a *Flowers for Algernon* type situation should Congress seek to take much of those rights away.²²⁷ Service members and the public are accustomed to accused service members having basic constitutional rights, such as the rights to an attorney, military judge, a trial by jury, and a review of their cases, that Congress and the military departments would face much criticism for removing these rights, which in turn could negatively impact morale within the services and challenge the legitimacy of the military justice process.

With the current and historical balances insufficient, Congress and the military departments should seize this opportunity to strike the proper balance. The key to finding the right balance is the appropriate level of due process. While recognizing that due process plays an essential role in the military justice trinity, Congress and the military departments should limit the extra-constitutional due process rights afforded to accused service members.²²⁸ By scaling back accused service members' extra due process rights, Congress and the military departments will strengthen the military justice system prong through restoring the viability of the court-martial as a tool for good order and discipline. In turn, the good order and discipline prong grows in strength as well as commanders now have the capability to deter serious misconduct.

To achieve these ends, the military departments and Congress can begin by identifying extra-constitutional rights throughout the court-martial process and then scale back those rights. Beyond reducing specific due process rights, the military departments should develop a culture where the goal of military law is good order and discipline, establishing that before any future reform efforts, to include increases and decreases in due process, the efforts must be balanced against their direct and indirect effects against good order and discipline.

A. Limiting Accused Service Members' Due Process Rights

1. Structural Reform - Eliminate the Distinction Between Special and General Courts-Martial

The distinction between a special and general courts-martial provides increased due process rights to an accused service member. A general court-martial, provided for instances of serious misconduct, includes multiple levels of review.²²⁹ Upon preferral of charges, the special court-martial convening authority reviews the charges and then forwards the charges, along with a recommendation, to the general court-martial convening authority, a superior commander.²³⁰ The general court-martial convening authority then determines whether to refer the charges to a general court-martial.²³¹ The two levels of review and the ultimate decision of referral resting with a superior commander, provides additional process for accused service members to ensure that their rights are not being violated.

The additional layers of review also prolong the process. As figure 3.1 portrays, between 2010 and 2013, general courts-martial average about 200 more days to process than do special courts-martial.²³² While the time disparity partly relates to the increased complexity of offenses referred to general courts-martial as compared to special courts-martial, which requires more investigative time between the date of discovery and preferral, the additional layer of review adds time to the process. Furthermore, resting the referral authority for a general court-martial with the superior commander distances the immediate commander from the court-martial process. While the immediate commander may prefer charges, the ultimate decision whether to refer to the case to trial resides at least two levels above the immediate commander. Consequently, when electing disciplinary action, the immediate commander may be hesitant to elect a court-martial, knowing that the case will be resolved well above his or her level.

As such, Congress and the military departments should eliminate the distinction between special and general courts-martial. Instead, an immediate commander should be responsible for the preferral of charges against his or her service members. The decision to refer should then reside with the current special court-martial convening authority, who is often co-located with the immediate commander and more directly involved with the day-to-day operations and discipline of the installation. Not only will removing the additional layer of review decrease processing times, but it will give the immediate commander and his or her directly superior commander greater responsibility and ownership over their cases. To prevent misuse of this authority, the special court-martial convening authority's staff judge advocate should have the discretion to recommend that the special court-martial convening authority's immediate commander, the current general court-martial convening authority, review cases where the special court-martial convening authority refuses to refer charges, when in his or her opinion, the facts of the case warrant trial by court-martial. Overall, by streamlining the court-martial process for all cases, cases will proceed to trial more quickly and lower-level commanders will be more invested in their cases, which in turn may increase their willingness to utilize the court-martial process to effectuate good order and discipline.

2. Pretrial Reforms

a. Eliminate Article 32 Hearings in Favor of Grand Jury System

Currently, accused service members have a right to an Article 32 hearing when the special court-martial convening authority recommends to the general court-martial convening authority that preferred charges should be referred to a general court-martial.²³³ Initially, Article 32 hearings had a limited purpose, mainly "to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what

disposition should be made of the case.”²³⁴ In practice, though, Article 32 hearings have developed into “mini-trials.” Because of the additional rights provided to accused service members in Article 32 hearings, specifically, the rights to counsel, to be present, to call witnesses, to cross-examine witnesses, and to possess evidence within the control of military authorities,” the government must invest substantial time and resources in preparing for the Article 32 hearing, to include witness travel and complying with defense discovery requests.²³⁵

As a result, Article 32 hearings are time consuming. For example, in 2012, the Air Force averaged 32 days from preferral of charges to the Article 32 hearing.²³⁶ The Air Force then averaged 24 days from the completion of the Article 32 hearing to referral of charges; thereby averaging 56 days from preferral of charges to referral of charges.²³⁷ In comparison, in 2012 the Air Force averaged 9 days between preferral and referral of charges in special courts-martial, where accused service members were not afforded the right to an Article 32 hearing.²³⁸ Similarly, in 2013, the Air Force averaged 41 days from preferral to the Article 32 hearing and 22 days between the Article 32 hearing and referral of charges, for a total of 63 days between preferral and referral.²³⁹ Meanwhile, that same year, the Air Force averaged 12 days from preferral to referral of charges in special courts-martial.²⁴⁰

To increase the expediency of the court-martial process, Congress and the military departments should eliminate the Article 32 hearing process and instead adopt a system closely related to the federal grand jury process. Within the federal system, the government must secure an indictment of an accused before a grand jury before the case can proceed to trial.²⁴¹ The federal system affords the accused very little rights within the grand jury system. For example, the accused does not have a right to be present, represented by counsel, to confront witnesses, or even to be aware of the proceedings, there is no judge present, the prosecutor is not bound by any

rules of evidence and may introduce improperly seized evidence, and the proceedings are performed in secret, with the accused not permitted to receive a transcript of the proceedings.²⁴²

The government also possesses a light standard of proof to secure an indictment, with the federal rules dictating a probable cause standard of proof.²⁴³

Such a system can be applied to the military justice system. Upon the preferral of charges, a convening authority may convene a grand jury like board, before which the designated trial counsel can present the government's case, not bound by the rules of evidence, and without the presence of the accused service member. The designated grand jury board can then determine whether the government meets its probable cause standard and provide a recommendation to the convening authority. Unlike in the federal system, the recommendation should not be binding as the convening authority is ultimately responsible for military discipline, but the process ensures that the government possesses probable cause to proceed further with the case. The end result of the process is that the government should be able to proceed more quickly between the preferral of charges and referral of charges, without perfecting its case in anticipation of the Article 32 hearing, while also ensuring that there remains some check on the government's ability to bring charges to trial.

b. Bring Discovery Rights in Line with Federal Discovery Rights

Civilian and military courts share a basic understanding of an accused service member's discovery rights. CAAF, however, expanded on the discovery rights guaranteed to accused service members. Through its determination that "military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts," CAAF prescribed a liberal discovery standard "across the board as an absolute binding mandate."²⁴⁴ Under this standard, government counsel should "generally resolve any

questionable issue involving discovery in favor of disclosure directly to defense counsel or through *in camera* inspection by the trial judge.”²⁴⁵ This standard has consequences in trial practice within the military justice system. As the current military justice process requires and mandates government discovery to the defense at various stages, to include prior to an Article 32 hearing, upon service of charges, and prior to trial, prosecutors spend much of their time scrambling to adhere to the liberal discovery mandates.²⁴⁶ When defense counsel submits a discovery quest, government counsel must presume that all the requested information is material and therefore provide the information.²⁴⁷ Coupled with the CAAF requirement that the government is responsible for providing all information within the liberally construed possession of the government, military prosecutors become overwhelmed with locating and perfecting discovery, adding time and delay to the process.²⁴⁸

The federal system provides a more efficient model to provide the accused with discovery rights. While the federal system complies with the standard discovery responsibilities, to include *Brady*²⁴⁹ and *Jenck’s Act*²⁵⁰ requirements, it does not establish a liberal discovery standard throughout the process. Instead, individual civilian courts “may vary in their interpretation of certain discovery rules.”²⁵¹ Based upon this standard, the military justice system could require the government to provide essential discovery material, such as exculpatory evidence and statements made by government witnesses when subject to direct examination, while also allowing the government to contest the materiality of defense requested discovery that does not fall within those categories. By doing so, the government will be able to proceed with the case and not become muddled in defense discovery request quagmires prior to trial.

3. Trial Reforms

a. Allow Witness Testimony via VTC

The expeditionary nature of military service presents a unique challenge to the military justice system. By the time a case proceeds to court-martial, trial participants, to include witnesses and investigators, may have moved on geographically to other assignments, separated from military service, or deployed overseas.²⁵² Consequently, in preparation for trial, government attorneys must locate these witnesses, secure their travel back to the location of the court-martial, and ensure that these witnesses are available for the court-martial when scheduled.²⁵³ These responsibilities come at great cost. The convening authority must pay for the travel and often, especially when the service member is deployed, the travel impacts the military mission.²⁵⁴ Similarly, locating, travelling the witnesses, and scheduling the trial to minimize mission to the impact adds time to the court-martial process.²⁵⁵

The military justice system currently in place does not reflect this unique challenge of witness availability. While the military justice system currently permits for remote testimony in courts-martial, both parties must agree to its use. As such, an accused service member may prohibit the use of remote testimony, which the military judge is obliged to follow.²⁵⁶ By removing the accused service member's ability to effectively veto the use of remote testimony, military prosecutors will be able to rely on technology such as VTC to secure the testimony of geographically separated witnesses, which will save time and resources.²⁵⁷ This expediency will come at minimal costs to the accused service members as the improvement in VTC technology still allows them to confront and cross-examine the witnesses.²⁵⁸

b. Remove the Preference Against Trying Multiple Accused Service Members Together

The military justice system deviates from the federal system in regards to trying multiple accused individuals together when their offenses arise from the same misconduct. In the federal system, the preference is to try these individuals together.²⁵⁹ The Supreme Court has repeatedly reminded federal courts “[t]here is a preference in the federal system for joint trials of defendants who are indicted together.”²⁶⁰ As the Supreme Court explained, “Joint trials play a vital role in the criminal justice system. They promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.”²⁶¹

The military justice system, though, provides that the preference should be to individually try each accused service member. In practice, if the convening authority refers multiple accused service members to a combined court-martial, any of the service members can move to sever the charges and the military judge must oblige.²⁶² The basis of this preference is the issue of forum selection.²⁶³ The military justice system provides each service member the right to elect their trial forum; as such, one service member may elect trial by military judge alone whereas the other service member requests trial by officer and enlisted panel members.²⁶⁴

The preference for trying service members separately for shared offenses serves to prolong the court-martial process. Rather than proceeding through the pretrial, trial, and post-trial process once, the government must go through each process multiple times, only adding time to the court-martial process.²⁶⁵ By giving commanders the option to try multiple accused at once, commanders are able to quickly try these cases and gain efficiencies of time and resources that would facilitate good order and discipline within their units.²⁶⁶ Again, this efficiency comes at a minimal cost to accused service members as the convening authority can still provide each individual accused service member with his or her forum rights. For example, should one

accused request trial by judge alone and one accused request trial by panel members, the convening authority could seat a panel to decide the case of the member requesting trial by military panel while the military judge decides the case of the Service member requesting trial by judge alone.²⁶⁷

4. Post-Trial Reforms – Review the Appellate Process

The due process right of appellate review is one of those basic due process rights that has become so important and ingrained into the military justice system that Congress and the military departments cannot completely do away with it. At the same time, however, Congress and the military departments must acknowledge and face the difficulties that appellate review has on the military justice trinity. Appellate review is not only a lengthy process, but since their creation, the military appellate courts have repeatedly created additional due process rights for accused service members.²⁶⁸ Should Congress and the military departments elect the limit accused service members' rights to expedite the court-martial process, the military appellate courts may undermine their efforts and either restore extra due process rights or create additional rights.

Thus, Congress and the military departments should examine alternative means of appellate review, with several possibilities existing. First, Congress and the military departments may expand the types of cases that undergo appellate review by the department's TJAG and limit review by the military appeal courts to only the most extreme cases, specifically cases where the accused service member has been sentenced to life in confinement or to death.²⁶⁹ Second, Congress and the military departments could elect to leave the military appellate court's jurisdiction as is, but instead limit their authority and standards of review.²⁷⁰ Under this approach, accused service members may have their cases reviewed, but the military appellate courts may be limited in their ability to establish new due process rights.

B. Creating a Cultural Emphasis on Good Order and Discipline

An appropriate military justice trinity requires more than scaling back identifiable excesses in due process. There remains the omnipresent possibility that remaining extra-constitutional due process rights may increasingly impede the court-martial process or that Congress, the President, the appellate process, or the military departments may introduce additional due process rights. Conversely, the de-escalation of due process may go too far, with the military departments and Congress taking away too many essential due process rights, resulting in de-legitimized punishment. Hence, the military departments must develop a culture built upon the military justice trinity that emphasizes the primacy of fair and just good order and discipline. To do so, the MCM's stated end and purpose of military law should be reformed to reflect that the end and purpose of military law is good order and discipline, with the military justice system and due process supporting and legitimizing good order and discipline.²⁷¹ With the appropriate culture in place, the military justice trinity can preserve a proper balance.

VI. Conclusion

The past few years have not been kind to military justice. As Congress and the public turn their attention to the perceived failures of the military justice system, highlighted by the increase in sexual assault and misconduct in the deployed environment, the military departments must respond and reform. A failure to do so will not only jeopardize mission readiness, as each of these offenses strikes at good order and discipline within the military, but also a failure to act from within allows for reform to be imposed upon the military departments. To address these issues, though, the military departments must achieve an understanding of what explains the apparent increase in service member misconduct. Only once the military departments have an explanation, can they craft an appropriate solution.

The explanation and solution for this rash of military misconduct lies in good order and discipline. Good order and discipline, with its “intelligent, willing, and positive obedience to the will of the leader,” which allows commanders to order their service members to kill in combat, to restrain from using force in a COIN operation, and to place the interests of their unit above their own, should prevent service members from engaging in sexual assault, murdering civilian non-combatants in the deployed environment, or conducting themselves in an unethical and criminal manner. But yet, service members continue to engage in such misconduct, despite UCMJ provisions prohibiting such conduct and senior leaders regularly speaking out and warning against such conduct and the public and Congress continue to take notice.

The reason for this breakdown in good order and discipline is that good order and discipline does not operate in a vacuum. Instead, good order and discipline is a prong in a military justice trinity, where the military justice system, due process, and good order and discipline, working in an interconnected manner, combine together to prevent service member misconduct. In an ideal balance, a commander can use the military justice system, legitimized and supported by due process, to effectuate good order and discipline within his or her unit. The commander can establish a “state of mind that produces proper action and prompt cooperation under all circumstances,” through the threat of punishment via the military justice system. Service members, viewing this process as legitimate due to the fairness afforded by due process, will then be deterred from engaging in misconduct.

Commanders, though, cannot use this military justice trinity to establish a state of mind within their subordinate service members to refrain from engaging in serious misconduct. Beginning with World War I, Congress, the military departments, and the military appellate courts have gradually increased the due process rights afforded to accused service members,

thereby strengthening the due process prong of the military justice trinity. The increased due process prong in turn impacted the military justice system prong. The court-martial process, once the primary tool utilized to preserve good order and discipline, became a time consuming and cumbersome option for commanders. Commanders, seeking swift and efficient justice, turned away from the court-martial and instead utilized nonjudicial punishment and administrative discharges to effectuate good order and discipline.

The weakened military justice prong subsequently impacted the good order and discipline prong. Commanders utilize not only positive means to achieve good order and discipline within their units, but also negative means. To deter misconduct, commanders required the capacity to impose punishment. It is the military justice system that affords that capacity. Nonetheless, for punishment to deter misconduct, it must be credible, severe, swift, and possess collateral consequences. Without an efficient or frequent court-martial tool, commanders no longer had such punishment necessary to deter misconduct. Therefore, commanders no longer could properly effectuate good order and discipline.

As they search for solutions to the rash of misconduct, the military departments must again rely upon good order and discipline. By doing so, the military departments will embed in their service members the “intelligent, willing, and positive” obedience to the military justice and leadership prohibitions against engaging in such misconduct. The military departments can only do so, however, by balancing the military justice trinity. Good order and discipline requires a fully realized court-martial process that can be used with frequency and celerity. The military departments can only restore the court-martial process by reducing the due process rights afforded to accused service members. They must proceed carefully, however, as due process legitimizes the military justice system and good order and discipline. Consequently, the military

departments should direct their focus on reducing the extra-constitutional due process rights of accused service members, which unduly lengthen and burden the court-martial process, while maintaining the constitutionally afforded due process rights of accused service members.

¹ John S. Cooke, "Military Justice and the Uniform Code of Military Justice," *Army Law.*, Mar. 2000, at 1, 6 (quoting D.S. Freeman, Washington 116 (1968)).

² Defense Legal Policy Board, *Report of the Subcommittee on Military Justice in Combat Zones: Military Justice in cases of U.S. Service members alleged to have caused the death, injury or abuse of non-combatants in Iraq or Afghanistan*. Final Report, Appendix V, (Washington DC: Department of Defense, May 30, 2013), 152-163. On November 19, 2005, a Marine Corps battalion operating in Haditha, Iraq suffered an IED attack, resulting in the death of a popular battalion Marine and two other Marines wounded. Subsequent to the attack, the Marines reported a small arms fire attack from homes within Haditha, surrounding the IED site. The battalion preceded to clear several homes. In the operation's aftermath, an investigation revealed that twenty-four unarmed Iraqi non-combatants; including women, children, and elderly were killed by the Marine battalion. See also Jennifer Steinhauser, "Reports of Sexual Assault Rise Sharply," *New York Times*, 7 November 2013. In November 2013, the Department of Defense released that it received 3,553 complaints of sexual assault within the military for the first three quarters of fiscal year 2013, a 50% increase from the total number reported for fiscal year 2012. Similarly, a Department of Defense survey revealed that in 2011, 26,000 service members related in the survey that they were the victims of sexual assault, whereas only 19,000 answered as such in 2010.

³ Defense Legal Policy Board, *Report of the Subcommittee*, 161-162. Marine Corps commanders preferred charges against eight of the battalion members, including the battalion commander. Prior to court-martial, however, charges were dropped against six of the members, including the battalion commander, who instead was forced into early retirement. Once faced trial by court-martial and was acquitted. Staff Sergeant Frank Wuterich faced a general court-martial, where he was charged with three specifications of violating Article 92, UCMJ, Dereliction of Duty; nine specifications of violating Article 119, UCMJ, voluntary manslaughter; two specifications of Article 128, aggravated assault; and one specification of Article 134, obstruction of trial. In the midst of trial, Sergeant Wuterich and the convening authority agreed upon a pretrial agreement, where in return of Sergeant Wuterich's plea of guilty to one specification of dereliction of duty, the convening authority would dismiss the remaining charges and their specifications and approve no confinement. Sergeant Wuterich was sentenced to confinement for 90 days, reduction in grade to E-1, and forfeiture of \$984.06 pay per month for three months. Pursuant to the pretrial agreement, the convening authority did not approve the confinement portion of the punishment.

⁴ See James Risen, "Hagel to Open Review of Sexual Assault Case," *New York Times*, 11 March 2013. In November 2012, a panel of military officers found Lt Col James Wilkerson guilty of

sexual assault in violation of Article 120, UCMJ. The members sentenced Lt Col Wilkerson to one year of confinement and a dismissal from the Air Force. The conviction stemmed from an allegation by a civilian female who reported that Lt Col Wilkerson sexually assaulted her when she was asleep at his home. After his conviction, the general court-martial convening authority, Lt Gen Craig Franklin, set –aside the conviction pursuant to his authority under Article 60, UCMJ. Reportedly, he subsequently attempted to promote Lt Col Wilkerson and provide him with a command. See also Craig Whitlock, General’s Promotion Blocked Over Her Dismissal of Sex-Assault Verdict.” *Washington Post*, 6 May 2013. In February 2012, Lt Gen Susan Helms set-aside Capt Matthew Herrera’s sexual assault conviction. Previously, a panel of officers convicted Capt Herrera of sexually assaulting a female Air Force lieutenant and sentenced him to 60 days of confinement and a dismissal.

⁵ Senate, *Military Justice Improvement Act of 2013*, 113th Cong., 2013, S.967. Section(3) provides that “the disposition of charges pursuant to paragraph (1) shall be subject to the following: (A) The determination whether to try such charges by court-martial shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O-6 or higher who – (i) are available for detail as trial counsel under section 827 of title 10, United States Code (Article 127, UCMJ). This provision is “with respect to charges under Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), that allege an offense, other than an offense specified in paragraph (2), that is triable by court-martial that chapter for which the maximum punishment authorized under that chapter includes confinement for more than one year.” The excluded offenses, per Section (2), were “(A) An offense under sections 883 through 891 of Title 10, United States Code (Articles 83 through 91 of the Uniform Code of Military Justice. (B) an Offense under sections 893 through 917 of title 19, United States Code (articles 92 through 117 of the Uniform Code of Military Justice). An Offense under section 933 of title 10, United States Code (Article 133 of the Uniform Code of Military Justice).

Upon the bill’s introduction Senator Gillibrand included a talking paper detailing military sexual assault scandals from with the past 10 weeks of the bill’s introduction, to include allegations against the West Point Rugby team; U.S. Naval Academy football players under investigation for sexual assault, the Fort Jackson Army commander facing adultery charges; members of the Fort Hood Sexual Assault Response Team accused of abuse and running a prostitution ring; the head of the Air Force’s Sexual Assault and Response Office arrested for sexual battery; an Army battalion at Fort Greely, Alaska , under investigation for condoning adultery and creating an “open season” climate when it comes to sexual activity within his battalion; a Fort Hood sergeant jailed in rape and kidnapping case; a soldier secretly taping female cadets, an Air Force Military Training Instructor accused of having sex with four trainees; an obscene Marine Facebook page denigrating women; the Fort Campbell sexual harassment manager arrested for threatening and stalking his ex-wife; and a Marine convicted of rape adjudged no confinement.

⁶ Ibid. See also Law Professor’s Statement on Reform of Military Justice, June 7, 2013.

⁷ Darren Samuelsohn, Juana Summers, Anna Palmer, “Kirsten Gillebrand’s Sexual Assault Bill Derailed,” *Politico*, 6 March 2014, <http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html>.

⁸ Ibid. This vote proved especially bipartisan, with the Republic Senate Majority Leader, Mitch McConnell, and leading Tea Party affiliated Senator Ted Cruz voting in favor of the bill, along with several prominent liberal Democrat Senators, to include Senator Gillibrand.

⁹ On season 2 of *House of Cards*, a Netflix streaming online show, the show's primary female antagonist, Claire Underwood, related that she was previously sexually assaulted by a Marine General, causing other victims to come forward. Consequently, emboldened by her husband's position as the Vice President of the United States, she advocated for the passing of a bill that would take the disposition of sexual assault cases out of the military chain-of-command and increase civilian control of the military justice system. This plot line lasted the entire season and proved to be essential to the show's main plot.

¹⁰ Carl von Clausewitz. *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1989, 87. Military doctrine is peppered with references to Clausewitz, especially joint and Army publications. Similarly, Clausewitz forms the foundation for much of the military departments' development education.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Kenneth M. Theurer and James W. Russell III, "Why Military Justice Matters," *The Reporter*, Vol. 37. No.2, Summer 2010, 10 (quoting Senator Edward Kennedy).

¹⁶ Robert Sherril, *Military Justice is to Justice As Military Music is to Music* (New York: Harper & Row 1970). The quote derives from French Prime Minister Georges Clemenceau.

¹⁷ U.S. Const. art. I, § 8. The Supreme Court has afforded great "deference to the determination of Congress made under its authority to regulate the land and naval forces." *Weiss v. United States*, 510 U.S. 163, 177 (1994). See also James B. Roan and Cynthia Buxton, "The American Military Justice System in the New Millennium," 52 *Air Force Law Review* 185, 2002, 1.

¹⁸ David A. Schlueter, "The Military Justice Conundrum: Justice or Discipline?" *Military Law Review*, Vol.215, Spring 2013, 16. See also Victor Hansen, "Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?," 16 *Tulane Journal of International and Comparative Law*, 419, Spring 2008, 427; *Chappel v. Wallace*, 462 U.S. 296, 302 (1983)(citing *Gilligan v. Morgan*, 413 U.S. 1, (1973) (finding that "it 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 . . . control of a military force are essentially professional military judgments."))

¹⁹ William T. Generous, Jr. *Swords and Scales*, (Port Washington N.Y.: National University Publications 1973), 5-13. See also Hansen, "Changes in Modern Military Codes and the Role of the Military Commander," 427.

²⁰ Schlueter, "The Military Justice Conundrum," 21 (citing Letter to General W.S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879).

²¹ Generous, *Swords and Scales*, 7.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid., 8.

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- ²⁷ Ibid.
- ²⁸ Ibid.
- ²⁹ Ibid., 5.
- ³⁰ Ibid.
- ³¹ Ibid.
- ³² Ibid.
- ³³ Ibid., 8-9.
- ³⁴ Ibid., 9.
- ³⁵ Ibid., 8.
- ³⁶ Ibid., 9.
- ³⁷ Ibid., 10.
- ³⁸ Ibid.
- ³⁹ Ibid.
- ⁴⁰ Ibid.
- ⁴¹ Ibid.
- ⁴² Ibid.
- ⁴³ The Articles of War, ed., enacted as part of the National Defense Act of June 4, 1920, Chapter 36, Title 10 U.S. Code, 1934.
- ⁴⁴ *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *U.S. ex rel. French v. Weeks*, 259 U.S. 326 (1922).
- ⁴⁵ Ibid.
- ⁴⁶ Generous, *Swords and Scales*, 14.
- ⁴⁷ Ibid.
- ⁴⁸ Ibid., 15-17.
- ⁴⁹ Ibid., 16.
- ⁵⁰ Ibid., 18.
- ⁵¹ Elizabeth L. Hillman, *Defending America: Military Culture and the Cold War Court-Martial*, (Princeton N.J.: Princeton University Press 2005), 14.
- ⁵² Schlueter, "The Military Justice Conundrum," 31-32 (citing Index and Legislative History, Uniform Code of Military Justice 606 (2000 Reprint, Hein)).
- ⁵³ Schlueter, "The Military Justice Conundrum," 29-30, (citing Report of War Department Advisory Committee on Military Justice 5 (12 Dec. 1946)).
- ⁵⁴ See generally Index and Legislative History, Uniform Code of Military Justice (2000 Reprint, Hein). See also Generous, *Swords and Scales*, 34-53.
- ⁵⁵ Generous, *Swords and Scales*, 46-49.
- ⁵⁶ Ibid., 49. Representative Frederick Wiener served as an Army Judge Advocate during World War II, rising to the rank of colonel. During the debate concerning the UCMJ, Rep. Wiener became a vocal supporter of the Articles of War, motivated by the belief that "the object of armed forces is to win wars, not just fight them [but] win them, because they do not pay off on place in a war." Concerning the role of military attorneys, Rep. Wiener warned the House of Representatives that "it will be a grave effort if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisdiction."
- ⁵⁷ Ibid., 51.
- ⁵⁸ Ibid.
- ⁵⁹ Ibid.

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- ⁶⁰ Ibid.
- ⁶¹ Hillman, *Defending America*, 14.
- ⁶² Generous, *Swords and Scales*, 54.
- ⁶³ Ibid. Quoting the editor of the Navy's legal journal.
- ⁶⁴ Ibid. See also Article 36, UCMJ.
- ⁶⁵ Ibid.
- ⁶⁶ Ibid.
- ⁶⁷ *United States v. Clay*, 1 C.M.R. 74 (1951). See also Generous, *Swords and Scales*, 80-81; Hillman, *Defending America*, 25.
- ⁶⁸ Hillman, *Defending America*, 25.
- ⁶⁹ Generous, *Swords and Scales*, 81.
- ⁷⁰ William T. Allison, *Military Justice in Vietnam: The Rule of Law in an American War*, (Lawrence: University Press of Kansas, 2007), 67-68.
- ⁷¹ Ibid., 68.
- ⁷² Ibid.
- ⁷³ Ibid.
- ⁷⁴ Hillman, *Defending America*, 27.
- ⁷⁵ Ibid.
- ⁷⁶ Ibid.
- ⁷⁷ Manual for Courts-Martial (MCM), United States, preamble. (2012)
- ⁷⁸ Roan and Buxton, "The American Military Justice System in the New Millennium," 192.
- ⁷⁹ Ibid.
- ⁸⁰ Ibid., 196.
- ⁸¹ See Rules for Courts-Martial (RCM) 307, Preferral of Charges and RCM 401, Forwarding and Disposition of Charges in General.
- ⁸² See RCM 401, Forwarding and Disposition of Charges in General.
- ⁸³ See RCM 601, Referral.
- ⁸⁴ See RCM 701, Discovery; RCM 703, Production of Witnesses and Evidence; RCM 704, Immunity; and RCM 705, Pretrial Agreements.
- ⁸⁵ See RCM 1107, Action by Convening Authority.
- ⁸⁶ See RCM 1108, Suspension of Execution of Sentence, Remission; RCM 1109, Vacation of Suspension of Sentence.
- ⁸⁷ See Article 60, UCMJ, Action by a Convening Authority. See also RCM 1107(d)(1) Action on a Sentence. The RCM provides that "the convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening authority or higher authority may not increase the punishment imposed by a court-martial."
- ⁸⁸ 2014 National Defense Authorization Act.
- ⁸⁹ Ibid.
- ⁹⁰ Article 60, UCMJ, Action by a Convening Authority. See also RCM 1107(d)(1).
- ⁹¹ Due process derives from the 5th and 14th Amendments. The 5th Amendment dictates to the federal government that no individual shall "be deprived of life, liberty or property without due process of law." Several decades later, the 14th Amendment mirrored this language, but restricted states from depriving any individual of life, liberty or property without due process. .

While due process has come to have specific meanings relating to substantive and procedural due process, at its core, due process refers to the government's obligation that before depriving a citizen of life, liberty, or property, the government must observe and offer fair procedures, that apply to all individuals and apply equally in all cases.

⁹² Schlueter, "The Military Justice Conundrum," 63-71.

⁹³ Ibid., 63.

⁹⁴ Ibid. See also U.S. Const. amend IV; MCM, 2012, Military Rules of Evidence, 311-317

⁹⁵ Schlueter, "Military Justice Conundrum," 63. See also U.S. Const. amend V, MCM, 2012, Military Rules of Evidence 301. See also Geoffrey S. Corn and Victor M. Hansen, "Even if it Ain't Broke, Why Not Fix It? Three Proposed Improvements to the Uniform Code of Military Justice," *Journal of National Security Law and Policy*, Vol. 6:447, 2013, 448-449.

⁹⁶ Schlueter, Military Justice Conundrum, 63-64. See also U.S. Const. amend IV, MCM, 201, Military Rules of Evidence 321.

⁹⁷ Schlueter, "Military Justice Conundrum," 64 (citing Ronald S. Thompson, "Constitutional Applications to the Military Criminal Defendant," 66 *University of Detroit Law Review* 221 (1989)).

⁹⁸ Elizabeth C. Hernandez and Jason M. Ferguson, "The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems," *The Air Force Law Review*, Volume 67 (2011), 187-243, 198 (citing *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F.) 2004, see also *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) (finding that "the military justice system provides for broader discovery than required by practice in federal civilian trials.)).

⁹⁹ Schlueter, "Military Justice Conundrum," 64-65.

¹⁰⁰ Hernandez and Ferguson, "The Brady Bunch," 199.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid., 200-202.

¹⁰⁵ Ibid., 202.

¹⁰⁶ Article 27, UCMJ. See also U.S. Const. amend VI.

¹⁰⁷ Article 27, UCMJ; Rule for Courts-Martial 501, Composition and Personnel of Courts-Martial; RCM 502, Qualifications and Duties of Personnel of Courts-Martial; RCM 506, Accused's Rights to Counsel.

¹⁰⁸ Ibid.

¹⁰⁹ Schlueter, "Military Justice Conundrum," 66.

¹¹⁰ Military Rule of Evidence 502.

¹¹¹ See generally RCM 1202, Appellate Counsel.

¹¹² Article 32, UCMJ. See also RCM 405, Pretrial Investigation.

¹¹³ RCM 405, Pretrial Investigation, *discussion*.

¹¹⁴ RCM 405.

¹¹⁵ Ibid.

¹¹⁶ RCM 405(f).

¹¹⁷ 2014 National Defense Authorization Act.

¹¹⁸ Article 26, UCMJ; RCM 801, Military Judge's Responsibilities.

¹¹⁹ Schlueter, "Military Justice Conundrum," 67.

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- ¹²⁰ Ibid., 68.
- ¹²¹ Article 25, UCMJ, Who May Serve on Courts-Martial; Rule for Courts-Martial 903, Accused's Elections on Composition of Court-Martial.
- ¹²² Ibid.
- ¹²³ U.S. Const. amend VI.
- ¹²⁴ Article 49, UCMJ; Rule for Courts-Martial 703(b)(1). See also Defense Legal Policy Board, Report of the Subcommittee, 104-105.
- ¹²⁵ Article 66(a), UCMJ.
- ¹²⁶ Ibid.
- ¹²⁷ Article 66(b), UCMJ.
- ¹²⁸ Article 67, UCMJ.
- ¹²⁹ Article 67, UCMJ; 28 U.S.C. § 1259 (2012).
- ¹³⁰ Schluster, "Military Justice Conundrum," 70. See also Article 66(c), UCMJ; MCM (2012); RCM 1203(b), *discussion*.
- ¹³¹ Schluster, "Military Justice Conundrum," 71 (citing *United States v. Smith*, 15 M.J. 948 (A.F.C.M.R. 1983)).
- ¹³² Schluster, "Military Justice Conundrum," 71 (citing *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967)).
- ¹³³ Hillman, *Defending America*, Table B-1, provided the courts-martial rates for each service from 1913-1980. The Annual Reports of the Judge Advocate General (Washington D.C.: Department of Defense, 1981-2013) provided the rates from 1981-2013.
- ¹³⁴ Hillman, *Defending America*, 14-15.
- ¹³⁵ Ibid.
- ¹³⁶ Ibid., 15.
- ¹³⁷ Ibid., 16.
- ¹³⁸ George S. Prugh, "Observations on the UCMJ 1954 and 2000," *Military Law Review*, vol.165 (2000), 21-41, 29.
- ¹³⁹ Prugh, "Observations on the UCMJ 1954 and 2000," *Military Law Review*, vol.165 (2000), 21-41, 29 (citing a report by the Womble Committee, 1953).
- ¹⁴⁰ Ibid., 69.
- ¹⁴¹ Ibid.
- ¹⁴² Ibid.
- ¹⁴³ Ibid.
- ¹⁴⁴ Information provided by the Military Justice Division, Air Force Legal Operations Agency.
- ¹⁴⁵ Generous, *Swords and Scales*, 138.
- ¹⁴⁶ Ibid.
- ¹⁴⁷ Ibid., 151.
- ¹⁴⁸ Ibid.
- ¹⁴⁹ Ibid.
- ¹⁵⁰ Hillman, *Defending America*, Appendix B, Table B.1.
- ¹⁵¹ The Annual Reports of the Judge Advocate General (Washington D.C.: Department of Defense, 1981-2013) provided the rates from 1979-2013.
- ¹⁵² Generous, *Swords and Scales*, 131.
- ¹⁵³ Ibid.

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- ¹⁵⁴ The Annual Reports of the Judge Advocate General (Washington D.C.: Department of Defense, 1974).
- ¹⁵⁵ Hillman, *Defending America*, 20.
- ¹⁵⁶ Ibid.
- ¹⁵⁷ The Annual Reports of the Judge Advocate General (Washington D.C.: Department of Defense, 2013).
- ¹⁵⁸ Ibid.
- ¹⁵⁹ Ibid.
- ¹⁶⁰ Ibid.
- ¹⁶¹ Plutarch, *The Lives of the Noble Grecians and Romans, Volume II*, ed. & rev. Arthur Hugh Clough (New York: Random House, 1992), 11.
- ¹⁶² Ibid.
- ¹⁶³ Defense Legal Policy Board, Report of the Subcommittee on Military Justice in Combat Zones, 113.
- ¹⁶⁴ See *Chappell v. Wallace*, 462 U.S. 296, 302 (finding that “it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decision as to the control . . . of a military force are essentially professional military judgments.”)
- ¹⁶⁵ Joint Publication 1, Doctrine of the Armed Forces of the United States, at V-22 (25 March 2013).
- ¹⁶⁶ Air Force Doctrine Document 1-1, Leadership and Development (18 February 2004); Army Regulation 600-100, Army Leadership (8 March 2007).
- ¹⁶⁷ Schlueter, “Military Justice Conundrum, 27 (citing AD Hoc Committee to Study the Uniform Code of Military Justice, Report to the Hon. William R. Brucker, Secretary of the Army 11-12 (18 Jan. 1960).
- ¹⁶⁸ Jeffrey C. Benton, *Air Force Officer’s Guide*, 34th ed. (Mechanicsburg PA: Stackpole Books 2005), 245.
- ¹⁶⁹ Theurer and Russell, “Why Military Justice Matters,” 8.
- ¹⁷⁰ Ibid.
- ¹⁷¹ Mark Clodfelter, *Beneficial Bombing: The Progressive Foundations of American Air Power, 1917-1945*. (Lincoln: University of Nebraska Press, 2010), 105.
- ¹⁷² Theurer and Russell, “Why Military Justice Matters,” 8.
- ¹⁷³ Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, (New York: Back Bay Books 2009), 144.
- ¹⁷⁴ Ibid.
- ¹⁷⁵ Ibid., 39.
- ¹⁷⁶ Ibid.
- ¹⁷⁷ Joint Publication 3, Joint Operations, Doctrine of the Armed Forces of the United States, at I-14 (11 August 2011).
- ¹⁷⁸ Ibid.
- ¹⁷⁹ Defense Legal Policy Board, “Report of the Subcommittee,” 18.
- ¹⁸⁰ Ibid.
- ¹⁸¹ Defense Legal Policy Board, “Report of the Subcommittee,” 17 (quoting Field Manual No.3-24/Marine Corps Warfighting Publication No. 3-33.5: “Counterinsurgency.”+)
- ¹⁸² Ibid.

¹⁸³ Grossman, *On Killing*, 149.

¹⁸⁴ Benton, *Air Force Officer's Guide*, 245.

¹⁸⁵ For example, An Airman assigned to Moody Air Force Base in Valdosta, Georgia, most likely has a squadron commander, a group commander, and a wing commander, all co-located with him or her at the installation. The Airman then falls under a Numbered Air Force commander Shaw Air Force Base in Sumter, South Carolina and also under Major Command commander located at Joint Base Langley in Hampton Roads, Virginia. Most likely, the Airman has little, if any, interaction with his or her wing commander, let alone the higher-level commanders located in different states.

¹⁸⁶ For example, in the deployed environment, he or she may fill a joint tasking as an individual augmentee. There, he or she may work for a non-Air Force military commander, but also be under the command of an Air Force expeditionary wing commander located somewhere in theater. Beyond the expeditionary wing commander, the Airman falls under the command of the Air Forces Central Command commander, located at Shaw Air Force Base.

¹⁸⁷ Grossman, *On Killing*, 144.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ See generally Defense Legal Policy Board, "Report of the Subcommittee."

¹⁹¹ Ibid.

¹⁹² Defense Legal Policy Board, "Report of the Subcommittee," 231 (quoting Brigadier General Gary Volesky).

¹⁹³ Grossman, *On Killing*, 145.

¹⁹⁴ Plutarch, *Lives*, 11.

¹⁹⁵ Grossman, *On Killing*, 145.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Theurer and Russell, "Why Military Justice Matters," 9.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Daniel S. Nagin and Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," *Criminology*, Vol.39, Issue 4 (November 2001), 865-892.

²⁰² Ibid., 870.

²⁰³ Ibid. 880.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid., 885.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid., 881.

²¹² Ibid.

²¹³ The Annual Reports of the Judge Advocate General (Washington D.C.: Department of Defense, 2013).

²¹⁴ Information provided by the Military Justice Division, Air Force Legal Operations Agency.
²¹⁵ Article 15, UCMJ.

²¹⁶ John Brooker, Evan Seamore, and Leslie Rogall, "Beyond 'T.B.D.': Understanding VA's Evaluation for a Former Services Member's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces," *Military Law Review*, Vol.215, Winter 2012, 1-292.

²¹⁷ Article 15, UCMJ.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Theurer and Russell, "Why Military Justice Matters," 10.

²²¹ Brooker, Seamore, and Rogall, "Beyond T.B.D.," 135.

²²² Ibid.

²²³ Manual for Courts-Martial (2012), Appendix 12, Maximum Punishment Chart.

²²⁴ Brooker, Seamore, and Rogall, "Beyond T.B.D.," 152.

²²⁵ Ibid.

²²⁶ Theurer and Russell, 9 (citing Kenneth Butterfield, et al. "Organizational Punishment from the Manager's Perspective: An Explanatory Study," *Journal of Managerial Issues*, Sept. 22, 2005.

²²⁷ Daniel Keyes, *Flowers for Algernon* (New York: Mariner Books, 2005). In *Flowers for Algernon*, Charlie Gordon, a middle-aged man with a remarkably low IQ, was the subject of a medical experiment where researchers were able to make him a genius. A happy individual before the procedure, Charlie became increasingly angry and unhappy with the higher IQ. Eventually, the treatment failed and Charlie resorted to his original IQ. However, he recalled life with the higher IQ and was extremely unhappy because of this experience, eventually giving up on life.

²²⁸ See James M. Hirschhorn. "The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights." *North Carolina Law Review*, Vol. 62, 177 (January, 1984), stating that "a stable majority of the [Supreme] Court has accepted the proposition that the armed forces are a 'separate community' in which greater than usual restrictions on individual liberty are required. In practice, the Court has given considerable, though not clearly delineated, deference to decisions by Congress or the military authorities that restrict the political expression, access to political activity, and right to counsel of servicemen and that impose gender-based restrictions on military prospects." Under this line of reasoning, Congress and the military departments can scale back the due process rights afforded to accused service members, with the extent of that de-escalation established by policy, not by law.

²²⁹ Article 18, UCMJ; RCM 405; RCM 406; RCM 601.

²³⁰ RCM 404

²³¹ RCM 601

²³² Information provided by Military Justice Division, Air Force Legal Operations Agency.

²³³ Article 32, UCMJ; RCM 405.

²³⁴ RCM 405, discussion.

²³⁵ RCM 405.

²³⁶ Information provided by Military Justice Division, Air Force Legal Operations Agency.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Fed.R.Crim.P. 6.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Hernandez and Ferguson, “The Brady Bunch,” 222 (citing *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987)).

²⁴⁵ Hernandez and Ferguson, “The Brady Bunch,” 222.

²⁴⁶ Ibid., 224.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that criminal defendants possess a constitutional right to receive all exculpatory evidence in the government’s possession).

²⁵⁰ 18 U.S.C. § 3500 (2006); Hernandez and Ferguson, “The Brady Bunch,” 206 (providing that “the Jencks Act requires that the prosecutor disclose pretrial statements or reports of a government witness, once that witness has testified on direct examination”).

²⁵¹ Hernandez and Ferguson, “The Brady Bunch,” 226.

²⁵² Defense Legal Policy Board, “Report of the Subcommittee,” 103.

²⁵³ Ibid., 103-104.

²⁵⁴ Ibid., 104.

²⁵⁵ Ibid.

²⁵⁶ Ibid., 104-105; RCM 703.

²⁵⁷ Defense Legal Policy Board, “Report of the Subcommittee, 105.” See also *Maryland v. Craig*, 497 U.S. 836, 848 (1990) (finding that remote-means testimony is permitted when (1) “denial of confrontation is necessary to further an important public policy,” and (2) “the reliability of the testimony is otherwise assured.”)

²⁵⁸ Defense Legal Policy Board, “Report of the Subcommittee, 106.

²⁵⁹ Ibid., 99. See also *Zafiro v. United States*, 506 U.S. 534, 536 (1993); *United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996).

²⁶⁰ Ibid.

²⁶¹ *Zafiro*, 506 U.S. at 537.

²⁶² RCM 601; RCM 604; RCM 906.

²⁶³ RCM 812, discussion (“where different elections are made and, when necessary approved, as to court-martial composition a severance is necessary”).

²⁶⁴ Ibid.

²⁶⁵ Defense Legal Policy Board, “Report of the Subcommittee, 101-102.

²⁶⁶ Ibid., 101.

²⁶⁷ Ibid., 102.

²⁶⁸ Generous, *Swords and Scales*, 96-106.

²⁶⁹ The appellate courts review cases under Article 66, UCMJ. Article 66 requires the service TJAGs to refer to a Court of Criminal Appeals any case “in which the sentence , as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more.” See also Article 69(a) and Article 69(b), UCMJ. Under Article 69(a), each department’s TJAG reviews cases where the sentence did not contain one year of confinement or a punitive discharge (cases not reviewed under Article 66, UCMJ). Article 69(a) allows the departments’ TJAGS to review whether “any

part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate.” Article 69(b) permits the TJAGs to review the findings or sentence of any case not reviewed under Article 66 “on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.”

²⁷⁰ Article 66 (f), UCMJ permits each department’s TJAG to “prescribe uniform rules for Courts of Criminal Appeals.”

²⁷¹ MCM, preamble (2012).



Bibliography

- Air Force Doctrine Document 1-1, Leadership and Development (18 February 2004).
- Army Regulation 600-100, Army Leadership (8 March 2007).
- Allison, William T. *Military Justice in Vietnam: The Rule of Law in an American War*. (Lawrence: University Press of Kansas, 2007).
- The Annual Reports of the Judge Advocate General (Washington D.C.: Department of Defense, 1913-2013).
- The Articles of War, ed., enacted as part of the National Defense Act of June 4, 1920, Chapter 36, Title 10 U.S. Code, 1934.
- Benton Jeffrey C. *Air Force Officer's Guide*, 34th ed. (Mechanicsburg PA: Stackpole Books 2005).
- Brooker, John, Evan Seamore, and Leslie Rogall, "Beyond 'T.B.D.': Understanding VA's Evaluation of a Former Service Member's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces." *Military Law Review*, Vol.215, Winter 2012.
- Butterfield, Kenneth, et. al. "Organizational Punishment from the Manager's Perspective: An Explanatory Study," *Journal of Managerial Issues*, Sept. 22, 2005.
- Clodfelter, Mark, *Beneficial Bombing: The Progressive Foundations of American Air Power, 1917-1945*
- Cook, John S. "Military Justice and the Uniform Code of Military Justice," *Army Law*, Mar. 2000.
- Corn, Geoffrey S. and Victor M. Hansen, "Even if it Ain't Broke, Why Not Fix It? Three Proposed Improvements to the Uniform Code of Military Justice." *Journal of National Security Law and Policy*, Vol. 6:447, 2013.
- Defense Legal Policy Board, "Report of the Subcommittee on Military Justice in Combat Zones: Military Justice in Cases of U.S. Service Members Alleged to Have Caused the Death, Injury or Abuse of Non-Combatants in Iraq or Afghanistan. Final Report, Appenedix V. (Washington DC: Department of Defense, May 30, 2013).
- Doctrine of the Armed Forces of the United States, Joint Publication 1 (25 March 2013).
- Doctrine of the Armed Forces of the United States, Joint Publication 3 (11 August 2011).

Generous, William T. Jr., *Swords and Scales*, (Port Washington N.Y.: National University Publications, 1973).

Grossman, Dave. *On Killing: The Psychological Cost of Learning to Kill in War and Society*, (New York: Back Bay Books 2009).

Hansen, Victor, "Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?" *Tulane Journal of International and Comparative Law*, Vol. 16, 419 (Spring 2008).

Hillman, Elizabeth L. *Defending America: Military Culture and the Cold War Court-Martial*, (Princeton N.J.: Princeton University Press 2005).

Hernandez, Elizabeth C. and Jason M. Ferguson, "The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems," *Air Force Law Review*, Vol. 67, 187 (2011).

Hirschhorn, James M. "The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights." *North Carolina Law Review*, Vol. 62, 177 (January, 1984).

Index and Legislative History, Uniform Code of Military Justice (2000 Reprint, Hein).

Keyes, Daniel, *Flowers for Algernon*, (New York: Mariner Books, 2005ed.).

Law Professors' Statement on Reform of Military Justice, June 7, 2013.

Lederer, Fredric I. and Barbara S. Hundley, "Needed: An Independent Military Judiciary - A Proposal to Amend the Uniform Code of Military Justice," *William & Mary Bill of Rights Journal*, vol. 3, 629 (Winter, 1994).

Manual for Courts-Martial, United States, Rules for Courts-Martial (2012).

Manual for Courts-Martial, United States, Military Rules of Evidence (2012).

Nagin, Daniel S. and Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," *Criminology*, Vol.39, Issue 4 (November 2001).

National Defense Authorization Act for Fiscal Year 2014.

Plutarch, *The Lives of the Noble Grecians and Romans, Volume II*, ed. & rev. Arthur Hugh Clough (New York: Random House 1992).

Prugh, George S., "Observations on the UCMJ: 1954 and 2000," *Military Law Review*, vol.165 (2000).

Risen, James. "Hagel to Open Review of Sexual Assault Case," *New York Times*, 11 March 2013.

Roan, James B. and Cynthia Buxton, "The American Military Justice System in the New Millennium," *Air Force Law Review* Vol. 52, 185 (2002).

Samuelsohn, Darren, Juana Summers, and Anna Palmer, "Kirsten Gillebrand's Sexual Assault Bill Derailed," *Politico*, 6 March 2014, <http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html>.

Schlueter, David A. "The Military Justice Conundrum: Justice or Discipline?" *Military Law Review*, Vol. 215, Spring 2013.

Senate, *Military Justice Improvement Act of 2013*, 113th Cong., 2013, S.967. Section (3).

Sherril, Robert, *Military Justice is to Justice as Military Music is to Music* (New York: Harper & Row 1970).

Steinhauser, "Reports of Sexual Assault Rise Sharply," *New York Times*, 7 November 2013.

Theurer, Kenneth M. and James W. Russell III, "Why Military Justice Matters," *The Reporter*, Vol. 37. No.2, Summer 2010.

Tillotson, Lee S. *The Articles of War, Annotated*. 4th ed. (Harrisburg Pennsylvania: The Military Service Publishing Company, 1946).

Uniform Code of Military Justice, 10 U.S.C. § 47 (2012).

United States Constitution

von Clausewitz, Carl. *On War*. Edited and translated by Michael Howard and Peter Paret. New Jersey, Princeton University Press, 1989.

Whitlock, Craig, "General's Promotion Blocked Over Her Dismissal of Sex-Assault Verdict." *Washington Post*, 6 May 2013.

Cases Cited

Brady v. Maryland, 373 U.S. 83 (1963).

Burns v. Wilson, 346 U.S. 137 (1953).

Chappel v. Wallace, 462 U.S. 296 (1983).

Gilligan v. Morgan, 413 U.S. 1 (1973).

Maryland v. Craig, 497 U.S. 836 (1990).

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

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

Reaves v. Ainsworth, 219 U.S. 296 (1911).

Rostker v. Goldberg, 453 U.S. 57 (1981).

Schlesinger et al. v. Councilman, 420 U.S. 738 (1975).

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

Toth v. Quarles, 350 U.S. 11 (1955).

United States ex rel. French v. Weeks, 259 U.S. 326 (1922).

Weiss v. United States, 510 U.S. 163 (1994).

Zafiro v. United States, 506 U.S. 534, 536 (1993).

United States v. Bordeaux, 84 F.3d 1544 (8th Cir. 1996).

United States v. Clay, 1 C.M.R. 74 (1951).

United States v. Reece, 25 M.J. 93, 94 (C.M.A. 1987).

