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Limiting jurisdiction over major felony crimes to base commanders, lawyers subordinate to base commands, or U.S. Attorneys will continue the alignment of military law with civilian courts by improving efficiency of court-martial procedure, increasing the legitimacy of courts-martial results, and removing competing interests within the command. Removing the operational commander from the court-martial process for major felony crimes will reduce the amount of time necessary to approve expert witnesses, protect the appearance of impartiality of a court-martial jury, and alleviate the risk associated with commanders choosing between mission accomplishment and a fair trial for the accused.

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MASTER OF MILITARY STUDIES

TITLE: Limiting Jurisdiction Over Major Felony Crimes

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF MILITARY STUDIES

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Executive Summary

Title: Limiting Jurisdiction Over Major Felony Crimes

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Thesis: Limiting jurisdiction over major felony crimes to base commanders, lawyers subordinate to base commands, or U.S. Attorneys will continue the alignment of military law with civilian courts by improving efficiency of court-martial procedure, increasing the legitimacy of courts-martial results, and removing competing interests within the command.

Discussion: In 2013, both Congress and the Secretary of Defense conducted a holistic review of the Uniform Code of Military Justice in response to perceived abuses inherent to the court-martial system. The resulting legislation, the Military Justice Act of 2016, entered into force in January 2019 and strove to align military courts-martial practice with that of federal civilian courts. However, neither Congress nor the Secretary of Defense recommended the single structural change necessary to make military courts commensurate with civilian federal courts: limiting jurisdiction over major felony crimes to authorities with legal experience. Since 1775, military law has enabled commanders to preserve the good order and discipline of a unit. As more Americans served during the Civil War, World War I, and World War II, a greater number of citizens faced the crucible of military justice. The perceived injustice and public outcry drove the evolution of the Articles of War into a Uniform Code that created a court system designed to balance the constitutional protections of a fair trial with the Commander's need to preserve discipline and ensure mission accomplishment. Despite continued attempts at rebalancing, the Uniform Code of Military Justice and the court-martial system still fails to protect basic constitutional rights like equal access to witnesses and evidence for a defendant and the right to an impartial jury. What is more, the current system overburdens operational commanders degrading combat effectiveness.

Conclusion: Removing the operational commander from the court-martial process for major felony crimes will reduce the amount of time necessary to approve expert witnesses, protect the appearance of impartiality of a court-martial jury, and alleviate the risk associated with commanders choosing between mission accomplishment and a fair trial for the accused.

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Figure 1. *Number of GCMCA convening at least 1 court-martial in FY13*.....18

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Since 2002, detention of unlawful enemy belligerents at Guantanamo Bay, abuses at Abu Ghraib, battlefield misconduct in Haditha and Hamdaniya, desecration of corpses by Marine snipers, and high-visibility instances of sexual assault across the services have reinvigorated the debate over the fairness, impartiality, and efficacy of justice in the military.¹ After the perceived mishandling of cases and resulting public criticism, the Chairman of the Joint Chiefs of Staff (CJCS) requested a holistic assessment of military justice in 2013.² The CJCS asked the Secretary of Defense for a comprehensive review of the Uniform Code of Military Justice (UCMJ) and the court-martial system.³ The rationale for the request included the changes across the services and society since the last major rewrite of the UCMJ:

“The U.S. Armed Forces operated under the Articles of War from 1775 until 1950. In 1950, President Truman signed the first [UCMJ] into law....[T]he last comprehensive review and update took place in 1984. Much has changed since then, to include the end of the Cold War, the successful integration of the All-Volunteer Force, and enactment of the Goldwater Nichols Act of 1986....[G]iven the changes in the force and society since 1984, a [Department of Defense]-led holistic review of the UCMJ and military justice system would be appropriate.”⁴

Then-Secretary of Defense, the Honorable Chuck Hagel, agreed with the Joint Chiefs and instructed the Department of Defense (DoD) to conduct an internal review of military justice.⁵ The internal, DoD review coincided with an independent evaluation of military justice mandated by Congress.⁶ Both reviews recommended hundreds of reforms to further align military justice with modern, civilian federal practice.⁷ However, neither the reviews nor the resulting legislation—the Military Justice Act of 2016—proposed the single structural change necessary to create military courts commensurate with modern civilian courts: limiting jurisdiction over major felony crimes.

The evolution of the UCMJ, the centrality of the commander in military justice, and modern court-martial practice reveal an enduring requirement to balance military necessity with

the rights of the accused. Since inception, commanders exercised instruments of military justice to instill instant obedience to orders. Over time, Congress, the President, and the Supreme Court acknowledged the need to further protect the rights of an accused in a justice system run by commanders focused on mission accomplishment. Today, military justice recognizes the powerful conflicting interests inherent to operational commanders that have never coordinated felony investigations, drafted charges for trial, consulted expert witnesses, argued motions, admitted evidence, voir dired a jury, cross examined a witness, or tried a felony case. Limiting jurisdiction over major federal crimes to base commanders with significant legal training and regular exposure to felony fact patterns, lawyers with extensive trial experience subordinate to base commanders, or the cognizant U.S. Attorney's Office would continue the alignment of military courts with modern, civilian trial practice by improving efficiency of court-martial procedure, increasing the legitimacy of courts-martial results, and removing the competing interests within the command to accomplish the mission or provide a fair trial to the accused.

I. Evolution of the UCMJ.

Customarily, commanders utilized military tribunals for battlefield encroachments and crimes with a military nexus.⁸ Although no written codes survive the period, military law originated with Greek and Roman prosecutions of “desertion, mutiny, cowardice, the doing of violence to a superior, and the sale or appropriation of arms....”⁹ Written codes of civil and military law permeated Europe as early as the 5th Century, but military specific codes matured only after hundreds of years of conflict across the continent.¹⁰

A. British Articles of War.

Traces of early British code surfaced during the 12th Century in the form of orders from Richard I, but Britain did not publish its most “elaborate” code, the Articles of Gustavus Adolphus, until

1639.¹¹ In 1765, Britain consolidated its military law from Richard I to Gustavus Adolphus by enacting the Articles of War of 1765. This code, *Rules and Articles for the Better Government of our Horse and Foot Guards and all other [of] our Forces in our Kingdoms of Great Britain and Ireland, Dominions Beyond the Sea, and Foreign Parts*, would be in force during the American Revolution.¹² Both the Articles of Gustavus Adolphus and the Articles of War of 1765 provided a framework and much of the language for the early American Articles of War.¹³

B. American Articles of War.

Enacted, adopted, and amended by the Continental Congress between 1775 and 1786, the American Articles of War pre-date the US Constitution.¹⁴ First enacted on June 30, 1775, the American Articles borrowed heavily from the Massachusetts Articles of War passed April 5, 1775, which were themselves a modified version of the British Articles of 1765.¹⁵ The American Articles of 1775, “constituted the first American written code of military laws.”¹⁶ The nascent code mandated an oath of allegiance, delineated the responsibilities of enlisted and officers, enumerated punitive articles, and sanctioned trial by courts-martial.¹⁷ The code also prescribed the composition of juries, sentence approval by the commanding officer, two-thirds concurrence for the imposition of the death penalty, and prescribed certain hours for trial unless the commanding officer that convened the court-martial, or convening authority, “require[d] [an] immediate example.”¹⁸ Further, Article 1 reduced the number of jury members for felony crimes at a general court-martial from thirteen to five when more than five members would cause “manifest injury to the service.”¹⁹ Similarly, Article 3 reduced the number of jury members from five to three for all lesser offenses at a garrison or regimental court-martial.²⁰ Additionally, Article 23 authorized transporting the accused to a location where the witnesses and appropriate number of jurors could be assembled.²¹ Here, wittingly or unwittingly, Congress began

incorporating what the Supreme Court would later deem “military necessity” into court-martial practice.²² Time and again throughout the code’s evolution, the shadow of military necessity would loom across the imposition of justice in the military. The proceeding history illustrates the tension between preserving American notions of justice and protecting the good order and discipline within the service.

C. Articles of 1806.

As amended, the Articles of 1775 and 1786 remained in effect until 1806, when Congress reexamined the code under the new form of Government established by the Constitution.²³ “The Articles of 1806,...were adopted by Congress mainly for the reason that the changed form of government rendered desirable a complete revision of the code.”²⁴ By its terms, the Constitution divided the regulation of the armed forces between the executive and legislative branches. Explicitly, “The President shall be Commander and Chief of the Army and Navy of the United States” and Congress shall “provide[] for the common defense,” must “raise and support Armies,” “define and punish...offenses against the law of nations,” and “make Rules for the Government and Regulation of the land and naval Forces.”²⁵ Certainly, the Constitution vested the Executive, as the “Commander in Chief” with great discretion and flexibility to regulate forces through executive orders, rules, and instructions from the new Constitution. However, pursuant to the express language of Article II and the precedent established by the Continental Congress between 1775 and 1786, the Legislative branch assumed the preeminent role in drafting and standardizing laws to support, define, punish, govern, and regulate the land and naval forces. In the new Articles of 1806, Congress exercised its sweeping authority and further cemented the role of the commander in military law by reaffirming the commander’s authority to appoint juries or “members” and review sentences not capital.²⁶ However, the authority to make

rules for the regulation of the land and naval forces, would not go untested by the Executive Branch during America's next major descent into War.²⁷

D. Civil War and the Lieber Code.

As the Civil War approached, approximately sixteen thousand officers and enlisted personnel served in the U.S. Army.²⁸ By war's end, over 900,000 Confederate troops and 2.1 million Union troops would serve.²⁹ The sheer size of the forces required greater regulation than previously exerted. In the 1806 Code, Congress had focused more on the orderly administration of an army in peacetime instead of the conduct of a conscripted army and navy in a modern, industrialized war.³⁰ In response to a dearth of wartime disciplinary rules, President Lincoln commissioned Professor Francis Lieber to draft the U.S. Army's first written code of conduct in war, General Order 100.³¹ Professor Lieber—a Prussian military veteran of the Napoleonic Wars, a legal scholar, a father of sons fighting on both sides—garnered unique insight into the conflict.³² As a professor at South Carolina College, Lieber witnessed the horrors of slavery first hand and drafted his articles to reflect his belief that “[t]he more vigorously wars are pursued...the better it is for humanity.”³³ As a result, Lincoln, “aim[ing] to become more aggressive, not less[.]” in the Union's perpetration of the War, approved Lieber's draft.³⁴ By signing and issuing the order, Lincoln executed an independent action to regulate U.S. forces in battle without Congressional approval. The Confederate States criticized General Order 100 labeling it “unrelenting and vindictive.”³⁵

“It authorized the destruction of civilian property, the trapping and forced return of civilians to besieged cities, and the starving of noncombatants. It permitted executing prisoners in cases of necessity or in retaliation. It authorized the summary field execution of enemy guerrillas. And in its most open-ended provision, the code authorized any measure necessary to secure the ends of war and defend the country.”³⁶

Further, General Order 100 made only four acts illegal: “torture, assassination, the use of poison, and perfidy in violation of truce flags or agreements between the warring parties.”³⁷

Consequently, President Lincoln in effect authorized the U.S. Army to take all steps “necessary for ‘securing the ends of the war.’”³⁸ Like Congressional regulation of the military in the 1806 Articles of War, the Executive Branch inserted “military necessity” into its provision of military law and the protection of good order and discipline during war.

E. Articles of World War I.

Although assimilating new rules for occupation, military tribunals, and military courts-martial through executive action during the Spanish American War and the Filipino Insurrection, U.S. military statutes largely laid dormant in the thirty years following adoption of the American Articles of War of 1874.³⁹ Congress did not enact new Articles of War until 1913 and 1916, on the eve of the first World War.⁴⁰ Notably, the 1913 and 1916 Articles included the modern court-martial structure and enumerated a number of the salient characteristics that comprise the military court system today.⁴¹ The articles created:

“(1) broad jurisdiction over a wide range of criminal offenses; (2) jurisdiction over certain civilians accompanying the armed forces; (3) appointment of a judge advocate for special as well as general courts-martial;... (5) express recognition of the accused’s right to be represented by the counsel of his own selection, if such counsel was reasonably available; (6) a statutory provision against compelled self-incrimination; and (7) a speedy trial requirement.”⁴²

Irrespective of the attempted modernization, abuses persisted. In one instance, “[T]hirteen African-Americans [were] executed only two days after being convicted in a mass court-martial in Texas with no appellate review.⁴³ As a result, public criticism and scrutiny of military law continued after the war.⁴⁴ Indeed, the interwar period injected similar upheaval to the Articles of War introducing the precursor to the military judge, the appointment of defense counsel at government expense, prohibition on “revisiting and acquittal,” and more robust post-trial

review.⁴⁵ However, true modernization did not occur until “Congress was flooded with countless complaints about the administration of military justice” during World War II.⁴⁶

F. Articles of World War II.

Similar to the Civil War and World War I, participation in the armed forces rose steeply at the beginning of World War II. More than sixteen million personnel served in the Army during the war.⁴⁷ The Navy, Marine Corps, and Coast Guard grew from 250,000 to a combined strength of 4,750,000.⁴⁸ With respect to military justice, the services averaged six hundred thousand courts-martial per year, conducted 1.7 million trials over the course of the war, incarcerated forty-five thousand service members, executed one hundred individuals, and accounted for one third of all criminal cases tried in the United States during that time.⁴⁹ Without question, military justice affected millions of Americans during the war, and the experience painted a bleak mosaic of military court-martial practice. Significant concerns included “improper command interference with court-martial, inadequate representation, insufficient training of court-members in the legal aspects of their duties, and unduly harsh sentences.”⁵⁰ The most biting grievance centered on a belief that “courts-martial were wholly lacking in independence and their decisions were dictated in advance of the trial by the commanders who appointed them.”⁵¹

G. Elston Act of 1948 and UCMJ of 1950.

In response, the Elston Act of 1948 enacted a number of improvements to military justice later incorporated into the UCMJ of 1950.⁵² The Act added enlisted service members to the jury pool, made a witness for the prosecution ineligible to sit on a jury, prohibited unlawful command influence of courts-martial, and granted counsel to an accused at the pretrial investigation, but the Act did little to assuage the Public’s appeal for reform.⁵³ Indeed, the UCMJ enacted in 1950 sought to further alleviate concerns over independence, impartiality, and just punishment.⁵⁴ To

be sure, the 1950 Code standardized court-martial practice across the services and made the “law officer,” later the military judge, distinguishable from jury members.⁵⁵ However, the 1950 Code still authorized the commander to approve expert witnesses, preselect jury members before voir dire in court that “in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament,” and failed to remove the competing interests of mission accomplishment and the right to a fair trial⁵⁶ Further, it failed to outline a mechanism for serving subpoenas or requesting subpoenas independent of the commander.⁵⁷

H. Reforms of 1968 and 1983.

The Military Justice Acts of 1968 and 1983 again addressed lingering apprehension over the impartiality of courts-martial by implementing a separate chain of command for defense counsel; eliminating the convening authority’s power to detail military judges; reducing the convening authority’s post-trial role to clemency alone; and codifying direct review by the Supreme Court.⁵⁸ However, both the legislative and executive branches ignored certain recommendations during the passing of the Acts that could have aligned military courts with federal civilian practice, namely, fashioning standing courts-martial not created by the commander of the accused, akin to civilian Magistrates Courts and District Courts.⁵⁹

Throughout the same period of reform, the Supreme Court wrestled with fundamental questions of jurisdiction and the protection of Constitutional rights afforded to members of the service vis-à-vis good order and discipline.⁶⁰ In 1969, the Court reviewed the court-martial conviction of an Army sergeant that broke into a hotel room, assaulted a girl, and attempted to rape her, while in civilian attire, on liberty, and off post in Hawaii.⁶¹ Finding the sergeant entitled to trial by a civilian court, the Court determined that if the case did not arise “in the land or naval

forces,” then the accused receives the benefit of an indictment by a grand jury and trial by jury in a civilian court in accordance with the Sixth Amendment and Article III Section 2 of the Constitution.⁶² In other words, the Court required a “service connection” to the crime for military courts to exercise jurisdiction over an individual.⁶³ However, in 1987 while reviewing whether a coastguardsmen’s sexual abuse of a fellow service member’s minor daughters in his privately owned home in Alaska had a sufficient service connection, the Court overruled the case of the Army sergeant.⁶⁴ Relying on the plain meaning of Article I, Section 8, clause 14 of the Constitution granting Congress the power to “make Rules of the Government and Regulation of the land and naval Forces,” the Court determined that the jurisdiction of courts-martial depends solely on the accused’s status in the armed forces rather than a service connection to the offense charged.⁶⁵ By rejecting the service connection doctrine, the Court revoked its previous protection of a service member’s right to an indictment by a grand jury and trial by a civilian courts.⁶⁶

However, the intervening decade had already heralded the Supreme Court’s shift toward disparate treatment of service members under the Constitution. In 1974, the Court reviewed an Army physician’s court-martial conviction for making public statements urging African American enlisted men to refuse to go to Vietnam.⁶⁷ The Court determined that the First Amendment applied differently in the Military because of the military’s distinctive character and purpose.⁶⁸ The court reasoned, “while military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”⁶⁹ Throughout this period the Supreme Court, relying on military necessity, upheld the constitutionality of military courts and tribunals despite service members lacking the full panoply of Constitutional protections found in Article III civilian courts.⁷⁰ As

such, all three branches continued to preserve the inherent competing interests between military necessity and the right to a fair trial accused during each period of reform.

Despite consistent rebalancing, critics still call for the wholesale abolition of the court-martial system during periods of non-combat operations and warned that “[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article II of our Constitution.”⁷¹ Admittedly, the fairness, impartiality, and efficacy of military justice receives perpetual scrutiny, but throughout the history of the UCMJ the President, Congress, and the Supreme Court have consistently preserved the centrality of the convening authority’s power to prosecute offenses in the court-martial system.⁷² Indeed, military commanders have always been at the center of the military justice system.⁷³ From 1775 the American military justice system evolved to instill good order and discipline by “punishing neglects, disorders, and other offenses unique to the military.”⁷⁴ However, even during its foundational period, civilian courts retained the authority to prosecute serious crimes such as rape and murder, because “[b]oth in England prior to the American Revolution and in our own national military history military trial of soldiers committing civilian offenses has been viewed with suspicion.”⁷⁵ Although solidifying the role of the convening authority over time, each period of modernization for military law and court-martial practice reveals a system with inherent competing interests. Throughout the history of military justice, the military commander has had to choose between the military necessity of mission accomplishment and a fair and impartial trial for the accused.

II. The Centrality of the Commander.

A. Initial Disposition.

In the U.S. military each commander has discretion to dispose of offenses by members of that command.⁷⁶ Ordinarily, the immediate commander of a service member accused or suspected of

committing an offense triable by court-martial initially determines how to dispose of that offense.⁷⁷ As a matter of policy, allegations of offenses should be disposed of at the lowest appropriate level.⁷⁸ However, a superior commander may withhold the authority to dispose of offenses in individual cases, such as the sniper urination case.⁷⁹ A superior commander may also withhold authority in specific types of cases, such as sexual assaults or cases of officer misconduct, but the superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.⁸⁰ Any actual or apparent limitations on the discretion of the subordinate commander constitutes unlawful command influence (UCI) by the superior commander, and the UCMJ strictly prohibits UCI.⁸¹ Therefore, each commander in the chain of command has independent but overlapping discretion to dispose of offenses within the limits of that officer's authority.⁸²

Generally, the power to prosecute crimes at a court-martial resides with commanding officers specifically designated as "convening authorities."⁸³ Neither the Constitution, the Congress, nor the President created standing military courts resembling county courts, magistrate courts, or federal district courts; thus, a convening order by a designated convening authority creates a court-martial on an ad hoc basis when an offense requires a trial.⁸⁴

B. Types of Courts-Martial.

If authorized by statute or regulation, convening authorities may convene three types of courts-martial: summary court-martial, special court-martial and general court-martial.⁸⁵ Although legally independent of rank, commanders typically in the rank of O-5 and O-6 possess the power to convene special courts-martial, and commanders in the rank of O-7 and above maintain the authority to convene a general court-martial.⁸⁶ In addition to differences in procedure and composition, the maximum authorized punishments distinguish the three types of courts-

martial.⁸⁷ A summary court-martial may impose up to thirty days of confinement and no punitive discharge.⁸⁸ However, service members may object to trial by summary court-martial because of abridged due process protections.⁸⁹ As a result, summary courts-martial largely resolve military specific offenses, other minor transgressions, or convene as part of a pre-trial agreement by an accused. The special court-martial may impose up to twelve months of confinement and a bad-conduct discharge.⁹⁰ Also, the special court-martial requires half as many jurors or members as a general court-martial. As such, the special court-martial resembles a misdemeanor civilian court. The general court-martial may impose death or life without the possibility of parole and a dishonorable discharge for enlisted service members or a dismissal for officers.⁹¹ Thus, the general court-martial comprises the military equivalent of federal felony court. Due to jurisdictional limitations at a summary and special court-martial, all felony-level offenses or major federal crimes that warrant a dismissal or a dishonorable discharge and more than one year confinement require prosecution at a general court-martial.⁹²

III. Modern Court-Martial Practice.

To be sure, the evolution of the UCMJ reveals a discernable trend toward aligning military courts-martial with modern civilian courts. Indeed, the assessments, recommendations, and proposed legislation over the past two decades have attempted to allay concerns over the role of the commander in the prosecution of major felony offenses. However, many of the fundamental critiques of fairness, impartiality, and efficacy of courts-martial remain. Moreover, critics argue that if Israel, Canada, Australia, Germany, and the United Kingdom have all removed military commanders from their justice systems, finding involvement of commanders to be a violation of a service member's right to an independent and impartial trial, then the United States should do the same.⁹³ Admittedly, the centrality of the commander in the U.S. military system perpetuates

assumptions and appearances of unfairness, impartiality, and inefficiencies. What is more, modern court-martial practice suggests the need for further progress to match the proficiency and professionalism of civilian federal courts.

A. Expert Assistance and Witnesses.

Modern court-martial practice inserts the convening authority into the expert witness request process, slowing the request process and increasing inefficiencies. If a defendant at a court-martial requires expert assistance or expert testimony to prepare or present evidence, then the defense must submit a request to the convening authority to authorize the employment and to fix the compensation of the expert.⁹⁴ The request must include a complete statement of the reasons necessitating expert employment, i.e. how the expert's assistance or testimony will support the defense's case and why the defense counsel cannot adequately provide the assistance or testimony without the expert.⁹⁵ Consequently, the convening authority makes the initial legal determination as to the requirement of experts for the defense. Only after denial by the convening authority may the defendant seek review and relief from the military judge.⁹⁶ Once denied by the convening authority, the defendant must renew the request to the court by motion explaining the relevance and necessity of the expert.⁹⁷ Even more problematic in felony cases like murder, child abuse, or aggravated domestic violence, the defense cannot move the court until the convening authority convenes the court-martial and the court arraigns the accused because standing courts do not exist in the military. Thus, cases ripe for protracted litigation based on the seriousness of the offense incur greater delay because the convening authority must review all expert requests and convene the court before the accused can seek relief from the military judge. The Military Justice Act of 2016, which entered into force in January of 2019, creates a military magistrate program that could, in theory, hear defense requests for experts to

reduce the significant time delay caused by waiting for a convening authority to convene a court-martial.⁹⁸ However, the act does not contemplate using military magistrates to review expert requests nor does it remove convening authorities from the request process.⁹⁹

Compare the military practice with the federal civilian court practice. Under federal rules of evidence the defendant may request an expert directly to a standing court at any time.¹⁰⁰ Additionally, the federal rules have a bias toward appointment stating, “On a party’s motion or on its own the court may order the parties to show cause why expert witnesses should *not* be appointed[.]”¹⁰¹ The federal practice streamlines the process. In contrast, the additional burden in military courts results in lengthy litigation and unnecessary continuances. Removing the convening authority from the expert request process or using a convening authority with the proper experience and education, an experienced military lawyer, or an AUSA would expedite the process and protect against claims that “justice too long delayed is justice denied.”¹⁰²

B. Preselecting the Jury.

Further, convening authorities empowered to personally preselect juries for felony cases create the appearance of impartiality and overburden the jury selection process. Generally, any member of the armed forces may serve on a court-martial jury or panel.¹⁰³ However, before jury selection in the military courtroom begins, the convening authority narrows the pool by selecting only those members who, in the convening authority’s professional opinion, “are best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament.”¹⁰⁴ In addition to the preselection process unique to military courts, Military law finds no requirement in the Constitution or the Sixth Amendment for a representative cross section of the military community on a court-martial jury.¹⁰⁵ Consequently, past employment of questionable criteria such as race, gender, duty position, seniority, and rank by the convening

authority to preselect juries have resulted in extensive litigation in modern court-martial practice.¹⁰⁶ To be sure, attorneys may exercise one preemptory challenge at a general or felony court-martial to counter-balance any perceived impartiality or influence by the convening authority.¹⁰⁷ However, in federal court the defendant has ten preemptory challenges when the defendant faces imprisonment for more than one year for any felony crime.¹⁰⁸

What is more, in federal civilian practice only the court or the attorneys for the parties may examine prospective trial jurors without interference or preselection by the convening authority.¹⁰⁹ As such, federal trials lack the protracted litigation over the convening authority's preselection of jury members. Therefore, to further align military courts with federal courts, the convening authority should be removed from the jury selection process or the process should be executed by convening authorities with proper training, experience, and resources to correct the appearance of impartiality.

C. Competing Interests: Military Necessity or the Right to a Fair Trial.

The financial responsibility for costs incurred in support of courts-martial falls on the convening authority.¹¹⁰ The costs of depositions, travel, advances, per diem, witness fees, expert fees, mileage, temporary lodging, and meals and incidentals must all be paid from the operation and maintenance allotment of the cognizant convening authority of the court-martial.¹¹¹ Operations and maintenance appropriations provides funding for a unit's mission, sustainment requirements, depot maintenance, base operating support costs, and training and education requirements.¹¹² Therefore, any additional experts, witnesses, investigation, site visits, depositions, translators, or individual military counsel approved by the convening authority directly reduces the amount of funding available for training, sustainment, and ultimately mission accomplishment. The burden on the convening authority to pay for a court-martial creates an inherent conflict of interest. The

convening authority can either grant as many experts and witnesses required to provide a fair trial, or the convening authority can limit the number of experts and witnesses in order to fully fund training, sustainment, and operating expenses.

Federal practice has no analogous construct. Neither the judge, clerk of courts, nor the prosecutor have a financial interest in the court proceedings. No party has an incentive to limit the witnesses, experts, or costs of the trial in order to reapportion funds to operating expenses. Convening authorities should not be placed in the ethical dilemma of providing a fair trial or ensuring mission accomplishment. Therefore, the authority to convene trials for major felony crimes, which create the greatest expense, should be consolidated away from operational commanders and to the base commander or judge advocate working for the base commander with specific funding allocated for courts-martial. Alternatively, the cognizant U.S. Attorney's office with no pecuniary interest in the conduct of the proceedings could adjudicate major felony crimes committed by service members.

IV. Maintaining Current Practice.

Without question, operational commanders will be reticent to cede control over the power to punish crimes and offenses in their unit. Indeed, the preamble of the Manual for Courts-Martial still maintains, "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."¹¹³ Moreover, even the Supreme Court has recognized that "military law has always been and continues to be primarily an instrument of discipline, not justice," and "[a] civilian trial...is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."¹¹⁴ Indeed, those in favor of maintaining the

commander's role in the prosecution of felony offenses have argued, "divesting military commanders of their existing convening authority role is both unjustified and counter-productive."¹¹⁵ Proponents contend,

"This authority is...integral to the command function of setting and enforcing standards by holding accountable those who fail to meet standards, which in turn contributes to good order and discipline in their organizations necessary for the Armed Forces to accomplish its mission."¹¹⁶

Although a credible message from former commanders, this argument conflates imposing discipline and enforcing criminal standards against acts of violence. With all of the other factors necessary for commanders to accomplish the mission, the time, resources, and analysis required to enforce the law against major felony offenses would only detract from an operational commander's primary responsibility. To be sure, combat service support units must enable mission accomplishment, and the supporting establishment and civilian court system has the time, resources, and expertise necessary to enforce serious felony crimes and free up operational commands to focus on the mission.

Further, consolidating convening authority for felony offenses to base commanders, judge advocates subordinate to base commanders, or a U.S. Attorney's Office will only affect service members facing more than one year of confinement and commanders that convene general courts-martial. Data from fiscal year 2013 in the Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel demonstrates that limiting jurisdiction over major felony crimes will affect only a select number of commanders across the services authorized to convene general courts-martial.¹¹⁷

	Active Duty Personnel	Commanders	Special Court- Martial Convening Authorities (SPCMCAs)	SPCMCAs convening 1 or more court- martial in FY 13	General Court- Martial Convening Authorities (GCMCAs)	GCMCAs convening 1 or more court- martial in FY 13
Army	521,685	7,000(approx.)	Not Tracked	Not Tracked	85	70
Navy	323,930	1,422	1,080	94	200	17
Marine Corps	192,350	2,182	451	106	50	29
Air Force	330,172	3,943	97	70	58	23
Coast Guard	40,665	677	350	12	18	9

Figure 1: Number of GCMCA convening at least 1 court-martial in FY13

Additionally, commanders will still have the summary and special court-martial at their disposal to protect the good order and discipline of their unit from misdemeanor crimes and military specific offenses. Further, consolidation or relinquishment of convening authority would remove service members from an operational commander's table of organization while awaiting trial and send the service member to the installation command for reassignment. In turn, removal from the roles of the operational commander would create a vacancy for combat ready replacements.¹¹⁸ Finally, relieving operational commanders from the responsibility of administering felony level trials will reduce the risk associated with the public scrutiny that sometimes accompanies such trials.¹¹⁹

V. Improving Efficiency, Legitimizing Results, and Removing Competing Interests.

Limiting jurisdiction over major felony offenses to further align military courts with civilian courts could take three forms. First, the military could consolidate convening authority over major felony offenses such as murder, rape, sexual assault, stalking, aggravated domestic violence, and child pornography with the base or installation commander. The regulations

already exist to permit consolidation or forwarding of charges across all four service branches.¹²⁰ When a convening authority empowered to convene a general court-martial finds the convening of such court-martial impracticable, due to deployments or other operational requirements, the charges may be forwarded to the parallel convening authority authorized to convene a general court-martial.¹²¹ Consolidation with the base commander would have three advantages. First, the base commanders could be specifically selected and trained based on their experience with military justice as opposed to operational training and experience. Second, if one commander coordinated with the military law enforcement agencies on every major felony crime and consistently worked with the judge advocates to prosecute those crimes, then the commander would have the relationships and acumen required to pursue, resource, and value crimes appropriately during pre-trial negotiations. Third, juries could be sourced from across the tenant commands that operate on the installations of the base commanders, and after appropriation, additional funding could be allocated by each service to the installation commander specifically for the conduct of courts-martial so as to not diminish the base commander's own operation and maintenance funds.

In the alternative, the military could consolidate convening authority over major felony offenses with the Judge Advocate Commanding Officer or Officer-in-Charge of the legal services command or section subordinate to the installation commander. Again, the regulations already permit such action across the services and each service provides a mechanism to request general court-martial convening authority through the respective service secretaries for commanders not designated by statute or below the rank of O-7.¹²² This approach would have all of the benefits of consolidation under the installation commander with the added benefit of having a licensed attorney with over twenty years of military justice experience making

prosecutorial decisions over how to dispose of cases, which experts to approve, how to provide and impartial jury, and how to allocate resources to ensure a fair trial.

Finally, the services could refer all major federal crimes to civilian courts. The DoD already has a Memorandum of Understanding with the Department of Justice (DOJ) granting the DOJ the right of first refusal and each service assigns active duty judge advocates to the United States Attorney's Office in the vicinity of all major military installations in the United States to assist with the prosecution of military personnel in federal court and civilians on exclusive federal property.¹²³ All three constructs increase the appearance of fairness, impartiality, and efficacy of courts-martial. However, prosecuting major non-military specific offenses in federal court would do the most to reassure the public that military justice complies with the Constitution that service members swear to protect.

VI. Conclusion.

“[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”¹²⁴

To this end, the armed services must ensure the swift, impartial, and transparent application of military law. Therefore, the armed services should cede the jurisdiction over major felony crimes to base commanders, judge advocates subordinate to base commanders, or cognizant United States' Attorneys to improve the administration of justice, increase the legitimacy of court-martial results, remove competing interests and “thereby strengthen the National Security of the United States.”¹²⁵

The Military Justice Act of 2016 aimed to strengthen the structure of the military justice system; enhance fairness and efficiency of pretrial and trial procedures; reform sentencing, guilty pleas and plea agreements; streamline the post-trial process; modernize military appellate

practice; increase transparency and independent review of the military justice system; and improve the functionality of the punitive articles and proscribe additional acts.¹²⁶ As the UCMJ enters another period of modernization with enactment of the Military Justice Act of 2016 in January of 2019, the three branches of the federal government and armed services enjoy another opportunity to transform its implementation. Current regulations provide the necessary flexibility to improve efficiency, impartiality, and efficacy.¹²⁷ The Manual for Courts-Martial permits designation of convening authority for felony offenses to alternative convening authorities to relieve operational Commands from the burden of convening felony level courts.¹²⁸

Ad hoc felony courts convened by Commanding Officers empowered to deny experts, preselect juries, and finance trials out of operating and maintenance expenses, by their nature, invite error, infringe Constitutional rights of an accused, and diminish the good order and discipline of a unit.¹²⁹ Nonetheless, military appellate courts and the Supreme Court, in consistently preserving the legitimacy of courts-martial, have upheld the disparate treatment of service members due to military necessity.¹³⁰ Undeniably, the legacy of ad hoc tribunals enables theatre-wide, forward deployment of military courts-martial to contemporary areas of armed conflict.¹³¹ However, ad hoc tribunals convened by a Commanding Officer create unnecessary friction and are an anathema to the intent of the Military Justice Act of 2016. Federal procedure, the Constitution, and the UCMJ preserve an accused's right to call experts, the right to a speedy trial, the right to be tried by an impartial jury, and the right to have a trial free from unlawful command influence.¹³² If the Military Justice Act of 2016 purports to align military courts-martial with federal practice, then the armed services must limit jurisdiction over major felony offenses to improve the efficient administration of justice, increase the legitimacy of court-martial results, and remove the competing interests within the command.

¹ Franklin D. Rosenblatt, *Symposium on Moral and Ethical Perspectives in War, Terrorism, and Military Law: Non-Deployable: The Court-Martial System in Combat From 2001 to 2009*, 44 Creighton L. Rev. 1045, 1046 (2011); THE INVISIBLE WAR (Cinedigm Entertainment Group 2012). “Focusing on the powerfully emotional stories of rape victims, The Invisible War is a moving indictment of the systemic cover-up of military sex crimes, chronicling the women’s struggles to rebuild their lives and fight for justice.” *About: The Movie*, THE INVISIBLE WAR, http://www.notinvisible.org/the_movie (last visited Jan. 21, 2019).

² US Department of Defense, *Memorandum from the Chairman of the Joint Chiefs of Staff on Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice*, CM-0210-13, August 5, 2013.

³ *Ibid.*

⁴ *Ibid.*

⁵ US Department of Defense, *Memorandum from Secretary of Defense on Comprehensive Review of the Uniform Code of Military Justice*, October 18, 2013.

⁶ National Defense Authorization Act of Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013).

⁷ Military Justice Review Group, *Report of the Military Justice Review Group: Part I: UCMJ Recommendations*, (Washington, DC: Government Printing Office, 2015), 23-38; Response Systems to Adult Sexual Assault Crimes Panel, *Report through the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives* (Washington, DC: Government Printing Office, 2014), 11-53.

⁸ Military Justice Review Group, 43.

⁹ Winthrop, William, *Military Law and Precedents*, (photo reprint 1920)(2d ed. 1896), 17.

¹⁰ *Ibid*, 17-18.

¹¹ *Ibid*, 19.

¹² *Ibid*, 18-19, 929.

¹³ *Ibid*, 19.

¹⁴ *Ibid*, 17.

¹⁵ Military Justice Review Group, *Report of the Military Justice Review Group: Part I: UCMJ Recommendations*, (Washington, DC: Government Printing Office, 2015), fn. 4, 42.

¹⁶ Winthrop, 22.

¹⁷ Military Justice Review Group, 42.

¹⁸ Winthrop, 976 and 983.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid*, 974.

²² *Parker v. Levy*, 417 U.S. 733 (1974); *Brown v. Glines*, 444 U.S. 348 (1980); *Secretary of Navy v. Huff*, 444 U.S. 453 (1980).

²³ Winthrop, 23.

²⁴ Winthrop, 23.

²⁵ U.S. CONST. art. II, § 2, cl. 1; U.S. CONST. art. I, § 8, cl. 1, 12, and 14; U.S. CONST. art. I, § 8, cl. 10.

²⁶ Winthrop, 982 and 984.

²⁷ U.S. CONST. art. I, § 8, cl. 10.

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- ²⁸ John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 187.
- ²⁹ Mark Grimsley, "Surviving Military Revolution: The U.S. Civil War," in *The Dynamics of Military Revolution, 1300-2050*, ed. MacGregor Knox and Williamson Murray, (Cambridge and New York: Cambridge University Press, 2001), 78-81.
- ³⁰ Grimsley, 74-75; Winthrop, 976-986.
- ³¹ John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 1, 174-175, 180.
- ³² John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 1, 174-175, 180.
- ³³ Witt, 3, 176-180.
- ³⁴ Witt, 3 and 4.
- ³⁵ Witt, 4.
- ³⁶ Witt, 4.
- ³⁷ Witt, 4.
- ³⁸ Witt, 4.
- ³⁹ Witt, 353-365. Military Justice Review Group, 58.
- ⁴⁰ Military Justice Review Group, 58.
- ⁴¹ *Ibid.*
- ⁴² *Ibid.*
- ⁴³ *Ibid.*, 60.
- ⁴⁴ *Ibid.*, 60-61.
- ⁴⁵ *Ibid.*, 61-67.
- ⁴⁶ *Ibid.*, 68.
- ⁴⁷ *Ibid.*, 67.
- ⁴⁸ *Ibid.*, 67.
- ⁴⁹ *Ibid.*
- ⁵⁰ *Ibid.*, 68.
- ⁵¹ Military Justice Review Group, 68 citing Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong. 825-26 (1949) (Testimony of Rep. Gerald R. Ford).
- ⁵² Military Justice Review Group, 69.
- ⁵³ Senate Committee on Armed Services, *A Study of the Proposed Legislation to Amend the Articles of War (H.R. 2575); and to Amend the Articles for the Government of the Navy (H.R. 3687; S. 1338)*, 80 Cong., 1948, Committee Print 2, 9-10.
- ⁵⁴ Military Justice Review Group, 69-86; Cox Commission, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (Washington, DC: National Institute of Military Justice, 2001), 2.
- ⁵⁵ Uniform Code of Military Justice (UCMJ) art. 16 and art. 26 (1951).
- ⁵⁶ UCMJ art. 25 (1951).
- ⁵⁷ UCMJ art. 46 (1951).
- ⁵⁸ John S. Cooke "The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X," 156 MIL. L. REV. 1, 2 (1998).
- ⁵⁹ *Ibid.*
- ⁶⁰ O'Callahan v. Parker, 395 U.S. 258, 261 (1969); Parker v. Levy, 417 U.S. 733, 756 (1974); and Solorio v. United States, 483 U.S. 435, 436 (1987).

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- ⁶² *Ibid.*
- ⁶³ *Ibid.*
- ⁶⁴ Solorio v. United States, 483 U.S. 435, 436 (1987).
- ⁶⁵ *Ibid.*
- ⁶⁶ O’Callahan v. Parker, 395 U.S. 258, 261 (1969); Solorio v. United States, 483 U.S. 435, 436 (1987).
- ⁶⁷ *Parker v. Levy*, 417 U.S. 733, 756 (1974).
- ⁶⁸ *Parker v. Levy*, 417 U.S. 733, 756 (1974).
- ⁶⁹ *Ibid.*, 758.
- ⁷⁰ *Weiss v. United States*, 510 U.S. 163, 178-79 (1994).
- ⁷¹ Michael I. Spak, and Jonathon P. Tomes, “*Courts-Martial: Time to Play Taps?*” 28 SW. U. L. REV. 481, (1999): 534-41; Andrew S. Williams “*Safeguarding the Commander’s Authority to Review the Findings of a Court-Martial*,” 28 BYU J. Pub. L. 471 (2014).
- ⁷² The Manual for Courts-Martial (MCM) (2019); *O’Callahan v. Parker*, 395 U.S. 258, 261 (1969); *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Solorio v. United States*, 483 U.S. 435, 436 (1987); *Weiss v. United States*, 510 U.S. 163, 178-79 (1994); see also, *US v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) finding equal protection not denied when there is a reasonable basis for difference in treatment.
- ⁷³ Response Systems to Adult Sexual Assault Crimes Panel, *Report through the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives* (Washington, DC: Government Printing Office, 2014), 75.
- ⁷⁴ Military Justice Review Group, *Report of the Military Justice Review Group: Part I: UCMJ Recommendations*, (Washington, DC: Government Printing Office, 2015), 43.
- ⁷⁵ *Ibid.*; *O’Callahan v. Parker*, 395 U.S. 258, 268 (1969).
- ⁷⁶ The Manual for Courts-Martial (MCM), United States, Rules for Courts-Martial (RCM) 306(a).
- ⁷⁷ *Ibid.*
- ⁷⁸ *Ibid.*, 306(b).
- ⁷⁹ *Ibid.*, 306(a).
- ⁸⁰ *Ibid.*, 306(a).
- ⁸¹ *Ibid.*, 104.
- ⁸² *Ibid.*
- ⁸³ 10 U.S.C. § 822; See also, US Department of Defense, *Manual of the Judge Advocate General*, JAGINST 5800.7F, June 26, 2012, 0120.
- ⁸⁴ RCM 504.
- ⁸⁵ RCM 201.
- ⁸⁶ Articles 22 and 23, UCMJ (2019); JAGMAN 0120.
- ⁸⁷ *Ibid.*
- ⁸⁸ RCM 1301.
- ⁸⁹ RCM 1303.
- ⁹⁰ RCM 201.
- ⁹¹ *Ibid.*
- ⁹² *Ibid.*
- ⁹³ Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?* 16 Tul. J. Int’l & Comp. L. 419

(2008); Subcommittee on the Role of the Commander, *Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel* (Washington, DC: Government Printing Office, 2014), 100.

⁹⁴ RCM 703(d)(1).

⁹⁵ *Ibid.*

⁹⁶ RCM 703(d)(2)

⁹⁷ RCM 703.

⁹⁸ RCM 309.

⁹⁹ *Ibid.*

¹⁰⁰ Federal Rules of Evidence 706.

¹⁰¹ *Ibid.*

¹⁰² Martin Luther King, “Letter from a Birmingham Jail, 1963 draft.

¹⁰³ Article 25, UCMJ (2019).

¹⁰⁴ *Ibid.*

¹⁰⁵ *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff’d*, 29 M.J. 304 (C.M.A. 1989); see also, *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988); Article 29(b)(2)(B).

¹⁰⁶ See *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008);

¹⁰⁷ RCM 912(g).

¹⁰⁸ Federal Rules of Criminal Procedure 24(b)(2).

¹⁰⁹ Federal Rules of Criminal Procedure 24(a)(1).

¹¹⁰ JAGMAN 0145.

¹¹¹ JAGMAN 0145 and 0146.

¹¹² 10 U.S.C. 114.

¹¹³ MCM, United States pt. I, ¶ 3 (2019 Edition).

¹¹⁴ *O’Callahan v. Parker*, 395 U.S. 258, 266 (1969).

¹¹⁵ Subcommittee on the Role of the Commander, *Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel* (Washington, DC: Government Printing Office, 2014), 101.

¹¹⁶ Subcommittee on the Role of the Commander, *Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel* (Washington, DC: Government Printing Office, 2014), 101.

¹¹⁷ Subcommittee on the Role of the Commander, *Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel* (Washington, DC: Government Printing Office, 2014), 23.

¹¹⁸ Commandant of the Marine Corps, *Legal Support and Administration Manual*, MCO 5800.16, August 8, 2018,

<https://www.marines.mil/Portals/59/Publications/MCO%205800.16%20%20CH1%20Master%20File.pdf?ver=2018-08-16-081634-697>

¹¹⁹ Commandant of the Marine Corps, *Legal Support and Administration Manual*, MCO 5800.16, August 8, 2018,

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- ¹²¹ JAGMAN 0128.
- ¹²² JAGMAN 0121, AFI51-201 18 January 2019, Headquarters department of the Army Washington DC 11 May 2016, AR27-10 5-2.a.(1), 29.
- ¹²³ See AR27-10, 23-3 and 23-4, 107.
- ¹²⁴ Richard Hofstadter, *The American Political Tradition and the Men Who Made it* (New York: Random House, 1976, 56.
- ¹²⁵ MCM, United States pt. I, ¶ 3 (2019 Edition).
- ¹²⁶ Military Justice Review Group, 6-8.
- ¹²⁷ Military Justice Review Group; US Department of the Navy, *Manual of the Judge Advocate General (JAGMAN)*, JAG Instruction 5800.7F, June 26, 2012, 0128 (a)(1).
- ¹²⁸ *Ibid*; The Manual for Courts-Martial (MCM), United States pt. I, ¶ 3 (2016 Edition); *Military Justice Act of 2016*, HR 4909, 114th Cong., Congressional Record (May 18, 2016).
- ¹²⁹ Cox Commission, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, (Washington, DC: National Institute of Military Justice, 2001), 6-9.
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- ¹³² U.S. Constitution, amend. 6 and 8; Fed. R. Crim. P. 17

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