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Abstract: Military justice has never been intended as an exact replica of civilian justice. Historically, the need to maintain discipline under the enormous stress of combat and the high stakes of war impelled all militaries to create a separate and, in many ways, unique justice system. The result is a criminal law process in which military needs sometimes must take precedence over certain rights-centered formalisms of a nation's civilian justice system. However, beginning with the adoption of the Uniform Code of Military Justice in 1951, the two U.S. systems have become increasingly close, with the importation into the military realm of many of the procedural protections of the civilian system. Military justice retains its distinctive features, including the criminalization of absence, cowardice, and insubordination, as well as other offenses without civilian counterpart but which are indispensable for what the Supreme Court calls the armed forces' "separate society." In addition, some procedural differences continue to exist, including command selection of military "juries," as well as an appellate court system empowered to review *de novo* factual findings of a court-martial. Recently, the use of military commissions—which are separate from courts-martial—have been revised to address war crimes committed by nonstate actors. Today, issues have arisen about the ability of the military justice system to operate independently and effectively. In part, this is the result of well-intended efforts over several decades to "civilianize" and "judicialize" its

processes—modifications that have often proven ill-suited to combat zones. Even more problematic is the tendency of political leaders and interest groups to encroach on the role of commanders in military justice matters, and to inject other political influences that threaten the military justice system's independence and effectiveness.

Groucho Marx, so the story goes, once quipped that "military justice is to justice what military music is to music." To the distress of many in the armed forces, as well as to admirers of its justice system, that wisecrack continues to describe the military's criminal jurisprudence in the minds of many Americans.

As with much humor, however, there is some truth in Marx's jest. Just as military music has served a martial purpose for eons—trumpets did a pretty good job for Joshua and the Israelites at the battle of Jericho—so too has military justice served war fighters since virtually the beginning of organized conflict, because it plays a central role in establishing the discipline indispensable for martial success. In the *Anabasis*, Xenophon observed that "if discipline is held to be of saving virtue, the want of it has been the ruin of many ere now."¹ Maurice de Saxe, in his 1732 treatise on war, *Mes Rêveries*, contends that the "Romans conquered all peoples by their discipline. In the measure that it became corrupted their success decreased." For his part, George Washington bluntly insisted that "discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all."

All of this suggests that military justice is not—and never has been—intended to be simply a doppelgänger for a civilian criminal justice system. Unlike its civilian counterpart, it is designed to help execute, if necessary, the difficult—and melancholy—task of getting human beings to kill, in the name of the state, and do so under circumstance where their opponents are bent upon doing the same to them. The current *U.S. Manual for Courts-Martial* (MCM) puts this stark purpose more delicately and rather more elliptically when it explains that "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 strengthen the national security of the United

States.”² Across nations, cultures, and time, military discipline has typically been unapologetically and, indeed, often necessarily, draconian. Throughout history, misbehaving soldiers have been punished in a variety of frightening ways, to include at times torture, maiming, and even summary execution. During the Revolutionary era, for example, the British army would impose punishments of up to one thousand lashes for relatively minor offenses.

In a way, it is not hard to understand why such harsh measures were needed: the tactics and weapons of the eighteenth century required troops to march shoulder to shoulder to within seventy-five yards of their adversary. At that point the infantrymen would fire volley after volley into the similarly packed ranks of their adversary to achieve the effect of mass fire with their oft-inaccurate muskets. Additionally, the crammed-together troops might also face withering exchanges of cannon fire from almost point-blank range. Anyone injured in such blasts faced, at best, the horrifying prospect of rudimentary medical care, including the high probability of amputation. It took uncompromising discipline to steel soldiers for this terrifying environment.

Given such verities, it is unsurprising that the Continental army adopted Britain’s military justice code, the Articles of War, with relatively few changes. That system, with periodic adjustments and improvements, largely persisted through World War II. In that conflict, which saw sixteen million Americans serving in uniform, over two million courts-martial of U.S. troops took place. Most of those trials were conducted without lawyers or legally trained personnel, and this and other deficiencies led to much criticism after the war. As one commentator put it,

Many of these citizens also had some very unpleasant experiences with the military justice system. At that time, the military justice system looked quite different than it does today and did not offer accused the protections afforded by the civilian courts system. It was a system that was foreign to many American citizens and they disapproved of the way criminal law was being applied in the military.³

To address these concerns, Congress passed major reform legislation in 1951 that replaced the Articles of War with the Uniform

Code of Military Justice (UCMJ)).⁴ The new law regularized disciplinary processes throughout the several service branches, provided for consistent rules of evidence, and embedded legally trained participants more deeply into the system. In addition, it established the all-civilian Court of Military Appeals (CMA), which is now known as the Court of Appeals for the Armed Forces (or CAAF). Importantly, this tribunal—like the entire military justice system—was established by Congress as an “Article I” court under its constitutional powers,⁵ as opposed to a part of the judicial branch of government, which is governed by Article III of the Constitution.

Later, the Military Justice Act of 1968, again drawing much from civilian jurisprudence, added additional modernizing procedures, to include the mandatory use of a military judge for all but the most minor trials.⁶ Moreover, the adoption in the 1980s of the Military Rules of Evidence from the Federal Rules of Evidence was—and is—considered an important step in ensuring fairness of military trials and promoting the sense that military courts are “just as good” as civilian trials because, after all, it is often said, the rules and procedures much mirror each other.

While such changes certainly address criticisms of the military justice system, it is not evident—as is discussed below—that all of the changes were actually constitutionally required or have, necessarily, facilitated the administration of military justice, especially in the field where it is so needed.⁷ The founding fathers, whose recent experience with the Revolution left them well aware of wartime exigencies, seemed to have recognized that all the particulars of Article III trials are not necessary or practical for a military disciplinary process, which may require administration in austere conditions. Continuing concern about the viability under field conditions of an increasingly complex military criminal justice system led then secretary of defense Leon Panetta in July 2012 to commission a panel to examine the efficacy of the military justice system in deployed areas.⁸

For its part, the Supreme Court frequently made it clear that it suffers no illusions about the need for special considerations as to how justice is administered in the military realm. In his superb book on military justice, retired Army colonel Larry Morris maintains

that the Supreme Court and other courts have a “strong inclination” to “defer to the military as a separate society and to set a lenient standard of review for decisions that are within the judgment of commanders, leaders, and policymakers.”⁹

Nevertheless, there have been biting critiques. In the 1969 case of *O’Callaghan v. Parker*¹⁰ Justice William O. Douglas remarked that while “the Court of Military Appeals takes cognizance of some constitutional rights,” courts-martial “as an institution are singularly inept in dealing with the nice subtleties of constitutional law.” He added, with ill-concealed contempt, that “a civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial,” Douglas asserted, “is marked by the age-old manifest destiny of retributive justice.”

Despite that unflattering assessment, the actual holding of *O’Callaghan* did not dismantle the military justice system. Instead, it merely determined that only those offenses that had “service connection” were suitable for military courts. The result of *O’Callaghan* was, however, near chaos in military practice, as courts at both the trial and appellate levels struggled to address a myriad of factual situations to determine if they were sufficiently related to military service for resolution at a court-martial.

At the same time a process began, much driven by the Court of Appeals (perhaps smarting from Douglas’s rebuke), to “judicialize” the system away from its traditional commander-centric focus toward one more akin to civilian courts. As then captain (later brigadier general) John Cooke wrote in 1977, a core principle of this effort was embodied in the decisions by the Court of Military Appeals that “substantially shifted the balance of power in the system by invalidating or restricting powers previously exercised by commanders and other line personnel, and by depositing greater ultimate authority in the hands of lawyers and judges.”¹¹

In his dissent in *O’Callaghan*, Justice John Harlan warned that “the infinite permutations of possibly relevant factors [establishing court-martial jurisdiction] are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue.” That proved to be exactly the case, and in 1987 the Supreme Court overruled *O’Callaghan* in *U.S. v. Solario*.¹² In *Solario* the Court

abandoned the “service connection” test in favor of essentially “green card” jurisdiction (in reference to the then green identification cards that members of the armed forces carried). It reestablished personal jurisdiction in courts-martial based exclusively on the military status of the accused.

Perceptions about the supposed callousness of the system, and even questions about its legitimacy, continue to haunt military jurisprudence. As recently as 2009, Chief Justice John Roberts cited with approval the 1957 case of *Reid v. Covert* for the proposition that “traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.”¹³ What is remarkable about his comment is that what is apparently believed to be a “rough form of justice” is, nevertheless, acceptable in the military of a democratic superpower.

Actually, the notion that the military system is a “rough form of justice” is not borne out by most objective analyses. A 2012 study by the Congressional Research Service amply demonstrates that military courts generally provide the same procedural safeguards as those found in civilian federal criminal trials.¹⁴ In a comparison to state court criminal proceedings using a hypothetical case arising in the state of Virginia as an example, two military attorneys found that in nearly every instance the armed forces provided as much as or more due process for a defendant. In particular, the greater resources available to military defense counsel were highlighted.¹⁵

Rather ironically, it is not altogether clear that the founding fathers ever intended courts-martial to involve the elaborate procedures they employ today. For example, the Constitution specifically exempts the military from the Fifth Amendment requirement for a grand jury indictment. Furthermore, the Court in *Covert* observed that “it has not been clearly settled to what extent the *Bill of Rights* and other protective parts of the Constitution apply to military trials.”¹⁶ That 1957 dictum remains largely true today, as a CAAF judge explicitly noted in her 2005 dissent in *U.S. v. Mizgala*.¹⁷

Thus, it can be argued that the rights of service members in disciplinary matters are much dependent upon the largesse of Congress.¹⁸ As the Supreme Court said in the 1953 case of *Burns v. Wilson*:

The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.¹⁹

However, for its part, CAAF claims rather inexplicably that “the Supreme Court has assumed the Bill of Rights applies to the military” and insists it applies “absent military necessity or operational needs.”²⁰ As a practical matter, the effectiveness—and fairness—of the system depends upon those who practice in it. These are principally military lawyers called JAGs (the acronym for their formal title of “judge advocates”). JAGs are not just licensed lawyers, but today are among the best and brightest the legal profession has to offer; in recent years only one in twenty applicants has been accepted by the service JAG corps.

Once a lawyer is licensed in a U.S. jurisdiction and commissioned into one of the services, the UCMJ requires the judge advocate general (the senior lawyer of each of the services) to certify the individual as competent to defend persons in courts-martial. In addition, the judge advocate general of each of the services has statutory responsibilities to supervise his assigned JAGs and to provide oversight of the administration of military justice throughout the armed forces. As a check on abuses in the field, JAGs are entitled by law to communicate directly with senior JAGs, notwithstanding any efforts by field commanders to the contrary.²¹

Many offenses prosecuted in the military justice system involve the same sort of crimes (e.g., assault, larceny, DWI) denounced in any criminal code. Indeed, the third clause of Article 134 of the UCMJ (the “catchall” article²²) permits the assimilation of virtually the entire federal criminal code into military law. There are, however, limits to integrating civilian law into the code. In the 2012 case of *U.S. v. Hayes*, CAAF refused to permit bootstrapping *state* criminal codes into the UCMJ.²³

Even among “conventional” offenses there are some differences based on the special considerations of military service. For example, Article 134 criminalizes deaths that are the result of simple negligence, a standard of culpability commonly found in civil lawsuits but not in the criminal courts. In the 1979 case of *U.S. v. Kick*, the Court of Military Appeals explained,

There is a special need in the military to make the killing of another as a result of simple negligence a criminal act. This is because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection.²⁴

Of course, the UCMJ contains a variety of offenses that are unique to the military. Absence offenses are a good example. Desertion—which is quitting one’s post with the intent to stay away permanently—carries the death penalty if done in time of war. Quite obviously, no armed force can tolerate troops abandoning their duties, especially in the face of combat. Lesser absences are also criminalized. In the military, being even a minute late for work during peacetime is a crime punishable by up to a month in jail. Of course, that measure of punishment is rarely imposed, but “failure to repair” (as lateness is termed in the military) commonly results in an administrative forfeiture of pay or even a reduction in rank.

The criminalization of absence offenses is one illustration of how the UCMJ helps create a mind-set of obedience and attention to detail that is so necessary for success in war. Another example—and one that often perplexes civilians—is dereliction of duty. There are several dereliction offenses, depending on whether the failure to execute an assignment was willful, negligent, or the result of culpable inefficiency.

The MCM does, however, make it clear that when the failure to complete that task is genuinely the result of inability—such as when a soldier repeatedly fails to pass his marksmanship test despite earnest effort—he is not criminally liable (although he may find himself required to put in many extra hours of practice, to include time that

otherwise might have been off-duty). Still, when a military member's failure to do his duty is, in fact, willful or negligent, then the punishment is more severe than for someone who fails to complete a project for a civilian company or organization.

The UCMJ also lists a number of offenses designed to help control the natural terror that combat can produce in individuals. Besides desertion in wartime, capital punishment may also be imposed for behaviors that may seem rather innocuous or even inexplicable to civilians, but is understandable given the paramount interests of a military organization at war. Thus, "sleeping on post," failing to do the "utmost" to "encounter the enemy," and "shamefully" surrendering are all death penalty offenses. Additionally, execution is authorized for "cowardly conduct," which the MCM defines as "misbehavior motivated by fear."²⁵

To be sure, a serviceman's mental state can exonerate him if—as is typical in civilian jurisprudence—he suffers from "a severe mental disease or defect" and as a result of that he is "unable to appreciate the nature and quality" of the act or its "wrongfulness."²⁶ Post-traumatic stress disorder (PTSD), for example, does not, per se, excuse misconduct, absent a showing it has the effect discussed above; it may, however, be raised as a matter of mitigation of any sentence.²⁷

Despite the rather large number of UCMJ offenses that carry the death penalty, no service member has been executed since 1961. Six soldiers are currently on death row at the U.S. Disciplinary Barracks in Fort Leavenworth, Kansas,²⁸ but none is there for a conviction for uniquely military offenses; all are sentenced for crimes that include premeditated murder as at least one of the charges.

The armed forces necessarily place a premium on the obedience of orders. In the 1890 case of *In Re Grimley*, the Supreme Court noted that an "army is not a deliberative body. . . . [Its] law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."²⁹ In the 1983 case of *Chappell v. Wallace*, the Court was equally unambiguous when it said, "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex, with no time for debate or reflection."³⁰

Nonetheless, military law imposes no obligation to obey an unlawful order. Although all orders are presumed lawful, and soldiers disobey them at their peril, there are limits to the "orders" defense. In the infamous Vietnam-era My Lai massacre case, Army lieutenant William Calley claimed his murderous behavior was in response to superior orders he had allegedly received. The Court of Military Appeals, after noting that Calley was "convicted of the premeditated murder of 22 infants, children, women, and old men" who were his prisoners, rejected out of hand the assertion that Calley's intelligence was such that he might not have known that the supposed order was unlawful. The court dryly observed that "whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here."³¹

However, when an order is not actually unlawful, the fact that it may be unreasonable or contrary to one's personal belief does not excuse disobedience. Indeed, the MCM explicitly states that the "dictates of a personal conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order."³² Thus, in *U.S. v. Rockwood*, an Army captain's conviction for offenses related to his departure from his base against his superior orders during the 1994 Haiti relief mission was sustained on appeal despite his claim that he had a moral and legal obligation under international human rights law to inspect the admittedly deplorable conditions of Haiti's National Penitentiary.³³ Such decisions, the court found, were the prerogative of command, not of individual subordinate soldiers.

Among the more fascinating aspects of the UCMJ are the provisions related to commissioned officers. Subordinates can be punished not just for disobeying officers, but also for being disrespectful in acts or language. In this regard, the MCM pointedly states that "truth is no defense." At the same time, however, officers are held accountable in ways enlisted personnel are not. In finding that officers can be sent to trial for offenses that are typically handled administratively when involving enlisted personnel, the CMA observed that

the Armed Services comprise a hierarchical society, which is based on military rank. Within that society commissioned officers have for many purposes been set apart from other groups. Since officers have special privileges and hold special positions of honor, it is not unreasonable that they be held to a high standard of accountability.³⁴

One of the special restrictions placed on officers is the prohibition in Article 88 against “contemptuous words” against the president, the secretary of defense, and other civilian officials. Though the MCM cautions that “private conversations should not ordinarily be charged” and that adverse criticism “even though emphatically expressed” ordinarily should not be alleged, speech is criminalized in a way that would be unconstitutional in civilian society.³⁵

In one of the rare instances where an Article 88 violation was prosecuted, Lieutenant Henry H. Howe was convicted for attending a demonstration in 1965 in El Paso, Texas, while carrying a sign that said “LET’S HAVE MORE THAN A ‘CHOICE’ BETWEEN PETTY, IGNORANT, FACISTS IN 1968” and, on the other side, “END JOHNSON’S FACIST AGGRESSION IN VIETNAM.” The CMA upheld the conviction against First Amendment challenges, finding that what Article 88 properly sought to “avoid is the impairment of discipline and the promotion of insubordination by an officer” and that under the circumstance the conduct constituted “a clear and present danger to discipline within our armed services.”³⁶

Unlike Article 88, which is rarely alleged, Article 133—which denounces “conduct unbecoming an officer and a gentlemen”—is not infrequently included on charge sheets involving officers. In another Vietnam-era case, *Parker v. Levy*, the Supreme Court examined whether “conduct unbecoming an officer” was too vague a standard to which to attach criminal liability.³⁷ Levy, an Army doctor and commissioned officer, was convicted for making statements to enlisted troops such as that he did not “see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight” and that “Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.”

In rejecting Levy's habeas corpus petition,³⁸ the Supreme Court observed that it had "long recognized that the military is, by necessity, a specialized society separate from civilian society" and that the "military has . . . by necessity, developed laws and traditions of its own." Those differences, the Court said, arose from the fact that "the primary business of armies and navies is to fight or be ready to fight wars should the occasion arise."

Thus, the Court believed that notwithstanding the broad language of Article 133, Levy could have no reasonable expectation that using the words he did under the circumstances would be anything other than violative of the UCMJ provision. In so concluding, the Court pointed out that the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Today, Article 133 charges often incorporate the elements of a wide range of offenses, to include relatively minor ones. Although prosecutors are required to prove the additional element that the misconduct was "conduct unbecoming an officer," any conviction permits the dismissal of the officer (the equivalent of a dishonorable discharge for an enlisted person).

Of course, not all violations of the UCMJ automatically result in a court-martial. Commanders are urged to attempt to resolve misbehavior at the lowest possible level, and most disciplinary measures are administrative, not judicial. For example, commanders and supervisors will employ corrective measures to include oral and written counselings, admonitions, and reprimands. For the vast majority of troops, these administrative tools are sufficient for correcting behavior.

More aggravated situations, yet still "minor offenses," can be handled by a commander via a nonjudicial procedure under Article 15 of the UCMJ.³⁹ These are summary administrative proceedings, often conducted by commanders without the involvement of legal personnel, that permit the imposition of limited fines, restrictions, extra duties, and—where facilities are available—correctional custody. Correctional custody is designed to be akin to confinement, but more of a reversion to the strict regime of boot camp in order to reinstill military virtues in the offender and return him to duty. (It

is reported that punishment pursuant to Article 15 is what is being recommended in the December 2011 incident involving the burning of Korans in Afghanistan.⁴⁰) In cases where an individual is deemed unsuitable for further service, but not for reasons warranting a court-martial, administrative discharge may be directed.

If a particular disciplinary situation appears to warrant more than administrative disposition, criminal charges are “preferred” on the accused as the first step in the court-martial process. While military law permits any person “subject to the Code” to prefer charges, it usually falls to the immediate commander to do so. Depending upon the seriousness of the allegation, the commander may decide—with the advice of his or her JAG—to dismiss the charges or to resolve them administratively. The commander, if authorized to convene courts-martial, can also “refer” the case to a summary or special court-martial. If, however, the charges are serious enough, he may order a formal investigation pursuant to Article 32 of the UCMJ.

Article 32 investigations are often considered to be a statutory substitute for the grand jury process, even though the Constitution explicitly exempts military cases from that requirement. In practice, Article 32 hearings are much different from grand jury proceedings in that they are usually public proceedings with the accused present and accompanied by counsel. The accused (or, more likely, his lawyer) is permitted to interrogate government witnesses and call his own.

In many ways, the Article 32 hearings have evolved into mini-trials where allegations are sometimes “litigated,” even though the hearings are, technically, merely investigations. The hearing officer, ordinarily a JAG, will draft a report that will be forwarded to the commander along with the assembled evidence and transcripts of testimony. The hearing officer will make a nonbinding recommendation as to how the charges should be resolved.

Several types of courts-martial exist to which a commander can refer charges: summary, special, and general. They are mainly distinguished by the maximum punishments that can be imposed.⁴¹ A summary court can jail a soldier for thirty days, but not impose a discharge. A special court-martial can confine a defendant for up

to a year, and the sentence can include a bad conduct discharge. A general court-martial can adjudge any punishment up to the maximum authorized for the crime, to include death and a dishonorable discharge. Besides the stigma attached to a “bad conduct discharge” and a “dishonorable discharge” (called a “dismissal” when imposed upon an officer), these punitive separations can cause the loss of eligibility for many federal and state veterans’ benefits.

The court-martial itself draws much from civilian trial processes. One key difference is that the “jurors” (called “members” in military parlance) are not randomly selected, as they generally are in civilian cases, but rather selected by the commander, based, as the UCMJ requires, on a determination that the officers are “best qualified by reason of age, education, training, experience, length of service, and judicial temperament.”⁴² Though the concern is often understandably raised that a commander could “pack” a court panel to achieve a desired result, in practice such is rarely the case.

There are a number of reasons for this, beginning with the fact that the independence of the officers selected (the panel may include up to one-third enlisted members if an enlisted accused so requests) is protected by Article 37 of the UCMJ, which prohibits any effort to coerce or unlawfully influence the members or, for that matter, the military judge or counsel for either side. In addition, the appellate courts, and especially CAAF, have been exceptionally rigorous in their effort to root out “unlawful command influence,” which it has long condemned as the “mortal enemy of the military justice system.”⁴³

Court-martial panels also differ from most civilian courts in their size, as well as the manner in which they come to their findings. Summary courts-martial consist of a single officer, while special courts need at least three members, and general courts must have at least five. If the accused does not choose to be tried by military judge alone, his case will be decided by a secret written ballot of the members during their closed deliberation. In military cases, however, a conviction requires only a two-thirds agreement of the panel; there are no “hung juries” in military trials. In addition, the sentence also is decided by the members (if the accused does not elect trial by military judge

alone). Like the finding, a sentence requires a two-thirds vote, unless the sentence includes confinement for more than ten years (requiring a three-fourths vote) or death (unanimous agreement is mandated).

Besides incarceration, military sentences can include reprimands, fines and forfeiture of pay, hard labor without confinement, reduction in grade, and a punitive discharge. Although not yet tested for constitutionality, death is the only authorized punishment for spying in violation of Article 106 of the UCMJ. Other military death penalty cases usually require procedures similar to those found in civilian jurisprudence, including the presentation of aggravating factors.

The appellate process for court-martial convictions is more elaborate than that typically available in civilian settings. Although its extent largely depends upon the severity of the punishment imposed, it typically begins with review by the commander who convened the court-martial. That review, aided by the advice of a judge advocate, cannot result in a reversal of acquittal to any charge or any increase in sentence, but only in the approval of the adjudged findings and sentence, or a mitigation of either in some way.

Again, depending upon the severity of the sentence, the next level of review ordinarily is conducted by the court of review of each individual service. What is unusual about these courts is that they are empowered not only to act on errors of law, but also to conduct a fresh (*de novo*) review of the facts and overturn the case—even in the absence of legal error—if they find the proof insufficient. Moreover, they may reassess the appropriateness of the sentence and diminish it if they wish. Essentially, they can only affirm the decision or act in some way to the defendant's benefit.

The next level of appeal is to the Court of Appeals for the Armed Forces. As already noted, the CAAF is empowered to review only errors of law (except in the Coast Guard, the judges in service courts of review are military appellate judges). Unlike the service courts of review, however, CAAF's powers are limited to errors of law. Beyond CAAF, appeal can be made to the Supreme Court,

but only in limited circumstances. As the Congressional Research Service put it,

[The Supreme Court's] power to review military cases generally extends only to cases that the CAAF has also reviewed. For this reason, the CAAF's discretion over the acceptance or denial of appeals often functions as a gatekeeper for military appellants' access to Supreme Court review. If the CAAF denies an appeal, the U.S. Supreme Court will typically lack the authority to review the decision. In contrast, criminal appellants in Article III courts have an automatic right of appeal to federal courts of appeals and then a right to petition the Supreme Court for review.⁴⁴

An issue related to military justice—but very separate—is the matter of military commissions. Military commissions have a long history in the United States. They were used during the Mexican War, and thousands of Americans were tried by military commission during the Civil War, including anti-Lincoln conspirators. However, in 1866 the Supreme Court in the case of *Ex Parte Milligan* found unconstitutional the domestic use of military commissions against nonbelligerents in areas where the courts were still functioning.⁴⁵

During World War II, civilians in Hawaii were tried by military tribunals under the authority of the Hawaii Organic Act, which permitted declarations of martial law. However, the Supreme Court applied its *Milligan* precedent in finding that despite the statutory authorization, such trials were unconstitutional where U.S. civilian courts were able to function.⁴⁶

Nevertheless, when German saboteurs—including a naturalized American citizen, Herbert Haupt—were delivered to U.S. shores by a Nazi submarine in 1942, the Court distinguished *Milligan*. In denying the saboteurs' petition for habeas corpus, the Supreme Court concluded in *Ex Parte Quirin* that “those who, during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.”⁴⁷

As to the American citizen among the saboteurs, the Court said:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.

Those “consequences” included being subject to trial by a military commission. Six of the eight—including Haupt—were executed within weeks of their conviction.

Following World War II, General Tomoyuki Yamashita, the Japanese commander in the Philippines, where horrific atrocities were committed by his troops, was tried by military commission. Charged not with personally committing or ordering war crimes, but rather with “unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes,” he was tried and convicted by military commission. In denying his application for leave to file a petition for a writ of habeas corpus and writ of prohibition, the Supreme Court found his commission trial lawful, even though hostilities had ended.⁴⁸ Yamashita was hanged on February 23, 1946.

The case has been widely criticized, but still stands for the important principle of command accountability, *respondeat superior*, the concept that commanders are responsible for the actions of their subordinates. Today, command responsibility incorporates requirements for some “information of knowledge that triggers a duty to act” with respect to “ongoing or anticipated law of war violations by subordinates,” as well as a “causal relationship between the commander’s omission and the war crimes committed by the subordinate.”⁴⁹

In the aftermath of 9/11, military commissions took on something of an unprecedented role when President George W. Bush issued his “Military Order” concerning detention of terrorism suspects,

as well as their potential trial by military commission.⁵⁰ It seems as if the design for the commission process used an improved version of the much-respected Nuremberg trials as the template. Those proceedings were not, however, military commissions conducted under U.S. law, but rather were international tribunals.

Regardless, it is doubtful that the processes used at Nuremberg could survive scrutiny today (e.g., the Nuremberg defendants did not have the right to remain silent, or challenge the impartiality of the fact-finding judges). Indeed, William Shawcross argues that Nuremberg offered defendants fewer rights than did the military commissions created by the Bush administration. According to Shawcross, any "German in the dock at Nuremberg would be astonished to learn of his rights, privileges, and entitlements, if he were suddenly transferred by time machine to the court in Guantanamo."⁵¹

In any event, in 2006 the Supreme Court in *Hamdan v. Rumsfeld*⁵² held that the military commissions devised by President Bush violated both the UCMJ and international law. This generated a number of statutory and regulatory changes, which ended with the implementation of the Military Commission Act of 2009.⁵³ Although some scholars remain dissatisfied with commissions as formulated today,⁵⁴ a comparison with courts-martial under the UCMJ suggests that the commissions are generally on firm legal footing, even as issues such as the scope of the charges triable by military commissions persist.⁵⁵

While courts-martial remain distinct from military commissions, an issue has emerged with them that relates to a fundamental concern of the commission cases: When can military authorities try a civilian who is not an enemy belligerent? As Professor Stephen I. Vladeck points out, "The Supreme Court repeatedly recognized categorical constitutional limits on the military's power to try civilians (including contractors), at least during 'peacetime.'"⁵⁶ Additionally, Vladeck notes that the CMA invalidated trials of contractors during the Vietnam War: because the conflict was never formally "declared" a war, it did not fit the statutory construct permitting the trial of "civilians accompanying the force" as provided by the UCMJ.⁵⁷

However, after a *foreign* contract employee of the Army assaulted another contract employee in Iraq in 2008, the alleged offender found himself tried by a U.S. court-martial. In discussing jurisdiction, the Army court of review observed that the law had changed since the Vietnam-era cases:

In 2006, Congress amended Article 2(a)(10), which had long authorized UCMJ jurisdiction over “persons serving with or accompanying an armed force in the field” during “time of war.” This amendment was effected by replacing the temporal requirement of a “time of war” with “time of declared war or contingency operation.”⁵⁸

Because of the statutory revision, the Army court concluded that since the incident occurred at an overseas combat outpost during actual hostilities, court-martial jurisdiction was properly found. CAAF agreed and affirmed the conviction,⁵⁹ but the case is likely to make its way to the Supreme Court.

Military law today is a well-developed corpus of jurisprudence, but one not without controversy. Incidents from the wars in Iraq and Afghanistan indicate an erosion of discipline.⁶⁰ Allegations that soldiers engaged in the killing of civilians for “sport” in 2010⁶¹ were followed by accounts in late 2011 and 2012 of other acts of indiscipline, including reports of troops burning Korans,⁶² urinating on Taliban corpses,⁶³ and posing with body parts of enemy fighters,⁶⁴ not to mention the shocking allegations of the cold-blooded murder of seventeen Afghans civilians by a U.S. Army sergeant.⁶⁵

Senior military officers and defense officials admit they are deeply troubled by the events,⁶⁶ because they keenly understand the destructive effect of indiscipline on the military’s ability to accomplish its mission. Secretary of Defense Leon Panetta told troops recently that “these days, it takes only seconds for one picture to suddenly become an international headline ... and those headlines can impact the mission we’re engaged in, they can put your fellow service members at risk, they can hurt morale, and they can damage our standing in the world.”⁶⁷

Panetta is echoing a point that former commandant of the Marine Corps General Charles C. Krulak made in 1999: that given

the enormous power of instant, worldwide media, every act carries potentially strategic consequences, even those committed by very junior troops in remote locations. Krulak presciently explained,

In many cases, the individual Marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well. His actions, therefore, will directly impact the outcome of the larger operation; and he will become ... the *Strategic Corporal*.⁶⁸

Clearly, misconduct can have a real effect on operational success in the twenty-first century. Many defense strategists cite the collapse of discipline that led to the detainee abuse scandal at Abu Ghraib as one of the worst setbacks the U.S. armed forces suffered since 9/11, much because of the propaganda victory that it handed the insurgents. General David Petraeus has said that “Abu Ghraib and other situations like that are non-biodegradable. They don’t go away. The enemy continues to beat you with them like a stick.”⁶⁹

There can be many explanations for erosion in discipline, but one aspect may be the military justice system itself, and the outcome of the 2005 Haditha incident in Iraq could be illustrative. This case arose from a situation where twenty-four innocent Iraqi civilians were killed by U.S. Marines in a botched response to an improvised explosive device attack on a convoy. Of the eight original suspects, six had charges dropped, one was tried and acquitted, and the last accused—Staff Sergeant Frank Wuterich—negotiated a plea agreement in 2012 that limited his punishment to a demotion but no jail time. Many military justice experts were at a loss to explain the apparent leniency in his case, as well as the apparent inability to convict any of the others allegedly involved.⁷⁰

However, the complex evidentiary rules—almost identical to those applicable in the most staid federal courtroom in an American suburb—may have also played a role. The *New York Times* reported that beyond missteps by military prosecutors and a reluctance of decision makers to second-guess the actions of troops in combat, “collecting physical evidence and finding witnesses can be difficult

because the killings often occur in unstable and dangerous areas, and the cases often come to light only after time has passed.”⁷¹ It is no surprise, therefore, that after reports of the killing of seventeen Afghan civilians in March 2012, CNN reported that “critics are questioning the military’s ability to conduct the transparent, speedy investigation demanded by Afghanistan in the case.”⁷²

Decades of “civilianizing” and “judicializing” of the military justice system may have altered the system beyond what the Constitution would require for military jurisprudence, and certainly far beyond the “rough justice” of Chief Justice Roberts’s belief. Indeed, as suggested above, the process today may be too cumbersome and complex for the battlefield environments where it is needed to function.⁷³ Major Franklin Rosenblatt presents a disturbing picture of the current situation in a 2010 article, “Non-Deployable: The Court-Martial System in Combat from 2001–2009.”⁷⁴ According to Rosenblatt, “After-action reports from deployed judge advocates show a nearly unanimous recognition that the full-bore application of military justice was impossible in the combat zone.”⁷⁵

Rosenblatt cites a catalog of reasons for the troubles in applying the UCMJ in remote areas, ranging from logistical difficulties to procedural shortcomings to attitudinal issues, and warns that “deployed courts-martial may someday become a relic of military history rather than a viable commander’s tool.”⁷⁶ Saddling commanders in austere locations with adhering to many of the same intricacies of a domestic judicial system may be proving to be too much. Lieutenant Colonel Michael Stahlman, a Marine JAG, admits that “commanders often perceive the military justice system as a roadblock instead of an effective leadership tool.”⁷⁷

Whether UCMJ complexities and burdens are the cause or not, it appears that commanders may be avoiding taking the disciplinary action they should, and this can create a dangerous attitude among the troops. In fact, a new Army report suggests commanders are “opting out” of the system:

The rise in crime in contrast to the decline in disciplinary action (e.g., court martial, summary court martial, Article 15), retention of multiple felony offenders and the deliberate change in terms of reference

regarding criminal misconduct all point to a softening in the perception of criminality.... Subtle changes in policy language (e.g., removing the term “criminal” from “serious criminal misconduct”), which may inadvertently shift leader perception of criminality, will not change the nature of the criminal act or alter its impact on victims, good order and discipline, and unit readiness.⁷⁸

Still, some experts insist that the system can work, even in the field. In a recent article, Major E. John Gregory cites his own Army experiences in Iraq and argues that they demonstrate that

when a proper emphasis is placed on military justice in theater by both the command and military justice practitioners, the court-martial system is a fully deployable system of justice which is not overly burdensome, meets the command’s disciplinary needs, and is highly protective of an accused’s rights.⁷⁹

Encouraging words for sure, but the trick is obtaining the “proper emphasis” under circumstances where there are multiple operational demands on a commander’s time and resources. The answer is not, however, to ship miscreants home, as some have suggested, but rather to examine the “civilianized” processes to determine which ones are truly constitutionally required—or prudent normatively—and streamline the system accordingly to make it compatible with the needs of discipline in the twenty-first century.

The ability to impose discipline, in situ, is vitally important to any military organization in combat, as otherwise misconduct can become a ticket out of a war zone. At the height of the Vietnam War in 1968, a court-martial was conducted in an underground bunker at Khe Sanh. As recorded by Gary Solis in his masterly *Marines and Military Law in Vietnam: Trial by Fire*, all the proceedings were conducted as the enemy poured intense artillery, rocket, and mortar fire onto the isolated outpost.⁸⁰ The court-martial acquitted the accused of smoking marijuana, but convicted him of sleeping on post and sentenced him to reduction in grade and forfeitures. The prosecutor aptly noted that the “sentence was appropriate” because the “accused was not sent back to the brig or otherwise allowed to escape the confines of Khe Sanh.”⁸¹

Interestingly, some nations—including especially heirs to the British military justice system—are increasingly civilianizing their systems even more than the United States has done, often with reference to resolving military disciplinary matters in civilian courts.⁸² Casting cases to civilian courts does not, however, necessarily provide the desired justice. Consider the case of former Marine sergeant Jose Luis Nazario.

Although retired military members may be subject to court-martial, military jurisdiction generally terminates at the end of an enlistment or when a military member is otherwise discharged without retirement.⁸³ Thus, Nazario, who was discharged before allegations related to the killing of four civilians in Iraq were resolved, had to be tried in a civilian court. Following his acquittal in 2008, news reports related that “several jurors acknowledged that they also did not feel qualified to judge a Marine’s actions in the midst of a battle.”⁸⁴ One juror said “she hoped the verdict would send a message to the troops in Iraq” to the effect that they would “realize that they shouldn’t be second-guessed, that we support them and know that they’re doing the right thing.”⁸⁵

Another challenge to the military justice system today relates to the handling of sexual assault allegations. In 2006, Congress, spurred primarily by heartrending but anecdotal claims of mishandled cases, and dissatisfied with the military’s efforts to address these alleged incidents, revised the sexual assault offense found in Article 120 of the UCMJ. The result was such a bloated and confusing statute that in 2011 CAAF found key provisions unconstitutional,⁸⁶ necessitating a complete legislative replacement (which itself may be subject to challenge).⁸⁷

The military’s difficulty in dealing with sexual assault cases may seem to be a manifestation of the victimization of women in an organization overwhelmingly populated by males (women compose only 14.6 percent of the 1.4 million active-duty service members⁸⁸). The *New York Times*, for example, claims that it “is even harder for military women to get away from abusers they work with or for; they can’t just quit their jobs or leave a combat zone.”⁸⁹ This misperceives the issue. A 2010 Department of Defense study did show that a higher *percentage* of women (4.4 percent) than men (0.9 percent)

reported “unwanted sexual contact.”⁹⁰ However, the translation of those percentages into actual *numbers* shows that considerably more men (approximately 11,288) perceived themselves as victims of “unwanted sexual contact” than did women (approximately 9,433).

The armed forces have made an extraordinary effort to crack down on sexual assaults, establishing a web of victim’s resources, special policies and reports, training, and—significantly—an increased emphasis on prosecution.⁹¹ However, criticism—especially in Congress—continues unabated.⁹² Accordingly, further legislation is now before Congress, a proposal called the “STOP Act.”⁹³ This legislation has a number of features, including the establishment of a Sexual Assault Oversight and Response Council, separate from the military chain of command, who would, in turn, appoint a “director of military prosecution” with authority over sexual offenses in the armed forces.⁹⁴

This proposal to remove field commanders from acting in this particular class of offenses is controversial. Army major general Gary Patton, the newly appointed head of the military’s Sexual Assault Prevention and Response Office, warns that “if you were to take the disciplinary component and put it into some external, centralized, whatever, body, independent, apart from the chain of the command, you’ve just removed the commander from the problem and tied the commander’s hands.”⁹⁵ His predecessor, Air Force major general Mary Kay Hertog, agreed with having more senior commanders take the initial action in these cases but added,

Some have argued that allegations of sexual assault are best addressed outside the chain of command. I disagree.... [Keeping the] initial disposition of these cases within the military chain of command ... will ensure that the military itself remains responsible for addressing this critically important issue. Experience has shown time and again that strong internal leadership is effective in bringing about major change. The chain of command must ensure justice and be held to account for the consequences.⁹⁶

Furthermore, the STOP Act proposal seems to assume that the military’s difficulties with sexual assault prosecution are somehow uniquely the result of command indifference (or worse). Indeed, in

its proposed “findings,” the STOP Act does cast aspersions on military officers by stating that the “great deference afforded command discretion raises serious concerns about conflicts of interest and the potential for abuse of power.” However, the American public—if not Congress—rates military officers second only to nurses as the profession having the highest honesty and ethics.⁹⁷ (Members of Congress were rated the lowest.) Similarly, an April 2012 poll showed the U.S. public had the most confidence in military leaders, and the least in those of Congress.⁹⁸ Thus, whatever negative view Congress may have as to the potential for abuse by military commanders, it would not seem to be shared by the public.

Moreover, the military’s challenges with sexual assault cases are hardly unique: the Department of Justice, while citing increasing civilian prosecutions, concedes that in the United States *generally*, “sexual assault cases have been underreported and had low prosecution rates.”⁹⁹ In any event, reports in December 2011 indicate that “military commanders sent about 70 percent more cases to courts-martial that started as rape or aggravated sexual-assault allegations than they did in 2009.”¹⁰⁰ Additionally, Reuters reported in August 2012 that military “commanders routinely lack sufficient evidence to prosecute [sexual assault] cases.”

Importantly, as in any justice system, it is a “fundamental right” of a service member to be subject to court-martial only where the evidence reasonably establishes that he or she has committed a triable offense.¹⁰¹ Clearly, prudence is necessary, especially when there are a growing number of cases where, but for DNA technology, persons wrongly convicted of sexual assault would continue to languish in jail. The National Registry of Exonerations compiled by University of Michigan Law School and Northwestern University recently reported, for example, that there have been more than two thousand wrongful convictions for serious crimes since 1989 (the year DNA exonerating evidence became readily available).¹⁰² Issues can also arise about misidentification and, occasionally, false reports.¹⁰³ It is simply counterfactual to blame military commanders for the difficulties associated with sexual assault cases, as these same matters would, one would assume, similarly impact the special directorate the draft legislation proposes to establish.

In addition, referring cases to an office with an obvious agenda to increase prosecutions and, presumably, convictions, raises serious questions not just about impartiality, *qua* impartiality, but also regarding the special “enemy” of the military justice system: unlawful command influence.¹⁰⁴ As a matter of law, improper influences on the military justice system can arise just as readily from politicians and others as from commanders formally part of the process.¹⁰⁵ Reports are already emerging that “the politics of rape are tainting [the] military justice system,” with one defense counsel claiming that “reality is they’re charging more and more people with bogus cases just to show that they do take it seriously.”¹⁰⁶

In fact, a McClatchy Newspaper analysis “found that the military is prosecuting a growing number of rape and sexual assault allegations, including highly contested cases that would be unlikely to go to trial in many civilian courts.”¹⁰⁷ Concerns have been raised, it is reported, “that the anti-rape campaign of advocacy groups and Congress is influencing” commanders to send undeserving cases to trial.¹⁰⁸ According to Charles Feldmann, a former military and civilian prosecutor turned civilian defense attorney, a military officer is “not going to put his career at risk on an iffy rape case by not prosecuting it,” because if he “dismisses a case and there’s political backlash, he’s going to take some real career heat over that dismissal.”¹⁰⁹

Efforts, such as the STOP Act, to diminish the role of commanders in military justice matters need to be approached with great caution, as doing so upends thousands of years of military practice and tradition built on hard-won experience. Those countries that have taken similar steps in recent years have found themselves struggling with disciplinary processes that are out of sync with battlefield realities, as well as the overall needs of armed organizations responsible for the nation’s defense.¹¹⁰ It should not be forgotten that, as the Supreme Court said in *Haig v. Agee*, “It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”¹¹¹

The U.S. military justice system, despite many challenges, can, will—and must—continue to sustain the most powerful armed force the world has ever known. While its legitimacy, especially in an era of an all-volunteer military, depends upon the perception as well as the fact of fairness, it also needs to be effective and

efficient. Achieving that aim requires thoughtful prudence, well grounded in the pragmatism generated by operational experience, and tempered by the values and principles of a liberal democracy. The importance of this responsibility cannot be overstated. As the renowned Roman military thinker Vegetius sagely warned, “No nation can be happy or secure that is remiss and negligent in the discipline of its troops.”

Notes

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