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Can Grandpa Really be Court-Martialed? The Constitutionality of Imposing Military Law upon Retired Personnel

MAJOR MARC J. EMOND*

> *And like the old soldier of that ballad, I now close my military career and just fade away—an old soldier who tried to do his duty . . . .*[1]

I. Introduction

Reaching the twenty years of service mark and being able to retire is the dream of every member of the Armed Forces. Retirees continue to receive monthly retirement pay[2] but can live a life indistinguishable from their civilian neighbors. They do not have to worry about formations, superior officers, physical fitness tests, or consistently moving from one place to another. The only daily reminders of their military service are the memorabilia on their walls and the retirement identification in their wallets. Their military service can slowly fade to a distant memory marked by photos and stories to their grandchildren.

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[1] Gen. Douglas MacArthur, Address to U.S. Congress (Apr. 19, 1951) (transcript available in the Library of Congress).

[2] *See* 10 U.S.C. § 12731 (providing for retired pay after twenty years of service).

But do retirees truly fade away after their careers have ended? While they may resemble the civilians around them, the military still subjects them to military law under the Uniform Code of Military Justice (UCMJ).[3] Through the UCMJ, Congress has provided court-martial jurisdiction over all retired personnel who receive pay.[4] This jurisdiction applies not only to those receiving retired pay due to length of service,[5] but also those who receive pay from the Department of Veterans Affairs because they have been deemed unfit for future service due to permanent disability.[6]

Congress derives its authority to implement the UCMJ from its power to "make Rules for the Government and Regulation of the land and naval [f]orces" as well as the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[7] The determinative question is therefore one of status, namely, whether retirees fall within the term "land and naval [f]orces."[8]

Addressing this question of whether military retirees can constitutionally be subject to military law is not inconsequential. The Supreme Court has routinely viewed the military as separate from civilian society and entitled to lesser rights in the pursuit of good order and discipline.[9] Even though military law has expanded the protections afforded to the accused,[10] they still pale in comparison to those rights entitled to civilians within the

[3] UCMJ art. 2(a)(4) (2019); 10 U.S.C. § 802(a)(4) (stating that "[r]etired members of a regular component of the [A]rmed [F]orces who are entitled to pay" are subject to the UCMJ). Additionally, those who complete at least twenty years of enlisted service within the U.S. Navy or Marine Corps may preliminarily retire to the Fleet Reserve. 10 U.S.C. § 8330(b). These individuals also remain subject to the UCMJ under Article 2(a)(6). UCMJ art. 2(a)(6) (2022).
[4] UCMJ art. 2(a)(4) (2019).
[5] *See, e.g.*, United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).
[6] *See* United States v. Bowie, 34 C.M.R. 411, 412 (C.M.A. 1964); *see also* United States v. Reynolds, No. 201600415, 2017 CCA LEXIS 282 (N-M. Ct. Crim. App. 2017).
[7] U.S. CONST. art. I, § 8, cls. 14, 18 (original style retained).
[8] Kinsella v. United States, 361 U.S. 234, 240–41 (1960).
[9] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955); Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion).
[10] *See* Ortiz v. United States, 138 S. Ct. 2165, 2174 (2018) ("The procedural protections afforded to a [S]ervice member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or [F]ederal." (citation omitted)).

constitutional Article III courts.[11] For instance, unlike their civilian counterparts, military defendants are not entitled to: a grand jury indictment;[12] a unanimous verdict in all felony cases;[13] a randomly selected jury of peers from across the community;[14] or a wholly independent judiciary.[15] Furthermore, those within the Armed Forces are significantly restrained, compared to their civilian counterparts, in what they are at liberty to say or do.[16]

The number of individuals impacted by continued military jurisdiction after retirement is also far-reaching. In fiscal year 2019, the combined number of regular retirees and disability retirees amounted to nearly 1.6 million people.[17] As such, the population of military retirees exceeds the populations found within ten states as well as the District of Columbia.[18]

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[11] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 327–28 (D.D.C. 2020) ("[T]he UCMJ's protections provide much less comfort to the accused than constitutionally guaranteed rights do because either Congress or the Court of Military Appeals could potentially amend the UCMJ at any time to remove or limit certain procedures or rights.").

[12] U.S. CONST. amend. V (requiring "presentment or indictment of a Grand Jury, except for cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger" (original style retained)).

[13] *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(c)(2) (2019) (requiring only a three-fourths majority to convict) *with* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (requiring unanimous verdicts in both state and Federal courts).

[14] United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) ("A [S]ervice member has no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen."). Instead, the jury in a military case is selected by the commander who convenes the court-martial. 10 U.S.C. § 825(e)(2), (3).

[15] *See* United States v. Norfleet, 53 M.J. 262, 268 (C.A.A.F. 2000) (explaining that military judges are subject to "involuntary assignment to a position outside the judiciary, involuntary geographic reassignment, review by promotion and retention boards that are not limited to considering military judges, and absence of tenure in the position").

[16] Parker v. Levy, 417 U.S. 733, 749 (1974) ("While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the [UCMJ] essays more varied regulation of a much larger segment of the activities of the more tightly knit military community."). Examples of such activity that are criminal under the UCMJ but protected civilian activity include: UCMJ art. 88 (2022), Contempt Toward Officials (criminalizing "contemptuous words" against public officials) and UCMJ art. 134 (2022) (criminalizing all conduct "of a nature to bring discredit upon the Armed Forces" or is "to the prejudice of good order and discipline in the Armed Forces").

[17] KRISTY N. KAMARCK, CONG. RSCH. SERV., RL34751, MILITARY RETIREMENT: BACKGROUND AND RECENT DEVELOPMENTS 2 (2021).

[18] Hawaii is the fortieth most populous state with a population of 1,455,271. *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021),

Even if the jurisdiction is rarely exercised, the threat of criminal sanction alone is enough to shape behavior.[19]

While the Supreme Court has struck down the imposition of military law upon several other classes of individuals deemed outside of the land and naval forces,[20] the question surrounding retirees has never been squarely addressed. Thus, whether retirees fall within the land and naval forces and are, therefore, constitutionally subject to military law under the UCMJ remains an open question.

The Court of Appeals for the Armed Forces (CAAF), the highest appeals court for military cases,[21] has long held that continuing to subject retirees to military law is indeed constitutional.[22] For more than sixty years, there was little debate about the constitutionality of extending military law to retired personnel.[23] The CAAF reiterated their holding as recently as 2021.[24]

Within Article III courts, however, a collateral challenge to a court-martial conviction has recently achieved a novel modicum of success; it has thereby injected new vigor into the debate surrounding whether retired personnel remain part of the Armed Forces and constitutionally subject to

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https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html.

[19] For example, the 2021 *U.S. Army Retired Soldier Handbook* advises retirees that:

> Retired Soldiers are subject to the UCMJ and may be tried by court-martial for violations of the UCMJ that occurred while they were on active duty or while in a retired status. Department of the Army policy provides that Retired Soldiers subject to the UCMJ will not be tried for any offense by any courts-martial unless extraordinary circumstances are present.

U.S. DEP'T OF THE ARMY, U.S. ARMY RETIRED SOLDIER HANDBOOK, 12 (2020).

[20] *See* McElroy v. United States, 361 U.S. 281, 286 (1960) (holding that court-martial cannot try peacetime civilian employees of overseas military forces); Kinsella v. United States, 361 U.S. 234 (1960) (holding that court-martial cannot try civilian dependents of military personnel); United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955) (holding that court-martial cannot try discharged Service members).

[21] *See* UCMJ art. 67 (2019).

[22] *See, e.g.*, United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[23] *Id.*

[24] United States v. Begani, 81 M.J. 273, 281 (C.A.A.F. 2021).

military law after they retire.[25] In 2020, the U.S. District Court for the District of Columbia found that continuing to subject retired personnel to military law while they are in a retired status is unconstitutional.[26] Even though the district court's decision was subsequently overturned on appeal, the U.S. Court of Appeals, D.C. Circuit rejected important underpinnings of CAAF's rationale in upholding the constitutionality of jurisdiction over retirees.[27] In addition to the majority rejecting CAAF's rationale, the dissenting judge strongly argued that such jurisdiction was an unconstitutional expansion of military law.[28] These novel victories represent new legal footing for challenges to CAAF, which has ruled as recently as 2021 that continuing to subject retirees to military law is indeed constitutional.[29]

The novel victories within the Article III courts provide new legal footing to challenge CAAF's holding either within CAAF itself or ultimately at the Supreme Court. In anticipation of this potential battle within the highest Court, this paper will analyze the question of whether military retirees do indeed fall within Congress's power over the land and naval forces. First, it will explore the recent opinions and rationales of both CAAF and D.C. District Court. Second, it will look to the Supreme Court's prior interpretations regarding the proper scope of military law. Third, it will assess the authority granted to Congress within the Constitution and whether retirees fall within the scope of the land and naval forces as it was originally understood. Next, it will assess whether Congress's authority should be expanded beyond the original understanding. In conclusion, the paper will recommend courses of action to meet the proper scope of Congress's authority.

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[25] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322 (D.D.C. 2020).
[26] *See id.* at 332. While the question before the court was whether court-martial jurisdiction over Fleet Reservists under UCMJ Article 2(a)(6) is constitutional, the court examined the constitutionality as it pertains to the entirety of the retiree population. *Id.* at 328–33.
[27] *Compare* Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022), *with Begani*, 81 M.J. 273.
[28] *See Del Toro*, 45 F.4th at 101 (Tatel, J., concurring in part and dissenting in part).
[29] *Begani*, 81 M.J. at 281.

II. Setting the Battlefield: Article III Courts Raise Questions Surrounding Military Courts' Rationale

Court-martial jurisdiction over retirees is not a new creation. Retirees have been subject to court-martial jurisdiction since 3 August 1861.[30] Since that time, courts-martial of retirees have been extremely rare, especially for post-retirement acts. Within the few cases presented, multiple Article III courts have declared that court-martial jurisdiction over retirees is proper.[31] Similarly, military courts have consistently upheld the constitutionality of subjecting retirees to military law.[32] The Supreme Court has never directly addressed the issue.[33]

In the 2021 case of *United States v. Begani*, CAAF most recently addressed the constitutionality of continued imposition of military law over retirees.[34] In line with their prior precedent, CAAF held that retirees are still members of the land and naval forces because they "have not severed all relationship with the military."[35] The court reasoned that even though retirees "ha[ve] no ongoing military responsibilities," continued

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[30] *See* PUBLIC LAWS OF THE UNITED STATES OF AMERICA, PASSED AT THE FIRST SESSION OF THE THIRTY-SEVENTH CONGRESS 287–90 (1861) (stating that those "partially retired" were to receive continuing monetary payments over the remainder of their lives, entitled to wear the uniform of their rank, subject to recall to active duty, and "*subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles*" (emphasis added)).

[31] *See, e.g.*, Chambers v. Russell, 192 F.Supp. 425 (N.D. Cal. 1961); Hooper v. Hartman, 163 F.Supp. 437 (S.D. Cal. 1958), *aff'd* 274 F.2d 429 (9th Cir. 1959); United States *ex. rel*. Pasela v. Fenno, 167 F.2d 593 (2d Cir. 1948); Closson v. United States, 7 App. D.C. 460 (D.C. Cir.1896); Runkle v. United States, 19 Ct. Cl. 396 (Ct. Cl.1884).

[32] *See, e.g.*, Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989); United States v. Overton, 24 M.J. 309 (C.M.A. 1987); United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[33] The Supreme Court has never squarely addressed the issue; however, they have made reference to it tangentially when addressing whether a retiree was entitled to a pay increase granted to the Army as a whole. *See* United States v. Tyler, 105 U.S. 244, 246 (1881) ("We are of the opinion that retired officers are in the military service of the government . . . ."). The court was not asked about the constitutionality of subjecting retirees to courts-martial but instead whether retirees warranted the pay increase granted to the Army when a parallel section declared them to be included within the Army by law. *Id.* This opinion caused Colonel William Winthrop to conclude the matter settled, however, stating that "retired officers are a part of the [A]rmy and so triable by court-martial [is] a fact indeed never admitted of question." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 n.27 (2d ed., Gov't Printing Off. 1920) (1895).

[34] *Begani*, 81 M.J. 273.

[35] *Id.* at 278.

retainer pay and the ability to be recalled provide sufficient reason to accept Congress's determination that retirees fall within the land and naval forces and must be subject to the UCMJ.[36] The court provided "broad deference" to Congress in reaching this conclusion.[37] Given this deference afforded to Congress, the court seemingly placed the burden upon the appellant to establish that he fell outside of the land and naval forces and that jurisdiction was improper.[38] Within his concurring opinion, however, Judge Gregory E. Maggs, joined by two other judges, acknowledged the possibility that their precedent may be overturned if it "is inconsistent with the original meaning of the Constitution."[39]

Less than one year prior to the *Begani* opinion, a district court within the D.C. circuit became the first Article III court to deny the constitutionality of exerting the UCMJ upon retirees.[40] The D.C. Court summarily rejected similar arguments, as would be presented to CAAF, regarding the receipt of retainer pay and the ability to be recalled to active duty place retirees within the land and naval forces.[41] The court found that, "neither factor . . . suffices to demonstrate why military retirees *plainly* fall within the 'land and naval forces' or why subjecting them to court-martial jurisdiction is *necessary* to maintain good order and discipline."[42] In reaching this conclusion, the court offered little deference to Congress. Instead, the court put the burden upon the Government to establish that court-martial jurisdiction was both constitutionally permissible and necessary.[43]

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[36] *Id.* at 278–79. The reference to pay is to the fact that retirees are paid a portion of the amount that they were paid on active duty based upon their time in service under 10 U.S.C. § 12731. The reference to recall is to the fact that retirees are subject to recall to active duty at any time by order of their Service Secretary under 10 U.S.C. § 688.

[37] *Begani*, 81 M.J. at 279 (citing Solorio v. United States, 483 U.S. 435, 447 (1987)).

[38] *See id.* at 277–80. The reason that the court likely placed the onus upon the appellant is due to the fact that he was asking them to overturn established precedent. The Court of Appeals for the Armed Forces, and its predecessor, the Court of Military Appeals, have both held that retirees are properly subject to court-martial jurisdiction on multiple occasions. *See, e.g.*, United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018); Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989); United States v. Overton, 24 M.J. 309 (C.M.A. 1987); United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[39] *Begani*, 81 M.J. at 282 (Maggs, G., concurring).

[40] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 332 (D.D.C. 2020).

[41] *Id.* at 329.

[42] *Id.* (emphasis in original).

[43] *Id.* at 327–33 (relying upon United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955)).

On appeal, the D.C. Circuit Court reversed the district court's holding. Within their opinion, however, the D.C Circuit Court flatly rejected the notion that any deference was owed to Congress in determining whom may be subjected to court-martial jurisdiction.[44] The court reasoned that the sole question regarding whether court-martial jurisdiction is permissible is whether the accused falls within the land and naval forces under the Constitution.[45] Using this framework, the court held in a 2-1 opinion that retirees do fall within the land and naval forces because they have "a formal relationship with the [A]rmed [F]orces that includes a duty to obey military orders."[46] While the dissent concurred with much of the majority's reasoning, it disagreed as to the result.[47] The dissent argued that a recall order is unlike any other order and that such a broad expansion of court-martial jurisdiction is unconstitutional.[48]

The difference in the two opinions' approaches and conclusions is striking. The difference in the amount of deference provided to Congress's determination to extend court-martial jurisdiction to retirees is particularly noteworthy. The CAAF opinion provided Congress broad deference, while the Article III courts' opinions provided a much narrower view. The majority at the D.C. Circuit refused to provide Congress with deference over who falls within the land and naval forces; however, it did provide that Congress can decide whom within that class may be subject to court-martial. Alternatively, both the district court majority and the circuit court dissent provided almost no deference to Congress; instead, they required the Government to show the necessity of the extension of court-martial jurisdiction over retirees. Based upon the level of deference given, diametrically opposing positions developed regarding whether retirees properly fall within the land and naval forces under the Constitution.

III. Supreme Court Precedent: Limited and Narrow as Necessary for Discipline

The deference that CAAF afforded to Congress is inconsistent with the Supreme Court's prior practice and precedent. The Court has

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[44] *Larrabee v. Del Toro*, 45 F.4th 81, 87–89 (D.C. Cir. 2022).
[45] *Id.* at 89.
[46] *Id.* at 91.
[47] *Id.* at 101–04 (Tatel, J., concurring in part and dissenting in part).
[48] *Id.*

previously struck down congressional action as unconstitutional that subjected military law upon: civilian employees of overseas military forces;[49] civilian dependents of military personnel;[50] and discharged Service members.[51] Within all of these decisions, the Court did not provide Congress deference in their determination that these populations fell within Congress's authority over the land and naval forces but instead looked to the scope of authority granted in the Constitution.[52]

The Supreme Court has found that the Constitution outlines that civilian courts—rather than military courts—are the default venue to try individuals charged with crimes against the United States.[53] These courts, along with their procedures, are outlined under Article III of the Constitution.[54] Within these civilian courts, there is a strong emphasis placed upon the "value and integrity of the individual."[55] This emphasis on the individual resulted in the creation of robust due process protections including, among other things, the right to a grand jury indictment and a unanimous verdict by a jury of their peers in front of a wholly independent judge.[56]

The Framers, however, recognized that robust due process rights likely would impede the discipline and duty required to maintain a strong military force. Accordingly, the Framers provided Congress a separate authority to "make [r]ules for the Government and [r]egulation of the land and naval [f]orces" as well as the power to "make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers."[57] These provisions provide a means to enforce good order and discipline through the use of military courts-martial and the creation of

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[49] McElroy v. United States, 361 U.S. 281, 286 (1960).
[50] Kinsella v. United States, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion).
[51] United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 23 (1955).
[52] *See id.* at 20–23; *Reid*, 354 U.S. at 34–35.
[53] *Reid*, 354 U.S. at 21 ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States."); *see also* U.S. CONST. art. III, § 2 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." (original style retained)).
[54] *See* U.S. CONST. art. III.
[55] *Reid*, 354 U.S. at 39.
[56] *Id.* at 37.
[57] U.S. CONST. art. I, § 8, cls. 14, 18.

military law.[58] The Court has recognized that, "the rights of men in the Armed Forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[59]

The Supreme Court has appreciated that "the task of balancing the rights of servicemen against the needs of the military" rests with Congress.[60] In pursuit of maintaining discipline and duty, Congress has determined that military courts-martial may greatly emphasize efficiency and place "less emphasis . . . on protecting the rights of the individual than in civilian society and civilian courts."[61] Consequently, individuals who are tried by courts-martial are not afforded many of the fundamental constitutional protections that civilian courts provide.[62] Furthermore, military law criminalizes a greater amount of individual behavior—including behavior that is constitutionally protected within civil society.[63] The Court has historically granted broad discretion to Congress's determinations to limit the constitutional rights afforded within court-martial procedure and the acts that are criminalized under military law.[64] It is this application of discretion that CAAF mistakenly relied upon in upholding the imposition of military law upon retired personnel.[65]

In sharp contrast to the Supreme Court's extreme deference to Congress's determinations of what rights to provide under military law

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[58] *See* U.S. CONST. art. I, § 8, cls. 14, 18.
[59] Burns v. Wilson, 346 U.S. 137, 140 (1953); *see also* Parker v. Levy, 417 U.S. 733, 744 (1974).
[60] Solorio v. United States, 483 U.S. 435, 447 (1987).
[61] *Reid*, 354 U.S. at 21*; see also* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22 (1955) ("Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hands means of compelling obedience and order.").
[62] *Reid*, 354 U.S. at 19 ("[Article I, § 8, cl. 14] creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights.").
[63] *See Parker*, 417 U.S. at 749 ("While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the [UCMJ] essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.").
[64] *See Solorio*, 483 U.S. at 447–48 (stating that "judicial deference . . . is at its apogee" in contexts implicating the constitutional rights of Service members and citing to numerous examples).
[65] United States v. Begani, 81 M.J. 273, 279-80 (C.A.A.F. 2021) (citing *Solorio*, 483 U.S. at 447).

and procedure, the Court has provided no deference to Congress's determinations regarding who falls subject to it.[66] In assessing these determinations, the Court has utilized an exacting standard to ensure that court-martial jurisdiction is imposed upon no more of the population than necessary. They have instructed that, "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed*.'"[67]

The Supreme Court's limitation on the constitutional power to authorize trial by court-martial upon an individual mirrors the Court's requirement to other areas that the Government impose the "least restrictive means" toward the end proposed.[68] This requirement places "a heavy burden on the [s]tate," requiring it to show that the end proposed cannot be met by any narrower means.[69] This is the harshest level of scrutiny the Court implements and is even more exacting than the "strict scrutiny test."[70] Consequently, the burden is upon the Government to show that the imposition of military law is necessary to meet the "demands of discipline and duty."[71] The Supreme Court's language makes clear that little deference should be afforded to Congress in their determinations of who should be subject to military law to meet this end.

It is unsurprising that the Court would require such exacting scrutiny over the scope of the population exposed to court-martial jurisdiction given the multitude of fundamental constitutional rights that are burdened

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[66] *See, e.g.*, *Toth*, 350 U.S. 20–23; Kinsella v. United States, 361 U.S. 234, 242-47 (1960).
[67] *Toth*, 350 U.S. at 22 (emphasis in original).
[68] *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").
[69] Board of Trustees v. Fox, 492 U.S. 469, 476–77 (1989); *see also Shelton*, 364 U.S. at 488.
[70] *See Fox*, 492 U.S. at 476–77 (explaining that requiring the "least restrictive means" imposes a higher burden upon the State than the "strict scrutiny test" and comparing the two levels of review).
[71] *See Toth*, 350 U.S. at 22 (calling for court-martial jurisdiction to be limited to "*the least possible power adequate to the end proposed*") (emphasis in original); *see also* Burns v. Wilson, 346 U.S. 137, 140 (1953) (recognizing that the purpose behind military law is "to meet certain overriding demands of discipline and duty").

by its imposition.[72] The Court has recognized that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts."[73] Accordingly, it follows that Congress should have to justify its use of the "very limited and extraordinary jurisdiction derived from the cryptic language in [Article I, Section 8, that] at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."[74]

Thus, the Supreme Court has determined that it is the role of the judiciary to ensure that the legislature does not exceed its authority regarding who may be subject to military law.[75] In making this determination, the Court has repeatedly looked to the Framers' original intent and understanding.[76] Their review of this intent has directed their analysis to center solely on the status of the accused and restricted Congress's authority "to persons who are actually members or part of the Armed Forces."[77] Accordingly, whether an individual is actually a member of the land and naval forces as articulated within the Constitution is the pivotal question in determining whether they may be subject to military law.

IV. Understanding the Framers' Intent Surrounding the Land and Naval Forces

When determining the limits to the imposition of military law, the Court has focused its attention upon trying to understand the Framers' original intent and understanding.[78] This is typical of the Court when

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[72] *See supra* text accompanying notes 12-15 (unlike their civilian counterparts, military defendants are not entitled to: a grand jury indictment; a unanimous verdict in all felony cases; a randomly selected jury of peers from across the community; or a wholly independent judiciary).
[73] Reid v. Covert, 354 U.S. 1, 21 (1957).
[74] *Id.*
[75] *See Toth,* 350 U.S. at 21-22.
[76] *See Reid*, 354 U.S. at 23–31 (outlining the Founders' distrust of military law in shaping the authority granted to Congress to impose it); Kinsella v. United States, 361 U.S. 234, 248-49 (1960) (looking to the Articles of War prior to and after the Constitutional Convention in determining whether jurisdiction was proper).
[77] *Toth*, 350 U.S. at 15; *see also* Solorio v. United States, 483 U.S. 435, 439-40 (1987).
[78] *See, e.g.*, *Kinsella*, 361 U.S. 234; *Reid*, 354 U.S. 1; *Ex parte Milligan*, 4 Wall. 2 (1866); *Toth*, 350 U.S. 11.

interpreting the Constitution and its meaning. The Supreme Court has repeatedly looked to the Framers' original intent and understanding to determine the proper application of constitutional provisions.[79] Justice Elena Kagan famously said during her confirmation hearings that "we're all originalists."[80] Simply put, the key to understanding constitutional provisions—and how the Supreme Court will interpret them—is to understand the original meaning and intent behind them. Thus, the key to understanding whether retirees fall within the authority granted to Congress over the land and naval forces is to determine the original meaning of those terms.[81]

Both history and experience taught the Framers to distrust the military in general and the expansion of the jurisdiction of military law in particular.[82] The Founders were keenly aware of the historical threat that militaries posed to the liberties of the populace.[83] Given this, the military was viewed as a necessary evil, required to protect the citizenry, but one that should be limited in its size and influence.[84]

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[79] *See e.g.* District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008) ("Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence."); Alden v. Maine, 527 U.S. 706, 734 (1999) ("By the same token, the contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law.").

[80] *Clip of Kagan Confirmation Hearing, Day 2, Part 1*, C-SPAN, https://www.c-span.org/video/?c4910015/user-clip-originalists (last visited Feb. 5, 2024). Originalism is defined as, "a legal philosophy that the words in documents and especially the U.S. Constitution should be interpreted as they were understood at the time they were written." *Originalism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/originalism (last visited Apr. 5, 2023).

[81] Judge Maggs of CAAF recognized as such, saying "[a] party urging this court to overturn its precedent on a constitutional issue at a minimum should show that the precedent is inconsistent with the original meaning of the Constitution." United States v. Begani, 81 M.J. 273, 282 (C.A.A.F. 2021) (Maggs, G., concurring).

[82] *See* Reid v. Covert, 354 U.S. 1, 24–31 (1957).

[83] THE FEDERALIST NO. 41 (James Madison) ("[T]he liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of military establishments.").

[84] *See* THE FEDERALIST NO. 8 (Alexander Hamilton) ("[The citizens] view [the army] with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights."); *see also* THE FEDERALIST NO. 41 (James Madison) ("A standing force, therefore, is dangerous, at the same time that

A. British Beginnings: Military Jurisdiction Applied Only to Those in Actual Service

While the Framers were influenced by the study of many historical civilizations and governments in their drafting of the Constitution, British law and history imposed the greatest influence upon them.[85] The Supreme Court has made a repeated practice of looking to British practice and law at the time of the founding as a means to decipher the original meaning of the Constitution.[86] Indeed, the Court has previously recognized that the law and practice surrounding our military jurisdiction directly traces its lineage to the British system.[87] Thus, the importance of understanding British law and practice surrounding military law at the time of the ratification of the Constitution cannot be understated.

As former Englishmen, British custom and law served as the bedrock upon which the legal,[88] military,[89] and governmental[90] entities of the

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it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution.").

[85] *See, e.g.*, THE FEDERALIST NO. 26 (Alexander Hamilton) (recognizing that "national sentiment . . . must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these [s]tates have in general sprung").

[86] *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019) (excessive fines); District of Columbia v. Heller, 554 U.S. 570, 582, 592–94 (2008) (militia and right to bear arms); Alden v. Maine, 527 U.S. 706, 715-16 (1999) (sovereign immunity).

[87] *See, e.g.*, Loving v. United States, 517 U.S. 748, 759–67 (1996) (outlining the direct effect of the British practice surrounding military jurisdiction upon our own and noting that "[w]e have undertaken before, in resolving other issues, the difficult task of interpreting Clause 14 [of Article I, § 8] by drawing upon English constitutional history") (citations omitted); Weiss v. United States, 510 U.S. 163, 178 (1994) (highlighting that our military justice system was modeled after the early English military tribunals); Parker v. Levy, 417 U.S. 733, 745 (1974) (recognizing the "British antecedents of our military law").

[88] *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 797–805 (1951) (explaining that both before and after the Revolution, British criminal and common law formed the basis for the law and jurisprudence of the United States).

[89] The American Articles of War of 1776 are nearly a carbon copy of the English Articles of War of 1774 on which they were based. Jan Horbaly, Court-Martial Jurisdiction 34 (June 10, 1986) (J.S.D. dissertation, Yale Law School) (on file with the Library of Congress).

[90] Much of the governmental structure and ideals within the U.S. Constitution are shared with the British government and laws of the time. For example, many of those rights outlined within the Bill of Rights in the U.S. Constitution were first laid out in the English

United States were built. The Founders relied upon the British experience, in the not-so-distant past, as a lesson in the proper construction of these institutions to protect the individual liberties of the populace. Englishmen were proud of the rights that had been granted to them by the Magna Carta in 1215 and jealously guarded them as much as possible.[91] Among these rights were the right to due process and to be tried by a jury of one's peers based upon the law of the land.[92] The Framers would adopt many of these same protections in the Constitution.

1. British Historical Background: Limited Imposition of Military Law

The founding generation appreciated the fact that throughout their long history, the British had repeatedly experienced a denial of liberty through standing armies and imposition of military law upon them by the crown.[93] An example of this was seen in 1628 when King Charles I subjected both soldiers and citizens alike to military law.[94] In reaction, both Houses of Parliament joined together and voiced in the Petition of Right that such actions violated the long standing rights of due process and to a jury of their peers that the Magna Carta afforded them in 1215.[95] Later, Parliament would also declare the rights of their citizens within the English Bill of Rights of 1689.[96] These various declarations of rights include many of the rights incorporated by the Framers in the Constitution's Bill of Rights.

Based upon those rights that they enjoyed, the Petition of Right declared it was illegal for the civilian populace to ever be subjected to

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Bill of Rights from 1689. *Compare* U.S. CONST. amends. I–VIII, *with* Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.), https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction.

[91] *See* McDonald v. City of Chicago, 561 U.S. 742, 815–19 (2010).

[92] Magna Carta, 9 Hen. 3, cl. 39 (1215) (Eng.) ("No free man shall be seized or imprisoned, or stripped of his rights or possession, or outlawed or exiled . . . , except by the lawful judgment of his equals or by the law of the land.").

[93] *See, e.g.*, THE FEDERALIST NO. 26 (Alexander Hamilton) (outlining the British history surrounding the negative effect standing armies have on the liberty of the people).

[94] 1 CHARLES M. CLODE, THE MILITARY FORCES OF THE CROWN; THEIR ADMINISTRATION AND GOVERNMENT 19 (1869) (cited with approval in Reid v. Covert, 354 U.S. 1, 6 (1957)).

[95] Petition of Right 1627, 3 Car., c. 1, https://www.legislation.gov.uk/aep/Cha1/3/1 (last visited Apr. 10, 2023); *see also* Magna Carta, 9 Hen. 3, cl. 39 (1215) (Eng.).

[96] Bill of Rights 1688, 1 W. & M., sess. 1 (Eng.).

military law.[97] Parliament further declared the imposition of martial law during peacetime against any person to be contrary to the laws and statutes of Britain.[98] Thus, in an effort to protect liberty to the greatest extent, the Petition of Right prohibited the imposition of military law on both the civilian and military populations during times of peace.

Parliament soon discovered that some allowance for military law during times of peace was necessary should a standing army be permitted to exist.[99] Accordingly, in 1689, Parliament began the annual practice of passing the Mutiny Act, which not only served as a "Parliamentary license to the Crown to maintain a body of troops: it also enable[d] the Crown to try offenders against military discipline by court martial."[100] In addition to those crimes made punishable by the act itself, it empowered the Crown to make articles or rules governing the discipline of the forces. This was historically conducted through the Articles of War.[101]

Within the original Mutiny Act, Parliament recognized that any extension of military law infringed upon both civilian court jurisdiction and the rights of the people to due process and a trial by a jury of their peers.[102] They emphasized the importance of these historical rights the civilian courts afforded and that the use of military law was merely out of

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[97] CLODE, *supra* note 94, at 19.
[98] *Id.*
[99] *See* I JOHN MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL 23 (2d ed. 1805). In 1688, after the overthrow of King James II by King William III, a mutiny of soldiers loyal to James II broke out. *See* Loving v. United States, 517 U.S. 748, 763 (1996). As this was a time of peace, military law could not be imposed. *Id.* at 762. Under common law, mutiny was not a criminal offense so there was no means to hold the soldiers accountable. *See id.* at 23.
[100] HARRIS PRENDERGAST, THE LAW RELATING TO OFFICERS IN THE ARMY 3 (Parker, Funivall, and Parker, Whitehall rev. ed. 1855). In addition to providing the means for military discipline, the Mutiny Act also authorized the Crown to raise and maintain a certain number of troops for a specified period of time. This fulfilled the requirement of Parliamentary consent for the Crown to maintain a standing army under the British Bill of Rights of 1688. However, it was required to be renewed annually. *Id.* This provided Parliament with both the power over authorization of the existence of a military altogether and the power of the purse to fund them. *See id.* The Crown, however, maintained their role as the paramount military authority. *Id.*
[101] *Id.*
[102] An Act for Punishing Officers or Soldiers Who Shall Mutiny or Desert Their Majestyes Service 1688, 1 W. & M. c. 5 (Eng.), https://www.british-history.ac.uk/statutesrealm/vol6/pp55-56#h3-0008 [hereinafter "Mutiny Act of 1688"].

necessity.[103] Parliament, however, admitted that "a more exemplary and speedy punishment [than] the usual forms of law will allow" was necessary for retaining forces and their discipline during their duty.[104] Consistent with this principle, Sir William Blackstone later observed that military law is "in truth and reality no law, but something indulged, rather than allowed as law: the necessity of order and discipline in an army is the only thing which can give it countenance . . . ."[105] These principles—that military jurisdiction is an exception to the normal means of justice and is used out of necessity for discipline and duty—are the same as those outlined by the Supreme Court when determining the limits of Congress's authority to impose court-martial jurisdiction upon individuals under the Constitution.[106]

2. Military Law Imposed on Only Those in Actual Service

Consistent with the principles outlined in the original Mutiny Act, Parliament jealously guarded the rights of their citizens to the greatest extent possible and prudently limited the reach of military jurisdiction only to those necessary.[107] For nearly one hundred years, leading up to the drafting of the Constitution in 1787, the British Parliament carefully perfected the proper scope of military law along this principle.[108]

Thus, from 1756 until March of 1786, the Mutiny Act specified that it only applied to those officers and soldiers who were "mustered or in

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[103] *Id.*
[104] *Id.*
[105] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (1765). The Supreme Court has described Sir William Blackstone's works as "the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999). The Supreme Court has approvingly cited this passage in particular. *See* Loving v. United States, 517 U.S. 748, 765 (1996).
[106] *See* Reid v. Covert, 354 U.S. 1, 21 (1957) ("Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial."); United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955) (calling for court-martial jurisdiction to be limited to "*the least possible power adequate to the end proposed*") (emphasis in original); *see also* Burns v. Wilson, 346 U.S. 137, 140 (1953) (recognizing that the purpose behind military law is "to meet certain overriding demands of discipline and duty").
[107] *See Reid*, 354 U.S. at 24–27; *see also* Solorio v. United States, 483 U.S. 435, 442–46 (1987).
[108] *See Solorio*, 483 U.S. at 442–46; *see also Loving*, 517 U.S. at 760–66.

pay."[109] Under these terms, "the militia were under military law when embodied in a militia, but were freed from it, after they returned into the mass of the people, and the character of the Soldier was sunk in that of the citizen."[110] The justification for this exercise of military jurisdiction was that it was necessary to keep members of the militia in order when they were called into service.[111] Further, the term "in pay" had legal significance and meant those who were employed and in full pay.[112] Therefore, the Mutiny Act only applied to two segments of the population from 1756 until the founding of the United States: those employed in full pay and the militia when called into actual service. Indeed, in 1786, General John Burgoyne[113] synthesized the Englishman's view of military law to that point in time:

> The whole system of martial law, as it infringed upon the natural and constitutional rights of the subject, [is] only defensible upon the strict ground of necessity and ought therefore, in times of peace more especially, to be narrowed if possible, instead of being extended. That the general principle, as recognized both in theory and practice of our constitution, [is] that the military law should be confined to actual military service alone.[114]

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[109] MCARTHUR, *supra* note 99, at 196–97. In 1786, Parliament amended the Mutiny Act to apply to officers who were "commissioned or in pay." *Id.* at 196–201. This change however did not make half-pay officers subject to military law unless they held brevet rank. PRENDERGAST, *supra* note 100, at 26.

[110] MCARTHUR, *supra* note 99, at 198.

[111] BLACKSTONE, *supra* note 105, at 413.

[112] *See* MCARTHUR, *supra* note 99, at 187 (explaining that the attempted inclusion of half-pay officers in 1749 rendered them "subject to martial law, in the same manner as if they were on whole pay").

[113] General John Burgoyne served in the British military from 1744 until his death in 1792. He attained the rank of lieutenant general in 1777 and is infamous for surrendering his forces at Saratoga during the American Revolution. He also served within the House of Commons in Parliament from 1761–1792. John Brooke, *BURGOYNE, John (1723–92)*, HIST. OF PARLIAMENT, https://www.historyofparliamentonline.org/volume/1754-1790/member/burgoyne-john-1723-92 (last visited Jan. 5, 2024).

[114] MCARTHUR, *supra* note 99, at 198.

3. Treatment of Individuals on "Half-Pay" Including "Half-Pay" Retirees

The fact that the term "in pay" under the Mutiny Act applied only to those employed within the military on full pay is best exemplified by the British treatment of half-pay officers.[115] While in a half-pay status, British law treated retired soldiers much the same as those who were within the militia.[116] Half-pay retirees were exempt from being subject to military law while in a retired status consistent with British practice of imposing military law only to those engaged in actual active service.[117] Immediately upon receiving an order to return to active duty, however, retirees were once again subject to military jurisdiction.[118]

While there are instances of half-pay reduction as early as 1640, the half-pay establishment within the British military did not truly take shape until 169. [119] Individuals within the half-pay establishment were individuals who were "reduced, wounded, or infirm."[120] The half-pay establishment took two forms. First, half-pay was provided to individuals whose units had disbanded, leaving them as supernumerary.[121] Second, half-pay was provided to "such officers who were maimed or lost their limbs in the late wars, or to such others as, by reason of their long service or otherwise . . . ."[122] All individuals who received half-pay were subject to involuntary recall into active service.[123] Moreover, half-pay officers maintained their rank while they occupied a retired status.[124]

Given these attributes, the British military retirement system at the time of the drafting of the Constitution was a near replica of the current

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[115] *See infra* pp. 21–23.
[116] MCARTHUR, *supra* note 99, at 198.
[117] *Id.*
[118] PRENDERGAST, *supra* note 100, at 76–77 ("when the Commander-in-Chief thinks proper to appoint an officer on the half-pay list to a regiment, or other military employment, accompanied by full-pay, he becomes subject at once to the provision of the Mutiny Act").
[119] CLODE, *supra* note 94, at 26, 369.
[120] *Id.* at 368–69.
[121] *Id.* at 368–71.
[122] *Id.* at 375–76.
[123] PRENDERGAST, *supra* note 100, at 76–77; *see also* CLODE, *supra* note 94, at 372–73 (explaining an instance where half-pay retirees were called back into active service in 1715).
[124] PRENDERGAST, *supra* note 100, at 50; *see also* MCARTHUR, *supra* note 99, at 196.

retirement system in the United States.[125] Indeed, the British system included all of the features—reduced pay and ability to be recalled—that have been used to argue for continued imposition of military law upon retirees.[126] Consequently, the British treatment of retired personnel under military law is instructive towards gleaning whether the Founders would have understood retirees within the scope of the congressional authority to impose military jurisdiction outlined in the "make rules" clause.

a. Individuals on Half-Pay Not Subject to Military Law

At the time of the drafting of the Constitution, the fact that those on half-pay were exempt from military law was settled under British law.[127] For a short period from 1749–1751, Parliament attempted to impose military jurisdiction upon officers in half-pay by specifically revising the Mutiny Act to apply to those "on half-pay," even though the judiciary was evenly split on whether such an extension was even legally permissible.[128] This clause extending jurisdiction to those on half-pay was provided for in addition to those "mustered or in pay."[129] Given the specific articulation that the Mutiny Act applied to both those in pay and those on half-pay, it is clear that half-pay individuals were not included within the term "in pay." Indeed, the term "in pay" has been treated synonymously with "whole pay."[130]

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[125] *Compare supra* notes 122–26 and accompanying text, *with* 10 U.S.C. § 1201 (providing for medical retirement within the Armed Forces); 10 U.S.C. § 12731 (providing for retired pay after twenty years of service); 10 U.S.C. § 688 (authorizing the recall of retired members of the Armed Forces); and 10 U.S.C. § 772(c) (authorizing retirees to bear the title and wear the uniform of his retired grade).

[126] *See e.g.* United States v. Begani, 81 M.J. 273, 278-80 (C.A.A.F. 2021) (reasoning that continued imposition of military law is justified based upon retirees receipt of pay and ability to be recalled); United States v. Overton, 24 M.J. 309, 311 (C.M.A. 1987).

[127] *See* MCARTHUR, *supra* note 99, at 195–96 (detailing that in 1787 the Court of Exchequer Chamber unanimously held that half-pay retirees were not subject to military law).

[128] The judiciary was split when consulted in 1749 about whether half-pay retirees could in-fact be included within the Mutiny Act and subject to military law. MCARTHUR, *supra* note 99, at 191. Nonetheless, for the first time, in 1749 Parliament included a provision that applied the Mutiny Act to both those "in pay" and those in "half pay." *Id.*

[129] *Id.*

[130] *See id.* at 187 (explaining that the attempted inclusion of half-pay officers rendered them "subject to martial law, in the same manner as if they were on whole pay").

In 1751, however, both Houses of Parliament affirmatively struck down the clause extending the Mutiny Act to those on half-pay.[131] Since that time, Parliament has not attempted to extend military law against those within a half-pay status.[132] Thus, from 1751 until March of 1786, the Mutiny Act specified that it only applied to those "mustered or in pay."[133]

This application of military law—that it only extended to those in full pay and the militia when called into actual service—was, therefore, settled practice for more than thirty years prior to the gathering of the Constitutional Convention.[134] This period included the entirety of the colonial experience with the British military during the French and Indian War.[135] During that campaign, thousands of colonists served alongside British regular units or under the command of British regular officers.[136] This included officers of the "American Regiment" who were activated from a half-pay retired status and who were clearly familiar with the British practice surrounding military law, including its applications to

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[131] *Id.* at 197–98. When explaining the general principle of the British to apply military only while in actual service, General John Burgoyne used Parliament striking half-pay officers from its inclusion as evidence to his point that military law is confined to actual service. He stated, "That officers on half-pay, though at first included in the mutiny act, had been exempted from its operation, by the deliberate voice of both houses of Parliament: circumstances which clearly proved that the prevalent idea, in all ages, had been to confine military law to actual military service." *Id.*

[132] *Id.* Indeed, the practice of retirees being outside the jurisdiction of military law while in a retired status has continued to the present time. *See* Armed Forces Act 2006, c. 52, § 367 (Eng.) (stating that service law is applicable to "member[s] of the regular forces" and "members of the reserve forces" in certain circumstances that do not list retired personnel). Section 368 of that same act defines "members of the regular forces" as those on the active list. *Id.* § 368.

[133] MCARTHUR, *supra* note 99, at 196–97. In 1786, Parliament amended the Mutiny Act to apply to officers who were "commissioned or in pay." *Id.* at 196–201. This change, however, did not make half-pay officers subject to military law unless they held brevet rank. PRENDERGAST, *supra* note 100, at 26.

[134] *See* MCARTHUR, *supra* note 99, at 196–97 (detailing that the last extension of military law to those on half-pay in Britain occurred in 1751); *see also* Moore v. Harper, 143 S.Ct. 2065, 2080 (2023) (stating that the Constitutional Convention convened in the summer of 1787).

[135] The French and Indian War lasted from 1754–1763. *French and Indian War/Seven Year's War, 1754–63*, DEP'T OF STATE: OFF. OF HISTORIAN, [hereinafter *French and Indian War*], https://history.state.gov/milestones/1750-1775/french-indian-war (last visited Jan. 5, 2024).

[136] Matthew C. Ward, *Mobilization, French and Indian War*, ENCYCLOPEDIA.COM (Mar. 9, 2022), https://www.encyclopedia.com/defense/energy-government-and-defense-magazines/mobilization-french-and-indian-war.

retirees.[137] Notably, among these colonists who served alongside the British Army were Benjamin Franklin[138] and George Washington,[139] both of whom were extremely influential during the Constitutional Convention.[140] Thus, the founding generation would have been keenly aware of the limitations on military law that the British exercised at the time.[141]

b. The Case of Major General Ross

Further evidence that military law did not extend outside of those in whole pay or the militia when called into actual service was seen in April of 1785.[142] At that point, the "twelve judges of England"—the Court of Exchequer Chamber[143]—unanimously held that half-pay retirees were not

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[137] *See To George Washington from William Fairfax, 5 September 1754*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/02-01-02-0098 (last visited Feb. 6, 2024) ("We have some intimation that the King has orders all the Officers of the late American Regiment now on half pay to repair thither & do duty").

[138] Brooke C. Stoddard, *When Ben Franklin Met the Battlefield*, SMITHSONIAN MAG. (OCT. 7, 2010), https://www.smithsonianmag.com/history/when-ben-franklin-met-the-battlefield-65116256.

[139] *French and Indian War, supra* note 135.

[140] Furthermore, numerous high-ranking officers within the Continental Army were former British officers who had retired on half-pay status and were familiar with the British practice of military law and how it applied to retired personnel. This included individuals as Major General Charles Lee and Brigadier General Horatio Gates. *See From George Washington to the Officers of Five Virginia Independent Companies, 20 June 1775*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/03-01-02-0008 (last visited Feb. 5, 2024).

[141] In fact, in 1756, Pennsylvania adopted their own Militia Act, which Benjamin Franklin drafted; it directly incorporated the British Mutiny Act and Articles of War upon the militia of Pennsylvania and applied to the same personnel as the British Mutiny Act: those "commissioned and in pay" and those "enlisted and in pay." *Mutiny Act, [15 April 1756]*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Franklin/01-06-02-0189 (last visited Apr. 5, 2024).

[142] *See* MCARTHUR, *supra* note 99, at 195–96.

[143] The "twelve judges of England" refers to the Exchequer Chamber, which has been described as "a super-en-banc court including all of England's judicial officers." *Hart v. Massanari*, 266 F.3d 1155, 1165 n.13 (9th Cir. 2001). "Decisions reached by the Exchequer Chamber were considered binding precedent" and settled matters of law for all of England. *Id.*

subject to courts-martial.[144] The question of military jurisdiction over half-pay retirees made its way to the Exchequer Chamber when a court-martial was appointed to try retired Major General Charles Ross for submitting a post-retirement letter to a newspaper for publication that attacked the character of his former commander, Lieutenant General Robert Boyd.[145]

The case was adjourned for the Exchequer Chamber to answer the preliminary question of whether, as an officer retired on half-pay, General Ross was subject to military law for his actions while in a retired status.[146] The judges gave a unanimous opinion that General Ross was not, as a half-pay retiree, subject to military law.[147] "They stated their answer on two points, and in both declared it as their opinion, that neither his warrant as a general officer, nor his annuity of half pay, rendered him obnoxious to military trial."[148] In accord, General Ross was released and the court-martial was disbanded.[149]

The case and outcome of Major General Ross's court-martial was well-known immediately preceding the drafting and ratification of the Constitution in 1787 and 1788 respectively.[150] It was widely publicized[151] (news of it traveled as far as India by 1786[152]), referenced within parliamentary debates in both 1786 and 1787,[153] and included in numerous

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[144] MCARTHUR, *supra* note 99, at 195–96; *see also Monthly Chronology*, LONDON MAG., May 1785, at 386. Unfortunately, the official record of this case was unable to be located by either the Judge Advocate General of The British Armed Forces or the United Kingdom National Archives. Email from His Honor Judge Alan Large, Judge Advocate General, The British Armed Forces, to Eugene Fidell (Mar. 30, 2022) (on file with author). It is believed that the record may have been destroyed during the bombing of the Office of the Judge Advocate General during World War II. *Id.* The author deeply appreciates their assistance on this matter.

[145] *General Ross's Court Martial*, CALCUTTA GAZETTE, Aug. 3, 1786, at 5.

[146] *Monthly Chronology*, *supra* note 144, at 386; *see also* MCARTHUR, *supra* note 99, at 196.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See infra* notes 153–56.

[151] *See, e.g.*, *Monthly Chronology*, *supra* note 144, at 386; *Court Martial on Major General Ross*, DERBY MERCURY, Mar. 3, 1785, at 2; *General Ross's Trial*, CHELMSFORD CHRON., Apr. 29, 1785 at 3; *Chronicle, in* ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEARS 1784 AND 1785, at 230–31 (J. Dodsley ed., 1786).

[152] *See General Ross's Court Martial*, *supra* note 145, at 5.

[153] *See, e.g.*, 20 THE PARLIAMENTARY REGISTER 18, 20 (1786); 22 THE PARLIAMENTARY REGISTER 126, 129, 130 (1787).

early nineteenth-century treatises.[154] This is unsurprising, as it involved a public disagreement between two flag officers that resulted in the court-martial of a major general and the rare occurrence of an Exchequer Chamber opinion disposed of the case.[155] News of the case was so widespread, and the result so clear from the state of the law leading up to it, that Lord Loughborough, a judge who sat on the court, stated that he "had heard from an infinite number of officers, that they should have been excessively surprised had he delivered any other opinion."[156] Given this notoriety, the case and its holding, that subjecting retirees to military law while in a retired status was unconstitutional, could hardly have escaped the notice of the members of the Constitutional Convention who met two years later in 1787.[157]

Thus, more than 200 years ago and prior to the drafting of the Constitution, the British court settled the law that subjecting individuals in a retired status to military law was contrary to their Constitution—the foundational basis for our own.[158] In so doing, they explicitly rejected the same arguments put forth today to support military jurisdiction over retirees while they occupy a retired status, and they confirmed that military jurisdiction did not extend to retired personnel. This additional evidence made abundantly clear that the only individuals subject to military law were those in actual service and limited to those employed in full pay or in the militia while in actual service.

B. The Framers' Intent: Adoption of the British System

Application of the British views of military law and practice is only relevant to define the powers conferred to Congress if there is evidence to

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[154] *See, e.g.*, MCARTHUR, *supra* note 99, at 196 (published in 1805); JOHN DELAFONS, A TREATISE ON NAVAL COURTS MARTIAL 62–63 (1805).

[155] *See* Hart v. Massanari, 266 F.3d 1155, 1165 n.13 (9th Cir. 2001) (noting that the Exchequer Chamber only met on "particularly vexing legal issue[s]" and issued "few decisions").

[156] 22 THE PARLIAMENTARY REGISTER 130 (1787).

[157] *Id.* Even if the case did somehow escape their attention, the constitutional principles and underlying rationale would have been as apparent to the Founders as it was to the "infinite number of officers" who wrote Lord Loughborough. *See id.*

[158] *See supra* notes 88–92 and accompanying text.

support its adoption by the Framers.[159] With that said, evidence that the founding era and the Framers adopted the British practice and principles surrounding military law is readily apparent. Indeed, the Supreme Court has repeatedly recognized that the substance and practice surrounding our military law directly derives from British military law.[160]

Guided by their joint history with the British as well as their own recent history of subjugation to martial law,[161] the Founders abided by the principles espoused by their British forefathers.[162] They sought to ensure that military jurisdiction was limited to the greatest extent possible and would remain subordinate to the civil courts that served as the primary arbiters of justice.[163] Further, the Framers based the creation and exercise of military jurisdiction within the Constitution upon the need for order and discipline.[164] The Supreme Court has consistently recognized that a separate jurisdiction and law within the military exists based upon a need

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[159] *See* Alden v. Maine, 527 U.S. 706, 715 (1999) (relying upon English practice surrounding sovereign immunity given adoption by the founding era).

[160] *See, e.g.*, Loving v. United States, 517 U.S. 748, 759–67 (1996) (outlining the direct effect of the British practice surrounding military jurisdiction upon our own and noting "[w]e have undertaken before, in resolving other issues, the difficult task of interpreting Clause 14 [of Article I § 8] by drawing upon English constitutional history") (citations omitted); Weiss v. United States, 510 U.S. 163, 178 (1994) (highlighting that "[t]he early English military tribunals . . . served as the model for our own military justice system"); Parker v. Levy, 417 U.S. 733, 745 (1974) (recognizing the "British antecedents of our military law").

[161] The Massachusetts Government Act of 1774 allowed the King to appoint the governor of Massachusetts and for the governor to appoint all judges, the attorney general, sheriffs, and other court officers in the province. MASSACHUSETTS GOVERNMENT ACT 1744, 14 Geo. 3 c. 45, https://avalon.law.yale.edu/18th_century/mass_gov_act.asp). The King had appointed General Thomas Gage, the commander of the British Army in North America, as governor who later imposed martial law. *See* Reid v. Covert, 354 U.S. 1, 28 n.49 (1957) (citations omitted). Furthermore, martial law had been imposed upon the colonies of Virginia and South Carolina. *Id.*

[162] *See Loving*, 517 U.S. at 761–67; Reid v. Covert, 354 U.S. 1, 23–30 (1957).

[163] The American Articles of War from 1776 were narrow in their application as they applied only to officers and Soldiers. The limited number of offenses focused upon the need for good order and discipline within the military. *See* Articles of War of 1776, sec. X, art. 1, *reprinted in* WINTHROP, *supra* note 33, app. X. When Soldiers committed civil offenses or offenses against the public, commanders were required to "deliver over such accused person or persons to the civil magistrate" or otherwise face punishment. *Id.*

[164] *See* THE FEDERALIST NO. 29 (Alexander Hamilton) (justifying the government and regulation of the militia while in service upon the need for "uniformity and discipline").

for order and discipline.[165] These guiding principles would likewise lead the Framers of the Constitution to follow the British practice of limiting the application of military law and jurisdiction upon only those who were in actual service, namely those in employed in whole pay and the militia when in actual service.

1. The Continental Congress's Adoption of the British System

There is no clearer evidence that the Founders wished to adopt the British practice surrounding military law than their creation of the American military criminal code of the era.[166] In 1776, John Adams suggested adopting the British Articles of War in total, noting that,

> There was [in existence] one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of discipline.[167]

The committee submitted a copy of the British Article of War with minor changes to the Continental Congress for approval, and they were adopted on 20 September 1776.[168]

This act by the Continental Congress not only adopted the British military law but it likewise adopted—or even narrowed—who was subject

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[165] *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion"); Parker v. Levy, 417 U.S. 733, 758 (1974) (recognizing the different constitutional protections afforded to service-members due to "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline"); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty").

[166] *See infra* notes 169-70 and accompanying text.

[167] *Diary of John Adams, [Monday August 19. 1776.]*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/01-03-02-0016-0172.

[168] *Id.; see also* 5 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1776, at 788-807 (Gov't Printing Off. 1906).

to it. By its title, the American Articles of War only applied to "troops raised, or to be raised, and kept *in pay*, by, and at the [e]xpense of the United States of America."[169] The limitation to troops who were "in pay" is an adoption of the language from the Mutiny Act.[170] As previously discussed, the term "in pay" under the Mutiny Act had legal significance and was limited to those employed with full pay in actual service.[171] The term "raised" is likewise consistent with actual service.[172] Thus, the American Articles of War applied only to those troops who were employed with full pay in actual service.[173]

The American Articles of War similarly applied to the militia forces who were "mustered and in continental pay."[174] This application was likewise consistent with the British model.[175] Accordingly, the Continental Congress clearly adopted the British practice regarding who was subject to military law and limited it only to those in actual service. These Articles of War would remain in effect years after the Constitution's ratification process was complete.[176] Consequently, from the time of the

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[169] 7 JOURNALS OF THE CONTINENTAL CONGRESS 264–65 (Gov't Printing Off. 1907) (emphasis added). The full title of the act was "The Rules and Articles for the Better Government of the Troops Raised, or to be Raised, and Kept in Pay, by, and at the Expence of the United States of America." *Id.* (original style retained).

[170] *Compare* 7 JOURNALS OF THE CONTINENTAL CONGRESS 264–65 (Gov't Printing Off. 1907), *with* MCARTHUR, *supra* note 99, at 196–97 (stating that from 1751 onward, the Mutiny Act applied to those officers, non-commissioned officers, and soldiers who were "mustered or in pay").

[171] *See supra* Part IV.A.2–3

[172] *Raise*, SAMUEL JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) [hereinafter JOHNSON'S DICTIONARY] (defining raise as "to collect; to assemble; to levy").

[173] *See* Felix Frankfurter, *Some Reflections on Reading Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it") (quoted in Sekhar v. United States, 570 U.S. 729, 732–33 (2013)).

[174] Articles of War of 1776, sec. XVII, art. 1, *reprinted in* WINTHROP, *supra* note 33, app. X.

[175] *See* CLODE, *supra* note 94, at 181.

[176] *See To John Adams From James McHenry, 6 April 1798,* NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-2400 (last visited Feb. 6, 2024) (referencing "the rules and articles for the better government of the Troops, raised or to be raised, and kept in pay, by and at the expense of the United States of America" in effect at the time). At the time of the letter, James McHenry was serving as the Secretary of War and had previously represented Maryland in the Constitutional Convention. ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., CTR. OF MIL. HIST., SOLDIER-STATESMEN OF THE CONSTITUTION 106–08 (Gov't Printing Off. 1987).

Revolution through the ratification of the Constitution, military law was understood to only apply to two populations: those employed in full pay and the militia when called to actual service.

2. Adoption of the British Practices Surrounding the "Half-Pay" Establishment

The fact that Congress limited jurisdiction to "troops raised and kept in pay" is significant for the discussion surrounding retirees given that the Continental Congress also adopted the half-pay practice followed by the British. Indeed, both Congress and General Washington sought to institute a half-pay establishment, which, in line with the British model, provided half-pay to officers for life who were either severely injured[177] or served to the end of the Revolution.[178] Neither of these approved provisions made reference to subjecting half-pay retirees to congressional regulation or court-martial even though earlier versions of the proposal contemplated such.[179] Thus, without express inclusion or amendment to the title of the law implementing the Articles of War—as Parliament had attempted in 1749—it is clear that these half-pay officers were not subject to military law.

While the creation of half-pay retirements surely is instructive of whether modern-day retirees may be subject to military law, the Continental Congress's treatment of supernumerary officers is even more so. In December of 1781, Congress reduced all general officers who were "not necessary to be in the field" and placed them on the "half pay

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[177] 5 JOURNALS OF THE CONTINENTAL CONGRESS 702–3 (Gov't Printing Off. 1906) (establishing half-pay for life to those "who shall lose a limb in any engagement, or be so disabled in the service of the United States of America as to render him incapable afterwards of getting a livelihood").

[178] 18 JOURNALS OF THE CONTINENTAL CONGRESS 958–61 (Gov't Printing Off. 1910) (providing "That officers who shall continue in the service to the end of the war, shall also be entitled to half pay during life, to commence from the time of their reduction"); *see From George Washington to a Continental Congress Camp Committee, 29 January 1778*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/03-13-02-0335 (calling for a "half pay and pensionary establishment").

[179] 10 JOURNALS OF THE CONTINENTAL CONGRESS 285–6 (Gov't Printing Off. 1908) (proposing half-pay for life and "that such half pay Officers shall at all times be subject to the regulations of Congress, and hold themselves in readiness for, and be liable to be called into actual service").

establishment."[180] Similar to their creation of the half-pay retirements, Congress did not expressly extend military law upon these reduced officers or amend the title of the act implementing the Articles of War.[181] In contrast, Congress explicitly made other populations subject to courts-martial who did not clearly fall within the term "troops raised . . . and kept in pay."[182] Congress did, however, in line with the British model, make clear that such supernumerary officers were "liable to be called into the field," and that, if recalled, they "shall receive during his continuance of command every allowance and emolument incident to his rank."[183] Thus, just as the British, the Continental Congress viewed officers who both received half-pay and were subject to recall as not subject to military law.

3. The Constitution: A Continuation of Prior Practice by the British and Continental Congress

Turning to the text of the Constitution itself, there is nothing to indicate any deviation from the prior practice of either the British or the Continental Congress. There are three separate constitutional provisions applicable to military jurisdiction. These include: Congress's authority under Article I;[184] the President's designation as the Commander-in-Chief under Article II;[185] and the Fifth Amendment.[186] The populations these sections cover—the Land Forces (Army), the Naval Forces (Navy), and the militia when in actual service—are consistent with both the British

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[180] 11 JOURNALS OF THE CONTINENTAL CONGRESS 1179–80 (Gov't Printing Off. 1908).
[181] *See id.*
[182] *See, e.g.*, 7 JOURNALS OF THE CONTINENTAL CONGRESS 235 (Gov't Printing Off. 1907) (specifying that "regimental surgeons and their mates . . . may be brought to trial by court-martial for misbehavior"); 18 JOURNALS OF THE CONTINENTAL CONGRESS 882 (Gov't Printing Off. 1910) (specifying that army regimental surgeons "may be brought to trial by court-martial for misbehavior"); 12 JOURNALS OF THE CONTINENTAL CONGRESS 244–5 (Gov't Printing Off. 1908) (outlining the manner in which finance inspectors and contractors may be subject to courts-martial).
[183] 11 JOURNALS OF THE CONTINENTAL CONGRESS 1179–80 (Gov't Printing Off. 1908).
[184] U.S. CONST. art. I, § 8, cls. 14, 16.
[185] U.S. CONST. art. II, § 2, cl. 1.
[186] U.S. CONST. amend. V. One could argue based upon the sentence construction that the phrase "when in actual service, in time of War, or public danger" applies to both "the militia" and the land and naval forces; however, this is unnecessary to establish that jurisdiction is tied to service. It is more likely that the latter clause is meant to only apply to the militia in this instance consistent with the descriptions in both Article I and Article II. *See id.*

practice and the American practice leading up to, and after, the ratification of the Constitution.

a. The Militia When in Actual Service

The Constitution is explicit regarding the militia in that military jurisdiction was to be applied only to those in actual service.[187] Simply put, military jurisdiction surrounding the militia is conditioned upon one singular factor: whether they are in actual service. Congress explicitly applying military jurisdiction only when an individual was in actual service is unsurprising because, at the time of the framing, "the Militia comprised all males physically capable of acting in concert for the common defense."[188] Thus, it was not until the militia was in actual service that they bore military character akin to those within the Army or Navy. It is only in this instance that Federal governance necessitated the imposition of military law to instill discipline.[189] Likewise, it was this military character through actual service that justified deviating from the normal practice afforded within the civilian courts.[190] This treatment of the militia shows that the Framers explicitly delineated between civilian and military jurisdiction over military service. Consequently, in conformity with the British practice, the Framers saw no need to authorize the exceptional jurisdiction within the military unless the militia were in actual service.[191]

b. The Land and Naval Forces

The Founders saw fit to extend military jurisdiction upon the militia only when in actual service; for this reason, there is little reason to think that application of the same should be viewed differently regarding those

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[187] *See* U.S. CONST. art. I, § 8, cls. 16; *see also* U.S. CONST. amend. V.
[188] District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)); *see also* THE FEDERALIST NO. 29 (Alexander Hamilton) (describing "all the militia of the United States" as including "the great body of the yeomanry, and of the other classes of the citizen").
[189] *See* THE FEDERALIST NO. 29 (Alexander Hamilton) ("It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense").
[190] *See* U.S. CONST. amend. V.
[191] *See* THE FEDERALIST NO. 29 (Alexander Hamilton).

within the land and naval forces. While the Framers did not explicitly condition jurisdiction over the land and naval forces upon actual service, the terms themselves would have been self-evident.[192] This is especially the case given that such a read is consistent with the application of military law prior to, and after, the ratification of the Constitution, which extended military law only to those "in pay."[193] Numerous state constitutions of the era explicitly tied punishment by military law to service or employment within the Armed Forces.[194] It can hardly be argued that these states ratified a U.S. Constitution that violated their own with regard to whom may be subject to military law.

Unlike the militia, the land and naval forces (the Army and the Navy) were a population that existed separate and apart from the general populace.[195] The existence of the Army and Navy were conditioned upon the need for national defense, and, therefore, their position in actual service would have been obvious to the founding era. Indeed, documents from that time consistently connect reference to the land and naval forces with necessary duties and operations.[196] In sharp contrast, a well-trained

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[192] *See* JOHNSON'S DICTIONARY, *supra* note 172 (defining: "land forces" as "warlike powers not naval; Soldiers that serve on land"; "forces" as "armament," which is defined as "a force equipped for war"; "Naval" as "consisting of ships; or belonging of ships"; "Army" as "a collection of armed men obliged to obey one man"; and "Soldier" as "a fighting man; a warrior. Originally one who served for pay").

[193] *See supra* notes 171-75 and accompanying text.

[194] *See, e.g.*, MD. CONST. art. XXIX (1776) ("That no person, except regular soldiers, mariners, and marines *in the service of this State*, or militia *when in actual service*, ought to be subject to or punishable by martial law") (emphasis added); MASS. CONST. art. XXVIII (1780) ("No person can in any case be subjected to law-martial . . . except those *employed* in the army or navy, and except the militia *in actual service*") (emphasis added); N.H. CONST. art. XXXIV (1784) ("No person can in any case be subjected to law martial . . . except those *employed* in the army or navy, and except the militia *in actual service*") (emphasis added).

[195] *See* THE FEDERALIST NO. 29 (Alexander Hamilton) (arguing that in contrast to a standing army, the militia are "men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests").

[196] *See, e.g.*, THE FEDERALIST NO. 24 (Alexander Hamilton) (arguing in support of a "permanent corps in the pay of the government" to man garrisons and "a navy" as necessary for protection from outside forces); ARTICLES OF CONFEDERATION of 1781, art. VI, cl. 4 ("nor shall any body of forces be kept up by any state, in time of peace, except such number only . . . deemed requisite to garrison the forts necessary for the defence of such state"); *id.* art. IX, cl. 4 (providing Congress the power to appoint "all officers of the land [and naval]

militia was viewed as merely "ready to take the field whenever the defense of the [s]tate shall require it."[197] The militia was ready to enter into actual service when necessary, but the Army and Navy were already acting within the scope of such service. Consequently, military jurisdiction over the land and naval forces only applied to those who were engaged in actual service.

4. Refuting the Purported Counterexample of the Mutiny of 1783

In his concurrence in *Begani*, Judge Maggs attempts to offer a counterexample that military law was imposed on those not in actual service by looking to the court-martial of the Soldiers engaged in the Philadelphia Mutiny of 1783.[198] He argues that these Soldiers were furloughed and, therefore, "had no ongoing duties, but they were in the Army, and they were subject to court-martial for offenses committed while furloughed."[199] His account, however, misses several salient points that negate his premise of using this event as a counterexample.

Importantly, immediately after receiving the furlough order on 13 June 1783, the Soldiers were verbally presented with the option to remain in service if they preferred it to being furloughed.[200] In accord, the Soldiers drafted a letter to Congress refusing to accept the furlough.[201] On 19 June 1783, the furlough orders were officially amended to "allow [Soldiers] to remain in service . . . if they prefer it to being furloughed."[202] It was not

forces, in the service of the United States" and to "mak[e] rules for the government and regulation of said land and naval forces, and directing their operations").

[197] THE FEDERALIST NO. 29 (Alexander Hamilton).

[198] United States v. Begani, 81 M.J. 273, 284-86 (C.A.A.F. 2021) (Maggs, G., concurring).

[199] *Id.* at 285.

[200] *See* Mary A. Gallagher, *Reinterpreting the "Very Trifling Mutiny" at Philadelphia in June 1783*, 119 PA. MAG. OF HIST. & BIOGRAPHY, Jan/Apr. 1995, at 3, 17–18. "Furthermore, Humpton reported that the furlough option [to remain in service instead of being furloughed if desired] was announced to the troops at the Philadelphia barracks in the 'After Orders' of June 13, six days before Congress officially approved Washington's modification." *Id.* at 33.

[201] *See id.* (explaining that the furlough order was conveyed on 13 June 1783 and quoting a letter from John Armstrong Jr. to Horatio Gates, 16 June 1783, stating that the Soldiers' letter declared "we will not accept your furloughs & demand a Settlement").

[202] *From Alexander Hamilton to Major William Jackson, [19 June 1783]*, NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0253

until after this official amendment, which permitted the Soldiers to remain in service, that the Soldiers engaged in an armed march upon Congress and the Pennsylvania State House on 21 June 1783 and thereby effectuated their mutiny.[203] Consequently, the Soldiers were engaged in actual service at the time of the mutiny and were subject to both military law and courts-martial. Thus, rather than provide a counterexample, this event only supports that imposition of military law extended to those engaged in actual service.

5. Original Constitutional Authority in the "Make Rules" Clause Relates to Only Those in Actual Service

Putting it all together, determining the proper scope of the population subject to military law becomes clear. Constitutional language merely continued the British and Continental Congress's practice of imposing military law only on those who were in actual service. Only upon these individuals was it necessary to deviate from the normal rule of justice within the civilian courts and impose military jurisdiction. This practice ensured that military jurisdiction was narrowly construed and limited to the least possible power adequate to promote order and discipline, which conforms to Supreme Court precedent.[204] Consequently, the authority provided to Congress within the make rules clause must be limited to this understanding, and any extension beyond it should be viewed with sharp scrutiny given the plethora of fundamental protections at issue.

V. Extension Beyond Original Authority is Improper and Unnecessary

The current status of retirees shows that nothing necessitates expanding the original reach of military jurisdiction by adding retirees to

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(last visited Apr. 5, 2024); *see also* 24 JOURNALS OF THE CONTINENTAL CONGRESS 403 (Gov't Printing Off. 1922) (recognizing a "variation . . . in the manner of furloughing troops").

[203] *See Elias Boudinot to George Washington, June 21, 1783*, AM. MEMORY, https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(dg020306)) (last visited Mar. 16, 2024) (explaining that 400–500 Soldiers surrounded the state house, with fixed bayonets, during a special session of Congress on 21 June 1783); *see also* Gallagher, *supra* note 200, at 24–26 (accounting for the insurrection on 21 June 1783 as well as the events that followed).

[204] *See, e.g.*, United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22 (1955).

the land and naval forces ranks and continuing to impose military law upon them. Indeed, the modern arguments that continued jurisdiction is supported by retirees' collection of pay and potential recall[205] was similarly present when the Continental Congress—and the British system upon which their military practice was derived—neglected to impose military law upon half-pay officers.[206] A review of the other aspects of the treatment of military retirees likewise shows that subjecting them to military law is unnecessary.

Once an individual retires from service, they essentially fall back into the civilian populace and are nearly indistinguishable from their civilian counterparts. They do not have any day-to-day military requirements, muster formations, or perform any activities that remotely resemble military service. They do not have to report to an established chain of command. The U.S. Court of Appeals, D.C. Circuit long ago recognized that the "duties of a retired officer . . . are of an exceedingly limited character."[207] Indeed, retired personnel bear far more resemblance to the militia at the time of the founding. They are analogous to the select corps that Hamilton described as "an excellent body of well-trained militia, ready to take the field whenever the defense of the State shall require it."[208] Further, like Hamilton explained of the militia, retirees "are daily mingling with the rest of their countrymen and . . . participate with them in the same feelings, sentiments, habits, and interests."[209] Accordingly, there is no reason to treat retired personnel differently than the militia and limit their subjugation to military law to when they are called back into service.

In contrast to their inclusion within civilian society, Congress has specifically alienated retired personnel from the military ranks.[210] Retired officers statutorily have no right to command except when they are recalled onto active duty.[211] They are forbidden from sitting as a member

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[205] *See, e.g.*, United States v. Begani, 81 M.J. 273, 278–79 (C.A.A.F. 2021).
[206] *See supra* Part IV.A.2–3; Part IV.B.1–2.
[207] Closson v. United States, 7 App. D.C. 460, 470 (D.C. Cir. 1896).
[208] THE FEDERALIST NO. 29 (Alexander Hamilton); *see also Militia*, JOHNSON'S DICTIONARY, *supra* note 172 (defining militia as "trainbands; the standing force of a nation"; and "trainbands" as "the militia; the part of the community trained to martial exercise").
[209] THE FEDERALIST NO. 29 (Alexander Hamilton).
[210] *See infra* notes 214–18 and accompanying text.
[211] 10 U.S.C. § 750.

upon a court-martial panel.[212] They are only permitted to wear their uniform in certain circumstances by Service regulations.[213] The code they are subject to is not even statutorily made available to them directly.[214] Even within the UCMJ, Congress contemplates retirees as being within "civilian life."[215] Simply put, the limited connection and contact that retired personnel have with the military do not necessitate continued imposition of military law upon them while in a retired status.

Even ignoring the original understanding of the constitutional authority provided, the Government's justifications to support continued jurisdiction over retirees are left wanting. As a preliminary matter, Congress did not provide any justification within their debates when they first extended jurisdiction over retirees in 1861.[216] Ignoring this, retired pay is insufficient grounds for continued jurisdiction. Indeed, the Supreme Court has stated that congressional actions have shown that they view retired pay as recognition of past service rather than continued salary for current reduced service.[217] Further, the manner in which congress pays retirees is consistent with deferred compensation akin to a pension rather than continued pay.[218] These facts make the continued pay of retired

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[212] 10 U.S.C. § 825 (limiting "who may serve on courts-martial" to active duty members).
[213] 10 U.S.C. §772 authorizes retirees to wear their uniform; however, Service regulations limit this authorization. For example, within the Army, wear of the uniform by retirees is generally reserved for ceremonial events. *See* U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF UNIFORMS AND INSIGNIA para. 23-1 (28 Jan. 2021).
[214] *See* 10 U.S.C. § 937(d) (stating that "[t]he text of this chapter and the text of the regulations prescribed by the President under this chapter shall be – available to a member *on active duty* or to *a member of a reserve component*.") (emphasis added).
[215] *See* 10 U.S.C. §§ 942(b)(1), (4) (requiring CAAF judges to be "appointed from civilian life" and specifying "[a] person may not be appointed . . . within seven years after retirement from active duty").
[216] *See* CONG. GLOBE, 37th Cong., 1st Sess., 2, 16–17, 40, 117–18 (1861).
[217] Barker v. Kansas, 503 U.S. 594, 603 (1992) (reasoning that Congress has treated military retirement pay as deferred compensation, given how it is federally taxed and that Congress permitted states to consider it a marital asset).
[218] Since 1985, Congress has placed a portion of the annual Department of Defense (DoD) appropriation in the Military Retirement Fund (MRF) based upon anticipated *future* retirement payments to current Service members, not the amount of retired pay actually paid to current retirees. KAMARCK, *supra* note 17, at 16. "Once military personnel retire, payments to them are made from the accumulated amounts in the MRF, not from the annual DoD budget." *Id.* The MRF is also used to fund civilian retirement annuities. 10 U.S.C. § 945(h).

personnel even less apt to justify their continued subjugation to military law no matter their ability to be recalled.

Furthermore, there is negligible necessity to justify imposing military law upon retirees for the sake of discipline. Indeed, even though members of the Reserve are likewise subject to involuntary recall to active duty,[219] they are only subject to military law while serving on their regular active-duty periods and while on inactive-duty training, but not when in inactive status.[220] Reserve component members, however, may still be prosecuted for actions committed while on active duty or inactive duty status afterward.[221] Given this treatment of a similarly situated population, it can hardly be said that continuing to subject retired personnel to military law in perpetuity is necessary beyond the ability to hold them accountable for actions committed on active duty prior to retirement.[222] In fact, Reserve component members are even more important to the national defense structure, as retired personnel will only be mobilized "when there is not enough active or qualified Reserve manpower available."[223] Based upon these factors, imposing military law upon retired personnel more broadly than reservists is inequitable and unnecessary.

If Congress merely wishes to ensure that retired pay ceases upon bad behavior, they can expound upon the list of civilian convictions that result in the termination of retired pay, such as a felony conviction in a state or Federal court. [224] This type of action is already contemplated for officers.[225] Such an act would ensure that retired personnel are afforded

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[219] 10 U.S.C. § 12302.
[220] *See* 10 U.S.C. § 802(a)(3)).
[221] 10 U.S.C. § 803(d); *see also* United States v. Wheeler, 10 U.S.C.M.A. 646 (C.M.A. 1959).
[222] *See Wheeler*, 10 U.S.C.M.A at 655–57 (explaining that reservists should only be subject to military prosecution for acts committed while on active duty even though they may be recalled to active duty "at the scratch of the Presidential pen" and serve as a "ready reserve qualified for immediate duty").
[223] U.S. DEP'T OF DEF., INSTR. 1352.01, MANAGEMENT OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS para. 3.3a (8 Dec. 2016).
[224] *See* 5 U.S.C. § 8312 (providing for termination of retired pay based upon convictions of certain Federal codes).
[225] *See* 10 U.S.C. § 1161 (permitting dismissal of an officer "who is sentenced to confinement in a Federal or [s]tate penitentiary or correctional institution . . . whose sentence has become final"); *see also* Allen v. United States, 91 F.Supp. 933 (Ct. Cl. 1950) (affirming dismissal from the retired rolls by a similar prior provision).

the constitutional safeguards provided in both Article III and the Bill of Rights. Likewise, this type of act would protect the Government's interest in retired personnel being capable of service and not, for example, being prohibited from carrying a firearm.[226]

Quite simply, there is insufficient reason to expand upon the original authority granted to Congress to subject retired personnel to military law continuously for the remainder of their lives. Such an imposition is beyond "the least possible power adequate to the end proposed" as it is unnecessary for either the discipline of the Armed Forces or national security.[227]

VI. Remedy and Conclusion

If the United States Supreme Court were presented with the question of whether Congress's authority to govern and regulate the land and naval forces includes continued imposition of military law upon retirees in perpetuity, they likely would find that it does not. Such imposition exceeds the original authority granted to Congress, and there is little need to justify its expansion. Consequently, both UCMJ Articles 2(a)(4) and (6)already exceed Congress's power under Article I of the Constitution and are unconstitutional.

Rather than wait for the Supreme Court to strike down both UCMJ Articles 2(4) and (6), Congress should amend the UCMJ to conform to the original scope of their authority: namely, that military law is only imposed upon those in or called into actual service. This rule would place retirees in uniform treatment with active-duty personnel,[228] Reserve personnel,[229] members of the Army and Air National Guards,[230] and civilians on the selective service list.[231] Rather than complicate things, this bright-line rule would simplify the delineation between civilian and military courts. Further, it would comply with Supreme Court precedent that calls for limiting the imposition of military law only to the extent necessary for

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[226] *See* 18 U.S.C. § 921.
[227] United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22 (1955).
[228] *See* UCMJ art. 2(a)(1) (2019).
[229] *See* UCMJ art. 2(a)(3) (2019).
[230] *See id.*
[231] *See* Billings v. Truesdall, 321 U.S. 542, 544 (1944).

good order and discipline. Until such act occurs, the military services should refrain from exercising jurisdiction under UCMJ Articles 2(a)(4) and (6) for actions committed by those occupying a retired status.

Retired personnel have devoted the prime of their lives protecting constitutional rights. It is only proper that they get to enjoy them after they "close [their] military career and just fade away."[232]

[232] MacArthur, *supra* note 1.

A Higher Calling: U.S. Military Cannabis Policy After Legalization

MAJOR NICHOLAS D. TURNER*

[Canadian Armed Forces] members are required to conduct themselves in a professional manner and are expected to make responsible choices in respect of their use of cannabis for recreational or medical purposes.[1]

I. Introduction

After work on a Tuesday, Corporal David Smith, an infantryman in the Canadian Army, heads home, eats dinner, turns on a horror movie,

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[1] Can. Dep't of Nat. Def., DAOD 9004-1, Use of Cannabis by CAF Members para. 4-4 (7 Sept. 2018) [hereinafter DAOD 9004-1].

and eats a cannabis[2] gummy candy.[3] This fact pattern may seem odd to a member of the U.S. military; however, the Canadian Armed Forces' (CAF) authorized cannabis use policy permits Corporal Smith's consumption of cannabis. During the work week, a typical CAF member may consume cannabis as long as it is more than eight hours prior to the next duty period.[4] Corporal Smith's unit intends to go to the rifle range on Friday. On Wednesday at final formation, his platoon leader reminds unit members that no CAF member handling a loaded weapon may consume cannabis within the prior twenty-four hours.[5] This would not prohibit cannabis use on Wednesday night, but it does prohibit cannabis use on Thursday night. As Corporal Smith considers whether he will legally use cannabis that night, he remembers a recent suggestion from a superior that he become a helicopter door gunner within the Canadian Air Force,[6] a position with stricter limits on cannabis use (not within twenty-eight days of any air gunner duty period).[7] This duty restriction would effectively prevent use of cannabis during his two-year assignment.[8] Although this situation is fictional, CAF members have been complying with cannabis use restrictions based upon periods of service and job types with waiting periods since 17 October 2018, when the Canadian military's authorized cannabis use policy went into effect.[9]

Currently, the CAF remains the only military within the North Atlantic Treaty Organization (NATO) to authorize its members to use cannabis.[10] Although Canada is currently the outlier on this issue, its experience with authorizing cannabis use by CAF members offers three important lessons

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[2] This paper will use the term cannabis rather than marijuana when describing the cannabis plant. Marijuana, or marihuana, is a slang term and is less-precise than the scientific plant name, cannabis. *See* Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), https://origins.osu.edu/article/illegalization-marijuana-brief-history?language_content_entity=en.

[3] This scenario of Corporal David Smith is fictitious but used to illustrate the Canadian military's cannabis use policy.

[4] DAOD 9004-1, *supra* note 1, para. 5-2.

[5] *Id.*

[6] *See, e.g.*, Ian Coutts, *Door Gunners*, CANADIAN ARMY TODAY (July 2, 2020), https://canadianarmytoday.com/door-gunners.

[7] DAOD 9004-1, *supra* note 1, para. 5-2.

[8] *See, e.g.*, Coutts, *supra* note 6.

[9] DAOD 9004-1, *supra* note 1, para. 1.

[10] Interview with Mark McGaraughty, Senior Strategic Pol'y Advisor, Dir. Mil. Pers. Pol'y Integration, Dep't of Nat'l Def., Ottawa, Can. (Nov. 5, 2021) (on file with author).

for the U.S. military. First, the CAF, like the U.S. military, does not have legal authority to authorize cannabis use without action by the country's political leadership. [11] Second, the CAF began working on a draft authorized cannabis use policy once the Canadian Liberal Party campaigned to legalize cannabis use even though the Canadian military had the legal authority to retain a prohibition on cannabis use.[12] Third, the Canadian military has provided a framework for authorized cannabis use within a similarly organized NATO military, which can be used as a model for a future U.S. military cannabis policy.[13] Based upon the clear trend toward lessening restrictions on cannabis use within U.S. states and territories, Federal cannabis legalization appears inevitable. [14] This potential should prompt the U.S. military to prepare for that occasion. First, the U.S. military should immediately liberalize its accession policies that currently restrict opportunities for applicants who have used cannabis previously or continue using cannabis legally in accordance with state or territorial law. Second, once Congress acts to legalize cannabis use, an authorized cannabis use framework should be adopted across the U.S. military using the Canadian military's authorized cannabis use policy as a model.

This article will review the background, history, and legal basis for current cannabis use prohibitions in the U.S. military before proposing a legal framework for cannabis use for Service members in the event of Federal cannabis legalization. Part II will show the broad normalization of cannabis use, which will force the U.S. military to adjust cannabis policies to recruit in a democratic society with legalized cannabis use. Part III will provide historical background of cannabis use and prohibition within the U.S. military and the initiation and legal authority for its drug testing regime. Part IV will review the statutory and regulatory prohibitions on

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[11] *See Canada's New Liberal Government Repeats Promise to Legalize Marijuana*, THE GUARDIAN (Dec. 4, 2015), https://www.theguardian.com/world/2015/dec/04/canada-new-liberal-government-legalize-marijuana; Nikki Frias, *Congress Set to a Vote on MORE Act the First Week of December*, FORBES (Nov. 30, 2020), https://www.forbes.com/sites/nikkifrias/2020/11/30/congress-set-to-a-vote-on-more-act-the-first-week-of-december.

[12] Interview with Commander (Retired) Mike Madden, Former Dir. of Mil. Pers. L., Dep't of Nat'l Def., Ottawa, Can. (Oct. 22, 2021) (on file with author).

[13] *Id.*; DAOD 9004-1, *supra* note 1.

[14] *See* Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATURES (June 22, 2023), https://www.ncsl.org/research/civil-and-criminal-justice/cannabis-overview.aspx. "Twenty-three states, two territories, and the District of Columbia have legalized small amounts of cannabis for adult recreational use." *Id.*

cannabis use for Service members while also highlighting required revisions to the Uniform Code of Military Justice (UCMJ) and other regulatory policies to comply with an authorized cannabis use policy. Part V will offer a suggested model U.S. military cannabis use policy that includes two elements: (1) a liberalized accession policy, and (2) an authorized cannabis use policy within the U.S. military that mirrors the Canadian military's authorized cannabis use policy. Failure to plan for the widespread legalization of cannabis across the United States will not make its occurrence less likely; therefore, this paper will serve as a proposed model[15] for the U.S. military to reconcile with normalized, legal cannabis use during state and territorial legalization and after Federal legalization.

II. Inevitable Cannabis Legalization, Military Legal Authority, and Accessions

In the United States, the vast majority of states and territories have authorized cannabis use for medical purposes, while a growing minority have authorized recreational use of cannabis.[16] While cannabis still remains illegal under Federal law, broad state legalization could force Congress to act on cannabis legalization.[17] When Congress legalizes cannabis, the U.S. military would be able to continue its cannabis use prohibition. However, continued cannabis prohibition in the military would increase the military-civilian divide and negatively impact recruitment and retention.[18]

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[15] A *Military Law Review* article from 1971 proposed limited accommodations the U.S. military could take if cannabis was legalized. "An exploration of permissible use based upon time and geographical considerations should be undertaken. . . . Nevertheless, there would be no reason based upon good order and discipline for prohibiting use while the member is on pass or leave, unless, as within a war zone, he would be subject to immediate recall." Charles G. Hoff, Jr. *Drug Abuse*, 51 MIL. L. REV. 147, 208 (1971). The present author hopes that in fifty plus years, his article is not being read by a Judge Advocate Officer Graduate Course student researching liberalized cannabis use in the military.

[16] Hartman, *supra* note 14.

[17] Deirdre Walsh, *House Approves Decriminalizing Marijuana; Bill to Stall in Senate*, NPR (Dec. 4, 2020), https://www.npr.org/2020/12/04/942949288/house-approves-de-criminalizing-marijuana-bill-to-stall-in-senate.

[18] BETH J. ASCH ET AL., RAND CORP., AN EMPIRICAL ASSESSMENT OF THE U.S. ARMY'S ENLISTMENT WAIVER POLICIES 38, 40-41 (2021).

A. Cultural Pressure, Legalization, and Normalization of Cannabis Use

When President Nixon announced the War on Drugs in 1971,[19] approximately 4 percent of adult Americans had used cannabis.[20] Fifty-one years later, 49 percent of adult Americans have used cannabis.[21] Normalization of cannabis use in U.S. society[22] has correlated with cannabis legalization across U.S. states and territories.[23] In 1996, California became the first state to authorize medical cannabis use.[24] Since 1996, all but seven states and territories have liberalized cannabis use policies in some form, ranging from adult recreational cannabis use to medical cannabis use to decriminalized possession of cannabis to authorized use of low levels of tetrahydrocannabinol (THC),[25] the primary psychoactive ingredient in cannabis.[26] However, the trend for liberalized cannabis use continues beyond merely low levels of THC or medical cannabis use.[27] Twenty-three states, two territories, and the District of Columbia have authorized adult recreational cannabis use.[28] States and territories have already rapidly responded to changes in cannabis use normalization and cultural pressure through liberalization largely using citizen ballot initiatives.[29] The repeated success of cannabis use liberalization through ballot initiatives passed by voters, not legislatures, reflects popular political support for reducing cannabis prohibitions.[30]

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[19] *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), https://www.nixonfoundation.org/2016/06/26404.
[20] Jeffrey M. Jones, *Nearly Half of U.S. Adults Have Tried Marijuana*, GALLUP (Aug. 17, 2021), https://news.gallup.com/poll/353645/nearly-half-adults-tried-marijuana.aspx.
[21] *Id.*
[22] Tom Angell, *Study: Rise in Marijuana Use Not Caused by Legalization*, FORBES (Sept. 14, 2017), https://www.forbes.com/sites/tomangell/2017/09/14/study-rise-in-marijuana-use-not-caused-by-legalization.
[23] Angela Dills et al., *The Effect of State Marijuana Legalizations: 2021 Update*, CATO INST. (Feb. 2, 2021), https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update#marijuana-other-substance-use.
[24] Siff, *supra* note 2.
[25] Hartman, *supra* note 14.
[26] Kimberly Holland, *CBD vs. THC: What's the Difference?*, HEALTHLINE (June 30, 2023), https://www.healthline.com/health/cbd-vs-thc#chemical-structure.
[27] Hartman, *supra* note 14.
[28] *Id.*
[29] Dills et al., *supra* note 23.
[30] *See 2023 Marijuana Policy Reform Legislation,* MARIJUANA POL'Y PROJECT, (June 8, 2023), https://www.mpp.org/issues/legislation/key-marijuana-policy-reform.

Political and economic pressures have also been building within state legislatures, which has subsequently prompted legislative action in several states and territories.[31] Increasing legalization of recreational cannabis use only increases the likelihood that Federal legalization of cannabis use will occur.[32]

Despite this broader move toward authorized use of cannabis, the Federal Government[33] and the Department of Defense (DoD)[34] retain criminal prohibitions on the use of cannabis. The current U.S. Federal drug policy is outlined in the Controlled Substances Act (CSA) and outlaws the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances."[35] The CSA classifies controlled substances into five schedules from most to least dangerous.[36] Cannabis has been classified, since the 1970 passage of the CSA,[37] as a Schedule I controlled substance.[38] A Schedule I controlled substance indicates the "drug or other substance has a high potential for abuse; [t]he drug or other substance has no currently accepted medical use in treatment in the United States; [and] [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision."[39] Federal criminal prohibitions on cannabis have failed to damper Americans' enthusiasm for cannabis; 68 percent of American adults favor legalizing cannabis use.[40] Support for legalization has increased nearly 20 percent in the past ten years, which corresponds with the cannabis use liberalization trend across the country.[41] The U.S. military's prohibition on cannabis remains codified in the statutory language of Article 112a, UCMJ, and also mirrors the CSA prohibitions.[42] If the U.S. military wanted to remove cannabis use

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[31] *Id*.
[32] *See* Hartman, *supra* note 14.
[33] *See, e.g.*, 21 U.S.C. § 844.
[34] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 112a (2019).
[35] 21 U.S.C. § 801.
[36] 21 U.S.C. § 812.
[37] LISA N. SACCO, CONG. RSCH. SERV., IN11204, THE SCHEDULE I STATUS OF MARIJUANA (2022).
[38] Siff, *supra* note 2.
[39] 21 U.S.C. § 812.
[40] Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%,* GALLUP (Nov. 9, 2020), https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx.
[41] *Id.*
[42] *See* UCMJ art. 112a (2019).

prohibitions for its Service members, Congress would first be required to remove cannabis from the statutory text in Article 112a, UCMJ.

Congress has yet to take action to legalize cannabis use or other related measures; however, political pressure is being brought to bear on Congress.[43] Cannabis sales are expected to exceed $24 billion in 2021.[44] In 2020, state excise taxes on cannabis sales totaled $1.7 billion.[45] Congress has begun acting upon these factors. One piece of cannabis legislation, The Secure and Fair Enforcement (SAFE) Banking Act,[46] which has been pushed by cannabis business groups, banks, and other business interests,[47] has passed the House of Representatives seven times.[48] The Marijuana Opportunity Reinvestment and Expungement (MORE) Act[49] was passed by the House of Representatives and would have removed cannabis from the Controlled Substances Act, authorized states and territories to set cannabis regulation policies, and imposed an excise tax on cannabis sales.[50] The MORE Act was the first time a congressional chamber had passed a bill that would remove legal

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[43] *See* Mona Zhang, *Marijuana Legalization May Hit 40 States. Now What?*, POLITICO (Jan. 20, 2020), https://www.politico.com/news/2020/01/20/marijuana-legalization-federal-laws-100688; Al Weaver, *Senate GOP Faces Politics vs. Policy Battle on Marijuana*, THE HILL (Dec. 16, 2022), https://thehill.com/homenews/senate/3777205-senate-gop-faces-politics-vs-policy-battle-on-marijuana.

[44] Courtney Connley, *Cannabis Is Projected to Be a $70 Billion Market by 2028—Yet Those Hurt Most by the War on Drugs Lack Access*, CNBC (July 1, 2021), https://www.cnbc.com/2021/07/01/in-billion-dollar-cannabis-market-racial-inequity-persists-despite-legalization.html.

[45] Jeremiah Nguyen, *States Projected to Post Higher Marijuana Revenues in 2021*, TAX FOUND. (Aug. 3, 2021), https://taxfoundation.org/states-projected-post-higher-marijuana-revenues-2021.

[46] *See, e.g.*, SAFE Banking Act of 2023, S. 1323, 118th Cong. (2023).

[47] The SAFE Banking Act would dramatically increase the ease with which consumers could purchase cannabis by preventing Federal banking regulators from treating cannabis business proceeds and purchases as "unlawful activity," which effectively requires cannabis businesses to only use cash for all transactions. *See* Chris Roberts, *Marijuana Banking Reform Advances, but Senate Unlikely to Pass—Here's Why*, FORBES (Sept. 24, 2021), https://www.forbes.com/sites/chrisroberts/2021/09/24/marijuana-banking-reform-advances-in-congress-thanks-to-old-trick-but-passage-through-senate-unlikely.

[48] *SAFE Banking Act Passes House*, AM. BAR ASS'N (July 28, 2022), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july-22-wl/safe-banking-0722wl.

[49] Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021).

[50] Frias, *supra* note 11.

prohibitions on cannabis use.[51] The MORE Act failed to pass,[52] but once Congress responds to the growing pressure, the U.S. military has a decision to make. It could retain a cannabis use prohibition or promulgate an authorized cannabis use policy.

B. U.S. Military's Authority to Retain Cannabis Use Prohibition Post-Legalization

Once Congress legalizes cannabis, the U.S. military would have the legal authority to retain cannabis prohibition; however, retention of cannabis prohibitions would harm recruiting and retention in a society with normalized cannabis use.[53] The U.S. Supreme Court provided a legal framework for curtailing certain rights for Service members that are protected for American civilians in *Parker v. Levy*.[54] Captain Howard Levy was court-martialed for failing to provide a training program for Special Forces medics and repeatedly criticizing the U.S. Army and its mistreatment of Black Service members throughout the Vietnam War to subordinates.[55] The Supreme Court acknowledged that Levy's statements may be protected under the First Amendment for a civilian, but the court also "has long recognized that the military is, by necessity, a specialized society separate from civilian society," and that members do not have "the same autonomy as there is in the larger civilian community."[56] While no specific cases [57] have been brought to challenge the cannabis use restrictions within the U.S. military, this holding has been repeatedly

[51] Walsh, *supra* note 17.
[52] *The MORE Act*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/policy/federal/the-more-act (last visited Feb. 7, 2024).
[53] ASCH ET AL., *supra* note 18, at 38, 40-41.
[54] Parker v. Levy, 417 U.S. 733 (1974).
[55] *Id.* at 735-37.
[56] *Id.* at 758, 743, 751.
[57] *See*, *e.g*, United States v. Pugh, 77 M.J. 1 (C.A.A.F. 2017). While not a challenge to cannabis restrictions, the Court of Appeals for the Armed Forces overturned an Article 92, UCMJ conviction for consuming hemp in Strong & KIND bars. The Air Force had restricted use of hemp products even if approved by the Food and Drug Administration to protect the Air Force Drug Testing Program. Testimony at trial indicated commercially available hemp products had insufficient THC to result in a positive drug test. Cannabis and hemp are the same plant with different levels of THC. This case demonstrates the challenge of enforcing prohibitions within a broader world that has normalized cannabis consumption and use. *See* Jeffrey Chen, *Hemp vs. Marijuana: What's the Difference?*, HEALTHLINE (Feb. 13, 2023), https://www.healthline.com/health/hemp-vs-marijuana.

upheld as standing for the proposition that the military retains broad deference about control of its forces, including Service members' actions.[58] The U.S. military's requirement to maintain good order and discipline seems likely to permit retention of cannabis use prohibitions under the UCMJ even if those prohibitions are more restrictive than those found in civilian society.

C. U.S. Military Cannabis Waiver Policies and Impact on Recruitment and Retention

While it is legally permissible to continue cannabis use prohibition, the impact on recruitment and retention within the U.S. military should force a change in cannabis use policy. Under current accession guidelines, 71 percent of potential candidates are already not eligible according to U.S. Army Recruiting Command (USAREC) because of "obesity, drugs, physical and mental health problems, misconduct, and aptitude."[59] As states or territories continue liberalizing cannabis use, candidates will be more likely to have used cannabis prior to enlistment or accession. For example, in Fiscal Year (FY) 2018, 57 percent of enlistment contracts came from states or territories with cannabis authorized for medical use and 19 percent of enlistment contracts came from states or territories with recreational cannabis use.[60] More importantly, as more states and territories authorize recreational cannabis, or once Federal cannabis legalization occurs, military recruiters will be forced to deal with entire populations who used cannabis legally within a military accession system that presumes strict limits on cannabis use.

1. Military Accession Limits on Cannabis

The presumed strict limits become clear when examining military accession policies. Under DoD accession policy, if a candidate refuses a

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[58] *See also* Greer v. Spock, 424 U.S. 828 (1976); Rostker v. Goldberg, 453 U.S. 57 (1981); Chappell v. Wallace, 462 U.S. 296 (1983). In this vein, the Court has provided deference to "essentially professional military judgments" concerning the "composition, training, equipping, and control of a military force." Gilligan v. Morgan, 413 U.S. 1, 15 (1973).
[59] *Facts and Figures*, U.S. ARMY RECRUITING COMMAND OFFICIAL WEBSITE, https://recruiting.army.mil/pao/facts_figures (last visited Feb. 7, 2024).
[60] ASCH ET AL., *supra* note 18, at 38.

drug test then the candidate will not be permitted to enlist.[61] If an enlistee tests positive for any controlled substance, including cannabis, during the accession process, then a misconduct waiver would be required to enter military service even if used legally under the law of the state or territory where the applicant resides.[62] However, the waiver cannot be processed until a disqualification period has passed.[63] In the Army, a positive drug test for cannabis requires an enlistee to wait six months to retest.[64] Only after testing negative for controlled substances can the enlistee request a misconduct waiver, which is not guaranteed to be approved.[65] A second positive drug test for cannabis would require the enlistee to wait twenty-four months before another re-test and permanently exclude that enlistee from service in the Army National Guard.[66] A third positive test for cannabis would permanently exclude that enlistee from service in the Regular Army and the U.S. Army Reserve.[67]

As an additional hurdle, a misconduct waiver for a positive drug test for cannabis would also require a criminal background check and permanently prevent enlistment into any job that requires a security clearance.[68] This restriction on job opportunities serves as merely another reason not to join the U.S. military, which only further reduces the population eligible for military service. Another restriction is whether the applicant scored between the 10th and 31st percentile, which is classified as Category IV, on the Armed Forces Qualification Test.[69] Only 4 percent of total enlistees may be Category IV, but those enlistees are also not

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[61] U.S. DEP'T OF DEF., INSTR. 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM para. 6.5b (15 June 2020) [hereinafter DoDI 1010.16].
[62] U.S. DEP'T OF DEF., INSTR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION encl. 4, para. 1d (23 Mar. 2015) (C3, 26 Oct. 2018) [hereinafter DoDI 1304.26].
[63] *Id.*
[64] U.S. DEP'T OF ARMY, REG. 601–210, REGULAR ARMY AND RESERVE COMPONENTS ENLISTMENT PROGRAM para. 4-18b(1)(a) (31 Aug. 2016) [hereinafter AR 601-210].
[65] *Id.* para. 4-18b(1)(b).
[66] *Id.*
[67] *Id.* para. 4-18b(1)(c).
[68] *Id.* para. 4-18d, 4-18e.
[69] U.S. DEP'T OF DEF., INSTR. 1145.01, QUALITATIVE DISTRIBUTION OF MILITARY MANPOWER para. 3.b(1) (12 Dec. 2013) (C2, 4 May 2020) [hereinafter DoDI 1145.01].

eligible for any misconduct waivers including cannabis use.[70] Finally, if a candidate tests negative for cannabis, but has a conviction for cannabis possession, the candidate would require a misconduct waiver prior to enlistment.[71]

These accession policies are not sacrosanct. During periods of increased recruitment, misconduct waivers increased;[72] the maximum amount of Category IV enlistees have increased;[73] and the cannabis positive retest period has repeatedly shifted based upon recruitment needs of the Army from 45 days to 180 days.[74] Between 2018 and 2022, the Army approved more than 3,300 waivers for applicants who failed a drug test or admitted prior drug use.[75] This flexibility shows that the DoD could choose to officially liberalize accessions for applicants who have used cannabis or been convicted of cannabis possession. A system that responds to broad scale cannabis legalization through misconduct waivers remains piecemeal and fails to comprehensively deal with the increased scale of legalized cannabis use.

2. Piecemeal Policy of Cannabis Waivers and Congressional Action

Army leaders and researchers have acknowledged that growing legalization of cannabis use will likely lead to increased cannabis use waivers and, eventually, a reduction in cannabis conviction waivers.[76] Misconduct waivers related to drug and alcohol tests or convictions have

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[70] Meghann Myers, *As the Army Modernizes its Standards to Join, Legal Marijuana Use is Still an Open Question*, ARMY TIMES (Aug. 29, 2018), https://www.armytimes.com/news/your-army/2018/08/29/as-the-army-modernizes-its-standards-to-join-legal-marijuana-use-is-still-an-open-question.

[71] AR 601-210, *supra* note 64, para. 4-6a(4)(b).

[72] U.S. Army Recruiting Command, Drug and Alcohol and Possession of Marijuana Approved Waivers (document on file with author) [hereinafter Approved Waivers].

[73] Fred Kaplan, *GI Schmo*, SLATE (Jan. 9, 2006), https://slate.com/news-and-politics/2006/01/why-dumb-recruits-cost-the-army-big-time.html.

[74] ASCH ET AL., *supra* note 18, at 40.

[75] Ernesto Londoño, *Needing Younger Workers, Federal Officials Relax Rules on Past Drug Use,* N.Y. TIMES (Apr. 30, 2023), https://www.nytimes.com/2023/04/30/us/marijuana-drugs-federal-jobs.html. Over the last three years, the Navy granted 1,375 waivers, while the Air Force and Marine Corps also routinely permitted an additional drug test for applicants who tested positive.

[76] *Id.*

been rising.[77] The Army approved zero waivers in FY 2013 and FY 2014.[78] The number of waivers rose to 21 in FY 2015 before dramatically increasing to 191 in FY 2016, 506 in FY 2017, and more than 600 in FY 2018.[79] Between 2016 and 2018, USAREC approved nearly 1,800 waivers for cannabis possession convictions.[80] The former commanding general of USAREC and waiver approval authority, Major General Jeff Snow, agreed that increased legal cannabis use would increase cannabis use waivers.[81] He said, "Provided they understand that they cannot do that when they serve in the military, I will waive [cannabis] all day long."[82]

With continued state and territorial cannabis legalization and potential Federal cannabis legalization, more of the recruited population would have legal access to cannabis. If the military retains a prohibition on cannabis with required misconduct waivers for legal cannabis use, the only way to recruit cannabis users would be through a piecemeal system of waivers. While Congress does not limit cannabis use or conviction waivers, Congress previously held hearings and delayed DoD nominees based upon expanded use of mental health and cannabis waivers.[83] After Congress's intervention, the Army backtracked and approved less than a hundred conviction waivers and only a few dozen cannabis use waivers in 2019.[84] Prior to this policy shift, drug and alcohol test waivers had been increasing in line with increasing cannabis legalization.[85] If cannabis use continues to disqualify applicants, and Congress remains opposed to increased cannabis waivers, the available recruitment population after Federal cannabis legalization will only further narrow. With a smaller pool of

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[77] Jeff Schogol, *The Army Missed Its Recruiting Goal for The First Time Since 2005*, TASK & PURPOSE (Sept. 21, 2018), https://taskandpurpose.com/bulletpoints/army-recruiting-goal-2018.
[78] *Id.*
[79] *Id.*
[80] Approved Waivers, *supra* note 72.
[81] Myers, *supra* note 70.
[82] *Id.*
[83] *See* Meghann Myers, *'No Changes to Standards': Army Leaders Take Control of Waiver Controversy*, ARMY TIMES (Nov. 15, 2017), https://www.armytimes.com/news/your-army/2017/11/15/no-changes-to-standards-army-leaders-take-control-of-waiver-controversy.
[84] Approved Waivers, *supra* note 72.
[85] Schogol, *supra* note 77.

recruits available, the importance of retaining Service members will only increase.

3. Legalized Cannabis and Military Retention

No specific data indicates that Service members are choosing to leave military service based upon the continued prohibition on cannabis use, but it could be a factor. In an effort to gain an understanding, the viewpoints of veterans and veterans' organizations on liberalizing cannabis use prohibitions can be utilized. The American Legion (Legion) has passed a resolution urging Congress to remove cannabis from Schedule I of the CSA.[86] The Legion also conducted a survey to gauge veterans' perspectives on cannabis use: 92 percent supported additional medical research; 82 percent supported full legalization; and 83 percent supported cannabis as a medical treatment option.[87] The Legion is one large example that highlights veterans' interest in low THC products, medical cannabis, further medical study, and even cannabis legalization.[88] Initial research has shown cannabis to be an effective treatment for post-traumatic stress disorder (PTSD), depression, and chronic pain, which tend to impact Service members and veterans at a higher rate than the broader population.[89] These examples do not specifically show that continued cannabis prohibition impacts Service member retention, but it does show Service members and veterans may be disproportionally helped by cannabis use. This may indicate that continued prohibition of cannabis use is a factor in some Service members' decisions to leave military service,

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[86] Bruce Kennedy, *How Federal Marijuana Policy Is Pushing Veterans into the Black Market*, POLITICO (May 27, 2020), https://www.politico.com/news/magazine/2020/05/27/federal-marijuana-policy-veterans-black-market-271197.

[87] *Survey Shows Veteran Households Support Research of Medical Cannabis*, AM. LEGION (Nov. 2, 2017), https://www.legion.org/veteranshealthcare/239814/survey-shows-veteran-households-support-research-medical-cannabis.

[88] *Id.*

[89] *See* Nick Etten, *Our Veterans Deserve the Well-Being that Medical Cannabis Can Provide*, MIL. TIMES (Dec. 17, 2019), https://www.militarytimes.com/opinion/commentary/2019/12/17/our-veterans-deserve-the-well-being-that-medical-cannabis-can-provide; *How Common Is PTSD in Veterans*, VETERANS ADMIN., https://www.ptsd.va.gov/understand/common/common_veterans.asp (last visited Apr. 7, 2024); Ismael Rodriguez Jr., *Federal Study Finds Cannabis Beneficial for PTSD Treatment*, VFW MAG. (Sept. 21, 2021), https://www.vfw.org/media-and-events/latest-releases/archives/2021/9/federal-study-finds-cannabis-beneficial-for-ptsd-treatment.

especially if they suffer from one of those conditions. A continued prohibition on cannabis use with its impact on recruitment and retention becomes more difficult to justify when examining historical cannabis policies.

III. Cannabis Prohibitions and the Initiation of the U.S. Military Drug Testing

The U.S. military drug testing program's origin begins with the popular perception of significant Service member heroin and cannabis use during the Vietnam era.[90] This historical background provides the modern foundation for the U.S. military cannabis prohibitions, which ultimately led to the institution of mandatory drug testing. However, cannabis use in the military began much earlier and resulted in no adverse action.[91]

A. Historical Background of Cannabis Use Prohibitions before Vietnam

The documented history of U.S. military cannabis use begins in the early twentieth century.[92] In 1907, U.S. Service members began serving in the Panama Canal Zone.[93] In Panama, cannabis was widely smoked for its psychoactive effect.[94] A few 1916 military reports mention that U.S. Service members stationed in the Panama Canal Zone quickly adopted cannabis use.[95] The Army conducted two research studies in 1925 and 1931, which found cannabis use did "not affect the combat efficiency and fighting spirit of the individual [S]oldier nor does it undermine military discipline."[96] The first legal prohibition for "habit-forming narcotic drugs" was instituted in the 1917 *Manual for Courts-Martial* but limited to

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[90] *Military Drug Program Historical Timeline*, OFF. OF UNDER SEC'Y FOR PERS. & READINESS, https://prhome.defense.gov/ForceResiliency/DDRP/Timeline (last visited Oct. 15, 2021).
[91] *Id.*
[92] LUKASZ KAMIENSKI, SHOOTING UP: A HISTORY OF DRUGS IN WARFARE 254-255 (2017).
[93] *Our History*, U.S. ARMY S. (SIXTH ARMY), https://www.arsouth.army.mil/About/History (last visited Oct. 26, 2023).
[94] KAMIENSKI, *supra* note 92, at 254-55.
[95] *Id.*
[96] *Id.* at 255.

introduction to installations and use, not possession.[97] In 1918, the Department of War's General Order No. 25 prohibited the possession of narcotic drugs.[98] However, cannabis possession or use was not prosecuted under these legal authorities until World War II, which indicates the legal interpretation initially did not include cannabis.[99]

Between Panama and World War II, the popular perception of cannabis changed based upon racialized stereotypes.[100] While cannabis was previously used in liquid medicines, Mexican immigrants introduced smoking cannabis, which racial minorities adopted[101] and twenty-six states legally prohibited by 1925.[102] This backlash culminated in the Marihuana Tax Act of 1937 federally criminalizing cannabis possession through heavy taxation, complex administrative requirements, and presumed illegality if possessed without complying with registration requirements.[103] In this new cultural milieu, the U.S. military began treating cannabis use more seriously.[104] Even though military prohibitions on cannabis use were not explicitly added until after World War II, during the war, cannabis use, possession, and introduction were prosecuted using the "habit-forming narcotic drug" legal framework that had not previously been used for cannabis.[105] This prosecution paradigm continued until the UCMJ codified specific cannabis offenses in 1950.[106]

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[97] A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES 166 (1917); *see also* Hoff, *supra* note 15, at 171.
[98] Hoff, *supra* note 15, at 171.
[99] *Id.*
[100] *See* Nathan Greenslit, *How Bad Neuroscience Reinforces Racist Drug Policy*, THE ATLANTIC (June 12, 2014), https://www.theatlantic.com/health/archive/2014/06/how-bad-neuroscience-reinforces-racist-drug-policy/371378.
[101] *Id.*
[102] Siff, *supra* note 2.
[103] *See* Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).
[104] Hoff, *supra* note 15, at 171.
[105] *Id.*
[106] Hoff, *supra* note 15, at 171.

B. Drugged U.S. Military Loses Vietnam War and Prompts Drug Testing Program

Service member drug use was a convenient explanation for the U.S. military's failure in Vietnam.[107] Press coverage and politicians focused attention on the "junkie army," which highlighted drugs and alcohol as part of the reason the U.S. military was losing the war.[108] Congressional hearings, DoD studies, and popular culture exaggerated the amount and impact of drug use on Service members in Vietnam.[109] In an extremely influential *Washingtonian* article, John Steinbeck IV claimed that 75 percent of Service members were regularly high, though he would later admit that he "overdramatized the nature of drug abuse in Vietnam for political purposes."[110]

While drug use among Service members did occur, any nuance to the issue was lost. For example, a 1971 DoD Study indicated that around 30 percent of all Service members had used cannabis in the last year while 12 percent had used narcotic drugs.[111] But, a majority of cannabis users used it less than once weekly.[112] After President Nixon's election, he proposed the Vietnamization of the Vietnam War, which would increase the capability of the South Vietnamese military through weapons and training while reducing the number of U.S. Service members in direct combat.[113] The impact of reducing American Service members by 480,000 from 1969 to 1972[114] raised concerns about Service members bringing addiction home.[115] In response, Service members returning from Vietnam were required to participate in compulsory drug testing.[116] A positive drug test meant the Service member would remain in Vietnam until a negative drug

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[107] KAMIENSKI, *supra* note 92, at 278.
[108] *Id.*
[109] JEREMY KUZMAROV, THE MYTH OF AN ADDICTED ARMY 54-55 (2009).
[110] KAMIENSKI, *supra* note 92, at 278.
[111] ALLAN H. FISHER, JR., HUM. RES. RSCH. ORG., PRELIMINARY FINDINGS FROM THE 1971 DOD SURVEY OF DRUG USE STUDY, at viii (1972) [hereinafter 1971 DOD Survey].
[112] *Id.* at 36.
[113] *Vietnamization*, HIST. (June 7, 2019), https://www.history.com/topics/vietnam-war/vietnamization.
[114] *Id.*
[115] Adam Janos, *G.I.s' Drug Use in Vietnam Soured – With Their Commanders' Help*, HIST. (Aug. 29, 2018), https://www.history.com/news/drug-use-in-vietnam.
[116] *Id.*

test was produced.[117] Although limited drug testing did occur prior to this policy, Operation Golden Flow was the first mandatory DoD drug testing program.[118]

After a drug amnesty program, additional drug testing, and a comprehensive study,[119] DoD Instruction (DoDI) 1010.01 codified the DoD's random drug testing program for all Service members in 1974.[120] The intention of this program was rehabilitation rather than adverse action even though rehabilitation failure could result in separation from service.[121] In response to continued drug use by Service members, Deputy Secretary of Defense Frank Carlucci shifted the focus from rehabilitation by promulgating authority to use positive results from compulsory drug tests as a basis for UCMJ prosecution and administrative separation proceedings.[122] The current cannabis use prohibitions, compulsory drug testing program, and authority to use positive drug tests for adverse action through the UCMJ and administrative separation proceedings follow directly from the 1981 Carlucci Memo.[123]

IV. Cannabis Prohibitions and Required Changes after Federal Cannabis Legalization

A. Statutory Prohibitions on Cannabis

Congress has statutorily prohibited cannabis use, possession, and introduction to an installation by military members in Article 112a, UCMJ.[124] In addition to cannabis restrictions codified under CSA or state law, this legal prohibition against cannabis use within the UCMJ provides an additional criminal jurisdiction to which Service members are

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[117] *Id.*
[118] *See* DEPUTY ASSISTANT SEC'Y OF DEF. (DRUG AND ALCOHOL ABUSE), THE DEPARTMENT OF DEFENSE EXPERIENCE IN DRUG ABUSE PROGRAMS 25-26 (June 1973).
[119] *Military Drug Program Historical Timeline, supra* note 90.
[120] *Id.;* U.S. DEP'T OF DEF., INSTR. 1010.01, DEPARTMENT OF DEFENSE DRUG ABUSE TESTING PROGRAM (4 Apr. 1974) [HEREINAFTER DODI 1010.01].
[121] DODI 1010.01, *supra* note 120, at para. 3a.
[122] Memorandum from Deputy Sec'y of Def. to Sec'ies of the Mil. Dep'ts & Dirs. of Def. Agencies, subject: Alcohol and Drug Abuse (28 Dec. 1981).
[123] *Military Drug Program Historical Timeline, supra* note 90.
[124] UCMJ art. 112a (2019).

accountable.[125] Congress enacted the UCMJ, under its constitutional authority to govern and regulate "land and naval forces,"[126] which provides a criminal code to prosecute military members as defined under Article 2, UCMJ.[127] The *Manual for Courts-Martial* preamble states, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the [A]rmed [F]orces . . . ."[128] The prohibition on cannabis use falls cleanly within the U.S. military's obligation to maintain good order and discipline. The UCMJ also includes two punitive articles related to drug use that would take on a new importance if an authorized cannabis use policy was implemented.[129] Article 112, UCMJ, criminalizes Service members who are incapacitated for proper performance of duty.[130] Article 112 can be used to charge incapacitation by either alcohol or drugs, including cannabis.[131] Article 113, UCMJ, criminalizes operation of a vehicle, aircraft, or vessel while impaired by either alcohol or drugs including cannabis.[132] These statutory tools exist, but regulations are the primary tools used to enforce cannabis prohibitions in the U.S. military (as shown by the requirement to initiate involuntary separation after a positive drug test),[133] and, therefore, they would also need to be adjusted.

B. Regulatory Prohibitions on Cannabis Use

Congress has prescribed cannabis use prohibitions in the UCMJ and thus authorized criminal prosecution; however, cannabis use by Service members is rarely prosecuted at a court-martial.[134] Units are required to

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[125] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 4-1, 4-2 (20 Nov. 2020).
[126] U.S. CONST. art. I, § 8, cl. 14.
[127] UCMJ art. 2 (2019).
[128] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 32 (2019).
[129] UCMJ arts. 112, 113 (2019).
[130] UCMJ art. 112 (2019).
[131] *Id.*
[132] UCMJ art. 113 (2019).
[133] U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 10-4 (23 July 2020) [hereinafter AR 600-85].
[134] Court-martials are rarely used for cannabis use. This assertion is based on the author's recent professional experience as an Army judge advocate for ten years. Other branches also rarely use court-martial for cannabis offenses. *See* e-mail from Major Kyle Owens, U.S. Marine Corps, to author (Mar. 29, 2022) (on file with author); e-mail from Major Deepa Patel, U.S. Air Force, to author (Mar. 30, 2022) (on file with author); and e-mail from Lieutenant Lorhel Stokes, U.S. Coast Guard, to author (Mar. 29, 2022) (on file with author) [hereinafter Court-Martial Experience].

initiate administrative separations in response to positive drug tests, and most positive drug tests result in administrative separation rather than court-martial.[135] The separation procedures for officers and enlisted begin with delegations of authority from Congress to the Secretary of Defense, who publishes separation procedures and limits before each Service promulgates final regulatory authorities.[136] Currently, the four separation regulations within the Army include regulatory bases to remove a Service member for use of illicit drugs or illegal use of legal drugs but does not specifically include a list of illicit drugs.[137] Army Regulation 600-85 more clearly defines illicit drugs by prohibiting the use of drugs specifically mentioned in Article 112a, UCMJ, or the CSA, but it also includes a lengthy list of other FDA-prohibited substances, controlled substance analogues, or other controlled substance variations.[138]

For the purposes of this article's analysis, cannabis or its active ingredient are mentioned by name in Article 112a, UCMJ, the CSA, and AR 600-85, along with hemp products, synthetic cannabis or synthetic tetrahydrocannabinol (THC), and "cannabidol CBD, regardless of the product's THC concentration."[139] Service members may be separated in accordance with each of the four separation regulations for use, possession, or a positive drug test for any of the cannabis substances described in AR 600-85.[140]

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[135] AR 600-85, *supra* note 133; Court-Martial Experiences, *supra* note 134.
[136] *See*, *e.g.*, 10 U.S.C. § 113; 10 U.S.C. § 138; 10 U.S.C. § 1181; U.S. DEP'T OF DEF., DIR. 5124.10, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (ASD(M&RA)) para. 2i (14 Mar. 2018); U.S. DEP'T OF DEF., INSTR. 1332.30, COMMISSIONED OFFICER ADMINISTRATIVE SEPARATIONS para. 2.2 (11 May 2018) (C3, 9 Sept. 2021); and U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS para. 2 (27 Jan. 2014) (C7, 23 June 2022).
[137] *See*, *e.g.*, U.S. DEP'T OF ARMY, REG. 135-175, SEPARATIONS OF OFFICERS paras. 2-11d, 2-13d (30 Mar. 2020) [hereinafter AR 135-175]; U.S. DEP'T OF ARMY, REG. 135-178 ENLISTED ADMINISTRATIVE SEPARATIONS para. 11-1d (7 Nov. 2022) [hereinafter AR 135-178]; U.S. DEP'T OF ARMY, REG. 600-8-24 OFFICER TRANSFERS AND DISCHARGES para. 4-2b (8 Feb. 2020) [hereinafter AR 600-8-24]; and U.S. DEP'T OF ARMY, REG. 635-200 ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 14-12c (28 June 2021) [hereinafter AR 635-200].
[138] AR 600-85, *supra* note 133, para. 4-2.
[139] *Id.*
[140] *Id.* para 10-6.

C. Required Legal Changes Prior to an Authorized Cannabis Use Policy

1. Article 112a, UCMJ

As shown through a review of statutory and regulatory cannabis authorities, Congress codified the foundational legal prohibition on cannabis use in Article 112a; in turn, Article 112a provides the legal authority for AR 600-85 and, ultimately, the four administrative separation regulations.[141] If the DoD wished to authorize cannabis use for Service members, it would first require congressional action to specifically remove cannabis from the statutory text in Article 112a.[142] For example, if Article 112a only prohibited controlled substances prohibited by the CSA, Congress could remove the military prohibition on cannabis use simply by amending the CSA. However, Congress specifically enumerated substances in the statutory text of Article 112a; therefore, Congress would not be able to legalize cannabis use for Service members without directly amending Article 112a.

Although the executive branch could conduct administrative rulemaking to remove cannabis from the CSA, the executive branch and the DoD do not have the legal authority to override the statutory text of Article 112a.[143] On the other hand, the Secretary of Defense and Service Secretaries have been delegated authority to promulgate personnel policies and administrative separation policies for the U.S. military.[144] But circumventing the clear statutory prohibition on cannabis use within Article 112a by excluding cannabis from substance abuse policies and separation regulations would be legally impermissible and beyond the scope of the Secretary of Defense and Service Secretaries' authority. Therefore, Congress must remove cannabis from Article 112a and the CSA before the DoD or individual Services would have the authority to promulgate an authorized cannabis use policy.

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[141] *See*, *e.g.*, UCMJ art. 112a (2019); AR 600-85, *supra* note 133, para. 4-2; AR 135-175, *supra* note 137, para. 2-11d, 2-13d; AR 135-178, *supra* note 137, para. 11-1d; AR 600-8-24, *supra* note 137, para. 4-2b; and AR 635-200, *supra* note 137, para. 14-12c.
[142] UCMJ art. 112a (2019).
[143] JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10655, DOES THE PRESIDENT HAVE THE POWER TO LEGALIZE MARIJUANA? 2-3 (2021).
[144] *See* 10 U.S.C. § 113; 10 U.S.C. § 138; 10 U.S.C. § 1181.

2. Article 112, UCMJ

If Congress removes cannabis from Article 112a, UCMJ, in conjunction with Federal cannabis legalization, Congress should also revise the statutory text of Article 112 to explicitly include impairment by cannabis under its framework. This revision would provide additional operating space for the Service Secretaries to craft cannabis use policies that fit each Service's character. Under an authorized cannabis use policy, misconduct would be focused on cannabis impairment or incapacitation in contrast to illegal cannabis use or possession.[145] Revising Article 112 to include impairment by cannabis would clearly indicate the shift toward an authorized cannabis use policy. However, this change is not required to adopt authorized cannabis use. Still, a focus on cannabis impairment under Article 112 would be in line with an authorized cannabis use policy under a revised AR 600-85.

3. Army Regulation 600-85

An authorized cannabis use policy should be added to AR 600-85. While the four separation regulations are the primary tools used to remove Service members who fail to comply with the U.S. military's cannabis prohibitions, those regulations will not require revision to comply with an authorized cannabis use policy because those regulations do not include any mention of cannabis.[146] In contrast, AR 600-85, the source document for the Army's Substance Abuse Program policy, would require a great deal of revision to comply with an authorized cannabis use policy. The revisions fall into four main categories.

First, an authorized cannabis use policy will require removal of cannabis, hemp products, synthetic cannabis or THC, and "cannabidol CBD, regardless of the product's THC concentration" from the prohibited substances that warrant adverse action if used.[147] Once cannabis is

[145] UCMJ art. 112 (2019).
[146] *See*, *e.g.*, AR 135-175, *supra* note 137, paras. 2-11d, 2-13d; AR 135-178, *supra* note 137, para. 11-1d; AR 600-8-24, *supra* note 137, para. 4-2b; AR 635-200, *supra* note 137, para. 14-12c.
[147] AR 600-85, *supra* note 133, para. 4-2.

removed from the CSA and Article 112a, UCMJ, this revision should be simple.

Second, the self-referral programs for alcohol treatment should be expanded to include self-referral for cannabis abuse, which should mirror the alcohol abuse treatment program.[148] Even with an authorized use cannabis policy, some Service members may abuse cannabis like some Service members abuse alcohol. The current substance use disorder treatment is focused on command referral and enforces cannabis prohibition through routine drug tests to prevent illicit drug use.[149] If cannabis use becomes authorized, this presumption would no longer be applicable. Therefore, cannabis misuse self-referral would be required in conjunction with an authorized cannabis use policy.

Third, the Army should codify its authorized cannabis use policy within AR 600-85. Similar to alcohol use, the policy should clearly state that authorized cannabis does not provide autonomy for Service members to use cannabis at any time, any place, or in any job.[150] The U.S. military has restricted the use of alcohol during the duty day,[151] prohibited underage drinking for Service members,[152] and prohibited wearing a uniform in an establishment primarily serving alcohol.[153] Therefore, limitations on cannabis use by periods of service, job types, and waiting periods would permit cannabis use but maintain responsible control over its use.

Fourth, AR 600-85 should also provide clarity about the distinction of medical cannabis under the authorized use policy.[154] It is possible that medicinal cannabis could retain the same limitations as authorized cannabis use. However, if the Food and Drug Administration (FDA) continues to approve cannabis medical treatments, then it may be treated

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[148] *Id.* paras. 8-1, 8-2.
[149] *Id.* para. 8-2.
[150] *See id.* para. 3-2.
[151] *Id.*
[152] *Id.;* U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 10-1c (24 Sept. 2010).
[153] U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 4-3 (26 Jan. 2021).
[154] AR 600-85, *supra* note 133, para. 4-14(c)(4)(d).

as simply another prescription medication.[155] It is also likely that FDA-approved cannabis medications may continue to be treated differently than smoking cannabis under a state law framework.[156] The required statutory and regulatory revisions highlight the legal issues that must be addressed prior to implementation of an authorized cannabis use policy; however, the U.S. military can learn lessons from the CAF. The CAF has authorized cannabis use by its members since 2018 with restrictions by service periods and job duties with waiting periods.[157] It provides a comparable NATO military model that the U.S. military should use as a framework for an authorized cannabis use policy.

V. A Suggested Model for U.S. Military Cannabis Policy

The U.S. military will be unable to authorize cannabis use for Service members without Congress removing cannabis from the CSA and Article 112a, UCMJ; however, this should not preclude the DoD from taking actions in response to the continued legalization of cannabis. First, the DoD should liberalize its accession policies that exclude applicants who have previously used cannabis or continue to use cannabis legally under the state or territory laws.[158] Second, the U.S. military should begin preparation for the inevitable legalization of cannabis by preparing to adopt a comparable policy to the Canadian military's cannabis policies[159] once Congress legalizes cannabis.

1. Liberalized Cannabis Accession Policies

While the U.S. military requires congressional action to authorize cannabis use for Service members, the DoD and each military department drive accession policies.[160] Liberalized cannabis policies by the Nation's states and territories resulted in significant increases in requests for

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[155] *Id*. para. 4-14.
[156] *Id.*
[157] DAOD 9004-1, *supra* note 1, para. 5-2.
[158] *See* DoDI 1010.16, *supra* note 61, para. 6.5b; DoDI 1304.26, *supra* note 62, encl. 4, para. 1d.
[159] *See* DAOD 9004-1, *supra* note 1.
[160] *See* DoDI 1010.16, *supra* note 61, para. 6.5b; DoDI 1304.26, *supra* note 62, encl. 4, para. 1d; DoDI 1145.01, *supra* note 69, para. 3b(1); AR 601-210, *supra* note 64, paras. 4.18b(1)(a)-(c), 4-18d, 4-18e.

cannabis use waivers.[161] This problem will only continue to increase with broad cannabis legalization. For these reasons, the U.S. military should liberalize four accession policies.

First, cannabis use or admission should no longer require a misconduct waiver.[162] Second, the retest period for the first positive test[163] for cannabis should be shortened from 180 days to 30 days. Cannabis can remain in urine for up to 28 days.[164] This time will allow any lingering cannabis from legal use to be excreted. Additionally, an applicant is unlikely to wait for six months to potentially be able to join the military. A shortened re-test period will ensure a negative drug test prior to entry, but it will also allow the recruiters to make clear that continued cannabis use is not authorized in the U.S. military. Third, cannabis use or admission should no longer prevent accession into jobs that require a security clearance,[165] which only reduces opportunities for eligible applicants. Fourth, Category IV applicants who test positive for cannabis or admit to cannabis use should be permitted to join.[166] These changes in the accession policies will reduce the negative effect of normalized cannabis use. The FY 2023 active duty Army end strength was reduced by 12,000 based upon recruitment difficulties.[167] Strict cannabis accession policies, which discourage qualified candidates, only worsen these recruitment challenges. More importantly, the data suggests that Service members who receive cannabis waivers perform no worse than other Service members.[168] Limiting career options for these Service members only harms the U.S. military. The U.S. military should liberalize accession policies while learning from the Canadian military's authorized cannabis use policies.

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[161] Approved Waivers, *supra* note 72.
[162] *See* DoDI 1304.26, *supra* note 62.
[163] *See* AR 601-210, *supra* note 64.
[164] *See* DAOD 9004-1, *supra* note 1, para. 4-12.
[165] *See* AR 601-210, *supra* note 64, paras. 4-18d, 4-18e.
[166] *See* DoDI 1145.01, *supra* note 69.
[167] Davis Winkie & Jen Judson, *Biden Budget Would Mean Smallest Army Since WWII*, MIL. TIMES (Mar. 28, 2022), https://www.militarytimes.com/news/pentagon-congress/2022/03/28/biden-budget-would-mean-smallest-army-since-wwii.
[168] Doug Irving, *Army Enlistment Waivers in the Age of Legal Marijuana*, RAND (Oct. 27, 2021), https://www.rand.org/blog/rand-review/2021/10/army-enlistment-waivers-in-the-age-of-legal-marijuana.html.

C. Canadian Armed Forces Cannabis Policies

The Government of Canada passed the Cannabis Act, which authorizes Canadians over the age of eighteen to possess, share, buy, grow, and use cannabis products beginning on 17 October 2018. [169] Even with Canadian cannabis legalization, the CAF had the option to rely upon a similar military deference doctrine as the U.S. military to enforce policies or restrictions that are more restrictive than those granted to broader Canadian society.[170] On multiple occasions, the Supreme Court of Canada has recognized the validity of the distinct military justice system.[171] The Canadian Charter of Rights and Freedoms (Charter), as part of the Canadian Constitution, reigns supreme over the National Defence Act, which organizes the Canadian Military Justice system; however, "an individual's rights can be limited where they are inconsistent with the basic obligations of military service."[172]

Even with this legal authority, the CAF began reviewing the possibility of an authorized cannabis use policy following the 2015 election.[173] The CAF continued its review through 2016; however, the policy review took on a new focus following the introduction of the Cannabis Act in Parliament.[174] While retaining a cannabis prohibition was considered, ultimately, the CAF determined an authorized use cannabis policy with proper limitations could comply with military service requirements.[175] One factor that influenced that decision is that the CAF is a professional military that relies upon volunteers.[176] A broader effort to increase recruitment from across the spectrum of Canadian society was

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[169] *Cannabis Legalization and Regulation*, GOV'T OF CAN., https://www.justice.gc.ca/eng/cj-jp/cannabis (last visited Feb. 7, 2024).
[170] *Canada's Military Justice System*, GOV'T OF CAN. (Sept. 25, 2023), https://www.canada.ca/en/department-national-defence/corporate/reports-publications/transition-materials/transition-assoc-dm/military-justice-system.html.
[171] *See*, *e.g.*, MacKay v. The Queen, [1980] 2 S.C.R. 370 (Can.); R. v. Généreux, [1992] 1 S.C.R. 259 (Can.); and R. v. Moriarity, [2015] 3 S.C.R. 485 (Can.).
[172] *An Overview of Canada's Military Justice System*, *supra* note 170.
[173] Interview with Commander (Retired) Mike Madden, *supra* note 12; Interview with Mark McGaraughty, *supra* note 10.
[174] *See The Cannabis Act: An Overview*, DENTONS (Apr. 18, 2017), https://www.dentons.com/en/insights/alerts/2017/april/18/the-cannabis-act-an-overview.
[175] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[176] *Id.*

occurring.[177] Continued cannabis use prohibition would only increase the divide between Canadian society and the CAF while potentially harming recruitment efforts and discouraging continued military service.[178]

In early 2017, the CAF instituted a broader working group that included all relevant stakeholders from the Department of National Defence, CAF, and the Canadian Department of Justice.[179] The broader working group collected input from the field, discussed draft policies and concerns, and reviewed finalized proposals.[180] A narrower working group reviewed scientific research, policy reviews of other countries' cannabis policies (including state policies from the United States), and input from Canadian military stakeholders while drafting specific policy language for an authorized cannabis use policy.[181]

The Canadian military remains the only NATO partner to authorize its military members to use cannabis.[182] Rather than continuing cannabis use prohibition, the Canadian military responded to its country's cannabis legalization by publishing guidance authorizing use of cannabis with limitations based upon periods of service and job types with waiting periods.[183] One important distinction in the Canadian military's authorized cannabis use policy remains the disparate legal treatment between medical cannabis and authorized cannabis use. The separate legal authorities and legal development that the CAF medical cannabis policy and CAF authorized use cannabis policy must be understood when understanding the CAF's treatment of cannabis as a whole.

1. Canadian Armed Forces' Authorized Cannabis Use Policy

The first piece of the cannabis policy framework is the authorized cannabis use policy. Members of the CAF are authorized to use cannabis provided their use complies with the cannabis use policy's main theme—

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[177] *Id*.
[178] Interview with Mark McGaraughty, *supra* note 10.
[179] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[180] *Id.*
[181] *Id.*
[182] Interview with Mark McGaraughty, *supra* note 10.
[183] DAOD 9004-1, *supra* note 1, para. 5-2.

responsibility.[184] For that reason, cannabis use that would cause "impairment which would prevent the safe and effective performance of duties" remains prohibited.[185] The Canadian military's authorized cannabis use policy is effectuated through two general limitations on cannabis use for military members.[186] First, CAF members are prohibited from using cannabis during specific periods of service.[187] These prohibition periods include: the duty day; domestic operations, exercises, collective training, or international exercises; operation or service in a vessel, vehicle, or aircraft; during initial entry training; and international operations.[188] Second, cannabis use is limited by job types and waiting periods. After a normal duty day, CAF members may consume cannabis so long as done more than eight hours prior to the next duty day.[189] If a member will be handling weapons, operating a military vehicle, beginning an exercise or collective training, parachuting, rappelling, or maintaining military aircraft then the member is prohibited from consuming cannabis for twenty-four hours prior to that duty type.[190] Members who serve on a submarine, conduct high altitude parachuting, serve on a military aircraft, or operate an unmanned aerial system are not permitted to use cannabis within twenty-eight days of any service period.[191] The twenty-eight day limitation essentially precludes CAF members in those roles from using cannabis because it can remain within urine for up to twenty-eight days.[192]

However, this quick synopsis of the cannabis limitations highlights the authorized cannabis use policy's clarity. It also results in the vast majority of the CAF members being permitted to use cannabis on a daily basis. As another tool to ensure clarity, Canadian military commanders are required to notify CAF members when a period of cannabis prohibition will begin based upon operational needs or upcoming missions.[193] This requirement

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[184] *Id.* para. 4-2.
[185] *Id.*
[186] *Id.* paras. 5-1, 5-2.
[187] *Id.* para. 5-1.
[188] *Id.*
[189] *Id.* para. 5-2.
[190] *Id.*
[191] *Id.*
[192] *Id.* para. 4-12.
[193] *Id.* para. 5-5.

ensures clear communication between leaders and CAF members when cannabis use is not authorized.

While cannabis use is authorized, the Canadian military expects its leaders to examine its CAF members for cannabis use disorder and cannabis misuse.[194] The authorized use policy includes training for junior leaders to highlight signs of cannabis misuse or cannabis use disorder.[195] Cannabis use disorder includes a problematic pattern of cannabis use that results in impairment or distress meeting at least two criteria under *Diagnostic and Statistical Manual of Mental Disorders*.[196] Cannabis use disorder will require referral for treatment; however, CAF members are permitted to decline treatment, but it may result in other administrative actions.[197]

In contrast, cannabis misuse can prompt adverse action.[198] Cannabis misuse is defined three ways: violation of federal, military, provincial, or foreign law; violations of the Canadian military's authorized cannabis use policy; or action that "undermines safety or operational effectiveness."[199] While the policy was being implemented, the Canadian military leadership focused its message on the responsibility of its military members.[200] "I think we can trust in our guys and our gals to look after themselves, to police themselves," said Lieutenant General Chuck Lamarre, Chief of Military Personnel.[201] Ultimately, he thought that very few CAF members would violate the rules.[202] After five years of authorized cannabis use, the policy analyst who manages the cannabis portfolio for the Department of National Defence was not aware of any issues based upon authorized cannabis use. [203] While authorized cannabis use continues without

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[194] *Id.* paras. 4-7, 6, 8.
[195] *Id.* para. 4-7; Interview with Commander (Retired) Mike Madden, *supra* note 12.
[196] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM 5-TR (5th ed. 2022); DAOD 9004-1, *supra* note 1, para. 2.
[197] DAOD 9004-1, *supra* note 1, paras. 4-14, 7-3.
[198] *Id.* para. 2.
[199] *Id.* para. 2.
[200] Ben Cousins, *Canadian Military Unveils Pot Policy*, CTVNEWS (Sept. 7, 2018), https://www.ctvnews.ca/canada/canadian-military-unveils-pot-policy-1.4084015.
[201] *Id.*
[202] *Id.*
[203] Interview with Mark McGaraughty, *supra* note 10.

problems, the Canadian military retains a separate policy for CAF members who are prescribed medical cannabis.[204]

2. Canadian Armed Forces' Medical Cannabis Use Policy

In 2000, the Court of Appeal for Ontario found that Canadians had a constitutional right to use cannabis as medicine under the Charter.[205] In response, the Canadian government prescribed regulations that authorized patients to grow or purchase cannabis from regulated producers.[206] The Canadian military permitted CAF members to use medical cannabis in accordance with the new regulations under the Charter.[207] Based upon this policy, CAF members who are prescribed medical marijuana must notify CAF healthcare providers, who will evaluate the member's medical condition and the cannabis prescription.[208] Canadian Armed Forces members who are prescribed medical cannabis will receive medical employment limitations (MELs).[209] These restrictions are equivalent to receiving a physical profile in the U.S. military but also can place limits on the performance of job duties.[210] The practical effect of MELs for medical cannabis means CAF members will be referred for disability processing if medical cannabis use is continued.[211] Four years after adoption of the authorized use cannabis policy, this legal distinction between authorized cannabis and medical cannabis remains in effect.

3. Disparate Treatment for Medical Cannabis and Authorized Use Cannabis

In practice, a CAF member who serves in a job without duty limitations could use cannabis every evening so long as the cannabis use

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[204] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[205] R v. Parker, [2000] 49 O.R. (3d) 481 (Can.).
[206] *A Timeline of Some Significant Events in the History of Medical Marijuana in Canada*, CTV NEWS, https://london.ctvnews.ca/medicalmarijuana/a-timeline-of-some-significant-events-in-the-history-of-medical-marijuana-in-canada-1.3858860 (last visited Apr. 17, 2024).
[207] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[208] DAOD 9004-1, *supra* note 1, para. 4-8.
[209] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[210] *Id.*
[211] *Id.*

does not result in cannabis use disorder or cannabis misuse.[212] However, if the same CAF member was medically prescribed CBD, which does not contain cannabis's psychoactive element, THC,[213] to reduce nighttime anxiety and enhance sleep,[214] the CAF member would be required to report the prescription, receive medical evaluation, and be assigned likely career-ending MELs.[215] These disparate cannabis policies developed independently from distinct legal backgrounds.[216] Nevertheless, the Canadian military has not rationalized these policies, which continue disparate treatment between medically prescribed cannabis and authorized cannabis use for CAF members. The U.S. military should carefully review and weigh the Canadian military's cannabis policies when determining how to implement a U.S. military cannabis use policy.

D. A Proposed U.S. Military Cannabis Use Policy

While preparing for the inevitable Federal cannabis legalization, the U.S. military should use the Canadian military's authorized cannabis use policy as a model when formulating its cannabis policy. In many ways, the Canadian military provides a crystal ball that grants the U.S. military a look into the future to examine impacts of cannabis legalization. First, both militaries are filled through voluntary service that requires recruitment across a diverse democratic society.[217] Second, both militaries are NATO members that operate in similar international environments with similar partners under comparable international obligations.[218] Third, both militaries are modern militaries with high-tech equipment, a commitment to operational safety, and legal systems focused on good order and

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[212] DAOD 9004-1, *supra* note 1, para. 2.
[213] Holland, *supra* note 26.
[214] *Information for Health Care Professionals: Cannabis (Marihuana, Marijuana) and the Cannabinoids*, GOV'T OF CAN. para. 4.9.5.1 (Spring 2018), https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/information-medical-practitioners/information-health-care-professionals-cannabis-cannabinoids.html#a4.9.5.1.
[215] *See* DAOD 9004-1, *supra* note 1, para. 4-8; Interview with Commander (Retired) Mike Madden, *supra* note 12.
[216] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[217] Interview with Commander (Retired) Mike Madden, *supra* note 12; Interview with Mark McGaraughty, *supra* note 10.
[218] Interview with Mark McGaraughty, *supra* note 10.

discipline.[219] Fourth, as a North American neighbor also settled by Great Britain, Canada retains a similar cultural background in its society and military.[220] Canada provides a comparable model from a partner military for the U.S. military to examine when determining a way forward with future cannabis legalization. Similar to the Canadian military, the U.S. military will also be required to wrestle with the distinction of medical cannabis use, as nearly fifty states and territories have authorized some type of medical cannabis use.[221]

1. Authorized Cannabis Use with Limits

Once Congress acts to legalize cannabis use, the U.S. military should encourage the amendment of Article 112a, UCMJ, to remove cannabis, which would allow the adoption of an authorized cannabis use policy similar to the Canadian military's policy. The U.S. military already has policies in place to prevent and punish impairment while on duty from either alcohol or drugs.[222] The adoption of an impairment-focused model for cannabis use would be in line with U.S. military's alcohol policies. The U.S. military should adopt the Canadian military's two general limitations on cannabis use: periods of service and job types with waiting periods.[223]

First, the prohibition of cannabis use during the duty day; domestic operations, exercises, collective training, or international exercises; operation or service in a vessel, vehicle, or aircraft; during initial entry training; and international operations[224] are common-sense limits on cannabis that mirror alcohol prohibitions the U.S. military already uses.[225] One additional limitation that expands beyond the Canadian military's

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[219] ALLAN D. ENGLISH, DEP'T OF NAT'L DEF. UNDERSTANDING MILITARY CULTURE: A CANADIAN PERSPECTIVE 1-5 (2001); Interview with Commander (Retired) Mike Madden, *supra* note 12.
[220] Norman L. Nicholson, *British North America*, CANADIAN ENCYC. (Nov. 25, 2022) https://www.thecanadianencyclopedia.ca/en/article/british-north-america; ENGLISH, *supra* note 219.
[221] Hartman, *supra* note 14.
[222] *See*, *e.g.*, UCMJ art. 112 (2019); UCMJ art. 113 (2019); AR 600-85, *supra* note 133, para. 3-2.
[223] DAOD 9004-1, *supra* note 1, para. 5-2.
[224] *Id.*
[225] *See*, *e.g.*, UCMJ art. 112 (2019); UCMJ art. 113 (2019); AR 600-85, *supra* note 133, para. 3-2; AR 670-1, supra note 153, para 4-3.

authorized cannabis use policy would be prohibition of cannabis use during international assignments like Korea, Germany, Italy, or Japan. Canada prohibits CAF members from using cannabis while outside of Canada; [226] however, Canada only has four military bases outside Canada.[227] The U.S. military assigns hundreds of thousands of Service members to duty locations around the world.[228] Many countries retain legal prohibitions on cannabis use.[229] For this reason, U.S. Service members should be prohibited from using cannabis during overseas assignments.

Second, the limitations on cannabis use based upon job types with waiting periods should also be adopted; however, each Service should be permitted to provide input upon the waiting periods for specific job types. During the Canadian military's creation of its authorized cannabis use policy, the Canadian Air Force, Canadian Special Operations Forces Command, and the Royal Canadian Navy had concerns about cannabis use based upon operational safety.[230] Some research indicated impacts on mental acuity in pressurized environments after using cannabis.[231] For this reason, the strictest limits on cannabis use within the Canadian military's authorized cannabis use policy apply to members of the Canadian Air Force, jobs within the Canadian Special Operations Forces Command, and Navy submariners.[232] While the eight-hour[233] and twenty-four-hour[234] limitations on cannabis use in the Canadian military's authorized cannabis

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[226] DAOD 9004-1, *supra* note 1, para. 5-2.
[227] Martin Lukacs, *Canada Building Global Network of Military Bases in Aggressive Shift*, THE BREACH (June 29, 2021), https://breachmedia.ca/canada-building-global-network-of-military-bases-in-aggressive-shift.
[228] "There were over 168,000 active-duty US troops serving overseas as of September 2023."*Where are the US military members stationed, and why?* USAFACTS TEAM (FEB. 2, 2024), https://usafacts.org/articles/where-are-us-military-members-stationed-and-why/.
[229] *Countries Where Weed is Illegal 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/countries-where-weed-is-illegal (last visited Apr. 17, 2024).
[230] Interview with Commander (Retired) Mike Madden, *supra* note 12.
[231] DAOD 9004-1, *supra* note 1, para. 4-12.
[232] *Id.* para 5-2.
[233] Service members may consume cannabis so long as done more than eight hours prior to next duty day. DAOD 9004-1, *supra* note 1, para. 5-2.
[234] If a member will be handling weapons, operating a military vehicle, beginning an exercise or collective training, parachuting, rappelling, or maintaining military aircraft, then the member is prohibited from consuming cannabis for twenty-four hours prior to that duty type. DAOD 9004-1, *supra* note 1, para. 5-2.

use policy should be sufficient for the vast majority of U.S. Service members, some job duties beyond the types highlighted by the Canadian military (members who serve on a submarine, conduct high-altitude parachuting, serve on a military aircraft, or operate an unmanned aerial system[235]) may also require cannabis use preclusion. The U.S. military should solicit feedback from each Service about potential job duties that may also require a twenty-eight-day restriction on cannabis use and continued random cannabis testing. Cannabis use policies do not have to be divided between medical and authorized use.

2. Rationalized Medical and Authorized Cannabis Use Policies

The U.S. military should treat medical and authorized cannabis use with one standard rather than retaining a bifurcated system like the Canadian military. Army Regulation (AR) 600-85 already permits use of cannabis-derived medicines as authorized medical use if the medications are FDA approved.[236] Primarily, state or territorial medical cannabis prescriptions do not include FDA-approved medications but rather other means of cannabis consumption such as smoking or consuming edibles.[237] Under a combined cannabis policy, U.S. Service members should be required to report cannabis prescriptions to military medical providers like CAF members.[238] As long as the prescription includes cannabis use that would comply with the authorized cannabis use policy, avoid impairment during duty periods, or only include short-term treatment (less than two weeks), no additional action would be required. On the other hand, if the cannabis is prescribed for use during the duty day in a manner inconsistent with job duty limitations or for long term use, then the Service member should be evaluated to determine if they meet medical retention standards in accordance with AR 635-40.[239] This proposed solution would combine

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[235] *Id.*
[236] AR 600-85, *supra* note 133, para. 4-2(l)(9)(a).
[237] *See FDA and Cannabis: Research and Drug Approval Process*, U.S. FOOD & DRUG ADMIN. (Oct. 1, 2020), https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process; Stephanie Watson, *Medical Marijuana FAQ*, WEBMD, (Dec. 18, 2021), https://www.webmd.com/a-to-z-guides/medical-marijuana-faq.
[238] DAOD 9004-1, *supra* note 1, para. 4-8.
[239] U.S. DEP'T OF ARMY, REG. 635-40, DISABILITY EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 4-7 (19 Jan. 2017).

both types of cannabis use into a workable policy. A failure to rationalize medical and authorized use cannabis policies would increase confusion for Service members while dis-incentivizing compliance.

3. Effects of an Authorized Cannabis Use Policy

An authorized cannabis use policy can increase recruitment and retention based upon normalized cannabis use in society; however, it also provides four additional positive effects for the U.S. military. First, it will save time, work, and money. The Navy Drug Screening Laboratories test 2.5 million urine samples each year, which includes samples from all components and branches along with all new accessions.[240] While an authorized cannabis use policy would not eliminate drug testing, it would dramatically reduce the number of positive tests. Because cannabis can be detected in urine for twenty-eight days, it is the most common positive test.[241] Most other drugs are not detectible within a few days of use.[242] If the laboratory is no longer required to do confirmation testing[243] for the vast majority of tests, it would dramatically reduce testing costs.

A positive cannabis test is only the first step in a long process. Once the test is confirmed as illicit drug use, the results are returned to the unit drug control representative who must receive the positive test and notify law enforcement, the unit commander, and unit staff.[244] Units are required to flag the Service member, refer the Service member for a substance use disorder evaluation, and initiate administrative separation.[245] Unit commanders may also choose to take other adverse actions against the Service member.[246] While the vast majority of cannabis cases are not handled by a court-martial,[247] even a small reduction in courts-martial and

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[240] NAVY & MARINE CORPS PUB. HEALTH CTR., DRUG TESTING FAQS 1 (2019), https://www.med.navy.mil/Portals/62/Documents/NMFA/NMCPHC/root/Documents/navy-drug-screening-labs/Drug-Testing-FAQs.pdf.
[241] DAOD 9004-1, *supra* note 1, para. 4-12.
[242] *See* Hayley Hudson, *Different Drugs Stay in your System for Different Amounts of Time*, ADDICTION CTR. (Feb. 23, 2022), https://www.addictioncenter.com/drugs/how-long-do-drugs-stay-in-your-system.
[243] *See Drug Testing FAQs*, supra note 240.
[244] AR 600-85, *supra* note 133, fig.4-2.
[245] *Id.* para. 10-4.
[246] *Id.*
[247] Courts-martial are rarely issued for cannabis use or possession. *See supra* note 134.

larger reduction in administrative separation boards would dramatically reduce the amount of time devoted to cannabis use cases. An authorized cannabis use policy would save time, work, and money at every step of the process from initial drug testing, confirmation testing, personnel actions, and, finally, legal processes.

Second, authorized cannabis use would result in fewer administrative separations and increased retention of trained Service members during a challenging recruiting environment.[248] The initial entry training cost for each new Service member ranges between $55,000 and $74,000.[249] Every Service member not administratively separated for cannabis use could theoretically serve in the U.S. military for longer and save money, training costs, recruiting costs, and reduce recruitment requirements.[250]

The third potential positive effect of instating an authorized cannabis use policy would be increased opportunities for first-line leaders to engage with their formations and develop and implement leadership skills. A dramatic change in cannabis use policy would require training first-line leaders and junior officers about signs of cannabis impairment and the process to refer for drug testing.[251] This would require some initial time and investment, but it also would be an opportunity to remind and engage junior leaders about their importance within the military formation. First-line leaders are closest to their Service members, and they have the ability to help catch cannabis misuse or other problems early. This new requirement is not unlike the current expectation for junior leaders to report Service members who are impaired on duty.[252]

Fourth, an authorized cannabis use policy would result in additional substance abuse treatment options. While self-referral for cannabis treatment was an option,[253] the current policy presumes illicit use of

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[248] Winkie & Judson, *supra* note 167.
[249] Sean Kimmons, *OPAT Reducing Trainee Attrition, Avoiding Millions in Wasted Training Dollars, Officials Say*, ARMY NEWS SERV. (July 2, 2018), https://www.army.mil/article/207956.
[250] *Id.*
[251] This requirement remains part of the Canadian military's authorized cannabis use policy. DAOD 9004-1, *supra* note 1, para. 4-7; Interview with Commander (Retired) Mike Madden, *supra* note 12.
[252] *See, e.g.*, UCMJ art. 112 (2019); UCMJ art. 113 (2019); AR 600-85, *supra* note 133, para. 10-12.
[253] AR 600-85, *supra* note 133, para. 7-3.

cannabis and self-referral does not prevent administrative separation.[254] Service members are unlikely to seek treatment for an illegal drug. If cannabis use is authorized, then AR 600-85 would have to be revised to reflect authorized cannabis use and self-referral. Even with an expanded self-referral option, command referral for cannabis treatment would occur similarly to command referrals for alcohol abuse now: when Service members were impaired by cannabis, misused cannabis, or were diagnosed with cannabis use disorder.[255] The Canadian military's authorized cannabis use policy treats cannabis misuse as a medical issue comparable to alcohol abuse.[256] The U.S. military should adopt this method to provide more effective substance abuse treatment options while also improving recruitment and retention through authorized cannabis use.

VI. Conclusion

Federal legalization of cannabis may not occur this year, but the clear trend of legalization throughout the states and territories shows the inevitability of cannabis legalization. The U.S. military must reconcile with this reality. Even without Federal legalization, state and territorial legalization and normalized cannabis use has already impacted military recruiting through the increased need for misconduct waivers for legally used cannabis. In 2018, the Canadian military had a choice to make. It could continue a cannabis use prohibition or authorize cannabis use for CAF members. Based upon its efforts to expand recruitment throughout all facets of Canadian society, the Canadian military prepared an authorized cannabis use policy, which permitted the vast majority of CAF members to use cannabis while retaining limitations based upon service periods and job duties with waiting periods.

The Canadian military has provided the U.S. military with a framework for authorized cannabis use within a similarly organized NATO military. It should be the model for future U.S. military cannabis policy. First, the U.S. military must liberalize its accession policies, which discourage applicants who legally used cannabis under state or territorial law from joining and limits their opportunities. Second, when Congress

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[254] *Id.* para. 10-12.
[255] *Id.* paras. 7-4, 7-5, 7-6.
[256] DAOD 9004-1, *supra* note 1, paras. 2, 4-14.

legalizes cannabis, the U.S. military should avoid the urge to retain cannabis prohibitions; rather, it should adopt an authorized cannabis use policy that builds off the Canadian military's authorized cannabis use policy framework while also rationalizing medical and authorized cannabis use. The Canadian military has had no issues since its cannabis use policy went into effect. This success provides more evidence that the U.S. military can trust its Service members "to look after themselves, to police themselves" [257] when cannabis use is authorized.

[257] *Supra* note 201 and accompanying text.

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The Self-Autonomous Accused: Is the Court-Martial System Ready for the Effects of *McCoy v. Louisiana*?

MAJOR DUSTIN L. MORGAN*

"I don't have to be what you want me to be. I'm free to be who I wanna be and think what I wanna think."[1]

I. Introduction

As a trial defense counsel, practitioners, maybe for the first time in their career, feel like they are finally free to practice law as they see fit. Unrestricted from the everyday confines and oversight that is present in military justice offices, defense counsels are free to try their cases. Defense counsel do not have to structure their decisions around the staff judge advocate's, or more importantly, the general court-martial convening authority's military justice philosophy; they are permitted to practice in the best interests of their client. Because of this freedom, defense counsel have traditionally wielded an enormous amount of control in the military justice system—it was seen as strictly within their purview to dictate the strategy and the tactical direction that the accused's court-martial will

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[1] Muhammad Ali, Post-Heavyweight Championship Fight Press Conference at the Miami Beach Convention Center (Feb. 26 1964).

take.[2] Defense counsel have the ability to choose which witnesses to call, what objections to make, how to make and structure their opening statement, and the arguments to advance in closing.[3] At first glance, it appears that defense counsel are on an island; engaging in possibly the only truly autonomous practice of law in the Army, beholden to no master.

This thought, present in the mind of many defense counsel, poses an important question: what role does the accused play in the court-martial process? It is, after all, the accused's liberty that is at stake. The balance of power between defense counsel and the accused is something constantly fought over, written about, and fine-tuned by the appellate court system. For years, inherently tactical decisions were left to the attorney to make; defense counsel had no obligation to seek an accused's affirmative permission to make tactical decisions, as long as those decisions would not render defense counsel's performance ineffective.[4] Under this standard, the accused was left to live with the consequences of their attorney's tactical decisions or risk the perilous decision to proceed to trial representing themselves.[5]

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[2] *See* Florida v. Nixon, 543 U.S. 175, 187 (2004) ("An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" (internal citations omitted)).

[3] *See* Gonzalez v. United States, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote."); *see also* Taylor v. Illinois, 484 U.S. 400, 418 (1988) ("Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.").

[4] *See Nixon*, 543 U.S. at 192 ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.").

[5] *See* Faretta v. California, 422 U.S. 806, 832 (1975) (establishing the Sixth Amendment right to self-representation).

This division of responsibility left one question unanswered in Sixth Amendment jurisprudence: could a defense counsel make a tactical decision over their client's affirmative objection? In other words, could an attorney substitute their better judgment, which presumably has the benefit of at least three years of legal education, over their client's wishes? What is the right approach when a defense attorney decides to make a strategic factual admission, essentially conceding an element of an offense, when the accused objects to the admission—can they make that call over their client's protest? Viewing history, it seems the answer should be yes—the attorney gets to make the tactical calls. They are, after all, the trained, legal professional, and these are legal questions and strategies. What possibly no one expected is that the United States Supreme Court, in answering this question, would establish a new fundamental constitutional right: the right to factual autonomy.[6]

In announcing this new rule in its 2018 decision, *McCoy v. Louisiana*, the Supreme Court, perhaps unintentionally, initiated a fundamental shift in the way defense attorneys must engage in the practice of law and the way appellate courts judge their actions. Rather than focus on the effectiveness of the attorney's trial strategy, as the Court did pre-McCoy, courts now examine whether defense attorneys and the accused agree on the "fundamental objectives" of the defense, with a particular focus on whether the accused voiced an affirmative objection to any factual concessions their attorney made during the trial.[7] Presently, attorneys have to consider not only the effectiveness of their strategic decisions, but also must obtain consent, or at least avoid an affirmative objection to any factual concessions they think are in their client's best interests. Although seemingly a small distinction, this is not an inconsequential change. It has dramatically shaped the criminal practice of law in the United States—in

[6] *See* McCoy v. Louisiana, 584 U.S. 414, 422 (2018) (holding the autonomy to decide the objective of the defense is to assert innocence is a decision left to the client).

[7] *See id.* at 426-27 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . the violation of [the accused's] protected autonomy right was complete when the court allowed counsel to usurp control of an issue with [the Accused's] sole prerogative.") (citing Strickland v. Washington 466 U.S. 668 (1984)).

the two years following McCoy, courts appear to have cited the opinion nearly every other day.[8]

This seismic shift would seemingly have repercussions for defense counsel out in the field trying their cases. Surprisingly though, the military appellate system has cited *McCoy* only three times.[9] This lack of attention by military appellate courts does not mean the accused's fundamental right to factual autonomy can be ignored; it means it is there lurking in the shadows. It is only a matter of time before the military appellate system—which is inclined to be paternalistic in its review of the defense counsel's representation of an accused—is presented with the right case, and then the broad-sweeping principles of *McCoy* will find their way into the court-martial practice.[10] Defense practitioners, and the court-martial system as a whole, should not wait for this imposition to act. Federal and state caselaw provide the answers to how the President, military judges, and the trial defense services can shape military justice practice now to prevent mass appellate reversals once this new fundamental right becomes firmly rooted. The military justice system can adjust now to the autonomous accused before it is forced to painfully adjust after the fact.

To proactively account for the imposition of the right to factual autonomy, this paper suggests four changes to the military justice practice. First, defense counsel should realize from the outset that they do not possess all the autonomy in their practice. The accused should be informed from the initiation of the attorney-client relationship that they have the prerogative to decide what factual concessions their defense counsel makes during the course of their court-martial. Defense counsel are already cautioned to advise their clients with a standard form, this form should be updated to account for the right announced in *McCoy*. Second, the Army's Rules of Professional Conduct, found in Army Regulation (AR) 27–26, should be updated to account for the accused's right to factual autonomy. Third, Rules for Court-Martial (RCM) 706 and 909 should be

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[8] *See* Rosemond v. United States., 958 F.3d 111 (2d Cir. 2020) *petition for cert. filed,* 2020 WL 5991229 (U.S. Sept. 28, 2020) (No. 20–464).

[9] *See* United States v. Hasan, No. 21-0193, 2023 CAAF LEXIS 639, at *16 (C.A.A.F. Sep. 6, 2023); United States v. Lancaster, No. 20190852, 2021 CCA LEXIS 219 at *3–7 (A. Ct. Crim. App. May 6, 2021); United States v. Hasan, 80 M.J. 682, 693 (A. Ct. Crim. App. 2020).

[10] *See infra* Section III (This paper will address the hallmarks of the military appellate system that make it susceptible to a broad interpretation of *McCoy* in Section III.).

revamped to account for the accused's role in shaping the overall goals of their court-martial. These standards need to be more exacting to ensure the accused is competent to make the decisions about the "fundamental objectives of the [accused's] representation."[11] Finally, the military judge should be required to engage in a colloquy with the accused to ensure that they do not object to any factual concessions their defense counsel make during the course of the court-martial.

II. The Sixth Amendment and *McCoy*: The Genesis and Development of Factual Autonomy

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[12]

Among the rights conferred to an accused, the Supreme Court has stated the right to counsel, "[I]s among the most fundamental . . . 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'"[13]

A. *Faretta* and the Personal Guarantees of the Sixth Amendment

Any consideration of the reaches of the Sixth Amendment right to assistance of counsel must begin with the Supreme Court's 1975 decision in *Faretta v. California*. Here, the accused, charged with grand theft in

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[11] *McCoy*, 584 U.S. at 426.
[12] U.S. CONST. amend. VI.
[13] Penson v. Ohio, 488 U.S. 75, 84 (1988) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

California, wished to represent himself because he believed the public defender's office was too busy to provide an adequate defense.[14] After originally granting Faretta's request, the trial judge *sua sponte* reversed his original ruling—finding that Faretta had no constitutional right to represent himself and that his waiver of the right to counsel was not knowing and voluntary because he could not intelligently answer questions on evidentiary rules and trial procedure.[15] Throughout the trial, Faretta renewed his request to represent himself and attempted to make motions on his own.[16] The judge denied all the requests and motions, and required that Faretta's defense be conducted solely through his appointed public defender.[17] The jury found Faretta guilty of all charges and sentenced him to prison, and the California appellate courts upheld the conviction.[18]

The Supreme Court, in reversing the lower courts, rendered an opinion that culminated over fifty years of jurisprudence on the right to assistance of counsel.[19] The Court, for the first time, spoke to the personal nature of the guarantees of the Sixth Amendment:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the

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[14] Faretta v. California, 422 U.S. 806, 807 (1975).
[15] *Id.* at 808–10.
[16] *Id.* at 810–11.
[17] *Id.* at 811.
[18] *Id.* at 811–812.
[19] *See, e.g.,* Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Betts v. Brady, 316 U.S. 455 (1942); Gideon v. Wainwright. 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

> accused; for it is he who suffers the consequences if the defense fails.[20]

The counsel provision, according to the Court, is not a requirement of the Sixth Amendment right to due process, it merely supplements the constitutional guarantees provided to an accused.[21] The assistance of counsel, like other guarantees afforded to an accused, "shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[22] To rule otherwise, according to the Court, would violate the logic of the Sixth Amendment; mandating a master, where the protections speak of an assistant.[23]

The Supreme Court notes that this personal right is guaranteed despite the fact that most accused would be better served by counsel.[24] The opinion reiterates:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case, counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[25]

To force an accused to accept an attorney against their will deprives an individual of their constitutional right to conduct their own defense.[26] It is against this backdrop that subsequent Sixth Amendment assistance of counsel questions will be decided going forward. The *Faretta* case remained the last word on the personal nature of the Sixth Amendment right to the assistance of counsel for nearly fifty years, until *McCoy*.

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[20] *Faretta*, 422 U.S. at 819–20.
[21] *Id.* at 820.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 834.
[25] *Id.* (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J, concurring)).
[26] *Faretta*, 422 U.S. at 836.

B. *McCoy*—Autonomy is Born

On May 5, 2008, Robert McCoy (McCoy) shot and killed his estranged wife's mother, stepfather, and son in Louisiana.[27] McCoy was arrested several days later in Idaho and extradited to Louisiana.[28] He was indicted on three counts of first-degree murder and was notified that the prosecutor intended to seek the death penalty.[29] Throughout his trial, McCoy insisted that he was innocent.[30]

McCoy advanced this theory by stating that he was out of the state at the time of the murders and that corrupt police officers had killed the victims because a drug deal had gone wrong.[31] McCoy advanced this theory despite overwhelming evidence.[32] Prosecutors presented evidence that: McCoy had abused and threatened to kill his estranged wife; that one of the victims called the police before being killed and could be heard screaming his name; witnesses saw a man fitting McCoy's description fleeing the scene in his car, which he later abandoned in an ensuing chase; when his car was recovered it contained the victim's stolen phone that was used to call the police; and McCoy was arrested hitchhiking in Idaho with a loaded gun that was later identified as the one that killed the victims in Louisiana.[33]

After his arrest, McCoy was provided appointed counsel from the public defender's office.[34] When his counsel learned of McCoy's intent to present a defense based on a police conspiracy, McCoy's counsel sought and attained a court-appointed sanity examination, which found him competent to stand trial.[35] Based on his appointed counsel's refusal to present his proposed defense, McCoy informed the court in January 2010 that his relationship with counsel was irretrievably broken.[36] During this time, he sought and gained permission to represent himself until his

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[27] McCoy v. Louisiana, 584 U.S. 414, 418 (2018).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 430 (Alito, J., dissenting).
[33] *Id*.
[34] *Id.* at 418.
[35] *Id.*
[36] *Id.* at 418-19.

parents could obtain new representation.[37] In March 2010, McCoy's parents retained new counsel, Mr. Larry English, who eventually concluded that the evidence against McCoy was overwhelmingly strong and that the only way to avoid the death penalty was to concede that McCoy committed the murders and ask for leniency based on contrition.[38]

McCoy vociferously objected to this strategy, voicing instead his desire to proceed with the police conspiracy, and two days before trial, sought to terminate Mr. English's representation.[39] Citing the lack of time to obtain new representation, the court denied McCoy's request, telling Mr. English: "[Y]ou are the attorney . . . you have to make the trial decisions that you are going to proceed with."[40] Mr. English proceeded with his concession strategy; telling the jury during his opening statement that they could not reach any other conclusion except that McCoy killed the victims—doing this even over his client's verbal objection.[41] McCoy voiced his verbal objection to the trial judge at several points during the trial and reiterated his desire to present his alternate theory.[42] Despite this, Mr. English repeated that McCoy had killed the victims again during his closing argument and the penalty phase, asking the jury to take mercy on his client due to mitigating mental and emotional issues.[43] Upon seeking a new trial after receiving three death sentences, both the appellate court and the Louisiana Supreme Court affirmed the sentence; finding Mr. English had the authority to concede McCoy's guilt over his client's objection because he had the reasonable belief this was the best tactic to avoid a death sentence.[44]

The United States Supreme Court disagreed, announcing for the first time that a criminal accused has a fundamental right to factual autonomy—whether to decide that the objective of the defense is to assert innocence is a category of decision that belongs solely to the accused.[45] The Sixth Amendment, in guaranteeing the assistance of counsel, does not require

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[37] *Id.* at 419.
[38] *Id.* at 418.
[39] *Id.* at 419.
[40] *Id.*
[41] *Id.* at 419-20.
[42] *Id.*
[43] *Id.* at 420.
[44] *Id.*; *see also* State v. McCoy, 218 So. 3d 535 (La. 201).
[45] *McCoy*, 584 U.S. at 422.

that an accused cede all control of their case.[46] The Sixth Amendment, in conferring the right to counsel, speaks of an assistant—no matter how expert an attorney may be, their role is to assist; some decisions will always belong to the client.[47] In the words of the Court:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives are.[48]

In holding this, the Court noted that counsel may assess that conceding guilt may be the best strategic decision to avoid an undesired punishment, but that the client's desire to avoid the opprobrium of admitting guilt or holding out for even the remote chance of an acquittal must still direct counsel's reasonable tactical decisions.[49]

The Court concluded its opinion by stating that violations of a client's right to factual autonomy should not be analyzed under ineffective assistance of counsel jurisprudence.[50] Since the violation of McCoy's Sixth Amendment rights was complete when the lower court allowed Mr. English to present a case based on factually conceding the murders, there is no testing for prejudice.[51] Going even further, the Court concluded, "Violation of a defendant's Sixth Amendment-secured autonomy ranks as an error of the kind our decisions have called 'structural;' when present,

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[46] *Id.* at 421.
[47] *Id*.
[48] *Id.* (quoting Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017)) ("[S]elf-representation will often increase the likelihood of an unfavorable outcome but 'is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'").
[49] *McCoy*, 584 U.S. 422-23.
[50] *Id.* at 426.
[51] *Id.* at 426-27; *see also* Strickland v. Washington, 466 U.S. 668 (1984) (outlining the test for a successful claim based on ineffective assistance of counsel).

such an error is not subject to harmless-error review."[52] The error is structural, the Court explained, because an admission of factual guilt over the objection of the client "blocks the defendant's right to make the fundamental choices about his own defense[,] [a]nd the effect of the admission would be immeasurable."[53] Therefore, the only true remedy is a new trial, without the need to show prejudice.[54]

The dissent, in arguing the imposition of this new right to factual autonomy should not be read into the Sixth Amendment, noted that situations like these are "rare," and do not require such a broad rule.[55] Justice Alito also argues that if the Court's decision were read to affect a defense counsel's ability to make unilateral decisions to concede an element of an offense, it would have important and wide-ranging implications.[56] The fact that the Court did not address this particular issue, but instead announced a comprehensive new right under the Sixth Amendment left this open for the lower courts to decide.[57]

C. The Imposition, or Lack Thereof, of Autonomy Throughout the United States

Justice Alito's warning appears to have been prophetic—the broad language and application of the right to autonomy found in the majority's

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[52] *McCoy*, 584 U.S. 414, 427 (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006); Waller v. Georgia, 467 U.S. 39, 49–50 (1984); Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

[53] *McCoy*, 584 U.S. at 428.

[54] *Id.*

[55] *Id*. at 433 (Alito, J., dissenting). The true rarity of this type of conflict in the military justice system will be addressed in section III. Of note, for now, many of the hallmarks that Justice Alito notes as rare, are common in the military justice system: panels that, until the recent changes that took place in December 2023, decide both guilt and the imposition of a sentence; the ability, or past lack thereof, to plead guilty in a capital case; the availability and imposition of assigned counsel in almost every court-martial, even for non-indigent accused; and the ability to voice an objection to defense counsel's trial strategy through the use of appellate fact-finding.

[56] *Id.* at 435.

[57] *See id.* at 437. Arguably, the fact that Justice Alito asks this question, indicates that the dissenting justices believe that this rule applies broadly to these specific circumstances. By indicating that the Court's decision may have unintended consequences, it is arguable that the dissent was attempting to draw a more limited opinion from the majority, something it failed to accomplish.

holding in *McCoy* has led to more questions than answers. The lack of clarity has led to a split amongst jurisdictions concerning the true reach of the right to factual autonomy and caused lower courts to cite *McCoy* at what appeared to be nearly every other day in the two years following the decision.[58] Jurisdictions either apply *McCoy* broadly, finding the right to factual autonomy extends to almost all factual concessions; or narrowly, limiting the holding to the particular circumstances where a capital defendant affirmatively objects to conceding guilt during the merits phase. Two cases exemplify each approach, with a third highlighting the sole time a military appellate court has addressed an accused's right to autonomy.

1. United States v. Read – True Unfettered Autonomy

In *United States v. Read*, the Ninth Circuit held, in an expansive view of *McCoy*, that the right to autonomy extends beyond the facts present there and extended *McCoy's* holding to prevent counsel from presenting an insanity defense over the accused's objection.[59] In *Read*, the accused was indicted for assaulting his cellmate with a homemade knife while he was serving a prison sentence for attempted robbery.[60] Jonathan Read (Read) claimed he had no memory of the attack and was later admitted to a treatment facility where he was diagnosed with schizophrenia and was found incompetent to stand trial.[61] After undergoing treatment for four months and being found competent, Read's court-appointed lawyer arranged for him to be evaluated to determine his state of mind at the time of the assault.[62] The report concluded that Read's psychosis rendered him unable to form the requisite intent to commit the charged offense, and indicated that he was still suffering from the disorder at the time of the evaluation.[63] Read's counsel provided the court with notice that he intended to present an insanity defense, and successfully petitioned the court to have Read re-admitted for a competency evaluation.[64] During his treatment and evaluation, Read stated he was suffering from demonization

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[58] Rosemond v. United States., 958 F.3d 111 (2d Cir. 2020) *petition for cert. filed,* 2020 WL 5991229 (U.S. Sept. 28, 2020) (No. 20–464).
[59] United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019).
[60] *Id.* at 715.
[61] *Id.* at 715–16.
[62] *Id.* at 716.
[63] *Id.*
[64] *Id.*

rather than mental illness, and sought to represent himself, relying on this defense.[65] Read's request was denied and his counsel put forward an unsuccessful insanity defense, over Read's affirmative objection.[66]

In reaching its conclusion, the Ninth Circuit likened the insanity defense to a concession of guilt, finding that this strategy carries the opprobrium that the Supreme Court noted an accused may wish to avoid.[67] The court found the government's argument that both Read and his counsel shared the same fundamental objective of convincing the jury that Read was not mentally responsible for the offense to be unpersuasive.[68] Read's affirmative indication that he did not want to pursue an insanity defense was enough to trigger his right to autonomy; his counsel could not take a contrary approach.[69] This analysis represents a broad interpretation of *McCoy*, finding this precedent is not limited solely to instances where the accused wants to maintain complete factual innocence—the personal belief that he was sane was enough to trigger the right to autonomy.[70] The Ninth Circuit, along with several other jurisdictions, echoes the sentiment found in Justice Alito's warning, finding that the majority's reasoning had extensive implications beyond the essential holding of *McCoy,* expanding the notion of autonomy in the process.[71] While this represents the broad approach to autonomy, other courts remain strict in their interpretation of this newly-created Sixth Amendment protection.

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[65] *Id.*
[66] *Id.* at 716–17.
[67] *Id.* at 721.; *see also* McCoy v. Louisiana, 584 U.S. 414, 422-23 (2018).
[68] *Read*, 918 F.3d at 721.
[69] *Id.*
[70] *See id.*
[71] *See generally* United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

2. United States v. Rosemond –The Limited Approach

In *United States v. Rosemond,* the Second Circuit, interpreting *McCoy* much more narrowly, held, "[T]he right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged."[72] After being charged with and convicted of murder for hire, James Rosemond (Rosemond) asked the Second Circuit to find that his attorney violated his autonomy rights when he conceded, over Rosemond's objection, that Rosemond had paid other individuals to shoot the victim, but that he did not intend for the victim to die.[73] In an affidavit filed with the trial court, Rosemond stated that he disagreed with his attorney's proposed trial strategy, but that he did not raise the issue with the court because he believed that his attorney had final authority to decide which trial tactics to pursue and what arguments to present to the jury.[74]

The Second Circuit, in limiting *McCoy's* reach, distinguished defense counsel's right to make factual concessions over an accused's objection from the right to deviate from an accused's fundamental objective of their defense.[75] It reasoned that, "Once a defendant decides on an objective—e.g., acquittal—'[t]rial management is the lawyer's province' and counsel must decide, *inter alia*, 'what arguments to pursue.'" [76] The court continued, "Conceding an element of a crime while contesting the other elements falls within the ambit of trial strategy."[77] Accordingly, under these principles, "[W]hen a lawyer makes strategic concessions in pursuit of an acquittal, there is no *McCoy* violation assuming, of course, the defendant's objective was to maintain his non-guilt."[78]

According to the Second Circuit's reasoning, because Rosemond and his attorney shared the same goal—an acquittal—his attorney was free to undertake that pursuit using any constitutionally effective strategy.[79] In

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[72] United States v. Rosemond, 958 F.3d 111, 122 (2d Cir 2020).
[73] *Id.* at 119.
[74] *Id.*
[75] *Id.* at 122-23.
[76] *Id.* at 122 (citing McCoy v. Louisiana, 584 U.S. 414, 422 (2018)).
[77] *Rosemond*, 958 F.3d at 122 (citing United State v. Jones, 482 F.3d 60, 76–77 (2d Cir. 2006); United States v. Arena, 180 F.3d 380, 397 (2d Cir. 1999)).
[78] *Rosemond*, 958 F.3d at 122–23.
[79] *See id.* at 123.

this case, that included making strategic concessions concerning the factual underpinning of the alleged crime.[80] This fundamental objective test represents a narrowing of the *McCoy* holding, giving back some of the strategic autonomy to an accused's attorney.[81] The Second Circuit, along with several other jurisdictions, do not find *McCoy* limits an attorney's discretion to make concessions over an accused's objection as long as they share the same desired outcome or goal of a defense.[82] This is the view the military appellate courts seemed to have relied heavily on, ignoring broader interpretations, during their first review of the right to autonomy.

3. United States v. Lancaster – The Military Dips its Toes into the Autonomy Waters

In the only military justice appellate decision that directly addresses the autonomy rights guaranteed by *McCoy*, the Army Court of Criminal Appeals (ACCA), in *United States v. Lancaster*, took the limited approach articulated in *Rosemond.* [83] Echoing the fundamental objective test eschewed by the Second Circuit, the ACCA held, "[A]s long as attorney and client share the same objective, an attorney may make strategic concessions in pursuit of an acquittal—including conceding some elements of the crime—without running afoul of *McCoy*."[84]

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[80] *Id.; see also Jones*, 482 F.3d at 76–77 (finding, under a *Strickland* effectiveness standard, that it was objectively reasonable for an attorney to admit his client shot the victim but argue that the shooting was unrelated to a drug conspiracy).

[81] This discretion is not unlimited. As was done in *Rosemond*, reviewing courts will always ensure that counsel's strategic choices were effective—determining whether an attorney's choices "fell below an objective standard of reasonableness." *Rosemond*, 958 F.3d at 121 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

[82] *See generally* United States v. Holloway, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (defendant's right to autonomy was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); United States v. Audette, 923 F.3d 1227, 1236 (9th Cir. 2019) (defendant's right to autonomy was not violated because he disagreed with his attorney about "which arguments to advance"); Thompson v. United States, 791 F. App'x 20, 26–27 (11th Cir. 2019) (vacated on other grounds) (defendant's right to autonomy is not violated because attorney conceded some, but not all, elements of a charged crime).

[83] *See* United States v. Lancaster, No. 20190852, 2021 CCA LEXIS 219, at *3–7 (A. Ct. Crim. App. May 6, 2021).

[84] *Id.* at *4 (citing *Rosemond*, 958 F.3d at 123).

In *Lancaster*, the accused asked the ACCA to rule that her attorney violated her Sixth Amendment autonomy rights by conceding that she had the requisite *mens rea* for larceny of government property under Article 121, Uniform Code of Military Justice (UCMJ).[85] The accused was charged with larceny for wrongfully receiving basic allowance for housing (BAH) for her and her dependent spouse from 2014 to 2018, despite being divorced since 2013.[86] To convict the accused of Article 121, UCMJ, the Government was required to prove, among other elements, that the accused had the intent to permanently deprive the United States of the use and benefit of its property, here funds established to pay soldiers BAH.[87]

The defense counsel predicated their case on the notion that the government could not prove the accused knew she was divorced, and therefore did not intend to deprive the United States of its property because she believed she was entitled to receive BAH.[88] Their strategy included conceding that the accused and her ex-husband divorced in 2013.[89] The defense counsel pursued this strategy, seemingly unaware that the government could also prove the accused's intent by showing she deliberately avoided the truth concerning her marital status.[90] After being convicted of larceny for receiving BAH from 2017 to 2018, the accused appealed, arguing her defense counsel violated her autonomy by making concessions sufficient for the panel to find she deliberately avoided the knowledge she was divorced.[91]

The ACCA, in affirming the accused's conviction, noted "Put simply, *McCoy* stands for the proposition that when an accused unequivocally states their desire to maintain their innocence, counsel may not 'steer the ship the other way.'"[92] Despite this general principle, the ACCA went on to delineate that *McCoy* did not address whether an attorney violates an

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[85] *Lancaster*, 2021 WL 1811735, at *3; UCMJ art. 121 (2016).
[86] *Lancaster*, 2021 WL 1811735, at *1.
[87] *Id.* at *4; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV ¶ 46.6 (2016) (establishing the elements for Article 121, UCMJ). At the time of the accused's trial, the 2016 version of the Manual for Courts-Martial was in effect. The 2016 version of the MCM did not change the elements of Article 121, UCMJ, as the statute remained untouched from 2012 until after 2016.
[88] *Lancaster*, 2021 WL 1811735, at *2.
[89] *Id.*
[90] *Id.* at *2–3.
[91] *Id.* at *3.
[92] *Id.* (citing McCoy v. Louisiana, 138 S.Ct. 1500, 1509 (2018)).

accused's autonomy by conceding an element of an offense and reasoned, "subsequent federal court decisions interpreting *McCoy* clarify an attorney may, as a strategic decision, effectuate a client's overall objective of acquittal by conceding certain elements of a crime, while still contesting others."[93]

This reasoning, and ultimate holding, adopting *Rosemond's* fundamental objective test seemingly narrowly tailors the reach of *McCoy* for the Army. But it is hard to imagine that this will be the final word on the matter. The military appellate system has not appropriately dealt with a constitutional issue that was cited at least once every other day in federal court in the years that followed the *McCoy* decision—*Lancaster* is the only case to address autonomy rights in the court-martial system.[94] In its sole decision addressing the issue, the ACCA ignores the dearth of federal and state cases that have taken an expansive view of *McCoy* following the Supreme Court's announcement of this new right to autonomy.[95] Finally, and most importantly, the ACCA does not undertake a discussion of the features of the military justice system which may make it susceptible to a broad reading of *McCoy*, features that were outlined by Justice Alito in his dissent.[96] A true look at the holding of *McCoy*, an examination of the cases that have interpreted this holding broadly, and scrutiny of the features of the military justice system that lend the system to a wide-ranging reading of the right to autonomy likely lead to the opposite result. Ultimately, it may be that *Lancaster* was a bad initial test case for the imposition of this new fundamental right. If this is true, and *McCoy* is imposed expansively, the military justice system needs to adapt to this new paradigm where an accused will have greater autonomy in their defense.

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[93] *Lancaster*, 2021 WL 1811735, at *4 (citing United States v. Rosemond, 958 F.3d 111, 123 (2d Cir. 2020)).

[94] *See* Petition for Writ of Certiorari at 4, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (No. 20–464), 2020 WL 5991229 at *2–3.

[95] *See generally* United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

[96] *See McCoy*, 138 S.Ct. at 1514 (Alito, J., dissenting).

III. The Susceptibility of the Military Justice System to a Broad Interpretation of *McCoy's* Autonomy Rights

In his dissent in *McCoy*, Justice Alito envisioned a criminal justice system where overriding an accused's autonomy rights would be a rare occurrence.[97] Emphasizing this point, he argued that the majority created an overly broad autonomy right for a condition that would seldom arise, without thinking about the wide-ranging implications of this new pronouncement.[98] Justice Alito's warning was prophetic in a way: appellate courts struggled to adapt to this new, judicially created right for years after *McCoy*.[99] Where Justice Alito may have had a blind spot was in his description of the rarity of this situation arising. Many of the circumstances that Justice Alito cited as making *McCoy* an extraordinary confluence of events are hallmarks of the modern military justice system.

In laying out his case for the rarity of the violation of an accused's autonomy rights, Justice Alito goes to great lengths to explain: "The constitutional right that the Court now discovered . . . is like a rare plant that blooms every decade or so."[100] In his mind, this circumstance is rare for five reasons: 1) a true conflict is only likely in capital cases, where the jury decides both guilt and sentence; 2) few rational defendants are likely to contest guilt where there is no real risk of an acquittal and risk the possibility of a harsh sentence; 3) where attorney and client cannot agree on a strategy, they are likely to part ways; 4) if counsel is appointed and this disagreement as to strategy exists, the judge is likely to delay trial and appoint substitute counsel; and 5) this right will not come into play unless the accused specifically voices his objection to his attorney's assertions during trial.[101] A close examination of each of these reasons reveals that this rare plant, autonomy, may be more like a dandelion in the military system, popping up and spreading uncontrollably.

What is rare in the civilian legal system is common in military practice because of the nature of the UCMJ and its implementation. First, "An

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[97] *See id.*
[98] *See id.*
[99] *See* Petition for Writ of Certiorari at 4, United States v. Rosemond, 958 F.3d 111 (2d Cir. 2020) (No. 20–464), 2020 WL 5991229 at *2–3 (explaining that federal courts cited *McCoy* at least once every other day in the years following the Court's decision).
[100] *McCoy*, 138 S.Ct. at 1514 (Alito, J., dissenting).
[101] *Id.* at 1514–15.

accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on unlawfully influencing a court-martial."[102] The accused could—until December 27, 2023—elect to be sentenced by the members that decided their guilt, even in non-capital cases.[103] Second, Justice Alito's general assessment of a "rational defendant" may not fit with actual criminal trial practice. The accused has an unequivocal right to plead not guilty and contest the charges against him or her.[104] Sometimes, even though the rational choice may be for the accused to admit guilt, not testify, or accede to a specific trial strategy, the accused goes against their counsel's advice. Justice Alito does not give enough credence to human nature—it is hard to admit wrongdoing. Third, unlike in civilian practice, where only indigent defendants are appointed counsel, every military accused has the right to appointed counsel.[105] Finally, *United States v. Dubay* provides the accused with a mechanism to voice their contention that their counsel violated their autonomy rights during the appellate phase, an ability which is unmatched in civilian practice.[106]

It appears when Justice Alito called these circumstances rare, he did not have the military justice system in mind. Each of these unique characteristics makes it much more likely that a question concerning whether an accused's autonomy rights have been violated will arise. When

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[102] United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020).

[103] UCMJ art. 25(d)(1) (2019). The Fiscal Year 2022 National Defense Authorization Act makes sentencing by military judge mandatory for all non-capital cases. National Defense Authorization Act for Fiscal Year 2022, Pub. L. Mo. 117-81, § 539E, 135 Stat 1541, 1700–01 (2021).

[104] *See* United States v. Garren, 53 M.J. 142, 143 (C.A.A.F. 2000) (reasoning that the accused has a constitutional right to plead not guilty, and that right cannot be commented on); *see also* U.S. DEP'T OF ARMY, PAM. 27-9, Military Judge's Benchbook para. 2-2-9 (Feb. 29, 2020) [hereinafter DA PAM 27-9] ("Do you understand that even though you believe you are guilty, you have the legal right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?).

[105] *Compare* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (finding the right to counsel includes the right to appointed counsel for indigent defendants), *with* UCMJ art. 38(b) (2016) ("The accused has the right to be represented in his defense before a general or special court-martial or at a preliminary hearing under section 832 of this title (article 32) as provided in this subsection . . . the accused may be represented by military counsel detailed under section 827 of this title (article 27). . .").

[106] *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967) (creating the mechanism for appellate fact-finding).

it inevitably does, the courts, if they take *McCoy* at its word, will have no choice except to take a broad interpretation of its imposition of the right to autonomy. A closer examination of each of these hallmarks and the military appellate courts shows why.

A. The Old Military Panel—Judge, Jury, Executioner

In Justice Alito's mind, the only reason that this situation would arise in a capital case where the jury decides both guilt and punishment is because, "In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing."[107] He argues that it is hard to imagine a competent attorney would admit guilt during the merits portion of the trial, only to receive no credit with the sentencing authority.[108] As stated above, this principle did not hold for the military justice system, where the accused had the right to be sentenced by the panel that decided their guilt.[109] This also is too narrow of a view, limiting his reasoning to a concession of complete guilt does not account for how extensively this new Sixth Amendment right could be applied. As Justice Alito realized, a broad reading of the accused's autonomy rights could prevent an attorney from making the unilateral decision to concede an element of any charged offense.[110] As *Read* and similar cases prove, this is a perfectly rational way to interpret *McCoy*'s mandate.[111] Given these realities, it is easy to see this could have been a frequent occurrence in the military justice system.

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[107] McCoy v. Louisiana, 138 S.Ct. 1500, 1514 (2018) (Alito, J., dissenting).
[108] *Id.*
[109] *See* UCMJ art. 25(d)(1) (2019).
[110] *McCoy*, 138 S.Ct. at 1516 (Alito, J., dissenting).
[111] *See generally* United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019) (holding the presentation of an insanity defense over the accused's objection violated his autonomy rights); United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

The accused's right to be sentenced by a panel was provided by Article 25, UCMJ. Specifically, Article 25(d)(1), UCMJ stated:

> Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members."[112]

This provision has been amended by the Fiscal Year 2022 National Defense Authorization Act, removing the accused's ability to elect member sentencing, and making sentencing by military judge mandatory.[113] This provision began to take effect on December 27, 2023.[114]

One can imagine there are cases currently pending appeal where the accused was given this option, elected sentencing by members, and where the attorney made concessions not considering the rights conferred to their client by *McCoy.* The cases scheduled to go forward under the current system and the ones pending appeal need to be closely scrutinized to examine whether the accused's autonomy rights were honored. The military appellate courts have a strong record of being protective of the accused's rights and are in the perfect position to perform this task.

B. Paternalism in Military Appellate Courts

The military appellate courts—like anything in the military justice system—are a creation of statute. Their existence and appellate mandate are governed by the UCMJ. Article 66, UCMJ requires each Judge Advocate General to: "[E]stablish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be

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[112] UCMJ art. 25(d)(1) (2019).
[113] National Defense Authorization Act for Fiscal Year 2022, Pub. L. Mo. 117-81, § 539E, 135 Stat 1541, 1700–01 (2021).
[114] *Id.*

composed of not less than three appellate military judges."[115] In cases in front of them, the Courts of Criminal Appeals (CCA) are tasked to:

> "[A]ffirm only such findings of guilty as the Court finds correct in law, and in fact . . . The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."[116]

While the CCA are, "[C]ourts of limited jurisdiction, defined entirely by statute,"[117] the mandate found in Article 66 is uniquely far-reaching. The Court of Appeals for the Armed Forces (CAAF) has interpreted Article 66 to bestow broad plenary power on the CCAs to review the entire record of the trial below.[118] It is against this extraordinary power that all assessments of the military appellate system must begin. This statutory authorization has grown through caselaw over time to make the CCAs paternalistic courts, often creating judicial remedies to correct perceived wrongs.

1. United States v. DuBay

There may be no better example of the expansion of the CCA's powers than *United States v. DuBay*. A case that barely spans two pages in the Court of Military Appeals (CMA) reporter, settling an allegation of unlawful command influence at Fort Leonard Wood, Missouri, has had tremendous implications for the military justice system.[119] In *DuBay*, the accused was challenging his conviction by alleging unlawful command influence infected his court-martial.[120] Specifically, he alleged the General Court Martial Convening Authority (GCMCA) named a specific law officer to ensure harsh sentences were imposed in cases involving absence without leave and desertion.[121] Faced with an incomplete accounting concerning why the GCMCA appointed the specific law officer, the Board

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[115] UCMJ art. 66(a)(1) (2021).
[116] UCMJ art. 66(d)(1) (2021).
[117] United States v. Brubaker-Escobar, 81 M.J. 471, 473–74 (C.A.A.F. 2021) (citing United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015)).
[118] *See* United States v. English, 79 M.J. 116, 121 (C.A.A.F. 2019).
[119] See Andrew S. Effron, *United States v. Dubay and the Evolution of the Military Law*, 207 MIL. L. REV. 1, 2–5 (2011).
[120] *Id.* at 22–23.
[121] *Id.*

of Review—the CCAs precursor—sent the record back to the trial court to establish a record concerning this issue.[122]

When the Army Judge Advocate General refused to allow these fact-finding hearings to occur, the Board of Review reversed the accused's conviction, making adverse inferences based on the lack of information.[123] The Judge Advocate General then certified the case to the CMA, with the government now seeking, for the first time, a fact-finding hearing.[124]

The resulting opinion forever shaped military appellate practice. Finding itself unable to adequately answer the question concerning unlawful command influence, the CMA ordered:

> "In each such case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon."[125]

It is from these words that military appellate courts derive their fact-finding powers. When there is a dispute concerning the underlying factual predicate of an accused's assignment of error on appeal, the CCAs can resort to this mechanism to settle questions unknowable from the record. This is not a power that they use sparingly. As an example, the ACCA has ordered five *DuBay* hearings over the course of the last eighteen months on questions of ineffective assistance of counsel alone.[126]

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[122] *Id.* at 24–25.
[123] *Id.* at 27.
[124] *Id.* at 35–36.
[125] United States v. DuBay, 37 C.M.R. 411, 413 (C.M.A. 1967).
[126] *See* United States v. Miner, Army 2020063 (A. Ct. Crim. App. Sep. 21, 2021) (Order); United States v. Colbert, Army 20200259 (A. Ct. Crim. App. May 17, 2022) (Order); United States v. Marin, Army 20210375 (A. Ct. Crim. App. May 26, 2022) (Order); United

Given this reality, one thing is clear, Justice Alito's final point in his rarity argument does not apply to the military justice system. An accused does not need to raise his autonomy claim at the trial level during their court-martial for a violation to arise on appeal. *DuBay* provides the perfect vehicle for an accused to disagree with their attorney's concessions, sit idle during their court-martial, then raise the autonomy violation for the first time on appeal. Where this would be the end of the inquiry in the civilian system, military appellate courts can apply closer scrutiny to alleged violations because of the mechanism provided by *DuBay*. This scrutiny is likely to lead to a legitimate look at autonomy rights and potential violations.

2. Restrictions on Guilty Pleas: United States v. Care

This level of scrutiny is not new, nor is it limited to the appellate court's ability to fact-find, it is deeply rooted in the military justice system. The military appellate system has a history of carefully considering one of the most basic tasks in the American justice system, the guilty plea. Foundationally, the imposition of appellate review of guilty pleas in courts-martial was introduced in *United States v. Chancelor*, where the CMA announced the requirement for a detailed providence inquiry for the first time.[127] After this decision, the law officer was required to establish the accused's guilt by explaining the elements of the offense to the accused and having them explain in their own words why they violated them.[128]

Three years later, seemingly out of frustration with the lack of acceptance of *Chancelor*'s requirements, the CMA announced an even more stringent requirement in *United States v. Care*. Specifically, the Court imposed a requirement on the military judge to explain each element of the crime to the accused and to factually examine why the accused believed his actions met each element.[129] This judicially created mandate has never been fully codified in either the UCMJ or Rules for Courts-Martial (RCM), the only mention is the requirement that the military judge

States v. Forrest, Army 20200715 (A. Ct. Crim. App. Oct. 11, 2022) (Order); United States v. Pope, Army 20210501 (A. Ct. Crim. App. Dec. 9, 2022) (Order).

[127] United States v. Chancelor, 36 C.M.R. 453, 456–57 (C.M.A. 1966).

[128] *Id.*

[129] United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969)

resolves any statements by the accused inconsistent with his providence inquiry.[130]

It would not be a logical leap to assume this level of paternalism would extend to autonomy rights. The guilty plea is one of the most basic and common practices in the justice system.[131] The imposition of judicial review into this relatively simple practice, all for the sake of protecting the accused, highlights that military appellate courts are prone to imposing their judgment when a fundamental right is involved. The Supreme Court's designation of autonomy as structural error—error that calls into doubt the very fabric of the trial—makes this the very kind of issue the appellate courts are likely to strictly enforce. Given the nature of the attorney-client relationship in the military, this level of analysis may be needed.

3. Appointed Counsel and IAC

It is the nature of the attorney-client relationship in the military justice system that necessitates strict enforcement of the accused's right to autonomy. In the majority of courts-martial, the accused will be represented by appointed military counsel. This is due, in large part, to the guarantees afforded in Article 38, UCMJ. This provision provides, in pertinent part:

> "(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at a

[130] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910(h)(2) (2019) [hereinafter MCM] ("If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.").

[131] *See* Jeff A. Bovarick, *Plea Bargaining in the Military*, 27 FED. SENT. R. 95, 95 (2014) ("With an estimated 90 percent of courts-martial resulting in guilty pleas, plea bargaining procedures primarily in the form of pretrial agreements are critical to the fair administration of military justice and essential to the overall court-martial process.").

> preliminary hearing under section 832 of this title (article 32) as provided in this subsection.
>
> (2) The accused may be represented by civilian counsel if provided by him.
>
> (3) The accused may be represented—
>
> (A) by military counsel detailed under section 827 of this title (article 27); or
>
> (B) by military counsel of his own selection if that counsel is reasonably available . . ."[132]

The right articulated in Article 38(b)(1), UCMJ is applicable to all military accused, it is not reserved solely for those found indigent.[133] In practice, Article 38(b)(1), UCMJ's universal guarantee is often effectuated through Article 38(b)(3)(A), UCMJ's detailing mechanism. Detailing is accomplished through reference to Article 27, UCMJ, which mandates defense counsel be appointed to each court-martial in accordance with the regulation promulgated by each service.[134]

The Army has implemented the requirement to appoint defense counsel through AR 27-10, Military Justice. Specifically, paragraph 6-9 states:

> "In the [regular Army] and the [Army Reserves], the Chief, [Army Trial Defense Service] details trial defense counsel for [special and general courts-martial]. This authority may be delegated to the [Senior Defense Counsel] in all non-capital cases. Detail of counsel will be reduced to writing and included in the [record of trial] or

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[132] UCMJ art. 38(b) (2016).

[133] *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (finding the right to counsel includes the right to appointed counsel for indigent defendants).

[134] *See* UCMJ art. 27(a) (2016) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.").

> announced orally on the record at courts-martial. The writing or announcement will indicate by whom the counsel was detailed."[135]

This system creates an interesting dynamic, an accused charged with a crime is sent to the local trial defense office to be assigned a defense counsel. Depending on the office, the accused may be randomly assigned an attorney solely based on the workload distribution amongst the defense attorneys, or the detailing authority may put thought into the factual predicate of each case. What is consistent is that the agency in choice of representation for anyone not seeking civilian representation is lost.

Given this system, military appellate courts have unsurprisingly exercised close scrutiny over defense counsel. The standard for ineffective assistance of counsel mirrors that found in the civilian justice system: "To establish that ineffective assistance of counsel occurred, an appellant must prove both that the defense counsel's performance was deficient and that the deficiency caused prejudice." [136] What differs, is the CAAF's willingness to examine a defense counsel's effectiveness, and the frequency they find deficient performance. In the past two terms, the CAAF has examined whether particular defense counsel were ineffective on five occasions, finding deficient performance twice.[137] At first glance, this does not seem like a large number of cases, but this must be compared against the fact that the CAAF only heard sixty cases in total over this two-

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[135] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-9 (Nov. 20 2020) [hereinafter AR 27-10].

[136] United States v. Palacios Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citing Strickland v. Washington, 466 U.S. 668, 698 (1984)).

[137] *See generally Palacios Cueto*, 82 M.J. at 326 (examining defense counsel's failure to admit mitigating evidence during sentencing, failure to advise the accused to mention sex offender registration during his unsworn, and failing to request specific sentencing instructions); United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022) (examining counsel's failure to argue the victim's patient-psychotherapist privilege could be pierced); United States v. Cooper, 82 M.J. 6, 10 (C.A.A.F. 2021) (examining whether the failure to forward a request for individual military counsel rises to the level of ineffectiveness); United States v. Furth, 81 M.J. 114, 117 (C.A.A.F. 2021) (assuming that counsel's failure to advise about the effects of a resignation for the good of the service was ineffective); United States v. Scott, 81 M.J. 79, 85 (C.A.A.F. 2021) (finding counsel ineffective for putting on a truncated sentencing case).

year period.[138] The CAAF is using almost ten percent of their discretionary docket to examine whether an accused was properly represented.[139]

What is evident is that the military appellate system is very interested in the relationship between the accused and their defense counsel. It is not a stretch to imagine this fascination extending into the realm of autonomy rights. The same fundamental features of appointed representation that make scrutiny into counsel's performance and choices for ineffectiveness purposes necessary, equally apply to an analysis considering whether a defense counsel violated an accused's fundamental right to autonomy. There is even an argument that the autonomy right requires an even closer look—while the test for ineffective assistance of counsel considers prejudice, autonomy rights are considered so fundamental, their violation constitutes structural error.[140] Given the nature of this type of violation, and the CAAF's constant forays into the attorney-client relationship, it is only a matter of time before an autonomy case catches the court's attention.

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[138] Each year, each of the services and CAAF submit an annual report to the Joint Service Committee on Military Justice that lists the number of cases tried or decided before each court. These numbers are derived from the reports for fiscal years 2021 and 2022. *See* JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2021 COMBINED ARTICLE 146A REPORT (Dec. 31, 2021), https://jsc.defense.gov/Annual-Reports/ (reporting 35 opinions rendered by the CAAF); JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2022 COMBINED ARTICLE 146A REPORT (Dec. 31, 2022), https://jsc.defense.gov/Annual-Reports (reporting 25 opinions rendered by the CAAF).

[139] While Article 67 makes review of some cases mandatory, the majority of cases are granted based on petition from an appealing party who has shown good cause for review. *See* UCMJ art. 67(a) (2021) ("The Court of Appeals for the Armed Forces shall review the record in— all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death; all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.").

[140] *Compare Palacios Cueto*, 82 M.J. at 327 (requiring a test for prejudice for ineffective assistance of counsel claims), *with* McCoy v. Louisiana, 138 S.Ct. 1500, 1511 (2018) (holding the violation of an accused's autonomy rights constitutes structural error).

C. A Storm Brewing—*United States v. Hasan*

The chance for the CAAF to weigh in on the role of autonomy rights in the military justice system presented itself last term. Under Article 67, UCMJ, the CAAF must review any case where the death penalty was adjudged.[141] *United States v. Hasan* presents such a case—the accused was sentenced to death in 2013.[142] This mandatory review presents a unique opportunity for appellate defense counsel to submit a plethora of issues to the CAAF, issues that may otherwise not have been granted certification.[143] Appellate defense counsel, seizing this opportunity, contended that Major (MAJ) Hasan's autonomy rights were violated.[144] Specifically, counsel argued that MAJ Hasan's decision to go pro se was not voluntary because he represented himself to avoid his counsel's plan to concede factual guilt.[145] Presented with the untenable choice of turning over the autonomy of his defense or going it alone, appellant, they argue, chose the latter.[146]

The CAAF, in deciding this issue, did not make a broad proclamation on the status of autonomy rights in the military justice system—the Court chose instead to rest their decision on the voluntary nature of MAJ Hasan's decision to proceed pro se.[147] Interestingly, in its opinion, the CAAF solely cites federal cases that restrictively interpreted the right to autonomy.[148] While this could provide a window into future interpretation, these references were made in response to MAJ Hasan's argument that *McCoy* also created a right to plead guilty to a capital offense—something

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[141] UCMJ art. 67(a)(1) (2016).
[142] United States v. Hasan, No. 21-0193, 2023 CAAF LEXIS 639, at *6–7 (C.A.A.F. Sep. 6, 2023).
[143] *Cf.* UCMJ art. 67(a)(3) (2016) ("The Court of Appeals for the Armed Forces shall review the record in all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.").
[144] *Hasan*, No. 21-0193, 2023 CAAF LEXIS 639, at *17 (C.A.A.F. 2023).
[145] *Id.* at *15–16.
[146] *Id.*
[147] *Id.* at *21.
[148] *See id.* at *59 (citing Kellogg-Roe v. Gerry, 19 F.4th 21, 28 (1st Cir. 2021) (declining to extend McCoy beyond the facts of that case); United States v. Rosemond, 958 F.3d 111, 123 (2d Cir. 2020) ("[W]e read McCoy as limited to a defendant preventing his attorney from admitting he is guilty of the crime with which he is charged.").

prohibited at the time by the UCMJ.[149] The court did not take the opportunity to address autonomy head on because it was not presented the proper case to do so. Arguably, self-representation cures any autonomy issue.

Although *Hasan* does not settle the autonomy question left by *McCoy*, this decision will ensure autonomy enters military justice practitioners' consciousness. As emphasized above, the military appellate system is almost the perfect vessel for an extensive interpretation of this right. Highlighting this relatively new right in a highly visible case will bring it to the forefront of the appellate world. Where this issue may not have been raised before, it now presents a new battleground for an accused to attempt to overturn their conviction. Given this, the military justice system needs to be ready to adapt. Luckily, there are mechanisms in place already that will require only slight alteration to adapt to the imposition of this new right and avoid mass upheaval.

IV. Implementing *McCoy's* Mandates into the Military Justice System

The paternalistic nature of the military appellate system should force prudent defense practitioners, and observant government counsel, into assuming that *McCoy* will be interpreted broadly. Military appellate courts are not likely to interpret *McCoy* to solely require defense counsel to stay within the "fundamental objective" of maintaining innocence.[150] Rather, given their propensity to closely examine the attorney-client relationship and their ability to develop an appellate record using the *DuBay* hearing, military appellate courts are likely to construct an expansive view of autonomy rights. Under a potentially far-reaching interpretation, defense counsel should be weary of admitting an element of any offense without first securing affirmative assent from their client.[151] Any decisions

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[149] *Hasan*, No. 21-0193, 2023 CAAF LEXIS 639, at *58 (C.A.A.F. 2023).

[150] *See* United States v. Rosemond, 958 F.3d 111, 122 (2d Cir 2020) (adopting the narrow "fundamental objective" test).

[151] *See generally* United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019) (holding the presentation of an insanity defense over the accused's objection violated his autonomy rights); United States v. Wilson, 960 F.3d 136 (3d Cir. 2020) (finding that counsel violates an accused autonomy rights by conceding certain elements of a charged offense over their affirmative objection); United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (holding that a prosecutor, during the accused's guilty plea, violated the accused's autonomy rights by neglecting to inform him of an element that he needed to admit as true in order to plead

concerning overarching trial strategy and how to wage a defense need to consider the accused's autonomy. This presents a specific challenge for military defense counsel. An examination of one of the most common charges a military accused faces, and the typical defense raised, shows why that is.[152]

Article 120(b)(2)(A), UCMJ, criminalizing sexual assault without consent, requires the government to prove: "That the accused committed a sexual act upon another person; and that the accused did so without the consent of the other person."[153] Under an expansive interpretation of *McCoy*, defense counsel would not be able to present a defense where they concede the sexual act and solely contest whether there was consent, without obtaining affirmative permission from the accused to proceed in this manner. What most attorneys would consider a tactical choice, left for them to decide, would run afoul of *McCoy's* mandates strictly enforced by the military appellate courts.[154] The potential frequency that this type of cases presents itself should cause practitioners to question their trial strategy. Going forward, all decisions concerning factual strategy need to be analyzed with this framework in mind.

Failing to account for the inevitable interpretation of this newly-discovered right could result in an automatic retrial for an accused—this error has been ruled structural, there is no test for prejudice.[155] Given the potential prevalence of the situation involving defending against sexual assault without consent, discussed above, the implications of this type of

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guilty to the charged offense); People v. Flores, 34 Cal. App. 5th 270 (2019) (holding that counsel violates *McCoy* by admitting the actus reus of the charged offense, even where they contest the mens rea of the offense).

[152] JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2022 COMBINED ARTICLE 146A REPORT (Dec. 31, 2022), https://jsc.defense.gov/
Annual-Reports (reporting 46 percent of Army courts-martial, amounting to 220 cases total for fiscal year 2022, involved a sexual offense either under Articles 120, 120b, or 120c, UCMJ).

[153] MCM, *supra* note 129, pt. VI, ¶ 60.b.(2)(d)(i)–(ii).

[154] *Compare* Florida v. Nixon, 543 U.S. 175, 187 (2004) ("An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision.") (internal citations omitted), *with* McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018) (Holding the autonomy to decide the objective of the defense is to assert innocence is a decision left to the client).

[155] *See* McCoy v. Louisiana, 138 S.Ct. 1500, 1511 (2018) (holding the violation of an accused's autonomy rights constitutes structural error).

decision by the CAAF could be massive. This right, if properly raised, could lead to mass reversals not seen since *United States v. Hills* and potentially imposed by *United States v. Anderson*; if the CAAF finds a right to a unanimous verdict.[156] The military justice system would be inundated by retrials in clear cases, and *DuBay* hearings where there is ambiguity, in an attempt to determine whether the accused's autonomy rights were violated.

Steps can, and should, be undertaken now to prevent any further possible damage. First, ensuring defense counsel advise their clients of their right to autonomy from the outset will confirm that any concessions are discussed early in the process. The attorney and client will be tasked with determining the nature of the defense case together. Next, capturing the accused's right to autonomy in the ethical rules regulating attorneys' conduct will require defense counsel to be cognizant of this guarantee throughout their representation of criminal clients. Third, updating the competency rules and the procedures for determining mental responsibility will provide a safeguard for both attorney and the accused, confirming the accused can appreciate the nature of the alleged misconduct and can truly assist under this new framework. Finally, requiring military judges to delve into the voluntariness of any concessions will prevent future appellate review by confirming that the accused has considered and properly waived this issue.

A. Advising the Accused—Trial Defense Counsel's Obligations to Inform their Client of Their Right to Autonomy

Even the savviest client is likely to be unaware of the fundamental role that they play in shaping their defense. The average accused, if pressed, would almost assuredly state that they have put their fate in their attorney's hands. The legal process is complex, has a unique set of rules, and uses a language that is foreign to the average person. It is not surprising, then, to represent a client that is uninformed about even their most fundamental rights, let alone something as nuanced as the right to autonomy. This problem is exacerbated when you consider this right is relatively new and

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[156] *See* United States v. Anderson, 83 M.J. 291, No. 22-0193/AF (C.A.A.F. 2023) (examining whether the accused has a right to a unanimous verdict); United States v. Hills, 75 M.J. 350, 352 (C.A.A.F. 2016) (holding that charged offenses may not be used for propensity purposes under Military Rule of Evidence 413).

is only known to those who follow criminal jurisprudence closely. The expectation that an accused will come in ready from the outset of representation to make important decisions that impact their right to autonomy is unreasonable. Given that most military accused will have an appointed attorney that they did not seek out, this expectation is almost certain to fail.

If the requirement is that the client will participate in a meaningful way in their defense—making decisions about what concessions can be made as part of the overall trial plan—the onus should be defense counsel to guarantee that the accused is informed of the role that they play. The unique nature of military defense counsel, who outrank their average client and have been automatically appointed, already requires defense counsel to take the time to explain their role and outline the rights that the accused retains.[157] The Army has come up with a workable solution that effectively outlines the attorney-client relationship and sets out the rights that the client possesses. This tool can easily be expanded to account for autonomy rights and establish the participation necessary to shape a successful defense with the parameters of *McCoy's* mandates.

The Defense Counsel Assistance Program (DCAP) provides defense counsel across the Army with standardized forms designed to effectively communicate the rights guaranteed to an accused. One of these forms, DCAP Form 8.3, is meant to outline the rights an enlisted accused has in the court-martial process.[158] This form explains the accused's rights to counsel and highlights the rights that they retain throughout the process.[159] Specifically, it informs the accused they have a right to choose trial by panel or military judge alone, to proceed with or waive their preliminary hearing, to decide to plead guilty or not guilty, and to choose to testify.[160]

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[157] *See* UCMJ art. 27(a) (2016) ("Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial."); AR 27-10, *supra* note 134, para. 6-9 (Nov. 20, 2020).

[158] Defense Counsel Assistance Program Form 8.3, Acknowledgement of Rights (Mar. 15, 2019) (on file with author).

[159] *Id.*

[160] *Id.*; *see also* United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020) ("An accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on

The recitation of the fundamental rights reserved to the accused remains helpful, but has been rendered incomplete by *McCoy*.

Including a description of the right to autonomy would set the initial conditions necessary to ensure compliance with *McCoy*'s mandate. Informing the client that they have a right to maintain innocence and insist on a defense centered around this premise can help identify the accused's preference and assist defense counsel in building a strategy consistent with the accused's wishes. Any account of the right to autonomy should include the guarantee that defense counsel will confer with the accused and seek their permission before making a concession during any court-martial proceeding. This understanding would serve as a building block to establishing a defense within the parameters of the accused's autonomy rights and would survive even the widest interpretation of *McCoy* by military appellate courts.[161]

Informing the client, while a good starting point, is not sufficient to guarantee compliance with a far-reaching understanding of the right to autonomy. The obligations imposed on defense counsel by *McCoy* cannot begin and end with a brief introduction of the guarantees bestowed by the Sixth Amendment. Autonomy principles must also be reinforced by the ethical rules that govern attorneys. The Army provides a good springboard within AR 27-26, Rules of Professional Conduct for Lawyers. Although the rules currently do not directly consider the role autonomy plays in the ethical representation of the accused, by slightly altering the existing

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unlawfully influencing a court-martial."); United States v. Carter, 60 M.J. 31, 33 (C.A.A.F. 2005) ("The privilege against self-incrimination provides an accused with the right to not testify, and precludes "comment by the prosecution on the accused's silence.") (citing Griffin v. California, 380 U.S. 609, 615 (1965)); United States v. Garren, 53 M.J. 142, 143 (C.A.A.F. 2000) (reasoning that the accused has a constitutional right to plead not guilty); UCMJ art. 32(a)(1)(B) (2016) ("Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required."); UCMJ art. 45(a) (If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.").

[161] *See infra* Appendix A, para. 6 for complete recommended language.

framework, defense counsel can be informed of their obligations to provide representation within the bounds of *McCoy.*

B. Reformation of the Army's Ethical Rules—Aligning Army Regulation 27-26 with *McCoy*

It should be obvious to every counsel that they have a duty to the accused they represent. Common sense dictates that defense counsel advocate for their clients and protect the rights afforded to them. This general principle, while a helpful starting point, has been delineated into discreet rules codified for Army practitioners in AR 27-26. Army Regulation 27-26 applies to all active-duty Judge Advocates.[162] Its mandates are meant to "provide comprehensive rules governing the ethical conduct of Army lawyers . . ."[163]

If AR 27-26 is to accomplish its goal of providing comprehensive guidance, its directives must be updated to account for the new right guaranteed to an accused by *McCoy*. Several of the rules found in AR 26-27 come close to accomplishing this, but their language fails to reach what would be required under a broad reading of autonomy rights. In particular, the rules governing the representation of clients need to be altered to ensure defense counsel are aware of the obligation to ensure their client's autonomy is not overcome.

Rule 1.2 governs the scope of representation and allocation of authority between the client and lawyer. Concerning the authority left for the attorney, this rule states:

> "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by the client's well-informed and lawful decisions concerning case

[162] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 7.a.(1)(a) (June 28, 2018) [hereinafter AR 27-26].
[163] AR 27-26, *supra* note 158, para. 1.

> objectives, choice of counsel, forum, pleas, whether to testify, and settlements."[164]

The rule highlights the decisions traditionally reserved for the client and may even try to account for *McCoy* by reference to case objectives, but it does not go far enough.

Interestingly, the rule has a carve-out, it only requires abdication to the client's well-informed and lawful decisions concerning case objectives. Further, comment 2 of this rule states: "A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so."[165] *McCoy* may dictate the opposite approach—the right to autonomy seems to be absolute.[166] Where the rule allows for an assessment by defense counsel whether to cede to the client's wishes concerning their autonomy must be changed. The definitive statement at the beginning of the quoted language comes much closer to what is required and should stand alone. Also, the comments to this rule need to make clear that, while means may still be defense counsel's choice, the accused's objectives must be honored. Additionally, any updated language must clarify that the objectives of the accused's defense include concessions to any element or essential fact of the charged offenses.[167] This addition will guarantee defense counsel are considering autonomy rights throughout the accused's defense.

This strict adherence to *McCoy*'s mandates may leave defense counsel in the untenable position of having to present an unreasonable defense based on the accused's wishes.[168] Luckily, the rules provide a potential escape for counsel in some circumstances. Rule 1.16 provides: "[A] lawyer may seek to withdraw from representing a client if . . . the client

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[164] AR 27-26, *supra* note 158, app. B, Rule 1.2(a).
[165] AR 27-26, *supra* note 158, app. B, Rule 1.2, Comment 2.
[166] *See* McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018) ("Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are.") (citing Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017)).
[167] *See infra* Appendix B for complete recommended language.
[168] *See McCoy*, 138 S.Ct. at 1506 (explaining the accused's preference to present a case based on a conspiracy by the FBI to frame him for the charged murders).

insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. . . ."[169] This rule could be used to relieve defense counsel from having to present an absurd defense, or could even be used to help persuade the accused from pursuing a theory that has no chance of success.

Finally, candor to the court needs to be considered. There is a legitimate question of whether the accused's autonomy rights could force a defense counsel into presenting a defense that has no basis in reality. The Army's rules account for the dilemma that defense counsel sometimes face in Rule 3.1. This rule, governing meritorious claims and contentions, states:

> "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action, may nevertheless so defend the proceeding as to require that every element of the case be established."[170]

The rule contemplates that defense counsel may be placed in the perilous situation of having to defend a client against overwhelming evidence. This differs, however, from presenting affirmative evidence based on the accused's desire to put forward a specific defense. While *McCoy* does not dictate this, there is still the question of how far this principle could be pushed.[171] If autonomy is expanded to this extreme, the rules will have to

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[169] AR 27-26, *supra* note 158, app. B, Rule 1.16.
[170] AR 27-26, *supra* note 158, app. B, Rule 3.1.
[171] *See McCoy*, 138 S.Ct. at 1507 (reasoning that the right to counsel cognizes the right to an assistant; the right does not requiring ceding all authority); *see also* Faretta v. California, 422 U.S. 806, 834 (1975) ("The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'").

account for the position defense counsel have been placed to ensure harmony between the Sixth Amendment and the obligation of candor before the court.

Changes to client notification of rights and the Army's Rules of Professional Conduct for Lawyers will ensure that the accused and defense counsel are fully aware of their rights and obligations. In a majority of cases, this will be enough to ensure *McCoy* is not violated and will leave little room for the appellate courts to find this structural error requiring reversal. As the federal circuits have made clear, though, there is still room for error where the client's competency comes into question.[172] The Rules for Court-Martial's mechanisms meant to ensure that an accused is competent to stand trial are not currently sufficient to address the question concerning how much autonomy an incompetent client may have to shape their defense. For both defense counsel and the accused's sake, these deficiencies need to be addressed.

C. Competency's Heightened Importance in the Post-*McCoy* World—Ensuring Rule for Court-Martial 909 Protects both Client and Attorney

Armed with the knowledge of what is required to satisfy *McCoy*, defense counsel have a greater obligation than just to notify the accused of their right to autonomy, they must ensure that their client is capable of meeting this heightened expectation of them. The Rules for Court-Martial, like many other jurisdictions, require the accused to be able to "cooperate intelligently in the defense of their case."[173] What intelligent cooperation means may have been fundamentally altered after *McCoy.* If the expectation is that the accused is the "master of his own defense," deciding the fundamental objectives of the defense and whether to make concessions, the standard needs to be heightened to account for expectations placed on the accused.[174]

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[172] *See* United States v. Read, 918 F.3d. 712, 721 (9th Cir. 2019) (holding the presentation of an insanity defense over the accused's objection violated his autonomy rights).
[173] MCM, *supra* note 129, R.C.M. 909(a).
[174] *See McCoy*, 138 S.Ct. at 1508 ("[T]he Sixth Amendment 'contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.'") (citing *Faretta*, 422 U.S. at 819–20).

The competency standard, as currently composed, does not present a challenging hurdle. Rule for Court-Martial 909(a) states:

> "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case."[175]

The CAAF has interpreted this requirement to present a low bar, requiring only that an accused have, "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[176] The inability to remember the details of an offense does not render the accused incompetent to stand trial.[177]

This standard does not recognize the participation that is now required of the accused. Autonomy, broadly construed, presupposes that the accused has the mental capacity to correctly recall and relay the facts and circumstances as they occurred. To require anything less may force defense counsel, as the defense counsel in *Read* found himself, to present a defense based on delusion.[178] The appropriate competency standard would account for the accused's ability to accurately recall and relay the circumstances that led to the alleged charges.

The military justice system's mechanism for determining competence is also woefully unable to account for the imposition of the comprehensive

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[175] MCM, *supra* note 129, R.C.M. 909(a).

[176] United States v. Barreto, 57 M.J. 127, 130 (C.A.A.F. 2002) (citing United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993) (omission in the original).

[177] *See Barreto*, 57 M.J. at 130 ("Concededly, such an accused is at some disadvantage—for, if innocent, he does not demonstrate that quality by testimony that he ... does not remember. However, he is still quite competent to assume the witness stand, and to assure the court that he does not remember—and he is certainly able to analyze rationally the probabilities of his having committed the offense in light of his own knowledge of his character and propensities." (citing United States v. Olvera, 15 C.M.R. 134, 142 (C.M.A. 1954).

[178] *See* United States v. Read, 918 F.3d. 712, 716 (9th Cir. 2019) (outlining the accused's wishes to present the defense that he was suffering from demonization, rather than mental illness).

right to autonomy. Rule for Court-Martial 706 provides commanders, counsel, and the military judge the ability to transmit a request to an authorized official to order an inquiry into the mental condition of the accused.[179] When ordered, the board is tasked with determining four questions, the final of which is: "Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?"[180] Equipped with a faulty standard and mechanism for determining competence, defense counsel may be poised to fail.

Luckily, there is an example in state law of a competency standard that accounts for the accused's ability to understand and communicate the facts and circumstances of the criminal allegations against them.[181] Texas, in its Code of Criminal Procedure, requires an expert to consider: "[T]he capacity of the defendant during criminal proceedings to . . . disclose to counsel pertinent facts, events, and states of mind; [and] engage in a reasoned choice of legal strategies and options . . ."[182] This standard would guarantee that an accused not only understood the nature of the alleged offenses, but also the factual underpinning, and require them to engage in a discussion concerning rational trial strategy.

The expansion of the accused's right to autonomy should be accompanied by heightened expectations concerning the accused's ability to understand and shape their defense. Amending the standards in the RCM would adequately account for the requirements now imposed on the client. The new standards would not only ask whether the accused understood and could participate in the proceedings against them but would also determine whether they could effectively communicate the factual underpinning of the allegations against them and participate reasonably in building a trial strategy.[183] This would adequately protect

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[179] MCM, *supra* note 129, R.C.M. 706(a).
[180] MCM, *supra* note 129, R.C.M. 706(c)(2)(D).
[181] Texas adopted their competency standard before *McCoy* was released, so it could not have been crafted in response to the imposition of an accused's autonomy rights. The comparison is made solely to illustrate what a comprehensive standard would look like in the military system.
[182] TEX. CODE CRIM. PROC. ANN. art. 46B.024 (West 2015).
[183] *See infra* Appendix C for complete recommended language.

both attorney and client, and likely avoid the situation the Ninth Circuit dealt with in *Read.*[184]

Having ensured that defense counsel and the accused are adequately informed of the rights enshrined in *McCoy*, the final gap remains with the military judge. The role that they play in making a record of the client's waiver of the right to autonomy will prevent needless appellate litigation—avoiding the issues that are inherent in the structure of the military appellate system.

D. The Military Judge's Obligations—Establishing Waiver and Preventing Unnecessary Appeals

While the right to autonomy belongs to the accused, it is the military judge's obligation to see that the right is protected during the course of the court-martial. The military judge is the presiding officer of any court-martial and has tremendous responsibilities associated with this power.[185] Among the most important of these responsibilities is to ensure that the proceedings are conducted in accordance with the UCMJ, Rules for Court-Martial, and the constitutional protections afforded to the accused.[186] Given this, military judges will be tasked with determining whether any concessions made during the course of the trial were made in accordance with the client's Sixth Amendment rights. In other words, the military judge will engage with the accused to determine whether they assented to any factual strategy employed by defense counsel.

This function will prevent future litigation concerning defense counsel's concessions. The CAAF does not review issues that it deems waived: "[W]e cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal."[187] In the past, the CCAs would review waived claims under their inherent Article 66, UCMJ authority, but

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[184] *See* United States v. Read, 918 F.3d. 712, 716 (9th Cir. 2019) (outlining the accused's wishes to present the defense that he was suffering from demonization, rather than mental illness).

[185] MCM, *supra* note 129, R.C.M. 801(a) ("The military judge is the presiding officer in a court-martial.").

[186] MCM, *supra* note 129, R.C.M. 801(a)(3) ("Subject to the UCMJ and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual.").

[187] United States v. Davis, 79 M.J. 329, 332 (C.A.A.F. 2020).

Article 66 was amended on January 1, 2021, to remove the "should be approved" language, arguably limiting this authority.[188] By assuring that the accused has waived their right to challenge a violation of their Sixth Amendment right to autonomy, the military judge will prevent future review of defense counsel's concessions.

The CAAF's jurisprudence concerning waiver of a constitutional right disfavors applying this principle: "We have . . . applied a presumption against finding a waiver of constitutional rights."[189] This presumption is not absolute—the CAAF has been willing to find a waiver of a constitutional right effective if it, "clearly established that there was an intentional relinquishment of a known right."[190] Any waiver of the accused's rights to autonomy then will be viewed with suspicion by the appellate courts. Knowing this, it is incumbent on the military judge to make an extensive record concerning the accused's assent to the concessions made by his counsel during the course of the court-martial. Accomplishing this will require a colloquy between the military judge and the accused establishing that the accused was aware of their right to autonomy, that they discussed this right with defense counsel, and they assented to their attorney's concessions.

Military judges already engage in similar colloquies with the accused over other constitutional issues.[191] In each of these situations, the military judge takes care to establish that the right was known to the accused and that their waiver of the right was voluntary. In cases involving a concession by defense counsel, the military judge should engage the accused to determine whether their rights to autonomy have been violated. Such a colloquy would determine whether: 1) the accused knew they had a right to maintain their factual innocence; 2) their attorney informed them of this right; 3) the accused permitted defense counsel to make the concession presented; and 4) the accused agrees that the court-martial has

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[188] *See* Article 66(d)(1)(A), UCMJ (2021); Untied States v. Ramirez, Army 20210376, 2022 WL 17095059 at *7 (A. Ct. Crim. App. Nov. 16, 2022) (finding the removal of the should be approved language from Article 66 removes the court of criminal appeals' ability to review waived claims).

[189] United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (citing United States v. Sweeny, 70 M.J. 296, 304 (C.A.A.F. 2011).

[190] *Jones*, 78 M.J. at 44 (citing *Sweeny*, 70 M.J. at 304).

[191] *See* DA PAM. 27-9, *supra* note 103, paras. 2-7-3 (waiver of conflict free counsel), 2-7-9 (waiver of members), 2-7-10 (waiver of motions).

been conducted in accordance with their right to autonomy.[192] These questions would presumably meet the CAAF's requirement that the accused's waiver of his Sixth Amendment right to autonomy constitutes an "intentional relinquishment of a known right."[193]

The military judge's role in establishing a waiver of rights will serve as the finishing touch ensuring compliance with a broad interpretation of *McCoy*. The suggestions above will guarantee the accused and defense counsel are aware of the right to autonomy, that the accused can meet the heightened expectations of assisting in their defense, and that any concessions are approved by the accused on the record. To not implement these steps risks having the paternalistic military appellate system come in after the fact, overturning convictions and stressing the military justice system in the process. Although military justice practitioners are waiting for the final word concerning the reaches of *McCoy*, this decision will have to be addressed eventually, and proactivity represents the best option.

V. Conclusion

The nature of criminal defense practice in the military is likely to face a fundamental shift in the near future. The CAAF, poised to issue its initial interpretation of *McCoy* in *United States v. Hasan*, passed on the opportunity, thereby leaving the question open.[194] Given this, the debate will be thrust upon military practitioners as many are introduced to *McCoy's* mandate for the first time. What will inevitably follow, is the shaping of the accused's right of autonomy to the nature of the court-martial system. As the issue is dealt with more and more it becomes increasingly likely that the military appellate system will step in and implement a broad interpretation of the fairly new Sixth Amendment protection.

Ultimately, defense counsel—who once thought of themselves engaged in the unburdened practice of law, free to make their own strategic decisions—will need to adapt to this new reality. In this new system they will have to ensure their clients are informed about the right to autonomy,

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[192] *See infra* Appendix D for complete recommended language.
[193] *Jones*, 78 M.J. at 44 (citing *Sweeny*, 70 M.J. at 304).
[194] *See* United States v. Hasan, No. 21-0193, 2023 CAAF LEXIS 639, at *21 (C.A.A.F. 2023) (deciding the Sixth Amendment waiver of counsel on a voluntariness basis).

able to assist in making the difficult semi-tactical decisions that are now reserved to accused, and then implement a trial plan where they make no unauthorized concessions. Where they once viewed themselves as the master of the ship, they need to realize much of this power has been shifted to the person with the most to lose, the accused.

Federal appellate courts have been struggling with *McCoy* since its inception, it is time the military justice system does as well. Where there is still ambiguity in the civilian practice, expect none in the military. The system possesses the hallmarks that make the broad implementation of *McCoy* necessary, [195] the military appellate system has shown a willingness to dive into the attorney-client relationship, [196] and the mechanism exists for the appellate courts to find this error where it exists.[197] If this change is coming, defense counsel and the system as a whole need to be ready to change now, before it is too late.

The failure to recognize this invites disaster. The military appellate system will be ready to pounce where defense counsel infringes upon the right of autonomy, reversing without testing for prejudice because of the structural nature of this error. [198] There is a way to avoid this. Implementing rules that require notification of the right to autonomy, incorporating *McCoy's* principles into the ethical rules, adjusting the competency evaluation and standard to align with the accused's new role, and allowing the military judge to ensure waiver where concessions are made, will guarantee the accused's rights have not been violated and there

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[195] *See* McCoy v. Louisiana, 138 S.Ct. 1500, 1514 (2018) (Alito, J., dissenting).

[196] *See generally* United States v. Palacios Cueto, 82 M.J. 323, 326 (C.A.A.F. 2022) (examining defense counsel's failure to admit mitigating evidence during sentencing, failure to advise the accused to mention sex offender registration during his unsworn, and failing to request specific sentencing instructions); United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022) (examining counsel's failure to argue the victim's patient-psychotherapist privilege could be pierced); United States v. Cooper, 82 M.J. 6, 10 (C.A.A.F. 2021) (examining whether the failure to forward a request for individual military counsel rises to the level of ineffectiveness); United States v. Furth, 81 M.J. 114, 117 (C.A.A.F. 2021) (assuming that counsel's failure to advise about the effects of a resignation for the good of the service was ineffective); United States v. Scott, 81 M.J. 79, 85 (C.A.A.F. 2021) (finding counsel ineffective for putting on a truncated sentencing case).

[197] *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967) (creating the mechanism for appellate fact-finding).

[198] *See McCoy*, 138 S.Ct. at 1511 (holding the violation of an accused's autonomy rights constitutes structural error).

is no room for appellate intervention. Fight the battle now, knowing how to best shape it, rather than waiting for it to come.

Appendix A – Amended DCAP Form 8.3

Acknowledgement of Rights of an Accused Facing Court-Martial
(Enlisted accused. SPCM or non-capital GCM)

This document outlines the rights an enlisted accused has in the court-martial process and other information and advice.

1. **The attorney-client relationship.** There is an attorney-client (lawyer-client) relationship between my attorney and me that gives me protection and incentive to discuss everything I know about the charges with my attorney. Failure to disclose all information I know about the case will make it difficult for my attorney to advise and assist me effectively. Any false or inaccurate information I provide to my attorney will make it more difficult for him or her to defend and assist me. Information I discuss with my attorney is confidential and may not be revealed to anyone, to include family and friends, without my consent, except under certain circumstances, which have been explained to me.

2. **Rights to counsel.** I have the following rights to counsel:

a. I have the right to be represented at my trial by a lawyer qualified and certified by The Judge Advocate General to practice before military courts.

b. (*Name of detailed counsel*), of the Trial Defense Service, has been detailed to represent me at my court-martial and is licensed to practice law. This counsel is provided to me free of charge.

c. I have the right to be represented at trial by a civilian lawyer provided by me and at no expense to the government. If I decide to hire a civilian lawyer, my detailed counsel would serve as assistant counsel if I desire, or he or she may be excused with my consent.

d. I have the right to be represented free of charge by a military lawyer of my own selection, if that lawyer is reasonably available. If the lawyer I request is appointed to my case, my detailed counsel may be excused. I may request that my detailed counsel be retained as assistant counsel to assist my individual military counsel.

e. I choose to be represented by: _____.

3. **Who will hear my case.** I have the following rights concerning who will decide whether I am guilty or not guilty and, if found guilty, who will determine my sentence:

a. My court-martial will be composed of the court members (jurors) selected by the commander (usually the commanding general) who referred the charges to trial. If the commander referred the charges to be tried by a special-court-martial with a military judge alone, there will be no court members, but I may be subject to a lower maximum punishment.

(1) I may request to be tried by military judge alone. If the military judge approves my request, he or she will decide whether I am guilty. If he or she finds me guilty of any offense, he or she will determine the sentence.

(2) I may request that the membership of the panel (the jury) include all officers.

(3) I may request that the membership of the panel include at least one-third enlisted persons. No member of the court will be junior in rank to me.

b. At a Special Court-Martial with members, there will be four members. At a General Court-Martial with members, there will be eight members.

c. If I am tried by a panel, I may be found guilty only if three-fourths of the members agree that I am guilty of an offense.

d. If I am tried by a panel and it finds me guilty, the military judge alone will determine my sentence, unless I request, before any sentencing evidence is presented, that the court members on the panel determine my sentence. Three-fourths of the members must agree in determining a sentence. (*If any offense is alleged to have occurred before 1 January 2019, unless the alleged offenses straddle 1 January 2019 and the accused is going to elect under RCM 902A(b) to be sentenced under the new*

sentencing rules, replace this subparagraph with: "If I am tried by a panel and found guilty, the panel will determine my sentence. Three-fourths of the members must agree in determining my sentence.")

4. **Preliminary hearing (general court-martial only)**. If the government intends to have my case tried at a general court-martial, the government must conduct an Article 32 preliminary hearing to inquire into the truth and form of the charges. This hearing is not a trial; it is a process where an independent preliminary hearing officer will determine whether there is probable cause to support the charges. I will have the right to be present, be represented by counsel, make a sworn or unsworn statement, present and confront evidence, and request to have witnesses provide testimony on my behalf. At the conclusion of the hearing, the preliminary hearing officer will make recommendations as to disposition of the charges. The preliminary hearing officer may also make recommendations as to the form of the charges and may recommend changing the current charges or adding additional charges. These recommendations are not binding upon the government. Also, within 24 hours of closure of the preliminary hearing, my defense counsel may submit to the preliminary hearing officer information relevant to the convening authority's disposition of the charges and specifications. I also have the right to waive (give up) my right to an Article 32 preliminary hearing.

5. **Pleas to the charge(s) and plea agreements**. I should consider the following rights and other considerations regarding the appropriate plea in my case:

a. I may plead "guilty" or "not guilty" to any or all of the specifications and charges. I may legally and morally plead "not guilty" to any offense even though I am guilty and believe that I am guilty. I am not lying by pleading "not guilty" when I know I am "guilty." I may not plead "guilty" to an offense unless I am, in fact, guilty of every element of that offense.

b. A plea of "not guilty" places the burden upon the prosecution to prove my guilt beyond a reasonable doubt. I have the right to assert defenses and objections.

c. A plea of "guilty" to an offense admits every element of the offense to which I plead "guilty" and would permit the court to find me guilty of that offense without further proof. If I plead "guilty" to an offense, I waive my right against self-incrimination, my right to trial of the facts, and my right to confront and cross-examine the witnesses against me. I only give up these right with respect to the offenses to which I plead "guilty."

d. I may submit to the convening authority an offer to plead "guilty" that, if approved by the convening authority, limits the sentence that may be adjudged. Also, such a plea agreement may contain a promise by the convening authority not to prosecute certain charges or specifications. (If any offense is alleged to have occurred before 1 January 2019, unless the alleged offenses straddle 1 January 2019 and the accused is going to elect under RCM 902A(b) to be sentenced under the new sentencing rules, replace this subparagraph with: "I may submit to the convening authority an offer to plead "guilty" that provides that he will approve no sentence greater than a stated and negotiated amount when he takes action on the findings and sentence in my case. If the convening authority accepts such an offer, he is bound to reduce my sentence in his action to the agreed limits, if the sentence adjudged by the court exceeds those agreed limits.")

(6. My right to participate in my defense. I understand that during the course of my court-martial, my attorney cannot admit to any of the charged conduct without consulting me first. I understand that I not only have the right to plead not guilty, but I have the right to maintain my factual innocence throughout my court-martial. I understand my attorney will not admit to any offense, or any conduct surrounding any offense, without obtaining my permission first. I will assist with determining the best strategy for my defense, including whether to make any admissions.)

6. **My right to testify.** During my trial, I may decide to be sworn and take the stand as a witness in my own behalf for all or some of the offenses. Like any witness, I may be cross-examined if I testify. However, I cannot be required to testify at the trial, and I may decide to remain silent. If I remain silent, my silence will neither be held against me nor be considered as an admission of guilt.

7. **Rights during the sentencing phase.** If I am found guilty, I may present evidence in extenuation and mitigation of any offense of which I was convicted. I may testify under oath, or I may remain silent. In addition, I may make an unsworn statement during the pre-sentencing case in extenuation and mitigation. I cannot be cross-examined on this unsworn statement, but the prosecution may offer evidence to rebut any statement of fact in the unsworn statement. I may make this unsworn statement orally or in writing, or both, and either my counsel or I, or both of us, may make the statement. I may also present evidence of good duty performance and my potential for rehabilitation. This evidence may be in the form of documents or the testimony of witnesses.

8. **Other evidence the defense may present during the sentencing phase**. The extenuation and mitigation evidence that can be presented during the pre-sentencing phase of the trial can include my accomplishments, what people know about me from any part of my military and civilian life, and any mental or behavioral conditions that I had or have. I understand it is important that, under the direction of my attorney, I locate and secure existing documents, certificates, awards, and other evidence and information that I would like to present during pre-sentencing or after the trial, to the convening authority.

9. **Maximum sentence**. The maximum sentence that can be adjudged against me by if I am found guilty of all charges:

(General Court-Martial: Reduction to E-1, confinement for _____, forfeiture of all pay and allowances, a fine, and a [Bad Conduct] [Dishonorable] Discharge).

(Special Court-Martial: Reduction to E-1, confinement for _____ months, forfeiture of 2/3ds pay per month for _____ months, a fine, and a Bad Conduct Discharge.)

10. **Effect of punitive discharge and/or conviction**. If I am discharged with a Dishonorable or a Bad-Conduct Discharge, the discharge will be a permanent impediment on my employment opportunities and government and VA benefits. Conviction at a Special or General Court-Martial is a federal conviction. If I am not a US citizen or acquired my citizenship through having served in the Armed Forces, there may be adverse

immigration consequences. If I am convicted of certain sex offenses, I will be required to register as a sex offender.

11. **Appeal**. In the event I am found guilty of any charges and specifications and the judgment includes a punitive discharge or confinement for two years or more, my case will automatically be forwarded to the United States Army Court of Criminal Appeals. Also, if not automatically appealed and the sentence includes confinement for more than six months, I will be eligible to file an appeal with the United States Army Court of Criminal Appeals. I will have the right to have appellate counsel represent me at no cost to me. I may also be represented by a civilian appellate counsel at no cost to the government. If the United States Army Court of Criminal Appeals does not review my case on appeal, my case will be reviewed by a military lawyer.

12. **Effect of a sentence including confinement and/or a punitive discharge** (**The language within the three pairs of brackets does not apply if all offenses are alleged to have occurred on or after 1 January 2019 and before the effective date of any executive order the President signs to implement the amendments to automatic reduction under Article 58a*.) If a sentence adjudged by the court includes confinement, I will begin serving that confinement immediately, unless I request deferment and the request is approved. If my sentence includes a punitive discharge or confinement for more than six months, the sentence automatically includes [a reduction to E-1 and*] forfeiture of pay equal to the amount that can be adjudged by the court-martial during any period of confinement. These are called [automatic reduction and*] automatic forfeitures. Automatic forfeitures, adjudged forfeitures and adjudged reductions in rank are effective fourteen days after the court-martial adjudges my sentence. [An automatic reduction is effective at entry of judgment.*] I may request that the convening authority defer confinement, adjudged reduction, adjudged forfeitures, or automatic forfeitures until entry of judgment. I can also request that the convening authority waive the automatic forfeitures for up to six months. The request for waiver must establish that I have dependents who would benefit from continued receipt of my pay. Soon after trial, I may petition the convening authority to take some favorable action, within the convening authority's limited authority, in my case.

13. **The administrative portion of the charge sheet**. I have checked the information in blocks 1-9 of my charge sheet for accuracy. The information is accurate, except for the following:

14. **Discharge in lieu of trial**. Under the provisions of Chapter 10, AR 635-200, I may request administrative separation in lieu of court-martial. In my application, I have to admit that I am guilty of at least one of the charges against me, or of a lesser-included offense, the punishment for which, at a court-martial, includes a punitive discharge. If my request is approved, the charges will be withdrawn and I will be separated from the Army, reduced to E-1, and can expect to receive an "Other Than Honorable" Discharge. This is a possible means of avoiding a federal conviction and punishment, but it will likely result in my losing most of my veterans benefits.

15. **Parole.** Department of Defense Instruction 1325.07 (with Change 3), encl. 2, para. 18 specifies parole eligibility requirements. A prisoner is eligible for release on parole when requested by the prisoner, and (1) the prisoner has an approved unsuspended punitive discharge or an approved administrative discharge or retirement; and (2) the unsuspended sentence or aggregate sentence to confinement is 12 months or more. In cases where the sentence to confinement is less than 30 years, the prisoner must have served one-third of the term of confinement, but in no case less than six months. In cases where the sentence to confinement is 30 years or more, up to and including life, the prisoner must have served at least 10 years of confinement. In cases in which a prisoner is convicted of an offense committed after February 15, 2000 and has been sentenced to confinement for life, the prisoner must have served at least 20 years of confinement. A prisoner sentenced to death or life without eligibility for parole is ineligible for parole. A prisoner will be considered for parole when the prisoner becomes eligible and annually thereafter. See paragraph 18 of Enclosure 2 to Department of Defense Instruction 1325.07 (with Change 3) for special rules for unusual circumstances.

16. I have received the following additional advice:

a. **Following orders of the chain of command**. I must comply at all times with orders and terms of restriction placed upon me. Violation of any such restriction may result in additional charges and/or pretrial

confinement. If I have received a "no-contact" order, I must obey it. I will immediately tell my lawyer about any orders or restrictions placed upon me.

b. **Continuing to Soldier**. I must strive to perform all my duties professionally, obey the orders and instructions of my chain of command, and demonstrate a positive attitude. Doing so can help my situation. Failure to do so can make my situation worse.

c. **Consent searches**. If asked to consent to a search of my person, vehicle, home/quarters/barracks, or property, I should refuse and notify my lawyer immediately. If I have already consented to any search or seizure, I must notify my lawyer about it immediately.

d. **Let my counsel investigate**. I must not try to investigate this case on my own or attempt to interview witnesses.

e. **Keeping my attorney informed**. I must keep my attorney informed of matters that I learn about my case or changes in my situation.

f. **Pretrial punishment**. If I feel I am being punished by my command before trial, I will immediately let my defense counsel know.

g. **Do not discuss the case with others**. I must not discuss my case with anyone by any means (face-to-face, phone, text messages, letters, email, or social media such as FaceBook Instagram, Snapchat, or Twitter). "Anyone" includes roommates, friends, family, investigators, the media, members of Congress, and anyone in my chain of command. If I am asked about my case by anyone, I should simply reply that my lawyer has instructed me not to discuss the case. The only exception to this rule is if my attorney specifically instructs me to do something or talk to a specific person and I agree to do so. If I am read my rights, I will invoke my right to remain silent and my right to counsel. I will not answer questions.

After invoking my rights, I will not initiate any conversation with law enforcement personnel or members of my command. Law enforcement may re-approach me and try to interrogate me. If they do, I will invoke my rights and remain silent. I will immediately contact my defense counsel if anyone from law enforcement or my command tries to talk to me about my case.

Client _____

Defense Counsel _____

Date: _____

Appendix B – Updated Rule 1.2, Rules of Professional Conduct for Lawyers

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(a) [Modified] Formation of client-lawyer relationships by Army lawyers with, and representation of, clients (whether the Army as client or individual clients) is permissible only when the lawyer is authorized to do so by competent authority. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation, ***although a lawyer may not take actions or present evidence inconsistent with the client's desire to maintain their factual innocence. This includes conceded any element of a charged offense during the course of a court-martial.*** A lawyer shall abide by the client's well-informed and lawful decisions concerning ~~case objectives,~~ choice of counsel, forum, pleas, whether to testify, and settlements.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) [Modified] A lawyer may limit the scope of the representation if the client consents after consultation, or as required by law, regulation, or policy and communicated to the client. Generally, the subject-matter scope of an Army lawyer's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A lawyer shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the lawyer towards the client.

(d) [Modified] A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client

Allocation of Authority between Client and Lawyer

(2) Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, ***including the right to decide what concessions to make during the course of representation,*** within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives, and the lawyer may take such action as is impliedly authorized to carry out the representation. A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. ***A lawyer may not override the client's choice to maintain factual innocence and refusal to concede an element of any charged offense and may not present evidence or argument inconsistent with this desire.*** A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical, legal, and tactical matters, such as which witnesses to call, whether and how to conduct cross-examination, which court members to challenge, and what motions to make. Except where precluded by Rule 4.4, the lawyer should defer to the client regarding such questions as any expense to be incurred in the representation, and concern for third persons who might be adversely affected by decisions resulting from the representation.

Appendix C – Updated RCMs 706(c) and 909

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(c) *Inquiry*.

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to***:***

(i) understand the nature of the proceedings against the accused***;*** or ~~to conduct or cooperate intelligently in the defense?~~

(ii) disclose to counsel pertinent facts, events, and

states of mind, and engage in a reasoned choice of legal strategies and options?

Other appropriate questions may also be included.

Rule 909. Capacity of the accused to stand trial by court-martial

(a) In general. No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. ***Intelligent cooperation includes the ability to disclose to counsel pertinent facts, events, and states of mind, and engage in a reasoned choice of legal strategies and options.***

Appendix D – Proposed Military Judges Benchbook (DA Pam. 27-9)
Instruction

2–7–3. WAIVER OF RIGHT TO AUTONOMY (DC CONCESSIONS DURING TRIAL)

MJ: _____, do you understand that you have a constitutional right to not only contest the charges against you, but to maintain your factual innocence?

ACC: (Responds.)

MJ: Do you understand that as part of this right your lawyer cannot admit that you committed any element of any offense without first seeking your permission?

ACC: (Responds.)

MJ: Your lawyer just (stated in opening statement that the evidence would show you _____) (argued in closing that you _____). By doing that they (conceded an element of the offense of _____) (conceded you committed the offense of _____). Do you understand that?

ACC: (Responds.)

MJ: Have you discussed this matter with your defense counsel?

ACC: (Responds.)

MJ: After discussing this matter with (her) (him), did you voluntarily permit (him) (her) from pursing this course of action?

ACC: (Responds.)

MJ: Do you understand that if you told your defense counsel you did not want them to make any concessions, they would have to present their case following your wishes?

ACC: (Responds.)

MJ: In other words, if you desired to make no concessions your defense counsel would have to base your defense on this principle. Do you understand that?

ACC: (Responds.)

MJ: Knowing all this, do you still consent to your defense counsel's concessions?

ACC: (Responds.)

MJ: Do you have any questions about your right to assert your factual innocence?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his/her) right to Sixth Amendment autonomy.

REFERENCES: McCoy v. Louisiana, 138 S.Ct. 1500 (2018).

The Impact of Panel Size on the Reliability of Criminal Verdicts in a Military Justice Context

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I. Introduction

The American trial by jury has ancient roots—to an English yew tree outside of London overlooking the Runnymede wetlands and the River Thames.[1] About 800 years ago, under the gaze of the Ankerwycke, a group of rebellious barons managed to wrest the right to a jury trial from the grip

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[1] *Runnymede and Ankerwycke*, NAT'L TRUST, https://www.nationaltrust.org.uk/visit/surrey/runnymede-and-ankerwycke (last visited May 2, 2024).

of their king.[2] That day, the rebels "gathered with a multitude of most famous knights, armed well at all points."[3] In turn, "[King] John was charming in public [but] behind the scenes he 'gnashed his teeth, rolled his eyes, grabbed sticks and straws and gnawed them like a madman.'"[4] Under the threat of violence, the insurgents forced the Crown into a peace accord, which we now call the *Magna Carta*.[5] As part of that agreement, the King promised to allow for jury trials.[6] Specifically, he swore that "no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."[7] Upon that heritage, American leaders have declared jury trials "the best method of trial that is possible,"[8] "the only anchor, yet imagined by man, by which a government can be held to the principles of its constitution,"[9] "heaven-taught," [10] and "our birth right."[11]

Furthermore, to the American mind, a jury trial means being tried by "a jury of twelve men all concurring in the same judgment."[12] That cultural understanding has fueled the creation of movies like *12 Angry Men*, where Henry Fonda played a lone hold-out juror who stood between the government and the citizen it accused, and who eventually persuaded his fellow jurors to acquit an innocent man.[13] While the U.S. Constitution allows the states to reduce the number of jurors downward from twelve,

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[2] DAN JONES, MAGNA CARTA: THE BIRTH OF LIBERTY, 134-35 (2015).
[3] RADULPHI DE COGGESHALL CHRONICON ANGLICANUM 172 (Joseph Stevenson ed., trans. 1875).
[4] MATTHAEI PARISIENSIS, MONACHI SANCTI ALBANI: CHRONICA MAJORA 611 (Henry Richards Luard ed., trans. 1872-1873).
[5] MAGNA CARTA, *supra* note 2, at 138-40.
[6] Magna Carta, 9 Hen. 3 (1215) (Eng.).
[7] *Id*. c. 39.
[8] Thompson v. Utah, 170 U.S. 343, 349-50 (1898) (quoting 1 Hale's P.C. 33).
[9] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 266, 270 (Julian P. Boyd ed. 1958).
[10] Claudio v. State, 585 A.2d 1278, 1292 (Del. 1991).
[11] *Id.*
[12] *Thompson*, 170 U.S. at 349-50.
[13] *See* 12 ANGRY MEN (Orion-Nova Production 1957).

few have done so.[14] At any rate, the authority to do so is limited: state juries with fewer than six members are unconstitutional[15] because empirical research in the civilian world has shown that juries so small tend to be inconsistent and unreliable.[16] Similarly, the Federal Constitution requires unanimous verdicts in civilian criminal trials at both the state and Federal level.[17] In explaining the importance of the requirement for unanimity, Associate Justice Brett Kavanaugh opined:

> [N]on-unanimous juries can silence the voices and negate the votes of [B]lack jurors, especially in cases with [B]lack defendants or [B]lack victims, and only one or two [B]lack jurors. . . . That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system.[18]

Despite those historical, cultural, and legal imperatives that implore the use of full-size, unanimous juries, not all Americans have received their inheritance. A Federal military conviction carries the same consequences as a civilian one,[19] but rather than being tried by a random selection of their peers, military court-martial panels are made up of a collection of the accused's superiors who are hand-picked by the officer who ordered the trial to proceed.[20] In some cases, military panels may have as few as four members.[21] Further, in most cases, military panels are not required to be unanimous to convict the accused—a mere three-fourths majority vote will suffice.[22] The military's Service courts have resisted arguments that these practices are unconstitutional.[23] The highest military

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[14] Nate Raymond, *U.S. Supreme Court's Gorsuch Says Justices Should Require 12-Person Juries*, REUTERS (Nov. 7, 2022), https://www.reuters.com/legal/government/us-supreme-courts-gorsuch-says-justices-should-require-12-person-juries-2022-11-07 (stating that only six states allow for fewer than twelve jurors in felony cases: Arizona, Connecticut, Florida, Indiana, Massachusetts, and Utah).
[15] Burch v. Louisiana, 441 U.S. 130, 134 (1979).
[16] Ballew v. Georgia, 435 U.S. 223, 234-36 (1978).
[17] Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).
[18] *Id.* at 1418.
[19] *See* Major Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, ARMY LAW., Dec. 2001, at 1.
[20] 10 U.S.C. § 825(e).
[21] 10 U.S.C. § 816(c).
[22] 10 U.S.C. § 852(a)(3).
[23] *See* United States v. Daniel, 73 M.J. 473 (A.F. Ct. Crim. App. 2014).

appellate court, the U.S. Court of Appeals for the Armed Forces (CAAF), which is a Federal court of record staffed by civilian judges appointed by the President and confirmed by the Senate for fifteen-year terms,[24] has refused to reverse those lower Service court decisions,[25] and the Supreme Court has refused to intervene.[26]

The research conducted thus far concerning the reliability of verdicts reached by small and nonunanimous juries has uniformly cast that question in the context of civilian mock trials—with jurors being instructed on civilian standards of law, civilian criminal procedure, civilian cultural references, and civilian fact patterns. This paper details the recent efforts of a multi-disciplinary team of two Air Force military lawyers (judge advocates), two psychologists, and an applied mathematician to explore whether small panels suffer the same deficiencies when the mock trial they participate in is presented as being a court-martial—with the panel members instructed on military standards of law, using military lexicon and rank designations, with military cultural references, and military fact patterns. More specifically, the team developed an experimental paradigm to contrast the deliberation outcomes of an eight-member panel and a six-member panel for a mock sexual assault court-martial case.

The findings from this research are particularly important now because, of late, Congress has shown a willingness to reassess its composition of courts-martial. In December 2016, Congress enacted changes to the controlling body of law: the Uniform Code of Military Justice (UCMJ) (Title 10, Chapter 46, U.S. Code).[27] Those changes took effect in January 2019 and raised the number of members required to serve on a general court-martial panel from five to eight, and the number required for a special court-martial from three to four.[28] These incremental changes, while a step in the right direction, still have not brought the

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[24] 10 U.S.C. § 942.

[25] *See, e.g.*, United States v. Daniel, 76 M.J. 473 (C.A.A.F. 2014). *But see also* United States v. Strong, 83 M.J. 392 (C.A.A.F 2023) (pending decision, but petition for review was recently granted, and briefs ordered, on the issue of "whether [a]ppellant was deprived of her constitutional right to a unanimous verdict").

[26] *See*, *e.g.*, Daniel v. United States, 574 U.S. 1079 (2015) (cert. denied).

[27] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, sec. 5161, § 816, 130 Stat. 2000, 2897 (2016).

[28] *Id*.

military justice system into alignment with civilian practice. A panel of four members is still well below what the Constitution requires for civilian trials. Even eight members falls short of the historical and cultural standard Americans traditionally expect of criminal trials of twelve members. Moreover, the eight members required of a general court-martial can be reduced to six if issues during trial necessitate the release of panel members.[29]

Further, although Congress increased the quorum required for a conviction of most offenses from a two-thirds majority vote to a three-fourths concurrence, that is still well short of the unanimity required for a conviction of a serious offense in American civilian jurisdictions.[30] Congress also chose to preserve the practice of allowing the officer who ordered the court-martial to proceed to also select the panel members.[31] Despite these differences from the civilian criminal justice system, the enactment of this legislation shows that Congress is trying to make courts-martial more closely match their civilian counterparts, while also making them more consistent and reliable as fact-finding entities.[32] This study offers valuable data to inform that effort.

II. Previous Research

Since 1967, as many as seventeen civilian empirical studies concerning the difference between six- and twelve-member juries have occurred.[33] The takeaway from those efforts is summarized as follows: "In short, there still are no ideal studies of jury size effects. All of them are compromises of one kind or another."[34] In 1997, the California legislature mandated a study that would have used rigorous methodology "because of frustrations resulting from equivocal findings generated by flawed

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[29] 10 U.S.C. § 829(d)(1)(B).
[30] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, sec. 5235, § 852, 130 Stat. 2000, 2916 (2016).
[31] *See id.* sec. 5182, § 825, 130 Stat. at 2900.
[32] *See* Fred L. Borch III*, Military Justice in the Army: The Evolution of Courts-Martial from the Revolutionary War Era to the Twenty-First Century*, ARMY LAW., no. 2, 2023, at 35.
[33] Michael J. Saks & Mollie W. Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 L.& HUM. BEHAV. 451, 452 (1997).
[34] *Id*. at 454.

studies."[35] That effort failed, however, when a court official forbade employment of the statute and allowed parties who were to receive smaller juries to "opt out of that assignment in favor of a [twelve]-person jury."[36]

Despite these shortcomings, in 1997, Michael Saks and Mollie Marti separately reviewed sixteen studies in existence to that date concerning the effect of jury size and conducted a meta-analysis.[37] The findings they published are a remarkable and concise compendium of the body of research relating to this topic. Their work marshals a wide variety of data regarding each study, including factors such as sample size, the pool from which study participants were acquired, whether the cases being studied were civil or criminal in nature, whether the study was conducted in a courtroom or in a laboratory, and the medium used to present the trial to the study participants.[38]

Saks and Marti then assigned each study a weighted value.[39] For example, "studies employing stimulus cases that were so extreme that all verdicts were the same, and which therefore were inherently incapable of detecting any effects of jury size on verdicts, received a weight of zero."[40] Only two studies received a weighting of zero.[41] Six studies were rated as either eight or nine, four received rating between four and seven, and four received a rating of one.[42] The studies that received a one rating constituted "uncontrolled correlational studies, which allowed the parties to self-select cases into jury size conditions, thereby tending to put more complex and higher stakes cases in front of larger juries."[43]

Ultimately, Saks and Marti concluded that the research showed significant differences between six- and twelve-member juries.[44] First, the "largest effect of any of the variables studied" is that "[twelve]-person juries are more likely than [six]-person juries to contain at least one

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[35] *Id*.
[36] *Id*.
[37] *See id*. at 453.
[38] *See id*.
[39] *See id*. at 454.
[40] *Id*.
[41] *Id*. at 453.
[42] *Id*.
[43] *Id.* at 454.
[44] *Id*. at 457.

member of whatever minority group is under consideration."[45] Reduced jury size decreases the opportunity of minority "representation from about 63-64 [percent] to about 36-37 [percent]."[46]

Only eleven of the studies Saks and Marti reviewed captured data on the length of deliberations, and only two of those provided statistics necessary to determine whether jury size significantly affected that factor.[47] However, much data regarding factors that favor more thorough deliberations was captured. For example, Saks and Marti found that "[t]rial testimony was discussed more accurately in the deliberations of larger juries than in the deliberations of smaller juries."[48] Further, members of larger juries "remembered more of the facts in evidence, measured by a post-deliberation test of their recall."[49]

Saks and Marti's work dovetails nicely with the findings of the U.S. Supreme Court on the subject. The Court, reviewing many of the same empirical studies that Saks and Marti relied upon, found that progressively smaller juries are "less likely to foster effective group deliberation" and are prone to "inaccurate fact-finding and incorrect application of the common sense of the community to the facts."[50] Additionally, the Court found that the research shows individual members in smaller panels are "less likely . . . to make critical contributions necessary for the solution of a given problem," and "as juries decrease in size . . . they are less likely to have members who remember each of the important pieces of evidence or argument."[51] Further, according to the research "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result."[52] In contrast, larger panels benefit from "increased motivation and self-criticism."[53]

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[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 459.
[49] *Id*.
[50] Ballew v. Georgia, 435 U.S. 223, 232 (1978).
[51] *Id*. at 233.
[52] *Id*.
[53] *Id*.

The Court held these deficiencies "suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."[54] The Court assessed that "the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense."[55]

It should be noted that the Court's conclusion that smaller juries impose an imbalance against the defense does not answer the next logical question of whether that imbalance causes incorrect verdicts. Whether such a detriment drives decisional errors in any given case is not easy to determine because the definition of correct is largely subjective. For example, Saks and Marti's study defined "correct" as being the verdict that they thought the public at large would have likely reached had they, collectively, had the opportunity to decide the case.[56] Under that standard, Saks and Marti concluded that "meta-analysis of the [ten] relevant studies of simulated trials [found that jury size had] no significant effects [on the jury's ability to reach the correct verdict]."[57] But that standard necessarily assumes Saks and Marti's assessment of the public's inclinations were accurate. There is no way to test that assumption because it is based on criteria that is non-empirical and non-replicable – the researcher's personal belief as to what the public would have done had it had the chance. Such a definition of correct is unscientific and unhelpful.

Further, even if a non-subjective standard for correctness could have been formulated, it was probably impossible for Saks and Marti to reach a reliable conclusion regarding correctness from the data set they were given. They aggregated data from studies that mixed data from civil and criminal cases, involving different standards of proof, different evidence, and potentially even different community mores.[58] For example, a correct outcome in a civil case may differ significantly from the outcome that would be deemed correct in a criminal trial given higher burdens of proof that are customarily placed on the prosecution in criminal proceedings.

Although the correctness of a verdict may be resistant to scientific measurement, that does not mean that the question of correctness is

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[54] *Id*. at 234.
[55] *Id*. at 236.
[56] *See* Saks & Marti, *supra* note 33, at 461.
[57] *Id*. at 461-62.
[58] *See* Saks & Marti, *supra* note 33.

unimportant to the question of the ideal size of a jury or court-martial panel. Rather, the size of a jury has long been thought to be an important factor driving the risk of an incorrect verdict.[59] Specifically, Condorcet's jury theorem, coined in 1785 by the Marquis de Condorcet in *Essay on the Application of Analysis to the Probability of Majority Decisions*,[60] posits that the ideal size of a jury varies in proportion to the relative likelihood of each individual juror reaching the correct vote.[61] For example, if under the circumstances individual jurors are more likely than not to vote correctly, then the more jurors on the court, the better. If, in contrast, each juror is more likely to vote incorrectly, then the ideal number of jurors for society's sake is one. Of course, applying that principle requires an accurate definition of what a correct vote looks like. For reasons explained above, reaching an accurate, scientific, non-subjective definition of correct in all but the most clear-cut of cases is an exceptionally challenging endeavor.

To meet the challenge of defining correctness of a verdict, study participants were presented a mock military justice sexual assault case that, evidentiarily, was designed to be a close call on the questions of consent and whether the accused harbored a reasonable mistake of fact as to consent. Pains were taken to ensure that evidence was presented to the undergraduate participants of the study that could support a finding of either guilty or not guilty. The evidentiary presentation was video recorded and played for each of the participating panels of undergraduate students. The military judge's instructions on the evidence and on the conduct of deliberations were likewise recorded and played for each panel. The goal was to make the mock case a neutral variable so as to test the effect of having panels of varying size. The research team then used statistical modeling to predict, mathematically, the probability of a guilty verdict of

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[59] *See* Ballew v. Georgia, 435 U.S. 223, 233-34 (1978) ("[R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate factfinding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.").

[60] MARIE-JEAN-ANTOINE-NICOLAS DE CARITAT, MARQUIS DE CONDORCET, ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DÈCISIONS RENDUES À LA PLURALITÉ DES VOIX [ESSAY ON THE APPLICATION OF ANALYSIS TO THE PROBABILITY OF MAJORITY DECISIONS] (1785) (Fr.).

[61] Franz Dietrich & Kai Spiekermann, *Jury Theorems*, STAN. ENCYC. OF PHIL. (Nov. 17, 2021), https://plato.stanford.edu/archives/spr2023/entries/jury-theorems.

an eight-member panel as opposed to panels of lesser size. By comparing the actual results of each mock trial to the statistical probability data that such a panel would render a guilty verdict, our study was able to assess the likelihood that the correct verdict would be rendered by a panel of that size.

III. Methods

A. Preliminary Analyses

As a preliminary step in determining how to test the efficacy of an eight-member panel (as compared to panels of lesser size), we examined the statistical probability of guilty verdicts for panel compositions of five members through eight. As shown in Table 1, the largest spread exists between panels of eight and six (a 12 percent difference in the percentage of non-guilty votes needed for acquittal).

Table 1

Number of and Percentage of Members Needed for Two-Thirds Majority and Acquittal

Number of Members	Two-thirds Majority	Number and Percentage of not guilty votes needed for acquittal
5	4	(2) 40%
6	4	(3) 50%
7	5	(3) 43%
8	6	(3) 38%

It was recognized that those statistics were relevant for only a single case, and that probabilistic modeling was needed to determine whether the probability of convictions *over time* is influenced by the fact that the number and percentage of not guilty votes needed to acquit varies depending on the size of the court-martial. Therefore, an applied

mathematician developed probabilistic models of conviction based on different jury composition sizes, focusing on the two jury compositions with the greatest spread (i.e., six- and eight-member panels) and in two different conditions (i.e., all votes are possible and at least two members of the panel vote not guilty).

B. Probabilistic Modeling Applied to Panel Size

A basis of this modeling involves a simple probability calculation. The probability of an event is a number between zero and one (including zero and one), that measures the likelihood that the event will occur. It is defined as the number of cases favorable for the event to occur, divided by the total number of cases possible, that is:

$$P = \frac{Number\ of\ favorable\ cases}{Number\ of\ cases\ possible}.$$

As an example, the probability of rolling a five on a die is one-sixth because there is only one favorable outcome out of six outcomes possible. However, the probability of an event does not predict the exact outcome; it is only an estimate of what to expect will happen, and it gets more and more accurate in the long run.

A second basis of this calculation involves combinatorial mathematics. The number of groups of *k* objects that could be formed from a total of *n* objects is denoted $\binom{n}{k}$, and it is called *the number of combinations of n objects taken k at a time* (often read as "*n* choose *k*"). It can be calculated using the formula:

$$\binom{n}{k} = \frac{n(n-1)(n-2)\cdots(n-k+1)}{1\cdot 2\cdot 3\cdots(k-1)k}.$$

For example, if a committee of three is to be formed from a group of twenty people, there are $\binom{20}{3} = \frac{20\cdot 19\cdot 18}{1\cdot 2\cdot 3} = 1140$ possible ways of choosing the committee.

When we apply these formulae to the six-member panel,[62] we need at least (2/3) * 6 = 4 guilty votes for conviction or at most two not guilty votes. This can occur in the following scenarios (in the diagrams below, the panel members' votes are represented by either a *g* or an *ng*):

Member:	**1**	**2**	**3**	**4**	**5**	**6**
(i) All members vote guilty:	g	g	g	g	g	g

which represents one of the *favorable cases* for conviction (see definition of probability).

(ii) All but one vote guilty:	ng	g	g	g	g	g
or	g	ng	g	g	g	g
or	g	g	ng	g	g	g
or	g	g	g	ng	g	g
or	g	g	g	g	ng	g
or	g	g	g	g	g	ng

Thus, there are six more *favorable cases* for conviction, when exactly one panel member votes not guilty. This number could have also been found by applying the combinations formula above for finding the number of k = 1 person groups that can be formed out of an n=6 persons: $\binom{6}{1} = \frac{6}{1} = 6$.

[62] In this discussion, we assume that for every member of the panel, the probability of a guilty or a non-guilty vote is the same; however, in practice, this might not be true.

Member:	**1**	**2**	**3**	**4**	**5**	**6**
(iii) All but two vote guilty:	ng	ng	g	g	g	g
or	ng	g	ng	g	g	g
or	ng	g	g	ng	g	g
.	.	.	.	.	.	.
or	g	g	g	g	ng	ng

Instead of enumerating all the possibilities, the combinations formula is applied, which gives a total of $\binom{6}{1} = \frac{6 \cdot 5}{1 \cdot 2} = 15$ possible scenarios in which exactly two panel members vote not guilty. In total, there are 1 + 6 + 15 = 22 scenarios possible for conviction, in which at least four members vote guilty. These represent the *favorable cases* in the definition of probability above. The total number of *cases possible* is $2^6 = 64$, because each one of the six panel members has two choices. Thus, the probability of a guilty verdict is:

$$P = \frac{22}{64} = 0.34375.$$

This means that, in the long run, we can expect an approximate rate of conviction of 34.375 percent.[63]

If we assume that at least two panel members always vote not guilty, then the number of *favorable* cases for a conviction drops to fifteen (as cases (i) and (ii) cannot happen anymore), and the number of *possible* cases also decreases to 64 - 1 - 6 = 57, for the same reason. Therefore, the probability of a guilty verdict under this restriction is:

$$P = \frac{15}{57} = 0.26316,$$

[63] In practice, we should expect the actual conviction rate to start getting close to this value only after a large number of trials.

which means that, in the long run, the approximate rate of conviction is expected to be 26.316 percent, when at least two of the panel members vote not guilty.

Meanwhile, for an eight-member panel, because (2/3) * 8 = 5.33, we need at least six guilty votes for conviction, or at most two not guilty votes. This can occur in the following scenarios:

Member:	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**
(i) All vote guilty:								
	g	g	g	g	g	g	g	g

which represents 1 of the *favorable cases* for conviction in the definition of probability.

Member:	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**
(ii) All but one vote guilty:								
	ng	g	g	g	g	g	g	g
or	g	ng	g	g	g	g	g	g
or	g	g	ng	g	g	g	g	g
or	g	g	g	ng	g	g	g	g
or	g	g	g	g	ng	g	g	g
or	g	g	g	g	g	ng	g	g
or	g	g	g	g	g	g	ng	g
or	g	g	g	g	g	g	g	ng

Thus, there are eight more *favorable cases* for conviction, when exactly one panel member votes not guilty. Again, we can apply the combinations

formula for finding the number of $k = 1$-person groups that can be formed out of an $n = 8$ persons: $\binom{8}{1} = \frac{8}{1} = 8$.

Member:	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**
(iii) All but two vote guilty:								
	ng	ng	g	g	g	g	g	g
or	ng	g	ng	g	g	g	g	g
or	ng	g	g	ng	g	g	g	g
.	.	.	.	.	.	.	.	.
or	g	g	g	g	g	g	ng	ng

This gives a total of $\binom{8}{2} = \frac{8 \cdot 7}{1 \cdot 2} = 28$ possible scenarios in which exactly two panel members vote not guilty.

Therefore, we have a total of 1 + 8 + 28 = 37 scenarios possible for conviction, in which at least six panel members vote guilty. Again, these represent the *favorable cases* in the definition of probability. The total number of *cases possible* is now $2^8 = 256$, because each one of the eight panels has two choices. Thus, the probability of a guilty verdict is

$$P = \frac{22}{64} = 0.14453.$$

This means that, in the long run, we can expect an approximate rate of conviction of 14.453 percent.[64]

In this case, if we assume that at least two panel members always vote not guilty, then the number of *favorable* cases for a conviction drops to twenty-eight (as cases (i) and (ii) cannot happen anymore), and the number of *possible* cases also decreases to 256 - 1 - 8 = 247, for the same reason. So, the probability of a guilty verdict under this restriction is

[64] Keep in mind that the percentage of convictions should get close to this 14.453 percent value only after a very large number of trials.

$$P = \frac{28}{247} = 0.11336,$$

which means that, in the long run, we can expect an approximate rate of conviction of 11.336 percent, when at least two of the panel members vote not guilty.

In sum, these probabilistic models show that over time, including cases where there were at least two dissenting not guilty votes, there is a significant imbalance in the likelihood of a conviction:

SIX-member panel	**EIGHT-member panel**
≈34.375 convictions	≈14.45 convictions
Out of 100 trials:	
≈26.316 convictions (if at least two vote not guilty)	≈11.33 convictions (if at least two vote not guilty)

Combining these two estimations within each group gives an average of 30.35 percent convictions expected in six-member panels and 12.89 percent convictions expected in an eight-member panel, which is a difference of 17.46 percent. Therefore, increasing the number of required members from six to eight would shift the balance (at least from a mathematical perspective) substantially towards verdicts favoring the defendant. However, although this offers statistical support for Congress's decision to increase the number of members required for a general court-martial from five to eight,[65] there was no known empirical evidence, until the research discussed in this paper, that a panel of eight would be more likely to acquit than a panel of six, especially in the types of criminal cases that are commonly seen in the U.S. military justice system (e.g., sexual assault cases).

[65] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, sec. 5161, § 816, 130 Stat. 2000, 2897 (2016).

C. Pilot Testing

In order to calibrate the case and test the effectiveness of the protocol, we piloted a mock criminal military trial scenario, involving an allegation of sexual assault committed by a military member against another military member, and tried by a court-martial, with eighteen panels (eleven panels containing six members and seven panels containing eight members) consisting of 122 undergraduates. The undergraduates were randomly assigned to a six- or eight-member panel. In this pilot testing, 36 percent of the six-member panels, and 0 percent of the eight-member panels determined that the accused, "Airman Abis," was *guilty*. Using the average of probabilistic modeling statistics of the verdicts with no restrictions and the verdicts with at least two not guilty votes as a benchmark (30.35 percent in six-member panels and 12.89 percent in eight-member panels), we determined that the case as presented likely contained too many exculpatory facts to return guilty verdicts in the eight-member panels. Therefore, to ensure the case would be more balanced towards conviction, we removed two statements made by Airman Kinsey's (the alleged victim) roommate from the trial script, "I overheard her say something about masturbation. Airman Abis asked whether he should close the door and she said, "I don't fucking care." Removing these sentences resulted in a more balanced case, with more panels finding the accused guilty. The following methods and results pertain to all of the panels conducted, using the calibrated case presentation, subsequent to this pilot testing.

D. Participants

Participants were 265 university students (162 women, 103 men) enrolled in a psychology subject pool at a midwestern university who received course credit for participating in the study. Their average age was 20.38 (*standard deviation (SD)* = 4.48, *range* = 18 to 55), and most described their sexual orientation as heterosexual (94 percent), followed by bisexual (3 percent), gay/lesbian (2 percent), and other (1 percent). Most participants (96 percent) were not currently and had never been in the military; however, five participants (2 percent) identified as veterans, four participants (2 percent) were current reservists, and one student identified as being a member of the National Guard.

E. Pre-Trial Procedure

Prior to trial day, participants completed a demographic survey and a pre-trial panel member attitudes survey.[66] Upon arrival on the day of the mock trial (to a classroom assembled as mock panel member room), participants were randomly assigned to panels of either six or eight members. They completed consent forms and were then told via a three-minute video that they would be participating in a mock trial. The gravity of the task was emphasized via the video, where they were encouraged to take seriously their roles as fact finders. Additionally, after viewing the opening instructions, they were all required to stand as a group (with their right hand raised) and go through traditional jury instructions. The experimenter read the following:

> Will the jury please stand and raise your right hand? Do each of you swear that you will fairly try the case before this court, and that you will return a true verdict according to the evidence and the instructions of the court, so help you, God? Please say "I do." [Experimenter waited for participants to say "I do."] You may be seated.

F. The Case

After all participants said, "I do," and took their seats, each participant was also provided with a pen and legal pad and was encouraged to take notes (all notes were shredded after the mock trials). The experimenter then played a twenty-minute video containing a fictitious sexual assault case involving two Air Force members: Airman Roberto Abis (accused) and Airman Ellen Kinsey (victim). In the case, Airman Roberto Abis was charged with sexual assault by causing bodily harm. Namely, "In that he did, at or near Scott Air Force Base, Illinois, on or about 14 August 2016, commit a sexual act upon Airman Ellen Kinsey, to wit: penetrating her vagina with his penis, by causing bodily harm to her, to wit: penetrating her vagina with his penis without her consent." The video, narrated by a U.S. Air Force judge advocate with experience serving as a trial defense counsel, included an introduction (including preliminary instructions), presentation of the evidence (including descriptions of testimony from the

[66] *See infra* Section III.H (Measures).

accused, the victim, several witnesses, and a forensic psychologist), substantive instructions on the law (including descriptions of key terms like bodily harm, mistake of fact as to consent, and reasonable doubt), and procedural rules, which described the rules they were required to follow during deliberation (a physical copy of the procedural rules was also given to each of the participants before they started their deliberation). The introduction, substantive instructions on the law, and procedural rules were fashioned using Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* (2014).[67]

G. Deliberation

For the deliberation, participants were seated around a rectangular deliberation table with their panel member numbers on the table in front of them (so that they could be identified when commenting). After viewing the case, the experimenter distributed a deliberation packet to each panel member and read them standard instructions about the materials contained in the packets. The experimenter also ascertained who was senior in rank (first in terms of class standing and second in terms of age) and appointed that person the foreperson. The foreperson was given a set of written instructions detailing the steps of the deliberation: 1. participants complete pre-deliberation individual verdict sheet, 2. participants discuss all relevant facts of case, 3. anonymous vote is taken whereby participants write "guilty" or "not guilty" on legal pad paper and hand it to the foreman, 4. foreperson counts votes aloud, 5. foreperson asks if any more deliberation or revote is necessary, 6. participants complete post-deliberation individual verdict sheet, and 7. foreperson completes group verdict sheet). Importantly, the experimenters did not know the true nature of the study. Once the packets were distributed and the foreperson was appointed, the experimenter told the mock panel members to begin their deliberations and to come to the hallway if they had any questions or when their deliberations were complete. Then, the experimenter left the room. All deliberations were recorded using an iPad and large table microphone and uploaded to an online password-protected archive. Overall, thirty-

[67] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (29 Feb. 2020).

eight of the forty deliberations were successfully recorded throughout the entire deliberation and then transcribed.

H. Measures

1. Pre-Trial

Prior to the mock-trial, participants completed a demographic survey and the previously validated Pretrial Juror Attitudes Questionnaire (PJAQ).[68] Participants responded on a five-point Likert scale (1 = *strongly disagree*, 5 = *strongly agre*e) to indicate their agreement with twenty-nine items in six different categories (for example: "Defense lawyers are too willing to defend individuals they know are guilty:" cynicism (CYN) towards the defense, and "If a suspect runs from police, then he probably committed the crime:" system confidence (CON)). For this study, only these two subscales (CON: Cronbach's alpha = .67, and CYN: Cronbach's alpha = .61) were used.[69]

2. Pre-Deliberation – Individual

Prior to leaving the room, the experimenter advised all participants to complete a pre-deliberation form before engaging in any discussion and to leave it in their personal folder so no one else could see it. This step was also listed in the instructions packet that was given to the foreperson. This verdict sheet, adapted from Ruva and Guenther,[70] asked participants to indicate whether, before any deliberation occurred, they found the defendant guilty or not guilty and then rate their confidence in the verdict on a seven-point Likert scale (1 = *I'm certain he is not guilty*, 7 = *I'm certain that he is guilty*).

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[68] Lecci, Len & Myers, Bryan, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 J. APPLIED SOC. PSYCHOL. 2010 (2008).

[69] Cronbach's alpha is a measure of internal consistency of a test or scale. It is a test of reliability (whether responses are consistent between questions).

[70] Christine L. Ruva & C. C. Guenther, *From the Shadows into the Light: How Pretrial Publicity and Deliberation Affect Mock Jurors' Decisions, Impressions, and Memory*, 39 L. & HUM. BEHAV. 294, 297 (2015).

3. Post-Deliberation – Individual

After the verdict was declared final, participants completed another individual verdict sheet. However, this time the participants were asked to indicate, after all deliberation occurred, whether they found the defendant guilty or not guilty and then rate their confidence in the verdict on a seven-point Likert scale (1 = *I'm certain he is not guilty*, 7 = *I'm certain that he is guilty*).

4. Post-Deliberation – Group

The foreperson completed the group verdict sheet, which was modeled after a verdict sheet from criminal court contexts. On this sheet, they were required to enter whether their panel found the defendant, Airman Abis, guilty or not guilty, and the final vote count. To be certain the two-thirds vote was used appropriately, the calculation was provided on the verdict sheet (such as: "Two-thirds majority vote is required for a [g]uilty verdict (for example: six-eighths or four-sixths)").

5. Deliberation Times

Deliberation times were computed by inspecting the electronic video files, calculating the time between when the experimenter left the room and when the foreperson left to retrieve the experimenter at the end of the group's deliberation.

6. Deliberation Comments

Deliberation comments were evaluated on their content as per Horowitz and Bordens.[71] After all deliberations were transcribed, the deliberations were segmented into single units of information (propositions)—resulting in a total propositions measure. Using the same classification scheme as Horowitz and Bordens,[72] two independent raters

[71] Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. APPLIED PSYCH. 121, 125 (2002).
[72] *Id.* at 125.

then classified each proposition as probative (case-related information, like "she had a boyfriend, she called her boyfriend to try to get him to come over" and "Justin said when he came over he did smell alcohol on her breath"), non-probative (not case-related, irrelevant, or incorrect, such as "three [drinks] – I counted three," and "I kinda felt my personal way about this situation"), and evaluative (evidence or case-based opinions, "but I think that it shouldn't be, like he shouldn't be charged with rape," and "he was more in a right mind than she was"). These raters were unaware of the true purpose of the study. The interrater reliability of the coding was acceptable (Kappa = .78). For final coding, the two raters resolved any differences through discussion.

IV. Results

Overall, forty mock trials were conducted (twenty-seven with six members and thirteen with eight members). One participant (from a six-member panel) did not complete the pre-trial questionnaire and that person's data was excluded; however, because he participated in the trial, the group's results were still presented. Prior to the group analyses, we analyzed the individual data to determine whether age or sex of participants was related to pre-trial attitudes or individual pre- and post-deliberation verdicts. Age was not significantly related to pre- or post-deliberation verdicts (*p*s > .05); however, age was inversely related to PJAQ scores for cynicism towards defense ($r = –.13$, $\underline{p} = .03$) and system confidence ($r = –.23$, $p < .001$), reflecting a more negative view towards the legal system and less cynicism towards defense counsel among older participants. Meanwhile, in terms of sex, women were significantly more likely than men to indicate that Airman Abis was guilty on the pre-deliberation form (64.6 percent of women vs. 49.5 percent of men, $X^2(n = 265) = 5.89$, $p = .02$). However, this difference disappeared in the post-deliberation verdicts; after deliberation, 45.6 percent of men and 42.6 percent of women indicated that Airman Abis was guilty (X^2 ($n = 265$) = 0.24, $p = .63$). Meanwhile, men and women did not differ significantly in their pre-trial attitudes towards defense or their system confidence (*p*s > .25).

We also examined whether the six- and eight-member panels were similar on these demographic characteristics. As shown in Table 2, the panels were similar in terms of age and their pre-trial attitudes towards

defense counsel and the legal system. However, there were significantly more men in the six-member panels than the eight-member panels. As women were more likely to indicate that Airman Abis was guilty on their pre-deliberation forms, this sex difference could potentially translate into a slight bias towards guilty verdicts for the eight-member panels. However, this was not the case; the individual pre-trial verdicts of the six- and eight-member panels did not differ significantly. The guilty votes in the individual pre-deliberation verdict sheets for the six- and eight-member panels, were 62 percent and 53 percent, respectively ($X2$ ($n = 264$) $= 1.97$, $p > .05$).

Table 2

Descriptives and Significance Tests for Demographic Characteristics of Six- and Eight-Member Panels

	6 members	**8 members**	
	M (*SD*)/ *N* (%)	*M* (*SD*)/ *N* (%)	t/X^2
Age	20.40 (4.23)	20.35 (4.86)	0.91
Male Sex	72 (69.9)	31 (30.1)	$X^2 = 5.91$, $p = 0.02$
Cynicism towards Defense	2.97 (0.50)	2.99 (0.57)	–0.40
System Confidence	2.94 (0.75)	2.95 (0.56)	–0.13

A. Verdicts

Among six-member panels, thirteen of twenty-seven (48 percent) returned a guilty group verdict, whereas in eight-member panels, four of thirteen (31 percent) returned a guilty group verdict. Thus, the probability of the accused being convicted dropped 17 percent in cases when two additional panel members were added to the panel.

As Table 3 shows, in the groups who returned a guilty verdict, most of the individual members (in both the six- and eight-member panels) thought the accused was guilty before the deliberation began, and this number increased after the deliberation. However, there were no significant differences in the average individual pre- or post-deliberation verdicts for the six- or eight-member panels. Additionally, after they returned their individual final verdicts, there were no significant differences between the six- and eight-member panels in how confident they were in their ratings. In both groups, participants were, on average, "pretty sure he is guilty."

Table 3

Descriptives and Significance Tests for Pre- and Post-Deliberation Guilty Votes and Verdict Confidence Ratings by Panel Size When Group Verdict was Guilty

	6 members		**8 members**		
	M (*SD*)	% guilty votes	*M* (*SD*)	% guilty votes	*t*
Pre-deliberation verdict	0.75 (0.43)	75%	0.63 (0.49)	63%	1.28
Post-deliberation verdict	0.91 (0.29)	91%	0.84 (0.37)	84%	0.99
Confidence	5.75 (1.49)	38%[a]	5.72 (1.41)	28%[a]	0.09

Note. Six-member panel $n = 77$, eight-member panel $n = 32$. For verdicts, 0 = not guilty, 1 = guilty. For confidence ratings, 0 = certainly not guilty, 7 = certainly guilty. [a]Percentage of those who indicated that they were "certain" that Airman Abis was guilty; there were no significant differences between six- and eight-member panels in these percentages $X^2(n = 109) = 0.91, p > .05$).

Meanwhile, in the groups that returned a not guilty verdict, most of the participants began the deliberation with the belief that the accused was not guilty, and the percentage who believed he was not guilty increased after the deliberation was finished.[73] Again, there were no significant differences in the average individual pre- or post-deliberation verdicts for the six- or eight-member panels. However, this time, there was a difference between the six- and eight-member panels in how confident they were in their post-deliberation verdict ratings. Those in eight-member panels had significantly greater confidence in their not guilty verdicts than those in six-member panels. While the average eight-member panelist

[73] *See infra* Table 4.

voting for acquittal was "pretty sure he is not guilty," the average six-member panelist voting for acquittal was "not sure but think he is guilty."

Table 4

Descriptives and Significance Tests for Pre- and Post-Deliberation Guilty Votes and Verdict Confidence Ratings by Panel Size When Group Verdict was Not Guilty

	6 members		**8 members**		
	M (*SD*)	% guilty votes	*M* (*SD*)	% guilty votes	*t*
Pre-deliberation verdict	0.50 (0.50)	50%	0.49 (0.50)	49%	0.71
Post-deliberation verdict	0.13 (0.34)	13%	0.11 (0.32)	11%	0.67
Confidence	2.83 (1.61)	17%[a]	2.29 (1.42)	26%[a]	2.22*

Note. Six member $n = 84$, eight member $n = 72$. For verdicts, 0 = not guilty, 1 = guilty. For confidence ratings, 0 = certainly not guilty, 7 = certainly guilty. [a]Percentage of those who indicated that they were "certain" that Airman Abis was not guilty; there were no significant differences between six- and eight-member panels in these percentages $X^2(n = 156) = 2.20$, $p > .05$).

B. Quality of Deliberation

The deliberation times in the six-member panels ranged from 4.42 minutes to 44.13 minutes, and the deliberation times in the eight-member panels ranged from 7.23 minutes to 31.20 minutes. There was no significant difference between the six- and eight-member panels in how many minutes they spent deliberating, on average ($M = 21.41$, $SD = 9.84$ versus $M = 18.53$, $SD = 7.41$, respectively, $t(37) = 0.93$, $p = 0.34$). However, there was a trend for those in the six-member groups to spend more time in deliberations. As Table 5 shows, there were also no

significant differences in neither the number of total propositions elicited by members in six- and eight-member panels nor in their percentage of probative, non-probative, and evaluative propositions. However, there was a trend for the six-member panels to produce more non-probative propositions during deliberation than the eight-member panels. Additionally, although the length of deliberation time was significantly and positively correlated to the percentage of probative statements in the eight-member panels (r =.63, $p < .05$); the length of deliberation was not significantly related to the percentage of probative comments in the six-member panels (r = .39, $p > .05$). In other words, the length of deliberation appeared to produce more substantive deliberations in the eight-member panels but not in the six-member panels.

Table 5

Descriptives and Significance Tests for Number and Percentage of Deliberation Propositions by Panel Size

	6 members		**8 members**		
	M (*SD*)	%	*M* (*SD*)	%	*t*[a]
Total propositions	284.04 (171.10)		234.38 (97.19)		0.96
Probative proposition	76.76 (49.08)	26%	65.61 (33.03)	27%	–0.50
Non-probative proposition	171.16 (102.50)	62%	133.54 (60.34)	58%	1.26
Evaluative proposition	36.12 (28.53)	12%	35.23 (15.13)	15%	–1.51

Note. [a]t-tests were performed to compare the two panel sizes on the percentage statistic (such as proposition/total propositions for each category).

V. Discussion and Recommendations

Previous studies concerning civil trials have already found that increasing panel size to twelve members results in a more diverse panel that engages in more robust deliberations.[74] Our goal was to test whether a more modest increase in panel size, corresponding to recent changes in military court-martial panel composition, has similar effects. Our study's findings confirm the validity of Saks and Marti's aggregation—progressively larger panels are more likely to acquit than smaller panels. However, we did not find, as Saks and Marti predicted, that such a relatively small increase in panel size resulted in more meaningful deliberations, at least not significantly (although eight-member panels were marginally less distracted by non-probative propositions). Of note, the smaller six-member panels were 17 percent more likely than eight-member panels to convict an accused. This aligns with the difference predicted by the probabilistic modeling (17.46 percent). The fact of that alignment supports the practical applications of probabilistic modeling for making predictions in human behavior in the context of trials. As discussed earlier, whether the increased risk of conviction posed by smaller panels represents an increase in the risk of "incorrect" verdicts is not a question easily amenable to scientific measurement. Nonetheless, exposing an accused to a risk of conviction that is higher than can be explained by statistics is a matter of concern for any criminal justice system. Justice requires verdicts to be reliable—in both fact and appearance.

This study made some additional findings that were not explored by Saks and Marti. For example, the discovery that older panel members tended to hold more negative views of the legal system while, conversely, viewing defense counsel with less cynicism, warrants further study. Likewise, more research could be focused on this study's finding that women were more likely than men to start deliberations with a view that the accused was guilty, but that their differing views at the start of the deliberative process were washed away by the end. This study's findings regarding the relative confidence that individual panel members had in the verdict their court reached also could be a fruitful area for further research. Panel members who were part of larger eight-member courts where the verdict reached was not guilty were significantly more confident in that

[74] Horowitz & Bordens, *supra* note 71, at 125-28.

verdict than their counterparts in six-member courts who had reached the same verdict. Confidence in verdicts is an important goal for any system of justice. Future research also should study the extent to which race and ethnicity of the panel members, as well as the accused and victim, might influence outcomes for panels of varying sizes, especially if unanimity is not required for the panel to render a verdict of conviction.

The implications of this research on military justice policy are profound. Increasing the size of panels, conclusively, increases the chance that the accused will be found not guilty of the Government's allegations. This may be especially important for a system of justice that has, of late, been criticized for pursuing adult penetrative sexual assault prosecutions all the way to verdict even though, in 31 percent of those cases, at the time the charging decision was made, the Government lacked sufficient evidence to support a reasonable expectation of obtaining or sustaining a conviction on that allegation.[75] In 10 percent of those cases, the Government lacked even probable cause.[76] In such a system, where contemporary standards of prosecutorial discretion[77] are not employed to prevent weak cases from going forward to trial, it is important to ensure that the trial forum is exceptionally reliable. Smaller panels lack such reliability. Further, allowing those smaller panels to render non-unanimous verdicts amplifies the risk that the voice of racial and ethnic minorities on those panels will be diluted. Such dilution is not only potentially dangerous to innocent minority defendants but is also incongruent with the goal of ensuring that racial and ethnic minority communities have the equal opportunity to participate in our system of government, including judicial systems.

For these reasons, abolishing court-martial panels that are smaller than eight members (as exists in special courts-martial and general courts-

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[75] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017, at 56 (2020).
[76] *Id*. at 57.
[77] The Department of Defense has prescribed a standard for prosecution but has expressly made that standard non-binding. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2.1, ¶ 2.3 (2024) ("This Appendix provides non-binding guidance issued by the Secretary of Defense [. . .] [convening authorities and special trial counsel] should not refer a charge to a court-martial unless the admissible evidence will probably be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder.").

martial where members become unexpectedly unavailable after the court has been impaneled) should be a congressional priority, as should the abolishment of non-unanimous verdicts in all courts-martial.

THE FIFTIETH KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

COLONEL (RETIRED) LAWRENCE J. MORRIS†

Introduction

Our military justice system has always been evolving. That evolution has not necessarily moved at a steady pace and never with the volatility of the last fifteen years or so. So, when I was asked to talk about military justice in transition, it prompted me to think about the nature of change in our system, how practitioners adapted, and what it might tell us about our practice as judge advocates as we move from an almost exclusively supporting role to a decision-making role in many aspects of good order and discipline.

* This is an edited transcript of remarks delivered on 10 April 2023 to members of the staff and faculty, distinguished guests, and officers attending the 71st Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This lecture is in honor of Major General Kenneth J. Hodson.

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Now, over the years, most of the changes to the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial* (MCM)[1] ratcheted toward greater due process. Many changes came from the civilian justice system, which yielded what some have used as a sort of pejorative, "civilianization." But, it might more accurately be called "judicialization." The changes that are now coming about were brought on largely by us: military leaders and lawyers. There were just enough anomalous cases to create a string of anecdotes that suggested to a critical observer or a badly treated victim that the system was too capricious, too uncertain, and too unsteady to be trusted to continue operating with the same rules and assumptions that have characterized military justice for decades. I do not agree with those assumptions in many respects, but I want to talk today mainly about what is in front of the justice system for leaders, lawyers, and, most importantly, for those facing discipline. We should also consider the impact on complainants, victims, and participants in the process.

Now, the change from a command-driven or command-dominant justice system *is* a big change, and, in some respects, it is more demanding on practitioners than prior changes because it is less about changes in the rules of evidence or procedure. As lawyers, we can learn the law and at least as much about the assumptions on which the system is built. The greater challenge for judge advocates is accomplishing what is expected of them to make the system work. When defining military courses of action, we find operators using the phrase that a plan might "create conditions for" whatever the mission is: taking the hill, bombing an outpost, or providing security transit for refugees. While commanders adjust to a radically different concept of authority and leadership in light of losing or dulling some of the tools of discipline, it is the lawyers' turn to create conditions for successfully implementing a foundational change. Before we finish, I will offer some of the challenges facing practitioners, suggest some approaches, and conclude with some recommendations and observations on the military justice system, as we are a couple of years away from the seventy-fifth birthday of the UCMJ.

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) [hereinafter MCM].

The Development of Military Justice

So first, let us walk briskly through some of the key points in the development of military justice that are pertinent, either to the changes that are coming or how the system adapted to prior changes. The military justice system predates our country; that is the reason for the "1775" on our regimental crest. Speaking of transition, we can see how the concept of deterrence may have evolved since George Washington, in 1776, approved the execution of Thomas Hickey, one of his guards, for a conspiracy to assassinate him. Washington stated the following in a general order: "The unhappy Fate of Thomas Hickey, executed this day for Mutiny, Sedition, and Treachery; the general hopes will be a warning to every Soldier, in the Army, to avoid these crimes, . . . [so] pernicious to his country, whose pay he receives and Bread he eats . . . ."[2] It goes on, but we always have been cautioned about the limitations of general deterrence as a concept, and here is a case of an execution in front of 20,000 other Soldiers in a pretty summary fashion. It was rough justice, which was not unusual in its time.

More than a century later, the most significant changes to military justice occurred in 1920 with the fifth revision of the British-influenced Articles of War[3] and then in 1950, with the adoption of the UCMJ.[4] The military justice practices of 1920 would look familiar to today in many respects, though, in general, the rules were less detailed. Commanders were convening the same three levels of courts with membership similar to today's courts.

As practitioners, we have often debated the optimal composition of courts-martial. Most of us operated in a 1-3-5 framework, with summary courts-martial initially having just one summary court officer, then a minimum of three, and now five members for special courts and eight for

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[2] Headquarters, Continental Army, Gen. Orders, 28 June 1776, *reprinted in* 5 THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES 129-30 (Philander D. Chase ed. 1993) (original style and grammar retained).

[3] 1920 Articles of War, Pub. L. No. 66-242, 41 Stat. 749.

[4] An Act to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

noncapital general courts-martial. Interestingly, the 1920 articles deleted a provision from the 1916 version that provided five to thirteen members in a general court-martial and at least thirteen when that number could be convened without manifest injury to the Service.

After the most intensive war in our history, we took a hard look at the military justice system. The 1950 law enacting the UCMJ and publication of the *Manual for Courts-Martial*[5] in 1951 represent a BC-to-AD hinge in our system. It was not just a total discarding of the legacy system, but the "U" in the UCMJ brought in the Navy, which historically operated its own statutory justice system via the Articles for the Government of the Navy.[6] The UCMJ brought the Navy into full conformity and into a system that covered all Services. There can be value in uniformity for uniformity's sake. Still, the universal reach of the UCMJ also meant a more mature and coherent system with other salutary effects, including all cases coming through the appellate process, which was also new. Uniformity and equity were the main themes in President Truman's 154-word signing statement on May 6, 1950. He signed it the day after Congress passed it. In his signing statement, he wrote, "The code is one of the outstanding examples of unification in the Armed Forces and is tangible evidence of the achievements possible by the coordinated teamwork of [all the Services]."[7] He went on to say that "the democratic ideal of equality is further advanced,"[8] and it was immediately battle-tested. Remember, President Truman signed the bill on May 6, 1950, the thirty-eighth parallel was breached on June 25, 1950, and the *Manual for Courts-Martial* took effect the following May.

The UCMJ came about after extensive scholarly—and occasionally spicy—debate and study. We are all military justice nerds to some degree, so it is safe to surmise that if you picked up a random section of the volumes of testimony from those years, you would find it fascinating. The hearings started less than five years after the end of World War II,

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[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951).
[6] *See, e.g.*, 34 U.S.C. § 1200 (1940).
[7] *Statement by the President Upon Signing Bill Establishing a Uniform Code of Military Justice*, HARRY S. TRUMAN LIB. & MUSEUM: NAT'L ARCHIVES, https://www.trumanlibrary.gov/library/public-papers/108/statement-president-upon-signing-bill-establishing-uniform-code-military (last visited Mar. 18, 2024).
[8] *Id.*

when many members of Congress were veterans, and some of them had at least some experience with the 2 million courts-martial conducted among the 18 million Americans who served in uniform during that war. As a result, there was considerable concern about command influence and capriciousness, concerns that were reflected in key aspects of the UCMJ. To be fair, about 800,000 of those courts were summary courts-martial, but they still collectively served as one giant test of and stress on the system. Truman was serving his only full term as President, and he had some pretty salty words about the command-heavy military justice system he saw in action as an artillery captain in France during World War I. So, one of the innovations of the UCMJ was the institution of the civilian, (then) three-judge Court of Military Appeals, which is now the five-person Court of Appeals for the Armed Forces (C.A.A.F.). In a process we would be unlikely to see today, President Truman personally interviewed the three candidates for the Court of Military Appeals before he nominated them to the Senate.

A heavy wartime experience made it clear that the military justice system had limitations, especially its sometimes-summary nature, uneven availability of qualified counsel, and the persistent specter of command control. Still, the UCMJ was becoming not just a tool but a system with a coherent set of protections not available in the civilian world. I suggest this formula for talking about what is distinctive about the system—what we in the military have that the civilian system does not have equivalently. Article 31[9] precedes *Miranda*[10] by more than a dozen years and is still broader than *Miranda*. You do not have to be in custody to qualify for your Article 31 protection, and, of course, you have to be told the offense you are suspected of committing—both protections that the civilians would love. Article 32[11] provided for a robust pretrial process wherein the client is present with counsel and can cross-examine, see substantial amounts of the Government's case, and use it, to some degree, as discovery. Article 27,[12] of course, provides for qualified counsel. Article 37[13] covers command control. When used at its best,

[9] UCMJ art. 31 (2022).
[10] Miranda v. Arizona, 384 U.S. 436 (1966).
[11] UCMJ art. 32 (2022).
[12] UCMJ art. 27 (2022).
[13] UCMJ art. 37 (2022).

nonjudicial punishment (NJP) is an ideal mechanism to attack precursor misconduct at a lower level under the blanket of the Sixth Amendment.[14]

The most disruptive year in America between Pearl Harbor and September 11, 2001, was 1968. We were fighting an increasingly bloody and unpopular war in Vietnam with a largely draftee Army, significant racial issues, and increased problems with the sale and use of illegal drugs in a combat zone. Imagine the daily impact on American families: an average of 325 Service members died every week of that year in Vietnam. About six times as many were wounded. There were urban riots all summer long, and we came to learn of the My Lai massacre. Once again, a major change to the military justice system was immediately battle-tested. In signing the Military Justice Act of 1968,[15] before his successor was elected President, Johnson said that the addition of the military judge and the provision of defense counsel for accused facing special courts kept a promise to Americans that Service members would not only receive excellent medical care, training, and equipment but "first class legal services as well."[16]

Johnson's remarks also remind us that the military justice system is not just an internal matter. It is not our system as practitioners and litigants; it represents society's pact with the Soldier. The non-military members of society still have a proper interest in the justice system that disciplines Service members. So, the 1968 act removed the lawyer from the jury box—who was called the law member[17]—who advised the panel and joined them to deliberate but not to vote. It gave the accused the option of a judge-alone trial, which we now know was about to become the norm. There was, however, no guarantee that it would work. Think of those first military judges, often junior in rank to some members of the

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[14] U.S. CONST. amend. VI.

[15] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[16] *Lyndon B. Johnson: October 24, 1968, Remarks Upon Signing the Military Justice Act of 1968*, AM. PRESIDENCY PROJ., https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-military-justice-act-1968 (last visited Jan. 18, 2024).

[17] The law member was the predecessor to the military judge. *See* 1920 Articles of War, Pub. L. No. 66-242, sec. II.B, art. 8, 41 Stat. 749, 788; *see also* JUDGE ADVOC. GEN.'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775—1975, at 136-37 (1975).

panel, making final and binding rulings. The *Care*[18] inquiry grew over time: again, a defense-protective process of acknowledging guilt in open court. That the trial judiciary was fielded immediately in a combat zone might have accelerated its acceptance; there was a war to fight and cases to try. Few seem to have clung to the law-member model, though it would briefly appear forty-five years later, right after September 11.

President Johnson was extolling a still-better military justice system. In the fall of 1968, the Supreme Court was deliberating the decision that it would issue the following June, in which it ruled that the military could not prosecute Service members for offenses that were not what they called "service-connected."[19] That case, *O'Callahan v. Parker*,[20] had to do with an off-post, off-duty sexual assault of a civilian in Hawaii by an Army noncommissioned officer (NCO) who was on leave. The opinion, by Justice William O. Douglas, harshly portrayed the military justice system and constricted the military's authority to try such cases while also injecting massive confusion into what constituted service connection and how to establish it. Justice Douglas hit the system hard. He said that "[a] court-martial is not yet an independent instrument of justice," adding that the system was, in general, "less favorable to defendants," and "history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[21] He continued,

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of the Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . . [C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.[22]

It was clear right away that the vagueness of this service connection rubric was consuming the court-martial system. Justice John Marshall Harlan II's *O'Callahan* dissent accurately forecasted that "the infinite

[18] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).
[19] O'Callahan v. Parker, 395 U.S. 258, 272 (1969).
[20] *Id.*
[21] *Id.* at 265.
[22] *Id.*

permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue."[23] The Court hustled to impose an interim fix in *Relford v. Commandant*,[24] issued in 1971 just twenty-one months after *O'Callahan*. Not often do we see the Supreme Court jump in to try to fix its own work with that speed. In *Relford*, the Court, in an opinion by Justice Harry Blackmun, created a nonexclusive list of twelve non-binding factors that would come to bear on the issue of jurisdiction. Like most compromises, it was even more unsatisfactory.

In practicing under this rubric early in my time on active duty, I found that we all disregarded the Court's caution that you could not just count up the factors and decide whether there was jurisdiction under the circumstances. Naturally, it triggered significant motion practice, uncertainty, and unpredictability. Trial judges would reiterate that the *Relford* factors were advisory and nonexclusive, and counsel would try to tote them up to persuade the military judge on the issue of jurisdiction. But the jurisdiction issue was so fraught and so confusing that contradictory rulings were made all the time at the trial level. As a defense counsel, I brought a writ to the Army court, later known as the Army Court of Criminal Appeals. I lost, learned, and developed a record in a case, futilely or not. Significant time and energy were consumed on litigating the service-connection issue before trial, which frustrated commanders and led to resource consumption, unpredictability, and commanders looking for alternative ways of speedily addressing Service member misconduct—one of the reasons for an increase in administrative separations. Then, as now, commanders were prone to the sentiment of "just get him out of my unit." As we move to the new system, judge advocates will be expected to credibly buttress leader confidence in the full range of disciplinary options still available to them in the many circumstances they still own.

O'Callahan was, as Justice Harlan observed, confusing and difficult to apply, and *Relford* was not much better. Justice Blackmun set out these twelve factors to describe aspects of the analysis that led to the conclusion. And though he was careful—futilely, I think—to warn

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[23] *Id.* at 284 (Harlan, J., dissenting).
[24] Relford v. Commandant, 401 U.S. 355 (1971).

practitioners that the application of the factors was not an arithmetical or mechanical process, this was a feast for lawyers: an invitation to advocacy, an explicit list onto which to craft a theory of why the Government did or did not have jurisdiction.

A couple of years later, in the Supreme Court's landmark abortion decision,[25] we came to see that Justice Blackmun was attracted to legal reasoning that proposed analytical rubrics—twelve factors in *Relford*, three trimesters in *Roe*—and that these themselves were seen to be sufficient to further analysis, scrutiny, and ambiguity. Some of those twelve *Relford* factors are quite specific.[26] To be fair, the Justice seemed to want to tease out information that might give a set of facts sufficient military color to quantify the narrow opening that Justice Douglas left in *O'Callahan* for non-military offenses. You can see how they might have been more simply clustered so those relating to location are combined, those relating to the victim's status are combined, and so on. It was a bit of a jumble.

Unhelpfully, Justice Blackmun gave his own box score in the *Relford* case, as he wrote:

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[25] Roe v. Wade, 410 U.S. 113 (1973).

[26] The *Relford* factors include:

1. The [Service member's] proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.

Relford, 401 U.S. at 365.

> It is at once apparent that elements four, six, eight, eleven, and twelve, and perhaps five and nine, operate in Relford's favor as they did in O'Callahan's. . . . Just as clearly, however, the other elements present and relied upon in O'Callahan's case, are not at hand in Relford's case. These are elements one, two, three, seven, and ten.[27]

So, you know what you would be doing out there: trying to count them up, divide by something, and persuade a judge that you did or did not have jurisdiction, depending on what side of the courtroom you were working. As a result, counsel prosecuting cases over those years worked hard to assert jurisdiction, which led to pretrial motions and disputes on the smallest of factors.

The case for which I took my writ up involved a male Soldier who met a female Soldier on the installation. She followed him on her own accord to a motel in town, where the two engaged in sexual activity. The company commander testified that the encounter did not directly impact good order and discipline. But, as I saw later, as the law crystallized, there were other substantial jurisdictional ties: both were Soldiers, they met initially on the installation, there was a rank disparity (although they were in civilian clothes), they were in different units, and they did not have any sufficient duty ties. So, there was no military involvement in the case. You may be thinking, "Yeah, but the course of action started in a military setting, even if they were not in uniform or showing ID to each other, and there's a certain level of trust in a fellow Soldier." Herein lies the *Relford* problem. The debatable and inexact dozen factors were endlessly debated, shaped, and asserted by counsel who excel in debating but who also have leaders to advise and take care of. Remembering that judge advocates were not the center of the system, it introduced uncertainty to the command, investing resources in cases they were not sure of, and in all respects was not reflecting a highly functioning military justice system.

The jurisdictional tangle came to a definite end in 1987 with the *Solorio*[28] decision, wherein the 6-3 Supreme Court declared simply that

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[27] *Id.* at 366.
[28] Solorio v. United States, 483 U.S. 435 (1987).

the military has jurisdiction in any case in which the Service member was in the military—no balancing, no collateral factors to weigh, just a singular criterion: the accused's status as a military member. *Solorio* was followed seven years later by the Supreme Court's *Weiss*[29] decision: a more technical case that upheld the structure, independence, and processes regarding the military judiciary. As a witness to how far perceptions and processes had come since O*'Callahan*, Justice Ruth Bader Ginsburg offered an unexpected endorsement in her *Weiss* concurrence. She wrote, "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges."[30]

The Current Changes

Presently, there are two main features of this year's changes: one seismic and the other a product of gradualness. The seismic change, of course, is that commanders soon will forfeit the authority to make prosecutorial decisions regarding sexual assault, murder, and a select chunk of other felony offenses in the UCMJ. The independent special trial counsel (STC), a judge advocate at the rank of brigadier general, will refer these offenses at his sole discretion, and the STC will report directly to the Service Secretary. Judge-alone sentencing has been discussed for the fifty-five years we have had military judges. Brigadier General (Retired) John Cooke, probably the most esteemed contemporary expert in military justice, called for this change on this stage about twenty-five years ago. Sentencing guidelines are also coming around the bend with the new Military Sentencing Parameters and Criteria Board. It is worth considering whether the system can now move closer to the truth in sentencing movement that has been afoot in civilian practice for more than a quarter-century. Some include informing the sentencing authority of factors, such as current clemency opportunities, corrections system clemency, parole options, and good-time calculations that we trust a judge to make. Should these same authorities not have

[29] Weiss v. United States, 510 U.S. 163 (1994).
[30] *Id.* at 194 (Ginsburg, R., concurring).

access to such information when they are making sentencing decisions? The corrections system may change along the way. And, we cannot predict when a Service member might be sent to the Federal system, which calculates sentences differently; nonetheless, that question arises anew under a judge-driven system.

Third is a serious analysis of the fundamental change in concept and protections provided by Article 32.[31] The investigation (now called a preliminary hearing) has become judicialized by requiring a judge advocate to conduct it whenever possible and removing some protections, rights, and advantages that were available to the accused. That person is now the preliminary hearing officer rather than the investigating officer—the title itself reflects the change in the role. As is most often the case, a legislative or procedural change comes about from some misuse of the process, and there were several cases and a growing perception that complainants in sexual assault cases were intimidated by harsh questioning at the Article 32 hearing. This would sometimes result in the witness withdrawing cooperation, undermining the pursuit of justice. Therefore, key Article 32 provisions have yielded a greatly changed process. Now, the victim cannot be compelled to testify. The Government need not present any witnesses. The decision of whether a witness is unavailable is exclusively that of the command. Discovery is no longer a recognized collateral purpose of the proceeding, and the preliminary hearing officer may consider witness statements and the like, regardless of whether the declarant is available.

What to take away from all this? Victims may be spared insulting or degrading cross-examination, but the corollary is that the witness loses an opportunity to prepare for the cross-examination that will occur at trial when the Sixth Amendment[32] is surely in play. The defense loses an opportunity to probe the Government's case and obtain testimony that can pry open access to information or leads not fully explored by investigators or counsel. It is harder to help prepare a client under these circumstances. Granted, a civilian attorney would think nothing of this because he cannot accompany his client into the grand jury room, much less have access to the government's witnesses or information.

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[31] UCMJ, art. 32 (2022).
[32] U.S. CONST. amend. VI.

The requirement for a judge advocate hearing officer inserts into the proceeding an individual with legal training, but it deprives both parties and the hearing officer of gaining the perspective of a smart lay officer who might sense the case in a different manner (more like a prospective juror than a career lawyer). Advocates of this change seem not to have had the confidence, based on anecdotal evidence, that a trained and advised investigating officer could maintain enough control of the proceedings to minimize the opportunities for unethical intimidation as opposed to probing-but-fair questioning. Still, this is the first time that, in any significant way, a defense-oriented, justice-oriented protection has been ratcheted in the other direction. As a result, a paper Article 32 may become the norm: undoubtedly more efficient and potentially less just.

It all comes back to the role of the commander. It is a philosophical or jurisprudential question as much as a procedural one. The issue of how separate a society the military is has been well settled. You would not likely hear sentiments expressed today the way they were by General Dwight D. Eisenhower or General William Sherman, who served about eighty years apart and were contemporary critics of the system. However, they have argued that leaders are integral to operating the military justice system. General Sherman, despite being the son of a lawyer and the brother to two lawyers, said, "[I]t will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practices in the civil courts . . . ."[33]

One of my heroes, General Eisenhower, gave a speech to a group of lawyers in New York about efforts to remove command control from the justice system. He delivered his remarks in November 1948 while president of Columbia University—about two years before his election as President and while the UCMJ was taking shape. He said the armed forces were "never set up to ensure justice. It is set up as your servant . . . to do a particular job, . . . and that function . . . demands within the Army

[33] WILLIAM T. SHERMAN, MILITARY LAW 130 (W.C. & F.P. Church 1880) (1879).

somewhat, almost of a violation of the very concepts upon which our government is established . . . ."[34]

About seven years before General Sherman's declaration, another general saw it differently. Closer to our contemporary view, then-Major General John Schofield, later to become Commandant and Commanding General of the Army, gave a speech to West Point's graduating class in 1879. He said, "The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an army."[35]

Our current flux has different roots, but we cannot underestimate the nature of the change. Nonetheless, it would be short-sighted and inaccurate to characterize the change as removing the commander from the process. On the contrary, the commander remains a key part of the process. Sexual assault is a scourge that robs readiness. However, it is still paradoxical that commanders have been judged inefficient and ineffective in sufficiently addressing sexual assault, while the presumed remedy is to take away a key tool that helps them maintain combat readiness and then give that authority to the people who provided legal advice to commanders when commanders had those responsibilities. The commanders must still select members and make a host of disposition decisions and recommendations. The greatest percentage of military justice actions are other than courts-martial, of course. There are at least eighty-five instances of NJP for every general court-martial in a typical year in the Army.

Most of all, the commander can and should advise the lawyer—speaking of role reversal—because the judge advocate needs the perspective of an accused's military leadership to properly gauge a disposition decision. Advocates of the change, however, are willing to exchange that now-indirect input for a sense that sexual offenses are dealt with less indulgently. Shapers of the system will have to entertain

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[34] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 35 (1970) (quoting November 17, 1948 address).

[35] John M. Schofield, Major General, U.S. Army, Address to the Corps of Cadets, U.S. Military Academy (Aug. 11, 1879).

the question of why certain offenses will go to the STC and why others will go to the legacy system. Why is kidnapping moving to the STC, but burglary, robbery, larceny, and selling crack cocaine still go through the old system? It is important to think about, talk about, and train about what authority remains to exercise in this area with more creativity and imagination.

The military's rich continuum of corrective and judicial activity runs from on-the-spot correction to admonition, to counseling, to material put in writing, to more formal actions, to NJP, to various levels of court-martial, and on. The greatest disciplinary tool in the world—and one that is not duplicated anywhere—is the ability to ensure that continuum is in your and the commander's heads as you consider the available options. It also includes, of course, administrative separations. I noticed that these separations are receiving renewed scrutiny for how enduring some of the disabilities that come with some administrative discharges can be. An interesting, recent article by former judge advocate John Brooker and Reserve judge advocate Eleanor Morales prompts some thinking about the balance of the impacts of administrative separations.[36] In many ways, the military practiced restorative justice before it became a popular term.

Speaking again of commanders, about ten years ago, Democratic Congresswoman Loretta Sanchez delivered a lecture with a resounding affirmation of command control.[37] She believed it involved accountability for the military's poor record on sexual assault but kept disciplinary tools in the hands of commander. She said, "I am suspicious of any broad structural changes to the UCMJ as the solution to enhance prosecution of one category of offenses."[38] She worried that rhetoric and change could have a chilling effect on the appropriate exercise of discretion and clemency and about unlawful command influence writ large. I still believe the commander is and must be the principal authority of military justice. If good order and discipline are not a primary command mission and responsibility, a lawyer-driven justice program

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[36] Eleanor T. Morales & John W. Brooker, *Restoring Faith in Military Justice*, 55 CONN. L. REV. 77 (2022).
[37] Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265 (2013).
[38] *Id.*

will not flourish in the military. Removing commanders from the disposition decision will undermine the quality of those decisions. I doubt that if we strip commanders of that responsibility, we can effectively hold them accountable for good order and discipline in other matters.

Clearly, Congress came to a different conclusion. Further energy should not be burned lamenting the reduced role of the commander. The effort is better put into making the restructured system work. I will offer some observations on how to get to that point.

Moving Forward

We know where the law has landed, and it is a given that practitioners in the broader force will train, prepare, and adapt accordingly. Applying these changes involves not just the letter of the law but also how it is implemented, respected, or undermined—the norms that evolve from practitioners practicing. At the threshold, we have to candidly understand the limits of any justice system to correct behavior. It is not that behavior reform cannot or should not be done or that it is futile; but such efforts remind us of how limited the criminal justice process is alone.

Successful collaborations between social awareness and intensified prosecution have occurred in recent decades in, for example, drunk driving, child abuse, domestic violence, and crack cocaine. The military's singular success was the urinalysis program that started in the 1980s. A combination of advanced science, precise nanogram counts that eliminated claims of passive inhalation, and a rule of evidence that permitted unit sweeps without probable cause contributed to such success. The hookup culture, on the contrary, seems to have been intractable. Is there something different about this set of crimes that has proved to be difficult to handle in the military as it has? It is relevant—though insufficient—to observe that society, including higher education, has not been much better at combatting the issue. That said, a set of proven social fixes are not available in this issue as they were for the glamorization of alcohol and the seriousness of domestic violence. Some inherencies exist. For instance, the military is still only 17 percent women in the fifth decade of women attending the Service academies.

Moreover, we know from college dormitories as well as military barracks that we are taking on quite a challenge in providing almost unsupervised billeting, no charge of quarters, no curfew, easy access to alcohol, and a more than five-to-one ratio of men to women. The law intersects deeply with policy in these areas.

Training and Acculturation from the Defense Side

The military trains better than anyone else, especially in speed and comprehensiveness. The closer the problem is to a purely legal issue, the easier it might be to solve. One of the best examples of successful integration was not guaranteed to work: the introduction of the independent uniformed defense counsel. The Services implemented them in different ways and on different dates, with the Army doing so in the late 1970s. Traditionally, counsel went from prosecution to the defense on a case-by-case basis. Sometimes, a young officer would work as a defense counsel for several months before switching back to prosecution (everybody has heard stories of counsel serving as defense counsel until they started to win and then became prosecutors).

The key elements of a credible and effective defense service remain, in my opinion, competence and independence. The independence required underwriting by commanders and senior military lawyers during that time of flux. It meant access to resources and commanders. Only the sustained practices by commanders and opposing counsel enabled Trial Defense Service (TDS) to root itself in military structure and culture. Still, the resource entanglements were ongoing. Only in recent years did warrant officers become available to TDS, and there was no Defense Counsel Assistance Program until the Trial Counsel Assistance Program was more than twenty years old.

Still, the change to institutionally independent defense counsel was not new in all respects, because so many commanders had that opportunity to serve as counsel. As a result, they related to the fight to some degree, and it was not launched cold. There was a three-year prep test in select U.S. Army Training and Doctrine Command units before Army-wide implementation. This provided a natural opportunity to respond to the concerns of leaders, lawyers, and the rank and file. Practitioners watched closely, gradually gaining confidence that serving

as a defense counsel—an ethical, prepared, and aggressive defense counsel—did not disqualify progression in rank and responsibility. As the organization matured, people witnessed defense counsel get promoted and a couple of individuals with significant defense experience rise to the rank of Judge Advocate General.

For those two main reasons, independence and competence, we obtained permission to design a new insignia. We had a worldwide contest to design the new patch to signify that TDS counsel are distinct from the rest of the Judge Advocate General's (JAG) Corps and the command in which they served, and to help clients know that they come from an independent organization, even if the rest of the uniform was the same one the client was wearing.

The first chief of TDS told a story at its twenty-fifth-anniversary symposium in this room about visiting the heraldry office in search of a patch. The clerk in the office pulled out a Tupperware container containing a bunch of old patches and said, "Let's look through here and see what you think might work." They landed on a pretty generic patch. It was an esteemed patch that goes back to service units in World War II, but it did not scream defense counsel. So, in deference to Lieutenant Colonel Shaun Lister and some of his griping pals, we got permission to incorporate part of the old patch into the new patch. Of course, there are regulations for everything, including the dimension of a prior patch that can be grafted onto a new patch. It was not an easy process, but it had a point. In the military, we are like NASCAR drivers; our uniforms are covered in items that identify us and our roles. You can learn a lot about a person before they open their mouth, and TDS clients now have some sense that their TDS attorney is on their side and works for them.

Article 32, UCMJ

Returning to Article 32, the coming changes to the provision are among the most significant and far-reaching. Almost every change in military justice has moved the ratchet in one direction, and as I mentioned, this one is moving the other way. The conversion and the shrinkage of Article 32 to remove the components that were most favorable to the defense and justice, in my perception, is a step back. The original Article 32 was a nutrient-rich broth of due process and

protections. The new Article 32 is comparatively sterile. It is a summary of limited value, and as practitioners, we may have brought it on ourselves, but the changes are here to deal with.

One of the ways we brought it on was by finding the need for speed in courts-martial. It was common during the many years I practiced for the Government to work out plea agreements in special courts-martial, and they kept moving the cases. This was sometimes a change in forum that a negotiated plea brought about. Since most general courts-martial also were negotiated pleas—a far smaller ratio than in the Federal system—but sometimes more than was healthy, the Government typically insisted on a waiver of Article 32. This was another unanticipated consequence of a justice-distorting factor. For some years, processing time was an overwhelming concern in the system. It was reinforced by a practice in which standings showing every general court-martial jurisdiction and the relative processing time were widely published in *The Army Lawyer*.

As a result, it was common for defense counsel to happily "eat" processing time in exchange for other sweeteners regarding dropped charges or a sentence cap. To be fair, a persistent backlog of cases threatened due process and discipline. However, there were enough cases with colossal processing times that the strict accounting requirement sparked competition in achieving the lowest processing time. This led to much statistical manipulation but not much improvement in justice. Most of all, the Government often portrayed Article 32 as an obstacle to avoid in a sprint to trial to improve processing time, and defense counsel were so eager to get better deals that they did not always adequately appreciate the protections and insights they forfeited in waiving the Article 32.

The ultimate unintended consequence of these reforms could be—and I think you will ensure it is not—a loss of command interest. The new changes, at least initially, are likely to be dispiriting in some ways to some serious leaders who want to exercise all disciplinary tools available to them. It is the judge advocate's job, bolstered by the best of command leadership, first, to continue to address the majority of the military's disciplinary issues over which they will still be the primary actors and second, to refute and guard against any sentiment of abdication ("That's the JA's problem now"). I think Congress never fully appreciated the complementarity of command and counsel. If so, they might have

recognized that they were making a change based on perceived poor performance and now entrusting responsibility to the people who advised the underperforming commanders.

Therefore, judge advocates, rather than reveling in a sort of uber status, should embrace the command tighter than ever, seek their advice, and keep them involved as much as humanly possible. It seems unlikely, but it is not inconceivable that leaders' perceived marginalization could give rise to underground military justice—returning us to the days of informal punishment that some commanders and senior enlisted winked at. I suggest that you be careful to guard your cynicism and be careful with your language. Prosecutors do not use society's lazy and belittling slang, like "he said, she said" to describe a sexual assault case. This phrase telegraphs that the victim is on equal footing with the accused. In other words, you might believe him, or you might believe her. This makes them equal in credibility, undermines proof beyond a reasonable doubt, and could lead to an unmerited acquittal. Defense counsel, on the other hand, look insensitive and might further undermine their case if their client does not take the stand. So, if you have to address this phenomenon, use different words.

The JAG Corps Itself

By any measure, the military is in an era of sustained low in discipline, whether it is measured by looking at courts-martial per thousand Soldiers or the rate just for general courts-martial (factoring in administrative separations). There has not been such a low rate for decades. This means there are fewer cases to try, which should be objectively good news. We should be alert to how it affects the professional development of military justice practitioners.

One constructive critic of our system has argued that there is a bloat in several sectors of the military justice system, to include the individual Service courts, and that the D.C. Circuit could absorb C.A.A.F.'s comparatively low caseload. That is an arguable point, though it also represents one more pebble of civilianization of military justice. More pertinent to the quality of justice is the impact on counsel and our corporate expertise. The reduced caseload means that a typical counsel tries far fewer cases than his predecessors did closer to the turn of the

twenty-first century. This creates the risk of a fixed number of judge advocates handling a much smaller caseload.

The most likely explanation for the reduction in case numbers is less indiscipline in the force, which is good. It is important for reasons of discipline and sociology to know what we have done right. A relentless and credible urinalysis program, sustained emphasis on sexual misconduct, and that pretty well-educated volunteers make up the present force are all explanations. Without that perspective, we cannot adjust how we train, advise, and develop counsel or the way we advise commanders, which is no less a critical skill in our transformed system. Note that the new rules specifically call for the option of second-chair counsel. I would suggest that no case tried anywhere, no matter how seemingly routine, that does not have two defense counsel and two prosecutors assigned. Even the most ordinary cases have to be prepared as though they are going to be contests. It is never a waste of time to hold fielding or batting practice, and there is never a case in which both counsel will not learn something or build courtroom muscle memory.

The introduction of the special victim's prosecutor over the last decade has institutionally moved the JAG Corps from strictly territorial-based criminal law operations, where prosecutors mainly try cases at their installation or ship, which may make this less of a lurch, but it still has an impact on military justice leaders at all levels (and more so for those who head out to be STC or chiefs of justice). Further, leaders will have to manage counsel rotations and developments to avoid the possibility of two JAG Corps: one of elite military justice practitioners and another of those who do everything else. That "everything else" is crucial work, and plenty of judge advocates would be content to take it on as a career path. Still, we have to develop a diverse set of talents, and commanders need to be able to rely on us in many areas beyond military justice. Thus, everybody's trial expertise must be developed in a way that does not forfeit the expertise of the entire organization. It will take careful management and imagination to maximize leaders' training and development obligations and not just grab slivers of a static or shrinking pie.

Time to Pause and Review

The system also needs a way to think. In recent years, Article 146[39] was added to the UCMJ to establish the Military Justice Review Panel. The Secretary of Defense appoints members to eight-year terms who are called on, in the words of the statute, "to conduct independent periodic reviews and assessments" of the military justice system.[40] This panel seems to be a successor of the Code Committee, which was not widely seen as effective. The first iteration of the panel commenced operations last fall. I sit on that panel with twelve colleagues. My opinions today are my own, as are any mistakes.

We need a rest. The last few years in justice have been everything, everywhere, all at once. So much change has happened in such a short time. We can only have so much confidence in what statistics and anecdotes tell us. We are about to make the most fundamental change since 1950: lawyers swapping roles with the commanders. Imagine if policymakers and politicians were to commit to a moratorium on any additional significant changes for ten years. Then, a calm analysis might give Soldiers and politicians a basis for deciding what to tweak or revise. Who knows which of the many changes is producing what outcomes? It would be wise to figure out some useful metrics to gather data while also letting the system pause for some period of time so we can disaggregate all of the changes in inputs that have been flooding in.

We can always find a lesson in baseball. This season, they have instituted a pitch clock, banned the shift, put a ghost-runner on second in extra innings, and made the bases bigger—they look like king-sized beds now—all in the interest of a better pace of play. They might not have foreseen the number of jammed ankles and snapped tibias that will come from more stolen base attempts. Similarly, unanticipated second-order effects are what we need to be alert for as this host of changes floods into the system. How will we know which of them has brought about changes and how do we then evaluate those changes? How do you count them, measure them, assess them, and move forward? I suggest that you are the individuals best-positioned to defend the system and make it work. There

[39] UCMJ art. 146 (2022).
[40] *Id.*

is probably no factor more precious to the military justice system than legitimacy. The shrewdest observers and critics have made a similar point. The military's practices are different from those of the civilian world for a good reason. But, the system must perform in a trusted, truth-seeking, due-process-based manner so the outcomes can be trusted. The military is a metric-heavy organization, and while I have discussed the limited value of metrics in the military justice system, they are necessary in certain respects and should be decided and tracked from the outset. Among the useful metrics will be cases convened by the STC, cases sent to trial despite the hearing officer's recommendation to the contrary, and all related ones.

Metrics, however, can be a vector of unlawful influence, including congressional influence. The great Justice Robert H. Jackson, when he was U.S. Attorney General, inspired and cautioned prosecutors with these words: "Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character."[41] Now, the Heisenberg Principle from the world of science tells us that the very act of observing something alters what is being observed or measured. The fact that military justice practitioners know that their processes, decisions, and outcomes are being tracked, and that reports will be made and congressional testimony sought, can alter their behavior. Does a person with prosecutorial discretion make different recommendations or decisions knowing the data about cases are being sliced and analyzed in all manner and that conclusions will be drawn and decisions made in light of that? Will a higher-than-normal number of acquittals mean that too many borderline cases were sent to trial or too many Soldiers' reputations and liberties were put at risk? Or does it mean that the defense counsel was especially strong? Or will a high rate of convictions reflect stellar prosecutorial advocacy or a risk-averse convening authority hesitant to take the close case to trial? The metrics will start immediately; the norms and interpretations of them will evolve over time.

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[41] Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Second Annual Conference of United States Attorneys, Washington, D.C. (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

Future Changes

So, how should we think about what's next? If you wanted a further judicialized system, what is the next set of changes you would seek? Critics of the American Military justice system would like us to have our own *Findlay* case[42]: the United Kingdom case that came before the European Court of Human Rights about twenty-five years ago, which pretty much ended traditional military justice in the United Kingdom. Critics would argue that non-deployment felonies should be sent to Federal courts. This would represent, in a way, a return to the disputatious and fragmented justice system of the Supreme Court's *O'Callahan v. Parker*[43] era, which reigned from 1969 until the Court's corrective opinion in 1987, *Solorio*.[44]

Solorio is thirty-six years old, and I expect that commanders find the unity of effort that comes from universal jurisdiction as giving them the maximum ability to affect order and discipline. Ceding that authority to the civilian system introduces variables, including the incarceration, trial, and corrections process, which undermine a leader's ability to affect as many aspects of justice and, therefore, a unit's discipline. It is worth preparing to engage the argument that we might at some point see regulation or new legislation intended to bring back the service-connection analysis in fancier threads to demarcate the line between the military and civilian systems.

While I believe it wise to resist the urge to implement additional reform to a justice system that is undergoing its most fundamental change since 1950, so long as we are on the operating table, let me suggest what else may be coming.

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[42] Case of Findlay v. The United Kingdom, App. No. 22107/93 (Feb. 25, 1997), https://hudoc.echr.coe.int/eng?i=001-58016.

[43] O'Callahan v. Parker, 395 U.S. 258 (1969) (portraying the military justice system in a harsh light, constricting the military's authority to try certain cases, and injecting massive confusion into what constituted service connection).

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

Professional Purple Judiciary

Henry Kissinger is said to have said "whatever must happen ultimately should happen immediately."[45] With the move to judge-alone sentencing and the sentencing committee, it seems near inevitable that the military judiciaries will merge into a single purple (joint) judiciary, even as we forfeit the community's involvement in administering sentences. The arguments against it get thinner as time goes by, primarily the need to educate judges on service, customs, and traditions when they hear cases from other Services. But this probably underestimates judges' brains and adaptability and counsels' ability to articulate these kinds of differences. Judges will be even more consequential under the new revisions, giving rise to a discussion about whether it is time for a board-selected cadre of judicial professionals. And these differences are probably small enough anyway. Does the Marine Corps view unauthorized absences *that* differently from the Air Force that a judge from one or the other Service could not hear a case? We also have to remember to trust counsel to educate the judges, and the judges to judge with some humility. This likely would have the collateral impact of fewer, busier, and more selectively appointed judges.

Panel Selection

As for member selection, with all the changes that have happened, does it almost seem odd that convening authority selection of panel members has survived this long? Are the arguments as strong as they ever were for our kind of blue-ribbon panels with judicial temperament? And with diminished command control, is it important to preserve this as a leader's function? It seems to be the change that drew a lot of scholarly attention over the years, and Major General Kenneth J. Hodson[46] and

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[45] *Who Was Betrayed?*, TIME, Dec. 8, 1986 at 17, 26 (quoting Henry Kissinger).

[46] Major General Hodson, for whom this lecture is named, served as: The Judge Advocate General, U.S. Army, from 1967 to 1971, the first Chief Judge of the Army Court of Military Review, and a principal architect of the Military Justice Act of 1968. Major General Michael J. Nardotti, Jr., *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202, 202 (1996).

Brigadier General (Retired) John Cooke[47] both embraced it. It might be worth thinking about revisions short of random selection that would serve the interests that have kept Article 25[48] in play for all these years.

Command Influence

I would like to say a couple of words on command influence. First, on old-school command influence, my argument would be to redefine it, legalize it, tax it. Why do we not do with undue command influence (UCI) what so many jurisdictions have done with cannabis: legalize it and regulate it? Any form of command influence remains uniquely corrupting. We never can declare victory over UCI because each new wave of practitioners has the opportunity to corrupt the system anew and become too personally involved or biased. The arc of the legal universe does not automatically bend toward justice. So, we need measures in place to guard the integrity of the system. Commanders really *will* have less authority and, therefore, less direct opportunity to exert influence. We drill commanders to "nest" their judgment on operational matters with that of senior leaders all the time, but in the area where they are least competent and least experienced—military justice—we expect them to ignore their senior leaders, whose counsel is more important in this area (because of junior leaders' inexperience) than in the operational space where they normally live.

As a result, some of the old-school constraints on UCI were marginal and unrealistic. Reduced command authority calls for a refreshed rubric for evaluating command influence. Then, there is new-school UCI: UCI in a flannel suit. While one set of command influence fades, there is a need to address the new set of potential command influence in the new structure. The lead special trial counsel will report directly to the Secretary of the Army, an official nominated by the President and

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[47] Brigadier General Cooke served in the U.S. Army Judge Advocate General's Corps from 1972 to 1998. His last assignment was as Chief Judge, U.S. Army Court of Criminal Appeals. *BG (Ret) John Cooke,* JAGCNET, https://www.jagcnet.army.mil/Sites/acca.nsf/xsp/.ibmmodres/domino/OpenAttachment/sites/acca.nsf/55F5C0CE7E3F70A2852584500069EDF3/Attachments/Bio%20-%20BG(R)%20Cooke.docx (last visited Oct. 31, 2023).

[48] UCMJ art. 25 (2021).

confirmed by the Senate; this process is obviously susceptible to political and interest group pressure, no matter how subtly asserted, which affects a class of cases rather than a particular one. The Court of Appeals for the Armed Forces has said for years that there is no such thing as "command influence in the air,"[49] but this is an inaccurate statement. What they meant to say was that most of the command influence in the air was not sufficiently detectable or traceable to warrant judicial relief. It was always in the air, but we had carbon monoxide detectors in place to reduce its reach and its lethality. We need a new term to describe unlawful influence under the new scheme.

These changes to the system have come from Congress, and properly so. Congress is responsible for the rules governing the land and naval forces; however, placing a political appointee at the apex of the system risks seeping into the judgment of those who have to make referral decisions. A recent article in the *Yale Law Journal* talked about the pressures Congress can place directly or otherwise on military practitioners, and it was published even before the move to STC.[50] The author considers the *Bergdahl* case[51] and others in which Congress delved deeply into particular military justice matters—there really was a bill introduced in Congress called the No Back Pay for Bergdahl Act.[52] So, as we are preparing to implement the new rules, we should think about how to respect Congress's legitimate oversight while guarding against dispositive decisions that tilt one way or another because of a perceived congressional preference.

The Death Penalty

Next, I would suggest that serious thought be given to rescinding the death penalty. It is hard to justify retaining a desuetudinal practice on the books for symbolic reasons. It is hard to imagine a scenario that would plausibly result in an actual execution. The last military execution was

[49] *See, e.g.*, United States v. Shea, 76 M.J. 277, 282 (C.A.A.F. 2017).
[50] Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 YALE L.J. 2110 (2021).
[51] United States v. Bergdahl, 80 M.J. 230 (C.A.A.F. 2020).
[52] Goldberg, *supra* note 50, at 2145-46; *see also* No Back Pay for Bergdahl Act, H.R. 4413, 115th Cong. (2017).

approved by President Kennedy, and the accused was hanged at Fort Leavenworth in April 1961. Sixty-two years and twelve commanders-in-chief later, there have been no further executions, despite cases being tried with great sophistication, exactitude, and integrity and despite multiple court decisions upholding the military death penalty. Regardless of anybody's personal philosophy, there are secondary impacts as well. At the height of the military commission effort, we negotiated with various foreign judicial officials about access to important terrorism evidence around the world. Several countries refused to provide us with timely and high-quality evidence because we refused to rule out the possibility of a death verdict in those cases. Just the fact that it was on the books—not even that it had been used—had an impact.

Military Corrections

I would also suggest reexamining military corrections to revise the mission or close the facilities. Our lassitude regarding the death penalty naturally prompts the question of why we continue to operate a corrections system when we do not revive legitimate opportunity for some number of those who serve their sentences to return to duty. There is less reason than ever to keep a boutique corrections system functioning where nearly zero accused are returned to duty. Keeping corrections facilities operating so that we have a warm pipeline of corrections professionals in the event of a major deployment is insufficient reason alone to keep open a set of facilities that are distinguished only by the prior profession of its confinees. Abu Ghraib prison did not do much to validate that model.

Trial Defense Service

We must continue to strengthen our TDS. It is one of the hallmarks of our system, along with the competence and independence that are indispensable to its value for our Service members. Here is something from the old days that I hope you cannot relate to anymore. Many of you know of or read the book *Fatal Vision*.[53] If not, you should put it on your

[53] JOE MCGINNISS, FATAL VISION (Signet 2012) (1983).

list. It is about a 1970 case at Fort Bragg[54] where a lieutenant was on trial for murdering his wife and children. He was in a room with his TDS attorney and on the phone with his civilian defense counsel, who was going through a very strict law-based inquiry.[55] The civilian attorney then asked the lieutenant to check and see if his military defense counsel's shoes were shined. The lieutenant looked down, confused and incredulous, and responded that no, they were not shined and were "kind of scruffy."[56] The civilian defense counsel said, "Okay, in that case, trust him. Cooperate with him until I can get down there myself."[57]

The civilian defense counsel's point was that if an Army lawyer keeps his shoes shined, he is trying to impress the system. And if he was trying to impress the system—one which had a vested interest in seeing the accused convicted—then he was not going to do any good. The scruffy shoes meant that maybe he cared more about being a lawyer. Well, to us, that is probably partly amusing, partly insulting, and definitely way out of date. But there cannot be any compromise on the institutional commitment to competence and independence. It will be truer than ever as we implement this new system.

It does not hurt to remind ourselves that it is not at all a defense counsel's job to serve as a sort of test pilot in improving or validating the new system. Every defense counsel has only one job: defend the person they are assigned to defend ethically, for sure, but with a wide band of tolerance for techniques. This high-quality advocacy might well lead to improvements in the system, but that is not their goal. Their goal is to defend the Soldier next to them. And Justice Byron White, who tilted jurisprudentially toward the prosecution, gave the following endorsement to the defense function, which defense counsel should consider if they are contemplating a sleeve tattoo. He said:

Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the

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[54] Now Fort Liberty.
[55] MCGINNISS, *supra* note 53, at 223.
[56] *Id.* at 224.
[57] *Id.*

prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the state to its proof, to put the state's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[58]

And, therefore, it is okay to shine your shoes.

Military Commissions

I would like to briefly discuss military commissions as one last example of transition. At the end of the Reagan administration, in December 1988, a Libyan bomb detonated on a plane over Lockerbie, Scotland, murdering all 259 passengers, who were mainly Americans returning from their studies in Europe for Christmas, and 11 individuals on the ground. A then-young Department of Justice official, William Barr, suggested that the murderers should be tried by military commissions—which had last been used in World War II—because it was not just a crime in his view. It was not just 270 discrete murders but an attack on America by noncitizen unlawful combatants. His memo advocating this move was incisive and creative, but it was probably just too novel for an event that occurred on the seam between two Presidential administrations.

President George W. Bush did revive military commissions, but at some cost and with results still pending. The Army led a team of talented lawyers from all Services in the preparation of the military order putting commissions into place for certain cases of terrorism. For several weeks,

[58] United States v. Wade, 388 U.S. 218, 257-58 (White, B., concurring in part).

we briefed the Secretary of the Army every morning. We researched commissions and assisted with drafting the President's order, which was published in November 2001.[59] The administration showed imagination and audacity in dusting off a mechanism last used before the court-driven criminal law revolution of the middle of the century. The Army leadership endorsed the concept of military commissions and joined in the effort to bring a historically rooted mechanism back to life. Our sense was to look at the changes in military justice and criminal law since 1942, the date of the *Quirin* decision,[60] and to recommend which to adopt, which to modify, and which to not incorporate at all.

Military counsel from all the Services had an acute concern for the legitimacy and integrity of the military justice system and the impact on the reputation of the justice system and its practitioners. Several key members of the civilian Department of Defense leadership, however, exhibited a lack of confidence in judge advocates, which was helpful in revealing an unfamiliarity with military justice and dated assumptions about practitioners. Some critical differences emerged, and several in the civilian leadership operated on an assumption that we did not share: that the closer they stuck to *Quirin*, the more likely it was that commissions would be successful.

There were a couple of key differences. The civilians wanted to bring back the law member, since it was the law in 1942, out of a worry that—in their terms—rogue military judges would unduly "judicialize" the commission's process. Our sense was that the military judge had become a fundamental, deeply rooted legislative change in effect since 1968: a rudiment of due process. Some key policy professionals did not understand the idea of totally independent military defense counsel. By 2001, it was the norm for all Services, but some civilian officials, lawyers and not, assumed a pliability on the part of uniformed military defense counsel that would generate easy guilty pleas. They did not understand sufficiently that a military defense counsel who sought a plea agreement would have his work carefully scrutinized. They also did not

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[59] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[60] *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding a U.S. military tribunal's jurisdiction over the World War II trial of eight German saboteurs).

want to permit civilian counsel to participate in the process, though that perspective changed over time. And, the administration wanted to use this process as part of its effort to reassert executive primacy. At that time, debates surrounded the "unitary executive,"[61] which was a paramount motivation of this senior official who was the theoretical brains behind resuscitating commissions. This factor distorted the judgment of those analyzing this flexible, constitutional mechanism of justice.

Preparation

One of the tools of well-prepared ethical advocacy is Appendix 2.1 of the *Manual for Courts-Martial*,[62] which is the successor to the discussion that used to be after Rule for Courts-Martial 306.[63] As a young prosecutor, I blew that up, photocopied it, and put it under the glass on my desk so that when I was talking to a commander, I could remember to prompt them with questions that I should have known to be asking. Appendix 2.1 is an exemplary analytic rubric for commanders and, therefore, for those who advise them. It lists factors that boil down to an assessment of the military impact and the human impact of an offense. It helps you sharpen and expand your thinking process.

Concluding Thoughts

We are all talking about how significant the change in referral authority is and it is. But in some respects, it is pretty close to what we have already done. Judge advocates have been the trusted gatekeepers for information and perspective about cases as they are developed and litigated. Here are the strengths. Here are the weaknesses. Here are the

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[61] The unitary executive theory, which the Bush administration adopted with Vice President Richard (Dick) Cheney credited as its major proponent, describes the theory that "the [P]resident, given 'the executive power' under the Constitution, has virtually all of that power, unchecked by Congress or the courts, especially in critical realms of authority." Mark J. Rozell & Mitchel A. Sollenberger, *The Unitary Executive Theory and the Bush Legacy*, *in* TAKING THE MEASURE: THE PRESIDENCY OF GEORGE W. BUSH 36 (Donald R. Kelley & Todd G. Shields eds., 2013).

[62] MCM, *supra* note 1, app. 2.1 (Non-Binding Disposition Guidance).

[63] *Id.* R.C.M. 306.

variables. Here is a sense of how we have treated similar cases in the past. Now, judge advocates will have the opportunity to be the deciders at the very top of the pyramid. But, most judge advocates will still be preparing cases and making recommendations, although in certain circumstances to the STC.

So, as I conclude, I cannot imagine a better time to be a judge advocate. I do not think that we who have worked in the system get nostalgic about what we did. But we can relate to this period in your careers where the system is in ferment. It needs smart, ethical counsel to give advice and, soon, to make decisions regarding matters of justice. I would suggest you wear your authority confidently but lightly. In some ways, you can keep commanders closer than ever because they are allowed to influence you. What a tremendous opportunity and responsibility for those who teach the Senior Officer Legal Orientation (SOLO) course here at The Judge Advocate General's Legal Center and School or who are out in the field talking to Soldiers and leaders. The commanders are not your bosses, but you are their emancipated servants, informed by those leaders' perspectives while managing the disposition of significant offenses. Vacuum up that perspective, remain open to hearing—not obeying, but hearing—what is on their minds: why one offense is really serious, why some we think are serious might not be in their eyes, and all that goes into forming and maintaining a combat-ready force.

Georges Clémenceau is said to have originated the phrase "military justice is to justice as military music is to music"[64]—not intended as a compliment. But Clémenceau and John Philip Sousa[65] were more or less

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[64] *See, e.g.*, UNITED NATIONS EDUC., SCI., AND CULTURAL ORG., LES DROITS CULTURELS AU MAGHREB ET EN EGYPTE [CULTURAL RIGHTS IN MAGHREB AND EGYPT] 237 (Souri Saad-Zoy & Johanne Bouchard eds., 2010) (Fr.) ("Il suffit d'ajouter 'militaire' à un mot pour lui faire perdre sa signification. Ainsi la justice militaire n'est pas la justice, la musique militaire n'est pas la musique." ["Just adding 'military' to a word can make it lose its meaning. Thus military justice is not justice, military music is not music."]) (quoting Georges Clémenceau).

[65] John Phillip Sousa, who composed the national march, *Stars and Stripes Forever*, served as the 17th Director of "The President's Own" U.S. Marine Band from 1880-1882. *John Philip Sousa,* U.S. MARINE CORPS, https://www.marineband.marines.mil/About/Our-History/John-Philip-Sousa (last visited Oct. 11, 2023).

contemporaries. The Frenchman likely did not know Sousa because if he did, he would know that the best military music can get your toes tapping and your left foot hitting the ground on the strike of the bass drum. You are the custodians who can continue to show that the French need better martial music or Clémenceau needs a new metaphor. And when you are listening as hard as you can and figuring out the advice to give to those who trust your judgment, sneak another peek at those factors under the glass on your desk.