

**FROM ROME TO THE MILITARY JUSTICE ACTS OF 2016  
AND BEYOND: CONTINUING CIVILIANIZATION OF THE  
MILITARY CRIMINAL LEGAL SYSTEM**

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I. Introduction

The recent, but unenacted, proposed Military Justice Act of 2016,<sup>1</sup> the very different and less ambitious, but enacted, Military Justice Act of 2016,<sup>2</sup> and congressional actions and proposals to sharply modify the military criminal legal system to combat sexual assault and harassment<sup>3</sup> provide both opportunity and necessity to reevaluate the fundamental need for and nature of the military criminal legal system. With the exception of the 1962 amendment to Article 15 of the Uniform Code of Military Justice to enhance the commander's punishment authority,<sup>4</sup> the modern history of military criminal law largely is defined by its increasing civilianization. My thesis is that we are close to the point at which that process will no longer meet the disciplinary needs of the modern armed forces, if, indeed, it does today. Further, the policy justifications traditionally used to defend a military criminal legal system that is separate and distinct from civilian law increasingly appear less

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<sup>1</sup> MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS (December 22, 2015) [hereinafter REVIEW GROUP REPORT], [http://www.dod.gov/dodgc/images/report\\_part1.pdf](http://www.dod.gov/dodgc/images/report_part1.pdf), (last visited May 22, 2017).

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2017 §5001 et seq (December 23, 2016).

<sup>3</sup> See, e.g., Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129,132-33 (2014).

<sup>4</sup> See text at note 53 *infra*.

compelling than in the past.<sup>5</sup> Congress, which has enhanced justice in the armed forces, should act to ensure that the traditional military need to ensure discipline is satisfied. This article proposes a possible solution that would ensure both justice and discipline for members of the armed forces. For purposes of simplicity, I will largely deal with these matters from an Army perspective.<sup>6</sup>

Although I will discuss the nature of the military legal system in detail later, it may suffice at present to note that the current system is commander driven, meaning that at least legally commanders<sup>7</sup> are responsible for making nearly all important case-related disposition decisions; that military personnel serve as court-members (jurors); and that implementing lawyers are military officers. Only at the appellate stage when the Court of Appeals for the Armed Forces and the Supreme Court may be involved do we depart from the truly military system. As will be evident below, “civilianization” has often meant fostering procedural due process, largely a highly commendable goal and result. However, if taken too far, it may, and likely has already, harmed the disciplinary goals of the military criminal justice system. At its most extreme, the alternative to a military criminal legal system, full “civilianization,” would mean civilian jurisdiction resolution and adjudication of offenses committed by military personnel, a system that would imperil seriously both the disciplinary and justice needs of the armed forces.

The initial question must be what are the traditional needs and goals for a separate military criminal legal system. Then after an historical analysis of how military law has evolved over the centuries the issue becomes how well the current system serves those needs and goals. Finally, in light of that appraisal the fundamental question must be

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<sup>5</sup> Indeed, that could clearly be the case if the entirety of the proposed Military Justice Act of 2016 were to be enacted, which at the time of this writing in summer, 2016, seems to be unlikely.

<sup>6</sup> The origins of criminal law in the Army (and the Air Force which was created from the Army in 194) are very different from those of the Navy and Coast Guard. *See, e.g.*, JAMES E. VALLE, ROCKS & SHOALS, ORDER AND DISCIPLINE IN THE OLD NAVY 1800-1861 (1980); NAVAL JUSTICE, NAVPERS 16199 (October 1945). However, I believe that contemporary perspectives will be similar in all of the armed forces.

<sup>7</sup> Service secretaries, the Secretary of Defense, and the President may all be involved in law making. Each may prescribe regulatory requirements which are legally binding absent contradiction by the Constitution or Congressional statute. *E.g.*, U.S. CONST. art. II § 2.

whether a separate military criminal legal system can still be justified, and what steps need to be taken to protect military discipline and justice regardless of who runs that system.

## II. Setting the Stage – Systemic Needs and Goals

The armed forces have long been considered a distinct and separate society:

As the Supreme Court has stated, the military remains a “specialized society separate from civilian society . . . [because] it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.” This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ, . . . <sup>8</sup>

On a practical level, this requires that our military criminal legal system take into account:

The worldwide deployment of military personnel;

The need for instant mobility of personnel;

The need for speedy trial to avoid loss of witnesses due to combat effects and needs;

The peculiar nature of military life, with the attendant stress of combat or preparation for combat;

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<sup>8</sup> REVIEW GROUP REPORT, *supra* note 1, at 17 (2015) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)) (Report note, “internal quotation and citation omitted,” omitted). As the Supreme Court also observed:

[The Uniform Code of Military Justice] cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated.

*Parker v. Levy*, 417 U.S. 733, 749 (1974).

The need for disciplined personnel.<sup>9</sup>

If these needs and goals are accurate, any legal system that fails them fails the armed forces.

#### A. Discipline and Justice

There is near unanimous agreement that the fundamental purpose of a military legal system is discipline. Although there are any number of definitions, we might initially define “discipline” as compliance with military orders.<sup>10</sup> If troops do not do what they’re told when and in the manner instructed, the mission likely fails.<sup>11</sup> If they exceed instructions or violate given constraints, the mission may fail. Even if successful, departing from orders may create unacceptable negative consequences, as in killing non-combatants and vastly complicating the applicable political situation. Such a definition then includes compliance with positive instructions, *e.g.*, “take that hill,” and negative ones, such as “Don’t rape, plunder, pillage, or mutiny.” Under the traditional view of discipline, to be safe a soldier should do no more and no less than instructed. Anything else puts the soldier at risk. Article 134 of the Uniform Code of Military Justice, an offense that dates back to pre-Revolution British military law, thus criminalizes conduct that is “prejudicial to good order and discipline.” Accordingly, even if given conduct has not previously been criminalized a service member is at risk if he or she does something out of the ordinary.<sup>12</sup> Although this can be justified by the need to deter unexpected misconduct with serious adverse

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<sup>9</sup> FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *I COURT-MARTIAL PROCEDURE* 1-4 (4th ed. 2015) (notes omitted).

<sup>10</sup> “[Discipline] means an attitude of respect for authority developed by precept and by training. Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed—is not characteristic of a civilian community. THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, *GOOD ORDER AND DISCIPLINE IN THE ARMY*, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 11 (Jan 18, 1960), quoted in REPORT OF THE DEPARTMENT OF DEFENSE STUDY GROUP ON THE UNITED STATES COURT OF MILITARY APPEALS 1, 34–35 (1989).

<sup>11</sup> More broadly, mission accomplishment depends on a background of training and lifestyle that results in an effective military force. *See, e.g.* Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 *Duke L.J.* 651, 691–98 (1996).

<sup>12</sup> *See, e.g.* *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964) (involving a case where, after having made a large bet with shipmates as to whether he would do it, the accused did a backflip off an aircraft carrier in heavy seas at twilight requiring a destroyer to leave the escort screen and a small boat to be launched from the destroyer placing men at risk).

military consequences, it also strongly communicates the message “Don’t take initiative because if things go wrong punishment may result.” Given such a constrained definition of discipline, a commander’s primary objective when determining what to do with an alleged offense by a subordinate may be to send a “message” to the rest of the troops to encourage or deter them generally. And, indeed as we will discuss with relation to Rome, historically disciplinary punishment can be heavy-handed with little concern for the equities as they affect a given charged offender. As Fran Gilligan and I have reported:

In 1946, a War Department Committee commented:

A high military commander pressed by the awful responsibilities of his position and the need for speedy action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment...<sup>13</sup>

Or, as Professor Wigmore put it in 1918, “The prime object of military organization is Victory, not Justice.”<sup>14</sup>

In short, a pure discipline-based system may care little or not at all for “justice” for the individual offender. Eisenhower observed that

It [the armed services] was never set up to [e]nsure justice. It is set up as your servant ... to do a particular job ... and that function ... demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established ....<sup>15</sup>

“Justice” customarily means fairness. At the very least no one should be punished unless he or she did something wrong, and, ordinarily, the

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<sup>13</sup> GILLIGAN & LEDERER, *supra* note 9, at 1-7 (quoting REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 5 (13 December 1946)).

<sup>14</sup> THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975, 131 (1975).

<sup>15</sup> Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 35 (1970) (quoting November 17, 1948 remarks quoted in Letter from New York State Bar Association to Committee on Military Justice (January 29, 1949) at 4 in VI Papers of Professor Edmund Morgan on the Uniform Code of Military Justice, on file in Treasure Room, Harvard Law School).

punishment should be compatible with at least the degree of harm caused.<sup>16</sup>

A justice-based system seeks accurate determination of individual responsibility and proportional punishment. It is based upon fairness, and to be functional, must be so perceived by the personnel operating under it. It encourages individual responsibility and institutional loyalty, for the crux of such a system is individual accountability. One can only be punished for what one has done wrong. Other goals are institutionally subordinated to accuracy and fairness. Such a system inherently assumes that people fight for reasons other than fear. The shortcomings of such a system are clear: accuracy requires a significant procedural process that is usually slow and expensive, at least by comparison to summary procedure. Further, depending upon the burden of proof used, a justice-based system will yield acquittals of guilty persons, thus potentially calling the system into disrepute and encouraging violations.<sup>17</sup>

As Senator Nunn observed in 2002, however:

Morale and discipline of the armed forces are at the heart of military effectiveness. Military Law is a vital element in maintaining a high state of morale and discipline. Members of the armed forces must have a clear understanding of the standards of conduct to which they must conform, and they must also have confidence that the system of justice will *operate in a fair and just manner*.<sup>18</sup>

The argument that “discipline” does not require justice is short sighted. It erroneously presumes that personnel will endure indefinitely the unjust punishment of others and comply fully with orders themselves despite the risk of personal unfair punishment. Further, our prior definition of discipline is flawed from a modern perspective. I would argue that a more useful, modern definition would be that “discipline” is

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<sup>16</sup> This is not to suggest that other factors aren't at least equally important. I am attempting to posit the most basic criminal justice considerations as many would accept.

<sup>17</sup> GILLIGAN & LEDERER, *supra* note 9, at 1-7 (note 21 omitted).

<sup>18</sup> Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, in EUGENE FIDELL & DWIGHT H. SULLIVAN, *EVOLVING MILITARY JUSTICE* 3, (2002) (emphasis added).

the prompt obedience to orders *and* a willingness to use personal initiative in an appropriate fashion in pursuit of mission. This is surely a more nuanced and modern view than the traditional one that wanted only simple obedience, and the difference is meaningful. In the modern world where we prize and require initiative, we need to ensure that the soldier has the right and ability to be judged on the basis of what he or she did and why. Even Article 134, punishing among other matters, conduct “prejudicial to good order and discipline,” theoretically only comes into play when a service member’s well-intentioned actions fail to achieve their positive military-acceptable goal.

In short, although the relationship between “discipline” and justice” remains an important conversation,<sup>19</sup> viable fairness likely is essential to maintain a modern form of American discipline. Accordingly, the modern United States military legal system considers justice to be at least as essential as discipline. The 2015 Report of the Military Justice Review Group opined that:

The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public. “Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.”<sup>20</sup>

Justice also requires that decision makers understand the unique nature of military life, including the special stresses and consequences of service, especially combat service.

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<sup>19</sup> See, e.g., David A. Schlueter, *The Military Justice System Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1 (2013).

<sup>20</sup> REVIEW GROUP REPORT, *supra* note 1, at 16 (2015) (quoting at note 13, AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11 (Jan. 18, 1960)), [http://www.dod.gov/dodgc/images/report\\_part1.pdf](http://www.dod.gov/dodgc/images/report_part1.pdf).

Ultimately, however, it is not only the reality of justice which is important but also the perception of justice, especially for the armed services members who are subject to military law. And, as Hamlet despairs in his soliloquy, “There’s the rub,” for it seems clear that our perception of justice is based on civilian law and procedure. Certainly the historical evolution of modern American military criminal law supports that conclusion and, if that is correct, the resulting legal system, mirroring the civilian system, may fail to successfully meet the armed forces’ systemic needs. If that proves to be the case, Congress will need to consider how best to restructure the Uniform Code of Military Justice to ensure that it complies with the disciplinary needs of the armed forces as well as justice.

Before proceeding further it may be useful to note what I am not addressing. In Herbert Packer’s 1964 article, *Two Models of the Criminal Process*,<sup>21</sup> which I and others use to explain differing policy understandings of the purpose of criminal law, he postulated two differing models of the criminal justice system, the crime control model and the due process model. Although the models are highly useful, and can be applied to military criminal law,<sup>22</sup> my ultimate concern is with the relationship between discipline and justice. Although there arguably is a strong relationship between discipline and crime control, the fact that discipline must at least be seen to be fair, makes the comparison questionable.

## II. The Evolution of American Military Criminal Law

It seems clear that the earliest form of military criminal law was the commander’s personal authority and responsibility to determine whether perceived misconduct had taken place and to punish it if so.<sup>23</sup> Such discretionary power was not tempered by any form of courts-martial and was subject only to the power of more senior commanders or mutiny. Rome provides a useful example.

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<sup>21</sup> Herbert Packer, *Two Models of the Criminal Process*, 118 U. PA. L. REV. 1-68 (1964).

<sup>22</sup> See David A. Schlueter, *The Military Justice System Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1 (2013).

<sup>23</sup> E.g. Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment—A Short History of Military Justice*, 11 A. F. REV 212 (1969) (“Among the early Germans, in the absence of written law, justice was administered summarily by the chief commander through priests.”)



Roman resolution of misconduct was command-based. Although scholarship has focused on the legions' use of extreme punishments such as decimation<sup>24</sup> for purposes of general deterrence, procedure appears to largely have been simply the commander's discretionary, and often arbitrary, decision—although there seems to have been some evidence of councils of tribunes in some cases.<sup>25</sup> Roman practice incorporated the assumptions that speedy and certain punishment provided general and specific deterrence. Further it embodied the view that it was essential for the troops to be aware of at least the realistic risk of disciplinary punishment. Harsh punishments, including decimation, met those needs.

In his seminal work, *Military Law and Precedents*, Colonel Winthrop declared that “of the written military laws of Europe the first authentic instance appears to have been those embraced in the Salic Code, originally made by the chiefs of the Salians at the beginning of the fifth century . . . .”<sup>26</sup> The famed 1621 code of King Gustavus Adolphus of Sweden included procedures, some of which required deliberative bodies. Article 19 declared that whoever

behaves himself not obediently until our great Generall [sic], or our Ambassador coming in our absence, . . . shall be brought to his answer, before a Counsell of Warre where being found guilty . . . he shall stand to the order of the Court, to lay what punishment upon him they shall thinke [sic] convenient. . . .”

Article 138 established a high court and a lower court, and Article 139 declared that “Every regiment has a lower Court” with a minimum of 13 officers with the Colonel as president. Appeals to a higher court were permitted by Article 151, and article 155 required all lower court sentences to be approved by the General. Notably, Article 161 required sentences to be read to all the men.<sup>27</sup>

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<sup>24</sup> Execution of every tenth man, often by fellow legionnaires.

<sup>25</sup> C.E. BRAND, *ROMAN MILITARY LAW* 77 (1968).

<sup>26</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 17 (2d ed. 1920 Reprint). See also Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment--A Short History of Military Justice*, 11 A.F. L. REV 212 (1969).

<sup>27</sup> WINTHROP, *supra* note 26, at 1418.

European and early American (if not later American as well) military justice was to remain a rather summary thing. There was usually little ceremony attendant upon the event of trial or hearing. Concern for the rights of the individual were of little or no moment. And punishment followed the judgment in rapid "one-two" order. In most instances the "convening authority," i.e., the commander, "presided" with the sentence being executed without confirmation and/or review by any superior authority.<sup>28</sup>

That discipline was not necessarily the only goal in the time period is illustrated by the following quote, which I use in my military law books:

Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.<sup>29</sup>

There were no peacetime British courts-martial until 1689; instead, serious offenses were tried by the civilian courts. With creation of a standing army in 1689, Parliament enacted the first (annual) Mutiny Act which both established parliamentary control and provided military punishments extending to life or limb) in peacetime, working in tandem with the pre-existing British Articles of War.<sup>30</sup> Those Articles of War, which included courts-martial, largely were adopted by the Continental Congress on June 30, 1775, although a number came from the intermediate Massachusetts Articles of War dating from a year earlier.<sup>31</sup> Then General Washington found them seriously deficient as he concluded that the new American Articles of War lacked sufficient summary discipline powers.

What Congress did not see fit to provide by statute, however, General Washington and other commanders of the Revolutionary Army provided for themselves. By General Orders dated September 19, 1776, Washington

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<sup>28</sup> Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment--A Short History of Military Justice*, 11 A. F. REV 212, 214 (1969).

<sup>29</sup> LOUIS DE GAYA, *THE ART OF WAR* (1678).

<sup>30</sup> See generally WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 18-20 (2d ed. 1920 Reprint); G.A. Stepler, *British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century*, 102 ENG. HIST. REV. 859 (1987).

<sup>31</sup> WINTHROP, *supra* note 26, at 21-22.

directed that: [All . . . officers are charged . . . to seize every soldier carrying Plunder . . . [and the] Plunderer [is to] be immediately carried to the . . . Brigadier or commanding officer of a regiment, who is instantly to have the offender whipped on the spot." Apparently because he was experiencing difficulty in disciplining the Army (and possibly having some doubt as to the authority by which he was ordering summary punishment), Washington sent a letter to the President of Congress on September 22, 1776, wherein he said: Some severe and exemplary Punishment to be inflicted in a summary Way must be immediately administered, or the Army will be totally ruined. I must beg the immediate Attention of Congress to this Matter as of the utmost Importance to our Existence as an Army." Two days later, in another letter to Congress, Washington renewed his complaint concerning lack of adequate laws to punish offenders and notified Congress that he had ordered instant corporal punishment for disobedience of orders."<sup>32</sup>

Unlike the Navy, Army commanders lacked significant recognized summary punishment powers until Article 15 of the Uniform Code of Military Justice was expanded in 1962.

The Articles of War were amended, sometimes extensively, particularly in 1786, 1806, and 1874.<sup>33</sup> There were few changes in basic military procedure in the 19th Century despite the Civil War. As Colonel Harold Miller noted:

The increase in the size of the Army during the Civil War brought with it a corresponding increase in disciplinary problems. Since statutory authority to summarily punish minor offenses was still not available, Washington's device of supplying the needed authority by issuing general orders was put to work again.

[Some of the punishments administered during the Civil War were, to say the least, rather unusual. One punishment that must have been particularly effective was

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<sup>32</sup> Harold Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 41 (1965).

<sup>33</sup> WINTHROP, *supra* note 26, at 22-24.

that of staking an offender out on the ground and pouring molasses on his hands, feet, and face. Whipping, confinement in the guard house, carrying a ball and chain, and tying [sic] up by the thumbs were other punishments awarded to offenders without benefit of a trial.<sup>34</sup>

Rapid summary punishment may assist effective discipline, at least from the Roman perspective, but it may be neither fair nor perceived as fair. Ideally, the determination of misconduct must be accurate and perceived to so, and any punishment adjudged and implemented must be fair and perceived as fair. From a pragmatic perspective, discipline requires that resolution of alleged misconduct be *perceived* as fair. However distressing it may be, from a disciplinary perspective it is likely that personnel will accept procedures and results that they feel is “fair” and just even if from an objective perspective they are not. Of course, should some form of appellate procedure exist, a reversed sanction won’t be perceived having been fair initially, especially if the punishment has already been carried out. Concern about both the reality and perception of justice became critical in the Army in the early twentieth century.

In 1917, black soldiers near Houston rioted against racial injustice; fifteen white men died. Sixty-three black soldiers were tried at Ft Sam Houston with the Staff Judge Advocate doing a daily review of the trial transcript. Five were acquitted, 58 convicted, and the 13 sentenced to death were executed the day after the trial without opportunity for review by higher authority.<sup>35</sup> Ultimately the trial and the internal Army legal dispute that followed “caused a nationwide clamor for revision of the 1916 Articles of War.”<sup>36</sup>

The then Judge Advocate General of the Army, Major General Enoch Crowder also served as Provost Marshall General (and thereby Director of Selective Service).<sup>37</sup> Author of the 1916 Articles of War, General Crowder was a traditionalist. The Acting Judge Advocate General of the Army, serving in General Crowder’s stead, was Brigadier General

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<sup>34</sup> Miller, *supra* note 32.

<sup>35</sup> ARMY LAWYER: *supra* note 14, at 126. See also Fred L. Borch III, “The Largest Trial in the History of the United States”: The Houston Riots Courts-Martial of 1917, *MURDER THE ARMY LAWYER*, February 2011 at 1.

<sup>36</sup> ARMY LAWYER: *supra* note 14, at 128.

<sup>37</sup> *Id.* at 113. See generally Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, *THE ARMY LAWYER*, May, 2012, at 1.

Samuel Ansell, a comparative liberal. General Ansell was appalled at the executions and believed that the Judge Advocate General had statutory authority to review convictions for serious error. The disagreement between Generals Crowder and Ansell was extensive and highly public, historically termed the “Ansell-Crowder debates.”<sup>38</sup> Ultimately, a general order was published that permitted review in the Office of The Judge Advocate General “in the nature of an appellate tribunal” before a death sentence or dismissal could be carried out.<sup>39</sup> “Civilianization” of military law had begun. General Ansell’s efforts to further civilianize military criminal law and to rely more heavily on lawyers via the 1920 Articles of War largely failed<sup>40</sup> — although the revised Articles prohibited reversing an acquittal, required a judge advocate “law member” in general courts and non-lawyer defense counsel in general and special courts-martial and established a board of review as an appellate authority.<sup>41</sup> Ultimately, conflicts between the two generals and dissatisfaction with his public advocacy for reform resulted in General Ansell’s reduction to his permanent grade of lieutenant colonel and his resignation.<sup>42</sup> Perhaps ironically, one of his staff, Major Edmund Morgan, later became a Harvard Law School professor and the principal author of the Uniform Code of Military Justice.

The World War II mobilization subjected large numbers of Americans to the Army and Navy’s military criminal legal systems. The resulting dissatisfaction (and the spin-off of the Air Force from the Army Air Corps) resulted in Congressional action. The first, interim measure, was the Elston Act of 1948. For our purposes, the Elston Act is useful as one small part illustrates and supports a key part of the thesis of this article, that civilian procedure provides the role model for military procedure.

Because it was unclear whether the Bill of Rights protects members of the Armed Forces,<sup>43</sup> the Articles of War contained statutory

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<sup>38</sup> ARMY LAWYER *supra* note 14, at 128.

<sup>39</sup> *Id.* at 130 (but it is possible that a convening authority could disregard the Judge Advocate General’s decision. *Id.*).

<sup>40</sup> *Id.* at 130.

<sup>41</sup> *Id.* at 136-38.

<sup>42</sup> *Id.* at 114-115.

<sup>43</sup> A matter resolved by the Court of Military Appeals in *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960) but as yet unaddressed by any Supreme Court holding. See Frederic L. Borch & Fredric I. Lederer, *Does the Fourth Amendment Apply to the Armed Forces?* 3 WM & MARY BILL RIGHTS J. 219

protections for rights such as the right against self-incrimination. Article of War 24 protected that right, making it applicable to members of the armed forces. It did not include, however, any requirement to warn a service member of that right during interrogation, custodial or otherwise. There was no warning requirement legally required in the United States at that time, and none was required until the Supreme Court *decided Miranda v. Arizona* in 1966.<sup>44</sup> The FBI gave such a warning but only as a matter of policy. Notwithstanding this, Article 24 was amended to require such a warning after one member of Congress simply asserted that such a warning was the civilian requirement:

Mr. Elston—"give the accused the same right a civilian has who is charged in the civil courts, with a crime, of being told that any statement he may make may be used against him?"

Mr. Burleson: That is right."<sup>45</sup>

When the Uniform Code of Military Justice subsequently was enacted, the amended Article of War became U.C.M.J. Article 31(b), a forerunner of the *Miranda* warnings. Military law had been modified on the basis of assumed civilian procedure.

The Elston Act contained other military law provisions, especially the creation of the Army's Judge Advocate General's Corps. Notably, General Eisenhower testified against creation of the Corps.

In response to World War II complaints about military criminal law, Congress created the Uniform Code of Military Justice.<sup>46</sup> Enacted in 1950 and effective in 1951,<sup>47</sup> the Uniform Code of Military Justice governed all of the armed forces. Perhaps its most important element was the establishment of the three judge (now five judge) civilian Court of Military Appeals. Feared by many military traditionalists as a potential major source of possible civilianization, the Court, albeit lacking explicit supervisory jurisdiction,<sup>48</sup> did become a major player in military law via

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(1994); reprinted in 144 MIL. L. REV. 110 (1994) and SEARCH & SEIZURE L. REP. December, 1994.

<sup>44</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>45</sup> 94 Cong. Rec. 185 (January 14, 1948).

<sup>46</sup> *See, e.g., Burns v. Wilson*, 346 U.S. 137, 140-41 (1953).

<sup>47</sup> ARMY LAWYER, *supra* note 14, at 200.

<sup>48</sup> Whether and if so, to what extent, the court has supervisory power is controversial and unclear. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) seems to hold that if the Court

its case law, recognizing, for example, the application of the Bill of Rights to service members<sup>49</sup> and incorporating *Miranda* into military law and this requiring the right to counsel at custodial interrogations.<sup>50</sup> Although, the Court has to some extent “civilianized” military criminal law, it has operated within the statutory framework of the U.C.M.J and not threatened command control of the system.<sup>51</sup> Notably, the Court has condemned both the reality and appearance of unlawful command influence, elevating due process over result-oriented discipline.

The new U.C.M.J. also contained Article 36, providing that the President could for courts-martial prescribe rules “which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . .” This led to the Military Rules of Evidence largely based on the Federal Rules of Evidence and the Rules for Courts-Martial, partially based on the Federal Rules of Criminal Procedure.

Against this backdrop of civilianization, in 1962 Congress amended Article 15 to expand commander’s summary hearing and punishment power.<sup>52</sup> Major changes were made in the 1968 amendments to the Uniform Code of Military Justice, among which was the creation of the position of military judge for general and special courts-martial, to be filled by military lawyers certified by the Judge Advocate General of the relevant service, provided the right to lawyer defense counsel at special courts-martial (unless not possible, for example by reason of military exigency), and renamed the Boards of Review as the Courts of Military Review.<sup>53</sup> As the history of the Army JAG Corps puts it,

Thus, the Military Justice Act of 1968 was the culmination of more than 15 years of debate among the persons and agencies responsible for ensuring justice to the American serviceman. It was the first change to the concept of and structure for the administration of criminal justice in the Armed Forces since 1951, and continued the

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of Appeals for the Armed Forces has such power, it is strictly constrained. *See generally* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, II COURT-MARTIAL PROCEDURE 1§25-90.00 (4th ed. 2015).

<sup>49</sup> United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

<sup>50</sup> United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967)).

<sup>51</sup> Although it has safeguarded procedural decision making from unlawful “command influence.” *See e.g.*, GILLIGAN & LEDERER, *supra* note 9, at §8-16.00.

<sup>52</sup> *See, e.g.*, ARMY LAWYER *supra* note 14, at 236.

<sup>53</sup> *Id.* at 245-47.

theme of making that system as much like civilian courts as possible.<sup>54</sup>

In 1983, Congress altered the post-trial responsibilities of convening authorities from that of a quasi-judicial reviewer to that of an officer empowered to adjudge clemency. Further, the Uniform Code was amended to provide limited discretionary appeal to the Supreme Court.<sup>55</sup>

Although the UCMJ provides that the convening authority appoints both defense and trial counsel (prosecutors)—and the military judge, actual practice differs. Pursuant to applicable regulations, defense counsel are now part of defense organizations, except in the Coast Guard, which uses counsel from other commands, and judges are assigned by other judges. Only the trial counsel can be appointed by an officer subject to the convening authority, in the Army usually the staff judge advocate.

In 1994, Congress renamed the Court of Military Appeals as the United States Court of appeals for the Armed Forces and the Courts of Military Review as the Courts of Criminal Appeals.

In 1999, Congress amended Article 19 of the Uniform Code to increase the maximum sentence of special courts-martial from six month's confinement to one year, making the general/special courts roughly parallel to the civilian felony/misdemeanor structure.<sup>56</sup>

In short, the modern history of military criminal law shows an ongoing “civilianization,” but one which largely retained command control over much of the process. Although administrative discharges substantially supplanted courts-martial as the preferred disposition of UCMJ violators, courts-martial remained a defining element of military criminal law. Indeed, as Colonel (Ret.) Fred Borch reports in his *Judge Advocates in Combat in Operation Desert Storm*, “In the 1<sup>st</sup> Armored Division, . . . ” junior enlisted soldiers ‘were surprised, if not shocked’

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<sup>54</sup> *Id.* at 245.

<sup>55</sup> Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1406. *See also U.C.M.J. art. 67a.*

<sup>56</sup> Except that most U.C.M.J. offenses can be sent to either a general or special court-martial. Article 19 of the U.C.M.J. prohibited only trial of capital cases. The National Defense Authorization Act of 2014 amended article 18 of the U.C.M.J. to provide that certain sexual assault cases may be tried only be general courts-martial. U.C.M.J. 18 (c).



upon hearing that a trial by court-martial was being conducted the night before the attack on Iraq.<sup>57</sup>

And, then came the modern era and the widespread recognition of the need to better resolve the problem of sexual assault and harassment in the Armed Forces

### III. Combatting Sexual Assault and Harassment – The Amendment of Article 60 and Afterwards

Recognition of the military's major problems with sexual assault and harassment focused attention on the Uniform Code of Military Justice. In addition to bolstering the protections afforded sexual assault victims,<sup>58</sup> the power and responsibility of commanders were criticized extensively. One case served to crystalize the issues for many. Air Force Lieutenant Colonel James Wilkerson, a fighter pilot, was accused of sexually assaulting a female house guest. After a highly-contested trial, he was convicted and sentenced to dismissal, one year's confinement, and forfeitures.<sup>59</sup> Pursuant to his powers under Article 60 of the UCMJ, the convening authority, Lieutenant General Franklin, subsequently disapproved the conviction and sentence, later stating that he simply did not believe that the prosecution evidence was sufficient to convict a reasonable doubt. Although appellate courts hold this power,<sup>60</sup> that a line commander would reach such a conclusion, especially in the case of a highly-favored accused, one who was considered a near certainty for eventual promotion to general officer, was highly disturbing for many. Ultimately Congress amended Article 60 to largely eliminate the convening authority's post-trial powers. The revised Article 60 now limits such powers to minor cases except as necessary to effectuate plea bargaining.<sup>61</sup> Interestingly, there appear to be few if any cases in modern history of a convening authority disapproving an entire verdict, and the assumption of many was that the power would be used on the advice of a

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<sup>57</sup> FREDERICK BORCH, JUDGE ADVOCATES IN COMBAT 190 (2001).

<sup>58</sup> *E.g.*, U.C.M.J. Art. 60(d) allowing victims to submit matters for consideration by convening authorities.

<sup>59</sup> *See, e.g.*, Major Angela D. Swilley, *A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency*, THE ARMY LAWYER, July, 2015 at 16, 17-18.

<sup>60</sup> When they conclude that no reasonable fact finder could convict given the admissible evidence.

<sup>61</sup> *See, e.g.*, Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60*, UCMJ, ARMY LAWYER, July, 2014 at 23.

staff judge advocate to cure major legal error. From a command perspective, the power might be useful in the admittedly unlikely circumstance of a commander needing the convicted accused for a military mission of great importance.<sup>62</sup> On balance, the need to disapprove a finding, as distinguished from an optional grant of sentence clemency seems entirely unnecessary. Yet, the amendment of Article 60 further “civilianized” the military criminal legal system. It virtually eliminated the convening authority’s power to grant clemency based on their intimate understanding of the nature of military life. Although the need for such clemency might be minimal in the event of member sentencing, assuming that the members had requisite experience, such cannot be said of judge alone sentencing where few military lawyers would have the knowledge and experience of combat arms personnel. It was, however, not just the post-conviction powers of the convening authority that came under legislative fire. The Article 32 Investigation was converted to a Preliminary Hearing with a provision that victims need not testify.

Dissatisfied with commanders having prosecutorial decision-making power and responsibility, Senator Kirsten Gillibrand led an effort to remove from convening authorities at least the power to refer sexual assault cases, arguing that such power should be vested in Judge Advocates.<sup>63</sup> As of the time this article was written, this legislative reform effort has failed, although there now are UCMJ provisions that for sexual assault cases provide for prosecutorial decision making at higher levels,<sup>64</sup> and we can expect that most commanders will now rely heavily upon the advice of their legal advisors which, of course, may not be any better than a commander’s judgment. We can expect similar efforts to be made in the future. If successful, they will remove at least referral power for sexual assault cases from the convening authority—and perhaps more. At the extreme, prosecution of such cases could be moved to

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<sup>62</sup> *Id.* at 24 quoting Eisenhower’s position as transmitted during the 1949 House hearing on the U.C.M.J.

<sup>63</sup> *Id.* at 25. The goal, of course, is the increase the number of sexual assault prosecutions, assuming that lawyers will be free of bias presumably held by commanders. Even assuming that such a distinction exists, which is questionable, such a change could result in less prosecution as prosecutors choose not to charge questionable cases or more cases in an effort to assure good annual efficiency/fitness reports. Prosecutorial power is broad enough that via allegations of other offenses, especially under the general articles, Articles 133 and 134, pretrial agreements likely could be obtained for at least other offense.

<sup>64</sup> See The Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015. See generally GILLIGAN & LEDERER, *supra* note 9, at §8-14.30.

civilian courts. Notably, the stage is set for a change which would make the military criminal legal system mirror civilian prosecutions.

#### IV. Other changes

Meanwhile there have been other major changes in military law that call into question the traditional assertions for a special military criminal legal system. Despite general agreement that speedy trials are particularly important in the armed forces so as to ensure the ability to deploy and reassign personnel (and to ensure availability of witnesses), the traditional emphasis on speedy trial no longer exists.

Article 10 of the UCM requires that:

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

For a significant period, the then Court of Military Appeals required that under *United States v. Burton*,<sup>65</sup> that dismissal of charges was required if the accused was in confinement in excess of ninety days, after subtracting defense delays. Ultimately, as of 1991 the Rule 707(a) set forth a 120-day rule, filled with escape holes, and *Burton* was no longer applied.

Faced with lengthy delay in approving convictions and appeals, the Court of Military Appeals in *Dunlap v. Convening Authority*<sup>66</sup> required dismissal of charges based on the extensive appellate delay involved and created a ninety-day rule giving rise to a presumption of unacceptable

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<sup>65</sup> 44 C.M.R. 166 (C.M.A. 1971), *overruled by* United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993).

<sup>66</sup> 48 C.M.R. 751 (C.M.A. 1974).

delay.<sup>67</sup> The Court overruled *Dunlap* in *United States v. Banks*<sup>68</sup> in 1979, however.

Recent data shows that for calendar years 2014 and 2015 the number of days between preferral of charges to trial termination for Army General Courts-Martial were 173.<sup>69</sup> Insofar as special courts-martial are concerned, the delay in 2014 was ninety-nine days; in 2015, eighty-five days, and as of May 2, 2016, seventy-six.

Data is also available for the time between preferral of charges and the first Article 39 (court session). For general courts-martial, that delay was 109 days in 2014, 108 days in 2015, and 100 as of May 2, 2016. For special courts-martial, the delay was seventy-three days in 2014, sixty-eight days in 2015, and sixty-one days as of May 2, 2016.

Greater delay occurs after sentencing. Current data shows that in 2015, average time from sentencing to action was 203 days.<sup>70</sup> In the appellate area, in 2015 the average time from receipt to ACCA decision was 298 days; of 537 decisions, 474 were rendered within 18 months. For the Court of Appeals for the Armed Forces, the most recent data shows ninety-four days from petition filing to grant; 129 days from grant to argument and 115 days from argument to final decision for Total CAAF time of 338 days.

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<sup>67</sup> *Id.* at 754:

30 days after the date of this opinion, a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial.

<sup>68</sup> *United States v. Banks*, 7 M.J. 92, 94 (C.M.A. 1979) (instead requiring proof of prejudice). See generally 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 24-80.00 (4th ed. 2015).

<sup>69</sup> Email from Homan Barzmehri, Management & Program Analyst, Army Court of Criminal Appeals on behalf of Mac Squires, Clerk of Court of the Army Court of Criminal Appeals (available through Professor Lederer). As of May 2, 2016. The 2016 delay was 171 days.

<sup>70</sup> See the ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD JANUARY 1, 1968 TO DECEMBER 31, 1968 at 23-24, <http://www.armfor.uscourts.gov/newcaaf/annual/1968AnnualReport.pdf>.

Especially given the post-trial delay figures, it is hard to argue that military necessity justifies a special military legal system

At the same time that delay has become endemic, the number of cases has dropped sharply. In 1968, using the year of my commission, as a simple baseline, there were a total of 57,685 general and special courts-martial in the Army, 3.82 percent of a strength of 1,510,064 strength. Those cases were handed by 1,490 active duty judge advocates, an average of thirty-one general and special courts-martial per judge advocate.<sup>71</sup> In 2015, the Army had a total of 1,010 cases, .2 percent of a strength of 491,363 with 1,819 active duty judge advocates for an average of .47 percent general and special courts-martial per judge advocate.<sup>72</sup> There are similar data for the other services. One of the reasons for the sharp decrease in cases is known to all—the armed forces now administratively discharge many of those who in earlier days would have been tried. It is unclear as to whether this is due to enlightened justice and management or to the increasingly civilian bureaucracy we have evolved, complete with delays.

## V. The Military Justice Acts of 2016

The interservice Military Review Group headed by retired Chief Judge Effron of the Court of Appeals for the Armed Forces drafted a

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<sup>71</sup> This number is misleading as in those days, non-lawyers could try special courts-martial. UCMJ art. 27 (c) (1951). The right to counsel came in the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. This gave rise to “AWOL mills” in which special commands were created for the express purpose of holding and trying (and/or administrative discharging) minor offenders, especially those absent without leave. Those offices had some lawyers but often had non-lawyers as well. By the time I graduated from law school, including the summer before I began, I tried about 300 courts-martial. In correspondence with me, Colonel Borch has opined that the absence of military judges at that time was also a significant reason for the period’s faster and more numerous trials. It’s certainly true that the absence of a legally trained judge discouraged motion practice. It is clear that we used to try many cases which today have been diverted from the criminal justice system. Overall, the change from a fast and efficient disposition process with fewer due process protections to the present due process system illustrates the on-going shift in military criminal law from discipline to justice.

<sup>72</sup> See the ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF HOMELAND SECURITY AND THE SECRETARIES OF THE ARMY, NAVY AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2014 TO SEPTEMBER 30, 2015 at 48-49, <http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf>.

proposed Military Justice Act of 2016, hereinafter the “Proposed Act.”<sup>73</sup> The Review Group’s product encapsulated the drive to civilianize the military criminal legal system. Congress chose not to enact the Proposed Act. Instead, the actual Military Justice Act of 2016 (the “Enacted Act”), enacted as part of the fiscal year 2017 National Appropriations Act,<sup>74</sup> made far less sweeping changes.

A brief examination of the Proposed Act illustrates its scope and inherent philosophic perspective. The Report that that summarized the review group’s findings stated that:

This Report examines many of the distinctions that remain between military practice under the UCMJ and federal and state civilian practice. The proposals recommend aligning certain procedures with federal civilian practice in instances where they will enhance fairness and efficiency and where the rationale for military-specific practices has dissipated.<sup>75</sup>

The Report recommended the creation of special courts-martial without members with sentences restricted to six month’s confinement, a recommendation adopted by Congress in the Enacted Act.<sup>76</sup> Critically, the Proposed Act would have placed enlisted personnel on courts-martial panels for trial of enlisted personnel subject to objection by the accused;<sup>77</sup> eliminated member sentencing for all non-capital cases, placed sentencing authority in the hands of the military judge, and eliminated

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<sup>73</sup> REVIEW GROUP REPORT, *supra* note 1.

<sup>74</sup> National Defense Authorization Act for Fiscal Year 2017 §5001 et seq (December 23, 2016) [hereinafter NDAA 2017].

<sup>75</sup> REVIEW GROUP REPORT, *supra* note 1, at 20. The Report added:

This Report’s proposals recommend retaining military-specific practices where the comparable civilian practice would be incompatible with the military’s purpose, function, and mission, or would not further the goals of justice, discipline, and efficiency in the military context. Maintaining distinct military practices and procedures—where appropriate—remains vital to ensuring justice within a hierarchical military organization that must operate effectively both at home and abroad, during times of conflict and times of peace. *Id.* As will be seen below, I think that some of the proposed changes would not have complied with this intent.

<sup>76</sup> NDAA 2017, at § 5163.

<sup>77</sup> *See also* NDAA 2017, at §5182.

automatic appeals. It would have also increased the military judge's power to act before referral. The "civilianization" impact of these proposed changes, had they all been enacted, is clear.

Although military justice has been increasingly divorced from the average member of the armed forces in recent years, member sentencing has survived as a relatively rare but important exception. From the perspective of the accused, member sentencing means sentencing by persons who have likely experienced the realities of military life, especially the impact of deployments and combat duty. But in a time in which most service members have little knowledge of what happens to an accused, especially given the lengthy delays in the process, the members are likely also a valuable information conduit. Instead the military judge, a judge advocate, likely to have never served in a combat unit let alone have been in combat personally,<sup>78</sup> would have full sentencing responsibility. In the Enacted Act, Congress rejected the total elimination of member sentencing. Instead, it created fixed sizes for is no unrescourts-martial panels and permitted an accused tried by members to elect sentencing by members.<sup>79</sup>

Both the Proposed and Enacted Acts increase the ability of the prosecution to file interlocutory appeals,<sup>80</sup> and sentencing appeals are now possible.<sup>81</sup> Both changes likely increase the time to try a case to finality.

In accordance with the Proposed Act, the Enacted Act largely removes the requirement for convening authorities to take "action" on a court-martial finding. Instead, non-summary court-martial sentences other than death or punitive discharges are self-executing.<sup>82</sup> Sentencing by Military Judge will now follow civilian procedure with each

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<sup>78</sup> Many judge advocates served in non-legal positions before going to law school as members of the Funded Legal Education Program or, more rarely, an Excess Leave Program. See generally U.S. DEP'T OF ARMY REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 10. Overall, however, there is no reason to believe that military judges necessarily would have had substantial backgrounds. Of course, this criticism can be met with the reasonable counter argument that there is no requirement that members with such backgrounds be appointed even though Article 25 of the Uniform Code of Military Justice requires appointment of "best qualified" members.

<sup>79</sup> NDAA 2017, at §5183.

<sup>80</sup> *Id.* at §5326.

<sup>81</sup> *Id.* at §5330.

<sup>82</sup> *Id.* at §5324; 5325.

specification (offense) receiving a separate sentence with the judge's decision to run consecutively or concurrently.

Interestingly, neither the Proposed nor Enacted Act removed commanders from serving as convening authorities, the power and responsibility to create (convene) courts-martial, refer cases to them, or to select court-members.<sup>83</sup> Although both the Proposed and Enacted Acts create a form of fixed assignment term for military judges, neither created an independent judiciary and both ignored the risk of post judicial-term retribution.<sup>84</sup> And, neither the review committee nor Congress seems to have even contemplated statutorily enacting limits on military jurisdiction over peacetime offenses in the form of the overruled *O'Callahan v. Parker*<sup>85</sup>—or following the United Kingdom model of further civilianizing the military criminal justice process.<sup>86</sup> In short, military law continues the civilianization process but apparently more slowly than some would prefer.

## VI. Where are we going? Where might we want to go?

The Military Review Group opined in its report that:

The need to promote discipline through an instrument of justice requires a court-martial system that differs in important respects from civilian criminal justice systems. As the Supreme Court has stated, the military remains a “specialized society separate from civilian society . . .

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<sup>83</sup> The Military Justice Review Group chose not to address this issue in light of the recent review of the Response Systems Panel. See REVIEW GROUP REPORT, *supra* note 1, at note 34.

<sup>84</sup> See generally Fredric Lederer & Barbara Hundley, *Needed: An Independent Military Judiciary: A Proposal To Amend the Uniform Code of Military Justice*, 3 Wm. & M. Bill. Rts. J. L. Rev. 629 (1994).

<sup>85</sup> *O'Callahan v. Parker*, 395 U.S. 258 (1969) (prohibiting military jurisdiction over “non-service-connected” offenses in the United States during peacetime), *overruled by Solorio v. United States*, 483 U.S. 435 (1987); see generally GILLIGAN & LEDERER, *supra* note 9, at §2-32.

<sup>86</sup> Prosecutorial decision-making in the U.K. is controlled by a civilian head, the Service Prosecuting Authority. *Service Prosecuting Authority*, MINISTRY OF DEFENCE, <http://spa.independent.gov.uk/index.htm> (last visited January 29, 2017). All courts-martial judges in the UK are civilians. See, e.g., *Military*, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/> (last visited January 29, 2017).



[because] it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.” This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ . . . .<sup>87</sup>

I know of no scientific way to determine the degree to which a court system delivers justice, as distinguished from efficiency. It is my impression, and I think that of many others, that the military criminal legal system viewed as a whole has done extremely well in its delivery of justice, at least once a case makes it to trial.<sup>88</sup> And, in all fairness military justice should be compared to its highly flawed civilian counterpart, which is hardly an enviable model.<sup>89</sup> Yet, if justice is the goal, the current structure of the military criminal legal system clearly needs further major change. At least at the general court-martial level, which deals with our most serious offenses, there is no contemporary justification in placing prosecutorial decision-making power and even more so juror selection power in commanders. It is not unreasonable for commanders intimately familiar with military life to make prosecutorial recommendations, and, in some compelling cases, decisions. Ordinarily, however, that value is heavily outweighed by concerns about untrained and potentially biased decision-making by non-legally trained officers whose primary goals are mission readiness and victory. Once a case reaches a general court, there should be no reason to believe that anything other than justice is appropriate. That does not negate the potential value in permitting commanders in exceptional circumstances to refer cases to trial or to discontinue a case for sound military reasons.<sup>90</sup> This conclusion might suggest to some that major cases might better be tried by civilian, perhaps Article III federal courts. But, to do so—even if the Article III courts could handle the caseload expansion—would remove the military knowledge necessary for fundamental fairness. Military judges and other

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<sup>87</sup> REVIEW GROUP REPORT, *supra* note 1, at 17.

<sup>88</sup> Concerns about sexual assault and related cases are well known, especially insofar as pretrial decision-making is concerned.

<sup>89</sup> Notably, the accused appearing before special and general courts-martial not only have free counsel, they have competent counsel, and the military appellate courts have been especially active to ensure competency. See GILLIGAN & LEDERER, *supra* note 9, at §5-55.00 (4th ed. 2015).

<sup>90</sup> The 2016 mistaken attack on a Doctors Without Borders Afghan medical center might be such a case. But see Eugene Fidell, *The Wrong Way to Handle the Kunduz Tragedy*, N.Y. TIMES, May 1, 2016, [https://www.nytimes.com/2016/05/02/opinion/the-wrong-way-to-handle-the-kunduz-tragedy.html?\\_r=0](https://www.nytimes.com/2016/05/02/opinion/the-wrong-way-to-handle-the-kunduz-tragedy.html?_r=0).

judge advocates<sup>91</sup> may not all have combat experience but they are indeed part of military life and culture and that knowledge is utterly essential.

If justice is the goal, what should be the role of commanders for it is both discipline and justice that we need. It is my view that the current military criminal legal system is increasingly failing in its discipline function. We have obviated the argument that for military reasons we must have speedy trials and appeals and eliminated the general deterrent effect of rapid punishment known to our personnel. Our trial rate has plummeted, but largely because of the use of administrative discharges. At present, although the economy is growing, civilian work is frequently competitive for many of our personnel. Should the economy boom, removing the economic discouragement, will commanders have reasonable and useful disciplinary punishment options?

We should adopt a two-tier system—a largely civilianized court-martial system and a rapid limited due-process disciplinary system for minor offenses. Non-judicial punishment under Article 15, “mast punishment” in the Navy and Coast Guard, was intended as a fairly minor, attention-getting informal sanction. Unfortunately, its authors likely never took into account the military personnel managers using Article 15 as a personnel management—and elimination—tool. Commanders frequently won’t use Article 15 not only because that process is itself increasingly legalistic and complicated, but also has unduly harsh career results. When I was an Army War College student, a survey that I conducted, concededly now quite dated, showed large numbers of commanders avoiding Article 15 in favor of other, quasi legal, informal procedures.<sup>92</sup>

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<sup>91</sup> Although it must be conceded that most judge advocates try so few contested cases that the criminal law and trial expertise that military counsel had is increasingly absent.

<sup>92</sup> 1992-93 C&GSC class former company commanders’ responses to non-judicial punishment alternatives. See 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 8-21.20 (4<sup>TH</sup> ED. 2015). The question was the degree to which commanders used either extra-military instruction or other, unofficial means, to punish persons otherwise subject to Article 15. My confirmed assumption was that many commanders would do so either to avoid the effort involved in Article 15 or to avoid adverse administrative consequences to the service member. See table 1 for a summary of alternative punishment usage.

	EMI AS PUNISHMENT	%OF TOTAL	UNOFFICIAL PUNISHMENT	% OF TOTAL
Never	185	29.3	265	42.9
Sometimes	378	59.8	319	51.6
Often	69	10.9	34	5.5

Table 1. Use of non-judicial punishment alternatives

If we are to provide commanders the disciplinary power they need, I believe that we should increase Article 15 punishments and remove most procedural protections in return for elimination of their use for administrative personnel management. The United Kingdom system provides for detention for 28 days with an extension to 90 days if approved by higher authority.<sup>93</sup> I would also recommend the actual and public use of Article 15 for at least junior officers in order to eliminate the belief by enlisted personnel that officers receive no punishment for offenses commonly punished if committed by enlisted personnel.<sup>94</sup> At the same time, in addition to permitting a service member to demand trial by court-martial as an alternative, we should restrict the use of Article 15 so that an individual can only receive NJP a limited number of times so that it cannot be used as a subterfuge alternative to court-martial.

We would do well to recognize that the vast majority of junior enlisted personnel—and officers—are young. Many serve in positions in which we are training them for demanding combat duty. Logically, those people are far more likely to commit minor offenses than older personnel or those working in more peaceful pursuits. The soldier trained to and prepared to use violence against the enemy is going to take some time to fully internalize applicable societal limits, especially in garrison. If we are both to ensure discipline and at the same time not over-punish those who go in harm's way, we need a way to firmly get their "attention" but not penalize them for the rest of what might otherwise be a very short

<sup>93</sup> Military Jurisdiction, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/> (last visited May 22, 2017).

<sup>94</sup> Generally, power to use Article 15 against officers is restricted to highly senior commanders. Officer "punishments" often take the form of bad efficiency or fitness reports, consequences, even when career-ending, that are invisible to enlisted personnel who then believe there are two separate justice standards.

service career.<sup>95</sup> Interestingly, Congress, following the Proposed Act made clear in the Enacted Act that summary courts-martial are not “criminal convictions.”<sup>96</sup> This increases the possibility for use of summary courts without civilian collateral consequence, but does not address the military administrative sanction.

## VII. In Conclusion

Rome, whether the Republic or the Empire, is long gone. The history of its legions suggest that they were not much concerned about justice, and we can be certain that Americans would reject unmerited punishment for the sake of military discipline. But, the Romans certainly understood discipline, as did General Washington and many of our founders. American military law has evolved and will continue to evolve. It is legalized to an extent that is unprecedented. One that accords with our Bill of Rights and the expectations of our citizens. We have worked hard to achieve just proceedings and largely have succeeded in doing so. But our model in the pursuit of justice has been our civilian legal system, based on a desire and expectation for due process. That system's goals and requirements have nothing to do with marshalling, deploying, and fighting an effective armed force. We can and must do better.

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<sup>95</sup> To say nothing of saving the cost of expensive recruiting and training of replacement. The reader might reasonably ask, “Why not simply change personnel regulations to eliminate use of Article 15’s for promotion and retention decisions?” As I learned to my disbelief when I was on active duty in the Office of The Judge Advocate General of the Army, it is sometimes easier to amend the UCMJ than to change personnel regulations, especially if we’re in a time of reduction in force.

<sup>96</sup> NDAA 2017, at § 5164.