Journal of Legislation

Volume 48 | Issue 2 Article 8

6-20-2022

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ENCROACHING ON COMMAND AUTHORITY: HOW HISTORY INFORMS THE "MILITARY JUSTICE IMPROVEMENT AND INCREASING PREVENTION ACT"

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"Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all . . . ."[1]

INTRODUCTION

For centuries, a strong military has been the hallmark of a strong state. Long-lasting and seemingly infallible governments like those of the Romans or Mongols have been backed by fierce, impenetrable armies and navies. After hundreds of years, empires fallen, wars fought, and republics built, that has remained true. When the first United States armed force was authorized in 1775 to fight the supreme British military, the need for security and strength was acute.[2] At that pivotal moment in United States history, the Continental Congress and Founding Fathers decided that the commander should be at the forefront of military justice.[3]

Unlike the civilian justice system, most are familiar with, the military justice system is based on the unique core values of "[o]bedience, discipline, and centralized leadership and control . . . ."[4] Historically and today, wartime situations or off-the-grid operations eliminate the availability of traditional courtroom proceedings.[5] Sitting and waiting through a time-consuming judicial process is not an option when orders go unfollowed, and lives are at risk. Ensuring the swift delivery of justice to maintain good order is imperative to the successful execution of military missions. These great differences in priorities mean that the structure of the military justice system looks far different from its civilian counterpart.

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1. Letter from George Washington, Colonial Gen., to Company Captains, (July 29, 1759), https://founders.archives.gov/documents/Washington/02-04-02-0223.

2. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953 (2d ed. 1920).

3. *See generally* Journals of the Continental Congress: Articles of War, June 30 (1775), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp (last visited May 22, 2022) [hereinafter Journals of Continental Congress]; *see also* American Articles of War of 1775, *reprinted in* WINTHROP, *supra* note 2, App. IX, at 953–60; Robert O. Rollman, *Of Crimes, Courts-Martial, and Punishment – A Short History of Military Justice*, 11 U.S.A.F. JAG L. REV 212 (1969).

4. Curry v. Sec. of the Army, 595 F.2d 873, 877 (D.C. Cir. 1979).

5. *Id.* at 878–79.

One of the most significant differences between the two systems is the primary figure in charge of delivering justice.[6] Unlike the judges and juries that dominate the civilian scene, the commander runs the show in military justice.[7] Also called a "convening authority" due to the commander's ability to convene courts-martial, a commander "has near absolute discretion at every stage of a military justice proceeding."[8] In judicial proceedings, the commander has no civilian equivalent. A commander is not a lawyer or a judge, and typically, they do not have any legal training at all.[9] A commander is a senior commanding officer, usually a colonel or general, with authority and discretion over the justice matters regarding the soldiers, sailors, and airmen below them.[10] The commander has the power to:

> [C]onduct direct investigations, authorize probable cause searches, refer charges to court-martial, convene courts-martial, grant witnesses' immunity, negotiate and approve pretrial agreements, make capital referrals to courts-martial, select courts-martial panel members, grant funding to government and defense counsel for employment of expert witnesses, approve sentences, and grant clemency.[11]

In recent years, the role of the commander has come under fire for being too involved and too discretionary in his or her role as the convening authority.[12] With the growing awareness that sexual misconduct in the military often goes unreported or unprosecuted, there has also come a push for top-to-bottom structural change to the Uniform Code of Military Justice ("UCMJ").[13] The Military Justice

6. *See Military Justice Overview*, VICTIM AND WITNESS ASSISTANCE COUNCIL, https://vwac.defense.gov/military.aspx (last visited May 22, 2022).

7. *Id.*

8. Lindsy Nicole Alleman, Note, *Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L. 169, 171 (2006) (citing Meredith L. Robinson, *Volunteers for the Death Penalty? The Application of* Solorio v. United States *to Military Capital Litigation*, 6 GEO. MASON. L. REV. 1049 (1998)).

9. Alleman, *supra* note 8, at 170.

10. *Id.*

11. *Id.* at 171 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303, 407(a), 502(a)(1), 601, 703(d), 704(c), 705, 1107, 1107(d)(1); Mil. R. Evid. 315(d); *See* 10 U.S.C. §§ 822–824).

12. *See, e.g.*, Erin Scanlon, *Military Justice Needs Sexual Assault Reform, Survivor Says*, MILITARY TIMES (Dec. 13, 2021), https://www.militarytimes.com/opinion/commentary/2021/12/13/military-justice-needs-sexual-assault-reform-survivor-says/; *see also* Ella Torres, *Military Sexual Assault Victim Says the System is Broken*, ABC NEWS (Aug. 28, 2020), https://abcnews.go.com/US/military-sexual-assault-victims-system-broken/story?id=72499053; *see also* Zoë Carpenter, *Sexual Assault in the Military is Still Going Unchecked. Will Congress Finally Act?*, THE NATION (July 27, 2021), https://www.thenation.com/article/society/military-sexual-harassment-gillibrand/.

13. *See, e.g.*, Press Release, Kirsten Gillibrand United States Senator for New York, *Senators Gillibrand, Grassley, Ernst, Blumenthal, Cruz, Shaheen, Kelly, and Military Sexual Assault Advocates Introduce New, Bipartisan Military Justice Improvement and Increasing Prevention Act* (Apr. 29, 2021), https://www.gillibrand.senate.gov/news/press/release/senators-gillibrand-grassley-ernst-blumenthal-cruz-shaheen-kelly-and-military-sexual-assault-advocates-introduce-new-bipartisan-military-justice-improvement-and-increasing-prevention-act [hereinafter Gillibrand Press Release]; *see also Sexual Assault, the Military Justice System and Commanders' Authority: Recent Developments*, CONG. RSCH. SERV. (May 25, 2021),

Improvement and Increasing Prevention Act ("MJIIPA"), introduced by Senator Kirsten Gillibrand and backed by a bipartisan group of legislators, seeks to take convening authority away from the commander for certain serious crimes such as sexual assault.[14]

On December 27, 2021, the National Defense Authorization Act of 2022 ("NDAA" or "the Act") was signed into law.[15] Passed annually, the NDAA authorizes all spending, policies, and regulations for the U.S. Department of Defense. Every year, Congress uses the NDAA to implement its defense and national security priorities for the coming year.[16] For 2022, there has been significant focus has been on the commander's authority, and the Act implemented some of the changes proposed by the MJIIPA.[17]

This Note will discuss the historical development of the military justice system throughout European and American history and how that past informs the proposed changes to the command structure of the UCMJ under the MJIIPA. This Note ultimately argues that taking crucial justice decisions out of the hands of the commander does not follow from history and doing so could corrupt the purpose of the system and be damaging to the U.S. military in the future. MJIIPA attempts to reorient the very objectives of the military justice system since its origin, a move that is much larger and affects much more than the Act's purpose of curbing sexual assault against servicemembers.

The first Section of this Note discusses the vast history and development of military law leading up to the present day UCMJ and the role of the UCMJ's modern commander. This Section will look at early bodies of military law, then look at British military law before examining the development and evolution of the American military justice system.

Section II will consider the modern role of the commander under the UCMJ and where a commander is allowed discretion in delivering justice for his or her unit. This Section will also describe the current protections that have been put in place by the UCMJ.

Section III of this Note will focus on the proposed reforms to the commander's role in the justice system, including the MJIIPA of 2021 and the NDAA for Fiscal Year 2022.

Finally, Section IV will pull these elements together and explain how history informs the proposed changes within these two pieces of legislation. Section IV also

https://crsreports.congress.gov/product/pdf/IN/IN11680; *see also Military Sexual Violence*, CONGRESSWOMAN JACKIE SPEIER, https://speier.house.gov/military-sexual-violence (last visited May 22, 2022).

14. Gillibrand Press Release, *supra* note 13.

15. Press Release, The White House, Statement by the President on S. 1605, the National Defense Authorization Act for Fiscal Year 2022 (Dec. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022/.

16. *See generally Summary of the Fiscal Year 2022 National Defense Authorization Act*, U.S. STATES SENATE COMM. ON ARMED SERVS. (Dec. 15, 2021), https://www.armed-services.senate.gov/imo/media/doc/FY22%20NDAA%20Agreement%20Summary.pdf.

17. David Dayen, *Gillibrand Slams 'Four Men' for Watering Down Military Sexual Assault Reform*, AM. PROSPECT (Dec. 8, 2021), https://prospect.org/politics/gillibrand-slams-four-men-for-watering-down-military-sexual-assault-reform/.

explains why the commander's role as convening authority should not be greatly reduced.

I. A BRIEF HISTORY OF MILITARY JUSTICE

A. Early Bodies of Military Law

As a body of law, military justice has developed over the course of centuries. While "no written military codes remain" from ancient times, their influence is still evident in our own military's justice system.[18]

Across Europe, many written bodies of military law have existed. The earliest known body of military law appears to be the Salic Code, "originally made by the chiefs of the Salians at the beginning of the fifth century and revised and matured by the successive Frankish kings."[19] At this time, civilian and military jurisdictions were "scarcely distinguished," and civil judges were often military commanders in times of war, meaning that the commanders were also the head of justice at this time.[20]

Frankish military law seems to have reached "full development in 1532 in the celebrated penal code of the Emperor Charles V."[21] This code has been historically viewed as the model for existing military codes across Europe.[22] Other prominent systems of early European military law include: the Articles of War of the Free Netherlands of 1590; the Swedish Articles of Gustavus Adolphus in 1621; the French Regulations of Louis XIV of 1651 and 1665; the Russian Articles and Regulations of Czar Peter the Great of 1715; and the Habsburgian dominions' penal code of the Empress Maria Theresa of 1768.[23]

18. WINTHROP, *supra* note 2, at 4.

19. WINTHROP, *supra* note 2, at 17–18; *see also* Craig Taylor, *The Salic Law, French Queenship and the Defence of Women in the Late Middle Ages*, 29 FRENCH HIST. STUD. 543 (2006); *see generally* Sarah Hanley, *The Salic Law*, *in* THE POLITICAL AND HISTORICAL ENCYCLOPEDIA OF WOMEN 2–17 (Christine Fauré ed., 2003).

20. WINTHROP, *supra* note 2, at 18 (citing AMEDEE LE FAURE, LES LOIS MILITAIRES DE LA FRANCE (J. Dumaine ed., 1876); VICTOR FOUCHER, COMMENTAIRE SUR LE CODE DE JUSTICE MILITAIRE POUR L'ARMEÉ DE TERRE (1858)).

21. WINTHROP, *supra* note 2, at 18; *see generally* CONSTITUTIO CRIMINALIS CAROLINA (1532) [excerpts], UNIV. OF OR., https://pages.uoregon.edu/dluebke/Witches442/ConstitutioCriminalis.html (last visited May 22, 2022) (citing John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* 259–308 (Cambridge: Harvard Press, 1974)). For more discussion of the influential 1532 Code, *see generally* Joy Wiltenburg, *The Carolina and the Culture of the Common Man: Revisting the Imperial Penal Code of 1532*, 53 RENAISSANCE Q. 3 (2000).

22. WINTHROP, *supra* note 2, at 18; *see generally* FRANCIS GROSE, MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY FROM THE CONQUEST TO THE PRESENT TIME (T. Egerton, et al. eds., 1801).

23. WINTHROP, *supra* note 2, at 18; *Gustavus Adolphus of Sweden*, MIL. WIKIA, https://military.wikia.org/wiki/Gustavus_Adolphus_of_Sweden (last visited May 22, 2022); *Louis XIV, King of France and Navarre*, BRIT. MUSEUM, hhttps://www.britishmuseum.org/collection/term/BIOG36242 (last visited May 22, 2022); Devan Walsh, Analysis of Peter the Great's Social Reforms and the Justifications of the Reactions from the General Public (Thesis, W. Or. Univ.) (2012); *Maria Theresa – The Heiress*, WORLD OF THE HABSBURGS, https://www.habsburger.net/en/chapter/maria-theresa-heiress (last visited May 22, 2022).

All of these bodies of law, influenced by the military commander, played a part in shaping the eventual code of the great British military that later shaped American military law.[24]

B. British Military Law

During and after the American Revolution, the American military structure and justice system were influenced by the great British Army and Navy.[25] For nearly two centuries until 1879, the British Military Code consisted of the Army Mutiny Act and the Articles of War.[26] Before these statutes, the earliest articles seem to have been military orders, also called ordinances of war, that were issued to the army during wartime at the start of expeditions and campaigns.[27] These orders—ordained by the King and sometimes even empowering generals in command to make special rules and articles of war—are seen as having shaped the later English codes.[28]

Following the English Civil War that lasted from 1642 to 1651, similar articles were continuously promulgated by the Crown until the passage of the first Mutiny Act in 1689, which allowed British military law to begin taking "statutory form."[29] Under the Mutiny Act of 1689, Parliament exercised control over military law for the first time, and desertion, mutiny, and sedition were made triable by court-martial and punishable by death at home.[30] The Mutiny Act was revised in subsequent years, and in 1718, the past articles promulgated by the Crown were expressly authorized by Parliament.[31] In 1803 "it was enacted that both the Act and the Articles" would apply equally at home and abroad, giving the Articles of War statutory authority under Parliament, rather than just the Crown.[32] In 1879, the Mutiny Act lapsed and

24. *See* discussion at *infra* Section B.

25. *See* WINTHROP, *supra* note 2, at 22; *see also* Rollman, *supra* note 3, at 215.

26. Rollman, *supra* note 3, at 213; *see also* Gerald Oram, *The Administration of Discipline by the English is Very Rigid: British Military Law and the Death Penalty* (1868–1918), 5 CRIME, HIST., & SOCIETIES 93, 103 (2001); *see generally* An Act to Bring into Force the Army Discipline and Regulation Act, 1879, Pub. Gen. Act, 42 & 43 Victoria, c. 32 (1879) (located in the Parliamentary Archives).

27. WINTHROP, *supra* note 2, at 18. The Crown governed the military by publishing articles of war with advice given by the Court of Chivalry, the tribunal viewed by many as the original court-martial of England. *See generally* GROSE, *supra* note 22 (discussing early ordinances from the king and the organization of Britain's armed forces from feudal time up to 1801); *Laws of Richard I (Coeur de Lion) Concerning Crusaders Who Were to Go by Sea (1189 A.D.),* AVALON PROJECT, https://avalon.law.yale.edu/medieval/richard.asp (describing the ordinance of war ordained by Richard I) (last visited May 22, 2022).

28. WINTHROP, *supra* note 2, at 1819; *see generally* Ridley McLean, *Historical Sketch of Military Law*, 8 J. CRIM. L. & CRIMINOLOGY 27 (1917); *see also* WAR OFFICE, MANUAL OF MILITARY LAW 6–7 (1914) [hereinafter MANUAL OF MILITARY LAW].

29. WINTHROP, *supra* note 2, at 19; *see also* MANUAL OF MILITARY LAW, *supra* note 28, at 7; Rollman, *supra* note 3, at 214; GROSE, *supra* note 22, at 63–65.

30. Rollman, *supra* note 3, at 215; *see also* McLean, *supra* note 28, at 28; *see generally* The First British Mutiny Act (1689), reprinted in WINTHROP, *supra* note 2, App. VI, at 929–30.

31. WINTHROP, *supra* note 2, at 20; MANUAL OF MILITARY LAW, *supra* note 28 at 13.

32. WINTHROP, *supra* note 2, at 20; *see also* McLean, *supra* note 28, at 28–29 ("With the Mutiny Act of 1803 the power of the Crown to make any Articles of War became altogether statutory and the former prerogative was merged in the Act of Parliament.").

the Army Discipline and Regulations Act was enacted, largely incorporating the previous Articles of War.[33]

Under the nineteenth-century British military justice system following the Mutiny Acts, "[a]ll general Courts-Martial [were] assembled under authority of the King . . . by delegation of the royal authority to any general officer, having chief command of a body of forces."[34] These commanders could "convene general Courts-Martial for the trial of offenses committed by any of the forces under his command."[35] Generally, "Courts-Martial [were] either general, for the trial of the greater military crimes, or regimental or garrison, for the cognizance of smaller offenses."[36] After a prisoner's initial arrest, "courts of inquiry" were often appointed to determine whether there were "sufficient ground[s] for bringing the accused person to trial" at all.[37]

The commander bringing the trial was not allowed to sit as "president" or "judge" over the case because "having the power of review, it would be improper that [the commander] should be a member of that court whose sentences he is authorized to review."[38] The "mode of trial by Court-Martial possesse[d] all the benefit of a trial by jury."[39] Prior to trial, the prisoner had to be given a "true copy" of his charges to allow him plenty of time to form a defense.[40] Because lawyers were seen to be "utterly ignorant of Military law and practice,"[41] they were not encouraged to be involved in courts-martial but also would not be refused to a prisoner if he requested assistance for his defense.[42] Other than that, the only other attorney involved in a court-martial was the judge advocate who acted as prosecutor on behalf of the Crown, though the judge advocate was not required to be a trained lawyer.[43] In a case where the prisoner could not obtain the assistance of professional counsel, the judge advocate could be directed to assist the prisoner in mounting a defense.[44]

33. Rollman, *supra* note 3, at 215; *see also* McLean, *supra* note 28, at 29; *see generally* An Act to Bring into Force the Army Discipline and Regulation Act, 1879, Pub. Gen. Act, 42 & 43 Victoria, c. 32 (1879) (located in the Parliamentary Archives).

34. ALEX FRASER TYTLER, AN ESSAY ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 129–30 (3rd ed. 1814).

35. *Id.*

36. *Id.* at 176.

37. *Id.* at 340.

38. *Id.* at 139.

39. *Id.* at 148.

40. *Id.* at 217.

41. *Id.* at 250. However, lawyers were not always seen as being ignorant of military law. Lawyers and judges in England could be and were consulted about the jurisdiction of military courts-martial. For instance, in *Sackville's Case*, after a court-martial began, questions arose about its jurisdiction to try a man no longer in the army. At the request of the court-martial members, the King asked common law judges for their opinion on the issue. *See* Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 639 (2021).

42. TYTLER, *supra* note 34, at 251.

43. *See id.* at 349–63, 353 ("And the person to whom the court is naturally to look for information . . . is the Judge-Advocate, who is either by profession a lawyer, or whose duty, if he is not professionally such, is to instruct himself in the common law and practice of the ordinary courts in the trial of crimes.").

44. *Id.* at 355.

Following the trial, "[n]o sentence . . . [was] indeed complete, [until] it [was] approved . . . by a commander in chief having that authority delegated to him."[45] The commander had the ability to remit the punishments of a court-martial or order the court to sit again and review their procedure and judgment, but he could not alter a judgment as restricted by the Mutiny Act.[46] The Act also said that "no sentence given by any Court-Martial, and signed by the president thereof, shall be liable to be revised more than once," limiting the commander's power to order reconsideration.[47] Those sentenced in a court-martial could appeal the decision, though the commander also determined whether that further review was just.[48]

John Tytler's *Essay* recognizes that the British military law system, while just in its operations, could afford fewer personal liberties than the civil system. Because of this, British law restricted the use of military justice processes but allowed for martial law to replace civil law during nationwide crises.[49] The *Essay* accounts:

> But in times of turbulence and danger, these securities of personal liberty must yield to the greater object, the security of the state; and the legislature authorizes for a time a suspension of the statute of Habeas Corpus. So likewise the common and statutory law, which, in ordinary time, is adequate to the coercion of all offenses, may be found, in times of extraordinary turbulence and alarm, utterly inadequate to the repression of the most dangerous crimes against the state. The slow and cautious procedure of the King's ordinary courts of justice keeps no pace with the daring celerity which attends the operations of rebellion; nor are their regulated forms and publicity of procedure fitted to bring to light the dark designs of a conspiracy.[50]

This quote demonstrates the vast difference between the British civil and military systems and how the institutions were perceived to protect individual rights. While Tytler says that "the Military law is a wise, equitable and humane system," he also recognizes that its purpose is "for the regulation and discipline of the army" and that it subsequently does not afford the same protections as the civil system.[51]

As the British Empire expanded its global influence, it brought with it its military systems, which became the standard for military success and excellence. At its founding, the United States military took several pages from the British military's book with the commander leading the justice process.[52]

45. *Id.* at 163.

46. *See id.* at 138–39, 170.

47. *Id.* at 171.

48. *Id.* at 334.

49. For more information on martial law in England, *see* J. V. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L.J. 152 (1977).

50. TYTLER, *supra* note 34, at 366–67.

51. *Id.* at 364.

52. *See* discussion at *infra* Subsection C.

C. Development of the American Military Justice System

On June 14, 1775, the Continental Congress declared that a military force should "be immediately raised" to "march and join the army near Boston," and appointed a committee, including newly appointed General George Washington, "to bring in a draft of Rules and regulations for the government of the army."[53] On June 30, 1775, Congress adopted a set of Articles—preceded by a preamble describing the circumstances leading the Colonies to "assume a defensive attitude and raise an armed force"[54]—establishing rules and orders for the Colonies' military forces.[55] These were the Articles of War of 1775; they consisted of sixty-nine articles and were patterned off of the British Articles of War of 1765 which were influenced by the code of Gustavus Adolphus.[56] John Adams even favored copying the British Articles *totidem verbis*,[57] believing that the British and Roman systems "had carried two empires to the head of mankind" and "it would be vain for us to seek our own invention . . . for a more complete system of military discipline."[58] Many of the new articles were also copied directly from the Massachusetts Articles for the observance of its own troops that were adopted in April 1775.[59] The Massachusetts Articles are believed "to have constituted the first American written code of military laws."[60]

The 1775 Code provided for the first general courts-martial and regimental courts-martial in the colonies as well as punishment "by order of the commanding officer."[61] The commander-in-chief—then, the general—had the "full power of pardon and mitigation over sentences imposed by the general court."[62] For regimental courts-martial, the power to pardon or mitigate sentences rested with the regimental commanders and the judgments had to be confirmed by the commanding officer.[63] While the code did delineate membership and procedural rules for courts-martial, punishments were not spelled out in great detail, and death was authorized

53. Journals of Continental Congress, *supra* note 3, at 89–90; *see* Washington Commission as Commander in Chief of the Continental Army (June 19, 1775), *in* 8 GEORGE WASHINGTON PAPERS, SUBSERIES B: DEGREES AND HONORS, 1775 JE THRU 1798 JL 4, at 2–3 (LIBR. OF CONGR.).

54. WINTHROP, *supra* note 2, at 21.

55. *See* Journals of Continental Congress, *supra* note 3, at 111–23.

56. *Id.* at 19. For a further discussion on the Articles of War of 1775, *see* WINTHROP, *supra* note 2, at 22, 931–46.

57. *Totidem verbis* is defined as meaning "in these exact words." *Totidem Verbis*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/totidem%20verbis (last visited May 22, 2022).

58. JOHN ADAMS, THE WORKS OF JOHN ADAMS 68, 83 (Charles F. Adams ed., 1856).

59. WINTHROP, *supra* note 2, at 22. The Massachusetts Articles were adopted on April 5, 1775, by the Provisional Congress of Massachusetts Bay and were followed by the passage of similar articles in Rhode Island and Connecticut. *Id.* at 22 n.32.

60. *Id.* at 22.

61. Journals of Continental Congress, *supra* note 3, at 115.

62. Rollman, *supra* note 3, at 215.

63. *Id.* The very first Articles of War in the colonies, supervised by General Washington, provided for significant control by the commanding authorities of the military over the deliverance of justice. *See generally id.* at 215–16.

for only two offenses.[64] In November, after months of field experience with the Articles in action, alterations were made involving punitive articles, including expanding the number of offenses for which death could be used as punishment.[65]

After the appointment of a revisions committee, which included John Adams and Thomas Jefferson,[66] the American Articles of War of 1776 were adopted on September 20, 1776.[67] The 1776 Articles modified the 1775 version between 102 articles that omitted all mention of "the Crown."[68] These 1776 Articles, with the exception of occasional amendments, were recognized by the First Congress after the Constitution was adopted and continued in effect until 1806.[69]

Significant revisions in 1786 impacted the role of the chain of command and the rights of the accused and included: (1) any sentence by a general court-martial that included death or dismissal of an officer had to be "transmitted to the Secretary of War, to be laid before Congress for their confirmation, or disapproval, and their orders on the case;"[70] (2) "[a]ll other sentences [had to] . . . be confirmed and executed by the Officer ordering the Court to assemble, or the Commanding Officer for the time being, as the case may be;"[71] and (3) prosecutions had to be handled by the judge advocate, who was charged to "consider himself counsel for the prisoner, after the said prisoner shall have made his plea."[72]

The Articles of 1806 "superseded all other legislation" on the same subjects and were adopted under the view that a "changed form of government 'rendered desirable a complete revision'" of the code.[73] Though not much changed in the new articles, they remained in place for almost seventy years. In 1874, Congress issued new articles, mostly clarifying the 1806 Code.[74] These 1874 Articles were amended numerous times, including in 1890 when the phrase punishment "left to the discretion of the court-martial" was eliminated and changed to punishment "shall not, in time of peace, be in excess of a limit which the President may prescribe."[75] Subsequently, the President issued an executive order listing the maximum punishments under the jurisdiction of courts-martial.[76] Additionally, the 1890 Code established the summary court-martial.[77]

64. *See also id.* at 215 ("Punishments were not generally prescribed with specificity but only in terms of 'as a general (or regimental) court-martial might order'; 'according to the nature of the offense'; or 'in the court's discretion.'"). *See generally* Journals of Continental Congress, *supra* note 3, at 111–23

65. Rollman, *supra* note 3, at 216.

66. *Id.* General Washington was in the field at this time and could not serve on the committee. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 217.

70. *Id.*; *see also* 30 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 3, at 317.

71. Rollman, *supra* note 3, at 217.

72. *Id.*

73. *Id.* at 217.

74. *Id.*

75. *See Act of September 27, 1890*, reprinted in WINTHROP, *supra* note 2, App. XIV, at 998.

76. Rollman, *supra* note 3, at 218.

77. *Id.*

By 1917, there were 121 Articles that were rearranged and put into place by the Manual for Courts Martial.[78] During those revisions, a Board of Review was established with appellate duties for "'cases in which the sentence extended to death, dismissal of an officer or dishonorable discharge of an enlisted man[.]'"[79] The death penalty was further limited largely to times of war, "save for assault on or willful disobedience of a superior officer, mutiny, sedition . . . and rape."[80] For the first time, the courts were "classified as general, special, and summary. . . ."[81] The revisions allowed an accused to choose to be represented by counsel of his own choice, or the judge advocate could "from time to time advise the accused of his rights."[82] Sentences had to be approved by the "officer appointing the court or by the officer commanding for the time being."[83] As of 1917, any sentence respecting general officers and extending to the death or dismissal of an officer or cadet required Presidential confirmation.[84]

The Articles of War of 1920 saw substantial procedural revisions and carried the U.S. military through World War II. Significant changes that served to protect the rights of the accused and included: (1) an expanded right against self-incrimination;[85] (2) a focus for the judge advocate only on prosecution; [86] (3) the accused's right to counsel before general or special court-martial, with the choice between civil counsel or "defense counsel duly appointed"; [87] (4) the required review of the record by the Judge Advocate General "[p]rior to action on a general court-martial" by the convening authority;[88] and (5) a unanimous vote requirement for a death sentence.[89]

Following World War II, the military fell under fire for command influence, unqualified court personnel and counsel, and violations of due process.[90] During World War II, more than 1,700,000 courts-martial were convened, with most resulting in conviction.[91] Since the armed forces processed nearly one-third of all criminal cases tried in the U.S. during the War, those cases and the system itself caught the public eye and rallied a cry for reform.[92] The "military establishment" felt an immediate need to set up a uniform court-martial procedure across the military branches and took steps to "overhaul the military justice system."[93]

78. *Id.* ("The Articles of War of 1916 . . . eliminated obsolete matters and were arranged in a more orderly and logical manner.").

79. *Id.* (citing William F. Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 40 (1949)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 219; *see also* The Articles of War of 1920, 66th Cong. 3 (June 4, 1920).

86. Rollman, *supra* note 3, at 219.

87. *Id.*

88. *Id.*

89. The Articles of War of 1920, 66th Cong. 3 (June 4, 1920).

90. *See* Rollman, *supra* note 3, at 220.

91. Michael Scott Bryant, *American Military Justice from the Revolution to the UCMJ: The Hard Journey from Command Authority to Due Process*, 4 CREIGHTON INT'L & COMP. L.J. 1, 4 (2013).

92. *Id.* at 9.

93. *See* Rollman, *supra* note 3, at 220.

Ultimately, Congress enacted the Selective Service Act of 1948, commonly referred to as the Elston Act.[94] This Act brought about further reform to the Army judicial system, including: (1) counsel for general courts-martial were "required to be lawyers, if available"[95] ; and (2) creation of a Judicial Council in addition to the Board of Review to consider specific case sentences.[96]

In August of 1948, the Secretary of Defense appointed a committee ordered to "prepare a code, uniform in substance, interpretation, and application, that would protect the rights of those subject to it and increase public confidence in military justice, without impairing the military function."[97] In a culmination of public protest and governmental investigations, the Uniform Code of Military Justice was enacted into law by Congress on May 5, 1950, and it became binding on all services on May 31, 1951.[98]

II. THE COMMANDER UNDER THE UCMJ

Since the adoption of the Articles of War of 1775, the commander has led the court-martial process in the U.S. military justice system.[99] Above all, it is the commander's responsibility to maintain good order and discipline in their unit. Also called the convening authority ("CA"), the commander has extraordinary control over the justice process.[100] Throughout every element of this control, there are also limits in place through the Uniform Code of Military Justice, Rules for Courts-Martial ("RCM"), and judicial review that hold the common goal of eliminating unlawful command influence ("UCI").[101]

After an offense and a report, the commander—acting as CA, and usually as the direct superior of the accused—decides the immediate action to take depending on the case.[102] They can (1) take no action, (2) initiate administrative action, (3) dispose of the offense with nonjudicial punishment, or (4) prefer[103] and forward charges to court-martial.[104] When considering whether to prefer charges, commanders refer to Appendix 2.1 of the RCM which is set forth by the Secretary of Defense and includes

94. *See generally* Selective Service Act of 1948, Stat. Pub. L. No..80–759, 62 STAT. 604 (1948) (codified as amended at 50 U.S.C. App. §§ 451–473); *see also* Rollman *supra* note 3, at 220.

95. *See, e.g.*, Rollman, *supra* note 3, at 220.

96. *Id.* It is important to note that at this time, the Army and Navy had different, though similar, judicial processes. However, the Navy followed the Articles for the Government of the Navy, "copied largely from the British Articles of 1749." *Id.* at n.39. Before the Uniform Code in 1950, there were no substantial modifications to the Navy's Code. *Id.* For more information on the Uniform Code of 1950 and its reforms, *see generally* Robert S. Palsey Jr. & Felix E. Larkin, *Navy Court Martial Proposals for Its Reform*, 33 CORNELL L. REV. 195 (1947).

97. Rollman, *supra* note 3, at 220.

98. *Id.*; *see generally* 10 U.S.C. §§ 801–940 (1951) (comprising the Uniform Code of Military Justice).

99. For further discussion on this point, *see* discussions at *infra* Subsection C and Section II.

100. Alleman, *supra* note 8, at 170.

101. For further discussion on this point, *see* discussion at *infra* Subsection A.

102. *See* 10 U.S.C. § 815 (2021); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307 [hereinafter R.C.M.].

103. *See generally* Michael E. Lyons, *Preferring v. Referring Charges in Military Courts*, PATRIOTS L. GRP. (Nov. 29, 2019), https://www.patriotslawgroup.com/preferring-v-referring-charges-in-military-courts.

104. *See generally* 10 U.S.C. §§ 815, 822, 823, 824, 834 (2021).

"non-binding disposition guidance."[105] The commanders undergo a thorough inquiry into the alleged offense and often utilize law enforcement and legal advice from judge advocates in making their decision.[106]

If the commander in his or her capacity as CA decides that the offense is serious enough to warrant a court-martial, he or she can refer and forward charges to a summary, special, or general court-martial, depending on the severity of the offense and punishment sought.[107] If the original CA is ranked high enough and there are not separate CAs involved for the different levels of court-martial,[108] that commander has the authority to appoint a Preliminary Hearing Officer ("PHO") and order an impartial Article 32 hearing to establish probable cause prior to trial.[109] After the hearing, the Staff Judge Advocate reviews the report and provides advice to the commander on the disposition of the case.[110] Based on advice from the Staff Judge Advocate, the commander decides whether to refer charges and convene a general court-martial.[111]

After charges are referred, the commander must select the court-martial panel members.[112] The commander does not have unbound discretion here. Article 25 details "[w]ho may serve on courts-martial" and limits selection to those "qualified" based on age, education, training, experience, length of service, and judicial temperament.[113] Because military members do not have a right to a trial before a "representative cross-section of the military community," it is "incumbent upon [appeals courts] to scrutinize carefully any deviations" and the "use of impermissible selection criteria for members cannot be tolerated."[114] Because of this strict de novo

105. R.C.M. *supra* note 102, at App. 2.1–2; 10 U.S.C. § 833 (2021).

106. *See* 10 U.S.C. §§ 832, 834 (2021).

107. *See generally Military Justice Overview*, *supra* note 6. This decision is important since court-martials differ in their processes, jurisdictions, and available punishments:

A summary court-martial is designed to dispose of minor offenses. Only enlisted soldiers may be tried by summary court-martial. A single officer presides over the hearing. The accused has no right to counsel but may hire an attorney to represent him. A special court-martial is an intermediate level composed of either a military judge alone, or at least three members and a judge. An enlisted service member may ask that at least one-third of the court members be enlisted. There is both a prosecutor, commonly referred to as the trial counsel, and a defense counsel . . . . A general court-martial is the military's highest level trial court. This court tries service members for the most serious crimes. The punishment authority of the general court-martial is limited by the maximum authorized punishment for each offense in the Manual for Courts-Martial. Before any charge is sent to a general court-martial, an Article 32 investigation must be conducted. *Id.*

For more information on the summary court-martial, *see also* 10 U.S.C. §§ 818–820 (2021).

108. 10 U.S.C. §§ 822, 823, 824 (2021); *see also Who Has the Authority to Convene a Court-Martial?*, L. OFF. OF JOCELYN C. STEWART, https://www.ucmj-defender.com/authority-convene-court-martial/ (last visited May 22, 2022). While the most senior-level officer at a base typically serves as the General Court-Martial Convening Authority, the Special Court-Martial CO is usually an O-6 and the Summary Court-Martial CO is usually an O-5. *See generally See U.S. Military Rank Insignia*, U.S. DEP'T OF DEFENSE, https://www.defense.gov/Resources/Insignia/ (last visited May 22, 2022).

109. 10 U.S.C. § 832 (2021).

110. *Id*.

111. *Id.* §§ 832, 834.

112. *Id.* § 825(e)(2).

113. *Id.*

114. *See, e.g.*, United States v. Riesbeck, 77 M.J. 154, 163 (C.A.A.F. 2018).

review, there is a heavy check on the commander's selection of court-martial panel members.[115]

At the conclusion of the court-martial, the commander once again has authority. Here, the commander has the ability to approve or dismiss the findings of the court and approve, mitigate, or disapprove the sentence.[116] While this is a broad grant of power, the commander's actions are limited by the provisions of Article 60[117] as well as RCM Rules 1107, 1009, and 1110.[118]

The UCMJ also established the U.S. Court of Military Appeals which consists of three civilian judges that review the decisions of court-martial proceedings.[119] Reforms made in the 1950 UCMJ that created the appellate court "intended to eliminate the potential for abuse in unrestrained command authority and inadequate appellate review of court-martial verdicts."[120]

D. Protections against Unlawful Command Influence

Pre-trial, there are many layers of protection that ensure the right decisions are made regarding case disposition for the victim and accused. Commanders work with law enforcement and legally trained judge advocates to determine the best course of action in each case under their authority. Before a case goes to a general court-martial, there is an Article 32 hearing.[121] After this hearing, the commander still has full discretion to decide whether or not to refer—even if the PHO does not find probable cause.[122] While UCI can occur at this stage in proceedings, as in *Boyce*,[123] if a case is referred to court-martial without probable cause, it will then go through another step of protection—the judicial process. A panel or judge will hear the facts and circumvent UCI by preventing an unjust conviction at court-martial. If a case is improperly referred, it is likely to be visible to a judge or panel when deciding the outcome of a case during trial; the defendant also has a right to raise that claim.[124] In

115. *Id.* at 162.

116. *See generally* R.C.M., *supra* note 102, at 1107–1110.

117. *See* 10 U.S.C. § 860 (2021).

118. *See generally* R.C.M. *supra* note 102, at 1107–1110.

119. *See generally About the Court*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/about.htm (last visited May 22, 2022).

120. Bryant, *supra* note 91, at 10 ("[The UCMJ] was designed to 'civilianize' a body of law that, prior to 1950, was regarded as separate and distinct from civilian legal norms.").

121. *See generally* 10 U.S.C. § 832 (2021).

122. Thomas Spoehr, *Congress Should Avoid Changes That Would Erode the Military Justice System*, HERITAGE FOUND. (May 11, 2021), https://www.heritage.org/defense/report/congress-should-avoid-changes-would-erode-the-military-justice-system ("Put another way, a commander can decide to refer a case to a court-martial even if there is no reasonable likelihood of success at trial. That is because the commander is not a lawyer and thus is not bound by the ethics rules that lawyers must follow.").

123. *See, e.g.*, United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017). Boyce's convictions were overturned where the convening authority's actions gave the appearance of unlawful command influence. The CA had previously set aside an unrelated sexual assault conviction and was subsequently threatened by the Air Force Chief of Staff to retire, giving the appearance that his decision to convene Boyce's court-martial was unlawful. *Id.*

124. 10 U.S.C. § 837 (2021).

the case that a defendant is ultimately convicted after a referral by UCI, they can appeal to branch appeals courts.[125]

Any glaring injustice could also be appealed to CAAF, a civilian court designed to "erect a further bulwark against impermissible command influence."[126] CAAF has said that despite case dismissal being a drastic remedy, "we have not shied away from endorsing this drastic measure in actual unlawful influence cases."[127] Pre-trial, there are multiple layers of inspection that can find and correct UCI. The same is true from the perspective of a victim.

Commanders already have a hefty responsibility when deciding whether or not to refer serious crimes to trial. In the current system, "disposition authority is diffused because all O-6[128] level commanders can initiate a special court-martial for all offenses, including felonies, if the command is satisfied with a maximum punishment for an offense of one year[.]"[129] Because of this, "[o]nly the most serious offenses need to be considered by a general officer, who is advised by an O-6 judge advocate, for possible referral to a general court-martial."[130]

Post-trial, a "Statement of Trial Results" is sent to the commander, acting as CA.[131] This statement includes the military judge's summary and written submissions by both the accused and trial counsel attempting to sway the commander's decision in approving, disapproving, or reducing the sentence—all within the commander's authority.[132] The commander, however, cannot act on a sentence of confinement greater than six months, severe forms of discharge, or a death sentences.[133] Nor can the commander change a finding of guilty or increase a sentence.[134] Aside from those major limits, the commander is required to exercise "good faith" and has sole authority to act on the sentence.[135] If the commander does decide to reduce, commute, or suspend the sentence, that decision is forwarded to the military judge for "appropriate modification of the entry of judgement" and then "to the Judge Advocate General for appropriate action."[136]

It is important to consider a crucial factor throughout these modern processes: political and media pressure. Because of the recent movement towards military

125. For more information on military appeals courts, *see generally* Anna C. Henning, *Supreme Court Appellate Jurisdiction Over Military Court Cases*, CONG. RSCH. SERV. (Mar. 5, 2009).

126. *Boyce*, 76 M.J. at 246.

127. United States v. Barry, 78 M.J. 70, 79 (C.A.A.F. 2018).

128. "O-6" is a U.S. military pay grade equivalent to a Colonel in the Army, Marine Corps, Air Force, and Space Force or a Captain in the Navy and Coast Guard. *See U.S. Military Rank Insignia*, U.S. DEP'T OF DEFENSE, https://www.defense.gov/Resources/Insignia/ (last visited May 22, 2022).

129. Brian Lee Cox, *Congress Must Stand Up to Misguided Political Pressure in Order to Avoid Risk of Systemic Military Justice Failure*, DUKE LAWFIRE (Nov. 29, 2021), https://sites.duke.edu/lawfire/2021/11/29/brian-cox-on-congress-must-make-informed-decisions-to-prevent-risk-of-systemic-military-justice-failure/.

130. *Id.*

131. 10 U.S.C. § 860a(c)(1) (2021)

132. *Id.*

133. *Id.* § 860a(b).

134. R.C.M., *supra* note 102, at 1107.

135. *See* United States v. Dvonch, 44 M.J. 531 (A.F. Ct. Crim. App. 1996).

136. 10 U.S.C. § 860a(f)(3) (2021).

justice reform, the spotlight is on the commander's actions as CA. In the face of attempts at reforming sexual harassment and assault response in the military, as discussed by Senator Gillibrand, there is a significant push towards more prosecution of these cases.[137] On this front, Congress, the news media, and the public have their eye on military justice like never before. When a commander is confronted with the threat of public backlash or a demotion, he or she tends to use his or her discretion according to popular opinion and err on the side of referring a sexual assault case to trial, no matter his or her personal feelings.[138] This pressure can act as a protection for victims as well, resulting in sending servicemembers to courts-martial without the threshold of probable cause for the sake of maintaining the commander's reputation and avoiding media scrutiny.[139]

Commanders are also motivated to make examples of individuals that violate the law and have full authority to send a case to trial solely for the sake of good order and discipline.[140] Unlike civilian prosecutors, commanders have no motivation to send only the easy-to-win cases to courts-martial.[141] This inherently results in more cases being referred to courts-martial, even those that may not have full probable cause. That fact reinforces the idea that "[c]ommanders refer cases to courts-martial to enforce good order and discipline."[142]

III. PROPOSED AND PASSED CHANGES TO THE COMMANDER'S ROLE

Despite protections in place to safeguard justice in the military, the push for reform has grown in the last decade. Senator Kirsten Gillibrand, the chair of the Senate Armed Services Personnel Subcommittee and a vocal advocate for change, first introduced the bipartisan Military Justice Improvement Act in 2013 in hopes of drawing attention to the issue of sexual crimes in the military.[143] According to data from Senator Gillibrand's website and the Department of Defense, there were nearly 21,000 instances of sexual assault in the military in 2018.[144] Even with the growing attention on sexual crimes against women, the "number of women in the military who experienced sexual assault increased by 50%" in 2018."[145] This "epidemic" was the driving force behind Senator Gillibrand's push to form a bipartisan coalition in favor

137. *See generally* Gillibrand Press Release, *supra* note 13.

138. *See, e.g*, United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017).

139. *Id.* at 245–47.

140. Spoehr, *supra* note 122.

141. *See* Maj. Jordan Stapley & Geoffrey Corn, *Military Justice Reform: The "Be Careful What You Ask for Act*," MIL. TIMES (June 2, 2021), https://www.militarytimes.com/opinion/commentary/2021/06/02/military-justice-reform-the-be-careful-what-you-ask-for-act/. *See also* Spoehr, *supra* note 122. The author recounts:

If asked, many—perhaps most—former and current military commanders can recall instances when they demanded that an individual be referred to a courtmartial against the advice of a military lawyer, including a military prosecutor. They knew that sending the case to court-martial sent a powerful message that such behavior would not be tolerated, even if the ultimate success of the case at trial was not certain. *Id.*

142. Spoehr, *supra* note 122.

143. Gillibrand Press Release, *supra* note 13.

144. *Id.*

145. *Id.*

of reforming the way that sexual harassment and assault cases are handled in the armed forces.[146]

After a change in Presidential administration, it seemed that Senator Gillibrand finally had the support needed to implement change. Secretary Lloyd Austin, appointed Secretary of Defense in January 2021, made his first directive to get reports on sexual assault prevention programs and undertake a thorough assessment of what has and has not worked in the past.[147] In April 2021, an independent review commission in the Pentagon created by Secretary Austin went against decades of Department of Defense arguments to keep cases within the chain of command, recommending that the decision to prosecute sexual assault be made by independent authorities, not commanders.[148] According to the panel, an independent prosecutor should decide whether to charge someone and whether that charge should go to court-martial.[149] While "[u]nit leaders will still be responsible for setting a proper command climate and still must play a role in preventing and addressing sexual assault, harassment and other problems with their service members," they would no longer be at the forefront of prosecuting sexual assault and other serious crimes for fear that these acts often go unprosecuted by convening authorities.[150]

On April 29, 2021, Senator Gillibrand and a bipartisan group of senators introduced the revamped Military Justice Improvement and Increasing Prevention Act ("MIJPA").[151] The House also introduced a companion bill, the Vanessa Guillén Military Justice Improvement and Increasing Prevention Act.[152] One of the main pillars of the bill calls for a shift in leadership on sexual assault cases. Specifically, the legislation would "[m]ove the decision on whether to prosecute serious crimes to independent, trained, and professional military prosecutors, while leaving misdemeanors and uniquely military crimes within the chain of command."[153] The Act would:

146. *Id.*

147. Lolita C. Baldor, *End Commanders' Power to Block Military Sex Assault Cases, Pentagon Panel Says*, MIL. TIMES (Apr. 22, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/04/22/end-commanders-power-to-block-military-sex-cases-pentagon-panel-says/.

148. *Id.*

149. *Id.*

150. *Id.* For insight into the experience of those involved in the system, *see* Stapley & Corn, *supra* note 141. As stated by the authors:

Almost all military justice experts who have worked within the system share a common experience: senior commanders who refuse to allow acquittal aversion to negatively influence their decisions on whether to send tough cases to trial. Indeed, many current and former staff judge advocates — the military lawyers who advise commanders on the strength of a case and whether to send it to trial — have had the experience of their commander ordering a case to trial knowing full well the probability of success was minimal. These decisions were not dictated by the odds of victory . . . And ironically, the high number of acquittals in these difficult cases — a statistic critics of the military system cite as evidence of its failure — corroborate the fact that commanders entrusted with this authority rarely shy away from tough cases[.] *Id.*

151. Gillibrand Press Release, *supra* note 13.

152. Press Release, Congresswoman Jackie Speier, Speier, Turner Introduce Bipartisan Vanessa Guillén Military Justice Improvement and Increasing Prevention Act to Remove Sexual Assault Prosecution Decisions from the Chain of Command (June 23, 2021), https://speier.house.gov/press-releases?ID=27875DF4-BA18-4608-BEDF-364B34F2FDC8 [hereinafter Speier Press Release]; *see generally* Vanessa Guillén Military Justice Improvement and Increasing Prevention Act, H.R. 4104, 117th Congress (2021).

153. Gillibrand Press Release, *supra* note 13.

[T]ransfer this responsibility [of prosecuting major crimes, such as murder and rape] to military attorneys with significant trial experience, offering victims and their loved ones the confidence that a professional military prosecutor who is independent—outside of the chain of command of the victim and the alleged perpetrator—is making crucial decisions on whether to pursue trial. Commanders would retain discretion to prosecute servicemembers for military-specific offenses, such as desertion, and for crimes with maximum punishment of less than one year of confinement.[154]

While Gillibrand fought for a stand-alone vote on the floor to avoid the bill being killed in conference, elements of the Act ended up being folded in the National Defense Authorization Act ("NDAA") for Fiscal Year 2022.[155] The NDAA is passed each year and "authorizes funding levels and provides authorities for the U.S. military and other critical defense priorities, ensuring our troops have the training, equipment, and resources they need to carry out their missions."[156] The $777 billion, sixty-first annual NDAA implemented some of the changes sought by MJIIPA but failed to fully take prosecutorial authority off the desks of commanders. Instead, the NDAA "empowers" an independent "Special Victim Prosecutor" for certain crimes, but military commanders still retain ultimate court-martial convening authority.[157] The Act mandates:

> [E]ach Service Secretary will establish an Office of Special Trial Counsel to prosecute sexual assault cases and related crimes, along with a Lead Special Trial Counsel who reports directly to the Secretary without intervening authority. Each service's Lead Special Trial Counsel is independent from the chain of command of the survivor and the accused. Special Trial Counsel decisions to convene a court-martial for sexual assault and related cases are binding on the commander and convening authority in any given case.[158]

While the House Armed Services Committee leaders insist that the special counsel's decisions be binding, reform supporters doubt that the new prosecutors will be able to maintain their authority under the influence of their commander.[159]

154. Speier Press Release, *supra* note 152.

155. Dayen, *supra* note 17 ("Sen. Jack Reed (D-RI), chair of the Senate Armed Services Committee and a close confidant of the Pentagon, fought to fold the bill into the National Defense Authorization Act (NDAA), to keep any changes within his committee and under his control."); *see also* National Defense Authorization Act for Fiscal Year 2022, S. 1605, 117th Cong. (2021).

156. *Summary of the Fiscal Year 2022 National Defense Authorization Act*, *supra* note 15.

157. Dayen, *supra* note 17.

158. Press Release, U.S. House of Representatives Armed Servs. Comm., The Facts: Delivering Real Reforms to Address the Military Sexual Assault Crisis (Dec. 13, 2021), https://armedservices.house.gov/2021/12/the-facts-delivering-real-reforms-to-address-the-military-sexual-assault-crisis [hereinafter House Press Release]. It is important to note that the FY22 NDAA also includes sexual harassment as a crime under the UCMJ for the first time. *Id.*

159. Dayen, *supra* note 17.

Despite the NDAA not picking up major provisions of the MJIIPA, Senator Gillibrand is not giving up on her bill. She will "continue calling for an up or down floor vote on the [MJIIPA], which has the support of nearly two-thirds of the Senate and the majority of the House."[160] The NDAA pulls back on some command authority when it comes to sexual assault and related cases, but backers of the MJIIPA are full steam ahead on plans to continue pushing for more prosecutorial independence from the chain of commander in 2022.[161]

IV. HISTORY'S INFLUENCE

Reform in the military to monitor, prevent, and rectify sexual assault and harassment is immediately necessary, but history tells us taking away command authority over the military justice system to do so would break down the very purpose of the system. From the beginning of the very conceptualization of military justice, a version of the commander has been at the forefront of decision-making.[162] That should not change. The immediate need for good order and discipline would be sacrificed if the commander was cut out of the primary system of discipline.

Throughout history, the military has slowly lost control over the laws that control its inner workings. Early bodies of military law were drafted and modified over time by kings and country rulers, traditionally military commanders themselves. As seen most clearly in British history, this power slowly transferred to the legislature.[163] When the Mutiny Act of 1689 passed, Parliament began to exercise control over military law in Britain.[164]

After experiencing life under the British military's control, there was an extent to which the American Founders "distrusted military rule detached from civilian control."[165] James Madison voiced his concern, stating that "[a] standing force . . . is a dangerous, at the same time that it may be a necessary, provision."[166] This apprehension could be seen in the amount of discretion immediately given to the Continental Congress to both raise an army and establish its rules in 1775.[167]

The American Articles of War were based on the British models and demonstrate a cohesive understanding that matters of military discipline should not be left entirely to its own discretion.[168] From its start, the U.S. made its military justice system beholden to the rule of law as developed and defined by the civilian Congress and President. The U.S. Constitution itself vested the war power in Congress,

160. Amanda Becker, *Congress Had the Votes to Overhaul How the Military Handles Serious Crimes. Why Didn't It?*, MS. MAG. (Dec. 16, 2021), https://msmagazine.com/2021/12/16/military-sexual-assault-congress/.

161. House Press Release, *supra* note 158.

162. For further discussion, *see infra* Section I.

163. For further discussion, *see infra* Section I.

164. Rollman, *supra* note 3, at 215

165. Bryant, *supra* note 91, at 5.

166. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 184 (1953) (citing THE FEDERALIST NO. 41 (James Madison)). As stated by Chief Justice of the Supreme Court, Earl Warren, "[d]istrust of a standing army was expressed by many." *Id.*

167. Bryant, *supra* note 91, at 5.

168. Rollman, *supra* note 3, at 216 (citing WINTHROP, *supra* note 2, at 22).

empowering it to "define offenses against the 'law of nations'" and recognized the president, a civilian, as commander in chief of the military.[169]

This push for civilian control over the laws of the military, however, did not ever overpower the view that the civilian legal system must give way to military commanders in times of war. The Articles of War of 1776 "recognized the unique needs of military culture by limiting freedom of speech" for "contemptuous or disrespectful words" spoken about the President, Vice President, or Congress.[170] Early on, the Founders recognized the importance of military necessity and the strict discipline of servicemembers. When John Adams traveled "through the Jersies to Staten Island," he "observed such dissipation and Idleness, such Confusion and distraction, among Officers and Soldiers," around the country that "astonished, grieved, and allarmed [sic] him.[171] He observed that "the Ruin of our Cause and Country must be the Consequence if a thoughrough [sic] Reformation and strict Discipline could not be introduced [to the military]."[172]

Thomas Jefferson echoed Adams' sentiment in a letter to John B. Colvin after Colvin asked whether "officers in high trust had to act beyond the law."[173] Jefferson reflected on past military operations and hypothetical scenarios, taking the view that:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen: but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[174]

169. Bryant, *supra* note 91, at 5; *see* U.S. CONST. art I, § 8 & art 2, § 2.

170. Bryant, *supra* note 91, at 6. While the Sedition Act of 1798 limited civilian speech in a similar way, it faced tremendous backlash from the public and after John Adams lost reelection in 1800, the Act expired in 1801. *See also The Sedition Act of 1798*, HIST., ART & ARCHIVES OF THE U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1700s/The-Sedition-Act-of 1798/#:~:text=In%20one%20of%20the%20first,government%20of%20the%20 United%20States (last visited May 22, 2022). The Sedition Act of 1918 was later passed as Title I to the Espionage Act of 1917 and again limited civilian free speech during World War I. The Act was repealed in 1920 and came to be viewed as an overstep by the government. *See also* Christina L. Boyd, *Sedition Act of 1918*, FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/1239/sedition-act-of-1918#:~:text=1912%2C%20public%20domain)- ,The%20Sedition%20Act%20of%201918%20curtailed%20the%20free%20speech%20rights,and%20expanded%20limitations%20on%20speech. Despite this, some limits have been maintained regarding military free speech. *See, e.g.*, Bill Kenworthy, *Military Speech*, FREEDOM FORUM INST.E (Feb. 2010), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/military-speech/.

171. John Adams, *Autobiography of John Adams*, FOUNDERS ONLINE, NAT'L ARCHIVES (Sept. 19, 1776), https://founders.archives.gov/documents/Adams/01-03-02-0016-0195.

172. *Id.*

173. Letter from Thomas Jefferson, President, United States, to John B. Colvin (Sept. 20, 1810), https://founders.archives.gov/documents/Jefferson/03-03-02-0060.

174. *Id.*

Commitment to the protection of the new country was a consistent theme in the nineteenth century. Desperate to keep Maryland in the Union during the Civil War, Abraham Lincoln defended his decision to suspend the writ of habeas corpus in 1861 asking: "are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?"[175] Later, William T. Sherman, Commanding General of the Army for the Union, addressed Congress, saying:

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation. These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by evengrafting on our code their deductions from civil practice.[176]

Without a strong military, America's new, fragile democracy could fall, pushing good order and discipline to the top of the new military justice system's priority list. It is no surprise then, that until the UCMJ, the commander's authority was placed beyond the due process rights of individual military members.

Even after World War II in 1948, the former Commander of U.S. Forces in Europe, Dwight Eisenhower stated that military law "was never set up to insure justice . . . it is set up . . . to perform a particular function; and that function, in its successful performance, demands . . . almost a violation of the very concepts upon which our government is established."[177] Eisenhower recognized that because of this, "[the] division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders, cannot be as separate as it is in our own democratic government."[178] Despite giving Congress control over military law text and processes, leaders throughout the years have agreed that the commander's

175. Note that this suspension was not military-specific, but Lincoln's response recognizes the need for flexibility in the law, especially as it relates to military necessity. *See* Abraham Lincoln, President, U.S., Message to Congress, Second Printed Draft, with Changes in Lincoln's Hand (June or July 1861), https://loc.gov/resource/mal.1057200/?sp=1&st=text.

176. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 4–5 (1970) (quoting *Hearings on H.R. 2498 Before a Spec. Subcomm. of the House. Comm. on Armed Services*, 81st Cong. (1949)).

177. Delafield, Marsh & Hope Counsellors at Law, *Letter to the Committee on Uniform Code of Military Justice*, LIBR. OF CONG., *in* THE EDMUND M. MORGAN PAPERS – VOLUME IV (Jan. 29, 1949), https://www.loc.gov/rr/frd/Military_Law/Morgan_Vol-4.html.

178. *Id.*

ultimate authority is necessary for the strength of the military and preservation of civilian democracy.

But after World War II, public sentiment against the military justice system was at its peak and convinced Congress to act.[179] The UCMJ was passed and brought great reforms to the fairness and due process of law in the U.S. military.[180] However, the role of the commander, while checked and modified, was always left strong and able.

Unlike the civilian justice system, military law has a unique purpose: discipline. As Justice Rehnquist stated in *Parker v. Levy*, "the fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[181] The reforms proposed by the MJIIPA depart "unequivocally from the historical and constitutionally validated American practice that has been followed for more than two centuries[.]"[182] Colonel William Winthrop, whom the Supreme Court dubbed "Blackstone of Military Law,"[183] stated:

> Courts-martial are . . . in fact, simply instrumentalities of the executive power . . . to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representative. Thus indeed strictly, a court-martial is not a *court* in the full sense of the term . . . It is indeed a creature of orders and except insofar as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body of persons.[184]

The public, as a whole, generally does not understand this aspect of military justice—that it is not as much a system for the enforcement of laws or punishment of wrongdoers as much as a system to ensure the readiness of armies in a given mission. In fact, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."[185] The Supreme Court has further noted that

179. *See, e.g.*, Rollman, *supra* note 3, at 220; *see also* discussion at *supra* Subsection C.

180. *See generally* 10 U.S.C. §§ 801–940 (2021).

181. 417 U.S. 733, 758 (1974). The *Parker* Court further stated:

While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors. *Id.*

182. Lt. Col. Dan Maurer, *What the FY 2022 NDAA Does, and Does Not Do, to Military Justice*, DUKE LAWFARE (Dec. 30, 2021), https://www.lawfareblog.com/what-fy-2022-ndaa-does-and-does-not-do-military-justice.

183. Reid v. Covert, 354 U.S. 1, n.38 (1955).

184. WINTHROP, *supra* note 2, at 49.

185. Orloff v. Willoughby, 345 U.S. 83, 94 (1953). Civil courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, *supra* note 165.

"the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[186]

Advocates for reform often advance the argument that military commanders do not have any form of legal training and are therefore ill-equipped to understand legal cases and refer charges to trial.[187] Commanders do not typically have any legal training, nor do they need it to do their very job—maintain good order and discipline. For centuries, that role has not changed, and no one knows it better than the leaders themselves.

The military commander in the military justice system has no equivalent to anyone in the civilian system. The system has been built and structured so that the commanding officers can "carry out the orders of their civilian leaders."[188] This misconception of the role of the court-martial and its decision-makers is why reform to a commander's role has long been opposed by the Department of Defense and is still being fought by high-ranking officials.

In a letter to Senate Armed Services Committee member, Jim Inhofe, Chairman of the Joint Chiefs of Staff, General Mark Milley said:

> It is my professional opinion that removing commanders from prosecution decisions, process and accountability may have an adverse effect on readiness, mission accomplishment, good order and discipline, justice, unit cohesion, trust, and loyalty between commanders and those they lead.[189]

Marine Corps Commandant General David Berger expressed similar concerns, writing about MJIIPA: "I consider this bill a significant risk to readiness and mission accomplishment if not appropriately resourced. This bill would seem to lengthen the process, limit flexibility, and potentially reduce confidence among victims."[190]

While freedom and security are widely taken for granted in the United States, those comforts could disappear in the face of war with an undisciplined army. During a revolution, the Founders recognized the need for command authority, despite their trepidation about a fully military-controlled-military. Today, "there is a fundamental anomaly that vests a commander with life-or-death authority over his troops in

186. Burns v. Wilson, 346 U.S. 137, 140 (1953).

187. Speier Press Release, *supra* note 152. As stated by the press release, "[u]nder current law, commanders who do not have legal training make the decision on whether to prosecute a servicemember . . . ." *Id. See also* Donald W. Hansen, *Judicial Functions for the Commander*, 41 MIL. L. REV. 1, 53 (1968) ("[T]he peculiar nature of military service is such that courts-martial 'probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.'").

188. Spoehr, *supra* note 122.

189. Scott Maucione, *Military Leaders Push Back on Taking Crimes Out of Chain of Command*, FED. NEWS NETWORK (June 22, 2021), https://federalnewsnetwork.com/defense-main/2021/06/military-leaders-pushback-on-taking-nonmilitary-crimes-out-of-chain-of-command/.

190. *Id.*

combat but does not trust that same commander to make a sound decision with respect to justice and fairness to the individual."[191]

In times of war and peace, the military operates in vastly different conditions than civilian systems, and history has shown that the commander requires full control of their unit to maintain strict order. This central element of the military has been recognized throughout generations of American military justice development. Plaguing the justice process with bureaucracy eliminates this crucial control. Taking away command authority to "send serious criminal cases to a court-martial undermines their ability and responsibility to enforce good order and discipline, which in turn erodes their ability to fight and win wars."[192]

CONCLUSION

History shows us that military justice has evolved.[193] Over time, the laws that govern the militaries across the world have become more civilianized and demilitarized.[194] While following European military justice systems closely, America's Founders were still skeptical of giving the military full autonomy and opted for a civilian-controlled system.[195] The military, while powerful, is beholden to the legislation created by Congress and the orders given by its civilian commander-in-chief, the President. Despite the gradual demilitarization of the military, the commander has remained at the forefront of decision-making.[196] This structure has withstood the tests of war and the even greater tests of time.

The military justice system does have its flaws, but so does its civilian equivalent. One thing that is evident in any study of United States military law is its ability to be flexible. When the system has been criticized in the past, leaders have found ways to incorporate reform that is effective but not damaging to the hierarchical structure necessary for a strong, disciplined armed force.[197] It will continue to reform in a way that ensure readiness and mission success. In August 2018, four-star general and Secretary of Defense General James Mattis addressed the "force," writing:

> It is incumbent on our leaders to ensure that American Forces are always the most disciplined on the battlefield. Whatever the domain might be . . . . We must . . . remove the cancer of sexual misconduct from our ranks . . . . Enforcing standards is a critical component of making our force more lethal. Our leaders must uphold proven standards. They should know the difference between a mistake and a lack of discipline . . . . The military justice system is a powerful

191. Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 193 (2003).

192. Spoehr, *supra* note 122.

193. *See* discussion at *infra* Section I.

194. Maurer, *supra* note 182.

195. *See* discussion at *infra* Section IV.

196. *Id.*

197. *See* discussion at *infra* Subsection C.

> tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander's duty to use it . . . . Leaders must be willing to choose the harder right over the easier wrong . . . As General Washington learned first-hand, discipline will make us stronger and more lethal. Therefore, let nothing prevent us from becoming the most disciplined force this world has ever known.[198]

Sexual crimes in the military must be handled with an iron fist but disrupting the command hierarchy and system that has been in place for centuries is not the way to do it. Taking the commander out of military justice as suggested by the MJIIPA reorients the very purpose of the long-effective system—good order and discipline. These oft-quoted principles, supported by an empowered commander, are imperative to a strong and ready armed force during both times of war and peace.

The NDAA already passed several of the changes suggested by the MJIIPA, creating the Office of the Special Trial Counsel to make prosecutorial decisions for sexual crimes. Before Congress passes the remainder of the MJIIPA that will remove the chain of command from involvement in serious UCMJ offenses, it should wait and analyze how the NDAA 2022 policies are implemented and whether they make the intended impact.

198. James Mattis, Gen., U.S. Sec'y of Defense, Address on Message to the U.S. Marine Corps. Force (Aug. 17, 2018), https://www.marines.mil/News/Press-Releases/Press-Release-Display/Article/1605285/secretary-of-defense-message-to-the-force/ ("General Washington once commanded an outmanned and outgunned group of patriots that defeated Great Britain, then the strongest military in the world. He observed: 'Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.'").