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**NEEDED: AN INDEPENDENT MILITARY JUDICIARY—A
PROPOSAL TO AMEND THE UNIFORM CODE OF MILITARY
JUSTICE**

Fredric I. Lederer*

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It is the sense of the American Judges Association that our Judicial Brethren [in uniform] are not adequately protected from the bureaucracy of the military organization under existing service personnel policies and applicable legislation. To achieve [the] separate, independent status the AJA deems healthy for any Judiciary, the 145 or so officers presiding over the criminal trials must be guaranteed a capability to function within, but independent of the military organizations they serve.¹

In April of 1994, the United States Court of Military Appeals,² faced with an attack alleging at least a perception of partiality and dependence of the appellate judges of the United States Navy-Marine Corps Court of Military Review, held that annual rating of the appellate judges did not violate the Fifth Amendment, provisions of the Uniform Code of Military Justice, or the Rules for Courts-Martial. The court reached its conclusion despite the fact that the annual reports for the three Marine judges on the court were prepared by the Assistant Judge Advocate General of the Navy, an officer responsible for the Judge Advocate General's military justice duties, who was at that time in personal competition with the

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¹ Letter from the American Judges Association to the President of the United States (July 21, 1992), *reprinted in* United States v. Mitchell, 39 M.J. 131, 155 (C.M.A. 1994).

² In 1994, Congress changed the names of the military appellate courts. The United States Court of Military Appeals is now the United States Court of Appeals for the Armed Forces and the Courts of Military Review are now called the Courts of Criminal Appeals. See Pub. L. No. 103-337, § 924, 108 Stat. 2663 (1994).

judges for further promotion, and whose prior cases, decided in his prior assignment as a military judge, were then on appeal to the court.³

*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.*⁴

I. INTRODUCTION

The military judiciary is unique. Civilian judges in the United States are either elected or appointed. Once named to the bench, they are not subject to the direction of any other person and, absent removal proceedings, they remain on the bench until death, resignation, or completion of the judicial term. Judicial independence is one of the defining elements of the civilian judiciary.⁵ The military judge, on the other hand, is appointed by the Judge Advocate General (TJAG) of the appropriate armed service, serves without a fixed term at the pleasure of the Judge Advocate General, and is evaluated at least annually by senior officers. Subsequent promotion and reassignment are dependent upon the judge's annual officer evaluation and the personal knowledge and desires of those senior officers responsible for assignments.

Military judges preside over a wide range of criminal cases, including capital cases. When requested by the accused in a non-capital case, they sit as sole fact finder, without a jury. The pivotal role of the military judge is apparent. Yet, notwithstanding the need for an impartial military judiciary,⁶ there have been periodic reports of attempts by senior officers, including senior military judges, to influence judges improperly,⁷ particularly in their sentencing. In one extraordinary incident the Secretary of the Navy attempted, unsuccessfully, to have the Judge Advocate General of the Navy fire a Navy trial judge because of the judge's sentencing.⁸ At the very least, some

³ *Mitchell*, 39 M.J. at 134-35, 150.

⁴ LOUIS DE GAYA, *THE ART OF WAR* (1678), reprinted in 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE v* (1991).

⁵ See, e.g., Martha A. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 136.

⁶ See *infra* note 37. Because military readiness depends upon morale, it is essential that military personnel perceive that the military judiciary is impartial rather than serving merely as an instrument of command. See discussion *infra* part III.

⁷ See discussion *infra* part III.B.

⁸ GILLIGAN & LEDERER, *supra* note 4, at § 14-10.00 (Supp. 1993); see *infra* note 119 and accompanying text.

military judges have complained of punitive reassignments or promotion denials following judicial assignments.⁹ In this regard the American Judges Association has opined:

The perception is that without tenure, a military judge is subject to transfer from the service judiciary should he/she render unpopular evidentiary rulings, findings, or sentences. There is no protection from retaliatory action by dissatisfied superiors in the chain of command.

Similarly, the perception exists that judges who make rulings unpopular with [the] military hierarchy are endangering their possibilities of promotion because that same hierarchy is the system which makes selections for promotion.¹⁰

Notwithstanding these concerns, the Supreme Court recently commented that insofar as the military judiciary was concerned, the Court believed that "Congress has achieved an *acceptable balance* between independence and accountability."¹¹ And, rather ironically, the Court of Military Appeals has

⁹ United States v. Mitchell, 37 M.J. 903, 913, 918 (N.M.C.M.R. 1993), *aff'd*, 39 M.J. 131 (C.M.A. 1994) (reciting the "abiding conviction" of former Judge Rubens, that he was non-selected for the position of colonel and assigned to Panama because of his judicial decisions). In one peculiar case, the former senior judge of Fort Hood, Texas, felt compelled to assert from the bench that he would attempt not to let rumors (which he apparently did not necessarily believe to be false) that he had been replaced due to his sentencing philosophy affect his trial of the case. United States v. Campos, 37 M.J. 894, 896-97 (A.C.M.R. 1993); *see also* 2 THE MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT 364-65 (1984). The Commission analyzed data, gathered in a survey of commanders and military justice practitioners from the different services, and their knowledge of issues relating to command influence on judges. Respondents were asked whether they were aware of any situations in which military judges were either reassigned or threatened with reassignment because of their judicial decisions. *Id.* at 365. They were also asked whether they were aware of any cases in which judges had been criticized directly or indirectly for court related decisions. *Id.*

¹⁰ Letter from the American Judges Association to the President of the United States (July 21, 1992), *reprinted in Mitchell*, 39 M.J. at 154-55.

¹¹ Weiss v. United States, 114 S. Ct. 752, 762 (1994) (emphasis added). Concurring in the judgment, Justice Scalia observed:

With respect to the Due Process Clause challenge, I think it neither necessary nor appropriate for this Court to pronounce whether "Congress has achieved an acceptable balance between independence and accountability. . . ." As today's opinion explains, a fixed term of office for a military judge "never has been a part of the military justice tradition. . . . Courts-martial . . . have been conducted in this country for over 200 years without the presence of a tenured judge. . . ." Thus, in the Military Justice Act of 1968 the people's elected representatives achieved a

made a virtue of a vice by praising the very litigation that has highlighted some of these matters:

All these cases are significant because they show that the process which Congress has devised to permit challenges to our system works. Courageous and competent military defense counsel are bringing these challenges at the trial level. The same courage and expertise has also been shown at the appellate level. In addition, this Court has not summarily denied review in these cases, using our discretionary review power.¹²

One could interpret the Court of Military Appeals' language as saying that so long as some of the systemic problems that permeate the military judiciary are challenged in court, albeit unsuccessfully, no problems exist.

The potential, or actual, judicial independence problem which has manifested in the military legal system generally, and particularly in the naval services, is an inherent consequence of a system that is historically¹³ and statutorily based upon "command control," control by military commanders. The concept of judges as officers responsible to other officers who are, in turn, at least pragmatically responsible to still other officers is a natural consequence of the military paradigm. In large measure the recent history of military criminal law generally is its evolution away from command control, an evolution largely based upon the increasingly important role of the military judiciary. It is only appropriate that it is now time to review the very nature of the judiciary itself.

One can plausibly argue that acceptance of, and reliance upon, a legal system requires only that a population *believe* the system to be fair and just. Reality and appearance can be different things. Because military morale is dependent upon a belief that the military legal system treats personnel fairly, it is particularly important that the judiciary be perceived as independent of command control and thus impartial. We do not suggest that appearance is more important than reality; we believe both to be essential. Yet, it is not enough to claim that the system *is* fair if it is not generally perceived as fair. If the military judiciary, and consequently the results of the military

"balance between independence and accountability" which, whether or not "acceptable" to five Justices of this Court, gave members of the military at least as much procedural protection, in the respects at issue here, as they enjoyed when the Fifth Amendment was adopted and have enjoyed ever since. That is enough, and to suggest otherwise arrogates to this Court a power it does not possess.

Id. at 770-71.

¹² *Mitchell*, 39 M.J. at 135.

¹³ *See infra* note 212 and accompanying text.

criminal legal system, are to be (or at least ought to be) perceived as impartial and free of command control, either the appearance or actuality of command involvement is sufficiently troubling to justify remedial legislative action.

Full understanding of this situation and its possible solution requires a review of the history and nature of the military criminal legal system and the questionable nature of judicial independence, including brief consideration of the recent Supreme Court decision in *Weiss v. United States*¹⁴ in which the Court rejected two challenges to the independence of the military judiciary. Ultimately, we conclude that although the present military judiciary may in fact be impartial, there is at least an appearance, if not an actuality, that reprisals may be taken against judges who are "out of step." Accordingly, we then propose amending the Uniform Code of Military Justice to create an independent military judiciary.

II. THE HISTORY AND NATURE OF THE MILITARY CRIMINAL LEGAL SYSTEM

A. *Historical Development*

A historical survey of military law demonstrates a recurrent debate over how closely military justice should mirror that of civilian courts, and the transition of the military justice system from a self-run system of discipline by operational commanders to a sophisticated legal system which has placed increasing power in the military judiciary with the intent to achieve justice¹⁵ and thus order and discipline.¹⁶

Military justice predates the United States Constitution.¹⁷ In its most fundamental form, military criminal law stems directly from the unfettered right of the military commander to discipline subordinates for violations of the commander's orders, including orders to comply with expected standards of behavior. Historically, one can reasonably view the traditional court-martial panel of officers as the equivalent of an ad hoc committee appointed by the commander, the "convening authority," to make preliminary disposition

¹⁴ 114 S. Ct. 752 (1994). See generally *supra* note 11.

¹⁵ Unfortunately, some critics view military justice as a system that is unfair simply because it is run by the military and belongs to the military. See, e.g., David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 6 (1991). This shift away from discipline and towards justice was needed to put an end to the negative stereotypes of military justice. *Id.* at 9.

¹⁶ See 1 GILLIGAN & LEDERER, *supra* note 4, § 1-30.00.

¹⁷ Donald N. Zillman, *What Military Criminal Law Can Teach Us: A United States Perspective*, 42 U.N.B. L.J. 229, 229 (1993).

recommendations to the commander via verdict (findings) and, upon conviction, a sentence. Even today, military commanders and convening authorities occupy a critical and central role. Commanders decide whether to send offenders to trial, and, if so, to what level of tribunal; they pick the military "jury" that will sit on the case; and they approve, or disapprove the verdict and sentence.¹⁸ Until 1920, even an acquittal could be overturned by a convening authority, who could then send the case to a new trial.¹⁹ Until fairly recently, courts-martial tended to elevate "crime control" considerations over due process concerns, the intention being to speed up resolution of charges brought against the military accused.²⁰

The Framers of the Constitution made only limited reference to military justice in either the Constitution or the Bill of Rights.²¹ The Framers' intent as to the role of a permanent system of military justice is unclear. Previous congressional inaction during the Revolution in the face of repeated requests by George Washington for statutory punishment power²² suggests that Con-

¹⁸ See, e.g., U.C.M.J. arts. 25(d)(2), 34(a), 60(c), 10 U.S.C. §§ 825(d)(2), 834(a), 860(c) (1988).

¹⁹ Although more frequently, (whether in the past or present) the convening authority acts to grant leniency by disapproval of part of the guilty findings or sentence. The power to overturn an acquittal was abrogated by the 1920 Articles of War. Articles of War 40, Act of June 4, 1920, 41 Stat. 787. Interestingly, the 1928 Manual for Courts-Martial provided that even though an acquittal could not be disapproved, the reviewing authority could "properly advise the members of the court by letter of his non-concurrence in an acquittal . . . and the reasons for such non-concurrence." MANUAL FOR COURTS-MARTIAL U.S. ARMY 1928, at 74 (1943).

²⁰ See generally Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. & CRIMINOLOGY 238 (1966); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

²¹ See generally Honorable Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 4 (1987); Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958).

²² "The first Articles of War . . . authorized punishment without trial [only] for such offenses as indecent behavior at divine services, profanity, and failure to retire to quarters or tent at retreat." Captain Harold L. Miller, *A Long Look At Article 15*, 28 MIL. L. REV. 37, 38 (1965) (citing III JOURNALS OF THE CONTINENTAL CONGRESS 112-15 (Ford ed. 1905)). The authorized punishments "included forfeiture of pay and short periods of confinement." *Id.*

[T]he Congress did not provide Army commanders with authority to similarly punish the wide variety of minor offenses that are characteristic of soldiers of any army. 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 directed that:

gress did not view military law as having a high priority, and Congress surely did not envision a standing armed forces of a contemporary nature. The lack of information as to the intent of the Framers of the Constitution makes it a more perplexing task to determine the role and institutional necessities required of military justice pursuant to both Congress's Article I powers over the military and the Article III requirements for courts of law.

Until 1951, the Army and the Air Force were governed by the Articles of War, and the Navy was governed by the Articles for the Government of the Navy, both of which were initially copied from the British at the time of the Revolution.²³ Although the Articles of War were revised a number of times, the procedural portions of the Articles for the Government of the Navy remained almost unchanged until their abolition.

The constitutionality of military courts-martial was confirmed by the Supreme Court in *Dynes v. Hoover*,²⁴ in which the Court reasoned that Congress's Article I power over the military provided Congress with the authority to establish a system of military justice which was separate and distinct from that of Article III.²⁵ At the time of *Dynes*, however, the mili-

"[A]ll . . . 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."

Id. at 39 (quoting 6 WRITINGS OF WASHINGTON 70 (Fitzpatrick ed. 1932)).

Washington subsequently requested congressional authorization to administer summary punishment, while notifying Congress in 1776 "that he had ordered instant corporal punishment for disobedience of orders." *Id.* at 39 (quoting 6 WRITINGS OF WASHINGTON 114 (Fitzpatrick ed. 1932)). With the exception of an article permitting summary punishment of "reproachful or provoking speeches and gestures," *id.* at 39 (quoting V JOURNALS OF THE CONTINENTAL CONGRESS 788 (Ford ed. 1905)), Congress did not grant that authority, and subsequently Washington authorized summary lashing of soldiers who fired their guns without leave. *Id.* at 40 (citing 6 WRITINGS OF WASHINGTON 233-34 (Fitzpatrick ed. 1932)). Yet another request to Congress in 1778 for authority to authorize the provost marshal by regulation to summarily punish the "many little crimes and disorders incident to soldiery, which require immediate punishment . . ." went unanswered. *Id.* at 39 (quoting 10 WRITINGS OF WASHINGTON 362, 376 (Fitzpatrick ed. 1932)); see also Fredric I. Lederer, *Rethinking "Disciplinary Punishment": A Proposed Adoption of Unit Punishments*, MIL. REV. (forthcoming 1994).

²³ WILLIAM T. GENEROUS JR., *SWORDS AND SCALES* 11-12 (1973). See generally Gerald F. Crump, *Part I: A History of the Structure of Military Justice in the United States, 1775-1920*, 16 A.F. L. REV. 41 (1974). For the Coast Guard, see *id.* at 53.

²⁴ 61 U.S. 65 (1857).

²⁵ The powers granted to Congress under Article I

show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilianized nations; and that the power to do so is given without any connection between it and the [third] article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

tary was still governed by the Articles of War and the Articles for the Government of the Navy, and courts-martial were perceived as a mere disciplinary tool for service-connected offenses, immunizing military law from the reaches of Article III.²⁶

In large measure the eventual evolution of military criminal law was presaged by the "Ansell-Crowder debates." As described in one treatise:

During World War I the Judge Advocate General of the Army, Major General Crowder, was assigned as the Provost Marshall General and director of selective service, leaving as acting Judge Advocate General, Brigadier General Ansell. Although the two men appear to have been personally at odds, they also differed sharply in their legal perspective. Crowder, the principal author of the 1916 Articles of War, was an outspoken defender of the existing system. Ansell believed major changes were needed. He was particularly motivated after 13 black soldiers were tried for mutiny at Fort Sam Houston, Texas, had their record of trial reviewed on a daily basis by the Staff Judge Advocate (the commander's lawyer) and were executed almost immediately after conviction, with the record of trial reaching Washington four months later. Although Ansell was eventually forced to resign from the Army, in large part due to the opposition of General Crowder, Ansell managed to obtain, by general order, mandatory review, "in the nature of an appellate tribunal" in The Judge Advocate General's Office in Washington, of death sentences and dismissals of officers. More importantly, he drafted and proposed major amendments to the 1916 Articles of War.

At the heart of these proposals was a radically new concept of military law, one which would divorce the court-martial from the commanding officer and move into the vacuum thus created lawyers, civilian-like rules of procedure and evidence, and a complex system of appellate review to filter out whatever remnants of past attitudes still remained.

Although most of Ansell's proposals were not adopted in the ensuing 1920 Articles, in one sense [General Ansell] "won." Professor Edmund Morgan, who had "served as a major under General Ansell" and who as a civilian testified in favor of his proposals, ultimately proved to be the primary

Id. at 79.

²⁶ Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1915 (1990).

drafter of the 1951 Uniform Code of Military Justice and adopted Ansell's views.²⁷

Popular disenchantment with military justice during World War II resulted in a substantial reform effort, and ultimately yielded the Uniform Code of Military Justice, the "U.C.M.J."²⁸ The 1950 enactment of the U.C.M.J. commenced the "modern era of military justice."²⁹ With this Code came the creation of the civilian United States Court of Military Appeals,³⁰ designed as a check on the operation of military justice.³¹ Both the Uniform Code and the Court of Military Appeals were compromises between those who demanded that commanders retain nearly unlimited control over military law and those who wished to place significant power in the hands of lawyers and judges.

Those who feared that the creation of a civilian court at the apex of the military legal system³² would threaten traditional military command control, were proven correct as the United States Court of Military Appeals increasingly assumed, and exercised, ever growing power over the system. Commanders might play a determining role in the early stages of a given case, but the Court of Military Appeals interprets the sources of military law: the Constitution, the U.C.M.J., and the President's implementing executive order, the Manual for Courts-Martial. As originally written, however,

²⁷ GILLIGAN & LEDERER, *supra* note 4, at § 1-43.00 (footnotes omitted). Article 50 1/2 did require, however, an appellate board of review in the office of the Judge Advocate General of the Army. See generally THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERALS CORPS 137 (1975).

²⁸ 10 U.S.C. §§ 801-946 (1988 & Supp. V 1993).

²⁹ Cox, *supra* note 21, at 14.

³⁰ The court was not officially named until passage of the Military Justice Act of 1968, Pub. L. No. 90-632, which expressly stated that the court was created pursuant to Article I of the Constitution. For a review of aspects of American military criminal law and the origins of the Court of Military Appeals, see generally JONATHAN LURIE, ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950 (1992). In 1994, the court was renamed the United States Court of Appeals for the Armed Forces. See *supra* note 2.

³¹ Noyd v. Bond, 395 U.S. 683, 694 (1969). Specifically, the Court stated that:

When . . . Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain . . . a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

Id.

³² Appeal to the Supreme Court was not statutorily authorized until 1983. See *infra* note 50 and accompanying text. Before 1983, cases could reach the Court only via appeals of habeas corpus or via court of claims cases. See, e.g., 2 GILLIGAN & LEDERER, *supra* note 4, at § 26-11.00.

the U.C.M.J. vested tremendous control in the “convening authority”—a nearly all powerful military commander who not only selected judge, jury, prosecutor and defense counsel, but also decided which cases were to be tried and the level of tribunal at which the case was to be heard. The authority of the “convening authority” was not matched at the trial level by the one legal figure who might have had countervailing powers: the trial judge.

As initially drafted, the U.C.M.J. did not mandate that trials be presided over by “judges.” Instead, until 1969 “law officers” presided over general courts-martial.³³ This “law officer,” though a lawyer, could be a direct subordinate of the convening authority.³⁴ Although the law officer presided over a general court-martial in a fashion analogous to a civilian judge, the law officer exercised far more limited authority. Not only were law officers devoid of authority until trial began, but some rulings were even subject to overruling by the court members, the “jury.”³⁵ Trials in the substantially more numerous special and summary courts-martial were tried without law officers entirely.³⁶

The Military Justice Act of 1968 created the position of “military judge” to preside over courts-martial,³⁷ and in doing so made the single most important step towards “civilianization”³⁸ since the 1950 creation of the Court of Military Appeals. The military judge who presided over general courts-martial and, ordinarily, special courts-martial,³⁹ was a military lawyer, a judge advocate, assigned to the position of judge by the Judge Advocate General of the armed force concerned.⁴⁰ Judges were no longer directly

³³ See Pub. L. No. 81-506, § 1, 64 Stat. 108 (1950).

³⁴ O’Callahan v. Parker, 395 U.S. 258, 264 (1969) (referring to the pre-1968 U.C.M.J.).

³⁵ A ruling on a motion for a finding of not guilty or a finding of the accused’s sanity was subject to overruling by the court members. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 ¶ 57d.

³⁶ See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 ¶ 78.

³⁷ When Congress enacted the Military Justice Act of 1968, the chief goal was to remove military judges from the influence of commanders.

The intent [was] to provide for the establishment within each service of an independent judiciary composed of military judges certified for duty on general courts-martial, who are assigned directly to the Judge Advocate General of the service and are responsible only to him or his designees for direction and fitness ratings.

United States v. Mitchell, 37 M.J. 903, 903 (N.M.C.M.R. 1993) (quoting S. REP. NO. 1601, 90th Cong., 2d Sess. 7 (1968)).

³⁸ The adoption of institutions and procedures substantially similar to civilian ones, especially those of the federal district courts.

³⁹ Although the U.C.M.J. permits special courts-martial without military judges, U.C.M.J. art. 26(a), 10 U.S.C. § 826(a), in the years after the amendment few such cases were actually tried. The Rules for Courts-Martial now mandate the use of judges at special courts-martial. R.C.M. 501(a)(2).

⁴⁰ U.C.M.J. art. 26(c), 10 U.S.C. § 826(c) (1988); see Pub. L. No. 90-632, 82 Stat.

responsible to commanders. Control over the aspects of court-martial procedure began to shift to the military judiciary.⁴¹

Immediately following the enactment of the Military Justice Act of 1968, and before the new institution of military judge took hold, the Supreme Court decided *O'Callahan v. Parker*,⁴² a case important both for the Court's (subsequently overruled)⁴³ holding and the manner in which Justice Douglas wrote the opinion. Prior to *O'Callahan*, the military had subject matter jurisdiction over any offense committed by a member of the armed forces, wherever that offense may have been committed.⁴⁴

Declaring that "[a] court-martial is not yet an independent instrument of justice but remains, to a significant degree, a specialized part of the overall mechanism by which military discipline is preserved,"⁴⁵ the Supreme Court required that there be a "service connection" between the accused member's crime and his military service before he could be subject to court-martial.⁴⁶ Absent such a service connection, the military member could only be tried by civilian authority.⁴⁷ If charged with a federal offense, the accused would be entitled to an indictment by a grand jury and trial in an Article III court.⁴⁸ *O'Callahan* was based in large part on the "sentiment that the military lacked the ability to render justice fairly and impartially" and that courts-martial lacked the safeguards present in Article III courts.⁴⁹ In large

1335 (1968).

⁴¹ The on-going evolution of the role of military judge was keenly summarized as follows:

[T]he Court of Military Appeals began a series of decisions in which it gradually has moved the status of the military judges closer to that of their counterparts in the federal civilian justice system. To appreciate the current role of military judges, one must examine not only their present powers, but also the historical development of the military trial judiciary. This history not only explains the basis for the current powers of military judges, but also suggests that the trend of expanded powers will continue. Decisions from the Court of Military Appeals also imply that, in time, military judges will assume still more of the powers now associated with the federal civilian bench.

Clyde Tate & Gary Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 23 (footnotes omitted).

⁴² 395 U.S. 258 (1969).

⁴³ See *Solorio v. United States*, 483 U.S. 435 (1987).

⁴⁴ *Id.* at 439 ("[I]n an unbroken line of decisions from 1866 to 1960, this court interpreted the constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

⁴⁵ *O'Callahan*, 395 U.S. at 265.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Of course, most military personnel would be tried in state courts that are not required to afford those protections or even, as it proved, unanimous twelve member jury verdicts.

⁴⁹ Cox, *supra* note 21, at 21 (referring to *O'Callahan*, 395 U.S. at 258). Unfortu-

measure *O'Callahan* reflected the traditional notion of a command controlled military legal system.

In 1983, Congress authorized the Supreme Court to hear certain appeals from the Court of Military Appeals.⁵⁰ Interestingly, the Military Justice Act of 1983 also provided for the establishment of an Advisory Commission⁵¹ to study and make recommendations concerning several issues pivotal to military justice, including “[w]hether military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure.”⁵² Not only did the Commission reject the notion of tenure for these judges,⁵³ in a dissent from the majority of the Commission,

nately, the Court’s opinion was based, in part, on the pre-1968 system of military justice. The facts of the case reveal that the alleged crime was committed in 1956, twelve years prior to the new Military Justice Act, thus forcing review of the military member’s conviction under the old system, which admittedly lacked independence. *O'Callahan*, 395 U.S. at 259.

⁵⁰ U.C.M.J. art. 67(a), 10 U.S.C. § 867(a) (1988 & Supp. V 1993). That statute provides:

- (a) Decisions of the United States Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Military Appeals in refusing to grant a petition for review.
- (b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

Id.

Given the review powers granted to the Supreme Court by the Military Justice Act of 1983, it is useful to recall the often upheld fundamental proposition that “[A]rticle III courts must give great deference to the professional judgement of military authorities concerning the relative importance of a particular military interest.” Cox, *supra* note 21, at 22 (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). Additionally, deference must be given to Congress in the exercise of its Article I power to operate the military. “[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.” *Burns v. Wilson*, 346 U.S. 137, 140 (1953). Finally, decisions by the Court of Military Appeals are entitled to great deference because they deal “with areas of law peculiar to the military branches.” *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

⁵¹ 10 U.S.C. § 867(g), Pub. L. No. 98-209, 97 Stat. 1393, 1405 (1983).

⁵² 1 THE MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT, COMMISSION RECOMMENDATIONS 2 (1984). The Commission also considered whether sentencing authority should be exercised by the military judge alone, rather than the court members, whether military judges should have tenure, whether the Court of Military Appeals should be an Article III court, and whether the jurisdiction of the special court-martial should be expanded. *Id.*

⁵³ See *id.* at 4.

a Navy captain and a Marine colonel lashed out at the present structure of our military justice system and at the Court of Military Appeals. They believed the system had moved too fast and too far toward being a "civilian system" and was therefore an inadequate tool for commanders of the twenty-first century.⁵⁴

Notwithstanding the Commission's decision to preserve the status quo, in 1987 *O'Callahan* was overruled by *Solorio v. United States*,⁵⁵ which held that court-martial jurisdiction depends solely on the accused's status as a member of the armed forces.⁵⁶ *Solorio* implicitly rejected Justice Douglas' harsh judgment of military law: "The demise of the service-connection test and the consequent expansion of military court jurisdiction to activities of service members unrelated to the military or to military discipline undermines [the] rationale [that courts-martial are merely a congressional or executive instrument designed to maintain discipline in the armed forces]."⁵⁷ With this expansion, military courts-martial now assumed a role somewhat equivalent to that of Article III courts.

Finally, in 1994 the Supreme Court rejected attacks on the independence of the military judiciary,⁵⁸ a rejection which has set the stage for this Article.

Viewing the history of military law from a broad perspective, it is evident that its modern history has been a struggle for power between the command structure and uniformed lawyers. Despite some significant anachronistic features which still remain, lawyers have now largely won the battle.⁵⁹ Ironically, the latest phase of the struggle is between the military judge and those other military lawyers, including supervisory judges, who may intentionally or accidentally seek or appear to seek to influence the judge.

⁵⁴ Cox, *supra* note 21, at 18 (footnote omitted).

⁵⁵ 483 U.S. 435 (1987).

⁵⁶ *Id.* at 450-51.

⁵⁷ *Military Justice and Article III*, *supra* note 26, at 1918.

⁵⁸ *Weiss v. United States*, 114 S. Ct. 752 (1994) (holding that current method for appointing military judges did not violate the Appointments Clause and that the Due Process Clause was not violated by the lack of fixed terms of office for military judges); see discussion *infra* part III.C.

⁵⁹ The last major campaign is likely to center around the ability of the military trial judiciary to issue orders in the form of extraordinary writs to senior commanders.

B. *The Structure of the Military Criminal Legal System*

Congress enacted the Uniform Code of Military Justice⁶⁰ by authority granted under Article I of the Constitution.⁶¹ The Code includes all the necessary procedural provisions for the military criminal legal system as well as the substantive criminal code applicable to members of the armed forces. Pursuant to the authority provided in Article 36⁶² and his inherent authority as Commander-in-Chief, the President issued the Manual for Courts-Martial as an executive order. The Manual includes the Military Rules of Evidence and the procedural Rules for Courts-Martial.

Under the Code and Rules for Courts-Martial, convening authorities, who are usually senior commanders, have the sole power to: create courts-martial;⁶³ decide whether to send a case to trial, and if so to what type of tribunal; appoint the court members (the jurors); and approve the findings (verdict) and sentence.⁶⁴

The Uniform Code of Military Justice establishes a three-tier structure of courts: the trial courts, the military appellate courts, and the United States Court of Appeals for the Armed Forces, previously known as the United States Court of Military Appeals until its 1994 name change.

1. *The Trial Courts*

The trial courts consist of three levels of courts-martial: summary, special, and general courts-martial. With a few exceptions, any of the military tribunals can be used to try any offense under the Uniform Code, however serious. The severity of the sentence sanctions available vary by the type of court-martial involved. The summary court-martial is a minor tribunal with jurisdiction only over non-officer service members who consent to its jurisdiction.⁶⁵ Summary courts-martial are presided over by a commissioned

⁶⁰ 10 U.S.C. §§ 801-946 (1988 & Supp. V 1993).

⁶¹ Congress has the power to "raise and support Armies," U.S. CONST. art. I, cl. 12; Congress is authorized to "provide and maintain a Navy," *id.* art. I, cl. 13; it has the power "to make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, cl. 14; and to "make all laws [that are] . . . necessary and proper," *id.* art. I, cl. 18.

⁶² 10 U.S.C. § 836 (1988 & Supp. V 1993).

⁶³ Courts-martial are not courts of continuing jurisdiction.

⁶⁴ *See supra* note 18 and accompanying text.

⁶⁵ These are ordinarily service members who have committed minor offenses. The U.C.M.J., however, does not prohibit the trial in summary courts-martial of what in civilian life would be serious felonies, including varying forms of homicide. The summary court's maximum punishment of one month's confinement and reduction to the lowest enlisted grade remains constant, regardless of the charged offense. U.C.M.J. art.

officer who normally is not legally trained, and who is empowered to impose up to one month confinement and other relatively modest punishments.⁶⁶ Because summary courts-martial lack judges, they are not at issue in the current debate. The special court-martial, on the other hand, is composed of a military judge and, unless the accused elects a bench trial, at least three court-martial members who act as a jury.⁶⁷ The maximum sentence available at a special court-martial is six months confinement, fines or forfeitures, and, for an enlisted accused, a bad conduct discharge.⁶⁸ Lastly, the general court-martial has jurisdiction over all U.C.M.J. offenses and may impose any lawful sentence, including death.⁶⁹ This type of courts-martial is presided over by a military judge and, unless the accused elects a bench trial,⁷⁰ a panel of at least five service members.⁷¹

2. *The Appellate Courts*

The first appellate level consists of the four Courts of Criminal Appeals, previously known as the Courts of Military Review until their 1994 name change,⁷² one each for the Air Force, Army, Coast Guard, and Navy-Marine Corps.⁷³ The Uniform Code provides for automatic review by these courts in all cases involving death sentences, dismissal of officers, dishonorable or bad-conduct discharges, and sentences of confinement for one year

19, 10 U.S.C. § 819 (1988).

⁶⁶ U.C.M.J. arts. 16(3), 20, 10 U.S.C. §§ 816(3), 820 (1988).

⁶⁷ U.C.M.J. art. 16(2), 10 U.S.C. § 816(2) (1988). Court-martial members may be either officers or enlisted personnel, depending on the status and desire of the accused service member. U.C.M.J. art. 25, 10 U.S.C. § 825 (1988). Their responsibilities are similar to, but somewhat greater than those of civilian jurors. *See id.*

⁶⁸ U.C.M.J. art. 19, 10 U.S.C. § 819 (1988). Lesser punishments including reductions in rank are available. *See id.*

⁶⁹ U.C.M.J. art. 18, 10 U.S.C. § 818 (1988).

⁷⁰ A bench trial is not available in a capital case. U.C.M.J. art. 18, 10 U.S.C. § 818 (1988); R.C.M. 201(f)(1)(C).

⁷¹ U.C.M.J. art. 16(1), 10 U.S.C. § 816(1) (1988).

⁷² *See supra* note 2.

⁷³ Article 66 of the U.C.M.J. addresses the establishment of Courts of Criminal Appeals:

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him.

U.C.M.J. art. 66(a), 10 U.S.C. § 866(a) (1988).

or more.⁷⁴ These courts, usually sitting in three-judge panels, exercise an “awesome, plenary, *de novo* power of review.”⁷⁵ A Court of Criminal Appeals “may affirm only such findings of guilty, and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.”⁷⁶ In 1993, there were thirty-five appellate military judges,⁷⁷ thirty-three of whom were active duty military officers and two of whom were retired military officers.⁷⁸

The final tier consists of the United States Court of Appeals for the Armed Forces, a five-judge panel of civilians appointed by the President with the advice and consent of the Senate for a fifteen year fixed term of office.⁷⁹ The Court of Appeals for the Armed Forces is the highest appellate court in the military.⁸⁰ Its decisions are reviewable by the Supreme Court of the United States.⁸¹

3. *The Judiciary*

Military trial judges are commissioned officers in the armed services, who are previously appointed as military officers by the President with the advice and consent of the Senate.⁸² A commissioned officer in the Judge Advocate General's Corps may be selected, certified as qualified, and assigned by the principal legal officer of her service, the Judge Advocate General (TJAG), to sit as a military judge for a certain judicial circuit.⁸³

⁷⁴ U.C.M.J. art. 66(b), 10 U.S.C. § 866(b) (1988).

⁷⁵ *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

⁷⁶ U.C.M.J. art. 66(c), 10 U.S.C. § 866(c) (1988).

⁷⁷ *Petition for Writ of Certiorari at 4, Weiss v. United States*, 114 S. Ct. 752 (1994) (No. 92-1482).

⁷⁸ Chief Judge Baum and Judge Bridgman are both retired military officers serving as judges on the U.S. Coast Guard Court of Military Review. *United States v. Prive*, 35 M.J. 569, 579 (C.G.C.M.R. 1992).

⁷⁹ U.C.M.J. arts. 67, 142, 10 U.S.C. §§ 867, 942 (1988 & Supp. V 1993).

⁸⁰ U.C.M.J. art. 142, 10 U.S.C. § 942 (Supp. V 1993).

⁸¹ U.C.M.J. art. 67(a), 10 U.S.C. § 867(a) (1988 & Supp. V 1993).

⁸² All commissioned officers are appointed by the President, with the advice and consent of the Senate. 10 U.S.C. § 531 (1988 & Supp. V 1993).

⁸³ The Uniform Code of Military Justice provides that:

A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such a military judge is a member.

U.C.M.J. art. 26(b), 10 U.S.C. § 826(b) (1988).

“The military judge of a general court-martial *shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a*

Judicial billets, or appointments, are not for fixed terms. "Each armed force assigns military judges as and when it sees fit."⁸⁴ Additionally, an assignment to a judicial billet may be terminated at any time by transfer to other duties or by decertification at the discretion of the military judge's Judge Advocate General.⁸⁵ Military judges are detailed (assigned or appointed) to special courts-martial, and when qualified under the Uniform Code,⁸⁶ to general courts-martial. While serving as military trial judges, however, these officers may also perform other tasks unrelated to their judicial duties with the approval of the Judge Advocate General.⁸⁷

Military trial judges in special and general courts-martial have far ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [of the jury] on questions of law and procedure which may arise," and to "promulgate and enforce rules of court."⁸⁸ Because of the unique history of military criminal law, which has given rise to courts of significantly limited jurisdiction, military judges are generally powerless unless assigned to a given case.⁸⁹ That fact, and the current assumption that military trial judges lack extraordinary writ powers, substantially limit the judge's ambit. The creation of continuous jurisdiction courts with extraordinary writ powers would give military judges the power to issue orders to flag officers, generals, and admirals, far senior to the judges in rank. Such a situation is an anathema to those who are strong adherents of command control.

Judges of the Courts of Criminal Appeals are also appointed by the individual Judge Advocate General and serve at that officer's pleasure without fixed terms.⁹⁰ Civilians can be appointed to the Courts of Criminal Ap-

member." U.C.M.J. art. 26(c), 10 U.S.C. § 826(c) (1988) (emphasis added).

⁸⁴ Petition for Writ of Certiorari at 5, *Weiss v. United States*, 114 S. Ct. 752 (1994) (No. 92-1482).

⁸⁵ GILLIGAN & LEDERER, *supra* note 4, at § 14-31.00.

⁸⁶ U.C.M.J. art. 26, 10 U.S.C. § 826 (1988).

⁸⁷ See 10 U.S.C. § 3037 (Army); *id.* § 5148 (Navy-Marine Corps); *id.* § 8037 (Air Force); U.C.M.J. art. 1(1), 10 U.S.C. § 801(1) (1988) (Coast Guard). The requirement for TJAG approval for non-judicial duties is limited to general court-martial judges. This rule was enacted to allow the services to have collateral duty special court-martial judges, as the Coast Guard still does.

⁸⁸ R.C.M. 801(a)(4), (5), (b)(1).

⁸⁹ A military "court" consists of the court members. Historically, the judge was a late addition. See *Weiss v. United States*, 114 S. Ct. 753, 756 (1994). Accordingly, a judge obtains legal status only upon the creation of a court-martial and the referral to it of a case to which the judge is assigned. The current practice of circuit judges with the power to detail themselves to cases occurring within their geographical jurisdiction suggests that modern day realities have undercut the historical origins of the current limitations.

⁹⁰ See Petition for Writ of Certiorari at 5, *Weiss* (No. 92-1482). Military judges are

peals.⁹¹ At present, the only "civilian judges" on the courts are retired officers.⁹² The Courts of Criminal Appeals do have all writs power.⁹³

Military trial and appellate judges receive annual fitness (efficiency) reports as do all other active duty commissioned officers.⁹⁴ These performance evaluations are the basis for promotions, future duty assignments, and susceptibility to involuntary early retirement.⁹⁵ Trial judges are evaluated by other senior supervising judges.⁹⁶ The appellate judges, however, may receive their evaluations from the appropriate service's Judge Advocate General, who is responsible for supervising all military lawyers who practice in the military judicial system, including military prosecutors.⁹⁷

C. *The System's Jurisprudential Goals*

Throughout most of the history of military law, the system's primary goal has been the creation or bolstering of discipline within the armed force involved, "a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed."⁹⁸ Arguably, a discipline based system need not be significantly concerned with justice.

Traditionally, those most interested in discipline are likely to emphasize prompt obedience to orders, and those most interested in justice are likely to emphasize accuracy and fairness in punishing individual offenders. The evolution of military criminal law demonstrates an often changing balance be-

appointed as the need arises. Although judges serve in assignments usually lasting two to four years, "a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force." *Id.* (quoting GILLIGAN & LEDERER, *supra* note 4, at § 14-31.00).

⁹¹ U.C.M.J. art. 66(a), 10 U.S.C. § 866(a) (1988).

⁹² *See supra* note 78 and accompanying text.

⁹³ *See, e.g.*, Coffey v. Commanding Officer, USS Charleston, 33 M.J. 938, 939 (N.M.C.M.R. 1991) (denying extraordinary relief); Tillman v. United States, 32 M.J. 962 (A.C.M.R. 1991) (granting *coram nobis*).

⁹⁴ Article 1129 of Navy Regulations, which are issued pursuant to 10 U.S.C. § 6011 (1988).

⁹⁵ *See, e.g.*, United States v. Mitchell, 39 M.J. 131 (C.M.A. 1994).

⁹⁶ *Id.* at 134.

⁹⁷ U.C.M.J. art. 27(b), (c), 10 U.S.C. § 827(b), (c) (1988) (counsel shall be certified by the Judge Advocate General); R.C.M. 109 (professional supervision of military judges and counsel).

⁹⁸ 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 (1960), *quoted in* REPORT OF THE DEPARTMENT OF DEFENSE STUDY GROUP ON THE UNITED STATES COURT OF MILITARY APPEALS 1, 34-35 (1989).

tween the goals of discipline and justice on the one hand and rapidity and due process on the other.

A justice-based system must seek accuracy in judgment. An individual should not be punished for a dereliction that he or she did not commit. A discipline-based system need not be so concerned. One can easily envision a system designed only to ensure prompt and total obedience to orders through fear of punishment. Unconcerned with individual accuracy, such a deterrence-based system assumes that personnel can best be motivated by fear. Presented solely as extremes, both models have pros and cons.

A discipline-based system can operate swiftly, efficiently, and economically. If sufficiently severe enough sanctions are imposed for rule violations, the basic survival instinct will normally impel rule compliance by personnel. Creation and maintenance of such a system may be a commander's first preference.

....

A discipline-based system has significant drawbacks. If discipline is perceived as unfair, personnel will likely distrust superior authority and have diminished institutional loyalty. They may also be particularly fearful of making mistakes, and personal initiative may be stifled. If sanctions are severe enough and imposed often enough, personnel may decide that mutiny is preferable to continued performance of duty.

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 which is usually slow and expensive, at least by comparison with 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.

Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice-based. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline

within an American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice oriented system in order to ensure discipline; in our case, justice is essential to discipline.⁹⁹

III. "COMMAND CONTROL" AND JUDICIAL INDEPENDENCE

By its very nature, the military criminal legal system operates in an awkward fashion. Commanders are given extensive responsibilities and powers in order to make it work. Yet, commanders who stray from the system's clear constraints run the risk of affecting the fairness of individual trials and subverting the legitimacy of the entire system. Although "command control" is lawful and mandated by Congress, "command influence" is not. Command influence is the unlawful action of individuals acting under what appears to be the color of command authority, which violates the Uniform Code of Military Justice's provisions by injecting what appear to be a commander's desires into a case in such a way that either the verdict or sentence might be affected. A commander who makes known to the military judge or jury (the court members) his desire for a conviction or some type of sentence is guilty of command influence. Once adequately raised, the allegation of the use of command influence compels reversal of a conviction unless the influence can be shown to have been harmless beyond a reasonable doubt.¹⁰⁰

The distinction between command control and command influence may sometimes seem fanciful to the civilian observer. Thus, although it is blatantly unlawful command influence for a commander to attempt to have court members sentence in accord with the commander's wishes, as the convening authority responsible for creating or convening the court, the commander is statutorily required to personally select the court members.¹⁰¹

The Court of Criminal Appeals has opined that "[c]ommand influence is the mortal enemy of military justice."¹⁰² Because of the structure of military law, commanders are inherently tempted to misuse their authority. Commanders charged with ensuring both mission readiness and unit discipline are placed in a particularly awkward position by a system that places total responsibility on them for mission accomplishment, but prohibits them

⁹⁹ GILLIGAN & LEDERER, *supra* note 4, at § 1-30.00 (footnotes omitted).

¹⁰⁰ See, e.g., *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987).

¹⁰¹ U.C.M.J. art. 25, 10 U.S.C. § 825 (1988). In actual practice, members tend to be selected from a duty roster type system with the convening authority only ratifying the proposed choices.

¹⁰² *Thomas*, 22 M.J. at 393.

from taking what often seems like common sense action. Why, a ship captain might ask, should one be encouraged to deter and stop drug use but be prohibited from suggesting that drug sellers receive significant prison sentences if convicted?

Even when commanders act properly there is a constant risk that subordinates may act in a fashion consistent with what they think the commander must want. The desire ordinarily to please one's boss is a civilian constant. In the military it is no less absent; arguably it is even stronger, given the powers of command. Further, an accused, if not a neutral observer, can also interpret well intentioned conduct by senior officers, such as a staff judge advocate (SJA), as attempting to adversely affect a verdict.¹⁰³

It is possible to apply the command control/command influence dichotomy to the military judiciary. It is a proper function of "command" for the Judge Advocate General to select an officer for assignment as a military judge, and it is a proper function for authorized officers to evaluate that judge.¹⁰⁴ Furthermore, upon the end of the assignment, or for other proper

¹⁰³ See, e.g., *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993) (alleging in petition that the SJA, who rated both prosecutor and defense counsel, showed outward support for the prosecutor, and that this conduct constituted unlawful command influence by subtly pressuring the defense counsel through lack of equal support). Improper influence by the SJA is less likely today because of independent defense counsel. Naval Legal Service Offices (NLSO) are combined legal offices in which the commanding officer rates both trial and defense counsel. The NLSO commanding officer, however, is not responsible to the convening authority. In the Coast Guard, as *Caritativo* demonstrates, an SJA might have rating authority over the defense counsel because of the small size of the service.

¹⁰⁴ Both the Uniform Code and regulations, however, strictly limit the criteria upon which a judge's rating may be based. Article 37(a), for example, provides:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

U.C.M.J. art. 37(a), 10 U.S.C. § 837(a) (1988). With respect to appellate judges, Article 66(g) provides:

No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces

reasons, it is a permissible use of command authority to terminate the judge's assignment or to relocate the judge.

In contrast, it is the equivalent of command influence for an officer senior to the judge, whether that officer is a supervising judge or the Judge Advocate General, to attempt to influence a judge's actions with respect to a case, including the judge's general sentencing behavior. Similarly, a judge should not be reassigned because of dissatisfaction with his or her decisions. Unfortunately, the risk of "command" retaliation—actions taken by more senior judges, the Judge Advocate General or his or her subordinates—can be very subtle. Any number of administrative decisions adverse to a judge can be taken in such a way as to defy either detection or clear causation. Real or perceived limitations on the independence of military judges stem directly from the very structure of the military legal system, complicated by the culture within which the judiciary exists.

A. *The Judge Advocate General*

Military judges are selected by the Judge Advocate General of the armed force concerned.¹⁰⁵ That officer, "TJAG" in army parlance, is a statutorily prescribed position that requires independent nomination by the President and confirmation by the Senate.¹⁰⁶ A significant legal advisor to the armed force in question, TJAG is responsible for each service's Judge Advocate General's Corps and is the principal advisor on criminal law matters.¹⁰⁷ The vast bulk of contemporary legal matters are non-criminal, although this has not always been true. TJAG often functions in a fashion similar to that of the Attorney General of the United States. At least theoretically, TJAG

is qualified to be advanced in grade, or in determining whether a member of the armed forces shall be retained on active duty.

U.C.M.J. art. 66(g), 10 U.S.C. § 866(g) (1988). Interestingly, trial judges are routinely rated by more senior trial judges. *See, e.g., GILLIGAN & LEDERER, supra* note 4, at § 14-10.00 (1993 Supp.).

¹⁰⁵ U.C.M.J. art. 26(c), 10 U.S.C. § 826(c) (1988). The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. The senior military lawyer in the Coast Guard is the Chief Counsel of the Coast Guard whose day to day operations approximate that of the other services' Judge Advocates General. *See* 10 U.S.C. § 3037 (Army); *id.* § 3036 (Navy); *id.* § 8037 (Air Force).

¹⁰⁶ The incumbent in the Army, Air Force, and Navy is a major general or rear admiral (upper half).

¹⁰⁷ In 1992, the general counsels of each military department were made the "chief legal officers" of those departments. For a review of the powers and responsibilities of the Judge Advocate General as compared with the general counsel, see generally Lieutenant Commander Kurt A. Johnson, *Military Department General Counsel as "Chief Legal Officers": Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field*, 139 MIL. L. REV. 1 (1993).

could be selected for assignment to a non-legal position and even further promotion in such a capacity.¹⁰⁸ Despite TJAG's responsibility for the administration of criminal law in his or her armed force, and the potential conflict of interest this may pose with respect to the decisions of military judges, the courts have been untroubled by it. In *Weiss v. United States*,¹⁰⁹ the Supreme Court observed:

Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.¹¹⁰

In *United States v. Mitchell*,¹¹¹ the Court of Military Appeals dealt directly with a challenge to the Judge Advocate General's neutrality. The court noted that petitioner,

initially assert[ed] that the Judge Advocate General of the Navy "serves various, often contradictory, roles within the military justice commands of the Navy-Marine Corps Appellate Review Activity and the Court of Military Review. . . ." He further assert[ed] that "the JAG's best interests are not always aligned with the protection of the court. . . ." Finally, he assert[ed] that "the JAG's and AJAG's prosecutorial duties within the command structure create an unresolved conflict between the JAG's interest in furthering prosecutorial objectives and simultaneously preserving the court's independence. . . ." In general, he cite[d] the JAG's statutory role as the provider of legal services to Navy Commands and his statutory roles in the military justice system.¹¹²

Then, quoting the *Weiss* language reproduced above, the court opined:

¹⁰⁸ No recent example of this exists. However, periodic rumors have existed pending the scheduled retirement of TJAGs or their deputies about their possible maneuvering for such a position.

¹⁰⁹ 114 S. Ct. 752 (1994).

¹¹⁰ *Id.* at 762.

¹¹¹ 39 M.J. 131 (C.M.A. 1994), *aff'g*, 37 M.J. 903 (N.M.C.M.R. 1993).

¹¹² *Id.* at 137 (footnotes omitted).

This view of the protective role of the Judge Advocate General with respect to judges in the military justice system is not new. In *United States v. Mabe*, 33 M.J. at 205-06, this Court noted the Judge Advocate General of the Navy's express recognition of this important responsibility and his actions in that case exercising that responsibility. Accordingly, we cannot presume for the purpose of appellant's argument that the Judge Advocate General holds a prosecutorial office or that the duties of his position reasonably imply a bias in favor of the Government.¹¹³

The court then determined that "appellant's systemic due process claim also fails to the extent it rests on a misapprehension of the lawful role of these military officers in the military justice system."¹¹⁴

The courts' conclusions in this area are too broad. While discussing how a reasonable person might perceive the Navy's appellate judge rating system, Judge Wiss of the Court of Military Appeals noted in *Mitchell* that:

the reports of decisions of this Court for the past four decades are peppered with instances of honorable persons—line officers, lawyers, judges, and even high-ranking officers of the Judge Advocate General's Corps—who affected the trial or appeal of cases in ways in which they undoubtedly at the time believed were permissible but which this Court ultimately condemned. Parenthetically, while our reasonable person knows that violation of this sworn duty "could . . . expose these military officers to criminal liability under the Uniform Code of Military Justice," . . . our reasonable person also knows that there is *no* reported prosecution of *any* officer for *any* of the transgressions just mentioned.¹¹⁵

Even if the Judge Advocate General has no actual interest in improperly affecting a judge or case, the evidence of past cases¹¹⁶ in which allegations of improper activities were made suggests that a reasonable person might view the actions of both the Judge Advocate General and his or her immediate subordinates in a different light.¹¹⁷

¹¹³ *Id.* at 138.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 148-49. *But cf.* HOMER E. MOYER, JUSTICE AND THE MILITARY 779-80 (1972).

¹¹⁶ See discussion *infra* part III.B.

¹¹⁷ We are suggesting a difference between reality and the court's conclusions.

The military's hierarchical structure extends to lawyers. Staff judge advocates, command legal advisors, are rated by the commanders they serve. They are also responsible through a technical chain of command to more senior lawyers. Trial judges are responsible to the chief circuit judge who is responsible to the Chief Trial Judge¹¹⁸ who is responsible to the Judge Advocate General, who serves the Chief of Staff or Chief of Naval Operations. In the Navy, lawyers command Navy Legal Services Offices and supervise both prosecutors and defense counsel. Each NLSO commanding officer is responsible to, and rated by, more senior judge advocates. Assignment of all judge advocates is ultimately in the control of the Judge Advocate General. Neither formal disciplinary action nor an adverse judicial rating form is necessary if the Judge Advocate General, or his or her immediate subordinate, wishes to punish a judge. An undesirable reassignment, especially one which is not considered "career enhancing," can be more than adequate.

Judge advocates not serving in a judicial capacity are thus accustomed to being responsible to their senior clients—commanders. Judges holding judicial supervisory positions understandably want those matters within their responsibility to go well. They would also prefer that those to whom *they* are responsible be happy, and therein lies the problem. Not only are some senior judges likely to identify with the perceived interests of command, but, ultimately, some officers in the judicial chain of command are responsible to a commander. When senior commanders are unhappy with their local judge's decisions, they tend to complain, directly or indirectly, to the Judge Advocate General. Chief Trial Judges, quite understandably, would prefer that such complaints not happen, however willing they are to disregard them. In a classic illustration of this scenario, Admiral Jenkins, former Judge Advocate General of the Navy, announced at a 1993 Judge Advocates Association Program that during his tenure as JAG, Secretary of the Navy Lehman had ordered him to "fire" a trial judge who had dissatisfied command.¹¹⁹ That Admiral Jenkins properly refused to do so is commendable. The incident, however, demonstrates not just the possibility of such command action but its actuality. There is no way of knowing how many other incidents may have occurred in the different services. What we do know is that a number of questionable incidents have occurred.

B. *Real or Perceived Attempts to Influence Military Judges*

A number of cases beginning in 1976 illustrate the tensions that exist between judges, especially trial judges, and the supervisory administrative

¹¹⁸ In the Army there is an additional link in the chain of command. The chief trial judge is responsible to the Army's Chief Judge, who is in turn rated by the Assistant Judge Advocate General and senior rated by TJAG.

¹¹⁹ GILLIGAN & LEDERER, *supra* note 4, at § 14-10.00 (Supp. 1993).

apparatus. In *United States v. Ledbetter*,¹²⁰ following sentencing of a convicted service member, the Air Force trial judge received several telephone calls from the Judge Advocate General of the Air Force, the Chief of the Air Force Trial Judiciary, and his assistant, concerning the leniency of sentences the judge had imposed in three cases, including Ledbetter's.¹²¹ The trial judge was led to believe that complaints by operational commanders had led to these calls.¹²² When questioned concerning the justification for the sentences imposed, the military judge informed the callers that he perceived the calls to be in violation of Article 37 of the Uniform Code.¹²³ The trial judge further stated that he "most definitely" felt that his superiors within the Judge Advocate General's Department were criticizing his sentences.¹²⁴

In *Ledbetter*, the Court of Military Appeals stated that "[i]f anything is clear in the Uniform Code of Military Justice, it is the congressional resolve that both actual and perceived unlawful command influence be eliminated from the military justice system."¹²⁵ Therefore, the court held that any inquiries that question a judge's decision could be made only by an independent judicial commission in accordance with section 9.1 of the ABA Standards.¹²⁶ In *Ledbetter*, however, the court found that there was "no error necessitating corrective action insofar as [the] accused [was] concerned" since all the inquiries post-dated the judge's sentencing decision.¹²⁷ After a lengthy hiatus, *Ledbetter* was followed by a series of Navy cases.

In *United States v. Carlucci*,¹²⁸ the Inspector General of the Depart-

¹²⁰ 2 M.J. 37 (C.M.A. 1976), *rev'g*, 1 M.J. 746 (A.F.M.C.R. 1975) (barring official inquiries outside the adversary process that question or seek justification for a judge's decision).

¹²¹ *Id.* at 41.

¹²² *Id.* at 44.

¹²³ *Id.* at 44-45; *see supra* note 104.

¹²⁴ *Ledbetter*, 2 M.J. at 46. The judge also believed that his subsequent "assignment to a non-military judge slot was directly attributable to [his] so-called lenient sentences in those three cases." *Id.* He acknowledged that sentences of other judges under his supervision had been criticized as well. *Id.*

¹²⁵ *Id.* at 42. The U.C.M.J. mandates that no person subject to the Code may attempt to coerce or influence the action of a court-martial or any member thereof. U.C.M.J. art. 37, 10 U.S.C. § 837 (1988). Additionally, the Rules for Court-Martial provide:

No convening authority or commander may censure, reprimand, or admonish a court-martial . . . military judge . . . with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

R.C.M. 104(a)(1).

¹²⁶ *Ledbetter*, 2 M.J. at 43.

¹²⁷ *Id.*

¹²⁸ 26 M.J. 328 (C.M.A. 1988).

ment of Defense sought to interview judges about their decision in *United States v. Billig*,¹²⁹ a notorious case involving a naval surgeon. The Inspector General sought access to the judge's decisional materials after receiving an "anonymous tip" alleging misconduct on the part of judges or staff of the Court of Military Review.¹³⁰ In granting the Navy-Marine Corps Court of Military Review a protective order prohibiting the Inspector General from investigating the Court of Military Review, the Court of Military Appeals held that "[i]nvestigation of a court's deliberative processes, however, is limited by a judicial privilege protecting the confidentiality of judicial communications."¹³¹

In *United States v. Mabe*,¹³² the court expressly held that a letter from the Chief Trial Judge of the Navy, calling judges' attention to lenient sentences adjudged in a certain circuit, subjected judges to unlawful command influence.¹³³ The letter from Chief Judge Garvin began:

I have great reluctance to write this note to you, but I know you are true Navy through & through and that you would want someone to share pertinent information with you. The subject is sentencing. As you should be aware I examine every court-martial case report submitted from the field. In many instances I am surprised and sometimes shocked by judge alone sentences but I seldom say anything about the sentence as I do not want to chill the independence of field judges.¹³⁴

Chief Judge Garvin relayed that he was "receiving grumbling from the Med regarding sentences" and asked the judge to reexamine his current stance to ensure he was being fair and impartial and not defense oriented.¹³⁵ In or-

¹²⁹ 26 M.J. 744 (N.M.C.M.R. 1988) (en banc).

¹³⁰ *Carlucci*, 26 M.J. at 328.

¹³¹ *Id.* at 337 ("The importance of this confidentiality is too plain to require further discussion.") (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)). However, the Court of Military Appeals held that it had inherent authority to create a "judicial commission" to investigate complaints of judicial misconduct. *Id.* at 340. The Honorable Walter T. Cox, III, Associate Judge, Court of Military Appeals, was appointed to serve as Special Master for the court in the investigation of judicial misconduct. In the investigation of the bribery allegations, the Inspector General was free to conduct her investigation with respect to persons not serving on or with the court. Through this arrangement the court determined that "the least threat is presented to the independence of the Court of Military Review and of other military tribunals." *Id.* at 342.

¹³² 30 M.J. 1254 (N.M.C.M.R. 1990) (en banc).

¹³³ *Id.* at 1266-67; see *Tate & Holland*, *supra* note 41, at 23.

¹³⁴ *Mabe*, 30 M.J. at 1257.

¹³⁵ *Id.*

der that his integrity and impartiality not be questioned, the trial judge in *Mabe* provided both counsel with a copy of Garvin's letter to assure them he would not be influenced by it and also to allow the attorneys to conduct voir dire on the subject.¹³⁶ Thus, the court held that Chief Judge Garvin's unlawful command influence did not result in an unfair trial for the accused and no remedial action was required.

In *United States v. Campos*¹³⁷ the trial judge, Colonel Mitchell, placed on the record his concern that he had been replaced as senior trial judge at Fort Hood because of his sentencing:

I have recently been relieved of my duties and responsibilities as senior military judge at Fort Hood. . . . My concern over this matter is the rumor and the appearance that I might have been replaced due to my sentencing philosophy. . . . A review of my previous sentences might, I suspect, reveal that on occasion, some of the sentences could have fallen short of that which was either anticipated or desired by the command. Regardless of the reason which resulted in me being relieved of my responsibilities and replaced by Colonel [Herbert] Green, I would like the defense to know that I will do my very best not to let it influence me in the performance of my duties as military judge in this case.¹³⁸

A lengthy voir dire by counsel then ensued. When asked whether there was any pressure on him to sentence or even to rule on the merits in certain cases or in a certain manner, Colonel Mitchell responded:

That's difficult to answer. I do feel a concern, but I can't really say that there is pressure. I don't feel anybody is pressuring me in this particular case, that if I were the judge and this was a judge alone case, and if the accused were convicted, I haven't received any pressure as to particular sentence which would be appropriate in this case at all, or in any of my prior cases, so it's very difficult to answer that. But, of course, there's the general concern which I do have.¹³⁹

In *Campos*, Colonel Mitchell himself made a finding that although it appeared that he was being replaced because of his sentencing philosophy,

¹³⁶ *Id.* at 1258.

¹³⁷ 37 M.J. 894 (A.C.M.R. 1993).

¹³⁸ *Id.* at 896.

¹³⁹ *Id.* at 896-97.

in fact this was not the case. Ultimately, he called a series of witnesses, including other judges in an attempt to clarify the command influence possibility. As the trial judge, he found that the defense had failed to carry its burden, and on appeal the Army Court of Military Review held that no one in the "judicial chain of command communicated to [the judge] any displeasure with his sentencing philosophy," and that even if the local command had tried to influence the judge through the judge's superiors, the command had failed.¹⁴⁰ *Campos* clearly demonstrates that the judges themselves feel they risk retaliation for unpopular judicial acts.¹⁴¹

Finally, in *United States v. Mitchell*,¹⁴² the Court of Military Appeals held that the Navy-Marine Corps Court of Military Review's independence was not adversely affected by the fact that the judges were rated by the Judge Advocate General of the Navy, or by the fact that the ratings were prepared in draft by a competing officer who was responsible for the Navy Judge Advocate General's military justice activities.¹⁴³

These cases demonstrate, at the very least, that a reasonable person could conclude there is a probability that judge tampering occurs in the armed forces on behalf of the command structure. In the alternative, a reasonable person would surely conclude that there is at least the appearance that judge tampering evil does sometimes occur.

The fact that "command" oriented tampering *may* sometimes occur does not mean that it either must occur or that it is commonplace. That military judges can indeed act with the necessary professional independence was dramatically demonstrated by Navy Judge William T. Vest, Jr. during the Tailhook scandal. Faced with a defense motion alleging actual and apparent unlawful command influence by the Chief of Naval Operations, Admiral Frank Kelso, Captain Vest, in a 111 page opinion, granted the motion thereby dismissing charges against the final three naval aviators on the grounds that the Navy's top officer acted improperly in the investigation.¹⁴⁴ Judge Vest found that Kelso had "manipulated the initial investigation process and the subsequent [discipline] process in a manner designed to shield his personal involvement in Tailhook '91."¹⁴⁵

The ramifications of Captain Vest's opinion should not be viewed lightly. Just one week after Judge Vest's ruling dismissing the last of the Tailhook courts-martial, Admiral Kelso finally succumbed to intense political pressure and announced that he would retire in the spring of 1994, end-

¹⁴⁰ *Id.* at 899-900.

¹⁴¹ Judge Mitchell is not alone. *See, e.g., supra* note 9.

¹⁴² 39 M.J. 131 (C.M.A. 1994), *aff'g*, 37 M.J. 903 (N.M.C.M.R. 1993).

¹⁴³ *Id.* at 133; *see also supra* notes 111-15 and accompanying text.

¹⁴⁴ For a complete copy of the judge's decision, see 140 CONG. REC. H460-03 (daily ed. Feb. 10, 1994).

¹⁴⁵ *Id.* at H460-03, H474.

ing a distinguished career. Judge Vest's brave decision challenged the very honesty and integrity of not just any superior commissioned officer but that of the Chief of Naval Operations, the highest ranking uniformed officer within the United States Navy. That Judge Vest properly exercised the independence we take for granted is not grounds for concluding the system is trouble free, only that many, if not all, of our judges are honorable professionals who act properly despite unnecessary systemic risk.

C. *Constitutional Attempts To Protect Judicial Independence: The Weiss Case*

Currently, judicial independence is protected by several means, including a judicial rating system in which judges are rated only by other judges, various limitations imposed by the Court of Military Appeals on challenges to judicial decision-making, and other statutory protections.¹⁴⁶ As discussed, however, none of these measures strike at the heart of the problem—the very structure of the military judiciary. Seeking to obtain some degree of structural change, litigants recently challenged the military judiciary on constitutional grounds.¹⁴⁷ Petitioners charged that the military judiciary was appointed in violation of the Appointments Clause, and that trials and appeals heard by judges without fixed tenure violated due process.¹⁴⁸ Both attempts floundered at the Supreme Court in 1994.¹⁴⁹ The Court's decision in *United States v. Weiss*¹⁵⁰ is instructive.

1. *The Appointments Clause*

The Appointments Clause of the United States Constitution provides:

The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for; and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in

¹⁴⁶ See, e.g., U.C.M.J. art. 37(a), 10 U.S.C. § 837(a) (1988); R.C.M. 104(a)(1).

¹⁴⁷ See *Weiss v. United States*, 114 S. Ct. 752 (1994).

¹⁴⁸ *Id.*

¹⁴⁹ Ultimately, the Supreme Court decided that neither constitutional provision was violated. *Id.*

¹⁵⁰ 114 S. Ct. 752 (1994).

the Heads of Departments.¹⁵¹

The Appointments Clause is part of the constitutional checks and balances that were drafted by the Framers as part of the separation of powers doctrine.¹⁵² “The purpose of the Appointments Clause is twofold: (1) it protects the prerogative of the President from congressional encroachment on his power to appoint his subordinates and; (2) ‘it limits the universe of eligible recipients of the power to appoint.’”¹⁵³ Although the appointment of commissioned officers as such satisfies the Appointments Clause, the question remained as to whether assignment to a military judgeship required a separate and distinct appointment. That issue was raised¹⁵⁴ and resolved in *United States v. Weiss*.¹⁵⁵

At the Court of Military Appeals, the court, in a three to two decision, held that the Appointments Clause was not violated.¹⁵⁶ Writing for the majority, Judge Gierke held that although the Appointments Clause did apply to the military, the Clause was satisfied by the initial appointment of a military judge as a commissioned officer.¹⁵⁷ Judge Crawford, concurring in the result, concluded that the Appointments Clause did not apply to the mili-

¹⁵¹ U.S. CONST. art. II, § 2, cl. 2.

¹⁵² *United States v. Weiss*, 36 M.J. 224, 235 (C.M.A. 1992) (Crawford, J., concurring).

¹⁵³ *Id.* at 226 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991)).

¹⁵⁴ The Appointments Clause issue was first raised in the *Weiss* appeal at the Court of Military Appeals level. 36 M.J. 224 (C.M.A. 1992). Interestingly, Marine Captain Dwight Sullivan, a member of the Navy-Marine Corps defense appellate team, “happened to be at the [Supreme] Court,” when the critical case of *Freytag* was argued. John Murawski, *Putting Military Justice on Trial*, LEGAL TIMES, May 10, 1993, at 1, 22. In *Freytag*, the Supreme Court held that “special trial judges” for the United States Tax Court, an Article I court, were “inferior officers” and thus their appointments had to conform to the Appointments Clause. *Freytag*, 501 U.S. at 882. “‘It’s wonderful how the law grows,’ notes Fidell [one of the counsel for petitioners in *Weiss*], ‘Here is a case that comes out of the U.S. Tax Court, and its potential relevance to the military-justice system wasn’t on anybody’s mind at first.’” *Id.*

¹⁵⁵ 114 S. Ct. 752 (1994). It is difficult to overstate the practical importance of the challenge. A ruling adverse to the status quo, even if not fully retroactive, would have thrown into question a huge number of pending cases in which this and related issues had been raised. *See, e.g.*, *United States v. Carpenter*, 37 M.J. 291, 293-94 (C.M.A. 1993); *United States v. Rice*, 36 M.J. 264, 267 (C.M.A. 1993); *United States v. Oatman*, 1993 WL 431975 (A.C.M.R. Oct. 26, 1993); *United States v. Booker*, 37 M.J. 1114 (N.M.C.M.R. 1993); *United States v. Smythe*, 37 M.J. 804, 808 (C.G.C.M.R. 1993); *United States v. Thorn*, 36 M.J. 955, 962 (A.F.C.M.R. 1993); *United States v. Ziots*, 36 M.J. 1007, 1010 (A.C.M.R. 1992). Interestingly, in reaching its decision in *Weiss*, the Supreme Court chose not to distinguish between active duty military judges and civilian or retired military judges.

¹⁵⁶ *Weiss*, 36 M.J. at 225.

¹⁵⁷ *Id.* at 225-34.

tary.¹⁵⁸ Chief Judge Sullivan and Judge Wiss, dissenting, both concluded that the distinct office of military judge warranted a separate constitutional appointment.¹⁵⁹

The Supreme Court held that a separate appointment was not required.¹⁶⁰ The Court's resolution of the issue turned on a two-prong analysis¹⁶¹ in which the Court first determined whether the Appointments Clause applied to the armed forces, and then whether military judges would require a separate appointment if the Clause did apply.¹⁶²

The application of the Appointments Clause to the armed forces was simple. Despite the fact that there has been some debate over this issue,¹⁶³ the answer was apparent from prior Supreme Court precedent.¹⁶⁴ The Court had earlier proclaimed that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Art. II]."¹⁶⁵ Under this guidance, certainly military officers, and military judges in particular, qualify as officers of the United States.¹⁶⁶

¹⁵⁸ *Id.* at 234-40 (Crawford, J., concurring). "[W]ith respect to [the goal of the Appointments Clause of] establishing a system of checks and balances between the Executive and Legislative branches, it is difficult to see how the present system of assigning military judges jeopardizes that delicate balance." *Id.* at 239.

¹⁵⁹ *Id.* at 240-63 (Sullivan, C.J., dissenting).

¹⁶⁰ *Weiss*, 114 S. Ct. at 754-55.

¹⁶¹ Various versions of this two step analysis can be found in the different opinions of the judges of the Court of Military Appeals in *Weiss* and in cases subsequent to *Weiss*. See e.g., *United States v. Prive*, 35 M.J. 596 (C.G.C.M.R. 1992) (holding military judges were officers and not mere employees of the United States, the court then found that the Appointments Clause was not applicable to military judges); *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (disposing with the first prong of analysis by assuming, arguendo, that the Appointments Clause applied, the court held that a military judge's official duties were germane to the office already held as a commissioned officer).

¹⁶² *Weiss*, 114 S. Ct. at 757.

¹⁶³ See *Weiss*, 36 M.J. at 234 (Crawford, J., concurring in result); *Prive*, 35 M.J. at 573 (holding that the Appointments Clause did not apply to the assignment of military judges on the Courts of Military Review).

¹⁶⁴ Respondents even conceded that they agreed with petitioners "that military officers must be appointed as officers pursuant to the Appointments Clause; [and] therefore disagree[d] with Judge Crawford's contrary view." Respondent's Brief at 10 n.4., *United States v. Weiss*, 114 S. Ct. 752 (1994) (No. 92-1482).

¹⁶⁵ *Freytag*, 501 U.S. at 881 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

¹⁶⁶ The Court has consistently declared that no subject matter exemptions from the Appointments Clause will be permitted simply because of Congress's interest or plenary power over the military. *Buckley*, 424 U.S. at 132 ("[N]o class or type of officer is excluded [from the Appointments Clause] because of its special functions."). The fact that military affairs are involved does not exempt Congress from constitutional man-

As one would anticipate, the Supreme Court held that the military was fully covered by the Clause.¹⁶⁷ The Court thus reached the second question of “whether these officers needed another appointment pursuant to the Appointments Clause before assuming their judicial duties.”¹⁶⁸

Petitioner argued that “[n]o class or type of officer is excluded [from the Appointments Clause] because of its special functions,” and that military judges were not excluded from this constitutional requirement.¹⁶⁹ Petitioner’s position was that the initial appointment of an officer was not equivalent to a blanket exemption for military officers; especially when civilians serving in these same positions should be appointed by the President (or the heads of departments) and confirmed by the Senate.¹⁷⁰ Additionally, Congress, under its Article I powers over the military, has required appointments to certain military billets by statute. “Congress [has] repeatedly and consistently distinguished between an office which would require a separate appointment, and a position or duty to which one could be ‘assigned’ or ‘detailed’ by a superior officer.”¹⁷¹

Apparently central to the Court’s resolution of the issue was *Shoemaker v. United States*,¹⁷² in which the Supreme Court concluded that military officers appointed by Congress to a civilian commission to select land for Rock Creek Park in the District of Columbia did not require second appoint-

dates. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (“None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs.”). In *Wood v. United States*, 107 U.S. 414 (1883), the Supreme Court presumed that the Appointments Clause applied to the military, stating that “the officers of the army on the retired list are a part of the army of the United States, and therefore no one can be upon that list who is not an officer appointed in the manner required by sect[ion] 2 of art[icle] 2 of the Constitution.” *Id.* at 417. In fact, the President has traditionally appointed active duty officers of the armed forces and the Senate has confirmed these appointments. This longstanding practice is now codified under 10 U.S.C. § 531 (1988 & Supp. V 1993). See Defense Officer Personnel Management Act, Pub. L. No. 96-513, § 531, 94 Stat. 2845 (1980).

¹⁶⁷ The Court of Military Appeals opined that, “while Congress may determine how the military justice system will operate, it may not exempt those who will operate it from the Appointments Clause.” *Weiss*, 36 M.J. 224, 226 (C.M.A. 1992).

¹⁶⁸ *Weiss*, 114 S. Ct. at 757.

¹⁶⁹ *Id.* (quoting *Buckley*, 424 U.S. at 132).

¹⁷⁰ *Id.*

¹⁷¹ *Weiss*, 114 S. Ct. at 758; see, e.g., 10 U.S.C. §§ 152, 154 (1988 & Supp. V 1993) (requiring that the Chairman and Vice Chairman of the Joint Chiefs of Staff be appointed by the President and confirmed by the Senate); *id.* §§ 5033, 5035 (Chief and Vice Chief of Naval Operations); *id.* §§ 5043, 5044 (Commandant and Assistant Commandant of the Marine Corps); *id.* §§ 3036, 5137, 8036 (Surgeons General of the Army, Navy, and Air Force); *id.* § 5141 (Chief of Naval Personnel); *id.* § 5142 (Chief of Chaplains); *id.* §§ 3037, 5148, 8037 (Judge Advocates General of the Army, Navy, and Air Force).

¹⁷² 147 U.S. 282 (1893).

ments as members of that commission “because additional duties, *germane* to the offices already held by them . . . cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.”¹⁷³ Both petitioners and respondent provided comprehensive arguments applying the principles furnished in *Shoemaker* to the facts of this case. The brief on behalf of the government extensively attempted to analogize the “quasi-judicial” duties performed by regular commissioned officers with those performed by military judges.¹⁷⁴ Appellant argued that *Shoemaker* did not support respondent’s position because military judges perform a range of duties exclusive to their positions, thus violating the “germaneness” requirement of *Shoemaker*.¹⁷⁵

The Court rejected this position and decided that the current scheme of military judicial assignment satisfies the Appointments Clause and that active duty officers do not require an additional appointment to fill the position of a military trial or appellate judge.¹⁷⁶ Writing for the Court, Chief Justice Rehnquist opined, “there is no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office [as was the fear of the Court in *Shoemaker*].”¹⁷⁷ Chief Justice Rehnquist proceeded to hold:

Even if we assume, arguendo, that the principle of “germaneness” applies to the present situation, we think the principle is satisfied here. . . . Although military judges obviously

¹⁷³ *Id.* at 301 (emphasis added).

¹⁷⁴ See Respondent’s Brief at 14-17, *Weiss* (No. 92-1482). For example, commissioned officers may be appointed as Article 32 Investigating Officers, U.C.M.J. art. 32, 10 U.S.C. § 832 (1988); commissioned officers may serve as summary court-martial officers, U.C.M.J. art. 51, 10 U.S.C. § 851 (1988); and commanding officers must determine whether probable cause warrants continued confinement of an accused pending court-martial, R.C.M. 305(h)(2).

¹⁷⁵ In response to the government’s argument that judicial duties are “germane,” petitioner argued:

In our view, those powers alone are sufficient to make the Appointments Clause applicable to all military trial judges, but there are a number of other important duties that such judges have [that no one else in the military is permitted by law to perform] which further demonstrate the need for compliance with the Appointments Clause here. These additional functions include conducting hearings and deciding motions outside the presence of court-martial members (Art. 39); granting or denying continuances (Art. 40); deciding challenges of court-martial members for cause (Art. 41(a)); holding persons in contempt (Art. 48 and Rules for Courts-Martial 801(b)(2) & 809); ruling on all questions of law (Art. 51(b)); and instructing the members of the court-martial on the applicable law (Art. 51(c)).

Petitioner’s Brief at 22-23, *Weiss* (No. 92-1482).

¹⁷⁶ *Weiss*, 114 S. Ct. at 757.

¹⁷⁷ *Id.* at 759.

perform certain unique and important functions, all military officers, consistent with a long tradition, play a role in the operation of the military justice system.¹⁷⁸

Although reasonable men and women can differ with the Court's decision on the simple basis that a military judge is a unique and special office, viewed as a question of law the *Weiss* decision is surely reasonable. Deference in the application of the *Shoemaker* germaneness test is necessary because of the wide range of assignments and special qualifications held by military officers.¹⁷⁹ Inherent in the military is the difficulty of defining what duties are intrinsic in any given "archetypal" billet of a military officer. Though it may be easy to say that the duties of commissioned officers, or even lawyers in the armed forces, are not germane to the duties of a military judge, the same could be said for many military jobs.¹⁸⁰

The more efficient, flexible, and well-rounded the military is, the more susceptible it is to attack under petitioner's Appointments Clause analysis.¹⁸¹ A broad definition of germaneness, amounting to a significant de-

¹⁷⁸ *Id.*

¹⁷⁹ Respondent endorsed a broad application of *Shoemaker's* germaneness test by stating:

That rule is a sensible one. It enhances the efficient operation of the Executive Branch by enabling existing officers to perform related duties without having to undergo the cumbersome process of reappointment and face the prospect of inter-branch friction every time the officers' duties are modified. And it does not undercut the authority of the Legislative Branch, which can define Executive Branch offices in a way that makes it clear when reappointment of officers is necessary and when it is not.

Respondent's Brief at 13, *Weiss* (No. 92-1482).

¹⁸⁰ Given the powers they alone possess, should commanding officers, for example, require separate appointments upon command designation? Should a new appointment be required when a military officer transfers from a shore staff billet to a command at sea billet? Should appointments be required for defense attorneys or trial counsel? The many line drawing problems are apparent. Supporters of new judicial appointments argue that military judges are distinct from all other military billets, and are thus the only ones deserving of this special recognition. It would certainly be easy, however, to imagine the scope of "specialized" billets increasing after a decision to re-appoint commissioned officers as military judges has been made.

¹⁸¹ See Respondent's Brief at 13, *Weiss* (No. 92-1482). Respondents argued that:

The military is in important respects a "specialized society separate from civilian society." It depends on its members—and particularly its officers—to perform a variety of essential tasks that ordinarily would be performed by specialists in the civilian sector. Military officers must be able to master and perform a wide range of jobs and missions, including a variety of tasks inherent in the enforcement of military order and discipline. The vehicle ultimately responsible for enforcing discipline within the command is the military justice system, and both commanders and subordinate officers play integral roles in the operation of that system.

gree of deference, is justified by Supreme Court case law,¹⁸² congressional intent,¹⁸³ and the intent of the Framers.¹⁸⁴

2. *The Fixed Tenure Attack*

The Supreme Court in *Weiss* dealt with more than just the Appointments Clause. Although partially justified by the “synergistic” impact of the claimed related Appointments Clause violation, the lack of fixed tenure, alone or in combination, allegedly denied military defendants due process.¹⁸⁵ Thus, the second issue raised by *Weiss* was, whether “the Due Process Clause¹⁸⁶ requires that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms?”¹⁸⁷

Due process includes the right to have an impartial decision maker.¹⁸⁸ This requirement is violated when interests beyond the pursuit of justice are

Id. (footnote omitted).

¹⁸² See e.g., *Solorio v. United States*, 483 U.S. 435, 447 (1987) (“We agree that ‘[j]udicial deference . . . is at its apogee’ when the authority of Congress to govern the land and naval forces is challenged.”); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (declaring that although Congress remains subject to constitutional limitations, “the tests and limitations to be applied may differ because of the military context”).

¹⁸³ See U.C.M.J. arts. 26(b), 66(a), 10 U.S.C. §§ 826(b), 866(a) (1988).

¹⁸⁴ As Judge Crawford extensively discussed in her concurring opinion below, “[b]ecause of national security interests and concerns for unforeseen military exigencies, it was the intent of the Framers to vest great authority over these matters in Congress.” *Weiss v. United States*, 36 M.J. 224, 236 (C.M.A. 1992) (Crawford, J., concurring); THE FEDERALIST NO. 23 (Alexander Hamilton); see also LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 353-56 (2d. ed. 1988).

¹⁸⁵ Petitioners argued that the Appointments Clause and Due Process Clause arguments involved concerns of fundamental fairness and accountability. Petition for Writ of Certiorari at 16, *United States v. Weiss*, 114 S. Ct. 752 (1994) (No. 92-1482). “Non-compliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused’s rights.” *Id.*

¹⁸⁶ “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

¹⁸⁷ *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), cert. granted sub. nom. *Weiss v. United States*, 113 S. Ct. 2412 (1993) (pursuant to the writ granted to hear *United States v. Weiss*).

¹⁸⁸ The Supreme Court, in an attempt to define this impartiality, stated:

[A] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. *That interest cannot be defined with precision.* Circumstances and relationships must be considered.

In re Murchison, 349 U.S. 133, 136 (1955) (emphasis added); see also *Tumey v. Ohio*, 273 U.S. 510 (1927).

interjected into the judge's performance of his or her duties.¹⁸⁹ Does the unfettered right to reassign a military judge rise to the level of a due process violation?

The Court of Military Appeals, in a unanimous decision, initially answered the question by holding, in *United States v. Graf*,¹⁹⁰ that fixed terms of office were not required for military judges.¹⁹¹ First, determining that the Due Process Clause applies to service members at court-martial,¹⁹² the court concluded that,

the Supreme Court has never expressly held that a judge in a criminal case must have a fixed term of office of any length in order to independently perform his duties. However, it has held that the Due Process Clause of the Fifth Amendment does not require tenure during good behavior for such judges.¹⁹³

Although civilian courts do provide fixed or lifetime terms of office to their judges, the court reasoned that the Uniform Code of Military Justice supplies sufficient (and substantial) protection for military judges to enable them to "independently and fairly perform their duties without protection of a fixed term of office."¹⁹⁴

The Supreme Court in *Weiss* unanimously affirmed the Court of Military Appeals' ruling in a similar decision in *United States v. Hernandez*,¹⁹⁵ by finding that

[a] fixed term of office, as petitioners recognize, is not an end in itself. It is a means of promoting judicial independence, which in turn helps to ensure judicial impartiality. We believe the applicable provisions of the U.C.M.J., and corre-

¹⁸⁹ For example, "the Judge Advocate General writes the annual fitness reports of the Navy-Marine Corps Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement." Petition for Writ of Certiorari at 16, *Weiss* (No. 92-1482).

¹⁹⁰ 35 M.J. 450 (C.M.A. 1992).

¹⁹¹ *Id.*

¹⁹² *Id.* at 454 (citing *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

¹⁹³ *Id.* at 463; see *Palmore v. United States*, 411 U.S. 389, 410 (1973).

¹⁹⁴ *Graf*, 35 M.J. at 463. The court cited various provisions within the U.C.M.J. and described how those provisions provide the requisite "substantial independence and protection for military judges." *Id.*; see art. 138, 10 U.S.C. § 938 (1988) (providing judges with a method to file a complaint against any superior who attempts to interfere with the judiciary); *id.* art. 98, 10 U.S.C. § 898 (affording disciplinary procedures for any service member who attempts to influence the independence of military judges).

¹⁹⁵ 37 M.J. 252 (C.M.A. 1993).

sponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.¹⁹⁶

The Court noted that “[a]lthough a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition.”¹⁹⁷ The Supreme Court also emphasized the fact that petitioners failed to prove an actual lack of independence on the part of any military trial or appellate judge.¹⁹⁸

Perhaps ironically, the Court’s decision on the tenure question was clearly correct for another, more pragmatic reason. Unless a military judge is serving the last assignment of her or his career, fixed tenure is of little consequence. The independence problem stems from concern that a military judge’s decision will be influenced by the judge’s interest in future assignment and promotion. Upon conclusion of a fixed tenure, the judge is once again in competition with all other officers of similar grade for promotions and better assignments. The degree of protection afforded a judge by fixed tenure is de minimis.

3. *What was at Stake in Weiss, What Weiss Decided, and What Weiss Opined: The Consequences of Politically Motivated Dictum*

On the surface, all that *Weiss* dealt with and resolved were two questions of constitutional law: whether the appointment of military judges requires a separate appointment, and whether due process requires fixed tenure for the military trial judiciary. In fact, *Weiss* dealt with the very office and image of the military judge. Writing separately, Professor Fredric Lederer and co-author Francis Gilligan argued that *Weiss* should have focused on the role and status of military judges.¹⁹⁹ Is “service as a [military] judge . . . merely the military duty of the moment,” or are “military judges . . . a special category of officer—separate and distinct from their commissioned officer status . . . [thus occupying] a unique military role?”²⁰⁰ Although the *legal* resolution of the Appointments Clause issue was of little consequence,

¹⁹⁶ *Weiss v. United States*, 114 S. Ct. 752, 762 (1994).

¹⁹⁷ *Id.* at 761.

¹⁹⁸ “Petitioners have fallen far short of demonstrating that the factors favoring fixed terms of office are so extraordinarily weighty as to overcome the balance achieved by Congress.” *Id.* at 763. In fact, retired Captain Ron Garvin, a former member of the Navy-Marine Corps Court of Military Review has stated, “[w]hen I was an appellate judge, never once did I stop to consider what impact my decisions would have on my career.” Murawski, *supra* note 154, at 22 (quoting Captain Ron Garvin).

¹⁹⁹ See GILLIGAN & LEDERER, *supra* note 4, § 14-10.00 (Supp. 1993).

²⁰⁰ *Id.* at § 2-22.30.

a decision requiring a separate appointment for a judge might well have had substantial collateral policy impacts. Indeed, such a decision might well have set the stage for an extension of extraordinary writ powers to the military trial judiciary.

More important than the issues actually addressed in *Weiss* was the language the Court chose to resolve them. Insofar as the tenure question was concerned, it sufficed for the Court to hold that “[p]etitioners have fallen far short of demonstrating that the factors favoring fixed terms of office are so extraordinarily weighty as to overcome the balance achieved by Congress.”²⁰¹

It was the *manner* in which the Court drafted its opinion that was of even greater importance. Rather than voice a deep concern with the possibilities of actual or apparent judicial dependence on the interests of command or senior authority, the Court did the exact opposite by stating that:

Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. . . . Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, *we believe Congress has achieved an acceptable balance between independence and accountability.*²⁰²

²⁰¹ *Weiss*, 114 S. Ct. at 763. Congress has actually exhibited meaningful oversight over the Judge Advocates General via the appointments process. In 1990, the Senate Armed Services Committee concluded (perhaps improperly so) that one acting Judge Advocate General of the Army had subordinated his loyalty to the Army as a whole in favor of lesser ranking personnel and declined to forward his confirmation as TJAG. The problem with the Court’s conclusion is that a Judge Advocate General can have both an interest in a given case and in case disposition as a whole. The Judge Advocate General is responsible to the Chief of Staff or Chief of Naval Operations, and may in fact have hopes for further promotion.

²⁰² *Id.* at 762 (emphasis added). Concurring in the judgment, Justice Scalia, joined by Justice Thomas, observed:

With respect to the Due Process Clause challenge, I think it neither necessary nor appropriate for this Court to pronounce whether “Congress has achieved an acceptable balance between independence and accountability”. . . . As today’s opinion explains, a fixed term of office for a military judge “never has been a part of the military justice tradition, . . . Courts-martial . . . have been conducted in this country for over 200 years without the presence of a tenured judge”. . . . Thus, in the Military Justice Act of 1968 the people’s elected representatives achieved a

After discussing the Code's limitations on improperly influencing judges and provisions permitting parties to challenge judges, the Court continued:

The entire system, finally, is overseen by the Court of Military Appeals, which is composed entirely of civilian judges who serve for fixed terms of 15 years. That Court has demonstrated its vigilance in checking any attempts to exert improper influence over military judges. In *United States v. Mabe*, 33 M.J. 200 (1991), for example, the Court considered whether the Judge Advocate General of the Navy, or his designee, could rate a military judge based on the appropriateness of the judge's sentences at courts-martial. As the Court later described: "We held [in *Mabe*] that the existence of such a power in these military officers was inconsistent with Congress' establishment of the military 'judge' in Article 26 and its exercise violated Article 37 of the Code." *Graf*, 35 M.J., at 465. And in *Graf*, the Court held that it would also violate Articles 26 and 37 if a Judge Advocate General decertified or transferred a military judge based on the General's opinion of the appropriateness of the judge's findings and sentences.²⁰³

Concurring, Justice Ginsburg opined that

[t]he care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate as judges. Nevertheless, there

"balance between independence and accountability" which, whether or not "acceptable" to five Justices of this Court, gave members of the military at least as much procedural protection, in the respects at issue here, as they enjoyed when the Fifth Amendment was adopted and have enjoyed ever since. That is enough, and to suggest otherwise arrogates to this Court a power it does not possess.

Id. at 770-71 (Scalia, J., concurring).

²⁰³ *Id.* at 762-63. The Court added by way of footnote that "[t]his added limitation on the power of the Judge Advocates General to remove military judges refutes petitioners' contention that Judge Advocates General have unfettered discretion both to appoint and remove military judges." *Id.* at 762 n.7.

has been no peremptory rejection of petitioners' pleas. Instead, the close inspection reflected in the Court's opinion confirms:

it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution. . . .²⁰⁴

Like the Court, we hold immense respect for the Judge Advocates General, the United States Court of Appeals for the Armed Forces, and the military judiciary, and take pride in such recognition, however long-delayed, but the sad truth is that insofar as *structural independence* is concerned, the Court's praise is too broad and dangerous. The very cases discussed above²⁰⁵ demonstrate some of the periodic problems permitted by the current statutory and regulatory structure. The praise is dangerous because it has already had its effect; all too many have decided that, given the Court's language, there is no problem to be addressed by Congress. Nothing could be further from the truth. If nothing else, "*an acceptable balance between independence and accountability*" is a far cry from the "best balance."

IV. THE NEED FOR LEGISLATIVE ACTION

Only in the armed forces is a judge dependent upon superiors for assignment and promotion, to say nothing of the risk of summary removal from the judiciary itself. And, notwithstanding the fact that those superiors are, for the most part, judges themselves, their interests rationally ought to be, and may in fact be, allied with those of the command structure who tend to hold prosecutorial attitudes. Certainly a substantial appearance of a lack of independence exists. Notably, in *United States v. Mitchell*,²⁰⁶ the Navy-Marine Court of Military Review complained:

For these reasons, although we find nothing *actually* inimical to our independence in this arrangement, arguably a reasonable observer may conclude that it is inappropriate for an officer whose duties do not include supervising the Court's

²⁰⁴ *Id.* at 769 (quoting *Winters v. United States*, 89 S. Ct. 57, 59-60 (1968) (Douglas, J., opinion in chambers).

²⁰⁵ See discussion *supra* part III.B.

²⁰⁶ 37 M.J. 903 (N.M.C.M.R. 1993).

judges, but whose professional responsibilities are so *directly* and *closely* affected by the Court's decisions, to participate in the evaluation of the appellate judges.²⁰⁷

On appeal, the Court of Military Appeals held only that petitioner "has simply not persuaded us that *his reasonable man perceptions* concerning the Naval officer fitness-report system created a constitutionally impermissible risk that *this* case was decided unfairly by his appellate military judges."²⁰⁸

The lack of known cases in which judges actually subordinated themselves to what they may have perceived as the interests of command is not determinative. In fact, such a lack of cases proves little, if anything. By its very nature, bias is hard to detect. Given a minimally intelligent judge, no record of bias would ever exist. The fact that some judges have clearly challenged what they perceived as an attempt to interfere with their judicial duties does not prove the absence of a problem; it conclusively proves that at least some judges perceived such a problem. What of the judges who experienced an actual or perceived problem and failed to complain, and who in fact succumbed to what they interpreted as improper pressure? That judges regularly and routinely fulfill their duties with integrity is praiseworthy, but incentive to do so is undermined by a system where objective and reasonable judges assume that their positions and future career success are always at risk. And, as we now know, there is more at work than perception. Whether it is a Chief Trial Judge warning a judge that his sentencing is disturbing, or an appellate judge being rated pragmatically by the officer who is not only in competition with him but also in charge of criminal law matters, or a Judge Advocate General directed to fire an allegedly unsatisfactory judge, it is absolutely clear that real threats to judicial independence and integrity exist, and that these threats are inherent in the very structure of the military judiciary.

There are those who would say that civilian judges are subject to many of the same pressures. This is only true when examined from a superficial perspective. A failure to satisfy the "government" or administration may indeed prohibit a federal judge from promotion, but the pay, status, and life tenure of the federal judiciary is such that it can hardly be compared with

²⁰⁷ *Id.* at 917. The court added,

[t]his opinion is not the place to develop administrative measures to cure an appearance problem arising from the fitness report preparation process. Suffice it to say that we acknowledge that such an appearance may exist, and we urge the Judge Advocate General to examine the process with a view to ensuring that those who participate in it occupy positions less directly affected by the decisions of this Court.

Id. at 143 n.14.

²⁰⁸ *Id.* at 141 (second emphasis added).

that of a military officer whose location can be changed in a moment by the decision of superiors. Although the civilian federal bench may also be affected by the hope of further elevation, the degree of inappropriate incentive is markedly less than that of the military judge who may hope simply to retain location or assignment.

The proper comparison, however, may be to state judges rather than federal ones. Here comparison initially seems more useful. After all, many state judges must stand for re-election or reappointment, and the political process can easily seize upon a judge's every act. Even setting aside the fact that military judges are federal judges, the comparison is not a realistic one. Some state judges may fail at re-election or reappointment because of the public perception of how poorly they fulfilled their judicial duties, but re-election or reappointment comes after a lengthy period so public reaction to a given event may not be very strong. Given enough time, the public, should it even remember a given event, has the opportunity to weigh any alleged dereliction against the weight of an incumbent judge's entire term. Only in the military can a judge be summarily removed without explanation. Only in the military can a single superior doom a judge through an annual fitness report. When comparing state and military judges, what initially might seem to be a quantitative difference in improper incentive, is actually a qualitative one.

Although the Court of Military Appeals in *Mitchell* denied petitioner's attack on the results of the rating system applicable to the judges of the Navy-Marine Corps Court of Military Review, the court expressly stated:

Our particular concern in this case is whether *appellant* received a fair and impartial review of his court-martial by members of the Navy-Marine Corps Court of Military Review. . . . Yet it is obvious to us that *the judges of the Navy-Marine Corps Court of Military Review*, at least those participating in appellant's case, are concerned about the fairness of their treatment as professional military officers. We sense dissatisfaction in the Navy appellate judges with respect to their officer-fitness-report system.

Nevertheless, our recognition of their complaints does not authorize this Court to employ our appellate powers to create, revamp, or eliminate the military-officer-fitness-report system. . . .

Of course, there is another forum in which consideration of these concerns is especially appropriate, *i.e.*, Congress. After all, it is specifically authorized to "make Rules for the Government and Regulation of the land and naval Forces." . . .

A Federal appeals court such as ours must know the

extent of its power. A court in its role of providing justice may use relevant legislation to decide a case but must refrain from making it in the first place—that is for the legislative branch to do. In this case, the relief desired by the *Navy appellate military judges* must come by way of legislation from Congress or by way of executive regulation from the President.²⁰⁹

Of course, the real problem in *Mitchell* was not just the rating structure. To a large degree the problem was, and is, that the very system in which a military judge's future is determined depends not just upon rating, but upon the discretionary decision making of the Judge Advocate General and others. Rejecting petitioner's attack on the impartiality of his appellate judges, the Court of Military Appeals in *Mitchell* held first, that petitioner had improperly used a "reasonable person" standard rather than the correct "reasonable judge" standard, and second, that based on Supreme Court precedent, the appearance of an improper due process argument required "a showing of a 'direct' pecuniary interest."²¹⁰ Consequently, though reasonable military personnel would conclude otherwise, the court found there was no perceivable command-bias in the system.²¹¹

As Justices Scalia and Thomas, hardly the most liberal members of the Supreme Court, observed in *Weiss*:

As sometimes ironically happens when judges seek to deny the power of historical practice to restrain their decrees, the present judgment makes no sense except as a consequence of historical practice. Today's opinion finds "an acceptable balance between independence and accountability" because the Uniform Code of Military Justice "protects against command influence by precluding a convening officer or any commanding officer from preparing or reviewing

²⁰⁹ *Id.* at 145-46 (citations omitted). The court also suggested that the President might take appropriate action, *id.* at 146, and noted that the Department of the Navy was considering regulatory changes, *id.* at 146 n.9.

²¹⁰ *Id.* at 141-42.

²¹¹ Earlier in the opinion the court rejected on factual grounds the argument "that a reasonable person or observer might perceive that appellate military judges generally shape their judgments to secure better fitness reports from the JAG or AJAG." *Id.* at 140. The court reached this peculiar conclusion primarily on the grounds that consideration of the decisions of the appellate judges could not *lawfully* be used in the fitness report evaluation process and that "not a shred of evidence has been presented . . . that the Judge Advocate General or his Assistant for Military Law have disregarded these decisions with respect to the fitness reports on the appellate military judges involved in *this case.*" *Id.* (emphasis added).

any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties"; because it "prohibits convening officers from censuring, reprimanding, or admonishing a military judge . . . with respect to any . . . exercise of . . . his functions in the conduct of the proceeding"; and because a Judge Advocate General cannot decertify or transfer a military judge "based on the General's opinion of the appropriateness of the judge's findings and sentences." But no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, . . . and is provided in all the States today. . . . (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")²¹²

Even if we were only faced with an unfortunate appearance problem, the current judicial structure should not be permitted to continue. The nation's obligation to its uniformed citizens demands a system which has both the appearance and the actuality of fairness. Retention of an inadequate system solely for reasons of history is unacceptable. We owe nothing less to those citizens who are prepared to die on our behalf and on behalf of the Constitution.

V. AMENDING THE UNIFORM CODE OF MILITARY JUSTICE TO ESTABLISH AN INDEPENDENT JUDICIARY

Congress should amend the Uniform Code in such a way as to eliminate even the appearance of a lack of judiciary independence within the military criminal justice system. In doing so, however, it is crucial that the unique situation and needs of the armed forces be taken into account.

The civilianization of the military judiciary by the use of civilian judges to preside over courts-martial would be both undesirable and unworkable. The armed forces require as judges individuals who are intimately familiar with the unique nature of military life.²¹³ Most courts-martial are bench

²¹² *United States v. Weiss*, 114 S. Ct. 752, 771 (1994) (Scalia, J., concurring) (citations omitted).

²¹³ If the connection between the judiciary and the military "were to be severed, and

trials.²¹⁴ Should the accused be tried or sentenced by someone unfamiliar with the special stresses of military duty? It is also critical that military judges be mobile. In fact, they must be deployable lest the military criminal legal system cease to function at all. Civilian judges, even volunteer judges, cannot be compelled to pick up and relocate at an instant's notice.²¹⁵ Admittedly, as long as military officers serve as judges within the military judiciary, not all people will view the military judiciary as truly independent. That not all people can be satisfied is not, however, reason to refrain from making those corrections which can reasonably be made.

A. *Criteria*

Any restructuring of the military judiciary must satisfy the following minimum criteria:

- The judiciary must be composed of lawyers who are members of the armed forces with military criminal law experience.
- A significant number of appellate judges ought to have had prior experience as trial judges.
- Judges should be selected by a person or persons with substantial knowledge of the armed forces and their mission.
- From a career perspective, judiciary assignments must be sufficiently appealing to attract highly competent candidates.
- Judges should be intellectually competent and possess appropriate judicial demeanor.
- Judges should possess sufficient rank and tenure so that in the eyes of a

true independence could only be achieved by such severance, the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the *eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively.*" C.F. Blair, *Military Efficiency and Military Justice: Peaceful Co-Existence?*, 42 U.N.B. L.J. 237, 241 (1993) (emphasis added). Neither the armed forces nor the accused would benefit from such a separation.

²¹⁴ See GILLIGAN & LEDERER, *supra* note 4, at § 15-60.00 (Supp. 1993) (compiling statistics comparing the number of trials to the total number of trials in the different services).

²¹⁵ Of course, we could use civilian judges who are subject to military activation in case of national emergency. Would such judges have the same degree of knowledge of the armed forces that is now customary? We think not.

reasonable observer, they are effectively immune from any desire to comply with command interests.

- Evaluation of judges, if permissible at all, ought to be conducted only by other judges and then in such a fashion as not to reflect on the merits of any given case.

B. *The Proposed Solution*

The proposed modification to the current judiciary structure is multi-faceted and serves to further protect and shelter the military judiciary from the control of operational commanders and the appearance of a lack of independence while also protecting the interests of the armed forces:

- All military trial and appellate judges shall be appointed by The Judge Advocate General of the Department. The Secretary concerned may appoint a Judicial Appointment Commission to review and recommend candidates to the Judge Advocate General for appointment. Such a commission may have civilian as well as military members.
- Except in time of [declared]²¹⁶ war, a new military judge will be appointed for a single probationary period to be set by the Secretary concerned.²¹⁷ Except in time of [declared] war, such a judge must be in the grade of O-4²¹⁸ or higher at the time appointed.
- Each Department, including the Department of Transportation, shall maintain a permanent trial and appellate judiciary no member of which shall be appointed without three years probationary service. An applicant for a non-probationary judgeship may apply during probationary service or subsequently while serving in a different assignment.
- Unless removed for good cause, each permanent judge shall remain a military judge until retirement, and shall not be eligible for reassignment to a non-judicial position [except with the consent of the Secretary of Defense]. While serving as a trial judge, the military judge shall hold the rank and grade of O-6²¹⁹ and shall retire in that grade. Personnel assigned to the permanent

²¹⁶ All bracketed provisions are optional.

²¹⁷ We recommend three years.

²¹⁸ In the Army, Air Force, and Marine Corps, an O-4 grade represents the rank of major. In the Navy and Coast Guard, an O-4 grade represents the rank of lieutenant commander.

²¹⁹ In the Army, Air Force, and Marine Corps, an O-6 grade represents the rank of colonel. In the Navy and Coast Guard, an O-6 grade represents the rank of captain.

judiciary shall not count against the statutory grade limitation ceilings. An officer removed from the judiciary for good cause shall be restored to the grade held upon appointment to the permanent judiciary and shall not be eligible for promotion beyond the grade of 0-6. An officer who voluntarily resigns from the permanent judiciary but who wishes to remain in non-judicial service shall hold the grade he or she most likely would have obtained absent permanent judicial service, as calculated by the service Board for the Correction of Military Records. In no case shall an officer who voluntarily resigns from the permanent judiciary after one year's service as a permanent judge be eligible for promotion beyond the grade of 0-6.

- Members of the permanent judiciary shall be entitled to remain in service until the completion of 30 years time in service.

- At least two-thirds of the appellate judges of each Department, including the Department of Transportation, shall be appointed from the ranks of the permanent trial judiciary. All permanent appellate judges shall serve in the grade of 0-6, except for the Chief Judge of each Department, including the Department of Transportation, who, with the concurrence of the Secretary concerned, shall be appointed by the Judge Advocate General concerned. The Chief Judge shall serve and retire in the grade of 0-7.²²⁰ An appellate judge shall not be reassigned involuntarily to the trial judiciary. Upon retirement, after three or more years of service as a permanent appellate judge, a judge shall retire in the grade of 0-7. Unless otherwise permitted by the Secretary concerned, non-permanent appellate judges who are military officers shall be in the grade of 0-6 and shall serve a single consecutive three-year term. An appellate judge shall not be reassigned involuntarily to the trial judiciary.

- [The Secretary of Defense may prescribe a judicial fitness/efficiency report and provide that judges be evaluated using such form. No judge may be evaluated by a non-judge, and no evaluation may be made unless the Secretary of Defense has so provided and promulgated a judicial fitness/efficiency report. When so authorized, the Judge Advocate General concerned, and any authorized Judicial Appointment Commission, may consider such reports when appointing permanent trial and appellate judges and the Chief Judge of each Department.]²²¹

²²⁰ In the Army, Air Force, and Marine Corps, an 0-7 grade represents the rank of brigadier general. In the Navy and Coast Guard, an 0-7 grade represents the rank of rear admiral.

²²¹ This last provision is optional because rating judges for any purpose is controversial. Certainly, the independent judiciary proposed would be largely unaffected by any type of rating. At the same time, we recognize the interest that some members of the civilian judiciary have in trying to evaluate case disposition efficiency and other matters. Accordingly, we include as an option a proposal that would permit some form of judicial performance

C. *Analysis of the Solution*

The proposed statutory amendment is not unique; similar proposals have been made before,²²² and aspects of this one are modeled in part on the retirement promotions of service academy permanent professors. Critically, the proposal would leave the military judiciary—*military*. Military judges would continue to be appointed from experienced military lawyers. The key to the proposal is the careful mix of selection provisions with post-selection independence.

Promotion to colonel or naval captain upon entrance to the permanent judiciary is necessary to make the judiciary attractive to high quality applicants.²²³ Not only would the promotion protect officers from loss of competitive promotion, the automatic promotion may also occur earlier than would be customary in the normal scheme of things.²²⁴ Because the judges would be outside the promotion system it would not be appropriate to count permanent judges for purposes of the grade limitation ceilings that limit how many officers of each grade may exist. The promotion, coupled with the right to remain until permanent retirement, absent good cause removal, would create an independent judiciary.

If an independent judiciary is to be created, the question of *whom* should be selected for it is critical. On the one hand, we do not wish to appoint judges who discover that judging, with its responsibilities and frequent isolation, is undesirable. On the other hand, the armed forces should have some guarantee of competence and judicial demeanor. A single required probationary term would address these concerns. This trial period, hopefully emphasizing the trial of special courts-martial, would permit adequate observation from both sides of the bench. Of course, judges who seek appointment to the permanent bench may be especially likely to want to gather favorable TJAG recognition.²²⁵ This risk, however, is not significantly

evaluation performed by other judges.

²²² See, e.g., Letter from the American Judges Association to the President of the United States (July 21, 1992), *reprinted in* United States v. Mitchell, 39 M.J. 131, 154-55 (C.M.A. 1994).

²²³ Most highly competent military lawyers retire in the grade of captain or colonel.

²²⁴ Normally, military officers who enter the permanent judiciary will be senior O-5s, i.e., a rank of lieutenant colonel in the Army, Air Force and Marine Corps, and a rank of commander in the Navy and Coast Guard, or O-6s. Nevertheless, if a highly deserving O-4 is selected to the permanent judiciary this automatic promotion to O-6 may still be appropriate. However, we do not wish to create a mechanism to bypass the ordinary promotion system for favored officers. Indeed, this is why an officer who leaves the permanent judiciary does not automatically retain the grade of colonel or captain.

²²⁵ This concern could be partially rectified by using judicial selection commissions to recommend judges to TJAG.

greater than the present one. Those judges who voluntarily choose not to seek permanent appointment would enrich the military legal system due to their own first-hand judicial experience.

The appellate judiciary would be restructured. Because we believe it helpful for the appellate court to have fresh viewpoints, we have permitted the Judge Advocate General to appoint up to one-third of the service appellate court from non-permanent judges. Because, however, we believe that appellate judges benefit from trial court experience, at least two-thirds of the appellate judges must be members of the permanent judiciary. The Chief Judge should be a brigadier general or admiral, both to recognize the importance of the judiciary, and to adequately represent it in the military world. At the same time, the possibility of selection to flag rank does create a risk of undue dependence on the Judge Advocate General. Automatic retirement in the grade of brigadier general or admiral (lower half) should adequately compensate for this possibility. Of course, the very hope of appointment to the appellate court could be said to imperil the independence of trial judges. Given, however, that trial judges will serve and retire in the grade of O-6, this risk is roughly analogous to the current, tolerable risk that federal district judges might wish to satisfy an incumbent administration in hope of elevation to the court of appeals.

The proposal also addresses a number of problematic areas. There are those officers who fervently aspire to be Judge Advocate General. We believe that ordinarily an officer who joins the permanent judiciary must give up this ambition.²²⁶ Otherwise, the very same problem of dependence on command favor is created. The proposal carries with it, however, an optional provision that would allow the Secretary of Defense to reassign a permanent judge to a non-judicial position because the time may come when a given officer should, in the interests of the service, be appointed TJAG, or assigned to other important non-judicial service. There are those judges who are happiest and most useful as trial judges. The proposal permits an appellate judge to be reassigned to the trial judiciary, but only voluntarily. Any risk of involuntary assignment would threaten judicial independence.

With the cold war over, it may seem overcautious to ponder the risk of a future large scale conflict. History demonstrates, however, that the future is unpredictable and that war is an ever present risk. The proposal thus has "time of war" escape clauses that would permit expansion of the military judiciary via the probationary appointment system. We would note that as the size of the armed forces shrinks, the possibility that such a provision may be necessary for even a small conflict is real.

²²⁶ The probationary term would provide an opportune time for mid-grade officers to make the election between judicial and non-judicial career paths.

VI. CONCLUSION

In 1955, the Supreme Court surmised that "military tribunals have not been and 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."²²⁷ Almost forty years later, it is doubtful whether the Court in *Toth v. Quarles* would even recognize the military justice system in light of its numerous changes. Although military courts likely will never mirror Article III courts,²²⁸ all military personnel deserve both the right to a fair trial and a well-founded belief that their cases will be heard impartially and fairly. As Justice Ginsburg stated in her concurrence in *Weiss v. United States*,²²⁹ "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. . . . 'A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution.'²³⁰

Military justice deserves recognition for its fundamental integrity.²³¹ The potential impact of command interest on the military judiciary, however, is an unnecessary and anachronistic evil that Congress should speedily correct. Lest we forget,

[j]ustice ought to bear rule everywhere, and especially in

²²⁷ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

²²⁸ And arguably should not, either for reasons of simple justice in the unique military context or in the interests of mission critical personnel morale.

²²⁹ 114 S. Ct. 752, 769 (1994) (Ginsburg, J., concurring).

²³⁰ *Id.* at 769 (Ginsburg, J., concurring) (quoting *Winters v. United States*, 89 S. Ct. 57, 59-60 (1968)) (Douglas, J., opinion in chambers).

²³¹ 1 THE MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT 4 (1984). As Judge Cox has opined,

[M]y response to any critics of the system, both to the civilians who cry "drumhead justice" and to military members who cry that the system is too "civilianized," is that you are wrong. The system functions and functions well. Yes, there may be tactical errors and an occasional injustice as the system malfunctions, but the grand strategy is sound.

Cox, *supra* note 21, at 30.

"Professor Lederer, a student of civilian criminal justice, states, '[w]hen the realities of the two systems are compared, there is absolutely no doubt which is better; military law could and should be better, but even as it is, it is immeasurably better than routine civilian operations.'" GILLIGAN & LEDERER, *supra* note 4, at § 1-60.00.

Advocates and supporters of military justice, with whom we should be numbered, ought not to mistake our position. On a comparative basis, military law should be commended. On an absolute basis, it has flaws. The insufficiently independent military judiciary is one.

*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.*²³²

²³² DE GAYA, *supra* note 4.