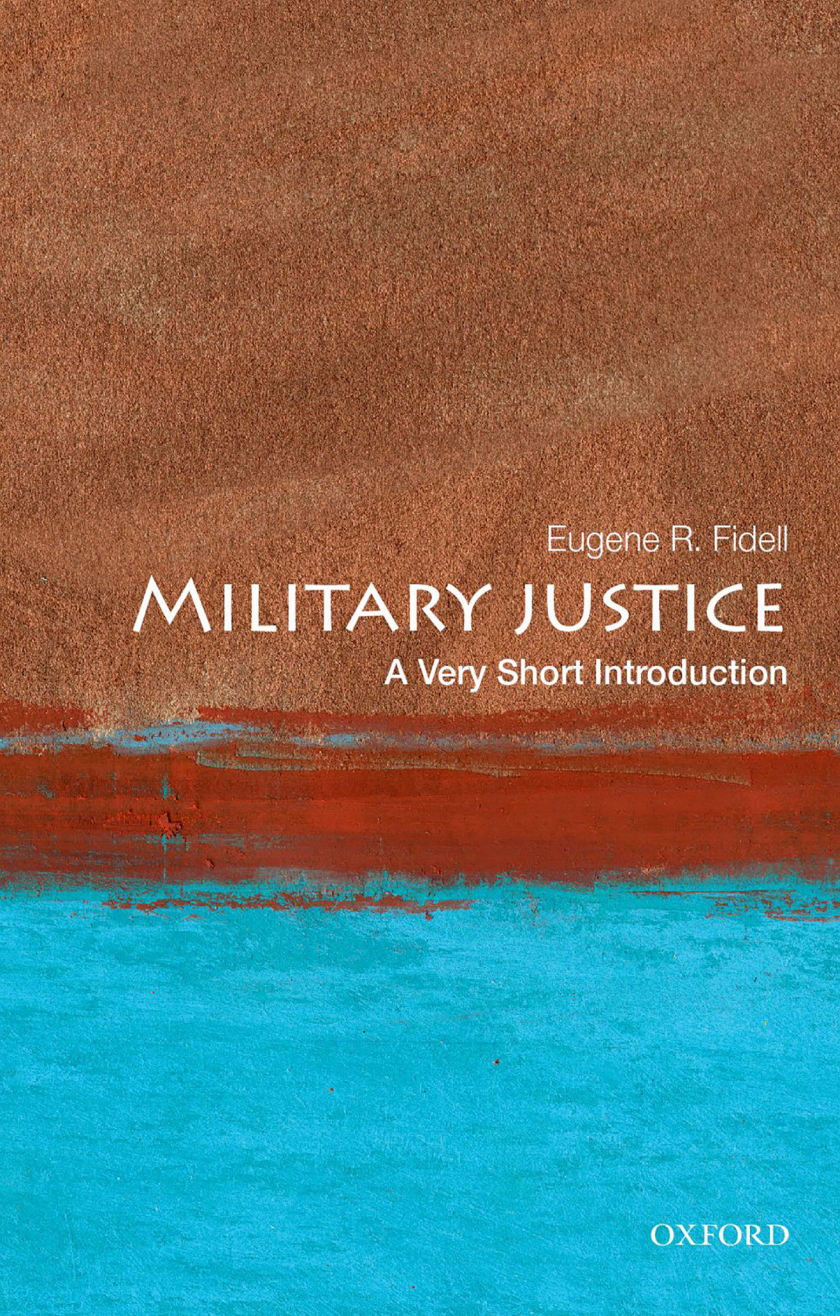
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Eugene R. Fidell

MILITARY JUSTICE

A Very Short Introduction

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Preface

What is it about military justice? It is virtually impossible to make a bad movie (or at least a boring one) about a court-martial. This may be because military courts pit the individual against the power of the state in unusually dramatic ways, but it may also be because courts-martial are themselves like theatrical productions: replete with costumes, unusual and sometimes archaic and therefore charmingly quaint customs, a private language, and high stakes. Even people who have never served a day in uniform find military justice a fascinating subject. Loyalists—often veterans—defend it stoutly and, not surprisingly, critics tend not to lavish it with praise. But whether one is for or against it, it remains a part of modern government and gets people's juices flowing. This book describes military justice as it has evolved and currently exists in the United States, the United Kingdom, Canada, and some other countries. It identifies strengths and weaknesses of these systems and tries to give a dispassionate appraisal of not only the current state of affairs but, more important, where the path should lead in the future. This is especially pertinent with the continuing emergence of new states such as East Timor or South Sudan, which may have nothing indigenous on which to draw.

The book provides an overview of the administration of criminal justice in modern armed forces, addressing important themes in

common law countries as well as some countries with other legal traditions. It only briefly addresses military commissions, a species of military tribunal being used to little effect (but at prodigious expense) by the United States at Guantánamo Bay, Cuba. They serve a different purpose from courts-martial, which are overwhelmingly concerned with the prosecution of crimes committed by military personnel rather than enemy forces. Although they in many respects resemble courts-martial, military commissions are still best thought of as sui generis.

The historic British model, based originally on the sovereign's sole powers and only later on Mutiny Acts enacted by Parliament, conferred on military commanders broad powers over the administration of justice within their units. Commanders alone decided who would be charged with what offenses, who would serve on the military equivalent of the jury, and what sentence would be approved. This commander-centric legacy has in important respects been abandoned by the UK and has been significantly modified elsewhere. Nonetheless, it remains largely intact in the United States, which adopted the offenses and procedures set out in George III's 1774 Articles of War even before the Declaration of Independence. That commander-centric system has become increasingly out of step with contemporary international standards in a variety of respects. American military justice today is "more British than the British."

The book has "attitude": military justice is not without strengths, but its deficiencies must be acknowledged. National systems reflect a variety of shortcomings, and this can be especially salient in Third World countries where the regular civilian judicial system may itself be either defunct or sadly unworthy of public confidence.

Ordinarily, modern democracies rely on courts of general jurisdiction to ensure an orderly society by punishing conduct that is proscribed by the criminal law. Special court systems were

common in the Middle Ages but have inexorably been subsumed within the general system for the administration of justice. A holdout in the process is the military justice system. The military is the rare part of contemporary society that enjoys the privilege of policing the behavior of its own members, with special courts and a separate body of rules. This goes beyond, for example, the power of a medical society, bar association, or church group to discipline or expel its erring members or officials: it includes criminal sanctions such as imprisonment and even capital punishment, and of course the enduring stigma of criminal conviction.

In many respects—what conduct is criminal, who decides which cases should be prosecuted, how the jury is picked, and how judicial independence is protected—military justice may differ dramatically from the civilian model. Why is that, and are the differences growing or shrinking?

This book attempts to integrate a description of the United States military justice system with a comparative view of civilian and selected foreign models for the administration of justice, including the increasingly important focus on human rights. The military justice systems of the United Kingdom and Canada as well as those of several other countries have experienced especially dramatic change because of concerns over human rights, including judicial independence and extravagant claims of military jurisdiction.

The book not only sketches the past and recent trajectory of military justice, but attempts to identify future trends as well.

Introduction: Separate rules for a separate society

To understand military justice you have to confront two threshold questions. Is the military a "separate society"? Should it be? The answers to these questions will determine the nature and scope of military justice in any particular country and will tell a good deal about that country's political values.

Military forces have evolved over the millennia. At their simplest, they have been individuals with weapons who join together without a lot of rules to engage in mutual defense against an adversary or to embark on offensive or retaliatory operations against an enemy; at their most complex, they are highly organized standing forces with elaborate structures and rules. Along the way, these forces grew apart from the rest of society; marks of this separation came to include living together in encampments, wearing identifiable uniforms, gaining a monopoly on certain kinds of weaponry, developing a private vocabulary, and above all, viewing themselves as an identifiable group in some sense distinct from the rest of society. Because success in military operations of any kind requires resources, order, and organization as well as the subordination of individual preferences to a larger set of common objectives, rules of conduct unique to the armed forces were inevitable and there remains a place for them.

From this perspective, the military represents a specialized society within society as a whole. Unlike society writ large, this subset has a specific purpose: the achievement of military goals, whether those goals are preserving domestic order, frightening or conquering neighbors, or protecting against invasion or rebellion. These are in contrast to the goals of the larger society, which are, at least in democratic countries, aimed at maximizing individual autonomy. The ever-present issue is whether these two societal ice floes—the larger society and the military—run the risk of drifting too far from one another.

How does the military justice system differ from the civilian criminal justice system? The differences are numerous and range from the trivial to the profound. Both systems seek to punish crime, but military justice also aims to maintain order and discipline within its boundaries, including adherence to a host of requirements and prohibitions that have no counterpart in civilian society. As Jeff Blackett, Judge Advocate General of the British Armed Forces, has noted, a separate system is needed not merely for operational effectiveness and morale and the maintenance of discipline but also as a reflection of the unique nature of armed forces in which personnel must employ lethal force, place their personal safety at risk, and be prepared to die for their country. Military justice also serves to extend national law to personnel serving outside the country and beyond the jurisdiction of civilian courts. Despite these separate interests, the overall process of military justice has come increasingly to resemble civilian criminal prosecutions since the middle of the 20th century.

There has also been a trend toward integrating military justice systems so that a single set of rules applies to all branches of the service. That shift makes excellent sense because a country's armed forces must work together; they typically have a common pay scale, and there may be a pattern of inter-service transfers or successive service in different branches—hence, the *Uniform* Code of Military Justice. Canada combined its systems in 1950, but the

United Kingdom (UK) did not achieve a tri-service military justice system until 2009. Some countries with major defense establishments have inexplicably still not instituted this basic reform, India being the prime example.

Everyone has heard the term "court-martial," but just what is a court-martial? It is a criminal trial, run very much like those familiar to most Americans. A legally trained judge presides and a group similar to a jury decides guilt or innocence based on the evidence and applying instructions received from the judge. The prosecution has the burden of proving its case beyond a reasonable doubt, and both it and the defendant (called the accused) are—these days—represented by attorneys. Trials unfold in the usual manner, with the prosecution presenting its case first, followed by the defense. Witnesses testify under oath and are subject to cross-examination. Courts-martial can punish only offenses prescribed by law, although some of the punishable offenses (such as disobedience, disrespect, or unauthorized absence) may have no counterpart in civilian criminal law.

The three levels of American courts-martial, in ascending order of punishment powers, are one-officer summary courts-martial for the trial of minor offenses, special courts-martial with at least three jurors and punishment powers limited to a year's confinement and a bad-conduct discharge from the military, and general courts-martial with at least five jurors having power to impose any sentence up to death. Capital cases require at least 12 jurors. Several members of the United States armed forces are on death row, all for murder; the last military execution was that of Private John A. Bennett, who was hanged in 1961 for the rape and attempted murder of a schoolgirl in occupied Austria seven years earlier.

Terminology for courts-martial varies from country to country. The UK has a standing trial court called "the Court Martial" for all cases involving military personnel. Civilians who are subject to service law are tried in the Service Civilian Court for minor

matters and in the Court Martial for serious offenses. Canada has general and standing courts-martial, the difference being that a standing court consists only of a judge; there is no jury.

Can a soldier be tried in civilian court? Certainly. Whether a case should be handled by a military or a civilian court is often a matter for negotiation between military and civilian authorities, but in the United States nothing prevents a civilian court from prosecuting a soldier for a crime under state or federal law. In some countries, military personnel may be subject to civilian trial only with the consent of military or other authorities. This is so, for example, in parts of India (e.g., Jammu and Kashmir) in which the Armed Forces (Special Powers) Act is in force. Under that controversial statute, permission is rarely if ever granted to prosecute a soldier in civilian court. The danger of impunity is obvious under such a legal framework.

What rights does a military accused have? People in the military do not stop being citizens (or permanent residents, as many soldiers are). Congress has given military personnel a host of rights that resemble, even if they do not precisely copy, those that Americans enjoy in criminal cases. These include the right to an impartial judge, speedy and public trial and effective assistance of counsel, protection against self-incrimination, the presumption of innocence, the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, the right to something like a jury (albeit ordinarily not a 12-person jury of peers whose decision must be unanimous), protection against cruel or unusual punishments, and the right to appeal to a higher court. By way of comparison, Canada has required jury unanimity in courts-martial since 2008. The UK requires jury unanimity in neither the civilian courts nor the Court Martial.

Some familiar rights simply do not apply. Examples of the differences between military justice and civilian criminal practice include the right to indictment by grand jury (applicable in federal

and some state court systems but not in courts-martial) and the right to a judge with either life tenure (in the federal district courts, courts of appeals, and Supreme Court), or lengthy fixed terms (as in most state court systems). There is no right to bail in American courts-martial; some other national systems, including those of the UK and Canada, allow bail in military cases. In addition, contrary to federal and state civilian practice (except for capital cases), in US courts-martial the jury decides the sentence (unless the accused opts for a trial by judge alone, in which case the judge pronounces sentence).

Can unconstitutionally seized evidence be used in courts-martial? Military jurisprudence basically tracks civilian federal law on this and other constitutional and evidentiary issues. The two systems diverge only when there is a strong showing that the civilian rule is impracticable. Congress requires that court-martial procedure, modes of proof, and rules of evidence conform with those generally recognized in the trial of criminal cases in US district courts when not impracticable. It has delegated to the president the power to make rules for courts-martial. These are found in the *Manual for Courts-Martial*, which was drafted within the Pentagon and, following review by the Department of Justice and (ordinarily) an opportunity for public comment, issued and amended periodically by Executive Order signed by the president. The governing statute is the Uniform Code of Military Justice (UCMJ), passed by Congress in 1950 and amended numerous times since then. The last major overhaul was in 1968. Despite the word "uniform" in the name of the statute, there are differences among the various armed forces, which remain surprisingly autonomous in the administration of justice. Equally surprisingly, the Defense Department has a very limited role in military justice matters.

American courts-martial that meet a sentence threshold are subject to review by a court of criminal appeals in each service (the Navy and Marine Corps share one). From there, discretionary

review can be sought from the five-member civilian US Court of Appeals for the Armed Forces and the Supreme Court of the United States. Capital cases are automatically reviewed by the service court of criminal appeals and the Court of Appeals for the Armed Forces. The Supreme Court has had appellate jurisdiction over courts-martial only since 1984. It accepts very few court-martial appeals, and only when a case presents a constitutional or other major generic issue. Because of jurisdictional barriers Congress erected when it first opened the Supreme Court's doors to military cases, most courts-martial unfairly remain ineligible for review there.

What about minor disciplinary offenses? For these, the United States, like other countries that maintain military justice systems, has an additional, far less formal adjudicatory system, with appropriately limited punishment powers. This is called non-judicial punishment, and it is imposed by the commanding officer. Whether a case will be handled by court-martial or non-judicial punishment is decided by the commanding officer, typically after consultation with a military attorney. The UK and Canada also have less formal systems for dealing with minor offenses, and in the case of the UK there is even a special court—the Summary Appeal Court—to rule on appeals from summary hearings. It consists of a judge advocate and two serving officers, and reviews the case de novo. An accused who appeals is not exposed to a stiffer sentence, and the proceedings on appeal comply with the European Convention on Human Rights, thereby saving from invalidation what would otherwise be a non-compliant summary discipline process.

In Fiscal Year 2015, the United States armed forces held 1,102 general courts-martial, 838 special courts-martial, and 634 summary courts-martial, and administered non-judicial punishment 51,792 times. The available data do not reveal how often non-judicial punishments are appealed to higher authority or how often accused members of the service demand trial by

1. Military justice has to be mobile to ensure discipline and accountability in the field when forces are on foreign deployment. Here, a Canadian commander conducts a summary trial in the field in Afghanistan.

court-martial instead of non-judicial punishment (as is their privilege unless they are attached to or embarked in a vessel).

The caseload data for Canada and the United Kingdom are predictably lower given their smaller military footprint. Canada conducted 67 courts-martial and 1,128 summary trials in reporting year 2013–14. For its part, the UK conducted 451 courts-martial and 4,151 summary hearings (also called "summary dealing" or "CO's Orders") in 2014. Interestingly, 97 percent of the summary hearings involved guilty pleas and 94 percent dealt with disciplinary (as opposed to civilian criminal) offenses. In contrast, criminal offenses accounted for two-thirds of British courts-martial. Only 76 of the UK summary hearings were appealed to the Summary Appeal Court, suggesting overall consumer satisfaction with the process, or at least with the results. Overall caseloads have been declining in the UK, reflecting downsizing of the armed forces.

Are these formal and less formal systems fair? On the whole, they are, in the sense that it is rare in any of these countries for an innocent member of the armed forces to be convicted or a guilty one to be acquitted. It is harder to tell for sentencing, especially in the United States, where there are currently no sentencing guidelines, but only a permissible maximum punishment. Sentences for similar crimes can vary dramatically, and only seriously aberrant sentences will be corrected on appeal.

Whether these systems could be improved is another matter. The ultimate heart of the system—the broad powers wielded by military and naval commanders—is a throwback to the days of George III and should be reformed to meet contemporary standards and thereby foster increased public confidence in the administration of justice.

Chapter 1
Military command and military discipline

The most important characteristic of a military unit is that it is a *unit*. To be effective, and something more than a collection of individuals with weapons, a unit must be commanded. Commanders are responsible for achieving the unit's objective, a function that requires them to ensure that subordinates will do as they are told. This is more than window-dressing; there can be heavy legal consequences for failure to comply. Under the law of war (the body of international law, also known as the law of armed conflict, or international humanitarian law, that among other things defines war crimes), with power comes responsibility. Specifically, a commander can in some circumstances be penalized for the misconduct of subordinates. This was the case, for example, with Japanese Army General Tomoyuki Yamashita, who was executed in 1946 for failing to control his troops when they rampaged in Manila toward the end of the Second World War. Command responsibility has come up several times more recently in several cases before the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, and other ad hoc or hybrid international tribunals.

In the classical model of military justice handed down from the United Kingdom, commanders played (and in some countries, such as the United States, still play) a powerful role. These models can fairly be called "commander-centric"

systems. Under the Uniform Code of Military Justice, commanders can not only dispense justice directly for minor disciplinary offenses through non-judicial punishment but can also decide—as "convening authority"—whether to convene ad hoc courts-martial, and determine such critical matters as who shall be prosecuted on what charges and at what potential level of severity, what resources the defense will have to prepare for trial, whether there will be a pretrial agreement or grants of immunity, who will serve on the jury, and even, in some cases, whether the findings and sentence should be approved or modified before appellate review. At one time commanders could even direct a court-martial to reconsider its verdict and until very recently they had discretion to modify or disapprove trial results, to quote the *Manual for Courts-Martial*, "for any reason or no reason."

Over time, commanders' military justice powers have been constrained in a variety of respects. A case cannot, for example, be sent any longer to a felony-level general court-martial without both a preliminary hearing to determine if there is probable cause and review by a staff judge advocate (an attorney). Convening authorities can no longer insist that a court-martial reconsider a ruling and accede to his or her views. Since 1983, the law has required a lawyer's finding that there is evidence to support the charges before a case can be referred to a court-martial. Even staunch defenders of the commander-centric system have suggested further constriction of commanders' powers by forbidding the referral of charges for trial against the recommendation of a preliminary hearing officer. Military law is also alert to efforts to exert unlawful command influence, which can manifest itself in countless ways, including discouraging witnesses from testifying or stacking the jury in the prosecution's favor. Even with the highest degree of vigilance, however, a system such as that of the United States lacks the independence that contemporary legal standards demand in the administration of justice, civilian or military.

The package of powers exercised by commanders in commander-centric systems has to be viewed cumulatively. If there is one power that lies at the very heart of such systems, it is the power to decide how charges shall be disposed of. That "disposition" (or charging) power in effect makes the commander a prosecutor, even though he or she is highly unlikely to be an attorney. Many countries have moved away from the traditional arrangement in favor of allocating the disposition power, at least for major offenses, to lawyers outside the chain of command. Thus, since 1955, Israel has vested charging power in the uniformed Military Advocate General, who is a general officer. Other common law countries, such as the United Kingdom, Ireland, Canada, Australia, New Zealand, South Africa, and Singapore, now rely on Directors of Military (or Service) Prosecutions to make these critical decisions. In the UK, the director can be either a civilian or a military officer; the first two occupants of the position have been distinguished civilian practitioners. In Canada, the director is a military officer, but not of general officer rank. The overall trend away from commanders exercising disposition power is not confined to the English-speaking world: a civilian chief prosecutor makes these decisions in Brazil.

Since the end of the Vietnam War there have been repeated—and thus far unsuccessful—calls to relieve American commanders of the disposition power. The idea has gained new traction because of outrage over the extent of sexual assault and harassment in the armed forces. A study conducted for the Defense Department reported in 2013 that there had been 26,000 such incidents in the preceding year. These data, coupled with *The Invisible War*, a 2012 documentary, attracted a great deal of public attention and galvanized a critical mass of federal legislators, many of them women, into action.

The fallout of congressional dismay over the incidence of sexual assaults in the armed forces has been messy. One bipartisan coalition succeeded in enacting an assortment of miscellaneous

amendments to the Uniform Code of Military Justice and other parts of the United States Code beginning in 2013. The other camp, also bipartisan, and led by Senator Kirsten E. Gillibrand of New York, while supportive of the first group's efforts, thought it critical to go further and end commanders' traditional disposition authority, so that charging decisions would be made by a lawyer outside the chain of command. In 2013, her Military Justice Improvement Act garnered 55 votes in the Senate—a majority, but still five votes short of the 60 needed to bring debate to a close ("cloture"). Two years later, with changes in the composition of the Senate, support for the measure fell to 50 votes. The bill continues to be stoutly resisted by the service chiefs and the leadership of the Senate Committee on Armed Services, but it remains in play. Senator Gillibrand is young (for a senator) and occupies a safe seat, and has said she will continue to press for passage. Eventually this signature piece of legislation (or something like it) will pass, but it may take several more years. Until then, it will not be the first time the country has been loath to abandon a British legal institution long after the mother country has done so (a prime example is the federal grand jury, which is hard-wired into the Fifth Amendment).

What are the arguments pro and con on this significant reform? The arguments *against* the change are phrased in many ways but boil down to three core claims: commanders need to have the disposition power because they are responsible for unit good order and discipline; they need it because they could be held responsible for their subordinates' misconduct like the unfortunate General Yamashita; they should have it because they are tough on crime and will prosecute cases that lawyers would not pursue (citing cases turned down by local civilian district attorneys but successfully tried by court-martial). Opponents of the Gillibrand bill also contend that countries that have instituted reform of the charging function have not experienced a decline in sexual assaults.

These claims are unpersuasive. No one disputes that commanders are responsible for the good order and discipline of their

2. On June 4, 2013, the Joint Chiefs of Staff and the Judge Advocates General were called to testify before the Senate Armed Services Committee about efforts to reduce sexual offenses in the US armed forces. As a group they have opposed stripping commanders of the power to decide who gets prosecuted in courts-martial.

subordinates, but that is not a reason for allowing them to retain the charging power, which after all requires an exercise of legal judgment which very few of them are trained to make. Modern society recognizes that legal training is necessary for proper exercise of the charging power. Moreover, no one has been able to point to evidence that the military readiness of any of the countries that have instituted this change has been adversely affected. A number of them have had regular occasion to deploy their military forces and have done so in an effective manner. Israel is a prime example, although opponents dismiss it as a model because the country's defense forces do not engage in the kind of long-distance deployments experienced by United States armed forces.

As for the command responsibility argument, two responses can be made. First, it would be farfetched to contend that the United Kingdom and the numerous other countries that have shifted

to a Director of Service (or Military) Prosecutions have thereby exposed their senior leaders to command responsibility liability they did not previously have. Second, there is no reason to believe that to avoid command responsibility, a commander's duty to control subordinates must include the power to compel the prosecution of a case. Surely it is enough that a commander, having caused war crimes allegations to be investigated, be able to refer any possible charges to an independent prosecutor with the final authority to decide whether to prosecute, assuming the prosecution system is functional and not a sham. It is inconceivable that any court would impose command responsibility liability on the notion that a commander could not exercise effective control because he or she could not literally compel a prosecution. Indeed, in the case of Jean-Pierre Bemba Gombo, a trial chamber of the International Criminal Court held in 2016:

> In the event the commander holds disciplinary power, he is required to exercise it, within the limits of his competence. If he does not hold disciplinary power, measures which may, depending upon the circumstances, satisfy the commander's duties include proposing a sanction to a superior who has disciplinary power or remitting the case to the judicial authority with such factual evidence as it was possible to find. . . . If the commander has no power to sanction those who committed the crimes, he has an obligation to submit the matter to the competent authorities.

It would thus be very surprising if the law of armed conflict failed to accommodate the evolving concepts of judicial and prosecutorial independence that have emerged in the decades since the Geneva Conventions of 1949 came into force.

The claim that commanders will send cases to court that lawyers would not—and that court-martial convictions have in fact been obtained in such cases—fares no better. Little if any data exist to support such a claim, and in any event the comparison is defective because it compares local prosecutors' decision making with

non-lawyer commanders' decision making, whereas the proper comparison would be between commanders' decision making and decision making by military prosecutors working outside the chain of command. Since that situation has never existed in the United States, this basis for opposition is purely hypothetical. That commanders occasionally send cases to trial over the objection of their staff judge advocates also lacks probative value; one would need far more and better information than opponents of reform have produced, and would also need to know the other side of the coin: how often have cases that have been referred for trial over a staff judge advocate's objection been dismissed by military judges or resulted in acquittals?

The real basis of much of the congressional opposition to abandoning commander-centric charging is that it will not drive up the number of sex offense prosecutions and convictions. The difficulty with that argument is that it focuses improperly on outcomes rather than on the structural fairness of the system. Similarly, claims by the military's surrogates—that ending commanders' disposition power in those countries that have done so has not been a success because sexual assault rates have not gone down—are transparently fallacious: not one of the countries that have enacted this reform did so for the purpose of driving up sexual assault prosecutions or driving down sex offense rates. Rather, they did it to satisfy domestic constitutional concerns (as happened in Canada) or independence and impartiality requirements imposed by international human rights bodies such as the European Court of Human Rights (as was the case in the UK and Ireland). The application of human rights principles to military courts is a recurring theme in contemporary military justice and its reform. Standards laid out in "Draft Principles Governing the Administration of Justice through Military Tribunals" were developed under UN auspices in 2006 and capture the main points, although in a few significant respects they remain disputed territory. Commonly known as the Decaux Principles, after Emmanuel Decaux, the French law professor who

was their primary draftsman, they attempt to identify neutral principles that apply universally. Regrettably, they have had no discernible impact on the course of military justice reform in the United States.

Proponents of the shift away from commander control of charging point to the fact that commanders may have conflicting interests. Thus, a commander may be evaluated (and therefore promoted or not) on the basis of "command climate," which includes an assessment of levels of criminality, treatment of women and minorities, and the like. A commander therefore may have an incentive to sweep matters under the rug in order to convey the impression that all is well within the unit. The commander may also know either the complainant or the suspect, and thereby bring to the charging decision personal information and relationships. Is the suspect a skilled fighter pilot? Perhaps that officer's peccadilloes can be overlooked. It was this kind of thinking that led one three-star Air Force general to overturn a jury verdict against a pilot in 2013. The general wound up being forced into retirement at a lower pay grade the following year. Another three-star general who had the temerity to set aside a sex-offense court-martial conviction found her nomination for a plum assignment blocked in the Senate Armed Services Committee. She decided to throw in the towel and retired. Congress responded to these cases by dramatically narrowing commanders' post-trial powers in 2014, but it failed to appreciate that precisely the same kind of vice can be found at the front end of the process where it counts most: in the charging decision.

The best test of Senator Gillibrand's proposal—which treats the mischief in commander control of the charging decision as relevant to all major offenses, rather than only sex offenses—is whether it will contribute to public confidence in the administration of justice. Professor (and former Air Force officer) Elizabeth L. Hillman and retired Virginia prosecutor Harvey Bryant, dissenting in part from the report of a congressionally chartered panel focused on adult

sexual assault crimes in the United States armed forces, powerfully state the case for reform in terms that transcend that limited, albeit important, category of misconduct:

> Requiring commanders to exercise prosecutorial discretion and perform judicial functions hinders their ability to respond vigorously and fairly to sexual assault. It also exacerbates the negative impact of inevitable failures of commanders to fairly and objectively act as prosecutors and judges. It rejects the independent prosecutors on whom every other criminal justice system—U.S. state and federal criminal courts, our allies' military courts, and international criminal courts—relies. As a result, the U.S. military justice system will continue to operate outside the constraints of 21st-century norms for fairness and transparency in criminal justice.

Are there other approaches to preventing abuse of the charging power? One might be to improve access to court records. At present, the government—mistakenly—does not routinely make public critical pretrial documents. Denial of access to documents such as the records of preliminary hearings that are ordinarily open to the public and address whether there is probable cause to conduct a court-martial has been a recurring source of frustration for journalists who attempt to cover military justice. American court-martial appellate decisions, on the other hand, are readily available, although records of trial and pleadings have proven difficult to obtain, even when they concern trials conducted entirely in public. On occasion the government may make special arrangements, as it eventually did in the high-profile case of Private Bradley (now Chelsea) Manning, for an electronic reading room. Manning was convicted of releasing thousands of classified documents to WikiLeaks.

Records of non-judicial punishment are typically withheld under the Privacy Act unless the government elects, in its discretion, to release them in cases with some public significance. In contrast, Canada's military justice regulations guarantee public access to

records of disciplinary proceedings by simple application to the commanding officer.

Another useful step to prevent abuse of the charging power might be to allow the civilian courts to oversee the exercise of that power. At least in American jurisprudence, that kind of oversight is beyond the pale. Prosecutorial discretion is essentially immune to judicial review, whether the decision is to prosecute or not to prosecute.

In sharp contrast, the Israeli Supreme Court has on occasion reviewed charging decisions of the Military Advocate General. This has happened both where no charges were filed and where the charges that were filed seriously understated the gravity of the offense, under what seemed to be collusive circumstances. This kind of review is haphazard and would never happen in the United States, given separation of powers concerns and case law that is deeply hostile to the reviewability of prosecution decisions. Empowering civilian courts to oversee the commander's choice of disciplinary tools would work a far more profound change in the American legal landscape than would transferring that choice to independent military prosecutors for serious cases.

The concern over sexual assault, harassment, and reprisal in the United States armed forces may not yet have driven a stake through the heart of the commander-centric military justice system, but it has already had pervasive effects, some of which are good, and some of which are not so good. On the plus side, the controversy has sparked basic reforms in the process. Preliminary investigations in major cases have been required since 1920, when the United States copied a British reform. Over the years, these so-called Article 32 investigations had turned into an extraordinarily valuable discovery tool for defense counsel, permitting them to learn the prosecution's case before trial. At the same time, however, they could be and not infrequently were misused, permitting defense counsel to engage in abusive, invasive

cross-examination of complaining witnesses, oftentimes with the intended effect of driving them to abandon their complaints. Congress wisely amended the statute to provide for preliminary hearings that were, at their core, simply probable cause hearings, comparable to those conducted in the civilian federal and state courts. As these hearings are currently constituted, victims can decline to testify and the opportunities for abuse are far fewer than before. Preliminary hearing officers still have to permit the accused to present evidence in mitigation or as to legal defenses, and anything else that bears on the kind of disposition the preliminary hearing officer ought to recommend to the convening authority. Overall, the new format is more disciplined than the system it replaced, although the differences may be more apparent than real. For example, like the pretrial investigations that preceded them, preliminary hearings must ordinarily be conducted in public.

The military defense bar at first complained bitterly that the previous equilibrium had been upset and that the pendulum had swung too far against uniformed criminal suspects. Now that the shock of the change has worn off, the lawyers are figuring out not what they *cannot* do, but what they *can* do if their clients' interests are served by actively participating in the preliminary hearing.

The preliminary hearing reform reflected a larger theme: protecting the interests of victims. This was not entirely new to American military justice. It had been cited, for example, when the US Court of Military Appeals overturned its own precedents and held in *United States v. Solorio* that the fact that a victim was a military dependent would suffice to justify the exercise of military jurisdiction over an off-base offense. Thereafter, victims' and witnesses' rights became an increasingly persistent focus of legislative and service attention, culminating in the creation of a Special Victims Counsel to advise personnel who complained of sexual assault. Congress eventually enacted that program into law, thereby turning what had been a two-party courtroom

struggle into, at times, a three-way mêlée. The consequences of this shift remain uncertain, as the various players continue to react to a fundamental change in the traditional adversary system. How will military prosecutors view their responsibility to protect their key witnesses now that some of them have their own free counsel? How broadly will these victims' counsel read their mandate? Will every sex prosecution and appeal turn out to have three parties rather than two? These remain open questions.

There is a negative side to the ledger as well in these recent changes. Do they single out women in the service in a way that retards efforts to integrate the military workforce, thereby reducing unit cohesion? By affording special treatment to sex offenses, do these changes undermine the congressional goal of having a single integrated military penal code? Apart from capital offenses, for which society broadly recognizes a need for special provisions, does it weaken the military justice system by carving out some offenses for special treatment?

Occasionally Congress has had to backtrack or revisit its handiwork, whether through technical corrections to military justice or, as in the case of the Uniform Code of Military Justice's sex crimes provisions, when hasty legislation proved to be unworkable. More often, however, once legislation is enacted in this area, Congress is unlikely to return to the subject, much less retrace its steps. As a result, even if experience in the coming years suggests that it erred in one or more respects in its recent military justice legislation, the odds are the legislation will remain in place and the armed forces, bench, and bar will have to make it work.

The broad discretion vested in commanders in systems that retain the commander-centric model (as well as some that do not, such as Israel) can be a serious source of dissatisfaction. Specifically, it is a commonplace among junior military personnel that misconduct by superiors is treated more harshly than similar misconduct by enlisted men and women. Generals and admirals and other senior

officers who misbehave may be given an easy way out. Rather than being tried in public before a bells-and-whistles court-martial, they may be quietly awarded non-judicial punishment such as a letter of reprimand and simultaneously encouraged to retire. United States law permits members of the service to retire only in the highest grade in which they have satisfactorily served, so at times general and flag officers may wind up retiring in pay grades one or more levels below the last rank they held on active duty. The result may be enormous financial losses due to reduced retired pay over the unfortunate officer's remaining decades, but this does little to assuage the sense among grievance-nursing junior personnel that there are "different spanks for different ranks."

The spectacle of putting a senior officer in the dock may be a source of satisfaction for subordinates but it is one every armed force prefers to avoid. Given the fact that senior officer misconduct, rare though it may be, can and does leak into the media and blogosphere and inevitably make its way into the ever-robust military rumor mill, keeping these matters entirely out of the courtroom is an unrealistic hope.

Chapter 2
The arc of civilianization

Since World War II, there has been an accelerating trend toward the merging of military and civilian legal systems. The trend has been resisted by some old-timers, but now has enough momentum that it will continue—but how far?

When it first appeared in discussions of military justice, the term "civilianization" was a dirty word. The administration of military justice was considered the exclusive province of the military, and anything that suggested otherwise was seen as profoundly mistaken. In actual practice, however, this view could be only partially supported as civilian lawyers had played a role in courts-martial since the 1600s. In wartime, it was only natural that some of those in uniform would have been lawyers in private life, and they would equally naturally be called to assist in courts-martial, either as counsel or as the judge advocate—the closest thing to a judge in the classic model. Similarly, while there have always been aspects of military justice that are quite different from how criminal cases are handled in the civilian courts (some of which are described in this book), it was inevitable that military law would be influenced by civilian practices and, over time, by changes taking place in the administration of justice generally.

Over the years, and especially since World War II, military justice has increasingly approximated civilian criminal justice. The two,

in the common law countries, are so much in harmony that it would be quite easy for a civilian criminal defense counsel who had never worn a uniform to step into a military courtroom without undue fear of committing malpractice. True, a bit of study will help, along with a willingness to rely on and learn from military co-counsel, when available, but a military courtroom today is no more of a minefield than is any other court of law. Some of the most effective representation comes from civilian lawyers, which is one reason court-martial defendants who have a right to free military counsel may hire a civilian at their own expense.

Civilianization has occurred on multiple levels. Where once the rules of evidence in a military court were unique to that system, today they are typically a carbon copy of the rules followed in civilian criminal trials. The Uniform Code of Military Justice gives the president broad rule-making authority for courts-martial, but it sets a benchmark that the rules cannot be contrary to or inconsistent with the Code, stating that the president "shall, to the extent he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." The case law puts the burden on a party who argues for a rule different from that followed by the regular federal courts. The *Manual for Courts-Martial* in turn includes a default rule under which changes in the Federal Rules of Evidence that apply in the civilian courts will automatically be incorporated into the Military Rules of Evidence after 18 months unless the president otherwise directs. Over the years, the president has determined that only three of the regular federal rules and one part of a fourth do not apply to courts-martial.

Moreover, the rule-making process involves civilian officials. The UCMJ itself, as an Act of Congress, was enacted and may be amended only through a political process that is thoroughly civilian, even if the military has a great deal of influence on both the Congress and the president in such matters. The services regulate large parts of the military justice terrain through internal

directives, but these in some instances require the approval of politically accountable (that is, senatorially confirmed) senior civilian officials. The *Manual for Courts-Martial* fills in a host of critical details. Changes typically originate within the armed forces through a standing Joint Service Committee on Military Justice, whose voting members are all uniformed personnel. From the time the committee proposes a change, however, it must pass through many civilian hands, including lawyers at the Department of Defense, Department of Justice, Office of Management and Budget, and White House Counsel, before it reaches the Oval Office for signature by the president. As a result, civilian involvement in military justice lawmaking is pervasive and at times serves as a check on military initiatives.

The civilian commander-in-chief plays a critical role as well in the administration of post-trial military justice in specific cases in two significant ways: no court-martial death sentence can be executed without the chief executive's personal approval, and members of the service who have been convicted may, like other federal convicts, apply for pardons or other forms of executive clemency that are the president's prerogative. Some presidents are more generous than others in granting clemency, and from time to time someone convicted in a court-martial will pop up on the list of lucky applicants.

Although there are uniquely military offenses that have no counterpart in civilian criminal law (e.g., absence without leave, desertion, cowardice, mutiny), military justice codes often also create offenses that are identical or very similar to familiar civilian crimes. This can occur either by broadly incorporating regular crimes as "service offenses" by means of a catchall provision, as is found in British, Canadian, or US military law, or by spelling out specific common law offenses in the military code, as in some of the punitive articles of the Uniform Code of Military Justice. The Code's Article 134(3) makes "crimes and offenses not capital" into court-martial offenses, sweeping in civilian federal crimes such

as counterfeiting, fraud, or tax evasion, as well as, in some circumstances, state crimes—so long as they are not capital offenses.

Other players may also be civilians, adding to the erosion of what might otherwise be differences between the two systems. Thus, although military judges in the United States, Canada, and Israel remain uniformed officers, in British courts-martial the Judge Advocate General (JAG, in effect, the chief trial judge) is a Senior Circuit Judge. Vice and Assistant JAGs are selected by the Judicial Appointments Commission in the same manner as other civilian judges and are appointed by the Lord Chancellor. Under the Armed Forces Act 2011, British judge advocates can and do regularly sit in the Crown Court, thus gaining valuable experience on the bench. Conversely, in more serious cases the Judge Advocate General can arrange for a High Court judge to preside.

In Canada, military judges are uniformed officers appointed to the bench by the Governor in Council (i.e., the Governor General acting on the advice of the Cabinet). Candidates are first screened by a Military Judges Selection Committee, three of the five members of which are military. The other two must be a retired civilian judge of a superior court and a nominee of the Canadian Bar Association. The committee's members are appointed by the Minister of National Defence. Plainly, the Ministry and Canadian Forces can exert a controlling influence over military judicial appointments.

Even in countries that continue to rely on uniformed officers to perform judicial functions, some of the judges will be reservists whose personal and professional lives are mostly in a civilian setting. The net effect, combined with the fact that uniformed lawyers and judges will have received their basic legal education in civilian law schools, is that the key players—however they are appointed—have deep roots in the civilian legal system.

Senior civilian officials such as an attorney general may also play a role in the sensitive decision to prosecute and the choice of a

civilian versus a military forum. This power is available in the UK, but rarely exercised. The same is true in Israel.

Another powerful factor that fosters ever-greater similarities between military justice and civilian criminal justice is the reliance on civilian appellate courts to hear appeals from courts-martial. The mere fact that a court-martial may wind up being scrutinized by the nation's highest court puts everyone on notice that inevitably civilian doctrines and ways of thinking about issues will have to be taken into account at trial. Even a constitutional court that recognizes military justice as a specialized jurisdiction that may mostly be left to police itself will at times find itself applying civilian doctrines. The US Supreme Court, which has discretionary jurisdiction over court-martial appeals, will on rare occasion take such a case to address an issue that may have ramifications beyond the military justice field. It has done so to clarify situations when an interrogation must cease or whether lie detector results may be used as evidence.

The ultimate in civilianization is abolition, and some countries have gone in that direction, especially in peacetime. Germany and, more recently, France, are examples of this, with criminal cases against military personnel simply being handled by civilian prosecutors and courts. Others have enacted variations on this theme. In the Netherlands, for example, criminal charges against military personnel are tried in civilian court, but only a particular one (in Arnhem), and the Dutch military provides a judge and technical support to the prosecutors. This too is civilianization, but not the high-octane variety found in Germany or France.

Complete or partial civilianization of military justice is a fact of life in so many countries that it is no longer quite the dirty word it once was. Nonetheless, when uttered, it often sounds as if it were in italics. It remains a surprisingly charged word, and is likely to be part of the background music for opposition to proposals for systemic reform, in both the United States and elsewhere.

Chapter 3
Who is subject to trial by court-martial?

Two questions are basic to military justice: who can be brought to trial in a military court, and for what?

In the civilian world, who is subject to criminal trial is typically entirely clear: everyone. Whichever sovereign has responsibility for a particular piece of territory can prosecute anyone who is present, whether that person is a citizen, a permanent resident, or simply a tourist. Around the edges, there may be some exceptions, such as foreign diplomats (who can claim diplomatic immunity) or personnel of other countries' armed forces (who may effectively enjoy immunity under Status of Forces Agreements). But in general, if you are in the country, you are subject to its criminal jurisdiction. You may even be subject to its criminal jurisdiction outside the country, but that is another story.

Military courts are different. Unlike civilian criminal courts, which may be of general or limited jurisdiction but in any event have authority over everyone in the country, courts-martial are exceptional courts. Their jurisdiction over individuals is limited, basically because it has always been understood that military justice has as its central purpose the maintenance of order and discipline within the armed forces.

This sounds simple, but the general rule has been tested time and time again, and even now is not universally accepted, even in developed countries with robust, functioning civilian court systems. Its acceptance is even less honored in countries where the civil administration of justice is imperfect or nonexistent.

So what kinds of personal jurisdiction issues have come up? Obviously, if a person is on active duty—that is, military duty is his or her full-time job—the question is an easy one. But what if the person is a reservist who wears the uniform only on weekends (so-called "weekend warriors") and for a couple of weeks in the summer? Should such a person be treated like a full-time soldier or sailor, or is she more like a civilian?

Of course, not all countries agree on what constitutes military service. Armies, navies, and air forces of course qualify. But what about border or coast guards or Interior Ministry forces? In Canada, the Coast Guard is composed of civil service employees; in the United States, the Coast Guard is an armed force and subject to military law at all times even though it is usually part of the Department of Homeland Security rather than the Department of Defense. Many countries have constabularies, which are sometimes referred to as national police. Spain's Guardia Civil, with its distinctive tricorn hats, and Italy's equally well-known Carabinieri fall into this category.

Whether such forces, whose armament is typically limited to smaller caliber weapons, should be subject to military justice is open to question. Turkey, for example, is considering removing its gendarmerie from the army. Perhaps the oddest uniformed service to be subjected to military justice is Brazil's Corpo de Bombeiros—the firefighters. In short, there is some line-drawing that separates the types of armed government personnel who are thought to be candidates for a special legal regime and those who are not. Where that line is drawn remains a judgment call for national authorities and is likely to reflect history and the political clout

3. It is not uncommon for countries to have militarized police or constabularies. One of the best known of these forces is Spain's Guardia Civil. Should personnel of these forces be subject to military justice?

of those organizations. It is difficult to imagine Madrid without the Guardia Civil, but subjecting that venerable organization to military justice seems increasingly debatable as national and international norms evolve.

Setting aside these organizational issues that can broaden or limit the category of full-timers who are subject to military justice, there are other categories of people whose coverage by military courts is much less clear. For example, some countries have sought to sweep in students such as those at service academies or in officer training programs such as the Reserve Officers' Training Corps (ROTC) in the United States. Others claim personal jurisdiction over retired personnel, and yet others go so far as to subject people who are no longer in the armed forces—or never were—to court-martial jurisdiction. These can include people who serve with or accompany an armed force in the field or are dependents of military personnel, such as spouses and children.

The ultimate extension of court-martial jurisdiction is found in countries that employ courts-martial or other military tribunals to prosecute civilians with no connection whatever to the military.

Many countries, including the UK, have long had laws on the books that give the military what might be called "tail jurisdiction" over people after they leave the service. Typically, these laws permit court-martialing these veterans for a fixed period after their discharge. Six months is a common period, and a variety of countries that follow British military legal traditions use that benchmark. Nor is the six-month period airtight: under s. 61(2) of the UK's Armed Forces Act 2006, the Attorney General can authorize a court-martial prosecution even after that period has expired.

Why have tail jurisdiction? The answer is simple: sometimes soldiers who are on the verge of hanging up their uniform commit crimes that come to light only after they have left the military. The most famous illustration of this was the case of the crown jewels of Hesse. After the defeat of Nazi Germany, the Hessian crown jewels fell into American custody, and a number of US Army officers helped themselves to various baubles. The theft was discovered eventually, but by then some of the thieves had been discharged as part of the post–World War II demobilization. The ones still on active duty were prosecuted, but one who had been discharged could not be tried under the then–Articles of War (a statute that preceded the Uniform Code of Military Justice). That individual could not be prosecuted for the theft, but the government was nonetheless able to achieve some accountability by prosecuting him for a customs offense. The case highlights why a country might want to keep a string on military personnel in order to prosecute later-discovered crimes.

American constitutional law traditionally took a very dim view of expansive court-martial jurisdiction because military trials do not afford some of the key rights conferred by the Bill of Rights, including, most notably, trial by jury, unanimous juries, and trial

by judges with the independence that comes with life tenure. There was serious concern in the 1950s that courts-martial were "drumhead" tribunals that did only rough justice. That impression was based in the experience of World War II, during which thousands upon thousands of courts-martial were conducted, often with little regard for due process and subject on many occasions to improper influence by commanders.

The habeas corpus case of *United States ex rel. Toth v. Quarles* came before the Supreme Court in 1955 under a UCMJ provision that permitted tail jurisdiction. Five months after Robert W. Toth was honorably discharged from the US Air Force, he was arrested by the military and charged with murder and conspiracy to commit murder while he was on active duty in South Korea. The Air Force brought him back to Korea but the federal courts in Washington, DC, intervened and eventually the Supreme Court struck down the provision under which ex-soldiers could be tried by court-martial for offenses committed before their release from active duty. Once a soldier had returned to civilian life, court-martial jurisdiction was at an end.

Of course Congress had a way out: simply provide for civilian trials instead of military trials to catch cases like that of the crown jewels of Hesse. This sounds easy and obvious enough, but amazingly, not until 2000, nearly half a century later, did Congress finally get around to plugging this loophole. It did so in the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), which, for serious offenses committed while a person was subject to military justice, permits veterans as well as civilians employed by or accompanying the armed forces outside the United States to be tried in the civilian federal courts instead. MEJA has been used surprisingly rarely in the intervening years. The best-known prosecution under the new law involved offenses committed by guards employed by the Blackwater private security company in a 2007 incident in Baghdad in which 17 Iraqi civilians were shot dead and 20 others were wounded. The defendants claimed that

their convoy had been ambushed and that they had used their weapons only in defense of the convoy. In the end, a civilian federal jury in Washington, DC, convicted four of them of offenses up to first-degree murder. One received a life sentence, while three others were sentenced to 30-year prison terms.

After *Toth v. Quarles*, in a series of cases the Supreme Court ruled out courts-martial for civilian employees and military dependents. The best known of the dependents' cases was *Reid v. Covert*, in which a military officer serving overseas had been murdered by his wife. Her conviction was set aside because the UCMJ provision under which she had been tried was unconstitutional. Other cases involving merchant mariners and civilian employees in Vietnam were also set aside by lower courts on other grounds (specifically, that the Vietnam conflict, not having been the subject of a formal declaration of war, was not a war within the meaning of the UCMJ). It looked like court-martial jurisdiction over civilians was at an end.

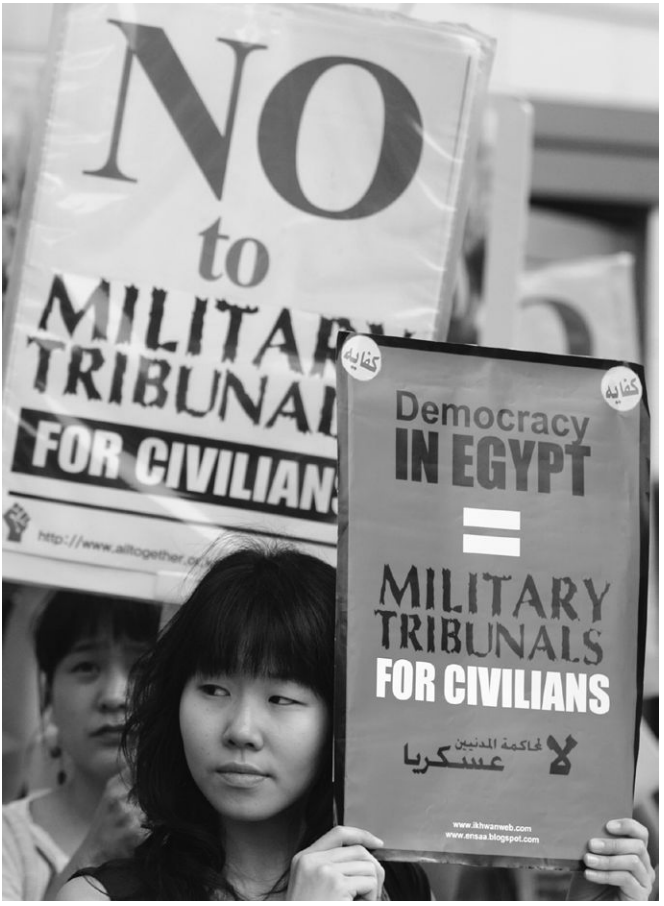
That was not to be. In 2006, Congress quietly amended the UCMJ to provide that civilians serving with or accompanying an armed force in the field in time of declared war or a contingency operation would be subject to trial by court-martial. A contingency operation is a military operation designated by the Secretary of Defense as one in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. A contingency operation is also an operation that results in a call or order to, or retention on, active duty of members of the uniformed services under various provisions of law during a war or a national emergency declared by the president or Congress. The provision is important because the United States has not issued a formal declaration of war since World War II but has engaged in numerous military operations overseas. It is also important because of the sheer number of nonmilitary personnel who work in or near the battle space in contemporary military operations.

A handful of cases arose in Iraq involving contractor personnel, but as soon as the contractors sought writs of habeas corpus in federal district court in Washington the government backed off. Finally, a test case arose when Alaa Mohammad Ali, a Canadian-Iraqi dual national who was a contract interpreter, got into a fight with and wounded another contract interpreter in Iraq. The question of personal jurisdiction was predictably raised at the court-martial, but the conviction and lenient sentence of the accused were upheld at both stages of the military appellate process. A petition for certiorari was filed with the US Supreme Court but failed to garner the four votes needed to grant review. Thus, the door is now again open to the prosecution of civilians by courts-martial in a narrow category of cases. How narrow? At times the United States has had tens of thousands of defense contractor employees working in Afghanistan and Iraq. Whether those employees were very law abiding, or their offenses never came to light, or the government employed great selectivity in exercising its jurisdiction under the revised code provision—whatever the explanation, there have been no further prosecutions, but the statute remains available should the need arise.

Should that expansion—sponsored by Senator Lindsey Graham of South Carolina—have been upheld? It seems doubtful. After all, Congress did enact MEJA, which covers conduct by civilians like Ali—except that Congress wrote in an exclusion for cases in which the offender is a national of the host state. That clause took Ali out of the statute as he was a dual national and one of his nationalities was Iraqi. Congress need not have enacted that exclusion, as it could have provided for jurisdiction over him in a civilian federal court. Because of that, it seems a reach to say that the arrangement permitting him to be tried by court-martial represented "the least possible power necessary to the end proposed," which is the constitutional test. Perhaps this issue will be joined again when another such case arises, giving the Supreme Court a further chance to say whether the cases from the 1950s remain good law.

The UK and Canada also permit military trial of civilians in narrow circumstances. One such case involved the minor son of a British soldier stationed in Germany. Alan Martin was charged with the murder of a German civilian and was prosecuted before a British court-martial, over his objection, in Germany. The court-martial board (or jury) at least included some civilians, but they were all employees of the UK Ministry of Defence. The case eventually reached the House of Lords, which at the time was still the highest court of Great Britain. The court upheld Martin's conviction against an argument that the case represented an abuse of process—a hard argument to make. Parliament being supreme, the House of Lords could not simply invalidate the pertinent provision of the Army Act.

Thereafter, Martin's case went to the European Court of Human Rights, where he attacked the court-martial's independence and impartiality on structural grounds, as well as the exercise of jurisdiction over him as a mere military dependent. The Strasbourg court found that the court-martial violated the European Convention on Human Rights because it lacked independence from military commanders, a principle that had previously been articulated in the landmark case of *Findlay v. United Kingdom*. The court nonetheless briefly addressed Martin's other objection, concerning the exercise of court-martial jurisdiction over him as a civilian. While not part of the holding, the court emphasized that courts-martial may exercise jurisdiction over civilians only in extremely limited circumstances: "The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case." The court cautioned that it was not enough that legislation assign certain kinds of offenses to courts-martial in the abstract. This cryptic observation means it is impossible to know in advance whether a particular offense by a civilian will be a proper subject for trial by court-martial. Civilians continue to be tried in the UK Court Martial, but national authorities proceeding by military court



4. Some countries continue to use military courts to try civilians who are former military personnel, even though human rights norms favor limiting the exercise of military jurisdiction to serving personnel. On June 4, 2007, South Koreans protested Egypt's persistent use of military courts to try civilians.

in such cases do so, in a sense, at their own risk if the country is subject to the jurisdiction of the European Court.

Is there a case to be made for court-martial jurisdiction over civilians? If there is, it is not an easy one. If the offense is committed within the country that seeks to try it and the local civilian courts are open, the objection to using a military forum seems compelling. If the offense has been committed somewhere else, providing a military forum that is more likely (depending on which nation is the host state) to afford due process may actually be doing the accused a favor. Thus, a person like Ali, the Canadian-Iraqi dual national, was better off being tried in a US court-martial than he would have been if he had been prosecuted in an Iraqi court.

That claim is difficult to accept for two reasons. First, typically, the defendant in a criminal case does not get to choose which sovereign prosecutes him. Second, in *Munaf v. Geren*, a 2008 case, the US government persuaded the Supreme Court that the Iraqi courts were sufficiently fair that a decision to turn a detainee over to them should not be second-guessed. However, where local courts are non-compliant with human rights standards by which the visiting state is bound by treaty, such as by permitting caning or amputation, turning an individual—civilian or military—over to those courts would itself be a violation of that state's treaty obligations.

Still, an offender who is serving with or accompanying an armed force in another country can obviously do a world of damage to relations with the local populace and thwart operational effectiveness in ways that may be indistinguishable from misconduct by uniformed personnel. The best way to avoid this is by ensuring that the civilian criminal law of the country that has sent its troops abroad extends to such individuals and provides the means to make that law a reality for civilians serving with its deployed forces. It remains important that those responsible for the administration of military justice in these settings have sensible guidelines for the exercise of their discretion and that

the affected individuals are afforded clear notice that they will be subject to military trial if that is warranted.

Many countries reserve and occasionally exercise the right to try military retirees by court-martial. The theory, presumably, is that retirees (at least those who draw retirement pay) form a part of the country's residual military forces since they can be recalled to active duty in an emergency. It is exceedingly rare for retirees to be prosecuted in military courts in countries with robust democratic institutions. Still, it does happen. In 2014, the UK prosecuted a long-retired Royal Air Force intelligence officer before a Court Martial panel consisting of Ministry of Defence officials for long-past sex offenses because there was no other way to try him. That seems an insufficient reason for denying him the full procedural rights otherwise enjoyed by British citizens. As similar cases come to light, some from as far back as 30 years ago, they too are being tried in the Court Martial.

The United States has occasionally prosecuted retirees, an action that requires approval from a senior civilian official. These have included cases arising in the Philippines and Saudi Arabia, where the alternative—trial in a local court—was unattractive to the defendants. Selden G. Hooper, a retired US Navy rear admiral, was prosecuted in the 1950s for sodomy, conduct of a nature to bring discredit on the armed forces, and conduct unbecoming an officer and a gentleman. These offenses were committed after he had retired. His years-long effort to overturn his conviction in the civilian court system led nowhere.

Master Sergeant Timothy B. Hennis is the poster child for court-martialing a retiree, although his offenses, unlike Admiral Hooper's, occurred while he was still on active duty. Eventually landing on military death row at the US Disciplinary Barracks at Fort Leavenworth, Kansas, Hennis was convicted in 1986 in a state court for the murder of an officer's wife and two children. That conviction was overturned on appeal, and when he was

retried in 1989, a jury acquitted him. His enlistment had expired but he chose to reenlist so that he could qualify for retirement on 20 years' service. This proved to be a terrible blunder because, after he retired, forensic technology having improved, DNA samples that had been taken in connection with the earlier civilian prosecution were reanalyzed and found to be incriminating. Seizing on Hennis's status as a retired regular, the Army recalled him to duty and obtained a conviction and death sentence in 2010. His state court acquittal did not bar prosecution in a federal court-martial because United States constitutional jurisprudence

5. In 2010, a court-martial sentenced retired US Army Master Sergeant Timothy B. Hennis to death for a triple murder he committed before he retired. Had he not reenlisted in order to qualify for retirement he could not have been tried in a military court. He was acquitted in an earlier state prosecution.

holds that the prohibition of double jeopardy bars successive prosecutions only by the same sovereign and the states are separate sovereigns from the federal government.

The problem with exercising military jurisdiction over retirees is that although it can prevent criminals from getting away with murder or other serious crimes, it also happens so infrequently that when it does, it seems capricious and, in a sense, tricky. Worse yet, the power is used in some countries to stifle dissent or penalize retirees who have made themselves nuisances or gadflies. A notorious case arose in Chile, where a retired officer working for the navy as a civilian contractor was prosecuted after he wrote a book that was critical of the navy. In Argentina, a retired officer was prosecuted for testifying that a senior officer was a liar. A dissident Mexican brigadier general was prosecuted by court-martial after he participated in a political parade. This phenomenon is not confined to Latin America (where the Inter-American Court of Human Rights has repeatedly held it a violation of the American Convention). In Uganda, a retired medical officer who had the gall to run for president against the incumbent was prosecuted by court-martial.

And then there are the countries that respect few or no limits on the exercise of court-martial jurisdiction over civilians. This is true of a number of countries in the Middle East, although it is difficult to say whether there is a trend away from it. Thus, Morocco in 2014 approved legislation ending court-martial jurisdiction over civilians but has been slow to put it into effect and seems not to be extending the new rule to existing cases. At the other end of the spectrum lies Egypt, where the al-Sisi military government that in 2014 ousted the elected civilian government of Mohamed Morsi issued a decree expanding military court jurisdiction to cover a host of offenses. Under the decree, thousands of civilians have been haled into military court. An unresolved issue is whether offenses occurring before the decree are also subject to military trial. Non-governmental organizations such as Human Rights

Watch have consistently and properly objected to the expanded use of military courts to try civilians.

Nonetheless, turbulent political or social conditions have caused some national leaders to turn to military courts as a way of restoring order and suppressing dissent. In addition to the military government in Egypt, the junta that rules Thailand has relied heavily on courts-martial to force civilians into compliance with all sorts of laws, including prosecuting them for violations of the country's retrograde lèse majesté laws that protect the monarchy from insults. Pakistan too has had a recurring dalliance with the use of military courts for the trial of civilians. The Pakistani Supreme Court invalidated such legislation in its landmark *Provisional Constitution Order Judges Case* in 2009, but the idea was revived following the Peshawar Army Public School massacre in 2014. After hasty debates, the country's political leaders amended the constitution so that parliament could authorize military courts to try civilian militants for a two-year period. This triggered a barrage of constitutional petitions asking the Supreme Court to hold that the 21st Amendment to the constitution was itself unconstitutional. In the end, in *District Bar Association, Rawalpindi v. Federation of Pakistan*, the court in 2015 upheld the change, a majority of the judges concluding that they lacked power to find a constitutional amendment unconstitutional. Secret trials and death sentences have followed, although not much seems to have been done to remedy the defects in the civilian criminal justice system that led to the constitutional amendment in the first place.

Finally, the use of military courts to prosecute civilians is also found in countries that, for whatever reason, no longer have functioning civilian judicial systems (assuming they ever did). The classic illustration is the Democratic Republic of Congo, where international assistance has tended to focus on bringing the country's military courts closer to compliance with prevailing human rights standards. In cases like this, the country faces far

graver existential challenges than simply keeping military justice in its proper lane.

Failed and failing states aside, who ought to be subject to trial by court-martial, assuming a country decides to maintain a separate military justice system? A strong case can be made that trials in a military court ought to be strictly limited to full-time uniformed personnel of traditional armed forces and to reservists when they are in a duty status. Prisoners of war also have a right under the Third Geneva Convention to be tried by military courts. Everyone else should be tried by civilian courts. International human rights law has not yet embraced a bright-line rule categorically excluding civilians from court-martial jurisdiction, but there is some sentiment for that view on the United Nations Human Rights Committee.

If a court-martial has jurisdiction over an accused, to what offenses does that jurisdiction extend?

Chapter 4
The substantive reach of court-martial jurisdiction

In civilian courts, we have a fairly good sense of the kinds of crimes being prosecuted. Depending on the country and the legal system, these are likely to include traditional crimes of violence such as murder, robbery, rape, and other kinds of assault, as well as other offenses that may not involve the use or threat of violence, such as larceny, drug offenses, child pornography, tax evasion, and securities fraud. One might think that military cases fit a different profile given the specific and limited purposes of military justice—and to a degree they do. Some military offenses—such as disobedience and disrespect, desertion, dereliction of duty, AWOL, missing movement, mutiny, oppressing a subordinate, or hazarding a vessel—have no counterpart in civilian criminal law. Ask any former or current military lawyer and he or she can cite weird, one-off cases, like the prosecution of the American sailor who jumped off an aircraft carrier or the one who was prosecuted for wearing white socks when he should have worn black, or the petty officer in charge of a New England lighthouse who was prosecuted for stealing 400 gallons of fresh water, "military property of the United States."

Some of the cases are nauseating, like the case from 1960 that raised the question "whether the chicken was admissible" in evidence (*hint*: the chicken was the victim), a 2014 case from Australia involving a rubber chicken (later overturned), or the one in which

6. Even in the most disciplined armed forces, serious misconduct can occur in battlefield conditions. In 2011, US Marine Corps snipers were filmed urinating on the bodies of enemy fighters in Afghanistan.

US Marine Corps snipers—on camera—urinated on the bodies of dead enemy fighters in Afghanistan in 2011. "Teabagging"—a form of oral sex—and misuse of a cigar tube as a form of sexual assault have figured in Australian and Canadian courts-martial.

As strange and off-putting as some of these cases are, it is surprising how many of the crimes tried by contemporary court-martial could just as well have been tried in civilian court. Twenty-first-century courts-martial often involve offenses like murder, rape and other kinds of assault, larceny, possession, use and trafficking of narcotics, domestic violence, and child pornography. If they are also forbidden by civilian law, where should they be prosecuted?

Military justice codes take a variety of approaches to defining what conduct will be prosecuted in courts-martial. Typically they set forth the required elements of some number of offenses. In the United States these are called "the punitive articles" of the Uniform

Code of Military Justice. They cover the uniquely military crimes, for which there is no civilian counterpart, but they may also include common offenses such as murder. Or they may exclude certain offenses when committed within the territorial limits of the country. Thus, until 1951, murder and rape committed by soldiers within the United States in peacetime were expressly excluded from court-martial jurisdiction, obviously on the theory that they could be prosecuted in the civilian courts. British and Canadian practice also had such exclusions, although they have varied over time. Until 2009, British courts-martial could not try homicide or rape committed within the UK. Even today, murder, manslaughter, and child abduction are by statute excluded from Canadian court-martial subject matter jurisdiction when committed within the country.

Codes of service discipline typically include a provision that sweeps in some or all offenses that are prescribed in the country's civilian criminal code. Examples include article 134(3) of the Uniform Code of Military Justice, which transforms "other crimes and offenses not capital" into military crimes, section 42 of the Armed Forces Act 2006, which makes it a service offense to commit an act that is criminal in England and Wales, and section 130(1)(a) of the Canadian Code of Service Discipline, which makes it a service offense to commit any act punishable "by ordinary law," meaning under Part VII, the Criminal Code, or any other Act of Parliament.

War crimes are a further category of court-martial offenses. United States law permits general courts-martial to try war crimes when permitted under the law of war. Under the Third Geneva Convention on Prisoners of War (GPW), prisoners of war who have committed war crimes must be tried by a military court unless the detaining power would prosecute its own personnel in a civilian court for the same offense. The United States turned to military commissions to prosecute war crimes by "unprivileged enemy belligerents" in the post-9/11 era.

A major bone of contention is whether human rights violations should be prosecuted in courts-martial. International human rights jurisprudence severely disfavors doing so, largely in response to a pattern of impunity that has been seen in Latin America, where offenses by military personnel against civilians either have not been prosecuted at all in the military justice system or, when prosecuted, have generated sentences that are excessively lenient. The Mexican Supreme Court, under pressure from the Inter-American Court of Human Rights, has rejected military jurisdiction in a number of cases where civilians were said to have been executed by military personnel, although new cases keep coming up.

Colombia has wrestled with similar issues in the context of the so-called false positives—homicides committed against members of the FARC insurgent group and civilians. The matter is especially fraught because the Colombian military fears that while peace will entail impunity for insurgent leaders, thousands of junior and senior military personnel will remain exposed to criminal charges for which they will be tried in civilian courts that are less friendly than military courts.

But what is a human rights violation, and is it proper to derive a rule of potentially universal application—as the Decaux Principles do—from the unsatisfactory record of a limited number of countries? Should a country that has a reliable, transparent, independent, and effective military justice system be subjected to the same jurisdictional limitation as one that has a proven record of impunity? To further complicate matters, military personnel also enjoy human rights. Does that mean—*can* it mean—that any case in which a military superior denies some acknowledged human right to a subordinate may be tried only in the civilian courts?

As important as these questions are, the biggest issues of court-martial subject matter jurisdiction have concerned whether common law or ordinary crimes ever ought to be tried by

court-martial rather than in the civilian courts, and if they should, whether that should be permitted only if there is some nexus or service connection.

This was an especially contentious issue in Canada, where several cases suggested that section 130(a)(1) of the Code of Service Discipline was unconstitutional and others held that in any event there must be a direct nexus between the offense and some military duty. In 2015, the Supreme Court of Canada unanimously upheld military jurisdiction over civilian offenses and rejected the nexus theory in *R. v. Moriarity*. Justice Cromwell's opinion for the court recites: "the fact that the offence has occurred outside a military context does not make it irrational to conclude that the prosecution of the offence is related to the discipline, efficiency and morale of the military." "[T]he behavior of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base." Despite the ruling, Parliament could still impose some limits on efforts to try civilian offenses in military courts.

Similarly, in 1987 the US Supreme Court held in *Solorio v. United States* that the US Constitution did not require an offense to be service connected for there to be court-martial jurisdiction. In doing so, the court overturned its 1969 decision in *O'Callahan v. Parker*, which had found there was no court-martial jurisdiction when a soldier raped a civilian in Honolulu. Congress could, of course, impose a service connection requirement by statute, but to date it has evinced no interest in doing so. The Supreme Court has shown no sign of having second thoughts about *Solorio*, except that some justices later suggested that the service-connection test might still apply to capital cases.

The armed forces have continued to prosecute cases that have no connection to the service beyond the fact that the accused is on active duty or otherwise subject to court-martial personal jurisdiction. This happens when local law enforcement authorities

decide that a case does not merit prosecution and a military commander, applying a different and perhaps idiosyncratic yardstick, disagrees. Hard data on this are scarce, but it is commonly understood that many local district attorneys will gladly turn a case over to the military, thus reducing the demands on their offices—an outcome for which commanders' staff judge advocates often successfully lobby. The problem with the process is that military and local prosecutors can collude to deprive an accused person in the military of valuable constitutional rights in a way that is not subject to judicial oversight and about which the accused and counsel may never have been consulted. At least in theory, the victim's views on the choice of forum ought to be taken into account. The problem of divergent civilian and military prosecution standards is averted where, as in the UK, the test is the same for both civilian and service prosecutions. It can be far more complicated in a federal system such as that of the United States, where local prosecutors, civilian federal prosecutors, and military commanders may go their separate ways in making charging decisions.

Prevailing human rights doctrine properly disfavors the use of courts-martial for the trial of offenses that have no relation to military service. A soldier who robs a bank, murders a taxicab driver in the civilian community, or views child pornography on a home computer should be tried in the courts of the civilian community. Permitting the military to handle these cases unwisely increases the gulf between the armed forces and the larger society. There should be more and better bridges between the two, not weaker ones. The wide-open US approach is in serious tension with prevailing international standards.

Cases arising on deployment raise additional issues. Thus, between the *O'Callahan* and *Solorio* decisions, the then–US Court of Military Appeals (it is now called the US Court of Appeals for the Armed Forces) recognized an "overseas exception" to the service connection requirement for court-martial subject matter jurisdiction. If the

offense was committed outside the United States, there was no need even to look for a service connection. This was entirely sensible for many cases, but it overlooked the possibility that even some offenses committed outside the country might be of no real concern to the military. For example, a soldier serving outside the country might commit an offense while on authorized leave in a third country for rest and recreation. So it was in *Re Colonel Aird; Ex parte Alpert*, a 2004 Australian case, where a divided High Court ruled that there was court-martial jurisdiction when a soldier assigned to duty in Malaysia was accused of having committed a rape while on vacation in Thailand. National legislation could make provision for civilian trial where non-service-connected offenses committed overseas are tried back in the soldier's home country, either for administrative convenience or because the accused's deployment has come to an end.

United States military justice case law also recognized a "petty offense" exception to the service connection requirement, since there is no constitutional right to a jury trial in petty offense cases. As a result, the accused was no worse off being tried by a court-martial.

Before leaving the question of subject matter jurisdiction, it's worth asking how it might interact with the question of *who* is subject to court-martial jurisdiction. If a country has wide-open subject matter jurisdiction, as the United States does, is it any consolation that at least its policy on personal jurisdiction is more constrained? The interaction between the two types of jurisdiction has not been closely studied; national systems seem to be evaluated from each perspective independently. That seems right.

Chapter 5
Command influence, lawful and unlawful

The military is a hierarchical and pervasively regulated society in which individuals can exert tremendous influence over subordinates. What is more, military codes in the United States and elsewhere vest tremendous discretionary power in commanders. "Command influence" occurs whenever a superior influences the action of some other participant in the military justice process. In common parlance, it smacks of overreaching and impropriety. But that connotation is in many situations unwarranted. Thus, command influence may be lawful or unlawful. Examples of entirely lawful command influence over the administration of justice include such core functions as deciding how charges should be disposed of (i.e., by court-martial, summary or non-judicial punishment, referral to civilian authorities, administrative measures, or no action) and, within limits, who should serve on the panel (jury). These kinds of powers may be tolerable or intolerable as a matter of public policy with respect to the architecture of military justice systems, but in principle they are legal in the United States. Indeed, supporters of the commander-centric military justice consider them virtues rather than vices.

Unlawful command influence, commonly referred to in the United States as UCI, is quite another matter and has been rightly called "the mortal enemy of military justice." Not surprisingly, given the broad scope of commanders' powers, it comes in a host of sizes

and shapes. Commanders and other players in the military justice system may attempt to stack the jury so as to ensure conviction and a harsh sentence. They may discourage witnesses from testifying for the defense. They may exert an undue influence simply by sitting in or loitering outside the courtroom. What if a commander or her staff judge advocate attempts to get rid of a lenient judge or badger a judge into recusing herself by allowing subordinates to spread damaging sexual innuendo about her? All of these have become issues in court-martial appeals, and it is no wonder the appellate courts take a hard look when such issues are raised.

American military jurisprudence is alert to unlawful command influence, and it is easy for defense counsel to raise such an issue. If the claim is plausible, the burden will shift to the government to rebut it. If the allegation is unrebutted, the appellate court will have to decide whether the UCI was harmless error—that is, that it did not prejudice the accused—and if it finds that the prosecution has not carried its burden of proof as to harmlessness, the court must fashion a remedy. The cases show that even though from time to time the prosecution is unable to prove harmlessness, the convicted person almost never gets any practical relief. Often the only result is a remand for further proceedings, with precisely the same outcome. Even a fruitless remand can serve a teaching function and perhaps afford the complaining party a measure of satisfaction. It may also deter others from committing UCI in the future.

Is this costly and uncertain cycle inevitable? It is so long as commanders are permitted to wield pervasive powers over the administration of justice. True, Congress has put in place a variety of protections against UCI, including forbidding retaliation against personnel for the performance of their roles in the court-martial process. A defense counsel's zeal, for example, cannot be commented on in her performance evaluation, on which promotions and assignments depend. Those protections

7. In 1894, Alfred Dreyfus, a captain on the French General Staff, was wrongly convicted of treason in perhaps the highest-profile court-martial in history. Eventually he was exonerated, restored to duty, and promoted, but only after he served time in the notorious Devil's Island prison off French Guiana. The Dreyfus Affair reflected antisemitism and split French society for decades.

have been on the books for decades, and yet UCI issues continue to bubble up.

Another protection against UCI is the Uniform Code of Military Justice provision that criminalizes the knowing and intentional denial of any procedural protection afforded to a military accused. That provision seems never to have been the basis for disciplinary action.

Is unlawful command influence always exerted by a uniformed official, or may civilians also engage in it? At times, allegations have been made that senior civilian officials such as service secretaries have said or done things that are functionally indistinguishable from UCI committed by uniformed personnel. A classic example is President Obama's ill-advised remark that any service member who is convicted of sexual assault should receive a dishonorable discharge—a punishment that can only be imposed by a general court-martial. As a damage control measure, Secretary of Defense Chuck Hagel promptly issued a memorandum saying that all personnel were expected to exercise their own judgment. A recent Commandant of the US Marine Corps made similarly unfortunate remarks about sexual misconduct in talks he gave at various Marine Corps installations. The predictable result was a flurry of UCI claims, although, equally predictably, not much has come of them.

A final threat to military justice, and one that at times may also be "mortal," is congressional influence. Congress has an explicit grant of legislative authority over military justice under Article I, section 8, of the Constitution, and it makes full use of that power. Unfortunately, it does so not only in enacting legislation but in other ways as well. At times, the House and Senate Committees on Armed Services or their members may take a sufficiently focused interest in particular cases as to influence the exercise of discretion vested in commanders and others under the statute. (I recall a time when Senator Margaret Chase Smith of Maine, who was

a member of the Senate Armed Services Committee, intervened with the admiral for whom I worked in Boston to overturn a non-judicial punishment. She was defeated at the next election, but not for this reason.) This is particularly true of the Senate committee, since it wields untrammeled power over officer and senior civilian promotions, which require Senate confirmation. Even a "hold" on a promotion may have a distorting effect on the exercise of command discretion. The Senate committee's sustained focus on deterring and punishing sexual assault in the armed forces certainly got the attention of senior officers when one general's confirmation for a higher assignment was blocked after she interpreted literally the provision in the *Manual for Courts-Martial* that said she could disapprove a court-martial conviction "for any reason or no reason."

Legislators have both a right and a duty to ask questions and gather information so they can perform their oversight, legislative, and advice-and-consent functions. No court can prevent them from doing so, so the real constraint here must come from within the halls of Congress. Committee leaders and individual legislators ought to think twice before initiating inquiries that might be construed by commanders and others with roles in the administration of military justice as signaling a preferred outcome in a particular case or class of cases. Simple fairness as well as respect for the legal process militate in favor of deferring these inquiries until the dust has settled in the court-martial itself and any appeals. Even then, it ill serves public confidence in the administration of justice for legislators to call into question the courts' completed adjudication of a particular case, as happened in 2015 in connection with the murder conviction of Sergeant Alexander Blackman of the UK's Royal Marines.

The case of US Army Brigadier General Jeffrey A. Sinclair, who was convicted in 2014 in a high-profile court-martial of adultery, having improper relationships, and mistreating a subordinate, provides a final illustration of how command influence has

acquired a meaning broader than its original scope. The convening authority announced that he had agreed to drop the more serious charge of sexual assault as part of a plea bargain, and this was widely criticized as UCI. In fact, he had dropped the charge because that is what the complaining witness—another Army officer—wanted. This was not a case of UCI but one of abdication. As such, it was equally improper, but to call it UCI was a category error that led to much needless confusion. General Sinclair avoided jail under a pretrial agreement but was fined $20,000 and retired two ranks lower, as a lieutenant colonel.

UCI covers a multitude of sins and a multitude of sinners. Like the poor, it will always be with us. Even with structural changes that reduce the power of commanders, there will inevitably be room for overreaching, and vigilance will continue to be required of both defense counsel and judges to keep it in check.

Overall, how does the US military justice system stack up against human rights standards, including independence and impartiality? Consider the following report card, which I and others submitted in connection with the 2015 Universal Periodic Review of United States compliance with the International Covenant on Civil and Political Rights:

- Military retirees and other civilians are subject to trial by court-martial even in the absence of objective and serious reasons for such action and even if the regular civilian courts are available; there is no provision for civilians to serve on courts-martial.
- Courts-martial are not limited to strictly military offenses, and persons accused of serious human rights violations can be tried in them.
- Summary courts-martial combine the functions of judge, jury, prosecutor, and defense counsel in one person.
- Personnel may be ordered into correctional custody or confinement by non-judicial punishment imposed by commanders or one-officer

summary courts-martial, both of which are non-compliant with the International Covenant on Civil and Political Rights.

- Personnel who refuse non-judicial punishment or trial by summary court-martial are exposed to increased punishment.
- Commanders rather than independent prosecutors make charging decisions.
- Commanders pick court-martial members (jurors).
- Even after recent legislative changes, commanders can in some circumstances overturn or modify court-martial results (but not increase the punishment).
- Military judges lack the protection of fixed statutory terms of office; those in the Army and Coast Guard have renewable three-year terms by regulation only, with no assurance of renewal; those in the Air Force, Navy, and Marine Corps lack any fixed term of office.
- Many courts-martial (including all summary courts-martial) are not subject to direct appellate review by a court of law.
- There is no guarantee of a duly reasoned written judgment in court-martial trials or first-level appeals; most intermediate military appellate decisions are utterly summary; the many denials of discretionary review by the US Court of Appeals for the Armed Forces do not state reasons.
- The prosecution has a right to appellate review by the highest court of the military justice system, while the accused must show good cause in order to obtain review; this is a denial of equality of arms (treating the prosecution and defense evenhandedly).
- The US Court of Appeals for the Armed Forces, which is the sole civilian tribunal in the military justice system, is located for administrative purposes in the Department of Defense, is subject to a statutory political-balance requirement (no more than three judges can be from the same political party), and lacks power to review sentences for appropriateness.

- Because of jurisdictional thresholds and other limitations imposed by Congress, more than 90 percent of courts-martial are ineligible for review by the Supreme Court, unlike regular federal and state criminal convictions, while the prosecution can always ensure that a military case is eligible for Supreme Court review.

On point after point, the structure and scope of the Canadian and British systems come far closer than the US system to meeting contemporary standards. Prosecution of civilians in military courts remains problematic in all three systems, as does the possibility that individuals whose offenses have little or no nexus to military service will be tried in a military forum rather than a civilian court in which the defendant may enjoy greater procedural protections.

Chapter 6
Conduct unbecoming and all that

Many people are surprised to learn that military justice concerns itself with many of the same kinds of criminality that keep the civilian courts busy. Cases involving drugs, sexual and other kinds of assault, and child pornography account for a sizable portion of the court-martial docket. But that docket also includes offenses that are quite different from the usual civilian court fare and at times raise thorny questions.

Some of these offenses are colorful but rarely encountered. For example, the punitive articles of the Uniform Code of Military Justice include specific provisions that criminalize such conduct as cruelty to a person subject to the accused's orders, mutiny (yes, it has happened in the United States as recently as the Vietnam War), compelling surrender, striking the colors, "forcing a safeguard" (i.e., violating a commander's effort to protect enemy or neutral persons or property), running away and cowardice, leaving a place of duty in order to pillage, hazarding a vessel (ship captains beware!), and engaging in a duel. Military law also includes offenses that are entirely contemporary.

In addition to its arsenal of traditional charges, US military law's "general article" (Article 134) prohibits, among other things, "conduct to the prejudice of good order and discipline" and conduct of a nature to bring discredit on the service. British, Canadian,

and other British-influenced systems have similarly broadly phrased offenses, referring to "conduct prejudicial to good order and service discipline" or some close variant. They provide a steady diet for courts-martial and disciplinary proceedings and involve an endless variety of fact patterns. That is both the strength and the weakness of these general articles.

Why strength? Military life is classically a 24/7 affair, and personal autonomy is necessarily constrained in a host of ways that differ in both kind and degree from civilian life. Aberrant behavior can upset routines as well as get in the way of immediate operational needs. To maintain order, the theory goes, a catch-all provision is essential.

But what about fair notice? Do the words "conduct to the prejudice of good order and discipline" afford soldiers and sailors the kind of notice we demand of civilian criminal prohibitions? This question came before the Supreme Court in *Parker v. Levy*, a 1974 habeas corpus case brought by a dissident Army physician who had been convicted at a general court-martial and sentenced to prison for disobedience, promoting disloyalty and disaffection, and making statements that were "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful to Special Forces personnel and enlisted personnel who were patients or under his supervision." His contention was that Article 134 was unconstitutionally vague. The Supreme Court dismissed the claim, reasoning that over the years the bare statutory text had acquired a gloss that made its sweep sufficiently clear to afford the fair notice required by due process. Vagueness challenges to the UK and Canadian analogues have similarly been unsuccessful.

Many past offenses under the general article are listed in the *Manual for Courts-Martial*. They range from "abusing a public animal" (it covers such conduct as "wrongfully kicking a public drug detection dog in the nose") to bigamy, wrongful cohabitation, disloyal statements, fraternization, gambling with a subordinate,

pandering, and straggling. For each one, the president has prescribed a maximum punishment in the *Manual*. The "max" for cohabitation, for instance, is four months' confinement. "Abusing a public animal" comes in at only three months.

Setting aside the fact that only military lawyers are likely to spend time rummaging through these so-called "listed offenses," and even in an all-volunteer era junior and many not-so-junior military personnel may be entirely unfamiliar with the historic reach of the general article, the decision in Dr. Howard B. Levy's case had no satisfactory answer to the problem posed by *unlisted* offenses, that is, offenses that had *never* been prosecuted before under the general article and hence were not included in the *Manual*'s catalogue.

You might think this hypothetical was unlikely to present a real problem because surely everything under the sun would have been spelled out. Not so. For example, in the 1964 case of *United States v. Sadinsky*, a Navy sailor's conviction for wrongfully jumping from an aircraft carrier under way, in violation of the "good order and discipline" clause, was upheld on appeal. At the time, such an offense was not listed in the *Manual*. Today it is—with a price tag of a bad-conduct discharge, six months' confinement, and forfeiture of all pay and allowances. This common law process did not end with Airman Recruit David G. Sadinsky's daring and (for both him and the Navy) costly backflip off USS *Intrepid*. In recent years, such modern offenses as child endangerment and stalking have been prosecuted by court-martial, and only later added to the "listed" offenses or made statutory offenses in their own right. When new offenses come up, seemingly out of nowhere, the US Court of Appeals for the Armed Forces has reasoned that the kind of misconduct at issue is commonly proscribed by state criminal law. But is it fair notice to a soldier stationed in Florida or Germany that some American states forbid certain conduct, especially if the soldier's home of record is in one that does not do so? Upholding a novel general article offense under these circumstances smacks

of judicial activism. If new military offenses need to be created, they ought to be enacted into law like other crimes.

One military crime that has received considerable attention is adultery. Today fewer than half of the states criminalize adultery even on paper, and civilian prosecutions are as rare as hen's teeth. Yet this offense shows up on military charge sheets with surprising frequency. Almost invariably, it is an add-on and something else more serious explains the prosecution. Even so, it makes the military justice system look silly. If an officer, for example, is told to end an adulterous relationship and fails to do so, there are ample other ways to deal with the matter, including adverse efficiency reports or the withholding of various benefits, such as government-funded schooling or coveted duty assignments.

Wisely, the *Manual for Courts-Martial* now includes some non-binding factors to guide the exercise of discretion as to when adultery should be pursued. These include the parties' and their spouses' marital status (including whether either or both were legally separated from their spouse), impact of the actors' ability to perform their duties, misuse of government resources to facilitate the affair, and flagrancy of the behavior. At the end of the day, it is difficult to predict whether and at what level of severity any particular adulterous affair will be prosecuted. At times, the driving force is the cuckolded spouse and his or her persistence. An enraged spouse who is a military retiree with friends in high places may well be able to bring down the wrath of the system on an offender who might otherwise have to face no tribunal harsher than his or her own conscience.

The problem of fair notice under the "good order and discipline" clause of the general article has been alleviated in the UK by a practice direction cautioning that the offense is not without limit, and that an accused must have known or had reasonable cause to believe the conduct complained of was prejudicial at the time. Fair notice concerns are exacerbated, however, in the United States by

a *Manual* provision under which a "breach of the custom of the service" may result in a violation. But what is a custom of the service, how does it have the force of law, and how long does it last? The *Manual* explains that a "custom which has not been adopted by existing statute of regulation ceases to exist when its observance has been generally abandoned." Plainly questions of fairness and notice abound here. In one long-ago case, it was argued that a hung-over chief petty officer who stayed in bed when he should have assisted in a rescue operation had violated Coast Guard custom according to which "you have to go out, you don't have to come back." Custom also played a role in the evolution of military law on fraternization between officers and enlisted personnel. The problem was that custom varied from service to service. Eventually the armed forces issued regulations on fraternization, making it unnecessary to rely on custom. The regulations perpetuate inter-service discrepancies, since they are not identical.

THE
WILMINGTON DISPATCH
FULL LEASED WIRE SERVICE
WILMINGTON, NORTH CAROLINA, SUNDAY MORNING, AUGUST 26, 1917.

MAY GIVE
THAT ITALY
RANCE WANT

FINDS SPY WAS CAUSE OF BLAST AT MARE ISLAND

Investigation Board Makes Report on Incident That Became Notable.

PARTLY SUPPORTS THE NAVY LEAGUE

Member of Cabinet Rises to Defense of Secretary Daniels and Denounces The Navy League.

(By United Press.)
Washington, Aug. 25.—A spy caused the fatal explosion in the Mare Island, California, power magazine recently, the investigation board concluded.
To that extent the report backed the recent charges of the Navy League that a conspiracy was responsible for the blast, but otherwise the board's report made public today denied there

NEGRO SOLDIERS MAY FACE FIRING SQUAD FOR ACTS

Clash Over Who Will Try Members of 24th Infantry.

CRIME SERIOUS SAYS GENERAL BELL

Mass Meeting In Houston Demands Return of the Negroes—Will Be Court Martialed.

(By United Press.)
Houston, Texas, Aug. 25.—Members of the 24th negro infantry, who spread death and terror in the rude riots of Thursday night, may soon face a firing squad.
This was indicated in a statement to the United Press tonight by Major-General George Bell, Jr., who came here today to take command of the situation.
"The rioters will be court-martial-

SENATOR
READY
ON REV

RD STRUGGLE
PROGRESS TO
FIX PRICE WHEAT

JEALOUS OVER HIS WIFE YOUNG HUSBAND SHOOTS

OVER FIFTY PER CENT OF VESSELS ATTACKED SUN

8. Violence during a 1917 riot in Houston, Texas, led to three courts-martial and the execution of 19 African American soldiers. The army responded by requiring review of all death sentences by the Judge Advocate General. Boards of review were created soon after, but even now, many courts-martial are reviewed only in the offices of the Judge Advocates General rather than by appellate courts.

The second clause of the general article criminalizes conduct of a nature to bring discredit on the armed forces. The conduct must be such that it will tend to "bring the service into disrepute" or "lower it in public esteem." Like "conduct to the prejudice of good order and discipline," this clause covers a multitude of sins and provides ample fodder for litigation. A 1995 case observed that "any reasonable officer would know that asking strangers of the opposite sex intimate questions about their sexual activities, using a false name and a bogus publishing company as a cover, is service-discrediting." Acts that violate local civil law or foreign law can also trigger this offense since even if they do not apply of their own force in a court-martial, the underlying conduct may bring the service into disrepute or lower public esteem. This part of the general article also unfortunately bears some resemblance to the provisions of some countries' military codes that penalize defaming the army or the flag.

What lowers the armed forces in public esteem in one country may not do so in another. This explains why in 2003 the Australian Defence Force Discipline Appeal Tribunal in *Mocicka v. Chief of Army* overturned a pornography conviction on the basis that it was not persuaded that the public would think the less of the Australian Defence Force simply because a noncommissioned officer had looked at dirty pictures (which were not child pornography) while using a government computer. The Tribunal said:

> Not everybody in society approves of, or even tolerates, pictures of the kind that the appellant kept. They would offend some people. If the appellant's conduct had been to brandish them to the general public in some way then, perhaps, it might be said that such conduct was likely to bring discredit on the Defence Force. In our view, on being told that a thirty-seven year old male army sergeant stored pornographic pictorial material that depicted what might be described as ordinary sexual activity, in a section of the Defence Force computer that was accessible

only by him and four system managers, the ordinary citizen would not raise an eyebrow. Even if he or she did not approve of such material, it is not likely on learning that that was the case, the Defence Force would be lowered in the esteem of that hypothetical person.

Two other offenses, unique to the military, and not applicable to enlisted personnel, are also worthy of mention. These are "conduct unbecoming an officer and a gentleman" and speaking contemptuously of the president and other high officials.

"Conduct unbecoming" is a phrase everyone knows—certainly those who remember the 1992 hit motion picture *A Few Good Men*, although the movie mistakenly referred to the nonexistent crime of "conduct unbecoming a United States Marine." The actual offense—and yes, it applies to women—covers any kind of act or omission by an officer that "under the circumstances" is unbecoming an officer and a gentleman. But isn't that utterly circular? Here is what the *Manual for Courts-Martial* says by way of explanation:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman.

Conduct unbecoming covers such offenses as knowingly making a false official statement, dishonorably failing to pay a debt, cheating on an examination, opening and reading mail sent to someone else, publicly associating with known prostitutes, and even "failing without good cause" to support one's family. This truly is a trip back in time, and it is revealing because it demonstrates how the values and expectations of an earlier era may persist in military society. It is also revealing because it puts on display the caste aspect of the division between officers and enlisted personnel. It is easy to chuckle at this kind of offense, but one is tempted to say it serves a purpose. Do we really want bigamists or deadbeats in the officer corps? In my own view, the answer to that question is "of course not," and there are other ways to be rid of them—such as disenrolling for cause an officer who cheats on an examination at a service school—without wheeling out the big guns of a potentially high-profile criminal proceeding.

Canada has a similar provision. Section 92 of the Code of Service Discipline states that "every officer who behaves in a scandalous manner unbecoming an officer" is guilty of an offense. The leading treatise on Canadian military justice not unfairly suggests that an offense under this section should be sustained only if the behavior was indeed scandalous, rather than that it merely may or could have been scandalous, but even so, the vagueness remains troubling. British military law lacks an offense of "conduct unbecoming an officer" but criminalizes cruel or indecent acts and omissions provided they are also disgraceful. It is not confined to officers.

Another offense that applies only to commissioned officers is Article 88 of the Uniform Code of Military Justice, which criminalizes the use of contemptuous words against the president, vice president, Congress, secretaries of defense and homeland security, the service secretaries, and even the governor and legislature of the state in which the offender is on duty or physically present. The purposes of such a provision in a democratic society

are clear: to protect civilian political control from military influence and discourage disloyalty among subordinates who might be influenced by their officers. Over the course of American history there has been no shortage of officers who have said extremely nasty things about popular presidents from Abraham Lincoln and Woodrow Wilson to Franklin D. Roosevelt, John F. Kennedy, Lyndon B. Johnson, Bill Clinton, and George W. Bush.

"Impeach Nixon" bumper stickers were disregarded when Richard Nixon was president, and the case law indicates that private conversations such as those around the family dinner table are "ordinarily" nobody's business. Similarly, adverse criticism of the protected officials, even if it is emphatically expressed, is not covered if offered in the course of a political discussion. On the other hand, truth is not a defense, so that even if a president actually is a notorious womanizer, that will not bar disciplinary action if an officer says so.

The most famous Article 88 case involved Second Lieutenant Henry H. Howe Jr., an orthographically challenged Army officer who marched in civilian clothes in an anti–Vietnam War demonstration during the Johnson Administration, carrying a sign that said "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS [*sic*] IN 1968" on one side and "END JOHNSON'S FACIST [*sic*] AGGRESSION IN VIET NAM" on the other. His attorneys challenged the statute as, among other things, a violation of the First Amendment guarantee of free speech, but the effort came to naught at the Court of Military Appeals. Howe served several months in the US Disciplinary Barracks at Fort Leavenworth, Kansas. After leaving the Army he attended law school, eventually practicing in North Dakota, where he amassed an impressive record of bar disciplinary actions, including one in 1977 for, among other things, failing to answer a question about his military service and claiming to have been classified 4-F (unfit) by his draft board. Nobody's perfect.

Air Force Major General Harold N. Campbell, who, at a banquet in the Netherlands, called President Clinton a "dope smoking," "skirt chasing," "draft dodging" commander-in-chief, was given a reprimand, fined $7,000, and forced to retire.

More recently, Army First Lieutenant Ehren K. Watada was initially charged with, among other things, saying this to reporters about President George W. Bush:

> As I read about the level of deception the Bush Administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such time-honored tradition, knowing we waged war based on a misrepresentation and lies?

The Article 88 charge did not survive, but Lieutenant Watada was tried on other charges arising from his refusal to deploy. In the end, the case collapsed as a result of a mistakenly granted mistrial, and he wound up leaving the Army with an administrative separation.

Cases such as these put the authorities in a touchy position, since the last thing any administration wants to do is create a martyr. An example of this occurred one spring during the Kennedy administration when a soldier was put up on charges after he accused JFK of calling out the reserves for political purposes. While he was not subject to Article 88 because he was an enlisted man, the soldier was still in trouble. The president defused the potentially ugly situation by deftly revealing at a press conference that he had discussed the matter with the secretary of the army and they had decided, in keeping with the spirit of the Easter season, that there was no need to pursue the matter. Typically, every effort is made to deal with those who violate the prohibition on contemptuous words or otherwise show themselves to be soreheads in as low key a manner as possible, while still getting rid of them.

Military personnel do not entirely give up their constitutional rights when they enter the service, but they definitely give them up to a degree. Article 88 plainly reduces free speech, and as a result the armed forces tend to tread carefully in this area. Finding the right balance when dealing with dissenters in uniform is an ever-present challenge in a democratic society. The sources of discontent may morph over time—one soldier objects to a deployment because he is convinced President Obama was not born in the United States, while another insists that the Constitution forbids her to wear the blue beret of a UN peacekeeper—but they will never entirely disappear. Indeed, if they did, it would suggest that we had lost some of our cantankerous "Don't Tread on Me" spirit.

Chapter 7
The military judiciary

Judicial independence is such a given in democratic countries that it tends to be taken for granted. Certainly societies have to remain alert to the familiar threats to judicial independence: arbitrary dismissal or voter recall of judges, "telephone justice" that is influenced by party, political, or underworld leaders, or undue coziness with prosecutors. But judicial independence is even more vulnerable in the context of military justice because of the inherently insular nature of such systems. In part this reflects the fact that military justice traditionally relied on ad hoc courts that exist only intermittently, like the mythical Scottish village in Alan Jay Lerner and Frederick Loewe's 1947 Broadway hit musical *Brigadoon*. In the classic British model on which the United States system was constructed, there was no judge at a court-martial. The court was simply a board of senior officers assembled for a particular purpose, much as might be done if a ship sank, a battle was lost, or some other significant mishap occurred that merited investigation.

The United States eventually assigned lawyers to serve as the judge advocate in courts-martial, and they could advise the court members on issues of evidence or law, but they lacked power to make dispositive rulings the way a civilian judge would. This changed by degrees, and by 1951, when the Uniform Code of Military Justice went into effect, there was a requirement for a

"law officer" in every general court-martial. The law officer began to look increasingly like a judge, and in 1968 Congress changed the title to "military judge" and the requirement for military judges to preside was extended, with minor exception, to special courts-martial that could at the time adjudge up to six months' confinement. Special courts-martial can now adjudge up to a year's confinement.

But even if the creation of military judges was a step forward, there was still a big problem, beyond the continued reliance on ad hoc courts. Neither the statute nor service regulations gave military judges the basic protection of a fixed term of office, much less the life tenure the US Constitution provides for federal district and circuit judges and justices of the Supreme Court. The only protection the military judges had was that provided by the unlawful command influence provisions of the Code, which forbade retaliation against them. They could be transferred from the bench at any time, simply by being issued a new set of orders.

The lack of fixed terms was raised in a variety of courts-martial and appeals as well as collateral attacks in the civilian courts, but these gained no traction. Finally, in *Weiss v. United States*, the Supreme Court ruled in 1994 that the Constitution's due process clause does not require that military judges have fixed terms of office. After all, the court observed, there were no military judges when the Bill of Rights was adopted and Congress had enacted other safeguards. The court took no heed of the fact that other countries, including even the Soviet Union, had given their military judges fixed terms.

The military declared victory, but soon the tide began to turn. Only a few years after *Weiss*, the Army promulgated a regulation giving its judges fixed terms of three years' duration, with an escape hatch for the needs of the service. The Coast Guard followed suit. Then things ground to a halt. The other armed forces refused to go along, and to this day their trial and intermediate appellate judges serve without the protection of fixed terms.

The result is a complete hodgepodge. Thus, since military judges can try cases in any branch of the service, an Army soldier who happens to come before an Army or Coast Guard judge is tried by a jurist with the protection of a fixed term, but a soldier who happens to be tried by a Navy, Marine Corps, or Air Force judge does not. Conversely, a sailor who happened to be tried by an Army judge would get one with a three-year term, while her co-accused who happened to be tried by a Navy judge would not. For a system that is regulated by a "uniform" statute, the result is anything but uniform. Nonetheless, the services remained content to go their separate ways on this fundamental question, leaving it for Congress to remedy the disparity. The federal courts, which generally take a hands-off approach to military justice matters, have been unfazed by the disparity in judicial tenure from one service to another, refusing to find a violation of Fifth Amendment equal protection.

The United States experience contrasts sharply with that of the UK and Canada. The UK separated the Judge Advocate General's civilian and military branches in 1948, and later moved the civilian JAG department under the Lord Chancellor's Office. The Judge Advocate General and his colleagues preside in the Court Martial. All are civilians who serve to age 70. The Royal Navy, alone among British forces, had relied on uniformed judge advocates to perform judicial functions, but in *Grieves v. United Kingdom*, the European Court of Human Rights held in 2003 that "the lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial . . . , for the absence of which the Government have offered no convincing explanation."

In Canada, in the landmark 1992 case of *R. v. Généreux*, the Supreme Court held that judicial independence required, among other things, security in office. As a result, Canada's British-inflected system was invalidated and legislation was

passed to provide for military judges with protected terms. This proved complicated to achieve, as Canada grappled with ensuring stable compensation for military judges, which is another of the three components the Supreme Court identified for judicial independence (the third being institutional independence). Not until 2013 did Parliament really fix things by providing Canadian military judges with tenure through age 60.

Prevailing international human rights standards call for courts to be both impartial and independent. The Decaux Principles recommend permanent tenure or fixed terms. There remains little agreement in practice, however, as to how long a judicial term must be in order to render the incumbent independent. Three years seems too short. Such a judge will likely never become really expert at judging. And if reappointment is permitted, as it is in the United States, a judge may be looking over his or her shoulder from start to finish—assuming the judge is interested in reappointment rather than seeking some other duty assignment that may be more career-enhancing. The armed forces resist tying judge advocates up in fixed judicial assignments because they believe it reduces the services' ability to shift personnel around and provide career opportunities. The result is that some judges serve for very short periods while terms for others are renewed time after time. After careful study, the Obama administration proposed legislation that would, at long last, provide for fixed judicial terms for all military judges. Congressional approval would be a step in the right direction.

Terms of office are not the only issue regarding the independence of military trial judges. One aspect that can influence their independence is the fundamental question of who appoints them. Should they be appointed by the armed forces or the defense ministry or should they be appointed by civilians outside the defense establishment? Recent reforms in Spain include transferring the appointment power away from the Minister of Defense to the regular civilian judicial screening body. In the

United States, trial and intermediate court military judges are appointed by the armed forces. In the UK, trial-level military judges (known as judge advocates) are appointed by civilian officials. Their Canadian counterparts are named by the Governor in Council.

Do these variations have any impact on the independence of those who are selected? There is no way to prove that there is or is not an effect, but if you take into account the question of appearances, appointment by a body outside the military would provide some reassurance.

What about appellate review? National practice is all over the lot when it comes to the structure of court-martial appellate review. In the United Kingdom and Canada, there is a Court Martial Appeal Court composed of senior judges of the civilian courts. All of the judges are civilians. Similarly, the US Court of Appeals for the Armed Forces is composed entirely of civilians, and indeed, until expiration of a cooling-off period, retired military personnel are ineligible to sit on the court. Contrary to the British model, judges of the court are not members of any other court. In a pinch (such as when there is a vacancy or a recusal, and no retired judge of the court is available to fill in), the court can also include civilian judges from other federal courts, who sit by designation from the Chief Justice of the United States. Judges of the court may not, however, sit on other courts.

India has taken a different approach with its Armed Forces Tribunal. The AFT sits in panels of two, with one member being a retired judge and the other a retired senior officer. Brazil's Superior Military Tribunal is unique. It consists of 15 judges, of whom 10 are senior officers specially promoted to the highest rank (to avoid the temptation of possible future promotion) and the remaining five are civilian lawyers.

In the Netherlands, appeals in military criminal cases are heard by a special chamber of the Arnhem Court of Appeal, one member

of which is a senior active duty officer appointed for a four-year term. In a 2014 case, *Jaloud v. The Netherlands*, the European Court of Human Rights held that such a judge had the measure of independence required by the European Convention on Human Rights, noting that he was freed from military discipline while serving on the court of appeal. The ruling supports the view that four years is long enough to meet minimum standards for judicial independence. Would the same hold true if the uniformed judge—as is the case in the United States and Canada—is not freed from military discipline while serving on the bench?

Is any one appellate structure preferable to another? Should non-lawyers ever serve as judges? The argument for their participation—indeed, the argument for specialized military appellate courts in general—is that specialized expertise is needed given the subject matter of courts-martial and military life. That argument seems farfetched given the arcane subjects, ranging from high technology to environmental and nuclear regulatory issues to mystifying questions of banking and finance, with which regular appellate courts grapple every day. They simply rely on counsel for the parties and amici curiae to inform them of the more obscure aspects.

Why shouldn't the same thing be possible in military justice? After all, there is nothing particularly elusive about the lion's share of the issues raised in contemporary courts-martial, which often are entirely familiar to civilian judges: drugs, child pornography, DNA evidence, intra-family violence, and the like. The successful record of the non-specialist court-martial appeal courts in various countries, whose members are simply borrowed from other courts as the need arises, puts the lie to claims that judges must have specialized knowledge of the subject.

Chapter 8
Military lawyering

Increasingly, national military justice systems look much like the systems of civilian criminal trials, with all that that entails: military or civilian lawyers acting as judges, and other lawyers prosecuting and defending. Most military lawyering is done by lawyers who are commissioned officers organized into a Judge Advocate General's Corps, department or branch. In addition, civilian lawyers may play a role, either as military judges in some systems, or as defense counsel retained by the accused. Often civilian defense counsel are former or retired judge advocates. Some of the most effective ones, however, have had no military experience but are successful in collaborating with uniformed co-counsel. The fact that a civilian defense attorney without prior military experience can be effective in a court-martial is also a reflection of the overall similarity between contemporary military practice and civilian criminal procedure in many countries. In the UK, nearly all defense counsel who practice in the Court Martial are now civilians and the armed forces provide a legal aid system that can be accessed by accused military personnel.

Military lawyers describe themselves as members of two professions: the profession of arms and the legal profession. There is a good deal of truth to this, as uniformed lawyers remain subject to military discipline and share in the camaraderie enjoyed by commissioned officers. Their incentive system—for those who are considering

a career in uniform—may, however, at times bump into their obligations as lawyers, including the duty of zealous representation. Judge advocates who do shirtsleeves courtroom work in their first tour of duty are going to be quite junior, and even though the military judge will be wearing robes, everyone in the courtroom will be mindful at all times that several pay grades separate the judge from counsel. The result may be greater deference and at times more of a go-along attitude than is typical of criminal defense counsel. This is one of the reasons military personnel who are in serious trouble (and can afford to do so) not uncommonly hire their own civilian defense counsel, who ordinarily has the laboring oar in the courtroom. Having some distance from the system, civilian attorneys may be more suited to launching systemic challenges.

Divided loyalties can raise vexing issues to which military justice systems have to be alert. These issues significantly affect defense counsel, but they can also arise for other uniformed lawyers in the military justice system.

Many military lawyers serve as advisors to commanders, and in that way can heavily influence military justice decision making. But there is a wrinkle in the advisory role. A staff judge advocate—the uniformed legal advisor to a commander—does not have an attorney-client relationship with the commander. Instead, the lawyer's duty is to the institution. Thus, unlike the usual legal client, a commander cannot expect that the legal advisor will take his confidences to the grave. In fact, interactions between commanders and their staff judge advocates rarely become public, but at times they do. This may happen, for example, when issues of unlawful command influence or jury stacking are litigated in courts-martial. This possibility is probably not going to be at the forefront of either the commander's thinking or that of the staff judge advocate, but it is something that the staff judge advocate ought to make clear when the commander seeks advice: the discussion is not necessarily going to stay within the room.

Prosecutors in the military justice system—called trial counsel in the United States—may also confront issues of professional responsibility. Like prosecutors in the civilian community, they have a duty to comply with professional responsibility requirements, such as candor to the tribunal. They also cannot withhold evidence favorable to the accused—unless they want to scuttle a case and get themselves in hot water. Nor can they engage in overreaching when dealing with the defense or witnesses. Regrettably, in the United States system, the standards guiding the exercise of prosecutorial discretion are imprecise, meaning trial counsel (and commanders, who unfortunately still have the charging power) have virtually unbridled discretion. Rachel E. VanLandingham, a former military lawyer, has suggested that it would be wise to require military prosecution decisions to be made according to the same criteria that are applied by Department of Justice prosecutors in the civilian federal courts. The idea merits consideration, whether the decisions are made by lay commanders or, as seems preferable, by legally trained judge advocates.

The critical power to decide who shall be prosecuted on what charges may vary widely, depending on whether national legislation calls for a director of service prosecutions (akin to a director of public prosecutions) or retains the George III model of vesting that power in the commanding officer. If the director of service prosecutions approach has been taken, as in the UK, Ireland, Canada, Australia, New Zealand, and South Africa, the applicability of rules of professional conduct or standards governing the prosecution function will be obvious. But what if, as in the United States, commanders retain the all-important power to decide on the disposition of charges? Very few commanders today are lawyers; what standards will a non-lawyer apply in making these critical decisions?

Another potential ethical problem arises from the fact that military justice often permits the same underlying misconduct to be charged in a host of ways, with a broad range of potential

maximum punishments. The same is true, of course, in the federal and state civilian criminal justice systems, with the result that military prosecutors enjoy a tremendous advantage in negotiating plea bargains (guilty pleas that reduce the potential punishment).

Military prosecutors often charge the same offense in a number of ways, and the case law clearly permits what is called "pleading for the contingencies of proof." That is, the trial counsel may not really know at the outset quite how the evidence will unfold, so the goal is to cover all the bases. Military justice seeks to correct for this by, for example, permitting the dismissal of charges by the judge where there is an unreasonable multiplication of charges. Trial counsel often consider it a challenge to be creative and come up with multiple ways of pleading the same underlying conduct. The leverage this affords the prosecution in pretrial negotiations cannot fully be corrected at trial, since the military judge is unlikely to examine whether overcharging has given the government an unfair advantage in those negotiations.

But the biggest source of concern is not with staff judge advocates or trial counsel; it is with defense counsel, because their efforts are likely to affect directly, and potentially catastrophically, the rights of the accused. Worse yet, in most instances, the defense counsel will not be selected by the accused, but rather, will be detailed to the case by the armed forces. Hence, the interpersonal dynamic between attorney and client may be radically different from what one finds in civilian criminal justice systems. What is more, most accused are junior enlisted personnel while all uniformed lawyers are commissioned officers, thus building in a very real social divide. Their conversations are unlikely to be those between social or educational equals. And the lawyer may be thinking about his or her next assignment.

The dangers are real, and in the United States, Congress has taken steps to ensure that military defense counsel are effective, as the Constitution and military law require. Thus, the Uniform Code

of Military Justice specifically forbids commanders to "censure, reprimand, or admonish" counsel based on their actions in connection with a court-martial or to give "a less favorable rating or evaluation . . . because of the zeal with which [they] represented any accused before a court-martial." Indeed, violation of these prohibitions is theoretically punishable under the Code, although there have been no such prosecutions.

Despite the structural protections, fundamental issues can and do arise in the representation of accused personnel by military defense counsel. A remarkable example (mentioned here with the consent of the accused, whom I represented on appeal) involved a Marine Corps officer who was charged with various offenses said to have been committed while he was in Ireland for a World War II commemoration. At the ensuing general court-martial, he was represented by both a Marine judge advocate and, as lead counsel, a civilian attorney retained at his own expense.

The Marine lawyer was nearing the end of his time in uniform and the local legal services command decided to shift him from defense duties to prosecuting at the same base in North Carolina. That transfer took effect before all of the cases he was trying as defense counsel, including the charged officer's, were complete. As a result, the Marine lawyer found himself serving simultaneously as a prosecutor and a defense counsel. Worse yet, in his role as a prosecutor, he was supervised (and his fitness reports were prepared) by his adversary in the officer's case.

The obvious conflict of interest was masked by the fact that the Marine lawyer was given two offices—one in which he worked as a prosecutor most of the time, and another in which he met his defense clients. His steps to make sure his defense clients were aware of the conflict so they could intelligently waive it were minimal and apparently never reduced to writing. He conducted no legal research to evaluate the conflict of interest, which he seems to have thought was merely the appearance of a conflict.

The conflict of interest could not have been clearer, and after a series of post-trial hearings, the court-martial was set aside and a new trial was authorized, this time with conflict-free defense counsel. The accused officer wound up pleading guilty the second time around in accordance with a favorable pretrial agreement.

The case demonstrates how even experienced military and civilian practitioners may have a tin ear when it comes to issues of professional responsibility. The circumstances were scandalous on a number of levels, including both the failure of counsel to do necessary legal research, their inability to produce their case files, and their inattention to a conflict of interest that could hardly have been more glaring. Equally disturbing was the passive attitude of several more senior Marine Corps lawyers who seemed incurious about the law, tone-deaf to an obvious ethical issue, or both.

Happily, the military appellate courts were alert to the conflict of interest issue and, more importantly, the case led the Marine Corps' Judge Advocate Division to take steps to prevent this kind of conflict from arising again. So far as is known, however, no disciplinary action was taken against either defense counsel. After leaving the Marine Corps, the uniformed defense counsel became a federal prosecutor.

In the United States, each branch of the armed forces maintains a professional responsibility program and has regulations governing the conduct of counsel (including civilian attorneys who may appear in courts-martial at the accused's expense). Why the services have been unable to agree on a single set of professional conduct rules is a mystery. Moreover, each service exercises the power to suspend or disbar lawyers and report them to state bar authorities. These processes are conducted largely outside of public view, and it is therefore difficult to gauge how effective they are.

What is clear from the sketchy available information is that uniformed lawyers—members of two professions though they

are—can display many of the same foibles that lead lawyers in the civilian community astray. One judge advocate was not even an attorney; another continued to practice in the military even though his state bar had disbarred him, until events caught up with him. That case led the service concerned to crack down by requiring proof of good standing from all judge advocates. The one problem that distinguishes uniformed and civilian lawyers who practice in military courts is that uniformed lawyers cannot charge the client a fee. As a result, they never encounter the host of fee-related questions with which civilian lawyers are familiar, such as whether a fee is excessive, whether a retainer must be deposited in a trust account, or what time records the attorney must maintain.

Interestingly, being a member of two professions may create novel issues where, for example, a judge advocate engages in misconduct that the military frowns on but the civilian bar typically disregards. Thus, the United States military services continue to punish adultery, while most civilian jurisdictions no longer do so. Should a military lawyer who engages in an extramarital affair have her right to practice law revoked? At least one branch of the Unites States armed forces thinks so. Conversely, missing a deadline is the type of thing for which lawyers can face bar discipline and civil liability in the civilian world, but in several cases where uniformed lawyers missed important filing deadlines they seem to have paid no penalty.

Because federal law effectively insulates uniformed lawyers from personal liability for malpractice, professional disciplinary processes and judicial insistence on the constitutionally required "effective assistance of counsel" represent the accused's only protection from uniformed lawyers who are unprepared, inattentive, indolent, or subject to conflicting interests. Shockingly, in one of the few court-martial appeals accepted by the Supreme Court of the United States and in which the defendant prevailed, uniformed counsel overlooked a critical deadline after further proceedings in the lower military courts. That blunder prevented

the client from obtaining another opportunity for review by either the US Court of Appeals for the Armed Forces or the Supreme Court. To be sure, there is no way of knowing whether he would have obtained relief had the deadline not been disregarded, but the chain of events is appalling. If any of the uniformed lawyers who were responsible were disciplined, it has been kept a deep secret. The same is true of a number of other cases in which uniformed counsel have overlooked filing deadlines. Professional accountability has not been achieved in this area.

Professionalism is a challenge in any system of criminal justice that relies on lawyer counsel. The military is aware of the potential problems and the fact that a lack of professionalism can take a toll on public confidence in the administration of justice. The military's legal ethics offices are no longer the "black hole" they once were, but they would do well to share more information about bar discipline.

Chapter 9
Military justice in the field

Military justice has to be portable because armies deploy. In battlefield conditions, soldiers rarely have time to get into the kinds of garden-variety trouble that occurs in garrison. Even so, field operations in unfamiliar environments generate their fair share of military justice controversies. Some of these are a function of the imposition of special rules intended to prevent friction with the local populace. Thus, theater commanders will typically issue general orders forbidding a host of activities. These can include such predictable matters as sexual contact with local residents, possession and use of drugs and alcohol, entering houses of worship without authority, possession of private firearms, and possession of pornography and other sexually explicit images. (US regulations carved out an exception for programs broadcast by the Armed Forces Radio and Television Service as well as commercially available magazines, CDs, DVDs, and videotapes distributed through base exchanges.) Gambling, looting, and engaging in black market transactions are also concerns during deployment. Attempts at religious proselytization by members of visiting forces are a potential flashpoint, and it is not surprising that they too are forbidden by general orders.

Other deployment-related prohibitions may be less familiar. Some of these reflect requirements of the law of war, including the

Geneva Conventions. For example, a general order issued for United States troops in Iraq prohibited photographing or filming detainees or human casualties, enemy, friendly, or non-combatant. One prohibition that proved so controversial that it was later revoked made it an offense to "becom[e] pregnant, or impregnating a Soldier, while assigned to the Task Force [area of operations], resulting in the redeployment of the pregnant Soldier." Standing orders also typically forbid "cohabiting, residing, or spending the night with members of the opposite sex within any building or living quarters." Fortunately, there is an exception for married couples. Presumably the opposite-sex parietal rules will be modified in the wake of Congress's 2010 repeal of the statutory "Don't Ask, Don't Tell" policy or the Supreme Court's 2015 *Obergefell v. Hodges* 5–4 decision finding a constitutional right to same-sex marriage.

Graver than these offenses, though, are the kinds of misconduct in which local civilians may be killed or wounded, or enemy fighters may be denied the protections afforded by the law of war. It is an unfortunate fact that these situations arise in every armed conflict, and international law imposes a duty on states to investigate and punish these crimes. In United States practice, such offenses are not prosecuted as "war crimes" but rather according to the underlying conduct. In other words, even though the 1968 My Lai Massacre, in which hundreds of unarmed Vietnamese civilians were murdered, was undoubtedly a war crime, the charges were laid under the normal murder provision of the Uniform Code of Military Justice. The United States might wish to reconsider this traditional approach given the unique stigma that properly attaches to convictions for war crimes.

The kinds of facts that give rise to these offenses beggar the imagination. Everyone remembers the iconic photos taken at the Abu Ghraib prison in Iraq, recording for all time a pattern of degrading treatment of prisoners. Less well known are incidents in which Marine snipers urinated on the bodies of dead enemy

9. With digital cameras and smartphones widely available even on deployments, misconduct can be easily recorded. Photographic evidence such as this iconic image from the Abu Ghraib prison in Iraq played a powerful role in courts-martial and in galvanizing public opinion in the United States, Iraq and elsewhere.

combatants in Afghanistan, prisoners were executed, innocent civilians shot, or excessive force used in responding to hostile fire. Probably every country that has participated in coalition operations in Iraq and Afghanistan can point to cases that have cried out for and received prosecution. Examples include the United States, the UK, the Netherlands, Poland, and Denmark, with highly divergent outcomes.

Although some deployment misconduct—such as the devastating Abu Ghraib cases—seems literally indefensible, battlefield crimes have proven to be both difficult and controversial to prosecute. At times there have been questions about which rules of engagement governed. Even where the governing rules are clear, a common theme is that events were moving fast, adrenaline was flowing, visibility was poor, and the actors were themselves in mortal danger. A common complaint is that the events were shrouded in the "fog of war." This cannot be lightly dismissed, especially at a comfortable distance from the battlefield, but the phrase has come to imply not simply that the facts may be unclear, but more broadly that there is something questionable—no, impermissible—for anyone to make after-the-fact judgments about these fast-moving violent interactions in faraway places.

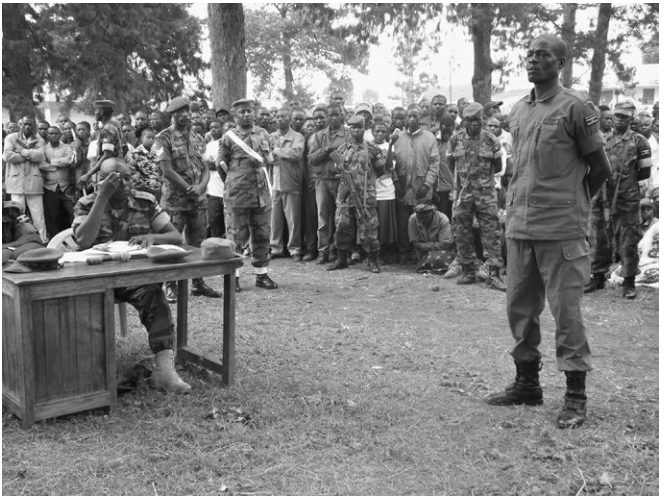
It is difficult to draw overall conclusions as to whether justice has been done in these cases. In some instances, military juries have been loath to convict where one would have thought a conviction was inevitable. At other times, in the rare instance when a battlefield crime finds its way into a civilian court, even a jury of randomly selected civilians may prove equally unwilling to second-guess soldiers' conduct. It is fair to say that no country enjoys putting its own troops on trial for conduct in the heat of battle, or even in an area that has recently seen battle.

Bringing cases to court requires a series of obstacles to be overcome. According to a 2013 Defense Department report (I was on the board that issued the report, and dissented from other portions):

> Evidence exists that Service members at the point of contact or their leaders have been reluctant to inform the command of reportable incidents. This reluctance may be attributed to any number of potential factors including a feeling of justification in connection with the actions taken, fear of career repercussions, loyalty to fellow Service members or the unit, or ignorance. One survey of Marines and soldiers in Iraq reported that… only 40% of Marines and 55% of soldiers indicated they would report a unit member for injury or killing an innocent non-combatant.
>
> …Individuals involved in reportable incidents themselves may fear personal consequences connected to reporting. Commanders may question events, but conclude that nothing problematic occurred, and then fail to report an incident. Leaders engaged in war-fighting may not want to be distracted with allegations they believe will inevitably prove to be unproblematic or unsubstantiated. Individuals may feel they are bypassing "unnecessary" work by not reporting. Service members may lack confidence in "the system" to fairly investigate and exonerate when the facts warrant.

If, despite these barriers, credible evidence of battlefield criminality comes to light, a country must take action. The resulting trials may do no good for morale, yet they must be conducted if we are to comply with both our international obligations and our core values.

Where should trials be conducted when crimes are committed on deployment? This has proven to be a messy issue. Plainly, it is unwise to create an incentive for GIs to commit crimes in order to get a ticket home. Similarly, key witnesses, both soldiers and local civilians, will be more readily available (and in the case of the civilians, more likely to testify) if the trial is conducted in the country in which the offense was committed. A local trial also makes it easier to reassure local residents that the visiting force is taking active measures to punish the guilty. It is certainly feasible to conduct trials overseas, as both lawyers and judges will be



10. Military "drumhead justice" persists in some parts of the world. Poorer countries lack proper courtroom facilities for military trials. Here, a Uganda People's Defence Force soldier stands trial in an open-air proceeding.

available without too much difficulty or undue expense. Many serious cases were tried in Vietnam, for example, and others were tried in Saudi Arabia, Iraq, and Afghanistan. But American practice remains inconsistent. Some branches of the military have tried cases "in-country," nearer to the scene of the crime, while others have tended to ship them back to the continental United States for trial. At the very least, doing so reduces the chance of local unrest if there is an acquittal or what seems to be an unduly lenient sentence.

What about peacekeeping and military justice? The United Nations (UN) has no military forces of its own, but many member states voluntarily participate in its peacekeeping operations as "troop-contributing countries." There are currently 16 such operations around the globe. Countries that contribute troops for

these operations retain responsibility for discipline. Unfortunately, misconduct is not unknown among UN peacekeepers, and often involves sexual exploitation and abuse of local women and children. Needless to say, this is utterly subversive of the UN's goals.

The UN has limited tools with which to deal with such offenses. It conducts a training program and has Conduct and Discipline Teams, but it cannot directly punish peacekeeper misconduct; it can, however, demand that offenses be investigated by the country contributing the pertinent troop contingent and that the results of any disciplinary action be reported to the UN. The UN can require the repatriation of specific offenders or, in extreme cases, repatriate an entire unit, or disqualify the troop-contributing country from participating in peacekeeping operations for some period of time.

The UN's Department of Peacekeeping Operations is increasingly making available to the public information about troop contingent discipline, including actions taken in particular cases, but it remains a problem that troop-contributing countries may be slow either to take serious disciplinary measures or to make the results known to the UN. Since the basic principle that discipline is the contributing country's responsibility is unlikely to change, the UN should look at other measures that might indirectly help reduce peacekeeper criminality. One possible reform measure would be to establish a corps of observers—probably retired military lawyers—who could be sent to observe and report back to the UN on disciplinary proceedings and courts-martial conducted by troop-contributing countries.

Chapter 10
What about Guantánamo?

It is an amazing fact that as many, if not more, people know about military commissions than know about courts-martial, even though there are vastly more courts-martial. The reason is that military commissions have been regularly in the news since shortly after the 9/11 terrorist attacks on the United States in 2001, and because in the public mind the commissions have been coupled with the larger problem of what to do about the detainees the United States has imprisoned for many years at the US Naval Station at Guantánamo Bay, Cuba. The conflation of those military commissions and courts-martial began early, with an unfortunate *New York Times* op-ed by Alberto R. Gonzales, then counsel to President George W. Bush, in which he commented: "The suggestion that these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system." The comment made military lawyers cringe because it was so far from the truth.

Military commissions are a category of military tribunal. They are not courts-martial because they are not used to prosecute offenses committed by US military personnel. Traditionally, they have been used in three situations: where martial law has been declared, in occupied areas, and where permitted by the law of war.

The history of military commissions in the United States has been traced back to the "board of officers" that tried Major John André, who was hanged as a British spy (and collaborator of Benedict Arnold) during the American Revolutionary War. A firmer precedent comes from the Mexican War, where a form of court was needed not only to prosecute depredations by Mexican forces but also misconduct by American soldiers. At the time, the Articles of War—the main legislative predecessor of the Uniform Code of Military Justice—did not apply outside the country, and a makeshift arrangement therefore had to be decreed.

Hundreds of military commissions were conducted during and after the Civil War, most notably the 1865 trials of the Lincoln conspirators and of Captain Henry Wirz, commandant of the notorious confederate prisoner of war camp at Andersonville, Georgia. Three years earlier, following the war with the Dakota Sioux in Minnesota, a military commission had led to the largest mass execution in American history, with 38 Indians hanged.

The next major chapter in military commission history came during and after World War II, when military commissions were used to prosecute German saboteurs on two occasions, as well as numerous other commissions held outside the country to prosecute war criminals.

After World War II, the only people who took any interest in military commissions were legal historians. That ended suddenly soon after 9/11, when President George W. Bush signed a "military order" authorizing revived military commissions to prosecute unlawful enemy combatants such as those who perpetrated the attacks that took so many lives in New York, Washington, and Pennsylvania. His order was a close replica of one President Franklin D. Roosevelt signed in preparation for the 1942 trial of German saboteurs who were landed on US shores by submarine. (That trial, conducted in secret at the Department of Justice, was

approved by the Supreme Court despite strong arguments that the proceedings violated the Articles of War. Worse yet, all but two of the eight defendants were executed before the Supreme Court issued the opinion explaining why it had denied relief.)

Before long, the United States transported hundreds of captives from Afghanistan and other places by air to Guantánamo Bay, a leased enclave in Cuba, where the vast majority were interrogated and simply imprisoned. The detentions led to a tidal wave of litigation, fought every step of the way by the government, in efforts to obtain the prisoners' release by writ of habeas corpus. Could the detainees sue? Did the federal courts have jurisdiction over detentions outside the United States? If they did, was habeas available? If it was, what procedures should be followed? Could Congress block the detainees' access to the federal courts? A string of Supreme Court decisions followed, keeping the courthouse doors ajar, but in time the Court lost interest and effectively abdicated to the US Court of Appeals for the District of Columbia Circuit. At the time that court had a considerable rightward tilt, and its decisions erected ever steeper evidentiary barriers to actions seeking the release of Guantánamo detainees. Congress imposed a string of statutory hurdles making it impossible for the administration to bring any of the detainees into the United States, and all but impossible to repatriate or relocate them to third countries if they were found not to be enemy combatants.

At the same time that all of the detainee litigation was being conducted, the military commissions chugged along at Guantánamo. A handful of minor cases were referred to the commissions, involving individuals such as Salim Hamdan (Osama bin Laden's Yemeni driver), a young Canadian named Omar Khadr, who had been a Taliban fighter, and a hapless Australian named David Hicks, who had gone to Afghanistan to engage in jihad. The commissions at first had only a slender statutory basis; mostly the rules were made by the US Secretary of Defense. The cases moved at a snail's pace, and the entire process

was rife with basic unfairness on such matters as access to evidence, the burden of proof, and other fundamentals. The procedures failed to meet contemporary standards in large part because the Bush administration had worked from a World War II–vintage model that did not reflect any of the intervening dramatic changes in military justice or the criminal justice revolution of the Warren Court era, much less the growing body of human rights law.

On the surface, military commissions looked like general courts-martial. There were military judges presiding, and the members of the commissions (again, like jurors) were selected by an appointing or convening authority. But some of the military tone was an illusion. The convening authority was at one time a civilian who had performed no military service but had been a Republican appointee to the US Court of Appeals for the Armed Forces. Others were retired senior officers recalled in their military capacity, while still others were retired senior officers hired back as civil servants. On the prosecution side, the military lawyers were joined by civilian lawyers from the Department of Justice, and on the defense side, judge advocates worked closely with civilian defense counsel. For a military tribunal, these commissions had a lot of civilian involvement.

They also suffered from a great deal of personnel turbulence. In addition to the parade of appointing and convening authorities, there were numerous chief prosecutors and chief defense counsel. A number of prosecutors and defense counsel quit over ethical issues, including one chief prosecutor—an officer who strongly believed in the military commissions—who objected to the Pentagon general counsel's effort to control his decision making. Several of the defense counsel complained that they had been passed over for promotion because of their work on the commissions. Even the military judges have been disgruntled at times: when a convening authority (a retired Marine Corps general) directed in 2015 that the judges would have to remain at Guantánamo until

their cases were completed, two of the commission trial judges resisted, forcing the Pentagon to rescind the order and effectively driving the convening authority from office.

Eventually, Hamdan's case reached the Supreme Court on a writ of habeas corpus, and the legal structure put in place by the administration came crashing down, albeit by a divided vote and with only a plurality opinion written by Justice John Paul Stevens. Although many people are under the impression that the decision rested on the Constitution, in fact it was linked closely to the Uniform Code of Military Justice and law of war principles governing the use of military commissions. *Hamdan v. Rumsfeld* invalidated the Bush commissions, but Congress almost immediately enacted legislation to repair the damage. The Military Commissions Act of 2006 for the first time articulated a durable statutory framework for military commissions, although it had to be amended three years later in response to another Supreme Court decision.

As the commission system finally achieved a measure of stability, major questions remained as a result of the *Hamdan* decision. Specifically, a military commission could try only offenses that were crimes under the law of war, which is a subset of international law. When Congress enacted the Military Commissions Acts of 2006 and 2009 it had included a list of offenses that it asserted were recognized under the law of war. The problem was that some of them were not. For example, issues arose as to whether material support for terrorism, solicitation, and conspiracy were law of war offenses.

The United States government has argued that there is an "American law of war," under which Congress can label certain forms of misconduct war crimes (and subject them to military commission trial) in the exercise of its constitutional power to "define and punish . . . Offences against the Law of Nations" even if the rest of the world disagreed. The courts have proved hostile

to these charges, effectively giving the military commissions a much-reduced jurisdiction. Even some cases that had produced convictions had to be set aside. Hicks is now a free man back in Australia. Hamdan again lives in Yemen. Khadr, a Canadian citizen, was sent home as part of a plea bargain, and was released on bail in 2015.

It seems likely that if any cases will be pursued before military commissions, it will be those that involve the perpetrators of the 9/11 attacks. Other cases may wind up in the civilian federal courts, which have a long record of promptly adjudicating terrorism charges and handing down lengthy sentences. It is difficult to resist the temptation to treat the current generation of military commissions as a costly blunder, imposing enormous emotional costs on families for whom emotional closure is long overdue, and prodigious dollar costs on US taxpayers.

Chapter 11
Peering ahead

What about the future? What new legal challenges can we expect given the strong likelihood of continuing military operations around the world, coupled with increased across-the-board austerity in government operations? What changes in military justice may flow from technological innovation and changing expectations of fairness?

Military justice is generally change-averse. Countries that have workable systems tend to resist change absent some compelling reason. The reasons for this are both cultural and practical. Culturally, military leaders tend to be conservative. Practically, resistance to change is defended on the basis that any tinkering may jeopardize national security in a dangerous time or neighborhood. It is also a fact that in many countries—including those with a robust parliamentary democratic tradition—legislators are likely to defer to the judgment of military officers.

Despite all this, major reforms in the field of military justice around the globe can be anticipated, although any predictions must be taken with a grain of salt. Unfortunately, there are also likely to be some changes that are the polar opposite of progress, such as efforts to *broaden* the scope of military justice to sweep in civilians under the banner of fighting terrorism.

The biggest question concerns globalization. The term is not meant to suggest that countries will abandon national control over their own military justice systems. Such systems, like military forces, are a hallmark of sovereignty, and their autonomy will continue to be jealously guarded. Still, for several reasons, the coalescing of national military justice systems seems likely. Because of the internet, it is now possible to monitor developments in other countries in a much more systematic and timely fashion than was ever possible in the past. Legislative activity in one country can have an effect, if only subliminally, on authorities in other countries. Regions that are closely integrated or at least harmonized in other respects may feel a strong temptation to look at regional models in military justice. This view has been expressed in Spain by the service members' association. The work of organizations such as the Brussels-based International Society for Military Law and the Law of War will facilitate the impulse to borrow and learn from other countries. Similarly, outreach efforts by governmental agencies such as the United States' Defense Institute for International Legal Studies and academic conferences can create the proper conditions.

Another force for globalization is the simple fact of friendly interaction among national armed forces. Whether through conferences and training programs, joint operations, or in the context of UN peacekeeping with mixed troop contingents, the military forces of different countries interact increasingly and with growing depth. Inevitably, this will lead to increased awareness of how other countries deal with the disciplinary issues that face all contemporary armed forces.

Globalization in the sense of harmonization or gradual assimilation must face serious headwinds because many countries' legal systems trace to a handful of models, typically as a result of imperial or colonial links. As in other parts of the legal forest, countries remain firmly rooted in the common law or civil law tradition, and indeed, in the particular subset of

that tradition, as witness the case of the Philippines' continued reliance on Articles of War that trace to a pre–Uniform Code of Military Justice American model. Liberia even calls its military law the Uniform Code of Military Justice. Countries that experienced decolonization in the last half of the 20th century are unlikely to leap to bind themselves to a new set of externally generated legislative norms on a part of government—the military—that is central to the decolonization project.

There are other forces at work, and these may be at least as potent as those that militate against systemic change. Thus, change is likely to be fostered as a result of broad national adherence to human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Convention on Human and People's Rights. The human rights treaty bodies, such as the UN Human Rights Committee and regional human rights courts, have, among them, developed what is shaping up as a coherent and increasingly fleshed-out body of jurisprudence, even if parts of it remain contested. Of course, not all countries have ratified these treaties and, of those that have, some remain reluctant to domesticate their provisions or accept the complaint procedure that permits individuals to invoke the treaty bodies' adjudicatory processes. The United States, for example, has ratified the ICCPR but not its optional protocol creating a complaint procedure. The United States filed a reservation noting that domestic law required legislation to domesticate the provisions of the Covenant, and has not taken action to pass such legislation; therefore, the Covenant remains essentially a dead letter for this country from the standpoint of legal effect.

Even for such holdouts, however, the human rights treaty processes can get the attention of signatories that have not opted

into complaint processes. Thus, these countries remain subject to periodic reviews of their compliance or non-compliance with human rights treaty obligations. Those reviews permit non-governmental organizations to submit so-called shadow reports directing attention to compliance deficits, leading to dialogue with the affected state and Concluding Observations and Universal Periodic Reviews, both of which can focus political and civil society concerns. Military justice has figured in many such reports, but not in the case of the United States, except for the high-profile issues relating to the military commissions at Guantánamo Bay, Cuba. Those who seek reform of national military justice systems will continue to bring their concerns before the treaty bodies, and over time that may have some salutary effect.

At times, countries that have not signed on to the UN's optional human rights complaint processes may find their non-compliance examined in those same processes when one of their military personnel resists deportation to his or her country where that country's military justice system is non-compliant. A United States deserter denied asylum in Canada can thus indirectly attack the American military justice system through the vehicle of a Human Rights Committee complaint against Canada, leaving that country in the odd position of having to defend another country's system and potentially having to compensate the deserter for the United States' non-compliance with the ICCPR. It would make far more sense for the United States to subject itself to the complaint process and defend its own system directly.

One step the UN Human Rights Council might consider is to establish a new mandate for a Special Rapporteur on Military Justice. In the past, military justice issues have been addressed by the Special Rapporteur on the Independence of Judges and Lawyers as well as by several other topical mandate holders. In practice, however, the subject has typically been peripheral to established mandates, and at times has received less attention,

and less systematic attention, than it warrants. Presumably the Human Rights Council does not wish mandates to proliferate unduly, but in an era in which there are, for example, mandates covering persons with albinism, the elderly, and slavery, perhaps it could find room for a purpose-built mandate on military justice, where issues abound and the potential for abuse is ever-present.

The growth of a body of international criminal law through the work of the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia, and other international criminal justice bodies provides an additional impetus for countries to adopt a global perspective when considering reform of their military justice systems. On one level, this is likely again to be merely an indirect influence, as military lawyers take a lively and respectful interest in the decisions of those courts on such matters as the doctrine of command responsibility: when is a commander criminally liable for the misconduct of subordinates due to a failure to control them and to see that they are subjected to proper discipline for misconduct?

But these courts may also have more than merely a subliminal effect on national military justice systems. Thus, the UK and Canada (but not the United States) have ratified the Rome Statute, potentially subjecting their personnel to ICC prosecution. The ICC prosecutor announced in 2014 that she was opening an investigation into British forces' treatment of detainees during operations in Iraq. The basis for her doing so, at the request of British human rights lawyers, is the doctrine of complementarity, under which the ICC may prosecute meritorious cases that a state party is either unwilling or unable to prosecute. The action arises from several closely watched cases, including that of Baha Musa, whose death in British custody prompted extensive investigation by British military and civilian authorities. One of the themes that emerged from these cases is that investigations into claims of battlefield misconduct must be conducted by officials who are substantially independent of operational commanders.

This concern was also apparent in the 2014 decision of the European Court of Human Rights in *Jaloud v. The Netherlands*. The case arose from the shooting death of an Iraqi citizen at a traffic checkpoint manned by Iraqi and Dutch personnel in an area over which the UK exercised overall control. One of the issues—apart from the application of the European Convention to UK-controlled Iraqi territory—concerned whether a Dutch junior officer should have been prosecuted, and this turned on, among other things, whether the Royal Dutch Constabulary's investigation had been effective and independent. The court was not persuaded that the investigation had been effective, but was satisfied with the Constabulary's independence from the operational command. Concern over investigative independence also led to creation of the Iraq Historic Allegations Team (IHAT). Its function is "to review and investigate allegations of abuse by Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009." It is led by a retired senior civilian police detective, relies heavily on retired police as staff, and is independent of the chain of command.

A related development that has increasingly concerned authorities in countries that are subject to the European Convention is the prospect that they will be exposed to financial penalties through litigation based on overseas military operations. The UK has been particularly exercised on this subject, following a spate of claims filed on behalf of Iraqi citizens asserting that they or their loved ones were injured during operations in Basra Province when it was under British control. So many of these claims were submitted by public interest lawyers that an investigation was ordered. Headed by Sir Thayne Forbes, the Al-Sweady Public Inquiry cost over £24 million, took a great deal of time, and concluded that many of the claims were not only unfounded but had been pursued under circumstances that suggested that the claimants' attorneys knew they had been invented. The case prompted great consternation within the British armed forces and their supporters in Parliament, and led to a bar inquiry.

Future developments in military justice will remain largely unpredictable since they are most likely to occur in response to crises or domestic or international judicial commands. Few observers could have foretold the public outrage that exploded in Taiwan in 2014 following the death of a conscript who had been worked to the point of exhaustion while undergoing disciplinary confinement. Within weeks, the Legislative Yuan abolished the military justice system. Nor could anyone have anticipated the political firestorm that erupted in the United States in 2013 and 2014 when dismaying levels of sexual assault and harassment within the armed forces gained the political spotlight, with legislators from both parties deeply engaged. The future trajectory of that controversy remains unclear.

A few more countries may follow the course charted in Western Europe of largely abandoning military justice in favor of reliance on civilian criminal justice systems, perhaps with some military involvement, as in the Netherlands. These changes may coincide with the abandonment of conscription. Continued erosion of the powers of command can be anticipated in countries that retain freestanding military justice systems, with prosecutorial discretion shifting to lawyer decision makers (civilian or military). There may also be a trend toward re-examining the scope of military justice, limiting court-martial jurisdiction to cases arising in core armed forces, and excluding constabulary forces that increasingly resemble agencies within the civil service. Subject matter jurisdiction could also shrink (and with it, caseloads) if states begin to take seriously the human rights axiom that military justice must be reserved for offenses that have a substantial and direct connection to military service, rather than sweeping in any and all criminal conduct in which military personnel engage.

If an overall trend emerges along some or all of these lines, an important corollary could be to reconsider the need for dedicated military confinement facilities, as those may become expensive luxuries with which governments that are starved for resources

may decide to dispense. Since few soldiers who serve time for military crimes wind up being restored to duty—they tend to be discharged either by judgment of the court-martial or through administrative action—integration of military offenders into the general prison population could have much to recommend it, although rehabilitative and redeployment results at the UK's Military Corrective Training Centre in Colchester are said to be impressive. Military correctional programs remain among the least studied aspects of the administration of justice in the armed forces.

Finally, as technology continues to advance, new challenges and opportunities can be anticipated. Technological changes now permit instantaneous communication so that decisions important to the administration of military justice can have the benefit of input from experts and decision makers on the opposite side of the world. This could make it easier to conduct and review courts-martial on deployment. Internet access and digitization of legal materials such as statutes, regulations, case law, and even periodical literature means that trial preparation, briefing, and judicial decision making can be conducted on deployment or in remote domestic settings with something closely approaching the rigor achievable in a conventional law office or courthouse setting. Scientific advances will inevitably continue to affect military justice as well. While countries such as the United States have banned the use of lie detectors in military courts, other advances such as urinalysis, DNA testing, and computer forensic analysis have become increasingly commonplace in military courtrooms, at least in systems that are not starved for resources.

But new challenges also emerge as new forms of technology become available. A Private Manning with computer access to a nation's secrets can spirit them out and into the wrong hands on the internet or on a thumb drive that costs a dollar, a pound, or a Euro. Photography on the battlefield has long been a concern. In World War II, German Army commanders forbade their soldiers

from taking their cameras to the front. Not surprisingly in the country that invented the Leica camera, this order was widely disobeyed, as evidenced by the mass of horrific and damning images assembled in the Hamburg Institute for Social Research's *The German Army and Genocide*, published in 1999. Today's inexpensive digital cameras and body cams have raised serious disciplinary issues, as in the case of the unforgettable Abu Ghraib, Baha Musa, and urinating-Marines photos.

Commanders today also need to concern themselves with blogging and social media such as Facebook. One controversial incident in the Israel Defence Force led in 2014 to what might be termed a Facebook mutiny, with thousands of soldiers protesting the discipline imposed on one of their comrades.

In the United States, a junior judge advocate was investigated and admonished that same year for posting a Facebook comment that favored military justice reform legislation to which the Pentagon was strongly opposed. A few years earlier, a white-supremacist enlisted man gained notoriety—and a court-martial—when he disclosed online his views on government, race, and religion as well as his status as a paratrooper. In the end, his conviction was overturned by a lopsided majority at the US Court of Appeals for the Armed Forces in *United States v. Wilcox*, but only because the prosecution had failed to offer evidence sufficient to convict him for either conduct to the prejudice of good order and discipline or service-discrediting behavior.

The dissenting judge's comments capture the challenge faced by the armed forces and military law:

> We cannot put the Internet genie back in the bottle. Nor should we hope or wish to. The genie is a source of morale in the field. It is a means of familial communication. And, it is a ubiquitous instrument that allows each bad idea to be met by a better idea. What we can do is ensure that it is not used to discredit the armed

forces and undermine compelling national interests. This is done through education, appropriate and lawful regulation, and where necessary, criminal sanction; and, where speech is involved, through application of an exacting constitutional review.

The era in which commanders' worst disciplinary concerns were long hair, marijuana, and displaying peace symbols is now just a receding memory. Military justice may resist change, but it is beyond dispute that it changes as society does, sometimes in the same ways and at the same pace, sometimes in different ways and at warp speed. It is still part of a separate society, but it is much less separate from the larger society's legal system than it once was. Here are some suggestions for how military justice in the United States could be changed for the better:

- Except for minor disciplinary offenses, the power to decide how charges should be disposed of should be transferred from commanders to civilian prosecutors or military prosecutors who are independent of the chain of command. Court-martial members (jurors) should be selected by a court-martial administrator who is independent of the chain of command rather than by military commanders. Commanders should have no power to set aside or modify the findings and sentence adjudged by a court-martial. Sentences can always be adjusted through appellate review or established clemency processes.
- Under no circumstances should civilians or retired military personnel be subject to trial by court-martial or, obviously, non-judicial punishment. Court-martial jurisdiction should be confined to military offenses and should exclude serious human rights violations, especially if the military justice system does not fully meet human rights structural and procedural requirements.
- All courts-martial should be subject to appeal with respect to both guilt and sentence. The prosecution and defense should have equal access to appellate review. All courts-martial should be eligible for

discretionary review by the Supreme Court of the United States, on an equal footing with civilian criminal cases.

- All military judges should have nonrenewable fixed terms of office of at least 10 years' duration.
- Non-judicial punishment powers exercised by military commanders should not include custodial sentences of any duration unless there is provision for prompt de novo review through a process that fully complies with the International Covenant on Civil and Political Rights. Where a member of the service refuses non-judicial punishment or a summary court-martial and the authorities decide to convene a general or special court-martial, the maximum punishment should not exceed that which was permissible as non-judicial punishment or at a summary court-martial. Summary courts-martial should be abolished.

Steps such as these would make military justice fairer and would foster increased public confidence. Especially for a country that relies on volunteers for its armed forces, but in fact for any democratic society, the importance of doing so cannot be overstated.

Glossary

Accused: Defendant

Accuser: Formally, the person who signs and swears to military charges. The concept has additional meanings in United States military justice: "any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the case." "The accuser concept" bars a person with such an interest from playing a variety of roles in the administration of justice.

Articles of War: Act of Congress that governed Army and Air Force military justice before Congress enacted the Uniform Code of Military Justice, which took effect in 1951. The first American Articles of War were based on a British version signed by George III in 1774. The Philippines still uses this name for its military criminal code.

AWOL: Absence without leave; the most common military disciplinary offense. Also known as unauthorized absence.

Board: Military justice term for the jury or court-martial panel. In current American military justice the members (jurors) need not be unanimous except in capital cases.

Bread and water: Traditional punishment in naval services. No longer permitted in the United States.

Brig: Naval jail. May also be a shipboard space used for short-term detention of prisoners.

Captain's mast: In American military justice parlance this is the term used for commanding officer's non-judicial punishment in the Navy and Coast Guard. In former times non-judicial punishment was conducted on deck at the main mast. When imposed by an admiral, the term used is "flag mast." If imposed by the Secretary of the Navy, it is called "Secretary's mast."

Captain's table: British term for captain's mast.

Charge sheet: Formal document setting forth the charges and specifications in a court-martial. It is executed by an "accuser" and is the equivalent of a criminal complaint or information.

Civil offenses: Offenses under civilian criminal codes. Many military justice codes sweep in civil offenses, which are sometimes called common law crimes.

Commander-centric military justice system: The classic British-derived military justice structure under which commanders play key roles such as deciding who shall be prosecuted on what charges and at what level of court-martial, whether the death penalty will be sought, who will be on the jury, what investigative and other resources will be made available to the defense, whether a pretrial agreement will be concluded with the accused, whether immunity will be granted to a witness, and what post-trial action will be taken on the findings and sentence.

Conduct to the prejudice of good order and discipline: One of many formulas national legislation employs to capture the multifarious forms of misconduct that military justice seeks to punish even though they do not fall within the terms of a more specific criminal prohibition such as absence without leave (AWOL) or desertion.

Conduct unbecoming an officer and a gentleman: A common provision of military justice codes, especially but not only in common law countries. These provisions sweep in a broad range of officer misconduct, and apply to both sexes.

Convening authority: In the classic British military justice model adopted by many countries, the convening authority is a commanding officer who has power to convene an ad hoc court-martial, assign (or detail) its personnel—judge, members, counsel—and decide what cases shall be referred to it for trial. The convening authority (or a reviewing authority) may have power to review the proceedings

following trial, including the power to change or set them aside or reduce or suspend the sentence. A number of countries have moved away from this commander-centric model.

Correctional custody: A form of physical detention imposed under American law by commanding officer's non-judicial punishment. Similar to but less onerous than confinement.

Court-martial: A court of law with authority to try cases under military law. It may be ad hoc or a standing body. Many countries have legislated more than one level of court-martial, with varying punishment powers, procedures, and jury size. The labels vary considerably, so a general court-martial in one system may be quite different from one in another system.

Detailed defense counsel: A judge advocate assigned to represent the accused at a court-martial.

Diminished rations: Traditional punishment in naval services. No longer permitted in the United States.

Director of Service (or Military) Prosecutions: Senior official with overall responsibility for deciding which cases should be tried by court-martial. Depending on national legislation, this lawyer may be a military officer or a civilian.

Extra duties: Additional work assigned as part of the sentence of a court-martial.

Findings: Verdict as to the accused's guilt or innocence.

Forfeitures: Loss of pay and allowances, adjudged as part of a court-martial sentence or non-judicial punishment.

Forum election: Accused's opportunity to opt for bench trial (i.e., trial by military judge alone, without jurors) or enlisted members.

General article: A catchall provision found in many military justice codes that criminalizes conduct to the prejudice of good order and discipline and in some cases conduct that tends to discredit the service in the eyes of the public. Various verbal formulas may be used, all with the same general purpose. Civil offenses may also be included in the general article (as in the United States) or (as in Canada) addressed in a separate provision. When used in the plural, "general articles" refers to Articles 133–34 of the Uniform

Code of Military Justice, Article 134 being the prohibition on "conduct unbecoming an officer and a gentleman."

General order: A military order issued by a senior officer and binding on all personnel within its coverage whether or not they have actual knowledge of its terms.

Good soldier defense: A now-disfavored military law doctrine according to which a record of good performance or "good military character" was deemed to be evidence that could raise a reasonable doubt as to the accused's guilt.

Hard labor: A court-martial punishment, involving unpleasant or onerous physical activity. In earlier times the standard deprivation of liberty adjudged in US courts-martial was "confinement at hard labor." That is no longer the case, but hard labor can be adjudged without confinement as a separate punishment.

Individual military counsel: Uniformed lawyer who must be made available to defend an accused if the requested officer's commander finds that the officer is reasonably available. Many judge advocates are by service regulation ineligible to serve as individual military counsel because of their duty assignments.

Interview without coffee: British euphemism for commanding officer's non-judicial punishment of an officer.

Judge advocate: A uniformed lawyer. The term may also be applied in a more limited sense to refer only to the officer performing judicial functions in a court-martial. The term has increasingly given way to "military judge." In contemporary British practice, judge advocates are civilian barristers. In the United States, judge advocates are commonly referred to as JAGs.

Judge advocate general: The senior uniformed lawyer in an armed force or a country. Plural: judge advocates general. The JAG may combine quasi-judicial functions with respect to the administration of military justice with the giving of advice to commanders and civilian ministerial officials. That combination has been the subject of controversy in Canada. In the UK, the term now refers to a civilian official whose only responsibility is judicial. The British JAG serves as chief trial judge and supervises the deputy and assistant JAGs. In the United States a judge advocate general is referred to as "the TJAG."

Lesser included offense: An offense that includes some but not all of the elements of some graver offense. AWOL is a lesser included offense (LIO) of desertion.

Loss of numbers: Traditional punishment in naval services, lowering an officer's seniority on the lineal (or seniority) list. No longer used in the United States.

Manual for Courts-Martial: Collected rules of procedure, evidence, and forms, issued periodically as an Executive Order for US courts-martial. In other national systems the comparable document may be called the Manual of Military (or Service) Law.

Martial law: Martial law is a special legal regime imposed on a geographical area where civilian institutions have broken down and the military is given responsibility for law and order.

Mast: See captain's mast. In addition to mast conducted for the imposition of punishment for minor disciplinary offenses, there is also "request mast," at which a member of a seagoing service may lodge a request with the commanding officer, and "meritorious mast," at which personnel may be decorated or otherwise commended for their performance of duty.

Member: Juror. As courts-martial have increasingly come to resemble civilian criminal courts, members have increasingly come to resemble civilian jurors. They receive and must follow instructions from the judge advocate or military judge. In some military justice systems, when a civilian is tried by court-martial, civilians may be detailed to serve as members.

Military commission: A military court used to try violations of the law of war.

Military due process: Flexible legal doctrine developed by the US Court of Military Appeals (now the US Court of Appeals for the Armed Forces) as a substitute for due process requirements under the Fifth Amendment to the Constitution.

Military judge: Uniformed lawyer who presides over a court-martial.

Military tribunal: Any military court. The term was broadly used to refer to military commissions established by President George W. Bush in 2001. The term covers not only military commissions but courts-martial and provost marshal courts.

Natural judge: Doctrine in Latin American jurisprudence under which a judge must be impartial.

Non-judicial punishment: Punishment imposed by a commanding officer on unit personnel for minor offenses. Also known in United States military justice parlance as "Article 15," referring to that provision of the Uniform Code of Military Justice.

Office hours: US Marine Corps term for non-judicial punishment.

Panel: Military jury in United States practice.

Personal jurisdiction: Status that determines whether a person is subject to trial by court-martial.

President: Senior member of a court-martial. Roughly comparable to foreperson of a civilian jury, but enjoying a few administrative privileges reflecting military seniority, such as determining the uniform of the day.

Pretrial agreement: Contractual plea bargain between a convening authority and an accused in the United States military justice system.

Providency inquiry: Colloquy between the accused and military judge for the purpose of determining whether proposed pleas of guilty are knowing, voluntary, and supported by the facts. Also known as a "*Care* inquiry," after the case in which the requirement was announced.

Punitive articles: Provisions of the Uniform Code of Military Justice that define military crimes.

Punitive discharge: A separation from the military adjudged as part of the sentence of a court-martial. In United States practice, there are three: for officers, dismissal, and for enlisted personnel, bad-conduct and dishonorable discharges (BCD and DD, respectively). Military personnel can also be separated administratively for misconduct or other reasons.

Reduction: Reduction of an accused's rank adjudged as part of a court-martial sentence or through non-judicial punishment. Some countries permit officers to be reduced in rank as part of a sentence. The United States does not, although an officer's rank at the time

of retirement can be reduced by administrative action to the highest grade in which the officer's service was satisfactory.

Reviewing authority [officer]: A military officer responsible for reviewing the findings and sentence of a court-martial. In some national systems, this post-trial command review may be performed by the same officer who convened the court-martial.

Special victims counsel: Judge advocate assigned to advise and represent sexual assault complainants in the United States military justice system.

Specification: Details of an offense. A charge sheet sets forth one or more "charges" citing the pertinent punitive article of the Uniform Code of Military Justice, with one or more "specifications" under each charge.

Stockade: Military jail.

Subject matter jurisdiction: Factual circumstances that determine whether a particular offense is subject to trial by court-martial.

Summary trial: Informal adjudicatory procedure for prosecuting minor offenses. Some national systems use the term "summary hearing," "summary dealing," or "summary court-martial."

Trial counsel: Uniformed lawyer who prosecutes in a court-martial.

Unlawful command influence: Actions by commanders and senior civilian officials that may pervert the course of military justice. Called "the mortal enemy of military justice." Some command influence is provided for by law and is therefore perfectly proper.

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www.aspals.com

Privately managed British website that closely follows the Court Martial and related appeals. It includes a sizable collection of case summaries from UK courts as well as the European Court of Human Rights.

Association of Military Court Advocates

www.facebook.com/AMCA-Association-of-Military-Court-Advocates-272597232872299/

Run by the organization of British lawyers who practice before the Court Martial.

CAAFlog

www.caaflog.com

This site follows closely the decisions of the US Court of Appeals for the Armed Forces and includes many useful links to US military justice sources and websites. Many comments are anonymous but occasionally provide worthwhile insights.

European Court of Human Rights

www.echr.coe.int/Pages/home.aspx?p=home

This official website gives access to decisions of the court through an easy-to-use search engine.

Geneva Centre for the Democratic Control of Armed Forces

www.dcaf.ch/

Non-governmental organization website with links to numerous publications concerning military justice.

Global Military Justice Reform

globalmjreform.blogspot.com

Blog edited by the author and presenting news and notes about military justice developments and reform efforts around the world.

Indian Military Service Benefits and Issues

www.indianmilitary.info/

Privately run website focusing on military and veterans issues in India, with particular reference to the work of the Armed Forces Tribunal.

International Committee of the Red Cross

www.icrc.org/eng/

International organization based in Geneva. The website includes national and international materials on International Humanitarian Law.

International Society for Military Law and the Law of War

www.ismllw.org/

Worldwide non-governmental organization with headquarters in Brussels. The multilingual website includes information on meetings and conferences as well as periodic news reports.

Iraq Historic Allegations Team

www.gov.uk/government/groups/iraq-historic-allegations-team-ihat

British government organization set up to review and investigate allegations of abuse made by Iraqi civilians against UK armed forces personnel in Iraq during the period of 2003 to July 2009. It is scheduled to complete its work at the end of 2019.

Judge Advocate General (Canada)

www.forces.gc.ca/en/about-org-structure/judge-advocate-general.page

Official website for Canadian military law, with links to basic sources and responsible offices.

Judge Advocate General (UK)

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Military Justice Review Group (US)

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Queen's Regulations and Orders (Canada)

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UN Conduct and Discipline Unit

cdu.unlb.org/
Department of Peacekeeping Operations site with data and developments.

UN Economic and Social Council, Commission on Human Rights

Draft Principles Governing the Administration of Justice through Military Tribunals, UN Doc. E/CN.4/2006/58 (2006), *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/77/PDF/G0610677.pdf?OpenElement*

Still awaiting approval, but an excellent summary of human rights jurisprudence regarding military courts.

United States Court of Appeals for the Armed Forces

http://www.armfor.uscourts.gov/newcaaf/home.htm
Official website, including the court's decisions, orders, rules, information about the judges, and a useful case digest.

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