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## The Military Justice Conundrum: Justice or Discipline?

David A. Schlueter

*St. Mary's University School of Law*, [dschlueter@stmarytx.edu](mailto:dschlueter@stmarytx.edu)

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# MILITARY LAW REVIEW

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## THE MILITARY JUSTICE CONUNDRUM: JUSTICE OR DISCIPLINE?

DAVID A. SCHLUETER\*

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*The point of proper accommodation between the meting out of justice and the performance of military operations—which involved not only the fighting, but also the winning of wars—is one which no one has discovered. I do not know of any expert on the subject—military or civilian—who can be said to have the perfect solution.<sup>1</sup>*

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\* Hardy Professor of Law and Director of Advocacy Programs, St. Mary's University School of Law. B.A., 1969 Texas A & M University; J.D., 1971, Baylor University School of Law; LL.M., 1981, University of Virginia; Army's Government Appellate Division (1972–1975), Chief of Criminal Law, Fort Belvoir, Virginia (1975–1976); Student, 25th Advanced Class (1976–1977); Faculty member, Criminal Law Division, The Army's Judge Advocate General's School, Charlottesville, Virginia (1977–1981); Legal counsel to the Supreme Court of the United States (1981–1983). He retired with the rank of lieutenant colonel in 1997, from the U.S. Army Reserve, Judge Advocate General's Corps.

From 1988 to 2005, Professor Schlueter served as the Reporter to the Federal Rules of Criminal Procedure Advisory Committee, a position to which Chief Justice Rehnquist appointed him. He is a Fellow in the American Law Institute and is a Life Fellow of the American Bar Foundation and the Texas Bar Foundation.

Professor Schlueter's publications include numerous law review articles and eleven books: MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (8th ed. 2012, LexisNexis); MILITARY RULES OF EVIDENCE MANUAL (7th ed. 2011, LexisNexis) (with Stephen A. Saltzburg & Lee D. Schinasi); MILITARY CRIMES AND DEFENSES (2d ed. 2012, LexisNexis) (with Charles H. Rose, Victor Hansen & Christopher Behan); MILITARY CRIMINAL PROCEDURE FORMS, (3d ed. 2009, LexisNexis) (with Kenneth V. Jansen, Kevin J. Barry & Kenneth A. Arnold); MILITARY EVIDENTIARY FOUNDATIONS (4th ed. 2010, LexisNexis) (with Stephen A. Saltzburg, Lee D. Schinasi & Edward J. Imwinkelried). FEDERAL EVIDENCE TACTICS (1997, LexisNexis) (with Edward J. Imwinkelried), TEXAS RULES OF EVIDENCE MANUAL (9th ed. 2012, Juris Pub.) (with Jonathan D. Schlueter); TEXAS EVIDENTIARY FOUNDATIONS (4th ed. 2011, LexisNexis) (with John F. Onion, Jr. Edward J. Imwinkelried); TEXAS RULES OF EVIDENCE TRIAL BOOK (2d ed. 2010, LexisNexis) (with Stephen A. Saltzburg); FEDERAL CRIMINAL PROCEDURE LITIGATION MANUAL (2013, Juris Pub.) (with Stephen A. Saltzburg); and EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (3d ed. 1998, ABA Section on Litigation and LEXIS Law Pub., Editor-in-Chief). In addition he has three self-published texts which he uses in his courses.

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## I. Introduction

Nearly three million servicemembers are subject to the Uniform Code of Military Justice (UCMJ), a comprehensive statutory framework for investigating and prosecuting the offenses it defines. The UCMJ was enacted in 1950 as a response to concerns about the existing Articles of War.<sup>2</sup> In enacting the UCMJ, Congress struggled to balance the need for the commander to maintain discipline within the ranks against the belief that the military justice system could be made fairer, to protect the rights of servicemembers against the arbitrary actions of commanders. The final product could be considered a compromise.

The UCMJ replaced the Articles of War, which had governed military justice since 1775. It was designed to provide a fair system of procedures and substantive rules to oversee the administration of justice in the ranks, to the end of promoting discipline. The commander remained an integral part of the military justice structure. But the Code expanded due process protections to servicemembers and created a three-judge civilian court to review court-martial convictions. Congress has amended the UCMJ many times, sometimes to favor the prosecution of offenses and at other times to expand the protections to the accused.<sup>3</sup>

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<sup>1</sup> Testimony of Secretary of Defense James Forrestal, House of Representatives, Committee on Armed Services, Subcommittee No. 1, Wash. D.C., March 7, 1949 (Index and Legislative History, Uniform Code of Military Justice 597 (1950)).

<sup>2</sup> A number of commentators have written on the history and background of the Uniform Code of Military Justice (UCMJ). *See, e.g.*, ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* (1956); BRIGADIER GENERAL JAMES SNEDEKER, *A BRIEF HISTORY OF COURTS-MARTIAL* (1954); Walter T. Cox, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 *MIL. L. REV.* 1 (1987) (presenting an overview of development of military justice in the United States and the applicability of the Constitution to various rules and practices); Major Gerald F. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966*, 17 *A.F. L. REV.* 55 (Fall 1975) (presenting brief overview of the military justice developments from the period following World War I until the period preceding the changes to the system in the 1968 changes to the UCMJ and the 1969 *Manual for Courts-Martial (MCM)*); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 *VAND. L. REV.* 169 (1953) (transcribing part of symposium on military justice, presenting an overview of the 1950 UCMJ and proposals leading to its passage); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 *MIL. L. REV.* 129 (1980).

<sup>3</sup> *See, e.g.*, Military Justice Act of 1968, 82 Stat. 1335 (1968); Major Howard H. Hoege III, "Oversight": *The Unconstitutional Double Burden Shift on Affirmative Defenses in the New Article 120*, *ARMY LAW.*, May 2007, at 2, 4 (describing Congress's effort to reverse the burden of proof on consent in sexual assault cases).

The military justice system has been described as a “rough form of justice,”<sup>4</sup> a system providing more rights than its civilian counterparts,<sup>5</sup> a system of “drumhead justice,”<sup>6</sup> a system incapable of dispensing justice,<sup>7</sup> an evolving system,<sup>8</sup> a system that has been civilianized,<sup>9</sup> a system in need of modernization,<sup>10</sup> and a system in search of respect.<sup>11</sup> However one describes or views the system, there has always been, and will always be, a debate over the exact purpose and function of the military justice system.

How one describes the system’s chief function may depend on what themes or concepts take the fore. The poles—as they always have been—are two: justice and discipline. These two values are often in competition with each other.<sup>12</sup> In that competition rests a conundrum that is not easily answered or solved. How do you fit together the two

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<sup>4</sup> See *United States v. Denedo*, 556 U. S. 904, 918 (2009) (Roberts, C.J., dissenting) (noting that traditionally military justice has been a rough form of justice).

<sup>5</sup> See Lieutenant Homer E. Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 ME. L. REV. 105 (1970), reprinted at 51 MIL. L. REV. 1 (1971); Robert Poydasheff & William K. Suter, *Military Justice? Definitely!*, 49 TUL. L. REV. 588 (1975).

<sup>6</sup> See, e.g., Robinson O. Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 648 (1973) (responding to allegations of “drumhead justice” in the military).

<sup>7</sup> See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

<sup>8</sup> See, e.g., Cox, *supra* note 2; Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 440 (1994) (noting that like other divisions of the government, the military justice system has evolved).

<sup>9</sup> See, e.g., Delmar Karlen, *Civilianization of Military Justice: Good or Bad*, 60 MIL. L. REV. 113 (1973) (arguing against blind application of civilian system to military justice); Edward F. Sherman, *Civilianization of Military Justice*, 22 MAINE L. REV. 3 (1970) (describing how system has been civilianized through the years).

<sup>10</sup> See, e.g., Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000) (offering suggestions for modernizing the procedures for amending the MCM); Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000); Kevin J. Barry, *A Reply to Captain Gregory E. Maggs’s ‘Cautious Skepticism’ Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37 (2000).

<sup>11</sup> David A. Schlueter, *Military Justice in the 1990s: A Legal System in Search of Respect*, 133 MIL. L. REV. 1 (1991) (discussing features of military justice system that typically draw criticism).

<sup>12</sup> See, e.g., General William C. Westmoreland & General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL’Y 1, 5 (1980) (“A second problem for military codes is to identify and adopt those procedures which ensure fairness and ‘due process’ while preserving the ability of the forces to achieve their mission. This brings into conflict the commander’s responsibility for mission accomplishment and the serviceman’s rights.”).

competing values of justice and discipline? Should one predominate? If so, which one?

Historically, it was assumed that the primary purpose of military justice was to enforce good order and discipline. The Articles of War, the predecessor to the UCMJ,<sup>13</sup> recognized the commander's broad authority to prosecute and punish any servicemember accused of an offense. Punishment was generally swift and sure and was sometimes harsh or arbitrary.<sup>14</sup> The "justice" component—which in the early days of the military justice system was much less than today's system—required the commander to provide basic due process while enforcing discipline.<sup>15</sup> Over time, the system has evolved. In many ways its evolution has reflected the expansion of individual rights in the civilian criminal justice systems.<sup>16</sup>

The *Manual for Courts-Martial (MCM)* lists the purposes of "military law" and places justice first:

### 3. Nature and purpose of military law.

Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.<sup>17</sup>

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<sup>13</sup> The Continental Congress enacted the original Articles of War in 1775. Through the years they were amended until the UCMJ finally replaced them in 1950.

<sup>14</sup> See *United States v. McCarty*, 29 C.M.R. 757, 760–61 (C.G.B.R. 1960) (noting severity of punishments during World War II and that sometimes there would be proposals to discipline court members for adjudging inadequate sentences); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 567 (2d ed. 1920 Reprint).

<sup>15</sup> Schlueter, *supra* note 2, at 145–50 (discussing protections for servicemembers subject to court-martial).

<sup>16</sup> *Id.* at 165 (noting due process developments reflecting extant views of justice).

<sup>17</sup> *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, pmb1. (2012) [hereinafter MCM].

Notwithstanding this language in the *MCM*, there is an ongoing debate over the relationship between justice and discipline the military. This article explores that debate.

Part II provides a brief summary of how the military justice system works, as a prelude to identifying the elements of the debate. Part III explores the various thematic approaches to the military justice conundrum. Those themes are sometimes in competition and sometimes complementary. They reflect the views of courts and commentators that have addressed the conundrum. Part IV discusses an approach to the conundrum by drawing from similar analyses of civilian criminal justice systems, which recognize the debate over whether a criminal justice system should reflect a crime control model or a due process model. Part V attempts to resolve the conundrum using a “primary purpose” analysis of the military justice system. Finally, Part VI offers some recommendations for solving the conundrum.

## II. Overview of the Military Justice System

Before addressing in more detail the debate over the relationship between justice and discipline, it is important briefly to review how the military justice system works.

### A. Pretrial Procedures

The statutory framework for military justice is the UCMJ. Article 36 provides that the President may adopt procedures for the conduct of courts-martial.<sup>18</sup> Those procedures are spelled out in the *MCM*. In addition, the Department of Defense, the service secretaries, and commanders may promulgate regulations to provide additional guidance.

Courts-martial, which are only temporary tribunals,<sup>19</sup> are created to determine the guilt or innocence of persons accused of committing offenses while subject to the jurisdiction of the Armed Forces. Some

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<sup>18</sup> UCMJ art. 36 (2012).

<sup>19</sup> *McLaughry v. Deming*, 186 U.S. 49, 63 (1902).



would argue that they are designed to enforce discipline and others, to ensure that justice is done.<sup>20</sup>

Currently, a commander convenes a court-martial to hear a specific case.<sup>21</sup> It is not a part of the federal judiciary. However, the Supreme Court of the United States may ultimately review a military conviction.<sup>22</sup> In some points, the court-martial provides greater safeguards than its civilian counterparts do. A brief survey of current practice demonstrates this point.

Before swearing to and preferring court-martial charges, a commander is responsible for conducting a thorough and impartial inquiry into the charged offenses.<sup>23</sup> This almost always involves obtaining legal advice from a judge advocate.<sup>24</sup> During that investigation, an accused is entitled to the protections of the Fourth Amendment vis-a-vis searches and seizures,<sup>25</sup> the privilege against self-incrimination as guaranteed by the Fifth Amendment and Article 31 of the UCMJ,<sup>26</sup> and the Sixth Amendment right to counsel, for example, at a pretrial lineup. These constitutional protections are implemented not only by case law, which has concluded that they extend to servicemembers, but by the Military Rules of Evidence (MRE).<sup>27</sup>

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<sup>20</sup> See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*, § 1-1 (8th ed. 2012).

<sup>21</sup> See UCMJ arts. 22–24 (2012) (designating those with power to convene general, special, and summary courts-martial); MCM, *supra* note 17, R.C.M. 504 (providing procedure for convening court-martial). The UCMJ provides that the President of the United States and a Service Secretary may convene a general court-martial. UCMJ art. 24(a), (2012).

<sup>22</sup> UCMJ art. 67(h) (2012); 28 U.S.C. § 1259 (2012). See generally Andrew Effron, *Supreme Court of Review of Decisions by the Court of Military Appeals: The Legislative Background*, *ARMY LAW.*, Jan. 1985, at 59 (reviewing the Military Justice Act, which placed the Court of Military Appeals directly under the U.S. Supreme Court's review); Bennett Boskey & Eugene Grossman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329, 105 S. Ct. at XCII (1984) (discussing the Military Justice Act and the resulting certiorari jurisdiction the Supreme Court has over military appeals).

<sup>23</sup> MCM, *supra* note 17, R.C.M. 1205.

<sup>24</sup> UCMJ art. 37 (2012) (listing the requirement that before convening a general court-martial the convening authority must consider the advice of the staff judge advocate). This is generally referred to as the "pretrial advice."

<sup>25</sup> MCM, *supra* note 17, MIL. R. EVID. 311–21.

<sup>26</sup> UCMJ art. 31 (2012); MCM, *supra* note 17, MIL. R. EVID. 301–05.

<sup>27</sup> See MCM, *supra* note 17, MIL. R. EVID. 301 (noting the privilege against self-incrimination); *id.* MIL. R. EVID. 304 (listing the procedures for determining admissibility of accused's statements); *id.* MIL. R. EVID. 305 (stating the Article 31(b) warnings and

The commander has broad discretion in deciding how to dispose of misconduct. First, the commander may decide that under the circumstances simply counseling the servicemember or issuing a reprimand is sufficient.<sup>28</sup> Second, the commander may decide to begin administrative proceedings to discharge the servicemember.<sup>29</sup> Third, the commander may decide to impose nonjudicial punishment. Under this third option, which is intended to be used for “minor” offenses, the commander decides whether the servicemember is guilty and, if so, adjudges the punishment. Unless the servicemember is assigned to a vessel,<sup>30</sup> the servicemember may demand a court-martial in lieu of the nonjudicial punishment.<sup>31</sup> Finally, the commander may decide to initiate court-martial proceedings by formally preferring charges against the servicemember.<sup>32</sup>

If charges are preferred, commanders move them up the chain of command for recommendations and actions. If the commander believes that the charges are serious enough to warrant a general court-martial (roughly equivalent to a civilian felony trial), the commander orders an Article 32 investigation.<sup>33</sup> At that investigation the accused is entitled to be present, to have the assistance of counsel, to cross-examine witnesses, and to have witnesses produced. Although the Article 32 investigation is

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right to counsel warnings); *id.* MIL. R. EVID. 311–16 (enumerating the rules addressing requirements for searches and seizures); and *id.* MIL. R. EVID. 321 (discussing the admissibility of eyewitness identifications).

<sup>28</sup> SCHLUETER, *supra* note 20, § 1-8, at 6 (listing various options available to military commander).

<sup>29</sup> *Id.* § 1-8(B), at 6.

<sup>30</sup> The term “vessel” is defined in 1 U.S.C. § 3 (2012). “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”

<sup>31</sup> See UCMJ art. 15 (2012) (setting out procedures for nonjudicial punishment).

<sup>32</sup> *Id.* art. 30. Technically, any person subject to the UCMJ may prefer charges against another; however, in current practice, the preferral is almost always done by the servicemember’s immediate commander, and only a commander may actually send charges to a court-martial. In the past, charges were apparently more often brought by an accuser who was not the commander. See Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796*, 144 MIL. L. REV. 77, 103–04 (1994) (recounting a case in which each of two officers accused the other of slights to his own honor, resulting in three courts-martial, to the consternation of their commanding general); LOUISE BARNETT, *UNGENTLEMANLY ACTS* 53 (2000) (stating that in the post-Civil War U.S. Army, filings of charges and countercharges were common and absorbed a great deal of the time and energy of commanding officers).

<sup>33</sup> UCMJ art. 32.

often equated with a civilian grand jury, in many ways it is far more protective of an accused's rights than a grand jury.<sup>34</sup>

If the decision is made to refer the charges to a court-martial, the convening authority—a commander authorized by the UCMJ to “convene” a court-martial—selects the court members, but does not select either the counsel or the military judge. Specific provisions in the UCMJ prohibit a convening authority from unlawfully influencing the participants in the court-martial or the outcome of the case.<sup>35</sup> In many cases, the accused and the convening authority engage in plea bargaining and execute a pretrial agreement.<sup>36</sup> Typically, those agreements require the accused to plead guilty in return for a guaranteed maximum sentence.<sup>37</sup>

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<sup>34</sup> SCHLUETER, *supra* note 20, ch. 7 (discussing and analyzing features of Article 32 pretrial investigation).

<sup>35</sup> See UCMJ art. 37 (2012) (prohibiting unlawful command influence). Unlawful command influence is a perpetual threat to the military justice system and is the subject of considerable case law and commentary. See generally Major Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988) (discussing unlawful command influence); Anthony P. DeGiulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72 (1972) (examining “the disciplinary policies established by command directives, the prohibition against the accuser as convening authority, and the command control over court personnel, counsel, military judges, and case review”); Major Larry A. Gaydos & Major Michael Warren, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW., Oct. 1986, at 9 (presenting a methodology to “teach commanders about lawful and unlawful command and control”); Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231 (1986) (discussing the corrective measures that must be taken when commanders “step over the line and undermine [the] right to a fair trial”); Joseph Hely, *Command Influence on Military Justice*, 15 ST. LOUIS U. L.J. 300 (1970) (noting inherent tendency for command influence); Lieutenant Richard C. Johnson, *Unlawful Command Influence: A Question of Balance*, THE JUDGE ADVOCATE GEN. (NAVY) J. 87, 88 (Mar.–Apr. 1965) (considering command control “and the problem arising therefrom”); Craig Schwender, *Who’s Afraid of Command Influence; or Can the Court of Military Appeals Be This Wrong?*, ARMY LAW., Apr. 1992, at 19 (reviewing appellate cases involving instructional issues); Captain Samuel J. Rob, *From Treacle to Thomas: The Evolution of the Law of Unlawful Command Influence*, ARMY LAW., Nov. 1987, at 36 (assessing the impact of case law on the evolution of laws regarding unlawful command influence); James Thwing, *An Appearance of Evil*, ARMY LAW., Sept. 1983, at 13 (reviewing the problem with establishing limits over command influence); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970) (discussing command influence).

<sup>36</sup> SCHLUETER, *supra* note 20, ch. 9.

<sup>37</sup> *Id.*

## B. Trial Procedures

At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court—largely because Article 36(a) requires that the rules of procedure for military courts parallel the procedures used in federal courts. For example, a military accused has:

- The right to a speedy trial (under the Sixth Amendment and under a 120-day speedy trial provision in the Manual for Courts-Martial),<sup>38</sup>
- The right to extensive discovery, including a right to access witnesses and documents that is supposed to be equal to the prosecution's;<sup>39</sup>
- The right to production of evidence for examination and testing;<sup>40</sup>
- The right to request witnesses, including expert witnesses at Government expense;<sup>41</sup>
- The right to request the assistance of experts at Government expense in preparing for trial;<sup>42</sup>
- The right to confront witnesses;<sup>43</sup>
- The right to select either trial with members or trial by judge alone;<sup>44</sup>
- The right to request inclusion of enlisted members if the accused selects trial by members (effectively a jury trial);<sup>45</sup>
- The right to full voir dire of the court members and the right to exercise both challenges for cause and peremptory challenges;<sup>46</sup>
- The right to challenge the military judge for cause;<sup>47</sup> and

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<sup>38</sup> UCMJ art. 10 (2012); MCM, *supra* note 17, R.C.M. 707 (speedy trial rule). The 120-day rule does not include delays requested by the defense; thus, a case may take much longer than 120 days if the defense requests delays.

<sup>39</sup> UCMJ art. 46 (2012); *see* MCM, *supra* note 17, R.C.M. 701 (setting out rules for discovery by both prosecution and defense counsel).

<sup>40</sup> MCM, *supra* note 17, R.C.M. 701(a)(2)(B).

<sup>41</sup> *Id.* R.C.M. 703(d)(B)(i) (right to request employment of expert witness at government expense).

<sup>42</sup> *Id.* R.C.M. 702.

<sup>43</sup> U.S. CONST. amend. VI.

<sup>44</sup> UCMJ art. 16 (2012).

<sup>45</sup> *Id.* art. 25.

<sup>46</sup> MCM, *supra* note 17, R.C.M. 912.

<sup>47</sup> *Id.* R.C.M. 902. For grounds for possible challenges to the military judge, *see* UCMJ art. 26 (2012); MCM, *supra* note 17, R.C.M. 502, 503 and 902.

- The right to file motions in limine, motions to suppress, and motions to dismiss the charges on a wide range of grounds (for example invoking constitutional privacy rights to dismiss rules or regulations governing personal conduct).<sup>48</sup>

If an accused enters a guilty plea to any charges, the military judge is required to conduct a detailed “providency” inquiry to insure that the accused is pleading guilty voluntarily and knowingly,<sup>49</sup> and that any pretrial agreement accurately reflects the intent of both the government and the accused<sup>50</sup> and is consistent with public policy.<sup>51</sup>

If the accused pleads not guilty, and the case is tried on the merits, the MRE apply during the trial.<sup>52</sup> Those rules generally mirror the Federal Rules of Evidence but include a number of rules not found there. For example, Section III of the Military Rules includes very specific guidance on searches and seizures (including evidence seized during military inspections), confessions, eyewitness identification, and interception of oral and wire communications. Section V contains fourteen detailed rules governing privileges. In particular, Military Rule of Evidence 505 provides very detailed guidance on disclosure of classified information and Rule 506 provides equally specific guidance of disclosure of government information that would be detrimental to the public interest.

Sentencing is a separate phase of the court-martial, though it typically occurs immediately after a finding of guilty.<sup>53</sup> The Military Rules of Evidence (unlike the federal rules) apply at the sentencing phase.<sup>54</sup> During sentencing, the accused is entitled to present witnesses and other evidence for the court’s consideration, and to challenge the prosecution’s evidence.<sup>55</sup>

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<sup>48</sup> MCM, *supra* note 17, R.C.M. 905. *See generally* SCHLUETER, *supra* note 20, ch. 13.

<sup>49</sup> MCM, *supra* note 17, R.C.M. 910; *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (setting out requirements for what has become known as the *Care* inquiry).

<sup>50</sup> United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

<sup>51</sup> MCM, *supra* note 17, R.C.M. 910 (listing provisions which may make a pretrial agreement impermissible).

<sup>52</sup> *See generally* STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL (7th ed. 2011).

<sup>53</sup> SCHLUETER, *supra* note 20, ch. 16 (discussing sentencing procedures at courts-martial).

<sup>54</sup> MCM, *supra* note 17, R.C.M. 1001; *id.* MIL. R. EVID. 1101.

<sup>55</sup> *Id.* R.C.M. 1001(c).

### C. Post-Trial Procedures and Appellate Review

Post-trial procedures are extremely detailed. A copy of the record of trial is given to the accused, at no cost.<sup>56</sup> Depending on the level of punishment imposed, a formal legal review of the proceedings is prepared.<sup>57</sup> The post-trial review and recommendations are presented to the convening authority for consideration.<sup>58</sup> During that process the accused has the right to present formally clemency matters.<sup>59</sup> The convening authority has the discretion to approve or disapprove any findings of guilt and approve, suspend, or reduce the severity of the sentence.<sup>60</sup>

For certain courts-martial, appellate review is automatic in the one of the service Courts of Criminal Appeals.<sup>61</sup> Appellate counsel is provided free of charge.<sup>62</sup> Members of those courts are high-ranking military officers.<sup>63</sup> Those courts are given fact-finding powers<sup>64</sup> and have the authority to reassess a court-martial sentence.<sup>65</sup>

An accused may petition for further review by the U.S. Court of Appeals for the Armed Forces (CAAF), which sits in Washington, D.C.<sup>66</sup> That court is composed of five civilian judges, who are appointed by the President for fifteen-year terms.<sup>67</sup> The entire process from the initial trial to review by the CAAF can take several years.<sup>68</sup> During appellate review, it is not unusual for one of the appellate courts to reverse a court-martial conviction for violation of one of the many procedural rules summarized above.

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<sup>56</sup> UCMJ art. 54(c) (2012); MCM, *supra* note 17, R.C.M. 1104.

<sup>57</sup> UCMJ art. 60(d) (2012); MCM, *supra* note 17, R.C.M. 1106.

<sup>58</sup> MCM, *supra* note 17, R.C.M. 1106.

<sup>59</sup> *Id.* R.C.M. 1105.

<sup>60</sup> UCMJ art. 60 (2012); MCM, *supra* note 17, R.C.M. 1107.

<sup>61</sup> UCMJ art. 66 (2012).

<sup>62</sup> *Id.* art. 70.

<sup>63</sup> *Id.* art. 66.

<sup>64</sup> MCM, *supra* note 17, R.C.M. 1203(b) discussion.

<sup>65</sup> *Id.*

<sup>66</sup> UCMJ art. 67 (2012).

<sup>67</sup> *Id.*

<sup>68</sup> *See generally* SCHLUETER, *supra* note 20, § 17-11, at 1150–60 (discussing post-trial and appellate delays).

In certain cases, a servicemember may seek certiorari review by the Supreme Court of a decision by the CAAF.<sup>69</sup>

#### D. Summary

For purposes of this article, it is important to note several key points from the foregoing discussion:

- First, the commander is deeply involved in, and is an integral part of, the military justice system.
- Second, lawyers and judges are heavily involved at all levels in the system.
- Third, a military accused is entitled to most, if not all, of the constitutional and statutory protections that are available to someone being tried in a civilian court.
- Fourth, the system provides a comprehensive right to appeal a conviction.

### III. Analyzing the Military Justice Conundrum

For the last sixty years, many commentators have vilified the military justice system,<sup>70</sup> defended it,<sup>71</sup> and recommended reforms.<sup>72</sup> For

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<sup>69</sup> UCMJ art. 67(h) (2012); 28 U.S.C. § 1259 (2012). *See generally* Effron, *supra* note 22, at 59 (overviewing the developments that led to the Military Justice Act).

<sup>70</sup> Michael I. Spak, *Military Justice: The Oxymoron of the 1980s*, 20 CAL. W. L. REV. 436 (1984); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps*, 28 SW. U. LAW REV. 481 (1999).

<sup>71</sup> *See* Joseph W. Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215 (1973) (rejecting calls for abandonment of the military justice system); Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F.L. REV. 185 (2000) (reaffirming military justice); Louis B. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971) (discussing need for separate system); Poydasheff & Suter, *supra* note 5 (attempting to dispel misconceptions of military justice).

<sup>72</sup> *See* Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (describing the origin and development of military justice and the recommendations of the Cox Commission in 2001, and arguing that the current system contains marks of an older system, which was primarily disciplinary in nature); Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009) (proposing statutory reforms for military sentencing to remedy the problem of unreasonably light sentences for very serious crimes); Henry B. Rothblatt,

example, they have raised questions about the commander's role in selecting members to hear the case or about the role of the appellate courts in reviewing courts-martial convictions. Virtually every one of these commentators, whether addressing one part of the system or the system as a whole, has discussed the relationship of the concepts of justice and discipline.

Often the debate about the functions and purposes of a criminal justice system is cast in terms such as "liberal," "conservative," "prosecution oriented," "defense oriented," or "law and order."<sup>73</sup> Those terms, while effective as sound bites, are not particularly helpful in understanding the fundamentals of the debate. Something is missing. At one level they may accurately capture a person's viewpoint about criminal justice generally, or military justice specifically. But they do not define the criteria or values for measuring the purposes and effectiveness for a criminal justice system.

In examining the military criminal justice system, the terms "justice" and "discipline" are often used to describe the two competing ideals or values which inform the system. Although those terms, in themselves, are ambiguous and fluid, they are very familiar to those working within the system (commanders, lawyers, judges) and those responsible for its structure (Congress). These terms frame the military justice conundrum.

Surprisingly, the UCMJ itself is silent on the issue of identifying the purposes of the military justice system.<sup>74</sup> Thus, one is left to review secondary sources, such as the *MCM* and case law.

The following sections discuss three possible approaches to analyzing the conundrum. Part IV discusses the various thematic approaches that courts and commentators have used to address the relationship between justice and discipline. Part V focuses on the

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*Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971) (recognizing and rejecting the often emotionally charged criticisms of the system, but offering constructive comments on proposals that would improve the military justice system); Schlueter, *supra* note 11 (exploring the criticisms often leveled at the military justice system and targeting a number of areas where the system seems most vulnerable, such as size and composition of the courts-martial, and offering suggested changes).

<sup>73</sup> See, e.g., Madhavi McCall & Michael McCall, *Chief Justice William Rehnquist: His Law and Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323 (2006) (discussing Chief Justice Rehnquist's impact on criminal justice).

<sup>74</sup> See Westmoreland & Prugh, *supra* note 12, at 40 (noting the UCMJ's failure to address what the military justice system should accomplish).



application of the crime control and due process models discussed in Professor Packer's law review article on that subject. Finally, Part VI suggests using a purpose and functions approach to resolving the conundrum.

#### IV. Thematic Approaches to the Conundrum

In addressing the military justice system, courts and commentators often fall into one of several themes in deciding the purposes and functions of the system. In many instances the themes overlap. Two or more may be reflected in the same quote, testimony, or court opinion. In other instances, the themes reflect diametrically opposed viewpoints.

The following discussion addresses those themes. Those who use them may recognize the conundrum, but do not always attempt to resolve the conflict between discipline and justice.

##### A. The "Deference" or "Hands-Off" Theme

The Supreme Court of United States has generally expressed an attitude of deference in addressing issues arising under the military justice system. Rarely does Court actually address the purpose or function of military justice. Instead, a continuing theme is recognition of the critical role that Congress plays in dealing with the competing values of military justice and military discipline.<sup>75</sup> From time to time the Court

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<sup>75</sup> There has been considerable commentary on the subject of review of courts-martial convictions by federal courts, and the deference they usually pay to the military. See generally Barney F. Bilello, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465 (Winter 1989) (providing review of the Supreme Court's role in reviewing constitutional challenges to various military regulations and procedures); Donald S. Burris & David Anthony Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971) (exploring remedies that servicemembers have used in attempting to secure relief in civilian courts from adverse court-martial determinations); John K. Chapman, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387 (2004) (suggesting that courts should apply standard and scope of review of the state habeas as under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) to the military); Joshua E. Kastenber, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker*, 26 T.M. COOLEY L. REV. 163 (2009) (analyzing sources and effects of Justice Douglas's

says something about the nature of military justice, but for the most part it defers to Congress and the President in this area. In *Chappell v. Wallace*,<sup>76</sup> the Supreme Court commented:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the . . . control of a military force are essentially professional military judgments.

The deference theme does not really address the conundrum. It simply reflects the view that the military justice system is different, and

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aversion to the legal construct of the military, particularly trial by court-martial); Major Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980) (discussing the Supreme Court's recognition of controlling principle of "military necessity" in assessing the lawfulness of military regulations, orders, and laws); Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907 (2006) (cataloging the Supreme Court's tradition of deference to the military dating back to cases in World War I to the more recent Guantánamo Bay case decisions); John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668 (2007) (responding to article written by Professor Steven B. Lichtman regarding the Military Deference Doctrine); John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (exploring historical application of the military deference doctrine); Richard Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5 (1985) (examining the relationship between civilian and military courts and proposing a standard of collateral review that would define and equalize the roles of the federal judiciary and the military courts); Edward Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969) (discussing historical basis for limited review and addressing those cases, particularly Supreme Court decisions where a servicemember's court-martial conviction has been reviewed); Scott Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F. L. REV. 81 (1976) (commenting on the "philosophy" of the Supreme Court and the Court of Military Appeals); Thomas Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1 (1974) (discussing the role of civilian courts in reviewing military courts-martial); Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994) (suggesting legislation to provide meaningful review of whether constitutional error occurred at the court-martial); Donald T. Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971) (examining traditional deference paid by the federal courts to unique military needs in the sensitive areas of due process and constitutional rights and proposing guidelines to determine when federal review of military proceedings is necessary).

<sup>76</sup> *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

that civilian judges should not attempt to resolve the issue of whether the system is designed to promote discipline or justice.

#### B. The “Separatist” Theme

The military justice system is often described as a system separate and apart from civilian justice systems. For example, in *Parker v. Levy*,<sup>77</sup> the Court stated:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that “it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise . . .” In *In re Grimley*, the Court observed: “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” *More recently we noted that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” and that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . .”*<sup>78</sup>

In *United States v. Brown*,<sup>79</sup> the accused was charged with organizing a strike and encouraging others to do so during Desert Storm. In affirming his conviction, the court stated:

This court has been sensitive to First and Sixth Amendments rights of servicemembers. But we are mindful that [j]udges are not given the task of running the Army . . . . The military constitutes a specialized

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<sup>77</sup> 417 U.S. 733 (1974). In *Parker*, the Court held that Articles 133 and 134, UCMJ, were not unconstitutionally void for vagueness. *Id.*

<sup>78</sup> *Id.* at 749 (citations omitted) (emphasis added).

<sup>79</sup> 45 M.J. 389 (C.A.A.F. 1996).

community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.<sup>80</sup>

In *United States v. Hawthorne*,<sup>81</sup> the court addressed the issue of whether a command-issued directive amounted to unlawful command influence on the accused's court-martial.<sup>82</sup> The Court of Military Appeals concluded that such influence had taken place and set aside the conviction. In his concurring opinion, Judge Latimer commented that “[i]n various areas involving disciplinary problems—of which judicial procedure is a necessary part—the convening authority has certain powers of his own, and unless he exceeds his authority he has a right to control his subordinates without interference by this Court . . . .”

And in *United States v. Borys*,<sup>83</sup> a case about the subject matter jurisdiction of courts-martial, the court recognized the need for military justice and that less favorable treatment of the defendant is necessary to an effective fighting force. The court stated that “the justification for such a system rests on the special needs of the military and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty.”<sup>84</sup>

### C. The “Primarily Discipline” Theme

From the beginnings of the United States’ military justice system, courts<sup>85</sup> and most commentators<sup>86</sup> agreed that the system was designed to

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<sup>80</sup> *Id.* at 393 (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)).

<sup>81</sup> 22 C.M.R. 83 (C.M.A. 1956).

<sup>82</sup> The Commanding General of the Fourth Army had issued a directive stating that repeat Regular Army offenders should be removed from the military. *Id.* at 87.

<sup>83</sup> 40 C.M.R. 259 (C.M.A. 1969).

<sup>84</sup> *Id.* at 260 (citing *O’Callahan v. Parker*, 395 U.S. 258, 265 (1969)). Under *O’Callahan*, and therefore under *Borys*, courts-martial did not have jurisdiction over “civil crimes committed in the United States against the civilian community when the local courts are open and functioning,” unless the crimes were “military-connected.” This “military connection” test has since been overturned. *Solorio v. United States*, 483 U.S. 435, 447–49 (1987).

<sup>85</sup> *See, e.g.*, *O’Callahan v. Parker*, 395 U.S. 258, 265 (1969). Justice Douglas noted that “a court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military

protect and promote military discipline. The “discipline” theme is generally reflected in court decisions addressing “purely military” crimes established by the UCMJ, such as absence without leave. But courts and commentators have also reflected this theme in discussing such issues as UCMJ jurisdiction over ex-servicemembers<sup>87</sup> and the authority of a commander to impose nonjudicial punishment.<sup>88</sup>

In 1776, Congress directed John Adams to revise the 1775 Articles of War. In addressing the new articles and the need for discipline, Adams wrote to his wife, Abigail:

If I were an officer, I am convinced that I should be the most decisive disciplinarian in the army . . . Discipline in an army is like the laws in a civil society. There can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can happiness

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discipline is preserved.” *Id.* He cited an article by Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969), who had asserted that “none of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.” *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 333 (C.M.A. 1988) (pointing out that a major objective of the military justice system is to obtain obedience by subordinates to orders of their superiors).

<sup>86</sup> See, e.g., Joseph W. Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215 (1973) (rejecting calls for abandonment of the military justice system and noting the need for discipline); Stephen J. Carrol, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187, 188 (1986) (noting that prompt but fair discipline is a goal of any criminal justice system); Ferris, *supra* note 8, at 445 (noting that “disciplinary function of the court-martial cannot be overstated”). Cf. R. Rivkin, *GI RIGHTS AND ARMY JUSTICE: THE SERVICEMAN’S GUIDE TO MILITARY LIFE AND LAW* 336–38 (1970) (indicating that studies showed that in a combat setting the fear of punishment is not a significant motivation).

<sup>87</sup> See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (“We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses . . . [T]rial of soldiers to maintain discipline is merely incidental to an army’s primary fighting function.”).

<sup>88</sup> For example, in *United States v. Gammons*, 51 M.J. 169 (C.A.A.F.1999), the court addressed the question of whether trying a servicemember for a minor offense for which the servicemember had already received nonjudicial punishment under Article 15, UCMJ, violated the double jeopardy clause. The court held that that clause did not apply because Article 15 proceedings are not criminal proceedings—they are disciplinary in nature. *Id.* at 173–74. See also *Middendorf v. Henry*, 425 U.S. 25, 31–31 (1976) (pointing out that nonjudicial punishment is an administrative method of dealing with minor offenses).

or safety in an army for a single hour when discipline is not observed.<sup>89</sup>

General Sherman's oft-quoted statement in a 1879 letter addressed the issue of the role of the military legal system:

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. *The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.*

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.<sup>90</sup>

Following World War I, there was a great debate among members of the armed forces and commentators about the role of military justice and the unjust treatment that servicemembers received under the system.<sup>91</sup> In response to calls for changes in the military justice system, Professor John Henry Wigmore wrote:

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<sup>89</sup> PAGE SMITH, JOHN ADAMS 289 (1962), *quoted in* JONATHAN LURIE, ARMING MILITARY JUSTICE 6 (1992).

<sup>90</sup> Letter to General W. S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879), *reprinted in* GENERAL WILLIAM T. SHERMAN, MILITARY LAW 130 (1880) (reprinted from *The Journal of the Military Service Institution of the United States*); Frederick Bernays Weiner quoted this language in his testimony before the House of Representatives, Committee on Armed Services, March 16, 1949. *Hearings on H.R. 2498 Before a Spec. Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 780 (1949).

<sup>91</sup> Schlueter, *supra* note 2, at 157–58; *see also* JOHN M. LINDLEY, “A SOLDIER IS ALSO A CITIZEN”: THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920 (1990); MAJOR GENERAL ENOCH H. CROWDER, MILITARY JUSTICE DURING THE WAR (1919), *available at* [www.loc.gov/rr/frd/Military\\_Law/MJ\\_during\\_war.html](http://www.loc.gov/rr/frd/Military_Law/MJ_during_war.html).

The military system can say this for itself: *It knows what it wants; and it systematically goes in and gets it. Civilian criminal justice does not even know what it wants; much less does it resolutely go it and get anything. Military justice wants discipline—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men.* The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. *But its object is discipline.*<sup>92</sup>

In its decision in *O’Callahan v. Parker*,<sup>93</sup> the Supreme Court established the service connection requirement for court-martial jurisdiction over offenses committed by servicemembers.<sup>94</sup> The Court addressed the criticisms of military justice and wrote that “[n]one of the travesties of justice perpetrated under the UCMJ is really very surprising, for *military law has always been and continues to be primarily an instrument of discipline, not justice.*”<sup>95</sup>

More recently, the three authors of a text on military justice noted in their teachers’ manual for that text that:

Chapter 1 attempts to convey *the raison d’être for military law: the need to control the violence of war and impose discipline in the ranks.* Its central theme is the tension between armed conflict and the rule of law, a

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<sup>92</sup> John H. Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. SOC’Y 151 (1921) (emphasis added), reprinted in Joseph W. Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215, 218 (1973). Regarding this quote, Professor Bishop observed that the clarity of purpose in the military justice system “compared favorably to the uncertainty of the civilian penal system as to whether it wants retribution, or prevention, or deterrence.” *Id.*

<sup>93</sup> 395 U.S. 258 (1969).

<sup>94</sup> After a historical review, the court came to this conclusion so that the Fifth Amendment exception to the right of grand jury indictment (“except in cases arising in the land or naval forces . . . when in actual service . . .”) would not “be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.” *Id.* at 272–73.

<sup>95</sup> *Id.* at 266 (emphasis added) (quoting Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969)).

tension that the substantive law and procedural rules of military law attempt to resolve.<sup>96</sup>

In context, some of the foregoing statements reflecting the discipline theme were made at times when there was a perceived threat that the military justice system would be revised to more closely resemble, or be replaced by, a civilian justice system.<sup>97</sup>

#### D. The “Justice-Based” Theme

In stark contrast to the “discipline” theme is the “justice-based” theme. Some form of the “justice” theme has appeared in one form or another for decades—at least since the early Twentieth Century when, following World War I, there were concerted efforts (not always successful) to include more procedural protections for servicemembers.<sup>98</sup> In the 1980s the Department of Defense took bold steps to engraft the Federal Rules of Criminal Procedure and the Federal Rules of Evidence into military justice to the greatest extent possible.<sup>99</sup> Those efforts

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<sup>96</sup> EUGENE R. FIDELL, ELIZABETH L. HILLMAN & DWIGHT H. SULLIVAN, *MILITARY JUSTICE CASES AND MATERIALS, TEACHERS’ MANUAL 1* (2d ed. 2012) (emphasis added). See Colonel (Retired) Henry G. Green, *Military Justice and Discipline: The Role of Punishment in the Military*, *THE REPORTER*, June 1997, at 9 (observing that “discipline” is the *sine qua non* of an effective fighting force, the author presents a wide range of thoughts and perspectives on the role of military justice and punishment); Dennis Hunt, *Trimming Military Jurisdiction: An Unrealistic Solution to Reforming Military Justice*, 63 *CRIM. L.C AND P.S.* 23 (1972) (arguing that discipline is the only way to preserve law and order and expanded jurisdiction of courts-martial is the only way to preserve discipline).

<sup>97</sup> See generally Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Justice Systems*, 16 *DUKE J. COMP. & INT’L L.* 169 (2006) (providing an overview of the role of the commander in the military justice system); Spak, *supra* note 70 (noting that military discipline does not require a broad military justice system that encroaches upon the constitutional rights of military personnel); Westmoreland & Prugh, *supra* note 12 (observing that the UCMJ is “too slow, too cumbersome, too uncertain, indecisive, and lacking in power to reinforce accomplishment of the military mission, to deter misconduct, or even to rehabilitate”).

<sup>98</sup> In what is often referred to as the “Ansell-Crowder” dispute, General Crowder took a position that emphasized the need for a strong system that focused on the discipline component of military justice. Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 *MIL. L. REV.* 1 (1967); LINDLEY, *supra* note 92, *passim*; CROWDER, *supra* note 91, *passim*.

<sup>99</sup> See George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley (U.S.*



resulted in the adoption of the Military Rules of Evidence in 1980<sup>100</sup> and four years later, the 1984 *MCM*.

In the 1984 *MCM* the drafters added a Preamble, which addressed in part the nature and purpose of military law.

3. Nature and purpose of military law.

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*The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.*<sup>101</sup>

The fact that this language first addressed the purpose of promoting justice and then second, the purpose of “maintaining good order and discipline” signaled a shift, apparently resolving the military justice conundrum in favor of the “justice” component.

Commentators citing the preamble have stated that the military justice system is now “justice based.” For example, in their treatise on court-martial practice, Colonel Gilligan and Professor Lederer have stated that:

*Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice-based. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline within the American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice-oriented system to ensure discipline; in our case, justice is essential to discipline.*<sup>102</sup>

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*Army 1952–1954, 1959–1981*), 208 MIL. L. REV. 213 (2011) (recounting General Alley’s role in the drafting of the Military Rules of Evidence (MRE)).

<sup>100</sup> See Fredric I. Lederer, *The Military Rules Of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1990) (discussing origins of MRE).

<sup>101</sup> *MCM*, *supra* note 17, pmb1. (emphasis added).

<sup>102</sup> 1 FRANCIS A. GILLIGAN & FREDRIC LEDERER, *COURT MARTIAL PROCEDURE* § 1-20.00, at 2 (1991) (emphasis added).

More recently, the Judge Advocate General of the Air Force, Lieutenant General Harding, addressed the question of instilling good order and discipline and its important role in creating an effective combat power. He wrote:

**Due process enhances discipline.** *America's mothers and fathers send their sons and daughters to us to join our all-volunteer force because they believe their children will be fairly treated.* They believe and expect that we will adhere to due process in judging their children, should they violate our code; otherwise, they would not have sent them to us. As a result, when we adhere to due process, we send a message to those parents, parents of other prospective Airmen and all Airmen everywhere that they can trust the Air Force to treat its Airmen fairly and to protect and promote justice within our service. By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving Airmen, who worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.

<sup>103</sup>

This view seems to take the justice-based theme to a new level. While it usually accepted that the lack of due process in the military justice system can adversely affect morale,<sup>104</sup> it is quite another thing, and certainly more difficult to prove, that due process actually enhances discipline and is a motivation for individuals to join the armed forces.

It would be incorrect to assume that the conundrum can be resolved by simply adopting either the discipline theme approach or the justice

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<sup>103</sup> Lieutenant General Richard C. Harding, *A Revival in Military Justice*, REPORTER, Summer 2010, at 4 (bold heading in original, emphasis added).

<sup>104</sup> See, e.g., Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, 28 No. 3 THE REPORTER 3 (2001) (stating that if troops perceive that courts-martial are arbitrary and unjust, disciplinary effect will be destroyed); Westmoreland & Prugh, *supra* note 12, at 66–67 (noting results of survey of officers attending the Army War College).

theme approach.<sup>105</sup> Many of the following themes reflect an attempt to reconcile the two main components.

#### E. The “Competing Interests” Theme

A number of themes attempt to consider both justice and discipline together. The first of these is the “competing interests” theme. The accused in *United States v. Perry*<sup>106</sup> was convicted of violating a lawful general regulation. The accused argued that the regulation had been promulgated by the base commander who had then convened the court-martial to try the accused. The Air Force Board of Review concluded that the convening authority’s interest in the case was only official and stated that:

Actually the question is more basic than appears for it concerns the official duties of a commander as well as the right of an accused to be tried by an impartial court. There is no question but that a commander is required by law, regulation or custom to issue such orders and publish such regulations or directives as may be necessary for the proper administration of his command. *His official duties require that he not only maintain discipline but also compel compliance with such official orders, regulations and/or directives he has found necessary, in his sound discretion, to promulgate. On the other hand there is no question but that an accused is entitled to a fair trial by an impartial court.*<sup>107</sup>

The court concluded that the convening authority’s interest in the case was official rather than personal, and as such did not render the trial unfair.<sup>108</sup> But in using this language, it implicitly recognized that the

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<sup>105</sup> See, e.g., Ferris, *supra* note 8, at 446 (stating that historically, the “primary purpose of the courts martial [sic] was to regulate the military conduct of servicemen,” signaling that under the current military justice system the primary function is provide justice) (emphasis added). Any implication in the justice theme that the military justice system is no longer concerned with governing the conduct or misconduct of servicemembers is not true. As noted in the discussion at Part V.E.1.d., above, elements of the current military justice system clearly represent the need for a commander to be able to deal with servicemembers who engage in misconduct.

<sup>106</sup> 12 C.M.R. 894 (A.F.B.R. 1953).

<sup>107</sup> *Id.* at 896 (emphasis added).

<sup>108</sup> *Id.* at 897.

needs of justice (having the case tried by an impartial tribunal) were in competition with the needs of discipline (having the commander both issue orders and send Airmen to trial for violating those orders).

#### F. The “Inseparable” Theme

Another thematic approach to the conundrum is to view the discipline and justice components as interrelated, integrated, or inseparable.

In the Powell Report to the Secretary of the Army in 1960 on the status of the Uniform Code of Military Justice, the Committee (composed of distinguished high-ranking Army officers) noted:

Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. *In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable . . .*

Once a case is before a court-martial it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.<sup>109</sup>

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<sup>109</sup> AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11–12 (18 Jan. 1960) (emphasis added), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Powell\\_report.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf).

In *United States v. Littrice*,<sup>110</sup> the Court of Military Appeals addressed the question of unlawful command influence on the accused's court-martial. The court addressed Congress's concerns about that issue in adopting the UCMJ. Writing for the court, Judge Latimer stated:

*It was generally recognized that military justice and military discipline were essentially interwoven. Nevertheless, a sharp conflict arose between those who believed the maintenance of military discipline with the armed forces required that commanding officers control the courts-martial proceedings and those who believed that unless control of the judicial machinery was taken away from the commanders military justice would always be a mockery.*<sup>111</sup>

#### G. The "Two Sides of the Same Coin" Theme

Related to the "inseparable" theme, discussed *supra*, is the theme that views the justice and discipline components as different sides of the same coin. In his article on the role of the Court of Military Appeals in the 1970's, Captain John Cooke wrote:

The precept [of the relationship of justice and discipline] has generally been reflected in the tendency of the court to distinguish and separate functions exercised by the commander and other line personnel. The commander is permitted to retain his disciplinary functions, but his functions in administering justice (*i.e.* judicial functions) have been taken from him. This dichotomization has been effectuated in other ways as well, as the court has attempted to guard against what it perceives as undue infringement of the integrity of the administration of justice by disciplinary activities and attitudes. *This tendency deserves close scrutiny, for it must be recognized that justice and discipline are properly but two sides of the same coin; to the extent that the court*

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<sup>110</sup> 13 C.M.R. 43 (C.M.A. 1953).

<sup>111</sup> *Id.* at 47 (emphasis added).

*separates them unnecessarily, it risks devaluing the whole system.*<sup>112</sup>

However, Generals Westmoreland and Prugh, in a later article, presented a different view of this theme:

*It is misleading to regard justice and discipline as different sides of the same coin, if the statement is to imply that the two concepts are opposites or complementary; that discipline must be balanced by justice, and vice versa. Discipline is but one tool for a commander, albeit an important, even essential, one; its essential focus addresses mission accomplishment. Justice encompasses fairness to the individual who may be accused of military wrongdoing and prosecution of such an accused only in accordance with the law. The two ideas are quite disparate—if one is an apple, the other is an orange.*

It is submitted that the other side of the coin from justice should more accurately be called *military exigency*. This is very different from *discipline*, which envisions conduct responsive to established rules.<sup>113</sup>

#### H. The “Middle Ground” Theme

In 1946, the Secretary of War appointed a War Department Advisory Committee on Military Justice, whose members were nominated by the American Bar Association. A “middle ground” theme appears in the report of this committee, sometimes referred to as the Vanderbilt Report after the chair of the committee, Arthur Vanderbilt. The Committee was formed to study the extant system of military justice and to make recommendations for changes. In its report, the Committee stated:

A high military commander pressed by the awful responsibilities of his position and the need for speedy

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<sup>112</sup> Captain John S. Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 52 (Spring 1977) (emphasis added).

<sup>113</sup> Westmoreland & Prugh, *supra* note 12, at 48 (emphasis added).

action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment, and he does not always perceive that the more closely he can adhere to civilian standards of justice, the more likely he will be to maintain the respect and the morale of troops recently drawn from the body of the people

Some of the critics of the Army system err on the other side and demand the meticulous preservation of the safeguards of the civil courts in the administration of justice in the courts of the Army. We reject this view for we think there is a middle ground between the viewpoint of the lawyer and the viewpoint of the general.<sup>114</sup>

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<sup>114</sup> REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 5 (13 Dec. 1946) [hereinafter VANDERBILT REPORT] (emphasis added), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/report-war-dept-advisory-committee.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf). The Report, commonly referred to as the Vanderbilt Report, was submitted by an Advisory Committee appointed by Edward F. Witsell, Sec'y of War, War Dep't Memorandum No. 25-46 (25 Mar. 1946). Arthur T. Vanderbilt chaired the committee (later he became Chief Justice of the New Jersey Supreme Court) which consisted of members and judges of the civilian bar, from various states. The appointing memorandum stated:

The function of the Committee will be to study the administration of military justice within the Army and the Army's courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army.

*Id.* at 2. The Advisory Committee heard testimony from numerous senior military officials at hearings conducted in Washington, D.C., heard additional testimony at regional public hearings and considered hundreds of letters, the results of a questionnaire sent to officers and enlisted men, and statistical and result studies prepared by the Judge Advocate General's Department. *Id.* at 5.

Attachments to the Committee's report include answers by respondents to a number of questions posed by the Committee. The first question focused on "The purposes of the court-martial system: maintenance of discipline or administration of justice?" The Committee reported that "Fifty-two [general officers] indicated that the purpose was a combination of justice and discipline. Only four listed discipline as the primary purpose, and six emphasized justice." *Id.* at 1 (Compilation of Answers), located at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Vanderbilt-B\\_Outline.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-B_Outline.pdf). For results from a similar survey taken at the Army War College in 1971-72. See Colonel Joseph N. Tenhet & Colonel Robert B. Clarke, *Attitudes of US Army War College Students Toward the Administration of Military Justice*, 59 MIL. L. REV. 27 (1973).

The Advisory Committee was one of several bodies considering changes to the military justice system. In 1948, Secretary of Defense James Forrestal appointed a special committee, chaired by Professor Edmund Morgan, to consider drafting a uniform code of justice that would apply to all of the services.<sup>115</sup>

Professor Morgan's subsequent testimony regarding the proposed uniform code presented yet another theme—"the fair and delicate balance" theme, *infra*.

#### I. The "Fair and Delicate Balance" Theme

In his statement to Congress in 1949, concerning the proposed Uniform Code of Military Justice, Professor Edmund Morgan<sup>116</sup> stated:

We are convinced that a Code of Military Justice cannot ignore the military circumstances under which it must

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Similarly, the Committee received responses to the same question from judge advocates (combat, regular Army judge advocates, Board of Review judge advocates, and staff judge advocates). The Committee reported their answers to that question in chart form. See [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Vanderbilt-B\\_Outline.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-B_Outline.pdf). In contrast to the responses from the general officers, thirty-five judge advocates indicated that the purpose of the court-martial system was to maintain discipline and administer justice; ten judge advocates listed discipline as the primary purpose and six listed justice as the primary purpose. Interestingly, of the six listing justice, three were on the Army Board of Review.

In its report the Committee also stated,

We desire to make it clear at the outset that our findings are not based on the testimony of convicted men or their friends. Complaints from that source were considered by the committee headed by Justice Owen J. Roberts who examined court-martial sentences for severity after the war and many instances reduced them.

VANDERBILT REPORT, *supra*, at 2.

<sup>115</sup> The appointment of this committee resulted from correspondence from Senator Chan Gurney, Chairman of the Senate Armed Services Committee, to Secretary Forrestal. Senator Gurney had written that his Committee was considering a number of proposals for changing the military justice system but that there had been no proposal to consider and recommend a uniform system of military justice. The correspondence between Senator Gurney and Secretary Forrestal can be viewed at [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-I\\_correspondence.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_correspondence.pdf).

<sup>116</sup> In 1948, Secretary of Defense James Forrestal appointed Professor Morgan to serve as the chair of a special committee to draft a uniform code of justice that would apply to all of the armed services.



operate but we were equally determined that it must be designated to administer justice.

We therefore, aimed at providing functions for the command and appropriate procedures for the administration of justice. *We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.*<sup>117</sup>

Five years later the Court of Military Appeals recognized this theme in *United States v. Littrice*,<sup>118</sup> a case addressing the issue of command influence. The court stated:

Thus, confronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws. While it struck a compromise, Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused. Both the Code and the Manual announce the same caveat. . . .

On the command side of the ledger, we find some provisions which indicate that [the commander] is not to be too tightly fettered by the new Code.

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*The same delicate balance which beset Congress now confronts us. Justice can be dispensed and discipline maintained if one is not permitted to overwhelm the other. Both should be given recognition and both must be governed and guided by the necessities peculiar to the military service.*<sup>119</sup>

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<sup>117</sup> INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 606 (2000 Reprint, Hein).

<sup>118</sup> 13 C.M.R. 43 (C.M.A. 1953).

<sup>119</sup> *Id.* at 47-48 (emphasis added). See also *United States v. Coates*, 25 C.M.R. 559, 564 (A.B.R. 1958) (quoting this language from *Littrice*).

#### J. The “Emasculation” Theme

Regardless of how one views the military justice conundrum, it is clear that lawyers have been deeply involved in addressing military justice issues.<sup>120</sup> In a letter to General W.S. Hancock, in 1879, General William T. Sherman addressed the role of lawyers in military justice. He stated:

I agree that it will be a grave error if by negligence we permit the military law to become *emasculated* by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.<sup>121</sup>

General Sherman, a lawyer himself, continued by stating that the needs of the military are unique and that civil justice systems standards and procedures can threaten the military.<sup>122</sup> This theme, while colorful, may be still be shared by some who view lawyers with skepticism—especially by those who are concerned that the role of the commander has been replaced by armed forces lawyers and judges.

#### K. The “Un-American” Theme

As noted above, after World War I there was heated debate about the function and role of military justice in what has become known as the “Ansell-Crowder” dispute.<sup>123</sup> The controversy centered in part, on the question of whether courts-martial were actually judicial bodies or

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<sup>120</sup> Brigadier General (Retired) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW, Mar. 2000, at 1, 1 (noting participation of judge advocates in development of military justice system).

<sup>121</sup> Letter to General W. S. Hancock, *supra* note 90; See also THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975, at 12 (1975) [hereinafter JAGC HISTORY].

<sup>122</sup> *Id.* Professor Turley notes that Sherman’s concern was that the military “should resist external influences, particularly legal values,” and emphasized the “cultural necessities of the military community in contrast to those of the larger republic.” Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 97 (2002).

<sup>123</sup> See Frederick B. Weiner, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989) (recounting what has been labeled the “Crowder-Ansell” dispute concerning court-martial practices during World War I). See also Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T Ansell*, 35 MIL. L. REV. 1 (1967).

instead agencies of the Executive Branch. The latter position was taken by Colonel Winthrop in his treatise<sup>124</sup> and by General Crowder. In sharp contrast, General Ansell<sup>125</sup> took the position that courts-martial were judicial in nature and that it was important to create an appellate court to review courts-martial convictions to insure that abuses did not occur at the trial level. In a 1919 law review article General Ansell wrote that:

I contend—and I have gratifying evidence of support not only from the public generally but from the profession—that *the existing system of Military Justice is un-American*, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists on maintaining it.<sup>126</sup>

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<sup>124</sup> WINTHROP, *supra* note 14, at 48. Colonel Winthrop stated that courts-martial did not belong to the judicial department and were thus simply “instrumentalities of the executive power.”

<sup>125</sup> At the time of the internal dispute between the two generals, Ansell was informally acting as the Judge Advocate General, in the absence of Crowder, the Judge Advocate General, who had been assigned the task of running the Selective Service System. LURIE, *supra* note 89, at 48.

<sup>126</sup> Samuel Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919) (emphasis added). *See also* Samuel Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146 (1922) (discussing proposed amendments to the Articles of War). In his Yale Law Journal article, General Ansell cited the preface to the proposed bill:

The primary principle of this Bill is to establish Military Justice, and regulate it by Law rather than by mere Military Command; or, stating it differently, to supersede personal Military Power over Military Justice by Public Law, to be effective for this purpose, must be law in its primary sense—a rule established beyond the control of the Department and the Army which are to administer it. . . .

*Id.* at 151 (citing *Senate Committee Print of S. 64, 66th Congress, 1st Session 2 et seq.* (1919)).

General Ansell's ideas about creating appellate courts to review courts-martial did not come to fruition until almost three decades later,<sup>127</sup> with the adoption of the UCMJ.<sup>128</sup>

#### L. The "Justice and Discipline Are Not Opposites" Theme

In his testimony before Congress in 1949 on the proposed UCMJ, Colonel Frederick Bernays Wiener testified as follows:

Colonel Wiener. *It is sometimes asked what is the object of military law. It is generally put as a personal question. Do you consider that the object of military law is to maintain discipline or to maintain justice? My answer always is that those are not opposites. You cannot maintain discipline by administering justice. The standards of guilt and innocence in military law are not different from civil law. Possibly there is a little more relaxation on what is harmless error than in the civil courts. But the real difference is the object and the amount of punishment. The object of the civilian criminal court generally is to reform and rehabilitate the offenders. The object of the military law is not vindictiveness. It is to act as a deterrent so that when the first man steps out of line and gets a hard sentence it will deter others.*

Mr. Rivers. In that connection there is no use for us to confuse the basic objective of keeping morale with the ultimate disposition of justice.

Colonel Wiener. Precisely.

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<sup>127</sup> In his book, *Arming Military Justice: The Origins of the United States Court of Military Appeals, 1775–1950*, Jonathan Lurie notes that in contrast to General Crowder, who was "reflective, somewhat hesitant in manner, and comfortable in a bureaucratic environment," General Ansell was "much more aggressive in manner," "impatient to get results," and "believed very deeply in his causes." That might explain, at least in part, his strident and overreaching comments about military justice. JONATHAN LURIE, *ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775–1950*, at 50–51 (1992).

<sup>128</sup> Ironically, Professor Edmund Morgan (who was then teaching at Harvard) had served as an Army Judge Advocate under General Ansell and three decades later chaired the committee that drafted the new uniform code, which created the Court of Military Appeals—one of life's ironies.

Mr. Rivers. *And they need not be opposites.*<sup>129</sup>

Colonel Weiner continued by testifying that the purpose of military justice was to act as a deterrent to other servicemembers:

Colonel Wiener. But the military justice has to be swift and its punishment will frequently be more severe. There is always an irreducible number in any group, particularly in a large number raised by selective service, who can only be ruled by fear and compulsion. If you have a system of military justice which minimizes a possibility that a guilty man can “beat the rap,” then you have an effective system of military justice. The more loopholes you inject the more the man feels, “Oh, well, I can get a lawyer; I can appeal it on up; I can get off.” To that extent you impair the object of military law. I am not suggesting that anybody be sent to the guardhouse on general principles or anything like that. You do have the irreducible minimum that can only be ruled by fear. You do have the necessity for swift and sure punishment, and you do have to have a feeling in the sense of the individual, “Well, maybe I had better not, because dire punishment will follow.”<sup>130</sup>

#### M. The “Justice and Discipline Are Not Synonymous” Theme

In contrast to the “not opposites” theme, *supra*, is the opinion of the Coast Guard Board of Review in *United States v. McCarty*.<sup>131</sup> In that case, the board addressed the aims of punishment in the military criminal justice system in a desertion case. The court noted that

[s]ociety, whether military or civilian, still insists on punishment for crimes and offenses. In the military where approximately 75% of all offenses involve unauthorized absence (which is no crime at all in civil

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<sup>129</sup> INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 780 (2000 Reprint, Hein) (emphasis added).

<sup>130</sup> *Id.* at 781. For a discussion about the role of deterrence in sentencing, see Part V.E.1.h, *infra*.

<sup>131</sup> 29 C.M.R. 757 (C.G.B.R. 1960).

life) punishment is thought necessary in the interest of military discipline. Even so, the Navy long since recognized that “*Discipline and punishment are not always synonymous . . . .* The question of punishment can be considered only when the cause of the offense has been correctly determined. Severity of punishment alone has never provided an answer to penal and disciplinary problems.”<sup>132</sup>

#### N. The “Oxymoron” Theme

In his law review article objecting to any expansion of court-martial jurisdiction over servicemembers, Professor Spak wrote:

Under the Uniform Code of Military Justice (UCMJ) military personnel are denied the right to grand jury indictment, trial by impartial jury, and bail. In addition, military personnel are denied the right to independent counsel. There is no doubt that military personnel enjoy less constitutional rights than their civilian counterparts. It is this author's aim to extend all of the constitutional rights traditionally enjoyed by United States citizens to military personnel absent compelling justification. Therefore, it is contended that court-martial jurisdiction should be limited to those statutory offenses that *require* military status and therefore should apply exclusively to members of the armed forces. *In sum, it is the author's thesis that military justice is the oxymoron of the 1980's.*<sup>133</sup>

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<sup>132</sup> *Id.* at 762 (quoting NAVAL JUSTICE 48, 51 (1949)) (emphasis added).

<sup>133</sup> Spak, *supra* note 70, at 437–38 (footnotes omitted) (emphasis added). He also stated:

An additional reason to restrict court-martial jurisdiction is found in the very nature of procedural military justice. Although not all aspects of military criminal procedure are narrower than their civilian counterpart, on balance, *Military Criminal Procedure is so ineffective in protecting the constitutional rights of military personnel, that it passes the point of being obscene.*

*Id.* at 457 (emphasis added). To support this proposition, Professor Spak cited L. WEST, THEY CALL IT JUSTICE (1977) and R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS

#### O. The “Hybrid” Theme

One commentator has recommended that the military justice system could be streamlined by, for example, eliminating the right of a servicemember to refuse nonjudicial punishment and by addressing delays in the Article 32 investigation. In addressing those issues, he noted:

Throughout history, members of the military have been subjected to a separate criminal justice system oriented toward reinforcement of proper behavior and punishment of misbehavior. Initially, commanding officers had complete control over the courts-martial process. A formal criminal court system consisting of trial and appellate judges did not exist. Over the course of United States history, civilian notions of criminal justice and criminal trial practice have been fused into the court-martial system. Following World War II, many of these notions were statutorily imposed on the armed forces. *Today the court-martial is a hybrid criminal trial with remnants of the earlier command-controlled model.*<sup>134</sup>

The hybrid theme, at least as it is presented in the quote, assumes that the role of the commander is no longer what it once was. That is not entirely true, as noted in Part V.E.1.d, below.

#### P. The “Legitimation” Theme

One writer—in focusing on the legitimacy of the military justice system—made the following observation:

*Legitimacy is an essential feature of an effective system of criminal justice. In order to maintain authority over those it regulates, a criminal justice system must remain legitimate in the eyes of those people. When people*

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MILITARY MUSIC IS TO MUSIC (1971), which in the '70s and '80s were often cited by critics of the military justice system.

<sup>134</sup> Stephen J. Carrol, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187, 187–88 (1986) (emphasis added).

perceive the criminal process as fair and legitimate, they are more likely to accept its results as accurate and are more likely to obey the substantive laws that the system enforces. Moreover, such people are more likely to cooperate with police and prosecutors, who necessarily rely on the trust of the community to carry out their roles in the criminal justice system.<sup>135</sup>

The author continues by noting that the legitimacy of a criminal justice system is enhanced when “observers and defendants believe that prosecutors are pursuing justice.”<sup>136</sup>

This theme relates to the view often expressed in conjunction with the “justice-based” theme, *supra*, that regardless of the commander’s need to maintain good order and discipline, if the command perceives that a servicemember has not been treated fairly by the system, discipline may actually suffer in the long run.

#### Q. The “Paternalistic” Theme

Some have viewed the military justice system as being paternalistic. For example, in *United States v. Sunzeri*,<sup>137</sup> the court concluded that a provision in the accused’s pretrial agreement that he could not present the testimony of certain witnesses during sentencing violated the *MCM*.<sup>138</sup> In dissent, one of the judges wrote:

The military justice system, as it is currently designed and has developed—with its post-World War II philosophy, revisions, and implementation of the Uniform Code of Military Justice—is *quite paternalistic in some regards*, with its numerous built-in safeguards to protect the individual servicemember in his or her quest to navigate, in his or her best interests, the treacherous

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<sup>135</sup> Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 941–42 (2010) (citations omitted, emphasis added).

<sup>136</sup> *Id.* at 942. See also Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005) (discussing legitimacy of criminal justice systems from subjective viewpoint of observers).

<sup>137</sup> 59 M.J. 758 (N-M. Ct. Crim. App. 2004).

<sup>138</sup> *MCM*, *supra* note 17, R.C.M. 705(c)(1)(B).



waters of military discipline. While there is, of course, absolutely nothing wrong with this approach, I think sometimes we may let it color too much our reading and interpretation of those safeguards.<sup>139</sup>

In contrast to that position, the court in *United States v. Rivera*,<sup>140</sup> five years earlier had observed that the military justice system had grown less paternalistic.<sup>141</sup>

#### R. The “Civilianization” Theme

Commentators who recommend reforms to the military justice system typically compare the system to civilian counterparts, whether in the United States or other countries. Apparently the belief is that the civilian system reflects qualities that should be applied to pretrial, trial, and appellate proceedings in the military. For example, Professor Sherman has observed:

The American court-martial, with its command-dominated structure, all military personnel, commander-selected jury primarily from the officer class, inadequate pre-trial procedures, and limited appeals, provides servicemen with an inferior form of criminal justice. Proposed reforms of the UCMJ would remedy some of these problems but would leave intact the structure of court-martial, with its intrinsic relationship to military

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<sup>139</sup> *Sunzeri*, 59 M.J. at 762 (emphasis added).

<sup>140</sup> 44 M.J. 527 (A.F. Ct. Crim. App. 1996).

<sup>141</sup> *Id.* at 530. See *United States v. Shelwood*, 15 M.J. 222, 224 n.1 (C.M.A. 1983) (noting that MRE 103(a)(1) is less paternalistic than pre-Rule standards); *United States v. Means*, 20 M.J. 522, 528 (A.C.M.R. 1985) (stating that development of independent defense counsel system was a fundamental change in policy that “transformed an excessively paternalistic system for litigating criminal cases into a truly adversarial one”). See also Captain John A. Schaefer, *Current Effective Assistance of Counsel Standards*, ARMY LAW., June 1986, at 7, 16 (pointing out that the military justice system has transformed courts-martial from being excessively paternalistic to adversarial); Corey Wielert, *Affecting the Bargaining Process in Pretrial Agreements: Waiving Appellate Rights in the Military Justice System*, 79 UMKC L. REV. 237, 254 (2010) (arguing that military justice has transformed from paternalistic system to more adversarial, especially regarding waiver of Article 32 investigations); Major Eugene Milhizer, *Curing Variance on Appeal*, ARMY LAW., July 1991, at 32 (proffering that the trend is to rely on counsel rather than on paternalistic protection of trial and appellate judges).

disciplinary policies and control. *Reforms along the lines of either the British or West German-Swedish models, resulting in the separation and civilianization of military justice functions, appear to be a feasible way to provide American servicemen with greater justice.*<sup>142</sup>

The suggested reforms, which many believe would truly “civilianize” the military justice system, generally focus on removing the commander from the equation.<sup>143</sup> In contrast to that position, Judge Raby of the Army Court of Criminal Review wrote:

[I] wish to muse whether we gatekeepers of military law are not inadvertently finding more and more novel ways in which gradually to ease line officers and commanders out of the military system—*moving it ever closer to the civilian justice model*. Quarere: If this trend continues, could we reach a point, in futuro, where the military justice system is no longer unique, and thus is no longer necessary?<sup>144</sup>

#### S. The “Judicialization” Theme

The judicialization theme is used to describe the process of treating the commander as a judicial officer for some functions in the military

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<sup>142</sup> Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L. J. 1398, 1425 (1973) (emphasis added). See also Robinson O. Everett, *Some Comments on the Civilianization of Military Justice*, ARMY LAW., Sept. 1980, at 1 (noting that if by “civilianization” it meant ignoring the uniqueness of military justice, he was opposed but that he favored civilianization if it meant an “acknowledgement that certain basic ethical norms apply to the military as well as the civilian”). Cf. Karlen, *supra* note 9 (questioning whether military justice system should import problems often encountered in civilian system).

<sup>143</sup> Recently, there have been suggestions that the prosecution of sexual assault offenses by servicemembers should be handled by civilian prosecutors. Statement by Professor Beth Hillman before the Civil Rights Commission, January 11, 2013, available at <http://www.c-span.org/Events/Military-Commission-Holds-Forum-on-Sexual-Assault/10737437187/>. Professor Hillman states that when compared to military justice systems in other countries, the United States’ system is an “outlier.” *Id.*

<sup>144</sup> *United States v. Ralston*, 24 M.J. 709, 711 (A.C.M.R. 1987) (appendix to opinion). See also Cox, *supra* note 2, at 28–30 (commenting on the civilianization of military justice).

justice system<sup>145</sup> and to stress the important role of military judges.<sup>146</sup> In addition, it reflects the growing role of the appellate courts in interpreting, and at times expanding, the due process protections available to an accused servicemember. In commenting on the role of the Court of Military Appeals in the 1970's, then-Captain John Cooke summarized this theme by observing:

[T]he court has substantially shifted the balance of power in the system by invalidating or restricting powers previously exercised by commanders and other line personnel, and by depositing greater ultimate authority in the hands of lawyers and judges. More subtly, the court has endeavored to adjust the attitudes with which all participants in the system exercise their particular authority.<sup>147</sup>

#### T. The "Can't Get No Respect" Theme

As demonstrated by some of the themes presented in this section, critics of the military justice system often show a complete lack of respect for its purpose, content, or operation. As one writer has observed:

The true depth and breadth of the [criticisms] is unknown. As far as I know, no recent national surveys have been conducted among the citizenry about their perceptions or feelings about military justice. Nevertheless, I do feel safe in believing that a broad cross-section of intelligent people either know very little about military justice or, if they do know something

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<sup>145</sup> Major Donald W. Hansen, *Judicial Functions of the Commander*, 41 MIL. L. REV. 1 (1968); Victor M. Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?* 16 TUL. J. INT'L & COMP. L. 419, 423 (2008).

<sup>146</sup> Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge*, 9 CAL. W. L. REV. 57 (1972) (discussing evolution of military judge's role); Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009) (suggesting methods of cultivating judicial independence); Major Gilbert D. Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F. L. REV. 1 (1975) (discussing emerging importance of military judges); Westmoreland & Prugh, *supra* note 12, at 18 (discussing role of military judges).

<sup>147</sup> Cooke, *supra* note 112, at 44.

about the system, they believe that it is still in the dark ages, void of any full legal recognition, and certainly not deserving of a full membership in the family of enlightened jurisprudence. *Clearly, it does not deserve “respect.”*<sup>148</sup>

#### U. The “No Perfect Solution” Theme

The final theme reflects the view that while everyone understands the importance of striking some sort of balance between discipline and justice, there is no real solution. For example, in his statement to the House Armed Services Subcommittee on the proposed UCMJ, Secretary of Defense James Forrestal addressed the process of drafting the proposed code: He stated:

Another problem faced by the [special committee charged with preparing a draft of the code] was to devise a code which would insure the maximum amount of justice within the framework of a military organization. We are all aware of the number of criticisms which have been leveled against the court-martial system over the years . . . .The point of proper accommodation between the meting out of justice and the performance of military operations—which involved not only the fighting, but also the winning of wars—is one which no one has discovered. *I do not know of any expert on the subject—military or civilian—who can be said to have the perfect solution.* Suffice it to say, we are striving for maximum military performance and maximum justice. I believe the proposed code is the nearest approach to those ideals.<sup>149</sup>

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<sup>148</sup> David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 4–5 (1991) (emphasis added).

<sup>149</sup> *Uniform Code of Military Justice: Hearings before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 597 (Mar. 7, 1949) (statement of James Forrestal, Secretary of Defense) (emphasis added), available at <http://pds.lib.harvard.edu/pds/view/13963097?n=4875&printThumbnails=no>.

#### V. Summary of Thematic Approaches

The foregoing themes reflect a variety of approaches to the military justice conundrum. They cover more than a hundred years of commentary on the American military justice system. While the theme of “discipline” seems to have dominated the discussion in the early and mid-years of the system, more recent court decisions and commentaries seem to favor the “justice” component.<sup>150</sup>

There are several reasons for that. First, since the nineteenth century, but especially since the 1930s, there has been a movement in the United States to codify the country’s legal systems. That is, there has been a move to codify a growing body of law, such as state criminal law and the Federal Rules of Procedure and Evidence.<sup>151</sup> The expansion of rules, in turn, tends to emphasize procedural due process concerns in both civil and criminal procedure. The military justice system reflects that trend. While the UCMJ has remained fairly static, the *MCM* has grown in scope and coverage exponentially.

Second, the shift in themes reflects the reality that the CAAF and the service Courts of Criminal Appeals have played a strong and persistent role in the factual and legal review of courts-martial. This was especially so during the 1970s when the then Court of Military Appeals took bold

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<sup>150</sup> See generally Ferris, *supra* note 8, at 442–52 (noting the that history of the court-martial reflects an evolution from discipline to justice).

<sup>151</sup> See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 83–86 (1977) (noting process of adopting Uniform Commercial Code); Colin Miller, *Virginia to Codify Its Rules of Evidence Effective July 1, 2012*, EVIDENCEPROF BLOG (Apr. 22, 2012), <http://lawprofessors.typepad.com/evidenceprof/2012/04/virginia-to-codify-its-rules-of-evidence-effective-july-1-2012.html> (noting that Virginia was codifying its common-law rules of evidence effective July 1, 2012, leaving Massachusetts as the last state not to have done so); Fred L. Borch, *The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial*, ARMY LAW., June 2012, at 1, 1 (noting that the adoption of the Military Rules of Evidence was driven by the codification of the Federal Rules of Evidence in 1975); Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine form Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 757–66, 809–10 (2003) (discussing the codification movement in criminal law); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098 *passim* (1978) (tracing the movement in the United Kingdom and the United States from Jeremy Bentham’s writings in the nineteenth century).

steps to engraft civilian due process standards on the military justice system.<sup>152</sup>

Finally, Department of Defense and military lawyers have played an increasingly important role in crafting policies and procedures which reflect concern about ensuring that the military justice system does not become simply a system of discipline.<sup>153</sup>

Regardless of the reasons for the shift, the foregoing themes present a somewhat abstract view of the military justice conundrum. Terms such as “indispensable,” “delicate balance,” “justice,” and even the term “discipline” are abbreviated sound bites or metaphors that might be used in any discussion about military justice. But there are other ways of analyzing and answering the conundrum.

## V. The Crime Control and Due Process Models’ Approach to the Conundrum

### A. In General

In analyzing the military justice conundrum, it is helpful to draw from those commentators who have conducted similar analyses of the civilian criminal justice system. One of the leading commentators on this subject is Professor Herbert L. Packer, who constructed two models for analyzing the purposes and functions of a criminal justice system.<sup>154</sup> In

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<sup>152</sup> See LURIE, *supra* note 89, at 247 (noting that Chief Judge Fletcher had stated in an interview with the Army Times in November 1977 that the Court of Military Appeals was interested in civilianizing military justice); Major Andrew W. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4, 7–9 (noting that in the late 1970s, the Court of Military Appeals began *sua sponte* dismissing cases with prejudice if the convening authority took more than ninety days after conviction to take action, so as to enforce constitutional speedy trial rights).

<sup>153</sup> See Cooke, *supra* note 120, at 6 (noting that armed forces lawyers “have the responsibility to manage and mold the system so that it serves the needs and expectations of the American people and their sons and daughters in the armed forces”); Eugene Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125, 130–31 (1989) (commenting on key role of armed forces lawyers in effecting change in the military justice system); Brigadier General Patrick Finnegan, *Today’s Military Advocates: The Challenge of Fulfilling Our Nation’s Expectations for a Military Justice System That Is Fair and Just*, 195 MIL. L. REV. 190, 198 (2008) (commenting on roles of armed forces lawyers).

<sup>154</sup> Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and*

his view, the two models reflect the competing perspectives at play in such legal systems.<sup>155</sup>

Packer believed that it was necessary, in his words, to “build a model” to better assess the potential for change in the criminal justice system and predict its probable direction. To do so, he explained, would move from the abstract to reality.<sup>156</sup>

The first model is the crime control model, which prioritizes the ability, and need, of the government to prohibit specified conduct.<sup>157</sup> The second is the due process model. It upholds those attributes of the system which serve as a check on the ability of the government to investigate, charge, and try those accused of criminal conduct.<sup>158</sup> One commentator has described Packer’s two models as follows:

Both models describe a set of values, beliefs, attitudes, and ideas about our criminal justice system that are held by many legal actors within the system and that are reflected in some of its institutions and practices. Both models are prescriptive as well as descriptive. They make competing normative claims about the validity of procedural functions and the relative weight that should be attached to valid procedural objectives when they conflict with each other. Finally, both ideologies have programmatic content because they suggest doctrinal

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*Burger Courts’ Competing Ideologies*, 72 GEO. L. J. 185, 209–13 (1983) (providing a critique and reconstruction of Professor Packer’s models). In reconstructing Professor Packer’s models, Professor Arenella states that they create an erroneous impression that criminal procedure is concerned solely with whether the government or the individual should get the advantage in an adversarial proceeding. *Id.* at 211. *See also* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). Professor Packer’s law review article, and later book, were an attempt to provide some perspective on the Supreme Court decisions under Chief Justice Warren. Professor Arenella’s work “reconstructed” Packer’s two models in addressing the decisions of the Court under Chief Justice Burger. *See also* John Griffiths, *Ideology in Criminal Procedure or a Third “Model” of the Criminal Process*, 79 YALE L.J. 359, 360–67 (1970) (examining Packer’s prevailing ideology of criminal procedure); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 158 (1980) (criticizing the Warren and Burger Courts for being erratic in applying criminal procedure doctrines), *reprinted at* 10 ANN. REV. CRIM. PROC. 151.

<sup>155</sup> Packer, *supra* note 154, at 5.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 9–10.

<sup>158</sup> *Id.* at 13–14.

courses of action that would implement their vision of how the process should function. Consequently, both ideological models provide a source for legitimate arguments that courts may use to shape legal doctrine in criminal procedure.<sup>159</sup>

The following discussion briefly describes the key features of Packer's two models, which can then be used to analyze the military justice conundrum. The crime control model translates into the discipline component of the military justice system. The due process model translates into the justice component.

#### B. The Crime Control (Discipline) Model

The crime control model views the most important function of the criminal process to be the repression of criminal conduct.<sup>160</sup> The model puts a premium on the speed and efficiency with which the process operates to punish the guilty.<sup>161</sup> Packer describes efficiency as "the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known."<sup>162</sup>

To be efficient and speedy in a system that lacks sufficient resources to deal with the vast number of cases that must pass through it, the crime control model prefers the informal, *ex parte*, administrative fact-finding of the police and prosecutor to the more cumbersome adversarial determination of guilt at trial.<sup>163</sup> The model trusts government officials to screen out the "probably innocent."<sup>164</sup> The screening process operated by police and prosecutors is considered a reliable indicator of probable guilt. Those not screened out are presumptively guilty.<sup>165</sup>

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<sup>159</sup> Arenella, *supra* note 154, at 189–90. Professor Arenella states, however, that while Packer's models identify some of the values furthered by trial adjudication and plea bargaining, neither model identifies the specific functions of American criminal procedure nor fully explains how these functions would be served or thwarted by a "due process" or "crime control" value perspective. *Id.* at 211.

<sup>160</sup> Packer, *supra* note 154, at 9.

<sup>161</sup> *Id.* at 10.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* Packer writes that under this model, "The process must not be cluttered with ceremonious rituals that do not advance the progress of a case." *Id.*

<sup>164</sup> *Id.* at 11.

<sup>165</sup> *Id.*



Once a person has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made (by police and prosecutors) that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. This “presumption of guilt” approach, according to Professor Packer, allows the Crime Control Model to deal efficiently with large numbers.<sup>166</sup> Professor Packer argues that “presumption of guilt” in this model is not the opposite of “presumption of innocence.” What he calls the “presumption of guilt” is a factual judgment about what probably happened (based on implicit trust of government officials). The presumption of innocence, by contrast, is a rule that does not depend on probabilities, but requires the accused to be *treated* as innocent until he has been adjudged otherwise. Thus, the presumption of innocence directs the government on how to proceed in a case, whereas the presumption of guilt predicts the outcome.<sup>167</sup>

In the military setting, the discipline component takes on attributes similar to Professor Packer’s crime control model. The military’s screening process generally reflects a desire to expedite investigations of alleged misconduct<sup>168</sup> and is thorough enough that if the evidence against a servicemember is weak, the command is not likely to begin court-martial procedures. Instead, a commander may choose any number of options for dealing with the issue outside the military justice arena.<sup>169</sup>

### C. The Due Process (Justice) Model

Packer's due process model concentrates on the problem of how best to limit official power over the individual.<sup>170</sup> He refers to this model as

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See, e.g., Mitsie Smith, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Military Sexual Assault*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 147, 153 (2011) (stating the “essence of military justice is swift punishment to ensure discipline”).

<sup>169</sup> Schlueter *supra* note 20, § 1-8, at 48, discusses various options available to the commander. These include taking no action or administrative action, and “administrative action” covers everything from a verbal counseling through extra training to administrative reduction in rank or separation from the service. See also MCM, *supra* note 17, R.C.M. 306(e)(1), (2).

<sup>170</sup> Packer, *supra* note 154, at 14.

an “obstacle course.”<sup>171</sup> This preoccupation with limiting government power reflects the due process model’s concern with “the primacy of the individual,” the stigma of the criminal sanction, and the possibilities of abuse inherent in official power.<sup>172</sup>

The concern with government power and its abuses explains why the due process model uses the criminal process to police itself by its formal commitment to the concept of “legal guilt.”<sup>173</sup> Packer explains:

According to this doctrine, an individual is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competencies duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to safeguard the integrity of the process are not given effect.<sup>174</sup>

The due process model prefers adversarial adjudication to an administrative determination of guilt for two reasons. First, trial adjudication is seen as a more reliable fact-finding mechanism. Second, the police and prosecutor lack the competence and willingness to apply factual guilt-disabling doctrines when they make their administrative determination of guilt.<sup>175</sup>

The due process model limits government power over all suspects, including the factually guilty, by forcing the state to prove its case in an adjudicative forum that will provide maximum protection to the factually innocent and maximum assurance that the state has respected the

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<sup>171</sup> *Id.* at 13.

<sup>172</sup> *Id.* at 16.

<sup>173</sup> *Id.* See also *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (rejecting argument that because evidence showed the defendant was clearly guilty, he could not complain of a lack of due process; “[n]o matter what the evidence was against him, he had the right to an impartial judge”).

<sup>174</sup> Packer, *supra* note 154, at 16. Professor Packer lists the various rules as including jurisdiction, venue, statute of limitations, double jeopardy, and criminal responsibility (i.e., the defendant must not be insane or underage). *Id.* at 16–17.

<sup>175</sup> *Id.* at 15.

defendant's rights in securing its evidence and proving its case.<sup>176</sup>

In the military context, the concept of a justice or a justice-based system describes this model.<sup>177</sup> It generally reflects a distrust of a commander's powers and recognition of the potential for abuse. Under Packer's approach, the procedural protections available to a servicemember charged with a crime fall within this model. The "justice" approach to military justice might better be referred to as the "due process" approach—the latter term better describes what is really at stake. However, this article will continue to apply the term "justice," as that is the term usually used in discussing military criminal procedures.

#### D. Summary of the Models

The following chart provides a summary of the two models for analyzing the military justice conundrum.

<b>Crime Control—Discipline</b>	<b>Due Process—Justice</b>
Efficient and Speedy	Efficiency Not Critical
Factual Guilt	Legal Guilt
Nonadversarial Procedures	Adversarial Procedures
Trust Government to Screen	Limits on Government's Function in Acting as Screener
Primacy of Public Interest	Primacy of Individual

#### E. Application of the Models to the Military Justice System

The following discussion applies the foregoing models to the current military justice system. The first section focuses on those features of the system that reflect concern about maintaining discipline. The second

<sup>176</sup> *Id.* at 14.

<sup>177</sup> In fact, we might better refer to it as the due process model—it better describes what is really at stake.

section focuses on those features that reflect concern about providing justice.

Not every aspect of military justice is addressed here. This discussion focuses on those features that are most readily identified with one model or the other. Even so, it will be apparent that some features, like the military's guilty plea procedures, reflect both models.

### *1. Features That Reflect the Crime-Control-Discipline Model*

#### *a. In General*

From the beginning, the Articles of War and then the UCMJ focused on the military commander's ability to maintain good order and discipline by imposing disciplinary measures on members of their command. The primary vehicle was trial by court-martial. Military law now also includes more informal measures, such as nonjudicial punishment under Article 15.

The Code contains several features that reflect the crime control-discipline model.

#### *b. Court-Martial Personal Jurisdiction*

Normally, in applying the crime control and due process models, commentators focus on the procedural aspects of criminal justice systems. But the fact that Congress has provided for court-martial jurisdiction over a wide range of individuals, including civilians,<sup>178</sup>

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<sup>178</sup> UCMJ art. 2(a)(10) (2012). In 2006, Congress amended Article 2 to provide for court-martial jurisdiction over persons serving with or accompanying an armed force in the field, during times of war or contingency operations. *See* *United States v. Ali*, 71 M.J. 256, 263–65 (C.A.A.F. 2012) (detailing how the accused was a non-US citizen, civilian interpreter, working in Iraq for the military; he was court-martialed for committing the offenses of false official statement, wrongful appropriation, and impeding an investigation in the field during Operation Iraqi Freedom). *See generally* Lieutenant Colonel Charles T. Kirchmaier, *Command Authority Over Contractors Serving with or Accompanying the Force*, *ARMY LAW.*, Dec. 2009, at 35, 39–41 (examining command authority over contractors); Major Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 *MIL. L. REV.* 92, 105–06 (2001) (noting that under the Military Extraterritorial Jurisdiction Act, Department of Defense personnel may arrest civilians for crimes committed in certain

reflects the crime control model in the UCMJ and the ability of the commander to regulate and if necessary, punish, behavior that is considered a threat to good order and discipline. Just within the last decade Congress has taken steps to fill what it perceived to be jurisdictional gaps.<sup>179</sup> Thus, rather than restricting the commander's authority to enforce crime control within his or her area of operations, Congress has actually expanded that authority<sup>180</sup>—thus rejecting civil libertarian arguments that civilians should not be subjected to court-martial jurisdiction.

*c. Defining Military Offenses*

Perhaps one of the most striking features of the current military justice system is in the substantive law aspects of the UCMJ. Articles 77 through 134 are considered the “punitive articles”<sup>181</sup> and proscribe criminal offenses.

The punitive articles include offenses that are clearly related to good order and discipline, such as disobedience of orders,<sup>182</sup> desertion,<sup>183</sup>

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areas, and a commander has considerable discretion about whether to turn these civilians over to foreign authorities).

<sup>179</sup> UCMJ art. 2(a)(10) (2012) (jurisdiction over civilians); 18 U.S.C. §§ 3261–3267 (offenses committed overseas).

<sup>180</sup> See Katherin J. Chapman, *The Untouchables: Private Military Contractors' Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1059–67 (2010) (recommending that military law should be used to hold private civilian contractors criminally accountable under UCMJ); Matthew Dahl, “Runaway Train”: *Controlling Crimes Committed by Private Contractors Through Application of the Uniform Code of Military Justice*, 14 BARRY L. REV. 55, 77 (2010) (endorsing amendment to Article 2(a)(10), UCMJ, as necessary for controlling crimes committed by private contractors and other civilians accompanying U.S. armed forces overseas); David A. Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. CRIM. L. & CRIMINOLOGY 74, 78–80 (1982) (discussing 1979 amendment to Article 2, UCMJ, codifying doctrine of constructive enlistments); Cf. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction Over Civilian Augmentees*, 62 U. OF MIAMI L. REV. 491, 497–98 (2008) (arguing that military's interests did not justify extension of jurisdiction over civilians by Military Extraterritorial Jurisdiction Act of 2000 and amendment to Article 2a(10), UCMJ).

<sup>181</sup> See DAVID A. SCHLUETER, CHARLES H. ROSE, VICTOR HANSEN & CHRISTOPHER BEHAN, *MILITARY CRIMES AND DEFENSES*, § 3-1[5], at 50 (2d ed. 2012).

<sup>182</sup> UCMJ art. 92 (2012).

<sup>183</sup> *Id.* art. 85 (2012).

disrespect,<sup>184</sup> insubordination,<sup>185</sup> and mutiny.<sup>186</sup> The military-related offenses also include the sometimes maligned general articles—Articles 133 and 134. These articles epitomize the discipline-crime control model of criminal law, because they hold a servicemember criminally responsible for actions that are not always specifically proscribed by law.<sup>187</sup> The military courts have held, however, that an accused must have been on fair notice that his actions violated a statute, regulation, or even custom of the service.<sup>188</sup>

The UCMJ also includes civilian offenses such as murder,<sup>189</sup> robbery,<sup>190</sup> and forgery.<sup>191</sup> The Supreme Court has abolished its prior “service connection” test, and held that the military can punish *any* violation of the UCMJ—just as long as the accused is personally subject to its jurisdiction.<sup>192</sup> While the nexus between the commander’s ability to punish a servicemember for violating a lawful order and the need to maintain discipline is more readily apparent, the same nexus often exits when a “civilian” offense is involved, and the commander does not need to demonstrate that it does in order to exercise his or her jurisdiction.

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<sup>184</sup> *Id.* art. 86 (2012).

<sup>185</sup> *Id.* art. 91 (2012).

<sup>186</sup> *Id.* art. 94 (2012).

<sup>187</sup> Thus, in *United States v. Sadinsky*, 34 C.M.R. 343, 345–46 (C.M.A. 1964), the Court of Military Appeals upheld a conviction for jumping from the deck of an aircraft carrier into the sea—conduct that had not been specifically proscribed either by law or regulation. “To superimpose a requirement that the conduct be prohibited by some order, regulation, or statute in order to fall within the proscription of . . . Article 134 would be contrary to the clear and fair meaning of its terms.” *Id.* at 346. Afterwards, the President added “Jumping from Vessel into the Water” as an enumerated offense under Article 134. MCM, *supra* note 17, at A23–24.

<sup>188</sup> See SCHLUETER, ROSE, HANSEN & BEHAN, *supra* note 181, § 7-3[3][c][i] (discussing requirement that accused must be on fair notice that his conduct is chargeable as a violation of Article 134).

<sup>189</sup> UCMJ, art. 118 (2012).

<sup>190</sup> *Id.* art. 122.

<sup>191</sup> *Id.* art. 123. The process of adding “civilian-type” offenses to military law was a gradual one. The Articles of War did not cover “civilian-type” crimes until 1863, and the process of including them was not complete until the UCMJ was adopted in 1951. Thus, under the Articles of War, murder and rape cases could not be tried at court-martial if the crime was alleged to have happened in the American homeland during peacetime. Sherman, *supra* note 9, at 39.

<sup>192</sup> *Solorio v. United States*, 483 U.S. 435, 451 (1987), *overruling* *O’Callahan v. Parker*, 395 U.S. 258, 265 (1969).

Consider the following examples<sup>193</sup>:

- First, the servicemember is charged with throwing butter onto the ceiling of a mess hall, a violation of Article 134.<sup>194</sup> At first blush this offense seems so trivial to be ignored. Yet, commanders are constantly faced with minor delicts that threaten the good order and discipline of a unit and could, if left unaddressed, lead to additional delicts and a lack of respect for command authority. It is important to note that although this offense, standing alone, would normally not give rise to a court-martial, at its core, the commander should have the authority to take disciplinary action, whether it be in the form of a reprimand, nonjudicial punishment, or a court-martial.
- Second, a servicemember is charged under Article 118 with killing servicemembers and civilians at an off-base convenience store.<sup>195</sup> The command's interest in crime control is clear in this instance. But the command also must have the authority to deal with this horrific offense under the UCMJ. Servicemembers are involved and the need to maintain good order may depend heavily on how the command handles the killings.<sup>196</sup>
- Third, a civilian contractor, working overseas for the military, is charged with sexual assault of a servicemember under Article 120.<sup>197</sup> As noted *supra*, in 2006, Congress amended Article 2 of the UCMJ to provide for court-martial jurisdiction over "persons serving with or accompanying an armed force in the field" during "contingency operations."

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<sup>193</sup> It is assumed in these examples that the military has appropriate personal and subject-matter jurisdiction over the servicemember.

<sup>194</sup> See *United States v. Regan*, 11 M.J. 745 (A.C.M.R. 1981). In *Regan*, the accused was charged with various offenses, including throwing butter onto the mess hall ceiling. The court concluded that the specification alleging the behavior failed to include the requisite words of criminality, e.g., failure to allege that the accused's conduct was "disorderly." Interestingly, the court did not conclude that the accused's actions could not be considered a violation of the UCMJ.

<sup>195</sup> UCMJ art. 118 (2012).

<sup>196</sup> Even assuming the command has a very high interest in handling a murder case, there may be an existing agreement with local authorities that requires that all murders be handled in the state or federal courts.

<sup>197</sup> UCMJ, art. 120 (2012).

Congress apparently believed that the need to control criminal activity by civilians accompanying the military was important enough to entrust that power to do so in a military commander.

- Finally, a servicemember is charged with violating a no-contact order under Article 92.<sup>198</sup> This offense, while raising issues of the ability of a commander to infringe on a servicemember's liberty interests,<sup>199</sup> reflects the view that in order to maintain good order and discipline, even if not strictly criminal activity, a commander should be able to order a servicemember to avoid contact which might in turn lead to criminal activity or other threats to the unit.

In each of the foregoing examples, the Congress has recognized that it is critical that the commander have the ability to address a wide range of misconduct—some of which would not be a crime in a civilian setting—in order to maintain good order and discipline.

#### *d. Role of the Commander*

The commander's role in military justice perhaps best reflects the crime control and discipline model, and prevents it from being viewed as a truly justice-based system. Critics and supporters of military justice have one thing in common. They recognize the pivotal role of the commander as a feature that distinguishes the military and civilian systems of criminal justice.<sup>200</sup> This role reflects the broad trust in the

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<sup>198</sup> *Id.* art. 92.

<sup>199</sup> See SCHLUETER, *supra* note 20, § 13-3(O)(5), at 728–32 (discussing rights of privacy in the military setting).

<sup>200</sup> *Weiss v. United States*, 510 U. S. 163, 175 (1994) (listing the powers of the military commander and concluding that “by contrast to civilian society, nonjudicial military officers play a significant part in the administration of military justice”). See generally Alleman, *supra* note 97; Brigadier General Paul R. Dordal, *The Military Criminal Justice System: A Commander's Perspective*, THE REPORTER, June 1997, at 3; Hansen, *supra* note 145, at 423 (“First and foremost, military justice is one of the primary tools a military commander has to maintain discipline within the ranks.” But “it is not the be all and end all of military justice, particularly in a democracy.”); William Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971).



judgment of government officials that characterizes the crime control model.<sup>201</sup>

A brief review of the commander's broad powers makes the point. First, the commander has very broad discretion to conduct investigations into allegations of misconduct.<sup>202</sup> The actual investigations are almost always conducted either by the law enforcement branches of the armed forces, who in turn report their findings to the commander, or by investigating officers appointed by the commander himself. The commander's powers include the authority to authorize searches and seizures, conduct inspections, and question suspects. While the commander's authority to do so is limited by the *MCM* and judicial opinions, the power is nonetheless broad and reflective of the crime control and discipline models.

Second, the commander has broad prosecutorial discretion.<sup>203</sup> Commanders, not lawyers, ultimately decide whether to take administrative actions, impose nonjudicial punishment, or commence court-martial proceedings. If a commander, after receiving legal advice and the advice and recommendations of subordinate commanders, decides to convene a court-martial, the commander personally selects the members of the court-martial panel.<sup>204</sup> This controversial feature of the military justice system draws support,<sup>205</sup> criticism,<sup>206</sup> and calls for

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<sup>201</sup> In Professor Packer's formulation, these officials may be police or prosecutors; in military justice, they are commanders.

<sup>202</sup> See SCHLUETER, *supra* note 20, § 5-2, at 265–66.

<sup>203</sup> See, e.g., *United States v. Baker*, 14 M.J. 361, 365 (C.M.A. 1983) (stating the “convening authority . . . is free to decide the number of offenses to charge . . .”); *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987) (noting that courts are hesitant to review decisions whether to prosecute; there is a strong presumption that convening authorities perform their function without bias); See also SCHLUETER, *supra* note 20, § 6-1[A], at 355–61 (discussing commander's discretion).

<sup>204</sup> UCMJ art. 25 (2012). Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, 28 THE REPORTER No. 3, at 3 (2001). The composition of the court-martial panel itself, quite aside from the commander's role in choosing it, manifests the crime control model. The panel always consists of servicemembers senior to the accused, whether officers or enlisted. If the accused requests that enlisted members be appointed to the court, the convening authority appoints noncommissioned officers from the command. Thus, regardless of whether the case is judge alone or panel, the accused's fate is decided by *government officials* (in the form of military leaders), and *not* by private citizens. Because the crime control model includes “trust in the judgment of government officials” the composition issue is a manifestation of that model.

<sup>205</sup> See Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV.

reform.<sup>207</sup> One popular proposal is to adopt a random system of selecting the members.<sup>208</sup> Nonetheless, the system remains intact. Third, after the court-martial is convened, the commander may decide such questions as to whether to grant immunity to witnesses, and whether to provide witnesses and expert assistance to the defense.<sup>209</sup> Again, although those

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190 (2003) (offering a strong defense for the current system of selecting court members); Charles W. Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. U. L. REV. 171 (1966) (stating the system is an ethical and pragmatic success).

<sup>206</sup> Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998) (criticizing process).

<sup>207</sup> See Major R. Rex Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972) (proposing reforms); Frank J. Chmelik, *The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Court-Martial for Service-Connected Civilian Offenses*, 8 HASTINGS CONST. L.Q. 617 (1981) (discussing Sixth Amendment right to jury trial should apply for non-military offenses); Victor M. Hansen, *Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 CREIGHTON L. REV. 911 (2011) (proposing a change to the military's panel selection system by using the accused's peremptory challenges to address the unfairness of stacking a court-martial panel); Major James T. Hill, *Applying Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117 (2010) (recommending new system for selecting members); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992) (proposing reforms); Daniel Maurer, *The Unrepresentative Military Jury: Deliberate Inclusion of Combat Veterans in the Military's Venire for Combat-Incidental Crimes*, 6 OHIO ST. J. CRIM. L. 803 (2009) (recommending greater inclusion of combat servicemembers in cases involving combat-related charges); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343 (1977) (discussing proposed reforms); Dwight W. Sullivan, *Playing the Numbers Game: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998) (proposing changes).

<sup>208</sup> See Matthew J. McCormack, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013 (1999) (recommending adoption of random selection process); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1973) (concluding that there would be little or no loss to discipline if the military adopted a random process of selecting members); Captain John D. VanSant, *Trial by Jury of Military Peers*, 15 A.F. L. REV. 185 (1973) (proposing random selection); Colonel James A. Young, *Revising the Court-Martial Selection Process*, 163 MIL. L. REV. 91 (2000) (recommending random selection process).

<sup>209</sup> However, a military judge may order the Government to provide expert assistance even if the commander refuses, and under Rule for Courts-Martial 703 may enforce the order with abatement if the Government refuses. See Major Dan Dalrymple, *Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources*, ARMY LAW., May 2013, at 35, 35 & n.6. A military judge may also order the live production of other witnesses, even if it is not militarily convenient for the commander to produce them. *United States v. Allen*, 31 M.J. 572, 610–11 (N.M.C.M.R. 1990); *United States v. Willis*, 3 M.J. 94, 95–96 (C.M.A. 1977).

decisions are subject to judicial review, the commander's authority to be involved in that process is broad.

Finally, commanders have broad post-trial powers and duties. Following a court-martial conviction, the commander who convened the court-martial is charged with, among other things, reviewing the results, considering any post-trial clemency matters the servicemember may have submitted, and deciding whether to approve the findings and the sentence.<sup>210</sup>

A commander's broad powers can lead to serious problems if a commander unlawfully exercises influence on the system. As noted above, the crime control model places trust in the ability of law enforcement personnel and prosecutors to efficiently and speedily resolve alleged criminal activity. While the military justice systems place some trust in the commanders to function similarly, unfettered discretion and power can tempt the commander to "fix" the outcome of a case being processed in the system. To that end, Article 37 of the UCMJ expressly forbids commanders, and others, from exercising unlawful influence on a case.<sup>211</sup> And Article 98 makes it an offense to not promptly dispose of charges or to enforce any provision in the UCMJ.<sup>212</sup> Unlawful command influence is considered the "mortal enemy of military justice,"<sup>213</sup> and the authorities that establish it check the commander's power in accordance with the due process model of criminal law. However, in general, the commander's broad discretion is a "crime control" rather than a "due process" feature of military justice.

Ultimately, it is the commanders, not the lawyers or the judges, who are responsible for good order and discipline in the Armed Forces.

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<sup>210</sup> The system recognizes that at the end of the day, the case goes back to where it started—on the commander's desk: To ensure that the system works.

<sup>211</sup> UCMJ art. 37 (2012).

<sup>212</sup> *Id.* art. 98.

<sup>213</sup> *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). *See generally* SCHLUETER, *supra* note 20, § 6-3, at 387–15 (discussing command influence).

*e. Nonjudicial Punishment*

Another feature that clearly reflects the crime control-discipline model is Article 15 of the UCMJ.<sup>214</sup> That provision authorizes commanders to impose nonjudicial punishment on members of their commands for minor offenses.<sup>215</sup> The Supreme Court has recognized these procedures as administrative in nature<sup>216</sup> and Congress has recognized that using nonjudicial punishment reduces the number of courts-martial for minor offenses that affect discipline.<sup>217</sup>

Under Professor Packer's crime control model, administrative procedures in a criminal justice system can efficiently and quickly dispose of criminal allegations and reduce the need for adversarial proceedings.<sup>218</sup> Nonjudicial punishment procedures fit hand-in-glove with that model. Because of their summary nature—where only minimal due process is provided<sup>219</sup>—nonjudicial punishment procedures have been challenged as being unconstitutional.<sup>220</sup>

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<sup>214</sup> UCMJ art. 15 (2012). Various terms are used for this procedure. In the Air Force and Army, it is referred to as an "Article 15," in the Coast Guard and Navy, "Captain's Mast," and in Marine Corps, "Office Hours." See SCHLUETER, *supra* note 20, §§ 3-5(A), 3-5(C), 3-5(D), and 3-5(E).

<sup>215</sup> See generally SCHLUETER, *supra* note 20, ch. 3 (discussing nonjudicial punishment procedures in the armed forces); Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965) (reviewing the history of nonjudicial punishment and discussing the fact that it is a much-needed disciplinary tool). See also Burrell M. Carnahan, *Comment—Article 15 Punishments*, 13 A.F. JAG L. REV. 270 (1971) (discussing Air Force Article 15 procedures); Dwight Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57 (1996) (discussing extensively the vessel exception).

<sup>216</sup> See *Middendorf v. Henry*, 425 U.S. 25, 31–31 (1976) (stating that nonjudicial punishment is an administrative method of dealing with minor offenses).

<sup>217</sup> See S. REP. NO. 1911, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 2379, 2380–82:

Article 15 . . . provides a means whereby military commanders may impose nonjudicial punishment for minor infractions of discipline. Its use permits the services to reduce substantially the number of courts-martial for minor offenses, which result in stigmatizing and impairing the efficiency and morale of the person concerned.

*Id.*

<sup>218</sup> Packer, *supra* note 154, at 13. Professor Packer's thesis is that unencumbered administrative fact-finding, similar to a guilty plea, can reduce adjudicative proceedings.

*Id.*

<sup>219</sup> Each of the services provide guidance to commanders on imposing nonjudicial punishment. In each service, to one degree or another, a servicemember receives notice of the pending proceeding, the right to consult with an attorney, a nonadversarial hearing

*f. Guilty Pleas*

In developing his two models for analyzing the criminal justice system, Professor Packer highlighted plea bargaining and guilty pleas as a prime example of the crime control model. In his view, the desire to use the criminal justice system to control crime was best reflected in the ability of the system to deal quickly and efficiently by permitting a defendant to plead guilty. He writes:

The pure Crime Control Model has very little use for many conspicuous features of the adjudicative process and in real life works a number of ingenious compromises with it. Even in the pure model, however, there have to be devices for dealing with the suspect after the preliminary screening process has resulted in a determination of probable guilt. The focal device, as we shall see, is the plea of guilty; through its use adjudicative fact-finding is reduced to a minimum. It might be said of the Crime Control Model that, reduced to its barest essentials and when operating at its most successful pitch, it consists of two elements: (a) an administrative fact-finding process leading to exoneration of the suspect, or to (b) the entry of a plea of guilty.<sup>221</sup>

Critics of this view point out that Professor Packer's recognition of the finality and efficiency of plea bargaining and guilty pleas does not demonstrate that guilty pleas promote criminal law objectives any better than trials.<sup>222</sup>

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before the commander (conducted by the commander), the right to demand a trial in lieu of the nonjudicial punishment (unless the servicemember is attached to embarked on, a vessel), and the right to appeal the punishment to a superior commander.

<sup>220</sup> See Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481 (1973) (taking position that servicemember faces dilemma of accepting punishment or demanding trial where constitutional protections would be available); Edward J. Imwinkelried & Francis A. Gilligan, *The Constitutionality of Article 15: A Rebuttal*, 83 YALE L.J. 534 (1974) (rejecting arguments that Article 15 procedures are unconstitutional).

<sup>221</sup> Packer, *supra* note 154, at 13. See also Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 316-17 (1983) (asserting that because of variables in an adjudicatory proceeding, trials cannot convey "truth" with regularity).

<sup>222</sup> Arenella, *supra* note 154, at 216-17.

Court-martial charges against servicemembers typically result in plea bargaining between the commander and the accused and entry of a guilty plea in return, for example, for a reduced charge or sentence.<sup>223</sup> Thus, the military's practice of permitting plea bargaining and guilty pleas reflects the crime control-discipline model. It permits the system to assign guilt, sentence the offender, and send a signal to others in the command that such conduct is not tolerated, with a minimum of administrative difficulty (unless the Government is seeking the death penalty, in which case a guilty plea is not allowed).

On the other hand, there are real dangers lurking in taking guilty pleas from accused servicemembers who may not fully appreciate their options or otherwise feel the pressure from the command to plead guilty. To guard against coerced or unformed guilty pleas, the military judge must first conduct a full inquiry into the basis of the plea<sup>224</sup> and an inquiry into any pretrial agreement between the commander and the accused.<sup>225</sup> Those requirements are thus due process limits on a feature of military justice which reflects the crime control-discipline model.

*g. Nonunanimous Verdicts*

In the military justice system, only a two-thirds vote of the court-martial members is required to convict, unless the case is being tried as a capital case.<sup>226</sup> The verdict is set by the first vote of the members, which is by secret written ballot.<sup>227</sup> Thus, there are no hung juries in military practice. This feature furthers the crime control-discipline model in two ways. First, the prosecution need not convince all of the members of the

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<sup>223</sup> See SCHLUETER, *supra* note 20, ch. 9 (discussing pretrial agreements), ch. 14 (discussing entry of guilty pleas).

<sup>224</sup> United States v. Care, 40 C.M.R. 247 (C.M.A. 1969). This inquiry is referred to as the *Care* providency inquiry. The "paternalistic" thoroughness of this process has been criticized on the grounds that it places too great a burden on Military Judges and counsel to extract all the necessary facts from the accused. Major Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 240 (1991). This critique thus represents a crime control-discipline response to a due process-justice practice, advocating greater trust in the trial judge and fewer "formalities" before finding the accused guilty.

<sup>225</sup> United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

<sup>226</sup> UCMJ art. 52 (2012).

<sup>227</sup> MCM, *supra* note 17, R.C.M. 921(c). The MCM provides for procedures for reconsideration of a verdict by the members. *Id.* R.C.M. 924.

court-martial that an accused is guilty. Thus, the chances of a conviction seem higher. Second, this rule reflects efficiency, one of the features of the crime control model—even if the trial ends in an acquittal.

#### *h. Sentencing*

If an accused is convicted by a court-martial, either a military judge or the court-martial members who found the accused guilty, decide the sentence. The presentencing phase of trial typically happens immediately after guilty findings are announced, on the same day or the next day; there is no delay while presentencing reports are prepared or additional evidence is gathered. The commander who sent the case to the court-martial does not set the sentence. During sentencing, an accused is permitted to introduce evidence in extenuation and mitigation, and may make an unsworn statement. The type and amount of maximum punishment that may be imposed are generally determined by the jurisdictional limits of the court-martial involved<sup>228</sup> the nature of the proceeding,<sup>229</sup> and limits spelled out in the *MCM*.<sup>230</sup> The sentencing authority's discretion is otherwise unfettered; there are no "sentencing guidelines" and (except in certain very serious cases) no mandatory minimum sentences.<sup>231</sup>

In arguing for an appropriate sentence, the prosecution may make a general deterrence argument—which reflects the commander's interest in deterring others in the command from engaging in the same sort of behavior.<sup>232</sup> However, as noted at Part V.E.2.i below, some features of the sentencing process clearly reflect the due process approach.

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<sup>228</sup> SCHLUETER, *supra* note 20, § 16-2(B) at 983-84 (discussing jurisdictional limits on punishments).

<sup>229</sup> *MCM*, *supra* note 17, R.C.M. 810(d) (limits on punishments in rehearings, new trials, and other trials).

<sup>230</sup> *Id.* pt. IV. Part IV of the *MCM* lists the various punitive articles and the maximum sentence that may be imposed for each offense. In addition, the *MCM* includes "escalator" provisions. *See id.* R.C.M. 1003(d).

<sup>231</sup> Colonel Steven J. Ehlenbeck, *Court-Martial Sentencing With Members: A Shot in the Dark?*, 35 THE REPORTER 33, 34 (2008) (the minimum sentence for certain types of murder is life; the minimum sentence for spying is death).

<sup>232</sup> *See United States v. Meeks*, 41 M.J. 150, 158-59 (C.M.A. 1994) (holding prosecutor's argument was fair comment on preserving good order and discipline and general deterrence). Deterrence is one of several utilitarian justifications for punishment. *See PACKER*, *supra* note 154, at 39-45.

## 2. Features That Reflect the Due Process-Justice Model

### a. In General

As noted above, a number of commentators have stated that the current military justice system is justice based.<sup>233</sup> While that point is debatable, some features of the military justice system clearly reflect the due process-justice model. The following discussion addresses substantive and procedural protections.

### b. Application of Bill of Rights Protections to Commander's Control of Servicemembers

A commander has considerable control over the lives of servicemembers in his or her unit—a feature that reflects the crime control-discipline model. But case law recognizes constitutional limits to that control, for example, when a commander issues an order that infringes on a servicemember's freedom of speech<sup>234</sup> or religion<sup>235</sup> or a servicemember's privacy interests.<sup>236</sup> Those limits reflect the due process (substantive and procedural) justice model.

### c. Application of the Bill of Rights Protections During Pretrial Processing of Cases

During the pretrial investigation and processing of charges, an accused benefits from a number of constitutional, statutory, and regulatory protections. The Fifth Amendment privilege against self-incrimination applies to any interrogations of a suspect or to any request to produce incriminating information.<sup>237</sup> The Fourth Amendment applies to any search and seizure conducted by military or civilian authorities.<sup>238</sup> And the Sixth Amendment right to counsel applies to any eyewitness

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<sup>233</sup> See Part IV.D, *supra*.

<sup>234</sup> SCHLUETER, *supra* note 20, § 13-3(O)(4), at 717–28 (First Amendment rights).

<sup>235</sup> *Id.* § 13-3(O)(4), at 724–25.

<sup>236</sup> *Id.* § 13-3(O)(5), at 728–32.

<sup>237</sup> U.S. CONST. amend V; MCM, *supra* note 17, MIL. R. EVID. 301. The privilege against self-incrimination at court-martial is actually older than the Bill of Rights itself, and was afforded to Major John André during his Revolutionary War trial for spying. *United States v. Tempia*, 37 C.M.R. 249, 254 (1967).

<sup>238</sup> U.S. CONST. amend IV; MCM, *supra* note 17, MIL. R. EVID. 311–17.



identification procedures.<sup>239</sup> In each of these areas, however, the courts have recognized that the demands of good order and discipline may prevail.<sup>240</sup>

*d. Military Discovery Practices*

The military's pretrial discovery rules clearly reflect the due process-justice model.<sup>241</sup> First, under Article 46, the accused has discovery rights that equal those available to the prosecution. The accused is entitled to compulsory process to obtain both military and defense witnesses, sometimes at government expense.<sup>242</sup> That might include obtaining immunity for a defense witness.<sup>243</sup> Second, an accused may request that the government provide an expert consultant to assist the defense in preparing its case<sup>244</sup> and to testify at trial on behalf of the accused.<sup>245</sup> If an expert is assigned to assist the defense, that person becomes part of the defense team.<sup>246</sup> Third, the accused is entitled to have the prosecution automatically disclose the following information: names and contact information of prosecution witnesses,<sup>247</sup> evidence which is favorable to the accused,<sup>248</sup> evidence of any prior convictions,<sup>249</sup> and evidence of

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<sup>239</sup> U.S. CONST. amend VI; MCM, *supra* note 17, MIL. R. EVID. 321.

<sup>240</sup> *See, e.g., Burns v. Wilson*, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty").

<sup>241</sup> *See generally* Ronald S. Thompson, *Constitutional Applications to the Military Criminal Defendant*, 66 U. DETROIT L. REV. 221 (1989) (noting that although modifications have been made to substantive constitutional law rights, in order to maintain good order and discipline, an accused servicemember has enhanced protections in other areas such as discovery and witness production).

<sup>242</sup> Francis A. Gilligan & Frederick Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 MIL. L. REV. 1 (1983); Major Calvin M. Lederer, *Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses*, 98 MIL. L. REV. 1 (1982).

<sup>243</sup> Major Steven W. Myhre, *Defense Witness Immunity and the Due Process Standard: A Proposed Amendment to the Manual for Courts-Martial*, 136 MIL. L. REV. 69 (1992).

<sup>244</sup> *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999); Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143 (1996).

<sup>245</sup> MCM, *supra* note 17, R.C.M. 703(d).

<sup>246</sup> *See* SCHLUETER *supra* note 20, § 11-5, at 589–90 (noting that in that instance, communications between the defense and expert consultant may be privileged).

<sup>247</sup> MCM, *supra* note 17, R.C.M. 701.

<sup>248</sup> *Id.* R.C.M. 701(a)(6); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>249</sup> MCM, *supra* note 17, R.C.M. 701(a)(4).

statements by the accused,<sup>250</sup> evidence seized from the accused,<sup>251</sup> and evidence of any eyewitness identifications.<sup>252</sup> Fourth, if the command intends to convene a general court-martial to try an accused, it must first hold an Article 32 hearing to determine if there is a basis for the charges.<sup>253</sup> During that hearing, which is sometimes equated with a civilian grand jury,<sup>254</sup> the accused is entitled to be present, to present evidence, but perhaps more importantly, to hear the testimony of witnesses who will likely testify against him at a later trial.<sup>255</sup> Furthermore, even in a special court-martial, “[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.”<sup>256</sup> Thus, unlike in some civilian jurisdictions, the Government may not encourage its witnesses to refuse to talk to the defense outside of court.<sup>257</sup>

In addition, an accused may request production of evidence and information such as the results of any tests or reports,<sup>258</sup> tangible evidence and documents,<sup>259</sup> Jencks Act materials,<sup>260</sup> and sentencing information.<sup>261</sup>

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<sup>250</sup> *Id.* MIL. R. EVID. 304(d)(1).

<sup>251</sup> *Id.* MIL. R. EVID. 311(d)(1).

<sup>252</sup> *Id.* MIL. R. EVID. 321(c)(1).

<sup>253</sup> UCMJ art. 32 (2012). *See generally* Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 MIL. L. REV. 49 (1986) (discussing of Article 32 procedures); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173 (2006) (recommending that Congress revise Article 32 to require independent establishment of probable cause); Lieutenant Colonel Timothy A. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1 (1961) (examining Article 32 procedures).

<sup>254</sup> Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. ST. L.F. 25 (1973) (comparing Article 32 to grand jury).

<sup>255</sup> *See* SCHLUETER, *supra* note 20, § 7-2(C), at 426–31 (discussing accused’s rights at Article 32 investigation).

<sup>256</sup> MCM, *supra* note 17, R.C.M. 701(e).

<sup>257</sup> *See* United States v. Irwin, 30 M.J. 87, 93–95 (C.M.A. 1990).

<sup>258</sup> MCM, *supra* note 17, R.C.M. 701(a)(2)(B).

<sup>259</sup> *Id.* R.C.M. 701(a)(2)(A).

<sup>260</sup> 18 U.S.C. § 3500 (2012). United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978). *See generally* Don Burnette, *Workshopping the Jencks Act*, ARMY LAW., June 1987, at 22; First Lieutenant Stephen T. Lynch, *Possession Under the Jencks Act*, 10 A.F. JAG R. 177 (Dec. 1981); Major Orlan G. Waldrop, *The Jencks Act*, 20 A.F. L. REV. 93 (1978); Daniel Bogart, *Jencks Act*, 27 JAG J. 427 (1973); Major Luther C. West, *Significance of the Jencks Act in Military Law*, 30 MIL. L. REV. 83 (1965).

<sup>261</sup> MCM, *supra* note 17, R.C.M. 701(a)(5)(A).

These procedural protections strongly reflect the due process-justice model in that they are designed to ensure that an accused has access to any evidence which he may introduce on his behalf or which may be introduced against him at trial by the prosecution.

*e. Appointment and Role of Counsel*

Throughout the military justice system, lawyers play a pervasive and essential role. Their participation clearly reflects the due process-justice model. Lawyers advise commanders at all levels of command, for example on promulgation of lawful orders and policies, pretrial investigations,<sup>262</sup> decisions concerning prosecutorial discretion, responding to defense requests, and post-trial disposition of courts-martial.

On the defense side, lawyers represent the accused at virtually every stage of the proceedings—from pretrial investigation to appellate review. Defense counsel are typically assigned to separate legal chains of command, so that they are not directly responsible to the local commanders.<sup>263</sup>

The military system takes the role of counsel very seriously. The appellate courts review, and act upon, allegations of unprofessional or ineffective representation by both the prosecution<sup>264</sup> and the defense.<sup>265</sup>

*f. Use of Military Judges*

Another feature of the military justice system that reflects the due process-justice model is the appointment of military judges to preside over courts-martial. Their role is critical in ensuring that the rules of

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<sup>262</sup> Although we usually focus on the appointment of defense counsel, the fact that the system involves prosecutors at the early stage to advise commanders is also another factor that, whether intended or not, could have justice implications for the defendant. Lawyers can be effective in dissuading a commander from proceeding with baseless charges that run the risk of demoralizing the command.

<sup>263</sup> See, e.g., U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (3 Oct. 2011) (discussing U.S. Army Trial Defense Service).

<sup>264</sup> See SCHLUETER, *supra* note 20, § 13-3(N), at 704–08 (discussing prosecutorial misconduct).

<sup>265</sup> See *id.* § 15-2(C)(3), at 835–59 (discussing ineffective assistance of defense counsel).

procedure and evidence are applied and enforced. While the commander can control what takes place outside the courtroom, it is the judge who is charged with the responsibility of ensuring that an accused receives a fair trial.

*g. Guilty Plea Inquiries*

As noted in Part V.E.1.f, above, the ability of the prosecution and defense to efficiently resolve pending charges through entry of a guilty plea—most often accompanied by a pretrial agreement—reflects the crime control-discipline model. But there are concerns that the government may coerce an accused into pleading guilty and thus waive important constitutional rights that would be available in a contested trial.<sup>266</sup> To address that concern, the military courts and the *MCM*<sup>267</sup> require the military judge to conduct an inquiry into the voluntariness and factual basis of a guilty plea.<sup>268</sup> In addition, the military judge is required to determine if there is any agreement between the accused and the commander and, if so, review the agreement to ensure that it comports with law and sound policy.<sup>269</sup> Failure to conduct the inquiry may result in the guilty plea later set aside by an appellate court.<sup>270</sup> Accordingly, the requirement to conduct these inquiries reflects the due process-justice model.

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<sup>266</sup> See Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978) (proposing a new rule that would allow a defendant to issue proper notice of his constitutional claims, plead guilty, and claim on appeal the violation of those rights); Note, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564 (1980) (noting that conditional guilty pleas are an appropriate compromise between the benefits of the plea bargain system and the need to provide defendants with an adequate forum for the consideration of their constitutional claims).

<sup>267</sup> *MCM*, *supra* note 17, R.C.M. 910.

<sup>268</sup> *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). *Cf.* Elling, *supra* note 224 (recommending changing the law so that courts will not be always required to reject a guilty plea whenever an inconsistency arises).

<sup>269</sup> *United States v. King*, 3 M.J. 458 (C.M.A. 1977); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976).

<sup>270</sup> See, e.g., *United States v. Turner*, 35 M.J. 787 (A.C.M.R. 1992) (guilty plea improvident where element of offense was missing).

*h. Trial Procedures*

Virtually every aspect of a court-martial itself reflects the due process-justice model. As outlined in Part II.B, *supra*, an accused is entitled to the same protections and rights that exist in federal and state criminal trials. The court-martial is an adversarial proceeding and is designed, as is its civilian counterpart, to determine whether an accused is guilty of the charged offense—both factually and legally.

While most courts-martial are conducted quickly and efficiently, they sometimes reflect what Packer refers to as the “obstacles” of due process. For example, a military accused is entitled to file motions to dismiss, motions to suppress evidence, motions for appropriate relief, and motions for continuances. The motions practice in the current military justice system, in keeping with the due process-justice model, can slow things down. For commanders and others who are concerned about the good order and morale of the military community, the process can sometimes be very frustrating—especially if the proceedings are protracted.<sup>271</sup>

*i. Sentencing*

If an accused is convicted by a court-martial, either the military judge or the court-martial members who found the accused guilty will determine the sentence. During sentencing, the commander’s interest in ensuring that the accused does not return to the command (the crime control-discipline model) is restricted by two rules: First, prosecution witnesses on sentencing are not permitted to testify that in their opinion the accused should be discharged.<sup>272</sup> Second, the prosecutor may not urge the court or the military judge to impose a discharge as part of the

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<sup>271</sup> For example, the court-martial of Major Nidal Hasan at Fort Hood has drawn negative comments from the surviving victims of that shooting. *See, e.g.*, Jim Forsyth, *Trial Delays Vex Fort Hood Survivors Three Years Later*, CHI. TRIB., Nov. 4, 2012, [http://articles.chicagotribune.com/2012-11-04/news/sns-rt-us-usa-crime-fort-hoodbre8a403y-20121104\\_1\\_major-nidal-hasan-fort-hood-trial-delays](http://articles.chicagotribune.com/2012-11-04/news/sns-rt-us-usa-crime-fort-hoodbre8a403y-20121104_1_major-nidal-hasan-fort-hood-trial-delays).

<sup>272</sup> MCM, *supra* note 17, R.C.M. 1001(b)(5)(B); *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989). This approach, which seems to reflect interests in the individual’s rehabilitation versus the command’s interests, clearly fits Packer’s due process model. The one thing the command might not want, because it could adversely affect good order and discipline, is for a convicted servicemember to return to the unit. As a practical matter, if a servicemember did not receive a punitive discharge, the command would have the option of administratively separating that person. *See also* PACKER, *supra* note 154, at 53–58 (discussing rehabilitation as a justification for punishment).

sentence.<sup>273</sup> In sentencing an accused, the court-martial or the military judge may consider not only the impact of the accused's actions on the military community and any victims, but also the rehabilitative potential of the accused.<sup>274</sup> To that extent, military sentencing reflects the due process-justice model.

Furthermore, Rule for Court-Martial 1001, which governs presentencing procedures,<sup>275</sup> is broadly asymmetrical in favor of the defense. The Government is generally limited to evidence in aggravation of the crimes of which the accused was convicted, plus evidence of prior convictions and punishments, uncharged misconduct, information about the victim, and a *very* limited form of testimony about the accused's rehabilitative potential.<sup>276</sup> The Government is also bound by the Military Rules of Evidence.<sup>277</sup> The defense, in contrast, is allowed to introduce nearly anything about the accused himself (as well as the crimes) that may tend to reduce the punishment. The defense also has the option to relax the rules of evidence,<sup>278</sup> and if the convicted servicemember chooses to make an unsworn statement, he is not only not subject to cross-examination,<sup>279</sup> but his "allocution" rights allow him to speak about almost anything he wishes to try to influence his sentence.<sup>280</sup>

Once the accused has been sentenced, a commander may not increase the punishment.<sup>281</sup> The commander may, however, take action to reduce<sup>282</sup> or suspend the sentence.<sup>283</sup>

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<sup>273</sup> See, e.g., *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992).

<sup>274</sup> MCM, *supra* note 17, R.C.M. 1001(b)(5).

<sup>275</sup> *Id.* R.C.M. 1001.

<sup>276</sup> *Id.* R.C.M. 1001(b)(5); see also Edward J. O'Brien, *Rehabilitative Potential Evidence—Theory and Practice*, ARMY LAW., Aug. 2011, at 5, 11 & n.58 (calling into question whether the "rehabilitative potential" evidence the Government may introduce is ever really useful in enhancing a sentence).

<sup>277</sup> MCM, *supra* note 17, R.C.M. 1001(c)(3), (d), and (3). See also MCM, *supra* note 17, MIL. R. EVID. 1101.

<sup>278</sup> *Id.* R.C.M. 1001(c)(3). If the judge has relaxed the rules of evidence for the defense, the prosecution may request that the rules of evidence be relaxed for any rebuttal evidence. *Id.*

<sup>279</sup> *Id.* R.C.M. 1001(c)(2)(C).

<sup>280</sup> *Id.* R.C.M. 1001(c)(2).

<sup>281</sup> *Id.* R.C.M. 1107(d)(1).

<sup>282</sup> *Id.* R.C.M. 1107(d)(1).

<sup>283</sup> *Id.* R.C.M. 1108.

*j. Appellate Review of Court-Martial Convictions*

Finally, the one feature of the military justice system that perhaps best reflects the due process-justice model is the system's appellate review of courts-martial.<sup>284</sup> The system of appellate review is sometimes described as "paternalistic," a reference to the view that the crime control-discipline model may lead to incorrect results (at the command level) and that the appellate courts can correct such results.

As noted in Part II.C, above, court-martial convictions can be appealed to the relevant service's Court of Criminal Appeals,<sup>285</sup> and review by that court is automatic in certain cases.<sup>286</sup> An adverse decision by those courts may be reviewed by the CAAF.<sup>287</sup> And that court's decisions may be reviewed by the Supreme Court of the United States.<sup>288</sup> This system ensures that whatever may have occurred at the command level, appellate courts (both military and civilian) can review a court-martial conviction to ensure that the conviction comports with the Constitution, the UCMJ, and the *MCM*.

Within that structure are sub-elements that further the due process-justice model. First, the accused is entitled to representation by a military appellate attorney at no cost to the accused.<sup>289</sup> Second, the service appellate courts have independent fact-finding powers which provide a convicted servicemember with an opportunity to argue that the conviction should be set aside because the evidence was insufficient.<sup>290</sup> Occasionally a court-martial conviction is reversed on those grounds.<sup>291</sup>

Third, in reviewing court-martial convictions, the appellate courts apply standards of review similar to those used in civilian courts.<sup>292</sup> Fourth, the service appellate courts have the power to review and, if

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<sup>284</sup> See generally Daniel T. Ghent, *Military Appellate Process*, 10 AM. CRIM. L. REV. 125 (1971) (reviewing the military appellate process).

<sup>285</sup> UCMJ art. 66(a) (2012). The Judge Advocate General of each service must establish a Court of Criminal Appeals.

<sup>286</sup> A case *must* be referred to the service's court of criminal appeals if the sentence includes death, a punitive discharge, or confinement of one year or more. *Id.* art. 66(b).

<sup>287</sup> *Id.* art. 67.

<sup>288</sup> *Id.* art. 67 (2012); 28 U.S.C. § 1259 (2012).

<sup>289</sup> UCMJ art. 70 (2012).

<sup>290</sup> *Id.* art. 66(c) (2012); *MCM*, *supra* note 17, R.C.M. 1203(b) discussion.

<sup>291</sup> See, e.g., *United States v. McDuffie*, 65 M.J. 631 (A.F. Ct. Crim. App. 2007) (evidence insufficient to sustain conviction).

<sup>292</sup> See SCHLUETER, *supra* note 20, § 17-14, at 1166-75 (discussing standards of review).

necessary, to reassess the sentence.<sup>293</sup> In doing so, they may consider sentences adjudged in similar cases.<sup>294</sup> Fifth, the appellate courts may return the case to the trial level for a hearing on a specified issue.<sup>295</sup> And finally, the CAAF has used its review powers to conclude that a particular statute or provision is not enforceable.<sup>296</sup>

### 3. Summary of Application of the Models

While application of the crime control-discipline model and the due process-justice model to features of the military justice system is instructive, there seems to be no way to objectively determine how the two models fit together, or relate to each other. And one cannot simply add up the features that appear to reflect each model and come to a conclusion about whether one or the other predominates. At the most, they can provide some insight into how courts and commentators view one or more features of the system. In themselves they do not resolve the conundrum.

## VI. The Primary Purpose Approach to the Conundrum

While the thematic approach<sup>297</sup> and the models approach<sup>298</sup> help in identifying the competing ideologies and approaches to the conundrum, neither approach provides a satisfactory answer to the core question: What is the primary purpose of the military justice system? The answer usually depends on one's ideological approach to the purposes of any criminal justice system. The models approach identifies and explores the different ideologies. The thematic approach reflects the writer's "sound bite" views on those ideologies.

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<sup>293</sup> MCM, *supra* note 17, R.C.M. 1203(b) Discussion.

<sup>294</sup> *See, e.g.*, United States v. Smith, 15 M.J. 948 (A.F.C.M.R. 1983) (in some cases comparing sentences is appropriate); *Cf.* Lieutenant Colonel Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. LAW. REV. 79 (2010) (suggesting that comparing sentences leads to inconsistent results).

<sup>295</sup> United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). *See also* Andrew Effron, United States v. DuBay and the Evolution of Military Law, 207 MIL. L. REV. 1 (2011) (discussing the history and application of *DuBay* hearings).

<sup>296</sup> *See generally* Cooke, *supra* note 112 (analyzing the shift in balance of power from the military commanders to the judges and lawyers).

<sup>297</sup> *See* Part IV, *supra*.

<sup>298</sup> *See* Part V, *supra*.



But the question remains. What is the primary purpose of the military justice system? The answer lies in part in an objective analysis of the history and development of military justice. Historically, starting with the Articles of War, the system was treated as a way to permit the commander to exercise his powers to provide good order and discipline in his unit.<sup>299</sup> Through the decades the Articles of War were amended to reflect concern about the extent of that power and abuses in exercising that power. But the charter for the military justice system, if you will, remained. The system was established and retained for the primary purpose of discipline. The fact that Congress has placed limits on the commander's discretion does not change the ultimate purpose and function of the system.

When Congress enacted the UCMJ in 1950, it created a unified military justice system, which reaffirmed the commander's power and authority to enforce good order and discipline. For example, the commander's authority to impose nonjudicial punishment was reaffirmed.<sup>300</sup> The UCMJ included new provisions that addressed concerns about abuse of those powers—limits which we now consider to be due process, or justice, protections. Those provisions—though they inured to the benefit of persons accused of crimes—did not negate or diminish the primary purpose of military justice.

In the succeeding decades Congress has tweaked the UCMJ, for example by providing for Supreme Court review of court-martial convictions. But it has not in any way signaled a change in the basic, primary, purpose of the Code. The fact that some functions which were originally assigned to a commander are now assigned to lawyers or judges<sup>301</sup> does not alter the primary function of military justice: promoting good order and discipline.

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<sup>299</sup> See generally EDWARD M. BYRNE, *MILITARY LAW* 1 (2d ed. 1976) ("Military justice must, of necessity, promote good order, high morale, and discipline."); WINTHROP, *supra* note 14, at 21 (noting that preamble to 1775 Articles of War stated that Articles of War were intended for the "due order and regulating of the military"); FERRIS, *supra* note 8, at 446 (stating the primary purpose was to regulate military conduct of servicemen). In his treatise, Colonel Winthrop included a listing of other statutes under the heading, "Other Statutory Enactments Relating to the Discipline of the Army." WINTHROP, *supra* note 14, at 24.

<sup>300</sup> See Part V.E.1.e, *supra*.

<sup>301</sup> See generally COOKE, *supra* note 112 (analyzing the shift in balance of power from the military commanders to the judges and lawyers).

The preamble to the current *MCM* incorrectly signals to the casual reader that the first purpose of the military justice system is to provide justice and the secondary purpose is to promote good order and discipline.<sup>302</sup> The order of the list of purposes is a threat to the true primary purpose because it can be used by those espousing a stronger justice model to justify additional limits on the commander's powers—or even divesting the commander of essential powers and responsibilities needed to insure good order and discipline.

And focusing primarily on the justice component could be used to justify transferring powers traditionally held by the commander to a civilian prosecutor. The current military justice system reflects the principle that the commander is responsible for fighting and winning wars—a view expressed by the Supreme Court in *United States ex rel. Toth v. Quarles*.<sup>303</sup> Thus, the commander should have the power to maintain good order and discipline through the military justice system. The commander should not have to depend on a civilian justice system to enforce good order and discipline.<sup>304</sup>

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<sup>302</sup> *MCM*, *supra* note 17, pmb1.

<sup>303</sup> 350 U.S. 11, 17 (1955).

<sup>304</sup> The use of civilian prosecutors was recently addressed in the Appeals Chamber decision in *Prosecutor v. Ante Gotovina & Mladan Markač*. Gotovina and Markač had been tried and convicted by the International Criminal Tribunal for the Former Yugoslavia. In overturning their convictions, the Appeals Chamber considered whether Markač, as commander of the Special Police during Operation Storm in the 1990s, could be held liable for crimes committed by them. The court observed:

Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markač. *However, the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that "crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors."*

*Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (citations omitted, emphasis added). In effect, Markač was exonerated in part because he lacked the power to discipline those under his command. He had to depend on civilian authorities to enforce the discipline in his command. For further discussion of this decision, see Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013).

If the primary purpose and function of the military justice system is to promote good order and discipline, then what of the “justice” or “due process” element? The answer lies in recognizing the difference in laws that authorize or grant powers, and those that serve as limitations on the exercise of that power. The thrust of the Code—as of the Articles of War—is to recognize the commander’s authority to exercise good order and discipline. Provisions in the Code, the *MCM*, service regulations, and case law provide checks on the commander’s exercise of that authority. But those “justice” checks do not change the primary purpose and function of the system.

## VII. Conclusion and Recommendations

Applied together, the thematic approach, the models approach, and the primary purpose approach summarize the relationship between the “discipline” and “justice” elements as follows:

- First, the primary purpose of the military justice system is to enable commanders to enforce good order and discipline in their units.
- Second, the military justice system imposes due process protections on the exercise of those powers by the commander, the prosecutor, the court-martial, and the appellate courts reviewing a court-martial.
- Third, the due process limitations—although critical to any criminal justice system—must not overwhelm the primary purpose of military justice.

Using those principles, I offer two recommendations for addressing the conundrum: First, developing a template to apply the foregoing principles and second, amending the UCMJ and the *MCM* to reflect those principles.

The tensions evident in the conundrum will appear any time there is a proposal to amend the UCMJ or the *MCM*. In finding the right balance and combination of the two elements, the policy makers and those charged with considering changes or amendments to the military justice system must follow some sort of principled template. A helpful starting point in looking for a principled template is the approach the Supreme

Court used in deciding how much procedural due process is due to a person who is threatened with a deprivation of life, liberty or property. In *Mathews v. Eldridge*,<sup>305</sup> the Court provided a three-pronged balancing test:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>306</sup>

In *United States v. Weiss*,<sup>307</sup> the Supreme Court addressed the question of whether the military accused had been denied due process because the military judge did not have a fixed term of office. The accused argued that the Court should apply the three-pronged *Mathews* test. The government argued that the Court should apply the test adopted by the Court in *Medina v. United States*.<sup>308</sup> The Court rejected both arguments, stating that those tests were inapplicable in the military context. The test, said the Court, was set out in *Middendorf v. Henry*<sup>309</sup>: The question is whether the factors militating in favor of a particular right are so extraordinarily weighty as to overcome the balance struck by Congress.<sup>310</sup>

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<sup>305</sup> 424 U.S. 319, 335 (1976).

<sup>306</sup> *Id.* at 335.

<sup>307</sup> 510 U.S. 163 (1994).

<sup>308</sup> 505 U.S. 437 (1992). In *Medina*, the defendant had argued that the Court should apply the *Mathews* test in the context of a challenge to a state procedural law which placed the burden of showing incompetency on the defendant. The Court said that the *Mathews* test should be limited to civil cases and that the appropriate test for criminal cases was whether "the [rule in question] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445. The Court noted that the Bill of Rights provide explicit guidance for criminal procedure rules and that expansion of those guarantees under the Due Process Clause would "invite undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.* at 443. The Court assumed that the states would decide how best to adjust their procedural rules.

<sup>309</sup> 425 U.S. 25 (1976).

<sup>310</sup> *Weiss*, 510 U.S. at 177.

This approach, however, assumes that Congress has applied some sort of test or template in crafting the UCMJ and in considering any subsequent amendments. Thus, the Court left to Congress the task of addressing the conundrum and deciding how to balance the military's interest in good order and discipline and the rights of a servicemember to due process of law. Congress, in Article 36 of the UCMJ, authorized the President to formulate policies and procedures for implementing the UCMJ. In considering changes to the military justice system the policy makers—whether in Congress, the White House, or in the Department of Defense—should consider the following questions.

- First, what military interests, e.g., good order and discipline, will be furthered by the provision in the UCMJ, the Manual, or the regulation?<sup>311</sup>
- Second, what benefits, if any, will the provision provide to the servicemember?<sup>312</sup>
- Third, what burdens, if any, will the provision place on the military justice system?<sup>313</sup>

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<sup>311</sup> The attention of those suggesting reforms or changes almost always focuses on expanding the rights of an accused. But in reality, there have been changes to the UCMJ over the years that recognized the need of commanders to maintain good order and discipline by expanding jurisdiction, see Part V.E.1.b, *supra*. The same is true for changes to the *MCM*. For example, the Military Justice Act of 1983 and the 1984 version of the Manual simplified greatly the requirements for preparing legal post-trial recommendations. Those reviews could properly be included in those features of the military justice system that protected the accused; but they consumed a great deal of time and were a constant source of problems, which resulted in many courts-martial records being returned to the trial level for corrective action. See SCHLUETER, *supra* note 20, § 17-8(B)(2), at 1117 (discussing problems with post-trial recommendations). The process was further streamlined in 2008 and 2010. *Id.* at 1120–21.

<sup>312</sup> This, in effect, is the flip side of the cost factor, listed above. Consider the example of the changes in the *MCM* that resulted in greatly simplifying of post-trial recommendations. Arguably, the accused lost a chance to challenge the technical failures in the recommendation, but the government was able to reduce the amount of time and resources in preparing what had become a very complicated and detailed report.

<sup>313</sup> For example, in 2009, the Cox Commission recommended that all general and special courts-martial be reviewable by the service appellate courts, regardless of the sentence adjudged and that a servicemember could seek review at the Supreme Court, even if the Court of Appeals of the Armed Forces did not hear the case. NAT'L INST. OF MILITARY JUSTICE AND THE MILITARY JUSTICE COMM., CRIMINAL JUSTICE SECTION OF THE AM. BAR ASS'N, REPORT OF THE COMMISSION ON MILITARY JUSTICE (Oct. 2009), available at [http://www.stripes.com/polopoly\\_fs/1.128855.1292429643!/menu/standard/file/coxreport.pdf](http://www.stripes.com/polopoly_fs/1.128855.1292429643!/menu/standard/file/coxreport.pdf). Those changes would certainly expand the due process rights of an accused. But it

This model roughly approximates the *Mathews v. Eldridge* test. Although the Supreme Court has said that this test was inapplicable to its review of military justice provisions, it should still remain useful to those charged with considering changes to the military justice system.<sup>314</sup> Addressing these questions helps frame the policymaker's approach to the conundrum—keeping in mind that the primary function of the military justice system is to promote good order and discipline.

With regard to the second recommendation—to amend the UCMJ and the *MCM* to reflect the three principles stated above—Congress should add a clear statement of purpose to the Code. It could be included in Article 1 and generally follow the form used in the preamble to the *MCM*.

In that regard, the Preamble to the *MCM* should be amended to put good order and discipline in first place, as the true primary purpose of military justice, but also recognize the need to provide due process of law to those accused of committing offenses in the Armed Forces:

The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.<sup>315</sup>

Changing the preamble and including similar language in the UCMJ would be a step in the right direction. In doing so, Congress and the President have an opportunity to resolve the military justice conundrum.

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would result in additional costs of time, personnel, and financial resources. Given the Supreme Court's record of granting full review in very few cases each year, those costs would be difficult to justify. The accused would still be able to seek collateral relief in the federal courts.

<sup>314</sup> *Medina v. California*, 505 U.S. 437, 453 (1992) (O'Connor, J, concurring) (noting that “the balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases”).

<sup>315</sup> This proposal uses the term “due process” of law. Although the term can be ambiguous, it is preferable to the more ambiguous term, “justice.”