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Back to the Future With the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline

Anthony J. Ghiotto

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BACK TO THE FUTURE WITH THE UNIFORM CODE OF MILITARY JUSTICE: THE NEED TO RECALIBRATE THE RELATIONSHIP BETWEEN THE MILITARY JUSTICE SYSTEM, DUE PROCESS, AND GOOD ORDER AND DISCIPLINE

ANTHONY J. GHIOTTO*

ABSTRACT

The military justice system is unique. At the center of this system is not a judge or even an attorney, but rather a military commander. The commander has the authority to charge service members with offenses, refer these cases to courts-martial, select the panel member who will hear the case, and to then review the findings and sentences adjudged by the court-martial. The primacy of the commander stems from the dual goals of the military justice system: to preserve good order and discipline, while also ensuring justice is achieved. Recently, though, reformers have argued that commanders have failed the system. Highlighting the recent increase in military sexual assaults and the rash of service member misconduct during deployment, these reformers argue that commanders should be removed from the military justice system. This paper argues, however, that it is not the commanders that failed the military justice system, but rather the military justice system that failed the commanders.

For commanders to ensure service members abide by their orders, they must be able to effectuate punishment that is credible and transparent. Simultaneously, this punishment must be viewed as legitimate. A balanced military justice trinity weighing good order and discipline, due process, and the military justice system provides the commander with these tools. The current system, though, does not present this balance. The gradual increase of due process into the military justice system has rendered the court-

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martial an obsolete tool, and consequently commanders rarely utilize it. Thus, commanders lack the capability to deter service member misconduct. This paper argues that only by restoring the balance, specifically by scaling back the extra-constitutional due process rights afforded to accused service members, can commanders effectively combat the increase in service member misconduct.

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I. INTRODUCTION

Despite the wears of Iraq and Afghanistan, the United States continues to possess the world’s preeminent military force. And at the core of any successful military unit is good order and discipline. Good order and

discipline is, as George Washington remarked, “the soul of an Army.”¹ During the recent decade of war, however, cracks emerged in the military’s foundation of good order and discipline, both in garrison and in the deployed environment. Two events have come to symbolize these cracks: the killing of twenty-four innocent Iraqi civilians by service members in Haditha, Iraq, and the dramatic increase in service members sexually assaulted by other service members.²

The intense nature of these events captured the public’s attention as to the apparent breakdown of good order and discipline within the military, and the military’s responses to these events have led to calls for dramatic reforms. In Haditha, only one of the Marines involved was convicted in a court-martial, which resulted in the convening authority approving no confinement.³ Regarding sexual assault, two Air Force convening authorities set aside the sexual assault convictions of two officers, undermining the sexual assault reform efforts of senior military leaders.⁴

1. John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., 1, 6 (Mar. 2000).

2. DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES: MILITARY JUSTICE IN CASES OF U.S. SERVICE MEMBERS ALLEGED TO HAVE CAUSED THE DEATH, INJURY OR ABUSE OF NON-COMBATANTS IN IRAQ OR AFGHANISTAN 154-82 (2013). On November 19, 2005, Marines reported a small arms fire attack from homes within Haditha, Iraq. *Id.* at 155. The battalion proceeded to clear several homes. *Id.* The Marine Corps battalion suffered an IED attack, resulting in the death of a popular battalion Marine and two other Marines wounded. *Id.* In the operation’s aftermath, an investigation revealed that twenty-four unarmed Iraqi non-combatants, including women, children, and elderly, were killed by the Marine battalion. *Id.* at 156. In November 2013, the Department of Defense released that it received 3,553 complaints of sexual assault within the military for the first three quarters of fiscal year 2013—a 50% increase from the total number reported for fiscal year 2012. See Jennifer Steinhauer, *Reports of Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html?_r=0. Similarly, a Department of Defense survey revealed that in 2011, 26,000 service members related in the survey that they were the victims of sexual assault, whereas only 19,000 answered as such in 2010. *Id.*

3. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 154-55, 164. Marine Corps commanders preferred charges against six of the battalion members, including the battalion commander. *Id.* at 154-55. Prior to court-martial, however, charges were dropped against five of the members, including the battalion commander, who instead was forced into early retirement. *Id.* Staff Sergeant Frank Wuterich faced a general court-martial, where he was charged with three specifications of violating Article 92, Dereliction of Duty; nine specifications of violating Article 119, Voluntary Manslaughter; two specifications of Article 128, Aggravated Assault; and one specification of Article 134, Obstruction of Justice. *Id.* at 164. In the midst of trial, Sergeant Wuterich and the convening authority reached a pretrial agreement where, in return of Sergeant Wuterich’s plea of guilty to one specification of dereliction of duty, the convening authority would dismiss the remaining charges and their specifications. *Id.* Sergeant Wuterich was sentenced to confinement for ninety days, reduction in grade to E-1, and forfeiture of \$984.06 pay per month for three months. *Id.* Pursuant to the pretrial agreement, the convening authority did not approve the confinement portion of the punishment. *Id.*

4. See James Risen, *Hagel to Open Review of Sexual Assault Case*, N.Y. TIMES, March 11, 2013, <http://mobile.nytimes.com/2013/03/12/us/politics/hagel-to-open-review-of-sexual-assault-case.html>. In November 2012, a panel of military officers found Lt. Col. James Wilkerson guilty

Multiplied by several acts of sexual misconduct across the military departments, the military command's failure to adequately address these events resulted in Senator Kirsten Gillibrand introducing legislation to dramatically alter the military justice system.⁵ Supported by several legal scholars and victim advocates, Senator Gillibrand proposed removing the commander's authority to prosecute service members for any offense that could result in an excess of one year of confinement, with some exceptions for military specific offenses, and instead placing such authority in a judge advocate with a rank of O-6 or above.⁶

Although Senator Gillibrand's bill failed to receive the sixty Senate votes necessary to survive a filibuster, fifty-five senators voted in favor of

of sexual assault in violation of Article 120, UCMJ. *Id.* The members sentenced Lt. Col. Wilkerson to one year of confinement and a dismissal from the Air Force. *Id.* The conviction stemmed from an allegation by a civilian female who reported that Lt. Col. Wilkerson sexually assaulted her when she was asleep at his home. *Id.* After his conviction, the general court-martial convening authority, Lt. Gen. Craig Franklin, set-aside the conviction pursuant to his authority under Article 60, UCMJ. *Id.* Reportedly, he subsequently attempted to promote Lt. Col. Wilkerson and provide him with a command. *Id.* In February 2012, Lt. Gen. Susan Helms set-aside Capt. Matthew Herrera's sexual assault conviction. Craig Whitlock, *General's Promotion Blocked Over Her Dismissal of Sex-Assault Verdict*, WASH. POST, May 6, 2013, http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html. Previously, a panel of officers convicted Capt. Herrera of sexually assaulting a female Air Force lieutenant and sentenced him to sixty days of confinement and a dismissal. *Id.*

5. S. 967, 113th Cong. (2013). Section 2(a)(3) provides:

[T]he disposition of charges pursuant to paragraph (1) shall be subject to the following: (A) The determination whether to try such charges by court-martial shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O-6 or higher who – (i) are available for detail as trial counsel under section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice).

Id. at § 2(a)(3).

Section 2(a)(1) further provides:

This provision is “with respect to charges under Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), that allege an offense, other than an offense specified in paragraph (2), that is triable by court-martial that chapter for which the maximum punishment authorized under that chapter includes confinement for more than one year

Id. at § 2(a)(1).

The excluded offenses, per section 2, are:

(A) An offense under sections 883 through 891 of title 10, United States Code (articles 83 through 91 of the Uniform Code of Military Justice). (B) An offense under sections 893 through 917 of title 10, United States Code (articles 93 through 117 of the Uniform Code of Military Justice). (C) An offense under section 933 of title 10, United States Code (article 133 of the Uniform Code of Military Justice).

Id. at § 2(a)(2).

6. See Richard L. Able et al., *Law Professor's Statement on Reform of Military Justice* (2013), <http://www.law.yale.edu/documents/pdf/conference/LawProfessorsStatement.pdf>.

the bill.⁷ Most strikingly, the bill received bipartisan support, with forty-four Democrats and eleven Republicans voting for the bill.⁸ Beyond the Senate vote, sexual assault and the military's supposed inability to address it now permeate American culture, serving as the subject of the Academy Award nominated documentary *The Invisible War* and as a major plotline on *House of Cards*, a popular television show.⁹ The military departments must heed the Senate vote and the continued public interest as an indication that reform to the military justice system is coming, and it may be dramatic.

Acknowledging that reform is inevitable, the military departments must first answer the why question—why the increase in the severity and frequency of service member misconduct? Only after answering that question can they move onto the how question—how do we fix it? These are complicated questions, with each proposed answer having second and third order effects, but the military departments possess the strategic framework to tackle them.

Military professionals tend to turn to Carl von Clausewitz when faced with perplexing strategic questions.¹⁰ In *On War*, Clausewitz views war as a “paradoxical trinity—composed of primordial violence, hatred, and enmity.”¹¹ Each of these prongs “are like three different codes of law, deep-rooted in their subject and yet variable in their relationship to one another.”¹² Indeed, “[a] theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless.”¹³ As such, Clausewitz burdens the strategist with developing “a theory that maintains a

7. Darren Samuelsohn, Juana Summers, & Anna Palmer, *Kirsten Gillebrand's Sexual Assault Bill Derailed*, POLITICO (March 6, 2014), <http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html>.

8. *Id.* This vote proved especially bipartisan with the Republic Senate Majority Leader, Mitch McConnell, and leading Tea Party affiliated Senator, Ted Cruz, voting in favor of the bill, along with several prominent liberal Democrat senators, including Senator Gillibrand. *Id.*

9. On season 2 of *House of Cards*, a Netflix streaming online show, the primary female antagonist, Claire Underwood, related that a Marine General previously sexually assaulted her, causing other victims to come forward. HOUSE OF CARDS (Netflix 2014). Consequently, emboldened by her husband's position as the Vice President of the United States, she advocated for the passing of a bill that would take the disposition of sexual assault cases out of the military chain-of-command and increase civilian control of the military justice system. *Id.* This plot line lasted the entire season and proved to be essential to the show's main plot.

10. See CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., Princeton Univ. Press 1989). Military doctrine is peppered with references to Clausewitz, especially joint and Army publications. Similarly, Clausewitz forms the foundation for much of the military departments' development education.

11. *Id.*

12. *Id.*

13. *Id.*

balance between these three tendencies, like an object suspended between three magnets.”¹⁴

The Clausewitzian trinity can be applied to the rash of service member misconduct to not only understand why it has occurred, but also to guide reform efforts. Instead of a paradoxical trinity composed of primordial violence, hatred, and enmity, however, service member misconduct consists of a paradoxical trinity composed of good order and discipline, the military justice system, and due process.

Military justice, good order and discipline, and due process are all unique and operate independently of one another. Simultaneously, they depend upon one another; the military justice system serves as the legal structure by which the military enforces good order and discipline. And due process provides legitimacy and a sense of justice to both the military justice system and good order and discipline. Problems arise when reform efforts fail to maintain the appropriate balance between these tendencies because strengthening one prong potentially weakens the other two.

As the governmental branch ultimately responsible for the military justice system, Congress failed to maintain an appropriate balance between these three tendencies. Following World War I, Congress incrementally increased the amount of due process afforded to accused service members. With the increased strength of the due process prong, the military justice system and good order and discipline suffered. The military justice system, specifically the court-martial process, became an ineffective tool for commanders to effectuate good order and discipline. In turn, good order and discipline waned, culminating in the recent breakdowns. Therefore, the military departments should drive Congress to aim its reform efforts at developing the appropriate balance between good order and discipline, the military justice system, and due process.

Section II analyzes the historical development of military justice. It highlights the fact that military justice originally consisted of a military justice system conflated with good order and discipline: a system with few due process rights afforded to accused service members. Gradually, though, Congress and the military departments increased the role of due process, resulting in the military justice trinity present today. Section III assesses the impact that the increased role of due process has on the military justice system. It argues that increases in due process have severely limited commanders' use of the court-martial as a tool to preserve good order and discipline. Section IV examines the relationship between the marginalization of the court-martial as a tool for good order and discipline.

14. *Id.*

It posits that without the court-martial commanders are limited in their ability to deter misconduct within their units. Section V provides recommendations designed to balance the military justice trinity.

II. THE FORMATION OF THE MILITARY JUSTICE TRINITY: FROM A MILITARY JUSTICE SYSTEM DOMINATED BY GOOD ORDER AND DISCIPLINE TO ONE DOMINATED BY DUE PROCESS

Depending on whom one speaks to, the United States' system of military justice is either the gold standard¹⁵ or "is to justice as military music is to music."¹⁶ The difference in opinion stems from the military justice trinity, which is composed of due process, good order and discipline, and the military justice system. In different times, one prong may weigh more heavily than the others, and interested observers, including service members, policy makers, and scholars, assess the system based on which prong is most important at that time. The military justice system is dynamic, and the relationship between each prong is ever-changing. If one narrative stretches throughout the history of military justice, however, it is the increased role of due process. At its inception, military justice was not a trinity, but consisted of a military justice system designed solely to effectuate good order and discipline. The Articles of War, the founding legislation for military justice, constricted due process in favor of commanders being able to exercise quick and severe discipline. As the services grew and more Americans encountered the military justice system, service members began to demand due process rights. The Congress and the military responded with incremental due process rights that subsequently created the trinity and today's system.

A. THE MILITARY JUSTICE SYSTEM UNDER THE ARTICLES OF WAR

The Articles of War proved to be a lasting and flexible contribution to the development of the military justice system. Arising during the Revolutionary War, the Articles of War guided military justice into the Mexican-American War, the Civil War, World War I, and World War II. During each of these wars, the Articles of War placed the primacy of the commander—often the battlefield commander—at the center of military justice. Another constant, though, during the Articles of War period was

15. Kenneth M. Theurer and James W. Russell, III, *Why Military Justice Matters*, 37 THE REPORTER 10 (Summer 2010).

16. ROBERT SHERRIL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 2 (1970). The quote derives from French Prime Minister Georges Clemenceau. *Id.*

the call for reform. After each major conflict, veterans, who often saw the abuses of unbridled command discretion firsthand, returned with calls for reform. It is from these calls for reform that due process entered into the military justice system.

1. *The Articles of War: The Primacy of Good Order and Discipline*

The Constitution provides Congress with the authority “to raise and support Armies,” “to provide and maintain a Navy,” and “to provide for organizing, arming, and disciplining” the militia.¹⁷ Under these provisions, the nation’s founders signaled that the authority for military justice resided not in the civilian Article III courts, but rather with Congress.¹⁸ Pursuant to this authority, Congress implemented the Navy and Army Articles of War, which provided the legal mechanism to ensure good order and discipline within the nascent American armies and navies.¹⁹

By balancing an accused service member’s due process rights against the need for good order and discipline, these Articles captured General William Sherman’s oft quoted description of military justice:

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

17. U.S. CONST. art. I, § 8. The Supreme Court has afforded great “deference to the determination of Congress made under its authority to regulate the land and naval forces.” *Weiss v. United States*, 510 U.S. 163, 177 (1994). See also James B. Roan and Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185 (2002).

18. David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 16 (2013). See also *Chappel v. Wallace*, 462 U.S. 296, 302 (1983) (quoting *Gilligan v. Morgan*, 413 U.S. 1 (1973)) (“[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”); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TULSA J. COMP. & INT’L L. 419, 427 (2008).

19. See WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES* 5-13 (1973). See also Hansen, *supra* note 18, at 427.

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.²⁰

Legal scholars in the post-Civil War era formalized Sherman's view of military justice solely as a means to ensure strict discipline. William Winthrop, an Army Judge Advocate, published the leading treatise on military justice at the end of the 19th Century.²¹ In his treatise, Winthrop provided: "It follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein."²²

As such, the Articles of War conflated good order and discipline with the military justice system, finding little role for due process rights. A commander had the authority to charge service members without conducting an investigation or rendering an oath, and accused service members did not possess the right to an attorney.²³ In fact, attorneys were marginalized from the process. The Articles did not require a military judge or a defense attorney.²⁴ Nor did they even require the prosecutor be an attorney.²⁵ The commander selected the court officers who would decide the case, and the commander had the sole authority to review the case upon its completion.²⁶ At that stage, the commander possessed the authority to set aside a conviction and to find a service member guilty if the court-martial found him not guilty.²⁷ The commander was subject to little, if any, review of his determinations.²⁸ With the absence of due process, commanders utilized courts-martial to rapidly mete out punishment and secure good order and discipline.

2. *World War I and the Calls for Reform*

At the onset of World War I, service member misconduct remained governed by nearly the same Articles of War present since the Revolution. The events of the war led some to question whether the military justice

20. Schlueter, *supra* note 18, at 21 (quoting Letter to General W. S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879)).

21. GENEROUS, *supra* note 19, at 7.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 8.

27. *Id.*

28. *Id.*

system required modernization—specifically increased due process rights for accused service members. Brigadier General Samuel Ansell led the calls for reform. Ansell served as the Army’s acting Judge Advocate General (“JAG”), after the Army’s JAG, Major General Enoch Crowder, left to serve temporarily as the Provost Marshall General.²⁹ Upon assuming his position, Ansell “suffered from a number of frustrations.”³⁰ Primarily, he was “repeatedly shocked by the sentences handed down by Army courts-martial, and his utter powerlessness to do anything to correct them.”³¹ A case involving thirteen African American soldiers who were tried, sentenced to death, and executed for mutiny before any higher authority was even notified of the trial especially concerned Ansell.³²

Ansell’s experiences during World War I led him to advocate for a dramatic overhaul of the military justice system. He advocated for a “radically new concept of military law, one which would divorce the court-martial from the commanding officer and move into the vacuum thus created lawyers, civilianlike rules of procedure and evidence, and a complex system of appellate review to filter out whatever remnants of past attitudes still remained.”³³ To Ansell, the Articles of War, with their lack of due process, “was designed for the Government of the professional military serf of another age.”³⁴ Spurred by Ansell’s advocacy, Congress introduced sweeping legislation that would (1) require commanders to make charges under oath and thoroughly investigate the charges before being brought to trial, (2) establish a “court judge advocate” who would perform the duties of trial judge, (3) provide that court members would be selected by the staff judge advocate from a panel of officers supplied to him by the convening authority, (4) require a sufficient number of enlisted court members when the accused was enlisted, (5) abolish the reviewing power of the commanding officer except for clemency authority, and (6) establish a court of military appeals where judges would have life tenure and cases involving certain severe punishments would warrant automatic review.³⁵

Congress declined to pass Ansell’s dramatic reforms. However, Congress did provide additional due process protections to accused service members in the 1920 Articles of War.³⁶ The new Articles “greatly changed

29. *Id.* at 5.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 8-9.

34. *Id.* at 9.

35. *Id.* at 8.

36. *Id.* at 9.

pretrial procedure by requiring sworn charges, a ‘thorough and impartial’ investigation, and expert legal advice for the commanding officer before he convened a court.”³⁷ Furthermore, the 1920 Articles created a “law member” who served as a voting member of the court and was assigned some duties of a traditional trial judge, mainly the authority to rule on the admissibility of evidence and to instruct the court on its responsibilities and on the applicable law.³⁸ Also, the new Articles required defense attorneys for all “but the lowest form of court-martial.”³⁹ Additionally, the 1920 revisions prevented commanders from imposing findings of guilty when accused service members were acquitted in trial.⁴⁰

Despite the increased due process, the 1920 Articles of War continued to emphasize the interconnectedness of the military justice system and good order and discipline at the cost of due process. The Articles afforded a “law member,” but did not require that this individual actually be an attorney.⁴¹ These provisions also limited the law member’s power by allowing the other court members to out-vote any ruling or determination made by the law member.⁴² Most dramatically, the first page of the revised Articles of War provided that military law is due process of law to those in the military service of the United States.⁴³ To support this statement, the Articles cite to two Supreme Court cases: *Reaves v. Ainsworth* and *U.S. ex rel. French v. Weeks*.⁴⁴ In both these cases, the Supreme Court recognized that “[t]he courts are not the only instrumentalities of government. They cannot command or regulate the army.”⁴⁵ Consequently, under these cases, due process rights for accused service members arise not out of the Constitution or the courts but from Congress’s power to regulate the military.

3. *World War II and the Increased Call for Due Process*

Wars tend to serve as watershed moments for military justice, whereas interest in military justice wanes in peacetime. Although the trinity remained largely untouched after World War I, World War II proved to be a

37. *Id.* at 10.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Articles of War: Hearing on S. 64 Before the S. Comm. on Military Affairs, 66th Cong. 36 (1920).

44. *U.S. ex rel. French v. Weeks*, 259 U.S. 326 (1922); *Reaves v. Ainsworth*, 219 U.S. 296 (1911).

45. *Reaves*, 219 U.S. at 306; *see also U.S. ex rel. French*, 259 U.S. at 335 (finding that civil courts could not overturn decisions of military tribunals acting under Congress’s power).

dramatic turning point in military justice. During the course of the war, approximately 80,000 service members were convicted by general court-martial, “an average of nearly sixty convictions by the highest form of military court . . . every day of the war.”⁴⁶ Overall, courts-martial of all types returned approximately two million convictions during the war.⁴⁷ These dramatic numbers, coupled with the overwhelming force used to fight the war, brought many Americans face-to-face with the military justice system. When faced with the reality of a military justice system with limited due process, returning service members called for reform.

These calls for reform led the department secretaries to establish several committees to examine military justice during World War II.⁴⁸ The majority of these studies reflected flaws in the military system, mostly focusing on the lack of due process. For example, the Vanderbilt Committee found fault with seven major areas: (1) a lack of attention to, emphasis on, and planning regarding military justice matters as a whole; (2) not enough qualified service members to serve as court officers and officials; (3) commanding officers frequently dominated the courts; (4) inadequate defense counsel; (5) sentences were frequently disproportionately severe; (6) discrimination between officers and enlisted members, both in the preferral of charges and in handing down convictions and sentences; and (7) inefficient and inadequate pretrial investigations.⁴⁹ Another study lamented that in its review of 2,115 cases, nearly half of them contained “flagrant miscarriages of justice.”⁵⁰ A civilian judge at this time described a 1948 court-martial as “saturated with tyranny.”⁵¹

A consensus arose from these committees: the military justice system and good order and discipline could not be conflated with one another. The committees began to view military justice as a balance between the military justice system and good order and discipline. Professor Edmund Morgan, the head of the Vanderbilt Committee, stated before Congress: “we are convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we are equally determined that it must be designated to administer justice.”⁵² Similarly, the Vanderbilt Committee report concluded:

46. GENEROUS, *supra* note 19, at 14.

47. *Id.*

48. *Id.* at 15-17.

49. *Id.* at 16.

50. *Id.* at 18.

51. ELIZABETH LUTES HILLMAN, DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL 14 (2005).

52. Schlueter, *supra* note 18, at 29-30 (quoting INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 606 (2000 Reprint, Hein)).

A high military commander pressed by the awful responsibilities of his position and the need for speedy action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment, 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 the 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.⁵³

Thus, at the end of World War II, justice was no longer viewed merely as an impediment to good order and discipline. Instead, critics of the system began to assert that justice could enhance good order and discipline by providing a sense of legitimacy and fairness to the commander's efforts to preserve good order and discipline. The focus then turned to how the military justice system could achieve that balance by providing a sense of justice and fairness to the process while also enabling the commander to preserve good order and discipline. Reformers found the answer in due process and the Uniform Code of Military Justice ("UCMJ").

B. REFORM IS HERE: THE UNIFORM CODE OF MILITARY JUSTICE AND THE MANUAL FOR COURTS-MARTIAL

After World War II, reformers demanded revision of the military justice system. They called specifically for the addition of the due process rights afforded to accused individuals in the civilian world. The issue soon became what the scope of these reform efforts would be and who would lead the charge: Congress or the Executive branch. Reformers achieved compromise and balance through two acts of legislation: the UCMJ and the Manual for Courts-Martial.

1. *The Uniform Code of Military Justice*

Congress enacted the UCMJ in an attempt to strike the appropriate balance between good order and discipline and the military justice system.

53. *Id.* at 29-30 (quoting REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 5 (1946), available at http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf).

Its primary method of doing so was by increasing the due process rights afforded to accused service members. The Congressional debate over the UCMJ focused on the role of commanders.⁵⁴ Advocates of reform argued in favor of placing increased restrictions on the commander and thereby increasing the role played by attorneys.⁵⁵ In contrast, opponents of reform insisted that “[y]ou cannot maintain discipline by administering justice” and warned about the costs of increasing the role of attorneys.⁵⁶ Ultimately, the UCMJ passed into law reflected a compromise between these views. Commanders would prefer charges, direct the pretrial investigation, refer charges to trial, and appoint counsel, law officers, and court members.⁵⁷ Commanders would also serve as the first “reviewer” of the results of trial.⁵⁸ Notably, the UCMJ failed to require attorneys to serve as military judges.⁵⁹ Nonetheless, the UCMJ provided for a lawyer at the pretrial investigation, prosecutorial and defense lawyers at the trial and appellate level, and an all-civilian Court of Military appeals.⁶⁰ Overall, the UCMJ established “a procedural and substantive criminal law that applied across the Army, Navy, Air Force, Marine Corps, and Coast Guard” with an increased emphasis on due process rights.⁶¹

2. *The Manual for Courts-Martial*

Once President Truman signed the UCMJ into law in 1950, military attorneys began to advocate for a Manual for Courts-Martial (“MCM”).⁶² To many, the UCMJ amounted to a “skeleton whose framework will be filled in by a law manual.”⁶³ The drafters of the UCMJ anticipated this need for a manual in drafting the UCMJ and created Article 36, which

54. See generally INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (2000 Reprint, Hein). See also GENEROUS, *supra* note 19, at 34-53.

55. GENEROUS, *supra* note 19, at 46-49.

56. *Id.* at 48. Representative Frederick Wiener served as an Army Judge Advocate during World War II and rose to the rank of colonel. During the debate concerning the UCMJ, Rep. Wiener became a vocal supporter of the Articles of War motivated by the belief that “[t]he object of armed forces is to win wars, not just fight them [but] win them, because they do not pay off on place in a war.” Articles of War: Hearing on H. R. 2498 Before the S. Comm. on Armed Services, 81st Cong. 779 (1949). Concerning the role of military attorneys, Rep. Wiener warned the House of Representatives by quoting General Sherman, stating “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 jurisdiction.” *Id.* at 780.

57. GENEROUS, *supra* note 19, at 51.

58. *Id.*

59. *Id.*

60. *Id.*

61. HILLMAN, *supra* note 51, at 14.

62. GENEROUS, *supra* note 19, at 54.

63. *Id.*

provided the President with the authority to “prescribe rules . . . [of] procedure, including modes of proof, in cases before courts-martial.”⁶⁴ To guide the President, the UCMJ provided that he “shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”⁶⁵ The only congressional oversight the provision required was the requirement that the President report the rules to Congress annually.⁶⁶ By establishing the authority to create the MCM and delegating it to the President, Congress provided an additional means to bestow due process rights upon accused service members. Similarly, the MCM provided a means to increase the “civilianization” of the military justice system by allowing the President to apply principles of law recognized in the federal system.

C. MILITARY JUSTICE UNDER THE UCMJ AND MCM

The UCMJ attempted to balance due process and good order and discipline by preserving the role of commander while also increasing due process protections. Furthermore, the MCM attempted to establish a role for the Executive branch in the military justice while also ensuring a continued role for Congress. These balances, though, left a fair amount of ambiguity, which in turn allowed other entities, such as the military courts and Congress, to continue to increase the amount of due process afforded in the military justice system.

1. *The Increased Role of the Court of Military Appeals*

While military justice was deployed in Korea, the military appellate courts increased due process in the military justice system. Traditionally, the military departments viewed due process as arising from Congress, not the courts. The Court of Military Appeals (“CoMA”), though, found differently. In a 1951 case, the court found that “Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system.”⁶⁷ Based on this ruling, the court determined that it was within the province of the CoMA to determine what due process an accused service member was entitled to under the UCMJ

64. *Id.* at 55.

65. *Id.*

66. *Id.*

67. *United States v. Clay*, 1 C.M.R. 74, 77 (C.M.A. 1951). *See also* GENEROUS, *supra* note 19, at 80-81; HILLMAN, *supra* note 51, at 25.

and MCM. Specifically, the court “described the procedural protections required at court-martial, including the right to be informed of the charges, to confront and cross-examine witnesses, to be represented by counsel, to avoid self-incrimination, and to appeal a conviction.”⁶⁸

This ruling recognized that due process rights for service members arise from the UCMJ and MCM instead of the Constitution, and it is significant because the court in effect warned “the services that if those rights granted GI’s by Congress which parallel the Constitutional rights enjoyed by civilians were violated by proper procedure at courts-martial, CoMA would not consider such infringements harmless and would reverse the convictions that followed.”⁶⁹ Thus, service members now had an avenue to not only define their due process rights, but to protect them as well.

2. *Reform During Vietnam*

The military justice system faced unique circumstances in Vietnam. In Vietnam, commanders faced a near breakdown in good order and discipline; service members openly disobeyed orders, deserted, and committed acts of misconduct, such as fragging, drug abuse, rape, and murder.⁷⁰ Commanders sought tools to effectively address this misconduct, even at the cost of accused service members’ due process rights.⁷¹ In the United States, though, the vocal opposition to the war led critics to argue that the problem in Vietnam was not due process but rather not enough due process.⁷² Hence, critics argued for further civilianization of the military justice system with an increased role for attorneys and less authority for commanders.⁷³

The call for further reform resulted in the 1968 Military Justice Act. The Act required that service members receive defense counsel for all special courts-martial where a bad conduct discharge was possible and for all other special courts-martial, unless deemed impractical because of military service.⁷⁴ Additionally, the Act created an independent trial judiciary where active duty attorneys would serve as military judges. The attorneys would have the authority to rule on pretrial motions as well as

68. HILLMAN, *supra* note 51, at 25.

69. GENEROUS, *supra* note 19, at 80.

70. WILLIAM T. ALLISON, *MILITARY JUSTICE IN VIETNAM: THE RULE OF LAW IN AN AMERICAN WAR 67-68* (2007).

71. *Id.* at 68.

72. *Id.*

73. *Id.*

74. HILLMAN, *supra* note 51, at 27.

issues of law and would serve under a separate chain of command from the convening authority.⁷⁵ Additionally, the accused service member now had the right to request trial by military judge alone and to refuse a trial by summary court-martial.⁷⁶

D. THE CURRENT MILITARY JUSTICE TRINITY: THE BALANCE OF THE MILITARY JUSTICE SYSTEM, DUE PROCESS, AND GOOD ORDER AND DISCIPLINE

Upon passage of the 1968 Military Justice Act, today's military justice trinity was formed. Under the new Act, commanders, carrying the responsibility to preserve good order and discipline within their units, remained at the center of the military justice system. Simultaneously, though, due process rights permeated the system, increased the role of attorneys, and altered how commanders utilize military justice. Before assessing the effectiveness of this trinity, however, a basic framework of the current military justice system and the role played by due process is necessary.

1. *The Current Military Justice System*

The role of the commander continues to define the current military justice system. Because of this continued role, military law still struggles with its inherent purpose. Is it to secure good order and discipline? Or, is it to promote justice? The current system attempts to answer both affirmatively.

a. The Purpose of Military Law

The current military justice system attempts to balance the need for good order and discipline with due process and the interests of the military justice. Specifically, the 2012 MCM provides the 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*

75. *Id.*

76. *Id.*

*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.*⁷⁷

Under this stated purpose, the current military justice trinity considers the role of justice and good order and discipline as being equal, noncompeting purposes that, when taken together, positively impact national security. Inherent in this framework is the continued role of military commanders.

b. Commander Driven System

Perhaps the most unique aspect of the military justice system is the primacy of commanders. The military justice system is predicated upon the “commander’s authority and discretion to control discipline within his or her unit.”⁷⁸ To ensure this authority, the military justice system involves commanders at every part of the process, such as directing preliminary investigations into misconduct, evaluating the results of investigations, disposing of cases, preferral and referral of charges, selecting panel members, and taking final action on both the court-martial’s adjudged findings and sentence after the court-martial concludes.⁷⁹

The commander’s most significant role in the military justice process is that of convening authority. Courts-martial are not standing courts; instead, they are convened when the need arises. Department secretaries establish their department’s convening authorities, whom are seasoned and established military officers who have extensive command authority.⁸⁰

Generally, convening authorities involve themselves in cases only after the preferral of charges.⁸¹ Upon receiving the evidence and charges, the convening authority may dismiss the charges, refer the charges to a court-martial, return the charges to the immediate commander for a lesser disposition, forward the charges with his or her recommendations to a higher convening authority, or direct further investigation to take place.⁸² Should the convening authority refer the case to trial, he or she then selects the court members, who serve a role equivalent to that of a civilian jury.⁸³

77. JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL I-1 (2012) (emphasis added).

78. Roan & Buxton, *supra* note 17, at 192.

79. *Id.*

80. *Id.* at 196.

81. See RULES FOR COURT-MARTIAL 308(9) (2012) (hereinafter R.C.M.), 401(a).

82. See R.C.M. 401.

83. See R.C.M. 601.

Prior to trial, the convening authority is responsible for responding to any pretrial agreement offered by the accused service member, granting immunity for military witnesses, paying for any expert witnesses or consultants, and funding witness travel.⁸⁴

After the court-martial, the case returns to the convening authority for final action.⁸⁵ The convening authority may grant clemency by suspending or disapproving a portion of the accused service member's sentence, but he or she may not increase the sentence.⁸⁶ Historically, the commander also had the ability to set aside a finding of guilty.⁸⁷ In the wake of recent cases, however, Congress restricted that right, and now convening authorities are prohibited from setting aside any felony offense where the adjudged sentence is longer than six months or carries a discharge.⁸⁸ Congress also prohibited convening authorities from setting aside convictions for any sexual offense, regardless of the adjudged sentence.⁸⁹ Convening authorities remain unable to impose a finding of guilty when the court-martial returns a finding of not guilty.⁹⁰

2. *Due Process*

Although not explicitly stated in the MCM's purpose and nature of military law, due process⁹¹ is a key component to the current military justice trinity. Due process is the means by which justice impacts the military justice system and good order and discipline. The current military justice system affords accused service members due process rights throughout the court-martial process. These rights fall into several different categories: application of constitutional protections during pretrial processing of cases, military discovery practices, appointment and role of counsel, Article 32 hearings, use of military judges, trial procedures, and the appellate review of court-martial convictions.⁹²

84. See R.C.M. 703(d), 704(c), 705(d).

85. See R.C.M. 1107(a).

86. See R.C.M. 1108(b), 1109(9).

87. See 10 U.S.C. § 860(c)(3)(a) (1996); see also R.C.M. 1107(d)(1) ("The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial.").

88. National Defense Authorization Act § 860(c)(4)(A), 10 U.S.C. § 860(c)(4)(A) (2014).

89. *Id.*

90. 10 U.S.C. § 860(f)(2)(A) (2014).

91. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law").

92. See Schleuter, *supra* note 18, at 63-71.

a. Application of the Bill of Rights Protections During Pretrial Processing

The UCMJ affords service members constitutional due process rights during the pretrial investigation and processing of charges.⁹³ Specifically, the Fourth Amendment applies in military proceedings to any search and seizure conducted pursuant to the investigation, whether conducted by military or civilian authorities.⁹⁴ Similarly, the Fifth Amendment privilege against self-incrimination applies to any interrogations of an accused service member or to any request to produce incriminating information.⁹⁵ Furthermore, an accused service member's Sixth Amendment right to counsel attaches immediately upon questioning.⁹⁶

b. Military Discovery Practices

Military discovery rules arise from accused service members' due process rights.⁹⁷ The UCMJ provides for a liberal discovery approach specifically designed to be broader than in civilian federal criminal proceedings "in an effort to eliminate pretrial gamesmanship."⁹⁸ The discovery rights afforded to accused service members include the right to compel the appearance of both military and civilian witnesses; the ability to request, from the government, an expert consultant or witness to assist the defense before trial and potentially testify during trial; and to have the prosecution automatically disclose names and contact information of prosecution witnesses, evidence that is favorable to the accused, evidence of any prior convictions, evidence of statements made by the accused, evidence seized from the accused, and evidence of any eyewitness identifications.⁹⁹ Often, the government pays for these services, especially the witness travel expenses and expert consultant or witness fees.¹⁰⁰

93. *Id.* at 63.

94. *Id.*

95. *Id.*; MANUAL FOR COURTS-MARTIAL *supra* note 77, at III-3; MIL. R. EVID. 301; *see also* Geoffrey S. Corn & Victor M. Hansen, *Even if it Ain't Broke, Why Not Fix It? Three Proposed Improvements to the Uniform Code of Military Justice*, 6 J. NAT'L SECURITY L & POL'Y 447, 448-49 (2013).

96. Schlueter, *supra* note 18, at 63-64.

97. *Id.* at 64 (citing Ronald S. Thompson, *Constitutional Applications to the Military Criminal Defendant*, 66 U. DETROIT L. REV. 22 (1989)).

98. Elizabeth C. Hernandez & Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 198 (2011) (finding that the military justice system provides for broader discovery than required by practice in federal civilian trials) (citing *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004); *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004)).

99. Schlueter, *supra* note 18, at 64-65.

100. *Id.* at 64.

In addition to any exculpatory evidence, the military discovery rules subject impeachment evidence to discovery.¹⁰¹ Impeachment evidence “includes disclosure of evidence that may affect the credibility of a government witness.”¹⁰² This information need not be admissible at trial for it to be discoverable.¹⁰³ Beyond the items required for discovery, the military discovery rules require government counsel to actively seek out potentially discoverable items and to do so in a timely manner.¹⁰⁴ Prosecutors must exercise due diligence to discover information that is material to the preparation of the defense, regardless of whether the defense could have discovered the information on its own.¹⁰⁵

c. Appointment and Role of Counsel

The UCMJ¹⁰⁶ affords accused service members their Sixth Amendment right to counsel.¹⁰⁷ An accused service member is provided with a military defense counsel free of cost.¹⁰⁸ This attorney will represent the accused service member immediately and throughout the pretrial and court-martial process.¹⁰⁹ Generally, the military defense counsel will be outside the installation commander’s chain-of-command; this ensures the defense attorney is able to freely represent his or her client without fearing reprisal or adverse career implications.¹¹⁰ The accused service member’s communications with the military defense counsel are also protected under the attorney-client privilege.¹¹¹ Accused service members also receive free representation during the appellate process, although it is often a different attorney than the one that represented them before or during the trial; however, the new attorney often specializes in appellate practice.¹¹²

101. Hernandez & Ferguson, *supra* note 98, at 199.

102. *Id.*

103. *Id.*

104. *Id.* at 200.

105. *Id.*

106. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2012) (hereinafter UCMJ).

107. UCMJ art. 27; *see also* U.S. CONST. amend. VI.

108. UCMJ art. 27; MANUAL FOR COURTS-MARTIAL *supra* note 77, at A8-20; R.C.M. 501(b), 502, 506.

109. Schleuter, *supra* note 18, at 66.

110. *Id.*

111. MANUAL FOR COURTS-MARTIAL, *supra* note 77, at A21-17; MIL. R. EVID. 502(a).

112. *See id.* at II-162; R.C.M. 1202(b).

d. Article 32 Hearings

The UCMJ provides any accused service member subject to a general court-martial the right to an Article 32 hearing.¹¹³ The intent behind an Article 32 hearing is threefold: “[to inquire] as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.”¹¹⁴ Conducted prior to the referral charges, an investigating officer, appointed by the convening authority, will hear evidence, investigate the charges, and then provide a non-binding recommendation to the convening authority as to the disposition of the charges.¹¹⁵ The UCMJ does not provide a standard of proof for the investigating officer’s recommendation. Instead, Rule for Court-Marital 405(j)(2)(H) provides that the investigating officer should base his or her recommendation on “reasonable grounds to believe that the accused committed the offense alleged.”¹¹⁶

The Article 32 hearing affords the accused substantial due process rights. The accused has the right to be present for the investigation, to be represented by counsel, to cross-examine witnesses, to object to irrelevant or privileged evidence, to call witnesses and introduce evidence in his or her defense and mitigation to all evidence presented by the government, and to receive a copy of the investigating officer’s report, which is to include the summary of all the testimony taken at the hearing.¹¹⁷ Additionally, the recent National Defense Authorization provides that, when reasonably available, a judge advocate should serve as the investigating officer.¹¹⁸ This provision advances due process and, while the military branches differed in their approach, non-attorney line officers were often used as investigating officers.

e. Use of Military Judges

Although not required by the United States Supreme Court, the UCMJ provides that accused service members have the right to a military judge to preside over their special or general courts-martial.¹¹⁹ The role of military judges is central to the due process rung of the trinity because it shifts the

113. UCMJ art. 32; *see also* MANUAL FOR COURTS-MARTIAL, *supra* note 77, at A22-58.

114. UCMJ art. 32(a).

115. R.C.M. 405(a).

116. R.C.M. 405(j)(2)(H).

117. *See* R.C.M. 405(f).

118. National Defense Authorization Act for Fiscal Year 2014, *supra* note 88, at § 1702.

119. UCMJ art. 26(a); MANUAL FOR COURTS-MARTIAL, *supra* note 77, at II-74; R.C.M. 801(a).

ability to mete out justice away from the commander and to a judge, who is then entrusted with “ensuring that the rules of procedure and evidence are applied and enforced.”¹²⁰

f. Trial Procedures

Due process dominates court-martial trial procedures. During courts-martial, an accused service member is entitled to file motions to dismiss, motions to suppress evidence, motions for appropriate relief, and motions for continuances.¹²¹ Likewise, the military justice system affords accused service members the right to select their trial forum, with enlisted service members possessing the right to select trial by military judge alone, officer members, or officer and enlisted members.¹²² Officer members may elect trial by military judge alone or officer members.¹²³ Accused service members are also able to exert their trial-specific constitutional rights, such as their Sixth Amendment right to confront any witness against them.¹²⁴ This provision is especially evident in the military justice system as, based upon the Confrontation Clause, the government cannot utilize video teleconference (“VTC”) or other alternative means to secure remote witness testimony over the accused service member’s objection.¹²⁵

g. Appellate Review

The UCMJ requires that each military department establish a court of criminal appeals.¹²⁶ Accused service members may then appeal their court-martial conviction to their department’s appellate court.¹²⁷ Appellate review is mandatory if the sentence includes death, a punitive discharge, or confinement of one year or more.¹²⁸ Upon complete of appellate review at the department level, accused service members may then appeal an adverse decision to the Court of Appeal for the Armed Forces (“CAAF”).¹²⁹ The United States Supreme Court may then review CAAF decisions.¹³⁰ The military justice system embeds, within the appellate process, several other due process rights. Specifically, these courts have independent “fact-

120. Schlueter, *supra* note 18, at 66-67.

121. *Id.* at 68.

122. MANUAL FOR COURTS-MARTIAL, *supra* note 77, at A21-53.

123. *Id.* at II-69.

124. U.S. CONST. amend. VI.

125. *Id.*

126. UCMJ art. 66(a).

127. *Id.*

128. UCMJ art. 66(b).

129. UCMJ art. 67.

130. UCMJ art. 67a; 28 U.S.C. § 1259 (2012).

finding powers which provide a convicted servicemember with an opportunity to argue that the conviction should be set aside because the evidence was insufficient.”¹³¹ Similarly, the appellate courts can review the sentence approved by the convening authority, including comparing it to sentences adjudged in other cases.¹³² Lastly, the appellate courts may remand the case to the trial court for a hearing on a specified issue.¹³³

III. DUE PROCESS AND THE MILITARY JUSTICE SYSTEM—HOW THE EXPANSION OF DUE PROCESS MARGINALIZED THE COURT-MARTIAL WITHIN THE MILITARY JUSTICE SYSTEM

The increase in due process greatly altered the military justice trinity. By strengthening the due process prong, Congress impacted the military justice system prong. Specifically, the increase in due process resulted in the court-martial process becoming costly and time-consuming. Seeking expedited discipline, commanders turned away from the court-martial process and opted for lesser but quicker means of punishment, especially nonjudicial punishment and administrative discharges.

A. THE CONSEQUENCES OF ALL THIS DUE PROCESS

The increase in due process rights afforded to service members had a marked influence on military justice. Most dramatically, both the number of courts-martial and the court-martial rates per thousand dramatically decreased. In addition to courts-martial occurring less frequently, when they did occur, they became drawn-out affairs, involving long processing times and increasingly cumbersome procedures.

1. *Courts-Martial Utilized With Much Less Frequency*

The cumulative effect of the due process evolution was to marginalize the court-martial as a tool for commanders to effectuate good order and discipline. Figure 3.0 below reflects the court-martial rates per thousand, beginning in 1913, for each military department. In 1913, under the Articles of War, commanders often utilized courts-martial with 588 soldiers and 239 sailors or Marines per thousand facing court-martial. Since then, commanders have utilized courts-martial less frequently with the court-martial rate gradually decreasing to the point where, in 2013, only 2.77

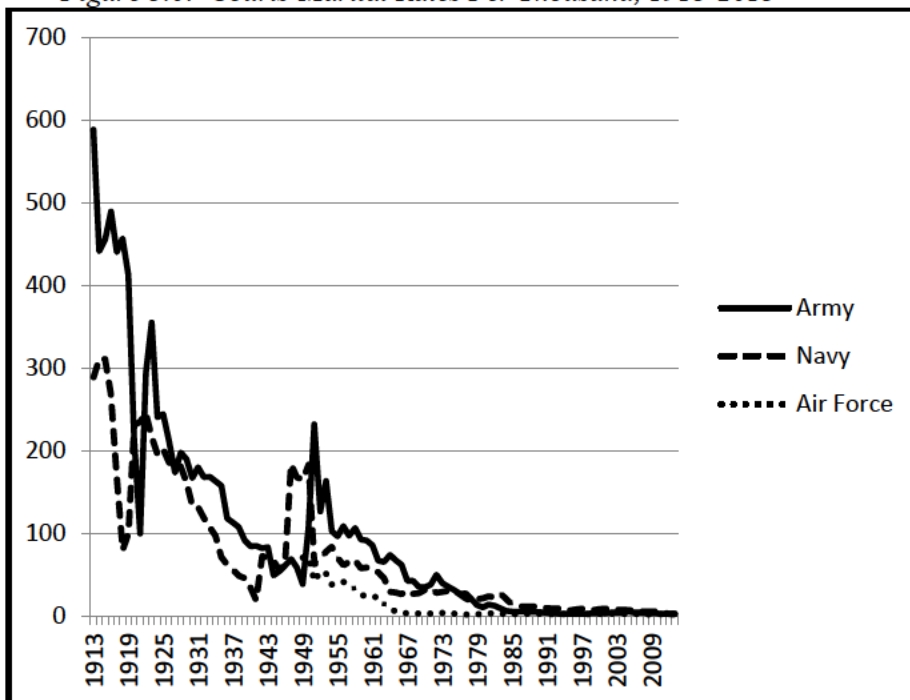
131. Schlueter, *supra* note 18, at 70. See also UCMJ art. 66(c); MANUAL FOR COURTS-MARTIAL, *supra* note 77, at II-171; R.C.M. 1203(b).

132. Schlueter, *supra* note 18, at 71.

133. *Id.*

soldiers, 2.48 sailors or Marines, and 2.33 airmen per thousand faced trial by court-martial.¹³⁴

Figure 3.0: Courts-Martial Rates Per Thousand, 1913-2013



While societal factors may have contributed to this decrease, “this decline in criminal trials is unique to the military.”¹³⁵ In fact, the “rates of criminal trials reported in the FBI’s annual survey went up” during many of the military’s declining years.¹³⁶ Instead, as Professor Elizabeth Hillman notes, “[t]he developing legal culture of the armed forces, with its emphasis on due process, legal representation, and civilian review, led directly to less frequent use of courts-martial.”¹³⁷ Consequently, “facing court-martial became an increasingly rare fate for wayward” service members as “[c]riminal censure now occupied the extreme end of commanders’ methods for promoting obedience and preserving good order among troops.”¹³⁸ Ultimately, these statistics reflect the fact that commanders

134. HILLMAN, *supra* note 51, at Table B-1 (providing the courts-martial rates for each service from 1913-1980).

135. *Id.* at 14-15.

136. *Id.*

137. *Id.* at 15.

138. *Id.* at 16.

rarely utilize the court-martial to preserve good order and discipline within their units.

2. *When Utilized, Today's Courts-Martial Are a Time-Consuming and Cumbersome Process*

Due process marginalized the court-martial as a capability for commanders to effectuate good order and discipline because it rendered the court-martial overly cumbersome and time-consuming. Almost immediately upon its passing in 1951, war in Korea tested the UCMJ. Commanders utilized the court-martial in Korea to varying levels of success, but found that the UCMJ hindered, more than assisted, in preserving good order and discipline.¹³⁹ In 1953, a congressional committee consisting of military commanders, none of whom were attorneys, concluded that “professional standards have been permitted to deteriorate through lack of disciplinary control. The adoption of the Uniform Code of Military Justice, with its unwieldy legal procedure, has made the effective administration of military discipline within the Armed Forces more difficult.”¹⁴⁰

Commanders in Vietnam expressed similar dissatisfaction with the UCMJ.¹⁴¹ While they attempted to use the military justice system to deter increased misconduct, the military justice system proved unresponsive.¹⁴² The due process rights afforded to service members—the right to an attorney, a military judge, and an Article 32 investigation—“took a great deal of time, and caseloads on the few military lawyers in Vietnam were heavy.”¹⁴³ Consequently, commanders often accepted favorable pretrial agreements or dismissed charges to avoid the laborious court-martial process.¹⁴⁴ This apparent ineffectiveness of the military justice system to ensure good order and discipline led some critics to wonder whether “due process has become a fetish” creating a system that was “exceedingly expensive, complicated and slow moving.”¹⁴⁵

Recent statistics suggest that the courts-martial process continues to be time consuming. Figure 3.1 depicts the processing times of Air Force

139. George S. Prugh, *Observations on the UCMJ: 1954 and 2000*, 165 MIL. L. REV. 21, 29-30 (2000).

140. *Id.*

141. *Id.* at 40.

142. *Id.* at 33-34.

143. ALLISON, *supra* note 70, at 69-70.

144. *Id.*

145. *Id.*

courts-martial from 2010 to 2013.¹⁴⁶ The Air Force initiates processing times at the date the offense was discovered and terminates the processing time when the convening authority takes final action.¹⁴⁷ For all four years, the processing times for general courts-martial averaged around 400 days.¹⁴⁸ In contrast, processing times for special courts-martial fluctuated between 159 and 210 days, while summary courts-martial ranged from 38 to 56 days.¹⁴⁹ As such, when an airman engages in misconduct, the commander faces the possibility that, should he or she proceed with a court-martial, the misconduct may not be resolved for another 200 or 400 days. To many commanders, the prospect of deferring resolution for 400 days renders the court-martial an unrealistic option.

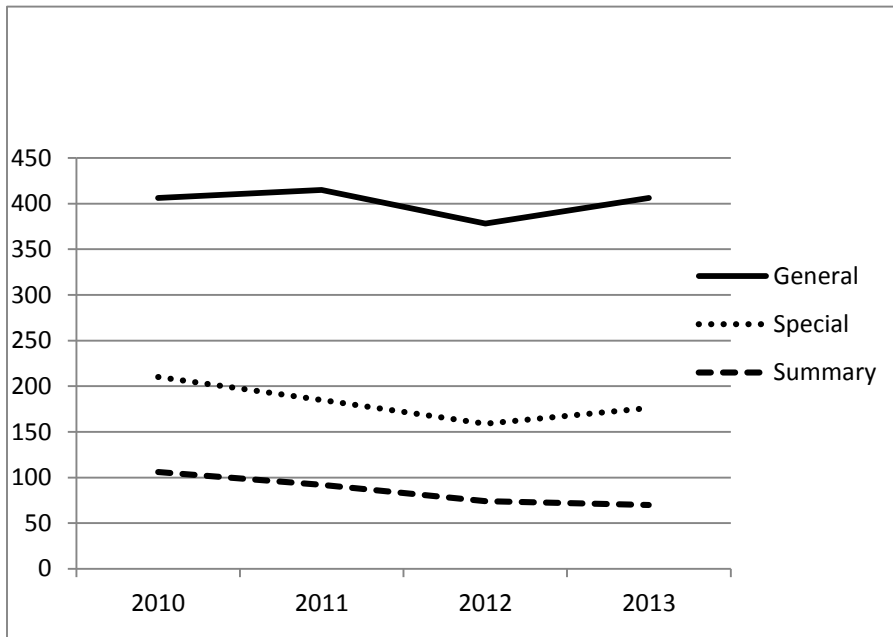
146. HEADQUARTERS U.S. AIR FORCE, ARTICLE 6 PROCESSING TIMES REVIEW CALENDAR YEAR 2012, at 2 (2012); HEADQUARTERS U.S. AIR FORCE, ARTICLE 6 PROCESSING TIMES REVIEW CALENDAR YEAR 2013, at 2 (2013).

147. HEADQUARTERS U.S. AIR FORCE, 2012, *supra* note 146, at 2; HEADQUARTERS U.S. AIR FORCE, 2013, *supra* note 146, at 2.

148. HEADQUARTERS U.S. AIR FORCE, 2012, *supra* note 146, at 2; HEADQUARTERS U.S. AIR FORCE, 2013, *supra* note 146, at 2.

149. HEADQUARTERS U.S. AIR FORCE, 2012, *supra* note 146, at 2; HEADQUARTERS U.S. AIR FORCE, 2013, *supra* note 146, at 2.

Figure 3.1: USAF Courts-Martial Processing Times, Date of Discovery to Final Action (days), 2010-2013



B. THE RISE OF ALTERNATIVE MEANS TO ACHIEVE GOOD ORDER AND DISCIPLINE

The UCMJ affords commanders alternate means to address service member misconduct. Nonjudicial punishment, which allows a commander to impose fines, reduce enlisted members in rank, or impose additional duties, allows a commander an expedient and, at times, visible form of punishment. Meanwhile, administrative discharges, which effectively “kick out” service members, allow a commander to quickly remove problematic soldiers. In recent years, commanders have turned to these alternative options with increasing frequency, apparently at the cost of courts-martial.

1. *Nonjudicial Punishment*

With the advent of increased due process rights, commanders turned away from courts-martial and instead embraced nonjudicial punishment and administrative discharges to address misconduct within their units. The initial UCMJ afforded commanders the power to impose nonjudicial punishment via Article 15, including the authority to impose confinement as

punishment.¹⁵⁰ The severe nature of the confinement option led to commanders continuing to use the court-martial where more due process rights were afforded, rather than nonjudicial punishment.¹⁵¹ In the early 1960s, however, the military departments advocated to reform Article 15, mainly by removing commanders' authority to impose confinement.¹⁵² As such, in 1962, Congress lessened the punishment afforded under Article 15.¹⁵³ In turn, commanders began to utilize nonjudicial punishment with increased frequency, leading to a steep decline in courts-martial.¹⁵⁴ Figure 3.2 represents the steep decline in Navy and Air Force court-martial rates after commanders had the increased ability to impose nonjudicial punishment.¹⁵⁵

Figure 3.2: Court-Martial Rates per Thousand, 1963-1965

	Army	Navy	Air Force
1963	65.4	45.7	14.8
1964	73.0	29.2	8.8
1965	67.5	28.4	5.9

In recent years, the relationship between nonjudicial punishment and courts-martial rates appears to have stabilized. Figures 3.3, 3.4, and 3.5 represent the courts-martial rates per thousand compared to the nonjudicial punishment rates per thousand for each department from 1979 to 2013.¹⁵⁶ These figures are pertinent for several reasons. First, they indicate each department experienced a dramatic decline in nonjudicial punishment rates in the 1980s from which they have not recovered. Second, with the decline in nonjudicial punishment rates per thousand, none of the departments experienced a significant increase in courts-martial rates per thousand. Taken together, these figures indicate that beginning in the 1980s,

150. GENEROUS, *supra* note 19, at 151.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. HILLMAN, *supra* note 51, at Table B.1.

156. The Annual Reports of the United States Court of Military Appeals provided the courts-martial and nonjudicial punishment rates for 1979-2013.

commanders have either failed to address allegations of misconduct, or, more likely, have increasingly relied upon administrative discharges.

Figure 3.3: Army Courts-Martial and Nonjudicial Punishment Rates per Thousand, 1979-2013

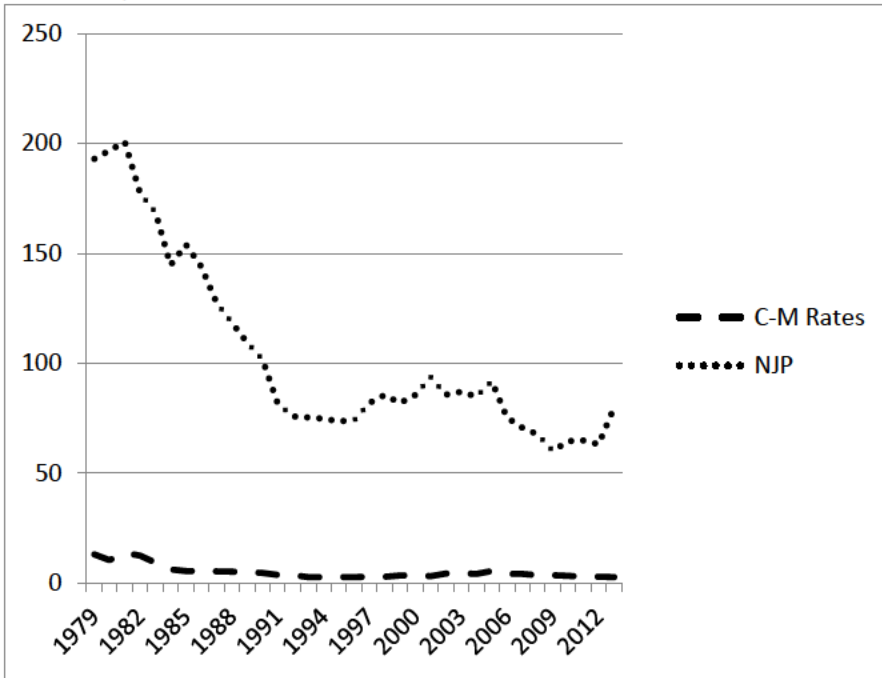


Figure 3.4: Navy Courts-Martial and Nonjudicial Punishment Rates per Thousand, 1979-2013

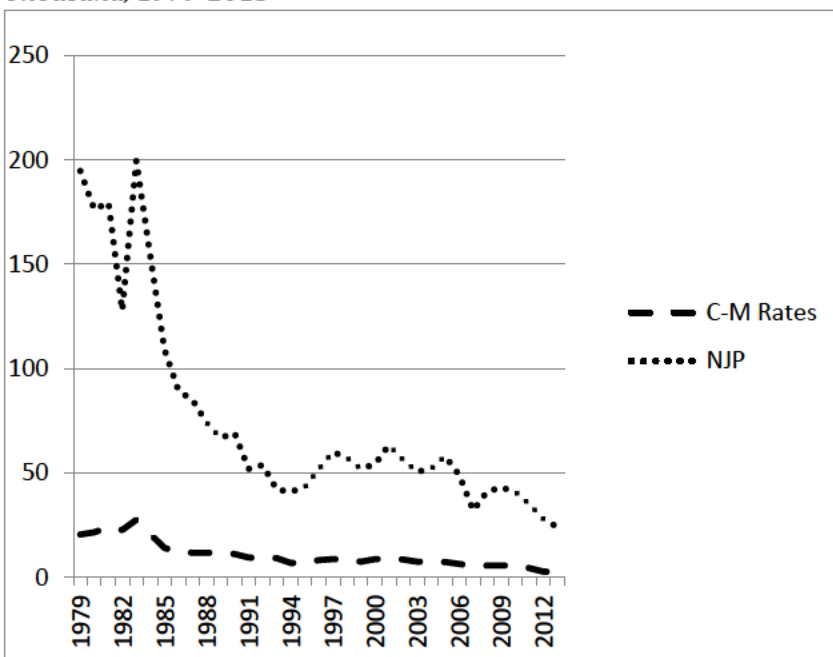
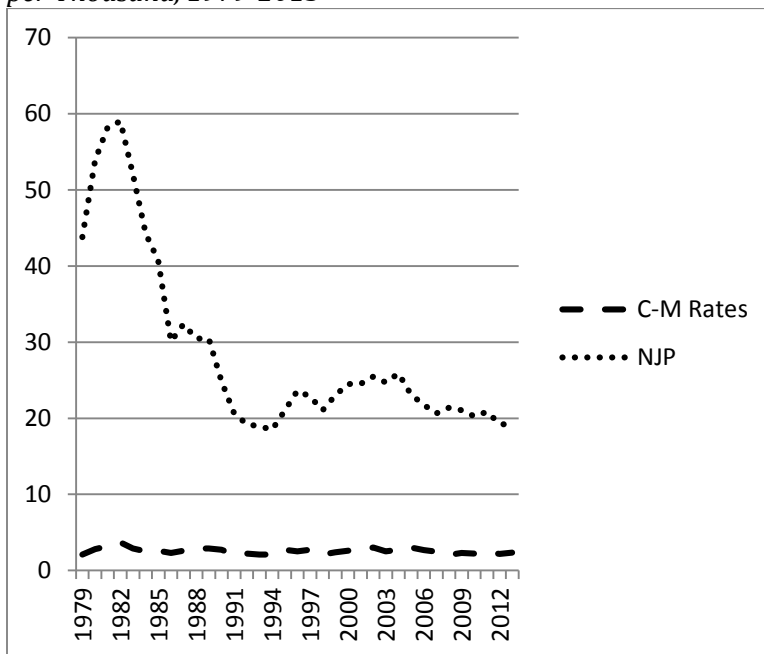


Figure 3.5: Air Force Courts-Martial and Nonjudicial Punishment Rates per Thousand, 1979-2013



2. *Administrative Discharges*

There is strong evidence to suggest that commanders are increasingly turning towards administrative discharges when faced with allegations of misconduct. Commanders began turning away from courts-martial and towards administrative discharges almost immediately upon the UCMJ's implementation. In 1958, the Air Force Judge Advocate General, Major General Reginald Harmon, attributed the decrease in the Air Force's courts-martial rate to the fact that "many commanders are using the legally authorized administrative discharge procedures instead of trial by court-martial to take care of and get rid of offenders."¹⁵⁷ Commanders throughout the service became "overwhelmed by what they regarded as unreasonable complexities in court-martial law and practices" and as such, "looked for simpler ways to handle their delinquency problems."¹⁵⁸ This trend continued into the 1970s as the Army Judge Advocate General acknowledged that an increase in commanders electing to administratively

157. GENEROUS, *supra* note 19, at 131.

158. *Id.*

discharge soldiers accused of misconduct was responsible for the decrease in courts-martial rates.¹⁵⁹ Within the military leadership at that time, the commonly held viewpoint became “[a]dministrative separations could eliminate servicemembers quickly and quietly.”¹⁶⁰ Overall, between 1950 and 1973, corresponding to the development of the UCMJ and subsequent due process reforms, “the percentage of undesirable discharges issued through administrative, rather than court-martial, proceedings climbed dramatically, from 64 percent in the early 1950s Army to 92 percent by the early 1970s, and from 40 percent in the early 1950s Navy to 66 percent by the early 1970s.”¹⁶¹

The preference for the speed and efficiency for administrative discharges remains today. In its Annual Military Justice Report for fiscal year 2013, the Marine Corps compared its total number of special courts-martial against the total number of administrative discharge boards from 2007 to 2013.¹⁶² In fiscal year 2007, the Marine Corps conducted approximately 800 special courts-martial and only 300 administrative discharge boards.¹⁶³ By fiscal year 2010, however, they performed approximately the same amount of administrative discharge boards and special courts-martial, around 600 of each.¹⁶⁴ In fiscal year 2013, though, they performed approximately 800 administrative discharge boards compared to only 300 special courts-martial.¹⁶⁵ This dramatic reversal of fortunes reflects that commanders are increasingly selecting the more expedient option of administrative discharge over the more costly and time-consuming option of a court-martial.

In sum, since World War I, Congress gradually increased the amount of due process afforded to accused service members. By increasing the weight of the due process prong of the military justice trinity, Congress greatly impacted the military justice system. The court-martial process, once the primary tool of the commander to achieve good order and discipline, became time-consuming and dominated by due process. As a result, commanders utilized the court-martial with increasingly less frequency and instead turned to less restrictive means to deal with instances

159. CODE COMM. ON MILITARY JUSTICE, ANNUAL REPORTS OF THE UNITED STATES COURT OF MILITARY APPEALS 15 (1976).

160. HILLMAN, *supra* note 51, at 20.

161. *Id.*

162. CODE COMM. ON MILITARY JUSTICE, ANNUAL REPORTS OF THE UNITED STATES COURT OF MILITARY APPEALS 98 (2013).

163. *Id.*

164. *Id.*

165. *Id.*

of misconduct, specifically nonjudicial punishment and administrative discharge.

IV. GOOD ORDER AND DISCIPLINE WITHOUT THE COURT-MARTIAL—HOW DUE PROCESS'S MARGINALIZING OF THE COURT-MARTIAL PROCESS PREVENTS A COMMANDER FROM PRESERVING GOOD ORDER AND DISCIPLINE

What then is the impact of due process's marginalization of the court-martial process on good order and discipline? This section argues that the court-martial is essential for commanders to effectuate good order and discipline. To effectively preserve good order and discipline, commanders must be able to use punishment to deter misconduct. It is the court-martial, more so than nonjudicial punishment or administrative discharge, which provides this capability to commanders. As such, without the court-martial, commanders lose the ability to effectively preserve good order and discipline.

The relationship between good order and discipline and the other two prongs is of vital importance. It is through good order and discipline that Congress and the military departments may find the root cause and solution to the recent bouts of service member misconduct. To understand the role and importance of good order and discipline, as well as its relationship to the military justice system and due process, it is necessary to establish a thorough understanding of what exactly good order and discipline is, why it is important, who is responsible for it, and how it is achieved.

A. WHAT IS GOOD ORDER AND DISCIPLINE?

Good order and discipline has long been an essential component of military campaigns. Studying the jurist Quintus Sertorius' successes against the Roman army, Plutarch focused on Sertorius' ability to bring good order and discipline to the seemingly barbaric tribes of the Roman frontier.¹⁶⁶ Plutarch noted that after the campaigns against Rome, Sertorius was "highly honored for his introducing discipline and good order amongst them, for he altered their furious, savage manner of fighting . . . out of a confused number of thieves and robbers he constituted a regular, well-disciplined army."¹⁶⁷ In modern times, the primacy of good order and discipline to achieve military objectives remains. Operation Enduring Freedom veterans regularly comment on the capability of Taliban forces in Afghanistan.

166. PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 687 (Arthur Hugh Clough ed., John Dryden trans., Random House 2d ed. 1992).

167. *Id.*

Although they expected disorganized and undisciplined fighters, these veterans instead faced a highly organized and structured force with Taliban commanders exercising good order and discipline to achieve military objectives.¹⁶⁸

Despite the accepted norm that good order and discipline is important, the actual definition of the term is murky at best. Part of the problem is that attorneys—both civilian and military—manage the relationship between good order and discipline and the military justice system, as opposed to military commanders. Attorneys tend to follow the Supreme Court and accept that war is a separate sphere best left to combat professionals, and good order and discipline falls within that sphere.¹⁶⁹ These scholars tend to acknowledge that good order and discipline is important and then move onto the more legally-centered military justice system.

In addition, military doctrine does not directly define good order and discipline. Joint Publication 1, the doctrine behind the joint force, establishes who is responsible for discipline in the joint environment, but fails to define it.¹⁷⁰ Army and Air Force leadership doctrines discuss the need for leaders to exercise self-discipline and intra-unit discipline, but both focus on how to achieve discipline, as opposed to what it is.¹⁷¹

Attempts to define the term in the past have focused more on the discipline portion than the good order portion. For example, a 1960 commission consisting of high-ranking officers defined good order and discipline as “a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed”¹⁷² A more thorough definition is utilized by the Air Force in its annual Air Force Officer’s Guide. There, the Air Force defines good order and discipline as:

Military discipline is intelligent, willing, and positive obedience to the will of the leader. Its basis rests upon the voluntary subordination of the individual to the welfare of the group. It is the cohesive force that binds the members of a unit, and its strict enforcement is a benefit for all. Its constraint must be felt not so much in the fear of

168. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 9.

169. See *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (“[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 . . .”).

170. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1, DOCTRINE OF THE ARMED FORCES OF THE U.S. IV-18 (2013).

171. See *generally* U.S. DEPT. OF THE ARMY AR600-100 (2007).

172. Schlueter, *supra* note 18, at 27 (quoting AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11-12 (1960)).

punishment as in the moral obligation it imposes on the individual to heed the common interests of the group. Discipline establishes a state of mind that produces proper action and prompt cooperation under all circumstances, regardless of obstacles. It creates in the individual a desire and determination to undertake and accomplish any mission assigned by the leader.¹⁷³

This definition has proven to be enduring; it appears unchanged in thirty-five editions, encompassing most of the Air Force's existence. It is also thorough and addresses obedience to military leaders, the primacy of such obedience to mission readiness, and also the need for unit cohesion, which speaks to the good order portion of good order and discipline. As such, this definition shall provide the basis for the understanding of good order and discipline in the following discussions.

B. WHY DOES GOOD ORDER AND DISCIPLINE MATTER?

While addressing why good order and discipline matters, it is easy to rely solely on the argument that good order and discipline enables successful military operations. The answer is more nuanced, however. In combat, the military requires service members to do three things often against human nature: put oneself at risk to be killed, to kill, and, at times, not kill when threatened.¹⁷⁴ Additionally, both before and during combat, the military mandates that service members subordinate personal interests in favor of the group to foster unit cohesion. Made possible through good order and discipline, these elements help ensure mission success.

1. *The Need to Place Service Members at Risk*

American history is peppered with instances of commanders ordering service members to put themselves at near risk of death. Whether storming Bunker Hill, Pickett's Hill, the beaches of Normandy, or the urban landscape of Fallujah, service members have faced an overwhelming risk of death to achieve military objectives.¹⁷⁵ At times, the risk presented even guaranteed death. During the combined bomber offensive in World War II, the Army Air Corps suffered dramatic losses. Army statisticians used 8th Air Force's loss rates and the number of flights required to return home to calculate that Army Air Corps' pilots faced a one hundred percent certainty

173. JEFFREY C. BENTON, AIR FORCE OFFICER'S GUIDE 41 (Stackpole Books, 35th ed. 2005).

174. Theurer & Russell, *supra* note 15, at 8.

175. *Id.*

of death during the course of the war.¹⁷⁶ Despite these daunting odds, service members continue to engage in these operations. It is good order and discipline, with its emphasis on creating a state of mind within service members to follow the will of their commanders, which enables commanders to order their service members at risk to achieve mission objectives and to have their service members follow the orders.

2. *The Need to Have Service Members Kill*

The harsh reality of war is that commanders must ask their service members to kill to achieve mission success.¹⁷⁷ Commanders cannot assume obedience from their service members when it comes to killing. Studies reflect that service members are often reluctant to actually engage the enemy once in contact.¹⁷⁸ For example, during World War II, only fifteen to twenty percent of combat infantry were willing to fire their rifles.¹⁷⁹ This reluctance relates to the idea that “within each person a force that understands at some gut level that all humanity is inextricably interdependent and that to harm any part is to harm the whole”¹⁸⁰ Marcus Aurelius contemplated this inner belief in his command of the Roman Army, positing “every individual dispensation is one of the causes of the prosperity, success, and even survival of that which administers the universe. To break of any particle, no matter how small, from the continuous concatenation—whether of cause or of any other elements—is to injure the whole.”¹⁸¹ In combat, though, commanders must rely upon good order and discipline to break their service members of this mindset and instead develop the willingness to kill when ordered to do so.

3. *The Need to Have Service Members Not Kill*

Today’s military is not limited to conventional warfare. The joint force is organized “across a range that extends from military engagement, security cooperation, and deterrence activities to crisis response and limited contingency operations and, if necessary, to major operations.”¹⁸² Within this range of military operations fall several operations, such as civil

176. MARK CLODFELTER, BENEFICIAL BOMBING: THE PROGRESSIVE FOUNDATIONS OF AMERICAN AIR POWER, 1917-1945 104 (2010).

177. Theurer & Russell, *supra* note 15, at 8.

178. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 144 (2009).

179. *Id.*

180. *Id.* at 37-38.

181. *Id.* at 38.

182. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3, DOCTRINE OF THE ARMED FORCES OF THE U.S. xvii (2011).

support, foreign humanitarian assistance, and counterinsurgency (“COIN”), where the use of lethal force will impede and damage the mission.¹⁸³

Restraint, though, may be easier said than done. COIN speaks to the inherent difficulty of exercising restraint in a kinetic environment. Commanders leading COIN operations utilize their service members to win the hearts and minds of the local population.¹⁸⁴ They do so with the understanding that by killing one innocent civilian, a service member may create five insurgents.¹⁸⁵ To the service member conducting COIN, however, he or she must be “ready to be greeted with either handshake or a hand grenade while taking on missions.”¹⁸⁶ When operating in a combat environment, it is natural for a service member to utilize lethal force when threatened. In COIN, however, the service member must show restraint when threatened because, if the grenade is actually a handshake, the effect of killing may have dire strategic consequences.¹⁸⁷ As such, it falls upon the commander to instill within his or her service members the restraint necessary to not kill when the mission requires.

4. *Unit Cohesion*

Unit cohesion is essential for military operations. It is unit cohesion that allows for a group of disparate service members to subject their personal fears and desires to the collective well-being and the success of the fighting force. Research indicates that “the primary factor that motivates a soldier to do the things that no sane man wants to do in combat (that is, killing and dying) is not the force of self-preservation but a powerful sense of accountability to his comrades in the battlefield.”¹⁸⁸ The importance of unit cohesion extends from the battlefield to the home station. In garrison, unit cohesion speaks to the readiness of the unit and the ties that bind them as a potential fighting force. A breakdown in unit cohesion in garrison is likely to lead to a further breakdown in combat, resulting in potentially tragic results. Inherent in the definition of good order and discipline is the principle’s ability to serve as the “cohesive force that binds the members of a unit.”¹⁸⁹

183. *Id.*

184. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 18.

185. *Id.*

186. *Id.*

187. *Id.*

188. GROSSMAN, *supra* note 178, at 149 (explanatory parenthetical contained in original).

189. BENTON, *supra* note 173, at 41.

C. WHO BEARS THE RESPONSIBILITY FOR GOOD ORDER AND DISCIPLINE?

In the debate about the continued role of commanders in the military justice system, there is one consistent point of agreement between critics and advocates—commanders are responsible for good order and discipline within their units. Commanders bear the responsibility of the welfare, morale, mission readiness, and safety of their service members, and, in combat, direct actions of service members that may result in their death. Consequently, the responsibility for good order and discipline can only fall upon the commander. But what commander?

In today's increasingly bureaucratic and integrated military, service members have several different commanders. Service members serve under their immediate commander, but they are often under at least three superior commanders. As the level of command grows, the more likely it is that the superior commander will be geographically separated from the service member.¹⁹⁰ The identification of the commander becomes even more difficult if the service member deploys. While deployed, a service member may serve under a joint commander, a service commander, and under the command of the service member's home station.¹⁹¹ The multiple layers of command make it difficult to assess which of these commanders is ultimately responsible for good order and discipline.

Studies reflect that military service places the immediate commander in the best position to bear the responsibility for good order and discipline. Proximity is the key. A World War II study examined instances where American soldiers engaged enemy forces with fire and incidents when they did not.¹⁹² The study found that "almost all soldiers would fire their weapons while their leaders observed and encouraged them in a combat situation."¹⁹³ In comparison, when the commander left, "the firing rate

190. For example, an airman assigned to Moody Air Force Base in Valdosta, Georgia, most likely has a squadron commander, a group commander, and a wing commander, all co-located with him or her at the installation. The airman then falls under a Numbered Air Force Commander at Shaw Air Force Base in Sumter, South Carolina and also under Major Command Commander located at Joint Base Langley in Hampton Roads, Virginia. Most likely, the airman has little, if any, interaction with his or her wing commander, let alone the higher-level commanders located in different states.

191. For example, in the deployed environment, he or she may fill a joint tasking as an individual augmentee. There, he or she may work for a non-Air Force military commander, but also be under the command of an Air Force expeditionary wing commander located somewhere in theater. Beyond the expeditionary wing commander, the airman falls under the command of the Air Forces Central Command commander, located at Shaw Air Force Base.

192. GROSSMAN, *supra* note 178, at 144.

193. *Id.*

immediately dropped to 15 to 20 percent.”¹⁹⁴ Similarly, in 2013, a number of commanders testified before the Department of Defense’s Defense Legal Policy Board concerning their experiences commanding in Iraq and Afghanistan.¹⁹⁵ Each commander testified that they bore the ultimate and immediate responsibility of good order and discipline for each of the service members under their joint command, even if an individual service member fell under the command of several other levels of service-specific command.¹⁹⁶ As one Army commander noted:

I was there. I saw these troops every day. I made sure they had food to eat, toilet paper to wipe themselves, and a place to sleep. I was the one that was going to ask them to kill and I was the one going to ask them to die. An Airman, Sailor, or Marine may have answered to a different commander somewhere, but when he was in my battlespace, he was my responsibility.¹⁹⁷

D. HOW DO COMMANDERS ACHIEVE GOOD ORDER AND DISCIPLINE?

Good order and discipline presents a daunting task for commanders. A commander needs to instill into his or her service members’ mindset a sense of uncompromising obedience and duty. This mindset must then lead to service members putting themselves at grave risk—to kill or not to kill—all at the order of their commander. How does the commander make the seemingly impossible possible? What tools does he or she need to make this mindset a reality? The answer lies in both positive and negative means, the negative means linking the good order and discipline prong of the trinity to the military justice prong.

1. *Positive Means*

Positive rewards and reinforcement enable a commander to achieve good order and discipline by ascribing a sense of loyalty and affection amongst his or her service members.¹⁹⁸ While describing Sertorius’ ability to achieve good order and discipline within his troops, Plutarch did not mention discipline or fear. Instead, he noted Sertorius:

bestowed silver and gold upon them liberally to gild and adorn their helmets, he had their shields worked with various figures and designs, he brought them into the mode

194. *Id.*

195. *See generally* REPORT OF THE SUBCOMMITTEE, *supra* note 2.

196. *Id.*

197. *Id.* at 231 (quoting Brigadier General Gary Volesky).

198. GROSSMAN, *supra* note 178, at 145.

of wearing flowered and embroidered cloaks and coats, and by supplying money for these purposes, and joining with them in all improvements, he won the hearts of all.¹⁹⁹

Sertorius recognized that to obtain the uncontested obedience of his disparate troops, they would have to feel ties of affection and loyalty to him; otherwise, they would not willingly submit to his command. Recent studies confirm that bonds of loyalty are essential to commanders exercising good order and discipline.²⁰⁰ A 1973 study demonstrated that “the primary factor in ensuring the will to fight is identification with the direct commanding officer.”²⁰¹ In this study, respected and established commanders were able to gain compliance from soldiers in combat much more effectively than unknown or disrespected leaders.²⁰² While commanders today cannot provide their service members with gold or money, they can provide positive rewards and reinforcement through a variety of means, including: awards, decorations, promotions, positive performance reviews, and morale activities.

2. *Negative Means*

Commanders cannot rely on positive reinforcement alone to effectuate good order and discipline. To ensure good order and discipline within their units, commanders must be able to hold service members accountable for acts of misconduct.²⁰³ Commanders do so via the ability to impose punishment.²⁰⁴ Beyond accountability, one of the primary purposes of punishment is deterrence, both specific and general. By punishing service members for misconduct that strikes at good order and discipline, commanders are not only able to deter the offending service member from again committing misconduct, but are also able to deter the other members of the unit from committing misconduct.

It is here that good order and discipline and the military justice system meet. The UCMJ serves as the “primary tool for administering legal consequences for breaches of discipline.”²⁰⁵ Under the UCMJ, commanders possess a range of punishment options ranging from the administrative to the nonjudicial to the court-martial. Through this ability,

199. PLUTARCH, *supra* note 166, at 687.

200. GROSSMAN, *supra* note 178, at 145.

201. *Id.* at 144.

202. *Id.*

203. Theurer & Russell, *supra* note 15, at 9.

204. *Id.*

205. *Id.*

commanders are supposed to be able to deter misconduct, thereby ensuring good order and discipline within their units.

E. HOW EFFECTIVE IS THE CURRENT MILITARY JUSTICE TRINITY IN ACHIEVING GOOD ORDER AND DISCIPLINE?

Commanders increasingly utilize nonjudicial punishment and administrative discharge tools to address service member misconduct. Consequently, the question then turns to how well do these lesser forms of punishment, as compared to the more severe option of the court-martial, deter service member misconduct. Criminology provides a basic framework to understand what factors best deter crime. This framework can be applied to service member misconduct and proves helpful in determining what means of punishment—the court-martial, nonjudicial punishment, or administrative discharge—best deters service member misconduct.

1. *Deterrence Theory: How Best to Deter Misconduct*

Deterrence theory identifies several factors that deter crime: credibility of punishment, severity of punishment, celerity of punishment, and collateral effects of punishment.²⁰⁶ Of these factors, studies reflect that the credibility of punishment—the belief that if an individual engages in crime, he or she will be caught and punished—best deters crime.²⁰⁷ The more an individual believes that he or she will be caught, the less likely he or she is to commit the offense.²⁰⁸ Closely related to credibility of punishment is the severity of the punishment. On its own, severity of punishment has little correlation to deterrence.²⁰⁹ A rational actor is unlikely to be deterred by the severity of the punishment if he or she does not believe there is a credible chance that he or she will be caught and punished.²¹⁰ If, however, there is a high degree of credibility, the severity of punishment correlates to deterrence.²¹¹ The likelihood of individuals engaging in a crime if they believe they will be caught further decreases as the level of severity in punishment increases.²¹²

206. See generally Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001).

207. *Id.* at 870.

208. *Id.* at 880.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

Concerning celerity, classical deterrence theory posited that for punishment to have a deterrent effect, it must be swift and immediately proceed the misconduct.²¹³ While recent studies reflect a minimal correlation between the celerity of a punishment and deterrence, it appears too soon to discount the deterrent effect of celerity.²¹⁴ Criminologists suggest that celerity may still play an important role in deterrence and warrants further research and studies.²¹⁵

Recent studies also indicate that the collateral effects of punishment may have a deterrent effect.²¹⁶ For example, in a study examining the deterrence effects of a driving under the influence (“DUI”) conviction, researchers indicated that the “extra-legal” consequences of a DUI conviction, including the shame of a conviction, the inability to drive, and the future recognition that they were convicted of a DUI, deterred DUI offenses with as much correlation as the legal sanctions of confinement and fines.²¹⁷ Overall, deterrence theory establishes that a high credibility of punishment, coupled with severity, best deters crime and that collateral effects and celerity of punishment also contribute to deterring misconduct.

2. *Deterrence Theory Applied to the Current Military Justice Trinity*

When applying this framework to the current military justice trinity, it becomes evident that none of the current forms of punishment effectively deter service member misconduct. In its current state, the court-martial process cannot deter misconduct. To be deterred, a service member must find the risk of being caught and punished to be credible. With a court-martial rate averaging around two service members per thousand²¹⁸, the court-martial process does not support a credible belief that service members will be caught and punished. A service member is unlikely to know someone who has been subject to court-martial, hear of a service member facing a court-martial for similar misconduct, or be exposed to the consequences of a court-martial. Thus, with a marginalized court-martial process, service members do not find the risk of punishment to be credible.

Similarly, celerity in the court-martial process is lacking. Courts-martial, especially general courts-martial, take a long time from the

213. *Id.* at 885.

214. *Id.*

215. *Id.*

216. *Id.* at 881-82.

217. *Id.* at 882.

218. *See generally* CODE COMM. ON MILITARY JUSTICE, *supra* note 159.

discovery of the offense to final action.²¹⁹ Hence, a service member is likely to change assignments, deploy, or separate prior to the completion of a court-martial action, reducing further the deterrent effect of the current court-martial process. While courts-martial continue to provide for severe punishments and collateral consequences, the lack of credibility and celerity provided by the court-martial process undermines the deterrent value of the present day court-martial system.

Likewise, nonjudicial punishment and administrative discharges provide little deterrent effect to service member misconduct. Admittedly, the frequency of nonjudicial punishment and the ever-increasing frequency of administrative discharges may enhance the credibility of punishment. As more service members receive nonjudicial punishment or are administratively discharged for instances of misconduct, other service members are likely to find it more credible that they will be caught and punished for similar misconduct. However, the non-public nature of nonjudicial punishment and administrative discharges undercuts the credibility that these punishments provide. Unlike a court-martial, nonjudicial proceedings are private.²²⁰ While other service members may be aware that a service member received nonjudicial punishment and the offending service members may publically display such punishment through a visible reduction in rank, the underlying offense is not necessarily publicized or apparent. Similarly, while an administrative discharge board may be public, administrative discharges are often handled absent a public hearing.²²¹ While an individual's separation is apparent, the basis for the separation may not be.

Even if nonjudicial punishment and administrative discharges provide a certain amount of credibility, the lack of severity regarding these punishments further undermines their deterrent effectiveness. Nonjudicial punishment does not allow for confinement or separation, either administratively or punitively.²²² As such, the most a commander can do is fine an accused, provide additional duties, reprimand, restrict an individual to base, or reduce a service member in rank.²²³ The options lessen when the

219. See HEADQUARTERS U.S. AIR FORCE, 2012, *supra* note 146, at 2; see also HEADQUARTERS U.S. AIR FORCE, 2013, *supra* note 146, at 2.

220. See UCMJ art. 15.

221. See generally John Brooker et.al., *Beyond 'T.B.D.': Understanding VA's Evaluation of a Former Services Member's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 128 (2012).

222. UCMJ art. 15.

223. *Id.*

accused service member is an officer and the commander loses the ability to reduce the officer in rank.²²⁴

Concerning administrative discharges, separation from the military may not even be a punishment to many accused service members. With service commitments and the prospects of deploying to a combat zone, many service members may welcome the opportunity to separate early, regardless of their service characterization.²²⁵ For those service members who do not desire an early separation, administrative discharges fail to provide severe punishment. While a service member will be effectively “fired,” the lasting effects are minimal. The commander may separate the service member with an honorable, general, or under other than honorable conditions (“UOTHC”) discharge.²²⁶ Both a general and UOTHC discharge characterization prevents the service member from enjoying the full benefits of previous military service, but neither of these characterizations involve confinement or the negative legal and social stigmas of a bad conduct or dishonorable discharge.²²⁷ Overall, the lack of confinement or punitive discharge options prevents nonjudicial punishment or administrative discharges from providing effective deterrence of service member misconduct.

A court-martial, though, used frequently and with celerity, provides the most effective deterrence for a commander. If commanders utilize a court-martial with increased frequency, service members will begin to believe that if they engage in misconduct, they will not only be caught, but will also be punished. Similarly, the severity of punishment afforded by the court-martial, including substantial confinement and punitive discharges, will increase deterrence when coupled with the increased level of credibility of punishment.²²⁸ Furthermore, the court-martial carries with it several collateral effects. Convicted service members will in most cases be convicted felons and lose federal rights accordingly.²²⁹ They will carry with them the shame of a federal conviction and the possibility of a punitive discharge, which will limit future employment options.²³⁰ Therefore, to achieve the appropriate level of deterrence to ensure good order and discipline, commanders need a frequent and efficient court-martial process.

224. *Id.*

225. *See* Theurer & Russell, *supra* note 15, at 10.

226. Brooker et al., *supra* note 221, at 135.

227. *Id.*

228. MANUAL FOR COURTS-MARTIAL, *supra* note 77, at II-126.

229. Brooker et al., *supra* note 221, at 152-53.

230. *Id.*

The need for a fully realized court-martial process, however, should not blind commanders. Underlying the need to use punishment for good order and discipline is the requirement that service members view this punishment as legitimate.²³¹ Here lies the continued role for due process in the military justice trinity. While the increase in due process may have rendered the court-martial process an ineffective tool for commanders to deter service member misconduct, due process also provides a sense of fairness and legitimacy to the court-martial process. Thus, commanders cannot neglect due process when relying upon the court-martial process to preserve good order and discipline.

In sum, commanders can only preserve good order and discipline within their units if they have the ability to deter misconduct through punishment. According to deterrence theory, commanders need punishment that is credible, severe, swift, and possesses collateral consequences to effectively deter misconduct. Additionally, the punishment imposed must be viewed as legitimate and just in order to have a deterrent effect. The current military justice trinity fails in its responsibility to provide that deterrent effect.

While the due process prong provides legitimacy and fairness, it renders the court-martial a marginalized tool. Consequently, the current court-martial process is not credible. The alternative means of punishment—nonjudicial punishment and administrative discharges—provide some credibility, but lack the severity and collateral effects of a court-martial, thereby minimizing their deterrence. It is the fully-realized court-martial process, with its allotment of severe punishment and collateral effects, when used with frequency and celerity, that best provides the commander with the capacity to deter through punishment.

V. RESTORING THE TRINITY—RECOMMENDATIONS FOR REFORM

The current military justice trinity is not properly balanced. Congress, the military appellate courts, and the military departments expanded due process at the cost of the military justice system. By rendering the court-martial process an overly cumbersome and time-consuming process, the expansion of due process restricted commanders' ability to effectuate good order and discipline—the results of which are apparent in the recent high-profile bouts of misconduct throughout the military departments. The

231. Theurer & Russell, *supra* note 15, at 9 (citing Kenneth Butterfield, et al. *Organizational Punishment from the Manager's Perspective: An Explanatory Study*, J. OF MANAGERIAL ISSUES (2005)).

question then turns to how should Congress and the military departments balance the military justice trinity.

The Articles of War represent the ultimate emphasis on good order and discipline. Absent much due process, the Articles of War allowed a commander to quickly and directly utilize the court-martial process to effectuate good order and discipline. Nonetheless, as evidenced by the calls for reform in World War I and World War II, the confluence of good order and discipline and the military justice system, at the expense of due process, was not the proper balance. Discipline must be legitimate; without due process the rampant use of court-martials was de-legitimized.

Additionally, a return to the limited-to-none due process model would not be a realistic option today. The fact that Congress, the military appellate courts, and the military departments have provided due process rights to accused service members creates a *Flowers for Algernon* type situation should Congress seek to take much of those rights away.²³² Service members and the public are accustomed to accused service members having basic constitutional rights, such as the right to an attorney, military judge, a trial by jury, and a review of their case. Congress and the military departments would face much criticism for removing these rights, which, in turn, could negatively impact morale within the services and challenge the legitimacy of the military justice process.

With the current and historical balances insufficient, Congress and the military departments should seize this opportunity to strike the proper balance. The key to finding the right balance is the appropriate level of due process. While recognizing that due process plays an essential role in the military justice trinity, Congress and the military departments should limit the extra-constitutional due process rights afforded to accused service members.²³³ By scaling back accused service members' extra due process

232. See generally DANIEL KEYES, *FLOWERS FOR ALGERNON* (2005). In *Flowers for Algernon*, Charlie Gordon, a middle-aged man with a remarkably low IQ, was the subject of a medical experiment where researchers were able to make him a genius. A happy individual before the procedure, Charlie became increasingly angry and unhappy with the higher IQ. Eventually, the treatment failed and Charlie resorted to his original IQ. However, he recalled life with the higher IQ and was extremely unhappy because of this experience, eventually giving up on life.

233. See James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 178 (1984) (“[A] stable majority of the [Supreme] Court has accepted the proposition that the armed forces are a ‘separate community’ in which greater than usual restrictions on individual liberty are required. In practice, the Court has given considerable, though not clearly delineated, deference to decisions by Congress or the military authorities that restrict the political expression, access to political activity, and right to counsel of servicemen and that impose gender-based restrictions on military career prospects.”). Under this line of reasoning, Congress and the military departments can scale back the due process rights afforded to accused service members with the extent of that de-escalation established by policy, not by law.

rights and restoring the viability of the court-martial as a tool for good order and discipline, Congress and the military departments will strengthen the military justice system prong. In turn, the good order and discipline prong will grow in strength and commanders will have the capability to deter serious misconduct.

To achieve these ends, the military departments and Congress can begin by identifying extra-constitutional rights throughout the court-martial process and then scaling back those rights. Beyond reducing specific due process rights, the military departments should develop a culture where the goal of military law is good order and discipline. But before implementing any reform, including increases and decreases in due process, the direct and indirect effects on good order and discipline should be weighed.

A. LIMITING ACCUSED SERVICE MEMBERS' DUE PROCESS RIGHTS

The military justice trinity is a delicate balance. Due process is especially delicate; a haphazard or piecemeal approach may not only fail to revitalize the court-martial as an effective tool for discipline, but may also delegitimize the entire process. As such, the military departments should assess due process at the structural, pretrial, trial, and post-trial levels.

1. *Structural Reform—Eliminate the Distinction Between Special and General Courts-Martial*

The distinction between a special and general courts-martial provides increased due process rights to an accused service member. A general court-martial, conducted in instances of serious misconduct, includes multiple levels of review.²³⁴ Upon preferral of charges, the special court-martial convening authority reviews the charges and then forwards the charges, along with a recommendation, to the general court-martial convening authority—a superior commander.²³⁵ The general court-martial convening authority then determines whether to refer the charges to a general court-martial.²³⁶ The two levels of review, and the ultimate decision of referral resting with a superior commander, provides additional process for accused service members to ensure their rights are not being violated.

These additional layers of review also prolong the process. As Figure 3.1²³⁷ portrays, between 2010 and 2013 general courts-martial averaged

234. UCMJ arts. 66-67a; R.C.M. 1201-1210.

235. R.C.M. 404

236. R.C.M. 601

237. *See supra* Part III.A.2.

about 200 more days to process than special courts-martial.²³⁸ While the time disparity partly relates to the increased complexity of offenses referred to general courts-martial as compared to special courts-martial, which causes general courts-martial to require more investigative time between the date of discovery and preferral, the additional layers of review also add time to the process. Furthermore, resting the referral authority for a general court-martial with the superior commander distances the immediate commander from the court-martial process. While the immediate commander may prefer charges, the ultimate decision whether to refer the case to trial resides at least two levels above the immediate commander. Consequently, when electing disciplinary action, the immediate commander may be hesitant to elect a court-martial because he or she knows the case will be resolved well above his or her level.

As such, Congress and the military departments should eliminate the distinction between special and general courts-martial. Instead, an immediate commander should be responsible for the preferral of charges against his or her service members. The decision to refer should then reside with the current special court-martial convening authority, who is often co-located with the immediate commander and more directly involved with the day-to-day operations and discipline of the installation.

Removing the additional layer of review will not only decrease processing times, but it will give the immediate commander and his or her directly superior commander greater responsibility and ownership over their cases. To prevent misuse of this authority, the special court-martial convening authority's staff judge advocate should have the discretion to recommend that the special court-martial convening authority's immediate commander—the current general court-martial convening authority—review the case. This recommendation should only occur when the special court-martial convening authority refuses to refer charges, and, in the judge advocate's opinion, the facts of the case warrant trial by court-martial. Overall, by streamlining the court-martial process, cases will proceed to trial more quickly and lower-level commanders will be more invested in their cases, which, in turn, may increase their willingness to utilize the court-martial process to effectuate good order and discipline.

2. *Pretrial Reforms*

During the pretrial process, accused service members receive extra-constitutional due process rights in the form of Article 32 investigations and

238. HEADQUARTERS U.S. AIR FORCE, 2012, *supra* note 146, at 2; HEADQUARTERS U.S. AIR FORCE, 2013, *supra* note 146, at 2.

an abundance of discovery rights. While these additional due process rights were intended to provide protections to accused service members and serve as a check on commanders, they make courts-martials increasingly laborious and time consuming. The military departments should address these issues by modeling Article 32 investigations and discovery rights on their federal practice counterparts.

a. Eliminate Article 32 Hearings in Favor of a Grand Jury System

Currently, accused service members have a right to an Article 32 hearing when the special court-martial convening authority recommends to the general court-martial convening authority that preferred charges should be referred to a general court-martial.²³⁹ Initially, Article 32 hearings had a limited purpose: mainly “to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case.”²⁴⁰ In practice, though, Article 32 hearings have developed into “mini-trials.” Because of the additional rights provided to accused service members in Article 32 hearings, specifically, “the rights to counsel, cross-examination, and presentation of evidence,”²⁴¹ the government must invest substantial time and resources in preparing for the Article 32 hearing, which includes witness travel and complying with defense discovery requests.

As a result, Article 32 hearings are time consuming. For example, in 2012, the Air Force averaged thirty-five days from preferral of charges to the Article 32 hearing.²⁴² The Air Force then averaged twenty-four days from the completion of the Article 32 hearing to referral of charges, thereby averaging fifty-nine days from preferral of charges to referral of charges.²⁴³ In comparison, in 2012, the Air Force averaged nine days between preferral and referral of charges in special courts-martial where accused service members were not afforded the right to an Article 32 hearing.²⁴⁴

Similarly, in 2013, the Air Force averaged forty-one days from preferral to the Article 32 hearing and twenty-two days between the Article 32 hearing and referral of charges, for a total of sixty-three days between preferral and referral.²⁴⁵ Meanwhile, that same year, the Air Force

239. UCMJ art. 32; R.C.M. 405.

240. R.C.M. 405(a) (discussion).

241. R.C.M. 405(b).

242. HEADQUARTERS U.S. AIR FORCE, 2012, *supra* note 146, at 5.

243. *Id.*

244. *Id.* at 8.

245. HEADQUARTERS U.S. AIR FORCE, 2013, *supra* note 146, at 5.

averaged twelve days from preferral to referral of charges in specials courts-martial.²⁴⁶

To increase the expediency of the court-martial process, Congress and the military departments should eliminate the Article 32 hearing process and instead adopt a system closely related to the federal grand jury process. Within the federal system, the government must secure a grand jury indictment of an accused before the case can proceed to trial.²⁴⁷ The federal system affords the accused very little rights within the grand jury system. For example, the accused does not have a right to be present, to be represented by counsel, to confront witnesses, or even to be aware of the proceedings. In addition, there is no judge present, the prosecutor is not bound by any rules of evidence and may introduce improperly seized evidence, and the proceedings are performed in secret, with the accused not permitted to receive a transcript of the proceedings.²⁴⁸ The government also possesses the light standard of probable cause to secure an indictment²⁴⁹

Such a system can be applied to the military justice system. Upon the preferral of charges, a convening authority may convene a grand jury-like board before which the designated trial counsel can present the government's case and not be bound by the rules of evidence or subject to the presence of the accused service member. The designated grand jury board can then determine whether the government meets its probable cause standard and provide a recommendation to the convening authority.

Unlike in the federal system, the recommendation should not be binding, as the convening authority is ultimately responsible for military discipline. However, the process ensures that the government possesses probable cause to proceed further with the case. The end result of the process is that the government would be able to proceed more quickly between the preferral of charges and referral of charges without perfecting its case in anticipation of the Article 32 hearing while also ensuring that there remains some check on the government's ability to bring charges to trial.

246. *Id.* at 8.

247. FED. R. CRIM. P. 6.

248. *Id.*

249. *Id.*

b. Bring Discovery Rights in Line with Federal Discovery Rights

Civilian and military courts share a basic understanding of an accused service member's discovery rights. CAAF, however, expanded on the discovery rights guaranteed to accused service members. Through its determination that "[m]ilitary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts," CAAF prescribed a liberal discovery standard "across the board as an absolute binding mandate."²⁵⁰ Under this standard, government counsel should "generally resolve any questionable issue involving discovery in favor of disclosure directly to defense counsel or through *in camera* inspection by the trial judge."²⁵¹

This standard has consequences in trial practice within the military justice system. Because the current military justice process requires and mandates government discovery to the defense at various stages—including prior to an Article 32 hearing, upon service of charges, and prior to trial—prosecutors spend much of their time scrambling to adhere to the liberal discovery mandates.²⁵² When defense counsel submits a discovery request, government counsel must presume that all the requested information is material, and therefore provide the information.²⁵³ Coupled with the CAAF requirement that the government is responsible for providing all information within the liberally construed possession of the government, military prosecutors become overwhelmed with locating and perfecting discovery, adding time and delay to the process.²⁵⁴

The federal system provides a more efficient model to provide the accused with discovery rights. While the federal system complies with the standard discovery responsibilities, to include *Brady*²⁵⁵ and *Jenck's Act*²⁵⁶ requirements, it does not establish a liberal discovery standard throughout the process. Instead, individual civilian courts "may vary in their interpretation of certain discovery rules."²⁵⁷ Based upon this standard, the

250. Hernandez & Ferguson, *supra* note 98, at 222 (quoting *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987)).

251. *Id.*

252. *Id.* at 224.

253. *Id.*

254. *Id.*

255. *See generally* *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that criminal defendants possess a constitutional right to receive all exculpatory evidence in the government's possession).

256. 18 U.S.C. § 3500 (2006); Hernandez & Ferguson, *supra* note 98, at 206 ("[T]he Jencks Act requires that the prosecutor disclose pretrial statements or reports of a government witness, once that witness has testified on direct examination.").

257. Hernandez & Ferguson, *supra* note 98, at 222.

military justice system could require the government to provide essential discovery material, such as exculpatory evidence and statements made by government witnesses when subject to direct examination, while also allowing the government to contest the materiality of defense-requested discovery that does not fall within those categories. By doing so, the government will be able to proceed with the case and not become muddled in defense discovery request quagmires prior to trial.

3. *Trial Reforms*

The due process rights afforded to accused service members during trial—the right to an attorney, a jury, a military judge, and the confrontation clause, to name a few—generally mirror the rights afforded to accused defendants in the federal system. However, the military justice system gives extra rights that resemble veto powers over remote testimony and joint trials that civilian defendants do not possess. By limiting these rights, commanders would have additional options in bringing accused service members to trial, which, at times, would also quicken the process.

a. Allow Witness Testimony via VTC

The expeditionary nature of military service presents a unique challenge to the military justice system. By the time a case proceeds to court-martial, trial participants, including witnesses and investigators, may have moved on geographically to other assignments, separated from military service, or deployed overseas.²⁵⁸ Consequently, in preparation for trial, government attorneys must locate these witnesses, secure their travel back to the location of the court-martial, and ensure that these witnesses are available for the court-martial when scheduled.²⁵⁹ These responsibilities come at great cost. The convening authority must pay for the travel, and often, especially when the service member is deployed, this travel impacts the military mission.²⁶⁰ Similarly, locating and transporting the witnesses and scheduling the trial to minimize mission disturbance adds time to the court-martial process.²⁶¹

The military justice system that is currently in place does not reflect these unique witness availability challenges. While the military justice system currently permits remote testimony in courts-martial, both parties must agree to its use. As such, an accused service member may prohibit the

258. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 103.

259. *Id.* at 103-04.

260. *Id.* at 104.

261. *Id.*

use of remote testimony, which the military judge is obliged to follow.²⁶² By removing the accused service member's ability to effectively veto the use of remote testimony, military prosecutors will be able to rely on technology, such as VTC, to secure the testimony of geographically separated witnesses, which will save time and resources.²⁶³ This expediency will come at minimal costs to the accused service members because the improvement in VTC technology still allows them to confront and cross-examine the witnesses.²⁶⁴

b. Remove the Preference Against Trying Multiple Accused Service Members Together

The military justice system deviates from the federal system in regards to trying multiple accused individuals together when their offenses arise from the same misconduct. In the federal system, the preference is to try these individuals together.²⁶⁵ The Supreme Court has repeatedly reminded federal courts that “[t]here is a preference in the federal system for joint trials of defendants who are indicted together.”²⁶⁶ As the Supreme Court explained, “[j]oint trials ‘play a vital role in the criminal justice system.’ They promote efficiency and ‘serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.’”²⁶⁷

The military justice system, though, prefers that each accused service member be tried individually. In practice, if the convening authority refers multiple accused service members to a combined court-martial, any of the service members can move to sever the charges, and the military judge must oblige. The basis of this preference is the issue of forum selection.²⁶⁸ The military justice system provides each service member the right to elect their trial forum; as such, one service member may elect trial by military judge alone, whereas the other service member may request trial by officer and enlisted panel members.²⁶⁹

262. *Id.* at 104-05; R.C.M. 703.

263. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 105. *See also* Maryland v. Craig, 497 U.S. 836, 850 (1990) (finding that remote-means testimony is permitted when (1) “denial of such confrontation is necessary to further an important public policy,” and (2) “the reliability of the testimony is otherwise assured.”).

264. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 106.

265. *Id.* at 99. *See also* Zafiro v. United States, 506 U.S. 534, 536 (1993); United States v. Bordeaux, 84 F.3d 1544, 1547 (8th Cir. 1996).

266. Zafiro, 506 U.S. at 537.

267. *Id.* at 537 (quoting Richardson v. Marsh, 481 U.S. 200, 209, 210 (1987)).

268. R.C.M. 812 (discussion) (“Where different elections are made (and, when necessary approved) as to court-martial composition a severance is necessary.”).

269. *Id.*

The preference for trying service members separately for shared offenses serves to prolong the court-martial process. Rather than proceeding through the pretrial, trial, and post-trial process once, the government must go through each process multiple times, adding time to the court-martial process.²⁷⁰ By giving commanders the option to try multiple accused at once, commanders are able to quickly try these cases and gain efficiencies of time and resources that would facilitate good order and discipline within their units.²⁷¹ Again, this efficiency comes at a minimal cost to accused service members; the convening authority can still provide each individual accused service member with his or her forum rights. For example:

[S]hould one accused request trial by judge alone and one accused request trial by panel members, the convening authority could seat a panel to decide the case of the member requesting trial by military panel while the military judge decides the case of the service member requesting trial by judge alone.²⁷²

4. *Post-Trial Reforms—Review the Appellate Process*

The due process right of appellate review is one of those basic due process rights that has become so important and ingrained into the military justice system that Congress and the military departments cannot completely do away with it. At the same time, however, Congress and the military departments must acknowledge and face the difficulties that appellate review has on the military justice trinity. Appellate review is not only a lengthy process, but since their creation, the military appellate courts have repeatedly created additional due process rights for accused service members.²⁷³ Should Congress and the military departments elect to limit accused service members' rights to expedite the court-martial process, the military appellate courts may undermine their efforts and either restore extra-constitutional due process rights or create additional rights.

Thus, Congress and the military departments should examine alternative means of appellate review. Several possibilities exist. First, Congress and the military departments may expand the types of cases that undergo appellate review by the department's TJAG and limit review by the military appeal courts to only the most extreme cases, specifically those where the accused service member has been sentenced to life in

270. REPORT OF THE SUBCOMMITTEE, *supra* note 2, at 101-02.

271. *Id.* at 101.

272. *Id.* at 102.

273. *See generally* GENEROUS, *supra* note 19, at 96-106.

confinement or to death.²⁷⁴ Second, Congress and the military departments could elect to leave the military appellate court's jurisdiction as is and instead limit their authority and standards of review.²⁷⁵ Under this approach, accused service members may have their cases reviewed, but the military appellate courts may be limited in their ability to establish new due process rights.

B. CREATING A CULTURAL EMPHASIS ON GOOD ORDER AND DISCIPLINE

An appropriate military justice trinity requires more than scaling back identifiable excesses in due process. There remains the omnipresent possibility that remaining extra-constitutional due process rights may increasingly impede the court-martial process or that Congress, the President, the appellate process, or the military departments may introduce additional due process rights. Conversely, the de-escalation of due process may go too far, with the military departments and Congress taking away too many essential due process rights, resulting in de-legitimized punishment. Hence, the military departments must develop a culture built upon the military justice trinity that emphasizes the primacy of fair and just good order and discipline. To do so, the MCM's stated end and purpose of military law should be reformed to reflect that good order and discipline is the end and purpose of military law, with the military justice system and due process supporting and legitimizing good order and discipline.²⁷⁶ With the appropriate culture in place, the military justice trinity can preserve a proper balance.

274. The appellate courts review cases under UCMJ art. 66. Article 66 requires the service TJAGs to refer to a court of criminal appeals any case "in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." UCMJ art. 66(b); *see also* UCMJ art. 69(a)-(b). Under Article 69(a), each department's TJAG reviews cases where the sentence did not contain one year of confinement or a punitive discharge (cases not reviewed under Article 66, UCMJ). Article 69(a) allows the departments' TJAGS to review whether "any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate." UCMJ art. 69(a). Article 69(b) permits the TJAGs to review the findings or sentence of any case not reviewed under Article 66 "on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." UCMJ art. 69(b).

275. UCMJ art. 66(f) permits each department's TJAG to "prescribe uniform rules of procedure for Courts of Criminal Appeals." UCMJ art. 66(f).

276. MANUAL FOR COURTS-MARTIAL *supra* note 77, at I-1.

VI. CONCLUSION

The past few years have not been kind to military justice. As Congress and the public turn their attention to the perceived failures of the military justice system, which are highlighted by the increase in sexual assault and misconduct in the deployed environment, the military departments must respond and reform. A failure to do so will not only jeopardize mission readiness, as each of these offenses strikes at good order and discipline within the military, but also may cause reform to be imposed upon the military departments. To address these issues, the military departments must understand what underlies the apparent increase in service member misconduct. Only once the military departments have an explanation can they craft an appropriate solution.

The explanation and solution for this rash of military misconduct lies in good order and discipline. Good order and discipline allows commanders to order their service members to kill in combat, to restrain from using force in a COIN operation, and to place the interests of their unit above their own. Good order and discipline should prevent service members from engaging in sexual assault, murdering civilian non-combatants in the deployed environment, and conducting themselves in an unethical and criminal manner. Yet, service members continue to engage in these crimes despite UCMJ provisions prohibiting such conduct, senior leaders regularly speaking out and warning against such conduct, and the public and Congress continuing to take notice.

The reason for this breakdown in good order and discipline is that good order and discipline does not operate in a vacuum. Instead, good order and discipline is a prong in the military justice trinity where the military justice system, due process, and good order and discipline, working in an interconnected manner, combine together to prevent service member misconduct. In an ideal balance, a commander can use the military justice system, legitimized and supported by due process, to effectuate good order and discipline within his or her unit. The commander can establish a “state of mind that produces proper action and prompt cooperation under all circumstances”²⁷⁷ through the threat of punishment via the military justice system. Service members, viewing this process as legitimate due to the fairness afforded by due process, will then be deterred from engaging in misconduct.

Commanders, though, cannot currently use this military justice trinity to establish a state of mind within their subordinate service members to

277. BENTON, *supra* note 173, at 41.

refrain from engaging in serious misconduct. Beginning with World War I, Congress, the military departments, and the military appellate courts have gradually increased the due process rights afforded to accused service members, thereby strengthening the due process prong of the military justice trinity. The bolstered due process prong, in turn, impacted the military justice system prong. The court-martial process, once the primary tool utilized to preserve good order and discipline, became a time-consuming and cumbersome option for commanders. Commanders, seeking swift and efficient justice, turned away from the court-martial and instead utilized nonjudicial punishment and administrative discharges to effectuate good order and discipline.

The weakened military justice prong subsequently impacted the good order and discipline prong. Commanders must utilize not only positive means to achieve good order and discipline within their units, but also negative means. To deter misconduct, commanders require the capacity to impose punishment. It is the military justice system that affords that capacity. In addition, for punishment to deter misconduct, it must be credible, severe, swift, and possess collateral consequences. Without an efficient or frequent court-martial tool, commanders no longer have access to punishment necessary to deter misconduct. Therefore, commanders can no longer properly effectuate good order and discipline.

As they search for solutions to the rash of misconduct, the military departments must again rely upon good order and discipline. By doing so, the military departments will embed in their service members the “intelligent, willing, and positive”²⁷⁸ obedience to the military justice system and prohibitions against engaging in such misconduct. The military departments can only do so, however, by balancing the military justice trinity. Good order and discipline requires a fully realized court-martial process that can be used with frequency and celerity. The military departments can only restore the court-martial process by reducing the due process rights afforded to accused service members. They must proceed carefully, however, as due process legitimizes the military justice system and good order and discipline. Consequently, the military departments should direct their focus on reducing the extra-constitutional due process rights of accused service members, which unduly lengthen and burden the court-martial process, while maintaining the constitutionally afforded due process rights of accused service members.

278. BENTON, *supra* note 173, at 41.