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MARTIAL MISCONDUCT AND WEAK DEFENSES: A HISTORY REPEATING ITSELF (EXCEPT WHEN IT DOESN'T)

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Abstract

This article explains how the debate over military justice reform, ongoing in Congress, within the Department of Defense, and in public conversation, ignores to its detriment several important factors – one involving subject matter jurisdiction, the other involving a set of normative claims – making this debate historically deficient. First, it ignores the key and historically accurate link between the outer limits of commanders' criminal jurisdiction and the military harms they need to deter. Second, defenders of the status quo unaccountably repeat a number of failed or weak arguments in justifying the reach of these commanders over misconduct that has neither historical nor empirical claims to legitimacy.

Military Justice is the body of criminal law and procedure

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that regulates the conduct of millions of Americans based solely on their employment status. It has a history that predates the Constitution, but a strong pedigree is not an immunity from criticism. In fact, public interest and legislative skepticism about military justice's more idiosyncratic features has not been this high since the ancient Articles of War (for the Army) and the Articles for the Government of the Navy were finally combined, reformed, and rationalized in the Uniform Code of Military Justice (1950). Intense and repeated criticism over the last decade from servicemember victims and their advocates in and out of uniform have centered almost exclusively on two issues: first, the crimes of sexual assault and sexual harassment; second, the investigative, prosecutorial, and (at times) judicial-like powers of lay commanding officers – those who are neither lawyers nor elected officials accountable to the public nor to a legal code of professional responsibility that traditionally works as constraints on prosecutorial abuse and error. This criticism has sired a predictable and vigorous defense of the status quo. This defense concludes that conventional legal authorities vested in those officers with high command responsibility are not only not a problem but actually the solution to the effective prevention and punishment of such crimes. The claims made in defense come from within the military services and from former commanders and judge advocates, yet the claims have not had the persuasive effect that has long buoyed incremental adjustments over time, civilianizing major components of military justice but eschewing wholescale reform.

In a recent twist, acknowledging where the gravity of public support actually lies, the Department of Defense and the president have agreed to make changes to the scope of certain commanding officers' prosecutorial discretion, but only for sex crimes. This article suggests that weak arguments supporting a military justice status quo – indeed, arguments favoring reform too – have inexplicably ignored two facts: (1) some, but not all, idiosyncratic elements of military codes of criminal law have displayed a certain degree of continuity overlaid on generally-accelerating civilianization; and (2) the arguments against increasing civilianization of due process and for the continuity of traditional authorities are also shockingly consistent with arguments made one hundred years ago before and after World War I. For the first time, these claims are systematically and thematically organized, revealing two related leitmotifs. Those arguments ultimately failed, but only in pieces. The failure to address and fully rationalize the linkage between the types of misconduct within the military's interest and the corresponding interests and roles of commanders has led inevitably to this current inflection point where Congress must decide how it wants the nation's military to police itself. It is in Congress's, and the Armed Forces', interest to pay heed to what history can illuminate.

I. INTRODUCTION

If you were so unlucky as to be a common Roman foot-soldier, or even a more privileged centurion, in the time of the Republic or centuries later under the Empire, in an army legion that occasionally displayed characteristics of insubordination or cowardice before an enemy force, you faced an uncomfortable and possibly very short future. If you had been deemed a coward for quitting your sentry post or avoiding direct contact of the enemy with your chariot during a charge, you could foresee the very likely event of your being cudgeled to death by your superiors.[1] But should you be, personally, *innocent* but assigned to a larger unit in which such desertion or cowardice was open and widespread, your fate was in the hands of chance. Your legion would be divided into cohorts, and those cohorts further subdivided into groups of ten. You and the other nine soldiers would draw straws, with the shortest straw marking the sacrificial subject. Rather than weaken a large portion of the army in the midst of a field campaign through mass corporal punishment, death, or banishment, but in order to achieve a maximum deterrent effect at the same time, only this *one* unlucky soldier, one in every ten, would endure the punishment—and ultimately death. The luckier nine served as the collective executioner, cudgeling or stabbing the sacrificial victim/convict to death (and thus the term: *decimation*).[2]

If you were a common soldier sailing with Richard the Lionheart to the Holy Land to participate in the Third Crusade, you would be incentivized to keep one's temper and greed under control, for if you happened to kill another while on board a vessel at sea,

1. This military disciplinary punishment was called *Fustuarium* in Latin and was a harsher alternative to flogging or public disgracing. POLYBIUS, HISTORIES 6:38 (Evelyn S. Shuckburgh trans., 1962) (1889), www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0234%3Abook%3D6%3Achapter%3D38 [perma.cc/J9JE-WKBF] (Polybius' book covered a fifty-three-year period in the mid-Second Century BCE, from Hannibal's Spanish Campaign to the Battle of Pydna). Beating the undisciplined with clubs was common practice among Spartan officers, who carried their "bakērtia" as part of their uniform of office. Simon Hornblower, *Sticks, Stones, and Spartans: the sociology of Spartan violence*, *in* WAR AND VIOLENCE IN ANCIENT GREECE 58-59 (Hans van Wees ed., 2009).

2. POLYBIUS, *supra* note 1. Polybius remains our best source for contemporaneous reports and analysis of the practice. Charles Goldberg, *Decimation in the Roman Republic*, 111.2 THE CLASSICAL J. 141 (Dec. 2015—Jan. 2016) ("Polybius' military knowledge and experience . . . indicate that *decimatio* was performed regularly enough in his day to qualify as a standard disciplinary measure for the legion." *Id*. at 143-44). *See also* SARA ELISE PHANG, ROMAN MILITARY SERVICE: IDEOLOGIES OF DISCIPLINE IN THE LATE REPUBLIC AND EARLY PRINCIPATE 128 (2008) (quoting Roman Senator, jurist, and suppressor of Spartacus' Revolt in 72 A.D.: "For when in a defeated army every tenth man is struck down with clubs, the brave meet the same fortune. Exemplary punishment always contains an element of injustice, but the public good outweighs the disadvantage of individuals").

you would have been tied to your victim's corpse and thrown overboard.[3] If you killed on land, you would have been tied to the victim's corpse and buried. If you slapped another with the palm of your hand, you would have been "thrice ducked in the sea," but if you committed an assault with a knife, you would have lost your hand.[4] If caught stealing from a fellow soldier or sailor, you would have been "shorn like a champion . . . [with] boiling pitch [to be] poured" on your head, then covered in down feathers and left at the first port of call.[5]

If you were an English nobleman, like Henry of Essex in the Twelfth Century, tried and convicted of cowardice, you would have been "deprived of [your] lands, shorn, and shut up for life as a monk in the Abbey of Reading."[6] Two hundred years later, if, in a conspiracy, you had given up a castle to the enemy, your noble body might have been drawn and then hanged, but your conspiratorial compatriot, a commoner with a good service record, would only have been beheaded.[7]

If you were a Sixteenth Century English archer on an expeditionary campaign in Normandy and accused of anything from disobedience, inciting an unlawful assembly or sedition, gambling, being in "disarray" in battle, assaulting a fortification without permission of the commander, or killing a prisoner captured by another, you would have been subjected to possible punishments ranging from drawing, quartering, hanging, beheading, imprisonment on nothing but bread and water, "riding the wooden horse,"[8] forfeiture of your property, losing a day's wages, or to be "punished at the King's pleasure" or "at the Marshal's discretion."[9]

We have come a long way since these heady days of rapid, rough "justice" whereby misconduct within the military ranks was, itself, treated like an enemy force: to be deterred with fear if possible but to exact the sharpest and swiftest of retribution if and when this "enemy within" were to strike. Between commission of these offenses and one's fate at the hands of other soldiers, commanders, or kings, lies an important component of *disciplina militaras*. The process of separating culpable fact from dubious allegation, determining guilt and assigning liability, and deciding the appropriate punishment was anything but uniform over the millennia.

It is impossible in the space of one article to describe with

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3. FRANCIS GROSE, MILITARY ANTIQUITIES RESPECTING THE HISTORY OF THE ENGLISH ARMY FROM THE CONQUEST TO THE PRESENT TIME 59 (1786-88).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 199.

9. *Id.* at 85-107 (quoting the military code of King Henry VIII, *Statutes and Ordinances for the Warre* (1543)).

sufficient detail or to provide some novel analysis about the long history of law governing military members' conduct.[10] But to place in proper context the current challenges that seem poised to uproot conventional notions of what military justice is for, and what roles commanders should have, it is necessary to review the wavetop evolution of the field, and highlight the themes that still resonate within contemporary military justice – with their "ancient lineage"[11] – that mark its distinguishing, and controversial, characteristics.

This article fills several important gaps in the literature and in the public conversation about the fate of the U.S. military justice system. As Congress continues to project skepticism about the functions filled by certain high ranking commanding officers in wake of continued problems with deterring and prosecuting sexual assault,[12] two important facts remain undiscussed. First, a survey

10. For a deeper review of the subject's history, *see* Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016); JOSEPH W. BISHOP JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2nd ed. 1920); Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980); Walter T. Cox III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (Fall 1987); WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 3-15 (1955); WILLIAM T. GENEROUS JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (1973); JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE, AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I (2017); JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE (2013). Much of the history discussed in this Part is drawn from these valuable studies.

11. Schlesinger v. Councilman, 420 U.S. 738, 755 (1975).

12. *See* Missy Ryan, *Pentagon Leaders Have Opposed Plans Overhauling the Military System for Trying Sexual Assault for Years. Has the Time Come for Change?*, WASH. POST (Apr. 10, 2021), www.washingtonpost.com/national-security/sexual-assault-military-reform-pentagon-resistance/2021/04/10/e5a98a92-96f7-11eb-8e42-3906c09073f9_story.html [perma.cc/DHK9-LMR7]; Ellen Mitchell, *Gillibrand Makes New Push for Military Sexual Assault Reform*, HILL (Apr. 29, 2021), https://thehill.com/policy/defense/550999-gillibrand-makes-new-push-for-military-sexual-assault-reform [perma.cc/8AGP-3KCT]; Leo Shane III, *Major Overhaul in How the Military Handles Sexual Misconduct Cases May Finally Happen*, MIL. TIMES (Apr. 29, 2021), www.militarytimes.com/news/pentagon-congress/2021/04/29/major-overhaul-in-how-the-military-handles-sexual-misconduct-cases-may-finally-happen/ [perma.cc/LUY4-MGRJ]; Michel Paradis, *Congress Demands Accountability for Service Members*, LAWFARE (June 1, 2021), www.lawfareblog.com/congress-demands-accountability-service-members [perma.cc/9Q7J-HQLZ]. For summaries of the legislative efforts to investigate and drive change in military sexual assault prevention and prosecution, *see generally* Rodrigo M. Caruço, *In Order to Form a More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success as a*

of historical efforts to manage the "good order and discipline" in armies – whether by a legislature, monarch, or president, and whether in peacetime or in war – reveals that these criminal justice codes became increasingly due-process oriented. Nevertheless, these codes remained concerned almost exclusively with what this article will refer to as "martial misconduct," or wrongs and harms that can only be deemed so in the context of military affairs like desertion, disobedience, disrespect, and dereliction of duties. Common law crimes that would be punished through civil courts – murder, rape, larceny, for example – were left to competent civil jurisdictions. Commanders were considered important for determining what behavior was militarily-criminal, for adjudging guilt, and for imposing punishments, but their discretion was cabined to circumstances that drew on their expertise and interests.

Second, there has been significant attention paid to the "civilianization" of military justice in the United States since the adoption of the Uniform Code of Military Justice ("UCMJ") in 1950, as well the first pangs of institutional reform that immediately preceded and followed the First World War.[13] However, in the contemporary debates over the legitimacy and value of many procedural elements of military law, little attention is given to the fact that many of the same pro-status quo arguments – and those of the critics – remain shockingly similar to those of a century ago.[14]

Part I below will survey western military (criminal) history from the Roman Republic through American Revolution, highlighting the growth of proto-due process for the benefit of accused soldiers and sailors and the reach of military codes' subject matter jurisdiction.

Part II synthesizes, for the first time, several significant themes evidencing a type of historical continuity, including that all of these early "Articles of War" systems scaled punishments to the gravity of the offense and established some form of stable procedure to formalize and make routine the investigation, prosecution, and punishment of those crimes.

Part III recounts the great debates surrounding potential due process reforms of the American Articles of War bookending World

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Court of Last Resort, 41 VT. L. REV. 71(2016); BARBARA SALAZAR TORREON & CARLA Y. DAVIS-CASTRO, CONG. RSCH. SERV., R43168, MILITARY SEXUAL ASSAULT: CHRONOLOGY OF ACTIVITY IN THE 113TH-114TH CONGRESSES AND RELATED RESOURCES (2019); KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., R44944, MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT (2021).

13. *The Uniform Code of Military Justice: Hearing on H.R. 2498 Before the H. Comm. on Armed Services*, 81st Cong. 606 (1949), www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-VI-hearings-on-HR-2498.pdf [perma.cc/PGY3-2559]; Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Criminal Legal System*, 225 MIL. L. REV. 512 (2017).

14. *See infra* Part IV.

War I, sparked by highly publicized controversial courts-martial. These debates, engaging the interests of Congress and the Commander-in-Chief, occurred largely within the military itself; its protagonists and antagonists wore the uniform of judge advocate officers.

Part IV compares the arguments made against reform in the first two decades of the twentieth century against those in the twenty-first, marking yet another theme of continuity that has gone unnoticed.

II. BRIEF HISTORY OF MILITARY CRIME AND PUNISHMENT

The history of military law and, particularly, military justice in the United States is one of long periods of quiescence, interrupted by cyclical bouts of intense interest and reform, occasioned by war and the conscription of great numbers of civilians.[15]

> Our military law is very considerably older than our Constitution . . . taken from pre-existing British Articles having their inception in remote antiquity.[16]

A. Roman Ancestors

We can trace official, formal means and methods of inducing militarily-beneficial conduct among American soldiers – another way of saying means and methods to deter and punish – back at least through the Roman Empire. Though in some sense fragmentary, what we do know about Roman military law (*leges militares*) is that there was never really a pure military legal code as we think of them today – "a regulated system of interior disciplinary control within the military establishment" distinct from regulations governing the day-to-day management of armies.[17] Rather, what we have are treatises written by Roman jurists at the time, efforts to organize and explain the customs, practices, and fundamentals of military legal affairs, and patchwork collections of various imperial edicts that provided for punitive sanctions on soldiers for certain offenses, among other administrative regulations.[18] Typical focus was on penalizing cowardice, mutiny, desertion, violent acts against superiors, and attempts to avoid service, but the actual definition of these offenses and their punishments was generally left to the vagaries, moods, and impulses of commanders.[19]

The closest Roman analogue to a modern code of military

15. BISHOP, *supra* note 10 at xv.
16. WINTHROP, *supra* note 10, at 15, 17.
17. C.E. BRAND, ROMAN MILITARY LAW 126-28 (1968).
18. *Id.*
19. *Id.;* Schlueter, *supra* note 10, at 129-44.

justice was the *Military Laws of Ruffus*.[20] This proto code consisted of sixty-five articles or rules. Subjects ranged from service-disqualifying events (*e.g.*, article 3: "adulterers or those convicted of any other public crime") and prohibitions on holding civil office while serving (article 7); to prohibitions and punishments for, among other things: conspiracy to "foment mutiny against their commander, from whatever cause" (article 10); insubordination (article 11); disorderly conduct, rioting, and disturbing the peace (articles 16-20); self-harm to avoid service (articles 23 and 24); fleeing from battle or an unwarranted retreat (articles 25, 26, 31, 32, 33, and 34); disobeying a command or order (article 30); drunkenness causing the soldier to "err and transgress" (article 45); evading military service (article 50); feigning illness (article 52); revealing plans to the enemy (article 53); and desertion (articles 57-63).[21]

The Emperor Maurice, of the eastern Byzantine Empire in the late Sixth Century, wrote and promulgated the *Strategica*, effectively "Articles of War" that acted as instructions to soldiers upon their entry into military service.[22] It included direction to commanders to disseminate these instructions to their troops when embarking on active operations.[23] These instructions prohibited the kind of behavior, sometimes under threat of "suffer[ing] the extreme penalty,"[24] thought to degrade a commander's ability to conduct those operations successfully or that which would foreseeably increase the risk to one's forces and plans. It punished what you would expect a warrior emperor to punish: sedition or mutiny against the commander; quitting a guard post without authority; desertion; failure to comply with orders; neglecting to maintain one's weapons;[25] plundering the dead; attempting a "hasty and disordered pursuit" of the enemy; and providing for the practice of decimation when units flee the field of battle "without just and manifest cause."[26]

From the various Latin treatises discussing Roman military law, we know that this body of regulated behavior did not define what modern legal usage calls "elements" of each offense, specifying

20. *Schlueter*, *supra* note 10, at 141 (the identity of Ruffus, also spelled "Rufus," has not been established, though suspected to be acutely familiar with military command and combat, and thought by some to Emperor Maurice of Byzantine (assuming throne from Tiberius in 582 CE)); BRAND, *supra* note 17, at 135-36.

21. *Leges Militares ex Ruffo* ("Military Laws from Ruffus"), *reprinted and translated in* BRAND, *supra* note 17, at 148-69.

22. Maurice, *Strategica*, Chapter VI, *reprinted and translated in* BRAND, *supra* note 17, at 194-95.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 196.

an actus reus and mens rea.[27] However, this law did concern itself with distinctions between "common" criminal offenses and those specifically military. "Specifically military" misconduct was defined as an offense that can only be committed by a "person in his capacity as a soldier" (in other words, it would be legally impossible to condemn and punish a civilian for feigning illness to avoid combat, or for disobeying a commander's order).[28] One such notable offense – one that continues today in the UCMJ, is any "disorder to the prejudice of the common discipline" including "offenses of laziness, of insolence, or of idleness."[29]

Rome's military law observed and administered a spectrum of military punishments tied to the severity or gravity of the offense – desertion in the face of the enemy, for example, was punished by death.[30] But this spectrum included not just corporal punishments but other forms of rebuke that we would today call "administrative corrective measures" or "non-judicial punishment."[31] Examples included fines, compulsory (extra) duties, transfer to other occupational branches of the army, reduction in rank, and various kinds of discharge from the service.[32] In fact, even among the most serious of offenses (desertion in battle), the law permitted punishment to be scaled based on the specific considerations of the case and characteristics of the accused: the duration of the desertion, whether he returned to duty unforced, what branch he served in, his rank, where he was posted, his previous conduct, whether he was alone or with others, and whether it was in connection with some other crime.[33]

Moreover, Roman commanders had certain expectations thrust upon them by virtue of their command roles, separate from their duty to accomplish a military mission but undoubtedly related to satisfying that duty. For instance, commanders were expected to lead training, keep soldiers in their camps and fortifications, periodically "make rounds" to observe and inspect the diligence of the sentries, to approve rations, prevent fraud, to "hear complaints

27. Morrisette v. United States, 342 U.S. 246, 250-51 (1952).

28. Arrius Menander, *Libro Primo de re Militari* ("Military Affairs, Book I"), *reprinted and translated in* BRAND, *supra* note 17, at 171.

29. *Compare* Menander, *Libro Tertio de re Militari* ("Military Affairs, Book III"), quoted in BRAND, *supra* note 17, at 183, and *supra* note 18, at 183, n. 11 *with* 10 U.S.C. § 934.

30. POLYBIUS, *supra* note 1.

31. UNITED STATES MANUAL FOR COURTS-MARTIAL, Part V (2019).

32. BRAND, *supra* note 17, at 172-73. Brand notes the transfer to other branches was a form of shaming: there existed a hierarchy of prestige among the branches, with cavalry superior to infantry, which was superior to "labor battalions." *Id*. at 173, n. 3. Macer, *Libro Primo de re Militari* ("Military Affairs, Book II"), quoted in BRAND*, supra* note 17, at 189 (noting the three kinds of discharge: honorable, for-cause, and dishonorable – the latter a consequence of conviction of a crime).

33. Menander, *Libro Secundo de re Militari* ("Military Affairs, Book II"), quoted in BRAND, *supra* note 17, at 181.

of their fellow soldiers, inspect the sick, and to "punish offenses according to the limits of their authority."[34] Brand notes that – according to Polybius at least – tribunes and commanders "sat together in council to try an offender . . . and thus constituted in fact a court-martial—the first of which we have any record."[35] Nevertheless, Roman military discipline was centered on enforcing the commander's will in order to achieve military goals – not to ensure Roman legionnaires were morally upright citizens of the communities they ostensibly defended. The patriarchal authoritarian nature of Roman society was cemented in Roman civil law – the power of *patriapotestas* was vested in the male head of each household (*paterfamilias*) – and naturally fit within a hierarchical structure of an army: "unrestricted discretion of its commander [was] the natural order."[36] Orders from commanders were unappealable, "unquestioned law."[37]

B. English Forebearers

After the fall and fracture of the Roman Empire, and before the late Middle Ages, myriad Italian, German and French (Norman) principalities and kingdoms of Lombards, Goths, and Bavarians each had variations of some sort of chieftain-led military tribunal to govern their forces both in peacetime and in conflict.[38] Professor Schlueter notes that over the succeeding centuries, "amidst the intense rivalries for land and power and the usual accompanying dishonorable practices, 'chevaliers' vowed to maintain order, and to uphold the values of honor, virtue, loyalty, and courage."[39] These chevaliers were the landed gentry and nobles, acted as judge and jury, and their jurisdiction included their peers and dependents (like a form of separate community self-regulation).[40] These informal dispute arbiters and nascent martial judges preceded the formalizing of such standing structures and systems by the Normans into "courts of chivalry."[41] William brought this method of law and order with him when he crossed the channel and conquered

34. Macer, *Libro Primo de re Militari* ("Military Affairs, Book II"), quoted in BRAND, *supra* note 17, at 189.

35. Macer, *supra* note 32, *quoted in* BRAND, *supra* note 17, at 188-89, n. 13.

36. *Id.*

37. BRAND, *supra* note 17, at 42-43. One noted scholar-soldier-lawyer, General Henry Halleck (General-in-Chief, later Chief of Staff, of the Union Army under Secretary of War Stanton), believed that the power of the Roman military judges (*magistri militum*) also included jurisdiction over civil actions between soldiers and civil or criminal claims brought by civilians against soldiers. Henry Wager Halleck, *Military Tribunals and their Jurisdiction*, 5 AM. J. INT'L L. 958, (1911), *reprinted in* MIL. L. REV. BICENT. ISS. 15 (1975).

38. Schlueter, *supra* note 10, at 131-32.

39. *Id.* at 132.

40. *Id.*

41. *Id.*

the English in 1066, incorporating the chivalry forum within his supreme court, the *Aula Regis*.[42]

In 1189, Richard I, as briefly recounted above, instituted a rather draconian-seeming set of prohibitions and punishments on soldiers working their way to the Holy Land to fight in the Third Crusade.[43] Though pouring boiling pitch on someone or burying them alive next to their victim may seem unnecessarily brutal and unusual, they were not considered either by the standards of the day, at least when compared to the routine punishment meted out by civilian criminal justice: drawing and quartering, disemboweling, placing decapitated heads on pikes, etc.[44] The military-aimed punishments were ostensibly cruel and discretion-less exercises in command prerogative to swiftly end disputes and deter misconduct through fear, but not categorically different than punishing all civilian felonies with "mutilation and death."[45]

Edward I (1272-1307) created a specific "Court of Chivalry" managed by two senior members of the royal administration: the "Lord High Constable" and "Earl Marshall" – the former essentially the King's ranking general and the latter acting as a kind of human resources-managing Adjutant General with ministerial powers to "marshal" the troops and keep the rolls of officers and soldiers.[46] Their combined "ministerial" and "judicial" jurisdiction "extended to matters of arms and matters of war," but were explicitly not intended to be bound by English common law nor to regulate the conduct of anyone outside of service in the armies.[47] Specifically, these "courts of honor" or "courts of chivalry" (also eventually called "courts-martial") primarily adjudicated three kinds of cases: civil cases of "death or murder beyond the sea," the "rights of prisoners taken in war" and – of most relevance to the evolution of military justice – "Offenses and Miscarriages of Soldiers contrary to the Laws and Rules of the Army."[48]

Richard II, in 1385 or 1386, published twenty-six rules or ordinances that prohibited, among other things, group desertion (under penalty of beheading and forfeiture of all property to the king), robbing or pillaging of churches, attacks on or capturing unarmed holy men, crying "havok!" (a military commander giving an order to cause chaos and mayhem by allowing soldiers to pillage and otherwise wantonly ransack and destroy civilian property), displays of grudge-holding by contests in which a participant could

42. *Id.* at 136.

43. POLYBIUS, *supra* note 1.

44. AYCOCK & WURFEL, *supra* note 10, at 3.

45. *Id.*

46. SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 36-38 (1739); James Stuart-Smith, *Military Law: Its History, Administration and Practice?*, 85 L.Q. REV. 478 (1969), *reprinted in* MIL. L. REV. BICENT. ISS. 25, 28 (1975).

47. *Id.*

48. *Id.*; WINTHROP, *supra* note 10, at 46.

be killed (*i.e.*, dueling), and required enemy prisoners to be safeguarded so that they would be available for interrogations.[49] It also required obedience to commanders and dutiful performance of military tasks.[50]

Henry V (1413-1422), considering war to be "inevitable," issued general articles of war specifically to corral the:

> noxious appetites . . . under the rule of justice, by which mankind are informed how to live honestly . . . without injuring each other, rendering to everyone their right. And that our army, as well in peace as war, may be led in the proper path, and the said common good preserved entire; and also on the other part that the constable and mareschal [sic] of our said army may judge and determine the more prudently in the causes daily brought before them.[51]

He ordered this "constitution" to be proclaimed publicly and required that each captain have a copy of it so that "all concerned may not pretend ignorance" of its restrictions.[52]

Given that, by this point in European history, most adults still fervently believed in witchcraft, thought that mice spontaneously generated in straw piles, were convinced that murdered corpses bled in the presence of its murderer, and understood that stars, planets, and the sun orbited a fixed Earth, it seems quite humane and modern by standards of his time.[53] It recognized the reality that "honorable" combat often is blighted by the stain of despicable deeds that undermine the functioning of the army in the field and sully the reputation of the king or his wartime effort. And so, Henry required a degree of civility and restraint among his armed forces, imposed at least tacit duties on his subordinate commanders to keep their troops in line, and recognized the desirability of an organized set of expectations so that those being judged were judged fairly. Stealing from churches, chapels, and monasteries was prohibited with capital punishment for anyone "laying violent hands on said priests,"[54] and rape also carried the death penalty; quitting of guard duty was of course criminalized.[55] These articles also reminded the troops of their agency relationship to the crown: all "soldiers, and

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49. GROSE, *supra* note 3, at 60-65.

50. One (much later) Chief Justice of the British court was quite pleasantly surprised by how "remarkable" this "elaborate code" really was: it was "minute in its details to a degree that might serve as a model to anyone drawing up a code of criminal law. They follow the soldier into every department of military life and service. They point out his duties to his officers, his duties to his service, his duties to his comrades, his duties with regard to the unarmed population with whom he may come into contact." *R. v. Nelson & Brand* (1867), Cockburn's report, 89.

51. *Reprinted in* GROSE, *supra* note 3, at 68.

52. *Id.* at 69.

53. DAVID WOOTEN, THE INVENTION OF SCIENCE: A NEW HISTORY OF THE SCIENTIFIC REVOLUTION 6-7 (2015).

54. *Reprinted in* GROSE, *supra* note 3, at 69.

55. *Id.* at 70.

other persons receiving wages from us, or our kingdom, shall be obedient to their immediate captain or masters, in all things legal and honest."[56] Commanders were barred from "fraudulent mustering" or reporting their numerical strength purposefully inaccurately; dueling was prohibited, as was "plundering" of merchants, physicians, and barbers; soldiers were barred from launching assaults on castles or fortresses without orders to do so; and prostitutes ("publick and common whores")[57] were banned from the camps – they must be "stationed together afar off from the army," at least a league distant.[58]

In the reign of King Henry VIII (1509-1547), commanders could dispose of indiscipline in the field, but the government also possessed another venue back in London.[59] The court – presided over by the "Marshall" – was directed to sit twice per week, on Mondays and Thursdays.[60] The court consisted of a judge martial, auditor, under-provosts, "gaoloers" (jailors), "tipstaves" (a clerk for the judge), and an executioner.[61] The preamble to his "Statutes and Ordinances for the Warre" (1543) speaks of his desire for the "due observation of laws and good order," and – like earlier monarchs – demanded soldiers' obedience to their officers; prohibited fraudulent musters; required commanders to ensure their soldiers were paid due wages; banned engendering "grudgings" against the king to prevent "murder, division, dissention, sedition, "stirring" or the "commocyon of the people;" proscribed "disarraying" oneself in battle; and prohibited gambling and crying havok.[62]

But his articles also appear somewhat progressive, offering limited appellate rights:

> if any man finde himself grieved after final sentence, that hee be at his appele before the marshall at all seasons . . . and for all causes made between any of them, and any other person of the army, that there, they, or any of them, abyde the judgment of the marshall and his court.[63]

They provided for rules for taking prisoners (death penalty if one kills the prisoner captured by another; cannot sell or ransom one's prisoner without special license from the "capteyne"); they prohibited "making inroads into enemy territory without permission from the king" or "chief-taynes of the ward;" and prohibited the robbing and pillaging of any lodgings where women were tending to children.[64]

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56. *Id.*
57. *Id.* at 79.
58. *Id.*
59. *Id.* at 54.
60. *Id.*
61. *Id.*
62. *Id.* at 85-95.
63. *Id.* at 99.
64. *Id.* at 99-105.

These edicts were, in turn, translated by subordinate commanders (select members of the nobility) into something remotely akin to a campaign- or deployment-specific general order, each proscribing certain conduct on or near the battlefield: "lawes and ordonnances of warre established for the better conduct of the service in the Northern parts, by his excellence the Earl of Northumberland, Lord General of his Majestie's armie and fleete."[65] Blasphemy was punished by boring the tongue of the offender with a red-hot iron.[66] Missing sermons and prayers was prohibited; death would accompany "traitorous words against his majesty's sacred person, or royal authority;" negligent or careless service was criminalized, as was quarrelling with a superior officer; as today, mutiny, sedition, and "departing . . . without license" (*i.e.*, AWOL) were serious offenses.[67] Such orders also banned adultery, theft, provoking or reproachful words, murder, slovenly reporting for duty, pawning off military equipment, straggling, extorting money or spoiling victuals from subjects when marching through their country, giving "false alarm" in camp, drawing one's sword in a private quarrel, sleeping or being drunk while on sentinel duty.[68] Penalties ranged from forfeiture of goods to loss of pay, riding the wooden horse, imprisoned to survive on bread and water alone, banishment from camp, death, "death without mercy," and "punishment at the King's discretion."[69] Soldiers who retreated before coming to blows with the enemy were punished with a variation of the Roman decimation: every tenth man would be punished at the discretion of the commander while the rest would serve as lowly and dishonorable "scavengers" until a "worthy exploit take off that blot."[70] These rules of conduct also imposed duties on commanders and officers. They must not defraud their troops of pay, they must stop troops from dueling, and be on the watch for drunkenness and quarrelling among their soldiers.[71] They were prohibited from creating fraudulent muster sheets that deceitfully enlarged the number of soldiers on the rolls with "counterfeit troopers."[72]

But rules are just arbitrary dictates without stable and consistent processes to administer "justice" over these soldiers when those dictates are ignored or violated. These supplementary orders, derived from the King's Articles of Warre,[73] provided for a semblance of necessary due process: for instance, in order to turn

65. *Id.* at 107.
66. *Id.* at 108.
67. *Id.* at 107-11.
68. *Id.* at 112-17.
69. *Id.*
70. *Id.* at 119.
71. *Id.*
72. *Id.* at 119-20.
73. *Id.* at 107.

over a criminally-accused prisoner to the Marshall General, the captor must provide the "cause and reason" – if not given, the prisoner was not accepted.[74] Once imprisoned, though, the information about the alleged crime for which the prisoner stood accused was to be handed over to the advocate of the army within forty-eight hours; if not, the prisoner was released.[75] Perhaps just as importantly, these prohibitions and rules were transparent: commanders were obliged to post and publish the codes and Articles of Warre so that no soldier could claim ignorance of the military's expectations and so that they may "thereafter govern themselves."[76]

By the reign of James I (1567-1603), the courts seemed to have merged into a "court or council of war," ordered by the military commander in chief, or sitting at certain stated times.[77] Officers in the rank of colonel or higher sat as "assessors or members" of the court, and court was presided over by a "president of the high court of war."[78] Not a lawyer himself, the president was assisted by a "learned fiscal or judge advocate" and a "well-experienced auditor" for record-keeping.[79] By the end of his reign and the beginning of Charles,' cases began to be heard by commissions of civil and military personnel drawn from where the army was then posted (domestically, like Dover, or Portsmouth), trying soldiers or camp followers under martial law.[80]

By the second half of the seventeenth century, English military justice was governed by *ad hoc* regulations (really, derivative articles of war) promulgated by the nobility under whose command authority the Crown's armies were formed and led.[81] The consequences of military law were meted out through an increasingly more complex and nuanced court-martial system, divided between "general" and "regimental" courts, probably influenced by the Swedish Articles of War of Adolphus (1621) which had by then made their way to the British Isles and been translated.[82] James' Rules for Councils of War provided for where trials of fact were to be held (in the field, in the general's quarters or tent; in garrison, in the colonel's quarters if encamped, the governor's home if not); provided for the sequence in which opinions of the courts' members would be heard during deliberations (in order of rank, from junior to senior); and provided that the court or

74. *Id.* at 124, note (n).

75. *Id.*

76. *Id.* at 126-27 (*see* 10 U.S.C. § 937, Article 137, UCMJ, for the same duty on commanders, for the same reasons).

77. *Id.* at 54-55.

78. *Id.* at 55.

79. *Id.*

80. *Id.* at 56.

81. CHARLES M. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 7-8 (1872).

82. *See* Part I.C., *infra*.

council would be presided over by the "president."[83] If the issue was a criminal matter, the prisoner would be brought before the council or court, the "information" (charge) read aloud, and the president would "interrogate the prisoner about the facts;"[84] the accused could offer a defense and evidence was elicited ("proof made"); then the accused would then be returned to the care of the marshal or "jailor."[85] The fact-finding members of the court or council, at least seven officers and usually all at least in the rank of captain, would then deliberate and vote "according to his conscience, and the ordinances or articles of war."[86] The sentence, if any, was determined by a plurality of votes; the prisoner was then brought back to the council and the sentence announced "in the name of the councel of war, or court-martial."[87] Some punishments were public – the convicted soldier's unit would be brought in to watch "that thereby the soldiers may be deterred from offending."[88]

Barrister and military historian Charles Clode, writing in 1872, described Articles of War of pre-Glorious Revolution England as royal prerogatives and direct commands intended to "confirm and enforce" certain "military obligations" – an enforcement mechanism for a three-way contract or agreement:

> At present the Officer's agreement is:—1. As towards his inferiors, to take charge of the Officers and Soldiers serving under him, to exercise and well discipline them in arms, and to keep them in good order and discipline (those under him being commanded to obey him as their superior Officer.) 2. As towards the Crown and his superiors, to observe and follow such orders and directions as rom time to time he shall receive from the Sovereign or any of his superior Officers, according to the rules and discipline of law. The Soldier's agreement (usually confirmed by his oath) is:—1. To defend the Sovereign, his crown and dignity, against all enemies; and, 2. To observe and obey all orders of his Majesty and of the Generals and Officers set over him.[89]

Like prior rulers, the King published his own rules as "Ordinances of War" as useful but interim directives dealing with the behavior of troops raised into a temporary army for a particular campaign or war.[90] But the Glorious Revolution of 1688 brought forth both new Royals (William and Mary) and a new interest and investment by Parliament in regulating the conduct of the monarchy's new standing army – mostly in recognition of and to deter mutinies of large swaths of the army like the one in which

83. CLODE, *supra* note 81, at 42.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*; *accord*, GROSE, *supra* note 3, at 137-39.
89. CLODE, *supra* note 81, at 27.
90. Stuart-Smith, *supra* note 46, at 26.

supporters of the ousted James II rejected the new authority of William and Mary.[91] Parliament enacted its first "Mutiny Act" in 1689 (re-enacted annually), which consisted – in effect – of two parts: Articles of War to be enacted by the King, empowered by Parliament, and governing his soldiers for most matters of military discipline, and a "mutiny" law that was binding on all subjects, regardless of war, and served as a temporary authorization for the raising and supplying of an army in time of conflict.[92] The Munity Act "recognized" – rather than created afresh – the court-martial as the English forum for trying soldiers accused of *military* criminal acts; such a device had been in use since at least 1666, when an English court-martial was first fully recorded in writing for posterity.[93]

The actual Articles of War, annually reenacted, were periodically reviewed thereafter, usually at the request of the King; they were occasionally amended, if at all, after review and recommendation by his "Board of General Officers," to conform to any amendments made to the annual Mutiny Act.[94] By that point, a civilian and politically-appointed "Judge Advocate General" ("JAG") position had been created to advise the Board, serve as its secretary, and oversee the administration of military law throughout the army.[95] This JAG later served as the legal advisor to the British uniformed "commander-in-chief," eventually on the Privy Council, and personally advised the Crown before results of any court-martial proceeding were confirmed.[96]

C. The Swedish Cousin

By this time, the British articles of war began to take on the appearance of, and aimed toward the same purposes as, the famous 1621 edict of Swedish warrior-king Gustavus Adolphus, which had been translated into English around 1632.[97] Adolphus, born in 1594,

91. CLODE, *supra* note 81, at 10, 31.

92. *Id.* at 44; GROSE, *supra* note 3, at 56-57.

93. Thomas Hanslope was charged with speaking "mutinous and opprobrious words against Sir Thomas Daniell, his Captain," refused to name a witness and charged again for contempt of court, was convicted, and sentenced to "Ride the Wooden horse for six days together during the time of the mounting of the Guards have his crimes written upon his Breast and back [and] [t]hat he run the Gantlope, and be Cashier'd and render'd incapable to serve in his Majesty's Armies." FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA 7-8, n. 6 (1967). Clode remarks that the Mutiny Act was careful to make the "Common Law supreme" in that it specifically warned against construing the Act to "exempt any Officer or Soldier whatsoever from the ordinary process of Law." CLODE, *supra* note 81, at 45.

94. *Id.* at 9-11.

95. Stuart-Smith, *supra* note 46, at 30-31

96. *Id*.

97. Published as THE SWEDISH DISCIPLINE, RELIGIOUS, CIVILE, AND

reigned during part of Europe's Thirty Years' War (ruled 1611-32).[98] He is long remembered as the George Washington of Sweden: a prodigious military hero and stately political leader shepherding his country into the great power status-track.[99] At the age of sixteen, when he inherited the crown from his father, he also inherited three ongoing wars against Denmark, Poland, and Russia.[100] This was an exceptionally dangerous time for much of Europe: eight million people – approximately twenty percent of Europe's population – died in the Thirty Years' War.[101] Armies were larger and more spread out geographically than the during medieval and Renaissance periods, and consisted mainly of conscripts and mercenaries, and were often led by war profiteering generals who were not necessarily from the country for whom they fought. Combat was becoming far costlier in blood and treasure.[102]

Not surprisingly, looting and extortion by troops in the field were typical methods of financing on-going operations.[103] Larger armies, fighting for pay and profit not national pride, security, or ideals, fighting on ever larger battlefields, inevitably led to command and control problems and the need for greater regimentation, if not professionalization.[104] Soldiers who were physically disabled by lack of food or toil, or who were hobbled by the natural psychological features of combat – fear and self-interest – lacked the necessary morale, unit cohesion, self-control and wellsprings of courage in the face of danger and terror.[105] Weak command and control over these forces meant that operations were less predictable, less influenced by the will of the sovereign, less likely to be part of a coherent national strategy, and far less efficient and effective.

MILITARY (William Watts & Sir Thomas Roe trans.) (1632).

98. Unless otherwise noted, this section on Gustavus Adolphus and his code relied on Cooper, *supra* note 8; Geoffrey Parker, *Dynastic War 1494-1660*, *in* THE CAMBRIDGE HISTORY OF WARFARE 158-59 (Geoffrey Parker ed., 2009 (rev. ed.); JOHN KEEGAN, A HISTORY OF WARFARE (1993) (*passim*); William R. Hagan, *Overlooked Textbooks Jettison Some Durable Military Law Legends*, 113 MIL. L. REV. 163 (1986); WINTHROP, *supra* note 10, at 907-18 (reprinting English translation of the 1621 Articles); *and* Schlueter, *supra* note 10.

99. Ernst Ekman, *Three Decades of Research on Gustavus Adolphus*, 38 J. MOD. HIS. 243 (1966) (noting that Swedish popular history remembers him as "holding a position somewhat analogous to that of Abraham Lincoln;" Ekman's description of Adolphus as the country's "first hero-king" of exceptional military leadership skill, however, draws him closer to George Washington, an analogy Ekman actually reserves for Adolphus' grandfather, King Gustavus Vasa (1523-60)).

100. Parker, *et al., supra* note 98.

101. *Id.*

102. *Id*. at 161.

103. *Id.*

104. *Id*.

105. *Id*. at 3. Clode quotes Lord Orrey's *Treatise on the Art of War* (1677): "It is not sufficient to make good Rules, unless the Prince or General see them punctually obeyed, or server punished if broken. CLODE, *supra* note 81, at 14.

Two centuries later, Prussian military general and war theorist Carl von Clausewitz described Adolphus as a military leader of genius in the ranks of Frederick the Great – one who could marshal and mobilize, then wield with talent, the "bravery, adaptability, stamina, and enthusiasm" of national armies.[106] His advances in organization and tactics were considerable for the time but originated in deep study of contemporary developments in other nations, like those of Dutch prince Maurice of Nassau (1567-1625).[107] Rather than maneuvering "squares" of slow-moving pikemen with few large canon, Adolphus adopted linear formations of infantry that covered significantly more ground and were much more readily shifted or transferred to reinforce actions, or to take advantage of weaknesses in the enemy's positions.[108] He, like Maurice, drilled the ability to conduct volley fire to make up for musket inaccuracies.[109] He sacrificed heavy bombardment for lighter, more mobile, artillery, and foreshadowed what has become known as "combined arms maneuver:"[110] using artillery and cavalry in concert with infantry, not in a well-tread scripted sequence. But these tactical innovations would have been unemployable if he had not also stressed and thought deeply about how to command and control his forces over space and time.

Deeply religious, Adolphus worked to reform the quality of his army – a national force of Swedes, not foreign mercenaries – by imbuing it with Christian ethics and stern discipline: willing submission to superior commands, including potential self-sacrifice, for the sake of larger goals.[111] He seemed to have sensed a relationship between tactical discipline and tactical opportunities for exploiting the enemy, leading to improved chances of tactical (and strategic) successes. He used drills not just as tactical rehearsals but also for instilling discipline. He was convinced that training *was*, in a sense, disciplining; and discipline was a factor in efficiently and effectively controlling forces on the battlefield.[112] In 1621, before starting a siege of Riga in Poland, Adolphus published his famous Articles of War – what amount to warfare-inspired

106. CARL VON CLAUSEWITZ, ON WAR 188-89 (Michael Howard and Peter Paret eds. and trans., 1984) (1832).

107. Parker, *et al., supra* note 98.

108. *Id.*

109. *Id.*

110. Michael Evans, *General Monash's Orchestra: Reaffirming Combined Arms Warfare*, in FROM BREITENFELD TO BAGHDAD: PERSPECTIVES ON COMBINED ARMS WARFARE, Land Warfare Studies Centre Working Paper no. 122, at 9 (Michal Evans & Alan Ryan eds.) (2003); *and see generally*, Gunther E. Rothenberg, *Maurice of Nassau, Gustavus Adolphus, Raimondo Montecuccoli, and the "Military Revolution" of the Seventeenth Century*, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 32-63 (Peter Paret ed.) (1986).

111. Parker, *et al., supra* note 98.

112. *Id.*

reforms in both tactics and in "law" governing the conduct of troops.[113]

The 167 provisions of the Adolphus code were published as orders from the king/commander-in-chief: "for that no government can stand firmly, unlesse it be first rightly grounded; and that the Lawes be rightly observed" (Article 17).[114] Adolphus informed his troops of the reason for having such articles: "for the welfare of our native country" (Article 167) and "Very requisite it is, that good justice be holden amongst our Soldiers as well as amongst our Subjects" (Article 135).[115] His articles described personal jurisdiction:

> whosoever is minded to serve us in these wars, shall be obliged to the keepin of these Articles. If any out of presumption, upon any strength, in any leaguer, in the field, or upon any work, shall do the contrary, be he native or be he Stranger, Gentlemen, or other, process shall be made out against him for very time, so long as he serves us in these wars in the quality of a soldier (Article 166).[116]

In other words, commoners and nobles, native-born or foreigners, in camp ("Leaguer") or in the field, those who bore arms in service of the country would be bound. Progressively, he imposed requirements on commanders, who were themselves subject to punishment for disobedience:

> no colonel or captain shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the judges; . . . also if any colonel or captain or other officer whatsoever shall by rigor take any thing way from any common soldier, he shall answer for it before the court" (Article 46)
>
> no colonel or captain shall lend any of their soldiers to another upon muster days for the making up of their numbers complete" (Article 121)
>
> if any soldier or native subject desires to be discharged from the wars, he shall give notice thereof unto the master-masters; who if they find him to be sick or maimed, or that he served 20 years in our wars, or has been ten times before the enemy, and can bring good witness thereof, he shall be discharged" (Article 128)
>
> no captain . . . shall hold back any of his soldiers' means from him (Article 132)[117]

And, like earlier (and later) British codes, leaders were commanded to read these articles to the soldiers every month in public, "to the end that no man shall pretend ignorance" (Article

113. *Id.*

114. WINTHROP, *supra* note 10, at 907-18 (reprinting English translation of the 1621 Articles).

115. *Id.*

116. *Id.*

117. *Id.*

167).[118]

These Articles also imposed what we would call rules of engagement or tactical directives, a precursor to the principled prohibitions imposed by modern International Humanitarian Law (also called the Law of Armed Conflict[119]). Article 87 prohibited setting any town on fire in one's own land, while Article 88 prohibited it in the enemy's territory unless commanded to so do – and no captain was authorized to give such an order unless it first came from a general (and if the act of arson ends up being advantageous to the enemy, it was punishable by death).[120] Articles 89, 92, and 94 prohibited pillaging one's own subjects *or* in the enemy's land.[121] Article 105 mandated that if soldiers took property from the houses in which they were billeted, the owners were to be compensated; Article 111 forbade the military arrest of enemy "princes, officers, gentlemen, counselors of state, senators, burgers, nor by any fact of violence offend them."[122]

As with the earlier Roman and English codes, it also specified what martial conduct was expected for it outlawed: disobedience to orders (Articles 18, 25, 26); discrediting comments or violence or threats against commanders (Article 20, 21, 22); dereliction of duties (Articles 42, 43, 44, 45); absence without leave (Article 49); being drunk or asleep on duty/watch/guard (Articles 50, 51); mutiny (Article 54); running away from battle or refusing to advance out of fear and cowardice (Articles 61, 62, 63, 64); aiding the enemy (Articles 70, 71, 72, 76, 77); selling or pawning weapons or supplies (Article 80); duels (Article 84); and conduct not otherwise proscribed but which is "repugnant to military discipline" (Article 116).[123]

But beyond imposing duties on commanders, articulating proto rules of engagement, and listing criminalized conduct, Adolphus' Articles also established a judicial-like process and procedures for determining jurisdiction, finding guilt, and delivering punishment. For example, his Articles distinguished between "higher" and "lower" courts-martial: the former being supervised by the commanding general and high-ranking staff officers with jurisdiction over major offenses, like treason and conspiracy (Article 150); the lower being supervised by the regimental commander and officers elected from within his regiment (Article 10); they provided

118. *Id.*

119. *See* DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 8 (2015) (December 2016 update) (explaining that the "law of war is often called the law of armed conflict. Both terms can be found in [Department of Defense] directives and training materials. International humanitarian law is an alternative term for the law of war that may be understood to have the same substantive meaning as the law of war.").

120. WINTHROP, *supra* note 10, at 907-18 (reprinting English translation of the 1621 Articles).

121. *Id.*

122. *Id.*

123. *Id.*

that officers would be tried by the general ("higher") court alone (Article 152); they provided for limited appeals (Articles 151 and 153); they limited the regimental court to cases of relatively minor disciplinary issues, like insubordination and theft among soldiers (Article 153); and they required the members of the fact-finding court to swear an oath to:[124]

> judge uprightly in all things according to the Lawe of God, or out Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty, that I finde guilty . . . (Article 144).[125]

These 1621 Articles have been considered by some to be the direct lineal ancestor of Britain's post-civil war Articles of War, the American Articles, and eventually the UCMJ.[126] They punished unlisted acts that were thought, under the circumstances, "repugnant to military discipline."[127] They created systems of hierarchical courts of trial and appeal. Punishments were scaled to fit the crime. Commanders were duty-bound to instruct subordinates on the Articles of War, to be honest in strength-reporting, and to care for the well-being and safety of the troops.[128] Though not articulated as such, the gravity of a soldier's offense had a relation to the type of court that would try him. The articles limited the scope of jurisdiction to soldiers but included both commoners and nobles, and whether in camp (garrison) or in the field.[129] Moreover, they criminalized mostly (but not exclusively) conduct that had an obvious military nexus (*e.g.*, AWOL, insubordination, threatening or attacking superiors, disobedience to orders, dereliction of duties, misbehavior before the enemy).[130]

It is possible to attack as an unsupported "legend" that the Swedish Articles were novel, arguing instead that Gustavus Adolphus was "important," but nonetheless a "follower who built upon, and simply revised and improved, provisions that English and Continental predecessors had formulated in the preceding century."[131] One scholar points in the direction of the French in the Thirteenth and Fourteenth Centuries: the evolution of the military position of *marechaux* – a subordinate, but critical, staff officer

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124. *Id.*

125. *Id.*

126. *See*, *e.g.*, Schlueter, *supra* note 10, at 135; MAJOR-GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES iv (1906); and principally, WINTHROP, *supra* note 10.

127. WINTHROP, *supra* note 10, at 907-18 (reprinting English translation of the 1621 Articles).

128. *Id.*

129. *Id.*

130. *Id.*

131. Hagan, *supra* note 98, at 166.

working for the commander, with responsibilities over administration of personnel (including discipline) and camps, and the "protection of the civil population from the excesses and depredations of the soldiers."[132] Eventually, the power to discipline was delegated downward to a new position: the *prevot de marechaux* (provost marshal), who both policed the military for misconduct and presided over its special courts – "[e]mbodied in this officer are the origins of an organized military justice system."[133] From there, Hagan notes that even the preeminent biographer of Adolphus, Michael Roberts, denied the complete originality of the 1621 code: it borrowed or was obviously influenced by the 1570 code of Maximilian II and early Sixteenth Century Swedish codes, as well as by the Englishman Matthew Sutcliffe and his 1593 book, *The Practice, Proceedings, and Lawes of Armes*.[134] Hagan concludes that Adolphus' chief contribution was in the formal division between types of courts-martial and their processes for fact-finding and adjudication of guilt and punishment; that it was "an improvement over previous codes, but it was more of a refinement rather than dramatic departure."[135]

Whether Adolphus was original or whether he was influenced by some earlier Roman, French, Swedish, and even English models, is a point of scholarly contention but not particularly important for the study of the Code's impacts. It is merely important to see what the 1621 code represents. It is evidence of an increasingly formalized and sophisticated catalogue of prohibitions, rules, and processes; a catalogue backed by and promulgated under the authority of the sovereign; one that imposes responsibilities on commanders and duties on soldiers; one that is applicable to a defined and wholly separate population of citizens; one that is applicable to that group only when serving in a specific function – that is, as members of the national military; and one regulating conduct that would have detrimental consequences for the sovereign's ability to command and control forces over increasingly larger scales of time and geography, and thereby increasing risk of mission failure if not deterred. All of this was for the purpose of enabling better management and use of force through more disciplined, obedient, and loyal Forces.

D. Great Britain as Parent and Surrogate

The 1765 British Articles of War reflect this evolution and are an important historical reference for they were copied nearly verbatim by the Continental Congress in 1775 at the outset of the

132. *Id.* at 181.
133. *Id.*
134. *Id.* at 188-89.
135. *Id.* at 194, 198.

Revolutionary War.[136] The British Articles stated their purpose simply: "for the better government of His Majesty's Forces," and through the oath required of each fact-finding member, identified the sources of military law: Acts of Parliament; conscience and understanding of the individual commander; and customs of war (Section XV, Article VI).[137] It further imposed a duty on officers: "Every officer commanding in quarters, garrison, or on the march, shall keep good order, and to the utmost of his power redress all such abuses or disorders which may be committed by any officer or soldier under his command" (Section IX, Article V).[138] It is not immediately obvious what an "abuse" or disorder" might be, but we can deduce it from context. Per Section XI, Article I, if a soldier or officer is accused of a "capital crime or having used violence, or committed any offense against the person or property of our subjects such as is punishable by the known laws of the land," the accused's commander will "use his utmost endeavors to deliver over such accused person or persons to the civil magistrate and likewise to be aiding and assisting to the officers of justice, in apprehending and securing the person or persons so accused, in order to bring them to trial."[139] In other words, "abuses and disorders" were only military-specific offenses committed outside the boundaries and requirements of civil criminal laws. If a soldier murdered or raped or defrauded a civilian, they were to be investigated and tried and punished by the civilian system.[140] One exception, beginning in

136. For a complete reprint of the 1765 Articles and the 1775 Continental Congress Articles of War, *see* WINTHROP, *supra* note 10, at 931, 955; ROLLIN A. IVES, A TREATISE ON MILITARY LAW AND THE JURISDICTION, CONSTITUTION, AND PROCEDURE OF MILITARY COURTS 17 (1879).

137. WINTHROP, *supra* note 10, at 942.

138. *Id.* at 937.

139. *Id.*

140. In Solorio v. United States, 483 U.S. 435, 443 (1987), the Court referred to the 1775 British Articles of War, (specifically, Section XIV, Art XVI – "malicious destruction" of [private] civilian property) as evidence that the original meaning of the American Articles of War included the trial of service members for civilian-type offenses by military court-martial. This went to support the Court's argument that a military nexus test (of the criminal act) for UCMJ jurisdiction is unworkable and ahistorical, in favor of service status-based personal jurisdiction for the UCMJ. However, this is a shallow reading of the early Code: the offense's act element had a specific purpose: destruction of private civilian property to "annoy rebels or other Enemies in Arms against us." To annoy rebels or other enemies is tactical purpose or goal in using that force – as such, it most certainly *is* a military service-connected offense, not merely a civilian common law offense. As Clode described this subject matter jurisdictional limit, it began in the 1717 Articles of War (Article 18), which mandated that commanders give up their soldier to civil magistrate for trial for any offense not "created by Articles of War." In 1718, Parliament reinforced this mandate in an amendment to the Mutiny Act by making a commander's failure to turn in the accused to the civilian authorities an offense subject to punishment of being cashiered from the Service "for neglect or refusal." Moreover, Parliament dictated that a civilian conviction foreclosed any subsequent court-martial for the same offense. CLODE, *supra* note 81, at 54.

1718, was when a non-military offense was committed by a soldier stationed or fighting in foreign territory where access to English civil courts was denied.[141] The other exception was when a soldier's otherwise-civilian misdeeds bore a strong relationship to martial conduct.[142]

The Articles prohibited, for example, conduct not otherwise listed if it was prejudicial to good order and discipline (Section XX, Article III), "behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentlemen" (Section XV, Article XXIII), and a court-martial was free to try civilian common law offenses when no British civilian jurisdiction existed abroad (Section XX, Article II).[143] As with the early modern codes before it, like that of Adolphus, British courts-martial were not monolithic: they held tiered courts based on the rank of the commander convening them (and based in part on the kind of command held, like a field command versus a post or camp) (*see* Section XV, Articles XII, XIII, and XIV).[144]

III. SOME GENERALIZATIONS ON CONTINUITY

To get a sense of the continuity between the Old World's version of modern military justice and the New World's, attention should be given to what was considered worthy of criminalizing, considered important for due process, and considered important enough to impose on commanders across the countries and generations. In all three of these areas, similarities abound among the 1621 Articles of Gustavus Adolphus, the British Army prior to the American Revolution, and the nascent Continental Army under George Washington. In terms of misconduct, all three criminalized falling asleep while on watch or guard duty, mutiny, striking a superior officer, desertion, AWOL, dereliction of duty, dueling, provoking speech or gestures, aiding the enemy, and acts or omissions that prejudice good order and discipline. All three established a tiered system of courts for fact-finding and adjudging punishments: for more significant or grave crimes, the higher the rank of the commander who convened and oversaw the trial, and a correspondingly wider range of potential punishments.[145] All three imposed on the commander a duty to accurately report personnel

141. In 1813, Parliament extended a military commander's extraterritorial criminal jurisdiction over his soldiers to any offense in which the purported victim was an inhabitant or resident of that foreign country. CLODE, *supra* note 81, at 54-55.

142. *Id.*

143. WINTHROP, *supra* note 10, at 946.

144. *Id.* at 943-44.

145. WINTHROP, *supra* note 10. From Gustavus Adolphus (1621): Articles 137-142, 150-157; from the British (1765): Section XV, esp. Articles V and XII; from the American colonialist (1775): Articles XXXIII – XXXIX.

strength and accountability.[146]

But these specific parallels are less interesting than the broader themes that can be traced over time. Though there were of course differences in wording and structure, by the time we get to 1775, we can make the following general, wavetop observations about military codes of justice (at least those that bear on the evolution of American military law), from Antiquity through the Age of Enlightenment:

> The sovereign government (of whatever form) recognized a need to regulate behavior of those serving as soldiers, separate from criminal law, as a means to achieve a larger strategic purpose: national security and defense through better, more disciplined fighting, by better, more disciplined soldiers
>
> Changes to military "law" seem to occur as functions of changes in the character of warfare – who fights, where they fight, how they fight
>
> Systems of military justice articulated by these early "Articles of War" shared certain characteristics:
>
> They identified and set aside certain conduct as "criminal," subject to certain punishments, scalable to the gravity of the offense
>
> They established some form of stable, recurring procedure to formalize and make routine the investigation, prosecution, and punishment of those crimes
>
> They created a separate adjudicative body or tribunal that would determine what happened and, if a crime, whether and how to punish the offender
>
> The enumerated offenses all had a certain character themselves: while performing some type of military duty, position, or role, the person did some act (or failed to some act) having a direct linkage to and negative effect on military operations, other military personnel, his own ability to perform his military duties, and/or the ability of the commander to sustain well-ordered ranks in preparing for or executing combat
>
> The Articles recognized that some behavior should be criminalized and punished simply because it prejudices good order and discipline, or dishonors or scandalizes an officer (even if not enumerated in the code, and even if not considered criminal at all if committed by civilians)
>
> They imposed managerial obligations on commanders and gave them authoritative roles within the military justice system

Notwithstanding the marked differences in forms of government and the philosophy of governing, sometimes this continuity was, evidently, self-conscious and purposeful. "There was," John Adams wrote,

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146. WINTHROP, *supra* note 10. From Gustavus Adolphus (1621): Articles 121, 130; from the British (1765): Section IV, Articles III - V; Section V, Articles I – IV; from American colonialist (1775): Articles LVII – LIX, LXII, LXIII.

> extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline . . . I was, therefore, for reporting the British articles of war, *totidem verbis*.[147]

The history of the structure of American military justice from the founding to the First World War is rich but fairly stable.[148] It is sufficient to note that after the Articles of War were revised in 1806 by Congress, they were not substantially revised again for more than a century.[149] This is remarkable in light of the country's repeated use of the military and its cyclical expansion and contraction during at least five major wars. One commentator noted acerbically that military historians and military lawyers took some sort of perverse pride in so little changing in military law from generation to generation, country to country, war to war.[150]

This source of pride in military law's "ancient lineage" was even more remarkable for it stood in conflict with how the Supreme Court understood and characterized military law – contrasted against what the military *lawyers* were saying, the Court's view was quite progressive. For the Court, across generations, military law was simply another version of jurisprudence, one in which constitutional rights and protections were applicable and in which its fact-finding and punishing tribunals were, like other civilian courts, "judicial" in nature.[151] None of those cases, however, suggested wholesale reform of the Articles of War was necessary, nor that its provisions (like the absence of direct appellate review, or the enormous influence of the accused's commander over the type of court and even its outcome) were violating soldiers' rights and liberties. Suffice it to say that it was not until the beginning of World War I that the public, and many within the services themselves, began to question the historical practice of courts-martial with their limited role for lawyers, abbreviated versions of

147. 3 WORKS OF JOHN ADAMS 68 (1851). Adams noted that disciplining the army, then under the command of General Washington, was a "very difficult and unpopular subject" but one that needed to be addressed and resolved according to Washington himself. *Id.*

148. For more on this subject and timeframe, *see* BRAY, *supra* note 10, and Schlueter, *supra* note 10.

149. UNITED STATES DEPARTMENT OF WAR, COMPARISON OF PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES (1912) (Letter from Major General Enoch Crowder, Army Judge Advocate General, to Henry Stimson Secretary of War), www.loc.gov/rr/frd/Military_Law/new_articles_war.html [perma.cc/2N5Y-MKGC] (outlining intent and scope of proposed changes and summarizing each enactment of the U.S. Articles of War, and their revisions and amendments, between 1775 and 1912).

150. S.T Ansell, *Some Reforms in our System of Military Justice*, 32 YALE L.J. 146, 146-47 (1922).

151. Ortiz v. United States, 138 S. Ct. 2165 (2018).

due process, and central roles and wide discretionary authority of commanders.[152] By that point, even conventional military justice's strongest advocates, including the Judge Advocate General testifying before Congress in 1912, admitted that the American Articles of War were "archaic," and that even the British – whose code served as the model since 1775 – *annually* amended its *own* Articles of War to the point that they were now an unrecognizable descendant of the code the Continental Congress adopted on grounds of hasty expediency during the emergency of a war, one that had not changed in substance in more than a century.[153]

IV. DISCONTENTS AND THE DEMILITARIZATION OF MILITARY LAW

A. Law to "Startle and Perplex the American Lawyer"

At least by the early decades of the Twentieth Century, American military law was broadly exceptional. By "broad," it characterized itself as more than simply a system of statutes and courtrooms. By "exceptional," it viewed itself as excepted from the conventional norms and rules of civilian law, as if it were a distinct theological body of self-regulating clerics. Especially in or around a time of war, its proponents felt it must aggressively address and decisively deter behavior that soldiers could have engaged in with impunity as civilians; it was purposefully incomparable to any other system of criminal justice and what was taken for granted as fundamental or essential in those systems could be simply ignored. If the cooks broke some eggs in the process, well, the risk was foreseeable and consequences acceptable: one senior judge advocate,

152. *The Injustice of Army Justice*, LITERARY DIG. 13 (Apr. 12, 1919); Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L.J. 52, 58-59 (1919). G. Norman Lieber, then professor of law at West Point and son of Francis Lieber (of Lieber Code, General Order no. 100 fame), wrote in 1879 about the duties expected of a judge advocate in his prosecutorial role (combined as it was with his role as "clerk to the court" and "legal advisor to the court"). He recognized that military law at the time had no interest in recognizing conventional due process protections afforded to civilian defendants, and so he warned fellow judge advocates (and those who would prosecute, who in all probability were not lawyers) to act "with good faith" toward the rights of the accused, "never seeking to gain an undue advantage by reason of any ignorance either of law or fact on the part of the accused; and remembering that the government never desires, and that it can reflect no credit on him, to secure a conviction in the teeth of facts. 'Put yourself in his place,' is a maxim which might be suggestive to the judge-advocate of the course he should pursue." Lieber, *supra* note 152, at vi. Of course, this "maxim" was only "suggestive," found only in a preface to a legal treatise used primarily for teaching West Point cadets, was not demanded by a regulation from the War Department in the Manual for Courts-Martial, nor codified by Congress in the Articles of War.

153. Ansell, *supra* note 150, at 147-48.

writing not long after World War I, observed dryly:

> It was to be expected that the unusual experiences of the World War, wherein upwards of 200,000 new officers were commissioned in the service, necessarily with brief training, and nearly 4,000,000 men were suddenly called into the army, would develop some defects in the system of administering military justice.[154]

At best, U.S. military law considered those other systems (of American justice) about as relevant to its development and structure as intellectual property law is to that of civil rights law. Some, like Professor Wigmore in 1919 (himself briefly a former judge advocate officer) went even further when he was Dean of Northwestern's Law School: not only was military law exceptional and broad, but its exceptional characteristics (that made it so "efficient") made it worthy of emulation by civilian jurisdictions which seemed, to Wigmore, incapable of identifying a primary purpose for criminal law and incapable of centralizing its administration.[155] For such critics, it was not military law that needed reform by way of civilianization; it was civilian law that needed – in a sense – to be militarized (or at least stay out of the way of military justice and its proponents).

Not all were so sanguine, let alone enthusiastic cheerleaders for the military justice system's exceptionalism in the years during and after the First World War. Then-Yale law professor Edmund Morgan (three decades before he led the drafting of the first UCMJ) observed that "analogies to the American system of administering criminal justice in the civil courts would serve only to mislead" and that the notable differences ought to "startle and perplex the American lawyer" not inspire civil court mimicking of the centralized court-martial system.[156] "No member of the court need be learned in the law or skilled in the investigation of facts," and that went for the "legal advisor" to the court (who also served as prosecutor and was usually a "line officer of comparatively low rank") and the defense counsel.[157] The system's indulgence for "hasty or ill-guarded action by officers exercising general court-martial jurisdiction" led to real cases of apparent irrational punitive injustice.[158] In one such case, Morgan notes, a soldier was sentenced to three months confinement for stealing condensed milk worth fourteen cents; another in which a soldier was sentenced to a dishonorable discharge and a year in prison for taking a little over three dollars from a pair of pants hanging on a wall, despite (while "conscience-stricken") returning the money within minutes; and a

154. William C. Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War*, 12 J. CRIM. L. & CRIMINOLOGY 84, 87 (1922).

155. John H. Wigmore, *Some Lessons for Civilian Justice to be Learned from Military Justice*, 10 J. CRIM. L. & CRIMINOLOGY 170 (1919).

156. Morgan, *supra* note 152, at 58-59.

157. *Id.*

158. *Id.* at 54.

third in which a soldier was sentenced to twenty-five years in prison for refusing to obey his sergeant's order to remove a bow tie and using "foul and abusive language" against that same sergeant when arrested for the disobedience.[159] In a telling illustration of the meaning of "appellate review" at the time, his quarter-century sentence was mercifully reduced to a mere *decade* by the commanding general.[160] In the wake of the First World War, such grossly undeserving punishments in a system in which the normal constitutional rights of the accused were absent (like representation by a qualified lawyer as defense counsel) earned ridicule in the public domain:

> The Buffalo *Evening News* finds the Army law system "archaic" and "pitilessly cruel" in many cases. Observing that "there is sometimes justice in a court-martial, but it is purely accidental," The Washington *Post* calls the system "hideous," while the pro-Administration New York *World* characterizes it as "lynch law for the Army." Even tho [sic] some of the stories of injustice may be distorted or exaggerated, the Newark *News*, generally friendly to the Administration and the Secretary of War, finds it clear enough that the system "is out of date and needs to be reformed." . . . The Brooklyn *Eagle* [was disturbed] "by the revelations of the grotesque ignoring of rights of private soldiers."[161]

The American military's criminal law necessarily included statutes promulgated by Congress under its Article I, section 8, clause 14 authority[162] (like the Articles of War[163] and Articles for the Government of the Navy[164]), legal precedents from certain courts, but also regulations issued by the president pursuant to a statute or in accordance with a Congressional grant of power under his "take care that the laws be faithfully executed" responsibility.[165] Military law also included regulations issued by the president under his "commander in chief" role, as well as *orders* from the president or secretary of war issued to administer the military organization and employment of force.[166] Such regulations and orders were considered the functional equivalent of binding law for those with this "sphere of [presidential] authority."[167] Orders from higher

159. *Id.* at 55, n.14.
160. *Id.*
161. *Injustice*, *supra* note 152, at 13.
162. U.S. CONST. art. I, § 8, cl. 14.
163. Act of June 4, 1920, ch. 227, 41 Stat. 787, 10 U.S.C. §§ 1471-1593.
164. Act of April 2, 1918, 40 Stat. 501.
165. U.S. CONST., art. II, § 3.
166. WINTHROP, *supra* note 10, at 27.
167. EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 8 (1907) (Colonel Dudley, a judge advocate, was serving as a Professor of Law at the U.S. Military Academy at West Point when he published this book. He intended this 650-page tome to serve several audiences: for "practical use" by lawyers and commanders in the field, and as a "textbook" with a "clear and thorough outline of the science of military law . . . to be contained within such brief compass as to be adapted for use in the instruction of Cadets within the

uniformed commanders to subordinates were also considered effectively "law," the violation of which would expose service-members to criminal liability and punishment.[168]

But even more than these doctrinal – or at least authoritative – sources of commands and prohibitions, military law encompassed the "customs and usages of the service derived from immemorial usage in time of peace or war."[169] Provided that the customs were "long, unquestioned, and continuous," they served as evidence of how to construe otherwise ambiguous rules, policies, and regulations.[170] This kind of unwritten legal precedent, *lex non scripta*, served as a gap-filler when the meaning of case law, regulations, orders, or statutes was in doubt.

These sources of authority remain, even today, the components of military law.[171] Even custom and usages of the service remain explicitly embedded within the rules of American military justice. "Custom" helps define the roles and responsibilities of military prosecutors and defense counsel;[172] helps establish when an officer's order to a subordinate is enforceable under the color of law;[173] helps establish a "duty," the breach of which subjects a service-member to the criminal charge of "dereliction of duty;"[174] helps explain why certain conduct between leaders, having a "special trust," and trainees or recruits is criminalizable;[175] helps explain what dishonorable conduct while held captive by the enemy is punishable;[176] helps explain why "fraternization" between officers

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limited period assigned to the study of the subject"). If any of my fellow Department of Law faculty assigned a 650-page book on this subject to cadets today, they may very well find themselves victims of a cadet-led mutiny, assault, disobedience, or other misconduct described in that very book.

168. *Id.* at 5-9.

169. *Id.* at 10.

170. *Id.* at 5-9; Martin v. Mott, 25 U.S. 19, 35-36 (1827); IVES, *supra* note 136, at 21.

171. MANUAL FOR COURTS-MARTIAL, *supra* note 31, at Part I (Preamble), para. 3.

172. 10 U.S.C. § 838 (Art. 38, UCMJ); MANUAL FOR COURTS-MARTIAL, *supra* note 31, at Rule for Courts-Martial (R.C.M.) 502(d), at II-53 to II-54.

173. MANUAL FOR COURTS-MARTIAL, *supra* note 31, at Part IV, para. 16.c.(1)-(2) (explaining the elements of Article 90, UCMJ, "Willfully disobeying superior commissioned officer").

174. *Id.* at para. 18.c.(3)(a) & (b) (explaining the elements of Article 92, UCMJ, "Failure to obey order or regulation," which includes being "derelict in the performance of duties").

175. *Id.* at para. 20.c.(1) ("The prevention of inappropriate sexual activity by trainers, recruiters, and drill instructors with recruits, trainees, students attending service academies, and other potentially vulnerable persons in the initial training environment is crucial to the maintenance of good order and military discipline. Military law, regulation, and custom invest officers, non-commissioned officers, drill instructors, recruiters, cadre, and others with the right and obligation to exercise control over those they supervise.").

176. *Id.* at para. 26.c.(3)(a).

and enlisted personnel is a potential crime;[177] and most notably justifies the charging, prosecution, and punishment of behavior that is not otherwise an enumerated offense under the UCMJ, would otherwise be constitutionally protected, but would be "prejudicial to good order and discipline" under the circumstances:

> In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned.[178]

Despite these similarities between American military law of past and present, few scholars, lawyers, or military leaders pre-World War I would have conceived of the military's judicial system as a "judicial system" at all – or at least not one connected to (let alone subservient to) a civilian justice process. General William Tecumseh Sherman, ironically a lawyer himself, wrote a decade and half after the Civil War:

> 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.[179]

At the time, this was the same view held by esteemed judge advocates, including the Army's Judge Advocate General: "military law is founded on the idea of a departure from civil law, and it seems to me a grave error to suffer it to become a sacrifice to principles of civil jurisprudence at variance with its object."[180] Courts-martial were thought, by the practitioners, to be definitively "not part of the judicial system of the United States" and their decisions of guilt and sentencing were not reviewed by civilian appellate courts (except insofar as to judge whether the court-martial had proper personal and subject-matter jurisdiction, or whether the sentence exceeded the court's authority).[181] Because they were temporary and solely derived from orders of the commander who convened the tribunal, they were not courts of record.

Nevertheless, they were still lawful tribunals exercising the gift of plenary authority over all military offenses. As such, they

177. *Id.* at para. 101.c.(1).
178. *Id.* at para. 91.c.(2)(b).
179. WILLIAM T. SHERMAN, MILITARY LAW 296 (1880).
180. Lieber, *supra* note 152.
181. *Id.*

were considered more like courts of honor, especially when trying officers for conduct unbecoming conduct or enlisted soldiers of conduct prejudicial to good order and discipline. Military discipline and justice, though undoubtedly derived from constitutional powers of the Congress and president, existed in practice outside the stream of constitutional commerce – that is, its norms, prohibitions, liberties, and protections were ineluctably unsuitable and largely irrelevant. What *was* suitable and relevant, however, were the specific rules and articles promulgated by Congress, commanders, and the president, individual leaders' consciences, and the customs of war.[182]

B. "An Organism Provided by Law"

Importantly and undeniably, the practitioner's (be it the judge advocate's or commander's) view of military justice at the turn of the twentieth century should be viewed as at odds with the U.S. Supreme Court's own view. In 1879, the same year General Sherman intellectually segregated civil from military law based on their principles, purposes, and procedures, the Court in *Ex Parte Reed*[183] said that a court-martial was an:

> organism provided by law and clothed with the duty of administering justice in this class of cases . . . Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances.[184]

A few years later, notwithstanding the military's purpose and singular methodology of gaining service members' compliance, and that a "court-martial organized under the law of the United States is a court of special and limited jurisdiction . . . called into existence for a special purpose, and to perform a particular duty," the Court noted that:

> the whole proceeding, from its inception, is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice – rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law.[185]

Of course, the Court in *Runkle v. United States*[186] was only

182. DUDLEY, *supra* note 167, at 13-15; WINTHROP, *supra* note 10, at 49-50.
183. *Ex parte Reed*, 100 U.S. 13 (1879).
184. *Id.* at 23.
185. Runkle v. United States, 122 U.S. 543, 558 (1887).
186. *Id.*

speaking of the president's statutory requirement to approve, with judicial-like authority, certain kinds of courts-martial sentences (dismissal of an officer in peacetime) and was in fact quoting a formal opinion of Attorney General Bates' to President Lincoln. The Court was not commenting on, nor judging the appropriateness or constitutionality of any procedural element of the trial or the system that convicted Major Runkle in the first place. But the Court's (adopting the Attorney General's) description is telling. The Court characterized the "whole proceeding" as "judicial," not a mere executive branch administrative employment decision.[187] It confirmed the court-martial – the entire military justice system – as within the range of the conventional civil due process norms, the meaning of the rule of law, and – at least – "the spirit of American institutions."[188]

It is difficult – if not impossible – to square the high court's description with that of General Sherman and the judge advocates of the period who viewed the systems as "diametrically opposed, foes"[189] with the military's nature and its objective justifying a wholly distinctive method for dealing with misconduct. The latter view was particularly galling to many reform-minded lawyers within the military in light of an opinion nearly twenty years after *Runkle*. In *Grafton v. United States*,[190] the Court held that a prior court-martial acquittal (the charge against Private Homer Grafton was the murder of a Filipino civilian while serving as a sentry on duty in the Philippines) barred subsequent trial for the same offense in a civilian criminal court. That is, the U.S. Constitution's double jeopardy protection applied.[191] The Court held that a trial by court-martial under the Articles of War (promulgated as a federal statute by the Congress) is – at least for the purposes of the Fifth Amendment's protection – the equal to a federal criminal prosecution under the law of the United States (which, at the time, was the law of Philippines under U.S. occupation).[192] The Court noted:

> It is indisputable that, if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance.[193]

The Court then quoted at length the colorful, and powerful,

187. *Id.*

188. S.T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919), *reprinted in* MIL. L. REV. BICENT. ISS. 61 (1975).

189. LIN-MANUEL MIRANDA, *The Room Where It Happens*, in HAMILTON (Act 2) (Jeffrey Seller 2015).

190. Grafton v. United States, 206 U.S. 333 (1907).

191. *Id.* at 352-55.

192. *Id.*

193. *Id.* at 345.

metaphor made twenty-seven years earlier in Ex Parte Reed: "an organism . . . clothed with the duty of administering justice."[194]

C. Ansell's Arguments for Reform

Samuel T. Ansell, the Acting Judge Advocate General of the Army during World War I, was an outspoken and influential critic of the very military justice system he helped manage.[195] A West Point alumnus and former infantry officer, Ansell was graduate of the University of North Carolina's law school (1904), and served subsequent tours as a judge advocate, including two stints as an instructor at West Point's Department of Law.[196] Later in his career, serving at the War Department and the office of the Judge Advocate General, he viewed these Supreme Court precedents as contradicting – rightly so – the uniformed apologists for a military justice system that was "not exactly congenial to justice [for] the militaristic mind is rather intolerant of those methods and processes necessary to justice."[197] His criticisms were public, abrasive, and full of "noble sentiments" but – to many within the bureaucracy – "demonstrated little personal restraint or tact."[198]

Brigadier General Ansell's unrestrained criticism marked the beginning of the first major public (and intra-governmental) controversy over the fundamental characteristics of American military justice. Now known as the Ansell-Crowder Controversy (or Dispute),[199] Ansell's legal positions and his vocal and repeated recommendations to reform the Articles of War were opposed by his boss, the actual Judge Advocate General of the Army, Major General Enoch Crowder. Crowder was also a West Point graduate, a contemporary of John J. Pershing, with troop-leading experience in the 1880s in Texas and against the Sioux Indians in the Dakota Territory (and earning his law degree from the University of Missouri[200]). Later earning a reputation for skillful and

194. *Id.* at 346.

195. *See generally* Fred L. Borch, *Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917-1920*, 2018 ARMY LAW. 40 (2018).

196. While researching for this article, assigned as an Assistant Professor of Law at West Point, I came across a rare treasure: a hardcopy first edition of DUDLEY, *supra* note 167: it bears the handwritten signature of the book's owner or – at least – its chief reader, on one of the first blank pages: "Ansell," written in pencil, in script at the top of the page. Dudley specifically thanked one Lieutenant Ansell, a fellow instructor in the Department of Law, for his edits and "revisions" to the draft that book. The volume was tucked away, unnoticed and non-descript, on a low shelf in the department's soon-to-be-antiquated law library.

197. Ansell, *supra* note 150, at 63.

198. GENEROUS, *supra* note 10, at 9 (referring to Ansell's tactics as "probably counterproductive").

199. Borch, *supra* note 195, at 40.

200. Crowder originally studied law on his own time while stationed in Texas. There was no law school, but rather he earned his license to practice

knowledgeable lawyering in the Philippines during the Insurrection (1899-1902), he developed close ties with General Arthur MacArthur (father to later General Douglas MacArthur), the Military Governor of the Philippines, and William Howard Taft, President McKinley's civilian representative in the islands. Taft, thereafter as Secretary of War and President, continued to support Crowder and continued to be a surrogate advocate for Crowder's views on military justice even after Taft left office and before his confirmation as the Supreme Court's Chief Justice.[201] Crowder impressed his superiors quickly, tasked with not only serving as legal advisor to the commanding general but also appointed to be an associate justice on the Philippine Supreme Court – where he also found time to write the government's code of criminal procedure.[202]

After his assignment to the Philippines, Crowder – by then promoted to Major – returned to Washington where he served as the Army's Deputy Judge Advocate General.[203] In 1903, Secretary of War Elihu Root appointed up-and-coming Major Crowder to study the effects of pending legislation intended to reorganize elements of the War Department as well as possible uses for the newly established National Guard.[204] Impressing yet another senior civilian official with his diligence and aptitude, Root sent Crowder as an observer to the Russo-Japanese War.[205] According to Legal Historian Joshua Kastenberg, "the importance of this duty cannot be overstated," for it was this experience – watching the first modern war of such a scale between technologically-matched adversaries – that convinced Crowder of the valuable role that rigid discipline, imposed via a legal code, plays in securing battlefield success against capable enemies under the harshest of combat conditions.[206] Upon returning, then-Secretary of War Taft assigned Crowder to Cuba, where he spent almost three years.[207] In 1911, then-President Taft nominated Crowder as the Judge Advocate

after demonstrating his knowledge and competence to a local judge on a written examination. Thus, strongly to modern eyes, he was a licensed attorney before he even began his studies in law at the University of Missouri. KASTENBERG, *supra* note 10, at 13-14. Crowder was assigned to Jefferson Barracks at the time and lobbied the Judge Advocate General Department for a transfer to Columbia, Missouri, so that he could enroll in the law school – they permitted this, while assigning him to the concurrent duty of Professor of Military Science for the university's ROTC program. Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW. (May 2012), at 1.

201. KASTENBERG, *supra* note 10, at 16.

202. *Id.*

203. Borch, *supra* note 200, at 3.

204. *Id.*

205. *Id.*

206. Kastenberg, *supra* note 10, at 18.

207. Borch, *supra* note 200, at 3.

General of the Army.[208] Beginning in 1914, he began sending select line officers to well-regarded law schools, and in 1916 began recruiting law professors – including John Wigmore (then Dean of Northwestern University's law school) and Felix Frankfurter (then of Harvard, and later of the U.S. Supreme Court) – to serve in the War Department as reserve Judge Advocates.[209] In 1916, after four years of development, Crowder's revisions to the Articles of War (the latest being from 1874, but substantially the same as those of 1806) were enacted by Congress.[210]

The debate or controversy over the state of the nation's military justice system under the 1916 Articles of War began in early 1917 when President Wilson appointed Crowder to the additional duty of Provost Marshal, in charge of running the country's conscription under the new Selective Service program.[211] Crowder was by then entangled in several quasi-personal, quasi-professional dilemmas. Passionately, he pleaded to Secretary of War Newton Baker for the opportunity to leave Washington and take command of a unit heading off to fight in France and Germany.[212] Due to his outsize bureaucratic influence and his ample administrative and legal abilities, his pleas were dismissed with the proverbial "you're just too important to us back here" determination that so rattles staff officers when war comes calling.[213] Reinforcing his bitterness at the rejection for field command, Crowder also faced a Chief of Staff of the Army (General Peyton March) who constantly sought to bring the independent Judge Advocate General Department under the direct control and authority of his office.[214] Crowder successfully, albeit against an antagonistic superior general officer, convinced Secretary of War Baker to leave the Department outside the military chain-of-command so as to allow the professional lawyers to provide unfiltered and timely legal counsel to the War Department's leadership.[215] Professor Kastenberg observes that "Crowder sought to preserve the profession of law for legal experts, arguing that just as the army would not send an infantry officer to supervise a bridge construction, which was essentially an engineer's duty, it should not permit a nonlawyer to command the army's legal office."[216]

This advocacy for the judge advocates is ironic in light of the controversy that soon erupted within his staff and spilled into Congress, capturing the public's attention.[217] Crowder was arguing

208. Id.
209. Kastenberg, *supra* note 10, at 20.
210. Act of August 29, 1916, 39 Stat. 619 (1916).
211. Kastenberg, *supra* note 10, at 23-25.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. Borch, *supra* note 195, at 40.

that the professional experts' legal training and knowledge were so critical and so technical that they must be *institutionally* detached from the imprimatur and pressure of command influence. It is a highly ironic argument because that was largely the claim of Ansell and his small band of fellow reform advocates but on a more tactical scale – that of the individual court-martial. Yet to Crowder, Ansell's suggestions were "radical" in the extreme.[218]

When Crowder took on the additional duty of running the draft, he appointed then-Lieutenant Colonel Ansell to the position of Acting Judge Advocate General, along with a brevet promotion to Brigadier General.[219] Ansell's task was to provide wartime legal advice to the leadership of the War Department, manage a military justice system that would conduct 31,000 general courts-martial and more than 300,000 special and summary court-martial in two and half years, and oversee the expansion of the Judge Advocate Department (which ballooned from a pre-War size of dozen to more than 400).[220] Ansell's primary, but by no means only, concern about military justice was the lack of meaningful appellate review of convictions and sentences.[221] At the time, the Articles of War provided for no regular panel of appellate judges to review allegations of legal error, factual insufficiency of the evidence, or prosecutorial misconduct, or to provide judicial remedies to soldiers prejudiced by those errors and due process abuses.[222] Instead, the convictions and sentences were reviewed and approved by the court-martial appointing authority (now known as the "convening authority"), who was typically the commanding general of the unit in which the accused served.[223] The records of trial were then simply forwarded to the Office of the Judge Advocate General for review and "to revise" the record; under certain conditions, the records were sent to the Secretary of War or President for review, approval, or clemency actions.[224]

Four American courts-martial conducted in the field in France drew Ansell's swift rebuke and triggered debate over a court-martial's structural fairness at the highest levels of the War Department.[225] In April 1918, Ansell's department reviewed four death sentences and their records of trial that totaled four sheets of

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218. *Id*.

219. KASTENBERG, *supra* note 10, at 3-4.

220. *Id*.

221. *Id*.

222. Morgan, *supra* note 152, at 71-72.

223. *Id*.

224. Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 1-2 (1967). The authority was Section 1199 of the Revised Statutes of 1878 (Act of June 23, 1874, ch. 458, sec. 2, 18 Stat. 244).

225. Statement of Samuel T. Ansell—Resumed, Before the United States Senate Subcommittee on Military Affairs, "Establishment of Military Justice"—Proposed Amendment of the Articles of War (Aug. 26, 1919), at 134-35.

paper. The accused soldiers were all privates, all volunteers, and all eighteen or nineteen years old.[226] Two were court-martialed for sleeping while on post on the front line, ostensibly observing the deadly "non man's land" between the belligerent's trench lines of machine gun nests and barbed wire.[227] They had been on this duty for seven consecutive days and nights, each one alternating sleep one hour at a time.[228] The total time it took for the court to hear the cases and sentence them to death was one hour and forty-five minutes.[229] Eventually, it took intercessions by Crowder and Baker, and pardons by the president, to prevent their execution.[230] The other two privates were prosecuted for disobeying an order to get their equipment and go to drill.[231] They pled guilty, but then made statements that were inconsistent with an acknowledgment of culpability: they said they were just too physically exhausted to drill.[232]

This should have raised the issue of their incapacity to obey an otherwise lawful order. Their defense counsel, a young non-lawyer lieutenant, called one witness – their company commander, and asked him a question about the defendant's military history; to the surprise of nobody, the captain testified: "Bad, very bad. One of the worst in the country."[233] This sealed their fate. Under the Articles of War and the Manual for Courts-Martial, these death sentences should have been forwarded directly to the Judge Advocate General Department to pass on to President Wilson for confirmation.[234] Instead, the records found themselves almost immediately in the hands of General Pershing, the Commander of the American Expeditionary Force in France and already a household name among Americans.[235] Pershing wrote a letter, inserted into the packet, meant to "induce the President of the United States to confirm these sentences of death" and asked for specific direction from the president to carry out the sentences expeditiously: "I recommend the execution of the sentences in all of these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future," Pershing wrote as if the judicial decision to execute upon the conviction of a capital offense were the same thing as the use of swift and brutal force in combat to deter enemy aggression.[236] Ultimately, President Wilson

226. *Id.* at 135, 144.
227. *Id.* at 135.
228. *Id.*
229. *Id.* at 144.
230. *Id.* at 147-48.
231. *Id.* at 135.
232. *Id.*
233. *Id.*
234. *Id.* at 136.
235. *Id.*
236. *Id.* at 141 (quoting the verbatim text of General Pershing's letter of January 17, 1918).

granted clemency to these two soldiers, commuting their sentences to three years of confinement.[237]

Two large scale prosecutions, both domestic rather than overseas in the theater of war, caught Ansell's attention during this time too, stoked his ire, and sparked immediate bureaucratic confrontation. The fight was over the scope of the Judge Advocate General's authority and the extent to which it could contravene or overrule decisions made by commanding officers with power granted by the Articles of War.[238] In 1917, about a dozen enlisted soldiers (including non-commissioned officers) stationed at Fort Bliss, in southwest Texas, were charged with "mutiny" because they refused an officer's order to attend required drill. While a seemingly straightforward case of disobeying the chain-of-command, these soldiers were already under arrest for various other minor infractions. An Army regulation of the time provided that non-commissioned officers should not attend drill while under arrest. The soldiers knew this when they disobeyed the order. Nevertheless, they were prosecuted and convicted at courts-martial, sentenced to dishonorable discharges and given terms of confinement ranging from ten to twenty-five years. These cases were reviewed, approved, and ordered executed, by the general officer appointing authority. Dutifully, the records were forwarded to the Office of the Judge Advocate General, where they came to Ansell's attention.[239]

Ansell interpreted his office's legal authority to "revise" broadly.[240] Rather than simply correct superficial errors, Ansell asserted that the language in the statute should be read as an authority to set aside findings and sentences the Office found to be unjust or prejudiced by legal error committed by the court or the chain-of-command.[241] This broad reading and assertion of binding legal review was novel; it angered Crowder, who immediately wrote to the Secretary of War that Ansell's interpretation was wrong.[242]

While the senior Judge Advocate General Department officers argued over this statutory interpretation of their own authority, a second significant prosecution – actually, three related prosecutions – came to Ansell's attention. On August 23, 1917, approximately one hundred Black infantrymen assigned to the 3d Battalion, 24th Infantry Regiment, participated in what quickly became known as the "Camp Logan Mutiny" or the "Houston Riots," leading to the largest court-martial for murder – in fact, the largest murder trial in any American jurisdiction – in history.[243]

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237. *Id.* at 147.
238. Borch, *supra* note 195, at 41.
239. *Id.*
240. *Id.*
241. Borch, *supra* note 195, at 41-42.
242. *Id.* at 41.
243. Fred L. Borch, *"The Largest Murder Trial in the History of the United*

Several significant problems arose – all of which were perfectly legal under the existing Articles of War. The 118 defendants were prosecuted in three courts-martial, all defendants plead not guilty, and all were represented by a single defense counsel.[244] That defense counsel, while experienced in some aspects of military discipline and investigations (he was the division's Inspector General) and having formerly taught in West Point's Law Department, was not a trained lawyer.[245] All defendants were Black, while the court-martial panels and judges were all white. Most significantly, the death sentence adjudged against thirteen of these soldiers after the first trial (*Nesbit*) was carried out within days of the verdict, well before the record of the trials were sent to Washington, D.C. for review and before the Judge Advocate General of the Army or the Secretary of War could make a recommendation to the president to approve or disapprove that sentence.[246] Under the existing Articles, the general in command of the division who convened the courts-martial was granted authority to impose that sentence without presidential review only in times of war.[247] The alleged crimes (disobeying orders, mutiny, murder, and aggravated assault) and the sentence all occurred in Texas, not a combat zone, but the language of the statute did not account for such nuances; it did not define "time of war," and the convening authority used this opportunity to exercise the utmost of his judicial powers as swiftly as he could.[248]

The results of the trials, in which 110 of the 118 indicted soldiers were found guilty and nineteen executed, enraged Ansell.[249]

States": The Houston Riots Courts-Martial of 1917, 2011 ARMY LAW. 1 (2011).

244. *Id.*

245. *Id.* at 2.

246. Statement of Samuel T. Ansell, *supra* note 225, at 131.

247. *Id.*

248. The courts-martial, in chronological order, were United States v. Nesbit, General Court Martial Case no. 109045 (1917), United States v. Washington, General Courts Martial Case no. 109018 (1917), and United States v. Tillman, General Courts Martial Case no. 114575 (1917). This episode has generated voluminous studies and books; for summaries of the events leading up to and including the "riots," and the trials, *see* James Robert Hawkins, *How Houston Citizens Started Bloody Riot*, CHICAGO DEFENDER, at A9, Mar. 17, 1934 (a narrative account from one of the Regiment's soldiers); JAIME SALIZAR & GEOFFREY CORN, MUTINY OF RAGE: THE 1917 CAMP LOGAN RIOTS & BUFFALO SOLDIERS IN HOUSTON (2021) (engaging with recently declassified documents); ROBERT V. HAYNES, A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917 (1976); Angela Armendariz Dorau, *Of Soldiers, Racism, and Mutiny, The 1917 Camp Logan Riot and Court Martial*, 16 HERITAGE MAG. 6 (1998), www.texashistory.unt.edu/ark:/67531/metapth45398/m1/6/ [perma.cc/P8HG-VAA4]; for immediate reporting of the incident, see *Army Riot at Houston Cost 17 Lives; Negro Troops Ordered Out of State; Congress Will Take Up Race Question*, N.Y. TIMES (Aug. 25, 1917), www.nytimes.com/1917/08/25/archives/army-riot-at-houston-cost-17-lives-negro-troops-ordered-out-of.html [perma.cc/E5QJ-QDD2].

249. Borch, *supra* note 195, at 42.

He wrote a memorandum to the Secretary of War, sent through Major General Crowder, criticizing Winthrop's view of the court-martial as a mere agency of the Executive Branch.[250] He restated that he interpreted existing law to permit the Judge Advocate General to revise the outcomes of flawed courts-martial with remedial actions to correct legal defects.[251] He noted that it made no sense for the Judge Advocate General to be able to declare a court-martial null and void for lack of jurisdiction (an authority beyond dispute) but not be able to meaningfully revise the proceedings for errors that substantially prejudiced the convicted soldier.[252]

Crowder penned a rebuttal – an opposition brief. He wrote that there was "no fundamental reason why court-martial jurisdictions, as at present constituted, should be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp." The "primary end" of military justice, he said, was discipline, so its procedure "must be simple, informal and prompt."[253] Secretary Baker replied at the end of December 1917 that he had read Ansell's brief as "based primarily on the necessity for, rather than the actual existence of, the power of revision" and then inquired of Crowder how far the power to revise could be extended by executive order or whether such a change needed Congressional action.[254]

At his prodding, and with the agreement of Crowder, Secretary of War Baker issued General Order no. 7 in January 1918.[255] This order prohibited the execution of any death sentence, or dismissal of any officer, before the record was reviewed for legality by the Office of the Judge Advocate General and the President had an opportunity to make an informed decision on potential clemency or commutation. To complete this task, and taking on an additional duty of reviewing the records in "all serious general courts-martial," Ansell established what became "boards of review" made up of judge advocates from his office – the first ever formal pseudo-"appellate" process for American courts-martial. These reviews were advisory only, but kick-started Ansell's determined effort to dramatically reform the Articles of War to make them – essentially – as close to civilian criminal trials as practically feasible.[256]

Ansell's efforts were aimed at several structural authorities long encoded in the Articles of War and the Manual for Courts-Martial. If he had been successful, the changes would have been

250. Statement of Samuel T. Ansell, *supra* note 225, at 123.

251. *Id*. at 127-30.

252. Brown, *supra* note 224, at 6.

253. *Id.* at 7.

254. *Id.* Brown writes that this Order was meant to "forestall" Congressional hearings by quieting the complaints of Ansell. *Id.* at 8.

255. United States Dep't of War, General Order no. 7, Jan. 17, 1918.

256. Borch, *supra* note 195, at 42; Brown, *supra* note 224, at 9, n. 44. Generous claims that Ansell was motivated, at least in part, by "ambition to take over Crowder's job." GENEROUS, *supra* note 10, at 6.

"revolutionary,"[257] and thirty years ahead of their time.[258] Ansell thought that the Articles of War[259] and Manual did not define the crimes with sufficient particularity, leaving a fair notice problem for the accused because their elements and modes of proof were only to be found in the Manual for Courts-Martial, which is only an Executive Order, subject to the discretionary revision of the President rather than codified into a criminal penal law; nor were there explicit penalties established for each offense by statute – rather, many of the punishments were simply left to the discretion of the court-martial itself.[260] Even more of an assault on modern due process norms, he felt, was the fact that charges would be referred to a general court-martial without having first been screened for evidentiary and prudential soundness in a preliminary investigation where the accused could make a statement or present exculpatory evidence.[261] Moreover, charges were referred without a lawyer first certifying in writing that such accusations were legally sufficient with at least prima facie proof of guilt.[262] This risked arbitrarily drafted accusations of criminality, based on nothing more than the possible caprice or pique of the commander.

Ansell also preferred that the Articles of War specify the number of panel members for each type of court-martial (eight for a general court-martial, three for a special) to prevent commanders with appointing authority from changing the roster of the panel mid-way through a trial;[263] he also strongly favored permitting enlisted soldiers to serve on panels, regardless of the rank of the accused. He believed that conviction should require three-fourths of the panel to agree, rather than the conventional requirement of only

257. Borch, *supra* note 195, at 43.

258. Brown, *supra* note 224, at 2, 44 ("if passed by Congress, [the Bill that Ansell drafted based on these recommendations] would have given the United States Army a code of military law in 1920 which would have closely paralleled, and in some respects exceeded, the Uniform Code of Military Justice [enacted in 1950]").

259. Articles of War, 39 Stat. 659 (1916).

260. *Id.* Articles 58 (desertion), 64 (assaulting or willfully disobeying a superior officer), 75 (misbehavior before the enemy), 96 (various crimes: e.g., common law offenses of rape, murder, mayhem, arson, robbery, embezzlement, and perjury), 98 (general article – prejudicial to good order and discipline or conduct of a nature to bring discredit upon the military service). *See also* Revisions of the Articles of War, Subcommittee of the Committee on Military Affairs, House of Representatives, 64th Cong. (1916) (Statement of Brigadier General Enoch H. Crowder, July 29, 1916), at 24, www.loc.gov/rr/frd/Military_Law/pdf/Hearing_subcomm.pdf [perma.cc/8EJG-DN6J].

261. As Borch notes (*supra* note 195, at 43), the 1917 Manual for Courts-Martial *did* require this, but as such it was nothing more than a rule that could be modified at the discretion of the president. UNITED STATES MANUAL FOR COURTS-MARTIAL 40-41 (1917) (para. 76).

262. Brown, *supra* note 224, at 18.

263. *Id.* at 21-22.

two-thirds and wanted unanimity for a death sentence.[264] Significantly, Ansell believed that each court-martial should have a "court judge advocate" serving in a judge-like role to rule on motions and questions of law, to summarize the evidence and applicable law for the benefit of the panel, to review the finding for legal sufficiency, and to impose the sentence.[265] Reinforcing this barricade of judicial independence at the trial level would be a new reviewing authority he called a "Court of Military Appeals," made up of three civilian judges appointed by the president and confirmed by the senate for life terms.[266]

A significant reason for Ansell's unease with the mechanisms of military justice can be found in the opening commentary to the discussion of punishment in the 1917 Manual for Courts-Martial:

> While courts-martial are the judicial machinery provided by law for the trial of military offenses, the law also recognizes that the legal power of command, when wisely and justly exercised to that end, is a powerful agency for the maintenance of discipline.[267]

In December 1918, allied to Ansell, attention over the character of military justice shifted into the public domain. Senator Chamberlain called for the establishment of a military appellate tribunal to address "unjust sentences" streaming out of the thousands of wartime courts-martial, both home and abroad. In January 1919, the executive committee of the American Bar Association commented on the need for reforming military law's administration (though its committee report later was "generally favorable to the military justice system"[268]).

Later that month, Chamberlain introduced a new bill – mostly drafted by Ansell himself – that would have reimagined the Articles of War along the lines Ansell had proposed. It would have required that a judge advocate be appointed for each general and special court-martial; it would have required the immediate announcement of acquittals; it would have given the Judge Advocate General power to modify or revise findings and sentences and even to order new trials if necessary.[269] Hearings were held, but his own committee did not advance the bill to the full Senate for debate.[270] At the end of the month, another front opened when Ansell "launched his public campaign for revision" of the Articles of War and "established himself as the standard bearer for the reformation of military

264. *Id*. at 40.

265. *Id.* at 22-23.

266. Borch, *supra* note 195, at 43; Brown, *supra* note 224, at 30. For a discussion of Ansell's proposed Articles of War, based on these objections, *see generally* Morgan, *supra* note 152.

267. MANUAL FOR COURTS-MARTIAL (1917), *supra* note 261, at 151.

268. Brown, *supra* note 224, at 9, n. 47.

269. *Id*. at 38-42.

270. *Id.* at 9.

justice."[271]

In March, Secretary Baker took a step toward shielding his Department from further public criticism. He wrote to Crowder:

> My Dear General Crowder: I have been deeply concerned, as you know, over the harsh criticisms recently uttered upon our system of military justice. During the times of peace, prior to the war, I do not recall that our system of military law ever became the subject of public attack on the ground of its structural defects. Nor during the entire war period of 1917 and 1918, while the camps and cantonments were full of men and the strain of preparation was at its highest tension, do I remember noticing any complaints either in the public press or in Congress or in the general mail arriving at this office. The recent outburst of criticism and complaint, voiced in public by a few individuals whose position entitled them to credit, and carried throughout the country by the press, has been to me a matter of surprise and sorrow. I have had most deeply at heart the interests of the Army and the welfare of the individual soldier, and I have the firmest determination that justice shall be done under military law.[272]

After assuring Crowder that his faith in the system and his confidence in the Judge Advocate General was strong, Baker confessed

> "[b]ut it is not enough for me to possess this faith and this conviction. It is highly important that the public mind should receive ample reassurance on the subject . . . you are in a position to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject."[273]

At Baker's request, Crowder delivered a seventy-page memorandum entitled "Military Justice During the War."[274] The report was defensive in tone. Crowder took several pages to detail his long-articulated desire to revise and modernize the Articles of War, dating back to a letter he wrote to the Acting Judge Advocate General of the Army (G. Norman Lieber) in 1888 when still a Cavalry lieutenant, suggesting that no one in the Army had a firmer resolve to identify that which *ought* to be fixed and then working assiduously to fix it over the length of his career. He expressed his "firm belief in the merits and high standards of our system of military law" and that a proper review the facts would "vindicate it from the recently published reproaches."[275]

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271. *Id*. at 10.

272. Secretary of War Newton D. Baker, to General Crowder (Mar. 1, 1919), www.loc.gov/rr/frd/Military_Law/pdf/letter.pdf [perma.cc/86KW-J28B].

273. *Id.*

274. Brown, *supra* note 224, at 10.

275. U.S. Dep't of War, Military Justice During the War: A Letter from the Judge Advocate General of the Army to the Secretary of War in Reply to a Request for Information (Mar. 10, 1919), at 4-8, www.loc.gov/rr/frd/Military_Law/pdf/letter.pdf [perma.cc/XKE4-TG7C].

Agreeing with General Sherman's comment from nearly forty years earlier, that military law is meant to govern armies of "strong men" not protect the rights and safety of the general public as civilian criminal law intends.[276] Crowder wrote: "military justice aims to make the man a better soldier or to eliminate him from the military organization if he cannot be improved, while civilian justice looks to the ultimate protection of the community at large."[277] Yet he also believed strongly that the systems and procedures of military justice were virtually the same as in most civilian jurisdictions: "The proceedings follow the fundamentals of our criminal common law," he concluded.[278] For example, it gave sufficient notice and opportunity to defend oneself; created a fair and open inquiry into the facts; ensured the witnesses, members, and counsel were sworn under oath; provided access to witnesses and to legal representation; including a proper arraignment and right to challenge the court members; did not breach a statute of limitation; refrained from violating a soldier's privilege against self-incrimination; demanded that evidence sustain the findings; reviewed for legal sufficiency by a two-step appellate process unheard of in civilian law – first, by the accused's commanding general acting as reviewing authority, advised by his senior judge advocate who provides that officer with a "quasi-judicial opinion," followed by rigorous scouring of the record by judge advocates in his office and subsequently by a three-officer board of review ("acting as an appellate court"), then the Chief of the Military Justice Division, then the Judge Advocate General.[279]

All of this, in his view, ultimately protected soldiers from "arbitrary" decisions by commanding officers. Recounting that the six national guard judge advocates assigned duty on the review boards in Washington, D.C., included one former state supreme court chief justice, a former justice on the Philippine Island Supreme Court, and two criminal law professors, Crowder opined that "it may be safely asserted that in no State of the Union is any more thorough scrutiny given to the record of a criminal case than is given in my office, and that in most State supreme courts the scrutiny does not approach in thoroughness the methods here employed."[280]

He further described the novel system of "indeterminate sentencing with no minimum" as a virtual guarantee that a large number of incarcerated soldiers were serving what amounted to a "probationary" term of confinement, especially for "purely military

276. *Id.* at 14.
277. *Id.*
278. *Id.* at 15.
279. *Id.* at 14-18.
280. *Id.* at 14-16. In the seventy-page Report, Crowder employs the word "scrutiny" thirty-four times, often preceded by "experienced," "skilled," and "thorough."

offenses" like desertion, disobedience, and absence without leave.[281] Such sentencing meant that these convicted felons – regardless of how superficially severe their confinement term might seem to civilians – could be, and regularly were, commuted by the prison commandant at any earlier time, releasing the soldier back into service.[282] And even those remaining behind bars, Crowder claimed, were the beneficiaries of an "enlightened" system of vocational, rehabilitative, and psychiatric services without parallel in civilian penitentiaries.[283]

Crowder suggested that any defects were the result – a foreseeable and not unreasonable result – of the high volume of cases coming out of an unprecedented war involving millions of American troops.[284] But, he cautioned, even the argument that commanders were sending too many "trivial" offenses to court-martial was undercut by the data: Crowder took pains to detail the raw numbers and ratios of courts-martial to Army personnel occurring before the War and those by the Wars end.[285] According to his records, the ratio of all types of courts-martial (summary, special, and general) to personnel strength went *down*, dramatically, once the War began and progressed despite armed conflict naturally giving rise to situations that would make new draftees – unfamiliar with the rigid disciplinary requirements of Army work – *more* likely to demonstrate insubordination and disorderliness and give commanders *more* reason to prosecute.[286] "There could be no more conclusive demonstration that commanding officers, though faced with a situation full of inducement to rigor in enforcing discipline among raw and untrained men, did in fact use remarkable consideration and self-restraint in not resorting to the instrumentalities of courts-martial."[287]

In some respects, Crowder's letter assumed too much or was outright misleading. Though he conceded that the role of the judge advocate *at trial* had no civilian analogue (because the officer advised both the court and the defendant, and presented evidence against that defendant, and was almost never a lawyer himself), he mistakenly analogized the role of the general's legal advisor – the staff judge advocate (usually a major or lieutenant colonel at the time) to that of a civilian appellate court: "The judge advocate's main function in military justice" is to review the record of trial and he

> advises the commanding general whether the trial has been

281. *Id.* at 18.
282. *Id.* at 18-19.
283. *Id.* at 19-20.
284. *Id.* at 21.
285. *Id.* at 23-24.
286. *Id.*
287. *Id.* at 24.

> conducted according to law in every respect; this includes the duty to advise whether the weight of evidence sustains the conviction, regardless of legal error. In this aspect he is essentially an appellate judge, and it is his duty to enforce the law as fully on behalf of the accused as on the behalf of the Government . . . [while] the judge advocate thus attached to the division commander's staff has other duties of legal advice, corresponding to those of the Attorney General of the United States as legal adviser of the Government in all civil matters . . . in military criminal justice his function is essentially judicial.[288]

Crowder's understanding of "judicial" was overbroad and disingenuous. He likened both the division's judge advocate and the "review boards" in Washington to appellate courts because they both enjoy and employ the technical expertise of neutral lawyers to parse the record for legal error and conformance with legal standards. But appellate courts are not advisory bodies that offer their opinions to the discretionary and conclusive judgment of another non-legal government official like the Secretary of War or Division Commander. Appellate courts' judgments are final, unless reversed or modified by a superior appellate court, and are binding and directive on the parties below. In the military justice system of the World War I era, and as both Crowder and Baker well knew, the only parties with such plenary authority were in the chain-of-command; the legal advisor to the court-martial appointing/reviewing authority, no matter his legal acumen or persuasive confidence, was nothing more than a staff officer assigned to that very commander who could and did reject the advice. The review boards, too, were advisory only.

Crowder acknowledged that the system did have flaws that could and should be corrected, and gave Secretary Baker a brief list of seven, but none of which would have triggered a wholesale project of reform and "civilianization" envisioned by Ansell.[289] Crowder recommended that the War Department issue a new General Order that would amend the Manual for Courts-Martial to require every summary court-martial convening authority (typically, a battalion commander) to personally investigate, or delegate the duty to a qualified subordinate officer, the accusation.[290] He also recommended a rule prohibiting commanders from ordering cases to general courts-martial without first receiving a written opinion from his staff judge advocate to avoid the appearance or actuality of bias and the prosecution of "trivial" matters;[291] of course, nothing required the convening authority to follow that opinion. Third, Crowder wished to increase the punitive authority of the special court-martial. He wanted to raise the maximum punishment to two

288. *Id.* at 26-27.
289. *Id.* at 62-64.
290. *Id.* at 63.
291. *Id.*

years of confinement and a dishonorable discharge, under a theory that this would reduce the commands' reliance on general courts-martial and reduce the number of allegedly unfairly severe sentences.[292] He further wanted to caution generals that they should reserve general courts-martial for only the kinds of offenses that could not be meaningfully addressed (re: punished) under the limits of a special or summary court-martial, or with the more restricted disciplinary tools of non-judicial punishment.[293] Crowder moved closer to Ansell's position in at least one respect: he thought it prudent and realistic to assign a judge advocate officer as a court member to all "serious, difficult, and complicated cases" if reasonably available.[294] Of course, this movement would have been measured in inches, for it was far from the kind of learned counsel and learned judging that Ansell wished for.[295]

After reading the Crowder memo, Senator Chamberlain asked Baker to print a reply that had been drafted by Ansell. Baker refused but instead invited Ansell to submit his views (he did the same day) and draft a bill to revise the Articles of War, probably in an effort to render him "harmless"[296] by giving him an official conduit for his argument that could be processed, considered, and ignored – which it was. In lieu of success with either his superiors at the War Department or in Congress, Ansell returned to making speeches and writing articles.[297] Cornell Law Professor George Bogert, echoing Crowder's memo, criticized Ansell's call for reform, saying it was based on "gross exaggerations, argument from isolated single instances to broad general considerations, statements of half-truths, misrepresentations and suppression of facts. There are defects, but they are minor and easily curable."[298]

D. The Kernan Board

Meanwhile, Senator Chamberlain introduced a bill intended to revise the Articles of War and held extensive subcommittee hearings. At the same time, the War Department established a board to study and report its views on whether – and how – to improve the court-martial system; in substance, though, it was directly responding to the proposed Chamberlain bill and Ansell's

292. *Id*. at 64.
293. *Id*.
294. *Id*.
295. Statement of Samuel T. Ansell, *supra* note 225, at 135-36, 42.
296. Morgan, *supra* note 10, at 172 (note that Morgan was one of the professors-turned-judge-advocate working for Ansell during that period, and one of Ansell's most preeminent supporters).
297. *See*, *e.g.*, Ansell, *supra* note 150.
298. George Gleason Bogert, *Courts-Martial: Criticisms and Proposed Reforms*, 5 CORNELL L.Q. 18, 47 (1919).

convictions.[299] The Kernan Board, chaired by Major General Francis J. Kernan, consisted of one other general officer (a National Guardsman from New York), one judge advocate (a lieutenant colonel), and a field artillery lieutenant colonel serving as the Board's recorder. Over a two-month period, the group invited comments from all officers who were then, or who had, exercised general court-martial authority and from all judge advocates – in total, 225 active duty, national guard, and retired or discharged officers responded. According to the Board, it characterized the responses in one of three ways: general support for the current system, intermediate, and "severely condemn." More than half of the total respondents (115) were classified in the "general support" column, and only 43 were characterized as strongly critical.[300]

In summarizing its findings, the Board reported that "the opinions of officers of longest and most intimate experience with courts-martial are generally strongly in favor of the existent [sic] system, and, while conceding some defects and offering some criticism, they in a general way defend the system and attribute imperfect results achieved under it not to the system itself but to the inexperience of those called upon to administer it as members, judge advocates, or counsel in court-martial trials."[301] Seemingly ignoring that courts-martial were also conducted outside of active combat, and ignoring the fact that the responsibility for the "inexperience" of members and counsel lies with the chain-of-command who assigned them to those trials, the Board was persuaded by these senior commanders because they understood better than anybody the "overwhelming importance of discipline in a command when it was subjected to the supreme test of battle[.]"[302] Those officers who had no direct combat exposure during the War, or whose experience was remote from the fighting, and those with little time in the service, compared military justice unfavorably with civilian criminal procedure. Their criticisms were similar to Ansell's: members of the court were "ignorant of the law" and lacked sound discretion; officers assigned as prosecutors (trial judge advocates) were "often incompetent;" worthless cases proceeded to trial because there was no effective pre-trial investigation of the facts; and too much discretion to punish was left in the hands of the court members, leading to "unduly severe sentences."[303]

The main gist of the critics' arguments, according to the Board, was the "radical" need to transfer authority from soldiers (commanders) to lawyers (who are "soldiers by title and courtesy

299. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure (July 17, 1919), www.loc.gov/rr/frd/Military_Law/pdf/proceedings.pdf [perma.cc/CSY4-3U56] [Kernan Proceedings and Report].

300. *Id.* at 14.

301. *Id.* at 4.

302. *Id.* at 5.

303. *Id.*

only, if at all").[304] This preference for adding forms of legalism into the court-martial was wrong-headed, they wrote because the "real purpose of the court-martial is to enable commanders to insure [sic] discipline in their forces." The president's authority as commander in chief, they said, cannot be "abridged" by Congress exercising its Article I power to make rules for the government and regulation of the armed forces. They suggested – by asking somewhat rhetorically – that the nature of command, derived from the Commander-in-Chief, "embrace[s]" and "impl[ies] . . . not merely the right to direct the use of the force, but the duty and authority to make and maintain the force fit and suitable to its purpose by instruction, by training, and by discipline."[305]

The Kernan Board did comment, reasonably, on the apparent inconsistency in punishments – "cases absolutely alike and hence called for absolutely identical punishments, are rare."[306] Sentences, they correctly noted, are functions of unique case facts and offender characteristics, and the effect of the crime on fellow soldiers or on the mission.[307] However, the Board viewed the "radical" changes proposed in the Chamberlain bill in "either-or" terms: either commanders have all power and responsibility, or the lawyers do. This was a remarkably narrow way to think about the possibilities, for it ignored the opportunity to vary and caveat the commander's ability to orchestrate the military justice system without diluting the commander's ability to command and control forces; nor did it consider its fundamental characterization of military law as being open to debate. Instead, the Board called the bill an "attempt by law to emasculate the legitimate and heretofore undisputed authority of the president as commander-in-chief."[308]

> To achieve the purpose of their existence armies must be clothed and fed and instructed and disciplined in preparation for the test of combat . . . [therefore] [t]he highest qualification for making a court-martial achieve the object of its existence [discipline] is a thorough knowledge of men and discipline in the profession of *arms*, not mere expertness in law.[309]

Because the English kings could unilaterally administer their

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304. *Id.* at 5-6.

305. *Id.* at 6-7. Similar arguments continue to be made. *Compare* GENEROUS, *supra* note 10, at 4 ("An attempt to graft onto courts-martial certain concepts borrowed directly from civilian law might raise its own set of problems. There are limits on the extent to which the essentially autocratic armed forces are able to adopt notions regarded as precious by a democratic society.") *with* Charles Dunlap, *Civilianizing Military Justice? Sorry, it Can't – and Shouldn't – Work*, WAR ON THE ROCKS (Oct. 8, 2015), www.warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/ [perma.cc/X5HM-PJ9Q].

306. Kernan Proceedings and Report, *supra* note 299, at 12.

307. *Id.* at 11-12.

308. *Id.* at 7.

309. *Id.* at 9 (italics in original).

military justice system, and because George Washington did, the Board concluded that modern day presidents and commanders should also be able to create, manage, administer, direct, and regulate courts-martial "without express authority of law."[310] Of course, the Board seemed to ignore British parliamentary involvement since the late seventeenth century, forgot that Congress had been promulgating the Articles of War (a law) since the Revolution, and made no distinction between a commander's interest in martial offenses (that disrupt or endanger the mission or his soldiers) and the kind of misconduct that was nothing more than civilian common law crimes.[311]

The Board's report is an unusual product. At points, it appears clearly written by a lawyer familiar enough with terms like "ab initio" to use them without pause.[312] It made a lawyerly textualist or originalist argument about the meaning of certain words:

> not only did our military system come essentially from England but the language in which that system is expressed is our own, so that words or phrases imbedded in our organic law may be taken to connote the same thing and to carry the same implications as in the mother tongue.[313]

As if in a defense attorney's closing argument, it employed *eighteen* rhetorical questions (*e.g.*, "Is it not . . . ?" and "Will not its . . . ?") in just over eleven pages of the Report.[314] Nevertheless, the Report lacked indica of having pretentions of a persuasive legal brief. The document contained no citations to legal treatises, no direct references to statutes or regulations to compare and contrast military law against civilian law, and no allusions or citations to the Supreme Court, or any court's, case law. It contained a plethora of arguments that were – putting it generously – spurious.

Strikingly, the Board made a number of these absurd or reality-stretching claims. For instance, it argued that military justice should not be taken from the chain-of-command because there might be an occasion to, not only relieve an ineffective officer

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310. *Id.* at 7.

311. *See supra*, Part I.

312. Kernan Proceedings and Report, *supra* note 299, at 13.

313. *Id.* at 7. Ansell attacked this line of argument much later, writing that the British Articles of War were simply not meant for a constitutional scheme in which command and control of the military rests with a chief executive but the making of rules "for the government and regulation of the land and naval forces" rests with a legislature. Britain's Articles were promulgated by and in the name of the king to govern and regulate members of the army; these soldiers and officers swore fealty to the monarch – the "army was his army" – and officers, drawing their "authority from the crown," represented the king, "applying his law, meting out his penalties, following his procedure and obeying his commands." Ansell, *supra* note 169, at 148-49.

314. Kernan Proceedings and Report, *supra* note 229, *passim* (four on page 6; *seven* on pages 7-8; just one on page 9; four on page 10; and two on page 12).

of command, but to *court-martial* the commander for "misconduct" if a military campaign or offensive turned into a tactical or strategic disaster.[315] If such a proceeding were to be reviewed for legal error by lawyers in Washington, the Board warned, the swift condemnation made by the court in the field (made up of the general's peers) could be set aside upon a legal technicality.[316] Most modern officers would know this is bunk: not only would the defeat be more about the commander's competence as a planner, leader, tactician, and strategist (and factors unforeseeable and beyond the reach of any commander's control) than about "misconduct," but the idea of subjecting a senior commander to anything like a federal conviction, dismissal, and possible incarceration for his military defeat stinks of aggressive, militant totalitarianism akin to the violent Nazi and Soviet purges of generals who were thought to be disloyal or incompetent.

In another example of questionable reasoning, the Board felt that the Articles of War should not require the appointing authority to assign to courts-martial only those officers he deemed "fair and impartial and competent" because – when if commander *did* make those assignments – it would signal that those *not* selected for court-martial duty lack those qualities. Moreover, how could the appointing authority know whether or not subordinate officers held such qualities? The first objection is laughable. The latter objection is curious. The Board either forgot or conveniently ignored, the realistic possibility (if not probability) that senior commanders lower in the chain-of-command could and would make recommendations for court membership based on their closer observations of the officer in question. Because we know the Board felt so warmly about the inherent justness and maturity of all commanders, this objection – discounting the role and input of the subordinate commanders – is not even consistent let alone persuasive.[317]

The Board also inverted the paradigmatic agency relationship between a commander and a lawyer, saying that the commander (like a surgeon who can distinguish between mere discoloration on a foot from gangrene) is the true expert while the lawyer, like a layman or patient, is largely ignorant of the subtle clues and incapable of judging what the proper remedy should be, except as the thoughtless mechanics of a procedure that they must administer.[318]

Finally, the Board recommended against permitting enlisted soldiers to serve as fact-finding and sentencing members of the court because doing so would be (somehow) antidemocratic.[319]

315. *Id.* at 8.
316. *Id.*
317. *Id.* at 19.
318. *Id.* at 10.
319. *Id.* at 18.

Strangely, the Board wrote that including such citizens – those without the "prestige" of rank – would be "out of harmony with the American conception of democracy and of our confidence in our institutions." They unsubtly suggested that only officers have the "capacity to discern the truth, the ability to weigh evidence, and the experience to fix punishments commensurate with the offense and with the need to deter others. These qualities usually imply education and experience."[320] If enlisted soldiers possessed such qualities, the Board said, they would be officers already. Because the Report contained no empirical or statistical reporting of data about the Army and its soldiers (other than surveying officers for their opinion), the Board provided no sound reason for believing in this type of professional caste prejudice. It did not much matter anyway, the Board said for it claimed – without any evidence – that "the enlisted men of our armies have full confidence in the fairness and ability of officers to do justice as members of courts."[321]

Ultimately, the Kernan Board – like institutional supporters of the status quo in this century – found little to divert It from Its conclusion that major reform was uncalled for: "military justice is carried out at times under great urgency and stress, where the nice deliberation and finish of the civil procedure is utterly impossible . . . [so] this board feels justified in averring that our system stands vindicated."[322] Nevertheless, it recognized or sensed an obligation to assuage the concerns of at least some of the court-martial critics. It recommended that the Articles require that the (single) officer selected to serve as judge, jury, prosecutor, and defense counsel at a summary court-martial should be "best qualified . . . by reason of rank, experience, and judicial temperament."[323] And, nudging closer toward Ansell's view, the Board recommended that the appointing authority appoint defense counsel for the accused in all general and special courts-martial, and that the Army should actively encourage young line officers to study law and then use them to as judge advocates for a period of years. "The most serious defect in our court-martial system arise from the lack of competent trial judge advocates and counsel."[324]

But the Board did not actually put that much faith in counsel – even if educated and experienced – for it stopped short of recommending that the military rules of evidence have as their model the federal rules for civilian courts. The reason: it would demand too much new learning and studying of the lawyers – they would need "permanent offices elaborately equipped with libraries and with abundant leisure to pursue the niceties of legal subtleties"

320. *Id.*
321. *Id.*
322. *Id.* at 13-14.
323. *Id.* at 19.
324. *Id.* at 22-23.

and real-world conditions were not amenable to such luxuries.[325] It also recommended against a civilian court of military appeals, for "those best informed through long experience in court-martial trials believe almost universally that very few innocent men are found guilty by military courts and sentenced to punishment."[326] We can wonder in astonishment, now, how the Board could know this *without* having an appellate court to make those determinations, and at why – if this were true – there would be any need at all for defense counsel or trained judge advocates.

E. Ansell's Criticisms of the Kernan Board

Ansell testified again before the Senate Subcommittee on Military Affairs in August 1919, after he had resigned at his Regular Army rank of Lieutenant Colonel.[327] Feeling uninhibited, he strongly criticized the "common sense" of the Kernan Board,[328] and accused Crowder and the War Department of not acting in good faith regarding General Order no. 7, saying that while it was a "step in the right direction," it was really nothing more than an attempt to "head off a more thorough and drastic reform." [329] He wanted to "subject courts-martial to legal restraint through the establishment of a revisory power in the office of the Judge Advocate General" because commanders – and the War Department – seemed to believe the granting of "mercy or clemency" was a "convenient mode of doing justice."[330] Simply having a board to review these records after the fact, with only an ability to *recommend* changes, was insufficient.

> Do not think that you can take a human being labelled a lawyer and put him in the war department and subject him to the power of military command and expect him to be judicially independent. He will not be.[331]

For Ansell, no post-conviction amelioration of punishment, like permitting the soldier to return to duty, excused the original unjust and "illegal" conviction and punishment.332 One case he pointed to involved a young private, assigned to kitchen duty at a camp in New Jersey. He was caught smoking outside by a lieutenant; the officer ordered him to put the cigarette out and hand over the pack, but the

325. *Id.* at 27.
326. *Id.* at 29-31.
327. Statement of Samuel T. Ansell—Resumed, Before the United States Senate Subcommittee on Military Affairs, "Establishment of Military Justice—Proposed Amendment of the Articles of War (Aug. 26, 1919), at 115-69, www.loc.gov/rr/frd/Military_Law/pdf/08_26.pdf [perma.cc/WTC2-N68P].
328. *Id.* at 120.
329. *Id.* at 134.
330. *Id.* at 115-17.
331. *Id.* at 134.
332. *Id.* at 118.

private refused. The soldier was charged, prosecuted, convicted, and sentenced to a dishonorable discharge and twenty-five years in prison.333 Ansell took particular personal insult to the defenders of the status quo (like the Kernan Board) criticizing him for apparent lack of sufficient time or experience in the military – that more time and experience somehow would lead an informed person to both understand the need for this sort of rigid discipline and appreciate the system's inherent reasonableness. This was a system whose "reasonableness" accepted twenty-five years for disobeying this kind of order, as if all orders carried the same import and all disobedience carried the same costs. He reminded the committee that he has as much or more command time then many of the general officers testifying in support of the Articles of War: "they come here and would have you simply be impressed by their expertness."

> The mere fact that a man is a major general, or certainly the mere fact that he was a major general up to the beginning of the war, when some of them did see some service, was indicative of little more than a long time conformance to a system which in itself tended to arrest mental and professional development . . . with entire accuracy it can be said that many of our generals are jokes to everybody else in the world except ourselves and themselves.[334]

Ansell acknowledged that these officers did have some command experience, but not experience leading larger-than-company-sized units before taking on command of divisions or larger organizations. Rather than inspiring their soldiers and managing with sensibility and sound judgment and temperament, such an officer – in Ansell's jaundiced view – was nothing better than a "chief administrator . . . a red-tape artist" sitting behind a desk "busying himself with the thousand and one administrative requirements that simply clog our peacetime administration of the Army."[335]

Ansell then engaged in the equivalent of military legal apostasy by criticizing the "Blackstone of the Army," Colonel William Winthrop, whose tome formed the analytical justification for much of the modern Army's "reactionary" desire to uphold this "anachronistic" system of deference to the commander's presumptively judicial qualities. While a "man of great capacity to express himself, and who was also a keen legal reasoner," he was first and foremost "a military man." His strongest argument was that the nature of military law fulfilled only an executive branch function – it was an instrumentality of command. This was, to Ansell, a non sequitur. Because military justice and courts-martial were not expressly made part of the federal judiciary in the

333. *Id.* at 120.
334. *Id.* at 121.
335. *Id.* at 122.

Constitution, Winthrop made an unjustified leap of logic to conclude "therefore they [courts-martial] belong to the power of the military command, an executive agency," foreclosing direct involvement by Congress or standards imposed by civilian courts.[336]

Writing in 1920, after he had testified before Congress, Ansell wrote in a law review article this very public and unequivocally severe denunciation of the system:

> [T]he existing system of Military Justice is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it. Intemperate criticism of those who have pointed out these defects will not serve to conceal them.[337]

He further described the military's criminal justice system – "the right hand of the commanding officer to aid him in the maintenance of discipline" – as a "vicious anachronism," "monarchical," "reactionary," "archaic," "mediaeval," where the members (the fact-finders) "need know no law, are presumed to know no law, and, as a rule, do know no law," a "do-as-you-please-code" illustrated by regularly recurring "ridiculous blunders with tragic consequences," and (more revolting than anything else) *allowed* to be such by the commanders who manage it with the "witless" acquiescence of Congress who refused to do anything but senselessly copy a penal system from a country whose political system was loathed.[338]

Summarizing the numerous defects of military justice up through the World War, and which resisted any substantive changes when Congress "revised" the Articles of War in 1916, Ansell pulled no punches. This accusation is, again, worth quoting in full:

> Proceedings of courts-martial, consisting of unlettered men and having with them no judge of the law, and applying a code that, though penal, is not specific either in defining the offenses, penalty or procedure, must be expected to be and frequently they are wrong from beginning to end; wrong in fact; wrong in law; wrong in the conduct of the inquiry; wrong in the findings; wrong in the "advice" given by compliant and impotent law officers, who recommend the approval of such proceedings; wrong in the ignorant confirmation of such proceedings; wrong in everything. And yet, of such errors there can

336. *Id.* at 123.
337. Ansell, *supra* note 169, at 53.
338. *Id. passim*.

be no review.[339]

A version of the Chamberlain bill, toned down from the "radical" restructuring advocated by Ansell and clearly influenced by the testimony of Crowder and the Kernan Report, was eventually passed with the support of the War Department, now known as the 1920 Articles of War.[340] It did not include a provision for a new civilian court of military appeals, and it did not permit enlisted soldiers the opportunity to serve as court-martial members to try the facts and render judgments on their fellow soldiers or officers. While not what Ansell had hoped for, the 1920 revision to the Articles was a significant departure from the previous versions and from what had become custom and conventional through the first World War. Among other reforms, it required a preliminary investigation (codifying what had only been permitted in the non-statutory Manual for Courts-Martial) with an opportunity for the accused to call witnesses and to cross-examine the prosecution's witnesses. It required that minor infractions and offenses be disposed of with a procedure that has since become known as "non-judicial punishment," wherein the limited range of punishments (which could not include a discharge or imprisonment) is a function of the rank of the accused and rank of the commander imposing it.[341] As an important constraint on the commanding officer, it required that the commanding general receive, in writing, a legal opinion from his staff judge advocate (though it was, and still is, not binding on the convening authority). It required that the members (the panel) consist only of officers "best qualified by reason of age, training, experience, and judicial temperament" but still left it to the discretion of the convening authority to select those members.[342] In a novel addition, it provided for the punishment for non-compliance with the code's procedure and abuse of power by those in military authority.[343] It provided for a new "law member" for every general court-martial to rule on interlocutory questions, including the admissibility of evidence.[344] It required defense counsel to be appointed for the accused, and either military or civilian attorneys were authorized.[345] It increased the minimum number of members for a guilty verdict from a simple majority to two-thirds, required three-fourths of the members to agree on a sentence of more than ten years in prison; and required unanimity for a death sentence. The 1920 revisions also created the first statutorily required appellate review process consisting of judge

339. *Id.* at 65.
340. Act of 4 June 1920, ch. 2, 41 Stat. 759, 787 (1920) [1920 Articles of War].
341. *Id.* at Article 104.
342. *Id.* at Article 4.
343. Ansell, *supra* note 169, at 155.
344. 1920 Articles of War, *supra* note 240, at Articles 8 & 31.
345. *Id.* at Articles 11 & 17.

advocates, enacting Ansell's Boards of Review.[346] It prohibited the commander from ordering the court to reconsider acquittals, and – if sentences were reviewed – they could not be increased.[347] It would be these revised Articles of War that governed and regulated the U.S. Army up to, and through, World War II.[348]

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346. *Id.* at Article 50½. The Board's opinion on legal sufficiency, however, was advisory only. Nevertheless, it was a progressive step. In cases where the accused was sentenced to a period of incarceration, or a discharge or dismissal, or death sentence, the new rule required the Board to review the record of trial and opine on its legal sufficiency (and then forward that opinion to Judge Advocate General) before it could be transmitted to the Secretary of War and President for action. If both the Board and the Judge Advocate General concurred that legal errors below prejudiced the accused ("injuriously affecting the substantial rights of the accused"), the findings and sentence were to be vacated in whole or in part and returned to the convening authority for rehearing or some other action deemed appropriate. Every other general court-martial record, regardless of the severity of the sentence, would be reviewed by the office of the Judge Advocate General. If that initial screening believed it to be insufficient to support the findings or sentence, it would be directed to one of the standing Boards of Review; if the Board concurred, it was sent to the Judge Advocate General; if the Judge Advocate General concurred, it was forwarded to the Secretary of War and President for action. The President could then "approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid."

347. Ansell, *supra* note 169, at 155.

348. It was not until the enactment of the Uniform Code of Military Justice in 1950 that the Navy's system of judicial and non-judicial punishment would mirror that of the Army's, when the Code merged the previously distinct laws. For the previous ninety years (since 1862), the Navy had its own criminal code. Articles for the Government of the Navy of the United States, Act of July 17, 1862, www.loc.gov/law/help/statutes-at-large/37th-congress/session-2/c37s2ch204.pdf [perma.cc/NPX6-L9GN]. This Act was only a modification of the Rules and Regulations of 1799. The Navy had no Ansell-type reformer, nor a sense of urgency to debate, update, and refine its rules, or – possibly – sailors just complained about their treatment less than soldiers did. See Generous, supra note 10, at 11-13 ("The basic understanding was that the sailor surrendered his claim to constitutional rights upon enlistment"). As a result, the Navy's system of justice looked very much like the Army's code (at least until Crowder's reorganization of the Articles in 1916) – commanding officers had essentially the same degree of discretion, the same kinds of martial misconduct were criminalized, and the court-martial system was tiered. On paper, though, the Navy actually had a more robust and organized appellate system than the pre-1920 Articles of War, for every conviction at a General Court-Martial was reviewed for legal error by the office of the Navy's Judge Advocate General and the Bureau of Naval Personnel could provide advice on discipline imposed below. In reality, the legal review was often conducted by non-lawyers. Id. at 12. Substantively, the 1862 Navy Articles, however, did deviate from the tenor of the Articles of War. Most noticeably, it contained an interesting imposition of a duty on commanding officers that the Articles of War did not. In its very first Article, Congress told "all commanders of all fleets, squadrons, naval stations, and vessels belonging to the Navy" that they are:

> strictly enjoined and required to show themselves a good example of virtue, honor, patriotism, and subordination, to be vigilant in inspecting

To Ansell's credit, the bill's title included the phrase: "establish military justice" suggesting it did not exist prior to the new Articles, as if it were a revolution in the exercise and structure of military law. He believed that the bill was based on the "fundamental theory" that courts-martial are "inherently courts, their functions inherently judicial, and that their powers must be judicially exercised."[349] It would be another ninety-eight years before the Supreme Court described the military justice system in similar terms in *Ortiz*.[350]

V. (UNSUCCESSFUL) ARGUMENTS

A. Past Claims in Defense of Convention – a Scared Theology

This abbreviated history of the contentious period of reform before and after World War I reveals that arguments (really, just claims) of military justice's status quo struck several chords. First, there is the claim that taking away authority from senior military leaders would be a "radical" disaster with inevitably dire consequences.[351] Relatedly, the second claim was that the system as is worked well enough, but for the need for the minor adjustment to remedy an outlier travesty of justice, according to experienced officers – especially those with direct experience in combat leadership positions.[352] The third line of argument held that military justice was a more efficient set of processes, and that this efficiency – even if it is the result of fewer due process protections – is a good in itself that justifies the system.[353] Fourth, advocates for

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the conduct of all who may be placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct all who may be guilty of them. (cite).

Since 1956, the U.S. Code – beyond the Uniform Code of Military Justice itself – has included strikingly similar language in its "Requirement of Exemplary Conduct." 10 U.S.C. § 5947, 64 Stat. 146 (1956). Nearly identical language is found in another part of the Code that imposes the same sort of duty on Army commanding officers and "others in authority." 10 U.S.C. § 3583, Pub. L. 105-85, 111 Stat. 1726 (1997). It is, perhaps, because naval commanding officers often operated well beyond the line-of-sight of their superiors, and because the temptation to impose strict, swift, and uncompromising punishment was present in maritime conditions where even minor misconduct by a sailor could endanger the lives of an entire vessel, that Congress believed imposition of this control measure on Naval commanders – and its reminder to diligently "inspect the conduct" of their subordinates – was thought to be worth explicitly stating.

349. Ansell, *supra* note 169, at 152.

350. Ortiz v. United States, 138 S. Ct. 2165 (2018).

351. *E.g.*, Kernan Proceedings and Report, *supra* note 229.

352. *Id.*

353. *E.g.*, Wigmore, *supra* note 155.

the status quo argued that military justice is necessarily different from civilian criminal law because the communities they regulate are inherently different; the military community exists to fulfill a specified purpose ("exercising the largest measure of force at the will of the nation").[354] Fifth, proponents claimed that constitutional norms, prohibitions, liberties, and protections were unsuitable for the kinds of circumstances in which military commanders must make disciplinary decisions.[355] Sixth, notwithstanding the absence of certain constitutional considerations, military justice is still a system involving "judicial" functions, even if its judicial forms are significantly dissimilar.[356] Seventh, nevertheless, these distinct judicial forms are merely the means and methods to achieve the ultimate "purpose" of discipline; the aim was to make the individual soldier better, or at least make the army better by removing those soldiers who could not be rehabilitated.[357] Eighth, commanders simply know better – they, not lawyers, were the experts in how, when, and why to discipline and punish the unique community under their charge.[358] Finally, the ninth type of claim made in defense of the status quo was that swift imposition of punishment at the direction of the commander (including death sentences), absent time-consuming appellate review by neutral lawyers and judges, was a (military) necessity – one of general deterrence, especially in combat conditions.

These nine arguments evoke a sense of a theological belief system, one that demanded credence in the distinct separateness of the military culture and its members, and one that demanded a trust that civilians (or military lawyers adopting civilian due process norms) were not as qualified as the "clergy" of military leadership to determine what ought to be within their disciplinary and punitive jurisdiction. As will be discussed below, these claims are not as axiomatic as their advocates promised and are related in form, tone, and gist to those made a century later.

B. Present Claims in Defense of Convention – a Privileged Position

The contemporary controversy that Congress faces over reforming U.S. military justice system has been concerned almost exclusively with what appears to be the institution's inability to effectively deter, prosecute, and punish certain sex-related offenses,

354. *E.g.*, Sherman, *supra* note 179.

355. *E.g.*, DUDLEY, *supra* note 167; WINTHROP, *supra* note 10.

356. *E.g.*, Runkle v. United States, 122 U.S. 543 (1887) (see text accompanying note 166, *supra*); *Ex parte Reed*, 100 U.S. 13 (1879) (see text accompanying note 164, *supra*).

357. *E.g.*, Manual for Courts-Martial (1917), *supra* note 261.

358. *E.g.*, Kernan Proceedings and Report, *supra* note 229.

including rape, assault, and harassment.[359] The issue is how much prosecutorial authority a commanding officer (usually in the rank of general or admiral) has to decide whether to charge a servicemember with such a crime and whether to "refer" the case from its investigative stage to an *ad hoc* general court-martial. Debate over this issue seems to polarize around two points of view: those who question the ability, willingness, and impartiality of those commanders when making such decisions (with the advice of their judge advocates) and those who decry the rate of sexual assault in the military but nevertheless believe ardently that traditional legal authorities granted by the UCMJ are critical to combating these offenses effectively and are adequately safeguarded by current practice and procedures.

Like the claims made a century earlier by those defending the status quo, these arguments fall into several identifiable bins. First, there is the arguably spurious and worst-case claim that removing commanders from the ability to decide when and how to prosecute these serious crimes ineluctably diminishes "good order and discipline" in general and "thereby weakening [commanders'] ability to fight and win wars."[360] As the Judge Advocate General of the Army testified:

> In my professional view, taking away a commander's decision over discipline – including the decision to prosecute at court-martial – will fundamentally compromise . . . the readiness and lethality of our Army today and on the next battlefield.[361]

Second, there is the claim that adding more lawyers to

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359. John M. Donnelly, *Congress poised to force historic change in military justice system*, Roll Call (Apr. 30, 2021), www.rollcall.com/2021/04/30/congress-poised-to-force-historic-change-in-military-justice-system/ [perma.cc/XU4C-T5RY].

360. Thomas Spoehr & Charles Stimson, Congress, *Biden Appear Determined to Undermine U.S. Military Justice System*, HERITAGE FOUND. (July 23, 2021), www.heritage.org/crime-and-justice/commentary/congress-biden-appear-determined-undermine-us-military-justice-system [perma.cc/MB3P-X3S4]; JOINT SERV. COMM. ON MIL. JUST., REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY (JSS-PAS) 6 (2020), www.dacipad.whs.mil/images/Public/10-Reading_Room/00_PolicyMaterials/13_JSC_Report_Alternative_MJSystem.pdf [perma.cc/Y6TE-4QSG] [hereinafter PAS Report] ("Reducing the commander's authority under the UCMJ to dispose of certain classes of offenses would make more difficult an already Herculean task: mission accomplishment while demonstrating the American values enshrined in the Constitution").

361. Jim Garamone, *Top Service Lawyers: Commanders Crucial to Attacking Sexual Assault, Harassment*, U.S. DEP'T OF DEF. (April 4, 2019), www.defense.gov/News/News-Stories/Article/Article/1806147/top-service-lawyers-commanders-crucial-to-attacking-sexual-assault-harassment/ [perma.cc/B6GD-ZL6X] (quoting Lieutenant General Charles Pede); Charles Dunlap, *Outsourcing Military Discipline: Bad for Everyone*, WAR ON THE ROCKS (Oct. 27, 2015), www.warontherocks.com/2015/10/outsourcing-military-discipline-bad-for-everyone/ [perma.cc/H4AT-C6JF].

decision-making process will actually reduce the quantity of prosecutions. This speculative claim is premised on the assumption that commanders are (more) willing to send "hard cases" to trial and let the judge and court-martial panel determine the facts.[362] This retired general's statement is worth quoting in full:

> When I was a commander, I sent several sexual assault cases to court-martial, even though the lawyers said we had only a slight chance of winning. I did so to demonstrate that the command would do everything possible to hold sexual predators accountable. Were those decisions made by a military lawyer, I doubt they would have gone to trial; lawyers – unlike commanders – are bound by ethics rules and cannot bring a case to trial unless there is a strong likelihood of success. Absent a commander able to push the process forward, fewer cases would be referred to trial, and a weaker message would be sent to the troops.[363]

Third, there is the claim that because commanders are responsible for their organization's or unit's climate that perpetuates or stops such crimes, they should be accountable for prosecuting them, and thus given the legal authority to make that discretionary call.[364] Fourth, there is the claim that might be paraphrased as: "trust the commander for they are acting in the unit's best interest and will make the right decision."[365] Fifth, there is the related argument that keeping this authority with commanders is critical for retaining their troops' confidence and trust, not in one another but in the commander. Without such trust, the commander will be unable to sustain the unit cohesion or troop

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362. Jordan Stapley & Geoffrey Corn, *Military justice reform: The "Be Careful What You Ask For" Act*, MIL. TIMES (June 2, 2021), www.militarytimes.com/opinion/commentary/2021/06/02/military-justice-reform-the-be-careful-what-you-ask-for-act/ [perma.cc/8MT2-GZZC].

363. Thomas Spoehr, *Dismantling the military justice system will not reduce sexual assault*, HILL (July 13, 2021), www.thehill.com/opinion/national-security/562681-dismantling-the-military-justice-system-will-not-reduce-sexual [perma.cc/T3KV-9AEH].

364. Victor M. Hansen, *Removing military commanders from sexual assault cases won't yield meaningful solutions*, USA TODAY (May 7, 2021), www.usatoday.com/story/opinion/todaysdebate/2021/05/07/removing-military-commanders-sexual-assault-cases-no-answer-editorials-debates/4886806001/ [perma.cc/3JMV-3UG7].

365. Charles J. Dunlap, *Top Ten Reasons Sen. Gillibrand's Bill is the Wrong Solution to Military Sexual Assault*, JUST SEC'Y (Dec. 9, 2013), www.justsecurity.org/4403/guest-post-reasons-gillibrand-bill-is-wrong/ [perma.cc/J3HV-27RY] ("it is mindboggling to me as to why anyone would think that the way to fix anything in the military would be to take the commander out of the process"); *see* Charles J. Dunlap, *Top Ten Reasons Sen. Gillebrand's Bill is the Wrong Solution to Military Sexual Assault*, DUKE LAW SCHOLARSHIP REPOSITORY (Nov. 28, 2013), www.scholarship.law.duke.edu/faculty_scholarship/3153/ [perma.cc/K68H-GGF8] ("It is axiomatic in the military that everything important is commander-led"); *and see* Dunlap, *supra* note 232.

morale.[366] Sixth, there is the claim that prosecution rates in civilian jurisdictions, as well as in allied militaries where commanders lack disposition authority, for such crimes are not necessarily better than those under the current system.[367] Seventh, without that trust and without their ability to levy swift adjudication, it is claimed that commanders cannot effectively wield the deterrent power of the UCMJ. This claim implies active management by commanders is the only way for the UCMJ processes and systems to be managed.[368] One recent Department of Defense-organized committee charged with studying potential changes to commanders' disposition and court-martial convening authority concluded:

> Military commanders rely on a triad of inspirational leadership, professional expertise, and the UCMJ to lead their organizations and carry out their legal and moral responsibility of …safeguard[ing] the morale, physical well-being, and the general welfare of the officers and enlisted persons under their command or charge. Simply put, commanders are responsible for ensuring the readiness of their commands. The triad is not severable or made of distinct functions, but is blended and emphasized by commanders based on the circumstances and the mission. Like an uneven stool, a weakness in any part of the triad diminishes the commander's capability to fulfill her obligations. The awesome role and authority of command has few parallels in society. A commander is singular; she alone is legally and morally responsible for carrying out her duties. The best commanders, the ones our service members are entitled to and our nation trusts the military to produce, rely mostly on their inspirational leadership and professional competence forged through experience, augmented with the UCMJ when necessary. Absent the authority stemming from the UCMJ, an inspirational and competent leader is impotent. Similarly, a commander who relies on UCMJ authority alone is an ineffective tyrant.[369]

This last argument, in particular, strikes the same chord as those made around World War I – specifically, that the true burden of expertise – and therefore the burden of decision-making and judgement – lies with lay commanding officers, not with legal experts (even those lawyers who are themselves officers).

366. Eliott C. McLaughlin, *Military chiefs oppose removing commanders from sexual assault probes*, CNN (June 5, 2013), www.edition.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/index.html [perma.cc/8KAQ-QNHP].

367. Dunlap, *supra* note 88, at 4; *see also* PAS REPORT, *supra* note 283, at 69 (quoting Lieutenant General Pede's testimony regarding the comparison of ethnic and racial disparities in civilian and military prosecution rates; *See* Subcommittee on Military Personnel Hearing: Racial Disparity in the Military Justice System – How to Fix the Culture, 116th Cong. (June 16, 2020), www.armedservices.house.gov/hearings?ID=A4D378D4-906F-4D61-B504-CAED54EAE38E [perma.cc/84MB-DZWT] (testimony of Lieutenant General Charles Pede).

368. McLaughlin, *supra* note 289.

369. PAS REPORT, *supra* note 283, at 5 (internal quotations omitted).

Ultimately it prefers to consider misconduct – *any* misconduct – as a martial matter in the same way that other forms of discipline (physical fitness, technical competence, shooting accuracy, tactical maneuvering, leadership, morale) are martial matters under their purview and competence. All of these arguments have potential to be highly relevant and persuasive, for they find their strength in two sources: history and the assertions of those with "experience" participating in and administering this system – a position of privilege (of authority, of knowledge, of responsibility). But as Parts I and II illustrated, history does not actually lend a hand to supporters of expansive commander jurisdiction over all kinds of crimes including those with no martial relevance; moreover, "experience" is highly contingent on facts and circumstances of particular crimes, actors, and context – it is therefore helpful to understand what happened under certain conditions in the *past*. It is not necessarily relevant to making predictions about future events and should be considered suspect when used to buttress sweeping forecasts of criminal justice system-wide unfairness or military-wide failures in national security. The character of prosecutorial decision-making is far too dependent on local circumstances, local policy, local politics, local law enforcement resources to be casually simplified and used as the standard by which to judge the relative worth of military justice – which is itself dependent on local factors (if it was not dependent, there would be no value in the promulgating "disposition factors" for commanders and judge advocates to consider case-by-case[370]).

VI. CONCLUSION

This article fills two previously unarticulated gaps left open by the contemporary debate over reforming or retaining some of the more unique characteristics of military justice. First, the long history of military codes of discipline has largely been ignored, instead of focusing on comparing and contrasting current forms of military justice with modern civilian criminal justice systems. While giving appropriate and admirable attention to real issues of victim protection and commander biases, the inattention to history has resulted in a failure to acknowledge certain undeniable continuities over time, most notably in the subject matter jurisdiction of the commander. Historically, only conduct that is "martial" in character, having articulable harms on the commander's ability to perform military missions effectively, has been capable of commander disposition via legal authorities and judicial processes. Ignoring this characteristic of military justice has consequences. It creates a deficit in the argument over a commander's professional interest in addressing crimes that involve

370. MANUAL FOR COURTS-MARTIAL, *supra* note 31, app. 2.1.

no martial harm. Such an argument has depended almost entirely on those commanders asserting, without argument or evidence, that mission accomplishment is a function of their quasi-prosecutorial authority over all misconduct regardless of its martial effect.

This deficit speaks to the second prong of the gap identified by this article – a continuity of (specious) argumentation. By reviewing the contentious period of military justice self-reflection that bookended the first World War, it is evident that claims rooted in overgeneralized history and dubious predictions of dire consequences did not cease when reform was finally enacted. Instead, they continue – and will likely continue – whenever the traditional or conventional reach of command authority is felt to be threatened. The leitmotif of the twentieth century was defense of a sacred theology that demanded belief in the separateness of the military and assertions that civilians (or military lawyers adopting civilian due process norms) were not as qualified as the "clergy" of military leadership to determine what ought to be within their jurisdiction. The leitmotif of the twenty-first was actually a logical extension: convention should not be disturbed because to do so would reject the claim of those "clergy"-like command authorities, and undermine the martial aims and martial capabilities presumably preserved by their privileged position in chain-of-command and in the justice system. In both eras, advocates for the conventional relied on speculations premised not on empirical data but on claims elevating special knowledge applied to special circumstances requiring those without such specialized experience to trust the experts. A clear-eyed appreciation of the historical subject matter jurisdiction of military law, and of the similarities in the defenses made to rebuff reform proposals, is advantageous to both contemporary critics and supporters of military justice status quo.