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A "JUDICIAL" SYSTEM IN THE EXECUTIVE BRANCH: *ORTIZ V. UNITED STATES* AND THE DUE PROCESS IMPLICATIONS FOR CONGRESS AND CONVENING AUTHORITIES

Jacob E. Meusch[1]♦

Abstract: *In* Ortiz v. United States, *138 S. Ct. 2165 (2018), the majority described the military court-martial system (a commander-controlled process for adjudicating criminal complaints) as judicial in character. It reached this conclusion over Justice Alito's dissent, which took a diametrically opposed view by describing the system as an Executive Branch entity that could not exercise judicial power. The conflict between these two views is nothing new as they have been at the center of a debate about the fundamental nature of courts-martial for more than a century. Since Congress legislates consistent with Justice Alito's executive view, a rift between the Legislative and Judicial Branches is now apparent. This gives rise to a question about the constitutionality of the court-martial framework under the Uniform Code of Military Justice (UCMJ): does the current commander-controlled process comply with the requirements of due process? The answer to this question is especially relevant in today's political environment where members of Congress, operating under an executive view of courts-martial, pressure senior military leaders to produce convictions in sexual assault cases. Therefore, this Article examines the due-process question, concluding that there is an argument that the UCMJ's court-marital framework may not meet constitutional muster. In reaching this conclusion this Article highlights the type of structural reform that is necessary to ensure due-process compliance.*

I. INTRODUCTION

On March 6, 2019, the Judge Advocates General of the Army, Air Force, and Navy and the Staff Judge Advocate to the Commandant of the Marine Corps (TJAGs) testified in front of the Senate Armed Services (SASC) Subcommittee on Personnel concerning the issue of the "Military Services'

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prevention of and response to sexual assault."[2] This was not the first time the TJAGs testified before members of the SASC on the issue. They did so on multiple occasions in 2013.[3] The March 6th hearing, however, is noteworthy in two respects. It represents the latest congressional effort to address how the military handles sexual assault cases, which is an issue that "seemed settled several years ago," and it reopens an ongoing national debate about a military commander's role as a convening authority in the court-martial process.[4]

On the role of a convening authority, Sen. Kirsten Gillibrand has championed a proposal to limit a convening authority's ability to "refer" charges to a court-martial,[5] but senior leaders in the Department of Defense continue to resist her efforts, desiring instead to maintain the current commander-controlled referral process.[6] As it stands, the Uniform Code of Military Justice (UCMJ) vests some commanders with the authority to serve as court-martial convening authorities, resulting in them having significant involvement in the court-martial process from beginning to end. These commanders call a court-martial into existence, refer charges, authorize searches, enter into plea agreements, hand-select members, approve or disapprove the production of witnesses, and, in some limited circumstances,

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[2] *Hearing to Receive Testimony on the Military Services' Prevention of and Response to Sexual Assault Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 116th Cong. 69 (2019) [hereinafter *Subcomm. on Personnel Hearing*].

[3] *See, e.g.*, *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 113th Cong. 44-85 (2013); *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services*, 113th Cong. 12-126 (2013). The Judge Advocate General of the Coast Guard also testified in the previous hearings.

[4] Jennifer Steinhauer & Richard A. Oppel Jr., *Senator Martha McSally's Revelation of Assault May Reopen Debate*, N.Y. TIMES (Mar. 7, 2019), https://www.nytimes.com/2019/03/07/us/ politics/mcsally-assault-military.html (noting that "debate over how to best get justice for victims" in the military was "likely to [be] renew[ed]"); Tom Vanden Brook, *Sen. Martha McSally, Pushes to Criminalize Sexual Harassment in Military, Add Lawyers for Victims*, USA TODAY (May 11, 2019), https://www.usatoday.com/story/news/politics/2019/05/11/mcsally-criminalize-sexual-harassment-add-lawyers-victims/1153267001/("McSally . . . said she stands by commanders' traditional role as the arbiter of prosecutions for sexual assault[; a] . . . stance [that] puts her at odds with . . . Gillibrand."); *see infra* Sections II-III.

[5] The military does not use indictments to bring criminal charges against an accused servicemember, instead it uses "a two-part charging procedure[.]" REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 291-92 (2015) [hereinafter MJRG REPORT]. The first part is described as the "preferral" of charges, which is the stage where a person drafts the charges and "officially" brings them "against the accused as a criminal matter." *Id.* at 292. The second part is the "referral" of charges to a court-martial, which involves "the order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial." MANUAL FOR COURTS-MARTIAL, R.C.M. 601 (2019).

[6] EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 12 (2016).

approve, disapprove, or modify a court-martial's findings and sentence should a panel of members or a judge find a servicemember guilty.[7]

Starting in 2013, Sen. Gillibrand has made repeated efforts to "end commanders' traditional disposition authority, so that charging decisions would be made by a lawyer outside the chain of command."[8] To that end, she introduced the Military Justice Improvement Act and "garnered 55 votes in the Senate—a majority, but still five votes short of the 60 needed to bring debate to a close ('cloture')."[9] She tried again in 2015 to pass the bill, but "with changes in the composition of the Senate, support for the measure fell to 50 votes."[10] And in March 2019, she once again signaled her intent to press for passage.[11] In remarks directed at the TJAGs, Sen. Gillibrand explained that she wants military lawyers—not convening authorities—to make charging decisions in military prosecutions and acknowledged the past overreaction of convening authorities in response to political pressure:

> [W]hy not, as the Navy has done, allow for a professionalization of their JAG system to become career criminal justice lawyers? It is exactly what all of the services should do. And then let the prosecutor make the ultimate decision about whether there is enough evidence to go forward, to convene a court-martial. There is no reason why commanders should not opine on it, should not be part of the process, should not influence the process. But just let it be a technical decision because as our defendant's rights advocates have said, why do we want to push the scales either way?
>
> I think a lot of commanders did overreact and say "Oh, I am going to send every case to court-martial." Well, maybe

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[7] *See* 10 U.S.C. §§ 817, 822, 823 (2012); MANUAL FOR COURTS-MARTIAL, R.C.M. 201(b)(1) (2019) ("[F]or a court-martial to have jurisdiction . . . [it] must be convened by an official empowered to convene it."); *see infra* Section IV.B. While military judges, prosecutors, and defense attorneys carry out the pre-trial and trial stages of a court-martial, convening authorities nevertheless maintain significant control. *See, e.g.*, COMMANDER'S LEGAL HANDBOOK, THE JUDGE ADVOCATE'S LEGAL CENTER AND SCHOOL 11 (2019), https://www.jagcnet.army.mil/Sites/jagc.nsf/0/EE26CE7A9678A67A85257E1300563559/$File/CommandersLegalHandbook.pdf ("The disciplinary system in the military is a Commander owned and operated system.").

[8] FIDELL, *supra* note 5, at 12.

[9] *Id.*

[10] *Id.*

[11] *Subcomm. on Personnel Hearing*, *supra* note 1, at 99-100 (statement of Sen. Kirsten Gillibrand).

> they did, but if you are sending false cases forward you are not going to instill confidence in the system. If all of your cases that you move forward end up in not convicting and saying that it did not happen, do you think a survivor is going to think that system works? No. So you only want to send forward cases that actually have the legitimate basis and have the evidence that a prosecutor would look at and say, "I can win this case."
>
> So I would love to work with all of you on trying to address with how we deal with sexual assault better. I do not think you need to retain this right. I think it is a red herring to say we are making you less in charge. We are not. We are just taking one technical decision away [from convening authorities].[12]

Despite Sen. Gillibrand's efforts, senior military leaders have "stoutly" opposed her proposal.[13] Nonetheless, Eugene Fidell, a Senior Research Scholar in Law at Yale Law School, believes that such opposition will eventually give way and that Sen. Gillibrand will succeed in passing her bill "or something like it," even if it "take[s] several more years."[14] At present, however, it is unclear whether his prediction is accurate, especially given Sen. Martha McSally's recently announced opposition.[15] A retired colonel in the Air Force, survivor of military sexual assault, and member of the SASC, Sen. McSally announced in the March 6th hearing that she is opposed to legislation that would remove referral authority from convening authorities:

> [W]e must allow, we must demand that commanders stay at the center of the solution and live up to the moral and legal responsibilities that come with being a commander. We must fix those distortions in the culture of our military that permit sexual harm towards women and, yes, some men as well. We must educate, select, and then further educate commanders who want to do the right thing, but are naive to the realities of sexual assault. We must ensure that all

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[12] *Id.*

[13] FIDELL, *supra* note 5.

[14] *Id.*

[15] *See* Steinhauer & Oppel Jr., *supra* note 3; Vanden Brook, *supra* note 3.

> commanders are trained and empowered to take legal action, prosecute fairly, and rid perpetrators from our ranks. And if the commander is the problem or fails in his or her duties, they must be removed and held harshly accountable.
>
> I do not take this position lightly. It's been framed often that some people are advocating for the victims while others are advocating for the command chain or the military establishment. This is clearly a false choice . . . . I very strongly believe that the commander must not be removed from the decision-making responsibility of preventing, detecting, and prosecuting military sexual assault.[16]

Sen. McSally's opposition to Sen. Gillibrand's proposal set the stage for another round in the ongoing debate on the issue of a convening authority's role in the court-martial process. Since Congress enacted the UCMJ following World War II (WWII), a commander's role as a convening authority has always been a central (and contentious) issue. In the years following enactment of the UCMJ, however, a lot has changed. Congress enacted statutory reforms that greatly enhanced the judicial character of the court-martial process. And then, in 2018, the Supreme Court finally addressed this development. In *Ortiz v. United States*, Justice Kagan, writing for the majority, used a single word to describe the "character" of the military's court-martial system: "judicial."[17] As a result, there is now another layer of analysis to consider when members of Congress debate the role a convening authority should have in the court-martial process: whether and to what degree the UCMJ must allow convening authorities to operate with judicial independence in order for a court-martial to retain its judicial character. This Article addresses that issue, and in doing so, it seeks to inform the current debate on a convening authority's role in the court-martial process, suggesting that members of Congress should view convening authorities as judicial actors.[18]

The modern debate usually compares a convening authority to a prosecutor as a means of framing the issue. That comparison, however, is incomplete. While convening authorities do serve in a "quasi-prosecutorial

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[16] *Subcomm. on Personnel Hearing*, *supra* note 1, at 12-13 (statement of Sen. Martha McSally).

[17] Ortiz v. United States, 138 S. Ct. 2165, 2174 (2018).

[18] This Article intentionally takes no position on any proposed changes to a convening authority's role in the court-martial process.

role and wield . . . discretionary authority over charges and pleas," they also serve in "quasi-judicial roles."[19] Indeed, the UCMJ clearly recognizes this fact, describing some of a convening authority's "acts" as "judicial in nature."[20] Yet the judicial nature of a convening authority's role is often underappreciated in the debate on the issue. This lack of concern is extremely problematic. The distinction between judicial and prosecutorial roles is significant, especially with respect to how members of Congress interact with convening authorities, TJAGs, and their superiors in the chain of command. Prosecutors operate as one party to a proceeding (the United States) while judges do not. Instead, judges have a distinct judicial responsibility to both parties in the proceeding. Therefore, while it may be appropriate for members of Congress to encourage a military prosecutor to pursue sexual assault convictions as a matter of policy, it is not appropriate for them to encourage a military judge to behave in the same manner. The Fifth Amendment requires judges to remain impartial and make independent decisions grounded in the law and facts of the cases before them.[21]

Those same considerations of impartiality and independence, as this Article argues, should also guide convening authorities in the exercise of their judicial responsibilities.[22] Correspondingly, this means that even though the role of a convening authority is neither purely prosecutorial nor purely judicial,[23] there is a need for members of Congress to respect the independence that is required for convening authorities to perform their judicial duties under the UCMJ. The modern debate, however, has largely overlooked this need and, consequently, many well-intended legislators have incentivized senior military leaders, including TJAGs, to influence convening authorities and courts-martial in a way that violates the prohibition on unlawful influence under Article 37 of the UCMJ.[24] In turn,

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[19] Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1403-04 (2016).

[20] 10 U.S.C. § 837 (2012).

[21] *See* Weiss v. United States, 510 U.S. 163, 179 (1994) (evaluating the constitutionality of the UCMJ's appellate judicial structure under the Due Process Clause).

[22] Notably, the Army expressly recognizes this point: "The commander plays a quasi-judicial role in the system, making decisions that in the civilian sector would be made by professional prosecutors or judges. Commanders must remain neutral and detached from the circumstances and make the best decision for the unit, the Soldier, and the interest of justice." COMMANDER'S LEGAL HANDBOOK, *supra* note 6, at 11.

[23] Bedi, *supra* note 18.

[24] 10 U.S.C. § 837 (2012). As the Military Justice Review Group ("MJRG") recently explained, "[u]nder Article 37, interference" by anyone "subject to the Code is prohibited." MJRG REPORT, *supra* note 4, at 19. This "prohibition has no direct parallel in federal civilian practice, but is essential in ensuring a system that maintains the confidence of both servicemembers and the public." *Id.* "The prohibition against unlawful command influence was a driving factor behind the enactment of the

this has resulted in military appellate courts overturning convictions for sex offenses, finding that politically motivated "unlawful influence" tainted them.[25] Such cases demonstrate a court-martial's susceptibility to pressure from members of Congress, and they stand in stark contrast to the *Ortiz* majority's description of the court-martial process as judicial in character.

Given the resurgence of the modern debate, this time between the competing positions of Sen. Gillibrand and Sen. McSally, the controversy surrounding the role of a convening authority seems poised to continue into the future and will likely continue to give rise to extensive interaction between senior military leaders and members of Congress. Unfortunately, as the past several years have demonstrated, when members of Congress use their interaction with senior military leaders to pressure them towards specific outcomes in a category of cases, that pressure metastasizes throughout the military justice system as "unlawful influence."[26] And if left unchecked, such pressure threatens to undermine both the integrity of the military justice system and its judicial character.

To be sure, it is possible for Congress to legislate in a manner that does not incentivize senior military leaders to succumb to unlawful influence. Doing so, however, requires members of Congress to view convening authorities as judicial actors and not just prosecutors (i.e. Executive Branch actors). While some members of Congress may initially balk at such a shift, there are many good reasons for the current approach to change. This Article sets forth the reasons why Congress should modify its understanding of convening authorities, proceeding in five parts. First, it outlines the two competing views on the fundamental nature of courts martial, executive and judicial, and describes how they frame the debate on a convening authority's role in the court-martial process. Second, drawing on the *Ortiz* majority's rationale, it looks to the historical development of a convening authority's role in the court-martial process as evidence of its judicial nature. Third, given a convening authority's judicial role, it examines the modern reform movement and how it gave rise to issues of politically motivated unlawful

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UCMJ[,]" and it is one of the reasons the Court found the UCMJ and corresponding regulations "'sufficiently preserved judicial impartiality so as to satisfy the Due Process Clause' requirement for 'a fair trial in a fair tribunal.'" *Id.* (quoting *Weiss*, 510 U.S. at 179).

[25] *See, e.g.*, United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018); United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017); United States v. Riesbeck, 77 M.J. 154, 159 (C.A.A.F. 2017); United States v. Schloff, No. 20150724, 2018 CCA LEXIS 350, at *3 (A.C.C.A. Feb. 5, 2018); United States v. Wright, 75 M.J. 501, 503 (A.F. Ct. Crim. App. 2015); United States v. Howell, No. 201200264, 2014 CCA LEXIS 321, at *11-12 (N-M. Ct. Crim. App. May 22, 2014).

[26] *See supra* note 24.

influence. Fourth, it discusses *Ortiz* and how the Court's decision may give result in a due-process challenge if members of Congress do not adopt a judicial view of courts-martial. And finally, it outlines the due-process challenge.

II. JUDICIAL OR EXECUTIVE: COMPETING VIEWS OF THE FUNDAMENTAL NATURE OF COURTS-MARTIAL

To understand the impact of *Ortiz* on the future relationship between Congress and convening authorities, it is first necessary to outline the two competing views of courts-martial—the judicial view and the executive view—discussed in the decision. In *Ortiz*, the Supreme Court examined whether it had "jurisdiction to review" the decisions of the Court of Appeals for the Armed Forces (CAAF).[27] Justice Kagan reasoned in her majority opinion that the "judicial character and constitutional pedigree of the court-martial system enable[d]" the Court to exercise "appellate jurisdiction" over the CAAF's decisions.[28] The majority reached this conclusion even though "Congress established the CAAF under its Article I, rather than its Article III, powers and . . . located the CAAF . . . within the Executive Branch, rather than the judicial one."[29] For Justice Kagan and the majority, the location of the CAAF in the Executive Branch—one of the two "political branches"[30] of government—did not matter as much as the "character" of the court-martial system itself.[31] In reviewing the "character" of the court-martial system, the majority concluded that it "closely resemble[d] civilian structures of justice" and "operated as [an] instrument[] of military justice."[32] Accordingly, the majority found the Court had jurisdiction to review decisions from the CAAF.[33]

Not all of the Justices, however, agreed with the majority's description of the court-martial system's character or that such character was more important, for jurisdictional purposes, than the system's location within the three branches of government. In dissent, Justice Alito, joined by Justice

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[27] Ortiz v. United States, 138 S. Ct. 2165, 2170 (2018).

[28] *Ortiz*, 138 S. Ct. at 2173. "Atop the court-martial system is the CAAF, a 'court of record' made up of five civilian judges appointed to serve 15-year terms." *Id.* at 2171.

[29] *Id.* at 2176.

[30] John F. O'Connor, *Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 166 (2000).

[31] *Ortiz*, 138 S. Ct. at 2176.

[32] *Id.* at 2170, 2175.

[33] *Id.* at 2170-71 ("Under 28 U.S.C. § 1259, we have jurisdiction to review the CAAF's decisions by writ of certiorari.").

Gorsuch, focused intently on the CAAF's location in the Executive Branch—the constitutional source of the CAAF's "power"—as opposed to the "character" of its process.[34] As Justice Alito explained, "Executive Branch officers," like the judges appointed to the CAAF, "cannot lawfully exercise the judicial power of *any* sovereign, no matter how court-like their decision-making process might appear," and "[t]hat means their decisions cannot be appealed directly" to the Supreme Court.[35] In Justice Alito's view, "Article III of the Constitution" gave "every single drop" of "judicial power" to the Supreme Court and the "inferior Courts" established by Congress, which meant that neither the CAAF nor the court-martial system were exercising judicial power.[36]

As a result, Justices Alito and Gorsuch found that the CAAF—an Article I court located in the Executive Branch—exercised executive instead of judicial power and concluded that this distinction had constitutional significance. They stated that because "Article II authorizes the President to discipline the military without invoking the judicial power of the United States" the Supreme Court has always found it permissible for the President to maintain a system of military courts-martial as ad-hoc tribunals that lack the constitutional safeguards of an Article III court. In fact, the two Justices stated that courts-martial have always been seen as "blunt instruments to enforce discipline."[37] In their view, courts-martial "represent[] the exercise of the power given to the President as the head of the Executive Branch and the Commander in Chief and delegated by him to military commanders."[38] Therefore, according to Justice Alito, even though the court-martial system lacks the constitutional safeguards of an Article III court, such a structure is constitutionally permissible because of its location outside of the Judicial Branch. Simply put, "[A]djudications by courts-martial are executive decisions; courts-martial are not courts; they do not wield judicial power, and their proceedings are not criminal prosecutions within the meaning of the Constitution."[39]

Notably, the crux of the disagreement between the majority and the dissent involves a question concerning the fundamental nature of courts-martial. All of the Justices recognize that courts-martial are "older than the

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[34] *Id.* at 2189-90, 2203-05 (Alito, J. dissenting) (describing the majority's analysis as the "looks like" test that is "utterly inadequate to police separation-of-powers disputes").

[35] *Id.* at 2190.

[36] *Id.*

[37] *Id.* at 2201.

[38] *Id.* at 2199.

[39] *Id.* at 2199-200.

Constitution,"[40] but they diverge on the significance associated with the court-martial system's location within the three branches of government. All of the Justices agree that the CAAF is an Executive Branch entity and that modern-day courts-martial have judicial-like procedures, yet they reach diametrically opposed conclusions about the fundamental nature of a court-martial and the power it wields. For Justice Kagan and the majority, courts-martial are judicial in nature, wielding at least some judicial power. For Justices Alito and Gorsuch, courts-martial are executive in nature, wielding only executive power.

When considering the tension between these two views, it is important to highlight that they are not new. Rather, *Ortiz* marks the latest chapter in a debate that is more than a century old. In 1919, the acting Judge Advocate General of the Army, Brigadier General (Brig. Gen.) Samuel Ansell, described these competing views in testimony before the Senate Committee on Military Affairs, explaining there were "two diametrically opposed legal theories as to courts-martial."[41] One theory was that "a court-martial is an executive agency, belonging to and under control of the military commander[,]" and the other was that "a court-martial is inherently judicial . . . and limited by the established principles of jurisprudence which govern the exercise of judicial functions in our system."[42]

And it's not just Justices on the Supreme Court who hold these opposing views. Unlike the *Ortiz* majority, Congress takes an executive view of courts-martial, treating the court-martial system as an Executive Branch entity when crafting legislation. And once again, the competing views between Congress and a majority of the Justices on the Supreme Court are not new; it is something that has persisted for more than a century. As Brig. Gen. Ansell observed in 1919, the "Supreme Court has always recognized the inherent judicial quality of courts-martial; Congress, however, . . . has legislated rather upon the other theory"—that "a court-martial is an executive agency, belonging to and under the control of the military commander."[43] For the dissent in *Ortiz*, this latter point—the fact that a military commander controls the court-martial process—is a key distinction

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[40] *Id.* at 2168, 2190.

[41] *A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trial by Courts-Martial, and for Other Purposes: Hearing on S. 5320 Before the S. Comm. on Military Affairs*, 65th Cong. 6 (1919) (statement of Brig. Gen. Samuel T. Ansell) [hereinafter *Ansell's Senate Statement*].

[42] *Id.*

[43] *Id.*

that undermines claims in favor of the court-martial system's judicial character.[44]

Since 1919, however, Congress has enacted significant changes to the court-martial system, passing the UCMJ in 1950 and several additional reforms in the ensuing decades. In doing so, Congress enhanced the judicial features of the court-martial framework, deliberately crafting it to more closely resemble civilian courts.[45] Yet despite these reforms, Congress never removed the court-martial process from a convening authority's control, a telling fact for the dissent in *Ortiz*. As Justice Alito explained, "The UCMJ preserves the chain of command's historic revisory power[.]"[46] Since court-martial judgments "cannot be executed until the President, the relevant branch Secretary, or one of his subordinates approves it," Justice Alito believes that the court-martial procedure is "radically inconsistent" with the idea of "judicial power," which does not permit "members of the Executive or Legislative Branches" to have the power to revise or suspend "any court's judgments."[47]

Of course, Justice Alito's executive view did not prevail in *Ortiz*. The majority rejected the argument that the "constitutional foundations, history, and fundamental character" of courts-martial "show that they are Executive Branch entities that can only permissibly exercise executive power."[48] And the majority's rejection is important. It frames the tension between the judicial and executive views of courts-martial and underlines that a majority of the Justices subscribe to the judicial view at a time when members of Congress subscribe to the executive view. Going forward, unless Congress adopts the *Ortiz* majority's judicial view, these two competing views will remain in tension and will continue to frame the issue of a convening authority's role in the court-martial process, especially given that congressional debate is heating up again. As the following sections explain, it would be in the best interest of the military justice system, and the men

[44] As Brig. Gen. Ansell noted, a military commander in 1919 exercised "a large and almost unrestrained discretion" in the court-martial process, "determining (1) who shall be tried, (2) the sufficiency of the charge, (3) the prima facie sufficiency of the proof, (4) the composition of the court-martial, (5) passing upon all questions of law arising during the progress of the trial, and (6) reviewing the record for what he may conceive to be its sufficiency in law and fact." *Id.* And under a theory of executive agency, he explained, "[a]ll of these questions are controlled[,] . . . not by law, but by the power of military command." *Id.*

[45] *See, e.g.*, 10 U.S.C. § 836 (2012) (authorizing the President to enact "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts").

[46] Ortiz v. United States, 138 S. Ct. 2165, 2205 (2018) (Alito, J. dissenting).

[47] *Id.* at 2204-05 (citing 10 U.S.C. §§ 871(a), (b) (2012)).

[48] *Id.* at 2205-06.

and women who serve in the Armed Forces, for members of Congress to adopt the judicial view of courts-martial.

III. LOOKING BACK: CONVENING AUTHORITIES AS JUDICIAL ACTORS WITHIN THE EXECUTIVE BRANCH BEFORE THE MODERN-DAY REFORM MOVEMENT

Having outlined the judicial and executive views, the remainder of this Article explains why it makes sense for Congress to adopt the *Ortiz* majority's judicial view, starting with an examination of the historical development of a convening authority's role in the court-martial process. Before *Ortiz*, opponents of the judicial view likely looked to history as a way to justify the executive view.[49] They could point to the location of the court-martial system within the branches of government and make a straightforward argument that convening authorities were executive, as opposed to judicial, actors. Convening authorities are military commanders (or their superiors, which includes the service Secretaries and the President), generally lack formal legal training,[50] are not military judges, and they do not derive any authority from Article III of the Constitution.[51] To the contrary, convening authorities are members of the Executive Branch, and the Court has "frequently note[d]" as much.[52] It is widely accepted that "[t]he Constitution vests control over the military in the political branches, and not in the courts,"[53] which suggests that convening authorities are not judicial actors under Article III since they fall under the Executive Branch. Before *Ortiz*, opponents of the judicial view could have even gone so far as to argue that this had always been the case throughout American history. The Constitution gave Congress the power to decide where to locate the court-martial system within the branches of government, and Congress responded by placing courts-martial in the Executive Branch, rather than in the Judicial Branch.[54]

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[49] *Compare Ortiz*, 138 S. Ct. at 2174 (describing the military justice system as "judicial" in "character") *with* Donald W. Hansen, *Judicial Functions for the Commander?* 41 MIL. L. REV. 1, 50 (1968) (concluding that while convening authorities have a "judicial function" the "court-martial is an instrument of the executive branch for the enforcement of discipline.").

[50] 10 U.S.C. §§ 822, 823.

[51] Hansen, *supra* note 48, at 23 ("If the court-martial is not an [A]rticle III court . . . [then] the commander is exercising executive powers, albeit pursuant to a legislative grant . . . .").

[52] O'Connor, *supra* note 29, at 166.

[53] *Id.*

[54] *See* Martin v. Mott, 25 U.S. 19, 28 (1827) (observing the Commander-in-Chief was authorized to conduct courts-martial under "the act of the 28th of February, 1795"); Hansen, *supra* note 48, at 50 ("The

After *Ortiz*, however, that argument is much more difficult to make. The *Ortiz* majority rejected the dissent's argument that the location of the court-martial system within the branches of government determined the type of power that its actors were exercising. As a result, post-*Ortiz*, there is room to argue that convening authorities are judicial actors based on the characteristics of the court-martial process. Indeed, following *Ortiz*, the more tenuous argument seems to be that convening authorities are executive, as opposed to judicial, actors because they are members of the Executive Branch.

In this way, *Ortiz* marks a fundamental shift in how the history of convening authorities in the court-martial process should be viewed. This has important implications for members of Congress and opponents of the judicial view. No longer is it sufficient to only consider the court-martial system's location within the branches of government. Post-*Ortiz* it is necessary to look beneath the surface and examine the role of a convening authority from a process-characteristics perspective. And from this perspective, there is ample historical support for the conclusion that convening authorities are judicial actors.

A. The Role of Convening Authorities in the Nineteenth Century

The Constitution vested Congress with the power to shape both the court-martial system and a military commander's role in it. Before the Constitutional Convention, "the Second Continental Congress codified the first American Articles of War, which, among other things, provided for courts-martial for certain prescribed offenses."[55] Therefore, by the time of the Constitutional Convention "there was little question" among the delegates that "there would be federal military justice separate and apart from Article III" courts.[56] What was uncertain, however, was what the military justice system would look like.[57] The shape of the military justice system fell to Congress under Article I, Section 8, Clause 14 of the Constitution, which states that Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces . . .

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historical development of the commander's relationship to military justice displays a recognition that the court-martial is an instrument of the executive branch for the enforcement of discipline.").

[55] Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 939 (2015) (citing 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 378 (Worthington Chauncey Ford ed., 1905)).; 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 111-12.

[56] *Id.* (citing AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 330 (2005)).

[57] *Id.*

."[58] And in the years that followed, Congress created a court-martial process that "developed as a separate legal system under command control. . . ."[59]

Courts-martial, of course, existed only as ad hoc forums, which made a military commander's control an operational necessity. Military commanders "called [courts-martial] into existence for a special purpose and to perform a particular duty."[60] That duty was to adjudicate a criminal charge against a servicemember, return a verdict (and sentence if the court-martial found the accused guilty), and then report back to the military commander who convened the court-martial (or the Secretary of War or the President as required under the relevant provision of the Articles of War).[61] Once the court-martial accomplished this task, it was "dissolved," and the execution of its findings and sentence were subject to the approval (or "revisory power"[62]) of the military commander who convened the court-martial.[63] In terms of process characteristics, this aspect of a military commander's involvement appeared judicial in nature. A commander "was not at liberty to delegate this duty to another," and was required to "act according to . . . [his] own judgment."[64]

Moreover, as early as 1887 the Supreme Court endorsed the view that a convening authority's role in the court-martial process was judicial. In *Runkle v. United States*, 122 U.S. 543 (1887), Chief Justice Waite observed that the power to review and act on a court-martial's findings and sentence was "judicial in its character."[65] Elaborating on this description, he noted that a person who takes such action must "consider the proceedings laid before him and decide personally whether they ought to be carried into effect."[66] This meant that "[h]is personal judgment [was] required, as much so as it would have been in passing on the case, if he had been one of the

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[58] U.S. CONST. art. 1, § 8, cl. 14. *See also* Dynes v. Hoover, 61 U.S. 65, 79 (1857) ("Congress has the power to provide for the trial and punishment of military and naval offences . . . and . . . the power to do so is . . . without any connection" to Article III of the Constitution).

[59] Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 (1973).

[60] Runkle v. United States, 122 U.S. 543, 555 (1887).

[61] *Id.*

[62] Ortiz v. United States, 138 S. Ct. 2165, 2205 (2018) (Alito, J. dissenting).

[63] *Runkle*, 122 U.S. at 556. When a commander "disagreed with an acquittal," this power included the authority to "ask the court members to reconsider their finding." MJRG Report, *supra* note 4, at 55.

[64] MJRG REPORT, *supra* note 4, at 55.

[65] *Runkle*, 122 U.S. at 557. In 1864, Attorney General Bates drafted a legal opinion for President Lincoln and expressly described this power as "judicial." *Id.* at 558. Attorney General Bates explained that the "act of the officer who reviews the proceedings . . . whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of th[e] judgment . . . as the trial or the sentence." *Id.* In his opinion, the "duty of approving the sentence of a court-martial" was an action that had "all the solemnity and significance of the judgment of a court of law." *Id.* In 1887, the Supreme Court adopted the same view as Attorney General Bates. *Id.*

[66] *Id.*

members of the court-martial itself."[67] And thus "his judgment, when pronounced, must be his own judgment and not that of another . . . because he is the person, and the only person, to whom has been committed th[is] important judicial power. . . ."[68]

B. The Role of Convening Authorities in the Early Twentieth Century

As the country moved into the twentieth century, and eventually into World War I, convening authorities continued to exercise control over the court-martial process, carrying out a similar role.[69] However, by the time that Brig. Gen. Ansell testified before the Senate in 1919, the competing views of the fundamental nature of courts-martial had emerged, with Congress adopting the executive view and the Court adopting the judicial view. At the same time, the public started to pay attention to the nature of the court-martial process and a convening authority's role in it. Following two high-profile cases in the early twentieth century, there was significant public criticism denouncing courts-martial and describing the role of a convening authority as arbitrary.[70]

Of those two cases, the one that generated the most public backlash was the "Houston Riots Courts-Martial of 1917."[71] The case involved a racially charged riot that lasted two hours and "left fifteen white citizens dead (including four Houston police officers)."[72] Sixty-three African-American Soldiers" were "court-martialed in the 'largest murder trial in the history of the United States.'"[73] "The accused—all of whom pleaded not guilty—were

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[67] *Id.*

[68] *Id.* The MJRG aptly summarized the nature of this power:

> The commanding officer who convened the court-martial had a legal duty to personally review and act on the case, exercising personal judgment as if the commanding officer were one of the court-martial members. The action was judicial in nature, involving the exercise of discretion to act according to the commanding officer's own judgment[.]"

MJRG Report, *supra* note 4, at 55.

[69] Historically, a commander, serving in the role of a convening authority, had the power to review the outcome of a court-martial and decide whether it should be approved. *Id.* at 335. In carrying out this action, a commander could exercise unfettered discretion, which meant that even where court-martial members found a servicemember guilty of an offense, a military commander could disapprove the conviction. *Id.* at 61. Similarly, a military commander could also intervene to change an acquittal to a finding of guilty, and, for example, in World War I "one-third of all acquittals . . . had been changed to guilty verdicts at the request of the convening authority." *Id.*

[70] Fred L. Borch, *Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917-1920*, 2017 ARMY LAW. 1, 1 (2017); Fred L. Borch, *Lore of the Corps: "The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, 2011 ARMY LAW. 1, 1 (2011).

[71] Borch, *Lore of the Corps*, supra note 69, at 1 (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 125, at fig. 37 (1975)).

[72] *Id.*

[73] *Id.*

represented by a single defense counsel" who was "not a lawyer."[74] The trial spanned "twenty-two days" and included testimony from "one-hundred and ninety-six witnesses."[75] "[D]espite the inherent conflict presented by representing multiple accused," the sole defense counsel argued that some men should be acquitted while "acknowledging" that others "were culpable. . . ."[76] At the conclusion of the court-martial, five soldiers were acquitted, forty-one were sentenced to life imprisonment, and thirteen were sentenced to death by hanging.[77] Two days after these thirteen soldiers learned of their death sentence, they "were handcuffed, transported by truck to a hastily constructed wooden scaffold, and hanged at sunrise."[78]

While the convening authority was permitted to carry out the execution of these thirteen men under the Articles of War, the decision to do so nevertheless generated "outcry and criticism."[79] The criticism prompted Brig. Gen. Ansell to create "a Board of Review with duties 'in the nature of an appellate tribunal'"[80]—an action taken with a focus on increasing the judicial character of the court-martial system. Brig. Gen. Ansell also made numerous legislative proposals aimed at moving "courts-martial away from their focus on discipline at the expense of justice" and towards "proceedings" that were "judicial" from "beginning to end. . . ."[81] In part, his hope was for Congress to eventually establish a "military judiciary" that was "untrammeled and uncontrolled" in the exercise of its functions by the power of military command."[82]

C. The Role of Convening Authorities Under the Uniform Code of Military Justice

While Congress did not initially create the full-scale judicial framework that Brig. Gen. Ansell had hoped for, his "ideas about military justice were not forgotten."[83] As noted by Borch in *Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917-1920:* [Ansell's] firm belief that there

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[74] *Id.* at 2.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 2-3.
[80] *Id.* (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 125, at 130 (1975))
[81] Borch, *Military Justice in Turmoil*, *supra* note 69, at 4-5 (quoting Edmund Morgan, *The Existing Court-Martial System and the Ansell Army Articles,* 29 YALE L.J. 52, 73-74 (1919) (internal quotation marks omitted)).
[82] *Id.*
[83] *Id.*

must be more limits on the role of the commander in the system . . . [was] accepted by Congress when it established a three civilian judge [Court of Military Appeals] as part of the UCMJ in 1950, and when it later created the position of the military judge in the Military Justice Act of 1968."[84] In making these changes, Congress removed a significant portion of a convening authority's control over the court-martial process and gave the military justice system a character that was decidedly more judicial. This is true even though Congress kept convening authorities as a central fixture in the court-martial process and continued to house the court-martial system entirely within the Executive Branch. Convening authorities maintained their "revisory power" over the court-martial and had significant control over the entire court-martial process.[85] As a result, Congress kept convening authorities in a judicial role, but in doing so, Congress added a new set of judicial actors, as well as a statutory safeguard to protect all of the judicial actors in a court-martial from unlawful influence.[86]

To be fair, before choosing a statutory framework that would keep convening authorities at the center of the court-martial process, members of Congress devoted considerable attention to the possibility of removing them. For example, Rep. Carl T. Durham and Rep. Philip J. Philbin highlighted the problems with convening authorities.[87] Rep. Durham described the convening authority's power in the court-martial process as "disturbing,"

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[84] *Id.* Congress has since changed the name of this court to "the United States Court of Appeals for the Armed Forces." UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/about.htm (last visited Dec. 15, 2018); *see also* JONATHAN LURIE, 2 PURSUING MILITARY JUSTICE 27-47 (1998); JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE 5 (2013).

[85] MJRG Report, *supra* note 4, at 80 ("Under the UCMJ, the convening authority continued to exercise an appellate-type review function with responsibility to act on the findings and sentence, and was only to approve them to the extent that he found them correct in law and fact" and believed they "should be approved.")..

[86] Regarding the enhanced judicial character of the court-martial process, the context in which the UCMJ was created is also important. It not only included significant procedural reforms, but also served as a mechanism to unify the court-martial practices among the services. Congress passed the UCMJ in response to public outcry after World War II, and notably, much of the criticism echoed the concerns that Brig. Gen. Ansell expressed a generation earlier about "autocracy in the handling of . . . courts martial." John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 10-11 (2014). In response, Congress passed the Elston Act in 1948, which significantly revised the Articles of War, and then it passed the UCMJ, which incorporated the Elston Act and created "a single military code" for "all of the armed forces." MJRG Report, *supra* note 4, at 69. Notably, Congress passed the UCMJ shortly after it "combined the military departments into a single organization, which became the Department of Defense." *Id.* President Truman signed the UCMJ into law on May 5, 1950, and the UCMJ went into effect on May 31, 1951. *Id.* From that point until today, the UCMJ—and its prohibition on unlawful influencing judicial actors—has applied to "all of the military services—the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard." *Id.* at 69-70.

[87] 95 CONG. RPT. 5, 5718 (May 5, 1949), https://www.loc.gov/rr/frd/ Military_Law/pdf/congr-floor-debate.pdf [hereinafter 1949 DEBATE].

noting that this power included the authority "to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed."[88] Rep. Philbin characterized the military justice system as "arbitrary" in character and believed that it caused a "manifest denial of constitutional safeguards generally recognized by civil courts since the establishment of the Government."[89] Nevertheless, he conceded that it "would be a grave error to attribute to our military leaders, as a whole, willful and deliberate disregard for fundamental principles of justice."[90]

Other members of Congress focused on the new statutory prohibition on unlawful influence in the UCMJ as a way to square the enhanced judicial character of courts-martial with their decision to retain a convening authority's control of the process. Rep. Charles H. Elston, for example, agreed that further reforms were needed, but pushed back on the idea that a convening authority framework could not operate in a just manner.[91] From Rep. Elston's perspective, it was sufficient to prevent such abuse through "safeguards over [command] authority."[92] Rep. Thomas Overton Brooks described "the question of command control" as the "most troublesome question," and then highlighted that the UCMJ made "it a court-martial offense for any person subject to this code to unlawfully influence the action of a court-martial."[93]

Notably absent from this debate, however, was explicit guidance as to whether members of Congress viewed a convening authority's role as judicial in character. Consistent with Rep. Philbin's suggestion that military leaders were capable of taking action in accord with fundamental principles of justice, Congress seemed to believe that the UCMJ's new court-martial system would hew closer to the judicial character of civilian courts despite a convening authority's control. But whether Congress viewed the role of a convening authority as judicial in character, as opposed to executive, is not apparent.

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[88] *Id.* at 21-22.

[89] *Id.* at 23.

[90] *Id.*

[91] As "chair of a Legal Subcommittee of the House Committee on Armed Services, Representative Elston conducted a detailed investigation of the military justice system[,] . . . recommended many reforms, and more importantly, supported each recommendation with detailed and persuasive evidence." Brooker, *supra* note 85, at 63. His efforts led to the Elston Act reforms in 1948 and also ensured "the 'battlefield was prepared' for the debates and exchanges that led to the 1950" bill enacting the UCMJ. *Id.* (quoting LAWRENCE J. MORRIS, MILITARY JUSTICE, A GUIDE TO THE ISSUES 125 (2010)).

[92] 1949 DEBATE, *supra* note 86, at 16.

[93] *Id.* at 10.

One possible explanation for the silence on this issue is that, as a functional matter, members of Congress did not give the distinction much thought since they placed the court-martial system in the Executive Branch. Indeed, it was this location outside the Judicial Branch that created the need for the UCMJ's judicial enhancements in the first place. Unlike Article III courts, the court-martial system, by design, operated without significant constitutional safeguards because it was seen as a necessary component of military command, which is an Executive Branch function. And under its executive view of courts-martial, it stands to reason that Congress saw the judicial character of a convening authority's role as inconsequential insofar as the source of the convening authority's power within the court-martial system was concerned.

Nevertheless, regardless of the intent behind Congress's decision to enhance the judicial character of the court-martial system while housing it in the Executive Branch, the Court continued to take a judicial view of courts-martial, and by judicial standards it still looked down on military justice even after the UCMJ was enacted.[94] Recognizing that Congress made "a number of improvements" to the military justice system in the UCMJ, a plurality of the Court diminished the importance of those improvements in 1957 because they were "merely statutory."[95] As the plurality opinion explained in *Reid v. Covert*, "Congress—and perhaps the President—can reinstate former practices, subject to the limitations imposed by the Constitution, whenever it desires."[96] Noting that a military trial was not a "trial by jury before an independent judge after an indictment by a grand jury," the plurality opinion characterized military law as "emphasiz[ing] the iron hand of discipline more than . . the even scales of justice[,]" and recognized that "command influence" was a continuing issue because "members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for

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[94] When compared to an Article III court, a court-martial was always lacking in constitutional safeguards. Therefore, under a judicial view the court-martial system has historically been seen as procedurally lacking yet trending towards greater judicial character. *Compare* United States v. Denedo, 556 U.S. 904, 918 (2009) (Roberts, C.J. dissenting) ("Traditionally military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.") (quoting Reid v. Covert, 354 U.S. 1, 35-36 (1957)) *with* United States v. Acevedo, 77 M.J. 185, 191 (C.A.A.F. 2018) (Ryan, J. dissenting) ("In the current climate, where it appears that neither the convening authority nor the lower courts are immune from external pressures, . . . [the CAAF] has a heighted responsibility to ensure that servicemembers receive fair and impartial justice, instead of a 'rough form of justice.'").

[95] *Reid*, 354 U.S. at 37.

[96] *Id.*

their future progress in the service."[97] Then, commenting on the character of the court-martial system, the plurality opinion observed that the President "and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials[,]" and that "[s]uch blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."[98] Despite such criticism, however, it is notable that the plurality opinion recognized, at least from a process-characteristics perspective, that the President and his military subordinates exercised some quantum of power that was judicial in nature in connection with courts-martial.

D. Early Reforms to the Uniform Code of Military Justice

Not too long after *Reid*, the United States found itself in another large-scale war—this time Vietnam—and military justice found its way back into the national debate. As Judge Walter T. Cox III, a former judge on the United States Court of Military Appeals,[99] explained:

> The Vietnam War years brought much controversy to the system. In 1969, the book, *Military Justice is to Justice as Military Music is to Music,* was published. This critique of the system was described by Mike Wallace of CBS News as "a chilling analysis of what can pass for justice in [the] military." In August of 1970, *Newsweek* magazine featured a cover story captioned, "Military Justice on Trial." It discussed several sensational cases of the era and concluded that the number one evil with military justice remained "command influence."[100]

Before 1969, however, Congress, was well aware of these criticisms and had already started studying the issue. Hearings were held in 1962 "to review allegations that the UCMJ, as designed and practiced, was violating the due-process rights guaranteed by the Fifth and Sixth Amendments of the Constitution."[101] And once again, there were "complaints of command

[97] *Id.* at 36-38.
[98] *Id.* at 38-39.
[99] *See supra* note 83.
[100] Walter T. Cox, III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice,* 118 Mil. L. Rev. 1, 16-17 (1987) (citing *Military Justice on Trial,* NEWSWEEK (Aug. 31, 1970)).
[101] Brooker, *supra* note 85, at 12.

control," which prompted lengthy hearings and numerous bills over the ensuing years.[102] Finally, "with the Military Justice Act of 1968, Congress amended the UCMJ to include new due-process protections, such as new rights to defense counsel [and] the creation of the military judiciary . . . ."[103] When President Johnson signed the act into law, he even went so far as to proclaim, "[t]he man who dons the uniform of his country today does not discard his right to fair treatment under the law."[104] In passing these reforms, Congress both sought to create a court-marital process that hewed even closer to the judicial character of Article III courts, while also keeping a commander-centric framework in place.

This same objective would also prove true fifteen years later when Congress again reformed the court-martial system in the Military Justice Act of 1983.[105] The 1983 Act created "more efficient pre-trial and post-trial processing procedures, independent (non-command) detailing of military judges and counsel, and an avenue, albeit limited, of Supreme Court review. . . ."[106] The latter reform was incredibility significant. In "establish[ing] a procedure for direct review" of decisions from the Court of Appeals for the Armed Forces "by the United States Supreme Court," the Military Justice Act of 1983 permanently altered the independent structure of the military justice system" and brought it, for the first time, under the direct review of a Court established within "Article III of the Constitution."[107] Indeed, this was a fundamental shift that increased the judicial character of the court-martial process. Yet once again, it came in tandem with a decision to keep convening authorities at the center of the court-martial process.

Concerns about commanders using their power as convening authorities to improperly influence the court-martial process, however, did not end there. And in an effort to address those concerns, Congress established a commission that surveyed the "military justice establishment" on the issue of a commander's improper influence.[108] Notably, survey participants "disclosed" that they were "aware of instances of improper pressure exerted on military judges,"[109] a significant finding at the time. It established "a

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[102] *Id.*

[103] *Id.*; *see also* Cox, *supra* note 99, at 19 ("One of the most sinificant changes . . . was the designation of a 'military judge' to preside over the court-martial proceedings.'").

[104] Cox, *supra* note 99, at 19.

[105] Brooker, *supra* note 85, at 13-14.

[106] *Id.*

[107] Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 455-56 (1994).

[108] *Id.* at 456.

[109] *Id.*

tangible basis for concluding that the amorphous concept of improper command influence [did], in fact, exist in the military justice system."[110] Nevertheless, Congress did not remove convening authorities from the court-martial process. In the Military Justice Act of 1983, Congress "memorialized the long-standing power of convening authorities and clearly established total control over the outcome of courts-martial by allowing convening authorities to overturn convictions completely and to grant clemency by reducing punishments as they saw fit . . . ."[111]

In sum, when viewed from a process characteristics perspective, convening authorities have performed actions that were judicial in character since the establishment of the American military, and the majority in *Ortiz* appeared to recognize as much. Accordingly, based on both the history of the convening authority's role in the court-martial process and the Court's decision in *Ortiz*, it follows that some actors in the court-martial process exercise judicial power, and one of those actors is the convening authority.

IV. MODERN REFORMS TO THE CONVENING AUTHORITY'S ROLE UNDER THE UNIFORM CODE OF MILITARY JUSTICE

As a result of reform efforts over the last century, "American military personnel . . . have legal rights that their nineteenth century predecessors couldn't have imagined . . . A steady march toward the civilianization of military courts has given [servicemembers] due-process protections," which historian Chris Bray describes as "stunning" in their "historical context."[112] Brig. Gen. Ansell's judicial view of courts-martial served as a guide for this march, advocating for increasing restraints on a convening authority's role in the court-martial process. Ansell, and others, insisted that the "role of commanders in convening and reviewing courts-martial cost military personnel the due-process rights that American civilians had always expected; justice tainted by the effects of command was arbitrary and dangerous to the accused."[113] After a century of reform efforts, Congress has not only imposed constraints on a convening authority's influence in the court-marital process, but required each of the services to staff the court-martial process with lawyers and judges. Together, these changes

[110] *Id.* at 457.

[111] Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, 2014 ARMY LAW. 23, 24-25 (2014). It is important to note, however, that a convening authority's decision to overturn a conviction did not necessarily preclude the possibility of a retrial.

[112] CHRIS BRAY, COURTS-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND 348 (2016).

[113] *Id.* at 350.

transformed the character of courts-martial from a state severely lacking in due process, as seen in the Houston Riots Court-Martial, into something more closely resembling the judicial character of Article III courts. However, that transformation did not happen overnight, and eventually the Court took notice in *Ortiz*.[114]

Unfortunately, as described above, the *Ortiz* majority's judicial view of the court-martial system contradicts the executive view that guided Congress's modern reform movement, both in the type of structural reforms enacted and the nature of congressional interaction with senior military leadership. As a result, the "civilianization" trend has arguably reversed over the last several years, reverting the court-martial system towards a "rough form of justice."[115] For some, this may not come as a surprise. Congress never abandoned its executive view of the court-martial system; it always viewed itself as retaining the authority to reduce the judicial character of courts-martial. For Congress, the judicial character of a court-martial was not anchored to the Constitution like an Article III court. Rather, the court-martial system derived its judicial character from statutes, and Congress, of course, retained the constitutional authority to change them. The reform movement over the last decade highlighted as much, and serves as a reminder that despite past judicial enhancements, Congress, unlike the *Ortiz* majority, continues to operate under an executive view of the court-martial system.

A. The Origin of the Modern Reform Movement

The modern reform movement highlights a widening gap between Congress's executive view of courts-martial and the *Ortiz* majority's judicial view—a delta that existed over the last century but was masked under legislative reforms aimed at increasing the judicial characteristics of the court-martial process. During that time, Congress, under pressure from the public to make courts-martial operate more like civilian courts, granted accused servicemembers procedural rights and developed a system that grew increasingly more judicial in character. In doing so, Congress pushed a system, which it specifically housed in the Executive Branch, to look and act with greater judicial character. These legislative efforts aligned with the

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[114] *Compare* Ortiz v. United States, 138 S. Ct. 2165, 2174 (2018) (describing the court-marital system as "judicial") *with* Reid v. Covert, 354 U.S. 1, 35-36 (1957) (describing the court-martial system as a "rough form of justice") *and* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) ("We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts.").

[115] United States v. Denedo, 556 U.S. 904, 918 (2009) (Roberts, C.J. dissenting).

Court's judicial view (and expectation) of the court-martial system. In this way, the development of the court-martial system across the two branches progressed in relative harmony, despite their fundamentally different views of courts-martial. So long as the focus of Congress was to make courts-martial more judicial in character, the Legislative and Judicial Branches seemed to move the court-martial system in the same direction, steadily enhancing its judicial character.

In the early 2000s, however, external pressures on Congress shifted, changing the direction of its reform efforts. In a return to a true executive view of the court-martial system, Congress began moving in the opposite direction of the Court's judicial view. In almost an instant, "the new reformist view of command influence . . . flip[ped] a century of history on its head."[116] Tethered to public concerns about how the military justice system handled reports of sexual assault, the modern political focus became less concerned with ensuring a fair and impartial process and more concerned about producing a specific outcome.[117] As a result, there was pressure on commanders to increase the number of convictions, ensure harsher punishments, and refrain from mitigating sentences. Unfortunately, "[t]he fallout of congressional dismay over the incidence of sexual assaults in the armed forces [was] messy."[118] Because the new congressional focus was on outcomes instead of process,[119] it led Congress to pass structural

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[116] BRAY, *supra* note 111, at 350.

[117] *See, e.g.*, Clair McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in Military: Column*, USA TODAY (Aug. 29, 2013), https://www.usatoday.com/story/opinion/2013/08/29/women-congress-sexual-assault-column/2725081/; JUDICIAL PROCEEDINGS PANEL, REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES 1-3 (2017); *Subcomm. on Personnel Hearing*, *supra* note 1. More recently, in a confirmation hearing for the Army Chief of Staff on May 2, 2019, Senator Gillibrand told the nominated general—who was poised to become a convening authority and superior in the chain of command for other convening authorities—that she believed the number of sexual assault cases prosecuted in the military was a "disturbing fact" because it was "going down" despite a new report showing an increase in the number of reported incidents. *Hearing to Consider the Nomination of General James C. McConville, USA, for Reappointment to the Grade of General and to be Chief of Staff of the Army Before the S. Comm. on Armed Services*, 116 Cong. 60-61 (2019) [hereinafter *Comm. on Armed Services Hearing*] (statement of Sen. Gillibrand). In making her remarks during the hearing, Senator Gillibrand did not mention the requirement for a convening authority to ensure there was a legitimate basis for a prosecution before proceeding forward with it. *Id.* at 58-62. The report that Senator Gillibrand referenced in her remarks was the Department of Defense Annual Report on Sexual Assault in the Military for Fiscal Year 2018. U.S. DEP'T. OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2019), https://sapr.mil/reports. Appendix C of the report provides statistics that include the number of cases where "commanders declined to take action . . . after a legal review of the matter indicated that the allegations against the accused were unfounded, meaning they were determined to be false or baseless." *Id.* at 22.

[118] FIDELL, *supra* note 5, at 11.

[119] "The real basis of much of the congressional opposition to abandoning commander-centric charging is that it will not drive up the number of sex offense prosecutions and convictions. The difficulty

reforms that diminished the limited procedural rights of accused servicemembers under the UCMJ and undermined some of the judicial character the court-martial system had developed since 1950. It even caused several senior military leaders to disregard the statutory prohibition on unlawful influence.[120]

Members of Congress, of course, were motivated to take such action in order to empower sexual assault victims. And to be sure, members of Congress had legitimate reasons to be concerned, as well as to believe that reforms were needed to ensure sexual assault victims had ready access to the military justice system. From the 1990s on, the military struggled to address a culture that contained various kinds of sexual misconduct and gender insensitivity.[121] By the end of the 1990s, legal scholarship had taken note of sexual misconduct in the military and "widely discussed" the issue.[122]

Yet despite public recognition of the issue in the 1990s, Congress did not immediately intervene. Instead, members of Congress initially encouraged military leadership to take the lead in addressing the issue.[123] By 2004, however, some members grew impatient and their frustration started to show. During a hearing before the Senate Armed Services Committee (SASC), "multiple senators 'made it clear that they were not satisfied with either the level of misconduct that persists or existing measures for treating victims of assault.'"[124] During the hearing, "Senator John Warner presciently warned, 'This committee is prepared to back the U.S. military to

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with that argument is that it focuses improperly on outcomes rather than on the structural fairness of the system." FIDELL, *supra* note 5, at 15.

[120] BRAY, *supra* note 111, at 351-55; *infra* note 136.

[121] An infamous example of this culture is the incident at the "Tailhook Symposium . . . in Las Vegas, Nevada on September 7, 1991," which involved several military officers sexually assaulting "an intoxicated young woman" and "extensive misconduct by dozens" of other officers. Samples v. Vest, 38 M.J. 482, 483 (C.M.A. 1994); *see also* United States v. Denier, 47 M.J. 253 (C.A.A.F. 1997) (discussing allegations of unlawful command influence related to the misconduct at the Tailhook Symposium).

[122] Brooker, *supra* note 85, at 93; *see also* Douglas R. Kay, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307 (1992); Peter Nixen, *The Gay Blade Unsheathed: Unmasking the Morality of Military Manhood in the 1990s, An Examination of the U.S. Military Ban on Gays*, 62 U.M.K.C. L. REV. 715 (1994); J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Assault in the Military*, 140 MIL. L. REV. 1 (1993); Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 683 (1996); Martha Chamallas, *The New Gender Panic: Reflections of Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998); *Elizabeth Lutes Hillman, The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999).

[123] Brooker, *supra* note 85, at 81-82.

[124] *Id.* (quoting Bradley Graham, *Military Scolded on Assaults; Senators Seek More Protection for Female Soldiers*, WASH. POST. Mar. 11, 2011, at A19.).

achieve zero tolerance,' but 'if you don't carry it out, we're going to take over.'"[125]

By 2012, concerns about sexual misconduct in the military finally came to a head. The issue reached an even wider audience through the documentary film *The Invisible War*,[126] which premiered at the Sundance Film Festival[127] and was nominated for an Academy Award as a "Best Documentary Feature."[128] Then, just as awareness of the issue was going mainstream, a commander in the Air Force, Lieutenant General (Lt. Gen.) Craig Franklin, overturned a sexual assault conviction and ignited a firestorm of national debate.[129] For several members of the SASC, this meant that the time had come for Congress to start taking over. For them, the court-martial system was an Executive Branch entity that they could directly influence through legislation and political pressure on senior military leaders to produce specific outcomes.

A number of "influential Senators" watched *The Invisible War* in a private screening.[130] Afterwards, Sen. Gillibrand "began to spearhead an effort to remove the decision to prosecute sex assault and other felony-level

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[125] *Id.* at 82.

[126] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[127] Goodwin, *supra* note 110 , at 23 n.5.

[128] *Id.*

[129] *Id.* In 2012, Lt. Gen. Franklin, Commander of the Third Air Force, used his power as a court-martial convening authority to "set aside the findings and sentence" of "a lieutenant colonel . . . in the Air Force . . . [who] had been convicted . . . of aggravated sexual assault." United States v. Boyce, 76 M.J. 242, 244 (C.A.A.F. 2017). Even though Lt. Gen. Franklin's action was a lawful exercise of his authority under the UCMJ, his decision was politically unpopular. And as a result, there was intense and focused congressional outrage. Senator McCaskill requested that the Secretary of the Air Force and the Chief of Staff of the Air Force "conduct a review of Lt[.] Gen[.] Franklin's actions." *Id.* at 255 n.2 (Ryan J. dissenting). Senator Gillibrand publicly disparaged Lt. Gen. Franklin, accusing him of being "untrained," "biased," and "subvert[ing] justice." *Id.* (quoting Press Release, Sen. Kirsten Gillibrand, *Gillibrand Statement on Ret. Of Military Commander Who Overturned Guilty Verdict in Aviano Sexual Assault Case and Shut Down Court Martial of Accused Rapist in Another Assault Case* (Jan. 8, 2014), https://www.gillibrand.senate.gov/news/press/release/2014/01/08/gillibrand-statement-on-retirement-of-military-commander-who-overturned-guilty-verdict-in-aviano-sexual-assault-case-and-shut-down-court-martial-of-accused-rapist-in-another-assault-case-1.). Senators Barbara Boxer and Jeanne Shaheen even went so far as to write a letter to the Secretary of Defense, "decrying" Lt. Gen. Franklin's decision and "urging" the Secretary to "take action to restrict military commander authority." *Id.* (quoting Press Release, Sen. Jeanne Shaheen, *Boxer, Shaheen Call on Defense Secretary Hagel to Immediately Review Dismissal of Sexual Assault Case* (Mar. 4, 2013), https://www.sha heen.senate.gov/news/press/boxer-shaheen-call-on-defense-secretary-hagel-to-immediately-review-dismissal-of-sexual-assault-case.). For Lt. Gen. Franklin, this congressional outrage over a decision he made in his role as a convening authority marked the end of his military career. The Chief of Staff of the Air Force gave him two options: voluntarily retire or wait for the Secretary of the Air Force to remove him from command. *See id.* at 245. Lt. Gen. Franklin chose to voluntarily retire and announced he would "step down from his position as Third Air Force Commander on January 31, 2014." *Id.* at 246.

[130] John-Loran Kiel Jr., *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, 2016 ARMY LAW. 8, 8-10 (2016).

offenses from commanders."[131] Consistent with a view that Brig. Gen. Ansell expressed nearly a century beforehand, Sen. Gillibrand explained that she wanted to "give the responsibility to a senior . . . judge advocate" instead.[132] Brig. Gen. Ansell and Sen. Gillibrand, however, reached this position from opposite directions. For Brig. Gen. Ansell, and reformers in the twentieth century, the focus was on making the court-martial process more judicial in response to "the complaint . . . that it was far too easy for the accused to be convicted and harshly punished."[133] Sen. Gillibrand, on the other hand, focused on the need to control the outcomes of courts-martial, attacking a convening authority's discretion under "a demand for more convictions, harsher punishments, and an end to the possibility that commanders will mitigate sentences."[134] To that end, Sen. Gillibrand made "reducing sexual assaults a personal crusade," and also "made it a particular point to remove certain decisions from prosecuting sexual assaults from within the chain of command, where commanders retain the authority to overrule a jury's verdict."[135]

When President Obama nominated Chuck Hagel to be Secretary of Defense, Sen. Gillibrand even went so far as to meet with Hagel before his confirmation hearing to ensure he "pledged his commitment to taking this issue head on."[136] Once confirmed, Secretary Hagel made good on his pledge and "recommended that the centuries-old power of a commander to overturn a court-martial conviction be eliminated," following a "comprehensive review" of the military justice system.[137] As for her efforts to remove convening authorities from the referral process, Sen. Gillibrand has not succeeded.[138] Nevertheless, in 2013 she successfully prompted a "grand debate" about the issue that both increased procedural rights for victims of sexual assault and scaled back some procedural rights for accused

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[131] *Id.*

[132] *Id.*; *see also* BRAY, *supra* note 111, at 350.

[133] BRAY, *supra* note 111, at 350-51.

[134] *Id.* at 351; *see also Comm. on Armed Services Hearing*, *supra* note 116, at 58-62.

[135] Reid Pillifant, *'This is Not Good Enough': Gillibrand Grills Generals Over Rise in Sexual Assaults*, POLITICO (May 7, 2013), https://www.politico.com/states/new-york/city-hall/story/2013/05/this-is-not-good-enough-gillibrand-grills-generals-over-rise-in-sexual-assaults-000000.

[136] Molly O'Toole, *Chuck Hagel Calls for Ending Military Law Option to Overturn Court Martial*, HUFFINGTON POST (Apr. 8, 2013), https://www.huffingtonpost.com/2013/04/08/chuck-hagel-military-law_n_3040116.html; *Testimony on Sexual Assaults in the Military: Hearings Before the H. Subcomm. on Armed Services*, 113th Cong. 4 (Mar. 13, 2013).

[137] O'Toole, *supra* note 135.

[138] FIDELL, *supra* note 5, at 12.

servicemembers.[139] With Secretary Hagel's support, Congress also made major changes that limited a convening authority's role in the court-martial process, such as "prohibiting dismissal" of some convictions and "requiring written explanations by convening authorities for modifications to sentences."[140] Sen. Claire McCaskill "championed" this alternative reform, as it allowed the military to avoid the "nuclear option of removing a commander from the process entirely."[141] Unfortunately, even though the reform efforts appeared well-intended, many of the resulting structural reforms came at the expense of a court-martial's judicial character and the procedural rights afforded to accused servicemembers.[142]

To put a fine point on this, it is important to highlight that a court-martial is not a jury trial. Court-martial panels are not required to make unanimous decisions, and it is permissible for them to fall below the Sixth Amendment's size requirements for a jury, which is problematic from a deliberative perspective.[143] Research shows that non-unanimous verdicts in criminal

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[139] Goodwin, *supra* note 110, at 25 (citing Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Case*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0). Even though Congress kept convening authorities in the court-marital process, it nevertheless enacted significant reforms to the UCMJ in the years leading up to the Military Justice Act of 2016. The National Defense Authorization Act for Fiscal Year 2014, for example, watered down the Article 32 investigation process, reducing it to a probable cause hearing without a corresponding purpose to provide discovery to the defense or take the testimony of a complaining witness. *See* National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a), 127 Stat. 954 (2013). Largely seen as the mechanism that provided a safeguard similar to the constitutional requirement for a grand jury indictment, Congress notably watered down the Article 32 investigation for all types of crimes in response to a complaint about its intrusiveness in a single-high-profile sexual assault case. *See* Kiel Jr., *supra* note 129, at 8-10. Congress also precluded military commanders from considering good military character of the accused when making disposition decisions. *See* NDAA for Fiscal Year 2014 § 1708. It made evidence of the accused's good military character inadmissible at trial on the merits. *See* Carl Levin and Howard P. "Buck" McKeon National Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292 (2014). And finally, in an organization where witnesses are transient and subject to combat deployments, Congress made it more difficult for an accused to receive permission to depose a witness. *See id.* § 532(a). The standard changed from permitting a deposition unless it is prohibited by competent authority, to allowing a deposition only with permission, and then restraining the competent authority from granting such a request absent a showing of "exceptional circumstances." *Id.*

[140] Goodwin, *supra* note 110, at 25-26.

[141] *Id.*

[142] *See supra* note 138.

[143] *See* O'Callahan v. Parker, 395 U.S. 258, 263-64 (1969) ("A court-martial is tried, not by a jury of the defendant's peers, which must decide unanimously, buy by a panel of officers empowered to act by a two-thirds vote."). Under the UCMJ, a convening authority hand-selects the members according to criteria Congress listed in Article 25. 10 U.S.C. § 825 (2012). "[A] finding of guilty results" when "two-thirds of the members . . . vote for a finding of guilty," even in cases where there are only five members on the panel. MANUAL FOR COURTS-MARTIAL, R.C.M. 921(c)(2)(B) (2016). *But see* MANUAL FOR COURTS-MARTIAL, R.C.M. 921(c)(2) (2019) (increasing the number of votes required for a finding of guilty to three-fourths as a result of reforms in the Military Justice Act of 2016); 10 U.S.C. § 816

trials weaken a jury's deliberation.[144] Justice Marshall famously observed as much, finding that when a "prosecutor has tried and failed to persuade those [minority] jurors of the defendant's guilt ... it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt."[145] Accordingly, the constitutional jury requirements are not some "pious platitudes recited to placate the shares of venerated legal ancients."[146] They are safeguards that protect individual liberty: "the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement."[147]

Yet neither Congress nor the Court have ever found it necessary to ensure a court-martial has the same deliberative safeguard. Rather, before the modern reform movement, servicemembers relied only on a convening authority's "judicial" power to grant clemency, which could involve either overturning a court-martial conviction or reducing a sentence. This power was crucial in order to supplement the lack of a unanimous jury.[148] Now, however, in most cases servicemembers are deprived of both a unanimous jury and a convening authority's power to grant significant clemency.

B. The Military Justice Act of 2016

In August 2013, in the midst of politically charged attempts to enact piecemeal military justice reform, "the Chairman of the Joint Chiefs of Staff, writing on behalf of the Joint Chiefs, recommended that the Secretary of Defense 'direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ[.]'"[149] In response, the Department of Defense General Counsel "established the Military Justice

(amended 2017) (fixing the size of a non-capital general court-martial panel at eight members and a special court-martial panel at four members).

[144] Majority verdicts, for example, can deprive the deliberative process of discussion that allows a minority vote to persuade others. Jessica M. Salerno & Shari Seidman Diamond, *The Promise of a Cognitive Perspective on Jury Deliberation*, 17 PSYCHONOMIC BULL. & REV. 174, 174-179 (2010).

[145] Johnson v. Louisiana, 406 U.S. 356, 401 (1972) (Marshall, J., dissenting).

[146] Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950).

[147] *Id.*; *see also* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. Pub. L. 471, 472, 503 (2014) ("Because court-martial panels are not juries, neither the public nor the military community can be genuinely confident that court-martial panels will always reach appropriate verdicts.").

[148] Williams, *supra* note 146, at 473 ("Because the panel's factual determinations will not always be as accurate as those of a jury, commanders need the authority to review those determinations.").

[149] James A. Young, *Post-Trial Procedure and Review of Courts-Martial under the Military Justice Act of 2016*, 2018 ARMY LAW 31, 31 (2018).

Review Group (MJRG)," which published a report that "became the basis of the Military Justice Act of 2016 (MJA 2016)."[150]

As with a number of the previous UCMJ reform efforts, MJA 2016 focused, in part, on a commander's role as a convening authority.[151] In the post-trial context, MJA 2016 was consistent with Sen. McCaskill's approach, placing significant limits on a convening authority's ability to grant clemency while preserving their role in the court-martial process.[152] Notably, MJA 2016 granted military judges the final reviewing authority before appellate review.[153] Where in the past a convening authority's approval was final, MJA 2016 requires a convening authority to review the case and send it back to a military judge who then makes an "entry of judgment."[154] This new entry of judgment requirement represents another shift away from a commander-controlled process and towards a process that hews closer to an Article III court structure, further enhancing the judicial character of the court-martial system and constraining a convening authority's control.[155]

Nevertheless, although MJA 2016 further constrains convening authorities, their general duties remain largely same. For example, convening authorities still refer charges, convene courts-martial, authorize searches, enter into plea agreements, hand-select members, approve or disapprove the production of witnesses, and, in some limited circumstances, approve, disapprove, or modify a court-martial's findings and sentence should a panel of members or a judge find a servicemember guilty.[156] From a process-characteristics perspective, this means that even after MJA 2016, the UCMJ still requires convening authorities to take judicial acts within the court-martial process. Following *Ortiz,* the fact that the UCMJ requires convening authorities to take judicial acts is overwhelming evidence that they are judicial actors wielding judicial power. Going forward, this has implications for how members of Congress interact with senior military leaders in the military justice arena, and could result in a due-process problem if members of Congress fail to adopt a judicial view.

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[150] *Id.* Congress passed a modified version of the MJA 2016 as a part of the National Defense Authorization Act for Fiscal Year 2017. *See id.* President Barack Obama "signed it into law . . . on December 23, 2016," and it went into effect on January 1, 2019. *Id.*

[151] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2894, 2894-968 (2016) [hereinafter "MJA 2016"].

[152] Young, *supra* note 148, at 31-34.

[153] Military Justice Act of 2016, *supra* note 150, at § 5324, UCMJ art. 60c(a)(1).

[154] *Id.*

[155] *Id.*

[156] *Compare* Manual for Courts-Martial (2019) *with* Manual for Courts-Martial (2016).

V. *ORTIZ* AND ITS IMPACT ON THE RELATIONSHIP BETWEEN CONGRESS AND CONVENING AUTHORITIES: A DUE-PROCESS PROBLEM.

The *Ortiz* majority's decision to characterize the court-martial system as judicial in character presents a new problem both for commanders who must act as convening authorities and members of Congress who must interact with senior military leaders. What kind of interaction is appropriate? Unlike its relationship with many Executive Branch officials, the relationship between Congress and Article III judges is measured. From America's founding it has been recognized that "[t]here is no liberty, if the power of judging be not separated from the legislative and executive powers."[157] Members of Congress never direct a life-tenured Article III judge to produce a specific outcome in a category of cases and then call the judge back a few years later to update them on the status of that directive.[158] For Executive Branch officials, however, Congress can (and does) do exactly that. When members of Congress see a problem under the control of an Executive Branch official, they exercise political influence to induce that official to address it. On a whole, commanders are accustomed to this process and frequently appear before Congress to testify about the results of various programs.[159] Outside of the military justice arena, these interactions between Congress and Executive Branch officials seems normal and not especially problematic.

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[157] Ming Chin, *Judicial Independence Needs to be Protected from Both Internal and External Threats*, ABA J. (Sep. 27, 2018), http://www.abajournal.com/news/article/protecting_judicial_independence_from_both_internal_and_external_threats (quoting Baron de Montesquieu, as quoted by THE FEDERALIST NO. 78 (Alexander Hamilton)).

[158] "Life-tenured [Article III] judges" have even "objected when faced with members of Congress scrutinizing their habits of work and use of courtrooms." Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2593 (1998). Directly referencing the political pressure on the military, Judge Reggie Walton recently made this point clear: "As a federal judge I don't have that type of pressure because I am insulated from that type of political pressure." U.S. DEP'T. OF DEF., PUBLIC MEETING BEFORE DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD), 81 (Jan. 25, 2019), https://dacipad.whs.mil/ images/Public/05-Transcripts/20190125_DACIPAD_Transcript_Final.pdf. Judge Walton then posed a significant question: "[I]s there any way that the military system can be totally fair and impartial when those external and internal political pressures are in play?" *Id.*

[159] *See, e.g.*, ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS 1 (2013) ("All Combatant Commanders testify to the Armed Services Committees on an annual basis about their posture and budgetary requirements.").

When it comes to military justice, however, the analysis is different. In order to sync with the majority opinion in *Ortiz*, Congress will need to begin viewing its relationship with senior military leaders on military justice issues through a different lens. When members of Congress address issues of military justice with convening authorities, and other senior military leaders, Congress should treat such interactions as though they are communicating with Article III judicial officials. The failure to recognize this point will continue to deprive convening authorities of the judicial independence they need to effectively and fairly carry out their duties under the UCMJ.[160]

To be clear, the nature of the interaction between members of Congress and senior military leaders, in addition to structural reforms, is significant. When members of Congress refuse to view convening authorities as judicial actors, the impact on the court-martial system is consequential. As mentioned above, servicemembers do not have a right to a jury trial.[161] Court-martial panels do not render unanimous verdicts or sentencing decisions, and convening authorities, even after MJA 2016, continue to exercise considerable influence over the procedurally limited court-martial process. Indeed, some convening authorities may even go so far as to ignore the UCMJ's prohibition on unlawful influence. This means that should convening authorities feel pressure from Congress to produce specific outcomes, either directly or indirectly through a senior judge advocate or a superior in their chain of command, they may not only feel obligated to use their influence over the process to produce that outcome, but will also have the means to do so. Congressional pressure incentivizes convening authorities to pursue political appeasement at the cost of justice in the court-

[160] Judicial independence is the ability to act "fairly and impartially without fear of punishment and without control or influence by the executive or legislative branches." Michael H. Reed, *Judicial Independence—An Essential American Value*, ABA J. (Mar. 29, 2018), http://www.abajournal.com/news/article/judicial_independence_an_essential_american_ value. For Article III courts, such independence is "grounded in the structure of the national government established under the U.S. Constitution that provides for the separation of powers." *Id.* For the Article I court-martial system the Court has recognized that a similar independence is necessary as it "helps to ensure [the] judicial impartiality" of military judges. Weiss v. United States, 510 U.S. 163, 179 (1994).

[161] This point frequently gets lost. For example, in 2013, Senator McCaskill asked then-General James Mattis if he "really" thought that "after a jury has found someone guilty . . . that one person, over the advice of their legal counselor, should be able to say, 'Never Mind'?" Donna Casseta, *Senators Outraged by Dismissal of Assault Case*, ASSOCIATED PRESS (Mar. 5, 2013), https://news.yahoo.com/senators-outraged-dismissal-assault-case-213240150.html. In posing the question, Senator McCaskill highlighted a fundamental misunderstanding of the court-martial process. There is no such thing as a "jury trial" in the military. *See* Williams, *supra* note 146, at 503 (arguing, in part, that military commanders should retain their authority as court-martial convening authorities because a court-martial is not a jury trial).

martial system—a condition that is incompatible with a character that is "judicial" under any definition of the term.

The unfortunate reality for servicemen and women is that this politicization of the court-martial process has already happened.[162] In the modern reform movement, members of Congress communicated not only a desire for more convictions in sexual assault cases, but also a willingness to punish convening authorities who did not produce this result.[163] Through this executive approach to military justice, members of Congress have directly impacted fundamental fairness in courts-martial. The CAAF describes this impact as "external pressure"[164] and, unfortunately, members of Congress continue to communicate these same desires. In her March 6th hearing before the SASC Subcommittee on Personnel, Sen. Gillibrand continued to focus on the need for increased sexual assault convictions,[165] while Sen. Thom Tillis communicated a willingness to block the promotions of convening authorities based on how they handle individual cases.[166]

In the context of military justice, such statements are incredibly concerning. Politically motivated unlawful influence is an issue the UCMJ is ill equipped to "eradicate" from the military justice system.[167] The

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[162] *See generally* Heidi L. Brady, Note, *Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. ILL. L. REV. 193 (2016) (providing background on the political climate that gave rise to unlawful influence in courts-martial). In its Third Annual Report, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DACIPAD) noted a significant finding by its predecessor, the Judicial Proceedings Panel (JPP):

> The combination of a less robust Article 32 pretrial hearing resulting from a significant statutory revision, perceived pressure on convening authorities to refer sexual assault charges to court-martial, and reliance on a low prosecution standard, probable cause, for referring cases to court-martial has led to sexual assault cases being prosecuted in which there is little chance for a conviction.

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, THIRD ANNUAL REPORT 121 (Mar. 2019). The DACIPAD continues to examine these issues and will evaluate them again following the implementation of MJA 2016. *Id.*

[163] For example, Senator McCaskill "place[d] a permanent hold on the nomination of Lt. Gen. Susan J. Helms to become vice commander of the Air Force's Space Command" citing "the general's decision . . . to erase the sexual-assault conviction of an Air Force captain." Craig Whitlock, *Senator Continues to Block Promotion of Air Force General,* WASH. POST (June 6, 2013), https://www.washingtonpost.com/world/national-security/senator-continues-to-block-promotion-of-air-force-general/2013/06/06/bbf9ea0a-cee3-11e2-ac03-178510c9cc0a_story.html?utm_term=.f3c1fd078fb9.

[164] United States v. Barry, 78 M.J. 70, 78 (C.A.A.F. 2018).

[165] *Subcomm. on Personnel Hearing, supra* note 1, at 99-100 (statement of Sen. Kirsten Gillibrand). *Comm. on Armed Services Hearing, supra* note 116, at 60-61 (statement of Sen. Kirsten Gillibrand).

[166] *Subcomm. on Personnel Hearing, supra* note 1, at 94-95 (statement of Sen. Thom Tillis).

[167] *See* United States v. Lewis, 63 M.J. 405, 413 (C.A.A.F. 2006) (noting that, when found, unlawful influence must be "eradicated").

structural mechanism that prohibits the exercise of "unlawful influence" over convening authorities (and judges and members)—Article 37 of the UCMJ—only applies to individuals who are subject to the UCMJ. A vast majority of the members of Congress are not subject to the UCMJ.[168] As a result, there is no effective statutory mechanism to stop members of Congress from punishing convening authorities who make politically unpopular decisions, even if those decisions constitute a lawful exercise of their discretion.[169] The absence of this mechanism is what gives rise to "external pressure" on the military justice system, a pressure felt by every branch of service in recent years.[170]

In fact, just last term the CAAF examined a high-profile example of this pressure in *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018),[171] highlighting the way in which the problem has metastasized throughout the Navy's court-marital system in the last decade. Special Warfare Operator Senior Chief Petty Officer (SOCS) Keith Barry was charged with sexual assault and stood trial in October 2014.[172] He elected a military judge-alone trial, contested the charge, and was convicted.[173] After he was sentenced, a transcript of the trial was prepared and sent to the convening authority, Rear Admiral (RADM) Patrick Lorge,[174] the Commander of Navy Region Southwest.[175] RADM Lorge personally reviewed the record of trial over the next several months and developed "serious misgivings about the evidence supporting this conviction."[176] Specifically, he "did not believe the evidence

[168] *Barry*, 78 M.J. at 81 (Ryan, J. dissenting) (describing the external pressure from members of Congress as "emanat[ing] from persons who are not subject to the UCMJ."). Of note, unlike most members of Congress, Senator McSally, as a retiree, likely remains subject to the UCMJ, and consequently, she has a duty to comply with Article 37. *See* United States v. Dinger, 77 M.J. 447, 448 (2018) (holding that "a court-martial is not prohibited from adjudging a punitive discharge in the case of . . . a retiree . . . ."); Stephen Vladek, *The Supreme Court and Military Jurisdiction Over Retired Servicemembers*, LAWFARE (Feb. 12, 2019),

[169] As an example, this means that while Article 37 of the UCMJ would prohibit the Chief of Naval Operations from punishing Commander, Naval Installations Command for her actions as a convening authority, it does not prohibit a civilian senator from doing so.

[170] *Barry*, 78 M.J. at 76; United States v. Riesbeck, 77 M.J. 154, 158-59 (2018); United States v. Boyce, 76 M.J. 242, 244 (2017); United States v. Schloff, 2018 CCA LEXIS 350, *3 (2018); United States v. Wright, 75 M.J. 501, 503 (2015); United States v. Howell, 2014 CCA LEXIS 321, *11-12 (2014).

[171] Full disclosure: I represented the appellant on appeal and argued the case before the CAAF.

[172] *Barry*, 78 M.J. at 70.

[173] *Id.* at 73.

[174] *Id.*

[175] Stephanie Francis Ward, *Military High Court Finds that Top Navy Lawyer Engaged in Unlawful Command Influence*, ABA J. (Sept. 6, 2018), http://www.abajournal.com/news/article/military_high_court_finds_that_top_navy_lawyer_engaged_in_unlawful_command.

[176] *Barry*, 78 M.J. at 73.

supported the alleged victim's account of events," and as a result, he was "inclined to disapprove the findings."[177]

Notably, at the time of RADM Lorge's review, Congress had already "curtailed" a military commander's authority to disapprove sexual assault findings in new cases.[178] That amendment, however, "did not impact offenses that occurred before June 26, 2014," and thus did not impact RADM Lorge's authority in SOCS Barry's case.[179] Accordingly, RADM Lorge still had the lawful authority to disapprove the conviction if he believed it was unwarranted based on the evidence.[180]

Before RADM Lorge finished reviewing SOCS Barry's case, however, the Deputy Judge Advocate General of the Navy, Rear Admiral (RADM) James Crawford III, intervened, meeting with RADM Lorge on April 30, 2015 to discuss the case.[181] By that time RADM Lorge was well aware of the political environment. In February 2014, the Judge Advocate General of the Navy, Vice Admiral (VADM) Nanette DeRenzi, explained to him that "commanders were facing difficult tenures as convening authorities due to the political climate surrounding sexual assault."[182] She further expressed that "every few months a decision in a sexual assault case would lead to increased scrutiny by Congress as well as other political and military leaders."[183] As a result, RADM Lorge believed "the political climate regarding sexual assault in the military was such that a decision to disapprove findings [in a court-martial], regardless of merit, could bring hate and discontent on the Navy from the President, as well as senators including Senator Kirsten Gillibrand."[184] Therefore, when RADM Crawford met with RADM Lorge on April 30, 2015, the question on RADM Lorge's mind was whether disapproving SOCS Barry's conviction would bring "big scrutiny on the Navy."[185]

Stepping back a moment, decades before RADM Lorge met with VADM DeRenzi or RADM Crawford, the Court noted that a crucial requirement under the UCMJ for the TJAGs was to protect the independence of judicial

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[177] *Id.* at 87 (Ryan, J., dissenting).
[178] *Id.* at 85 n.11 (Ryan, J., dissenting).
[179] *Id.*
[180] *Id.* at 86.
[181] *Id.* at 74-76.
[182] *Id.* at 74.
[183] *Id.*
[184] *Id.* at 80. In her dissenting opinion, Judge Ryan observed that this view was "reasonably grounded in fact." *Id.* at 81.
[185] Oral Argument at 32:01, United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (No. 17-0162), https://www.armfor.uscourts.gov/newcaaf/calendar/201803.htm.

actors in the court-martial system.[186] While this guidance came in the context of a challenge to the lack of fixed terms of office for appellate military judges, the Court's decision was nevertheless a clear signal to the TJAGs that both the UCMJ and the Constitution require them to protect the fairness of the court-martial process.[187] In fact, the Court's decision to uphold the UCMJ's appellate judiciary as constitutional was premised on a belief that TJAGs "have no interest in the outcome of a particular court-martial" and thus can serve as supervisors for appellate military judges.[188] In the Court's view, this structure "help[ed] protect" the "judicial independence" of appellate military judges and thus ensured a balance between accountability and independence that complied with the requirements of due process.[189]

When RADM Crawford visited RADM Lorge's office on April 30, 2015, however, he did not protect fairness in the court-martial process. Instead, he politicized the process. He "either told RADM Lorge 'not to put a target on his back' or, through similar language, gave RADM Lorge the impression that failing to approve the findings and sentence would put a target on his back."[190] Weeks later, in a phone conversation, the two admirals discussed SOCS Barry's case again.[191] This time RADM Crawford advised RADM Lorge that "approving the findings and sentence was the appropriate course of action" and the "best he could do," even though such advice was substantively inaccurate.[192] Despite the fact that RADM Lorge believed SOCS Barry's guilt was not proven beyond a reasonable doubt, he ultimately approved SOCS Barry's conviction.[193]

On appeal, the CAAF acknowledged that RADM Crawford's advice may have been in the political interest of the Navy given the congressional

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[186] *See* Weiss v. United States, 510 U.S. 163, 180 (1994). Presumably, this requirement extends to the Deputy Judge Advocates General as well.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Barry*, 78 M.J. at 75.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 78-79 n.9 ("[I]f RADM Lorge truly believed that Appellant's guilt had not be proven beyond a reasonable doubt, he would have been required to disapprove the findings and sentence and dismiss the charge and specification. Article 60(e)(3), UCMJ.").

pressure at the time.[194] Nevertheless, such advice was unlawful.[195] In the final analysis, the CAAF determined that RADM Crawford's conduct constituted an "improper manipulation of the criminal justice process."[196] The CAAF's holding was clear: "a [Deputy Judge Advocate General] can indeed commit unlawful influence" and RADM Crawford "actually did so in this case."[197] The CAAF condemned RADM Crawford's actions and found that only dismissal with prejudice would "eradicate the unlawful . . . influence and ensure the public perception of fairness in the military justice system . . . ."[198]

The dark irony in SOCS Barry's case is that the same political pressure that motivated his prosecution and approval of his conviction also led to the CAAF's decision to dismiss it with prejudice. Drawing on observations of cases that pre-dated SOCS Barry's, Chris Bray used a "circle" to describe this phenomenon:

> As reformers have tried to remove command authority from military sexual assault cases to ensure aggressive punishment for rapists, the political pressure on the armed forces led uniformed leadership to pressure subordinates to deliver court-martial convictions—an injection of unlawful command influence into military sexual assault cases, which caused convictions to be overturned[.]ensure aggressive punishment for rapists, the political pressure on the armed forces led uniformed leadership to pressure subordinates to deliver court-martial convictions—an injection of unlawful command influence into military sexual assault cases, which caused convictions to be overturned . . . .[199]

Building on Bray's observation, SOCS Barry's case now suggests there is an additional dimension to this phenomenon. The political pressure on

[194] As government counsel agreed at oral argument, it was "unlikely" that Senator Gillibrand would have receive RADM Lorge's intended action well and that it was possible that RADM Lorge's intended action could have ignited a congressional response like the one taken against Lt. Gen. Franklin. Oral Argument at 31:16, United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (No. 17-0162), https://www.armfor.uscourts.gov/newcaaf/calendar/201803.htm.

[195] *Barry*, 78 M.J. at 78-80.

[196] *Id.* at 73.

[197] *Id.* at 79.

[198] *Id.*

[199] BRAY, *supra* note 111, at 353.

senior military leadership has not only caused senior commanders and their superiors in the chain of command to inject unlawful influence into the court-martial system, but also the very people charged with ensuring the fair operation of the military justice system—the TJAGs and their deputies.[200] In light of the March 6th hearing before the SASC Subcommittee on Personnel, this cycle of political pressure and unlawful influence shows no signs of letting up.[201]

VI. DOES THE UNIFORM CODE OF MILITARY JUSTICE'S CONVENING AUTHORITY FRAMEWORK COMPLY WITH DUE PROCESS?

Following *Ortiz*, it would be prudent for members of Congress to stop and consider the impact the *Ortiz* majority's opinion may have on congressional efforts to legislate and engage directly with senior military leaders on the issue of a convening authority's role in the court-martial process. Given the *Ortiz* majority's judicial view of courts-martial, the judicial characteristics of a convening authority's role (both historically and in modern practice), and the lack of an effective statutory mechanism to protect the independence of convening authorities from congressional pressure, the following question must now be asked: does the UCMJ afford convening authorities enough judicial independence to satisfy the requirements of due-process? Unfortunately, unless and until Congress takes a judicial view of courts-martial and amends the UCMJ, there is a strong argument that the UCMJ's convening authority framework fails to comply with due-process.

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[200] *See Barry*, 78 M.J. at 70-80 (describing the unlawful influence of RADM Crawford); *see also* United States v. Boyce, 76 M.J. 242, 245 (2017) (recounting the following advice from then-Judge Advocate General of the Air Force, Lt. Gen. Richard Harding, to Lt. Gen. Franklin's legal advisor: "[F]ailure to refer the case to trial would place the Air Force in a difficult position with Congress; absent a 'smoking gun,' victims are to be believed and their cases referred to trial.").

[201] At the time of this Article's publication deadline, attention on the issue of sexual assault in the military was increasing. *See generally* U.S. DEP'T. OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2019), https://sapr.mil/reports (reporting an increase in the prevalence of sexual assault in the military for Fiscal Year 2018); Vanden Brook, *supra* note 3; Meghann Myers, *Gillibrand Grills Next Army Chief on Rise of Sexual Assaults, Decrease in Prosecutions*, ARMY TIMES (May 2, 2019), https://www.armytimes.com /news/your-army/2019/05/02/gillibrand-grills-next-army-chief-on-rise-of-sexual-assaults-decrease-in-prosecutions/; Danielle Garrand, *Sexual Assault in Military has Spiked by Nearly 40 Percent, Pentagon Says*, CBS NEWS (May 2, 2019), https://www.cbsnews.com/news/sexual-assault-in-military-sexual-assault-in-military-has-spiked-by-nearly-40-percent-pentagon-says/; Rebecca Kheel, *Gillibrand Tears into Army Nominee over Military Sexual Assault: 'You're Failing Us'*, THE HILL (May 2, 2019), https://thehill.com/policy/defense/441840-gillibrand-tears-into-army-nominee-over-military-sexual-assault.

Even though Congress has the constitutional authority to enact military justice legislation, there are limits. As the Court has expressly recognized, "Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."[202] To that end, "a basic requirement of due process" is "a fair trial in a fair tribunal," meaning that in order for Congress to meet the requirements of due process in the context of a court-martial, it must give judicial actors enough independence to be impartial.[203] Therefore, at the forefront of the due-process analysis is a question about the lack of structural safeguards protecting convening authorities from congressional pressure. Absent such a statutory safeguard, has Congress complied with the requirements of the Due Process Clause?

There is no statute prohibiting most members of Congress from pressuring military commanders to produce specific results in either individual courts-martial or categories of cases. Article 37 of the UCMJ prohibits military personnel from unlawfully influencing a convening authority, and it prohibits a military commander from unlawfully influencing a court-martial.[204] But, the UCMJ does not prohibit civilian members of Congress from applying pressure to convening authorities, their superiors in the chain of command, or to the military justice system more generally, in order to achieve specific outcomes. As a result, the UCMJ lacks the statutory shield necessary to protect the military justice system from improper congressional influence. This means there is little structural resistance to members of Congress who use their political influence to push senior military leaders towards action focused on specific, politically popular outcomes with little concern for due process or the facts of a given case.

Even after the MJA 2016 reforms, this problem continues. While a convening authority is certainly more limited in his or her discretion today than during the "foundational period" of military justice,[205] that fact should

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[202] Weiss v. United States, 510 U.S. 163, 176 (1994). Regarding the importance of the Due Process Clause to the military justice system, the Army Court of Criminal Appeals has even gone so far as to describe it as the "singular bedrock for our system of [military] justice. From it follows the presumption of innocence, overcome only when one's guilt is proven beyond a reasonable doubt in accordance with the Constitution." *United States v. Garcia*, 2015 CCA LEXIS 335, *19 (A. Ct. Crim. App. Aug. 18, 2015) (unpublished).

[203] *Weiss*, 510 U.S. at 178 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

[204] *See* 10 U.S.C. § 837 (2012).

[205] *See* David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 74-83 (describing changes to the convening authority's post-trial review power).

not detract from the significance of this issue or the need to protect convening authorities from congressional pressure going forward. Even after MJA 2016, circumstances remain where a convening authority retains the power to disapprove a conviction and modify a sentence.[206] Therefore, a convening authority's post-trial actions, even though substantially limited in scope, will still be judicial in nature. Moreover, in other areas of the post-MJA 2016 court-martial process, convening authorities retain the hallmarks of judicial action. They involve the "exercise of . . . discretion"[207] and require convening authorities to be "just," "impartial," and "fair" in the exercise of that discretion.[208] For example, to ensure that servicemembers receive a "fair trial in a fair tribunal,"[209] considerations of fairness must guide a convening authority's selection of the members who will sit in judgment of an accused at a court-martial.[210] In MJA 2016, military commanders retained this authority to hand-pick the "best qualified" members according to the criteria listed in Article 25 of the UCMJ, representing yet another action that is judicial in nature.[211]

In MJA 2016, convening authorities also retained the authority to authorize expert witnesses at government expense, both for the prosecution and defense.[212] This decision inherently requires a convening authority to act impartially. Furthermore, MJA 2016 reforms still permit a military "commander" to authorize a probable cause search.[213] A search authorization can only be "issued by an impartial individual," and under the rule, commanders are grouped together with military judges and military magistrates as individuals who can carry out such actions.[214] Therefore,

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[206] MJA 2016, *supra* note 150, § 5323.

[207] A "judicial act" is defined as an "act involving the exercise of judicial power," and "judicial power" involves "the exercise of judgment and discretion." *Judicial Act*, BLACK'S LAW DICTIONARY (9th ed. 2009); *Judicial Power*, BLACK'S LAW DICTIONARY (9th ed. 2009). This is distinct from "ministerial" power, which "involves obedience to instructions or laws instead of discretion." *Ministerial Power*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[208] *Justice*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED, at 1228 (1993); *see also Justice*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "justice" as "the fair treatment of people").

[209] Weiss v. United States, 510 U.S. 163, 176 (1994) (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

[210] United States v. Loving, 41 M.J. 213, 305 (1994) (Sullivan, C.J. concurring) (expressing concern about a convening authority's selection process and recognizing that a convening authority's "broad discretion" in "selecting court-martial panels clearly constitutes a system" that is "susceptible to abuse.").

[211] *See* Hansen, *supra* note 48, at 24 ("[T]he selection method of the personnel is so intimately connected with the organization of the court it cannot be considered other than judicial in nature.").

[212] MANUAL FOR COURTS-MARTIAL, R.C.M. 703(d) (2019).

[213] MANUAL FOR COURTS-MARTIAL, Mil. R. Evid. 315(d) (2019).

[214] *Id. See also* United States v. Lopez, 35 M.J. 35, 41 (1992) (noting that in the context of issuing search authorizations "a commander must be impartial").

even though a convening authority's actions in some areas of the court-martial process are not "judicial acts," MJA 2016 did not change the fact that convening authorities must perform many other judicial acts under the UCMJ—actions that must be taken "without partiality, favor, or affection."[215]

While the Court has never directly considered a due-process challenge to the UCMJ based on a convening authority's lack of independence, its decision in *Weiss v. United States* is instructive. In *Weiss*, the Court considered a due-process challenge to the UCMJ based on the lack of fixed tenure for military judges.[216] The petitioner's challenge was grounded in the "assumption" that the lack of a fixed tenure meant a lack of judicial independence, which is the same root issue with convening authorities—independence.[217] Obviously, convening authorities are not military judges. Nevertheless, after all of the modern reforms limiting a convening authority's discretion, the judicial character of their role is still very much the same, which means that post-*Ortiz* there is still a constitutional need to protect the independence of a convening authority's judicial acts to the same degree as those of a military judge. Thus, despite the differences between a military judge and a convening authority, *Weiss* provides a useful framework for analyzing whether the UCMJ complies with due process in the absence of an express statutory safeguard against congressional pressure.

In *Weiss v. United States*, the Supreme Court considered "whether the lack of a fixed term of office for military judges violate[d] the Fifth Amendment's Due Process Clause."[218] Finding no due-process violation, the Supreme Court applied the *Middendorf* balancing test and analyzed "whether the existence of such tenure is such an extraordinarily weighty factor as to overcome the balance struck by Congress."[219] In resolving this

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[215] Ortiz v. United States, 138 S. Ct. 2165, 2175-76 (2018).

[216] Unlike Article III judges, appellate military judges historically did not have a fixed tenure and were subject to military detailing orders. Weiss v. United States, 510 U.S. 163, 168 (1994). After the MJA 2016, however, military judges now have minimum tour lengths (typically three-years). MANUAL FOR COURTS-MARTIAL, R.C.M. 502(c)(3) (2019).

[217] *Weiss*, 510 U.S. at 178-79.

[218] *Id.* at 165.

[219] *Id.* at 179. Notably, the majority in *Weiss* used a due-process standard that was different from the standards put forth by the petitioner and the government. The petitioner advocated for application of the test established in Mathews v. Eldridge, 424 U.S. 319 (1976), while the government advocated for application of Medina v. California, 505 U.S. 437 (1992). *Weiss*, 510 U.S. at 177. The *Weiss* majority rejected both and applied Middendorf v. Henry, 425 U.S. 25 (1976) instead, making it more difficult to prevail on a due-process challenge in the military context. *Weiss*, 510 U.S. at 177.. While it is beyond the scope of this Article, whether the *Weiss* majority applied the appropriate standard is something that merits consideration in conjunction with the argument outlined here.

issue, the Court offered an analysis that is particularly salient in relation to the politically motivated unlawful influence of today:

> A fixed term of office, as petitioners recognize, is not an end in itself. It is a means of promoting judicial independence, which in turn helps to ensure judicial impartiality. We believe the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.
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> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U.S.C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe the structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.[220]

With respect to the question of a convening authority's independence, the relevant issue under *Weiss* is whether "the applicable provisions of the UCMJ . . . insulate" convening authorities "from the effects of [external] influence . . . sufficiently to preserve judicial impartiality so as to satisfy the Due Process Clause."[221] If the UCMJ insulates convening authorities from external pressure in the same way that it insulates military judges, then the analysis is fairly straightforward. Under *Weiss*, the Court is unlikely to find a due-process issue. As long as convening authorities fall under the protection of someone who had "no interest in the outcome of a particular

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[220] *Weiss*, 510 U.S. at 179-80.
[221] *Id.* at 179.

court-martial,"[222] the Court would likely conclude that Congress has struck an "acceptable balance between independence and accountability."[223]

Unfortunately, however, convening authorities do not fall under the protection of an officer who has no interest in the outcome of a particular court-martial. Congress failed to insulate convening authorities in the same way as military judges.[224] Unlike military judges, Congress did not give a neutral officer supervisory authority over convening authorities.[225] Instead, convening authorities, senior officers who fall under a traditional chain of command and require Senate confirmation for promotion, are exposed to political influence in a way that military judges are not. Therefore, it is possible to argue that Congress has in fact not struck an acceptable balance between independence and accountability when it comes to convening authorities.

By definition, a convening authority includes "a commissioned officer in command."[226] Articles 22 through 24 define who may convene courts-martial, and for general courts-martial, Congress lists the following: the President, the Secretary of Defense, a combatant commander, the service Secretary, and several delineated military commanders from each service.[227] In practice, however, general court-martial convening authorities typically include admirals and generals who require Senate confirmation to advance to the next rank. As recent history has demonstrated, some senators are willing to block a commander's promotion when they are unhappy with the

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[222] *Id.* at 180. In *Weiss*, the Supreme Court viewed the supervisors of military judges, the Judge Advocates General, as not having an interest in the outcome of a particular case. *Id.* Recent cases, however, have called that observation into question. *See supra* Sections IV-V.

[223] *Weiss*, 510 U.S. at 180.

[224] It also bears mentioning that Sen. Gillibrand's proposal to shift charging decisions in sexual assault cases from a convening authority to a military prosecutor does not resolve the issue of "external pressure" in the context of charging decisions. United States v. Barry, 78 M.J. 70, 78, 81 (C.A.A.F. 2018). As RADM Crawford demonstrated in *Barry*, senior military lawyers are also susceptible to pressure from members of Congress. *Id.* Therefore, while Sen. Gillibrand's proposal vests a lawyer with the authority to refer sexual assault charges to a court-martial, it fails to insulate that lawyer from external pressure from civilian members of Congress. Military Justice Improvement Act, S. 2141, 115th Cong. § 2(d)(5) (2017) (proposing a reform to the UCMJ that would protect a military lawyer's charging decisions from "unlawful or unauthorized influence or coercion" without a further reform to ensure they are protected from external pressure from members of Congress). Therefore, an alternative reform worth considering would be to expand the prohibition on unlawful influence to all people, not just those subject to the UCMJ. *See, e.g.*, 10 U.S.C. § 949b (2012) (prohibiting all persons from engaging in unlawful influence of a military commission).

[225] In fact, as RADM Crawford's conduct in *Barry* demonstrates, the officer who is supposed to exercise neutral supervisory authority over military judges, may, in fact, be a source of unlawful influence, compounding the harm associated with the pressure from Congress to produce specific outcomes. *See supra* text accompanying note 197.

[226] MANUAL FOR COURTS-MARTIAL, R.C.M. 103 (2019).

[227] 10 U.S.C. §§ 822-824.

commander's decisions as a convening authority.[228] In the March 6th hearing before the SASC Subcommittee on Personnel, Sen. Tillis made this point clear. He explained that as a senator who is consulted on military promotions, he "guarantee[s]" that "if there is any credible evidence in a file" that a commander failed to properly handle a case, "that person will never get promoted as long as [he is] in the U.S. Senate."[229]

It is here that convening authorities and military judges differ significantly. For the most part, military judges are insulated from this type of outcome-based evaluation. There are rules prohibiting their direct supervisors from engaging in this behavior, and their promotions, even though they require Senate confirmation, are neither as high-profile nor controversial. Senators appear to respect the judicial nature of a military judge's position. As a result, under the UCMJ and regulatory structure of the military services, military judges are both less susceptible to external pressure than convening authorities and more protected from it. In *Weiss*, the Supreme Court explained as much, when it found an acceptable balance between accountability and independence, citing "the UCMJ" and "corresponding regulations" that insulate military judges from the "effects" of external pressure in addition to the protective role of the Judge Advocates General.[230]

In the Navy, for example, service regulations expressly prohibit supervisors from evaluating a military judge's performance based on the popularity of their rulings. BUPERSINST 1610.10D states that performance reviews "on military judges and appellate judges may properly evaluate their professional and military performance, but may not include marks, comments, or recommendations based on their judicial opinions or

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[228] *Barry*, 78 M.J. at 81 (Ryan, J., dissenting). *Compare* Reid v. Covert, 354 U.S. 1, 36 (1957) (explaining that command influence of courts-martial was an issue because members of the court-martial depended on commanders for "their future progress in the service") *with Subcomm. on Personnel Hearing, supra* note 1, at 94-95 (statement of Sen. Thom Tillis) (describing how military commanders depend on members of the Senate for promotion).

[229] *Subcomm. on Personnel Hearing, supra* note 1, at 94-95 (statement of Sen. Thom Tillis). Senator Tillis made this comment in response to a question from Senator Rick Scott about holding "commanding officers" accountable for failing to "properly" deal with sexual harassment complaints. *Id.* at 94. Senator Scott did not elaborate on the meaning of "properly," and arguably, the term can be understood in one of two ways: (1) as failing to comply with the relevant service regulations or (2) as an exercise of discretion that fails to comply with his expectations, even if the commanding officer otherwise complied with the relevant service regulations. It is only the latter understanding that gives rise to the issues discussed in this Article.

[230] Weiss v. United States, 510 U.S. 163, 179-80 (1994).

rulings, or results thereof."[231] These performance reviews are a critical part of a military judge's promotion potential, and by excluding outcome-based evaluations from the process, the Navy has created a structure that protects a military judge's independence. The other service branches have enacted similar safeguards, and the CAAF has demonstrated a willingness to reinforce them.[232]

However, the same cannot be said for convening authorities, especially in Senate confirmations. There is no statute prohibiting civilian members of Congress from engaging in an outcome-based evaluation of a commander's judicial acts as a convening authority, and there is no statute prohibiting civilian members of Congress from using that evaluation to block his or her promotion, as Sen. Tillis has suggested he would do. Therefore, unlike military judges, who rely on service regulations and a neutral and impartial senior officer to shield them from political pressure, convening authorities have significantly less structural protection. Unlike military judges, convening authorities do not answer to a Judge Advocate General, who (at least in theory) has no interest in the outcome of a given case. Instead, convening authorities must answer directly to a formal chain of command that ultimately reports to a political appointee—the service Secretary. And, they all answer to Congress when it comes to promotions and operational budgets.[233]

As a result, with respect to convening authorities, there is an argument that Congress has not struck the same balance between accountability and independence as it has with military judges. In fact, lawmakers like Sens. Gillibrand, McSally, and Tillis have expressed a much heavier emphasis on accountability than independence when it comes to convening authorities.[234] As Sen. Gillibrand has explained, she does not believe "the military" takes "cases of sexual assault and sexual harassment seriously," and believes "it's Congress's job to hold the military accountable."[235] Indeed, accountability

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[231] U.S. DEP'T. OF THE NAVY, 1610.10D, BUPERS INSTRUCTION I-3 (May 1, 2015), https://www.public.navy.mil/bupers-npc/reference/instructions/BUPERSInstructions/Documents /1610.10D.pdf.

[232] *See generally* FRANCIS A. GILLIGAN & FREDERICK I. LEDERER, COURT-MARTIAL PROCEDURE § 14-80.00 (4th ed. 2018) (describing how the services ensure judicial independence).

[233] *See generally* LAWRENCE KAPP, CONG. RESEARCH SERV., R44757, DEFENSE PRIMER: A GUIDE FOR NEW MEMBERS (2019) (discussing various aspects of congressional authority over the military); LAWRENCE KAPP, CONG. RESEARCH SERV., R44389, GENERAL AND FLAG OFFICERS IN THE U.S. ARMED FORCES: BACKGROUND AND CONSIDERATIONS FOR CONGRESS (2019) (discussing various aspects of congressional management of senior military officer personnel).

[234] *Subcomm. on Personnel Hearing*, *supra* note 1.

[235] Tom Vanden Brook, *Bad Santa: Senators Challenge Joint Chiefs about 'Bad Santa' General Who Cried 'Fake News'*, USA TODAY (Apr. 19, 2018) (embedded video at 00:43),

was the driving force behind Sen. McCaskill's previous efforts to keep military commanders in the court-martial process. As Sen. McCaskill and Rep. Loretta Sanchez explained in an editorial in *USA Today*, they wanted to keep military commanders in the court-martial process because they thought that removing them would "weaken" the ability of Congress "to hold commanders accountable" and "lead to fewer prosecutions."[236]

In the Supreme Court's view, however, ensuring accountability is only half of the equation.[237] Congress must balance the need for accountability in the military command structure with the need for judicial actors, such as convening authorities in the post-*Ortiz* paradigm, to exercise independent discretion based on the facts and circumstances of the cases before them.[238] Even with the recent changes to the UCMJ, the fact that the statutory framework does not prohibit civilian members of Congress from using their political positions to punish convening authorities who make lawful, albeit unpopular, decisions is evidence that Congress has still not struck an acceptable balance between accountability and independence. The absence of a statutory safeguard insulating convening authorities from the effects of congressional pressure coupled with members of Congress continuing to take the executive view of courts-martial (especially as they interact with senior military leaders and enact legislative reforms) has resulted in the UCMJ's convening authority structure falling far short of the Fifth Amendment's due-process requirements under *Weiss*.

VII. CONCLUSION

In response to the Court's decision in *Ortiz*, a fundamental question must now be asked: if the court-martial system exercises judicial power, does its convening authority structure comply with the requirements of due process? As this Article outlines, there is an argument that absent statutory reform to

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https://www.usatoday.com/story/news/politics/2018/04/19/senators-grill-joint-chiefs-sexual-misconduct-harassment/533557002/.

[236] McCaskill & Sanchez, *supra* note 116.

[237] Weiss v. United States, 510 U.S. 163, 180 (1994).

[238] Not only is this balance needed to satisfy the requirements of due process, but also to accord with the "[n]ature and purpose of military law." MANUAL FOR COURTS-MARTIAL, pt. I, § 3 (2019) ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."). To promote justice, it is necessary for Congress to balance accountability of convening authorities with the need for convening authorities to have some measure of independence in carrying out judicial acts that require them to exercise discretion in individual cases. *See also id.* app. 2.1 § 2.1 (listing non-binding disposition guidance for convening authorities to consider, "in consultation with a judge advocate," that focuses on "the interests of justice and good order and discipline . . . .").

insulate convening authorities from the effects of congressional pressure, the UCMJ's convening authority framework fails to comply with due process. When it comes to the structural safeguards protecting convening authorities—officials who are required to carry out judicial acts under the UCMJ—Congress has arguably failed to strike an acceptable balance between accountability and independence. This imbalance may reflect the fact that members of Congress continue to view the court-martial system as an Executive Branch entity, even though a majority of the Justices have made clear they view it as something else, a judicial system within the Executive Branch. Both history and current practice support this judicial view. Yet whether members of Congress will sync their future legislative reform efforts and interactions with senior military leadership to the *Ortiz* majority's judicial view remains to be seen.

Given the combination of recent cases tainted by unlawful influence and the *Ortiz* majority's characterization of the court-martial process as "judicial," it is no longer possible to ignore the executive vs. judicial layer of the debate over the scope of a convening authority's role. At this point, if members of Congress continue operating under an executive view of courts-martial, they will perpetuate the injustice associated with the current cycle of politically motivated unlawful influence and undermine the judicial character of the court-martial system. This would relegate the *Ortiz* decision to mere aspiration. In time, the diametrically opposed views of Congress and the *Ortiz* majority may come to a head through litigation, but that could take years or decades and would allow the court-martial system to move back towards the "rough form of justice" of the past.[239] To avoid such a result, and ensure the court-martial system complies with due process, members of Congress should reexamine how they interact with senior military leaders on issues of military justice and enact a structural reform that ensures convening authorities can perform their judicial acts free from "external pressure."[240]

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[239] United States v. Denedo, 556 U.S. 904, 918 (2009) (Roberts, C.J., dissenting) (quoting Reid v. Covert, 354 U.S. 1, 35-36 (1957)).

[240] United States v. Acevedo, 77 M.J. 185, 191 (C.A.A.F. 2018) (Ryan, J., dissenting).