A LOGIC OF MILITARY JUSTICE?

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Abstract

This Article seeks to advance two conversations. First, a scholarly analysis of what ultimately justifies the United States operating a separate code of criminal law applicable to servicemembers at home and when deployed,

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whether "on duty" or off, for acts that may have nothing at all to do with military affairs, and in which a lay officer "in command" has discretionary authority to investigate, prosecute, and in some ways punish offenders – we might refer to this as jus in disciplina militaras. The second, a professional discussion that directly confronts the reality of increased Congressional and public skepticism about military justice procedures, directly acknowledges that Supreme Court precedent that has long defined and permitted this system's departure from civilian norms and practices may be turning a corner, and that around the corner is a view of military justice that rejects the presumptive primary importance of that lay commanding officer. To spark both of those conversations, this Article must necessarily investigate the subject from a flank that has not been approached in any formally deliberate way to date. It will draw from the vast forest of military professionals, lawyers, scholars, and courts, describing parts or all of military justice, a sense of the underlying logic that has purported to justify, historically, the distinctive attributes that separate what it means to be under the criminal jurisdiction of the military from what it means to be under that of the civilian state government and local law enforcement authorities. Out of a host of explicit statements and implicit assumptions, this Article will construct what amounts to that logical defense. This Article will then qualify those statements, distinguishing the factually supported from the aspirational and normative; and it will identify how that logic seems contrary to contemporary public explanations of military justice's animating purpose, in particular the U.S. Supreme Court's most recent description of military justice in 2018. Lastly, it will explore how those arguments that seem to express confidence in military justice, placing it on the same moral and legal plane as "normal" civilian justice, ironically undermine the very justifications for keeping the most prominent characteristics of modern American military criminal law intact. I self-consciously position this Article as neutral on what could or should change as a consequence of this logic, for the framing and questions are more important at this early stage than recommendations.

INTRODUCTION

A Navy SEAL is investigated, charged, tried, convicted, and punished by the Navy for actions in combat.[1] *The President intercedes, granting clemency, triggering the firing of the Secretary of the Navy and a national debate over both political acceptance of behavior that violates the military's own*

1. Bill Chappell, *Navy SEAL Demoted for Taking Photo with Corpse of ISIS Fighter*, NPR (July 3, 2019, 3:29 AM), https://www.npr.org/2019/07/03/738463353/jury-reduces-navy-seals-rank-for-taking-photo-with-corpse-of-isis-fighter.

criminal code and implicates the laws of war, and political interference with the military's dispensation of "justice."[2]

Ten months before a presidential election, a retired four-star general pens an op-ed in the New York Times accusing the incumbent President of being selfish, immoral, and a liar.[3] *Three months later, he reiterates in the Washington Post, labeling the President nepotistic, vindictive, divisive, and ignorant.*[4] *Upon re-election, the President orders the Army to initiate court-martial proceedings, bringing the retired senior citizen back to service for prosecution for violating the Uniform Code of Military Justice's*[5] *prohibition on using "contemptuous words" against the Commander in Chief.*[6]

An enlisted airman, in debt to the electronics retailer Best Buy, fortuitously receives a check as a gift from his cousin.[7] *The airman uses the bank account and routing number from the check to fraudulently generate more than two dozen electronic checks totaling $50,000 on their account through Best Buy's automated bill pay system.*[8] *He is arrested, charged, pleads guilty at a court-martial, is convicted, and sentenced to fourteen months in prison for, among other offenses, larceny and forgery.*[9]

A non-commissioned officer is convicted at a court-martial on charges of child endangerment, sexual assault, and adultery for hosting a party at his

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2. *See id.*; Dave Phillipps, *Anguish and Anger From the Navy SEALs Who Turned In Edward Gallagher*, N.Y. TIMES (Dec. 27, 2019), https://www.nytimes.com/2019/12/27/us/navy-seals-edward-gallagher-video.html; Geoffrey S. Corn & Rachel E. VanLandingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFAREBLOG.COM (Nov. 26, 2019, 7:22 PM), https://www.lawfareblog.com/gallagher-case-president-trump-corrupts-profession-arms.

3. *See generally* Paul LeBlanc, *Retired Gen. Stanley McChrystal Hits Trump as Immoral, Dishonest*, CNN (Dec. 31, 2018, 12:11 PM), https://www.cnn.com/2018/12/30/politics/stanley-mcchrystal-trump-dishonest-immoral/index.html (using a hypothetical quote derived from retired General Stanley McChrystal's comments).

4. *See generally id.* (same).

5. The Uniform Code of Military Justice (UCMJ) and its articles are codified under 10 U.S.C. §§ 801–946a [hereinafter UCMJ].

6. This is a hypothetical scenario, plausible under UCMJ Art. 88, though its facts are based in part on public comments by General (Retired) Stanley McChrystal. *See* LeBlanc, *supra* note 3; *see also* Steve Vladeck, *The Supreme Court and Military Jurisdiction Over Retired Servicemember*s, LAWFAREBLOG (Feb. 12, 2019, 7:00 AM), https://www.lawfareblog.com/supreme-court-and-military-jurisdiction-over-retired-servicemembers; Larrabee v. United States, 78 M.J. 107 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 1164 (2019) (leaving in place the lower Navy-Marine Corps Court of Criminal Appeals decision finding military jurisdiction over retired service members, under UCMJ Art. 2 constitutional); *but see* Larrabee v. Braithwaite, No. 19-654, 2020 WL 6822706 (D.D.C. Nov. 20, 2020) (holding UCMJ Art. 2's jurisdiction over retirees to be an unconstitutional expansion of Congress's "make [r]ules" power in Article I, § 8, cl. 14).

7. *See* United States v. Weeks, 71 M.J. 44 (C.A.A.F. 2012).

8. *Id.*

9. *Id.* (reversing conviction for forgery, finding accused's guilty plea improvident).

off-post residence where he drinks heavily throughout the night, leaving his thirteen-month-old son in his crib.[10] *He is sentenced to twelve years of confinement and a dishonorable discharge.*[11]

Child endangerment, adultery, and sexual assault off-post and off-duty; a retired general excoriating the President; theft to pay off civilian debt under false pretenses; posing for a photograph with a dead ISIS member after a firefight: What do these cases all have in common?[12] Nothing, except for the fact that each of these defendants were subject to trial by court-martial, under military rules of evidence, under military rules of procedure, in front of a military judge and military panel members, and prosecuted by a military lawyer for what are deemed military crimes.[13] In order for any of that to happen, however, a non-lawyer officer (usually the accused's commander) charged the suspect and another commanding officer of much higher rank referred the case to a court-martial, essentially indicting the service member.[14] If there had been a need for pre-trial confinement, a commanding officer would have made that decision too.[15] If the accused's defense counsel desired for the government to pay for a specific non-military expert witness or consultant, the commanding officer who referred the case would have approved or denied the request; granting immunity, approving plea deals, and even the final form of the charges themselves are all under the lawful authority of a commanding officer.[16] Despite more than half a century of slowly reforming American military justice with much needed procedural guarantees, not all has changed. Even with lawyers advising the chain-of-command at every step and reducing the direct and indirect influence of commanders on the investigation, prosecution, trial, and punishment of offenders, there remain two fundamental characteristics that make this criminal justice process unique among criminal jurisdictions within the United States and, increasingly, throughout the world: the executive authority role that commanders play and the range of conduct that such commanders may (in their discretion) punish directly or direct into the court-martial process. What is the *fundamental rationale*—the logic—that justifies these characteristics in this domain of *jus in disciplina militaras*?[17] The answer to that is far from obvious and, it turns out, difficult for military

10. *See* United States v. Plant, 74 M.J. 297 (C.A.A.F. 2015).

11. *Id.*

12. *See id.*; *Weeks*, 71 M.J. 44; Chappell, *supra* note 1; LeBlanc, *supra* note 3.

13. *See Plant*, 74 M.J. 297; *Weeks*, 71 M.J. 44; Chappell, *supra* note 1; *see* LeBlanc, *supra* note 3.

14. *See Plant*, 74 M.J. 297; *Weeks*, 71 M.J. 44.

15. *See* Dan Maurer, *The "Shadow Report" on Commanders' Prosecutorial Powers Raises More Questions than Answers*, LAWFAREBLOG (May 11, 2020), https://www.lawfareblog.com/shadow-report-commanders-prosecutorial-powers-raises-more-questions-answers. Special thanks to the editors at LAWFARE for allowing me to draw from and expand on this material.

16. *Id.*

17. *See infra* Part I.C (discussing commanders' impact on discipline and military court proceedings).

justice's proponents, including the United States Supreme Court, to explain fully, consistently, and persuasively.[18]

In 2018, the Supreme Court decided *Ortiz v. United States*, a case arising from a court-martial conviction of an airman.[19] This case was unusual in two regards. First, the Supreme Court rarely reviews petitions from the lower U.S. Court of Appeals for the Armed Forces (CAAF)[20] addressing matters of a conviction's legal sufficiency under the Uniform Code of Military Justice (UCMJ).[21] Second, the primary issue before the Court was ostensibly straightforward, but an amicus argument by a law professor[22] raised such a novel attack on the Court's jurisdiction to even entertain the petitioner's complaint that Justice Kagan, writing for a seven-Justice majority, went to some length to describe the very nature of military justice as "judicial."[23] In doing so, she defended the Court's role atop the "integrated 'court-martial system'" even though that system is not one provided for under Article III of the U.S. Constitution but under Congress' authority in Article I, § 8.[24] In describing the attributes and processes of modern military justice, however, the Court (including the two dissenters) seemed to take no notice of long precedent in which the Court has described the character of military justice in far different terms, in both defending it and criticizing it.[25] In short, the *Ortiz* court blindly slipped right past the primary and central role that a non-lawyer commanding officer—with investigative, prosecutorial, and quasi-judicial functions granted by both statute and administrative

18. *See infra* Parts I–II (discussing how military justice's proponents and the Supreme Court have attempted to answer the proposed question).

19. *See* Ortiz v. United States, 138 S. Ct. 2165 (2018).

20. 28 U.S.C. § 1259 extends Supreme Court appellate review to decisions by the CAAF by writ of certiorari; if the CAAF declines to review a case, the Supreme Court has no authority to review the action. 10 U.S.C. § 867(a). The CAAF is the highest appellate court for cases arising from the military justice system, hearing appeals from all four Armed Services' courts of criminal appeals (CCA) (Army, Navy-Marine Corps, Air Force, and Coast Guard). *See* 10 U.S.C. § 867 (noting that jurisdiction includes mandatory review of all cases in which a death sentence is adjudged, and mandatory review of cases "certified" by a service's senior Judge Advocate General coming out of the respective CCA; the CAAF may grant review of petitions from the accused upon good cause shown following review from a CCA). The court is an Article I tribunal, administered through the Department of Defense, and consists of five civilian judges serving staggered fifteen-year terms, appointed by the President with the advice and consent of the Senate. 10 U.S.C. §§ 941–42. CCA jurisdiction is described in 10 U.S.C. § 866 (including that court judges are usually military judge advocates, certified and assigned by their respective service's Judge Advocate General).

21. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (current version at 10 U.S.C.§§ 801–946a). For a recent critical review of the CAAF's structure and methods, see Rodrigo M. Caruço, *In Order to Form a More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success as a Court of Last Resort*, 41 VT. L. REV. 71, 74 (2016) (concluding that "CAAF is a court of last resort that, far too often, acts as an intermediate error-correction court").

22. Brief of Professor Aditya Bamzai as Amicus Curiae Supporting Neither Party, Dalmazzi v. United States, Cox v. United States, Ortiz v. United States, 138 S. Ct. 2165 (2018), 2017 WL 5495453.

23. *Ortiz*, 138 S. Ct. at 2173, 2175.

24. U.S. CONST. art. 1, § 8, cl. 14 ("[T]o make Rules for the Government and Regulation of the land and naval Forces."); *Ortiz*, 138 S. Ct. at 2170.

25. *See Ortiz*, 138 S. Ct. 2165.

regulations, and sanctioned by decades of court precedent—plays within this system of criminal law.[26]

This role is the most significant and obvious character trait distinguishing military justice from its civilian relatives. In the last decade, that peculiar role has been repeatedly assailed by concerned citizens and members of Congress in the context of sexual assault prevention, prosecution, and punishment within the ranks.[27] However, in the National Defense Authorization Act of 2020, Congress indicated that their concern over the commander's role exceeded the bounds of just sexual assault offenses and extended to all felonies; Congress required the Department of Defense to report on the feasibility of transferring the discretionary prosecutorial authority from generals and admirals in command over the accused to experienced, independent, military lawyers—for all felonious offenses, regardless of the crimes' military service connection and regardless of the nature of the crimes themselves.[28]

These developments, though recent and (arguably) radical in their suggestions, actually fall into lockstep with the trend toward a "civilianization" of military justice, in matters substantive and procedural, that began in earnest with the enactment of the UCMJ in 1950.[29] This Article

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26. *See id.*

27. *See, e.g.*, Caitlin M. Kenney, *Pentagon: Reports of Sexual Assault, Harassment in the Military have Increased*, STARS AND STRIPES (Apr. 30, 2020), https://www.stripes.com/news/us/pentagon-reports-of-sexual-assault-harassment-in-the-military-have-increased-1.627966; THE INVISIBLE WAR (Chain Camera Pictures Jan. 20, 2012); Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 POL. & SOC'Y 101 (2009); Maureen Dowd, *America's Military Injustice*, N.Y. TIMES (May 7, 2013), https://www.nytimes.com/2013/05/08/opinion/dowd-americas-military-injustice.html?hp&_r=0. For summaries of the legislative efforts to investigate and drive change in military sexual assault prevention and prosecution, see Caruço, *supra* note 21, at n.3 and n.4, and see BARBARA SALAZAR TORREON & CARLA Y. DAVIS-CASTRO, Cong. Rsch. Serv., R43168, Military Sexual Assault: Chronology of Activity in the 113th-114th Congresses and Related Resources (May 16, 2019), and KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, Cong. Rsch. Serv., R44944, Military Sexual Assault: A Framework for Congressional Oversight (Sept. 12, 2017).

28. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 (2019) (codified as § 540F) ("Report on Military Justice System Involving Alternative Authority for Determining Whether to Prefer or Refer Changes [sic] for Felony Offenses Under the Uniform Code of Military Justice."). For an extended treatment of this Congressional requirement, see Maurer, *supra* note 15. The Department of Defense Office of General Counsel tasked this study to the Joint Service Committee on Military Justice, which chartered a subcommittee it called the "Prosecutorial Study"; the Subcommittee's report was publicly released on September 2, 2020, and is found at *Report of the Joint Service Subcommittee Prosecutorial Authority Study*, JOINT SERV. COMM. ON MIL. JUST. (Sept. 2, 2020), https://drive.google.com/file/d/11Pq2a9iOi0jPAg6CAStUmSLZ3hkSGmUY/view. Congress continues to advance proposals—at least some of which is likely to be include in the National Defense Authorization Act for Fiscal Year 2022–for removing the referral (court-martial convening) authority from the commanding officer; as of this writing, the Senate bill would transfer convening authority to senior judge advocate prosecutors for all "felonies;" a House version would only impact the commander's prosecutorial authority over "sex crimes." For a summary of the two bills and their implications for other elements of military justice, see Daniel Maurer, Comparative Analysis of UCMJ Reform Proposals, CAAFLOG (June 4, 2021), https://www.caaflog.org/home/maurer-comparative-analysis-of-ucmj-reform-proposals.

29. *See, e.g.*, Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, *in* THE CONSTITUTION AND THE FUTURE

will not provide an exhaustive treatment of the winding historical road of military justice, for that path has already been traveled and described quite well by numerous scholars and military justice practitioners.[30] Instead, this Article will focus on just one narrow but necessary question implied by these developments: How *exactly* do we understand—and how should we accurately describe—the logic of a separate military justice code?

This is a critical, yet wholly analytically underdeveloped, issue. A code of law that criminalizes both martial wrongdoing (*e.g.*, absence without leave, disobedience to superior officers and orders, dereliction of duty, mutiny, conduct unbecoming an officer and gentlemen, conduct that is "of a nature to bring discredit upon the armed forces")[31] *and* typical offenses that are largely analogous to state criminal statutes (*e.g.*, murder, rape, robbery, kidnapping, arson, extortion)[32] deserves such scrutiny. That the Code invests in non-lawyers' substantial authority to decide when, how, and whether to charge, prosecute, discipline, and punish members of this separate "community" for all of these offenses is another reason for that scrutiny. That the Code imparts, and the Courts accept, constraints on certain civil liberties in the process makes that deserved scrutiny an imperative.

This scrutiny begins in Part I, with a brief description of *Ortiz* and its (so far) unheralded implications, for the emphasis of the Court's attention in that case reasonably suggest that most conventional arguments defending the current shape of American military justice may be eroding in their persuasiveness, if not validity.[33] While clearly falling within the tradition of grand deference to Congress in its military rule-making endeavors and to the

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OF CRIMINAL JUSTICE IN AMERICA 287 (John T. Parry & L. Song Richardson eds., 2013); Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/opinion/military-justice-congress.html; Dan Maurer, *Are Military Courts Really Just Like Civilian Courts?*, LAWFAREBLOG (July 13, 2018, 10:00 AM), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts; *accord* United States v. Briggs, 141 S. Ct. 467, 471 (2020).

30. *See, e.g.*, CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016); JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2nd ed., 1920); Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980); Walter T. Cox III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987); WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 3–15 (1955); JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE (2013).

31. 10 U.S.C. §§ 886, 890, 892, 894, 933, 934 respectively. This Article will refer to these types of offenses that have no civilian analogue and are military service-connected only as "martial offenses" or "martial misconduct." The Author prefers this term over "military-related" offenses or "military crimes" because *all* offenses—civilian-type or otherwise—in the UCMJ are by definition "military offenses." The Author wishes to describe a particular *character* of the conduct and misconduct, associated with the state's use of armed force and engaged in only by those who are authorized to use that armed force, and "martial" conveys that more specialized meaning.

32. 10 U.S.C. §§ 918, 920, 922, 925, 926, 927 respectively.

33. *See infra* Part I (explaining that *Ortiz* declares that the United States Supreme Court exercises appropriate appellate jurisdiction over the United States military justice system).

armed forces in their asserted claims of military necessity,[34] the *Ortiz* opinion may ironically signal increased skepticism at the Court if future cases coming from the CAAF raise more direct assaults on commanders' pretrial discretionary decision-making on subjects ranging from the selection of jury-like panel members to the very decision to refer a case to a court-martial, to the constitutionality of making adult rape punishable by death.[35] Part II rationalizes why rationalization in military law is long overdue, and briefly surveys some historical antecedents of the modern American military code.[36] Part III endeavors to articulate a series of linked premises that form a logic of a separate military justice system in which both military and non-military offenses are punishable, and in which a lay officer, with appropriate qualifications and duty position, plays a central discretionary role.[37]

For the most part, these premises have remained unstated or underemphasized by critics and defenders of the system alike; many, if not most, of these statements are thought of, or at least treated as axiomatic—beyond debate.[38] Each statement, therefore, will be categorized based on its proximity to fact (ranging from mere speculation or assumption, to more validly defensible presumptions). Most importantly, we will distinguish what might be called a "descriptive fact" from what is otherwise better labeled a "normative evaluation."[39] Part IV will describe what seems to be missing from this logic chain, as it seems to not quite square with trends toward civilianization of both substance and procedure in military law, nor with the

34. Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981); Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 CHI.-KENT L. REV. 265, 289 (1994); Steven B. Lichtman, *The Justices and the Generals: Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 915 (2006) (tracing the evolution from a practice of non-interference with decisions coming from military courts, regardless of subject, to one of "affirmative deference"); this attitude was in part based on the Court's acknowledging that civilian courts lack the subject matter expertise to fully review and question assertions underlying military policy preferences. *See id*. at 920 (referring to this as a "laissez faire approach to military justice"). One former Air Force judge advocate and now civilian law professor laments this unjustified deference to the military (or to Congress' law-making about the military) as a signal of the "current state of decay in our civil-military relations." DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 27 (2010).

35. Steve Vladeck, *The New Military Federalism*, HARV. L. REV. BLOG (June 29, 2018), https://blog.harvardlawreview.org/the-new-military-federalism/; *see also* Briggs v. United States, 592 U.S. ___ (2020) (discussing but not deciding the applicability of Article III death penalty jurisprudence in the military).

36. *See infra* Part II (discussing the history of the modern American military code and ultimately why rationalization is crucial in military law).

37. *See infra* Part III (explaining why military law is successful by closely examining linked premises that assist in the argument).

38. *See infra* text accompanying note 400 (illustrating the broad support from those who have served in the military).

39. *See infra* text accompanying notes 358–96 (providing defenses with each premise as it is methodically broken down).

public defenses of this system heralding its intention and ability to achieve justice.[40] Some concluding remarks will follow.[41]

PART I—THE SUBTLE IMPLICATIONS OF *ORTIZ*[42]

One holding of *Ortiz* is that the Supreme Court of the United States "exercises [appropriate] appellate jurisdiction over the United States' military justice system."[43] This system "begins at the court-martial level, or trial level, through each Service's Court of Criminal Appeals, up to the [CAAF], a tribunal with five president-appointed, Senate-confirmed civilian judges."[44]

> The majority's opinion . . . rests on its view that this "integrated court-martial system"[45] is one that "closely resembles civilian structures of justice"[46] and therefore has the same amount of "judicial character" that other non-Article III courts exhibit,[47] which the Supreme Court has long established as part of its jurisdiction.[48] Because of how the Court defended its jurisdiction, [described below], this decision carries non-obvious, but [eye-opening], implications for the [C]ourt's precedent.[49]

Before *Ortiz,* the Court "*had* cleanly segregated military criminal justice from its civilian cousin."[50] The Court "may [have], as a result, inadvertently undermine[d] the conventional arguments from within the military defending a muscular, [prosecutorial and] quasi-judicial role for commanding officers," which is thought to be the keystone within the overall defense of a separate military criminal justice system.[51]

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40. *See infra* Part IV (explaining the weaknesses in the argument developed through the linked premises).

41. *See infra* text accompanying notes 429–73 (summarizing overall opinion on military law and *Ortiz* as well as clarifying less supported opinions).

42. This Section is drawn from an earlier essay published: Dan Maurer, *Are Military Courts Really Just Like Civilian Courts?*, LAWFAREBLOG (July 13, 2018, 10:00 AM), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts. Brief portions of Part I.A through Part I.E may appear verbatim from this earlier essay without quotation marks. Special thanks to the editors at LAWFARE for allowing me to draw from and expand on this material.

43. *See* Maurer, *supra* note 42; Ortiz v. United States, 138 S. Ct. 2165, 2172 (2018).

44. *See* Maurer, *supra* note 42; *Ortiz*, 138 S. Ct. at 2172–74.

45. *See* Maurer, *supra* note 42; *Ortiz*, 138 S. Ct. at 2170 (quoting United States v. Denedo, 556 U.S. 904, 920 (2009)).

46. *See* Maurer, *supra* note 42; *Ortiz*, 138 S. Ct. at 2170–71 (quoting *Denedo*, 556 U.S. at 920).

47. *See* Maurer, *supra* note 42; *Ortiz*, 138 S. Ct. at 2180 (*e.g.*, territorial courts) (quoting *Ex parte* Vallandigham, 68 U.S. 243, 253 (1863)).

48. *See* Maurer, *supra* note 42; *Ortiz*, 138 S. Ct. at 2174.

49. *Id*.

50. *Id*.

51. Maurer, *supra* note 42.

A. Executive vs. Judicial Character of the Military Court System

The basic background facts of *Ortiz* are these: Airman First Class Keanu Ortiz was convicted at a court-martial of both possessing and distributing child pornography.[52] After he was sentenced to a dishonorable discharge and confinement for two years, the Air Force Court of Criminal Appeals—conducting both a factual and legal review of the case below—affirmed the decision.[53] Ortiz then petitioned the CAAF to consider whether one of the three Air Force appellate judges was disqualified from serving on that bench because of his concurrent appointment to the Court of Military Commission Review (an appointment made by the Secretary of Defense, under authority of 10 U.S.C. § 950f(b)(2), and reinforced by a presidential nomination and senatorial confirmation to that court).[54] Ortiz argued that this dual-hatted appellate appointment violated both 10 U.S.C. § 973(b)(2)(A)[55] and the Appointments Clause.[56] The CAAF rejected both arguments.[57] The Supreme Court granted certiorari and held the Air Force judge advocate officer's simultaneous service on both courts did not violate either the statute or the Constitution.[58] But how the Court even made it to the position where it could so decide was not as straightforward as one would have expected.

> To those practicing or observing military justice, the *Ortiz* result seems both uncontroversial and foreordained, as the [C]ourt has reviewed CAAF cases nine times since the late 1980s without questioning its own statutory or

52. *Ortiz*, 138 S. Ct. at 2171.

53. United States v. Ortiz, No. ACM 38839, 2016 CCA LEXIS 337, 2016 WL 3681307 (A.F. Ct. Crim. App. June 1, 2016). That the intermediate appellate court conducts a de novo factual review of every case before it, regardless of the issued raised by the appellant, further emphasizes the central role of the commanders: even though a trained judge, independent from the chain-of-command, presides over each court-martial, the implied influence, and possible risk to the accused's due process, taints the proceedings. Therefore, it is believed, this second check on persuasiveness of the government's evidence is necessary security. *See* 10 U.S.C. § 866(c); United States v. Rosario, 76 M.J. 114 (C.A.A.F. 2017); United States v. Cole, 31 M.J. 270 (C.M.A. 1990); Christopher Mathews, *Introductory Note to Rules of Practice and Procedure of the Service Courts of Criminal Appeals*, *in* MILITARY COURT RULES OF THE UNITED STATES (Eugene R. Fidell & Franklin D. Rosenblatt eds. 2019) ("[T]he service court in effect sits as a second trier of fact empowered to set aside any findings or sentence with which it does not agree."). For a strong argument in favor of abolishing this factual review authority, *see* Matt C. Pinsker, *Ending the Military Courts of Criminal Appeals De Novo Review of Findings of Fact*, 47 SUFF. U. L. REV. 471, 479–80 (2014) (describing this authority as a vestige of a bygone era in which the proceedings at courts-martial were highly irregular with few enforced guarantees of due process and few checks on the legal competence of the counsel, fact-finder, and "law officer" presiding over these tribunals).

54. *See* United States v. Ortiz, No. 16-0671/AF, LEXIS749 (C.A.A.F. 2016).

55. *See* 10 U.S.C. § 973(b)(2)(A) ("Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—(i) that is an elective office; (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.").

56. U.S. CONST. art 2, § 2, cl. 2.

57. United States v. Ortiz, 76 M.J. 189 (C.A.A.F. 2017).

58. Ortiz v. United States, 138 S. Ct. 2165, 2172, 2184 (2018).

> constitutional basis for those reviews.[59] But University of Virginia law professor Aditya Bamzai's *amicus* brief[60] and oral arguments in *Ortiz* suddenly compelled the [C]ourt to confront this jurisdictional authority for the first time.[61] Bamzai observes that the "integrated court-martial system" that climaxes in the CAAF arises from within the [E]xecutive branch.[62]

This is a largely uncontroversial but misleading observation.[63] The military's function as the organ of government responsible for executing national defense relies on the good order and discipline of its members and is under the bifurcated authority of both Congress and the President as Commander in Chief.[64] The novel argument, and what raised the eyebrows and interest of the Court, came next. Under a theory derived from *Marbury v. Madison*,[65] Bamzai reasoned, an executive decision by a body such as the CAAF is no different than then-Secretary of State James Madison's decision to not convey the justice-of-the-peace commission William Marbury demanded ("[f]or constitutional purposes, the members of the CAAF thus stand on equal footing with James Madison in *Marbury*," Bamzai wrote).[66] By analogy, then, just as Justice Marshall explained that the Court had no such Article III original jurisdiction to issue the writ which Marbury sought (because the case or "cause" had not seen any lower appellate review), today's Court should have refused to hear Ortiz's writ of certiorari from the CAAF.[67] Bamzai argued that these military justice cases are not really *cases* at all, as understood by the Framers in drafting Article III or by Chief Justice Marshall.[68] Instead, they are mere exercises in executive power, by Executive Branch officers, and not a reviewable exercise in *judicial* power.[69]

There is little room to disagree that Bamzai's arguments reflect a jurisdictional position that is, in the Court's words, both "new" and "serious."[70] His strategy aimed to convince the Court that the CAAF judges are Executive Branch officers, not judges in the sense of Article III, because they lack the indicia of other Article III judges (life tenure, un-diminishable salaries, etc.), and because the tribunal on which they sit is akin to Executive Branch panels addressing quintessentially Executive Branch prerogatives.[71] However, Bamzai's brief cites cases that predate the Uniform Code of

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59. *See* Maurer, *supra* note 42.
60. *See id*.; Bamzai, *supra* note 22.
61. *See* Maurer, *supra* note 42; United States v. Ortiz, 2016 CAAF Lexis 749 No. 160671/AF (2016).
62. *See* Maurer, *supra* note 42; Bamzai, *supra* note 22.
63. *See* Maurer, *supra* note 42; Bamzai, *supra* note 22.
64. *See* Maurer, *supra* note 42; Bamzai, *supra* note 22.
65. *See* Marbury v. Madison, 5 U.S. 137 (1803).
66. Bamzai, *supra* note 22, at 4.
67. *See Marbury*, 5 U.S. 137.
68. Bamzai, *supra* note 22, at 3–4.
69. *Id.* at 14–16.
70. Ortiz v. United States, 138 S. Ct. 2165, 2173 (2018).
71. *See* Bamzai, *supra* note 22.

Military Justice (UCMJ) involving military commissions from the Civil War, the Spanish-American War, and World War II,[72] and compares the CAAF to the National Labor Relations Board, over which the Supreme Court exerts no original review (for the latter analogy, he refers an argument made by Richard Fallon in his treatise on Federal Courts).[73] "Given that its members lack Article III's structural protections for judges," Bamzai wrote, "that conclusion is unassailable. The CAAF and its members do not exercise 'judicial [p]ower' from which this Court may exercise direct review, but rather the 'executive [p]ower' of the Executive Branch."[74]

In support, he referred to the works of two respected and long-dead military law theorists—Colonel William Winthrop and General George Davis.[75] Both soldier-lawyer-scholars noted that military law ought to be distinguished from civilian judicial work in both substance and procedure.[76] However, Colonel Winthrop, who was also cited favorably by the majority in *Ortiz*, first opined on this matter before the Wright brothers flew at Kitty Hawk,[77] and Davis's treatise was first published during the McKinley administration.[78] The modern military justice system on the other hand began with the UCMJ in 1950, and reached a kind of jurisprudential maturity with the enactment of 28 U.S.C. § 1259, in 1983, giving the Supreme Court direct appellate authority over the CAAF.[79] Bamzai argued, nevertheless, that the mere fact that a statute (like the UCMJ) purports to create a "court" does not, by its words alone, make it a court that exercises judicial power in the sense

72. Bamzai, *supra* note 22, at 14–16 (first citing *Ex parte* Vallandigham, 68 U.S. 243 (1863); then citing *In re* Vidal, 179 U.S. 126 (1900); and then citing *In re* Yamashita, 327 U.S. 1 (1946) respectively).

73. Bamzai, *supra* note 22, at 4–5.

74. *Id*. at 26.

75. *Id.* at 27.

76. *See id*.

77. WINTHROP, *supra* note 30. Despite their age, Winthrop's studies have aged well, so it was not an unreasonable secondary source: Winthrop (almost always his MILITARY LAW & PRECEDENTS book) had been cited in forty-six Supreme Court opinions between 1869 (*United States v. Gilmore*, 75 U.S. 330 (1869)) and 2009 (*United States v. Denedo*, 556 U.S. 904 (2009))—the most recent case involving military law before *Ortiz*), or roughly 80% of cases reaching the Court during that period involving the subject matter jurisdiction, personal jurisdiction, meaning of punitive articles, or due process rights (including writ of habeas corpus right of enemy detainees) afforded by a court-martial, military tribunal, or military commission under the Articles of War or the UCMJ. He was not cited in *Boumediene v. Bush*, 553 U.S. 723 (2008), addressing the Military Commissions Act of 2006, Pub. L. No. 109–366 (2006) (codified at 10 U.S.C. §§ 948–49). Opinions citing Winthrop since the 1970s, as discussed below, addressed the constitutionality of various procedural and punitive articles, like Articles 66, 133, and 134 of the UCMJ. As the Court noted in *Ortiz*, Winthrop has become the "Blackstone" of military jurisprudence. Ortiz v. United States, 138 S. Ct. 2165, 2175 (2018) (quoting Reid v. Covert, 354 U.S. 1, n.38 (1957)). His treatise is considered "the required starting point for anyone who seeks to understand the roots of military law and, especially, how military law was administered in the second half of the nineteenth century," a sentiment clearly embodied by the Supreme Court. William R. Hagan, *Overlooked Textbooks Jettison Some Durable Military Law Legends*, 113 MIL. L. REV. 163, 170–71 (1986).

78. MAJOR-GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (1898).

79. *See* Maurer, *supra* note 42.

intended by Article III.[80] In essence, he wanted the Justices to assert, at least with respect to tribunals created to work within other Branches, that "it is substance, not form, that matters" as the defining characteristics of a court.[81]

It is peculiar then that the amicus brief does not offer a compelling set of features about the military justice system's substance that could have strengthened the position that its "courts" act as mere arms of the Executive Branch.[82] The most striking feature, long recognized by the Supreme Court, is the powerful role the lay commanding officer plays in this system.[83] This "substance" might have undercut the basis on which the Court erected its primary support for the judicial character of the "integrated court-martial system" and the CAAF. That the Court ignored it suggests that role is neither as prominent nor as indispensable as conventionally believed.

B. The Majority's Philosophical Defense of the CAAF's Judicial Nature

Justice Kagan's opinion defended the judicial nature of courts-martial and appellate processes by reciting a half-dozen examples where the military system is similar to typical civilian criminal regimes in its most salient features (*e.g.*, due process protections for the accused, an appellate review system, a stable body of governing case and statutory law, the *res judicata* effect of its decisions, offenses—and punishments—that are indistinguishable from civilian jurisdictions).[84] The Court writes, "courts-martial have operated as instruments of military justice, not (as the dissent would have it) mere 'military command' . . . [a]s one scholar has noted, courts-martial 'have long been understood to exercise "judicial power" of the same kind wielded by civilian courts."[85] In a subsequent footnote, the court again remarks:

> The independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function, as the dissent claims . . . . By adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so—in comparison to, say, a commander in the field—is fundamentally judicial.[86]

And, after referring to Colonel Winthrop's treatise, Justice Kagan writes:

> When a military judge convicts a service member and imposes punishment . . . he is not meting out extra-judicial discipline. He is acting *as a judge*, in

80. Bamzai, *supra* note 22, at 5.
81. *Id.* at 29.
82. *See id.*
83. *Id.* at 16.
84. Ortiz v. United States, 138 S. Ct. 2165, 2174–75 (2018).
85. *Id*. at 2175.
86. *Id*. at 2176 n.5.

> strict compliance with legal rules and principles—rather than as an "arm of military command."[87]

Though the primary holding of the Court in *Ortiz* addresses whether the CAAF correctly decided that a Court of Criminal Appeals judge (an officer on active duty) could simultaneously serve as a judge on the Court of Military Commission Review, it would be mistaken to diminish the majority's recital of UCMJ characteristics as mere dicta.[88] It is critical to Justice Kagan's rebuttal to both Justice Samuel Alito's dissent[89] and Bamzai's arguments.[90]

What Alito and Bamzai *could have* presented, but did not, was a starkly different perspective on the character of military justice. That perspective could have been based not solely on what the pinnacle of that system looks like relative to other Executive Branch tribunals, but on how a "case" like that of Ortiz—an airman convicted of a crime that had nothing directly to do with military efficiency or effectiveness—ever entered into the stream that emptied into the CAAF's pool in the first place.[91] This would have turned the attention to the quasi-judicial and prosecutorial function that a lay officer exercises when executing executive responsibilities as a commander and some of the reasons for that function.

Instead, Justice Alito (joined by Justice Gorsuch) argued that regardless of what the CAAF is named, or what robes the "judges" wear, these decision-makers do not wield "judicial power" as understood by the Framers of Article III; consequently, they should be properly viewed as nothing more or less than a body of Executive Branch agents whose *executive* decisions cannot be directly appealed to the Supreme Court.[92] The dissenters' primary concern, apparently, was that the Court seemed willing to "confer part of the judicial power of the United States on an entity that is indisputably part of the Executive Branch."[93] Justice Alito argues that courts-martial are, *and have always been*, non-judicial tribunals to be used as "instruments of military command," as a means to "assist the President in the exercise of that command authority."[94] The formal enforcement of discipline, thought so intrinsically necessary for competent fighting, is simply and only "the exercise of the [executive] power given to the President as the head of the Executive Branch and the Commander in Chief and delegated by him to

87. *Id.*
88. *See id.*
89. *Id.* at 2175.
90. Bamzai, *supra* note 22.
91. *See Ortiz*, 138 S. Ct. at 2170.
92. *See id.*
93. *Id.* at 2190 (Alito, J., dissenting). As one commentator concludes, "*Ortiz* may stand for the proposition that the mere *specter* of Executive revision, influence, or involvement — without more — will not render an otherwise capable tribunal incapable of exercising 'judicial power' outside of Article III." Note, *Article III — Federal Courts —* Ortiz v. United States, 132 HARV. L. REV. 317, 318, 322 (2018).
94. *Ortiz*, 138 S. Ct. at 2199 (Alito, J. dissenting).

military commanders."[95] Nevertheless, the dissenters did not explain what that delegation looks like in practice, other than to pejoratively describe it as a "recent reform" that would erroneously allow the ill-informed (and the majority, according to Justice Alito) to "mistake a military tribunal for a regular court and thus to forget its fundamental nature as an instrument of military discipline."[96] Moreover, the dissent seems to ignore the possibility that a modern military tribunal might be an instrument of both justice *and* discipline in varying degrees and still exhibit the "judicial character" implied by Article III appellate review without undercutting the practical utility a commander might find in using this authority.[97]

C. Command Responsibility Defines the System's Character

In fiscal year 2019, the year after *Ortiz* was decided, the military convened 1,778 courts-martial.[98] That means at least 1,778 times, an officer other than a judge advocate, in a command billet, made a "command

95. *Id.*

96. *Id.* at 2200.

97. *See infra* Part IV.B (analyzing more information on military justice). To date, the only other legal scholarship published on *Ortiz*, while not focusing on the role of the commander as a central tenant of military justice, criticizes the majority for ignoring two characteristics of the CAAF that seem to cut against its judicial nature: that the President, as Commander in Chief, plays a necessary role in approving certain results after the CAAF has reviewed and opined (approving death sentences and dismissals of officers) and the President's ability to summarily remove judges from the CAAF bench; *see* Maurer, *supra* note 42, at 325–26. One other recent article does take a more holistic review and assumes that the *Ortiz* Court is correct about the court-martial's judicial nature and ponders whether current constitutional protections for due process—applicable to judicial bodies—are available or impeded by the UCMJ. *See* Jacob E. Meusch, *A "Judicial" System in the Executive Branch:* Ortiz v. United States *and the Due-Process Implications for Congress and Convening Authorities*, 34 J.L. & POL'Y 19 (2019).

98. United States Department of Defense, *Reports of the Services on Military Justice for Fiscal Year 2019* (May 6, 2020), https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Report%20-%20FY19%20-%20All%20Services.pdf?ver=2020-07-22-091702-650. This report is required annually by Congress under 10 U.S.C. § 946(a) (Article 146a, UCMJ). These statistics are drawn from the appendices to each service's report and include: general, non-bad conduct discharge special courts-martial, "[b]ad [c]onduct [d]ischarge [s]pecial" courts-martial, summary courts-martial, and the new military judge alone special court-martial under Article 16(c)(2)(a), UCMJ. These new judge alone variant trials may be presided over by a military magistrate (a judge advocate, but not one certified by The Judge Advocate General as a military judge under Article 26(b), UCMJ) designated by the military judge, with the consent of the parties. 10 U.S.C. § 819(c). The maximum punishment available upon conviction by one of these courts, however, is not more than six months of confinement, not more than six months of pay forfeiture, and no discharge may be adjudged. 10 U.S.C. § 819(b). One noteworthy observation drawn from this data is that of the fifty-three new judge alone special courts-martial, the government prosecution was a perfect 53-0. The report does not specify, but I strongly suspect this is because the new forum was only employed as part of a guilty plea. Similarly, the conviction rate at summary courts-martial was around ninety-seven percent, and—while the report does not explain—is typically used as part of a "Summary-OTH" deal, at least in the Army: the accused agrees to plead guilty at a Summary Court-Martial and then accept an "other than honorable" discharge from a follow-on administrative separation process for which he waives his regulatory right to a hearing before a board. This report did not include data on Coast Guard personnel strength, nor data on its non-judicial punishment numbers, but a study should be made exploring why its conviction rate was so low relative to the other services (although, the population of Coast Guard trials is so small that just one year's data would likely be unilluminating).

decision" to charge a subordinate with an offense or series of offenses under the UCMJ.[99] These charging decisions are available to any officer in command, which in the Army for example, may be as junior and inexperienced as a captain in command of a company or detachment (roughly 100–150 soldiers) after only a few years of commissioned service.[100] It also means that at least 1,778 times, an officer other than a judge advocate (upon receipt of legal advice) made a "command decision" to refer that accused service member to a criminal trial of the facts where a potential outcome is the deprivation of life, liberty, or property.[101] Only commanders senior enough, though, to be assigned court-martial convening authority have the decisional responsibility to commit that case to a trial of the facts before a neutral and chain-of-command-independent military judge.[102] In the Army, for example, special and general court-martial convening authorities are typically colonels in command of brigades, major generals in command of divisions, and lieutenant generals in command of corps.[103] (There are other, less prevalent examples of court-martial convening authorities too.)[104] If the accused elects to be tried by a jury-like "panel" (the default) rather than by judge alone, that panel was pre-selected (before the accused's case was up for a referral decision) by a convening authority.[105] Moreover, commanders, wearing their convening-authority hat, approve or disapprove government and defense requests for expert assistance,[106] and may negotiate and accept, on behalf of the government, offers to plead guilty in pretrial agreements.[107] That is to say, commanding officers have a lot of power over what justice

99. United States Department of Defense, *supra* note 98.

100. *Id.*; *see also* U.S. Army Ranks, *U.S. Army Officer*, goarmy.com/content/dam/goarmy/downloaded–assets/pdfs/advocates–army–rank.pdf (last visited May 22, 2021) (for information on the number of troops, officers in the Army command).

101. United States Department of Defense, *supra* note 98; 10 U.S.C. § 819(c); 10 U.S.C. § 819(b) (demonstrating how military trials work and some of the possible consequences of being found guilty).

102. United States Department of Defense, *supra* note 98; 10 U.S.C. § 825(e)(2).

103. *See* 10 U.S.C. § 822(a)(5) (for general court-martial convening authority in the Army); 10 U.S.C. §§ 823 (a)(2), (3) (for special court-martial convening authority in the Army).

104. 10 U.S.C.S. § 822 (assigning "General Court-Martial Convening Authority" to the President of the United States and two other political civilian positions: the *Secretary* of Defense and the various service Secretaries).

105. 10 U.S.C § 825(e)(2); *see also* United States v. Riesbeck, 77 M.J. 154, 162–63 (2018). For vigorous debate about the merits and concerns of this unusual jury-like function in the court-martial, *see* Peter L. Colt, *"Military Due Process" and Selection of Court-Martial Panels: An Illogical Gap in Fundamental Protection*, 2 HAST. CONST. L. Q. 547 (1975); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); Matthew J. McCormack, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013 (1999); Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 170 MIL. L. REV. 190 (2003); Bradley J. Huestis, *Anatomy of a Random Court-Martial*, 2006 ARMY L. 22 (2006).

106. MANUAL FOR COURTS-MARTIAL (2019 ed.) [hereinafter M.C.M.], RULES FOR COURT-MARTIAL *in* MANUAL FOR COURTS-MARTIAL [hereinafter R.C.M.] 703(d)(1).

107. R.C.M. 705(a).

looks like both systematically and case-by-case within the military's criminal justice system.[108]

Under military law, commanders decide, in many instances, whether an allegation of wrongdoing is to be investigated beyond an informal "preliminary inquiry" at all.[109] In complex cases, like homicide or an economic crime, commanders are encouraged to refer the case to professional investigators[110] (in sexual assault allegations, commanders now have no such discretion—any reported allegation becomes an open law enforcement case).[111] In cases arising in the local community—outside of base, camp, post, or installation—local law enforcement authorities generally have the right of first refusal to investigate and prosecute the suspect.[112] Commanders have the discretion to place a suspect under pretrial restraints (sometimes called "conditions on liberty") that restrict the accused's freedom to leave defined areas or take certain actions without the commander's notice and approval.[113] Commanders have the discretion to order a suspect into pretrial confinement for up to seven days with no independent, neutral review of that decision.[114] Commanders then have the discretion (except in sexual assault cases) to "dispose" of the matter in a manner they believe to be right and just.[115] Historically, the Manual for Courts-Martial has discussed this discretion in detail:

> The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any

108. Curry v. Sec'y of the Army, 595 F.2d 873, 878 (D.C. Cir. 1979) ("The power of the convening authority to refer charges to the court-martial is justifiable on two grounds. First, prosecutorial discretion may be essential to efficient use of limited supplies and manpower. The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium. Second, as we previously have stated, maintenance of discipline and order is imperative to the successful functioning of the military."); Mackay v. The Queen, 2 S.C.R. 370, 403–04 (1980) ("From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason."); James W. Weirick & James Joyner, *This is Why Civilianizing Military Justice Can Work*, WAR ON THE ROCKS (Oct. 16, 2015), https://warontherocks.com/2015/10/this-is-why-civilianizing-military-justice-can-work/.

109. R.C.M. 303 ("Preliminary Inquiry into reported offenses").

110. *Id.* ("Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation.").

111. *Id.* ("A commander who receives a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer shall refer the report to the military criminal investigative organization with responsibility for investigating that offense . . . .").

112. R.C.M. 201(d) and Discussion; *see also* M.C.M. App. 2.1, para. 3.1 ("Prosecution in Another Jurisdiction.").

113. R.C.M. 304.

114. R.C.M. 305.

115. R.C.M. 306.

> mitigating or extenuating circumstances, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.[116]

The modern Manual goes on to list fourteen considerations to guide the lay officer, and her judge advocate legal advisor, in making this inherently-prosecutorial decision, including:

> The mission-related responsibilities of the command; . . . [t]he effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command; . . . [t]he nature, seriousness, and circumstances of the offense; . . . [t]he extent of the harm caused to any victim; . . . [t]he truth-seeking function of trial by court-martial; . . . [and] [t]he accused's criminal history or history of misconduct.[117]

The menu of a commander's disposition options, considering these factors, is long. The commander may take no action,[118] she may direct "non-judicial punishment" (a system intended for minor offenses that provides limited due process, exposes the accused to limited punishments, and that the accused may turn down in favor of trial by court-martial),[119] she may instead opt to impose "administrative corrective measures" (e.g., admonishments, written reprimands, transfers),[120] or she may charge the service member with violations of the UCMJ, just as Ortiz's commander opted to do.[121]

By any reasonable reading of these rules, no accused service member ever enjoys access to those half-dozen features of due process that Justice Kagan and the majority highlight without an enforceable decision by a commanding officer.[122] This implies an intimate and necessary judicial function for the commander.[123] But it might yet be fair to object to this

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116. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) [hereinafter M.C.M. 2016], R.C.M. 306(b) and Discussion. This admonition can be found in the previous *ten* versions of the MANUAL, over a period of thirty-five years, dating back to the 1984 edition (that edition marked a substantial rewriting and reorganization of the previous version, last updated in 1969). The most current M.C.M. (2019 ed.) lacks this, but instead refers to a new appendix called "[n]on-[b]inding [d]isposition [g]uidance," whose "intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline." M.C.M. App. 2.1, para. 1.1b., 2.1a.–n.

117. M.C.M. para. 2.1.

118. R.C.M. 306(c)(1).

119. R.C.M. 306(c)(3); M.C.M. pt. V; UCMJ Art. 15 (codified at 10 U.S.C. § 815).

120. R.C.M. 306(c)(2).

121. R.C.M. 307(a); United States v. Ortiz, 138 S. Ct. 2165, 2171 (2018).

122. *Id.*

123. *See generally* Donald Hansen, *Judicial Functions of the Commander*, 41 MIL. L. REV. 1 (1968).

implication as too broadly construing the commander's discretion and suggesting it is without a legal model. Looking at the nature of the available actions a commander could take, they are not so different than a prosecutor working for a U.S. attorney under Justice Department regulations or the county district attorney.[124] Indeed, the Manual for Courts-Martial mentions that Rule 306 disposition decision-factors are based on a military context application of the American Bar Association's Standards for the "Prosecution Function."[125]

The military's regulations articulate something close to a guiding principle behind this grant. The preamble to the Manual for Courts-Martial, for example, says:

> 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.[126]

In the Army's regulation that defines and describes the nature of command responsibility, there is a not-so-subtle link between the UCMJ and the "purpose of military discipline" related to the "controls and obligations imposed on them by virtue of their military [s]ervice."[127] Furthermore, "[c]ommanders are responsible for everything their command does or fails to do."[128] Congress, not just the President, weighs in on the scale and scope of this responsibility too. Section 3583 of Title 10 of the United States Code, detailing the requirements for a commanding officer's exemplary conduct, reads:

> All commanding officers and others in authority in the Army are required . . . [t]o show in themselves a good example of virtue, honor, patriotism, and subordination; . . . [t]o be vigilant in inspecting the conduct of all persons who are placed under their command; . . . [t]o guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; . . . [t]o take all necessary and proper measures, under the laws, regulations, and customs of the Army, [and] to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.[129]

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124. M.C.M App. 2.1, A2.1–4 (Analysis).

125. *Compare* M.C.M. App. 2.1, para. 2.1 *with* AM. BAR ASS'N, *Criminal Justice Standards for the Prosecution Function* (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

126. M.C.M., pt. I, para. 3 (Preamble).

127. *See* Army Regulation [hereinafter AR] 600–20, *Army Command Policy*, para. 1–6(4)(b).

128. AR para. 2-1b.

129. 10 U.S.C.S. § 7233 (2018).

Yet, commanders' legal discretion is not universal. There are several noteworthy restraints on their investigative, prosecutorial, and judicial decision making.[130] Commanders cannot whimsically, arbitrarily concoct offenses that are not already prescribed by Congress in the UCMJ.[131] Each offense must be proved by the government by a "beyond a reasonable doubt" standard.[132] Commanders cannot interfere or inhibit an accused from obtaining legal advice and representation.[133] Commanders cannot attempt, or even appear to attempt, to influence the outcome of a court-martial through contacting directly or indirectly the judge, counsel, or panel members.[134] The commander, before referring a case to a court-martial, must consider written legal advice from his or her staff judge advocate (usually a colonel [or captain, if Navy or Coast Guard] whose independence is at least partially secured through technical oversight by the Office of the Judge Advocate General at the Pentagon, away from the chain-of-command).[135] In addition to the disposition guidance and factors listed in the current Manual for Courts-Martial, that appendix also identifies factors that are emphatically off-limits, including "[t]he accused's race, ethnicity, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs . . . [t]he time and resources already expended in the investigation of the case . . . [and] [p]olitical pressure to take or not to take specific actions in the case."[136] Commanders are also tacitly restrained by the ever-present risk

130. 10 U.S.C. §§ 933, 934.

131. However, under Articles 133 and 134, UCMJ, the terms are so vague (though not unconstitutionally vague) that a commander could theoretically "criminalize" otherwise lawful behavior that has never been criminalized and was not criminal at the time of the accused's act or omission. UCMJ Art. 133, 134. That conduct would still be held to some standards: it must—under the circumstances—be an official act that dishonors or disgraces the person as an officer, seriously compromises the officer's standing, or is unofficial or private behavior that dishonors or disgraces the officer personally thereby "seriously compromising the person's standing as an officer" (UCMJ Art. 133, "conduct unbecoming an officer and a gentleman"); or is to "prejudice of good order and discipline" or "of a nature to bring discredit upon the armed forces" (UCMJ Art. 134); *see*, *e.g.*, United States v. Meakin, 78 M.J. 396, 398 (C.A.A.F. 2019) (holding that an Article 133 conviction of an Air Force Lieutenant Colonel for engaging in explicit online chats about child sex fantasies was not protected speech under the First Amendment, even with no direct or indirect connection to military affairs).

132. R.C.M. 918(c); United States v. Paul, 73 M.J. 274, 278–79 (C.A.A.F. 2014) ("It is a fundamental principle of due process that in order to prove its case, the government must present evidence at trial supporting each element of the charged offenses beyond a reasonable doubt.") (citing *In re* Winship, 397 U.S. 358, 364 (1970)).

133. 10 U.S.C. § 827(b); United States v. Cain, 59 M.J. 285, 294 (C.A.A.F. 2004) ("Members of the armed forces facing criminal charges, like their civilian counterparts, have a constitutional right to effective assistance of counsel."); 10 U.S.C. § 837(a) ("No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.").

134. 10 U.S.C. § 837(a); United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (recognizing that the Code's prohibition on unlawful influence bars not just commanders, but *anyone subject to the UCMJ*, including judge advocates, from engaging in the improper behaviors described by the statute).

135. 10 U.S.C. § 834(a); R.C.M. 406.

136. M.C.M. App. 2.1, para. 2.7a–e.

that their senior commanders have the authority to relieve or evaluate harshly any subordinates that are not impartial, just, or fair systematically or on a case-by-case account and to take the case away from subordinates, withholding jurisdiction and decision-making at the higher level.[137] Furthermore, no commander may decide who the judge in any given case will be;[138] no commander may dictate who will prosecute or defend;[139] no commander may order the accused to plead guilty;[140] no commander may order the accused to testify against himself or otherwise incriminate himself;[141] searches and seizures of personal property during a criminal investigation are bound by the Fourth Amendment's requirement for reasonableness, based on a "reasonable expectation of privacy" test and probable cause standards.[142] Finally, command decisions are subject to inspector general investigations based on credible complaints, claims for redress under Article 138 of the UCMJ,[143] and of course appeals of verdicts and sentences through the service courts of criminal appeals, the CAAF, and ultimately to the Supreme Court.[144]

All this suggests there is more to commander involvement in disciplining service members than just statutory and regulatory grants of legal powers that make them look like investigators, prosecutors, and judges. Rather, with their congressionally imposed duty "to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge,"[145] these military leaders appear entrusted with a normative educational responsibility.[146] That is, these commanders are expected to wield their disciplinary and punitive authority in a way that signals to—or professionally educates—the force about *what right looks like*. The military certainly esteems and promotes martial characteristics: courage under fire, valor, loyalty to one's team, and

137. (AR) 600–20, para. 2–17a–c.

138. 10 U.S.C. § 826(c)(1).

139. 10 U.S.C. § 827(b).

140. R.C.M. 705(c)(1)(a) ("A term or condition in a [plea] agreement shall not be enforced if the accused did not freely and voluntarily agree to it."); R.C.M. 910(d) ("The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705."); *see also* United States v. Care, 18 C.M.A. 535, 539 (C.M.A. 1969).

141. 10 U.S.C. § 831(a); United States v. Mitchell, 76 M.J. 413, 416–17 (C.A.A.F. 2017) (explaining and applying the Fifth Amendment privilege against self-incrimination within a military context).

142. R.C.M. 311(a)(2); R.C.M. 315, 316; *see generally* United States v. Eppes, 77 M.J. 339, 345 (C.A.A.F. 2018).

143. *See* 10 U.S.C. § 938.

144. *See* 10 U.S.C. §§ 866 (Courts of Criminal Appeals), 867 (Review by the Court of Appeals for the Armed Forces", 867a "Review by the Supreme Court".

145. 10 U.S.C. § 3583 (current version at 10 U.S.C. § 7233).

146. *See* 10 U.S.C. § 7233 (discussing the requirement of commanding officers to have exemplary conduct).

controlled aggressiveness.[147] But the military esteems them so much that it holds violations contemptible to the point of criminalization.[148]

By choosing when, and over what conduct, to use that authority, the commander signals what behavior is so undesirable or detrimental to the mission, or to the other members of that unit, that he is willing to set in motion a process that could result in that service member's discharge from the service, reduction in rank, and incarceration.[149] In military parlance, this nothing more and nothing less than an application of establishing a good "command climate," a variable that reflects a collective view of the commander's leadership and each individual's sense of worth, opportunity, and belonging within that command, which is assumed to affect morale, cohesion, willingness to subscribe to military virtues of self-sacrifice, respect, and subordination and—ultimately—mission readiness and mission accomplishment.[150]

D. Precedent: Military Community v. the Civilian Community

This distinguishing feature of military justice has also been expounded, and defended, by the Supreme Court long before *Ortiz*.[151] In *Parker v. Levy*,[152] the Court upheld the conviction of an Army captain for violating several UCMJ articles that, when applied to his conduct, look like restraints on the service member's First Amendment rights.[153] Captain Howard Levy was a physician assigned to Fort Jackson in South Carolina.[154] In his role as the chief dermatologist, he was to conduct a training clinic for Special Forces medics ("aide men") in route to Vietnam.[155] He refused to conduct that training, even after a direct order by his hospital commander instructed him

147. *See* THE HALL OF VALOR PROJECT, valor.militarytimes.com/hero/27560 (last visited Maya 12, 2021).

148. *See infra* notes 189, 251–59.

149. *See* U.S.C. § 7233(3).

150. For an early discussion of the relationship between command climate and indiscipline, *see* Kent S. Crawford & Edmund D. Thomas, *Organizational Climate and Disciplinary Rates on Navy Ships*, 3 ARMED FORCES & SOC'Y 165 (1977). For a widely used military concept, command climate is a surprisingly ill-defined and vague term. Andrew Bell & Kurt Sanger, *We Need to Understand What We Mean When We Talk About Command Climate*, FOREIGN POLICY (May 30, 2013, 2:40 PM) https://foreignpolicy.com/2013/05/30/we-need-to-understand-what-we-mean-when-we-talk-about-command-climate/; for various descriptions and applications of command climate*, see generally* Charles D. Allen, *Ethics and Army Leadership: Climate Matters*, 45 PARAMETERS 69 (2015); Joseph Doty & Joe Gellneau, *Command Climate*, 2008 ARMY MAGAZINE 22 (July 2008); Ananthan S.S. Inderjit, *Evaluating the Command Climate in Military Units*, 1 EUR. J. EDUC. SCI. 165 (2014); ARMY LEADERSHIP AND THE PROFESSION, Army Doctrine and Reference Publication 6–22, para. 6–23 (2019) armypubs.army.mil/epubs/DR_pubs/DR-pubs/DR-a/ARN 20039-ADP-6-22-001-web-0.pdf.

151. *See* Ortiz v. United States, 138 S. Ct. 2165 (2018); Parker v. Levy, 417 U.S. 733 (1974).

152. *Parker*, 417 U.S. at 733.

153. *Id.* at 760–61.

154. *Id.* at 736.

155. *Id.*

to do so.[156] Moreover, Levy spoke to African–American junior-enlisted soldiers on several occasions, outside of his official duties, disparaging the Special Forces (calling them "liars and thieves and killers of peasants and murderers of women and children"), and seemingly advising these soldiers to disobey orders to deploy to Vietnam.[157] Levy was convicted of sowing "disloyalty and disaffection among the troops," violating UCMJ prohibitions on disobeying orders, "conduct unbecoming an officer and a gentleman," and engaging in speech that was "to the prejudice of good order and discipline."[158] His statements, which would have been not only lawful but constitutionally protected if he had been simply Dr. Howard Levy, M.D., not an Army captain to boot, were alleged to be "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful."[159] In reviewing whether his convictions were based on overbroad or unconstitutionally vague criminal UCMJ prohibitions, the *Parker* Court fully embraced the view that military and civilian criminal justice systems are—by virtue of what they intend to do and under what conditions they operate—necessarily and justly different.[160] For example, "[t]he armed forces depend on a command structure that at times must commit men to combat"—one of the "other considerations [that] must be weighed."[161] Speaking to the freedom of speech, the Court wrote:

> [T]he different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[162]

This view echoes sentiments from respected military commanders dating back at least to General William Tecumseh Sherman, who—as the Army's Commanding General—told Congress in 1879:

> [I]t [would] be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into . . . the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence. . . . The object of military law is to

156. *Id.*
157. *Id*. at 736–39.
158. *Id*. at 738.
159. *Id*. at 739.
160. *Id.* at 759.
161. *Id*.
162. *Id*. at 758.

> govern armies . . . of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.[163]

The *Parker* Court also approvingly cited to two cases from 1953, just after the UCMJ was enacted: *Orloff v. Willoughby*, quoting that the military community requires "a separate discipline from that of the civilian";[164] and *Burns v. Wilson*, for the proposition that the "rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[165] Moreover, *Burns* described military law as "a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[166]

The *Parker* Court summarized:

> The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian . . . code.[167]

Fundamentally, therefore, the *Parker* Court's argument was premised on two related features inapplicable to any civilian system of justice. First, the military justice system establishes (by how it empowers commanders) the relationship between the government and military member as an employer to employee, not just as sovereign to a citizen.[168] Second, the military justice system penalizes acts or omissions not criminalized by civilian law.[169] Without the first feature (essentially, the commander's need to enforce among his or her subordinates good order and discipline in context of

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163. JUDGE ADVOCATE GENERAL'S CORP., THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 1775–1975, 87 (1975) [hereinafter THE ARMY LAWYER] (quoting William Tecumseh Sherman, testimony before Congress (1879)).

164. Orloff v. Willougby, 345 U.S. 83, 91–94 (1953) (holding, *inter alia*, that an Army psychiatrist cannot, through habeas corpus attack, obtain judicial review of his assignment to a military duty which he alleges to be contrary to the special professional purpose for which he was inducted and commissioned—Orloff argued that he was denied his assignment and reassigned as a laboratory technician because he refused to sign the oath of loyalty disavowing association with "subversive" organizations. This was not a military justice case, but rather an employment rights case; nevertheless, the Court fatefully signaled its stance on deference: "[J]udges are not given the task of running the Army." *Id.* at 93).

165. Burns v. Wilson, 346 U.S. 137, 140 (1953) (holding, *inter alia*, that federal civilian courts should not substitute their judgment, via habeas proceedings, of the factual or legal sufficiency of a court-martial that had been previously reviewed by military appellate authorities and for which the petitioners had exhausted their remedies under the pre-UCMJ Articles of War).

166. *Id*. at 139–40 ("Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law. Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.").

167. *Parker*, 417 U.S. at 749.

168. *Id.* at 751.

169. *See id.* at 748–51.

preparing, training, or executing military operations), there is no plausible justification for the second.

Nevertheless, this acknowledgement—saying the military's justice system is essentially separate but deservedly so—gets muddier when considering *Schlesinger v. Councilman*,[170] coming on the heels of *Parker* and largely accepting that Court's description of military justice.[171] While not addressing the ultimate jurisdiction problem at play in *Ortiz*, *Schlesinger* addressed whether a federal district court could enjoin court-martial proceedings before the case is even tried.[172] In defending a largely hands-off approach to equitable intervention into military justice (and not questioning its ultimate jurisdiction), *Schlesinger* analogized court-martial proceedings to state court criminal proceedings as a fellow "coordinate judicial system[.]"[173] In other words, the Court believed that, just like state courts, "it must be assumed that the military court system will vindicate servicemen's constitutional rights"[174] because it is "a system established by Congress and carefully designed to protect not only military interests[,] but his legitimate interests as well."[175] Justice Kagan makes the same analogy in *Ortiz*.[176] But what marks *Schlesinger* as particularly noteworthy now in light of *Ortiz* is how it justifies its federalism-like approach.[177] Even more so than for state criminal trials, the Court disfavored equitable intervention because of the unique military exigencies for which this separate criminal code exists (again, emphasizing *Parker*).[178] *Ortiz*, on the other hand, analogizes the military justice system to that of state courts but *eschews* any mention of unique military exigencies and focuses on the due process *similarities* state courts share with modern courts-martial.[179]

E. Implications of Ortiz's Deemphasis on Commanders

The Court in *Ortiz* did what *Parker* said not to do. It explicitly equated the military justice system (including the UCMJ) to civilian codes.[180] It appears that the *Ortiz* Court missed or ignored this critical characterization of military criminal law in its own jurisprudence, somehow finding the role of the commander to be irrelevant to the *character* of the military justice

170. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975).
171. *Id.* at 758–60.
172. *Id.* at 753–54.
173. *Id.* at 756.
174. *Id.* at 758.
175. *Id.* at 759–60.
176. Ortiz v. United States, 138 S. Ct. 2165, 2170, 2174 (2018).
177. Vladeck, *supra* note 35.
178. *See* Parker v. Levy, 417 U.S. 733, 749–51 (1974).
179. *See Ortiz*, 138 S. Ct. at 2176–78.
180. *Id.* at 2174–76.

system atop which the CAAF sits in judgment.[181] It also appears that Justice Alito and Professor Bamzai missed an opportunity to exploit the Court's own precedent about the discipline-centric, commander-driven, integrated court-martial system, not to mention the uncontested rules and regulations for how that system runs, as an alternative to the features Justice Kagan chose to highlight.[182] Recall that part of the Court's proof of the CAAF's judicial character was the fact that the system includes a "vast swath of offenses, including garden-variety crimes unrelated to military service."[183] This proof is rendered less persuasive because it obviously ignores the vast swath of offenses that are clearly, and *only*, related to military service.[184] Rather than argue dismissively that the CAAF is literally robed in "court-like . . . adornments," as Justice Alito did,[185] the better argument against that Court's judicial character label would have emphasized the two features of military justice undergirding the Court's logic in *Parker* and *Schlesinger*.[186]

Finally, the arguments put forth in *Ortiz* should be of concern to those whose job it is to defend the direct role that commanders have under UCMJ (in proceedings other than sexual assault cases).[187] From public congressional testimony offered by the service chiefs and their senior judge advocates general,[188] these defenses generally rely on a few propositions.[189] First,

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181. *Id.*

182. *Id.* at 2170.

183. *Id.* at 2174.

184. *See, e.g.*, 10 U.S.C. §§ 106–108a, 110, 112, 131f, 131g, 132, 133, 134, 883–904b, 905a; *see also* M.C.M., pt. IV, para. 92–108 for specified offenses under UCMJ Art. 134. It is also important to note that the UCMJ, as well as the Articles of War before it, has provided for military criminal jurisdiction over common law offenses like murder, assault and battery, rape, and theft, that are committed in the context of armed conflict such that they are said to be violations of the law of war, like grave breaches of the Geneva Conventions or other international law offenses. Under UCMJ Art. 18, this includes enemy forces' behavior that is not protected or immunized by the Law of War, and "any other law of war violation[s]" by U.S. military members and civilians accompanying those forces in the field that "entails or results in a crime under the UCMJ." John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM & MARY L. REV. 813, 820 (2018). This wider subject-matter and personal jurisdiction characteristic of American military law goes back at least to the Mexican-American War (1847), in which U.S. Forces established "military commissions" to prosecute and punish just about anyone (Mexican civilians or American civilians in Mexico) for violations of Mexican municipal criminal law or any other common law crime (rape, murder, robbery), including but not limited to when the victims of those offenses were American service members. Nevertheless, this Article hews to the reasonable analytical distinction to be made between the use of a separate military justice system for the members of the Armed Forces and the use of the Armed Forces to administer justice over non-military populations; such a distinction was made in C.E. BRAND, ROMAN MILITARY LAW (Univ. of Tex. Press 1968). Thanks to John Dehn for raising this point with the Author.

185. *Ortiz*, 138 S. Ct. at 2190 (Alito, J., dissenting).

186. *See* Parker v. Levy, 417 U.S. 733 (1974); Schlesinger v. Councilman, 420 U.S. 738 (1975).

187. *See* sources cited in *supra* note 27 (noting increased public concern with military sexual assault prevention and punishment).

188. *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on the Armed Services*, 113th Cong. (June 4, 2013), https://www.armed-services.senate.gov/imo/media/doc/pendinglegislationsexualassaultsinmilitaryfullcommhearing060413.pdf [hereinafter *Pending Legislation*].

189. Eliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault*

crimes (any crimes) committed by service members necessarily degrade unit "readiness" or its ability to accomplish its national security functions.[190] But while offenses like absence without leave, drunkenness on duty, and mutiny and sedition clearly do impact mission accomplishment, the effect of crimes not intrinsically related to military functions (like housebreaking, fraud, and extortion) is less obvious and arguably incredulous. For this reason, defenders of the majority view offer a second value proposition: commanders need to retain their role to encourage "trust" from their subordinates.[191] In other words, indiscipline—especially harm caused by one service member against another—will result in serious people with serious authority taking the matter very seriously.[192] Without this trust, the argument goes, the commander is unable to generate and sustain unit cohesion or troop morale necessary for mission accomplishment.[193] Third, without that trust and without swift adjudication, commanders cannot wield the deterrent power of the UCMJ.[194] This would suggest there is no point to a UCMJ if commanders are not its active managers. These contemporary arguments are not that far off from those of the traditional defenders of the status quo like General Sherman quoted above.[195] Before the dramatic reshaping (the "civilianization")[196] of military law with the enactment of the UCMJ, the conventional view held that a court-martial is more like a commander's weapon against the insurgency of criminal activity in the ranks, rather than a forum in which due process permits justice to happen.[197]

Departing from those arguments, the Court in *Ortiz* stresses that this system is primarily an "instrument[] of military justice" and expressly says it is "not mere military command."[198] When the opinion states that "courts-martial of course help to keep troops in line[,] [b]ut . . . ,"[199] it unmistakably suggests that the majority now believes that the fundamental purpose of military justice is *justice*, in the same substantial way that the purpose of Ohio's criminal code is justice.[200] If so, the primary purpose cannot be the commander's need for discipline, implicitly rejecting the rationale behind *Parker*, *Burns*, and *Orloff*.[201] Otherwise, there would be little

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Probes, CNN (June 5, 2013), https://edition.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/index.html.

190. *Pending Legislation*, *supra* note 188, at 90.
191. McLaughlin*, supra* note 189.
192. *See id.*
193. *Id.*
194. *See id.*
195. THE ARMY LAWYER, *supra* note 165.
196. *Id.*
197. *Id.* at 3–4.
198. Ortiz v. United States, 138 S. Ct. 2165, 2168 (2018).
199. *Id.* at 2176 n.5.
200. *See id.* at 2175.
201. *See* Parker v. Levy, 417 U.S. 733 (1974); Burns v. Wilson, 346 U.S. 137 (1953); Orloff v. Willoughby, 345 U.S. 83 (1953).

advantage in opening the court-martial doors to prosecuting even more service members for criminal acts completely unrelated to military service, as the Court did in *Solorio v. United States* in 1987.[202] The Court seems to be saying that the two purposes are related but not equal, with justice laying the superior claim over "good order and discipline" because the latter is merely incidental or a byproduct of a system of rules and laws essentially of the same character as the civilian criminal courts.[203] Well-worn tradition is certainly no bar to reconsidering the historical function of the commander. As the Court said in *Schlesinger*, "ancient lineage, particularly if sprung from circumstances no longer existent, [does not] establish[] the contemporary utility of a rule."[204] We may take the recent, dramatic changes to the UCMJ by the Military Justice Act of 2016[205] as further de-militarization of military law[206] and circumstantial evidence that the circumstances once justifying the ancient lineage of the commander's judicial power are slowly waning.[207]

If the Court is serious that commanders do not play a *necessary* function in making this system *judicial* in character, and that commanders' valid reasons for good order and discipline are of a *secondary* consideration, then arguably there is no practical (or philosophically sound) reason for keeping commanders in the military justice decision loop (with a view toward courts-martial) at all; judge advocates or civilian criminal justice institutions could replace them.[208] Ordering searches and seizures, compelling pretrial confinement, preferring and referring charges, convening courts-martial, and selecting panel members are now on the table as potential areas in which commanders should see their discretionary power (their "command decision" authority over legal matters) ebb, if we take the Court's meaning to its natural conclusion.[209]

Even though this is not the holding of the case or a rule that rings with precedential value, the *Ortiz* argument surely *does* give opponents of the current structure a good argument for changing it and should cause us to question whether *Parker*, *Burns*, and *Orloff* remain authoritative on the

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202. Solorio v. United States, 483 U.S. 435 (1987).

203. *Id.* at 445 n.10.

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

205. Shane Reeves & Mark Visger, *The Military Justice Act of 2016: Here Come the Changes*, LAWFARE (Aug. 29, 2017, 9:00 AM) https://www.lawfareblog.com/military-justice-act-2016-here-come-changes; David A. Schlueter, *Reforming Military Justice: An Analysis of Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1 (2017).

206. Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015).

207. Schlueter, *supra* note 205, at 119.

208. *See, e.g.*, Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 AM. J. CRIM. L. 395 (1992); *see also* REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014), at 113 (Finding 19-4), https://responsesystemspanel.whs.mil/public/docs/Reports/02_RoC/ROC_Report_Final.pdf (appointed by the Secretary of Defense pursuant to § 576(d)(1) of the National Defense Authorization Act for Fiscal Year 2013); *see also* U.S. COMM'N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 200-01 (2013) (statement of Commissioner Dave Kladney).

209. *See* Ortiz v. United States, 138 S. Ct. 2165 (2018).

meaning and purpose of military law more generally. And as one scholar has suggested, *Ortiz* may be a "harbinger of increased interest in military justice by the Justices themselves."[210] These are the unintended consequences of the Court's defense of its jurisdiction over the CAAF and was a missed opportunity for Alito and Bamzai to remind the Court of its own entrenched characterization, for better or worse, of military criminal law.[211]

PART II—REASONS FOR NEEDING REASONS

A. Why Is It a "Special and Exclusive System" Anyway?

"The need for special regulations in relation to military discipline, and the consequent need for justification for a special and exclusive system of military justice, is too obvious to require extensive discussion."[212]

Because it is thought so obvious, military justice—as a "special and exclusive" institution as the U.S. Supreme Court put it—rarely receives this reflective, critical treatment.[213] There are, of course, examples of reflective, critical treatment from within the military itself, but they often occur in spurts and following unusually long periods of armed conflict commensurate with increased congressional oversight and public scrutiny.[214] Moreover,

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210. Vladeck, *supra* note 29. One area in which the *Ortiz* perspective might, in the future, justify the Court's criticism of the UCMJ is personal jurisdiction. The Court has a history of being skeptical of Congressional claims that UCMJ jurisdiction is necessary over civilian dependents of service members (Reid v. Covert, 354 U.S. 1 (1957)); and over ex-service members (United States *ex rel*. Toth v. Quarles 350 U.S. 11 (1955)); finding such jurisdiction to be unconstitutional. As recently as November 2020, a U.S. district court held that UCMJ jurisdiction over retired service members was also unconstitutional—not on equal protection or due process grounds, but for exceeding Congress' authority under Art. I, § 8, cl. 14 ("make Rules for the Government and Regulation of the land and naval Forces"). The court found the government's argument that such extensive personal jurisdiction was necessary to maintain "good order and discipline" extremely wanting. Larrabee v. Braithwaite, No. 19-654, 2020 WL6822706 (D.D.C. Nov. 20, 2020). If this matter should make its way to the Court of Appeals for the D.C. Circuit, the government will again be hard-pressed to justify why such jurisdiction aids the military in its goal of sustaining a disciplined, obedient, fighting force when there is no evident prejudice to good order and discipline caused when a retiree, like Larrabee, commits an entirely non-martial offense, harming no military victim or property, and involving no means, motives, or opportunities created by or connected to the military. Aside from its illogic, such a claim is inconsistent with *Ortiz*'s message that courts-martial are *fundamentally and principally about justice*, not primarily an aid or instrument of the command designed for disciplining service members into more a reliable and effective armed forces.

211. *See Ortiz*, 138 S. Ct. at 2165.

212. Chappell v. Wallace, 462 U.S. 296, 300 (1983). Scholar-lawyer-soldier Colonel C.E. Brand wrote "[i]t is of course prerequisite to the exercise of military command that the commander must have some latitude of disciplinary control over his military subordinates that is independent of the judicial process." BRAND, *supra* note 184, at viii, n.1. Of course, the questions that naturally follow are: What does "some latitude" mean in practice, and just how "independent?"

213. *Chappell*, 462 U.S. at 300.

214. *See, e.g.*, The Committee on the Uniform Code of Military Justice [and] Good Order and Discipline in the Army, *Report to Honorable Wilber M. Brucker, Secretary of the Army*, (18 Jan. 1960) [hereinafter *Powell Report*] (loc.gov/rr/frd/Military-Law/pdf/Powell_report.pdf) (comprehensive review

independent, private organizations like the National Institute of Military Justice—consisting of respected senior practitioners (mostly retired judge advocates)—have occasionally conducted hearings and submitted reports to the Department of Defense and to Congress.[215] From time to time, legal scholars weigh in with studies of military law and usually from the advantageous vantage point of having had prior government experience and exposure to the issues and contexts in which criminal law is applied within the military.[216]

Other than these fairly isolated and obscure efforts, military justice remains mostly undisturbed as a system of law that exists parallel to, and usually in lieu of, conventional civilian courts of justice and criminal procedure.[217] It is a system of law carved out from the larger justice enterprise

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by Army leadership of the practice of law after approximately ten years of discipline under the UCMJ); William C. Westmoreland and George S. Pugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1, 3 (1980) (concluding, in the wake of the Vietnam War, that the UCMJ failed to accomplish its goals in combat settings or other times of military stress); Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 2010 ARMY L. 12 (Sept. 2010); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014); Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N. D. L. REV. 485 (2014).

215. *See* 2001 Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (2001 Cox Commission Report) and 2009 Final Report of the Commission on Military Justice (2009 Cox Commission) https://nimj.org/topics/military-justicelaw/cox-commission/.

216. *See, e.g.*, BRAND, *supra* note 184, at ix; BISHOP, *supra* note 30 (a self-proclaimed informed rebuttal to what he viewed as ill-informed polemical accounts, mostly journalistic in nature, erupting out of the anti-war and anti-government skepticism of the 1960s and early 1970s, like ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AND MILITARY MUSIC IS TO MUSIC (1970); BRAY, *supra* note 30. Steve Vladeck, a prolific civilian scholar and practitioner, has observed that the relatively small volume of civilian scholarship about military justice is in part due to the Supreme Court's infrequent review of courts-martial, yielding fewer appellate opinions, and consequently a dearth of fodder on which academics might chew; but he notes that the underlying reason for the Supreme Court's infrequent forays into this field is that it may—by statute—only hear cases that have already been reviewed by the CAAF, and the CAAF only reviews a few dozen cases per year, leaving much of the "law" to be made at the court-martial level itself, which is difficult to both generalize and to observe. Steve Vladeck, *Why Military Justice Doesn't Get Enough Academic Attention*, JOTWELL (Aug. 14, 2018) (reviewing Caruço, *supra* note 21). I assume he refers to the relative dearth in scholarship by civilian scholars with no military service experience themselves, for the citations in this article to former or retired military lawyers—now academics—should certainly indicate that scholarship about military justice is alive and well, just within a relatively small group (*see*, *e.g.*, citations to Corn, Dehn, Dunlap, Fidell, Fissell, Hansen, Lederer, Maggs, Mazur, Rosenblatt, Schenck, Schlueter, and VanLandingham).

217. BRAY, *supra* note 30, at xi–xii ("Military justice is separate from civilian justice, but not separate from American society; it's a different forum, but it's not a different country. . . . [t]he court-martial is a strange creature, and it delivers a separate kind of justice. Military courts have always judged cases with a set of values, procedural rules, and practical considerations that have no place in other court systems."). Critics of Congress' recent foray into military justice, challenging the expertise of the military courts and the presumption of credible command decision-making with regard to sexual assault offenses, would likely disagree that the system is "undisturbed." Retired Air Force Major General Charles Dunlap, the former Deputy Judge Advocate General for the U.S. Air Force, has been the most outspoken and consistent of these critics. *See*, *e.g.*, Charles J. Dunlap, Jr., *Top Ten Reasons Sen. Gillibrand's Bill is the Wrong Solution to Military Sexual Assault*, JUST SECURITY (Dec. 9, 2013), https://www.justsecurity.org/4403/

for a relatively small subpopulation based exclusively on their membership in a specialized functional profession.[218] It is system of law that forbids a much wider range of conduct for this much smaller community than civilian law can possibly "carve out" for the majority population.[219] It is an instrumentalist system of law that considers due process norms and rules (e.g., right to assistance of counsel, right to confront witnesses, presumption of innocence, etc.) as side constraints on the operational flexibility of those entrusted with running the system, rather than those due process norms as a starting point and baseline unaffected by goals of efficiency.[220] It is an instrumentalist system of justice, but that's not all: duty and the martial-based expectations that flow from that duty are baked in:

> "Stern discipline and uncomplaining obedience to orders is the first principle in the science of war, which no successful general in the world's history has ever disregarded."[221]

It is a system of law that often asks its critics and courts to simply trust practitioners' convictions that the system is both legitimate and fair (and in a

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guest-post-reasons-gillibrand-bill-is-wrong/ ("it is mindboggling to me as to why anyone would think that the way to fix anything in the military would be to take the commander out of the process"), and his original essay fleshing out this argument at Charles J. Dunlap, Jr. *Top Ten Reasons Sen. Gillibrand's Bill is the Wrong Solution to Military Sexual Assault* 1 (Nov. 28, 2013), https://scholarship.law.duke.edu/faculty_scholarship/3153/ ("It is axiomatic in the military that everything important is commander-led"); Charles Dunlap, *Civilianizing Military Justice? Sorry, It Can't — and Shouldn't — Work*, WAR ON THE ROCKS (Oct. 8, 2015), https://warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/; Charles Dunlap, *Outsourcing Military Discipline: Bad for Everyone*, WAR ON THE ROCKS (October 27, 2015), https://warontherocks.com/2015/10/outsourcing-military-discipline-bad-for-everyone/.

218. 10 U.S.C. § 802 (UCMJ Art. 2); *see* Solorio v. United States, 483 U.S. 435 (1987).

219. Parker v. Levy, 417 U.S. 733, 749 (1974) ("the [UCMJ] essays [are a] more varied regulation of a much larger segment of the activities").

220. Burns v. Wilson, 346 U.S. 137, 140 (1953) (noting the recent enactment of the UCMJ reformed and modernized military criminal law and procedure, the Court observed that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck."); *accord* Reid v. Covert, 354 U.S. 1, 36 (1957) ("Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. . . . [Therefore] there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts."); United States v. Merritt, 1 C.M.R. 56, 62 (C.M.A. 1951) (speaking to the role of the President in promulgating rules for structuring and operating courts-martial, in the immediate wake of newly-enacted UCMJ, the court opined "we conclude that Congress intended that the President should be fettered only to the extent that his orders must be consistent with and not contrary to the Act, and that he be permitted to exercise his discretion in prescribing the manner of prosecution so long as he provided a method by which all offenses could be prosecuted."); *see also* United States v. Kelson, 3 M.J. 139, 140–41 (C.M.A. 1977) (interpreting the meaning and intent of UCMJ Art. 36 the court concluded the President's "authority in that regard is limited only by the requirement that the rules be consistent with the Constitution or other laws.").

221. Unknown source, quoted in Arthur W. Lane, *The Attainment of Military Discipline*, 55 J. MIL. SERV. INST. 1, 2 (1914).

sense legitimate *because* it is fair, or fair *because* it is legitimate),[222] and that further explanation is a matter of closely-held and hard-earned professional military expertise, defying easy civilian translation.[223] It is a system of law that dresses itself in semantic ambiguities (nowhere in military law is the phrase "good order and discipline" actually defined) while admitting no need for express definitions or empirically-based justifications.[224]

But this does not mean it is a system of law that cannot be justified and explained in a credible way. If military criminal law is, as some say, *sui generis*,[225] then it *must* be justified and explained in a credible way.[226] The effortless response that military justice is self-evident, grounded in unquestionable common-sense, like that expressed by the Supreme Court in *Chappell v. Wallace*,[227] is simply wrong. Leaving it to undefined platitudes and catchphrases like "promote justice" and "maintain good order and discipline," as the United States military justice system does,[228] leaves defenders of this separate legal culture with arguably empty sounding, oversimplified, and overused platitudes. And because the Supreme Court resorts to a default deference to the other branches on nearly all matters relating to the institutional, organizational, and operational military,[229] refusing to demand more than mere reasonable-sounding assertions of government interest (*e.g.*, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies"), there is

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222. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("implicit in the congressional scheme embodied in the [UCMJ] is the view that the military court system generally is adequate to and responsibly will perform its assigned task. . . . it must be assumed that the military court system will vindicate servicemen's constitutional rights.").

223. Dunlap, *supra* note 217 ("Perhaps because Sen. Gillibrand, like many of her supporters, has no military service or related experience on her resume, her proposal and her statements in connection with it reflect almost no appreciation for the potential harm to the nation's security her bill could cause.").

224. Jeremy S. Weber, The Disorderly, Undisciplined State of the "Good Order and Discipline" Term, (16 Feb. 2016) (thesis, U.S. Air War College). (available at https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/weber_j.pdf?ver=2017-12-29-142200-423).

225. *See, e.g.*, AKHIL REED AMIR, AMERICA'S CONSTITUTION: A BIOGRAPHY 330 (2005); Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125 (1989); Burns v. Wilson*,* 346 U.S. 137, 139–40 (1953); *see also* Vladeck, *supra* note 206, at 939 ("Perhaps the most important point to understand about the military exception to Article III is that it is the departure from Article III with the strongest historical pedigree. . . . American military justice predates the Constitution.") (citing the American Articles of War of 1775).

226. *Contra* Chappell v. Wallace, 462 U.S. 296, 300 (1983).

227. *Id.*

228. M.C.M. pt. I (Preamble), para. 3. According to this explanation, which is the closest we have to a "theory" that justifies and explains the logic of the system as a whole, the "purposes" of military law are threefold: "to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote [the] efficiency and effectiveness in the military establishment." *Id.*

229. Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (upholding the Military Selective Service Act against a Fifth Amendment due process challenge, the Court stated: "This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *see also* Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 58 (2006).

no "demand signal" to the institution itself to search for and describe any deeper rationalizations for commander involvement and the scope of that authority in military justice.[230]

Rather, it is a good deal more complicated. In 1974, partly to rebut what he felt to be sensationalized "popular polemics" unjustly kicking around military justice, legal scholar and former World War II War Department official Joseph Bishop, Jr. wrote that military law, while flawed in many regards, is "not a debasement and corruption of the ordinary criminal process in the interest of military discipline, but a very gradual and still partial homologization [sic] of civilian criminal justice by a penal system with totally different purposes and origins."[231] Writing in 1980, reflecting on their experience in Vietnam, the former commander of American forces in that combat theater and his former legal advisor wrote that law and armed forces are "competitors for authority" in an age-old battle of ideas.[232] These two ideas have a

> [L]imited tolerance or respect for the institutions and doctrine of the other. One is essentially a restriction upon the exercise of power while the other is essentially the effective use of power . . . but both deal with matters deemed vital to the state: [those are] stability, safety, and security.[233]

A commander's "full and immediate disciplinary authority"[234] was developed originally as a means of direct command and control during conflict over large groups of armed men whose fighting qualities, motives, loyalties, and bravery were easily questionable and posed risks to combat effectiveness. But, as mentioned earlier, these controls have expanded beyond military-specific "martial" offenses and now admit commanders' prosecutorial and judicial functions over common law-type civilian offenses (e.g., murder, rape, robbery, fraud, kidnapping, arson) that occur off military installations, involve civilian victims, and use means, methods, and for motives totally unconnected to military service.[235] While the standard justifications for the American military justice system are still often explained as key components of fighting well,[236] they do not address how or

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230. MAZUR, *supra* note 34, at 29.

231. BISHOP, *supra* note 30, at 5.

232. Westmoreland & Pugh, *supra* note 214, at 3.

233. *Id.*

234. *See* 2001 Cox Commission Report, *supra* note 215, at 5 (emphasis added).

235. *See supra* notes 228–29 and accompanying text. Periodically in United States history, the government has turned to "military tribunals" during periods of conflict to try military members for civilian crimes and civilians for non-martial offenses, and these have operated alongside traditional courts-martial. *See* Dehn, *supra* note 184; *see also* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (plurality opinion).

236. *See, e.g.*, Memorandum from James Mattis, Secretary of Defense, to Secretaries of the Military Departments, Chiefs of the Military Services, Commanders of the Combatant Commands (Aug. 13, 2018)

why a commander's authority and discretion over *this* non-military conduct serves those purposes or satisfies those interests.

B. The Original Idea

American military justice is aimed at governing personnel constituting the armed forces (in contrast to military law governing *use* of armed force in conflict).[237] It was originally conceived as a tool, an "instrumentality," for maintaining good order and discipline in the field or combat setting.[238] This was thought prudent and inherently necessary for commanders, who require strict obedience to orders and a willingness among the troops to expose themselves to danger.[239] With this form of admittedly "rough justice,"[240] commanders could impose their directive authority via court-martial or other

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(available at http://www.partner-mco-archive.53.amazonaws.com/client_files/154283120.pdf) [hereinafter Mattis Memorandum].

237. M.C.M. pt. 1, para. 3.

238. *See, e.g.*, *In re* Grimley, 137 U.S. 147, 153 (1890); Carter v. McClaughry, 183 U.S. 365, 390 (1902); United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343 (1922); Burns v. Wilson, 346 U.S. 137, 140 (1953); United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17–18, 22 (1955); Reid v. Covert, 354 U.S. 1, 36, 39 (1955); Relford v. Commandant, 401 U.S. 355, 367 (1971); Parker v. Levy, 417 U.S. 733, 751 (1974); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); Chappell v. Wallace, 462 U.S. 296, 300, 302 (1983); Loving v. United States, 518 U.S. 748, 755–56 (1996). *But see* DAVIS, TREATISE, *supra* note 78at 1, n. 1 (explaining that military law means the "rules of action and conduct as are imposed by a State upon persons in its military service, with a view to the establishment and maintenance of military discipline"). Davis interprets discipline in two directions, though: benefiting the nation on the field of battle and protecting the homeland from a "licentious and undisciplined military." *Id.* ("The aim of all military legislation should, therefore, be twofold: first, to render the army as efficient as possible against the public enemy; and secondly, to deprive it of all power of injuring the country which supports it.") (quoting JOHN O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL 3 (1984)).

239. *See, e.g.*, United States v. Grimely, 137 U.S. 147, 153 (1890). While military justice is aimed at those personnel who—as their job—may be called upon to use force, not as a body of law to govern *the use of military force* against an enemy, there is an ironic parallel between military justice and *jus in bello* principles governing the law of armed conflict. Both consider the "military necessity" of the commander's decision, in context, and with extraordinary discretion granted to that commander with significant deference by reviewing, "appellate," authorities. Speaking to the court-martial and death sentences imposed on four junior soldiers convicted of shirking guard duty in various forms on the front lines in World War I, General John Pershing wrote to the War Department: "I recommend the execution of the sentences in all these cases, in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future." Letter from Commanding Gen. John J. Pershing to Army Judge Advocate Gen., *in Establishment of Military Justice—Proposed Amendments of the Articles of War: Hearing on S. 64 Before the Subcomm. On Mil. Affairs*, 66th Cong. 141 (1919) (admitting letters and statements into the record). In this way, the command approached the subject of disciplining the troops in the same way he would approach a tactical problem involving actions by an enemy: swift, conclusive, and harsh in order to effectively remove the threat *and* deter future such threats. *See id.* Compare this with a definition of the *jus in bello* principle of "military necessity" at *Military Necessity*, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC): HOW DOES LAW PROTECT IN WAR?, https://casebook.icrc.org/glossary/military-necessity (last visited May 24, 2021).

240. *See Reid*, 354 U.S. at 35–36 ("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."); United States v. Denedo, 556 U.S. 904, 918 (2009) (Roberts, C.J., dissenting).

ad hoc tribunal to address various kinds of misconduct in the ranks swiftly, set a deterrent example, and thereby enable the unit—and even the convicted service member—to be ready for and fight in combat.[241] It was an imperative, in both senses of the word.[242] Though military law has evolved to embrace more restraints on command interference (or "unlawful command influence") with due process and other checks,[243] the rationale behind this "classical theory of military law" remains current[244] (but not undisputed).[245]

Military law was, according to Winthrop (who was so usefully cited in *Ortiz*), the primary treatise author on the subject at the turn of the twentieth century, a child of twin necessities: "enforcement of discipline and administration of criminal justice in the army."[246] These twin necessities were not unique to the time or American geography. Some form of intra-military criminal justice operated at the behest of military commanders (usually kings and their representatives) prior to the Constitution, and even prior to the

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241. Sherman, *supra* note 29, at 4; s*ee also* DAVIS, *supra* note 78, at 13 (the court-martial has been "an agency for the maintenance of discipline in armies"); WINTHROP, *supra* note 30, at 49 (noting that the Constitution itself in Article I, Section 8, provides Congress a way to legislate into existence tools that the President, as Commander-in-Chief of the military, may use "to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives"). Whether this assertion remains complete or has evolved to be more inclusive and akin to civilian systems both substantively and procedurally is open to argument, including in sections that follow. *See* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 74 (2013).

242. *See* Sherman, *supra* note 29, at 4.

243. *See generally* Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. In 1949, the principal architect of what became the Uniform Code of Military Justice (replacing the loose collection of customs, procedures, and Articles of War that had been rightly criticized as inadequate protections of service member rights), Professor Edmund Morgan testified that "[w]e [the drafting committee] have tried to prevent courts martial from being an instrumentality and agency to express the will of the commander." *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the H. Comm. on Armed Services*, 81st Cong. 38 (1949) (Statement of Professor Edmund F. Morgan, Jr., Harvard University Law School), https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-VI-Morgan-statement.pdf. It is important to note that he and the framers of the UCMJ took pains to ensure that it struck a balance between a commander's need for discipline as a means to the end of mission accomplishment and service member's rights and expectations for "justice." *See id.* Thus, they sought to prevent military justice from being an instrumentality of the *unlawful and unfair* expressions of "the will of the commander." *See* Cox, *supra* note 30, at 10; *Uniform Code of Military Justice*, *supra* note 243. It remained an agency-like instrumentality, but with clearer and uniform standards, rules, and procedures for its wielding. *See supra* Part I.C (explaining how the character of a military justice system is defined by the commander's responsibilities).

244. Cox, *supra* note 30, at 9–10; Huestis, *supra* note 105, at 22–23.

245. Westmoreland & Pugh, *supra* note 214, at 3–4; *see also* Rosenblatt, *supra* note 214. *But see* (for more optimistic appraisals) E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, 2012 ARMY L. 6, 8 (2012) ("The U.S. military's court-martial system is a blue ribbon system of justice, exemplifying the best in the Anglo-American adversarial system while at the same time serving the interests of the military command in preserving good order and discipline. . . . [A]ny advice influenced by the notion that the court-martial system is not fully and practically deployable is advice based on a deeply flawed premise."); Captain Eric Hanson, *Know Your Ground: The Military Justice Terrain of Afghanistan*, 2009 ARMY L. 36, 44 (2009) ("[T]he common misconception that military justice is too difficult to implement or is too distracting to enforce during combat should be corrected.").

246. WINTHROP, *supra* note 30, at 17.

written Articles of War of Great Britain upon which early American military law was grounded.[247] This form of justice remained carved out by the Constitution's Framers and distinct from traditional Article III meanings of judicial power and federal criminal procedures limited by the Fourth, Fifth, Sixth, and Eighth Amendments.[248] Winthrop, for instance, highlighted military disciplinary measures systematically employed by the ancient Greeks and Romans, evolving slowly and maturing during the medieval period of Western Europe.[249] At the time, there was little separation from civil codes in either procedure or purpose.[250] By the European Renaissance, military law in codified form took on a distinctly modern look, with that of Charles V and others forming the basis on which later edicts by Gustavus Adolphus, Peter the Great, and Louis XIV were modeled.[251] Swedish King Adolphus, in particular, created a noteworthy antecedent to modern military justice (including the court-martial as a field-expedient tribunal) when his *Articles of War* were published to his Army in the field in 1621, and comprised less of a statute than a series of martial orders.[252] These Articles in turn influenced the combined efforts of British Parliament and monarchs to devise, execute, and oversee articles of war.[253]

Modern American law has cemented Congress' belief, not just the President's expectation, in the primary place for commanders, at all ranks and unit sizes, at the head of the *disciplinary* formation.[254] As early as 1953, just after Congress enacted the UCMJ to address due process deficiencies and a sense of arbitrary unfairness of commanders publicly raised in the wake of World War II,[255] the United States Supreme Court noted: "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[256] Even though he recognized that many, if not most, of the liberties enshrined in the U.S. Constitution's Bill of Rights protect those in the military, one author cautioned, as recently as 1974, that they apply in an "ill-defined" way, and wrote: "[T]he process

247. *See, e.g.*, AKHIL REED AMIR, AMERICA'S CONSTITUTION: A BIOGRAPHY 330 (2005).

248. *Id.*

249. WINTHROP, *supra* note 30, at 18.

250. *Id.* Hagan, however, notes that Winthrop may have read the *Carolina* (Charles V's "celebrated" code) but that is suspect: the code, according to Hagen, is a universal penal code for the Holy Roman Empire and no provision of it applies specifically to the military. Hagan, *supra* note 77, at 179–80.

251. WINTHROP, *supra* note 30, at 18.

252. Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981); *but see* Hagan, *supra* note 77, at 174–86 (describing what he calls the "Winthrop Gap"—the period of historical development of military codes after English King Richard II in 1385 but *preceding* the Swedish code of 1621, not discussed by Winthrop in his treatise, which has led most modern authors astray with the incorrect belief that Gustavus Adolphus was *the* innovative source for modern Articles of War and discounting *his* foundational sources (an argument that the Adolphus Articles are not as original and innovative as Winthrop and others have repeated)).

253. WINTHROP, *supra* note 30, at 19.

254. *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 140 (1953).

255. *See* Schlueter, *supra* note 205, at 4–5.

256. *Burns*, 346 U.S. at 140.

that is due a soldier is not necessarily the same as that due a civilian."[257] The normative values of expediency and discipline are qualities intended to promote the commander's military effectiveness (and by extension, in the aggregate, facilitate national-level strategic victory).[258] Discipline, for example, might connote "punishment" to civilian ears, but it means something else to military ears: "It means an attitude of respect for authority developed by precept and by training. Discipline [is] a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed."[259]

These values are also echoed in the long-standing customs and traditions of practice, like the role of the commander in conducting some investigations,[260] in criminal charging decisions,[261] in administering punishment for minor offenses through a "non-judicial" forum,[262] in pre-trial confinement decisions,[263] in referring charges to a court-martial to adjudicate guilt and punishment,[264] in authorizing searches and seizures of property,[265] in plea bargaining,[266] in granting testimonial immunity,[267] in granting clemency after convictions,[268] in choosing the members of a standing panel (a close approximation of a jury),[269] and in the types of conduct this body of law prohibits, like dereliction of duty,[270] "disobeying an order,"[271] "conduct unbecoming an officer and a gentleman,"[272] or acts that are "prejudicial to good order and discipline" or are "discrediting to the service,"[273] even when such acts would be not only free from criminal sanction but *constitutionally protected* if in a civilian jurisdiction.[274] Indeed, Article 134 of the modern UCMJ, which permits such sanctions, can be traced back through the early

257. BISHOP, *supra* note 30, at 133.

258. *Id.*

259. *Powell Report*, *supra* note 214, at 11.

260. R.C.M. 303.

261. R.C.M. 306, 401. The general court-martial convening authority may also choose to withdraw and dismiss charges for any reason before findings of fact are announced. *See* R.C.M. 604.

262. 10 U.S.C. § 815 (UCMJ Art. 15); M.C.M. pt. V.

263. R.C.M. 304, 305.

264. 10 U.S.C. §§ 822–825 (UCMJ Arts. 22–25); R.C.M. 601.

265. M.C.M. *supra* note 109 (citing Military Rules of Evidence [hereinafter M.R.E.] 315, 316); *see* United States v. Huntzinger, 69 M.J. 1 (C.A.A.F. 2010).

266. R.C.M. 705.

267. R.C.M. 704.

268. 10 U.S.C. § 860 (UCMJ Art. 60); R.C.M. 1103, 1106, 1107, 1109, 1110.

269. 10 U.S.C. § 825(e)(2) (UCMJ Art. 25(e)(2)).

270. 10 U.S.C. § 892(3) (UCMJ Art. 92(3)).

271. 10 U.S.C. § 890 (UCMJ Art. 90 titled "willfully disobeying superior commissioned officer"); *id.* § 892(1)–(2) (UCMJ Arts. 92(1), 92(2) titled "Failure to obey order or regulation").

272. 10 U.S.C. § 933 (UCMJ Art. 133); M.C.M. pt. IV, para. 90.

273. 10 U.S.C. § 934 (UCMJ Art. 134); M.C.M. pt. IV, para. 91.

274. *See generally* Parker v. Levy, 417 U.S. 733 (1974).

American *Articles of War*,[275] the British *Articles of War*,[276] and a version of it can discerned in the *Articles of War* of Gustavus Adolphus.[277] The ability of the chain-of-command, an authority granted by Congress, to determine if a novel set of facts constitute a wholly novel crime to be punished solely because of its degradation on good order and discipline or to the reputation of the armed forces is a powerful one.[278] And it had its critics as far back, at least, to Sir William Blackstone, who referred to the English version of the late eighteenth century as giving the Crown an "almost an absolute legislative power. . . . A vast and most important trust! [A]n unlimited power to create crimes, and annex to them any punishments."[279] It is as if the single overarching principle of military justice is the "good" of the commander insofar as it enables the commander to perform his military mission.[280] This supports Schlueter's description of military justice as an example of Herbert Packer's *Crime Control* model where efficiency, speed, trust in the fact-finding and decision-making of authority, and the "[p]rimacy of [p]ublic [i]nterest" is emphasized over values of adversarial fact-finding, limits on government's allocation of power, and "primacy of the individual" (what both refer to as the *Due Process* Model).[281] The degree to which any court-martial, tribunal process, or substantive military law deviated from this commander-centric model was considered a measure of the civilianization of military justice, with that label used pejoratively.[282]

> [I]t will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence. . . . An army is a collection of armed men

275. *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS 112–23 (1775); AMERICAN ARTICLES OF WAR OF 1776 (1776), reprinted in WINTHROP, *supra* note 30, at 961–71.

276. BRITISH ARTICLES OF WAR OF 1765 (1765), reprinted in WINTHROP, *supra* note 30, at 931–46.

277. CODE OF ARTICLES OF KING GUSTAVUS ADOLPHUS KING OF SWEDEN (1621), reprinted in WINTHROP, *supra* note 30, at 907–18.

278. *See* 10 U.S.C. § 934.

279. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 403 (Oxford, Clarendon Press 1765).

280. *See id.* This ignores Hart's admonition that a "penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 401 (1958).

281. Schlueter, *supra* note 205, at 49–62.

282. Fidell, *supra* note 225, at 125. For an illustration of criticism, from within the learned judge advocate community, consider that Colonel C.E. Brand referred to these changes, first trickling in after World War I and then in earnest after World War II, as "stifling . . . legal strictures upon day-to-day disciplinary administration" and on "command authority . . . . to the detriment of discipline" that might "effectively disable [commanders] from performing their primary function as disciplinary agencies in time of war or other grave public emergency." BRAND, *supra* note 184, at xviii–xix. For a more recent, though less full-throated, warning about encroaching civilianization, *see* Frederic I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 513 (2017).

> obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.[283]

PART III—CONSTRUCTING A LOGICAL DEFENSE

If the military justice system is to, as Sherman says above, meet civilian skeptics on the threshold of discussion, a sensible preliminary move ought to be to identify its own deductions before it might attempt to shield itself from those of civil practice.[284] As Ronald Dworkin wrote: "If we understand the nature of our legal argument better, we know better what kind of people we are."[285] It is in that spirit and with that intention that we next turn to constructing—if it is possible—a logical explanation of military justice.

A. Characterizing the Premises

Good-faith efforts to explain military criminal law's rationale or motivating principles—as an entire system—are anything but unified or uniform. When assembled, the scattershot descriptions and rationales offered for *pieces* of military justice—for what constitutes a crime worthy of *military* justice's attention, or what criminal procedure properly balances fairness with military operations and context—actually proceed from an easy-to-follow, but not necessarily justified, predicate logic.[286]

To suggest that it is not *necessarily justified* is a loaded, and bound to be controversial, claim. Therefore, in exposing the sometimes unstated bases for why military justice looks the way it does, we should remark upon the relative strengths of the premises in this logic chain and how likely they are to support conclusions about how a separate system of criminal law might satisfy its skeptics. To that end, I suggest we might qualify these premises in the following way:

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283. William Tecumseh Sherman, testimony before Congress (1879) (quoted in THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, 87–88 (1975).

284. *See id.*

285. RONALD DWORKIN, LAW'S EMPIRE 11 (1986).

286. *See, e.g.*, R.A. Duff and Stuart Green, *Introduction: Searching for Foundations*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 1 (R.A. Duff & Stuart P. Green eds.) (2011). Not all theorists of criminal law believe that criminal law is inherently rational or justifiable; because criminal law draws from community definitions of moral wrongs, social customs, and norms and is born from a politically-managed process, it is naturally irrational or at least a-rational. *Id.* In other words, we expect too much if we hunt for logical justifications for why criminal law looks the way it does in practice. *Id.*

Descriptive Fact: a statement illustrated by sufficiently long human experience which a prudent person would necessarily rely upon to draw a conclusion and would *dispute only if* presented with "proof beyond reasonable doubt"; may be treated as general law or principle; something from which a reasonable person may deduce other facts; matches reality; certain.[287]

Presumption: a statement of belief that something is true, supported by enough evidence that a reasonable person could infer tentative conclusions or base further action or ideas upon it as if it were a fact, but which may be refuted objectively by further evidence; its truth is more likely than not; a reasonable person may base upon it a normative evaluation, judgment, or choice among alternatives.[288]

Assumption: a statement of belief that something is true, but where the belief is not based on or supported by direct reference to evidence, such that a reasonable person could use it as the basis to make conclusions, including normative evaluations, that are tentatively accepted in absence of confirming or disconfirmed evidence; its truth is indeterminate.[289]

Speculation: a conclusion inferred from one or more assumptions or presumptions but not necessarily any facts; a reasonable person would not use it alone as a basis by which to make a normative evaluation, judgment, or choose among alternatives.[290]

Normative Evaluation: (given a set of one or more facts, presumptions, or assumptions) a statement about an action, quality, or characteristic that a person, process, system, or other object ought to do or possess; this statement implicitly or explicitly endorses one or more values, principles, or ideals.[291]

These definitions admittedly contain terms that reasonable people knowledgeable about criminal law and military justice might dispute or for which they might demand further definitions (like "reality" or "evidence," or "reasonable person"). Though more refinement is always possible in

287. *See* Jacob E. Gersch & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 592–94 (2008).

288. *See* Murl A. Larkin, *Article III: Presumptions*, 30 HOUS. L. REV. 241, 241 (1993).

289. *See* Steven D. Smith, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1106–07 (1984).

290. *See* David S. Schwartz, *An Excess of Discretion? "Thayer's Triumph" and the Uncodified Exclusion of Speculative Guidance*, 105 CALIF. L. REV. 591, 593 (2017).

291. *See, e.g.*, Michal Buchhandler-Raphael, *Loss of Self-Control, Dual-Process Theories, and Provocation*, 88 FORDHAM L. REV. 1815, 1822 (2020) (discussing "normative evaluations, which rest on . . . policy considerations, communities' shared values, contemporary cultural norms, and moral principles.").

definitions, these general attempts capture enough of their popularly understood meaning as to be useful in assessing the predicate statements listed below.[292] Each statement below will be followed by one of these five tentative labels. For the sake of brevity, and to reinforce that these are tentative, arguable qualifications, this Article invites the reader to judge whether each label accurately characterizes its statement.

B. Premises of Military Justice

When assembled, the logic might read something like this, starting with some very general premises:

SOVEREIGNTY AND ITS OBLIGATIONS

1. National governments create, organize, and oversee specialized bureaucracies to perform various national security and defense missions dictated or influenced by national interests as interpreted by, or designated by, the sovereign.[293] **Descriptive Fact**

2. One such specialized bureaucratic organ is the military, tasked with using its specialized means and methods to protect national interests on behalf of the sovereign through force or the threat of force.[294] **Descriptive Fact**

3. Wars are states of armed conflict recognized under international law between nations, between groups of nations, and between nations and non-state armed groups, using organized armed forces to achieve objectives determined through their respective modes of sovereignty or authority.[295] **Descriptive Fact**

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292. *See supra* notes 287–91 and accompanying text (demonstrating how these terms are commonly defined and used).

293. *See* U.S. CONST., art. I, § 8, cl. 11 (declaration of war), cl. 12 ("raise and support Armies"); cl. 13 ("provide and maintain a Navy"), cl. 14 ("make Rules for the Government and Regulation of the land and naval Forces"), cl. 15 ("provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"), cl. 16 ("provide for organizing, arming, and disciplining, the Militia"); art. II, § 2, cl. 1 ("The President [is] Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

294. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 2, 11–12 (1967); PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 1–2 (2003).

295. U.S. MARINE CORPS, WARFIGHTING 3 (1997).

4. Militaries exist to deter (if possible) and fight (if necessary) wars.[296] "War is the parent of armies."[297] **Descriptive Fact**

WARFIGHTING: WHAT IT IS AND WHO LEADS IT

5. Wars (at any scale) are inherently dangerous physically and emotionally, rife with uncertainty, periodically strenuous, and morally ambiguous.[298] **Descriptive Fact**

6. Fighting wars is the professional jurisdiction, dominion, and responsibility of specialized leaders, called military commanders, who understand how to compete against adversaries in light of the physically and emotionally dangerous, uncertain, strenuous, and morally ambiguous conditions.[299] **Descriptive Fact**

7. Military commanders are granted some degree of discretion and authority from civil leaders, who monitor and regulate them, and within a hierarchical military chain-of-command, to direct larger numbers of people in non-democratic ways.[300] **Descriptive Fact**

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296. THE FEDERALIST NO. 24 (Alexander Hamilton); George Washington, *State of the Union Address* (1790), MOUNT VERNON, https://www.mountvernon.org/education/primary-sources/state-of-the-union-address/#-. These sentiments are largely captured in modern U.S. military doctrine—its internal hierarchy of knowledge and self-identity. *See*, *e.g.*, UNITED STATES DEPARTMENT OF THE ARMY, ARMY DOCTRINE PUBLICATION (ADP) 1-0, para. 1-1 (2019).

297. James Madison, Political Observations (Apr. 20, 1795), 15 THE PAPERS OF JAMES MADISON (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds.) (1985).

298. U.S. MARINE CORPS, *supra* note 295, at 5–17; *see* CARL VON CLAUSEWITZ, ON VICTORY AND DEFEAT: from ON WAR 101 (Michael Eliot Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832) ("War is the realm of danger. . . . War is the realm of physical exertion and suffering. . . . War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty. . . . War is the realm of chance."); *id.* at 113–16 (discussing the characteristics of "danger" and "physical effort" as two "sources" of the "friction" of war); *id.* at 119–21 (describing "friction"); *see also* ANTULIO J. ECHEVARRIA II, CLAUSEWITZ & CONTEMPORARY WAR 103–08 (2007).

299. For the purpose of this section, a "commander" is defined simply as a military officer authorized by a legitimate higher authority (be it civilian or military) to exercise sole direction, leadership, control, responsibility, and discipline over a group of subordinates and military property, the extent to which is usually commensurate with the officer's rank. For examples and illustrations of most common duties inherent to any commander of any rank, in any Service, *see* 10 U.S.C. 7233 (2010) (Congressionally imposed "Requirement of exemplary conduct") and UNITED STATES DEPARTMENT OF THE ARMY REGULATION 600-20, ARMY COMMAND POLICY, para. 1–5 (2014).

300. Brand calls this a principle of "independent self-sufficiency" and the "primary reason" for having a separate justice system for the military community. BRAND, *supra* note 184; *see also* MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 40 (1971); FEAVER, *supra* note 294, at 3, 59–61; Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 214 (1999).

8. It follows that these military commanders are presumptively non-rebuttable: they are authoritative sources for deciding what means and methods are beneficial in directing their subordinates as they prepare for and fight wars.[301] **Presumption**

INGREDIENTS OF SUCCESSFUL WARFIGHTING

9. Military commanders claim that fighting wars well, or preparing well to fight them, demands efficient competence in those they lead and direct, especially in life-threatening, uncertain, and morally ambiguous situations that demand acceptance of risk of self-sacrifice for larger objectives.[302] **Presumption**

10. Efficient competence in these situations, military commanders assert, is due to strict adherence to their lawful orders.[303] **Assumption**

11. Strict adherence to lawful orders, they explain, requires disciplined obedience to superior authority figures from each individual.[304] **Descriptive Fact**

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301. Huntington described this classical view as "objective control" and believed it to be preferable to its opposite, "subjective control." HUNTINGTON, *supra* note 294, at 83–85. Objective control traded the military's voluntary subordination to civilian authority for its professional autonomy and independent discretion on technical matters related to national defense. *See* Dan Maurer, *Fiduciary Duty, Honor, Country: Legislating a Theory of Agency in Strategic Civil-Military Relations*, 10 HARV. NAT'L SEC. J. 259, 279 (2019). Though profoundly influential throughout the American military profession as the "seminal" work of civil-military relations, Huntington's theory of objective control is not without his modern-day critics. *See, e.g.*, Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT'L SEC'Y 7, 8–9 (2020) ("Huntington's norms contain intrinsic weaknesses and fundamental contradictions.").

302. Mattis Memorandum, *supra* note 236; George Washington, *Instructions to Company Captains, 29 July 1757*, *at* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/02-04-02-0223 (last visited May 24, 2021).

303. THE ARMY LAWYER, *supra* note 163, at 87 (quoting the testimony of William Tecsmusch Sherman) ("An army is a collection of armed men obliged to obey one man."); GENERAL WILLIAM T. SHERMAN, MILITARY LAW 132 (1880) ("Every general, and every commanding officer knows, that to obtain from his command the largest measure of force, and the best results, he must possess the absolute confidence of his command by his fairness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all his command[,] [but] [w]ithout this quality no army can fulfill its office."). This view has retained its currency. *See* REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY, *supra* note 28, at 18–19.

304. Eugene A. Ellis, *Discipline: Its Importance to an Armed Force, and the Best Means of Promoting or Maintaining it in the U.S. Army*, 16 J. MIL. SERV. INST. U.S. 211, 212–18 (1895); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMPAR. L. 419, 423 (2008) ("Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands. Even

12. Military commanders train and direct these individuals to function as a cohesive unit to accomplish various goals, in which the individual's ordinary preference, survival instinct,[305] and security is sacrificed for the group's mission, preservation, and security.[306] **Descriptive Fact**

13. The effective privileging of the group over the individual requires each individual to hold themselves accountable, and to hold one another accountable, for actions that undermine the preservation and security of the group, and thus undermine their collective ability to accomplish the commander's mission.[307] **Assumption**

DETRIMENTS TO SUCCESSFUL WARFIGHTING

14. Military commanders expect that some individual subordinates will, at some point, engage or attempt to engage in behavior that does, or likely will, degrade the

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in peacetime, commanders must establish and maintain a high level of respect for authority. . . . The provision granting the commander the means to impose swift and summary punishment to maintain discipline and obedience is thus a critical aspect of any military justice system."). French general and military theorist, Marshal Maurice de Saxe, observed: "[Discipline] is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will be only contemptible, armed mobs, more dangerous to their own country than to the enemy."). MAURICE DE SAXE, REVERIES UPON THE ART OF WAR 77 (Thomas R. Phillips ed. & trans., Dover Publications, Inc. 1944) (1757); *accord* John H. Wigmore, *Lessons from Military Justice*, 4 J. AM. JUDICATERE. SOC'Y 151, 151 (1921) ("[A]ction in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men.").

305. LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST TO LEARNING TO KILL IN WAR AND SOCIETY 5–17 (1995); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 1995 ARMY L. 27, 30 (1995); BRAND, *supra* note 184, at xi–xii ("[I]ndividual well-being becomes secondary to the group efficiency of the fighting unit. . . . The nature of war is essentially such that the military duty of the individual soldier must often require him to act in a way that is highly inconsistent with his fundamental instinct of self-preservation."); Gen. William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1970) ("Discipline conditions the soldier to perform his military duty . . . in a way that is highly inconsistent with his basic instinct for self-preservation."). Note the similarity in language: "highly inconsistent" and "instinct for self-preservation." It appears that General Westmoreland co-opted his definition, nearly verbatim, from an earlier official report published by a blue-ribbon committee, on which he served as a member, on military justice convened in 1959 by the Secretary of the Army released in early 1960 (which appears to have been meant to justify the Army's opposition to a proposed UCMJ amendment (H.R. 3455) then under consideration by Congress). *Powell Report*, *supra* note 214. It is not clear whether Brand was aware of the Powell Report, which predates his book by eight years, but it is plausible: Colonel Brand was a senior Army Judge Advocate; the Judge Advocate General of the Army, Major General Charles Decker, wrote the Preface to Brand's book; and Major General Decker was a member of the Powell committee.

306. JEFFREY C. BENTON, AIR FORCE OFFICER'S GUIDE 41–42 (35th ed. 2008).

307. REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 129 (Annex B: "Report of the Role of the Commander Subcommittee") (2014), https://responsesystemspanel.whs.mil/public/docs/Reports/02_RoC/ROC_Report_Final.pdf; *see also* BRAY, *supra* note 30, at 82.

commanders' capability or capacity to accomplish their objectives because what they are tasked to do runs contrary to their personal preferences and instincts, or—when in combat—their actions are attempts to accomplish the mission or military objective but entails or results in conduct that violates the laws and customs of war or a domestic criminal law.[308] **Descriptive Fact**

15. Behavior that degrades the commander's capability or capacity to accomplish their objectives includes that which directly undermines a lawful and legitimate military order; other such behavior includes that which directly disturbs unit cohesion and morale,[309] that which makes the individual service member less ready to do his duty or perform the mission, that which endangers other service members or service property, that which violates rules or customs of the law of war,[310] and that which aids the enemy in a time of conflict.[311] **Descriptive Fact**

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308. *See* Dehn, *supra* note 184. *Compare* Louis B. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482, 484 (1971) ("Discipline instills in a soldier a willingness to obey an order no matter how unpleasant or dangerous the task to be performed."), *with* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 69 (Harvard Univ. Press 2009) (1881) (explaining a "general theory of criminal liability, as it stands at common law. . . . [that] may be summed up as follows[:] . . . acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent"), *and* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 3 (2009) ("Ultimately, what underlies the criminal law is a concern with harms that people suffer and other people cause—harms such as loss of life, bodily injury, loss of autonomy, and harm to or loss of property. The criminal law's goal is not to compensate, to rehabilitate, or to inculcate virtue. Rather, the criminal law aims at preventing harm."). *See generally* JOHN STUART MILL, ON LIBERTY 21–22 (1859) (first articulation of what has become known as the "Harm Principle"). Control of military forces on the march—to protect the local civilians "from the excesses and depredations of the soldiers"—has been one of the fundamental intentions behind disciplinary codes. Hagan, *supra* note 77, at 181.

309. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("[T]o accomplish its mission[,] the military must foster instinctive obedience, unity, commitment, and *esprit de corps.") (emphasis added).* The U.S. Supreme Court has accepted this view in its largely unbroken deference to the military decisions that seem to impinge First Amendment rights. *Id; see Top Brass Reject Overhauling Military Justice System to Reduce Sexual Assault*, PBS NEWSHOUR (June 4, 2013), https://www.pbs.org/video/top-brass-reject-overhauling-military-justice-system-1377553127/; *see also* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1486, 1492 (2016) (contrasting traditional theories of criminal law—based on just deserts, happiness, or liberty—with Kleinfeld's theory of "reconstructivism," whose "lodestar normative concept is . . . *solidarity*") (emphasis in original).

310. *See* Dehn, *supra* note 184.

311. *See, e.g.*, 10 U.S.C. §§ 885, 894–95, 903a.

16. To ensure that these commanders receive the expected disciplined obedience from their subordinates (individually and collectively), it follows that commanders must be able to encourage and instill a sense of accountability within each individual, and to threaten or to impose disciplinary sanctions as a preventive deterrent, as a rehabilitative method, as a tool of accountability, and sometimes, as retribution.[312] **Normative Evaluation**

17. "Normal" civilian systems of justice and discipline are inadequate venues with impractical processes considering what military members are required to do, where they must do it, and the manner in which it must be done, especially if the misconduct occurs abroad where civilian jurisdiction by the suspect's nation is inaccessible or inadequate.[313] **Presumption**

18. It follows, then, that an alternative to normal civilian justice systems must operate with jurisdiction over military members in which commanders play some role in determining what conduct is to be reformed if

312. SEC'Y OF WAR'S BD., OFFICER-ENLISTED MAN RELATIONSHIPS, S. Doc. No. 196 (1946), at 4, 12, 18 (noting that despite thousands of complaints and recommendations received from active duty, separated, and retired soldiers about the paucity of good officer leadership and "abuse of privileges" among many poorly-qualified officers during the Second World War, all recognized that "discipline and obedience can only be accomplished by creating rank and giving necessary privileges to accompany increased responsibilities" and "no witness maintained that there should not be discipline and strict obedience to orders," and "maintenance of control and discipline [is] essential to the success of any military operation") *See also* Westmoreland, *supra* note 305, at 6 (remarking that the aims of military justice include deterrence of conduct that, "in the military [could be] infinitely more serious to soldiers, to the military organization as a whole, and to the Nation. . . . [which] must be deterred by criminal sanctions," but the aims also include protecting the "discipline, loyalty, and morale," protecting the "integrity of the military organization and the accomplishment of the military mission," and "must also provide a method for the rehabilitation of as many offenders as possible").

313. *See* REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY, JOINT SERV. COMM. ON MIL. JUST. 92 (2020), https://drive.google.com/file/d/11Pq2a9iOi0jPAg6CAStUmSLZ3hkSGmUY/view (last visited May 24, 2021); SHERMAN, *supra* note 29, at 132, quoted in Major George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 30 (2000); GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 2 (2012); *see also* Dehn, *supra* note 184 (discussing American use of military commissions and non-courts-martial tribunals during periods of martial law or military occupation of a foreign country); BRAND, *supra* note 184, at xv ("[T]he ends of military justice are best served by more speedy and more certain action on the part of the court than is possible under the usual safeguards of individual rights which the civil law provides.").

beneficial, deterred if possible, and punished if necessary.[314] **Normative Evaluation**

19. To efficiently and meaningfully place these commanders in a position to credibly threaten or impose this discipline under strenuous, deadly, and ambiguous conditions, it is reasonable to afford them much unfettered discretion to impose their judgment;[315] they "reserve the right to exercise drastic sanctions against their personnel" especially in the context of armed conflict where "their actions center on violence in situations of extreme crisis."[316] The danger of leaving such discretion in the hands of a commander is offset by its inherent "flexibility."[317] **Normative Evaluation**

20. Furthermore, these commanders assert that they must possess a virtual armory of many types of corrective or disciplinary options that they can fit to the specific offense or offender.[318] **Normative Evaluation**

21. These commanders further assert that they must also be granted opportunities to initiate, moderate, and terminate the process that leads to disciplinary sanctions in such a way that these opportunities do not distract or divert time and other resources from their primary military mission.[319] This includes authorities that look like measures of "preventive justice"—that is, on grounds of preventing the *possibility of future criminal harms* that may be committed by certain "likely" offenders, commanders should be able to regulate conduct by imposing constraints on these individuals

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314. Lane, *supra* note 221, at 15 ("[E]very breach of discipline decreases the efficiency of the army; hence it is the duty as well as the right of those in command to administer such punishment as will tend to prevent a repetition of the offense by anyone in the military service. Punishment has three objects: retribution, deterrence[,] and reform[,] [but] [d]eterrence is the primary object.").

315. Sherman, *supra* note 29; *see also* Mackay v. The Queen, 2 S.C.R. 370, 403–04 (1980) ("From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason."); BRAND, *supra* note 184, at vii.

316. JANOWITZ, *supra* note 300, at 43.

317. Delmar Karlen, *The Personal Factor in Military Justice*, 1946 WIS. L. REV. 394, 402–03 (1946).

318. *See generally* Hansen, *supra* note 123 (discussing the indispensable role commanders play in the judicial system).

319. *See* Rosenblatt, *supra* note 214 (citing and discussing numerous unit "After Action Reports" (AARs) from the U.S. Army's experience in Iraq and Afghanistan between 2001 and 2009).

without first a formal criminal conviction that would otherwise justify those regulations and constraints *post facto*.[320] **Normative Evaluation**

COMMANDERS' ROLES AS THE SOVEREIGN'S AGENTS FOR BALANCING COMPETING VALUES INHERENT TO WARFIGHTING

22. These conditions on service member behavior, and affordances of authority to commanders, may appear to diminish or violate constitutionally protected civil liberties and autonomy of individual military service members.[321] **Descriptive Fact**

23. Service in the military is like living in a "separate community,"[322] but not an exercise in surrendering one's constitutional rights; some rights are inviolate, others must—in application—be modified to suit military exigencies and contexts.[323] **Normative Evaluation**

24. Therefore, to the extent that any of these conditions, or affordances of the commander, restrict the civil liberties and limit the autonomy of the individual military service members, reviewing authorities outside of the military ought to grant maximum deference to reasonable decisions made by commanders when those

320. *See* R.C.M 304–305. Under the current American military justice system, a commander is permitted to impose various forms of pretrial restraints like conditions on liberty and restriction in lieu of arrest short of directing a person into pre-trial confinement—which is itself a command-discretionary tool permitted under certain conditions after a crime has been committed. However, due process checks the authority to impose pre-trial confinement. *See* UCMJ Art. 9(d); R.C.M. 305(h), (i). Furthermore, UCMJ Art. 13 prohibits "pretrial punishment" of an accused. UCMJ, Art. 13. Under the less demanding standards of R.C.M. 304, however, "[p]retrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses" and needs only a determination, by the commander, that probable cause exists to believe that the person to be restrained committed an offense and that such restraint is required by the circumstances. R.C.M. 304. One of those circumstances, recognized by the CAAF, is that the restraint is considered by the commander to be "reasonably necessary to protect the morale, welfare, and safety of the unit." United States v. Mack 65 M.J. 108, 109 (C.A.A.F. 2007) (internal citations omitted).

321. *See* Parker v. Levy, 417 U.S. 733 (1974); Kehrli v Sprinkle, 524 F.2d 328 (10 Cir. 1975).

322. WINTHROP, *supra* note 30, at 15; Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

323. United States v. Kazmierczak, 16 U.S.C.M.A. 594, 599 (C.M.A. 1967) ("We start with the fundamental principle that persons serving on active duty in the armed forces of our country are not divested of all their constitutional rights as individuals. . . . However, the Constitution itself recognizes that certain individual rights cannot appropriately be exercised in a military setting to the extent they can in the civilian community.").

commanders make choices consciously, considering military circumstances.[324] **Normative Evaluation**

25. This deference ought to appear as a presumption of validity, if not necessity, in the commander's actions and choices.[325] **Normative Evaluation**

26. "Correction and discipline are command responsibilities in the broadest sense, but some types of corrective action are so severe that under time honored principles they are not entrusted solely to the discretion of a commander. At some point, he must bring into play judicial processes."[326] **Normative Evaluation**

27. "When the judicial process has concluded, however, a further opportunity is given the commander to exert his influence and leadership toward the establishment of discipline."[327] **Normative Evaluation**

28. As a result, it can be said that a military commander exercising this form of control to exact obedience (to both discipline his soldiers *as a form of punishment* and encouraging *a state of disciplined military behavior*)

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324. Lane, *supra* note 221, at 2–3 (juxtaposing five basic "[i]deas of [l]iberty [o]pposed to [m]ilitary [d]iscipline" against five countervailing assertions that justify, in some respects, the "interfering with or suspending" of certain liberties and rights); *see* Orloff v. Willoughby, 345 U.S. 83 (1953) ("[T]here must be a wide latitude allowed to those in command. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *see* Chappell v. Wallace, 492 U.S. 296, 300 (1983) ("[C]onduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.").

325. Korematsu v. United States, 323 U.S. 214, 218–19, 223 (1944); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments."); *Orloff*, 345 U.S. at 93–94; Weiss v. United States, 510 U.S. 163, 179 (1994). To adapt the phrase, this rationale presumes that, "unless the contrary unmistakably appears, that [commanders] are reasonable persons pursuing reasonable purposes reasonably." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1278 (1958); *but cf.* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 188 (1962) ("When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.").

326. *Powell Report*, *supra* note 214, at 11.

327. *Id*. at 11–12.

operates as an agent for the sovereign.[328] **Descriptive Fact**

29. The resulting system of rules, prohibitions, processes, practices, and authorities will operate on the military in two primary respects: as a method for *it to control itself* while it works as the agent for the civilian sovereign,[329] and as a means (in the aggregate) for the *sovereign to control its agent*, the military.[330] **Speculation**

30. The resulting military justice system will yield more disciplined, obedient military members and, therefore, in the aggregate yield a more efficient and effective military that will achieve civilian national security objectives.[331] **Speculation**

C. Some Observations about the Premises

Admittedly, this logic chain is artificial to the extent that nobody purporting to explain, defend, or critique military justice lays out its factual or presumed support in a comprehensive, analytical manner. Such an argument was not made, but skirted around, in *Orloff*, *Burns*, *Parker*, *Schlesinger*, *O'Callahan*, *Solorio*, and *Ortiz*.[332] Indeed, most explanations, defenses, or critiques of military justice begin with something akin to statement 8 (which is only a presumption), skip to statement 11 (a descriptive fact), then to statement 15 (descriptive fact), and move right to a series of normative evaluations describing preferred roles of commanders, the deference owed them by reviewing authorities, and the acknowledged

328. *See* 10 U.S.C. § 3583. Clearly, this way of describing the rationale behind a military justice system, at least as its practitioners have historically and conventionally described parts of it, evokes an image of law-as-forcible-coercion, and a service member's relationship to the military profession, military hierarchy, and to the government as a whole as something illiberal and subjugating, like an "oppressed subject to alien sovereign"—it is, just as clearly, *not* a "liberal polity" within the larger national polity. *See* R.A. Duff, *Theories of Criminal Law*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 14, 2008), https://stanford.library.sydney.edu.au/archives/fall2008/entries/criminal-law/.

329. *See* 10 U.S.C. § 3583. Congress certainly views military officers in this guardian-like role for the benefit of the larger polity.

330. FEAVER, *supra* note 294, at 93; Hansen, *supra* note 123, at 21–22 ("[T]he power to enforce violations of the punitive articles [of the UCMJ] by convening general courts-martial involves a command function designed to insure that the commander has available responsible personnel to effectuate the basic purpose of the armed forces, [that is:] [t]he military establishment's existence can only be justified as an agency designed for fighting and winning wars.").

331. M.C.M. pt. I, para. 3.

332. *See* Orloff v. Willoughby, 345 U.S. 83 (1953); Burns v. Wilson, 346 U.S. 137 (1953); Parker v. Levy, 417 U.S. 733 (1974); Schlesinger v. Councilman, 420 U.S. 738 (1975); O'Callahan v. Parker, 395 U.S. 258 (1969); Solorio v. United States, 483 U.S. 435 (1987); Ortiz v. United States, 138 S. Ct. 2165 (2018).

constraints on otherwise sacrosanct civil liberties (statements 16, 18, 21–27).[333] They avoid, or at best obliquely reference, the nature of war, character of warfare, and the principal-agent dynamic of the civil-military relationship, without which a commander would have no *need* for some mechanism that encourages disciplined obedience, deters misconduct, and facilitates mission accomplishment, and without which a commander would not have the *right, license, or mandate to use* such a mechanism, granted by legitimate civilian authority.[334]

Though artificial, this chain is not arbitrary. While many of the statements are usually left as unarticulated premises or ignored altogether when discussing the character of military justice, each of the statements has an intrinsic relationship to the behavior of military members (like explaining why obedience to orders is such a strongly-defended precept of military professionalism and explaining why some behaviors are dangerous enough to prevent with the threat of punishment). Each identifies the relationship that exists between those military members and commanders. Each either tacitly or explicitly defends various responsibilities and duties of both populations. Each statement, individually, has broad support from those who have served in the military; those who have been assigned as commanders; those who observe and comment on the history, psychology, and philosophy of warfare; those who study the relationship between civilian political authority and military institutions and actors; authors of treatises and casebooks on military justice, and the courts interpreting laws that embody many of these presumptions and operationalize the normative evaluations.[335]

In this sense, the character of this logic chain is artificial only in as much as it is a series of supposed truisms, opinions, and otherwise inchoate

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333. *See*, *e.g.*, BISHOP, *supra* note 30, at 21–25 (recounting the four most recurring arguments in support of a separate justice system with commanders playing key roles).

334. *Id.* at 23–27.

335. *See infra* notes 358–96 (explaining the role these statements play in describing the military experience, and including, *inter alia*, Generals William Tecumseh Sherman and William Westmoreland; Secretary of Defense James Mattis; Alexander Hamilton; James Madison; civil-military theorists Samuel Huntington, Morris Janowitz, and Peter Feaver; scholars of military justice like Eugene Fidell, David Schlueter, and William Winthrop; combat psychologist Dave Grossman; and Prussian war theorist Carl von Clausewitz). This raises an interesting question: In favoring multiple perspectives and points of view over a single relevant perspective, might we be mischaracterizing the relevance and persuasiveness of these statements? For instance, if we only consider the view or intention of Congress—because, ultimately, it is under Article I authority that military justice as a code exists—statements 29 and 30 might not be mere "speculation" but instead stronger "normative evaluations." *See* U.S. CONST. art. I, § 8. That recasting might imply the need to re-evaluate the strength of earlier statements' assumptions, presumptions, and facts. If, on the other hand, we only consider the views of the Executive branch, we might wish to reject statements that accept the dimming of executive authority for the sake of "due process." If we adopt the perspective of a person subject to a military justice code, what gets noticed as a "fact," what counts as a "presumption," and what bears emphasis might go in the opposite direction. I thank Mark Visger for raising this point, specifically with respect to Congress and statement 30. Nevertheless, I punt: it is a problem perhaps left for another day and a deeper probe. The question of "whose point of view should matter (more)?" is at the heart of any debate over granting authorities to some while denying liberties and imposing duties on others, including changing a criminal code.

descriptions pulled from various intellectual and experiential "shelves" and assembled together in a formal order for the first time. Here, I firmly subscribe to political scientist Samuel Huntington's caveat in his influential book on civil-military relations theory:

> [U]nderstanding requires theory; theory requires abstraction; and abstraction requires the simplification and ordering of reality [but] [n]o theory can explain all the facts, and, at times, the reader of this book may feel that its concepts and distinctions are drawn too sharply and precisely and are too far removed from reality. . . . Yet neat logical categories are necessary if [we are] to think profitably about the real world . . . to derive from it lessons for broader application and use.[336]

In broad strokes, we see that this predicate logic chain begins with seven descriptive facts and, much later, culminates in two speculative statements.[337] A traditional military justice proponent would need eleven facts, two presumptions, and two assumptions before being able to arrive at the *first* normative evaluation describing part of how a military justice system ought to be configured: "[T]hat *commanders* must be able to encourage and instill a sense of accountability within each individual, and to *threaten or to impose disciplinary sanctions* as a preventive *deterrent*, as a *rehabilitative* method, as a tool of *accountability*, and, sometimes, as *retribution*."[338] We can further see that by adding one more presumption (statement 17: that normal civilian justice venues are inadequate to the task), proponents of a separate military justice system can make four more normative evaluations in quick succession.[339] These statements about actions, qualities, or characteristics, that *ought* to be the case, include granting largely unfettered discretion to commanders to impose sanctions on subordinates; that there should be a lengthy menu of possible sanctions; and that commanders may "initiate, moderate, and terminate the process that leads" to those sanctions they deem most appropriate.[340]

Add just one more fact—that conditions imposed on military members by the authority of commanders might violate highly-valued civil liberties (statement 22)—and proponents can make an additional five consecutive normative evaluations with no intervening predicate presumptions, assumptions, or facts. These include, first, value-laden ideas like modifying some otherwise fundamental rights of military members (like free speech and privacy), even if those modifications are much more restrictive of individual

336. HUNTINGTON, *supra* note 294, at vii (suggesting a framework through which to analyze these issues at hand).

337. *See supra* notes 293–300 and accompanying text (exhibiting the seven descriptive facts used in the evaluation).

338. *See supra* note 312 and accompanying text (statement 16).

339. *See supra* notes 313–320 and accompanying text (statements 17–21).

340. *See supra* note 319–320 and accompanying text (statement 21).

autonomy and liberty than a civilian would accept. Second, that commanders, in making disciplinary decisions, are owed significant deference by objective reviewing authorities. Third, that a commander's wide discretion, that includes power to impose severe consequences, must be corralled "at some point" by a neutral judicial process because some consequences are too severe in light of those *un*modified individual rights. Finally, fourth, that a commander's leadership responsibilities may still play a role in adjudicating some aspects of individual cases after or outside of judicial processes (see statements 23–27 above).[341]

Ultimately, this argument concludes with two species of speculation, both of which re-orient attention upwards and outwards away from conventional theories about why we seek to deter individuals from committing crimes and punishing those who do so. The first (statement 29 above) infers that a military justice system built around the exercise of authority granted to commanders, acting in quasi-prosecutorial and quasi-judicial executives, over a substantial slice of a military member's actual and potential conduct, is one that both self-regulates and is controllable by higher civilian authority. The second (statement 30) infers that such a system will be best suited to address successfully the descriptive facts about war and warfare that opened the argument (statements 3, 5, and 9).

Of the thirty statements, nearly half (thirteen) are descriptive facts, and these—as one would likely expect—are clustered at the argument's outset, forming reasonable predicates or premises for what might follow.[342] As "facts," they are value-neutral, immune from refutation and considered either obvious and axiomatic, or easily recognized when applying common sense and experience.[343] There are relatively few assumptions (only two) and presumptions (three), which is very good if a traditional military justice system's proponent seeks to infer or deduce consequences based on relevant evidence, draw stronger tentative conclusions, and stand on firmer ground when making choices among alternatives.[344] But note the normative evaluations. Out of twelve consecutive statements (statements 16-27), ten are normative evaluations, defined as "statement[s] about an action, quality, or characteristic that a person, process, system, or other object ought to do or possess."[345] All ten normative evaluations are clustered in the second half of the argument, with the intrusion of only one presumption (statement 17) and one descriptive fact (statement 22) within that cluster.[346]

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341. *See supra* note 322–27 and accompanying text (statements 23–27).

342. *See supra* notes 293–331 and accompanying text (statements 1–30).

343. *See supra* notes 293–300 and accompanying text (statements 1–7).

344. *See supra* notes 293–331 and accompanying text (statements 1–30).

345. *See supra* notes 312–27 and accompanying text (statements 16–27)*; supra* note 291 and accompanying text (explaining what a normative evaluation is).

346. *See supra* notes 312–27 and accompanying text (statements 16–27).

When set against the early cluster of predicate descriptive facts at the argument's opening, this later clustering of normative statements might suggest that such evaluations are not *unreasonable*, but also not *necessarily* deduced from the facts. In other words, each normative evaluation on its own, and when viewed collectively, may be reasonably sound recommendations, but there is no logical inevitability to them; they are not themselves *necessary* deductions from the prefatory facts because they implicitly or explicitly adopt one or more *subjective values*. Consider that a commander could plausibly claim the desirability for a wide range of disciplinary measures (statement 20) regardless of whether the military is a subordinate creature of a democratic civil government or a junta that has displaced civilian law and order with martial control (statements 1–4). Or consider that even if we accept as an inevitability that a military member will commit acts that destabilize the morale, cohesion, and military efficiency of the unit (statement 14), and that morale, cohesion and military efficiency are critical to military effectiveness (statement 15), the statements that the *civilian* criminal law systems and venues are inadequate (statement 17), or that *civilian* judicial systems reviewing commanders' actions should be highly deferential (statement 24) are not inevitably deduced; they instead depend on accepting as "true" certain value-driven principles. It may be appropriate to say that these evaluative statements are *probably* valid by, at least, standards of inference. But it by no means conclusively assures us that conventionally managed systems of military justice are "right" or "better" than nations with no separate military code or a separate code but with significantly different authorities for commanders and fewer proscribed behaviors subject to military jurisdiction. From the statement that civil venues are inadequate given military circumstances (a presumption at best, not a fact; see statement 17), one can infer *not just* that a military venue or jurisdiction, prioritizing the role of the commander, is *an* alternative (a normative evaluation, not a fact; see statement 18). Rather, the inference that we ought to reform civilian processes and venues to make them "adequate" is just as valid a normative evaluation. Alternatively, we could reject the antecedent presumptions altogether. This further reduces the inevitability of what, ultimately, is only a recommendation.

This exercise reveals another stark truth. If one prefers the current system of status-based, worldwide, personal jurisdiction in which commanders have disposition and referral authority for all martial and non-martial offenses listed in the Uniform Code, all thirty premises are relevant to that argument. *But they are not sufficient*. The premises concerning warfighting, and the tools needed by commanders to effectively engage in it, do not directly support or imply subject matter jurisdiction over non-martial offenses committed, for example, off-duty, off-base, involving a

civilian victim or property. Nor do they directly validate or imply an extension of the UCMJ's personal jurisdiction over individuals, like retirees, cadets, or contractors that have no linear relationship to warfighting and the tools commanders deem relevant. Nor do they explain or justify the wide range of investigative and prosecutorial authorities that commanders wield prior to making a charging decision at all; nor do they justify the range of post-referral influence and decisions in the hands of court-martial convening authorities, like approving plea deals, granting immunity, paying for witness travel, and dismissing or withdrawing charges. There may very well be good arguments for all of these characteristics of modern military justice, but they are not found inside the thirty premises sketched above.[347]

Most importantly, though, whether the normative evaluations can be deduced or inferred from the descriptive facts is of secondary importance. No single statement or premise is objectively *incorrect*. It is either a fact, an assumption, presumption, speculation or normative evaluation; at worst, the *jury is still out* for the presumptions (and continuing the metaphor, the case for or against the assumptions has not yet begun in the courtroom), so any speculative statement or normative evaluation based on them are somewhere on a spectrum ranging from persuasive to unpersuasive—but not factually erroneous or descriptively inaccurate. We can now identify and select which ideas are lacking empirical and historical support and spot those ideas most in need of diagnostic attention. Further, by distinguishing some statements as *normative*, we clearly distinguish them from the *facts*.[348] This is the too-often overlooked but essential step toward embracing a rational, persuasive argument for or against a military justice system separate from a civilian system. It is also an essential step toward embracing arguments attending such a system's martial components like the roles of the commander, limits or adaptations on individual liberties, processes for making decisions and oversight in light of the military context, and the forms and severity of punishments.

PART IV—THE INCOMPLETENESS OF THE PREMISES

A. Where Is Justice?

Recall that the Court in *Ortiz* emphatically described military justice—as applied in the venue of a court-martial—not as an instrument of command authority, like an operational order, training tool, weapon system, or keeping disciplined troops organized enough to fight well, but as an instrument of

347. *See supra* notes 293–331 and accompanying text (statements 1–30).

348. *See supra* notes 287, 291 and accompanying text (showing the difference between a descriptive fact and normative evaluation).

justice.[349] We can confidently state that trends, illustrated by implications within *Ortiz* and the congressionally demanded changes over the last half-century, toward civilianization of military justice are trends toward other social good and goals, like justice.[350] If so, then there is a problem within the predicate logic described above in Part III.B.[351] That traditional argument, artificially cast as it might be, centralizes the commander and the "obvious" import of obedience and discipline.[352] It does not emphasize aims of criminal law that run parallel to, if not trumping in some cases, a commander's legitimate need for disciplined, law-abiding, service members. Many of those aims, like justice or "due process," nevertheless are reflected clearly in many of the improvements imposed upon a sometimes reticent and tradition-bound institutional military over the last few decades.[353]

The system of criminal law that results from such reasoning is, like any other, one that can deprive a person of life, liberty, and property, and can attach the stigma of a conviction—the community's formal opprobrium and, in some cases, a lasting "civil disability."[354] Therefore, it ought to strike hard the sensibilities of those expecting any such system to be bound by, at least, the Constitution's protective guarantees. Those guarantees seem less like promises and more like "good to have, but not necessary" though, from starting premises to final conclusions. As legal historian Colonel C.E. Brand wrote in 1968,

> [T]here is substantial doubt among officers of the military judiciary as well as among officers of the line whether the removal of the courts-martial from command supervision and the imposition upon them of the technical and dilatory procedures of the ordinary criminal courts will not effectively disable them from performing their primary function as disciplinary agencies in time of war or other grave public emergency. In such crises, . . . speed and certainty of appropriate disciplinary action would appear to be of higher importance to the survival of the state than assurance of the last drop of abstract justice to the individual accused, whose life is, after all, committed to his commanders to be utilized, and expended if necessary, in the state's best interests.[355]

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349. Ortiz v. United States, 138 S. Ct. 2165, 2170–71 (2018).

350. *See id.*

351. *See generally supra* Part III.B (explaining the predicate logic now argued to be problematic).

352. *See generally supra* Part III.B (same).

353. *See supra* Part I.C (explaining how even the institutional military is seeing justice changes).

354. *See* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 2 (2005) (addressing stigma);David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1280, 1294 (2009) (describing the history of the "civil disabilities test" evolving from United States v. Keane, 852 F.2d 199 (7th Cir. 1988)).

355. BRAND, *supra* note 184, at xix. In a footnote to that passage, Brand continued, remarkably, to say: "Can the Army, consistent with the requirements of discipline . . . of orders, afford to the disobedient soldier the refinements of 'due process of law' which the Supreme Court prescribes for the trial of civilian

Upon reviewing the sad facts and the numerous courts-martial of the Army prisoners accused of "mutiny" at San Francisco's military stockade in 1968 (the Presidio 27), investigative journalist Robert Sherill described the system as "racked by the most arbitrary gusts of emotion and self-interest"[356] largely because a "command[er] is allowed to run his own outfit with all the autonomy of a medieval fiefdom."[357] The thirty-statement typecast rationale seemingly ignores what we now consider basic and fundamental to a just system of criminal law: due process, allocations of the burden of proof and persuasion, and indictments by grand juries and trials by petit jury; it ignores whether a certain punishment may be "cruel and unusual" in violation of the Eighth Amendment.[358] It appears to ignore the role of independent qualified

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offenders? Clearly there is no such requirement in the Constitution; and as surely the Army cannot in reason legally emasculate its military commanders on the field of battle." *Id.*

356. SHERRILL, *supra* note 216.

357. *Id*. at 42. Sherill's account and conclusions drew sharp criticism from law professor and former War Department official Joseph Bishop, who wrote: "Mr. Sherill's specialty is ascending Pisgah-heights of moral indignation." Joseph W. Bishop, *Against the Evidence*, COMMENTARY (June 1971), https://www.commentarymagazine.com/articles/joseph-bishop-2/military-justice-is-to-justice-as-military-music-is-to-music-by-robert-sherrill/. Bishop fact-checked many "fishy" assertions in Sherrill's book, including alleged but uncorroborated statements made by counsel at various courts-martial, mischaracterizing or ignoring actions taken by reviewing appellate courts, and the undervaluation of the historical and constitutional framing of military justice. *Id.*

358. *See, e.g.*, UCMJ Art. 55. Article 55 prohibits cruel and unusual punishments, but its statutory text is limited to barring "flogging, or by branding, marking, or tattooing on the body or any other cruel and unusual punishment." *Id.* In December 2020, the Supreme Court decided United States v. Briggs, 141 S. Ct. 469 (2020). In *Briggs*, the Court addressed a situation in which the punitive consequences of a particular offense (adult rape under Art. 120, punishable by death at the time the offenses occurred, but not at the time they were charged) implicated the UCMJ's statute of limitations (Art. 43) or was instead tied to Art. 55. *Id.* at 470. At the time of the offenses, Art. 120 permitted punishment by death; Art. 43(a) held that any crime "punishable" by death is not subject to the standard five-year Statute of Limitations. *See id.* at 474. But the Court in *Coker* held that death for adult rape was a violation of the Eighth Amendment's ban on cruel and usual punishment, the same goal of Article 55. Coker v. Georgia, 433 U.S. 584 (1977). Thus, the Court could have addressed and answered the novel question—raised by the respondents below—of whether the UCMJ's (now extinct) death penalty for adult rape was unconstitutional under *Coker*. Given that this penalty ended with an executive order in 2016, the Court opted not to answer this question, but rather conducted a narrow statutory interpretation analysis, holding that simply that Congress seems to have rationally intended Article 43(a)'s exemption for rape to remain the law, consistent with the President's determination that the maximum sentence includes death, regardless of *Coker* and regardless of Article 55. *Briggs*, 141 S. Ct. at 473. This reversed the CAAF's decision below and remanded the case for further proceedings. *Id.* This was a missed opportunity. *See* Evan Lee, *Argument Preview: Determining the Statute of Limitations for Military Rape – and Possibly a lot More*, SCOTUSBLOG (Mar. 16, 2020, 3:28 PM), https://www.scotusblog.com/2020/03/argument-preview-determining-the-statute-of-limitations-for-military-rape-and-possibly-a-lot-more/. At the CAAF, and in their arguments to the Court, both parties constructed their arguments, at least in part, on describing the nature of military justice: for the United States, it is about distinguishing the context and demands of military life to justify making rape by a military member punishable by death, even though it is unconstitutional for a civilian to be subject to that punishment. Brief of Petitioner at 31–38, United States v. Briggs, 141 S. Ct. 467 (2020) (No. 19-108) (quoting and citing, *inter alia*, *Parker v. Levy* and *Chappell v. Wallace*). For Briggs and the two other petitioners whose cases were consolidated with his, it was about framing the question in terms of whether the Eighth Amendment prohibition, including the death penalty for adult rape, should be excepted on grounds of "military necessity," rather than framing it as opportunity

judges, protecting the accused from undue political or non-judicial influence, the safeguards and restraints of appellate review and victims' rights.[359] It seems to afford laymen powers of prosecutorial and judicial discretion, beyond simply fact-finding and toward actually defining what acts constitute "crime" that should be punished, and does so for the benefit of expediency and deterrence, but in a way that risks sacrificing commitment to other normative values.[360] It ignores whether a suspect should be afforded representation by counsel when facing potential discipline, and suggests the irrelevance of public trust and confidence in the system.[361] It also ignores how an individual service member, voluntarily joining an organization and profession that imposes this system as a condition of employment, would understand and accept that system's purpose, limitations, and what constitutes the minimum obligations of responsible citizenship.[362] Henry M. Hart once observed that four conditions must always be satisfied if a criminal law system that imposes commands and directions is to function in any given case: (1) the person to whom the command is directed knows that the command exists and what it basically directs; (2) the person must know what circumstances trigger her obligation to conform to that command; (3) she must be able to comply with it; and (4) she must be willing to do so.[363] As noted contemporary military justice scholar, Eugene Fidell asks, "[W]ho would join the armed forces if there was reason to believe that fairness, justice, and the rule of law were not assured? Who would encourage their child or sibling to do so?"[364]

This lengthy typecast rationale described in Part III.B seemingly explains why commanders are well-suited, and necessary, to the task of playing prosecutorial and judicial roles.[365] But at the same time, it simply does not *require* a commander to consider the integrity or consistency of the

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to apply the Eight Amendment for the first time to a court-martial conviction. Brief for Respondent at 36, United States v. Briggs, 141 S. Ct. 467 (2020) (No. 19-108).

359. Hansen, *supra* note 123, at 427.

360. *Id.*

361. *But see Powell Report*, *supra* note 214, at 2 (suggesting public confidence is irrelevant in the justice system).

362. Eugene R. Fidell, *Military Justice and Its Reform*, JUST SECURITY (Apr. 6, 2016), https://www.justsecurity.org/30451/military-justice-reform/.

363. *See* Hart, *supra* note 280, at 412 (showing the four conditions that must be met for the system to function). "The core of a sound penal code . . . is the statement of those minimum obligations of conduct [that] the conditions of community life impose upon every participating member if community life is to be maintained and to prosper . . . ." *Id.* at 413. A similar recounting of criminal law's functions is given by Paul Robinson, who divides those functions in two: "(1) . . . the ex ante function of announcing the rules of conduct that are to govern the conduct of all persons within the code's jurisdiction; and (2) . . . the ex post function of establishing for the participants in the criminal justice process the principles by which violations of the rules of conduct are to be adjudicated." Paul H. Robinson, *Structuring Criminal Codes to Perform Their Function*, 4 BUFF. CRIM. L. REV. 1, 2–3 (2000) (suggesting that these two functions serve two distinct but intertwined purposes with distinct audiences and doctrines and, therefore, should generate two separate "codes").

364. Fidell, *supra* note 362.

365. *See supra* Part III.B (explaining why commanders can fulfill judicial and prosecutorial roles).

system in which he plays a role when he plays that role.[366] Finally, it in no way explains *why* non-military crimes—those with no obvious correlation to a negative effect on the efficiency, obedience, discipline, organization, responsiveness, or tactical effectiveness of military members—*should be* included as punishable offenses under some military codes, as in the United States[367] and Canada.[368] Recall that a service member is subject not only to the criminal sanctions of the state in which he or she serves or resides but also, under the UCMJ, for civilian crimes like murdering a civilian off an installation's property over a betting dispute, or credit card fraud, or child endangerment, or "depositing obscene materials in the mail."[369] It must be assumed, because they remain in the UCMJ, that making such acts subject to the disciplinary decisions of commanders and the fact-finding and punishment choices of military panels or military judges serves some *military* purpose above and beyond the ordinary purposes of civilian justice systems and courts ("to punish wrongful conduct [that] threatens public order and welfare").[370] The only reasonable argument in its favor is that a separate military justice system, with commanders at the center of decision-making, is necessary to address non-military crimes committed in areas where access to civilian courts of national jurisdiction is impractical or not available, like during occupation during and after conflict abroad. Thus, the "mobility" of the military justice system is heralded as a key distinguishing feature.[371]

Yet, this skeletal argument—one that is entirely, consciously designed to justify a criminal justice system as an "instrumentality" of military command,[372] not an instrument of justice—is no mere strawman.[373] In both

366. Hart, *supra* note 344, at 280.

367. *See*, *e.g.*, UCMJ Arts. 115 (communicating threats), 118 (murder), 119 (manslaughter), 120 (rape and sexual assault), 122 (robbery), 124 (bribery and graft), 125 (kidnapping), 126 (arson), 127 (extortion), 128 (assault), 129 (burglary), 130 (stalking).

368. R. v. Généreux, [1992] 1 S.C.R. 259, 286 (Can.); Government of Canada, *Judge Advocate General Report: 2018-2019*, Chapter Two – The Canadian Military Justice System: Structure and Statistics, https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2018-2019/chapter-two-service-tribunals-statistics.html. For a broader examination of modern reforms to military justice internationally, see MILITARY JUSTICE IN THE MODERN AGE (Alison Duxbury & Matthew Groves eds., 2016).

369. Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*,179 MIL. L. REV. 128, 138 (2004).

370. Hansen, *supra* note 304, at 433.

371. MAGGS & SCHENCK, *supra* note 313, at 2.

372. *See supra* note 94 (discussing how the drafters of the American model of military justice, the UCMJ, took great pains to ensure that the system being created was *not* to be a mere instrumentality of the command).

373. Kleinfeld, *supra* note 309, at 1487. Presenting this generic argument that purports to ground military justice as a legally and morally justifiable system separate (and distinct in form and substance) from civilian systems of justice follows in the mold of criminal law "reconstructivism"—that is, an effort to "rationally reconstruct the normative order already at work in the world in order to see that normative order more clearly and critique it"—specifically, describing the various "social practices and institutions" in terms of the implicit values "embodied" in those practices and institutions. *Id*; *see also* J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE

its substantive and procedural aspects,[374] or its special and general parts,[375] military justice was explained and justified in these terms (again, not consistently or holistically) by American courts, commanders, and commentators well into the late nineteenth and twentieth centuries.[376] Writing in 1879, long after his infamous success in the American Civil War, General Sherman, himself a lawyer and author of a treatise on military law, wrote:

> Every general, and every commanding officer, knows that to obtain from his command the largest measure of force, and the best results[,] he must possess the absolute confidence of his command by his firmness, impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all in his command. Without this quality no army can fulfil its office.[377]

This attitude was shared by the Supreme Court for nearly another century:

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.[378]

On the eve of the First World War, the Army's Judge Advocate General, Major General Enoch Crowder wrote: "War is an emergency condition requiring a far more arbitrary control than peace. . . . The fittest field of

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L. J. 105, 123 (1993) ("Rational reconstruction is the attempt to see parts of the law as a defensible scheme of principles and policies.").

374. *See* Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 414 (R.A. Duff & Stuart P. Green eds., 2011). Distinguishing between the substance of criminal law (what is or is not a crime, simplifying) and the procedures that identify relevant facts and adjudicate the truth of the historical event that might have constituted a crime in any given case take up a lot of philosophical airtime, for good cause. *Id.* Their relationship is neither always logical nor always clearly distinguishable, yet has real-world tangible consequences for individuals subjected to the criminal law and for designing criminal law (in substance and procedure) that satisfies externally imposed requirements of rationality, fairness, or other community expectations, political decisions, and norms. *Id.* A legal culture in which external factors and considerations, beyond straight fact-finding, influence legal decisions and "institutional design of criminal procedure" is what Donald Dripps calls an exercise of "practical reason," or "pluralism" (in contrast with two other views: rationalism and reductionism). *Id.*

375. *See* John Gardner, *On the General Part of the Criminal Law*, in PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 206–08 (Antony Duff ed., 1998).

376. Dripps, *supra* note 374.

377. SHERMAN, *supra* note 303, at 132.

378. *In re* Grimley, 137 U.S. 147, 153 (1890).

application for our penal code is the camp. . . . [D]iscipline, must be simple, informal[,] and prompt."[379] This too was echoed in the courts:

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck . . . .[380]

> Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars . . . . [T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function . . . .
>
> Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order.[381]

> Because of its very nature and purpose, the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.
> . . . .
> In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.[382]

It was not until after the Second World War that both the U.S. Congress and the President were politically incentivized to consider and adopt significant reform of the Articles of War, ultimately enacting the UCMJ.[383] This reform began a process of increasingly curtailing commander discretion and authority within military justice.[384] Nevertheless, commanders a generation later still felt strongly about the necessarily strong role of the commander:

> Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his

379. *Establishment of Military Justice: Hearing on S. 64 Before a Subcomm. of the Comm. on Military Affairs, 66th Cong*. 90 (1919) (Brief of General Crowder).
380. Burns v. Wilson, 346 U.S. 137, 140 (1953).
381. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17, 22 (1955).
382. Reid v. Covert, 354 U.S. 1, 36, 39 (1957).
383. Vladeck, *supra* note 6.
384. *Id.*

> military duty . . . in a way that is highly inconsistent with his basic instinct for self-preservation.[385]

And it continues to underlie a military justice system that allows commanders a significant role in the investigation, prosecutorial decision-making, and judicial outcomes.[386]

> During hostilities or emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed under their command. . . . [because of] the recognized need of commanding officers to function decisively and effectively during times of war *as well as peace*.[387]

And yet, the virtue and value of justice remains prominent on the tongues of those both defending the status quo of military justice and those ardently demanding reform.[388]

B. Justice or Discipline, Both, Neither, Something Else Too?

"[C]ourts-martial are still very much instruments of command authority, and their ultimate purpose is to protect the military effectiveness of the armed forces."[389]

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385. Westmoreland, *supra* note 305, at 5. Interestingly, Westmoreland, or whomever was tasked to translate his remarks into a law journal article, appears to have copied without citation the first two sentences of this definition of "discipline" from the 1960 Powell Report, on which Westmoreland served as a member but is not credited as authoring. *See Powell Report*, *supra* note 214, at 11. The Powell Report also seems to be the uncredited source for the definition of discipline by J.B. Fay, who appears to have copied a significant portion, beyond those first two sentences, of page eleven of the Powell Report without citation or acknowledgement. J.B. Fay, *Canadian Military Criminal Law: An Examination of Military Justice*, 23 CHITTY'S L. J. 120, 123 (1975). This is concerning from an accurate scholarly attribution standpoint, as others cite Fay's article as the definitive source for this definition. *See, e.g.*, R. v. Généreaux, [1992] 1 S.C.R. 259, 325 (Can.) (L'Heureux-Dubé, dissenting). *Généreux* was a landmark case that led to significant structural changes in the Canadian Armed Forces military justice system. *See* David McNaim, *A Military Justice Primer, Part I*, 43 CRIM. L. Q. 243, 250 (2000) ("One of the most astute observations on the need for[,] in the military[,] discipline comes to us from James B. Fay. . . .") (quoting Fay, *supra* note 385, at 123).

386. Westmoreland, *supra* note 305.

387. *See* 2001 Cox Commission Report, *supra* note 215, at 5 (emphasis added). This refrain appears again quite recently in response to Congress's effort to question whether lay officers should be involved in convening any felony. Geoffrey S. Corn, Chris Jenks, & Timothy C. MacDonell, *A Solution in Search of A Problem: the Dangerous Invalidity of Divesting Commanders of Disposition Authority for Military Criminal Offenses*, JUST SECURITY (June 29, 2020), https://www.justsecurity.org/71111/introducing-an-open-letter-from-former-u-s-military-commanders-judge-advocates-commander-authority-to-administer-the-ucmj/ (introducing an open, signed letter from 120 officers from all the Armed Services, including thirteen retired lieutenant generals and vice admirals and nineteen retired major generals and rear admirals).

388. *See* discussion *infra* Part IV.B (discussing the current state and future evolution of military justice).

389. BRAY, *supra* note 30, at xiv; *see also* BRAND, *supra* note 184, at xviii–xiv.

"[A] Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designed to administer justice."[390]

"Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice."[391]

These quotes are representative of three elusive but, nevertheless, widely referenced concepts: military effectiveness; administration of justice; good order and discipline.[392] Three competing values are each offered independently to justify and explain why a separate code of criminal law for military members is necessary, why it looks the way it does, and why it should (or should not) evolve toward a more civilianized criminal justice system.[393] At least two of these values seem related: good order and discipline seems like a quality that sets the necessary conditions for military effectiveness.[394] But that is, at best, a broad generalization and readily subject to contradiction. One can lose a battle, or war, despite well-ordered and disciplined troops.[395] And what about justice? Does it modify the other two values by constraining martial excesses? Is it the case that "military effectiveness" depends on justice?[396] Or does justice create conditions for

390. Morgan, *supra* note 243 (describing the intent of the Uniform Code of Military Justice drafting committee he led); *see also* 1 FRANCIS A. GILLIGAN & FREDRIC LEDERER, COURT MARTIAL PROCEDURE § 1-20.00, at 2 (1991).

391. Reid v. Covert, 354 U.S. 1, 38 (1957). *But see* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.").

392. *See supra* notes 389–91 and accompanying text (explaining the competing values of military justice).

393. *See supra* notes 389–91 and accompanying text (explaining the competing values of military justice).

394. *See supra* notes 389–91 and accompanying text (explaining the competing values of military justice).

395. This is a long-held military truism, best expressed by various versions of "Murphy's Law" (*anything that can go wrong, will*). On the (possible) history of this adage and scores of its corollaries and other prescient maxims, *see* ARTHUR BLOCH, MURPHY'S LAW AND OTHER REASONS WHY THINGS GO WRONG! (1977) and consider this variation, known as the "Army Maxim": *Any order that can be misunderstood has been misunderstood*. BLOCH, *supra* note 395, at 61. A disciple of Clausewitz, Prussian general Helmuth Karl Bernhard Graf von Moltke (the Elder), is said to have coined the phrase: *No plan survives first contact with the enemy*. CORRELLI BARNETT, THE SWORDBEARERS: STUDIES IN SUPREME COMMAND IN THE FIRST WORLD WAR 35 (1963).

396. Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 8–9 (1998) (citations omitted).

good order and discipline?[397] For that matter, is the administration of justice a *form* of good order and discipline?[398]

> Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.[399]

Or is military effectiveness irrelevant or diminished if those who make military operations effective also suffer under a failure of justice? Despite their patent ambiguities and questionable definitions, these remain the closest approximations for a theory of military justice. American military criminal law blurs the matter by saying the purpose of military law is *all three* of these sometimes contradictory values, with all three (according to some case-by-case admixture) ultimately resolving to enable and improve "national security" but without indicating how, or which value, if any, has primacy.[400] It ignores what could be said to be another independent purpose altogether: that in its prohibitions of certain conduct military justice codes, it signals what values are most important to, and therefore protected by, the profession of arms.[401] "[F]ormal compliance with official rules wasn't really the point," historian Chris Bray writes of military law and customs during the Jacksonian era in Antebellum America.[402] Rather, "firmness and

397. David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's – A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 10–11 (1991); Geoffrey S. Corn & Victor M. Hansen, *Even If It Ain't Broke, Why Not Fix It?: Three Proposed Improvements to the Uniform Code of Military Justice*, 6 J. NAT'L SEC'Y L. & POL'Y 447, 448 (2013) ("[A]n important aspect of maintaining good order and discipline is having a justice system that is seen by those within the system as fair."); 2009 Cox Commission Report, *supra* note 215 ("United States military criminal law and procedure constitutes a body of law of which Americans can be proud. It protects the rights of servicemembers, permits robust access to counsel, and grants commanders the latitude to pursue operational objectives, yet promote fairness and justice in military courts.").

398. *Powell Report*, *supra* note 214, at 12.

399. *Id.*

400. M.C.M. pt. I, para. 3. Leading military justice scholar David Schlueter has had, it appears, a change in his own view of the matter. *Compare* Schlueter, *supra* note 292, at 11 ("There should be no doubt, however, that if military justice is to be viewed as a legitimate system of criminal justice in today's society, it must be viewed primarily as a tool of justice."), *with* Schlueter, *The Military Justice Conundrum*, *supra* note 241, at 77 ("[T]he Preamble to the *MCM* should be amended to put good order and discipline in first place, as the true primary purpose of military justice, but recognize the need to provide due process of law. . . ."). Though his view may have changed with respect to the dominance of one value over the other, Schlueter remains convinced in the necessary centrality of the commanding officer within the system, whatever its' purpose Letter from David Schlueter, Hady Chair Emeritus, St. Mary's School of Law, to Dan Maurer, Assistant Professor of Law, U.S. Mil. Acad. at West Point (on file with author).

401. Schlueter, *supra* note 241.

402. BRAY, *supra* note 30, at 70–74.

determination," courage under fire, honesty, valor, loyalty, and controlled aggressiveness are the products of not behaving in the myriad ways deemed "criminal" by military law.[403] For example, in the UCMJ, it is a crime to: "feign[] illness, physical disablement, . . . or intentionally inflict[] self-injury" with an "intent to avoid work, duty, or service;" to "quit[] his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service;" to be willfully or negligently "derelict in the performance of [ones] duties;" to act, "while in the hands of the enemy in a time of war . . . in a manner contrary to law, custom, or regulation, to the detriment of others . . . held by the enemy as civilian or military prisoners;" to "wrongfully" wear on one's uniform an "insignia, . . . badge, ribbon, device, or lapel button" one has not earned or is not authorized to wear; to knowingly make a false official statement; and to "dishonorably" fail to pay a debt under circumstances in which the failure was "to the prejudice of good order and discipline" or "was of a nature to bring discredit upon the armed forces." [404] In this way, a military code of justice is example-setting: it establishes the minimum qualifications for being a "good soldier" (or Marine, sailor, airman, etc.).[405] In other words, do your job to the standard required and expected, even when it is dangerous or difficult; be honest and candid about your qualifications and military experience, especially about that which is bestowed for exceptional martial merit and valor; act in ways that fortify, not undermine, the command's ability to effectively manage an orderly and usually self-controlled force; and do not bring shame or disrepute upon the Armed Services.[406] But such a legitimate educative purpose, evidenced by these offenses, is at best only tacitly suggested.[407]

The most complete, current, and overt attempt to identify some underlying theme or purpose of military justice that might begin to explain the trademark distinctiveness of this system is David Schlueter's *Military Justice Conundrum* written in 2013.[408] Writing well before the Court decided *Ortiz*, Schlueter took great care to parse out various ways in which American courts and commentators have historically resolved whether military justice's "primary purpose" is justice or discipline.[409] If there were ever evidence of a wide-spread confusion of what military justice is *for*, we might consider that Schlueter, himself a former practitioner and current prominent

403. *Id.*

404. 10 U.S.C. § 883 (UCMJ Art. 83); 10 U.S.C. § 885(a)(2) (UMCJ Art. 85(a)(2)); 10 U.S.C. § 892(3) (UCMJ Art. 92(3)); 10 U.S.C. § 898(1) (UCMJ Art. 98(1)); 10 U.S.C § 906(a) (UCMJ Art. 106(a)); 10 U.S.C. § 107 (UCMJ Art. 107); UCMJ Art. 134; M.C.M. Part IV, para. 96, at IV–143.

405. *See* 10 U.S.C. §§ 801–946 (UCMJ Arts. 1–146).

406. *See id.*

407. *See infra* note 471 (outlining the referenced offenses). The fact that no source actively dispels such a plausible purpose, or at least outcome, of military justice is further evidence of the field's inattention to the absence of principled theory.

408. Schlueter, *supra* note 241.

409. *Id.* at 74.

scholar of military justice, identified no less than *twenty-one* approaches taken by courts and commentators to describe the balance of just two values: justice and discipline.[410] Some courts, he says, adopt a "separatist" theme in describing, justifying, or condemning military justice's application of constitutional rights;[411] some say military justice is about "primarily discipline,"[412] while commentators hold it is "justice-based;"[413] some courts describe these values as "inseparable"[414] while others say they are "not synonymous;"[415] he notes that some critics, with good reason, once described the system's disregard for fundamental fairness as "un-American,"[416] while others worried that injecting conventional norms of civilian due process would lead to the "emasculation" of military law;[417] and he notes that many now say the system strikes a "fair and delicate balance,"[418] whiles others lament that there is "no perfect solution."[419] It is as if these "themes" represent nearly two dozen different formulas to calculate some definable and explicit "purpose and function"[420] of military justice—all of them based on the same variables, just arranged and weighted differently.[421]

Public concern ought to be piqued if only because so eminent an observer as Schlueter uncovered these many ostensibly contradictory themes.[422] However, it is also telling that while several of these themes are supported by precedent (like repeated deference to the military's pragmatic justifications), many others categorizes are supported by only a single commentator,[423] a law review article that discusses criminal law generally but

410. *Id*. at 16–43. *See also* JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE 2 (2013) (identifying the "tension seen in appropriate High Court cases between military justice and military discipline[,] [which] is far more than just a question of semantics involved in this distinction [for] [i]t is impossible to take the military out of the concept 'military justice,' nor should we try . . . . But . . . while discipline rather than justice may appear to be the goal, both our legal history and the appropriate congressional statute focus on military justice.").

411. *Schlueter*, *supra* note 241, at 18.

412. *Id*. at 19.

413. *Id*. at 23–24.

414. *Id*. at 27–28.

415. *Id*. at 36–37.

416. *Id.* at 33–35.

417. *Id*. at 33.

418. *Id*. at 31–32.

419. *Id*. at 43.

420. *Id*. at 5.

421. *Id.* at 50.

422. *Id.* at 34.

423. *Id.* at 28–29 (defining his "Two Sides of the Same Coin" Theme); *see also id.* at 35–36 (defining his "Justice and Discipline are not opposites" Theme).

not military justice,[424] a dissenting opinion from an inferior service-level appellate court,[425] or themes that blend into one another indistinguishably.[426]

But this catalogue is not entirely satisfying. He concludes that the system's *primary*, but not only, purpose is maintaining good order and discipline, but his argument presupposes that there is some identifiable "exact purpose and function" for it.[427] It also ignores any possible distinction between "purpose" and "function"—like in strategy, where the ways and means are rationally calculated methods and resources aimed at some end, the functions of military justice should likewise be derived from its purposes.[428]

Moreover, his argument supposes that there must be a *primary* value, applicable in all circumstances.[429] Schlueter concluded that the primary purpose of military justice is the establishing, sustaining, and repairing of a unit's good order and discipline rather than promoting justice.[430] In other words, justice—manifested by due process protections—are valuable and good, but only to the extent that they do not inhibit a commander from his or her good order and discipline duty.[431] The support for his conclusion, however, is weaker than what ought to undergird such a broad universal claim, just as the evidence was weak in both the majority and dissenting opinions in *Ortiz*.[432] He cited the historical use of Articles of War in Western European nations that influenced our own initial efforts; he cites to *U.S. ex rel. Toth v. Quarles*,[433] a case decided in 1955, not long after the UCMJ was enacted, and claims that when enacted, Congress was reaffirming a commander's authority—it was "established and retained for the primary purpose of discipline."[434] This is directly contradicted, however, by the words

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424. *Id*. at 38–39 (in defining his "Legitimation" Theme, he cites only to Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J CRIM. L. 105 (2005)).

425. *Id.* at 39–40 (defining his "Paternalistic" Theme, for which he cites to United States v. Sunzeri, 59 M.J. 758 (N-M Ct. Crim. App. 2004)).

426. *Compare id.* at 31–32 (defining his "Fair and Delicate Balance" Theme) *with id.* at 43 (referring to the "No Perfect Solution" Theme). The other "themes" Schlueter defines are: the "Deference" theme (at 17–18), the "Competing Interests" theme (at 26–27), the "Middle Ground" theme (at 29–31), the "Justice and Discipline are not Opposites" theme (at 35–36), the "Oxymoron" theme (at 37), the "Hybrid" theme (at 38–39), the "Legitimation" theme (at 38–39), the "Paternalistic" theme (at 39–40), the "Civilianization" theme (at 40–41), the "Judicialization" theme (at 41–42), and the "Can't Get No Respect" theme (at 42–43). *Id.* It is worth the attempt to uncover the distinctiveness and relevance of these sometimes redundant and sometimes ill-supported categorizations, though Schlueter himself recognizes that they are but his own "sound bite views on those" ideological ways of framing the purpose of any criminal justice system. *Id.* at 71.

427. *Id.* at 5.

428. *Id.*

429. *Id.* at 72.

430. *Id.* at 71–72.

431. *Id*. at 74.

432. *See* Ortiz v. United States, 138 S. Ct. 2165 (2018).

433. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).

434. Schlueter, *supra* note 241, at 72.

of the primary drafter of UCMJ, Professor Edmund Morgan, who emphasized repeatedly that they struck a balance to *avoid* leaving military justice as primarily "an instrumentality of the command[]."[435] His citation to *Quarles* and to the enactment of the UCMJ are undercut considerably by the attributes of the modern American military justice system that he mentions himself and, of course, by the Court in *Ortiz*.[436] He described the Due Process Model characteristics (taken from Herbert Packer)[437] of the UCMJ in great detail, immediately after and counterbalanced his description of the UCMJ's "Crime Control" model characteristics.[438] He commented favorably upon the UCMJ's protections of the Fifth Amendment's privilege against self-incrimination (in Article 31(b)), its Fourth Amendment protections against unreasonable searches and seizures, and its Sixth Amendment guarantees of effective defense counsel and right to confront witnesses; and he cites to the protections of lawyers advising at every level of command and at every stage, to pre-trial discovery rules and pre-trial hearings, and the lengthy protective inquiry that a judge has with an accused during a guilty plea to ensure voluntariness and factual sufficiency—indeed, Schlueter describes the court-martial sentencing procedures as "broadly asymmetrical in favor of the defense."[439]

Nevertheless, he believes these due process protections do not tell the story of military justice, but instead are subordinate to the chief narrative of "good order and discipline."[440] The only case Schlueter cites to support his claim that "courts have recognized that the demands of good order and discipline may prevail"[441] over these constitutional protections is *Burns v. Wilson*.[442] But this case dealt exclusively with the extent to which federal civilian courts ought to defer to the judgments of courts-martial when their verdicts or sentences are collaterally attacked.[443] That case not only pre-dates the beginning of the modern-day military appellate court system, including the Supreme Court's jurisdiction over these matters, but in it the Court stated: "Military law . . . is a jurisprudence which exists separate and apart from [federal] law . . . . [and] [t]his Court has played no role in its development; we have exerted no supervisory power over the courts" and that Congress has reformed the Articles of War to define rights and to "provide a complete system of review within the military system to secure those rights."[444] This

435. Morgan statement, *supra* note 243.

436. *See Ortiz*, 138 S. Ct. 2165.

437. Schlueter, *supra* note 241, at 45–50 (detailing Packer's classification models in Herbert L Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964)).

438. Schlueter, *supra* note 241, at 45–50.

439. *Id.* at 69.

440. *Id.* at 7.

441. *Id*. at 64.

442. *See generally* Burns v. Wilson, 346 U.S. 137 (1953).

443. *Id.*

444. *Id*. at 140.

may very well have been true in the mid-1950s, but the very advances in due process protections Schlueter carefully itemized obviate the concerns that animated these early descriptions of military justice's purpose.[445]

This *conundrum*, as Schlueter calls the debate over whether justice or discipline is the core purpose, begins to outline the shape of an underlying theory, but this "either-or" and focus on *primacy* is off the mark.[446] It is illustrative of why the best we have been able to do is cobble together a practice-informed rationale for the existing system based on history, military affairs, and claims by the practitioners of military law and by military leaders.[447] That rationale still emphasizes commander involvement and neglects commonly held understandings of norms of due process and justice, contrary to the most current Supreme Court case describing the characteristics of American military justice.[448]

CONCLUSION

This Article has attempted to maintain a position of agnostic neutrality with respect to what could or should change in military justice as a result of *Ortiz* and the logic described above.[449] There are two exceptions. First, I am not neutral with respect to the importance of *Ortiz*. It is a noteworthy case not because the Court emphasized "justice" over "discipline" as the end or purpose of military criminal law; it is important because it does so by minimizing the relevance of the commanding officer within the system.[450] This should change how both defenders and critics marshal their arguments for all species of command legal authority, not just with respect to disposition decisions and court-martial referrals. Second, by unpacking the logic of military justice, we might better see the strong and weak connections between personal jurisdiction, command authority, and subject matter jurisdiction. If the goal of military justice is X, for example, then command authority should be related to X, and the types of conduct regulated by the system should be related to X, and the reach of personal jurisdiction should extend only to those effecting X; if its goal is instead Y, the kinds of command authorities and the reach of subject matter and personal jurisdiction should reflect Y. In other words, this article recommends articulating the logic to figure out whether we have the "ends" correctly stated, let alone whether the "ways" and "means" satisfy those ends.

The traditional rationales of military justice—whether explicit or implicit—can be, and should be, unpacked, explained, and justified if such a

445. Schlueter, *supra* note 397, at 63–70.
446. *Id.* at 49.
447. *Id.* at 71.
448. *Id.* at 55, 63–71.
449. *See generally* Ortiz v. United States, 138 S. Ct. 2165 (2018); *see also* Schlueter, *supra* note 397.
450. *Ortiz*, 138 S. Ct. at 2170.

unique system is to engender trust from those subjected to its provisions, from those empowered to use it, and from those authorized to oversee it and change it.[451] That is, this variation of "criminal law should be rational and principled" because it "is a human institution"; and because it is a fallible human institution, that "can be reformed and altered . . . it has potential to become more rational and more principled."[452] If we do not subject this system of *jus in disciplina militaras* to critical review, and look for a theory behind it, we risk what military sociologist of civil-military relations Morris Janowitz warned about long ago: "outbursts of organizational rigidity which remain baffling to the civilian outsider [and] [a]nachronistic survivals are practiced alongside highly effective procedures of military management."[453] Because we should expect and demand "unconditional" rationality, we should expect to be able to identify and articulate this system's superstructure of principles. This effort is necessary if the rational is to be held as acceptable practice by the public, who provide the members subjected to this system and who are represented by officials charged with designing, implementing, overseeing, and regulating this system.

As the members of one independent, private review committee reported in 2001, "in order to maintain a disciplinary system as well as a justice system[,] commanders must have a significant role in the prosecution of crime at courts-martial. But this role must not be permitted to undermine the standard of due process to which servicemembers are entitled."[454] Recent events suggest such an unpacking is either happening already organically through the courts, through practice, through public commentary and political discourse, through legislation, or that—if not happening explicitly yet—is bound to force the conversation about the nature, purpose, and scope of military justice.[455] While the Supreme Court's newer characterization, in *Ortiz*, of military justice (one in which the purpose and end of justice dominates over the incidental benefit of good order and discipline) is telling, it may just be an interesting historical footnote.[456] Congress, under its wide "make rules for the government and regulation of the land and naval forces" power, has the ball in *its* "court."[457] It is Congress's function, responsibility, and interest to oversee this system; any change to who wields the investigative, prosecutorial, and punitive authority (and over what conduct) would and should come from Congress.[458] But because of the extraordinary deference the Court explicitly gives to legislators in making these rules,[459]

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451. Schlueter, *supra* note 397.
452. Gardner, *supra* note 375, at 206.
453. JANOWITZ, *supra* note 300, at 51.
454. 2001 Cox Commission Report, *supra* note 215, at 7.
455. *Ortiz*, 138 S. Ct. 2165.
456. *Id.*
457. U.S. CONST., art. I, § 8, cl. 14.
458. *Id.*
459. *See supra* note 34 and accompanying text (describing the deference give on military matters).

the Court will be in the position to only *de*scribe, not *pre*scribe, the military justice system as promulgated by Congress.[460]

This has implications:

- In departing from the commander-centric, discipline-focused defense of the UCMJ that has long defined the Supreme Court's view, Congress's view, and the military's view, *Ortiz* is a subtle—but no less significant—change in the narrative about American military justice.[461] This narrative—a theme that drives how we ought to construct and interpret this peculiar criminal law—emphasizes contemporary values and norms of due process and justice. And it does so by expressly shrinking the relevance of the commander's enforcement of those values and norms. It relegates historical values and norms of command efficiency and obedience to secondary concerns (still valid, but secondary). If that change in narrative is indeed the larger lesson from *Ortiz*, both Congress and the President (and their military agents) must take heed.[462] Everything from a commander's ability to apprehend suspects, investigate misconduct, confine a service member before trial, prefer (charge) and refer (indict) cases, select the type of court-martial (and thus range of punitive exposure), amend or dismiss charges, and the very catalogue of offenses for which the military has jurisdiction, is open for debate. At a time when presidential authority, the role of Congress, the independence of the Court, and tremendous social and community upheaval are deserved front page news, this debate is both unavoidable and should be welcomed.

- I have compiled and arranged thirty statements in Part III.B.[463] Without hesitation, I can admit there may be more or fewer of these, and that current statements may be inaccurately phrased. These statements make up a *potential* predicate logic that purports to explain (and justify) commanders' jurisdiction, authority over, and latitude for, at least, military offenses, so it is important that we continue to reflect on the strength of that logic. Seventeen of the thirty are not "facts," at least as I have defined the term.[464] That is to say, more than half of the claims are made—and brought—regularly without support from empirical evidence or not based on such strong

460. *See id.*

461. Thanks to Eugene Fidell for suggesting I consider this broader question of "what is the (new) narrative?"

462. *Supra* Part I (discussing the impact of *Ortiz* on concepts of military justice).

463. *Supra* Part III.B (constructing and discussing the premises of logical defense).

464. *Supra* Part III.B (same).

historical experience that only an imprudent person would doubt them. For those charged with explaining (and justifying) the status quo—and for those seeking to modernize the system—it is to your advantage to both recognize what is merely a presumption, assumption, speculation, or normative judgment and to offer something stronger than anecdotal-centric "in my professional experience" forms of "proof."[465]

- One clear example is in statement number seventeen in Part III.B: the "presumption" that civilian justice is inferior, in terms of expedience and expertise, to military courts even for non-military crimes.[466] Such a claim is hard to accept unless we account for the nuances and idiosyncrasies of particular local jurisdictions, the types of offenses we are concerned about, and what rules or rights we are determined to protect.

- Congress's interest in shifting lay officers out of their traditional convening authority roles is overbroad and insufficiently nuanced. By focusing on the felony/misdemeanor distinction, it is true that heavily punishable crimes would fall into the orbit of experienced prosecutors. But this ignores the fact, already built within the UCMJ, that some offenses are punished more severely when the victim is an officer to the extent that the identity of the victim becomes the only thing distinguishing felonious nature of the crime.[467] It is not immediately obvious why the judge advocate as a convening authority is better positioned to handle the officer-as-victim cases than the commanding general or admiral.[468] This means that as experienced, in the law, as those prosecutors may be, they are not necessarily better positioned or more qualified to render this prosecutorial decision for misconduct that only implicates military readiness, training, or operations.[469] Indeed, a strong argument in favor of keeping commanders involved is the Law of Armed Conflict

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465. *See, e.g.*, *Open Letter from Former U.S. Military Commanders & Judge Advocates to the Committees on Armed Services of the U.S. Senate and the House of Representatives*, *supra* note 124. An otherwise spurious-sounding assumption or speculation becomes a well-grounded normative evaluation when based on empirical facts and weighty historical evidence. Thanks to Geoff Corn for asking me to explain the criteria necessary for a critic of military justice to turn a long-held, flawed, assumption into a military justice-supporting normative evaluation.

466. *Supra* Part III.B (constructing and discussing the premises of logical defense).

467. National Defense Authorization Act for Fiscal Year 2020, *supra* note 28.

468. *Supra* Part III.B at 3 (observing that assault on a non-commissioned or petty officer carries a maximum punishment of six months of confinement, whereas that same assault on an officer carries a maximum punishment exceeds one year of confinement; under the proposed § 540F arrangement, this maximum punishment factor is the only factor dividing prosecution authority between the conventional lay commanding officer and the judge advocate); *see supra* note 15 (discussing the "Shadow Report").

469. *Id.*

and UCMJ-imposed obligations to train and wield a well-disciplined force in the use of armed force.[470]

- Nevertheless, a distinction between the martial and non-martial offenses may be categorically reasonable, but it may be practically too complicated to deliver: one legitimate objection is that we would still be left with a potentially confusing situation open for inconsistent and arbitrary-looking prosecutorial decisions. Most types of misconduct can be cast as violating several, and sometimes many, statutory prohibitions. Sometimes, that misconduct will involve both martial and non-martial acts or omissions. And with the UCMJ's preference for joining all known misconduct under the banner of one charge sheet and one court-martial,[471] the division of prosecutorial discretion between two different types of convening authorities naturally raises concerns for the economy of military resources and consistency of application. Pragmatic challenges in possible innovations, however, do not foreclose responsibility to think critically about moving outside of convention, tradition, and historical practice.

- Finally, responsibility to think critically implies acknowledging that the most ardent critic of military justice ground their arguments in a contrast of military justice against civilian practice, norms, rules, rights, and authorities. It is an implication that civilian forms are superior and thus the benchmark of acceptability that the military must justify departing from. But this, too, is nothing but a "normative evaluation" constructed of its own long list of facts, assumptions, presumptions, and speculations. These should be examined, just as critically as this Article attempted with military justice's "logic," before reasonable people can agree or disagree reasonably about that which is comparable or superior.[472]

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470. *See supra* note 108 and accompanying text (explaining power of commanding officer to shape military justice).

471. R.C.M 601(e)(2) ("In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless of whether related."), and Discussion ("Ordinarily all known charges should be referred to a single court-martial.").

472. Much can be said, for example, about the meaningful differences in the experiential qualifications required of military trial and appellate judges contrasted against those of typical civilian state and county judges, or the degree of oversight among military judge advocates before charges are formalized and referred to a court-martial, when contrasted against the relative independence of most state and local prosecutors. *See, e.g.*, UCMJ Articles 26 (military judges), 26a (military magistrates), 27 and 38 (trial and defense counsel), and 66 (Court of Criminal Appeals judges). These distinctions and comparisons can easily be identified and marshalled in support of both critics and defenders of the myriad authorities and due process defining modern military justice.

As discussed above, the very practitioners and beneficiaries of this criminal law authority have not fully or consistently defended their conclusions.[473] However oversimplified, or even incomplete, this Article's initial sketch of military justice's logic might be, it may yet achieve some of those conversational goals, and support in time a more general theory of military justice.

473. *Id.*