THE CASE FOR STANDING COURTS-MARTIAL

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The need to formally convene courts-martial is a historical relic that no longer serves the purposes of military law. Ad hoc courts-martial might have been necessary and useful at one time, but that time has passed, and commanders should be permitted to shed some of the unnecessary administrative burdens associated with the legacy system. Congress should therefore establish a standing courts-martial system to which commanders may refer charges for adjudication instead of having to individually convene and disband each tribunal. After exploring the historical origins and constitutional basis for courts-martial, this Article proposes specific modifications to the Uniform Code of Military Justice and Rules for Court-Martial that would implement standing courts-martial. It then offers an example of how one service, the Marine Corps, could implement the proposal, and concludes by demonstrating the new system's utility in deployed environments. Courts-martial have become permanent fixtures in the military justice landscape—it is time they have the statutory and procedural status to match.

> "We must divest of legacy capabilities that do not meet our future requirements, regardless of their past operational efficacy."[1]

I. Introduction

Military law has a distinct purpose: "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

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[1] 38TH COMMANDANT OF THE MARINE CORPS, COMMANDANT'S PLANNING GUIDANCE 2 (2019).

national security of the United States."[2] Any aspect of the military justice system that burdens commanders, harms servicemember rights, or impedes the administration of good order and discipline should be reformed. The need to formally convene courts-martial fits all three categories. In light of the level of expertise needed to comply with the elaborate system of rules that now govern courts-martial,[3] recent debate has centered on whether Congress should curtail commander discretion over how to dispose of criminal cases.[4] This Article addresses the much narrower question of whether the military justice system has evolved away from the need for a commander to formally convene a court-martial in the first place.

At best, ad hoc tribunals are a vestige from a bygone era when courts-martial were primarily disciplinary tools rather than judicial procedures, before the Uniform Code of Military Justice (UCMJ) standardized and professionalized the practice of military justice. At worst, convening individual courts invites inefficient processes and inconsistent outcomes while undermining the credibility of the military justice system. Ad hoc courts-martial might have been necessary and useful at one time, but that time has passed. While commanders must remain at the heart of the disciplinary process, they should also be permitted to shed some of the unnecessary administrative burdens associated with the "legacy" system. Congress should therefore establish a standing military court system that commanders may refer charges to for adjudication, instead of individually convening and disbanding each tribunal.

Part II of this Article explores the historical origins for the court-martial convening authority, placing that authority within the broader context of the commander-driven military justice system. It will also examine the constitutional basis for U.S. courts-martial and assess their federal counterparts under Article III of the Constitution. Part III proposes specific modifications to the Manual for Courts-Martial that will create standing military courts, define their authority, and govern their implementation. Discussion will focus on the UCMJ and the Rules

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2019) [hereinafter MCM].

[3] One expert recently described the military justice system as a "Rube Goldberg machine" because it has "many moving parts of various types, maniacally designed to achieve some simple goal." Eugene Fidell, *Rube Goldberg and Military Justice*, JUST SEC. (Apr. 6, 2020), https://bit.ly/3j7mH5B.

[4] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198, 1367 (2019) (requiring the Secretary of Defense to evaluate "the feasibility and advisability of an alternative military justice system," in which charging decisions are made by judge advocates, not commanders); I Am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. § 2 (2020) (proposing the establishment of an Office of the Chief Prosecutor within each military department to make charging decisions for sex-related offenses); Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014) (calling for military lawyers to decide how to dispose of offenses). *But see* Michel Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020, 11:30 AM), https://bit.ly/35K8cwC (arguing that Congress might not have the constitutional authority to grant prosecutorial discretion to judge advocates rather than commanders).

for Court-Martial, highlighting how each modification will benefit the stakeholders in the military justice system by improving its efficacy and efficiency. Finally, Part IV demonstrates how one service, the Marine Corps, could staff a standing court-martial office with relatively minor adjustments to current force structure, as well as how standing courts could be applied in current and foreseeable operating environments. Courts-martial have become permanent fixtures in the military justice landscape—it is time they have the statutory and procedural status to match.

II. Background

The commander has played a central role in the U.S. military justice system since its inception.[5] In fact, "[i]t would be inconsistent with our doctrine, and the needs of our globally deployable military, to organize our justice system in any other way."[6] This is because command authority derives, at least in part, from disciplinary authority.[7] The doctrine of command responsibility also requires commanders to retain the authority to discipline their troops.[8] But a commander-driven system also leads to an inherent tension between the military justice system's dual functions: it is both a tool for enforcing discipline and an arbiter of criminal liability.[9] This tension has led to a gradual but steady progression of courts-martial from low-level, informal hearings to trials more procedurally and substantively in line with the civilian criminal justice system. Part II of this Article provides a brief history of the military justice system, concluding that the authority to refer charges to a standing court-martial preserves the traditional role of the

[5] *See generally* Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1 (1968) (tracing the exercise of judicial functions by military commanders throughout British and U.S. history).
[6] Lindsay L. Rodman, *Unity of Command: Authority and Responsibility Over Military Justice*, 93 JOINT FORCES Q. 71, 72 (2019).
[7] *See id.* at 74–75 (contextualizing the role of military justice within joint and service command and control doctrines); Kyle G. Phillips, *Military Justice and the Role of the Convening Authority*, U.S. NAVAL INST. PROC., May 2020 ("The authority to discipline and hold people accountable under the law is the backbone of command authority."); William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 76 (1980) ("[A] commander cannot be held responsible for mission accomplishment unless he is given the necessary resources and authority.").
[8] Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, *in* MILITARY JUSTICE IN THE MODERN AGE 106, 115 (Alison Duxbury & Matthew Groves eds., 2016).
[9] *See* Hansen, *supra* note 5, at 2–3 (identifying this theme in the congressional hearings that led to the adoption of the UCMJ); Memorandum from Sec'y of Def. to the Secretaries of the Military Dep'ts et al., Subject: Discipline and Lethality (Aug. 13, 2018) ("The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members."). *But see* William C. Westmoreland, *Military Justice–A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971) ("A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.").

commander and is not substantively different from the authority to convene a court-martial itself.

A. Origins of the Convening Authority

Military law is "considerably older than our Constitution."[10] The ancient Greeks and Romans, for example, criminalized desertion, mutiny, and cowardice among their militaries, with punishments ranging from death and maiming to extra duties and dishonorable discharge from the service.[11] Throughout the Middle Ages, European military commanders exercised summary jurisdiction over their troops, primarily for military-specific offenses, while operating far from the civil court constructs that would ordinarily oversee the process.[12] By the sixteenth century, rudimentary "codes" in Sweden and the Netherlands implemented frameworks for the first courts-martial, then known as courts or councils of war.[13] The Swedish code, promulgated by Gustavus Adolphus,[14] inspired the British to adopt the first Articles of War in 1639 and, fifty years later, the Mutiny Act.[15] Both provisions recognized court-martial jurisdiction over servicemembers only "abroad or in time of war," and only for the offenses of mutiny, sedition, and desertion.[16] All of these systems, from the Romans to the British, were designed to be commander-driven and expeditionary, enforceable only under narrow circumstances and carrying almost no administrative overhead or protections for the accused.[17] The tribunals operated outside the civilian criminal court construct, and each one existed only for the lifespan of a single case, freshly convened and disbanded as required by military commanders.

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[10] 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 15 (2d ed. 1920).
[11] *Id.* at 17.
[12] *See* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE 3–4 (1974).
[13] *Id.* at 4–5.
[14] Adolphus's "articles for the maintenance of order" established two tiers of court-martial: regimental, which handled lower-level offenses and was convened on a case-by-case basis, and standing, which was presided over by the commanding general and heard more egregious allegations, like treason. David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 132–34 (1980). No subsequent systems seem to have adopted this "standing" feature until the early 2000s, when the United Kingdom implemented permanent trial-level military courts. *See* Ann Lyon & Geoffrey Farmiloe, *The New British System of Courts Martial*, *in* MILITARY JUSTICE IN THE MODERN AGE, *supra* note 8, at 168.
[15] WINTHROP, *supra* note 10, at 18–19.
[16] BISHOP, *supra* note 12, at 7. Updates to the Mutiny Act in 1718 expanded its jurisdiction to apply domestically so that servicemembers could be tried "within and without the realm, in peace and war." *Id.* at 8. Parliament similarly expanded the Articles of War in 1803. *See* WINTHROP, *supra* note 10, at 20.
[17] *See* WINTHROP, *supra* note 10, at 45–47.

The U.S. military justice system is derived primarily from the British model.[18] In 1775, on the same day that the Continental Congress resolved to "immediately raise" a military force, it also appointed George Washington to lead a committee "to prepare rules and regulations for the government of the Army."[19] A month later, the committee adopted provisions mostly from the British Articles of War in place at the time, which the colonists were already familiar with from fighting alongside British forces in North America.[20] The system established three tiers of court-martial, depending on the severity of the offense and the rank of the accused,[21] and most offenses were military-specific.[22] To initiate a court-martial, a commissioned officer signed a formal "preferral" of charges against the accused, which was then forwarded to the accused's commander for "referral" to trial if, in the commander's discretion, a court-martial was appropriate.[23] The authority to "convene" a court-martial also rested with the commander of the accused, who simply "published an order announcing the place and time of the trial, the name of the person or persons to be tried, and the appointment of all court-martial personnel, which included the persons to serve as court members (judge and jury) and as the judge advocate (prosecutor)."[24] From the beginning, therefore, the "convening authority," which focused on the technical assembly of the court, was more administrative than the "referral authority," which centered on the decision of whether to bring charges. This basic structure remained in place through the nineteenth century[25] and continues to inform the current system.[26]

Several key features have changed, however, with direct bearing on the establishment of standing courts-martial. In the foundational treatise on U.S. military justice, first published in 1886, William Winthrop described a court-martial as "a temporary summary tribunal—not a court of record."[27] He based this observation on fundamental aspects of the courts-martial then in place: "no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, [a] judgment [that] is simply a recommendation, not operative till

[18] *See* Schlueter, *supra* note 14, at 136, 144. The most significant difference is that the U.S. system was "wholly statutory, having been, from the beginning, enacted by Congress as the legislative power," rather than decreed by the monarch. WINTHROP, *supra* note 10, at 21.
[19] WINTHROP, *supra* note 10, at 21.
[20] MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 41–42 (2015) [hereinafter MJRG]. The committee also relied on the Articles of War enacted by the Massachusetts Bay colony, but that system was in turn heavily dependent on the British Articles. Schlueter, *supra* note 14, at 147.
[21] *See* Schlueter, *supra* note 14, at 148–49.
[22] MJRG, *supra* note 20, at 43. Common offenses included desertion, absence without leave, and contemptuous words toward the government or military commander. *Id.*
[23] *Id.* at 45. The commander also had the authority to dispose of the charges at a lower forum or dismiss them altogether. *Id.*
[24] *Id.* at 46; *see also* WINTHROP, *supra* note 10, at 158–61 (summarizing the contents of a historical convening order).
[25] MJRG, *supra* note 20, at 43.
[26] United States v. Ortiz, 138 S. Ct. 2165, 2175 (2018).
[27] WINTHROP, *supra* note 10, at 49.

approved by a revisory commander[,] . . . . and not only the highest but the only court by which a case of a military offence can be heard and determined."[28] After various statutory and policy updates, each of these points is no longer accurate to some degree. Winthrop also noted that a court-martial traditionally "has no fixed place of session [and] no permanent office or clerk."[29] This too is no longer accurate in practice, but the regulations have not caught up to reflect the reality.

B. U.S. Military Courts

Article III of the U.S. Constitution vests "the judicial Power of the United States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[30] The phrase "judicial power" is generally understood to mean the authority to "act upon core private rights to person and property,"[31] and the express grant of it in Article III would seem to preclude its exercise beyond those parameters.[32] Yet military courts, even though they exercise a form of judicial power, are not Article III courts.[33] In fact, courts-martial and other military tribunals "are conspicuously absent from the Constitution."[34] Instead, Congress enacted the UCMJ[35] and its predecessor legislation under Article I's grant of authority "[t]o make Rules for the Government and Regulation of the [armed forces]."[36]

The Supreme Court initially sanctioned this authority in 1858, stating that Congress's "power to provide for the trial and punishment of military and naval offenses . . . is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States."[37] In addition to the "make rules" clause, the Court relied on Congress's authority "to provide and

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[28] *Id.* at 50.
[29] *Id.*
[30] U.S. CONST. art. III, § 1.
[31] Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576 (2007).
[32] *See id.* at 575 ("Throughout the nineteenth century, jurists agreed that 'Congress cannot vest any portion of the judicial power of the United States' in entities other than the courts it has 'ordained and established' in conformity with Article III.").
[33] *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656–657 (2004) (identifying courts-martial as exceptions to Article III's mandate); *see also* WINTHROP, *supra* note 10, at 49 ("[A court-martial] has no common law powers whatever, but only such powers as are vested in it by express statute or may be derived from military usage.").
[34] Paradis, *supra* note 4; *see also* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (exploring the Framers' experience with and understanding of military tribunals).
[35] 10 U.S.C. §§ 801–946 (2019).
[36] U.S. CONST. art. I, § 8, cl. 14; *see also* WINTHROP, *supra* note 10, at 48–49 (addressing the "authorization" of courts-martial in the Constitution).
[37] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858); *see also* Pfander, *supra* note 33, at 648 ("[T]he boundary lines between Article I tribunals and Article III courts have been marked neither by logic nor by constitutional text, but by history, custom, and expediency.").

maintain a Navy"[38] and the President's authority as commander in chief of the armed forces[39] to conclude that courts-martial may exist "entirely independent" of Article III courts.[40] Yet this authority has limits. For example, it does not permit court-martial jurisdiction over ex-servicemembers because they no longer have a relationship with the armed forces (and presumably the armed forces no longer have an interest in their good order and discipline).[41] This rule accords with the broader principle that the jurisdiction of military courts may not "encroach[] on the jurisdiction of federal courts set up under Article III of the Constitution, where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[42] These safeguards include a broader, more diverse federal jury composition than the typical panel of servicemembers, as well as the guaranteed salary and lifetime tenure "during good behavior"[43] offered to Article III judges to incentivize their independence.[44] The Supreme Court has nevertheless expressed confidence that the military justice system offers a fair forum for the adjudication of criminal behavior,[45] and, as recently as 2018, the Court upheld the constitutionality of the non-Article III court-martial system[46] while observing that "[t]he military justice system's essential character [is,] in a word, judicial."[47]

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[38] U.S. CONST. art. I, § 8, cl. 13.
[39] U.S. CONST. art. II, § 2.
[40] *Dynes*, 61 U.S. at 78–79. The Court also cited the 5th Amendment's exclusion of "cases arising in the land or naval forces" from its grand jury requirements. *See id.* at 79 (1858). *But see* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 n.5 (1950) (stating that this provision of the 5th Amendment "does not grant court-martial power to Congress").
[41] *Quarles*, 350 U.S. at 15 ("[T]he power granted Congress 'To make Rules' and regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."). The regular use of uniformed trial counsel as Special Assistant United States Attorneys (SAUSAs) slightly blurs this distinction. SAUSAs work with their affiliated U.S. Attorney's Office to prosecute civilians in federal court for felony and misdemeanor offenses that occurred within the physical jurisdiction of military installations. U.S. DEP'T OF THE NAVY, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S UNIFORMED LEGAL COMMUNITIES 89 n.188 (2019) [hereinafter COMPREHENSIVE REVIEW].
[42] *Quarles*, 350 U.S. at 15. *But see* United States v. Ortiz, 138 S. Ct. 2165, 2174 (2018) ("The procedural protections afforded to a servicemember are virtually the same as those given in a civilian criminal proceeding, whether state or federal."). This contrast is mostly an anachronism: by the time of the *Ortiz* decision, the military justice system afforded more substantial protections to the accused than it did at the time of the *Quarles* decision.
[43] U.S. CONST. art. III, § 1.
[44] *Quarles*, 350 U.S. at 17–19; *see also* Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL L. REV. 49, 57–61 (2009) (placing the debate over judicial tenure for military judges in the context of judicial independence).
[45] *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[T]he military court system generally is adequate to and responsibly will perform its assigned task . . . [and] vindicate servicemen's constitutional rights.").
[46] *Ortiz*, 138 S. Ct. at 2178.
[47] *Id.* at 2174. *Contra id.* at 2199 (Alito, J., dissenting) (arguing that courts-martial "have always been understood to be an arm of military command exercising executive power, as opposed to independent courts of law exercising judicial power").

Article I tribunals remain inferior to Article III courts through several structural features. Direct appellate review,[48] the codification of various common law writs,[49] and the grant of federal jurisdiction over common law proceedings challenging inferior tribunal rulings,[50] for example, have maintained Article III federal court oversight of Article I tribunals. Courts-martial are no exception. They operate beyond the "traditional boundaries" of Article III courts by exercising jurisdiction over servicemembers being disciplined by the military chain of command,[51] but their outcomes are still subject to federal court oversight.[52] In *Schlesinger v. Councilman*, for example, the Supreme Court recognized the authority of federal district courts to grant collateral relief from "void" judgments of courts-martial that had exceeded their jurisdiction.[53] Other potential avenues of oversight include federal court review of service discharges, hearing of habeas corpus claims, and enjoinder of courts-martial through common law tort claims.[54] The status of courts-martial as "inferior tribunals" means "they do not exercise the [Article III] judicial power, but remain subject to it."[55]

Finally, not all military courts are courts-martial. Under Article 66 of the UCMJ, each service's Judge Advocate General has established a Court of Criminal Appeals (CCA) staffed by uniformed attorneys with jurisdiction to review judgments of courts-martial.[56] CCA decisions are in turn reviewed by the Court of Appeals for the Armed Forces (CAAF), which consists of five civilian judges who are appointed by the president and serve fifteen-year terms.[57] The UCMJ explicitly states that CAAF "is established under Article I of the Constitution," and that it is "located for administrative purposes only in the Department of Defense."[58] CAAF decisions, other than denials of petitions for review, are then

[48] *See* Pfander, *supra* note 33, at 721–24.
[49] *See id.* at 724–27.
[50] *See id.* at 727–31.
[51] *See id.* at 715–17.
[52] *See id.* at 731 (identifying examples of "midstream [federal] judicial intervention in cases involving clear-cut violations of federal rights"); *see also* WINTHROP, *supra* note 10, at 52 (discussing federal court authority to conduct habeas review of courts-martial); Eric Freyfogle, *Post-Conviction Review in the Federal Courts for the Servicemember Not in Custody*, 73 MICH. L. REV. 886 (1975) (discussing non-habeas review of court-martial convictions).
[53] Schlesinger v. Councilman, 420 U.S. 738, 748 (1975).
[54] *See* Pfander, *supra* note 33, at 754; s*ee also* MJRG, *supra* note 20, at 84 (discussing the "collateral review" of courts-martial by Article III courts).
[55] *See* Pfander, *supra* note 33, at 757.
[56] Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2019). *But cf.* WINTHROP, *supra* note 10, at 54 ("Not being subject to being reversed or appealed from, the judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive."); MJRG, *supra* note 20, at 55 ("the primary responsibility for review [in the eighteenth and nineteenth centuries] rested with the commander who convened the court-martial").
[57] Article 142, UCMJ, 10 U.S.C. § 942 (2019); *see also* MJRG, *supra* note 20, at 1019–20 (comparing CAAF judges with their Article III counterparts).
[58] Article 141, UCMJ, 10 U.S.C. § 941 (2019). An early proposal to move the highest military appellate court into the Article III system does not seem to have gained much traction. *See* Daniel P. O'Hanlon,

subject to review by the U.S. Supreme Court via writ of certiorari.[59] The Supreme Court recently evaluated this scheme and concluded that the standing military appellate courts are indeed constitutional.[60]

Based on the above, the constitutionality of courts-martial does not rest on their ad hoc nature. As the Supreme Court noted in *McClaughry v. Deming*, "[a] court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."[61] In other words, as long as the composition and procedure of a court-martial comply with the UCMJ, and the UCMJ complies with the Constitution, the court-martial will be constitutional.[62] With the changes proposed to the UCMJ below, standing courts-martial would be as constitutional as their ad hoc counterparts currently are.

III. Proposal

The establishment of standing courts-martial offers benefits to all stakeholders in the military justice system: the commander, the accused, the alleged victim, and the institution. Part III of this Article makes specific proposals for the necessary modifications to the UCMJ and Rules for Court-Martial to implement standing courts and highlights the ways each change will improve the current system. Congress should incorporate these modifications to the UCMJ via the National Defense Authorization Act after conducting substantive hearings on their scope and impact. The president should then implement the subsequent changes to the Rules for Court-Martial via Executive Order.[63] These proposals are narrowly tailored, changing no more than is necessary to better align means (the administration of military justice) with ends (military readiness and good order and discipline). This analysis will demonstrate that, rather than being another

The Military Judicial System: Should It be Brought Under Article III?, 2 L. & SOC. ORD. 329 (1972) (arguing that Congress had the authority to declare CAAF's predecessor court "be vested with Article III status and power," staffed with lifetime judges and given expanded authority to review writs of habeas corpus).

[59] *See* 28 U.S.C. § 1259; Article 67a, UCMJ, 10 U.S.C. § 867a (2019).

[60] "CAAF is a permanent court of record created by Congress; it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures; and its own decisions are final (except if we review and reverse them)." Ortiz v. United States, 138 S. Ct. 2165, 2180 (2018).

[61] McClaughrey v. Deming, 186 U.S. 49, 62 (1902). The Court went on to observe that a "court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved." *Id.* at 63. This observation is descriptive, though, not prescriptive, and it does not bar the creation of standing courts-martial.

[62] *See* WINTHROP, *supra* note 10, at 33–35 (noting that military justice provisions may not contravene existing law).

[63] Article 36, UCMJ, 10 U.S.C. § 836 (2019) (granting the President the authority to implement pretrial, trial, and post-trial court-martial procedures).

example of the "civilianization" of military justice, the call for standing courts-martial is the rare procedural change that offers a range of benefits without altering the fundamental nature of military justice itself. These changes represent a subtle but fundamental shift in the design of the military justice system. The overall concept of replacing temporary courts-martial with permanent ones is simple. Making the new system legally and procedurally sound, though, requires updates to various statutory and rules-based provisions.

A. Framework

The following analysis addresses the advantages of permanent courts along three primary lines of effort: efficacy, efficiency, and credibility.[64] If the military justice system is a tool for strengthening national security, then its structure should enable the accomplishment of that mission. Instead, the current system of ad hoc tribunals, which was designed to afford commanders maximum discretion over the military justice process, increases commanders' administrative burdens and exposure to risk at the appellate level without offering corollary benefits. According to one former Army Chief of Staff, "[m]ilitary justice should be efficient, speedy, and fair."[65] Yet a general decline in contested trials over the last twenty-five years has led to a lack of familiarity with the administrative requirements of courts-martial among both commanders and staffs.[66] Unfamiliarity, in turn, breeds inefficiency, a cycle that becomes self-perpetuating[67] as fewer commanders turn to courts-martial to resolve disciplinary issues because the process is cumbersome and riddled with delays.[68] The military legal

[64] A line of effort "links multiple tasks and missions using the logic of purpose." It describes and connects the major efforts/actions of the campaign. JOINT CHIEFS OF STAFF, JOINT PUB. 5-0: JOINT PLANNING IV-30 (2020). These lines of effort are similar to the categories that guided the MJRG's work, which included "improv[ing] the functionality" and "strengthen[ing] the structure of the military justice system," "increas[ing] transparency," "enhanc[ing] fairness and efficiency," and "streamlin[ing]" and "moderniz[ing]" the practice. MJRG, *supra* note 20, at 6–8.

[65] Westmoreland, *supra* note 9, at 8.

[66] *See, e.g.*, STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, COMMANDERS' PHILOSOPHY ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE MARINE CORPS 2 (2012) [hereinafter COMMANDERS SURVEY] (observing that the rate of decline in the use of special courts-martial "accelerated at a seemingly unnatural pace" between 1997 and 2011); COMPREHENSIVE REVIEW, *supra* note 41, at 81 (visually depicting the decline in frequency of Navy general and special courts-martial between 2000 and 2019). The majority of Marine Corps Special Court-Martial Convening Authorities between 2001 and 2011 referred between one and five cases to special court-martial during their time in command, and less than 17% referred more than ten cases. COMMANDERS SURVEY, *supra,* app. B at 3.

[67] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 79–80 (observing the trend of fewer courts-martial leading to less familiarity with them, which in turn leads to fewer courts-martial).

[68] *See, e.g.*, Memorandum, *supra* note 9 ("Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system."); COMPREHENSIVE REVIEW, *supra* note 41, at 81, 92 (finding that extended case-processing times have a negative effect on good order and discipline); COMMANDERS SURVEY, *supra* note 66, at 1 ("The number one reported reason by commanders for the reduced use of [special courts-martial] was a lack of timely processing."); Westmoreland, *supra* note 9, at 6–7 ("[The military] justice system should

community has become familiar with the need to convene courts-martial, but the current system is opaque to commanders, servicemembers, and victims, none of whom are generally familiar with the construct until they participate in the process (if at all). This creates a perception that the military justice system is unnecessarily antiquated as well as more opaque than its civilian counterpart. The establishment of standing courts-martial, on the other hand, implements a system that most people already recognize from the civilian world, and to some degree probably presume is the system the military already uses. Additionally, professionalization of the system leads to more predictable outcomes, which in turn bolsters credibility.

Various pieces of legislation over the years have sought to improve the military justice system. The Military Justice Act of 2016 ("MJA 16") is the most recent example to have been signed into law.[69] MJA 16 was largely derived from the work of the Military Justice Review Group (MJRG), a panel of military justice experts convened in 2013 by the Department of Defense General Counsel at the direction of the Secretary of Defense.[70] The panel conducted a comprehensive review of the UCMJ, guided by the overall goal of "ensur[ing] that it effectively and efficiently achieves justice consistent with due process and good order and discipline."[71] To achieve this goal, the MJRG began with the then-current UCMJ "as a point of departure" and considered opportunities to more closely align military justice practice with Article III federal criminal practice.[72] Although some critics have expressed concerns about this broader trend toward the "civilianization" of military justice,[73] the federal criminal justice system remains the closest analog to the military justice system.[74] This Article takes the same

operate with reasonable promptness . . . . A military justice system cannot allow a backlog of cases to develop.").

[69] Military Justice Act of 2016, Pub. L. No. 114-328, § 5542, 130 Stat. 2935 (2016).

[70] MJRG, *supra* note 20, at 5.

[71] *Id.*

[72] *Id.* The United Kingdom recently undertook a similar endeavor, culminating in the establishment of standing courts-martial. *See* CLAIRE TAYLOR, HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 05/75, BACKGROUND TO THE FORTHCOMING *ARMED FORCES BILL* 34 (2005) ("[T]he Bill is intended to reflect civilian criminal justice measures already in force or to incorporate changes that are being made, in order to bring the system of Service law more closely into line with civil law, where practical.").

[73] *See, e.g.*, 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 (2017) (questioning whether the military justice system remains sufficiently distinct from the civilian criminal justice system).

[74] *See* Article 36(a), UCMJ, 10 U.S.C. § 836(a) (2019) (permitting the President to prescribe "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district courts"); MJRG, *supra* note 20, at 79 ("With military rules and procedures modeled on civilian rules and procedures, courts-martial can look to federal court decisions interpreting those rules and procedures as persuasive authority."); *see also* WINTHROP, *supra* note 10, at 54–55 (identifying parallels between courts-martial and civilian criminal courts in the historical context).

approach the MJRG did, exploring several aspects of the Article III system that bear directly on the proposal to establish standing military courts.

B. Recommendations

The proposed changes to the UCMJ and the Rules for Courts-Martial (R.C.M.)[75] shift administrative responsibility from commanders to supporting institutions like the military judiciary and legal services offices. This continues a trend over the last fifty years toward the professionalization of the military trial administration apparatus.[76] To be clear, these proposals do not strip commanders of investigation, disposition, charging, and post-trial authorities, as some recent proposals would.[77] Nor do they affect commanders' control of the spectrum of disciplinary measures short of court-martial, from informal counseling, to nonjudicial punishment, to summary court-martial. Instead, they favor functionality over obsolete custom by streamlining the military justice system.

The original UCMJ, passed in 1950, is the oldest precedent considered. Previous models of the U.S. military justice system are useful for historical context,[78] but they do not provide a worthwhile template for future modifications because the UCMJ marked such a significant paradigm shift from those previous models.[79] The 2019 UCMJ and R.C.M. serve as the baseline, with the goal of making as few changes as possible to achieve the desired endstate.[80] The primary analytical focus is weighted toward the provisions that are most important to a standing court-martial system. Congress could modify various R.C.M.s, depending on the scope of its interest and mandate,[81] but this proposal aims to be a scalpel, not a hatchet.

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[75] The R.C.M. govern court-martial jurisdiction, court-martial procedure, and post-trial requirements, among other areas. The President promulgates the R.C.M. via executive order based on congressional delegation of this authority in the UCMJ and his Article II authority as Commander in Chief of the Armed Forces. *See* U.S. CONST. art. II, § 2, cl. 1; Article 36, UCMJ, 10 U.S.C. § 836 (2019); *see also* MCM, *supra* note 2, app. 15, intro.

[76] *See* Ku, *supra* note 44, at 52–56 (surveying the evolution of the role of military judges within the U.S. military justice system).

[77] *See supra* note 4 and accompanying text.

[78] *See, e.g.*, Schlueter, *supra* note 14, at 144–60 (tracing the development of the U.S. court-martial system from 1775 to 1950).

[79] *See* MJRG, *supra* note 20, at 41 (categorizing the post-World War II period as a distinct "phase" in the history of military justice).

[80] In addition to the specific provisions outlined below, the text of the R.C.M.s will need to be generally updated throughout to replace "convening authority" with "referral authority."

[81] For instance, preliminary hearings could be brought under the purview of the standing courts, via changes to Article 32, UCMJ, and R.C.M. 405, but this depends on establishing standing courts in the first place.

1. Court-Martial Structure

a. Jurisdiction.

Article 16. "Courts-martial classified." No single UCMJ provision declares that courts-martial are temporary. Rather, their ad hoc nature stems from the lack of a provision establishing their permanence. The most direct way to fix that is by adding a paragraph (e) to the current text of Article 16:

> (e) Standing Courts-Martial. Each Judge Advocate General shall establish a permanent court-martial system to hear general courts-martial, as described in subsection (b), and special courts-martial, as described in subsection (c), for the hearing of cases in accordance with sections 818 and 819 of this title. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed to proceedings under this section.

This modification to Article 16 would establish permanent trial courts in much the same way that Article 66 establishes permanent appellate courts, leaving it up to the Judge Advocates General to implement them in their respective services.[82] It also parallels the idea of the Secretaries establishing military judge detailing procedures from Article 30a, which recently expanded the pre-referral authority of the military judiciary.[83] The establishment of standing courts-martial will eliminate the need to convene individual courts-martial. Under this proposal, commanders will therefore relinquish the traditional "convening authority" while retaining the "referral authority" to send cases to trial at the permanent courts.[84]

R.C.M. 201. "Jurisdiction in general." "Jurisdiction" is the authority to hear a case and render a legally binding decision.[85] Reflecting the military justice system's origins, court-martial jurisdiction is "entirely penal or disciplinary,"[86] and, with limited exceptions, it does not depend on where the offense was committed or where the court-martial itself sits.[87] R.C.M. 201 identifies five

[82] The federal judiciary offers a template for this system, with "chief judges" who "oversee and coordinate the efficient operation of the court." ADMIN. OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL COURTS 21 (2018). This job is essentially identical to the military services' circuit military judges, who are responsible for the administration and internal organization of their assigned circuit, including the authority to detail military judges to court-martial proceedings. *See, e.g.*, U.S. DEP'T OF NAVY, JAGINST 5813.4I, NAVY-MARINE CORPS TRIAL JUDICIARY ¶ 4.d (2017).
[83] See *infra* Part III.B.3.a. for further discussion of Article 30a.
[84] See *infra* Part III.B.1.b. for further discussion of the referral authority.
[85] *See* MCM, *supra* note 2, R.C.M. 201(a)(1), Discussion.
[86] *Id.* at R.C.M. 201(a)(1).
[87] *Id.* at R.C.M. 201(a)(2)-(3).

requirements for a court-martial to have jurisdiction: the accused[88] and the offense[89] must be subject to court-martial, the military judge and the members must meet the personnel and qualifications requirements in R.C.M.s 501 through 504,[90] each charge at the court-martial must have been referred by a competent authority,[91] and the court-martial must "be convened by an official empowered to convene it."[92] The implementation of standing courts-martial affects only the final requirement. Under the proposed system, individual courts-martial will no longer need to be convened in accordance with R.C.M. 201(b)(1). Instead, the "referral authority" established in Articles 22 (general courts-martial) and 23 (special courts-martial) of the UCMJ will be the "competent authority" that sends cases to court-martial with continuous jurisdiction by referring charges per R.C.M. 201(b)(3). This proposal requires no other changes to jurisdictional provisions in the Rules for Court-Martial.[93]

b. Referral Authority

Article 22. "Who may convene general courts-martial." General courts-martial (GCMs) are the highest forum for disposing of criminal cases within the military justice system and expose the accused to the statutory maximum punishment for an offense.[94] Since its origin, the UCMJ has consistently limited general court-martial convening authority to a small group of high-level civilian officials and military commanders. Article 22(a) of the 2019 UCMJ, for example, reads almost identically to the original 1950 version, with Congress granting only the Secretary of Defense and combatant commanders additional general court-martial convening authority in the intervening seventy years.[95]

The composition of a GCM, on the other hand, has changed significantly over that time. Under the 1950 UCMJ, a GCM consisted of a "law officer" and no fewer than five panel members.[96] Law officers were attorneys and filled a quasi-judicial role, although Article 26a required only good standing in a federal bar or highest state bar, not training, experience, or certification as a judge.[97] After

[88] *Id.* at R.C.M. 201(b)(4).
[89] *Id.* at R.C.M. 201(b)(5).
[90] *Id.* at R.C.M. 201(b)(2).
[91] *Id.* at R.C.M. 201(b)(3).
[92] *Id.* at R.C.M. 201(b)(1). R.C.M. 504 identifies who may convene general and special courts-martial. *See* MCM, *supra* note 2, app. 15 (proposing slight modifications to R.C.M. 504).
[93] R.C.M. 201 implements Article 17 of the UCMJ, "Jurisdiction of courts-martial in general." *Compare* MCM, *supra* note 2, R.C.M. 201, *with* Article 17, UCMJ, 10 U.S.C. § 817 (2019).
[94] Article 18(a), UCMJ, 10 U.S.C. § 818(a) (2019).
[95] *Compare* Article 22(a), UCMJ, 10 U.S.C. § 822(a) (2019), *with* Article 22(a), UCMJ, 10 U.S.C. § 822(a) (1950).
[96] Article 16, UCMJ, 10 U.S.C. § 816 (1950). See *infra* Part III.B.2.a for the discussion on member qualifications under Article 25.
[97] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. II, ¶ 4(e) (1951) [hereinafter 1951 MCM]. One critic has described law officers as an "awkward hybrid that was part trial judge, part juror, and

various modifications, GCMs now consist of a military judge and eight panel members (twelve members if a capital case) or a military judge alone (upon request by the accused).[98] Military judges, who must be certified by their respective service's Judge Advocate General[99] per the criteria in Article 26 of the UCMJ,[100] assumed authorities and responsibilities similar to their Article III criminal trial-level counterparts.[101] As one service summarizes it, the trial judiciary "has an affirmative duty to ensure that each referred general and special court-martial, and any required post-trial proceeding, is tried in an expeditious manner, consistent with the needs of fundamental fairness and due process."[102]

These provisions reflect the seemingly competing trends of, on the one hand, increased judicial autonomy over individual trials, and, on the other, consolidation of the convening authority itself. The establishment of standing courts-martial would strike a balance between these trends. Congress should modify Article 22 to grant "referral authority" of individual cases to standing general courts-martial, not "convening authority" of individual general courts-martial themselves. With standing courts-martial, each of the people designated by the UCMJ as someone "who may convene general courts-martial"—the president, the secretary of defense, combatant commanders, service secretaries, and commanders of certain-sized units[103]—would instead simply send the charges to a preexisting tribunal.[104] The difference between "convening" a court-martial and "referring" charges to one is likely transparent to commanders, who tend to focus more on whether they can hold a servicemember accountable than on the

insufficiently either to satisfy anyone." LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 135 (2010).

[98] Article 16(b), UCMJ, 10 U.S.C. § 816(b) (2019).

[99] *See, e.g.*, U.S. DEP'T OF NAVY, SECNAVINST 5430.27E, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS FOR SUPERVISION AND PROVISION OF CERTAIN LEGAL SERVICES ¶ 1.b. (2019).

[100] Article 26, UCMJ, 10 U.S.C. § 826 (2019) ("education, training, experience, and judicial temperament"). See *infra* Part III.B.2.b. for further discussion on the role of military judges.

[101] MORRIS, *supra* note 97, at 135.

[102] JAGINST 5813.4I, *supra* note 82, ¶ 3.a.

[103] Article 22(a), UCMJ, 10 U.S.C. § 822(a) (2019).

[104] This approach resolves a lingering issue in the recent report by the Secretary of Defense-appointed Independent Review Commission (IRC) on sexual assault in the military. The IRC recommended that each Service should appoint a Special Victim Prosecutor (SVP) who could refer sex crimes charges to a court-martial convened by a traditional convening authority. According to the IRC, though, the SVP "should not have the authority to direct a convening authority to convene a court" because then the convening authority would be subject to the authority of the SVP. The problem is that the IRC does not address what would happen if the convening authority refuses to convene a court to which the SVP refers charges, a not-unlikely scenario due to competing priorities, resources, and opinions. The establishment of standing courts-martial would avoid this possibility, and streamline the overall process, by enabling the SVP to simply refer charges to an already-convened court. *See* INDEPENDENT REVIEW COMMISSION, HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY app. B at 15 (2021) [hereinafter IRC REPORT].

technical machinations required to get there.[105] No modification is necessary to the current definition of "referral," which is "the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial."[106]

Article 23. "Who may convene special courts-martial." A lower forum than general courts-martial, special courts-martial expose the accused to less severe sentencing jeopardy but provide many of the same procedural and evidentiary protections as general courts-martial.[107] Similar to Article 22, Article 23 has undergone almost no revision since its original adoption,[108] even though the composition of special courts-martial has changed significantly. The 1950 UCMJ required only three panel members[109] and no lawyers unless "it is anticipated that complicated issues of law will be presented."[110] Even if the circumstances called for a lawyer, the lawyer would serve as a member of the court-martial, not in a judicial or quasi-judicial role.[111] Today, a special court-martial consists of a military judge and four panel members, a military judge alone (upon request by the accused), or a military judge alone subject to restrictions on punishment (upon decision by the convening authority).[112] Congress added this last option following the MJRG's recommendation to offer commanders a disposition "similar to the judge-alone forum in civilian proceedings."[113] This was in keeping with the broader mandate to improve military justice by adopting best practices from United States district courts when applicable.[114] The most critical difference between special courts-martial as adopted in 1950 and as they function today is the central role of the military judge, who is subject to the same certifications and protections as a military judge at a general court-martial.[115]

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[105] *See generally* COMMANDERS SURVEY, *supra* note 66. The Marine Corps Center for Lessons Learned conducted a survey on legal service support of almost 500 former O-5-level commanders who had served as Special Court-Martial Convening Authorities between 2001 and 2011. The clearest trend to emerge from the study is the desire among convening authorities to reduce administrative burdens in the military justice system. The authority to formally convene a court-martial did not appear on their list of priorities. *See id.* at 1–3.

[106] MCM, *supra* note 2, R.C.M. 601; *see also* WINTHROP, *supra* note 10, at 154–55 (summarizing the historical practice of "the referring of charges for trial").

[107] Article 19, UCMJ, 10 U.S.C. § 819 (2019).

[108] *Compare* Article 23, UCMJ, 10 U.S.C. § 823 (1950), *with* Article 23, UCMJ, 10 U.S.C. § 823 (2019).

[109] Article 16, UCMJ, 10 U.S.C. § 816 (1950).

[110] 1951 MCM, *supra* note 97, ch. II, ¶ 4(d).

[111] *Id.*

[112] Article 16(c), UCMJ, 10 U.S.C. § 816(c) (2019).

[113] MJRG, *supra* note 20, at 6.

[114] *Id.* at 5–6; *see also* Article 36(a), UCMJ, 10 U.S.C. § 836(a) (2019) (permitting the President to prescribe "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district courts").

[115] Article 26, UCMJ, 10 U.S.C. § 826 (2019).

With the implementation of standing courts-martial, Congress should modify Article 23 to grant "referral authority" of individual cases to special courts-martial, not "convening authority" of individual special courts-martial themselves. Just as with Article 22, the proposed Article 23 would grant the authority to refer cases to a standing special court-martial to each of the individuals granted convening authority by the current Article 23. There is no need to modify the composition of the court-martial or the options available to the referral authority and the accused, and military judges retain their independence under Article 26.

Article 24. "Who may convene summary courts-martial." Summary courts-martial differ from general and special courts-martial in several critical ways. For example, summary courts-martial consist of a single commissioned officer, who is not required to be a lawyer, and military judges play no part in the process.[116] Although the Military Rules of Evidence apply at the hearing,[117] the accused does not have the right to representation.[118] The accused also has the right to refuse trial by summary court-martial, and the punishments available are severely curtailed.[119] The convening authority or summary court-martial officer may also act as the accuser.[120] Most importantly, summary courts-martial are not criminal fora,[121] and "[a] finding of guilty at a summary court-martial does not constitute a criminal conviction."[122] These provisions have remained mostly unchanged since 1950.[123]

Summary courts-martial are courts in name only. In practice, they are a throwback to the earlier days of military justice and share few of the safeguards—or exposure to criminal liability—that define modern general and special courts-martial.[124] The implementation of standing courts-martial therefore does not require any changes to Article 24, because summary courts-martial will continue to operate outside the referral construct as non-criminal, ad hoc tribunals for the adjudication of minor offenses.[125] This approach comports with the MJRG's recommendation to "preserv[e] a unique feature of the military justice system that

[116] Article 16(d), UCMJ, 10 U.S.C. § 816(d) (2019).
[117] MCM, *supra* note 2, R.C.M. 1304(b)(2)(E)(i).
[118] *Id.* at R.C.M. 1301(e).
[119] Article 20(a), UCMJ, 10 U.S.C. § 820(a) (2019). At summary court-martial the UCMJ caps confinement at thirty days and does not permit punitive discharges. *See id.*
[120] MCM, *supra* note 2, R.C.M. 1302(b).
[121] *See* Middendorf v. Henry, 425 U.S. 25, 42 (1976) (holding that a summary court-martial is not a "criminal prosecution" entitling the accused to representation under the 6th Amendment); *see also* 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 & COMP. L. 419, 444–46 (2008) (providing context to the *Middendorf* decision).
[122] Article 20(b), UCMJ, 10 U.S.C. § 820(b) (2019).
[123] *Compare* Article 20, UCMJ, 10 U.S.C. § 820 (2019) *with* Article 20, UCMJ, 10 U.S.C. § 820 (1950).
[124] *See Middendorf*, 425 U.S. at 31–33 (explaining the differences among the four methods of disposing of cases under the UCMJ).
[125] For the definition of "minor offense," see MCM, *supra* note 2, pt. V, ¶ 1(e) (2019).

allows for efficient disposition of relatively minor offenses in an administrative, non-criminal forum."[126] This principle applies equally to commanding officer's non-judicial punishment under Article 15,[127] which fall outside the scope of courts-martial, standing or otherwise.

R.C.M. 401 through R.C.M. 407. The 400 series of the R.C.M.s addresses the forwarding and disposition of charges. Changes here primarily involve replacing "convening authority" with "referral authority" and related substitutions. In R.C.M. 401(1), for example, only persons authorized to "refer charges" to court-martial or to administer non-judicial punishment under Article 15 may dispose of charges. In R.C.M. 402, a commander not authorized to "refer charges" to court-martial may dismiss them or forward them to a superior commander for disposition. No modification is necessary to R.C.M. 405, which governs preliminary hearings under Article 32 that are non-judicial and can be convened on a case-by-case basis. Written pretrial advice from a staff judge advocate will still be required to send a case to general court-martial per R.C.M. 406, just as referral to a special court-martial will still require consultation with a judge advocate per R.C.M. 406A.

R.C.M. 504. "Convening courts-martial." R.C.M. 504 implements Articles 22 and 23 of the UCMJ.[128] Appendix A contains the proposed language for the new R.C.M., which tasks the military judge with issuing a "detailing order" that states the type of court-martial, announces the location and time that it will start, and assigns personnel to sit as members (if requested by the accused). This also eliminates the current practice in the Army, Navy, Marine Corps, and Coast Guard of each convening authority issuing an annual standing convening order and then amending it for individual courts-martial.[129] The new practice will be more similar to the Air Force approach, in which commanders publish a new convening order for each new case referred to trial, except the military judge will issue the detailing order, not the commander.[130]

R.C.M. 601. "Referral." Referral of charges requires three elements: an authorized and qualified convening authority, preferred charges, and a properly convened court-martial.[131] Changing the title of the accused's commander from "convening authority" to "referral authority" does not change that calculus. In fact, the establishment of standing courts-martial automatically satisfies the third element. The remainder of the referral requirements—probable cause that an offense triable by court-martial has been committed and that the accused

[126] MJRG, *supra* note 20, at 250.
[127] Article 15, UCMJ, 10 U.S.C. § 815 (2019).
[128] MJRG, *supra* note 20, at 245, 247.
[129] *Id.* at 253 n.12.
[130] *Id.*
[131] MCM, *supra* note 2, R.C.M. 601(a), Discussion.

committed it, and that the specification alleges an offense—are also not affected.[132] The commander may still personally order the referral of charges to the standing court-martial and join offenses[133] or accused as appropriate.[134] Withdrawal of charges under R.C.M. 604 would remain within the purview of the commander who referred them in the first place.[135]

2. Court-Martial Personnel

a. Panel Members

Article 25. "Who may serve on courts-martial." The UCMJ grants the convening authority broad discretion over the selection of court-martial panel members.[136] This empowerment is a recognition of the commander's central role in maintaining good order and discipline through the military justice system. According to one panel of experts, however, it is also "an invitation to mischief," and "[t]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."[137] The establishment of standing courts-martial would address these concerns by shifting member detailing authority from the commander to the court itself. The decision to elect a panel will remain with the accused, and the members will still be drawn from the unit of the "referral authority." But the elimination of member selection by commanders will reduce administrative burdens on the commander, [138] foreclose various member challenges and avenues for appeal, and enhance the credibility of the military justice system with both the accused and the public.[139]

The criteria for convening authorities to consider when detailing the "best qualified" members to a court-martial have not changed since 1950: "age,

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[132] *Id.* at R.C.M. 601(d)(1).
[133] *Id.* at R.C.M. 601(e)(2).
[134] *Id.* at R.C.M. 601(e)(3).
[135] These provisions also do not affect the referral authority's ability to enter or withdraw from plea agreements under R.C.M. 705. *Id.* at R.C.M. 705.
[136] *See* United States v. Bartlett, 66 M.J. 426, 429 (C.A.A.F. 2008) ("Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process, while maintaining the basic fairness of the military justice system.").
[137] WALTER T. COX III, GUY R. ABBATE, JR., MARY M. CHEH, JOHN S. JENKINS & FRANK J. SPINNER, NAT'L INST. OF MIL. JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF UNIFORM CODE OF MILITARY JUSTICE 7 (2001); *see also* Hansen, *supra* note 8, at 124 ("While there are few reported cases of commanders overtly manipulating the process, the risk is real.").
[138] See *infra* Part IV.A.2 for a discussion on the personnel and administrative structure, separate from the accused servicemember's chain of command, required to implement this proposal.
[139] *See, e.g.*, Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 25–26 (describing the implementation of a random-selection model by V Corps as a "change [that] would benefit Soldiers" and improve their "impressions of the military justice system").

education, training, experience, length of service, and judicial temperament."[140] The only factors that disqualify a member are formal involvement in the case or failure to meet rank/grade requirements.[141] The panel may represent a cross-section of the military community, but it is not required to,[142] and convening authorities may not exclude panel members due to their race,[143] gender,[144] or rank.[145] Convening authorities must personally consider the Article 25 criteria when detailing panel members; they may not delegate this responsibility.[146] Beyond these basic guidelines, convening authorities enjoy wide latitude in decisions about member detailing. As a result, most challenges to panel composition turn on the circumstances of the particular case, as viewed through the lens of unlawful command influence (UCI).[147] The removal of commanders from the member selection process—or at least the reduction of their role in it—helps mitigate the risks posed by UCI, which the Court of Military Appeals once described as "the mortal enemy of military justice."[148]

Article 37 of the UCMJ prohibits convening authorities and commanding officers from "unlawfully influencing" the findings or sentence of a court-martial or other military tribunal.[149] UCI of panel member composition usually takes the form of "court stacking," or selecting members who are more likely to find in favor of the convening authority's desired outcome.[150] The intent of the convening

[140] Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) (2019); *see generally* Erik C. Coyne, *Influence with Confidence: Enabling Lawful Command Influence by Understanding Unlawful Command Influence—A Guide for Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. REV. 1 (2012); Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261 (1996).
[141] *See Bartlett*, 66 M.J. at 429.
[142] *See* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial.").
[143] *See* United States v. Crawford, 35 C.M.R. 3, 13 (C.M.A. 1964) (prohibiting the exclusion of Black members from a panel, but not requiring their inclusion).
[144] *See* United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988) ("[A] convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population.").
[145] *See* United States v. Daigle, 1 M.J. 139, 140–41 (C.M.A. 1975) ("Except for the statutory preference for exclusion of persons in a rank lower than the accused, all ranks are eligible to serve on a court-martial."); *see also* United States v. Kunishige, 79 M.J. 693 (N-M Ct. Crim. App. 2019) (finding that convening authorities may not focus on rank at the exclusion of the factors enumerated in Article 25).
[146] *See* United States v. Ryan, 5 M.J. 97, 100–01 (C.M.A. 1978). Subsequent amendments to the UCMJ "did not overturn the prohibition against delegation of the power to detail court-members." United States v. Benedict, 55 M.J. 451, 457 (C.A.A.F. 2001) (Effron, J., dissenting).
[147] *See* United States v. Riesbeck, 77 M.J. 154, 159 (C.A.A.F. 2018) (identifying the improper selection of panel members as a form of unlawful command influence).
[148] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1988).
[149] Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2019); *see generally* Luther C. West, *A History of Command Influence on the Military Justice System*, 18 U.C.L.A. L. REV. 1 (1970) (tracing the doctrine of UCI throughout American history).
[150] *See* United States v. Upshaw, 49 M.J. 111, 113 (C.A.A.F. 1998).

authority is key. If a "convening authority's motive is benign, systematic inclusion or exclusion [of members] may not be improper."[151] If the accused is able to show evidence of UCI and tie it to the potential for unfair treatment at the court-martial, though, the government must persuade the court beyond a reasonable doubt that either the UCI does not exist or that the UCI will not negatively impact the proceedings.[152] As CAAF has noted, "an accused must be provided both a fair panel and the appearance of a fair panel."[153]

Convening authority control over member detailing, like the authority to convene courts-martial, is a vestige of a bygone era of military justice. Although modification of Article 25 is not necessary to establish a standing military court system, the elimination or reduction of commander input on member selection complements this Article's proposal by enhancing the credibility of courts-martial and streamlining their execution. This provision marks a fundamental change to the military justice system; it is potentially more controversial than the re-designation of the convening authority itself. Yet the shift has been advocated for in the past,[154] and it is consistent with the trend toward impartiality, both actual and implied, in the administration of military justice. Under the current system, commanders attain at best a neutral panel of members that could just as easily have been selected by the administrative apparatus of a standing court. At worst, commanders, whether intentionally or unintentionally, open the member selection process to challenge. At trial, this means extended *voir dire* and potential delays to draft new convening orders and detail new members. Post-trial, a substantiated allegation of UCI over member selection could overturn an otherwise legitimate outcome.[155] If nothing else, this change will liberate convening authorities from the administrative headaches associated with personal review of a list of members according to the Article 25 criteria, which some critics have pointed out is mostly a fiction anyway.[156]

Acknowledging congressional rejection of previous, similar proposals, this Article offers several potential courses of action. Standing courts-martial are

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[151] *Id.*
[152] *See* United States v. Biagese, 50 M.J. 143, 150–51 (C.A.A.F. 1999).
[153] United States v. Ward, 74 M.J. 225, 228 (C.A.A.F. 2015) (citations omitted).
[154] *See, e.g.*, COX ET AL., *supra* note 137, at 6–8; Arthur J. Keefe & Norton Moskin, *Codified Military Injustice: An Analysis of the Defects in the New Uniform Code of Military Justice*, 35 CORNELL L. Q. 151, 158 (1949) (discussing the American Bar Association's recommendation to remove the commander from member selection). *But see* Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 196 (2003) (arguing that the current system effectively "balances the needs of the military institution with the rights of the individual").
[155] *See, e.g.*, United States v. Smith, 27 M.J. 242, 251 (C.M.A. 1988) (reversing a conviction because the convening authority detailed female panel members under the assumption that they would be more likely to vote to convict the accused for assault of a female victim).
[156] *See, e.g.*, James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 138–40 (2010).

a tweak to the military justice system, not an excuse for wholesale change, and the goal is to establish them with as little effect on the rest of the military justice system as possible. Here are some potential modifications:

- Remove altogether Article 25(e)(2) criteria, which focus on the convening authority's "opinion" of who is "best qualified" to serve as a member. It is a fair assumption that all servicemembers possess a core level of competence to sit on a panel. Keep the rules for rank in Article 25(a), (b), and (c).[157]

- Authorize the "referral authority" to identify a large pool of members and submit that roster to the standing court-martial administrative office, which then details members from that pool on a random basis (in accord with applicable rank provisions).[158]

- Authorize the "referral authority" to identify members of the unit who do not comply with Article 25(e)(2)'s criteria and remove them by name from the pool before detailing by the court. A servicemember who is pending criminal or administrative action or a permanent change of station, for example, would likely not be a suitable panel member.

The Court of Military Appeals endorsed a version of the second approach in *United States v. Yager*,[159] affirming the conviction of a soldier by a panel of members seated via a "random jury selection program" implemented by one convening authority as an experiment.[160] The second and third options, which still

[157] The IRC recently renewed the call for random selection of panel members, and the Department of Defense has indicated its intent to make the change. *See* IRC REPORT, *supra* note 104, app. B at 54; C. Todd Lopez, *DOD Takes Phased Approach to Implementing Recommendations on Sexual Assault, Harassment*, DEP'T OF DEF. (July 21, 2021), https://bit.ly/3fsgBu5. Congress previously considered two variations of this proposal in the early 1970s but declined to adopt it. Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 45 (1971) ("The Bayh and Bennett bills provide that the administrative division of the Regional Command will select the members of general and special courts-martial at random from a pool of all the officers and enlisted men who have served on active-duty for at least one year and are permanently stationed within that Regional Command.").

[158] The American Bar Association endorsed this approach in testimony before Congress during hearings on adoption of the original UCMJ. *See* Keefe & Moskin, *supra* note 154, at 158.

[159] 7 M.J. 171 (C.M.A. 1979).

[160] "In accordance with procedures promulgated by a local directive . . . names for a list of prospective jurors were selected from personnel data files and placed on a 'Master Juror List' and thereafter screened by having each individual whose name appeared on the list complete a questionnaire regarding qualifications to serve as a court-martial member. Upon completion of the screening process and the elimination of unqualified and exempt personnel, the remaining persons were considered 'Qualified

acknowledge the importance of members' "age, education, training, experience, length of service, and judicial temperament," are most compatible with the findings of a report by the Joint Service Committee on Military Justice that examined this issue.[161] They are also more in line with the recommendations of the MJRG, which proposed only minor modifications to Article 25.[162] The primary downside of these approaches is an increased logistical burden on the office tasked with identifying members for each court-martial.[163] The larger pool of members requires the collection of more questionnaires, for example, as well as the tracking of more potential excusals.[164] This burden shifts from the commander to the standing court administrative office, though, and should be a welcome reprieve for most staff judge advocates.[165]

Another consideration is that, according to one unit's experience, randomly selected panels are more likely to consist of junior personnel than panels chosen by a commander.[166] Although a more junior panel is potentially more "defense friendly," there is no empirical evidence to support that assertion, and rank is specifically excluded from the Article 25 criteria.[167] Finally, these logistical challenges do not bear on the ultimate question of whether choosing the members of a court-martial facilitates the commander's obligation to maintain good order and discipline. As one expert recently concluded, "[t]here does not appear to be a strong nexus between this power and command responsibilities . . . [and] transferring this power from commanders to independent offices seems justified."[168]

R.C.M. 503. "Detailing members, military judge, and counsel, and designating military magistrates." Under this proposal, the convening authority would no longer be responsible for detailing court-martial members for the reasons just explained. R.C.M. 503 should therefore replace "convening authority" with "military judge" in paragraph (a), giving the military judge authority to detail no fewer "qualified persons" than required by the forum. This change also removes the policy that a military judge may impanel alternate members only if the

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Jurors,' and they were eligible for selection, at random, for court-martial duty." *Id.*; *see also* Huestis, *supra* note 139, at 22 (describing a similar experiment conducted by V Corps in 2005).

[161] DEP'T OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (1999).

[162] MJRG, *supra* note 20, at 251–58.

[163] *See* Hansen, *supra* note 8, at 124.

[164] *See* Huestis, *supra* note 139, at 30. In 2005, V Corps identified a pool of 100 potential members, drawn from 500 nominations by subordinate commanders, who fit the Article 25 criteria. The SJA then identified the requisite number of members for each trial according to a random basis that satisfied rank requirements. *See id.* at 29–30.

[165] See *infra* Part IV.A.2 for a discussion of staffing and running the permanent court office.

[166] *See* Huestis, *supra* note 139, at 31.

[167] *Compare id.* at 31, *with* Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) (2019).

[168] Hansen, *supra* note 8, at 124.

convening authority has authorized them.[169] Overall, this update is consistent with civilian practice and makes the military justice system more credible because it removes the appearance of command influence. No changes are required to the detailing instructions for military judges,[170] magistrates,[171] or counsel,[172] none of whom are currently detailed by the convening authority. The contents of the detailing order are outlined in Appendix A, which contains a proposed R.C.M. 504.

R.C.M. 505. "Changes of members, military judge, and counsel." Similarly, R.C.M. 505(c)'s provision that convening authorities may change the members of the court-martial should be removed. If commanders no longer have member-detailing authority, then they also lose the authority to change members detailed by the court regardless of whether it is before or after assembly.

b. Military Judiciary

Article 26. "Military judge of a general or special court-martial." Military judges play a unique role in the administration of military justice. Emerging from the post-World War II effort to professionalize courts-martial,[173] military judges must be certified under Article 26, and in accordance with service-specific regulations, "by reason of [their] education, training, experience, and judicial temperament."[174] In an effort to maintain their neutrality, military judges operate independently of the court-martial convening authority. For example, military judges have mandatory minimum tour lengths,[175] they can be neither assigned to nor removed from a case by a convening authority,[176] and they do not receive performance evaluations from the convening authority or anyone on the convening authority's staff.[177] This judicial independence builds trust among

[169] MCM, *supra* note 2, R.C.M. 503(a)(1)(C).
[170] *Id.* at R.C.M. 503(b).
[171] *Id.* at R.C.M. 503(b)(4).
[172] *Id.* at R.C.M. 503(c).
[173] *See* Ku, *supra* note 44, at 52–56 (summarizing the establishment of the military judiciary); MJRG, *supra* note 20, at 74–77 (detailing the transformation of law officers to military judges).
[174] Article 26(b), UCMJ, 10 U.S.C. § 826(b) (2019).
[175] Article 26(c)(4), UCMJ, 10 U.S.C. § 826(c)(4) (2019); *see* Schlueter, *supra* note 14, at 38–39 (praising the minimum tour length provision).
[176] *See, e.g.*, U.S. DEP'T OF NAVY, SECNAVINST 5430.27E, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS FOR SUPERVISION AND PROVISION OF CERTAIN LEGAL SERVICES ¶ 1.b (2019) (assigning the Judge Advocate General with the sole authority to detail military judges).
[177] Article 26(c)(2), UCMJ, 10 U.S.C. § 826(c)(2) (2019).

commanders,[178] accused servicemembers,[179] and the broader public.[180] The establishment of standing courts-martial does not require modifications to the manner in which military judges are appointed or operate, because they already work outside the purview of the convening authority.[181]

One remaining question is whether trial-level military judges would gain the authority to issue writs under the proposed system. The All Writs Act empowers "all courts established by an Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[182] Appellate military courts, established in Article 66, clearly fit this definition and wield writ authority via R.C.M.s 1203 and 1204, but courts-martial, even post-referral, do not.[183] Although standing courts-martial do not require military judges to have writ authority, granting it to them would be consistent with the overall trend toward bringing military judges' authorities in line with those of their civilian counterparts.[184] The proposed modifications to Article 16 would elevate courts-martial to the status of "courts established by an Act of Congress," but, if desired, Congress could easily restrict this authority in either the All Writs Act (specifically excluding courts-martial) or Article 16 (specifically excluding writ authority).

Article 26a. "Military Magistrates." The position of military magistrate is relatively new, marking "one of the most significant changes to the UCMJ" in MJA 16.[185] The specific duties of military magistrates are determined by the service secretaries, and not all of the services have adopted the military magistrate program.[186] In the Army, magistrates are authorized to issue search, seizure, and

[178] *See* COMMANDERS SURVEY, *supra* note 66, at 2 ("More than 90% of commanders felt that military judges evaluate the facts and make well-reasoned decisions in most, if not all, cases.").
[179] *See* MJRG, *supra* note 20, at 219 (noting the popularity of judge-alone courts-martial since their creation in 1968).
[180] *See, e.g.*, Weiss v. United States, 510 U.S. 163, 179–81 (1994) (praising "the number of safeguards in place to ensure impartiality" among military judges).
[181] *See* Hansen, *supra* note 121, at 446–48 (distinguishing the Supreme Court's approach in the *Weiss* decision from recent decisions in the United Kingdom and Canada that invalidated those systems' attempt to mostly remove the commander from military justice).
[182] 28 U.S.C. § 1651 (2021).
[183] *See* Patrick S. Wood, *A Writ of Habeas Corpus* Ad Prosquendum, ARMY LAW., no. 3, 2019, at 48, 49; *see generally* Thomas M. Rankin, *The All Writs Act and the Military Justice System*, 53 MIL. L. REV. 103 (1971).
[184] *See* BISHOP, *supra* note 12, at 30–33.
[185] Schlueter, *supra* note 14, at 39. The Army previously managed its own internal magistrate program via a service-specific publication, but MJA 16 marked the creation of the role in the UCMJ. *See id.* at 39–40; MJRG, *supra* note 20, at 271–74.
[186] *Compare* U.S. ARMY TRIAL JUDICIARY, MILITARY MAGISTRATE STANDARD OPERATING PROCEDURES (2019) (laying out procedures for Army magistrates), *with* U.S. MARINE CORPS, ORDER 5800.16, LEGAL SUPPORT AND ADMINISTRATION MANUAL 51 (Jun. 19, 2020) [hereinafter 16 LSAM] ("The Secretary of the Navy has not authorized the utilization of military magistrates as defined in Article 26a, UCMJ.").

apprehension authorizations, as well as to review pretrial confinement decisions, but they may not preside over special courts-martial or prereferral proceedings that require a military judge.[187] This distinction is modeled on the authority of civilian magistrate judges, who, although they are judicial officers of the district courts rather than presidentially appointed judges,[188] exercise various quasi-judicial functions.[189] The military magistrate program is compatible with the adoption of standing courts-martial, which could provide a home and other resources for military magistrates, but the initiatives are not interdependent. No modifications are necessary to the current Article 26a—it already provides adequate space for the establishment of standing courts-martial.

c. Support Staff

Article 28. "Detail or employment of reporters and interpreters." Court reporters make audio records and prepare transcripts of each court-martial proceeding for inclusion with the record of trial,[190] much like civilian court reporters, who are supervised by the clerk of court.[191] Since the adoption of the UCMJ, convening authorities have detailed military court reporters to cases, even though they do not otherwise oversee them.[192] This marked a change from previous practice, when the president of the court-martial panel, as a member of the court, appointed the court reporter.[193] With the establishment of standing courts-martial, Article 28 should be modified to remove convening authority detailing power over court reporters, who will instead be assigned to cases by the military clerk of court or equivalent office.[194] This is a natural shift that recognizes the structure and practice already in place, while bringing military court administration more in line with historical and civilian models.

R.C.M. 502. "Qualifications and duties of personnel of courts-martial." In addition to court reporters, the standing court-martial office will be responsible for providing other trial support personnel, such as bailiffs, guards, and escorts.

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[187] U.S. ARMY TRIAL JUDICIARY, *supra* note 186, at 2. The authority to review pretrial confinement decisions is the most intrusive on the commander's authority and has the potential to cause friction. *See, e.g.*, Jack E. Owen, *A Hard Look at the Military Magistrate Pretrial Confinement Hearing:* Gerstein *and* Courtney *Revisited*, 88 MIL. L. REV. 3 (1980).

[188] Pfander, *supra* note 33, at 765 (explaining that magistrates may not be freely substituted for federal judges at the trial stage of a federal proceeding).

[189] 28 U.S.C. § 636 (2009). Civilian magistrates conduct most initial proceedings in criminal cases, including issuing search and arrest warrants, conducting detention and probable cause hearings, and deciding motions. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 82, at 27; MJRG, *supra* note 20, at 306–07.

[190] MCM, *supra* note 2, R.C.M. 502(e)(3)(B).

[191] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 82, at 11.

[192] MJRG, *supra* note 20, at 281.

[193] *Id.*

[194] See *infra* Part IV.A.2. for a discussion of how the Services could implement a military clerk of court position.

R.C.M. 502 lists five disqualifying criteria for people serving in these roles. In a given case, they may not be the accuser, a witness, an investigating or preliminary hearing officer, counsel for any party, or a panel member of the court-martial or any previously related courts-martial.[195] The provision of personnel from within the court office, rather than the unit of the accused, comports with this rule and avoids any potential conflicts of interest between the accused and members of his unit filling quasi-administrative functions.

3. Court-Martial Mechanics

a. Pretrial

Article 30a. "Certain proceedings conducted before referral." Another significant change made by MJA 16 was the grant of pre-referral powers to military judges and magistrates.[196] This change represented an acknowledgment that certain pretrial matters disproportionately affect case outcomes and deserve heightened attention, and it marked a substantial departure from the principle that a court-martial does not exist until convened by a commander. Under the old system, the only person authorized to make decisions on a case before referral of charges was the convening authority, even if the decisions involved technical legal issues.[197] Now, Congress has authorized military judges to issue investigative subpoenas, issue warrants or orders for electronic communications, address matters referred by an appellate court, and consider designations of victim representatives and certain victim-filed writs, all before referral.[198] If approved by the respective service secretary, military judges may also designate military magistrates to preside over these proceedings, an even further delegation of authority.[199] Pre-referral hearings bear a direct relationship with federal civilian practice, which regularly entertains pre-arraignment motions.[200] Article 30a is the best example to date of the increasingly blurry distinction between standing federal courts and ad hoc courts-martial, vesting military judges with authority that has traditionally only belonged to their civilian counterparts.[201]

R.C.M. 309. "Pre-referral judicial proceedings." R.C.M. 309 codifies the pre-referral authorities contained in Article 30a. It grants military judges the

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[195] MCM, *supra* note 2, R.C.M. 502(e)(2).
[196] Article 30a, UCMJ, 10 U.S.C. § 830a (2019); *see* MJRG, *supra* note 20, at 303-10 (providing background to the adoption of Article 30a).
[197] MJRG, *supra* note 20, at 304.
[198] Article 30a(a)(1), UCMJ, 10 U.S.C. § 830a(a)(1) (2019).
[199] Article 30a(c), UCMJ, 10 U.S.C. § 830a(c) (2019). Military magistrates may not issue warrants for electronic communications. *Id.*
[200] Federal magistrates preside over preliminary proceedings on issues such as search and arrest warrants, summonses, initial appearances, evidentiary matters, detention hearings, and guilty pleas. *See* MJRG, *supra* note 20, at 306.
[201] *See* Schlueter, *supra* note 14, at 47–49.

authority to issue investigative subpoenas and orders for electronic communications, as well as the authority to hear requests for relief from people who receive such subpoenas or orders, all before the referral of charges to a formally convened court-martial.[202] A proposed Executive Order will expand the scope of these authorities to include the victim-based provisions in Article 30a, as well as reviews of an accused's mental state under R.C.M. 706 and pretrial confinement under R.C.M. 305.[203] All of these trends nest comfortably within a standing court-martial system; no change is required to R.C.M. 305, which in fact lays much of the groundwork for at least a standing military judiciary.

R.C.M. 702. "Depositions." A deposition is "the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded.[204] Before referral, R.C.M. 702(b) permits only a convening authority to order a deposition. After referral, either the convening authority or the military judge may order a deposition. Extending the military judge's authority to pre-referral is consistent with the other provisions in this proposal, and it does not necessarily have to come at the expense of convening authorities, who may still order depositions during the disposition phase for their own purposes. This change simply means that both military judges and referral authorities will be able to order pre-referral depositions. R.C.M. 702(d)(1) should also be updated to grant pre-referral authority to the military judge to review a convening authority's decision to deny a deposition request.

R.C.M. 703. "Production of witnesses and evidence." Control of court-martial funding is a controversial topic that mostly falls outside the scope of this Article. The establishment of standing courts-martial would lend support to arguments in favor of removing commander authority over expert and lay witness requests, but such a change is not necessary to implement the new system. Under the current approach, costs come out of the convening authority's Title 10 Operations and Maintenance budget,[205] which detracts from readiness and training while potentially injecting cost as a charging consideration for commanders.[206]

[202] MCM, *supra* note 2, R.C.M. 309(b).
[203] Interview with Lieutenant Colonel Adam M. King, U.S. Marine Corps, Military Justice Branch Head, Judge Advocate Division, Headquarters Marine Corps (Mar. 27, 2021). There is no projected date for signature, but the military justice community is confident that the Executive Order will be signed. *Id.* The IRC report includes the recommendation that DOD "expedite processing of proposed executive orders regarding military justice." *See* IRC REPORT, *supra* note 104, app. B at 50.
[204] MCM, *supra* note 2, R.C.M. 702(a), Discussion.
[205] *See, e.g.*, U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL ¶¶ 0145–46 (2020).
[206] *See* COMPREHENSIVE REVIEW, supra note 41, at 113 ("Commanders and trial counsel are inappropriately evaluating defense counsel requests solely on the basis of financial expense, and not upon their importance to a fair and impartial trial."). *But see* COMMANDERS SURVEY, *supra* note 66, at 4 ("Commanders were not as concerned with the manpower and financial costs associated with a trial. Less than 3% of commanders rated 'costs' as very important factors to consider when making a disposition decision.").

Defense offices do not have their own budget, so, for defense counsel to request Government assistance in witness production, defense counsel must submit to trial counsel a written list of the witnesses, with justifications for their presence.[207] This has led to concerns over the defense potentially being forced to reveal their case strategy to the Government by having to explain the relevance of each witness in enough detail to convince the convening authority to pay for the witness to attend the court-martial.[208]

A related concern is the employment of expert witnesses and consultants, who are compensated by the convening authority only if they are determined to be "necessary" to the case, and again only after defense explains how the experts fit into their overall case.[209] Military judges do not have the authority to review funding decisions until after referral, even though expert input is often valuable earlier in the case.[210] Courts-martial then spend excessive time settling disputes over expert funding, even as trial approaches.[211] This is not an efficient system and is markedly different from civilian practice, in which courts and defense offices have their own budgets to spend as they see fit.[212]

A standing court-martial system helps address these issues in several ways. If funding for witnesses and experts remains with the referral authority, R.C.M. 703(d)(2) could be modified to allow a military judge to review the funding decision pre-referral, giving counsel more certitude as they prepare for trial. This does not change authorities; it only shifts them to earlier in the court-martial process. A more radical approach involves moving the funds from the start from the commander to either the military judge or the defense office, which then could dispense money more in line with federal civilian practice.[213] None of these changes are required by the establishment of standing courts-martial, but they would be logical features of permanent courts.

b. Trial

Article 29. "Assembly and impaneling of members; detail of new members and military judges." In addition to the Article 25 authority to identify panel members, convening authorities may appoint alternate members in case not enough members are seated to meet the statutory requirements for the type of

[207] MCM, *supra* note 2, R.C.M. 703(c)(2).
[208] *See, e.g.*, COMPREHENSIVE REVIEW, *supra* note 41, at 204–06 (arguing for an independent defense budget).
[209] MCM, *supra* note 2, R.C.M. 703(d)(1).
[210] *Id.* at R.C.M. 703(d)(2).
[211] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 205-06.
[212] *See* David E. Patton, *The Structure of Federal Public Defense*, 102 CORNELL L. REV. 335, 348–53 (2017).
[213] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 204–06. The IRC recently endorsed this approach. *See* IRC REPORT, *supra* note 104, app. B at 55.

court-martial.[214] Seating of the panel proceeds in two phases: "assembly," which is pre-challenge and excusal, and "impaneling," which is post-challenge and excusal.[215] Once the panel is assembled, the convening authority's only function is to detail new members in case seated members are removed.[216] The adoption of standing courts-martial, which would potentially move member identification from the convening authority to the court, would simplify assembly and impaneling by giving the military judge sole control over the identification of alternates and detailing of new members. Article 29 should be modified to remove the convening authority's role in the excusal and seating of members, consistent with the changes proposed to Article 25 above. This would bring the panel member selection process more in line with the seating of federal civilian juries and further eliminate any perceptions of court-stacking by keeping the process solely within the purview of the military judge.[217] R.C.M.s 912A and 912B implement these rules.

c. Post-Trial

R.C.M. 1101 through R.C.M. 1117. The 1100 series of the R.C.M.s addresses post-trial procedure. The military judge and court reporter bear the bulk of the administrative responsibility in this realm, while the commander exercises dwindling discretion over the outcome of the trial.[218] A court-martial sentence is executed and takes effect when the military judge enters the court's judgement into the record of trial.[219] The court reporter prepares and certifies that the record of trial contains all required information,[220] providing copies to the accused and victim once all sealed exhibits and transcripts/recordings of closed sessions have been removed.[221] Standing courts-martial would obviate the need for R.C.M. 1112(e)(3)(A), which makes the convening authority responsible for removing all classified information from the accused's copy of the record of trial, because there is no need to reinject the commander with a risky administrative requirement that late in the process when the military judge is better positioned to handle it.

One natural role for a permanent military judiciary is conducting hearings on the vacation of suspended sentences under R.C.M. 1108. Although this is not required, it would bring a degree of regularity and familiarity with legal processes

[214] Article 29(c), UCMJ, 10 U.S.C. § 829(c) (2019).
[215] Article 29(a)-(b), UCMJ, 10 U.S.C. § 829(a)-(b) (2019).
[216] Article 29(d), UCMJ, 10 U.S.C. § 829(d) (2019).
[217] MJRG, *supra* note 20, at 284; Schlueter, *supra* note 14, at 42–43.
[218] *See* MJRG, *supra* note 20, at 80–81. *But see* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 473 (2014) (arguing that commanders should retain robust discretion over court-martial findings and sentences as part of their mission to ensure good order and discipline).
[219] MCM, *supra* note 2, R.C.M. 1102(a)(1), 1111(a)(1).
[220] *Id.* at 1112(c).
[221] *Id.* at 1112(e)(1), 1112 (e)(3)(B).

to the job, which is currently done on an ad hoc basis by the offender's special court-martial convening authority or a judge advocate appointed by him.[222] The most critical aspect of the post-trial process is that the commander retains the authority to impose the punishment itself, rather than fully transitioning to the civilian model in which the court acts on behalf of the government. If the court were to exercise final judicial power, without review or approval by the commander, then it would potentially exceed its authority under Article I of the Constitution.[223]

IV. Implementation

So far, this Article has provided the historical and constitutional framework for establishing a system of standing courts-martial, as well as the statutory and procedural modifications required to implement it. If the proposal is adopted, it will require fundamental changes in the administration of military justice, and any proposal that is not functionally practical is unlikely to be implemented. Assuming a resource-constrained environment, in both personnel and funding, each Service will have to determine for itself how to best administer permanent courts. The following section addresses how one Service, the Marine Corps, could adapt its current legal services structure to support standing courts-martial with relatively minor adjustments. It will conclude by addressing the feasibility of standing courts-martial in deployed environments, which present unique challenges and distinguish military courts from civilian courts.

A. Proof of Concept: A Standing Court System in the Marine Corps

The Marine Corps recognizes two forms of legal support: command legal advice and legal services.[224] The first category, command legal advice, is "independent legal advice to commanders" provided by Marine judge advocates "assigned or attached to, or performing duty with, military units."[225] This is the role of staff judge advocates (SJAs), who inform the commander's decision-making process on military justice, operational law, administrative law, claims, and ethics, among other issues.[226] The second category, legal services, are "those recurring legal support tasks that are executed to implement a commander's decision, sustain the force, and support servicemembers, retirees, and their families."[227] These functions are performed by four regionally-configured Legal

[222] *Id.* at 1108(d)(1)(A).
[223] Lyon & Farmiloe, *supra* note 14, at 265.
[224] 1 U.S. MARINE CORPS, ORDER 5800.16, LEGAL SUPPORT AND ADMINISTRATION MANUAL ¶ 0201 (2018) [hereinafter 1 LSAM].
[225] 10 U.S.C. § 5046(d)(2) (2018).
[226] 1 LSAM, *supra* note 224, ¶ 0202.
[227] *Id.* ¶ 0203; *see also* COMPREHENSIVE REVIEW, *supra* note 41, at 162 (discussing Marine Corps legal service missions).

Services Support Sections (LSSSs) and ten subordinate Legal Service Support Teams (LSSTs).[228] The SJA to the Commandant of the Marine Corps makes recommendations on legal structure and resource alignment to the Commandant, who retains the authority to change LSSS structure as part of "implementing and administering" the UCMJ in accordance with Title 10 of the U.S. Code.[229] Standing courts-martial are consistent with the LSSS/T construct and in many ways complement it, better enabling execution of the legal services mission.

1. The Current System

LSSS/Ts functionally support commanders and individuals in their region but administratively fall under the Marine Corps installation that hosts them.[230] The LSSS/T chain of command is separate from, and independent of, the respective installation SJA, who focuses solely on command legal advice.[231] Military justice capabilities—trial, defense, victims' legal counsel (VLC), and post-trial review—are regionally consolidated at the LSSS/T, rather than stovepiped by individual locations, for the sake of proficiency, efficiency, and accountability.[232] Each LSSS is led by an Officer in Charge (OIC) (O-6) and supported by a Legal Administrative Officer (CWO-4) and a senior enlisted Legal Services Chief (E-9).[233]

A recent reorganization has left OICs with primarily administrative responsibilities.[234] They oversee the court reporters and the post-trial review section, via the Post-Trial Administration Officer (chief warrant officer or judge

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[228] 1 LSAM, *supra* note 224, ¶ 0203; COMPREHENSIVE REVIEW, *supra* note 41, at 136.

[229] U.S. MARINE CORPS, ORDER 5430.2, ROLES AND RESPONSIBILITIES OF THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS 1-2 (2013); *see also* COMPREHENSIVE REVIEW, *supra* note 41, at 135–37 (explaining the Commandant-directed reorganization of the Marine Corps legal community in 2012). A Table of Organization and Equipment Change Request (TOECR) that does not create or consume force structure is usually not controversial and can be executed via the monthly Authorized Strength Report. Changes to employment and function of the LSSS/T can be immediately directed through Marine Administrative Message and then memorialized in the LSAM and published as soon as possible. Telephone interview with Major Gavin K. Logan, Deputy Dir., Joint Strat. Initiatives Branch, Judge Advocate Div., Headquarters Marine Corps (Mar. 30, 2021).

[230] 1 LSAM, *supra* note 224, ¶ 0203; COMPREHENSIVE REVIEW, *supra* note 41, at 136.

[231] *See* U.S. MARINE CORPS, MARADMIN 416/12, PROVISION OF LEGAL SERVICES SUPPORT ¶ 3(B) (2012).

[232] COMPREHENSIVE REVIEW, *supra* note 41, at 137. This was the primary effect of the 2012 reorganization of the Marine Corps legal community, which emphasized "regional consolidation of military justice capabilities (Trial, Defense, Victims' Legal Counsel, and Post-Trial Review)." *Id.* at 155.

[233] *Id.* at 144.

[234] Until recently, the LSSS OICs bore ultimate responsibility for the provision of trial services within their regions. 16 LSAM, *supra* note 186, ¶ 0203. This included supervision of the trial office via the Regional Trial Counsel (O-5), whose reporting senior for fitness reports was the OIC even though the OIC was not a trial counsel and did not try cases. *Id.* ¶ 0204. The same principle applied to LSST OICs and STCs at the sub-regional level. *Id.* ¶ 0213.

advocate),[235] and they ensure compliance with the information reporting requirements of Article 140a by querying case management databases for substantive information on offenses and the production and distribution of records of trial.[236] OICs also maintain installation courthouses, which feature courtrooms, judicial chambers,[237] waiting areas for witnesses, members, and spectators, and work spaces for the trial, defense, VLC, and court reporter sections.[238] To assist in this mission, the LSSS OIC appoints a courthouse security officer to oversee physical security measures within the region and train LSSS personnel in the use of metal detectors, physical searches, and non-lethal force.[239] Trial security officers are responsible for the security of individual military justice proceedings through oversight of courtroom security personnel, bailiffs, and command brig chasers.[240] LSST OICs coordinate with local facilities that provide confinement services for supported commands.[241] OICs are also responsible for assigning officers and enlisted Marines among the LSSS/T offices throughout their tour there.[242]

The Regional Trial Counsel (RTC) (O-5),[243] Regional Defense Counsel (O-5),[244] and Regional VLC (O-4)[245] operate within their own technical chains of command, independent of the OIC, even though they reside at the LSSS and are administratively supported by the OIC. A Trial Services Administration Officer (CWO-2) is directly responsible to the RTC for the administration of trial services throughout the region, including witness travel coordination, notifications required under the Victim-Witness Assistance Program, and "all other administrative tasks associated with a court-martial that do not require Article 27(b) certification."[246] The LSSTs mirror this structure, with an OIC (O-5) administratively supporting a

[235] *Id.* ¶ 022201.
[236] *Id.* ¶ 1303. The military judiciary is responsible for ensuring access to docket information, filings, and records, which would not change under this proposal.
[237] Military judges use facilities maintained and operated by the LSSS or LSST but remain administratively and functionally independent from those chains of command. JAGINST 5813.4I, *supra* note 82; s*ee supra* Part III.B.2.b. (discussing the roles and responsibilities of military judges). This proposal does not affect the current arrangement.
[238] 16 LSAM, *supra* note 186, ¶ 1604.
[239] *Id.* ¶ 150404.
[240] *Id.* ¶ 150405.
[241] *Id.* ¶ 0121203.
[242] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 135–36.
[243] As of 1 June 2021, all trial services personnel fall within the Marine Corps Trial Services Organization and report to the Chief Trial Counsel of the Marine Corps, rather than their respective LSSS/T OIC. MIL. JUST. BRANCH, JUDGE ADVOCATE DIV., HEADQUARTERS MARINE CORPS, PRACTICE DIRECTIVE 1-21, ESTABLISHMENT OF THE MARINE CORPS TRIAL SERVICES ORGANIZATION AND THE CHIEF TRIAL COUNSEL OF THE MARINE CORPS (2021).
[244] *Id.* ¶ 010608.
[245] *Id.* ¶ 010304(B).
[246] *Id.* ¶ 020702.

Senior Trial Counsel (O-4), Senior Defense Counsel (O-4), and VLC (O-3) who actually run their respective shops.[247]

2. The Proposed System

Now that OICs no longer supervise trial counsel, LSSS/T OIC functions are nearly identical to the roles and responsibilities of federal Clerks of Court. Charged with "carry[ing] out the court's administrative functions," clerks maintain the records and dockets of the court, manage the court's information technology systems, administer the court's jury system, provide court reporter services, and provide courtroom support services like security and maintenance.[248] Clerks are "the chief administrative officer[s] of the court."[249] If Congress establishes standing courts-martial, the OICs of LSSSs and LSSTs could easily transition to the equivalent of a "Clerk of Military Court" position, still aligned regionally and responsible to the host installation for the provision of court services. The title of the billet is less important than its responsibilities and authorities, so this proposal recommends that they remain "OIC" for the sake of simplicity and continuity.[250]

The support apparatus that currently falls under the OIC—Legal Administration Officer, Legal Services Chief, Post-Trial Administration Officer, courthouse security officers, and trial security officers—would remain in place and carry on essentially as it does now, with the exception of the oversight of personnel moves within the LSSS.[251] The Legal Administration Officer would continue to "be responsible for the administrative and functional management of the business aspects of the provision of legal services support" and serve as "the principal technical advisor to the [OIC] on all administrative matters."[252] The Legal Services Chief would remain the senior enlisted legal services specialist at the LSSS and act as personnel advisor to the OIC.[253]

Finally, the Post-Trial Administration Officer would retain control of the court reporters[254] and post-trial review section, which ensures proper certification and service of records of trial and tracks, promulgates, and stores records for all court-martial proceedings in the region.[255] Changes to the LSSS structure would not impact the post-trial R.C.M.s discussed above. The post-trial office would

[247] *Id.* ¶¶ 0212, 0213.
[248] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 82, at 21.
[249] *Id.* at 22.
[250] The names of the "LSSS" and "LSST" also do not need to change.
[251] COMPREHENSIVE REVIEW, *supra* note 41, at 144.
[252] U.S. MARINE CORPS, ORDER 1200.17E, MILITARY OCCUPATIONAL SPECIALTIES MANUAL 1-148 (2013).
[253] COMPREHENSIVE REVIEW, *supra* note 41, at 156.
[254] *Id.* ¶ 022204 (placing court reporters under the Post-Trial Administration Officer); *id.* ¶¶ 1201–11 (detailing court reporter procedures).
[255] *Id.* ¶ 022201.

remain responsible for forwarding the record of trial and convening authority action to the military judge for entry of judgment, which terminates the trial proceedings and initiates the appellate phase.[256] The LSSS would remain responsible for ensuring the collection of trial data according to Article 140a of the UCMJ.[257]

For personnel assignments, the Marine Corps should divide the functional areas within the LSSS/Ts into separate Monitored Command Codes (MCCs), one each for trial, defense, and VLC, with a fourth MCC for the OIC's office (this could remain the same as the current LSSS/T MCC).[258] This will encourage continuity within the three military justice shops and reinforce their functional independence from the OIC.[259] The primary outcome of dividing the LSSS/Ts into MCCs that correspond to trial, defense, and VLC shops is the elimination of the need for the OIC to administratively oversee any of the military justice shops.[260] Instead, the OIC will focus solely on the administrative aspects of the standing court system.[261] This maintains the OIC's "landlord" functions relative to the "tenants" of the military justice system by providing the facilities, security, and administrative support that enable the various components to execute their assigned functions.

One of the more substantial changes will be the staffing of a member identification office within the LSSS. As discussed above, the establishment of

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[256] *Id.* ¶ 170606. The Department of the Navy Chief Judge and Assistant Judge Advocate General (02) remain accountable and responsible for cases from Navy and Marine Corps Appellate Review Activity through Navy and Marine Corps Court of Criminal Appeals. COMPREHENSIVE REVIEW, *supra* note 41, at 239.

[257] *See supra* Part III.B.3.c. (discussing the 1100 series of the R.C.M.s). The LSSS currently "ensure[s] data is collected and reflected accurately in accordance with the Secretary of Defense's standards." 16 LSAM, *supra* note 186, ¶ 1704.

[258] Creating multiple MCCs within a single Reporting Unit Code (RUC) does not alter command relationships, so the administrative command relationships involved with hosting Marine Corps installations would remain unaffected. *See generally* U.S. MARINE CORPS, ORDER 5311-1E, TOTAL FORCE STRUCTURE PROCESS (2015). Modifying MCCs requires a TOECR, which does not move, create, or consume personnel structure. Marine Corps Installations Command is the appropriate command to sponsor this TOECR. Interview with Major Gavin K. Logan, *supra* note 229.

[259] Personnel could still move among MCCs within the time period of their orders if circumstances required. *See* U.S. MARINE CORPS, ORDER 1300.8, MARINE CORPS PERSONNEL ASSIGNMENT POLICY 6-17 (2014).

[260] Congress previously considered a version of this approach but did not ultimately pass it. As detailed above, much has changed in the intervening half-century, and the necessary modifications to the UCMJ in Part III are significantly more modest. *See* Sherman, *supra* note 157, at 42–43 (identifying four proposed bills in the early 1970s that would have established "an independent court-martial command," composed of divisions for military judges, trial counsel, defense counsel, administrative functions, and review, and that would "exercise most of the appointive and administrative functions presently performed by the commander or his subordinates").

[261] The Navy is also considering this approach, by separating the trial shop into its own command to encourage more "focused attention to military justice." COMPREHENSIVE REVIEW, *supra* note 41, at 111.

standing courts-martial will potentially shift the responsibility for identifying panel members from the commander to the administrative office that runs the courts. [262] In this case, that office is the component of the LSSS still functionally controlled by the OIC. The convening authority's SJA and administration shops currently handle this responsibility, and the LSSS office will have to closely coordinate with them to ensure they are working with accurate personnel rosters and availability. To that end, the member identification office should be staffed with an additional administrative component, preferably led by an adjutant or chief warrant officer, in much the same way the trial shop is today augmented by an administrative specialist non-commissioned officer.[263] Potential staffing for this office can also come from the supported SJAs' offices, which will have a significant administrative burden removed from their portfolio.

The bailiffs, brig chasers, and courtroom security personnel who are currently supplied by convening authorities and the LSSS on a case-by-case basis would instead become permanent members of the standing court office.[264] This benefits commanders, who will no longer have their personnel siphoned off to fill duties outside of their Military Occupational Specialties, and the broader military justice institution, which is in need of professionalized support services. [265] Consideration should be given to reassigning responsibility for witness travel to this office so that the trial shop can increase its focus on prosecuting cases.

The first Marine Corps leadership principle is, "Know yourself and seek self-improvement."[266] The Marine Corps legal community has taken that principle to heart, conducting dozens of reviews and initiatives over the last fifty years to assess and refine our capabilities. [267] The above proposal is the next step in that evolution, allowing us to more effectively and efficiently provide legal services to the Fleet through the staffing of standing courts-martial.

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[262] *See* Part III.2.a. (discussing proposed changes to Article 25 of the UCMJ).
[263] *See* 16 LSAM, *supra* note 186, ¶ 0217. The trial shop would retain their trial services clerks, who assist in the execution of trial-specific tasks like witness interview proofers, documentation preparation, and other clerical jobs. *See id.* ¶ 0218.
[264] See *id.* ¶ 150801 (describing OIC roles and responsibilities in the context of courtroom security).
[265] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 146–48, 234 (observing that Navy and Marine Corps courtroom security does not employ permanent personnel and needs to be professionalized to elevate it to civilian courtroom standards).
[266] U.S. MARINE CORPS, MARINE CORPS WARFIGHTING PUBLICATION 6-11, LEADING MARINES 105 (1995).
[267] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 141–42 (listing various evaluations of the Marine Corps legal community that informed the most recent Comprehensive Review Group's work).

B. Military Justice in Deployed Environments

Deployability is a key feature of military law.[268] Yet the nature of deployments is fundamentally different now than when the court-martial model first developed, with technology permitting ease of communication and travel that was not available to earlier generations of servicemembers.[269] The unique circumstances of a deployed environment, even in the modern context, demand flexibility and efficiency in a military justice system. These challenges only heighten the benefits of standing courts-martial, which enable commanders to focus on mission rather than administration by relying on an independently-operated court office to process cases.

World War II marked a turning point in the development of the U.S. military justice system.[270] It was also the last large-scale, multiple-theater war in which the United States was engaged. Perceived inequities in the administration of military justice during World War II led to the implementation of the UCMJ, which has governed military justice for the last 70 years.[271] The first major changes to the UCMJ came in 1969 at the height of the Vietnam War, demonstrating that the military justice system can undergo significant changes to its procedural and substantive framework in the midst of a major conflict.[272] Practical considerations also led to changes in confinement procedures, with commands consolidating their confinees at centralized brigs while awaiting trial or serving sentences because their units lacked the resources to individually supervise them in a non-garrison setting.[273]

This trend toward the centralization of military justice matters soon carried over to courts-martial themselves in an effort to reduce the administrative and logistical strain on units conducting distributed operations.[274] Between 1965 and 1970, the Navy established 30 "law centers" around the world to consolidate legal services for ships and shore commands operating far from home.[275] The Marine Corps followed suit in Vietnam, implementing "the law center concept [as]

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[268] *See, e.g.*, Westmoreland, *supra* note 9, at 7 (The military justice system must be "fully integrated into the Armed Services so that it can operate equally well in war as in peace. We need a system that is part of the Army to permit the administration of justice within a combat zone, and to permit our constitution and American legal principles to follow our servicemen wherever they are deployed.").
[269] Lyon & Farmiloe, *supra* note 14, at 159 (Early military justice systems "evolved over a lengthy period in circumstances in which lawyers were simply not available (fleets at sea or garrisons abroad, at times when communications moved at the speeds of horse and sailing ship).").
[270] *See* MJRG, *supra* note 20, at 67–70.
[271] *See id.* at 70–86.
[272] *See* FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 33 (2001) (describing the Military Justice Act of 1968).
[273] *See id.* at 32–33.
[274] *Id.* at 38–40.
[275] GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 146 (1989).

an efficient method which relieved field commanders of a heavy burden."[276] Each law center in the 1st Marine Division was managed by a Legal Administration Officer (CWO), who tracked case progress, ensured proper documentation, and enforced timeliness "from original complaint to conviction or release."[277] This structure also enabled professionalization of the court reporter cadre, which was struggling to meet the mission in more distributed environments.[278]

The next sustained combat operations came during Operations Enduring Freedom and Iraqi Freedom. From 2001 to 2003, "units handled almost all minor misconduct in the deployed theater; however, they generally sent service members suspected of more serious offenses back to the United States or Germany for prosecution due to austere deployed conditions and mission requirements."[279] Even after the environments in Afghanistan and Iraq became less kinetic, the standard practice was to push courts-martial to rear or supporting units so that combat units could focus on operations.[280] Even if the case remained in theater for trial, the court-martial itself was managed by a centralized office that maintained theater-wide communication and support but consolidated administrative functions at a large installation.[281] This construct has also been applied as a best practice in the joint environment, which presents unique jurisdictional and convening authority issues,[282] and is incorporated into service-specific publications.[283]

Standing courts-martial are fully compatible with today's deployed environments. By consolidating administrative structures and reducing red tape to better provide legal services downrange, they would further streamline military law by formalizing practices that are already in place.

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[276] *Id.*
[277] *See id.*
[278] *See id.* at 145.
[279] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME 1, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003) 233 (2004).
[280] *See* COMMANDERS SURVEY, *supra* note 66, at 1 ("Both the Marine Corps and the Army try a very small percentage of [their] cases forward-deployed.").
[281] *See generally* E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6 (describing the experiences of the Army III Corps' deployed military justice team in support of Operation Iraqi Freedom 10-11).
[282] *See, e.g.*, Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, ARMY LAW., July 2002, at 1.
[283] *See, e.g.*, 1 LSAM, *supra* note 224, ¶ 0206 (explaining legal support to deployed Marine Air Ground Task Forces).

V. Conclusion

The military justice system has come a long way from its early days as a method of enforcing discipline far from the constructs of civilian society. The professionalization of military law should culminate in the establishment of standing courts-martial, which comply with the constitutional framework under which the current system operates. With relatively minor adjustments, Congress and the President can increase the efficacy, efficiency, and credibility of military justice, both in garrison and deployed. Ad hoc courts-martial are a legacy capability, useful and necessary at one time but now causing more harm than good. We should divest ourselves of them.

Appendix A: Proposed Changes to Rule for Court-Martial 504

[new language underlined]

(a) *In general*. A court-martial is a standing court established pursuant to 10 USC 816 and operated by each service's Judge Advocate General.

(b) *Who may refer charges to courts-martial*.

(1) *General courts-martial.* Unless otherwise limited by superior competent authority, general courts-martial may have charges referred to them by persons occupying positions designated in article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

(2) *Special courts-martial.* Unless otherwise limited by superior competent authority, special courts-martial may have charges referred to them by persons occupying positions designated in article 23(a) and by commanders designated by the Secretary concerned.

(A) [No changes.]

(B) [No changes.]

(3) [No changes.]

(4) *Delegation prohibited.* The power to refer charges to courts-martial may not be delegated.

(c) *Disqualification*.

(1) *Accuser*. An accuser may not refer charges to a general or special court-martial for the trial of the person accused.

(2) *Other*. A referral authority junior in rank to an accuser may not refer charges to a general or special court-martial for the trial of the accused unless that referral authority is superior in command to the accuser. A referral authority junior in command to an accuser may not refer charges to a general or special court-martial for the trial of the accused.

(3) *Action when disqualified.* When a commander who would otherwise refer charges to a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another referral authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

(d) *Detailing order*.

(1) *General and special courts-martial.* For each court-martial, the detailed military judge shall issue a detailing order.

(A) A detailing order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members, if any, in accordance with R.C.M. 503(a);

(B) A detailing order may designate when and where the court-martial will meet.

(C) If the referral authority has been designated by the Secretary concerned, the detailing order shall so state.

(2) [No change.]

(3) Additional matters. Additional matters to be included in the detailing orders may be prescribed by the Secretary concerned.

(e) *Place*. The court-martial office shall ensure that an appropriate location and facilities for courts-martial are provided.