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MILITARY JUSTICE AND MODERNITY

EUGENE R. FIDELL* AND JAMES A. YOUNG**

“Change is the basis of all history, the proof of vigor.”***

ABSTRACT

Over the decades, Congress has made significant improvements in the military justice system. In doing so, however, it has neglected to remove outdated features of the system, leading to needless effort, expense, delay, and bloat. A thorough review is warranted to remove these artifacts, while taking care to ensure that the substantial rights of the accused are not prejudiced in the process.

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*** Jenny Holzer, *Inflammatory Essays* (1979–81).

INTRODUCTION

A current casebook is called “MODERN MILITARY JUSTICE.”¹ It’s a catchier title than, say, “MILITARY JUSTICE: CASES AND MATERIALS,”² but one does wonder whether it is not more aspirational than strictly accurate to apply the term “modern” to contemporary American military criminal justice. In important respects, as noted below, our system remains rooted in the eighteenth century, despite noteworthy recent changes. The argument is not so much that the present military justice system should be altered (it should), but that it already has been altered, repeatedly and usefully, in ways that render parts of it otiose or worse.

In the afterglow of the Supreme Court’s decision in *Ortiz v. United States*,³ those responsible for the administration of justice in the armed forces of the United States have had much to be pleased about. The Court, by a divided vote, pronounced a broad benediction over the military justice system, or at least over that system’s highest tribunal, the U.S. Court of Appeals for the Armed Forces (CAAF). Not to spoil the fun, but a case can be made that the kind words in *Ortiz*—the precise constitutional issue aside—are as misplaced as were the harsh words for which *O’Callahan v. Parker*⁴ had been faulted. While there remain major issues for the Court, the new Military Justice Review Panel,⁵ and Congress to resolve, scholarly attention has shifted to high theory and history, rather than closer to where the rubber meets the road, where important work remains to be done.

In the past seventy years, Congress has made substantial substantive and procedural changes to align military justice more closely with civilian federal criminal law. And although the last major review of the entire system resulted in the 2015 Military Justice Review Group’s two-volume report, the changes keep coming, although in a less systematic manner. Only eight years have passed since that report, but we believe it is time to reexamine the entire system with a view to conforming military justice, to the extent possible, with contemporary standards of judicial administration and thereby decreasing costs, moving cases more quickly, fostering greater public confidence, and, importantly, doing so without prejudicing the substantial rights of the accused.

The armed forces are likely to resist some or all of the changes suggested here, some of which will shrink the several Judge Advocate General’s Corps and the equivalent legal programs of the U.S. Marine Corps and U.S. Coast Guard, neither of which has a separate legal corps. Concern over agency turf and resources is hardly a novelty in public administration, and these elements of the defense establishment have

1. LISA M. SCHENCK, *MODERN MILITARY JUSTICE: CASES AND MATERIALS* (3d ed. 2019).

2. EUGENE R. FIDELL, BRENNER M. FISSELL, FRANKLIN D. ROSENBLATT & DWIGHT H. SULLIVAN, *MILITARY JUSTICE: CASES AND MATERIALS* (4th ed. 2023).

3. 138 S. Ct. 2165, 2174 (2018) (holding that the courts in the military justice system are judicial in character).

4. 395 U.S. 258 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

5. *See* Uniform Code of Military Justice (UCMJ), art. 146, 10 U.S.C. § 946 (2018).

enjoyed a kind of triumphalism as a result of mission creep and *Ortiz's* pat on the head. Resistance to change is a familiar syndrome in the armed forces' administration of military justice.⁶ Recent examples include the effort to improve judicial independence through fixed terms of office,⁷ the transfer of charging power for a broad and increasing range of offenses from commanders to lawyers,⁸ and the expansion of servicemember access to the Supreme Court on an equal footing with other persons convicted of federal or state crimes.⁹ Because experience teaches that it is unlikely that, left to their own devices, the armed forces will readily jettison structural artifacts that are no longer needed or look aggressively for ways to reduce bloat in the military justice system, Congress should either do so itself or see to it that the Review Panel, which is already charged with conducting periodic comprehensive reviews and assessments of the system,¹⁰ does so.

I. PENTIMENTI

The OXFORD ENGLISH DICTIONARY defines “pentimento” as, “[in] a painting (particularly in oils), a trace of an earlier composition or of alterations that has become visible with the passage of time.”¹¹ Oftentimes,

6. See generally Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125 (1989).

7. The government successfully resisted claims that Fifth Amendment due process requires military judges to have the protection of fixed terms of office. See, e.g., *Weiss v. United States*, 510 U.S. 163, 176–81 (1994). Eventually the Army and then the Coast Guard established terms by regulation, and in time Congress required the other services to get in step, although it did not prescribe a specific minimum term of office. See UCMJ, arts. 26(c)(4), 66(a)(1), 10 U.S.C. §§ 826(c)(4), 866(a)(1). That was done by the President in the *Manual for Courts-Martial*. See *Manual for Courts-Martial, United States* (2019 ed.) [hereinafter *MCM*]; Rules for Courts-Martial 502, 1203 (2019) [hereinafter R.C.M.].

8. The Judge Advocates General and service chiefs resisted the transfer of disposition power from commanders to lawyers. They lost that battle in 2021 when Congress passed legislation that will by the end of 2023 create “special trial counsel” in each armed force with disposition power over a broad swath of offenses. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539c, 135 Stat. 1541, 1692–99 (2021) (codified as amended at 10 U.S.C. §§ 801(18), 824a); Philip D. Cave, Don Christensen, Eugene R. Fidell, Brenner M. Fissell & Dan Maurer, *The Division of Authority Between the Special Trial Counsel and Commanders Under the Uniform Code of Military Justice: Planning Now for the Next Phase of Reform*, LAWFARE (Feb. 28, 2022, 11:59 AM), <https://www.lawfaremedia.org/article/division-authority-between-special-trial-counsel-and-commanders-under-uniform-code-military-justice> [https://perma.cc/E5F4-2QW8]; Rachel VanLandingham, *FY22 NDAA: A Missed Opportunity to Improve Military Justice*, JUST SEC. (Dec. 8, 2021), <https://www.justsecurity.org/79481/ndaa-a-missed-opportunity/> [https://perma.cc/9SZ8-BV65]. A few additional offenses were transferred to the special trial counsel by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541, 136 Stat. 2395, 2579–81 (2022), and it seems fair to predict that other offenses will meet the same fate in due course.

9. See National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023).

10. See UCMJ, art. 146(a), 10 U.S.C. § 946(a).

11. *Pentimento*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

the original work of art can still be discerned. So it is with military justice: all you need to do is get beneath the later accretions. And once you do, it becomes apparent that, far from having effaced the earlier state of affairs, the initial version may continue to play a role. Indeed, its effect may be profound even if it is not apparent to the naked eye.

So it is, we suggest, with the many changes that American military justice has experienced over the decades. Some of those have been highly significant; others have been late, reluctant, and in the end unduly tentative. This is not the place to retrace the path of military justice reform; many others have done that. Rather, the question is whether, despite many changes, there remain aspects of the system that silently and unwisely still reflect an earlier state of affairs. This may happen for two reasons: first, the political process (including legislative deference to change-resistance within the armed forces) may be such that only incremental reform is feasible, and second, out of an abundance of caution, Congress may be loath to jettison parts of the system on the premise that there is no harm in retaining them, belt-and-suspenders, even though changes have long since made them redundant. Congress may be slow to grasp the nettle. An example is its unwillingness to create standing military trial courts, even though it has taken steps to empower military judges to rule on certain matters prior to referral. There is no shortage, sadly, of missed legislative opportunities.

Perhaps Holmes overstated the matter when he wrote a century and a quarter ago:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹²

In the context we are addressing, there is no occasion for revulsion, but simply a recognition that, in 1916, 1920, 1950, 1968, 1983, 2016, and 2021, each of which witnessed dramatic changes, Congress failed to give due consideration to whether, when enacting them, corresponding changes in the interest of removing what is archaic and unnecessary should also have been made, and in any event should be made—or at least carefully considered—now. No known interest group or PAC is going to make this point, but those who labor in this vineyard might, if the conditions were right, have a chance at attracting the attention of some senators or members of Congress who can be persuaded to take the long view rather than waiting for the next discrete reform-ready issue to come without warning across the legislative radar.

The starting point is to identify the core characteristics of the *ur*-system: the command-centric model we and other countries inherited from Great Britain. Common law legal systems around the globe have

12. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

wrestled with whether, to what extent, and how that system should be modified with evolving expectations and to keep pace with other developments in national law. In this sense, the United States has plenty of company.

What, then, were the core characteristics and assumptions of the original model? Here are a few of the most salient ones. It did not rely on standing courts. It relied on commanders to make charging decisions, select officers to sit on the panel, and act on the record following the trial. It did not contemplate a role for lawyers representing the parties at trial. Nor did it involve trial judges or direct appellate review by a law court. Army and navy courts-martial were governed by separate sets of rules that were far from identical. Most of those who were accused of offenses lacked education. And because the classic model had taken shape long before either the American criminal justice revolution of the twentieth century or the development of an international corpus of human rights law, the rights afforded to the accused were minimal.

Much of the original military justice system has been altered by periodic spasms of reform. Yet it retains features and asserted protections that no longer serve a purpose. Let us begin with a feature that is so obvious that it attracts virtually no attention: the significant autonomy of the individual armed services. In 1950, Congress broke new ground by enacting a single disciplinary statute for all of the armed forces—a step that other democratic countries such as the United Kingdom and Canada took years ago, but that others still have not embraced.¹³ Yet the result was not a *unified* American system, but what was labeled merely a *uniform* one, and one that on examination proves to have a host of interservice variations, typically buried in service-specific regulations.¹⁴ To be sure, the services' systems are interoperable in the sense that trial judges (but not appellate military judges)¹⁵ may preside in cases arising in a different armed force (although they rarely do so),¹⁶ and courts-martial can try members of other U.S. armed forces.¹⁷ But in critical respects, “the military justice system” to which observers and participants so often refer is not a

13. India remains a major holdout. See U C JHA & KISHORE KUMAR KHERA, COLONIAL FOOTPRINT IN THE INDIAN MILITARY LEGAL SYSTEM MILITARY LAW: THEN, NOW AND BEYOND 193–209 (2022) (noting, for example, maximum sentence disparities among armed forces); Eugene R. Fidell & Navdeep Singh, *Why India Must Get Rid of Separate Disciplinary Codes for Army, Navy & Air Force*, THE PRINT (July 16, 2021), <https://the-print.in/opinion/why-india-must-get-rid-of-separate-disciplinary-codes-for-army-navy-air-force/696951/> [<https://perma.cc/VK43-7E3J>].

14. See U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (2020); U.S. DEP'T OF AIR FORCE, INST. 51-201, ADMINISTRATION OF MILITARY JUSTICE (2022); U.S. DEP'T OF NAVY, JAG INST. 5800.7G, MANUAL OF THE JUDGE ADVOCATE GENERAL (2021); U.S. COAST GUARD, COMD. INST. M5810.1H, MILITARY JUSTICE MANUAL (2021).

15. See UCMJ, art. 66(a)(1), 10 U.S.C. § 866(a)(1).

16. See R.C.M. 201(e)(4). Judge advocates commissioned in one armed force may serve as counsel in courts-martial convened in another. *Id.* Jurors (called “members”) may also serve in courts convened by service branches other than their own. *Id.*

17. See R.C.M. 201(e)(3).

single system of criminal justice at all, but rather a constellation of similar systems. These systems may be headed by admirals and generals who typically march in lockstep (at least in public), but, with possible exceptions for high-profile or politically-charged cases, they remain subject to only light supervision, if that, at the Department of Defense (DoD) level.¹⁸

What of the protections enacted in and after 1950? With the introduction of appellate counsel, it makes no sense to require the service Courts of Criminal Appeals to engage in a non-adversarial review of records of trial in hopes of spotting some error.¹⁹ Nor should the Court of Appeals for the Armed Forces sua sponte engage in such review by its Central Legal Staff, especially if the accused has specifically waived an issue at trial.²⁰ Searching for viable issues is counsel's work, not the judges' and not a Central Legal Staff's. We applaud Congress's amendment of Article 66, UCMJ, to get factual sufficiency review in sync with comparable review by the Article III courts of appeals,²¹ but it left undisturbed the practice of sua sponte review of the entire record that is no longer warranted given the role of legally-trained appellate counsel.

18. The only aspects of military justice in which the Office of the Secretary of Defense plays a case-specific role are: (1) as a general court-martial convening authority (a power that seems never to have been exercised since it was conferred in 1986), *see* UCMJ, art. 22(a)(2), 10 U.S.C. § 822(a)(2); (2) decisions on whether to oppose a defense petition for certiorari or to seek certiorari in a case the government has lost at the Court of Appeals for the Armed Forces, *see* U.S. DEP'T OF DEFENSE, INST. 5030.7, COORDINATION OF SIGNIFICANT LITIGATION AND OTHER MATTERS INVOLVING THE DEPARTMENT OF JUSTICE, encl. 2 (1988); and (3) advising the President on whether to approve a capital sentence, *see* UCMJ, art. 57(a)(3), 10 U.S.C. § 857(a)(3); R.C.M. 1204(c)(2)(B). The practice of forwarding capital cases via the Secretary of Defense was not memorialized in the *Manual for Courts-Martial* until 2007, but began under President Eisenhower. *See* Exec. Order No. 13,447, 72 Fed. Reg. 56178 (Oct. 2, 2007) (amending R.C.M. 1204); Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 29 n.112 (2006) (citing Dwight H. Sullivan, *Executive Branch Consideration of Military Death Sentences*, in *EVOLVING MILITARY JUSTICE* 138 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002)). A number of UCMJ and *Manual* provisions confer powers on the Secretary of Defense, but these relate to the wholesale administration of military justice, rather than retail or case-specific matters. *See, e.g.*, UCMJ, arts. 22(a)(2), 33, 113(b)(1)(B), 137(c)-(d)(2), 140a(a), (d), 146, 146a(c), 10 U.S.C. §§ 822(a)(2), 833, 913(b)(1)(B), 937(c)-(d)(2), 940a(a), (d), 946, 946a(c); R.C.M. 109(c)(8), 201; MIL. R. EVID. 315, 317(c), 505(a). The Joint Service Committee on Military Justice, which proposes statutory and *Manual for Courts-Martial* changes, operates under the direction of the General Counsel of the Department of Defense. *See* 32 C.F.R. § 152.3 (2023). The DoD General Counsel's JSC advisor and that of the Chairman of the Joint Chiefs of Staff, however, do not have a vote. *See id.* § 152.4(a)(6). The Court of Appeals for the Armed Forces is located in the Department of Defense, but "for administrative purposes only." *See* UCMJ, art. 141, 10 U.S.C. § 941.

19. *See* UCMJ, art. 66(d)(1)(A), 10 U.S.C. § 866(d)(1)(A) (stating in any case brought by the accused, the Courts of Criminal Appeals "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved").

20. *United States v. Chin*, 75 M.J. 220, 221 (C.A.A.F. 2016).

21. *See* UCMJ, art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B).

Congress long ago conferred on the accused a right to be represented for free by any military attorney of his own selection, if that attorney is reasonably available—“individual military counsel”—in addition to free detailed (lawyer) defense counsel.²² Neither of these was part of the George III legacy, but we wonder whether the right to individual military counsel is another artifact that can be dispensed with. After all, Congress materially cut back on that right after the Court of Military Appeals held in *United States v. Johnson*²³ that it extended to lawyers in a different armed force.²⁴ As a result, individual military counsel play a much smaller role than they once did. Furthermore, unlike in earlier days, defense counsel now have robust support from, and better communication with, more experienced members of the defense bar, both military and civilian. Because there is no comparable right to select one’s own free defense counsel in the civilian courts,²⁵ and all uniformed defense counsel must be certified after extensive training on the Code,²⁶ perhaps this feature of the system is no longer required.

The classic model of military justice, lacking a legally-trained trial judge, necessarily involved sentencing by the equivalent of a jury. With the advent of true military judges in 1968, other aspects of the system should also have been changed.²⁷ One of these is that, other than in capital cases, court-martial members should not determine the sentence, yet Congress kept that option open for the military accused.²⁸ Civilian federal defendants do not enjoy such an option²⁹ and jury sentencing is uncommon in state non-capital criminal justice systems.³⁰ Sentencing by members should have been dispensed with long ago in non-capital courts-martial, and Congress finally did so in 2021, but only for cases in

22. See UCMJ, art. 38(b)(3)(A), (B), 10 U.S.C. § 838(b)(3)(A), (B).

23. 48 C.M.R. 764 (C.M.A. 1974).

24. See *id.* at 766; UCMJ, arts. 38(b)(3)(B), (b)(7), 10 U.S.C. § 838(b)(3)(B), (b)(7); R.C.M. 506(b)(1).

25. See generally Tom Lynch & Adam Bates, *Poor Defendants Should Get to Choose Their Lawyers Too*, CATO AT LIBERTY (Apr. 6, 2017, 10:01 AM), <https://www.cato.org/blog/poor-defendants-should-get-choose-their-lawyers-too> [<https://perma.cc/U3SD-W45W>]; Melanie Navamanikkam, *The Sixth Amendment and the Right to Choose Appointed Counsel*, U. CIN. L. REV. BLOG (Mar. 1, 2017), <https://uclawreview.org/2017/03/01/the-sixth-amendment-and-the-right-to-choose-appointed-counsel/> [<https://perma.cc/23UP-QRBL>].

26. See UCMJ, art. 27(b)–(c), 10 U.S.C. § 827(b)–(c).

27. Factual sufficiency review by the Courts of Criminal Appeals is a prime example. See Matt C. Pinsker, *Ending the Military’s Courts of Criminal Appeals De Novo Review of Findings of Fact*, 47 SUFFOLK U. L. REV. 471 (2014) (discussing implications for factual sufficiency review). Congress has retained factual sufficiency review but the accused must now first make “a specific showing of a deficiency in proof.” See UCMJ, art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B).

28. See UCMJ, arts. 25(d), 53(b), 10 U.S.C. §§ 825(d), 853(b).

29. See FED. R. CRIM. P. 32(b)(1).

30. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003) (collecting statutes).

which all of the offenses that resulted in findings of guilty were committed after December 27, 2023.³¹

Given the level of education the armed forces now require of recruits, it could be argued that the statutory requirement to afford all personnel a careful explanation (i.e., actual knowledge) of the punitive articles of the Code³² is also no longer warranted, and that constructive knowledge should be relied on, just as it is with respect to federal and state civilian criminal prohibitions.³³ On the other hand, to the extent that some, at least, of the punitive articles may well be unfamiliar to personnel entering from civilian life, this inexpensive artifact may be justified simply in the interest of discouraging criminal conduct and there is no reason to abandon it.

In contrast, there is reason to reconsider whether there is a need for a separate, specialized, civilian appellate court sitting atop the military justice system.³⁴ This dates only to enactment of the Code in 1950, rather than the British or American Articles of War, so it is not some truly ancient artifact. Nonetheless, other structural reforms, as well as the inevitable flow of appellate decisions, have rendered the Court of Appeals for the Armed Forces obsolete by undermining the premises that led Congress to create the Court of Military Appeals (as it was originally named) in the first place. These include decades of case law that has filled in the blanks associated with what was in important respects a new statute as well as the dramatic assimilation of military law to civilian federal law, especially in the area of evidence.³⁵ Additionally, the development of a proper trial

31. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021).

32. See UCMJ, art. 137, 10 U.S.C. § 937.

33. *E.g.*, *Cheek v. United States*, 498 U.S. 192, 199 (1991) (noting that “[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system”); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910) (noting that “innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse”).

34. See generally Eugene R. Fidell, *The Case for Termination of the United States Court of Appeals for the Armed Forces*, 23 J. APP. PRAC. & PROCESS 263 (2023). How important is it that judges in military cases have specialized military knowledge or experience? In *Grievés v. United Kingdom*, the European Court of Human Rights, in words that apply at least as well to appellate judges, saw little benefit in “the knowledge a naval officer would have of the unique language, customs and environment of the Royal Navy.” App. No. 57067/00, 39 Eur. Ct. H.R. 22, ¶ 88 (2003). The court continued:

[S]ince the essential function of the Judge Advocate is to ensure the lawfulness and fairness of the court-martial and to direct the court on points of law, it is difficult to understand why a detailed knowledge of the way of life and language of the navy should be called for, particularly where, as in the present case, the offence with which the applicant was charged was the ordinary criminal offence of malicious wounding. In any event, the Court is not persuaded that a civilian Judge Advocate would have more difficulty in following naval language or customs than a trial judge would have with complex expert evidence in a civilian case.

Id.

35. The Military Rules of Evidence, substantially based on the Federal Rules of Evidence, were promulgated by Exec. Order No. 12,198 (Mar. 12, 1980), *reprinted in*

judiciary, referred to above, undercuts the case for intermediate military appellate courts and a top court that swoops in and acts as a policeman for the system as a whole. The dramatic fall-off in the caseload of the Court of Appeals for the Armed Forces is a further factor to take into account: the facts on the ground have simply changed.

Historically, if an accused was not entitled to review by the Court of Criminal Appeals, she was entitled to have her case reviewed in the Office of the Judge Advocate General (JAG). If any part of the findings or sentence was unsupported by law or if the JAG so directed, the case would be reviewed by the service appellate court and, if the JAG further desired, by the Court of Appeals for the Armed Forces.³⁶ That provision has undergone numerous changes that needlessly complicated military appellate procedure. “[T]he biggest failure of both the [Military Justice Review Group] and Congress [was] the refusal to afford the appellate review to which every accused convicted at a special or general court-martial should be entitled: an appeal of right to the [Court of Criminal Appeals].”³⁷ Congress has, at long last, now subjected all general and special court-martial convictions to review by an appellate court.³⁸ Nevertheless, it makes little sense for some accused to have to apply for relief from the JAG before being entitled to review by an appellate court. Article 69 should be repealed.

A final holdover that can properly be dispensed with, even if the Court of Appeals for the Armed Forces is retained, is the power of the JAG to certify issues of law for appellate review.³⁹ Unlike an accused’s appeal, which is subject to review at the discretion of the court, certification by the JAG, which is almost always done at the behest of the prosecution,⁴⁰ requires the Court of Appeals for the Armed Forces to review the issue raised. Again, this is not something out of George III’s playbook, but rather an artifact of the original UCMJ. The purpose was to afford the services a way to obtain, as of right, an authoritative judicial determination of novel points of law under the then-new statute. With the passage of time, the Court of Military Appeals and Court of Appeals for the Armed Forces have painted in virtually every inch of the statutory canvas, some many times over. Additionally, that court has given the

45 Fed. Reg. 16932 (Mar. 14, 1980).

36. Uniform Code of Military Justice, ch. 169, art. 67(b), 64 Stat. 129–30 (1950).

37. James A. Young, *Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016*, ARMY LAW., Jan. 2018, at 31, 36. Summary courts-martial can be dispensed with given the availability of non-judicial punishment. In any event, appellate review by a court of law is unnecessary because they are not criminal proceedings. See *Middendorf v. Henry*, 425 U.S. 25, 33–43 (1976) (distinguishing summary courts-martial from criminal prosecutions and concluding “a summary court-martial is not a criminal prosecution for purposes of the Sixth Amendment”).

38. See generally James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022).

39. See UCMJ, art. 67(a)(2), 10 U.S.C. § 867(a)(2) (2018).

40. EUGENE R. FIDELL, BRENNER M. FISSELL, MARCUS N. FULTON & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 22.03[5], at 252 (22d ed. 2023) [hereinafter RULES GUIDE].

certification power even less scope, imposing a time limit,⁴¹ for example, and applying doctrines of mootness and ripeness as further curbs on the JAG's power.⁴² Nothing of value will have been lost if that power is repealed. What is more, doing so will render it at least slightly more plausible that the JAGs are impartial administrators, rather than dependable prosecution allies.

From the time the Code was enacted, there was, in military justice, a *leitmotif* of paternalism. The Court of Appeals for the Armed Forces has long since gone out of that business.⁴³ Nonetheless, there is a sense that, like the forms of action at common law,⁴⁴ the paternalism legacy (like other, more explicit features of the system inherited from Britain) may yet rule us from the grave. Defenders of the status quo will argue that Congress's failure to tidy up after itself is defense in depth. At a certain point, however, the system becomes so encrusted with artifacts that it loses coherence. We believe that point has been reached.

II. BLOAT

Because Congress has failed to get rid of artifacts that have outlived their usefulness and other institutional players have been more than willing to expand (and refuse to contract) whenever possible, the military justice system suffers from both make-work and bloat. Some of the bloat is a result of the make-work, some of it is free-standing. Here are some examples:

Are there too many trial judges for the shrinking overall court-martial caseload?⁴⁵ Might fewer judges be needed overall (and might cases move more quickly) if more cases were tried by judges from service branches other than that of the accused? These questions of resources and judicial administration merit examination by the Military Justice Review Panel. It is sometimes claimed that the smaller caseload does not mean fewer trial judges are needed because the cases now being tried are more complicated than hitherto. We reject that claim. Very few

41. See UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES RULES OF PRACTICE AND PROCEDURE 19(b)(3), 22(b)(3) (2023) [hereinafter C.A.A.F. R.]; RULES GUIDE, *supra* note 40, § 19.03[5], at 183–86.

42. RULES GUIDE, *supra* note 40, § 8.03[14], at 89–92.

43. See, e.g., *United States v. Johnson*, 21 M.J. 211, 214 (C.M.A. 1986); see David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 40 n.141 (2013).

44. See FREDERIC W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES I* (A.H. Chaytor & W.J. Whittaker eds., 1954) (“The forms of action we have buried, but they still rule us from their graves.”). Faulkner similarly observed, “[t]he past is never dead. It’s not even past.” WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (Random House, Inc. 1951) (1919). And as Dickens wrote, “[i]t’s in vain, Trot, to recall the past, unless it works some influence upon the present.” CHARLES DICKENS, *THE PERSONAL HISTORY OF DAVID COPPERFIELD* 324 (J.M. Dent & Sons Ltd. 1931) (1854).

45. See Jake Dianno, *Numbers Crunching*, NAT’L INST. MIL. JUST. (Oct. 8, 2022), <https://www.nimj.org/caaflog/numbers-crunching> [<https://perma.cc/J6AZ-UJBP>] (detailing a general decrease in opinions issued by courts-martial between 2000 and 2023).

court-martial cases are truly complicated or can plausibly be described as “complex litigation”—a phrase that can be found on far too many military and former-military resumé. The fact that new issues have to be researched by relatively inexperienced trial and defense counsel does not make those cases “complex.” Of course, some cases are indeed complicated—murder cases, for example, but these are rare. Computer cases used to involve learning curve challenges, but there is no reason for them to be treated as per se complex today. The same is true for many of the domestic violence cases, which are hardly novel (and many of which belong in the civilian courts in any event, *Solorio v. United States*⁴⁶ notwithstanding, but that is another article). In addition, military judges are no longer required to perform the onerous task of “authenticat[ing]” each record of trial over which the judge presided, in effect, double-checking the court reporter’s work for error.⁴⁷

The work of the service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces is needlessly expansive. They review records of trial not only in connection with issues identified by the free appellate defense counsel provided by the taxpayers and the civilian appellate defense counsel who may represent appellants on a fee or pro bono basis. Rather, these courts’ review includes a search for any errors not identified by either counsel or the petitioner.⁴⁸ This kind of review—unheard of in the Article III courts of appeals—may have made sense before lawyers played their current pervasive role in courts-martial, before there was a military trial judiciary worthy of the name, or when the Uniform Code of Military Justice was new and large parts of the jurisprudence had yet to be painted in. But none of these conditions apply now; indeed, they haven’t for decades.⁴⁹

The continued willingness of the Court of Appeals for the Armed Forces to entertain petitions for grant of review that cite no issues⁵⁰ is a prime example of the persistence of outdated systemic features. Whether or not that practice made sense in the years before Congress transformed the Boards of Review into Courts of Military Review in 1968,⁵¹ it made none thereafter, and yet the Court of Appeals continues to employ

46. 483 U.S. 435 (1987).

47. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5238, 130 Stat. 2000, 2918 (2016).

48. During the October 2021 Term of Court, only half of the petitions for review received by the Court of Appeals for the Armed Forces cited issues that had been identified and briefed by appellate defense counsel.

49. International standards have also evolved. Thus, the “Yale Draft,” a 2018 revision of the 2006 Draft Principles Governing the Administration of Justice Through Military Tribunals, observes in Principle No. 17 (Recourse procedures in the ordinary courts) that “[i]n all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts.” See FIDELL, FISSELL, ROSENBLATT & SULLIVAN, *supra* note 2, at 720. The present composition of the Courts of Criminal Appeals does not comport with this principle.

50. See C.A.A.F. R. 21(e).

51. See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

a Central Legal Staff that conducts de novo review of records of trial. There's no harm in having such a staff to deal with procedural motions, motions for summary disposition, and the like, but what the CAAF staff does far exceeds those tasks. It should be abolished or made smaller.

But the problem runs deeper. There are simply too many appellate courts in the military justice system.⁵² At least one, the Coast Guard Court of Criminal Appeals, has almost nothing to do—certainly not enough to justify its existence.⁵³ For all practical purposes it is a collateral duty for everyone, except the chief and one other judge,⁵⁴ a kind of judicial “vanity plate” for the Nation's second smallest armed force.⁵⁵ Even the larger ones see so few cases in which counsel can actually identify a substantial appellate issue (and conduct so few oral arguments) that they could easily be consolidated into a single “purple” inter-service court, with considerably fewer total appellate military judges.

As for the Court of Appeals, its throughput of cases has become so anemic that a compelling case can be made for its termination.⁵⁶ In the most recent three terms, it handed down decisions on full opinion in only eighty-six cases: twenty-five in 2019, thirty-six in 2020, and twenty-five in 2021.⁵⁷ This is not necessarily to fault that court: trial court caseloads are down, and we are willing to assume that the Court of Appeals grants any petition that qualifies even marginally as a showing of the requisite “good cause.”⁵⁸ If that is so, it simply does not have enough work to justify its existence. Nor is it a question of not warranting five judgeships; even the three it had from 1951 to 1989 are not warranted given the paucity of cases that have come to it with colorable issues over the last ten or more years.

The time has come for the military justice appellate structure to replicate that of the civilian federal courts. If, as we believe, the uniformed trial judiciary has reached maturity, there is simply no need, if there ever was one, to subject courts-martial to three tiers of appellate review.

52. The four service intermediate appellate courts—Air Force, Army, Coast Guard, and Navy-Marine Corps—released a combined total of twenty-one published opinions between January 1 and October 22, 2022.

53. Including cases submitted without allegation of error, the Coast Guard Court issued a total of fifteen opinions between January 1, 2020 and September 12, 2022 (an average of less than one every two months). See *Opinions*, U.S. COAST GUARD, U.S. DEP'T HOMELAND SEC., <https://www.uscg.mil/Resources/Legal/Court-of-Criminal-Appeals/CGCCA-Opinions/> [<https://perma.cc/LGE4-SCZS>] (last visited Dec. 16, 2023).

54. See *Coast Guard Court of Criminal Appeals*, U.S. COAST GUARD, U.S. DEP'T HOMELAND SEC., <https://www.uscg.mil/Resources/legal/Court-of-Criminal-Appeals/> [<https://perma.cc/K99S-8Q4M>] (last visited Dec. 16, 2023).

55. The U.S. Space Force is much smaller and has no intermediate appellate court of its own. Space Force court-martial appeals are heard by the Air Force Court of Criminal Appeals.

56. See generally Fidell, *supra* note 34.

57. See *Opinions*, U.S. CT. APPEALS FOR ARMED FORCES, <https://www.armfor.uscourts.gov/opinions.htm> [<https://perma.cc/4YWF-Q8YH>] (last visited Dec. 16, 2023).

58. See UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3) (2018).

We therefore recommend abolition of the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces. In their place, there should be appellate review as of right in the U.S. Court of Appeals for the District of Columbia Circuit, subject to the usual discretionary review by the Supreme Court by writ of certiorari.⁵⁹

Apart from questions of appellate structure and featherbedding, the amount and variety of bloat in the military justice system is impressive. There is no shortage of examples. The Army, Navy-Marine Corps, and Air Force run separate law schools, located in, respectively, Virginia, Rhode Island, and Alabama. Surely this is unnecessary.⁶⁰ Similarly, the services have continued to promulgate separate rules relating to trial and appellate procedure, professional responsibility, judicial conduct, and legal citation. Whether this is inevitable or merely the result of personnel turbulence so every new incumbent feels impelled to revamp their predecessors' rulemaking, the result is a book that is far thicker than it needs to be.⁶¹

Additional bloat can be attributed to recent legislation creating special trial counsel in each service to assume responsibility for charging decisions in an as-yet unknown fraction of the overall general and special court-martial caseload.⁶² At least one service, the Army, has seized on it as an opportunity to add scores of additional lawyers, paraprofessionals, and others to its JAG Corps workforce.⁶³ It is hard not to see this as excessive. Indeed, introduction of the special trial counsel will (or should) reduce the work of existing legal personnel. Congress should consider whether the armed forces' legal programs are adding bodies unnecessarily.

CONCLUSION

The Military Justice Act of 2016 and the National Defense Authorization Acts for Fiscal Years 2022 and 2023 made important changes in the military justice system. They remained, however, essentially conservative projects. It would be tremendously unfair to those who worked to enact them to say that all these measures achieved was mere tinkering. But the 2016 legislation remained tethered to the essential architecture of

59. *See generally* Fidell, *supra* note 34, at 294–98.

60. The taxpayers also continue to fund multiple law-review-ish publications where a single purple one would suffice. The Army trains all of the armed forces' military judges at its Legal Center and School in Charlottesville.

61. *See* EUGENE R. FIDELL, BENJAMIN K. GRIMES, JONATHAN F. POTTER, FRANKLIN D. ROSENBLATT & JOCELYN C. STEWART, *MILITARY COURT RULES OF THE UNITED STATES: PROCEDURE, CITATION, PROFESSIONAL RESPONSIBILITY, CIVILITY, AND JUDICIAL CONDUCT* viii (9th ed. 2023) (“The sheer size of this compendium is irrefutable evidence that the proliferation of rules has become excessive and indefensible.”).

62. *See generally* Cave, Christensen, Fidell, Fissell & Maurer, *supra* note 8.

63. *See* Todd South, *Army Creates New Legal Office for Murder, Rape and Other Serious Crime*, *ARMY TIMES* (Dec. 5, 2022), <https://www.armytimes.com/news/your-army/2022/12/05/army-creates-new-legal-office-for-murder-rape-and-other-serious-crime/> [<https://perma.cc/2K43-MFRZ>].

the preexisting system and the FY 22–23 NDAs unwisely left the armed forces with—at least for the time being—two parallel charging systems for court proceedings, one “owned and operated” by commanders and another in which lawyers outside the chain of command will make the charging decision. What Congress should have done—and can still do—is undertake a more sweeping redesign rooted not in the eighteenth century but in the twenty-first. What it would opt for today if it were to work on a clean slate is anyone’s guess, and this Article does not pretend to offer anything approaching a complete blueprint for such a system. Rather, it identifies some systemic issues in the hope that a proper holistic debate can occur and inform congressional thinking, particularly as the dust settles from the last several cycles of defense authorization legislation.