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## **Ending the Military's Courts of Criminal Appeals De Novo Review of Findings of Fact**

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### ABSTRACT

Under Article 66(c) of the Uniform Code of Military Justice (UCMJ), the military's courts of criminal appeals have the unusual appellate power to conduct a de novo review of a trial court's findings of fact. Congress gave the military's appellate courts their unique fact-finding powers in 1950 because under the original UCMJ, special and general courts-martial were highly unprofessional proceedings and extremely susceptible to command influence, thereby creating the risk of unjustly convicting and harshly sentencing servicemembers. Originally, there were not even military judges presiding at summary courts-martial. Instead, a senior line officer untrained in the law was designated president of the panel and was responsible for deciding questions of law, such as the admissibility of evidence. The panel president also served as a juror, voting with the panel to decide the accused's guilt or innocence and sentencing. While law officers were present at general courts-martial, they

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were not the presiding officers of the court and lacked the traditional judicial powers bestowed upon judges to ensure the integrity of trials and other judicial proceedings. Furthermore, both the law officer and panel president were hand-picked and evaluated by the convening authority. Based on this structure and the high potential for both prejudicial command influence and legal error, the appellate courts' de novo review of a trial court's findings of fact was an important protection for servicemembers.

Today, these justifications for the plenary fact-finding powers of the courts of criminal appeals no longer exist. Due to amendments to the UCMJ over the past fifty years, military trials now resemble civilian trials and are presided over at both special and general courts-martial by an independent and professional circuit of military judges with powers modeled after Article III judges. This has reduced the potential for command influence while increasing the professionalism of trials, thus mitigating the chances of legal error. Furthermore, the fact-finding power of the military's courts of criminal appeals is actually an impediment to justice because it adds a considerable burden on the military's already severely backlogged appellate system. Claims of factual insufficiency are frequently and easily made by appellate defense counsel, but are very time consuming for appellate prosecutors to respond to. Despite this huge investment of resources in conducting a de novo review of claims of factual sufficiency, the courts of criminal appeals almost never find factual insufficiency. On the rare occasion they do, courts rarely reduce a sentence, and therefore, the high costs of the power's continued existence cannot be justified. Not only will removing this de novo fact-finding power reduce the military's appellate backlog, but it will also do so without prejudicing the rights of servicemembers because they already have numerous due process protections that civilians do not.

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## I. INTRODUCTION

As frequently happens, a young man and woman are intoxicated at a party and slip away for some privacy.<sup>1</sup> A few days later, the woman reports that she was raped, while the man claims the sexual intercourse was consensual, and eventually there is a trial. Television shows such as *Law & Order* and *CSI* promote the myth that the outcome of this trial will hinge on the introduction of forensic evidence like DNA, fingerprints, hair fibers, or semen deposits. The reality is that cases these are frequently “he said, she said,” and will be decided by little more than witnesses taking the stand and reporting what they saw and heard. It is then up to the jury to decide whom it believes. When deciding the facts, a jury considers not only what is said, but also how it is said. A jury will actually see tears running down the face of a victim or her face flushing red with humiliation as she relates intimate details of a sexual assault. The jury will hear the tone of her voice as it gets choked with emotion and her deep breaths as she tries to regain her composure. A jury can compare this with a defendant who fails to make eye contact, speaks in a flat monotone as he is slouched in his seat at the witness stand with his arms crossed, uses a contemptuous or sarcastic tone in reference to the victim, and takes abnormal delays in answering basic questions.

Because a jury is actually present in the courtroom during the trial, it is exposed to more and better information than any appellate judge merely reading the record of it. For this reason, it is appropriate that, in most

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1. This hypothetical is loosely based on the facts of *United States v. Lucas*. See No. NMCCA 201100372, 2012 WL 3728017 (N-M. Ct. Crim. App. Aug. 28, 2012).

jurisdictions, appellate judges are deferential to a jury's findings of fact.<sup>2</sup> However, this is not the case in military courts.<sup>3</sup> In the military's courts of criminal appeals, appellate judges conduct a near de novo review of a panel's findings of fact.<sup>4</sup> Their review gives a "fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency . . . [while taking] into account the fact that the trial court saw and heard the witnesses."<sup>5</sup> If the appellate court thinks the panel was mistaken or is not convinced of an accused's guilt beyond reasonable doubt, the court will overturn a conviction.<sup>6</sup> This power comes from Article 66(c) of the Uniform Code Military Justice (UCMJ), which states:

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.<sup>7</sup>

This unusual appellate power is a vestigial trait of the sixty-three-year-old UCMJ. When the UCMJ was enacted in 1950, appellate fact-finding review was useful because general and special courts-martial were highly unprofessional tribunals that operated very differently than civilian trials.<sup>8</sup> The person who decided to put the defendant on trial also selected the judge and jury.<sup>9</sup> These issues made the fact-finding powers of the appellate courts a necessary and vital means of protecting the rights of the accused because they resulted in the first impartial review of a trial by experienced attorneys who were independent of the commander that convened the court-martial.<sup>10</sup> While this unusual appellate power was logical and justified in 1950, due to fundamental changes in the UCMJ, the original arguments and reasons for its

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2. See KARL OAKES, 12A CYCLOPEDIA OF FEDERAL PROCEDURE § 51:63 (3d ed. 2011).

3. See generally Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2012) (constituting military's substantive and procedural criminal laws).

4. See *id.* § 866(a).

5. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

6. See *United States v. Mitchell*, 2 M.J. 1020, 1023 (A.C.M.R. 1976).

7. 10 U.S.C. § 866(c).

8. See Andrew S. Effron, *United States v. Dubai and the Evolution of Military Law*, 207 MIL. L. REV. 1, 11 (2011).

9. See Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 89 (1998) (discussing how law officer and panel members formerly appointed by convening authority).

10. 10 U.S.C. § 866(a) (2012) (establishing appellate review of courts-martial); *id.* § 822 (stating who can convene general courts-martial); *id.* § 823 (stating who can convene special courts-martial).

continuation no longer exist. Military justice has undergone fundamental changes since 1950 and it is time for Congress to recognize that despite its rough beginnings, military justice has evolved to the point where today it is highly professional and provides “a more protective statutory system for military accused than the Constitution provides for civilians.”<sup>11</sup> Because of changes in military justice concerning command influence and the professionalism of courts-martial, in conjunction with an overburdened appellate system yielding few benefits, the UCMJ should be amended so that appellate courts may no longer conduct a de novo review of findings of fact.

Part II of this Article will explain the legal significance of Article 66(c) and how it deviates from the usual practice in civilian courts. Part III will explore the history of command influence and discuss how the creation of an independent military judiciary has rendered the original rationale for granting criminal-appellate courts this unusual power obsolete. Part IV furthers the argument that the reason for affording the appellate courts extensive powers no longer exists. Although military justice under the original UCMJ was very unprofessional, today’s system, with modern military judges and the well-developed Military Rules of Evidence (MRE), has made the modern courts-martial highly professional and analogous to civilian trials. Part V illustrates how Article 66(c) generates considerable work for the government’s appellate attorneys, while yielding minimal benefits for the accused, and thereby contributes to the injustice of an already overtaxed, backlogged, and slow appellate system. Part VI demonstrates that even if Article 66(c) is amended to eliminate the appellate courts’ fact-finding powers, the rights and protections of servicemembers will not be prejudiced as they will still have rights and protections that exceed those which the U.S. Constitution provides to civilians. Finally, Part VII considers some possible counterarguments, but shows how they do not outweigh the benefits accrued from implementing this proposed change.

## II. EXPLANATION OF ARTICLE 66(C) AND THE STANDARD OF REVIEW

Under Article 66 of the UCMJ, the military’s courts of criminal appeals are required to review all courts-martial sentences carrying a bad conduct or dishonorable discharge, or more than one year of confinement.<sup>12</sup> To affirm a sentence, the court must review the entire record of the trial and the judges must be convinced beyond a reasonable doubt that the appellant is guilty both as a matter of law and fact.<sup>13</sup> The test for legal sufficiency “is whether,

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11. *United States v. Warner*, 62 M.J. 114, 121 (C.A.A.F. 2005).

12. *See* 10 U.S.C. § 866(b)(1).

13. *See United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (holding military appellate courts must determine whether evidence is both factually and legally sufficient); John Powers, *Fact Finding in the Courts of Military Review*, 44 BAYLOR L. REV. 457, 462 (1992). “Questions of fact are those decided by a tribunal’s

considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all of the essential elements beyond reasonable doubt.”<sup>14</sup> For example, in *United States v. Wilcox*,<sup>15</sup> the Court of Appeals for the Armed Forces (CAAF) found legal insufficiency to support an Article 134<sup>16</sup> conviction for comments a white supremacist made on the Internet because there was absolutely no evidence introduced at trial to prove that the statements were in fact service discrediting or interfered with good order and discipline.<sup>17</sup>

In contrast to legal sufficiency, “[f]or *factual sufficiency* the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [court of

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reasoning *from the evidence* received in the course of litigation.” Powers, *supra*, at 462. In litigation, parties will introduce evidence to the court through oral testimony, written documentation, or even the physical production of an item. *See id.*

This evidence defines the substance of the controversy and reveals its particulars. From the mass of evidence, the tribunal distills a complex of basic facts that the tribunal will treat as being true in reaching its decision. The various basic truths [decided on by the panel] may deal with any number of things: a person’s identity or age, where he was at a particular time, what he did or suffered, the facts that make up the surrounding circumstances, and so on. These basic facts have no legal consequences in and of themselves. No legal training or instruction is required in reaching such deductions or conclusions from the evidence. By them, however, a set of basic facts becomes established for the purpose of adjudication, which occurs when the tribunal applies to them the rules and principles of law deemed applicable by the tribunal.

*Id.* This stands in contrast to questions of law, which are

those decided by a tribunal’s reasoning *from rules and principles of law*, as these apply or not to an established state of basic facts. Reasoning of this kind requires legal training or instruction.

The law attaches definite legal consequences to the tribunal’s determination of questions of law: following its determination, the tribunal may do such things as suppress or exclude evidence, order a new trial, dismiss the charges against the accused, or find the elements of the offense satisfied and the accused guilty.

*Id.* at 461-62. An example of this would be if a “tribunal concludes from an established set of facts that the accused consented voluntarily to a delay in his court-martial trial, the applicable rules of law may dictate that the court overrule his motion for dismissal of the charges, urged on the theory of a ‘speedy trial’ violation.” *Id.* at 462.

14. *Turner*, 25 M.J. at 324.

15. 66 M.J. 442 (C.A.A.F. 2008).

16. *See* 10 U.S.C. § 934 (2012). Article 134 is the general punitive provision of the UCMJ, stating:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

*Id.*

17. *See Wilcox*, 66 M.J. at 451.

criminal appeals] are *themselves* convinced of the accused's guilt beyond a reasonable doubt."<sup>18</sup> Factual insufficiency occurs when there is some evidence of each element of an offense, but not enough to convince an appellate court that the accused is guilty beyond a reasonable doubt.<sup>19</sup> For example, in *United States v. Nicely*,<sup>20</sup> a key question in the case was whether an alleged victim was too intoxicated to consent to sex.<sup>21</sup> The court acknowledged that there was some evidence the alleged victim was intoxicated, but as to whether the level of intoxication was at the point where she was unable to consent to sex, "[t]here [was] simply not enough evidence in the record for [the court] to be convinced of the accused's guilt beyond a reasonable doubt."<sup>22</sup>

In their review, appellate courts employ a nearly *de novo* standard in reviewing a trial court's findings of both law and fact.<sup>23</sup> Beyond the provision in Article 66(c) of "recognizing that the trial court saw and heard the witnesses,"<sup>24</sup> the court is not required to show deference to the findings of the panel, has "independent fact-finding power,"<sup>25</sup> and may "'weigh the evidence . . . and determine controverted questions of fact' differently from the court-martial."<sup>26</sup> As none of the judges were present at the trial—except in the case of a *DuBay* hearing<sup>27</sup>—the appellate court's review is limited to using only the record of the trial, oral arguments, and briefs.<sup>28</sup> This means that when the factual sufficiency of a conviction is challenged, a court of criminal appeals conducts what is essentially a retrial at the appellate phase without the benefit of witnesses or evidence. Just how much deference and consideration the judges are supposed to give the fact that the trial court actually "saw and heard the witnesses"<sup>29</sup> is not provided for in the UCMJ or any other authority such as the Rules for Courts-Martial (RCM) or Manual for Courts-Martial (MCM). The CAAF has suggested that the courts of criminal appeals should show very little deference, stating, "[t]his awesome, plenary, *de novo* power of review grants unto the Court of Military Review authority to . . . 'substitute its judgment' for that of the military judge. . . . [and] the court members."<sup>30</sup>

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18. *Turner*, 25 M.J. at 325 (emphasis added).

19. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

20. No. ACM36730, 2007 WL 2506432 (A.F. Ct. Crim. App. Aug. 15, 2007).

21. *See id.* at \*1.

22. *Id.* at \*3.

23. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

24. 10 U.S.C. § 866(c) (2012).

25. *United States v. Mitchell*, 2 M.J. 1020, 1023 (A.C.M.R. 1976).

26. *United States v. Sikorski*, 45 C.M.R. 119, 122 (C.M.A. 1972) (alteration in original) (quoting 10 U.S.C. § 866(c)), *overruled by United States v. Graves*, 1 M.J. 50 (C.M.A. 1975).

27. *See generally United States v. DuBay*, 37 C.M.R. 411 (1967). A *DuBay* hearing is a post-trial procedure to determine collateral issues that require findings of fact and law. *See id.*

28. *See Powers*, *supra* note 13, at 465.

29. 10 U.S.C. § 866(c).

30. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Furthermore, “Article 66 requires the [c]ourt of [criminal appeals] to use its judgment to ‘determine[ ], on the basis of the entire record’ which findings and sentence should be approved.”<sup>31</sup> If the court is not convinced beyond a reasonable doubt of the appellant’s guilt, it will overturn the verdict.<sup>32</sup>

The law granting the courts of criminal appeals this fact-finding power is well established. The following is a summary of law on Article 66(c) derived from an appellate brief filed by the U.S. Army’s Government Appellate Division to the U.S. Army Court of Criminal Appeals.

The standard of review for questions of both legal and factual sufficiency is *de novo*.<sup>33</sup> The test for factual sufficiency “is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, [the court is] convinced of the [accused’s] guilt beyond a reasonable doubt.”<sup>34</sup> The court applies “neither a presumption of innocence nor a presumption of guilt,” but “must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.”<sup>35</sup>

The CAAF has described the fact-finding powers of the courts of criminal appeals as “unparalleled among civilian appellate tribunals.”<sup>36</sup> While it is common practice for appellate courts to conduct a *de novo* review on questions of law, an appellate court that conducts a nearly *de novo* review on questions of fact is highly unusual in the American judicial system at both the state and federal levels.<sup>37</sup> There are some limited exceptions to this observation such as in Georgia and Illinois where appellate courts will conduct a *de novo* review of undisputed facts.<sup>38</sup> In Tennessee, when a case is tried without a jury, “the standard of review is *de novo* upon the record of the Trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.”<sup>39</sup> In Iowa, for equity proceedings, courts are expected to “give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them.”<sup>40</sup> In Texas, “a court must determine ‘whether, after viewing the evidence in the light

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31. *Id.*

32. *See* United States v. Lucas, No. NMCCA 201100372, 2012 WL 3728017, at \*8 (N-M. Ct. Crim. App. Aug. 28, 2012). In the conclusion of the opinion, the court set aside the verdict for the rape charge. *See id.*

33. *See* United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002); United States v. Craion, 64 M.J. 531, 534 (A. Ct. Crim. App. 2006).

34. *Craion*, 64 M.J. at 534.

35. *Washington*, 57 M.J. at 399.

36. United States v. Baker, 28 M.J. 121, 122 (C.M.A. 1989).

37. *See* Int’l Bhd. of Elec. Workers v. Miss. Power & Light Co., 442 F.3d 313, 316 (5th Cir. 2006); David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c)*, UCMJ, 38 A.F. L. REV. 63, 63 (1994).

38. *See* Dep’t of Human Res. v. Woodruff, 507 S.E.2d 249, 250 (Ga. Ct. App. 1998); *In re* Estate of King, 710 N.E.2d 1249, 1250 (Ill. App. Ct. 1999).

39. *Varner v. Perryman*, 969 S.W.2d 410, 411 (Tenn. Ct. App. 1997).

40. *In re* Marriage of Vieth, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).



most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>41</sup>

In the federal system, Article III district courts conduct a de novo review of findings of fact from bankruptcy court judges, but only on noncore matters.<sup>42</sup> The tax court requires that “[d]ue regard . . . be given to the circumstances that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.”<sup>43</sup> A similar rule exists in the Court of Claims.<sup>44</sup> As a general rule, however, Article III appellate courts “cannot ordinarily review questions of fact,”<sup>45</sup> and when they do, they will not set aside a verdict unless the finding was in clear error or clearly erroneous.<sup>46</sup> “Under this standard, [the appellate court] will reverse the district court only if [the appellate court] ha[s] a ‘definite and firm conviction that a mistake has been made.’”<sup>47</sup> “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”<sup>48</sup> “[R]eview under the ‘clearly erroneous’ standard is significantly deferential.”<sup>49</sup> “The standard of review for a district court’s finding of guilt at a bench trial is whether the conviction is supported by substantial evidence.”<sup>50</sup> The substantial-evidence standard is less deferential than the clearly erroneous one, but still considerably deferential to whomever sat as the factfinder during the trial stage.<sup>51</sup>

### III. COMMAND INFLUENCE

The unusual standard of review for the military’s courts of criminal appeals was created to prevent commanders from prejudicially influencing convictions

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41. *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

42. *See* 28 U.S.C. § 157(c)(1) (2012); *Marshall v. Marshall*, 547 U.S. 293, 303 (2006).

43. TAX CT. R. 183(d) (2012).

44. *See* Christopher M. Pietruszkiewicz, *Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity*, 44 Hous. L. Rev. 1337, 1354 (2008).

45. *See* 24 C.J.S. *Criminal Law* § 2376 (2014).

46. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’.”); *El-Nobani v. United States*, 287 F.3d 417, 420 (6th Cir. 2002).

47. *United States v. Messner*, 107 F.3d 1448, 1456 (10th Cir. 1997) (quoting *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985)).

48. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

49. *Id.* at 623.

50. *United States v. Garcia*, 135 F.3d 951, 955 (5th Cir. 1998).

51. For a decision concerning the substantial-evidence and clearly erroneous standards of review, see *Dickinson v. Zurko*, 527 U.S. 150 (1999).

and sentencing,<sup>52</sup> and because courts-martial under the original UCMJ were highly unprofessional tribunals and considerably different than civilian trials.<sup>53</sup> The problems that arose from the military's formerly unprofessional justice system are discussed in Part IV, while command influence is discussed in this Part. Command influence had been a major injustice during courts-martial in World War II,<sup>54</sup> for of the sixteen million men and women who served in the armed forces, an alarming 2 million courts-martial were convened, and with a conviction rate of ninety-seven percent, 45,000 servicemembers were imprisoned.<sup>55</sup> The upside to these troubling statistics was that they were responsible for bring to light problems in military justice, such as the proliferation of command influence under the Articles of War—the original judicial code of the armed forces.<sup>56</sup> As servicemembers returned home, they brought with them horror stories of military justice, which generated considerable demand for reform.<sup>57</sup> In 1946, hearings were held by the War Department Advisory Committee on Military Justice in eleven major cities where the complaints centered on the abuses of command control and excessive courts-martial sentences.<sup>58</sup> The hearings found that a significant number of commanding officers influenced court-martial proceedings to the point where they were no longer fair and impartial trials.<sup>59</sup> It was common practice to simply pass the highest sentence upon the accused and leave it to the commander to make adjustments.<sup>60</sup> World War II veteran and former Governor of Vermont, Ernest W. Gibson, described the pervasiveness of command influence in these trials:

[W]e were advised, not once but many times on the Courts that I sat on, that if we adjudged a person guilty we should inflict the maximum sentence and leave it to the Commanding General to make any reduction. . . . I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted—yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me,

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52. See Powers, *supra* note 13, at 470–71.

53. See *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 597 (1949) [hereinafter *Doyle Statement*] (statement of Rep. Clyde Doyle).

54. See Effron, *supra* note 8, at 5.

55. See John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*,

55 MIL. L. REV. 39, 39–41 (1972).

56. See *id.* at 40–43.

57. See *id.* at 40.

58. See *id.* at 41.

59. See Willis, *supra* note 55, at 41.

60. See *id.* at 41.

which was done forthwith.<sup>61</sup>

Congress was well aware of the pervasiveness of command influence and the need for change, as evidenced by U.S. Navy veteran and then House Representative Gerald R. Ford's statement, "I can recall hearing conversations between members of boards along this line: 'What does the Old Man want us to do?'"<sup>62</sup> Ford's recollection showed how the military's judicial boards were not even attempting to determine guilt or innocence based on the facts of the case, but instead, did what the superior officer wanted.<sup>63</sup> It was felt by many that "the question of command control was perhaps the most vital single point in military justice reform."<sup>64</sup> Consequently, there was widespread, though not unanimous, support for a reformed system of military justice that would address the problems of command influence by curtailing the role of the convening authority.<sup>65</sup>

#### A. *The Law and History of Command Influence*

When the UCMJ was drafted, Congress gave the courts of criminal appeals, then called Boards of Review,<sup>66</sup> fact-finding powers as the mechanism to curb command influence at courts-martial.<sup>67</sup> The concept of limiting command influence by having appellate courts reviewing findings of fact was not new. During World War II, the Army had "a three member Board of Review, which, with the concurrence of the Judge Advocate General, could find a conviction 'legally insufficient,' and remand the case to the convening authority for a rehearing or 'such other action as may be proper.'"<sup>68</sup> The aforementioned

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61. *Id.* at 41–42 (alterations in original) (quoting Letter from Ernest W. Gibson, to Edmund M. Morgan (Nov. 18, 1948)).

62. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Servs.*, 81st Cong. 825–26 (1949) (statement of Rep. Gerald R. Ford).

63. Effron, *supra* note 8, at 41–42.

64. Samuel J. Rob, *From Treacle to Thomas: The Evolution of the Law of Unlawful Command Influence*, ARMY LAW., Nov. 1987, at 36, 37 n.16 (quoting *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Servs.*, 81st Cong. 626 (1949) (statement of Mr. Frederick P. Bryan, Chairman, Special Committee on Military Justice, Bar Association of the City of New York)).

Mr. Frederick P. Bryan . . . echoed the sentiments of many when he testified before Congress concerning the proposed Uniform Code of Military Justice that, "We have felt for a long time, in fact all the way through our studies of this problem, that the question of command control was perhaps the most vital single point in military justice reform."

*Id.*

65. See Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 182–83 (2007).

66. See 10 U.S.C. § 866 (2012).

67. See Powers, *supra* note 13, at 470–71.

68. Jividen, *supra* note 37, at 65 (quoting Articles of War, ch. 227, art. 50 <sup>1/2</sup>, 41 Stat. 787, 798 (1920)).

public outrage concerning military justice during World War II suggests that this board was highly ineffective at combating command influence.

Between World War II and the creation of the UCMJ, Congress attempted to reform military justice and address command influence by revising the Articles of War through the Selective Service Act of 1948, also known as the Elston Act.<sup>69</sup> Specifically, the Elston Act sought to address the issue by “codif[ying] several reform initiatives for the Army, including giving the board of review the power to” conduct a factual review.<sup>70</sup> Pursuant to the Elston Act, the Articles of War were amended such that: “In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General (JAG) and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.”<sup>71</sup> A problem with the Elston Act, however, was that it only applied to the Army and not the Navy, Marine Corps, Coast Guard, or newly created Air Force; accordingly, soon after its enactment, Congress began developing the UCMJ.<sup>72</sup> The word “Uniform” in the title of the UCMJ signifies that the Code applies to all branches of the service.<sup>73</sup> The House of Representatives began hearings on the proposed UCMJ on March 7, 1949,<sup>74</sup> and it was signed into law by President Truman on May 31, 1951.<sup>75</sup>

The original UCMJ prohibited command influence in Article 37, entitled “Unlawfully influencing action of court.”<sup>76</sup> It stated:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this Code shall attempt to coerce or, by any unauthorized means, influence the action of a

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“Any disagreement between the Board of Review and the Judge Advocate General regarding the legal sufficiency of a conviction was forwarded to the President through the Secretary of War for the President’s resolution.” *Id.* at 65 n.13.

69. See Selective Service Act of 1948 (Elston Act), ch. 625, 62 Stat. 604. The Elston Act’s extensive revision of the Articles of War was a forerunner to the 1950 UCMJ.

70. See Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. REV. 79, 90 (2010). These provisions for review were designed to lessen the dangers of command influence. See *id.*

71. Elston Act § 226.

72. See Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65, 68 (1988).

73. See Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 22 (1965).

74. See Willis, *supra* note 55, at 63.

75. See *id.* at 66.

76. See Uniform Code of Military Justice, ch. 169, art. 37, 64 Stat. 1078, 120 (1950) (current version at 10 U.S.C. § 837 (2012)).

court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.<sup>77</sup>

Simply put, Article 37 states that neither the convening authority nor commanding officer is to pressure any member of the court, be it the law officer or military judge, any of the counsel, or the panel to influence the action of a court-martial or any post-trial action.<sup>78</sup> The modern text of Article 37 has changed little since its inception.<sup>79</sup> Furthermore, Article 98 made it a punitive criminal offense for a commander to violate Article 37 by purposefully trying to influence court proceedings.<sup>80</sup> The text of Article 98, entitled “Noncompliance with procedural rules,” has not changed since it was created in 1950 and states the following:

Any person subject to this chapter who—

- (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
- (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.<sup>81</sup>

Just because a prohibition against command influence was written into the 1950 version of the UCMJ does not mean that the practice actually ceased. Declaring something unlawful does not mean it disappears, which is evidenced by the failure of prohibition in the 1920s, the easy acquisition of marijuana despite its criminalization, and the proliferation of file-sharing music and movies. Although Article 37 prohibited command influence and Article 98 made violations of Article 37 punitive, no one has ever been prosecuted under Article 98.<sup>82</sup> It is an elementary concept that for a law to have meaning, enforcement is necessary. There are numerous possible explanations for why no one has been prosecuted for command influence. During Senate hearings concerning command influence, it was opined “that there is absolutely no way of proving an officer guilty of a violation of article 37 unless he is a hopeless

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77. *Id.*

78. See Bower, *supra* note 72, at 68.

79. Compare 10 U.S.C. § 837 (2012), with *supra* text accompanying note 77 (providing original text of Article 37).

80. See Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time To Play Taps?*, 28 SW. U. L. REV. 481, 518 (1999).

81. 10 U.S.C. § 898 (2012).

82. See Spak & Tomes, *supra* note 80, at 518.

idiot,” and that “you cannot prevent an officer from discussing a case.”<sup>83</sup> While institutional failures are another possible explanation,<sup>84</sup> there is also case history where although unlawful command influence may have been present, it was exercised inadvertently or without any malicious intent.<sup>85</sup> More often than not, commanders are not trying to target any particular individual, but instead are trying to advance their legitimate concerns of enforcing discipline, especially when selecting officers to sit on panels.<sup>86</sup> Still, the fact that unlawful command influence was done unintentionally and without malice is of little comfort to an accused facing potentially severe consequences because of his commander’s mistake.

### B. Enforcing the Prohibition Against Command Influence

Congress chose to curb command influence by affording appellate courts fact-finding powers.<sup>87</sup> “[A]llowing a panel of experienced judges to review sentences was seen as an important check to ensure commanders were not influencing courts-martial to hand down excessive sentences.”<sup>88</sup> As explained below, the reason Congress chose to address command influence at the appellate level was because the commander too closely controlled the trial phase. Today, general and special courts-martial are presided over by military judges who are appointed by their branch’s JAG and are independent of the convening authority’s chain of command.<sup>89</sup> However, under the original UCMJ, general and special courts-martial were not presided over by independent military judges. Instead, the panel president, who was typically a

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83. *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 307 (1949) [hereinafter *Farmer Testimony*] (testimony of Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association).

84. *See Spak & Tomes, supra* note 80, at 518.

85. *See United States v. Saracoglu*, No. NMCCA 201000447, 2011 WL 3691948, at \*4 (N-M. Ct. Crim. App. Aug. 9, 2011) (finding apparent, unlawful command influence in Captain’s comments, but not finding any prejudice); *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (finding error not due to unlawful command influence, and therefore no prejudice).

86. *See United States v. Biagase*, 50 M.J. 143, 146 (C.A.A.F. 1999) (involving situation where superior servicemember circulated accused’s confession saying conduct “will not be tolerated”); *United States v. Lewis*, 46 M.J. 338, 339 (C.A.A.F. 1997) (constituting case where more women than usual detailed to panel for case involving offenses against accused’s wife); *United States v. Redman*, 33 M.J. 679, 681 (A.C.M.R. 1991) (discussing courts of appeals’ authority to replace unsatisfactory panel under Article 25(d)(2) authority to find “best qualified” members); *United States v. Hilow*, 29 M.J. 641, 642 (A.C.M.R. 1989) (involving scenario where deputy adjutant General selected potential members of court-martial panel who supported “hard discipline”); *United States v. Swagger*, 16 M.J. 759, 759 (A.C.M.R. 1983) (dealing with situation in which provost marshal, i.e., chief law enforcement officer, directly supervised military police in command).

87. *See Weber, supra* note 70, at 90.

88. *Id.* (citing Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 31 (1965)). “These provisions for review were designed to lessen the dangers of command control.” Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 31 (1965).

89. *See* 10 U.S.C. § 826 (2012).

line officer instead of a Judge Advocate,<sup>90</sup> presided over a special court-martial, and a law officer presided over a general court-martial.<sup>91</sup> Both the panel president and the law officer were subject to the command of the convening authority.<sup>92</sup> The position, duties, and certifications of the law officer were described in Article 26 of the original UCMJ as follows:

(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(b) The law officer shall not consult with the members of the court, other than on the form of the findings as provided in Article 39, except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court.<sup>93</sup>

As stated in Article 26 of the 1950 UCMJ, unlike the military judges of today, law officers were appointed to a court-martial by the convening authority where they were subject to the convening authority's control and beholden to the chain of command for efficiency reports and discipline.<sup>94</sup> The same applied to the panel president, who, like any other panel member, was also appointed by the convening authority.<sup>95</sup> To put it simply, under the original UCMJ, the convening authority—the person who had already decided to court-martial the accused and selected and evaluated the jury—was also the one selecting and evaluating the law officer or panel president, who were the closest thing to a judicial authority in 1950.<sup>96</sup> Because the law officer and panel president were both under command of the convening authority, expecting either of them to address allegations of command influence would have been like expecting the fox to guard the henhouse. If he were to investigate or act on allegations of command influence, he would essentially be

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90. See Effron, *supra* note 8, at 16.

91. See Uniform Code of Military Justice, ch. 169, art. 26, 64 Stat. 107, 117 (1950) (current version at 10 U.S.C. § 826 (2012)).

92. The convening authority appointed the law officer pursuant to Article 26(a). See art. 26(a), 64 Stat. at 117. The convening authority appoints the president and all other members of the panel pursuant to Article 25(d)(2). See 10 U.S.C. § 825(d)(2) (2012).

93. art. 26, 64 Stat. at 117.

94. See Jeffery D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 12 (2004).

95. See art. 25, 64 Stat. at 116.

96. See art. 37(a), 64 Stat. 120.

accusing his superior officer of breaking the law.<sup>97</sup> It is unlikely that the mere fact that it was against the law for the convening authority to pressure the law officer, panel president, or other panel members would provide much comfort to an accused, especially given the aforementioned difficulty in proving unlawful command influence.<sup>98</sup> Because the trial courts could not be trusted to protect against command influence, this duty logically fell upon the appellate courts.

Unlike trial courts, the members of the appellate courts could be trusted with addressing command influence because they were not subject to the convening authority's chain of command.<sup>99</sup> Under the original iteration of Article 66(a):

The Judge Advocate General of each of the armed forces shall constitute in his office one or more Boards of Review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal Court or of the highest court of a State of the United States.<sup>100</sup>

The members of the boards of review<sup>101</sup> answered to the JAG and not the convening authority, making them the first independent, neutral, and disinterested review of a trial.<sup>102</sup> Their power to review factual sufficiency and grant relief when they felt that the evidence did not justify a conviction or sentence was an important check on a commander's power to influence proceedings and outcomes.<sup>103</sup> Even if command influence could not be proven—inherently a very difficult task<sup>104</sup>—their plenary power of review would enable them to make changes in the interest of justice if the trial record did not support the conviction or sentence.<sup>105</sup> The importance of an independent appellate body with these powers is self-evident considering that trials were so closely controlled and potentially influenced by commanders. However, this power is no longer necessary, in part because modern military

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97. See Uniform Code of Military Justice, ch. 169, art. 98, 64 Stat. 107, 137 (1950) (current version at 10 U.S.C. § 898 (2012)).

98. See *Farmer Testimony*, *supra* note 83.

99. See art. 66, 64 Stat. at 128-29.

100. *Id.* art. 66(a).

101. The boards of review were renamed the courts of military review and its board members were made judges by the Military Justice Act of 1968. See *History of the U.S. Army Court of Criminal Appeals*, U.S. ARMY CT. OF CRIM. APPEALS, <https://www.jagcnet.army.mil/8525749F007224E4/0/743B9E914850721085257443006DD643?opendocument> (last visited Mar. 25, 2014). In 1994, the courts were again renamed the [applicable military branch] Court of Criminal Appeals, for example, the U.S. Army Court of Criminal Appeals. See *id.* The modern iteration of Article 66(a) reads in part: "Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed one or more panels, and each such panel shall be composed of not less than three appellate military judges." 10 U.S.C. § 866(a) (2012).

102. See 10 U.S.C. § 866.

103. See Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 263 (1996).

104. See *Farmer Testimony*, *supra* note 83.

105. See *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).



trials are no longer so closely controlled by commanders.

*C. Addressing Command Influence at Trial*

Because the commanders' ability to influence trials in 1950 led to the creation of a powerful military judiciary, it follows that because the commanders' ability to influence trials has been limited, then so too should the powers of the appellate courts. The UCMJ has been amended since 1950, and general and special courts-martial are no longer presided over by law officers and panel presidents who are subject to the control of the convening authority. While the convening authority still selects the members of the panel including the president, he or she can no longer select the presiding judicial figure.<sup>106</sup> Instead, a military judge, who has the same independence from the convening authority as the appellate judges, presides over present day general and special courts-martial. Rather than answering to the convening authority like the law officer, a military judge is assigned by and directly responsible to the JAG.<sup>107</sup> The modern iteration of Article 26 states that "[t]he military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail."<sup>108</sup> Furthermore, under Article 26(c), "neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge."<sup>109</sup> In *Weiss v. United States*,<sup>110</sup> the United States Supreme Court recognized the change from law officers to military judges has created an independent judiciary within the military.<sup>111</sup> The Court stated, "the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."<sup>112</sup> As Justice Souter observed in his concurring opinion, this has led to what is essentially an independent judiciary, which can operate autonomously and without fear of repercussions for its decisions, just like Article III judges.<sup>113</sup>

What this means is that unlike law officers and panel presidents, military judges are independent of the convening authority, and therefore, can be entrusted to guard against command influence. Unlike the appellate judges

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106. See 10 U.S.C. § 825(d)(2) (2012); *id.* § 826.

107. See *id.* § 826(c).

108. *Id.*

109. *Id.*

110. 510 U.S. 163 (1994).

111. See *id.* at 191-92 (Souter, J., concurring).

112. *Id.* at 179 (majority opinion).

113. See *id.* at 191-92 (Souter, J., concurring) (analogizing military judges to Article III federal circuit and district judges).

sitting on the courts of criminal appeals, military judges are actually present in the court during the trial, therefore they are much better situated to recognize and address potential command influence. The CAAF has created a straightforward process for addressing possible command influence at trial.<sup>114</sup> First, it is the defense that must “rais[e] the issue of unlawful command influence.”<sup>115</sup> The test is that there must be “some evidence” of “facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.”<sup>116</sup> The burden then shifts to the government to prove beyond a reasonable doubt any one of the following: “(1) that the predicate facts do not exist; or (2) that the facts do constitute unlawful command influence; or (3) that unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.”<sup>117</sup> Upon a finding of unlawful command influence, a trial court may institute remedies as severe as a dismissal of charges with prejudice, or impose no remedy at all.<sup>118</sup> In addition, “although a military judge may not adjust or suspend a sentence, he may declare a mistrial under RCM 915.”<sup>119</sup> Furthermore, like a federal judge, a military judge is “empowered to set aside the findings of guilty if it [is] apparent to him that the evidence [is] legally insufficient.”<sup>120</sup> Given that unlike appellate judges, trial judges are actually present throughout the trial and are better situated to observe and act on possible cases of command influence, this modern means of rectifying command influence at trial is superior to the 1950 boards-of-review system.

Appellate courts were given fact-finding powers because all of the members of the trial, including the judicial figure, were subject to the chain of command of the convening authority. With the advent of the independent military judge, this is no longer the case. Replacing the law officer at general courts-martial and panel president at special courts-martial with an independent military judge has decreased a commander’s ability to influence courts-martial proceedings. Therefore, appellate courts do not need the same fact-finding powers to rectify command influence. The fact that there is already a military judge presiding over the trial with both the independence and power to rectify command influence has rendered the fact-finding in courts of criminal appeals redundant, rather than a necessary front line of defense. Yet, the fact that historic reasons

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114. See *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

115. *Id.*

116. *Id.*

117. *Id.* at 151.

118. Interview with Col. Gregory Maggs, Judge, U.S. Army Court of Criminal Appeals, in Wash., D.C. (Dec. 19, 2012).

119. *United States v. Loving*, 41 M.J. 213, 297 (C.A.A.F. 1994), *modified*, 42 M.J. 109 (C.A.A.F. 1995), *aff’d*, 517 U.S. 748 (1996).

120. *United States v. Griffith*, 27 M.J. 42, 48 (C.M.A. 1988).

for giving the courts this unusual power no longer exists is not in itself a justification to remove this power. On the contrary, it is merely a reason to review whether the modern usage and justifications for this power warrant its continued existence. As explored below, the burden de novo factual review places on the military's overtaxed appellate system, without yielding any apparent benefits, makes it unlikely that the power is still justifiable today.

#### IV. PROFESSIONALISM OF COURTS-MARTIAL

The unprofessional nature of courts-martial under the original UCMJ is a principal reason why the military's boards of review were given their unusual appellate power.<sup>121</sup> During the drafting of the UCMJ, Congressman Clyde Doyle stated that he believed "strongly that a military court is not comparable to a civilian court," which was why Congress should "permit the Judicial Council to review the facts as well as the law."<sup>122</sup> As explained below, in the early days of the UCMJ this was an accurate statement, and because of problems arising due to the lack of professionalism at trials, the fact-finding appellate powers of the boards of review were an invaluable means of remedying injustices. However, the professionalism of the courts-martial structure has greatly improved since 1950. Today, military justice is at the point where it is not only comparable to its civilian counterpart, but actually exceeds a civilian court's limitations by granting more rights and protections to the accused.<sup>123</sup> While Congressman Doyle's argument was valid in 1950, it does not hold true today, and accordingly, this justification for affording the military's appellate courts such an unusual power no longer exists.

##### A. A Professional Judiciary

In 1950, one of the most recognizable distinctions between civilian criminal trials and general or special courts-martial was the absence of a judge at courts-martial. Although a law officer was present at general courts-martial, as subsequently explained, these officers were not analogous to a civilian judge, did not exactly preside over the trial, and were not present at special courts-martial. The absence of true judges at courts-martial was a great weakness in the military justice system because judges play an important role in maintaining the fairness, integrity, and impartiality of trials.<sup>124</sup> Today, when a judge observes issues such as a possible juror bias<sup>125</sup> or the improper admission of

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121. See Jividen, *supra* note 37, at 68.

122. Doyle Statement, *supra* note 53.

123. See United States v. Warner, 62 M.J. 114, 121 (C.A.A.F. 2005) ("Congress . . . adopt[ed] a more protective statutory system for military accused than the Constitution provides for civilians in a criminal trial.").

124. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 59 (2003).

125. See, e.g., State v. Shillcutt, 350 N.W.2d 686, 688 (Wis. 1984) (summarizing how one juror remarked,

evidence,<sup>126</sup> he or she has both the legal training to recognize a potential impediment to justice and the power to dispel it. The difference between a law officer and a military judge is not merely one of title, but rather marks a vast increase in the competence and professionalism in the military's judiciary, bringing military justice in line with civilian practice.<sup>127</sup>

To understand the significance of having a military judge instead of a law officer or panel president presiding at trial, one must look at the history of the military judiciary. The original military judicial code was the Articles of War, which was adopted in 1775 and had undergone only superficial changes since its inception.<sup>128</sup>

At the end of World War I, Congress amended the Articles of War in response to dissatisfaction from the large number of people brought into contact with the command-dominated justice system for the first time. Congress . . . required the convening authority to appoint, in each Army general courts-martial, one of the panel members to serve as a "law member." As one of the panel members, this law member would vote with the rest of the panel, but was assigned certain judge-like duties, such as ruling on the admissibility of evidence and instructing on the applicable law in a given case. Whenever possible, this law member would be a Judge Advocate, although a "specially qualified" officer could be appointed if a Judge Advocate was not available. There was still no requirement that the law member be a licensed attorney. Moreover, a majority of the panel could overrule the law member's decisions. In the absence of a law member, the president of the court-martial panel ruled upon all interlocutory issues. As with the law member, a majority of the panel could also overrule the president's decisions.<sup>129</sup>

Although the creation of the law member was a step in the right direction, it hardly constituted a fair and independent judiciary. By World War II, servicemembers were still "essentially subject to a 160-year-old criminal code that provided no right to trial by peers, that was largely administered by men untrained in the law, and that was closely controlled by a commander whose natural and primary interest was the maintenance of good order and discipline

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"Let's be logical, he's a black, and he sees a seventeen year old white girl—I know the type"); *Tobias v. Smith*, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979) (involving case where juror told other jurors problems with identification of defendant did not matter, because "[y]ou can't tell one black from another. They all look alike"); *Smith v. Brewer*, 444 F. Supp. 482, 485 (S.D. Iowa 1978) (describing how juror strutted around jury room "as a minstrel used to do" and mimicked a "black dialect"), *aff'd*, 577 F.2d 466 (8th Cir. 1978); *see also Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1595, 1603 (1988).

126. *See Osborne v. United States*, 351 F.2d 111, 113 (8th Cir. 1965).

127. *See Military Justice Act of 1968*, Pub. L. No. 90-632, 82 Stat. 1335. This Act called for the military judge to have powers similar to a civilian judge, which the law officer had lacked. *See id.*

128. *See Willis*, *supra* note 55, at 43.

129. 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, 52–53 (2009)

within his command,” instead of fair proceedings safeguarding an American citizens’ rights to due process.<sup>130</sup>

The Elston Act was a significant movement toward a professional judiciary and a precursor to the UCMJ in which Congress amended the Articles of War to “require that the law member be a Judge Advocate or a licensed attorney serving as a commissioned officer on active duty and certified by The Judge Advocate General (TJAG) as qualified for such detail.”<sup>131</sup> The “[l]aw members continued to rule on interlocutory questions and such rulings were generally final except in two circumstances: (a) on motions for finding of not guilty; and (b) on questions regarding an accused’s sanity.”<sup>132</sup> “[They] had the additional responsibility of instructing other court-martial panel members regarding the burden of persuasion and standard of proof.”<sup>133</sup> However, the Elston Act applied only to the Army, and there was still a need to modernize the Navy’s judicial code.

During the drafting of the UCMJ, there was disagreement as to whether the military should continue its practice of having a “law member” with weak judicial powers, or to “provide for a law officer who acted solely in a judicial capacity” and was empowered to issue authoritative rulings.<sup>134</sup> Much of the opposition to a powerful judicial figure came out of the military’s respect for rank and hierarchy.<sup>135</sup> The JAG of the Army at the time, Major General Thomas H. Green, opposed this system because the law officer would in most cases be junior in rank to the president of the court-martial, who was determined by his status as the highest-ranking officer on the panel.<sup>136</sup> Major General Green was opposed to the idea of a lower-ranking law officer issuing binding orders and rulings to a more senior and higher-ranking panel president.<sup>137</sup> Logically, this was a very poor argument for not having a law officer. The law officer would be trained in the law, while the president of the panel would likely be a line officer without legal expertise.<sup>138</sup> Just as one would find it ludicrous for an infantry General to order a dentist to drill a cavity a certain way, or a senior Chaplain to instruct an Apache pilot how to compensate for a strong wind during flight, neither should this General or Chaplain be able to instruct a lawyer on the practice of law. Despite this flawed logic, Major Green’s concerns were validated, for in the early days of the UCMJ, having law officers inferior in rank to the panel president was a

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130. See Willis, *supra* note 55, at 43.

131. Ku, *supra* note 129, at 53.

132. *Id.* at 53-54.

133. *Id.* at 54.

134. Effron, *supra* note 8, at 9.

135. *See id.*

136. *See id.* at 4.

137. *See id.* at 9.

138. *See* Effron, *supra* note 8, at 9.

problem that jeopardized the integrity of the process and the rights of the accused, contributing to the appellate workload.

Ultimately, the first UCMJ mandated the appointment of a weak law officer for each general court-martial with the authority to issue final rulings of law on most interlocutory matters and to take other authoritative judicial actions.<sup>139</sup> “In contrast to the role of the law member under the Articles of War, the law officer of a general court-martial under the UCMJ [was intended to] occupy a position similar to a judge in civilian proceedings and would not participate as a voting member of the court-martial panel.”<sup>140</sup> Law officers would not be appointed to special courts-martial, so the panel president would preside instead.<sup>141</sup> While this was a step towards creating a military judiciary, there were still multiple problems left to address. First, there was confusion resulting from law officers not being assigned to special courts-martial. This meant that at special courts-martial “the rulings on interlocutory matters and other matters of law . . . [were] the responsibility of the special court-martial president” who would typically be a line officer, and not a lawyer.<sup>142</sup> This also meant that individuals without a law school education would be ruling on legal issues.<sup>143</sup>

The potential for error with persons unschooled in the law making legal decisions is very high, which justifies a powerful appellate review. Errors in matters of law have the potential to result in findings of fact that otherwise would not have been made. An accused was potentially prejudiced by this arrangement because evidence that should have been excluded was often allowed at trial, possibly leading to convictions that never would have occurred had an experienced lawyer decided evidentiary matters. This is exactly what happened in *United States v. Patrick*,<sup>144</sup> where the Navy Board of Review found that “[i]t was error for the court to permit prosecution witnesses to testify over objection that an ‘order’ was given [to the] accused.”<sup>145</sup> Had an attorney been presiding over this court, he or she would have known that it was improper to ask a witness to make a legal conclusion. Based in part on this testimony, the servicemember was wrongfully convicted, and the Navy Board of Review overturned the conviction.<sup>146</sup> In *Patrick*, the evidence before the Board of Review was “not a complete record of the proceedings and testimony,” and the Board of Review, using its factual-review power, made the determination that the evidence was insufficient to prove the guilt of the

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139. *See id.* at 10.

140. *Id.*

141. *See* Uniform Code of Military Justice, ch. 169, art. 26, 64 Stat. 107, 117 (1950) (current version at 10 U.S.C. § 826 (2012)).

142. Effron, *supra* note 8, at 11.

143. *See id.*

144. 3 C.M.R. 429 (N.B.R. 1952).

145. *Id.* at 431.

146. *See id.* at 430.

accused beyond a reasonable doubt.<sup>147</sup>

Admittedly, the presence of a military judge does not guarantee these sorts of errors do not occur. For example, in *United States v. Parker*,<sup>148</sup> an appellant had been convicted of first-degree murder despite the improper admission of crucial hearsay evidence, and the Navy-Marine Court of Criminal Appeals overturned the verdict.<sup>149</sup> The court found that some of the evidence used to implicate the appellant had been hearsay.<sup>150</sup> When the court removed the hearsay from its consideration of the factual sufficiency of the case, it determined that although it was more likely than not that the accused had in fact committed the murder, the members of the court were not convinced beyond reasonable doubt of the accused's guilt and overturned the verdict.<sup>151</sup> However, incidents like these should occur far less often with an experienced military judge, instead of a nonlawyer panel president or weakly powered law officer, presiding over courts-martial. The infrequency of incidents like this is considered in greater detail later in Part VI. Furthermore, it is worth noting that even the *Parker* court acknowledged that Article 66(c) made it more likely the court was protecting against a false conviction, as opposed to acquitting a guilty murderer.<sup>152</sup>

Unprofessional military justice causes a second impediment. In the absence of a law officer at special courts-martial, panel presidents become accustomed to expansive judicial powers that they would inappropriately attempt to exercise at general courts-martial, which created tension and conflict with the law officer.<sup>153</sup> The problem was that "an officer might serve in one case as the president of a special court-martial with broad powers over the proceedings, while serving in another case as the president of a general court-martial with limited, vaguely defined powers."<sup>154</sup> When panel presidents, accustomed to their broad powers at special courts-martial would sit for general courts-martial, they would occasionally try to usurp the authority of the lower ranking law officer.<sup>155</sup> Case law indicates this happened because law officers were not true judges empowered to preside over general courts-martial.<sup>156</sup> Although "[t]he legislative background of the Uniform Code makes clear beyond question Congress' conception of the law officer as a judge to all material

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147. *See id.* at 430-31.

148. 71 M.J. 594 (N-M. Ct. Crim. App. 2012).

149. *See id.* at 608.

150. *See id.*

151. *See id.* at 608-09.

152. *Parker*, 71 M.J. at 608-09.

153. *See Effron, supra* note 8, at 10-11.

154. *Id.* at 11.

155. *See United States v. Berry*, 2 C.M.R. 141, 147 (C.M.A. 1952) (reviewing case where president of panel intruded upon judicial duties of law officer).

156. *See id.* at 146.

intents and purposes,”<sup>157</sup> as a practical matter, this was a complete failure.<sup>158</sup> Despite Congress’s attempt to create a judicial figure, “the UCMJ did little to broaden the judicial authority of the law officer over that of the law member. The law officer could rule on interlocutory questions, but he still could not rule on challenges, and certain of his rulings were subject to the objections of the court members.”<sup>159</sup>

“[T]he UCMJ did not expressly place the law officer in charge of trial proceedings at a general court-martial,” which aggravated the fact that law officers lacked judicial powers.<sup>160</sup> “Congress retained the position of ‘president’ of a court-martial without clearly specifying the nature of the relationship between the law officer of a general court-martial and the president of the court-martial.”<sup>161</sup> There is conflicting authority as to whether the law officer or the president of the panel was in charge of general courts-martial. On one hand, select quotes from the hearings on the UCMJ have clearly analogized the law officer to that of a judge, for “the law officer has been charged generally with the responsibility for the fair and orderly conduct of the proceedings.”<sup>162</sup> Further supporting this proposition, “[t]he drafting history [of the UCMJ] described the president of a general court-martial as occupying ‘a position similar to that of the foreman of a jury’ except for a ‘few listed’ duties under paragraph 40b(1) of the 1951 MCM.”<sup>163</sup>

However, this is conflicted by the MCM itself, as “[it] described the president of the court-martial—not the law officer—as ‘the presiding officer of the court.’”<sup>164</sup> The MCM gave the panel president many powers and duties that are normally reserved for judges such as the following:

- (a) After consultation with the trial counsel and, when appropriate, the law officer . . . , he sets the time and place of trial and prescribes the uniform to be worn.

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157. *Id.* at 147.

Professor E. M. Morgan, chairman of the Secretary of Defense’s committee, whose efforts resulted in the confection and passage of the Code, stated in response to Congressional Committee inquiry into the place of the law officer: “Well, the fundamental notion was that the law officer ought to be as near like a civilian judge as it was possible under the circumstances.”

*Id.*

158. See Effron, *supra* note 8, at 15 (listing some powers and responsibilities one expects of judicial figure carried out by panel president).

159. Gilbert D. Stevenson, *The Inherent Authority of the Military Judge*, A.F. L. REV., Summer 1975, at 1, 4–5.

160. Effron, *supra* note 8, at 10.

161. *Id.* at 10–11.

162. *Id.* at 15.

163. *Id.*

164. Effron, *supra* note 8, at 10.



(b) As the presiding officer of the court, he takes appropriate action to preserve order in the open sessions of the court in order that the proceedings may be conducted in a dignified, military manner, but, except for his right as a member to object to certain rulings of the law officer . . . , he shall not interfere with those rulings of the law officer which affect the legality of the proceedings.

(c) He administers oaths to counsel.

(d) For good reason, he may recess or adjourn the court . . . , subject to the right of the law officer to rule finally upon a motion or request of counsel that certain proceedings be completed prior to such recess or adjournment, or that a continuance be granted . . . . Whether a matter of recess or adjournment has become an interlocutory question will be finally determined by the law officer .

. . .<sup>165</sup>

This sounds confusing because it is confusing; two authorities reached separate conclusions as to who was in charge at general courts-martial. While the law officer was responsible for the fair and orderly conduct of the proceedings—and the drafting history of the UCMJ indicated that the law officers were supposed to be equatable to civilian judges—the implementing MCM recognized the president of the court as retaining his pre-UCMJ powers as the presiding officer.<sup>166</sup>

History indicates that the absence of a clear authority did in fact cause problems, for example, the Court of Military Appeals “observed instances . . . in which the president has stepped into the breach,” usurping the role of the law officers.<sup>167</sup> The Court of Military Appeals found occasions where law officers, typically of inferior rank to the panel president, were being “intimidated into inaction by an aggressive president.”<sup>168</sup> There are even documented occasions where law officers were reluctant to fulfill their judicial duties as intended by the drafters of the UCMJ. This caused the Court of Military Appeals to “recommend that law officers of general court-martial not hesitate to employ the powers conferred upon them by Congress in order that military trials may proceed in a fair and orderly manner.”<sup>169</sup>

The ambiguity as to the job description of a panel president and law officer was eventually resolved by developments in the case law of the Court of Military Appeals. As one would expect, the unclear roles of these two presiding officers led to numerous appeals filed with assignments of error concerning the roles of the panel president and law officer. Even though “[s]everal commentators . . . asserted that Congress actually did not intend to

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165. UNITED STATES MANUAL FOR COURTS MARTIAL ¶ 40b, at 57 (1951 ed.), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1951.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf).

166. See Stevenson, *supra* note 159, at 5.

167. United States v. Berry, 2 C.M.R. 141, 147 (C.M.A. 1952).

168. *Id.*

169. United States v. Cole, 31 C.M.R. 16, 20 (C.M.A. 1961).

equate law officers with civilian judges,” the issue was rendered moot by the court.<sup>170</sup> Over time, through its decisions in cases concerning law officers and panel presidents, the court shaped the position of law officer to be somewhat analogous to that of a judge. As previously mentioned, the court’s view was that “[t]he legislative background of the Uniform Code makes clear beyond question Congress’ conception of the law officer as [a] judge.”<sup>171</sup> The fact that the court felt it was necessary to state the role of the law officer in such blunt terms sheds some light on the degree of ambiguity initially present in the UCMJ.

The evolution of the law officer into a judge has its roots in *United States v. Berry*, where the court noted that the law officer, “like the judge, is the final arbiter at the trial level as to questions of law. He is the court-martial’s advisor and director in affairs having to do with legal rules or standards and their application.”<sup>172</sup> In subsequent opinions, the Court of Military Appeals continued issuing rulings where the dictum clarified the role of the law officer, recognizing that the law officer was fulfilling the role of a judge,<sup>173</sup> and “consistently expanded the powers of law officers.”<sup>174</sup> In *United States v. Jackson*, the court held that the UCMJ imposed a duty upon the law officer to control criminal proceedings.<sup>175</sup> In *United States v. Biesak*, the court ruled that a law officer could perform a key judicial function and instruct members of the panel on inferences that can be drawn from evidence.<sup>176</sup> Next, in *United States v. Stringer*, the court held that a law officer could declare a mistrial, even though there was no provision expressly authorizing this in the UCMJ or MCM.<sup>177</sup> Then, in *United States v. Strand*, the court recognized a law officer’s power to dismiss multiplicative specifications, even after the members had announced their findings.<sup>178</sup> In *Strand*, the court purposefully acted to conform the role of the law officer to that of a civil judge, noting that “[t]here is no compelling reason requiring a different practice in the military.”<sup>179</sup> The fact that the court had to write opinions stating that law officers had these basic judicial powers is telling of just how weak, misunderstood, and undeveloped the role of the law officer was in 1950.

Much like the increased size of the military during World War I and World

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170. Major Tate & Lieutenant Colonel Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 23, 23–24.

171. *Berry*, 2 C.M.R. at 147.

172. *Id.* at 146.

173. See, e.g., *United States v. Jones*, 22 C.M.R. 73, 75–76 (C.M.A. 1956), *United States v. Jackson*, 14 C.M.R. 64, 65 (C.M.A. 1954); *United States v. Stringer*, 17 C.M.R. 122, 130 (C.M.A. 1954).

174. Tate & Holland, *supra* note 170, at 25.

175. See *Jackson*, 14 C.M.R. at 70.

176. See 14 C.M.R. 132, 140 (C.M.A. 1954).

177. See *Stringer*, 17 C.M.R. at 131.

178. See 20 C.M.R. 13, 21–22 (C.M.A. 1955).

179. *Id.* at 22.

War II gave rise to the recognition of a need to reform the Articles of War, the escalation of the war in Vietnam led to the recognition of a need to reform the role of the law officer.<sup>180</sup> For example, in 1964 there were 43,668 general and special courts-martial, and in 1968 the number had grown to 65,114.<sup>181</sup> During this time, there was a revolution in civilian criminal due process to more vigorously protect the rights of criminal defendants. Landmark cases recognized a civilian accused's constitutional rights, which were already guaranteed to servicemembers under the UCMJ, such as the right to an attorney and to be informed of his or her rights.<sup>182</sup> In 1966, Senator Sam Ervin of both the Armed Services and Judiciary Committees conducted hearings on the rights of military personnel.<sup>183</sup> Following the hearings, Senator Ervin introduced numerous military justice reform bills to "to enhance the independence, impartiality and competence of law officers who preside over courts-martial by creating in each service an independent 'field judiciary' made up of experienced, full-time legal officers assigned and responsible directly to the Judge Advocate General of the service."<sup>184</sup>

Following these hearings, Congress ultimately passed the Military Justice Act of 1968<sup>185</sup> to create the role of the military judge pursuant to Article 26 of the UCMJ.<sup>186</sup> The newly created position of the military judge expanded the position of the law officer.<sup>187</sup> The military judge was to be the presiding officer for both special and general courts-martial, rule on all questions of law, and instruct court-martial members regarding the law and procedures to be followed.<sup>188</sup> The Military Justice Act was intended to

streamline court-martial procedures in line with procedures in U.S. district courts . . . and give [military judges] functions and powers more closely allied to those of Federal district judges, . . . [and] to increase the independence of military judges and members and other officials of courts-martial from unlawful influence by convening authorities and other commanding officers.<sup>189</sup>

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180. See Ku, *supra* note 129, at 55.

181. See Effron, *supra* note 8, at 17.

182. See *Miranda v. Arizona*, 384 U.S. 436, 449 (1966) (requiring police inform accused of his or her rights in custodial interrogation); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (holding right to counsel necessary for criminal proceedings).

183. See Effron, *supra* note 8, at 18.

184. *Id.* at 19 (quoting *Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and a Special Subcomm. of the S. Comm. on Armed Servs.*, 89th Cong. (1966)).

185. Pub. L. No. 90-632, 82 Stat. 1335.

186. See *id.* § 2(9); see also *Weiss v. United States*, 510 U.S. 163, 180-81 (1994) (outlining Article 26).

187. See Eric J. Konecke, Comment, *The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office*, 5 SETON HALL CONST. L.J. 489, 561 (1995).

188. See *Weiss*, 510 U.S. at 167.

189. S. REP. NO. 90-1601, at 3 (1968), reprinted in 1968 U.S.C.C.A.N. 4501, 4503-04.

The Committee noted that the legislation would “provide for the establishment within each service of an independent judiciary composed of military judges certified for duty on general courts-martial, who are assigned directly to the JAG of the service and are responsible only to him or his designees for direction and fitness ratings.”<sup>190</sup> “The applicable legislation has remained unchanged since the 1968 amendments.”<sup>191</sup>

In modeling the role of the military judge after that of federal district judges, Congress granted military judges many of the powers of federal district court judges, which law officers had lacked.<sup>192</sup> The President of the United States has also furthered the progression towards harmonizing the powers of military judges and federal district court judges. “Pursuant to the rulemaking authority in Article 36, the President has supplemented Article 26 by prescribing RCM 902, ‘Disqualification of military judge.’ RCM 902 is based on the statute governing disqualification of federal civilian judges.”<sup>193</sup> The President also promulgated the 1969 MCM,<sup>194</sup> and with this edition, the military judge was authorized to make many decisions that previously had been within the province of the convening authority or the president and members of the court-martial.<sup>195</sup> Military judges were empowered to exclude spectators from the trial for good reason, to require additional evidence, and to prevent the court members from requiring the recall of witnesses, the call of additional witnesses, or the procurement of additional evidence.<sup>196</sup> They were also authorized to summarize and comment on evidence for the court members, and intervene in the trial to prevent unnecessary waste of time or to clarify obscurities.<sup>197</sup> Quite possibly, the final stroke solidifying the power of the military judge was the holding in *United States v. McElhinney*, which recognized that the military judge had the power to issue legally-binding orders to a convening authority.<sup>198</sup>

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190. *Id.* at 4507-08.

191. *United States v. Norfleet*, 53 M.J. 262, 267 (C.A.A.F. 2000).

192. *Id.* at 267 n.4 (outlining provisions of 1968 legislation that enhanced powers of trial judiciary).

193. *Id.* at 269 (citation omitted); see 28 U.S.C. § 455 (2012); UNITED STATES MANUAL FOR COURTS-MARTIAL app. 21 (2012 ed.) [hereinafter MCM], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf). RCM 902(a) states: “[A] military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” MCM, *supra*, r. 902(A). RCM 902(b) details five circumstances constituting specific grounds for disqualification of a military judge: (1) “personal bias or prejudice”; (2) acting in specified disqualifying capacities “as to any offense charged or in the same case generally”; (3) being a “witness in the same case” or an “accuser,” as well as having “forwarded charges in the case with a personal recommendation as to disposition” or “expressed an opinion concerning the guilt or innocence of the accused”; (4) disqualification under RCM 502(c) or not being properly detailed under RCM 503(b); and (5) being related “within the third degree of relationship” to a party, a person with an interest in the outcome, or a likely material witness in the case. *Id.* r. 902(b).

194. See generally UNITED STATES MANUAL FOR COURTS-MARTIAL (1969 ed.), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1969.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1969.pdf).

195. See Stevenson, *supra* note 159, at 6.

196. See *id.*

197. See *id.*

198. See 45 C.M.R. 210, 213 (C.M.A. 1972).

Although in early cases the Court of Military Appeals had indicated its “aim [was] to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system,” the revolutionary aspects of subsequent developments of the military judiciary by Congress and the President are indicative of the fact that the court failed in this endeavor.<sup>199</sup> The military judiciary has come a long way since the law-officer structure in 1950. When the boards of review were granted their fact-finding powers, trials in the military were extremely different than civilian trials. They were presided over by either a panel president who was not a lawyer but made legal rulings, or by both a panel president and law officer who shared, and at times competed, over poorly understood and very limited powers. One can contrast this procedure to today’s structure where trials are now presided over by a modern military judge whose position and powers were modeled after and closely resemble Article III district court judges.<sup>200</sup> The development of the military judge is a “development in military justice to the achievement of the high standards of the system.”<sup>201</sup> Because of the changes in the military judiciary at trial, the initial justification in having appellate courts with unusual appellate powers no longer exists. In keeping with the military’s acknowledged objective of making military justice as similar to the federal system as possible, the next logical step is for Congress to amend the appellate authority of the military’s courts of criminal appeals so that they too are modeled after the federal appellate courts, which would require removing the fact-finding power of military appellate courts.<sup>202</sup>

### B. Military Rules of Evidence

While the evolution of the military judge is the strongest argument for removing the fact-finding powers of the courts of criminal appeals, there are other reasons that also support this position. One such reason is the adoption of the MRE. Not only did the rules increase the professionalism of the courts-martial, they also rendered military justice even more analogous to the federal courts. The 1921 MCM was the military’s first attempt to clarify the rules of evidence for courts-martial.<sup>203</sup> Unlike the modern MRE, the 1921 MCM did

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199. See *United States v. Biesak*, 14 C.M.R. 132, 140 (C.M.A. 1954).

200. See, e.g., *Weiss v. United States*, 510 U.S. 163, 192 (1994) (Souter, J., concurring) (stating military judges “no more ‘limited [in] duties’ than lower Article III or Tax Court judges”); *United States v. Weiss*, 36 M.J. 224, 238 (C.M.A. 1992) (Crawford, J., concurring) (recognizing military judiciary similar to federal civilian judiciary “in . . . importance and scope of [its] duties”); *Courtney v. Williams*, 1 M.J. 267, 272 (C.M.A. 1976) (Ferguson, J., concurring) (stating military trial judges “have all the prestige and authority of other federal trial judges, wherever practicable”); see also Konecke, *supra* note 187, at 561.

201. Stevenson, *supra* note 159, at 2.

202. See *Biesak*, 14 C.M.R. at 140 (describing court’s aim to harmonize status of law officer with that of civilian judge).

203. See Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171, 173 (1990).

not set forth detailed rules, but instead, simply stated that the rules of evidence at courts-martial would be the same as those generally followed in the federal district courts.<sup>204</sup> While this provided some guidance, it was inadequate for several reasons. First, there are traditional distinctions concerning evidence admissible in military, but not federal courts, such as the allowance of character evidence in the “good soldier” defense.<sup>205</sup> Next, the federal courts themselves were lacking a unified and coherent system of evidence at the time, instead relying on the common law to decide issues of admissibility.<sup>206</sup> Historically, the rules of evidence for federal courts had been an aspect of common law, rather than codified law.<sup>207</sup> The official Federal Rules of Evidence (FRE), on which the modern MRE would later be based, were not adopted until 1975.<sup>208</sup> The Rules Enabling Act of 1934 allowed the Supreme Court to make rules for evidence, but only two such rules were promulgated.<sup>209</sup> Although the Supreme Court developed rules such as the Rules of Civil Procedure and the Rules of Criminal Procedure, it avoided tackling issues of evidence.<sup>210</sup> Making a unified and coherent set of rules for the federal courts was an extremely political and controversial process, which is perhaps why it was not until 1975 that the federal courts had a cohesive set of rules.<sup>211</sup>

Today, just as the federal courts are guided by the FRE, military courts are guided by the very similar MRE. The MRE are promulgated by the President under the authority prescribed by Congress in Article 36 of the UCMJ and have the force of law.<sup>212</sup> Although the MRE were modeled after the FRE, there are some differences such as the aforementioned good-soldier defense.<sup>213</sup> Prior to the implementation of the MRE, the military courts simply used the MCM, which was little more than “‘how to guides,’ coupled with basic hornbook type discussion and compilations of necessary legal information.”<sup>214</sup> A key difficulty with the MCM was determining which parts were controlling and

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204. *See id.*

205. *See* Elizabeth Lutes Hillman, Note, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 880 (1999).

206. *See* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used To Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 883 (1988).

207. *See* Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking”*, 53 HASTINGS L.J. 843, 846-47 (2002) (tracking history and creation of FRCP and FRE).

208. *See* Capofari, *supra* note 203, at 175.

209. *See* Scallen, *supra* note 207, at 846. These rules made are now Federal Rules of Civil Procedure 43 and 44. *See id.*

210. *See* Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 158 (2008).

211. *See* Scallen, *supra* note 207, at 846-54.

212. *See* Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 9-10 (1990).

213. *See* Capofari, *supra* note 203, at 175.

214. Lederer, *supra* note 212, at 7.

which parts were advisory.<sup>215</sup> With the modern MRE, the rules can more easily be applied uniformly in both general and special courts-martial. The MRE also make the determination of the admissibility of evidence easier and more straightforward.

This application of the modern MRE can be contrasted with trying to enforce rules of evidence at special courts-martial in 1950. As previously stated, law officers were not present at special courts-martial, which were instead presided over by a panel president who would typically be a line officer instead of a lawyer.<sup>216</sup> The rules of evidence, despite being codified, can be complicated for even lawyers to interpret. Looking back, one can only speculate as to just how difficult it was for a nonlawyer panel president at a special court-martial to try to interpret and apply the common-law rules of evidence.<sup>217</sup> After removing the improperly admitted evidence from the record, a board of review could consider the remaining evidence and determine if it was sufficient to sustain the verdict.

While there will always be some differences which reflect the uniqueness of the military, the MRE's striking resemblance to the FRE have rendered special and general courts-martial more analogous to federal trials than most probably anticipated when the UCMJ was promulgated. With only some exceptions, the same evidence that would be heard in a military court would also be heard in a civilian court. Furthermore, some of those exceptions, such as the good-soldier defense, actually work to the advantage of the defendant.<sup>218</sup> The military trials themselves are conducted in very similar fashion to trials in federal district courts. Not only do both use nearly the same standards for determining the admissibility of evidence, but a lawyer is also making the determination using clarified rules of evidence to determine what the panel may see and hear. No longer is there a panel acting as judge and jury as in 1950,<sup>219</sup> instead just like a federal district court, powers are divided between a panel deciding issues of fact and a judge presiding over proceedings and ruling on matters of law. Finally, unlike law officers in 1950, military judges today are analogous to federal district judges in that they operate with a wide scope of independence. This combination of factors has radically changed the way courts-martial are conducted and their overall professionalism and fairness. The fact-finding power of the boards of review was created because courts-martial under the original UCMJ were unprofessional, unfair, and did not at all resemble a civilian trial. Considering this basis is no longer true today, it is no longer necessary for the military's courts of criminal appeals to have fact-finding

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215. *See id.*

216. *See* Effron, *supra* note 8, at 9.

217. *See* United States v. Patrick, 3 C.M.R. 429, 430-31 (N.B.R. 1952).

218. *See* Hillman, *supra* note 205, at 880.

219. *See* United States v. New, 55 M.J. 95, 103 (C.A.A.F. 2001).

powers to ensure justice and fairness.

## V. JUDICIAL ECONOMY

The fact-finding powers of the courts of criminal appeals are no longer being employed as intended—that is, to rectify command influence and to correct errors which inevitably arose out of the highly unprofessional proceedings. However, this is not in itself a reason to remove this power, but does indicate that the power should be reviewed to determine whether or not it is an asset to military justice. While the merits of having another level of review can be debated, the statistics concerning the overburdened appellate system speak for themselves. Judicial economy is a reason to consider eliminating the fact-finding ability of the courts of criminal appeals because this power is contributing to the overburdened workload of the military's justice system.<sup>220</sup> Not only is this one more task for the judges to perform, but it also generates significant work for the government's appellate counsel, thus contributing to a formidable backlog of cases.

### A. Appellate Defense

Pursuant to Article 70 of the UCMJ, at no cost to the appellant, the JAG assigns appellate defense counsel to review each case resulting in a guilty verdict, which must be affirmed by the courts of criminal appeals.<sup>221</sup> The appellate defense attorneys review the entire record of the trial to look for errors.<sup>222</sup> Upon finding possible errors, defense counsel includes them in an assignment of errors in a brief filed with the court and sent to the government's appellate division. The military's appellate defense attorneys openly acknowledge claims of factual insufficiency are frequently made, even when they are unlikely to succeed.<sup>223</sup> This is not to say that the claim is being made frivolously, but thorough defense counsel will explore every possibility to benefit their client. With the standard of review being almost *de novo*, factual insufficiency is a relatively easy and cost-effective argument for defense attorneys to make.<sup>224</sup> The attorneys are already obligated to review the entire record of trial, and in the process they can pull out any items of evidence favorable to the appellant and argue that any particular piece of evidence could possibly raise reasonable doubt.<sup>225</sup> Given that the burden of proof at trial and

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220. See Steven J. Carroll, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187, 209 (1986).

221. See 10 U.S.C. § 870(a) (2012).

222. Interview with Lt. Cara J. Condit, Judge Advocate and Appellate Def. Counsel, Legal & Defense Servs., U.S. Coast Guard, in Wash., D.C. (Feb. 11, 2013).

223. See *id.*

224. See *id.*

225. See *id.*



on appeal is the high standard of beyond reasonable doubt, it is somewhat plausible that any piece of evidence favorable to the defense raises reasonable doubt.<sup>226</sup> Moreover, no attorney ever wishes to see his or her work subsequently challenged on appeal as failing to meet the standards of competence under the *Strickland* test, regardless of the merits of the claim.<sup>227</sup> Alleging everything possible, including factual insufficiency, is one way to prevent this from occurring.<sup>228</sup>

### B. Government Appellate Division

Claims of factual insufficiency place a very heavy burden on the government's appellate attorneys.<sup>229</sup> Answering the defense's claim of factual insufficiency forces government attorneys to reargue the case on paper, which is a very time-consuming process.<sup>230</sup> A government attorney has to go through hundreds, and sometimes thousands, of pages of the trial record to pick out evidence and witness testimony supporting the finding of guilt and rebutting the claims of the appellate defense attorneys.<sup>231</sup> Depending on the length of the trial record and the specific nature of the claims of factual insufficiency, addressing this one assignment of error can easily take a government attorney days to complete, despite its high likelihood of futility.<sup>232</sup> This is not an efficient use of time or resources, especially considering the already sizable backlog of military appeals. On average, it takes 441 days between the conclusion of a trial and a decision from an Army Court of Criminal Appeals.<sup>233</sup> The harm caused by this delay is tangible as individuals actually suffer from it. There are documented cases where persons have already served their sentence of confinement and been released by the time their case is decided by a court of criminal appeals, which then removed the time in confinement from the person's record after adjusting their sentence.<sup>234</sup> For example, in *United States v. Moore*,<sup>235</sup> the court adjusted a sentence of six

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226. See *In re Winship*, 397 U.S. 358, 361 (1970).

227. See *Strickland v. Washington*, 466 U.S. 668, 680-81 (1984).

228. The applicable acronym is CYA, which stands for "Cover Your Ass."

229. Interview with Capt. Steve Nam, Gov't Appellate Div., U.S. Army Judge Advocate General Corps, in Wash., D.C. (Feb. 14, 2013). Having personally answered such defense claims, the author can also attest to the large quantities of time consumed by rearguing the factual sufficiency of a case.

230. See *id.*

231. See *id.*

232. See *id.* The author has first-hand experience with such record review from his time in the Government Appellate Division.

233. See E-mail from Col. Malcolm Squires, Clerk, U.S. Army Court of Criminal Appeals, to author (Jan. 17, 2013, 1:27 PM EST) (on file with author) (compiling 2011 statistics, upon request, for Army Court of Criminal Appeals).

234. See *United States v. Gean*, 71 M.J. 553, 554 (A. Ct. Crim. App. 2012). Fortunately for Private Gean, his sentence was for time already served.

235. No. NMCCA 9901782, 2003 WL 22843143 (N-M. Ct. Crim. App. Nov. 26, 2003).

months down to five months.<sup>236</sup> However, the six-month sentence had been adjudged February 12, 1999, and the appellate court made its decision November 26, 2003, so as a practical matter the appellant did not receive any real relief.<sup>237</sup>

Furthermore, “at a minimum, Government Appellate Division and Defense Appellate Division will usually get JAGs with at least one assignment as a trial counsel or trial defense counsel . . . .”<sup>238</sup> Undoubtedly, the military can find better uses for its veteran litigators than spending days sifting through trial records to pick out pieces of evidence to reargue a case on paper. Applying the same standard on appeal as the federal courts is just one way to discourage appellate defense counsels from alleging factual sufficiency assignments of errors they know are unlikely to succeed. If the military courts were like civilian appellate courts where the threshold for finding factual insufficiency is not beyond a reasonable doubt, but rather is the more deferential standard of “clearly erroneous,” there would be less of an incentive for defense counsel to pursue frivolous assignments of error.

### C. Judges

A final point about judicial economy concerns the judges on the courts of criminal appeals, who are typically lieutenant colonels and colonels, making them among the most experienced attorneys in the JAG Corps. The review of the entire record of trial “must be made by each member of the court” and is extremely time consuming.<sup>239</sup> “The specific requirement that a ‘law and fact’ determination be based ‘on the basis of the entire record’ and at the time consumed in compliance therewith greatly expands the judicial workload.”<sup>240</sup> Given that the judges are already burdened with having to read the entire record of trial to review issues of law, the additional work to analyze factual sufficiency is not a heavy added burden at first glance.<sup>241</sup> Still, taking into account that the backlog of cases is already over a year, any amount of time saved is worth considering. Surely the military can find better uses for the time of its top attorneys than reading briefs and hearing oral arguments—without the benefits of witnesses or evidence—and reconsidering the factual sufficiency of a case already decided by presumably competent panels of military judges and attorneys.

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236. *See id.* at \*7.

237. *See id.*

238. Interview with Capt. Steve Nam, *supra* note 229.

239. G. H. P. Bursley, *Appellate Review in the Military Justice System: Can It Be Expedited?*, ARMY LAW., May 1978, at 19, 20.

240. *Id.* at 21.

241. *See* Interview with Col. Gregory Maggs, Judge, U.S. Army Court of Criminal Appeals, in Wash., D.C. (Oct. 2, 2012).

## VI. INCREASING DEFERENCE TO A TRIAL COURT'S FINDINGS OF FACT WILL NOT PREJUDICE THE RIGHTS OF SERVICEMEMBERS

Fundamentally, the courts of criminal appeals review of a panel's findings of fact is designed to protect servicemembers. Any time there is advocacy to remove such a protection, it is prudent to explore the effects of the proposed change. Military justice already has an undeserved reputation as being unfair to the rights of the accused, so any action reinforcing this erroneous belief is potentially problematic. In reviewing the consequences of adopting this proposed change to the UCMJ, one will find that it will have little effect on military justice as a whole. It is a power that is very rarely employed by the appellate courts and there are already numerous protections granted to an accused tried in military courts that are not available to civilians. The Court of Appeals of the Armed Forces stated, "Congress was free to, and did, adopt a more protective statutory system for military accused than the Constitution provides for civilians in a criminal trial,"<sup>242</sup> and has given servicemembers "safeguards unparalleled in the civilian sector."<sup>243</sup>

### A. Convictions Are Rarely Overturned due to Factual Insufficiency

Of the 579 cases reviewed by the Army Court of Criminal Appeals in 2012,<sup>244</sup> factual insufficiency of the evidence was found in only fifteen cases, and of those fifteen, the length of confinement was reduced in only one case (with twelve years reduced to ten).<sup>245</sup> Also, of the fifteen cases where factual

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242. *United States v. Warner*, 62 M.J. 114, 121 (C.A.A.F. 2005).

243. *United States v. McGraner*, 13 M.J. 408, 414 (C.M.A. 1982).

244. E-mail from Homan Barzmehri, Mgmt. & Program Analyst, U.S. Army Court of Criminal Appeals, to author (May 2, 2013, 2:24 PM EST) (on file with author).

245. In *United States v. Moses*, the court found the evidence factually and legally insufficient to affirm a lesser-included offense of assault consummated by battery, but affirmed the main charge of the improper touching of a child under the age of sixteen. *See* No. ARMY 20090247, 2012 WL 243758, at \*1 (A. Ct. Crim. App. Jan. 23, 2012), *aff'd in part, rev'd in part*, 71 M.J. 351 (C.A.A.F. 2012). In *United States v. Martucci*, the court found the evidence supporting the forgery charge to be insufficient, but upheld other charges and affirmed the original sentence. *See* No. ARMY 20090572, 2012 WL 401510, at \*1-2 (A. Ct. Crim. App. Jan. 27, 2012). In *United States v. Willis*, the court found the evidence of an assault on a noncommissioned officer to be factually insufficient, but in light of other charges, did not change the sentence. *See* No. 20110217, 2012 WL 346624, at \*1 (A. Ct. Crim. App. Jan. 31, 2012). In *United States v. Bowersox*, the court could not affirm one of multiple specifications concerning the possession of child pornography, but did affirm the sentence. *See* 71 M.J. 561, 565 (A. Ct. Crim. App. 2012), *aff'd*, 72 M.J. 71 (C.A.A.F. 2013). In *United States v. Lavergne*, the court found factual insufficiency for an adultery conviction, and remanded the case to the convening authority to reassess the sentence. *See* No. ARMY 20090986, 2012 WL 1123592, at \*2 (A. Ct. Crim. App. Mar. 30, 2012). In *United States v. Leber*, the court could not affirm the lesser charge of receiving pay in a drug trafficking operation, but still affirmed the sentence. *See* No. ARMY 20100931, 2012 WL 1371868, at \*1 (A. Ct. Crim. App. Apr. 19, 2012). In *United States v. Gean*, the court did not affirm a conviction for making threats because of facts concerning Gean's psychiatric counseling, and when the court upheld the bad-conduct discharge but disapproved of the confinement, the appellant had already served his time sentenced of 164 days, so no practical relief was granted. *See* 71 M.J. 553, 556 (A. Ct. Crim. App. 2012). In *United States v. Hassell*, the evidence was factually insufficient for a larceny charge, but various other charges were upheld and the

insufficiency was found, in twelve of these cases the entire sentence was affirmed.<sup>246</sup> Three of the cases involved reduced sentences: In *United States v. Burdett*, a sexual predator's twelve year sentence was reduced to ten; in *United States v. Gean*, an appellant who had been sentenced to time served had that time removed from his record; and in *United States v. Lavergne*, the court remanded the sentence to the convening authority for reassessment.<sup>247</sup> When a court of criminal appeals overturns a finding because of factual insufficiency, it is typically a secondary charge, rather than the main one.<sup>248</sup> The simple conclusion drawn from this observation is that despite the enormously time-consuming burden placed on appellate attorneys by having to review factual-sufficiency claims, it rarely yields a meaningful change in an accused's conviction or punishment. There is the occasional exception, such as *United States v. Lucas*<sup>249</sup> or *United States v. Parker*,<sup>250</sup> but these are such infrequent occurrences that the fact-finding power is not worth the costs it exacts. The military's legal resources are limited and should be allocated in a manner such that they will have the most impact, and the evidence shows that despite the countless hours being spent addressing Article 66(c) factual sufficiency issues, it is very unlikely that it will make a difference or influence an outcome.

In a judicial system that so strongly protects the rights of the accused, a possible counterargument to support the fact-finding powers of the appellate

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sentence was affirmed. See No. ARMY 20110634, 2012 WL 2225605, at \*2 (A. Ct. Crim. App. June 13, 2012). In *United States v. Gillum*, the court disapproved a lesser charge of willful disobedience for factual insufficiency, but affirmed the original sentence. See No. ARMY 20111156, 2012 WL 3150409, at \*2 (A. Ct. Crim. App. July 27, 2012). In *United States v. Mullings*, the court set aside a lesser conviction for failure to obey a lawful order while upholding the convictions for battery, housebreaking, assault, among other charges, and still affirmed the sentence. See No. ARMY 20100925, 2012 WL 4866686, at \*1 (A. Ct. Crim. App. Oct. 4, 2012). In *United States v. Burdett*, the court overturned a conviction for aggravated sexual contact with a child, and reduced the defendant's sentence from twelve years of confinement to ten. See No. ARMY 20110013, 2012 WL 5406638, at \*1 (A. Ct. Crim. App. Oct. 31, 2012). In *United States v. Olmotorres*, the court found the evidence legally and factually insufficient to support the terminal element of an Article 134 conviction for possession of child pornography, but nevertheless affirmed the sentence for unlawfully possessing child pornography under 18 U.S.C. § 2256. See No. ARMY 20111103, 2012 WL 5522570, at \*1 (A. Ct. Crim. App. Nov. 8, 2012). In *United States v. Potter*, the court did not affirm a marijuana charge and restored some of the defendant's privileges such as pay and allowance, but did not change the fifteen months of confinement sentenced. See No. ARMY 20110332, 2012 WL 5553237, at \*5 (A. Ct. Crim. App. Nov. 8, 2012). In *United States v. Pleasant*, the court upheld a larceny conviction while finding factually insufficient evidence for the attempted larceny conviction, but did not lessen the defendant's sentence. See 71 M.J. 709, 718 (A. Ct. Crim. App. 2012). In *United States v. Willbarger*, the court determined the evidence in the case was factually insufficient to support two convictions for making false statements, but did not change the sentence. See No. ARMY 20091026, 2012 WL 6804146, at \*3 (A. Ct. Crim. App. Dec. 26, 2012).

246. See *supra* note 245 (citing cases where entire sentence affirmed). The sentences were changed in *United States v. Lavergne*, *United States v. Gean*, and *United States v. Burdett*.

247. See *Burdett*, 2012 WL 5406638, at \*1; *Gean*, 71 M.J. at 556; *Lavergne*, 2012 WL 1123592, at \*2.

248. See *supra* note 245 and accompanying text.

249. No. NMCCA 201100372, 2012 WL 3728017, at \*8 (N-M. Ct. Crim. App. Aug. 28, 2012) (overturning primary rape charge).

250. 71 M.J. 594, 608 (N-M. Ct. Crim. App. 2012) (reducing sentence from death penalty to life in prison).

courts is that even if one conviction is overturned, then the costs are justified. While the poor returns described above on the investment into claims of factual insufficiency make it doubtful the costs are in fact worth it, it is important to remember that just because a conviction is overturned on factual insufficiency does not necessarily mean the person did not commit the crime. Instead, what it means is that appellate judges who were not present at trial did not believe the person committed the crime beyond a reasonable doubt, but that the panel or military judge at the trial was convinced beyond a reasonable doubt. Beyond a reasonable doubt is an extremely high threshold, and to have even gone to trial, pursuant to Article 32 of the UCMJ, it was more likely than not the accused committed the crime.<sup>251</sup> In fact, in *United States v. Parker*, the court itself acknowledged that because of Article 66(c), it was overturning a conviction for murder even though the court thought it was more likely than not the accused had committed the crime.<sup>252</sup> There is a difference between making sure an innocent person is not wrongfully convicted, and allowing a guilty person to escape punishment because of a legal rule or technicality. Because of the numerous safeguards in the military justice system to prevent the conviction of an innocent person, when the court does overturn a verdict based on factual insufficiency, it is more likely than not letting a guilty person go free than exonerating an innocent person. What follows is a classic philosophical question: just how many guilty people should be let go before a single innocent person is punished? At some point the line must be drawn, and wherever that line should fall, it is inevitable that at times persons will be wrongfully convicted. It is contended here that when a person has already been found guilty beyond a reasonable doubt at trial, it is not an injustice to keep the person imprisoned, even if the appellate judges who were not present at the trial and merely reading the record of the trial, are not convinced of guilt beyond a reasonable doubt.<sup>253</sup>

#### *B. Due Process Protections for Servicemembers Exceed Those of Civilians*

If Congress does remove the fact-finding power of the courts of criminal appeals, members of the military will continue to have broader due process rights and protections than civilians.<sup>254</sup> The protection intended by Article 66(c), though it has powerful potential, is so rarely employed that it pales in comparison to the numerous other statutory protections used more frequently to protect servicemembers from injustice. These protections help ensure innocent

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251. See 10 U.S.C. § 832 (2012).

252. See *Parker*, 71 M.J. at 608.

253. The author would make an exception to this argument for death-penalty cases. This is a penalty that can never be changed, and if imposed, there should be no question by any person reviewing the record as to the guilt of the accused.

254. See Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 8 (2004).

persons are not wrongfully convicted or unduly punished, making the need for a powerful appellate court to protect the rights of servicemembers less compelling. Although the preventative measures described below offer little comfort to an accused who has already been convicted, there are also many post-trial remedies—other than Article 66(c) of the UCMJ—which offer servicemembers significant opportunities for relief that are unavailable to civilians. Upon being informed of the generous pre- and post-trial protections members of the military have that civilians do not, one will find the removal of the rarely outcome-determinative Article 66(c) fact-finding powers will not unjustly prejudice those accused of crimes under the UCMJ.

### I. *Miranda Rights*

The requirement in the military that an accused is informed of his or her right to remain silent and right to an attorney is more expansive than in civilian criminal justice, making it more difficult to obtain a conviction, thus preventing servicemembers from being wrongfully convicted in the first place.<sup>255</sup> In both civilian and military justice, this is popularly known as the reading of one's *Miranda* rights.<sup>256</sup> There is an obligation for authorities in both justice systems to notify the accused of his or her right to remain silent and right to an attorney.<sup>257</sup> It was not until the Supreme Court's 1968 decision in *Miranda v. Arizona* that the Court formerly acknowledged that civilians' had these rights.<sup>258</sup> In deciding *Miranda*, the Court favorably noted that the practice of reading an individual his or her rights was well-established under the original UCMJ.<sup>259</sup> However, relative to the generous protections given to servicemembers by Article 31 of the UCMJ, the scope of rights granted to civilians by the *Miranda* decision is very limited. The decision in *Miranda* required the reading of rights only in custodial interrogations.<sup>260</sup> A custodial interrogation has been defined by the Supreme Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>261</sup> This leaves numerous other opportunities where criminal investigators may question an individual without reading rights, such as traffic stops<sup>262</sup> or on-the-street police questioning.<sup>263</sup>

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255. See 10 U.S.C. § 831 (2012).

256. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

257. See generally *id.*; 10 U.S.C. § 831.

258. See generally *Miranda*, 384 U.S. 436.

259. See *id.* at 489.

260. See *id.* at 444.

261. *Id.* at 428.

262. See *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding questioning during traffic stop did not constitute custodial interrogation for *Miranda* purposes).

263. *United States v. Masse*, 816 F.2d 805, 810 (1st Cir. 1987) (holding questioning suspect on street not

In the military, “protections against self-incrimination . . . under Article 31, Uniform Code of Military Justice, exceed the protections given civilians under the Fifth Amendment.”<sup>264</sup> In the original UCMJ, Article 31 is entitled “Compulsory self-incrimination prohibited” and states:

No person subject to this Code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement at all regarding the offense of which he is accused or suspected.<sup>265</sup>

The text and its application have changed very little since 1950.<sup>266</sup> “Congress has provided members of the armed forces with a rights’ warning requirement that is broader than the warnings required in a civilian setting as a matter of constitutional law under *Miranda*.”<sup>267</sup> First, the application of “Article 31 [is] to all suspects, not just those who are in custody.”<sup>268</sup> Next, while *Miranda* is limited only to law enforcement, Article 31 of the UCMJ applies to anyone who is part of any “disciplinary investigation or inquiry.”<sup>269</sup> “Questioning by a military superior in the immediate chain of command ‘will normally be presumed to be for disciplinary purposes.’”<sup>270</sup> Like in civilian justice, failure to notify the accused of his or her rights prior to questioning may result in suppression of evidence—i.e., incriminating statements made to the police during interrogation.<sup>271</sup>

Not only is the right against self-incrimination broader in military justice, but so too is the right to an attorney. In the military, a person “who is accused of an offense or who is placed under investigation has the opportunity to consult with, and to be represented by, an attorney without charge regardless of his financial status and regardless of whether a general or special court-martial ultimately tries the case.”<sup>272</sup> This right is codified under Article 27 of the UCMJ, entitled “Detail of trial counsel and defense counsel.”<sup>273</sup> Article 27 provides that “[t]rial counsel and defense counsel shall be detailed for each general and special court-martial.”<sup>274</sup> It was only in 1963, through the

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custodial interrogation).

264. Stevenson, *supra* note 159, at 1–2.

265. Uniform Code of Military Justice, ch. 169, art. 31, 64 Stat. 107, 118 (1950) (current version at 10 U.S.C. § 831 (2012)).

266. Compare art. 31, 64 Stat. at 118, with 10 U.S.C. § 831 (2012).

267. *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000).

268. *Id.*

269. *Id.* at 446; see *United States v. Moses*, 45 M.J. 132, 134 (C.A.A.F. 1996).

270. *Swift*, 53 M.J. at 446 (quoting *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)).

271. See *id.* at 445.

272. Stevenson, *supra* note 159, at 1–2.

273. 10 U.S.C. § 827 (2012).

274. *Id.* § 827(a)(1).

landmark decision of *Gideon v. Wainwright*,<sup>275</sup> that civilians received the right to an attorney at the state's expense.<sup>276</sup> However, this right has many limitations. First, it applies only to indigent clients.<sup>277</sup> In contrast, Article 27 does not make any distinctions as to the financial status of the accused. Rich and poor servicemembers alike are entitled to counsel at no cost to them. This is an important benefit for middle-class servicemembers who, though able to afford an attorney, may find paying costly legal fees unjustifiable when facing minor criminal charges, and wouldn't be entitled to counsel at government's expense in a civilian case.

Next, the right to free counsel for civilians is extended only when the accused faces potential imprisonment.<sup>278</sup> Not only is there no such limitation to a servicemember's right to free counsel at general or special courts-martial,<sup>279</sup> but with the exception of an optional summary court-martial,<sup>280</sup> the right to have an attorney present even applies to nonjudicial proceedings such as administrative hearings.<sup>281</sup> Finally, the right to an attorney attaches earlier in the military criminal process than in civilian criminal justice.<sup>282</sup>

## 2. Free Appellate Counsel

The right to free appellate counsel is also more extensive in military justice than its civilian counterpart. While only indigent appellants are generally guaranteed free appellate counsel in civilian courts,<sup>283</sup> pursuant to Article 70 of the UCMJ, all persons regardless of financial situation are offered free appellate counsel.<sup>284</sup> Article 70 states that "[t]he Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel."<sup>285</sup> Again, this is a significant benefit to individuals who are not indigent, but also do not have the financial resources to pay for drawn out appellate litigation. The military's appellate attorneys are typically experienced

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275. 372 U.S. 335 (1963).

276. *See id.* at 345.

277. *See id.* at 344.

278. *See Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

279. There is no right to counsel at summary courts-martial. Summary courts-martial outcomes are not federal convictions, and the trial itself is not a criminal prosecution within the meaning of the Sixth Amendment. They are intended to be a brief and informal hearing, and having counsel present would defeat that purpose. Furthermore, the accused can always turn down summary courts-martial in favor of special or general courts-martial. *See Middendorf v. Henry*, 425 U.S. 25, 46–47 (1976).

280. *See Henry*, 425 U.S. at 48.

281. *See Clifford v. United States*, 120 F. App'x 355, 358 (Fed. Cir. 2005).

282. Lecture by Francis Gilligan, Professorial Lecturer in Law, George Washington Univ. Sch. of Law (Feb. 14, 2013) (on file with author).

283. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

284. *See* 10 U.S.C. § 870 (2012).

285. *Id.* § 870(a).



former prosecutors or defense attorneys.<sup>286</sup> For a nonindigent civilian client, hiring an attorney with these skills and expertise would likely cost hundreds of dollars per hour. The work these attorneys do in reading the entire record of trial, researching and writing briefs, preparing for oral argument, and other tasks could easily cost a client tens-of-thousands of dollars at a private law firm's rates.

Furthermore, the quality of representation given to military appellants by appellate defense is uniformly competent.<sup>287</sup> As previously stated, the military's appellate attorneys are usually veteran prosecutors or defense attorneys.<sup>288</sup> They are highly skilled and competent attorneys who are intimately familiar with military law and criminal procedure.<sup>289</sup> When preparing for a case, these counselors follow a general procedure, which is extensive and thorough.<sup>290</sup> After an attorney receives and reads a record of a trial, he or she does preliminary work to develop a strategy.<sup>291</sup> A general meeting is called where the captain to whom the case is assigned discusses the case with the other attorneys in the office.<sup>292</sup> The lead attorney discusses the case and his or her strategy, and the other attorneys provide feedback.<sup>293</sup> These meetings typically last from thirty minutes to an hour.<sup>294</sup> The attorney finishes and submits the brief, and then at least three practice oral argument sessions are held.<sup>295</sup> At these sessions, the more senior attorneys of the branch play the role of the judges by asking questions and providing meaningful feedback.<sup>296</sup> Each case represents a team effort, with all attorneys in the office contributing to the case in some way.<sup>297</sup> The overall quality and thoroughness of representation for each appellant in each case is outstanding.

Not only does an appellant have a right to free counsel, but the appellant can also force his counsel to raise any issue he chooses on appeal. The decision of the Court of Military Appeals in *United States v. Grostefon* required appellate defense counsel to bring to the attention of the reviewing court every issue urged by the client-appellant.<sup>298</sup> Even if the appellant's attorney disagrees with

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286. See Interview with Capt. Steve Nam, *supra* note 229.

287. See Interview with Lt. Cara J. Condit, *supra* note 222.

288. See *id.*

289. See *id.*

290. See *id.*

291. See Interview with Lt. Cara J. Condit, *supra* note 222.

292. See *id.* For the Army Government Appellate Division, these meetings typically consisted of approximately ten to fifteen experienced attorneys.

293. See *id.*

294. See *id.*

295. See Interview with Lt. Cara J. Condit, *supra* note 222.

296. In the Army Government Appellate Division, the mock judges would usually include a Lieutenant Colonel, a couple of Majors, and a couple of senior Captains.

297. This observation is likewise based on the author's personal experience in the Army Government Appellate Division.

298. See 12 M.J. 431, 435 (C.M.A. 1982).

the opinion of his client, he is still obligated to raise the issue on appeal. This practice is the military's method of providing the accused a means of having an "active, meaningful role in the presentation of the case on appeal, and not be[ing] a mere pawn."<sup>299</sup> This is not a right guaranteed to civilians.

Moreover, unlike civilian cases, all cases in the military are guaranteed an appellate review for the sole purpose of protecting the rights of the appellant. While Articles 66 and 70 of the UCMJ provide appellate review for serious offenses, Article 69 provides appellate review for minor offenses. Article 69 states that the

record of trial in each general court-martial that is not otherwise reviewed under [Article 66] shall be examined in the office of the Judge Advocate General if there is a finding of guilty . . . and [i]f any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.<sup>300</sup>

The power of the Judge Advocate is plenary, much like the power of the courts of criminal appeals. Article 69(b) lists numerous grounds to modify or set aside a sentence, in whole or in part.<sup>301</sup> The list includes, "newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence."<sup>302</sup> Pursuant to Article 69(c), the JAG may order a rehearing, and if the convening authority chooses or is unable to hold one, the charges are to be dismissed.<sup>303</sup> There is a stipulation for when the JAG sets aside a verdict for lack of evidence.<sup>304</sup> When this occurs, the case will be dismissed.<sup>305</sup> The right to a second look at the trial is not guaranteed to all civilians. The right to appeal is not found in the U.S. Constitution, and two states—West Virginia and New Hampshire—do not even have an automatic right to appeal.<sup>306</sup>

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299. Appellant's Reply to Appellee's General Opposition to Supplement to Petition for Grant of Review at 1, *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010) (No. 08-0344), 2008 WL 1693627, at \*1.

300. 10 U.S.C. § 869(a) (2012).

301. *See id.* § 869(b).

302. *Id.*

303. *See id.* § 869(c).

304. *See* 10 U.S.C. § 869(c).

305. *See* E-mail from Colonel Gregory Maggs, Judge, U.S. Army Court of Criminal Appeals, to author (Feb. 20, 2013, 11:37 PM EST) (on file with author).

306. *See* Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right To Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 739 (2005).

### 3. Care Inquiry

Another unique protection in military justice is the “providence inquiry” for guilty pleas. Any time a member of the service intends to plead guilty to a crime, before his or her plea is accepted, the military judge must ensure a guilty plea is appropriate by conducting a lengthy and thorough questioning.<sup>307</sup> This is a frequently used process, for “[i]n general and special courts-martial, about 60% of the accused plead guilty to all of the charges and specifications against them, and an even higher percentage plead guilty to some of the charges and specifications.”<sup>308</sup> Of the 555 cases reviewed in 2011 by the Army Court of Criminal Appeals, the appellant had pled guilty to all charges in 390 of them,<sup>309</sup> and in many other cases the accused pled guilty to some of the charges.<sup>310</sup> Servicemembers will enter a guilty plea for the same reasons and justifications as civilians, such as pretrial agreements with the prosecution to reduce the seriousness of offenses, dismissal of certain charges or specifications, or limitations on the maximum punishment that may be imposed.<sup>311</sup> There is also the possibility that a service member will plead guilty without any agreement, in what is called a “naked plea,” in hopes that confessing to the crime, cooperating, and accepting responsibility will result in a quicker resolution of the case and a more favorable sentence.<sup>312</sup>

When an accused pleads guilty, the military judge conducts a providence inquiry to ensure that the guilty plea is appropriate.<sup>313</sup> The duties of the military judge in conducting the providence inquiry are established in RCM 910.<sup>314</sup> Under RCM 910(c)(1), the military judge informs the accused of the nature of the offense and the maximum penalties the accused faces if convicted.<sup>315</sup> Pursuant to RCM 910(d) and (e), the military judge is looking to ensure that the accused’s plea is both voluntary and accurate.<sup>316</sup> Finally, under RCM 910(f), the military judge makes certain that the accused understands and agrees to any pretrial agreement.<sup>317</sup> This questioning by the judge is commonly known as the “Care inquiry”—named after the case of *United States v. Care*.<sup>318</sup> In *Care*, the court “mandated that military judges explain to the accused the

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307. GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 284 (2012).

308. *Id.*

309. See E-mail from Colonel Malcolm Squires, Clerk, U.S. Army Court of Criminal Appeals, to author (Feb. 11, 2013, 8:47 AM EST) (on file with author) (containing Army Court of Criminal Appeals data).

310. Figures not readily available. *See id.*

311. *See* MAGGS & SCHENCK, *supra* note 307.

312. *See id.*

313. *See id.*

314. *See id.*

315. *See* MAGGS & SCHENCK, *supra* note 307.

316. *See id.*

317. *See id.*

318. 40 C.M.R. 247, 253-54 (C.M.A. 1969).

elements of the offenses to which he or she is pleading guilty, and that they elicit a factual basis for the guilty plea to ensure that the accused actually is guilty of those offenses.”<sup>319</sup> In conducting a *Care* inquiry, a military judge is to adhere to the following procedure:

First, the military judge should state clearly the elements of the offense. Second, the judge should provide an explanation of the terms at least to the extent contained in the *Military Judge’s Benchbook*. Third, the judge should ask if the accused understands the elements of the offense and the definitions of all terms. Fourth, after receiving an affirmative response from the accused on the understanding of the elements and definitions, the judge should ask if the accused admits each element of the offense and whether the elements and definitions taken together accurately describe the accused’s conduct. Finally, the judge should elicit statements from the accused that constitute an adequate factual basis for the accused’s admission of each element of the offense. Also, if the accused is pleading guilty pursuant to a pretrial agreement that requires him or her to stipulate to the circumstances of an offense, the trial counsel should ensure that the stipulation not only contains the accused’s admissions that his or her conduct constituted each and every element of the offense, but also leaves no room for doubt that the accused’s actions satisfy the factual basis for the elements and definitions involved in the offense.<sup>320</sup>

This highly detailed and structured process of ensuring the propriety of guilty pleas in military courts stands in contrast to the brevity and speed of a guilty plea in civilian courts. Despite the fact that over ninety percent of criminal convictions in civilian courts are the result of guilty pleas,<sup>321</sup> the civilian justice system lacks anything resembling the *Care* inquiry to protect the rights of those pleading guilty. It is expected that defense attorneys will both thoroughly review their clients’ cases to ensure the elements of the crime exist and inform their clients of any direct consequences of pleading guilty.<sup>322</sup> A person pleading guilty must be acting voluntarily and with an understanding of the consequences of pleading guilty.<sup>323</sup> Judges will inform the defendant of “a list of the rights the defendant [is] explicitly waiving by choosing to plead guilty,” but are not required to do much else.<sup>324</sup>

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319. LTC Holland, *It’s Time To Care*, ARMY LAW., Nov. 1990, at 35, 35.

320. *Id.* at 36–37.

321. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002).

322. See *id.* at 699.

323. See Gregory G. Sarno, Annotation, *Compliance with Federal Constitutional Requirement that Guilty Pleas Be Made Voluntarily and with Understanding*, in *Federal Cases Involving Allegedly Mentally Incompetent State Convicts*, 38 A.L.R. FED. 238, 254 (1978).

324. Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 652 (2007).

Consequently, defendants in civilian courts frequently plead guilty to crimes without really knowing what they are admitting to.<sup>325</sup> Civilians are not lawyers and do not know the elements of the crimes to which they are admitting, and their “simplistic view of guilt and innocence [is] based solely on conduct. It ignores many of the factors our substantive criminal law uses to define criminal liability, such as circumstances, results, causation, mental state, and defenses.”<sup>326</sup> With over ninety percent of civilian cases being pled guilty and lacking the right to a careful review by the judge,<sup>327</sup> it can only be speculated just how many civilians are pleading guilty to crimes that would not be accepted at a court-martial. This is just one more protection unavailable to civilians designed to ensure that those who are convicted of crimes under the UCMJ are in fact guilty.

#### 4. Free Mitigation Experts

Another right granted to members of the military but not to civilians is the provision, at the government’s expense, of a mitigation expert in capital cases. Mitigation is a key component of capital cases—both civilian and military. For civilians, the Supreme Court has stated that a “[s]tate cannot bar ‘the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.’”<sup>328</sup> In the military, the RCM dictates that military judges “shall instruct the members [of the panel] . . . that they must consider all evidence in extenuation and mitigation before they adjudge death.”<sup>329</sup> To pass a death sentence, there are four steps at a general court-martial that are very similar to civilian capital cases.

First, the members must find the accused guilty of a capital offense. Second, they must find that an aggravating factor exists. Third, the panel members must find that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. Fourth, the members must unanimously agree on the death penalty. “If at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option.”<sup>330</sup>

A mitigation expert’s role is to focus on the third requirement and convince the panel members that there are extenuating or mitigating circumstances.

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325. See *id.* at 657–62 (citing cases where defendants entered guilty pleas without knowledge or sincerity to what they were pleading).

326. *Id.* at 657.

327. See Chin & Holmes, Jr., *supra* note 321, at 698.

328. *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990)).

329. MCM, *supra* note 193, r. 1004(a)(6).

330. J. Michael Montgomery, *Death Is Different: Kreutzer and the Right to a Mitigation Specialist in Military Capital Offense Cases*, ARMY LAW., Feb. 2007, at 13, 14–15 (citations omitted).

Mitigation experts are typically not lawyers and their work “is beyond the ken of a competent, diligent attorney.”<sup>331</sup> They are “person[s] qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant.”<sup>332</sup>

Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant’s life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review.<sup>333</sup>

As opposed to reviewing the law, mitigation experts spend considerable time reviewing a defendant’s prison records, employment history, potential psychological testing, and personal information; interviewing a defendant’s family and friends; searching for evidence of drug and alcohol abuse; and evaluating a defendant’s mental capacity.<sup>334</sup> These experts also expend considerable time and energy preparing a complete social history of a defendant, which is very dissimilar to the routine investigations of attorneys for noncapital criminal cases.<sup>335</sup> The American Bar Association (ABA) has stated that “[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have.”<sup>336</sup>

The evidence presented by a mitigation expert can make the difference between life and death for an accused. For this reason, the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* states the defense team should contain an investigator and a mitigation specialist.<sup>337</sup> RCM 703(d) affords the right to the assistance of necessary experts,<sup>338</sup> and just as attorneys are provided without

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331. *United States v. Thomas*, 33 M.J. 644, 647 (N-M. C.M.R. 1991), *aff’d in part, rev’d in part*, 46 M.J. 311 (C.A.A.F. 1997).

332. Jonathan P. Tomes, *Damned If You Do, Damned If You Don’t: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 367-68 (1997).

333. JAMES R. SPENCER ET AL., SUBCOMM. ON FED. DEATH PENALTY CASES, COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE U.S., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May 1998).

334. *See Tomes, supra* note 332, at 368–70.

335. *See Montgomery, supra* note 330, at 16.

336. Am. Bar Assoc., *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 959 (2003).

337. *See id.* at 925.

338. *See United States v. Kreutzer*, 61 M.J. 293, 295 (C.A.A.F. 2005).

any consideration of the financial situation of a defendant, the military will also pay for a mitigation expert without proof of financial need.<sup>339</sup> In contrast, this guarantee does not extend to civilians because the Supreme Court has not recognized a right to a court-appointed and state-funded mitigation expert.<sup>340</sup> Some states will provide for a mitigation expert for indigent clients.<sup>341</sup> However, the corresponding state statutes, such as Virginia's, are often very restrictive and will not include specialists such as sociologists, instead focusing on psychiatrists and psychologists who are better trained for medical diagnoses than forensic social work.<sup>342</sup> As can be expected, mitigation experts are expensive, costing hundreds of dollars per hour. This can place the cost of a mitigation expert outside the financial ability of many accused of capital crimes. For these individuals, it is expected that their attorneys will do the work necessary for mitigation. The provision of a mitigation expert is a key way the military prevents the risk of an unwarranted death sentence that could otherwise occur in a civilian court.

### 5. Clemency

Military members have the strong possibility of receiving clemency from the convening authority. The closest similar power in civilian justice is the power of clemency endowed upon the President and state governors. For civilians, the hope for clemency lies in either the power of a governor under a state constitution, or in Article II, Section 2 of the U.S. Constitution, which states that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States."<sup>343</sup> The Supreme Court has interpreted this language to include the power to remit fines and forfeitures,<sup>344</sup> pardon criminal contempt of court,<sup>345</sup> award conditional pardons,<sup>346</sup> commute sentences,<sup>347</sup> among other powers.<sup>348</sup> Both the President and state governors rarely use these powers. On the Department of Justice's website for the Office of the Pardon Attorney, statistics have been compiled concerning the infrequency of pardons being granted by the President.<sup>349</sup> Of the thousands of convictions that occur

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339. See Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. C.R. L.J. 199, 200 (2002).

340. See Montgomery, *supra* note 330, at 18.

341. See VA. CODE ANN. § 19.2-264.3:1 (West 2013).

342. See Tomes, *supra* note 332, at 367.

343. U.S. CONST. art. II, § 2, cl. 1.

344. See Pollock v. Bridgeport Steam-Boat Co., 114 U.S. 411, 413-14 (1885).

345. See *Ex Parte* Grossman, 267 U.S. 87, 121 (1925).

346. See *Ex Parte* Wells, 59 U.S. 307, 313 (1855).

347. See *United States v. Klein*, 80 U.S. 128, 141-42 (1871).

348. See generally P. S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development and Analysis (1900-1993)*, 27 PRESIDENTIAL STUD. Q. 251 (1997).

349. See *Clemency Statistics*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (last updated Mar. 2014).

each year in the United States, there are only a few hundred pardon applications, and there have never been more than 3,431 convicts (in any given year) applying for clemency.<sup>350</sup> As of March 6, 2014, President Obama has issued only fifty-two pardons and nine grants of clemency.<sup>351</sup> Typically, the number increases towards the end of a President's tenure, but it has never exceeded 2,000 pardons.<sup>352</sup> Although readily available statistics on clemency by state governors is lacking, the available data indicates that it is rarely granted.<sup>353</sup> In a country with approximately 3.9 million felons and numerous misdemeanor convictions, there are relatively few pardons granted.<sup>354</sup>

This stands in contrast to military justice where clemency requests are standard procedure and "an accused's best hope for sentence relief."<sup>355</sup> Although military judges do not have the authority to change a sentence, the convening authority takes up a role that is "similar to that of a judicial officer."<sup>356</sup> The convening authority is obligated to be impartial and give "full and fair consideration to matters submitted by the accused and determines appropriate action on the sentence."<sup>357</sup> This means that, "each accused is entitled to an individualized, legally appropriate, and careful review of his sentence by the convening authority."<sup>358</sup> The entirety of Article 60 of the UCMJ is dedicated to post-trial procedures where the convicted servicemember petitions the convening authority for clemency.<sup>359</sup> This stands in addition (as a precursor) to the automatic review of a case under either Article 66(c) by a court of criminal appeals, or the branch's JAG under Article 69. "After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority . . ."<sup>360</sup> The convening authority has very broad powers, which include dismissing any charges or specifications by setting aside a finding of guilt, or reducing an offense to a lesser included one.<sup>361</sup> The convening authority is obligated to "consider any and all matters submitted in writing by the servicemember, such as allegations of legal error in the proceedings, letters from family and friends, or clemency recommendations," which typically come from his staff judge advocate.<sup>362</sup>

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350. *See id.*

351. *See id.*

352. *See id.*

353. *See* Christopher Reinhart, *Pardon Statistics from Other States*, OLR RES. REPORT (Jan. 14, 2005), <http://cga.ct.gov/2005/rpt/2005-R-0065.htm>.

354. *See* Scott M. Bennett, *Giving Ex-Felons the Right To Vote*, 6 CAL. CRIM. L. REV. 1, 1 (2004).

355. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003).

356. *United States v. Fernandez*, 24 M.J. 77, 78 (C.A.A.F. 1987).

357. *Davis*, 58 M.J. at 102.

358. *Fernandez*, 24 M.J. at 78.

359. *See* 10 U.S.C. § 860 (2012) (explaining action by convening authority).

360. MCM, *supra* note 193, r. 1005(a).

361. *See* 10 U.S.C. § 860(c)(3)(A)-(B).

362. Marinello, *supra* note 65, at 169.



Relative to civilian justice, clemency is granted very frequently in the military. There is no data immediately accessible, but over the years some studies have been conducted concerning how frequently clemency has been granted. Malcolm Squires, the current clerk of the Army Court of Criminal Appeals, stated that, “When I was the chief of [the Defense Appellate Division] from July 1992-July 1993, we examined each [record of trial] that was received during that period of time and discovered that some form of clemency was granted in somewhere between 10 and 11% of all the cases we reviewed.”<sup>363</sup> Former Navy JAG Corps Lieutenant Michael J. Marinello conducted a more recent study. From a sampling of 807 cases from 1999 to 2004, Lieutenant Marinello found the defense requested clemency 33% of the time, and the convening authority exercised clemency in 35 cases.<sup>364</sup> Out of the 807 original cases, clemency was granted 4.3% of the time.<sup>365</sup> Of this sample, from 2003 to 2004, clemency was granted 2% of the time.<sup>366</sup> While these numbers are small, an accused in the military justice system has a significantly greater chance of receiving clemency relative to the civilian justice system. It is worth noting that the prevalence of plea bargaining may have deflated the clemency statistic.<sup>367</sup> Because the convening authority must approve of any plea bargain, a de facto form of “pretrial clemency” is given in advance of sentencing.<sup>368</sup>

The propriety of the convening authority changing a lawful conviction and sentence can be disputed for many of the same reasons as the courts of criminal appeals, but ultimately, it is more appropriate for the convening authority to have this power than the courts of criminal appeals. First, members of the military would be prejudiced relative to civilians in that they do not have a governor who can grant clemency, and therefore, it is important that the convening authority fills this void. Second, unlike appellate judges, the convening authority has high-level, direct involvement in prosecuting the suspect, more so than that of any governor or president. Unlike a governor or president, the convening authority decides to convene the courts-martial,<sup>369</sup> selects the jury,<sup>370</sup> and approves any plea bargain.<sup>371</sup> Given the convening authority’s direct involvement in prosecution, at the very least he or she can have the same powers as a state governor or the President in granting clemency.

Although both civilians and servicemembers have access to clemency, it is a

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363. See E-mail from Col. Malcolm Squires, *supra* note 233.

364. See Marinello, *supra* note 65, at 195.

365. See *id.*

366. See *id.*

367. See Telephone Interview with Lt. Com. Michael Marinello, U.S. Navy Reserves (Feb. 13, 2013). This view was the personal opinion of Lt. Com. Marinello and not that of the U.S. Navy.

368. See *id.*

369. See 10 U.S.C. § 822 (2012).

370. See *id.* § 825(d)(2).

371. See Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr.-May 2003, at 17, 30-34.

privilege exercised more often in the military than in the civilian criminal-justice system. In fact, the exercise of clemency by the convening authority is arguably superior from a fairness perspective than clemency exercised by civilian leaders. Unlike civilian leaders, military convening authorities are not elected officials who need to worry about the bad politics of appearing soft on crime and the impact it could have on future elections. It is fair speculation that Presidents often wait until the end of their political careers, or their last days in office, to grant clemency so as to avoid any political fallout. In the case of President Gerald Ford, for example, his grant of clemency to President Richard Nixon arguably cost him a second term in the White House.<sup>372</sup> More recently, a convening authority's grant of absolute clemency to an officer accused of rape sparked Congressional hearings.<sup>373</sup>

## VII. COUNTERARGUMENTS

The case to remove the fact-finding power of the courts of criminal appeals is by no means clear-cut. Although the historical reasons for granting the courts fact-finding powers no longer exist, there are legitimate and valid reasons for maintaining the power today. As previously noted, military justice has a poor reputation for fairness. It is important that the public has confidence in the courts, and the removal of a protection of an accused has the potential to generate bad publicity. Reputation and public perception are important factors in the administration of justice. It would take an act of Congress to amend Article 66(c), and it is possible that such an amendment would result in military justice being unfairly dragged through the mud on a public stage. Given that the fact-finding powers of the courts are rarely employed, and rarely make a difference when they are exercised, perhaps it would be best to leave Article 66(c) be, for the benefits might not outweigh the political effort and cost. However, the probability of this worst-case scenario is very low. Military justice is rarely a priority in media coverage or public attention, and public confidence is high in the military as an institution.<sup>374</sup> Even though the power is rarely exercised, and when it is, it rarely or barely influences the outcome, it still imposes a high cost and time commitment upon the government appellate attorneys in a system that faces a backlog of over one year.<sup>375</sup>

There are also practical considerations that justify maintaining the fact-

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372. See Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 800 (1996).

373. See Donna Cassata, *Outraged Lawmakers Look To Change Military Justice*, DAYTON DAILY NEWS, May 5, 2013, <http://www.daytondailynews.com/news/news/military/outraged-lawmakers-look-to-change-military-justice/nXg6L>.

374. See *Confidence in Institutions*, GALLUP (June 1-4, 2013), <http://www.gallup.com/poll/1597/confidence-institutions.aspx> (indicating poll on public's confidence in various American institutions places military highest at seventy-six percent).

375. See E-mail from Col. Malcolm Squires, *supra* note 233.

finding power of the courts. First, military prosecutors, defense attorneys, and even military judges typically do not come into their positions with significant prior criminal practice. Newly admitted Judge Advocates are typically fresh out of law school, rather than veteran attorneys.<sup>376</sup> One of the recruitment points for JAG is that, unlike associates at big law firms who spend years conducting research behind a desk, new JAGs are soon in the courtroom trying cases.<sup>377</sup> Still, this is not an issue unique to the JAG Corps. Many district attorneys and public defenders will, just like the JAG Corps, hire individuals fresh from law school without any prior experience practicing criminal law. Whether it is in the military courts or the civilian courts, the only way an inexperienced attorney becomes experienced is by practicing. At least in the military, a new attorney is guaranteed a support system of experienced attorneys. This is not necessarily guaranteed among civilian lawyers, especially with solo practitioners in criminal defense.

A more compelling argument for a powerful appellate court is the lack of criminal law experience in the JAG Corps.<sup>378</sup> The military trains its Judge Advocates to be general practitioners and exposes them to numerous areas of the law including criminal, operations, administrative, international, claims, and legal assistance.<sup>379</sup> Colonel Gregory Maggs, a judge on the Army Court of Criminal Appeals, has noticed errors made by attorneys and trial judges that are the result of inexperience of the sort typically not seen in civilian courts.<sup>380</sup> This can be contrasted with civilian practice where there are individuals who spend a lifetime in a public defender's or district attorney's office. Still, these concerns over limited criminal experience in the military should be counterbalanced by the military's rigorous selection process for hiring new Judge Advocates, weeks of quality training at each branch's respective JAG school, and the overall system of support and mentoring provided to attorneys throughout their careers. In contrast, any civilian with a law degree can hang a shingle and begin practicing criminal law without any support or mentoring from more senior attorneys whatsoever. Although the JAG Corps may not reach the heights of experience found in civilian firms specializing solely in criminal law, it still vastly exceeds the minimal experience of junior attorneys practicing in the civilian sector.

The lack of experience of the military judiciary is also an argument to

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376. The Army, Navy, and U.S. Air Force (USAF) all have summer internship program for aspiring Judge Advocates. The Navy, Marines, and USAF also have programs for training and commissioning students while they are still in law school.

377. See *Top Reasons To Join the Navy JAG*, U.S. NAVY JAG CORPS, [http://www.jag.navy.mil/careers/\\_careers/whyjag.html](http://www.jag.navy.mil/careers/_careers/whyjag.html) (last visited Mar. 31, 2014).

378. See Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24, 24–26.

379. See *id.* at 25 n.15, 26.

380. See Interview with Col. Gregory Maggs, Judge, U.S. Army Court of Criminal Appeals, in Wash., D.C. (Oct. 2, 2012).

maintain the fact-finding powers of the courts of criminal appeals. Military judges are typically appointed to their position as senior Majors or Lieutenant Colonels with approximately fifteen years of service, and with a retirement option after only twenty years of service, the military lacks judges with the decades of experience on the bench often present in civilian courts with lifetime appointments.<sup>381</sup> However, this alone is not sufficient justification to maintain the unusual powers of the military's appellate courts, for whether it is the military or civilian justice system, there will always be new judges on the bench. Furthermore, having judges with decades of experience is not always advantageous, as evidenced by the arguments in favor of mandatory retirement ages.<sup>382</sup> Federal judges, appointed for life,<sup>383</sup> and answerable to no one, can theoretically pursue their own agendas with virtual impunity. In contrast, military judges are periodically assessed and have to answer to the JAG.

Furthermore, the military judiciary completely avoids many potential problems that come with an elected judiciary. If elected, judges who wish to maintain their positions must make decisions that satisfy the electorate and do not cost them campaign financing.<sup>384</sup> Obviously, there are no statistics or hard data concerning what is going through an elected judge's mind when he or she passes a sentence after a week dominated by media coverage of violent crime, rules on a criminal evidentiary matter despite the entirety of his or her former practice being in business law, or conducts a bench trial shortly before election day where the defendant is accused of committing a violent sex crime in a small community. No judge in an election season would wish to be perceived as "soft on crime," which creates a very strong motive for a judge to be unduly harsh on an accused. The inherent nature of elected office, and the motives of any person who wishes to remain employed, would justify giving appellate courts a very broad scope of review on the findings of any elected judge. On occasion, there are issues with elected judges that the military judiciary would never have to face.<sup>385</sup> Although military judges may at times lack the experience of some civilian judges, they also avoid the problems of lifetime appointments and the issues associated with elections, therefore it is not necessary to subject military judges to the extra monitoring of a powerful appellate court.

Another argument for allowing the courts of criminal appeals to have fact-

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381. *See id.*

382. See Christopher R. McFadden, *Judicial Independence, Age-Based BFOQS, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. REV. 81 (2000), for a discussion of mandatory retirement ages and the judiciary.

383. U.S. CONST. art. III, § 1.

384. See Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 72 (2011).

385. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009). In *Caperton*, the Court required an elected judge on the West Virginia Supreme Court of Appeals to recuse himself in a case where a party had given three million dollars to his campaign. *See id.*

finding powers is to protect against the potential bias of panels.<sup>386</sup> This is not a mere academic issue, but one forever branded in military history following the Houston Riots, where only days after courts-martial, thirteen convicted black soldiers were executed before any opportunity for appellate review.<sup>387</sup> In today's military, bias could play out in the form of a panel believing a white person over a black person, or even elitism such as taking the word of an officer over that of an enlisted man or woman. While most courts-martial consist of enlisted men or women, most panels are made up entirely of officers or no more than one-third enlisted personnel,<sup>388</sup> thus enlisted servicemembers do not get true juries of their peers.<sup>389</sup>

It would simply be wishful thinking to believe that society has evolved to the point where racism has been defeated, or that the word of a doctor would be treated with equal weight of that of a layman. However, this is not an issue unique to military justice, for civilian jurors are just as prone, if not more so, to racism and other biases, so it does not justify the military's courts of criminal appeals having a broader standard of review than civilian appellate courts. In fact, it could be argued that the jury panel at courts-martial is superior to a civilian jury because of the rigorous entry and selection requirements concerning education, intelligence, and character standards of officers. On the other hand, for an individual to be a civilian juror, one must merely be an English-speaking U.S. citizen who is at least eighteen years old and without a disqualifying mental or physical condition, or a felony conviction.<sup>390</sup>

#### VIII. CONCLUSION

This Article advocates for completely eliminating the fact-finding power of the military's courts of criminal appeals. The reasons for creating this power—concerns of command influence and the unprofessional nature of special and general courts-martial in 1950—no longer exist. The power to find factual insufficiency is rarely exercised, and when it is, it seldom results in a different outcome. Despite yielding very few returns, it places a huge burden on an already overtaxed military appellate system. If the fact-finding powers of the courts are removed, servicemembers would not be prejudiced because they will still benefit from the numerous due process rights and protections that are even more extensive than those of civilians.

While this Article advocates for the elimination of these powers, there are

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386. See E-mail from Col. Gregory Maggs, Judge, U.S. Army Court of Criminal Appeals, to author (Jan. 28, 2013, 12:24 AM) (on file with author).

387. See Fred L. Borch, III, "The Largest Murder Trial in the History of the United States": *The Houston Riots Courts-Martial of 1917*, ARMY LAW., Feb. 2011, at 1, 1-3.

388. See 10 U.S.C. § 825 (2012).

389. See Glazier, *supra* note 9, at 101.

390. See *Juror Qualifications, Exemptions and Excuses*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/JuryService/JurorQualifications.aspx> (last visited Mar. 31, 2014).

other more moderate options. One option would be removing the automatic appeals procedure for all sentences carrying at least one year of confinement, a bad-conduct discharge, or a dishonorable discharge, and instead making the appeal discretionary.<sup>391</sup> Another option would be a waiver of a right to appeal factual sufficiency in the event of a guilty plea.<sup>392</sup> This would expedite the process, for of the 555 cases reviewed by the Army Court of Criminal Appeals; in 2011, the appellant had pled guilty to all charges in 390 of them.<sup>393</sup> Of course, no solution will ever be perfect. Still, considering the backlog of 441 days for the military's criminal cases, almost anything that can expedite military appeals without prejudicing the rights of servicemembers should be considered.<sup>394</sup>

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391. See Bursley, *supra* note 239, for a thoughtful argument on this point.

392. See generally Teeter, *supra* note 306 (discussing waiver of appeals); see also *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

393. See E-mail from Col. Malcolm Squires, *supra* note 233.

394. See *id.*