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MODERN
MILITARY JUSTICE
FOURTH EDITION

BY

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*To my family and my students for their consistent support, encouragement,
and inspiration.—LMS*

PREFACE TO THE FOURTH EDITION

This textbook is about the modern military justice system of the United States. It covers court-martial procedures, substantive criminal law, and non-judicial punishment under the Uniform Code of Military Justice (UCMJ), in addition to other administrative and disciplinary measures.

The military justice system serves the Nation as a whole by helping to establish and maintain good order and discipline in the Armed Forces, making our military power more reliable and effective. The system also strives to treat fairly and appropriately the millions of American servicemembers who are subject to it. For these reasons, this textbook is aimed at a wide audience. It is suitable for all law students, whether or not they hope to pursue military careers, and also for non-law students such as cadets, midshipmen, officer candidates, and others who have an interest in the subject of military justice. The book focuses on what is common to all of the Armed Forces—the Army, Marine Corps, Navy, Air Force, Space Force, and the Coast Guard—while noting certain differences among them. To make this book especially relevant to cadets and midshipmen, it includes several cases arising out of the Service Academies.¹ No prior knowledge of military matters, however, is necessary for using this book.

The Fourth Edition

The Fourth Edition addresses all the changes to the UCMJ and the Manual for Courts-Martial since publication of the Third Edition in the Spring of 2019. During this period, Congress made amendments to the UCMJ in the following acts

- National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31, 137 Stat. 136 (2023) (amending UCMJ arts. 16, 24a, 25, 67a, 118, 128B, 130, 146)
- James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (2022) (amending UCMJ arts. 1, 24a, 25, 61, 66, 69)
- National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (amending UCMJ arts. 1, 6b, 22, 23, 24a, 27, 32, 34, 44, 53, 53a, 56, 65, 66, 133)
- William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021) (amending UCMJ Arts. 23, 24, 66, 67, 140a, 146a)

¹ The cases involving cadets and midshipmen are *United States v. Perry*, 48 M.J. 197 (C.A.A.F. 1998) [p. 400]; *United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010) [p. 490]; *United States v. Gibson*, 39 M.J. 319 (C.M.A. 1994) [p. 503]; and *United States v. Green*, 58 M.J. 855 (Army Ct. Crim. App. 2003) [p. 526].

- National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019) (amending UCMJ Arts. 30a, 37, 43, 128b, 940a)

In addition, the President issued the following two executive orders amending the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (M.R.E.)

- Exec. Order No. 14,103, 88 Fed. Reg. 50535 (Aug. 2, 2023) (amending R.C.M. 103, 104, 105, 201, 301, 302, 303, 303A, 305, 306, 306A, 307, 308, 309, 401, 401A, 402, 403, 404, 404A, 405, 406, 406A, 407, 502, 503, 504, 505, 601, 603, 604, 701, 702, 703, 704, 705, 706, 707, 804, 804, 805, 810, 813, 902, 902A, 905, 906, 908, 909, 910, 911, 912, 912A, 912B, 914, 914A, 914B, 916, 918, 920, 924, 925, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1101, 1102, 1104, 1106, 1106A, 1107, 1109, 1111, 1112, 1113, 1115, 1116, 1117, 1201, 1202, 1203, 1204, 1208, 1210, 1301, 1302, 1304, 1306 and M.R.E. 311, 315, 404, 503, 505, 506, 507, 611, 803, 807, 902)
- Exec. Order No. 14,062, 87 Fed. Reg. 4763 (Jan. 26, 2022) (amending R.C.M. 916)

Also since publication of the Third Edition of this book, the President promulgated three new editions of the Manual for Courts-Martial, United States (M.C.M.): the 2019 Edition, the 2023 Edition, and the 2024 Edition

Instructors and students using this book should download the new M.C.M. (2024 Edition), which incorporates all the recent changes. It is available online for free at the website of the Joint Service Committee on Military Justice: <https://jsc.defense.gov/>.

The Fourth Edition contains a revised Chapter 1 that provides an overview of the new military justice system—a system which is much more complicated than it was just a few years ago. Essentially, the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) significantly changed the role of commanders in preferring and referring court-martial charges, creating a bifurcated system of military justice—one process for “covered offenses” with uniformed judge advocates spearheading the process (see The Court-Martial “Covered Offenses” Process Chart, *infra*), and one process for “non-covered offenses” with commanders playing an integral role in the process (see The Court-Martial “Non-Covered Offenses” Process Chart, *infra*).

The Fourth Edition also includes an updated chapter concerning the substantive law of rape and other sex crimes under the UCMJ. Because approximately half of all courts-martial now involve such crimes, students of military justice need an introduction to this important and complicated subject. The Fourth Edition also contains expanded coverage of inappropriate relationships, extramarital sexual conduct, and federal court jurisdiction. The chapter on trial of enemy combatants by Military Commissions was eliminated in the Third Edition. Several new cases have been added.

The Author

Associate Dean Lisa Schenck has become the sole author of the Fourth Edition. She served on active duty in the U.S. Army Signal Corps and Judge Advocate General's Corps for more than 25 years, retiring with the rank of colonel. Following various assignments as a military lawyer and assistant professor at the U.S. Military Academy, she was appointed an appellate military judge on the U.S. Army Court of Criminal Appeals. In 2003, she received the Judge Advocates Association's Outstanding Career Armed Services Award (Army). In 2005, she became the first female Senior Judge on that court. In 2007, the Secretary of Defense appointed her to serve concurrently as an Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in the Military Services. She now teaches Military Justice at the George Washington University Law School, where she is also a senior administrator.

Gregory E. Maggs, who was a co-author of the first two editions, became a judge on the U.S. Court of Appeals for the Armed Forces in February 2018. To avoid potential conflicts with his new judicial role, he has discontinued his work on this book.

The views expressed in this book are the personal views of the author and are not intended to represent the views of the U.S. Army, the Department of Defense, or the U.S. government. This textbook contains several cases in which the author has had personal involvement as a military judge. But by including them, she does not mean to suggest that they are the definitive words on the subjects that they address.

Editorial Conventions

Throughout this book the author has used the following editorial conventions. When editing cases, she has used three asterisks (* * *) to indicate an omitted paragraph or paragraphs. The author has used ellipses (. . .) to indicate omitted words or sentences within a paragraph. She also has slightly changed the format of certain citations within quoted materials to promote uniformity throughout the textbook. She recommends that anyone citing the materials included in this book consult the original sources. Please note that much of military law was created when the Armed Forces included few female service-members, and the wording of legal sources often reflects this history by not using gender neutral pronouns. Throughout this book, in quoting, describing, and illustrating legal rules, any pronoun in the masculine gender is intended also to include the feminine gender.

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The author hopes that instructors and students will find this book both useful and interesting. Please communicate your reactions so that she may make improvements to future editions.

Lisa M. Schenck
Washington, D.C.
March 2024

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MODERN
MILITARY JUSTICE

CHAPTER 1

OVERVIEW OF THE MILITARY JUSTICE SYSTEM

1-1. History of the Military Justice System and Sources of Law

In the 1770s, acrimonious disputes arose between the United Kingdom of Great Britain and the inhabitants of some of its colonies in North America. The disagreements concerned taxation, self-governance, individual rights, and western expansion. Harsh measures by the Crown and Parliament prompted rebellious actions by the colonists. Armed conflict erupted on April 18-19, 1775, when British troops garrisoned in Boston unsuccessfully attempted to seize colonial weapons at nearby Lexington and Concord. The British Army was forced to retreat to Boston, where it was besieged by volunteer New England militiamen. Shortly afterward, representatives from the various colonies met in Philadelphia to address the crisis. The gathering of these representatives became known as the Second Continental Congress.

On June 14, 1775, the Second Continental Congress voted to create the Continental Army, a military force that has existed continuously for more than two centuries and that is now known as the United States Army. The Second Continental Congress resolved that ten “companies of expert riflemen be immediately raised” and that “each company, as soon as completed, shall march and join the army near Boston, to be there employed as light infantry, under the command of the chief Officer in that army.” 2 Journals of the Continental Congress 90 (1775). The same day that Congress created the Army, Congress also formed a committee to prepare “a dra’t of Rules and regulations for the government of the army.” *Id.* This committee, whose members included George Washington and four others, soon afterward proposed sixty-nine “Articles of War” based on British and colonial military law. *Id.* at 112-123.

These Articles of War, which Congress approved on June 30, 1775, specified offenses that could be tried by a court-martial. Here are two typical examples:

Art. VII. Any officer or soldier, who shall strike his superior officer, or draw, or offer to draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence

whatsoever, or shall disobey any lawful commands of his superior officer, shall suffer such punishment as shall, according to the nature of his offence, be ordered by the sentence of a general court-martial.

Art. VIII. Any non-commissioned officer, or soldier, who shall desert, or without leave of his commanding officer, absent himself from the troop or company to which he belongs, or from any detachment of the same, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a general court-martial.

Id. at 113.

On June 20, 1775, the Second Continental Congress appointed George Washington to be the "General and Commander in chief, of the army of the United Colonies, and of all the forces now raised, and to be raised, by them." *Id.* at 100-101. Just a few days later, on June 29, 1775, Washington asked Congress to appoint a Harvard-educated and successful Boston lawyer, William Tudor, to be the Judge Advocate of the Continental Army, the Army's top legal officer. John Marshall, who later would become Chief Justice of the United States, served as the Deputy Judge Advocate of the Army. Among the 15 or so other judge advocates in the Army during the Revolution, several subsequently became members of the House of Representatives or Senate and one became a governor. See *The Army Lawyer: The History of the Judge Advocate General's Corps 1775-1975* 10-12, 23-24 (1975).

Why was it immediately necessary for the Second Continental Congress to create a military justice system for the new Army? Why did the Army immediately need extremely capable lawyers among its officers? These questions traditionally have yielded two standard answers.

One answer concerns the need for military discipline. As the Supreme Court has explained, a separate military law is needed because the military is

". . . a specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history." *Parker v. Levy*, 417 U.S. [733, 743 (1973)]. . . . To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

The second answer concerns mobility. The military often operates where civil authority does not exist. When deployed against enemies, whether in the Middle East, Asia, Europe, or elsewhere, U.S. Armed Forces must carry their justice system with them. They cannot postpone addressing disciplinary problems until the fighting stops and all can go home. The Supreme Court has explained: "Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order." *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

Points for Discussion

1. How do the offenses stated in Articles VII and VIII of the 1775 Articles of War illustrate the idea that a separate military law is required because of the unique need for order and discipline in the military?
2. During the Revolutionary War, who would have tried soldiers for offenses if not courts-martial? Who would have assisted with the legal issues presented if not military lawyers? Are courts-martial still needed to provide "ready-at-hand" justice?

More than two hundred years have passed since 1775, but much of the original military justice system remains the same. Servicemembers are still tried by court-martial. Most of the original military offenses in the Articles of War approved by the Continental Congress remain offenses today. The Armed Forces still use military lawyers called judge advocates to implement the military justice system. Military proceedings are still mobile, with courts-martial being held around the world wherever U.S. Armed Forces are located.

But there have been several important developments and improvements in military law. The military law governing the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard has been largely unified since 1950. This unification brought about a modern appellate system for review of courts-martial decisions. Military judges have presided over general courts-martial and nearly all special courts-martial since 1969. The rules of evidence applicable to courts-martial have been codified since 1984.

The aim of this casebook is to outline and explain the modern military justice system. The first subject addressed is the basic sources of military law, which you will see throughout this text.

The Constitution

The Constitution addresses military justice in several provisions. Article I, § 8, clause 14 gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." Pursuant to this power, Congress has established offenses that may be tried by court-martial and procedures for conducting these trials. Two cases in this chapter consider the scope of this power in some depth.

In addition, Article II, § 2, clause 1 makes the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Pursuant to this provision the President has the power, even without a specific legislative grant of authority, to exercise all of the powers military commanders have traditionally enjoyed. These powers include convening courts-martial for trying servicemembers and military commissions for trying war criminals. See *Swaim v. United States*, 165 U.S. 553, 558 (1897) ("[I]t is within the power of the president of the United States, as commander in chief, to validly convene a general court-martial" even in circumstances not authorized by Congress);

Hamdan v. Rumsfeld, 548 U.S. 557, 595 (2006) (recognizing a “general Presidential authority to convene military commissions” even in the absence of Congressional authorization, “in circumstances justified under the Constitution and law of war”).

The Constitution addresses the rights of the accused in a number of provisions in the Bill of Rights. An important question has been the extent to which the Bill of Rights protects servicemembers. The Fifth Amendment to the Constitution expressly does not require a grand jury indictment “in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” But the courts have held that most other provisions of the Bill of Rights do apply to servicemembers. See *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960) (“the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to the members of our armed forces”). Further discussion of these matters appears in later chapters.

The Uniform Code of Military Justice

Prior to 1950, military justice varied from Service to Service. The Army and Navy, in particular, had separate laws, customs, and practices. In 1950, however, Congress enacted the Uniform Code of Military Justice (UCMJ) for the purpose of creating a single, comprehensive military justice system for all servicemembers. The UCMJ is divided into “articles” and codified at 10 U.S.C. § 801 to § 946a.

Articles 77-134, UCMJ, 10 U.S.C. §§ 877-934, closely resemble the original articles of war adopted by the Second Continental Congress. They contain the so-called “punitive articles,” the provisions that define the various crimes that courts-martial may try. For example, just as Article VII from the 1775 Articles of War (quoted above) made it a crime to strike a superior officer, Article 89(b), UCMJ, 10 U.S.C. § 889(b), now provides:

(b) ASSAULT.—Any person subject to this chapter who strikes that person’s superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer’s office shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

Article 90, UCMJ, 10 U.S.C. § 890, also like Article VII of the 1775 Articles of War, makes willfully disobeying a superior officer a crime. Similarly, Articles 85 and 86, UCMJ, 10 U.S.C. §§ 885-886, like Article VIII of the original Articles of War, address the subjects of desertion and being absent without leave.

One can see in these and other provisions that most of the disciplinary problems facing the military two hundred years ago remain issues today. But the

UCMJ also contains new provisions aimed at modern forms of misconduct, like drunk driving, see *id.* Art. 113, UCMJ, 10 U.S.C. § 913, or wrongful drug use, see *id.* Art. 112a, UCMJ, 10 U.S.C. § 912a, that were not known in 1775. We will consider the punitive articles in later chapters of this book.

Articles 30-76, UCMJ, 10 U.S.C. §§ 830-876, address pre-trial, trial, post-trial, and appellate procedures. These sections, however, contain only the broad outlines of how the military justice system is to work. The UCMJ leaves it to the President to specify the details by promulgating rules of evidence and procedure. Article 36(a), UCMJ, 10 U.S.C. § 836(a), one of the most important provisions in the UCMJ, states in part:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.

Pursuant to this provision, the President has issued executive orders establishing the Rules for Courts-Martial and the Military Rules of Evidence. These rules appear in a very important government publication called the Manual for Courts-Martial, which is discussed below. The President also has authority under Article 56, UCMJ, 10 U.S.C. § 856, to establish the maximum limits for punishment for various offenses.

Other articles of the UCMJ address apprehension and restraint, 10 U.S.C. §§ 807-814, nonjudicial punishment, *id.* § 815, the composition of courts-martial, *id.* §§ 822-29, and general and miscellaneous other matters, *id.* §§ 801-805, 835-841.

The Manual for Courts-Martial

The Manual for Courts-Martial (MCM) has been called the military lawyer's Bible. It includes five Parts plus numerous appendices. Part I is a short explanatory preamble. Parts II and III contain the Rules for Courts-Martial Procedure (R.C.M.) and Military Rules of Evidence (M.R.E.). These rules resemble the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, and largely serve the same function. Interspersed among these rules are helpful but non-binding "discussions" of the rules. Court-martial procedures are different in many ways from those in civilian courts, but the rules of evidence are largely the same. Accordingly, once a trial by court-martial gets underway, it has much the same feel as a civilian criminal trial.

Part IV of the MCM contains what amounts to a guide to the UCMJ's punitive articles. It quotes the text of each offense, identifies the elements of the

offense, explains the offense, lists lesser included offenses, and provides sample specifications to be used for charging an accused servicemember. Military lawyers and judges rely very heavily on Part IV to determine exactly what the evidence must show for a court-martial to find someone guilty.

Part V concerns nonjudicial punishment, a subject that is addressed in Chapter 3 of this casebook. The rest of the MCM contains various important appendices, including copies of the Constitution and UCMJ, sentencing parameters and criteria, a table of maximum penalties, and helpful analyses of the procedural and evidentiary rules.

Service Regulations

Each Service also has promulgated regulations that address various aspects of the military justice system. Army Regulation 27-10, *Military Justice*, for example, states numerous policies concerning subjects such as the assignment of defense counsel, military justice within the reserve components, and so forth. Although these Service regulations do not directly control the conduct of a court-martial trial, they do affect many important aspects of the military justice system. We will see several examples in subsequent chapters.

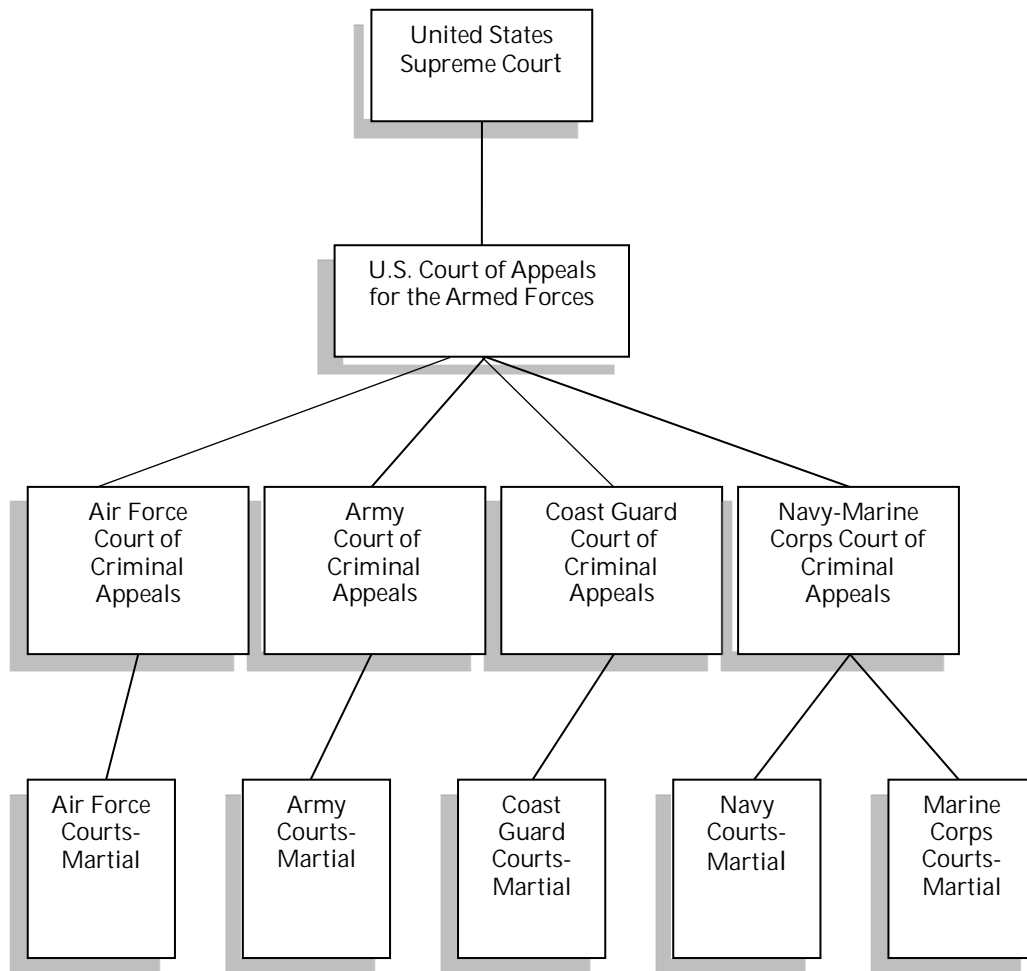
Reported Judicial Decisions

The chart below illustrates the structure of the military justice court system. Subject to certain exceptions, courts-martial—the trial courts of the Armed Forces—generally prepare complete records of trial, including a complete verbatim transcript of the entire proceeding from start to finish. See R.C.M. 1114. But courts-martial rarely issue published opinions. Published opinions, however, are prepared by the three levels of appellate courts that may review the results of a court-martial.

Secondary Sources

Many excellent secondary sources cover the military justice system. Two publications are especially helpful. The *Military Judges' Benchbook*, Department of Army Pamphlet 27-9, is an instructional guide for the conduct of trials. This book is available online at the U.S. Army Publishing Directorate <www.armypubs.army.mil>. It contains model "scripts" for most parts of a court-martial, panel instructions, and many other materials. The best historical source is William Winthrop, *Military Law and Precedents* (2d ed. 1896, 1920 reprint), which courts often consult when deciding constitutional issues. It is available at the Library of Congress's website <www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html>.

THE MILITARY JUSTICE COURT SYSTEM



As discussed more fully in subsequent chapters, an appeal from a court-martial goes first to one of the four Service Courts of Criminal Appeals—the Air Force Court of Criminal Appeals, the Army Court of Criminal Appeals, the Coast Guard Court of Criminal Appeals, or the Navy-Marine Corps Court of Criminal Appeals. All of the decisions they designate as publishable are included in West's *Military Justice Reporter*. Military lawyers constantly look to and cite these decisions because they often answer issues arising under the UCMJ, the Rules for Courts-Martial, and Military Rules of Evidence.

Decisions of the Service Courts of Criminal Appeals are subject to discretionary review by the United States Court of Appeals for the Armed Forces. Decisions of the Court of Appeals for the Armed Forces (or C.A.A.F.) are also published in West's *Military Justice Reporter*. From the Court of Appeals for the Armed Forces, litigants may petition the U.S. Supreme Court for review by

writ of certiorari. The Supreme Court's decisions appear in the *United States Reports*.

The military judges and members of the courts-martial for all Services are uniformed servicemembers. The judges of the Air Force, Army, and Navy-Marine Corps Courts of Criminal Appeals are JAG officers, but the Coast Guard Court of Criminal Appeals includes civilians. The Supreme Court has upheld the constitutionality of this arrangement. See *Edmond v. United States*, 520 U.S. 651 (1997).

One initially challenging aspect of researching military justice cases is that the names of the military courts have changed over time. Prior to 1994, the U.S. Court of Appeals for the Armed Forces was called the Court of Military Appeals. The Courts of Criminal Appeals for the various Services have undergone two name changes. Prior to 1994, they were called Courts of Military Review, and prior to 1968, they were called Boards of Review (i.e., the Army Board of Review became the Army Court of Military Review, and then later became the Army Court of Criminal Appeals). Prior to 1951, there was no court equivalent to the Court of Appeals for the Armed Forces and the precursors to the Boards of Review were considerably different in structure and function.

The following case illustrates how parties and judges sometimes may dispute what is and is not a binding source of military law.

UNITED STATES v. LAZAUSKAS
U.S. Court of Appeals for the Armed Forces
62 M.J. 39 (C.A.A.F. 2005)

Judge CRAWFORD delivered the opinion of the Court.

In March 2001, a confidential informant reported to the law enforcement officials at Lackland Air Force Base that Appellant was selling and using ecstasy. After the controlled purchase of ecstasy by the confidential informer, follow-up inquiries led to the discovery of a number of witnesses who stated that Appellant [Stephen J. Lazauskas, Airman Basic, U.S. Air Force] used drugs in February, March, April, and May 2001, at various times both on and off the installation.

At his arraignment, Appellant made a motion to dismiss the charges against him based on a violation of his right to speedy trial under Rule for Courts–Martial (R.C.M.) 707, Article 10, UCMJ, 10 U.S.C. § 810 (2000), and the Sixth Amendment. The military judge denied his motion on all grounds. . . . [T]he military judge determined that the Government was excluded from accountability for a total of seventy-two days out of the 189–day delay and was therefore left accountable for a total delay of 117 days, which was within the R.C.M. 707 allowable limit of 120 days. . . .

* * *

[One] period of time in dispute is a six-day continuance allowed during an Article 32 hearing [from August 8-13]. The convening authority appointed an

investigating officer for the Article 32 hearing, and in the Appointment Memorandum stated the officer was “delegated the authority to grant any reasonably requested delays of the Article 32 investigation.” . . . Two days prior to the date originally scheduled for the Article 32 hearing, the Government representative provided the military defense counsel with a list of eight witnesses the Government expected to testify at the Article 32 hearing. . . . At the Article 32 hearing, six of these witnesses testified; however, two witnesses were on leave. The defense then requested the witnesses and objected to taking their testimony over the telephone. Based on the defense objection, the Article 32 investigating officer delayed the hearing until August 13, 2001, to procure their live testimony. . . .

* * *

. . . Under R.C.M. 707(c), all pretrial delays approved by the convening authority are excludable so long as approving them was not an abuse of the convening authority’s discretion. It does not matter which party is responsible.

The discussion pertaining to this rule provides: “Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.” R.C.M. 707(a)(1) discussion.

Additionally, where, as here, the convening authority has delegated to an investigating officer the “authority to grant any reasonably requested delays of the Article 32 investigation,” then any delays approved by the Article 32 investigating officer also are excludable.

Thus, when an investigating officer has been delegated authority to grant delays, the period covered by the delay is excludable from the 120–day period under R.C.M. 707. If the issue of speedy trial under R.C.M. 707 is raised before the military judge at trial, the issue is not which party is responsible for the delay but whether the decision of the officer granting the delay was an abuse of discretion. . . .

. . . R.C.M. 405(g)(1)(A) provides that the parties are entitled to the presence of witnesses who have relevant testimony and the evidence is “not cumulative.” However, R.C.M. 405(g)(4)(B) provides that the investigating officer may take sworn statements of unavailable witnesses over the telephone. The first period of time involved the delay to obtain the personal testimony of two witnesses who were on leave. The investigating officer, under the authority delegated to him by the convening authority, granted the delay. As to this period, the military judge found that:

[A]t some point during the Article 32 hearing, the defense learned that several witnesses it believed the government would be calling live were actually going to be called telephonically. The defense objected to their being called telephonically and the Article 32 hearing was delayed so that the defense could question them when they were personally available which was on 13 August 2001.

We hold that the military judge did not abuse his discretion in excluding this delay.

* * *

GIERKE, Chief Judge (concurring in the result):

The discussion to R.C.M. 707(c)(1) states that “[p]rior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.” [Although the court relies on this statement, the] . . . discussion does not definitively resolve this issue for two reasons. First, the authority to grant a continuance is not necessarily the same as the authority to exclude the resulting delay from Government accountability. A rational military justice system could give the investigating officer the power to grant delays but reserve for other officials the power to exclude such delay from Government accountability. . . .

Second, the discussion accompanying the Rules for Courts–Martial, while in the *Manual for Courts–Martial, United States* (2002 ed.) (*MCM*), is not part of the presidentially-prescribed portion of the *MCM*. The *MCM* expressly states that it consists of its “Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures.” Absent from this list are the discussion accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles, as well as the *MCM*’s appendices, including the *MCM*’s drafters’ analysis. As Professor Gregory E. Maggs helpfully explains, “The President played no role in preparing these supplementary materials, and he did not promulgate them by executive order; on the contrary, these materials represent only the beliefs of staff personnel who worked on the Manual.”⁵ So, as Professor Maggs concludes, the courts “do not violate the principle of deference to the President when they disagree with them.”⁶

Nevertheless, I agree with the majority opinion that the time was properly excluded. . . .

* * *

. . . I would recognize that after charges have been referred, the Government may seek a ruling from the military judge retroactively excluding pre-referral delay from Government accountability. To rule otherwise would elevate form over substance. If the time should be excluded from Government accountability, a different result should not arise merely because a specific official did not bless the delay when it occurred. And allowing a military judge to retroactively exclude pre-referral delay from Government accountability is consistent with R.C.M. 707(c) because the pretrial delay would be “approved by a military judge.”

⁵ Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 Mil. L. Rev. 96, 115 (1999).

⁶ *Id.*

In this case, the military judge's ruling approved the pretrial delay. That ruling was neither unreasonable nor an abuse of discretion. Therefore, the time was properly excluded from Government accountability.

* * *

Points for Discussion

1. How many different sources of military law are cited in this short opinion?
2. Is the majority opinion's reliance on the "discussion" of R.C.M. 707, which is included in the MCM improper if the discussion is not binding as Judge Gierke says?

1-2. Overview of the System from Start to End

This section describes key steps that occur in the military justice system, beginning with the formal accusation that someone has committed an offense and ending with the conclusion of multiple levels of appeals. The system is much more complicated than it was just a few years ago. As explained below, Congress recently decided that in cases involving certain offenses (called "covered offenses"), judge advocates now must exercise responsibilities that formerly belonged exclusively to commanders.

The Changing Roles of Commanders and Judge Advocates

As described in the preceding discussion (Chapter 1-1, *supra*), since the founding of the country, the American military justice system has relied on commanders playing a key role. Moreover, commanders at all levels have been an integral part of initiating (i.e., preferring), processing, and referring charges to courts-martial. See generally David Schlueter & Lisa Schenck, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the Military Justice System*, 14 N.Y.U. J. L. & LIBERTY 529 (2020) (addressing commanders' important roles in the military justice system). In 1950, when Congress adopted the Uniform Code of Military Justice (UCMJ)—the statutory basis for the military justice system—military attorneys (i.e., uniformed judge advocates) took on an important role in the military justice system, but commanders, generally, retained the final authority over many aspects of the military justice system.

Numerous and significant changes, however, have been made to the UCMJ, over the past decade.¹ Additionally, many calls for further reform have

¹ Congress has enacted amendments to the UCMJ every year since 2014 (in addition to many amendments before 2014). See Gregory E. Maggs, *Amendments to the Uniform Code of Military Justice Since 1950 at 4-17* (2024 edition), <https://dx.doi.org/10.2139/ssrn.4703897> (listing all amendments). The Acts making the most extensive changes have been the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017), the

suggested removing commanders entirely from the military justice process, to eliminate what they perceive as the “outdated” command-centric military justice system. See, e.g., Eugene Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, GLOB. MIL. J. REFORM (May 13, 2014), <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html> (proposing a new system in which a “chief trial counsel who shall be independent of the chain of command and shall have exclusive authority to refer charges for trial by special and general courts-martial”); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014) (proposing that military lawyers have prosecutorial discretion over disposition of offenses).

The National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) [hereinafter NDAA FY22] significantly changed the role of commanders in preferring and referring court-martial charges. In effect, the NDAA FY22 created a bifurcated system of military justice—one process for “covered offenses” with uniformed judge advocates spearheading the process (see The Court-Martial “Covered Offenses” Process Chart, *infra*), and one process for “non-covered offenses” with commanders playing an integral role in the process (see The Court-Martial “Non-Covered Offenses” Process Chart, *infra*). These significant NDAA FY22 changes went into effect on December 27, 2023.

The Court-Martial Process for “Covered Offenses”

With this background, first consider the new military justice process for “covered offenses.” Covered offenses, which are listed in Article 1(17), UCMJ, are generally serious crimes that are not specific to the military, such as murder, rape, sexual assault, and kidnapping.² Congress has concluded that judge advocates rather than military commanders should make prosecutorial decisions over such offenses.

To implement this new system for covered offenses, the NDAA FY22 created the Office of Special Trial Counsel (OSTC) and a position of lead Special Trial Counsel (STC) for each Service. The STC is a senior judge advocate with

National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021), and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (2022).

² Covered offenses include Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 82 (Solicitation to commit one of the foregoing offenses); Article 81 (Conspiracy to commit one of the foregoing offenses); Article 80 (Attempt to commit one of the foregoing offenses); Article 119a (Death or Injury of an Unborn Child); Article 120a (Deposit of Obscene Matter); and, effective January 1, 2025, Article 134 (Sexual Harassment). See Article 1(17), UCMJ.

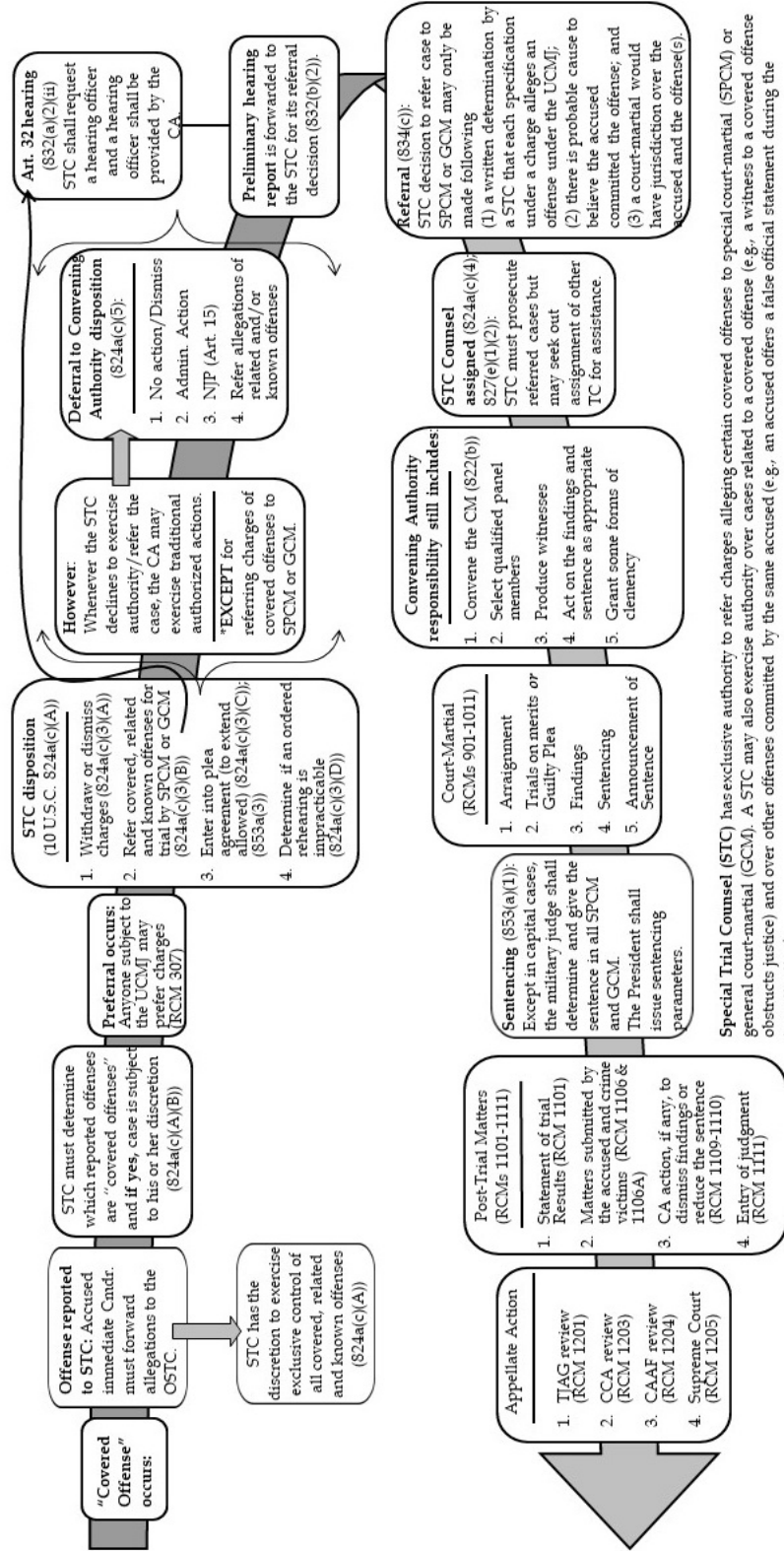
extensive military justice experience. All allegations that a covered offense has been committed are now to be forwarded promptly to the STC. See R.C.M. 301. The STC has the exclusive authority to determine whether a reported offense is a covered, known, or related offense in accordance with R.C.M. 303A. If the STC determines a reported offense is a covered offense, the STC has authority over that offense. Additionally, the STC may exercise authority over “any other offense” or charge alleged to have been committed by the suspect of the covered offense. See R.C.M. 303A. The STC also may exercise authority over any reported offense or charge “related” to a covered offense, whether allegedly committed by the covered offense suspect or by anyone else subject to the UCMJ.

In exercising jurisdiction over offenses, the STC may decide to “prefer” charges (i.e., swear to and initiate formal procedures with respect to those charges) or may defer the offense by electing not to prefer. See R.C.M. 306A. Only the STC may dispose of a specification alleging a covered offense or another offense over which an STC has exercised such authority. See R.C.M. 401A. But if the STC declines to prefer or refer charges for a covered offense, a commander or convening authority can exercise limited authority. See Art. 24a(c)(5), UCMJ; R.C.M. 401A(c)(3); R.C.M. 306A Drafters’ Analysis. For example, the commander or convening authority may initiate nonjudicial punishment or an administrative separation but may not refer covered offense charges to a special or general court-martial. See *id.*

When the STC exercises authority over a covered offense, almost all aspects of the court-martial process largely fall into the control of the STC. For example, the STC oversees the drafting of the charges and specifications, the referral of the case to a general or special court-martial, the possible granting of immunity to witnesses, and the making of any plea agreements between the government and the accused.³ One important exception is that the commander still has responsibility for actually convening the court-martial, which involves selecting and detailing officers or enlisted members from within the command to hear the case.

³ See NDAA FY23 § 541(c) (transferring the additional powers from the convening authority to the STC or military judge, effective in December 2023).

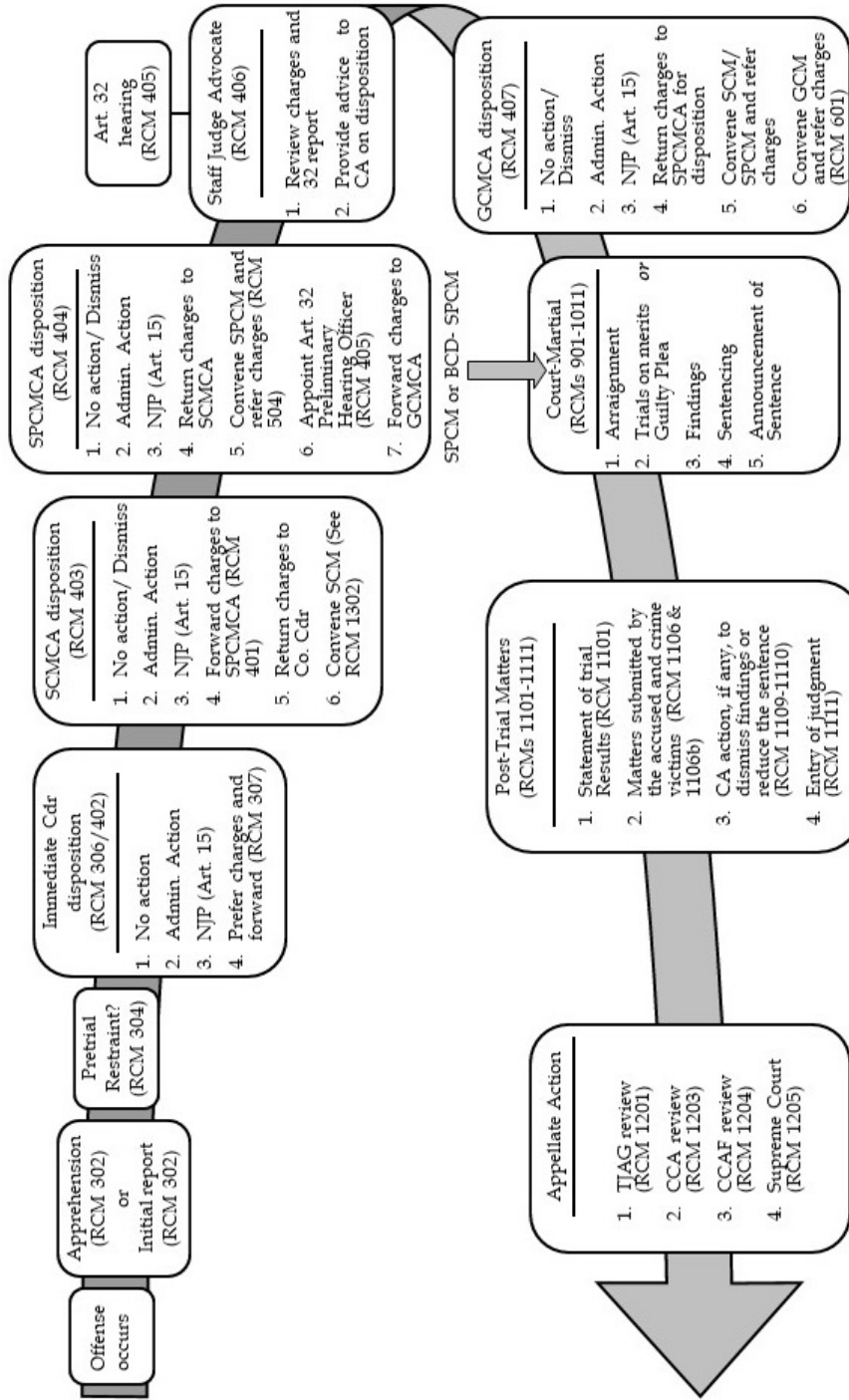
The Court-Martial "Covered Offenses" Process



The Court-Martial Processes for “Non-Covered Offenses”

If the accused is charged with an offense other than a covered offense, those offenses will continue to be processed in the manner in which they have been handled since the adoption of the UCMJ in 1950, as reflected in The Court-Martial “Non-Covered Offenses” Process Chart that follows. Uniformed judge advocates, however, are heavily engaged throughout the processing for “non-covered offenses”—not just providing legal advice to commanders but also performing functions such as shepherding the criminal investigation, advising investigators, drafting charge sheets, and prosecuting the accused at the court-martial. See, e.g., U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (20 Nov. 2020) (directing uniformed judge advocates to perform various duties).

The Court-Martial “Non-Covered Offenses” Process



Note: The process outlined here is subject to exceptions and special rules.

A Hypothetical Example

With this background, consider now a hypothetical example of how the modern military justice system might handle a violation of the UCMJ which is a "non-covered offense." The Court-Martial "Non-Covered Offenses" Process Chart above shows the many steps in the process from start to finish.

The following imaginary facts draw in part upon sample forms in an appendix to the Manual for Courts-Martial: Suppose that at 0630 on 15 July 2023, Company A of the 61st Infantry Brigade, garrisoned at Fort Blank in Missouri, called roll. All were present or accounted for except Private First Class (PFC) Reuben J. James, who was absent without leave. PFC James's squad leader immediately asked other members of the squad if they knew where he was. No one knew, but one soldier said, "I bet PFC James is off post buying drugs." When the sergeant asked why he thought so, the soldier replied: "Three days ago, PFC James showed me 10 grams of cocaine that he had bought. I imagine he is out looking for some more drugs."

The squad leader informed the platoon sergeant and platoon leader, who told the company commander, Captain (CPT) Jonathan E. Richards. Richards relayed the information to the Military Police, who immediately began looking for PFC James. They apprehended him a few hours later as he tried to reenter Fort Blank through the main gate. When the MPs searched his person, they found 10 grams of white powder which a screening test subsequently determined to be cocaine. The processes of the military justice system has begun. Because the alleged offenses are considered "non-covered offenses," the commander will have discretion regarding how the violations of the UCMJ are handled."

Following The Court-Martial "Non-Covered Offenses" Process Chart, you can see that once PFC James has been apprehended, CPT Richards had a few important decisions to make. The first decision was whether to impose "pre-trial restraint." Under R.C.M. 304, pretrial restraint "may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement." After consulting with a military attorney, CPT Richards decided to order PFC James not to leave the confines of the post, a typical restriction imposed on soldiers who have gone absent without leave for a brief time.

As PFC James's immediate commander, CPT Richards also had to decide how to dispose of the apparent AWOL and drug offenses. Military commanders have considerable discretion in such questions because upon them falls the responsibility of deciding what is necessary for discipline within their units. According to R.C.M. 306, Captain Richards had several options. One option would have been to take no action. That choice might be appropriate for a trivial or technical violation of the UCMJ, or where the commander feels the evidence is too lacking to proceed. But CPT Richards felt that drug use leading a soldier to miss duty required a more forceful response.

A second option under R.C.M. 306 would have been to address the misconduct with "administrative corrective measures," such as counseling,

admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproaches, rebukes, or extra military instruction. While more than nothing, CPT Richards decided that administrative corrective measures were still not enough of a response to the alleged misconduct.

A third option would have been to address the misconduct with “nonjudicial punishment.” Also as described in Chapter 3, Article 15, UCMJ, 10 U.S.C. § 815, empowers the commander to impose minor punishments on soldiers for violations of the UCMJ (i.e., “non-covered offenses” or offenses the STC defers as described *supra*), without trying them by court-martial unless the accused insists on a court-martial. While offenses disposed of under Article 15 are “criminal” offenses, their level of disposition does not result in a criminal conviction, and the permissible punishments are limited. For example, CPT Richards might have ordered a forfeiture of pay or a period of additional duty as a punishment for the misconduct. But again, CPT Richards thought the apparent offenses called for something more.

Accordingly, CPT Richards chose a fourth option, namely, “preferring” charges against PFC James so that he could be tried by a court-martial. Under R.C.M. 307, a person prefers charges by putting them in writing, stating that he or she has personal knowledge of or has investigated the matters set forth in the charges and specifications, and by signing them under oath. The following hypothetical “Charge Sheet” illustrates CPT Richards’s action in this hypothetical story.

CHARGE SHEET			
I. PERSONAL DATA			
1. NAME OF ACCUSED (<i>Last, First, Middle Initial</i>) JAMES, Reuben J.	2. SSN 111-11-1111	3. GRADE OR RANK PFC	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION Co. A, 1st Battalion, 61st Inf. Bde., Fort Blank, MO		6. CURRENT SERVICE	
		a. INITIAL DATE 1 April 2022	b. TERM 3 years
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC \$ 2161.00	b. SEA/FOREIGN DUTY \$ 0.00	c. TOTAL \$ 2161.00	Restriction 1 August 2023
II. CHARGES AND SPECIFICATIONS			
10. CHARGE I		VIOLATION OF THE UCMJ, ARTICLE 86	
SPECIFICATION In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 61st Infantry Brigade, Fort Blank, Missouri, did, on or about 15 July 2023, without authority, absent himself from his unit, to wit: Company A, 1st Battalion, 61st Infantry Brigade, located at Fort Blank, Missouri, and did remain so absent until on or about 30 July 2023.			
Charge II: Violation of the UCMJ, Article 112a			
In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 61st Infantry Brigade, did, on or about 12 July 2023, wrongfully possess 10 grams of cocaine.			
III. PREFERRAL			
11a. NAME OF ACCUSER (<i>Last, First, Middle Initial</i>) Richards, Jonathan E.	b. GRADE CPT	c. ORGANIZATION OF ACCUSER Co. A, 1st Bn, 61st Inf Bde	
d. SIGNATURE OF ACCUSER Jonathan E Richards			e. DATE (YYYYMMDD) 20230801
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 1st day of August , 2023 , and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.			
Will M. Wilson		1st Bn, 61st Inf Bde	
<i>Typed Name of Officer</i>		<i>Organization of Officer</i>	
CPT		Adjutant	
<i>Grade</i>		<i>Official Capacity to Administer Oath (See R.C.M. 307(b), must be commissioned officer)</i>	
Will M. Wilson			
<i>Signature</i>			

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PREVIOUS EDITION IS OBSOLETE.

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Box 10 of the Charge Sheet shows that CPT Richards formally accused PFC James of one specification of being absent without leave in violation of Article 86, UCMJ, 10 U.S.C. § 886, and one specification of possessing cocaine in

violation of Article 112a, UCMJ, 10 U.S.C. § 912a. In box 11, CPT Richards signed the charges under oath. The reverse side of the form shows what happened next.

12. On <u>2 August</u> , <u>2023</u> , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)		
Jonathan E. Richards <i>Typed Name of Immediate Commander</i>		Co. A, 1st Bn, 61st Inf Bde <i>Organization of Immediate Commander</i>
CPT <i>Grade</i>		
<u>Jonathan E Richards</u> <i>Signature</i>		
IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY		
13. The sworn charges were received at <u>1100</u> hours, <u>2 August</u> , <u>2023</u> at		
1st Bn, 61st Inf Bde <i>Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)</i>		for the COMMANDER
Will M. Wilson <i>Typed Name of Officer</i>		Adjutant <i>Official Capacity of Officer Signing</i>
CPT <i>Grade</i>		
<u>Will M. Wilson</u> <i>Signature</i>		
V. REFERRAL; SERVICE OF CHARGES		
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE (YYYYMMDD)
61st Infantry Brigade	Fort Blank, Missouri	20230802
Referred for trial to the <u>special</u> court-martial convened by <u>CMCO number 12 dated</u>		
<u>1 August</u> , <u>2023</u> , subject to the following instructions:		
<u>None</u>		
By _____ Of _____		
Carl E. Nevens <i>Typed Name of Officer</i>		Commander, 61st Infantry Brigade <i>Official Capacity of Officer Signing</i>
O-6/COL <i>Grade</i>		
<u>Carl E. Nevens</u> <i>Signature</i>		
15. On <u>8 August</u> , <u>2023</u> I (caused to be) served a copy hereof on (each of) the above named accused.		
Hamilton Burger <i>Typed Name of Trial Counsel</i>		CPT <i>Grade or Rank of Trial Counsel</i>
<u>Hamilton Burger</u> <i>Signature</i>		
FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken. 2 - See R.C.M. 601(e) concerning instructions.		

As indicated in box 12, CPT Richards informed PFC James of the charges against him. Box 13 shows that the form was forwarded to an unnamed officer who was designated as the "Summary Court-Martial Convening Authority" for the 1st Battalion of the 61st Infantry Brigade.

As shown on The Court-Martial “Non-Covered Offenses” Process Chart, the Summary Court-Martial Convening Authority also had several choices. Under R.C.M. 403, he or she could dismiss the charges or forward the charges to a subordinate or superior commander for disposition. Alternatively, he or she could refer the charges to a “summary court-martial.”

As discussed at considerable length later in this book, there are three types of courts-martial: a summary court-martial, a special court-martial, or a general court-martial. See R.C.M. 201(f). These three types of courts-martial differ in the formality of their procedures and the range of penalties that they may impose.

A summary court-martial is a very informal proceeding that takes place without a military judge or a prosecutor. Instead, a junior officer typically serves alone and hears the evidence. Findings of guilt are not considered criminal convictions. The sentences that can be imposed are modest, and vary according to the rank of the accused. Chapter 3 considers summary courts-martial in more depth.

A special court-martial is an adversary criminal trial, almost always presided over by a military judge, with both the government and the accused represented by counsel. Witnesses testify according to regular rules of evidence, and the trial follows very formal procedural rules—much like any state or federal criminal trial. The maximum penalties that a special court-martial may impose are a bad-conduct discharge, one year of confinement, and forfeiture of two-thirds pay and benefits for one year.⁴ A rough analogy in civilian practice is that a special court-martial is typically used for misdemeanors.

A convening authority also has the power to refer charges to a specific special court-martial that consists of a military judge alone, with no option for the accused to request a trial by members.⁵ See Art. 16(c)(2)(A), UCMJ. This type of court-martial, which some military lawyers call a “special-special” court-martial and others call a “short-martial,” has limited sentencing authority: “Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone.” Art. 19(b), UCMJ. The amount of forfeiture of pay is still limited to two-thirds pay per month. See Art. 19(a), UCMJ. Note, a special trial counsel may not refer charges to a special court-martial consisting of a military

⁴ Although written pretrial advice from the staff judge advocate is not required to refer a case to a special or summary court-martial, Article 34(b), UCMJ, requires that before referring charges to a special court-martial, the convening authority must “consult a judge advocate on relevant legal issues.”

⁵ The accused may object to a military judge alone special court-martial in cases where (1) the maximum authorized confinement for the offense alleged would be greater than two years if tried by general court-martial (except for a wrongful use or possession of a controlled substance offense) or (2) cases involving offenses for which sex offender notification would be required. R.C.M. 201(2)(E).

judge alone. See R.C.M. 601(e)(1)(B) Discussion, citing Art. 16(c)(2)(A), UCMJ.

If the convening authority refers the charges to a special court-martial, but does not specify that the special court-martial will consist of a military judge alone, the accused may elect whether to be tried by the military judge alone or by a court-martial consisting of a military judge and four members. See Art. 16(c)(1) & (2)(B), UCMJ. This kind of court-martial can sentence the accused to any punishment except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year. See Art. 19(a), UCMJ.

The following table illustrates approximate analogues among the Federal, State, and military court systems:

COMPARISON OF FEDERAL, STATE, AND MILITARY COURTS

	Federal Civil & Criminal	Typical State Civil & Criminal	Military Criminal Only
Appeals	U.S. Supreme Court	U.S. Supreme Court	U.S. Supreme Court
Appeals		State Supreme Court	U.S. Court of Appeals for the Armed Forces
Appeals	U.S. Circuit Courts of Appeals	State Intermediate Appellate Courts	U.S. Army Court of Criminal Appeals U.S. Navy-Marine Corps Court of Criminal Appeals U.S. Air Force Court of Criminal Appeals U.S. Coast Guard Court of Criminal Appeals
Trials	U.S. District Court	Court of General Jurisdiction (e.g., County Court)	General Court-Martial
Trials	U.S. Magistrate	Misdemeanor Court Juvenile Court Traffic Court Probate Court Family Court	Special Court-Martial Summary Court- Martial

A general court-martial, like a special court-martial, is also an adversary criminal trial conducted according to formal evidentiary and procedural rules. One major difference is that a general court-martial is typically used for more serious crimes. A general court-martial can impose any lawful sentence authorized for the offense of which the accused is convicted, including life imprisonment or even death for serious crimes.

In this case, box 14 of the Charge Sheet indicates that the Summary Court-Martial Convening Authority did not refer the charges to a summary court-martial, but instead forwarded them to Colonel (COL) Carl E. Nevin, an officer designated as the Special Court-Martial Convening Authority. Under R.C.M. 404, COL Nevin also had several choices. He could take no action and dismiss the charges. He could employ administrative corrective measures or possibly nonjudicial punishment to address the situation. He could return the charges

to the Summary Court-Martial Convening Authority. He could convene a special court-martial. He could order a “preliminary hearing” for the purpose of securing more information about the best disposition of the charges. (Unless waived, a preliminary hearing is necessary before referral of charges to a general court-martial.) Finally, COL Nevin could forward the charges to the officer designated as the General Court-Martial Convening Authority, who might be a major general or lieutenant general commanding the division at Fort Blank or the corps of which the division is a part.

The reverse side of the Charge Sheet shows that COL Nevin chose to refer the case to a special court-martial. Accordingly, there was no preliminary hearing and the case was not forwarded to the General Court-Martial Convening Authority.

When PFC James is tried by a special court-martial, the trial will resemble a civilian criminal trial in most respects. As The Court-Martial “Non-Covered Offenses” Process Chart indicates under R.C.M. 901-1011, there will be an arraignment, and unless he pleads guilty, a trial on the merits in which rules of evidence are used, followed by a finding of guilty or not guilty. If he is found guilty, each side will produce evidence relevant to sentencing, and a decision on the sentence will follow. PFC James can request a trial either by a judge or a panel. The panel, however, is not exactly like a civilian jury. Its members will consist of officers or enlisted members chosen by the convening authority to hear the case. Because PFC James is enlisted, he may request that the membership of the court-martial “be comprised entirely of officers or of at least one-third enlisted ‘members.’” R.C.M. 503(a)(2). And unlike a civilian jury, the panel’s finding does not have to be unanimous.⁷ It could find him guilty by a three-fourths vote.

⁶ The Military Justice Act of 2016 (MJA 2016) changed the previous default rule that the panel would consist only of officers unless the accused was enlisted and requested that the panel have at least one-third enlisted members. Instead, pursuant to the MJA 2016, if the accused is enlisted, the convening authority can refer a case to a panel of officers or a panel that includes both officers and enlisted members. If the accused wants a different composition, the accused may request either a panel consisting entirely of officers or a panel with at least one-third enlisted members. See Art. 25(c), UCMJ. Also, under the MJA 2016, votes on findings require agreement of three-fourths of the panel members, rather than the previous two-thirds requirement. See Art. 52(b), UCMJ; R.C.M. 921(c)(2). But in capital cases, the rule remains that the death penalty may be imposed for capital offenses only if the vote to convict is unanimous and the vote on the death penalty is unanimous. The MJA 2016 did not change the rule in Article 52(b) that “[a]ll other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote.”

⁷ Whether a unanimous verdict is required in military criminal cases has become an issue based on the Supreme Court’s decision in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), overturning *Apodaca v. Oregon*, 406 U.S. 404 (1979), and holding that the Sixth Amendment requires conviction by a unanimous jury for felony offenses and that the right to a unanimous jury verdict applies to state criminal trials pursuant to the Fourteenth Amendment. The Court of Appeals for the Armed Forces weighed in on

If the special court-martial finds PFC James guilty, he will have two chances for review of his conviction. First, the results of the trial will be forwarded to COL Nevin. Under R.C.M. 1106, PFC James will have the opportunity to submit documents and arguments to COL Nevin. With some limitations,⁸ COL Nevin will have the power to approve the findings or dismiss them, or to approve the sentence, mitigate the sentence, or disapprove the sentence. See R.C.M. 1110(c). He can base a decision not to approve the findings or sentence as adjudged either on grounds that errors occurred at the trial or that PFC James deserves clemency.

this issue in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), holding that military accuseds tried by courts-martial do not have a constitutional right to a unanimous guilty verdict. The court distinguished the Supreme Court's holding in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), and first, rejected the argument that *Ramos* required unanimous verdicts in courts-martial. The court noted that the U.S. Supreme Court has repeatedly stated that the Sixth Amendment right to trial by jury does not apply to courts-martial. The court further applied the balancing test adopted by the Supreme Court in *Weiss v. United States*, 510 U.S. 163 (1994) for determining whether the Fifth Amendment's Due Process Clause requires a unanimous verdict in courts-martial. The Court of Appeals for the Armed Forces concluded that weighing the factors in favor of the right to a unanimous verdict did not overcome the balance struck by Congress in Article 52, UCMJ, that permits a nonunanimous verdict. Also, the court rejected the argument that equal protection in the Fifth Amendment's Due Process Clause required unanimous verdicts in courts-martial because military accuseds are being treated differently from civilian defendants. The court found that those two classes of persons are not similarly situated.

⁸ The convening authority's discretion in acting on the *findings* of the court-martial is now limited. The convening authority cannot act on the findings of a general or special court-martial for (1) findings of any offense for which the authorized confinement punishment exceeds two years; (2) cases where the adjudged sentence includes a dismissal, or a dishonorable or bad-conduct discharge; (3) cases where the adjudged confinement exceeds six months (for all offenses running consecutively); or (4) cases where the accused was convicted of a violation of a sexual offense listed in Articles 120(a)-(b), 120b, 125, or any other offense the Secretary of Defense specifies. Art. 60a(a), UCMJ; R.C.M. 1109. The convening authority's discretion on acting on the sentence is also limited. In general, the convening authority may not disapprove, commute, or suspend—in whole or in part—an adjudged sentence of confinement exceeding six months or a sentence of dismissal, dishonorable discharge, bad conduct discharge, or death. This general rule, however, has two exceptions. One exception is that the convening authority can disapprove, commute, or suspend an adjudged sentence if the accused has provided substantial assistance in the investigation or prosecution of another accused (even in cases with a mandatory minimum sentence). The other exception, as described below, is that the convening authority may follow a military judge's recommendation that the convening authority suspend a discharge or confinement exceeding six months. *Id.* The convening authority may reduce, commute, or suspend a sentence of a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, and confinement of a sentence if the confinement adjudged is six months or less (including if confinement running consecutively totals six months or less). See *id.*

If PFC James is sentenced to a bad-conduct discharge, his case automatically will be reviewed by the U.S. Army Court of Criminal Appeals. See Art. 66(b)(3), UCMJ. If he is not sentenced to a bad-conduct discharge but is sentenced to more than 6 months of confinement, the U.S. Army Court of Criminal Appeals has discretion to review his case. After the U.S. Army Court of Criminal Appeals reviews his case, he may seek review by the U.S. Court of Appeals for the Armed Forces, see Art. 67(a), UCMJ and then review by the Supreme Court, Art. 67A(a), UCMJ. If he receives a lesser sentence, he may still seek review by the Judge Advocate General. See R.C.M. 1205.

Points for Discussion

1. Is the military justice system necessary or could civilian courts handle the trials of servicemembers accused of committing crimes? The answer perhaps depends on how frequently the military justice system is invoked. This figure varies over time, depending on what the military is doing and how many servicemembers are on duty. During World War II, there were 1.7 million courts-martial in the Armed Forces, the equivalent of one-third of all the civilian criminal cases tried in the United States during the War. See *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975* 192 (1975). Most of the World War II-era courts-martial, however, were summary courts-martial, as commanders at the time could not impose punishment for minor offenses as is now permitted using Article 15, UCMJ. In recent years, with an all-volunteer force, the number of courts-martial has declined substantially. To look at just one Service, in Fiscal Year 2023, there were 453,468 soldiers on active duty in the Army. Of these soldiers, 356 were tried by general courts-martial, 119 by (bad conduct) special courts-martial, and 34 by summary courts-martial. In addition, 17,462 received nonjudicial punishment. See Joint Services Committee on Military Justice, Report to Congress Fiscal Year 2023, [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service's%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=ONidRcQfxFK9M1lvTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service's%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=ONidRcQfxFK9M1lvTff-6w%3d%3d). Although the number of prosecutions has declined, what might still be some of the practical difficulties of turning all of these matters over to civilian courts?

2. Who provides legal advice to commanders and the accused as cases proceed through the military justice system? Could civilian lawyers operate as effectively as military lawyers in this role?

The following two cases are included for different reasons. The first one illustrates how cases sometimes encounter difficulties as they move through the complex path of military justice. The second case illustrates the seriousness of some of the cases that the military justice system must address.

A few words of background may help in understanding *Tittel*. In a typical case, the victim or other witness accuses a servicemember of an offense under the UCMJ. The accusation is forwarded to a commander who has

responsibility for deciding whether to refer such a case to a court-martial for trial (i.e., for deciding whether the government should prosecute the servicemember for the alleged offense). This model puts the commander in charge of determining what steps are necessary for maintaining order and discipline, while also ensuring that servicemembers accused of crimes are treated fairly. The model, however, only works properly if the commander can remain neutral and detached in making the referral decision. In a case in which the accused is charged with violating an order issued by the commander, is it appropriate for the commander to decide whether to refer the case to trial? What might be an alternative manner of handling the situation? If the commander does refer the case to trial, is the error ever harmless? These are issues raised in *Tittel*. For more details on restrictions on the role of commanders in the court-martial process, see *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994) [p. 238] and *McKinney v. Jarvis*, 46 M.J. 840 (Army Ct. Crim. 1997) [p. 335].

UNITED STATES v. TITTEL
U.S. Court of Appeals for the Armed Forces
53 M.J. 313 (C.A.A.F. 2000)

Senior Judge COX delivered opinion of the Court.

Prior to the case at hand, in June of 1996, a general court-martial convicted appellant [Specialist Third Class Todd A. Tittel, U.S. Navy] of a number of charges, one of which was shoplifting from the Navy Exchange in Sasebo, Japan. He was sentenced to be confined for 90 days and reduced to paygrade E-4. In September of 1996, appellant was processed at an administrative separation board because of his earlier court-martial conviction; the board recommended a General Discharge.

The case at hand begins in October of 1996, one day before the execution date of appellant's discharge, when he was caught shoplifting from the Navy Exchange, Yokosuka, Japan. While being filmed by a video surveillance camera, appellant stole 44 items with the total value of about \$366.33. After this incident, Captain William D. Lynch, Commanding Officer Fleet Activities, Yokosuka, Japan, ordered appellant not to enter any Navy Exchange facility. Appellant disobeyed that order by entering a Navy Exchange.

Appellant was apprehended and charged with several offenses. He was tried by a special court-martial, and pursuant to his pleas was convicted of willful disobedience of a superior officer, Captain Lynch, in violation of Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890 and larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The court-martial sentenced appellant to be confined for 103 days, to forfeit \$578 pay per month for 1 month, to be reduced to the paygrade of E-1, and to be discharged from the Navy with a bad-conduct discharge. The convening authority, also Captain Lynch, approved the sentence.

In an unpublished opinion the Court of Criminal Appeals affirmed the conviction. However, the Court reduced the sentenced confinement period from 103 days to 73 in order to comply with the pretrial agreement.

We granted review of the following issue:

WHETHER THE NAVY–MARINE CORPS COURT OF CRIMINAL APPEALS ERRED BY AFFIRMING APPELLANT’S CONVICTION, WHERE THE CONVENING AUTHORITY WAS AN ACCUSER AND THUS COULD NOT CONVENE APPELLANT’S COURT–MARTIAL.

For the first time on appeal, appellant seeks relief. Appellant contends that where an officer’s order is willfully disobeyed, the officer is the victim of that crime. As such, the officer has a personal interest in the disposition of the offense and becomes an “accuser.” An “accuser” is disqualified from convening a special court-martial. RCM 504(c)(1), Manual for Courts–Martial, United States (1955 ed.).

Appellant’s argument is facially appealing. Convening authorities must be neutral. His rationale is that where an officer is the victim of willful disobedience, he cannot be neutral. Therefore, he cannot be the convening authority for that same case of willful disobedience.

When addressing the question, the Court of Criminal Appeals stated the following:

[T]he appellant contends that the convening authority was an accuser and prohibited from convening his court-martial. Based on the record before us, we find no evidence that Captain Lynch became personally involved with the appellant to the extent that he became an accuser. Assuming arguendo that he did become an accuser, which we do not, his failure to forward the charges to the next higher level of command for disposition was a nonjurisdictional error, which was waived by the appellant’s failure to raise it at his court-martial. RULE FOR COURTS–MARTIAL 904(e), MANUAL FOR COURTS–MARTIAL, UNITED STATES (1998 ed.); [*United States v.*] *Shiner*, 40 M.J. [155, 157 (C.M.A. 1994)]. We find no plain error. See *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986); *United States v. Powell*, [49 M.J. 460 (1998)]. In light of the serious nature of the charges facing the appellant, we find it unlikely that any competent authority would not have referred this case to a special court-martial. Consequently, we find no fair risk that the appellant was prejudiced by the error. See Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Having reviewed the record, we agree with the analysis of the Court of Criminal Appeals. Accordingly, we find that the Navy–Marine Corps Court of Criminal Appeals did not err by affirming appellant’s conviction.

The decision of the United States Navy–Marine Corps Court of Criminal Appeals is affirmed.

EFFRON, Judge, with whom SULLIVAN, Judge, joins (concurring in part and in the result):

I agree with the majority opinion, except to the extent that it may be read to suggest that this case provides an appropriate vehicle for deciding whether the status of a convening authority as an accuser can be passively waived, as opposed to being the subject of a knowing and intelligent waiver. I note that the decision in this case is not based upon waiver, but rests instead upon the conclusion that the convening authority was not an accuser. The majority opinion appropriately endorses the holding of the lower court that “[b]ased on the record before us, we find no evidence that Captain Lynch became personally involved with the appellant to the extent that he became an accuser.”

A personal order does not necessarily implicate a commander’s personal interest such that he becomes an “accuser” and is disqualified as a convening authority. See *United States v. Voorhees*, 50 M.J. 494 (1999). The order that appellant disobeyed was a routine, administrative type of order that virtually automatically flowed from the fact of appellant’s arrest for shoplifting. No reasonable person would conclude that it represented any personal, versus official, interest of Captain Lynch or that its violation was an act that a commander would take personally. See Art. 1(9) and 23(b), UCMJ, 10 U.S.C. §§ 801(9) and 823(b), respectively; *United States v. Gordon*, 1 U.S.C.MA 255, 261, 2 CMR 161, 167(1952). Under these circumstances, the issue of waiver does not arise because the record does not support appellant’s contention that the convening authority had become an accuser.

Points for Discussion

1. How would you trace the path of this case on The Court-Martial “Non-Covered Offenses” Process Chart included in Chapter 1?
2. In how many ways did the Navy respond to Tittel’s various acts of misconduct? Which officers and courts reviewed the finding of guilt and the sentence in this case?
3. Why shouldn’t the convening authority—the officer who convenes the court-martial—be a person who has an interest in any of the charges? Is it appropriate to describe Captain Lynch, the officer who convened the court-martial, as the victim of one of the crimes?

UNITED STATES v. SCHAP
U.S. Army Court of Criminal Appeals
44 M.J. 512 (Army Ct. Crim. App. 1996)

JOHNSTON, Judge:

Contrary to his plea, the appellant [Stephen J. Schap, Sergeant, U.S. Army] was found guilty by a general court-martial composed of officer and enlisted members of premeditated murder in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (1988) [hereinafter UCMJ]. Although the appellant was sentenced by the members to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to

Private E1, they recommended that the confinement be reduced as a matter of clemency. The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for forty-five years, forfeiture of all pay and allowances and reduction to Private E1.

The appellant contends, *inter alia*, that the evidence is legally and factually insufficient to support a conviction for any offense greater than voluntary manslaughter, that the military judge made numerous errors in regard to instructions to the members, and that the military judge abused his discretion in improperly limiting the testimony of a defense expert and in admitting evidence that was unduly prejudicial. We disagree and affirm.

Facts

This case involves a sordid tale of infidelity and murder by decapitation.

The appellant and his wife were married in 1989 after a six-month courtship. The appellant took his marriage seriously and wanted it to be a permanent commitment. Because his wife had suffered through three miscarriages during the marriage, the appellant obtained a vasectomy to preclude further suffering on her part.

By December 1991, the wife felt that her feelings for her husband "had pretty much died" and she decided that she could not continue with the marriage. Nevertheless, in December, 1992, she followed her husband to Fulda, Germany, where he was assigned after joining the Army in January, 1992. During 1993, she took advantage of the assignment to Germany and often traveled throughout Europe without him.

The appellant and the victim, Specialist (SPC) Glover, became friends in early 1993. On two or three occasions, SPC Glover visited the appellant and his wife in their quarters. In the summer of 1993, the appellant was required to attend a military leadership training course. While the appellant was away from home, SPC Glover went to the appellant's quarters at least six times and had sexual intercourse with the appellant's wife. The appellant wrote love letters to his wife while attending the course. Although by her own account she no longer loved the appellant at the time and she was having an affair with SPC Glover, she responded with equally passionate correspondence.

By October, 1993, the appellant's wife learned that she was pregnant as a result of her sexual liaisons with SPC Glover. She did not tell the appellant about the pregnancy. She and her husband stopped having sexual relations that same month. In mid-November, 1993, she told the appellant that she no longer loved him and wanted a divorce. Over the Thanksgiving weekend, the couple talked about the details of a separation and divorce. Ultimately they agreed to a separation and her early return to the United States.

Although the appellant's wife assured him that there was no other man in her life, the appellant was suspicious. He intercepted a letter to her postmarked 29 November 1993, that suggested that she was pregnant. On 5 December 1993, the appellant found his wife's secret diary that indicated she may have had many other lovers during their marriage. When the appellant confronted

her, she tried to explain the journal entries as fantasies or innocent relationships. On 6 December 1993, they met with a chaplain as a prelude to the pending separation, and both claimed to have been faithful during the marriage.

On 7 December 1993, the appellant went to work as normal while his wife intended to go to the bank. On the way, she experienced very heavy vaginal bleeding. Because she was afraid she was having another miscarriage, she asked an acquaintance to take her to the local German hospital. After she arrived at the hospital, she was told she would be there for at least a week. She attempted to contact SPC Glover through a legal clerk at the legal assistance office where she had worked as a volunteer. Later in the morning, when the appellant coincidentally stopped by the legal assistance office to obtain some papers in connection with the pending marital separation, that same legal clerk told the appellant that his wife was in the hospital. The appellant was concerned and went to the hospital at approximately 1420 while dressed in his battle dress uniform.

When the appellant arrived at the hospital, his wife informed him that she was pregnant because of an extramarital affair with a person she did not identify. He remained calm and appeared to be concerned about her condition. The appellant left the hospital around 1500 and returned to his quarters to retrieve items his wife had requested for her stay at the hospital. When he had not returned by 1530, she called the quarters twice, but received no answer.

The appellant arrived back at the hospital at approximately 1610 wearing jeans and a jeans jacket. He appeared agitated and questioned his wife about the identity of her lover and the circumstances of the relationship. She told him that the child was conceived while she made love on a quilt in the appellant's living room. The appellant and his wife agreed that the lover should come to the hospital where she was undergoing treatment for the possible miscarriage. She also informed him that she had made arrangements for a message to be delivered to her lover so he could come to her side. While the appellant was in the room with her, she called the legal clerk to see if the message had been delivered. Although the appellant did not learn of SPC Glover's identity at that time, he learned that the lover held the rank of specialist.

Approximately ten minutes later, the appellant called the legal clerk and asked, "did you deliver the message to the specialist?" The legal clerk said he was going to do so, but did not reveal the identity of the intended recipient. He then asked the appellant if he knew where a particular barracks was located.

The appellant immediately drove to the location of the barracks, approached the staff duty noncommissioned officer (NCO), and explained that he needed to find the legal clerk who was looking for a room and that he also needed to find that same room. When the staff duty NCO asked the appellant which soldier he was looking for, the appellant said, "forget it" and departed. At approximately the same time, the legal clerk found the correct room and placed a message under SPC Glover's door. He also had SPC Glover paged to

ensure that he was notified that the appellant's wife wanted him to join her at the hospital.

The appellant, who by this time was aware that SPC Glover was the paramour, began looking for him. At some point the appellant had obtained a fighting knife with an eight-inch double-edged blade that he brought with him in his car. The appellant, acting normal, asked a soldier near the barracks dining facility if he had seen SPC Glover. The soldier informed the appellant that SPC Glover was in the telephone booth adjacent to the dining facility. The appellant replied, "[w]ell, I guess he got the message."

Specialist Glover had answered the page and had spoken with the legal clerk. He also had retrieved the message from under his door. At approximately 1715 he called the appellant's wife at the hospital. While SPC Glover was talking on the telephone with the appellant's wife, the appellant approached the telephone booth. Without confronting SPC Glover or giving him any chance to explain what had happened, the appellant stabbed and slashed his intended victim in the back of the neck. Specialist Glover attempted to flee but slipped to the ground. The appellant pursued, ran past his fallen victim, turned and knelt over him and stabbed and cut him ten to twenty times in the throat, practically severing his head. A witness described some of the motions involved in the attack as if the appellant was "cutting meat or skinning a deer." Another witness described it as "slow" and "rhythmic," "sort of like a sawing motion."

After stabbing the victim, the appellant stood up and kicked SPC Glover in the head several times. The head separated from the body and rolled several feet away. The onlookers were stunned at the severity of the attack and sickened with the results. One soldier, who observed the attack, vomited at the sight. The appellant, on the other hand, walked over to the head, picked it up by the hair, held it aloft and announced in a loud clear voice, "[t]his is what happens when you commit adultery." He also stated in a sarcastic tone, "[a]nd he said he was sorry." The appellant then turned and walked at a brisk pace to his car, carrying the head under his arm "like a football."

A short time later the appellant was observed near his car that was stopped on a bridge over a stream. When another car approached, he quickly departed from the area. The appellant continued on his way and parked several hundred yards from the hospital. He removed his blood-stained jacket and shirt, put on an olive-colored jacket, and entered the hospital while carrying an athletic bag. He entered his wife's small hospital room and removed SPC Glover's head from the athletic bag. He appeared agitated and very upset. He held the head in both hands and thrust it toward his wife's face and chest. She screamed and cowered while the appellant set the head facing his wife on an adjacent night stand. He sat down on the bed and said, "Glover's here, he'll sleep with you every night now, only you won't sleep, because all you'll see is this."

As startled medical personnel rushed to the room, the appellant remained seated on the bed, with his legs extended over his wife's legs, his hand on her chest trying to make her look at the head. He said to the German doctors "[g]ood, you stay here, and listen to everything that I have to say, remember as

much as you can." He also stated, "I'm her husband, and she's an adulteress, not just with that man, . . . but many times over." His wife described his statements as follows:

He turned to me, he said, "you know," he said, "you gave me enough clues. It was easy enough to figure out who it was. It was easy enough to do this." And he told the doctors, "I'm not normally a violent man. This is my only violent act, but don't underestimate me, I'm very skilled at what I do. I studied this, I planned this, I calculated this." And he turned to me and he said, "I did this for you, because I love you."

When she asked him what he did with the body and the knife the appellant replied:

I'm not that stupid . . . I don't care if they put me in jail for the rest of my life, because I'll just think about you. And I don't care if they put me to sleep, if they kill me, because I'll just think about you while they do it.

One of the German doctors testified that the appellant "behaved in a calm way" in the midst of the extraordinary situation at the hospital. The appellant asked for a bucket of water to wash his hands. He told the doctor that he "felt mistreated, humiliated, cheated on." He took off his identification tags and threw them at the German police who arrived on the scene and said, "[t]here's my name, I'm Stephen Schap." He also said they should stay and listen to everything he had to say and be witnesses, but he'd go peacefully only when the military police arrived. Ultimately, the German police on the scene dragged the appellant from the room.

Shortly after he was apprehended, the appellant stated that his wife "shouldn't have done what she'd done," and that he "shouldn't have done what he'd done either," but he "realized what he did" and he would just have to "pay for it." He was described by one witness as being "mighty calm about it." The witness testified that the appellant "didn't appear upset at all."

The appellant's car was located several hundred yards from the hospital. The gas tank was full. Inside, authorities found a change of clothing, food, shaving items, closed-out bank account records, appellant's passport, small amounts of six types of foreign currency, telephone records, diplomas, and tax records. Although prior to the incident, the appellant had received permission to travel to the Netherlands for the weekend of 11–13 December 1993, some of the items found in the car normally were stored in boxes at the appellant's quarters.

At his court-martial the appellant, who did not testify on the merits, never contested the fact that he had brutally attacked SPC Glover and taken the severed head to the hospital. His entire defense was that he acted in the sudden heat of passion in committing the crime of voluntary manslaughter.

Assigned Errors

The appellant contends, *inter alia*, that the evidence at trial was legally and factually insufficient to sustain any offense other than voluntary manslaughter.

Although the law recognizes that a “person may be provoked to such an extent” that “a fatal blow may be struck before self-control has returned,” there are very specific requirements for a finding of voluntary manslaughter. See Manual for Courts–Martial (1995 Edition) [hereinafter MCM], Part IV, para. 44c(1)(a); see also *United States v. Maxie*, 25 C.M.R. 418 (C.M.A. 1958). . . .

In order for an unlawful killing to be reduced from murder to voluntary manslaughter the homicide must be committed in the “heat of sudden passion” which is “caused by adequate provocation.” MCM, Part IV, para. 44c(1)(a). For the provocation to be “adequate,” however, the provocation must be of a nature to “excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion.” *Id.* Although the “passion may result from fear or rage,” the provocation can not be “sought or induced” by the killer. *Id.* Furthermore, “[i]f, judged by the standard of a reasonable person, sufficient cooling time elapses between the provocation and the killing, the offense is murder, even if the accused’s passion persists.” *Id.*

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); accord *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). We are satisfied that the evidence of record more than meets this standard as to premeditated murder.

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant’s guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. In applying this test, we make the following findings.

First, we find that upon his wife’s verification of his suspicions that she was unfaithful, the appellant set about to identify and track down the paramour. This was to be accomplished through his questioning of his wife, his contact with the legal clerk who was to deliver the message to the paramour, and his questions to the staff duty NCO.

Next, and most importantly, we find that the appellant intended to murder his wife’s paramour, regardless of who it was. He planned to accomplish this objective by using the large fighting knife he brought along for that very purpose. We reject the suggestion that the appellant only intended to confront the paramour and brought along the knife in case matters became unmanageable.

We also find that the nature and severity of the attack, coupled with the appellant’s vigorously kicking SPC Glover’s head, led to the head being severed from the body. Once the head was severed the appellant picked it up and made his coldly calculated comment about the deadly price of adultery.

We further find that the appellant carefully prepared for his escape and intended to flee from the scene of the crime. Once he held the severed head aloft, however, he realized that his identity would become known. Consequently, he determined to inflict the maximum emotional suffering upon his wife before he was apprehended. All of his conduct prior to the attack, along with his

comments at the scene, at the hospital to his wife and the doctors, and to the police, convinces us that the murder was a premeditated act rather than a crime committed in the heat of passion.

In order to prevail on his contention that his crime was voluntary manslaughter, we would have to be persuaded that the evidence presented by the government was insufficient to prove premeditated murder or unpremeditated murder. We find, however, that the murder was consummated in a cold and calculating manner. We further find that the appellant had not lost self-control at the time he killed SPC Glover. We specifically reject the defense contention that the learning of the paramour's identity triggered an uncontrollable rage. The evidence shows that the intent to kill was present before the identity of the paramour was known.

We also specifically find the appellant did not kill SPC Glover while under the influence of uncontrolled passion and because of that passion. Our conclusion is that once the appellant learned of the lover's identity, he specifically intended to kill SPC Glover, that he contemplated and planned SPC Glover's murder, and that he had adequate "cooling off" time to reflect upon the consequences before he acted.

We have carefully evaluated the entire record of trial, and conclude, applying our fact-finding powers of Article 66, UCMJ, that the appellant methodically planned the murder. In short, this was a premeditated murder in violation of Article 118(1), UCMJ, rather than voluntary manslaughter under Article 119, UCMJ.

The appellant has assigned three errors in regard to instructions or lack thereof from the military judge. In this case the military judge gave the standard instructions for premeditated murder, unpremeditated murder, and voluntary manslaughter. See Dep't of the Army, Pam. 27-9, Military Judges' Benchbook, para 3-86; 3-87. At various points in the instructions he correctly discussed heat of passion. At no time did the defense object to or request additional instructions. The trial defense counsel's failure to object to an instruction or omission of an instruction constitutes waiver of the objection in the absence of plain error. Rule for Courts-Martial 920(f). See *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993); see also *United States v. Olano*, 507 U.S. 725 (1993). We are satisfied that the instructional errors, if any, did not rise to the level of plain error. The instructions, when taken as a whole, were appropriate and complete. We hold that the assignments of error concerning the military judge's instructions or lack of instructions are without merit.

* * *

The appellant next contends that the military judge abused his discretion in limiting the testimony of the defense expert about rage and premeditation. The military judge permitted the defense expert to testify over government objection. The expert's testimony was directed at states of mind in general. The military judge permitted the witness to testify about how long an individual could remain in a state of rage. He also correctly allowed the expert to discuss

a person's ability to reflect on their actions. The military judge properly limited the expert discussion to prevent confusion between the concept of reflection and the legal standard of premeditation. Thus, the assigned error is without merit.

The appellant also contends that the military judge abused his discretion in refusing to allow the defense psychiatrist to testify that at the time of the offense the appellant was in a rage. To the contrary, the military judge allowed the expert to testify about these matters. He properly would not allow the expert to bring before the members those comments made by the appellant during his clinical interviews. The expert was allowed to testify about the basis of his conclusions, but he was not allowed to place the appellant's version of events before the members without the benefit of cross-examination of the appellant himself. The assigned error is without merit.

The appellant further contends that the military judge abused his discretion in admitting several books and catalogs concerning knives into evidence. Apparently government investigators searched through the appellant's bookshelves in an effort to find any link to the use of knives as weapons. This issue was fully litigated at an Article 39(a), UCMJ, session prior to trial on the merits. Government counsel offered the books on the theory that they provided corroboration of the appellant's admissions or confession. See Military Rule of Evidence. 304(g). The trial defense counsel contended that the books would be taken out of context and would prove to be more prejudicial than probative. In his view, it would not be unusual or probative of anything to find that a soldier in the United States Army possessed books or catalogs that had pictures or articles about knives and self-defense. The military judge made specific findings that the items were probative and that no unfair prejudice would result to the appellant if the books were admitted into evidence. In addition, he offered the trial defense counsel the opportunity to put the books into their proper context by use of testimony and photographs. The defense presented evidence, and directed its cross-examination to highlight that the appellant merely possessed the books and that the government presented no proof that he relied upon them in executing his alleged crime.

We are satisfied that the military judge did not abuse his discretion regarding this issue. In addition, even if the military judge erred in allowing the materials into evidence, we hold that the appellant suffered no unfair prejudice, as we are confident that the members gave the books little weight. The members certainly recognized that many soldiers, including the appellant, possess books and catalogs that featured military equipment, including knives. We also are confident that the members recognized that many soldiers were likely to have materials about knives and guns in their personal libraries.

This murder case is unusual only in regard to the decapitation and display of the head. There was little if any dispute as to the acts involved. Our review of the record convinces us that the government carried the burden to prove premeditated murder beyond a reasonable doubt. Our review also convinces us that the alleged errors are without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge GRAVELLE and Judge ECKER concur.

[The Court of Appeals for the Armed Forces granted review of several issues but affirmed the judgment of the Army Court of Criminal Appeals. See 49 M.J. 317 (C.A.A.F. 1998). The Supreme Court denied certiorari. See 525 U.S. 1179 (1999).—Ed.]

Points for Discussion

1. Are the military courts capable of handling crimes of this magnitude? Should the military courts have jurisdiction over cases that have little to do with military discipline? Would the outcome of the case likely have been the same or different if the case had been tried in a civilian court?

2. Pursuant to a "Status of Forces Agreement" with Germany, most crimes by U.S. servicemembers in Germany are tried by courts-martial rather than German courts. Why might both Germany and the United States favor this arrangement?

1-3. Jurisdiction Over Military Persons and Offenses

Nearly everyone tried by court-martial is a servicemember accused of committing a crime while on active duty. This includes both regular servicemembers (i.e., those who are always on active duty) and reservists and national guardsmen who have been mobilized or placed on active duty for training. Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1), unambiguously gives courts-martial jurisdiction over these servicemembers by saying: "The following persons are subject to this chapter . . . [m]embers of a regular component of the armed force . . . and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it."

This observation raises two questions. The first is whether a court-martial has jurisdiction to try anyone other than a servicemember on active duty. The second is whether the offense for which a person is tried by court-martial must be connected to the person's service. These questions are considered in turn.

Persons Subject to Court-Martial

Although most of the accused who are tried by court-martial are servicemembers on active duty, Article 2(a)(2)-(13), UCMJ, 10 U.S.C. § 802(a)(2)-(13), reprinted in the margin,¹ lists twelve additional categories of persons

¹ 10 U.S.C. § 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the

armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) (A) While on inactive-duty training and during any of the periods specified in subparagraph (B)—

(i) members of a reserve component; and

(ii) members of the Army National Guard of the United States or the Air National Guard of the United States, but only when in Federal service.

(B) The periods referred to in subparagraph (A) are the following:

(i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.

(ii) intervals between consecutive periods of inactive duty training on the same day, pursuant to orders or regulations.

(iii) Intervals between inactive-duty on consecutive days, pursuant to orders or regulations.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(13) Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.

subject to trial by court-martial. Some of these additional categories are well-accepted. For example, it is perhaps not surprising that Military Academy cadets and Naval Academy midshipmen are subject to court-martial jurisdiction, under Article 2(a)(2), UCMJ, 10 U.S.C. § 802(a)(2), because they live according to very strict military discipline. But other categories are more controversial. Few military retirees who are receiving retired pay probably realize that retirees can be and occasionally are tried by court-martial.² Indeed, in recent years a retired Army major general was convicted of a fraternization-type offense, see Robert Burns, *Retired General Demoted*, Wash. Post, Sept. 3, 1999, at A25, and a retired Army master sergeant was sentenced to death for committing three murders, see *Hennis v. Hemlick*, 2012 WL 120054 (4th Cir. 2012); *United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2020). Similarly, during the United States' military engagements in Iraq and Afghanistan, the United States has relied on private companies (typically called "contractors") to carry out tasks such as driving trucks, running dining facilities, translating foreign languages, and so forth. The employees for these contractors are all subject to trial by court-martial because they are, in the words of Article 2(a)(11), UCMJ, 10 U.S.C. § 802(a)(11), "[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." In reality, however, only a few have faced a court-martial to date.

The Supreme Court held in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), that a court-martial cannot exercise jurisdiction over a former soldier for a crime committed while on active duty. In *Reid v. Covert*, 354 U.S. 1 (1957), the landmark case that follows, the Supreme Court concluded that a

² Two conflicting cases raise an issue regarding continuous UCMJ jurisdiction over retirees of a regular armed forces component entitled to pay (pursuant to Article 2(a)(4), UCMJ and over Fleet Reserve or Fleet Marine Corps Reserve (e.g., "Fleet Reservists") (pursuant to Article 2(a)(6)), UCMJ) (Enlisted members of the Navy or Marine Corps may transfer into the Fleet Reserve or Fleet Marine Corps Reserve after twenty years of active-duty service and then receive retainer pay, are subject to recall, and must maintain military readiness.) The U.S. District Court for the District of Columbia held, in *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322 (D.D.C. 2020), that court-martial jurisdiction over Fleet Marine Reservists was unconstitutional because it exceeds Congress's Article I authority to "make rules for the regulation and government of the land and naval forces." This decision, however, was reversed by the U.S. Court of Appeals for the D.C. Circuit in *Larrabee v. Del Toror*, 45 F.4th 81 (D.C. Cir. 2022). A petition for certiorari is now pending before the U.S. Supreme Court. The Court of Appeals for the Armed Forces (C.A.A.F.) reached the same result as the U.S. Court of Appeals for the D.C. Circuit in *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), reaffirming that UCMJ jurisdiction over retirees and Fleet Reservists is constitutional based on their status as members of the "land and naval forces" and sufficient connections as such (e.g., pay, recall status, and the maintaining readiness requirement). The C.A.A.F. further held that subjecting Fleet Reservists and not retired Reservists to continuous UCMJ jurisdiction did not violate the Fifth Amendment's Equal Protection guarantee because the two groups are not similarly situated, receive different benefits, and are subject to different requirements.

court-martial could not exercise court-martial jurisdiction over civilian family members accompanying servicemembers overseas during peacetime. In reading the decision, note that it lacks a majority opinion: Justice Black wrote a plurality opinion for four justices and Justice Frankfurter and Justice Harlan wrote separate concurrences in the judgment, while Justice Clark wrote a dissent which Justice Burton joined. Justice Whitaker did not participate. Thus, there were seven Justices on one side, and two on the other, but no opinion received five votes.

REID v. COVERT
U.S. Supreme Court
354 U.S. 1 (1957)

Mr. Justice BLACK announced the judgment of the Court and delivered an opinion, in which The CHIEF JUSTICE, Mr. Justice DOUGLAS, and Mr. Justice BRENNAN join.

These cases raise basic constitutional issues of the utmost concern. They call into question the role of the military under our system of government. They involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights. These cases are particularly significant because for the first time since the adoption of the Constitution wives of soldiers have been denied trial by jury in a court of law and forced to trial before courts-martial.

In No. 701 Mrs. Clarice Covert killed her husband, a sergeant in the United States Air Force, at an airbase in England. Mrs. Covert, who was not a member of the armed services, was residing on the base with her husband at the time. She was tried by a court-martial for murder under Article 118 of the Uniform Code of Military Justice (UCMJ). The trial was on charges preferred by Air Force personnel and the court-martial was composed of Air Force officers. The court-martial asserted jurisdiction over Mrs. Covert under Article 2(11) of the UCMJ, which provides:

The following persons are subject to this code:

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States * * *.

Counsel for Mrs. Covert contended that she was insane at the time she killed her husband, but the military tribunal found her guilty of murder and sentenced her to life imprisonment. The judgment was affirmed by the Air Force Board of Review, but was reversed by the Court of Military Appeals, because of prejudicial errors concerning the defense of insanity. While Mrs. Covert was being held in this country pending a proposed retrial by court-martial in the District of Columbia, her counsel petitioned the District Court for a writ of habeas corpus to set her free on the ground that the Constitution forbade her trial

by military authorities. Construing this Court's decision in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) as holding that 'a civilian is entitled to a civilian trial' the District Court held that Mrs. Covert could not be tried by courtmartial and ordered her released from custody. The Government appealed directly to this Court under 28 U.S.C. § 1252.

In No. 713 Mrs. Dorothy Smith killed her husband, an Army officer, at a post in Japan where she was living with him. She was tried for murder by a court-martial and despite considerable evidence that she was insane was found guilty and sentenced to life imprisonment. The judgment was approved by the Army Board of Review, and the Court of Military Appeals. Mrs. Smith was then confined in a federal penitentiary in West Virginia. Her father, respondent here, filed a petition for habeas corpus in a District Court for West Virginia. The petition charged that the court-martial was without jurisdiction because Article 2(11) of the UCMJ was unconstitutional insofar as it authorized the trial of civilian dependents accompanying servicemen overseas. The District Court refused to issue the writ, and while an appeal was pending in the Court of Appeals for the Fourth Circuit, we granted certiorari at the request of the Government.

The two cases were consolidated and argued last Term and a majority of the Court, with three Justices dissenting and one reserving opinion, held that military trial of Mrs. Smith and Mrs. Covert for their alleged offenses was constitutional. 351 U.S. 470 (1956). The majority held that the provisions of Article III and the Fifth and Sixth Amendments which require that crimes be tried by a jury after indictment by a grand jury did not protect an American citizen when he was tried by the American Government in foreign lands for offenses committed there and that Congress could provide for the trial of such offenses in any manner it saw fit so long as the procedures established were reasonable and consonant with due process. The opinion then went on to express the view that military trials, as now practiced, were not unreasonable or arbitrary when applied to dependents accompanying members of the armed forces overseas. In reaching their conclusion the majority found it unnecessary to consider the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, cl. 14 of the Constitution.

Subsequently, the Court granted a petition for rehearing. Now, after further argument and consideration, we conclude that the previous decisions cannot be permitted to stand. We hold that Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities.

I.

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect

his life and liberty should not be stripped away just because he happens to be in another land. . . .

The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution.

Among those provisions, Art. III, § 2 and the Fifth and Sixth Amendments are directly relevant to these cases. Article III, § 2 lays down the rule that:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Fifth Amendment declares:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *.

And the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The language of Art. III, § 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home. After declaring that all criminal trials must be by jury, the section states that when a crime is "not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." If this language is permitted to have its obvious meaning, § 2 is applicable to criminal trials outside of the States as a group without regard to where the offense is committed or the trial held. From the very first Congress, federal statutes have implemented the provisions of § 2 by providing for trial of murder and other crimes committed outside the jurisdiction of any State "in the district where the offender is apprehended, or into which he may first be brought." The Fifth and Sixth Amendments, like Art. III, § 2, are also all inclusive with their sweeping references to "no person" and to "all criminal prosecutions."

* * *

II.

At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. For its part, the United States agreed that these military courts would be willing and able to

try and to punish all offenses against the laws of Great Britain by such persons. In all material respects, the same situation existed in Japan when Mrs. Smith killed her husband. Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that article 2(11) of UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

* * *

In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert. Since their court-martial did not meet the requirements of Art. III, § 2, or the Fifth and Sixth Amendments we are compelled to determine if there is anything within the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas.

III.

Article I, § 8, cl. 14, empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces." It has been held that this creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights. But if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians—even though they may be dependents living with servicemen on a military base. The term "land and naval Forces" refers to persons who are members of the armed services and not to their civilian wives, children and other dependents. It seems inconceivable that Mrs. Covert or Mrs. Smith could have been tried by military authorities as members of the "land and naval Forces" had they been living on a military post in this country. Yet this constitutional term surely has the same meaning everywhere. The wives of servicemen are no more members of the "land and naval Forces" when living at a military post in England or Japan than when living at a base in this country or in Hawaii or Alaska.

* * *

The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded. The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined

within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders. They were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament. During this attempt, contrary to the Common Law, he used courts-martial to try soldiers for certain non-military offenses. This court-martialing of soldiers in peacetime evoked strong protests from Parliament. . . .

* * *

The generation that adopted the Constitution did not distrust the military because of past history alone. Within their own lives they had seen royal governors sometimes resort to military rule. British troops were quartered in Boston at various times from 1768 until the outbreak of the Revolutionary War to support unpopular royal governors and to intimidate the local populace. The trial of soldiers by courts-martial and the interference of the military with the civil courts aroused great anxiety and antagonism not only in Massachusetts but throughout the colonies. . . .

In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were "necessary and proper" for the regulation of the "land and naval Forces." Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does not say that Congress can regulate "the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces." There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.

In No. 701, *Reid v. Covert*, the judgment of the District Court directing the Mrs. Covert be released from custody is affirmed.

In No. 713, *Kinsella v. Krueger*, the judgment of the District Court is reversed and the case is remanded with instructions to order Mrs. Smith released from custody.

Mr. Justice WHITTAKER took no part in the consideration or decision of these cases.

Mr. Justice FRANKFURTER,* concurring in the result.

* Justice Felix Frankfurter was a major in the U.S. Army Reserve, Judge Advocate General's Corps, while serving on the U.S. Supreme Court. By his own admission, he avoided wearing his uniform whenever possible. He explained: "The reason I didn't want to go into uniform was because I knew enough about the doings in the War Department to know that every pipsqueak Colonel would feel that he was more

* * *

Trial by court-martial is constitutionally permissible only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I to regulate the "land and naval Forces," and who therefore are not protected by specific provisions of Article III and the Fifth and Sixth Amendments. . . .

* * *

The prosecution by court-martial for capital crimes committed by civilian dependents of members of the armed forces abroad is hardly to be deemed, under modern conditions, obviously appropriate to the effective exercise of the power to "make Rules for the Government and Regulation of the land and naval Forces" when it is a question of deciding what power is granted under Article I and therefore what restriction is made on Article III and the Fifth and Sixth Amendments. I do not think that the proximity, physical and social, of these women to the 'land and naval Forces' is, with due regard to all that has been put before us, so clearly demanded by the effective "Government and Regulation" of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses.

The Government speaks of the "great potential impact on military discipline" of these accompanying civilian dependents. This cannot be denied, nor should its implications be minimized. But the notion that discipline over military personnel is to be furthered by subjecting their civilian dependents to the threat of capital punishment imposed by court-martial is too hostile to the reasons that underlie the procedural safeguards of the Bill of Rights for those safeguards to be displaced. It is true that military discipline might be affected seriously if civilian dependents could commit murders and other capital crimes with impunity. No one, however, challenges the availability to Congress of a power to provide for trial and punishment of these dependents for such crimes. The method of trial alone is in issue. . . .

* * *

I therefore conclude that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments.

* * *

Mr. Justice HARLAN, concurring in the result.

important than a Major As a civilian I could get into the presence of a General without saluting, clicking my heels, and having the Colonel outside say, 'You wait. He's got a Colonel in there.'" *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975* 118 (1975).—Ed.

I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces over-seas in times of peace.

* * *

For analytical purposes, I think it useful to break down the issue before us into two questions: First, is there a rational connection between the trial of these army wives by court-martial and the power of Congress to make rules for the governance of the land and naval forces; in other words, is there any initial power here at all? Second, if there is such a rational connection, to what extent does this statute, though reasonably calculated to subserve an enumerated power, collide with other express limitations on congressional power; in other words, can this statute, however appropriate to the Article I power looked at in isolation, survive against the requirements of Article III and the Fifth and Sixth Amendments? I recognize that these two questions are ultimately one and the same, since the scope of the Article I power is not separable from the limitations imposed by Article III and the Fifth and Sixth Amendments. Nevertheless I think it will make for clarity of analysis to consider them separately.

* * *

. . . I cannot say that the court-martial jurisdiction here involved has no rational connection with the stated power. The Government, it seems to me, has made a strong showing that the court-martial of civilian dependents abroad has a close connection to the proper and effective functioning of our overseas military contingents. There is no need to detail here the various aspects of this connection, which have been well dealt with in the dissenting opinion of my brother CLARK. Suffice it to say that to all intents and purposes these civilian dependents are part of the military community overseas, are so regarded by the host country, and must be subjected to the same discipline if the military commander is to have the power to prevent activities which would jeopardize the security and effectiveness of his command. . . .

It seems to me clear on such a basis that these dependents, when sent over-seas by the Government, become pro tanto a part of the military community. I cannot say, therefore, that it is irrational or arbitrary for Congress to subject them to military discipline. I do not deal now, of course, with the problem of alternatives to court-martial jurisdiction; all that needs to be established at this stage is that, viewing Art. I, § 8, cl. 14 in isolation, subjection of civilian dependents overseas to court-martial jurisdiction can in no wise be deemed unrelated to the power of Congress to make all necessary and proper laws to insure the effective governance of our overseas land and naval forces.

I turn now to the other side of the coin. For no matter how practical and how reasonable this jurisdiction might be, it still cannot be sustained if the Constitution guarantees to these army wives a trial in an Article III court, with indictment by grand jury and jury trial as provided by the Fifth and Sixth Amendments.

* * *

. . . I cannot agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, is required in every case for the trial of a civilian dependent of a serviceman overseas. The Government, it seems to me, has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, such a requirement would be as impractical and anomalous as it would have been to require jury trial for Balzac in Porto Rico. Again, I need not go into details, beyond stating that except for capital offenses, such as we have here, to which, in my opinion, special considerations apply, I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments. Where, if at all, the dividing line should be drawn among cases not capital, need not now be decided. We are confronted here with capital offenses alone; and it seems to me particularly unwise now to decide more than we have to. Our far-flung foreign military establishments are a new phenomenon in our national life, and I think it would be unfortunate were we unnecessarily to foreclose, as my four brothers would do, our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts, in the light of continuing experience with these problems.

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. . . . In fact, the Government itself has conceded that one grave offense, treason, presents a special case: 'The gravity of this offense is such that we can well assume that, whatever difficulties may be involved in trial far from the scene of the offense . . . the trial should be in our courts.' I see no reason for not applying the same principle to any case where a civilian dependent stands trial on pain of life itself. The number of such cases would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems.

On this narrow ground I concur in the result in these cases.

Mr. Justice CLARK, with whom Mr. Justice BURTON joins, dissenting.

The Court today releases two women from prosecution though the evidence shows that they brutally killed their husbands, both American soldiers, while stationed with them in quarters furnished by our armed forces on its military installations in foreign lands. . . .

Mr. Justice BURTON and I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine under the long-recognized cases of this Court. The opinions were neither written nor agreed to in haste and they reflect the consensus of the majority reached after thorough discussion at many conferences. In fact, the cases were here longer

both before and after argument than many of the cases we decide. We adhere to the views there expressed since we are convinced that through them we were neither “mortgaging the future,” as is claimed, nor foreclosing the present, as does the judgment today. We do not include a discussion of the theory upon which those former judgments were entered because we are satisfied with its handling in the earlier opinions.

Points for Discussion

1. How did the plurality opinion and the two concurrences in judgment differ from each other?

2. Does *Reid v. Covert* prevent a court-martial from trying a civilian accompanying the force in the field, such as a cafeteria worker or truck mechanic who commits murder? See Chapter 16, of this text *infra* for a further discussion regarding trying civilians who are serving with or accompanying an armed force, including the first case decided under the revised version of UCMJ Article 2(a)(10) involving a civilian employee of the Army who was also a citizen of Iraq, *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012).

3. Clarice Covert killed her husband, a master sergeant in the Air Force, by striking him with an ax as he lay sleeping. Dorothy Smith, who happened to be the daughter of an Army General, killed her husband, an Army Colonel, by stabbing him with a knife while he slept. Both wives appeared to have psychiatric problems and the murders had nothing directly to do with their husband’s military service. Imagine, however, that the facts were different and that the wives had committed crimes such as espionage on the military or murder for the purpose of sabotaging a military mission. Could a court-martial try them in such circumstances? For the fascinating telling of complete story of the case, see Brittany Warren, *The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Courts-Martial*, 212 Mil. L. Rev. 133 (2012).

4. This case is said to be the only case in which the Supreme Court overruled its previous judgment on rehearing. It was successfully litigated by Frederick Bernays Wiener, a retired Army judge advocate and distinguished legal scholar at The George Washington University, who gained considerable renown for this accomplishment.

In *Reid v. Covert*, the plurality opinion observes that people of England were outraged that Charles I had used courts-martial to try soldiers for non-military offenses during peacetime. This practice, however, occurs constantly in the United States. The military prosecutes soldiers for crimes that have no military connection and that take place not on any military premises. For example, if a soldier left the garrison, went into town in civilian clothes and used illegal drugs in a private home, he could be tried by a court-martial. Is this constitutional? In *O’Callahan v. Parker*, 395 U.S. 258 (1969), an active duty Army sergeant was charged with breaking into a hotel room in Honolulu, assaulting a young civilian girl, and attempting to rape her. The Supreme Court

held that a court-martial could not exercise jurisdiction over these charges. The Court reasoned:

The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. * * * "Status" is necessary for jurisdiction; but it does not follow that ascertainment of "status" completes the inquiry, regardless of the nature, time, and place of the offense.

Both in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion. Abuses of the court-martial power were an important grievance of the parliamentary forces in the English constitutional crises of the 17th century. The resolution of that conflict came with the acceptance by William and Mary of the Bill of Rights in 1689 which established that in the future, Parliament, not the Crown, would have the power to define the jurisdiction of courts-martial. 1 W. & M., Sess. 2, c. 2. The 17th century conflict over the proper role of courts-martial in the enforcement of the domestic criminal law was not, however, merely a dispute over what organ of government had jurisdiction. It also involved substantive disapproval of the general use of military courts for trial of ordinary crimes.

Parliament, possessed at last of final power in the matter, was quick to authorize, subject to annual renewal, maintenance of a standing army and to give authority for trial by court-martial of certain crimes closely related to military discipline. But Parliament's new power over courts-martial was exercised only very sparingly to ordain military jurisdiction over acts which were also offenses at common law. The first of the annual mutiny acts, 1 W. & M., c. 5, set the tone. It established the general rule that

"noe Man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall Law or in any other manner than by the Judgment of his Peeres and according to the knowne and Established Laws of this Realme."

And it proceeded to grant courts-martial jurisdiction only over mutiny, sedition, and desertion. In all other respects, military personnel were to be subject other manner than by the Judgment of

The jurisdiction of British courts-martial over military offenses which were also common-law felonies was from time to

time extended, but with the exception of one year, there was never any general military jurisdiction to try soldiers for ordinary crimes committed in the British Isles. It was, therefore, the rule in Britain at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court.¹² Evasion and erosion of the principle that crimes committed by soldiers should be tried according to regular judicial procedure in civil, not military, courts, if any were available, were among the grievances protested by the American Colonists.

Early American practice followed the British model. The Continental Congress, in enacting articles of war in 1776, emphasized the importance of military authority cooperating to insure that soldiers who committed crimes were brought to justice. But it is clear from the context of the provision it enacted that it expected the trials would be in civil courts. The "general article," which punished "[a]ll crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war," was interpreted to embrace only crimes the commission of which had some direct impact on military discipline. [W. Winthrop's *Military Law and Precedents* 1123 (1920) (reprint of 2d edition published 1896)]. While practice was not altogether consistent, during the 19th century court-martial convictions for ordinary civil crimes were from time to time set aside by the reviewing authority on the ground that the charges recited only a violation of the general criminal law and failed to state a military offense. *Id.*, at 1124, nn. 82, 88.¹⁶

During the Civil War, Congress provided for military trial of certain civil offenses without regard to their effect on order and discipline, but the act applied only 'in time of war, insurrection, or rebellion.' Act of Mar. 3, 1863, c. 75, § 30, 12 Stat. 736; Rev. Stat. § 1342, Art. 58 (1874). In 1916, on the eve of World War I, the Articles of War were revised, 39 Stat. 650, to provide for military trial, even in peacetime, of certain specific civilian crimes committed by persons "subject to military law" and the general article, Art. 96, was modified to provide for military trial of "all crimes or offenses not capital." In 1950, the Uniform Code of Military Justice extended military jurisdiction to capital crimes as well.

We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time

of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits on an indictment by a grand jury and a trial by a jury of his peers. The power of Congress to make " 'Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights. We were advised on oral argument that Art. 134 is construed by the military to give it power to try a member of the armed services for income tax evasion. This article has been called "a catch-all" that "incorporates almost every Federal penal statute into the Uniform Code." R. Everett, *Military Justice in the Armed Forces of the United States* 68-69 (1956). The catalogue of cases put within reach of the military is indeed long; and we see no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial.

In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection-not even the remotest one-between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

We have accordingly decided that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts.

O'Callahan v. Parker, 395 U.S. at 267-275. But *O'Callahan* was overruled in the following case:

SOLORIO v. UNITED STATES
U.S. Supreme Court
483 U.S. 435 (1987)

Chief Justice REHNQUIST delivered the opinion of the Court.

This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U.C.M.J.) to try a member of the Armed Forces depends on the "service connection" of the offense charged. We hold that it does not, and overrule our earlier decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969).

While petitioner Richard Solorio was on active duty in the Seventeenth Coast Guard District in Juneau, Alaska, he sexually abused two young daughters of fellow coastguardsmen. Petitioner engaged in this abuse over a 2-year period until he was transferred by the Coast Guard to Governors Island, New York. Coast Guard authorities learned of the Alaska crimes only after petitioner's transfer, and investigation revealed that he had later committed similar sexual abuse offenses while stationed in New York. The Governors Island commander convened a general court-martial to try petitioner for crimes alleged to have occurred in Alaska and New York.

There is no "base" or "post" where Coast Guard personnel live and work in Juneau. Consequently, nearly all Coast Guard military personnel reside in the civilian community. Petitioner's Alaska offenses were committed in his privately owned home, and the fathers of the 10- to 12-year-old victims in Alaska were active duty members of the Coast Guard assigned to the same command as petitioner. Petitioner's New York offenses also involved daughters of fellow coastguardsmen, but were committed in Government quarters on the Governors Island base.

After the general court-martial was convened in New York, petitioner moved to dismiss the charges for crimes committed in Alaska on the ground that the court lacked jurisdiction under this Court's decisions in *O'Callahan v. Parker* and *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971). Ruling that the Alaska offenses were not sufficiently "service connected" to be tried in the military criminal justice system, the court-martial judge granted the motion to dismiss. The Government appealed the dismissal of the charges to the United States Coast Guard Court of Military Review, which reversed the trial judge's order and reinstated the charges.

The United States Court of Military Appeals affirmed the Court of Military Review, concluding that the Alaska offenses were service connected within the meaning of *O'Callahan* and *Relford*. 21 M.J. 251 (1986). Stating that "not every off-base offense against a servicemember's dependent is service-connected," the court reasoned that "sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned." . . . We now affirm.

The Constitution grants to Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const., Art. I, § 8, cl. 14. Exercising this authority, Congress has empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J., Arts. 2, 17, 10 U.S.C. §§ 802, 817. The Alaska offenses with which petitioner was charged are each described in the U.C.M.J. Thus it is not disputed that the court-martial convened in New York possessed the statutory authority to try petitioner on the Alaska child abuse specifications.

In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused. *Gosa v. Hayden*, 413 U.S. 665, 673 (1973) (plurality opinion); see *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243 (1960); *Reid v. Covert*, 354 U.S. 1, 22-23 (1957) (plurality opinion) . . . ; cf. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955) This view was premised on what the Court described as the “natural meaning” of Art. I, § 8, cl. 14, as well as the Fifth Amendment’s exception for “cases arising in the land or naval forces.” *Reid v. Covert*, *supra*, 354 U.S., at 19; *United States ex rel. Toth v. Quarles*, *supra*, 350 U.S., at 15. As explained in *Kinsella v. Singleton*, *supra*:

“The test for jurisdiction . . . is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces.’ . . .” *Id.*, 361 U.S., at 240-241.

“Without contradiction, the materials . . . show that military jurisdiction has always been based on the ‘status’ of the accused, rather than on the nature of the offense. To say that military jurisdiction ‘defies definition in terms of military “status” ’ is to defy the unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.” *Id.*, at 243.

Implicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress:

“[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.” *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) (footnote omitted).

In 1969, the Court in *O’Callahan v. Parker* departed from the military status test and announced the “new constitutional principle” that a military tribunal may not try a serviceman charged with a crime that has no service connection. See *Gosa v. Hayden*, *supra*, 361 U.S., at 673. Applying this principle, the *O’Callahan* Court held that a serviceman’s off-base sexual assault on a civilian with no connection with the military could not be tried by court-martial. On

reexamination of *O'Callahan*, we have decided that the service connection test announced in that decision should be abandoned.

The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting Congress authority, inter alia, to regulate commerce among the several States, to coin money, and to declare war. On its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section. Whatever doubts there might be about the extent of Congress' power under Clause 14 to make rules for the "Government and Regulation of the land and naval Forces," that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services. As noted by Justice Harlan in his *O'Callahan* dissent, there is no evidence in the debates over the adoption of the Constitution that the Framers intended the language of Clause 14 to be accorded anything other than its plain meaning. Alexander Hamilton described these powers of Congress "essential to the common defense" as follows:

"These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. . . .

* * *

". . . Are fleets and armies and revenues necessary for this purpose [common safety]? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them." *The Federalist* No. 23, pp. 152-154 (E. Bourne ed. 1947).

The *O'Callahan* Court's historical foundation for its holding rests on the view that "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion." 395 U.S., at 268. According to the Court, the historical evidence demonstrates that, during the late 17th and 18th centuries in England as well as the early years of this country, courts-martial did not have authority to try soldiers for civilian offenses. . . .

The *O'Callahan* Court's representation of English history following the Mutiny Act of 1689, however, is less than accurate. In particular, the Court posited that "[i]t was . . . the rule in Britain at the time of the American Revolution that a soldier could not be tried for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court." 395 U.S., at 269. In making this statement, the Court was apparently referring to Section XI, Article I, of the British Articles of War in effect at the time of the Revolution. This Article provided:

"Whenever any Officer or Soldier shall be accused of a Capital Crime, or of having used Violence, or committed any Offence against the Persons or Property of Our Subjects, . . . the Commanding Officer, and Officers of every

Regiment, Troop, or Party to which the . . . accused shall belong, are hereby required, upon Application duly made by, or in behalf of the Party or Parties injured, to use . . . utmost Endeavors to deliver over such accused . . . to the Civil Magistrate." British Articles of War of 1774, reprinted in G. Davis, *Military Law of the United States* 581, 589 (3d rev. ed. 1915).

This provision, however, is not the sole statement in the Articles bearing on court-martial jurisdiction over civilian offenses. Specifically, Section XIV, Article XVI, provided that all officers and soldiers who

"shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by Order of the then Commander in Chief of Our Forces, to annoy Rebels or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court Martial." *Id.*, at 593.

Under this provision, military tribunals had jurisdiction over offenses punishable under civil law. Accordingly, the *O'Callahan* Court erred in suggesting that, at the time of the American Revolution, military tribunals in England were available "only where ordinary civil courts were unavailable." 395 U.S., at 269, and n. 11.

The history of early American practice furnishes even less support to *O'Callahan's* historical thesis. The American Articles of War of 1776, which were based on the British Articles, contained a provision similar to Section XI, Article I, of the British Articles, requiring commanding officers to deliver over to civil magistrates any officer or soldier accused of "a capital crime, . . . having used violence, or . . . any offence against the persons or property of the good people of any of the United American States" upon application by or on behalf of an injured party. It has been postulated that American courts-martial had jurisdiction over the crimes described in this provision where no application for a civilian trial was made by or on behalf of the injured civilian. Indeed, American military records reflect trials by court-martial during the late 18th century for offenses against civilians and punishable under civil law, such as theft and assault.

The authority to try soldiers for civilian crimes may be found in the much-disputed "general article" of the 1776 Articles of War, which allowed court-martial jurisdiction over "[a]ll crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline." American Articles of War of 1776, Section XVIII, Article 5. Some authorities, such as those cited by the *O'Callahan* Court, interpreted this language as limiting court-martial jurisdiction to crimes that had a direct impact on military discipline. Several others, however, have interpreted the language as encompassing all noncapital crimes proscribed by the civil law. . . .

George Washington also seems to have held this view. When informed of the decision of a military court that a complaint by a civilian against a member

of the military should be redressed only in a civilian court, he stated in a General Order dated February 24, 1779:

"All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other." 14 *Writings of George Washington* 140-141 (J. Fitzpatrick ed. 1936).

We think the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of Clause 14 which *O'Callahan* imported into it. There is no doubt that the English practice during this period shows a strong desire in that country to transfer from the Crown to Parliament the control of the scope of court-martial jurisdiction. And it is equally true that Parliament was chary in granting jurisdiction to courts-martial, although not as chary as the *O'Callahan* opinion suggests. But reading Clause 14 consistently with its plain language does not disserve that concern; Congress, and not the Executive, was given the authority to make rules for the regulation of the Armed Forces.

* * *

When considered together with the doubtful foundations of *O'Callahan*, the confusion wrought by the decision leads us to conclude that we should read Clause 14 in accord with the plain meaning of its language as we did in the many years before *O'Callahan* was decided. That case's novel approach to court-martial jurisdiction must bow "to the lessons of experience and the force of better reasoning." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting). We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged. The judgment of the Court of Military Appeals is

Affirmed.

Justice STEVENS, concurring in the judgment.

Today's unnecessary overruling of precedent is most unwise. The opinion of the United States Court of Military Appeals demonstrates that petitioner's offenses were sufficiently "service connected" to confer jurisdiction on the military tribunal. . . .

Justice MARSHALL, with whom Justice BRENNAN joins, and with whom Justice BLACKMUN joins . . . [in part], dissenting..

* * *

The requirement of service connection recognized in *O'Callahan* has a legitimate basis in constitutional language and a solid historical foundation. It should be applied in this case.

* * *

Points for Discussion

1. If a court-martial could not try soldiers for crimes that are not service related, could they still be tried by some other court?
2. What advantages and disadvantages did the *O'Callahan* decision have for soldiers and the Armed Forces?
3. Could Congress by statute strip courts-martial of jurisdiction to try servicemembers for crimes that are not service related? If so, why might Congress not have done so?

Overlapping Jurisdiction

Servicemembers who commit crimes in the United States potentially could face prosecution in any of three different court systems. For example, suppose that Army Private Pogie sells cocaine in Virginia. He could be prosecuted in a court-martial for violating Article 112a, UCMJ. Alternatively, he could be prosecuted in federal court for violating federal anti-narcotics laws applicable to all persons within the United States. In addition, he could be prosecuted in Virginia state court for violating a Virginia state anti-narcotics law. Private Pogie's status as a servicemember does not exempt him from the application of any federal or state laws.

That said, it is most likely that Private Pogie would be tried in a court-martial. The Department of Justice and the Department of Defense have entered into a memorandum of understanding, reprinted in Appendix 3 of the Manual for Courts-Martial, that establishes a presumption that servicemembers will be tried in courts-martial rather than federal district court for crimes usually prosecuted under the UCMJ. The Fifth Amendment's prohibition against Double Jeopardy prevents a servicemember from being tried by both a federal district court and a court-martial.

Most state prosecutors are eager to allow military prosecutors to bring cases against servicemembers. But nothing prevents state prosecution of a servicemember for violating state law. Indeed, because the states and federal government are separate sovereigns, a servicemember could be tried in both a state court and court-martial for the same offense without violating the prohibition against double jeopardy. The Supreme Court has explained:

The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." *United States v. Lanza*, 260 U.S. 377, 382 (1922).

Heath v. Alabama, 474 U.S. 82, 88 (1985). Although dual prosecutions are rare, they do happen. Consider the following case:

UNITED STATES v. SCHNEIDER
U.S. Army Court of Military Review
34 M.J. 639 (A.C.M.R. 1992)

De GIULIO, Senior Judge:

Appellant [Major David P. Schneider, U.S. Army] was tried by general court-martial for attempted murder of his wife and two specifications of conduct unbecoming an officer and a gentleman by committing perjury and by having sexual intercourse with and otherwise engaging in a sexual or other improper affair with a woman not his wife in violation of Articles 80 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 933 (1982) [hereinafter UCMJ]. Contrary to his pleas, a court consisting of officer members found him guilty and sentenced him to dismissal, confinement for twenty-three years, and total forfeitures. The convening authority approved the sentence except that he conditionally suspended the forfeiture in excess of \$400.00 pay per month until execution of the dismissal.

Appellant asserts several errors which we find to be without merit. We affirm the findings of guilty and the sentence.

This is a case where the offenses were motivated by love and money. In 1987, appellant was assigned to the Lawrence Livermore National Laboratory in California. He moved to the area with his wife and two children. While working at the laboratory, he met Paula, with whom he worked for a time on a daily basis. In August 1987, Paula's friends asked Paula, the appellant, and appellant's family to accompany them on a boat trip. Appellant indicated that his wife and children would not go because his wife feared for the safety of the children but, if permitted, he would go. During the boat trip which lasted overnight, appellant and Paula shared adjoining quarters at the opposite end of the boat from where the other passengers were quartered. In April of 1989, according to Paula, her relationship with appellant became sexual and intimate.²

In July 1989, appellant told his wife that he had to go on a mission for the laboratory; but, due to its classified nature, he could not tell her of its location, other details, or point of contact for emergencies. In fact, appellant and Paula traveled to Hawaii where they stayed together in the King Kamehameha Hotel, Kailua, Hawaii.

In 1989, appellant was assigned to attend the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas. At Fort Leavenworth, he moved his family into government quarters. In August 1989, he met with an insurance agent. Although the agent recommended appellant increase insurance coverage on himself, appellant declined to do so but stated he wanted an

² Paula did not testify at the court-martial because she could not be found. Her prior testimony at appellant's state criminal trial was admitted into evidence. It is evident from that testimony that she was reluctant to testify and had refused to talk to prosecutors before she testified.

additional \$150,000 coverage on his wife, Debbie. This policy, with appellant as the beneficiary, was effective 1 October 1989.

In the fall of 1989, appellant purchased a home in Tracey, California. He convinced Debbie that her name should not be on the title. He used the proceeds from the sale of the family home near his prior assignment for the purchase of this house. He told her that he had to go to California to take care of details of this purchase over Labor Day weekend of 1989. He spent that weekend with Paula. Paula told a friend that it was the best weekend of her life.

Numerous telephone calls were made between appellant at Fort Leavenworth and Paula in California.

After returning home from a party on the evening of 20 October 1989, Debbie went to bed and fell asleep. She awoke with intense pain in her head and was pulled up to a sitting position on the bed. She saw appellant standing next to the bed. The toilet tank lid from the bathroom was on the floor near his feet.

The toilet tank lid was broken. She felt a baseball-sized lump on her head. The lump was "oozing."

She brushed small pieces of porcelain from her hair. She described appellant, who was normally calm and cool in time of crisis, as visibly shaken. He stated repeatedly, "you must have hit your head." Appellant assisted her to the bathroom where she sat on the toilet. When she began shaking, he helped her to the bathroom floor and covered her with a quilt. He wanted to take her for medical attention but she wanted only to go back to bed. He assisted her to the bed. The next morning, he took her to the medical facility. When asked what had happened to her head, appellant stated to medical personnel that Debbie was sleepwalking, picked up the toilet tank lid, tripped, and hit her head. The statement that she was injured while sleepwalking was recorded on medical documents. Evidence of record indicates appellant's wife had never walked in her sleep. When she returned home, Debbie found small pieces of the toilet tank lid on her pillow. This incident was the subject of the specification alleging attempted murder.

On 28 October 1989, appellant took his wife for a "romantic" overnight stay in a local downtown hotel. The room was on the top floor. After dinner he tried to get her to drink more champagne than she normally consumed. After they went to their room, appellant tried to get her out on the balcony. She refused because it was too cold and because she was afraid of heights.

On 4 November 1989, appellant and his wife were to attend the Armor Ball. Without her knowledge, appellant made arrangements for another "romantic" night at Embassy Suites Hotel. She discovered his plans when the babysitter told him she could not stay overnight. Appellant decided to go to the hotel after the ball anyway but to return home early. At the ball Debbie enjoyed the dancing and only left early to go to the hotel at appellant's insistence. Although appellant had asked for an eighth floor room when making reservations, he was given a room on the seventh floor.

Two sixteen-year-old girls, Chantel and Brandi, who were on the eighth floor, observed appellant and his wife when they entered the hotel. They were attracted to the couple because of their "extravagant attire." They watched appellant and his wife ride the glass elevator to the eighth floor and watched them walk side by side down the hallway. Brandi looked away. Chantel saw appellant make vigorous hand movements in front of his wife as she faced him with her back to the rail. She observed appellant put his left arm around Debbie where the rail met her back, put his right hand on her chest, and flip her over the rail. Chantel watched Debbie plunge 70-80 feet and hit a table on the atrium floor.³ Chantel watched appellant look over the railing, walk toward the elevator, walk back to the railing and call for someone to call an ambulance. He then walked back to the elevator and proceeded down. Testimony indicates that appellant's conduct when he reached the atrium floor can be described as cool and collected. Debbie's pelvis was fractured in thirteen places. Both left and right femurs were broken in several places, with one bone penetrating her abdominal cavity, damaging her colon. She also had a fractured ankle and a fractured rib. Her colon injury required a temporary colostomy. While his wife was being wheeled into the operating room, he asked the doctor to give her a "tummy tuck." Debbie's roommate at the hospital and the roommate's mother described appellant's attitude toward his wife while she was hospitalized as cool and distant. He was also described as a "jerk" in his attitude toward his wife.

On 2 December 1989, Debbie returned home from the hospital confined to a wheelchair. On 4 December, appellant told her that he didn't love her anymore and was getting a divorce. On 5 December, in an interview with local police, appellant admitted having an affair with Paula, stated he loved her and hoped to marry her when his divorce was final. On 6 December, appellant filed for divorce. Later, appellant was charged by local authorities with first degree assault for the incident at the Embassy Suites Hotel on 4 November. On 18 December, appellant moved to have his petition for divorce dismissed.

At his trial for attempted murder in state court, appellant testified that, at the Embassy Suites Hotel, they mistakenly went to the eighth floor. He told his wife that he wanted to carry her across the threshold. He picked her up and was carrying her at high port when she told him they were in the wrong place. He turned and in doing so tripped. His wife slipped from his grasp, causing her to fall over the balcony railing to the atrium floor. He testified that he did not intend to injure his wife. Appellant was acquitted of this offense in the state court.

At the state trial, appellant also testified regarding the October toilet tank lid incident. He stated that his wife went to bed, and he stayed up to do his school homework. Before he went to bed, he noted the toilet was running. He removed the tank lid and set it down against the cabinet. He fixed the toilet but decided to leave the tank lid off. He then went to bed and to sleep. He was

³Debbie has no memory of this event from the time she entered the hotel.

awakened by a motion on the bed or noise. His wife was sitting on the bed, moaning, with her hand to her head. He got up to go to her but stepped on something. When he turned on the light, he discovered it to be "shards of obviously pieces of the toilet tank lid." She complained her head hurt, but upon his inquiry stated she didn't know what had happened. He stated that it was clear to him that she had hurt herself somehow. He helped her to the bathroom where she started to go into shock. He sat her on the toilet and turned on the faucet in the tub, in case he needed water. He then wrapped her in a blanket and checked to see if she could discern the number of fingers he held before her. He wanted to take her to the hospital but she refused. He concluded she did not have a fracture, gave her aspirin, and took her to bed. He testified at his state trial that he told personnel at the hospital that, "She was probably sleepwalking. I don't know or words to that effect." He testified, "I don't believe I would have told them she was sleepwalking, 'cause Debbie has never slept-walked, and so I wouldn't say that."

* * *

. . . [A]ppellant contends that the military judge erred by denying a motion to dismiss the specification of perjury because it violated appellant's right against double jeopardy. Appellant's argument is that his testimony in his state court trial went to the heart of the issue of the offense for which he was tried and was determined favorable to him. Thus, he argues, the government is collaterally estopped from charging appellant with perjury for his testimony. We do not agree with appellant that double jeopardy applies here.

The doctrine of collateral estoppel has not been applied in military criminal law. *United States v. Cuellar*, 27 M.J. 50 (C.M.A. 1988), cert. denied, 493 U.S. 811 (1989). We see no reason to apply it here. Additionally, prosecution of an offense in state court does not normally bar a federal prosecution of the same criminal matter. *Heath v. Alabama*, 474 U.S. 82 (1985); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922). We find no merit in this assertion of error.

* * *

The findings of guilty and the sentence are affirmed.

Judge HAESSIG and Judge ARKOW concur.

[The Court of Military Appeals affirmed this decision, 38 M.J. 387 (C.M.A. 1993), and the Supreme Court denied certiorari, 511 U.S. 1106 (1994).—Ed.]

Points for Discussion

1. Why do you think both state and military authorities wanted to prosecute Major Schneider? Is it unfair that he must face two prosecutions?
2. Would it make any difference if the accused was acquitted of capital murder in state court and then was recalled from retirement to face capital charges at a court-martial? For a detailed description of the crime and

jurisdiction in the case see *Hennis v. Hemlick*, 2012 WL 120054 (4th Cir. 2012) and *United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2020).

1-4. Role of the Commander and Unlawful Command Influence

The Military Justice system rests on two key postulates that are not inherently in conflict, but that may collide in some instances. The first postulate, clearly and concisely articulated by the President in the Manual for Courts-Martial, is: "Commanders are responsible for good order and discipline in their commands." MCM, pt. V, ¶1.d.(1). The second postulate, expressed by Congress directly in the UCMJ, is: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof" Article 37, UCMJ, 10 U.S.C. § 837(a).

The first postulate rests on the idea that a fighting force will be ineffective and perhaps dangerous unless it obeys orders and deports itself in a controlled manner. The only person who can achieve good order and discipline is the unit's commander. The commander accomplishes this difficult task primarily through strong leadership and effective drills and training. But these measures are not always enough. When servicemembers commit serious misconduct, the commander may decide that it is necessary to invoke the military justice system. Crimes that go unprosecuted may lead to other wrongdoing, and the breakdown of all order in the unit.

The second postulate rests on the idea that the military justice system must be just. A court-martial must be a real court, where guilt or innocence is determined by disinterested judges and panel members based solely on the facts and the law. Nothing could harm morale more, and in turn frustrate the mission of a military unit, than a belief among servicemembers that they may be punished for acts they did not commit or that they may be treated overly harshly for crimes they did commit.

A potential conflict may arise because of the hierarchical nature of military life. It is not difficult to imagine that, without constant vigilance, subordinate participants in the military justice system could be influenced by their superiors, resulting in unfairness to the accused. The general or admiral who convenes a court-martial in the belief that a prosecution is necessary typically is senior in rank to the military judge and the military lawyers involved in the trial, is senior in rank to all of the witnesses who are to testify, and is senior in rank to all of the officers and enlisted members who sit in judgment of the accused. The system must provide protections so that everyone involved is not improperly influenced from those above.

The military justice system attempts to prevent this conflict in several ways. It makes improper command influence a crime. It pushes the initial decisions on how to address misconduct to the lowest level. As described above, the servicemember's immediate commander decides in the first instance how to address alleged misconduct (consisting of "non-covered offenses" and "covered

offenses" that the special trial counsel defers¹). The immediate commander can forward the matter to a superior commander, or the superior commander can take the case from the immediate commander, but the superior commander cannot tell the immediate commander what to do. There also can be no service-wide or unit-wide prosecutorial policies.

How well do these measures work? In general, most observers consider the military justice system to be fair. Occasionally, however, allegations of misconduct arise.

What constitutes unlawful command influence as defined in Article 37, UCMJ, has been provided through years of case law from the military appellate courts. As, the Court of Appeals for the Armed Forces in *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017) explained:

[t]wo types of unlawful command influence can arise in the military justice system: *actual* unlawful command influence and *the appearance of* unlawful command influence. From the outset, actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. See *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991); see also *United States v. Allen*, 31 M.J. 572, 584 (N.M.C.M.R. 1990) ("Unlawful command influence . . . is impermissible command control.").

* * *

Chief Judge Erdmann wove together the various strands of our jurisprudence on this topic a decade ago in *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). In doing so, he first stated that in order for a claim of actual unlawful command influence to prevail, an accused must meet the burden of demonstrating: (a) facts, which if true, constitute unlawful command influence; (b) the court-martial proceedings were unfair to the accused (i.e., the accused was prejudiced); and (c) the unlawful command influence was the cause of that unfairness. *Id.*

The following cases further clarify the standards and provide modern illustrations.

¹ See Chapter 1-2 and accompanying, The Court-Martial "Covered Offenses" Process Chart and The Court-Martial "Non-Covered Offenses" Process Chart, of this text, *supra*, for a discussion of the bifurcated military justice system.

UNITED STATES v. HORNE
U.S. Court of Appeals for the Armed Forces
82 M.J. 283 (C.A.A.F. 2022)

Judge MAGGS delivered the opinion of the Court.

Prior to the trial in this sexual assault case, a trial counsel and a special victim's counsel (SVC) took actions to dissuade the Air Force Office of Special Investigation (AFOSI) from interviewing a witness whom the trial counsel believed might provide exculpatory evidence. Appellant [Staff Sergeant Brandon M. Horne, U.S. Air Force] contends that these actions constituted apparent unlawful command influence in violation of Article 37, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 837 (2012).² He therefore asks that we set aside the findings and sentence adjudged by the court-martial and dismiss with prejudice the sole charge and specification in this case. Focusing on one requirement for granting relief for apparent unlawful command influence, we granted review of the assigned issue of "whether the conduct of the trial counsel and special victim's counsel created an intolerable strain on the public's perception of the military justice system." After a careful consideration of the record and the arguments of the parties, we conclude the Government has demonstrated beyond a reasonable doubt that the answer is no. Accordingly, Appellant is entitled to no relief under our precedents. See *United States v. Boyce*, 76 M.J. 242, 249-50 (C.A.A.F. 2017) (providing the applicable rules regarding apparent unlawful command influence).

I. Background

In July 2017, while in Germany on temporary duty, Appellant [Staff Sergeant Brandon M. Horne, U.S. Air Force] and the victim spent an evening drinking with others on a patio outside the hotel where the victim was staying. At one point during the evening, the victim sent her husband a text message that read: "Falling asleep...I love you babe.[.] text me in the morning." The victim, however, continued to drink with her companions on the patio.

Eventually the victim returned to her hotel room. Later that night, Appellant knocked on her hotel door, pushed his way into the room, shoved her onto the bed, undressed her, and without her consent penetrated her vagina with his penis. The victim reported the offense the next day and called her husband in the United States and told him what had happened.

An AFOSI agent subsequently made an appointment to interview the victim's husband in October 2017. Before the interview took place, however, the SVC for the victim called the agent. The SVC told the agent that the interview "needed to be cancelled" and that the husband should only be contacted through the SVC.

² Congress amended Article 37, UCMJ, in 2019, after the events at issue in this case occurred. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(a), 133 Stat. 1198, 1359 (2019). We do not address the amended version of the article in this case.

Around the same time, the SVC also contacted the trial counsel assigned to Appellant's case, and told her that the attempted interview upset the victim and that she was thinking about dropping out of the case altogether. The trial counsel then emailed an AFOSI agent and said that "[f]rom a prosecution standpoint, we do not believe that an [AF]OSI interview of the husband is necessary nor relevant enough to outweigh the risk of the Victim dropping out of the process entirely." The AFOSI agent replied that contacting the husband was appropriate for them to do and that an interview was within AFOSI's rights, but AFOSI nevertheless acquiesced in trial counsel's request and did not interview the husband.

In January 2018, while the investigation of the victim's allegations was continuing, the SVC assisted the victim in preparing a sworn statement, and the trial counsel provided the SVC with a slide deck as a reference for charging theories. At one point, the victim emailed a draft of the statement to the SVC asking whether it was "what the legal office [was] looking for." In response, the SVC responded with comments, one of which stated: "If you actually felt the penetration of his penis, please do your best to described it as you detail the situation." The victim subsequently included the following sentence in her sworn statement: "I felt his penis pushing through my vagina." The trial defense counsel, however, specifically told the military judge: "We are not alleging that the statement was materially altered."

In February 2018, the convening authority referred one charge and specification of sexual assault to a general court-martial. In May 2019, Appellant filed a pretrial motion to dismiss the charge and specification with prejudice and to suppress the victim's testimony on the basis of unlawful command influence. Appellant asserted that the SVC and trial counsel had collaborated unlawfully to limit the scope of the AFOSI investigation and to shape the victim's testimony. At this point, the trial counsel and the SVC had been released from their roles as attorneys in this case and were replaced by other counsel.

In May and July 2018 the military judge held hearings under Article 39(a), UCMJ 10 U.S.C. § 839(a) (2018), on the motion. Shortly before the first hearing session, counsel for both parties interviewed the husband. During the hearings, the victim, her husband, the trial counsel, the SVC, and the AFOSI agents all testified. In addition to the facts described above, evidence emerged that the Air Force uses metrics to encourage the timely processing of cases, that three previous sexual assault trials handled by the trial counsel's office had resulted in findings of not guilty, and that the trial counsel involved was highly regarded by her superior.

In November 2018, the military judge sent counsel an email briefly announcing that he was denying Appellant's motion to dismiss for unlawful command influence. The trial took place in December 2018. A general court-martial with officer and enlisted members found Appellant guilty contrary to his plea, of one charge and specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Supp. IV 2013-2017). The court-martial sentenced Appellant to be reduced to grade E-4 and to be dishonorably

discharged.

After the trial, in May 2019, the military judge supplemented his email ruling on the motion to dismiss with a lengthy written ruling. Two of the military judge's findings of fact were (1) that an "earlier pretrial interview of [the victim's] husband, by either a representative for the government or any member of the defense, would [not] have developed additional information or information contrary to any made available through access to the witness in May 2018" and (2) that there was no "motive to gain some unfair advantage" on the part of the trial counsel. Consistent with his prior email ruling, the military judge concluded: "The defense has not shown some evidence that [unlawful command influence] occurred. Assuming it has, however, the government has demonstrated beyond a reasonable doubt that the facts as presented do not constitute [unlawful command influence]...."

The convening authority approved the adjudged sentence, and the United States Air Force Court of Criminal Appeals (AFCCA) affirmed. *United States v. Horne*, No. ACM 39717, 2021 CCA LEXIS 261, at *120, 2021 WL 2181169, at *39 (A.F. Ct. Crim. App. May 27, 2021). In addressing Appellant's argument that the findings and sentence should be set aside and dismissed because of apparent unlawful command influence, the AFCCA "assume[d] for purposes of [its] analysis that [the] combined actions of [the SVC and trial counsel] may constitute 'some evidence' of the appearance of unlawful influence." *Id.* at *51, 2021 WL 2181169, at *17. But the AFCCA then concluded that the Government had shown beyond a reasonable doubt that "the alleged unlawful influence did not place an intolerable strain upon the public's perception of the military justice system, and that an objective, disinterested, fully informed observer would not harbor a significant doubt about the fairness of Appellant's court-martial." *Id.* at *56, 2021 WL 2181169, at *19 (citing *Boyce*, 76 M.J. at 249–50). One judge dissented from the AFCCA's judgment, concluding that the evidence was factually insufficient to prove Appellant's guilt beyond a reasonable doubt. *Id.* at *120–21, 2021 WL 2181169, at *39 (Johnson, C.J., dissenting).

II. Discussion

A. Standards of Review and Applicable Law

This Court must accept the military judge's findings of fact unless the findings are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). "A finding of fact is clearly erroneous when there is no evidence to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (citations omitted) (internal quotation marks omitted). This Court reviews de novo the legal question of whether the facts establish apparent unlawful command influence. *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020).

This Court has held that the version of Article 37, UCMJ, applicable to this case prohibits both actual and apparent unlawful command influence. *Boyce*,

76 M.J. at 247–49. In this appeal, however, Appellant alleges only apparent unlawful command influence. In *Bergdahl*, this Court concisely described the multistep process for determining whether apparent unlawful command influence occurred and whether an appellant is entitled to relief. This Court stated:

To make a prima facie case of apparent unlawful command influence, an accused bears the initial burden of presenting “some evidence” that unlawful command influence occurred. *Boyce*, 76 M.J. at 249 (internal quotation marks omitted) (quoting *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). “This burden on the defense is low, but the evidence presented must consist of more than ‘mere allegation or speculation.’ ” *Id.* (quoting *Salyer*, 72 M.J. at 423).

Once the accused meets the “some evidence” threshold, the burden shifts to the government to prove beyond a reasonable doubt that either (a) the “predicate facts proffered by the appellant do not exist,” or (b) “the facts as presented do not constituted unlawful command influence.” *Id.* (citing *Salyer*, 72 M.J. at 423; *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999)). If the government cannot succeed at this step, it must prove beyond a reasonable doubt that the unlawful command influence “did not place an intolerable strain upon the public’s perception of the military justice system and that objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.” *Id.* at 249 (alteration in original) (internal quotation marks omitted) (citation omitted).

Bergdahl, 80 M.J. at 234

In *United States v. Proctor*, 81 M.J. 250 (C.A.A.F. 2021), this Court addressed two recurring issues in apparent unlawful command influence cases. These issues are, first, the relevance of prejudice to the accused, and second, the relevance of ameliorative efforts to address the unlawful command influence. *Id.* at 255. The Court explained: “Unlike actual unlawful command influence, a meritorious claim of the appearance of unlawful command influence does not require prejudice to an accused... Instead, the prejudice is what is done to the ‘public’s perception of the fairness of the military justice system as a whole.’ ” *Id.* (quoting *Boyce*, 76 M.J. at 248). But that does not mean that prejudice to the accused is irrelevant. The Court in *Proctor* further stated: “A significant factor in determining whether the unlawful command influence created an intolerable strain on the public’s perception of the military justice system is whether the ‘appellant was not personally prejudiced by the unlawful command influence, or the prejudice caused by the unlawful command influence was later cured.’ ” *Id.* (quoting *Boyce*, 76 M.J. at 248 n.5).”

In applying the apparent unlawful command doctrine, this Court has not required the parties actually to produce what one court has called “credible

evidence that any substantial segment of the general population suffered any loss of confidence in the military justice system." *United States v. Ashby*, No. NMCCA 200000250, 2007 CCA LEXIS 235, at *96, 2007 WL 1893626, at *31 (N-M. Ct. Crim. App. June 27, 2007), *aff'd* 68 M.J. 108 (C.A.A.F. 2009), *cert. denied* 559 U.S. 940 (2010). Instead, the Court simply has assessed the aggravating and mitigating facts and circumstances and then decided, in its own estimation, whether the Government's conduct "place[d] an intolerable strain upon the public's perception of the military justice system." *Boyce*, 76 M.J. at 249 (internal quotation marks omitted) (citation omitted). Amicus Protect Our Defenders criticizes the objectivity and propriety of this practice, suggesting that the apparent unlawful command influence doctrine in reality may be "simply a cover for a military judge to rule in accordance with his own personal views on the fairness of a court-martial." Whatever the merits of this criticism, we do not consider the issue now because the parties do not challenge our precedent in this case but instead simply disagree about the application of the current doctrine.

B. Analysis

In this case, the Government makes no effort to dispute that Appellant has made a prima facie case of apparent unlawful command influence. The Government also does not assert that it can prove beyond a reasonable doubt either that the predicate facts do not exist or do not constitute unlawful command influence. Instead, the Government focuses only on the final step in the apparent unlawful command influence analysis described above. Relying on our decision in *Proctor*, 81 M.J. at 257, and consistent with the assigned issue in this case, the Government asserts that this Court can resolve the case "solely based on whether the government has proven beyond a reasonable doubt that the conduct at issue did not place an intolerable strain on the public's perception of the military justice system."

The Government cites five facts and circumstances in support of its position that we consider the most persuasive. The Government asserts: (1) the parties fully litigated the unlawful command influence issue before trial; (2) the trial counsel and SVC were released from their roles in the case before trial; (3) the Government disclosed all written communications related to the alleged unlawful influence; (4) the military judge found that the trial counsel did not have an intent to gain an advantage; and (5) the military judge found that the actions to discourage the AFOSI investigations ultimately did not cause Appellant any personal prejudice. The Government contends that these and other facts and circumstances establish beyond a reasonable doubt that the conduct of the trial counsel and SVC did not place an intolerable strain on the public's perception of the military justice system.

Appellant disagrees, identifying in its briefs at least fifteen facts and circumstances that Appellant believes prevent the Government from meeting its high burden of proof. The matters cited by Appellant include: (1) the trial counsel's "intentional abandonment of evidence believed to be exculpatory in nature"; (2) the trial counsel's improper "influence over an independent investigative

agency”; (3) the involvement of “judge advocates—persons who should know better” in the misconduct; (4) the trial counsel’s ceding of the Government’s “sovereign authority to the SVC and the named victim to determine which witnesses to interview”; (5) the manner in which the SVC leveraged his role “to become the most influential decision maker in what is statutorily designed to be a commander-driven military justice system”; (6) the “highly politicized climate surrounded sexual assault in the military”; (7) the “significant” role of “Article 120, UCMJ, litigation within the Armed Forces”; (8) the “lack of protections to check prosecutorial overreach” in the military justice system; (9) the “arbitrary [case] processing metrics used to bolster officer performance reports” in the Air Force JAG Corps; (10) the “nominal” remedial actions taken by the Government in response to the misconduct; (11) the dissenting opinion at the AFCCA on the issue of the factual sufficiency of the evidence against Appellant; (12) the “prosecuting legal office’s lack of sexual assault conviction in the two years leading up to Appellant’s case” and trial counsel’s “involvement in those acquittals”; (13) the improper collaboration of the trial counsel and special victim’s counsel “regarding the substance of the named victim’s sworn witness statement”; (14) the departure from the norm that “charging decisions are typically made *after* review of the evidence”; and (15) the appearance that the “purpose and timing of the [military judge’s] written ruling primarily served as insulation against appellate scrutiny.” Appellant contends that these facts and circumstances taken together establish at least a reasonable doubt about whether the conduct at issue created an “intolerable strain” on the public’s perception of the military justice system.

Before assessing the merits of the parties’ respective positions, we first commend both parties for advancing specific arguments with respect to the “intolerable strain” element of the apparent unlawful command influence doctrine. Under our precedent, we must consider “all the facts and circumstances” in determining whether apparent unlawful command influence occurred and whether the Appellant is entitled to relief. *Boyce*, 76 M.J. at 249 (internal quotation marks omitted) (citation omitted). Without specific arguments highlighting aggravating and mitigating facts and circumstances, any review of these issues would be very difficult.

Turning to the merits, we agree that some of the facts and circumstances that Appellant has identified would harm the public’s perception of the military justice system. Indeed, matters (1) through (5) generally concern a point that the Government itself concedes in its brief, namely, that the efforts of trial counsel and SVC “to discourage law enforcement agents from interviewing [the victim’s husband]—an outcry witness—were unwise and inadvisable” because neither side “benefits when [AF]OSI fails to fully investigate a case.” We also specifically agree that trial counsel, as a judge advocate, should have known better than to discourage an AFOSI investigation into potentially exculpatory evidence.

We cannot agree, however, that all the facts and circumstances that Appellant has asserted carry much weight. Matters (6) through (9) concern general

features of the military justice system that have little if any relevance to the question of whether the conduct of those involved in this case created an intolerable strain on the public's perception of the military justice system. Although matters (10) through (12) are more case-specific, they are marginal in significance. In raising matters (13) and (14), Appellant implies that the victim was improperly influenced when preparing her sworn statement. But the aggravating force of this suggestion is undercut in our view because trial defense counsel specifically told the military judge: "We are not alleging that the statement was materially altered." Finally, the record provides no basis for the suggestion in matter (15) that the military judge issued his post-trial written ruling on the unlawful command influence issue "primarily...as insulation against appellate scrutiny."

Given that at least some of the facts and circumstances that Appellant has cited are validly characterized as prejudicial to the military justice system, the question is then whether the Government has met its burden to establish beyond a reasonable doubt that the conduct of the trial counsel and SVC did not place an intolerable strain on the public's perception of the military justice system. We believed that it has. As the Government asserts, the full litigation of Appellant's allegations before trial reflected well on the military justice system. The litigation showed that the military judge realized the importance of resolving the matter before trial. All the relevant parties—the victim, her husband, the trial counsel, the special victim's counsel, and the AFOSI agents—testified about what happened. The military judge entertained extensive briefing and argument on the question and granted two of Appellant's requested remedies. Fair process of this kind, especially when undertaken in advance of trial, may largely if not completely prevent the appearance of unlawful command influence from placing a strain on the military justice system. In this regard, the present appeal is notably different from *United States v. Riesbeck*, 77 M.J. 154, 159 (C.A.A.F. 2018), where the military judge dismissed an allegation of unlawful command influence, "blithely asserting the issues could be worked out on appeal rather than actually investigating the allegation.

We also agree with the Government that the release of the original trial counsel and the original SVC was a significant—not merely "nominal"—ameliorative measure. Because no one else was responsible for their conduct, their release surely helped the public perception of the military justice system. And while certainly true—in Appellant's words—that judge advocates "should [have] know[n] better," the military judge found as a fact that trial counsel did not have an intent to gain an advantage. Because the wrongful acts were not coupled with an improper motivation, the public would likely see them more as very regrettable mistakes but nothing worse. Mistakes of this kind may lessen confidence in the military justice system, but in this instance we think that they fall short of creating an intolerable strain.

Finally, the military judge determined that the actions of the trial counsel and the SVC did not cause personal prejudice. Although the investigation was initially delayed, ultimately AFOSI did interview the victim's husband. As explained above, this Court has held that "unlike actual unlawful command

influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence.” *Boyce*, 76 M.J. at 248. But the lack of personal prejudice is still a “significant factor in determining whether the unlawful command influence created an intolerable strain on the public’s perception of the military justice system.” *Proctor*, 81 M.J. at 255.

Appellant argues that the military judge’s finding that Appellant suffered no personal prejudice is clearly erroneous. Appellant contends that memories fade over time and he gives a concrete example. Appellant notes that the husband recalled talking to his wife in March 2018 but did not remember this two months later in May 2018. Appellant states: “This suggests—if he truly forgot anything—the loss of memory occurred between March 2018 and May 2018, directly undermining the military judge’s finding that any earlier interview would not have been helpful.” Appellant’s suggestion and supposition are insufficient to demonstrate that the military judge’s finding of fact was clearly erroneous. We can find clear error only when there is “no evidence to support the finding” by the military judge or when, upon reviewing all the evidence, we are “left with the definite and firm conviction that a mistake has been committed.” *Criswell*, 78 M.J. at 141 (internal quotation marks omitted) (citation omitted). That is not the case here.

Neither unlawful command influence nor the appearance of unlawful command influence should occur in the military justice system. When it has occurred, the Government may take immediate steps to reduce prejudice to the accused and to ameliorate the situation.⁹ Precisely that occurred here. Accordingly, despite the valid aggravating facts and circumstances that Appellant has emphasized, the Government has convinced us beyond a reasonable doubt that the conduct of the Government ultimately did not create an intolerable strain on the public’s perception of the military justice system.

III. Conclusion

This Court answers the assigned issue in the negative. The judgment of the United States Air Force Court of Appeals is affirmed.

[Senior Judge Ryan’s concurring opinion is omitted.—Ed.]

Points for Discussion

1. In *United States v. Boyce* 76 M.J. 242 (C.A.A.F. 2017) (discussed prior to *United States v. Horne* above), the court reversed the findings and sentence because of the negative impact of unlawful command influence on the public’s

⁹ This Court has not held that taking ameliorative efforts is always necessary for proving beyond a reasonable doubt that unlawful command influence did not place an intolerable strain upon the public’s perception. See *Bergdahl*, 80 M.J. at 244 (finding that some evidence of unlawful command influence did not place an intolerable strain upon the public’s perception even though the government performed no ameliorative efforts). But as the Court indicated in *Proctor*, such efforts may reduce the prejudice to the military justice system. 81 M.J. at 255.

perception of the military justice system, stating

[T]he prejudice involved in [apparent unlawful command influence] is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused.

76 M.J. at 248-49.

Essentially, according to the *Boyce* decision, courts can reverse a conviction even if the accused was not prejudiced personally by the apparent unlawful command influence. However, in the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, Congress added Article 37(c), UCMJ, a provision which states:

(c) No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.

In light of this Article 37(c), UCMJ provision, should courts now conclude that an accused must be prejudiced in cases of apparent unlawful command influence?

2. Commanders cannot be indifferent to crimes committed by members of their units. But they must be very careful about what they say. Commenting on unlawful command influence, then-Lieutenant Colonel Mark Johnson wrote: "If commanders must address [crime within a unit] they are reminded to talk about the offense, rather than the offender, and the process, rather than the result." Mark L. Johnson, *Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle against the "Mortal Enemy" of Military Justice*, Army Lawyer, Jun. 2008 at 104, 111. What are examples of what commanders can say and cannot say?

3. As reflected in *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) and *United States v. Horne*, 82 M.J. 283 (C.A.A.F. 2022) (previously discussed and provided in this chapter), military case law supports that the conduct and or statements of non-commanders such as members of Congress, the President, and even Armed Forces attorneys may raise the issue of unlawful command influence. For example, in *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020), the late Senator John McCain and President Trump (as a presidential candidate and later as President) made negative comments about the accused. A plurality opinion concluded that Senator McCain (as a military retiree) and President Trump (as a sitting President) were capable of committing unlawful command influence with their comments and although the accused met his burden of showing "some evidence" of unlawful command influence, their comments did not "place an intolerable stain upon the public's perception of the military justice system" and an objective, disinterested observer, would conclude that instead of being swayed by those comments, the military judge was "notably impervious to them." *Id.* at 233-44.

UNITED STATES v. BALDWIN
U.S. Court of Appeals for the Armed Forces
54 M.J. 308 (C.A.A.F. 2001)

Judge SULLIVAN delivered the opinion of the Court.

During the fall of 1997 and in February of 1998, appellant [Captain Holly Baldwin, U.S. Army] was tried by a general court-martial composed of officer members at Fort Bliss, Texas. Contrary to her pleas, she was found guilty of two specifications of larceny, conduct unbecoming an officer, and two specifications of service-discrediting conduct (mail tampering and obstruction of justice), in violation of Articles 121, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 933, and 934, respectively. The military judge then dismissed the two larceny specifications as multiplicitous with the remaining offenses, and the members sentenced appellant to a dismissal, 1 year's confinement, and total forfeitures on February 6, 1998. The convening authority on May 19, 1998, approved this sentence, and the Court of Criminal Appeals affirmed on October 1, 1999.

On May 19, 2000, this Court granted review on the following [issue] of law:

I. WHETHER THE CONVENING AUTHORITY EXERCISED UNLAWFUL COMMAND INFLUENCE OVER THE PROCEEDINGS BY REQUIRING THE COURT MEMBERS, IN THE MIDDLE OF THE TRIAL, TO ATTEND AN OFFICER PROFESSIONAL DEVELOPMENT PROGRAM WHERE "APPROPRIATE" PUNISHMENTS FOR OFFICER COURT-MARTIAL DEFENDANTS WAS DISCUSSED.

* * *

Nine months after her court-martial, appellant signed a statement and later filed it with the Court of Criminal Appeals. See *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). It said:

AFFADAVIT [sic]

November 20, 1998

I, Holly M. Baldwin, would like to make the following statement. Shortly after I was transferred from Fort Lewis to Fort Bliss (fall 1997), Ft. Bliss was having a Family Values Week. One of the Officer Professional Development programs mandated by Commanding General Costello was one directed at Ethics. At that particular OPD, one of the topics discussed was an incident that happened with three of the Officers in the 31st ADA BDE that were being court-martialed. The address included comments that the court-martial sentences were too lenient and that the minimum sentence should be at least one year and that Officers should be punished harsher than enlisted soldiers because Officers should always set the example and be above reproach. The day after this OPD one of the officers from the 31st was set to be sentenced. I believe his name was Major Brennan. *I attended this OPD,*

but didn't learn of the sentencing until a discussion I had with his attorney, Mr. Jim Maus. He is an attorney in my civilian attorney's (Jim Darnell) law office in El Paso, TX. Mr. Maus was Major Brennan's civilian counsel. Mr. Maus also informed me that this type of OPD was inappropriate and that it could be considered jury tampering and he was filing an appeal on Major Brennan's behalf stating such.

On the day of my conviction and sentencing, the final part of the trial was delayed for another OPD that was mandatory for all Officers on post. This OPD dealt with the situation Lt. Kelly Flynn was embroiled [sic]. The theme about this OPD was that she was not punished as she should have been and that she had basically gotten over. It was then stated she should not have been allowed to resign, but should have been court-martialed. I would also like to note here that I submitted a Resignation for Good of Service [sic] on or about 1 May 97 and it was held and never sent up as the regulation states. That afternoon after the officers on my panel went to the OPD, I was convicted and sentenced to 1 year at Ft. Leavenworth. It should also be noted that 4 of the officers on my panel were in the same rating chain. They included the Brigade Commander, Brigade Deputy Commander, the HHC Company Commander and another BDE Primary Officer.*

I swear the above mentioned statement is true to the best of knowledge.

Signed Holly Morris Baldwin

Date November 20, 1998

(Emphasis added).

Appellant argued that "her sentence to one year in confinement and the rejection of her request for Resignation for the Good of the Service was the result of these actions, which clearly constitute unlawful command influence in this case." The Government did not oppose this motion to file, but in its final brief it simply asserted that "it [appellant's claim] lacks merit." The Court of Criminal Appeals summarily affirmed this case.

* * *

The Government argues that appellant's post-trial claim of unlawful command influence should be denied because she "has failed to meet her threshold burden of production in this case." Final Brief at 7. It further contends that "[a]ppellant's own ambiguous, self-serving, and unsubstantiated declaration does not establish a viable claim of unlawful command influence." Moreover, it notes that "appellant never raised this issue at trial" nor made any "effort to bring this allegation to the military judge's attention and conduct some minimal voir dire before findings and sentence deliberations." *Id.* We conclude that

* Air Force First Lieutenant Kelly Flinn (whose name is misspelled in the affidavit and is correctly spelled Flinn) was the first female assigned to pilot a B-52 aircraft. She was allowed to resign from the Air Force after being charged with making a false official statement, committing adultery with a subordinate's spouse, and disobeying an order. Her case received national media attention in 1997.—Ed.

none of these reasons legally justifies the lower appellate court's summary denial of appellant's post-trial claim of unlawful command influence.

Article 37, UCMJ, 10 U.S.C. § 837, states:

§ 837. Art. 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a 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. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(Emphasis added.)

We have long held that the use of command meetings to purposefully influence the members in determining a court-martial sentence violates Article 37, UCMJ. *United States v. Levite*, 25 M.J. 334, 339 (C.M.A. 1987); *United States v. Cruz*, 25 M.J. 326, 329 (C.M.A. 1987); *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *United States v. McCann*, 8 U.S.C.MA 675, 676, 25 CMR 179, 180 (1958). Moreover, we have also held that the mere "confluence" of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require a sentence rehearing. See *United States v. Brice*, 19 M.J. 170, 172 n. 3 (C.M.A. 1985).

Here, appellant avers that there were two command officer meetings before and during her court-martial, which she and the officers of her panel attended. She also avers that various court-martial situations on base and in the Air Force at large were discussed. Furthermore, she asserts that comments were made that court-martial sentences were too lenient; that officers should always be punished more harshly than enlisted persons; and that the minimum sentences should be 1 year. Finally, appellant points out that she, an officer, subsequently received a 1-year sentence at her court-martial. If appellant's averments are true, then as in *Brice*, a confluence of timing and subject matter would exist.

The Government contends, however, that appellant's self-serving averments are not legally sufficient (or competent) to raise her post-trial claim. We disagree. In *United States v. Ayala*, 43 M.J. 296, 300 (1995), this Court held that "[t]he quantum of evidence necessary to raise unlawful command

influence is the same as that required to submit a factual issue to the trier of fact." While not particularly delineating the proof required, we have generally held that it must be more than "mere speculation." See *United States v. Biagase*, 50 M.J. 143, 150 (1999). Here, appellant's post-trial statement was based on her own observations (cf. *United States v. Ruiz*, 49 M.J. 340, 348 (1998) (no abuse of discretion for convening authority to refuse to order post-trial hearing on basis of unsubstantiated assertions of unlawful command influence by counsel)), and it was detailed in nature. Cf. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994) (must be more than a bare allegation). Moreover, the record of trial, which contains an unexplained decision to delay any sessions on the date in question until the early afternoon, may be viewed as tending to corroborate appellant's allegation that there was a command meeting at that time. In the absence of any post-trial submission from the Government, we conclude appellant's allegations in this context are sufficient to raise a post-trial complaint of unlawful command influence. See *United States v. Ayala*, supra (some evidence to which a member might reasonably attach credit); see generally *United States v. Ginn*, 47 M.J. 236, 248 (1997) (third principle: "if the affidavit is factually adequate on its face to state a claim of legal error . . .").

Although we reject the Government's legal insufficiency claim, we are reluctant to order relief without a complete record concerning appellant's claim. A full development of the material facts surrounding these command meetings and their effect on appellant's court-martial is required. See *United States v. Dykes*, 38 M.J. 270; see also *United States v. Fricke*, 53 M.J. 149, 155 (2000). Accordingly, [an evidentiary] hearing should be ordered.

* * *

The decision of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for submission to a convening authority for a limited hearing on the issue of command influence. At the conclusion of the hearing, the judge will make specific findings of fact on that issue. A verbatim record of the proceedings will be submitted after authentication to the Court of Criminal Appeals for further review. Thereafter, Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3), shall apply.

Points for Discussion

1. If General Costello is responsible for maintaining good order and discipline, what is wrong with expressing his opinion on minimum sentences and whether soldiers accused of wrongdoing should be allowed to resign? Suppose a civilian mayor of a town gave a speech urging prosecutors, judges, and juries to get tough on crime. Would that prevent fair trials in the town? Would criminal convictions have to be reversed?
2. What is the remedy for General Costello's action? Can there be no more trials at Fort Bliss after his speech