Hofstra Law Review

Volume 49 | Issue 1 Article 2

9-1-2020

Is Demilitarizing Military Justice an Ethical Imperative for Congress, the Courts, and the Commander-in-Chief?

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SYMPOSIUM INTRODUCTION: LEGAL ETHICS AND MODERN MILITARY JUSTICE

IS DEMILITARIZING MILITARY JUSTICE AN ETHICAL IMPERATIVE FOR CONGRESS, THE COURTS, AND THE COMMANDER-IN-CHIEF?

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It is an unfortunate reality that military justice—both in substance and process, in theory and in practice—is understudied in the legal academy.[1] If it were otherwise, there would be a wider appreciation among its practitioners, among the political actors who determine the scope of this unique criminal law, and among the judiciary, of just how complex a system it actually is. From the perspective of civilian courts, lawyers, legislators, and the public, the system of military justice is complex—and some would say arcane, or even archaic; to some it is even a contrived and silly mimicry of "real" justice.[2] "Military justice is to justice as military music is to music," as some have caustically noted.[3]

While modern Supreme Court jurisprudence has taken a far more favorable view of military justice, it has done so in large part because

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1. Steve Vladeck, *Why Military Justice Doesn't Get Enough Academic Attention*, JOTWELL (Aug. 14, 2018), https://courtslaw.jotwell.com/why-military-justice-doesnt-get-enough-academic-attention.

2. Reid v. Covert, 354 U.S. 1, 38 (1957) ("Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.").

3. *See, e.g.*, ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 2 (1970). This quote is attributed to Georges Clémenceau. *See* THE YALE BOOK OF QUOTATIONS 158 (Fred R. Shapiro ed., 2006).

Congress has partially demilitarized this body of law and practice over time, increasing its complexity with ever more trappings of civilian law.[4] It is complex in its personal jurisdiction over active duty troops, retired servicemembers, service academy cadets, enemy prisoners of war, and civilians "accompanying an armed force in the field."[5] It is complex in its subject matter jurisdiction over both common law crimes and service-connected offenses. It is complex in its due process protections developed and enforced by statute, by the Supreme Court, by the inferior military appellate courts, and by customs and norms of unwritten military law. It is complex in what rights (to notice, to representation, to appeal, to privileges) it affords which personnel and under what circumstances (civilian victims, military accused, foreign nationals). It is complex in its trial procedures (in its sentencing, in its jury-like member selection, in its pre- and post-trial legal screening. It is complex in the authorities imparted to military leaders and commanders who act as quasi-investigative, quasi-prosecutorial, and quasi-judicial figures.

But it is no less complex and mystifying from the perspective of even those whose primary business it is to manage this system: its uniformed commanding officers, counseled by uniformed judge advocates and superintended by three different principals—Congress, the President as Commander-in-Chief, and the courts (both military and civilian).

Legal ethics and professional responsibility pervade this discipline just as they do in any other criminal justice system. But in such a dizzyingly specialized criminal justice schema, the problems and perils of legal ethics and professional responsibility are both heightened and clouded by their seemingly difficult remoteness. Because the context of military justice implicates—to various degrees—national security, and not just individual cases and individual parties, special attention is owed in several critical areas. Political interference in military prosecutions has a long history, and it inevitably corrupts and taints individual cases, impairing public confidence in the judicial integrity of the court-martial.[6] This is a justice system that self-consciously celebrates the influential and central role of the commanding officer, creating an "operating

4. *See, e.g.*, Ortiz v. United States, 138 S. Ct. 2165, 2170 (2018). In the author's view, "demilitarized" is simply less condescending than the more frequently employed "civilianization," which is too often used within the military as a pejorative to describe the evolution of military justice since the middle of the twentieth century. *See generally* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970).

5. *See, e.g.*, Uniform Code of Military Justice ("UCMJ") Art. 2, 10 U.S.C. § 802.

6. *See generally* Joshua Kastenberg, *Fears of Tyranny: The Fine Line Between Presidential Authority over Military Discipline and Unlawful Command Influence Through the Lens of Military Legal History in the Era of* Bergdahl, 49 HOFSTRA L. REV. 11 (2020).

environment [which] remains an orders-driven, hierarchical, and profoundly coercive special society."[7] It must, therefore, still contend with and actively combat the ever-present risk of "unlawful command influence" no matter how many other civilianizing characteristics military justice now enjoys, and regardless of whether that influence was direct or merely indirect, actual or only apparent, intentional or just inadvertent.[8] Moreover, in a field as obscure as military law, public transparency of judicial and prosecutorial decision-making—especially in terms of sentencing—may outweigh the countervailing goal of shielding the "deliberative process" when both statutes and case law either already require it in civilian practice or encourage it.[9] Some national security professionals, military justice practitioners among them, are "under pressure" to depart from professional norms and their professional obligations, and to dilute or change their advice to their (political) principals, or to advocate on the principal's behalf thereby losing their highly valuable professional independence—they are "wedged between their principles and principals."[10]

Other idiosyncratic martial-legal concerns distinguish military from civilian criminal law professional responsibility; these, too, endanger the credibility, legitimacy, and effectiveness of the military justice system. One such concern is the relative speed with which a convening authority (compared to a civilian district attorney, for example) may refer a case to a court-martial, based solely on a standard of "probable cause" rather than the additional requirement of "sufficient admissible evidence to sustain a conviction."[11] In other words, should it be easier (read: more efficient) for the government to refer charges against a servicemember to a court-martial than to indict a criminal defendant in a civilian court? On what principled grounds could such a distinction survive?[12] The effort to effectively manage a sometimes pathological "forced co-counsel relationship" between military and civilian defense attorneys representing the same uniformed client reveals several challenges. For

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7. *See* Rachel E. VanLandingham, *Ordering Injustice: Congress, Command Corruption of Courts-Martial, and the Constitution*, 49 HOFSTRA L. REV. 211, 214 (2020).

8. UCMJ Art. 37, 10 U.S.C. § 837; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2019) [hereinafter MCM] (implementing Article 37); *see* United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (explaining that the statute prohibits "unlawful influence" not merely that which comes directly from those in "command"); *see generally* VanLandingham, *supra* note 7.

9. *See generally* Christopher E. Martin & Timothy P. Hayes, Jr., *Court-Martial Sentences: Time for More Transparency*, 49 HOFSTRA L. REV. 63 (2020).

10. *See* Dakota S. Rudesill, *At the Elbow and Under Pressure: Legal, Military, and Intelligence Professionals*, 49 HOFSTRA L. REV. 161, 163 (2020).

11. *See* Mitchell M. Suliman, *Probable Cause and the Provable Case: Bridging the Ethical Gap that Exists in the Military Justice System*, 49 HOFSTRA L. REV. 187, 195 (2020).

12. *See generally id.*

one, steering the same ship in two directions (with one oarsman possibly rowing more competently and diligently than the other) is a "delicate situation" that opens the door to "ineffective assistance of counsel" allegations which serve as a significant constitutional and professional responsibility threat.[13] Aggravating the strain is the absence of useful "ethical rules and service policies" that could help military defense counsel navigate these waters where civilian criminal defense attorneys with *civilian* clients never swim.[14]

Complicating the matter further is the confrontational relationship between quintessential legal ethics and the normative, regulatory, and cultural mores of the military profession, and the very reason such a profession exists—to provide for effective national defense. There is a significant difference, for example, between what Article III federal judges must disclose about themselves to the parties and the public to protect the appearance of the court's impartiality and what a *military* judge must disclose.[15] The latter is not just an "officer of the court," but an officer commissioned into a service where his or her judgeship is only a temporary, non-tenured duty assignment among many other judge advocate assignments. While the Article III judiciary is largely "self-policing" with few disclosure requirements, there is an argument that military judges ought to be bound by stronger, externally imposed and regulated, ethics regimes to shore up its appearance of integrity and to enforce judicial transparency.[16] Merely donning the "trappings of judicial mystique," i.e., wearing of black robes, the title of "judge," do not mount a sufficient defense against the intrinsically hierarchical character of military service, nor its professional duties and incentives that are so unlike conventional civilian judiciaries.[17]

Yet discussion and scholarly debate over these profound ethical dilemmas rarely reaches civilian readers and the larger public. This Symposium is intended to remedy that deficiency—or to use the military judiciary's expression: to "bridg[e] the gap."[18] It is first important to recognize that the use of a separate military justice system by

13. United States v. Boone, 44 M.J. 742, 746 n.4 (A. Ct. Crim. App. 1996), *aff'd in part, rev'd in part*, 49 M.J. 187 (C.A.A.F. 1998).

14. *See* Robert E. Murdough, *A House Divided: The Unique Ethical Dynamic of Civilian and Military Co-Counsel Relations in Court-Martial Defense*, 49 HOFSTRA L. REV. 111, 114 (2020).

15. *See* Michel Paradis, *Judicial Disclosure and the Judicial Mystique*, 49 HOFSTRA L. REV. 125, 136-141, 143-45 (2020).

16. *See generally id.*

17. *See id.* at 143-45.

18. United States v. McNutt, 62 M.J. 16, 17 & n.1 (C.A.A.F. 2005) (referring to an informal, discretionary, out-of-court feedback session between the military judge and counsel).

Congress,[19] the President,[20] the Secretary of Defense, and inferior appointed civilian leaders within the Department of Defense, has always been a persistent source of possible (and quite overt) civilian-military friction.[21] As civilians "control" the military in our historical, constitutional, statutory, and normative experience, the special relationship between civilians—whether they are elected officials in the White House and Congress or appointed in the national security establishment—and the military is very much a necessary subject of political, public, and legal relevance and often controversy.

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19. Congress enacted the UCMJ—the federal criminal code binding members of the United States armed forces (and sometimes civilians) in both peacetime and war. This authority flows from the Federal Constitution. U.S. CONST. Art. I, § 8, cl. 14 ("[T]o make Rules for the Government and Regulation of the land and naval Forces."). Congress first enacted the UCMJ in 1950, but it was preceded by 175 years of the "Articles of War" and "Articles for the Government of the Navy" that were, themselves, modeled off of the British Articles of War in force during the American Revolution. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 15-17 (2d ed. 1920) (1886). *See generally* Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016). The most recent significant Congressional reform to the UCMJ occurred via the National Defense Authorization Act ("NDAA") for Fiscal Year 2017. *See* Military Justice Act of 2016, 10 U.S.C. §§ 5001–5542; Shane Reeves & Mark Visger, *The Military Justice Act of 2016: Here Come the Changes*, LAWFARE (Aug. 29, 2017, 9:00 AM), https://www.lawfareblog.com/military-justice-act-2016-here-come-changes.

20. UCMJ Art. 36, 10 U.S.C. § 836 (authorizing the President to "prescribe" rules and regulations for "pretrial, trial, and post-trial procedures, including modes of proof, for cases . . . triable in courts-martial"). Such rules prescribed by the President can be found in the Rules for Courts-Martial, the Military Rules of Evidence, the list of maximum punishments, and "non-binding disposition guidance" promulgated as Executive Orders in the often-revised Manual for Courts-Martial. *See* MCM, *supra* note 8. The President also acts as a general court-martial convening authority. *See* UCMJ Art. 22, 10 U.S.C. § 822.

21. For example, in 1925, President Coolidge ordered the court-martial of Colonel "Billy" Mitchell, an outspoken critic of the War Department's policies on air power following the First World War and two highly publicized deadly crashes involving military aircraft, which he told the media demonstrated the "incompetency, criminal negligence, and almost treasonable administration of our national defense." Fred L. Borch III, *Lore of the Corps: The Trial by Court-Martial of Colonel William "Billy" Mitchell*, ARMY LAW., Jan. 2012, at 1, 1. The crime: his comments were allegedly "prejudicial to good order and discipline" and brought "discredit upon the military service." *Id.* at 1-3. He was convicted by a court-martial panel that, ironically, included another hero/villain of American civil-military relations (depending on one's point of view)—General Douglas MacArthur. *Id.* at 2. President Trump's interventions in military justice prosecutions for what amount to "war crimes"—which includes issuing pardons—is a more recent, and highly controversial, illustration of such friction. *See, e.g.*, Quil Lawrence, *Veterans React to 3 Controversial Pardons Issued by President Trump*, NPR (Nov. 18, 2019, 4:19 PM), https://www.npr.org/2019/11/18/780563061/veterans-react-to-3-controversial-pardons-issued-by-president-trump; Dan Maurer, *Should There Be a War Crime Pardon Exception?*, LAWFARE (Dec. 3, 2019, 9:31 AM), https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception; Charles J. Dunlap, Jr., *Reasonable People Can Differ on Trump's Military Justice Actions*, SMALL WARS J. (Dec. 16, 2019, 9:06 AM), https://smallwarsjournal.com/jrnl/art/reasonable-people-can-differ-trumps-military-justice-actions.

Maintaining obedience to lawful orders under the stressors of conflict is usually portrayed as the *sine qua non* justification for a separate military justice code—one that is managed by the military chain-of-command, executed by military lawyers, devised by Congress, and (in large part) regulated by the President. On several levels, the nature of that civil-military relationship is that of a principal-agent dynamic, and so we can expect that it naturally implicates features of military professionalism and judgment exercised by agents.[22] Ethical issues, like responsible disobedience, "disciplined" and "disciplining" armed forces, how far the military can be coopted into partisan conduct or "civilianized," and the nature of "military expertise" are all questions common to the parties in this relationship.[23] The manner in which the Uniform Code of Military Justice ("UCMJ" or the "Code") is used by these actors to deter or punish crime, maintain "good order and discipline,"[24] and foster cohesive units is, in large part, predicated on believing that military agents possess an intangible expertise and judgment that is unavailable in a civilian court system or to other civilian officials.[25] This makes military justice an unusually salient front line in American civil-military relations. The administrative rules, *lex non scripta*, and positive law that permits or constrains the ethical conduct of its actors are of paramount importance in resolving discrete conflicts, establishing positive norms, and reinforcing the rule of law.

But after two decades of continuous combat deployments, and novel—or at least very public—political engagement and interventions with military justice, the field is approaching an inflection point (if not already there). For the first time in American history, a President pardoned his subordinate military officers for their combat actions abroad, actions that could have been charged as war crimes, releasing a torrent of loud criticism.[26]

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22. *See generally* ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME (2002) (discussing the tension between civil and military leadership); PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS (2003) (advancing a principal-agent relationship between civilians and the military, respectively).

23. MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 38-53 (The Free Press 1971) (1960).

24. Memorandum from James N. Mattis, U.S. Sec'y of Def., to Sec'ys of the Mil. Dep'ts, Chiefs of the Mil. Servs., Commanders of the Combatant Commands (Aug. 13, 2018) ("The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of [servicemembers]. It is a commander's duty to use it.").

25. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955); Parker v. Levy, 417 U.S. 733, 748-49 (1974).

26. Press Release, White House, Statement from the Press Secretary Regarding the Pardons of Lieutenant Clint Lorance, Major Mathew Golsteyn, and Rank Restoration of Special Warfare Operator First Class Edward Gallagher (Nov. 15, 2019), https://www.whitehouse.gov/briefings-

In the wake of a summer of Black Lives Matter protests and resurgent public criticism of police practices, the Department of Defense ("DOD") is grappling with allegations of racial disparities in its military justice.[27] The DOD is also enduring recurrent congressional skepticism of its efforts and ability to address systemic sexual assault and harassment.[28] Congress has considered, and remains concerned with, the role of lay commanding officers, not just in sexual assault investigations and trials, but in questioning commanders' relevance, impartiality, and efficacy in addressing *all* felonies.[29] Less public but no less significant, Congress is eliminating the authority of the military appellate courts to conduct "factual sufficiency review" of the record when the accused appeals on any other grounds.[30] Moreover, Congress is further civilianizing military justice by requiring the DOD to publish "sentencing guidelines" that would be—for the most part—functionally

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statements/statement-press-secretary-97; Geoffrey S. Corn & Rachel E. VanLandingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFARE (Nov. 26, 2019, 7:22 PM), https://www.lawfareblog.com/gallagher-case-president-trump-corrupts-profession-arms; Richard Spencer, Opinion, *Richard Spencer: I Was Fired as Navy Secretary. Here's What I've Learned Because of It*, WASH. POST (Nov. 27, 2019, 5:56 PM), https://www.washingtonpost.com/opinions/richard-spencer-i-was-fired-as-navy-secretary-heres-what-ive-learned-because-of-it/2019/11/27/9c2e58bc-1092-11ea-bf62-eadd5d11f559_story.html; Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals*, LAWFARE (May 27, 2019, 7:59 AM), https://www.lawfareblog.com/when-presidents-intervene-behalf-war-criminals; Lawrence, *supra* note 21; Pauline M. Shanks Kaurin & Bradley J. Strawser, *Disgraceful Pardons: Dishonoring Our Honorable*, WAR ON THE ROCKS (Nov. 25, 2019), https://warontherocks.com/2019/11/disgraceful-pardons-dishonoring-our-honorable.

27. John Vandiver, *Air Force Fails to Deal with Racial Disparities in Military Justice, Report Says*, STARS AND STRIPES (May 27, 2020), https://www.stripes.com/news/air-force/air-force-fails-to-deal-with-racial-disparities-in-military-justice-report-says-1.631314; U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-648T, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL DISPARITIES (2020), https://www.gao.gov/assets/710/707582.pdf; Sarah Armstrong, *Veterans Day 2020: The Troubling Racial Disparities that Still Exist in Military Justice*, HARV. C.R.-C.L. L. REV.: AMICUS BLOG (Nov. 11, 2020), https://harvardcrcl.org/veterans-day-2020-the-troubling-racial-disparities-that-still-exist-in-military-justice.

28. For summaries of the legislative efforts to investigate and drive change in military sexual assault prevention and prosecution, see BARBARA SALAZAR TORREON & CARLA Y. DAVIS-CASTRO, CONG. RSCH. SERV., R43168, MILITARY SEXUAL ASSAULT: CHRONOLOGY OF ACTIVITY IN THE 113TH-114TH CONGRESSES AND RELATED RESOURCES (2019); KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., R44944, MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT (2017).

29. NDAA for Fiscal Year 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198, 1367-68 (2019) ("Report on Military Justice System Involving Alternative Authority for Determining Whether to Prefer or Refer Changes [sic] for Felony Offenses Under the Uniform Code of Military Justice"). For the DOD's response, see JOINT SERV. COMM. ON MIL. JUST., REPORT OF THE JOINT SERVICE SUBCOMMITTEE - PROSECUTORIAL AUTHORITY STUDY 1-4 (2020), https://drive.google.com/file/d/11Pq2a9iOi0jPAg6CAStUmSLZ3hkSGmUY/view.

30. NDAA for Fiscal Year 2021, H.R. 6395, 116th Cong. § 532 (2020).

analogous to the United States Sentencing Commission's Guidelines under the Sentencing Reform Act.[31]

But the President and Congress are not the only parties actively driving the military toward this inflection point of reform; the courts are, too. The Court of Appeals for the Armed Forces, the only Article I federal civilian court with direct review authority over courts-martial,[32] has revolutionized the doctrine of unlawful influence. The Court has held that a servicemember may get appellate relief when the *President* breaches the long-established prohibition on using official authority to unfairly manipulate the investigation, disposition, prosecution, or sentencing of that servicemember, though historically courts only focused their attention on unlawful *command* influence by *military officers*.[33] A United States District Court, conducting a limited form of collateral review of courts-martial, concluded that the long-arm jurisdiction over retirees, vested by the UCMJ, is an unconstitutional overextension of Congress's "make rules" authority over the armed forces.[34] Finally, the United States Supreme Court has reinvented its characterization of military justice. It shifted from an emphasis on the UCMJ's unique attributes necessary for a "separate community" of specialized professionals to one that emphasizes the commonalities that the UCMJ shares with civilian codes, placing prominent stress on the due process protections that the Code and its courts provide in ways similar to sister civil courts.[35]

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31. NDAA for Fiscal Year 2020 § 537.

32. UCMJ Art. 67, 10 U.S.C. § 867. Not even the Supreme Court has direct review over courts-martial. Under the jurisdictional review scheme crafted by Congress in 1983, the Supreme Court may grant certiorari for only those cases in which the Court of Appeals for the Armed Forces ("CAAF") has already reviewed or granted a petition for review, or has granted relief, or in which the Judge Advocate General of the relevant armed service has "certified" the case for the CAAF to review under § 867(a)(2). 28 U.S.C. § 1259.

33. United States v. Bergdahl, 80 M.J. 230, 234-35 (2020).

34. Larrabee v. Braithwaite, No. 19-654, 2020 U.S. Dist. LEXIS 219457, at *5, *23 (D.D.C. Nov. 20, 2020).

35. *Compare* Parker v. Levy, 417 U.S. 733, 749 (1974) ("[The] Code cannot be equated to a civilian criminal code. . . . While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the [UCMJ] essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.") *with* Ortiz v. United States, 138 S. Ct. 2165, 2176 n.5 (2018) ("The independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function, as the dissent claims. By adjudicating criminal charges against [servicemembers], courts-martial of course help to keep troops in line. But the way they do so—in comparison to, say, a commander in the field—is fundamentally judicial." (internal citation omitted)). *See* Dan Maurer, *Are Military Courts Really Just Like Civilian Criminal Courts?*, LAWFARE (July 13, 2018, 10:00 AM), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts. To date, the only other legal scholarship published on *Ortiz*, while not focusing on the role of the commander as a central tenant of military justice, criticizes the majority for ignoring two characteristics of the CAAF that seem to cut against its judicial nature: that the

This Symposium will directly confront these dramatic, but too often underdiscussed, developments in the military justice frontline of civil-military relations. Seven Articles approach the ethical challenges and professional responsibility implications raised by what Congress, the Courts, and the Commander-in-Chief are now saying, or doing, about the military justice's "integrated court-martial system."[36] This is a system that enjoyed large deference from these parties for most of its history, but for sporadic bouts of intense interest and usually useful reform. If there is a common theme to these Articles, it may be that further demilitarizing military justice can relieve pressure on some long-endured professional responsibility concerns for those servicemembers and civilians who play critical roles in its day-to-day management and in its evolution. After reading the contents of this Symposium, the reader should have a solid basis for judging whether we are in the midst of another such bout of reform, or—if not—whether one is needed.

President, as Commander-in-Chief, plays a necessary role in approving certain results after the CAAF has reviewed and opined (approving death sentences and dismissals of officers) and the President's ability to summarily remove judges from the CAAF bench. Note, *Article III—Federal Courts*—Ortiz v. United States, 132 HARV. L. REV. 317, 322, 325-26 (2018). One other recent Article does take a more holistic review by assuming that the *Ortiz* court is correct about the court-martial's judicial nature and ponders whether current constitutional protections for due process—applicable to judicial bodies—are available or impeded by the UCMJ. *See generally* Jacob E. Meusch, *A "Judicial" System in the Executive Branch:* Ortiz v. United States *and the Due Process Implications for Congress and Convening Authorities*, 35 J. L. & POL. 19, 26-29, 48-65 (2019).

36. *Ortiz*, 138 S. Ct. at 2170.

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