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## Congressional Influence on Military Justice

**ABSTRACT.** This Note explores the successes and failures of Congress's relationship with military justice, from the Founding to the present. The Note reveals how Congress has become more willing over time to alter the structure and function of military justice, shaping a system that increasingly resembles the civilian courts. But congressmembers also have interfered with the everyday administration of military justice in ways that they would never dare to do in the civilian system. This Note proposes legislative reforms to preserve Congress's legitimate oversight of the enduring problems in military justice and to prevent congressmembers from meddling with pending cases in ways that undermine the system's integrity.

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## INTRODUCTION

The Taliban captured Sergeant Robert “Bowe” Bergdahl in 2009 after he walked off of his post in Afghanistan.<sup>1</sup> For five years, he was held hostage, tortured, and brutalized when he repeatedly attempted to escape.<sup>2</sup> Once he returned home, he was investigated and court-martialed for desertion, among other offenses.<sup>3</sup> Under the Uniform Code of Military Justice (UCMJ or “the Code”), the governing law for courts-martial, Bergdahl’s trial should have been free from outside influence.<sup>4</sup> But, long before the case had come to a close, John McCain, the chair of the Senate Armed Services Committee (SASC), pronounced his own verdict. “If it comes out that he has no punishment,” he announced, “we’re going to have to have a hearing . . . . And I am not prejudging, OK, but . . . [he] is clearly a deserter.”<sup>5</sup>

The choice facing the military officers who would determine Bergdahl’s sentence was clear: either impose a punitive sentence or face an investigation from the SASC, which had authority over their pay, benefits, retirement, and promotions.<sup>6</sup> The fate of their careers and institution hung in the balance. Under such pressure, could anyone remain impartial?

Congress’s relationship with the military justice system is at a critical juncture. A crisis of sexual assault in the military has attracted intense congressional scrutiny, and the resulting legislation has radically transformed the system.<sup>7</sup> The days of drumhead military justice are largely behind us, as military justice

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1. *United States v. Bergdahl (Bergdahl I)*, 79 M.J. 512, 517-18 (A. Ct. Crim. App. 2019), *aff’d*, 80 M.J. 230 (C.A.A.F. 2020).
  2. *Id.* at 518.
  3. *Id.*
  4. See 10 U.S.C. § 837 (2018) (prohibiting unlawful command influence (UCI) in military justice proceedings).
  5. Laurel J. Sweet, *John McCain Wants Answers if Bowe Bergdahl Avoids Prison*, BOS. HERALD (Nov. 18, 2018, 12:00 AM), <https://www.bostonherald.com/2015/10/12/john-mccain-wants-answers-if-bowe-bergdahl-avoids-prison> [<https://perma.cc/NY7F-ERRC>].
  6. See STANDING RULES OF THE SENATE, S. DOC. NO. 113-18 (1st Sess. 2013) [hereinafter STANDING RULES OF THE SENATE], R. XXV(c)(1) (explaining this authority); see also *United States v. Bergdahl (Bergdahl II)*, 80 M.J. 230, 245 (C.A.A.F. 2020) (Stucky, C.J., concurring in part and dissenting in part) (“Senator McCain certainly had a right to announce that he intended to hold hearings . . . . But conditioning the hearings on [Bergdahl] receiving a sentence to no punishment was undoubtedly meant to cause the sentencing authority and the convening authority to carefully consider the adverse personal and institutional consequences of adjudging or approving such a sentence.”).
  7. See, e.g., Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5101-5542, 130 Stat. 2894, 2894-2968 (making sweeping changes to the military justice system). See generally *infra* Section III.A (putting these reforms in context).

increasingly resembles the civilian system thanks to productive congressional oversight.<sup>8</sup> But heightened congressional attention has come at a cost. Congressmembers have often meddled with the administration of military justice in ways they would never do with respect to proceedings in civilian federal courts. This congressional interference undermines the system's integrity and, while individual instances have garnered some media attention, the underlying systemic problems have been ignored.<sup>9</sup>

As military justice grows more civilianized, Congress has less reason to intercede in its administration. Intercession may have been appropriate when military justice was primarily about discipline and resembled a typical executive-branch function. Today, interference jeopardizes the integrity of a system that is essentially judicial. For the military justice system to command the same respect as its civilian counterpart, it must be insulated from officials who can use their authority to improperly influence proceedings, regardless of whether they are formally part of the chain of command.

To make this argument, this Note analyzes military justice history and contemporary case studies, and proposes policy reforms to mitigate congressional interference with the “retail administration of military justice.”<sup>10</sup> Part I explains unlawful command influence and its relationship to Congress. Part II traces the historical development of the command-centric military justice system to delineate several paradigms of congressional oversight and to demonstrate the novelty of Congress's recent attention to the day-to-day operation of military justice. Part III uses two recent case studies, the Military Justice Act of 2016 (MJA) and the ongoing litigation in *United States v. Bergdahl*,<sup>11</sup> to examine how congressional oversight has interacted with the modern military justice system. Part IV argues that congressional intercession in pending cases is incompatible with the contemporary system of military justice. Finally, Part V proposes three policy

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8. See *infra* Sections II.B-C for an account of this transformation.
  9. Notwithstanding these risks, the issues with congressional influence over military justice have garnered little scholarly attention. The only work that discusses the issue is over two decades old. See Misti E. Rawles, *Congressional Oversight: The New Mortal Enemy of Military Justice?* (Apr. 2000) (unpublished LL.M. thesis, The Judge Advocate General's Corps, United States Army), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a439865.pdf> [<https://perma.cc/34W5-WZVT>].
  10. Appellant's Petition for Reconsideration at 26, *United States v. Bergdahl*, 80 M.J. 362 (C.A.A.F. 2020) (No. 19-0406/AR).
  11. Bergdahl's direct appeals in the military courts are over. See Order Denying Petition for a Writ of Error Coram Nobis, *Bergdahl v. United States*, No. 21-0091/AR, (C.A.A.F. Feb. 2, 2021), <https://www.armfor.uscourts.gov/journal/2021Jrnl/2021Feb.htm> [<https://perma.cc/2ZLE-CC57>]. However, at the time of writing, a habeas petition is pending in federal district court. See Complaint, *Bergdahl v. United States*, No. 21-cv-00418 (D.D.C. Feb. 17, 2021).

options that prevent congressmembers from interfering with pending cases while preserving Congress's ability to reform and improve military justice.

### I. UNLAWFUL COMMAND INFLUENCE FROM "THE TOP"

Military justice in the United States has always operated separately from the civilian system.<sup>12</sup> While the "military justice system's essential character" is "judicial,"<sup>13</sup> as recognized by the Supreme Court, its judges, prosecutors, juries, and defendants, with limited exceptions, are executive-branch personnel.<sup>14</sup> The U.S. system retains a traditional military character in contrast with many of its counterparts in developed countries, some of which have "civilianized" their military justice systems to the point of abolition.<sup>15</sup> In the American "command-centric" system, high-ranking officers, rather than professional prosecutors or other judicial officials, administer justice directly for minor violations and also make decisions about whether and when to bring charges for more serious crimes.<sup>16</sup> While in general only commanders can decide whether and what type of proceedings to initiate, anyone may report and several classes of people may

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12. See Articles of War, 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1779, at 111 (1775) (Worthington Chauncey Ford ed., 1905) (establishing military justice in the United States); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400-03 (1973) (recounting the origins and history of a separate system).

13. *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018). *But cf.* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 49, 53-54 (2d ed. 1896) ("Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact *simply instrumentalities* of the executive power. . .") (emphasis added and removed). Winthrop's view still holds weight. See, e.g., Thomas Spoehr, *I Was a 3-Star General. Here's Why Efforts to Weaken Officers' Court-Martial Authority Would Backfire*, HERITAGE FOUND. (Apr. 5, 2019), <https://www.heritage.org/defense/commentary/i-was-3-star-general-heres-why-efforts-weaken-officers-court-martial-authority> [<https://perma.cc/B8AE-L33R>] (arguing that the command-centric system augments officers' ability to enforce good order and discipline, bolsters the military justice system, and ensures that more cases go to trial).

14. See 10 U.S.C. § 802 (2018).

15. See EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 22-26 (2016). For example, while military judges in the United States, Canada, and Israel are uniformed officers, Britain's military judges are civilians. Germany and France have completely abolished the separate system of military justice, and the Netherlands tries all military offenses in a designated civilian court. *Id.*

16. *Id.* at 9-10. When a commander serves in this judicial-disciplinary role, they are known as the "convening authority." See 10 U.S.C. §§ 815, 822-24 (explaining who may convene courts-martial and impose nonjudicial punishment).

investigate or bring charges for violations of military law.<sup>17</sup> Although the command-centric model has some advantages, as well as vocal defenders,<sup>18</sup> it is more susceptible than a system of independent judicial decisionmakers to influence from powerful members of military command, who can use their positions of authority to affect the processes and outcomes of military justice.

When Congress enacted the UCMJ, it took steps to limit this influence.<sup>19</sup> The Code's drafters reached a compromise to remedy the most problematic aspects of command influence by defining and prohibiting *unlawful* command influence (UCI) over military justice proceedings.<sup>20</sup> Article 37 of the Code defines the restrictions on UCI, which prohibit convening authorities and other military personnel from unduly influencing the court-martial procedure at any stage.<sup>21</sup> Referred to by the nation's highest military court as "the mortal enemy of military justice,"<sup>22</sup> UCI sometimes requires dismissal of charges, a new trial, or other remedies.<sup>23</sup>

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17. Command centrality remains central to the system. *See, e.g.*, U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL, Rule for Courts-Martial 401 (2019) [hereinafter R.C.M.]. *But see, e.g.*, Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for FY 2015, Pub. L. No. 113-291, § 534(b), 128 Stat. 3292, 3367 (2014) (modestly limiting commanders' power to dispose of charges); National Defense Authorization Act for FY 2014, Pub. L. No. 113-66, § 1744(d), 127 Stat. 671, 981-982 (2013) (same); *see also infra* Section III.A (discussing these reforms). Under the current system, commanders generally decide which kinds of proceedings to initiate. *See* R.C.M. 402-407 (authorizing the commander to impose nonjudicial punishment (NJP) and to convene special and general courts-martial). Anyone can report charges. R.C.M. 301(A). For an example of how investigatory roles are assigned within a given branch of the military, *see* U.S. DEP'T OF ARMY, REGULATION NO. 600-20, ARMY COMMAND POLICY, ¶ 4-5 (2014). R.C.M. 307 sets forth the rules for preferal (bringing) of charges.
  18. *See, e.g.*, Spoehr, *supra* note 13.
  19. The Uniform Code of Military Justice (UCMJ) is codified at 10 U.S.C. §§ 801-946. While the UCMJ as construed by the Manual for Courts-Martial is by far the most important law governing military justice and discipline, several other federal statutes also play important roles in the system. *See, e.g.*, 10 U.S.C. §§ 1169(1), 1181-1187 (authorizing service secretaries to provide for the removal of enlisted personnel and officers); *id.* § 1553 (authorizing service secretaries to establish boards of review for administratively imposed discharges or dismissals); *id.* §§ 1561-1562, 1567, 1567a, 1601, 1602, 1611-1613, 1621, 1622, 7381 (concerning the resolution of complaints of sexual assault, domestic violence, child abuse, and sexual harassment).
  20. UCI is governed by Article 37 of the UCMJ, codified at 10 U.S.C. § 837. *See* James F. Garrett, Mark "Max" Maxwell, Matthew A. Calarco & Franklin D. Rosenblatt, *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, ARMY LAW., Aug. 2014, at 4, 9.
  21. 10 U.S.C. § 837.
  22. *United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).
  23. *See* 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 6-3 (10th ed. 2018) (explaining the various stages of proceedings at which UCI issues can arise).

Yet Article 37 is mostly silent on a critical matter—the extent to which the many *civilian* members of the federal government who can exercise “command-like” authority over proceedings may permissibly interfere. The Supreme Court’s longstanding principle of non-interference into military justice also exacerbates the problems caused by this gap in UCI restrictions, because it discourages the Court from stepping in to correct for improper influence by government personnel outside the chain of command.<sup>24</sup> The law on influence by civilian leaders of the military is thin, and the lines between permissible and impermissible conduct are difficult to discern. As the U.S. Army Court of Criminal Appeals (ACCA) recently emphasized in Bergdahl’s case, the “risk [of UCI] is exacerbated when [it] comes from the top.”<sup>25</sup> While “the top” (including the President, the Secretary of Defense, and other Department of Defense (DoD) personnel) is not explicitly subject to the Code, courts have occasionally applied Article 37 to their conduct.<sup>26</sup> The Court of Appeals for the Armed Forces (CAAF), reviewing *Bergdahl*, held that “any sitting president . . . has the ability to commit unlawful command influence.”<sup>27</sup> President Trump, with his unusual and often tweet-based interventions into the military justice system, brought renewed scholarly attention to the UCI doctrine.<sup>28</sup>

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24. See, e.g., *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (affirming that the military justice system is based on Article I, not Article III of the Constitution). *But see* *Ortiz v. United States*, 138 S. Ct. 2165, 2172–80 (2018) (holding that the Supreme Court may exercise appellate jurisdiction over the Court of Appeals for the Armed Forces (CAAF), notwithstanding that the CAAF is not an Article III court). The Supreme Court has mentioned UCI only once, in passing. See *Weiss v. United States*, 510 U.S. 163, 180 (1994) (concerning the constitutionality of certain aspects of military judge appointments).
25. *Bergdahl I*, 79 M.J. 512, 532 (A. Ct. Crim. App. 2019) (citing *United States v. Estrada*, 23 C.M.R. 99, 101 (C.M.A. 1957)), *aff’d*, 80 M.J. 230 (C.A.A.F. 2020).
26. See, e.g., *id.* at 523–27 (analyzing the President’s tweet for UCI under the *Barry/Boyce* framework); *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018) (“[A] plain reading of Article 2 and Article 37 together makes clear that a [Deputy Judge Advocate General], just like any other military member, is capable of committing unlawful influence . . . even [when] acting without the mantle of command authority.”); *Boyce*, 76 M.J. at 246 n.3 (C.A.A.F. 2017) (“The Secretary of the Air Force is not a person subject to the UCMJ . . . [but] the Government unequivocally conceded at oral argument that our jurisprudence pertaining to unlawful command influence applies in the instant case, and we deem it appropriate to accept that concession . . . .”); *United States v. Fowle*, 22 C.M.R. 139, 142 (C.M.A. 1956) (“Reasonable men must conclude that once the Secretary of a service enters into the restricted arena of the courtroom, whether the members of the court are conscious thereof or not, he is bound to exert some influence over them.”).
27. See *Bergdahl II*, 80 M.J. 230, 235 (C.A.A.F. 2020).
28. See, e.g., Donald Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 9:49 AM EST), <https://twitter.com/realdonaldtrump/status/1183016899589955584> (“The case of Major Mathew Golsteyn is now under review at the White House. Mathew is a highly decorated

The flurry of attention to the President's actions has obscured the similar but distinct issues with congressmembers' influence on military justice. For most of American history, the issue posed only a limited problem, as Congress generally gave commanders significant latitude to impose punishment as they saw fit.<sup>29</sup> Since the Founding, legislators have exercised varying degrees of oversight over the scope, structure, and operation of military justice. Congress has a constitutional duty to fund and oversee the military, and maintains a full committee dedicated to the task in each chamber.<sup>30</sup> While congressmembers do not have the same type of direct, official involvement in proceedings as members of the military chain of command, the House Armed Services Committee (HASC) and SASC (collectively, ASCs) retain significant control over the military through appropriations, investigations, and, in the case of SASC, promotion review.<sup>31</sup> Unlike military personnel who are subject to the UCMJ, congressmembers are not ordinarily subject to Article 37's prohibitions and can therefore seek to influence proceedings without fearing meaningful consequences.<sup>32</sup> Members of the military also may seek to convince members of Congress to influence particular proceedings, rather than doing so themselves, thereby reducing the risk that the dispositions of those proceedings will be invalidated on the basis of UCI.<sup>33</sup>

While congressional influence is not unique to the present moment, its contemporary form is unprecedented in American history. Appreciating how and why today's Congress engages in both productive oversight and destructive interference with regard to military justice requires an historical account of Congress's relationship to the system.

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Green Beret who is being tried for killing a Taliban bombmaker. We train our boys to be killing machines, then prosecute them when they kill!"), *archived*, Brendan Brown, TRUMP TWITTER ARCHIVE V2, <https://www.thetrumparchive.com/?searchbox=Golsteyn> [https://perma.cc/8FEZ-GGKA]; see also Brief of Professors of Law at 3, *Bergdahl I*, 79 M.J. 512 (No. 19-0406/AR) (arguing that "in cases of actual or apparent unlawful command influence resulting from presidential statements or actions, the presumptive remedy must be dismissal"); Stephen I. Vladeck, *Unlawful Command Influence and the President's Quasi-Personal Capacity Response*, 96 TEX. L. REV. ONLINE 35 (2018) (arguing that President Trump's comments on *Bergdahl* could constitute UCI).

29. See, e.g., *infra* text accompanying notes 106-112.
30. Article I grants Congress the power to "raise and support Armies" and to "provide and maintain a Navy" and provides that Congress shall "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art 1, § 8, cls. 12-14.
31. See STANDING RULES OF THE SENATE, *supra* note 6, R. XXV(c)(1); Rules of the House of Representatives, H.R. Res. 8, 117th Cong., Rule X, cls. 1(c), 3(b) (2021) (enacted).
32. Some congressmembers are subject to the Code, though not by virtue of their office; military retirees and certain reservists are subject to the Code. See 10 U.S.C. § 802 (2018).
33. For an example of how this has happened, see discussion *infra* Section II.C.



## II. MILITARY JUSTICE AND CONGRESS

Since the birth of the U.S. military justice system in 1775,<sup>34</sup> Congress has exercised its oversight authority with varying degrees of involvement. This Part surveys the history of the American military justice system<sup>35</sup> from the Founding to the present, identifying three historical paradigms of congressional involvement. The first, characterized by broad delegation to the executive branch, lasted from the Founding until World War I (WWI). The second existed from WWI to the enactment of the UCMJ in 1950, when Congress, against the clamorous backdrop of the two World Wars, became more willing to exercise its powers to reform military justice. Third and finally, since the UCMJ's enactment, congressmembers have grown more eager not only to adjust the mechanisms of the military justice system, but also to exert pressure in pending matters and even to legislate with particular cases in mind.

### A. *The Founding to WWI: Delegation and Neglect*

The 1775 Articles of War adopted by the Continental Congress were a hasty copy of King George III's 1774 Articles.<sup>36</sup> They were quickly discarded, as General Washington found them inappropriate for use in wartime.<sup>37</sup> In their place, on September 20, 1776, Congress passed new Articles, which prevented the

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34. The Continental Congress approved the first American Articles of War on June 30, 1775. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1779, at 111-23 (1775) (Worthington Chauncey Ford ed., 1905).
35. The various branches of the military maintained separate systems for the administration of military justice until the UCMJ's enactment in 1950. This Note focuses on the Army's system pre-1950, since that branch was the focus of activity for most of the history of military justice and because the systems evolved similarly from the Founding to the UCMJ. For a succinct overview of military justice in the Navy through the UCMJ's enactment, see WALTER B. HUFFMAN & RICHARD D. ROSEN, MILITARY LAW: CRIMINAL JUSTICE & ADMINISTRATIVE PROCESS § 1.25 (2020). For the purposes of this Note, the major difference between the Army and the Navy is that the latter did not experience the same period of intense scrutiny during World War I (WWI), at least in part because the Navy lacked a counterpart to Brigadier General Ansell. See *infra* Section II.B. The Air Force was created after World War II, and the UCMJ was the first complete law of military justice that (unequivocally) applied to it. See WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 31-32 (1973). The UCMJ also applies to the Space Force, which was established by the 2020 National Defense Authorization Act (NDAA) and organized under the Department of the Air Force. See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 951-61, 133 Stat. 1198, 1211 (2019) (to be codified at 10 U.S.C. §§ 9063-68).
36. David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 145-47 (1980).
37. JONATHAN LURIE, 1 ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 3-5 (1992).

execution of court-martial sentences until after a report “of the whole proceedings to Congress, or to the general or commander in chief of the forces of the United States.”<sup>38</sup> In 1786, Congress made several other changes to make the Articles easier to administer, and, significantly, granted to itself the responsibility to review several important categories of court-martial judgements, such as death sentences and dismissals of commissioned officers.<sup>39</sup>

When the Constitution replaced the Articles of Confederation in 1789, Congress declined to amend the Articles of War.<sup>40</sup> Congress had the final say over court-martial dispositions and sentences until it returned this power to the President in 1796.<sup>41</sup> Congress made some additional revisions to the Articles in 1796<sup>42</sup> and 1806.<sup>43</sup> It then made no further substantive changes to the structural allocation of power under the Articles until 1890, when Congress delegated to the President the power to set maximum punishments and directed that these maximums were to be exceeded only in wartime.<sup>44</sup> Congress revised the Articles again on the eve of WWI in 1916, mainly to expand the enumerated offenses and to restructure the various types of court-martial and punishment, but these amendments did not affect the system’s command-centric structure.<sup>45</sup>

From 1796 to 1920, the Articles largely left the commanding officer’s discretion over the disposition of charges without a meaningful check. Military law during that period provided for only two types of review for court-martial convictions: (1) review by the commander or his successor (“reviewing authority”),

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38. Articles of War of 1776, art. 8, [https://avalon.law.yale.edu/18th\\_century/contcong\\_09-20-76.asp](https://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp) [<https://perma.cc/XP2E-PT29>]. The 1775 Articles had allowed for the execution of a sentence upon the commanding officer’s certification, without further review. Articles of War of 1775, art. 2, [https://avalon.law.yale.edu/18th\\_century/contcong\\_06-30-75.asp](https://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp) [<https://perma.cc/6EUS-GWAE>].

39. Articles of War of 1786, art. 2, *reprinted in* WINTHROP, *supra* note 13, at 972, \*1504.

40. Secretary of War Henry Knox wrote to President Washington after ratification that the Articles of War ought to “be revised and adapted to the Constitution,” 1 AMERICAN STATE PAPERS MILITARY AFFAIRS 6 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832), but Congress presumably felt no need to do so, perhaps because the “make rules” clauses of the Articles of Confederation and the Constitution were so similar. *Compare* U.S. CONST. art. I, § 8, cl. 14. (stating that Congress has the power “to make Rules for the Government and Regulation of the land and naval Forces”), *with* ARTICLES OF CONFEDERATION OF 1781, art. IX, cl. 4 (establishing that Congress enjoys the “sole and exclusive right and power . . . [to make] rules for the government and regulation of the said land and naval forces, and directing their operations”).

41. Act of May 30, 1796, ch. 39, § 18, 1 Stat. 483, 485.

42. *Id.*

43. Act of Apr. 30, 1806, ch. 20, 2 Stat. 359.

44. Act of Sept. 27, 1890, ch. 998, 26 Stat. 491.

45. Act of Aug. 29, 1916, ch. 418, §§ 2-3, 39 Stat. 619, 651-66.

and (2) review by the President (“confirming authority”).<sup>46</sup> While this system kept review of court-martial convictions entirely within the military-command structure, there was one important civilian check on the system – the long-accepted practice of civilian prosecution for offenses without a service connection, committed both on and off base.<sup>47</sup> Congress began to chip away at the service-connection requirement beginning with the United States’s entrance into WWI. In the 1916 revisions to the Articles of War, Congress extended court-martial authority to cover a variety of civilian offenses,<sup>48</sup> beginning a trend that continued throughout the twentieth century.

While pre-WWI Congresses rarely agitated to reform the military justice system, they did occasionally involve themselves in individual cases by considering private bills and claims that arose from complaints about military justice proceedings. Private bills were an avenue for redress of individual cases, and they may even have served as a relief valve of sorts for pressures on Congress to reform the system.<sup>49</sup> However, private bills and the determinations of the Claims Committees could only provide collateral or post hoc remedies for specific cases of unjust or undesirable disciplinary action. They aimed neither to alter nor to influence the legal rules of the military justice system, nor to intercede on behalf of servicemembers in pending cases.

With some intermittent congressional involvement, from the Founding to WWI, the military justice system’s development was primarily process internal to the executive branch. During this period, Congress served mainly to ratify executive efforts rather than to oversee or reform them. The legislature began to supervise the system more closely only once an agitator on the inside – visible, brazen, and sufficiently frustrated with injustice – demanded action.

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46. William F. Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15, 25 (1949). In 1796, Congress gave up its review powers; from 1786 to 1796, Congress had served as the confirming authority. See *supra* text accompanying note 41.

47. Unlike King George III’s 1774 Articles and the Continental Congress’s 1775 Articles, the 1776 Articles and their successors reserved military prosecution only for military offenses. ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 173 (1970). This practice continued until WWI, with the exception of a temporary period during the Civil War in which civilian offenses committed by military personnel were permitted to be tried by court-martial. *Id.*

48. § 18, 39 Stat. at 659-66 (enumerating offenses such as burglary and embezzlement as among those subject to court-martial).

49. The volume of petitions for private legislation in the Early Republic was large enough that the House and Senate Claims Committees were the third and fourth standing committees in their respective houses of Congress. Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, 27 PROLOGUE 45, 50-51 (1995). The number of claims related to war and the military was so great that Congress established additional claims committees, first in 1825 and again in 1831. *Id.* For an example of a private bill, see Act for the Relief of Fred R. Nugent, Priv. L. No. 7-28, 45 Stat. 1708 (1928).

*B. WWI to the UCMJ: A Clamor for Reform*

WWI led to unprecedented congressional oversight, prompted by a legendary feud among leaders of the military justice system and the decision of one of them to start a revolution. The fires of the Ansell-Crowder Dispute, fueled by infamous court-martial trials during the war, provided the substrate for the first major revision of the Articles to challenge the finality of the commanding officer's decision at a court-martial.<sup>50</sup>

The facts of the dispute and underlying courts-martial are complex and have received considerable attention elsewhere.<sup>51</sup> To summarize, from 1917 to 1920, a feud played out between two of the U.S. Army's top legal officers. In 1917, Major General Enoch Crowder, the Army Judge Advocate General (JAG), had been assigned to administer the Selective Service Act, leaving Brigadier General Samuel Ansell as the acting occupant of Crowder's office.<sup>52</sup> The two men had completely divergent views about the purpose of military justice. To Crowder, as to Colonel Winthrop,<sup>53</sup> courts-martial were essentially military in both form and function. Their justice was a means to the end of good order and discipline, and only the most rank and unconscionable injustices would provide grounds for objection.<sup>54</sup> Ansell, on the other hand, saw courts-martial as judicial bodies first and foremost, with due process as the sine qua non of their legitimacy.<sup>55</sup>

Before and during WWI, disagreements between the two leaders played out against several racially charged courts-martial. The first was the trial at Fort Bliss of a group of enlisted men for refusing to drill.<sup>56</sup> For a relatively minor offense, all were dishonorably discharged and given carceral sentences ranging from ten

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50. This was not, however, the first time that a particular military trial commanded congressional attention. That (dis)honor probably belongs to the Somers affair. See LURIE, *supra* note 37, at 21 (explaining how an unjust court-martial prompted outrage over the practice of reconsideration and prompted proposals for an appellate tribunal to review military sentences). Unlike the Ansell-Crowder Dispute, the clamor after the Somers incident quickly died down and did not lead to significant changes in military justice. See *id.* at 21-29 (detailing the trial, execution, subsequent furor, and lack of congressional response).

51. A more thorough treatment can be found in LURIE, *supra* note 37, which recounts the history of the military justice system from 1775 to 1950 and explains how the Ansell-Crowder Dispute was among the key events that eventually led to the adoption of the UCMJ.

52. *Id.* at 48.

53. See WINTHROP, *supra* note 13, at 57-59, 65-69.

54. See U.S. WAR OFFICE, PROCEEDINGS AND REPORT OF SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE 6, 7 (1919), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/proceedings.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/proceedings.pdf) [<https://perma.cc/2DYZ-MZ2N>].

55. S.T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1, 5-7 (1919).

56. Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 1-2 (1967).

to twenty-five years.<sup>57</sup> When Ansell attempted to set aside the sentences using the review authority that Congress had granted to the JAG in the wake of the Civil War,<sup>58</sup> Crowder intervened, informing Secretary of War Newton Baker that Ansell in his capacity as acting JAG lacked review authority under the statute, and that Crowder would not exercise it himself.<sup>59</sup>

The second was the 1917 trial of Black enlisted men and noncommissioned officers who were serving under white officers in the segregated 24th Infantry Regiment in Houston, Texas.<sup>60</sup> Following proceedings fraught with substantive and procedural injustice, thirteen Black servicemembers were expeditiously hanged without approval from the War Department or any other national authority.<sup>61</sup> Ansell, appalled, convinced the Secretary of War to issue General Orders No. 7, which required a determination of legality by the JAG before the execution of any military death sentence.<sup>62</sup> Congress, for the moment, took no action.

While the orders represented a minor victory for Ansell, these cases convinced him that changes would be required to ensure justice in the military system.<sup>63</sup> In an unprecedented move, Ansell enlisted the help of a senator, George Chamberlain of Oregon, who introduced a bill containing all of Ansell's proposals in the Senate in 1919.<sup>64</sup> Describing the then-pending bill in the *Yale Law Journal*, Edmund Morgan characterized the "Ansell Army Articles" as embodying "the very antithesis . . . of the existing court-martial system."<sup>65</sup> In the face of vehement opposition from the Army, Chamberlain's bill failed to pass. In the wake

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57. *Id.*

58. The provision read, in pertinent part, "the said Judge-Advocate-General shall receive, revise, and have recorded the proceedings of all courts-martial." Act of June 23, 1874, ch. 458, § 2, 18 Stat. 244, 244.

59. JUDGE ADVOCATE GEN.'S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 128-29 (1975).

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

61. One hundred and ninety-six witnesses testified during the twenty-two-day trial of sixty-three Black servicemembers, all of whom were charged with identical crimes and represented by a single defense counsel, who was not a lawyer. Thirteen were hanged, forty-one were sentenced to life imprisonment, four received lesser sentences, and only five were acquitted. JUDGE ADVOCATE GEN.'S CORPS, *supra* note 59, at 126-27; Borch, *supra* note 60, at 2.

62. U.S. WAR DEP'T, GENERAL ORDERS NO. 7 (Jan. 17, 1918); *see* Borch, *supra* note 60, at 2-3 (quoting a letter from the "incensed" Ansell).

63. A list and discussion of Ansell's proposed changes can be found in JUDGE ADVOCATE GEN.'S CORPS, *supra* note 59, at 132-35.

64. S. 64, 66th Cong. (1919).

65. Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 *YALE L.J.* 52, 73 (1919).

of that failure and under great pressure from his superiors, Ansell resigned from the Army.<sup>66</sup> A few of his proposals, watered down, made it into the 1920 revisions of the Articles of War.<sup>67</sup>

The concerns that Ansell raised emerged again during World War II (WWII). Between the attacks on Pearl Harbor and Japan's surrender, more than sixteen million men and women served in the U.S. armed forces.<sup>68</sup> The same period saw the convening of a stunning two million courts-martial—one per every eight servicemembers—which produced 80,000<sup>69</sup> convictions, an average rate of around sixty per day. The armed services carried out over 100 executions, and by the end of the war 45,000 servicemembers had been imprisoned.<sup>70</sup>

The sheer scope of the conflict and the pervasiveness of military justice within servicemembers' lives ensured that nearly all of the sixteen million had been exposed to the system by the time they returned home. That system was substantially similar to the one that produced the injustices to which Ansell reacted decades earlier, and returning GIs raised the cry for reform.<sup>71</sup> These cries prompted groups like the American Bar Association (ABA), the American Legion, the Judge Advocates Association, and the New York Bar to engage with military justice reform.<sup>72</sup>

This time, the initial response came from within the Department of War. In 1946, the Secretary appointed Arthur Vanderbilt, a former ABA president, to chair an advisory committee tasked with recommending changes to the court-martial system.<sup>73</sup> The Vanderbilt Committee operated similarly to congressional

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66. Edmund M. Morgan, *General Samuel T. Ansell*, 14 *LAW. & BANKER & S. BENCH & B. REV.* 342, 344 (1921).

67. See Act of June 4, 1920, ch. 227, 41 Stat. 759.

68. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1970*, at 256 tbl.385 (1970).

69. GENEROUS, *supra* note 35, at 14.

70. LURIE, *supra* note 37, at 128.

71. See, e.g., ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 9 (1956) (“When Johnny came marching home . . . he brought with him . . . a conviction that the administration of military justice had not always lived up to the goals of fairness and impartiality . . . accepted as part of the American legal tradition.”).

72. Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 *MIL. L. REV.* 1, 12 (1987).

73. Edward F. Sherman, *The Civilianization of Military Law*, 22 *ME. L. REV.* 3, 31 (1970). The Secretary of the Navy convened a similar commission, the Keith-Larkin panel, in the same year. That commission found rampant problems related to the powers of the convening authority. Its report emphasized that while command control was essential for discipline, once referred to trial, a case “ceases to be a mere disciplinary matter, and from that time on the process of law should be paramount, and command control should cease.” LURIE, *supra* note 37, at 143

committees, conducting hearings and investigations related to servicemembers' complaints of injustice.<sup>74</sup> The Committee's report, issued the same year, recounts its findings of a "disquieting absence of respect" for the system among servicemembers, severe under-resourcing and lack of attention from military leadership, and widespread sentencing disparities and excessiveness, all of which had led to a "serious impairment of the morale of the troops."<sup>75</sup>

The report caught the attention of Congress, which addressed the findings through congressional committee investigations<sup>76</sup> and attached several revisions of the Articles of War to the Selective Service Act of 1948.<sup>77</sup> That legislation, known as the Elston Act, made a few important changes to the system, including the creation of the JAG Corps.<sup>78</sup> These reforms were quickly overshadowed. A month before the Elston Act passed in the Senate, Chairman J. Chandler "Chan" Gurney of the SASC wrote a letter to Secretary of Defense<sup>79</sup> James Forrestal to commission a feasibility study to explore the creation of a uniform system of justice for all three branches of the armed forces.<sup>80</sup> Two months later, Forrestal tapped law professor Morgan<sup>81</sup> to draft the new law.<sup>82</sup> The committee finished its first draft in less than six months, and, after hearings in March and April of 1949, Congress passed and President Truman signed the UCMJ, enacting the Morgan Committee's draft without significant changes.<sup>83</sup>

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(quoting REPORT OF THE GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD TO THE SECRETARY OF THE NAVY 203 (1947)).

74. See Sherman, *supra* note 73.
75. U.S. WAR DEP'T ADVISORY COMM. ON MILITARY JUSTICE, REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 3-4 (1946).
76. See, e.g., H. COMM ON MILITARY AFFAIRS, 79TH CONG., INVESTIGATIONS OF THE NATIONAL WAR EFFORT: REPORT PURSUANT TO H. RES. 20, at 2 (1946).
77. Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201-49, 62 Stat. 604, 627-44.
78. *Id.* § 246. The Act also adopted the Vanderbilt Committee's recommendation to prohibit command interference with a court-martial. *Id.* § 233.
79. By this time, the 1947 National Security Act had unified the armed services under the newly created Department of Defense. See National Security Act of 1947, Pub. L. No. 80-253, § 201, 61 Stat. 495, 499-500.
80. Letter from Sen. Chan Gurney to James Forrestal, Sec'y of Def. (May 3, 1948), [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-I\\_correspondence.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_correspondence.pdf) [https://perma.cc/56EX-WZRW].
81. Morgan had written an influential article in the *Yale Law Journal* supporting Ansell's proposals nearly three decades earlier. See Morgan, *supra* note 65.
82. LURIE, *supra* note 37, at 161.
83. Sherman, *supra* note 73, at 38.

The UCMJ took effect on May 31, 1951.<sup>84</sup> The Code was most controversial for what it did not change. It stopped short of abolishing command control of courts-martial, a change that reformers had long urged<sup>85</sup> in the face of impassioned opposition from military leadership.<sup>86</sup> In the end, Morgan's committee brokered a compromise between the reformers and the military: command control would remain a fundamental feature of the system, but particularly undesirable forms of command influence would be proscribed.<sup>87</sup>

It would be difficult to overstate reformers' disappointment with the decision to preserve command control over courts-martial. During hearings on the UCMJ, the Chair of the War Veterans' Bar Association testified:

[T]he basic reform which the court-martial system requires and without which no real reform is possible—the elimination of command control from the courts—is conspicuously missing. . . . We will still have the same old story of a court and counsel, all of whom are dependent upon the appointing and reviewing authority for their efficiency ratings, their promotions, their duties, and their leaves.<sup>88</sup>

Despite these critiques, the changes were revolutionary. The UCMJ was the first and last time Congress made major structural changes to the U.S. military

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84. Uniform Code of Military Justice, Pub. L. No. 81-506, § 5, 64 Stat. 107, 145 (1950) (codified as amended at 10 U.S.C. §§ 801-946 (2018)).
85. See, e.g., Letter from George A. Spiegelberg, Chairman, Special Comm. on Military Justice, Am. Bar Ass'n, Frederick P. Bryan, Chairman, Special Comm. on Military Justice, Ass'n of the Bar of the City of N.Y., Richard H. Wels, Chairman, Special Comm. on Military Justice, N.Y. Cty. Lawyers' Ass'n & Arthur E. Farmer, Chairman, Comm. on Military Law, War Veterans' Bar Ass'n, to Edmund M. Morgan, Chairman, Comm. on a Unif. Code of Military Justice (Nov. 22, 1948), [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-IV-comments-on-Committee.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-IV-comments-on-Committee.pdf) [<https://perma.cc/6C4C-S3T2>].
86. See, e.g., Dwight D. Eisenhower, General, U.S. Army, Speech to the New York Lawyer's Club (Nov. 17, 1948), quoted in Sherman, *supra* note 73, at 35 (“[T]he Army . . . was never set up to ensure justice. It is set up . . . to perform a particular function.” (quoting Letter from N.Y. State Bar Ass'n to Comm. on Military Justice 4 (Jan. 29, 1949))). The same critique endures today. See, e.g., Spoehr, *supra* note 13 (arguing that a reallocation of disciplinary-referral power from commanders to more independent Judge Advocate Generals (JAGs) is “terribly misguided”).
87. See Uniform Code of Military Justice art. 37, 64 Stat. at 120 (codified as amended at 10 U.S.C. § 836).
88. *Hearings on H. R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 646 (1949) (statement of Arthur E. Farmer, Chairman, Comm. on Military Law of the War Veterans Bar Ass'n). This line of argument also applies to the Armed Services Committees (ASCs), given both committees' role supervising the Department of Defense and the Senate Armed Services Committee's (SASC's) powers over the promotion of officers. See *supra* note 31 and accompanying text.



justice system. This new system emphasized justice alongside military order and discipline – an unprecedented change in focus.<sup>89</sup>

Congress, having heard extensive testimony from both supporters and detractors of the command-centric system, was keenly aware of the compromise nature of the UCMJ's protections against undue influence. During a floor debate in the House, Representative Foster Furcolo expressed concern that Article 37's protections did not go far enough, admonishing the military that "Congress is going to follow this matter up and . . . see that the command control is kept within bounds as much as possible."<sup>90</sup> Representative Thomas E. Martin recognized the need for "Congress [to] be ever ready to revise and improve the system," yet emphasized the importance of allowing the system "to function without undue interference by Congress in specific cases."<sup>91</sup> Neither the UCMJ, nor any subsequent law, has ever addressed Martin's concern about congressional interference in military justice.

At the time, Martin's concern about congressional interference was new. Before the UCMJ, legislators would occasionally voice desires for specific actions in individual cases.<sup>92</sup> But these actions generally did not raise allegations of impropriety or the appearance thereof, perhaps because the intercessions could be characterized as an exercise of legislative authority to oversee the Executive – hardly an improper role for congressmembers. By its passage, Article 37 colored previously unscrutinized congressional rhetoric as undue interference in a judicial process, even though the provision did not actually proscribe such conduct. By establishing that courts-martial, like civilian trials, were judicial proceedings in which interference was improper, the UCMJ not only revolutionized the rules, but also recharacterized the system as one of impartial justice rather than drum-head discipline.

These monumental changes began with an insider, Ansell, who saw problems in the system and agitated for change – arguably committing UCI as the Code later defined it – thereby jeopardizing his position within the military bureaucracy. Ansell actively solicited the attention of Congress to legislate against systemic problems with military justice, but did not request that Congress legislate with particular cases in mind. While Ansell had at first attempted to influence unjust cases on his own, he – and the congressmembers who shared his goal of reform – eventually focused on systemic change rather than case-specific

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89. See *infra* Part IV for further discussion of the justice/discipline distinction.

90. 95 CONG. REC. 5,728 (1949) (statement of Rep. Furcolo).

91. *Id.* at 5,729 (statement of Rep. Martin).

92. See, e.g., Frederick R. Barkley, *Demand Navy Put Corrigan on Trial: Senators Assert Court-Martial Should Judge Using 'Restricted' Data for Private Benefit*, N.Y. TIMES (May 27, 1944), <https://timesmachine.nytimes.com/timesmachine/1944/05/27/86857744.html> [https://perma.cc/DWM9-VT5J].

oversight and legislation. The legacy of Ansell's impact comes not from his initial actions in individual cases, but from his later efforts to transform the system.

While it is doubtful that the UCMJ would have been enacted without Ansell's activism,<sup>93</sup> WWII and the resulting exposure of the military justice system's inner workings to the light of day also contributed to its passage. The period leading up to the UCMJ's enactment was characterized by intensified congressional oversight of the military justice system and concerted efforts to gather information about its nature and operation. Nevertheless, Congress and its members tended to respect the integrity of the adjudicatory process and generally did not seek to intercede in individual cases.

### C. From the UCMJ Onwards: Accelerating Engagement

Congress made no major changes to the UCMJ in the 1950s.<sup>94</sup> By the beginning of the next decade, the United States had experienced the postwar occupation of Europe and Asia, had gone to war in Korea, and was beginning to fight a new war in Vietnam. The Court of Military Appeals, which began hearing cases shortly after the UCMJ's enactment, was issuing frequent rulings interpreting both the UCMJ and the Constitution.<sup>95</sup> The military bar remained abuzz with proposals for how military justice might be further reformed.<sup>96</sup>

Despite the UCMJ's monumental changes, congressmembers were still receiving "numerous complaints concerning military justice" that left them

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93. Morgan, Ansell's contemporary and a fellow giant of military reform, made clear that Ansell's efforts were of historic importance: "Without this officer, we should still have the cruel and archaic system." Morgan, *supra* note 66, at 344.

94. This was not for lack of trying. The first report of the committee responsible for an annual assessment of the UCMJ recommended seventeen immediate changes. ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD JUNE 1, 1952, TO DECEMBER 13, 1953, at 3-11 (1954). Reforms were proposed throughout the 1950s and 1960s, but most failed to pass. See, e.g., H.R. 3455, 86th Cong. (1959). See generally Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971) (cataloging proposals).

95. See, e.g., *United States v. Solinsky*, 2 C.M.A. 153 (1953) (holding that jurisdiction was proper where a servicemember was court-martialed after reenlistment for an offense that occurred during a previous period of service, distinguishing *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949)); *United States v. Reeves*, 1 C.M.A. 388 (1952) (holding that the Court of Military Appeals will not assume jurisdiction until a final action from the intermediate appellate tribunal); *United States v. Roman*, 1 C.M.A. 244 (1952) (holding that the defense of intoxication is limited to offenses that have as an element either premeditation or specific criminal intent).

96. See, e.g., William A. Creech, *Congress Looks to the Serviceman's Rights*, 49 A.B.A. J. 1070 (1963); William F. Walsh, *Military Law: Return to Drumhead Justice?*, 42 A.B.A. J. 521 (1956).

“greatly disturbed.”<sup>97</sup> During the 1950s, several military justice cases at the Supreme Court caught the attention of the public and congressmembers.<sup>98</sup> Most prominent among them were Senators Sam Ervin and Kenneth Keating, both veterans of the First and Second World Wars. Ervin and Keating were particularly concerned with “assuring that the serviceman’s constitutional rights will not be lost because of a decision to try him by court-martial instead of in a civilian court.”<sup>99</sup> After two rounds of hearings in 1962 and 1966, on issues including court-martial administration, administrative discharge procedures, review and appeals, and jurisdiction, the Senators and their allies put forward eighteen bills with proposed reforms.<sup>100</sup> Many of their proposals were enacted as part of the Military Justice Act of 1968, which further judicialized the system.<sup>101</sup>

As the Vietnam War grew in scope and increasing numbers of young Americans were drafted into service, complaints to Congress increased. Beyond the usual wartime increases in absent-without-leave (AWOL) and other disciplinary offenses, crimes stemming from political dissent and war atrocities also characterized military justice in the Vietnam era.<sup>102</sup> By 1971, just three years after the passage of the 1968 Act, three major bills for military justice reform were pending in the ninety-second Congress, and another three from the ninety-first were being revised for reintroduction.<sup>103</sup>

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97. *Bills to Improve the Administration of Justice in the Armed Services: Joint Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and a Special Subcomm. of the S. Comm. on Armed Servs.*, 89th Cong. 2 (1966) [hereinafter *1966 Joint Hearings*] (statement of Sen. Sam Ervin, Chairman, Subcomm. on Constitutional Rights).

98. *E.g.*, *Harmon v. Brucker*, 355 U.S. 579 (1958) (per curiam) (holding that federal courts may judicially review administrative discharges); *Wilson v. Girard*, 354 U.S. 524 (1957) (permitting the military to waive its jurisdiction over a servicemember’s offense committed in Japan and to allow him to be tried in a Japanese court); *Burns v. Wilson*, 346 U.S. 137 (1953) (holding that courts-martial must provide a limited form of due process).

99. *Constitutional Rights of Military Personnel, Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 4 (1962) (statement of Sen. Ervin).

100. *1966 Joint Hearings*, *supra* note 97, at 2-3 (statement of Sen. Ervin).

101. Pub. L. No. 90-632, 82 Stat. 1335 (1968); see John Jay Douglass, *The Judicialization of Military Courts*, 22 *HASTINGS L.J.* 213, 214-15 (1971) (describing the 1968 changes).

102. See *Parker v. Levy*, 417 U.S. 733 (1974) (establishing limits for political expression for those serving in the military in the case of an Army physician who was tried and convicted by court-martial after he urged Black enlisted men not to serve in Vietnam due to discriminatory treatment); *United States v. Calley*, 22 C.M.A. 534 (1973) (upholding Calley’s conviction for war crimes at My Lai, Vietnam).

103. H.R. 6901, 92d Cong. (1971) (introduced by Rep. Charles Whalen); S. 1127, 92d Cong. (1971) (introduced by Sen. Birch Bayh); H.R. 2196, 92d Cong. (1971) (introduced by Rep. Melvin Price); S. 4178, 91st Cong. (1970) (introduced by Sen. Mark Hatfield); S. 4168, 91st Cong. (1970) (also introduced by Sen. Hatfield); S. 1266, 91st Cong. (1969) (introduced by Sen.

While each of these bills suggested structural, procedural, and substantive changes to the military justice system, none addressed intercession in individual cases. Nevertheless, the issues raised by highly publicized trials, including that of Second Lieutenant William Calley for the murder of twenty-two unarmed civilians in My Lai, Vietnam,<sup>104</sup> drew the attention of national leaders, including congressmembers. In his brief to the Court of Military Appeals, Calley cited the statements of President Nixon, Secretary of Defense Melvin Laird, Secretary of the Army Stanley Resor, and several congressmembers to argue (unsuccessfully) that the statements amounted to UCI.<sup>105</sup>

One of the most egregious examples of congressional influence in a pending court-martial from this period arose from the HASC investigation of the massacre.<sup>106</sup> On December 11, 1969, Representative F. Edward Hébert was appointed to chair a four-member panel of the HASC charged with investigating the alleged war crimes.<sup>107</sup> Hébert, who served on the infamous House Un-American Activities Committee, held strong views about communism and the role of the United States in Vietnam.<sup>108</sup> He led an aggressive investigation, which conducted all of its interviews in executive session.<sup>109</sup> Witnesses were informed that their privacy was protected, that their testimony would not be released, and that they were under no obligation to speak with reporters.<sup>110</sup> Hébert characterized the committee's procedures as an effort to insulate the investigation from

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Ervin). The Bayh and Hatfield bills are particularly notable for the ambitious reforms they proposed. The Bayh bill proposed several regional and overseas court-martial commands to make referral decisions and appoint panel members subject to the civilian-like oversight of a military judge. S. 1127 § 806a. The commander would retain only referral authority. One of the Hatfield bills would have established several judicial circuits divided into four sections, each of which would detail investigators at the commander's request. S. 4168 § 806b. If the circuit recommended against court-martial, the commander could proceed only with the JAG's express approval. *Id.*

104. *See Calley*, 22 C.M.A. 534.

105. LUTHER C. WEST, *THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM* 156-66 (1977).

106. *See generally* Michael J. Davidson, *Congressional Investigations and Their Effect on Subsequent Military Prosecutions*, 14 J.L. & POL'Y 281, 298-308 (2006) (describing the congressional influence on the proceedings in detail).

107. Mark D. Carson, *F. Edward Hébert and the Congressional Investigation of the My Lai Massacre*, 37 LA. HIST. 61, 67 (1996).

108. *Id.* at 79.

109. *Id.* at 67, 69.

110. *Id.* at 69.

ongoing military justice proceedings.<sup>111</sup> Throughout the investigation, the Army incessantly called Hébert. “Day after day,” Hébert later recounted, “they kept calling, here on the Hill. At home in Alexandria. At my daughter’s house in New Iberia. Hell, they even called me back in a Boston hospital [when I was] recuperating from an [eye] operation.”<sup>112</sup>

But, in the end, it was the Congressman who influenced the military, and not the other way around. Even as the Army attempted to induce Hébert to turn over the materials necessary for the trials, the Congressman stood firm in his insistence that the proceedings remain completely shielded from the machinery of justice through which the United States was trying to reckon with atrocities committed by its own soldiers. After his investigation concluded, Hébert refused to honor subpoenas from military courts for committee transcripts.<sup>113</sup> This decision had a profound impact on pending military justice proceedings. For instance, in the trial of Staff Sergeant David Mitchell (a squad leader in Calley’s platoon), the military judge, Colonel George Robinson, declined to allow four critical prosecution witnesses to testify because of Hébert’s refusal to comply with his subpoena.<sup>114</sup> As a result of Hébert’s decision, the case against Mitchell fell apart and he was acquitted a month later.<sup>115</sup>

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111. “[T]o avoid any prejudice to the rights of any person currently under charges, or who might have charges brought against him, all of our witnesses will be heard in executive session.” *Investigation of the My Lai Incident - Hearings of the Armed Services Investigating Subcomm. of the Comm. on Armed Services*, 91st Cong. 1 (1970) (statement of Rep. Hébert).
112. Mel Leavitt, *My Lai: Don’t Call Me, I’ll Call You* 35 (1971) (unpublished journalistic typescript), *quoted in* Carson, *supra* note 107, at 70.
113. Carson, *supra* note 107, at 73.
114. William Greider, *Hill Panel Sets Back Mylai Case*, WASH. POST, Oct. 16, 1970, at A1, <https://search.proquest.com/news/docview/147797968/6F942B84C89C4BEEPQ> [<https://perma.cc/72SQ-LWEQ>]. See generally Note, *A Defendant’s Right to Inspect Pretrial Congressional Testimony of Government Witnesses*, 80 YALE L.J. 1388 (1971) (defending Judge Robinson’s ruling). Judge Robinson apparently reasoned that if the prosecution had called the witnesses, it would have been required to turn over the hearing transcripts under the Jencks Act—which, in the face of the Hébert’s refusal to comply with the court’s subpoena, it could not do. See 18 U.S.C. § 3500(b) (1970) (“After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness *in the possession of the United States* which relates to the subject matter as to which the witness has testified.”) (emphasis added). Judge Robinson’s ruling depended on a broad conception of materials “in the possession of the United States” to encompass congressional hearing testimony. But, as the Fifth Circuit later noted in its review of Calley’s habeas petition, Judge Robinson’s curious reading of the Jencks Act was not followed by the federal courts. *Calley v. Callaway*, 519 F.2d 184, 225 n.64 (5th Cir. 1975) (citing *United States v. Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C. 1974), *aff’d*, 546 F.2d 910 (D.C. Cir. 1976)).
115. Douglas Robinson, *G.I. in Mylai Case Cleared by Army*, N.Y. TIMES (Nov. 21, 1970), <https://www.nytimes.com/1970/11/21/archives/gi-in-mylai-case-cleared-by-army-sergeant-mitchell-acquitted-by.html> [<https://perma.cc/NGQ7-MPWX>].

In Mitchell's case and several others, Hébert rebuffed requests for disclosure from all quarters: counsels for the accused, prosecuting attorneys, news media, and even his own colleagues in Congress.<sup>116</sup> Hébert's conduct demonstrated both the extent of HASC's ability to influence military justice proceedings and how the military can attempt to use congressional investigations to reach a favorable result (albeit unsuccessfully). In a letter to fellow Congressman L. Mendel Rivers regarding Hébert's intransigence, then-Representative Abner Mikva complained:

The Committee's decision to withhold from a defendant put to trial by the United States evidence which may be necessary to his defense and simultaneously deny to the prosecution testimony of important witnesses is a decision that can reflect credit on neither the committee nor the congress. It seems a sorry spectacle . . . to see the foremost lawmaking body in the land obstructing administration of the very law it writes.<sup>117</sup>

In the years since Vietnam, congressional conduct like Hébert's has become less exceptional. Clashes between Congress's legislative and supervisory prerogatives and the judicial integrity of the military justice system have appeared as part of several military justice incidents, including the Army's Aberdeen scandal and the case of Air Force Lieutenant Kelly Flinn's adulterous affair and subsequent perjury.<sup>118</sup>

As congressmembers reached beyond their oversight prerogative to engage in interference, legislative changes to the military justice system became more frequent but less comprehensive. In the early 1970s, Senators Bayh, Hatfield, and others introduced bills that responded to the injustices of the Vietnam War and proposed comprehensive reforms to the command-centric structure of military justice.<sup>119</sup> Among other restrictions, such as strict limits on court-martial jurisdiction, these proposals would have created a separate "command" for military justice, removing the commander's influence over the system and more fully civilianizing the system.<sup>120</sup> Had these reforms come to pass, they also would have heavily restricted Congress's ability to interfere in pending matters. Under proposals such as Bayh's and Hatfield's, because the commander would not exercise

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116. Carson, *supra* note 107, at 74.

117. *Id.* (quoting Letter from Rep. Abner K. Mikva to Rep. L. Mendel Rivers (Dec. 7, 1970)).

118. For a trenchant analysis of these incidents and others from the 1990s, see Rawles, *supra* note 9, at 58-107.

119. See *supra* note 103 and accompanying text.

120. This is a generalization. The various bills proposed differing means for accomplishing the same broad objective of removing command control. See *supra* note 103.

final prosecutorial authority, SASC members would no longer be able to influence the commander by holding up promotions because they disagreed with how the commander disposed of a particular case.<sup>121</sup>

Despite multiple reintroductions, none of these bills became law. The next significant congressional UCMJ reform<sup>122</sup> came in 1983, with no changes to command structure or other measures to rein in improper influence.<sup>123</sup> The amendments through the 1990s generally followed the same trend, making relatively minor tweaks.<sup>124</sup>

The Vietnam War had an immense impact on American society, politics, and the structure of the DoD.<sup>125</sup> It also laid bare the problems inherent in the UCI framework, especially with regard to congressional activity. Nevertheless, the American experience in Vietnam failed to fundamentally change how military justice worked.

At the dawn of the new millennium, the military justice system looked largely the same as it had for the last half century. The military itself had changed greatly, with perhaps the most notable change being the growing number of female servicemembers. From 1973, the last year of the draft, to 2000, the number of women on active duty increased from 42,278 to 169,084, from one in fifty to more than one in seven.<sup>126</sup> The challenges accompanying a mixed-gender force led to Congress's next and most recent major reconfiguration of military justice.

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121. See Rawles, *supra* note 9, at 116-17; see also *infra* Section V.C (making a similar proposal).

122. Two other significant reforms came from the Executive. In 1980, the President by executive order amended the R.C.M. to adopt the Military Rules of Evidence (MRE). Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980). In 1984, the President again revised the R.C.M. from a treatise to a rules-based format. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984).

123. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. The act's major contribution was to establish Supreme Court review by certiorari to the Court of Military Appeals, later renamed CAAF. *Id.* § 10(a)(1), at 1406.

124. See, e.g., National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1570 (1989) (codified at 10 U.S.C. § 942 (2018)) (increasing the number of CAAF judges from three to five); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 577, 113 Stat. 512, 625 (1999) (codified as amended at 10 U.S.C. § 819 (2018)) (increasing the maximum special court-martial sentence).

125. See Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992.

126. Table D-13. *Female Active Component Enlisted Members by Service with Civilian Comparison Group, FYs 1970-2018*, CNA, [https://cna.org/pop-rep/2018/appendixd/d\\_13.html](https://cna.org/pop-rep/2018/appendixd/d_13.html) [<https://perma.cc/9TQ4-AL4P>].

### III. CONTEMPORARY CONGRESSIONAL MANAGEMENT OF MILITARY JUSTICE

Today's Congress is deeply engaged with shaping military justice. Since 1973, 657 bills mentioning military justice have been introduced in Congress, and just over half have come from the last eight Congresses.<sup>127</sup> In the 116th Congress, members introduced 45 bills concerning military justice.<sup>128</sup> The 94th Congress, which oversaw the end of the Vietnam War, had only nine.<sup>129</sup> This increased legislative activity is a positive development; many of the bills in recent Congresses have addressed systemic problems with the military justice system, such as the rampant underprosecution of sexual misconduct.<sup>130</sup>

While appreciating the history of Congress's oversight of military justice is essential to understand how, why, and under what circumstances Congress and the military have interacted, comprehending the challenges inherent in the relationship today demands a focus on current events. This Part analyzes two case studies that exemplify Congress's contemporary relationship with the military justice system: (A) the response to sexual assault in the military through the MJA, and (B) congressional responses to the increased politicization of individual instances of military discipline, with a focus on the recent *United States v. Bergdahl* case. The former demonstrates the positive consequences of robust congressional oversight, and the latter exemplifies the threat that untrammelled interference in pending cases may pose to the system's integrity.

Together, these case studies reveal the Janusian nature of contemporary congressional engagement with military justice. Tracing the development of the MJA highlights the evolution of legislative action from interference to oversight. While congressional attention to sexual assault in the military began with improper, one-off interventions into individual cases, this practice eventually gave way to a more productive paradigm of legislative oversight, focused on broad investigation and legislation. On the other hand, examining the political tumult

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127. *Legislation*, CONGRESS.GOV (2020), <https://www.congress.gov/advanced-search/legislation> [<https://perma.cc/AJQ4-PT9A>] (search for the exact phrase "military justice" among bills introduced in the 93rd to 116th Congresses (1973-2020)).

128. *Id.* [<https://perma.cc/AE88-85MA>] (search for the exact phrase "military justice" among bills introduced in the 116th Congress).

129. *Id.* [<https://perma.cc/2RSU-ER62>] (search for the exact phrase "military justice" among bills introduced in the 94th Congress).

130. Of the 657 bills dealing with military justice introduced in Congress from 1973 to 2020, 210 (thirty-two percent) addressed sexual assault. See *Legislation*, *supra* note 127, [<https://perma.cc/6BVH-LY3W>] (displaying this result after a search for the exact phrases "military justice" and "sexual assault" among bills introduced in the 93rd to 116th Congresses).



surrounding Bergdahl's case helps to explain how improper interventions into the retail administration of military justice persist.

*A. Productive Oversight: Sexual Assault and the Military Justice Act of 2016*

As the size of the military grew through the wars in Iraq and Afghanistan, a now-familiar problem became notorious. High-profile incidents of sexual assault in the 1990s and early 2000s, such as the Army's 1996 Aberdeen Scandal and the 2003 allegations of sexual violence at the Air Force Academy, brought the problem to light and prompted intensive academic study.<sup>131</sup> By the early 2010s, evidence had accumulated about the scope and severity of the problem.<sup>132</sup> The results were sobering. Up to thirty-three percent of women reported experiencing an attempted or completed rape while serving in the military.<sup>133</sup>

Scholars rightly identified military law as among many factors contributing to the crisis.<sup>134</sup> Unfortunately, members of Congress initially responded by focusing on individual adjudications, sometimes with tragic results. In the early 1990s, members of the ASCs began to routinely use their powers to influence military justice investigations and proceedings. The first and most egregious instance occurred after the 1991 Tailhook Association Symposium, where Marine Corps and Navy officers (allegedly) sexually assaulted around eighty women and men.<sup>135</sup> While congressional attention to the incident initially focused on demands for a more thorough investigation, the SASC later resorted to targeting individual personnel. The Committee "flagged" and withheld promotions from

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131. See Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 *AGGRESSION & VIOLENT BEHAV.* 267, 267 (2010).

132. See, e.g., Lee Martin, Leora N. Rosen, Doris Briley Durand, Robert H. Stretch & Kathryn H. Knudson, *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 *MIL. MED.* 213 (1998); Maureen Murdoch, Melissa A. Polusny, James Hodges & Nancy O'Brien, *Prevalence of In-Service and Post-Service Sexual Assault Among Combat and Non-combat Veterans Applying for Department of Veterans Affairs Posttraumatic Stress Disorder Disability Benefits*, 169 *MIL. MED.* 392 (2004); Amy E. Street, Jane Stafford, Clare M. Mahan & Ann Hendricks, *Sexual Harassment and Assault Experienced by Reservists During Military Service: Prevalence and Health Correlates*, 45 *J. REHABILITATION RES. & DEV.* 409 (2008).

133. Turchik & Wilson, *supra* note 131, at 268; see also Laura C. Wilson, *The Prevalence of Military Sexual Trauma: A Meta-Analysis*, 19 *TRAUMA, VIOLENCE & ABUSE* 584, 584 (2018) (finding, in a more recent meta-analysis, that around thirty-eight percent of women in the military experience sexual harassment, assault, or both).

134. See Turchik & Wilson, *supra* note 131, at 272.

135. See GREGORY L. VISTICA, *FALL FROM GLORY: THE MEN WHO SANK THE U.S. NAVY* 324-31, 425 n.54 (1995).

any officer who was even tangentially associated with the convention.<sup>136</sup> The resulting furor swept up many officers who were clearly innocent.<sup>137</sup> Had the military justice process been allowed to run its course, it is unlikely that as many innocent people would have been impacted. On the other hand, it is also unlikely that the same number of people would have been brought to justice absent the serious pressure that Congress brought to bear.

Several other subsequent cases provoked similar individualized attention and influence from the ASCs. These included the court-martial of Lieutenant Kelly Flinn for fraternization, adultery, and other charges, and the prosecution of Major Sonnie Bates for refusing to take the anthrax vaccine.<sup>138</sup> Although each of these and several other cases—most, but not all, involving sexual misconduct—attracted considerable media attention throughout the 1990s and 2000s, no meaningful legislative reforms passed until well into the 2010s.<sup>139</sup> Although much of Congress's oversight activities in relation to these incidents was legitimate, the focus on individual cases initially overshadowed the need for systemic reform.

Even as consciousness about the need for systemic reform grew, congressmembers continued to use their power to intercede in individual cases. For instance, in 2013, Senator Claire McCaskill placed a hold on former astronaut and Lieutenant General Susan Helms's nomination to lead the Space Command because the Senator disagreed with the commander's decision to dismiss a sexual-assault case.<sup>140</sup> McCaskill maintained her hold until President Obama eventually

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136. See Robert J. Caldwell, *Closing Tailhook's Bleeding Wound, Scandal Bred a Legacy of Mistrust and Bitterness*, SAN DIEGO UNION-TRIB., Dec. 15, 1996, at G-4. Admittedly, withholding promotions is a power that the SASC may legitimately exercise. However, its use or threatened use in circumstances where it is likely to influence the disposition of a court-martial at least raises the possibility of improper influence.

137. See *id.* (describing how Naval Lieutenant John Cooney was punished despite his insistence that he had not even been present at Tailhook).

138. See Rawles, *supra* note 9, at 71-77 (analyzing the congressional influences upon these investigations in detail).

139. See Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse than the Disease*, 14 DUKE J. GENDER L. & POL'Y 749 (2007) (explaining how, across several sexual-misconduct scandals, the military's leadership acted under congressional pressure to persecute innocent suspects while failing to deliver justice to victims).

140. See Craig Whitlock, *General's Promotion Blocked over Her Dismissal of Sex-Assault Verdict*, WASH. POST (May 6, 2013), [https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528\\_story.html](https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html) [https://perma.cc/5GST-UPX4]; Craig Whitlock, *Senator Continues to Block Promotion of Air Force General*, WASH. POST (June 6, 2013), <https://www.washingtonpost.com/world/national-security/senator-continues-to-block-promotion-of-air-force-general/2013/06/06/bbf9eaoa-cee3-11e2-ac03-178510c9c0ca>

withdrew Helms's nomination.<sup>141</sup> While McCaskill did not explicitly demand that Helms reverse her decision, the action drew heavy criticism, with one commentator characterizing the Senator's actions as "a mockery of basic principles of justice."<sup>142</sup>

As these intercessions continued, the legislative process finally began to produce results.<sup>143</sup> The first successful bill was introduced and passed in 2013, after Air Force Lieutenant General Craig Franklin disapproved<sup>144</sup> of Lieutenant Colonel James Wilkerson's court-martial, which granted clemency for the sexual assault of a junior officer after the panel had already pronounced its guilty verdict.<sup>145</sup> In the 2014 and 2015 National Defense Authorization Acts (NDAAAs), Congress enacted a suite of changes to the UCMJ to improve adjudications of sexual misconduct.<sup>146</sup> The reforms restricted the commander's discretion throughout the process by allowing victims to express a nonbinding preference for civilian prosecution;<sup>147</sup> subjecting the commander's decision not to refer a sex-related offense to a court-martial to review by a superior (in certain cases,

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\_story.html [https://perma.cc/UJ2A-6E5D]. Under the UCMJ, Helms, as the convening authority, had independently reviewed the evidence presented at trial and determined that it was insufficient to support the panel's guilty verdict. See Susan J. Helms, Lieutenant Gen., USAF, Memorandum for Record: Disapproval of Findings in *U.S. v. Herrera* 5 (Feb. 24, 2012), https://www.compliance.af.mil/shared/media/document/AFD-130509-026.pdf [https://perma.cc/RV9B-MC5J]. Helms possessed authority to do so under 10 U.S.C. § 860 (2018) and R.C.M. 1106, *supra* note 17.

141. Chis Carroll, *Helms Nomination for Space Command Withdrawn*, STARS & STRIPES (Nov. 8, 2013), https://www.stripes.com/news/helms-nomination-for-space-command-withdrawn-1.251789 [https://perma.cc/YK3L-XQEJ].

142. See, e.g., James Taranto, *Gen. Helms and the Senator's "Hold"*, WALL ST. J. (June 17, 2013), https://online.wsj.com/article/SB10001424127887324021104578549891063938034.html [https://perma.cc/UF33-QJX7].

143. See *supra* note 130.

144. "Disapproval" here refers to the convening authority's exercise of power to set aside the charges or sentence after the conclusion of the court-martial. See 10 U.S.C. § 860b (2018). Note that this provision was created by the Military Justice Act of 2016, Pub. L. No. 114-328, § 5323, 130 Stat. 2894, 2926 (codified at 10 U.S.C. §§ 826-946 (2018)). For the version of the provision that was in effect at the time of Lieutenant Colonel Wilkerson's court-martial, see 10 U.S.C. § 860 (2012).

145. Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html [https://perma.cc/T8LJ-APT4].

146. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) (codified as amended in scattered sections of 10 U.S.C.); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) (codified as amended in scattered sections of 10 U.S.C.).

147. § 534(a)(3), 128 Stat. at 3367-69.

the civilian service secretary);<sup>148</sup> and limiting the convening authority's power to take any action on court-martial findings to disapprove, commute, or suspend a sentence for nonminor offenses.<sup>149</sup> Considered together, these changes modestly reduced the primacy of the commander within the military justice system.

While these changes were meaningful, Congress and the military leadership recognized them as a prelude. Beginning in 2013, a spate of media reports on alleged and actual misconduct by senior military leaders prompted a flurry of responsive legislation from senators including Kirsten Gillibrand, Barbara Boxer, and Claire McCaskill.<sup>150</sup> The most extreme and well-publicized was Senator Gillibrand's Military Justice Improvement Act. Echoing the Bayh and Hatfield bills decades earlier, the Act sought to reform military justice by removing command authority (for certain sexual offenses); prohibiting the consideration of character in charging decisions; and eliminating entirely the commander's power to overturn or downgrade convictions as clemency.<sup>151</sup> While none of these bills passed, some of their proposals were incorporated into later NDAs.<sup>152</sup>

In the meantime, the DoD was working internally. On August 5, 2013—months before the passage of the 2014 NDAA—General Martin E. Dempsey, then-Chairman of the Joint Chiefs of Staff, requested that Secretary of Defense Chuck Hagel “conduct a comprehensive, holistic review of the UCMJ and the military justice system . . . solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline.”<sup>153</sup> While the request itself did not specify a focus on sexual assault, the subtext was clear enough. Among other hints, Dempsey noted that the need for such a review had arisen “[d]uring a recent Tank session on Sexual Assault Prevention and Response.”<sup>154</sup> Two months later, Hagel granted the Chairman's request and directed the Office of General Counsel (DoD OGC) to conduct the

148. § 1744(a), 127 Stat. at 980-81.

149. § 1702(b), 127 Stat. at 955-56.

150. Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013) (Gillibrand); Article 32 Reform Act, S. 1644, 113th Cong. (2013) (Boxer); Victims Protection Act of 2013, S.1775, 113th Cong. (2013) (McCaskill).

151. S. 967.

152. See 128 Stat. 3292 (2014); 127 Stat. 672.

153. Memorandum from General Martin E. Dempsey, Chairman, Joint Chiefs of Staff, to Chuck Hagel, Sec'y of Def., Dep't of Def., Subject: Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice ¶ 3 (Aug. 5, 2013), in REPORT OF THE MILITARY JUSTICE REVIEW GROUP app. A, at 1263 (Dec. 22, 2015) [hereinafter MJRG REPORT], [https://ogc.osd.mil/images/report\\_part1.pdf](https://ogc.osd.mil/images/report_part1.pdf) [<https://perma.cc/4JTG-JXH2>].

154. *Id.* ¶ 1.

review.<sup>155</sup> To undertake the task, the DoD OGC established the Military Justice Review Group (MJRG), chaired by Andrew Effron, a former Chief Judge of CAAF.<sup>156</sup> On December 22, 2015, the Group issued its final recommendations.<sup>157</sup>

A year later, the wave of sexual-assault reform reached a crescendo with the passage of the MJA.<sup>158</sup> Encompassing 442 sections of the 2017 NDAA, the MJA represented, in the words of Senator McCain, “the most significant reforms to the Uniform Code of Military Justice since it was enacted.”<sup>159</sup>

The reforms were nowhere near as sweeping as those of the original Code. Like the UCMJ, the MJA did not go as far as progressive reformers had hoped. Much of the text was occupied with the banal task of enumerating as separate crimes a significant number of offenses previously charged under Article 134, and a relatively small number of provisions addressed the pressing issue of sexual assault.<sup>160</sup> The law retained the command-centric structure of courts-martial,<sup>161</sup> but also incorporated most of the MJRG’s proposals and represented a marked if modest shift towards a more civilianized court-martial process. Among many changes,<sup>162</sup> the Act reorganized the punitive articles,<sup>163</sup> amended Article 120 to

155. Memorandum from Chuck Hagel, Sec’y of Def., Dep’t of Def., to Sec’y of the Military Dep’ts et al., Subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013), in MJRG REPORT, *supra* note 153, app. B, at 1267.

156. MJRG REPORT, *supra* note 153, at 14.

157. *Id.* at 15.

158. National Defense Authorization Act for Fiscal Year 2017, Part LI, Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5101-5542, 130 Stat. 2894 (2016).

159. Shane R. 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> [<https://perma.cc/PA72-C5MD>]. An excellent and comprehensive account of all the changes can be found in David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY’S L.J. 1 (2017).

160. See Schlueter, *supra* note 159, at 94-105. Article 134, 10 U.S.C. § 934 (2018), may be used to charge offenses not specified in other parts of the UCMJ; the elements of these offenses are usually listed in the Manual for Courts-Martial, but “unlisted” offenses may also be charged, as long as they satisfy the basic requirements of Article 134. See R.C.M., *supra* note 17, pt. IV, ¶ 60.c.(6)(c).

161. Senator Gillibrand has reintroduced her bill several times, most recently in 2019. See Military Justice Improvement Act of 2019, 116th Cong. (2019).

162. While calls for reform in the wake of numerous sexual-assault scandals were the primary drivers of the 2016 reforms, they were not the only ones, and the changes touched many other areas. Here, the focus is on the Military Justice Act as a response to the phenomenon of rampant sexual assault in the military.

163. Military Justice Act of 2016, Pub. L. No. 114-328, § 5401, 130 Stat. 2894 (codified at 10 U.S.C. §§ 826-946 (2018)).

clarify the definitions of prohibited sexual misconduct,<sup>164</sup> and increased the level of judicial oversight for courts-martial.<sup>165</sup>

For the most part, reform-minded legislators in the lead-up to the MJA focused on bills addressing systemic problems rather than on legislation directed at individual cases. However, it was also a common practice during the era for legislators to demand investigations into individual cases of sexual misconduct.<sup>166</sup> Infrequently but not uncommonly, ASC members publicly opined on the appropriate adjudication of guilt or the sentence in a particular case or set of cases—raising at least the appearance of undue influence.<sup>167</sup> Then and now, soliciting a congressional investigation is regarded as a promising litigation strategy for some military justice defendants.<sup>168</sup> Demands for investigation may constitute undue, if indirect, influence from Congress on pending military justice matters,<sup>169</sup> especially when investigations, like Hébert’s, directly influence proceedings by withholding evidence or demanding the testimony of panel members and military judges.<sup>170</sup>

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164. *Id.* § 5430, 10 U.S.C. § 920.

165. *See, e.g., id.* § 5301, 10 U.S.C. § 853(b)(1)(a) (defaulting to sentencing by the military judge).

166. *See, e.g.,* Tom Roeder, *Senators Call for Investigation into AFA Sex Assaults*, COLO. SPRINGS GAZETTE (Aug. 23, 2014), [https://gazette.com/military/senators-call-for-investigation-into-afa-sex-assaults/article\\_54894fc2-9326-5504-9a6d-ca84ccab4478.html](https://gazette.com/military/senators-call-for-investigation-into-afa-sex-assaults/article_54894fc2-9326-5504-9a6d-ca84ccab4478.html) [https://perma.cc/HTW4-ZRRG]. This phenomenon was not limited to matters involving sexual assault. *See, e.g.,* Michelle Tan, *Senators Call on Army to Investigate 22,000 Misconduct Discharges*, ARMY TIMES (Nov. 4, 2015), <https://www.armytimes.com/news/pentagon-congress/2015/11/04/senators-call-on-army-to-investigate-22000-misconduct-discharges> [https://perma.cc/DB8D-XU5U].

167. *See, e.g.,* Nancy Montgomery, *Sexual Assault Case Not Dismissed Despite Ruling of Unlawful Command Influence*, STARS & STRIPES (Aug. 12, 2015), <https://www.stripes.com/news/sexual-assault-case-not-dismissed-despite-ruling-of-unlawful-command-influence-1.362563> [https://perma.cc/K2XT-4YA7] (quoting a military judge’s allegation that the Air Force JAG told the initial convening authority that the failure to send an accused’s case to a court-martial “would enable Senator Kirsten Gillibrand to gain needed votes on a pending bill to remove commanders from the court-martial process”); *No Prison Time for Army General in Sex Case* (WITN television broadcast Mar. 15, 2014) (interviewing Congressman Walter Jones, who opined on the proper length of the sentence: “If this general gets off with two years, I think he’s very lucky because what they’ve accused him of doing is very serious”).

168. Matthew Barry, *Congressional Inquiry in the Military*, THE LAW OFFICE OF MATTHEW BARRY, PLLC (Oct. 19, 2020), <https://mattbarrylaw.com/2020/10/19/congressional-inquiry-in-the-military> [https://perma.cc/NV77-VQTM] (explaining how soliciting congressional attention can “be used to subtly inform a Command that a third party (member of Congress) is tracking a certain issue, therefore potentially forcing the Command to make a certain decision”).

169. *See Rawles, supra* note 9, at 60–70.

170. *See Davidson, supra* note 106, at 298–308.

In line with the UCMJ's history, the impetus for the MJA's reforms came from within the military. Congress contributed both marginal changes and radical proposals during the new policy's development, but the substantive changes in the MJA arose primarily from an internal DoD committee organized for the purpose of reform. As the largest discrete exercise of congressional oversight of military justice in recent years, the MJA sets a standard for productive congressional oversight.

Echoing how injustices inflicted upon Black servicemembers played a critical role in the reforms that led to the UCMJ,<sup>171</sup> the MJA came about because of a long-term effort to fix a systemic issue that disproportionately impacted another marginalized group – women in the military. When the pressures for structural reforms have been weaker, congressmembers have more frequently focused their attention on individual cases, with more concerning results.

*B. Destructive Interference: The Case of Bowe Bergdahl*

Since the 1990s, leaders in both the executive and legislative branches have become increasingly willing to opine on individual military justice cases, including pending cases. Among several instances in which Congress has given significant attention to individual cases,<sup>172</sup> the case of Sergeant Bergdahl is particularly notable for three reasons. First and most obvious is President Trump's brazen disregard of his duties as commander-in-chief. Second, the scope and visibility of congressional intercession involved in Bergdahl's individual case, primarily by the then-SASC Chairman, Senator McCain, is unusual. Third, *Bergdahl* includes CAAF's most recent and most significant account of presidential and congressional capacity to commit UCI.<sup>173</sup>

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171. See *supra* Section II.B.

172. Some of these have already been mentioned. See, e.g., *supra* note 167. The case of Edward "Eddie" Gallagher ranks alongside Bergdahl's case in terms of recent notoriety and undue attention from the President and Congress. See 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> [https://perma.cc/UE87-3P2V]; *Congressmembers Say Video Proves Navy SEAL Chief Eddie Gallagher Is Not Guilty of Killing ISIS Fighter* (KUSI television broadcast May 9, 2019), <https://www.kusi.com/members-of-congress-say-video-proves-navy-seal-chief-eddie-gallagher-is-not-guilty-of-killing-isis-fighter> [https://perma.cc/4S76-BKZL]. Also pertinent is the case of Colonel Alexander Vindman, whom President Trump expressed interest in charging after Vindman testified at the President's impeachment hearings. See Dan Mauer, *What Lt. Col. Vindman's Testimony Says About Civil-Military Relations and Military Justice*, LAWFARE (Nov. 18, 2019, 10:45 AM), <https://www.lawfareblog.com/what-lt-col-vindmans-testimony-says-about-civil-military-relations-and-military-justice> [https://perma.cc/74GB-K9TV].

173. *Bergdahl I*, 79 M.J. 512 (A. Ct. Crim. App. 2019), *aff'd*, 80 M.J. 230 (C.A.A.F. 2020).

On June 30, 2009, Bergdahl left his post in Afghanistan to complain about the treatment of his platoon, and the Taliban captured him on his walk to headquarters.<sup>174</sup> A massive manhunt began, diverting significant military resources and leading to the injury of several servicemembers.<sup>175</sup> Over the next five years, Bergdahl unsuccessfully attempted to escape, and was eventually exchanged for five Taliban detainees in May 2014.<sup>176</sup> Upon his return, Major General Kenneth Dahl was appointed to investigate Bergdahl's departure from his post.<sup>177</sup> Dahl eventually found that Bergdahl had left his post with the intent to shirk important service, punishable as desertion under the UCMJ.<sup>178</sup>

The decision to exchange Taliban detainees for Bergdahl sparked controversy.<sup>179</sup> The news media reported extensively on President Trump's astonishing comments. As a candidate, before Bergdahl's guilt was determined, Trump referred to Bergdahl as a "dirty, rotten traitor," a "whackjob," a "son of a bitch," and "a very bad person who killed six people," among other prejudicial epithets.<sup>180</sup> At his rallies, Trump incited crowds by advocating cruel, unusual, and illegal punishments—for instance, that Bergdahl be "dropped from an airplane over Afghanistan, or alternatively into the hands of ISIS fighters (whom the United States would proceed to bomb)."<sup>181</sup> As President, Trump reaffirmed these comments even as he acknowledged the impropriety of speaking publicly about the case.<sup>182</sup> Bergdahl's lawyers successfully argued before CAAF that the President's

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174. *Id.* at 517-18.

175. *Id.* at 518.

176. *Id.*

177. *Id.*

178. *Id.* The maximum penalty for desertion with intent to shirk important service is five years' confinement, dishonorable discharge, and forfeiture of all pay and allowances. R.C.M., *supra* note 17, pt. IV, ¶ 9.c.(c)(iv).d.(1).

179. See, e.g., Dan Lamothe & Kevin Sieff, *Mixed Reaction to Bergdahl's Recovery by Service Members Who Consider Him a Deserter*, WASH. POST (June 1, 2014), [https://www.washingtonpost.com/world/national-security/mixed-reaction-to-bergdahls-recovery-by-service-members-who-consider-him-a-deserter/2014/06/01/3713e3ce-e9c5-11e3-b98c-72cef4a00499\\_story.html](https://www.washingtonpost.com/world/national-security/mixed-reaction-to-bergdahls-recovery-by-service-members-who-consider-him-a-deserter/2014/06/01/3713e3ce-e9c5-11e3-b98c-72cef4a00499_story.html) [<https://perma.cc/NU5W-7WRV>].

180. Brief for Appellant at 10-11, *Bergdahl II*, 80 M.J. 230, 2019 WL 7488993 (C.A.A.F. 2020) (No. 19-0406/AR).

181. *Id.* at 11.

182. Specifically, on the same day that Bergdahl entered his guilty plea, President Trump made the following comments during a press conference: "Well, I can't comment on Bowe Bergdahl because he's—as you know, they're—I guess he's doing something today, as we know. And he's also—they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past." *Bergdahl II*, 80 M.J. at 238.



reaffirmation ratified his previous comments and incorporated them by reference.<sup>183</sup>

As inflammatory as President Trump's comments were, the defense's brief cited no additional evidence of efforts by the Administration to influence the proceedings.<sup>184</sup> Arguably the strongest threat to the integrity of Bergdahl's proceedings came from McCain. After the preliminary hearing but before the charges were referred,<sup>185</sup> McCain commented in an interview with the *Boston Herald*, "If it comes out that [Bergdahl] has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee. . . . And I am not prejudging, OK, but . . . [he] is clearly a deserter."<sup>186</sup>

Unlike the President's comments, much of McCain's attention to the proceedings happened in private. In his first appellate brief, Bergdahl noted that the Chairman's staff had pressured the Army for information throughout the process, from the charging decision through the preliminary hearing – on at least one occasion demanding a same-day turnaround on a status report.<sup>187</sup> Contrary to both Dahl and the preliminary hearing officer's recommendation for a special court-martial,<sup>188</sup> General Robert Abrams, the convening authority, referred the case to a general court-martial.<sup>189</sup>

In the first of three motions that the defense filed regarding UCI,<sup>190</sup> Bergdahl's attorneys argued that McCain's comments, specifically the threat to

183. *Id.*

184. See Brief for Appellant, *Bergdahl II*, 80 M.J. 230, 2019 WL 7488993.

185. *Bergdahl I*, 79 M.J. 512, 518 (A. Ct. Crim. App. 2019).

186. Sweet, *supra* note 5.

187. Brief for Appellant at 7–9, *Bergdahl II*, 2019 WL 7488993.

188. See 10 U.S.C. § 819 (2018) (setting forth the jurisdiction of special courts-martial, misdemeanor courts at which neither a custodial sentence greater than one year nor a bad-conduct discharge can be imposed). Dahl testified at the preliminary hearing that it would be "inappropriate" for Bergdahl to face jail time. Richard A. Oppel, Jr., *John McCain's Comments on Bowe Bergdahl Bring Rebuke from Lawyer*, N.Y. TIMES (Oct. 12, 2015), <https://www.nytimes.com/2015/10/13/us/john-mccains-comments-on-bowe-bergdahl-bring-rebuke-from-lawyer.html> [<https://perma.cc/WZ3Z-BK8M>]. Lieutenant Colonel Mark Visger, the hearing officer, issued a recommendation that Bergdahl face neither jail time nor a punitive discharge. *Id.*

189. *Bergdahl I*, 79 M.J. at 518. A general court-martial, unlike a special court-martial, is a felony court. See generally 10 U.S.C. §§ 816–820 (classifying and setting forth the jurisdiction of general, special, and summary courts-martial).

190. The other motions concerned President Trump's comments, which have been the focus of most of the attention on UCI in the case. See, e.g., Brief of Professors of Law, *Bergdahl I*, 79 M.J. 512 (A. Ct. Crim. App. 2019) (mentioning only the claims of UCI against President Trump, and not those against McCain).

convene a hearing if Bergdahl was not punished, created the appearance of UCI.<sup>191</sup> The trial judge found that Article 37 did not apply to McCain, and that, even if Article 37 did apply to the Senator as a military retiree, McCain's comments had not affected Abrams's referral decision; therefore, the defense had not met its initial burden to show evidence of UCI with respect to the Senator.<sup>192</sup>

On appeal, ACCA found that while the trial court had erred in finding that Article 37 did not apply to McCain, it agreed that there was no evidence or appearance of UCI.<sup>193</sup> The court reasoned that, even if McCain's prejudgments and hearing threat were in fact an attempt to influence the convening authority, his "ill-advised" statements did not rise to the level that would create an "intolerable strain" on the military justice system.<sup>194</sup>

ACCA's acknowledgement that the statements were "ill-advised" is telling, especially since the Army had almost contemporaneously recognized them as such. The day after McCain's comments, the Army asked the Senator to make an announcement walking back his comments; McCain declined.<sup>195</sup> Even if the trial and appellate courts were right to conclude, as a matter of law, that McCain's comments failed to constitute apparent UCI, as a practical matter, the fact remains that they alarmed those best positioned to judge the comments' effect on the military justice system: the leaders of the military itself.<sup>196</sup>

ACCA's discussion also exposed a serious problem with the UCMJ's ability to regulate the conduct at issue. One of the main arguments that the defense put forward for UCI by McCain emphasized his status as chairman of the SASC, which approves all promotions for senior military officials.<sup>197</sup> In its opinion, ACCA emphasized that the UCMJ applied to McCain not by virtue of his chairmanship but rather because he fell within a class of military retirees subject to the UCMJ under Article 2.<sup>198</sup> Strangely, whether the Chairman happened to be a military retiree did not affect the crux of the UCI inquiry, which addresses the actual or potential impact of the alleged UCI on how observers might perceive

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191. *Id.* at 518.

192. *Id.* at 521.

193. *Id.*

194. *Id.* at 522.

195. Morris D. Davis, *McCain Should Stop Meddling in the Bergdahl Case*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/12/opinion/mccain-should-stop-meddling-in-the-bergdahl-case.html> [<https://perma.cc/ZR2N-K8YT>].

196. The Army's concerns were echoed by a former chief prosecutor of the military commissions created by President George W. Bush to try terrorism suspects for war crimes. *See id.*

197. STANDING RULES OF THE SENATE, *supra* note 6, R. XXV(c)(1).

198. *Bergdahl I*, 79 M.J. at 521-22.

the judicial integrity of the military justice system.<sup>199</sup> Nevertheless, following the opinion's reasoning, had McCain not been a military retiree, the defense's claim of UCI with respect to him would not have been cognizable.

When CAAF ruled on the case a year later, its splintered decision left this problem unresolved.<sup>200</sup> Among four separate opinions, the court divided three-two on whether UCI tainted the proceedings.<sup>201</sup> In a portion that all of the judges joined, Judge Ohlson's majority opinion confirmed that both the President (as commander-in-chief) and McCain (as a military retiree) were capable of committing UCI.<sup>202</sup> Next, joined by Chief Judge Stucky and Judges Sparks and Ryan, Judge Ohlson wrote that with respect to both McCain and President Trump, Bergdahl had carried his burden of showing "some evidence" of UCI.<sup>203</sup> The rest of the majority opinion, joined only by Judges Maggs and Ryan, analyzed each portion of the proceedings, concluding that "the decision-making at each stage . . . was unaffected by any outside influences."<sup>204</sup> Therefore, the government had met its burden of showing the absence of an "intolerable strain upon the public's perception of the military justice system"—the basis for the court to conclude that apparent UCI was absent.<sup>205</sup>

The central problem with the final part of the majority opinion, as Judge Sparks and Chief Judge Stucky pointed out in dissent,<sup>206</sup> was that it significantly diverged from the test for apparent UCI that CAAF had articulated just three years earlier in *United States v. Boyce*: whether "an objective, disinterested observer, fully informed of all the facts and circumstances" would "harbor a significant doubt about the fairness of the proceeding."<sup>207</sup> Applying this standard in

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199. *Id.* at 521 n.12.

200. *Bergdahl II*, 80 M.J. 230 (C.A.A.F. 2020). In the wake of the adverse CAAF decision on his direct appeal, Bergdahl filed petitions for reconsideration and error coram nobis, both of which were denied by summary order. See Order Denying Appellant's Petition for Reconsideration, *United States v. Bergdahl*, 80 M.J. 362 (C.A.A.F. 2020); Order Denying Petition for a Writ of Error Coram Nobis, *Bergdahl v. United States*, No. 21-0091/AR, (C.A.A.F. Feb. 2, 2021), <https://www.armfor.uscourts.gov/journal/2021Jrnl/2021Feb.htm> [<https://perma.cc/2ZLE-CC57>]. At the time of writing, a habeas petition is pending in federal district court. See Complaint, *Bergdahl v. United States*, No. 21-cv-00418 (D.D.C. Feb. 17, 2021).

201. *Bergdahl II*, 80 M.J. at 238-44.

202. *Id.* at 234-36.

203. *Id.* at 236-38.

204. *Id.* at 239-44.

205. *Id.* at 244.

206. See *id.* at 246-47 (Sparks, J., concurring in part and dissenting in part); *id.* at 245-46 (Stucky, C.J., concurring in part and dissenting in part).

207. 76 M.J. 242, 249-50 (C.A.A.F. 2017) (quoting *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)); see also *United States v. Woods*, 74 M.J. 238, 239 (C.A.A.F. 2015) (establishing this legal standard for apparent UCI).

his dissenting opinion, Chief Judge Stucky hit on the key distinction between oversight and interference:

Senator McCain certainly had a right to announce that he intended to hold hearings on [Bergdahl] . . . . But conditioning the hearings on [Bergdahl] receiving a sentence to no punishment was undoubtedly meant to cause the sentencing authority and the convening authority to carefully consider the adverse personal and institutional consequences of adjudging or approving such a sentence.<sup>208</sup>

The majority did not respond to this point. By focusing much of its discussion on the factual question of whether decisionmaking at each stage was *affected* by any outside influences, Judge Ohlson obscured the difference between actual and apparent UCI. Although the inquiry for actual UCI does ask whether the influence actually prejudiced the proceedings, the apparent UCI inquiry concerns merely the *appearance* of fairness to a disinterested observer.<sup>209</sup> It is unclear whether this distinction survived *Bergdahl*.

Had the majority chosen to preserve this distinction, it would likely have sided with the dissenters in concluding that apparent UCI was present. By going the other way, the majority declined an opportunity to establish the UCI doctrine as a check on congressional interference in military justice, at least with respect to members of Congress who are subject to the Code. Even though the majority acknowledged that the Senator’s comments may be “troubling, disturbing, disappointing, inaccurate, inappropriate, and ill-advised,” it declined to find UCI.<sup>210</sup> By holding that neither President Trump’s nor McCain’s comments impermissibly tainted the proceedings, the *Bergdahl* majority weakened the UCI doctrine’s ability to deter misconduct, thereby encouraging politicians to “score political points by meddling in the retail administration of military justice in ways they would never dare to do with respect to cases in Article III Courts.”<sup>211</sup> The opinion also demonstrated CAAF’s reluctance to rule on politically sensitive UCI.

Perhaps this reluctance arose from deeper difficulties in distinguishing between legitimate congressional oversight and destructive interference. A bill introduced during the pendency of Bergdahl’s appeal illustrates the problem. On November 15, 2017, Representative Stevan Pearce and several other Republican legislators sponsored the “No Back Pay for Bergdahl Act,” which sought to

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208. *Bergdahl II*, 80 M.J. at 245 (Stucky, C.J., concurring in part and dissenting in part).

209. See *Boyce*, 76 M.J. at 246-48 (discussing the differences between actual and apparent UCI).

210. *Bergdahl II*, 80 M.J. at 244 (internal quotation marks omitted).

211. Appellant’s Petition for Reconsideration at 26, *Bergdahl II*, 80 M.J. 230 (C.A.A.F. Oct. 14, 2020) (No. 19-0406/AR).

amend Article 85 of the UCMJ to revoke back pay for any person found guilty of desertion or attempted desertion.<sup>212</sup> Besides naming Bergdahl in the title, the proposed legislation specified that the amended provision “shall apply with respect to Bowe Bergdahl.”<sup>213</sup> Notwithstanding the questionable constitutional propriety of a legislative attempt to increase the criminal punishment of a named individual after he has already been sentenced,<sup>214</sup> the bill sent the unambiguous message that legislators believed the military justice system should not treat Bergdahl kindly. Like McCain’s comments, Pearce’s bill likely could lead a “reasonable member of the public” to “question the fairness” of the proceedings.<sup>215</sup> Admittedly, the measure made no attempt to directly pressure specific decisionmakers within the military justice system — and therefore does not fit within the UCI framework. But it is difficult to imagine a member of Congress introducing a bill that singled out a defendant in federal court for special punishment. This comparative lens reveals a problematic assumption that undergirds Pearce’s bill: that courts-martial are less deserving of independence from congressional influence than comparable civilian proceedings.

Regardless of whether Pearce’s bill was improper, the congressional actions in *Bergdahl*, like the Vietnam-era Hébert hearings, highlight an imbalance in the system of congressional oversight of military justice. Even for those who believe that Bergdahl was ultimately treated fairly or even leniently, the degree of apparent political influence casts doubt over the integrity of the proceedings. Unlike the scourges of racially motivated prosecutions and nonaccountability for sexual misconduct,<sup>216</sup> which have already been addressed by legislation, politically charged cases like Bergdahl’s, Calley’s, or Mitchell’s are unlikely to be insulated from undue interference absent more sweeping reform. Current norms, rules, and doctrine are inadequate to protect the integrity of military justice proceedings in the face of congressional efforts to sway them. If courts-martial are to maintain the same integrity as their civilian counterparts, pending cases must be safeguarded from improper influence — without impeding legitimate congressional oversight.

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212. No Back Pay for Bergdahl Act, H.R. 4413, 115th Cong. § 2(a) (2017). The bill died in committee.

213. *Id.* § 2(b).

214. See U.S. CONST. art. I, § 9, cl. 3 (prohibiting bills of attainder and ex post facto laws).

215. This is the standard for apparent UCI, see *United States v. Woods*, 74 M.J. 238, 239 (C.A.A.F. 2015), or, at least, it *was* the standard before *Bergdahl II* apparently collapsed the distinction between actual and apparent UCI.

216. See *supra* Sections II.B & III.B.

**IV. CIVILIANIZATION AND CONGRESS'S PROPER ROLE**

The stories of the MJA and *Bergdahl* present the modern quandary of military justice oversight. While increased attention to the system has led to beneficial legislative reform, it has also prompted members of Congress to destructively interfere with individual cases. This Part explains why today's military justice proceedings must enjoy a high degree of independence from congressional interference, comparable to those of Article III courts or, at least, administrative adjudications.

As it was originally conceived in 1775 and persisted mostly uninterrupted thereafter, American military justice was the domain of the commander. Until the UCMJ became law, commanders had broad discretion to exercise their disciplinary authority freely and to dispose of charges as they saw fit. This current of command centrality runs deep in the American tradition and played a role in nearly every military justice scandal the system has witnessed, from the *Somers* affair to *Bergdahl*. One way to understand the system as it existed before the UCMJ follows Colonel Winthrop's nineteenth-century characterization of military justice as "simply [an] instrumentalit[y] of the executive power," in which justice was merely a means to the end of discipline.<sup>217</sup> A more charitable and contemporary interpretation is that justice is not an instrumentality but rather an inseparable component of discipline—which General William C. Westmoreland defines as "an attitude of respect for authority which is developed by leadership, precept, and training."<sup>218</sup> A certain measure of justice, and perhaps even independent judicial oversight, is inseparable from the notion of discipline. Nevertheless, the unilateral authority to mete out punishment without oversight is hardly conducive to "an attitude of respect" or the successful recruitment of today's all-volunteer force.

Over the last century, each time the citizenry was exposed to the military justice system—the First and Second World Wars, Vietnam, and the opening of the military to women in the seventies and eighties—it cried out for justice. On each of these occasions, Congress responded by changing military justice to make the system more like civilian criminal courts. Congress never eliminated command centrality, but it trimmed some of its excesses. For instance, as the military feared losing its authority to control military justice proceedings,

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217. WINTHROP, *supra* note 13, at 49 (emphasis omitted).

218. William C. Westmoreland, *Military Justice—a Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1971).

Morgan's committee devised Article 37 to "protect the rights of persons subject to the code without undue interference with appropriate military functions."<sup>219</sup>

Despite multiple tweaks to Article 37 since 1950, the provision remains imperfect. Although it generally fulfills its promise "to assure to all in the military service an absolutely fair trial in which the findings and sentence are determined solely upon the evidence, and free from all unlawful influence exerted by any military superior,"<sup>220</sup> it is silent on undue influence from civilians who possess authority akin to that of a military superior.

In the years before Winthrop's consensus began to crumble, when courts-martial and military punishments primarily concerned the executive power to discipline soldiers, it would have been conceptually difficult to complain about congressional interference from the standpoint of judicial integrity. After all, military courts are Article I courts.<sup>221</sup> For most of American history, military justice proceedings were not "judicial" in the Article III sense of the word. Early military justice proceedings did not resemble civilian trials.<sup>222</sup> At the Founding, the President, Congress, or both directly reviewed each court-martial sentence; there was no direct judicial oversight.<sup>223</sup> During the era in which courts-martial were executive functions in a zone of concurrent executive and legislative powers, the President or Congress's direct involvement in the system was a valid exercise of their authority, generally unchecked by judicial power.<sup>224</sup>

For most of American history — at least until the adoption of the UCMJ — this argument that military courts did not need the same independence as Article III courts would have been decisive. Historically, the Supreme Court recognized that the justice of Article I military courts differed substantially from that of

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219. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 605 (1949) (statement of Edmund M. Morgan, Jr., Professor, Harvard Law School).

220. *United States v. Navarre*, 17 C.M.R. 32, 37 (C.M.A. 1954).

221. *See Dynes v. Hoover*, 61 U.S. 65, 79 (1857) ("[T]he power to provide for the trial and punishment of military and naval offences . . . is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States . . .").

222. *See William Baude, Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1548-50 (2020) (describing military justice as a "form of executive adjudication" which might deprive a subject of life, liberty, or property and nonetheless satisfy due process).

223. *See supra* Section II.A.

224. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (describing three zones of executive and legislative power and the corresponding level of proper judicial scrutiny).

Article III civilian courts.<sup>225</sup> Even as the military system became increasingly civilianized, it maintained several distinct aspects. Commentators continue to debate the extent to which military justice is and ought to be essentially “military.”<sup>226</sup>

Over centuries, the nature of American military justice has transformed. While today’s military justice system does not fall under Article III, it is functionally more judicial than executive. The Supreme Court most recently recognized this in *Ortiz v. United States*, in which it upheld, seven to two, its exercise of appellate jurisdiction over CAAF.<sup>227</sup> The Court noted that “[t]he military justice system’s essential character . . . [is] judicial.”<sup>228</sup> The Court went on to observe a slew of similarities between the military and civilian systems. In particular, the Court observed that “each level of military court decides criminal ‘cases’ as that term is generally understood, and does so in strict accordance with a body of federal law,” and that “procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding.”<sup>229</sup> The Court’s holding and reasoning in *Ortiz* are incompatible with the greater latitude of members of Congress to interfere with military justice proceedings in comparison to cases in civilian courts.<sup>230</sup> Moreover, although *Ortiz* suggests that military justice is properly conceptualized as quasi-Article III adjudication, one does not need to accept this analogy to see why military justice must be free from congressional interference. Even if we envision military justice as analogous to more typical forms of administrative adjudication under Article I, congressional intercession would still be unacceptable.<sup>231</sup>

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225. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (noting that the military community requires “a separate discipline from that of the civilian”); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (arguing that the “rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty” and that military justice is “a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment”). To the extent that these pronouncements imply that military justice is non-judicial, they were abrogated by *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018).

226. See, e.g., Dan Maurer, *Are Military Courts Really Just Like Civilian Courts?*, LAWFARE (July 13, 2018, 10:00 AM), <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts> [<https://perma.cc/PGV4-MNGK>] (describing some of this debate).

227. *Ortiz*, 138 S. Ct. at 2165.

228. *Id.* at 2174.

229. *Id.* at 2174–76 (emphasis added) (quoting DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 50 (9th ed. 2015)).

230. *But cf.* Baude, *supra* note 222, at 1558 (arguing that military courts are not judicial in character and rejecting *Ortiz* as “rest[ing] on a mistaken theory of non-Article III adjudication”).

231. See, e.g., *D.C. Fed’n. of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (holding that congressional interference with a pending judicial or quasi-judicial administrative decision



In the wake of *Bergdahl*, Congress should set its own rules to prevent members from interfering in pending cases. CAAF in *Bergdahl* affirmed that all members of the chain of command, including the President, are subject to UCMJ Article 37.<sup>232</sup> That ruling leaves the congressmembers on the ASCs as the only government officials who may use their powers to influence military justice proceedings without meaningful legal constraints (unless they happen to be military retirees or are otherwise subject to the UCMJ). The system must change to meet this challenge.

An essentially judicial system of military justice cannot tolerate political intercession from the legislature. Measures that address Congress's ability to intervene should aim to establish norms that promote judicial integrity. At the same time, reforms must take care to respect the separation of powers and Congress's prerogative to exercise fully informed oversight. While destructive interference is an enduring problem, it would be disastrous for reforms to damage Congress's ability to legislate effectively on military justice, which depends on the ability of the House and Senate to see a complete picture of how the system is working.

An ideal policy solution would fulfill four criteria. First, it would not limit Congress's ability to conduct the type of oversight necessary to identify targets for systemic, generally applicable reforms of military justice. Second, the solution would impose at least some costs on congressmembers who seek to use their power to influence the outcomes of military justice investigations or adjudications. Third, it would be minimally disruptive to the current system. Finally, the solution would be politically feasible, such that Congress would not see it as unduly limiting or curtailing its own powers.

## V. PROPOSED REFORMS

An "ideal policy solution" is usually a pipe dream. The four criteria noted above are in tension with one another, and any possible solution may come up short when measured against all or some of them. Because recent Congresses have introduced useful legislation on military justice, any solutions should aim

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violates due process when it creates "the appearance of bias or pressure"); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966) (same). *But cf.* *Aera Energy LLC v. Salazar*, 642 F.3d 212, 216 (D.C. Cir. 2011) (holding that where political motivations to show "good faith" to state officials did not impact the "ultimate decisionmaker," there was no due-process violation). This point is particularly significant since the deprivations of liberty at stake in military justice proceedings are due-process interests of a much higher order than those at issue in *D.C. Federation*, *Pillsbury*, and *Aera Energy*. See, e.g., *Bergdahl II*, 80 M.J. 230, 246-47 (C.A.A.F. 2020) (Sparks, J., concurring in part and dissenting in part) (finding that the facts in *Bergdahl*'s case "raise a serious due process concern" in addition to apparent UCI); *cf.* 5 U.S.C. § 551(1)(F) (2018) (exempting courts-martial from APA review).

232. *Bergdahl II*, 80 M.J. at 230.

to curb destructive interference while preserving current levels of productive oversight. This Part suggests, in order of decreasing political feasibility, three strategies for reform that strike different balances among the criteria. None of the proposals are mutually exclusive.

Proposal A, committee ethics rules or guidelines, represents an easy first step to reform, one that could be implemented without much effort (at least relative to the other solutions). Proposal B, procedural restrictions, imposes real constraints on interference, at the risk of overly limiting productive oversight. Finally, and unsurprisingly, the solution with the most desirable outcome is the most difficult to accomplish. Proposal C, civilianization, would require a significant and disruptive change to the current system, but it would cut off the primary avenue through which congressmembers can exert improper influence. While a civilianized system is normatively attractive, it is a long-term goal. In the short to medium term, strengthening norms and experimenting with procedural restrictions will likely provide the most productive avenues for reform.

#### *A. Use Existing or New Rules to Discourage Destructive Interference*

The most politically feasible solution would be for the congressional committees to police themselves, either through novel interpretations of existing chamber-wide ethics rules, or via new ethics rules that would apply only to members of the ASCs, who wield disproportionate influence over the military justice system.

The simplest way to accomplish this would be for Congress to look to existing ethics rules for guidance. Already, the rules of both houses of Congress prohibit members from intervening in pending court or agency actions.<sup>233</sup> While not all forms of improper influence will be squarely covered by existing rules, the rules do not suggest that influence on military justice proceedings should be treated any differently from influence on other judicial or quasi-judicial administrative proceedings. Along these lines, the congressional ethics committees could consider promulgating guidelines for how existing ethics rules apply with respect to members' actions that influence military justice proceedings. Using existing ethics rules is advantageous because they would apply to all members, not just to those who sit on the ASCs.

The ASCs might also adopt guidelines to discourage their members from unilaterally and/or improperly interfering with military justice proceedings. A

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233. See generally H.R. Rep. No. 113-666 (2014) (reviewing and analyzing the various House and Senate Rules, federal laws, and associated standards of conduct involved, as well as associated caselaw); MORTON ROSENBERG & JACK H. MASKELL, CONG. RESEARCH SERV., RL 32113, CONGRESSIONAL INTERVENTION IN THE ADMINISTRATIVE PROCESS: LEGAL AND ETHICAL CONSIDERATIONS (2003); see also *supra* note 231 (discussing key cases).

resolution promulgating these guidelines need not be complex, so long as it clearly delineates the type of activities to be discouraged. An example text is set forth in Appendix A.<sup>234</sup>

Although these measures would be relatively easy to implement, relying solely on guidelines runs the risk that members will disregard them without consequence.

### *B. Set Procedural Defaults for Military Justice Oversight*

New rules restricting improper interference would go one step further to insulate the retail administration of military justice from improper influence. The difficulty with this solution lies in its calibration. For instance, an outright ban on congressional requests for testimony regarding pending cases would be both too drastic, because it would preclude even productive oversight in some cases, and unrealistic, because the ASCs are unlikely to enact substantive restrictions on their own power to investigate. The ideal regime would set strong norms against interference, providing space for the military establishment to insulate itself from improper influence while still respecting the committees' expansive power to investigate as they see fit. New rules could define reasonable procedures for congressional requests for documents and testimony on matters of military justice and require more consensus within the requesting committee for requests that have an increased potential to influence military justice proceedings.<sup>235</sup>

These rules, coupled with laxer requirements for less sensitive categories of requests, would incentivize Congress to pursue lines of inquiry that maximally respect the judicial integrity of military justice. The restrictions would also prevent situations like the Hébert investigation, in which members of Congress used their investigative power for political ends.<sup>236</sup> However, because these kinds of rules could stymie congressional investigations, especially in today's polarized political environment, any proposal in this area must strike a careful balance

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234. The author invites the reader to apply the text in Appendix A to the sexual assault case study in Section III.A to consider whether these reforms would discourage productive oversight. Specifically, because none of the oversight that led to the recent reforms on sexual assault depended on congressional investigations into pending military justice cases à la Hébert, it would have been unaffected by these proposed reforms.

235. These rules would layer on to the existing rules for congressional subpoenas. See, e.g., *STANDING RULES OF THE SENATE*, *supra* note 6, R. XXVI(1); Rules of the House of Representatives, H.R. Res. 8, 117th Cong., Rule XI, cls. 2(m)(1), (3) (2021) (enacted); *Rules of the Committee on Armed Services, 117th Congress*, HOUSE ARMED SERVS. COMMITTEE, R. 12, <https://armedservices.house.gov/committee-rules> [<https://perma.cc/LRQ5-NZ8L>]; *Rules of Procedure*, U.S. SENATE COMMITTEE ON ARMED SERVS., R. 9, <https://www.armed-services.senate.gov/about/rules> [<https://perma.cc/NT8Y-JN3C>].

236. See *supra* notes 106-117 and accompanying text.

between preventing destructive interference and encouraging productive oversight. This consideration is also important because members of Congress are unlikely to vote for rules that they perceive as limiting their legitimate powers of oversight. Example text for these rules is included in Appendix B.

### C. *Cut Back or Eliminate the Command-Centric System*

The final solution, which would eliminate the command-centric structure and transition military justice to a fully civilianized system, would do nothing to damage Congress's powers of oversight and would significantly limit the possibility for interference. It would also be the greatest change from the status quo.

Destructive congressional interference, like UCI, occurs because the military justice system is embedded in the command structure. The influence that members of the ASCs enjoy emanates in substantial part from the power they wield over the careers of the top officers who serve as convening authorities.<sup>237</sup> If impartial adjudicators controlled military justice, the potential for influence would significantly decrease. Following this simple logic, reforms that remove power from commanders have been suggested throughout the system's history. Many reformers (Ansell,<sup>238</sup> Bayh and Hatfield,<sup>239</sup> and Gillibrand,<sup>240</sup> to name a few) have proposed attacking UCI at its root by severely restricting or eliminating command control, by moving most proceedings to Article III courts, or by other means completely "civilianizing" the military courts.<sup>241</sup>

Of all the proposed solutions, complete civilianization is most in line with the Supreme Court's logic in *Ortiz*, but contradicts more traditional understandings of military justice's purpose.<sup>242</sup> Completely civilianizing the system would be a major step away from command centrality, a reform on the same scale as the UCMJ and the MJA. Given that similar reforms have been repeatedly proposed yet failed to gain traction, it seems doubtful that they will come to pass soon, or at least not before the MJA has a chance to prove itself to the congressmembers who enacted it. If the history of the UCMJ is any guide,<sup>243</sup> it would be highly unusual for Congress to pass another sweeping reform so soon after the MJA.

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237. See STANDING RULES OF THE SENATE, *supra* note 6, R. XXV(c)(1).

238. See *supra* note 64 and accompanying text.

239. See *supra* note 103.

240. See *supra* note 161.

241. Several other countries have made similar changes. See *supra* note 15 and accompanying text.

242. See Maurer, *supra* note 226 ("[T]he *Ortiz* argument surely *does* give opponents of the current structure a good argument for changing it.").

243. See *supra* Section II.C.

Nevertheless, such a solution is possible. In the 2020 NDAA, Congress requested a report from the Secretary of Defense on whether it should reallocate charging authority for serious crimes from the commander to a specially-designated judge-advocate,<sup>244</sup> and congressmembers continue to put forward similar proposals in response to the ongoing crisis of sexual assault.<sup>245</sup> Admittedly, the historical persistence of command centrality in military justice suggests that improper influence on military justice proceedings may be with us for some time. When the Department of Defense released its response to Congress's request, it rebuffed the suggestion, finding that "implementation of the alternative military justice system defined by Section 540F [of the 2020 NDAA] is neither feasible nor advisable."<sup>246</sup>

## CONCLUSION

Even as Congress continues to pass productive reforms to the military justice system, members' increasing tendency to interfere with pending military justice proceedings threatens the system's integrity. While *Bergdahl* presented CAAF with a significant opportunity to rule on congressional UCI, Senator McCain's comments would not have been at issue but for the fact that he was a military retiree, a fortuitous coincidence in Bergdahl's case.<sup>247</sup> In the wake of CAAF's decision, it has become clear that establishing a regime of congressional oversight of military justice that respects the system's integrity will require action from

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244. National Defense Authorization Act of 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198, 1204 (2019).

245. See, e.g., Alex Horton, *Proposed Vanessa Guillén Law Would Transform Military's Sexual Misconduct Inquiries*, WASH. POST (Sept. 16, 2020, 5:04 PM EDT), <https://www.washingtonpost.com/national-security/2020/09/16/proposed-vanessa-guilln-law-would-transform-militarys-sexual-misconduct-inquiries> [<https://perma.cc/63LP-KYQC>].

246. *Report of the Joint Service Subcommittee Prosecutorial Authority Study (JSS-PAS)*, DEP'T DEF. 1 (2020), [https://dacipad.whs.mil/images/Public/10-Reading\\_Room/00\\_PolicyMaterials/13\\_JSC\\_Report\\_Alternative\\_MJSystem.pdf](https://dacipad.whs.mil/images/Public/10-Reading_Room/00_PolicyMaterials/13_JSC_Report_Alternative_MJSystem.pdf) [<https://perma.cc/DK5B-A9RA>]. A "shadow" report published in March 2020 had suggested that a pilot program should go forward. SHADOW ADVISORY REPORT GROUP OF EXPERTS, ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER TO PREFER OR REFER CHARGES FOR FELONY OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE: A SHADOW ADVISORY REPORT TO THE SENATE COMMITTEE ON ARMED SERVICES AND THE HOUSE COMMITTEE ON ARMED SERVICES (2020), <https://assets.documentcloud.org/documents/6861828/Shadow-Advisory-Report-April-20-2020.pdf> [<https://perma.cc/6JUZ-YRRJ>].

247. *Bergdahl II*, 80 M.J. 230, 234 (C.A.A.F. 2020). This fortuity is highlighted by the fact that last year the Supreme Court declined to consider the constitutional question of whether military retirees may be subjected to the jurisdiction of military courts with regard to offenses committed while they were retired. See *Larrabee v. United States*, 139 S. Ct. 1164 (2019) (denying the petition for certiorari).

Congress itself. This action must seek to curb overreach and to instill among congressmembers a regard for the military justice proceedings that is comparable to that which legislators give to Article III courts.

The time is ripe. The long twilight of command centrality raises an opportunity to rethink improper influence both within the chain of command and beyond it. When Congress set to work on the problem of sexual assault through one-off provisions in the 2013 and 2014 NDAAAs, it also collaborated with the Pentagon to draft changes that reached beyond sexual assault alone to create a system that resembled civilian practice more than it ever has, culminating in the 2016 MJA. Proposals for future reform invite Congress to legislate a military justice system that is efficient, fair, and free from partisan vicissitudes. Congress should consider them seriously.

**APPENDIX****APPENDIX A  
NEW RULE FOR ASC MEMBER CONDUCT**

To be enacted as a resolution of the Senate/House Armed Services Committee:

Resolved that, with respect to military justice proceedings not yet final, members of this committee shall not:

- (1) attempt to 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 such authority's judicial acts;
- (2) censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings; or
- (3) in the context of determining whether a member of the armed forces is qualified to be advanced in grade, transferred, or retained on active duty, consider or evaluate the performance of duty of any such person as a convening authority or member of a court-martial.

**APPENDIX B  
ASC RESOLUTION ON PROCEDURE**

To be enacted as a resolution of the Senate/House Armed Services Committee:

**Procedures for Investigations of Military Justice Matters**

Preamble: The following resolution shall define the standard procedures for this committee's investigations of military justice matters. Should the committee seek to deviate substantially from these procedures in a particular case, it must articulate reasons for doing so.

*(a) Definitions.*

A "military justice matter" is defined as any adjudicative proceeding in the military justice system, including but not limited to charging decisions, trials, appeals, and nonjudicial punishment proceedings.

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*(b) Requests for testimony and materials regarding policies and procedures.*

All requests for testimony of military personnel or materials concerning the policies and practices of the military justice system generally may be made as otherwise permitted by law.

*(c) Requests for testimony and materials regarding specific matters already final.*

All requests for testimony of military personnel or materials concerning the military justice matters already final may be made as otherwise permitted by law.

*(d) Requests for testimony and materials regarding specific matters not yet final.*

Given the risk to the execution of impartial justice posed by investigations into pending military justice matters, all requests for testimony of military personnel or materials concerning military justice matters under investigation or not yet final may be authorized only by the concurrence of a proportion of the members of the Committee on Armed Services of the House or Senate as each committee may prescribe for itself. Such requests include but are not limited to those for reports on pending matters; testimony of panel members, military judges, or convening authorities regarding a pending matter; and internal memoranda regarding the same.

*(e) Procedure for request processing.*

(1) All requests for testimony of military personnel or materials concerning military justice matters shall be made in writing to the Secretary and General Counsel of the Department of Defense. Upon transmission of the request, the Secretary shall confer with the General Counsel and other Department of Defense personnel as necessary to fulfill the request. The Secretary of Defense shall fulfill the request to the greatest extent permitted by law as promptly as possible, but no later than 30 days after the transmission of the request.

(2) In the event that the Secretary determines that the information cannot be furnished within 30 days, the Secretary must provide the requesting entity with a statement of reasons for the additional delay within the earlier of 48 hours of making its determination, or 10 days after the transmission of the request. In either event, the time between



the transmission of the request and the Secretary's fulfillment of the request shall not exceed a maximum of 60 days.

(3) In the event that the Secretary, after conferring with the General Counsel and any other relevant Department of Defense personnel, determines that the law prevents compliance with the request in whole or in part, the Secretary shall inform the requesting entity in writing within the earlier of 48 hours of making the determination, or 10 days after the receipt of the initial request. As part of this information, the Secretary shall provide a statement of reasons for the refusal of the request.

(4) No portion of this Section shall be construed as limiting the committee's means of obtaining records or testimony as otherwise permitted by law.