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The Cartoon Physics of the Court-Martial

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THE CARTOON PHYSICS OF THE COURT-MARTIAL

JOHN M. BICKERS*

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It is the birthright of every American citizen when charged with crime, to be tried and punished according to law.¹

The Supreme Court has told those who guard its doors that they may not seek protection within. Even though these people, who are mostly young and disproportionately poor and people of color, are our fellow citizens, the government is permitted to abuse them in a manner which would be unacceptable in any other context.²

Any body suspended in space will remain suspended in space until made aware of its situation.³

I. INTRODUCTION

Everyone who wears or has worn the uniform of the United States is familiar to at least some degree with the court-martial, the criminal court for the armed forces. Everyone who grew up with American cartoons is equally aware that physics in cartoons is different, subject to its own set of absurd but consistent rules.

What many do not realize is that the second of these subjects can provide real insight into the first. For an examination of the court-martial reveals that it varies in startling ways from the constitutional rules—especially regarding trial by jury—that guide and limit every other criminal trial conducted under federal and state law. The reason that courts-martial are allowed to continue in this

¹ Ex parte Milligan, 71 U.S. 2, 119 (1866).
² Keith M. Harrison, Be All You Can Be (Without the Protection of the Constitution), 8 HARV. BLACKLETTER L.J. 221, 250 (1991).
arguably unconstitutional form has to do with the same set of laws established by American animators over the course of the twentieth century. Specifically, as noted above, a character may run off a bridge or cliff above a chasm and not fall—until the character looks down. In similar fashion, the court-martial continues to exist in violation of the Constitution because it is unaware that it is violating the Constitution.

This article will explain the position that the modern understanding of the jury trial right in the Sixth Amendment makes the current configuration of courts-martial untenable. Part II will provide a brief summary of the court-martial as it is currently composed by federal legislation and executive regulation. This part will explain both how the command structure chooses the court members and the roles that the court-martial is designed to play within the military. Part III then summarizes the current understanding of the requirements of the Sixth Amendment, including randomness and unanimity, which seem to contradict the court-martial practice previously described. Part IV explains the bridge on which courts-martial travel over these requirements. This bridge consists almost exclusively of dicta from two Supreme Court cases, neither addressing courts-martial directly, which simply announced that the jury trial right did not apply to military trials. In the first of these cases, Ex parte Milligan, 5 the Court prohibited a military tribunal during the Civil War from hearing a criminal trial of an American in Indiana because the local courts were open and operational. In the second, Ex parte Quirin, 6 the Court allowed the military to try captured Nazi saboteurs rather than subjecting them to ordinary criminal trials. This part will include a discussion of the disciplinary argument that best supports the Supreme Court’s almost casual announcement that military courts-martial need not comply with the Sixth Amendment jury right. Part V will then illustrate the ways in which the bridge has been removed. Many of the fundamental

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4 It is by no means a new idea that courts-martial, particularly in the method by which the panels are selected, is unconstitutional. It has been nearly a quarter-century since Guy Glazier laid out a persuasive case that tragically persuaded neither the President nor Congress. See Major Guy P. Glazier, He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three-Selection of Military Juries by the Sovereign: Impediment to Military Justice, 157 Mil. L. Rev. 1, 11 (1998). The field has not been stagnant since then. Other scholars, exposed to the court member selection process that is the focus of this article, have reacted negatively. See, e.g., Meghan J. Ryan, Lessons from Gitmo, 49 Int’l L. 229, 234 (2015) (describing the selection as “like having the prosecutor decide which jurors would judge the case” and concluding that “[i]n ordinary courts, this would reek of unfair, and unconstitutional, bias.”); see also Jonathan Turley, Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy, 70 Geo. Wash. L. Rev. 649, 671 (2002) [hereinafter Turley, Tribunals & Tribulations]; see also Stephen I. Vladeck, Military Courts and Article III, 103 Geo. L.J. 933, 988 (2015). Even some of the defenders of the current court-martial member selection process have offered possible reforms in recognition of the fact that the system’s configuration is troubling. See, e.g., Victor Hansen, Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military, 44 Creighton L. Rev. 911, 917 (2011) [hereinafter Hansen, Avoiding the Extremes].

5 71 U.S. 2 (1866).

6 317 U.S. 1 (1942).
assumptions the Supreme Court made about the jury right at the time of the Civil War and World War II have changed. Later cases have undercut the original dicta in part because randomness and unanimity are now required by the Constitution. Additionally, the role of the court-martial recognized by the Supreme Court, Congress, and even the military itself, has changed it fully into a criminal proceeding. Indeed, the Court itself casually equated the court-martial panel to a jury more than three decades ago and announced in 2018 that the court-martial was a judicial proceeding as if it were merely pointing out something obvious to all. Part VI will conclude the argument by suggesting that the proposed advantages of maintaining a jury-free court-martial are illusory. Indeed, the article will suggest that both justice and discipline would improve in the military through the simple method of acknowledging that the constitutional requirements for a criminal trial apply also to a criminal trial conducted by uniformed personnel. This conclusion will suggest that ordinary rules of jury selection will bring courts-martial into line with constitutional requirements while not changing their fundamental military character.

II. OUR PROTAGONIST

Our protagonist in this exploration of impossible physics is the court-martial, the system used for over two hundred years to try military personnel and, occasionally, civilians.7 To those who know the court-martial only from Hollywood portrayals, the protagonist may appear to be a bullet-headed reactionary, concerned only with military operations,8 obsessed with acronyms and uniquely military jargon,9 and indifferent to the niceties of the law.10 To the protagonist’s friends, though, it is a justice system of some magnificence

7 See infra Part 2 and accompanying text.
8 See infra Part 1 and accompanying text.
9 See infra note 21 and accompanying text.
10 The classic work of criticism, predating many of the reforms discussed in this article, is ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (Harper & Row 1970).
complete with legal behavior that matches federal trials, and a deep commitment to the rights of the accused.

This article will not endeavor to resolve this conflict—that is beyond the author's capabilities. This article will not give a full explanation of the system—that is beyond the publishing capacity of this or any journal. However, a brief overview of some of the key aspects of this system will be necessary to appreciate the absurdist nature of the position in which the court-martial now finds itself.

A. The Court-Martial Among its Siblings

Because it will matter when considering the critical Supreme Court decisions, it should be noted that the court-martial is only one of a variety of military tribunals that have appeared throughout American history. Classically, the court-martial is used by the military to try its own personnel for disciplinary and criminal infractions. The military commission, which in earlier times was

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12 See, e.g., Robinson Everett, The 50th Anniversary of the Uniform Code, 16 CRIM. JUST. 21, 28 (2001) (“[M]ilitary justice offers new safeguards not available to defendants in other systems of criminal justice.”).

13 U.S. WAR DEP’T, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OTHER PROCEDURES UNDER MILITARY LAW 2 (1916) [hereinafter 1916 MCM] (noting that courts-martial were “for the trial of offenders against military law” where military law was defined as the “legal system that regulates the government of the military establishment”).
almost indistinguishable procedurally from the court-martial, was used in martial law settings and for the trial of those accused of war crimes.

Although this article focuses on the court-martial proper, it should be noted that both *Milligan* and *Quirin* were actually about military commissions. The former was conceived of as a martial law commission and the latter as a law of war commission. In both cases, though, the Supreme Court’s sweeping pronouncements about the rules governing—and not governing—such commissions were taken then and later as applying wholly to courts-martial.

1. Procedural Rules

The basic design of the court-martial system is set out in the Uniform Code of Military Justice (UCMJ), developed after World War II to replace the separate land and sea rules of the Articles of War and the Naval Articles. The UCMJ establishes the courts that try criminal offenses, the offenses that they

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14 See Note, *Federal Military Commissions: Procedure and “Wartime Base” of Jurisdiction*, 56 Harv. L. Rev. 631, 640 (1943) (discussing Quirin and noting that the “general procedural principles which have been followed in practically all trials before military commissions are closely assimilated to those of a general court-martial”). Following World War II, the systems diverged notably, and the post-war international military commission that tried Japanese General Tomoyuki Yamashita did not resemble a contemporary court-martial. See Hamdan v. Rumsfeld, 548 U.S. 557, 618 (2006) (“The procedures and rules of evidence employed during Yamashita’s trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court.”). The military commissions called into life by President George W. Bush as a response to the attacks by al-Qaeda differed greatly in their operating procedures from courts-martial. *Id.* at 624 (holding that the rules of the Uniform Code of Military Justice, passed after the trial of General Yamashita, must apply to military commissions, and “it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules”).

15 1916 MCM, supra note 13, at 2 (defining military commissions as bodies for the trial of “offenders against the law of war under martial law” as opposed to courts-martial, which were “for the trial of offenders against military law”).

16 *Ex parte* Milligan, 71 U.S. 2 (1866).

17 *Ex parte* Quirin, 317 U.S. 1 (1942).

18 See id. at 29 (“Congress has authorized trial of offenses against the law of war before such commissions . . . . We may assume that there are acts . . . . which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan[.]*”).

19 See, e.g., United States v. Curtis, 32 M.J. 252, 267 (C.M.A. 1991) (citing *Ex parte* Milligan, 71 U.S. at 16–19) (“Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment[,]”).


21 See Barry, supra note 11, at 69.

may try, and the procedures that govern all of the participants in the system.

It authorizes the president to promulgate procedural and evidentiary rules that function as a handbook for these courts, as well as a set of evidentiary rules that mirror federal rules as far as possible. All of these are consolidated into a volume, the Manual for Courts-Martial, which offers a truly impressive method for organizing a criminal justice system.

Because of the similarity of the rules to federal practice and because the Military Rules of Evidence so closely parallel their civilian cousins, spectators at a court-martial see something that looks much like what they expect to see at criminal trial. Of course, many of the participants—the prosecutors, most of the defense counsel, many of the witnesses, and virtually all of the defendants—are wearing uniforms.

Some of the terminology will strike the spectators’ ears as odd but is likely to be understood as part of the tradition of the military using different words for common experiences. Thus, the audience will recognize the prosecutors despite their being called “trial counsels,” and will rapidly figure out that when criminal charges are initiated they are “preferred” and when they are assigned to particular courts they are “referred.” There will be hints, though, that something odd is looming behind the familiar. Charges will have been referred to the court-martial by the “convening authority,” which is the title for the commander when acting in a judicial role. If spectators stay until the end—when there is a conviction—they will hear an announcement from the judge that no finding of guilt or punishment is final until it is approved by that same

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23 Id. §§ 877–934.
24 Id. §§ 830–876(b).
25 See, e.g., id. § 836.
26 Id. So, for example, Military Rule of Evidence 803 governing hearsay exceptions largely repeats the rule governing federal courts but includes as examples “enlistment papers” and “morning reports[,]” Mt. R. Evid. 803(6)(E). As the National Archives notes, “morning reports” are “unit records that were filled out each day to reflect changes in duty status for personnel assigned to the unit; such as, gains, losses, leave, transfers, TDY, promotions, etc.” Veterans Serv. Officer (VSO) Info., Nat’l Archives (June 14, 2023), https://www.archives.gov/personnel-records-center/vso.
27 The Manual for Courts-Martial contains the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles (which contains the elements and maximum punishments of all offenses under the U.C.M.J.), and the rules for a disciplinary procedure called Nonjudicial Punishment, as well as sample forms and the U.C.M.J. itself. See R.C.M. § 101; see also Mt. R. Evid. 101; see also 10 U.S.C.A. §§ 877–934 (West 2023).
28 But c.f., infra note 42 and accompanying text.
30 Id. § 830.
31 Id. § 834.
32 Id. §§ 822–824.
commander. This is puzzling: the very person who decided that the accusations merited trial gets to ratify or disapprove the results of that trial?

But one seemingly similar naming convention will hide a very significant difference. The judge will refer to the group of uniformed people entering and exiting the deliberation room as a “panel” or “court members” rather than a jury. They look, to the spectators, like a jury: they hear evidence and weigh the accusations, they are excused from the court for conferences between the judge and the attorneys, and they have a private room in which to deliberate. But as will be seen, the difference between the two is not merely a label. Rather, it is indicative of an extraordinary—and, this article will argue, unconstitutional—distinction.

2. Personal Jurisdiction

Before turning to a fuller discussion of panels and juries, a moment needs to be spent on the forlorn person at the defense table whose name appears on the court-martial proceedings. The defendant, called “the accused” in the court-martial system, is the focus of the event. The accused in courts-martial, like their civilian defendant counterparts, face possible deprivation of liberty or even life. They also face the possibility of a range of punishments that include reprimands, assignment to extra duties, loss of pay, fines, and discharge from the service.

As noted above, virtually all of the accused are members of the Armed Forces. The UCMJ does include congressional authorization, though, to subject

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33 Id. § 860(b). In 2019, statutory changes limited the convening authority’s ability to alter the findings or sentences of some offenses related to sexual violence. See id. § 860(a).


35 There are a great many other features of the process that are beyond the scope of this article that are either remarkably similar or quite different from the criminal justice systems of the states and the federal government. After the approval of charges and sentence by the commander, certain punishments will trigger a right of appeal. See 10 U.S.C.A. § 865 (West 2023). That appeal, though, will feature a review for “factual sufficiency” as well as legal error. Id. § 866. At least one scholar, though, contends that the convening authority’s review is vital because “military appellate courts’ performance of this type of review is not encouraging.” Andrew S. Williams, Safeguarding the Commander’s Authority to Review the Findings of a Court-Martial, 28 BYU J. Pub. L. 471, 507 (2014) (contending that the lack of training and standards in the area mean that the review by the military appellate judges is “more illusory than real”). Indeed, the changes added in the Authorization Act of 2020 demanded that the appellant make “a specific showing of a deficiency in proof” and remind the appellate courts that in determining factual sufficiency they were to show “deference” both to “the fact that the trial court saw and heard the witnesses and other evidence” and the findings of the military judge. 10 U.S.C.A. §§ 866(d)(1)(B)(i)–(ii) (West 2023).

36 R.C.M. § 103(17)(A).


38 R.C.M. § 1003.
other people to trial by court-martial: those who are adjacent to active service (academy cadets and members of the reserve forces), those who are under the control of the military (enemy prisoners of war as well as discharged U.S. personnel who remain in a military prison after their conviction by court-martial), those who continue to benefit from a prior connection with the military (retirees), and those who are closely attached to the military during critical situations (contractors and others serving with the military in the field during a war or a contingency operation).

The Supreme Court has limited some previous expansive efforts to enable courts-martial to try former military personnel as well as family members of current military personnel. Nonetheless, although the overwhelming majority of courts-martial involve military personnel, recent cases involving a foreign translator and an American military retiree show that there remain real oddities near the boundaries of the personal jurisdiction of courts-martial.

3. Panel Selection Process

Oddities involving the accused are, however, incredibly rare; oddities involving the panel overhang every single court-martial. Those oddities are not confined to the obvious wearing of uniforms. The panel is created by personal selection of the convening authority based on a set of congressionally-

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40 Id. §§ 802(a)(7), 802(a)(9).
41 Id. §§ 802(a)(4)-(5).
42 Id. § 802(a)(10).
44 See Reid v. Covert, 354 U.S. 1, 39–41 (1957).
47 Even in cases which are tried before a judge, a panel was selected in the case. See R.C.M. § 503. The accused has the ability to waive the panel and proceed to trial by military judge alone, a condition which is allowed by the rules and insisted upon by the trial counsel in many pretrial agreements. See id. § 705(c)(2)(E).
48 See id. § 103(6). “Convening authority” is another slightly unusual term that translates pretty easily into the more widely understood concept of commanding officer. The convening authorities are so called because they convene the court-martial by selecting the panel and assigning (referring) cases to it. After the trial, it is the convening authorities who approve the findings and sentence of the court. This is not merely perfunctory, as the convening authority may disapprove most findings of guilt or portions of the sentence but may not approve anything that the court-martial rejected. This accounts for the unusual style of plea agreements in courts-martial: the agreement limits the amount of punishment that a convening authority can approve. The court-martial, unaware of that limitation, sentences the accused, who therefore gets the better of the adjudged sentence or the quantum of the plea. See id. § 705. This Article will not concern itself with wider applications of the convening authority’s duties beyond panel selection but will remind the reader that the
determined criteria. Congress has directed the commander that when she convenes a court-martial she is to “detail as [panel] members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” It should be noted that of the six factors at least five— all but judicial temperament—are linked strongly with higher ranks. As if to reinforce the point, the UCMJ also prohibits the trial of a more senior person by a more junior one “when it can be avoided.” An interesting point of entry into the system by defendants is that any who are enlisted members of the service may request enlisted members be selected for the panel.

Commanders senior enough to be able to convene general courts-martial will be unlikely to know enough about all of the members of their command to have an opinion about which of those people are “best qualified” in areas like judicial temperament. As a result, the actual system most often used involves subordinate commanders nominating selected officers and non-commissioned officers in a process organized by the staff judge advocate, the convening authority’s senior lawyer. And while defense attorneys have frequently asked commanding officers are invariably assisted by their staff judge advocates, senior lawyers who walk the convening authorities through each step of the judicial process.

50 Id. § 825(e)(2).
51 See Hansen, Avoiding the Extremes, supra note 4, at 917. The military appellate courts have long held that a commander who “deliberately and systematically” refuses to consider the lower enlisted ranks has violated the panel selection process. United States v. Crawford, 35 C.M.R. 3, 10 (1964). But those courts have simultaneously emphasized the six statutory criteria and proved themselves very reluctant to criticize the decisions of commanders to fill court panels with senior officers, although in one case from the time before there were military judges, the Court of Military Appeals did reject a commander’s choice of legal personnel to serve on a court martial. See United States v. Sears, 20 C.M.R. 377, 384–85 (1956). The court noted that this “smacks of court packing.” Id.
52 10 U.S.C.A. § 825(e)(1) (West 2023). As a practical matter, the only time that it cannot be avoided is with extremely high-ranking members of the armed forces.
53 See id. § 825(c)(2)(B) (allowing an accused who is enlisted to request that “enlisted members comprise at least one-third of the membership of the court-martial”); see also David A. Schlueter, The Military Justice Conundrum: Justice or Discipline?, 215 MIL. L. REV. 1, 11 (2013).
54 A general court-martial, which is empowered to sentence those it convicts to any punishment, including death, is routinely convened by officers serving at levels of command reserved for generals and admirals. See 10 U.S.C.A. §§ 818, 822 (West 2023). The size of an example of that level of command, the Army Division, typically ranges between 10,000 and 15,000 soldiers. Military Units: Army, U.S. DEP’T DEF., https://www.defense.gov/Experience/Military-Units/Army/#army (last visited Jan. 27, 2024).
the military appellate courts to review behavior in the selection process, the courts have done so with extreme deference to the commanders.\(^{56}\)

The oddity of panel selection is obvious to all of the participants but not apparent to an eyewitness because, as one former military judge put it, a court-martial panel is the “functional equivalent” of a jury.\(^{57}\) Indeed, a panel has essentially served as a super-powered jury.\(^{58}\) It not only finds the facts that may establish guilt, but until 2022 it was also responsible for sentencing\(^{59}\) any person whom it convicted.\(^{60}\) What is more, except in capital cases, it is not required to make findings of guilt unanimously.\(^{61}\)

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56 See Major Deidra J. Fleming, Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements, 2005 ARMY LAW., 45, 48 (2005) (noting that provided no ranks were excluded and the statutory criteria was used “the likelihood of raising error and establishing prejudice based on alleged improper panel selection is slight”).


58 At least according to “The Blackstone of Military Law,” the court-martial panel had super-powers to match their roles. See Joshua Kastenberg, The Blackstone of Military Law (Martin Gordon ed., 2d ed. 2009); see also William Winthrop, Military Law and Precedents 360 (2d ed. 1886) (“A court-martial, by reason of the superior education and intelligence of its members, is a species of jury peculiarly qualified for the discrimination and comparisons necessary to be made in estimating the relative weight and credibility of oral testimonies.”).

59 The military was rare but not unique in this. Kentucky, for example, uses a similar procedure. See Ky. Rev. Stat. Ann. § 532.055 (West 2023) (“[T]he court shall conduct a sentencing hearing before the jury, if such case was tried before a jury[.]”), invalidated by Jackson v. Commonwealth, 481 S.W.3d 794 (Ky. 2016). A 2020 amendment to Virginia law limited the previously available provision for jury sentencing to those cases “when ascertainment of punishment by jury has been requested by the accused[.]” See Va. Code Ann. §§ 19.2–295.1 (West 2023).

60 Although it has yet to take effect as of the date of this writing, the 2022 National Defense Appropriations Act changed the language of 10 U.S.C. § 853, which provided for court-martial member sentencing when a panel of such members made a finding of guilt to a procedure for sentencing wherein “if the accused is convicted of an offense in a trial by general or special court-martial, the military judge shall sentence the accused.” See 10 U.S.C.A. § 853(A) (West 2023); see also National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, § 539F, 135 Stat. 1541, 1706 (2021). Sentencing by members of the panel had long been criticized, even by those who defended the system generally. See, e.g., Major James Kevin Lovejoy, Abolition of Court Member Sentencing in the Military, 142 MIL. L. REV. 1, 36 (1993) (arguing that the “problem with member sentencing lies not with the integrity of the members, but with asking them to perform a duty they know little if anything about”).

61 Williams, supra note 35, at 494 (calling the lack of a requirement of unanimity the court-martial panel’s “most pernicious feature”). The sole exception is in capital cases, where both the findings of guilt and the sentence determination must be unanimous. 10 U.S.C.A. § 852(b)(2) (West 2023). It should be noted that Colonel Williams, a staff judge advocate for a general court-martial convening authority when he authored the 2014 article, expressed concern not only of improper convictions by court-martial panels, but also objected because the military procedure which requires a vote “heightens the risk that the panel will acquit guilty persons at a higher rate than would be possible if unanimity is required.” Williams, supra note 35, at 502.
The idea that a panel, which is not required to agree unanimously, was selected personally by the very person who sent the case to trial strikes a discordant note with the notion that jury should be “selected at random from a fair cross section of the community in the district or division wherein the court convenes.” These features have been the cause for both criticism and praise. As will be seen, it is the lack of these features which make the court-martial, as it is currently structured, unconstitutional.

B. The Court-Martial: What it Does

Although the court-martial can look a great deal like any other criminal proceeding, it must be recognized as a unique phenomenon. There is no question that the court-martial system is quite different in many ways from any other justice system within the United States. Fundamental to that distinction is that the court-martial, unlike other criminal courts, plays two separate roles within military society: it serves a disciplinary function as well as a judicial one.

1. The Disciplinary Function

There has never been a doubt that courts-martial play a critical role in maintaining the military’s ability to perform its critical offensive and defensive missions. The Punitive Articles are filled with behaviors made criminal that are simply not criminalized anywhere else in American society: calling in sick to work when one is not actually ill, leaving a job without permission, speaking

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62 Taylor v. Louisiana, 419 U.S. 522, 529 (1975); see also Brief of the U.S. Navy-Marine Corps App. Def. Div. et al. as Amici Curiae in Support of Petitioner at 9–10, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646), 2018 WL 4358116, at *9–10 (“A court-martial defendant has ‘no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen.’ The convening authority - the defendant’s commanding officer - selects (‘details’) the military personnel who, after the court screens them for bias in the voir dire process, serve as the panel members for the defendant’s case”).

63 See, e.g., Turley, Tribunals & Tribulations, supra note 4, at 671 (noting that the personal selection of the panel “creates a continual danger of packing of a jury that is largely barred under the civilian system”).

64 See, e.g., Holland, supra note 57, at 130 (arguing for a wider adoption of the court-martial supermajority vote standard because “the single-minded pursuit of absolute agreement may well lead to a perversion of the truth-seeking goal”).

65 Stigall, supra note 11, at 65 (noting that the panel selection process is “often the subject of ridicule as it does not satisfy the Sixth Amendment of the U.S. Constitution”).

66 See, e.g., Hansen, Changes, supra note 34, at 423 (“[M]ilitary justice is one of the primary tools a military commander has to maintain discipline within the ranks.”).


68 Id. §§ 885, 886 (“Desertion” and “absence without leave”).
rudely about one’s boss⁶⁹ or Congress,⁷⁰ or acting in a way that is beneath what society expects of someone in an equivalent station,⁷¹ among others. Faced with such a list, some observers conclude that the military’s status as a separate society justifies real deviation of courts-martial from the constitutional norms for criminal trials.⁷² Some of the best defenses of the current court-martial system have argued that any current deviation from otherwise constitutionally-required practice is necessitated by the need for expertise in these uniquely military matters.⁷³ Some have even argued that the focus on discipline is appropriate because a court-martial isn’t really a court at all.⁷⁴

2. The Justice Function

Of course, the court-martial is a court, at least in the sense that it determines guilt for offenses that can include confinement for life and, under some circumstances, the death penalty.⁷⁵ And while the punitive articles do have many examples of offenses that are unique to a military setting, they also contain all the staples of a modern American criminal code: murder,⁷⁶ rape,⁷⁷ assault,⁷⁸ larceny,⁷⁹ narcotics offenses,⁸⁰ and kidnapping, among many others.⁸¹ Beginning with the 1969 decision by the U.S. Supreme Court in *O’Callahan v. Parker*,⁸² there was the possibility that the justice function of

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⁶⁹ *Id.* § 889 (“Disrespect toward superior commissioned officer”).
⁷⁰ *Id.* § 888 (“Contempt toward officials”).
⁷¹ *Id.* § 933 (“Conduct unbecoming an officer”).
⁷² See, e.g., Hansen, *Changes*, supra note 34, at 424 (“[U]nique values, norms, and attitudes that create this separate society should be reflected in the military justice system.”).
⁷³ See, e.g., Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190, 255–56 (2003) (describing as “a venerable and practical” custom “the philosophy that those who judge will be sufficiently acquainted with the principles of good order and discipline to place alleged offenses in their proper context”).
⁷⁴ See, e.g., William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1549 (2020) (arguing that military courts do not exercise judicial power but rather “a form of executive adjudication of life, liberty, or property that nonetheless satisfies due process”); Williams, *supra* note 35, at 477–78 (arguing that the court-martial is not a court “but is tolerated as an indispensable tool for the preservation of good order and discipline in the U.S. Armed Forces”).
⁷⁵ See 10 U.S.C.A. § 853(c) (West 2023). Some of the ancient punishments once associated with military courts, such as branding and flogging, are specifically outlawed. *See id.* § 855.
⁷⁶ *Id.* § 918.
⁷⁷ *Id.* § 920.
⁷⁸ *Id.* § 928.
⁷⁹ *Id.* § 921.
⁸⁰ *Id.* § 912(a).
⁸¹ *Id.* § 925.
courts-martial might be significantly curtailed. In a dramatic change from the usual practice of deference in military justice cases, the Court announced a sharp limit to the subject-matter jurisdiction of courts-martial. Calling the military justice system “singularly inept in dealing with the nice subtleties of constitutional law” the Court limited future trials by court-martial to those that were “service-connected” because otherwise the military could deprive a member of the services of the right to “a trial by a jury of his peers.”

What exactly might be the meaning of “service-connected” was the subject of litigation for the next decade and a half. Arguments focused on such matters as the location of the offense, the connection between the victim and the military, and whether the offense was related to the accused’s military duties. The Supreme Court openly acknowledged that this was an “ad hoc” inquiry.

The Supreme Court, having opened this field of combat, closed it again in 1987. All of the complex battles over “service connection” were swept away by the Court’s conclusion that a “dearth of historical support” justified the limitation of courts-martial considering “the plain language of the Constitution.” The “plain language” at issue was Congress’s power “to make Rules for the Government and Regulation of the land and naval Forces.” The Court noted at the time that there was “no indication” that this power was “any less plenary” than the other powers of that section, such as the power to regulate interstate commerce.

Henceforth, all that would matter for a court-martial to exercise jurisdiction over a criminal offense was the status of the accused, a reality that some scholars would praise as an appropriate decision by Congress and others.

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83 Indeed, one scholar referred to O’Callahan as “one of the rare instances in which the Supreme Court has been openly critical of military practice,” Steven B. Lichtman, The Justices and the Generals: A Critical Examination of the U.S. Supreme Court’s Tradition of Deference to the Military, 1918-2004, 65 Md. L. Rev. 907, 919 (2006).
84 O’Callahan, 395 U.S. at 265.
85 Id.
86 Id. at 272.
87 Id. at 273.
89 Id. at 365–66.
90 Id. at 369.
92 Id. at 447.
94 Solorio, 483 U.S. at 441; See infra note 222 and accompanying text.
95 See, e.g., Geoffrey S. Corn & Chris Jenks, A Military Justice Solution in Search of a Problem: A Response to Vladeck, 104 GEO. L.J. ONLINE 29, 38 (2015) (arguing that “Congress, acting on advice from our military leaders, is best suited to make this necessity judgment”).
would oppose as a symptom of a troublingly expansionist military.\textsuperscript{96} However one views the relative merits of the two cases, it is certainly the case that they marked 1969 and 1987 as extraordinarily significant years in the history of the court-martial.\textsuperscript{97} But while 1969 shows that a different view of the system is possible and some scholars have explicitly called for the re-adoption of such a view,\textsuperscript{98} the Court has not changed its understanding of the Constitution and courts-martial since 1987, which has led to new disputes about just how widely the concept of military status can go.\textsuperscript{99}

III. Gravity

Having met our protagonist the court-martial, it is time to take in the scene in which the protagonist operates. It is a world that has a set of physical laws to make it work. Just as gravity operates consistently in the real world but only intermittently in the animated ones, so too some of the legal rules seem strangely absent from the world of the court-martial. Many of those rules derive from the U.S. Constitution, and among the features they require of criminal trials are juries.

\textbf{A. The Constitutional Right to a Trial by Jury}

The Sixth Amendment explicitly guarantees that any federal criminal trial will feature an impartial jury.\textsuperscript{100} The Supreme Court has long celebrated this requirement, frequently tying it to the centuries-old traditions of the common law.\textsuperscript{101}

At least since the 1940s, the Supreme Court has explicitly recognized that one vital attribute of the jury is that it represents the voice of the community.\textsuperscript{102} Indeed, race-based exclusion from juries was recognized as so reprehensible that the Court in \textit{Strauder v. West Virginia}\textsuperscript{103} struck it down well

\begin{itemize}
  \item[96] See, e.g., Turley, \textit{Tribunals & Tribulations, supra} note 4, at 651 (noting that “the military took a governance system built on narrow combat-related values and expanded it exponentially”).
  \item[98] Turley, \textit{Tribunals & Tribulations, supra} note 4, at 715 (calling for “a confinement of the military legal system to service-related offenses”).
  \item[99] \textit{See infra} Part VII.
  \item[100] U.S. CONST. amend. VI. The Supreme Court has allowed states to decline to offer jury trials for “petty” offenses, but that does not include offenses that carry more than six months of confinement. See Baldwin v. New York, 399 U.S. 66, 68 (1970).
  \item[101] See Patton v. United States, 281 U.S. 276, 288 (1930) (declaring that it was “not open to question” that the jury trial was “as understood and applied at common law” including “all the essential elements as they were recognized in this country and England when the Constitution was adopted”).
  \item[103] 100 U.S. 303 (1879).
\end{itemize}
before they objected to other aspects of segregation. More than a decade before Brown v. Board of Education, the Supreme Court extended the Strauder rule to government action that systematically excluded racial minorities from grand juries. For the Court, it was the representation function of the jury that was recognized as critical: “[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.” Subsequently, the Court reminded the states that the same was true of the systematic underrepresentation of women, as it rejected a Louisiana system that forbade the selection of a woman for jury duty “unless she had previously filed a written declaration of her desire to be subject to jury service.” The Court noted that “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.” This standard, of course, the court martial fails. As the Court of Military Appeals once observed, “Article 25 of the Uniform Code, 10 U.S.C. § 825, contemplates that a court-martial panel will not be a representative cross-section of the military population.”

Juries must also reach their decisions unanimously. Indeed, unanimity was a celebrated feature of the jury from its early days, as Blackstone noted. There was a fascinating interlude during which state juries were not thought by the Court to be required to demand unanimity for

104 Id. at 308 (calling the “very idea of a jury” that it “is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds”), abrogated by Taylor v. Louisiana, 419 U.S. 522 (1975). The Court rejected West Virginia’s limitation of jury service to white men four years before striking down a federal law prohibiting racial exclusion from inns, public conveyances, and public amusements and almost twenty years before allowing states to explicitly require common carriers to segregate passengers according to race. See Civil Rights Cases, 100 U.S. 3, 25 (1883) (because by the 1880s an African-American must resume “the rank of a mere citizen” and be no longer “the special favorite of the laws”); see also Plessy v. Ferguson, 163 U.S. 537 (1896).
106 Smith, 311 U.S. at 128.
107 Id. at 130.
108 Taylor, 419 U.S. at 523.
109 Id. at 528.
111 See William Blackstone & Thomas McIntyre Cooley, Commentaries on the Laws of England 343 (Cooley ed., 1899) (“[T]he truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion.”).
112 See Thompson v. Utah, 170 U.S. 343, 355 (1898) (rejecting a state’s attempt to use a lower standard than twelve-member unanimous juries for felonies that had been committed while it was still a federal territory), overruled by Collins v. Youngblood, 497 U.S. 37 (1990).
convictions, but that era appears to have ended recently in yet another jury case from Louisiana, which reversed the earlier case as “an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that’s become lonelier with time.” Here, too, the court-martial fails to meet the standard: except for capital cases, the court-martial panel need only meet the standard of three-quarters to conclude that an accused is guilty.

Thus, in all criminal trials in the United States today, whether conducted in a state or federal court, the gravity created by the Constitution is clear: there must be a jury, the pool from which it is randomly chosen must be representative of the population, and it must decide matters unanimously. All criminal trials, that is, except the court-martial.

B. The Lack of a Constitutional Right to Trial by Jury

The Constitution does not countenance the casual removal of the jury right. Yet, as this article will recount, the Court and the Congress have both been remarkably casual about the absence of this right from courts-martial. American case law is replete with instances of courts noting that it would clearly violate the Constitution if civilians were treated the same way that service members are treated.

For example, in rejecting trial by courts-martial of civilians in Hawaii during World War II, the Supreme Court referred to “military trials of civilians charged with crime” as “obviously contrary to our political traditions and our institution of jury trials in courts of law” and “a radical departure from our steadfast beliefs.”

What remains to be explained, then, is hidden in the word “obviously.” Why should it be the case that military personnel may be deprived of constitutional rights that “obviously” cannot be taken from other Americans?

113 See Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (focusing on the function of the jury and finding “no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one”), abrogated by Ramos v. Louisiana, 140 S. Ct. 1390 (2020); see also Johnson v. Louisiana, 406 U.S. 356, 360 (1972) (finding the same true of a three-quarters requirement because “the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt”).

114 Ramos, 140 S. Ct. at 1405 (saying of Apodaca that “no one on the Court today is prepared to say it was rightly decided”).

115 Id. at 1408.


117 See Major Lauren A. Shure & Colonel (Ret.) Jeremy S. Weber, Ortiz v. United States: The Savior or Death Sentence of the Military Justice System?, 81 A.F.L. REV. 187, 198–99 (2020) (“Although the Sixth Amendment guarantees the right to an impartial jury in ‘all criminal prosecutions,’ military courts-martial have been exempt from this requirement for the entirety of the nation’s history.”).

IV. THE BRIDGE OVER THE VOID: CONSTITUTIONALITY

What explains the ability of the court-martial system to operate free from the gravitational requirements of the jury guaranteed by the Constitution? There must be some structure, a bridge perhaps, that provides the sure footing on which the court-martial walks above the void. A quick glance at the case law reveals that there is such a structure in the form of frequently repeated invocations to two well-known seminal cases, one from each of the last two centuries.119 This section provides an overview of the foundational cases and analyzes the philosophical rationales for why court-martial proceedings did not need juries.

A. The Seminal Cases

1. An “Enemy” from Indiana

The most dramatic early announcement that the Constitution would not reach courts-martial came after a trial that was not itself a court-martial.120 In October, 1864, Army authorities arrested Lambdin P. Milligan as a member of the Order of American Liberty, a group of self-appointed northern promoters of the Confederate cause during the Civil War.121 The military believed that this secret society of “Copperheads”122 planned to steal Army weapons and free Confederate prisoners.123 As an alleged member of the conspiracy, Milligan was tried before a military commission, convicted, and sentenced to death.124 Before the date of the execution, scheduled for May, 1865, Milligan sought a writ of habeas corpus from the Circuit Court.125 The appeal to the Supreme Court did not occur until the next year.126

119 See Ex parte Milligan, 71 U.S. 2 (1866); see also Ex parte Quirin, 317 U.S. 1 (1942).
120 Milligan, 71 U.S. at 2.
121 Id. at 6.
122 A Copperhead was the name given to “Peace Democrats,” Americans of northern states who supported immediate cessation of hostilities with the Confederacy. JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH 2–3 (2006). The name seems to have arisen from a letter written to a Cincinnati newspaper suggesting that they were poisonous snakes but was adopted by the Copperheads themselves because that term was also used to describe the U.S. penny, which at the time bore the image of Lady Liberty. Id.
123 Milligan, 71 U.S. at 6–7.
124 Id. at 7.
125 Id. at 8–9. The Circuit Court split on the questions presented by the case, so it proceeded to the Supreme Court for final resolution.
126 Along the way, counsel for the United States made an argument that might result in sanctions today: it was past the scheduled execution date, so Milligan was probably already dead, id. at 12 (“[F]or aught that appears, we are discussing a question relating to the liberty of a dead man.”). Id. at 118. The opinion of the Court made short work of this argument. Id. at 118. (“[T]he inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case[.]”).
The Court had little difficulty rejecting the effort of the Army to try a civilian before a military commission when civilian courts capable of trying crimes were operational.\(^\text{127}\) It did so in part as a rejection of the idea that the “laws and usages of war” could bind civilians in areas where civilian courts were operational.\(^\text{128}\) It also found this trial by military commission objectionable because it denied to Lambdin Milligan the right to have his case heard by a jury.\(^\text{129}\) Unfortunately, while praising the jury trial right as “one of the most valuable in a free country,”\(^\text{130}\) the Court went out of its way to note that the right only applied to those who were “not attached to the army, or navy, or militia in actual service.” The Court noted that the Fifth Amendment explicitly excepted such persons from the right of the grand jury requirement and concluded that “the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.”\(^\text{131}\)

Thus, a core reason that American civilians could not be tried by military commissions, at least while civilian courts offered an alternative, is that only those in military service might be denied “the inestimable privilege of trial by jury.”\(^\text{132}\) At one level, this seems odd. The ordinary rule of *expressio unius est exclusio alterius* would seem to reverse the Court’s logic.\(^\text{133}\) The specific exclusion of the military from the protection of the grand jury right might signal that in the following amendment the lack of such an exclusion meant to include the military within the protection of the petit jury. But that conclusion is not compelled by the bare text: as will be seen later, many defenders of the court-martial, then and now, have argued that it is not designed to be a judicial body.\(^\text{134}\) If they are correct, and the court-martial is merely a tool of discipline available to field commanders, then the exclusion of the military from the grand jury requirement might well—even if not quite *doubtlessly*—mean that the petit jury requirement did not apply either.

Suffice it to say, though, that the Court did not spell out this logic. Instead, the opinion offered this negative conclusion in a statement of the purest and most *obiter* bit of *dicta*. It has subsequently provided one of the two great

\(^{127}\) Id. at 123.

\(^{128}\) Id. at 121.

\(^{129}\) Id. at 122.

\(^{130}\) Id. at 123.

\(^{131}\) Id. (emphasis added).

\(^{132}\) Id.

\(^{133}\) *Black’s Law Dictionary* 620 (8th ed. 2004) (“A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.”).

\(^{134}\) See, e.g., Ortiz v. United States, 138 S. Ct. 2165, 2205 (2018) (Alito, J., dissenting) (describing the Court of Appeals for the Armed Forces, the top court in the court-martial system, as “an agent of executive power to aid the Commander in Chief”).
foundations for the continued exclusion of the Sixth Amendment jury trial right from courts-martial.

2. Enemies from Germany (and Chicago)

_Ex parte Quirin_, the second of the two foundational cases, began with perhaps an even more unusual set of circumstances than those surrounding Lambdin Milligan. Shortly after the entry of the United States into the Second World War, Hitler and Nazi leadership hit upon the idea of sending saboteurs to America to disrupt the production of war material. They assembled a group of Germans who spoke English, Germans who had lived in America, and even included Herbert Hans Haupt, whose immigration from Germany to Chicago when he was five meant that he became an American citizen when his father did five years later. These men would be deposited by mini-submarines on U.S. beaches with disguises, explosives, and suitcases full of money, and they were to find ways to destroy rail lines and factories with an eye to preventing the U.S. from effectively deploying forces against the Axis.

Fortunately for the world, if unfortunately for the plans of the Third Reich, they had chosen poorly in one of the saboteurs. George Dasch had no intention of sabotaging the U.S.; instead, he hoped to use the opportunity to defect to the U.S. He promptly sought the assistance of the Federal Bureau of Investigation (FBI), revealing the sabotage plans to federal authorities. The FBI rapidly rounded the Germans up, and J. Edgar Hoover would ultimately receive a medal for his “patriotic” work in foiling Hitler’s plan.

While it was possible for the Secretary of War to hold the saboteurs as prisoners of war for the duration of the conflict, the Roosevelt Administration had no intention to do so. A long-established tradition under the laws of war gave capturing states the right to deny combatant immunity to spies and saboteurs as far back as the American Revolution, those charged as spies had been executed

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135 Operation Pastorius, named after a German colonist of the 17th century, was to feature destruction of war material manufacturing, transportation hubs, and power plants. See PIERCE O’DONNELL, IN TIME OF WAR: HITLER’S TERRORIST ATTACK ON AMERICA 21 (2005).

136 Id. at 29.

137 Ex parte Quirin, 317 U.S. 1, 21 (1942).

138 O’DONNELL, supra note 135, at 78.

139 Id. at 99–102.

140 Id. at 153.

141 Spies had been subjected to execution as a matter of law at least since the writings of the 18th century legal scholar Emmerich de Vattel. See JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 25 (2012). By the time Francis Lieber penned the law of war instructions to the Army saboteurs had been added to the list of those unprotected by combatant immunity. See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 31 (1898) (noting that a person who traveled secretly “to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case”).
after a trial. General Washington had convened a commission of officers to determine the guilt of John Andre, the British officer who secured the treason of Benedict Arnold. These commissions continued, if irregularly, throughout the nineteenth century.

The existence of this exception to combatant immunity gave the Administration the means to try, rather than merely detain, the saboteurs. The motive came from the fact of Dasch’s betrayal of his mission. It was difficult to keep secrets in a prisoner of war camp. The Administration’s story—that the remarkable talents of Hoover and his FBI had rapidly ended this threat—would unravel as soon as the world learned that a better screening by the Nazis of their participants might well have inflicted significant harm on the American war effort. To continue the charade was critical to efforts to deter the Third Reich from trying again. A trial could offer such deterrence, but only if conducted in the utmost secrecy.

Hence the return to use of the military commission, the descendent of the body that made the decision that led to the hanging of John Andre. A commission of seven officers convened in Washington publicly but with proceedings conducted under extreme secrecy. After hearing evidence and arguments for nineteen days and deliberating for two more days, it convicted all of the accused and sentenced each to death. Because of their cooperation with the FBI and the military commission, the prosecutors recommended to President Roosevelt that he commute the death sentences of Dasch and Ernest Burger, which he did.

Kenneth Royall, who had served as the assigned defense counsel and would later serve as the Secretary of War and Secretary of the Army, had taken a petition for a writ of habeas corpus to the District Court during the trial. When it was denied, he petitioned the Supreme Court for certiorari. The Court granted the petition, heard arguments on July 29th and 30th, and issued a brief—to the point of perfunctory—per curiam rejection of the defendant’s claims “in

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142 Quirin, 317 U.S. at 31.
143 O’Donnell, supra note 135, at 120.
144 Id. at 125 (“Roosevelt was particularly concerned about how easily the German U-boats could approach America’s coasts by sending a message that the executive branch . . . had the capacity to intercept and execute enemy saboteurs, the United States would deter any future German sabotage attempts.”).
145 Id. at 128.
146 Id. at 243.
147 Id. at 244.
148 Id. at 248.
149 Id.
150 Id. at 291.
151 Id. at 202.
advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation” on July 31, 1942.\textsuperscript{152}

When the Court issued its full opinion on October 29th of that year,\textsuperscript{153} it fully supported the Administration’s actions. Noting the different treatment allowed by the law of war for spies and saboteurs, including an approving nod to the case of John Andre,\textsuperscript{154} the Court held that a spy and an “enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”\textsuperscript{155} This distinguished the case of the Nazis from that of Lambdin Milligan, but the Court used the opportunity to reaffirm that case’s conclusions about military tribunals, especially the lack of a requirement for a jury:

We must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.\textsuperscript{156}

To the Milligan Court’s conclusion that “doubtless” the jury right did not apply to military judicial proceedings, the Quirin Court added a passive construction to confirm the point, noting that military cases were “expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.”\textsuperscript{157}

3. Epilogue: American Marines on Trial

The Supreme Court had another opportunity to clarify the constitutional status of courts-martial a half-century later. In Weiss v. United States,\textsuperscript{158} the Court heard challenges from two Marines to their convictions. Each previously pleaded guilty, but now claimed the judges who presided over their trials served in an unconstitutional manner.\textsuperscript{159} The Court rejected their claims, but it did so

\textsuperscript{152} Ex parte Quirin, 317 U.S. 1, 11 (1942).
\textsuperscript{153} By then, six of the defendants were dead, having been executed by electric chair on August 8th. See O’Donnell, supra note 135, at 249.
\textsuperscript{154} See Quirin, 317 U.S. at 31; see also Barry, supra note 11, at 69.
\textsuperscript{155} Quirin, 317 U.S. at 31.
\textsuperscript{156} Id. at 40.
\textsuperscript{157} Id.
\textsuperscript{158} 510 U.S. 163, 164 (1994).
\textsuperscript{159} Id. at 165–66.
without taking the opportunity to further clear up the puzzles of Milligan and Quirin.\footnote{Id.}

The military judges who preside over courts-martial\footnote{The position of “military judge” only dates from the 1969 amendments to the UCMJ. See Pub. L. No. 90-632, 82 Stat. 1335 (1968). Prior to that, the senior member of the panel, still referred to as the president of the panel, made final rulings of the kind associated with judges. Thus, in looking at any court-martial before 1969, one must remember that evidentiary rulings, requests from counsel, and countless other critical matters to the trial were decided by the person who functionally most resembles the foreperson of the jury.} are senior military officers certified by their service’s Judge Advocate General.\footnote{R.C.M. § 502(c)(1).} In this process they are designated as judges, and their service’s Judge Advocate General may assign them other duties while they serve as a military judge.\footnote{10 U.S.C.A. § 826(c) (West 2023).} The statute offers no tenure protection at all, but the president has promulgated a rule that their assignment as a judge shall last at least three years.\footnote{R.C.M. § 502(c)(3).}

In the view of the two Marines, this was a contradiction of the constitutional requirement that federal judges must have protection in the form of life tenure.\footnote{U.S. CONST. art. III, § 1.} They also argued that it was inconsistent with constitutional principles for the appointment of principle and inferior officers.\footnote{Id. art. II, § 2.} However, the Supreme Court turned back both of these challenges.\footnote{Weiss v. United States, 510 U.S. 163, 163 (1994).} The Court surveyed the three levels of military courts: trial courts and the service courts of criminal review, both of which are primarily staffed by military officers appointed by the Judge Advocate Generals of their services, and the Court of Appeals for the Armed Forces, an appellate court of five civilian judges appointed by the President with Senate confirmation for fifteen-year terms.\footnote{Id. at 167–69.} The Court then unanimously rejected both concerns, in part because it viewed questions involving “rules relating to the rights of servicemembers” as one of the areas where its deference to Congress was at its “apogee.”\footnote{Id. at 177.} In a concurrence, though, Justice Ginsburg noted that the Court’s very attention to the claims made by the petitioner showed that “men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.”\footnote{Id. at 194 (Ginsburg, J., concurring).}

None of the opinions ever mentioned Milligan or Quirin. None addressed the Sixth Amendment, as the Court confined its consideration to the
Due Process Clause of the Fifth Amendment.171 That battle for the Marines was always an uphill one: the argument that military judges required tenure ran headlong into the reality that Congress had long created other Article I judges without life tenure.172 Here, too, the Court rejected the Marines’ contention, once again relying on the fact that Congress “has never required tenured judges to preside over courts-martial.”173 But noteworthy is that the Court’s analysis begins with the conclusion that “of course” the Due Process Clause protected service members.174

If, even in an area where deference to Congress was at its zenith,175 that body was limited by the text of the Due Process Clause of the Fifth Amendment, it remains a puzzle that the Jury Clause of the Sixth Amendment did not similarly limit Congress. The most reasonable explanation for the anomaly is that offered a decade and a half earlier: the conclusion that “the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline.”176 Simply put, provided that a matter could be characterized as a question of military discipline, Congressional decisions regarding the scope of the Constitution were presumptively correct.

This unanimity by the Court177 might simply demonstrate a reflexive military deference.178 On the other hand, a different treatment of military judges than Article III judges is more defensible than a separate treatment of court-martial panels and federal juries. For one difference, state judges have never been held to the strictures of the Article III tenure protection rule; even when

171 U.S. CONST. art. II, § 2. But the Court dealt swiftly with that argument, noting that all of the appointments of the military judges as commissioned officers complied with the appointments clause and rejecting the notion that they required a second appointment to serve as judges because Congress chose to require merely that the judges be “detailed” or appointed to the duties, but did not require a separate appointment for such positions the way that Congress had for, e.g., the Chairman of the Joint Chiefs of Staff. Weiss, 510 U.S. at 171–72. Thus, because Congress had not indicated that the Constitution required a separate appointment, the Constitution did not require a second appointment.

172 Weiss, 510 U.S. at 167.
173 Id. at 178.
174 Id. at 176.
175 See id. at 177.
177 See id. Even accounting for the fact that there were two separate concurrences from Justices Souter and Ginsburg, and a third opinion styling itself a concurrence in part and concurrence in the judgment by Justice Scalia, there was no justice who disagreed with the Court on the resolution of either issue.
178 See Turley, Tribunals & Tribulations, supra note 4, at 701 (arguing that the Court treats the military as a “fifty-first state” but without imposing “many of the requirements imposed on the states under a variety of constitutional provisions and doctrines”).
remaining within the federal system, the Court rejected a similar challenge to the judges of the criminal courts of the District of Columbia.\textsuperscript{179}

\textbf{B. The Rationale Justifying the Seminal Cases}

	extit{Milligan} and \textit{Quirin} provided the original justification for courts-martial that by the 21st Century superficially resemble ordinary criminal proceedings in many ways but lack the critical feature of a jury.\textsuperscript{180} Although the Supreme Court never set out to provide—indeed, because of the context of \textit{Milligan} and \textit{Quirin}, it could not provide\textsuperscript{181}—a philosophical rationale as to why court-martial proceedings did not need juries, many commentators over the years have done so. Primarily, such justifications have relied on one or more of three ideas: the disciplinary role of military courts, a demand for efficiency in this separate system, or even an appeal to justice.\textsuperscript{182} Before proceeding to the argument that the bridge of justification for this separate system has run out, it is worth taking seriously such arguments to determine whether they accurately depict a world in which our hero should continue to run mid-air.

1. The Disciplinary Rationale

The idea that military tribunals serve a critical disciplinary function that would be ill-served if bound by the Constitution is one that the Supreme Court itself voiced. The \textit{Milligan} Court claimed that an efficient army and navy needed “swifter modes of trial than are furnished by the common law courts,”\textsuperscript{183} which justified Congress’s decision to create courts-martial.\textsuperscript{184}

\textsuperscript{179} Palmore v. United States, 411 U.S. 389, 410 (1973) (noting that a defendant in the D.C. Superior Court was “no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime”).

\textsuperscript{180} James W. Smith III, \textit{A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System}, 27 Whittier L. Rev. 671, 687 (2006) (noting in passing that “[i]n contrast to defendants facing trial in a civilian federal or state trial, an accused does not enjoy the Sixth Amendment right to an impartial jury of his peers”).

\textsuperscript{181} As noted earlier, these were military commissions trying civilians, not courts-martial trying service members.

\textsuperscript{182} My categories differ slightly from the four offered by the Supreme Court itself, as set forth in Professor Vladeck’s masterful discussion of the phenomenon of the Court’s deference to military decision-making. See Vladeck, \textit{supra} note 4, at 948 (citing “four distinct—but related—normative justifications: what might be described as “physical” separation, “philosophical” separation, “legal” separation, and “remedial” separation”). But I whole-heartedly agree with his conclusion that “none of these rationales can possibly bear the weight that has been placed upon them,” Vladeck, \textit{supra} note 4, at 936.

\textsuperscript{183} \textit{Ex parte} Milligan, 71 U.S. 2, 123 (1866).

\textsuperscript{184} \textit{Id.} It cannot be stressed too often that the Court was making this point not in celebration but in condemnation of military proceedings. The Court conceded that one serving “surrenders” the right to a trial, but all others were “guaranteed the inestimable privilege of trial by jury.” \textit{Id.}
Many scholars of the system have embraced this idea. As Professor Hansen noted, “First and foremost, military justice is one of the primary tools a military commander has to maintain discipline within the ranks.”\textsuperscript{185} This idea, that it is the disciplinary role of the court-martial that justifies the lack of key features of the justice system, is one that has been significantly eroded by almost every change to the court-martial’s jurisdiction and procedure over the last century. Indeed, even a defender such as Professor Hansen has noted that it cannot serve as “the be all and end all of military justice.”\textsuperscript{186} Yet it persists.\textsuperscript{187}

2. The Separate Society Rationale

Another rationale that has been offered by the Court, frequently in the context of deference, is that the military is simply different, and it would be inefficient to have one system that endeavored to cover both military and civil society. In 1974, the Court held that the system set forth in the UCMJ was not the equivalent of criminal law because it covered “aspects of the conduct of members of the military which in the civilian sphere are left unregulated.”\textsuperscript{188}

Once one categorizes something as different, then differences are fine. This approach accounts for some of the statements one encounters among the explanations of the military justice system. For example, references to the “compromise” that protects the right to remain silent but denies the right to a jury to guarantee that the court-martial system “is regarded as fair.”\textsuperscript{189} Or that the importance of the existence of post-trial review by the commander because, since “the panel was not a true jury, the panel’s verdict will not always resemble the commonsense judgment of a jury.”\textsuperscript{190}

This rationale, that the different military society must be allowed to use its own criminal justice procedure, ultimately reduces to a question of trust in military authorities.\textsuperscript{191}

\textsuperscript{185} Hansen, Changes, supra note 34, at 423.
\textsuperscript{186} Id.
\textsuperscript{187} See Shure & Weber, supra note 117, at 226 (“the military has always resisted change, especially the changes which made it ‘more judicial’”).
\textsuperscript{189} Shure & Weber, supra note 117, at 205.
\textsuperscript{190} Williams, supra note 35, at 471–72. The same author, an Air Force attorney who is undeniably an expert practitioner in the system, referred to the appellate right in the military justice system as “illusory.” Id. at 473.
\textsuperscript{191} See Hansen, Changes, supra note 34, at 425 (calling the system “an expression of the nation’s collective will as to how much authority we are willing to give to our military leadership”). It should go without saying that one of the key premises of the amendments to the Constitution was that authority needs to be bounded.
3. The Justice Rationale

Noting that the lack of unanimity is one of the key features that separated courts-martial from civilian criminal juries, one scholar and long-time expert in the system even posited that the lack of unanimity was a benefit. Acknowledging that “historic function of the jury in the American criminal trial is to ensure that the judgment that a citizen is culpable of a serious crime is reached by a group of his fellow citizens, rather than by a government official,” retired military judge Robert Holland contended that the lack of unanimity makes courts-martial more just than their civilian equivalents.

Comparing the deliberations of military panels to appellate courts, Holland criticized the unanimity requirement as one which “places inordinate power in any single juror to thwart the consensus of the vast majority of the jurors acting as a body.” Ultimately, he concluded, this requirement “may well lead to a perversion of the truth-seeking goal.” He painted a picture of jury unanimity not reflecting a true commitment of the body but rather the “wearing down, but not convincing, a few holdouts or one holdout who cannot withstand the pressure to end the deliberations by agreeing.” It must be noted that Professor Holland’s concern was not simply the wearing down of a select few who thought the defendant not guilty; as he observed, even acquittals required unanimity in civilian trials. In the military, on the other hand, a poll that failed to acquire the requisite number of guilty votes resulted in acquittal, which he termed the “default position” of the court-martial.

This approach seems, at one level, compelling. At the time when Professor Holland wrote this paean to non-unanimous juries, they were permitted by the Supreme Court, with some limitations, in state criminal trials. Since 2020’s Ramos v. Louisiana, however, the Court has made clear that the constitutional jury requirement requires a unanimous jury. The clash between the military’s approach and the Constitution has become quite stark. For our protagonist the court-martial, blissfully avoiding the pull of constitutional gravity by walking along a bridge that it believes exists, the Ramos decision suggests that there is no longer any bridge to walk on.

193 Id.
194 Id. at 130 (noting that even death sentences may be approved at the appellate level by non-unanimous decisions).
195 Id.
196 Id.
197 Id. at 144.
198 Id. at 125.
199 140 S. Ct. 1390, 1391 (2020).
V. THE BRIDGE HAS RUN OUT

Ramos is just one part of the problem for courts-martial. The twenty-first century problem for this aging system is two-fold: on one hand, the bridge was never all that strong. The two key decisions of the Supreme Court justifying the differentness of the military justice system suffer from deficiencies that made them poor choices on which to base an entirely separate judicial system.

On the other hand, the passage of time has brought with it extraordinary changes. Congress, as the creator of the system, has altered some of its structures in ways that move it far from the idea that courts-martial are merely objects of discipline as had been suggested by Milligan\textsuperscript{200} and Quirin\textsuperscript{201}. The military appellate courts, both uniformed and civilian, have given ruling after ruling that have unintentionally questioned whether the separate system can truly rely on the treatment of an Indiana traitor and a handful of Nazis for its continued existence. Finally, the Supreme Court, although not confronting the foundation of the system directly yet, has offered conclusions that fundamentally vary from the logic of those two cases. Indeed, a subsequent pronouncement of the Supreme Court rejecting, Milligan-like, another attempt to exercise court-martial jurisdiction over a civilian, put the point in a stark way:

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army’s primary fighting function.\textsuperscript{202} Therefore, this section explains the weaknesses that have existed in the foundational cases from the start and explains how subsequent developments have eroded the ability of courts-martial to continue to disregard the gravity of constitutional requirements.

A. The Weakness of the Seminal Cases

Initially, it must be noted that the Milligan and Quirin cases really are alone among Supreme Court cases in justifying a constitutional exception for military courts. As Professor Vladeck has noted, the Court has deployed a number of arguments justifying deference to the military justice system, but it

\begin{itemize}
\item Ex parte Milligan, 71 U.S. 2, 52 (1866).
\item Ex parte Quirin, 317 U.S. 1, 18–19 (1942).
\end{itemize}
has not set them up as justifying the constitutional status of courts-martial. After a lengthy analysis of the Court’s work, as well as that of many academic observers, he concluded that they were sui generis. Reliance on \textit{Milligan} as a justification for approving the constitutionality of military justice is problematic for a number of reasons. Among them, of course, is the case’s age. While reliance on ancient precedents is a feature of many areas of constitutional law, it is odd to do that in the area of criminal procedures, where the revolutions in rights—including the jury right—did not fully develop until long after \textit{Milligan}.

Much more than mere age diminishes \textit{Milligan}. The case is, at best, a justification for courts-martial by negative implication. It was, it is to be remembered, a strenuous rejection of military commissions as vehicles for trial of \textit{civilians} because they deprived the accused of constitutional rights acknowledged even then. Any support for courts-martial of military personnel was done perfunctorily. As one military scholar put it succinctly more than two decades ago, “on one page in the middle of the opinion, in the middle of extolling the paramount nature of the right to trial by jury, the Court withheld the right from those in military service.”

\textit{Quirin} is, if anything, a worse choice as a precedent than \textit{Milligan}. Criticism of Supreme Court precedents is commonplace. The Court’s swift approval of the military commissions for Nazi saboteurs has certainly attracted criticism of that kind. Although three-quarters of a century younger than \textit{Milligan}, \textit{Quirin} is in some substantive ways even further from our own day than Lambdin Milligan’s military commission was from that which tried the Nazis. Extraordinary changes have happened since then not only in the development of criminal procedure but also in the role and structure of courts-martial even since the younger of the two cases.

But criticism of \textit{Quirin} has arisen in the Court itself. Merely a decade after that case, the Court referred to the importance of confining the military justice system “to the narrowest jurisdiction deemed absolutely essential to

\begin{itemize}
\item \textsuperscript{203} Vladeck, \textit{supra} note 4, at 950 (noting the Court has “looked, however unsatisfyingly, to constitutional text”).
\item \textsuperscript{204} \textit{Id.} at 988.
\item \textsuperscript{205} \textit{See, e.g.}, Tennessee Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2459 (2019) (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).
\item \textsuperscript{206} \textit{See, e.g.}, Patton v. United States, 281 U.S. 276 (1930); Ramos v. Louisiana, 140 S. Ct. 1390 (2020).
\item \textsuperscript{207} Glazier, \textit{supra} note 4, at 11.
\item \textsuperscript{208} \textit{See, e.g.}, Neal K. Katyal & Laurence H. Tribe, \textit{Waging War, Deciding Guilt: Trying the Military Tribunals}, 111 \textit{Yale L.J.} 1259, 1291 (2002) (“Quirin plainly fits the criteria typically offered for judicial confinement or reconsideration.”).
\item \textsuperscript{209} Glazier, \textit{supra} note 4, at 44 (citing the “vast difference” between a time when “courts-martial were specialized, limited-jurisdiction tribunals” and today, when “they are hardly distinguishable from federal district courts”).
\end{itemize}
maintaining discipline among troops in active service” because of the “dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.”\footnote{210} This is hardly a ringing endorsement of a separate system of justice.

More recently, some justices have expressed even more displeasure with the precedent, with Justice Scalia castigating \textit{Quirin} as “not this Court’s finest hour.”\footnote{211} Although often a proponent of deference to military authorities,\footnote{212} Justice Scalia noted the disturbing fact that the Court’s short opinion rejecting the defense arguments was rendered the day after the oral argument; by the time the full opinion was released months later, those defendants sentenced to death were already dead, having been executed a week after the \textit{per curiam} opinion was released.\footnote{213}

Beyond the specific issues with \textit{Milligan} and \textit{Quirin}, their greatest failing as foundations for the separate system is that neither offered the kind of thoughtful analysis or deployment of logic that true foundational cases do. Instead, the \textit{Milligan} Court simply announced that the right to trial by jury “doubtless” did not apply to courts-martial.\footnote{214} In the century and a half since that case, the Court has routinely repeated the conclusion,\footnote{215} but has never endeavored to explain or justify it.\footnote{216} One scholar conducting a thorough review of the cases in courts at all levels referred to the conclusory repetition of the rule that the jury right does not limit the practice of courts-martial as a “tired and thoughtless mantra.”\footnote{217} Although technically it could not be a holding in a case that was preventing the use of a military tribunal against a civilian, the \textit{Milligan} “doubtless” conclusion has become the foundation of the separate system.\footnote{218}

\footnotetext[210]{United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955).}
\footnotetext[212]{See, e.g., Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (claiming that the majority decision “will almost certainly cause more Americans to be killed”).}
\footnotetext[213]{Hamdi, 542 U.S. at 569 (Scalia, J., dissenting).}
\footnotetext[214]{Ex parte Milligan, 71 U.S. 2, 123 (1866).}
\footnotetext[215]{Lamb, supra note 55, at 133 (noting that Justice Marshall, in dissenting from the holding of Solorio v. U.S., called the Milligan observation that the jury right did not extend to courts-martial a holding).}
\footnotetext[216]{Vladeck, supra note 4, at 936.}
\footnotetext[217]{Glazier, supra note 4, at 12.}
\footnotetext[218]{Hansen, \textit{Avoiding the Extremes}, supra note 4, at 914 (noting that the Court of Military Appeals held the 6th Amendment inapplicable to courts-martial and concluding that although the Supreme Court had directly held this “given the Court’s past deference to Congress on military justice matters, it is unlikely that the Court would find the right to a jury trial applies to courts-martial”). Note also the decision by the Court of Appeals for the Armed Forces (the successor to the Court of Military Appeals) rejecting an objection to court-martial jurisdiction in the case of an Iraqi civilian working for the U.S. tried by court-martial in that country. In a separate opinion, the Chief Justice of that court took the opportunity to set out his opinion that American servicemembers had no right to a jury. United States v. Ali, 71 M.J. 256, 277 (C.A.A.F. 2012) (Baker, C.J., concurring in part and in the result) (“What he was not entitled to were the rights to a
B. Time Has Eroded the Bridge

The persistent problem with the ritual incantation of the Milligan “doubtless” language, whether it was dicta or holding, is that the system of today bears only a passing resemblance to that which faced the Copperhead. Changes inaugurated by Congress, by the appellate courts it created to maintain the system, and by the Supreme Court itself have cast aside most of the logical bases that might have supported the denial of the Sixth Amendment’s application to the military at the time. Multiple actors have removed the bridge over the chasm, and the court-martial is running in the air.

1. Changes Created by Congress

The Constitutional power to regulate the military belongs to Congress. The Supreme Court has recognized this for more than a century and a half. The Court has read this provision with a deference that they do not use for similar grants of power. Congress has used this power to create a justice system that does feature some protection of the rights of the accused, sometimes in ways which cast doubt on the rationales for denying other constitutional rights.

The earliest system of military justice bore little resemblance to any legal proceedings. Even the “judge advocate,” the legal advisor to the board of officers which determined questions of guilt, need not be a lawyer. After the creation of the Uniform Code of Military Justice (UCMJ) in 1950, this practice could no longer occur. Even so, this system, created eight years after Quirin, allowed jury trial and indictment by grand jury—rights that extend beyond those to which members of the United States Armed Forces are themselves entitled”.

219 See Milligan, 71 U.S. at 6.
221 Dynes v. Hoover, 61 U.S. 65, 79 (1857) (“Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations”). See also Whelchel v. McDonald, 340 U.S. 122, 127 (1950) (calling the constitution of courts-martial “a matter appropriate for congressional action”).
222 Turley, Tribunals & Tribulations, supra note 4, at 687 (referring to the Court’s deference as “mantra-like” and objecting on originalist grounds because the idea “that such matters have been historically left to Congress reflects, however, not the clear views of the Framers, but the conclusory view of the Court itself”). Compare this with the way the Court treats other textual grants of power to Congress such as the Commerce Clause, see, cf., United States v. Morrison, 529 U.S. 598, 614 (2000) (“Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so”).
223 Shure & Weber, supra note 117, at 203.
225 Benjamin Feld, A Manual of Courts-Martial Practice and Appeal 67 (1957) (“Disqualification because the [Law Officer] is not on active duty or is not a member of the bar and certified as competent by TJAG of his armed force cannot be waived”).
for military trials largely conducted by line officers, with the members themselves voting to resolve any challenge for cause against a particular member.\footnote{Id. at 66 (noting that all members of the court-martial except the one challenged would “participate irrespective of whether any of them are, or have been, unsuccessfully challenged on the same ground”).}

It was not until the time of the Vietnam War that Congress elected to create the position of Military Judge.\footnote{Weiss v. United States, 510 U.S. 163, 179 (1994) (“Congress did not even create the position of military judge until 1968”). The change of the “Law Officer” to a military judge was unquestionably a reform effort. See Colonel George R. Smawley, A Majority of One: A Summary and Analysis of an Oral History of Colonel Denise K. Vowell (Retired), United States Army, 1973-2006, ARMY LAW., Jan. 2015, at 26 (“the 1968 amendments to the UCMJ were implemented, dramatically expanding the rights of Soldiers and the establishment of a more professional and institutionalized judiciary”).} Unlike the “law officer” of the original UCMJ, who at least had to be an attorney, the Military Judge was not limited to an advisory function and could make rulings on matters of law that bound the panels.\footnote{10 U.S.C.A. § 851 (West 2023).} Thus while a court-martial proceeding of the mid-nineteenth or even mid-twentieth century looks extraordinarily different to modern observers, a current court-martial is easily familiar to any modern lawyer.\footnote{Id. at 836 (West 2023).}

Congress adopted for this “separate” system of justice a rule that requires the President to adopt the Federal Rules of Evidence unless they are impracticable,\footnote{Id. § 846.} guarantees the defense counsel an equal opportunity to secure the testimony of witnesses,\footnote{Id. § 866.} and a two-tier system of appellate courts composed of both military officers\footnote{Id. § 942.} and presidentially-appointed civilians.\footnote{Lamb, supra note 55, at 112 (noting that the system is designed to secure a jury “selected at random from a fair cross section of the community”).} Amid all of these changes designed overtly to bring military practice more into conformity with the constitutional standards that govern all other criminal trials, the exclusion of a key constitutional right such as the right to a jury looks increasingly arbitrary. This is especially true when Congress has also enacted a law to govern the selection of juries in other federal courts, one that clearly prohibits the kind of hand-picking of jurors that once accompanied the “key man system”\footnote{In such a system, a judge appoints some number of “jury commissioners” who then personally select the members of the pool from which the grand jury will be drawn. See Castaneda v. Partida, 430 U.S. 482, 497 (1977) (noting that such a system was “susceptible of abuse”).} and is still vital for panel selection in courts-martial.\footnote{Even Hollywood (sometimes) recognizes this. Compare the courts-martial in THE CAINE MUTINY (Stanley Kramer Productions 1954), with A FEW GOOD MEN (Castle Rock Entertainment 1992).}
2. Changes Created by the Military Appellate Courts

But the changes do not stop with those set forth directly by Congress. For the UCMJ created a system of appellate courts that has developed a binding body of law that governs trial. It is unquestionably one of the engines that has helped create a series of military trials that have “increasingly come to resemble ordinary civilian courts in recent years.”\(^{236}\)

Although the apex court, the Court of Appeals for the Armed Forces (CAAF, originally named the Court of Military Appeals, or CMA) has continuously and almost casually embraced the idea that the jury was irrelevant to the trials of service members,\(^{237}\) it has nonetheless applied other constitutional protections to courts-martial.\(^{238}\)

So, for example, the CMA in 1988 held the *Batson*\(^{239}\) challenge rule applicable to courts-martial because it was “not based on a right to a representative cross-section on a jury but, instead, on an equal protection right to be tried by a jury from which no ‘cognizable racial group’ has been excluded.”\(^{240}\) Therefore, the court held the right applied to courts-martial “just as it does to civilian juries.”\(^{241}\)

The CAAF has even found, in the statute authorizing the President to prescribe the procedures for courts-martial including the requirement that these regulations “so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,”\(^{242}\) that “Congress intended that, to the extent ‘practicable,’ trial by court-martial should resemble a criminal trial in a federal district court.”\(^{243}\) Thus when a military installation sought to find potential members for courts-martial panels by posting an advertisement on command communications that sought volunteers to contact the office of the staff judge

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\(^{236}\) Vladeck, *supra* note 4, at 941.

\(^{237}\) See, e.g., United States v. Kemp, 22 C.M.A. 152, 154 (1973); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988) (“the right to trial by jury has no application to the appointment of members of courts-martial”).


\(^{241}\) *Id.* at 390.


advocate, the CAAF struck down the practice. Although it repeated the ritual incantation that the constitutional jury right did not apply to courts-martial, it nonetheless rejected this “novel” method in order to retain consistency with “current federal practice.” It chose to “embrace the approach of the Court of Appeals” for the Fifth Circuit when that court was construing a federal law that was itself designed in accordance with the Sixth Amendment right to a jury. If the desire of military courts is to parallel federal practice as closely as possible in jury selection, it makes little sense to distinguish the act of the convening authority’s choice that is the very basis of the selection of members for the military panel.

3. Changes Created by the Supreme Court

The Supreme Court for centuries adopted a view of courts-martial that not even the Constitution was viewed as an impediment to the creation of any system Congress wished to create. This deference meant, most obviously, that juries were not required in military trials. This fact of course harmed service members, which did not trouble the Court; it was, however the basis of the Milligan ban on the use of these tribunals to try civilians. Thus, the Court was skeptical of the very system that it allowed to exist for military personnel.

Almost a century later, the Court reached for that skepticism when finding that Congress lacked the authority to subject former military personnel

\[\text{\begin{footnotesize}244\end{footnotesize}}\] United States v. Dowty, 60 M.J. 163, 166 (C.A.A.F. 2004) (referencing a notice which included the following language: “MEMBERS NEEDED. Would you like to serve as a member in a general or special courts-martial in the greater Washington, DC area? Interested active-duty military personnel, both officers and enlisted, please contact [the Assistant Staff Judge Advocate] . . . for further information”).

\[\text{\begin{footnotesize}245\end{footnotesize}}\] Id. at 172.

\[\text{\begin{footnotesize}246\end{footnotesize}}\] Id. at 169.

\[\text{\begin{footnotesize}247\end{footnotesize}}\] Id. at 172.

\[\text{\begin{footnotesize}248\end{footnotesize}}\] Id. at 173. In the earlier federal case, a panel of the Fifth Circuit had rejected the use of a jury composed of volunteers from earlier panels. Although that court did not find that the practice had prejudiced the defendant, it went on to “roundly condemn this practice” and warned the lower courts that it expected “not to review it again”), United States v. Kennedy, 548 F.2d 608, 614 (5th Cir. 1977).

\[\text{\begin{footnotesize}249\end{footnotesize}}\] See, e.g., Kahn v. Anderson, 255 U.S. 1, 8 (1921) (rejecting the accused’s contention that Congress could only provide a system with jury and grand jury rights).

\[\text{\begin{footnotesize}250\end{footnotesize}}\] Whelchel v. McDonald, 340 U.S. 122, 126–27 (1950) (“The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions”). \textit{Whelchel} made the obligatory reference to \textit{Quirin}, 340 U.S. at 127, as well as to \textit{Kahn}, which contained a tip of the hat to \textit{Milligan}. Kahn v. Anderson, 255 U.S. 1, 10 (1921).

\[\text{\begin{footnotesize}251\end{footnotesize}}\] Turley, \textit{Tribunals & Tribulations, supra} note 4, at 682 (“military cases decided by the Supreme Court are remarkable in their overbroad treatment of military uniqueness in allowing such differences to exist despite their negative impact on the rights of servicemembers”).
to trial by court-martial.\textsuperscript{252} In \textit{Toth v. Quarles} the Court offered a hymn to the importance of a diversity of experience among members of a jury. \textsuperscript{253} It then rejected a jury-less court-martial for civilians because “military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”\textsuperscript{254}

The Court did not preempt the existence of such tribunals for those currently serving, though, because of an idea that would prove to be important in the coming years: the special nature of military offenses. The Court acknowledged that “military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules.”\textsuperscript{255} Referring to distinctly military offenses such as disobeying orders or leaving duties without authorization, the Court nonetheless rejected trial by specialists because “the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better.”\textsuperscript{256}

Fourteen years later, this idea would give birth to a (short-lived) revolution in the Court’s approach to military justice. In the 1969 case of \textit{O’Callahan v. Parker},\textsuperscript{257} the Court acknowledged the importance of the court-martial as a tool of discipline while calling it “not yet an independent instrument of justice.”\textsuperscript{258} It singled out the lack of a jury and the (then-existing) lack of a true judge as reasons for that conclusion.\textsuperscript{259} It therefore confined courts-martial, even of active duty military personnel, to the “appropriate sphere”—disciplinary infractions and other offenses connected to military service—because otherwise there was “no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury.”\textsuperscript{260}

The \textit{O’Callahan} period, in which courts-martial were required to show a service connection for the criminal offense in order to assert jurisdiction, lasted

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  \item\textsuperscript{252} United States ex rel. Toth v. Quarles, 350 U.S. 11, 14 (1955) (“It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions”).
  \item\textsuperscript{253} \textit{Id.} at 18 (“Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field”).
  \item\textsuperscript{254} \textit{Id.} at 17.
  \item\textsuperscript{255} \textit{Id.} at 18.
  \item\textsuperscript{256} \textit{Id.}
  \item\textsuperscript{257} 395 U.S. 258 (1969).
  \item\textsuperscript{258} \textit{Id.} at 265.
  \item\textsuperscript{259} \textit{Id.} at 263–64.
  \item\textsuperscript{260} \textit{Id.} at 265.
  \item\textsuperscript{261} \textit{Id.} at 273 (the Court expressed particular concern that Article 134 of the UCMJ, called “the general article” because of its non-specificity, could be used to subject service members to court-martial for income tax evasion).
\end{itemize}
just long enough for a child born shortly after the case to join the military. In 1987 the Supreme Court again took up precisely the same question—whether courts-martial were limited in their jurisdiction—and in Solorio v. U.S. it reversed O’Callahan to reach the opposite answer.²⁶²

Finding the grant of power to create courts-martial belonged solely to Congress,²⁶³ the Court returned to the “status” test that it held was the appropriate and unquestioned standard for almost one hundred years.²⁶⁴ Thus, any person who Congress made subject to the jurisdiction of courts-martial might be tried by court-martial for any offence.²⁶⁵ Some commentators have viewed Solorio as returning to a proper level of deference from the Court to congressional (and military) decision-making.²⁶⁶ For others, including the spirited dissent, it reflected contempt for both service-members and the Constitution because the former could now be tried without a jury for “any offense, from tax fraud to passing a bad check, regardless of its lack of relation to ‘military discipline, morale and fitness.’”²⁶⁷

Although the Solorio removal of the service-connection limitation of the O’Callahan court might have prefigured the withdrawal of the Supreme Court from the military justice system, it did not. Scholars have long recognized the “dominant role” the Supreme Court has occupied in the development of the military justice system,²⁶⁸ as “the very act of noninterference creates knowledge among the military that civilian capacity to restrain their decisions will be limited.”²⁶⁹ Whether there has been an unbroken history of the kind of deference that Chief Justice Rehnquist posited in Solorio or whether before the 1950s the Court was actually engaging in a kind of “noninterference” where “the Court’s disinclination to inquire into the constitutionality of military practices was palpable”²⁷⁰ and that military deference doctrine “was more or less the brainchild

²⁶³ Id. at 441. The majority opinion by C.J. Rehnquist noted that the grant of power to regulate the Armed Forces was not “any less plenary” than the other congressional powers such as the regulation of interstate commerce.
²⁶⁴ Id. at 439.
²⁶⁵ See supra notes 39–42 and accompanying text.
²⁶⁶ See, e.g., Joshua E. Kastenberg, Shaping U.S. Military Law: Governing a Constitutional Military 183 (2014) (criticizing Solorio’s historical analysis but concluding that it is “constitutionally sound when adjudged against the Constitution’s plain text, in a manner in which O’Callahan is not”); Corn & Jenks, supra note 95, at 37 (“it was O’Callahan, and not Solorio, that deviated from the longstanding tradition of allowing Congress to establish the scope of military jurisdiction”).
²⁶⁷ Solorio, 483 U.S. at 467 (Marshall, J., dissenting). Notably, the majority opinion did not refer at all to the jury right. See also Stephen I. Vladeck, Military Courts and Article III, 103 GEO. L.J. 933, 962 (2015).
²⁶⁸ Turley, Tribunals & Tribulations, supra note 4, at 682.
²⁶⁹ Lichtman, supra note 83, at 938–39.
of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued\(^{271}\) does not matter for the crucial conundrum that the Court’s decisions, especially \textit{Solorio}, have raised. That is, if the \textit{Toth} idea that what justifies the lack of a jury is the peculiar nature of offenses such as dereliction of military duties, how does one explain the fact that criminal trials for tax fraud or passing a bad check do not require a jury if, and only if, the alleged perpetrator happens to be serving in the military? A series of cases over twenty years that began a decade after \textit{Solorio} demonstrate that, in fact, the bridge provided by \textit{Milligan} and \textit{Quirin} has run out.

C. “\textit{In a Word}”

The first hint that the bridge simply no longer supported the court-martial system came as early as 1998. In \textit{U.S. v. Scheffer}, the Supreme Court granted certiorari in a case that involved an Airman’s unsuccessful attempt to introduce a government polygraph that found no deception when he denied knowingly using narcotics after a urinalysis indicated the presence in his system of methamphetamines.\(^{272}\) The military judge in the court-martial refused to allow the accused to introduce the evidence, as Military Rule of Evidence 707 categorically excluded polygraphs from admission in those proceedings.\(^{273}\) After the Court of Appeals for the Armed Forces reversed the case,\(^{274}\) the Supreme Court reversed that decision, reinstating Airman Scheffer’s conviction.\(^{275}\)

The \textit{Scheffer} case did not directly address any of the questions that concern the argument that courts-martial, as currently constructed, violate the Constitution. The assumptions present throughout the review, however, indicate just how thoroughly removed the current system is from the bases for it set forth in \textit{Milligan} and \textit{Quirin}. At the highest level of review created by Congress within the Department of Defense, the CAAF determined that the judge was required to admit the polygraph results offered by the accused despite the plain language of the Military Rule of Evidence promulgated by the President.\(^{276}\) It did so because it held the rule was unconstitutional because “The Sixth Amendment grants an accused ‘the right to call witnesses in his favor.’ An accused’s right to present testimony that is relevant and material may not be denied arbitrarily.”\(^{277}\) Thus the CAAF struck down an action by the President based on a provision of the

\(^{271}\) \textit{Id.} at 703.


\(^{273}\) \textit{Id.} at 306.

\(^{274}\) \textit{Id.} at 307.

\(^{275}\) \textit{Id.} at 308.

\(^{276}\) \textit{MIL. R. EVID.} 707(a) (“Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.”).

Sixth Amendment—the very amendment whose jury right, Milligan teaches, “doubtless” does not apply to courts-martial.278

Although the Supreme Court disagreed that the Constitution limited this particular rule of evidence, it did not do so by concluding that the whole of the Sixth Amendment “doubtless” did not apply to courts martial. Instead, it seemed to amplify the dissonance with Milligan by repeatedly relying on the proper role of the “jury.”279 The jury was supposed to assess the credibility of witnesses, Justice Thomas wrote for a plurality of the Court, because they were “presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.”280

Justice Kennedy wrote a separate opinion for himself and three other justices, concurring in part and in the result. Although he disagreed with some of Justice Thomas’s more conclusory observations, Justice Kennedy shared Justice Thomas’s view that the proper framework for understanding the case involved the concept of the jury.281

Justice Stevens dissented alone. But he too thought the jury was the appropriate framework for understanding the question. He would have allowed the jury to receive polygraph evidence because it “may be of assistance to the jury” in determining the consciousness of guilt of the accused.282

Thus, as early as 1998 all nine justices found the “jury” to be the correct way to understand the court-martial panel. This was not merely the substitution of two words. Justice Thomas’s focus on the juror’s ability to understand human nature flew directly in the face of the Milligan-Quirin-Toth line of cases suggesting that what made military panels different from juries was that they were composed of experts who could evaluate matters such as military orders. Nor can it be the case that the Court was merely using a military case to explain a general federal rule, as most of the Military Rules of Evidence are direct copies of the Federal Rules of Evidence. Scheffer dealt with one of the exceptions: there is no Federal Rule of Evidence 707. The Court simply found, despite a lengthy precedential history explaining that courts-martial have no juries, that a court-martial panel was, essentially, a jury.

Twenty years later, the non-existence of the bridge became even more apparent. The case of Ortiz v. U.S.283 rejected a challenge to the simultaneous appointment of a military officer to the Air Force Court of Criminal Appeals and

278 United States v. Santiago-Davila, 26 M.J. 380, 389–90 (C.M.A. 1988) (applying an amendment other than the Sixth); see also supra text accompanying note 237.
279 Scheffer, 523 U.S. at 313 (Thomas, J.) (“A fundamental premise of our criminal trial system is that “the jury is the lie detector”) (emphasis in opinion).
280 Id. (citing Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)).
281 Id. at 318–19 (Kennedy, J., concurring in part) (concluding that the Thomas opinion “demeans and mistakes the role and competence of jurors in deciding the factual question of guilt or innocence”) (emphasis added).
282 Id. at 336 (Stevens, J., dissenting).
the Court of Military Commission Review. Again, as in Scheffer, the baseline assumptions illustrate the ways in which the line of cases allegedly justifying courts-martial no longer matter. The Court confronted an initial challenge by an amicus based on their ability to even review the proceedings of non-Article III courts. Rejecting that argument, the Court based its decision on the undeniable fact that the “jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review.” Indeed, the Court went out of its way to note that courts-martial have res judicata and double jeopardy effects, and even went so far as to note that “procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding, whether state or federal.”

The dissent by Justice Alito hearkened back to the line of precedent suggesting the importance of the difference of the military justice system as an executive function. He referred to the critical understanding, heretofore at least allegedly shared by the majority of the Court, that the role of the court-martial was “the enforcement of military discipline.” Indeed, he went so far as to declare that “courts-martial are not courts; they do not wield judicial power; and their proceedings are not criminal prosecutions within the meaning of the Constitution.”

This argument was by no means irrational: it exemplified precisely the reason that Milligan had denied the right of military tribunals to try civilians, that Quirin had carved out an exception for foreign unprivileged combatants, that Toth had policed the boundary by limiting the court-martial to those currently serving, and that O’Callahan had rejected even the trial of active service-members for offenses that had no connection to the armed forces. This idea that the court-martial was merely a disciplinary tool requiring specialized understandings by the participants was ingrained in Supreme Court precedent for well over a century.

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284 Id. at 2173 (it was in response to this argument that the Court, in footnote 3, made its only mention of United States v. Scheffer).
285 Id. at 2174.
286 See Williams, supra note 35, at 484 (“the collateral consequences of a court-martial conviction are now essentially the same as those of the civilian justice system”). Colonel Williams noted that sexual offender registration, supervised releases, firearms possession, and even the Federal Sentencing Guidelines treat court-martial convictions as federal convictions.
287 Ortiz, 138 S. Ct. at 2174.
288 Id. at 2190 (Alito, J., dissenting) (arguing that the Court should have dismissed the petition because it had no jurisdiction to consider what he characterized as the executive action of a court-martial (“military tribunals do not comply with Article III, and thus they cannot exercise the Federal Government’s judicial power”)).
289 Id. at 2196.
290 Id. at 2199.
291 Id. at 2200.
But the Court rejected it in the most succinct of fashions. The majority found that the “essential character” of the system was “in a word, judicial.”

It cited the fact that, since *Solorio*, military courts could try members of the military “for a vast swath of offenses, including garden-variety crimes unrelated to military service.”

It noted that the jurisdiction of courts-martial therefore “overlaps significantly with the criminal jurisdiction of federal and state courts.”

It observed that the military justice’s appellate system “replicates the judicial apparatus found in most States.”

The Court went out of its way to examine the case of Clement Vallandigham, a Copperhead tried by a military commission convened by the general officer commanding the Department of Ohio, in which the Supreme Court in 1864 had found it lacked jurisdiction.

The Court rejected the comparison because of the changes in the military justice system:

> [T]he very thing that Burnside’s commission lacked, the court-martial system—and, in particular, the CAAF (whose decision Ortiz asks us to review)—possesses in spades. Once again, the CAAF is a permanent “court of record” created by Congress; it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures; and its own decisions are final (except if we review and reverse them). That is “judicial character” more than sufficient to separate the CAAF from Burnside’s commission, and align it instead with territorial and D.C. (and also state and federal) courts of appeals.

The majority did not explain why these changes to the system since the 1860s did not also repudiate the dicta from *Milligan*—a case the majority never mentioned—that, because they lacked juries, military tribunals could not try civilians. If, as the Court found, “courts-martial have operated as instruments of military justice, not (as the dissent would have it) mere ‘military command,’” then it is evident that something is amiss. The primary justification for courts-martial evading the Sixth Amendment jury requirement was that they served as elements of a disciplinary, not a judicial, system. If they

292 *Id.* at 2174 (majority opinion).
293 *Id.*
294 *Id.* at 2174–75.
295 *Id.* at 2175.
296 *Id.* at 2180.
297 *Id.* (internal citations omitted).
298 *See id.* at 2195 (Alito, J., dissenting) (arguing that *Vallandigham* showed that the Supreme Court could not review an executive branch organism such as the CAAF, and that *Milligan*, only two years later, was different because Lambdin Milligan “first sought relief in a lower federal court.”).
299 *Id.* at 2175 (majority opinion).
are “in a word, judicial,” then the bridge that supported them over the constitutional chasm no longer exists.

VI. TIME TO LOOK DOWN

It is not unfair to ask, at this point, about the consequences of recognizing that the bridge no longer exists. If the court-martial indeed were to look down, discover that nothing supports the military justice system, and plunge in the abyss of the Constitution, what then? Does it simply crash upon the rocks, doomed to perish? Would that leave the military without any justice system of its own, and simply require commanders to report crimes committed by their soldiers to local law enforcement? What happens when the U.S. military is abroad, and the local law enforcement belongs to other nations? What happens to offenses like desertion or disobedience that have no civilian analogue?

To answer these questions is to determine whether our protagonist, cartoon-like, could survive a great fall into the chasm of constitutionality with little more than a bruised ego. If, indeed, application of constitutional rights to courts-martial would work fatal damage upon them, that is the best argument that the Constitution cannot possibly subject courts-martial to these rights. The Constitution, the Supreme Court reminds us, is not a suicide pact.300

To find that out, this section considers some alleged problems that would arise from compliance with the constitutional requirement of a jury and then analyzes whether there are any real advantages that would accrue to the military from doing so.

A. A Possible Disadvantage: Congress Knows Best

An initial objection is based on the textual commitment of the system to Congress. Scholars and participants in the system have long joined civilian and military courts in recognizing that the rule-making power for military justice belongs to Congress. One pair of officers recently described this as “what the framers of the Constitution understood: Congress is in the best position institutionally to regulate the military, including how to translate civilian notions of justice and due process into the military environment.”301

Of course, one response to that is that there is simply no other power that is granted to Congress that is immune from the rights-protection of the amendments or judicial review. It is obviously the role of courts “to say what the law is,”302 and there isn’t another power among those conveyed by Section 8 of

300 Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (“[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).
301 Shure & Weber, supra note 117, at 204.
Article I that has been thought to be immune from judicial review and constitutional limitation. Indeed, the point of the critical Supreme Court cases involving military justice, from Milligan through Toth to Ortiz, was that the Court felt empowered to judge what Congress had wrought. To dismiss arguments for a jury in military tribunals is to defer to Congress in a way that would be thought inappropriate anywhere else. Indeed, it only takes the thought experiment of imagining Congress creating a new category of “militia” that encompassed the whole of the American population and then subjecting it to a specialized court system, to see the limits of the argument. As one scholar noted, the “operative question, however, remains whether Congress has the right to create special courts with materially reduced rights for some citizens.”

B. Another Possible Disadvantage: Courts-Martial Cannot Accommodate Juries

A more practical complaint would argue that the application of the jury right to courts-martial would be too difficult or disruptive. Usually, the claim is that the use of randomly selected juries would directly harm the military’s accomplishment of its missions. With a special emphasis on what is, after all, the critical world-wide war-fighting mission of the military, Professor Hansen, who was himself a longtime military officer, poses a frightening scenario:

Just imagine that on the eve of a major operation a subordinate commander responsible for leading the offensive is called to serve on a court-martial. Would the benefits of having a random selection process outweigh the costs to the mission’s success by pulling that subordinate commander off the line just before the initiation of an important military offensive? Many would say

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303 Some scholars, though, have embraced the argument that military justice is outside of constitutional limitations despite the fact that no other congressional power is. See, e.g., Corn & Jenks, supra note 95, at 33–34 (“[T]he ‘trial and punishment of military and naval offences’ is not, as Professor Vladeck would have it, an ‘exception’ to Article III’s guarantees of judicial tenure and trial by jury. Rather, the Court made clear that such power lacked ‘any connection’ to Article III and was instead derived from Congress’s enumerated authority to make rules for the land and naval force”). This argument, though, simply does not account for the fact that Congress may not ignore Article III and the Sixth Amendment for other powers deriving from Article I, Section 8. It creates an additional difficulty, at least for textualists, arising from the fact that the Fifth Amendment grand jury requirement includes an explicit exception for “cases arising in the land or naval forces.”

304 Turley, Tribunals & Tribulations, supra note 4, at 711 (concluding that “if Congress did intend to establish such broad jurisdiction in the military courts, they would be subject to the same federal standards and protections”).

305 See, e.g., Hansen, Avoiding the Extremes, supra note 4, at 926 (“If service members are selected at random to serve on court-martial duty, that means they can be removed from critical assignments and mission essential work without the commander’s permission or say in the decision.”).
this is too high of a price to pay for the perception of fairness that a random selection process might provide.\footnote{306}

Harm to a major military operation is a high price indeed. But it need never happen. Setting aside the relative rarity of courts-martial in deployed environments compared to the whole number of such cases, every court system includes ways of removing those from participation in a jury pool who are truly engaged in emergency or critical societal roles.\footnote{307} Just as a doctor need not be pulled away from life-saving surgery to decide a larceny case, so too a subordinate commander critical to the war effort could be easily excused from hearing a drug possession trial.\footnote{308}

What is more, there is evidence that the military justice system—in an era when the limits of automation made it more difficult—was able to execute jury selection in a way much closer to constitutional requirements. In the 1970s, Fort Riley, Kansas used a random process to assign soldiers to the court-martial of Private Michael E. Yager.\footnote{309} The Court of Military Appeals rejected an argument from Yager that this was improper because it excluded those below the rank of E-3 (Private First Class). The court noted that it was “not completely ‘random’ as the selection of court-martial members was subject to the approval of the convening authority.”\footnote{310} This was, of course, a fig leaf: the federal law, then as now, required the commander to detail to the court those who were in the commander’s opinion “best qualified.”\footnote{311} The commander merely adopted the result of the random selection process, a technique that the Court of Military Appeals would later find legitimate because “even this method of selection is permissible, if the convening authority decides to employ it in order to obtain representativeness in his court-martial panels and if he personally appoints the court members who have been randomly selected.”\footnote{312}

\footnote{306} Id. at 927. Professor Hansen recognizes the problems with the current panel selection process. Rejecting random selection, he proposes instead the increase in the number of peremptory challenges for the defense and elimination of government peremptory challenges. See id. at 931. Currently, each side has one peremptory challenge, see R.C.M. § 912(g).

\footnote{307} See, e.g., Excusing of Juror, Postponement or Reduction of Service, Ky. Rev. Stat. Ann. ADMIN. PROC. II, § 9 (West 2023) (“[T]he trial judge may excuse such juror upon a showing of undue hardship, extreme inconvenience, or public necessity.”).

\footnote{308} States routinely create exemptions from jury duty based on societal needs; see, e.g., Ohio Rev. Code Ann. § 2313.14(a)(1) (West 2023) (allowing excusal from jury service when public interest “will be materially injured by the juror’s attendance”).

\footnote{309} Yager was convicted of “disrespect to his superior commissioned officer, disrespect to his superior noncommissioned officer who was then in the execution of his office, extortion, and aggravated assault,” United States v. Yager, 2 M.J. 484, 485 (A.C.M.R. 1975), aff’d, 7 M.J. 171 (C.M.A. 1979).

\footnote{310} Id. at 171 n.1.

\footnote{311} 10 U.S.C.A. § 825(d)(2) (West 2023).

\footnote{312} United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988).
Such attempts to find a more random way to select panels despite the plain language of Article 25 have continued. More than 15 years ago, the Army’s V Corps, then operating in central Europe, created a random selection process because the commanding general “believed that the change would benefit Soldiers. At a minimum, by adapting a random seating system that more closely mirrored the popular American notion of how a fair trial should work, Soldiers’ impressions of the military justice system would improve.”313 Lieutenant Colonel Huestis, who was the Chief of Military Justice (the Army equivalent to the District Attorney for V Corps) at the time, wrote later that the adoption of random juries moved the “panel selection and seating systems closer to the American ideal of fairness and due process without adversely impacting the Corps’ good order and discipline or military mission.”314 Quite simply, the V Corps random selection process did not cause the unit to pay a high price, despite the fact that it did, in fact, deploy from Germany to Iraq to serve as part of the multi-national force conducting military operations there.315

C. The Genuine Advantages of Following the Constitution

Unlike the claims that complying with constitutional requirements would hamstring military justice—claims that the V Corps experiment showed were unfounded—there are demonstrable reasons that having a jury in courts-martial would improve them. Replacing panels with juries would make them more just. It would also, paradoxically, improve the disciplinary function that courts-martial are said to serve. Finally, and of critical importance, it would contribute to breaking down the conception that the military is a separate society removed from the Constitution, an idea that grows only more dangerous over time.

1. Justice and Fairness

Most obviously, juries are more fair than military panels. The point of cases like Milligan and Toth was that these tribunals could not be used on non-military personnel precisely because they were unfair. The Supreme Court’s insistence upon representative pools for jurors316 is founded on the idea that law

314 Id. at 32.
315 Id. at 30. The V Corps panels were representative because they included potential service by everyone subject to the jurisdiction: that is to say, military personnel but not civilian employees or family members. This is why a constitutionally representative court-martial need not include civilians. Because they are not subject to trial by court-martial, they need not be included in the pool from which jurors are drawn.
316 Smith v. Texas, 311 U.S. 128, 130 (1940) (“[P]art of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”).
decision-making from a variety of perspectives is engrained in our system because it is better. The Court’s more recent insistence on unanimity is similarly based on a confidence that this is the more just path.\textsuperscript{317} Yet the court-martial continues to stagger through the air, requiring only a two-thirds majority of panels as small as six as long as death is not an option.\textsuperscript{318} And while the dicta from \textit{Milligan} is still frequently quoted, the differences between that military and today’s armed forces could not be starker.\textsuperscript{319} The \textit{Solorio} holding, re-opening military courts to consideration of tax evasion and the like, makes this reality more jarring.\textsuperscript{320} As military justice moves ever deeper into areas “far removed from any conventional military function,”\textsuperscript{321} and as other nations use this time to reevaluate their own systems for trying soldiers and sailors,\textsuperscript{322} it becomes ever more difficult to justify a patent decrease in justice for those who serve.

This would all be true even if the “unique beast”\textsuperscript{323} of unlawful command influence\textsuperscript{324} were not present. The fact that it is, and the fact that military courts

\begin{footnotes}
\footnotetext[317]{Ramos v. Louisiana, 140 S. Ct. 1390 (2020).}
\footnotetext[318]{See 10 U.S.C.A. \S\ 829(b) (West 2023), which requires the impaneling of eight members for a general court-martial convened without the authority to sentence the accused to death, twelve for a general court-martial with the power of capital punishment, and four for a special court-martial whose power to punish is limited to one year of confinement. The statute allows the first of these to go as low as six members before there is any need to impanel replacements. See also Turley, \textit{Tribunals \& Tribulations}, supra note 4, at 675 (“Studies have shown striking differences in the rate of conviction, consistency of verdicts, and percentage of hung juries in panels of twelve versus six members.”).}
\footnotetext[319]{Kathryn Sobotta, \textit{Command Authority, Undue Command Influence and the Role of the Staff Judge Advocate}, 31 GEO. J. LEGAL ETHICS 847, 848 (2018).}
\footnotetext[320]{Turley, \textit{Tribunals \& Tribulations}, supra note 4, at 696 (“Rather than the small, heavily combat-related force of early years, the military is now a broad system of governance with a comprehensive legal system. In this modern context, the conclusory portrayal of basic rights as diversions from combat readiness seems more pretense than reality.”).}
\footnotetext[321]{Id. at 699.}
\footnotetext[322]{Hansen, \textit{Changes}, supra note 34, at 421 (citing recent changes in Canada and the United Kingdom).}
\footnotetext[324]{Military law has long recognized that officers, particularly commanding officers, were in position to improperly affect the outcome of tribunals that operated within their command. Thus, there has long been a prohibition of this influence on a tribunal, which is currently codified at 10 U.S.C.A. \S\ 837 (West 2023) (prohibiting, inter alia, the rule that “no person subject to this chapter may attempt to coerce or, by any unauthorized means, 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”). Commentators closer to the adoption of the UCMJ recognized that “one of the problems in which the Congress exhibited a sincere concern was the exercise of improper command.” Lieutenant Commander A. E. Camarinos, \textit{Command Influence}, 1955 JAG J. 3, 3 (1955). The military courts have followed suit, famously announcing that “[c]ommand influence is the mortal enemy of military justice.” United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). Although the Court of Appeals for the Armed Forces later amended this to “[u]nlawful \textit{c}ommand

for decades have referred to it as “the mortal enemy of military justice,” makes the lack of the right to a jury far more harmful to the interests of fairness. Avoiding improper influence on a court-martial’s decision-making while simultaneously handpicking the members of the court-martial panel “naturally breeds unlawful command influence and its mien.”

Military courts have occasionally struck down convictions based upon more egregious cases of unlawful command influence when those in the panel selection process were unusually forthright in their desire to find court members who would be harsh. It is incredibly difficult to show that there has been unlawful command influence in most cases, however, and even a panel chosen without an attempt to find personnel who are inclined toward guilty verdicts will still be likely to align their interests with those of the commander who personally chose them and is also responsible for the prosecution. And while the military courts repeatedly announce that unlawful command influence is bad and panel members should not be chosen because they are pro-prosecution, they have simultaneously lauded choices by convening authorities to fill panels with subordinate commanders and senior noncommissioned officers as the creation of “blue ribbon” panels. Of course, as one participant in the system noted, “[n]either an accused, nor the public, can distinguish or appreciate the difference between being hammered—that is, receiving a stiff sentence—by a blue ribbon panel and being hammered by a stacked panel.”

The solution is a jarringly simple one. The conclusion that the military is not exempt from the Sixth Amendment’s jury trial right would import the requirement that unanimous, randomly selected juries would replace non-unanimous hand-picked bodies. Almost fifty years ago, a retired military officer...

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influence is the mortal enemy of military justice.” United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998). The scope and issues relating to the problem of command influence are well beyond the scope of this article. For further enlightenment, readers can consider Monu Bedi, Unraveling Unlawful Command Influence, 93 WASH. UNIV. L. REV. 1401 (2016) (comparing command influence to prosecutorial misconduct by civilian prosecutors), Rachel E. VanLandingham, Military Due Process: Less Military & More Process, 94 TUL. L. REV. 1 (2019) (grounding the doctrine on constitutional due process requirements), and VanLandingham, supra note 323 (Professor VanLandingham’s 2020 work arguing that recent changes to 10 U.S.C. § 837 threaten the legitimacy of the military justice system).

325 Thomas, 22 M.J. at 393.
326 Glazier, supra note 4, at 4 (noting that there is not only actual misconduct in the selection process but that, even when there is not, the process “incorporates the varied individual biases of numerous convening authorities and their subordinates”).
328 Id. at 521 (noting the difficulty of distinguishing between an improperly “stacked” panel and one that is “best qualified” under the selection criteria of 10 U.S.C. § 825).
329 Turley, Tribunals & Tribulations, supra note 4, at 674.
330 Lamb, supra note 55, at 150.
331 Id.
who had served as the Judge Advocate General, Army, argued for a set of protections for service members that included this easy change.\textsuperscript{332} As one commentator noted, “the panel’s verdicts would be entitled to the same respect as that of a jury.”\textsuperscript{333}

2. Discipline and Efficiency

Perhaps counterintuitively, application of the Constitution to trials by court-martial should actually improve their function as components of a system of military discipline because randomly selected juries would reduce any concerns about unlawful command influence in the selection process.\textsuperscript{334} More importantly, the function of discipline is enhanced by a more professional and fairer justice system, not the reverse. As other observers have noted, the Supreme Court’s characterization of the court-martial as “in a word, judicial,” was based in part on the idea that “providing military members basic constitutional rights enhances discipline.”\textsuperscript{335}

There is no mystery about why this is so. As Major Glazier long ago noted, the court martial system “like running a motor pool, conducting close order drill, or training an infantry battalion, has a mission. If done properly, it enhances discipline. If done poorly, it detracts from discipline.”\textsuperscript{336} Requiring the military justice system, which looks so much like the criminal justice system to most observers, to comply with the rules imposed on every other criminal trial in America would make the system both be more just and appear to be more just. That change can only enhance discipline.

Further, there would be no meaningful decrease in military efficiency as a cost of such a system.\textsuperscript{337} Other criminal justice systems can find and assign random persons to jury pools despite having at best an imperfect knowledge of the people in their jurisdiction; “[the] military knows, on a daily basis, exactly who is within the geographical boundaries of its jurisdictions and their physical

\textsuperscript{332} Kenneth J. Hodson, \textit{Military Justice: Abolish or Change}, 1975 MIL. L. REV. 579, 596 (1975) (recommending a set of changes to protect the rights of the accused that included “trial by a randomly selected jury presided over by an independent judge”).

\textsuperscript{333} Williams, \textit{supra} note 35, at 510 (Williams advocates that Congress do this with its rule-making power, but a constitutional decision would reach the same result.).

\textsuperscript{334} Glazier, \textit{supra} note 4, at 110. \textit{See generally supra} note 324.

\textsuperscript{335} Shure & Weber, \textit{supra} note 117, at 232.

\textsuperscript{336} Glazier, \textit{supra} note 4, at 94.

\textsuperscript{337} It is of course true that a system that demands unanimity runs a risk of mistrials that a single super-majority voting procedure does not. \textit{See} Holland, \textit{supra} note 57, at 125. But whatever the rate of mistrials is, focusing on them detracts from the larger question: if the Constitution calls for unanimous, randomly selected juries for all, why should military personnel be subject to the risk of wrongful conviction, or society be subject to the risk of wrongful acquittal, for a small decrease in time?
Whether the military should use its control over data merely to prescreen available personnel to allow better selections or should appoint an officer to randomly select panels from lists of nominees, observers have suggested a number of simple and efficient options to replace the individual selection process that currently dominates the military justice system. As noted earlier, an Army Corps decided to adopt just such a randomized approach. The unit’s participation in combat missions was not impaired.

3. Reducing Separation from Society

A final improvement from complying with the Constitution arises from the language that the Supreme Court has sometimes used in identifying the reason that the Constitution does not apply to military matters. While the Court occasionally justifies treating the military differently because it is a “separate society,” there is no such thing in the Constitution.

After Solorio, this notion of a separate society is suspect: a parade of horribles that includes people without expertise judging uniquely military offenses simply mischaracterizes the reality that most trials are of offenses that would be recognized in any state or federal criminal proceeding. A review of the Punitive Articles, the section of the UCMJ that defines specific criminal offenses, will demonstrate to an observer without a military background just how true this is.

But the idea of a separate society, a class set apart not by dedication to duty but by application of the Constitution, creates a dangerous precedent in a

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338 Glazier, supra note 4, at 72–73.
340 Lamb, supra note 55, at 161.
341 Huestis, supra note 313, at 22.
342 Id.
343 The Fifth Amendment’s exclusion of military cases from the grand jury requirement, far from creating a wholly separate society for constitutional purposes, can easily be read as an exception from the one constitutional right that does not fit well with a military that has combat responsibilities. Indeed, as the military courts have routinely applied other constitutional amendments as limits on the system, it seems the most consistent way to read the Fifth Amendment. See, e.g., United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).
344 Turley, Tribunals & Tribulations, supra note 4, at 700 (blaming the “mystique of a warrior class” for obscuring “the fact that the legal issues dealt with in military courts are largely conventional criminal matters”).
345 10 U.S.C.A. §§ 877–934 (West 2023). The first six of these, Articles 77–82, outline forms of liability generally. Articles 83–87 generally define absence from military duties and Articles 88–93 govern improper performance of those duties. All of the rest, until Articles 133 and 134, respectively prohibit conduct unbecoming an officer and other actions that prejudice good order and discipline, concern themselves with the larcenies, assaults, and drug offenses that would be familiar to any prosecutor in the United States.
republic. It is this idea, the fear of a “pocket republic,” that caused Professor Turley to recommend actual civilian juries in courts-martial.\textsuperscript{346} Another option is the removal of the non-military specific offenses altogether from the military, creating a sort of enhanced \textit{O’Callahan} rule.\textsuperscript{347} But the simplest and least radical answer is simply to hold the military justice system to the existing constitutional standards, joining much of the rest of the world that no longer allows its separate military to pretend to a separate judicial existence.\textsuperscript{348}

VII. CONCLUSION

The military would be better off if it, the courts, and Congress recognized that the limits set by the Constitution are not mere obstacles to be avoided. A randomly selected jury, chosen from a representative venire and subject to the requirement of unanimity, would promote both justice and discipline. Nonetheless, it is clear that the military will not make this decision on its own. Recent cases from military courts have utterly rejected the application of \textit{Ramos} to courts-martial, with logic and citation that are wearily predictable to the reader.\textsuperscript{349}

The conduct of the military appellate courts concisely exposes the cartoon physics of the modern court-martial. All citizens have trial by jury as birthright;\textsuperscript{350} juries must be randomly selected\textsuperscript{351} and must decide questions of guilt unanimously;\textsuperscript{352} there is “doubtless” an exception to these constitutional

\textsuperscript{347} Williams, supra note 35, at 509–10.
\textsuperscript{348} Glazier, supra note 4, at 88 (noting that by 1997 the E.U., the U.K., and Canada “all agree[d] that member selection by the convening authority fail[ed] to meet minimum standards of independence and impartiality in practice and appearance”).
\textsuperscript{349} See, e.g., United States v. Westcott, No. ACM 39936, 2022 WL 807944, at *2 (A.F. Ct. Crim. App. Mar. 17, 2022) (wherein the Air Force Court rejected the application of \textit{Ramos} to the military because “The United States Supreme Court similarly concluded neither the Fifth Amendment nor the Sixth Amendment creates a right to a jury in a military trial in \textit{Ex parte Quirin}.”) (citation omitted). An even more extraordinary scenario played out in the Army Courts, as recounted in United States v. Pritchard, 82 M.J. 686 (A. Ct. Crim. App. 2022). There, the appellate court considered a writ of prohibition to a military judge (Col. Pritchard) to prevent him from instructing the panel that unanimity was required to convict the accused (the real party in interest, a Lt. Col. Dial). Id. It is noteworthy that Col. Pritchard did not seek to look down; indeed he “determined that \textit{Ramos v. Louisiana} did not alter the longstanding holdings of both the Supreme Court and our superior court that the Sixth Amendment right to a jury trial does not apply to service members facing court-martial,” but concluded rather that unanimity was required by equal protection as a component of the Due Process Clause of the Fifth Amendment. Id. at 691. The Army Court of Criminal Appeals rejected that argument as well and granted the writ. Id. at 694.
\textsuperscript{350} \textit{Ex parte} Milligan, 71 U.S. 2, 119 (1866).
\textsuperscript{351} Taylor v. Louisiana, 419 U.S. 522, 529 (1975).
\textsuperscript{352} Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).
requirements, based on the need for discipline, among the military;\textsuperscript{353} but the court-martial system itself is not primarily disciplinary but “in a word, judicial”;\textsuperscript{354} but there is also nothing wrong with subjecting those who defend the nation to a non-unanimous,\textsuperscript{355} hand-selected panel.\textsuperscript{356} Our military justice system is walking boldly but irrationally through the air over a chasm of unconstitutional behavior. It is time for it to look down.

\textsuperscript{353} Milligan, 71 U.S. at 123.
\textsuperscript{355} 10 U.S.C.A. § 852 (West 2023).
\textsuperscript{356} \textit{Id.} § 825.