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THE VEIL (OR HELMET) OF IGNORANCE: A RAWLSIAN THOUGHT EXPERIMENT ABOUT A MILITARY'S CRIMINAL LAW

Dan Maurer *

This Article loosely adapts political philosopher John Rawls's famous social contract thought experiment to interrogate a corner of law that receives too little theoretical attention: the separate federal code at the intersection of criminal law and national security that regulates both martial and non-martial conduct of millions of citizens, invests judicial responsibility and prosecutorial authority in nonlawyer commanding officers, operates with no territorial limitations, and pulls even certain retirees within its jurisdiction: the Uniform Code of Military Justice. Employing the perspectives of four "idealized" actors—Congress, a president, a Chairman of the Joint Chiefs of Staff, and a potential recruit—this "experiment" reconsiders the fundamental and necessary qualities of a specialized system of criminal law. Such qualities must render the system acceptable to civilian political leadership in a representative democracy exercising ultimate command and control over a professional military, but also accepted by those over whom its penal jurisdiction will rest. When considering the reasonable inferences and deductions each of these four actors will likely make from a hypothetical "original position," four common principles emerge. Principles of nonrepulsion, retention, mission risk reduction, and compliance operate as four prescriptive corners bounding and framing a sensible set of answers to the following questions: (1) what conduct is to be

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proscribed and subjected to punishment? (2) what punishments, forms of discipline, or administrative censure are available for violations? (3) what processes shall organize the steps from investigating to punishing violations? (4) who shall have discretionary agency within the ranks to administer these processes with investigative, prosecutorial, and judicial authority? and (5) what constraints, limits, or individual rights and liberties shall operate to ensure due process, justice, and protection from that authority's abuses? Answering these questions in light of the four principles goes some way toward articulating a "normative theory of criminal law"¹—a prospect that military justice currently lacks.

INTRODUCTION

In every generation, it seems the United States military's means and methods for ensuring good order and discipline, its own federal criminal law called the Uniform Code of Military Justice ("UCMJ"),² come under an unusually direct reform-minded offensive from at least one branch of the civil government. The offensives are like surgical strikes: quick, forceful, but localized. They usually follow documented "travesties of justice" in which a high-profile court-martial prosecution, or lack of one, raises public awareness of just how different military justice is, both substantively and procedurally.³ Or it follows in the wake of long hardships of warfare, during which the use of military justice—either in particularly egregious cases or systemically—affects large numbers of

1. R.A. Duff, *Towards a Theory of Criminal Law?*, 84 PROC. ARISTOTELIAN SOC'Y 1, 17 (Supp. 2010) ("[A] normative theory of criminal law must say something about its proper scope—if not directly about what kinds of conduct should or should not be criminalized, at least about the considerations that should bear on questions of criminalization, and about the procedures through which such questions should be settled.").

2. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946).

3. See, e.g., Fred L. Borch, "The Largest Murder Trial in the History of the United States": *The Houston Riots Courts-Martial of 1917*, 2011 ARMY LAW. 1 (summarizing the infamous prosecution, subsequent executions, and due process violations of Black soldiers following their alleged "mutiny" while stationed near Houston, Texas, after the United States' entry into the First World War); Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 15–27 (1970) (describing reforms made during and after the First World War); see also *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the H. Comm. on Armed Servs.*, 81st Cong. 599 (1949) (statement of Professor Edmund F. Morgan, Jr.) (describing the intent of the Uniform Code of Military Justice drafting committee he led); Christopher Brito, *House Will Vote on Bill Named After Slain Fort Hood Soldier Vanessa Guillén*, CBS NEWS (Sept. 17, 2020), <https://www.cbsnews.com/news/vanessa-guill-en-bill-military-sexual-assault-harrasment-house-vote/?intcid=CNM-00-10abd1h> [https://perma.cc/5WYN-G6NQ].

citizens whose veteran status has become stigmatized by a federal conviction. Such was the case after each of the World Wars,⁴ again in the late 1960s and 1970s,⁵ and then beginning a decade or so into the United States “War on Terror.”⁶

It is usually Congress, reacting to public pressure and interest from constituents, that launches these surgical strikes; but its interest in such matters tends to ebb and flow over time, especially if the Armed Forces reject the complaints or—if acknowledging their validity—quarrel with Congress strongly over proposed remedies. The usual argument is that the cure would be worse than the disease, that it fails to consider the value of natural antibodies in the military justice system—the commanders along with their judge advocate legal advisors, uniformed defense counsel, and codified rights—that check abuses and secure the vital interests of

4. See generally CHRIS BRAY, *COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND* 292–93 (2016); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 157–58 (1980); Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 11–12 (1987).

5. See, e.g., Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971); ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 2–3 (1970); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 23 (1974).

6. Geoffrey S. Corn & Victor M. Hansen, *Even if It Ain't Broke, Why Not Fix It? Three Proposed Improvements to the Uniform Code of Military Justice*, 6 J. NAT'L SEC. L. & POL'Y 447, 448 (2013); Charles J. Dunlap, Jr., *Top Ten Reasons Sen. Gillibrand's Bill is the Wrong Solution to Military Sexual Assault*, JUST SECURITY (Dec. 9, 2013), <https://www.justsecurity.org/4403/guest-post-reasons-gillibrand-bill-is-wrong/> [<https://perma.cc/84MY-A4X5>] (“[I]t is mindboggling to me as to why anyone would think that the way to fix anything in the military would be to take the commander out of the process.”). For Dunlap's original essay fleshing out this argument, see Charles J. Dunlap, Jr., *Top Ten Reasons Sen. Gillibrand's Bill is the Wrong Solution to Military Sexual Assault* (2013), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5891&context=faculty_scholarship [<https://perma.cc/26EL-6XJK>] (“It is axiomatic in the military that everything important is commanded.”); see also Charles Dunlap, *Civilianizing Military Justice? Sorry, It Can't—and Shouldn't—Work*, WAR ON THE ROCKS (Oct. 8, 2015), <https://warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/> [<https://perma.cc/4TDM-RZRF>]; Charles Dunlap, *Outsourcing Military Discipline: Bad for Everyone*, WAR ON THE ROCKS (Oct. 27, 2015), <https://warontherocks.com/2015/10/outsourcing-military-discipline-bad-for-everyone/> [<https://perma.cc/RLM4-BWGG>]; Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 2010 ARMY LAW. 12; Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 129, 132 (2014); Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485 (2014).

both crime victims and accused service members. The other argument is that the diagnosis is in fact wrong, and no pathology exists—or the symptoms are simply taken out of context.⁷

As a result, those strikes that do launch are limited: they carefully aim for few targets and rarely reconsider the fundamental questions that have long animated the design and execution of the military's criminal law. It is as if Congress—despite its constitutional responsibility for making rules and regulations that govern the Armed Forces⁸—frets over the potential for collateral damage that a wider impact area and lengthier target list might engender. That is certainly the risk articulated by the four-star generals and admirals serving as Chiefs-of-Staff of the individual Armed Services (roughly equivalent to a CEO, but subordinate by law to the politically appointed civilian Secretary of each Service and the Secretary of Defense) and their Judge Advocate Generals.⁹ It is not always the case that “different is better” and, as one long-time reform campaigner, Professor Eugene Fidell of Yale, cautioned, “[T]hose who seek to preserve older approaches [should not] be derided as fuddy-duddies or worse for counseling caution or being

7. In response to congressional directive in section 540F of the National Defense Authorization Act for FY2020, the Department of Defense Office of General Counsel tasked the Joint Service Committee on Military Justice to study the “feasibility and advisability” of an alternative military justice system, somewhat parallel to other modern military systems, in which Congress would transfer commanders’ prosecutorial authority for all felony offenses to career judge advocate prosecutors. See U.S. DEPT OF DEF., REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY 1 (Sept. 2, 2020). The Committee chartered a subcommittee, called the “Prosecutorial Authority Study.” See *id.* The subcommittee’s report was publicly released. See *generally id.* The subcommittee, consisting of fifteen former commanders and judge advocates from all uniformed services (who took some time to describe their operational and educational credentials), concluded that no such dramatic change was needed or desirable for the UCMJ, making all of these arguments. See *generally id.* at 1–2.

8. U.S. CONST. art. I, § 8, cl. 12.

9. See, e.g., Jim Garamone, *Top Service Lawyers: Commanders Crucial to Attacking Sexual Assault, Harassment*, U.S. DEPT DEF. (Apr. 4, 2019), <https://www.defense.gov/Explore/News/Article/Article/1806147/top-service-lawyers-commanders-crucial-to-attacking-sexual-assault-harassment/> [<https://perma.cc/YCW2-XTN3>] (quoting the Judge Advocate General of the Army, Lieutenant General Charles Pede: “In the multitude of congressionally mandated studies, where diverse panels of experts have exhaustively examined the military justice system, hearing from hundreds of witnesses who gave thousands of hours of testimony, they reported back to you one critical consistent conclusion: that commanders should not be removed from the justice system”); *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Armed Servs. Comm.*, 113th Cong. 320 (2013) (statement of General Raymond Odierno, Chief of Staff, U.S. Army). Congress has defined the roles and functions of each Service’s Chief of Staff. For the Army, see 10 U.S.C. § 7033. For the Chief of Naval Operations, see *id.* § 8033. Congress has also defined the role, qualifications, and duties of each Service’s senior uniformed lawyer, The Judge Advocate General (“TJAG”). For the Army’s TJAG, see *id.* § 7037.

loath to jettison institutions, modes of thought, and legal practices that they believe to be useful and legitimate and for which they view themselves as legatees and trustees.”¹⁰

After the dust settles from these reform-oriented strikes, the military’s justice system recovers well; it fills in the craters left by those strikes, adapting its processes and rules, but very little looks fundamentally altered after Congress’s operation. It remains intact as a system that subjects a sliver of the population, solely because of their employment in a certain profession, to potential criminal punishment for conduct that could not be criminalized in a civilian jurisdiction, and affords lay officers in command significant authority to investigate misconduct, prevent misconduct, prosecute misconduct, and (within certain bounds on their discretion) punish that misconduct, all under the umbrella of enforcing obedience to lawful commands through “good order and discipline.”¹¹

Congress remains engaged, planning such operations now following growing evidence of systemic racism and bias in many organs of government from which military criminal justice is not excluded.¹² And Congress—at least a vocal, but resolute, portion of it—continues to interrogate the efficacy of a system that seems frustratingly incapable of eradicating sexual assault by service members against service members;¹³ the primary target remains

10. Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125, 132 (1989). Professor Fidell also created and hosts the Global Military Justice Reform blog. Eugene R. Fidell, GLOBAL MIL. JUST. REFORM, <https://globalmjreform.blogspot.com/> [<https://perma.cc/A3MH-BVU4>].

11. 10 U.S.C. § 934; Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 423 (2008) (“Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands. Even in peacetime, commanders must establish and maintain a high level of respect for authority. . . . The provision granting the commander the means to impose swift and summary punishment to maintain discipline and obedience is thus a critical aspect of any military justice organization.”).

12. Elizabeth McLaughlin, *Lawmakers Call for Addressing Racial Disparities Found in Military Justice System*, ABC NEWS (June 16, 2020), <https://abcnews.go.com/Politics/lawmakers-call-addressing-racial-disparities-found-military-justice/story?id=71275267> [<https://perma.cc/SD28-WEYE>].

13. In June 2019, Senator Kristin Gillibrand (D-NY) introduced a bill to amend the UCMJ. See Military Justice Improvement Act of 2019, S. 1789, 116th Cong.; Rebecca Kheel, *Gillibrand Reintroduces Proposal to Confront Military Sexual Assault*, HILL (June 13, 2019, 1:19 PM), <https://thehill.com/policy/defense/448402-gillibrand-reintroduces-proposal-to-confront-military-sexual-assault> [<https://perma.cc/ST95-L5YP>]; Michel Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020, 11:30 AM), <https://www.lawfareblog.com/major-change-military-justice-works> [<https://perma.cc/GD4U-UWJW>].

the capacious role of the commanding officer, in many ways the central hub around which the mechanisms of military justice orbit. Members of Congress remain intent on questioning why it should be the case that a commanding officer, wielding “judicial authority” but no legal credentials, can decide whether an alleged sex offender should be prosecuted under the UCMJ (if the crime allegedly occurred on base, the local civilian authorities either have no jurisdiction or will defer to the military’s decision). Indeed, one proposal envisions a military justice system in which high-ranking commanders with court-martial “convening authority” lose that authority for any misconduct considered a felony, sex offense or not, to professional uniformed prosecutors.¹⁴

But it is not always Congress probing the defenses of military justice, and probing is not always deliberate. In recent years, the other two branches of the federal government have unwittingly demonstrated the reach that a president and the Supreme Court of the United States each have over a system conventionally and popularly thought to be the sole province of the professional military caste as a means of self-policing the profession for the good of mission-accomplishment.¹⁵ President Trump’s interventions into the prosecutions of former Army Special Forces Major Matthew Golsteyn and Navy SEAL Eddie Gallagher, and pardoning of convicted murderers Army Lieutenants Clint Lorance and Michael Behenna,¹⁶ serve as a proof of concept. They demonstrate that a

14. Unsurprisingly, military justice experts—a distinguished panel of commanders with “convening authority” experience and judge advocates from all the Armed Services—contend such a proposal (even as a limited pilot program as a proof of concept) is “neither feasible nor advisable.” U.S. DEP’T OF DEF., *supra* note 7, at 1–4.

15. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments. . . .”); GENERAL WILLIAM T. SHERMAN, *MILITARY LAW* 132 (1880) (“Every general, and every commanding officer knows, that to obtain from his command the largest measure of force, and the best results, he must possess the absolute confidence of his command by his fairness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all in his command. Without this quality no army can fulfil its office. . . .”). *But cf.* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187–88 (1962) (“When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.”).

16. Bryan Bender & Wesley Morgan, *Trump Pardons Soldiers Implicated in War Crimes*, POLITICO (Nov. 15, 2019, 8:32 PM), <https://www.politico.com/news/2019/11/15/trump-pardon-war-crimes-071244> [<https://perma.cc/2M2M-K6ZZ>]; Dan Maurer, *Should There Be a War Crime Pardon Exception?*, LAWFARE (Dec. 3, 2019, 9:31 AM), <https://www.politico.com/news/2019/12/03/war-crime-pardon-exception>.

president, as commander-in-chief, can and will take interest in individual cases and make decisions heavily criticized by members of the retired military community and which reflect a lack of confidence in the military's criminal justice system.¹⁷ This is ironic, but inevitable, because that system necessarily includes the investigative, prosecutorial, and judicial-like functions of professional officers in the chain-of-command who ultimately report to the president. It is doubly ironic when those very commanders exercise the independent command discretion over criminal matters that the president both authorizes and for which he provides systemic guidance.¹⁸ Though historically unusual, President Trump's adventures in military justice signal a reason why it is prudent for the profession to articulate *reasons* justifying the means and methods of the modern military justice system.

For its part, the U.S. Supreme Court rarely wades deep into military justice waters, but when it does so, it may disturb the current more than the current influences it. In 2018, the Court issued a largely unnoticed opinion that reflected on the nature of military criminal law under the Uniform Code of Military Justice.¹⁹ This

com/news/2019/11/15/trump-pardon-war-crimes-071244 [https://perma.cc/68JJ-528W]; Statement from the Press Secretary, The White House (Nov. 15, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97> [https://perma.cc/US66-WVLT]; Bill Chappell, *Trump Pardons Michael Behenna, Former Soldier Convicted of Killing Iraqi Prisoner*, NPR (May 7, 2019, 10:17 AM), <https://www.npr.org/2019/05/07/720967513/trump-pardons-former-soldier-convicted-of-killing-iraqi-prisoner> [https://perma.cc/33S4-QSKQ] (noting Behenna had been sentenced to twenty-five years, but was released on parole in 2014).

17. Quil Lawrence, *Veterans React to 3 Controversial Pardons Issued by President Trump*, NPR (Nov. 18, 2019), <https://www.npr.org/2019/11/18/780563061/veterans-react-to-3-controversial-pardons-issued-by-president-trump> [https://perma.cc/2HDZ-VAVZ]; Pauline M. Shanks Kaurin & Bradley J. Strawser, *Disgraceful Pardons: Dishonoring Our Honorable*, WAR ON THE ROCKS (Nov. 25, 2019), <https://warontherocks.com/2019/11/disgraceful-pardons-dishonoring-our-honorable/> [https://perma.cc/NF39-8FPF]; Anna Mulrine Grobe, *Does Trump's Navy SEAL Pardon Undermine Military Justice?*, CHRISTIAN SCI. MONITOR (Nov. 27, 2019), <https://www.csmonitor.com/USA/Politics/2019/1127/Does-Trump-s-Navy-SEAL-pardon-undermine-military-justice> [https://perma.cc/8QS9-4S8R].

18. MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2.1, at A2.1-1 (2019) ("Non-binding Disposition Guidance"). While judge advocate officers draft charges against service members and validate that they accurately state an offense, and that the facts support the charge (at least by a probable cause standard), ultimately it is the commander who signs and is responsible for the prosecutorial action (both the "preferral" of charges and the "referral" of those charges to a court-martial). This is what Stuntz would call "informal adjudication," drawing power and influence over criminal law away from the courts and in favor of law enforcement. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001).

19. *Ortiz v. United States*, 138 S. Ct. 2165 (2018). To date, legal scholarship has paid little attention to *Ortiz*; that which has paid attention has nevertheless not focused on the

was not the point or issue of the case under review, of course, but it was thought a necessary digression to answer a subject-matter jurisdictional problem posed by an enterprising amicus brief, filed by Professor Bamzai of the University of Virginia.²⁰ In *Ortiz v. United States*, without much explanation or cause, the Court seemingly ignored precedent which had long described military justice as a system for a “specialized community,”²¹ a system that is different from civilian criminal law in three respects. With the Court’s stamp of approval (at least before *Ortiz*), the military’s system has been considered purposefully distinctive for the types of acts and omissions it criminalizes and punishes, its employment-based but worldwide personal jurisdiction, and the role of nonlegal commanders in the investigating, prosecuting, and—in some ways—judging suspected criminal activity by service members. The underlying rationale (and saving grace) for such a system—what kept it from violating fundamental constitutional requirements and due process protections—was its utility: protecting the chain-of-command’s pragmatically required and historically validated need to sustain disciplined obedience in the ranks. This disciplined obedience was itself just a means toward another larger end: that of assuring reliable and successful national security.²²

role of the commander as a central tenant of military justice, but rather criticizes the majority for ignoring two characteristics of the United States Court of Appeals for the Armed Forces (“CAAF”) that seem to cut against its judicial nature: that the president, as commander-in-chief, plays a necessary role in approving certain results after the CAAF has reviewed and opined (approving death sentences and dismissals of officers) and the president’s ability to summarily remove judges from the CAAF bench. *The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 317, 325–26 (2018). One other recent article does take a more holistic review, assumes that the *Ortiz* Court is correct about the court-martial’s judicial nature, and ponders whether current constitutional protections for due process—applicable to judicial bodies—are available or impeded by the UCMJ. See Jacob E. Meusch, *A “Judicial” System in the Executive Branch: Ortiz v. United States and the Due Process Implications for Congress and Convening Authorities*, 35 J.L. & POL. 19 (2019). Nevertheless, some commentators have pointed toward the implications of *Ortiz*’s rationale. See, e.g., Dan Maurer, *Are Military Courts Really Just Like Civilian Criminal Courts?*, LAWFARE (July 13, 2018, 10:00 AM), <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts> [<https://perma.cc/T43C-6M9Q>]; Col. Linda Strite Murnane, *Did Military Courts Just Lose Their Right to be Different? Five Takeaways from Ortiz v. United States*, NAT’L JUD. COLL. (July 25, 2018), <https://www.judges.org/news-and-info/did-military-courts-just-lose-their-right-to-be-different-five-takeaways-from-ortiz-v-united-states/> [<https://perma.cc/VKS9-U989>].

20. Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, *Dalmazzi v. United States*, 138 S. Ct. 53 (2018) (No. 16-961), *Cox v. United States*, 138 S. Ct. 53 (2018) (No.16-1017), *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (No. 16-1423).

21. *Parker v. Levy*, 417 U.S. 733, 744 (1974).

22. *Id.* at 759.

In *Ortiz*, the Court did not outright reject this deference and justification. In analogizing the modern military justice system to state criminal law and practice, the Court focused on their similarities: due process protections, appellate jurisdiction, rules of evidence, and the kinds of conduct that they prohibit and punish.²³ But the Court also ignored three things of paramount relevance: first, its own precedent that emphasized, stressed, and did everything but underline the separateness of these two communities and their penal laws; second, it emphasized that “justice” is the purpose of a military justice system, with “discipline” being a useful but incidental byproduct of that system;²⁴ and third, the role of the commanding officer in the military “community” over which he or she exercises personal judgment and discretion.

Whether the Court’s change of direction is a paradigm shift of some precedential value or mere dicta, or whether its conception of military justice is simply the latest in the “civilianization” of military law, is beside the point of this Article. What *is* relevant about the Court’s decision, as is relevant about Congress’s interest and presidential interventions, is that it opens the door to reasonable skepticism for the assertion that military law is, has been, and always will be paradigmatically different than “normal” state and federal criminal law. The actions of all three branches, when viewed together, suggest that remaining tied to convention, tradition, and refusing to question core assumptions is not only to ignore the winds, but may be counterproductive. This Article is one way in which those core assumptions might be reconsidered.

Recognizing that employing thought experiments of any kind is highly unusual for a scholarly interrogation of military justice, section I.A. explains their general utility. Section I.B. explains the virtues, and limits, of turning to Rawls for a model that might be useful in the military justice context. Part II, given certain starting assumptions, presents the “original position” of our four actors: Congress, the president, the senior ranking uniformed military officer, and a potential recruit. All four positions are idealized—that is to say, simplified and unrealistic—but the point is to clarify fundamental considerations and what a reasonable actor, from each of

23. 138 S. Ct. at 2174–75.

24. *Id.* at 2176 n.5; accord David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 74 (2013); see Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 515–19 (2017).

those vantage points, would think about and demand of a military criminal law system if starting from scratch. From those four very different starting positions, the same four principles will emerge—at least it would not be unreasonable for them to emerge.

When we reorient ourselves back to the real world of circumstantial context, personalities, ambitions, ideologies, stresses of time and expectations, armed conflict and preparing for it, politics, and bureaucracies, we must account for the reality of individual egoistic self-interest. Part III describes how this feature of the real world suggests strongly that a system of criminal law constructed like military justice, with its strategic purpose ultimately animating its tactical means and methods, creates a paradox. This paradox is simply this: a duty of individual self-negation for the benefit of the unit or military community coexists, uncomfortably and awkwardly, with the system's reasonable self-interest in protecting fundamental, widely desirable rights of the individual in that unit or community. In other words, it tries to nest liberal individualism (legal constraints on what the government can do to the individual) within a larger illiberal communitarianism (legal duties owed by that individual to the government as part of a larger group).²⁵

The Article concludes with a suggestion and a speculation. It suggests that it would behoove both the critics and defenders of military justice—as a separate criminal law for a separate community and for its particular means and methods—to find an underlying super-rationale that reconciles these principles with this paradox. It speculates that such a super-rationale would go beyond the basic, somewhat superficial, and undefined “purposes” of military justice (Is it justice? Is it discipline? Is it both? Is there something else?). It speculates that given the nature and purpose of a military, given the subservient role it plays to civilian principals to achieve those purposes, given the professional character and responsibilities of its members, and given values of the military community at large, such a super-rationale does exist, can be articulated, and can be consistent with historical practice (of law and combat) and with legal precedent.

25. Special thanks to Professor Brenner Fissell for discussing this particular point with me.

I. WHY A THOUGHT EXPERIMENT?

A. *Some Thoughts About Thinking*

Fictions, metaphors, hypothetical narratives and multiple perspectives are hugely helpful because they each generate a different set of possibilities. These devices are what make legal reasoning so resourceful and ingenious, because they are inherently tentative and experimental.²⁶

Relying, in part, on an imaginative thought experiment to explore foundations of a legal theory and its real-world implications is not as unusual a strategy as it might seem at first.²⁷ But because it is not a common accompaniment to legal analyses of a military's criminal law, I will take a moment to review why thought experiments are thought valuable and to argue why the effort could be worth the departure from standard practice in this case.

Narrow thought experiments are often used in argument by a litigant to suggest that the application of a rule or law, or a finding against them, would result in some (hypothetically forecasted) unjust outcome or that their opponent's position is flawed by the logic of *reductio ad absurdum*. If I were to argue, for instance, that the edifice of military justice is *nothing more than* an exercise of managerial executive branch administration,²⁸ I would describe a hypothetical "board" (not a judge or a court) umpiring violations of professional standards or requirements as a forum for the profession's self-regulation. Addressing an act that violates some punitive provision of the UCMJ, like the prohibition on murder or rape, would not be an exercise of "prosecution" held to high standards and the Constitution's requirements in a "court of law." Indeed, the acts themselves would not be "criminal" in a conventional sense, but sanctionable for some other reason and the sanctions themselves would not be seen or felt to be "criminal punishment"—they would be constrained to those rebukes and consequences typically found in employment suspension or termination contexts. When

26. Maksymilian Del Mar, *The Legal Imagination*, AEON, <https://aeon.co/essays/why-judges-and-lawyers-need-imagination-as-much-as-rationality> [<https://perma.cc/4A8T-HMJ5>] (adapted from his primary thesis in MAKSYMILIAN DEL MAR, ARTEFACTS OF LEGAL INQUIRY (2020)).

27. See Maks Del Mar, *Thought Experiments in Law: Practice and Theory*, JUNKYARD (July 19, 2017), <https://junkyardofthemind.com/blog/2017/7/17/thought-experiments-in-law-practice-and-theory> [<https://perma.cc/GFZ2-W3VD>].

28. See Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, *supra* note 20.

such a hypothetical vision is presented and contrasted against the real-world features and common understanding of how UCMJ offenses are addressed, we see that such a vision should either be dismissed as absurdly ahistorical or—if believed—should justify significant reforms and dismantling of the current bureaucracy that manages military justice. This is but one advantage of employing a thought experiment.²⁹

They are also used by courts attempting to more clearly identify and describe the fundamental nugget of controversy.³⁰ Courts may turn to them as helpful heuristics for applying a vague and nebulous limit on governmental authority to a particular individual's case.³¹ Justice Harlan's now-standard "reasonable expectation of privacy" test for Fourth Amendment-approved searches and seizures (invoking a two-prong subjective and objective question) is but one well-known example.³² The factfinder must not only know what the accused believed was private, but must also imagine a hypothetical case in which that subjective belief were universalized; if the factfinder believes that extension would be unreasonable, the belief is said to have failed the "objective" prong of the test. These techniques are often used by courts during their decisionmaking process from the bench, not just in final opinions, when

29. The particular advantage of a thought experiment has much to do with its function. Thought experiments, especially in the sciences, come in various types—a "taxonomy," according to one leading philosopher of science. Under that taxonomy, some thought experiments are "destructive": they identify hypothetical scenarios that bring into clarity a non-superficial "shortcoming" in an existing framework or theory. Some are "constructive": they "might illustrate some otherwise highly counter-intuitive aspect of the theory thereby making it seem more palatable," or they conjecture a hypothetical phenomenon in one's imagination, then construct a theory to explain it. Or they might start from real-world phenomena and end with a new theory that might yet be empirically verified or refuted; some efforts might exhibit features of both constructive and destructive thought experiments. See JAMES ROBERT BROWN, *THE LABORATORY OF THE MIND: THOUGHT EXPERIMENTS IN THE NATURAL SCIENCES* 33–45 (1991). It is possible that scientists, historians of science, and philosophers of science would not consider what lawyers, legal scholars, and courts consider to be true thought experiments anywhere within this taxonomy. *Id.* at 14–15.

30. Adam Liptak, *A Thought Experiment at the Supreme Court over How to Sue a Country*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sudan-sailors-terror-attack-supreme-court.html> [<https://perma.cc/FBZ2-WTRT>] (describing oral arguments at the U.S. Supreme Court in the case of *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019)).

31. Holmes's "bad man" thought experiment, as basis for his "predict[ion]" theory of what the law fundamentally *is*, is one example. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Game theory's "Prisoner's Dilemma" is another. See, e.g., *United States v. Herrera*, 70 F.3d 444 (7th Cir. 1995) (placing the facts of the case squarely in terms of this famous thought experiment).

32. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

they listen and respond to parties' oral arguments.³³ As one scholar comments, "Imagination allows judges to explore what might be at stake in any particular dispute, and to provide a set of resources for future decision-makers."³⁴

Thought experiments may also be relied upon by legal scholars examining implications of Supreme Court decisions or explaining the reasons behind trends in those decisions.³⁵ Lon Fuller's famous "Speluncean Explorers" article is itself a mid-twentieth-century exercise in creative thought experimentation. It tested implications of natural law and legal positivism on one level, involving several hypothetical future jurists evaluating a particularly troubling fact pattern in the country of "Newgarth" in the year 4300. On another level, those fictitious jurists, to various degrees, rely on their own analytical thought experiments to raise objections to the views of their fellow court members.³⁶ The following thought experiment is novel, so far as I can tell, in the writings about military criminal law.

B. *The Character of a (Modified) Rawlsian Thought Experiment*

The form of the thought experiment in this Article is indebted to and inspired by John Rawls's "original position" and "veil of ignorance" concepts and consequences he explored in various essays in the late 1950s and into the 1960s, then culminating in his monumentally influential *Theory of Justice*.³⁷ Because this Article focuses on the justifications, and underlying theory, for a military justice system, it addresses perhaps a small part of Rawls's four "tasks of political philosophy": to

33. E. Barrett Prettyman, Jr., *The Supreme Court's Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555, 555–56 (1984) (cataloguing scores of hypothetical questions the Justices have asked counsel from the bench during arguments—sometimes to clarify counsels' positions, sometimes to probe the reasonable or legal limits of a proposed rule or standard, and sometimes to signal to fellow Justices: staking out positions the questioning Justice will find compelling or irrelevant for later discussion in conference).

34. Del Mar, *supra* note 26.

35. See, e.g., Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

36. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 618–19 (1949).

37. JOHN RAWLS, A THEORY OF JUSTICE, at vii–viii (1999) [hereinafter THEORY] (citing six essays published in philosophical journals or chapters in collected volumes). Of course, Rawls found opportunities to respond to various objections and make refinements in subsequent articles and books, most notably in his POLITICAL LIBERALISM (1993), the revised edition of A THEORY OF JUSTICE (1999) and JUSTICE AS FAIRNESS: A RESTATEMENT (2001).

contribute to how a people [here, the military members and those responsible for it in civil government] think of their political and social institutions as a whole [here, a military investigative, prosecutorial, and judicial institution and its various operational means and methods], and their basic aims and purposes as a society with a history [here, the military profession of arms and its experiences training for, preparing for, and waging combat].³⁸

Though I find it to be useful enough to modify into my own hypothetical “social contract”-like scenario, in no way do I consider the following as any form of critique or supplement to his “justice as fairness” theory. This is obviously not an article that purports to uncover or defend a political theory of rights, nor to take his theory and apply it to a more specific formulation of a military criminal law code.³⁹ In fact, it assumes that the form of government that

38. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT 2–3* (Erin Kelly ed., 2001). To those objecting to this method, and for whom this effort is nothing more than “reconstruction” where invoking Rawls and a thought experiment is unnecessarily abstract, I partially agree. As Balkin writes, “Rational reconstruction is the attempt to see parts of the law as a defensible scheme of principles and policies.” J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *YALE L.J.* 105, 123 (1993). That is surely the ultimate goal of this Article—to suggest principles upon which military justice most coherently stands, with an attitude of “sympathetic” advocacy. *Id.* But the means and methods of reconstruction are a little too narrow here: I will hypothesize characteristics of an ideal military justice system from the distinct points of view of various “subjects,” each of whom bring different experiences and have different purposes and different reasons for viewing military law in their idiosyncratic way. *Id.* at 121–22. I am not yet considering the rationality of specific legal doctrines or specific procedures or substantive criminal law as applied within a military justice scheme. Instead, I am considering the rationality of a military justice scheme. This is a broader task, requiring something different than just the “deconstruction” of arguments, cases, doctrines, and explanations to decide if specific parts of the law cohere. *Id.* at 125–26 (discussing “rational deconstruction” as the technique for rational reconstructing). Balkin analogizes this deconstructive process and attitude toward the law to sculpting: “to uncover the statue buried in a block of marble.” *Id.* at 126. In contrast, this Article is not (yet) about revealing the statue, but rather deciding *which kind of stone to chisel, which specific stone to sculpt, and what kinds of tools would be helpful in light of the artist’s ultimate creative goal.* And it asks these questions from multiple subjects’ viewpoints: not just the sculptor’s, but those of the artist’s patron, the art critic, and a visitor to the museum or gallery where the sculpture may stand. I owe special thanks to Brenner Fissell for suggesting I consider whether this project is better described as a kind of “Dworkinian reconstruction” than a Rawlsian thought experiment (correspondence on file with the author). To the extent that using a Rawlsian thought experiment for my purpose is flawed, my determination to use it is at least an illustration of *Balkinian* reconstruction in action, though one flawed in its scale and imagery.

39. Rawls says that a “legal system [i]s an order of public rules addressed to rational persons in order to regulate their cooperation,” and so the “purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end.” *THEORY*, *supra* note 37, at 212, 276. At least one scholar attempts to evaluate the place, purpose, and justifications of criminal law (generally, not military justice specifically) within Rawls’s views on distributive justice in a fair and equal, well-ordered liberal democratic society. Emmanuel Melissaris, *Toward a Political Theory of Criminal Law: A Critical*

establishes this system of military justice is already determined and in force as a constitutional representative democracy that shares the same separation of powers found in the first three articles of the U.S. Constitution. Any parallels or similarities between the thought experiment below and Rawls's work is purely the result of finding his method of argument suitable and helpful to me (and hopefully the reader) as I think through the antecedent problems associated with articulating a theory of military justice.

It will follow roughly the thought experiment procedure Rawls described: create a simplified situation; each actor in the situation is capable of rational self-interested decisionmaking; each actor has certain ends in mind and relates to other actors in certain ways. Each actor must choose among various "courses of action" in view of his knowledge of his own circumstances and goals, then consider what option the actors would likely choose by working deductively from initial assumptions about their beliefs, interests, and alternatives. The goal is to identify and explain the most "acceptable" course for a group, picked unanimously.⁴⁰ Where Rawls had his imaginary rational actors compare and contrast optional conceptions of justice in pairs, to ultimately settle on those principles that would guide all further agreement, he recognized an alternative method of grading and choosing among various menu options was to establish "necessary and sufficient conditions for a uniquely best conception of justice and then exhibit a conception that fulfilled these conditions."⁴¹ As described below, this latter method will be the procedure I employ.

Granted, Rawls emphasized "justice" writ large: an imagined form of political and social compact that a just and liberal democratic society should accept for itself, and the method of creating fair conditions so that social cooperation might be possible among those who would be subject to that political and social justice. His model imagined a refined but more foundational version of the classic "social contract" in a hypothetical state of nature (of Rousseau, Kant, and Locke). This was in part to offer a reasonable alternative to the predominate popularity of utilitarianism in moral

Rawlsian Account, 15 *NEW CRIM. L. REV.* 122, 127–28 (2012) (arguing that Rawls said very little about criminal justice and what he did say (emphasizing retributive elements of punishment) was incongruent with his overall thesis about allocation of social rights, advantages, and responsibilities).

40. *THEORY*, *supra* note 37, at 103–04.

41. *Id.* at 122–23.

and political theory.⁴² The ambition here, however, is far narrower, more modest, and more specific. The central question, though, is the same: what will reasonable parties—some of whom will be bound by the terms of the law they agree to create themselves—consider as relevant to that project, and why? Presumably, such a law must survive beyond the original parties to bind future generations, deal with unknown dilemmas but remain grounded in foreseeable variables and circumstances, assign various rights and responsibilities, and impose certain demands.

In this sense, a Rawlsian thought experiment (in its general outlines and aims, anyway) is transferable here in thinking about what a military code ought to be and ought to do. But I should emphasize that I do not intend to criticize or defend military justice—or any specific incarnation of it like that of the United States—using Rawls’s specific theory: I will not rule out some application of utilitarianism justifying some parts of military justice, nor will I conclude that a military justice system—to be rationally justified—must result in “compensating benefits for everyone, and in particular for the least advantaged members of society.”⁴³ A rational and consistent military justice system may (or may not) do just that, but attempting a full Rawlsian analysis of military justice may just be a distinct project for another day. Again, the goals of this Article are far less comprehensive.⁴⁴

42. *Id.* at vii–viii, 5–6, 22–33.

43. *Id.* at 14–15.

44. Here are two obvious departures from Rawls’s thought experiment. First, I do not need to blind each participant to their own social position, general authority, innate ability, or their “conceptions of the good,” because this project—unlike Rawls’s—does not address how individuals would fairly (justly) determine the “basic structure of society,” and from which its principles would “regulate all further agreements” and institutions of society. *See id.* at 11–12 (describing the “veil of ignorance” as the exclusion of the “knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices”). For the more complete description, see also *id.* at 136–42. Less ambitiously and moving forward in time past this most original of original positions, this project explores only one such agreement (what military justice ought to look like) based on the intended purpose and functions of an institution within that society (the military, with its civilian oversight and control). Second, the positions of authority (or no authority) that seem natural attendants to our hypothetical parties are, in practice, contrary to Rawls’s initial status quo of absolute equality in the “assignment of basic rights and duties.” *Id.* at 13. In my hypothetical (but mirroring reality), Congress has legislative authority over the Armed Forces; a president has ultimate command and control authority over the employment of armed force and to some extent over the personnel using, or prepared to use, that armed force; the general has limited command authority over military policy, if not military subordinates and knows that his views on overarching political and strategic national objectives must not be the basis for his dissent or disobedience from otherwise lawful commands from civilian authority; the ideal recruit has no direct authority over Congress other than as a citizen with ability to

The thought experiment proceeds in four sections. The initial two sections address *whether* a separate code of criminal law would be thought necessary. That is, under what conditions would the legitimate governing authority believe that a distinct form of jurisdiction over a subpopulation—a minority community defined by employment—is preferable or necessary? The first section adopts the point of view of a reasonable legislative body; the second adopts the point of view of a reasonable chief executive with “commander-in-chief” authority.

The third section assumes the conclusions of these two and next explores what conditions must characterize such a separate code of criminal law from the perspective of those who, historically, have managed such codes. This section, therefore, adopts the point of view of the most senior uniformed military officer, representing the “reasonable commander,” and acting as the military agent of two elected civilian principals—the president as commander-in-chief, and Congress. Finally, the fourth section approaches the same question—what conditions must characterize such a separate code—but does so from the point of view of those who would make up most of the population subject to the code’s provisions. Therefore, this section adopts the point of view of the “ideal recruit,” or a reasonable person considering whether to voluntarily join the military and becoming informed that doing so would be to subject oneself to the military’s criminal jurisdiction. Each section presumes that a legitimately established and enforced Constitution has done three primary tasks: *structured* the distribution of government power among three branches (legislative, executive, and judicial), *checked* or limited the power of individuals within those branches and their institutions through means of veto, oversight, personnel qualifications, term limits, and enforced collaboration (e.g., nomination by one branch with consent or confirmation by another), and *protected* certain fundamental liberties, rights, and personal autonomies.

vote, and no authority over the general, save the discretion to not enlist if conditions are not favorable. An equality of rights and responsibilities in my thought experiment is an irrational precondition because, as with the first departure from Rawls’s thought experiment just noted, we are not concerned with the *fundamental* structure of society but only a post-script design of a system *within* an organization that we assume is hierarchical by nature and created for some functional purpose. Nevertheless, there is an equality of sorts to be found if the military system designed holds equally for all members—including commanders—within its jurisdiction so that rank or duty position is no lawful excuse for the commission of a crime and has no bearing on punishment for such crimes.

This set of preconditions is not assuming so much, or steering the conversation so particularly, that the inevitable conclusion is the very system under investigation—that is, the current *American* form of military justice under the UCMJ. Instead, the narrow scope of this thought experiment is to simply examine what, *in theory*, could lead a modern government to determine that a military justice code is either necessary or advantageous (and some clearly do not).

We may safely rely on some basic assumed initial regime structures even if they are of the kind that did—in fact—eventually lead to the present state of affairs. It is historical fact that the American military criminal justice practice *did* evolve through multiple forms, a fitful growth influenced by short- and long-term social, cultural, legal, and war-waging factors that were external to the terms of the Constitution. This is weighty evidence that initial or foundational regime characteristics do not have the final say over the particular patterns or eventual elements comprising the institutions and practices organized and permitted by that structure. As Rawls said of his larger theory, “While the principles of justice as fairness impose limits on these social arrangements within the basic structure, the basic structure and the associations and social forms within it are each governed by distinct principles in view of their different aims and purposes and their peculiar nature and special requirements.”⁴⁵

II. STRAPPING ON THE “VEIL (HELMET?)”: IF YOU COULD START FROM SCRATCH . . .

A. *The Legislature’s “Original Position”*

Why should Congress reasonably choose to enact a law that criminalizes certain conduct of individual service members—a special set of criminal prohibitions that only restrict or inform the conduct of this distinct population? This special set of criminal prohibitions could provide for incarceration and even capital punishment, far beyond the threat or application of employment-related sanctions and consequences. But given that these service members are also subject to the civilian criminal laws of the state,

45. RAWLS, *supra* note 38, at 11.

would Congress have a reasoned justification for carving out a wholly autonomous code of criminal law?⁴⁶

Congress may create, organize, and oversee specialized bureaucracies to perform various national security missions influenced by public interests as interpreted by, or designated by, the sovereign.⁴⁷ One of the specialized bureaucratic organs of government that Congress creates, oversees, and funds is the military. The military is tasked with using its specialized means and methods to protect national interests on behalf of the sovereign through force or the threat of force.⁴⁸ Imagine that Congress has been afforded, under the Constitution, a nondelegable authority to make rules that regulate the behavior and conduct of the nation's military.⁴⁹ These rules, it is believed by members of Congress, would regulate both the forms and functions of the military as an institutional bureaucracy, as a network of linked and hierarchical organizations and units, and as a collection of individuals who volunteer to serve

46. American criminal law—both federal and state—already covers an extensive field of trifling to wicked behavior, “far more conduct than any jurisdiction could possibly punish.” Stuntz, *supra* note 18, at 507. Adding an entirely new blanket of criminal prohibitions, especially one that covers conduct already proscribed elsewhere, should not be reflexively sustained, even if it applies to a relatively small portion of a population. *See id.* Of more concern is the possibility that Congress simply has *no* reasoned justification, will not attempt to find one, and—what’s more—does not care. *Id.* at 508 (“American criminal law’s historical development has borne no relation to any plausible normative theory—unless ‘more’ counts as a normative theory.”). Instead, Congress acts as an aggregation of individual choices based on ideology, public opinion, cost, personal prejudices, interpersonal relationships with certain constituents, donors, or other members of Congress, their reelection goals, or to capture or retain the favor of the sitting president, or a desire to be consistent with their earlier legislative positions or public statements. *Id.* at 523–33. Stuntz also emphasizes the role of “legislative inertia” that makes it far easier to advocate for, support, and defend adding to (rather than carefully pruning) existing criminal law. *Id.* at 556–57. This reality cannot be ignored when analyzing legislative history and text, voting patterns, or forecasting future legislative reforms—but neither should we ignore what a reasonable point of view might look like if isolated and stripped of all this noise. Isolating the reasons and isolating the reasoner from entangling relationships are the objectives of this Article.

47. U.S. CONST. art. I, § 8, cl. 11 (declaration of war), cl. 12 (“raise and support Armies”), cl. 13 (“provide and maintain a Navy”), cl. 15 (“provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”), cl. 16 (“provide for organizing, arming, and disciplining, the Militia”), cl. 18 (“make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); *cf. id.* art. II, § 2, cl. 1 (the president is “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”).

48. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 2, 11–12 (1959); *see also* PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 2 (2003).

49. U.S. CONST. art. I, § 8, cl. 14 (“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.”).

in the military in some capacity for some period of time. Such rules might include the organizational structure and division of labor among various technical or domain specialties, like a ground force-based Army and maritime-focused Navy.⁵⁰ They might include the professional qualifications of senior military leaders for whom the president wishes to assign levels of high responsibility.⁵¹ They might include rules for submitting and sharing information about defense-related activities with Congress.⁵² They might include rules that establish fundamental duties of officers as leaders,⁵³ and even might define their oath of office.⁵⁴ While broad, these rules would not purport to restrict the discretion of the president as commander-in-chief in his employment of the Armed Forces in national defense: in other words, these rules regulate the Armed Forces, not the use of armed force.

50. See, e.g., 10 U.S.C. §§ 7001–7842 (Army); *id.* §§ 8001–8951 (Navy and Marine Corps); *id.* §§ 9011–9842 (Air Force).

51. See, e.g., *id.* § 152 (requirements for grade and rank of the Chairman of the Joint Chiefs of Staff); *id.* § 153 (functions and areas of responsibility of the Chairman, “subject to the authority, direction, and control of the President and the Secretary of Defense”).

52. See, e.g., *id.* § 115a (requiring the Secretary of Defense to submit annually to Congress a “military manpower profile report” which includes, *inter alia*, “justification for the strength levels recommended and an explanation of the relationship between the personnel strength levels recommended for that fiscal year and the national security policies of the United States in effect at the time”); *id.* § 116 (requiring the Secretary of Defense to submit an annual report to Congress on the military’s “operations and maintenance” status).

53. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 507, 111 Stat. 1629, 1726 (1997) (codified at 10 U.S.C. § 3583 (2000)) (“All commanding officers and others in authority in the Army are required—(1) to show in themselves a good example of virtue, honor, patriotism, and subordination; (2) to be vigilant in inspecting the conduct of all persons who are placed under their command; (3) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and (4) to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.”).

54. A military officer’s oath is found at 5 U.S.C. § 3331 (“An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: ‘I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.’”). The oath of enlistment, for service members without a commission as an officer, is found at 10 U.S.C. § 502 (“Each person enlisting in an armed force shall take the following oath: ‘I, ___, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.’”).

In distinguishing between lawmaking over the *fighting* of wars from lawmaking over *those who fight* in wars, Congress implicitly accepts some fundamental understanding of what “war” or “armed conflict” is. Though there is no single uniform definition under U.S. law,⁵⁵ even the Supreme Court has taken a stab at describing it: war is “[t]hat state in which a nation prosecutes its right by force.”⁵⁶ Without such an understanding, even if tacit, Congress would not be capable of making reasonable judgments in its effort to legislate rules governing and regulating members of the Armed Forces. If considered at its most generic level, Congress could define war as a state of armed conflict recognized under international law between nations, between groups of nations, or between nations and nonstate armed groups, using organized armed forces to achieve objectives determined through their respective modes of sovereignty or authority. In fact, this is how the U.S. military itself defines war.⁵⁷

Consequently, Congress would determine that militaries exist to deter (if possible) and fight (if necessary) wars.⁵⁸ As James Madison wrote, “War is the parent of armies.”⁵⁹ Human nature and common experience would further confirm to Congress that wars of any size or duration, and regardless of their designs, are inherently dangerous to those who fight and those near to the fighting; that wars are uncertain in both outcome and in the facts that drive military decisionmaking in the “fog of war”; that they are physically

55. Fred K. Green, *The Concept of “War” and the Concept of “Combatant” in Modern Conflicts*, 10 MIL. L. & L. WAR REV. 267, 269 (1971) (“[I]n US municipal law, the existence of war and its beginning and termination is a question of objective fact determined for different purposes by different agencies of the sovereign. There has been no apparent effort to coordinate federal law so as to permit establishment of fixed criteria that would be identified and applicable for all purposes. The tremendous variations in result that this situation produces renders meaningless any attempt to generalize with respect to established criteria.”).

56. *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1863) (quoting 3 EMERICH DE VETTAL, *Definition of War*, in *THE LAW OF NATIONS: OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* § 1, at 291 (1760)).

57. See, e.g., U.S. MARINE CORPS, MCDP 1, WARFIGHTING, at 3 (1997).

58. THE FEDERALIST NO. 24 (Alexander Hamilton); President George Washington, State of the Union Address (Jan. 8, 1790) (transcript available at <https://www.mountvernon.org/education/primary-sources/state-of-the-union-address/#-> [https://perma.cc/H6JJ-Z468]). These sentiments are largely captured in modern U.S. military doctrine: its internal hierarchy of knowledge and self-identity. See, e.g., U.S. DEP’T OF THE ARMY, ADP 1-01, DOCTRINE PRIMER para. 1-1 (July 2019).

59. James Madison, *Political Observations*, in 15 THE PAPERS OF JAMES MADISON 511, 518 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985).

and emotionally strenuous; and that actions taken during the fighting are often morally ambiguous.⁶⁰

Recognizing these truths, Congress would reasonably conclude that fighting wars ought to be, primarily, within the professional jurisdiction and responsibility of specialized (either full-time or part-time) leaders, called military commanders, who have been trained in forcibly competing against adversaries given the physically and emotionally dangerous, uncertain, strenuous, and morally ambiguous conditions.⁶¹ Without such a recognition, Congress would have no interest in, or aptitude for, legislating rules about professional qualifications of high-ranking strategic military leaders, nor in approving the commissioning and promotion of military officers, nor in voting to confirm presidential nominees to military offices of exceptional and significant responsibility.

Despite these conditions, it is not yet clear whether a hypothetical Congress would necessarily—or even reasonably—determine that a separate substantive and procedural criminal justice system ought to be among the rules legislated into U.S. code, let alone what its characteristics would be. To get closer to that answer, Congress would necessarily consult with its semi-autonomous expert agents—those whom Congress has already brought within its scope of oversight and administrative jurisdiction: the uniformed military leaders. Given their specialized knowledge and experience, and in light of the fluid, ambiguous, dangerous, and indeterminate nature of war and character of any particular armed conflict, Congress would be expected to do two reasonable things: first, to seek the counsel of military commanders before making final authoritative rules that would aim to regulate military members; second, with these rules, to grant to military commanders a degree

60. U.S. MARINE CORPS, *supra* note 57, at 5–16; see CARL VON CLAUSEWITZ, ON WAR 101 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832) (“War is the realm of danger . . . War is the realm of physical exertion and suffering . . . War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty . . . War is the realm of chance.”); *id.* at 113–16 (discussing the characteristics of “danger” and “physical effort” as two “sources” of the “friction” of war); *id.* at 119–21 (describing “friction”); see also ANTULIO J. ECHEVARRIA II, CLAUSEWITZ & CONTEMPORARY WAR 103–08 (2013).

61. For the purpose of this section, a “commander” is defined simply as a military officer authorized by a legitimate higher authority (be it civilian or military) to exercise sole direction, leadership, control, responsibility, and discipline over a group of subordinates and military property, the extent to which is usually commensurate with the officer’s rank. For examples and illustrations of most common duties inherent to any commander of any rank, in any Service, see 10 U.S.C. § 7233 (congressionally imposed “[r]equirement of exemplary conduct”); see also U.S. DEP’T OF THE ARMY, ARMY REGULATION 600–20, para. 1–5 (2014).

of discretionary authority to make decisions and act independently, and to direct larger numbers of people in nondemocratic ways, physically and figuratively away from the civilian leaders who otherwise monitor and regulate them.⁶²

B. *The Executive's "Original Position"*

Given the roles of the nation's chief law-enforcing authority and commander-in-chief of the armed forces,⁶³ would a president reasonably believe—like Congress—that a special set of criminal prohibitions, only restricting or informing the conduct of the military, is rationally desirable? If so, at what level of abstraction or managerial detail would it be reasonable for the president to be active in executing this law? If Congress has been granted the sole power to “make rules” that regulate the behavior, values, qualifications, and martial expectations for the members of the Armed Forces, it stands to reason that making rules regulating the *use* of armed force by those members, and supervising their compliance with such rules, falls to the commander-in-chief, unless the Constitution specifically left that within the scope of the legislature's duty. Assume for this hypothetical that such a legislative duty remains plenary over the administrative makeup and funding of the military, while an executive duty—embodied by a single elected political, civilian actor, not a military agent—remains plenary over the use and implementation of force. If this vague but broad division of labor is all we must start with, what might the civilian commander-in-chief expect of a military justice system, if anything?

As a preliminary matter, a president would hardly find it necessary to disagree with Congress about the nature of war. Indeed, it is to the president's advantage to hold that warfare, generally, is unpredictable, harsh, violent, and that public support for it can be volatile or fickle. A president would also surely concur that such conditions call for specialized expertise for making rapid, but

62. Brand calls this a principle of “independent self-sufficiency” and the “primary reason” for having a separate justice system for the military community. C.E. BRAND, *ROMAN MILITARY LAW*, at x (1968); see also MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 40 (1971); FEAVER, *supra* note 48, at 3, 59–61; Peter D. Feaver, *Civil-Military Relations*, 2 ANN. U. REV. POL. SCI. 211, 214 (1999).

63. U.S. CONST. art. II.

sound, life-and-death and fiscally expensive decisions far from direct interaction with a civilian principal.⁶⁴ Whether he chooses to follow that specialized counsel, or go his own way, is another matter. While presidential personality and experience, and combat conditions, may trigger different degrees of political involvement in “military decision making,”⁶⁵ some expectations are universal. A president would expect that a professional body of experts—with relevant military experience, training, and established professional norms, standards, and techniques—will be best positioned to efficiently manage this controlled application of violence, including its preparation, according to his political intent.⁶⁶

64. HUNTINGTON, *supra* note 48. Though Huntington’s book remains the most-referenced “manual” guiding the education of senior military professionals, recent scholarship has taken his work to be—at best—outdated and no longer representative of either reality or worthy of prescriptive theory. See, e.g., FEAVER, *supra* note 48, at 2, 12 (applying a rational actor-based descriptive and prescriptive model of civilian principals monitoring and checking the conduct of their military agents); Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT’L SEC. 7, 8–10 (2020) (emphasizing that the norms implied by, or inspired by, Huntington’s “objective control” theory ironically yield the very consequences civilian control of the military is meant to disarm: enabling partisan behavior by military professionals (though promoting apolitical and non-partisan attitudes), dampening of civilian practical oversight over the use of force (though reinforcing civilian authority), and weakening of strategic effectiveness in armed conflict (though contributing to tactical success)).

65. For colorful and insightful case studies illustrating such a range of expectations and relationships between commanders-in-chief and their military commanders, written by political scientists, historians, and journalists, see generally PETER BERGEN, *TRUMP AND HIS GENERALS: THE COST OF CHAOS* (2019); MICHAEL BESCHLOSS, *PRESIDENTS OF WAR* (2018); ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* (2002); DALE R. HERSPRING, *THE PENTAGON AND THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH* (2005); MATTHEW MOTEN, *PRESIDENTS & THEIR GENERALS: AN AMERICAN HISTORY OF COMMAND IN WAR* (2014); BOB WOODWARD, *OBAMA’S WARS* (2010).

66. MOTEN, *supra* note 65, at 4–5 (“[T]he extent of military authority varies depending upon how presidents choose to exercise their role as commander in chief of the armed forces, as well as how much trust and confidence they retain in the military profession itself and its incumbent leaders.”). Those expectations, however, may or may not be well-founded. The fractures in the relationships between President Lincoln and most of the generals before U.S. Grant, and the tension between President Kennedy and the Joint Chiefs of Staff during and after the Bay of Pigs fiasco, are two well-known proofs. The relationship between political leadership and civilian subordinate advisors on the one hand, and uniformed military leaders and staff on the other, is sometimes disabled by technical ignorance, mistaken assumptions about competences, unarticulated intentions, flawed teamwork, and confusion over responsibilities. Michèle A. Flournoy, *Best Practices: Eight Lessons for Navigating National Security*, in *CRUCIBLE: THE PRESIDENT’S FIRST YEAR* 130, 130–34 (Michael Nelson, Jeffrey L. Chidester & Stefanie Georgakis Abbot eds., 2018). For a study of the “institutional drivers” of friction between civilian leadership and military planners, looking at the different expectations each party has of the other based on bureaucratic planning processes and roles, see Janine Davidson, *Civil-Military Friction and Presidential Decision Making: Explaining the Broken Dialogue*, 43 PRESIDENTIAL STUD. Q. 129 (2013). For some insight into the travails of President Lincoln, see the classic T. HARRY WILLIAMS, *LINCOLN AND HIS*

A reasonable president, under most circumstances, is sensitive to public opinion both domestically and among foreign partners, adversaries, and allies. But a president would wish to retain a veto-proof ability to dictate, based on the evolving circumstances of a particular armed conflict or contemporary trends, what conduct would have a deleterious effect on military missions or on the martial functions of the individual and the unit. Believing that conflict is unpredictable in its outcomes and in its details, but predictable in its harmful consequences and impulses, a reasonable president would likely value a system that consistently restrains or dampens the worst of violent human instincts unleashed during armed conflict, while not ignoring the “military necessities” called for under some circumstances in the typical course of warfare. This would be thought essential to keep the execution of political and military plans from being undermined or negated by individual “wrongful” acts that provoke domestic political and social criticism of the administration or the military. Therefore, a reasonable president would prefer a system that presents him with the opportunity to decide what conduct—in general and *ab initio*—should be proscribed, and what conduct should trigger punitive consequences, and—at the very least—what rules of procedure ought to be constructed that enable efficient resolutions (those that do not detract unreasonably from the military’s ability to perform its essential war-preparation and war-making functions).⁶⁷

Knowing that the military is to consist—by default—of volunteers from the civilian public, a reasonable president would prefer a system that prevents, deters, or punishes behavior that would discredit the reputation, perceived character, and moral standing of the military, or respect for its individual members.⁶⁸ But for the

GENERALS 13 (1952) (for example, saying Lincoln “was willing to discard his judgment of what was good strategy and take the opinion of any general whom he considered to be able. He was willing to yield the power to direct strategic operations to any general who could demonstrate that he was competent to frame and execute strategy”).

67. A similar point is made in FEAVER, *supra* note 48, at 93 (“[T]o the extent that civilian leaders determine which behaviors are proscribed by law and which areas are left to commanders’ discretion, and to the extent that senior military officers take their cues about exercising this discretion from civilian leaders, the military justice system can be considered a part of the civilian monitoring and punishment edifice.”).

68. One retired general-turned-just war philosopher describes, as a “*jus in bello* war-waging principle,” the imperative of “legitimacy” (“Legitimacy concerns maintaining the support of the population as one conducts a war, that support being, in turn, a function of the righteousness of the war (a *jus ad bellum* issue) and progress toward probable success (a *jus in bello* issue).”). JAMES M. DUBIK, JUST WAR RECONSIDERED: STRATEGY, ETHICS, AND THEORY 155–57 (2016). He points to the abuses perpetrated on Iraqi detainees at the hands

same reason, that president would want a system that recognizes and enforces certain civil liberties and the degree of due process that such volunteers expect, or at least would not protest against by refusing to volunteer or to remain in service.⁶⁹ In doing so, a reasonable president would prefer a system that can itself survive assaults on its legitimacy and not result in recurring injustices that discredit the military in the eyes of the public.

Further, a reasonably informed president would know that the Congress will dictate certain systemic administrative features governing the armed forces; he would know also that the Congress is responsible for funding (or defunding) the military and its programs or activities; and would know that the Congress will provide various degrees of investigative oversight over the programs, policies, and actions that it funds. A reasonable president would therefore favor a system that (1) provides for minimal legislative scrutiny—in which the legislature delegates much of its rule-making authority to the executive, and (2) defers to the reasonable managerial decisions and discretion of the chief executive/commander-in-chief and his agents, including deference to his decisions over how seriously the rules ought to treat various bad actors and bad acts (that is, who may be exposed to punishment and the severity of potential punishments for particular conduct).

Because presidents are presumed accountable to the electorate for war-waging decisions, a reasonable president would prefer a system that encourages military members to adopt characteristics that exemplify certain ideal traits useful to successful military efforts. This likely includes loyalty to both aspirational standards and to one's organization, camaraderie and high morale, sensible obedience to lawful orders, self-sacrifice, personal integrity, courage under fire, and technical competence.⁷⁰ Similarly, a reasonable

of U.S. Army military police soldiers at Abu Ghraib prison (2004) as just one illustration of the political leadership's responsibility to ensure its reasons and processes underlying strategy and tactics, including preparing and training before such strategies and tactics are used, are consonant with achieving and sustaining legitimacy in the eyes of the public. *Id.* at 166–67.

69. Fidell makes a similar point. Eugene R. Fidell, *Military Justice and Its Reform*, JUST SECURITY (Apr. 6, 2016), <https://www.justsecurity.org/30451/military-justice-reform/> [<https://perma.cc/G378-LREZ>].

70. Presidents have long been considered, at least by the Supreme Court, accountable to the electorate and the authorities granted by the Constitution—rather than judicial or statutory standards—for decisions made while exercising their *foreign* affairs powers, including their strategic and tactical decisions made in the course of avoiding, preparing for, or in waging international armed conflict. *United States v. Curtiss-Wright Export Corp.*,

president would want a system that discourages military members from acting on preferences that value self over service, disobeying lawful commands, skirting or avoiding hazardous duties, disrespecting the hierarchy of leadership and command (either through personal affronts or general contempt for authority), being unresponsive to training, being dismissive of professional customs and norms, and from neglecting one's duties and being indifferent about one's state of skills and competence.

Because the military and civilian leaders are generally bound by international law—at least its norms, if not the express letter or widespread and historical customs of the law—prudent presidents would value a system that peremptorily identifies certain conduct as unjust and unlawful (say, knowingly killing an unarmed non-combatant or detainee with no affirmative defense⁷¹); provides mechanisms for preventing (e.g., rules of engagement training⁷²), investigating, and punishing those who wrongfully plan, participate in, overlook, or condone those acts; and deters both individuals and groups from acting, or planning to act, in a manner that

299 U.S. 304, 319–20 (1936). However, preparing for armed conflict necessarily includes training and operations outside of armed conflict, domestically, in localities already regulated by criminal prohibitions and law enforcement. Thus, the expectations imposed on service members are not a matter solely implicating international affairs. When a president attempts policies or actions claiming prerogative under Article II, but which seem to originate from the same scope of powers granted Congress in Article I, the answer to the question that will determine how the courts will favor or disfavor such attempts turns on what Congress has explicitly or implicitly said on the matter. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Making rules for the conduct of military members, backed up by threat of punitive sanctions, at home and abroad, arguably arises from the Commander-in-Chief Clause *and* from Article I, Section 8, Clause 14. Congress has further muddied the waters in Article 33 of the UCMJ, wherein it affords the president discretion to issue “non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges,” 10 U.S.C. § 833, and in Article 36 of the UCMJ, wherein it affords the president ability to prescribe rules for “[p]re-trial, trial, and post-trial procedures, including modes of proof,” 10 U.S.C. § 836.

71. President Trump's much-maligned interventions into military prosecutions of conduct that could have been charged as war crimes may prove to be the exception that proves the rule. Geoffrey S. Corn & Rachel E. VanLandingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFARE (Nov. 26, 2019, 7:22 PM), <https://www.lawfareblog.com/gallagher-case-president-trump-corrupts-profession-arms> [<https://perma.cc/36YZ-UWS3>]; Maurer, *supra* note 16.

72. See, e.g., the now classic and highly regarded article by then-Major Mark Martins, Army judge advocate, who later became the Chief Prosecutor for the military commissions trying cases arising out of the 2001 Al Qaeda terrorist attacks on the United States. Maj. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

would violate fundamental tenets of the law of armed conflict understood and shared by military communities worldwide and largely expected of military professionals by the public.⁷³

Moreover, if a reasonable president should expect a professional body of experts will manage the controlled application of violence for political purposes, then she should expect a professional body of experts—with relevant experience, training, and established professional norms, standards, and techniques—to operate a certain kind of system. This is a system that (1) investigates possible breaches of norms, rules, processes, and prohibitions; (2) determines whether these breaches warrant punishment or other forms of individual accountability; and (3) which effectively, impartially, and efficiently reinforces widely accepted values of this community.

As with Congress, neither these axiomatic conditions nor the president's good grounds for her preferences make it obvious whether a hypothetical president would necessarily—or even reasonably—determine that a separate substantive and procedural criminal justice system ought to be among the supervisory or managerial tasks comprising her commander-in-chief duties. To get closer to that answer, and like Congress, a president would naturally consult with the semi-autonomous expert agents—those whom a president has within her operational and strategic jurisdiction or chain-of-command: the uniformed military leaders. Though a president sits in a different position of authority (from that of Congress) relative to the military's leaders, its rank-and-

73. Such was one motivation driving the Lincoln administration to call on esteemed law professor Francis Lieber to draw from the Articles of War and the rules, customs, and norms of international law of war binding “civilized” nations, to draft “instructions” (in the form of a general order to be published to all Union forces, and distributed in the South to set out the North's expectations for the Confederacy's treatment of Union soldiers and civilians) on what kind of armed force is, and is not, permissible for the members of Armed Forces to use against enemy combatants, noncombatants, civilian property, and captured prisoners of war—and why. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1898) (originally issued as General Orders No. 100 (1863)), https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf ?loclr=bloglaw [https://perma.cc/DZ32-WAVH] (now best known as the “Lieber Code”). See generally JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012). “Lincoln's General Orders No. 100 aimed to establish a framework for making decisions in wartime that would make salient both of war's twin imperatives: resolve and humility.” *Id.* at 382–83. See also EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 82–88 (2016) (providing a concise summary of military justice's intersection with the law of armed conflict).

file and its mission, a president would—as Congress would—be expected to do two reasonable things: first, to seek the counsel of military commanders before making final authoritative rules that would aim to discipline or inspire the conduct of military members; second, with these rules, to grant to subordinate military commanders a degree of discretionary and independent authority.

C. *The Creative General*

Imagine now that a general or admiral is nominated by the president and confirmed by the Senate as the Chairman of the Joint Chiefs of Staff—by the terms of another law, the senior-ranking military officer in the U.S. military.⁷⁴ In our hypothetical, this officer is consulted by Congress for help in answering the following question: Should Congress enact a law that criminalizes certain conduct of individual service members—a law that includes a special set of criminal prohibitions that only restrict or inform the conduct of this class of employees, trained and essentially licensed to use force by the government on behalf of the government? What facts would such a military leader consider relevant to answer this question? On what assumptions would he rely?⁷⁵ On what subjects would he necessarily have to speculate? What normative judgments would he make in giving his advice?

Such a military leader, having been nominated and confirmed as the most senior-ranking officer and the primary uniformed defense advisor to civilian officials, will already be—it can reasonably be assumed—highly regarded within his professional circles. His experience (including, probably, in combat or other hostile deployment), his assignment history, his reputation, his skills (including soft “political” skills of communicating and compromising with both military subordinates and peers, as well as with civilian authorities), and his strategic enterprise-level concern and interest,

74. 10 U.S.C. § 152(c).

75. For the sole sake of reading ease, this Article will refer to an individual military member by a single pronoun; because the vast majority of U.S. service members are male, and because—historically and currently—the Chairman of the Joint Chiefs of Staff and all of the individual Chiefs of the Armed Services (Army, Navy (including Marine Corps), Air Force) are male, this Article will use the male pronoun. In no sense should this be taken as a personal preference, or a preference of the Department of Defense, for service members (or the highest-ranking officers) that are of a certain sex or gender-identify in a particular way.

and his apparent alignment with the administration's policy preferences or assumed political ideology, made him an attractive candidate for the office.⁷⁶ Indeed, these factors would be prerequisites if he expects to perform effectively the roles assigned by Congress and by the president with any degree of sagacity and credibility. Such a leader would know that military commanders (having been one himself) claim that fighting wars well, or preparing well to fight them, demands the efficient competence of those service members and junior officers whom the commanders lead and direct day to day. This demand would be heightened and especially salient in the harsh, life-threatening, uncertain, and morally ambiguous situations that call for a stoic acceptance of possible self-sacrifice for larger imperatives.⁷⁷

"Efficient competence" in these situations, those military commanders would maintain, is due primarily to a strict faithfulness to and respect for their lawful orders, regardless of how dangerous or mundane the operational context.⁷⁸ Faithfulness to and respect for lawful orders, the commanders would explain, demands disciplined obedience from each individual service member to superior authority figures regardless of the individual's particular role.⁷⁹

76. See generally James Thomas Golby, *Duty, Honor . . . Party? Ideology, Institutions, and the Use of Military Force* (June 2011) (unpublished Ph.D. dissertation, Stanford University), <https://searchworks.stanford.edu/view/9238414> [<https://perma.cc/3GVL-RTWS>]. "[T]he president's dominance in foreign policy [relative to Congress and the military bureaucracy] is contingent on his informational advantages, and his informational advantages are contingent on whether or not he has senior military advisors who share his preferences." *Id.* at 107. However, there is no legal requirement that such a nominee share policy or partisan preferences of the president or Secretary of Defense.

77. Memorandum from James Mattis, Sec'y of Def., on Discipline and Lethality to Secretaries of the Military Departments, Chiefs of the Military Services, Commanders of the Combatant Commands (Aug. 13, 2018) [hereinafter Mattis Memorandum]; George Washington, *Instructions to Company Captains* (July 19, 1757), <https://founders.archives.gov/documents/Washington/02-04-02-0223> [<https://perma.cc/BR98-G5C2>].

78. See THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 87 (1975) (quoting General William Tecumseh Sherman's remarks before Congress that "an army is a collection of armed men obliged to obey one man"); SHERMAN, *supra* note 15, at 132 ("Every general, and every commanding officer knows, that to obtain from his command the largest measure of force, and the best results, he must possess the absolute confidence of his command by his fairness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet, in order to execute the orders of his superiors he must insist on the implicit obedience of all his command, [but] [w]ithout this quality no army can fulfill its office.").

79. Eugene A. Ellis, *Discipline: Its Importance to an Armed Force and the Best Means of Promoting or Maintaining It in the U.S. Army*, 16 J. MIL. SERV. INST. 211, 217–18 (1895); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMP. L.

Military commanders train and direct these individuals to function as a cohesive unit or team to accomplish various military goals; the individual's ordinary preferences, survival instinct,⁸⁰ and security is knowingly sacrificed—or at least knowingly endangered—for the group's mission, preservation, and security.⁸¹

Such leaders would recognize another truism based on human nature and common experience. Service members are often tasked to do things that might run contrary to their personal preferences and instincts. Military commanders would also reasonably expect that some individual subordinate service members will comport themselves in ways that will, or likely will, reduce the commanders' ability to accomplish military objectives.⁸² More simply, given

419, 423 (2008) ("Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands. Even in peacetime, commanders must establish and maintain a high level of respect for authority . . . [t]he provision granting the commander the means to impose swift and summary punishment to maintain discipline and obedience is thus a critical aspect of any military justice system."). French general and military theorist Marshal Maurice de Saxe observed: "[Discipline] is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will be only contemptible, armed mobs, more dangerous to their own country than to the enemy." MAURICE DE SAXE, *REVERIES ON THE ART OF WAR* 77 (Thomas R. Phillips ed. & trans., Military Serv. Publ'g Co. 1944) (1757); accord John H. Wigmore, *Lessons from Military Justice*, 4 J. AM. JUDICATURE SOC'Y 151, 151 (1921) ("action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men").

80. DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* 5–8 (1995); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 1995 ARMY L. 27, 28; BRAND, *supra* note 62, at xi–xii ("[I]ndividual well-being becomes secondary to the group efficiency of the fighting unit. . . . The nature of war is essentially such that the military duty of the individual soldier must often require him to act in a way that is highly inconsistent with his fundamental instinct of self-preservation."); Gen. William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1971) ("Discipline conditions the soldier to perform his military duty . . . in a way that is highly inconsistent with his basic instinct for self-preservation."). Note the similarity in language: "highly inconsistent" and "instinct for self-preservation." It appears that General Westmoreland co-opted his definition, nearly verbatim, from an earlier official report published by a blue-ribbon committee, on which he served as a member, on military justice convened in 1959 by the Secretary of the Army released in early 1960 (which appears to have been meant to justify the Army's opposition to a proposed UCMJ amendment (H.R. 3455) then under consideration by Congress). The Committee on the Uniform Code of Military Justice [and] Good Order and Discipline in the Army, *Report to Honorable Wilber M. Brucker, Secretary of the Army*, (Jan. 18, 1960) [hereinafter *Powell Report*] (comprehensive review by Army leadership of the practice of law after approximately ten years of discipline under the UCMJ). It is not clear whether Brand was aware of the *Powell Report*, which predates his book by eight years, but it is plausible: Colonel Brand was a senior Army Judge Advocate; the Judge Advocate General of the Army, Major General Charles Decker, wrote the preface to Brand's book; Major General Decker was a member of the Powell committee.

81. JEFFREY C. BENTON, *AIR FORCE OFFICER'S GUIDE* 41 (35th ed. 2008).

82. See Louis B. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482,

people and time, misconduct (undesirable behavior that is sanctionable) will occur—whether motivated by self-interest, exigencies, or other suitable conditions. This would, commanders assert, include that which directly undermines a lawful and legitimate military order; that which directly disturbs unit cohesion and morale;⁸³ that which makes the individual service member less ready to do his or her duty or perform the mission; that which endangers other service members or military property; that which violates rules or customs of the law of war; and that which aids the enemy in a time of conflict.

In light of these conditions, and given that both Congress and the president would afford commanders some degree of professional autonomy, the Chairman would want a formal, easily reproducible mechanism that enables these commanders to regularly obtain the disciplined obedience expected from subordinates. The Chairman would believe that commanders must be able with this mechanism to encourage and instill a sense of accountability within each individual service member. Yet, the commander must remain able to threaten or impose some form of disciplinary sanction as a preventative measure to deter unwanted conduct, or as a rehabilitative tool, and even at times—knowing human nature—

484 (1971) (“Discipline instills in a soldier a willingness to obey an order no matter how unpleasant or dangerous the task to be performed.”); see also JOHN STUART MILL, ON LIBERTY 13 (1859) (first articulation of what has become known as the “Harm Principle”). Compare OLIVER WENDELL HOLMES, JR., THE COMMON LAW 75 (Dover Publ’ns 1991) (1881) (“[A] general theory of criminal liability, as it stands at common law . . . may be summed up as follows . . . acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent.”), with LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 3 (2009) (“[U]ltimately, what underlies the criminal law is a concern with harms that people suffer and other people cause—harms such as loss of life, bodily injury, loss of autonomy and harm to or loss of property. The criminal law’s goal is not to compensate, to rehabilitate, or to inculcate virtue. Rather, the criminal law aims at preventing harm.”). Control of military forces on the march—to protect the local civilians from the “excesses and depredations of the soldiers”—has been one of the fundamental intentions behind disciplinary codes. William R. Hagan, *Overlooked Textbooks Jettison Some Durable Military Law Legends*, 113 MIL. L. REV. 163, 181 (1986). See generally John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 820 (2018).

83. The U.S. Supreme Court has accepted this view in its largely unbroken deference to the military decisions that seem to impinge First Amendment rights. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.”); see also *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Armed Servs. Comm.*, 113th Cong. 12–14 (2013) (statement of General Raymond Odierno, Chief of Staff, U.S. Army).

as pure retribution to signal the military profession's and community's contempt, disavowal, and repudiation.⁸⁴

Nevertheless, the Chairman believes—again based on long experience—that purely conventional civilian systems of justice and discipline are often inadequate and impractical considering military members' professional employment conditions: specifically, what they are required to do, where they must do it, and the manner in which it must be done. This belief becomes more defensible when the misconduct occurs abroad where civilian jurisdiction by the suspect's nation is inaccessible, as under combat conditions.⁸⁵ The Chairman would therefore advise Congress and the president that an alternative to “normal” civilian justice systems should operate with legal jurisdiction over military members; and further that those military commanders should play some preferential and managerial role in determining what conduct is acceptable under the circumstances or what conduct is to be reformed, deterred, and even punished.⁸⁶

84. ELBERT DUNCAN THOMAS, REPORT OF THE SECRETARY OF WAR'S BOARD ON OFFICER-ENLISTED MAN RELATIONSHIPS, S. DOC. NO. 196, at 3, 12, 18 (2d Sess. 1946) (noting that despite thousands of complaints and recommendations received from active duty, separated, and retired soldiers about the paucity of good officer leadership and “abuse of privileges” among many poorly qualified officers during the Second World War, all recognized that “discipline and obedience can only be accomplished by creating rank and by giving necessary privileges to accompany increased responsibilities” and “[n]o witness maintained that there should not be discipline and strict obedience to orders,” and “[m]aintenance of control and discipline [is] essential to the success of any military operation”); see also R. v. Généreux, [1992] 1 S.C.R. 259, para. 60 (Can. S.C.C.) (describing the “[p]urpose of a [s]ystem of [m]ilitary [t]ribunals” as the logical way to efficiently address combat readiness, combat effectiveness, and morale, despite its demands for speedy and sometimes severe punishment that would be inappropriate in a civilian context); Westmoreland, *supra* note 80, at 6 (remarking that the aims of military justice include deterrence of conduct that, “in the military [could be] infinitely more serious to soldiers, to the military organization as a whole, and to the Nation . . . [which] must be deterred by criminal sanctions,” but the aims also include protecting the “discipline, loyalty, and morale,” protecting the “integrity of the military organization and the accomplishment of the military mission,” and “must also provide a method for the rehabilitation of as many offenders as possible”).

85. George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 30 (2000) (quoting SHERMAN, *supra* note 15, at 132); GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 2 (2012). For a discussion of American use of military commissions and non-courts-martial tribunals during periods of martial law or military occupation of a foreign country, see Dehn, *supra* note 82; BRAND, *supra* note 62, at xv (“[T]he ends of military justice are best served by more speedy and more certain action on the part of the court than is possible under the usual safeguards of individual rights which the civil law provides.”).

86. Lieut. Arthur W. Lane, *The Attainment of Military Discipline*, 55 J. MIL. SERV. INST. U.S. 1, 15 (1914) (“[E]very breach of discipline decreases the efficiency of the army; hence it is the duty as well as the right of those in command to administer such punishment as will tend to prevent a repetition of the offense by anyone in the military service . . . [p]unishment

We must set aside certain questions for now for the sake of this thought experiment. For instance, questions of how much unfettered discretion such military commanders ought to have in a criminal justice system (including discretion on the timing of initiation and termination of punitive processes), and of what types of corrective or disciplinary options they might employ are necessary follow-on questions, assuming that Congress would in fact legislate a military criminal code. But at this point, it is enough to pause and ponder what this hypothetical Chairman would now reasonably claim or assert.

Being one of the service members over whom such a criminal code would have jurisdiction, this senior military leader would surely recognize that these restrictive conditions on service member behavior, and the disciplinary authority granted to commanders, may appear to risk dimming their own presumably esteemed constitutionally protected civil liberties: in general, the right to complain and object to government actions, the right to assemble and air grievances, and the right to a degree of privacy free from intrusive government investigation.⁸⁷ Indeed, even the basic tenet that a person has an inalienable claim to their own “life, liberty, and the pursuit of happiness” is alienated by such conditions and authorities. He would agree, again based on long experience, that military service is like living in a “separate community,”⁸⁸ but would likely suggest that it is not an exercise in surrendering all of one’s constitutional or natural rights. Some rights, he would likely declare, are inviolate while others must be modified to suit military exigencies.⁸⁹ He would suggest that exercising the full powers of the office, arbitrarily and capriciously, would be an example of poor command leadership and would manifest disrespect for the very rule of law that gave birth to the kind of government that separates and subordinates the military to civilian authority.

has three objects: retribution, deterrence and reform [but] [d]eterrence is the primary object.”).

87. *See generally* Parker v. Levy, 417 U.S. 733 (1974); Kehrli v. Sprinkle, 524 F.2d 328 (10th Cir. 1975) (discussions of the intersection of the First Amendment with Article 134, UCMJ).

88. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 15 (2d ed. 1920); Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

89. *United States v. Kazmierczak*, 16 U.S.C.M.A. 594, 599 (1967) (“We start with the fundamental principle that persons serving on active duty in the armed forces of our country are not divested of all their constitutional rights as individuals. However, the Constitution itself recognizes that certain individual rights cannot appropriately be exercised in a military setting to the extent they can in the civilian community.”).

He would suggest that some of those powers are so “severe” that—even when used in good faith and respectful of due process—a commander-independent body distanced from executive authority, like the judiciary, is the more appropriate venue with more suitable professionals.⁹⁰

With these observations at the heart of his recommendation to Congress, the Chairman would be granted discretion by the president (as commander-in-chief) and by Congress to design—for their approval—rules for “good order and discipline” of a new all-volunteer military. In this military chain-of-command, his authority to lead and administer will not be absolute, but subject to the lawful orders of elected and appointed civilian officials. His own orders to subordinates must also be lawfully based on some legitimate scope of authority granted by the civilian government. The Chairman would have no knowledge of the individual character, bearing, discipline, and personal desires of those who volunteer to serve, and the terms “good order” and “discipline” are not defined for him by law. Nevertheless, he knows that these individual members must use their training, instincts, and efforts in concert with other members to achieve certain military effects. He knows that this will occur in times of peace and in places of hostility where the risk of injury or death is high, at least relative to civilians who do not deploy to combat under orders. Moreover, while he believes that some behavior by those in the military could damage, impede, or frustrate his ability (and that of his subordinate leaders in the chain-of-command) to lead, train for, plan, and execute military operations, he has no foreknowledge of when or where these offenses will occur, who will commit them or why, or what consequences (if any) for his mission will follow.

Now it seems sensible to say, from the point of view of this hypothetical Chairman, that Congress would approve of “good order and discipline rules” that are sensitive to these conditions and features of military life, provided that his characterizations hold and his normative judgments are credible. What broad parameters would then influence the design of these rules? A fair—and ideally complete—accounting would reveal four parameters. First, they must make up part of the “package” of benefits and opportunities that attract civilians into the service, or at least not be a factor that discourages their enlistment by fear or ignorance of its rules. We

90. *Powell Report*, *supra* note 80, at 11–12.

might call this the *principle of nonrepulsion*. Second, they must not encourage those members in the service to, at some future point, leave out of fear or disdain for the system when comparing it to the rights, privileges, and liberties entertained under normal civilian law. They must account for satisfying and keeping those members best suited and fitted for the Chairman's purposes. We might call this the *principle of retention*. Third, they must effectively reduce the danger that service members can or could behave in ways that would tend to degrade the favorable conditions necessary for the commander's accomplishment of a mission. We might call this the *principle of mission risk reduction*. Finally, fourth, they must discourage disobedience and encourage duty fulfillment by those members who have subjected or will subject themselves to those prohibitory rules. We can call this the *principle of compliance*. Every rule of criminal procedure, adjudication standard, and substantive military criminal law (another way of saying H.L.A. Hart's primary and secondary rules⁹¹) should then be derived from and measured by one or some combination of these four principles.

D. *The Ideal Recruit*

Setting aside the general's preferences for a moment, we ought to ask what an otherwise typical, normal young adult—who will decide, voluntarily, whether to enlist in this hypothetical military—would expect and prefer. This is a natural question to ask and answer if we hold the Chairman's views to be sound and thorough, for the twin principles of *nonrepulsion* and *retention* are surely implicated by the attitude and esteem that an individual considering enlistment (and later, that of a serving member) has for the rules that will obligate her to forgo certain liberties and accept various constraints on her freedom of choice. This recruit would interpret the ultimate questions—should there be a separate criminal justice system for the military and what should it look like?—from a *different* vantage point than that of the general. The general would recommend features that regulate an entire ecosystem of rules and processes. These rules and processes govern a potentially sprawling bureaucracy and organization that manages a multitude of service members under a wide range of generic circumstances he can foresee based upon his experience. Our imagi-

91. H.L.A. HART, THE CONCEPT OF LAW 81, 94 (2d ed. 1994).

nary recruit, on the other hand, has no way yet to personally appreciate the scale and scope of this ecosystem. Rather than having perfect knowledge of the culture, the mission, or the bureaucracy, or specific knowledge of any other enlistee or her mission, the recruit must ponder her choice under a Rawlsian “Veil of Ignorance”—required to “evaluate principles [and options] solely on the basis of general considerations.”⁹²

In the absence of this specific knowledge, the recruit would—at least for the sake of this hypothetical—come to these questions knowing with assurance at least a few self-evident features of life and of her potential profession. If we indulge in the assumption that this recruit will make a reasoned choice voluntarily, one that satisfies her personal goals, needs, or inclinations, we may further claim that this is a person with sufficient common sense and appreciation for the world of everyday experience, even if she has not shared in that experience herself. She would know, even without being informed so by a recruiter, that a military exists to fight wars (however they may be defined). She would further know that a military is built from a preexisting population of many civilians, whose skills and knowledge would necessarily have to develop toward certain specified military benchmarks in order to professionalize these volunteers—that is, after all, a description of her at the current moment before she decides whether to enlist at all. She would further presume that the professional use of military force probably requires some form of rigorous training beforehand and expert coordination in its execution.

Based on these straightforward inferences, she could reasonably assume that others are considering voluntarily subjecting themselves to these rules, like she is. This recruit would deduce that this military is organized in a hierarchy of command and control, in which superior-ranking officers may dictate the actions of those junior in rank and position. She would conclude that those who subject themselves to these rules would be, under the many physically harsh, dangerous, and psychologically taxing conditions a reasonable person would presume to be part of warfare, required to work in concert with others to achieve objectives dictated by those superior authorities.

92. THEORY, *supra* note 37, at 118–23.

If this hypothetically blind recruit were to be asked what rules regulating her behavior she should expect to find under these conditions, she would necessarily assume its rules would not discourage interest in enlistment. If she is correct in believing that she will be required to work in concert with others to achieve military objectives under harsh, variable, and uncertain conditions, she will acknowledge that her own safety is at least partly dependent on the judgment and competence of others like her. Out of at least her own self-interest, she would prefer, therefore, rules and processes that permit the removal or dismissal of others who are deemed not best fitted for these conditions.

Knowing that she may one day find her own fitness to serve under scrutiny by her peers or superiors, and facing removal or dismissal from her employment, it would be reasonable for her to favor rules and processes for such investigative scrutiny and dismissals. It would also be reasonable for her to expect that some basic standard of fairness is applied universally without regard to any factor or influence except her competence or fitness to serve. In this, she would implicitly accept that her professional choices—and to an extent her life in which she makes those and other personal choices—are regulated by some larger set of prohibitory rules, instructions, customs, directives, and expectations established by her professional community. As before, she would want those who disobey those rules to be subjected to some adverse consequence out of a sense that such consequences would serve as a deterrent, or out of a visceral desire for retribution to signal her censure. And as before, she would know that she may one day find her own conduct under such scrutiny; she would again highly value rules and processes for such investigative scrutiny and potential punishment that meet some basic standard of fairness, applied universally, without regard to any factor or influence except her own conduct—that is, a system that only assesses what she does and why, not who she is, who she knows, or what she likes, or what she might yet do in the future.

At this point, as with the Chairman, we can conclude that this ideal recruit would favor or prefer a system of “good order and discipline rules” that is sensitive to these conditions and features of military life, provided that her assumptions hold. The same four broad parameters that informed the Chairman’s recommendations to Congress would influence her expectations of what such a military justice system will be in practice. That is, for the reasons listed

above, this recruit would *also* adopt the *principle of nonrepulsion*, *principle of retention*, *principle of mission risk reduction*, and *principle of compliance*. Both idealized hypotheticals suggest the same four underlying tenets would frame the military's rules for good order and discipline.

E. *A Brief Recap*

With a cautious set of (reasonable) assumptions about certain fundamental government regime characteristics—the legal separating and checking of powers, balanced against certain preferred rights and liberties—we created an oversimplified description of a hypothetical Congress and hypothetical president. Based on reasonable stipulations and conditions informing both how and why such actors would likely view the context for a possible military criminal code, we deduced that both bodies would likely prefer a system of rules that ultimately enabled them to perform their assigned constitutional duties more responsibly, effectively, and efficiently. This implied turning to the reasoned judgment and advice of seasoned, sensible, expert agents within the military to answer the question of whether a separate and distinctive military justice code is a reasonable—or the only—method for achieving such goals.

If the answer calls for such a code, a reasonable Congress and president situated with such accountability and authority would also likely defer to the discretionary managerial decisions of those expert agents, while retaining some degree of both oversight and strategic direction. Representing this body with a hypothetical Chairman of the Joint Chiefs of Staff, we reasoned that the military's understanding of what conditions tend to dictate the preparation and fighting of war, and what those conditions induce within or require of those who prepare and fight them, would lead it to believe that a separate system would indeed be appropriate, subject to its satisfying four fundamental principles. Because those four principles of nonrepulsion, retention, mission risk reduction, and compliance implicated the attitudes and preferences of those who would fall within the legal jurisdiction of such a code—the rank-and-file service members—we further reflected on what *that* body would envision if answering the same query from Congress and the president that the military leadership did. Representing this body with a hypothetical ideal recruit, we reasoned that the

potential volunteer contemplating employment within the profession of arms would naturally and reasonably conclude that the same four principles formed organizing tenets for the profession's method of self-discipline and internal control.⁹³

III. ONE COMMON THREAD TYING TOGETHER FOUR PRINCIPLES

But these implications—specifically, the four principles—are not the end of the analysis. Even a hypothetical and oversimplified legal fiction such as this, if it is to be a useful agenda for making decisions about amendments and reforms to real laws, must be informed by and constructed with elements of reality and common experience that the real parties would naturally expect and to which they would be responsive. At least one such element of reality and common experience is egoistic self-interest. Regardless of whether we think it is a dominating factor or instead merely incidental, and regardless of whether it is context dependent, this is a thread we see weaving throughout the description of both Congress and the president's "original position," as well as the preferences and ultimate expectations of both the creative general and ideal recruit.

Oliver Wendell Holmes believed that "at the bottom of all private relations, however tempered by sympathy and all social feelings, is a justifiable self-preference."⁹⁴ This self-preference is ultimately an instinct for self-preservation. It might be the case, then, that a military's criminal law is nothing more than a device to expand or inflate each individual military member's bubble of self-interest, preference, and preservation to include more selflessly his or her team, unit, organization, institution, and—ultimately—nation. Used by military commanders (as agents to their civilian principals and military superiors), military justice is not merely about "jus-

93. RAWLS, *supra* note 38, at 17 ("We characterize the original position by various stipulations—each with its own reasoned backing—so that the agreement that would be reached can be worked out deductively by reasoning from how the parties are situated and described, the alternatives open to them, and from what the parties count as reasons and the information available to them."); *see also id.* at 103 ("[This is a] simplified situation . . . in which rational individuals with certain ends and related to each other in certain ways are to choose among various courses of action in view of their knowledge of the circumstances. What these individuals will do is then derived by strictly deductive reasoning from these assumptions about their beliefs and interests, their situation and the options open to them.").

94. HOLMES, *supra* note 82, at 44.

tice” or even “discipline.” It also inculcates the professional community’s idea of the “right” values or norms (self-negating and community-benefiting values and norms) in their respective formations to deliver reliable armed forces (people) capable of delivering reliable armed force (action) when, where, and how it is ordered to do so.⁹⁵ General Douglas MacArthur’s famous “Duty, Honor, Country” speech at West Point in 1962 evoked this ideal quality of the American soldier faced with unendurable hardships and risks: “patience under adversity, of his courage under fire, and of his modesty in victory,” and the “enduring fortitude, that patriotic self-abnegation, and that invincible determination.”⁹⁶ He observed:

in memory’s eye I could see those staggering columns of the First World War, bending under soggy packs, on many a weary march from dripping dusk to drizzling dawn, slogging ankle-deep through the mire of shell-shocked roads, to form grimly for the attack, blue-lipped, covered with sludge and mud, chilled by the wind and rain, driving home to their objective, and for many, to the judgment seat of God.⁹⁷

This view of military justice as a tactical device to modify an individual’s instincts for self-preservation so that they now encompass a desire for securing a much larger population suggests that the nature of military justice is utilitarian. In Jeremy Bentham’s classic terms, “utility” is the “property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness,” but it also means “to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered.”⁹⁸ When an act or omission has the “tendency” to destroy a pleasure or produce a pain, the public is justified in punishing it.⁹⁹ Bentham’s utilitarianism, if applied to designing a criminal code, would consider the maximum good for the maximum number of people in a particular community when it articulates what ought to be done, what acts ought to be prohibited, and what acts are permissible but not mandatory.

95. Reliability of military service members as a goal of military justice is rarely argued; for the exception, see MAGGS & SCHENCK, *supra* note 85, at v.

96. Douglas MacArthur, Sylvanus Thayer Award Acceptance Address (May 12, 1962) (transcript available at <https://www.americanrhetoric.com/speeches/douglasmacarthurtheyaward.html> [<https://perma.cc/3EP3-NP2J>]).

97. *Id.*

98. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Dover Publ’ns 2007) (1780).

99. *Id.* at 41.

But it is not obvious or necessary why it should be the case that any criminal law system, let alone military-specific criminal justice, must consider *all* interests (the sum of pains and pleasures) of *all* members equally compelling when calculating the greatest good, nor is it clear how generic “utility” will clarify what a system is to do when accounting for the foreseeable event that community members’ individual interests, or collective interests, collide and conflict.¹⁰⁰ Not every person, or every community, measures the value of pain and pleasure with the same definitions of “intensity,” “duration,” “certainty,” “propinquity,” “fecundity,” “purity,” and “extent”—or even by these same variables.¹⁰¹ So it would seem that Bentham’s utilitarianism may over-generalize and blur relevant distinctive characteristics and behaviors of this military community.

Perhaps there is a better way to acknowledge the reality of egoistic self-interest and its relationship to the four principles we have deduced from our thought experiment. Through all of its rules and regulations, customs and courtesies, and laws and norms, the military attempts to deprioritize one’s self-regard and prioritize group-regard. This is not unique to the military: various religions also attempt to shift or reprioritize the balance of one’s regard; various professions and vocations, like medical practice, law enforcement, and firefighting do the same. But the military takes this reprioritization to another level: it demands it upon pain of criminal penalty.

But this yields a potential paradox. Taken to its logical extreme, there would be no demand signal in the system of military justice, or in the tactical application of it case-by-case, for what we know are commonly accepted principles and values protecting, among other things, due process rights of defendants, the rights of certain victims, or even the appearance of what we understand to be fundamental fairness to an individual accused of misconduct and facing punishment. Yet, such principles and values *are* observed, both in the rules of procedure in military criminal codes *and* in general philosophies of moral and ethical codes expected to be self-consciously adopted by military “professional[s]” and “warrior[s],” like honor, gallantry, bravery, teamwork, and “intestinal fortitude.”¹⁰²

100. THEORY, *supra* note 37, at 150–51.

101. BENTHAM, *supra* note 98, at 29–31.

102. JANOWITZ, *supra* note 62, at 215–32. Though many of Janowitz’s observations about

This is a little like Clausewitz's abstraction of "absolute" war. If we consider only what the violent actors wished to do for *their own* ends, there is no external stopping rule—violence builds and escalates in waves as each belligerent seeks advantage over the other and reacts to the other's moves and intentions. Yet, war (like the law) is never *actually* total or absolute in this sense at all. Clausewitz painted this picture to emphasize the real-world variables that real militaries and political leaders ought to understand.¹⁰³ He recognized that the very nature of war incorporated within self-generating restraints that—at times unintentionally—reduce the scale of violence and dampen the danger posed by each side. "Friction" caused by a lack of clear or timely information, freak accidents, personality failings and relationship flaws among key leaders, visceral and unpredictable human reactions to fear and violence among noncombatants or the rank-and-file troops, tactical blunders and strategic genius, popular will and public attention, and bounds imposed by law are all features of any armed conflict that characterize its range, duration, and risk, and make real warfare far different than war "on paper."¹⁰⁴

Considering what might emerge from the "helmet of ignorance" thought experiment, we might consider those four principles of nonrepulsion, retention, mission risk reduction, and compliance as the kind of Clausewitzian "friction" that makes military justice *in practice* less dynamic and more measured, less blunt and more nuanced, less controlled and more unpredictable than it appears to be on paper.

CONCLUSION: FROM THOUGHT EXPERIMENT TO THEORY

*"The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion."*¹⁰⁵

the life and community of a soldier have evolved in the six decades since he wrote, the professional's "code" of martial virtues and values remains largely the same. See, e.g., *Soldier's Creed*, U.S. ARMY, <https://www.army.mil/values/soldiers.html> [<https://perma.cc/NJT9-X93W>]; *Ranger Creed*, U.S. ARMY, <https://www.army.mil/values/ranger.html> [<https://perma.cc/XHP6-4CEY>].

103. CLAUSEWITZ, *supra* note 60, at 75–89.

104. *Id.* at 119.

105. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

This curt rejection of deeper meaning in military justice is now proven unsatisfactory. It was the Court itself, in *Ortiz*, that inadvertently proved it when the Court rejected the long-dominant emphasis on *discipline* in favor of emphasizing *justice* (with discipline as a useful, but incidental, side effect). Along with recurring interest in reform by Congress, the possibility of interventions by commanders-in-chief into particular prosecutions, and the slow but inevitable “civilianization” of military law, the logic employed in cases like *Parker v. Levy* is ripe for rethinking. To answer questions like who should manage the military’s criminal law, and what should that criminal law actually prohibit and punish, and for what reasons, the Court (and lawmakers, and commanders) would, before *Ortiz*, have relied on a simple chain of reasoning, all of which necessarily depends on deferring to the judgment of the uniformed specialists. The logic chain goes something like this: wars will happen, so polities need militaries to protect the sovereignty and security of those polities; militaries need to be competent, and competence demands discipline and obedience; discipline and obedience is the sole purview and responsibility of commanders; misconduct—any misconduct—undermines, in one way or another, the chain-of-command’s ability to forge and sustain disciplined and obedient troops; ergo, misconduct is a threat to commanders’ missions and readiness to execute those missions; thus, commanders must be the primary actor through which military justice happens.¹⁰⁶

But to reconcile what appears to be a paradox implied by our thought experiment’s four principles, we need some defensible justification that explains how both drives—that of self-negation for the greater good and systemic protection of rights—can logically and practically coexist. In other words, what set of principled ideas—satisfying the tacit demands of the four principles of *nonrepulsion*, *retention*, *mission risk reduction*, and *compliance*—will justify the duty of self-negation for the benefit of the unit or military community, enforced through a very specific kind of criminal law, and yet protect fundamental, widely desired rights of the individuals in that military unit or community?

It is beyond the scope of this Article to put meat on these bones. But we can at least sketch the shape of those bones and begin to

106. For both a thorough description and critical assessment of this standard reasoning, see Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. (forthcoming 2021).

sense the structure they help form. These four principles identify at the very minimum what a military justice system must do in a democratic republic in which civilian political leadership controls a deferential but legally managed military. As the public's interest and congressional oversight fluctuates, as the Supreme Court's limited military jurisprudence evolves, and as presidential interventions periodically dominate news cycles, both critics and defenders of the current American model of military justice should be better prepared to state their case. Ultimately, resolute calls for reform, whether drastic or incremental, and rigid defenses of the conventional status quo are simply an argument over just five core questions. First, what conduct is to be proscribed and subjected to punishment? Second, what punishments, forms of discipline, or administrative censure are available for violations? Third, what processes shall organize the steps from investigating to punishing violations? Fourth, who shall have discretionary agency within the ranks to administer these processes with investigative, prosecutorial, and judicial authority? Finally, what constraints, limits, or individual rights and liberties shall operate, assuring the accused due process, ensuring victims access to justice, and protecting everybody from that authority's abuses? Principles of nonrepulsion, retention, mission risk reduction, and compliance serve to frame the boundaries for the acceptable answers to those five questions.

Looking ahead, as a line of further fruitful research and argument, these principles and the paradox they seem to imply might yield an underlying super-rationale, or a general theory of military justice. That sort of rationale would go some way toward reconciling the principles with the paradox. At that point, a court, a commander, Congress, a commander-in-chief, or the average civilian (who may someday fall within its jurisdiction or is a family member of someone who already is within its reach) would be able to explain that this unique and alien criminal law is maybe not *just* a criminal law. Military justice's *raison d'être* would be better explained, and its means and methods better justified (or critically reviewed), using this super-rationale or "theory," rather than the simple reflexive resort to "it's about good order and discipline," or "it's about justice." Neither refrain is fully accurate, neither is fully defined, and neither is both necessary *and* sufficient justification for the system as it currently stands. Given the nature and purpose

of a military; given the role it plays subservient to civilian principals to achieve their political purposes;¹⁰⁷ given the professional character and agent-like responsibilities of its members; and given the professional, deliberately inculcated values of the military community at large, such a super-rationale does exist, it can be articulated, and it can be consistent with historical practice (of law and combat). To ignore this opportunity is to willfully, and stubbornly, don a kind of unproductive, unreflective, “veil of ignorance” that Rawls would have abhorred.

107. This assumes that those purposes are legitimate (i.e., within the scope of that civilian’s responsibility) and lawful (i.e., are not unconstitutional or in violation of an enacted statute).