

Even If It Ain't Broke, Why Not Fix It?

Three Proposed Improvements to the Uniform Code of Military Justice

Geoffrey S. Corn* & Victor M. Hansen**

Some might wonder what military justice has to do with national security. It is a fair question. While there is little doubt that the debate over the use of military commissions to try terrorist suspects involves important national security matters, it may be somewhat less obvious how the Uniform Code of Military Justice (UCMJ), the system Congress established to discipline our own military forces, relates to national security. It does for several reasons. First and foremost, good order and discipline within the military is a key component of military readiness and effectiveness. Second, the military justice system is a vital tool in the military commander's arsenal to ensure subordinate forces comply with the laws of war. Additionally, high profile incidents frequently arise which draw the attention of our allies, or enemies, and the general public to the military justice system. In those situations, the military justice system operates under intense scrutiny, and how the U.S. military disciplines its own forces can have a significant impact on the success or failure of the overall mission. For these and other reasons, an article that focuses on military justice is directly related to national security issues.

The UCMJ came into effect in 1951. Over the past sixty years it has proved to be an effective, resilient system of justice in both peacetime and war. Its resilience is in large measure a result of two important influences.¹ First, the system has been responsive to societal evolutions, ensuring that good order and discipline is achieved through a process considered fundamentally fair by participants within the system and observers without.² Second, the system's resilience is a result of continual efforts by military law experts to critique existing rules and recommend important adjustments to substantive and procedural aspects of military law.³ In the spirit of responsiveness and resilience, this article proposes what the authors believe are three important changes to the

* Presidential Research Professor of Law, South Texas College of Law; Lieutenant Colonel (Retired), U.S. Army Judge Advocate General's Corps. Professor Corn has served in a variety of military assignments, including as the Army's senior law of war advisor, supervisory defense counsel for the Western United States, Chief of International Law for U.S. Army Europe, and as a tactical intelligence officer in Panama.

** Professor of Law, New England Law, Boston. Professor Hansen served for twenty years in the U.S. Army. He has been a military defense attorney and military prosecutor involved in military capital litigation and, previously, an associate professor at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. © 2013, Geoffrey S. Corn & Victor M. Hansen.

1. DAVID A. SCHLEUTER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*, §1 (3rd ed. 1992).

2. *Id.*

3. *Id.*

UCMJ: (1) incorporating a “no-adverse-inference” warning into Article 31(b)⁴ (the military version of *Miranda* warnings), (2) transforming the Article 32⁵ pretrial investigation into a preliminary hearing process, and (3) expressly enumerating a limited category of offenses for which civilians accompanying the force in the field can be held responsible. While each proposal focuses on a different aspect of military justice – criminal investigations, pretrial hearings, and trial procedures for civilians accompanying the force – each proposal is connected to a broader theme of ensuring fairness in the system while preserving military readiness. These proposals reflect the fact that an important aspect of maintaining good order and discipline is having a justice system that is seen by those within the system as fair. A system that gives lip-service to fairness but fails to provide important protections for those subject to military jurisdiction erodes confidence and trust in the system and in military authority itself. While we do not believe such erosion has yet occurred, we do believe that these three proposals will enhance actual and perceived fairness of the military justice system without producing any degradation to mission effectiveness or any significant additional burden on the resources relied upon to implement military justice.

This article explains how each of these proposed changes will eliminate aspects of the military justice process that are no longer rationally justifiable. For each proposed change, the article demonstrates how the change will actually further the underlying objective of the relevant UCMJ provision, and how, accordingly, these changes will further the interests of military justice by enhancing the reality and perception of legitimacy without undermining the ability to ensure good order and discipline.

I. ARTICLE 31(B): FULLY PROTECTING THE PRIVILEGE AGAINST SELF-INCRIMINATION BY ADDING A NO-ADVERSE-INFERENCE WARNING

In 1966, the Supreme Court issued its landmark decision in *Miranda v. Arizona*.⁶ Based on its extensive analysis of contemporary police interrogation practices, the Court concluded that the inherent coercion associated with custodial interrogation was so pervasive that it impermissibly undermined the Fifth Amendment privilege against self-incrimination.⁷ As a result, the Court held that statements made in custodial interrogation were presumptively coerced, and therefore inadmissible unless the interrogators ensured a knowing and voluntary waiver of the privilege against self-incrimination.⁸ The Court imposed the

4. See Uniform Code of Military Justice, Art. 31b, 10 U.S.C. §831b [hereinafter all UCMJ citations will be to the U.S.C.].

5. 10 U.S.C. §832.

6. 384 U.S. 436 (1966).

7. *Id.* at 458 (noting that, without adequate constitutional safeguards to combat the inherently coercive nature of custodial interrogation, no suspect’s confession can be considered truly voluntary).

8. *Id.* at 475.

requirement that the government comply with certain procedural safeguards – advising a witness of his or her rights during custodial interrogation and obtaining a waiver of those rights from the witness – as a condition precedent to introduction at trial of statements made by a witness while in custody.⁹ The ubiquitous *Miranda* warnings have become perhaps the most readily recognizable aspects of any decision in the Court’s history.¹⁰

Underlying the decision to require the warnings and waiver was the *Miranda* Court’s conclusion that informing a suspect of his or her rights and eliciting a voluntary waiver effectively restores confidence in the voluntariness of the suspect’s decision to submit to custodial interrogation.¹¹ Accordingly, use in trial of statements made following the requisite warnings and waiver would not violate the privilege against self-incrimination because proof of waiver would insure the presumptive voluntariness of the statements.¹² Absence of waiver left the presumption of involuntariness intact, rendering the statement inadmissible.

Compliance with *Miranda* was never, however, required for all police questioning. For the Supreme Court, it was the specific context of *custodial* interrogation that produced the level of inherent coercion to trigger compliance with these new procedural protections.¹³ *Miranda* was not the first recognition that the inherent coercion associated with interrogation undermined the free exercise of the privilege against self-incrimination, and that procedural safeguards were necessary to restore confidence that statements made by a suspect subjected to interrogation were in fact the result of a knowing and voluntary waiver of the privilege. Sixteen years prior to the *Miranda* decision, Congress incorporated into the UCMJ the military predecessor to the *Miranda* rule: Article 31(b).¹⁴

Article 31(b) provides:

No person subject to this chapter [persons subject to the UCMJ] may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial.¹⁵

9. *Id.*

10. See, e.g., *Miranda Waivers and Invocations*, POINT OF VIEW, 1 (Alameda County District Attorney’s Office, Alameda, California), 2006, available at <http://le.alcoda.org/publications/files/MIRANDAWAIVERSINVOCATIONS.pdf> (“While not as exalted as McDonald’s, Microsoft, or Madonna, *Miranda* also qualifies as an instantly recognizable name that is safely lodged in contemporary American culture”). Additionally, television programs such as *COPS* and *Dragnet* have made *Miranda*’s warning requirements an easily identifiable part of the detention and arrest process. See, e.g., Todd S. Purdum, *The Nation*; *Miranda as a Pop Culture Icon*, N.Y. TIMES, July 2, 2000, at §4.

11. 384 U.S. at 476.

12. *Id.* at 477.

13. *Id.*

14. 10 U.S.C. §831(b).

15. *Id.*

The requirements of Article 31(b) are not identical to the warning and waiver requirements established by the *Miranda* decision. In one sense, Article 31(b) is more protective – requiring the individual questioning a suspect to give notice of the nature of the suspected offense.¹⁶ It does, however, omit a significant protection mandated in civilian contexts by the *Miranda* decision: the right to have counsel present during the interrogation.¹⁷ However, consistent with the general practice of extending constitutional protections to members of the armed forces, the “*Miranda* right to counsel” was subsequently incorporated into military practice through a change to the Military Rules of Evidence (MRE).¹⁸ MRE 305(d) provides:

(d) *Counsel rights and warnings.*

(1) *General rule.* When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if –

(A) The interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.

This military right to counsel during interrogations does not, however, apply coextensively with Article 31(b). Instead, as the result of military jurisprudence extending the *Miranda* rights to the armed forces, it is triggered by situations that trigger the *Miranda* right to counsel: custody or its functional equivalent.¹⁹ Accordingly, MRE 305 defines military custody – the situation that triggers the

16. *Id.*

17. *See id.*

18. MILITARY RULE OF EVIDENCE 305(D), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

19. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *see also Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004) (holding custody, for purposes of *Miranda*, is determined by (1) an inquiry into the circumstances surrounding interrogation, and (2) a determination of whether a reasonable person would have considered himself at liberty to terminate the interrogation, under the circumstances).

MRE 305 right to counsel – to include any significant deprivation of a service-member’s freedom.²⁰

Article 31(b) and MRE 305 therefore not only fully extend *Miranda*-type protections to the military, but extend these protections even further by requiring *Miranda* warnings for individuals whenever subjected to official questioning, even if not in custody. As with *Miranda*, the core objective of these combined protections is to ensure that an individual subjected to interrogation in a presumptively coercive environment is afforded the information necessary to make a knowing and voluntary decision to submit to questioning by an authority who suspects criminal misconduct.²¹

The scope of the core protection – the requirement that a suspect be informed of the right to remain silent and the consequence of submitting to questioning – is broader in the military than in the civilian community.²² Custody is not required to trigger this right, as required by *Miranda* outside the military context.²³ Congress recognized that the nature of the military environment itself produces a level of presumptive coercion that undermines confidence in the free choice of servicemembers to submit to questioning.²⁴ Article 31(b) was intended to offset this coercion, restoring confidence that a military suspect’s submission to questioning was consistent with the privilege against self-incrimination.²⁵

This expansion of situations requiring a right-to-silence warning (analogous to that required by *Miranda* during only custodial interrogation), coupled with the coextensive application of a *Miranda* right to counsel, might suggest military suspects are sufficiently protected from the effects of presumptive coercion. While these protections are laudable, the real question is whether they are genuinely effective in arming military suspects with the information they need to meaningfully exercise the privilege against self-incrimination. While the authors are unaware of any empirical studies of the propensity of military suspects to waive their Article 31(b) rights, common experience suggests that the waiver rate is high, as it is with civilian suspects. This raises serious questions about the efficacy of the existing warnings to inform suspects of the most significant consequence of waiver: the risk of voluntary self-incrimination. The efficacy is certainly not undermined because suspects are unaware that submitting to questioning may create evidence to be used against them, as this is the core warning of both *Miranda* and Article 31(b). We assert it is the result

20. *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990).

21. SCHLEUTER, *supra* note 1, at 203-204.

22. *Cf.* MIL. R. EVID. 305(c) (2012); *see also* SCHLEUTER, *supra* note 1, at 201.

23. *See* MIL. R. EVID. 305(c). It is clear from the text of the rule that someone suspected of committing a crime under the UCMJ must be warned in accordance with Article 31(b) prior to any questioning, without regard to whether the suspect is in custody. *See* SCHLEUTER, *supra* note 1, at 203.

24. SCHLEUTER, *supra* note 1, at 201.

25. *Id.*

of the absence of a requirement to inform the suspect of the evidentiary consequence, or lack thereof, of deciding *not* to submit to questioning.

Of course, a high waiver rate could be attributable to causes other than the absence from the existing warnings of an explanation of the consequences of remaining silent. This, however, seems unlikely. As Professor Corn noted in a prior article critiquing the civilian *Miranda* warnings:

How did *Miranda* ultimately produce a net gain for the government – the high probability of waiver with the accordant “virtual ticket” to admissibility? Three apparent answers emerge. First (as Justice Scalia periodically asserts), perhaps waiver and confession by a criminal suspect is a logical and laudable action motivated by contrition and the desire to accept responsibility for criminal wrongdoing – a natural product of human catharsis. This conclusion is suspect. If true, the interrogation techniques on which police routinely rely to obtain confessions (albeit after a valid *Miranda* waiver) would generally be unnecessary; suspects would be inclined to confess of their own immediate volition. Second, perhaps the whittling away of the breadth of the *Miranda* decision by subsequent jurisprudence has practically nullified the protective impact of *Miranda*. This explanation is equally unlikely considering most confessions are obtained in the traditional custodial interrogation environment where compliance with *Miranda* remains an admissibility requirement that is routinely satisfied. Third, perhaps the *Miranda* warnings never truly achieved the intended objective of providing a suspect with the information necessary to ensure the decision to cooperate during a police interrogation was made knowingly and voluntarily and not the product of the coercion inherent during custodial interrogation. If the purpose of the warnings was to educate a criminal suspect of his right to refuse to assist the government in establishing guilt, perhaps suspects do not clearly and completely understand this right?

This Article embraces the latter explanation. Accordingly, it asserts that, contrary to the criticism that *Miranda* was overly protective of the rights of criminal suspects, the warnings required by that decision are, in fact, not protective enough. This accounts for the reality that most criminal suspects waive their rights and facilitate their own convictions.²⁶

It can be assumed that most military suspects, like their civilian counterparts, continue to waive their right to silence and submit to interrogation that frequently provides prosecutors with decisive evidence against them. This assumption calls into question the efficacy of even the expanded military protection. Even without such an assumption, a review of the core purpose of *Miranda* type warnings – to protect the privilege against self-incrimination by facilitating an informed decision as to whether to submit to government interrogation – justifies considering whether the existing range of warnings is sufficient to achieve this purpose.

26. See Geoffrey S. Corn, *The Missing Miranda Warning: Why What You Don't Know Really Can Hurt You*, UTAH L. REV. 761, 769-780 (2011).

A. *Do the Current Rights Warnings Genuinely Protect the Privilege?*

Article 31(b), like *Miranda*, is premised on a critical assumption: informing a suspect of the right to remain silent and the consequence of submitting to interrogation effectively ensures a meaningful exercise of the privilege against self-incrimination.²⁷ Is this assumption valid? The facts suggest the answer is “no.” Contrary to the dire predictions that *Miranda* warnings would almost always result in invocation of the right to silence (and thereby deprive police of confessions), the vast majority of custodial suspects waive their *Miranda* rights, submit to questioning, and routinely provide powerful evidence that may be used against them.²⁸ Post-*Miranda* experience demonstrates that the warning and waiver requirement in no way disabled the efficacy of custodial interrogation as a police investigatory tool. This experience contributed to the Supreme Court’s subsequent decision to uphold *Miranda* when the constitutionality of the core ruling was challenged several decades later.²⁹

Ironically, *Miranda* has produced a net benefit for the government. Because most suspects waive their *Miranda* rights, the government continues to successfully elicit confessions in almost ninety percent of the situations where suspects are subjected to custodial interrogation.³⁰ Furthermore, because the *Miranda* waiver is almost conclusive proof that these confessions are in fact voluntary, the government is rarely forced to litigate, much less face challenges based upon assertions of actual coercion in violation of due process. Indeed, as Justice Anthony Kennedy noted in *Missouri v. Seibert*, “giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; [a suspect’s] maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver.”³¹

27. This section builds Corn’s argument that the *Miranda* warnings themselves never fulfilled the objectives of that decision because they did not include a requirement to inform suspects that no-adverse-inference may be drawn from invocation of the right to silence.

28. Corn, *supra* note 26, at 770.

29. See *Dickerson v. United States*, 530 U.S. 428 (2000). In *Dickerson*, the Supreme Court was offered the opportunity to overrule *Miranda* by concluding that a federal statute resurrecting the pre-*Miranda* actual voluntariness test for admissibility of custodial statements trumped the *Miranda* warning and waiver requirement. Writing for a seven-Justice majority, Chief Justice William H. Rehnquist held that because *Miranda* was a constitutional decision, Congress could not substitute a less protective standard for the requirement. The Court’s analysis relied, in part, on its recognition that *Miranda* never produced the debilitating effect on law enforcement predicted when it was decided. Instead, the Court recognized that the high proclivity of suspects to waive their rights and the almost insurmountable presumption of actual voluntariness resulting from waiver indicated that the clarity provided by the *Miranda* requirement actually produced a net gain for the government. The Court noted that the voluntariness test Congress sought to re-impose lacked the benefit of clarity provided by *Miranda* – clarity that over time proved to contribute to the efficient prosecution of criminal misconduct. Thus, the benefit of overruling the decision did not outweigh the uncertainty it would produce.

30. *Id.*

31. 542 U.S. 600, 608-609 (2004).

A logical explanation for the inconsistency between the expected consequences of the *Miranda* decision and the actual consequences is that *Miranda* warnings were deficient from inception.³² The one warning a suspect truly needs to make an informed decision to waive the right to silence and submit to questioning is the one that has always been missing: that *silence* cannot be used against her.³³ An average lay person can rationally deduce that the answers to police questions will be used against her. But what the average lay person cannot rationally deduce is that silence in the face of police accusation cannot be used as evidence to infer guilt.³⁴ Accordingly, unless a suspect is informed that invoking the right to silence will not result in any adverse evidentiary inference, the decision to waive the right and submit to questioning can never be the product of a knowing and intelligent waiver.³⁵

This proposal to add to existing *Miranda* warnings the information that the choice to invoke the right to silence cannot result in any negative evidentiary consequence is bolstered by analogy to Supreme Court decisions prohibiting prosecutors from commenting on an accused's silence at trial, a prohibition equally applicable to military criminal practice.³⁶ These decisions, which also provide an accused with an absolute right to a no-adverse-inference instruction, are based on the Court's determination that the lay instinct to equate silence with guilt is so powerful that absent these protections an accused will be compelled to testify at trial.³⁷ The logical extension is clear: if this "silence equals guilt" instinct is so powerful an invalid influence among jurors, then it must produce an even more powerful (and invalid) influence on a suspect confronted with an allegation of wrongdoing by police.³⁸ Therefore, like the jury, the suspect should receive notice that as a matter of law, silence in the face of the accusation has absolutely no evidentiary impact.³⁹

Article 31(b) – even when supplemented by MRE 305 – does not require a servicemember subject to questioning to be informed that invoking the right to silence produces no adverse evidentiary consequence.⁴⁰ Instead, military suspects, like their civilian counterparts, are vulnerable to the identical lay instinct that refusing to submit to questioning will produce an inference of guilt. As in the civilian context, the potential impact of this instinct on the proclivity of servicemembers to waive their Article 31(b) rights and submit to questioning is difficult to ignore. Indeed, the subtle pressure to respond to allegations of

32. Corn, *supra* note 26, at 779.

33. *See id.* at 763.

34. *See id.* at 781-782.

35. *Id.* at 771.

36. *Id.* at 783-784 (*citing* Griffin v. California, 380 U.S. 609, 614 (1965)).

37. *Id.* at 784-785.

38. *Id.* at 770-771.

39. *Id.* at 795.

40. *Cf.* MIL. R. EVID. 305(c).

misconduct is probably even stronger in the military environment.⁴¹ This reality only exacerbates the impact of what we call “the missing *Miranda* warning.”

*B. Military Society, Inherent Coercion, and the Absence of a
Custody Trigger for Article 31(b)*

Proposing an expansion of *Miranda* warnings undoubtedly cuts against the grain of contemporary *Miranda* jurisprudence. Since the *Miranda* decision, the Court has engaged in an ongoing restriction of *Miranda*’s impact, ranging from endorsing a public safety exception to restricting the evidentiary impact of a *Miranda* violation. If, however, the *Miranda* warnings are in practice functionally deficient to fully offset the subtle, inherent coercion of interrogation, their deficiency is logically most notorious in the military context. This is because the very nature of military society exacerbates that inherent coercion. Accordingly, there is no context where the need for this additional no-adverse-inference warning is more important than in the military.

The pervasive degree of inherent coercion naturally associated with military society was, in fact, the primary rationale for expanding the triggering situations for the warning and waiver requirement of 31(b). As noted above, this remains one of the most significant differences between *Miranda* and Article 31(b).⁴² Unlike *Miranda*, Article 31(b) is triggered whenever: (1) the person being questioned is suspected of having committed an offense, and (2) the person doing the questioning is subject to the UCMJ.⁴³ In relation to the no-adverse-inference warning proposed here, the significance of this expanded scope is not that Article 31(b) warnings are required in many circumstances in which *Miranda* warnings are not. It is, instead, the underlying rationale for requiring 31(b)’s expanded scope of applicability.

Custody has always been central to understanding the *Miranda* warning and waiver requirement. *Miranda* and subsequent Supreme Court decisions interpreting the meaning of custody for purposes of triggering *Miranda*’s requirements emphasize that while all police questioning produces some inevitable coercion, it is only the type of coercion produced in the custodial environment that erodes confidence in the voluntariness of a suspect’s cooperation with police so pervasively that a procedural offset is necessary.⁴⁴ *Miranda* warnings and waiver have never been required outside the context of custody because only custodial interrogation necessitates requiring the government to establish that the suspect’s cooperation with police was the product of a voluntary relinquishment of the privilege against compelled self-incrimination.

Why then would applicability of Article 31(b) be so much broader in scope? One possible answer is that Congress incorporated Article 31(b) into the UCMJ

41. SCHLEUTER, *supra* note 1, at 201.

42. See *supra* notes 24-25, and accompanying text.

43. 10 U.S.C. §831b.

44. *Miranda*, 384 U.S. at 479.

several years before *Miranda* was decided, and therefore adopted a warning and waiver requirement triggered by any interrogation, irrespective of the context. Had this been the case, then arguably Congress would have amended the scope of Article 31(b) following the *Miranda* decision, an amendment never attempted. Instead, the answer is far more rational. Like *Miranda*, Article 31(b) was intended to offset a special type of inherent coercion that erodes confidence that a suspect's cooperation with interrogators was in fact voluntary, and that the mere decision to submit to interrogation implied a knowing and intelligent waiver of the privilege against self-incrimination.⁴⁵ However, the absence of a custody trigger for the Article 31(b) warning requirement suggests Congress recognized that in military society, custody is not necessary to produce the coercion that results in this erosion. The very nature of military society itself, when coupled with official questioning, produces sufficient inherent coercion to necessitate a procedural offset to restore confidence that the submission to questioning was truly voluntary.⁴⁶ Indeed, this understanding of the relationship between military society and inherent coercion related to questioning of service-members has been a consistent theme in military appellate jurisprudence.

In *United States v. Jones*,⁴⁷ the Court of Military Appeals overturned an Air Force Senior Airman's conviction for violating lawful general regulation⁴⁸ under UCMJ Article 92,⁴⁹ in regard to tax-exempt vehicles she was accused of importing into the Philippines and illegally transferring to local residents.⁵⁰ The court reasoned that the regulation, as applied, violated Jones' Fifth Amendment right against self-incrimination.⁵¹ Jones invoked her right not to incriminate herself, and was prosecuted for her silence.⁵² Had the investigators been under a requirement to warn her that her silence could not be used against her, it would have been difficult, if not impossible, to prosecute her on that basis alone.

In *United States v. Swift*,⁵³ an Airman appealed his conviction for a number of UCMJ offenses, including making false official statements⁵⁴ (3 specifications), impeding an investigation, bigamy, and writing bad checks⁵⁵ (2 specifications). Airman Swift's wife (the first Mrs. Swift) became suspicious that he was involved in another relationship after receiving a call from someone claiming to be his wife.⁵⁶ The caller also claimed that Swift had divorced the first Mrs.

45. SCHLEUTER, *supra* note 1, at 203-204.

46. *Id.* at 201.

47. 31 M.J. 189 (C.M.A. 1990).

48. *Id.*

49. 10 U.S.C. §892.

50. *Jones*, 31 M.J. at 190.

51. *Id.* at 192.

52. *Cf. id.* at 192-93.

53. 53 M.J. 439 (C.A.A.F. 2000).

54. 10 U.S.C. §907.

55. 10 U.S.C. §934.

56. 53 M.J. at 441.

Swift in 1994.⁵⁷ The first Mrs. Swift relayed this information to Airman Swift's commander and stated that although she lived apart from him, she was not aware of any divorce.⁵⁸ In response, Swift's commander initiated an investigation.⁵⁹

During the investigation, Swift's first sergeant informed him of the phone call from his wife, questioned him about the purported divorce, directed Swift to produce a copy of the divorce decree, and informed him of the UCMJ penalty for bigamy.⁶⁰ Airman Swift maintained that he had divorced the first Mrs. Swift in 1994 and produced what later proved to be a falsified divorce decree.⁶¹

When Airman Swift was brought to trial by court-martial, he moved to suppress the statements made in response to his first sergeant's questioning and the false divorce decree. The military judge denied the motion and admitted all this evidence.⁶² The Court of Appeals for the Armed Forces (CAAF) reversed Swift's conviction for making a false official statement because, without the unwarned statements, there was no evidence to support the charge.⁶³ In its discussion of the rights warnings required under Article 31(b), CAAF acknowledged the inherently coercive nature of the military environment, describing it as follows:

In the armed forces, a person learns from the outset of recruit training to respond promptly to the direct orders and the indirect expectations of superiors and others, such as military police, who are authorized to obtain official information. Failure to respond to direct orders can result in criminal offenses unknown in civilian life, see, e.g., Arts. 90 and 91, UCMJ, 10 USC §§890 and 891, respectively. Failure to respond to the expectations of military life can lead to charges of dereliction of duty, see, e.g., Art. 92, UCMJ, 10 USC §892, as well as serious administrative consequences, see, e.g., Department of Defense (DoD) Directive 1332.14 Enlisted Administrative Separations (1993).

In such an environment, a question from a superior or an investigator is likely to trigger a direct response without any consideration of the privilege against self-incrimination. The Article 31(b) warning requirement provides members of the armed forces with statutory assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked. See *United States v. Gibson*, 3 USCMA 746, 752, 14 CMR 164, 170 (1954).

57. *Id.*

58. *Id.* at 442.

59. *Id.*

60. *Id.* at 442-443.

61. *Id.* at 443.

62. *Id.* at 444.

63. *Id.*

Another special feature of military life is the blending of both administrative and law enforcement roles in the performance of official duties. Officers and non-commissioned officers (NCOs) in particular, have broad responsibility not only for the accomplishment of specific missions, but also for the health, welfare, morale, good order, and discipline of their subordinates. As a result, a servicemember may perceive that a question from an officer or NCO is being asked for administrative purposes, although the purpose actually may be to acquire information for use in disciplinary proceedings.⁶⁴

This discussion of the inherently coercive nature of questioning in the military emphasizes the underlying rationale for Article 31(b) and the protections of the military courts: to protect servicemembers from a pressure they intuitively understand from the inception of their service. The very nature of military society produces subtle (and oftentimes not so subtle) coercion to be responsive when confronted with an allegation of misconduct.⁶⁵ This subtle coercion undermines the ability of servicemembers to exercise their constitutional right to silence in the face of accusation, which is precisely why Article 31(b) is applicable in non-custodial situations.⁶⁶ If, therefore, a no-adverse-inference warning is a justifiable – if not essential – enhancement to the prophylactic protection of the privilege against self-incrimination, the need for this warning seems most compelling in the military questioning context.

The expanded scope of Article 31(b) is therefore a logical response to the almost axiomatic proposition that questioning of a servicemember by another person acting in a position of official military authority is itself sufficient to produce the type of inherent coercion that motivated the *Miranda* Court to impose procedural safeguards for the exercise of the privilege against self-incrimination. Custody certainly exacerbates this inherent military coercion, but custody is not the key which triggers a prophylactic warning requirement under Article 31(b). It is equally logical to conclude that the inherent pressure from the natural (albeit legally invalid) lay assumption that silence in the face of accusation infers guilt is much more pervasive in the military context.⁶⁷ Adding to Article 31(b) a warning that invoking the right to silence produces no-adverse-inference would, like adding it to *Miranda* warnings,⁶⁸ be an important step in fulfilling the original protective purpose of the article: to enable a knowing and intelligent exercise of the privilege against self-incrimination.⁶⁹

The nature of military society supports the conclusion that this additional warning is essential to effectuate the free exercise of the privilege against

64. *Id.* at 445-446.

65. *Cf. id.* at 445.

66. *Id.*

67. *See id.* at 439.

68. Corn, *supra* note 28.

69. *See* Manuel E.F. Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?*, 123 MIL. L. REV. 151, 187 (1989).

self-incrimination. Servicemembers live within a culture that prizes candor, integrity, and personal responsibility.⁷⁰ The values of military society – values that are drilled into the minds of servicemembers from the very outset of their training – conflict sharply with the privilege against self-incrimination, a privilege at the very core of the adversarial legal tradition.⁷¹ The absolute right to remain silent in the face of government accusation is regarded as perhaps the most important constitutional protection afforded to criminal suspects,⁷² and Congress explicitly extended it to members of the armed forces when it adopted Article 31(b). Nonetheless, because these required warnings do nothing to offset the powerful instinct that duty demands candor in response to official questioning, in military society standing on that right may often be perceived as inconsistent with the core duties of military service.⁷³

Article 31(b) was a progressive and important step to ensure servicemembers do not confuse the duties inherent in military service with an obligation to assist the government in substantiating allegations directed against them.⁷⁴ By requiring notice of the right to remain silent, Congress sought to ensure that servicemembers would not assume an obligation to cooperate with military authorities when questioned about a suspected criminal offense.⁷⁵ However, like their civilian counterparts, the proclivity of military suspects to waive the right to silence calls into question the efficacy of the existing warnings. For servicemembers, this efficacy is further undermined by the intense military cultural ethos requiring servicemembers to be forthcoming and candid with superior authority, and to accept responsibility for transgressions.⁷⁶

Servicemembers confronted with an allegation of misconduct by superior military authority – whether a member of the formal chain of command or military law enforcement personnel acting in their official capacity – need to be told more than the obvious in order to make an informed and intelligent decision as to whether to submit to questioning. The warning currently required by Article 31(b) is relatively self-evident: that anything servicemembers say can be used against them.⁷⁷ While it is clear that Article 31(b) is more protective than the warnings required by *Miranda* (both in scope of applicability and because of the required notice of the suspected offense),⁷⁸ without the addition of a no-adverse-inference warning, even Article 31(b) may be insufficient to

70. *Id.*

71. *Id.*

72. *Miranda*, 384 U.S. at 460.

73. *See* *Swift*, 53 M.J. at 452.

74. *Id.* at 445.

75. *Id.* at 448.

76. *Id.*

77. 10 U.S.C. §831(b).

78. *See* *United States v. Gardiner*, 65 M.J. 60 (C.A.A.F. 2007) (holding that *Miranda* warnings are not a sufficient substitute for Article 31(b) warnings, because even though Gardiner had been properly read his required *Miranda* rights, Article 31(b) notice is a “corresponding requirement” with “particular significance in the military context”). *Id.* at 62-63.

fully effectuate the underlying objective of a truly knowing exercise of the privilege against self-incrimination.

When questioned by military authorities, it is fairly logical for servicemembers to assume their answers will be used for official purposes.⁷⁹ Article 31(b)'s requirement to notify the suspect of the general nature of the offense for which she is suspected adds to the strength of this assumption.⁸⁰ As a result of this notice, the servicemember knows that the questioning authority is in the process of investigating misconduct.⁸¹ This can only bolster the assumption that any statements provided will be used to resolve the accusation of misconduct.

However, this assumption arises only when questioning is clearly part of an underlying official investigation. *United States v. Norris* was an appeal from the U.S. Navy-Marine Corps Court of Criminal Appeals.⁸² Norris was charged with raping a teenager whose father was also a member of his unit (although not in his chain of command),⁸³ and superior in rank to him. During a meeting in the father's office, during which the father inquired about letters exchanged between Norris and his daughter, Norris made statements that led to a subsequent investigation of his illegal conduct with the teenage girl.⁸⁴ Norris thought the meeting was not personal in nature, instead claiming he assumed he was subject to the military authority of the father, who outranked him, throughout the conversation.⁸⁵ Because of this, Norris believed his conversation should not be admitted because he was questioned by a member of the armed forces of superior rank who failed to advise him of his Article 31(b) rights.⁸⁶

Rejecting Norris' assertion, the court noted that an accusation of rape did not arise until after the initial meeting.⁸⁷ Though the father suspected there might be something unusual occurring between Norris and his daughter, there was no criminal investigation and Norris was not subject to questioning as a suspect.⁸⁸ Indeed, there was not enough information available yet for any charge in violation of the UCMJ.⁸⁹ Since "Congress did not intend [Article 31(b)] to apply to every conversation between members of the armed forces regardless of the circumstances," the personal conversation between the father and Norris did not rise to a level requiring a strict notice requirement.⁹⁰ Such a notice require-

79. Jones, 31 M.J. at 192; see also *United States v. Williams*, 29 M.J. 112 (C.M.A. 1989) (recognizing a required records exception to Article 31(b)); *United States v. Lee*, 25 M.J. 457, 459 (1988) (holding compulsory "show and tell" regulation unconstitutional, as applied to servicemember suspected of violating the regulation).

80. 10 U.S.C. §831(b); see also *Supervielle*, *supra* note 69, at 206.

81. 10 U.S.C. §831(b).

82. 55 M.J. 209 (C.A.A.F. 2001).

83. *Id.* at 213-214.

84. *Id.*

85. *Id.*

86. *Id.* at 214.

87. *Id.* at 215.

88. *Id.*

89. *Id.*

90. *Id.*

ment is thus only required in the context of investigation into suspected criminal activity.

What is not obvious to a lay person, and especially not to a member of the armed forces, is that silence in the face of official accusation results in no adverse evidentiary consequence.⁹¹ Like *Miranda* warnings, Article 31(b) warnings (even when supplemented by a MRE 305 right to counsel warning), do not provide this notice to a suspect.⁹² Instead, suspects are left to ponder the consequence of silence. Requiring a military suspect to make such a critical (and often detrimental) decision to waive a fundamental statutory and constitutional right without being adequately informed of the full consequence of both waiver *and* invocation of silence is difficult to justify when considered in the context of the purpose of the existing warning and waiver requirement.

Ironically, in the context of the criminal trial, military law recognizes the pervasiveness of the lay instinct that silence in the face of accusation infers guilt.⁹³ However, in this context the focus is not on ensuring the accused understands his or her right not to testify (although the accused is informed of this right). Instead, instruction is provided to prevent lay jurors (panel members) from drawing any adverse inference from the accused's silence at trial.⁹⁴ In order to offset the lay instinct that any person falsely accused would contest the accusation, court-martial instructions require panel members to be informed that the accused has an absolute right to remain silent, and that as a result it is impermissible to draw any adverse inference against the accused for failing to testify.⁹⁵

These instructions are analogous to instructions required in all civilian trials. This requirement is the result of Supreme Court jurisprudence.⁹⁶ This jurisprudence, based on protecting the privilege against self-incrimination, established

91. Supervielle, *supra* note 69, at 187.

92. *Cf.* MIL. R. EVID. 305.

93. For example, the standard instruction used for Army courts-martial provides:

MJ: (You heard)(A question by counsel may have implied) that the accused may have exercised (his)(her) (right to remain silent)(and)(or)(right to request counsel). It is improper for this particular (question)(testimony)(statement) to have been brought before you. Under our military justice system, servicemembers have certain constitutional and legal rights that must be honored. When suspected or accused of a criminal offense, a servicemember has (an absolute right to remain silent)(and)(or) (certain rights to counsel). That the accused may have exercised (his)(her) right(s) in this case must not be held against (him)(her) in any way. You must not draw any inference adverse to the accused because (he)(she) may have exercised such right(s), and the exercise of such right(s) must not enter into your deliberations in any way. You must disregard (question)(testimony)(statement) that the accused may have invoked his right(s). Will each of you follow this instruction?

See HEADQUARTERS DEP'T OF THE ARMY, DEP'T OF THE ARMY PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK §2-7-20 (2002); *see also* United States v. Garrett, 24 M.J. 413, 418 (C.M.A. 1987) *vacated in part sub nom.* Garrett v. Lowe, 39 M.J. 293 (C.M.A. 1994); United States v. Sidwell, 51 M.J. 262, 262 (C.A.A.F. 1999); United States v. Jackson, 23 M.J. 841, 842 (A.F.C.M.R. 1987).

94. *Cf. id.*

95. *Id.*

96. *See, e.g.,* Doyle v. Ohio, 426 U.S. 610, 611 (1976).

two now-universal rules of criminal trial procedure.⁹⁷ First, it is per se reversible error for prosecutors to comment on an accused's silence at trial.⁹⁸ Second, an accused who chooses not to testify has an absolute constitutional right to a no-adverse-inference instruction on request.⁹⁹ Interestingly, in the latter case, the government argued that the lay instinct that silence infers guilt is so pervasive that a no-adverse-inference instruction can never eliminate the effect of this instinct.¹⁰⁰ The Supreme Court agreed with this argument, but held that the Constitution requires efforts to mitigate this invalid influence on the trial process, if requested by the defendant.¹⁰¹

It is difficult to reconcile the Supreme Court's express acknowledgment that the lay instinctual response to silence in the face of accusation is so pervasive that it necessitates a mandatory no-adverse-inference instruction – an acknowledgment also reflected in military trial practice – with its failure to provide a no-adverse-inference warning for suspects subject to government questioning.¹⁰² The same difficulty applies to Article 31(b). Court-martial instructions indicate a genuine concern that lay members of the armed forces do not properly understand the privilege against self-incrimination but, instead, harbor a legally invalid instinct that silence in the face of accusation infers guilt.¹⁰³ These instructions attempt to mitigate the impact of this inference by instructing panel members of its legal invalidity.¹⁰⁴ However, when the military suspect is confronted with accusation, no analogous effort is made to ensure she understands the same: that invoking the right to silence produces no adverse evidentiary consequence.

United States v. Dowell was an appeal from the Army Court of Military Review in which Private Dowell was being charged with unauthorized absences and aggravated assault.¹⁰⁵ His company commander visited him in pretrial confinement to discuss the charges against him and, during the visit, Dowell contested the charges.¹⁰⁶ The problem with this chain of events was not that the commander's visit occurred almost two weeks after Dowell was given initial Article 31(b) notice.¹⁰⁷ Instead, the court focused on "human nature . . . that persons falsely accused of a crime [will] deny the accusation rather than remain silent."¹⁰⁸

97. Cf. *id.*

98. *Id.* at 619-620.

99. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

100. *Id.*

101. *Id.*

102. Corn, *supra* note 26, at 23-24.

103. *Jackson*, 23 M.J. at 842.

104. *United States v. Suttles*, 6 M.J. 921, 924 (A.F.C.M.R. 1979).

105. *United States v. Dowell*, 10 M.J. 36, 36-37 (C.M.A. 1980).

106. *Id.* at 40.

107. *Id.*

108. *Id.*

The court said such a response from Dowell was “reasonably foreseeable” and warranted proper Article 31(b) notice.¹⁰⁹ However, even the most thorough and deliberate reading of Article 31(b) in its current form would likely not have changed Dowell’s response in the heat of the moment. Since a servicemember facing “serious charges . . . will feel a need to say something,” Article 31(b), as it stands, fails to properly inform servicemembers that immediate responses are not required to help him preserve his innocence.¹¹⁰

This incongruity can, and should, be eliminated by adding a no-adverse-inference warning to Article 31(b). The form of the warning need only be to tell the suspect that choosing to remain silent cannot be used as evidence against her.¹¹¹ For example, following the existing warnings, the suspect would be notified that “if you decide not to answer questions, your decision to remain silent is not evidence and cannot be used against you in any disciplinary proceeding.”

It is impossible to predict how adding this additional warning would impact investigatory efforts. However, it is fair to assume it would result in an increased percentage of suspects who invoke the right to silence, thereby making it more difficult for the government to resolve allegations of misconduct. This is not, however, a justification for continuing to subject military suspects to an insufficiently informed waiver decision. Waiver of the right to silence is a windfall for the government, but certainly not an entitlement. On the contrary, our adversarial system has always demanded that the government be prepared to prove accusations *without* the assistance of the accused.¹¹² If providing a suspect with the information necessary to make a truly informed choice as to whether to cooperate with the government or stand on the right to silence and require the government to prove an allegation without such cooperation results in a reduction in confessions, that is a cost imposed by the Constitution itself, and not our proposal.

Ultimately, incorporating a no-adverse-inference warning into Article 31(b) may make it more difficult for military authorities to prove allegations of misconduct. It will, however, ensure that when they do so based on confessions, those confessions are the result of a genuine waiver of the fundamental constitutional right to silence. This is a tradeoff well worth embracing and long overdue.

II. ARTICLE 32 INVESTIGATIONS AS A “TRUE” PRELIMINARY HEARING

As background to this proposal, we begin with an overview of the court-martial system and the role of the commander, essential context to understand-

109. *Id.*

110. *Id.*

111. *See* Corn, *supra* note 26, at 30.

112. *Cf.* U.S. Const. amend. V; Supervielle, *supra* note 69, at 153-164 (discussing development of right against self-incrimination in Anglo-American jurisprudence).

ing need for reform. The military commander plays a central role in the military justice system. Commanders who have the responsibility and authority to convene a military court-martial are referred to as convening authorities. The responsibilities and powers of a convening authority at the pretrial, trial, and post-trial stages of a court-martial are significant.

Before trial, a commander has the authority to order investigations into alleged misconduct.¹¹³ Each branch of service has investigative agencies to conduct criminal investigations ranging from minor infractions to the most serious offenses. None of these agencies, however, have independent authority or ability to dispose of a criminal charge against a servicemember under the UCMJ. Only a commander of the accused servicemember has the authority to dispose of the case.¹¹⁴ The commander can dismiss the charges, adjudicate the charges within the commander's level of authority, or forward the case to a superior commander for disposition.¹¹⁵

The commander must determine whether to dispose of the case or refer the matter to a higher-level commander for disposition.¹¹⁶ Commanders have the authority to refer the charges to a military court-martial. A military court-martial is an ad hoc tribunal, which the convening authority can convene to hear the charges against the accused servicemember in order to determine guilt or innocence of the accused. If the servicemember is found guilty, the court-martial then decides the punishment that the accused servicemember will receive. A finding of not guilty by the court-martial is binding on the convening authority.¹¹⁷ Likewise, the convening authority cannot impose a greater punishment than the sentence imposed by the court-martial tribunal.¹¹⁸ The convening authority may however exercise clemency with respect to both the findings and sentence handed down by the court-martial.¹¹⁹

At the pretrial stage of a court-martial, the convening authority must determine whether the accused servicemember will be tried by a special court-martial of limited jurisdiction,¹²⁰ or a general court-martial empowered to sentence the accused to the full range of punishments authorized by the UCMJ.¹²¹ The convening authority also selects the military members who will hear the case. Article 25 of the UCMJ charges the commander with personally selecting those members who, in his opinion, are "best qualified for the duty by reason of

113. See, e.g., MCM, *supra* note 18, Rules for Courts-Martial (R.C.M.) 303 (2008) [hereinafter R.C.M.].

114. See R.C.M. 306.

115. *Id.*

116. *Id.* 306(5).

117. See *id.* 1107(b)(4).

118. See *id.* 1107(d)(1).

119. *Id.* 1107(d)(2).

120. See 10 U.S.C. §819 (special court-martial is limited to imposing punishments not to exceed one year of confinement and a Bad Conduct Discharge).

121. See 10 U.S.C. §818.

age, education, training, experience, length of service, and judicial temperament.”¹²²

In addition to selecting the members who will hear the case, the convening authority performs several significant functions during the course of the trial. The convening authority can order depositions to be taken in a pending case.¹²³ The convening authority also approves and authorizes funding for witness travel, as well as the employment and funding of expert witnesses, requested by either the prosecution or the defense.¹²⁴ The convening authority is authorized to grant both transactional and testimonial immunity for any witness who would otherwise be subject to punishment under the UCMJ.¹²⁵ If the accused desires to enter a guilty plea, any pretrial agreement is negotiated on behalf of the convening authority with the accused, and the convening authority must approve of any pretrial agreement.¹²⁶ The convening authority can also order an inquiry into the mental capacity or mental responsibility of the accused.¹²⁷

At the conclusion of the trial, if the accused is found guilty of any offense, the convening authority continues to play a significant role in the case. Before the verdict becomes final, the convening authority must approve both the findings and the sentence of the court-martial.¹²⁸ After a decision has been reached by the court, the convening authority may still dismiss any charge or specification (by setting aside findings of guilt), change the findings of guilt to a lesser included offense, modify the sentence to any lesser sentence, or order a proceeding in revision or rehearing.¹²⁹ The commander’s authority to modify the findings and sentence in this manner is viewed as “a matter of command prerogative involving the sole discretion of the convening authority.”¹³⁰

It is important to note that the convening authority’s power is not absolute and there are several protections built into the system to provide safeguards against untrammelled exercise of the convening authority’s power. One important check is the requirement under Article 46 of the UCMJ that all parties to the court-martial shall have equal opportunity to obtain witnesses and evidence.¹³¹ There are also a number of prohibitions within the UCMJ and the Rules for Courts-Martial (RCM) which prohibit the convening authority from exercising unlawful command influence over a case.¹³² These protections include Article 37 of the UCMJ, which prevents the commander from unlawfully influencing any action of the court, such as taking any adverse actions against a court

122. See 10 U.S.C. §825(d)(2).

123. See R.C.M., *supra* note 113, 702(b).

124. See *id.* 703.

125. *Id.* 704.

126. *Id.* 705.

127. *Id.* 706.

128. *Id.* 1107.

129. *Id.* 1107(c).

130. 10 U.S.C. §860.

131. 10 U.S.C. §846.

132. 10 U.S.C. §837; see also R.C.M., *supra* note 113, 401-406.

member because of that member's vote in a case.¹³³ Finally, the military has a robust appellate system whereby cases are reviewed first by a military service court of appeals, followed by discretionary review by civilian judges on the Court of Appeals for the Armed Forces and possible review by the Supreme Court on a writ of certiorari.¹³⁴

The considerable authority that a military commander has within this scheme, coupled with the checks that exist to prevent the commander from abusing his authority, reflect the structure and purpose of the military justice system. First and foremost, military justice is one of the primary tools available to a military commander to effectively maintain discipline within the ranks. 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. Military leaders in the United States are trained to develop and maintain this level of discipline primarily through positive leadership techniques such as leading by example, maintaining high standards of performance and readiness, and attending to the needs of both the individual soldiers and the requirements of the military organization.¹³⁵

However, because military organizations are unique, in that soldiers may be ordered to sacrifice their lives to accomplish a mission or an objective, positive leadership may not always be enough to maintain the necessary level of discipline required to sustain operations. The military justice system gives a commander the means to impose punishment in order to maintain order and discipline within the ranks. In the United States, a commander's disciplinary authority is viewed as a critical component of his or her command. Many offenses specified in the UCMJ involve common law crimes such as murder, rape, arson, larceny, assault, as well as statutory crimes like possession of child pornography.¹³⁶ Even crimes that occur off the battlefield can adversely impact unit cohesion and mission readiness, and, if not prosecuted and punished, they can undermine the commander's authority.

One must also consider how the military justice system relates to the commander's personal responsibility and the associated criminal liability if he or she fails to adequately prevent, suppress, and punish law-of-war violations committed by the forces under his command. The doctrine of command responsibility holds that a commander may be criminally liable for law-of-war violations committed by the forces under his command.¹³⁷ Over the years, the doctrine has obtained the status of customary international law and has been codified in various

133. 10 U.S.C. §837.

134. 10 U.S.C. §§866-867.

135. See U.S. DEP'T OF THE ARMY, REG. 600-100, ARMY LEADERSHIP ¶1-6 (Mar. 8, 2007) [hereinafter AR 600-100].

136. 10 U.S.C. §§918-931.

137. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85-87, June 8, 1977, 1125 U.N.T.S. 4 [hereinafter Additional Protocol I] (entered into force Dec. 7, 1978).

international agreements.¹³⁸ Under this doctrine, if a commander fails to prevent, suppress, or punish law-of-war violations that he knew existed, or recklessly or negligently failed to notice, he can be punished as if he committed the crimes personally.¹³⁹

This doctrine is based on the commander's unique position within a military organization. It recognizes the commander as the focal point of military discipline and order. It is the commander's responsibility to maintain command and control of his subordinate forces. The doctrine of command responsibility reflects the traditional role of the military commander as the person ultimately responsible for maintaining order and discipline and dispensing justice within the military unit. The doctrine is based on the recognition that there is often a very thin line separating a disciplined military force from an armed mob. It is the commander who stands on that line and, through the use of all resources and authority available to him, ensures that his forces do not violate the laws of war. When a military force violates the laws of war, it is in large part attributable to the commander's failings. Because of this considerable responsibility, it is important that the commander have the necessary authority to operate a justice system in which he is able to maintain order and discipline within the military organization.

Maintenance of discipline is a hallmark of military justice, but it is not the be-all and end-all of military justice, particularly in a democracy. Loyalty to both superiors and subordinates is an essential part of the military ethos. Soldiers must be loyal to their superiors and willing to support the unit's mission. In turn, senior leaders owe a measure of loyalty to the soldiers they command. A justice system seen as arbitrary and unfair, particularly by the enlisted ranks, detracts from that loyalty. In such a system, soldiers may become resentful of their superiors. This resentment can lead to a lack of trust and confidence and, ultimately, to a weakening of discipline. It is important that an effective military justice system strike the right balance between discipline and fairness.

Of all the commander's responsibilities in the military justice system, none is as important as determining whether to refer a military accused to a court-martial and, if so, what charges to pursue against the accused. While these decisions are within the sole purview of the commander, he does not make these decisions without advice.

138. See, e.g., Additional Protocol I, *supra* note 137; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (entered into force July 1, 2002); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

139. Victor M. Hansen, *What's Good for the Goose is Good for the Gander – Lessons from Abu Ghraib: Time for the United States To Adopt a Standard of Command Responsibility Toward Its Own*, 42 GONZ. L. REV. 335 (2007).

Before a commander can refer a case to a general court-martial, he must first obtain legal advice from a Judge Advocate General legal advisor.¹⁴⁰ The legal advisor must advise the commander on the legality of the charges, whether the evidence supports the charges, whether there is court-martial jurisdiction over the offense and the accused, and what actions the commander can take on the case.¹⁴¹

In addition, Article 32 of the UCMJ requires that a preliminary investigation into the charges be conducted prior to the convening authority's referral for a general court-martial. Article 32(a) states:

No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and recommendation as to the disposition which should be made of the case in the interest of justice and discipline.¹⁴²

These preliminary investigations are commonly referred to as Article 32 investigations. There is no precise civilian counterpart to these investigations. The investigations are frequently referred to as the military counterpart to a grand jury.¹⁴³ However, this comparison is not accurate.

An Article 32 investigation differs considerably from a grand jury proceeding, and in most ways the Article 32 investigation provides more rights to the military accused.¹⁴⁴ For example, unlike a grand jury proceeding, the accused can be present at the Article 32 hearing.¹⁴⁵ The accused has the right to be represented by counsel at the hearing, the right to cross-examine witnesses, the right to object to irrelevant or privileged evidence, and the right to call witnesses and introduce evidence in his defense or mitigation.¹⁴⁶ The accused also has the right to a summary of all the testimony taken at the Article 32 hearing.¹⁴⁷ The statute itself does not state what standard of proof the investigating officer should apply in evaluating the "truth of the matter charged."¹⁴⁸ However, Rule for Court-Martial 405(j)(2)(H) states that the investigating officer's conclusion should be based on "reasonable grounds to believe that the

140. R.C.M., *supra* note 113, 601(d); 10 U.S.C. §834.

141. 10 U.S.C. §832.

142. 10 U.S.C. §832 (a).

143. Kirk Johnson, *Pretrial Hearing Starts for Soldier Accused of Murdering 16 Afghan Civilians*, N.Y. TIMES, Nov. 5, 2012, at A16. James Risen, *The Struggle for Iraq : Treatment of Prisoners; G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15. Ernesto Londono, *Accusations Against Generals Cast Dark Shadow over Army*, WASH. POST, Oct. 27, 2012, at A03.

144. Note that the Fifth Amendment specifically exempts military proceedings from the requirement of a grand jury indictment. U.S. CONST. amend. V.

145. FED. R. CRIM. P. 6(d)(1).

146. 10 U.S.C. §832.

147. *Id.*

148. 10 U.S.C. §832.

accused committed the offenses alleged.”¹⁴⁹ In comparison to the rights afforded to the criminal defendant in a grand jury proceeding, the Article 32 hearing provides greater protections and greater pretrial access to evidence and information.

The Article 32 hearing is more similar to preliminary hearings used in many states at the pretrial vetting stage. In many ways the Article 32 hearing provides even greater protections to the accused than is generally available in civilian preliminary hearings. Preliminary hearings, in most jurisdictions, do not allow the defendant to present evidence, call witnesses, and examine the government’s case in as robust a way.¹⁵⁰ Also, the standard of proof in most civilian systems that use a preliminary hearing is simply that the government must prove there is probable cause to support the charges.¹⁵¹ Probable cause is a low standard that allows the government to obtain a criminal indictment with little evidence. By contrast, the Article 32 hearing requires the investigating officer to determine whether there are reasonable grounds to believe that the accused committed the offenses.¹⁵² This is a higher standard of proof that approaches a preponderance of the evidence standard. It requires the government to produce more evidence and it requires the investigating officer to consider and resolve factual and credibility disputes before making a recommendation on whether to refer the case to trial.

In many ways the Article 32 investigation already strikes a fundamentally fair balance between protecting the rights of the individual service member and the need to preserve order and discipline within the military unit. However, there is one key aspect where the protections provided by the Article 32 investigation are deficient. This critical deficiency has the potential to render most of the other protections of Article 32 moot. The deficiency is the nature of the non-binding recommendation by the Article 32 investigating officer. Reform in the nature of the recommendation can improve the fairness of the system without degrading the commander’s essential function.¹⁵³

In a grand jury proceeding or a civilian preliminary hearing, if the government fails to meet its burden of proof, no criminal indictment or information is filed and the case is dismissed.¹⁵⁴ This is not so with an Article 32 investigation. The recommendation by the Article 32 investigation officer to the convening authority is just that, a recommendation.¹⁵⁵ It is not binding on the convening authority. If the investigating officer examines witnesses and evidence and recommends that reasonable grounds do not exist to support the accused’s guilt, the convening authority can disregard that recommendation and still refer the

149. R.C.M., *supra* note 113, 405.

150. *See* MASS. R. CRIM. P. 5.; N.Y. CRIM. PROC. LAW §190.25; N.M. STAT. ANN. §31-6-4.

151. FED. R. CRIM. P. 5.1(e).

152. R.C.M., *supra* note 113, 405(j)(2)(D).

153. 10 U.S.C. §832.

154. FED. R. CRIM. P. 5.1(f).

155. 10 U.S.C. §832.

case to a general court-martial.¹⁵⁶ It is difficult to discern a principled reason why the rules give the convening authority a veto power over an investigating officer's finding that the evidence is insufficient to warrant a general court-martial. It is the investigating officer who examines the witnesses and the evidence and, assuming that the officer is performing his or her duty to fully investigate the matter, the investigating officer has the best perspective to determine the sufficiency of the evidence.

Perhaps the best explanation for allowing the commander to exercise veto authority over an insufficiency-of-evidence finding is that the commander, as the official responsible for maintaining justice within the unit, should have the final say over the disposition of any criminal proceeding. However, deference to the commander's authority in this circumstance is problematic and unjustified. Because the commander appoints another officer to investigate the charges,¹⁵⁷ the commander does not personally assess the quality and sufficiency of the evidence, nor is the commander able to personally assess the credibility of the witnesses. The investigating officer makes these important assessments and is in a better position than the commander to make accurate determinations. There is no legitimate reason why the commander should have the authority to trump a finding that the evidence is insufficient. In contrast, there seem to be several reasons why a commander should *not* have this sweeping veto authority.

The commander does not need this authority to legitimately maintain good order and discipline within the unit. If the Article 32 investigator determines that there is not sufficient evidence for a case to proceed to a general court-martial, fairness and good order are not maintained where a convening authority ignores the recommendation and proceeds to trial with inadequate evidence. The most likely consequence is that the case will ultimately be dismissed or the servicemember will be found not guilty on the charges. If the dismissal or acquittal occurs in a case where the commander was aware that the evidence did not support a court-martial, members of the unit are likely to view the discipline system as arbitrary and spiteful. This kind of impression does not enhance good order and discipline within the unit.

Giving the commander a veto authority also potentially renders the significant protections of the Article 32 process moot. It hardly matters that the servicemember can be represented by counsel, question witnesses, present evidence, and argue against the sufficiency of evidence when the commander, who is not even present at the investigation, can disregard these findings and refer the case to trial in spite of the investigating officer's recommendation to the contrary.¹⁵⁸ This is not to suggest that commanders frequently abuse the process or ignore the recommendations of the investigating officer. The point is that the potential exists for an arbitrary abuse of the system and it gives a

156. 10 U.S.C. §832; R.C.M., *supra* note 113, 405, 601.

157. R.C.M., *supra* note 113, 405(d)(1).

158. 10 U.S.C. §832.

commander who is of a mind to abuse the process the ability to do so. It is also difficult for a military judge or an appellate court to subsequently correct a commander's arbitrary exercise of his authority because the statute currently gives the commander the unreviewable discretion to reject the investigating officer's recommendation and refer the case to a court-martial.¹⁵⁹ Because the commander's authority to reject the recommendation is absolute, there is nothing for a military judge or an appellate court to review with respect to that decision.

A commander's veto authority can further undermine the Article 32 investigation in even a more fundamental way. One clear purpose for the Article 32 investigation is to provide the military accused valuable information about the charges against him.¹⁶⁰ Such a broad discovery right of the government's case does not exist in the civilian grand jury proceeding or in most jurisdictions that have preliminary hearings. Because of the convening authority's veto power, the prosecution may be able to undermine the accused's discovery rights by simply not providing certain information to the Article 32 investigating officer. The prosecution faces no risk by withholding evidence because, even if the investigating officer does not recommend the case be referred to a general court-martial, the prosecution can still petition the commander to disregard that recommendation. Because the military prosecutor in most instances works under the supervision of the convening authority's legal advisor,¹⁶¹ the prosecutor enjoys special access to the convening authority, and as a result the convening authority is likely to take the advice of his legal advisor/prosecutor over the advice of the Article 32 investigating officer.

The current rule is also extremely inefficient. If the commander refers the case to trial against the recommendations of the investigating officer who personally evaluated the evidence of a case, significant resources must now be committed to a case that has little chance of a successful prosecution. Time and resources are diverted away from other priorities at the unit. This also undermines good order and discipline within the unit. The costs of giving the commander this veto authority outweigh the benefit of giving him the absolute final word on what cases should proceed to a general court-martial.

Some may contend that if the commander did not have this veto authority over an investigating officer's recommendation, the investigating officer's role would be elevated above that of the convening authority. This is not the case. Removing the commander's veto authority would not prevent later charges being pursued against the accused service member if more evidence comes to light at a later date. With federal grand juries, for example, if the grand jury votes against an indictment and the charges are dismissed, the prosecutor is not precluded from reinitiating charges if more evidence is found or developed

159. 10 U.S.C. §834.

160. *United States v. Roberts*, 10 M.J. 308, 311 (C.M.A. 1981).

161. U.S. DEP'T OF THE ARMY, REG. 27-10, MILITARY JUSTICE (Oct. 3, 2011) [hereinafter AR 27-10].

later.¹⁶² The same is also true in the military system. Even if the commander declines to refer the case to a court-martial, that does not preclude a later prosecution.¹⁶³ A commander's ability to ensure good order and discipline is not eroded by the proposed change. A recommendation by the investigating officer that the case should not be referred to trial would simply mean that based upon the evidence currently presented to the investigating officer, the government has not met its standard of reasonable grounds to believe that the accused committed the offenses. Nothing would preclude the initiation of those or other charges at a later date if more evidence becomes available.

Removing the convening authority's veto power in this context also does not convert the Article 32 hearing into a mini-trial. The standard of proof does not change. The investigating officer's function does not change. The only change is to the investigating officer's finding. If the investigating officer concludes that there are not reasonable grounds to believe that the accused committed the offenses, that finding cannot be vetoed or ignored by the convening authority.

This proposal also does not take away the commander's authority not to refer a case to a general court-martial even when the investigating officer recommends that the case proceed to trial. The commander's veto authority in this situation is very different and there are important reasons why that authority should be preserved. First, the commander must assess the value of referring the case to a general court-martial against the cost and the impact such a trial would have on the resources of the unit and how such a trial would impact overall good order and discipline. An investigating officer's recommendation that there is sufficient evidence for the case to go to trial is in essence a statement that the case *could* go to trial and that under the facts, the prosecution *could* be successful. That recommendation says nothing about whether the case *should* go to trial. That decision is left to the commander because the commander is in the best position to make that assessment and is the one who ultimately is responsible for that decision.

Likewise the commander must make the assessment as to what is best for the accused servicemember. The commander is responsible for that servicemember and he or she needs the power to determine whether a general court-martial is in the best interest of that servicemember and the unit. In the post-trial phase of a court-martial, the commander has unlimited authority to exercise clemency towards the convicted servicemember up to and including the authority to set aside the findings of guilt on any charges and return the servicemember back to the unit.¹⁶⁴ This clemency power is part of the commander's inherent authority to maintain good order and discipline.¹⁶⁵ For this same reason, the commander's authority to disregard an Article 32 investigating officer's recommendation

162. FED. R. CRIM. P. 5.1(f).

163. R.C.M., *supra* note 113, 401, 604.

164. *See* 10 U.S.C. §860.

165. *See* United States v. Jones, 15 M.J. 890 (A.C.M.R. 1983).

to refer the case to trial should be preserved. The proposed modification set out below preserves this authority.

In order to remove the convening authority's veto power when an investigating officer recommends that there is insufficient evidence for the case to proceed to trial but preserve the convening authority's ability to maintain good order and discipline, the following should be added as new section (f) to Article 32 UCMJ:

The convening authority may not refer a specification under a charge to a general court-martial for trial unless the investigating officer finds that reasonable grounds exist to believe that the accused committed the specification under charge.

In addition, Rule for Courts-Martial 601(d)(2)(A) should be amended as follows: "There has been substantial compliance with the pretrial investigation requirements of R.C.M. 405 *and the investigating officer finds that reasonable grounds exist to believe that the accused committed the specification under charge.*"

These proposed changes to Article 32 of the UCMJ and Rule for Courts-Martial 601(d) accomplish the goal of preserving the convening authority's appropriate authority over the court-martial system to ensure good order and discipline. The recommended changes prevent the convening authority from overriding the important protections which Congress intended when it created Article 32.

III. JURISDICTION OVER CIVILIANS ACCOMPANYING THE FORCE: IMPOSING A LOGICAL LIMITATION ON THE SCOPE OF UCMJ PROSCRIPTION

In October of 2006, Congress resurrected the long dormant UCMJ jurisdiction over civilians accompanying the armed forces in the field.¹⁶⁶ Although Article 2(10) of the UCMJ subjected civilians accompanying the force in time of war to UCMJ jurisdiction since it was enacted in 1950 (a continuation of analogous jurisdiction that dates back to the inception of the armed forces in 1775), the 1970 *Averette* decision by the Court of Military Appeals (COMA) significantly restricted exercise of this jurisdiction.¹⁶⁷ That decision interpreted Article 2(10) to apply only during periods of formally declared war.¹⁶⁸ Because the United States has not declared war since World War II, and was unlikely to do so after 1970, this decision led to a *de facto* nullification of UCMJ jurisdiction over civilians accompanying the force. Indeed, an entire generation of

166. John Warner National Defense Authorization Act for Fiscal Year 2007. Pub. L. No. 109-364. §552, 120 stat. 2083, 2217, *codified at* 10 U.S.C. §802(a)(10) (2006).

167. *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970).

168. *Id.* at 365.

Judge Advocates learned that it was almost inconceivable civilians would ever again be court-martialed.

The conflict in Iraq produced a shift from inconceivable to conceivable. The high profile cases of alleged misconduct by subcontractors in Iraq and the perception that they acted with impunity¹⁶⁹ set the conditions for a radical change in the landscape of military jurisdiction over civilians. Responding to this perception of impunity, Congress enacted an amendment to Article 2(a)(10) of the UCMJ that effectively overruled the restriction imposed by COMA in *Averette*.¹⁷⁰ This amendment expanded Article 2(a)(10)'s grant of jurisdiction beyond time of war to include any "contingency operation."¹⁷¹ Accordingly, enactment of this amendment resurrected military criminal jurisdiction over more than 100,000 civilian employees and contractors deployed in support of the U.S. military.¹⁷²

To date, only one civilian has been tried by court-martial pursuant to this resurrected jurisdiction.¹⁷³ Although the defendant pled guilty, he challenged the validity of the amendment to Article 2(10). The Court of Appeals for the Armed Forces recently affirmed the constitutionality of the amendment and upheld his conviction.¹⁷⁴ In response, the defendant is preparing a petition for certiorari with the Supreme Court of the United States.¹⁷⁵

Prevailing on this constitutional challenge will certainly present a significant burden considering Congress expressly resurrected the exercise of military jurisdiction over this limited category of civilians.¹⁷⁶ Furthermore, the exercise of military jurisdiction over civilians accompanying the force in the field is

169. See, e.g., *More Women Report Sex Assaults in Iraq*, USA TODAY, Dec. 19, 2007.

170. *Supra* note 166.

171. *Id.*

172. See Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D1.

173. *United States v. Ali*, 71 M. J. 256 (C.A.A. F. 2012). Ali, who was born in Iraq and subsequently became a naturalized Canadian citizen (and thereafter held dual citizenship) worked for a contractor providing interpreters to U.S. forces in Iraq. After participating in a fight in which he allegedly stabbed another contractor, Ali was charged pursuant to the 2006 UCMJ amendment and pled guilty to wrongful appropriation of a knife owned by a U.S. soldier, obstruction of justice for wrongfully disposing of the knife after it was used in a fight with another interpreter, and making a false official statement to military investigators. A military judge sentenced Ali to five months confinement. Ali challenged the legality of the NDAA's resurrection of military jurisdiction over civilians accompanying the force during any "contingency" operation in both the Army Court of Criminal Appeals and the Court of Appeals for the Armed forces. Both courts rejected his challenge and upheld the exercise of jurisdiction.

174. *United States v. Ali*, 71 M.J. 256, No. 12-0008/AR (C.A.A.F. 2012).

175. See Dwight Sullivan, *Ali's Counsel Asks for More Time To File a Cert Petition*, NATIONAL INSTITUTE OF MILITARY JUSTICE BLOG-CAAFLOG, <http://www.caaflog.com/2012/11/14/alis-counsel-ask-for-more-time-to-file-a-cert-petition/>.

176. See, e.g. Brief of Appellee at 269, *United States v. Alaa Mohammad Ali*, No. 20080559 (M.J. Apr. 5, 2012) (arguing that "Congress's 'war powers' provided constitutional authority for Uniform Code of Military Justice (UCMJ) provision subjecting persons serving with or accompanying an armed force in the field during a contingency operation to military jurisdiction").

presumably based on a solid constitutional foundation.¹⁷⁷ Although the seminal Supreme Court decision in *Reid v. Covert* struck down the exercise of military jurisdiction over civilian dependents, that case addressed a different provision of Article 2.¹⁷⁸ *Reid* involved an exercise of jurisdiction over civilians pursuant to an executive agreement, which triggered the jurisdiction provided by Article 2(a)(11) of the UCMJ (granting military jurisdiction over civilians when such jurisdiction was established by treaty or international agreement).¹⁷⁹ The Supreme Court held that an executive agreement could not trump the Constitution by depriving U.S. citizens of certain fundamental constitutional trial rights – most notably the right to indictment by grand jury and trial by jury.¹⁸⁰ However, the holding in *Reid* was more limited than is often understood.

First, only a plurality of Justices concluded that these constitutional rights applied at all times and in all circumstances.¹⁸¹ Justice Harlan joined the opinion, but only because the defendants were tried for capital offenses.¹⁸² For Harlan, indictment by grand jury and trial by jury were required for capital cases no matter where the United States exercised jurisdiction.¹⁸³ However, he broke with the plurality's conclusion that these rights applied for *all* offenses subject to trial by courts-martial because he was unwilling to conclude that indictment and trial by jury were fundamental rights in relation to all potential offenses.¹⁸⁴ Second, and far more significant in relation to the resurrection of Article 2(a)(10) jurisdiction, the Court explicitly exempted from its opinion the very narrow grant of jurisdiction over civilians accompanying the armed forces in the field.¹⁸⁵ According to the Court, “[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.”¹⁸⁶

Of course, *Reid* addressed only the specific question of the constitutionality of exercising military jurisdiction over U.S. citizens pursuant to a stationing agreement, and therefore a narrow reading of the decision indicates it should not implicate the permissibility of asserting such jurisdiction over non U.S. nation-

177. See Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491 (2008) (analyzing the constitutional validity of subjecting civilians accompanying the force to military jurisdiction); see also John F. O'Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751 (2010) (reviewing the history and practice of military jurisdiction over civilians and concluding that the 2006 amendment cannot be justified because of the availability of civilian trial alternatives).

178. *Reid v. Covert*, 354 U.S. 1, 16 (1957).

179. *Id.*

180. *Id.* at 16-17.

181. *Id.* at 3.

182. *Id.* at 65 (Harlan, J., concurring in the result).

183. *Id.* at 74.

184. *Id.*

185. *Id.* at 35.

186. *Id.* at 33.

als or even over U.S. citizens during contingency operations. However, the Court's skepticism over the use of military courts to try civilians created uncertainty as to the constitutionality of exercising such jurisdiction in other contexts. This doubt was seized upon by the COMA in *Averette* to support the limitation on the exercise of jurisdiction it adopted by narrowly interpreting the meaning of "time of war."¹⁸⁷ Nonetheless, by exempting Article 2(a)(10) from its holding, the *Reid* decision provides substantial support for the 2006 resurrection of jurisdiction over civilians accompanying the armed forces during contingency operations.¹⁸⁸ It is simply impossible to predict the ultimate outcome of the pending constitutional challenge to this resurrection of jurisdiction, or of subsequent challenges pressed by U.S. citizens subjected to it.¹⁸⁹

Upholding this resurrection will not, however, eliminate contemporary concern that trying civilians by courts-martial is an overreaction to the problem of misconduct committed by civilians supporting military operations in the field. This concern is not based only on the historical reticence to subject civilians to trial by military courts, a concern mitigated but certainly not eliminated by the substantial process provided to military defendants and the widely recognized credulity of the military justice system. It also derives from the fact that unlike in eras past, most civilians now accompanying the armed forces are already subject to federal civilian criminal jurisdiction for the type of serious offenses that most likely motivated this jurisdictional resurrection. Thus, trial by court-martial is not the exclusive remedy available to the government to address misconduct by civilians operating with the armed forces. Instead, in most cases they may be tried in Article III courts pursuant to the Military Extraterritorial Jurisdiction Act¹⁹⁰ or the War Crimes Act.¹⁹¹

Ideally, careful analysis of the constitutionality of the amendment to Article 2(10) will bring into sharp focus two underlying flaws in this effort to enhance the accountability of civilians accompanying the force: first, the unlimited scope of the subject-matter jurisdiction and the accordant broad range of military proscriptions resulting from the amendment; second, the failure to provide for the inclusion of civilian panel members (jurors) in cases involving civilian defendants tried by courts-martial.¹⁹² If this jurisdictional resurrection continues to survive judicial challenge, these flaws should be addressed through additional amendments to the UCMJ, amendments that can be as easily enacted as the jurisdictional resurrection itself.

187. *Averette*, 41 C.M.R. at 364.

188. *Reid*, 354 U.S. at 35.

189. See David L. Snyder, *Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 65 (2008).

190. Military Extraterritorial Jurisdiction Act, 18 U.S.C. §3261.

191. War Crimes Act, 18 U.S.C. §2441.

192. 10 U.S.C. §825.

A. *Limiting Subject-Matter Jurisdiction*

Including civilians within the scope of UCMJ criminal jurisdiction was almost certainly intended to provide a criminal remedy to acts of serious civilian misconduct.¹⁹³ This is a laudable objective, as the perception of impunity for both U.S. and non-U.S. nationals associated with U.S. armed forces during contingency operations almost certainly undermines the military objective of legitimacy.¹⁹⁴ However, pursuant to Article 2(10), any individual subject to UCMJ jurisdiction is subject to prosecution for all of the offenses established in punitive articles of the Code.¹⁹⁵ These enumerated offenses can generally be categorized either as traditional common law crimes (like murder, larceny, rape, robbery, etc.), or as uniquely military crimes (like disobedience, absence without leave, disrespect, missing movement etc.). While subjecting civilians to prosecution for offenses derived from the common law is a logical response to the perception of civilian impunity, it seems illogical to subject them to criminal liability for violating the uniquely military crimes enumerated in the Code. Instead, based on the type of contractor misconduct that caught public attention leading up to the 2006 amendment, it is reasonable to assume Congress sought to provide a viable criminal remedy for serious common law offenses only.¹⁹⁶

As noted above, the constitutionality of resurrecting military jurisdiction over civilians is the subject of an ongoing judicial challenge. However, if this resurrection is ultimately upheld, it should be restricted to the type of offenses normally applicable to civilians subject to U.S. criminal law. The resurrection enacted by Congress goes far beyond this.¹⁹⁷ Accordingly, Congress should enact an amendment enumerating only those UCMJ offenses logically applicable to civilians and therefore falling within the jurisdiction of Article 2(a)(10), or, in the alternative, exempting from jurisdiction offenses of a military nature.

One model that Congress might follow is that of the proposed Civilian Extraterritorial Jurisdiction Act (CEJA).¹⁹⁸ Like the Military Extraterritorial Jurisdiction Act (MEJA), this legislation was introduced to provide more compre-

193. H.R. REP. NO. 109-664, pt. 1 (2006).

194. See Jeffery Thumner, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW 64 (July 2008).

195. 10 U.S.C. §802(a).

196. See *Hearing Before the H. Comm. on the Judiciary, Enforcement of Federal Criminal Law To Protect Americans Working for U.S. Contractors in Iraq* (2007) (“This hearing was convened in response to accusations that contractors in Iraq act with impunity and disregard for the law.”); see generally Jennifer K. Elsea, Moshe Schwartz, & Kennon N. Nakamura, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, (Cong. Res. Serv.), Aug. 25, 2008; *Private Security Contractors at War: Ending the Culture of Impunity* (Human Rights First, 2008); Daniel Frisk & R. Derek Trunkey, *Contractors’ Support of U.S. Operations in Iraq* (Cong. Budget Office, 2008) (“Contractor personnel have a different legal status than government employees and are subject to different regulations and laws (both U.S. and international). Those differences have led some Members of Congress to express concern about using contractors as part of military operations – concerns that date back to the use of contractors in the Revolutionary War . . .”).

197. See *supra* note 195 and accompanying text.

198. Civilian Extraterritorial Jurisdiction Act of 2011, S. 1145, 112th Cong. (2011).

hensive Article III jurisdiction for civilians associated by employment or contractual relationships with the U.S. government abroad. In fact, like the 2006 amendment to the UCMJ, it was motivated by the MEJA jurisdictional limits exposed by contractor misconduct. Because MEJA required a contractual relationship with the Department of Defense, some civilian contractors working for other federal agencies fell beyond the reach of federal criminal sanction for serious misconduct. CEJA is supported by the Department of Justice, and although not enacted as of this date, may be in the future.¹⁹⁹

CEJA, while complementing MEJA, is different from MEJA in two important respects. First, its jurisdiction extends beyond civilians associated with the armed forces to all civilians (employees, dependents, or contractors) working for any other federal government agency.²⁰⁰ Second, unlike MEJA's incorporation by reference of all offenses specified in the Special Maritime and Territorial Jurisdiction of the United States, CEJA expressly enumerates offenses for which these civilians can be held accountable.²⁰¹ This enumeration will provide more explicit notice to civilians subject to the proposed statute, and will limit these offenses to those most relevant to civilians operating outside the United States.

CEJA is a contemporary reflection of Congress's view of the offenses for which civilians associated with the U.S. government overseas appropriately and necessarily should be held accountable. The offenses enumerated in CEJA include, inter alia, murder, manslaughter, assault, arson, larceny, burglary, kidnapping, sexual assault, manufacture and distribution of narcotics, bribery, and certain attempts and conspiracies.²⁰² CEJA enumerates offenses similar to offenses enumerated by the UCMJ for which civilians can be prosecuted when accompanying the force. A similar enumeration in the UCMJ would limit criminal proscriptions applicable to civilians to serious common law offenses and several other offenses uniquely appropriate to the extraterritorial employment context. This would eliminate the applicability of military offenses to civilians – the most questionable outcome of the 2006 jurisdictional amendment.

Prosecutorial discretion, exercised by both Judge Advocates and the convening authorities they advise, will be decisive in the actual range of offenses civilians will be charged with pursuant to the 2006 amendment. As a result, it may be relatively unlikely that this newly resurrected scope of military jurisdiction will be used to prosecute civilians for purely military offenses. However,

199. See *Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad Before S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Lanny R. Breuer, Assistant Att'y Gen. of the United States), available at <http://www.justice.gov/criminal/pr-testimony/2011/crm-testimony-110525.html>.

200. CEJA S. 1145 §2.

201. *Id.*

202. *Id.*

such prosecutions are not without precedent.²⁰³ More importantly, the fundamental question raised by the jurisdictional expansion is whether commanders should ever be authorized to consider such charges. Ensuring accountability for civilians accompanying the force is certainly a legitimate goal, a goal that Congress chose to accomplish – at least in part – by resurrecting military jurisdiction over these civilians.²⁰⁴ However, exposing civilians to prosecution for uniquely military offenses is inconsistent with this goal for the simple reason that civilians are not expected to conform their conduct to the type of military norms from which these offenses arise. Therefore, restricting the scope of the 2006 resurrection of military criminal jurisdiction to offenses analogous to those enumerated in CEJA will enhance the legitimacy of any future exercise of this jurisdiction without compromising the purpose for the resurrection.

B. Providing for Civilian Panel Members

Even if the UCMJ offenses applicable to civilians are narrowly tailored by legislation (or in practice through the exercise of prosecutorial discretion), trying civilians by courts-martial will still result in a deprivation of a number of fundamental constitutional rights applicable to defendants in Article III criminal courts.²⁰⁵ None of these is more significant than the right to trial by jury.²⁰⁶ In *Duncan v. Louisiana*, the Supreme Court held that trial by jury is a fundamental aspect of due process, and therefore confirmed the right applied to the states through the conduit of the due process clause of the Fourteenth Amendment.²⁰⁷ In support of its holding, the Court explained that the right to trial by a jury of peers is central to the concept of legitimate justice in the Anglo-American legal tradition and characterized the right as an “inestimable safeguard” against oppressive or arbitrary government prosecution.²⁰⁸ The Court subsequently held that this right is triggered by trial for any offense with a potential punishment in excess of six months’ confinement.²⁰⁹

Although an accused facing trial by special or general court-martial (the type of court-martial that would likely be used to try a civilian) has a right to request trial by “members,” this is not analogous to a jury of peers. Indeed, the “military jury” is selected from a pool chosen by the commanding officer ordering trial by court-martial, based on a number of statutorily defined factors.²¹⁰ One statutory requirement is that each member be superior in rank to the accused.²¹¹ How this

203. See generally, Geoffrey S. Corn, Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military Criminal Jurisdiction over Civilian Augmentees 62 U. MIAMI L. REV. 491 (2008).

204. 10 U.S.C. §802(a)(10).

205. Reid, 354 U.S. at 16-17.

206. *Id.* at 9 (quoting Blackstone’s Commentaries 379).

207. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

208. *Id.* at 156.

209. *Baldwin v. New York*, 399 U.S. 66, 90, (1970).

210. 10 U.S.C. §825.

211. *Id.* at §825(d)(1).

requirement will be interpreted in choosing a jury for the trial of a civilian is unclear. Any effort to include individuals superior in rank to the accused civilian would obviously be inconsistent with a pool of peer jurors.

Indeed, the inconsistencies between the Sixth Amendment right to trial by jury and the court-martial panel were the focal point of the Supreme Court's *Reid* decision.²¹² The Court relied heavily on its conclusion that the court-martial panel structure did not satisfy the requirements of the right to trial by jury.²¹³ This was also the key consideration that led Justice Harlan to join the plurality – at least in the context of capital cases.²¹⁴ As noted above, the Court explicitly declined to address in its ruling trial of civilians who accompanied the forces in the field. However, it seems significant that *Reid* predated *Duncan*'s holding that the right to trial by jury is so fundamental it extends to the states as a component of minimal due process. This conclusion only bolsters the argument that *any* prosecution of a civilian for a criminal offense carrying a risk of confinement in excess of six months triggers the right to a jury trial. Excluding a civilian tried pursuant to the jurisdiction of Article 2(a)(10) from this fundamental component of due process seems difficult to justify, even though it is permissible to deny this protection to members of the armed forces.

This consideration did not, however, deter Congress from subjecting civilians to trial by courts-martial. As with consideration of the scope of that jurisdiction itself, it is useful to consider how court-martial procedure might be adjusted to balance the interests of the timely and efficient military trial with the rights of the civilian defendant. Abandoning the panel system altogether in favor of a jury drawn randomly from the civilian population seems utterly illogical, as the offense, and quite frequently the court-martial, will occur in the territory of another nation. Indeed, the difficulty in empanelling such a jury has always been partial justification for subjecting civilians in the field to trial by courts-martial. Furthermore, even if it were feasible to utilize an entirely civilian jury, it would in large measure nullify one of the most important aspects of the military justice process: selection of panel members based on their age, experience, education, and judicial temperament.²¹⁵ However, retaining a purely military panel exacerbates the perception (if not the reality) that the civilian defendant is being deprived of a fundamental component of fair justice – a jury reflecting a fair cross section of members of her own society.²¹⁶

One possible solution would be to adopt the approach currently used to enhance the fairness of panels sitting in judgment of enlisted servicemembers: including the right to demand a panel composed of one-third members drawn

212. *Reid*, 354 U.S. 1.

213. *Id.* at 9.

214. *Id.* at 77 (Harlan, J., concurring in the result).

215. 10 U.S.C. §825.

216. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

from the defendant's peer group, in this case civilians.²¹⁷ When an enlisted servicemember is tried, the UCMJ provides the enlisted accused an absolute right to demand that at least one-third of the panel members be enlisted personnel.²¹⁸ A similar provision could be added to the Code to allow civilian defendants tried pursuant to Article 2(a)(10) to demand one-third civilian panel members (other civilian employees or contractors). Considering the population of civilians normally associated with U.S. military contingency operations, it is difficult to imagine the inability to find several civilians capable of serving as panel members. Furthermore, because military panel members are instructed that rank shall play no role in their deliberations, the fact that a civilian panel member is not subject to the orders of the senior military member of the panel is irrelevant.

Civilian panel members are not currently contemplated in Article 25 of the UCMJ – the article establishing the criteria for Convening Authority selection of court-martial members. Therefore, an amendment to the UCMJ (and not the Rules for Courts-Martial alone) would be necessary to provide this option.²¹⁹ Furthermore, any such amendment would have to specify the qualifying criteria for civilian panel members in order to facilitate the selection process. Such an amendment does not, however, seem particularly difficult to conceive.

Congress could easily amend Article 25 to establish these selection criteria. Like the criterion for selection of military panel members, this amendment could require selection based on age, experience, education, and judicial temperament. It would be difficult to include some analogue to the superior rank requirement;²²⁰ however, it would be possible to require that civilian members satisfy a minimum time with the service to be eligible. In order to deal with the reality that civilian employees associated with the mission on a de facto basis are often not de jure part of the commander's unit, it might be necessary to authorize the selection of civilian panel members who are not technically members of the Convening Authority's command.

Were Congress to adopt such an amendment, other modifications to the Rules for Courts-Martial and standard instructions on deliberation and voting would likely also be necessary. For example, the normal requirement that panel members not be of the same unit as the accused would need to be modified to address the relationship between the civilian accused and the civilian panel member.²²¹ Similar adjustments to the chain-of-command connection between

217. This is the practice used by the United Kingdom when courts-martial are convened to try civilians. *See* Regina v. Martin [1997] UKHL (appeal taken from Her Majesty's Courts-Martial Appeal Court) (upholding the trial by courts-martial of a civilian dependent of a member of the U.K. armed forces in Germany for crimes committed in Germany while his father was stationed there pursuant to The Army Act of 1955), available at <http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971216/mart01.htm>.

218. 10 U.S.C. §825(c)(1).

219. *Id.*

220. *Id.* at §825(d)(1).

221. *Id.* at §825(c)(1).

military and civilian panel members would be required.²²² As for instructions, there would need to be some method of ensuring that the normal admonition that “rank play no role in deliberations” extends to military or civilian status.²²³

Trying civilians by courts-martial may be constitutional under limited circumstances, and may actually at times offer the most effective means for criminal accountability. However, subjecting civilians to military trials must be considered an exceptional measure, with recognition that such trials will almost inevitably create a perception of military overreaching. Assuming the resurrection of military jurisdiction enacted by Congress in 2006 will withstand appellate scrutiny, it is in the interests of the military and potential civilian defendants to adjust the scope of this jurisdiction. Congress should define a limited range of common law offenses applicable to civilians in order to exclude them from UCMJ proscription for uniquely military offenses. Furthermore, Congress should provide for inclusion of civilian panel members on the “juries” that will sit in judgment of civilian defendants. Neither of these adjustments is overly complex, and both will enhance the credibility of the 2006 jurisdictional resurrection.

CONCLUSION

These three modest but important proposals will improve overall fairness in the system: (1) incorporating a no-adverse-inference warning into the Article 31(b)²²⁴ military version of *Miranda* warnings; (2) transforming the Article 32²²⁵ pretrial investigation into a process more like a preliminary hearing process; and (3) expressly enumerating a limited category of offenses to which civilians accompanying the force in the field are subject to prosecution. These improvements come at no significant cost to military readiness. Each strikes an appropriate balance between justice and discipline and each takes into account the unique features of military service. Accordingly, we believe that Congress should implement these changes.

222. *Id.* at §822 and 823.

223. *See* R.C.M., *supra* note 113, 921(a) .

224. 10 U.S.C. §831(b).

225. *Id.* at §832.