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As a result of the Ortiz decision the seam between Congress's executive view and the Ortiz majority's judicial view is now apparent, and it gives rise to a question about the constitutionality of the court-martial framework under the Uniform Code of Military Justice (UCMJ): does the current commander-controlled process comply with the requirements of due process? The answer to this question is especially relevant in today's political environment where members of Congress, operating under an executive view of courts-martial, pressure senior military leaders to produce convictions in sexual assault cases. Therefore, this Article examines the due-process question, concluding there is an argument that the UCMJ's court-marital framework may not meet constitutional muster. In reaching this conclusion it highlights the type of structural reform that is necessary to ensure due-process compliance.

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A "JUDICIAL" SYSTEM IN THE EXECUTIVE BRANCH: *ORTIZ V. UNITED STATES* AND THE DUE-PROCESS IMPLICATIONS FOR CONGRESS AND CONVENING AUTHORITIES

JACOB E. MEUSCH*

Abstract: *In Ortiz v. United States, 138 S. Ct. 2165 (2018) the majority described the military court-martial system—a commander-controlled process for adjudicating criminal complaints—as judicial in character. It reached this conclusion over Justice Alito's dissent, which took a diametrically opposed view, describing the system as an Executive Branch entity that could not exercise judicial power. These opposing views are not new. They have been at the center of a debate about the fundamental nature of courts-martial for more than a century, and Congress, unlike the Supreme Court, legislates consistent with Justice Alito's executive view. As a result of the Ortiz decision, however, the seam between Congress's executive view and the Ortiz majority's judicial view is now apparent, and it gives rise to a question about the constitutionality of the court-martial framework under the Uniform Code of Military Justice (UCMJ): does the current commander-controlled process comply with the requirements of due process? The answer to this question is especially relevant in today's political environment where members of Congress, operating under an executive view of courts-martial, pressure senior military leaders to produce convictions in sexual assault cases. Therefore, this Article examines the due-process question, concluding there is an argument that the UCMJ's court-marital framework may not meet constitutional muster. In reaching this conclusion it highlights the type of structural reform that is necessary to ensure due-process compliance.*

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I. INTRODUCTION

On March 6, 2019, the Judge Advocates General of the Army, Air Force, and Navy and the Staff Judge Advocate to the Commandant of the Marine Corps (TJAGs) testified in front of the Senate Armed Services (SASC) Subcommittee on Personnel concerning the issue of the "Military Services' prevention of and response to sexual assault."[1] This was not the first time the TJAGs testified before members of the SASC on the issue. They did so on multiple occasions in 2013.[2] The March 6th hearing, however, is noteworthy in two respects. It marks the beginning of another round of congressional debate on how the military handles sexual assault cases, which is an issue that "seemed settled several years ago," and it revives a century-old debate about a military commander's role as a convening authority in the court-martial process.[3]

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[1] C-SPAN, Sexual Assault in the Military (Mar. 6, 2019), https://www.armed-services.senate.gov/hearings/19-03-06-military-services-prevention-of-and-response-to-sexual-assault (hereinafter "SASC Subcomm. on Personnel Hearing").

[2] *Testimony on Sexual Assaults in the Military Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 113th Cong. 303 (2013); *Pending Legislation Regarding Sexual Assaults in the Military Before the S. Comm. on Armed Services*, 113th Cong 320 (2013). The Judge Advocate General of the Coast Guard also testified in the previous hearings.

[3] Jennifer Steinhauer & Richard A. Oppel Jr., *Senator Martha McSally's Revelation of Assault May Reopen Debate*, N.Y. TIMES (March 7, 2019), https://www.nytimes.com/2019/03/07/us/politics/mcsally-assault-military.html (noting that "debate over how to best get justice for victims" in the military was "likely to [be] renew[ed]"); Tom Vanden Brook, *Sen. Martha*

On the issue of convening authorities, Sen. Kirsten Gillibrand continues to champion a proposal to remove a convening authority's ability to "refer"[4] sexual assault charges to a court-martial, and senior leaders in the Department of Defense, now with Sen. Martha McSally's support, continue to resist Sen. Gillibrand's efforts, desiring instead to maintain the current commander-controlled referral process.[5] As it stands, the Uniform Code of Military Justice (UCMJ) vests some commanders with the authority to serve as court-martial convening authorities, and as a result, they have significant involvement in the court-martial process from beginning to end. They call a court-martial into existence, refer charges, authorize searches, enter into plea agreements, hand-select members, approve or disapprove the production of witnesses, and, in some limited circumstances, approve, disapprove, or modify a court-martial's findings and sentence should a panel of members or a judge find a servicemember guilty.[6]

McSally, Pushes to Criminalize Sexual Harassment in Military, Add Lawyers for Victims, USA TODAY (May 11, 2019), https://www.usatoday.com/story/news/politics/2019/05/11/mcsally-criminalize-sexual-harassment-add-lawyers-victims/1153267001/("McSally . . . said she stands by commanders' traditional role as the arbiter of prosecutions for sexual assault[; a] . . . stance [that] puts her at odds with . . . Gillibrand."); *see infra* Sections II-III.

[4] The military does not use indictments to bring criminal charges against an accused servicemember, instead it uses "a two-part charging procedure[.]" REPORT OF MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 291 (2015) [hereinafter MJRG Report]. The first part is described as the "preferral" of charges, which is the stage where a person drafts the charges and "officially" brings them "against the accused as a criminal matter." *Id.* at 292. The second part is the "referral" of charges to a court-martial, which involves "the order of a convening authority that charges against an accused will be tried by a specified court-martial." Rule for Courts-Martial (R.C.M.) 601, Manual for Courts-Martial (2019).

[5] EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 12 (2016); Vanden Brook, *supra* note 3 ("[Sen. McSally's] defense of a commanders' prerogative to prosecute sexual assault cases puts her at odds with Gillibrand and on the same page as Pentagon leadership.").

[6] 10 U.S.C. §§ 817, 822, 823 (2012); R.C.M. 201(b)(1) ("[F]or a court-martial to have jurisdiction . . . [it] must be convened by an official empowered to convene it."); *see infra* Section IV.B. While military judges, prosecutors, and defense attorneys carry out the pre-trial and trial stages of a court-martial, convening authorities nevertheless maintain significant control. *See, e.g.*, The Judge Advocate's Legal Center and School, U.S. Army, Commander's Legal Handbook 7-15 (2015), *available at* https://www.jagcnet.army.mil/Sites/jagc.nsf/0/EE26C

Since 2013, Sen. Gillibrand has made repeated efforts to "end commanders' traditional disposition authority [in sexual assault cases], so that charging decisions would be made by a lawyer outside the chain of command."[7] To that end, she introduced the Military Justice Improvement Act and "garnered 55 votes in the Senate—a majority, but still five votes short of the 60 needed to bring debate to a close ("cloture")."[8] She tried again in 2015 to pass the bill, but "with changes in the composition of the Senate, support for the measure fell to 50 votes."[9] And in March 2019, she once again signaled her intent to press for passage.[10] In remarks directed at the TJAGs, Sen. Gillibrand explained that she wants military lawyers—not convening authorities—to make charging decisions in military prosecutions and acknowledged the past overreaction of convening authorities in response to political pressure:

> Why not, as the Navy has done, allow for a professionalization of their JAG system to become career criminal justice lawyers. This . . . is exactly what all of the services should do. And then let the prosecutor make the ultimate decision about whether there is enough evidence to go forward, to convene a court-martial. There is no reason that commanders shouldn't opine on it, shouldn't be part of the process, shouldn't influence the process, but just let it be a technical decision. Because as our defendant's rights advocates have send, why do we want to push the scales either way?
>
> I think a lot of commanders did overreact and say "Oh, I am going to send every case to court-martial." Well, maybe they did, but if you are sending false cases forward you are not going to instill confidence in the system. If all of your cases that you move forward end up in not convicting and saying that it didn't happen, do you think a survivor is going to think that system works? No. So you only want to send forward cases that actually have the legitimate basis and have the evidence that a prosecutor would look at and say, "I can win this case." So, I would love to work with all of you on trying to address with how we deal with sexual assault better. I do not think you need to retain this right. I think it is a red herring to say

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E7A9678A67A85257E1300563559/$File/Commanders%20Legal%20HB%202015%20C1.pdf ("The disciplinary system in the military is a Commander owned and operated system.").

[7] FIDELL, *supra* note 5.

[8] *Id.*

[9] *Id.*

[10] SASC Subcomm. on Personnel Hearing, *supra* note 1.

> we are making you less in charge. We're not. We're just taking one technical decision away [from convening authorities].[11]

Despite Sen. Gillibrand's efforts, senior military leaders have "stoutly" opposed her proposal.[12] Notably, Eugene Fidell, a Senior Research Scholar in Law at Yale Law School, believes that such opposition will eventually give way and that Sen. Gillibrand will succeed in passing her bill "(or something like it)," even if it "take[s] several more years."[13] At present, however, it is unclear whether his prediction is accurate, especially given Sen. McSally's opposition.[14] A retired colonel in the Air Force, survivor of military sexual assault, and member of the SASC, Sen. McSally announced in the March 6th hearing that she is opposed to legislation that would remove referral authority from convening authorities:

> [W]e must allow, we must demand that commanders stay at the center of the solution and live up to the moral and legal responsibilities that come with being a commander. We must fix those distortions in the culture of our military permit sexual harm towards women, and yes, some men as well. We must educate, select, and then further educate commanders who want to do the right thing, but are naive to the realities of sexual assault. We must ensure that all commanders are trained and empowered to take legal action, prosecute fairly, and rid perpetrators from our ranks. And if the commander is the problem, or fails in his or her duties, they must be removed and held harshly accountable.
>
> I don't take this position lightly. It's been framed often that some people are advocating for the victims while others are advocating for the command chain or the military establishment. This is clearly a false choice. . . . I very strongly believe that the commander must not be removed from the decision-making responsibility of preventing, detecting, and prosecuting military sexual assault.[15]

With Sen. McSally's opposition to Sen. Gillibrand, the issue of a convening authority's role in the court-martial process is once again at the center of a congressional debate. Since

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[11] *Id.* at 1:52:00.
[12] FIDELL, *supra* note 5.
[13] *Id*.
[14] Steinhauer & Oppel Jr., *supra* note 3; Vanden Brook, *supra* note 3.
[15] SASC Subcomm. on Personnel Hearing, *supra* note 1 at 12:50; Vanden Brook, *supra* note 3.

Congress enacted the UCMJ following World War II (WWII), a commander's role as a convening authority has always been a central (and contentious) military justice issue. In the years following enactment of the UCMJ, however, a lot changed. Congress enacted statutory reforms that enhanced the judicial character of the court-martial process. And in 2018, the Supreme Court noted as much. In *Ortiz v. United States*, Justice Kagan, writing for the majority, used a single word to describe the "character" of the military's court-martial system: "judicial."[16] Accordingly, there is another layer of analysis to consider when it comes to a convening authority's role in the court-martial process: whether and to what degree must the UCMJ allow convening authorities to operate with judicial independence in order for a court-martial to retain its judicial character. This Article addresses that issue, and in so doing, it seeks to inform the current debate on a convening authority's role in the court-martial process, suggesting that members of Congress should view convening authorities as judicial actors.[17]

The modern debate usually compares a convening authority to a prosecutor as a means of framing the issue. That comparison, however, is incomplete. While convening authorities do serve in a "quasi-prosecutorial role and wield . . . discretionary authority over charges and pleas," they also serve in "quasi-judicial roles."[18] Indeed, the UCMJ clearly recognizes this fact, describing some of a convening authority's "acts" as "judicial."[19] Yet the judicial nature of a convening authority's role is often underappreciated in the debate on the issue, and this lack of attention is problematic. The distinction between judicial and prosecutorial roles is significant,

[16] *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018).
[17] This Article intentionally takes no position on any proposed changes to a convening authority's role in the court-martial process.
[18] Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1403-04 (2009).
[19] 10 U.S.C. § 837 (2012).

especially with respect to how members of Congress interact with convening authorities, TJAGs, and their superiors in the chain of command. Prosecutors operate as one party to a proceeding—the United States—while judges do not. Instead, judges have a distinct judicial responsibility to both parties. Therefore, while it may be appropriate for members of Congress to encourage a military prosecutor to pursue sexual assault convictions as a matter of policy, it is not appropriate for them to encourage a military judge to do so. The Fifth Amendment requires judges to remain impartial, making independent decisions grounded in the law and facts of the cases before them.[20]

Those same considerations of impartiality and independence, as this Article argues, should also guide convening authorities in the exercise of their judicial responsibilities.[21] Correspondingly, this means that even though the role of a convening authority is neither purely prosecutorial nor purely judicial,[22] there is a need for members of Congress to respect the independence that is required for convening authorities to perform their judicial duties under the UCMJ. The modern debate, however, has largely overlooked this need, and consequently, many well-intended legislators have incentivized senior military leaders, including TJAGs, to influence convening authorities and courts-martial in a way that violates the prohibition on unlawful influence—Article 37, UCMJ.[23] In turn, this has resulted in military appellate courts overturning

[20] *See Weiss v. United States*, 510 U.S. 163, 179 (1994) (evaluating the constitutionality of the UCMJ's appellate judicial structure under the Due Process Clause).
[21] Notably, the Army expressly recognizes this point: "The commander plays a quasi-judicial role in the system, making decisions that in the civilian sector would be made by professional prosecutors or judges. Commanders must remain neutral and detached from the circumstances and make the best decision for the unit, the Soldier, and the interest of justice." The Judge Advocate's Legal Center and School, supra note 6, at 11.
[22] Bedi, *supra* note 18.
[23] 10 U.S.C. § 837 (2012). As the Military Justice Review Group (MJRG) recently explained, "[u]nder Article 37, interference" by anyone "subject to the Code is prohibited." MJRG Report, *supra* note 4, at 19. This "prohibition has no direct parallel in federal civilian practice, but is

convictions for sex offenses, finding politically motivated "unlawful influence" tainted them.[24] Such cases demonstrate a court-martial's susceptibility to pressure from members of Congress, and they stand in stark contrast to the *Ortiz* majority's description of the court-martial process as judicial in character.

Given the resurgence of the debate—this time between the competing positions of Sen. Gillibrand and Sen. McSally—the controversy surrounding the role of a convening authority seems poised to endure into the future and will likely continue to give rise to extensive interaction between senior military leaders and members of Congress. Unfortunately, as the past several years have demonstrated, when members of Congress use their interaction with senior military leaders to pressure them towards specific outcomes in a category of cases, that pressure metastasizes throughout the military justice system as "unlawful influence."[25] And if left unchecked, such pressure threatens to undermine both the integrity of the military justice system and its judicial character.

To be sure, it is possible for Congress to legislate in a manner that does not incentive senior military leaders to resort to unlawful influence. Doing so, however, requires members of Congress to view convening authorities as judicial actors and not just prosecutors. While some

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essential in ensuring a system that maintains the confidence of both servicemembers and the public." *Id.* "The prohibition against unlawful command influence was a driving factor behind the enactment of the UCMJ[,]" and it is one of the reasons the Court found the UCMJ and corresponding regulations "'sufficiently preserved judicial impartiality so as to satisfy the Due Process Clause' requirement for 'a fair trial in a fair tribunal.'" *Id.* (quoting *Weiss v. United States*, 510 U.S. 163, 179 (1994)).

[24] *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018); *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017); *United States v. Riesbeck*, 77 M.J. 154, 159 (C.A.A.F. 2017); *United States v. Schloff*, No. 20150724, 2018 CCA LEXIS 350, *3 (A.C.C.A. Feb. 5, 2018); *United States v. Wright*, 75 M.J. 501, 503 (A.F. Ct. Crim. App. 2015); *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321, *11-12 (N-M. Ct. Crim. App. May 22, 2014).

[25] *See supra* note 24.

members of Congress may initially balk at such a shift, there are good reasons for doing so, and this Article sets forth those reasons, proceeding in five parts. First, it outlines two competing views on the fundamental nature of courts-martial—executive and judicial—and describes how they frame the debate on a convening authority's role in the court-martial process. Second, drawing on the *Ortiz* majority's rationale, it looks to the historical development of a convening authority's role in the court-martial as evidence of its judicial nature. Third, given a convening authority's judicial role, it examines the modern reform movement and how it gave rise to issues of politically motivated unlawful influence. Fourth, it discusses how the Court's decision in *Ortiz* may give rise to a due-process challenge if members of Congress do not adopt a judicial view of courts-martial and take action accordingly. Finally, it outlines of a possible due-process challenge should Congress fail to take such action.

II. JUDICIAL OR EXECUTIVE: COMPETING VIEWS OF THE FUNDAMENTAL NATURE OF COURTS-MARTIAL

To understand the impact of *Ortiz* on the relationship between Congress and convening authorities, it is first necessary to outline the two competing views of courts-martial—the judicial view and the executive view—discussed in the decision. In *Ortiz*, the Court examined whether it had "jurisdiction to review" the decisions of the Court of Appeals for the Armed Forces (CAAF).[26] Justice Kagan reasoned in her majority opinion that the "judicial character and constitutional pedigree of the court-martial system enable[d]" the Court to exercise "appellate jurisdiction" over the CAAF's decisions.[27] The majority reached this conclusion even though "Congress established the CAAF under its Article I, rather than its Article III, powers and . . .

[26] *Ortiz*, 138 S. Ct. at 2170.
[27] *Ortiz*, 138 S. Ct. at 2173. "Atop the court-martial system is the CAAF, a 'court of record' made up of five civilian judges appointed to serve 15-year terms." *Id.* at 2171.

located the CAAF . . . within the Executive Branch, rather than the judicial one."[28] For Justice Kagan and the majority, the location of the CAAF in the Executive Branch—one of the two "political branches"[29] of government—did not matter as much as the "character" of the court-martial system itself.[30] In reviewing the "character" of the court-martial system, the majority concluded that it "closely resemble[d] civilian structures of justice" and "operated as [an] instrument[] of military justice."[31] Accordingly, the majority found the Court had jurisdiction to review decisions from the CAAF.[32]

Not all of the Justices, however, agreed with the majority's description of the court-martial system's character or that such character was more important, for jurisdictional purposes, than the system's location within the three branches of government. In dissent, Justice Alito, joined by Justice Gorsuch, focused intently on the CAAF's location in the Executive Branch—the constitutional source of the CAAF's "power"—as opposed to the "character" of its process.[33] As Justice Alito explained, "Executive Branch officers," like the judges appointed to the CAAF, "cannot lawfully exercise the judicial power of *any* sovereign, no matter how court-like their decision making process might appear," and "[t]hat means their decisions cannot be appealed directly" to the Supreme Court.[34] In Justice Alito's view, "Article III of the Constitution" gave "every single drop" of "judicial power" to the Supreme Court and the "inferior Courts"

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[28] *Id.* at 2176.
[29] John F. O'Connor, *Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 166 (2000).
[30] *Ortiz*, 138 S. Ct. at 2176.
[31] *Id.* at 2170, 2175.
[32] *Id.* at 2170-71 ("Under 28 U.S.C. § 1259, we have jurisdiction to review the CAAF's decisions by writ of certiorari.").
[33] *Id.* at 2189-90, 2203-05 (Alito, J. dissenting) (describing the majority's analysis as the "looks like" test that is "utterly inadequate to police separation-of-powers disputes").
[34] *Id.* at 2190.

established by Congress, which meant that neither the CAAF nor the court-martial system were exercising judicial power.[35]

As a result, Justices Alito and Gorsuch found that the CAAF—an Article I court located in the Executive Branch—exercised executive instead of judicial power and concluded this distinction had constitutional significance. Because "Article II authorizes the President to discipline the military without invoking the judicial power of the United States" the Court always found it permissible for the President to maintain a system of military courts-martial—ad-hoc tribunals that lacked the constitutional safeguards of an Article III court and were historically seen as "blunt instruments to enforce discipline."[36] Courts-martial "represented the exercise of the power given to the President in the head of the Executive Branch and the Commander in Chief and delegated by him to military commanders."[37] Therefore, in Justice Alito's view, even though the court-martial system lacked the constitutional safeguards of an Article III court, such a structure was constitutionally permissible because of its location outside of the Judicial Branch. "[A]djudications by courts-martial are executive decisions; courts-martial are not courts; they do not wield judicial power, and their proceedings are not criminal prosecutions within the meaning of the Constitution."[38]

Notably, the crux of the disagreement between the majority and the dissent involves a question concerning the fundamental nature of courts-martial. All of the Justices recognize that courts-martial are "older than the Constitution,"[39] but they diverge on the significance associated with the court-martial system's location within the three branches of government. All of the

[35] *Id.*
[36] *Id.* at 2201.
[37] *Id.* at 2199.
[38] *Id.* at 2200.
[39] *Id.* at 2168, 2190.

Justices agree that the CAAF is an Executive Branch entity and that modern-day courts-martial have judicial-like procedures, yet they reach diametrically opposed conclusions about the fundamental nature of a court-martial and the power it wields. For Justice Kagan and the majority, courts-martial are judicial in nature, wielding at least some judicial power, and for Justices Alito and Gorsuch, they are executive in nature, wielding only executive power.

When considering the tension between these two views, it is important to highlight that they are not new. Rather, *Ortiz* marks the latest chapter in a debate that is more than a century old. In 1919, the acting Judge Advocate General of the Army, Brigadier General (Brig. Gen.) Samuel Ansell, described these competing views in testimony before the Senate Committee on Military Affairs, explaining there were "two diametrically opposed legal theories as to courts-martial."[40] One theory was that "a court-martial is an executive agency, belonging to and under control of the military commander[,]" and the other was that "a court-martial is inherently judicial . . . and limited by the established principles of jurisprudence which govern the exercise of judicial functions in our system."[41]

And it's not just justices on the Supreme Court who hold these opposing views. Unlike the *Ortiz* majority, Congress takes an executive view of courts-martial, treating the court-martial system as an Executive Branch entity when crafting legislation. And once again, the competing views between Congress and a majority of the justices on the Supreme Court are not new. It is something that has persisted for more than a century. As Brig. Gen. Ansell observed in 1919, the "Supreme Court has always recognized the inherent judicial quality of courts-martial; Congress,

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[40] *A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trial by Courts-Martial, and for Other Purposes: Hearing Before the Sen. Subcommittee on Military Affairs*, 65th Cong. 6 (1919) (statement of Brig. Gen. Samuel T. Ansell) (hereinafter "Ansell's Senate Statement").
[41] *Id.*

however, . . . has legislated rather upon the other theory"—that "a court-martial is an executive agency, belonging to and under the control of the military commander."[42] For the dissent in *Ortiz*, this latter point—the fact that a military commander controls the court-martial process—is a key distinction that undermines claims in favor of the court-martial system's judicial character.[43]

Since 1919, however, Congress has enacted significant changes to the court-martial system, passing the Uniform Code of Military Justice (UCMJ) in 1950 and several additional reforms in the ensuing decades. In doing so, Congress enhanced the judicial features of the court-martial framework, deliberately making it more closely resemble civilian courts.[44] Yet despite these reforms, Congress never removed the court-marital process from a convening authority's control, and for the dissent in *Ortiz*, that was a telling fact. As Justice Alito explained, "the UCMJ preserves the chain of command's historic revisory power[.]"[45] Court-martial judgments "cannot be executed until the President, the relevant branch Secretary, or one of his subordinates approves it," and this aspect of court-martial procedure is "radically inconsistent" with the idea of "judicial power," which does not permit "members of the

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[42] *Id.*

[43] As Brig. Gen. Ansell noted, a military commander in 1919 exercised "a large and almost unrestrained discretion" in the court-martial process, "determining (1) who shall be tried, (2) the sufficiency of the charge, (3) the prima facie sufficiency of the proof, (4) the composition of the court-martial, (5) passing upon all questions of law arising during the progress of the trial, and (6) reviewing the record for what he may conceive to be its sufficiency in law and fact." *Id.* And under a theory of executive agency, he explained, "[a]ll of these questions are controlled[,] . . . not by law, but by the power of military command." *Id.*

[44] *See, e.g.*, 10 U.S.C. § 836 (2012) (authorizing the President to enact "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts").

[45] *Ortiz*, 138 S. Ct. at 2205 (Alito, J. dissenting).

Executive or Legislative Branches" to have the power to revise or suspend "any court's judgments."[46]

Of course, Justice Alito's executive view did not prevail. The majority rejected the argument that the "constitutional foundations, history, and fundamental character" of courts-martial "show that they are Executive Branch entities that can only permissibly exercise executive power."[47] And the majority's rejection is important. It frames the tension between the judicial and executive views of courts-martial and underlines that a majority of the justices subscribe to the judicial view at a time when members of Congress subscribe to the executive view. Going forward, unless Congress adopts the *Ortiz* majority's judicial view, these two competing views will remain in tension and will continue to frame the issue of a convening authority's role in the court-martial process, especially given that congressional debate is heating up again. And as the following sections explain, it would be in the best interest of the military justice system, and the men and women who serve in the Armed Forces, for members of Congress to adopt the judicial view of courts-martial.

III. LOOKING BACK: CONVENING AUTHORITIES AS JUDICIAL ACTORS WITHIN THE EXECUTIVE BRANCH BEFORE THE MODERN-DAY REFORM MOVEMENT

Having outlined the judicial and executive views, the remainder of this Article explains why it makes sense for Congress to adopt the *Ortiz* majority's judicial view, starting with an examination of the historical development of a convening authority's role in the court-martial process. Before *Ortiz*, opponents of the judicial view likely looked to history as a way to justify the executive view.[48] They could look to the location of the court-martial system within the

[46] *Id*. at 2204-05 (citing 10 U.S.C. §§ 871(a), (b) (2012)).
[47] *Id.* at 2206.
[48] *Compare Ortiz*, 138 S. Ct. at 2174 (describing the military justice system as "judicial" in "character") with Donald w. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1,

branches of government and make a straightforward argument that convening authorities were executive actors, as opposed to judicial actors. Convening authorities are military commanders (or their superiors, which includes the service Secretaries and the President). They generally lack formal legal training. They are not military judges, and they do not derive any authority from Article III of the Constitution.[49] To the contrary, they are members of the Executive Branch, and the Court has "frequently note[d]" as much.[50] "[T]he Constitution vests control over the military in the political branches, and not in the courts,"[51] which suggests that convening authorities are not judicial actors under Article III since they fall under the Executive Branch. Before *Ortiz*, opponents of the judicial view could have even gone so far as to argue that this had been the case throughout American history. The Constitution gave Congress the power to decide where to locate the court-martial system within the branches of government, and Congress always gave courts-martial to the Executive Branch, as opposed to the Judicial Branch.[52]

After *Ortiz*, however, that argument is much more difficult to make. The *Ortiz* majority rejected the dissent's argument that the location of the court-martial system within the branches of government determined the type of power that its actors were exercising. As a result, post-*Ortiz*, there is room to argue that convening authorities are judicial actors based on the characteristics of the court-marital process. Indeed, following *Ortiz*, the more tenuous argument

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50 (1968) (concluding that while convening authorities have a "judicial function" the "court-marital is an instrument of the executive branch for the enforcement of discipline.").

[49] Hansen, *supra* note 48, at 23 ("If the court-martial is not an article III court[,] . . . . [then] the commander is exercising executive powers, albeit pursuant to a legislative grant[.]").

[50] O'Connor, *supra* note 29, at 166.

[51] *Id.*

[52] *See Martin v. Mott*, 25 U.S. 19 (1827) (observing that Congress gave the President authority over courts-martial in "the act of the 28th of February, 1795"); Hansen, *supra* note 47 ("The historical development of the commander's relationship to military justice displays a recognition that the court-martial is an instrument of the executive branch for the enforcement of discipline.").

seems to be that convening authorities are executive actors, as opposed to judicial actors, because they are members of the Executive Branch.

In this way, *Ortiz* shows how convening authorities in the court-martial process should be viewed, which has important implications for members of Congress and opponents of the judicial view. It is not sufficient to only consider the court-martial system's location within the branches of government. Post-*Ortiz* it is necessary to look beneath the surface and examine the role of a convening authority from a process-characteristics perspective. And from this perspective, there is ample historical support for the conclusion that convening authorities are judicial actors.

A. THE ROLE OF CONVENING AUTHORITIES IN THE NINETEENTH CENTURY

The Constitution vested Congress with the power to shape both the court-martial system and a military commander's role in it. Before the Constitutional Convention, "the Second Continental Congress codified the first American Articles of War, which, among other things, provided for courts-martial for certain prescribed offenses."[53] Therefore, by the time of the Constitutional Convention "there was little question" among the delegates that "there would be federal military justice separate and apart from Article III" courts.[54] What was uncertain, however, was what the military justice system would look like.[55] The shape of the military justice system fell to Congress under Article I, Section 8, Clause 14 of the Constitution, which states that Congress shall have the power "[t]o make Rules for the Government and Regulation

[53] Stephen I. Vladek, *Military Courts and Article III*, 103 GEO. L.J. 933, 939 (2015) (citing 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 378).
[54] *Id.* (citing AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 330 (2005)).
[55] *Id.*

of the land and naval Forces[.]"[56] And in the years that followed, Congress created a court-martial process that "developed as a separate legal system under command control[.]"[57]

Courts-martial, of course, existed only as ad-hoc forums, which made a military commander's control an operational necessity. Military commanders "called [them] into existence for a special purpose and to perform a particular duty."[58] That duty was to adjudicate a criminal charge against a servicemember, return a verdict (and sentence if the court-martial found the accused guilty), and then report back to the military commander who convened the court-martial (or the Secretary of War or the President as required under the relevant provision of the Articles of War).[59] Once the court-martial accomplished this task, it was "dissolved," and the execution of its findings and sentence were subject to the approval (or "revisory power"[60]) of the military commander who convened the court-martial.[61] In terms of process characteristics, this aspect of a military commander's involvement appeared judicial in nature. A commander "was not at liberty to delegate this duty to another," and was required to "act according to . . . [his] own judgment."[62]

Moreover, as early as 1887 the Supreme Court endorsed the view that a convening authority's role in the court-martial process was judicial. In *Runkle v. United States*, 122 U.S.

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[56] U.S. Const. art. 1 § 8, cl. 14. *See also Dynes v. Hoover*, 61 U.S. 65, 79 (1857) ("Congress has the power to provide for the trial and punishment of military and naval offences . . . and . . . the power to do so is . . . without any connection" to Article III of the Constitution).
[57] Edward F. Sherman, Military Justice without Military Control, 82 YALE L.J. 1398, 1400 (1973).
[58] *Runkle v. United States*, 122 U.S. 543, 555 (1887).
[59] *Id.*
[60] *Ortiz*, 138 S. Ct. at 2205 (Alito, J. dissenting).
[61] *Runkle*, 122 U.S. at 556. When a commander "disagreed with an acquittal," this power included the authority to "ask the court members to reconsider their finding." MJRG Report, *supra* note 4, at 55.
[62] *Id.*

543 (1887), Chief Justice Waite observed that the power to review and act on a court-martial's findings and sentence was "judicial in its character."[63] Elaborating on this description, he noted that a person who takes such action must "consider the proceedings laid before him and decide personally whether they ought to be carried into effect."[64] This meant that "[h]is personal judgment [was] required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself."[65] And thus "his judgment, when pronounced, must be his own judgment and not that of another . . . because he is the person, and the only person, to whom has been committed th[is] important judicial power[.]"[66]

B. THE ROLE OF CONVENING AUTHORITIES IN THE EARLY TWENTIETH CENTURY

As the country moved into the twentieth century, and eventually into World War I, convening authorities continued to exercise control over the court-martial process, carrying out a similar role.[67] However, by the time that Brig. Gen. Ansell testified before the Senate in 1919,

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[63] *Runkle*, 122 U.S. at 557. In 1864, Attorney General Bates drafted a legal opinion for President Lincoln and expressly described this power as "judicial." *Id.* at 558. Attorney General Bates explained that the "act of the officer who reviews the proceedings[,] . . . whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of th[e] judgment . . . as the trial or the sentence." *Id.* In his opinion, the "duty of approving the sentence of a court-martial" was an action that had "all the solemnity and significance of the judgment of a court of law." *Id.* In 1887, the Supreme Court adopted the same view as Attorney General Bates. *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* The Military Justice Review Group aptly summarized the nature of this power:

> The commanding officer who convened the court-martial had a legal duty to personally review and act on the case, exercising personal judgment as if the commanding officer were one of the court-martial members. The action was judicial in nature, involving the exercise of discretion to act according to the commanding officer's own judgment[.]"

MJRG Report, *supra* note 4, at 55.

[67] Historically, a commander, serving in the role of a convening authority, had the power to review the outcome of a court-martial and decide whether it should be approved. *Id.* at 335. In

the competing views of the fundamental nature of courts-martial had emerged with Congress adopting the executive view and the Court leaning more towards the judicial view. At the same time, the public started to pay attention to the nature of the court-martial process and a convening authority's role in it. Following two high-profile cases in the early twentieth century, there was significant public criticism denouncing courts-martial and describing the role of a convening authority as arbitrary.[68]

Of those two cases, the one that generated the most public backlash was the "Houston Riots Courts-Martial of 1917."[69] The case involved a racially charged riot that lasted two hours and "left fifteen white citizens dead (including four Houston police officers)."[70] Sixty-three African-American Soldiers" were "court-martialed in the 'largest murder trial in the history of the United States.'"[71] "The accused—all of whom pleaded not guilty—were represented by a single defense counsel" who was "not a lawyer."[72] The trial spanned "twenty-two days" and included testimony from "196 witnesses."[73] "[D]espite the inherent conflict of interest," the sole defense counsel argued that some men should be acquitted while "acknowledging" that others

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carrying out this action, a commander could exercise unfettered discretion, which meant that even where court-martial members found a servicemember guilty of an offense, a military commander could disapprove the conviction. *Id.* at 61. Similarly, a military commander could also intervene to change an acquittal to a finding of guilty, and, for example, in World War I "one-third of all acquittals . . . had been changed to guilty verdicts at the request of the convening authority." *Id*.

[68] Fred L. Borch, *Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917-1920*, 2017 ARMY LAW. 1, 1 (2017); Fred L. Borch, *Lore of the Corps: "The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, 2011 ARMY LAW. 1, 1 (2011) (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 125, at 130 (1975))

[69] Borch, *Lore of the Corps*, supra note 68, at 1 (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 125, at fig. 37 (1975)).

[70] *Id.*

[71] *Id.*

[72] *Id.* at 2.

[73] *Id.*

"were culpable[.]"[74] At the conclusion of the court-martial, five soldiers were acquitted, forty-one were sentenced to life imprisonment, and thirteen were sentenced to death by hanging.[75] Two days after these thirteen soldiers learned of their death sentence, they "were handcuffed, transported by truck to a hastily constructed wooden scaffold, and hanged at sunrise."[76]

While the convening authority was permitted to carry out the execution of these thirteen men under the Articles of War, the decision to do so nevertheless generated "outcry and criticism," which prompted Brig. Gen. Ansell to create "a Board of Review with duties 'in the nature of an appellate tribunal'"[77]—an action taken with a focus on increasing the judicial character of the court-martial system. General Ansell also made numerous legislative proposals aimed at moving "courts-martial away from their focus on discipline at the expense of justice" and towards "proceedings" that were "judicial" from "beginning to end[.]"[78] In part, his hope was for Congress to eventually establish a "military judiciary" that was "untrammeled and uncontrolled in the exercise of its functions by the power of military command."[79]

C. THE ROLE OF CONVENING AUTHORITIES UNDER THE UNIFORM CODE OF MILITARY JUSTICE

While Congress did not initially create the full-scale judicial framework that Brig. Gen. Ansell had hoped for, his "ideas about military justice were not forgotten."[80] "His firm belief that there must be more limits on the role of the commander in the system . . . [was] accepted by

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 3 (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 125, at 130 (1975))
[78] Borch, Military Justice in Turmoil, *supra* note 68, at 5 (quoting Edmund Morgan, *The Existing Court-Martial System and the Ansell Army Articles,* 29 YALE L. J. 52, 73-74 (1919)) (internal quotation marks omitted).
[79] *Id.*
[80] *Id.*

Congress when it established a three civilian judge [Court of Military Appeals] as part of the UCMJ in 1950, and when it later created the position of the military judge in the Military Justice Act of 1968."[81] In making these changes, Congress removed a significant portion of a convening authority's control over the court-martial process and gave the military justice system a character that was decidedly more judicial. This is true even though Congress kept convening authorities as a central fixture in the court-martial process and continued to house the court-martial system entirely within the Executive Branch. Convening authorities maintained their revisory power over the court-martial and had significant control over the entire court-martial process.[82] As a result, Congress kept convening authorities in a judicial role, but in doing so, Congress added a new set of judicial actors, as well as a statutory safeguard to protect all of the judicial actors in a court-martial from unlawful influence.[83]

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[81] *Id.* Congress has since changed the name of this court to "the United States Court of Appeals for the Armed Forces." United States Court of Appeals for the Armed Forces, https://www.armfor. uscourts.gov/about.htm (last visited Dec. 15, 2018); *see also* JONATHAN LURIE, PURSUING MILITARY JUSTICE: VOLUME 2, 27-47 (1998); JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE, 5 (2013).

[82] "Under the UCMJ, the convening authority continued to exercise an appellate-type review function with responsibility to act on the findings and sentence, and was only to approve them to the extent that he found them correct in law and fact" and believed they "should be approved." MJRG Report, *supra* note 4, at 80.

[83] Regarding the enhanced judicial character of the court-martial process, the context in which the UCMJ was created is also important. It not only included significant procedural reforms, but also served as a mechanism to unify the court-martial practices among the services. Congress passed the UCMJ in response to public outcry after World War II, and notably, much of the criticism echoed the concerns that Brig. Gen. Ansell expressed a generation earlier about "autocracy in the handling of . . . courts martial[.]" John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 10 (2014). In response, Congress passed the Elston Act in 1948, which significantly revised the Articles of War, and then it passed the UCMJ, which incorporated the Elston Act and created "a single military code" for "all of the armed forces." Notably, Congress passed the UCMJ shortly after it "combined the military departments into a single organization, which became the Department of Defense." *Id.* MJRG Report, *supra* note 4, at 69. President Truman signed the UCMJ into law on May 5, 1950, and the UCMJ went into effect on May 31, 1951. From that point until today, the UCMJ—and its

To be fair, before choosing a statutory framework that would keep convening authorities at the center of the court-martial process, members of Congress devoted considerable attention to the possibility of removing them. For example, Rep. Carl T. Durham and Rep. Philip J. Philbin highlighted the problems with such a framework.[84] Rep. Durham described the convening authority's power in the court-martial process as "disturbing," noting that this power included the authority "to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed."[85] Rep. Philbin characterized the military justice system as "arbitrary" in character and believed that it caused a "manifest denial of constitutional safeguards generally recognized by civil courts since the establishment of the Government."[86] Nevertheless, he conceded that it "would be a grave error to attribute to our military leaders, as a whole, willful and deliberate disregard for fundamental principles of justice."[87]

Other members of Congress focused on the new statutory prohibition on unlawful influence in the UCMJ as a way to square the enhanced judicial character of courts-martial with their decision to retain a convening authority's control of the process. Rep. Charles H. Elston, for example, agreed that further reforms were needed, but pushed back on the idea that a convening authority framework could not operate in a just manner.[88] From Rep. Elston's

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prohibition on unlawful influencing judicial actors—has applied to "all of the military services—the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard." *Id.* at 69-70.

[84] 95 CONG. R. PT. 5, 5718 (May 5, 1949), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf [hereinafter 1949 DEB.].

[85] *Id.* at 21.

[86] *Id.* at 23.

[87] *Id.*

[88] As "chair of a Legal Subcommittee of the House Committee on Armed Services, Representative Elston conducted a detailed investigation of the military justice system[,] . . .

perspective, it was sufficient to prevent such abuse through "safeguards over [command] authority."[89] Rep. Thomas Overton Brooks described "the question of command control" as the "most troublesome question," and then highlighted that the UCMJ made "it a court-martial offense for any person subject to this code to unlawfully influence the action of a court-martial."[90]

Notably absent from this debate, however, was explicit guidance as to whether members of Congress viewed a convening authority's role as judicial in character. Consistent with Rep. Philbin's suggestion that military leaders were capable of taking action in accord with fundamental principles of justice, Congress seemed to believe that the UCMJ's new court-martial system would hew closer to the judicial character of civilian courts despite a convening authority's control. But whether Congress viewed the role of a convening authority as judicial, instead of executive, is not apparent.

One possible explanation for the silence on this issue is that, as a functional matter, members of Congress did not give the distinction much thought since they placed the court-martial system in the Executive Branch. Indeed, it was this location outside the Judicial Branch that created the need for the UCMJ's judicial enhancements in the first place. Unlike Article III courts, the court-martial system, by design, operated without significant constitutional safeguards because it was seen as a necessary component of military command—an Executive Branch function. And under its executive view of courts-martial, it stands to reason that Congress saw

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recommended many reforms, and more importantly, supported each recommendation with detailed and persuasive evidence." Brooker, *supra* note 83, at 63. His efforts led to the Elston Act reforms in 1948 and also ensured "the 'battlefield was prepared' for the debates and exchanges that led to the 1950" bill enacting the UCMJ. *Id.*

[89] 1949 DEB., *supra* note 84, at 16

[90] *Id.* at 10.

the judicial character of a convening authority's role as inconsequential insofar as the source of the convening authority's power within the court-martial system was concerned.

Nevertheless, regardless of the intent behind Congress's decision to enhance the judicial character of the court-martial system while housing it in the Executive Branch, the Court continued to hew towards a judicial view of courts-martial, and by judicial standards, it still looked down on military justice even after the UCMJ was enacted.[91] Recognizing that Congress made "a number of improvements" to the military justice system in the UCMJ, a plurality of the Court diminished those improvements in 1957 because they were "merely statutory."[92] As the plurality opinion explained in *Reid v. Covert*, "Congress—and perhaps the President—can reinstate former practices, subject to the limitations imposed by the Constitution, whenever it desires."[93] Noting that a military trial was not a "trial by jury before an independent judge after an indictment by a grand jury," the plurality opinion characterized military law as "emphasiz[ing] the iron hand of discipline more than . . the even scales of justice[,]" and recognized that "command influence" was a continuing issue because "members of the court-martial must look to the appointing officer for promotions, advantageous assignments and

[91] When compared to an Article III court, a court-martial was always lacking in constitutional safeguards. Therefore, under a judicial view the court-martial system has historically been seen as procedurally lacking yet trending towards greater judicial character. *Compare United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J. dissenting) ("Traditionally military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.") (quoting *Reid v. Covert*, 354 U.S. 1, 35-36 (1957)) *with United States v. Acevedo*, 77 M.J. 185, 191 (C.A.A.F. 2018) (Ryan, J. dissenting) ("In the current climate, where it appears that neither the convening authority nor the lower courts are immune from external pressures, . . . [the CAAF] has a heighted responsibility to ensure that servicemembers receive fair and impartial justice, instead of a 'rough form of justice.'").
[92] *Reid*, 354 U.S. at 37.
[93] *Id.*

efficiency ratings—in short, for their future progress in the service."[94] Then, commenting on the character of the court-martial system, the plurality opinion observed that the President "and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials[,]" and that "[s]uch blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."[95] Despite such criticism, however, it is notable that the plurality opinion recognized, at least from a process-characteristics perspective, that the President and his military subordinates exercised some quantum of power that was judicial in nature in connection with courts-martial.

D. EARLY REFORMS TO THE UNIFORM CODE OF MILITARY JUSTICE

Not too long after *Reid*, the United States found itself in another large-scale war—this time Vietnam—and military justice found its way back into a national debate. As Judge Walter T. Cox III, a former judge on the United States Court of Military Appeals,[96] explained:

> The Vietnam War years brought much controversy to the system. In 1969, the book, *Military Justice is to Justice as Military Music is to Music,* was published. This critique of the system was described by Mike Wallace of CBS News as "a chilling analysis of what can pass for justice in [the] military." In August of 1970, *Newsweek* magazine featured a cover story captioned, "Military Justice on Trial." It discussed several sensational cases of the era and concluded that the number one evil with military justice remained "command influence."[97]

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[94] *Id.* at 36-37.
[95] *Id.* at 38-39.
[96] In 1994, Congress changed the name to "the United States Court of Appeals for the Armed Forces." United States Court of Appeals for the Armed Forces, https://www.armfor.uscourts.gov/about.htm (last visited Dec. 15, 2018).
[97] Walter T. Cox, III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 Mil. L. Rev. 1, 16-17 (1987) (citing *Military Justice on Trial*, NEWSWEEK (Aug. 31, 1970)).

Before 1969, however, Congress, was well-aware of these criticisms and had already started studying the issue. Hearings were held in 1962 "to review allegations that the UCMJ, as designed and practiced, was violating the due-process rights guaranteed by the Fifth and Sixth Amendments of the Constitution."[98] And once again, there were "complaints of command control," which prompted lengthy hearings and numerous bills over the ensuing years.[99] Finally, "with the Military Justice Act of 1968, Congress amended the UCMJ to include new due-process protections, such as new rights to defense counsel [and] the creation of the military judiciary[.]"[100] When President Johnson signed the act into law, he even went so far as to proclaim, "[t]he man who dons the uniform of his country today does not discard his right to fair treatment under the law."[101] In passing these reforms, Congress both sought to create a court-marital process that hewed even closer to the judicial character of Article III courts while also keeping a commander-centric framework in place.

This same objective would also prove true fifteen years later when Congress again reformed the court-martial system in the Military Justice Act of 1983.[102] The 1983 Act created "more efficient pre-trial and post-trial processing procedures, independent (non-command) detailing of military judges and counsel, and an avenue, albeit limited, of Supreme Court review[.]"[103] The latter reform was incredibility significant. In "establish[ing] a procedure for direct review" of decisions from the Court of Appeals for the Armed Forces "by the United States Supreme Court," the Military Justice Act of 1983 permanently altered the independent

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[98] Brooker, *supra* note 83, at 12.
[99] *Id.*
[100] *Id.*; *see also* Cox, *supra* note 97, at 19 ("One of the most significant changes . . . was the designation of a 'military judge' to preside over the court-martial proceedings.'").
[101] Cox, *supra* note 97, at 19.
[102] Brooker, *supra* note 83, at 13-14.
[103] *Id.*

structure of the military justice system" and brought it, for the first time, under the direct review of a Court established within "Article III of the Constitution."[104] Indeed, this was a fundamental shift that increased the judicial character of the court-martial process. Yet once again, it came in tandem with a decision to keep convening authorities at the center of the court-martial process.

Concerns about commanders using their power as convening authorities to improperly influence the court-martial process, however, did not end there. And in an effort to address those concerns, Congress established a commission that surveyed the "military justice establishment" on the issue of a commander's improper influence.[105] Notably, survey participants "disclosed" that they were "aware of instances of improper pressure exerted on military judges,"[106] which was a significant finding at the time. It established "a tangible basis for concluding that the amorphous concept of improper command influence [did], in fact, exist in the military justice system."[107] Nevertheless, Congress did not remove convening authorities from the court-martial process. In the Military Justice Act of 1983, Congress "memorialized the long-standing power of convening authorities and clearly established total control over the outcome of courts-martial by allowing convening authorities to overturn convictions completely and to grant clemency by reducing punishments as they saw fit[.]"[108]

In sum, when viewed from a process characteristics perspective, convening authorities have performed actions that were judicial in character since the establishment of the American

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[104] Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 455-56 (1994).
[105] *Id.* at 456.
[106] *Id.*
[107] *Id.* at 457.
[108] Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, 2014 ARMY LAW. 23, 24-25 (2014). It is important to note, however, that a convening authority's decision to overturn a conviction did not necessarily preclude the possibility of a retrial.

military. And the majority in *Ortiz* appeared to recognize as much. Accordingly, based on both the history of the convening authority's role in the court-martial process and the Court's decision in *Ortiz*, it follows that some actors in the court-martial process exercise judicial power, and one of those actors is the convening authority.

IV. MODERN REFORMS TO THE CONVENING AUTHORITY'S ROLE UNDER THE UNIFORM CODE OF MILITARY JUSTICE

As a result of reform efforts over the last century, "American military personnel . . . have legal rights that their nineteenth century predecessors couldn't have imagined[.] . . . A steady march toward the civilianization of military courts has given [servicemembers] due-process protections" that historian Chris Bray describes as "stunning" in their "historical context."[109] In connection with the increasing restraints on a convening authority's role in the court-martial process, a guide for this march was Brig. Gen. Ansell's judicial view of courts-martial. Brig. Gen. "Ansell, and many other critics, had argued that the role of commanders in convening and reviewing courts-martial cost military personnel the due-process rights that American civilians had always expected; justice tainted by the effects of command was arbitrary and dangerous to the accused."[110] And after a century of reform efforts, Congress has not only imposed constraints on a convening authority's influence in the court-marital process, but required each of the services to staff the court-martial process with lawyers and judges. Together, such changes transformed the character of courts-martial from the severely lacking process seen in the Houston Riots Court-Martial into something that more closely resembles the judicial character of

[109] CHRIS BRAY, COURTS-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016).
[110] *Id*.

Article III courts. That transformation did not happen overnight, and eventually the Court took notice in *Ortiz*.[111]

Unfortunately, as described above, the *Ortiz* majority's judicial view of the court-martial system does not sync with the executive view that has guided Congress's modern reform movement, both in the type of structural reforms enacted and the nature of the interaction between members of Congress and senior military leadership. As a result, over the last several years, the civilianization trend has arguably reversed, moving the court-martial system back towards a "rough form of justice."[112] For some, this may not come as a surprise. Congress never abandoned its executive view of the court-martial system, which meant that it always viewed itself as retaining the authority to reduce the judicial character of courts-martial. For Congress, the judicial character of a court-martial was not anchored to the Constitution like an Article III court. Rather, the court-martial system derived its judicial character from statutes, and Congress, of course, retained the constitutional authority to change them. The reform movement over the last decade highlighted as much, and it serves as a reminder that despite past judicial enhancements, Congress, unlike the *Ortiz* majority, continues to operate under an executive view of the court-martial system.

A. THE ORIGIN OF THE MODERN REFORM MOVEMENT

The modern reform movement highlights a widening gap between Congress's executive view of courts-martial and the *Ortiz* majority's judicial view—a delta that existed over the last

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[111] *Compare Ortiz*, 138 S. Ct. at 2174 (describing the court-marital system as "judicial") *with Reid*, 354 U.S. at 35-36 (describing the court-martial system as a "rough form of justice") *and United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts[.]").

[112] *Denedo*, 556 U.S. at 918 (2009) (Roberts, C.J. dissenting).

century but was masked under legislative reforms aimed at increasing the judicial characteristics of the court-martial process. During that time, Congress, under pressure from the public to make courts-martial operate more like civilian courts, gave accused servicemembers procedural rights and developed a system that grew increasingly more judicial in character. In doing so, Congress pushed a system that it housed in the Executive Branch to look and act with greater judicial character, which aligned with the Court's judicial view (and expectation) of the court-martial system. In this way, the development of the court-martial system across the two branches progressed in relative harmony even though they had fundamentally different views of courts-martial. So long as the focus of Congress was to make courts-martial more judicial in character, Congress and the Court moved the court-martial system in the same direction, steadily enhancing its judicial character.

In the early 2000s, however, the pressure on Congress changed, which, in turn, changed the direction of its reform efforts. Consistent with its executive view, Congress started moving the court-martial system in the opposite direction of the Court's judicial view. In almost an instant, "the new reformist view of command influence . . . flip[ped] a century of history on its head."[113] Tethered to public concerns about how the military justice system handled reports of sexual assault, the modern political focus became less concerned with ensuring a fair and impartial process and more concerned about producing a specific outcome.[114] "[T]he ongoing

[113] BRAY, *supra* note 109.

[114] *See, e.g.*, Clair McCaskill and Loretta Sanchez, Commanders must fight sexual assault in military: Column, USA Today (Aug. 29, 2013), https://www.usatoday.com/story/opinion/2013/08/29/women-congress-sexual-assault-column/2725081/; JUDICIAL PROCEEDINGS PANEL, REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES 1-3 (May 2017); SASC Subcomm. on Personnel Hearing, *supra* note 1. More recently, in a confirmation hearing for the Army Chief of Staff on May 2, 2019, Sen. Gillibrand told the nominated general—who was poised to become a convening authority and superior in the chain of command for other convening authorities—that she believed the number of sexual assault

attack on command influence in courts-martial [was] based on demand for more convictions, harsher punishments, and an end to the possibility that commanders will mitigate sentences."[115] Unfortunately, "[t]he fallout of congressional dismay over the incidence of sexual assaults in the armed forces [was] messy."[116] Because the new Congressional focus was on outcomes instead of process,[117] it led Congress to make structural reforms that diminished the limited procedural rights of accused servicemembers under the UCMJ, undermining some of the judicial character the court-martial system had developed since 1950 and causing several senior leaders to act as if the statutory prohibition on unlawful influence did not exist.[118]

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cases prosecuted in the military was a "disturbing fact" because it was "going down" despite a new report showing an increase in the number of reported incidents. C-SPAN, Armed Services: Hearing to Examine the Nomination of General James C. McConville, USA, for Reappointment to the Grade of General and to be Chief of Staff of the Army, 1:12:40 (May 2, 2019), https://www.c-span.org/video/?46 0195-1/armed-services (hereinafter "Confirmation Hearing: Chief of Staff of the Army"). In making her remarks during the May 2nd hearing, she did not mention the requirement for a convening authority to ensure there was a legitimate basis for a prosecution before proceeding forward with it. *Id.* at 1:08:40–1:14:45. The report Sen. Gillibrand referenced in her remarks was the Department of Defense Annual Report on Sexual Assault in the Military for FY 2018. DEPT. OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2019), *available at* https://sapr.mil/reports. Appendix C of the report provides statistics that include the number of cases where "commanders declined to take action . . . after a legal review of the matter indicated that the allegations against the accused were unfounded, meaning they were determined to be false or baseless." *Id.* at Appendix C, p. 22.

[115] BRAY, *supra* note 109. The political pressure to produce more convictions remains today. As Sen. Gillibrand has recently remarked, she believes there are "not enough" sexual assault investigations and that the "rate of convictions are going down," which is not "the right direction." Gabriel Debenedetti, *A Long Talk with Kirsten Gillibrand*, N.Y. MAG (Mar. 6. 2019), http://nymag.com/intelligencer/2019/03/a-long-talk-with-new-york-senator-kirsten-gillibrand.html; SASC Subcomm. on Personnel Hearing, *supra* note 1 at 1:52:00 (remarking that the "conviction rate" for sexual assaults in the military is "sad").

[116] FIDELL, *supra* note 5, at 11.

[117] "The real basis of much of the congressional opposition to abandoning commander-centric charging is that it will not drive up the number of sex offense prosecutions and convictions. The difficulty with that argument is that it focuses improperly on outcomes rather than on the structural fairness of the system." FIDELL, *supra* note 5, at 15.

[118] BRAY, *supra* note 109; *infra* note 136.

Members of Congress, of course, were motivated to take such action in order to empower sexual assault victims. And to be sure, members of Congress had legitimate reasons to be concerned, as well as to believe that reforms were needed to ensure sexual assault victims had ready access to the military justice system. From the 1990s going forward, the military struggled to address a culture that contained various kinds of sexual misconduct and gender insensitivity.[119] And by the end of the 1990s, this was no secret. Legal scholarship had taken note of sexual misconduct in the military and "widely discussed" the issue.[120]

Yet despite public recognition of the issue in the 1990s, Congress did not immediately step in. Instead, members of Congress encouraged military leadership to take the lead in addressing the issue.[121] By 2004, however, some members grew impatient and their frustration started to show. During a hearing before the Senate Armed Services Committee (SASC), multiple senators 'made it clear that they were not satisfied with either the level of misconduct that persists or existing measures for treating victims of assault.'" And "Senator John Warner

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[119] An infamous example of this culture is the incident at the "Tailhook Symposium . . . in Las Vegas, Nevada on September 7, 1991," which involved several military officers sexually assaulting "an intoxicated young woman" and "extensive misconduct by dozens" of other officers. *Samples v. Vest*, 38 M.J. 482, 483 (C.M.A. 1994); *see also United States v. Denier*, 47 M.J. 253 (C.A.A.F. 1997) (discussing allegations of unlawful command influence related to the misconduct at the Tailhook Symposium).

[120] Brooker, *supra* note 83, at 93; *see also* Douglas R. Kay, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 Cal. W. L. Rev. 307 (1992); Peter Nixen, *The Gay Blade Unsheathed: Unmasking the Morality of Military Manhood in the 1990s, An Examination of the U.S. Military Ban on Gays*, 62 UMKC L. Rev. 715 (1992); J. Richard Chema, *Arresting "Tailhook"; The Prosecution of Sexual Assault in the Military*, 140 Mil. L. Rev. 1 (1993); Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 Duke L.J. 651, 683 (1996); Martha Chamallas, *The New Gender Panic: Reflections of Sex Scandals and the Military*, 83 Minn. L. Rev. 305 (1998); *Elizabeth Lutes Hillman, The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 Yale L.J. 879 (1999).

[121] Brooker, *supra* note 83, at 81-82.

presciently warned, 'This committee is prepared to back the U.S. military to achieve zero tolerance,' but 'if you don't carry it out, we're going to take over.'"[122]

By 2012, concerns about sexual misconduct in the military finally came to a head as the issue reached an even wider segment of the public through the documentary film *The Invisible War*,[123] which premiered at the Sundance Film Festival[124] and was nominated for an Academy Award as a "Best Documentary Feature."[125] Then, just as awareness of the issue was going mainstream, a commander in the Air Force, Lieutenant General (Lt. Gen.) Craig Franklin, disapproved a sexual assault conviction and ignited a firestorm of national debate.[126] For several members of the SASC, this meant that the time had come for them to start taking over, again reflecting an executive view. For them, the court-martial system was an Executive Branch entity that they could directly influence through legislation and political pressure on senior military leaders to produce specific outcomes.

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[122] *Id.* at 82.
[123] THE INVISIBLE WAR (Chain Camera Pictures 2012).
[124] Goodwin, *supra* note 108, at 23 n.5.
[125] *Id.*
[126] *Id.* In 2012, Lt. Gen. Franklin, Commander of the Third Air Force, used his power as a court-martial convening authority to "set aside the findings and sentence" of "a lieutenant colonel . . . in the Air Force . . . [who] had been convicted . . . of aggravated sexual assault." *United States v. Boyce*, 76 M.J. 242, 244 (C.A.A.F. 2017). Even though Lt. Gen. Franklin's action was a lawful exercise of his authority under the UCMJ, his decision was politically unpopular. And as a result, there was intense and focused congressional outrage. Senator McCaskill requested that the Secretary of the Air Force and the Chief of Staff of the Air Force "conduct a review of Lt. Gen. Franklin's actions[.]" *Id.* at 255 n.2 (Ryan J. dissenting). Senator Gillibrand publicly disparaged Lt. Gen. Franklin, accusing him of being "untrained," "biased," and "subverting justice." *Id.* Senators Barbara Boxer and Jeanne Shaheen even went so far as to write a letter to the Secretary of Defense, "decrying" Lt. Gen. Franklin's decision and "urging" the Secretary to "take action to restrict military commander authority." *Id.* For Lt. Gen. Franklin, this congressional outrage over a decision he made in his role as a convening authority marked the end of his military career. The Chief of Staff of the Air Force gave him two options: voluntarily retire or wait for the Secretary of the Air Force to remove him from command. *Id.* at 245. Lt. Gen. Franklin chose to voluntarily retire and announced he would "step down from his position as Third Air Force Commander on January 31, 2014." *Id.* at 246.

A number of "influential Senators" watched *The Invisible War* in a private screening,[127] and afterwards, Sen. Gillibrand "began to spearhead an effort to remove the decision to prosecute sex assault and other felony-level offenses from commanders."[128] Consistent with a view that Brig. Gen. Ansell expressed nearly a century beforehand, Sen. Gillibrand explained that she wanted to "give the responsibility to a senior . . . judge advocate" instead.[129] Brig. Gen. Ansell and Sen. Gillibrand, however, reached this view from opposite directions. For Brig. Gen. Ansell, and reformers in the twentieth century, their focus was on making the court-martial process more judicial in response to "the complaint . . . that it was far too easy for the accused to be convicted and harshly punished."[130] Sen. Gillibrand, on the other hand, focused on the need to control the outcomes of courts-martial, attacking a convening authority's discretion under "a demand for more convictions, harsher punishments, and an end to the possibility that commanders will mitigate sentences."[131] To that end, Sen. Gillibrand made "reducing sexual assaults a personal crusade," and also "made it a particular point to remove certain decisions from prosecuting sexual assaults from within the chain of command, where commanders retain the authority to overrule a jury's verdict."[132]

When President Obama nominated Chuck Hagel to be Secretary of Defense, Sen. Gillibrand even went so far as to meet with Secretary Hagel before his confirmation hearing to

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[127] John-Loran Kiel Jr., *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, 2016 ARMY LAW. 8, 8-10 (2016).
[128] *Id.*
[129] *Id.*; *see also* BRAY, *supra* note 109.
[130] BRAY, *supra* note 109.
[131] *Id.*; *see also* Confirmation Hearing: Chief of Staff of the Army, *supra* note 114, at 1:08:40–1:14:45.
[132] Reid Pillifant, '*This is not good enough': Gillibrand grills generals over rise in sexual assaults*, POLITICO (May 7, 2013), https://www.politico.com/states/new-york/city-hall/story/2013/05/this-is-not-good-enough-gillibrand-grills-generals-over-rise-in-sexual-assaults-000000.

ensure he "pledged his commitment to taking this issue head on."[133] Once confirmed, Secretary Hagel made good on his pledge and "recommended that the centuries-old power of a commander to overturn a court-martial conviction be eliminated" following a "comprehensive review" of the military justice system.[134] As for her efforts to remove convening authorities from the referral process, Sen. Gillibrand has not succeeded.[135] Nevertheless, in 2013 she did succeed in prompting a "grand debate" about the issue that both increased procedural rights for victims of sexual assault and scaled back some procedural rights for accused servicemembers.[136] And with Secretary Hagel's support, Congress also made major changes that limited a convening authority's role in the court-martial process, such as "prohibiting dismissal" of some convictions

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[133] Molly O'Toole, *Chuck Hagel Calls for Ending Military Law Option to Overturn Court Martial*, HUFFINGTON POST (Apr. 8, 2013), https://www.huffingtonpost.com/2013/04/08/chuck-hagel-military-law_n_3040116.html; *Testimony on Sexual Assaults in the Military, Hearings Before a Subcomm. of the House on Armed Services*, 113th Cong. 4 (Mar. 13, 2013).

[134] *Id.*

[135] FIDELL, *supra* note 5, at 12.

[136] Goodwin, *supra* note 108, at 25 (citing Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Case*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0). Even though Congress kept convening authorities in the court-marital process, it nevertheless enacted significant reforms to the UCMJ in the years leading up to the Military Justice Act of 2016. The National Defense Authorization Act for Fiscal Year 2014, for example, watered down the Article 32 investigation process, reducing it to a probable cause hearing without a corresponding purpose to provide discovery to the defense or take the testimony of a complaining witness. National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a), 127 Stat. 954. Largely seen as the mechanism that provided a safeguard similar to the constitutional requirement for a grand jury indictment, Congress notably watered down the Article 32 investigation for all types of crimes in response to a complaint about its intrusiveness in a single-high-profile sexual assault case. Kiel Jr., *supra* note 127, at 8-10. Congress also precluded military commanders from considering good military character of the accused when making disposition decisions. NDAA for Fiscal Year 2014 § 1708. It made evidence of the accused's good military character inadmissible at trial on the merits. NDAA for Fiscal Year 2015 § 536. And finally, in an organization where witnesses are transient and subject to combat deployments, Congress made it more difficult for an accused to receive permission to depose a witness. The standard changed from permitting a deposition unless it is prohibited by competent authority, to allowing a deposition only with permission, and then restraining the competent authority from granting such a request absent a showing of "exceptional circumstances." *Id*. § 532(a).

and "requiring written explanations by convening authorities for modifications to sentences."[137] Sen. Claire McCaskill "championed" this alternative reform, and it allowed the military to avoid the "nuclear option of removing a commander from the process entirely."[138]

Unfortunately, even though the reform efforts appeared well-intended, many of the resulting structural reforms came at the expense of a court-martial's judicial character and the limited procedural rights afforded to accused servicemembers.[139] To put a fine point on this, it is important to highlight that a court-martial is not a jury trial. Court-martial panels are not required to make unanimous decisions, and it is permissible for them to fall below the Sixth Amendment's size requirements for a jury, which is problematic from a deliberative perspective.[140] Research has shown that non-unanimous verdicts in criminal trials weaken a jury's deliberation.[141] And as Justice Marshall famously observed, when a "prosecutor has tried and failed to persuade those [minority] jurors of the defendant's guilt … it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a

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[137] Goodwin, *supra* note 108, at 26.
[138] *Id. at 25.*
[139] *See supra* note 136.
[140] "A court-martial is tried, not by a jury of the defendant's peers," but by "a panel" comprised of servicemembers. *O'Callahan v. Parker*, 395 U.S. 258, 263-64 (1969). Under the UCMJ, a convening authority hand-selects the members according to criteria Congress listed in Article 25, UCMJ. 10 U.S.C. § 825 (2012). "[A] finding of guilty results" when "two-third" of the members "vote for a finding of guilty," even in cases where there are only five members on the panel. Rule for Courts-Martial 921, Manual for Courts-Martial (2016). *But see* Rule for Courts-Martial 921, Manual for Courts-Martial (2019) (increasing the number of votes required for a finding of guilty to three-fourths as a result of reforms in the Military Justice Act of 2016) *and* 10 U.S.C. § 816 (amended 2019) (fixing the size of a non-capital general court-martial panel at eight members and a special court-martial panel at four members).
[141] Majority verdicts, for example, can deprive the deliberative process of discussion that allows a minority vote to persuade others. Jessica M. Salerno & Shari Seidman Diamond, *The Promise of a Cognitive Perspective on Jury Deliberation*, 17(2) PSYCHONOMIC BULLETIN AND REVIEW 174, 174-179 (2010).

reasonable doubt."[142] Accordingly, the constitutional jury requirements are not some "pious platitudes recited to placate the shades of venerated legal ancients."[143] They are safeguards that protect individual liberty: "the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement."[144]

Yet neither Congress nor the Court have ever found it necessary to ensure a court-martial has the same deliberative safeguard. Rather, before the modern reform movement, servicemembers were forced to rely on a convening authority's "judicial" power to grant clemency—overturn a court-martial conviction or reduce a sentence—to fill in for the lack of a unanimous jury.[145] Now, however, in most cases servicemembers are deprived of both a unanimous jury and a convening authority's power to grant significant clemency.

B. THE MILITARY JUSTICE ACT OF 2016

In August 2013, while in the midst of politically charged attempts to enact piecemeal military justice reform, "the Chairman of the Joint Chiefs of Staff, writing on behalf of the Joint Chiefs, recommended that the Secretary of Defense 'direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ[.]'"[146] In response, the Department of Defense General Counsel "established the Military Justice Review Group

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[142] *Johnson v. Louisiana*, 406 U.S. 356, 401 (1972) (Marshall, J., dissenting).
[143] *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).
[144] *Id.*; *see also* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. Pub. L. 471, 472, 503 (2014) ("Because court-martial panels are not juries, neither the public nor the military community can be genuinely confident that court-martial panels will always reach appropriate verdicts.").
[145] Williams, *supra* note 144, at 474 ("Because the panel's factual determinations will not always be as accurate as those of a jury, commanders need the authority to review those determinations.").
[146] James A. Young, *Post-Trial Procedure and Review of Courts-Martial under the Military Justice Act of 2016*, 2018 ARMY LAW 31, 31 (2018).

(MJRG)," and in December 2015 the MJRG published a report that "became the basis of the Military Justice Act of 2016 (MJA 2016)."[147]

As with a number of the previous UCMJ reform efforts, MJA 2016 focused, in part, on a commander's role as a convening authority.[148] In the post-trial context, MJA 2016 was consistent with Sen. McCaskill's approach, placing significant limits on a convening authority's ability to grant clemency while retaining them in the court-martial process.[149] Notably, MJA 2016 made a military judge the final reviewing authority before a case is ready for appellate review.[150] Where in the past a convening authority's approval was all that was required, MJA 2016 requires a convening authority to review the case and send it back to a military judge who then makes an "entry of judgment."[151] This new entry of judgment requirement represents another shift away from a commander-controlled process and towards a process that hews closer to an Article III court structure, which again enhances the judicial character of the court-martial system and constrains a convening authority's control.[152]

Nevertheless, even though MJA 2016 further constrains convening authorities, their general duties remain largely same. For example, they still refer charges, convene courts-martial, authorize searches, enter into plea agreements, hand-select members, approve or disapprove the production of witnesses, and, in some limited circumstances, approve, disapprove, or modify a court-martial's findings and sentence should a panel of members or a

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[147] *Id.* Congress passed a modified version of MJA 2016 as a part of the National Defense Authorization Act for Fiscal Year 2017. *Id.* President Barack Obama "signed it into law . . . on December 23, 2016." *Id.* And MJA 2016 went into effect on January 1, 2019. *Id.*
[148] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2894, 2894-968 (2016) [hereinafter "Military Justice Act of 2016"].
[149] Young, *supra* note 146, at 31-34.
[150] Military Justice Act of 2016, *supra* note 148, at §5324, UCMJ art. 60c(a)(1).
[151] *Id.*
[152] *Id.*

judge find a servicemember guilty.[153] From a process-characteristics perspective, this means that even after MJA 2016, the UCMJ still requires convening authorities to take judicial acts within the court-martial process. And following *Ortiz,* the fact that the UCMJ requires convening authorities to take judicial acts is evidence that they are judicial actors wielding judicial power. Going forward, this has implications for how members of Congress interact with senior military leaders in the military justice arena, and it could also result in a due-process problem if members of Congress fail to adopt a judicial view.

V. *ORTIZ* AND ITS IMPACT ON THE RELATIONSHIP BETWEEN CONGRESS AND CONVENING AUTHORITIES: A DUE-PROCESS PROBLEM

For commanders who must take action as convening authorities and members of Congress who are required to interact with senior military leaders, the *Ortiz* majority's decision to characterize the court-martial system as a judicial in character raises the following question. What kind of interaction is appropriate? Unlike its relationship with many Executive Branch officials, the relationship between Congress and Article III judges is measured. From America's founding it has been recognized that "[t]here is no liberty, if the power of judging be not separated from the legislative and executive powers."[154] Members of Congress are not going to direct a life-tenured Article III judge to produce a specific outcome in a category of cases and then call the judge back a few years later to update them on the status of that directive.[155] For

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[153] *Compare* Manual for Courts-Martial (2019) *with* Manual for Courts-Martial (2016).
[154] Ming Chin, *Judicial Independence needs to be protected from both internal and external threats*, ABA JOURNAL (Sep. 27, 2018), http://www.abajournal.com/news/article/protecting_judicial_independence_from_both_internal_and_external_threats (quoting Baron de Montesquieu as quoted by Alexander Hamilton in Federalist 78).
[155] "Life-tenured [Article III] judges" have even "objected when faced with members of Congress scrutinizing their habits of work and use of courtrooms." Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspiration*s, 86 GEO. L.J. 2589, 2593 (1998). Directly referencing the political pressure on the military, Judge Reggie Walton recently made this point clear: "As a federal judge I don't have that type of pressure

Executive Branch officials, however, Congress can (and does) do exactly that. When members of Congress see a problem under the control of an Executive Branch official, they can use their political influence to get that official to address it. And for the most part, commanders are accustomed to this and frequently appear before Congress to testify about the results of various programs.[156] Outside of the military justice arena, this interaction between Congress and Executive Branch officials seems normal and not especially problematic.

When it comes to military justice, however, the analysis is different, and in order to sync with the majority opinion in *Ortiz*, Congress will need to start viewing its interaction with senior military leaders on military justice issues through a different lens. When members of Congress interact on issues of military justice with convening authorities, their superiors in the chain of command, and other senior military leaders, they should treat such interactions as though they were interacting with judicial officials. Because under the *Ortiz* majority's judicial view of the court-martial system, that is exactly what convening authorities are—judicial actors. And the failure to recognize this point will continue to deprive convening authorities of the judicial independence they need to carry out their duties under the UCMJ.[157]

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because I am insulated from that type of political pressure." *Public Meeting Before Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)*, Dept. of Defense 81 (Jan. 25, 2019), available at https://dacipad.whs.mil/images/Public/05-Transcripts/20190125_DACIPAD_Transcript_Final.pdf. Judge Morris then posed a significant question: "[I]s there any way that the military system can be totally fair and impartial when those external and internal political pressures are in play?" *Id.*

[156] For example, "[a]ll Combatant Commanders testify to the Armed Services Committees on an annual basis about their posture and budgetary requirements[.]" U.S. Library of Congress, Congressional Research Service, *The Unified Command Plan and Combatant Commands: Background and Issues for Congress*, by Andrew Feickert, R42077, (2013), https://fas.org/sgp/crs/natsec/R42077.pdf.

[157] Judicial independence is the ability to act "fairly and impartially without fear of punishment and without control or influence by the executive or legislative branches[.]" Michael H. Reed, *Judicial independence—an essential American value*, ABA JOURNAL (Mar. 29, 2018), http://www.abajournal.com/news/article/judicial_independence_an_essential_american_ value.

To be clear, the nature of the interaction between members of Congress and senior military leaders, in addition to structural reforms, is significant. When members of Congress refuse to view convening authorities as judicial actors, the impact on the court-martial system is consequential. As mentioned above, servicemembers do not have a right to a jury trial.[158] Court-martial panels do not render unanimous verdicts or sentencing decisions, and convening authorities, even after MJA 2016, continue to exercise considerable influence over the procedurally limited court-martial process, with some convening authority's even going so far as to ignore the UCMJ's prohibition on unlawful influence. This means that should convening authorities feel pressure from Congress to produce specific outcomes, either directly or indirectly through a senior judge advocate or a superior in their chain of command, they may not only feel obligated to use their influence over the process to produce it, but actually have the means to do so. Congressional pressure incentivizes convening authorities to seek political appeasement over justice in the court-martial system—a circumstance that is not compatible with a character that is "judicial" under any definition of the term.

For Article III courts, such independence is "grounded in the structure of the national government established under the U.S. Constitution that provides for the separation of powers[.]" *Id.* For the Article I court-martial system the Court has recognized that a similar independence is necessary as it "helps to ensure [the] judicial impartiality" of military judges. *Weiss*, 510 U.S. at 179.

[158] This point frequently gets lost. For example, in 2013, Sen. McCaskill asked then-General James Mattis if he "really" thought that "after a jury found someone guilty . . . that one person, over the advice of their legal counselor, should be able to say, 'Never Mind'?" Donna Casseta, *Senators Outraged by Dismissal of Assault Case*, ASSOCIATED PRESS (Mar. 5, 2013), https://news.yahoo.com/senators-outraged-dismissal-assault-case-213240150.html. In posing the question, Sen. McCaskill highlighted a fundamental misunderstanding of the court-martial process. There is no such thing as a "jury trial" in the military. *See* Williams, *supra* note 144, at 503 (arguing, in part, that military commanders should retain their authority as court-martial convening authorities because a court-martial is not a jury trial).

The unfortunate reality for the men and women serving in the military is that there is evidence that this politicization of the court-martial process has already happened.[159] As the modern reform movement unfolded, members of Congress, treating their interaction with senior military leaders as executive in nature, communicated a desire for more convictions in sexual assault cases and a willingness to punish convening authorities who did not produce this result.[160] Consequently, members of Congress have directly impacted fundamental fairness in courts-martial, something the CAAF describes as "external pressure"[161] on the military justice system. And unfortunately, members of Congress continue to communicate these same desires. Sen. Gillibrand continues to focus on the need for increased sexual assault convictions[162] while

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[159] *See generally* Heidi L. Brady, Note, *Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. ILL. L. REV. 193 (2016) (providing background on the political climate that gave rise to unlawful influence in courts-martial). In its Third Annual Report, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DACIPAD) noted a significant finding by its predecessor, the Judicial Proceedings Panel (JPP):

> The combination of a less robust Article 32 pretrial hearing resulting from a significant statutory revision, perceived pressure on convening authorities to refer sexual assault charges to court-martial, and reliance on a low prosecution standard, probable cause, for referring cases to court-martial has led to sexual assault cases being prosecuted in which there is little chance for a conviction.

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, THIRD ANNUAL REPORT 121 (Mar. 2019). The DACIPAD continues to examine these issues and will evaluate them again following the implementation of MJA 2016. *Id.*

[160] For example, Senator McCaskill "place[d] a permanent hold on the nomination of Lt. Gen. Susan J. Helms to become vice commander of the Air Force's Space Command[,]" citing "the general's decision . . . to erase the sexual-assault conviction of an Air Force captain[.]" Craig Whitlock, *Senator continues to block promotion of Air Force general,* WASH. POST (June 6, 2013), https://www.washingtonpost.com/ world/national-security/senator-continues-to-block-promotion-of-air-force-general/2013/06/ 06/bbf9ea0a-cee3-11e2-ac03-178510c9cc0a_story.html ?noredirect=on&utm_term=.6001bacd 5aab.

[161] *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018).

[162] SASC Subcomm. on Personnel Hearing, *supra* note 1, at 1:52:00. Confirmation Hearing: Chief of Staff of the Army, *supra* note 114, at 1:12:40.

Sen. Thom Tillis has communicated that he is willing to block the promotions of convening authorities based on how they handle individual cases.[163]

In the context of military justice, such statements are incredibly concerning. Politically motivated unlawful influence is an issue the UCMJ has demonstrated it is ill equipped to "eradicate" from the military justice system.[164] The structural mechanism that prohibits the exercise of "unlawful influence" over convening authorities (and judges and members)—Article 37, UCMJ—only applies to individuals who are subject to the UCMJ, and a vast majority of the members of Congress are not subject to the UCMJ.[165] As a result, there is not an effective statutory mechanism to stop members of Congress from punishing convening authorities who make politically unpopular decisions, even if those decisions constitute a lawful exercise of their discretion.[166] The absence of this mechanism is what gives rise to the "external pressure" on the military justice system, and it is something that every branch of service has felt in recent years.[167]

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[163] SASC Subcomm. on Personnel Hearing, *supra* note 1, at 1:47:00.
[164] *See United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (noting that, when found, unlawful influence must be "eradicated").
[165] *Barry*, 78 M.J. at 81 (Ryan, J. dissenting) (describing the external pressure from members of Congress as "emanat[ing] from persons who are not subject to the UCMJ."). Of note, unlike most members of Congress, Sen. McSally, as a retiree, likely remains subject to the UCMJ, and consequently, she has a duty to comply with Article 37, UCMJ. *See United States v. Dinger*, 77 M.J. 447 (2018) (holding that "a court-martial is not prohibited from adjudging a punitive discharge in the case of . . . a retiree"); Stephen Vladek, *The Supreme Court and Military Jurisdiction Over Retired Servicemembers*, Lawfare (Feb. 12, 2019), https://www.lawfareblog.com/supreme-court-and-military-jurisdiction-over-retired-servicemembers (noting that courts have "routinely upheld the military's power to try those retired servicemembers who continue to receive pay from the government").
[166] As an example, this means that while Article 37, UCMJ would prohibit the Chief of Naval Operations from punishing Commander, Naval Installations Command for her actions as a convening authority, it does not prohibit a civilian senator from doing so.
[167] *Barry*, 78 M.J. at 70; *Riesbeck*, 77 M.J. at 159; *Boyce*, 76 M.J. at 244; *Schloff*, 2018 CCA LEXIS 350 at *3; *Wright*, 75 M.J. at 503; *Howell*, 2014 CCA LEXIS 321 at *11-12.

In fact, just last term the CAAF examined a high-profile example of this pressure in *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018),[168] highlighting the way in which it metastasized throughout the Navy's court-marital system during the last decade. Special Warfare Operator Senior Chief Petty Officer (SOCS) Keith Barry was charged with sexual assault and stood trial in October 2014.[169] He elected a military judge-alone trial, contested the charge, and was convicted.[170] After he was sentenced, a transcript of the trial was prepared and sent to the convening authority, Rear Admiral (RADM) Patrick Lorge,[171] the Commander of Navy Region Southwest.[172] RADM Lorge personally reviewed the record of trial over the next several months and developed "serious misgivings about the evidence supporting this conviction."[173] Specifically, he "did not believe the evidence supported the alleged victim's account of events," and as a result, he was "inclined to disapprove the findings."[174]

Notably, at the time of RADM Lorge's review, Congress had already "curtailed" a military commander's authority to disapprove sexual assault findings in new cases.[175] That amendment, however, "did not impact offenses that occurred before June 26, 2014," and thus did not impact RADM Lorge's authority in SOCS Barry's case.[176] Accordingly, RADM Lorge still

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[168] Full disclosure: I represented the appellant on appeal and argued the case before the CAAF.
[169] *Barry*, 78 M.J. at 70.
[170] *Id.* at 73.
[171] *Id.*
[172] Stephanie Francis Ward, M*ilitary high court finds that top Navy lawyer engaged in unlawful command influence*, ABA JOURNAL (Sept. 6, 2018), http://www.abajournal.com/news/article/military_high_court_finds_that_top_navy_lawyer_engaged_in_unlawful_command.
[173] *Barry*, 78 M.J. at 73.
[174] *Id.*
[175] *Id.* at 85 n.11 (Ryan, J. dissenting).
[176] *Id.*

had the lawful authority to disapprove a conviction if he believed the conviction was unwarranted based on the evidence.[177]

Before RADM Lorge finished reviewing SOCS Barry's case, however, the Deputy Judge Advocate General of the Navy, Rear Admiral (RADM) James Crawford III, intervened, meeting with RADM Lorge on April 30, 2015 and discussing the case.[178] By that time RADM Lorge was already aware of the political environment. In February 2014 the Judge Advocate General of the Navy, Vice Admiral (VADM) Nanette DeRenzi, explained to him that "commanders were facing difficult tenures as convening authorities due to the political climate surrounding sexual assault."[179] "She shared that, every few months, a decision in a sexual assault case would lead to increased scrutiny by Congress as well as other political and military leaders."[180] As a result, RADM Lorge believed "the political climate regarding sexual assault in the military was such that a decision to disapprove findings [in a court-martial], regardless of merit, could bring hate and discontent on the Navy from the President, as well as senators including Senator Kirsten Gillibrand."[181] Therefore, when RADM Crawford met with RADM Lorge on April 30, 2015, the question on RADM Lorge's mind was whether disapproving SOCS Barry's conviction would bring "big scrutiny on the Navy."[182]

Stepping back a moment, it is important to mention that decades before RADM Lorge met with VADM DeRenzi or RADM Crawford, the Court noted a crucial requirement under the

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[177] *Id.* at 86.
[178] *Id.* at 74-76.
[179] *Id.* at 74.
[180] *Id.*
[181] *Id.* at 80. In her dissenting opinion, Judge Ryan observed that this view was "reasonably grounded in fact." *Id.* at 81.
[182] Oral Argument at 32:01, *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018), available at https://www.armfor.uscourts.gov/newcaaf/calendar/201803.htm.

UCMJ for the TJAGs: protect the independence of judicial actors in the court-martial system.[183] While this guidance came in the context of a challenge to the lack of a fixed term of office for appellate military judges, the Court's decision was nevertheless a clear signal to the TJAGs that both the UCMJ and the Constitution require them to protect the fairness of the court-martial process.[184] In fact, the Court's decision to uphold the UCMJ's appellate judiciary as constitutional was premised on a belief that TJAGs "have no interest in the outcome of a particular court-martial" and thus can serve as supervisors for appellate military judges.[185] In the Court's view, this structure "help[ed] protect" the "judicial independence" of appellate military judges and thus ensured a balance between accountability and independence that complied with the requirements of due process.[186]

When RADM Crawford visited RADM Lorge's office on April 30, 2015, however, he did not protect fairness in the court-martial process. Instead, he politicized it. He "either told RADM Lorge 'not to put a target on his back' or, through similar language, gave RADM Lorge the impression that failing to approve the findings and sentence would put a target on his back."[187] Weeks later, in a phone conversation, the two admirals discussed SOCS Barry's case again.[188] This time RADM Crawford advised RADM Lorge that "approving the findings and sentence was the appropriate course of action" and the "best he could do," even though such advice was substantively inaccurate.[189] As a result, despite the fact that RADM Lorge believed

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[183] *Weiss*, 510 U.S. at 180. Presumably, this requirement extends to the Deputy Judge Advocates General as well.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Barry*, 78 M.J. at 75.
[188] *Id.*
[189] *Id.*

SOCS Barry's guilt was not proven beyond a reasonable doubt, he approved SOCS Barry's conviction anyway.[190]

On appeal, the CAAF acknowledged that RADM Crawford's advice may have been in the political interest of the Navy given the congressional pressure at the time,[191] nevertheless it found that such advice was unlawful.[192] In the final analysis, the CAAF determined that RADM Crawford's conduct constituted an "improper manipulation of the criminal justice process."[193] And the CAAF's holding was clear: "a [Deputy Judge Advocate General] can indeed commit unlawful influence" and RADM Crawford "actually did so in this case."[194] The CAAF condemned RADM Crawford's actions and found that only dismissal with prejudice would "eradicate the unlawful . . . influence and ensure the public perception of fairness in the military justice system[.]"[195]

The dark irony in SOCS Barry's case is that the same political pressure that motivated his prosecution and the unlawful approval of his conviction also led to the CAAF's decision to dismiss it with prejudice. Drawing on observations of cases that pre-dated SOCS Barry's, Chris Bray used a "circle" to describe this phenomenon.[196] "As reformers have tried to remove command authority from military sexual assault cases to ensure aggressive punishment for

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[190] *Id.* at 78-79 ("[I]f RADM Lorge truly believed that Appellant's guilt had not be proven beyond a reasonable doubt, he would have been required to disapprove the findings and sentence and dismiss the charge and specification. Article 60(e)(3), UCMJ.").
[191] As government counsel agreed at oral argument, it was "unlikely" that Sen. Gillibrand would have receive RADM Lorge's intended action well and that it was possible that RADM Lorge's intended action could have ignited a congressional response like the one taken against Lt. Gen. Franklin. Oral Argument at 31:16, *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018), available at https://www.armfor.uscourts.gov/newcaaf/calendar/201803.htm.
[192] *Barry*, 78 M.J. at 78-80.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] BRAY, *supra* note 109.

rapists, the political pressure on the armed forces led uniformed leadership to pressure subordinates to deliver court-martial convictions—an injection of unlawful command influence into military sexual assault cases, which caused convictions to be overturned[.]"[197] Building on Bray's observation, SOCS Barry's case now suggests there is an additional dimension to this phenomenon. The political pressure on senior military leadership has not only caused senior commanders and their superiors in the chain of command to inject unlawful influence into the court-martial system, but also the very people who have been charged with ensuring the system operates with fundamental fairness—the TJAGs and their deputies.[198] And given the resurgence of congressional attention on the issue following the March 6th hearing before the SASC Subcommittee on Personnel, this cycle of political pressure and unlawful influence shows no signs of letting up.[199]

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[197] *Id*.

[198] *See Barry*, 78 M.J. at 70-80 (describing the unlawful influence of RADM Crawford); *Boyce*, 76 M.J. at 245 (recounting the following advice from then-Judge Advocate General of the Air Force, Lt. Gen. Richard Harding, to Lt. Gen. Franklin's legal advisor: "failure to refer the case to trial would place the Air Force in a difficult position with Congress; absent a 'smoking gun,' victims are to be believed and their cases referred to trial").

[199] At the time of this Article's publication deadline, attention on the issue of sexual assault in the military was increasing. *See* DEPT. OF DEFENSE ANNUAL REPORT, *supra* note 162 (reporting an increase in the prevalence of sexual assault in the military for FY 2018); Vanden Brook, *supra* note 3; Meghann Myers, *Gillibrand Grills Next Army Chief on Rise of Sexual Assaults, Decrease in Prosecutions*, ARMY TIMES (May 2, 2019), https://www.armytimes.com /news/your-army/2019/05/02/gillibrand-grills-next-army-chief-on-rise-of-sexual-assaults-decrease-in-prosecutions/; Danielle Garrand, *Sexual Assault in Military has Spiked by Nearly 40 Percent, Pentagon Says*, CBS NEWS (May 2, 2019), https://www.cbsnews.com/news/sexual-assault-in-military-sexual-assault-in-military-has-spiked-by-nearly-40-percent-pentagon-says/; Rebecca Kheel, Gillibrand Tears into Army Nominee over Military Sexual Assault: 'You're Failing Us', THE HILL (May 2, 2019), https://thehill.com/policy/defense/441840-gillibrand-tears-into-army-nominee-over-military-sexual-assault.

VI. DOES THE UNIFORM CODE OF MILITARY JUSTICE'S CONVENING AUTHORITY FRAMEWORK COMPLY WITH DUE PROCESS?

Following *Ortiz*, it would be prudent for members of Congress to stop and consider the impact the *Ortiz* majority's opinion may have on their efforts to legislate and engage directly with senior military leaders on the issue of a convening authority's role in the court-martial process. Given the *Ortiz* majority's judicial view of courts-martial, the judicial characteristics of a convening authority's role (both historically and in modern practice), and the lack of an effective statutory mechanism to protect the independence of convening authorities from congressional pressure, the following question must now be asked: does the UCMJ afford convening authorities enough judicial independence to satisfy the requirements of due-process? And unfortunately, unless and until Congress takes a judicial view of courts-martial and amends the UCMJ, there is an argument that the UCMJ's convening authority framework does not comply with due-process.

Even though Congress has the constitutional authority to enact military justice legislation, there are limits. As the Court has expressly recognized, "Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."[200] To that end, "a basic requirement of due process" is "a fair trial in a fair tribunal," meaning that in order for Congress to meet the requirements of due process in the context of a court-martial, it must

[200] *Weiss*, 510 U.S. at 176. Regarding the importance of the Due Process Clause to the military justice system, the Army Court of Criminal Appeals has even gone so far as to describe it as the "singular bedrock for our system of [military] justice. From it follows the presumption of innocence, overcome only when one's guilt is proven beyond a reasonable doubt in accordance with the Constitution." *United States v. Garcia*, 2015 CCA LEXIS 335, *19 (A.C.C.A. Aug. 18, 2015) (unpublished).

give judicial actors enough independence to be impartial.[201] Therefore, at the forefront of the due-process analysis is a question about the lack of structural safeguards protecting convening authorities from congressional pressure. Absent such a statutory safeguard, has Congress complied with the requirements of the Due Process Clause?

There is no statute prohibiting most members of Congress from pressuring military commanders to produce specific results in either an individual court-martial or a category of cases. Article 37, UCMJ prohibits military personnel from unlawfully influencing a convening authority, and it prohibits a military commander from unlawfully influencing a court-martial. But it does not prohibit civilian members of Congress from applying pressure to convening authorities, their superiors in the chain of command, or to the military justice system more generally, in order to achieve specific outcomes. As a result, the UCMJ lacks the statutory shield it needs to protect the military justice system from improper congressional influence, which, in turn, means there is little structural resistance to members of Congress who use their political influence to push senior military leaders towards action focused on specific, politically popular, outcomes with little concern for due process or the facts of a given case.

Even after the MJA 2016 reforms, this remains a continuing problem. While it is true that a convening authority's discretion today is much more limited than it was during the "foundational period" of military justice,[202] that fact should not detract from the significance of this issue or the need to protect convening authorities from congressional pressure going forward. Even after MJA 2016, there are still circumstances where a convening authority retains

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[201] *Id.* at 178 (quoting *In re Murchison*, 349 U.S. 133 (1955)).
[202] *Id.* Military Justice Act of 2016, *supra* note 148, at §§ 5321, 5322. David A. Schlueter, Reforming Military Justice: An Analysis of the Military Justice Act of 2016, 49 ST. MARY'S L.J. 1, 73 (describing changes to the convening authority's post-trial review power).

the authority to disapprove a conviction and modify a sentence,[203] which means that a convening authority's post-trial actions, even though substantially limited in scope, will still be judicial in nature. Moreover, in other areas of the post-MJA 2016 court-martial process, a convening authority's actions retain the hallmarks of judicial action. They involve the "exercise of . . . discretion"[204] and require convening authorities to be "just," "impartial," and "fair" in the exercise of that discretion.[205] For example, to ensure that servicemembers receive a "fair trial in a fair tribunal,"[206] considerations of fairness must guide a convening authority's selection of the members who will sit in judgment of an accused at a court-martial.[207] In MJA 2016, military commander's retained this authority to hand-pick the "best qualified" members according to the criteria listed in Article 25, UCMJ, and accordingly, this represents another action that is judicial in nature.[208]

In MJA 2016 convening authorities also retained the authority to authorize expert witnesses at government expense, both for the prosecution and defense,[209] which is a decision that requires a convening authority to act impartially. And the MJA 2016 reforms still permit a military "commander" to authorize a probable cause search.[210] A search authorization can only

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[203] *Id.* at § 5323.
[204] A "judicial act" is defined as an "act involving the exercise of judicial power," and "judicial power" involves "the exercise of judgment and discretion[.]" *Black's Law Dictionary* 28, 924 (9th ed. 2009). This is distinct from "ministerial" power, which "involves obedience to instructions or laws instead of discretion[.]" *Id.* at 1086.
[205] *Webster's Third New International Dictionary Unabridged* 1228 (1993); *see also Black's Law Dictionary* 943 (9th ed. 2009) (defining "justice").
[206] *Weiss*, 510 U.S. at 178 (quoting *In re Murchison*, 349 U.S. 133 (1955)).
[207] *United States v. Loving*, 41 M.J. 213 (1994) (expressing concern about a convening authority's selection process and recognizing that a convening authority's "broad discretion" in "selecting court-martial panels clearly constitutes a system" that is "susceptible to abuse[.]").
[208] "The selection method of the personnel is so intimately connected with the organization of the court it cannot be considered other than judicial in nature." Hansen, *supra* note 48 at 24.
[209] Rule for Courts-Martial 921, Manual for Courts-Martial (2019).
[210] *Id.*

be "issued by an impartial individual," and under the rule, commanders are grouped together with military judges and military magistrates as individuals who can carry out such action.[211] Therefore, even though a convening authority's actions in some areas of the court-martial process may not meet the definition of "judicial acts," MJA 2016 did not change the fact that convening authorities must perform judicial acts under the UCMJ—actions that must be taken "without partiality, favor, or affection."[212]

While the Court has never considered a due-process challenge to the UCMJ based on a convening authority's lack of independence, its decision in *Weiss v. United States* is instructive. In *Weiss* the Court considered a due-process challenge to the UCMJ based on the lack of fixed tenure for military judges.[213] The petitioner's challenge was grounded in the "assumption" that the lack of a fixed tenure meant a lack of judicial independence, which is the same root issue with convening authorities.[214] Obviously, convening authorities are not military judges. Nevertheless, after all of the modern reforms limiting a convening authority's discretion, the judicial character of their role is still very much the same, which means that post-*Ortiz* there is still a constitutional need to protect the independence of a convening authority's judicial acts to the same degree as a military judge's. Thus, despite the differences between a military judge and a convening authority, the Court's decision in *Weiss* is a useful framework for analyzing whether

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[211] *Id. See also United States v. Lopez*, 35 M.J. 35, 41 (noting that in the context of issuing search authorizations "a commander must be impartial").
[212] *Ortiz*, 138 S. Ct. at 2175-76.
[213] Unlike Article III judges, appellate military judges historically did not have a fixed tenure and were subject to military detailing orders. *Weiss*, 510 U.S. at 168. After MJA 2016, however, Article 66, UCMJ now imposes minimum tour lengths (typically three-years). 10 U.S.C. § 866 (2012) (as amended).
[214] *Weiss*, 510 U.S. at 178-79.

the UCMJ complies with due process in the absence of a statutory safeguard protecting a convening authority's independence from congressional pressure.

In *Weiss v. United States*, the Supreme Court considered "whether the lack of a fixed term of office for military judges violate[d] the Fifth Amendment's Due Process Clause."[215] Finding no due-process violation, the Supreme Court applied the *Middendorf* balancing test and analyzed "whether the existence of such tenure is such an extraordinarily weighty factor as to overcome the balance struck by Congress."[216] And in resolving this issue, the Court offered an analysis that is particularly salient in relation to the politically motivated unlawful influence of today:

> A fixed term of office, as petitioners recognize, is not an end in itself. It is a means of promoting judicial independence, which in turn helps to ensure judicial impartiality. We believe the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.
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> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U.S.C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe the structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.

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[215] *Id*. at 165.

[216] *Id.* at 179. Notably, the majority in *Weiss* used a due-process standard that was different from the standards put forth by the petitioner and the government. The petitioner advocated for application of the test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), while the government advocated for application of *Medina v. California*, 505 U.S. 437 (1992). *Id.* at 177. The *Weiss* majority rejected both and applied *Middendorf v. Henry*, 425 U.S. 25 (1976) instead, making it more difficult to prevail on a due-process challenge in the military context. *Id.* While it is beyond the scope of this Article, whether the *Weiss* majority applied the appropriate standard is something that merits consideration in conjunction with the argument outlined here.

With respect to the question of a convening authority's independence, the relevant issue under *Weiss* is whether "the applicable provisions of the UCMJ . . . insulate" convening authorities "from the effects of [external] influence . . . sufficiently to preserve judicial impartiality so as to satisfy the Due Process Clause."[217] And if the UCMJ insulates convening authorities from external pressure in the same way that it insulates military judges, then the analysis is straightforward. Under *Weiss*, there likely would be no due-process issue. So long as convening authorities fall under the protection of someone who has "no interest in the outcome of a particular court-martial,"[218] the Court would likely conclude that Congress struck an "acceptable balance between accountability and independence."[219]

Unfortunately, however, convening authorities do not fall under the protection of an officer who has no interest in the outcome of a particular court-martial. Congress has not insulated convening authorities in the same way as military judges. Unlike military judges, Congress did not give a neutral officer supervisory authority over convening authorities.[220] Instead, convening authorities—senior officers who fall under a traditional chain of command and require Senate confirmation for promotion—are exposed to political influence in a way that military judges are not. Therefore, it is possible to argue that Congress has not struck an acceptable balance between independence and accountability when it comes to convening authorities.

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[217] *Id*. at 179.
[218] *Id*. In *Weiss* the Supreme Court viewed the supervisors of military judges, the Judge Advocates General, as not having an interest in the outcome of a particular case. *Id.* Recent cases, however, have called that observation into question. *See supra* Sections IV-V.
[219] *Weiss*, 510 U.S. at 180.
[220] In fact, as RADM Crawford's conduct in *Barry* demonstrates, the officer who is supposed to exercise neutral supervisory authority over military judges, may, in fact, be a source of unlawful influence, compounding the harm associated with the pressure from Congress to produce specific outcomes.

By definition, a convening authority includes "a commissioned officer in command."[221] Articles 22 through 24 define who may convene courts-martial, and for general courts-martial, Congress lists the following: the President, the Secretary of Defense, a combatant commander, the service Secretary, and several delineated military commanders from each service.[222] In practice, however, general court-martial convening authorities are usually admirals and generals who require senate confirmation to advance to the next rank. And as recent history has demonstrated, some senators are willing to block a commander's promotion when they are unhappy with the commander's decisions as a convening authority.[223] In the March 6th hearing before the SASC Subcommittee on Personnel, Sen. Tillis made this point clear. He explained that he is consulted on military promotions and would "guarantee" that "if there is any credible evidence in a file" that a commander failed to properly handle a case, "that person will never get promoted as long as I am in the U.S. Senate."[224]

It is here that convening authorities and military judges differ significantly. For the most part, military judges are insulated from this type of outcome-based evaluation. There are rules prohibiting their direct supervisors from engaging in it, and their promotions, even though they

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[221] Rule for Courts-Martial 921, Manual for Courts-Martial (2019).
[222] 10 U.S.C. § 822 (2012).
[223] *Barry*, 78 M.J. at 81 (Ryan, J. dissenting). *Compare Reid*, 354 U.S. at 37 (explaining that command influence of courts-martial was an issue because members of the court-martial depended on commanders for "their future progress in the service.") *with* SASC Subcomm. Hearing on Personnel, *supra* note 1, at 1:47:00 (describing how military commanders depend on members of the Senate for promotion).
[224] SASC Subcomm. Hearing on Personnel, *supra* note 1, at 1:47:00. Sen. Tillis made this comment in response to a question from Sen. Rick Scott about holding "commanding officers" accountable for failing to "properly" deal with sexual harassment complaints. *Id.* at 1:45-1:48. Sen. Scott did not elaborate on the meaning of "properly," and arguably, the term can be understood in one of two ways: (1) as failing to comply with the relevant service regulations or (2) as an exercise of discretion that fails to comply with his expectations, even if the commanding officer otherwise complied with the relevant service regulations. It is only the latter understanding that gives rise to the issues discussed in this Article.

require Senate confirmation, are neither as high-profile nor controversial. Senators appear to respect the judicial nature of a military judge's position. As a result, under the UCMJ and regulatory structure of the military services, military judges are both less susceptible to external pressure than convening authorities and more protected from it. In *Weiss*, the Supreme Court explained as much when it found an acceptable balance between accountability and independence, citing "the UCMJ" and "corresponding regulations" that insulate military judges from the "effects" of external pressure in addition to the protective role of the Judge Advocates General.[225]

In the Navy, for example, service regulations expressly prohibit supervisors from evaluating a military judge's performance based on the popularity of their rulings. BUPERSINST 1610.10D states that performance reviews "on military judges and appellate judges may properly evaluate their professional and military performance, but may not include marks, comments, or recommendations based on their judicial opinions or rulings, or results thereof."[226] These performance reviews are a critical part of a military judge's promotion potential, and by excluding outcome-based evaluations from the process, the Navy has created a structure that protects a military judge's independence. The other services have also enacted similar safeguards, and the CAAF has demonstrated a willingness to reinforce them.[227]

The same cannot be said for convening authorities, especially when it comes to Senate confirmation. There is no statute that prohibits civilian members of Congress from engaging in

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[225] *Weiss*, 510 U.S. at 180.
[226] Department of the Navy, BUPERS INSTRUCTION 1610.10D (May 1, 2015), available at https://www.public.navy.mil/bupers-npc/reference/instructions/BUPERSInstructions/Documents/1610.10D.pdf.
[227] *See generally* Francis A. Gilligan & Frederick I. Lederer, *Court-Martial Procedure*, § 14-80.00 (4th Ed. Matthew Bender & Co. 2018) (describing how the services ensure judicial independence).

an outcome-based evaluation of a commander's judicial acts as a convening authority. And there is no statute that prohibits civilian members of Congress from using that evaluation to block his or her promotion, as Sen. Tillis has suggested he would do. Therefore, unlike military judges, who can rely on service regulations and a neutral and impartial senior officer to shield them from political pressure, convening authorities have much less structural protection. They do not answer to a Judge Advocate General, who, at least in theory, has no interest in the outcome of a given case. Instead, they answer directly to a formal chain of command that ultimately answers to a political appointee—the service Secretary. And they all answer to Congress when it comes to promotions and operational budgets.[228]

As a result, with respect to convening authorities, there is an argument that Congress has not struck the same balance between accountability and independence as it did with military judges. In fact, lawmakers like Sen. Gillibrand, Sen. McSally, and Sen. Tillis have expressed a much heavier emphasis on accountability than independence when it comes to convening authorities.[229] As Sen. Gillibrand has explained, she does not believe "the military" takes "cases of sexual assault and sexual harassment seriously," and as a result "it's Congress's job to hold the military accountable."[230] Indeed, accountability was the driving force behind Sen. McCaskill's previous effort to keep military commanders in the court-martial process. As Sen.

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[228] *See generally* LAWRENCE KAPP, CONG. RESEARCH SERV., GENERAL AND FLAG OFFICERS IN THE U.S. ARMED FORCES: BACKGROUND AND CONSIDERATIONS FOR CONGRESS (2019) (discussing various aspects of congressional management of senior military officer personnel); LAWRENCE KAPP, CONG. RESEARCH SERV., DEFENSE PRIMER: A GUIDE FOR NEW MEMBERS (2019) (discussing various aspects of congressional authority over the military).
[229] SASC Subcomm. Hearing on Personnel, *supra* note 1.
[230] Vanden Brook, *Bad Santa: Pentagon releases report on sexual harassment at Navy's boozy Christmas bash*, video (0:43) USA TODAY (Oct. 12, 2018), https://www.usatoday.com/story/news/politics/2018/10/12/navys-bad-santa-pentagon-releases-report-christmas-party-scandal/1600956002/.

McCaskill and Rep. Loretta Sanchez explained in an editorial in *USA Today*, they wanted to keep military commanders in the court-martial process because they thought that removing them would "weaken" the ability of Congress "to hold commanders accountable" and "lead to fewer prosecutions."[231]

In the Supreme Court's view, however, ensuring accountability is only half of the equation.[232] Congress must balance the need for accountability in the military command structure with the need for judicial actors, such as convening authorities in the post-*Ortiz* paradigm, to exercise independent discretion based on the facts and circumstances of the cases before them.[233] Even with the recent changes to the UCMJ, the fact that the statutory framework does not prohibit civilian members of Congress from using their political positions to punish convening authorities who make lawful, albeit unpopular, decisions is evidence that Congress has not struck an acceptable balance between accountability and independence. Therefore, in the absence of a statutory safeguard insulating convening authorities from the effects of congressional pressure, so long as members of Congress continue to take the executive view of courts-martial, especially as they interact with senior military leaders and enact legislative

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[231] McCaskill and Sanchez, *supra* note 114.

[232] *Weiss*, 510 U.S. at 180.

[233] Not only is this balance needed to satisfy the requirements of due process, but also to accord with the "[n]ature and purpose of military law[.]" *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. 1, para. 3 ("The purpose of military law is to promote justice, to assist in good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."). To promote justice, it is necessary for Congress to balance accountability of convening authorities with the need for convening authorities to have some measure of independence in carrying out judicial acts that require them to exercise discretion in individual cases. *See also MCM*, App. 2.1, at § 2.1 (listing non-binding disposition guidance for convening authorities to consider, "in consultation with a judge advocate," that focuses on the "interests of justice and good order and discipline").

reforms, it will be possible to argue the UCMJ's convening authority structure falls short of the Fifth Amendment's due-process requirements under *Weiss*.

VII. CONCLUSION

In response to the Court's decision in *Ortiz*, a fundamental question must now be asked: if the court-martial system exercises judicial power, does its convening authority structure comply with the requirements of due process? And as this Article outlines, there is an argument that absent a statutory reform to insulate convening authorities from the effects of congressional pressure, the UCMJ's convening authority framework does not. When it comes to the structural safeguards protecting convening authorities—officials who are required to carry out judicial acts under the UCMJ—Congress has arguably failed to strike an acceptable balance between accountability and independence. This imbalance may be a reflection of the fact that members of Congress continue to view the court-martial system as an Executive Branch entity, even though a majority of the Justices have made clear they view it as something else—a judicial system within the Executive Branch. Both history and current practice support this judicial view. Yet whether members of Congress will sync their future legislative reform efforts and interactions with senior military leadership to the *Ortiz* majority's judicial view remains to be seen.

Given the combination of recent cases tainted by unlawful influence and the *Ortiz* majority's characterization of the court-martial process as "judicial," it is no longer possible to ignore the executive-judicial layer of the debate over the scope of a convening authority's role. At this point, if members of Congress continue operating under an executive view of courts-martial, they will perpetuate the injustice associated with the current cycle of politically motivated unlawful influence and undermine the judicial character of the court-martial system, suggesting the *Ortiz* majority was merely aspirational in its description of the court-martial

system. In time, the diametrically opposed views of Congress and the *Ortiz* majority may come to a head through litigation. But that could take years or decades and would allow the court-martial system to move back towards the "rough form of justice" of the past.[234] To avoid such a result, and to ensure the court-martial system complies with due process going forward, members of Congress should reexamine how they interact with senior military leaders on issues of military justice and enact a structural reform that ensures convening authorities can perform their judicial acts free from "external pressure."[235]

[234] *Denedo*, 556 U.S. at 918 (2009) (Roberts, C.J. dissenting).
[235] *States v. Acevedo*, 77 M.J. 185, 191 (C.A.A.F. 2018) (Ryan, J. dissenting).