Reserve Soldiers from 418th Military Police Detachment (Detention Camp Liaison), headquartered in Orlando, Florida, receive tour of U.S. Naval Consolidated Brig in Charleston, South Carolina, March 5, 2018 (U.S. Army Reserve/Michel Sauret)

Unity of Command

Authority and Responsibility over Military Justice

By Lindsay L. Rodman

The military justice system has been undergoing constant change for the past decade, as a seemingly endless stream of legislation continues to modify the procedures through which we achieve justice and accountability. This period of flux, however, is coming to an end. The most sweeping reforms in 30 years, the result of a comprehensive 2-year Department of Defense (DOD) review, were passed by Congress in late 2016 and implemented via executive order on March 1, 2018.[1] These changes went into effect on January 1, 2019, bringing with them the modern era of military justice. Many important changes will come out of this legislation, including sentencing reform, a reformed appellate process, and changes to jury composition. Perhaps the most important outcome of all of these reforms is not what has changed, but what has remained the same: the role of the commander in the military justice process.

The military places commanders at the center of all disciplinary decisions related to their troops. Commanders have the authority to direct investigations and then to determine what forum is appropriate for the adjudication of misconduct. For lower level misconduct, the commander can choose to impose administrative punishment, that is, anything from a reprimand to nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ).[2] For more serious misconduct, it is the commander who determines whether a court-martial is appropriate, and if so,

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Servicemembers review Manual for Court Martial in legal office of USS *Dwight D. Eisenhower*, deployed in support of Operation *Inherent Resolve*, maritime security operations, and theater security cooperation efforts, Arabian Gulf, August 11, 2016 (U.S. Navy/Joshua Murray)

whether a summary, special, or general court-martial is warranted.[3]

Commanders have always been at the center of the military justice process. That role has been under attack over the past decade by legislators who believe that the system would be more just if decisions were taken away from commanders. Very few other countries with similar civilian justice systems continue to maintain as central of a role for commanders in justice matters. Many onlookers have therefore understandably asked why commanders must stay at the center of the U.S. military justice system. The answer is simple: it would be inconsistent with our doctrine, and the needs of our globally deployable military, to organize our justice system in any other way.

There are many reasons for commanders to retain authority over the military justice process, but primarily the question of accountability must be paired with responsibility. If commanders are accountable for what happens in their units—that is, whether their troops are following orders and maintaining discipline—then they must have the concomitant authority and responsibility to address disciplinary infractions. Similarly, if commanders are accountable for the well-being of their troops, then they must have the authority and responsibility to take care of them, which includes things like enabling access to health care and responding to the needs of victims of crimes.

Commanders' oversight of the military justice process is not only an imperative from an accountability perspective, but it is also actually what is best for all stakeholders in the military justice process: the accused, the victim, and those who seek justice. Commanders have the ability to take a systems-based approach to protect the rights of both victims and those accused of crimes. Rather than disaggregate the various services and processes that go into investigations, courts-martial, and victim rehabilitation, the commander is uniquely positioned to ensure that the system is effective holistically, as well as in its component parts.

This article explains more thoroughly what many military justice practitioners have taken for granted for some time: the importance of retaining authority of the commander over the military justice process. First, the article examines the commander's role over military justice as a historical matter and as established in the law. Then it discusses the commander's role as a doctrinal imperative. Finally, it addresses some of the practicalities associated with the commander's role and major counterarguments.

A Matter of History and Law

Although military court-martial proceedings now look similar in most ways to Federal civilian criminal proceedings, their history is quite different. Courts-martial have evolved over time

to look like civilian courts, as expectations from Congress and the American people about due process, the rights of accused and victims, and consistency of outcomes have driven reforms to the system. Nevertheless, their origins are instructive, as they highlight the fundamental differences between the two systems and their purposes.

The modern-day military justice system derives primarily from the establishment in 1950 of the UCMJ, which was a codification and professionalization of the U.S. Army's Articles of War. These articles had evolved over the course of the Army's history, starting in 1775, and had their roots in British law and tradition.[4] Although the original scope of military jurisdiction was meant to be narrow and only apply to military offenses, commanders in practice would use disciplinary proceedings even for civilian offenses because of their impact on the discipline of the unit.[5] In 1863, Congress "expressly authorized courts-martial to try various civil crimes, regardless of whether the circumstances of their commission prejudiced good order and discipline,"[6] thus codifying what had become practice out of necessity in the preceding 88 years. Another similar expansion occurred in 1916, when court-martial jurisdiction was again extended to all civilian crimes, in peacetime as well as during a time of war.[7]

While the historical trend was toward giving commanders more authority over their Servicemembers, by the end of World War II there was also a call for military justice reform. During the 4 years of U.S. involvement in World War II, there were roughly 2 million court-martial proceedings.[8] Many of the outcomes in those cases appeared arbitrary or haphazard, leading to public pressure on Congress to use its constitutional authority "to make Rules for the Government and Regulation of the land and naval Forces" to create a fair system of justice.[9] The effort to achieve a balance between the need for commanders to have expanded jurisdiction over their members and the need for a system that treats the accused fairly and in accordance with American values of fairness and justice resulted in the 1950 UCMJ.

Before the consolidation of disparate justice systems into one UCMJ, military courts-martial looked much more like administrative separation boards than today's courts-martial.[10] Each Service had its own system with its own rules. The common thread was the commander's authority to appoint a person or board to make a swift determination of guilt or innocence, and an appropriate sentence, for any accusation of criminal activity against a Servicemember under his or her purview. At the time, there was no expectation that courts-martial should have the same protections or processes as civilian criminal courts. Quite the opposite—the military context dictated that the process had to be battlefield- or battleship-appropriate and accommodate the exigencies of war.

Even after 1950, courts-martial did not use judges. Instead, "law officers" who were trained judge advocates were appointed as nonvoting members to advise the court-martial (a panel of Servicemembers) about the law as they reached their decisions.[11] The commander was responsible for selecting the law officer and the panel.[12] There were no "standing courts," that is, judges and a system of courts standing by waiting for cases to come to them. Instead, a court-martial would be convened, as necessary, by the commander to address misconduct ad hoc.

Today's system still preserves the same roles for the commander, with some modern-day tweaks. Only a subset of the panel is actually selected to serve in its current role, which is akin to that of a jury. And although military judges have replaced the law officers, thus fundamentally changing the look and feel of the court-martial, there are still no standing courts. Courts-martial are convened only when they are needed. A commanding officer still must determine that alleged misconduct should be appropriately adjudicated through a criminal court proceeding, and only then, through his or her "convening order" is a judge appointed.

Although the UCMJ is often thought of as the collection of laws that govern courts-martial, it is actually a much broader set of statutes that creates the framework for the establishment of good order and discipline within military units. The modern UCMJ codifies important tools other than the court-martial for commanders to use to maintain the security and discipline of their troops, including the authority to arrest or restrain[13] and the authority to impose nonjudicial punishment.[14]

The role of the military commander controlling all aspects of discipline for the Servicemember is one that has been reinforced many times over the course of U.S. history. Starting with the Bill of Rights, the Fifth Amendment right to a grand jury applies "except in cases arising in the land or naval forces, or in the militia," indicating that even the Founding Fathers acknowledged the importance of an expedient military justice system outside the normal civilian criminal process. The history of expanded military jurisdiction summarized above is indicative of this need. The resulting modern day UCMJ states in its preamble, "The purpose of military law is to promote justice, to assist in maintaining 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." Additionally, a long line of Supreme Court cases, culminating in the clarification of law in *Solorio v. United States*,[15] upholds Congress's establishment of jurisdiction over U.S. Servicemembers for all cases, simply as a result of their service in uniform, understanding the need for the military to retain control over the discipline of its Servicemembers.

In international law, the doctrine of command responsibility creates liability for commanders for the war crimes of their subordinates.[16] Commanders can be found guilty at court-martial solely because they were the superior at the time, if one of their subordinates commits a war crime.[17] Command responsibility is good law, and came up as recently as 2015, when onlookers clamored for greater accountability for leadership after the mistaken bombing of a hospital in Kunduz, Afghanistan. Although U.S.

Airman with 455th Air Expeditionary Wing Legal Office Superintendent (left) looks over Manual for Courts-Martial guide with Airman NCO-in-Charge of General Law, at Bagram Air Field, Afghanistan, March 17, 2016 (U.S. Air Force/Nicholas Rau)

commanders are rarely brought before courts-martial on command responsibility charges,[18] this notion—that "Commanders are legally responsible for their decisions and for the actions, accomplishments, and failures of their subordinates"[19]—is a basic principle of the international laws of war.

A Matter of Doctrine

Marine Corps Doctrinal Publication (MCDP) 6, *Command and Control*, states simply, "No single activity in war is more important than command and control."[20] The doctrinal definition of *command* used by all the Services is found in Joint Publication (JP) 1-02, *Department of Defense Dictionary of Military and Associated Terms*, and it "includes responsibility for health, welfare, morale, and discipline of assigned personnel."[21] Current doctrine in all Services expects commanders to be responsible and accountable for disciplinary matters, which is due in part to their legal obligations under the UCMJ. However, closer examination of the Services' command and control (C2) doctrine reveals the importance of keeping disciplinary decisions within the command. C2 doctrine *requires* commanders to have complete disciplinary authority, as this authority derives from fundamental principles of command in general.

The interaction of responsibility and accountability is essential to understanding command authority. As explained in JP 1, *Doctrine for the Armed Forces of the United States*, "Inherent in command is the authority that a military commander lawfully exercises over subordinates including authority to assign missions and accountability for their successful completion. Although commanders may delegate authority to accomplish missions, they may not absolve themselves of the responsibility for the attainment of these missions."[22] Commanders' inherent authority and responsibility for the attainment of the missions below them make them likewise inherently responsible for the deeds, and misdeeds, of their troops. In the Marine Corps, responsibility and accountability are described as corollaries of authority: "Responsibility, or accountability for results, is a natural corollary of authority. Where there is authority, there must be responsibility in like measure. Conversely, where individuals have responsibility for achieving results, they must also have the authority to initiate the necessary actions."[23]

The Navy uses nearly identical language in its doctrinal publication on command and control, and Navy culture additionally takes accountability and responsibly even more seriously than the

other Services.[24] Famously, in the Navy, commanders are routinely relieved of command for failures in their unit, regardless of their proximity to the failure itself.[25]

Authority and responsibility have long been intertwined concepts, and it is not surprising to see the Services' doctrines recognize their interdependence. In doctrine they are used nearly interchangeably. This is important because the American public has an expectation that commanders must be accountable for any bad behavior, including criminality, within their units. Accountability for misbehavior in the unit must be paired with the authority to address it.[26] Failure to hold commanders properly accountable is therefore not best addressed by the removal of authority. Even when commanders delegate their authority, as stated in JP 1, "they may not absolve themselves of the responsibility for the attainment of these missions."[27] The Air Force includes this language, nearly verbatim, in its own C2 doctrine.[28]

The Army Doctrine Publication (ADP) 6, *Mission Command*, on command approaches the subject slightly differently than the Navy and Marine Corps, distinguishing between the *art* of command and the *science* of control, stating, the "art of command lies in discriminating between mistakes to underwrite as teaching points from those that are unacceptable in a military leader."[29] Part of the essence of command, to the Army, is in making the tough decisions about military justice and discipline within the unit. In fact, in the Air Force, the minimum requirements for a commander to have sufficient administrative control of a unit to go forward are the following: "responsibility for UCMJ actions, protection of assigned forces and assets, lodging, dining, and force reporting"[30]—in other words, as a matter of doctrine, but one cannot have effective C2 if one does not have UCMJ disciplinary authority.

Command and control includes a number of concepts that are integral to effective warfighting and a professional military. Navy Doctrinal Publication 6, *Command and Control*, breaks command down into its component parts succinctly, addressing five characteristics in turn: mission control, unity of effort, decentralized decisionmaking and execution, initiative of subordinates, and implicit communication and understanding. These five elements are addressed in each of the Services' doctrine, using slightly different verbiage, but with similar sentiments. Each of the Services' treatments of these elements of effective command reveals the importance of retaining disciplinary authority with the role of the commander.

Mission control "takes the form of feedback—the continuous flow of information about the unfolding situation returning to the commander—which allows the commander to adjust and modify command action as needed."[31] This iterative process is a quintessential part of warfighting. Only the commander has the ability to determine the needs of the unit and the resultant means through which a disciplinary issue must be handled. Although disciplinary matters are incredibly important, they are not the primary mission of the Armed Forces; the primary mission is warfighting.

One attribute essential to effective warfighting is speed: "speed over time is tempo—the consistent ability to operate quickly."[32] In the Navy, "To use his command and control process at peak effectiveness, the naval commander must gather and use information better and faster than his adversary."[33] Different Services have different mnemonics for understanding decisionmaking and speed or tempo.[34] Regardless of which model is employed, the decisionmaker must have all pertinent information, and then must make decisions quickly, in order to maintain an advantage over an adversary. Especially in a battlefield scenario, the commander must be able to autonomously make decisions.

Unity of effort is the Navy's second characteristic that comprises command and control. JP 1 provides the following: "Unity of command means all forces operate under a single commander with the requisite authority to direct all forces employed in pursuit of a common purpose. Unity of effort, however, requires coordination and cooperation among all forces toward a commonly recognized objective, although they are not necessarily part of the same command structure."[35]

As stated, UCMJ authority is a requirement for troops to be administrative control to a unit, meaning that unity of command and unity of effort should be the same for disciplinary matters. Because disciplinary matters can be complex, it is important that unity of command exists for these matters. Typically, the notion of unity of command stands for the notion that one person cannot and should not have more than one chain of command. For disciplinary matters, this means that delegating disciplinary decisions outside of the chain of command would contravene the doctrine of unity of command.

The last three of the Navy's five characteristics of command and control (decentralized decisionmaking and execution, initiative of subordinates, and implicit communication and understanding) all derive from the trust that commanders must place in their subordinates. The idea of disciplined initiative by subordinates is also foundational to the Army's notion of mission command. In the Army, it is the role of the commander "to enable disciplined initiative within the commander's intent to empower agile and adaptive leaders" in the employment of land operations.[36] As stated in ADP 6, the "exercise of mission command is based on mutual trust, shared understanding, and purpose."[37] The ultimate trust from commanders will result from their own knowledge that they hold the authority and responsibility over the trustworthiness of their troops.

MCDP 6 states that C2 effectiveness can only be measured in relation to the enemy.[38] In matters of discipline, that means commanders must be held responsible and accountable for outcomes in their units—their enemy is criminality, bad behavior, and victimization. As discussed, that responsibility is not best achieved by diminished authority (that is, less C2 altogether), but rather through better accountability measures and improved leadership (better and more effective C2).

Practical Concerns

In 2013, the Secretary of Defense established the Military Justice Review Group (MJRG) to perform the largest review of the military justice system since 1980.[39] MJRG efforts resulted in the Military Justice Act, which passed the House and Senate in December 2016 and which represents the largest set of reforms of the UCMJ since its enactment.[40] The MJRG states at the outset of its report, which was released in December 2015, that "the necessity for justice and the requirement for discipline are inseparable."[41] In other words, the achievement of military discipline is not, and should not be, at odds with the achievement of justice. It is therefore the role of the commander to maintain the discipline of the unit and to achieve justice when misconduct arises; both roles are intertwined and complementary.

The MJRG also considered one of the most often cited reasons that the commander's central role in the military justice process should be maintained: the ability to be globally engaged and deployed. The MJRG, which did not substantially revise the commander's disciplinary decisionmaking authority, stated, "In the military, there is a unique need to conduct trials in deployed environments during ongoing combat operations around the world, as well as in other nations where American Servicemembers are stationed."[42] Commanders must be able to address misconduct in any deployed environment; our military does not have the luxury of outsourcing these kinds of decisions in expeditionary and combat environments. Nevertheless, there are good reasons that commanders are best poised to execute disciplinary decisionmaking at home as well.

Aside from the MJRG, which was established within DOD, a number of outside groups have studied the commander's role in the military justice process recently. The most noteworthy of these was the Response Systems to Adult Sexual Assault Crimes Panel (RSP), a Federal Advisory Committee Act commission established in the National Defense Authorization Act of 2013. DOD made many witnesses and resources available to the RSP, which did laudable and thorough investigations. Advocacy organizations that felt strongly about removing the commander's discretionary authority in the military justice process also provided extensive testimony and other materials for consideration. At the end of the day, the RSP was not persuaded that it made sense to modify the commander's central role in the decision process, despite its departure from civilian norms. The RSP, which was exclusively focused on sexual assault crimes, concluded as follows, addressing many counterarguments along the way:

Evidence considered by the [RSP] *does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase conviction rates in these cases. Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization. Further, civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.*[43]

The RSP was appointed in the context of annual efforts to legislate change in the military justice process in order to help address the problem of sexual assault in the military. Many of the changes that resulted from passed legislation have helped address problems in the military justice process or problems with how the military was handling sexual assault generally. Proposals to remove the commander from the military justice process have not passed, likely due to conclusions like those of the RSP and MJRG that altering the commander's role would not help address actual problems.

Most of the recent proposed legislation that would remove the commander's disciplinary authority would place that authority in the hands of uniformed lawyers, either assigned to the command or assigned to a separate legal unit. However, some have hinted that serious crimes could be removed from the commander's authority altogether, which is the practice in some other countries.[44] For the U.S. military, these proposals would not lead to a more effective military or more just outcomes.

There are many reasons that other countries have modified the commander's role regarding military justice. The primary reason is lack of capacity and professional capability in their court-martial systems. Smaller militaries cannot achieve a critical mass of experienced and professional litigators to competently try complex cases. Lawyers need years of trying a variety of cases to become well-prepared for higher stakes cases. In other countries, justice is better served by letting civilian authorities handle those cases. This is a problem that the U.S. military has addressed by working hard over the past decade to better professionalize and train its litigators, including a requirement that complex cases be tried by specially qualified prosecutors.

There is no country in the world that is engaged globally to the same extent as the U.S. military. The United States has the thorniest missions, in some of the most remote parts of the planet. In those environments, disciplinary decisions, like most decisions, can have life-or-death consequences. As discussed, there is a doctrinal imperative associated with retaining disciplinary authority in the commander. There is also a pragmatic utility to ensuring that commanders have control over the discipline of their units and do not have to refer to other officers, other lawyers, or other units to make swift determinations that best meet the needs of the mission. Countries that do not find themselves fighting in similar environments consistently may not prioritize these mission effectiveness considerations to the same extent as the United States.

Alabama National Guard Trial Defense Service and 167th Judge Advocate General's Corps section culminated yearlong training exercise, August 7–8, 2018, at Calhoun County Courthouse, Anniston, Alabama, with mock trial, going through entire legal process that Uniformed Code of Military Justice would require (U.S. Army National Guard/Katherine Dowd)

It is worth noting, however, that justice is not compromised by retaining the commander's authority over military justice. The commander is in the best position, from the perspective of all stakeholders in the criminal process, to oversee military justice. Commanders have no incentive to condone criminality or harbor those who commit misconduct. Lack of discipline is toxic to mission accomplishment. At the same time, commanders want justice for their troops and have an incentive to ensure that proceedings are fair. Commanders do not have an incentive to railroad innocent Servicemembers; they have a strong incentive to take care of their troops. For victims of crimes, this means providing additional resources to help with recovery, both mental and physical.

Especially with respect to sexual assault cases, the military has developed in many areas, with the help of some legislation, pressure from leadership in the White House and Congress, and consultation with advocacy organizations. The military has vastly improved its ability to support victims in the past few years, including the advent of the victims' legal counsel and efforts to incorporate new methods into the victim support processes, such as counseling and workplace support.[45] There is a need for culture change within the military to address sexual assault. But removing the commander from disciplinary decisions is not the way to achieve culture change. As the RSP stated, "Historically, commanders have proved essential in leading organizational responses during periods of military cultural transition, as the Services have relied on them to set and enforce standards and effect change among subordinates under their command."[46]

Especially in the area of victims' needs and rights, it is imperative that commanders stay involved. Commanders will be, and should be, held accountable for ensuring, first, that the rate of sexual assault decreases (that is, fewer victims are created), and, second, that victims are well supported if a sexual assault should occur. A commander who is powerless over the justice process is also powerless to ensure that a victim's needs and input are taken into consideration.

There is a saying in the military that 10 percent of troops take up 90 percent of the commander's time. Some advocates, and even the occasional commander, have argued that removing the authority over discipline from commanders would free them up to concentrate on other matters. The desire to move away from commanders controlling these decisions reflects a misunderstanding of the history, doctrine, and underlying policy justifications for the current system. Maintaining the well-being of the unit is commanders' responsibility, and as such they must retain the concomitant authority.

Legislation that would further distance commanders from their command responsibility will degrade discipline, decrease effectiveness, and impair command response to victim needs and enforcement of victim rights. Future legislative, executive, and regulatory efforts should adopt a harmonized approach to the codification of principles consistent with both command responsibility and the fundamental principle of unity of command. The reforms made to the military justice system in this last round of litigation are truly transformative. They promise to professionalize the military justice system, bringing it further in line with civilian practice without sacrificing the pivotal role of the commander. JFQ

Notes

[1] Military Justice Act of 2016 is Division E, "Uniform Code of Military Justice Reform," of the National Defense Authorization Act for Fiscal Year 2017, Public Law No. 114-328, 114th Cong., 2nd sess., January 4, 2016, available at <http://jsc.defense.gov/Portals/99/Documents/FY17NDAA.pdf?ver=2016-12-30-100457-077>; Executive Order 13825, *2018 Amendments to the Manual for Courts-Martial, United States* (Washington, DC: The White House, March 1, 2018), is available at <www.federalregister.gov/documents/2018/03/08/2018-04860/2018-amendments-to-the-manual-for-courts-martial-united-states>.

[2] 10 *U.S. Code* § 815, Art. 15, "Commanding Officer's Non-Judicial Punishment."

[3] See 10 *U.S. Code* § 822–24.

[4] Jan Horbaly, "Court-Martial Jurisdiction" (Ph.D. diss., Yale Law School, 1986), available at <www.loc.gov/rr/frd/Military_Law/pdf/CM-Jurisdiction_Horbaly.pdf>.

[5] Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* (New York: Charterhouse, 1974); William Winthrop, *Military Law and Precedents* (Washington, DC: U.S. Government Printing Office, 1920); see also *Solorio v. United States*, 483 U.S. 435, 444 (1987).

[6] Robert D. Duke and Howard S. Vogel, "The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction," *Vanderbilt Law Review* 12, no. 2 (March 1960), 435, 449–450.

[7] Horbaly, "Court-Martial Jurisdiction," 69n8.

[8] Department of Law, U.S. Military Academy at West Point, "Overview of Criminal Law and the Military Justice System," n.d., 3, available at <www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/01-2_crimLaw_miljsystem.authcheckdam.pdf>.

[9] U.S. Const., art. I, § 8.

[10] Uniform Code of Military Justice (UCMJ), Act of May 5, 1950, ch. 169, 64 Stat. 108 (now 10 *U.S. Code* §§ 801–940 (1970). Hereinafter, 1950 UCMJ.

[11] Article 26, 1950 UCMJ. The 1950 version of the Uniform Code of Military Justice is available at <www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf>.

[12] Article 25–26, 1950 UCMJ.

[13] 10 *U.S. Code* § 809, Art. 9, "Imposition of Restraint."

[14] 10 *U.S. Code* § 815, Art. 15.

[15] *Solorio v. United States*, 483 U.S. 435, 444 (1987). *Solorio* reversed *O'Callahan v. Parker*, which for a brief time limited jurisdiction in the military to only Service-connected cases. *Solorio* describes *O'Callahan* as ahistorical and misunderstanding a long tradition of jurisdiction over Servicemembers by military commanders.

[16] Victor Hansen, "What's Good for the Goose Is Good for the Gander: Lessons from Abu Ghraib; Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own," *Gonzaga Law Review* 42, no. 3 (2006–2007), 335–414, available at <http://blogs.gonzaga.edu/gulawreview/files/2011/01/Hansen.pdf>.

[17] See *In re Yamashita*, 327 U.S. 1 (1946).

[18] The last such trial was the *United States v. Medina* (see *Medina v. Resor*, 43 C.M.R. 243 [C.M.A. 1971]), which precipitated out of the My Lai massacre during the Vietnam War.

[19] Army Doctrinal Publication (ADP) 6-0, *Mission Command* (Washington, DC: Headquarters Department of the Army, May 17, 2012), 6.

[20] Marine Corps Doctrinal Publication (MCDP) 1, *Warfighting* (Washington, DC: Headquarters United States Marine Corps, June 20, 1997), 35.

[21] Joint Publication (JP) 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Washington, DC: The Joint Staff, November 8, 2010, as Amended Through February 15, 2016), 101.

[22] JP 1, *Doctrine for the Armed Forces of the United States* (Washington, DC: The Joint Staff, March 25, 2013, Incorporating Change 1, July 12, 2017).

[23] MCDP 6, *Command and Control* (Washington, DC: Headquarters United States Marine Corps, October 4, 1996), 39.

[24] Navy Doctrinal Publication (NDP) 6, *Naval Command and Control* (Washington, DC: Headquarters Department of the Navy, May 19, 1995), 8.

[25] Ibid., 7.

[26] Loretta Sanchez, "Hold Commanders Responsible for Sexual Assaults," *U.S. News & World Report*, February 14, 2014, available at <www.usnews.com/debate-club/is-sen-gillibrand-right-on-how-to-address-sexual-assault-in-the-military/rep-loretta-sanchez-commanders-must-be-held-accountable-military-culture-must-change>.

[27] JP 1, V-1.

[28] Air Force Doctrine Document (AFDD) 6-0, *Command and Control* (Washington, DC: Headquarters Department of the Air Force, June 1, 2007, Incorporating Change 1, July 28, 2011), 5.

[29] ADP 6-0, 6.

[30] AFDD 6, 39.

[31] MCDP 6, 40.

[32] MCDP 1, 40.

[33] NDP 6-0, 4.

[34] In the Marine Corps, for example, it is Colonel John Boyd's Observe-Orient-Decide-Act Loop. See MCDP 1, 40n18.

[35] JP 1, V-1.

[36] ADP 6, 1. The notion of disciplined initiative reappears on page 4.

[37] ADP 6, 2.

[38] JP 1, 38.

[39] Secretary of Defense Memorandum, "Comprehensive Review of the Uniform Code of Military Justice," October 18, 2013, available at <http://ogc.osd.mil/images/mjrg_secdef_memo.pdf>.

[40] Ibid.

[41] Military Justice Review Group, *Report of the Military Justice Review Group: Part I; UCMJ Recommendations* (Washington, DC: Department of Defense, December 22, 2015), 16, available at <http://ogc.osd.mil/mjrg.html>.

[42] Ibid., 19.

[43] Response Systems to Adult Sexual Assault Crimes Panel (RSP), *Annex to Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel* (Arlington, VA: RSP, May 2014), annex B: "Report of the Role of the Commander Subcommittee," 5, available at <http://responsesystemspanel.whs.mil/public/docs/Reports/00_Final/RSP_Report_Annex_Final_20140627.pdf>.

[44] For example, in Canada, murder, manslaughter, and abduction cannot be tried at court-martial, according to section 70 of the National Defence Act. In Australia, the military justice system is used "when the offence substantially affects the maintenance and ability to enforce Service discipline in the [Australian Defence Force]. Otherwise, criminal offences or other illegal conduct are referred to civil authorities, such as the police." See Australian Government Department of Defence, "Military Justice System," available at <www.defence.gov.au/mjs/mjs.asp>.

[45] 10 *U.S. Code*, § 1044e, "Special Victims' Counsel for Victims of Sex-Related Offenses."

[46] RSP, annex B, 2.