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MILITARY JUSTICE AND THE SUPREME COURT'S OUTDATED STANDARD OF DEFERENCE: WEISS v. UNITED STATES

Karen A. Ruzic*

INTRODUCTION

The general public often views the military as a hierarchical and rigid system that imposes its ideology and method of operation on members who blindly obey orders. Such notions may lead to a perception by civilians and servicemembers alike that the military treats its members unfairly. This viewpoint is reflected in the oft quoted saying that "military justice is to justice as military music is to music."¹ Thus, the military has been traditionally regarded as a "separate society" that mandates a different system of justice for those members of society who choose to serve in their country's military.²

This "separate society" view, however, is no longer an accurate view of the modern day military establishment. In its present peacetime form, the military functions much like a large civilian corporation, with officers playing the role of managers and enlisted personnel playing the role of employees. Both the public's and the Supreme Court's perceptions, however, have not caught up with the changes in the military. In fact, the Supreme Court still takes a "hands off" position when dealing with military issues.

In Weiss v. United States,³ for example, the Supreme Court again followed its traditional approach of adhering to the "separate society" doctrine. The Court applied a standard of review highly deferential to Congress since this case, after all, involved a military issue. In doing so, it declined to extend constitutional protections, enjoyed by civilian judges, to members of the armed forces. The Court found both that military judges did not need a second appointment and that they did not need fixed terms of office to ensure impartiality.⁴ Had the Court been less deferential to the military and more willing to explore the

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4. Id.
realities of today's military establishment, it would surely have arrived at different conclusions.

This Note will discuss the merits of treating the military as a "separate society" and will argue that the modern military does not differ greatly from civilian society. Part I of this Note will give an overview of the history of the military judicial system. Part II will give a background of the military court structure. Part III will continue with an account of the Court's opinion in Weiss. Finally, this Note concludes with a discussion of the realities of today's military and argues that such realities render the Court's rationale for a high degree of deference obsolete.

I. Historical Development of American Military Law

A. From Roman Times to Anglo Tradition

Military judges existed at least as early as the Roman Empire. Their jurisdiction resembles that of a modern day court-martial, as Roman soldiers were subject to the court's full jurisdiction over criminal and even civil matters. In fact, the general rule in Roman times was that no wrong could exist without a remedy. Thus, if the civilian courts did not take action in a particular case, the military courts would. If fact, in time of war, civilian courts yielded all power to military tribunals.

Following the Middle Ages, and the development of more elaborate forms of government, nations began to recognize civil rights and liberties. As a result, the jurisdiction of military courts gave way to the increased authority and scope of their civilian counterparts. Nevertheless, in time of war, entire societies would fall subject to martial rule at the hands of a conqueror. Even today, the use of martial rule remains a potential reality.

History tells us that the jurisdiction of the military over soldiers may have been codified as early as the reigns of Richard II, Henry V, and Henry VII, and courts-martial tribunals may have convened in the

6. Id. at 16.
7. Id.
8. Id.
time of William the Conqueror. These early tribunals were called either the Court of Honour or the Court of Chivalry and had jurisdiction over all military offenses. The head of these courts was the Lord High Constable. Over time, these courts came under the authority of Earl Marshal. Under the new name of Courts of the Marshal, they continued to operate well into the 17th Century, with the advice of a civilian lawyer.

It was during the 17th Century that the title of Judge Advocate came into use, and in 1629 that the first Articles of War were written. Issued by the Crown, the Articles specifically gave the Judge Advocate jurisdiction over soldiers. Later in the 17th Century, the army wrote the Mutiny Acts and continually rewrote them well into the 19th Century. It was under the Mutiny Acts that the procedures were first developed for courts-martial proceedings.

In 1881, the Army Act combined the Articles of War and the Mutiny Acts into one system of military law. With an occasional revision, this system continued into the 20th Century. For example, in 1923, the Military Department of the Judge Advocate General was created and authorized to perform prosecutorial functions. Then, in 1938, a committee was formed to assure judicial independence, thereby requiring that the prosecutorial and judicial bodies be subject to the authority of different Ministers.

B. Beginnings of the American Military System

On June 14, 1775, the Continental Congress appointed a committee to establish the rules and regulations for the army, and adopted the American Articles of War. These original articles bore a strong

11. Id.
12. Id. In 1521, the Lord High Constable was beheaded for disagreeing with the King. Nevertheless, these courts continued to function and were later called Courts of the Marshal. Id.
13. Id. The court name was later shortened to Courts of Marshal and eventually evolved into the modern term courts-martial. Id.
14. Id.
15. Id. at 29. The first recorded Judge Advocate General was Samuel Barrow in 1666. Id.
16. Id. at 26-27.
17. Id.
18. Id. at 32.
19. Id. at 32-33.
resemblance to their British namesake. Under this early system, Congress was given ultimate authority over the military. The early avowal of civilian control over the military would prove to be a continuing theme in the new nation, sparking major concern and controversy.

The experience of the Revolutionary War provided the background of what would become the “standing army” debate at the Constitutional Convention over whether to have a standing army or a militia. Having rebelled against oppressive British military rule, many citizens feared the maintenance of a peacetime army. At the same time, however, some citizens saw the War as evidence that a strong standing army was needed in the new nation. Thus, the standing army debate was born, and the lines were drawn between federalists, who favored a professional military, and anti-federalists, who favored a militia.

The distrust of a standing army resulted in a careful diffusion of the war powers. While the President would be Commander-in-Chief of the military forces, Congress would have various checks on the President's power. Thus, Article I gave Congress the powers “to raise and support” an army, “to provide and maintain a Navy,” “to make Rules for the Government and [the] Regulation of the forces,” and to “make all Laws ... necessary and proper” for the mainte-

21. Id. Revisions were made to the Articles in 1776, but the system remained in effect until the Constitutional Convention. Id. at 145-48.
22. Stephanie A. Levin, The Deference That is Due: Rethinking the Jurisprudence of Judicial Deference to the Military, 35 VILL. L. REV. 1009, 1032 (1990). The founders created this system in the midst of the Revolutionary War. Given the attitude of the day against the British military, it is not surprising that the founders would immediately set about the task of controlling their own military, subjugating it to Congressional control. Although the framers said little about military justice specifically, they were quite concerned with civilian checks on the military. This concern would play itself out in the ratification debates. Honorable Walter T. Cox III, The Army, the Courts, and the Constitution: The Evolution of Military Justice, 118 MIL. L. REV. 1, 4 (1987).
23. Levin, supra note 22, at 1024. The colonialists had experienced the hierarchical, highly disciplined military of the British and feared its use as a political tool for the head of government. It was also seen as an instrument of the class system, with the aristocracy dominating the officer corps and subjecting the lower classes to their place in the ranks. Id. at 1024-25.
24. Id. at 1031.
25. Id. at 1031-35. The anti-federalist/federalist debate over the standing army issue was symbolic of the entire philosophical chasm between these two groups. The federalists favored a strong, centralized government while the anti-federalists championed states' rights and decentralized power. Id. at 1044-45.
nance of the military establishment. For our purposes, the practical
effect was to give Congress authority over the trial and punishment of
military offenses, independent of the judicial power of Article III.31
Herein lies the American tradition of a separate military subject to
civilian authority.32

This distribution of power, however, did not entirely allay the
tension between individual rights and military necessity, and the ongo-
ing debate carried over into the fight for the Bill of Rights.33 The
rights of civilians against the potential for military encroachment are
clearly espoused in the Constitution.34 Nonetheless, intense debate
has continued over the applicability of the Bill of Rights to individual
members of the military. An understanding of the court-martial sys-
tem, its development, its procedures, and its purposes, will aid in our
discussion of the applicability of the Bill of Rights to servicemembers.

Under the Articles of War, courts-martial were handled by the
commander of the unit,35 but until 1920, no level of appellate review
was available.36 During World War II, the ranks of the army included
more "regular" citizens than ever before. Some of these citizens were
lawyers who were shocked at the military justice system's potential for
unfair treatment.37 A cry for reform led to the short-lived Elston Act
in 1948. The only major development to result from that act was the
creation of the Judge Advocate General's Corps.38 However, the
seeds for reform were planted, and following World War II, in con-
junction with unification of the armed forces under the Department of
Defense, a call for a uniform system of justice arose.

In 1948, newly appointed Secretary of Defense, James Forrestal,
appointed a committee to work on a uniform code of military jus-

31. Cox, supra note 22, at 3 (citing Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857)).
32. Warren, supra note 26, at 251. In his article, the author points out that the supremacy of
civilian representatives over the military has survived in our country without any period of sub-
mission to military control.
33. Levin, supra note 22, at 1012. In fact, the author argues, the standing army debate was
one of the primary reasons the Bill of Rights was created. See also Warren, supra note 26, at 253.
34. See, e.g., U.S. CONST. amend. II (right to bear arms); U.S. CONST. amend. III (right to
refuse quartering of soldiers).
35. John Murawski, Putting Military-Style Justice on Trial: Attacking a System in which
Prosecutors Judge the Judges, THE RECORDER, May 12, 1993, at 1. Thus, a servicemember
appeared before the very officer responsible for convening the court-martial.
125 (1969), reprinted in DEPT. OF THE ARMY, MILITARY LAW REVIEW BICENTENNIAL ISSUE 273, 
276 (1975).
37. Cox, supra note 22, at 11.
38. Id. at 12.
39. Id. at 13.
tice for each branch of the military, modernizing the system without
impeding the military function, and improving on the Articles of
War. The end result was the adoption, in May 1950, of the Uniform
Code of Military Justice ("Code"). Included in the new Code were
the addition of law officers to hear courts-martial cases, the addition
of counsel for the accused in bad conduct discharge cases, and the
creation of the Court of Military Appeals to ensure civilian review of
military cases.

Throughout the 1950's and 60's, the Code Committee met and
proposed revisions to the Code. Sam J. Erwin, Jr., for example, pro-
posed amendments to the Code in June 1968. The Department of
Defense made several objections to these amendments, but after
some modification, Congress passed the Military Justice Act of 1968. Of
ded significance were the establishment of Courts of Military
Review as an intermediate appellate court for each branch of the mili-
tary, the creation of military judges at both the trial and appellate
level, and the guarantee of trained legal counsel to handle the prose-
cution and defense in all courts-martial proceedings. Congress en-
acted one other major revision in 1984. The result was to subject
certain decisions of the Court of Military Appeals to Supreme Court
review.

40. Id. (citing Letter from James Forrestal to the Committee on Uniform Code of Military
Justice (Aug. 18, 1948), reprinted in I Morgan Papers).
41. Id. at 14.
42. Law officers, while acting in the capacity of a judge, were not formally trained lawyers.
Ross, supra note 36, at 276.
43. Id.
44. Cox, supra note 22, at 14-15. This codification of appellate courts was a significant step
for military justice. The original Articles of War made no provision for appellate review. It
was not until the reforms in 1920 that "appellate" boards of review were enacted by Congress. Fred
45. The Code Committee was established by Article 37(g) of the Code. The Committee
was to meet annually to discuss and propose changes to the Code. Ross, supra note 36, at 273-
74. Several civilian agencies also contributed to the discourse on revision of the Code. Among
them were the American Legion and the Association of the Bar of the City of New York. Id. at
276-77.
46. Id. at 279.
47. Id. at 279-80.
48. Id. at 280. The Act was enacted on October 24, 1968. For a more comprehensive
description of the Erwin Amendments, the Department of Defense objections, and a list of the
Code provisions affected by the Military Justice Act, see id. at 279-81.
49. Murawski, supra note 35, at 1.
50. Cox, supra note 22, at 19.
circumstances in which cases qualify for certiorari are quite limited. Those circumstances in-
clude: cases resulting in the death penalty approved by one of the four Courts of Military Re-
view, cases which the Judge Advocate General has certified to the Court of Military Appeals,
II. BACKGROUND OF THE COURT-MARTIAL SYSTEM

A. Structure of the Court-Martial System

The basic difference between Article I and Article III courts lies in the guarantee of judicial independence. Federal Courts established under Article III require tenure and salary protection for federal court judges; those protections help to ensure that judges are impartial and independent. Although Congress has the power to extend these Article III protections to Article I courts, it has declined to do so with regard to military courts; this decision has been upheld by the Supreme Court.

A military trial court, known as a court-martial, is a court of general criminal jurisdiction, created by Congress pursuant to Article I, Section 8, of the Constitution, which gives Congress the power to regulate the armed forces. The jurisdiction of these trial courts extends to all active duty military personnel who have committed either a military or a civilian crime. However, it is not a standing court, but an ad hoc tribunal convened by the commander of a unit whenever a crime has been committed.

At the trial level, military courts are substantially different from civil courts in both structure and procedure. Judges serving at the court-martial level are appointed at the discretion of the Judge Advo-

and cases in which the Court of Military Appeals has either granted a petition for review, or granted relief. Id.

52. Article I, § 8, sets out powers granted to Congress with regard to the military. Among these powers are the power to "raise and support armies," to "provide and maintain a Navy," to "make Rules for the Government and Regulation of the land and naval Forces," and to "make all Laws . . . necessary and proper" for carrying out these powers. U.S. Const. art. I, § 8.

53. Article III states in pertinent part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.


57. See infra section IV(B)(2) for a discussion on the expansion of court-martial jurisdiction.

58. In fact, there are three distinct types of courts-martial proceedings. Military judges preside over special and general courts-martial proceedings. Summary courts-martial proceedings may be convened and adjudicated by a commissioned officer. A finding of guilty in a general courts-martial proceeding may result in a sentence of death, life imprisonment, imprisonment for a number of years, forfeiture of pay and allowances, reductions in pay grade, and/or a dishonorable discharge. UCMJ Art. 18, 10 U.S.C. § 818. Sentences which may be imposed at a special court-martial include up to six months confinement, forfeiture of up to two-thirds pay per month for six months, reductions in pay grade, and/or a bad-conduct discharge. UCMJ Art. 19, 10 U.S.C. § 819.
cate General (JAG), and because military courts are established through Congress' Article I powers, military judges do not enjoy Article III protections at either the trial or the appellate level. Military judges do not enjoy the protections afforded civilian judges in the form of life tenure, a fixed term, or even a distinct position. Additionally, the jury in a military trial may contain less than twelve jurors, and their decision need not be unanimous. Nevertheless, the Supreme Court long ago upheld the constitutionality of the court-martial system.

At the appellate level, each branch of the service has a Court of Military Review. All courts-martial cases resulting in the imposition of the death-penalty, in the discharge from the armed services, or in confinement for more than one year, are automatically reviewed by this Court. Judges serving on Courts of Military Review may be either civilians or commissioned officers, provided, however, that they are members of a bar. Although they serve on permanent courts, these judges, like their trial level counterparts, are appointed by the JAG. Moreover, they are not appointed for fixed terms of office, leaving their status subject to the JAG under which they serve.

The highest court in the military justice system is the United States Court of Military Appeals. Also an Article I court, it consists of five civilian judges who have been appointed by the President with the advice and consent of the Senate. These judges serve fifteen year terms and enjoy the salary of a federal court judge. There is no direct appeal to this court. Rather, to reach the Court of Mili-

60. See Burch v. Louisiana, 441 U.S. 130 (1979)(allowing nonunanimous finding if the jury is composed of more than six persons). In cases where the death penalty is a mandatory punishment, however, the UCMJ specifically requires a unanimous verdict: "No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken." UCMJ Art. 52, 10 U.S.C. § 852(a)(1).
64. UCMJ Art. 66, 10 U.S.C. § 866(a).
66. Id.
67. Id. For a further discussion of military judges fixed terms of office, see discussion infra section III(B) and accompanying notes.
68. UCMJ Art. 42, 10 U.S.C. § 942(a) (Supp. V. 1993). Although Court of Military Appeals judges are appointed from civilian life, they are typically individuals with prior military experience. Currently, all five judges on the court have such prior experience.
69. UCMJ Art. 142, 10 U.S.C. § 942(b)(1).
70. UCMJ Art. 142, 10 U.S.C. § 942.
tary Appeals, cases must first be adjudicated at the Court of Military Review level.\textsuperscript{71} Moreover, while the Supreme Court can now review military cases, it typically can only do so where a case has first been heard by the Court of Military Appeals.\textsuperscript{72} Thus, this Court plays a unique screening role in the military justice system.\textsuperscript{73}

Since its establishment in 1950,\textsuperscript{74} the status of the Court of Military Appeals as an Article I, rather than Article III, court has been variously questioned by civilian and military sources alike. In 1987, the Court of Military Appeals itself established a committee to study and consider the court’s role and status both as an instrument of justice and an instrument of the military.\textsuperscript{75} The committee, while making various suggestions and recommendations for improvement, declined to address the court’s Article III status, deciding that the issue should be left for later consideration.\textsuperscript{76}

B. The Purpose of the Court-Martial System

Originally, the court-martial system was aimed at meeting the disciplinary needs of a commander.\textsuperscript{77} Modern changes in the military system of justice, however, have raised complaints that the system has become too “civilianized.”\textsuperscript{78} The question remains, however, whether the main goal of the system is the achievement of discipline or the achievement of justice, and whether both of these interests can, or should, be served by the military court system.\textsuperscript{79}

In the 1800’s, court-martials were predominately an instrument to enforce discipline in the ranks.\textsuperscript{80} The classical theory of military law

\textsuperscript{71} UCMJ Art. 67, 10 U.S.C. § 867(b). For a detailed discussion of the Court of Military Appeals' practice regarding review of cases under Article 67, see William N. Early et al., \textit{USCMA and the Specified Issue: The Current Practice}, 123 Mil. L. Rev. 9 (1989).

\textsuperscript{72} UCMJ Art. 67a, 10 U.S.C. § 867a(a) (Supp. V. 1993).

\textsuperscript{73} \textit{Military Justice and Article III, supra} note 54, at 1912-13.

\textsuperscript{74} UCMJ Art. 67, 10 U.S.C. § 867 (1950) (current version at 10 U.S.C. § 867 (Supp. V. 1993)).


\textsuperscript{76} Id. (citing United States Court of Military Appeals Committee Report, (1989)). The committee commended the job the Court of Military Appeals was doing but made sixteen recommendations for improvement. For an in depth look at three of those recommendations, see id.


\textsuperscript{78} The “civilianization” of the military justice system began with the enactment of the Uniform Code of Military Justice in 1950 and continued with various statutory changes to that system over the years. The effect of these changes has been to create a system that more closely resembles its civilian counterpart. Weiss v. United States, 114 S. Ct. 752, 759 (1994).

\textsuperscript{79} Id. at 759-60.

\textsuperscript{80} Cox, \textit{supra} note 22, at 7.
saw courts-martial as a tool of the Executive to maintain order and discipline.\textsuperscript{81} Even with the move to a more civilianized system, the military is often seen as a "specialized society separate from civilian society,"\textsuperscript{82} that accordingly warrants a separate system of justice. The military continually points to the "separate community" doctrine to justify the Supreme Court's application of a high degree of deference to Congress in any case addressing military issues.

Justification for this separate community is based on "military necessity."\textsuperscript{83} In other words, the military points to the need for a flexible system of justice, which a commander can resort to quickly and definitively to fulfill the objectives of military discipline and a sense of duty.\textsuperscript{84} Specifically, the separate community doctrine views the military as a "distinct subculture" that requires the subordination of its members.\textsuperscript{85} This philosophy maintains that strict standards of allegiance are necessary for the military to accomplish its goal\textsuperscript{86} of defending the nation from opposing forces. Thus, where the military's needs conflict with the servicemember's individual rights, civilian courts are not deemed competent to determine how to protect those rights without decreasing military efficiency.\textsuperscript{87}

The argument against a system of military justice focused on discipline and in favor of a system founded in justice, is based on both procedural and substantive arguments. Procedurally, proponents for a basis in justice argue that the system has already become more judicially based, as evidenced by the creation of military judges\textsuperscript{88} and the adoption of the federal rules of evidence. In addition, Congress initially changed the name of the military's highest court from Court of

\textsuperscript{81} S.T. Ansell, \textit{Military Justice}, 5 \textit{Cornell L. Q.} (1919), reprinted in \textit{Dept. of the Army, Military Law Review} Bicentennial Issue 53, 57 (citing 1 W. Winthrop, \textit{Military Law} 54 (18xx)). \textit{See also} W. Winthrop, \textit{Military Law and Precedents} 47-48 (2d ed. reprint 1920). This view was consistent with the supremacy of the monarch, and Ansell believed this placed courts-martial proceedings above the law. Ansell, \textit{supra}, at 57-58. W. Winthrop was the foremost authority on military law in the 19th Century. Even today, his classical theory of military law is often cited.


\textsuperscript{83} Gary M. Heil, Comment, \textit{Military Triers of Fact: A Needless Deprivation of Constitutional Protections?}, 33 \textit{Hastings L. J.} 727, 734 (1982). Fulfilling the objectives of the military demands discipline and a strong sense of duty. \textit{Id.}

\textsuperscript{84} \textit{Military Justice and Article III}, \textit{supra} note 54, at 1909.

\textsuperscript{85} Hirschhorn, \textit{supra} note 82, at 201.

\textsuperscript{86} \textit{Id.} at 201-03.

\textsuperscript{87} \textit{Id.} at 238.

\textsuperscript{88} UCMJ Art. 26, 10 U.S.C. § 826(b).
Military Appeals to "United States Court of Military Appeals" to ensure that it would be regarded as a true federal court.\(^8\) Congress again changed the court's name to "United States Court of Appeals for the Armed Forces" in 1994; perhaps again to "civilianize" the military justice system.\(^9\) Even this court has recognized courts-martial as a judicial proceeding, rather than an instrument of discipline.\(^9\) Hence, if it is a system of justice, it follows that judicial independence should be secured.\(^9\)

Moreover, critics of the military's separate justice system expound the idea that morale and discipline would be better served by fair treatment of servicemembers.\(^9\) Were the system perceived as a legitimate instrument of justice, the resulting respect and perception of fairness would promote adherence to its regulations.\(^9\) The military itself has recognized that the goal is not to balance justice and discipline, but rather to promote justice.\(^9\) Thus, the result of the proper functioning of a court-martial will itself promote discipline.\(^9\) Accordingly, discipline should be viewed as the result of, and not the justification for, military justice proceedings.

Critics of military justice further contend that the very nature of the military makes judicial independence even more necessary than in civilian society. This concern is magnified by the absence of constitutional protections of servicemembers' rights and the potential for unlawful command influence.

III. **WEISS v. UNITED STATES**

The Supreme Court has recently had its jurisdiction extended to review decisions of the Military Court of Appeals.\(^9\) Despite its expanded jurisdiction, however, the Supreme Court has heard only two cases since 1984. This, however, has not been due to a lack of challenges at the military appellate level. In fact, over 200 appeals alleg-

89. Schlueter, *supra* note 77, at 3.
90. 10 USC § 94(a)(1994). At the same time, Congress also changed the name of the Courts of Military Review to the "Court of Criminal Appeals." 10 USC § 941(b)(1994).
92. Ansell, *supra* note 81, at 63. Ansell states that "justice cannot be achieved unless the methods of the trial are themselves just." *Id.*
94. Schlueter, *supra* note 77, at 11 (citing The Powell Report 11, 12 (1960), ("a study of the military justice system by high-ranking Army officers in a report to the Secretary of the Army on the status of the UCMJ")).
95. *Id.*
96. *Id.*
97. See *supra* note 51.
ing appearances of impropriety in military proceedings have been made to the Supreme Court. On May 24, 1993, the Supreme Court finally opened its doors to a constitutional challenge that struck at the very heart of military justice.

A. Facts

The Weiss case arose out of the courts-martial proceedings against two United States Marines. Weiss was found guilty of one count of larceny, while the other petitioner, Hernandez, was found guilty of possession, importation and distribution of cocaine. Petitioners' convictions were affirmed by the Navy-Marine Corps Court of Military Review. Petitioners then appealed to the Court of Military Appeals claiming that the judges lacked authority to convict them. Their contention was based on the theories that (1) the judges' appointments violated the Appointments Clause, and (2) the judges' lack of a fixed term of office violated the Due Process Clause.

The court unanimously agreed that due process does not require a fixed term of office for military judges, and a plurality of the court rejected the Appointments Clause challenge.

Weiss v. United States is representative of numerous cases recently heard by military appellate courts and petitioned to the U.S. Supreme Court. The basic issue before the Court was whether the appointment of military judges at the trial and appellate level, by and at the discretion of the JAG and without Article III protections, violates the Appointments Clause and the Fifth Amendment Due Pro-

100. At the time of the court of Military Appeals' decision, Congress had not yet changed the court's name. Therefore, the "Court of Military Appeals" has been retained in this section to preserve historical accuracy.
101. The Appointments Clause of the Constitution, Article II, § 2, cl. 2, provides the method for the appointment of officers of the United States. It states that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in The Heads of Departments.
103. Weiss, 36 M.J. at 234.
104. 114 S. Ct. 752. Together with Hernandez v. United States, also on certiorari to the same court.
cess Clause. As such, this challenge to the military justice system addressed both procedural and substantive constitutional issues.

B. Lower Court's Opinion

The Court of Military Appeals' decision in Weiss was somewhat fractured. First, it dispensed with Petitioners' Fifth Amendment due process claim, based on its recent decision in United States v. Graf.107 Confronting the Appointments Clause issue, a plurality of the judges upheld the convictions. While two of the judges determined the Appointments Clause is satisfied by the original appointment of a military officer who is later made a judge, the third judge joining in the plurality concluded the Appointments Clause does not apply to the military. In separate dissents, Judge Sullivan and Judge Wiss recognized that due to the many changes to the military justice system, military judges' duties are distinct from the duties of other military officers. Thus, they concluded a second appointment is necessary.

C. Supreme Court Opinion

1. The Appointments Clause Challenge

Although Petitioners presented two possible grounds for finding an Appointments Clause violation, the Court concluded that the present method of appointing military judges does not violate Article II of the Constitution. Petitioners' first argument was that Congress meant to require a separate appointment for military officers appointed as military judges. Petitioners argued that since Congress has required military judges to have certain special qualifications, an


106. Before addressing Petitioners' arguments, the Court pointed out an area on which both parties agreed. Based on the duties and powers that military judges enjoy, both parties conceded the status of military judges as "officers" of the United States. Weiss, 114 S. Ct. at 757 (citing Freytag v. Commissioner, 111 S. Ct. 2631 (1991) (concluding special trial judges of Tax Court are officers); Buckley v. Valeo, 424 U.S. 1, 126 (1976) (concluding that a person "exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'")); 35 M.J. 450 (where the court unanimously declined to find a due process requirement of a fixed term of office for military judges).

107. 35 M.J. 450 (where the court unanimously declined to find a due process requirement of a fixed term of office for military judges).

108. Weiss, 36 M.J. at 234.

109. Id. (Crawford, J., concurring).

110. Id. at 240 (Sullivan, C.J., dissenting); id. at 256 (Wiss, J., dissenting).

111. Id.


113. Weiss, 114 S. Ct. at 754.
additional appointment would, by implication, be necessary.\textsuperscript{114} Rejecting this argument, the Court decided special qualification requirements alone do not indicate congressional intent to create a separate office.\textsuperscript{115} The Court further recognized such implication is unnecessary because Congress had spoken to the issue, previously specifying those positions which do, and those positions which do not, require a second appointment by the President.\textsuperscript{116} Specifically, the Court noted that the language of the Code cites positions to which officers may be "detailed" or "assigned" without any mention of a second appointment.\textsuperscript{117} Military judges are "detailed" by their respective Judge Advocate General.\textsuperscript{118} Thus, the Court declined to infer a requirement of a second appointment for military judges.

Petitioners’ second argument was that the Appointments Clause itself required an additional appointment. In support of their position, Petitioners cited three earlier Supreme Court decisions.\textsuperscript{119} Although the cases cited by Petitioners established the classification of a military judge as an officer, they did not, according to the Court, address whether the Appointments Clause requires an additional appointment.\textsuperscript{120}

More specifically, the Court turned to the consideration given to \textit{Shoemaker v. United States},\textsuperscript{121} by both the Court of Military Appeals and the parties in the present case. At issue in \textit{Shoemaker} was a statute enacted by Congress that established a five person commission to oversee the development of a national park. Three of the members of the commission were appointed in accordance with Article II—in other words, they had received two appointments—but the remaining two members were already military "officers" at the time they were

\textsuperscript{114} Brief of Petitioners at 18, \textit{Weiss} (No. 92-1482).
\textsuperscript{115} \textit{Weiss}, 114 S. Ct. at 757.
\textsuperscript{116} \textit{Id.} at 757-58. The Court listed several positions that do not require a second appointment as high level positions: Chairman and Vice Chairman of the Joint Chiefs of Staff, Chief and Vice Chief of Naval Operations, Commandant and Assistant Commandant of the Marine Corps, Surgeons General of the Army, Navy and Air Force, Chief of Naval Personnel, Chief of Chaplains, and the Judge Advocates General of the Army, Navy and Air Force. \textit{Id.}
\textsuperscript{117} \textit{Id.} at 758 (citing 10 U.S.C. § 826(a) (1988)).
\textsuperscript{118} \textit{Id.} Military judges are "detail[ed]" to each general court-martial and may be "detail[ed]" to a special courts-martial. For assignment to a general court-martial, a judge must be designated by the JAG, but for assignment to a special court-martial, the relevant Service Secretary regulates the manner of appointment. \textit{Id.}
\textsuperscript{120} \textit{Weiss}, 114 S. Ct. at 758.
\textsuperscript{121} \textit{Id.} (citing Shoemaker v. United States, 147 U.S. 282 (1898)).
The Court found that the two military officers did not need to receive a second appointment because the new duties were "germane" to the offices they already held. Thus, where an officer's new duties are "germane" to her existing duties, "Congress may increase the power and duties . . . without thereby rendering it necessary that the incumbent should be again nominated and appointed." The Court pointed out the difference in the supporting argument of Shoemaker—that Congress delegated new duties to two existing offices, each held by a single officer, thus raising the potential of Congress "circumventing" the Appointments Clause. In Weiss, however, the same danger does not exist. Congress is not attempting to fill a particular office with any particular officer. Rather, the statute permits an unspecified number of military judges who could be appointed from the hundred or perhaps thousands of qualified commissioned officers. Therefore, the Court concluded, germaneness analysis is not even necessary in this case.

Moreover, were it necessary to apply the principles of germanness, the Court maintained that the test would be satisfied with respect to military judges. Although the Court acknowledged the changes made to the military justice system since 1950 make it more "civilianized," it reaffirmed the long-standing idea that the military justice system "remains a 'specialized society separate from civilian society.'" Further, the military justice system is one in which all military officers, not just military judges, play a role.

In addition, the capacity in which a military judge serves is less defined than that of a civilian judge. For example, military trial judges act only when they are detailed to a court-martial and military appellate judges act only when assigned to a Court of Military Review. Furthermore, military judges do not enjoy a fixed term and may even

122. Shoemaker, 147 U.S. at 282. One of the officers was the Chief of Engineers of the Army while the other was the Engineer Commissioner of the District of Columbia. Id.
123. Weiss, 114 S. Ct. at 759 (quoting Shoemaker, 147 U.S. at 300-01).
124. Id. The Court in Shoemaker described the argument as being that "while Congress may create an office, it cannot appoint the officer." Id.
125. Id.
126. Id.
127. Id. (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).
128. The Court gave various examples of the role military officers play in the scheme of military justice. For example, officers have the authority to dispel arguments among military servicepersons and to apprehend those who take part in such disturbances. They may also impose "non-judicial" punishment which may include: restricting a servicemember's movement, suspending a servicemember from duty, forfeiting a week's pay, and imposing extra duties for up to two weeks. Id. (citing 10 U.S.C. §§ 807(c), 815).
129. Id. (citing United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992)).
perform other functions while serving as a judge. Accordingly, the role of a military judge is "germane" to the duties of any military officer.\textsuperscript{130}

2. The Due Process Challenge

Having concluded that a second appointment is neither required by Congressional intention nor by the language of the Appointments Clause itself, the Court addressed the potential due process challenge. Petitioners argued that the Due Process Clause required a fixed term, but not life tenure, for military judges.\textsuperscript{131} Conceding that the military must abide by the Due Process Clause of the Fifth Amendment, the Court then went on to reaffirm the traditional approach taken by courts, affording "particular deference to the determination of Congress"\textsuperscript{132} in evaluating military policies to determine the appropriate level of due process.\textsuperscript{133}

It is well established that due process requires a fair trial, and a fair trial requires an impartial judge.\textsuperscript{134} Petitioners, therefore, argued that without a fixed term of office, military judges are not sufficiently impartial.\textsuperscript{135} The Court, however, did not find support in either historical or present practice to support the argument that military judges lack the level of independence necessary to ensure impartiality.\textsuperscript{136}

Historically, the Court explained, fixed terms have never been a part of military justice. In fact, military judges in their present form did not even exist in the United States until 1968.\textsuperscript{137} The Court also found the ongoing maintenance of the present system "suggests the

\textsuperscript{130} Id. at 760.
\textsuperscript{131} Id.
\textsuperscript{132} Id. (citing Middendorf v. Henry, 425 U.S. 25, 43 (1976) (holding the right to counsel in a summary courts-martial not be mandated by the Fifth Amendment Due Process Clause)).
\textsuperscript{133} Id.
\textsuperscript{134} Weiss, 114 S. Ct. at 761 (citing Tumey v. Ohio, 273 U.S. 510, 532 (1927)).
\textsuperscript{135} Brief of Petitioners at 22-33, Weiss (No. 92-1482). Petitioners cited three different methods used to determine terms of office for judges in the federal government. The first are life-tenured Article III judges. Petitioners did not assert any right to such status for military trial and appellate judges. Second, petitioners referred to the class of person serving federal judicial functions with specified terms of office, such as Court of Military Appeals, magistrate and tax court judges. Finally, petitioners reach the third class of judges which includes military trial and appellate judges, special trial judges of the Tax Court and administrative judges. It is this last group of judges who lack any fixed term of office, and thus, "their independence is always open to substantial doubt." Id. at 22-23.
\textsuperscript{136} Weiss, 114 S. Ct. at 761.
\textsuperscript{137} See supra notes 46-51 and accompanying text.
absence of a fundamental fairness problem.”138 While acknowledging that the mere existence of a practice does not automatically guarantee an absence of a due process violation, the Court also noted that Congress has continually made changes to the military justice system, yet never deemed it necessary to grant tenure to military judges.139

Discarding both the government’s and Petitioners’ proposed tests,140 the Court found that military policies require a higher level of judicial deference than their civilian counterparts,141 a difference justified by the Constitution’s delegation to Congress of control over the military.142 This high level of deference extends even to treatment of servicemembers’ constitutional rights.143 Thus, the Court applied the standard set forth in Middendorf: “[W]hether the factors militating in favor of . . . (the particular right) . . . are so extraordinarily weighty as to overcome the balance struck by Congress.”144

Thus, the only remaining question was whether a fixed term is a factor of such significance as to upset the balance Congress has set; the historical treatment of life tenure becomes part of the equation. Quickly finding fixed terms to be just one way of ensuring judicial impartiality, the Court evaluated those provisions of the Code that also serve to protect judicial independence.

Article 26 of the Code, for example, places a military judge under the authority of the JAG,145 not the officer who convened the court-martial. The Court referred to the structure of the military as requiring accountability to superiors. Under this analysis, the balance struck between accountability and independence is appropriate because the JAG has no interest in the outcome of a particular case.146 Moreover, Article 26 prevents a convening or commanding officer from evaluating a military judge in so far as the judge’s military duties are con-

139. Id. at 762.
140. Id. at 760. Petitioners sought to apply the due process analysis of Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), while the government urged the test set forth in Medina v. California, 112 S. Ct. 2572 (1992). Id.
141. Id. (citing Rostker v. Goldberg, 453 U.S. 57, 67 (1981)). In fact, the Court cited the Rostker language that judicial deference is “at its apogee” when evaluating military cases. Id. at 760-61.
142. Id. at 760 (citing Chappell v. Wallace, 462 U.S. 296, 301 (1983)) (Congress has “plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.”).
143. Id. at 761 (citing Solorio v. United States, 483 U.S. 435, 447-48 (1987)).
146. Id.
cerned. In addition, Article 37 of the Code prohibits a convening authority from reprimanding a military judge regarding performance of judicial duties, and violations of this provision are punishable by courts-martial.

Specific restraints on judges may also be found in the Code. For instance, a military judge may not take part in a case in which he has been previously involved. An accused may challenge a military judge or member of a court-martial panel for cause under Article 41. Finally, perched atop the military hierarchy is the Court of Military Appeals, made up of five civilian judges who serve as the ultimate protectors of justice in the military.

Based on these various provisions, the Court found that military judges were sufficiently "independent" and found the need for fixed terms was not "so extraordinarily weighty as to overcome the balance achieved by Congress." Therefore, having found neither a violation of the Appointments Clause nor the Due Process Clause, the Court unanimously upheld the constitutionality of the modern system of military justice.

D. Concurring Opinions

Justice Ginsburg concurred in the Court's decision but wrote separately to emphasize several points. First, she noted that the Court took special care in evaluating the issues and, thus, protected servicemembers' constitutional rights. Second, she maintained that the modern military justice system is more responsive to due process concerns, citing the requirement of legal training for today's military lawyers and judges. Finally, she asserted that the Court had done

147. *Id.* (citing 10 U.S.C. § 826).
149. *Id.* (citing 10 U.S.C. § 898).
150. *Id.* (citing 10 U.S.C. §§ 826(c), 866(h)).
151. *Id.* (citing 10 U.S.C. § 841). Article 41 states, "The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court." 10 U.S.C. § 841.
152. Weiss, 114 S. Ct. at 762. The Court further observed the "vigilance" undertaken by the Court of Military Appeals in examining and ruling on instances of improper command influence over military judges. *Id.* See, e.g., United States v. Mabe, 33 M.J. 200 (C.M.A. 1991) (finding the power of the JAG of the Navy to rate military judges based on the appropriateness of the judge's courts-martial sentences improper); United States v. Graf, 35 M.J. 450, 465 (C.M.A. 1992) (holding that the JAG could not decertify or transfer a military judge based on the General's opinion of the appropriateness of the judge's findings and sentences).
153. Weiss, 114 S. Ct. at 763.
154. *Id.*
155. *Id.* at 769 (Ginsburg, J., concurring).
156. *Id.*
justice to the issues in the instant case,\footnote{Id.} in accordance with their function of ensuring

that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander . . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution . . . .\footnote{Id. (quoting Winters v. United States, 89 S. Ct. 57, 59-60 (1968) (Douglas, J., opinion in chambers)).}

Concurring in part and concurring in the judgment, Justice Scalia found Justice Rehnquist’s opinion needed more Appointments Clause analysis and less Due Process analysis. Justice Scalia found that the Court’s conclusion that “germaneness” need not be evaluated did not logically follow the Court’s attempt to distinguish Shoemaker from the instant case. Thus, Justice Scalia set forth a different approach to applying the germaneness test.\footnote{Id. at 770 (Scalia, J., concurring).} In Justice Scalia’s opinion, germaneness analysis should take place whenever an Appointments Clause violation is at issue. Thus, the analysis would be applied not only when Congress itself “appropriates” appointment power by conferring new duties, but also when Congress grants others, such as the JAG, the power to confer new duties.\footnote{Id.} Under this analysis, granting the JAG the power of appointment would violate Article II if the JAG’s new duties were nongermane. Like the rest of the Court, however, Justice Scalia found that the new duties of a military judge are germane to the duties of a military officer.\footnote{Id. at 771 (Scalia, J., concurring).}

Addressing the Court’s due process analysis, Justice Scalia found it neither necessary nor appropriate for the Court to determine whether Congress has effectuated a proper balance between judicial independence and the military chain-of-command. Citing Justice Rehnquist’s findings of sufficient Code protections of judicial independence, Justice Scalia admitted that similar protections would not satisfy due process in a civilian justice system. However, using an original intent point of view, Justice Scalia was satisfied that a fixed term had never been a part of the scheme of military justice. Thus, for Justice Scalia, history was not just a part of the equation, but rather, was the conclusive grounds on which the Court could decide the due process aspect of this case.\footnote{Id.}
Justice Souter also wrote a concurring opinion, elaborating on the Appointments Clause aspects of the decision. By way of clarification, Justice Souter wrote to explain why military judges are inferior officers under the Appointments Clause. The language “officers of the United States” in the Appointments Clause refers to principal officers who require appointment by the President and approval by Congress. However, the Clause also permits Congress to grant the power to appoint inferior officers to the President alone, Heads of Departments, or the courts without Congressional approval. Stating that military officers in general are recognized as inferior officers, Justice Souter explained that the constitutional and legislative histories also confirmed that military judges are inferior officers. Thus, the strict requirements for appointment of principal officers is not necessary for military judges, and Congress has legitimately granted appointment power to the JAG.

IV. ANALYSIS: A THREAT TO SERVICEMEMBERS’ CONSTITUTIONAL RIGHTS

While servicemembers may have some limits on their individual rights, in reality, the military system is conceived to provide more rights in some ways than the civilian justice system. The only right from which servicemembers are expressly excluded is the right to indictment by a grand jury. In fact, in some ways, the protection of individual rights was advanced earlier in the military than in civilian courts. For instance, the historic Miranda decision was decided subsequent to the enactment of Article 31 of the Code.

It is the very nature of the military establishment that requires careful and consistent protection of servicemembers’ rights. The potential for abuse in a hierarchical system like the military led this nation’s founders to specifically provide for civilian checks on the power of the military establishment. Thus, when military justice poses serious threats to individual rights, it is imperative that the Supreme Court be able and willing to curtail the potential for abuse.

163. Id. at 763 (Souter, J., concurring).
164. Id. (citing Morrison v. Olson, 487 U.S. 654, 670 (1988); Buckley v. Valeo, 424 U.S. 1, 132 (1976)).
166. For Justice Souter’s in depth discussion, see Weiss, 114 S. Ct. at 764-69 (Souter, J., concurring).
167. Id. at 769.
168. See infra, note 196. Even though servicemembers are subject to inspections, thus depriving them of some degree of privacy, these inspections must be reasonable.
In *Weiss*, however, the Court's lengthy yet elusive evaluation of the military justice system does little to alleviate potential dangers posed to servicemembers' rights under the present system. The decision adds nothing to the existing body of judicial treatment of military issues, nor does it look beyond the superficial justification of the military's "separate society" to evaluate the effect that standard has on the rights of servicemembers.

**A. The Cost of Judicial Dependence—the Potential for Partiality**

The Court in *Weiss* incorrectly held that military judges do not need the same protections afforded to civilian judges to ensure their independence. The Court, in reaching its conclusion, failed to take notice that the military chain-of-command still affords the potential for abuse. A military judge, at least at the trial and first appellate level, serves at the discretion of the Judge Advocate General, the individual who is the senior military officer in each department of the military. \(^{169}\) The potential for abuse in this situation is obvious. For instance, a general may determine that a major's decisions are negatively affecting discipline and call the Judge Advocate General. This action would likely result in that major's removal from the role of judge. \(^{170}\) The Judge Advocate General, the "boss," is also responsible for writing the officer's annual efficiency report. \(^{171}\) There can be little doubt this evaluation process could have an effect on the military judges' decisions. \(^{172}\) Not only does the JAG have the power to assign judges, to evaluate their performance, and to rotate them to another post, but that same JAG Corp appoints and supervises the prosecuting attorneys. \(^{173}\)

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171. Interview with Jonathan P. Tomes, Visiting Associate Professor of Legal Writing at Chicago-Kent College of Law, Illinois Institute of Technology, in Chicago, IL (Jan. 14, 1994) (U.S. Army, retired). This authority of the JAG over military judges is, in effect, analogous to the Attorney General writing evaluations on all federal district court judges. *Id.*


173. Basically then, a military judge owes his job and next assignment to the prosecution. *Putting Military Style Justice on Trial*, AM. LAW MEDIA, May 12, 1993.
While the pressure of this system may not be a problem for the majority of judges, it is the possibility of influence that may violate due process. In fact, the Supreme Court has previously called even the "temptation to . . . a judge to forget the burden of proof required to convict the defendant" a violation of due process. The mere existence of cases alleging unlawful command influence suggests that military judges may be so tempted. For example, military judges may be lured into deciding cases in such a way as to promote their own careers. Because military judges' objectivity and independence are not guaranteed by tenure and salary protections, it is impossible for the Court to deny that the "possibility of influence" exists.

This "potential" is more that a theoretical possibility. In United States Navy-Marine Corps Court of Military Review v. Carlucci, for example, the potential problems of dependent military judges came to fruition. In that case, the Navy Inspector General felt that improper influence had been applied toward the Court of Military Review judges in connection with their review of a court-martial conviction. Furthermore, the Court of Military Review itself petitioned the Court of Military Appeals to prevent the Inspector General from proceeding with the investigation. Apparently, the JAG of the Navy had given the Chief Judge of the Court of Military Review a direct order to make all of the judges, court personnel, and internal court materials available to the Inspector General for questioning and inspection (and the Supreme Court in Weiss says the JAG has no interest in the outcome of a particular case). The Court of Military Appeals recognized the seriousness of the situation; had the Chief Judge of the military review court refused to comply with the JAG's direct order, he could have been tried by court-martial and subjected to dismissal, confined to hard labor for five years, and forfeited pay and allowances.

Although the Court of Military Appeals granted relief to the Court of Military Review in the form of a protective order, this case illus-

174. Interview with Jonathan P. Tomes, supra note 170. Professor Tomes attests to the fact that concerns about fitness evaluations and promotions probably do not affect most judges. This is due to the fact that entering the judiciary is not necessarily a good career move in the military as it is not likely to result in opportunities for quick advancement. Thus, the type of people who enter the judiciary are less likely to be concerned with offending commanding officers. Id.
179. Id. at 329.
180. Id. at 333.
181. Id. at 342.
trates the potential for influence and the serious considerations a military judge may face when deciding a case—considerations that go beyond the consequences a decision will have on the accused to the consequences a decision will have on the judge.

Furthermore, a military judge’s future career is not influenced solely by the JAG’s evaluations. Military promotions are ultimately decided by selection boards that do not consist solely of JAG officers. Thus, officers whose actions were previously condemned by a military judge may later sit on the very review board that determines whether the particular judge gets promoted. This potential for irregular promotion decisions became a reality for at least one army officer, and in fact became an impetus for a Senate investigation of the promotion selection process. In 1982, the Commanding General of the 3d Armored Division of the Army made a series of speeches to members of that Division. In essence, the speeches influenced the actions of officers and non-commissioned officers with respect to courts-martial proceedings within the division. Those speeches were later found to constitute improper command influence.

Between 1989 and 1990, the nomination of several officers for promotion, officers that were involved in those instances of improper command influence, prompted a Senate investigation of the Army’s promotion selection process. For instance, Colonel John R. Bozeman, who had served as Staff Judge Advocate of the 3d Armored Division during the aforementioned speeches, was on the promotion selection board for an army major. Apparently, Colonel Bozeman had previously attempted to influence the actions of a major who had served as appellate defense counsel in the command influence cases. Colonel Bozeman later sat on the review board that declined to promote the major. The Army Board for Correction of Military Records subsequently found that Colonel Bozeman should not have been a member of the selection board, and ordered promotion of the major to lieutenant colonel. As a result of this and other events, the nominations for the promotion of several high ranking JAG Corp officers were withdrawn.

183. Id.
184. Id.
185. Id. As a result of these events, one nomination for promotion to brigadier general and a nomination for the position of JAG were returned to the President at the end of the 1st Session of the 101st Congress and the end of the 101st Congress, respectively, and were not resubmitted.
The military itself recognizes the potential danger of unlawful command influence and that it could threaten the military justice system. In a policy memorandum to judge advocates, the army states that unlawful command influence is detrimental to "order, discipline, morale, and unit cohesiveness." Coincidentally, these are the same characteristics upon which the military relies as justification for maintaining a separate system of justice. In theory, the military recognizes that "even the appearance" of unlawful command influence can affect the public's perception of military justice. In practice, however, the military shuns the use of procedural safeguards that would ensure fairness.

The fact that all officers play a role in military justice poses an additional threat to servicemembers' due process rights. For instance, a commander who convenes a court-martial proceeding also has the authority to select the members of the jury. Technically, the only requirement with which the commander must comply in choosing jury members is that they be the "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Thus, the commander of the accused may also be the commander of the jury members. The danger in allowing such wide latitude may manifest itself in two ways. First, the members of the jury may feel compelled to convict the accused in order to gain favor with the commander. Second, the commander may select jury members based on their disposition to the case. Under either scenario, the possibility of prejudice to the accused is unjustifiable. Therefore, this method of jury selection constitutes an "insurmountable" obstacle to fairness in military courts-martial proceedings.

by the President. In addition, two other nominations for brigadier general were withdrawn by the President. Id.

186. Memorandum from Acting JAG to All Staff and Command Judge Advocates and Supervising Judge Advocates (April 1990) (Dept. of the Army Pamphlet 27-50-208, reprinted in William K. Sutter, Unlawful Command Influence—Policy Memorandum 90-1, ARMY LAW. (Apr. 1990)). This memorandum was addressed to all staff and command judge advocates and supervisory judge advocates.

187. Id.

188. Id.

189. Schlueter, supra note 77, at 19.


191. Id.

192. Id.

193. Id.

194. Interview with Michael I. Spak, supra note 172. Professor Spak believes the system is "clearly less fair" than the civilian system of criminal justice, and cites two things which make the military system patently unfair. The first is the jury selection process. Obviously, by using this
Notwithstanding the integrity of military commanders, it is impossible to avoid at least the appearance of impropriety.195

B. Extreme Deference—The Supreme Court's Touchstone

The former Court of Military Appeals once said that the Bill of Rights applies to servicemembers “unless any given protection is, expressly or by necessary implication, inapplicable.”196 Only one protection of the Bill of Rights, the requirement of indictment by a grand jury, is made “expressly” inapplicable to servicemembers.197 As this discussion will point out, however, servicemembers have been denied the protection of several other provisions of the Bill of Rights, by “necessary implication.”198

Traditionally, the Supreme Court has displayed a “hands off” attitude toward military matters,199 and the Weiss decision is certainly no exception. Seldom has the Court found a military practice unconstitutional.200 Although the Court has shown reluctance toward unlimited military power,201 its decisions have also reflected a great deal of deference to the military's authority over its personnel.202 In Rostker v. process one can predict the outcome of a trial. Second, he pointed to the existence of ineffective defense counsel. This deficiency he attributes to the fact that accused persons in the civilian world often have the assistance of defense counsel who devote their careers to working as public defenders. Good military defense counsel, on the other hand, are promoted to supervisory positions, leaving only the young, inexperienced JAG officers to defend servicemembers. Id.

197. U.S. CONST., amend. V. The requirement of indictment by grand jury is not extended to military cases.
198. Middleton, 10 M.J. at 126-28 n.S. A service member's reasonable expectation of privacy under the Fourth Amendment is diminished. Id. at 127 (citing Parker v. Levy, 417 U.S. 733, 743 (1974)). Also, the Supreme Court has held that the Sixth Amendment guarantee of counsel does not apply to a servicemember in the summary court-martial, since it is not a “criminal prosecution.” Id. (citing Middendorf v. Henry, 425 U.S. 25 (1976)).
199. Warren, supra note 26, at 254-55. See also Levin, supra note 22, at 1056, where the author states that the Court has consistently deferred to the military on issues limiting servicemembers' liberty. See, eg., Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (the Court denied a free speech claim by a Jewish officer who was prohibited from wearing his yarmulke in uniform); Parker, 417 U.S. at 744 (the Court applied a separate standard for the military); Brown v. Glines, 444 U.S. 348, 357-58 (1980) (the Court denied both statutory and constitutional free speech challenges to Air Force regulations requiring prior approval of a commanding officer before a servicemember could circulate petitions of any kind).
201. Heil, supra note 83, at 735 (citing United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (the military was prevented from extending its jurisdiction to ex-military servicemembers); Reid v. Covert, 354 U.S.S. 1 (1957) (the military was prevented from asserting jurisdiction over dependents of military personnel).
202. In Burns v. Wilson, the Court stated that courts-martial proceedings can be challenged through habeas corpus proceedings in civil courts if the defendant was denied fundamental
Goldberg,\textsuperscript{203} for instance, the Court denied a challenge that President Carter's reinstatement of the draft constituted gender discrimination. The Court in Goldberg specifically stated that when dealing with military affairs, "the Court [has] accorded Congress [great] deference."\textsuperscript{204} This tradition of deference also reflects the Court's belief that they are ill-equipped to understand military needs, and thus should leave such questions to Congress and the military.\textsuperscript{205} The Weiss Court blindly followed that tradition. Taking the easy way out, the Court gave mere lip service to the requirement that the military abide by the Fifth Amendment, but then proceeded to apply an artificially elevated level of deference to Congress' determination of the military's individual brand of due process.

The Weiss Court's misconception is based on an inaccurate view of the military's role in modern society. Today's military establishment constitutes a large part of our nation's economy. It is, in fact, a business, with the majority of its members serving in noncombat support roles.\textsuperscript{206} No specialized knowledge is necessary to understand the basic workings of the modern military. Thus, in light of today's enormous and bureaucratic military, the Court's "unthinking deference . . . is misplaced"\textsuperscript{207} and outdated.

The Supreme Court's highly deferential standard of judicial review, and subsequent refusal to extend constitutional rights doctrine to the military,\textsuperscript{208} has had some other disturbing repercussions. Of particular interest are the Court's virtual removal of a remedy in cases where a servicemember's constitutional rights have been assailed, and its expansion of court-martial jurisdiction.

1. Limited Access to the Courtroom

In a line of cases from 1950 to 1987, the Supreme Court systematically dispensed with servicemembers' opportunities to secure a rem-

\begin{itemize}
  \item \textsuperscript{203} 346 U.S. 137, 142 (1953). Nevertheless, this decision has been read to bestow a limited right, thereby recognizing judicial deference to the military. Henderson, \textit{supra} note 20, at 143.
  \item \textsuperscript{204} 453 U.S. 57 (1981).
  \item \textsuperscript{205} Warren, \textit{supra} note 26, at 255. See also \textit{Solorio v. United States}, where the Court stated that civil courts are "ill equipped" to deal with military matters. 483 U.S. 435, 448 (1987).
  \item \textsuperscript{207} Levin, \textit{supra} note 22, at 1059. The remainder of this discussion is postponed for the section on the system's failure to evolve.
  \item \textsuperscript{208} Id. at 1013.
\end{itemize}
edy when deprived of their constitutional rights by their superiors. While the Supreme Court has affirmed the existence of constitutional rights for servicemembers, it has also found those rights to be limited by the needs of the military. Thus, we have again returned to the view that "military necessity," and the Court's unwillingness to interfere with the methods of military discipline, will prevail over constitutional rights.

In *Feres v. United States*, servicemembers brought an action against the military under the Federal Tort Claims Act (FTCA). The Court in *Feres* declined to apply the waiver of sovereign immunity for tortious acts committed by agents and employees of the government to cases brought against the military. Rather, the Supreme Court declined to allow servicemembers a cause of action against the military based on three grounds. First, the Court found that the FTCA did not create any new causes of action. Thus, since servicemembers had no cause of action before its enactment, the FTCA did not bestow on them any new right to a cause of action. Second, because servicemembers do not determine their own geographical situation, the Court determined liability for their injuries could not be based on the law of the state in which the tort was committed. Finally, the Supreme Court felt that because servicemembers had an already existing remedy for their injuries, a new cause of action was not necessary.

The Court's rationale was taken a step further in *Chappell*, where servicemembers were denied monetary damages from their superiors for constitutional tort violations. Using "separate society" rationales, the Court cited both special factors of the military discipline structure and Congress' activity in the area to find that it was ill-equipped to deal with the issue, and thus, allowing remedies would be inappropriate.

The *Stanley* decision took the final step in denying servicemembers redress for torts committed against them. Stanley had been negligently administered LSD by the military. Nevertheless, the

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210. *Chappell*, 462 U.S. at 300. Thus, the Court has reaffirmed the need for distinct regulations that serve the goals of military discipline justifying an exclusive system of military justice.


213. *Id.*

214. *Id.* at 99.

215. *Id.*
Court denied servicemembers a remedy for constitutional tort injuries resulting from military service.216

Despite the Court’s rationalization based on the need for discipline and a resulting strong national defense, the results are over-reaching. While it is true that servicemembers rights are limited, it does not mean they should be entirely eliminated.217 Discipline is best achieved through noncoercive methods, but eliminating servicemembers’ chances at redress gives military commanders a free hand.218 In addition, such a limitation of rights is not necessary to enforce discipline. Military courts already have unlimited subject matter jurisdiction, thus subjecting servicemembers to an entrenched system of discipline.219

2. The Expansion of Court-martial Jurisdiction

The ongoing debate over the proper jurisdiction of military trial courts goes back to the 17th Century.220 The British Articles of War gave military courts jurisdiction over both military and civilian offenses,221 as did the 1776 American Articles of War.222 The Framers, however, were wary of military jurisdiction.223 It was this distrust that led the Framers to delegate to Congress the power to make rules for the military,224 in hope that civilian society would maintain a system of checks on military power.

However, from 1866 to 1960, despite the concern for limiting military power, court-martial jurisdiction was based solely on military status.225 Thus, a servicemember could be tried by court-martial for any crime, even one unrelated to his status in the military. For an eighteen year period, from 1969 to 1987, the court reigned in the authority of

216. Id. at 102-03.
217. Id. at 105-06.
218. Id. at 108.
219. Id. at 112.
221. Id. at 443 (citing British Articles of War of 1774 § XIV, art. XVI, reprinted in G. DAVIS, MILITARY LAW OF THE UNITED STATES 581, 589 (3d rev. ed. 1915)).
222. Id. at 444 (citing American Articles of War of 1776, § XVII, art. 5, reprinted in 2 Winthrop 1503).
223. Levin, supra note 22, at 1016. It was exactly the separate standard type of review, used by the Supreme Court today, that made the Framers wary of expansive jurisdiction of military courts. See also Solorio, 483 U.S. at 455 (Marshall, J., dissenting) (stating that the framers were "wary of military jurisdiction" and also asserting that the British were suspicious of courts-martial jurisdiction in the 17th and 18th Centuries).
224. Solorio, 483 U.S. at 441.
225. Id. at 439 (citing Gosa v. Mayden, 413 U.S. 665, 673 (1973)). Late 18th Century trial by courts-martial for civilian offenses is also referenced in O'Callahan v. Parker, 395 U.S. 258, 278 n. 3 (1969) (Harlan, J., dissenting).
courts-martial judges by imposing the "service connection" test.\textsuperscript{226} Under this test, off-base conduct without any connection to the military could not be tried by a court-martial proceeding.\textsuperscript{227}

By 1987, both civilian and military trial courts had found it increasingly difficult to draw the line between crimes that were connected to military service and those that were not. Accordingly, the Court again addressed the scope of court-martial jurisdiction, and on reevaluation, overruled the service-connection test rule.\textsuperscript{228} Again the Court professed its inability to understand the workings of the military as a justification for the application of a higher standard of deference. In so doing, the Court let loose the jurisdictional constraints of courts-martial proceedings in an action that Justice Marshall referred to as evidencing "contempt both for the members of our Armed Forces and for the constitutional safeguards intended to protect us all."\textsuperscript{229}

The broad jurisdictional reach of military trial courts could certainly not have been justified had the courts adhered to the dictates of history. Nevertheless, the Court in \textit{Weiss} used history as a major justification for its decision that military judges do not need a fixed term to protect their independence.\textsuperscript{230} The Court pointed to changes to the system of military justice, and the absence of a fixed term as one of those changes, to infer that because fixed terms were never a part of the system of military justice, due process does not so require. The Court's rationale is analogous to saying that because we did not have \textit{Miranda} rights before 1966, those rights are not required by due process. This logical gap evidences the Court's attempt to apply a high level of judicial deference to a system no longer in need of such a standard.

\section{C. The Failure to Evolve}

Neither the system, nor the Supreme Court's treatment of it, reflect the needs of a military that is substantially different from the one

\begin{itemize}
\item \textsuperscript{226} \textit{Military Justice and Article III}, supra note 54, at 1915-16.
\item \textsuperscript{227} \textit{O'Callahan}, 395 U.S. at 274.
\item \textsuperscript{228} \textit{Solorio}, 483 U.S. at 436. The facts of the case centered around the sexual abuse of two young girls by a Coast Guard Yeoman First Class. One instance of abuse had taken place in his private home and the other on a military post. The girls were the daughters of another Coast Guardsman. Thus, the Court of Military Appeals found that the service connection test was satisfied. \textit{Id.} at 437-38.
\item \textsuperscript{229} \textit{Id.} at 467 (Marshall, J., dissenting).
\item \textsuperscript{230} \textit{Weiss} v. \textit{United States}, 114 S. Ct. 752, 753 (1994). For Justice Scalia, history would be the determinate factor. \textit{Id.} at 771 (Scalia, J., concurring); see also discussion supra Part III(c)(2).
\end{itemize}
our Founders created. While the Court has empowered the military justice system with far-reaching authority over the conduct of servicemembers, it has failed to extend to those servicemembers the developments in civilian due process doctrine. Due to the changing nature of the military forces, this exclusion of servicemembers from constitutional protections is simply unjustified.

1. The Realities of Today's Military Establishment

When the Founders debated the role of the military in the new nation, their concerns centered around preventing the growth of a large, expensive and powerful military. At the time, military justice consisted simply of courts-martial proceedings, and the system extended only to the small colonial army.\(^2\) Even then, some of the Founders were opposed to court-martial jurisdiction in times of peace.\(^2\) The situation is much different today.

Servicemembers are specifically excluded from the right to grand jury indictment, and over the years, much discourse has been spent to determine the status of their other constitutional rights. In addition, the modern military establishment is a major arm of the government, with a judicial system which extends to 1.5 million active duty servicemembers.\(^3\)

Certainly the founders did not foresee a modern military of such enormous proportions. Hence, the debate continues about the role this establishment should play in our modern society. What controls the civilian populace should have over this "separate society" and its system of justice continues to be a controversial issue.

2. What this Growth Means to Military Justice

In addition to the expansive size and reach of the military, changes have also occurred in the composition of the forces. During World Wars I and II, and especially during Korea and Vietnam, there existed a great deal of opposition to our country's involvement in foreign wars.\(^4\) While such opposition was not new, hostile political opposition to both the Vietnam war, and the draft, led to a more

\(^2\) Wiener, supra note 55, at 177. Furthermore, the Articles of War extended courts-martial jurisdiction only to military offenses. \(\text{Id. at 177-78.}\)

\(^3\) Henderson, supra note 20, at 149. During the ratification debates, George Mason asserted an interest in codifying the applicability of courts-martials only in time of war. \(\text{Id.}\)

\(^4\) Murawski, supra note 35.

\(^2\) Hirschhorn, supra note 82, at 177.
emotional anti-war movement than had occurred in the past. As a result, the ranks included many “politically hostile individuals” with a willingness to attack the authority of their chain of command, especially over issues concerning their individual rights. Unlike the military of Vietnam, today’s military is an all volunteer force. Consequently, the need for disciplinary action is less frequent because servicemembers are in the military by choice.

The decreased need for formal disciplinary action leads to fewer cases, which, in turn, leads to less experienced lawyers. Whereas a JAG defense counselor once tried approximately 5-8 cases per week, they currently try only that many per year. Thus, a servicemember is often deprived of qualified counsel.

Moreover, the growth of the military has posed some unique problems in the application of constitutional guarantees. A peacetime military force makes different demands on a justice system, demands that have nothing to do with order and discipline. Thus, the inordinately high standard of judicial deference, so ardently clung to by the Supreme Court in military matters, is no longer appropriate.

This is not to say that military justice is bankrupt. Congress has, in fact, extended some constitutional protections to servicemembers by statute. Additionally some would argue that if one could assure competent counsel and only lawful command influence, the military system could actually be more fair than the civilian. As it stands however, military personnel accused of crimes are getting the “worst of all possible worlds.”

235. Id.
236. Id.
237. Interview with Jonathan P. Tomes, supra note 170. As an example, Professor Tomes cites the decrease in the amount of drug crimes committed in the armed forces today as compared to the high number during the Vietnam era. Id.
238. Id. This statistic is based on interviewee’s personal experience as military defense counsel and a military judge. For a contrary view, Professor Spak stated that military lawyers today are just as experienced as those of the past. Regardless of the number of crimes, Spak states that the majority of defense and prosecution counsel in the military consists of lawyers fresh out of law school. After a given period of time, they are then rotated out of their positions or promoted to supervisory roles. Thus, he would conclude that military counsel has always been of a lower standard than civilian counsel since only the young lawyers serve in these positions in the military. Interview with Michael T. Spak, supra note 172.
239. Warren, supra note 26, at 257.
240. Id. at 260. Justice Warren recognized that with a peacetime army, the need for military deference would not be as great.
241. Wiener, supra note 55, at 237. Some of these protections include: assistance of counsel, protection against self-incrimination, protection against unreasonable search and seizure, and protection against subjection to double jeopardy. Id.
242. Interview with Jonathan P. Tomes, supra note 170.
243. Id.
To the further discredit of the system, the expansion of the Bill of Rights in the civilian courts has not been carried over into military justice. It is time for the Supreme Court to abandon its touchstone of deference and recognize that the "sweeping capacity" of today's military justice system creates a need for increased constitutional safeguards.

V. Where Do We Go From Here

A. Where the Court's Decision Leaves Us

The Court in Weiss correctly recognized that military justice has come a long way. Just a few decades ago, the system was run by law officers who lacked any formal legal training. Today's accused have the advantage of professional lawyers and judges. The changes to date, however, are simply not enough. Although unlawful command influence is forbidden and punishable under the Code, it remains a reality—one that puts the rights, and even the freedom, of servicemembers at risk. The Court in Weiss simply acquiesced to their traditional, and outdated, standard of extreme deference to Congress; a standard this Note has argued should be abandoned. In upholding the current practices of appointing and assigning military judges, the Court has declined to provide the military justice system with an important first step toward becoming a system attuned to its modern status.

Congress, however, has various options available to legitimize the status of military trial and appellate judges. First, Congress could statutorily provide for a true appointment process for military judges, thereby recognizing their stature as the protectors of justice for servicemembers. To further increase servicemembers and civilians perception of military justice, Congress could provide for designated terms of office for military judges. In addition, an absence of efficiency reports, or efficiency reports by other than the JAG would en-

244. Wiener, supra note 55, at 240.
245. Warren, supra note 26, at 255. Justice Warren professes that the subjection of military courts to the checks of their civilian counterparts will help meet the goal of assuring due process. Id.
246. For opposing views on the competency of military counsel, see supra note 236 and accompanying text.
247. United States v. Weiss, 36 M.J. 224 (C.M.A. 1992). The plurality opinion recognized Congress' right to require a second appointment for judges and considered it inappropriate for the courts to make this decision. Specifically, the court expressed its reluctance to consider the merits of a policy issue.
sure the independence and impartiality of military officers while they serve as military judges.

B. What the Weiss Decision Means for Other Issues Confronting Today's Military

The Court’s decision does not speak well for other more public issues the modern military must face. For the majority of the general public, military justice is “out of sight, out of mind,” which may explain the unanimous and nonemotional response of the Court in Weiss. Other more controversial issues, however, do spark popular interest.

In the aftermath of “Tailhook,”248 for instance, the public’s perception of military discipline and justice cannot help but be clouded. The fact is, the Tailhook incident is symptomatic of the problems the Weiss Court failed to see. The modern military faces the same controversial issues as civilian society—sexual harassment, discrimination, gays in the military249 and the like. No longer is the military a group of men blindly following their leader to battle. Today’s military is an enormous business. Its employees come from all walks of life and carry with them all the social and political ideas of their civilian counterparts. The military, and its justice system, must face these problems and must have the tools to do so.

248. The Tailhook incident involved allegations of sexual harassment of female naval officers by male naval officers at an aviator convention. The consequences incident received a great deal of media attention. Following a Pentagon investigation, the Secretary of the Navy was forced to step down while other high ranking officers were forced into early retirement. Ultimately, however, not a single officer was disciplined for involvement in the incident.

249. The issue of gays in the military is one which will certainly continue to plague the military justice system. Although the issue is outside the scope of this Note, the reader may want to consider what the legal consequences of the “don’t ask/don’t tell” might be.