THE APPOINTMENTS CLAUSE AND MILITARY JUDGES: INFERIOR APPOINTMENT TO A PRINCIPAL OFFICE

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I. INTRODUCTION

The personnel making up the United States Government can generally be categorized in the two mutually exclusive categories of officers of the United States and employees.[1] Additionally, officers of the United States can be divided into two further classifications, principal and inferior officers.[2] Determining the proper category in which to place the various government personnel is vital for purposes of the Appointments Clause of the United States Constitution[3] due to the general requirement of appointments for officers of the United States and the specific requirement of separate and distinct appointment methods for principal and inferior officers.

The Appointments Clause empowers Congress to create offices of the United States but requires Congress to designate the appointment power in other officials.[4] Congress's discretion in choosing officials to appoint officers of the United States is not without its limitations. For principal

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[1]For instance, the members of the President's cabinet and federal judges are the clearest examples of officers of the United States. *See infra* note 297. Such positions as a paymaster's clerk in the United States Navy and a merchant appraiser employed by the Collector of Customs of the port of New York have been classified as employees. *See* United States v. Mouat, 124 U.S. 303, 306-07 (1886); Auffmordt, v. Hedden, 137 U.S. 310, 327 (1890).

[2]U.S. CONST. art. II, § 2, cl. 2.

[3]The Appointments Clause provides in full:

> [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 otherwise 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.

U.S. CONST. art. II, § 2, cl. 2.

[4]*See supra* note 3 (setting forth the text of the Appointments Clause).

officers,[5] the Appointments Clause requires Congress to vest their appointment in the President with the advice and consent of the Senate.[6] Regarding the appointment of inferior officers, Congress may either provide for their appointment by the President with the advice and consent of the Senate, the President alone, one of the Courts of Law, or a Head of a Department.[7]

The Framers of the United States Constitution and United States Supreme Court decisions have neglected to adequately distinguish officers from employees generally and principal from inferior officers specifically; thus, leading to a sporadic and *ad hoc* application of the Appointments Clause to positions in the United States Government. Accordingly, this Comment will examine the viability of the United States Supreme Court's Appointments Clause approaches by analyzing their application to the appointment of military judges. Specifically, this Comment will note the problems inherent in the Court's previous and current approaches in defining officers of the United States and classifying such officers as principal or inferior. This Comment will then posit alternative methods, and apply these methods to the office of a military judge.

Part II of this Comment will trace the evolution of the Appointments Clause by examining the Framers' intent and the United States Supreme Court's interpretation of the Appointments Clause, concentrating specifically on how to distinguish officers from employees and principal from inferior officers. To facilitate an understanding of the Appointments Clause's application to military judges, Part III will briefly outline the structure of the military justice system, and Part IV will provide the authority and duties of military judges within that system.

In Part V, this Comment will survey the Supreme Court's recent examination of the constitutionality of the appointments of military judges in *Weiss v. United States*. Part VI will analyze, in detail, the majority's opinion in *Weiss*. Part VII will evaluate the workability of the Court's current approach in distinguishing principal from inferior officers, as applied by Justice Souter in his concurring opinion in *Weiss*, and provide an alternative,

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[5]The Appointments Clause does not specifically use the term "principal" officers. *See supra* note 3 (setting forth the text of the Appointments Clause). The officers required to be appointed by the President with the advice and consent of the Senate under the Appointments Clause however, have been universally designated as principal for purposes of clarification. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Principal officers are selected by the President with the advice and consent of the Senate.").

[6]*See supra* note 3 (setting forth the text of the Appointments Clause).

[7]*See supra* note 3 (setting forth the text of the Appointments Clause).

more operative approach. Finally, Part VIII will apply this more operative approach to military judges concluding that military judges are principal officers, and hence, military officers must receive a separate appointment by the President with the advice and consent of the Senate to serve in the office of military judge.

II. EVOLUTION OF THE APPOINTMENTS CLAUSE

The men who assembled in Philadelphia to draft the United States Constitution were less concerned with defining officers of the United States than delineating who would appoint them.[8] The Framers were aware of the corruption that resulted from unfettered appointments of officers by the Monarch in England[9] and were equally fearful of legislative tyranny.[10] With these concerns, the delegates at the Constitutional Convention concentrated on placing the appointment power in well-informed and politically-accountable hands.[11] The Founding Fathers, however, did

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[8]Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause,* Morrison v. Olson, *and Rule of Law*, 63 S. CAL. L. REV. 1515, 1544 (1990) ("While the members of the Constitutional Convention vigorously debated the wording of the [A]ppointments [C]lause, they were primarily concerned with whether Congress or the President would have the power *to appoint*, rather than whom they would appoint." (citations omitted)).

[9]*See* Freytag v. Commissioner, 501 U.S. 868, 883 (1991) ("The 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against the executive power because the 'power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 79, 143 (1969))); John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of* Buckley v. Valeo, 22 WAYNE L. REV. 1335, 1341 (1976) (noting that some of the Framers "believed that a strong Chief Executive with appointing powers would quite naturally become autocratic").

[10]Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 SYRACUSE L. REV. 1037, 1069 (1987). *See also infra* note 11 (setting forth the arguments of those Framers who were reluctant to place the appointment power in the Legislature because of their fear of legislative tyranny).

[11]*See* Susolik, *supra* note 8, at 1537 ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." (citing Bowsher v. Synar, 478 U.S. 714, 730 (1986)). Two factions formed during the Appointments Clause debates. There were those delegates who argued for placing the appointment power in the Executive Branch and those who favored vesting it in one of the branches of the Legislature.

Delegates James Wilson and Edmund Randolph vehemently desired appointments to be made by the President. Delegate Randolph argued that appointments by the President would assure qualified appointments. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 80 (rev. ed. 1966). Delegate Wilson maintained that placing the appointment power in a single, responsible President would be preferable to conferring it on a multi-member legislature. 1 FARRAND, *supra*, at 119. Delegate Wilson reasoned that "[e]xperience shewed the impropriety of such appointm[ents] by numerous bodies [because] [i]ntrigue, partiality, and concealment were the necessary consequences." *Id.*

Delegates John Rutlidge, James Madison, Luther Martin, Roger Sherman, Charles Pinkney, and Oliver Elssworth were the foremost opponents of placing the appointment power in the President. Delegate Rutlidge was fearful of placing the awesome power of appointment in a single person because "[t]he [American] people [would] think [they were] leaning too much towards [a] Monarchy." *Id.* Agreeing with Delegate Rutlidge's reasoning, these delegates argued for granting the appointing power to the Senate. Encompassing the opinions of these delegates, James Madison reasoned that "the Senatorial branch [was] numerous [enough] to be confided in — as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgements." *Id.* at 120 (footnote omitted).

Delegate Nathaniel J. Ghorum hesitated in placing the appointment power in any one branch and, thus, suggested that the President appoint officers of the United States with the advice and consent of the Senate. 2 FARRAND, *supra*, at 41. Following Delegate Ghorum's example, Madison motioned that the President elect nominees and, unless the Senate disagreed by a two-thirds vote, the nominees would become appointed. *Id.* at 80. Madison, reasoning that this method combined the concerns of both factions, asserted:

> [T]hat it secured the responsibility of the Executive who would in general be more capable and likely to select fit characters than the Legislature, or even the [second branch] of it, who might hide their selfish motives under the number concerned in the appointment . . . . [I]n the case of any flagrant partiality or error, in the nomination, it might be fairly presumed that [two-thirds] of the [second] branch would join in putting a negative on it.

Id. Madison's compromise was passed on July 21, 1787 and became embodied in the final draft of the Constitution. SAUL K. PADOVER, TO SECURE THESE GREAT BLESSINGS: THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787, at 407 (1962). *See also supra* note 3 (providing the text of the Appointments Clause). Alexander Hamilton, commenting on the stability of Madison's compromise, wrote:

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify than a body of men who may each be supposed to have an equal number; and will be so much the less liable to be misled by the sentiments of friendship and of affection. . . . [T]he necessity of [the Senate's] concurrence would have a powerful, though, in general, a silent

distinguish between two classes of officers — principal and inferior. Principal officers, the Framers mandated, are to be appointed by the President with the advice and consent of the Senate.[12] Regarding the

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> operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

THE FEDERALIST No. 76, at 429-30 (Alexander Hamilton) (Issac Kramnick ed., 1987). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-9, at 244 (2nd ed. 1988) ("[T]he [A]ppointments [C]lause . . . seeks to preserve an executive check upon legislative authority in the interest of avoiding an undue concentration of power in Congress.").

Additionally, the Framers added another provision, the "Excepting Clause," to Article II, § 2, cl. 2 of the United States Constitution. The provision in the Appointments Clause allowing Congress to vest the appointment of inferior officers in the Courts of Law, Heads of Departments, or the President, has been termed the Excepting Clause. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 673 (1988). Gouverneur Morris moved to annex "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the [C]ourts of [L]aw, or in the [H]eads of [D]epartments" after the provision delineating the appointment of Ambassadors, other Public Ministers and Consuls, judges of the Supreme Court and "all other Officers not otherwise provided for." JONATHAN ELLIOT, 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 550 (1987). There was very little debate concerning Gouverneur Morris's motion to add this Excepting Clause to the Appointments Clause with the only objection being raised by James Madison. *Id.* Madison objected to the limitability of the Excepting Clause, believing that other principal officers, below Heads of Departments, also should have the power to appoint inferior officers. *Id.* From this limited discussion, it is extremely difficult to establish what the Framers intended by including the Excepting Clause. It has been suggested, however, that the Excepting Clause was included to foster administrative feasibility. *See* United States v. Germaine, 99 U.S. 508, 510 (1878) ("[F]oreseeing that when offices became numerous, and sudden removals necessary, [appointment by the President with the advice and consent of the Senate] might be inconvenient, [the Framers] provided that . . . Congress might by law vest [the] appointment [of inferior officers] in the President alone, in the [C]ourts of [L]aw, or in the [H]eads of [D]epartments."); Alexander I. Tachmes, Comment, *Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?*, 42 U. MIAMI L. REV. 735, 746-47 n.79 (1988) (same (citations omitted)). *See also* PADOVER, *supra*, at 407 (noting that the Excepting Clause was added to ensure that "the [E]xecutive would not create official positions *not* provided for by the Congress").

[12]*See supra* note 3 (providing the text of the Appointments Clause). There is some disagreement among courts and commentators concerning which offices the Framers intended to be principal. Although the Supreme Court of the United States has attempted

to distinguish between principal and inferior officers, *see infra* notes 14-74 and accompanying text, the Court has never considered the possibility that the officers specifically mentioned in the Appointments Clause, namely Ambassadors, other Public Ministers and Consuls, Justices of the Supreme Court, Heads of Departments, Courts of Law, and the President, may have been the only officers which the Framers considered to be principal. *See generally infra* notes 14-88 and accompanying text (examining the Court's attempt to distinguish officers from employees and principal from inferior officers).

The text of the Constitution creates, rather than resolves, the ambiguity of which offices the Framers intended to be principal. Essentially, the doubt revolves around what the Framers meant by the term "officers of the United States." At the outset, the Appointments Clause states that Ambassadors, other Public Ministers and Consuls, and Justices of the Supreme Court are to be appointed by the President with the advice and consent of the Senate. *See supra* note 3 (providing the text of the Appointments Clause). Following this specific list of principal officers is the "all other Officers" provision which establishes that "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law" are also to be appointed by the President with the advice and consent of the Senate. *See supra* note 3. Subsequent to the "all other Officers" provision, separated only by a colon, the Appointments Clause further reads: "but the Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." *See supra* note 3 (setting forth the text of the Appointments Clause).

Primarily, two interpretations of the Appointments Clause have been advanced. Some commentators have argued that the officers specifically mentioned in the Appointments Clause, Ambassadors, Public Ministers, Consuls, United States Supreme Court Justices, Courts of Law, Heads of Departments, and the President of the United States, are the only principal officers. Eric R. Glitzenstein & Alan B. Morrison, *The Supreme Court's Decision in* Morrison v. Olson*: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359, 364 (1989); Tachmes, *supra* note 11, at 747-49 (1988). Consequently, these commentators have interpreted the phrase "all other Officers of the United States, whose Appointments are not herein otherwise provided for" as referring to inferior officers. *See* Glitzenstein, *supra*, at 365 ("As to all other officials [not specifically enumerated in the Appointments Clause], Congress has considerable latitude in determining which method of appointment it 'think[s] proper' for the legislative scheme being crafted — in other words, whether the advice and consent process is needed or whether a particular appointment should be vested 'in the President alone, in the Courts of Law, or in the Heads of Departments.'" (second alteration in original) (citing U.S. CONST. art. II, § 2, cl. 2)); Tachmes, *supra* note 11, at 747 ("The use of the word 'such,' if given its ordinary construction, refers back to the phrase that provides for the appointment of 'all other Officers . . . whose Appointments are not herein otherwise provided for.' Certainly, 'such inferior Officers' would not be referring back to the principal officers whose appointments require Senate confirmation and who were thought important enough to be listed by name." (footnote omitted)); Brief for Appellant at 30-31, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279) ("One possible way of construing the proviso of the Appointments Clause is to read the words 'such inferior Officers' as embracing *all* appointed officials in the second category — all officers other than those mentioned at the outset (Ambassadors etc. and Justices of [the Supreme Court]).").

appointment of inferior officers, the Framers gave Congress the authority to designate the appointment of these officers in either the President with the advice and consent of the Senate, the President alone, one of the Courts of Law, or a Head of a Department.[13] Although the Framers provided the

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Thus, under this interpretation, the only officers the Framers intended to be principal are those officers specifically mentioned. Consequently, "all other Officers" are inferior officers that either may be appointed by the President with the advice and consent of the Senate or, if Congress chooses, by the President alone, the Courts of Law, or the Head of a Department.

Another proposed reading of the Appointments Clause is that the officers specifically mentioned are just a sampling of principal officers and that "all other Officers" not yet created but "which shall [later] be established by law," are also principal officers that must be appointed by the President with the advice and consent of the Senate. Expressing this translation, Alexander Hamilton wrote:

> The President is to nominate, and, *with the advice and consent of the Senate*, to appoint [A]mbassadors and other [P]ublic [M]inisters, judges of the Supreme Court, and *in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution.*

THE FEDERALIST No. 69, at 400 (Alexander Hamilton) (Isaac Kramnick ed, 1987) (second emphasis added). *See also* Hobson v. Hansen, 265 F. Supp. 902, 912 n.12 (D.D.C. 1967) ("[W]e do not construe 'such inferior Officers, as they [the Congress] think proper' as identical with 'Officers of the United States.'" (second alteration in original) (citing United States v. Germaine, 99 U.S. 508, 509-10 (1878)). Consequently, this interpretation requires definitions of principal and inferior officers to be posited. *See* Burkoff, *supra* note 9, at 1337 ("[I]f 'all other Officers' and inferior Officers are mutually exclusive categories, it must be determined who *is* an other Officer but *not* an inferior Officer as a person in this category can constitutionally be appointed to office only by presidential nomination and Senate confirmation."). The Supreme Court of the United States, by attempting to define principal and inferior officers, apparently has adopted this reading of the Appointments Clause. *See infra* notes 14-88 (examining the Court's attempt to define principal and inferior officers).

[13]The Appointments Clause does not list which officers are inferior. *See supra* note 3 (providing the text of the Appointments Clause). The definition of inferior officers depends on how the Appointments Clause is interpreted with regard to principal officers. That is, if principal officers are only those specifically listed in the Appointments Clause, then "all other Officers" are inferior. Conversely, if those officers listed in the Appointments Clause are only a sampling of the principal officers, then a distinction between both inferior and principal officers must be drawn. As the Supreme Court has attempted to define principal and inferior officers, it necessarily follows that they have accepted the former interpretation. *See supra* note 12. For the Supreme Court's attempt at distinguishing inferior from principal officers, see *infra* notes 75-88 and accompanying text. Conversely, a more workable approach to classify officers as principal or inferior is provided *infra* notes 281-87 and accompanying text.

manner in which principal and inferior officers would be appointed, they omitted to specifically define the term officers and its two classifications.

A. THE DIFFERENCE BETWEEN OFFICERS AND EMPLOYEES

The United States Supreme Court, though providing more guidance than the Founding Fathers, has been slow in satisfactorily defining the term "officers of the United States" found in the Appointments Clause.[14] In 1867, the Court first attempted to define this term in *United States v. Hartwell*.[15] In *Hartwell*, Defendant, a clerk in the office of the Assistant Treasurer of the United States,[16] contended that he was not an officer punishable under the Sub-Treasury Act for embezzlement.[17] Defendant argued that he was only a subordinate to the Assistant Treasurer, rather than an officer, and thus was not subject to the Act which was applicable only to officers.[18]

The Court introduced two approaches, which it would continue to use in future Appointments Clause cases, to determine that Defendant was, in fact, an officer. First, the Court applied a functionalist approach. Under the functionalist approach, an office is distinguished from employment by

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[14]*See* Susolik, *supra* note 8, at 1545. Susolik noted that "a definitive understanding of the term 'officer[,]'" by examining the Court's Appointments Clause cases, "is not forthcoming for two simple reasons: (1) there are too few cases for any consistent precedential principle to be articulated; and (2) the few cases that do exist posit conclusions rather than arguments and provide little insight to justify their results." *Id.* For a further critique of the Court's approach in defining officers, see *infra* notes 270-80 and accompanying text.

[15]73 U.S. (6 Wall.) 385 (1867).

[16]Hartwell was appointed, pursuant to the General Appropriation Act of July 13, 1866, by the Assistant Treasurer with the Approbation of the Secretary of the Treasury. *Id.* at 393.

[17]*Id.* at 392. The Sub-Treasury Act of 1846, charging officers with the safe keeping of the public money, provided, in part, that various treasurers in the United States Government "and all public officers of whatever character . . . keep safely . . . all public money collected by them, or otherwise . . . placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out . . . ." Sub Treasury Act of 1846, ch. 90, 9 Stat. 59, 60 (current version at 31 U.S.C. § 3302 (1988)).

[18]*Hartwell*, 73 U.S. (6 Wall.) at 390-91.

examining the nature and functions of the government position.[19] In this manner, the Court, in distinguishing an office from employment,[20] noted that an office is a public station that "embraces the ideas of tenure, duration, emolument,[21] and duties."[22] Contrarily, the Court asserted that employment is limited in its duration and duties[23] and is defined by contract rather than by legislation.[24]

Applying these characteristics to Defendant's position, the Court first noted that the position of a clerk in the office of the Assistant Treasurer possessed the emoluments of an office because its appointment and compensation were fixed by law rather than by contract.[25] The Court next explained that Defendant's position possessed the tenure of an office because Defendant would have remained in his position even if his superior was terminated.[26] Finally, the Court posited that Defendant's duties as a clerk

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[19]*See* Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 537 n.7 (1992).

[20]The Court did not explicitly refer to employment. Rather, the Court advanced that it was making a distinction between a government office and a government contract. *Hartwell*, 73 U.S. (6 Wall.) at 390-91.

[21]Emolument is defined as that "which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office." BLACK'S LAW DICTIONARY 362 (6th ed. 1991).

[22]*Hartwell*, 73 U.S (6 Wall.) at 393.

[23]*Id.* The Court posited that "[a] government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects." *Id.*

[24]*Id.* The Court noted that "[t]he terms agreed upon [in a contract] define the rights and obligations of both parties, and neither may depart from them without the assent of the other." *Id.* (citations omitted). In *Hall v. Wisconsin*, the Supreme Court further explained the difference between employment and offices of the United States. *Hall*, 103 U.S. 5 (1880). The Court noted that employment is defined by the contract between the parties while United States offices are established by acts of Congress. *Id.* at 9. In explaining this distinction, the Court stated that "[w]here an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond . . . ." *Id.*

[25]*Hartwell*, 73 U.S. (6 Wall.) at 393.

[26]*Id.* The Court reasoned that "[v]acating the office of his superior would not have affected the tenure of his place." *Id.*

were continuing and permanent rather than occasional or temporary as in employment contracts.[27] Accordingly, the Court concluded that, under a functionalist approach, Defendant was an officer.[28]

Next, the Court employed a formalist approach to determine if Defendant was an officer or employee. Under this method, a person is deemed an officer if he is appointed as one under the Appointments Clause.[29] Applying this approach, the Court implied that Defendant must be an officer because he was appointed by the Head of a Department who was authorized to commission officers under the Appointments Clause.[30] Therefore, the Court concluded that, under both a formalist and functionalist approach, a clerk in the office of the Assistant Treasurer was an officer.[31]

The Court again employed its functionalist and formalist approaches to define the term "officer" in *United States v. Germaine*.[32] Defendant

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[27]*Id.*

[28]*Id.*

[29]Throughout this Comment, the Court's method of defining officers of the United States by looking at how they were appointed will be referred to as the formalist approach. *See also* Burkoff, *supra* note 9, at 1347 (classifying the Court's formalist approach as "consequentialist"); Owen, *supra* note 19, at 539 (deeming the Court's method of defining officers by Congress's chosen method of appointment as "circular").

[30]United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393-94 (1867) (citing U.S. CONST. art. II, § 2, cl. 2). The Court, without analysis, stated, in a one sentence paragraph after its discussion of the nature and functions of Defendant's position, that "[t]he defendant was appointed by the [H]ead of a [D]epartment within the meaning of the constitutional provision upon the subject of the appointing power." *Id.* Essentially, the Court, after classifying Defendant's position as an office based upon its functions, supported its conclusion with a deferment to Congress. As Congress deemed a clerk in the office of the Assistant Treasurer to be an officer, by prescribing its appointment under one of the methods under the Appointments Clause, the Court accepted Congress's conclusion.

[31]*Id.* at 393-94 (citing U.S. CONST. art. II, § 2, cl. 2).

[32]99 U.S. 508 (1878). Prior to *Germaine*, the Court in *United States v. Moore* applied the Appointments Clause but did not expand upon or clarify *Hartwell*'s definition of officers. United States v. Moore, 95 U.S. 760 (1877). In *Moore*, Defendant entered the Navy as an assistant-surgeon, subsequently passed the examination for a promotion to the grade of surgeon, and then was notified by the Secretary of the Navy that he would thereupon be regarded as a passed assistant-surgeon. *Id.* at 761. Defendant claimed that under the applicable statutes governing the rate of pay of assistant-surgeons in the Navy, he was entitled to be paid the higher rate of passed assistant-surgeon, when he was appointed as an assistant-surgeon, and not later when he was appointed, by the Secretary of the Navy, as a passed assistant-surgeon. *Id.* at 762.

Germaine, a civil surgeon appointed by the United States Commissioner of Pensions, was indicted for extortion under a federal statute applicable only to officers of the United States.[33] Advocating a formalist approach, Defendant contended that he was not an officer of the United States because he was not properly appointed as an officer under the Appointments Clause and, hence, did not fall within the purview of the extortion statute.[34]

Justice Miller, writing for the Court, used both a functionalist and formalist approach to hold that Defendant was not an officer of the United States and, thus, not subject to the statute.[35] Applying a formalist approach and mirroring Defendant's assertion that he was not an officer because he was improperly appointed, the Justice reasoned that Germaine's appointment was invalid because the Commissioner of Pensions, who appointed Defendant, was not authorized to make such an appointment under the Appointments Clause.[36] Finding that Defendant was not appointed under

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Citing the Appointments Clause and its decision in *Hartwell*, the Court held that the position of passed assistant-surgeon was an office and, therefore, required a valid appointment. *Id.* (citing United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867); U.S. CONST. art. II, § 2, cl. 2). Hence, the Court found that Defendant could not be paid the officer's rate of a passed assistant-surgeon until he was appointed to that position by the Secretary of the Navy. *Id.* In reaching its conclusion, the Court did not apply its functionalist approach, making an inquiry into the nature or duties of the passed assistant-surgeon, or formalist approach, examining the method of appointment of Defendant to his position, to come to its conclusion that it was an office. Rather, the Court merely noted that the position of passed assistant-surgeon "had every ingredient of an office." *Id.* at 763.

[33]*Germaine*, 99 U.S. at 508-09. The relevant portion of the federal statute read:

> That, if any officer of the United States shall be guilty of extortion, under, or by colour of his office, every person so offending shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding one year, according to the aggregation of the offense.

Act of March 3, 1825, ch. 65, § 12, 4 Stat. 115, 118 (repealed).

[34]*Germaine*, 99 U.S. at 509.

[35]*Id.* at 509-12.

[36]*Id.* at 510-11. The Court concluded that the Commissioner of Pensions was not a Head of a Department and, thus, unauthorized to appoint officers of the United States. *Id.* at 511. The Court narrowly defined the Heads of Departments as the principal officers in each of the Executive Departments, such as "the Secretary of State, who is by law the Head of the Department of State, the Departments of War, Interior, Treasury, [etc.]" and the Attorney General of the United States who is the Head of the Department of Justice.

the Appointments Clause, the Justice concluded that he was not an officer subject to the extortion statute.[37]

Next, the Court implemented the functionalist analysis it developed earlier in *Hartwell*. Applying *Hartwell*'s characteristics of "tenure, duration, emolument, and duties," associated with an office, the Court posited that the nature of Germaine's position did not resemble that of an office.[38] The Court noted that Defendant's position did not exhibit the duties, tenure, or duration of an office because he was only called upon to perform his duties occasionally and intermittently rather than continuously and permanently.[39] In addition, the Court recognized that Defendant's position lacked the emoluments of an office because his compensation was not appropriated by law.[40] Further, expanding upon *Hartwell*'s characteristics, the Court added that Defendant's position lacked the independence of an office.[41] The Court reasoned that Defendant merely acted as an agent of the Commissioner of

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Id. In other words, the Court defined Heads of Departments as the members of the President's cabinet. *See also* Burnap v. United States, 252 U.S. 512, 515 (1920) ("The term '[H]ead of a [D]epartment' means, [for Appointments Clause purposes], the Secretary in charge of a great division of the [E]xecutive [B]ranch of the Government, like the State, Treasury and War, who is a member of the Cabinet."). *But see* Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam) (defining the term Heads of Departments, under the Appointments Clause, broadly as the "Departments . . . themselves in the Executive Branch or at least hav[ing] some connection with that branch").

[37]*Germaine*, 99 U.S. at 510.

[38]*Id.* at 511-12 (citing United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867)).

[39]*Id.* at 512. The Court reasoned:

> The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

Id.

[40]*Id.* The Court explained that "[n]o regular appropriation is made to pay [Defendant's] compensation, . . . but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the [C]ommissioner." *Id.*

[41]*Id.*

Pensions and could be freely removed by the Commissioner at his discretion.[42] Accordingly, the Court concluded that neither the functions of Defendant's position nor the form of his appointment resembled those of officers.[43]

In the years immediately subsequent to *Germaine*, the Court continued to primarily employ a formalist approach to distinguish officers from employees, sometimes supporting it with a functionalist analysis of the position's duties, tenure, duration, and emoluments.[44] It was not until

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[42]*Id.*

[43]*Id.* Professor Burkoff, commenting on the Court's analysis in *Germaine*, stated: "[i]f one is appointed like an Office, then one is an Officer provided that the nature of the post is such that a majority of the Supreme Court perceives it to be an 'an office.'" Burkoff, *supra* note 9, at 1350.

[44]*See* United States v. Mouat, 124 U.S. 303, 307 (1886) (applying exclusively a formalist approach); United States v. Perkins, 116 U.S. 483, 484 (1886) (applying exclusively a formalist approach); United States v. Smith, 124 U.S. 525, 532-33 (1887) (applying both formalist and functionalist approaches). The Court's reluctance to articulate a concrete definition of an office seems to have been more the result of practicality rather than indifference. All of the Appointments Clause cases addressed the status of a government official in order to determine if they were subject to various criminal or civil statutes applicable only to officers of the United States. *See* Hartwell v. United States, 73 U.S. (6 Wall.) 385, 394 (1867) (holding that clerk in the office of the Assistant Treasurer was officer punishable under the Sub-Treasury Act applicable only to officers of the United States); United States v. Moore, 95 U.S. 760, 761-62 (1877) (finding that passed assistant-surgeon would not be paid rate of that office until validly appointed to it); United States v. Germaine, 99 U.S. 508, 509-10 (1878) (determining that surgeon appointed by United States Commissioner of Pensions was not an officer of the United States and, thus, not punishable by a criminal statute applicable only to officers); *Perkins*, 116 U.S. at 484 (finding that naval cadet engineer was an officer for purposes of statute immunizing naval and military officers from being removed from office during peacetime); *Mouat*, 124 U.S. at 306-07 (declaring that a paymaster's clerk in the United States Navy was not entitled to more favorable method of reimbursement of travel expenses applicable only to officers); *Smith*, 124 U.S. at 531-32 (holding that clerk in the office of Collector of Customs was not punishable under criminal statute charging officers with the safe keeping of the public moneys because not an officer). It was never necessary for the Court to adequately define an officer because the government personnel's manner of appointment was never directly an issue. *Cf.* Burkoff, *supra* note 9, at 1361 (stating that the cases prior to *Buckley* did not challenge "the officeholder's inability to act due solely to deficiencies in appointment methodology"). To determine whether various government personnel would receive certain benefits or penalties as an officer, the Court simply had to examine whether Congress provided for their commission under the Appointments Clause. *But see Mouat*, 124 U.S. at 308 (cautioning that there may be situations where Congress could have intended the term "officer" to have a broader meaning than simply those persons who must be appointed under the Appointments Clause); United States v. Hendee, 124 U.S. 309,

1890, in *Auffmordt v. Hedden*,[45] however, that the United States Supreme Court, for the first time, principally utilized a functionalist approach to define an officer.[46] It appears that the Court was forced to mainly apply a functionalist approach because, unlike its prior Appointments Clause cases,[47] Congress's chosen method of appointing a person in the United States Government was being challenged directly.[48]

In *Auffmordt*, Plaintiffs were dissatisfied with the appraisement of, and corresponding duties imposed upon, certain goods they were importing into New York.[49] Upon notice of Plaintiffs' dissatisfaction with the appraisement, the Collector of the port of New York appointed a merchant appraiser to reappraise the imported goods.[50] Dissatisfied with the merchant appraiser's decision, Plaintiffs argued, among other things, that the

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313-14 (1888) (defining the term "officer," in a statute providing for the amount of compensation to be paid naval officers, broadly "to include all men regularly in service in the [A]rmy or [N]avy" rather than only those who must be appointed under the Appointments Clause).

[45]137 U.S. 310 (1890).

[46]*But see* Owen, *supra* note 19, at 545 (opining that the Supreme Court did not singularly apply its functionalist approach to define officers until *Buckley v. Valeo*). For a full discussion of *Buckley*, see *infra* notes 55-63 and accompanying text.

[47]*See supra* note 44 and accompanying text (noting the Court's decisions, prior to *Auffmordt*, where the positionholder's authority was not being challenged directly).

[48]*Auffmordt*, 137 U.S. at 320.

[49]*Id.* at 311.

[50]*Id.* at 315-16. The statute granting the Collector the authority to appoint merchant appraisers provided in part:

> If the importer, owner, agent, or consignee, of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the [C]ollector, in writing, of such dissatisfaction; on the receipt of which the [C]ollector shall select one discreet and experienced merchant . . . to examine and appraise [the goods] . . . .

Revised Statutes, tit. XXXIV, ch. 6, § 2930, 18 Stat. 567 (1878) (repealed).

aforementioned statute, under which the merchant appraiser was appointed, violated the Appointments Clause.[51]

In determining whether the merchant appraiser was properly appointed, the Court first examined the nature and functions of the merchant appraiser's position. Applying a functionalist approach, Justice Blatchford, writing for the Court, held that the merchant appraiser was not an officer of the United States.[52] The Justice reasoned that the merchant appraiser could only act when called upon in certain cases and, thus, lacked *Hartwell*'s characteristics of "tenure, duration, continuing emolument, [and] continuing duties . . . ."[53] Accordingly, the Court concluded that the merchant appraiser could be appointed in a manner not in compliance with the Appointments Clause, and therefore, the merchant appraiser's appraisal was upheld.[54]

In 1976, the Court disregarded prior precedent and provided a more substantive functionalist definition of officers of the United States in *Buckley v. Valeo*.[55] Similar to *Auffmordt*, the Court in *Buckley* had to decide if

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[51]*Auffmordt*, 137 U.S. at 320. Plaintiffs reasoned that the merchant appraiser's appointment, by the Collector, was insufficient because the merchant appraiser was an inferior officer that should have been appointed by the President alone, a Court of Law, or a Head of a Department. *Id.*

[52]*Id.* at 327 (citations omitted).

[53]*Id.* (citations omitted). Justice Blatchford explained that:

> [The merchant appraiser] is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. . . . He has no claim or right to be designated, or to act except as he may be designated.

Id. at 326-27.

[54]*Id.* at 327.

[55]424 U.S. 1 (1976) (per curiam). Subsequent to *Auffmordt*, the Court continued to fluctuate between its formalist and functionalist approaches in defining officers. *See, e.g.*, United States v. Eaton, 169 U.S. 331, 343 (1898) (holding that Vice Consul is an inferior officer because he only performed the more significant functions and duties of the principal office of Consul "for a limited time, and under special and temporary conditions . . . ."); Burnap v. United States, 252 U.S. 512, 516 (1920) (opining that the distinction between officers and employees is "determined by the manner in which Congress has specifically provided for the creation of the several positions . . . and appointment thereto." (citations omitted)).

certain officers, in the newly created Federal Election Commission,[56] were officers of the United States requiring appointment under the Appointments Clause.[57]

In *Buckley*, the Court, in a *per curiam* opinion, set forth a new substantive definition of officers wholly different from that used in prior Appointments Clause cases.[58] The Court broadly defined officers of the United States as "any appointee exercising significant authority pursuant to the laws of the United States."[59] The Court, however, failed to apply this "significant authority test" to the Federal Election Commissioners.[60] Rather, the Court cited two other government positions, a paymaster first class and a clerk of the district court, that were previously found to be inferior officers and, without analysis, declared that if these two positions were held to be inferior officers, then the four Commission members must also be "at the very least such 'inferior Officers' within the meaning of [the Appointments] Clause."[61] In a footnote, however, the Court did distinguish employees from officers. Defining employees as "lesser functionaries subordinate to officers of the United States[,]" the Court found that the

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[56]In 1974, Congress amended the Federal Election Campaign Act of 1971 to provide for an eight member Federal Election Commission. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310, 88 Stat. 1263, 1280 (codified as amended at 2 U.S.C. § 437c (1988)). Under the 1974 amendments, four of the commissioners were to be appointed by officials unauthorized to make appointments to inferior or principal officers. 2 U.S.C. § 437c (a)(1)(A)-(B) (Supp. IV 1974) (current version at 2 U.S.C. § 437c(a)(1)(A)-(B) (1988)). From recommendations provided by the majority and minority leaders of the Senate, two of the commissioners were required to be appointed by the President *pro tempore* of the Senate. *Id.* § 437c(a)(1)(A). Additionally, another two commissioners were appointed by the Speaker of the House of Representatives after being recommended by the minority and majority leaders of the House. *Id.* § 437c(a)(1)(B). All four of these commissioners were further required to be confirmed by a majority of both Houses of Congress. *Id.* § 437c(a)(1)(A)-(B).

[57]*Buckley*, 424 U.S. at 109.

[58]*Id.* at 126.

[59]*Id.*

[60]*See* Owen, *supra* note 19, at 546 (recognizing that the *Buckley* Court's failure to apply its "significant authority test" to determine the Appointments Clause status of the Federal Election Commissioners "leaves open the issue of . . . when that standard is satisfied").

[61]*Buckley*, 424 U.S. at 126 (citing Myers v. United States, 272 U.S. 52 (1926); In re Hennen, 38 U.S. (13 Pet.) 230 (1839)).

Commission members were not employees, but officers, because they were not subordinate to a higher government official.[62]

This approach, however, does not clarify the Court's new "significant authority test" for defining officers of the United States. In essence, the *Buckley* Court circularly defines an employee as someone not an officer and an officer as someone not an employee. The definitions of officers and employees both depend upon the other, but neither is defined.[63]

Recently, in *Freytag v. Commissioner*,[64] the Court applied both *Buckley*'s "significant authority test" and *Hartwell*'s "characteristics test" to hold that special trial judges of the United States Tax Court were inferior officers.[65] In *Freytag*, Petitioners sought review in the United States Tax Court of determined tax deficiencies.[66] Thereupon, the Chief Judge of the Tax Court assigned Petitioners' case to a special trial judge who decided against them.[67] Petitioners challenged the authority of a special trial judge to hear their case arguing that the special trial judge's appointment, by the United States Tax Court, was constitutionally defective.[68] Specifically, Petitioners claimed that special trial judges were inferior officers and,

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[62]*Id.* n.162 (citing Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Germaine, 99 U.S. 508 (1878)). This definition was previously used by the Court in *Germaine* as one of the factors to distinguish employees from officers. *See supra* notes 41-42 and accompanying text (setting forth the Court's holding in *Germaine* that a civil surgeon was not an officer because, *inter alia*, he was under the control of the Commissioner of Pensions who could remove him at will). Subsequently, in 1988, the Supreme Court again utilized this subordinate/removability factor to distinguish inferior from principal officers in *Morrison*. See *infra* notes 75-88 and accompanying text for a discussion of *Morrison*.

[63]*See* Owen, *supra* note 19, at 546 n.84 ("By defining 'employee[s]'" as lesser functionaries subordinate to officers of the United States, "the Court appeared to be making employee status dependent on the judicial classification of governmental officials as officers. In light of the Court's failed attempt in *Buckley* to define specifically which federal officials are officers, this linkage of employee status with officer status is tenuous at best.").

[64]501 U.S. 868 (1991).

[65]*Id.* at 881-82.

[66]*Id.* at 871.

[67]*Id.* at 871-72.

[68]*Id.* at 872. *See also* 26 U.S.C. § 7443A(a) (1988) (providing for the appointment of special trial judges by the United States Tax Court).

therefore, must be appointed by a Court of Law, Head of a Department, or the President of the United States.[69]

In determining whether special trial judges were officers or employees, the Court applied both *Buckley*'s "significant authority test" and *Hartwell*'s "characteristics test."[70] Consistent with the *Buckley* Court's definition of an officer, the Court noted that special trial judges possessed significant duties and discretion.[71] Further, the Court applied *Hartwell*'s "characteristics test" to the position of special trial judge, reasoning that special trial judges possessed the emoluments of an office as their "duties, salary, and means of appointment" were set by law.[72] In addition, the Court posited that special trial judges do not exercise their duties occasionally or temporarily as do employees.[73] Thus, the Court concluded that special trial judges were inferior officers that required appointments under the directions of the Appointments Clause.[74]

B. THE DIFFERENCE BETWEEN PRINCIPAL AND INFERIOR OFFICERS

The Court in *Buckley* broke from precedent, trying to clarify the distinction between officers and employees, by defining officers solely based upon the significance of their authority. The *Buckley* Court, however, failed to take the next step and definitively differentiate inferior from principal officers. It was not until 1988, in *Morrison v. Olson*,[75] that the United States Supreme Court accepted this challenge.

In *Morrison*, the Attorney General of the United States requested the Special Division of the United States Court of Appeals for the District of

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[69]Freytag v. Commissioner, 501 U.S. 868, 880 (1991).

[70]*Id.* at 881-82.

[71]*Id.* The Court reasoned that "special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery. In the course of carrying out these important functions, the special trial judges exercise significant discretion." *Id.*

[72]*Id.* at 881.

[73]*Id.*

[74]*Id.* at 882.

[75]487 U.S. 654 (1988).

Columbia[76] to appoint an independent counsel to investigate Theodore Olson, an official in the Department of Justice.[77] The Special Division appointed Morrison as independent counsel.[78] Conceding that the independent counsel was an officer of the United States,[79] Chief Justice Rehnquist, writing for the majority, examined whether the independent counsel was an inferior or principal officer to determine if her appointment by a Court of Law was constitutionally permissible.[80] After recognizing the complexity in characterizing officers as principal or inferior,[81] Chief Justice Rehnquist declared that, in this case, a line did not have to be drawn between inferior or principal officers because the independent counsel "clearly [fell] on the 'inferior officer' side of [the] line."[82] In supporting this conclusion, Chief Justice Rehnquist relied upon *Hartwell*'s characteristics of "tenure, duration, and duties" associated with an office and additionally focused upon

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[76]The Special Division was established specifically for appointing independent counsels. *See* 2 U.S.C. § 49 (1988).

[77]*Morrison*, 487 U.S. at 666-67. Under the Ethics in Government Act of 1978, as amended, the Attorney General is required to apply to the Special Division to appoint an independent counsel when "the Attorney General, upon completion of a preliminary investigation . . . , determines that there are reasonable grounds to believe that further investigation is warranted . . . ." 28 U.S.C. § 592(c)(1)(A) (1988). Once appointed by the Special Division, the independent counsel has the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under Section 2516 of title 18." *Id.* § 594(a) (1988).

[78]*Morrison*, 487 U.S. at 607.

[79]The Court dismissed in a footnote, the possibility that the independent counsel was an employee rather than an officer. *Id.* at 670-71 n.162 (citing Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam)).

[80]*Id.* at 671-73. Recall, if the independent counsel was determined to be a principal officer, her appointment by the Special Division, a Court of Law, would be in violation of the Appointments Clause which requires all such principal officers to be appointed by the President with the advice and consent of the Senate. *See supra* note 3 (setting forth the text of the Appointments Clause).

[81]*Morrison*, 487 U.S. at 671. The Chief Justice opined that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." *Id.*

[82]*Id.*

the independent counsel's ability to be removed.[83] Specifically, the Chief Justice concluded that the position of independent counsel was an inferior office because the position's holder: could have been removed by the Attorney General;[84] was limited in duties as she could only investigate and prosecute certain federal crimes;[85] was limited in jurisdiction as it was confined to that granted by the Special Division at the Attorney General's request; and was appointed solely to perform a single task and, thus, its responsibilities were only temporary.[86]

The *Morrison* test of distinguishing between inferior and principal officers is ineffective due, in part, to its misapplication. Rather than providing a separate test to distinguish between inferior and principal officers, Chief Justice Rehnquist simply applied the characteristics previously used by the Court to differentiate officers from employees.[87] In order for the same characteristics to successfully be applied to both distinguish officers from employees and inferior from principal officers, the Court must establish how limitedly or extensively those characteristics must be satisfied for a government position to be an office as opposed to an employment and an inferior as opposed to a principal office. As the *Morrison* test does not make

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[83]*Id.* at 671-73. The control of a position by its superiors previously had been used by the Court as a factor to distinguish officers from employees. *See* United States v. Germaine, 99 U.S. 508, 512 (1878) (noting the removability of a civil surgeon by the Commissioner of Pensions as one of the reasons for deeming the position as employment rather than an office); Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam) (opining that Federal Election Commissioners were not officers because they were "not subject to the control or direction of any other executive, judicial, or legislative authority").

[84]*Morrison*, 487 U.S. at 671. Chief Justice Rehnquist opined:

> Although [the independent counsel] may not be 'subordinate' to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree 'inferior' in rank and authority.

Id.

[85]*Id.*

[86]*Id.* at 672.

[87]*See supra* notes 19-28, 38-42, 52-54, 72-74 and accompanying text (noting the Court's examination of a postion's duties, duration, jurisdiction, and independence to distinguish officers from employees).

this distinction, it is ineffective in classifying officers as inferior or principal.[88]

III. THE MILITARY JUSTICE SYSTEM

Congress has established three tiers of military courts in each Armed Force Branch under the Uniform Code of Military Justice ("UCMJ").[89] The lowest tier consists of three types of trial courts, referred to as "courts-martial," in the military justice system.[90] First, general courts-martial are

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[88]*See infra* notes 270-80 and accompanying text (analyzing in greater detail the inconsistencies of the *Morrison* test). *See also infra* notes 281-87 and accompanying text (providing a more operative test to distinguish principal from inferior officers).

[89]Pursuant to its power to make rules governing the Armed Forces, *see* U.S. CONST. art. I, § 8, cl. 14 ("Congress shall have the power [t]o make Rules for the Government and Regulation of the land and naval Forces."), Congress established the present military justice system under the Uniform Code of Military Justice. [hereinafter UCMJ]. The UCMJ consists of 146 articles which apply to each of the Armed Force Branches. *See* 10 U.S.C. §§ 801-946 (1988 & Supp. V 1993). Generally, there are four branches of the Armed Forces. The Navy and Marine Corps are considered one branch. UCMJ, art. 1(2), 10 U.S.C. § 801(2) (1988). The other three branches are the Army, Air Force, and Coast Guard. Additionally, the Coast Guard, when operating as a service of the Navy, is considered part of the Navy/Marine Corps Branch. *Id.* To implement the UCMJ, the President of the United States, pursuant to his authority to establish pretrial, trial, and post-trial procedures for courts-martial, *see* UCMJ, art. 36, 10 U.S.C. § 836 (1988 & Supp. III 1991), promulgates the Manual for Courts-Martial. *See* 1984 MANUAL FOR COURTS-MARTIAL [hereinafter M.C.M.]. The M.C.M. contains the Military Rules of Evidence [hereinafter MIL. R. EVID.] and the Rules for Courts-Martial [hereinafter R.C.M.]. The M.C.M. has the force of statutory law. Levy v. Dillon, 286 F. Supp. 593, 596 (D. Kan. 1968) (citations omitted), *aff'd*, 415 F.2d 1263 (10th Cir. 1969).

[90]Courts-martial are not Article III courts. Rather, they are legislative courts, established by Congress pursuant to its powers under Article I to make rules governing the Armed Forces. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857); Northern Pipeline Co. v. Marathon Pipeline Co, 458 U.S. 50, 66 (1982) (plurality). *See also supra* note 89 (setting forth, in relevant part, the text of Article I). The authority of courts-martial, being legislative courts, is limited to that granted by statute, regulations, and case law. Gragg v. United States, 10 M.J. 732, 736 (N.C.M.R. 1980) (plurality). Generally, each Armed Force Branch has court-martial jurisdiction over all persons subject to the UCMJ, *see* UCMJ, art. 2, 10 U.S.C. § 802 (1988) (delineating those persons subject to the UCMJ), who while on active duty, committed a plenary offense under the UCMJ, *see* UCMJ, arts. 77-134, 10 U.S.C. §§ 877-934 (1988 & Supp. V 1993) (listing those offenses punishable under the UCMJ), or law of war. UCMJ, art. 17(a), 10 U.S.C. § 817(a) (1988); R.C.M. 201(a)-(b), 203. *See also* Solorio v. United States, 483 U.S. 435, 450-51 (1987) (holding that courts-martial have jurisdiction over all military personnel on active duty at the time of the offense). In addition, courts-martial, in order to have jurisdiction,

composed of a military judge,[91] designated or appointed by the Judge

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must be convened by an authorized official, composed of the requisite number of qualified personnel, and have charges referred to it by an authorized authority. R.C.M. 201(b). *See also* UCMJ, arts. 22-24, 10 U.S.C. §§ 822-824 (1988) (listing those persons authorized to convene courts-martial); R.C.M. 504, 1302 (same); R.C.M. 501-504, 1301 (noting the requisite number and qualifications of courts-martial personnel); R.C.M. 601 (designating who may refer charges to courts-martial).

[91]Prior to 1968, the position of military trial judge did not exist. The evolution of the present position of military trial judge was brought about slowly beginning in 1920. Prior to 1920, however, the proceedings in general and special courts-martial in the Army, *see infra* notes 98-105 and accompanying text (discussing special courts-martial), were presided over by their president, who was the senior in rank among the court-martial members at all times during the trial. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 170 (2d. ed. 1920). In a sense, court-martial members acted as both judges and jurymen. *See generally id.* at 172-78 (describing the duties and authority of court-martial members prior to 1920). The president of the court-martial had no real authority but to see that the proceedings were conducted in an orderly fashion. *Id.* at 171. Aside from presiding over the courts-martial, the president acted as an ordinary court-martial member. *Id.*

The 1920 Articles of War, applicable only to the Army, added the "law member," the forerunner of the military trial judge, to the Army's general courts-martial. Act of June 4, 1920, chapter 227, ch. II, art. 8, 41 Stat. 759 (repealed 1950) [hereinafter 1920 Articles of War]. The law member was more than just the presiding officer of the court-martial as he could rule on all interlocutory questions, except for challenges, that arose during the proceedings. 1920 Articles of War, art. 31. The law member, however, could be overruled by a majority of the court-martial members on all interlocutory issues, except those dealing with the admissibility of evidence. *Id.*

The 1948 Articles of War increased the law member's authority. Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 604 (repealed 1950) [hereinafter 1948 Articles of War]. Under the 1948 Articles of War, the law member was required to be a member of the Judge Advocate General's Department or a licensed attorney serving as a commissioned officer on active duty. 1948 Articles of War, art 8. *See also infra* note 92 (explaining the position and authority of the Judge Advocate General). Additionally, general courts-martial could not receive evidence or vote on findings of sentence unless in the law member's presence. 1948 Articles of War, art. 8. Moreover, the law member's rulings on interlocutory questions, except for findings on motions of not guilty and questions relating to the sanity of the defendant (which were capable of being overruled by a majority of the court members) were now final. 1948 Articles of War, art. 31. Finally, the law member was required to provide legal instructions to the court-martial members before their deliberations. *Id.*

With the passage of the UCMJ in 1950, the law member was renamed a "law officer" and given additional duties and authority. Uniform Code of Military Justice Act of 1950, Pub. L. No. 81-506, 64 Stat. 117 (codified as amended at 10 U.S.C. §§ 801-946 (1988 & Supp. V 1993)) [hereinafter 1950 UCMJ]. After the 1950 UCMJ, the law officer served independently of court members, consulted with the court outside the presence of the accused and counsel, and ruled on the finality of challenges. 1950 UCMJ, arts. 26(a), 51, 41.

Advocate General,[92] and at least five court members who act analogously

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On October 24, 1968, Congress significantly amended the UCMJ with the passage of the Military Justice Act of 1968. Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended at 10 U.S.C. §§ 801-946 (1988 & Supp. V 1993)) [hereinafter 1968 UCMJ]. Under the 1968 UCMJ, Congress replaced the law officer with a military judge in general courts-martial. *See* 1968 UCMJ, arts. 6(c), 26. In addition, the 1968 UCMJ allowed military judges to be detailed to special courts-martial. 1968 UCMJ, art. 26. The military judge assumed the duties of his predecessors — the law officer and law member. *Id.* The military judge, however, was given significant additional authority in recognition of his status as a judge. 1968 UCMJ, arts. 26, 39, 40. The present authority and duties of military trial judges essentially are identical to those under the 1968 UCMJ. Therefore, for a further discussion of the military trial judge's duties and authority, see *infra* notes 121-66 and accompanying text. For a more detailed discussion on the evolution of military trial judges, see generally JUDGE ADVOCATE GENERAL'S CORPS, UNITED STATES ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 (1975); WILLIAM T. GENEROUS, JR., SWORDS AND SCALES (1973); ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); MORRIS O. EDWARDS & CHARLES L. DECKER, THE SERVICEMAN AND THE LAW (rev. reprint, 6th ed. 1953); WILLIAM B. AYCOCK & SEYMOUR W. WURREL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE (1951); Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987); Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge*, 9 CAL. WEST. L. REV. 57 (1972); Colonel Carl Goldschlager, *The Military Judge: A New Judicial Capacity*, 11 JAG. L. REV. 175 (1969); Major Tate & Lieutenant Colonel Holland, *An Ongoing Trend: Expanding the Status & Power of the Military Judge*, ARMY LAW., Oct., 1992, at 23.

[92]UCMJ, art. 26(c), 10 U.S.C. § 826(c) (1988). The Judge Advocates General, in each of the four Armed Force Branches, select military trial judges to preside over courts-martial. UCMJ, art. 26(b), 10 U.S.C. § 826(b) (1988). The Judge Advocate General is the principal legal officer responsible for the supervision of military justice in each service. *See* 10 U.S.C. § 3037 (1988) (explaining the authority of the Judge Advocate General in the Army); 10 U.S.C. § 5148 (1988) (explaining the authority of the Judge Advocate General in the Navy-Marines); 10 U.S.C. § 8037 (1988) (explaining the authority of the Judge Advocate General in the Air Force); 10 U.S.C. § 801(1) (1988) (designating General Counsel of the Department of Transportation to act as the Judge Advocate General of the Coast Guard). Military trial judges, to be eligible to preside over courts-martial, must be commissioned officers, members of the bar of a federal court or a state's highest court, and certified as qualified to serve as a judge by the Judge Advocate General. UCMJ, art. 26(b). Military trial judges, however, are not appointed for fixed terms, though they typically serve between two to four-year terms. Brief of Petitioners at 5, Weiss v. United States, 114 S. Ct. 752 (1994) (No. 92-1482). The Judge Advocates General, in their discretion, may remove military trial judges from office or assign them to perform other nonjudicial duties. UCMJ, art. 26.

After the Judge Advocates General select military trial judges and certify that they are qualified to preside over courts-martial, the military judges stand ready to be detailed, or assigned, to courts-martial. The manner in which military judges are detailed to courts-

to civilian jurors when the court-martial is presided over by a military judge.[93] The accused, whose charges are referred[94] to a general court-martial, may request, in noncapital cases, to be tried by a military judge alone,[95] provided the accused first knows the identity of the judge and the judge approves.[96] The general court-martial has the broadest jurisdiction of the three trial courts, as all offenses can be tried and any sentence may be imposed under the UCMJ.[97]

The second level of trial courts, special courts-martial, are made up of at least three court members and may contain a military judge[98] if a bad-

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martial is determined by the Secretaries of the respective Armed Force Branches. UCMJ, art. 26(a), 10 U.S.C. § 826(a) (1988). *See, e.g.*, Army Reg. 27-10 pars. 1-4b, 8-6b (authorizing the Chief Trial Judge, a designee of the Judge Advocate General responsible for the supervision and administration of the United States Army Trial Judiciary, to detail general and special court-martial judges).

[93]UCMJ, art. 16(1), 10 U.S.C. § 816(1) (1988); R.C.M. 501(a)(1)(A). In courts-martial without a military judge presiding, the court-martial members generally possess all the powers regularly exercised by military trial judges. UCMJ, art. 51, 10 U.S.C. § 851 (1988). General courts-martial are always presided over by a military judge. *See supra* note 91 and accompanying text. Usually, special courts-martial are presided over by a military judge. *See infra* notes 98-100 and accompanying text. Military judges, however, are never detailed to summary courts-martial. *See infra* note 106 and accompanying text.

[94]Generally, referral is the convening authority's order that charges against an accused will be tried by a designated court-martial. R.C.M. 601(a). *See also* R.C.M. 601(b)-(c) (delineating when, and by whom, charges may be referred). Referral has been analogized to the return of a true bill by a federal grand jury in federal criminal cases. *See* Courtney v. Williams, 1 M.J. 267, 272 (C.M.A. 1976) (Ferguson, S.J., concurring).

[95]UCMJ, art. 18, 10 U.S.C. § 818 (1988).

[96]UCMJ, art. 816, 10 U.S.C. § 816 (1988); R.C.M. 501(a)(1)(B). *See also* R.C.M. 903(a)(2) (setting forth the time requirements to request trial by military judge alone).

[97]UCMJ, art. 18. A trial by military judge alone, however, cannot try any offense for which the death penalty may be imposed unless the case was initially referred as noncapital. *Id. See also* UCMJ, art. 17, 10 U.S.C. § 817 (1988) (setting forth the general jurisdiction of all courts-martial).

[98]UCMJ, art. 16(2), 10 U.S.C. § 816(2) (1988); R.C.M. 501(a)(2). Unlike general courts-martial, military judges are not required to be detailed to every special court-martial. *See* UCMJ, art. 26(a) (requiring that military trial judges be detailed to *every* general court-martial while only *allowing* military trial judges to be detailed to special courts-martial). Although not required under the UCMJ, a military trial judge is usually detailed to every special court-martial. *See* Respondent's Brief at 3 n.1, United States v. Weiss,

conduct discharge[99] could be imposed upon the accused.[100] In special courts-martial, the accused may elect to be tried solely by a military judge under the same conditions as in general courts-martial.[101] Special courts-martial, however, are more limited in jurisdiction than general courts-martial. Unlike general courts-martial, special courts-martial cannot hear capital offenses unless specifically empowered by the President of the United States.[102] Additionally, any sentence under the UCMJ may be imposed by a special courts-martial except for the following: death; dishonorable discharge;[103] dismissal; over six months forfeiture of pay; over six months confinement; over three months hard labor without confinement; and over two-thirds forfeiture of pay per month.[104] Moreover, bad-conduct

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114 S. Ct. 752 (1994) (No. 92-1482) ("Although Article 16(2) allows court-martial members to sit without a military judge at a special court-martial, in practice military judges are almost always detailed to such cases"). Similar to its history in general courts-martial, the military judge was first able to sit on special courts-martial with the passage of the 1968 UCMJ. *See supra* note 91 (examining the evolution of military trial judges). Unlike in general courts-martial, which were previously presided over by a law member and then law officer, special courts-martial did not contain a presiding officer until the addition of a military judge. *See supra* note 91 (examining the evolution of military trial judges). Thus, the addition of the military judge to special courts-martial was a significant change in the military justice system.

[99]Receiving a bad conduct discharge is a serious punishment. *See* United States v. Hodges, 22 M.J. 260, 263 (C.M.A. 1986) (noting that receiving a bad conduct or dishonorable discharge carries with it "considerable stigma" and "may preclude eligibility for veterans' benefits").

[100]UCMJ, art. 16(2).

[101]*Id.* *See* supra notes 94-96 and accompanying text (describing the requirements for a military bench trial).

[102]UCMJ, art. 19, 10 U.S.C. § 819 (1988). *See* R.C.M. 201(f)(2)(C) (delineating those situations in which special courts-martial can try capital offenses).

[103]*See supra* note 99 (describing the ramifications of receiving a dishonorable discharge).

[104]UCMJ, art. 19; R.C.M. 201(f)(2)(B)(i).

discharges, under certain conditions, may be imposed in special courts-martial.[105]

Finally, the third level of courts-martial, summary courts-martial, consists of one commissioned officer.[106] The summary courts-martial is limited to enlisted servicemembers and can only be held with the accused's consent.[107] Summary courts-martial have jurisdiction to hear minor offenses under the UCMJ,[108] except those committed by: commissioned or warrant officers; cadets; and aviation cadets and midshipmen.[109] Further, summary courts-martial may not impose the following punishments: death; bad-conduct or dishonorable discharge; over one month confinement; over forty-five days hard labor without confinement; over two months restriction to certain limits; or two-thirds forfeiture of one month's pay per month.[110]

The second tier of military courts in the military justice system is the Court of Criminal Appeals,[111] which exists in each of the Armed Force

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[105]UCMJ, art. 19; R.C.M. 201(f)(2)(B)(ii). R.C.M. 201 provides that a bad conduct discharge may not be imposed unless: "[Qualified counsel] . . . is detailed to represent the accused; and [a] military judge is detailed to the trial, except in a case in which a military judge could not be detailed because of physical conditions or military exigencies . . . ." R.C.M. 201(f)(2)(B)(ii)(a),(b). The failure to detail a military judge in special courts-martial where a bad conduct discharge is imposed will only be excused in rare circumstances "such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place." R.C.M. 201(f)(2)(B)(ii)(b).

[106]The commissioned officer shall be on active duty and of the same Armed Force as the defendant. R.C.M. 1301(a).

[107]UCMJ, art. 16(3), 20, 10 U.S.C. §§ 816, 820 (1988).

[108]Summary courts-martial are intended "to promptly adjudicate minor offenses under a simple procedure." R.C.M. 1301(b). Summary courts-martial may hear any noncapital offense under the UCMJ. R.C.M. 1301(c).

[109]UCMJ, art. 20; R.C.M. 1301(c).

[110]UCMJ, art. 20; R.C.M. 1301(d)(1). *See also* R.C.M. 1003 (prescribing other punishments which may be adjudged).

[111]Until recently, military appellate courts were named Courts of Military Review. *See* UCMJ, art. 66, 10 U.S.C. § 866 (1988). On October 5, 1994, however, Congress renamed these courts as Courts of Criminal Appeals without altering their authority or jurisdiction. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(b)(1), 108 Stat. 2663, 2831 (1994) [hereinafter 1995 N.D.A.A.].

Branches.[112] These appellate courts are composed of one or more panels, with at least three military judges sitting on each panel.[113] The Judge Advocate General of each service designates, or appoints, military officers, who must be members of a state's highest court or federal bar, to serve as

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[112]*See* UCMJ, art. 66, 10 U.S.C. § 866 (1988) (mandating Judge Advocates General of each service to establish Courts of Criminal Appeals), *amended by* 1995 N.D.A.A. § 924(b)(2); R.C.M. 1203(a) (same). Unlike courts-martial, which can only come into existence by an order of a convening authority, *see* R.C.M. 504(a), Courts of Criminal Appeals are standing courts. Brief of Petitioners at 4, United States v. Weiss, 114 S. Ct. 752 (1994) (No. 92-1482).

[113]UCMJ, art. 66(a). For many years, there were no military appellate judges. In 1917, however, the Secretary of War ordered that courts-martial in the Army imposing sentences of death or dishonorable discharge be reviewed by the Judge Advocate General. *Clerk of Court Note: The United States Army Court of Military Review*, ARMY LAW., Oct. 1991, at 37. Thereupon, the Army Judge Advocate General set up Boards of Review to accomplish this task. *Id.* The Boards of Review were formally codified into existence under the 1920 Articles of War. *See* 1920 Articles of War, art. 50 1/2. Under the 1920 Articles of War, the Boards of Review were empowered to examine all cases involving sentences of death, unsuspended dismissal, dishonorable discharge, or confinement to a penitentiary. *Id.* The Boards' decisions, however, were required to be affirmed by the Judge Advocate General. *Id.* If the Judge Advocate General disagreed with the Boards' decisions, the matter was transferred to the Secretary of War or to the President of the United States for review. *Id.* Moreover, the Boards were limited to reviewing questions of law. *Id.*

The 1950 UCMJ made substantial modifications to the Boards of Review. First, the Boards were made mandatory in the Navy, Air Force, Marine Corps, Coast Guard, and the Army. 1950 UCMJ, art. 66. Previously, only the Army and the Air Force were required to provide Boards of Review. *See* 1920 Articles of War, art. 50 1/2 (establishing Boards of Review in the Army); Act of June 25, 1948, Pub. L. No. 775, § 2, 62 Stat. 1014 (1948) (extending Boards of Review to the Air Force). Second, the Boards were no longer limited to reviewing questions of law but were empowered to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. 1950 UCMJ, art. 66(c). Third, the Boards were given independent authority to affirm or reverse court-martial findings. 1950 UCMJ, art. 66.

The 1968 UCMJ amended the UCMJ by renaming the Boards of Review as the Courts of Military Review. 1968 UCMJ, art. 66. The 1968 UCMJ additionally condensed the numerous Boards of Review into a single Court of Military Review for each service. *Id.* Each services' Court of Military Review was required to be composed of three military appellate judges. *Id.* Moreover, each military appellate judge was required to be a commissioned officer or civilian, as well as a member of the federal bar of the highest court in the state. *Id.* Subsequently, on October 5, 1994, Congress renamed Courts of Military Review as Courts of Criminal Appeals without altering their jurisdiction or authority. *See supra* note 111. For a discussion of the present duties and reviewing powers of the Courts of Criminal Appeals, see *infra* notes 167-79 and accompanying text.

judges on the Courts of Criminal Appeals.[114] Generally, the Judge Advocate General refers to the Courts of Criminal Appeals courts-martial cases in which the accused has not waived his right to appeal[115] and the approved sentence extends to: death; dismissal of a commissioned officer, cadet or midshipman; dishonorable or bad-conduct discharge; or confinement equal to or greater than one year.[116]

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[114]The UCMJ does not specifically empower Judge Advocates General to appoint all military appellate judges. *See* UCMJ, art. 66. Under Article 66, however, Judge Advocates General are authorized to appoint the Chief Judges of the Courts of Criminal Appeals. UCMJ, art. 66(a). The Judge Advocates General of the four services have interpreted this authority as empowering them to appoint all Court of Criminal Appeals judges and the military courts have accepted this interpretation. *See, e.g.*, United States v. Prive, 35 M.J. 569, 571 (C.G.C.M.R. 1992), *review granted in part*, 37 M.J. 49 (C.M.A. 1992), *aff'd*, 39 M.J. 28 (C.M.A. 1993).

[115]The accused may waive or withdraw appellate review of general courts-martial in which the approved sentence does not include death and of special courts-martial with a military judge presiding. UCMJ, art. 61(a), (b), 10 U.S.C. §§ 861(a), (b) (1988); R.C.M. 1110(a).

[116]UCMJ, art. 66(b)(1). The post-trial procedure in the military justice system is somewhat complex. In addition to the Court of Criminal Appeals judges, several other officers, such as the convening authority, judge advocates, Judge Advocates General, the President, and Secretaries of each respective service, are authorized to review courts-martial convictions. *See generally* UCMJ, art. 60, 10 U.S.C. § 860 (1988) (reviewing by convening authority), UCMJ, art. 64, 10 U.S.C. § 864 (1988) (reviewing by judge advocates); UCMJ, art. 69, 10 U.S.C. § 869 (1988 & Supp. I 1989) (reviewing by Judge Advocate General), *amended by* 1995 N.D.A.A. § 924(c)(2); R.C.M. 1105, 1112, 1201.

The court-martial is final once the military judge authenticates the record of trial. Authentication is essentially a certification that the record of the court-martial accurately reflects the trial proceedings. R.C.M. 1104(a)(1). Generally, the record is authenticated by the military judge in general courts-martial and special courts-martial in which a bad-conduct discharge has been adjudged. R.C.M. 1104(a)(2)(A). In special courts-martial in which a bad-conduct discharge has not been adjudged, the Secretaries of the four Armed Force Branches, through regulations, determine the manner of authentication. *Id. See also* R.C.M. 1104(a)(2)(B) (prescribing the manner of authentication when the military judge, in emergency situations, is not available to authenticate the record of the proceedings); R.C.M. 1305(a) (describing the method of authentication in summary courts-martial). After the completion of the court-martial, the authenticated record of the court-martial is forwarded to the convening authority for action. UCMJ, art. 60(a); R.C.M. 1104(e). The accused may submit matters to the convening authority to consider in taking action. UCMJ, art. 60(b)(1); R.C.M. 1105(a). *See also* R.C.M. 1105(b) (setting forth those matters which accused may submit).

The convening authority, upon receiving the authenticated record, must take action on the sentence, UCMJ, art. 60(c)(2); R.C.M. 1107(a), and may take action on the findings. UCMJ, art. 60(c)(3); R.C.M. 1107(a). In acting on the sentence, the convening

authority must either "approve, disapprove, commute, or suspend the sentence in whole or in part." UCMJ, art. 60(c)(2); R.C.M. 1107 (d)(1). If the convening authority acts on the findings, he may change a finding of guilty to a lesser-included offense or set aside the finding altogether. UCMJ, art. 60(c)(3)(A), (B); R.C.M. 1107(c)(1)-(2). *See* United States v. McKinley, 27 M.J. 78, 80 (C.M.A. 1988) (holding that for the convening authority to change a finding of guilty to a lesser-included offense, "[t]here must be a lesser-included offense to consider"), *mandate issued*, 27 M.J. 426 (C.M.A. 1988), *review denied*, 28 M.J. 248 (C.M.A. 1989). The power of the convening authority to take action on the findings and sentence is a matter of command prerogative. UCMJ, art. 60(c)(1); R.C.M. 1107(b)(1). That is, action by the convening authority may be taken "in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons." R.C.M. 1107(b)(1) discussion. The convening authority does not have to review the record for legal errors or the sufficiency of the facts. R.C.M. 1107(b)(1). The convening authority, however, must consider the required recommendation of the staff judge advocate and the result of trial before taking action on the findings and sentence. UCMJ, art. 60(d); R.C.M. 1107(b)(3)(A). *See also* R.C.M. 1106 (governing the staff judge advocate's recommendation). The judge advocate is a trained legal officer who is either: "an officer of the Judge Advocate General's Corps of the Army or the Navy; an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or an officer of the Coast Guard who is designated as a law specialist." UCMJ, art. 1(13), 10 U.S.C. § 801(13) (1988).

Additionally, the convening authority may order a revision proceeding or a rehearing. UCMJ, art. 60(e)(1); R.C.M. 1107(e). A proceeding in revision may be ordered only if the record includes errors or manifests improper or inconsistent action by the court-martial that can be corrected without substantial prejudice to the accused. UCMJ, art. 60(e)(2). A revision proceeding, however, may not reconsider a finding of not guilty or escalate the severity of the sentence. *Id.* Moreover, the convening authority may order a rehearing if he disapproves the sentence and findings and gives his reasoning. UCMJ, art. 60(e)(3). If the convening authority disapproves the sentence and findings, but does not order a rehearing, he must dismiss the charges. *Id.* For a further discussion of revision and rehearing proceedings, see generally Major Jerry W. Peace, *Post-Trial Proceedings*, ARMY LAW., Oct., 1985, at 20; Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., Dec., 1991, at 9.

After the convening authority's action, the record of trial is either sent to the judge advocate or the Judge Advocate General. For general courts-martial, the record of trial is sent to the Judge Advocate General if the accused has not waived appellate review or the sentence approved by the convening authority includes death. UCMJ, art. 69; R.C.M. 1111(a)(1). See UCMJ, art. 61, 10 U.S.C. § 861 (1988); R.C.M. 1110 (stating that accused may waive appellate review of general courts-martial not resulting in a sentence of death and special courts-martial not resulting in sentence of bad-conduct discharge). All other general courts-martial records are sent to a judge advocate for review. UCMJ, art. 64; R.C.M. 1111(a)(2).

Special courts-martial records of trial are sent to the Judge Advocate General for review if the approved sentence includes a bad-conduct discharge and the accused does not waive appeal. R.C.M. 1111(b)(1). All other special courts-martial records are sent to a judge advocate for review. R.C.M. 1111(b)(2).

Unless directed by regulations promulgated by the Secretary of the service concerned, the records of summary courts-martial are forwarded to a judge advocate for review. R.C.M. 1306(c). In addition, the accused may request the Judge Advocate General to review the record of summary courts-martial, which has been already finally reviewed by a reviewing authority other than the Court of Criminal Appeals or the Judge Advocate General "on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." R.C.M. 1306(d), 1201(b)(3).

For those cases forwarded to the judge advocate for review, the judge advocate first reviews the record to determine whether: "(A) the court had jurisdiction over the accused and the offense; (B) the charge and specification stated an offense; and (C) the sentence was within the limits prescribed as a matter of law." UCMJ, art. 64(a)(1)(A)-(C). *See also* R.C.M. 1112(d)(1)(A)-(C) (same). After the judge advocate makes these determinations, the record is sent to the officer exercising general court-martial jurisdiction, when: "the judge advocate who reviewed the case recommends corrective action; the sentence approved [by the convening authority] extends to dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months; or such action is otherwise required by regulations of the Secretary concerned." UCMJ, art. 64(b)(1)-(3). *See also* R.C.M. 1112(e)(1)-(3) (same). If the record is sent to the officer exercising general court-martial jurisdiction for action, the judge advocate must forward to that officer "a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law." UCMJ, art. 64(a)(3); R.C.M. 1112(d)(3).

Upon receipt of the record and recommendation by the judge advocate, the officer exercising general court-martial jurisdiction over the accused may take the following actions: disapprove or approve the findings and sentence, in whole or in part; remit, commute, or suspend the sentence in whole or in part; except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or dismiss the charges. UCMJ, art. 64(c)(1)(A)-(D). *See also* R.C.M. 1112(f)(1)(A)-(D) (same). If the action taken by the officer exercising general court-martial jurisdiction is less than that recommended by the judge advocate, the record is further sent to the Judge Advocate General for review. UCMJ, art. 64(c)(3); R.C.M. 1112(g)(1). Upon receipt of the record, the Judge Advocate General may modify or vacate the findings and/or sentence in whole or in part upon a finding of: "newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." UCMJ, art. 69(b); R.C.M. 1201(b)(2).

When the authenticated record, after being acted upon by the convening authority, is sent directly to the Judge Advocate General, the Judge Advocate General either reviews the record or forwards it to the Court of Criminal Appeals. The Judge Advocate General must forward the record of courts-martial to the Court of Criminal Appeals cases: "(1) [i]n which the sentence, as approved, extends to death; or (2) [i]n which — (A) [t]he sentence, as approved, extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for [one] year or longer; and (B) [t]he accused has not waived or withdrawn appellate review." R.C.M. 1201(a)(1)-(2). *See also* UCMJ, art. 66(b)(1)-(2) (same).

If the accused does not waive or withdraw his right to appellate review, the records of general courts-martial that result in a finding of guilty and a sentence, that are not sent to the Court of Criminal Appeals, must be reviewed by the Judge Advocate General. UCMJ, art. 69(a); R.C.M. 1201(b)(1). In reviewing such cases, the Judge Advocate General may vacate or modify the findings and/or the sentence "if any part of the findings or sentence is found unsupported in law, or if the reassessment of the sentence is appropriate . . . ." UCMJ, art. 69(a); R.C.M. 1201(b)(1). After making such a review, the Judge Advocate General, in his discretion, may forward the record to the Court of Criminal Appeals. UCMJ, art. 69(d); R.C.M. 1201(b)(1). The Court of Criminal Appeals, upon receipt of such records, may review the action taken by the Judge Advocate General and the record of trial only regarding matters of law. UCMJ, art. 69(d)(2), (e).

In addition to the courts-martial cases described above, the Judge Advocate General may review, upon his own discretion or on application of the accused, other court-martial records which have not been previously reviewed by the Court of Criminal Appeals or the Judge Advocate General. UCMJ, art. 69(b); R.C.M. 1201(b)(3)(A). In other words, those cases reviewed by a judge advocate or, when required, the officer exercising general court-martial jurisdiction. The Judge Advocate General may review such cases "on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." R.C.M. 1201(b)(3)(A). If authorized to make such a review, the Judge Advocate General may modify or set aside the finding and/or sentence in whole or in part. UCMJ, art. 69(b); R.C.M. 1201(b)(3)(A). Moreover, whenever the Judge Advocate General vacates the findings or sentence, he may order a rehearing unless the convening authority determines it is impractical. UCMJ, art. 69(c); R.C.M. 1201(b)(4). If the Judge Advocate General vacates the findings or sentence but does not order a rehearing, or the convening authority finds a rehearing impractical, the charges against the accused are dismissed. UCMJ, art. 69(c); R.C.M. 1201(b)(4).

Finally, the President of the United States and Secretaries of each respective service, or their delegees, have the authority, in certain situations, to review and modify the decisions of courts-martial. When the court-martial imposes a death sentence, the portion of the sentence extending to death must be approved by the President, or his delegee, before being executed. UCMJ, art. 71(a), 10 U.S.C. § 871(a) (1988), *amended by* 1995 N.D.A.A. § 924(c)(2); R.C.M. 1207. *See also* UCMJ, art. 40, 10 U.S.C. § 840 (1988) ("The President may delegate any authority vested in him under [the UCMJ], and provide for the subdelegation of any such authority."). In these situations, the President has the additional authority to commute or remit any part of the sentence. *Id.* The President, in his discretion, may also suspend any part of the sentence except that portion imposing death. *Id.*

All cases resulting in dismissals of military officers must be approved by the Secretary, or, if designated by the Secretary, the Under Secretary or Assistant Secretary of the Armed Force Branch concerned. UCMJ, art. 71(b), 10 U.S.C. § 871(b) (1988), *amended by* 1995 N.D.A.A. § 924(c)(2); R.C.M. 1206(a). In these situations, the Secretary, or his designee, may also commute, suspend, or remit all or any portion of the sentence. UCMJ, art. 71(b). Moreover, the Secretaries of each respective service, or their designees, are empowered to remit or suspend any portion of the unexecuted part of any sentence except those that have been already approved by the President. UCMJ, art. 74(a), 10 U.S.C. § 874(a) (1988), *amended by* 1995 N.D.A.A. § 924(c)(2); R.C.M.

The third tier of the military justice court system is the Court of Appeals for the Armed Forces.[117] This court, consisting of five civilian judges, is the highest court in the military justice system.[118] These judges are appointed by the President with the advice and consent of the Senate to serve fifteen year terms.[119] The Court of Appeals for the Armed Forces reviews the records of courts-martial, previously reviewed by the Courts of Criminal Appeals, in all cases which: a death sentence has been imposed; the Judge Advocate General orders to be reviewed by the Court of Appeals for the Armed Forces; or the Court of Appeals for the Armed Forces, upon application of the accused and for good cause shown, grants review.[120]

IV. AUTHORITY AND DUTIES OF MILITARY JUDGES

A. MILITARY TRIAL JUDGES

Congress has granted military trial judges broad authority over the accused, counsel, and court members in court-martial proceedings. Military trial judges not only exercise such powers during the trial but also at the pretrial and post-trial levels. In so doing, Congress has succeeded in mirroring the authority of military trial judges with those of federal civilian judges.

1206(b)(1). Finally, when the President, under Article 71(a), commutes a death sentence to a lesser sentence, the Secretary, or his designee, may then remit or suspend any portion or amount of any unexecuted part of that sentence. R.C.M. 1206(b)(3).

For the review of cases forwarded to the Court of Criminal Appeals, see *infra* notes 117-20 and accompanying text.

[117]Until recently, the Court of Appeals for the Armed Forces was named the United States Court of Military Appeals. *See* UCMJ, art. 67, 10 U.S.C. § 867 (1988). On October 5, 1994, Congress renamed this court as the Court of Appeals for the Armed Forces. *See* 1995 N.D.A.A. § 924(a)(1).

[118]UCMJ, art. 67, 10 U.S.C. § 867 (Supp. I 1989), *amended by* 1995 N.D.A.A. § 924(c)(1)-(2).

[119]UCMJ, art. 42(b), 10 U.S.C. § 942(b) (Supp. IV 1992), *amended by* 1995 N.D.A.A. § 924(c)(1). As the Court of Appeals for the Armed Forces's judges are appointed to their judicial office in the manner provided for principal officers, they are not at issue in this Comment.

[120]UCMJ, art. 67(a); R.C.M. 1204.

Congress has authorized military judges to preside over every general courts-martial.[121] Additionally, military judges are detailed to special courts-martial whenever feasible.[122] Although military judges are detailed by the convening authority, they are directly responsible to the Judge Advocate General.[123] The Judge Advocate General may assign military trial judges additional judicial or nonjudicial duties.[124] Military judges designated to preside over general courts-martial, however, perform such functions as their primary duty.[125]

The military judge's authority commences once the court-martial comes into existence by order of the convening authority[126] and the convening authority refers the charges to the court-martial.[127] Military trial judges possess supreme authority over the court-martial proceedings.[128] Unlike

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[121]*See supra* note 91 and accompanying text.

[122]*See supra* notes 98-100 and accompanying text.

[123]UCMJ, art. 26(c). In order to prevent command influence over the military trial judge's decisions, the convening authority may not "prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge . . . [relating] to his performance of duty as a military judge." *Id.* Rather, military judges are directly responsible to the Judge Advocate General. *Id.*

[124]*Id.*

[125]*Id. See, e.g.*, United States v. Beckermann, 25 M.J. 870, 874 (C.G.C.M.R. 1988) (plurality) (holding that a legal officer may not be designated as a military judge solely for the trial of one general court-martial), *aff'd*, 27 M.J. 334 (C.M.A. 1989).

[126]Courts-martial come into existence when an officer, authorized to convene courts-martial, issues a convening order. R.C.M. 508.

[127]*See supra* note 94 (explaining the meaning of referral).

[128]*See* United States v. Blanchard, 8 M.J. 655, 656 (A.F.C.M.R. 1979) (holding that the military judge is not just a figurehead or umpire in the court-martial (citing United States v. Kimble, 49 C.M.R. 384, 386 (C.M.A. 1974); United States v. Wilson, 2 M.J. 548 (A.C.M.R. 1976)), *petition granted*, 9 M.J. 128 (C.M.A. 1980), *mandate issued*, 11 M.J. 463 (C.M.A. 1981); United States v. Blackmon, 39 M.J. 1091, 1093 (A.C.M.R. 1994) ("The military judge is 'more than a mere referee' and he has a duty to insure the accused receives a fair trial." (quoting United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975)); Cretella, *supra* note 91, at 91 (opining that the military trial judge is not just a referee but a judge in the real sense of the term).

their predecessors,[129] military trial judges are not just another member of the court[130] but are its sole presiding officer.[131] Consistent with this immense judicial role, military trial judges must impartially preside over the court-martial's proceedings.[132] Even before the actual trial begins, the military trial judge has the authority to make significant decisions. One of the most authoritative powers military trial judges possess at the pretrial level is the ability to hold "Article 39(a) sessions."[133] Pursuant to this authority,

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[129]*See supra* note 91 (setting forth the composition of courts-martial prior to the inclusion of military judges).

[130]The military judge may not consult with the court members outside the presence of the accused and counsel. UCMJ, art. 26(e), 10 U.S.C. § 826(e) (1988). Additionally, the military judge may not vote with the other members of the court. *Id. See* Cox, *supra* note 91, at 19 (1987) ("[T]he court-martial is run by a military judge in a fashion similar to civilian trials, rather than by the senior member or President of the court-martial." (citing UCMJ, art. 26; R.C.M. 801)).

[131]As the presiding officer of the court-martial, the military trial judge controls every part of the proceedings. First, the military judge determines the time, place, and the uniforms to be worn at the court-martial. R.C.M. 801(a)(1), 906(b)(11). Second, the military judge is to "[e]nsure that the dignity and decorum of the proceedings are maintained." R.C.M. 801(a)(2). Third, the military judge is to "exercise reasonable control over the proceedings to promote the purposes of [the] [R]ules [of Courts-Martial] and [the] Manual [for Courts-Martial]." R.C.M. 801(a)(3). Under this authority, the military judge delineates "the manner and order in which the proceedings may take place." *Id.* discussion. Fourth, the military judge rules on all legal and interlocutory questions that arise during the proceedings. R.C.M. 801(a)(4). *See infra* notes 153-57 and accompanying text (discussing this authority further). Fifth, the military judge must instruct court members on all questions of law and procedure that arise during the proceedings. R.C.M. 801(a)(5). *See infra* note 157 (discussing this authority further). Sixth, the military judge is empowered to "promulgate and enforce rules of court." R.C.M. 801(b)(1); R.C.M. 108. Finally, the military judge may exercise contempt powers. R.C.M. 801(b)(2), 809. *See infra* note 156 and accompanying text (describing the contempt power further). For other examples of military trial judges' powers to control the proceedings, see United States v. Dock, 20 M.J. 556, 557 (A.C.M.R. 1985) (holding that military trial judges may set reasonable time limits upon the arguments of counsel), *petition denied*, 21 M.J. 159 (C.M.A. 1985); United States v. Rhea, 29 M.J. 991, 995 (A.F.C.M.R. 1990) (finding that military trial judges have authority to rule on the ethical responsibilities of counsel appearing before the court-martial).

[132]United States v. Felton, 31 M.J. 526, 531 (A.C.M.R. 1990) ("The military judge must conduct himself with impartiality and may not assume the role of advocate or partisan." (citing United States v. Payne, 31 C.M.R. 41 (C.M.A. 1961)), *review denied*, 35 M.J. 249 (C.M.A. 1992).

[133]*See generally* UCMJ, art. 39(a), 10 U.S.C. § 839(a) (Supp. II 1990).

military trial judges may call the court into session without the presence of the court-martial members to decide a number of issues.[134] Similar to federal civilian judges,[135] military trial judges may hold "Article 39(a) sessions" to determine the admissibility of evidence, decide motions, and dispose of interlocutory matters.[136] Additionally, military trial judges may hold pretrial conferences.[137] Although principally utilized to pinpoint the issues that will be heard at trial,[138] military judges may make rulings during these pretrial conferences as long as the prosecution and defense counsel concur in his judgment.[139]

Another important function of military trial judges at the pretrial level is to protect the accused by carefully examining guilty pleas and pretrial agreements. Before the judge accepts a guilty plea, he must make a detailed

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[134]*Id.* Under Article 39(a), the military trial judge may hold court sessions, without the court members present, for purposes of:

> (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
> (2) hearing and ruling upon any matter which may be ruled upon by the military judge under [the UCMJ], whether or not the matter is appropriate for later consideration or decision by the members of the court;
> (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving pleas of the accused; and
> (4) performing any other procedural function which may be performed by the military judge under [the UCMJ] or [R.C.M.] and which does not require the presence of the members of the court.

Id.

[135]*See* Cretella, *supra* note 128, at 89 (stating that the ability to hold Article 39(a) sessions exemplifies that military trial judges are to have identical powers as state and federal civilian judges); Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 91-92 (1969) (same); Major Randy L. Woolf, *The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan., 1991, at 27 (same).

[136]*See* R.C.M. 803 discussion.

[137]R.C.M. 802. Under this rule, "the military judge, may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial." *Id.*

[138]Stanley T. Fuger, *Military Justice, Variation on a Theme*, 66 CONN. B. J. 197, 203 (1992).

[139]R.C.M. 802 discussion.

inquiry to ensure that the accused's rights are not being violated.[140] The judge must personally question the accused to determine whether the guilty plea was given voluntarily rather than through the coercion of the commanding officer or other authority.[141] If the military trial judge finds that there is a possibility that the accused's plea was forced, he must reject the plea.[142] Additionally, the military trial judge must review pretrial agreements between the accused and the commanding officer to ensure that the accused comprehends the agreement and that all parties agree to its terms.[143]

Moreover, military trial judges have broad powers to regulate and enforce discovery both prior to and during the trial.[144] Military trial judges have the discretion to determine the "time, place, and manner of making discovery" and to add any terms and conditions that they deem just.[145] In the event that one of the parties fails to comply with discovery, the judge has a plethora of mechanisms to ensure observance, including ordering discovery, granting continuances, denying the admission of evidence or defenses that were not disclosed, and making any other order that he determines to be just.[146]

As during the pretrial proceedings, military trial judges possess vast powers during the court-martial trial. The first step in any court-martial "jury" trial is the selection of the trier of fact or court-martial members. The convening authority details, or assigns, court members to the court-martial.[147] Military trial judges, however, have the authority to prescribe the manner and scope that *voir dire* examinations of the detailed members

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[140]R.C.M. 910(d).

[141]*Id.*

[142]R.C.M. 910(e). After questioning the accused about the charged offenses, the military trial judge must be satisfied that there is a factual basis for the plea. *Id.*

[143]R.C.M. 705, 910(f).

[144]*See generally* R.C.M. 701. It has been contended that the military's pretrial discovery rules "are among the most generous in the nation." Fuger, *supra* note 138, at 204.

[145]R.C.M. 701(g)(1).

[146]*Id.* at 701(g)(3).

[147]UCMJ, art. 25, 10 U.S.C. § 825 (1988); R.C.M. 503(a).

will be conducted.[148] The military trial judge may conduct the examinations himself, accepting or not accepting written questions from counsel, or permit counsel to conduct the *voir dire*.[149] As in civilian trials, each party is entitled to a certain number of peremptory challenges and an unlimited number of challenges for cause.[150] During the *voir dire* examinations, the military trial judge determines when challenges for cause are to be granted.[151] Moreover, the military trial judge has the discretion to grant each side additional peremptory challenges.[152]

After the court members are selected, the court-martial trial commences. Military judges have the general authority to rule on all interlocutory questions and questions of law that arise during the proceedings.[153] For

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[148]R.C.M. 912(d). Military trial judges' discretion to determine the scope of *voir dire* is broad as it will only be overturned on appeal when there has been "a clear abuse of . . . discretion, prejudicial to the appellant." United States v. Adams, 36 M.J. 1201, 1204 (N.M.C.M.R. 1993) (citing United States v. White, 36 M.J. 284 (C.M.A. 1993); United States v. Smith, 27 M.J. 25 (C.M.A. 1988)).

[149]R.C.M. 912(d). *See* United States v. Slubowski, 7 M.J. 461, 463 (C.M.A. 1979) (adopting the federal criminal procedure of allowing the judge to conduct *voir dire*), *mandate issued*, 9 M.J. 269 (C.M.A. 1980).

[150]*See generally* UCMJ, art. 41, 10 U.S.C. § 841 (Supp. II 1990).

[151]UCMJ, art. 51(b). Military trial judges are expected to grant challenges for cause liberally. United States v. Henry, 37 M.J. 968, 970 (A.C.M.R. 1993) (citing United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987)). The judge's decision on challenges, however, will not be overturned on appeal unless there has been "a clear abuse of discretion." United States v. Nigro, 28 M.J. 415, 417 (C.M.A. 1989) (citations omitted), *mandate issued*, 29 M.J. 307 (C.M.A. 1989). *See* United States v. Keenan, 39 M.J. 1050, 1054 (A.C.M.R. 1994) ("Abuse of discretion [in ruling on challenges for cause] exists whenever in the exercise of his or her discretion, the military judge exceeds the bounds of reason, all of the circumstances before him or her being considered." (citing United States v. White, 36 M.J. 284, 290 (C.M.A. 1993) (plurality)).

[152]United States v. Carter, 25 M.J. 471, 476 (C.M.A. 1988). The military judge *must* grant additional peremptory challenges if "necessary to assure a fair trial." *Id.* *See generally* Colonel Norman G. Cooper & Major Eugene R. Milhizer, *Should Peremptory Challenges be Retained in the Military Justice System in Light of* Batson v. Kentucky *and its Progeny?*, ARMY LAW., Oct., 1992, at 10, 10-13 (reviewing peremptory challenges in the military).

[153]UCMJ, art. 51(b); R.C.M. 801(a)(4). Rulings by the military judge on questions of law are final. UCMJ, art. 51(b); R.C.M. 801(e)(1)(A). The military judge's rulings on interlocutory questions are final except for factual issues of the mental responsibility of the accused which are subject to objection by court members. UCMJ, art. 51(b).

instance, during the course of the trial, the military trial judge may declare a mistrial,[154] comment upon evidence,[155] give judicial notices of law and fact, authorize probable cause searches, and conduct contempt proceedings in the same manner as federal civilian judges.[156] Additionally, military trial judges must instruct court members on all questions of law and procedure that arise during the proceedings.[157]

After both sides have presented their case, military trial judges are empowered, on motion by the accused or *sua sponte*, to enter a finding of not guilty.[158] If the military trial judge does not enter a finding of not

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[154]R.C.M. 915. *See also* United States v. Stringer, 17 C.M.R. 122 (1954) (Quinn, C.J., concurring in part and dissenting in part). Although the support appears in a concurring opinion, *Stringer* is cited as the first case granting the military trial judge the authority to declare a mistrial. In *Stringer*, Chief Judge Quinn held that because civilian federal judges have the power to declare a mistrial, the law officer, the predecessor of the military trial judge, also should have this power. *Id.* at 137-38 (Quinn, C.J., concurring in part and dissenting in part).

[155]United States v. Slavick, 5 C.M.R. 616, 618-19 (1952) ("Since a civilian judge has the discretion to summarize and comment upon the evidence, the [military judge] must have the same discretion.").

[156]MIL. R. EVID. 201, 201A, 315(d)(2); R.C.M. 801(b)(2), 809(c). In a bench trial, the military judge punishes for contempt. R.C.M. 809(c)(1). When the court members are present, the military judge only decides if contempt proceedings are to be conducted; the members vote on whether contempt has been committed and on what the punishment will be. R.C.M. 809(c)(2). The military judge, however, has the authority to hold that a contempt has not been committed as a matter of law before submitting the matter to a vote by the members. *Id.* Additionally, the military judge has the power to delay contempt proceedings, in the same manner as federal civilian judges, until the case is tried. United States v. Burnett, 27 M.J. 99, 107 (C.M.A. 1988), *final opinion ordered*, 27 M.J. 425 (C.M.A. 1988), *appeal after remand*, 29 M.J. 446 (C.M.A. 1989). For a concise overview of contempt proceedings in courts-martial, see generally Lieutenant Colonel David L. Hennessey, *Courts-Martial Contempt — An Overview*, ARMY LAW., June 1988, at 38.

[157]R.C.M. 801(a)(4), (5).

[158]R.C.M. 917(a). R.C.M. 917(a) provides in part that "[t]he military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected." *Id.* Moreover, this provision has been interpreted as granting military trial judges the additional authority to enter a finding of not guilty after the court-martial has rendered its verdict if the evidence is legally insufficient to establish guilt. United States v. Griffith, 27 M.J. 42, 48 (C.M.A. 1988), *mandate issued*, 27 M.J. 424

guilty, he must instruct the court members as to the elements of the offense and give them charges before they deliberate.[159]

If the accused is found guilty of the charges, the military trial judge does not have the power to determine the sentence unless the case is tried by the judge alone.[160] In court-martial "jury" trials, however, the judge must instruct the court members on the sentence before they decide the punishment to be imposed.[161] Although the instructions must include certain prescribed

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(C.M.A. 1988). Thus, under this authority, military judges are allotted the same powers as those granted to federal district court judges under the Federal Rules of Criminal Procedure. Major Tate, *supra* note 91, at 27. *See also* FED. R. CRIM. PROC. 29(b) (granting federal district court judges the power to overturn a guilty verdict if the evidence is legally insufficient to establish guilt).

[159]UCMJ, art. 51(c); R.C.M. 920(a). The military judge must instruct court members on all offenses and factual issues reasonably raised by evidence at trial whether he is requested to or not. United States v. Groce, 3 M.J. 369, 370 (C.M.A. 1977) (citations omitted), *mandate issued*, 3 M.J. 482 (C.M.A. 1977); United States v. Wray, 9 M.J. 361, 362-63 n.2 (C.M.A. 1980) (per curiam), *mandate issued*, 10 M.J. 100 (C.M.A. 1980); United States v. Watford, 32 M.J. 176, 178 (C.M.A. 1991), *mandate issued*, 33 M.J. 155 (C.M.A. 1991); United States v. Williams, 4 M.J. 507, 509 (A.C.M.R. 1977); United States v. Cobb, 7 M.J. 696, 698 (N.C.M.R. 1979); United States v. Bullock, 10 M.J. 674, 676 (A.C.M.R. 1981), *petition granted*, 11 M.J. 162 (C.M.A. 1981), *aff'd*, 13 M.J. 490 (C.M.A. 1982). *See also* R.C.M. 920(e) (prescribing the instructions that the military trial judge must give to the court members before they deliberate).

[160]R.C.M. 502(a)(2), 1002. Military trial judges, however, do not have to comply with the Federal Sentencing Guidelines when they are determining the sentence of the accused. *Id. See* Brief of Petitioners at 6, Weiss v. United States, 114 S. Ct. 752 (1994) (No. 92-1482) (stating that military trial judges' exemption from the Federal Sentencing Guidelines provides them with "even more discretion than . . . [federal] district [court] judge[s]"). *See also* R.C.M. 1003 (explaining punishments authorized to be imposed in the military courts).

[161]R.C.M. 1005(a).

elements,[162] military trial judges have discretion in tailoring them to the facts of each individual case.[163]

Once the court members or military judge renders a verdict and, if the accused is found guilty, decides the sentence, the military trial judge's powers do not cease. Specifically, the military trial judge may again hold "Article 39(a) sessions" anytime before the record of trial is authenticated[164] to resolve any matter that "substantially affects the legal sufficiency of any findings of guilty or the sentence."[165] For example, military courts have allowed military trial judges, at the post-trial session, to receive evidence and decide issues of juror misconduct, violations of constitutional duties by trial counsel, and the legal sufficiency of the evidence at trial in sustaining a guilty verdict.[166]

B. MILITARY APPELLATE JUDGES

Court of Criminal Appeals judges also have been given judicial powers comparable to those of civilian federal judges. The judges on the Courts of Criminal Appeals have extensive jurisdiction to hear appeals. The Judge

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[162]*Id.* The instructions must include:

> (1) A statement of the maximum authorized punishment which may be adjudged and of the mandatory minimum punishment, if any;
> (2) a statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;
> (3) a statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening [authority] or higher authority; and
> (4) a statement that the members should consider all matters in extenuation, mitigation, and aggravation . . . .

Id.

[163]*Id.* discussion; United States v. Henderson, 11 M.J. 395, 396-97 (C.M.A. 1981); United States v. Givens, 11 M.J. 694, 696 (N.M.C.M.R. 1981).

[164]*See supra* note 116 (explaining who may authenticate the record of courts-martial and its effects).

[165]UCMJ, art. 39(a); R.C.M. 1102(b)(2), (d).

[166]*See generally* United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983), *mandate issued*, 16 M.J. 437 (C.M.A. 1983); United States v. Brickey, 16 M.J. 258 (C.M.A. 1983), *mandate issued*, 16 M.J. 437 (C.M.A. 1983); United States v. Griffith, 27 M.J. 42 (C.M.A. 1988), *mandate issued*, 27 M.J. 424 (C.M.A. 1988).

Advocate General must refer to the Court of Criminal Appeals the record of trial of every court-martial in which the sentence extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for more than one year.[167] Additionally, the Court of Criminal Appeals may review general court-martial cases, in which the accused has not withdrawn or waived appellate review, provided the Judge Advocate General so directs,[168] and interlocutory appeals petitioned by the Government from adverse trial rulings made by military trial judges.[169] Moreover, the Court of Criminal Appeals may review all petitions for new trials and petitions for extraordinary relief.[170]

In reviewing lower courts' rulings, military appellate judges have even broader powers than federal circuit judges.[171] In addition to the identical

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[167]UCMJ, art. 66(b); R.C.M. 1201(a).

[168]UCMJ, art. 69(d); R.C.M. 1201(b)(1). General courts-martial cases that are not required to be reviewed by the Court of Criminal Appeals are reviewed by the Judge Advocate General. R.C.M. 1201(b)(1). The Judge Advocate General, however, may forward these cases to the Court of Criminal Appeals if he desires. *Id.*

[169]UCMJ, art. 66(b). Congress granted Courts of Criminal Appeals judges the authority to review governmental appeals to better equate them with federal circuit judges. *See* Captain John J. Hogan, *Government Appeals: A Trial Counsel's Guide*, ARMY LAW., June, 1989, at 28 ("[G]overnment appeals were intended to parallel such appeals in federal criminal cases." (citing S. REP. NO. 53, 98th Cong., 1st Sess. 23 (1983)).

[170]UCMJ, art. 73, 10 U.S.C. § 873 (1988); CT. CRIM. APP. R. PRAC. PROC. 2(b), *reprinted in* 10 U.S.C. app. at 1262-67 (1988), *amended by* 1995 N.D.A.A. § 924(b)(2). *See also* Order Giving Notice on Renaming of the Courts of Military Review, *available in* WESTLAW, US-ORDERS. In its sole discretion, the Court of Criminal Appeals may "entertain petitions for extraordinary relief including, but not limited to, writs of *mandamus*, writs of prohibition, writs of *habeas corpus*, and writs of error *coram nobis*." CT. CRIM. APP. R. PRAC. PROC. 2(b). On petitions for extraordinary relief, the Court of Criminal Appeals may "issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law." R.C.M. 1203(b) discussion.

[171]*See Clerk of Court Note*, *supra* note 113, at 38 ("Given the more far-reaching powers of the [C]ourts of [Criminal Appeals] over cases within their jurisdictions, the selection of appellate military judges is . . . even more important than the selection of federal circuit judges.").

power that federal circuit judges have in reviewing questions of law,[172] military appellate judges are empowered to make inquiries of fact.[173] In construing the accuracy of the record below, military appellate judges may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.[174] If the military appellate court sets aside the findings and sentence of the court-martial, it may order a rehearing unless its decision is based on a conclusion that the findings are unsupported by sufficient evidence.[175] If the military appellate court does not order a rehearing, it must then dismiss the charges.[176]

Besides their awesome power to review court-martial cases for factual and legal error, military appellate judges also have the power to control the conduct in their courtroom. Military appellate judges may regulate the

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[172]The Courts of Criminal Appeals may only review the sentence and findings as approved by the convening authority. UCMJ, art. 66(c). *See also supra* note 116 (explaining the convening authority's initial action on the sentence and findings). The Courts of Criminal Appeals may only overturn the findings or sentence imposed by courts-martial on an error of law if "the error materially prejudices the substantial rights of the accused." UCMJ, art. 59(a), 10 U.S.C. § 859(a) (1988).

[173]UCMJ, art. 66(c). *See also* United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990) (stating that under Article 66(c), the Court of Criminal Appeals has "awesome, plenary, *de novo* power of review" and can "'substitute its judgment' for that of the military judge" and "for that of the court members"). When reviewing cases appealed by the Government, the Court of Criminal Appeals may not review the factual determinations of the court-martial. UCMJ, art. 62(b), 10 U.S.C. § 862(b) (1988), *amended by* 1995 N.D.A.A. § 924(c)(2).

It has been suggested that the reason Congress gave the Court of Criminal Appeals the power to review both the law and facts of courts-martial was to remove "any possibility that command influence might have affected the trial court, whether in applying rules and principles of law or in any possible disregard or manipulation of the evidence or any facts fairly inferable therefrom." Judge John Powers, *Fact Finding in the Courts of Military Review*, 44 BAYLOR L. REV. 457, 465 (1992).

[174]UCMJ, art. 66(c). *See generally* Major Martin D. Carpenter, *Standards of Appellate Review and Article 66(c): A* De Novo *Review?*, ARMY LAW., Oct., 1990, at 36 (discussing further the Courts of Criminal Appeals' power to review the record below for factual sufficiency).

[175]UCMJ, art. 66(d).

[176]*Id.* If the Court of Criminal Appeals orders a rehearing, the record is forwarded to the convening authority who may dismiss the charges "if he finds that a rehearing is impractical." UCMJ, art. 66(e); R.C.M. 1203(c)(2).

conduct of counsel appearing before them.[177] Additionally, military appellate judges may grant continuances and dispose of interlocutory or other matters "in such a manner as may appear to be required for a full, fair and expeditious consideration of the case."[178] Moreover, Court of Criminal Appeals judges are given broad authority to suspend all rules and conduct the proceedings in accordance with its own discretion.[179]

V. *WEISS V. UNITED STATES*: THE SUPREME COURT'S APPLICATION OF THE APPOINTMENTS CLAUSE TO THE MILITARY JUDICIARY

A. THE MAJORITY OPINION

1. CASE HISTORY

The United States Supreme Court examined the newly modified military judicial system within the context of the Appointments Clause in the consolidated cases of *Weiss v. United States* and *Hernandez v. United States*.[180] Weiss, a United States Marine, plead guilty at his special court-martial to one count of larceny in violation of Article 121 of the UCMJ.[181]

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[177]CT. CRIM. APP. R. PRAC. PROC. 9. Rule 9 provides that the Court of Criminal Appeals "may exercise its inherent power to regulate counsel appearing before it, including the power to remove on an *ad hoc* basis, counsel misbehaving before or in relation to their appearance before the Court." *Id.*

[178]CT. CRIM. APP. R. PRAC. PROC. 24.

[179]CT. CRIM. APP. R. PRAC. PROC. 25.

[180]114 S. Ct. 752 (1994).

[181]*Id.* at 755. Article 121 provides, in relevant part, that:

> Any person . . . who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or any other person any money, personal property, or article of value of any kind with intent permanently to deprive or defraud another person of the use and benefit of property . . . , steals that property and is guilty of larceny . . . .

UCMJ, art. 121, 10 U.S.C. § 921 (1988). Specifically, Weiss admitted stealing a racquetball glove from his barracks. United States v. Weiss, 36 M.J. 224, 225 (C.M.A. 1992) (plurality), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994). Consequently, Weiss received a bad-conduct discharge, three months confinement, and partial forfeiture of pay. *Weiss*, 114

Hernandez, also a Marine, plead guilty to possession, distribution, and importation of cocaine and to conspiracy in violation of Articles 112a and 81 of the UCMJ.[182]

Weiss and Hernandez both petitioned the Navy-Marine Court of Military Review.[183] Petitioners argued that the military trial and appellate judges who heard their cases lacked the power to do so because their appointments were constitutionally defective.[184] Specifically, Petitioners posited that the military trial and appellate judges, designated by the Judge Advocate General,[185] were officers of the United States that were not appointed in accordance with the Appointments Clause.[186]

The Navy-Marine Court of Military Review, in unpublished opinions, affirmed both Petitioners' convictions.[187] Thereupon, the United States Court of Military Appeals, the highest court in the military judicial system,

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S. Ct. at 755.

[182]*Weiss*, 114 S. Ct. at 755. Under Article 112a, "[a]ny person . . . who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States . . . [cocaine] shall be punished as a court-martial may direct. UCMJ, art. 112a(a)-(b), 10 U.S.C. § 912a(a)-(b) (1988). Article 81 provides that "[a]ny person . . . who conspires with any other person to commit an offense under [the UCMJ] shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct. UCMJ, art. 81, 10 U.S.C. § 881 (1988).

Consequently, Hernandez received a dishonorable discharge, twenty-five years of confinement, forfeiture of pay, and a reduction in rank. *Weiss*, 114 S. Ct. at 755. Hernandez's sentence, however, was reduced to twenty years by the convening authority. *Id.* For a discussion of the power of the convening authority to reduce sentences of courts-martial, see *supra* note 116.

[183]*Weiss*, 114 S. Ct. at 755.

[184]*Id.*

[185]*See supra* notes 92, 114 and accompanying text (noting the manner in which military trial and appellate judges are appointed).

[186]*Id.* Officers of the United States are either: (1) principal, who must be appointed by the President with the advice and consent of the Senate; or (2) inferior, who, depending on Congress's discretion, may be either appointed by the President with the advice and consent of the Senate, the President alone, a Court of Law, or a Head of a Department. *See supra* note 3 (setting forth the text of the Appointments Clause).

[187]*Weiss*, 114 S. Ct. at 755.

granted Weiss and Hernandez plenary review.[188] The Court of Military Appeals in Weiss's case affirmed the decision of the Court of Military Review.[189] Judge Gierke, writing for the plurality of the Court of Military Appeals,[190] first decided that the Appointments Clause applied to the military judicial system.[191] Subsequently, Judge Gierke determined that the military trial and appellate judges possessed the authority to hear Petitioners' cases because they were already appointed in accordance with the Appointments Clause.[192] Relying on the over one-hundred-year-old Supreme Court case of *Shoemaker v. United States*,[193] Judge Gierke reasoned that the military trial and appellate judges, who were already appointed by the President with the advice and consent of the Senate to

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[188]United States v. Weiss, 36 M.J. 224 (C.M.A. 1992) (plurality), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994).

[189]*Id.* at 234 (plurality).

[190]Additionally, Judge Cox, without writing an opinion, concurred. *Id.* (Cox, J., concurring). Judge Crawford, finding that the Appointments Clause does not apply to the military, concurred in the result. *Id.* at 234-40 (Crawford, J., concurring in the result). Chief Judge Sullivan and Judge Wiss authored separate dissenting opinions both concluding that military trial and appellate judges are officers of the United States that must be appointed by a Court of Law, by a Head of a Department, or by the President. *Id.* at 240-56 (Sullivan, C.J., dissenting); *id.* at 256-63 (Wiss, J., dissenting).

[191]*Id.* at 226 (plurality). The United States Coast Guard, as *amicus curiae*, raised the contention that Congress is exempt from complying with the Appointments Clause in "[making] Rules for the Government and Regulation of the land and naval Forces," in accordance with Article I of the United States Constitution, because the Supreme Court has granted Congress great deference in the exercise of that power. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 14.). Relying on the Supreme Court decision in *Buckley v. Valeo*, Judge Gierke reasoned that the deference granted to Congress is in the exercise of its legislative power to determine the manner in which the military will operate. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976)). Conversely, Judge Gierke argued that the appointment of those who will operate the military system, if considered officers of the United States, is an executive power which Congress may not disregard. *Id.* Accordingly, Judge Gierke held that the Appointments Clause applied to the military justice system. *Id.*

[192]*Id.* at 226-34 (plurality).

[193]147 U.S. 282 (1893).

perform their general military duties,[194] did not need an additional appointment to perform their judicial functions.[195]

In *Shoemaker*, two officers, the Chief of Engineers of the Army and the Engineer Commissioner of the District of Columbia, were elected to serve as members on the Rock Creek Park Commission.[196] The Supreme Court held that these officers, who were already appointed to their respective positions, did not need additional appointments to serve on the Commission because their new duties were germane to the offices they already held.[197] Judge Gierke interpreted *Shoemaker* to mean that a second appointment was not necessary if Congress had not created new offices of military trial and appellate judges or if the duties of the new offices were germane to those of the military officers holding them.[198]

Applying this interpretation, Judge Gierke determined that Congress did not create a new office of military trial judge.[199] Examining the historic

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[194]All military trial judges and most military appellate judges are commissioned officers. UCMJ, art. 26(b), 66(a), 10 U.S.C. §§ 826(b), 866(a). *See* UCMJ, art. 66(a) (allowing for the designation of civilians to Courts of Criminal Appeals). Commissioned officers are considered officers of the United States, *see* Wood v. United States, 107 U.S. 414, 417 (1882), who are appointed by the President with the advice and consent of the Senate. *See* 10 U.S.C. § 531 (1988) (appointment of regular officers); 14 U.S.C. §§ 211, 212 (1988) (appointment of regular Coast Guard officers); 10 U.S.C. §§ 593, 5912 (1988) (appointment of reserve officers); 10 U.S.C. § 624 (1988) (reappointment of active duty military offices upon each promotion).

[195]United States v. Weiss, 36 M.J. 224, 226-34 (C.M.A. 1992) (plurality), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994).

[196]*Shoemaker*, 147 U.S. at 284. The Rock Creek Park Commission was created by Congress to select, survey, and map land for a public park in the District of Columbia. *Id.* Additionally, the Commission was to determine the amount of compensation to pay the owners of the selected land upon the land's condemnation. *Id.*

[197]*Id.* at 300-01. The Supreme Court in *Shoemaker* reasoned that: "[i]t can not be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." *Id.* at 301.

[198]*Weiss*, 36 M.J. at 228 (plurality). Judge Gierke stated that military trial and appellate judges do not need to be reappointed if: "Congress did not create a new 'office'; or Congress created a new office, but the duties of that office are 'germane' to the duties of the military officer detailed to perform them." *Id.*

[199]*Id.* at 228-30 (plurality).

evolution of military trial judges,[200] Judge Gierke reasoned that the duties of such judges are merely a compilation of those duties previously performed by the members and president of courts-martial.[201] Further, Judge Gierke concluded that even if a new office of military trial judge was created, a second appointment of military officers was not necessary to serve in that office because the duties of general commissioned military officers are germane to those of military judges.[202] Judge Gierke reasoned that the duties of military trial judges are similar to those customarily performed by military officers sitting as members of courts-martial.[203]

Based on its decision in *Weiss*, the Court of Military Appeals additionally affirmed Hernandez's conviction in an unpublished opinion.[204] Thereupon, the United States Supreme Court granted *certiorari*.[205]

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[200]For a brief overview of the evolution of military trial judges, see *supra* note 91.

[201]*Weiss*, 36 M.J. at 228-29 (plurality). Judge Gierke, however, did recognize that certain duties were granted to military trial judges that were never previously held by the president of courts-martial. *Id.* First, Judge Gierke noted that the 1968 UCMJ allowed a military trial judge to hear a case alone if requested by the accused. *Id.* at 229 (plurality) (citing UCMJ, art. 16). The Judge, however, dismissed this new authority as alternating the composition of general and special courts-martial rather than enhancing the duties of their presiding officers. *Id.* Second, Judge Gierke reasoned that the unprecedented authority of military trial judges to decide legal and procedural issues not in the presence of the court-martial members, granted by the 1968 UCMJ's amendment to Article 39(a), was intended to conserve the court members' time rather than create a new office of military trial judge. *Id.* (citing UCMJ, art. 39(a); S. REP. NO. 1601, 90th Cong., 2d Sess. 10 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4510).

[202]*Id.* at 230 (plurality).

[203]*Id.* Specifically, Judge Gierke held that the duties of military trial and appellate judges are germane to the duties of legally-trained military officers. *Id.* at 230, 233 (plurality). Judge Gierke reasoned that "[j]ust as the duties of a Rock Creek Park Commissioner were germane to the duties of a military engineer [in *Shoemaker*], presiding over courts-martial is clearly germane to the duties of a military lawyer" because "the duties of the military [trial] judge are the same as those traditionally performed by military officers serving as members of courts-martial." *Id.* at 230 (plurality). Moreover, Judge Gierke reasoned that the duties of military appellate judges are germane to the duties of legally-trained military officers since such officers were previously responsible for review of courts-martial prior to the creation of Boards of Review. *Id.* at 233 (plurality) (citations omitted). *See supra* note 113 (explaining the review of courts-martial prior to the creation of military appellate judges).

[204]*See* United States v. Hernandez, 37 M.J. 252 (1993).

[205]Weiss v. United States, 113 S. Ct. 2412 (1993).

On petition to the Supreme Court, Weiss and Hernandez, relying on *Shoemaker*, proffered that general commissioned military officers and military judges occupy separate and distinct offices, and therefore, military officers must receive an additional appointment to perform their judicial duties.[206] Petitioners posited that general commissioned military officers and military judges are separate offices for two reasons. First, Petitioners noted that Congress has treated military trial and appellate judges as separate and distinct offices from general military officers.[207] Second, Petitioners opined that general commissioned military officers and military judges occupy separate and distinct offices because their duties are unrelated.[208] Accordingly, Petitioners concluded that Congress must provide for a second appointment of military officers to the office of military judge.[209]

Chief Justice Rehnquist interpreted Petitioners' *argument* that military judges and general commissioned officers are separate and distinct offices requiring specific appointments, due to their unrelated duties and Congress's separate treatment, as two different *arguments*.[210] Specifically, the Chief Justice stated that Petitioners' contention that military judges and other military positions are so different that either: Congress impliedly intended military officers to receive a second appointment to serve as military judges but "in a fit of absentmindness forgot to say so" or the Appointments Clause mandates a second appointment.[211]

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[206]Brief of Petitioners at 19-26, Weiss v. United States, 114 S. Ct. 752, 757 (1994) (No. 92-1482).

[207]*Id.* at 19-20. First, Petitioners noted Congress's requirement that military judges meet certain qualifications. *Id.* at 19. Petitioners explained that the UCMJ requires military judges to be members of either the bar of the highest court of a state or of a federal court and to be certified by the Judge Advocate General of their respective Armed Force Branch. *Id.* (quoting UCMJ, art. 26(b)). Second, Petitioners recognized that Congress required the "Judge Advocate General to establish a *separate* Court of Military Review to handle appellate functions." *Id.* (emphasis added). Third, Petitioners illustrated that military judges are assigned special functions under the UCMJ. *Id.* Finally, Petitioners emphasized that military judges are required to take a separate oath of office. *Id.* at 20 (citing United States v. Elliott, 15 M.J. 347 (C.M.A. 1983); UCMJ, art. 42(a), 10 U.S.C. § 842(a) (1988)).

[208]*Id.* at 21-26.

[209]*Id.* at 26.

[210]Weiss v. United States, 114 S. Ct. 754, 757 (1994).

[211]*Id.* at 757-58.

2. CONGRESS'S REQUIREMENT THAT MILITARY JUDGES POSSESS CERTAIN QUALIFICATIONS DOES NOT ESTABLISH AN INTENT TO CREATE A NEW OFFICE OF MILITARY JUDGE REQUIRING A SECOND APPOINTMENT

After quickly conceding that the Appointments Clause applied to the military justice system[212] and that the judges within that system are officers of the United States,[213] the Court examined Petitioners' interpreted arguments. Chief Justice Rehnquist, writing for the majority,[214] first

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[212]*Id.* at 757. The Court, relying wholeheartedly upon the holding of *Buckley v. Valeo* to support its conclusion that the Appointments Clause applied to the military judicial system, stated: "[a]s we said in *Buckley*, '*all* officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions.'" *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976)). For alternative arguments advanced by military courts that the Appointments Clause does not apply to the military justice system, see United States v. Weiss, 36 M.J. 224, 234-40 (C.M.A. 1992) (Crawford, J., concurring) (explaining that the Supreme Court's recognition of special deference to Congress in its governance of the Armed Forces exempts it from conforming to the Appointments Clause when determining the manner of appointment of military judges), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994); United States v. Kovac, 36 M.J. 521, 523-24 (C.G.C.M.R. 1992) (same), *review granted in part*, 38 M.J. 186 (C.M.A. 1993), *aff'd*, 39 M.J. 29 (C.M.A. 1993); United States v. Prive, 35 M.J. 569, 573-77 (C.G.C.M.R. 1992) (Baum, C.J., concurring) (same), *review granted in part*, 37 M.J. 49 (C.M.A. 1992), *aff'd*, 39 M.J. 28 (C.M.A. 1993).

[213]*Weiss*, 114 S. Ct. at 757 (quoting Freytag v. Commissioner, 501 U.S. 868 (1991); Buckley v. Valeo, 424 U.S. 1, 126 (1976)). The Court, however, did not determine whether the office of military judge is principal or inferior.

[214]Chief Justice Rehnquist, joined by Justices Blackmun, Stevens, O'Connor, Kennedy, Souter, and Ginsburg, authored the majority opinion of the Court. *Weiss*, 114 S. Ct. at 754-63. In Part I of the majority opinion, Chief Justice Rehnquist dismissed the contentions that Congress, by implication, or the Constitution, by expression, intended military officers to receive a separate appointment to serve in the office of military judge. *Id.* at 756-60. In Part II of the majority opinion, Chief Justice Rehnquist rejected Petitioners' argument that the Due Process Clause requires military judges to receive a fixed term of office. *Id.* at 760-63. Justice Scalia, joined by Justice Thomas, concurred in the majority opinion as to Parts I and II-A and concurred in the judgment. *Id.* at 769-71 (Scalia, J., concurring in part and concurring in judgment). Justice Souter wrote an opinion concurring in the majority opinion on the understanding that military judges are inferior officers. *Id.* at 763-69 (Souter, J., concurring). Justice Ginsburg filed a concurring opinion to underscore the equitableness of the majority's consideration of Petitioners' Due Process Clause challenge. *Id.* at 769 (Ginsburg, J., concurring). Whether military judges' lack of a fixed term of office violates the Due Process Clause is

dismissed the contention that Congress's disparate treatment of military judges and general commissioned officers implies that Congress intended to create a separate office of military judge. Focusing singularly on one example of Congress's disparate treatment of military judges,[215] Chief Justice Rehnquist declared that Congress's requirement that military judges possess special qualifications does not, *per se*, establish an intent by Congress to create a new and separate office of military judge.[216] The Chief Justice reasoned that military officers perform a plethora of duties, requiring specified qualifications, without receiving a second appointment.[217]

Chief Justice Rehnquist additionally noted that Congress expressly has required a second appointment of military officers to hold distinct positions where it desired.[218] Chief Justice Rehnquist, however, noted that although the UCMJ provides for the assignment and detailment of military judges, Congress did not explicitly require the appointment of military officers to those positions.[219] The Chief Justice, therefore, concluded that if Congress

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not at issue in this Comment, and therefore, those portions of the Justices' opinions will not be surveyed.

[215]For other instances of Congress's disparate treatment, see *supra* note 207.

[216]*Weiss*, 114 S. Ct. at 757.

[217]*Id.* The Chief Justice cited military lawyers and pilots as specific examples of military duties requiring special qualifications. *Id.* Chief Justice Rehnquist, however, declared that "no one would seriously contend that the positions of military lawyer or pilot . . . are distinct offices because officers performing those duties must possess additional qualifications." *Id.*

[218]*Id.* at 757-58. The Chief Justice cited a number of military positions that require a second appointment by the President and Senate, namely: the Chairman and Vice Chairman of the Joint Chiefs of Staff; the Chief and Vice Chief of Naval Operations; the Commandant of the Marine Corps; the Surgeons General of the Army, Navy, and Air Force; the Chief of Naval Personnel; the Chief of Chaplains; and the Judge Advocates General of the Army, Navy, and Air Force. *Id.* (citing 10 U.S.C. §§ 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 5141, 5142, 5148, 8036, 8037 (1988 & Supp. IV 1992)).

[219]*Id.* at 758 (citing 10 U.S.C. §§ 826(a), 826(c), 866 (1988)). Chief Justice Rehnquist additionally noted other military positions to which Congress delineated an assignment or detailment, rather than a second appointment. *Id.* For example, the Chief Justice noted that the Deputy and Assistant Chiefs of Staff for the Army and the Chief of Staff of the Marine Corps are detailed, rather than appointed, to their positions. *Id.* (citing 10 U.S.C. §§ 3035, 5045 (1988)).

intended military officers to receive a second appointment to serve as military judges, it would have explicitly provided for a second appointment.[220]

The Chief Justice misinterpreted Petitioners' argument. Petitioners did not outline the military's distinctive treatment of military judges to conclude that Congress intended military judges to be a separate and distinct office requiring a separate appointment but somehow forgot to provide for a second appointment of military officers to the office of military judge. Rather, in applying *Shoemaker*, Petitioners outlined the military's recognition of military judges as a separate and distinct office to support their contention that service as a military judge is not merely an extension of the general responsibilities of a military officer, and thus, a second appointment is required for military officers to perform judicial duties.[221]

3. THE APPOINTMENTS CLAUSE DOES NOT MANDATE A SECOND APPOINTMENT OF MILITARY OFFICERS TO THE OFFICE OF MILITARY JUDGE

A. *SHOEMAKER*'S "GERMANE TEST" DOES NOT APPLY

Next, Chief Justice Rehnquist rejected the proposition that the Appointments Clause itself mandates that military officers receive separate appointments to serve as military judges.[222] The Chief Justice distinguished *Shoemaker v. United States* which was relied upon by Petitioners and lower military courts as support for their contention that military officers should

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[220]*Id.*

[221]Petitioners posited that another "error in equating the office of military judge with that of a military officer" is that "the military itself treats these positions as separate offices." Brief of Petitioners at 19, Weiss v. United States, 114 S. Ct. 752 (1994) (No. 92-1482). Thus, Petitioner reasoned that "if, under *Shoemaker* the test is of whether the office of military judge is a separate office, the UCMJ . . . treat[s] judicial offices differently from other billets held by commissioned military officers, and therefore, that test has plainly been met." *Id.* at 20. Judge Wiss, in a dissenting opinion in the United States Court of Military Appeals' decision in *United States v. Weiss*, advanced this same argument. *See* United States v. Weiss, 36 M.J. 224, 262 (1992) (Wiss, J., dissenting) (stating that "[b]ecause a servicemember's admission to the independent bar by civilian authority is a statutory qualification for a military judge, I cannot conclude that the duties of a military judge" are simply an extension of the duties of military officers), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, 114 S. Ct. 752 (1994).

[222]Weiss v. United States, 114 S. Ct. 752, 758-60 (1994).

receive a second appointment to serve in the office of military judge.[223] Chief Justice Rehnquist explained that in *Shoemaker*, Congress delegated new duties to two existing offices held by individual officers.[224] The Chief Justice stated that *Shoemaker* examined whether the duties of the two offices were distinct in order to prevent Congress from unilaterally transferring a particular officer to a different office without conforming to the Appointments Clause.[225] Chief Justice Rehnquist, however, declared that in the present case, Congress was not trying "to both create an office and also select a particular individual to fill the office."[226] Rather, the Chief Justice opined that Congress authorized military judges to be designated from countless commissioned officers.[227] Accordingly, the Court concluded that *Shoemaker*'s "germane test" did not apply.[228]

The majority's conclusion that *Shoemaker*'s "germane test" does not apply is somewhat misguided. The majority in *Weiss* focused too much on distinguishing the facts of *Shoemaker* rather than focusing on the principle to be derived therefrom. The Court in *Shoemaker* held that Congress can create a new office and assign the duties of that office to an officer already appointed under the Appointments Clause, without an additional appointment, if the functions of the two offices are germane.[229] Contrary to the Court's opinion in *Weiss,* however, *Shoemaker* must be applied regardless of the

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[223]*Id.* at 758-59 (citing Shoemaker v. United States, 147 U.S. 282 (1893)). *See also supra* notes 193-203 and accompanying text (providing the United States Court of Appeals' analysis regarding *Shoemaker*).

[224]*Weiss*, 114 S. Ct. at 759.

[225]*Id.* The Court noted that "[b]y looking to whether the additional duties assigned to the offices [of the Chief of Engineers of the Army and Engineer Commissioner for the District of Columbia] were 'germane,' the Court [in *Shoemaker*] sought to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." *Id.*

[226]*Id.*

[227]*Id.*

[228]*Id.* at 759.

[229]Shoemaker v. United States, 147 U.S. 282, 301 (1893).

number of candidates Congress may choose from to fill a particular office.[230] Concedingly, Congress may not be expanding its authority under the Appointments Clause by selecting a *particular* military officer to fill the office of military judge which Congress created. If military judges are a separate and distinct office from general military officers, however, Congress is violating the Appointments Clause by allowing the office of military judge to be filled by the Judge Advocates General of the respective services who are unauthorized to do so under the Constitution.[231] Thus, *Shoemaker*'s

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[230]*See* Weiss v. United States, 114 S. Ct. 752, 770 (1994) (Scalia, J., concurring in part and concurring in judgment). Justice Scalia reasoned that:

> [I]f acting as a military judge under the Military Justice Act is nongermane to serving as a military officer, giving Judges Advocate General the power to appoint military officers to serve as military judges would violate the Appointments Clause, even if there were "hundreds or perhaps thousands" of individuals from whom the selections could be made. For taking on the nongermane duties of military judge would amount to assuming a new "Offic[e]" within the meaning of [the Appointments Clause], and the appointment to that office would have to comply with the strictures of [the Appointments Clause].

Id. (second alteration in original).

[231]*See id.* at 765-66 (Souter, J., concurring). Justice Souter noted that the Appointments Clause can be violated either by abdication or aggrandizement. The Justice stated:

> First, *no Branch may aggrandize its own appointment power at the expense of another*. Congress, for example, may not unilaterally fill any federal office; and the President may neither select a principal officer without the Senate's concurrence, nor fill any office without Congress's authorization. Second, *no Branch may abdicate its Appointments Clause duties*. Congress, for example, may not authorize the appointment of a principal officer without Senate confirmation; nor may the President allow Congress or a lower-level Executive Branch official to select a principal officer.

Id. (emphasis added) (citation and footnote omitted). *See also* Mark F. Bernstein, Note, *The Federal Open Market Committee and The Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 137-38 (1989) ("To the extent that Congress itself appoints principal officers, it breaches the separation of powers and weakens the President's authority as [C]hief [E]xecutive. When it vests the power to appoint members of the [E]xecutive [B]ranch in [individuals other than those authorized under the Appointments Clause], Congress does not merely usurp the appointment power but misappropriates it."). If the duties of military judges are nongermane to those of their general military office, Congress has, and will be, abdicating its Appointments Clause duties by misappropriating the power to appoint military judges in the Judge Advocates General of the respective services who are unauthorized to do so under the Appointments Clause.

"germane test" should be applied whenever Congress creates and fills an office itself or grants the authority to fill the office to someone else who is not empowered by the Appointments Clause to do so.[232] *Shoemaker*'s "germane test" prevents Congress from violating the Appointments Clause in either of these two ways by ensuring that the officeholder is qualified to perform the office's functions.[233] If the duties of the office for which its holder was already appointed are essentially the same as those which he will be performing under the new office, there is no need to receive an additional appointment because an authorized person has already decided that he is qualified to perform those types of responsibilities.[234] As Congress has allowed the Judge Advocates General, unauthorized under the Appointments Clause to appoint officers, to fill the office of military judge, *Shoemaker*'s "germane test" must be applied to ensure that military judicial duties are performed by accountable and qualified military officers.

B. ASSUMING, *ARGUENDO*, THAT *SHOEMAKER*'S "GERMANE TEST" DOES APPLY, THE DUTIES OF MILITARY JUDGES ARE GERMANE TO THOSE OF GENERAL COMMISSIONED MILITARY OFFICERS

After holding that *Shoemaker*'s "germane test" does not apply, Chief Justice Rehnquist nevertheless argued that the duties of military judges resemble those of commissioned officers.[235] The Chief Justice stated that military officers already performed many judicial functions, including the following: the power of commissioned officers to "quell quarrels, frays, and disorders," arrest persons subject to the [UCMJ], and serve as court-martial

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[232]*See Weiss*, 114 S. Ct. at 770 (Scalia, J., concurring in part and concurring in judgment). Scalia posited that *Shoemaker*'s "germane test" should be applied whenever it is necessary to ensure that Congress does not violate the Appointments Clause either by effectively: "appropriating the appointment power over the officer exercising the new duties . . . ," without the constitutional authority to do so, or lodging the "appointment power in any person other than those whom the Constitution specifies." *Id.*

[233]*See supra* note 11 (explaining the Framers' intent in drafting the Appointments Clause to ensure that the offices in the Federal Government would be filled with qualified appointees); *infra* note 256 (same).

[234]*See* In re Benny, 812 F.2d 1133, 1145 (9th Cir. 1987) ("When Congress merely adds duties to an office that are germane to the officeholder's existing duties, Congress has simply expanded the power of an official in the field . . . in which a *valid* appointing authority has already entrusted him to act.").

[235]*Weiss*, 114 S. Ct. at 759.

members;[236] the power of commanding officers to impose non-judicial punishment, such as restricting a servicemember's movement, suspending them from duty, forfeiting pay, and imposing extra duties; and the convening officer's authority to review and modify the court-martial's sentence.[237] Moreover, the Chief Justice opined that the position of military judge is not distinct from other military positions, reasoning that military judges have no "'inherent judicial authority'" when they are not acting at a courts-martial, have no fixed term of office, and have the ability to perform other nonjudicial duties while serving as judges.[238] Accordingly, Chief Justice Rehnquist held that the duties of military judges are just another duty imposed upon commissioned officers, and therefore, military officers do not require separate appointments to serve in the office of military judge.[239]

Chief Justice Rehnquist's conclusion that military officers do not require a second appointment is unsubstantiated for two reasons: the duties proffered by the Chief Justice were (1) nongermane and/or (2) not a significant function of all military officers.[240] First, most of the general commissioned military officers' duties, listed by Chief Justice Rehnquist as related to

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[236]The Chief Justice noted that court-martial members, when detailed to a court-martial held without a judge, possess the authority to resolve all the issues that would otherwise be decided by the military trial judge. *Id.* (citing UMCJ, art. 51).

[237]*Id.* (quoting 10 U.S.C. § 807(c) and citing 10 U.S.C. §§ 815, 860 (1988)).

[238]*Id.* at 760 (quoting United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992) and citing UCMJ, art. 26(c)).

[239]*Id.*

[240]Additionally, Chief Justice Rehnquist stated that because military judges may perform judicial duties, only when presiding over a court-martial, and other nonjudicial duties, when not acting at a court-martial, holding the office of military judge is just another duty of military officers. *See supra* note 238 and accompanying text. This reasoning, however, is misplaced. The fact that military judges may perform other nonjudicial duties is not relevant regarding the issue of whether military officers' duties are germane to the office of a military judge. The question, under *Shoemaker*'s "germane test," is not whether military judges' duties are so related to other officer's duties so that he can perform general military duties. Rather, the question is whether military judges' duties are so related to military officer's duties so that he can perform the judicial duties without an additional appointment. Moreover, the fact that military judges only perform their judicial duties when assigned to a court-martial adds nothing to Chief Justice Rehnquist's germane argument. No matter how often or how long military judges perform their judicial functions, the fact of the matter is that military commissioned officers do not perform related judicial duties.

judicial duties, are nongermane to those of military judges.[241] For example, the Chief Justice asserted that the duties of general commissioned military officers to "quell quarrels, frays, and disorders" and apprehend[242] the military personnel involved are germane to those of military judges.[243] These duties, however, more closely resemble police rather than judicial powers. Although police powers may be germane to the enforcement of military justice, they are not significantly related to the duties of military judges. In addition, Chief Justice Rehnquist contended that the power of commanding officers to impose nonjudicial punishment[244] and the power of convening authorities[245] to take action on the findings and sentence of courts-martial[246] are germane to judicial duties.[247] These duties, however, are instruments of discipline rather than justice. Unlike military judges, commanding officers do not base their decisions on established precedent. Rather, the commanding officers' actions are primarily based upon his idea of how his unit should be disciplined.[248]

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[241]As posited by Chief Justice Rehnquist, court-martial members' duties when serving on a court-martial without a military judge are the same as those of military trial judges. *See supra* note 236 and accompanying text.

[242]Apprehension is the taking of the person into custody, R.C.M. 302(a)(1), and is the equivalent of an arrest in civilian terminology. R.C.M. 302(a)(1) discussion.

[243]*See supra* note 236 and accompanying text.

[244]Under Article 15 of the UCMJ, "any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of [several] *disciplinary* punishments for minor offenses without the intervention of a court-martial." UCMJ, art. 15(b), 10 U.S.C. § 815(b) (1988) (emphasis added).

[245]The convening authority is typically the commanding officer of the accused. Fuger, *supra* note 138, at 200 n.10. *See also* UCMJ, art. 22-24 (delineating who may convene general, special, and summary courts-martial).

[246]*See supra* note 116 (explaining further the convening authority's power to take action on the findings and sentence of courts-martial).

[247]*See supra* notes 236-37 and accompanying text.

[248]The proceedings that the commanding officer conducts before imposing non-judicial punishment are not like a trial by a court-martial. EDWARD M. BYRNE, MILITARY LAW 197 (3d. ed. 1981). The procedural protections are dissimilar to those afforded by a court-martial. *Id.* Non-judicial punishment is allowed due to the "mandatory military necessity for prompt resolution of minor offenses." *Id.* Further, the determinations of guilt at non-judicial punishment proceedings are not convictions. *Id.* at 199. *See also* United States

Second, the military commissioned officers' duties, listed by Chief Justice Rehnquist, even if germane to those of military judges, are only performed by a limited class of military officers. Chief Justice Rehnquist's recognition that court-martial members perform judicial duties when serving on a court-martial without a military judge is correct.[249] Serving on a court-martial, however, is not a significant function of military officers. Rather, military officers serve as court members rarely, if ever. Further, even if commanding officers' powers to impose nonjudicial punishment and modify the findings and sentence of court-martial are germane to judicial duties, these duties are also performed by a limited number of military officers. Accordingly, as the aforementioned duties are not a significant function of all military commissioned officers, they cannot be broadly extended, even if they are germane to judicial duties, to exempt all military commissioned officers from receiving a second appointment.[250]

The Supreme Court's broad extension of *Shoemaker*'s "germane test" to permit all commissioned officers to serve as military judges without an additional appointment is simply unprecedented.[251] The purpose of

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v. Penn, 4 M.J. 879, 882 (N.C.M.R. 1978) (recognizing that nonjudicial punishment is not a criminal proceeding but rather an administrative method of managing minor offenses (citations omitted)).

Similarly, the convening authority's power to modify the findings and sentence of courts-martial is not a matter of justice but of command prerogative. The convening authority is not required to review the court-martial record for legal errors or sufficiency of fact. R.C.M. 1107(b). Rather, the convening authority's action may be taken for reasons such as discipline, mission requirements, or clemency. *Id.* discussion. *See also* United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988) (distinguishing the convening authority's and military appellate judges' roles in the appeal process, the court reasoned that convening authorities grant mercy, by reducing the sentence, as a matter of command prerogative, while military appellate judges do justice by determining the appropriateness of the sentence), *mandate issued*, 27 M.J. 411 (C.M.A. 1988).

[249]*See supra* note 236 and accompanying text.

[250]*See* United States v. Weiss, 36 M.J. 224, 253 (C.M.A. 1992) (Sullivan, C.J., dissenting) ("I do not consider a military judge's judicial duties similar to or within the sphere of the general military justice responsibilities of a line officer. Moreover, the latter duties are collateral and irregular and, therefore, also lack the specificity-of-office considered in *Shoemaker.*"), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994).

[251]*See Weiss*, 36 M.J. at 241 (Sullivan, C.J., dissenting) ("There is no blanket 'commissioned officer' exception to the Appointments Clause written in the Constitution, and the decision of the Supreme Court in *Shoemaker v. United States* should not be broadly extended to create one for military officers who are simply 'legally trained.'" (citation

Shoemaker's "germane test" is to prevent the unnecessary reappointment of officers who already have been designated by authorized officials to perform essentially the same duties.[252] Even if it could be contended that some military officers perform duties that are remotely related to those performed by military judges, such officers were not specifically appointed to perform those functions. Rather, military officers are appointed to perform general military duties. Therefore, the appointment of military officers to perform general military duties should not be extended to allow them to serve as military judges without an additional appointment.[253]

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omitted)). *Shoemaker*'s "germane test" has been narrowly applied to allow certain officers to perform essentially the same duties albeit in a different office, without requiring an additional appointment. *See, e.g.*, Gila River Pima-Maricopa Indian Community v. United States, 8 Cl. Ct. 700, 702 (1985) (recognizing that Congress did not require a new appointment of trial judges from the old Court of Claims when they were transferred to the newly created United State Claims Court because "[a] Claims Court judge occupies the same office previously held by a trial judge of the Court of Claims, albeit with added duties."); In re Certain Complaints Under Investigation, 783 F.2d 1488, 1515 (11th Cir. 1986) (holding that federal judges did not have to be reappointed to serve on Investigating Committee of the Judicial Council of the Eleventh Circuit because serving on the Committee "is merely an outgrowth of their existing responsibilities"), *application to vacate stayed*, Hastings v. Godbold, 476 U.S. 1112 (1986), *cert. denied*, Hastings v. Godbold, 477 U.S. 904 (1986).

[252]*See supra* notes 232-34, 251 and accompanying text.

[253]*See Weiss*, 36 M.J. at 252 (Sullivan, C.J., dissenting). Chief Judge Sullivan attacked the plurality of the Court of Military Appeals for stretching the holding of *Shoemaker* in essentially the same manner as the Supreme Court. The plurality held that the duties of military judges were germane to those of legally-trained military officers in the same manner as the Rock Creek Park Commissioner members' duties, in *Shoemaker*, were germane to those of military engineers. *Id.* at 233-34 (plurality). The Chief Judge rejected this extension of *Shoemaker* because the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia were specifically appointed to those positions in addition to being appointed as general commissioned officers. *Id.* at 253 (Sullivan, C.J., dissenting). The Chief Judge noted that *Shoemaker* did not find the duties of the Rock Creek Park Commissioners germane to those of all military engineers but to those of the Chief of Engineers and the Engineer Commissioner who were specifically appointed to serve in those positions. *Id.*

In the same manner, the Supreme Court found the duties of military commissioned officers, which are moderately related to justice, germane to those of military judges. *See supra* notes 235-239 and accompanying text. Military judges, however, were not *specifically* appointed to perform their "quasi-judicial" functions. When the President appoints, with the advice and consent of the Senate, military officers to perform general military duties, they are not specifically ensuring that such officers are qualified to perform judicially-related duties. Therefore, the appointment of military officers to perform their

B. JUSTICE SOUTER'S CONCURRING OPINION: MILITARY JUDGES ARE NOT PRINCIPAL OFFICERS

Justice Souter concurred in the opinion and judgment provided that military judges were considered inferior officers.[254] The Justice noted that general commissioned military officers, detailed to act as military judges, already have been appointed as inferior officers.[255] Justice Souter, however, cautioned that if military judges were principal officers, the appointment of general commissioned officers to their inferior office would not constitutionally suffice for them to serve in the principal office of a military judge.[256] Congress may not, the Justice directed, "dispense with

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general military duties is not sufficient for them to serve as military judges. It would be different if military officers who serve as military judges had already received a specific appointment to perform other judicially-related duties. *See supra* note 251 (noting the narrow application of *Shomaker*'s "germane test" by other courts).

[254]Weiss v. United States, 114 S. Ct. 752, 763 (1994) (Souter, J., concurring).

[255]*Id.*

[256]*Id.* at 763-64 (Souter, J., concurring) (citing United States v. Germaine, 99 U.S. 508, 509 (1879); Myers v. United States, 272 U.S. 52, 128-29 (1926); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)). Justice Souter reasoned that if military judges were principal officers, their selection from the ranks of inferior military commissioned officers, without an additional appointment, would be an abdication by Congress and the President of their appointing responsibilities even though, technically, general military officers are appointed by the President with the advice and consent of the Senate. *Id.* at 767 (Souter, J., concurring). Justice Souter noted that the Framers granted the President the power to nominate principal officers because granting Congress the double power to create and fill offices would lead to "legislative despotism." *Id.* at 764 (Souter, J., concurring). Further, Justice Souter posited that Congress was given the power to confirm nominations of principal officers as a "salutary check" on the President from abusing his power. *Id.* at 764-65 (Souter, J., concurring). Justice Souter explained that the appointment method for principal officers, chosen by the Framers, prevents either branch from making "injudicious appointments" through accountability to each other and the American people. *Id.* at 765 (Souter, J., concurring). Justice Souter concluded that if the Framers intended benefits of a structured appointment method are to be preserved, "no branch may aggrandize its own appointment power at the expense of another" nor "abdicate its Appointments Clause duties." *Id.* at 765-66 (Souter, J., concurring). For a further elaboration on the Framers' reasons for requiring the President and Senate to share in the appointment of principal officers, see *supra* note 11.

For military judges commissioned as general military officers before the creation of military judges in 1968, Justice Souter posited that Congress and the President, when they nominated and confirmed the candidate to serve in that inferior office, did not even know of the possibility that such officers might later serve in the principal office of a military

the precise process of appointment required for principal officers, whether directly or 'by indirection.'"[257]

Next, Justice Souter attempted to determine whether military judges should be characterized as principal or inferior officers.[258] Justice Souter first applied the *Morrison* test,[259] determining that military judges are not limited in tenure,[260] jurisdiction,[261] or duties.[262] Although recognizing that military judges are removable, Justice Souter found such removability to be inconsequential because the same could be said of most Executive Branch officers who are considered principal.[263] Thus, under the *Morrison*

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judge. *Weiss*, 114 S. Ct. at 767 (Souter, J., concurring). Additionally, Justice Souter realized that neither branch, when commissioning military officers for general duty after 1968, would seriously consider the remote possibility that such officers may some day be selected to serve in the principal office of military judge. *Id.* Noting that the Framers' chosen method of appointing principal officers was to ensure "'judicious appointments . . . by empowering the President and the Senate to check each other . . . [and] by allowing the public to hold the President and Senators accountable for injudicious appointments," Justice Souter, therefore, concluded that if military judges are principal officers, a second appointment to that position was required or the President, Congress, and the American people would be prevented from exercising their respective roles to ensure "judicious appointments." *Id.* at 765, 767 (Souter, J., concurring).

[257]*Weiss*, 114 S. Ct. at 764 (Souter, J., concurring) (quoting Springer v. Phillipine Islands, 277 U.S. 189, 202 (1928)).

[258]*Id.* at 768 (Souter, J., concurring).

[259]*See supra* notes 75-88 and accompanying text (explaining the *Morrison* test).

[260]*Weiss*, 114 S. Ct. at 768 (Souter, J., concurring) (quoting Morrison v. Olson, 487 U.S. 654, 672 (1988)). Justice Souter opined that "the office of military judge is not 'limited in tenure,' as that phrase was used in *Morrison* to describe 'appoint[ment] essentially to accomplish a single task [at the end of which] the office is terminated.'" *Id.* (alterations in original).

[261]*Id.* Justice Souter posited that military judges are not "'limited in jurisdiction,' as used in *Morrison* to refer to the fact that an independent counsel may investigate and prosecute only those individuals, and for only those crimes, within the scope of the jurisdiction granted by the special three-judge appointing court." *Id.* (quoting *Morrison*, 487 U.S. at 672).

[262]*Id.* (quoting *Morrison*, 487 U.S. at 762). The Justice stated that military judges are "no more 'limited [in] duties' than lower Article III or Tax Court judges." *Id.* (alteration in original).

[263]*Id.* (quoting *Morrison*, 487 U.S. at 716 (Scalia, J., dissenting)).

test, Justice Souter concluded that military judges should be classified as principal officers.[264]

Apparently suspicious of the soundness of the *Morrison* test, Justice Souter checked its accuracy by comparing military judges to similar judicial officers of the United States Tax Court who may be considered principal officers.[265] Justice Souter determined that military trial judges compared poorly with Tax Court judges for two reasons. First, Justice Souter noted that Courts of Military Review are empowered to review, *de novo*, the factual and sentencing decisions, in addition to the legal rulings, of military trial judges.[266] Second, Justice Souter contrasted the judges' degrees of independence, stating that unlike Tax Court judges, who are removable only for cause and serve fifteen year terms, military appellate judges may be detailed to other assignments for whatever reason and have no fixed term of office.[267]

After finding, under the *Morrison* test, that military judges should be classified as principal officers, but compare poorly with Tax Court judges (who may be principal officers), Justice Souter concluded that the arguments for classifying military judges as either principal or inferior officers were equally balanced.[268] Unable to tip the scale, Justice Souter applied a formalist approach by deferring to Congress's determination that military judges are inferior officers because of Congress's chosen method of appointment.[269]

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[264]*Id.*

[265]*Id.* at 768 (Souter, J., concurring). Justice Souter noted that the analogy to Tax Court judges may not even be appropriate because they may not be principal officers. *Id.* The Justice cautioned that "though *Freytag* holds that the Tax Court is a 'Cour[t] of Law' that can appoint inferior officers, it may be that the Appointments Clause envisions appointment of some inferior officers by other inferior officers." *Id.* (alteration in original). In other words, the judges of the Courts of Law may be inferior officers. *But see infra* notes 288-97 and accompanying text (positing that the Framers intended Courts of Law to be principal offices).

[266]Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring).

[267]*Id.* at 768-69 (Souter, J., concurring).

[268]*Id.* at 769 (Souter, J., concurring).

[269]*Id.* (quoting In re Sealed Case, 838 F.2d. 476, 532 (D.C.C. 1988) (Ginsburg, J., dissenting), *rev'd*, Morrison v. Olson, 487 U.S. 654 (1988). In other words, Congress expressly would have required military judges to be separately appointed by the President with the advice and consent of the Senate if it considered them to be principal officers.

As Justice Souter perceptively observed, if military judges are principal officers, the appointment to their inferior commissioned military officer position cannot be extended to authorize the performance of their significantly greater duties as military judges.[270] Although the President appointed, with the advice and consent of the Senate, the military personnel to their inferior military offices,[271] neither branch at that time seriously considered the fitness of such officers to serve as military judges.[272] Therefore, allowing commissioned military officers to be designated as military judges without a proper second appointment "would amount to an impermissible abdication of both political branches of their Appointments Clause duties."[273]

Further, Justice Souter demonstrated that the *Morrison* test is unsuitable in distinguishing principal from inferior officers.[274] The unworkability of the characteristics used in the *Morrison* test is due to their misapplication. That is, the characteristics of tenure, duties, jurisdiction, and removability were intended to establish the existence of an office and not to classify an office as either inferior or principal.[275] In extending this analysis to

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Accordingly, Justice Souter accepted Congress's judgment.

[270]*See supra* notes 255-57 and accompanying text.

[271]Thus, military judges were appointed in the manner provided for principal officers when they were commissioned as military officers. *See supra* note 3 (setting forth the text of the Appointments Clause).

[272]*See supra* note 256 and accompanying text.

[273]See *supra* notes 255-57 and accompanying text (providing Justice Souter's concurring opinion in *Weiss*).

[274]*See supra* note 265 and accompanying text. By refusing to accept the conclusion, after applying the *Morrison* test, that military judges are principal officers, Justice Souter apparently sensed the inadequacies of that test.

[275]Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting). Justice Scalia scorned the majority's misapplication of the characteristics of tenure, duties, and jurisdiction to distinguish principal from inferior officers. *Id.* The dissenting Justice declared that "it is not clear from the Court's opinion why the factors it discusses . . . are determinative of the question of [the classification of an office]." *Id.* Justice Scalia noted that these characteristics were used to distinguish "an 'officer of the United States' . . . as opposed to a mere *employee*" rather than an inferior from principal officer. *Id.* (citation omitted). The Supreme Court has also considered the independence of a position's holder from a higher governmental official to determine if he is an officer as opposed to an employee. *See supra* notes 41-42, 62 and accompanying text. The *Morrison* test's

classify an office as either inferior or principal, the Court failed to establish how limitedly or extensively these characteristics must be satisfied in order to be at least an inferior officer as opposed to an employee and a principal rather than an inferior officer, thereby leading to inconsistent conclusions.

Generally, the Court's analysis went as follows. If the Court determined that the position was not limited in tenure, jurisdiction, or duties, and its holder was not subject to the control of a higher official, the Court concluded that the position was an office and not an employment.[276] Being an office, the position had to have been at least an inferior office. The Court then applied these same characteristics when classifying the office as either inferior or principal.[277] That is, if the office was not limited in jurisdiction, tenure, or duties, and its holder was not subject to the control of a higher official by being unremovable, it was a principal office. By applying these characteristics at both levels without establishing how limitedly or extensively the characteristics must be satisfied to make a position employment, an inferior office, or a principal office, *Morrison*'s test makes it possible to classify the same office as both inferior and principal.

Rather than establishing a distinctive manner of applying these characteristics at both levels, the Court has either: (1) determined, in an *ad hoc* manner, which classification to give an officer, and then retroactively downplayed the officer's characteristics to conform to its desired conclusion;[278] or (2) applied its previous formalist approach of defining an

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removability factor is essentially an examination of the officer's independence from a higher governmental official.

[276]*See supra* notes 14-74 and accompanying text.

[277]*See supra* notes 75-88 and accompanying text.

[278]For instance, in *Morrison*, the Court diminished the independent counsel's tenure, duties, jurisdiction and independence so that it could classify the office as inferior. *See* Morrison v. Olson, 487 U.S. 654, 715-18 (1988) (Scalia, J., dissenting) (refuting the majority's examination of the characteristics of tenure, duties, jurisdiction, and removability of the independent counsel); Laura L. Cox, Note, *Political Accountability and the Independent Counsel: A Sheep in Wolf's Clothing?*, 57 CINN. L. REV. 1471, 1498-99 (1989) ("The [*Morrison*] Court's determination that the independent counsel is an inferior officer seems to be primarily a policy decision designed to preserve the validity of the independent counsel provisions . . . ."); Owen, *supra* note 19, at 552 (explaining that the *Morrison* Court's "determination of the tenure, duration, and duties of the office of the independent counsel diverged greatly from the realities of the position's characteristics").

office by looking at Congress's chosen method of appointment.[279] Accordingly, the Court's failure to distinguish the manner in which the characteristics of the *Hartwell* and *Morrison* tests should be applied to distinguish officers from employees and principal from inferior officers does nothing more than permit courts to conduct standardless, whimsical determinations in each individual case.[280]

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[279]For example, Justice Souter, in his concurring opinion in *Weiss*, deferred to Congress's decision that military judges are inferior officers after being unable to make the determination using *Morrison*'s test. *See supra* notes 268-69 and accompanying text. For the Court's previous cases wherein it applied a formalist approach, see *supra* notes 29-31, 36-37, 44 and accompanying text. A formalist approach to defining and classifying officers negates the purpose of the Appointments Clause. *See* Owen, *supra* note 19, at 541 ("[Under the Court's formalist approach,] an appointment can never be struck down as unconstitutional; if the Court looks to the method of appointment to determine the nature of the office instead of looking to the office itself to determine whether the method of appointment is constitutional, the Court does not normatively assess the method of appointment.")

[280]*See* Owen, *supra* note 19, at 549-52. Owen reasons that the decision in *Morrison*:

> [R]eflects [the Court's] inability to formulate concrete criteria to demarcate definitively between the levels of officials in the federal bureaucracy. . . . Hence, [the Court has] resorted to an argument of "we know an inferior [or principal] officer when we see [them]." By using this approach, the Court has failed an essential function, providing guidance to lower courts and to other branches of government as to the fundamental differences between the constitutionally mandated classifications of "officers," "inferior officers," and mere "employees."

Id. at 552 (footnote omitted). *See also* Bernstein, *supra* note 231, at 143 ("The false precision of the *Morrison* balancing test contains the potential for its great abuse."); Susolik, *supra* note 8, at 1557-58 (stating that the *Morrison* Court "failed to significantly develop an understanding of the relevant standards involved [in classifying officers]. The main problem was that [then] Justice Rehnquist did not elaborate on the reasons or principles he used to arrive at his conclusion. . . . As such, the [principal]/inferior officer distinction . . . [is] in as much disarray as [it was] before the case was decided"). For an example where a military court has applied the "I know it when I see it" approach to defining officers, see United States v. Weiss, 36 M.J. 224, 250 (1992) (Sullivan, C.J., dissenting) (concluding, without analysis, that military judges are inferior officers because Tax Court special trial judges are inferior officers), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994).

VI. A MORE OPERATIVE TEST TO CLASSIFY OFFICERS AS PRINCIPAL OR INFERIOR

In *Buckley*, the Supreme Court proffered a concise, functionalist definition of officers of the United States. The Court declared that officers, as opposed to employees, are all those who exercise "significant authority pursuant to the laws of the United States."[281] The *Buckley* Court's definition of officers of the United States, focusing singularly on the authority of the position, rather than its duration, should replace *Hartwell* and its progeny's use of the "characteristics test" in distinguishing officers from employees.[282] Similarly, the Court should classify officers as principal or inferior based upon the authority of their respective positions.[283]

The Court's *Hartwell* and *Morrison* "characteristic tests," which focus on the tenure, duration, and removability of the position, should be discarded because they are inconsistent with the purpose of Appointments Clause. The

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[281]*See supra* notes 55-63 and accompanying text (analyzing the *Buckley* decision).

[282]It is unclear whether *Buckley*'s "significant authority test" has replaced or merely clarified *Hartwell*'s "characteristics test." The Court in *Buckley*, after proffering the "significant authority test," failed to apply it. *See supra* note 55-74 and accompanying text. *See also* Freytag v. Commissioner, 501 U.S. 881, 881-82 (1991) (applying a combination of *Buckley*'s "significant authority test" and *Hartwell*'s "characteristics test" to conclude that special trial judges of the United States Tax Court are officers rather than employees). *But see* O'Keefe, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Theoretical Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOK. L. REV. 113, 130 n.69 (1982) (agreeing that *Buckley*'s "significant authority test" should replace *Hartwell* and its progeny's focus on the characteristics of tenure, jurisdiction, and duties); Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolutions Provisions of the United States - Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1302 (1992) (recognizing that, after *Buckley*, officers of the United States should be defined exclusively by the significance of the position's authority); Bernstein, *supra* note 231, at 139 (applying *Buckley*'s "significant authority test" to determine that members of the Federal Open Market Committee are officers of the United States).

[283]Brief for Appellees at 20, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279) (arguing that principal officers are those officers "who exercise sufficient authority and discretion as to require the acquiescence of two branches of Government in their selection"). For two alternative methods of classifying officers as principal or inferior, see Owen, *supra* note 19, at 555-59 (reasoning principal officers can be distinguished from inferior officers by examining whether the office is empowered to substantially infringe upon the powers of another branch of the Federal Government); Morrison v. Olson, 487 U.S. 654, 719-23 (1988) (Scalia, J., dissenting) (declaring that inferior officers, as opposed to principal officers, are subordinate to another governmental official).

Appointments Clause ensures that government personnel exercising important powers are *qualified* to perform their duties.[284] The "characteristics tests," by focusing on the duration that a person occupies a position, may allow unqualified persons to hold positions with significant authority but limited duration, by allowing them to escape the inquiry involved in the appointment process. For instance, if a particular position existed only for one day and the position's authority was significant, the holder of the position, under the "characteristics tests," would not be required to be appointed under the Appointments Clause. Consequently, this significant authority possibly could be exercised by persons unqualified to do so. *Buckley*'s "significant authority test," focusing solely on the importance of the position's duties, should replace the "characteristics tests" because it is more consistent with the purpose of the Appointments Clause.[285] In order to avoid the same whimsical determinations warranted under the *Morrison* test, however, the Court must adequately place parameters on how significant the office's authority must be for it to be considered principal rather than inferior.[286]

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[284]*See supra* notes 233-34 and accompanying text.

[285]*See* O'Keefe, *supra* note 282, at 129-30 n.69 ("It is suggested that the *Buckley* definition is preferable to and should be read as superseding that of [*Hartwell*]. The importance, not the term of the servant, should govern his or her status for the purposes of the [A]ppointments [C]lause.")

[286]*See* Burkoff, *supra* note 9, at 1366 (reasoning that employing *Buckley*'s "significant authority test" without adequately defining it results in a "I know it when I see it" approach); Tachmes, *supra* note 11, at 746 (cautioning that failing to place parameters on how broad an officer's authority must be to be considered principal results in courts making "*ad hoc* determinations as to the scope of a particular officer's power").

Although not at issue in this Comment, the Supreme Court must also determine how significant a position's authority must be for it to be considered an office rather than employment. Rather than comparing the authority of the position to others found to be offices by the Court in past cases, the Court should devise a standard that can be independently applied in each individual case. *See* Owen, *supra* note 19, at 550 (opining that a comparative method of defining offices leads to *ad hoc* decision-making and misapplications of prior precedent due to the "myriad of federal offices and duties"). One method to determine if a position possesses the significance of authority resembling an office is to examine the effect of the position's exercise of its authority. *See* Owen, *supra* note 19, at 554. Owen proposes a two-step analysis to determine if a position is an office rather than employment. Owen's analysis asks:

> First, *do the official's actions affect a traditional or vested right?* The officer's actions significantly affect individual rights if he has the power to set policy, establish and oversee programs, or supervise and overturn, where appropriate, an employee's actions. Second, *do the official's actions affect individual rights*

The Court should compare the authority of the office in question with that of a concrete example of a principal office, specifically those listed in the Appointments Clause.[287] This approach not only promotes consistency, but it also adheres to what the Framers themselves thought to be principal officers.

VII. CONCLUSION

A. COURTS OF LAW ARE PRINCIPAL OFFICES

The Supreme Court has yet to resolve the issue of whether Courts of Law, mentioned in the Appointments Clause, are principal offices.[288] The records of the Constitutional Convention, however, suggest that the Framers intended Courts of Law to be principal offices, and thus, judges presiding over Courts of Law to be principal officers, who must be appointed by the President with the advice and consent of the Senate.[289]

Governor Morris was the delegate who first introduced the Excepting Clause[290] of the Appointments Clause, which provides that Congress may

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on a broad scale? The officer's actions affect individual rights on a broad scale if the official's actions affect a large segment of the public.

Id. at 554.

[287]The Appointments Clause mentions six specific officers. Three of those officers, Ambassadors, other Public Ministers and Consuls and Justices of the Supreme Court, are all listed as principal officers in the Appointments Clause. *See supra* note 3 (setting forth the text of the Appointments Clause). The Appointments Clause, although empowering Congress to grant Courts of Law, Heads of Departments, and the President the power to appoint inferior officers, does not specifically state that these three officers are principal. *See supra* note 3 (setting forth the text of the Appointments Clause). There is general agreement, however, that Heads of Departments and the President are principal officers. The classification of Courts of Law, however, is fairly debated. For an argument that Courts of Law are principal officers, see *infra* notes 288-97 and accompanying text.

[288]*See* Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring) ("[T]hough *Freytag* [held] that the Tax Court is a 'Cour[t] of Law' that can appoint inferior officers, it may be that the Appointments Clause envisions appointment of some inferior officers by other inferior officers." (third alteration in original)).

[289]*See infra* notes 290-97 and accompanying text (examining the intent of the Framers).

[290]Recall, the provision in the Appointments Clause granting Congress the authority to vest the power to appoint inferior officers in the Courts of Law, Heads of Departments, or the President, is generally referred to as the Excepting Clause. *See supra* note 11.

delegate the appointment power of the inferior offices to the Courts of Law, Heads of Departments, or the President.[291] When Governor Morris moved to annex the Excepting Clause to Article II of the United States Constitution, James Madison objected.[292] Although Madison agreed that Courts of Law, Heads of Departments, and the President should have the power to appoint inferior officers,[293] he argued that other principal officers[294] with lesser authority than Heads of Departments should additionally have been given the power to appoint inferior officers.[295]

As Madison believed that there were other principal officers who should have been given the power to appoint inferior officers, he obviously also regarded those officers, who were already empowered to do so, as principal. That is, Madison must have considered the Heads of Departments, President, and judges presiding over the Courts of Law to be principal.[296] Assuming Madison's views of the Excepting Clause were shared by all the delegates, when they voted to add it to the Appointments Clause, Courts of Law are a principal office, and accordingly, judges presiding over such courts should be considered principal officers.[297]

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[291]2 FARRAND, *supra* note 11, at 627. *See also supra* note 3 (setting forth the text of the Appointments Clause).

[292]2 FARRAND, *supra* note 11, at 627.

[293]*Id.*

[294]Technically, Madison used the word "superior" rather than "principal." *See infra* note 295.

[295]2 FARRAND, *supra* note 11, at 627. Madison objected that the Excepting Clause "[did] not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." *Id.*

[296]*See* Brief for Appellees at 21, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279) ("[Madison's] statement indicates that, within the broad category of [principal] Officers, the Framers envisioned a sub-category of [principal] officers that included department heads as well as certain person below them. As '[principal,]' as opposed to 'inferior' officers, those persons would not fall within the ambit of the Excepting Clause, but instead were to be appointed by the President with the consent of the Senate, as prescribed by the remainder of the section.").

[297]Several commentators and courts have concluded that the Framers intended Courts of Law to be principal offices. Freytag v. Commissioner, 501 U.S. 868, 884 (1991) ("[T]he [Appointments] Clause bespeaks a principal of limitation by dividing the power to appoint the *principal* federal officers — Ambassadors, Ministers, Heads of Departments, and *Judges* — between the Executive and Legislative Branches." (emphasis added)); In re

B. MILITARY JUDGES ARE PRINCIPAL OFFICERS BECAUSE THEIR AUTHORITY IS AS SIGNIFICANT AS OTHER JUDGES PRESIDING OVER COURTS OF LAW

Although military courts are not Courts of Law,[298] the judges presiding

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Sealed Case, 838 F.2d 476, 481 (D.C. Cir. 1988) ("Among the officers who must be appointed by the President with the advice and consent of the Senate it seems most obvious to include the [H]eads of [D]epartments and [Courts of Law] since they are specifically empowered to appoint inferior officers. In fact, . . . the purpose of the [E]xcepting [C]lause was to ensure that [C]ourts of [L]aw and [H]eads of [D]epartments could appoint officers inferior to them; it was certainly not meant to allow the appointment of department heads without the advice and consent of the Senate." (footnote omitted), *rev'd*, Morrison v. Olson, 487 U.S. 654 (1988); Brief for Appellant at 33, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279) ("We are content to define the category [of inferior officers] as including those federal appointees who rank below judges and department heads."); E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 76 (1957) ("The term [inferior officer] seems to suggest in [the Appointments Clause] context officers intended to be subordinate to those in whom their appointment is vested, and at the same time to exclude the Courts of Law and [H]eads of [D]epartments."); Glitzenstein, *supra* note 12, at 364 ("[T]he officers listed in both the first and last part of the [Appointments C]lause, such as [A]mbassadors, other public [M]inisters and [C]onsuls, judges of the Supreme Court and the *[C]ourts of [L]aw*, and the [H]eads of [D]epartments, must be appointed by the President with the advice and consent of the Senate." (emphasis added)); Tachmes, *supra* note 11, at 747 ("The judges of the '[C]ourts of [L]aw' as well as the '[H]eads of D]epartments' should probably be treated as included among [the principal officers]. Because Congress may vest in the [H]eads of [D]epartments and in the [C]ourts of [L]aw the power to appoint inferior officers under the clause, by implication, these individuals cannot themselves be inferior officers.").

[298]Military courts are not Courts of Law because their decisions are reviewable by various nonjudicial Executive Branch officials. In *Freytag v. Commissioner*, the Supreme Court held that the Appointments Clause's reference to Courts of Law includes Article I courts that exercise judicial power and perform judicial functions exclusively. 501 U.S. 868, 889-90 (1991). The Court determined that the United States Tax Court was one of the Courts of Law because it was it exercising judicial powers exclusively, reasoning:

> The Tax Court exercises judicial, rather than executive, legislative, or administrative power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion of the judicial power of the United States.
>
> The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions.

over military courts should be considered principal officers because their authority is as significant as that of judges sitting on the United States Tax Court, federal district courts, and federal circuit courts, which all have been classified as Courts of Law.[299] As military judges are empowered to exercise similar judicial authority as these principal officers sitting on Courts of Law, they should additionally be classified, and consequently appointed, as principal officers.

Military judges, sitting on general courts-martial and some special courts-martial,[300] exercise significant judicial powers in the same manner as other judges on Courts of Law.[301] Military trial judges apply and interpret the UCMJ in cases between the Government and the accused.[302] Prior to, during, and after the trial, military judges are empowered to exercise significant judicial authority. For example, military trial judges are empowered to decide the admissibility of evidence, examine guilty pleas to prevent coerced confessions, regulate and enforce discovery, rule on challenges of court members for cause, rule on all interlocutory questions and questions of law that arise during the proceedings, enter a judgment notwithstanding the verdict, determine the findings and sentence, and hold post-trial sessions without the presence of the court members.[303]

Id. at 890-91.

In addition to looking at the functions of the Tax Court, the Court placed importance on their independence from the Executive and Legislative Branches to conclude that they were Courts of Law. *Id.* at 891. The Court reasoned that "[t]he Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President." *Id.* For this reason, military courts cannot be classified as Courts of Law. Although military courts exercise judicial powers exclusively, they are not independent of the other two branches because their decisions are reviewable by various members of the Executive Branch. *See supra* note 116 (setting forth the powers of the President, Secretaries of each Armed Force Branch, convening authorities, judge advocates, and Judge Advocates General to review the decisions of courts-martial); *supra* note 116 (setting forth the powers of the President and Secretaries to review the decisions of Courts of Criminal Appeals).

[299]*Freytag*, 501 U.S. at 891-92.

[300]The UCMJ does not require that all special courts-martial be presided over by a military judge. *See supra* note 98-100 and accompanying text.

[301]*See generally supra* notes 121-66 and accompanying text (setting forth the judicial powers of military trial judges).

[302]*See supra* notes 121-69 and accompanying text.

[303]*See supra* notes 121-66 and accompanying text.

Additionally, military appellate judges, in the cases they are called upon to review, are empowered to review those cases in the same manner as federal circuit judges.[304] Actually, military appellate judges possess greater authority than federal circuit judges as they are able to review *de novo* the facts in certain cases.[305] Further, military appellate judges may review petitions for extraordinary relief and governmental appeals.[306] Many commentators and courts have recognized the comparable status of military judges with judges of the Courts of Law.[307]

Military trial and appellate judges exercise authority as significant as the judges presiding over the principal offices of Courts of Law. Thus, military judges, under the proposed more operative test for classifying officers as principal or inferior, should also be classified as principal officers. Accordingly, inferior military officers, to be able to serve in the principal office of a military judge, must receive a second appointment to that position by the President with the advice and consent of the Senate.

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[304]*See supra* notes 167-79 and accompanying text (setting forth the Courts of Criminal Appeals' powers to review the sentence and findings of courts-martial).

[305]*See supra* notes 172-74 and accompanying text (stating those cases where Courts of Criminal Appeals can review the findings of courts-martial anew).

[306]*See supra* notes 169-70 and accompanying text.

[307]*See, e.g.*, Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring) (stating that military judges are "no more 'limited in duties' than lower Article III or Tax Court judges"); United States v. Weiss, 36 M.J. 224, 238 (C.M.A. 1992) (Crawford, J., concurring) (recognizing that the military judiciary is similar to the federal civilian judiciary "in their importance and scope of their duties"), *cert. granted*, Weiss v. United States, 113 S. Ct. 2412 (1993), *aff'd*, Weiss v. United States, 114 S. Ct. 752 (1994); *id.* at 248-49 (Sullivan, C.J., dissenting) ("[T]he Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in the American legal tradition." (quoting United States v. Graf, 35 M.J. 450, 465 (C.M.A. 1992)); *id.* at 260 (Wiss, J., dissenting) (stating that Congress intended military trial judges' roles to be "more closely approximate to that of a civilian trial judge" (quoting 114 Cong. Rec. 30564 (1968)); Courtney v. Williams, 1 M.J. 267, 272 (C.M.A. 1976) (Ferguson, J., concurring) (stating that military trial judges "have all the prestige and authority of other federal trial judges, wherever practicable"); Brief of Petitioners at 6, Weiss v. United States, 114 S. Ct. 752 (1994) (No. 92-1482) ("Military trial judges are, for all practical purposes, the equivalent of United States District Judges . . . ."). Fuger, *supra* note 138, at 210 ("A court-martial is, in almost all respects, the equivalent of a criminal trial in any federal district court in the country with the major difference being that the participants wear military uniforms."); *supra* notes 128, 130, 135, 144, 149, 154-156, 158, 160, 169, 171.