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Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?

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Interest in and knowledge of the Uniform Code of Military Justice (UCMJ) and military law tends to wax and wane with the times. Periodically issues related to military justice gain the public’s attention and interest and a corresponding interest in the legal and academic communities increases. At other times, interest in military justice tends to be limited to a fairly small group of academics and practitioners and the subject garners little attention outside of this small circle. Currently we are in a period where military justice seems to be attracting a significant amount of attention by the public, the courts, Congress, and legal scholars. While it would be a stretch to say that this level of interest in unprecedented, the degree and duration of this interest is certainly unusual.

Current interest in these issues can be attributed to two primary factors. First, over the past few years there have been a number of high profile criminal cases and investigations within the military justice system that have attracted public attention, both domestically and internationally. Likely the most significant high profile issues have focused on the detainee abuse scandal at Abu Ghraib and the follow-on investigations and criminal trials. Politicians, legal scholars, the American public, and the world community have observed the military’s handling of the investigations and the criminal cases that followed or did not follow as the case may be. There have also been several

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other incidents and cases coming from the battlefields of Iraq and Afghanistan that have caught the public’s eye as we examine how the military justice system operates.

Along with the attention that these high profile cases have attracted, there is another recent development which has placed the spotlight on military justice. This of course is the attention that has come as a result of the President’s decision to try certain “unlawful enemy combatants” by military commission. While the use of military commissions is certainly not without historical precedent, this is the first time that military commissions have been used by the United States since the promulgation of the UCMJ in 1951. Because of this, there has been a constant comparison between the military justice system established under the UCMJ and the various versions of the military commission put forth by the President and ultimately codified under the Military Commissions Act.² And there has been a consistent call by those critics of the military commissions for the President to prosecute unlawful enemy combatants under the UCMJ.³ This call seems to be based on both a recognition that in many ways the system established under the UCMJ has developed into a mature legal system capable of balancing the rights of the individual against the interests of the state, and a recognition that for all its faults, the UCMJ is still a much better and much fairer system of justice than the system now codified under the Military Commissions Act.

The attention that is now focused on the UCMJ because of these high profile cases and because of the establishment of the military commissions has in a sense created a perfect storm. Given this attention, the time seems right for academics, policy makers, ² Military Commissions Act of 2006, 10 U.S.C. §§ 948a-950w (2006).
³ Hamden Amicus Briefs – http://www.law.georgetown.edu/faculty/nkk/publications.html#h.
and the public to reexamine our military justice system to see if it is up to the task of functioning on the modern battlefield and to question whether it really does strike the appropriate balance between individual rights and the interests of the state in maintaining an effective fighting force. In light of this renewed interest, this article calls to attention the revolution that has taken place and is taking place within the military justice systems of other democracies that share a common law tradition. This revolution, which began in the early 1990’s and continues today; significantly changed what has traditionally been one of the hallmarks of a military justice system: the role of the military commander in military justice.

Canada was one of the first countries to lead this revolution and it began in the rather ordinary case of a soldier charged with narcotics offenses and desertion. The soldier was tried by a general court-martial, found guilty and sentenced to fifteen months imprisonment and a dishonorable discharge from the service. He appealed his conviction first through the military system and ultimately through the federal system to the Supreme Court of Canada. He claimed that the military court-martial system violated his rights to an independent and impartial tribunal guaranteed by the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada invalidated the court-martial conviction because, according to the court, there was a lack of necessary judicial independence in the court-martial system, and because there was insufficient institutional independence due to the structural involvement of the military commander in the system. As a result, Canada significantly revamped its military justice system.

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5 Id. at 272.
Later in the decade, this revolution spread to the United Kingdom, which changed significant aspects of its military justice system based on the United Kingdom’s treaty obligations under the European Convention on Human Rights and an opinion by the European Court of Human Rights in the case of Findlay vs. the United Kingdom. In that case the European Court of Human Rights held that the United Kingdom’s military justice system violated Findlay’s right to an independent and impartial tribunal, guaranteed by the European Convention. The court’s holding was based in large part on the degree of control and involvement that a military commander enjoyed under the British system.

Since these cases and the subsequent modifications to Canada’s and Great Britain’s military justice systems, a number of other countries have reexamined their systems and have either modified or are considering modifications that would significantly alter and limit the role and the influence that the military commander has over the military justice system.

In light of the attention that is now being paid to the UCMJ and the United States’ system of military justice and with the changes that have taken place in other military systems that share a common heritage, this paper will examine whether the United States should join this revolution. Part I examines the goals of a military justice system and how a commander’s involvement is designed to achieve those objectives. Part II of the paper looks in some detail at that revolution in modern military codes of Canada, and the United Kingdom, the reasons for the changes and how those systems have been

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restructured. In Part III, the article compares the approaches of the Canadian Supreme Court and the European Court of Human Rights, with the approach taken by the United States Supreme Court in the few cases where the U.S. Supreme Court has been asked to examine structural aspects of the UCMJ. Part IV of the paper highlights the various proposals to change the structure of the UCMJ as it relates to the role of the commander. In Part V, the paper examines some consequences of diminishing a commander’s involvement in military justice. This section also discusses whether the UCMJ is indeed lagging behind the developments in other countries. In the last section, the article suggests that this is the appropriate time for Congress to re-examine certain provisions of the code relating to a commander’s role. This section also offers specific recommendations for Congress to consider in making a more accurate assessment of the appropriate role for the military commander to ensure that changes are not made just for the sake of change and, more importantly, the changes that are made will support the legitimate objectives of a military justice system.

**Goals of the System and the Role of the Commander**

**Goals of a Separate Military Justice System**

Any discussion of changing the military justice system must begin with an understanding of what the goals and objectives of a military justice system are, the role that the commander has traditionally played in that system, and how the commander’s role is designed to support those objectives. To some degree the goals of a military justice system differ from the goals and objectives of a civilian justice system, hence the need for the creation of this separate system.

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First and foremost, military justice is one of the primary tools which a military commander has to maintain discipline within the ranks.\textsuperscript{9} Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands. Even in peace time, commanders must establish and maintain a high level of respect for authority. Military leaders in the United States are trained to develop and maintain this level of discipline primarily through leading by example, maintaining high standards of performance and readiness, attention to the needs of both the individual soldiers and the requirements of the military organization, and other such positive leadership techniques.\textsuperscript{10}

However, a military organization is like none other. Soldiers may be ordered to sacrifice their lives in order to accomplish a mission or an objective. In some instances, positive leadership may not be enough to maintain the level of discipline required by the situation. A system that provides the commander the means to impose swift and summary punishment to maintain discipline and obedience is thus a critical aspect of any military justice system.\textsuperscript{11}

Maintenance of discipline is a hallmark of military justice, but it is not, as some assume, the be all and end all of military justice, particularly in a democracy. One of the lessons that the United States military learned during WWII is that a system that lacks fundamental fairness and a respect for individual rights can be counter-productive.\textsuperscript{12} Loyalty is an essential aspect of an effective military. Loyalty to both superiors and subordinates is an essential part of the military ethos.\textsuperscript{13} This reflects that soldiers must

\textsuperscript{10} U.S. Dep’t of Army, Army Field Manual FM 22-100 (1999).
\textsuperscript{12} Lederer and Hundley, supra note 9, at 636-37.
\textsuperscript{13} U.S. Dep’t of Army, Army Field Manual FM 22-100, chapter 1 paragraph 1-68 (1999).
be loyal to their superiors and willing to support the unit’s mission and in turn the senior leaders owe a measure of loyalty to the soldiers they command. A justice system that is seen - particularly by the enlisted ranks - as arbitrary and unfair detracts from that loyalty. In such a system soldiers may become resentful of superiors. This resentment can lead to lack of trust and confidence and ultimately to a weakening of discipline.

Additionally, in a democracy, support for the military by broader society is essential. This support is not only critical in general terms but more directly, those who join the military and those who send their family members into the military must have confidence that they will be cared for and treated fairly. A justice system that is seen as unfair and arbitrary undermines the support of the public which the military serves and from whose population its ranks are filled. Thus another critical aspect of an effective military justice system is one that shows respect for individual rights and is perceived by members of the force and by the broader public as fair. A military justice system that creates and maintains loyalty within the ranks by showing respect for individual rights serves to support the internal sense of discipline that a military seeks to develop among its members.

Every military draws its members from the population it serves. Various mechanisms from universal conscription to an all-volunteer force serve as the means for bringing the public into the ranks of the military. To a greater or lesser degree the members of a military organization reflect the values, customs and attitudes of the general public. That said, in many ways the military law is treated separate and apart

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14 Id.
15 Hirschhorn, supra note 11.
from state or federal law. The may reflect the treatment of military as separate and apart from civilian society. It has its own values, attitudes, customs and norms. From the first day of basic training service members are taught to subordinate the interests of the individual to the needs of the organization.

These unique values, norms, and attitudes that create this separate society should be reflected in the military justice system. Service members who know the impact that insubordination has on a military organization should sit in judgment of those accused of disobedience to orders. Those who know first hand how the rights of the individual must be balanced against the needs of the organization should decide where that line should be drawn. Those who have served in combat and have trained for war should judge the behavior of soldiers on the battlefield charged with violating the laws of war. One goal of a military justice system, then, is to reflect the values of the organization and to judge the conduct of individual soldiers by those who are equipped with the expertise to make those judgments.

Another, sometimes overlooked goal of a military justice system is that it must be deployable. It must be capable of functioning when military forces are over seas or otherwise outside the reach of the civilian courts. The need for this deployability has both a practical and more theoretical component. Practically speaking, if cases that arise while the force was deployed had to be sent back to the home country for adjudication the effectiveness of the system would be severely undermined. It is impractical to expect that a commander could or would dedicate the time and resources needed to send the

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18 For an example of this basic training process, see THOMAS E. RICKS, MAKING OF THE CORPS (Scribner 1998) (1997).
accused soldier, the relevant witnesses, and evidence back to the home country for adjudication, particularly during combat or military operations. It is also unlikely that the commander would wait to resolve these cases until the unit redeployed. Without a justice system that can follow the commander into a deployed environment, the commander may operate outside of any established system.

In addition to this practical consideration is also the goal that the United States and many other democracies want to achieve during a deployment. By having a justice system that can travel with the forces into combat and other operations a military encourages its forces to respect the rule of law. This military force also garners respect and trust from the world community. This trust and respect can certainly carry over to world opinion about the legitimacy of the military operations. Of course the contrary is also true: when U.S. forces or any forces operate outside the rule of law with regard to their own forces the legitimacy of any military operation is significantly undermined.

One final objective of a military justice system that is particularly relevant to the United States is the reinforcement of the civilian control over the military. Congress has the primary responsibility to make rules for the regulation of the armed forces. Ultimately, balance between the needs of the military and the rights of individual service members is struck primarily by elected officials. The military justice system is an expression of the nation’s collective will over how much authority we as a society are willing to give to our military leadership. Such a system reinforces the notion that the military derives its authority from civilians and in so doing helps to minimize the risk of a military coup and helps protect civilian supremacy over the military.

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20 Hirschhorn, supra note 11, at 239.
Role of the Commander and the Court-Martial System

There is simply no civilian counterpart to a commander in the civilian justice system. To many this has served as a starting point for their criticism of military justice. Basing criticisms of the military justice system on this point alone, however, is both pre-mature and sometimes misplaced. Before one can criticize the power that a commander holds over military justice, it is essential to understand how the commander’s position attempts to achieve the sometimes competing goals of the system.

From before the establishment of the Constitution until well into the 20th Century U.S. military commanders enjoyed a position of almost absolute power within military justice. Commanders had a virtual unfettered right to discipline soldiers for violations of the military code. Until the 1916 amendments to the Articles of War there was no system of appellate review of court-martial findings and sentences and until 1920 commanders had the power to disapprove of any court-martial finding and even order the retrial of an acquitted soldier.

It is easy to be dismissive of a system where this level of control is vested in one office. In light of some of the objectives of a military justice system, however, many of these goals are achieved by vesting the commander with such authority. The commander in this system had the ability to use the justice system as an effective and swift disciplinary tool to ensure obedience to orders. The absolute power of the commander in this system also reflected the unique society that sets the military community apart and it

22 Lederer and Hundley, supra note 9, at 633-34.
24 THE ARMY LAWYER at 137.
was a system that took into account the overriding need for the organization to achieve its objectives even at the expense of the individual soldier. Such a system also functioned in a combat environment and because the system was authorized and established by Congress it reflected to some degree the collective will of the society at large regarding military justice matters.

There are of course problems with a system that gives the commander such absolute control over military justice matters. The rights of the individual soldier are rarely accorded much weight or consideration and commanders with such power can easily abuse the system to the point where the rule of law is replaced by a commander who operates as a law unto himself. Such absolute power in the hands of one person can also pose a threat the civilian control of the military. As the commander is given more power to act without any outside check on his authority, his appetite for such power can increase and the temptation is always there that a military lead by such leaders can potentially turn against the civilian leadership.

The pressures to reform aspects of the U.S military justice system began in the near the end of WWI.25 Major General Crowder, the Provost Marshall General of the Army, was a strong proponent of the then existing system, which kept the commander as the focal point of the military justice system. Brigadier General Ansell was the acting Judge Advocate General of the Army and he argued for major reforms to the system that would reduce the role of the military commander and give greater protection to individual

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25Lederer and Hundley, *supra* note 9, at 636.
rights. In the short term, General Crowder’s position won out in the 1920 Articles of War.\textsuperscript{26}

The conclusion of WWII saw a ground swell of support for reforms to the military justice system. During the war many in uniform were subjected to what they believed was an unfair and arbitrary system of justice.\textsuperscript{27} Due in large part to these pressures Congress held extensive hearings and ultimately drafted the UCMJ, which was signed into law by President Truman in 1951.\textsuperscript{28} The UCMJ was seen as a compromise between the proponents of individual rights and those who wanted to maintain the commander as the source of virtual unlimited control over military justice.\textsuperscript{29} Since the enactment of the code in 1951 there have been two significant amendments to the code in 1968\textsuperscript{30} and 1983.\textsuperscript{31}

Taken together, the 1951 UCMJ and subsequent amendments have given individual soldiers greater rights and protections than had existed prior to the code, by limiting the control and influence a commander can assert over the courts-martial process. Some of the significant systemic changes included the establishment of the military service courts of review,\textsuperscript{32} the civilian court of appeals for the armed forces,\textsuperscript{33} and ultimately, review by the U.S. Supreme Court.\textsuperscript{34} Review by the civilian Court of Appeals for the Armed Forces in particular was designed to be a significant check on the

\textsuperscript{26}Id.
\textsuperscript{28}Id. at 187-188.
\textsuperscript{29}Lederer and Hundley, supra note 9, at 637.
\textsuperscript{32}See UNIFORM CODE OF MILITARY JUSTICE §866, art. 66 (1983) [hereinafter “UCMJ”]. Review by this court is automatic for any sentence that includes a punitive discharge or a sentence to confinement of one year or more. See art. 66(b)(1).
\textsuperscript{33}See UCMJ. §867, art. 67.
\textsuperscript{34}See UCMJ. §867, art. 67(a).
commander’s operation of the military justice system. Other significant systemic reforms included the creation of the position of the military trial judge and the creation of the trial judiciary to appoint judges to individual courts-martial. Safeguards were also created under Article 37 of the code to prevent those participating in the court-martial, including the military judge, the attorneys, and the members from suffering any adverse personnel actions based on their participation in the courts-martial. A number of other protections were put into place to prevent the risk of the commander attempting to unlawfully influence the court-martial process.

While these reforms to the military justice system were designed to limit a commander’s ability to unlawfully influence a case, there are several areas where the commander still has the legal authority to assert command control over the process. Under the current version of the UCMJ, the commander who holds the position of a court-martial convening authority still has extensive power in investigating and charging soldiers, conducting summary disciplinary actions, and in the court-martial process.

Before trial, the commander has the authority to order investigations into misconduct. Each service has an established regulatory process that allows the

35 See UCMJ. §826, art. 26.
36 See UCMJ. §837, art. 37.
37 Some of these additional protections include Article 34 which required the convening authority to obtain advice from a staff judge advocate (legal advisor to the commander) before any charge is referred to a general court-martial and a requirement that each commander exercise his or her own independent judgment as to the proper disposition of the case without influence from a superior authority. See RULE FOR COURTS-MARTIAL, Rule 306(a), reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-25 (2005). In spite of these protections, unlawful command influence continues to plague the military justice system and many of the reported cases by the Court of Appeal for the Armed Forces and its predecessor the Court of Military Appeals, have dealt with this issue. It is beyond the scope of this paper to explore these issues in detail. Suffice it to say that as the appellate courts have recognized, unlawful influence is the “mortal enemy of military justice.” United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986).
38 See RULE FOR COURTS-MARTIAL, Rule 303, reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-19 (2005).
commander to appoint individuals and boards to conduct investigations.\textsuperscript{39} In addition, each service has a number of investigative agencies to conduct investigations from minor infractions to the most serious offenses.\textsuperscript{40} None of these agencies, however, has the independent authority or ability to dispose of a criminal charge against a service member under the UCMJ. Only a commander of that service member has that authority to dispose of the case by dismissing the charges, adjudicating the charges within his or her level of authority, or forwarding the charges to a superior commander for disposition.\textsuperscript{41} Practically speaking commanders are assisted by their legal advisors throughout this process, but at the end of the day, it is the commander and only the commander who can decide the disposition of the case and the commander can certainly ignore the advice of his legal advisor.

In addition, the UCMJ gives commanders significant authority to conduct non-judicial punishment\textsuperscript{42} and summary courts-martial rather than referring the case to a court-martial. Briefly, non-judicial punishment under Article 15 of the UCMJ allows the commander to be the sole adjudicator of charges which the commander brings against the service member. In this proceeding the commander serves as the finder of fact, deciding first upon the guilt or innocence of the accused, and if the accused is found guilty, the commander can impose any punishment within his level of authority. Depending on the rank of the service member involved and the rank of the commander imposing

\textsuperscript{39} As an example, see Department of Army, Regulation 15-6, Procedure for Investigating Officers and Boards of Officers (1988).

\textsuperscript{40} Examples of these agencies include each service’s Inspector General Office, The Army’s Criminal Investigation Division, the Navy and Marine Corps Naval Criminal Investigative Service, and the Air Force’s Office of Special Investigations.


\textsuperscript{42} See UCMJ, §815, art. 15.
punishment, such punishment can include reductions in rank, restrictions on the accused’s liberty to specified limits for up to 45 days, imposition of extra duty for up to 45 days, correctional custody for up to 30 consecutive days and forfeitures of pay.\textsuperscript{43} Although in most cases the service member has the right to refuse adjudication under Article 15 of the UCMJ\textsuperscript{44} and demand trial by court-martial, a significant number of cases within the military are disposed of under this process over which the commander enjoys significant control.\textsuperscript{45} A service member has only a limited appeal under Article 15 to the next higher commander within the chain of command.\textsuperscript{46}

In addition to this non-judicial punishment power, commanders also have the authority to convene summary courts-martial. In a summary court, the commander will appoint an officer within the command to serve as the summary court officer. The summary court officer has authority similar to that enjoined by the commander under non-judicial punishment. At a summary court the court officer is the finder of fact and if the accused is found guilty, the summary court officer will impose a sentence which could include up to one month confinement, reduction in rank and forfeiture of pay.\textsuperscript{47}

\textsuperscript{43} See UCMJ. §815, art. 15(b). The specific formulation for the imposition of these punishments is complex and is further governed by each service’s implementing regulations and a complete description is beyond the scope of this paper. Suffice it to say that the ability to impose non-judicial punishment is a significant disciplinary power over which the commander had virtual total control.

\textsuperscript{44} See UCMJ. §815, art. 15(a). Also, in the Navy and Marine Corps, if the service member is aboard a ship that is underway, he or she does not have the right to demand trial by court-martial.

\textsuperscript{45} In 2006, the Army imposed non-judicial punishment in 42,814 cases for a rate of 74.53 per thousand service members, the Navy/Marine Corps imposed non-judicial punishment in 26,080 cases for a rate of 4.9 per thousand service members, and the Air Force imposed non-judicial punishment in 7,616 cases for a rate of 21.78 per thousand service members. See Annual Report of the Code Committee on Military Justice, Appendices to report Sections 3, 4, and 5 (Fiscal Year 2006), available at: http://www.armfor.uscourts.gov/annual/FY06AnnualReport.pdf.

\textsuperscript{46} See e.g. U.S. Dep’t of Army, Army Regulation 27-10, Military Justice, Paragraph 3-33 (2005).

\textsuperscript{47} See UCMJ. §820, art. 20.
As with non-judicial punishment, the service member can refuse to have his case adjudicated by summary court and can instead demand trial by court-martial.\textsuperscript{48}

For cases that are disposed of by general and special courts-martial the commander still has considerable authority to assert command control over the court-martial process.\textsuperscript{49} As mentioned above, it is ultimately the commander who decides which cases are tried at a special or general courts-martial. Not only does the commander select the forum for the case, he also selects the members who will hear the case if the accused elects to be tried by a military panel. Under Article 25 of the UCMJ, the commander is charged with personally selecting those members to serve who in his opinion are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”\textsuperscript{50} Beyond the selection of the members who will hear the case, the commander/convening authority has several significant functions during the course of the trial.

The convening authority can order depositions to be taken in a pending case.\textsuperscript{51} The convening authority approves and authorizes funding for witness travel.\textsuperscript{52} He also approves the employment and funding of expert witnesses requested by either the

\textsuperscript{48} \textit{Id.}
\textsuperscript{49} In referring to the court-martial process here the article refers to the two levels of court-martial beyond a summary court. Under the UCMJ these two levels of court-martial are referred to as special courts-martial and general courts-martial. Both levels of court martial are authorized to hear any case arising from a violation of the punitive articles of the code. However, special courts-martial have jurisdiction limits placed on the sentence they can impose. \textit{See} UCMJ, §819, art.19. In addition, the minimum number of members necessary to adjudicate a special court is three. General courts-martial on the other hand have no such jurisdictional limits on a sentence and can impose any sentence authorized for the specific offense that is authorized by the code, including death. In addition, the minimum number of members needed to hear a general court-martial case is five and in the case where the death penalty is sought, the minimum number is twelve. \textit{See} UCMJ, §818, art. 18; \textit{RULE FOR COURTS-MARTIAL, Rule 501, reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-42 (2005).}
\textsuperscript{50} \textit{See} UCMJ, §825, art. 25(d)(2).
\textsuperscript{51} \textit{See} RULE FOR COURTS-MARTIAL, Rule 702(b), \textit{reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-59 (2005).}
prosecution or the defense. The convening authority is also authorized to grant both transactional and testimonial immunity for any witness subject to the UCMJ. If the accused desires to enter into a guilty plea, any such pretrial agreement is negotiated between the accused and the convening authority directly and any such agreement is binding on the court. The convening authority can also order an inquiry into the mental capacity or mental responsibility of the accused.

At the conclusion of the trial, if the accused is found guilty of any offense, the convening authority continues to have significant involvement in the case. The convening authority must approve both the findings and the sentence of the court-martial before it becomes final. At that time the convening authority may dismiss any charge or specification by setting aside findings of guilt; change the findings of guilt of a charge to a lesser included offense; modify the sentence to any lesser sentence, and order a proceeding in revision or rehearing. No rehearing or proceeding in revision can reconsider a finding of not guilty. The commander’s authority to modify the findings

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52 See RULE FOR COURTS-MARTIAL, Rule 703(e), reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-63 (2005).
53 See RULE FOR COURTS-MARTIAL, Rule 703(d), reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-63 (2005). In some regards the convening authority’s power to fund and authorize witness employment and travel is limited by the military judge’s ability to abate the proceedings if the convening authority refuses to fund a witness that the military judge has deemed essential to the case. Nevertheless, obtaining the convening authority’s authorization for witness funding is not a mere formality and the convening authority’s use of the power of the purse can certainly have an impact on the trial.
56 See RULE FOR COURTS-MARTIAL, Rule 706, reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES at II-69 (2005).
57 See UCMJ. §860, art. 60(c)(3)(A).
58 See UCMJ. §860, art. 60(c)(3)(B).
59 See UCMJ. §860, art. 60(e).
60 Id.
and sentence in this manner is viewed as “a matter of command prerogative involving the
sole discretion of the convening authority.”

Keeping in mind the goals of a military justice system set out above, the system
set out in the UCMJ does seek to achieve many of these goals. Even though the
convening authority maintains a degree of control which would never be allowed in
civilian courts, such control in the hands of one person in many ways facilitates the
effectiveness of a military unit. The United States is not the only military that has
historically allowed the commander to assert significant command control over military
justice. This control of course creates a tension between the justice system and the rights
of the individual soldier. This tension is nothing new. What is new, however, is the
changes that are taking place in military justice systems of other democracies which have
a tradition similar to the United States. These changes, which began in the early 1990’s
and continue today, have significantly altered the role of the military commander in those
military justice systems. This next part examines in some detail the revolution in the
modern military codes of Canada and the United Kingdom, and the impetus for these
changes.

**Changes to the Military Commander’s Role in Canada and the UK**

**Canada**

The revolution in the Canadian military justice system came as a result of the
Canadian Supreme Court’s opinion in the case of Michel Genereux. Genereux was a
corporal in the Canadian Army stationed at a military base in Quebec. In September
1986 Genereux’s residence was searched pursuant to a warrant, and during the search

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61 See UCMJ, §860, art. 60(c)(1).
several illegal drugs were found, including cocaine and hashish. Genereux was subsequently charged with possession of narcotics for the purpose of trafficking and desertion from the Army, both offenses punishable under the Canadian National Defense Act.  

Genereux’s immediate commander recommended trial by court-martial for the offenses charged and in May 1989 Genereux was tried by a military court-martial. The court-martial found him guilty of one count of possession and two counts of possession for the purpose of trafficking. The court-martial did not find him guilty of desertion but did find him guilty of the lesser offense of absent without leave. He was sentenced to fifteen months imprisonment and a dishonorable discharge from the service.

Genereux appealed his conviction first through the military appeals system and then through the Canadian federal courts. The case reached the Supreme Court of Canada on the following issues relevant to this discussion:

1. Do ss. 166 to 170 of the National Defence Act, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms?

2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

3. Does s. 130 of the National Defence Act, R.S.C., 1985, c.

63 Id. at 269.
64 Id. at 270.
65 Id. at 271 – 272.
66 Id. at 272.
67 Id.
N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?

4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*? 

In taking up these issues, the Court first noted that the Canadian military justice system has a purpose beyond just maintaining discipline and integrity in the armed forces. The Canadian National Defense Act also makes any act or omission that is punishable under the Canadian Criminal Code or Act of Parliament an offense under the code of service discipline. Thus, the Canadian military justice system also serves some of the same purpose of other ordinary criminal courts – to punish wrongful conduct which threatens public order and welfare. Because the military justice system has a shared purpose with its civilian counterparts, the court held that constitutional principles are applicable to the military court system.

It is significant for this discussion that Genereux did not challenge the impartiality of the actual court-martial by which he was tried. There was no evidence proffered and the court did not consider any evidence to suggest that the court-martial was actually

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68 R. v. Genereux at 279 – 280. Section 1 of the Charter provides: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Section 7 of the Charter provides: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 11(d) of the Charter provides: Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. See Canadian Charter of Rights and Freedoms, available at: http://laws.justice.gc.ca/en/charter/.

69 R. v. Genereux at 281.
biased.\textsuperscript{71} Instead, the court sought to determine whether a reasonable person would have been satisfied that the court-martial system that existed at the time was independent.\textsuperscript{72} According to the court, in order to be independent, the status of the tribunal must guarantee freedom from interference by the executive and legislative branches as well as other external forces.\textsuperscript{73}

The court then set out three specific criteria to evaluate the independence of the military court-martial system. The first criteria is security of tenure. According to the court, what is essential is that the decision-maker only be removable for cause.\textsuperscript{74} Second, the decision maker must have a basic degree of financial security such that salary and pension is not subject to arbitrary interference in a manner that could affect judicial independence.\textsuperscript{75} Finally, there must be institutional independence with respect to matters of administration that directly relate to the tribunal’s judicial function, such as assignment of judges, sittings of the court, and court lists.\textsuperscript{76}

The court next examined the structure of the court-martial system in light of these standards. In doing so, the opinion identified many similarities of the then-existing Canadian system to the current U.S. system, such as responsibility placed on the commander for matters of discipline, a commanding officer’s authority to dispose of the matter in a summary proceeding, and the commander’s authority to convene a court-martial composed of members of the military.

\textsuperscript{70} \textit{Id.} at 281 – 282. \hfill \textsuperscript{71} \textit{Id.} at 284. \hfill \textsuperscript{72} \textit{Id.} \hfill \textsuperscript{73} \textit{Id.} at 283. \hfill \textsuperscript{74} \textit{Id.} at 285. \hfill \textsuperscript{75} \textit{Id.} \hfill \textsuperscript{76} \textit{Id.} at 286.
Focusing on the role of the judge advocate in a General Court-Martial, the court noted that the judge advocate is a legally trained officer with several years of experience and is appointed from a pool of military judges to the court-martial to preside over the court and function as a trial judge.\textsuperscript{77} In Canada the judge advocate by historical practice is a member of the Canadian military and serves on an ad hoc basis. The judge advocate is appointed to the General Court-Martial by the Judge Advocate General upon the recommendation of the Chief Judge Advocate.\textsuperscript{78}

According to the court, it was this system of appointing military judges to a General Courts-Martial which violated section 11(d) of the Canadian Charter of Rights and Freedoms. The Judge Advocate General who appoints the military judges on an ad hoc basis was an agent of the executive, and the appointment process lacked sufficient independence from the executive.\textsuperscript{79} In addition, because the appointment was done on a case by case basis there is no objective guarantee that a military judge’s career would not be affected by his or her past decisions.\textsuperscript{80}

The court next looked at the financial security of the members participating in courts-martial. At the time of Genereux’s trial, there were no prohibitions against evaluating an officer’s performance on the basis of his or her performance at a General Court-Martial. Likewise, there was no prohibition on evaluating a judge advocate based on his or her performance at a General Courts-Martial. According to the court, a commander could reward or punish members who served on a court-martial by either commenting favorably or unfavorably on their performance. Because those performance

\begin{itemize}
  \item \textsuperscript{77} Id. at 299 – 302.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id. at 304.
  \item \textsuperscript{80} Id. at 304 – 305.
\end{itemize}
evaluations have a significant impact on future promotions and assignments, the court held that a reasonable person could conclude that the members of a court-martial lacked sufficient financial security and independence from the commander.\textsuperscript{81}

Lastly the Genereux court examined the broader characteristics of the General Court-Martial system, and specifically the responsibilities of the military commander within that system, and determined that there was insufficient institutional independence to satisfy the requirements of Section 11(d) of the Canadian Charter.\textsuperscript{82} The court disapproved of a system that allowed the convening authority to determine when a General Court-Martial will take place,\textsuperscript{83} appoint the members who will hear the case,\textsuperscript{84} decide how many members will hear the case,\textsuperscript{85} and appoint the prosecutor who will represent the executive at the court-martial.\textsuperscript{86}

After noting these deficiencies the court then analyzed whether any exception was justified under Section 1 to the requirements of Section 11(d) of the charter. Here the court provided an analysis relying on the balancing test previously set out in Regina v. Oakes.\textsuperscript{87} Under this test, limitations on constitutional rights must be justified by important and overriding governmental concerns. Next, the means chosen to restrict the rights must be reasonable.\textsuperscript{88} Applying this test, the court recognized again that one of the primary purposes of the separate military justice system was to maintain a high level of discipline and this was an important interest.\textsuperscript{89} However, the court without further

\textsuperscript{81} R. v. Genereux at 307.
\textsuperscript{82} Id. at 309 – 310.
\textsuperscript{83} Id. at 309.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{88} R. v. Genereux at 312 – 313.
\textsuperscript{89} Id. at 312.
analysis held that a military tribunal that is not in compliance with the requirements of Section 11(d) of the charter would only satisfy the second prong of the Oakes test in the most extraordinary circumstances, such as a period of war or insurrection.\textsuperscript{90}

The consequence of this opinion was that many of the provisions of the Canadian military justice system relating to the commander’s role within that system were invalidated. In response, the Canada rewrote much of its military code. In fact, revisions to the military code began while the Genereux case was making its way through the appellate process. Changes that had already occurred by the time Genereux reached the Canadian Supreme Court included limited tenure for military judges which allowed them to remain in that position for two to four years.\textsuperscript{91} Further, military judges were no longer appointed to the case by the Judge Advocate General, instead they are appointed by the Chief Military Trial Judge.\textsuperscript{92} Also, an officer’s performance as a member of a General Court-Martial can no longer be used to determine his qualification for promotion or rate of pay.\textsuperscript{93} In dicta, the court in Genereux commented favorably on these changes.\textsuperscript{94}

The most significant aspects of the role of the convening authority were unchanged when Genereux was decided.\textsuperscript{95} Changes following Genereux which altered the traditional role of the military commander included the following: Commanders can no longer conduct a summary action on a case which they have personally investigated.\textsuperscript{96} While a commander still has the authority to bring charges, the military police also have

\begin{footnotes}
\textsuperscript{90} Id. at 313.
\textsuperscript{91} Id. at 305.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 307.
\textsuperscript{94} Id.
\end{footnotes}
independent authority to investigate serious and sensitive cases and they too can bring charges independent of the military commander.\footnote{97} The accused now has the right to elect trial by court-martial in all but very minor cases.\footnote{98} Summary court jurisdiction and the severity of punishment by summary court have been limited to minor offenses.\footnote{99} The authority to appoint prosecutors to individual cases has been given to the newly created Director of Military Prosecutions (DMP).\footnote{100} The DMP, not the commander is now responsible for preferring all charges to be tried by court-martial.\footnote{101} The DMP determines the type of court-martial that will hear the charges.\footnote{102} Court members are now selected on a random basis by a Court-Martial Administrator at the request of the DMP.\footnote{103} In most cases the military commander is required to refer the case to the DMP with a recommended disposition by the commander.\footnote{104} Commanders have the authority not to proceed with a case but they no longer have the jurisdiction to dismiss a case.\footnote{105} Military police can refer a charge to the referral authority independent of the military commander in cases where the commander has decided not to proceed with a charge.\footnote{106}

These changes to the traditional role of the military commander reflect a convergence of Canada’s military and civilian criminal justice processes. The net effect of this convergence is that the military commander now has much less control and involvement in the court-martial process and much of the decision-making has been

\begin{footnotes}
\footnote{100} Canada National Defense Act, R.S.C., N-5 § 165.11(1985).
\footnote{101} Id.
\footnote{104} Canada National Defense Act, R.S.C., N-5 § 164.2(1)(1985).
\footnote{105} Canada National Defense Act, R.S.C., N-5 § 163.1(2); § 164.1(2); § 165.12(3)(1985).
\footnote{106} Canada National Defense Act, R.S.C., N-5 § 163.1(2); § 164.1(3)(1985).
\end{footnotes}
turned over to lawyers, judges and other officials with legal training, but who do not hold
the mantel of command.

**United Kingdom**

The 1990’s also saw a revolution in the military justice system of the United Kingdom which, like Canada, made major changes in response to judicial opinions. In the case of the United Kingdom, however, the judicial opinions came from the European Court of Human Rights. Members of the Council of Europe are High Contracting Parties to the European Convention on Human Rights and are thus subject to the jurisdiction of the European Court of Human Rights. Individuals can bring an action against the state at this court if they believe that the state has violated rights guaranteed them under the Convention or its protocols. If the individual succeeds he will be entitled to monetary compensation. More importantly, if the court determines that the state has violated the Convention or the protocols, the state must modify its law or practice according to the decision. In addition, other signatories to the Convention will often modify their domestic laws and practices to avoid similar cases being brought against them.

This was the context in which the case of Findlay v. United Kingdom came to the European Court. Alexander Findlay, a British citizen, was a member of the Scots Guard. In July 1990, after drinking heavily, Mr. Findlay held members of his own unit at gun point and threatened to kill himself and some of his colleagues. He fired two shots not aimed at anyone and eventually surrendered the pistol. Findlay was tried by a

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107 Also, at the time that the High Contracting Parties signed the European Convention, countries could elect to exclude the governance of their military forces from the jurisdiction of the Convention and the Court. The UK, however, did not elect to exempt its military forces. See Peter Rowe, *A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court*, 8 J. CONFLICT & SECURITY L. 201, 202 (2003).


109 *Id.* at 224.
military general court-martial and he pleaded guilty to assault charges, conduct prejudice to good order and military discipline, and threatening to kill another person. He was sentenced to two years imprisonment, reduction in rank, and dismissal from the Army. He petitioned for a reduction in his sentence through the then-established military system and to the domestic civilian courts. His petitions were rejected.

Ultimately Mr. Findlay brought his case before the European Court of Human Rights. He claimed that the court-martial system under which he was tried violated Article 6 of the Convention because, among other things, it did not provide him with an independent and impartial tribunal established by law. The court examined the Army Act of 1955 and applicable rules of procedure at the time of Findlay’s case to determine if those procedures complied with the Convention.

At the time of Findlay’s case, a soldier could be tried by a district, field, or general court-martial. A general court-martial consisted of a president and at least four other officers, including a judge advocate. Military commanders at certain levels of command were also convening officers. The Convening officer decided the nature and the detail of the charges to be brought and the type of court martial required. He was also

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110 Id. at 225.
111 Id. at 227.
112 Id. at 233. Article 6, paragraph 1 states: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11, art. 6(1), November 4, 1950, ETS No. 005, available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.
113 Findlay v. United Kingdom at 239. As the case was pending, the United Kingdom had already begun significant revisions to its justice system with regard to the role of the military commander. While the court did not rule on these changes, it did comment favorably on many of them.
114 Id. at 229.
responsible for convening the court.\textsuperscript{115} The convening officer would specify the place and time of the trial. He appointed the president and other members of the court and he either appointed or ensured that the Judge Advocate appointed the prosecutors and the defense counsel.\textsuperscript{116} The convening authority also provided the prosecutor with an abstract of the evidence in the case.\textsuperscript{117} He ensured that the accused had proper representation and sufficient time to prepare for trial.\textsuperscript{118} The convening officer could dissolve the court-martial either before or during the trial and he could also comment on the proceeding of the court-martial to the members of the court.\textsuperscript{119} The convening officer also ensured the availability of all witnesses at trial.\textsuperscript{120} No trial was final until it was confirmed by a confirming officer.\textsuperscript{121} In most cases this confirming officer was the same commander that served as the convening officer.\textsuperscript{122} After final action the accused could petition for review to reviewing officials within the military chain of command.\textsuperscript{123} The reviewing officials received legal advice from the Judge Advocate General’s office: however, none of that advice was made public and the reviewing officials were not required to give any reasons for their decisions.\textsuperscript{124} There was a court-martial appeals court made up of civilian judges to hear appeals of convictions, but no such appeal was available for an accused who pleaded guilty.\textsuperscript{125}

\textsuperscript{115} Id. at 229-230.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 230.
\textsuperscript{121} Id. at 231 – 232.
\textsuperscript{122} Id. at 227 – 228.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 232.
The European Court found that this system violated the requirements under Article 6 for an independent and impartial tribunal in several regards. All officers of the court-martial were appointed by and directly subordinate to the convening officer, who also performed the role of prosecuting authority. Additionally, because that same officer served as the confirming officer and no case was final until confirmed by him, this system raised serious doubts as to the independence of the tribunal from the prosecuting authority. The court also stated that any involvement by the judge advocate and any oath requirements were not sufficient to dispel the doubts as to the tribunal’s independence and impartiality. The court reasoned that in order for the tribunal to be impartial it must be subjectively free from personal prejudice and bias and it must also be impartial from an objective viewpoint. In essence the European Court held that primarily because of the central role played by the convening officer in the court-martial structure, the system violated Article 6 of the Charter.

Even before Findlay’s case was decided by the European Court, the United Kingdom had begun to restructure its court-martial system. In this restructuring process, the United Kingdom adopted a system similar to the Canadian model and these changes have the collective effect of reducing significantly the role of the commander in military justice and working a convergence of the military and civilian systems of justice. Changes in the British system began with the Armed Forces Act of 1996. Under that act, the role of the convening officer has been abolished. In its place, those functions are now divided into three separate bodies; the higher authority, the prosecuting authority, and
court administration. The higher authority is a senior officer who decides whether
cases referred to him by the accused’s commanding officer should be dismissed, dealt
with summarily, or referred to the prosecuting authority. Once the higher authority has
made that decision he or she has no further involvement in the case. If the case is
referred to the prosecuting authority, that authority has the absolute discretion to decide
whether to prosecute the case, the charges to be brought, and the level of court-martial
that will hear the case. The prosecuting authority will often consider the views of the
higher authority and the accused’s command when making this determination. The
prosecuting authority also conducts the prosecution.

If the case is referred to a court-martial the court administrator is responsible for
arranging the trial. This includes selection of members, ensuring the availability of
witnesses, selecting the time and selecting the venue for the case. Officers under the
command of the higher authority will not be selected as members of the court-martial.
After trial, a reviewing authority will conduct a single review of each case and the
reviewing authority must publish the reasons for his decisions. The reviewing authority
has the power to quash a finding and related sentence. He also has the power to
substitute a finding of guilt on a lesser offense and substitute a sentence less severe than
the original sentence. The reviewing authority also has the power to authorize a retrial.

130 Id. at 245.
131 Id. at 232
132 Id.
133 Id. at 232.
134 Id.
136 Findlay v. United Kingdom at 232.
137 Id. at 232 – 233.
138 Rowlinson, supra note 135, at 40 – 41.
During this process the reviewing authority will receive advice from the judge advocate. The role of confirming officer was abolished.\textsuperscript{139}

In addition to these changes under the Armed Forces Discipline Act of 2000 a Summary Appeal Court was created to review cases which the commander disposed of by summary action. This court is composed of a judge advocate and two military officers. The appeal is by way of re-hearing in open court and the reasons for the finding and sentence must be provided by the court.\textsuperscript{140}

As a whole the changes to the role of the military commander in the Canadian and United Kingdom’s military justice systems have in many ways detached the commander from the military justice system. As can be expected, these changes have not come without other consequences. Some of those consequences will be discussed in more detail below.

\textbf{III. The approach taken by the United States Supreme Court}

\textbf{UCMJ}

As noted above, the U.S. military justice system under the UCMJ, while similar to the British and Canadian systems, has already accounted for some of the problems noted by the European Court and the Canadian Supreme Court. However, other aspects of the UCMJ still give the commander a great degree of control over military. In the United States there have been a number of challenges lodged against various aspects of the UCMJ and a few of these challenges have focused either directly or indirectly on the role of the military commander in that structure. Unlike their counterparts abroad, the U.S. Supreme Court has taken a more deferential approach on this issue.

\textsuperscript{139}Findlay v. United Kingdom at 232.
Court-Martial Jurisdiction

In two important cases the Court addressed issues of the court-martial structure in O’Callahan v. Parker\textsuperscript{141} and Solorio v. United States,\textsuperscript{142} both of which pre-date the Canadian and European Court cases. O’Callahan involved a soldier who was tried and convicted by general court-martial for the attempted rape of a civilian victim. The crime occurred off of the military reservation. In a petition for habeas corpus O’Callahan challenged the jurisdiction of the military to try him by court-martial for this criminal offense. He argued that, because the offense had no military connection, he should have been tried in civilian court.

In its opinion the Court recognized Congress’ power under the Constitution to create rules for the governing of the land and naval forces.\textsuperscript{143} However, the Court also noted that many of the protections enjoyed by U.S. citizens in a criminal trial are not available in a court-martial proceeding. Specifically, the court noted that military law officers (the precursor to the military judge) do not have life tenure and can be removed by the commander at will. Also the panel selected to hear the case is chosen by the commander, and the panel’s decision is reviewed by the commander at the conclusion of the trial. According to the Court in O’Callahan, this court-martial system lacked the degree of independence found in civilian courts.\textsuperscript{144} Accordingly, the Court held that unless the military could establish a service connection showing that the offense was

\textsuperscript{140} See Peter Rowe, \textit{A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court}, 8 J. CONFLICT & SECURITY L. 201, 204 (2003).
\textsuperscript{141} 395 U.S. 258 (1969).
\textsuperscript{142} 483 U.S. 435 (1987).
\textsuperscript{143} O’Callahan, 395 U.S. at 262-63.
\textsuperscript{144} Id. at 263-65.
committed under such circumstances as to have directly offended against the government and discipline of the military state, a court-martial lacked jurisdiction to try the case.\textsuperscript{145}

As a precedent, O'Callahan enjoyed a short life span and 18 years later a very different Court overruled O'Callahan in Solorio v. United States.\textsuperscript{146} Solorio was a Coast Guardsmen charged under the UCMJ for sexually abusing two female family members of another serviceman.\textsuperscript{147} The abuse allegedly occurred in off-base housing at Solorio’s prior duty station. Solorio claimed that the military lacked jurisdiction to try him because there was no service connection between the offense and a military interest.\textsuperscript{148} The Court reversed O’Callahan and ruled that military jurisdiction relies solely on the accused status as a member of the military. The Court’s rationale was based on a plain reading of Article I, § 8, cl. 14, of the Constitution which grants Congress plenary power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”\textsuperscript{149} Rather than conducting a detailed balancing of the individual rights of the soldier against the needs of the military, the Court noted that the Constitution reserved that balancing responsibility for Congress.\textsuperscript{150} In reversing O’Callahan, the Court adhered to a long line of pre-and post O’Callahan cases where the Court deferred to Congress in situations where the constitutional rights of a service member were implicated.\textsuperscript{151} As a result, the military is

\textsuperscript{145} Id. at 274 & n.19.
\textsuperscript{146} 483 U.S. 435 (1987).
\textsuperscript{147} Solorio, 483 U.S. at 447.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 440-441.
no longer required to show a service connection in order to establish jurisdiction to try a
solder by court-martial.

**Summary Courts**

In another case, the Court was called upon to invalidate the structure of the
summary court-martial system.$^{152}$ In Middendorf v. Henry, five service members
challenged the constitutionality of the UCMJ’s summary court proceeding, which denied
them the right to be represented by counsel in the summary proceeding. According to the
petitioners, the denial of counsel violated their 6th Amendment right to counsel.$^{153}$ The
Court first shifted the focus of the issue by holding that a summary court proceeding was
not a “criminal prosecution” to which the Sixth Amendment would apply.$^{154}$ The Court
analogized a summary court proceeding to probation or parole revocation hearings and
juvenile proceedings. According to the Court, even though a summary court punishment
could result in a loss of liberty, if that were the only criterion, then the Court would also
have to extend the right to counsel in other non-judicial proceedings under Article 15 of
the UCMJ, and this was something the Court was unwilling to do.$^{155}$

Next, the Court addressed the lack of counsel in a summary court under the due
process standards of the Fifth Amendment. Here the Court noted that the Constitution
reserved the authority to establish summary court proceedings to Congress.$^{156}$ Unless the
factors militating the right to counsel at a summary court are so extraordinary as to

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$^{153}$ Id. at 29-31.
$^{154}$ Id. at 34.
$^{155}$ Id. at 36.
$^{156}$ Id. at 44-45.
overcome the balance struck by Congress, the Court will not intervene.\textsuperscript{157} Under such a deferential standard, it is not surprising that the Court found no due process violation of the summary court process. The Court noted that it is the business of the military to be ready to fight and to fight wars as occasion warrants.\textsuperscript{158} The military has a need to maintain discipline and in many cases to act quickly to enforce discipline. If counsel were required at a summary court proceeding it could turn that proceeding into a protracted hearing.\textsuperscript{159} According to the Court, a more expansive process is not necessary given the relatively minor offenses being tried and the limits of punishment available at a summary court.\textsuperscript{160}

Two points about this opinion are particularly interesting. In comparing the Court’s opinion in Middendorf with the opinions in Genereux and Findlay, we see a court that seems much less willing to involve itself in the supervision of military justice matters. This is of course due in part to a constitutional structure that grants much of this responsibility to Congress.\textsuperscript{161} The next section will discuss this point in more detail. This deference may also stem in part from an unwillingness by the Court to involve itself in an area where it perceives a lack of expertise and a fear that if the Court were to recognize greater individual rights, it may have serious adverse consequences on the military’s ability to perform its mission. No similar unwillingness was expressed or seen by either the Canadian Court in Genereux or by the European Court in Findlay.

Yet, in spite of the U.S. Supreme Court’s deference to Congress, the opinion in Middendorf does a least attempt to give some specific recognition to interests of the

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 45-46.
\textsuperscript{160} Middendorf, 425 U.S. at 44-45.
individual soldier as well as the interests of the state in pursuing discipline. By contrast, both the Genereux court and the Findlay court strike down significant aspects of the military justice systems of Canada and the UK, with very little mention of the competing interests at stake in those cases and the consequences that may result from separating the commander from the military justice system.

Military Judges

O’Callahan, Solorio, and Middendorf were all decided before the Genereux and Findlay cases and before the changes to the military justice systems of the United Kingdom and Canada brought about by those opinions. The Supreme Court did hear one case while the changes and Canada and the United Kingdom were taking place. In Weiss v. United States, the two service members sought to attack the structure of the UCMJ by focusing on the lack of a presidential appointment and the lack of fixed terms of office for military judges.

The defendants asserted that the Appointments Clause in Article II requires a person serving as a military judge to be appointed to that specific position by the President with the advice and consent of the Senate. The Court rejected that argument. The Court noted, first, that all military officers are appointed to their positions as officers with the advice and consent of the Senate and are reappointed every time they are promoted in rank. So long as the officer is functioning in a position that is germane to his duties as an officer, there is no requirement for a separate appointment. The Court then examined the duties of a military judge and noted that they are not the only
commissioned officers to be heavily involved in the administration of military justice. According to the Court, there is a long tradition of officer involvement in military justice. The Court then cited a number of examples where the military commander and other commissioned officers are regularly involved with the administration of justice. Of particular importance for the Court was the fact that, until a military judge is detailed to a specific case, he has no inherent judicial authority. These facts were significant in the Court’s determination that the duties of a military judge were germane to the role of any commissioned officer and the Constitution did not require an additional appointment.

The most interesting aspect of this portion of the Court’s opinion is its acceptance of a justice system where the military commander plays such a critical and involved role. Rather than using this case as an opportunity to re-examine or question the role of the military commander, the Court points to this aspect of the military justice system to explain why no additional appointment is needed for an officer to serve as a military judge. This restrained and deferential approach is in stark contrast to the approaches taken by the Genereux and Findlay courts.

On the question of tenure, the Court limited its focus to the question of whether there was a due process requirement for military judges to serve for some fixed length of time. Here again, the Court noted that it is the responsibility of Congress to balance the rights of the individual against the interests of the military. As in Middendorf, the Court asked whether the factors militating in favor of a fixed term of office are so

165 Id. at 174-75.
166 Id.
167 Id. at 175-76.
168 Id.
extraordinarily weighty as to overcome the balance struck by Congress.\textsuperscript{171} Applying this test the Court held that the factors were not so extraordinarily weighty.\textsuperscript{172}

The Court noted and cited with approval several articles included in the UCMJ that protect the rights of the accused even though the military judge does not enjoy a fixed term of office.\textsuperscript{173} These protections include Article 26 of the UCMJ,\textsuperscript{174} which places military judges under the authority of their respective Judge Advocate General. Because the Judge Advocate General “has no interest in the outcome of a particular case” he would be less inclined to manipulate the detailing of military judges to individual cases.\textsuperscript{175} Another protection of Article 26 cited by the Court is the prohibition on the convening authority or other commanding officer from preparing or reviewing any report concerning the effectiveness or efficiency of a military judge relating to his judicial duties.\textsuperscript{176} In addition, Article 37 prevents convening authorities from reprimanding or admonishing a military judge with respect to the findings or sentence adjudged in a case.\textsuperscript{177} Other protections noted by the Court include the accused’s ability to challenge the military judge for cause and the fact that the entire system is overseen by an appellate court comprised of civilian judges who do serve for fixed terms of 15 years.\textsuperscript{178} The Court held that these protections were sufficient to ensure the independence of the military trial

\textsuperscript{169}Id. at 175-176.
\textsuperscript{170}Id. at 179-80.
\textsuperscript{171}Id.
\textsuperscript{172}Id.
\textsuperscript{173}Id.
\textsuperscript{174}UCMJ art. 26 (2005).
\textsuperscript{175}Weiss, 510 U.S. at 180-81.
\textsuperscript{176}Id.
\textsuperscript{177}UCMJ art. 37 (2005).
\textsuperscript{178}Weiss, 510 U.S. at 180-81.
judiciary even though they did not enjoy a fixed term of office and that Congress’ balancing of these interests satisfy the Constitution’s Due Process requirements.\textsuperscript{179}

\textbf{IV Calls for Change}

For scholars and practitioners the changes to Canadian and British military justice systems have not gone unnoticed.\textsuperscript{180} Because if the U.S. Supreme Court’s deferential approach on these questions, many of these scholars look with some envy to the changes they have observed elsewhere, and they are actively pushing for similar changes to the UCMJ.\textsuperscript{181} Our constitutional structure vests the plenary authority in Congress under Article I Section 8 of the Constitution to create rules governing the land and naval forces.\textsuperscript{182} Most experts in the field and particularly those advocating for various changes to the UCMJ which would reduce the role of the military commander understand this, and have accordingly focused their efforts on policy makers and politicians.\textsuperscript{183}

One of the most influential voices for changes to the UCMJ relating to the role of the military commander has come from what has been referred to as the Cox Commission. This commission was sponsored by the National Institute of Military Justice and chaired by Walter T. Cox III, a former judge on the United States Court of Military Appeals, later renamed the Court of Appeals for the Armed Forces. The work of

\begin{itemize}
\item \textsuperscript{179} \textit{Id.} at 181-81. In the late 1990s, the Army and the Air Force instituted fixed terms of office for military judges by regulation. \textit{See}, e.g., U.S. Dep’t Army Reg. 27-10 Military Justice, § 8-1(g) (Nov. 16, 2005).
\item \textsuperscript{182} U.S. CONST. art. I, § 8.
\end{itemize}
this commission coincided with the 50th anniversary of the UCMJ and was intended to be a “bottom up” review of military justice and to examine a system that in the opinion of the commission, had failed to keep pace with the changes in the U.S. military and with the changes taking place in other country’s military justice systems.184

After conducting numerous hearings and reviewing testimony from a fairly wide range of perspectives, the Commission recommended several changes to the current UCMJ related to the role of the military commander. First, the Commission recommended modifying the pretrial role of the military commander. Specifically, the commission recommended removing the commander from the panel selection process and for randomizing the selection of court members.185 This recommendation was certainly not something new and it has remained one of the most hotly debated aspects of reform to the UCM since its inception in 1951.186

The Cox report and other critics of the current U.S. system list several reasons why the convening authority should not participate in selecting the court members who will hear and decide the case. These reasons include the continuing danger that commanders who have the authority to select the members may be tempted to intervene and manipulate the court-martial process.187 In addition, this aspect of the military justice system differs significantly from the civilian system and there is certainly the public

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185 Id. at 5-6.
186 Id. at 6-8; Matthew J. McCormack, Comment, Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice, 7 Geo. Mason L. Rev. 1013, 1049-51 (arguing that the military should remove the convening authorities’ power to handpick court-martial panel members); Lindsy Nicole Alleman, Note, Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems, 16 Duke J. Comp. & Int’l L. 169, 190-92 (2006) (suggesting random selection method for choosing panel member that is tailored to meet needs of U.S. military).
perception of inherent unfairness in a system where the convening authority is able to hand select those responsible for deciding the case, even if there is no evidence of actual manipulation in a specific case.\textsuperscript{188}

The Cox Commission also recommends removing the commander from other pre-trial processes such as the approval of travel of witnesses for pre-trial hearings, the approval of funding of expert witnesses and expert assistance; and approval of funding for pre-trial investigative assistance.\textsuperscript{189} The Cox Commission believes that under the current system the convening authority is too involved in these decisions and there is the risk that he could grant or withhold approval of these requests based on personal preference rather than a legal standard.\textsuperscript{190} Notably, the report does not cite to a significant number of instances where convening authorities who receive legal advice on these issues from their staff judge advocates are actually making these decisions on other than a legal standard, but the Commission was nonetheless concerned that such a risk exists.\textsuperscript{191}

To replace some of the functions currently performed by the convening authority, the Cox Commission and others have called for a greater role for lawyers and in particular military judges.\textsuperscript{192} One of the most unique features of most military justice systems is that court-martials are convened on an ad hoc basis and come into and go out of existence with the convening and concluding of a particular case. This means that there are no standing judges and standing trial level courts to which a party can petition

\footnotesize{188} Id. at 7; see also Alleman, supra note 185, at 170-72; Kevin J. Barry, A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice, 2002 L. REV. MICH. ST. U. DET. C. L. 57, 100-103 (2002).

\footnotesize{189} Cox Commission Report, supra note 181, at 6-7.

\footnotesize{190} Cox Commission Report, supra note 181, at 7-8.

\footnotesize{191} Cox Commission Report, supra note 181, at 6-7.

\footnotesize{192} Id. at 8-9; see also Cooke, supra note 183, at 18-25; Ferris, supra note 180, at 487-91.
prior to the formal convening of a court-martial. The Cox Commission recommended the establishment of standing judges who would replace the convening authority as the official deciding most pre-trial petitions such as witness finding, employment of experts, and the provision of pre-trial investigative assistance.  

Along with the transfer of power away from the convening authority to the military judge there has been the call by many for increasing the independence of military judges by giving them tenure. The calls for this change have come within and outside of the military and have increased since the Supreme Court’s decision in Weiss.  

The rationale for some form of judicial tenure is to enhance the independence of the trial judiciary. According to these critics there is at least the perception that commanders can influence the Judge Advocate General to remove or reassign a military judge for an unpopular or unfavorable decision.  

While Congress has not acted to grant military judges tenure, the Army has amended its regulations and has established a limited form of tenure for military judges.  

Another call for reform affecting the authority of the military commander is the abolition of the summary court-martial. Currently, summary courts are a tool of the military commander to quickly adjudicate and impose swift punishment for relatively minor offenses. Calls for the abolition of these courts seems to be based on the belief that

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194 See, e.g., Id. at 9; Cooke, supra note 183, at 18-19; Ferris, supra note 180, at 488-92; Fredric I. Lederer, Needed: An Independent Military Judiciary--A Proposal to Amend the Uniform Code of Military Justice, 3 WM. & MARY BILL RTS. J. 629, 672-78 (1994).  
195 See Cooke, supra note 183, at 18.  
196 See, e.g., Army Reg. 27-10 Military Justice, § 8-1(g) (Nov. 16, 2005).  
197 See Cooke, supra note 183, 23.
these courts are overly vulnerable to command influence and do not provide sufficient procedural protections for service members facing a summary court.\textsuperscript{198}

In addition to the specific calls for reform that have been fueled by the changes in other military justice systems, some have called for much more dramatic reforms. One such proposal calls for the virtual abolition of the military justice system except in time of war or other overseas deployments.\textsuperscript{199} This proposal seems based more on the personal dissatisfaction of the authors with military justice, rather than a thoughtful analysis of the military justice system, the unique objectives of a military justice system, and the balancing of interests that should be a central focus of any reforms to that system.

Interestingly, even though many of these calls for reform have been fueled by changes to the United Kingdom’s system based on the Findlay case, there has been very little examination of whether the United States, like the United Kingdom has treaty obligations which would require modifications to its military justice system. In fact, the United States is a signatory to the American Convention on Human Rights.\textsuperscript{200} This Convention was created under the auspices of the Organization of American States and was adopted by the Organization of American States in 1969.\textsuperscript{201} Like the European Convention, the American Convention on Human Rights contains a section on the right to a fair trial. Specifically Article 8 Section 1 states that “Every person has the right to a hearing, with due guarantees and with a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . .”;\textsuperscript{202} These terms are very

\textsuperscript{198} Id.
\textsuperscript{199} See, e.g., Spak & Tomes, supra note 138, at 534-41.
\textsuperscript{201} Supra note 162.
\textsuperscript{202} Supra note 162, at art. 8, § 1.
similar to the language the European Court of Human Rights used to invalidate a number of aspects of the United Kingdom’s military justice system.

In spite of this language, it is highly unlikely that the Convention would be a significant catalyst for changes to the UCMJ. The Organization of American States did create an Inter-American Court of Human Rights to enforce provisions of the Convention in 1979. However, in addition to not ratifying the Convention, the United States does not as of yet recognize the jurisdiction of this court. In light of the United States’ position regarding the jurisdiction of the International Criminal Court and other such international tribunals, it is highly unlikely that the United States would ever recognize the jurisdiction of the Inter-American Court to decide domestic military justice matters.

V. Collateral Consequences of Change

Amongst the various calls for reform to the U.S. system there has been little commentary, discussion or research on the possible unintended consequences of these reforms, in spite of the information that is now available from both the UK and Canada as to some of the effects that their reforms have had on military justice. In Canada one of the perhaps unintended consequences of dividing the responsibilities of the convening authority into three separate offices is exemplified in the very recent case of the Director of Military Prosecutions v. The Court Martial Administrator and the Chief Military Judge.

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203 Supra note 162, at ch. VIII.
206 [2006] F.C. 1532 (Can.).
In this case, the Director of Military Prosecutions sought to bring a member of the Canadian Armed Forces before a court-martial to face charges of aggravated assault and ill-treatment of a subordinate. However, the soldier in question was at the time assigned to a special unit of the Canadian Armed Forces and under the policy of the armed forces his name and other identifying features could not be made public. Because the identifying information on the charge sheet was marked “SECRET” the Chief Military Judge refused to assign a military judge to the case and the Court Martial Administrator refused to issue a convening order.

To resolve the dispute between the three agencies, the Director of Military Prosecution sought an order of mandamus from the Canadian federal court to compel the Chief Military Judge to assign a judge to the case and for the Court Administrator to issue a convening order. The focus of the opinion is on the scope and purpose of a mandamus order and whether the Director of Military Prosecutions was correct in seeking this remedy. Ultimately the court ruled that a writ of mandamus was not appropriate and dismissed the petition.

For the purposes of our discussion, the important issue is the consequences to military justice when the role of the convening authority is divided into three separate offices. As this case illustrates, these offices can become a kind of three headed creature where all three heads must be in agreement before a court-martial can be convened. In such a situation the question is whether the fairness or perceived fairness that was added to Canada’s system is worth the loss in efficiency, deployability, control, and discipline that are hallmarks of a system where the military commander has a greater role. There are additional costs to efficiency, control and discipline when the civilian courts must

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207 Id. at para. 2.
routinely get involved to resolve these disputes and to some degree supervise the military justice system.

Likewise, the United Kingdom’s military justice system has not been free from additional legal attacks despite the monumental changes to that system following the Findlay case. Three fairly recent cases from the European Court of Human Rights show that the British military justice system is still being subjected to intense scrutiny by this court. In two cases the court examined certain aspects of the legislation passed following the Findlay case. In Cooper v. The United Kingdom the petitioner alleged broadly that Article 6 of the European Convention of Human Rights precluded service tribunals from trying any criminal offense in time of peace.\footnote{Cooper v. United Kingdom, 39 E.H.R. R. 8, 197 (2003).} The court dismissed this claim and said that the proper focus was whether the procedures under the post-1996 court-martial system adopted by the UK met the requirements of independence and impartiality.\footnote{\textit{Id.} at 197-98.}

The petitioner, relying on an unpublished opinion from the court, attacked a number of specific aspects of the 1996 act as implemented by the Royal Air Force. First, the accused claimed that the prosecuting authority was not independent because it was a part of the legal branch which gave general advice to the service authorities. Second, he claimed that the position of a permanent president of courts-martial, a position held by an officer in his last assignment before retirement and a position for which he did not receive a performance rating, created a senior officer who was “case hardened.” Because he was the senior member of the court-martial, there was a risk that he would dominate the deliberation process and impose his will on the other members. The petitioner also claimed that, because the other members of the court-martial were still in the military and
were still rated for their performance, they were not sufficiently independent. Finally, the petitioner argued that, because no case was final until acted on by the reviewing authority, the members of the court-martial would impose a harsher sentence in order to please the reviewing authority and in the hope that the reviewing authority would reduce the sentence.\footnote{210}

The court rejected each of these arguments. It held that there were sufficient protections in the new system to ensure the independence and impartiality of the court-martial participants.\footnote{211} Significant to the courts reasoning was the fact that the judge advocate who served as a judge in the court-martial was a civilian.\footnote{212} The instructions the judge advocate gives to the members of the court further protect and ensure their independence. In addition, no members of the court were evaluated on their performance and the decisions they reached while serving as members of the court-martial.\footnote{213} Finally, because the prosecuting authority was composed of a discrete group of legal officers who had no other duties and who reported to officials outside of the chain of command, they were independent of any command influence.\footnote{214}

Cooper involved the court-martial procedures of the Royal Air Force. On that same day the court reached different conclusions in its review of the Royal Navy’s implementation of the 1996 act.\footnote{215} According to the court, the Navy’s procedures differed from the Air Force and the Army in a number of important ways. First, in the Navy, members of the prosecuting authority can come from a list of uniformed naval

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\begin{itemize}
\item \footnote{210} \textit{Id.} at 198.
\item \footnote{211} \textit{Id.} at 198-199.
\item \footnote{212} \textit{Id.}
\item \footnote{213} \textit{Id.}
\item \footnote{214} \textit{Id.} at 199.
\item \footnote{215} Grieves v. United Kingdom, 39 E.H.R.R. 2 (2003).
\end{itemize}
barristers who serve as members of the prosecuting authority on an ad hoc basis.\textsuperscript{216} Second, in the Navy system, there is no position of a permanent president of the court-martial. Rather, the position of president is selected from the ranks of the Navy on an ad hoc basis and after serving as president, the officer returns to the ranks of the naval officers.\textsuperscript{217} Finally, unlike the Royal Air Force and Army, the judge advocate at a Naval court-martial is not a civilian, but is a naval legal officer who carries out other legal duties when not sitting at a court-martial.\textsuperscript{218} According to the court, these distinctions made a difference and cast doubt as to the independence and impartiality of the British Navy’s court-martial system.\textsuperscript{219}

In a third post-Findlay case\textsuperscript{220} that came after of the Findlay case and in the midst of the United Kingdom’s revamping of their court-martial system, the European Court examined and invalidated much of the UK’s summary court-martial process. Specifically the court ruled that the UK’s summary court procedure in which the commander was central to the prosecution of the case and served as the judge, violated the Convention’s requirement for a trial by an independent and impartial tribunal.\textsuperscript{221} In addition, because the soldier was not entitled to be represented by an attorney at a summary court, the procedure also violated Article 6 Section 3 of the Convention,\textsuperscript{222} which establishes the right to legal assistance in a criminal case.\textsuperscript{223}

\textsuperscript{216} \textit{Id.} at 20-21
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} at 22-23.
\textsuperscript{219} \textit{Id.}
\textsuperscript{221} European Convention on Human Rights and Fundamental Freedoms, art. 6, § 1, Nov. 4, 1950, E.T.S. No. 5, available at \url{www.pfc.org.uk/legal/echrtext.htm} [hereinafter European Convention].
\textsuperscript{222} European Convention, \textit{supra} note 221, at art. 6, § 3.
\textsuperscript{223} Thompson, 40 E.H.R.R. at 255-56.
This focused and continued scrutiny by the European Court of Human Rights on the United Kingdom’s military justice system has several consequences. First and most strikingly, the supervision of military justice, the balancing of interests within the system, and the structural development of the military justice system now rests with a judicial body that is detached from the military. The system is continually subjected to review based on challenges in individual cases. This can very easily lead to piece meal revisions and modifications to the justice system based on individual cases at the expense of a uniform and coherent system that is familiar to those working within the system on a routine basis. Under this approach any legislative changes or revisions to the system are only provisional until they receive approval by a very active judiciary that is willing to substitute its judgment for that of the legislature and the executive/military on the best ways to accomplish the sometimes competing goals of a military justice system.

Another consequence of the Findlay case and the cases which followed is the expertise and awareness of the unique military environment that was traditionally a key component of military justice has been significantly diminished. As reflected in the Grieves case, the prosecutors are not a part of the military, the judge advocate is not a member of the military, and the president of the court-martial must be so detached from the military that he cannot be the president unless he is on his last assignment and will never return to the military community from which the case arose. Under such a system some of the military expertise and awareness of the unique military context in which the cases arise is lost.

Perhaps the most unconsidered consequence of the changes to the Canadian and United Kingdom’s military justice systems relates to the commander’s own personal
responsibility and associated criminal liability if he fails to adequately prevent, suppress, and punish law of war violations committed by the forces under his command. The doctrine of command responsibility, developed primarily at the conclusion of WWII, holds that a commander may be criminally liable for the law of war violations committed by the forces under his command. Over the years the doctrine has obtained the status of customary international law and has been codified in various formulations. Under this doctrine, if a commander fails to control his forces in such a way as to prevent, suppress, and punish law of war violations that he either knew about or was either reckless or negligent in failing to become aware of, he can be punished as if he committed the crimes engaged in by the forces under his command.

This doctrine is based on the unique position that the commander holds in a military organization. It is a recognition that the commander is the focal point for military discipline and order and it is the commander’s responsibility to maintain command and control of his subordinate forces. The doctrine is also based on the traditional role of the military commander as the oracle for military justice. In essence the doctrine is based on the recognition that there is often a very thin line separating a disciplined military force from a mob. It is the commander who stands on that line and

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224 See generally Ex parte Quirin, 317 U.S. 1 (1942) (sanctioning use of military tribunal to try Nazi saboteur); In re Yamashita, 327 U.S. 1 (1946) (approving military commission to try commander for war atrocities committed by troops under his command).


by use of all the resources and authority available to him, ensures that his forces do not violate the laws of war. If they do, it is in large part attributable to the commander’s failings.

As discussed throughout this paper, one of the unique aspects of military justice is that it serves as one of the primary tools that the commander has to maintain order and discipline within the force. If outside officials, government bureaucrats, courts, and international commissions step in and take for themselves the disciplinary authority that was once reserved for commanders, it raises a number of concerns.

If commanders lose a significant portion of the disciplinary authority they traditionally have held, do they no longer occupy that critical position of responsibility over the forces under their command? If they have lost that authority, to whom does the law now turn for accountability? For example, can the office of the Director of Military Prosecutions or the Chief Military Judge be held criminally liable if it fails to prosecute or fails to convene a court-martial to try soldiers for law of war violations? Must these or similarly situated officials be consulted and involved in the training of service members and in the planning of military operations, since they now have the responsibility for prosecuting and convening courts for law of war violations? Or does the commander who has lost some of his authority and ability to maintain discipline through the military justice system now find himself in a situation where he is given the responsibility to maintain discipline and control without having sufficient authority to meet that obligation? Worse yet, is the commander still likely to be held criminally liable for failings that are now beyond his control? Are the military forces less likely to respect and
abide by the directions and commands of an officer who they know has little ability to punish them for their conduct?

To raise these questions is not to suggest particular answers, and time may show that some of these concerns are not warranted. However, in the move to make the military justice systems of Canada and the United Kingdom more like their civilian counterparts, there is little to suggest these issues have been carefully or closely examined, and the consequences are as of yet unknown.

The Cox Commission and other commentators suggest that it is time for the United States to reexamine its military justice system. A consistent theme from these commentators is that the United States has fallen behind Canada, the United Kingdom and other countries and that it is time for our system to catch up. Undoubtedly, some of the proposed changes offered by these commentators may have an overall beneficial effect on military justice in the United States. It is not the purpose of this article to take a position for or against any specific change to the UCMJ. Rather, the point is that any changes ultimately made to the UCMJ should not be implemented haphazardly. Nor should changes be made merely to catch us up with what some other system is doing in an attempt to improve our perceived standing in the international community.

Instead, any changes relating to the commander’s role in military justice should be done in a unified and coherent fashion, keeping always at the forefront the reasons and purpose for having a separate military justice system. Additionally, changes should be considered and implemented by the branch of the government with the primary constitutional responsibility and by the branch best suited to weigh and balance the competing interests and the likely consequences brought on by structural changes to the
UCMJ. This branch should also be the one most accountable to the electorate, from which the ranks of the military will ultimately be filled.

VI. An Approach to Making Changes to the Role of the Military Commander in Military Justice.

It remains to discuss first why Congress is the body best suited to change military justice procedures. Rather than offering a laundry list of suggested structural changes to the UCMJ, this section sets out specific recommendations and suggestions which legislators and policy makers should take into account when considering changes to the UCMJ structure that involve the role of the military commander. This approach will help to ensure that, whatever structural changes are made they are done so not merely because we need to close the gap in some perceived shortfall vis-à-vis the military systems of other countries, but because the changes will enhance the overall effectiveness of the military justice system.

Congressional Responsibly

Prior to deciding what changes should be made with respect to the role of the commander in the military justice system it is important to ask who should be primarily responsible for making those decisions. In both Canada and the United Kingdom, courts have taken a very active role in restructuring the military justice systems of those countries as well as closely scrutinizing changes to those systems. It is certainly possible for the U.S. Supreme Court and lower federal courts to assume a similar role. However, as past precedent indicates, that has not been the jurisprudence of the Supreme Court.\(^{227}\)

Turning to the language of the Constitution itself, there is good reason for the deference that the Court has exercised in the past. The Constitution grants to Congress a
preeminent role regarding the structure and the governing of the armed forces. Among the powers given to Congress, the most significant for this discussion is the authority to "make rules for the government and regulation of the land and naval forces." Unquestionably, this includes the authority and responsibility for determining the appropriate role for the commander within that system.

The genius of the framers in giving this authority to Congress is most evident in the practical recognition of why Congress is best suited to perform this function. Unlike the courts, which must decide issues on a case by case basis with only a limited ability to anticipate the broader impact on the military of those decisions, Congress is able to consider these much broader consequences. Congress is better able to gather facts and develop the level of expertise necessary to understand the competing interests, strike the appropriate balances, and create the most effective structure for a military justice system. As the branch most accountable to the electorate Congress must be attentive to the concerns of the public. Congress is best able to consider the current and former service members’ experience with military justice as well as the public’s perception of the fairness of that system.

A Suggested Approach

Congress will continue to be the focal point for any future changes. And changes will come. There is no question that we are experiencing a period of renewed attention on military justice. This attention and pressure for change is likely to increase as both a result of the many high profile cases and investigations that are coming out of Iraq and

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227 See supra Part III.
228 Indeed, the Constitution expressly authorizes the Congress, among other things, to “provide for the common Defense,” see U.S. Const., art. I, § 8, cl. 1; to raise and support armies, see id. § 8, cl. 12, and to “make rules for the government and regulation of the land and naval forces,” see id. § 8, cl. 14.
Afghanistan and as forces return from service to civilian life and take stock of their military experiences. Add to this the pressure that is already being asserted by various groups and individuals with an interest in military justice issues, as well as pressures from within the military to reexamine military justice, the inescapable conclusion is that change will come.

As Congress responds to these pressures and begins to consider structural changes to the UCMJ a careful and thoughtful approach is needed. First, Congress should be ever aware of its unique responsibility and it should not cede control to the Executive or to the courts by inaction. Second, in considering structural changes to the UCMJ, Congress must move beyond mere platitudes. It is not enough for Congress to simply say that a certain function is necessary to maintain an effective fighting force. A much more close and careful analysis that asks what the relationship should be between the commander and the justice system is needed. Congress must inform itself as to what authority currently enjoyed by the commander is necessary to the accomplishment of the military’s missions. On the other hand, Congress must inquire whether authority enjoyed by the commander is merely a function of custom or tradition and is unrelated to accomplishing military objectives. Congress must also carefully consider the relationship between the service member and the state and in what ways the rights of the individual need to be subordinated in order to accomplish military objectives.

The process of drafting the UCMJ and subsequent amendments have been viewed by some as a struggle between the military lawyers and the military commanders, both

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230 In short Congress should not behave as it did recently with regard to military commissions. See, e.g., Hamdan v. Rumsfeld, 126. S.Ct. 2749 (2006).
competing for control over the justice system. Any future modifications to the UCMJ’s structure should avoid approaching modifications on these terms. The fact is that both military commanders and military lawyers play an essential role in the system. The work and responsibilities of commanders and lawyers should be viewed as having a synergistic effect on military justice and not as a turf battle between the two most important components of an effective system. Tension between the lawyers and commanders can also be avoided in how Congress goes about its work. It is important for Congress to solicit input from a broad spectrum of sources, examine the impacts on the relationship between commanders and lawyers in the Canadian and British systems as a consequence of their changes, and recognize that the overall objectives of any reforms are to achieve a more effective military justice system.

Many of those proposing structural changes to the UCMJ cite as the main reason for those changes the public’s perception of military justice. Indeed, public perceptions served as one of the primary reasons for the Findlay and Genereux rulings. While public perception is an important factor to consider, it cannot be the primary or only reason for change. Public perception is at best a fluid concept and it is unlikely that there can ever be broad agreement by the public on what structural changes are necessary. Public perception can also be addressed through education and explanation of why the various aspects of a military justice system exist. Making changes to the structure of military justice primarily to satisfy some perceived public perception as to the fairness of the system runs the risk of cutting the military justice system from its moorings and setting it adrift.

231 See Cooke, supra note 183, at 7-11.
What is needed, then, is an approach that views proposed changes to the role of the military commander holistically and in context with the overall structure of the military justice system. It is important that Congress keeps at the forefront an understanding of the goals sought to be achieved by having a separate military justice system. Some of these goals may in fact compete with others. In such cases, Congress must view any changes in light of the goals that will be achieved by the changes as well as the objectives which may be thwarted if those changes are put into effect. Congress should appreciate that a balance must be struck and then carefully consider and clearly articulate why the balance is being struck at a particular point. This articulation must go beyond shallow catch phrases. The record must be clear as to what interests were considered and how Congress reached the resolution of the various competing interests. A clear articulation and a record of these decisions will also aid the courts when they are called upon to rule on aspects of the system established by Congress.

In addition to an approach that is focused on the goals of a military justice system, Congress should also carefully consider how the current system is actually operating in the field and how other changes to the military’s structure may affect the role that the commander should play in the military justice system. Congress now has the benefit of over 50 years of experience with military justice under the UCMJ to consider in deciding how to change the system’s structure. Over that time, military justice has not remained stagnant and certainly the broader military structure has not remained stagnant. In order to keep pace with the ever changing nature of warfare military organizations change and will undoubtedly continue to change in the future.
One aspect that has been lacking in many of the proposed changes to the role of the military commander is an understanding of how the UCMJ currently functions in practice in peace, in war, in a deployed environment, and at home station. While the UCMJ was designed to function within the entire spectrum of military operations, there is little in the way of hard evidence to suggest how effectively the UCMJ has operated over the last 50 years.

Over the past few years the Army, for example, has undergone a number of structural changes as it moves away from a force that was designed for a cold war enemy towards an army that is designed to respond to multiple worldwide threats that span the entire spectrum of military operations.\textsuperscript{233} To address these changes, the Army has created mission specific task forces made up of various military components of all the services.\textsuperscript{234} Congress must assess how the UCMJ should function in this environment. For example, does it make sense for a home station commander to maintain UCMJ jurisdiction for the service members of his command which have now been made part of a task force and are no longer under his geographic control? On the other hand, does it make sense to saddle a commander of a joint task force with the additional responsibility of operating a military justice system for all of the disparate components of his task force? Should that Army task force commander have military justice responsibility over service members from other services? While the current UCMJ structure certainly allows for the accommodation of many of these issues, there is no standard approach to these questions. The current flexibility allowed for under the UCMJ in establishing these

\textsuperscript{233} See generally Army Reg. 10-87 Army Commands, Army Service Component Commands, and Direct Reporting Units (September 4, 2007).
command relationships may be the best way to operate a military justice system. Congress must carefully consider how effectively these command relationships work in practice before structural changes to the commander’s role are changed.

Much is also made of the need for the commander to maintain control of the forces under his command to ensure a disciplined fighting force. It is a well accepted axiom that a commander conducting combat operations needs to have control over the military justice system so that system can be used as a means of enforcing and maintaining discipline over his forces. In reality the practice is often quite different. There are many situations where the combat commander has in fact given up control over cases to another military authority outside the theater of combat. The practice of moving service members out of the theater of combat during a criminal investigation and subsequent court-martial is quite common. When the combat commander elects to do this he gives up any military justice authority he may have had over that service member. The UCMJ specifically prohibits a commander from imposing his will on any other commander with respect to the disposition of a case.

There are many understandable reasons for this practice. A commander engaged in combat operations may not want to be distracted with a criminal investigation and subsequent trial, particularly in serious cases which may demand a great deal of time,

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234 In Iraq for example, at the conclusion of the initial push into Baghdad, a Joint Task Force (JTF) was created. This JTF included service embers from all of the military services and was commanded by an Army Lieutenant General.
235 Spak & Tomes, supra note 180, at 534-41.
236 Some recent examples of this practice include the Akbar case, the Haditha prosecutions, and the Abu Ghraib prosecutions. In United States v. Akbar, a solider charged with the murder and attempted murder of a number of his comrades on the eve of the invasion of Iraq, was immediately sent back to the United states for trial within days of the incident. The marines charged with the killings in Haditha are not being tried in theater, but back at their home base in San Diego. The soldiers charged with detainee abuse at Abu Ghraib prison were all removed from Iraq and were eventually tried in Fort Hood Texas and other instillations in the United States.
attention and resources. He may not want to divert the resources that would be needed to
conduct an investigation and convene a court-martial. Instead the commander may elect
to keep those resources focused on combat operations allowing a commander out of
theater to determine the disposition of the case. In spite of the clearly logical reasons for
this practice, it is somewhat inconsistent with the notion that the combat commander
must have the greatest degree of military justice authority over the forces under his
command.

This common practice of moving soldiers out of the theater of combat for
criminal investigations and courts-martial has not been closely studied, particularly in
connection with any proposed structural changes to the UCMJ. This is clearly an area
where Congress must carefully examine how the UCMJ is being applied. If this practice
is wide-spread and if the benefits to effective military operations outweigh the loss of
control that a commander has over a particular case, then perhaps the level of control that
a commander enjoys should be reexamined.

Closely related to this issue is the question of how the UCMJ is being applied and
implemented by each of the services. One of the stated purposes reflected in the name of
the UCMJ was to make the implementation of military justice uniform across the
services. In spite of that goal there is still a degree of flexibility enjoyed by each of the
services as to how they will implement both the UCMJ and the rules for court-martial.238
Some of these differences relate directly to the functions of the military commander
within the system. In reviewing structural changes to the UCMJ, Congress should

237 See RULE FOR COURTS-MARTIAL, Rule 306, reprinted in MANUAL FOR COURTS-MARTIAL UNITED
STATES at II-25.
question the degree to which uniformity is needed. Are there aspects unique to the Navy, for example, which would necessitate the convening authority having certain functions that are not applicable to the other services? An examination of how each of the services currently implements the UCMJ may help to answer whether one size fits all of the services equally well.

An examination of the role of the military commander in the military justice system must also include the effect of any changes relative to the law of war. As discussed above, the doctrine of command responsibility is closely connected to a commander’s responsibility for military justice. Under the doctrine of command responsibility commanders who fail to prevent, suppress or punish law of war violations may face criminal liability. A commander’s ability to prevent, suppress and punish violations of the law of war is directly related to the degree of control a commander has over the criminal justice system.

Under its current structure the UCMJ places the commander in a pivotal role. Commanders who fail to exercise their duties relating to law of war violations committed by the forces under their command should be held accountable for failing to exercise their legal authority. However, if the structure of the UCMJ is changed such that the commander no longer has the authority to convene a court-martial, initiate an investigation, exercise some form of summary discipline, or to decide which cases will be prosecuted and which charges are most appropriate, then these changes may potentially affect the application of the doctrine of command responsibility. It may no longer be

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238 For example under Rules for Court-Martial 405(c) each service has the authority to establish its own investigative procedures. Under Rules for Court-Martial 502 each service can establish its own procedure for qualifying military judges. *Id.* at II-34, II-42.
appropriate to hold a commander criminally liable for failing to punish law of war violations when that commander no longer has the authority to direct the military justice system. Likewise, a commander who has only a limited role in the administration of military justice cannot exercise the same degree of discipline and control over his forces as a commander who plays a key role in the justice system. This is not an issue Congress can ignore. It goes to the very heart of the commander’s unique position in the military justice system and it relates to one of the primary purposes for having a separate system of military justice.

One final consideration for Congress, which has not been fully explored, is how significant changes to one country’s military justice system may affect its relationship with its allies, particularly in the context of joint operations. As a rule, each country maintains strict control over the discipline of their forces. However, it is not too difficult to imagine a scenario where forces from one country could play a role in military investigations or disciplinary actions being conducted by another country. If the allied country’s military justice system differs significantly from our own, the allied country may be unwilling to allow their service members to participate in the investigation in a system which they perceive is unfair. In light of these issues, it would be unwise for congress to merely succumb to pressures to change the UCMJ’s structure simply to keep up with some current trend.

Conclusion

Congress must take a cautious and thoughtful approach in responding to calls for changing the structure of military justice and the role of the commander under the UCMJ.

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It must first keep in mind both its constitutional authority and its ability to best assess the need for change and evaluate specific calls for change in light of the overall function of the military and how a military justice system serves to aid the military in accomplishing its objectives. Congress now has the benefit of more than 50 years of military justice experience under the UCMJ as it considers proposed structural changes to the role of the military commander. It has the opportunity to view both the changing structure of the military and how the military has actually employed the UCMJ over the past 50 years along the full spectrum of military operations. This information is essential to aid Congress in the task of evaluating the many proposed structural reforms to the UCMJ. Congress must also evaluate this information to determine if a completely uniform code is the best approach to military justice or whether the code’s structure should be modified to reflect the unique aspects of each service and the role of the commander within each service. Finally, Congress must carefully consider how changes in the commander’s role within the justice system could impact on a commander’s obligations and potential liability under the law of war.

A detailed and thoughtful approach of this magnitude is no easy task. It will take painstaking and persistent effort to capture and evaluate the past 50 year history of the UCMJ, how commanders function within that system and how the code has actually been implemented. Such effort is not unlike the multi-year effort which led to the creation and passage of the UCMJ following WWII. However, the revolution taking place in other military justice systems, particularly those changes which have reduced and in some cases eliminated the role of the commander, necessitates that Congress undertake this effort. Calls for changes to the role of the military commander within the U.S. military
justice system are natural by-products of this revolution. These calls for change have been constant and can be expected to increase over the next several years as renewed attention is placed on military justice in a post-September 11th environment and an era of increased military operations in Iraq, Afghanistan, and elsewhere. Undoubtedly, as service members leave the military, some will put additional pressure on their elected officials to reform military justice. The public is also more aware of this separate system as high profile cases within the military attract the public’s attention. With this increased awareness comes pressure by the public to modify the UCMJ’s structure to make it more like the civilian systems with which they are most familiar.

These various pressures can serve as a positive force for change. However, Congress must resist getting caught up in the revolutionary spirit of Canada and the United Kingdom to make changes merely for changes sake or to appease some amorphous notion of public perception. Congress must instead do the hard work. Careful and thoughtful analysis before any structural changes are made is the best guarantee to ensure that any modifications will not have the net effect of seriously diminishing the military’s ability to accomplish its essential functions of being prepared and when necessary fighting our nation’s wars.