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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I. INTRODUCTION

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 attention and interest of the public and correspondingly of the legal and academic

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communities. At other times, interest in military justice tends to be limited to a fairly small group of academics and practitioners. Currently, we are in a period when military justice is attracting a significant amount of attention from the public, the courts, the U.S. Congress, and legal scholars. While it would be a stretch to say that this level of interest is 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 both domestic and international attention. The most significant, high profile issues have focused on the detainee abuse scandal at the Abu Ghraib prison 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 other incidents and cases coming from the battlefields of Iraq and Afghanistan that have caught the public's eye.

In addition to the attention these high profile cases have attracted, President George W. Bush's decision to try certain "unlawful enemy combatants" by military commission has placed the spotlight on military justice. While the use of military commissions is not without historical precedent, this is the first time since the promulgation of the UCMJ in 1951 that the United States has used military commissions. Because of this, there has been a constant comparison between the military justice system established under the UCMJ and the various versions of military commissions put forth by President Bush, ultimately codified under the Military Commissions Act of 2006 (MCA).[1] Critics of the military commissions have called for the President to prosecute unlawful enemy combatants under the UCMJ rather than the MCA.[2] This call seems to be based on two reasons: (1) a belief that, in many ways, the UCMJ system has developed into a mature legal system capable of balancing the rights of the individual against the interests of the State, and (2) a belief that for all its faults, the UCMJ is still a fairer system of justice than that codified under the MCA.

The attention currently focused on the UCMJ due to these high profile cases and the establishment of the military commissions has, in a

1. *See* Military Commissions Act of 2006, 10 U.S.C. §§ 948a-950w (2006).

2. *See, e.g.*, Brief for Richard A. Epstein, et al., as Amici Curiae Supporting Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 42067.

sense, created a perfect storm. Given this attention, the time seems right for academics, policy makers, and the public to reexamine our military justice system—to determine whether it can function on the modern battlefield and whether it strikes an 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 1990s, has significantly changed 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, beginning with the rather ordinary case of a soldier charged with narcotics offenses and desertion.[3] The soldier was tried by a general court-martial, found guilty, and sentenced to fifteen months imprisonment and a dishonorable discharge from the service.[4] He appealed his conviction first through the military system and ultimately through the federal court system to the Supreme Court of Canada.[5] He claimed that the military court-martial system violated his right to an independent and impartial tribunal as guaranteed by the Canadian Charter of Rights and Freedoms.[6] The Supreme Court of Canada invalidated the court-martial conviction because of a lack of necessary judicial independence in the court-martial system and insufficient institutional independence due to the structural involvement of the military commander in the system.[7] As a result, Canada significantly revamped its military justice system.[8]

Later in the decade, this revolution spread to the United Kingdom, which changed significant aspects of its military justice system. These changes were due to the United Kingdom's treaty obligations under the European Convention on Human Rights[9] (European Convention) and the European Court of Human Rights (ECHR) opinion in *Findlay v. United Kingdom*.[10] In that case, the ECHR held that the United Kingdom's

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3. R. v. Généreux, [1992] 1 S.C.R. 259, 260 (Can.).
4. *Id.* at 272.
5. *Id.* at 272-73.
6. *Id.* at 275-76.
7. *Id.* at 309-10.
8. Jerry S.T. Pitzul & John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 A.F. L. REV. 1, 9 (2002).
9. European Convention on Human Rights and Fundamental Freedoms, art. 6, § 1, Nov. 4, 1950, ETS No. 005 [hereinafter European Convention].
10. Findlay v. United Kingdom, App. No. 2210/93, 24 Eur. H.R. Rep. 221 (1997).

military justice system violated Findlay's right to an independent and impartial tribunal as guaranteed by the European Convention.[11] The court's holding was based in large part on the degree of control and involvement that military commanders enjoyed under the British system.[12]

Since these cases and the subsequent modifications to Canada's and the United Kingdom's military justice systems, a number of other countries have reexamined their systems and have either modified them or are considering modifications that would significantly limit the influence that military commanders have over them.[13]

In light of the attention currently focused on the UCMJ and the U.S. military justice system in general, as well as the changes that have taken place in the military systems of other common law nations, this Article examines whether the United States should join this revolution. Part II examines the goals of a military justice system and how a commander's involvement is designed to achieve those goals. Part III examines the revolution in the modern military codes of Canada and the United Kingdom, the reasons for those changes, and how those systems have been restructured. In Part IV, the Article compares the approaches of the Supreme Court of Canada and the ECHR with the approach taken by the United States Supreme Court in the few cases where it has been asked to examine structural aspects of the UCMJ. Part V highlights various proposals to change the structure of the UCMJ as it relates to the role of the commander. In Part VI, the Article examines the consequences of diminishing a commander's involvement in military justice. This Part also discusses whether the UCMJ is indeed lagging behind the developments of other countries. In the final Part, the Article suggests that this is the appropriate time for Congress to reexamine certain provisions of the UCMJ relating to a commander's role in the military justice system. This Part also offers specific recommendations for Congress to consider when assessing the appropriate role of the military commander and ensuring that any changes will support the legitimate objectives of a military justice system.

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11. *Id.* at 246.

12. *Id.* at 245.

13. *See, e.g.*, Defence Legislation Amendment Act 2006, No. 159 (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0159FD955DE5A72f17cA25737C0000F409/$file/1592006.pdf.

II. GOALS OF THE SYSTEM AND THE ROLE OF THE COMMANDER

A. 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 a separate system.

First and foremost, military justice is one of the primary tools a military commander has to maintain discipline within the ranks.[14] Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands. Even in peacetime, 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 positive leadership techniques such as leading by example, maintaining high standards of performance and readiness, and attending to the needs of both the individual soldiers and the requirements of the military organization.[15]

However, because a military organization is unlike any other organization, as soldiers may be ordered to sacrifice their lives to accomplish a mission or an objective, positive leadership may not be enough to maintain a necessary level of discipline. The provision granting 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.[16]

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. During World War II, the U.S. military learned that a system lacking fundamental fairness and a respect for individual rights can be counterproductive.[17] Loyalty to both superiors and subordinates is an essential part of the military ethos.[18] Soldiers must be loyal to their superiors and willing to support the unit's mission; in turn, the senior

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14. Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 646 (1994).

15. U.S. DEP'T OF ARMY, FIELD MANUAL No. 22-100, ARMY LEADERSHIP B-7 (1999).

16. James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 219 (1984).

17. Lederer & Hundley, *supra* note 14, at 637.

18. U.S. DEP'T OF ARMY, *supra* note 15, at 1-16.

leaders owe a measure of loyalty to the soldiers they command.[19] A justice system seen—particularly by the enlisted ranks—as arbitrary and unfair detracts from that loyalty.[20] In such a system, soldiers may become resentful of their superiors.[21] This resentment can lead to a lack of trust and confidence and, ultimately, to a weakening of discipline.[22]

Additionally, in a democracy, support for the military by the broader society is essential. More immediately, 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 seen as unfair and arbitrary undermines the support of the public 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 its members 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.[23]

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 varying degrees, the members of a military organization reflect the values, customs, and attitudes of the general public. That said, in many ways military law is treated separate and apart from state and federal law.[24] This may reflect the treatment of military society as separate and apart from civilian society.[25] 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.[26]

The unique values, norms, and attitudes that create this separate society should be reflected in the military justice system. Service members who understand the impact that insubordination has on a military organization should sit in judgment of those accused of disobedience. Those who know firsthand how the rights of the individual

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19. *Id.*
20 Lederer & Hundley, *supra* note 14, at 647.
21. *Id.*
22. *Id.*
23. *See* Hirschhorn, *supra* note 16, at 219.
24. Burns v. Wilson, 346 U.S. 137, 140 (1953).
25. Parker v. Levy, 417 U.S. 733, 744 (1974).
26. See THOMAS E. RICKS, MAKING THE CORPS 40 (1997) for an example of this basic training process.

must be balanced against the needs of the organization should decide where that line should be drawn. Those who have trained for war and have served in combat should judge the behavior of soldiers on the battlefield who are being charged with violating the laws of war. A military justice system should reflect the values of the organization and judge the conduct of individual soldiers by those who are equipped with the expertise to make such 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 overseas or otherwise outside the reach of the civilian courts. This need for deployability has both a practical and theoretical component. Practically speaking, the effectiveness of the system would be severely undermined if cases arising while the forces were deployed had to be sent back to the home country for adjudication. It is impractical to expect a commander to dedicate the time and resources necessary to send the accused soldier, the relevant witnesses, and evidence back home, 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 might operate outside of the established system.

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. A military force that respects the rule of law 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 military forces operate outside the rule of law, the legitimacy of their operation is significantly undermined.

A final objective of a military justice system, particularly relevant to the United States, is the reinforcement of civilian control over the military. In the United States, Congress has the primary responsibility for making rules to regulate armed forces.[27] Ultimately, elected officials strike the balance between the needs of the military and the rights of individual service members. The military justice system is an expression of the nation's collective will as to how much authority we 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

27. U.S. CONST. art. I, § 8, cl. 14.

minimize the risk of a military coup and protect civilian supremacy over the military.[28]

B. Role of the Commander and the Court-Martial System

The civilian justice system simply has no counterpart to the military commander. The commander's role in the military has served as a starting point for criticisms of military justice.[29] Basing criticisms of the military justice system on this point alone, however, is both premature and sometimes misplaced. Before one can criticize the power a commander holds over military justice, it is essential to understand how the commander's position attempts to achieve the at times competing goals of the system.

From the colonial period until well into the twentieth century, U.S. military commanders enjoyed a position of almost absolute power within the military justice system. Commanders had a virtually unfettered right to discipline soldiers for violations of the military code.[30] Until the 1920 amendments to the Articles of War, there was no system of appellate review of court-martial findings and sentences;[31] commanders had the sole power to disapprove of any court-martial finding and even to order the retrial of an acquitted soldier.[32]

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 had the ability to use the justice system as an effective and swift disciplinary tool to ensure obedience. The absolute power of the commander reflected the unique society that set the military community apart from the civilian society. It 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. 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.

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28. Hirschhorn, *supra* note 16, at 238-39.

29. ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 76 (1969).

30. Lederer & Hundley, *supra* note 14, at 633-34.

31. U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 137-38 (1975).

32. *Id.*

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 to civilian control of the military. As the commander is given more authority to act without any outside check on that authority, his appetite for power can increase. The temptation is always there for a military commander to turn against the civilian leadership.

The pressure to reform aspects of the U.S military justice system began near the end of World War I.[33] Major General Enoch 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.[34] Brigadier General Samuel T. Ansell, the acting Judge Advocate General of the Army, argued for major systemic reforms that would reduce the role of the military commander and give greater protection to individual rights.[35] In the short term, General Crowder's position won out in the 1920 Articles of War.[36]

The conclusion of World War II saw a groundswell of support for reforms to the military justice system.[37] During the war, many in uniform were subjected to what they believed was an unfair and arbitrary system of justice.[38] Due in large part to these pressures, Congress held extensive hearings and ultimately drafted the UCMJ, which was signed into law by President Harry S. Truman in 1951.[39] The UCMJ was seen as a compromise between proponents of individual rights and those who wanted to retain the commander as a source of virtually unlimited control over military justice.[40] Since the enactment of the code in 1951, there have been two significant amendments to the code, in 1968[41] and 1983.[42]

By limiting the control and influence a commander can assert over the court-martial process, the 1951 UCMJ and its subsequent

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33. Lederer & Hundley, *supra* note 14, at 636.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See* James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 187-88 (2002).
38. *Id.*
39. *Id.*
40. Lederer & Hundley, *supra* note 14, at 637.
41. *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).
42. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

amendments have provided individual soldiers with greater rights and protections than they previously possessed. Some of the significant systemic changes included the establishment of the Military Service Courts of Review,[43] the civilian Court of Appeals for the Armed Forces,[44] and ultimately, review by the United States Supreme Court.[45] In particular, review by the civilian Court of Appeals for the Armed Forces was designed to be a significant check on the 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.[46] Under article 37 of the UCMJ, safeguards were created to prevent those participating in the court-martial, including the military judge, the attorneys, and the members, from suffering adverse personnel actions based on their participation in the court-martial.[47] A number of other protections were put into place to prevent the risk of the commander attempting to unlawfully influence the court-martial process.[48]

While these reforms 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 still has extensive power in investigating and charging soldiers, in conducting summary disciplinary actions, and in the court-martial process.

Before trial, the commander has the authority to order investigations into misconduct.[49] Each service has an established regulatory process that allows the commander to appoint individuals and boards to conduct

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43. 10 U.S.C. § 866 (2000) (establishing a review by this court is automatic for any sentence that includes a punitive discharge or a sentence to confinement of one year or more).

44. *Id.* § 867.

45. *Id.* § 867(a).

46. *Id.* § 826.

47. *Id.* § 837.

48. *Id.* § 834 (requiring 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); *see also* MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 306(a) (2008), *available at* http://www.jag.navy.mil/documents/mcm2008.pdf (requiring that each commander exercise his or her own independent judgment as to the proper disposition of the case without influence from a superior authority). In spite of these protections, unlawful command influence continues to plague the military justice system. Many of the reported cases by the Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, have dealt with this issue. It is beyond the scope of this Article 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, 393 (C.M.A. 1986).

49. *See* R.C.M. 303.

investigations.[50] In addition, each service has a number of investigative agencies to conduct investigations from minor infractions to the most serious offenses.[51] 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 the authority to dispose of the case. This disposition can be achieved by dismissing the charges, adjudicating the charges within the commander's level of authority, or forwarding the charges to a superior commander.[52] Practically speaking, commanders are assisted by their legal advisors throughout this process, but at the end of the day, it is the commander alone who can decide the disposition of the case.

In addition, the UCMJ gives commanders significant authority to conduct nonjudicial punishment[53] and summary courts-martial rather than referring the case to a court-martial. Briefly, nonjudicial punishment under article 15 of the UCMJ allows the commander to be the sole adjudicator of charges brought by the commander 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 finding the accused guilty, imposing any punishment within the commander's level of authority. Depending on the rank of the service member involved and the rank of the commander imposing punishment, such punishment can include reductions in rank, restrictions on the accused's liberty for up to forty-five days, imposition of extra duty for up to forty-five days, correctional custody for up to thirty consecutive days, and forfeitures of pay.[54] Although in most cases the service member has the right to refuse adjudication under article 15 of the UCMJ[55] and demand trial by court-martial, a significant number of cases within the military are disposed of under this process in which the commander

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50. *See generally* U.S. ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2006), *available at* http://www.usma.edu/EO/regspubs/r15_6.pdf.

51. 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.

52. *See* R.C.M. 306; R.C.M. 401.

53. *See* 10 U.S.C. § 815 (2000).

54. *See id.* The specific formulation for the imposition of these punishments is complex and is further governed by each service's implementing regulations. A complete description is beyond the scope of this Article. Suffice it to say that the ability to impose nonjudicial punishment is a significant disciplinary power over which the commander had virtually total control.

55. *See id.* 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. *Id.*

enjoys significant control.[56] Under article 15, a service member has only a limited appeal to the next superior commander within the chain of command.[57]

In addition to this nonjudicial punishment power, commanders also have the authority to convene summary courts-martial.[58] 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 enjoyed by the commander under nonjudicial punishment. At a summary court, the court officer is the finder of fact. 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.[59] As with nonjudicial punishment, the service member can refuse to have his case adjudicated by a summary court and can instead demand trial by court-martial.[60]

In cases of general and special courts-martial, the commander still has considerable authority to assert command control over the court-martial process.[61] As mentioned above, it is ultimately the commander who decides which cases are tried at a special or general court-martial. Not only does the commander select the forum for the case, if the accused elects to be tried by a military panel, the commander also selects the members who will hear the case. Under article 25 of the UCMJ, the commander is charged with personally selecting those members who in

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56. In 2006, the Army imposed nonjudicial punishment in 42,814 cases for a rate of 74.53 per thousand service members, the Navy and Marine Corps imposed nonjudicial punishment in 26,080 cases for a rate of 4.9 per thousand service members, and the Air Force imposed nonjudicial punishment in 7616 cases for a rate of 21.78 per thousand service members. *See* CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES apps. 3-5 (2006), *available at* http://www.armfor.uscourts.gov/annual/FY06AnnualReport.pdf.

57. *See, e.g.*, U.S. ARMY, REG. 27-10, MILITARY JUSTICE 3-33 (2005), *available at* http://usmilitary.about.com/library/milinfo/arreg2/blar27-10.htm.

58. 10 U.S.C. § 824 (2000).

59. *Id.* § 820.

60. *Id.* § 824.

61. In referring to the court-martial process here, this 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 courts-martial are authorized to hear any case arising from a violation of the punitive articles of the code. However, special courts-martial have jurisdictional limits placed on the sentences they can impose. *See id.* § 819. 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 sentences and can impose any sentence authorized by the code for the specific offense, including death. 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. *See id.* § 818; MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 501 (2008), *available at* http://www.jag.navy.mil/documents/mcm2008.pdf.

his opinion are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." [62]

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.[63] The convening authority approves and authorizes funding for witness travel[64] as well as the employment and funding of expert witnesses requested by either the prosecution or the defense.[65] The convening authority is authorized to grant both transactional and testimonial immunity for any witness subject to the UCMJ.[66] If the accused desires to enter a guilty plea, any pretrial agreement is negotiated between the accused and the convening authority directly and is binding on the court.[67] The convening authority can also order an inquiry into the mental capacity or mental responsibility of the accused.[68]

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. Before the case becomes final, the convening authority must approve both the findings and the sentence of the court-martial.[69] At that time, the convening authority may dismiss any charge or specification by setting aside findings of guilt,[70] change the findings of guilt to a lesser included offense,[71] modify the sentence to any lesser sentence, or order a proceeding in revision or rehearing.[72] No proceeding in revision can reconsider a finding of not guilty.[73] The commander's authority to modify the findings and sentence in this manner is viewed as

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62. *See* 10 U.S.C. § 825(d)(2) (2000).
63. *See* R.C.M. 702(b).
64. R.C.M. 703(e).
65. R.C.M. 703(d). 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.
66. R.C.M. 704.
67. R.C.M. 705.
68. R.C.M. 706.
69. 10 U.S.C. § 860(c)(1)-(2) (2000).
70. *See id.* § 860(c)(3)(A).
71. *See id.* § 860(c)(3)(B).
72. *See id.* § 860(e)(1).
73. *Id.* § 860(e)(2)(A).

"a matter of command prerogative involving the sole discretion of the convening authority."[74]

The UCMJ seeks to achieve the goals discussed throughout this Article. 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 creates a tension between the justice system and the rights of the individual soldier. This tension is reflected in the changes taking place in the military justice systems of other democracies that have a tradition similar to the United States. These changes, which began in the early 1990s, have significantly altered the role of the military commander in these military justice systems. The next Part examines the revolution in the modern military codes of Canada and the United Kingdom and the impetus for these changes.

III. CHANGES TO THE MILITARY COMMANDER'S ROLE IN CANADA AND THE UNITED KINGDOM

A. Canada

The revolution in the Canadian military justice system came as a result of the Supreme Court of Canada's opinion in the case of Michel Généreux.[75] Généreux was a corporal in the Canadian Army stationed at a military base in Quebec.[76] In September 1986, Généreux's residence was searched pursuant to a warrant; during the search, several illegal drugs were found, including cocaine and hashish.[77] Généreux 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.[78]

Généreux's immediate commander recommended trial by court-martial, and in May 1989, Généreux was tried by a military court-martial.[79] The court-martial found him guilty of one count of simple possession and two counts of possession for the purpose of trafficking.[80] The court-martial did not find him guilty of desertion, but did find him

74. *See id.* § 860(c)(1).
75. *See* R. v. Généreux, [1992] 1 S.C.R. 259 (Can.).
76. *Id.* at 269.
77. *Id.* at 270.
78. *Id.* at 269-70.
79. *Id.* at 271-72.
80. *Id.* at 272.

guilty of the lesser offense of absence without leave.[81] He was sentenced to fifteen months imprisonment and given a dishonorable discharge from the Army.[82]

Généreux 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 [sections] 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 [sections] 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 [section] 130 of the *National Defence Act*, R.S.C., 1985, c. 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*?[83]

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.[84] The Canadian National Defence Act also makes any act or omission punishable under the Canadian Criminal Code

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81. *Id.*

82. *Id.*

83. *Id.* at 279–80. 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* Can. Act 1982, ch. 11 (U.K.), *available at* http://laws.justice.gc.ca/en/charter/.

84. *Généreux*, 1 S.C.R. at 281.

or Act of Parliament an offense under the Code of Service Discipline.[85] Thus, the Canadian military justice system also serves one of the purposes of ordinary criminal courts—to punish wrongful conduct which threatens public order and welfare.[86] Because the military justice system shares a purpose with its civilian counterparts, the Court held that constitutional principles are applicable to the military court system.[87]

It is significant for this discussion that Généreux 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 suggesting the court-martial was actually biased.[88] Instead, the court sought to determine whether a reasonable person would have been satisfied that the court-martial system existing at the time was independent.[89] According to the court, in order to be independent, "[t]he status of a tribunal . . . must guarantee . . . freedom from interference by the executive and legislative branches" as well as other external forces.[90]

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."[91] According to the court, "[w]hat is essential is that the decision-maker be removable only for cause."[92] Second, the "decision-maker [must] have a basic degree of financial security" so that salary and pension are not subject to arbitrary interference in a manner that could affect judicial independence.[93] Finally, there must be "institutional independence with respect to matters of administration that relate directly to the . . . tribunal's judicial function . . . [such as] assignment of judges, sittings of the court, and court lists."[94]

The court next examined the structure of the court-martial system in light of these standards. In doing so, the court 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, the 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.[95]

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85. *Id.* at 281-82.
86. *Id.* at 281.
87. *Id.* at 282.
88. *Id.* at 284.
89. *Id.*
90. *Id.* at 283-84.
91. *Id.* at 285.
92. *Id.*
93. *Id.*
94. *Id.* at 286.
95. *Id.* at 297-98.

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.[96] 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.[97]

According to the Court, it was this system of appointing military judges to a General Court-Martial which violated Section 11(d) of the Canadian Charter of Rights and Freedoms.[98] The Judge Advocate General who appointed the military judges on an ad hoc basis was an agent of the executive, and the appointment process lacked sufficient independence from the executive.[99] In addition, because the appointment was done on a case by case basis, there was no objective guarantee that a military judge's career would not be affected by his or her past decisions.[100]

The Court next looked at the financial security of the members participating in courts-martial. At the time of Généreux's trial, "[t]here were no . . . prohibitions . . . against evaluating an officer on the basis of his or her performance at a General Court Martial."[101] Likewise, there was no prohibition on evaluating a judge advocate based on his or her performance at a General Court-Martial.[102] 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.[103] Because those performance evaluations had a significant impact on future promotions and assignments, the Court held that a reasonable person could conclude that members of a court-martial lacked sufficient financial security and independence from the commander.[104]

Lastly, the *Généreux* Court examined the broader characteristics of the General Court-Martial system and determined that there was insufficient institutional independence to satisfy the requirements of

96. *Id.* at 299-301.
97. *Id.* at 301-02.
98. *Id.* at 302.
99. *Id.* at 303-04.
100. *Id.* at 304-05.
101. *Id.* at 306.
102. *Id.*
103. *Id.* at 306-07.
104. *Id.* at 307.

section 11(d) of the Canadian Charter.[105] The Court disapproved of a system that allowed the convening authority to determine when a General Court-Martial would take place, appoint the members who would hear the case, decide how many members would hear the case, and appoint the prosecutor who would represent the executive at the court-martial.[106]

After noting these deficiencies, the Court then analyzed whether any exception to the requirements of section 11(d) of the charter was justified under section 1. Here, the court provided an analysis relying on a balancing test previously set out in *R. v. Oakes*.[107] Under this test, limitations on constitutional rights must be justified by important and overriding governmental concerns.[108] Next, the means chosen to restrict the rights must be reasonable.[109] 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 that this was an important interest.[110] However, without further analysis, the Court held that a military tribunal that is not in compliance with the requirements of section 11(d) of the Charter would satisfy the second prong of the *Oakes* test only in the most extraordinary circumstances, such as a period of war or insurrection.[111]

The *Généreux* holding invalidated many of the provisions of the Canadian military justice system relating to the commander's role. In response, Canada rewrote much of its military code.[112] In fact, revisions to the military code began while the *Généreux* case was making its way through the appellate process. Changes that had already occurred by the time *Généreux* reached the Canadian Supreme Court included limited tenure for military judges, allowing them to remain in that position for only two to four years.[113] Further, military judges are no longer appointed to the case by the Judge Advocate General, instead they are appointed by the Chief Military Trial Judge.[114] Also, an officer's performance as a member of a General Court-Martial can no longer be used to determine

105. *Id.* at 309-10.
106. *Id.* at 309.
107. *Id.* at 312-13; *see also* R. v. Oakes, [1986] 1 S.C.R. 103, 105-06.
108. *Oakes*, 1 S.C.R. at 105-06.
109. *Id.*
110. *Généreux*, 1 S.C.R. at 312.
111. *Id.* at 313.
112. *See* Pitzul & Maguire, *supra* note 8, at 9.
113. *Généreux*, 1 S.C.R. at 305.
114. *Id.*

his qualification for promotion or rate of pay.[115] In dicta, the Court in *Généreux* commented favorably on these changes.[116]

However, the most significant aspects of the role of the convening authority were unchanged when *Généreux* was decided.[117] Changes following *Généreux* altered the traditional role of the military commander so that commanders can no longer conduct a summary action on a case which they have personally investigated.[118] While a commander still has the authority to bring charges, the military police also have independent authority to investigate serious and sensitive cases, and they too can bring charges independent of the military commander.[119] The accused now has the right to elect trial by court-martial in all but very minor cases.[120] Summary court jurisdiction has also been limited to minor offenses.[121] The authority to appoint prosecutors to individual cases has been given to the newly created Director of Military Prosecutions (DMP).[122] The DMP, not the commander, is now "responsible for . . . referring . . . all charges to be tried by court-martial."[123] The DMP determines the type of court-martial that will hear the charges.[124] Court members are now selected by a Court-Martial Administrator at the request of the DMP.[125] In most cases, the military commander is required to refer the case to the DMP with a recommended disposition by the commander.[126] Commanders still have the authority not to proceed with a case, but they no longer have the jurisdiction to dismiss a case.[127] In cases where the commander has decided not to proceed with a charge, military police can refer a charge to the referral authority independent of the military commander.[128]

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-

115. *Id.* at 307.
116. *Id.*
117. Pitzul & Maguire, *supra* note 8, at 10.
118. *See* National Defense Act, R.S.C., N-5 § 163(2)(a) (1985), *as amended*, *available at* http://laws.justice.gc.ca/en/N-5/section-[section-noP.html.
119. *See id.* § 163.1(3).
120. *See id.* § 162.1.
121. *Id.* § 164(1).
122. *Id.* § 165.11.
123. *Id.*
124. *Id.* § 165.14.
125. *Id.* § 165.19.
126. *Id.* § 164.2(1).
127. *Id.* §§ 163.1(2), 164.1(2).
128. *Id.* § 164.1(3).

martial process. Much of the decision making has been turned over to lawyers, judges, and other officials with legal training who do not hold the mantel of command.

B. United Kingdom

The 1990s also saw a revolution in the military justice system of the United Kingdom which, like Canada, made major changes in response to judicial opinions.[129] In the case of the United Kingdom, however, the judicial opinions came from the ECHR.[130] Members of the Council of Europe are High Contracting Parties to the European Convention and are, thus, subject to the jurisdiction of the ECHR.[131] Individuals can bring an action against the State in this court if they believe the State has violated rights guaranteed to them under the European Convention or its protocols.[132] If the individual succeeds, he will be entitled to monetary compensation.[133] More importantly, if the court determines that the State has violated the European Convention or its protocols, the State must modify its law or practice according to the decision.[134] In addition, other signatories to the European Convention will often modify their domestic laws and practices to avoid similar cases being brought against them.[135]

This was the context in which the case of *Findlay v. United Kingdom*[136] came to the ECHR. Alexander Findlay, a British citizen, was a member of the Scots Guard.[137] In July 1990, "after . . . heav[ily] drinking, [Findlay] held members of his own unit at [gun] point and threatened to kill himself and some of his colleagues."[138] "He fired two shots . . . not aimed at anyone . . . and [eventually] surrendered the pistol."[139] Findlay was tried by a military general court-martial and pled guilty to assault charges, conduct prejudice to good order and military

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129. Simon P. Rowlinson, *The British System of Military Justice*, 52 A.F. L. REV. 17, 18-19 (2002).

130. *Id.* at 19.

131. 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 European Convention and the ECHR. The United Kingdom, 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).

132. *Id.* at 203.

133. *Id.*

134. *Id.* at 202.

135. *Id.* at 215.

136. Findlay v. United Kingdom, App. No. 2210/93, 24 Eur. H.R. Rep. 221 (1997).

137. *Id.* at 224.

138. *Id.* at 224-25.

139. *Id.* at 225.

discipline, and threatening to kill another person.[140] He was sentenced to "two years' imprisonment, reduction . . . [in] rank and dismissal from the army."[141] He petitioned for a reduction in his sentence through the then-established military system and to the domestic civilian courts. His petitions were rejected.[142]

Ultimately, Findlay brought his case before the ECHR. He claimed that the court-martial system under which he was tried violated article 6 of the European Convention because, among other things, it did not provide him with an independent and impartial tribunal established by law.[143] 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 European Convention.[144]

At the time of Findlay's case, a soldier could be "tried by [a] district, field or general court-martial."[145] "[A] general court-martial consisted of a President . . . and at least four other army officers," including a judge advocate.[146] Military commanders at certain levels of command were also convening officers. The convening officer "decide[d] . . . the nature and [the] detail of the charges to be brought and the type of court-martial required."[147] He was also responsible for convening the court.[148] The convening officer would specify the place and time of the trial.[149] He appointed the president and other members of the court and either

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140. *Id.* at 227.

141. *Id.*

142. *Id.* at 228.

143. *Id.* at 233. Article 6, paragraph 1 of the European Convention 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 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

144. *Findlay*, 24 Eur. Ct. H.R. at 229-32. 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.

145. *Id.* at 229.

146. *Id.*

147. *Id.* at 230.

148. *Id.*

149. *Id.*

appointed or ensured that the judge advocate appointed the prosecutors and the defense counsel.[150] The convening authority also provided the prosecutor with an abstract of the evidence in the case.[151] He ensured that the accused had proper representation and sufficient time to prepare for trial.[152] "The convening officer could dissolve the court-martial either before or during the trial" and could also comment on the proceeding of the court-martial to the members of the court.[153] The convening officer also ensured the availability of all witnesses at trial.[154] No trial was final until it was confirmed by a confirming officer.[155] In most cases, this confirming officer was the same commander who served as the convening officer.[156] After final action, the accused could petition reviewing officials within the military chain of command for review.[157] The reviewing officials received legal advice from the Judge Advocate General's office; however, that advice was not made public, and the reviewing officials were not required to give any reasons for their decisions.[158] A Court-Martial Appeal Court consisting of civilian judges heard appeals of convictions, but no such appeal was available for an accused who pled guilty.[159]

The ECHR 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.[160] 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.[161] 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.[162] The court reasoned that in order for the tribunal to be impartial it "must be subjectively free [from] personal prejudice [and] bias . . . [and] must

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 231–32.
156. *Id.* at 227–28.
157. *Id.* at 232.
158. *Id.*
159. *Id.*
160. *Id.* at 240.
161. *Id.*
162. *Id.* at 239.

also be impartial from an objective viewpoint."[163] In essence, the ECHR held that because of "the central role played by the convening officer" in the court-martial structure, the system violated article 6 of the Charter.[164]

Even before Findlay's case was decided by the ECHR, 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. These changes had the collective effect of significantly reducing the role of the commander in military justice and converging 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. Its functions are now divided into three separate bodies: the higher authority, the prosecuting authority, and the court administration.[165] "The higher authority . . . [is] a senior officer [who] decide[s] whether . . . case[s] referred to him by the accused's commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped. Once the higher authority has [made that] decision, he or she has no further involvement in the case."[166] If the case is referred to the prosecuting authority, that authority has absolute discretion to decide whether to prosecute the case, which charges to be brought, and what level of court-martial will hear the case.[167] The prosecuting authority will often consider the views of the higher authority and the accused's commander when making this determination.[168] The prosecuting authority also conducts the prosecution.[169]

If the case is referred to a court-martial, the court administrator is responsible for arranging the trial.[170] This includes selecting members, ensuring the availability of witnesses, and selecting the time and venue for the case.[171] "Officers under the command of the higher authority will not be selected as members of the court-martial."[172] After trial, a reviewing authority conducts a single review of each case, and the reviewing authority must publish the reasons for his decisions.[173] The reviewing authority has the power to quash a finding and related

163. *Id.* at 244–45.
164. *Id.* at 246.
165. *Id.* at 232.
166. *Id.*
167. *Id.*
168. *Id.*; Rowlinson, *supra* note 129, at 33.
169. *Findlay*, 24 Eur. Ct. H.R. at 232.
170. *Id.* at 232-33.
171. *Id.* at 233.
172. *Id.*
173. *Id.*

sentence.[174] 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.[175] The reviewing authority may also authorize a retrial.[176] During the review process, the reviewing authority will receive advice from the judge advocate.[177] The role of confirming officer was abolished.[178]

In addition to these changes under the Armed Forces Discipline Act of 2000, the Summary Appeal Court was created to review cases of which the commander disposed by summary action. This court is composed of a judge advocate and two military officers. The appeal is by way of rehearing in open court, and the court must provide the reasons for the finding and sentence.[179]

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

IV. THE APPROACH TAKEN BY THE UNITED STATES SUPREME COURT

A. Uniform Code of Military Justice

As noted above, the U.S. military justice system under the UCMJ has already rectified 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 justice. In the United States, there have been a number of challenges lodged against various aspects of the UCMJ, some of which have focused either directly or indirectly on the role of the military commander in that structure. Unlike its counterparts abroad, the United States Supreme Court has taken a more deferential approach to this issue.

B. Court-Martial Jurisdiction

The Court addressed issues of the court-martial structure in *O'Callahan v. Parker*[180] and *Solorio v. United States*,[181] both of which pre-

174. Rowlinson, *supra* note 129, at 40.
175. *Id.*
176. *Id.* at 41.
177. *Id.*
178. *Findlay*, 24 Eur. Ct. H.R. at 232.
179. *See* Peter Rowe, *supra* note at 131, at 203-05.
180. 395 U.S. 258, 261 (1969).
181. 483 U.S. 435, 436 (1987).

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.[182] The crime occurred outside of a military reservation.[183] 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 a civilian court.[184]

In its opinion, the Court recognized Congress's power under the Constitution to create rules for the governing of land and naval forces.[185] 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.[186] Specifically, the Court noted that military law officers (the precursor to the military judge) do not have life tenure and can be removed by their commander at will.[187] Also, the panel selected to hear a case is chosen by the commander, and the panel's decision is reviewed by the commander at the conclusion of the trial.[188] According to the Court, this court-martial system lacked the degree of independence found in civilian courts.[189] Accordingly, the Court held that unless the military could establish a service connection showing that the offense was committed under circumstances as to have directly offended the government and discipline of the military state, a court-martial lacked jurisdiction to try the case.[190]

As a precedent, *O'Callahan* enjoyed a short life span; eighteen years later a very different Court overruled *O'Callahan* in *Solorio v. United States*.[191] Solorio was a Coast Guardsman charged under the UCMJ for sexually abusing two female family members of another serviceman.[192] The abuse allegedly occurred in off-base housing at Solorio's prior duty station.[193] Solorio claimed that the military lacked jurisdiction to try him because there was no service connection between the offense and, thus, no military interest.[194] The Court reversed *O'Callahan* and ruled that

182. 395 U.S. at 259-60.
183. *Id.*
184. *Id.* at 261.
185. *Id.* at 262-63.
186. *Id.* at 263.
187. *Id.* at 264.
188. *Id.*
189. *Id.*
190. *Id.* at 274.
191. *Solorio*, 483 U.S. at 435.
192. *Id.* at 436.
193. *Id.* at 437.
194. *Id.*

military jurisdiction relies solely on the accused's status as a member of the military.[195] The Court's rationale was based on a plain reading of Article I, Section 8, Clause 14, of the Constitution which grants Congress plenary power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[196] 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.[197] In reversing *O'Callahan*, the Court adhered to a long line of pre- and post-*O'Callahan* cases in which the Court deferred to Congress in situations where the constitutional rights of a service member were implicated.[198] As a result, the military is no longer required to show a service connection in order to establish jurisdiction to try a soldier by court-martial.

C. Summary Courts

In another case, the Supreme Court was called upon to invalidate the structure of the summary court-martial system.[199] 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 a summary proceeding.[200] According to the petitioners, the denial of counsel violated their Sixth Amendment right to counsel.[201] The Court first held that a summary court proceeding was not a "criminal prosecution" to which the Sixth Amendment applied.[202] The Court analogized a summary court proceeding to probation or parole revocation hearings and juvenile proceedings.[203] According to the Court, although a summary court punishment could result in a loss of liberty, the extension of the right to counsel in this case would require the Court

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195. *Id.* at 450-51.
196. *Id.* at 438.
197. *Id.* at 440.
198. *Id.* at 447. *See* Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (quoting Rostker v. Goldberg, 453 U.S. 57, 70-71 (1981)) (free exercise of religion); Chappell v. Wallace, 462 U.S. 296, 300-05 (1983) (racial discrimination); *Rostker*, 453 U.S. at 64-66, 70-71 (sex discrimination); Brown v. Glines, 444 U.S. 348, 357, 360 (1980) (free expression); Middendorf v. Henry, 425 U.S. 25, 43 (1976) (right to counsel in summary court-martial proceedings); Schlesinger v. Councilman, 420 U.S. 738, 753 (1975) (availability of injunctive relief from an impending court-martial); Parker v. Levy, 417 U.S. 733, 756 (1974) (due process rights and freedom of expression).
199. *Middendorf*, 425 U.S. at 25.
200. *Id.*
201. *Id.* at 29-31.
202. *Id.* at 34.
203. *Id.* at 35.

to extend the right to counsel to other nonjudicial proceedings under article 15 of the UCMJ, something the Court was unwilling to do.[204]

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.[205] The Court will not intervene, unless "the factors militating in favor of counsel at [a] summary courts-martial are so extraordinar[y] as to overcome the balance struck by Congress."[206] Under such a deferential standard, it is not surprising the Court found no due process violation in the summary court process.[207] The Court noted that it is the business of the military to be ready to fight wars as occasion warrants.[208] 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.[209] 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.[210]

In comparing the Court's opinion in *Middendorf* with the opinions in *Généreux* and *Findlay*, we see a court that appears much less willing to involve itself in the supervision of military justice matters. This is due in part to a constitutional structure that grants much of this responsibility to Congress.[211] This deference may also stem in part from an unwillingness by the Court to involve itself in an area where it perceives both 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 Supreme Court in *Généreux* or by the European Court in *Findlay*.

In spite of the United States Supreme Court's deference to Congress, the opinion in *Middendorf* at least attempts to give some specific recognition to interests of the individual soldier and also recognize the interests of the State in pursuing discipline.[212] By contrast, both the *Généreux* court and the *Findlay* court struck down significant

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204. *Id.* at 36.
205. *Id.* at 44-45.
206. *Id.*
207. *Id.* at 25.
208. *Id.*
209. *Id.* at 45-46.
210. *Id.* at 44-45.
211. U.S. CONST. art. I, § 8, cl. 14.
212. *Middendorf*, 425 U.S. at 25.

aspects of the military justice systems of Canada and the United Kingdom, with little mention of the competing interests at stake in those cases and of the consequences that may result from separating the commander from the military justice system.

D. Military Judges

O'Callahan, *Solorio*, and *Middendorf* were all decided prior to *Généreux* and *Findlay* and before the ensuing changes to the military justice systems of the United Kingdom and Canada. The Supreme Court did hear one case while the changes in Canada and the United Kingdom were taking place. In *Weiss v. United States*, two service members sought to attack the structure of the UCMJ by focusing on the lack of a presidential appointment and the absence of fixed terms of office for military judges.[213]

The defendants asserted that the Appointments Clause in Article II of the Constitution 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.[214] The Court rejected that argument noting, first, that all military officers are appointed to their positions as officers with the advice and consent of the Senate and are reappointed each time they are promoted in rank.[215] As long as the officer is functioning in a position germane to his duties as an officer, there is no requirement for a separate appointment.[216] The Court then examined the duties of military judges and noted that they are not the only commissioned officers to be heavily involved in the administration of military justice.[217] According to the Court, there is a long tradition of officer involvement in military justice.[218] The Court then cited a number of examples where the military commander and other commissioned officers are regularly involved with the administration of justice.[219] 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.[220] These facts were significant in the Court's determination that the duties of a military judge were germane to

213. Weiss v. United States, 510 U.S. 163, 165-66 (1994).
214. *Id.*; U.S. CONST. art. II, § 2, cl. 2.
215. *Weiss*, 510 U.S. at 169-72 & n.5.
216. *Id.* at 173-74.
217. *Id.* at 174-75.
218. *Id.* at 175.
219. *Id.* at 175-76.
220. *Id.* at 175.

the role of any commissioned officer and that the Constitution did not require an additional appointment.[221]

The *Weiss* Court condoned a justice system where the military commander played such a critical and involved role.[222] Rather than use this case as an opportunity to reexamine or question the role of the military commander, the Court pointed 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.[223] This restrained and deferential approach is in stark contrast to the approaches taken by the *Généreux* 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 a fixed length of time.[224] 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.[225] As in *Middendorf*, the Court asked whether the factors militating in favor of a fixed term of office are so "extraordinarily weighty . . . as to overcome the balance struck by Congress."[226] Applying this test, the Court held that the factors were not so extraordinarily weighty to overcome the balance.[227]

The Court noted several articles included in the UCMJ that protect the rights of the accused despite the military judge's lack of a fixed term of office.[228] These protections include article 26 of the UCMJ which "places military judges under the authority of [their respective] Judge Advocate General."[229] Because the Judge Advocate General "ha[s] no interest in the outcome of a particular [case]" he would be less inclined to manipulate the detailing of military judges to individual cases.[230] 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."[231] In addition, article 37 prevents "convening authorities from . . . reprimanding or admonishing a military judge 'with respect to the findings or sentence adjudged'" in a

221. *Id.* at 176.
222. *Id.* at 178-79.
223. *Id.* at 180-81.
224. *Id.* at 179.
225. *Id.* at 179-80.
226. *Id.* at 179.
227. *Id.* at 179-80.
228. *Id.*
229. *Id.* at 180; 10 U.S.C. § 826 (2000).
230. *Weiss*, 510 U.S. at 180.
231. *Id.*

case.[232] 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 serve for fixed terms of [fifteen] years."[233] The Court held that these protections were sufficient to ensure the independence of the military trial judiciary even though they did not enjoy a fixed term of office and that Congress's balancing of these interests satisfied the Constitution's Due Process requirements.[234]

V. CALLS FOR CHANGE

For scholars and practitioners, the changes to the Canadian and British military justice systems have not gone unnoticed.[235] Because of the United States Supreme Court's deferential approach to these questions, many scholars look with interest to the changes they have observed elsewhere and are actively pushing for similar changes to the UCMJ.[236] Our constitutional structure vests the plenary authority to create rules governing the land and naval forces in Congress.[237] Most experts in the field understand this power structure and have accordingly focused their efforts on policy makers and politicians.[238]

One of the most influential voices for diminishing 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.[239] The work of the commission coincided

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232. *Id.*; 10 U.S.C. § 837.

233. *Weiss*, 510 U.S. at 180-81.

234. *Id.* at 181. In the late 1990s, the Army instituted fixed terms of office for military judges by regulation. *See, e.g.*, U.S. ARMY, REG. 27-10, MILITARY JUSTICE § 8-1(g), *supra* note 57.

235. *See* Andrew M. Ferris, Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 487-91 (1994) (calling for greater role of lawyers and military judges); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 534-41 (1999) (calling for virtual abolition of the military justice system except in time of war or other overseas deployments).

236. "But the UCMJ has failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world." Cox Commission, National Institute of Military Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice 2 (May 2001), *available at* http://www.nimj.org/documents/Cox_Comm_Report.pdf. [hereinafter Cox Commission]. *See, e.g.*, Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 195-96 (2000).

237. U.S. CONST. art. I, § 8.

238. *See, e.g.*, John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998).

239. *See* Cox Commission, *supra* note 236, at 2.

with the fiftieth 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 within the U.S. military and with the changes taking place in other countries' military justice systems.[240]

After conducting numerous hearings and reviewing testimony from a fairly wide range of perspectives, the Cox Commission recommended several changes to the current UCMJ related to the role of the military commander.[241] First, the Cox Commission recommended modifying the pretrial role of the military commander.[242] Specifically, the commission recommended removing the commander from the panel selection process and randomizing the selection of court members.[243] This recommendation was certainly not something new and has remained one of the most hotly debated aspects of reform to the UCMJ since its inception in 1951.[244]

The Cox Commission's report lists several reasons why the convening authority should not participate in selecting the court members who will hear and decide the case. One reason is the continuing danger that commanders still retain the ability to intervene and manipulate the court-martial process.[245] In addition, such excessive power bestowed in the commander differs significantly from the civilian system, creating a public perception of inherent unfairness despite a lack of evidence of actual manipulation.[246]

The Cox Commission also recommended removing the commander from other pretrial processes such as the approval of witness travel for pretrial hearings, the approval of funding for expert witnesses and expert assistance, and the approval of funding for pretrial investigative assistance.[247] The Cox Commission asserted that under the current

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240. *Id.* at 2-4.

241. *Id.* at 4-6.

242. *Id.* at 5.

243. *Id.* at 6-8.

244. *Id.* at 7-8; 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 (1999) (arguing that the military should remove the convening authority's 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 a random selection method for choosing panel member that is tailored to meet needs of U.S. military).

245. Cox Commission, *supra* note 236, at 6-7.

246. *Id.* at 7; *see also* Alleman, *supra* note 244, 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, 100-03 (2002).

247. Cox Commission, *supra* note 236, at 7-8.

system the convening authority is too involved in these decisions, and there is a risk that he could "withhold or grant approval [of these requests] based on personal preference rather than a legal standard."[248] Though the report does not cite a significant number of instances where convening authorities who received legal advice on these issues from their staff judge advocates actually made these decisions on a basis other than a legal standard, the commission was nonetheless concerned that such a risk existed.[249]

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, in particular military judges.[250] A unique feature of most military justice systems is that courts-martial are convened on an ad hoc basis.[251] As a result, there are no standing judges or standing trial level courts a party can petition prior to the formal convening of a court-martial.[252] The Cox Commission recommended the establishment of standing judges to replace the convening authority in deciding pretrial petitions such as witness finding, employment of experts, and the provision of pretrial investigative assistance.[253]

In addition to the transfer of power from the convening authority to the military judge, there has been a call for increasing the independence of military judges by giving them tenure.[254] The calls for this change have come from both within and outside of the military and have increased since the Supreme Court's decision in *Weiss*.[255] The rationale for some form of judicial tenure is to enhance the independence of the trial judiciary.[256] 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.[257] While Congress has not acted to grant military judges tenure, the Army has amended its regulations to establish a limited form of tenure for military judges.[258]

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248. *Id.* at 7.
249. *Id.* at 7-8.
250. *Id.* at 8-9; *see also* Cooke, *supra* note 238, at 18-25; Ferris, *supra* note 235, at 487-91.
251. Cox Commission, *supra* note 236, at 9.
252. *Id.*
253. *Id.* at 8-9.
254. Cooke, *supra* note 238, at 19; Ferris, *supra* note 235, at 488-92.
255. Cooke, *supra* note 238, at 18-19; Ferris, *supra* note 235, at 488-92; Lederer & Hundley, *supra* note 14, at 672-78.
256. Cooke, *supra* note 238, at 19.
257. *See id.* at 18-19.
258. *See, e.g.*, U.S. ARMY, REG. 27-10, MILITARY JUSTICE, *supra* note 57, § 8-1(g).

Another call for reform affecting the authority of the military commander is the abolition of the summary court-martial.[259] Currently, summary courts are a tool of the military commander to quickly adjudicate and impose swift punishment for relatively minor offenses.[260] Calls for the abolition of these courts seem to be based on the belief that these courts are overly vulnerable to command influence and do not provide sufficient procedural protections for service members facing a summary court.[261]

There have also been calls for 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.[262] This proposal seems based more on the critics' personal dissatisfaction with military justice, rather than a thoughtful analysis of the military justice system, the unique objectives of a military justice system, or the balancing of interests that should be a central focus of any reforms to that system.

Though many of these calls for reform have been fueled by changes to the United Kingdom's system, there has been very little examination of whether the United States has treaty obligations which would require modifications to its military justice system, as the United Kingdom does. In fact, the United States is a signatory to the American Convention on Human Rights (American Convention).[263] The American Convention was created under the auspices of the Organization of American States (OAS) and was adopted by the OAS in 1969.[264] Like the European Convention, the American Convention contains a section on the right to a fair trial. Specifically, article 8 section 1 states, "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law."[265] These terms are very similar to the language the ECHR used to invalidate a number of aspects of the United Kingdom's military justice system.[266]

In spite of this language, it is highly unlikely that the American Convention would be a significant catalyst for changes to the UCMJ.

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259. *See* Cooke, *supra* note 238, at 23.

260. BLACK'S LAW DICTIONARY, 385-86 (8th ed. 2004).

261. Cooke, *supra* note 238, at 23.

262. *See, e.g.*, Spak & Tomes, *supra* note 235, at 534-41.

263. *See* Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

264. *Id.*

265. *Id.* art. 8, § 1.

266. *See* Cooper v. United Kingdom, App. No. 48843/99, 39 Eur. Ct. H.R. 8 (2003); Grieves v. United Kingdom, 39 Eur. Ct. H.R. 2 (2003).

Though OAS created an Inter-American Court of Human Rights to enforce provisions of the American Convention, the United States has not recognized the jurisdiction of this court.[267] In light of the United States' position regarding the jurisdiction of the International Criminal Court and other international tribunals,[268] it is highly unlikely that the United States would ever recognize the jurisdiction of the Inter-American Court of Human Rights to decide domestic military justice matters.

VI. COLLATERAL CONSEQUENCES OF CHANGE

Among 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 United Kingdom and Canada regarding the effects 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 illustrated by the recent case of the *Director of Military Prosecutions v. The Court Martial Administrator and the Chief Military Judge*.[269]

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.[270] 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.[271] 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.[272]

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267. *See* American Convention, *supra* note 263.

268. Press Release, John R. Bolton, Under Sec'y of State for Arms Control on Int'l Sec., International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm; *see generally* John P. Cerone, *Dynamic Equilibrium: The Evolution of U.S. Attitudes Toward International Criminal Courts and Tribunals*, 18 EUR. J. INT'L L. 277, 295-97 (2007).

269. Dir. of Military Prosecutions v. The Court Martial Admin. & the Chief Military Judge [2006] F.C. 1532. Although the case was overruled in *Director of Military Prosecutions v. The Court Martial Administration & the Chief Military Judge*, [2007] F.C.A. 390, it still illustrates the consequences that can occur when the traditional role of the convening authority is divided among several different government bodies.

270. Dir. of Military Prosecutions v. The Court Martial Admin. & the Chief Military Judge, [2006] F.C.A. 1532.

271. *Id.*

272. *Id.*

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 Martial Administrator to issue a convening order.[273] The focus of the opinion centered on the scope and purpose of a mandamus order and whether the Director of Military Prosecutions was correct in seeking this remedy.[274] Ultimately, the court ruled that a writ of mandamus was not appropriate and dismissed the petition.[275]

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 three-headed creature requiring all three heads to be in agreement before a court-martial can be convened.[276] In such a situation, the question is whether the fairness, or perceived fairness, added to Canada's system is worth the loss in efficiency, deployability, control, and discipline that are hallmarks of a system in which the military commander has a greater role. There are additional costs to efficiency, control, and discipline when the civilian courts must routinely get involved in resolving these disputes and, to some degree, supervising the military justice system.

Likewise, the United Kingdom's military justice system, despite the monumental changes to that system following the *Findlay* case, has not been free of additional legal attacks. Three fairly recent cases from the ECHR show that this court is still subjecting the British military justice system to intense scrutiny. In two cases, the court examined certain aspects of the legislation passed following the *Findlay* case. In *Cooper v. United Kingdom*, the petitioner alleged that article 6 of the European Convention precluded service tribunals from trying any criminal offense in times of peace.[277] The court dismissed this claim, saying that the proper focus was whether the procedures under the United Kingdom's post-1996 court-martial system met the requirements of independence and impartiality. [278]

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.[279] First, the accused claimed "that the Prosecuting

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273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. Cooper v. United Kingdom, App. No. 48843/99, 39 Eur. Ct. H.R. 8, 197 (2003).
278. *Id.* at 172.
279. *Id.* at 197.

Authority was part of the 'legal branch' which gave 'general advice' to the service authorities" and, thus, was not independent.[280] 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 for which he received no performance rating, created a senior officer who was "case-hardened."[281] Because this officer was the senior member of the court-martial, there was a risk he would dominate the deliberation process and impose his will on the other members.[282] 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.[283] 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.[284]

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.[285] Significant to the court's reasoning was the fact that the judge advocate who served as a judge in the court-martial was a civilian.[286] The instructions the judge advocate gives to the members of the court further protect and ensure their independence.[287] In addition, no members of the court were evaluated on their performance or the decisions they reached while serving as members of the court-martial.[288] 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.[289]

On the same day that the court evaluated the court martial procedures of the Royal Air Force, it reached a different conclusion in its review of the Royal Navy's implementation of the 1996 act.[290] In *Grieves v. United Kingdom*, the court found that the Navy's procedures differed

280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 198.
284. *Id.*
285. *Id.* at 205.
286. *Id.*
287. *Id.*
288. *Id.* at 208.
289. *Id.* at 204.
290. Grieves v. United Kingdom, App. No. 57067/00, 39 Eur. Ct. H.R. 2 (2003).

from the Air Force's in a number of important ways.[291] First, in the Navy, members of the Prosecuting Authority can come from a list of uniformed naval barristers who serve as members of the Prosecuting Authority on an ad hoc basis.[292] Second, in the naval system, there is no position of Permanent President of the Court-Martial.[293] Rather, the 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.[294] 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.[295] According to the court, these distinctions cast doubt as to the independence and impartiality of the Royal Navy's court-martial system.[296]

In a third post-*Findlay* case[297] coming in the midst of the United Kingdom's revamping of their court-martial system, the ECHR examined and invalidated much of the United Kingdom's summary court-martial process. Specifically, the court ruled that the United Kingdom's summary court procedure, in which the commander was central to the prosecution of the case and served as the judge, violated the European Convention's requirement for a trial by an independent and impartial tribunal.[298] 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 European Convention,[299] which establishes the right to legal assistance in a criminal case.[300]

This continued scrutiny by the ECHR on the U.K. military justice system has had several consequences. First, the supervision of military justice, the balancing of interests within the system, and the structural development of the military justice system now rest with a judicial body separate from the military. As evidenced by *Cooper* and *Grieves*, the system is continually subjected to review based on challenges in individual cases. Such an appeals process may lead to piecemeal revisions and modifications to the justice system based on individual

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291. *Id.* at 52.
292. *Id.* at 57.
293. *Id.* at 61.
294. *Id.*
295. *Id.* at 71-72.
296. *Id.* at 71-74.
297. *See* Thompson v. United Kingdom, App. No. 36256/97, 40 Eur. Ct. H.R. 11 (2004).
298. *Id.* at 255; European Convention, *supra* note 9.
299. *Thompson*, 40 Eur. Ct. H.R. at 255-56.
300. *Id.*

cases at the expense of a uniform and coherent system that is familiar to those working within it on a routine basis. Because the judiciary is active, any legislative revisions are only provisional suggestions subject to the review and approval of the court.

Another consequence of the *Findlay* case and its progeny is that the expertise and awareness of the unique military environment, a traditional key component of military justice, has been significantly diminished. As reflected in *Grieves*, the prosecutors and the judge advocate are not members 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. This clearly diminishes the military expertise and awareness of the unique military context in which these cases arise.

The final consequence of the aforementioned changes to the Canadian and U.K. military justice systems relates to the commander's own personal responsibility and associated criminal liability if he fails to adequately police law-of-war violations committed by the forces under his command. The doctrine of command responsibility, developed primarily at the conclusion of World War II, holds that a commander may be criminally liable for the law-of-war violations committed by the forces under his command.[301] Over the years, the doctrine has obtained the status of customary international law and has been codified in various international agreements.[302] Under this doctrine, if a commander fails to control his forces in such a way as to prevent, suppress, or punish law-of-war violations that he either knew about or was either reckless or negligent in failing to notice, he can be punished as if he committed the crimes personally.[303]

This doctrine is based on the commander's unique position in a military organization. It is a recognition that the commander is the focal point of military discipline and order, and it is the commander's responsibility to maintain command and control of his subordinate forces.[304] The doctrine is also based on the traditional role of the military

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301. *See generally* Quirin v. Cox, 317 U.S. 1 (1942) (sanctioning use of military tribunal to try a Nazi saboteur); Yamashita v. Styer, 327 U.S. 1, 13-15, 23 (1946) (approving military commission to try a commander for war atrocities committed by troops under his command).

302. *See, e.g.*, Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 U.N.T.S. 3; S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, ¶ 1, art. 4, art. 6, U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF/183/9 (July 17, 1998).

303. S.C. Res. 955, *supra* note 302, art. 6.

304. *See, e.g.*, Hague Convention Respecting the Laws and Customs of War on Land, § 1, C.1, art. 1, Oct. 18, 1907, 36 Stat. 2295.

commander as the oracle for military justice. 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, 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 Article, one of the unique aspects of military justice is that it serves as a primary tool available to the commander 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 have traditionally 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 to for accountability? Can the office of the Director of Military Prosecutions or the Chief Military Judge be held criminally liable if either 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, as 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 unwarranted. 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. 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 has been 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.[305] 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 changes 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 allow the United States to catch up with what other systems are 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, always keeping 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 primary constitutional responsibility that is best suited to balance the competing interests and likely consequences brought on by any structural changes. This branch should also be the one most accountable to the electorate, from which the ranks of the military will ultimately be filled.

VII. AN APPROACH TO CHANGING THE ROLE OF THE MILITARY COMMANDER IN MILITARY JUSTICE

This Part sets out specific recommendations and suggestions which legislators and policy makers should take into account when considering changes to the UCMJ structure involving the role of the military commander. This approach will help ensure that, whatever structural changes are made, they are not made 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.

A. Congressional Responsibility

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 their military justice systems as well as closely scrutinizing changes to those systems. It is certainly possible for the United States Supreme Court and lower federal courts to assume a

305. Cox commission, *supra* note 236, at 1.

similar role. However, as past precedent indicates, that has not been the jurisprudence of the Supreme Court.[306]

Turning to the language of the Constitution itself, there is good reason for the deference the Court has exercised in the past. The Constitution grants to Congress a preeminent role regarding the structure and the governance of the armed forces.[307] Among the powers given to Congress is the authority to "make Rules for the Government and Regulation of the land and naval Forces."[308] Unquestionably, this includes 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 broader consequences. Congress is better able to gather facts and develop the level of expertise necessary to understand competing interests, strike 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.

B. A Suggested Approach

Congress will continue to be the focal point for any future changes. With the renewed attention on military justice, changes are likely. As both a result of the many high profile cases and investigations that are coming out of Iraq and Afghanistan and as forces return from service to civilian life and take stock of their military experiences, this attention and pressure is likely to increase. Add to this the pressure 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, and the inescapable conclusion is that change will come.

As Congress responds to these pressures and begins to consider structural changes to the UCMJ, it must adopt a careful and thoughtful

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306. Weiss v. United States, 510 U.S. 163, 178-79 (1994).

307. Indeed, the Constitution expressly authorizes Congress to "provide for the common Defense." U.S. CONST. art. I, § 8, cl. 1. Congress is also authorized to "raise and support Armies." *Id.* § 8, cl. 12.

308. *Id.* § 8, cl. 14.

approach. First, Congress should be ever aware of its unique responsibility and should not, through inaction, cede control to the Executive or the courts.[309] Second, in considering structural changes to the UCMJ, Congress must move beyond mere platitudes. It is not enough for Congress simply to say that a certain function is necessary to maintain an effective fighting force. It needs a much more close and careful analysis that asks what the relationship should be between the commander and the justice system. 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 the authority enjoyed by the commander is merely a function of custom or tradition and 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 military lawyers and military commanders, both competing for control over the justice system.[310] Any future modifications to the UCMJ's structure should avoid approaching modifications on these terms. 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.

Some advocates of structural changes to the UCMJ cite as the main reason for those changes the public's perception of military justice.[311] Indeed, public perceptions served as a primary reason for the *Findlay* and *Généreux* rulings. While public perception is an important factor to consider, it cannot be the primary or only reason for change. Public

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309. 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, 2754 (2006).

310. *See* Cooke, *supra* note 238, at 7-11.

311. *See* Cox Commission, *supra* note 236, at 6.

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 to satisfy perceived fairness of the system risks cutting the military justice system from its moorings and setting it adrift.

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 that balance is being struck. 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 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 the commander should play in the military justice system. Congress now has the benefit of over fifty years of experience with military justice under the UCMJ to consider when deciding how to change the system's structure. Over that time, military justice and the broader military structure have not remained stagnant. To keep pace with the ever changing nature of warfare, military organizations change and will undoubtedly continue to change in the future.

One aspect 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 the 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 fifty years.

Over the past few years, the United States Army, for example, has undergone a number of structural changes moving away from a force designed for a Cold War enemy toward an army designed to respond to multiple, worldwide threats that span the entire spectrum of military operations.[312] To address these changes, the Army has created mission-specific task forces made up of various military components of all of the services.[313] 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 under his command who 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 allows for the accommodation of many of these issues, there is no standard approach to these questions. The current flexibility allowed under the UCMJ in establishing these 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 made.

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.[314] In reality, the practice is often quite different. There are many situations where the combat commander has in fact given up control of cases to another military authority outside the theater of combat.[315] The practice of moving service members out of the theater of

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312. *See generally* U.S. ARMY, REG. 10-87, ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS (Sept. 4, 2007).

313. In Iraq, for example, at the conclusion of the initial push into Baghdad, a Joint Task Force (JTF) was created. This JTF included service members from all of the military services and was commanded by an Army Lieutenant General.

314. Spak & Tomes, *supra* note 235, at 534-41.

315. Some recent examples of this practice include the *Akbar* case, the Haditha prosecutions, and the Abu Ghraib prosecutions. A soldier 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. Shaila Dewan, *Trial Opens for Sergeant Accused of Killing 2 Officers*, N.Y. TIMES, Apr. 12, 2005, at A15. The marines charged with the killings in Haditha have not been tried in the war theater but back at their home base in San

combat during a criminal investigation and subsequent court-martial is quite common.[316] When the combat commander elects to do this, he gives up any military justice authority he may have had over that service member. The *Manual for Courts-Martial* specifically prohibits a commander from imposing his will on any subordinate commander with respect to the disposition of a case.[317]

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, attention, and resources. He may not want to divert the resources 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 the 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 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

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Diego. Richard A. Oppel, Jr., *Iraqis' Accounts Link Marines to the Mass Killing of Civilians*, N.Y. TIMES, May 29, 2006, at A1. 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. Kate Zernike, *Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005, at A12.

316. *Id.*

317. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 306 (2008), *available at* http://www.jag.navy.mil/documents/mcm2008.pdf.

Court-Martial.[318] 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 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.[319] 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 so that the commander no longer has the authority to convene a court-martial, initiate an investigation, exercise some form of summary discipline, or 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 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 only has 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

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318. For example, under Rule for Courts-Martial 405(c), each service has the authority to establish its own investigative procedures. Under Rule for Courts-Martial 502 each service can establish its own procedure for qualifying military judges. R.C.M. 405(c), 502.

319. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, *supra* note 302.

justice system and relates to one of the primary purposes of having a separate system of military justice.

One final consideration for Congress 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 its forces. However, it is not 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 an allied country's military justice system differs significantly from our own, the allied country may be unwilling to allow its service members to participate in an investigation under a system which it perceives as unfair. In light of these issues, it would be unwise for Congress to succumb to pressures to change the UCMJ's structure simply to keep up with some current trend.

VIII. CONCLUSION

Congress must take a cautious and thoughtful approach when responding to calls for changing the structure of military justice and the role of the commander under the UCMJ. Congress must first keep in mind that both its constitutional authority and its ability to best assess the need and specific calls for change in light of the overall function of the military and how a military justice system operates, serves to aid the military in accomplishing its objectives. As it considers proposed structural changes to the role of the military commander, Congress has the benefit of more than fifty years of military justice experience under the UCMJ. It also has the opportunity to view both the changing structure of the military and how it has actually employed the UCMJ over the past fifty years along the full spectrum of military operations. This information is essential in aiding Congress in its 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 if the code's structure should be modified to reflect the unique aspects 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 a commander's obligations and potential liability under the law-of-war doctrine.

A detailed and thoughtful approach of this magnitude is no easy task. It will take painstaking and persistent effort to capture and evaluate the fifty-year history of the UCMJ, the commanders' function within that system, and the actual implementation of the code. Such effort is not

unlike the multiyear effort which led to the creation and passage of the UCMJ following World War II. 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, additional pressure will be put on 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, making changes merely for the sake of change 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 seriously diminish the military's ability to accomplish its essential functions of being prepared and, when necessary, fighting our nation's wars.